

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Greenville County
John C. Few, Circuit Court Judge

S.C. Supreme Court

Opinion No. 2011-UP-588 (S.C. Ct. App. filed 12/21/2011)
08-GS-23-04268

THE STATE,

RESPONDENT,

V.

LORENZO R. NICHOLSON,

APPELLANT

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Lorenzo R. Nicholson, Appellant.

Appeal From Greenville County
John C. Few, Circuit Court Judge

Unpublished Opinion No. 2011-UP-588
Submitted December 1, 2011 – Filed December 21, 2011

AFFIRMED

Appellate Defender Kathrine H. Hudgins, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Mark R. Farthing, all of Columbia; and Solicitor W. Walter Wilkins, III, of Greenville, for Respondent.

PER CURIAM: Lorenzo R. Nicholson appeals his convictions for trafficking cocaine and possession of a weapon during the commission of a violent crime. He argues the trial court erred in denying his motion to suppress the cocaine and the weapon because the police found them at his house as a result of a search warrant for which the probable cause was obtained during an unconstitutional protective sweep. We affirm.^[1]

In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous." State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (S.C. App. 2003) (citation omitted). On appeals from a motion to suppress based on Fourth Amendment grounds, the court applies a deferential standard of review and will reverse if there is clear error. State v. Randall, 388 S.C. 518, 522, 698 S.E.2d 203, 206 (2010). However, this deference does not bar this court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence. Id. The arresting officers are permitted in the circumstances of an in-home arrest "to take reasonable steps to ensure their safety after, and while making, the arrest." Maryland v. Buie, 494 U.S. 325 (1990) (emphasis added).

The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts[,] [together with the rational inferences from those facts,] that the area to be swept harbors an individual posing a danger to those on the arrest scene.

the record supports the trial court's finding that the protective sweep was reasonable. Arresting officers testified they tried to arrest Nicholson for armed robbery, pursuant to a warrant, at the front door of his house. The officers stated they entered Nicholson's house while trying to handcuff him because he was uncooperative and backed into his house. The officers asserted Nicholson remained uncooperative after being handcuffed and, in addition, asked to read the arrest warrant, delaying the departure from the house. Moreover, their statements indicated that his sister's arrival at the front door contributed to Nicholson's unsettling behavior. The officers testified they were concerned dangerous persons were in the house, like a passenger from a car waiting in Nicholson's driveway with its engine running and the operator in the driver's seat, one of Nicholson's codefendants in the armed robbery who was out on bond, or others staying at the house. They also considered a protective sweep was necessary for their safety considering the crime for which Nicholson was being arrested and his disappearance from view before opening the door. Additionally, the officers' description of the protective sweep giving them probable cause for a search warrant indicated it was limited. Therefore, the protective sweep did not violate Nicholson's Fourth Amendment rights, and the trial court properly denied Nicholson's motion to suppress the cocaine and the weapon.

AFIRMED.

UFF, PIEPER, and LOCKEMY, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

LORENZO R. NICHOLSON,

APPELLANT

Appeal from Greenville County

John C. Few, Circuit Court Judge

Opinion No. 2011-UP-588

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Lorenzo R. Nicholson petitions the Court for rehearing. Petitioner respectfully submits that the Court overlooked the fact that the officers lacked specific, articulable facts to support a warrantless search of petitioner's house as a protective sweep. In affirming the conviction this Court wrote:

The record supports the trial court's finding that the protective sweep was reasonable. Arresting officers attested they tried to arrest Nicholson for armed robbery, pursuant to a warrant, at the front door of his house. The officers stated they entered Nicholson's house while trying to handcuff him because he was uncooperative and backed into his house. The officers asserted Nicholson remained uncooperative after being handcuffed and, in addition, asked to read the arrest warrant, delaying the departure from the house. Moreover, their statements indicated that his sister's arrival at the front door contributed to Nicholson's unsettling behavior. The officers testified they were concerned dangerous persons were in the house, like a passenger from a car waiting in Nicholson's driveway with its engine running and the operator in the driver's seat, one of Nicholson's codefendants in the armed robbery who was out on bond, or others staying at the house. They also considered a protective sweep was necessary for their safety considering the crime for which Nicholson was being arrested and his disappearance from view before opening the door.

State v. Nicholson, No. 2011-UP-588 (S.C. Ct.App. filed December 21, 2011).

While the officers testified that they were concerned that someone else was in the house, Officer Weiner admitted that he did not hear anyone upstairs and Officer Hannieg admitted that he did not have any specific information as to whether there was someone else in petitioner's house. (R. pp. 25-31; pp 55-58). Before the officers attempted to serve the arrest warrant, they spoke with the driver of the vehicle waiting in petitioner's driveway and learned that petitioner was probably at home. (R. p. 7). The officers had no specific articulable reason to believe that a passenger from that car was inside the house. The officers had absolutely no information to believe that a codefendant was inside the house.

In an appeal from a motion to suppress evidence based on Fourth Amendment grounds, an appellate court may conduct its own review of the record to determine whether the evidence supports the circuit court's decision. See State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). Generally, a warrantless search is per se unreasonable and thus violative of the Fourth

Amendments prohibition against unreasonable searches and seizures. State v. Bultron, 318 S.C. 323, 331, 457 S.E.2d 616, 621 (Ct. App. 1995). However, a warrantless search will withstand constitutional scrutiny where the search falls within one of a few specifically established and well delineated exceptions to the Fourth Amendment exclusionary rule. *Id.* 318 S.C. at 331-32, 457 S.E. 2d at 621. In such cases, the burden is upon the State to justify a warrantless search. State v. Bailey, 276 S.C. 32, 35, 274 S.E.2d 913, 95 (1981).

Exigent circumstances can be the basis for an exception to the warrant requirement. The exigent circumstances doctrine provides an exception to the Fourth Amendments protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exist. State v. Brown, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986) (quoting Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed2d 486 (1978)). For instance, a warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling. Minnesota v. Olson, 495 U.S. 91, 100, 110 S.Ct. 1684 109 L.Ed2d 85 (1990). In such circumstances, a protective sweep of the premises may be permitted. See Maryland v. Buie, 494 U.S. 325, 337, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990) (allowing a protective sweep of a house during an arrest where the officers have a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene).

The State failed to present evidence that exigent circumstances existed to justify the officers entering a back bedroom and going upstairs after placing Nicholson in custody. In trying to explain his actions in regard to the warrantless search, Investigator Weiner testified, "Continue a protective sweep of the residence again based on what type of warrant it was, the fact that I had been informed that he disappeared from view for several minutes before coming to the door. There was also a co-defendant in the case that was out on bond." (R. p. 10, lines 11-16). Investigator Weiner admitted

that Nicholson was secured prior to the warrantless search. (R. p. 25, lines 3 – 23). He also admitted that he did not hear anybody “rummaging around upstairs.” (R. p. 25, lines 20 – p. 26, line 1).

Investigator Hannieg testified, “Based on the burnt marijuana and the fact that we had an arrest warrant for a subject for armed robbery where there was other co-Defendants, not knowing who was in the house, I stayed with the Defendant along with Investigator Fortner.” (R. p. 43, lines 13-17). Investigator Hannieg then testified that Investigator Weiner went into a back bedroom located 20 to 25 feet from where Nicholson was secured. (R. p. 43, lines 21 – p. 44, lines 1-5). Investigator Hannieg admitted that he did not have any specific information indicating that there were other people in the home at the time of the arrest. (R. p. 58, lines 22 – p. 59, line 1). Investigator Fortner testified that the affidavit in support of the search warrant stated that a protective sweep of the residence was conducted to ensure there were no other subjects present in the house. (R. p. 66, lines 6-17).

Maryland v. Buie 494 U.S. 325, 337, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990) allows a protective sweep when the officers have a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual who poses a threat to those on the arrest scene. The officers lacked specific, articulable facts to believe that an individual posing a threat was inside the house. The officers’ general assertion that there may have been others present in the house is not sufficient under Buie to justify the warrantless search. The State failed to demonstrate that exigent circumstances existed to justify the warrantless search of a back bedroom and the upstairs of the house.

During the warrantless search officers found unsmoked bits of marijuana on a dresser in a back bedroom and upstairs found a smoked marijuana cigarette. (R. p. 10, lines 18-p. 11, lines 1-9; R. p. 44, lines 12-25). A search warrant was obtained based on the marijuana found on the dresser. (R. p. 124). The investigators executed the search warrant and found 15.28 grams of crack cocaine and a gun. (R. p. 100, lines 19 – p. 101, 102, 103, 104 lines 1-4). Counsel for Nicholson moved to suppress the

drugs and the gun. arguing that the officer's warrantless search of the back bedroom and upstairs, which provided the basis of the search warrant, exceeded what is allowed under the protective sweep exception for warrantless searches. (R. pp. 1-83). The drugs and gun found pursuant to the search warrant should have been suppressed. The search did not meet the protective sweep exception for a warrant because the officers lacked specific, articulable facts to believe that an individual posing a threat was inside the house. Petitioner respectfully seeks rehearing.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

This 5th day of January, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

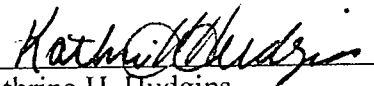
V.

LORENZO R. NICHOLSON,

APPELLANT

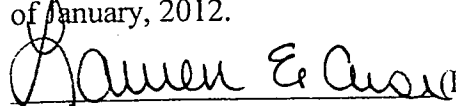
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, this 5th day of January, 2012.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 5th day
of January, 2012.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: August 23, 2014.

The South Carolina Court of Appeals

The State,

Respondent,

v.

Lorenzo R. Nicholson,

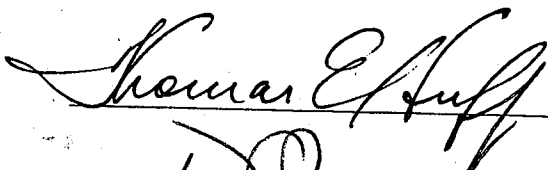
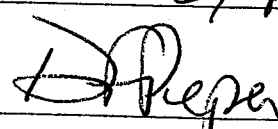
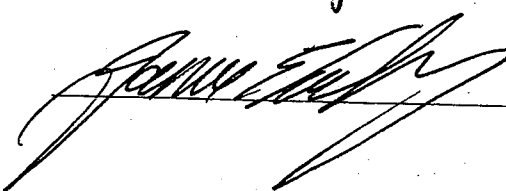
Appellant.

The Honorable John C. Few
Greenville County
Trial Court Case No. 2008-GS-23-04268

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a 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.

It is, therefore, ordered that the Petition for Rehearing be denied.

 J.
 J.
 J.

Columbia, South Carolina

FILED

January 30, 2012

STATE OF SOUTH CAROLINA

In The Court of Appeals

RECEIVED

APPEAL FROM GREENVILLE COUNTY

MAY - 7 2012

John C. Few, Circuit Court Judge

S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

LORENZO R. NICHOLSON,

APPELLANT

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	COURT OF GENERAL SESSIONS
	)	
COUNTY OF GREENVILLE	)	Case No(s) : 08-GS-23-4268
	)	
State of South Carolina	)	
	)	
Plaintiff,	)	
	)	
-VS-	)	TRANSCRIPT OF RECORD
	)	
Lorenzo Nicholson	)	
	)	
Defendant.	)	
	)	

August 12 - 13, 2009
Greenville, South Carolina

B E F O R E:

HONORABLE JOHN C. FEW, Judge.

A P P E A R A N C E S:

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P R O C E E D I N G S

MR. SCALZO: We made a motion, a written motion that we submitted to the state as well as to Your Honor for suppression. Essentially, Judge, the police officers had an arrest warrant, came to my client's home to arrest him for obviously an unrelated charge. During the course of that investigation, that arrest, they ended up going through the house. They found marijuana on the second floor bedroom of the house. They then went and got a search warrant and found crack cocaine which was the basis for the trafficking charge. We are moving to suppress this on the violation of Fourth Amendment and police officer conduct during the search of the house.

THE COURT: Whose house was it?

MR. SCALZO: His house, Judge.

THE COURT: Mr. Webb?

MR. WEBB: Your Honor, we have two or three witnesses for that. Would you like me to call the first witness?

THE COURT: Sure.

MR. WEBB: The state calls Investigator David Weiner to the stand.

DAVID WEINER

1 having first been sworn, testifies as follows:

2 **DIRECT EXAMINATION**

- 3 **BY MR. WEBB:**

4 **Q** All right. Investigator, did you respond out
5 to [REDACTED] on March 5th, 2008?

6 **A** Yes, sir.

7 **Q** Is that in Greenville County?

8 **A** Yes, sir.

9 **Q** And why did you go out there?

10 **A** To serve an arrest warrant on the Defendant
11 Lorenzo Nicholson.

12 **Q** And the arrest warrant, what was that for?

13 **A** Armed Robbery on a bank.

14 **Q** What did you see when you arrived at the
15 house?

16 **A** As I came to the house, there was a car in
17 the driveway running with an operator sitting in the
18 front seat. I approached him and confirmed that he
19 was not Mr. Nicholson. Asked him if he felt Mr.
20 Nicholson was home. He said yes, that Mr. Nicholson
21 just called him. At that time, I went to the rear of
22 the residence to make sure no one fled out the rear.

23 **Q** Was anyone else with you?

24 **A** Yes. Investigator Hannieg was with me as
25 well.

1 Q All right. So you went to the rear of the
2 house?

3 A Investigator Hannieg went to the front.

4 Q What did you see when you went to the back
5 of the house?

6 A No movement or anything like that. Nothing
7 out of the ordinary.

8 Q Was this person still in the car when you
9 went to the back of the vehicle?

10 A Yes, sir. He remained in the vehicle.

11 Q What happened next?

12 A After a few moments, maybe a couple of
13 minutes, Investigator Hannieg advised me that he had
14 Mr. Nicholson at the front door opening the door. I
15 came out front about that time. Investigator Fortner
16 arrived as well as a patrol vehicle. We approached
17 Mr. Nicholson as he opened the door and told him he
18 was under arrest for armed robbery.

19 He started to, not physically resist at that
20 time but start to question what we were doing. Told
21 him I had an actual arrest warrant in his name. He
22 started to back into the house at which point I
23 grabbed his arm. He continued backing into the house
24 pulling myself and Investigator Hannieg with him
25 about, say, a few feet inside the house.

1 We were able to eventually cuff him. He was
2 what we call passively resisting, locking his arms
3 out. He was not swinging at us. He was just failing
4 to comply with what we told him to do.

5 Q When you say he was pulling you into the
6 house?

7 A Yes, sir.

8 Q What do you mean by that?

9 A I got a cuff on one wrist. He kept backing
10 into the house. Of course my fear is based on that
11 warrant, there's going to be a weapon inside that
12 house. I don't want him to have access to it.

13 Q You were able to handcuffed him?

14 A Yes, sir. Initially, in front. He was very
15 argumentative, yelling. His sister pulled up out
16 front. He was screaming for her. Just yelling that
17 we were assaulting him, it was an unlawful arrest. We
18 eventually got him cuffed in the front. When I was
19 able to start to settle him down, I was able to move
20 the handcuffs to the back. We were in these little
21 kitchen eating area inside the front door.

22 Q So you were in the kitchen area there --

23 A Yes, sir.

24 Q -- sitting down, what did you do then?

25 A At that time, we decided to do a protective

1 sweep of the residence based upon the charges that we
2 had. His actions once we gotten inside there --

3 Q What, if anything, did you smell at that
4 time?

5 A At that time, you could smell the odor of
6 marijuana, what I felt from almost 10 years was pretty
7 fresh burnt marijuana. Not unsmoked but smoked
8 marijuana.

9 Q So you smelled marijuana. I'm sorry to
10 interrupt you. At that point, what did you do then?

11 A Continue a protective sweep of the residence
12 again based on what type of warrant it was, the fact
13 that I had been informed that he disappeared from view
14 for several minutes before coming to the door. There
15 was also a co-Defendant in the case that was out on
16 bond.

17 Q Co-Defendant in the armed robbery?

18 A In the bank robbery. Yes, sir. Did a
19 protective sweep. I went downstairs. Investigator
20 Hannieg was upstairs. On the dresser in plain view,
21 was several unsmoked bits of marijuana. Investigator
22 Hannieg completed his protective sweep upstairs. He
23 told me he found a marijuana blunt, smoked blunt
24 upstairs.

25 Q When you say you went downstairs, is that

1 the same level --

2 **A** Same level, I'm sorry. We just checked any
3 space a person could fit. I checked the walk-in
4 closet. I checked the bedroom. I checked the back room
5 and I looked in the garage.

6 **Q** Where was that marijuana?

7 **A** On the bedroom dresser. There's like a, a
8 very shiny wood dresser. It was sitting right on top.

9 **Q** What did you do then?

10 **A** Once we determine no one else was present,
11 Mr. Nicholson was continuing in his activities of
12 yelling and screaming. We decided at that time it
13 would be in our best interest to get him away from the
14 location. We put him in a marked patrol car to have
15 him taken downtown and have bond served or get a bond
16 served on the armed robbery warrant. At that time, we
17 secured the residence and Investigator Fortner went to
18 get a search warrant.

19 **Q** Did he get a search warrant?

20 **A** Yes, sir.

21 **(WHEREUPON, Plaintiff Exhibit Number 1 was marked**
22 **for identification.)**

23 **BY MR. WEBB:**

24 **Q** How long did it take you to get a search
25 warrant?

1 A Maybe 30, 45 minutes.

2 Q What, if anything, happened in the meantime?

3 A The Defendant's sister, once the Defendant
4 had left the scene, it seemed to calm down a bit. I
5 wanted to deal with the car that was in the driveway.
6 I felt no reason to hold him there. He wasn't doing
7 anything wrong. I just asked to see -- it turned out
8 to be a rental car. I asked to see the rental
9 agreement. He showed it to me. His name was not on a
10 rental agreement and it was several days overdue. I
11 just called the rental company and they came and
12 picked up the car.

13 While I was dealing with the car, Mr.
14 Nicholson's sister repeatedly kept trying to get
15 inside the house, kept trying to get inside the house.
16 We did not have a key or anything to lock it. While I
17 was talking to the driver, she went behind me, went
18 inside the house and locked the door. She was in there
19 for two or three seconds. I forced the door open.
20 When I forced the door, she was standing right there
21 at it. We removed her from the house at that point
22 and again secured it. She took the man that was
23 driving the car and they left.

24 Q In your opinion, did she have time to go
25 anywhere in the house once she went into the door.

1 **A** When I forced the door, it hit her. That's
2 how close she was to the door.

3 **Q** Do you know where she lives?

4 **A** She lives a couple of houses down on the
5 same street as the Defendant. At the time, she did.

6 **Q** And, uh, tell me what happened when Fortner
7 got back with the search warrant?

8 **A** Once he got back with a search warrant, we
9 conducted a search of the residence. It was a pretty
10 decent sized house. It was relatively clean. We had
11 a K-9 officer respond to try and help us pinpoint some
12 areas to search. Once the K-9 officer came out of the
13 residence, he indicated to me -- there was a couple of
14 areas that we already knew like the dresser with the
15 marijuana on it or where the blunt was found.

16 He told me that the dog, I'm not really sure
17 of the terminology, but had given off some strong
18 indicators to, like, the little pantry off the kitchen
19 particularly the one box that was in there. He had,
20 like, the flat side that you would see, like, say,
21 whatever they come in 48 Coke cans or whatever. It
22 was like a bunch of canned goods and cereal boxes and
23 stuff were sitting in it. Apparently this dog alerted
24 to that collection of cans and boxes. He pointed that
25 specific one to me. I pulled it out and put it on the

1 floor. There was a popcorn box there. And inside that
2 popcorn box was were I located a large amount of white
3 powder that tested positive for cocaine.

4 Q What did you do with that white powder then?

5 A Put it on the kitchen counter. We were
6 starting to make a, just an itemized, you know, we
7 were trying to put everything together that we were
8 going to seize. That was put on the kitchen counter
9 with the other items that we seized.

10 Q What other items did you seize?

11 A Some plastic baggies that we normally see
12 used in the distribution of narcotics, razor blades,
13 digital scales. I located some type of prescription
14 pills in the kitchen. There was a machine gun located
15 in the Defendant's bedroom closet.

16 Q Okay. Who found that?

17 A Investigator Hannieg did. He brought it to
18 my attention.

19 Q Do you know where all the razor blades were
20 found?

21 A That was all in the kitchen, the drawers in
22 the kitchen.

23 Q Did you find anything that established that
24 the Defendant lives at the residence?

25 A Yes, sir. We found a letter with his name

1 and that address on it as well as his driver's
2 license.

3 (WHEREUPON, Plaintiff Exhibit Number 2 was marked
4 for identification.)

5 (WHEREUPON, Plaintiff Exhibit Number 3 was marked
6 for identification.)

7 (WHEREUPON, Plaintiff Exhibit Number 4 was marked
8 for identification.)

9 (WHEREUPON, Plaintiff Exhibit Number 5 was marked
10 for identification.)

11 BY MR. WEBB:

12 Q Investigator, I'm going to show you what's
13 been marked State's Exhibit number 5. Can you tell me
14 what that is?

15 A That is Mr. Nicholson's state issued
16 driver's license.

17 Q And what is the residence?

18 A [REDACTED] which is where we executed
19 a search warrant.

20 MR. WEBB: For the purpose of this hearing,
21 the State moves this into evidence.

22 MR. SCALZO: No objection.

23 THE COURT: It is admitted.

24 BY MR. WEBB:

25 Q What, if anything else, did you do at the

1 house at that time?

2 **A** We photographed some damage to the door from
3 where I had forced entry. We also took photographs of
4 the residence and all the evidence that we seized.
5 And then at that time, we secured as best we could and
6 returned to our office.

7 **Q** What did you do with the cocaine?

8 **A** Investigator Hannieg and I had ridden over
9 there together. It was secured it in my vehicle. We
10 rode back to the Law Enforcement Center and was turned
11 over to him.

12 **Q** You spoke about these pictures that you
13 took. I'm going hand you what has been marked as
14 State's 1, 2, 3 and 4. Could you tell me what these
15 are pictures of?

16 **A** The first one marked number 1 would be the
17 marijuana that I observed in plain view on the dresser
18 in the Defendant's bedroom. The one marked Exhibit 2
19 is an exterior photograph of the residence along with
20 that vehicle and the driver of that vehicle when we
21 arrived. The one marked number 3 would be the digital
22 scales, the baggies and the razor blade and all that
23 we seized. The one marked number 4 would be the box
24 where the cocaine was located in the Defendant's
25 pantry.

1 Q All right. Thank you. Are these fair and
2 accurate representations of these items?

3 A Yes, sir.

4 MR. WEBB: The State moves exhibits 1 through 4
5 into evidence for the purpose of this hearing only.

6 MR. SCALZO: Without objection for this
7 hearing.

8 THE COURT: They are admitted.

9 MR. WEBB: No more questions, Judge.

10 MR. SCALZO: Thank you, Your Honor.

11 **CROSS-EXAMINATION**

12 BY MR. SCALZO:

13 Q Investigator Weiner, you had a warrant for
14 armed robbery; is that correct?

15 A Yes, sir.

16 Q It was an arrest warrant only?

17 A Yes, sir.

18 Q And that warrant was based on incident
19 happened November 27, 2007?

20 A Yes, sir.

21 Q You were a serving or attempting to serve it
22 on March 5th, 2008?

23 A Yes, sir.

24 Q You went to this residence that you believed
25 was Mr. Nicholson's house; is that correct?

1 **A** Yes, sir.

2 **Q** How long had you been there before you
3 actually approached anybody?

4 **A** As soon as we rode by the residence and saw
5 that there was a car with an occupant in it, we just
6 stopped right there instantaneously.

7 **Q** You testified you walked up to the occupant
8 in the car and found out from him that he was there to
9 pick up the Defendant?

10 **A** Yes, sir.

11 **Q** He did not say he was there to pick up the
12 Defendant and his friend or the Defendant and his
13 girlfriend. He just said he was there to pick up the
14 Defendant?

15 **A** I asked him if he knew that Mr. Nicholson
16 was home. He said, I think his exact words to me was
17 something to the effect of, Yes, he's home. He just
18 called me to come pick him up.

19 **Q** Okay. But he did not mention anybody else?

20 **A** No, sir.

21 **Q** You testified that you went around the back
22 of the house while Investigator Hannieg went up to the
23 front of the house?

24 **A** Yes, sir.

25 **Q** Not very long from the time that you went to

1 the back of the house to the point at which Mr.

2 Nicholson actually comes to the front door?

3 **A** I would say it was probably about two or
4 three minutes.

5 **Q** Okay. It was not a situation where you had
6 to kick the door open to get in. Mr. Nicholson
7 actually answered the door?

8 **A** Yes, sir.

9 **Q** Isn't it true that your understanding from
10 the other investigator was that he had communicated
11 with Mr. Nicholson, Mr. Nicholson saw that he was
12 there, he said he wasn't dressed, wanted to go get
13 dressed and then came to the door?

14 **A** Yes, sir.

15 **Q** That is your understanding the steps that
16 took place?

17 **A** He just told me that he had seen the
18 Defendant and the Defendant left his view and then
19 came back.

20 **Q** Did you later --

21 **A** Yes, sir.

22 **Q** Mr. Nicholson comes to the door. He opens
23 the door?

24 **A** Yes, sir.

25 **Q** He essentially is standing in the threshold

1 of the door after having opened it?

2 **A** He opens it probably about 6 to 8 inches to
3 where we can see kind of like a narrow portion of
4 him --

5 **Q** Uh-huh.

6 **A** -- when we were talking to him --

7 **Q** Uh-huh.

8 **A** -- and he wants to know what is going on.

9 **Q** Okay. You testified that he was
10 argumentative and screaming and saying things like you
11 were assaulting him and something to that effect?

12 **A** Yes, sir.

13 **Q** That's what you testified to today?

14 **A** Yes, sir.

15 **Q** Is that correct?

16 **A** Yes, sir.

17 **Q** All right. Now, you wrote a report in this
18 case, didn't you?

19 **A** Yes, sir.

20 **Q** The report is five pages long; is that
21 correct?

22 **A** I have to look at it, sir.

23 **Q** You have a copy of it with you?

24 **A** Yes, sir.

25 **Q** Do you have your copy?

1 A Yes, sir.

2 Q Okay. Well, if you're not sure about
3 something, refer to your report. The copy I got is
4 five pages. You have any reason to doubt it is five
5 pages long?

6 A I don't. There should be a cover page and
7 four supplemental reports.

8 Q Okay. In that report, you do not describe
9 the Defendant being argumentative or screaming about
10 this being a unlawful arrest or anything of that
11 effect; isn't that correct?

12 A I summarized it by saying that the suspect
13 was not very cooperative and was trying to get his
14 sister to come over to him. I advised him that he was
15 under arrest for armed robbery and he would initially
16 would not comply with my instructions to put his hands
17 behind his back.

18 Q Go ahead. You said he locked --

19 A Locked his arms for a few seconds before
20 complying. I then secured the suspect with handcuffs
21 without incident.

22 Q Without incident. This took place two feet
23 inside the house?

24 A Correct.

25 Q Right?

1 A Yes, sir.

2 Q You don't describe him yelling and
3 screaming, right?

4 A Like I said, I just summarized it. He was
5 not cooperative.

6 Q You also said without incident, right?

7 A Right. He continues to yell. I put it in
8 here as well.

9 Q He continues to yell?

10 A Yeah. Before I could perform a protective
11 sweep, the suspect stood up and starting walking to
12 the front door. This was done while he was yelling at
13 his sister to come inside.

14 Q In fact, what he is really yelling about is
15 he doesn't want you to search his house?

16 A All he wants, all he keeps yelling is for
17 her to come up there to him.

18 Q He wants to get out of the house. That's why
19 he's moving. He wants to get outside the house. He
20 doesn't want you inside the house.

21 A He is standing up and walking towards the
22 door.

23 Q Okay. Now, he opens the front door?

24 A Yes, sir.

25 Q You both are standing there?

1 A Yes, sir.

2 Q Investigator Fortner is already on the
3 scene?

4 A Yes, sir.

5 Q Are you there when he opens the door?

6 A Am I there when he opens the door?

7 Q Yes.

8 A I came around and the door was already open.

9 Q Okay. So he already got the door open and
10 Investigator Hannieg is standing there?

11 A Yes, sir.

12 Q Was Investigator Fortner also there?

13 A I don't recall where he was. He wasn't up
14 there at the door with us. He may have been on the
15 other side of the house. I am not sure.

16 Q You and Investigator Hannieg grabbed the
17 Defendant?

18 A Correct.

19 Q Instead of taking him out of the house, you
20 go into the house; is that right?

21 A He pulled me. He's, I bet, 30 or 40 pounds
22 heavier than me.

23 Q He pulled you?

24 A Yes, sir.

25 Q And Investigator Hannieg?

1 **A** Yes, sir. I was --

2 **Q** Let's go back to your report. In your
3 report, you don't say anything about him pulling you
4 inside the house? Did you?

5 **A** I don't see where it is marked.

6 **Q** In fact, you said it was without incident?

7 **A** Once he was handcuffed.

8 **Q** Well, you also describe that at first, you
9 said, here we are to arrest you for this armed
10 robbery. He kind of just stood there with his hands
11 like he didn't want to cooperate but he did not do
12 anything other than stand there; isn't that correct?

13 **A** He was yelling at his sister.

14 **Q** In your report, do you not say he would not
15 comply with my instructions to put his hands behind
16 his back. He locked his arms for a few seconds before
17 complying?

18 **A** Correct.

19 **Q** And then you secure him is the next
20 sentence?

21 **A** Right. We were able to get him handcuffed
22 in the front first.

23 **Q** What I'm saying is isn't it true that you
24 did not describe in your report that he takes you and
25 the other officer into the house?

1 **A** Like I said, I just summarized it by saying
2 he was not compliant.

3 **Q** Now, when you take him inside the house, the
4 kitchen area is right there is what you were
5 describing?

6 **A** I would say it was probably originally
7 designed to be some sort of entrance way. It was like
8 tiled but there was a table and some chairs there.

9 **Q** Okay. And you sit him down at a chair?

10 **A** Yes, sir. I sit him in a chair.

11 **Q** This is on the first floor?

12 **A** Correct.

13 **Q** This is a two-story house?

14 **A** Correct.

15 **Q** What you are describing is you wanted to
16 perform a protective sweep.

17 **A** Yes, sir.

18 **Q** Isn't that right?

19 **A** Yes, sir.

20 **Q** Okay. Now, you had secured him, didn't you?

21 **A** Correct.

22 **Q** He was in handcuffs?

23 **A** Correct.

24 **Q** Did you hear anybody else rummaging around
25 upstairs?

1 **A** I did not hear anybody. No, sir.

2 **Q** His sister that you said he was talking to
3 was outside of the house; isn't that correct?

4 **A** Correct.

5 **Q** Of course, he did give you permission to go
6 through the house?

7 **A** I did not ask him, sir.

8 **Q** All right. Let's talk about you said that
9 you smelled marijuana?

10 **A** Yes, sir.

11 **Q** In your five pages, did you ever -- of your
12 report, did you ever say anything about smelling
13 marijuana?

14 **A** I didn't put it in my report, No, sir.

15 **Q** You didn't put it in your report. And you
16 are familiar with the search warrant; are you not?

17 **A** Yes, sir.

18 **Q** The search warrant, the basis for the search
19 warrant does not indicate there is a smell of
20 marijuana; isn't that true?

21 **A** It puts what we found in plain view.

22 **Q** This says that you were doing a protective
23 sweep.

24 **A** Correct.

25 **Q** Found some items and that was the basis for

1 your search warrant?

2 **A** Yes, sir.

3 **Q** Okay. Take a look at your report one time.

4 On the first page, which is the initial part of the
5 incident report, in the section where it says subject,
6 there is little, I guess, X box that you can put in
7 there that says drugs, was the person using drugs.
8 You, in fact, X'd no. Isn't that right? That the
9 subject was not using drugs.

10 **A** That is correct. That's what is marked on
11 here.

12 **Q** But you testified today that what you
13 smelled was burnt marijuana?

14 **A** Correct. That's what we located.

15 **Q** On the second floor?

16 **A** Correct?

17 **Q** You remember the preliminary hearing of this
18 case?

19 **A** I recall that we had one. I don't remember
20 details of it.

21 **Q** In that preliminary hearing, let's see if
22 you remember some of these details. Do you recall
23 that you did not testify that Mr. Nicholson brought
24 you and Investigator Hannieg into the house?

25 **A** Like I said, I just remember that we had a

1 preliminary hearing. I don't remember the testimony of
2 -- Okay. Let me show you. I've got a transcript of the
3 hearing. Let me take a look at it. I'm going to look
4 at the front. I'm going to be referring to page 9.
5 Take a look at that. On page 9 is where I am
6 questioning you for your information.

7 | **A** Okay.

8 Q There are some other lines in there. Isn't
9 it true that in that transcript what is being talked
10 about is the actual taking into custody of Mr.
11 Nicholson?

12 | **A** Yes, sir.

13 Q If you need to read it, take your time.

14 **A** That's what it looks like. Yes, sir.

15 Q And I believe it goes out to the next page.
16 You do not describe him taking you into the house, you
17 describe going into the house. But you don't describe
18 him taking you in.

19 | **A** Okay.

20 Q Is that correct?

21 **A** Yes, sir.

22 **MR. SCALZO:** I think that is all that I have,
23 Judge, right now.

24 MR. WEBB: Just two questions, Judge.

25 REDIRECT EXAMINATION

1 BY MR. WEBB:

2 Q Investigator Weiner, what is the purpose of
3 a protective sweep?

4 A To ensure the safety of the other deputies
5 on the scene, to make sure no co-Defendants or armed
6 individuals may be in the residence that could harm
7 us.

8 Q Is that the reason why you conducted a
9 protective sweep that day?

10 A Yes, sir.

11 Q Tell the Court, beside from a protective
12 sweep, you never did a protective sweep that day.
13 After you smelled what you thought was marijuana, what
14 would you have done?

15 A Obtained a search warrant for the residence.

16

17 Q For what reason?

18 A Based on the smell of marijuana inside.

19 MR. WEBB: No further questions, Judge.

20 MR. SCALZO: Judge, recross?

21 **RECROSS-EXAMINATION**

22 BY MR. SCALZO:

23 Q There were two co-Defendants in this armed
24 robbery, isn't that correct?

25 A Four.

1 Q Four?

2 A There was a total of four defendants.

3 Q Okay.

4 A I'm sorry. So three co-Defendants.

5 Q And you had had, the reason you had an
6 arrest warrant was because two of the co-Defendants
7 provided information that he was involved?

8 A Correct.

9 Q That is the basis of your arrest warrant?

10 A Yes.

11 Q And you only had an arrest warrant?

12 A Correct.

13 Q You didn't ask a magistrate before you got
14 there for a search warrant for proceeds of the armed
15 robbery or anything like that?

16 A No, sir.

17 Q Okay. You were there to serve an arrest
18 warrant on some other co-Defendant?

19 A No, sir.

20 Q And other than your speculation that it is
21 possible that another person could be in the house,
22 did you have any specific knowledge that there was
23 someone else in the house?

24 A Are you asking if like he said somebody was
25 there? I'm not understanding what you --

1 Q I'm just asking you other than it is
2 possible that there could be people inside the house,
3 just the mere possibility --

4 A Yes, sir.

5 Q -- aside from that mere possibility, did you
6 have any specific facts that would have indicated to
7 you that there was someone else in the house besides
8 Mr. Nicholson?

9 A The car waiting in the driveway to me was an
10 indicator that there could be someone else there.

11 Q But isn't it true that he told you that he
12 was there for Mr. Nicholson and not Mr. Nicholson and
13 a friend or somebody else?

14 A I never asked him if anybody got out of the
15 car to go inside or anything like that.

16 Q Okay. So you are telling us you were
17 concerned that someone else was in the house?

18 A Yes, sir.

19 Q You did not ask him if he was there to pick
20 up more than Mr. Nicholson?

21 A Not at the time. I was interested in if Mr.
22 Nicholson was there.

23 Q You interested in if Mr. Nicholson was there
24 but you are now saying that you were concerned that
25 there were other people in the house but you didn't

1 ask him.

2 **A** I'm stating that the car comes into play as
3 to whether or not there was another passenger in
4 there.

5 **Q** You didn't hear any movement upstairs?

6 **A** No, sir.

7 **Q** You did a search based on, I'm assuming this
8 is before you got there. You believed this house was
9 his residence?

10 **A** Yes, sir.

11 **Q** You able to do is search through your
12 computer to figure out who lives at the house?

13 **A** Yes, sir.

14 **Q** Other than Mr. Nicholson, did you find
15 anybody who was address came back to that residence?

16 **A** Not that I recall.

17 **MR. SCALZO:** Okay. That's all I have, Judge.

18 **THE COURT:** Let me see the search warrant
19 please.

20 **MR. SCALZO:** Yes, sir.

21 **THE COURT:** Just to make sure that I have
22 this correct, the sequence of events is that you
23 went into the house -- well, you encountered that
24 Defendant at the door?

25 **THE WITNESS:** Yes, sir.

1 **THE COURT:** In whatever fashion, you went in
2 the house and completed the arrest?

3 **THE WITNESS:** Correct.

4 **THE COURT:** You and the other officers then
5 did the protective sweep?

6 **THE WITNESS:** Yes, sir.

7 **THE COURT:** You then took the Defendant,
8 somebody took the Defendant to the detention
9 center?

10 **THE WITNESS:** Yes, sir.

11 **THE COURT:** Someone else went to get a search
12 warrant?

13 **THE WITNESS:** Yes, sir.

14 **THE COURT:** The search warrant was brought
15 back to the house?

16 **THE WITNESS:** Yes, sir.

17 **THE COURT:** And then executing the search
18 warrant, you found that drugs that were subject
19 to this charge?

20 **THE WITNESS:** Yes, sir.

21 **THE COURT:** All right. (Pause).
22 Am I missing the affidavit here?

23 **MR. SCALZO:** I've got a copy of the
24 affidavit.

25 **THE WITNESS:** They should all be there, sir.

1 Down at the bottom.

2 **THE COURT:** I see. Okay. Now who actually
3 found the marijuana on the dresser in the
4 bedroom?

5 **THE WITNESS:** I did, sir.

6 **THE COURT:** Tell me where the bedroom was.

7 **THE WITNESS:** On the first floor where we
8 were. Once you walk into the house, it was that
9 small entranceway, the kitchen and to the back
10 right was his bedroom.

11 **THE COURT:** Can I get you to go back through
12 the specific sequence of events that starts when
13 you say that he is pulling you into the house?

14 **THE WITNESS:** Yes, sir.

15 **THE COURT:** Go ahead.

16 **THE WITNESS:** When we advised him that he was
17 under arrest, he became argumentative, said it
18 was a false arrest. I put my hands on him. We
19 got one cuff on his, I think it was his right
20 hand. He's just locking his arms out. I think
21 Investigator Hannieg got the other hand. He
22 starts backpedaling.

23 I just was not ready for that. I did not
24 expect that to happen. We took about three feet
25 into the house with him into the door. We were

1 able to get his two hands together and cuff. We
2 sat him down in the chair, got him to calm down a
3 little bit and then I moved the handcuffs to the
4 rear. That is when I did that.

5 **THE COURT:** Okay. All right. At this point,
6 who is with him besides you?

7 **THE WITNESS:** Myself, Investigator Hannieg
8 and Investigator Fortner in there. I think the
9 uniform patrol deputy stayed outside where his
10 sister was.

11 **THE COURT:** Keep going.

12 **THE WITNESS:** Once he settled down and we got
13 him handcuffed, I did the first level protective
14 sweep and Investigator Hannieg stayed downstairs
15 while Investigator Fortner stayed with Mr.
16 Nicholson.

17 **THE COURT:** Let's talk about what you did a
18 little bit more specifically after you got him
19 settled.

20 **THE WITNESS:** Right. Investigator Fortner
21 stayed with him. I just did a protective sweep.
22 As soon as you walk almost halfway through the
23 kitchen, there was a little cubby area to the
24 right. There was a door there that lead to the
25 garage. I opened that door to make sure nobody

1 was in there. Closed it.

2 As soon as you go past the kitchen, straight
3 behind it, there is a family room area. It was a
4 couch and a TV. I think that was it. To the
5 back right was his bedroom. I walked into there.
6 There was a large walk-in closet. I opened the
7 door, looked in there and walked to the other
8 side of his bed that was up against the wall to
9 make sure nobody was in. Then returned back to
10 the kitchen.

11 **THE COURT:** Approximately how much time had
12 lapsed from the time you got the Defendant
13 settled in the chair until you left the bedroom?

14 **THE WITNESS:** Like how long did the protective
15 sweep take?

16 **THE COURT:** Yes.

17 **THE WITNESS:** Two minutes at that. It was
18 very quick.

19 **THE COURT:** Any further questions from either
20 of you?

21 **MR. WEBB:** Just one further question, Judge,
22 just to clarify.

23 **REDIRECT EXAMINATION**

24 **BY MR. WEBB:**

25 **Q** Investigator Weiner, how much time passed by

1 the time that you got the Defendant settled down and
2 the time you did the protective sweep?

3 **A** As soon as he was settled down.

4 **MR. WEBB:** That's all.

5 **RECROSS-EXAMINATION**

6 **BY MR. SCALZO:**

7 **Q** What time of day was this? I don't think
8 anybody asked you that.

9 **A** I think it was in the morning time. 9:30 in
10 the morning.

11 **MR. SCALZO:** Thank you.

12 **THE COURT:** So the Defendant is, after you
13 got back to the Defendant, what was involved in
14 actually completing the arrest and moving him
15 from the house.

16 **THE WITNESS:** We kept him there at the table
17 for a minute. His sister was outside yelling. He
18 was yelling at her. That is when I just decided
19 it's time to get him out. But maybe another 30
20 seconds to a minute. We just walked him outside.
21 We had to wait on another uniform patrol car to
22 get there.

23 **THE COURT:** What is going on with him and the
24 sister while you are doing the protective sweep?

25 **THE WITNESS:** The uniform patrol deputies was

1 out there with her. Investigator Fortner were
2 standing with him. I don't remember him yelling
3 anything at her then.

4 **THE COURT:** All right. You can step down.

5 **THE WITNESS:** Yes, sir.

6 **MR. WEBB:** Your Honor, the State calls
7 Investigator --

8 **THE COURT:** I think we may have to break for
9 lunch right here and then come back. Let's be
10 back here at 1:30.

11 **MR. WEBB:** Yes, sir.

12 **THE COURT:** Somebody better make the
13 search warrant an exhibit.

14 **MR. SCALZO:** I don't have an objection to
15 that.

16 **(WHEREUPON, State's Exhibit 6 is marked for**
17 **identification purposes and admitted into the record.)**

18 **MR. WEBB:** It is State's Exhibit Number 6.

19 **THE COURT:** Okay.

20 **(WHEREUPON, a lunch recess is taken.)**

21 **THE COURT:** Okay. Call your next witness.

22 **MR. WEBB:** Yes, Your Honor. The State calls
23 Investigator Craig Hannieg to the stand.

24 **CRAIG HANNIEG**

25 having first been sworn, testifies as follows:

DIRECT EXAMINATION

2 **BY MR. WEBB:**

3 **Q** Investigator Hannieg, were you with David
4 Weiner the day of March 5th, 2008?

5 **A** Yes, sir. I was.

6 **Q** And, uh, were you guys partners?

7 **A** Yes, sir.

8 **Q** And were you investigating someone?

9 **A** I was there to backup Investigator Weiner to
10 serve an arrest warrant to a subject wanted for armed
11 robbery.

12 **Q** And did you respond out to [REDACTED]
13 with David Weiner?

14 **A** I did.

15 **Q** And what did you see when you got there?

16 **A** When Investigator Weiner and I drove by the
17 residence, we noticed a vehicle in the driveway with a
18 person occupying the front passenger seat, I'm sorry,
19 the front driver's seat. Uh, Investigator Weiner
20 decided to go ahead and stop the vehicle. Investigator
21 Weiner spoke to the driver who identified himself with
22 a driver's license. He established that it was a
23 rental car. Investigator Weiner asked if he knew where
24 Mr. Nicholson was. He said Yeah, he called me to come
25 pick him up.

1 Q At that time, Investigator Weiner went down
2 to the, if you were facing the house, to the left side
3 of the house, uh, where did you go?

4 A I went to the front door. When I got to the
5 front door, there was a half moon window at the top of
6 the front door. I looked through. As I did, I knocked.
7 As I knocked, I saw a subject later identified as the
8 Defendant look at me, made eye contact and saw him go
9 behind a wall.

10 Q When you say go behind a wall, what wall?

11 A When you look through the door, you're
12 looking right down a hallway. The dining room kitchen
13 on the left. Behind that wall is a master bedroom, a
14 pantry and a family room.

15 Q What was he wearing when you first saw him?

16 A I only saw -- it was a high door. I looked
17 through. I saw he had no shirt on.

18 Q Okay. You couldn't tell at the bottom?

19 A Right. I really wasn't concerned with the
20 bottom after I had saw him.

21 Q Could you tell if there was anything in his
22 hands at that time or could you see his hands?

23 A I couldn't see his hands. I just made eye
24 contact with him.

25 Q What did you do then after he went out of

1 sight, jumped out of sight?

2 **A** I called around the corner to Investigator
3 Weiner. I said Dave, I got him. I just saw him inside.
4 Investigator Weiner made his way around the corner at
5 the same time the door had opened.

6 **Q** Now, how long was he out of your sight?

7 **A** Five seconds.

8 **Q** All right.

9 **A** As Investigator Weiner came around the
10 corner, the door had opened. I introduced myself to
11 Mr. Nicholson. Investigator Weiner came around the
12 corner. He said you are under arrest.

13 **Q** Now, was he inside or outside the house at
14 that point?

15 **A** Standing at the threshold of the door.

16 **Q** Okay.

17 **A** If you were to open your front door and
18 stand over to speak to somebody.

19 **Q** All right. Then what happened?

20 **A** As we handcuffed the Defendant, he -- we got
21 the first handcuff on him without incident. As soon as
22 we did, we were going for the second hand and he
23 started pulling back as opposed to -- not actively
24 resisting but just kind of backing into his house.

25 **Q** Stepping backward?

1 **A** Yes, sir.

2 **Q** And how far did he back up?

3 **A** A foot, one person's foot, maybe two feet
4 inside the dwelling.

5 **Q** Okay. Then what happened?

6 **A** We were able to obtain his other hand and we
7 handcuffed him.

8 **Q** What did you do with him?

9 **A** Uh, he was, uh, since he was inside his
10 residence, we walked in the residence. When he opened
11 the door, I could smell burnt marijuana. Without a
12 doubt, it was a burnt marijuana cigarette.

13 **Q** So right when you entered the threshold of
14 the door, you could smell it?

15 **A** As the door was closed, I couldn't. When he
16 opened the door, I would smell burnt marijuana.

17 **Q** All right. And how do you know what
18 marijuana smells like?

19 **A** Through my training and experience of
20 multiple arrest of narcotics violators somewhat using
21 marijuana.

22 **Q** Now, you are with SLED right now, right?

23 **A** Yes, sir.

24 **Q** What are your duties at SLED?

25 **A** I'm assigned to the narcotics unit.

1 Q You investigate marijuana?

2 A Marijuana, cocaine.

3 Q Okay. So you handcuffed the Defendant. Where
4 do you place him?

5 A He's -- actually sat in the chair at the
6 kitchen table.

7 Q How far inside the doorway is that?

8 A It's right there. There's nothing else in
9 that dining room area, that kitchen area if you will
10 except for the dining room table. It's about six feet.

11 Q All right. So at that point, what did you
12 do?

13 A Based on the burnt marijuana and the fact
14 that we had an arrest warrant for a subject for armed
15 robbery where there was other co-Defendants, not
16 knowing who was in the house, I stayed with the
17 Defendant along with Investigator Fortner.
18 Investigator Weiner, I could keep my eye on him for
19 officer safety purposes. We could see nobody was in
20 the kitchen. There is no walls. It's like a half wall.
21 Investigator Weiner went to the family room
22 area, then into the master bedroom. You never search a
23 house by yourself for officer safety reasons, so I
24 could keep an eye on him. He came back and stayed with
25 the Defendant. Investigator Fortner and I went

1 upstairs to secure the upstairs residence.

2 Q How far away was the master bedroom from
3 where you were with the Defendant?

4 A Straight down the hallway. I would say 20
5 feet, 25 feet.

6 Q Okay. And, uh, did he find anything in the
7 master bedroom?

8 A He did.

9 Q What did he find?

10 A He found a small green leafy substance on
11 the dresser which field tested positive for marijuana.

12 Q Okay. What did you do when he got back?

13 A Investigator Fortner and I went upstairs to
14 secure the upstairs.

15 Q Okay. Did you find anything?

16 A No people were found. But I did find a burnt
17 marijuana roach on the back of the table.

18 Q Was that in plain view?

19 A Yes, sir.

20 Q What did you do after that?

21 A We came back downstairs. I told Investigator
22 Weiner that it was a marijuana cigarette upstairs.
23 Again, being there for a narcotics case, Mr., the
24 Defendant was transported to a police car where he was
25 transported to the LEC.

1 Q I want to take a step back, how much time
2 lapse between the time that you sat the Defendant down
3 and Investigator Weiner went and did his protective
4 sweep?

5 A A minute maybe. He was agitated. He was
6 upset.

7 Q Weiner or the Defendant?

8 A The Defendant.

9 Q Okay.

10 A He was agitated. His sister had arrived. We
11 didn't know but she lived down the street. She showed
12 up. There was some yelling between the two of them. He
13 was claiming false arrest. After we got him settled
14 down, we tried to tell him we had an arrest warrant.
15 We were going to transport him to the Law Enforcement
16 Center. As soon as he was calm and Investigator
17 Fortner was with me, Investigator Weiner checked the
18 bedroom and family room.

19 Q All right. And then you guys found the
20 marijuana or what field tested positive as marijuana.
21 Then what happened?

22 A We secured the residence by knowing nobody
23 was inside. The Defendant was transported to the Law
24 Enforcement Center. Investigator Fortner went and
25 obtained a narcotics search warrant based on the smell

1 of marijuana and the marijuana that was in plain view
2 that was inside the business.

3 Q Did anything happen in the meantime while
4 you were waiting for the search warrant?

5 A Yes, sir. The Defendant's sister was outside
6 as well as the subject that was occupying the rental
7 vehicle. Knowing that the interior of the house was
8 secure, that nobody was in there, we checked the
9 subject in the rental car for warrants. He didn't have
10 any. The rental car company responded. It was not his
11 rental. It was overdue. They took the rental car.

12 We were talking to the sister. She asked many
13 times to go inside the residence. We told her the
14 residence was being secured right now. She was not
15 allowed to go inside.

16 Q Do you know if she lived there?

17 A We did not. I did not.

18 Q What happened at that point?

19 A As Investigator Weiner and I was speaking to
20 her in the driveway, she began talking on her cell
21 phone. We were about 10 feet from the door. We were
22 right up in the driveway. She just walked right to the
23 front door, opened and shut it immediately. I looked
24 at Investigator Weiner. He went right up to the front
25 door, checked it. It was locked. And he kicked the

1 door opened.

2 Q How long was she inside the house?

3 A When he kicked the door, the door hit her.

4 Q Okay.

5 A Three, four seconds maybe. Five seconds at
6 the most

7 Q All right. What did you do with her then?

8 A She was placed under arrest for obstruction.

9 Q And, uh, did Investigator Fortner come back
10 with a search warrant?

11 A He did.

12 Q Did you help with the search of the house?

13 A I did.

14 Q Where did you search?

15 A I searched in the master bedroom. The
16 family room, my area was the family room and the
17 master bedroom. The family room was real easy. It was
18 just a couch and a TV. It just took a minute or two.
19 I searched the master bedroom. I recovered the
20 suspected marijuana from the dresser and returned that
21 to the kitchen table or the kitchen counter. I went
22 to the master bedroom closet.

23 Q What did you find there?

24 A Inside a black book bag with wheels, I found
25 a loaded Tec-9, it's a 9 millimeter Luger machine gun.

1 **Q** What did you do when you found it?

2 **A** That was photographed and taken to the
3 kitchen counter.

4 **THE COURT:** This is after the warrant, right?

5 **MR. WEBB:** Yes, Your Honor.

6 **THE COURT:** I don't -- I don't think you need
7 to get into all that.

8 **MR. WEBB:** That's fine. Let me ask one or
9 two more questions.

10 **THE COURT:** Okay.

11 **BY MR. WEBB:**

12 **Q** You stated that you smelled marijuana when
13 the door opened to the house.

14 **A** Yes.

15 **Q** Aside from the protective sweep, from your
16 experience and your training, what would you have done
17 but for the protective sweep? If that never had
18 happened.

19 **A** I would have pulled back and got a narcotic
20 search warrant.

21 **Q** And what would have been your cause for
22 that?

23 **A** The smell of burnt marijuana, freshly burnt
24 marijuana.

25 **MR. WEBB:** No more questions at this

1 time, Judge.

2 **THE COURT:** Mr. Scalzo.

3 **MR. SCALZO:** Thank you, Your Honor.

4 **CROSS-EXAMINATION**

5 **BY MR. SCALZO:**

6 **Q** Investigator, you talked about walking up to
7 the front door.

8 **A** Yes, sir.

9 **Q** First of all, how were you dressed?

10 **A** I was wearing khaki pants which is what I
11 usually wore, some sort of dress slacks.

12 **Q** Okay.

13 **A** A shirt and tie.

14 **Q** Okay.

15 **A** With my weapon on my right side next to my
16 badge with handcuffs.

17 **Q** Did you announce yourself when you knocked
18 on the door?

19 **A** No, sir. I did.

20 **Q** Okay. And you described that Mr. Nicholson
21 peeked to see somebody out the door, jumps back but
22 then comes back downstairs?

23 **A** No, sir. As I looked through the window, I
24 looked through the window first. I knocked on the
25 door. Mr. Nicholson came in the view -- it was just a

1 small --

2 Q Sure.

3 A -- half way window at the top. He came into
4 view and we made eye contact. He disappeared off to
5 the right.

6 Q Okay.

7 A If I looked at the front door facing the
8 house, he disappeared which would be to your left and
9 my right.

10 Q Okay.

11 A He came back about five seconds later.

12 Q Okay.

13 A He started walking to the front door at
14 which time I called to Investigator Weiner and said he
15 just came to the door.

16 Q All right. But the point being that he saw
17 that somebody was there. When you first saw him, he
18 wouldn't, didn't look like he was dressed, at least
19 from the top.

20 A Correct.

21 Q The next time you saw him, he was dressed.

22 A He had a shirt on.

23 Q He had a shirt on. He wasn't in there an
24 abnormal long amount of time. He wasn't in there for a
25 half hour and you kept banging on the door.

1 **A** No, sir.

2 **Q** Would you guess it was about the time it
3 took to put a shirt on or something to that effect?

4 **A** It was about five seconds.

5 **Q** Okay.

6 **A** If he had a shirt in his hands, maybe.

7 **Q** Okay. Then he -- he comes out and he walks
8 right down the hallway, right to the door and opens
9 the door?

10 **A** Yes.

11 **Q** You describe that Investigator Weiner is
12 coming up at the same time as he is essentially
13 opening the door?

14 **A** Within -- he opened the door. I said, Hi,
15 how are you. I knew Investigator Weiner was coming
16 around the corner. That's when we approach him.

17 **Q** You tell him that you have an arrest
18 warrant?

19 **A** Investigator Weiner did.

20 **Q** And, uh, who grabbed him first?

21 **A** Investigator Weiner reached out and grabbed
22 him. We knew he was going to jail.

23 **Q** Sure.

24 **A** We already had the arrest warrant. As soon
25 as I saw Investigator Weiner reach out and grab

1 handcuff. The first handcuff went on without a
2 problem.

3 Q Uh-huh.

4 A As that went on, I think he realized I'm
5 going to jail for something and started back into his
6 house like trying to figure out what his next move is
7 going to be.

8 Q You didn't ask him to come out and he said
9 no?

10 A No, sir.

11 Q He was simply standing in the threshold of
12 the doorway?

13 A Yes. For officer safety reasons, we wouldn't
14 ask him to come out. We grab our hands on him. He's
15 right there.

16 Q I'm sorry. I said he opens the door. You
17 say, Hi, how are you. You didn't say can you step out
18 here and he say oh, no, I'm not coming out?

19 A That's what I said. Investigator Weiner came
20 around the corner. As soon as he got there --

21 Q So when the both of you are standing there,
22 you wanted to be able to grab him so that you could
23 have control over him?

24 A Yes.

25 Q You just described that he's sort of

1 stepping backwards into the house.

2 **A** Yes.

3 **Q** This is at the point where you, at least one
4 of you has gotten your hands on him?

5 **A** Yes.

6 **Q** You wrote a report. There is a one-page
7 report. You did not describe in your report that he
8 tried to retreat back into the house, did you?

9 **A** If he was flailing his arms, kicking and
10 pulling back, I would have described that. It kind of
11 startled me because of the time that the arrest
12 warrant was served and the time of the armed robbery
13 was at least four months.

14 **Q** Yeah. It was November 2007 til March of '08.

15 **A** Right, so like four or five months.

16 **Q** Uh-huh.

17 **A** So when he saw me, he didn't see anybody
18 except for my head through the window.

19 **Q** Uh-huh.

20 **A** So when he opened the door and I said, hey,
21 how are you and we handcuffed him, Investigator Weiner
22 handcuffed him, something clicked that he was in
23 trouble. That's when he, his reaction was just a pull
24 back.

25 **Q** But again, you don't describe that in your

1 report?

2 **A** There was no reason to.

3 **Q** And you don't actually take him down to the
4 ground?

5 **A** There was no reason to do that either.

6 **Q** It is not that kind of resisting, so to
7 speak?

8 **A** You're right.

9 **Q** Okay. The gun that was found, you are aware
10 that it is an inoperable weapon? You weren't aware
11 then but now are you aware of that?

12 **A** I was just made aware of that yesterday.

13 **Q** Okay. When you are standing out in the
14 doorway and you have this encounter with him or even
15 before you actually encounter him and he opens the
16 door, do you hear anything else going on inside the
17 house?

18 **A** No.

19 **Q** You are aware that -- were you present when
20 Investigator Weiner talked to the other man that was
21 parked outside?

22 **A** Yes.

23 **Q** He said he was there to pick the Defendant
24 up?

25 **A** I did not hear their conversation. When we

1 pulled up, Investigator Weiner went to go speak with
2 that gentlemen. I was going towards the front door.
3 It's a two-story house. First of all, I didn't want
4 to stand at the windows.

5 Q Uh-huh.

6 A And second of all, I went towards the front
7 door to figure out what was going to happen if this
8 guy came out or somebody else came out what our plan
9 of action would have been.

10 Q Okay. But when Investigator Weiner comes up
11 to you after talking to the man in the car, he doesn't
12 come up to you and say, okay, there could be other
13 people in the house. This guy is here to pick up the
14 Defendant, his brother or -- he does not say anything
15 like that to you?

16 A No, sir. He wouldn't. He would never do
17 that. He would always assume that there are other
18 people in the house and that they are armed. That is
19 what you would assume.

20 Q Hold on. Are you trying to tell us that if
21 you walk up to a house and you don't know if anybody
22 is in there and the officer, your partner just got
23 information that there might be more than one person
24 in the house besides the person you are looking for,
25 he would not say anything to you?

1 **A** I'm sure he would say something.

2 **Q** That's what I'm asking.

3 **A** Yes, sir.

4 **Q** I believe you testified that you had
5 arrested him essentially handcuffed in front. You
6 didn't put the handcuffs behind, you got him in the
7 front?

8 **A** Yes, sir.

9 **Q** You and Investigator Weiner then take him
10 from the threshold -- you say about two feet inside
11 the threshold of the house. You take him into the
12 house about six feet and sit him down at a table?

13 **A** Yes.

14 **Q** Other than moving another person, he did not
15 resist. It was not difficult for you to get him to go
16 and sit down at that table as far as once you got him
17 cuffed?

18 **A** It took some verbal coursing to have him
19 settle down --

20 **Q** Right?

21 **A** -- and tell him you are under arrest, we
22 have an arrest warrant. He wanted to read the
23 warrant. He said I wanted to read the warrant. We
24 were going to give him the opportunity. At this time,
25 he had not physically resisted arrest. In our minds,

1 we had handcuffs on him. He was relatively secure.
2 We had to conduct a pat down. He already pulled us
3 into his house. He already stepped back.

4 Q He stepped back?

5 A Yes, sir.

6 Q He did not pull you. In other words, you
7 said it was an uneventful situation. He did not drag
8 you and the other investigator into the house.

9 A He was under arrest. He was going with us.

10 Q Right.

11 A If he pulled himself all the way to the back
12 family room, we were going with him. We had an arrest
13 warrant.

14 Q Absolutely. But you had him under control,
15 right? You directed him to go sit at the kitchen
16 table. You got him there?

17 A As he was demanding to read the arrest
18 warrant, calling out for his sister.

19 Q I understand that. But you were able to get
20 him to the chair is my point?

21 A Yes.

22 Q He was already handcuffed, you had him under
23 arrest?

24 A Yes.

25 Q Right. When you went there, you went there

1 with only an arrest warrant?

2 **A** That is correct.

3 **Q** Prior to Investigator Fortner going to get
4 his search warrant, he was inside the house with you
5 and Investigator Weiner?

6 **A** Yes.

7 **Q** You were, you were not aware, you did not
8 have any information that anybody other than the
9 Defendant was living at the house?

10 **A** Investigator Weiner checked the computer.

11 **Q** Uh-huh.

12 **A** However, boyfriends, girlfriends, friends
13 and relatives who might be staying there renting rooms
14 don't generally show up on the computer.

15 **Q** I understand that. My question was you did
16 not have any specific information that someone else
17 was there?

18 **A** We did not have any specific information
19 that someone wasn't there.

20 **Q** That wasn't my question?

21 **A** That was my answer.

22 **Q** When you arrived on the scene, you did not
23 have any other specific information that anybody other
24 than the person that you saw when you walked up there
25 was inside the house?

1 **A** That is correct.

2 **Q** Okay. You had to go from -- you described
3 from the front of the house to where the master
4 bedroom was in the back of the house was about 20 to
5 25 feet is what you testified to?

6 **A** I am guessing, yes, sir.

7 **Q** Theoretically, the Defendant that you have
8 now placed in the kitchen inside the house, he would
9 have had to have gone close to 20 feet in order to get
10 to that room?

11 **A** No.

12 **Q** 15 feet?

13 **A** I don't understand the question. You are
14 talking about when I looked through the window?

15 **Q** No. You're inside the house. You have got
16 the Defendant sitting at the kitchen table?

17 **A** Yes, sir.

18 **Q** In order for him to go from where he is to
19 that back bedroom, about 15 or 20 feet easily?

20 **A** Yes, sir.

21 **Q** You indicated in your report, you said, tell
22 me if I'm wrong, Mr. Nicholson was taken into custody
23 without incident and secured in a patrol car. You
24 actually did not describe him sitting at the kitchen
25 table, correct, in your report?

1 **A** That is correct.

2 **Q** You also don't describe him as being
3 argumentative or yelling or things of that nature?

4 **A** The only reason I would not have described
5 that in my report is that he would have to be charged.
6 I would have to have documentation to support a charge
7 of obstructing or resisting arrest.

8 **Q** The answer is no, you did not put that in
9 there?

10 **A** That is correct.

11 **MR. SCALZO:** I don't have any further
12 questions at this time.

13 **THE COURT:** Any redirect?

14 **MR. WEBB:** No, Judge.

15 **THE COURT:** Step down. Anything else from
16 the State?

17 **MR. WEBB:** Just briefly. Mike Fortner. He
18 does not have much to add but we can call him up
19 there. The State calls Michael Fortner to the
20 stand.

21 **MICHAEL FORTNER,**
22 having first been sworn, testifies as follows:

23 **DIRECT EXAMINATION**

24 **BY MR. WEBB:**

25 **Q** All right, Investigator Fortner, did you go

1 out to [REDACTED] on March 5, 2008?

2 A Yes, sir, I did.

3 Q Why did you go out there?

4 A Investigator Weiner had an arrest warrant
5 for the Defendant.

6 Q Did you drive out there with him?

7 A Well, yes, sir. We are initially set up
8 down the road a little bit. Myself and a uniform
9 patrol deputy and Investigator Weiner and Hannieg were
10 going to drive by in a less obvious type car. Just
11 drive by and check the house out and see if they can
12 figure out what was going on. They were supposed to
13 call me and let me know if we were going all have to
14 go down there together. But when they observed the
15 individual in the driveway, things did not go quite
16 the way we planned.

17 Q What do you mean by that?

18 A Well, they got out and made contact with
19 him. Then, during this time, they were making contact
20 with the guy inside. Prior to all of this is when
21 they said come down now. Myself and the uniform
22 patrol deputy headed down that way.

23 Q What did you see when you got down there?

24 A As I am arriving, the front door is open to
25 the house. Investigator Weiner and Hannieg are at the

1 front door with the Defendant. It is obvious that
2 they're trying to place him under arrest. It is
3 obvious that he is not complying simply by turning
4 around and placing his hands behind his back. He was
5 not throwing a fist or anything like that. It was
6 obvious that he was not complying.

7 Q Describe his actions. What was he doing?

8 A As I am coming up to the door, he was
9 backing away with Investigator Weiner and Hannieg into
10 the house.

11 Q Did they have their hands on him at the time
12 trying to arrest them?

13 A Yes, they did.

14 Q Approximately how far did you backup?

15 A Just a few feet into the house. It wasn't
16 much. It was like a wall or something right in there.

17 Q Were you able to help out with the arrest of
18 the Defendant?

19 A By the time I got out of my car and went up
20 to the house, they had him handcuffed and was walking
21 him to the table. We sat him down.

22 Q Then what happened?

23 A At that time, we did a protective sweep of
24 the house. Marijuana was found in plain view. I went
25 down to the Law Enforcement Center to obtain a search

1 warrant.

2 Q When you say we did a protective sweep,
3 where did you go?

4 A I went upstairs. Myself and Investigator
5 Hannieg went upstairs to do the sweep upstairs.

6 Q Where did Investigator Weiner go?

7 A He did downstairs where we were all at at
8 that time at the Defendant.

9 Q How much time passed between the time that
10 the Defendant was sitting at the chair and the time
11 that you guys did a protective sweep?

12 A Just a minute or two.

13 Q You said you found what else there? Did you
14 find anything?

15 A Investigator Hannieg did locate some
16 marijuana, burned marijuana upstairs.

17 Q Okay. You said you went and got a search
18 warrant?

19 A Yes, sir. I left the incident location and
20 went to the LEC and obtained a search warrant.

21 Q Then you came back to the residence after
22 that?

23 A Yes, sir.

24 MR. WEBB: That is all, Judge.

25 THE COURT: Any cross-examination?

1 **MR. SCALZO:** Yes, sir.

2 **CROSS-EXAMINATION**

3 **BY MR. SCALZO:**

4 **Q** Investigator Fortner, when you came up, you
5 said Investigator Weiner and Hannieg were already at
6 the door, already appeared to you serving the arrest
7 warrant, arresting him?

8 **A** Yes, sir.

9 **Q** You did not run up there?

10 **A** I did not run up there.

11 **Q** It was not a situation where they needed
12 immediate assistance to help dealing with this
13 individual that they were arresting?

14 **A** They were not that far way.

15 **Q** And you walked into the house?

16 **A** Yes, sir.

17 **Q** By the time you got to the house, you said
18 they already brought him six feet in and put him down
19 in the chair?

20 **A** I got into the house and then all three of
21 us walked him over to the chair.

22 **Q** All three of you walked him over to the
23 chair?

24 **A** Yes.

25 **Q** Now three officers that got him. He was not

1 trying to run out the back or run through you or
2 anything like that?

3 **A** Not at this time.

4 **Q** Okay. After your protective sweep -- before
5 we even talk about the protective sweep. While you are
6 in there, you don't hear any rumbling of other people
7 walking around upstairs or any thing like that?

8 **A** No, sir. I did not.

9 **Q** No banging or anything that makes you look
10 around to see if anybody is was there?

11 **A** No, sir.

12 **Q** After you do your protective sweep, you said
13 you went upstairs with officer Hannieg and Mr. Weiner
14 went to the back, right?

15 **A** The first floor, the kitchen.

16 **Q** Okay. You then go down to the magistrate?

17 **A** Yes, sir.

18 **Q** When you go down to the magistrate -- well,
19 I am assuming you went to your office to type out the
20 warrant?

21 **A** That is correct. Yes, sir.

22 **Q** You type out all the pages that are attached
23 to it that you got to fill out?

24 **A** Yes, sir.

25 **Q** One of the things that you type out is the

1 affidavit with your sworn testimony that you're going
2 to give to the magistrate?

3 **A** Yes, sir.

4 **Q** And, uh, do you have a copy of it?

5 **A** No, sir.

6 **Q** Okay. This is Court's Exhibit 6. Take a
7 look at that. I believe it is the second page in that
8 packet where your affidavit would be?

9 **A** Yes, sir.

10 **Q** At the bottom, the third sentence where it
11 says the suspect, you are with me there?

12 **A** Okay.

13 **Q** Isn't it true that it says the suspect was
14 arrested and in the interest of officer safety, a
15 protective sweep was conducted of the rest of the
16 residence to ensure that there were no other subjects
17 present at the house?

18 **A** Correct.

19 **Q** During the course of the protective sweep, a
20 small amount of green dried plant material was located
21 on a dresser in the bedroom?

22 **A** Yes, sir.

23 **Q** It was recognized to be marijuana. A search
24 warrant is needed to find more drugs, potentially more
25 drugs; isn't that correct?

1 **A** Yes, sir.

2 **Q** That's what you told the magistrate was the
3 basis for your search warrant?

4 **A** Yes, sir.

5 **MR. SCALZO:** That is all I have, Judge.

6 **MR. WEBB:** Nothing else, Judge.

7 **THE COURT:** You can step down, sir.

8 Anything else from the state?

9 **MR. WEBB:** I can proffer more evidence. I
10 believe that is all that I need for the
11 protective sweep, Judge.

12 **THE COURT:** That is all you need for your 20-
13 minute hearing?

14 Any evidence from the defense?

15 **MR. SCALZO:** No, sir, not for this hearing.

16 **THE COURT:** You want to make any argument,
17 Mr. Scalzo?

18 **MR. SCALZO:** I do, Your Honor. Judge, I
19 believe the controlling law in this case would be
20 Maryland versus Bowie. It is a United States
21 Supreme Court case. The South Carolina case
22 would be State versus Abdalla which is 357 S.C.
23 344. Essentially, the State case simply says
24 Maryland versus Bowie is really the controlling
25 law. They apply the facts of that case to

1 Maryland versus Bowie. There is not any new law
2 created in South Carolina at that point.

3 The protective sweep is a very limited, very
4 specific procedure, if you will, that police are
5 allowed to employ in very specific circumstances.
6 It is pointing out in several cases in the Fourth
7 Circuit and other circuits, one of the things
8 that they always point out is what the court says
9 in Maryland versus Bowie. I can hand you up a
10 copy of the case, Judge, if you need a copy of
11 the case.

12 **THE COURT:** Maryland versus Bowie?

13 **MR. SCALZO:** Yes, sir.

14 **THE COURT:** I have looked at it in the last
15 few minutes. If you have an extra copy, it would
16 not hurt me to have it.

17 **MR. SCALZO:** Okay. The point I am looking
18 for I believe would be on the actual page 8 of
19 the printout. Basically, it says a protective
20 sweep should last no longer than is necessary to
21 dispel a reasonable suspicion of danger and, in
22 any event, no longer than it takes to complete
23 the arrest and depart the premises. I think that
24 somewhat crystallizes the issue that is before
25 the court.

1 They arrested him at a point where they
2 grabbed him, placed the handcuffs on him,
3 standing at the threshold of the house. What is
4 clear that they can do is they can search the
5 wingspan of the immediate close area. Just like
6 in a car or any place he could reach incident to
7 that arrest. What Maryland versus Bowie is
8 saying is just because you are arresting him does
9 not mean you can now rush in after you have
10 completed your arrest and continue looking in the
11 house, unless you have got some articulable facts
12 as to why you need to go in there for a safety
13 issue.

14 I think that is important. Maryland versus
15 Bowie is about safety. It is not about the
16 collection of evidence. In this case, what the
17 State has not done is not provided additional
18 facts that can be articulated, not just surmise,
19 not just a gut feeling or anything like that that
20 would support the idea that once they have got
21 him in custody, they now need to go further into
22 the house in order to find somebody else.

23 In the very facts of Maryland versus Bowie,
24 it is sort of a more of a hot pursuit situation.
25 They have got an armed robbery, there are two co-

1 Defendants. The police go into the house. When
2 they initially to go into the house, they do not
3 encounter anybody. It is only when you go to a
4 basement that confront who turns out to be the
5 Defendant in the case. They go and secure him
6 then they go further down the basement to work he
7 was.

8 You have a very different scenario here when
9 you have Mr. Nicholson is in custody. He does
10 not run down the hall. There isn't another co-
11 Defendant that they intend to go get.

12 **THE COURT:** Let me ask you a question.

13 **MR. SCALZO:** Sure.

14 **THE COURT:** Why is this not reasonable? Two,
15 to some extent, three police officers show up at
16 a home to arrest a suspect for armed robbery.
17 They be at the door just like this. There is a
18 little bit of resistance shown, not a whole lot.
19 They get him handcuffed and sit down. He wants
20 to read the warrant.

21 **MR. SCALZO:** Uh-huh.

22 **THE COURT:** He is entitled to ask for that,
23 right?

24 **MR. SCALZO:** I would say yeah.

25 **THE COURT:** There is nothing magical about

1 the requirement that they are out of the house
2 and headed to where the patrol car in 30 seconds
3 or two minutes or 10 minutes, right?

4 MR. SCALZO: When you say nothing magical --

5 THE COURT: There is no requirement.

6 MR. SCALZO: I don't know about that.

7 THE COURT: There is none. Maryland versus
8 Bowie is not talking about the timeframe in which
9 you complete the arrest. It is talking about
10 what you do in addition to the arrest or incident
11 to the arrest. They go into the house. They
12 make the arrest. The guy is showing some
13 resistance. He in some sort of verbal exchange
14 with another person outside which they have
15 described as, I forgot the words but not entirely
16 pleasant. He sits down. Maybe they sit him
17 down. He wants to read the warrant. It is going
18 to take a minute for him to read the warrant,
19 right?

20 MR. SCALZO: Uh-huh.

21 THE COURT: These officers that are out
22 there to serve an arrest warrant for armed
23 robbery, are they not entitled to, for their own
24 safety purposes to look in a bedroom 20 feet away
25 to see if a man or a woman might be armed in

1 there?

2 **MR. SCALZO:** I don't think so.

3 **THE COURT:** I think so. I really do. I
4 think that to say that they are required to stand
5 with an armed robbery suspect in a house they
6 never been in where they smell marijuana smoke
7 and take the risk that someone might be in that
8 bedroom back there, they don't know. Maybe there
9 is one half of one percent chance that somebody
10 is in that bedroom. They are entitled to take a
11 cursory look in that bedroom to see if anybody is
12 there.

13 If, in the course of doing so, they see
14 something that they recognize to be an illegal
15 drug, that changes the whole dynamic right there.
16 They're not entitled to conduct a search of the
17 home. No. But they come back. At that point in
18 time, if not beforehand, these officers realize
19 that a search warrant is going to be sought.
20 During the timeframe that the search warrant is
21 going to be sought, there is an angry sister
22 outside who has to be dealt with.

23 Some officer is going to have to stay at the
24 house while the other one goes to execute the
25 search warrant. There are three guys there. One

1 is taking the Defendant to the detention center.
2 One is going to get a search warrant. One is
3 staying at the house. If he is going to be
4 staying at the house for -- what? 20 minutes to
5 get a search warrant? That would be pretty
6 quick, wouldn't it?

7 **MR. SCALZO:** Probably.

8 **THE COURT:** It is going to take at least
9 20 minutes. He is going to be staying at this
10 house with a somewhat irate family member, an
11 upstairs to the building. He really does not
12 know if there is anybody up there or not. Is he
13 not entitled to walk upstairs and see if there is
14 anybody up there in preparation for, in
15 anticipation of perhaps some personal risk to
16 himself? Not only in the sense of his own safety
17 but in the sense of his own ability to control
18 the irate sister. If there are two people to be
19 controlled or even three people to be controlled,
20 even if it is not a matter of officer safety, it
21 is something they need to know.

22 I think the way the whole thing progresses,
23 if they met the guy at the door, smelled no
24 marijuana, met no resistance, met no request to
25 read the warrant and the guy says would you

1 please go ahead and escort me to jail. There is
2 no reason for me to go back inside. Let's go.
3 If they then went upstairs, that would be a
4 problem.

5 But, as the situation progresses, they
6 clearly are warranted under the Fourth Amendment
7 to be at the chair in the room where he sits down
8 seconds after they first go in the house. That
9 is when the arrest is completed. They clearly
10 are warranted in allowing him time to read the
11 arrest warrant if that's what he wants to do. In
12 my opinion, they clearly are entitled to inspect
13 the rooms they are in an immediate vicinity out
14 of which someone may step with a weapon and have
15 an easy shot at them. That is well within the
16 parameters of what the Supreme Court recognized
17 as a protective sweep in the Maryland case.

18 So, once they see the marijuana, they realize
19 they're going to be there awhile. They probably
20 already knew that from the smell of marijuana
21 when they first walked in. They are entitled to
22 know if there is another person upstairs. I
23 believe that going up there is warranted.
24 Alternatively, the evidence that leads to the
25 search warrant, that leads to the seizure of the

1 crack cocaine is found independent of the trip
2 upstairs. Even if that were to be a violation, a
3 foray beyond the bounds of what a protective
4 sweep can allow, I would not suppress the
5 evidence on that basis. So, for those reasons,
6 I'm going to deny the motion to suppress.

7 I'm going to give you -- let me back up. I'm
8 going to give you a chance to point out to me
9 anything I overlooked or any reasoning that I
10 that may be flawed. Now is your chance.

11 **MR. SCALZO:** Thank you, Your Honor. A couple
12 of things, I think as far as you described the
13 facts, there were more officers on the scene than
14 the three officers that testified. One, they
15 bought a fourth officer with him to the scene
16 prior to serving the warrant. I believe they
17 also called in a backup, that is the person that
18 takes them away eventually in the patrol car. I
19 think what Maryland versus Bowie is saying, what
20 the court is saying in that case is that the
21 police -- part of the problems in this case is
22 even if he were to take a step backwards as if, I
23 think the way they describe is almost like a
24 shock, a natural step backward.

25 Even if that were the case, once they have

1 arrested him, it doesn't give them the right to
2 go 20 feet into the house. That is not, they
3 have to have more facts to rely on to go 20 feet
4 into the house incident to arrest. In order to
5 do a protective sweep --

6 **THE COURT:** I have covered that.

7 **MR. SCALZO:** I understand. You said if I
8 wanted to address your reasoning.

9 **THE COURT:** We just disagree about whether or
10 not a protective sweep would allow them to go
11 back and look in that bedroom.

12 **MR. SCALZO:** Additionally, what the court
13 also addressed, Maryland asked the court for a
14 broad rule. They said if you are arresting for a
15 violent crime, we think we should be allowed to
16 make a protective sweep just for the mere fact of
17 being able to an arrest for that charge. The
18 court rejected that argument and said no you
19 can't do that. You need to have specific facts.

20 **THE COURT:** I know. They never made any
21 suggestion that the nature of the crime for which
22 the arrest is being made doesn't fit into that
23 category of facts that the police officer can
24 consider. It does not automatically give them a
25 broad opportunity to make a search.

1 **MR. SCALZO:** I understand that. I am not
2 saying that they don't.

3 **THE COURT:** All right.

4 **MR. SCALZO:** Another concern, Judge, is by
5 taking him into the house, which the police do,
6 even if you took a two-foot step back, it is two
7 police officers, a third police officer walking
8 up at the point that they got him. He is
9 controlled in the front. They don't have to take
10 him down. They are not permitted to go into the
11 house. I think what is going on is it is a
12 bootstrapping argument. If they can get him
13 inside the house, now they want to argue once we
14 are inside the house, now we can broaden our
15 search to be able to search all the rooms that
16 are close in hand.

17 That is not what Bowie was about. What Bowie
18 was about was protection of the officer when they
19 find themselves in a certain situation. Not one
20 that they create in and of themselves.

21 **THE COURT:** You're putting your own spin on
22 those facts. That is not the evidence. The
23 evidence is not that they pushed him in the
24 house. I could, I, I could discount the way they
25 described it, I suppose, but I find it credible

1 that when they went to place the handcuffed on
2 the second hand, his demeanor changed. He began
3 to back up into the house. There is nothing that
4 requires a police officer to act in a certain
5 manner at that point.

6 The officer would be justified if he chose to
7 do so in yanking the guy outside. The officer is
8 also justified, if he chooses to do so, to some
9 extent following him to the inside. One of the
10 factors that I imagine would play into that split
11 second decision that has to be made is whether or
12 not there is an irate sister outside that may
13 create a problem.

14 So, I am satisfied that everything that was
15 done was within the bounds of the Fourth
16 Amendment. If there is anything we have not
17 discussed or any point you feel I have
18 overlooked, I want you to share it with me. At
19 this point, there is no need to repeat any of the
20 arguments that have already been made.

21 **MR. SCALZO:** I am just checking, Judge.
22 (Pause).

23 Uh, obviously I realize that we are going to
24 disagree. Clearly it could be an issue. I want
25 to make sure on the record that I made it clear

1 as to our position. One, the arrest, the search
2 warrant itself does not reference the smell of
3 marijuana as a basis for that. I want to make
4 clear.

5 **THE COURT:** I will be delighted to talk about
6 that. That is irrelevant to what we are talking
7 about. That is relevant to whether or not the
8 magistrate was warranted in signing and issuing
9 the search warrant. That is not, that has
10 nothing to do with whether the officer's actions
11 in light of what they saw, heard, smelled was
12 reasonable and within the confines of what is
13 allowed under Maryland versus Bowie. The simple
14 fact that they did not write down the fact that
15 they smelled marijuana does not mean they have to
16 ignore that they are proceeding through the next
17 few seconds in deciding how to protect their own
18 safety while they complete an arrest of an armed
19 robbery suspect.

20 **MR. SCALZO:** My point is the fact that it was
21 not in the warrant goes to the fruit of the
22 poisonous tree argument. I want to make that
23 clear. I am not relitigating it.

24 **THE COURT:** I don't catch that point.
25 Explain to me what you means by the fruit of the

1 poisonous tree argument. So far, I have not
2 found the poisonous tree.

3 **MR. SCALZO:** Your Honor described in its
4 analysis putting in the smell of marijuana.

5 **THE COURT:** Right.

6 **MR. SCALZO:** I guess my point is having the
7 smell of marijuana would not have permitted them
8 to go into the house on its own. They would have
9 needed a search one based on that. My point is
10 the fact that it is not in the search warrant is
11 to say that, one, I understand Your Honor said he
12 believes them. Our position is that there was a
13 smell of marijuana in the house.

14 If that is not the case, it is not something
15 that they can use on its own, they don't have
16 articulable facts required to go further into the
17 house for a protective sweep, their basis for the
18 search warrant should be invalidated because the
19 evidence they found is only that is used for the
20 search warrant is found only in the back bedroom.
21 They do not go and ask for it based on the smell
22 of marijuana. I want to be clear in terms of the
23 argument. I am saying the poison was the
24 protective --

25 **THE COURT:** The only reason I really

1 mentioned the smell of the marijuana -- this
2 really is a minor point. That relates, in my
3 opinion, only to the decision or it relates most
4 prominently to the decision to go upstairs. That
5 was there was going to be an officer that was
6 there for awhile. It seems to me that that
7 officer is entitled to know that someone else was
8 upstairs. That is the reason I am interested.

9 The smell of marijuana is one of the things
10 the officer observed when he first got there that
11 led him to conclude we are going to get a search
12 warrant. Somebody is going to be here awhile.
13 Officer safety justifies knowing who was in the
14 house. When I say be there awhile, I don't
15 necessarily mean inside, even outside. Anyway,
16 that point, I think, has been discussed.

17 In my opinion, the smell of marijuana does
18 relate to the officer's decision to walk to the
19 back bedroom but not significantly. To me, the
20 most important thing is that the Defendant has
21 requested, reasonably so, to be seated in the
22 room long enough to read the warrant. The
23 officer is going to be there for half a minute, a
24 minute, minute and a half, two minutes, while he
25 reads it, I think the officer is entitled to take

1 a quick look into the bedroom to see if anybody
2 is back there.

3 MR. SCALZO: Additionally, Judge, State v.
4 Brown is a South Carolina case. The site is 289
5 S.C. 581. It is pre-Bowie. However, it is cited
6 as well in Abdalla. One of the things Abdalla
7 cites it for is the proposition that the State
8 must meet the additional ground that there was no
9 time to secure a warrant which is set forth --
10 they are basing that on Michigan versus Tyler
11 which was a United States Supreme Court case.

12 I think that is relevant as well to the time
13 frame of what is going on here. What South
14 Carolina is saying, South Carolina has a history
15 of having a heightened protection, Fourth
16 Amendment protection as compared to this federal
17 protection. What the Court is saying in Bowie and
18 then adopted again in Abdalla after Bowie is that
19 one of the factors is if the police have time to
20 go get a search warrant, they need to go get the
21 search warrant. I think when you put all that
22 together, what you have is a scenario where the
23 courts are saying you don't get to use an arrest
24 as a proxy to then go further into a search.

25 THE COURT: Right. It has absolutely nothing

1 to do with my ruling. My ruling is simply
2 related to the protective sweep.

3 **MR. SCALZO:** I think that Bowie is relevant.
4 It is part of the analysis of the protective
5 sweep as well.

6 **THE COURT:** Okay. I deny the motion. I, uh,
7 am going to try the case with the jury.

8 **MR. SCALZO:** Can I talk to him and make sure
9 we address the issue?

10 **THE COURT:** Sure. While you do that, I'm
11 going to -- what you got?

12 You got a light?

13 **THE BAILIFF:** That was in the Courtroom 2. I
14 had one just a minute ago. They were just
15 waiting to find out when they were going to get
16 an answer. They were getting a little anxious.

17 **THE COURT:** They wanted to know when they
18 were going to get an answer to the question?

19 **THE BAILIFF:** Yes, sir.

20 **THE COURT:** Did they ask right before our 20-
21 minute suppression hearing?

22 **THE BAILIFF:** No, sir.

23 **THE COURT:** I'm just kidding. All right. I'm
24 going to bring that jury out and answer the
25 question.

1 **MR. SCALZO:** I am going to go back and talk
2 to him.

3 **THE COURT:** Okay.

4 **(WHEREUPON,** a short recess is taken at
5 approximately 2:28 p.m.)

6 **(WHEREUPON,** State's Exhibits 7a, 7b, 7c are
7 marked for identification purposes only.)

8 **(WHEREUPON,** State's Exhibits 8 through 19 are
9 marked for identification purposes only.)

10 **(WHEREUPON,** the Court resumes at approximately
11 3:28 p.m.)

12 **MR. SCALZO:** May it please the Court, Your
13 Honor. We had indicated before the suppression
14 hearing and the start of the trial that we were
15 requesting to have a bench trial of this matter.
16 I think Your Honor has indicated that you want a
17 jury trial. We are, I guess, objecting to that
18 and renewing our request to have a bench trial. I
19 want to put that on the record and address that
20 with the Court.

21 **THE COURT:** Okay. Is there anything else
22 you want to say about that?

23 **MR. SCALZO:** Not unless Your Honor needs me
24 to make a further argument.

25 **THE COURT:** Unless I need you to what?

1 **MR. SCALZO:** Make a further argument or
2 want to hear anymore about it.

3 **THE COURT:** No, I don't need you to make
4 further argument. In light of -- in light of --
5 does the State have a position on it?

6 **MR. WEBB:** I leave it up to your
7 discretion, Judge.

8 **THE COURT:** Well, in order to go forward
9 with a bench trial, you would have to waive your
10 right to a trial by jury. But in light of the --
11 the way the suppression hearing went and I
12 already determined that I find the officers to be
13 credible, it really, it puts me in a position
14 that I don't choose to be put in. I'm going to
15 let the jury decide the case. All right.

16 Bring in the jury panel.

17 Any special voir dire?

18 **MR. WEBB:** Not from the State, Judge.

19 **MR. SCALZO:** Does Your Honor generally ask
20 about, uh, position to drugs, religiously or
21 things like that.

22 **THE COURT:** I will.

23 **MR. SCALZO:** We ask that you include that
24 kind of --

25 **THE COURT:** All right. I will.

1 **MR. SCALZO:** Okay.

2 **THE COURT:** Is there going to be anything
3 else we need to take up before we actually go
4 into opening statements?

5 **MR. SCALZO:** One of the issues --

6 **THE COURT:** That's alright. Just yes or no
7 is fine.

8 **MR. SCALZO:** I think so with regard to the
9 arrest warrant. I --

10 **THE COURT:** You don't need to get into
11 that.

12 **MR. WEBB:** I just told my officers not to
13 mention that at all.

14 **THE COURT:** That take care of it?

15 **MR. SCALZO:** Yeah. How is it going to be
16 dealt with or explained to the jury why --

17 **MR. WEBB:** That they were sent there to
18 serve an arrest warrant, not the specific crime
19 as charged.

20 **MR. SCALZO:** It wasn't a concern. Back to
21 the request for a bench trial is once you start
22 talking about the criminal process of something
23 completely unrelated, you then have jurors
24 speculating about what it is. I understand
25 that --

1 **THE COURT:** What if you just, uh, are they
2 there?

3 **THE BAILIFF:** Yes, sir.

4 **THE COURT:** Bring them on in.
5 Y'all come up here.

6 **(WHEREUPON, a bench conference is held off the**
7 **record.)**

8 **(WHEREUPON, the jury panel enters at**
9 **approximately 3:33 p.m.)**

10 **THE COURT:** I'm glad that I forewarned you
11 all Monday morning that there might be times when
12 you would have to sit downstairs with nothing to
13 do while you were waiting on us to get ready for
14 you. That has certainly been true today. I take
15 responsibility for that. We have been in the
16 courtroom working since 9:30 this morning except
17 for about a 35-to-40-minute lunch break that we
18 stole.

19 It's just been sort of, there's been a series
20 of events in this trial that we ramping up. The
21 other jury is still back there deliberating. We
22 just had to play them about 45 minutes of
23 testimony over again. That led to you all
24 waiting for us. For that, again I apologize. We
25 are ready now. If I can find the indictment.

1 Did you take the indictment?

2 Both counts?

3 **MR. WEBB:** Yes, Your Honor.

4 **THE COURT:** We are ready now for jury
5 selection in the case of the State of South
6 Carolina versus Lorenzo Nicholson. Mr. Nicholson
7 has been indicted in 2008-GS-23-4268 in two
8 counts. One for Trafficking in Cocaine and one
9 for Possession of a Weapon during the Commission
10 of a Violent Crime. In Count One of the
11 indictment, it is alleged that Lorenzo Nicholson
12 did in Greenville County or about the fifth day
13 of March 2008 possess or visibly display a
14 firearm during the commission or attempted
15 commission of a violent crime, to wit:
16 Trafficking Cocaine. This is in violation of
17 section 16-23-490 and Section 44-53-370 of the
18 South Carolina Code of Laws.

19 In Count Two, it is alleged that Lorenzo
20 Nicholson did in Greenville County on or about
21 fifth day of March 2008 knowingly sell,
22 manufacture, deliver or bring into the State of
23 South Carolina or did knowingly provide financial
24 assistance or otherwise aid, abet, attempt, or
25 conspire to sell, manufacture, deliver or bring

1 into the State or was knowingly in actual or
2 constructive possession of more than 10 grams of
3 cocaine. This is a violation of section
4 44-53-370 of the South Carolina Code of Laws.

5 For those of you who are selected to serve on
6 the jury, in just a few minutes I will give you
7 some more detailed instructions about the
8 indictment and some of the other legal
9 considerations that will go in your service as
10 jurors. I want to take a moment right now to
11 make it clear to you that what I just read to you
12 from the indictment is not evidence and cannot be
13 considered by you in any manner as evidence of
14 the Defendant's guilt.

15 The indictment is simply a formal written
16 instrument that contains the allegations that
17 have been made against the Defendant and it
18 serves to process the case and bring it into this
19 court for trial. The Defendant has pled not
20 guilty to both counts of this indictment. The
21 plea of not guilty cast the burden on the State
22 to prove the Defendant guilty beyond a reasonable
23 doubt.

24 For those of you who are selected to serve on
25 the jury, that will be your job to determine

1 anything of that sort. The other jury room is
2 open?

3 **THE BAILIFF:** Yes, sir.

4 **THE COURT:** I'm going to send you all back
5 in the jury room. I'm going to have you out here
6 as quickly as possible.

7 (WHEREUPON, the jury exits at approximately
8 4:07 p.m.)

9 (WHEREUPON, a short recess is taken approximately
10 4:07 p.m.)

11 (WHEREUPON, the Court resumes approximately
12 5:09 p.m.)

13 **MR. SCALZO:** We renew our request for a
14 bench trial. If Your Honor would grant the
15 request for a bench. As far as a plea, I think he
16 wants to go forward as a bench trial.

17 **THE COURT:** Uh, All right. Mr. Henderson,
18 Nicholson, stand up for a moment please. You can
19 stand right there. Raise your right hand.

20 (WHEREUPON, the Defendant is sworn.)

21 **THE COURT:** Now, you can put your hand
22 down. We've been talking for a while now about
23 your right to a jury trial and the possibility
24 that you would want to waive that right and
25 proceed with a non-jury trial in which I will

1 decide the facts in the case. Just so the record
2 is clear which I think it already is, you are the
3 one who is asking for this, right? Asking for a
4 non-jury trial.

5 **MR. NICHOLSON:** Yes, sir. I think this is
6 a matter of law. I would rather have a bench
7 trial.

8 **THE COURT:** You would rather have a bench
9 trial.

10 **MR. NICHOLSON:** Yes, sir.

11 **THE COURT:** I just want to make sure you
12 understand a few things. You have a
13 constitutional right as you apparently know to a
14 jury trial.

15 **MR. NICHOLSON:** Right.

16 **THE COURT:** You understand that?

17 **MR. NICHOLSON:** Yes, sir.

18 **THE COURT:** You have talked to Mr. Scalzo
19 about that?

20 **MR. NICHOLSON:** Yes.

21 **THE COURT:** If you choose to exercise your
22 right to a trial by jury, certain things will,
23 well, we already have a jury. The State would be
24 required to prove to the jury beyond a reasonable
25 doubt that, uh, that you are guilty. That would

1 mean that you are guilty. That would mean they
2 would have to prove to the jury all of the
3 elements of the crime of trafficking and all the
4 elements of the crime of possession of a weapon.

5 **MR. NICHOLSON:** I am guilty, sir. That's
6 not the issue.

7 **THE COURT:** Well, uh, at this point, it is
8 the issue. We are just talking about your right
9 to a trial by jury. If you, I'm just wanting to
10 make sure you understand your right to a trial by
11 jury.

12 **MR. NICHOLSON:** Yes, Your Honor.

13 **THE COURT:** If you exercise that right, in
14 order to convict you, the State would have to
15 prove to a jury beyond a reasonable doubt that
16 you are guilty.

17 **MR. NICHOLSON:** I understand that.

18 **THE COURT:** All right. Now, Mr. Scalzo,
19 are you satisfied that he understands all this?

20 **MR. SCALZO:** Yes, sir.

21 **THE COURT:** Okay. And you heard me say
22 earlier in the discussion about whether or not to
23 allow you to waive your right to a trial by jury
24 that I already heard the officers testify and I
25 already made a finding of fact that they are

1 credible. My finding of fact that I made before
2 was just based on preponderance of the evidence.
3 The next finding of fact has to be beyond a
4 reasonable doubt. You know the difference?

5 **MR. NICHOLSON:** Yes.

6 **THE COURT:** Even in light of that, you
7 still want to go forward and let me decide the
8 facts?

9 **MR. NICHOLSON:** The facts have already
10 been decided.

11 **THE COURT:** Well, the facts, if you,
12 unless you decide to plead guilty and nobody is
13 pressuring you to do that, then even in a bench
14 trial, the State has to prove the crime, prove
15 the elements of the crime beyond a reasonable
16 doubt. It would simply be that I would be the
17 person to decide whether or not they've done that
18 rather than the jury. I just want to make sure
19 you remember and understand what I said earlier.

20 I'm not prejudging you. I will listen very
21 carefully and I will hold the State to the task
22 of proving you guilty beyond a reasonable doubt.
23 But, uh, I already expressed some concern over it
24 because I've already made a factual finding that
25 they, not a factual finding that you are guilty.

1 I didn't make that finding. I made a factual
2 finding that they told the truth when they
3 described the way the arrest unfolded. Okay. We
4 get to the drugs that were allegedly in the
5 pantry later. All right. So you understand all
6 that?

7 **MR. NICHOLSON:** I understand that but my
8 concern is that they wasn't telling the truth the
9 way the arrest went.

10 **THE COURT:** Okay.

11 **MR. NICHOLSON:** It was, the officer, the
12 officer that was on the scene, the lady cop that
13 took me and brought me down the detention center,
14 she was on the scene. She seen, she seen them
15 bring me out and arrest me on the porch as the
16 statement, as the supplementary report, I think
17 it was Fortner or Craig or whoever wrote that
18 supplementary report, they brought me out on the
19 porch. They arrested me.

20 My sister was out there on the porch. The
21 reason that I was hollering at my sister is
22 because they had took me within my residence.
23 After I tried to shut my door, they put their
24 hand up and stopped it. Took me inside my
25 residence. They asked me could they search. I

1 asked them if they had a search warrant. They
2 told me no. They said they was doing something
3 called a protective sweep. I was telling my
4 sister that --

5 **THE COURT:** Okay.

6 **MR. NICHOLSON:** I don't know why I said
7 it but I told her to call the police.

8 **THE COURT:** Hold on just a minute. All I
9 want to do is make sure you understand your right
10 to a trial by jury.

11 **MR. NICHOLSON:** Yes, sir. I understand.

12 **THE COURT:** I want you to remember what I
13 said earlier before you made your decision about
14 whether or not to waive that right. I think we've
15 been over it all. You've had a chance to talk to
16 Mr. Scalzo about it. Do you still want to -- and
17 again, nobody is pressuring you to. Do you want
18 to waive your right to a trial by jury?

19 **MR. NICHOLSON:** Yes, sir.

20 **THE COURT:** All right. We will proceed
21 then in the morning with the, with a non-jury
22 trial. Okay.

23 **MR. SCALZO:** And Judge, just so, I think
24 what he's trying to tell the Court and why he
25 says he's guilty is that he sees it as a legal

1 issue. The drugs should not have been admitted.

2 **THE COURT:** I fully understand.

3 **MR. SCALZO:** I want to make that certain
4 that that's what he's really asserting.

5 **MR. NICHOLSON:** I'm guilty. I didn't deny
6 the facts that drugs and a gun was found in my
7 home. What I'm saying is why would they want to
8 put their lives in danger and take me in my house
9 when they done pulled me out of my house and put
10 the cuffs on me when they could have just took me
11 right there to the car when an officer was
12 sitting right there in the car.

13 **THE COURT:** Okay. I got you. All right. I
14 will -- let me see the attorneys in a few
15 minutes. Hold Mr. Nicholson -- I'm sorry -- here
16 for just a few minutes so Mr. Scalzo can talk to
17 him after our discussion in a minute. I will be
18 right back.

19 **(WHEREUPON, the Court recesses at**
20 **approximately 5:23 p.m.)**

21 **(WHEREUPON, the Court resumes on August 13, 2009**
22 **at approximately 9:06 a.m.)**

23 **THE COURT:** Is the State ready to proceed?

24 **MR. WEBB:** Yes, Your Honor.

25 **THE COURT:** Call your first witness.

1 **MR. WEBB:** The State calls Investigator
2 David Weiner to the stand.

3 **DAVID WEINER**
4 having first been sworn, testifies as follows:

5 **DIRECT EXAMINATION**

6 **BY MR. WEBB:**

7 **Q** Investigator Weiner, where did you go on
8 March 5, 2008?

9 **A** [REDACTED] which is in Taylors located
10 within Greenville, South Carolina.

11 **Q** And why did you go there?

12 **A** To serve an arrest warrant.

13 **Q** On who?

14 **A** On Lorenzo Nicholson.

15 **Q** [REDACTED] his residence?

16 **A** Yes, sir, it is.

17 **Q** What did you see when you got there?

18 **A** As I approached with another investigator, I
19 found a vehicle running in the driveway with a
20 driver's seated in it.

21 **Q** All right. Did you speak with this driver?

22 **A** Just briefly. He told me that he felt Mr.
23 Nicholson is home because he made a phone call to him
24 in order to get a ride or something like that.

25 **Q** Who was with you when you went out there?

1 **A** Initially Investigator Hannieg was there and
2 also Investigator Fortner and a uniform patrol deputy.

3 **Q** What did you guys do after that?

4 **A** I went to the rear of the residence to make
5 sure nobody fled out the back. Investigator Hannieg
6 knocked on the front door. He advised me that he made
7 contact with somebody but they would not come to the
8 door yet. Then, he told me again now they were at the
9 door. I came around to the front.

10 **Q** And what did you see when you were out at
11 the front?

12 **A** Mr. Nicholson was standing in the doorway.
13 I advised him that we had a warrant for armed robbery
14 for his arrest. I was able to get one handcuff on at
15 which time he was started back into the house taking
16 me with him. Then he was secured in the front and
17 seated at the table.

18 **Q** Was Investigator Hannieg with you at that
19 point?

20 **A** Yes, sir. As well as Investigator Fortner.

21 **Q** He is sitting down at the table. How far is
22 the table inside the door?

23 **A** Just a few feet.

24 **Q** What, if anything, could you smell at that
25 time?

1 **A** Marijuana, burnt marijuana odor.

2 **Q** What did you do then?

3 **A** After he was secured and calmed down, he
4 also had a sister who arrived on the scene from her
5 residence which was a few houses down. Once we calmed
6 him down enough, I and myself and Investigator Hannieg
7 and Investigator Fortner conducted a protective sweep
8 of the residence.

9 **Q** Where did you go during the sweep?

10 **A** On the first floor, the main floor, just
11 into the kitchen, living room area, the garage and the
12 bedroom.

13 **Q** When you --

14 **THE COURT:** Let me ask. Obviously, under
15 normal circumstances, all of this testimony have
16 to be repeated during the trial because there is
17 a jury and they have not heard the testimony
18 before. I have already heard this once. From my
19 own standpoint, unless you just insist on it, I
20 don't need to hear it again. You can go right to
21 the --

22 **MR. WEBB:** Search warrant?

23 **THE COURT:** To the part I have not heard. We
24 would incorporate by reference the testimony from
25 the suppression hearing.

1 **MR. SCALZO:** Yes, sir. We have not had a
2 chance to cross-examine him on those issues.

3 **THE COURT:** All right. that suits you?

4 **MR. WEBB:** Yes, sir.

5 **THE COURT:** The testimony that was offered
6 yesterday during the suppression hearing is by
7 agreement incorporated by reference into the
8 record of the trial and will be part of the
9 record on which I will decide whether or not the
10 State has met its burden of proving the Defendant
11 guilty.

12 **BY MR. WEBB:**

13 **Q** Investigator Weiner, when you received a
14 search warrant or Investigator Fortner received a
15 search warrant and came back to the house, you guys
16 searched the house?

17 **A** Yes, sir, we did.

18 **Q** Where did everyone search?

19 **A** We started with a K-9 officer conducting the
20 search because it was a residence, not just a small
21 area. The K-9 officer indicated to us where the dog
22 had alerted, one of the primary locations was the
23 kitchen area, like the countertops and the drawers.
24 He also alerted to a pantry and specifically to a box
25 in the pantry that held several canned goods and box

1 items like cereal and things of that nature.

2 Q Was anything in the pantry as far as
3 narcotics?

4 A Yes, sir. I took that box down. Obviously,
5 canned goods was still sealed. I made sure they were
6 canned goods. Not like something with a removable
7 bottom like a safe or anything like that. Inside a
8 popcorn box, I located a bag of large powder which did
9 field test positive as cocaine.

10 Q What did you do with the white power?

11 A Placed it on the kitchen counter along with
12 any other items I was going to seize.

13 Q If you would just give us the -- who took
14 custody of it?

15 A Once the items were documented that were
16 being seized, they were placed in my vehicle, returned
17 to my office and turned over to Investigator Hannieg
18 to be placed in P&E.

19 Q What were the items received?

20 A Uh, there is a burnt marijuana blunt.

21 Q Where was that found?

22 A Upstairs in the residence in an ashtray.

23 Q Okay?

24 A And Intratec nine millimeter model AB10
25 submachine gun with a magazine loaded with 28 rounds.

1 Q Where was that found?

2 A In the defendants bedroom inside a black
3 suitcase, roll along suitcase. Also seized was some
4 evidence of trafficking of the narcotics, razor blade
5 and two digital scales, a box of clear plastic
6 sandwich bag which is commonly used as well as the
7 driver's license belonging to the Defendant showing
8 that address and a piece of mail addressed to that
9 Defendant at that address.

10 Q Address of [REDACTED]?

11 A Yes, sir.

12 Q Which is in Greenville County?

13 A Yes, sir.

14 Q To your knowledge, what did Investigator
15 Hannieg do with those items?

16 A All items were placed on the counter to be
17 inventoried and then placed in my vehicle, driven back
18 to the Law Enforcement Center and placed in P&E by
19 Investigator Hannieg.

20 Q During the search of the house, did you see
21 any female clothing?

22 A I don't recall any.

23 Q Did you see anyone other than the Defendant
24 in the house?

25 A No, sir.

1 Q I want to show you what has been marked
2 State's Exhibit number 11. Please tell me what that
3 is.

4 A That is the white bag or the bag containing
5 a white powder that was placed in the popcorn box in
6 the pantry.

7 Q Is that the same substance you gave
8 Investigator Hannieg?

9 A Yes. Yes, sir, it is.

10 Q To your knowledge, was this tested by Sean
11 Collins?

12 A Yes, sir. It is marked with his initials
13 and the weight.

14 Q What is that weight?

15 A 15.28 grams.

16 Q Of which substance?

17 A I don't have the lab analysis.

18 Q Okay. I want to show you what is marked as
19 State's Exhibit 18. Tell me what that is.

20 A This is a copy of a Department of Public
21 Safety, County of Greenville drug analysis report
22 submitted by Sean Collins.

23 Q Does that have what has been marked State's
24 Exhibit 11 on there?

25 A Yes, sir, it does. It is listed as item 1.

1 Q What was that tested as?

2 A It says the result, cocaine found. 15.28
3 grams.

4 Q All right.

5 MR. WEBB: At this time, the State move
6 Exhibit 11 and 18 into evidence?

7 MR. SCALZO: Judge, subject to our pretrial
8 motion for suppression. Otherwise, we don't
9 object.

10 THE COURT: They are admitted. Any further
11 questions?

12 BY MR. WEBB:

13 Q I'm going to show you what was marked
14 State's Exhibit number 7A, B, C. Could you please
15 tell me what those are?

16 A That is the Intratec nine millimeter
17 submachine gun located in the Defendant bedroom along
18 with the magazine and I actually removed and counted
19 28 bullets from the magazine.

20 Q This is the same item that you found?

21 A Yes, sir, they are. I can confirm by the
22 serial number.

23 Q What is that?

24 A It is marked A032244 on the weapon.

25 Q Thank you.

1 **MR. WEBB:** The State moves Exhibit 7A, B, C.
2 into evidence.

3 **MR. SCALZO:** Same basis for the pretrial
4 motion. Otherwise we don't have any --

5 **THE COURT:** Okay. They are admitted.

6 (WHEREUPON, State's Exhibits 7A, 7B, and 7C were
7 admitted into the record.)

8 **MR. WEBB:** Judge, I think that is all the
9 questions I have.

10 **THE COURT:** Okay. Cross-examination.

11 **MR. SCALZO:** Thank you, Your Honor.

12 **CROSS-EXAMINATION**

13 **BY MR. SCALZO:**

14 **Q** Officer, with regard to the gun, you are
15 aware that the gun was determined to be inoperable?

16 **A** It is my understanding it was tested by our
17 lab and determined to be inoperable, yes, sir.

18 **Q** At the time you found it, it was inside a
19 bag. It was not laying out in the open, correct?

20 **A** Correct.

21 **MR. SCALZO:** Okay. That is all I have, Judge.

22 **THE COURT:** All right, sir. You can step
23 down. Any additional witnesses?

24 **MR. WEBB:** No, Your Honor. I believe the
25 State rests.

1 **THE COURT:** Do you have any motions?

2 **MR. SCALZO:** Yes, sir. I obviously would
3 renew my prior motion as far as suppression but
4 more specifically, I would move for a directed
5 verdict on the weapons charge. The statute says
6 you have to be in possession of a firearm or
7 visibly display what appears to be a firearm.
8 Then, the most relevant part is Section D. of the
9 statute that talks about a weapon essentially
10 that may readily be converted to dispel a
11 projectile. What you have is an inoperable gun.
12 It is a broken gun essentially.

13 I think what the statute is talking about
14 there is the Defendant can't say I have a gun
15 with a clip, I take the clip out and therefore it
16 is not a working gun. Therefore, I am not guilty.
17 I think what the legislature was trying to
18 prevent with that language is that exact
19 situation. That is not the situation you have
20 here. You have a broken gun. It is essentially
21 not a weapon. That would be the basis for the
22 directed verdict.

23 **THE COURT:** I deny the motion. All right.
24 Do you have any evidence you want to present
25 other than the possible testimony of the

1 Defendant?

2 **MR. SCALZO:** Not other than the Defendant. I
3 need to make sure -- he just kind of handed me
4 something. I need to make sure it is not
5 something that needs to be presented.

6 **THE COURT:** Take a moment to have that
7 discussion with him.

8 (WHEREUPON, the Defendant and counsel confer.)

9 **MR. SCALZO:** Judge, I have talked to him
10 about testifying. I do not believe he wants to
11 testify. I believe he is prepared to answer
12 questions.

13 **THE COURT:** All right. Mr. Nicholson, please
14 stand. Raise your right hand.

15 (WHEREUPON, the Defendant is sworn.)

16 **THE COURT:** You can put your hand down. You
17 have had a chance to talk with Mr. Scalzo about
18 the right to remain silent?

19 **MR. NICHOLSON:** Yes, sir.

20 **THE COURT:** You also talked with him about
21 your right to testify?

22 **MR. NICHOLSON:** Correct.

23 **THE COURT:** Do you feel as though you
24 understood what he has explained to you about
25 those rights?

1 **MR. NICHOLSON:** Yes, sir.

2 **THE COURT:** I'm going to talk to you about it
3 myself so I can make sure you understand. You
4 have the right to remain silent. That right
5 comes by way of the Fifth Amendment to the United
6 States Constitution. What that means is that no
7 one can make you testify in a trial of this case.
8 If you choose not to testify, the fact that you
9 did not testify would not be held against you in
10 any manner. Do you understand?

11 **MR. NICHOLSON:** I understand.

12 **THE COURT:** On the other hand, if you choose
13 to testify, you may do so. If you testify, you
14 are subject to cross-examination. And, uh, by
15 the solicitor. Do you understand that?

16 **MR. SCALZO:** Yes, sir.

17 **THE COURT:** You should listen very carefully
18 to the advice that has been given to you by Mr.
19 Scalzo about whether or not you should testify.
20 Ultimately, you're the person who has to make up
21 your mind as to whether or not you wish to
22 testify. Do you understand that?

23 **MR. NICHOLSON:** Yes, sir.

24 **THE COURT:** Do you need some more time to
25 talk to Mr. Scalzo?

1 **MR. NICHOLSON:** Yes, sir. May I talk with
2 him?

3 **THE COURT:** Sure.

4 (WHEREUPON, the Defendant and counsel confer.)

5 **MR. NICHOLSON:** Yes, I consulted with my
6 lawyer. I do not wish to testify.

7 **THE COURT:** You do not wish to testify?

8 **MR. NICHOLSON:** No, sir.

9 **THE COURT:** All right. You can be seated.
10 Any further evidence, Mr. Scalzo?

11 **MR. SCALZO:** No, sir.

12 **THE COURT:** Does the State wish to make a
13 brief closing argument?

14 **MR. WEBB:** Brief, Judge. The evidence shows
15 that, one, the Defendant was in actual
16 possession, essentially actual possession of the
17 cocaine when he came to the door, ducked in, put
18 the cocaine in the pantry. Otherwise, the
19 evidence clearly shows he was in constructive
20 possession. He was in the house. He was the
21 only person in there. The driver's license came
22 back to that address. He had clothing in there.
23 He was undressed when he first came to the door.
24 The gun was in the bedroom. All of this was
25 constructive possession of the gun as well as the

1 drugs which would actually be actual possession.

2 **THE COURT:** Okay. Thank you.

3 **MR. WEBB:** Thank you.

4 **THE COURT:** Mr. Scalzo?

5 **MR. SCALZO:** Just to address some of the
6 issues the solicitor brought out, in fact, based
7 on Investigator Hannieg's testimony, he was
8 standing at the front door, he observed the
9 Defendant. Essentially, he is saying he see the
10 Defendant from the waist up. While he does duck
11 in, it does not appear that he ducked in long
12 enough to put on a shirt as well as go to the
13 pantry and put it in the box.

14 I don't think that the State has established
15 actual possession of the drugs as far as beyond a
16 reasonable doubt. Again, my argument from a
17 factual basis with regard to the gun, it is an
18 inoperable weapon. A person in possession of a
19 firearm, a weapon during the commission of a
20 violent crime, it requires possession of an
21 operable weapon, not an inoperable weapon.

22 As far as put possession goes, while he may
23 be the owner or sole occupant of the house at the
24 time, they don't have any evidence to indicate
25 that he has been the only occupant ever in that

1 house. What it is is obviously an issue of
2 personal constructive possession, no DNA, no
3 fingerprints. You don't have any of the
4 forensics supplied to directly tie him or
5 physically have him have possession of those
6 drugs.

7 Again, I believe the case law says while it
8 is an inference, that could mean as far as your
9 house and knowing what is inside your house, it
10 is not a presumption. It is something that can
11 be rebutted or that the trier of fact can choose
12 not to follow. In that sense, I don't believe it
13 rise to the level of beyond a reasonable doubt.
14 There may be hunches and questions. But it is
15 not beyond a reasonable doubt particularly with
16 regards to the weapon.

17 **THE COURT:** All right. Well, since we have
18 this sort of legal dispute about whether or not
19 the weapon is such that he can be found guilty
20 under 16-23-480, let me first go down and take a
21 close look at it. (Pause).

22 **MR. WEBB:** Judge, if I may be heard on that
23 issue.

24 **THE COURT:** No, you can't be heard. The
25 closing argument have ended. I am going to do

1 like Judge McGowan used to do. I'm going to give
2 myself a jury charge on the operability of a
3 firearm by making the record clear that I am
4 looking at 16-23-490, subsection D. as used in
5 this section, firearm means any weapons which
6 will expel a projectile or is designed to expel a
7 projectile or which may readily be converted to
8 expel a projectile.

9 From the testimony, the first of those three
10 options does not exist because it will not expel
11 a projectile. Whether the last option exist,
12 whether it could readily be converted to expel a
13 projectile, there is no evidence of that.
14 Whether it is designed to expel a projectile is
15 extraordinarily clear to me as I have examined
16 the pistol that it is in fact designed to expel a
17 projectile. As those three options are stated in
18 the alternative in the statute, then I find that
19 -- what is the exhibit number?

20 **MR. WEBB:** 7A, I believe.

21 **THE COURT:** State's Exhibit 7A is a firearm
22 under section 23-490(b). I find the Defendant
23 guilty of trafficking under Count Two and guilty
24 of possession of a weapon during the commission
25 of a violent crime under Count One. I have

1 obviously considered the elements of trafficking
2 that the Defendant knowingly possessed more than
3 10 grams of cocaine. Therefore, he is guilty of
4 trafficking. I find that he was in fact in
5 possession of the weapon during the commission of
6 the crime of trafficking. Guilty. Bring him
7 around for sentencing.

8 Any posttrial motions before we go into his
9 sentencing?

10 **MR. SCALZO:** Yes, sir. I would make a motion
11 for a new trial and renew my prior motions in
12 order to preserve any legal issues.

13 **THE COURT:** They are respectfully denied.
14 Any prior record?

15 **MR. WEBB:** Yes, Your Honor. One moment.
16 (Pause).

17 Judge, he has a 1997 Assault and Battery,
18 False Information to Police, 1998 Malicious
19 Injury to Personal Property, 2001 Receiving
20 Stolen Goods, 2005 Assault and Battery, 2003
21 Receiving Stolen Goods, 2000 Simple Possession of
22 Marijuana in which this Defendant received a fine
23 of \$641, no respective jail time which may would
24 make this offense a trafficking second offense.
25 I can make this exhibit part of the court record.

1 **THE COURT:** Okay.

2 **MR. WEBB:** He also has a conviction for armed
3 robbery of this year.

4 **THE COURT:** Okay. Now, you said you were
5 going to show me some case law the second offense
6 question.

7 **MR. WEBB:** Yes, Your Honor, I'm going to show
8 you Robinson versus State. The cite is 380 S.C.
9 201. Judge, I am referring to page 3 in the
10 second column, top paragraph which states the
11 Defendant prior uncounseled misdemeanor
12 conviction may only be used to enhance a sentence
13 for a subsequent conviction if the Defendant was
14 not actually in prison as a result of the prior
15 possession. Hence, the prior misdemeanor, prior
16 marijuana.

17 **THE COURT:** Okay, I can take it from there.

18 **MR. SCALZO:** State v. Spratt which is a 2009,
19 a recent case, somewhere along the lines of the
20 case that has been handed up.

21 **THE COURT:** Hand it up to me. I don't mind
22 reading it, looking at it myself.

23 **MR. SCALZO:** I believe what Spratt
24 essentially says is the Court will make a
25 determination about whether or not the

1 uncounseled plea was done properly. (Pause).

2 **THE COURT:** Okay. Do you have any evidence
3 that you wish to present?

4 **MR. SCALZO:** Yes, sir. We can offer some
5 testimony from the Defendant regarding that
6 particular bench trial I believe it was.

7 **THE COURT:** You're still under oath, sir.

8 **MR. SCALZO:** Mr. Nicholson, would you tell
9 the Court. What we are talking about is the
10 hearing in Greenville Municipal Court back in
11 2007 for possession of marijuana that day.

12 **MR. NICHOLSON:** It happened on the weekend.

13 **MR. SCALZO:** Not the incident. I'm talking
14 about the court date.

15 **MR. NICHOLSON:** He made me come to court the
16 following Monday without consulting a lawyer. He
17 did not give me time to consult a lawyer. He
18 sentenced me without consulting a lawyer.

19 **THE COURT:** Did the judge talk to you about,
20 uh, the perils -- I guess I will use that word --
21 of not having a lawyer?

22 **MR. NICHOLSON:** I never was instructed that I
23 needed a lawyer for the case.

24 **MR. SCALZO:** When you appeared before the
25 judge, did you ask that you be allowed to have a

1 lawyer?

2 MR. NICHOLSON: Yes, I did.

3 MR. SCALZO: This was in Municipal Court?

4 MR. NICHOLSON: Yes, sir.

5 MR. SCALZO: It was for a charge of Simple
6 Possession of Marijuana.

7 MR. NICHOLSON: Yes, sir.

8 MR. SCALZO: Your sentence, was it a
9 suspended sentence? Did you go to jail that day?

10 MR. NICHOLSON: No. I was fined fines.

11 MR. SCALZO: Did you ever pay the fine or go
12 to jail as a result?

13 MR. NICHOLSON: I paid the fine.

14 MR. SCALZO: I think that is all that I have,
15 Judge. (Pause).

16 THE COURT: All right. Uh, the question is,
17 uh, whether the imposition of a fine with no jail
18 time for a conviction of Simple Possession of
19 Marijuana renders that conviction
20 constitutionally defective such that it can not
21 be used to enhance the sentence on this
22 trafficking, right?

23 MR. SCALZO: I think additionally whether or
24 not warnings were provided to the Defendant.

25 THE COURT: Have you read the cases that he

1 handed up which might equivocally state that
2 whether or not he was getting, whether or not he
3 validly waives his right to counsel has nothing
4 to do with this?

5 **MR. SCALZO:** I have not read those two.

6 **THE COURT:** All right. It is a second
7 offense. I am ready to impose sentence as a
8 second offense. All right. I will hear from
9 you.

10 **MR. SCALZO:** The only thing, I want to make
11 sure my argument is clear that my basis for
12 seeing it is, should not be enhanced is because
13 he was not given warnings. I think the most
14 recent case speaks to that analysis as well
15 despite the case that was provided to the court
16 by the state. I want to make sure I was clear
17 about what our legal position was. As far as
18 sentencing goes, I can address that if the Court
19 is ready to hear from me.

20 **THE COURT:** Hold on just a minute. (Pause).

21 The Spratt case does not actually say this,
22 it is clear from the context that the prior
23 conviction was for possession of cocaine. It had
24 to have involved actual imprisonment. And the
25 trial judge said it was uncounseled plea,

1 therefore, I am not going to consider it as a
2 prior offense for sentencing enhancement.

3 The State, at the plea hearing, was put in
4 the position that you can not make a summary
5 ruling like that. The judge has to hear evidence
6 as to whether or not the Defendant waived his
7 right to counsel in the prior hearing. The trial
8 judge in Spratt refused to do that. The Court of
9 Appeals reversed to send it back so that the
10 judge would hear evidence on the question of
11 whether or not the Defendant had waived his right
12 to counsel in the prior plea. That is irrelevant
13 in a case such as this where there is no actual
14 imprisonment in the prior conviction. The Spratt
15 case is irrelevant. Now, I have ruled. I am
16 ready to hear you on the question of sentencing.

17 **MR. SCALZO:** With regard to Mr. Nicholson's
18 current situation, you heard the conviction for
19 the armed robbery. That is the armed robbery
20 that was the arrest warrant that the police was
21 serving in this case. He has received a 13-year
22 federal sentence for that armed robbery. He has
23 simply been in the jail waiting for the
24 resolution of this case. I think he would like
25 to address the court, Your Honor, just as soon as

1 I am done. I will let you know that his sister
2 and family and friends have been in the
3 courtroom.

4 He has been clear with me and I think he
5 expressed this yesterday that he does see this
6 hearing as a trial primarily as a legal battle
7 over whether or not the drugs were admissible.
8 He has expressed, and he said this yesterday, he
9 recognizes that he had the drugs in his house.
10 This was never an effort to really get away from
11 saying he did not actually have those. It was a
12 way of challenging the ability of the state to
13 come in his house without a search warrant.
14 Really, the only mechanism he has for doing that
15 ultimately becomes a trial. That is why we ended
16 up at trial. That is why he initially asked for
17 a bench trial so that the legal issue could be
18 fleshed out and addressed and preserved.

19 Lorenzo is an intelligent guy. He has been,
20 I think he has worked with me. I think that what
21 I would ask the court to consider is a concurrent
22 sentence that does not extend the federal
23 sentence that he is going to do. My
24 understanding, I could be corrected obviously, is
25 that once he is done serving the federal

1 sentence, he will have a federal parole to
2 follow. He will have a monitoring to follow by
3 the federal government. I would ask the court to
4 consider not extending his sentence.

5 **THE COURT:** The sentence is 13 years on
6 trafficking, five years on the weapon charge,
7 concurrent with credit for time served. Good
8 luck to you, sir.

9 **MR. NICHOLSON:** I did not get to speak.

10 **THE COURT:** Did you want to speak, sir?

11 **MR. NICHOLSON:** Yes, sir.

12 **THE COURT:** Go ahead.

13 **MR. NICHOLSON:** We all know this is not a
14 case as to whether or not I was guilty or not.

15 **THE COURT:** I will be glad to hear you on the
16 question of sentencing. I will not hear you on
17 the question of whether or not the service was
18 legal. If you want to talk to me about your
19 sentence, I will be glad to hear it.

20 **MR. NICHOLSON:** I was offered three years. I
21 was offered 0 to 10, first offense, throw the gun
22 out. It was not, the question, it wasn't the
23 question about the time or me being guilty, it
24 was just that I wanted you, understand that my
25 rights were violated in the search. It was all

1 kind of --

2 **THE COURT:** I'm going to extend to you the
3 privilege of discussing your sentence. If you
4 talk one more time about the legality of the
5 search, I'm going to cut you off and send you
6 back to the jail. You want to talk about your
7 sentence, I will be glad to hear you. Anything
8 you want to say?

9 **MR. NICHOLSON:** I want to know, you said it
10 is run concurrent?

11 **THE COURT:** Yes.

12 **MR. NICHOLSON:** Concurrent with my federal
13 sentence.

14 **THE COURT:** Yes.

15 **MR. NICHOLSON:** The 30 and five years is run
16 concurrent also.

17 **THE COURT:** Yes.

18 **MR. NICHOLSON:** When you say concurrent,
19 being that as soon as my --

20 **THE COURT:** Meaning that if you don't waste
21 any more of my time, I will leave it like it is.

22 **MR. NICHOLSON:** My federal --

23 **MR. SCALZO:** I will talk to you.

24 Thank you, Judge. Thank you.

25 **MR. WEBB:** Thank you.

THE STATE OF SOUTH CAROLINA)
 COUNTY OF GREENVILLE)

THE STATE)

v.)

LORENZO R. NICHOLSON,)

DEFENDANT.)

IN THE COURT OF GENERAL SESSIONS
 THIRTEENTH JUDICIAL CIRCUIT
 Warrant/Indictment Nos.: 2008-GS-23-04268

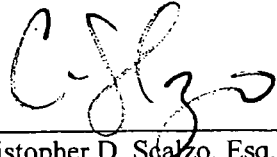
I 475038, 39

MOTION TO SUPPRESS EVIDENCE

COMES NOW, the defendant, **Lorenzo R. Nicholson**, by and through his undersigned counsel and moves this Court, pursuant to the 4th Amendment to the United States Constitution and Article 1 Section 10 of the South Carolina Constitution, for an Order suppressing any tangible evidence obtained from an unreasonable search and seizure by law enforcement officers within Greenville County on or about March 5, 2008.

Respectfully submitted,

GREENVILLE COUNTY PUBLIC DEFENDER

By: 

Christopher D. Scalzo, Esq.
 Attorney for Defendant
 305 E. North Street, Suite 123
 Greenville, SC 29601
 (864) 467-8522

Greenville, SC

Date: July 24, 2009

STATE OF SOUTH CAROLINA

County of

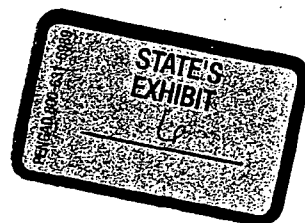
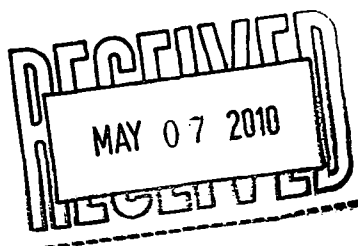
Greenville

~~01-2007-164231~~

28-33596

* COPY *

SEARCH WARRANT

Date 3/5/08Officer Michael E. Fortner

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

AFFIDAVIT

Personally appeared before me, one Michael E. Fortner
who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions
of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

Marijuana, drug paraphernalia, and any other evidence associated with the use, distribution, or packaging of marijuana.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

A two story residence located at [REDACTED] in Taylors, SC 29687. It is a beige in color vinyl sided house with a singel car
attached garage. There is a white mail box attached to a black mailbox post with the number 51 in white. The number 51 is also in
white on the front door. There is an overhang over the front porch. [REDACTED] is located off of Tanner Rd which turns off of
Mountain Creek Church Rd which turns off of Rutherford Rd near Terminex.

REASON FOR AFFIANT'S BELIEF THAT THE
PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

Affiant has been employed by the Greenville County Sheriff's Office for approximately 14 and a half years. On 03-05-08, affiant along with
investigators David Weiner and Craig Hanning served an armed robbery warrant on a suspect at the premises to be searched. The suspect
was arrested and in the interest of officer safety a protective sweep was conducted of the rest of the residence to ensure that there were no
other subjects present at the house. During the course of the protective sweep a small amount of green dried plant material was located on a
dresser in a bedroom. Affiant recognized the plant material to be marijuana. A search warrant is needed in order to conduct a more
thorough search of the residence for the existence of more marijuana.

Sworn to and Subscribed before me

this 5 day of March 20 08
[Signature] (L.S.)
Signature of Judge

[Signature]

Affiant

Address

4 MCGEE STGREENVILLE, SC 29601

Phone

(864) 467-5388

RETURN

I received the attached Search Warrant March 05,, 19 2008, and have executed it as follows:

On March 05,, 19 2008 at 16:20 o'clock A. M, I searched
(the person) described in the warrant and (the premises)

I left a copy of the warrant with the residence

Name of person searched or "at the place of search" with.
Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

1 INTRATEC 9MM 'TEC-9' SER# A032244 w/MAGAZINE
- INSIDE BLACK TRAILMAKER SUITCASE
1 BAG WHITE POWDER
1 BLUE DIGITAL SCALE
1 BOX PLASTIC SANDWICH BAGGIES
1 BLACK DIGITAL SCALE
11 WHITE PILLS
2 RAZOR BLADES
1 PIECE GREEN LEAFY SUBSTANCE
1 BLUNT
1 PIECE OF U.S. MAIL

This inventory was made in the presence of D. WEINER

AND P. DEROSA

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this

day of

5 March, 19 2008
(L.S.)

Signature of Judge

CIT 1018

(Signature of Officer Executing Warrant)

ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY
OF GREENVILLE COUNTY

It appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

A two story residence located at [REDACTED] in Taylors, SC 29687. It is a beige in color vinyl sided house with a singel car attached garage. There is a white mail box attached to a black mailbox post with the number 51 in white. The number 51 is also in white on the front door. There is an overhang over the front porch. [REDACTED] is located off of Tanner Rd which turns off of Mountain Creek Church Rd which turns off of Rutherford Rd near Terminex.

Now, therefore, you are hereby authorized to search the subject premises for the property described below, and to seize such property if found:

DESCRIPTION OF PROPERTY

Marijuana, drug paraphernalia, and any other evidence associated with the use, distribution, or packaging of marijuana.

This Search Warrant shall not be valid for more than ten days from the date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to

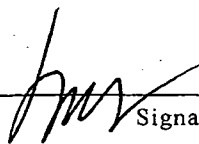
Mag. issuing magistrate

within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such search if practicable, and, if not, to such person as soon thereafter as is practicable; in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to a prominent place on such premises.

GREENVILLE, S. C.

March 05, 19 2008



Signature of Judge

(L. S.)

WITNESSES

David Weiner



Greenville County Sheriffs Office

3/12/2008

DOCKET NO. 2008-GS-23-
LBP

004268

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

April TERM 2008

THE STATE

vs.

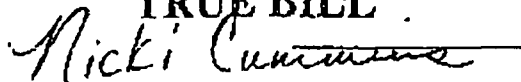
LORENZO RANTELLE NICHOLSON

PLEAD GUILTY

ARREST WARRANT NUMBER

1475039 and 1475038

ACTION OF GRAND JURY
TRUE BILL



FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Indictment for

0549
0278

POSSESSION OF A WEAPON DURING THE
COMMISSION OF A VIOLENT CRIME AND
TRAFFICKING COCAINE

Foreperson of Petit Jury

Date:

VIOLATION § 16-23-0490 and § 44-53-0370

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)

INDICTMENT FOR
 POSSESSION OF A WEAPON DURING THE COMMISSION
 OF A VIOLENT CRIME AND
 TRAFFICKING COCAINE

At a Court of General Sessions, convened on **APR 14 2009** the Grand Jurors of Greenville
 County present upon their oath:

COUNT I

That LORENZO RANTELLE NICHOLSON did in Greenville County, on or about the 5th day of March, 2008, possess or visibly display a firearm during the commission or attempted commission of a violent crime, to wit: Trafficking Cocaine. This is in violation of § 16-23-0490 and § 44-53-0370 of the South Carolina Code of Laws (1976) as amended.

COUNT II

That LORENZO RANTELLE NICHOLSON did in Greenville County, on or about the 5th day of March, 2008, knowingly sell, manufacture, deliver or bring into the State of South Carolina, or did knowingly provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver or bring into the State or was knowingly in actual or constructive possession of more than 10 grams of Cocaine. This is 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.

Rich B. Daskin
 SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF
STATEGreenville
VS.

Lorenzo Rantelle Nicholson

AKA:

Race: B Sex: M Age: 29

DOB:

Address:

DL#:

SID#:

In disposition of the said indictment comes now the Defendant who was
TO: Possession of a weapon during the 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) ☐ § 17-25-45

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:

Webb, Douglas

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:

☒ 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)

§ 47-12 (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)

§ 90-7 (SCCJA Surcharge)

3% to County (if paid in installments)

TOTAL

\$	
\$	
\$100	\$ 100
\$100	\$
\$12	\$
\$25	\$
\$500	\$
\$25	\$ 25
\$100	\$
\$	\$
\$50	\$
\$40/ea	\$
\$5	\$ 5
\$	\$
\$	\$

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (06/2009)

Paul B. Diebensimer
T. Johnson

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2008GS2304268

A/W#: 1475039

Date of Offense: 3/5/2008

S.C. Code § : 16-23-0490

CDR Code #: 0549

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

PRESIDING JUDGE

Judge Code:

Sentence Date:

21
8/13/09
3

STATE OF SOUTH CAROLINA

COUNTY OF Greenville
STATE VS.
Lorenzo Rantelle Nicholson

AKA:

Race: B Sex: M Age: 29

DOB:

Address:

DL#: SID#:

In disposition of the said indictment comes now the Defendant who was
TO: Trafficking In Cocaine 2nd -over 10 grams

in violation of § 44-53-0370(E)(2)(of the S.C. Code of Laws, bearing CDR Code # 0387.

☐ 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.

ATTORNEY
Webb, Douglas

74747
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 13 ~~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:

☒ 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:

☐ set by SCDPPPS.

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
§ 47-12 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25
§ 14-1-213 (Drug Court Surcharge)	\$100	\$ 100
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
§ 90-7 (SCCJA Surcharge)	\$5	\$ 5
3% to County (if paid in installments)	\$	\$
TOTAL	\$	\$

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (06/2009)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2008GS2304268

A/W#: 1475038

Date of Offense: 3/5/2008

S.C. Code § : 44-53-0370(E)(2)(

CDR Code #: 0278

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

PRESIDING JUDGE

Judge Code:

Sentence Date:

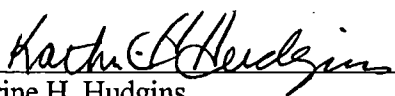
☐ Appointed PD or appointed other counsel, \$47.12
requires \$500 be paid to Clerk during probation.

8/13/09 3

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 4th, 2010


Kathrine H. Hudgins
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 APPEALS

RECEIVED

MAY -7 2012

Appeal from Greenville County S.C. Supreme Court

John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LORENZO R. NICHOLSON,

APPELLANT

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

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

ATTORNEY FOR APPELLANT.

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STATEMENT OF ISSUE ON APPEAL

Did the judge err in refusing to suppress cocaine and a weapon found pursuant to a search warrant where the probable cause for the search warrant was based on a warrantless search of the appellant's home and the State failed to establish an exception to the warrant requirement in violation of the Fourth Amendment prohibition against unreasonable searches and seizures?

STATEMENT OF THE CASE

In April of 2008, the Greenville County Grand Jury indicted Nicholson for possession of a weapon during the commission of a violent crime and trafficking in cocaine, indictment #2008-GS-23-4268. On August 12, 2009, Nicholson, represented by counsel, Christopher Scalzo, picked a jury for the trial of his case. The jury trial was to begin the following day but Nicholson waived his right to a jury trial and elected to proceed with a bench trial before the Honorable John C. Few. Judge Few found Nicholson guilty and sentenced him to 13 years for trafficking and 5 years concurrent for the weapon charge. A timely notice of intent to appeal was served on August 13, 2009. This appeal follows.

ARGUMENT

The judge erred in refusing to suppress cocaine and a weapon found pursuant to a search warrant where the probable cause for the search warrant was based on a warrantless search of the appellant's home and the State failed to establish an exception to the warrant requirement in violation of the Fourth Amendment prohibition against unreasonable searches and seizures.

On March 5, 2008, Investigators David Weiner, Craig Hannieg and Michael Fortner went to the defendant's home to serve an arrest warrant for armed robbery. Investigator Hanneig knocked on the front door and when Nicholson opened the door, Investigators Hanneig and Weiner placed him under arrest. (R. p. 40, lines 4- p. 41, lines 1-19). Investigator Hannieg testified that after placing one handcuff, the defendant began to back into the house. (R. p. 41, lines 20-24). The officers were able to obtain Nicholson's other hand and handcuff him. (R. p. 42, lines 1-7). Investigator Hannieg testified that they smelled burned marijuana when they entered the house. (R. p. 42, lines 9-12). Investigator Weiner testified, "We took about three feet into the house with him into the door. We were able to get his two hands together and cuff. We sat him down in the chair, got him to calm down a little bit and then I moved the handcuffs to the rear. That is when I did that." (R. p. 34, lines 24 – p. 35, lines 1-4).

Investigator Weiner then testified, "Once he settled down and we got him handcuffed, I did the first level protective sweep and Investigator Hannieg stayed downstairs while Investigator Fortner stayed with Mr. Nicholson." (R. p. 35, lines 12-16). Investigator Wiener found unsmoked bits of marijuana on a dresser in a back bedroom. (R. p. 10, lines 18-p. 11, lines 1-9). Investigator Hannieg went upstairs and found a smoked marijuana cigarette. (R. p. 44, lines 12-25). Investigator Hannieg testified that Investigator Fortner then obtained a search warrant based on the smell of marijuana and the marijuana found in the house. (R. p. 45, lines 22 – p.46, lines 1-2). Investigator Weiner admitted that his report and the affidavit in support

of the search warrant did not include any information about investigators smelling marijuana. (R. p. 26, lines 11 – p. 27, lines 1-16; Search Warrant, R. p. 123).

The investigators executed the search warrant and found 15.28 grams of crack cocaine and a gun. (R. p. 100, lines 19 – p. 101, 102, 103, 104 lines 1-4). Counsel for Nicholson moved to suppress the drugs and the gun. (R. pp. 1-83). In support, counsel cited State v. Abdullah, 357 S.C. 344, 592 S.E.2d 344 (Ct. App. 2004) and Maryland v. Buie, 494 U.S. 325, 337, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990) arguing that the officer's search of the back bedroom and upstairs exceeded what is allowed under the protective sweep exception for warrantless searches. (R. pp. 67-83). The judge denied the motion to suppress. (R. p. 83, line 6). The judge erred.

In an appeal from a motion to suppress evidence based on Fourth Amendment grounds, an appellate court may conduct its own review of the record to determine whether the evidence supports the circuit court's decision. See State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). Generally, a warrantless search is per se unreasonable and thus violative of the Fourth Amendments prohibition against unreasonable searches and seizures. State v. Bultron, 318 S.C. 323, 331, 457 S.E.2d 616, 621 (Ct. App. 1995). However, a warrantless search will withstand constitutional scrutiny where the search falls within one of a few specifically established and well delineated exceptions to the Fourth Amendment exclusionary rule. *Id.* 318 S.C. at 331-32, 457 S.E. 2d at 621. In such cases, the burden is upon the State to justify a warrantless search. State v. Bailey, 276 S.C. 32, 35, 274 S.E.2d 913, 95 (1981).

Exigent circumstances can be the basis for an exception to the warrant requirement. The exigent circumstances doctrine provides an exception to the Fourth Amendments protection against warrantless searches, but only where, from an objective standard, a

compelling need for official action and no time to secure a warrant exist. State v. Brown, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986) (quoting Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed2d 486 (1978)). For instance, a warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling. Minnesota v. Olson, 495 U.S. 91, 100, 110 S.Ct. 1684 109 L.Ed2d 85 (1990). In such circumstances, a protective sweep of the premises may be permitted. See Maryland v. Buie, 494 U.S. 325, 337, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990) (allowing a protective sweep of a house during an arrest where the officers have a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene).

The State failed to present evidence that exigent circumstances existed to justify the officers entering a back bedroom and going upstairs after placing Nicholson in custody. In trying to explain his actions in regard to the warrantless search, Investigator Weiner testified, "Continue a protective sweep of the residence again based on what type of warrant it was, the fact that I had been informed that he disappeared from view for several minutes before coming to the door. There was also a co-defendant in the case that was out on bond." (R. p. 10, lines 11-16). Investigator Weiner admitted that Nicholson was secured prior to the warrantless search. (R. p. 25, lines 3 – 23). He also admitted that he did not hear anybody "rummaging around upstairs." (R. p. 25, lines 20 – p. 26, line 1).

Investigator Hannieg testified, "Based on the burnt marijuana and the fact that we had an arrest warrant for a subject for armed robbery where there was other co-Defendants, not knowing who was in the house, I stayed with the Defendant along with Investigator Fortner." (R. p. 43, lines 13-17). Investigator Hannieg then testified that Investigator Weiner went into a back bedroom located 20 to 25 feet from where Nicholson was secured. (R. p. 43, lines 21

– p. 44, lines 1-5). Investigator Hannieg admitted that he did not have any specific information indicating that there were other people in the home at the time of the arrest. (R. p. 58, lines 22 – p. 59, line 1). Investigator Fortner testified that the affidavit in support of the search warrant stated that a protective sweep of the residence was conducted to ensure there were no other subjects present in the house. (R. p. 66, lines 6-17).

Maryland v. Buie 494 U.S. 325, 337, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990) allows a protective sweep when the officers have a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual who poses a threat to those on the arrest scene. The officers' general assertion that there may have been others present in the house is not sufficient under Buie to justify the warrantless search. The State failed to demonstrate that exigent circumstances existed to justify the warrantless search of a back bedroom and upstairs when the officers were present on the scene for the purpose of serving an arrest warrant and Nicholson had already been secured.

The case is distinguished from State v. Abdullah, 357 S.C. 344, 592 S.E.2d 344 (Ct.App. 2004), where the South Carolina Court of Appeals found that exigent circumstances existed to justify a protective sweep. In Abdullah, officers responded to call in reference to a burglary and gunfire at an apartment. When the officers arrived at the apartment, the door was open and they saw a man inside. The officers also saw bullet holes in the walls of the apartment. When the man refused to cooperate with the officers, they placed him in custody and conducted a protective sweep looking into a bedroom where the man had been standing. The officer saw a gun, money, drug paraphernalia and bags of marijuana. The officers then sought a search warrant based on what they had seen during the protective sweep. Importantly, at the time of the sweep, the officers needed to determine if there were other victims or suspects inside the apartment because they were responding to a call in regard to a burglary and gun shots and

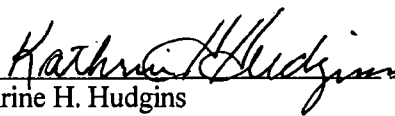
observed bullet holes in the walls of the apartment. A warrantless search is justified when the police reasonably believe that there is a person inside in immediate need of aid. Mincey v. Arizona, 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

In the present case the officers had no reason to believe that a victim or person in immediate need was in the back bedroom or upstairs. In the present case the officers had no reason to believe that there were others inside the house who posed a threat. The officers had ample time to seek a search warrant based on the alleged smell of marijuana upon entering the house. The officers, however, did not base the search warrant on the smell of marijuana. Instead, the search warrant was based on the marijuana seen during the illegal warrantless search in violation of the Fourth Amendment. The drugs and gun found pursuant to the search warrant are fruit of the poisonous tree and should have been suppressed. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

CONCLUSION

Based on the above argument, the conviction and sentence should be reversed and a new trial granted.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

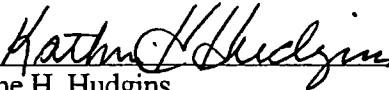
ATTORNEY FOR APPELLANT.

This 25th day of October, 2010.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 25, 2010


Kathrine H. Hudgins
Appellate Defender

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

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

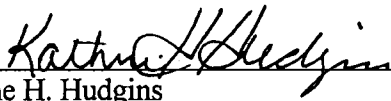
V.

LORENZO R. NICHOLSON,

APPELLANT

CERTIFICATE OF SERVICE

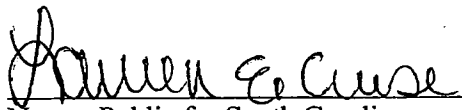
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 25th day of October, 2010.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 25th day of October, 2010.



Lauren E. Cruise (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.



SCCID

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October 25, 2010

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Assistant Attorney General
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PO Box 11549
Columbia, SC 29211

Re: The State v. Lorenzo R. Nicholson

Dear Mark:

Enclosed are two copies of the Final Brief of Appellant in the above-entitled case, which I have filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,

Kathrine H. Hudgins
Appellate Defender

KHH:lec

Enclosure



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October 25, 2010

Mr. Lorenzo R. Nicholson, #273996
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990 Wisacky Hwy.
Bishopville, SC 29010

Re: Your appeal

Dear Mr. Nicholson:

Enclosed is a copy of the Final Brief of Appellant in your case, which I have filed with the South Carolina Court of Appeals.

Please contact me if you have any questions.

Sincerely,

Kathrine H. Hudgins
Appellate Defender

KHH:lec

Enclosure

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STATEMENT OF ISSUE ON APPEAL

The trial judge properly denied Appellant's suppression motion because the protective sweep of Appellant's residence was justified by exigent circumstances and was reasonable. Furthermore, even if the protective sweep was unreasonable, the trial judge properly found no error as the incriminating evidence would have inevitably been discovered based on the officers' probable cause for a search warrant independent of the evidence discovered during the protective sweep.

STATEMENT OF THE CASE

On March 5, 2008, Appellant Lorenzo Rantelle Nicholson was arrested by police officers serving an arrest warrant for an unrelated offense. In April of 2009, Appellant was indicted by the Greenville County grand jury for one count of trafficking in cocaine and one count of possession of a weapon during the commission of a violent crime. On August 12, 2009, a jury trial was commenced in the Greenville County court of general sessions with the Honorable John C. Few, circuit court judge, presiding. Prior to trial, Appellant moved to suppress evidence discovered in a search of his home, and the motion was denied. Appellant then elected to waive his right to a jury trial and proceed with a bench trial. At the conclusion of trial, Appellant was convicted as charged and was sentenced to terms of imprisonment of thirteen (13) years for the trafficking offense and five (5) years for the weapon offense. The sentences were ordered to run concurrently. Appellant then filed a timely notice of appeal.

STATEMENT OF FACTS

On March 5, 2010, Investigators David Weiner and Craig Hannieg drove to Appellant Lorenzo Rantelle Nicholson's residence in order to serve an arrest warrant for armed robbery. (R. p. 7; p. 39). Investigator Michael Fortner followed behind along with a uniformed patrol deputy. (R. p. 61). Upon arriving at Appellant's residence, the officers observed a running car in Appellant's driveway with the driver inside. (R. p. 7; p. 39; p. 61). Weiner spoke with the driver and learned Appellant was likely inside his home. (R. p. 7).

Weiner proceeded to the rear of the house to ensure no one fled out the back. (R. pp. 7-8). Hannieg approached the front of the house and knocked on the door. (R. p. 40). He observed Appellant inside, and Appellant quickly ducked behind a wall out of sight. (R. p. 40). Hannieg then alerted Weiner of Appellant's presence, and Weiner moved around to the front of the house. (R. p. 8; p. 41).

Shortly thereafter, Appellant opened the door, and the officers advised him of the arrest warrant. (R. p. 8; p. 41). Immediately after Appellant opened the door, Weiner and Hannieg unmistakably smelled the odor of freshly burned marijuana.¹ (R. p. 10; p. 42). Appellant began to question what they were doing, but the officers were able to handcuff one of Appellant's hands. (R. pp. 8-9; p. 41). Appellant, who was approximately thirty to forty pounds heavier than the officers, then backed into the house, pulling the officers who grabbed him inside. (R. p. 8; p. 23; pp. 41-42). Appellant passively resisted the officers attempts to arrest him and locked his arms in an outward position. (R. p. 9).

¹Appellant conceded there was an odor of marijuana in the home. (R. p. 80). Defense counsel stated to the trial court: "Our position is that there was a smell of marijuana in the house." (R. p. 80).

After being pulled several feet into the house, the officers were able to secure Appellant's other hand. (R. pp. 8-9; p. 42). Fortner was approaching the house when he observed Appellant backing inside with the officers. (R. p. 62). He assisted the other officers, and they arrested Appellant and seated him at a kitchen table approximately six feet into the house. (R. p. 9; p. 43; p. 62).

Meanwhile, Appellant's sister arrived on the scene, and Appellant yelled to her the arrest was unlawful. (R. p. 9). Appellant stood from the table, began walking to the front door, and called for his sister to come inside. (R. p. 22). Once the officers settled Appellant down, they were able to reposition his handcuffs from the front to the rear. (R. p. 9). Appellant then requested to read the arrest warrant, and the officers allowed him to do so. (R. p. 56). Appellant and his sister continued to yell to each other, so the officers kept him inside the residence. (R. p. 37).

While in the kitchen area with Appellant seated at the table, Weiner decided to do a protective sweep based on Appellant's armed robbery charges and his actions after they served the arrest warrant. (R. pp. 9-10). Based on the pending charges, Weiner believed a weapon might be in the home and did not want anyone to access it. (R. p. 9). Weiner concluded a protective sweep was necessary because the arrest warrant was for armed robbery, Appellant had disappeared from view when they came to the door, and one of Appellant's co-defendants in the armed robbery had been released on bond. (R. p. 10). Weiner then performed a protective sweep of the downstairs area of the home. (R. p. 10). The officer looked in areas downstairs where a person could hide, including a family room, the garage, the master bedroom, and a walk-in closet. (R. p. 11). During the sweep, he observed a quantity of marijuana on a dresser in the bedroom. (R. pp. 10-11).

Hannieg and Fortner remained with Appellant and maintained visual contact with Weiner as he performed the sweep approximately twenty to twenty-five feet from Appellant's location. (R. pp. 43-44).

After Weiner returned to Appellant's position, Hannieg and Fortner conducted a protective sweep of the upstairs area. (R. pp. 43-44; p. 63). During the upstairs sweep, Hannieg observed more marijuana in plain view on a table. (R. p. 44; pp. 62-63). However, no other individuals were located inside of the residence. (R. p. 44).

Following the protective sweep, the officers removed Appellant from the scene and secured the residence while Fortner left to procure a search warrant. (R. pp. 11-12; pp. 44-45). While the officer was away securing the warrant, Appellant's sister repeatedly tried to gain access to the house. (R. p. 12; p. 46). As Weiner spoke with the driver of the vehicle in the driveway, Appellant's sister snuck by the officer, entered the residence, and locked the door. (R. p. 12; p. 46). Weiner then immediately kicked the door open, removed Appellant's sister, and re-secured the residence. (R. p. 12; pp. 46-47).

Shortly thereafter, Fortner returned with a search warrant within thirty to forty-five minutes of the arrest.² (R. pp. 12-13; p. 47; p. 63). The officers then performed a search of the residence with the assistance of a police dog. (R. p. 13; p. 47). The officers

²The search warrant was issued by the magistrate based on the following affidavit: "Affiant [Investigator Fortner] has been employed by the Greenville Sheriff's Office for approximately 14 and a half years. On 03-05-08, affiant along with investigators David Weiner and Craig Hannieg served an armed robbery warrant on a suspect at the premises to be searched. The suspect was arrested and in the interest of officer safety a protective sweep was conducted of the rest of the residence to ensure that there were no other subjects present at the house. During the course of the protective sweep a small amount of green dried plant material was located on a dresser in a bedroom. Affiant recognized the plant material to be marijuana. A search warrant is needed in order to conduct a more thorough search of the residence for the existence of more marijuana." (R. pp. 123-126).

recovered the marijuana previously observed in plain view from various locations. (R. p. 13). Additionally, the officers located a large quantity of powder cocaine inside a box in Appellant's pantry, several plastic baggies, razor blades, digital scales, and some prescription pills. (R. pp. 13-14). The officers also discovered a loaded machine gun in Appellant's bedroom closet. (R. p. 14; p. 47).

Subsequently, prior to trial, Appellant sought to suppress all the evidence discovered during the search, and the trial judge conducted a suppression hearing. (R. p. 6). Investigator Weiner recounted the circumstances of the arrest and the protective sweep. (R. pp. 8-10). The protective sweep lasted two minutes at the maximum. (R. p. 36). Weiner noted he performed the protective sweep to make sure there was no one present who could harm him or the other officers. (R. p. 29). He further indicated he was concerned someone was in the house. (R. p. 31). However, he admitted he did not hear anyone upstairs. (R. pp. 25-26).

Investigator Hannieg also testified during the suppression hearing. (R. p. 39). Hannieg recounted the circumstances surrounding the protective sweep of the upstairs area of Appellant's residence, noting the sweep was performed within a minute of Appellant's arrest and placement at the kitchen table. (R. pp. 43-44; p. 45). He further noted he would have pulled back and obtained a search warrant based on the smell of marijuana in the home if no protective search had been performed. (R. p. 48). Hannieg indicated he always assumes there are other armed people inside of a residence, but he did not have any specific information as to whether there was someone else in Appellant's house. (R. p. 55; p. 58).

Following the testimony of the officers, Appellant asserted the officers exceeded the scope of a permissible search because there were no articulable facts warranting a protective sweep. (R. pp. 67-70). The trial judge noted the officers should reasonably be able to search the nearby rooms in the house while Appellant reviewed the arrest warrant following his arrest and found the officers were entitled to perform a protective sweep to secure the residence. (R. pp. 71-72; p. 74). The trial judge also found there was sufficient evidence for the issuance of a search warrant independent of the evidence discovered during the protective sweep. (R. pp. 74-75). The trial judge found the officers' testimony to be credible and denied the suppression motion. (R. pp. 77-78; p. 83).

Appellant then conceded he was guilty and elected to proceed with a bench trial. (R. p. 92; p. 95). Appellant stated: "I am guilty, sir. That's not the issue." (R. p. 92). He further stated: "I'm guilty. I didn't deny the facts that drugs and a gun was found in my home. What I'm saying is why would they want to put their lives in danger and take me in my house when they done pulled me out of my house and put the cuffs on me when they could have just took me right there to the car when an officer was sitting right there in the car." (R. p. 96). The trial judge then proceeded with a bench trial and found Appellant guilty of the indicted offenses. (R. p. 113). Appellant was sentenced to an aggregate term of imprisonment of thirteen years for the convictions. (R. p. 120).

ARGUMENT

The trial judge properly denied Appellant's suppression motion because the protective sweep of Appellant's residence was justified by exigent circumstances and was reasonable. Furthermore, even if the protective sweep was unreasonable, the trial judge properly found no error as the incriminating evidence would have inevitably been discovered based on the officers' probable cause for a search warrant independent of the evidence discovered during the protective sweep.

Appellant contends the trial judge erred in refusing to suppress the evidence obtained from a search of his home. Appellant asserts the officers' protective sweep of the home was not supported by exigent circumstances. The officers performed a protective sweep of the residence to ensure their safety and the safety of others after Appellant's arrest. The protective sweep was limited in scope and was reasonable. It was necessary to dispel the officers' reasonable suspicion an unknown individual could be hidden and pose a safety risk. The trial judge properly denied the suppression motion, and his ruling is supported by the evidence. Furthermore, even if the protective sweep was unreasonable, the officers had probable cause for the search warrant independent of the discoveries made during the protective sweep based on the unmistakable odor of burnt marijuana emanating from Appellant's residence. Thus, the incriminating evidence would have inevitably been discovered even if the protective sweep had never occurred. Appellant's conviction should be affirmed.

A. Reasonableness of the Protective Sweep

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The reviewing court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). The appellate court does not re-evaluate

the facts based on its own view of the preponderance of the evidence, but instead, simply determines whether the trial judge's ruling is supported by any evidence. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004) ("On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings."). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). The appellate court must affirm the trial court if there is any evidence in the record to support the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Thus, the Fourth Amendment protects against **unreasonable** searches and seizures. Id. (emphasis added). However, "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and

personal security of individuals.’ ” United States v. Mendenhall, 446 U.S. 544, 553-554 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).

Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial: State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). The well-settled rule is warrantless searches are unreasonable per se unless they fall under an exception to the Fourth Amendment’s warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) search incident to a lawful arrest; (2) “hot pursuit”; (3) stop and frisk; (4) the automobile exception; (5) the “plain view” doctrine; and (6) consent. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981) (emphasis added).

Furthermore, the exigent circumstances doctrine permits law enforcement officers to act without a search warrant where the exigencies of the situation make the officers’ course of action immediately imperative. Abdullah, 357 S.C. at 351, 592 S.E.2d at 348. “The exigent circumstances doctrine provides an exception to the Fourth Amendment’s protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exist.” Id. This doctrine permits a protective sweep of the premises where there is a risk of danger to the police officers or others inside or outside of a dwelling. Id.

“A ‘protective sweep’ is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others.” Maryland v. Buie, 494 U.S. 325, 327 (1990). A protective sweep is permitted under the Fourth Amendment when the searching officer possesses a reasonable belief based on specific, articulable

facts and the rational inferences drawn from those facts that an area to be swept harbors an individual posing a danger to the officer or others. Id.

In Maryland v. Buie, law enforcement officers obtained arrest warrants for Buie and an accomplice in the armed robbery of a pizza restaurant. Id. at 327. In executing the arrest warrant on Buie, officers set up surveillance of his home, entered the residence, and fanned out inside. Id. One officer shouted for anyone in the basement to surrender. Id. at 328. After several commands, Buie revealed his hands and came up. Id. Another detective then entered the basement and observed incriminating evidence in plain view. Id. Subsequently, the trial court denied Buie's suppression motion, the Court of Special Appeals of Maryland affirmed, and then the Court of Appeals of Maryland reversed, finding the protective sweep to be unconstitutional. Id. at 328-329. The United States Supreme Court then granted certiorari to review the matter. Id. at 329.

After reviewing the circumstances of Buie's arrest, the Supreme Court noted the basis to search Buie's home under the arrest warrant ended when he was discovered. Id. at 332-333. However, the Court further noted officers have an interest in assuring themselves the house in which a suspect is being arrested or was just arrested does not harbor other dangerous suspects because of the increased danger of ambush inherent in an in-home arrest. Id. at 333. The Court instructed: "[A]rresting officers are permitted in such circumstances to take reasonable steps to ensure their safety **after**, and while making, the arrest." Id. at 334 (emphasis added). The Court explained spaces where an attack could be launched immediately adjoining the place of arrest could be searched without reasonable suspicion and other areas could be swept if there are articulable facts warranting a reasonably prudent officer to believe the area harbored an individual posing

a danger to others at the arrest scene. Id. However, the Court emphasized the protective sweep should be confined to a cursory inspection of the spaces where a person could be found and must last no longer than necessary to dispel the suspicion of danger or to complete the arrest and depart the premises. Id. at 335-336. The Supreme Court then vacated the decision of the Court of Appeals of Maryland and remanded the case for further proceedings.³ Id. at 336.

South Carolina courts have also addressed the issue of protective sweeps. In State v. Brown, 289 S.C. 581, 586, 347 S.E.2d 882, 885 (1986), police officers responded to a motel after receiving a report Brown was overheard discussing a recent murder. The officers conducted surveillance of Brown's motel room for approximately two hours, observed no movement from the room, and called Brown on the telephone to demand his surrender. Id. Brown and two other people then exited and were arrested. Id. Following the arrest, officers performed a protective sweep of the motel room and discovered several pieces of incriminating evidence. Id. The South Carolina Supreme Court found the protective sweep of the motel was justified on the basis it was reasonable to believe concealed individuals remaining in the room might pose a danger. Id. at 587, 347 S.E.2d at 886. However, the Court found the officers could not satisfy the requirements of exigent circumstances because they offered no reason for failing to obtain a warrant during the hours the motel was under surveillance. Id. at 587-588, 347 S.E.2d at 886.

³Based on the Supreme Court's holding, the Court of Appeals of Maryland subsequently found the protective sweep was supported by reasonable suspicion and affirmed Buie's conviction. See Buie v. State, 320 Md. 696, 705, 580 A.2d 167, 172 (Md. 1990) ("Keeping in mind the test is one of reasonable suspicion, and not of proof beyond a reasonable doubt or even of probable cause, and adopting a practical and non-technical approach, it seems clear that a prudent police officer in Frolich's position could reasonably suspect that the basement harbored an individual who posed a danger to those on the arrest scene, and thus he was justified in conducting a cursory sweep of that area to neutralize the danger.").

Coupled with a lack of evidence the items were discovered in plain view, the Court held the trial court erred in denying Brown's suppression motion. Id. at 588, 347 S.E.2d at 886.

More recently, the Court of Appeals considered the issue of protective sweeps in State v. Abdullah. In Abdullah, officers responded to a report of a burglary in progress and shots fired. Id., 357 S.C. at 348, 592 S.E.2d at 346. Upon arriving at the apartment, they saw the door was open and entered the apartment. Id. They observed Abdullah inside, and he refused to cooperate with their commands to come out. Id. Abdullah then moved behind a bedroom doorway and continued to ignore the officers' commands. Id. The officers were forced to physically restrain Abdullah, and he began to exclaim he was the victim. Id. Additionally, the officers observed bullet holes in the door and walls. Id. at 348, 592 S.E.2d at 347. The officers then performed a protective sweep to secure the residence from other potentially-hidden suspects and to discover any potential victims. Id. at 348-349, 592 S.E.2d at 347. The trial court suppressed the evidence discovered during the sweep, finding there were no exigent circumstances to justify the search. Id. at 349, 592 S.E.2d at 347. The Court of Appeals reversed, finding the officers' need to secure the premises and assist any potential victims justified the protective sweep. Id. at 352, 592 S.E.2d at 348. Importantly, the Court noted: "We find this basis for the circuit court's ruling improvidently presupposes that subduing and securing Abdullah foreclosed the officers objectively reasonable need to search the crime scene for suspects and victims." Id. at 352, 592 S.E.2d at 349.

Additionally, although not controlling, the Court of Appeals of North Carolina addressed a case very similar to Appellant's in State v. Bullin, 150 N.C. App. 631, 564

S.E.2d 576 (N.C. Ct. App. 2002). In Bullin's case, officers obtained an arrest warrant for Bullin after observing activity at Bullin's house during a narcotics investigation. Id. at 633-634, 564 S.E.2d at 579. When officers tried to arrest Bullin at his residence, he attempted to close the door and retreat into the home. Id. at 634, 564 S.E.2d at 579. The officers entered the home, arrested Bullin, performed a brief search to ensure no one else was present, and observed narcotics in plain view. Id. They then waited for the issuance of a search warrant before proceeding with a further search. Id. The Court noted the officers knew Bullin had a history of drug dealing, was suspected to be involved in drug trafficking, and resisted arrest when served with the arrest warrant. Id. at 640, 564 S.E.2d at 583. The Court held:

Given the defendant's actions and his previous involvement with drugs, as well as the dangerous and unpredictable nature of drug trafficking, a prudent officer could reasonably believe that under these facts, a protective sweep of defendant's home was necessary to make certain that no one else was hiding in the residence. Furthermore, the evidence shows that the search was limited in scope and duration and aimed at ensuring the officers' safety.

Id. For these reasons, the Court affirmed the trial court's denial of Bullin's suppression motion. Id. at 641, 564 S.E.2d at 583.

In the case sub judice, exigent circumstances clearly existed justifying the protective sweep of Appellant's residence. During the course of arresting Appellant on armed robbery charges, Appellant was uncooperative and pulled Investigators Weiner and Hannieg into his residence. He resisted the officers by locking out his arms while yelling to her sister outside. He remained agitated and continued yelling to his sister even after the officers handcuffed him. He was then moved a short distance into the home and was placed at a kitchen table. After being handcuffed, he attempted to walk to the door and

called for his sister to come into the home. Once seated and settled down, Appellant then demanded to read the arrest warrant.

Once Appellant was secured, Investigator Weiner decided to perform a protective sweep of the adjoining areas in the downstairs portion of Appellant's home. His sweep was brief, lasting only two minutes at a maximum, and involved cursory glances into the areas of the home where a person could be concealed for the purpose of officer safety. He remained in visual contact with the other officers during the entire sweep and was no more than twenty-five feet away at the maximum. During the sweep, Investigator Weiner observed marijuana in plain view on a dresser. See State v. Beckham, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999) ("Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence."). Investigator Weiner initiated the sweep directly after Appellant was arrested and subdued. He performed the sweep based on the fact Appellant was being arrested for an armed robbery, a fellow co-defendant had been released from custody, Appellant had briefly disappeared from view after seeing the officers, and the presence of the running vehicle in Appellant's driveway. Following Investigator Weiner's sweep, the other officers then performed a protective sweep of the upstairs area and discovered more marijuana in plain view.

Arguably, the protective sweep was permissible without any suspicion as it was confined to the adjoining areas of the home connected to the place of the arrest. See Buie, 494 U.S. at 334 ("We also hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look

in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.”). However, even if the area of the sweep exceeded the adjoining areas of the residence, a reasonable officer clearly could suspect an individual posing a danger to the officers could be concealed somewhere in the home under the existing circumstances. The officers had no way to confirm with certainty absent the sweep no one had come inside from the vehicle in the driveway. Furthermore, they could not be certain Appellant’s co-defendant in the armed robbery or another dangerous party was not concealed in the house. Appellant’s actions further raised concerns as he ducked out of view upon seeing the officers, attempted to back away into the house, resisted the officers’ attempts to take him into custody, and yelled for his sister to come inside.

See United States v. Hauk, 412 F.3d 1179, 1192 (10th Cir. 2005) (“Mr. Hauk’s efforts to retreat into his house reinforced the officers’ reasonable suspicion that the situation was dangerous. . . . Mr. Hauk’s attempt to slam the door on the officers gave them reason to suspect *something* was going on in the house that Mr. Hauk did not want them to see and that any third party in the house might also resist their efforts to serve the warrant.”

(citation omitted)). Under the circumstances and based on the inherent dangers in arresting a criminal suspect in the suspect’s home, it was necessary for the safety of the officers, Appellant, and other people at the scene for the officers to perform a protective sweep.⁴ Based on the facts available to the officers and the reasonable inferences to be

⁴ Appellant’s own statements illustrated the inherent dangers the officers faced in entering the residence to arrest him. (R. p. 96). He expressed disbelief the officers would “put their lives in danger” by entering his home. (R. p. 96). The fact the potential danger appeared clear to Appellant himself supports the trial judge’s ruling the protective sweep was reasonable and justified.

drawn therefrom, the officers were justified in performing a protective sweep of the residence.

The officers performed the sweep directly after Appellant was arrested and confined the search to a cursory look at areas where a person could be concealed. The officers' actions in performing a protective sweep ensured they could safely remove Appellant from the residence after he finished reading the arrest warrant without fear of an attack from a hidden individual. The officers' actions were entirely reasonable and necessary to ensure the safety of the officers, Appellant, and the public. See Abdullah, 357 S.C. at 352, 592 S.E.2d at 348 ("We are firmly persuaded for our review of the record that the totality of the circumstances, including Abdullah's unsettling behavior and the evidence of a violent crime and gunfire, gave the officers highly reasonable grounds from an objective standard for searching the premises with the dual goals of securing the scene against perpetrators and facilitating assistance to possible victims.").

Based on the rational inferences drawn from the facts available to the officers, including Appellant's suspicious behavior and resistance, the vehicle waiting in the driveway, the existence of the armed robbery charges, and the release of Appellant's co-defendant on bond, the officers' decision to perform a protective sweep to ensure no unknown, dangerous parties were hidden in the residence was entirely reasonable, justified, and consistent with the expected actions of a reasonable officer in their position. The officers' caution was prudent and warranted under the circumstances and was critical to ensuring their safety and the safety of others. As the protective sweep was justified by the circumstances and was reasonable, the officers' actions did not require the suppression of the evidence obtained from the subsequent search. See Buie, 452 U.S. at

331 ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]").

Further supporting the reasonableness and necessity of the officers' sweep, the officers left the discovered evidence and procured a search warrant after completing the sweep and securing the residence. See Abdullah, 357 S.C. at 352, n. 3, 592 S.E.2d at 348 ("The reasonableness of the officers' conduct may be further gleaned from the decision to secure a warrant to seize the contraband once the protective sweep was concluded and the exigent circumstances unquestionably ceased to exist."). Furthermore, immediately upon entering the residence, the officers smelled the odor of marijuana before observing marijuana in the initial protective sweep. The indicators of the presence of narcotics made it necessary for the officers to perform a sweep to secure the scene. See United States v. Taylor, 248 F.3d 506, 513 (6th Cir. 2001) ("Once an officer has probable cause to believe contraband is present, he must obtain a search warrant before he can proceed to search the premises. . . . We think that it follows logically that the principle enunciated in Buie with regard to officers making an arrest – that the police may conduct a limited protective sweep to ensure the safety of those officers – applies with equal force to an officer left behind to secure the premises while a warrant to search those premises is obtained." (citations omitted)); see, e.g., Nelson v. State, 271 Ga. App. 658, 661, 610 S.E.2d 627, 630 (Ga. Ct. App. 2005) ("[T]he officers were entitled to conduct a limited sweep to ensure their safety prior to obtaining consent to search from Brisco.").

Otherwise, the officers ran the risk an undiscovered individual inside the residence could destroy evidence or pose a danger to others while they obtained a search warrant.

Therefore, the protective sweep was necessary and justified.

Just like in Buie and Brown, the officers performed a quick protective sweep of the residence following an arrest. Similar to the situation in Bullin, the officers had sufficient cause under the circumstances to perform a protective sweep to secure the area. The protective sweep was reasonable and necessary based on the totality of the circumstances to ensure the security of the officers and others and to protect the residence while a search warrant was obtained. If the officers had not performed a protective sweep, they would have exposed themselves to unnecessary danger and risk. See Hawk, 412 F.3d at 1192 ("Police are predisposed by their instinct for self-preservation to assume that an unknown situation is dangerous. The Fourth Amendment limits officers' ability to act on this assumption, but we must take care not to restrict officers' common-sense precautions, particularly in cases involving reasonable suspicion."). The officers took no more steps than those reasonably necessary to ensure their safety after Appellant's arrest. Their actions in performing the protective sweep were entirely reasonable. See State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977) ("It is only unreasonable searches and seizures that are prohibited."). Therefore, the trial judge correctly found the officers' action were justified under the circumstances, and his ruling is supported by the evidence. Appellant's conviction should be affirmed.

B. Inevitable Discovery

The inevitable discovery doctrine has been adopted as an exception to the exclusionary rule. Nix v. Williams, 467 U.S. 431, 444 (1984). If the prosecution can establish by a preponderance of the evidence that information or evidence would have inevitably been discovered by lawful means, then the discovered evidence, even if obtained by unlawful means, is admissible. Id. "Exclusion of physical evidence that

would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial.” Id. at 446.

In the case at bar, the officers immediately smelled an unmistakable odor of marijuana when Appellant opened the door to his residence, and Appellant conceded this fact at trial. Based on the officers' recognition of the odor of marijuana in Appellant's home, the officers had sufficient probable cause to obtain a search warrant. See State v. Lane, 271 S.C. 68, 72, 245 S.E.2d 114, 116 (1978) (“From the record it is evident that the odor emanating from the packages alone was sufficient basis to establish probable cause as to their contents when it is considered that an officer of the law, familiar with the odor of marijuana, believed the odor being emitted was that of marijuana. While the knowledge of the contents of the first package increased the probability that marijuana was in the second package, the fact remains that prior probable cause existed independently of the knowledge subsequently gained from an opening of the first package. Probable cause having existed prior to the opening of the first package, the warrant cannot be deemed a product of the illegal search. . . .”). Therefore, even though they discovered marijuana in plain view during the protective sweep and used this information as the basis for the search warrant, the officers had sufficient information without the sweep to justify the issuance of a warrant based on probable cause. Investigator Hannieg testified he would have pulled back and sought a warrant based on the marijuana smell had they not performed the protective sweep. Therefore, even if the protective sweep was unlawful, the recovered evidence should not be excluded because it would have inevitably been discovered during an ensuing search. If the evidence were excluded, the State would be put in a worse position than if the officers had not

performed the protective sweep, which would be a result inconsistent with the goals of the exclusionary rule. See Nix, 467 U.S. at 443 (“[T]he prosecution is not to be put in a better position than it would have been in if no illegality had transpired. By contrast, the derivative evidence analysis ensures that the prosecution is not put in a worse position simply because of some earlier police error or misconduct.”).

The exclusion of evidence in Appellant’s case would not further the goals of the exclusionary rule and would impose an unnecessarily heavy societal cost. The evidence discovered in a search of Appellant’s home would have inevitably been discovered based on the officers’ detection of the odor of marijuana at the outset of Appellant’s arrest. The trial judge properly ruled evidence supporting the search warrant was found independent of the protective sweep. His ruling is supported by the evidence. Therefore, reversal of the denial of the suppression motion is not warranted.⁵ Appellant’s conviction should be affirmed.

⁵ Additionally, Appellant has left no doubt he was guilty of the indicted offenses. He repeatedly emphasized his guilt to the trial judge and made no effort to dispute his possession of drugs and a machine gun. (R. p. 92; p. 96; p. 120). Appellant’s statements at trial removed any lingering doubt as to whether he is responsible for his crimes. See State v. Sroka, 267 S.C. 664, 665, 230 S.E.2d 816, 817 (1976) (finding further review of Sroka’s case unnecessary after Sroka admitted in open court he participated in a robbery with a firearm); see also Whetsell v. State, 296 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (“Furthermore, review of a trial error is unnecessary where a defendant admits in open court after his conviction that he is guilty.”). Therefore, further review of Appellant’s case is unnecessary.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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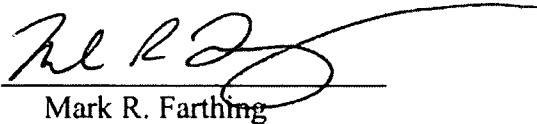
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October 6, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
Honorable John C. Few, Circuit Court Judge

THE STATE,

Respondent,

vs.

LORENZO RANTELLE NICHOLSON,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
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