

RECEIVED

DEC 14 2015

S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

LORENZO R. NICHOLSON

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001231

APPENDIX

TIFFANY L. BUTLER
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

KAREN RATIGAN
Senior Assistant Deputy Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX.....	i
TRIAL TRANSCRIPT DATED AUGUST 12 – 13, 2009	1
APPLICATION FOR POST-CONVICTION RELIEF.....	138
RETURN AND PARTIAL MOTION TO DISMISS.....	173
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED APRIL 21, 2015	178
ORDER OF DISMISSAL	207
INDICTMENT	216

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.

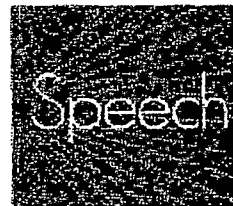
A P P E A R A N C E S:

DOUG WEBB, Esquire
Assistant Solicitor

CHRISTOPHER SCALZO, Esquire
Attorney for Defendant

Teresa B. Johnson
Certified Verbatim Reporter
P.O. Box 2812
Greenville, S.C. 29602

Records are
taken and
produced via



Speech CAT 7™

I N D E X

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Suppression Hearing	5			
David Weiner				
by Mr. Webb	6			
by Mr. Scalzo		16		
by Mr. Webb			27	
by Mr. Scalzo				28
by Mr. Webb			35	
by Mr. Scalzo				36
Craig Hannieg				
by Mr. Webb	38			
by Mr. Scalzo		48		
Michael Fortner				
by Mr. Webb	60			
by Mr. Scalzo		64		
Ruling of the Court	83			
Jury Qualification	87			
Jury Selection	96			
Motion for Bench Trial	104			
David Weiner				
by Mr. Webb	111			
by Mr. Scalzo		119		
Remarks to Defendant	121			

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Closing Argument				
by Mr. Webb	122			
by Mr. Scalzo	123			
Verdict	126			
Sentencing of the Court	127			
Certificate of Reporter	137			

EXHIBITS PAGE

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
STATE'S EXHIBITS			
S-1	Photo	11	17
S-2	Photo	15	17
S-3	Photo	15	17
S-4	Photo	15	17
S-5	Drivers License	15	
S-6	Search Warrant	38	38
S-7a	Gun	84	119
S-7b	Magazine	84	119
S-7c	Bullets	84	119
S-8	Sandwich bag	84	
S-9	Scale	84	
S-10	Scale	84	
S-11	Drugs - white powder	84	118
S-12	Drugs - roach	84	
S-13	Blade	84	
S-14	Drug - pills	84	
S-15	Envelope	84	
S-16	Photo	84	
S-17	Photo	84	
S-18	Lab Report	84	118
S-19	Backpack	84	

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
DEFENSE EXHIBITS			
(No exhibits offered.)			
COURT'S EXHIBITS			
C-1	Ticket		

P R O C E E D I N G S

1
2 **MR. SCALZO:** We made a motion, a written
3 motion that we submitted to the state as well as
4 to Your Honor for suppression. Essentially,
5 Judge, the police officers had an arrest warrant,
6 came to my client's home to arrest him for
7 obviously an unrelated charge. During the course
8 of that investigation, that arrest, they ended up
9 going through the house. They found marijuana on
10 the second floor bedroom of the house. They then
11 went and got a search warrant and found crack
12 cocaine which was the basis for the trafficking
13 charge. We are moving to suppress this on the
14 violation of Fourth Amendment and police officer
15 conduct during the search of the house.

16 **THE COURT:** Whose house was it?

17 **MR. SCALZO:** His house, Judge.

18 **THE COURT:** Mr. Webb?

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

22 **THE COURT:** Sure.

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

25 **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:

1 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 whether or not the State has met that burden of
2 proof. I'm about to ask you a series of
3 questions that we call voir dire questions.
4 Please listen very carefully to these questions.
5 If you have any information that is responsive to
6 a question that I ask, then I would like for you
7 to stand, tell me your name and tell me your
8 information.

9 If you have any reason why you don't want to
10 do that, why you would rather speak to me
11 privately rather than stand up and speak out loud
12 in front of other members of the jury panel,
13 you're welcome to come down front. Just let me
14 know you would like to do that and I will get you
15 to come down front and speak with me and with the
16 attorneys.

17 If you know something about this case or if
18 you know some of the people who are going to be
19 involved in this case and if you think that
20 giving your information out in front of other
21 members of the jury might expose those jurors to
22 information that they should not be exposed to,
23 then in that event, you must come down front and
24 answer the question privately with me and with
25 the attorneys. I will remind you as I've done

Jury Qualification

91

1 several times already, you are under oath from
2 the oath that the clerk gave you Monday morning.

3 Mr. Webb, would you please introduce yourself
4 and your assistant to the jury panel.

5 **MR. WEBB:** Good afternoon. My name is
6 Doug Webb. I'm a prosecutor. I represent the
7 State of South Carolina in this case. This is
8 Lindsay Kicklighter. She is my investigator. To
9 her left is David Weiner who is an investigator
10 with the Greenville County Sheriff's Office.

11 **THE COURT:** Is there any member of the jury
12 who is related by blood or marriage to Mr. Webb
13 or to Mrs. Kicklighter or do you know either of
14 them in any way? If so, please stand.

15 (No response).

16 Now, Mr. Webb works for Bob Ariail who is the
17 elected Solicitor of this circuit. It is Mr.
18 Ariail's responsibility to prosecute criminal
19 cases here in Greenville County and also over in
20 Pickens County. He has a staff of lawyers and
21 non-lawyers who assist him in doing that. Is
22 there any member of the jury who is related by
23 blood or marriage to Solicitor Ariail or to
24 anyone who works for him or do you know Solicitor
25 Ariail or anyone who works for him? If so,

1 please stand.

2 (No response).

3 Mr. Scalzo, would you please introduce
4 yourself and your client to the jury.

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

6 Good afternoon. My name is Chris Scalzo.
7 This is Lorenzo Nicholson.

8 **THE COURT:** Any member of the jury related by
9 blood or marriage to Mr. Scalzo or to Mr.
10 Nicholson or do you know either of these
11 gentlemen in any way? If so, please stand.

12 (No Response).

13 Do you have a witness list for me, Mr. Webb?

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

15 **THE COURT:** Mr. Scalzo?

16 **MR. SCALZO:** Your Honor, it will be just
17 Mr. Nicholson.

18 **THE COURT:** I'm going to read for you all
19 a list of potential witnesses. Then after I've
20 done that, I'm going to ask you whether you know
21 or are related to any of these potential
22 witnesses. If the witness is in the courtroom
23 when I call your name, please stand.

24 Investigator David Weiner. Thank you.

25 Investigator Craig Hannieg. Thank you, sir.

1 Investigator Michael Fortner. Deputy Ramon
2 Rivera. Thank you, sir.

3 Renee Pruitt from Greenville County Property
4 and Evidence, Sean Collins from the Department of
5 Public Safety, Iona Ooten, and Kara Bennick. Is
6 there any member of the jury panel who is related
7 by blood or marriage to any of these potential
8 witnesses or do you know them in any way? If so,
9 please stand.

10 Yes, ma'am.

11 **THE JUROR:** My name is Julie Miller. I
12 know Mr. Weiner's parents.

13 **THE COURT:** His parents?

14 **THE JUROR:** Yes.

15 **THE COURT:** Can you just tell me briefly how
16 you know his parents.

17 **THE JUROR:** Through an antique car club
18 association.

19 **THE COURT:** How often do you see his parents?

20 **THE JUROR:** Maybe once or twice a year.

21 **THE COURT:** Have you in the course of that
22 seen Mr. Weiner?

23 **THE JUROR:** Yes.

24 **THE COURT:** Have you had chances to talk to
25 him?

1 **THE JUROR:** On one occasion, that was a
2 couple of years ago.

3 **THE COURT:** All right. Would the fact that you
4 know Mr. Weiner in that way and also know his
5 parents, would that interfere in any way with
6 either your willingness or your ability to get
7 the State and the Defendant a fair and impartial
8 trial?

9 **THE JUROR:** No, sir.

10 **THE COURT:** All right. Thank you, ma'am.

11 **THE COURT:** Is there any member of the jury
12 panel who has any particular interest in the
13 outcome of this case? If so, please stand.

14 (No response).

15 Is there any member of the jury panel formed
16 or expressed any opinion as to guilt or innocence
17 of this defendant? If so, please stand.

18 (No response).

19 Is there any member of the jury who has any
20 bias or any prejudice either towards or against
21 the State or the Defendant in connection with
22 this case? If so, please stand.

23 (No response).

24 You heard from the indictments that this will
25 involve allegations of drugs and also the use or

1 possession of weapons. Is there any member of
2 the jury panel who has such strong feelings about
3 the drug trade or drug abuse or drug use or
4 possession or the possession or use of weapons or
5 even the combination of the two that you think
6 those feelings might interfere with your ability
7 to be a fair and impartial juror in this case?
8 If so, please stand.

9 (No response).

10 Is there any member of the jury panel who
11 knows of any reason why you could not give both
12 the State and the Defendant a fair and impartial
13 trial in this case? If so, please stand.

14 (No response).

15 Any additional voir dire?

16 **MR. WEBB:** None from the State, Judge.

17 **MR. SCALZO:** No, sir.

18 **THE COURT:** All right. Ladies and Gentlemen,
19 we're going to strike a jury. Some of you saw us
20 do this yesterday. Your names have been sorted
21 randomly by a computer. They will be called in
22 random order.

23 When your name is called, please come down
24 front here to the center of the courtroom and
25 stand next to this podium. Please face the

1 attorneys. You will first hear from Mr. Webb who
2 will ask either that you be excused in which case
3 you may return to your seat or that you be
4 presented to the defense. If you are presented
5 to the defense, then we will hear from Mr. Scalzo
6 who will ask either that you be excused or that
7 you be seated on the jury. We continue with that
8 process until we have us a jury and at least one
9 alternate.

10 **THE COURT:** Come here for a second.

11 (WHEREUPON, a bench conference is held off
12 the record.)

13 **THE CLERK:** Number 2, John Adams.

14 What says the State?

15 **MR. WEBB:** Please present the juror.

16 **THE CLERK:** What says the defense?

17 **MR. SCALZO:** Please swear the juror.

18 **THE CLERK:** Please have a seat in the jury
19 box.

20 Number 163, Crystal Rentz.

21 What says the State?

22 **MR. WEBB:** Please present this juror.

23 **THE CLERK:** What says the defense?

24 **MR. SCALZO:** Please excuse the juror.

25 **THE CLERK:** Thank you. You are excused from

1	this case.
2	Number 227, Beverly Wood.
3	What says the State?
4	MR. WEBB: Please excuse this juror.
5	THE CLERK: Thank you. You are excused from
6	this case.
7	Number 50, Michael Craig.
8	What says the State?
9	MR. WEBB: Please excuse this juror.
10	THE CLERK: Thank you. You are excused from
11	this case.
12	Number 219, Shantice Wilson.
13	What says the State?
14	MR. WEBB: Please present the juror.
15	THE CLERK: What says the defense?
16	MR. SCALZO: Please seat this juror.
17	THE CLERK: Please have a seat a jury box.
18	Number 153, Anne Persons.
19	What says the State?
20	MR. WEBB: Please present the juror.
21	THE CLERK: What says the defense?
22	MR. SCALZO: Please seat the juror.
23	THE CLERK: Please have a seat in the jury
24	box.
25	Number 3, Anthony Amor.

1 What says the State?

2 **MR. WEBB:** Please present the juror.

3 **THE CLERK:** What says the defense?

4 **MR. SCALZO:** Please swear the juror -- seat
5 the juror.

6 **THE CLERK:** Please have a seat in the jury
7 box.

8 Number 64, George Fox.

9 **MR. SCALZO:** You said 64?

10 **THE CLERK:** 64.

11 What says the State?

12 **MR. WEBB:** Please present this juror.

13 **THE CLERK:** What says the defense?

14 **MR. SCALZO:** Please excuse the juror.

15 **THE CLERK:** Thank you. You are excused from
16 this case.

17 Number 189, Quincy Stevens.

18 What says the State?

19 **MR. WEBB:** Please present the juror.

20 **THE CLERK:** What says the defense?

21 **MR. SCALZO:** Please seat This see the juror.

22 **THE CLERK:** 139, Tina Mitchell. What says
23 the State? Was to mark.

24 **MR. WEBB:** Please present the juror.

25 **THE CLERK:** What says the defense?

1 **MR. SCALZO:** please excuse the juror.

2 **THE CLERK:** Thank you. You are excused from
3 this case.

4 Number 81, G.T. Greggs.

5 What says the State?

6 **MR. WEBB:** Please excuse this juror.

7 **THE CLERK:** Thank you.

8 You are excused from this case.

9 Number 68, Daniel Fullmer.

10 What says the State?

11 **MR. WEBB:** Please present this juror.

12 **THE CLERK:** What says the defense?

13 **MR. SCALZO:** Please excuse this juror.

14 **THE CLERK:** Thank you. You're excused from
15 this case.

16 Number 155, Robert Pirtle.

17 What says the State?

18 **MR. WEBB:** Please present the juror.

19 **THE CLERK:** What says the defense?

20 **MR. SCALZO:** Please excuse the juror.

21 **THE CLERK:** You are excused from this case.

22 Number 82, Gary Griffin.

23 What says the State?

24 **MR. WEBB:** Please present the juror.

25 **THE CLERK:** What says the defense?

1 **MR. SCALZO:** Please seat the juror in the
2 jury box.
3 Number 108, Mark Johnson.
4 **THE CLERK:** What says the State?
5 **MR. WEBB:** Please present the juror.
6 **THE CLERK:** What says the defense?
7 **MR. SCALZO:** Please seat the juror.
8 **THE CLERK:** Please have a seat in the jury
9 box.
10 Number 171, Robin Rosenberg.
11 What says the State?
12 **MR. WEBB:** Please present the juror.
13 **THE CLERK:** What says the defense?
14 **MR. SCALZO:** Please seat the juror.
15 **THE CLERK:** Please have a seat in the jury
16 box.
17 Number 108, Mark Rosenberg.
18 What says the State?
19 **MR. WEBB:** Please present the juror.
20 **THE CLERK:** What says the defense?
21 **MR. SCALZO:** Please seat the juror.
22 **THE CLERK:** Please have a seat in the jury
23 box.
24 Number 25, Beverly Brown.
25 What says the State?

1 **MR. WEBB:** Please excuse this juror.

2 **THE COURT:** Thank you. You are excused from
3 this case.

4 Number 126, Alan Lohr.

5 What says the State?

6 **MR. WEBB:** Please present the juror.

7 **THE CLERK:** What says the defense?

8 **MR. SCALZO:** Please seat the juror.

9 **THE CLERK:** Please have a seat in the jury
10 box.

11 Number 183, Sharon Skey.

12 What says the State?

13 **MR. WEBB:** Please present this juror.

14 **THE CLERK:** What says the defense?

15 **MR. SCALZO:** Please seat the juror.

16 **THE CLERK:** Please have a seat in the jury
17 box.

18 Number 19, Craig Bielek.

19 What says the State?

20 **MR. WEBB:** Please present the juror.

21 **THE CLERK:** What says the defense?

22 **MR. SCALZO:** Please seat the juror.

23 **THE CLERK:** Please have a seat in the jury
24 box.

25 **THE COURT:** All right, we will get one

1 alternate. The strikes are one and two.

2 **THE CLERK:** Number 198, Lance Tasciotti.

3 What says the State?

4 **MR. WEBB:** Please present the juror.

5 **THE CLERK:** What says the defense?

6 **MR. SCALZO:** Please excuse the juror.

7 **THE CLERK:** You are excused from this case.

8 Number 15, Layla Powell.

9 What says the State?

10 **MR. WEBB:** Please present this juror.

11 **THE CLERK:** What says the defense?

12 **MR. SCALZO:** Please seat the juror.

13 **THE CLERK:** Please have a seat in the jury
14 box.

15 **THE COURT:** Any exceptions to the composition
16 or manner of selection of the jury?

17 **MR. WEBB:** Nothing from the State, Your
18 Honor.

19 **MR. SCALZO:** No, sir.

20 **THE COURT:** Are you satisfied with what I
21 proposed or do you want me to just do nothing?

22 **MR. SCALZO:** Can we approach?

23 **THE COURT:** Yes. Those of you who were not
24 selected to serve on the jury tonight -- I mean
25 today. Gosh, it has almost tonight -- you are

1 free to go for the rest of today. Please call
2 back tonight after 6:00.

3 I think Judge Pyle is probably picking one
4 more jury tomorrow. I'm not positive about that.
5 Anyway, the chances of you having to come back
6 are not remote, but not strong. So -- I hate to
7 get your hopes up or down as the case may be.
8 But any way, call back tonight after 6:00. There
9 will be an instruction on there about what you
10 need to do tomorrow. All right.

11 (WHEREUPON, the jury panel exit at approximately
12 4:04 p.m.)

13 (WHEREUPON, a bench conference is held off the
14 record.)

15 THE COURT: All right. We have a system in
16 the courthouse. Yellow note means it's not a
17 verdict. (Pause).

18 All right. Ladies and Gentlemen, I'm going to
19 have to take up a matter with this other jury. It
20 will take me just a few minutes to do that. I'm
21 going to send you back into the jury room while I
22 do that. You can talk about anything you want to
23 except this case when you go back there. Don't
24 talk about the charges in the case or the people
25 involved in the case or the nature of the case or

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

Remarks

121

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?

MR. NICHOLSON: Yes, sir. May I talk with

him?

THE COURT: Sure.

(WHEREUPON, the Defendant and counsel confer.)

MR. NICHOLSON: Yes, I consulted with my

lawyer. I do not wish to testify.

THE COURT: You do not wish to testify?

MR. NICHOLSON: No, sir.

THE COURT: All right. You can be seated.

Any further evidence, Mr. Scalzo?

MR. SCALZO: No, sir.

THE COURT: Does the State wish to make a

brief closing argument?

MR. WEBB: Brief, Judge. The evidence shows

that, one, the Defendant was in actual

possession, essentially actual possession of the

cocaine when he came to the door, ducked in, put

the cocaine in the pantry. Otherwise, the

evidence clearly shows he was in constructive

possession. He was in the house. He was the

only person in there. The driver's license came

back to that address. He had clothing in there.

He was undressed when he first came to the door.

The gun was in the bedroom. All of this was

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 Hanneg'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.

1

2

(END OF PROCEEDING)

1 I, the undersigned, Teresa B. Johnson, Official
2 Court Reporter for the Thirteenth Judicial Circuit of
3 the State of South Carolina, do hereby certify that
4 the foregoing is a true, accurate and complete
5 Transcript of Record of all the proceedings had and
6 evidence introduced in the trial of the captioned
7 case, relative to appeal, in the Court of General
8 Sessions for Greenville, South Carolina, on this 24rd
9 day of September, 2009.

10 I do further certify that I am neither of kin,
11 counsel nor interest to any party hereto.

12

13

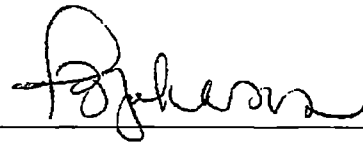
14

15

16

17

18



Teresa B. Johnson

Official Court Reporter

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF Greenville)Leleah Runtelle Nicholson # 273776)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2014-CP-23-

03378

APPLICATION FOR

POST-CONVICTION RELIEF

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
P. B. WICKINSIMER
2014 JUN 11 4 39INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Kershaw Corrections
2. Name and location of Court which imposed sentence Thirteenth Judicial Circuit of South Carolina
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 0863 334268
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) August 15, 2009
 - (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals _____
- ii. South Carolina Court, Supreme Court _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Denied _____
- ii. Denied _____
- iii. _____
- (c) the date of each such result:
- i. December 21, 2011 _____
- ii. July 25, 2013 _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: See Attached Sheets

- (a) _____
- (b) _____
- (c) _____

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

- (a) See Attached Sheets
- (b) _____
- (c) _____

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

- (a) any petition in a State Court under South Carolina Law? no
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no
- (d) any other petitions, motions or applications in this or any other Court? no

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

- (a) the specific nature thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (c) the disposition thereof:
 - i. _____
 - ii. _____
 - iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
My attorney has
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. 4th Amendment Violation
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. Trial, Direct Appeal, Supreme Court of South Carolina
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) ~~First Amendment Violation~~ First Amendment Violation Attorney never raised this
- (b) ~~Fourth Amendment Violation~~ South Amendment Violation " " "
- (c) Fourteenth Amendment Violation " " "
17. Were you represented by an attorney at any time during the course of:

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

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

- (a) the name and address of each attorney who represented you:
- i. Christopher Scarfo, 305 E. North Street, Suite 123, Greenville, S.C. 29601
- ii. Katharine Hudgins, PO Box 11689, Columbia, S.C. 29211-1509
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Trial
- ii. Appeal
- iii. _____

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

Sentence vacated

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

No

STATE OF SOUTH CAROLINA

County of

VERIFICATION

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

Louise Nielsen

SWORN to and subscribed before me this 21
day of May, 2014.

Catherine A. Amos (L.S.)
Notary Public

~~My Commission Expires:~~My Commission Expires December 22, 2016

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

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

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


Applicant

SWORN or affirmed to and subscribed before me this
21 day of May, 2014


Notary Public

My Commission Expires: ~~My Commission Expires December 22, 2010~~

Paul B. Wickensimer
 Greenville County Clerk
 305 East North Street
 Greenville, S.C. 29601

Loretto R. Nicholson #293716
 Kershaw Corr. Inst.
 4846 Goldmine Hwy
 Kershaw, S.C. 29067

May 21, 2014

RE: P.C.R. Application

Dear Sir :

Enclosed within for filing please find one (1) copy of the above named applicant's P.C.R. Application. Please forward one time-stamped copy of this letter when the application is filed to the applicant at the above address. Thank you.

Sincerely yours,

Jonny Nicholson

Sworn and subscribed before me
 on the 21st of May, 2014.

Catherine A. Amos
 SC Notary Public

My Commission Expires December 22, 2015

cc: File

Grounds one thru nine:

1. An illegal search and seizure was conducted of the applicants home in violation of U.S. Law and the First, the Fourth, and the Fourteenth Amendments of the Constitution to the United States;
2. The State failed to fulfill its Constitutional obligation to provide the applicant, an indigent felony defendant with the effective assistance of counsel, in violation of U.S. Law and the First, the Sixth, and the Fourteenth Amendments to the Constitution of the United States;
3. The applicant was unconstitutionally denied and deprived of the right to have the effective assistance of counsel in violation of U.S. Law and the First, the Sixth, and the Fourteenth Amendments to the Constitution of the United States;
4. The applicant was unlawfully sentenced in violation of U.S. Law and the First, the Sixth, and the Fourteenth Amendments to the Constitution of the United States;
5. The Courts did not have proper Jurisdiction to impose a sentence on the applicant in violation of U.S. Law and the First, the Sixth, and the Fourteenth Amendments to the Constitution of the United States;
6. The applicant's sentence was unlawfully enhanced in violation of U.S. Law and the First, the Sixth and the Fourteenth Amendments to the Constitution of the United States;
7. The applicant was unconstitutionally denied and deprived of the right to have meaningful access to the Courts in violation of U.S. Law and the First, the Sixth, and the Fourteenth Amendments to the Constitution of the United States

8. The applicant was unconstitutionally denied and deprived of the right to have the equal protection of the Law in violation of U.S. Law and the First, the Sixth, and the Fourteenth Amendments to the Constitution of the United States.
9. The applicant was unconstitutionally denied and deprived of the right to have due-process in violation of U.S. Law and the First, the Sixth, and the Fourteenth Amendments to the Constitution of the United States.

(a) Supporting facts for ground one thru nine:

1. Pursuant to an arrest warrant that was served on the applicant on March 06, 2008 the applicant was arrested and charged with one count of Robbery / Armed Robbery, Robbery While Armed or Allegely Armed with a Deadly Weapon in violation of Section 16-11-0330 (A) of the South Carolina Code of Laws.
2. On March 06, 2008 at approximately 0930 Investigator David Wiener, Investigator Craig Hanning, Investigator Micheal Fortner, Deputy DeRosa, M.D.T. Cox and other officers came to the applicant's home to serve a warrant on the applicant for Robbery / Armed Robbery, Robbery While Armed or Allegely Armed with a Deadly Weapon in violation of section 16-11-0330 (A) of the South Carolina Code of Law.
3. The officers arrived at the applicant's home; completed the arrest on the front porch then force fully took the applicant in to his home and performed a protective sweep.
4. The officers search the applicant's entire home without a search warrant.
5. The officers search the applicants entire home without a search warrant under the guise of a protective sweep.
6. The officers conducted an illegal search and seizure.
7. The officers that performed the protective sweep did not have probable cause to search the applicants entire home.
8. The officers that performed the protective sweep did not have exigent circumstances to search the applicants entire home.

9. The officers that performed the protective sweep did not have specific and articulable facts that the place to be search had a hidden confederate who could have launched an attack.
10. After the illegal search and seizure the applicant was took to the Greenville County Detention Center.
11. The applicant was arrested and charge with one count of Drug/Trafficking in cocaine, 10g or more, but less than 25g 1st offense in violation of section 44-53-0370 (c)(a) of the South Carolina ~~code~~ Code of Laws, this warrant was served on the applicant on March 12, 2008.
12. The applicant was arrested and charge with one count of Weapon/Poss weapon during a Violent Crime, if not also sentence to life without parole or death in violation of section 16-23-0490 of the South Carolina Code of Laws, this warrant was served on the applicant on March 12, 2008.
13. Christopher Scalzo was appointed to represent the applicant on or about March 15, 2008.
14. Mr. Scalzo failed to provide the applicant with the effective assistance of counsel.
15. Mr. Scalzo failed to do any of the routine things that any reasonably competent defense attorney would have done.
16. Mr. Scalzo failed to do any of the routine things that any reasonably competent defense attorney would have done while handling a new case.
17. Mr. Scalzo failed to take the time to properly familiarize himself with all of the relevant facts and or circumstances surrounding the applicant's case before proceeding through the applicant's Preliminary Hearing, and or while handling his case and or before proceeding through the applicant's Suppression Hearing.

18. Mr. Sculze never made any attempt to take the time that would have been necessary to make a thorough and or an objective evaluation of the facts of the case before proceeding through the applicant's Preliminary Hearing and or Suppression Hearing.
19. Mr. Sculze never made any attempt to take the time that would have been necessary to properly analyze and or properly assess any of the material facts of the case before proceeding through the applicant's Preliminary Hearing, and or Suppression Hearing.
20. Mr. Sculze never made any attempt to take the time that would have been necessary to properly identify any of the legal issues that might have been properly raised by the facts of the case before proceeding through the applicant's Preliminary Hearing and or Suppression Hearing.
21. Mr. Sculze never made any attempt to take the any of the time that would have been necessary to conduct any kind of independent factual investigation of his own and or check out any of the facts himself before proceeding the Preliminary Hearing and or Suppression Hearing and or while handling the applicant's case.
22. Mr. Sculze never made any attempt to contact, to locate, and or in any other way interview any of the witnesses involved directly and or indirectly in this case before proceeding through the applicant's Suppression Hearing, and or Preliminary Hearing.
23. Mr. Sculze never made any attempt to bring to the Court's attention that Investigator Michael Fortner used unlawfully obtained evidence allegedly found during an illegal search and seizure for probable cause to obtain a search warrant for the applicant's home.
24. Mr. Sculze never made any attempt to bring to the Court's attention that Mr. Fortner committed a misdemeanor by lying to the Judge to obtain a search warrant for the applicant's home.

25. Mr. Sculzo never made any attempt to bring to the Court's attention that Mr. Fortner's Affidavit to the search warrant contradicts and conflicts with Investigator Craig Hanning's Supplemental Report for probable cause to obtain a search warrant.
26. Mr. Sculzo never made any attempt to bring to the Court's attention that Mr. Hanning's and David Weiner's Supplemental Reports are perjured.
27. Mr. Sculzo never made any attempt to bring to the Court's attention that Mr. Hanning's Supplemental Report contradicts and or conflicts with the facts of the case.
28. Mr. Sculzo never made any attempt to bring to the Court's attention that Mr. Hanning's Supplemental contradicts and or conflicts with Mr. Weiner's Supplemental Report, Incident Report, and on the Preliminary Hearing Testimony.
29. Mr. Sculzo never made any attempt to bring to the Court's attention that Mr. Weiner's Supplemental Report, Incident Report, and/or Preliminary Hearing Testimony are inconsistent.
30. Mr. Sculzo never made any attempt to bring to the Court's attention that Mr. Weiner's Supplemental Report, Incident Report, and/or Preliminary Hearing Testimony are inconsistent, contradicts and conflicts with facts of the case.
31. Mr. Sculzo never made any attempt to bring to the Court's attention that Mr. Weiner's Supplemental Report, Incident Report, and/or Preliminary Hearing Testimony contradicts, conflicts and are inconsistent to Mr. Hanning's Supplemental Report.
32. Mr. Sculzo never made any attempt to bring the Court's attention to the facts surrounding the applicant's case and or of the case.
33. Mr. Sculzo never made any attempt to bring to the Court's attention the Jurisdiction Defect.

34. Mr. Scalzo never made any attempt to bring to the Court's attention the fact that Mr. Fortner never made and or the applicant never received a Supplemental Report and or a follow up Report.
35. Mr. Scalzo never made any attempt to bring to the Court's attention the fact that Deputy DeRosa never made and or the applicant never received a Supplemental Report and or a follow up Report.
36. Mr. Scalzo never made any attempt to bring to the Court's attention the fact that M.D.T. Cox never made or the applicant never received a Supplemental Report and or a follow up Report.
37. Mr. Scalzo never made any attempt to draw the Court's attention to the fact that the Search Warrant for the applicant's home stated specifically what property was to be sought: Marijuana, Drug paraphernalia, and any other evidence associated with use, distribution, or packaging of marijuana. Guns were not apart of the items of property to be sought.
38. Mr. Scalzo never made any attempt to bring to the Court's attention that the gun was unlawfully seized allegedly from the applicant home.
39. Mr. Scalzo never made any attempt to bring to the Court's attention to the fact that the applicant was arrested and charged with one count of Weapon/Poss. Weapon during a violent crime, if not also sentence to life without parole or death in violation of section 16-23-0490 of the South Carolina Code of Laws, due to an illegal search and seizure of property.
40. Mr. Scalzo never made any attempt to bring to the Court's attention the fact that the applicant was arrested and charged with one count of Weapon/Poss. Weapon during a violent crime, if not also sentence to life without parole or death in violation of section 16-23-0490 of the South Carolina Code of Laws, due to an unlawfully obtain Search warrant.

41. Mr. Scalzo never made any attempt to bring to the Court's attention that that applicant was arrested and charged with one count of Drug/Trafficking in cocaine 10g or more, but less than 28 g 1st offense in violation of section 44-55-0370 (e)(2) of the South Carolina Code of Laws, due to an illegal search and seizure.
42. Mr. Scalzo never made any attempt to bring to the Court's attention that the affidavits for the arrest warrants for Weapon/Poss. and or Drug/Trafficking are perjured.
43. Mr. Scalzo never made any attempt to bring to the Court's attention that Mr. Weiner used perjury to obtain the arrest warrants for Weapons/Poss and or Drugs/Trafficking.
44. Mr. Scalzo never made any attempt to prepare to proper motions for the applicant's case.
45. Mr. Scalzo never made any attempt to have a properly prepare defense to defend the applicants case during the preliminary hearing.
46. Mr. Scalzo failed to properly impeach Mr. Weiner during the cross-examination
47. Mr. Scalzo never made any attempt to argue the applicant's case
48. Mr. Scalzo Failed to properly question Mr Weiner about the fact. of the case.
49. Mr. Scalzo never made any attempt to move the Court to dismiss the applicant's case based on the facts.
50. Mr. Scalzo failed to do any of the routine things any competent defense attorney would have done at a Preliminary Hearing, therefore the applicants case was bounded over for trial.

51. Mr. Sculzo never had any intentions to have the applicant's case settled in a manner which would have been to his advantage.
52. Mr. Sculzo failed to do any of the routine things any competent defense attorney would have done to properly prepare the applicant's case for trial.
53. Mr. Sculzo failed to do any of the routine things any competent defense attorney would have done to prepare the applicant for trial.
54. Mr. Sculzo grossly neglected the applicant's case.
55. Mr. Sculzo dealt with the applicant in a deceitful and dishonest manner while handling the applicant's case.
56. Mr. Sculzo tried to run a con game on the applicant.
57. Mr. Sculzo took advantage of the applicant's lack of legal knowledge to obtain the applicant's conviction.
58. Mr. Sculzo never made any attempt to properly communicate and or collaborate with the applicant while handling his case.
59. Mr. Sculzo never made any attempt to properly advise the applicant while handling his case.
60. Mr. Sculzo never made any attempt to properly inform the applicant while handling his case.
61. Mr. Sculzo never made any attempt to properly consult with the applicant while he was handling his case.

62. Mr. Scalzo did everything that he could do to keep the applicant unprepared, uninformed, and in the dark while handling the applicant's case.
63. Mr. Scalzo failed to act like the applicant's advocate while he was handling his case.
64. The whole time that Mr. Scalzo was handling the applicant's case he was working contrary to his interest.
65. The whole time that Mr. Scalzo was handling the applicant's case he was acting as a facilitator for the State.
66. Mr. Scalzo never made any attempt to properly provide the applicant with a thorough and or objective legal evaluation of his case.
67. Mr. Scalzo deliberately hindered, obstructed, and impeded the applicant's access to the discovery material.
68. Mr. Scalzo deliberately hid and concealed the information in the discovery material from the applicant.
69. Mr. Scalzo never made any attempt to properly provide the applicant with copies of the discovery material that the State Attorney turned over to him during the discovery phase.
70. Mr. Scalzo never made any attempt to provide the applicant with the Brady material, the Menthorn material, the Rovario material or the Jencks material even though no Ex-Parte request to prevent disclosure and or to limit access to any of the discovery material had been properly made by the State.

71. Mr. Scalzo never properly reviewed and or went over the discovery materials that the State turned over to him, with the applicant.
72. Mr. Scalzo worked in collusion with and cooperated with the State to obtain the applicant's conviction.
73. Mr. Scalzo breach his duty.
74. Mr. Scalzo failed to do the job that he was legally required to do.
75. There was a Suppression Hearing in this case, and the following pertains to the Hearing.
76. Mr. Scalzo failed to do any of the routine things that any reasonably competent defense attorney would have do while handling a case.
77. Mr. Scalzo failed and/or never located, contacted, and or in any other way interview any of the officers, any of the witnesses, and or potential witnesses, before proceeding through the Suppression Hearing.
78. Mr Scalzo never made any attempted to subpoena any witnesses for the defense.
79. Mr Scalzo never made any attempt to subpoena any and all witnesses.
80. Mr. Scalzo failed to properly prepare before proceeding through the Suppression Hearing.
81. Mr. Scalzo failed to properly inform the applicant before proceeding through the applicant's Suppression Hearing.

82. Mr. Scalzo never made any attempt to properly prepare the applicant before proceeding through the Suppression Hearing.
83. Mr. Scalzo never made any attempt to properly inform the applicant while handling his case.
84. Mr. Scalzo never made any attempt to move the Court to have the witnesses for the State sequestered before examinations.
85. Mr. Scalzo allowed the State witnesses to testify unsequestered that they may be able to corroborate each other's sworn testimony.
86. Mr. Scalzo allowed the State witnesses to testify unsequestered in order that their story could correlate to make their ~~story~~ believable for the Court.
87. Mr. Scalzo collaborated with the State in order to sabotage the applicant's Suppression Hearing.
88. Mr. Scalzo never made any objection to any malfeasance at the Suppression Hearing.
89. Mr. Scalzo never made any objection to any misconduct at the Suppression Hearing.
90. Mr. Scalzo never made any attempt to object to the unlawfully obtained exhibits during the Suppression Hearing marked one, two, three, four.
91. Mr. Scalzo never made any attempt to bring to the court's attention that the exhibits were unlawfully obtained marked one, two, three, four.
92. Mr. Scalzo allowed the State to move the unlawfully obtained exhibits for the Suppression Hearing into evidence without objection marked one, two, three, four.

93. Mr. Scazo never made any attempt to bring to the Court's attention that the Court did not have proper Jurisdiction to hear the applicant's case before proceeding through the Hearing.
94. Mr. Scazo never made any attempt to bring to the Court's attention the Jurisdictional issue while proceeding through the Hearing.
95. Investigator David Weiner was the first witness for the State to be examined during the Suppression Hearing.
96. During direct examination Mr. Scazo failed and/or never made any attempt to object to the perjured sworn testimony that Mr. Weiner gave under oath during the Hearing.
97. During cross-examination Mr. Scazo allowed Mr. Weiner to give perjured testimony during the Suppression Hearing without objection.
98. Mr. Scazo allowed Mr. Weiner a witness for the State to give perjured testimony for the record without object during the Hearing.
99. Mr. Scazo failed to properly question Mr. Weiner during the Hearing.
100. Mr. Scazo failed to ask Mr. Weiner questions in a logical coherent manner.
101. During the cross-examination of Mr. Weiner, Mr. Scazo failed to pursue questions or a line of questioning to come to a logical conclusion.
102. During the cross-examination Mr. Scazo failed to make any attempt to get the witness David Weiner to answer questions in a logical, coherent, and clear manner.

103. Mr. Scalzo allowed Mr. Wiener to answer question in an illogical, incoherent, unclear, and confusing manner.
104. Mr. Scalzo failed to get clear answers to many of the questions he asked Mr. Wiener.
105. Mr. Scalzo never made an objection to and/or allow Mr. Wiener's incoherent rambling testimony during the cross-examination
106. Mr. Scalzo deliberately injected confusion into Mr. Wiener cross-examination during the Suppression Hearing
107. Mr. Scalzo failed to properly question Mr. Wiener as to the inconsistencies given in his affidavits, Preliminary Hearing testimony, Suppression Hearing testimony.
108. Mr. Scalzo failed to properly question Mr. Wiener as to the contradiction given in his affidavits, Preliminary Hearing testimony, Suppression Hearing testimony.
109. Mr. Scalzo failed to properly question Mr. Wiener as to the conflicts given in his affidavits, Preliminary Hearing testimony, Suppression Hearing testimony.
110. Mr. Scalzo never made any attempt to object to any misconduct during the cross-examination and or the direct-examination of Mr. Wiener
111. Mr. Scalzo never made any attempt to properly impeach Mr. Wiener during the examination
112. Mr. Scalzo never made any attempt to move the Court to have Mr. Wiener charged with perjury.

113. Investigator Craig Hanning was the second witness for the State to be examined.
114. Mr. Scalzo never made any attempt to object to the perjured testimony of Mr. Hanning during direct-examination.
115. Mr. Scalzo allowed Mr. Hanning to give perjured testimony during direct-examination.
116. Mr. Scalzo never made any attempt to object to the perjured testimony of Mr. Hanning during the cross-examination.
117. Mr. Scalzo allowed Mr. Hanning to give perjured testimony during his cross-examination.
118. Mr. Scalzo never made any attempt to move the Court to have Mr. Hanning charged with perjury.
119. Mr. Scalzo never made any attempt to object to the Solicitor Mr. Webb of putting words into the witness Craig Hanning's mouth during direct-examination.
120. Mr. Scalzo never made any attempt to question as to why the search warrant was sought during Mr. Hanning cross-examination.
121. Mr. Scalzo never made any attempt to question Mr. Hanning as to where the applicant's arrest took place or actually happens.
122. Mr. Scalzo never made any attempt to object to Solicitor Mr. Webb giving testimony during the direct-examination of Mr. Hanning.
123. Mr. Scalzo failed to properly question Mr. Hanning.

- 124 Mr. Scalzo failed to question and or pursue a line of questioning in an order to come to a logical conclusion.
- 125 Mr. Scalzo allowed Mr. Hanning to answer questions in an illogical, unclear, and confusing manner.
- 126 Mr. Scalzo failed to get or request that Mr. Hanning answer his questions in a logical, clear, coherent manner
- 127 Mr. Scalzo never made any attempt to object to Mr. Hanning incoherent rambling testimony.
- 128 Mr. Scalzo deliberately injected confusion into Mr. Hanning cross-examination.
- 129 Mr. Scalzo failed to properly question Mr. Hanning as to the inconsistencies given in his affidavit, Suppression Hearing testimony.
- 130 Mr. Scalzo failed to properly question Mr. Hanning as to the ~~contradictions~~ contradictions given in his affidavit, Suppression Hearing testimony
- 131 Mr. Scalzo never made any attempt to question Mr. Hanning as to the inconsistencies in his affidavit, Suppression Hearing testimony.
- 131 Mr. Scalzo never made any attempt to question Mr. Hanning as to the contradictions in his affidavit, Suppression Hearing testimony.
- 132 Mr. Scalzo never made any attempt to question Mr. Hanning as to the conflicts in his affidavit, Suppression Hearing testimony.
- 133 Mr. Scalzo failed to properly impeach Mr. Hanning during the examinations.

134. Mr. Scalzo never made any attempt to move the Court to have Mr. Hanning charged with perjury.
135. Investigator Michael Fortner was the third witness for the State to be examined.
136. Mr. Scalzo never made any attempt to object to the perjured testimony of Mr. Fortner during the examinations.
137. Mr. Scalzo allowed Mr. Fortner to give perjured testimony during the examination without objection.
138. Mr. Scalzo failed to properly question Mr. Fortner.
139. Mr. Scalzo failed to properly question Mr. Fortner as to the facts of the case.
140. Mr. Scalzo failed to properly question Mr. Fortner as to the search warrant.
141. Mr. Scalzo never made any attempt to question Mr. Fortner as to why he did not make a Supplemental Report and or follow up Reports as required to account for the time he spent handling the applicant's case.
142. Mr. Scalzo never made any attempt to question Mr. Fortner as to why and or where are his report so that they can be properly examined and or properly tested.
143. Mr. Scalzo never made any attempt to question Mr. Fortner as to where the arrest actually took place and or where the arrest was actually completed.
144. Mr. Scalzo never made any attempt to question Mr. Fortner as to the protective sweep and or who was actually involved and or what duties did they perform.

145. Mr. Scalzo never made any attempt to question Mr. Fortner as to the inconsistencies, contradiction and or conflicts during the cross examination.
146. Mr. Scalzo never made any attempt to impeach Mr. Fortner
147. Mr. Scalzo never made any attempt to move the Court to have Mr. Fortner charged with perjury.
148. Mr. Fortner obstructed justice.
149. Mr. Scalzo allowed Mr. Fortner to obstruct justice.
150. Mr. Scalzo never made any attempt to bring to the Court's attention that Mr. Fortner obstructed justice, and or to move the Court to have Mr. Fortner charged with obstruction of justice.
151. Mr. Scalzo failed to argue the applicants case on point.
152. Mr. Scalzo failed to properly argue the Fourth Amendment violation.
153. Mr. Scalzo failed to put forth a proper argument for the officers violating my Fourth Amendment rights.
154. Mr. Scalzo never made any attempt to set the record straight from the on-set with the facts of the case.
155. Mr. Scalzo allowed the fact to be distorted which caused the applicant to be convicted.
156. Mr. Scalzo never made any attempt to object and or set the record straight with the facts of the case when the Court made an assessment of what he believed to be facts to base his ruling on.

157. Mr. Scalzo allowed the Court to base its ruling off of perjured testimony without objection and or setting the facts straight for the record to reflect.
158. Mr. Scalzo never made any attempt to point out to the Court the relevant facts for the record to reflect.
159. Mr. Scalzo never made any attempt to prove to the Court the relevant fact that there were more than five officers involved in the arrest.
160. Mr. Scalzo never made any attempt to point out to the Court the relevant fact that the applicant was arrested on the front porch then escorted forcefully into his home.
161. Mr. Scalzo never made any attempt to point out to the Court the relevant fact that there were four officers involved directly in the protective sweep.
162. Mr. Scalzo never made any attempt to point out to the Court the relevant fact that of how exactly the protective sweep takes place and or who performs what particular duty.
163. Mr. Scalzo never made any attempt to point out to the Court the relevant fact that there was never an irate sister on the scene.
164. Mr. Scalzo never made any attempt to point out to the Court the relevant fact that my sister Dasheneick Nicholson did not hinder or interfere at any time.
165. Mr. Scalzo never made any attempt to point out to the Court the relevant fact that my sister Dasheneick Nicholson was accused of a crime for hindering charged and arrested in connection with this case for a crime she did not commit.

166. Mr. Scalzo never made any attempt to point out to the Court the relevant fact that there was not any resistance of any type before, during, and or after the arrest.
167. Mr. Scalzo never made any attempt to point out to the Court the relevant fact that the applicant never at any time made a request to read any warrant.
168. Mr. Scalzo never made any attempt to point out to the Court the relevant fact that no smell of marijuana existed.
169. Mr. Scalzo never made any attempt to object to the Court's abuse of discretion.
170. Mr. Scalzo allowed the court to abuse its discretion without objection.
171. The Court stated for the record his ruling simply relates to the protective sweep and concluded that even if that were to be a violation, a far cry beyond the bounds of what a protective sweep can allow, I would not suppress the evidence on that basis. So for those reasons, I'm going to deny the Motion to Suppress.
172. Mr. Scalzo failed to have the evidence suppressed.
173. Mr. Scalzo sabotaged the applicant's suppression attempt.
174. Mr. Scalzo deliberately sabotaged the applicant's attempt to have the evidence suppressed.
175. The Motion to Suppress was denied and the case was bounded over for trial.
176. The applicant was given a moment to confer with his attorney and Mr. Scalzo suggested a bench trial.

177. Mr. Scalzo never made any attempt to properly explain to the applicant that to have a bench trial from the same Judge who had already denied the applicant's motion to suppress and found the witnesses for the State credible could only have resulted in a finding of guilty.
178. Mr. Scalzo never made any attempt to properly explain to the applicant the benefits of a jury trial.
179. The applicant did not properly understand the implications of giving up his right to a jury trial for a bench trial.
180. Mr. Scalzo never made any attempt to properly explain to the applicant the implications of giving up his rights to a jury trial for a bench trial.
181. Mr. Scalzo continually persisted to have a bench trial in light of the Judge ruling to deny the motion to suppress.
182. Mr. Scalzo made an attempt to pressure the applicant into taking a plea.
183. The applicant refused to take a plea so that he may reserve the rights of an appeal.
184. Mr. Scalzo suggested to the applicant that his case was a matter of Law and who better to decide the Law than the Judge.
185. Although the Judge was reluctant to be put in a position to decide the case after he denied the motion to suppress and found the witnesses for the State to be credible and even went through the process of selecting a jury, he abused his discretion by granting the defense counsel's continued requests for a bench trial. Because the applicant's constitutional rights guarantee only a jury trial any doubt should have been resolved only by a jury.

186. Mr. Scalzo used lies and deceit to trick the applicant into choosing a bench trial.
187. Mr. Scalzo never made any attempt to properly prepare for trial.
188. Mr. Scalzo never made any attempt to properly prepare the applicant for trial.
189. Mr. Scalzo failed to properly advise the applicant before trial.
189. Mr. Scalzo failed to provide a proper defense for the applicant's trial.
190. Mr. Scalzo failed to defend the applicant's case during trial.
191. Mr. Scalzo only asked two questions through the applicant's trial during cross-examination of the State's witnesses.
192. Mr. Scalzo never made any attempt to examine any of the other witnesses for the State and/or remaining witnesses for the State.
193. Mr. Scalzo never made any attempt to subpoena any witnesses for the defense.
194. Mr. Scalzo never made any attempt to subpoena any of the officers that were involved in the applicant's case before moving through the applicant's trial.
195. Mr. Scalzo never made any attempt to contact, to locate, and/or interview any of the witnesses or potential witnesses before moving through the applicant's trial.
196. Mr. Scalzo failed to subject the State's witnesses to a proper and meaningful examination.

191. Mr. Scalzo never made any attempt to subject the State's case to any adverse testing during the applicant's trial.
192. The Judge stated for the record that he was not prejudging me, but he incorporated by reference into the trial, the testimony offered during the suppression hearing in which he had already made a bias ruling. Therefore he was prejudice by his own admission.
199. The applicant was prejudged before trial.
200. The applicant did not have a fair trial.
201. The Judge abused his Judicial Authority, by incorporating by reference the testimony offered during the Suppression hearing by agreement in which the defense never agreed.
202. Although Mr. Scalzo never agreed to the Judge's offer, to incorporate by reference into the trial, the testimony that was offered during the suppression hearing, he did not disagree and or have any objections. Therefore rendering his assistance ineffective.
203. Although Mr. Scalzo never agreed to the Judge's offer to incorporate by reference into the trial, the testimony that was offered during the suppression hearing, he allowed it to transpired with objection. Therefore make his assistance ineffective.
204. Mr. Scalzo never made any attempt to object to the Judge giving himself a charges to perform a duty that only a expert had the expertise to perform and determine.
205. Mr. Scalzo failed to properly preserve all the relevant issues for appellate review while proceeding through the applicants trial.

200. Mr. Scalzo failed to properly argue the applicant case on point.
201. Mr. Scalzo failed to make a proper argument against the applicant's Fourth Amendment right being violated.
202. Mr. Scalzo failed to make a proper argument against the applicant's sentence being unlawfully enhanced.
203. Mr. Scalzo deliberately sabotage the applicant's case.
210. Mr. Scalzo took advantage of the applicant's lack of legal knowledge to obtain the applicant's conviction.
211. Mr. Scalzo deliberately worked in collusion with the State to obtain the applicant's conviction.
212. The applicant was convicted and sentenced to 13 years for second offense Trafficking and 5-year for Weapon Possession to serve concurrently.
213. The applicant was unaware, uninformed, and/or not advised that he was being tried for second offense Trafficking before trial.
214. The applicant was unlawfully enhanced to a second offense due to a bond forfeiture.
215. The applicant appealed his conviction.
216. The applicant filed a pro se Motion with the Court to request to have for Mr. Scalzo not to represent him on appeal.

217. Mr. Scalzo was relieved as counsel and Kathrine Hudgins was appointed to represent the applicant on appeal.
218. Ms. Hudgins failed to provide the applicant with the effective assistance of counsel.
219. Ms. Hudgins failed to do any of the routine thing that any reasonably competent appeal attorney would have done.
220. Ms. Hudgins failed to do any of the routine thing that any reasonably competent appeal attorney would have done while handling a new case.
221. Ms. Hudgins failed to take the time to properly familiarize herself with all the relevant facts and or circumstances surrounding the applicant's case before preparing and or filing the applicants brief.
222. Ms. Hudgins never made any attempt to take the time that would have been necessary to make a thorough and or an objective evaluation of the facts of the case before preparing and or filing the applicant's brief.
223. Ms. Hudgins never made any attempt to take the time that would have been necessary to properly analyze and or properly assess any of the facts of the case before proceeding to prepare and or file the applicants brief.
224. Ms. Hudgins failed to properly advise, communicate, and or inform the applicant while handling his case.
225. Ms. Hudgins failed to properly perfect the applicant's appeal.
226. Ms. Hudgins filed a meritorious brief.

229. Ms. Hudgins never made any attempt to draw the Court's attention to the relevant fact that the witnesses for the State lied under oath during their examinations about the facts of what transpired during the arrest, how many officers were involved in the arrest, where the arrest actually took place, what transpired during the protective sweep and how many officers were involved in the protective sweep.
230. Ms. Hudgins never made any attempt to draw the Court's attention, to the relevant fact that the officers testimony, that she used in the brief to describe what transpired during the arrest, how many officers were involved in the arrest, where the arrest actually took place, what transpired during the protective sweep and how many officers were involved in the protective sweep are inconsistent, conflicting, and or contradictory to the evidence.
231. Ms. Hudgins failed to do her duty to assist the applicant in his endeavor to receive a fair assessment of the fact on appeal.
232. Ms. Hudgins failed to do her duty to assist the applicant in his endeavor to receive a fair assessment of the law.
233. Ms. Hudgins failed to do her duty to assist the applicant in his endeavor to receive a fair judgement of his case.
234. Ms. Hudgins failed to do what she was appointed to do.
235. Ms. Hudgins failed to do the job that the law required her to do.
236. Ms. Hudgins sabotaged the applicant's appeal.
237. Ms. Hudgins obstructed justice.

236. There was a rehearing I was denied.

237. There was a Writ Of Certiorari I was denied for the same reasons above.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2014-CP-23-3378
COUNTY OF GREENVILLE	)	
	)	
Lorenzo Rantelle Nicholson,	)	
S.C.D.C. No. 273996,	)	
	)	
Applicant,	)	
	)	RETURN AND PARTIAL MOTION TO DISMISS
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed June 17, 2014, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the April 2009 term of General Sessions for possession of a weapon during commission of a violent crime (2008-GS-23-4268, count 1) and trafficking cocaine (2008-GS-23-4268, count 2). Christopher D. Scalzo, Esquire represented the Applicant.

After the State called the case to trial, the Applicant proceeded to a bench trial and was found guilty. On August 13, 2009, the Honorable John C. Few sentenced the Applicant to concurrent terms of 5 years for possession of a weapon during commission of a violent crime and 13 years for trafficking cocaine, second offense.

A notice of appeal was filed at the South Carolina Court of Appeals. Kathrine H. Hudgins, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate

Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Nicholson, Op. No. 2011-UP-588 (S.C. Ct. App. filed Dec. 21, 2011). While the Applicant filed a petition for writ of certiorari to the South Carolina Supreme Court, the petition was denied by order dated July 25, 2013. The Remittitur was sent on July 31, 2013.

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

In his application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following general reasons:¹

1. Illegal search and seizure of the Applicant's home.
2. Ineffective assistance of counsel.
3. "[W]as unlawfully sentenced."
4. "The Courts did not have proper Jurisdiction to impose a sentence on the [A]pplicant."
5. "[S]entence ws unlawfully enhanced."
6. "[D]eprived of the right to have meaningful access to the Courts."
7. Deprived of equal protection and due process.

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial

¹ The Applicant raised 237 issues in his PCR application.

process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an

evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

As to the issues other than ineffective assistance of counsel, the Respondent submits these are issues that could have been raised on direct appeal. Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The Applicant could have raised these issues on appeal. The failure to do so has waived these allegations as grounds for relief.

V.

The Respondent denies each allegation not expressly admitted, qualified or explained.

VI.

WHEREFORE, having made its Return and Partial Motion to Dismiss, the Respondent requests that (1) a hearing be held solely on the issue of ineffective assistance of counsel, (2) that counsel be and counsel appointed to represent the Applicant solely upon that issue, and (3) that all other issues should be dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By: Karone Parize
Attorneys for Respondent

November 22, 2014

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	2014-CP-23-3378
COUNTY OF GREENVILLE	)	
	)	
	)	
	)	
	)	
LORENZO R. NICHOLSON,	)	
PLAINTIFF,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA,	)	
DEFENDANT.	)	
	)	

April 21, 2015
Greenville, South Carolina

B E F O R E:

THE HONORABLE JUDGE EDWARD W. MILLER

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

CAROLINE M. HORLBECK, ESQ.
Attorney for the Plaintiff

KAREN C. RATIGAN, ESQ.
Attorney for the Defendant

CHERYL A. SMITH
Circuit Court Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

(PW) - Denotes Plaintiff Witness
(SW) - Denotes State's Witness

PAGE

(PW) LORENZO RANTELLE NICHOLSON:
Direct Examination by Ms. Horlbeck

7

Plaintiff Rests

17

(SW) CHRISTOPHER SCALZO:
Direct Examination by Ms. Ratigan

17

State Rests
Ruling of the Court
Certificate of the Reporter

23
24, 27
28

EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
-----------	--------------------	-----------	------------

(No exhibits introduced.)

P R O C E E D I N G S

MS. RATIGAN: May it please the Court. This is the case of Lorenzo Nicholson vs. The State of South Carolina. Docket number is 2014-CP-23-3378.

Mr. Nicholson was indicted for possession of a weapon during the commission of a violent crime and trafficking cocaine. He was represented on these charges by Mr. Scalzo. The case was brought to trial. It was actually tried as a bench trial before Judge Few.

On August 13, 2009, Judge Few found Mr. Nicholson guilty and sentenced him to concurrent terms of five years for the weapons charge, 13 years for trafficking cocaine, second offense. An appeal was filed. The Court of Appeals affirmed his convictions and sentences in December of 2011. His subsequent petition for a writ of certiorari was denied by the Supreme Court in July of 2013. Mr. Nicholson did file a timely application.

I would note, Your Honor, his original application alleges more than 200 issues. He has filed a subsequent amendment of more than 100 issues. I have been advised by counsel today they are proceeding upon six issues and would simply ask for affirmation that he is abandoning his other 300 some issues.

MS. HORLBECK: That's correct, Judge. Issues that we want to -- we've got six. He is alleging ineffective

1 assistance of counsel for counsel failing to raise a
2 violation of Section 22-5-180 at the suppression hearing;
3 number two is for failing to object to a judge's abuse of
4 discretion; number three is for failing to adequately
5 defend petitioner's constitutional rights against an
6 unreasonable search and seizure; number four for failing to
7 move that the judge recuse himself; number five for failing
8 to object to the judge's request to incorporate into the
9 trial record the testimony offered during the suppression
10 hearing; number six for failing to properly argue against
11 an enhancing petitioner's sentence.

12 THE COURT: Let's go.

13 MS. HORLBECK: Judge, he also -- he has a -- I'm not
14 sure which one of these addressed it, but he has a -- I
15 think he also has an issue regarding when the grand jury
16 meets. So I guess we actually have seven. His argument
17 would be that the grand jury wasn't specifically given
18 permission to meet when they did, and he has asked me to
19 get an order giving the grand jury permission to meet when
20 they did to indict him. And I told him I don't believe
21 there is any such order. I don't believe we're going to
22 find that.

23 THE COURT: There is such an order which lays out the
24 dates when the grand jury will meet, and it's signed every
25 six months. And they meet on that appointed day.

1 MS. HORLBECK: I don't have a copy of that. He wanted
2 me to look for it, you know. I told him he could make the
3 argument if he wanted to. But I also told him we'd ask for
4 a continuance on that ground. I mean, I don't have -- I
5 don't ---

6 THE COURT: How is that relevant in any way?

7 MS. HORLBECK: Judge, I would suggest he's probably
8 challenging the indictment, the sufficiency of the
9 indictment.

10 THE COURT: Well, the date that the grand jury met,
11 how is that relevant?

12 MS. HORLBECK: He's saying that the date they met was
13 not included on the list. That would be his argument.
14 Would not be included as one of the dates in the order
15 allowing the grand jury to meet.

16 THE COURT: It doesn't -- you know.

17 PETITIONER NICHOLSON: Excuse me, Your Honor.

18 THE COURT: Yeah. What?

19 PETITIONER NICHOLSON: I was -- they -- I believe the
20 grand jury convened outside of the statute, outside of the
21 terms that legislate the terms. I think it was 9-5-7 --
22 9-5 -- yeah. 9-5-75 -- 9 -- 9-5-790, the terms that they
23 give them to meet. And I think they convened outside of
24 the term. I think because they had a court order from the
25 judge pursuant to ---

1 THE COURT: What term are you talking about? What
2 9-5-7 ---

3 PETITIONER NICHOLSON: Let me get it. Let me get it
4 here.

5 MS. RATIGAN: Your Honor, this is actually an
6 extremely common PCR issue. There's an old statute
7 that ---

8 PETITIONER NICHOLSON: 14 -- 14-5 ---

9 MS. RATIGAN: There's an old statute that sets out ---

10 PETITIONER NICHOLSON: --- 14-5-19 and 14-5 --
11 14-5-790 and 14-5-920.

12 MS. RATIGAN: There's an old statute that sets out ---

13 PETITIONER NICHOLSON: I was just wanting the court
14 orders for I can prepare me a case for it.

15 MS. RATIGAN: The terms of court, Your Honor, this is
16 raised all the time. As you know, the statute is not
17 controlling when there's a court ordering ---

18 PETITIONER NICHOLSON: That's five hundred ---

19 MS. RATIGAN: --- and I can present case law if you
20 need it. But it's fairly ---

21 THE COURT: I think it's a well-settled issue.
22 No, we're not continuing.

23 MS. HORLBECK: All right, Judge. We would call
24 Mr. Nicholson to the stand.

25 THE COURT: Okay.

1 WHEREUPON,

2 LORENZO RANTELE NICHOLSON,
3 after first having been duly sworn, testified as follows:

4 THE CLERK: Please state your full name for the
5 record.

6 THE WITNESS: Lorenzo Rantelle Nicholson.

7 THE CLERK: Thank you. You may be seated.

8 DIRECT EXAMINATION

9 BY MS. HORLBECK:

10 Q Mr. Nicholson, who represented you in this case?

11 A Christopher Scalzo.

12 Q How long did he represent you?

13 A I'm not exactly sure.

14 Q Just give me an idea. A year? six months? What?

15 A Say a year.

16 Q Okay. Were you incarcerated at the Law Enforcement
17 Center or had you made bond?

18 A Incarcerated.

19 Q All right. How many times do you think you and
20 Mr. Scalzo met on this case?

21 A Maybe a couple times. Two.

22 Q All right. Did you and Mr. Scalzo review the police
23 reports and any statements that were in the case?

24 A I guess some of them.

25 Q Okay. Did you request a copy of discovery?

1 A Yes.

2 Q Did you receive that copy?

3 A Not in whole.

4 Q Okay. What do you think is missing?

5 A Well, I had -- I had two charges. I had the armed
6 robbery, so I got the discovery from the armed robbery, and
7 I didn't have all the discovery for the trafficking charge.
8 But that's not what -- I'm not worried about a discovery
9 issue right now.

10 Q Okay. All right. Did you and Mr. Scalzo have a
11 chance to meet and outline a strategy in this case?

12 A No.

13 Q No? Was this case -- was this case always a jury
14 trial or was this something that you wanted to plead to at
15 one point?

16 A This was a bench trial.

17 Q Right. But is this something that you always wanted
18 some sort of trial on?

19 A Right.

20 Q Yes?

21 A Yes.

22 Q All right. Were there any plea offers in the case?

23 A Yes.

24 Q All right. Do you know what the plea offers were?

25 A The first one was -- he came to me three separate

1 times. The first one was 7 nonviolent, 5 and 3, and then
2 he came to me a second time. It was 0 to 10, 0 to 10, and
3 then a third time it was just a straight 13.

4 Q Okay. All right. And you didn't want to plead
5 guilty, correct?

6 A Right.

7 Q Okay. And how did you and Mr. Scalzo make the
8 decision to have a bench trial?

9 A How did we make the decision?

10 Q Right. Why did you have a bench trial instead of a
11 jury trial?

12 A Because we decided that the judge knew the law best.

13 Q Okay. So is that a decision that you made freely and
14 voluntarily?

15 A Well, we made it together.

16 Q Okay. And did you talk about that decision with
17 Mr. Scalzo?

18 A Yes.

19 Q All right. And was it his advise that you have a
20 bench trial and not a jury trial?

21 A He didn't actually give me no advice.

22 Q All right. So how did the case end up being a bench
23 trial instead of a jury trial then? Was that your choice
24 without advice?

25 A Yeah. He -- yes. It was my choice to have a bench

1 trial.

2 Q Okay. All right. And at your bench trial, you had a
3 suppression hearing, correct?

4 A Correct.

5 Q Okay. And as a result of the suppression hearing, the
6 evidence was not suppressed, correct?

7 A Correct.

8 Q All right. And what did you think your attorney
9 should have done that he didn't do at that suppression
10 hearing?

11 A Well, I feel like he was ineffective for failing to
12 raise a violation of Section 22-5-180.

13 Q Okay. And what's that?

14 A David Weiner [phonetic], the affiant, he actually
15 swore out the warrant, and then he came to serve the
16 warrant. And the statute says that he can't do that.

17 Q Okay. All right. Mr. Scalzo never raised that
18 objection?

19 A No.

20 Q Okay. All right. And how do you think the outcome of
21 the case would have been different if he'd done that, if
22 he'd raised that statute?

23 A Well, by counsel not presenting this violation, it
24 allowed police to collect evidence after the arrest was
25 made, using it against me in trial. Had he presented this

1 issue, that suppression hearing probably would prove that
2 officers acted outside of the statute breaking the law and
3 therefore no evidence should have been admissible.

4 Q All right. Okay. And that objection was never made.
5 And your contention is that he should have argued that,
6 correct?

7 A Yeah. He should have argued that.

8 Q All right. You also listed an allegation of failing
9 to object to the judge's abuse of discretion. Tell the
10 Court about that.

11 A Okay.

12 Q Don't read it. We're here to testify. Don't read it.

13 A This is my testimony.

14 Q Don't read it. You need to testify.

15 THE COURT: Sum it up for me.

16 THE WITNESS: Okay. Well, the judge concluded that if
17 there would be a violation of a full raid beyond the bounds
18 of what a protective sweep can allow, he would not suppress
19 evidence on that basis. That's in my transcript on page
20 75, lines 2 through 6.

21 (Pause in proceedings.)

22 THE COURT: Go ahead.

23 THE WITNESS: By counsel -- by counsel not objecting
24 to this abuse of discretion, it procedurally barred me from
25 having this issue reviewed on direct appeal. Had he

1 objected, this issue would have been preserved for
2 appellate review, therefore giving me the opportunity to
3 present the evidence proving that the officers had indeed
4 exceeded the boundaries of what a protective sweep can
5 allow. I got David Weiner's report showing how he
6 violated, you know what I'm saying? It goes to show where
7 I was arrested at. If you look at Craig Hannon's
8 [phonetic] report, he said I was arrested on the front
9 porch, and therefore, I shouldn't -- they shouldn't have
10 even been in my house.

11 BY MS. HORLBECK:

12 Q Okay. But they got a search warrant, correct?

13 A No. They only had an arrest warrant.

14 Q Okay. All right.

15 A They violated my Fourth Amendment by -- he said --
16 well, he said he arrested -- the arrest was complete on the
17 front porch, and David Weiner said the arrest was complete
18 on the -- in my threshold, the threshold of the doorway.
19 But they searched upstairs in my bedroom and in the back
20 bedroom. So he had to go past the kitchen, he had to go
21 past my living room to get to the back bedroom where
22 they're saying they found this evidence.

23 THE COURT: This issue was addressed in the Court of
24 Appeals' opinion.

25 MS. HORLBECK: All right, we'll move on.

1 BY MS. HORLBECK:

2 Q Is there anything else you wanted to say about the
3 judge's abuse of discretion that hasn't already been
4 addressed?

5 A I'm actually -- I'm actually just -- I'm saying he's
6 ineffective for failing to object to it and didn't preserve
7 it. He didn't preserve it. And this ---

8 THE COURT: My point is is that the Court of Appeals
9 addressed the issue of the protective sweep, found it to be
10 reasonable, okay? That's been ruled on.

11 THE WITNESS: He didn't -- we didn't address the
12 violation, though, the violation where he should have
13 objected to it, to an abuse of discretion. And, see, they
14 didn't address -- they didn't even -- they didn't rule on
15 -- they didn't rule on -- they didn't rule on the actual
16 reports and stuff.

17 BY MS. HORLBECK:

18 Q Did you have -- were there any arguments that your
19 attorney failed to make at the suppression hearing?

20 A Yes.

21 Q Okay.

22 A He -- well, actually ---

23 Q Without getting into something that the Court of
24 Appeals has already reviewed, what did you want him to
25 investigate that he hadn't investigated in preparation for

1 the hearing?

2 A Well, I feel like he should have pointed out the facts
3 of the reports. He didn't -- he didn't properly -- he
4 didn't properly -- what do you call it when -- he didn't
5 properly impeach the witnesses as far as their reports. He
6 allowed these guys to create -- do a raid into my house,
7 and he didn't impeach them as far as their reports. He
8 didn't properly impeach them.

9 Q What did you want him to impeach them about?

10 A The raid, where the arrest was completed at.

11 Q I mean specifically.

12 A As far as where the arrest was completed at, he didn't
13 impeach Craig Hannon to his report as where the arrest
14 actually was completed at. And that would have --
15 therefore, that would allow them -- they weren't allowed to
16 go into my house to do the search.

17 Q Okay. All right. You also allege that Mr. Scalzo
18 should have made a motion to request that the judge recuse
19 himself?

20 A Yes. Yeah. I say the judge -- counsel was -- he
21 should have recused -- asked him to recuse him. This is
22 page 85.

23 Q On what grounds?

24 A On what grounds? The judge had made counsel aware
25 that there was a conflict of interest by implying that he

1 could not be fair after finding the officers' testimony
2 credible and deny it at the suppression hearing.

3 Q And how do you think the outcome of the case would
4 have been different if Mr. Scalzo had made that motion?

5 A If he would have asked the judge, I could have got a
6 fair trial. He could have used -- used the same evidence
7 to reach a -- I mean, if he asked the judge to recuse
8 himself, he could have developed and highlighted material
9 inconsistencies in the police testimony which, if properly
10 developed and argued, would have given rise to reasonable
11 doubt.

12 Q All right. And your next allegation is that you
13 wanted Mr. Scalzo to object to the judge's use of the
14 testimony offered during the suppression hearing as part of
15 the trial, and you wanted him to have a whole separate
16 bench trial on the case?

17 A Well, I asked him -- no. By him allowing the judge to
18 incorporate the testimony that he had used from the
19 suppression hearing, this prejudices me -- inherently
20 prejudiced me being that there was no way for the judge to
21 find the officers' testimony credible and deny a motion at
22 the suppression hearing, reside over my bench trial and use
23 that same evidence and reach a different conclusion. So by
24 him not objecting, it deprived me of my only viable
25 defense.

1 My defense depended on the opportunity to develop and
2 highlight the material inconsistencies in the police
3 testimony. He used -- if you're going to use the
4 suppression hearing testimony and use that to decide
5 whether they met the burden of proving me guilty, it wasn't
6 fair to me because the judge said -- the judge said I
7 request to incorporate into the trial record the prejudiced
8 testimony from the suppression hearing to be used as a
9 reference to decide whether or not the State has met its
10 burden of proving me guilty. That's on page 113, line 14
11 through page 114, line 11.

12 Q Okay. All right. And your next allegation is
13 Mr. Scalzo made the wrong arguments in your enhancement --
14 in the enhancement portion of sentencing?

15 A I'm moving too fast.

16 Q What else did you want him to argue?

17 A I say trial counsel was ineffective for failing to
18 properly argue (mumbling). Okay. The trial counsel was
19 unprepared and didn't take the time to familiarize himself
20 with all the relevant facts and circumstances surrounding
21 my case. He used the State vs. Spratt case before using it
22 to argue my case -- I mean before using it to argue my
23 case, which page 130, lines 25 to page 131 lines 5. That's
24 on my transcript. Therefore, the judge denied counsel's
25 argument and imposed petition of sentence as a second

1 offense, which it should have been -- it should have been
2 -- it should have been a first offense. It's, I think,
3 44-53-470 applies to the -- and just the enhancement law
4 for drug offences 44-53-370(e)(2), that he argues State vs.
5 Spratt, that was irrelevant to my case.

6 MS. HORLBECK: All right. Please answer any questions
7 Ms. Ratigan may have.

8 MS. RATIGAN: I don't have any questions for
9 Mr. Nicholson, Your Honor.

10 THE COURT: All right. You can step down.
11 Anything else?

12 MS. HORLBECK: No, Judge. I don't have anything
13 further.

14 THE COURT: Okay.

15 MS. RATIGAN: Your Honor, the State would call
16 Mr. Scalzo.

17 WHEREUPON,

18 CHRISTOPHER SCALZO,
19 after first having been duly sworn, testified as follows:

20 THE CLERK: Please state your full name for the
21 record.

22 THE WITNESS: Christopher Scalzo, S-C-A-L-Z-O.

23 DIRECT EXAMINATION

24 BY MS. RATIGAN:

25 Q Mr. Scalzo, do you recall representing Mr. Nicholson

1 on these charges?

2 A I do.

3 Q Were you appointed through the Public Defender's
4 Office?

5 A Yes.

6 Q Did you file the usual Brady and Rule 5 motions?

7 A I did.

8 Q To the best of your knowledge, did you receive full
9 discovery from the State?

10 A Yes, ma'am.

11 Q Did Mr. Nicholson ever make bond or was he at the
12 detention center?

13 A He was at the detention center the whole time.

14 Q Did you go and meet with him at the jail?

15 A Yes, I did.

16 Q Did you review the State's evidence with him?

17 A Yes.

18 Q Did you review his version of events?

19 A Yes.

20 Q Did he provide you any witnesses to contact?

21 A I think the only witnesses would have been, I believe,
22 his sister that was present on the scene potentially. I
23 don't recall if there would have been other witnesses that
24 could have been there.

25 Q Did you talk to his sister?

1 A I don't have a note that I did. I may not have.

2 Q Do you know if she was charged with anything?

3 A I don't believe she was charged with anything, no.

4 Q So you reviewed with him the circumstances of how he
5 was arrested and his home was searched?

6 A Yes.

7 Q And did you formulate a strategy based on your
8 discussions with him and the State's evidence?

9 A You mean in terms of the trial or just in general?

10 Q Just in general.

11 A Yeah. I mean, we would discuss he obviously had plea
12 offers pending and during the negotiation stage of the
13 case, so we would have discussed how to handle that and
14 what we wanted to do.

15 Q When the case was actually put on the trial docket,
16 what was your strategy at that point?

17 A At that point, I believe that Mr. Nicholson's primary
18 concern was preserving the issue of the illegal search, the
19 search of the house based on the arrest warrant only. They
20 didn't have a search warrant. And because there wasn't
21 going to really be a factual dispute over the fact that the
22 drugs were in the house, that it all really hinged on the
23 legal issue of the suppression, and so we had a -- as he
24 described earlier, we decided to have a bench trial to
25 litigate that part of it and preserve it for appeal.

1 Q And did you explain to Mr. Nicholson the kind of pros
2 and cons of having a bench trial versus a jury trial?

3 A Yeah. I would say that most times I am not inclined
4 to do a bench trial. This would be one of those exceptions
5 when it really is crystallized as primarily a legal issue.
6 But most times I prefer to do a jury trial.

7 Q Mr. Nicholson stated that you failed to raise a
8 violation of Section 22-5-180. Were you familiar with that
9 statute?

10 A I was not. I had to look it up while he was
11 testifying. That's not something that I considered back
12 then, for sure.

13 Q Having looked it up just a few minutes ago, can you
14 see any argument you could have raised now based on that
15 statute?

16 A No. It's a little bit of a vague statute. It looks
17 like in context, the statute is referring to an individual,
18 not a law-enforcement person, that when they would go to a
19 magistrate and say, "I want to swear out a warrant against
20 somebody," that the magistrate couldn't then say, "All
21 right. I've sworn out the warrant. You're now a deputy.
22 You can go serve the warrant on the person." That's how I
23 read the statute just now. I have not seen anything else
24 to tell me different.

25 And it's very common for a law-enforcement officer to

1 go to the magistrate, get an arrest warrant, and then be
2 the one that serves the arrest warrant, so that would have
3 been an exception that I was not familiar with.

4 Q Did you see any basis through which to move for Judge
5 Few to recuse himself?

6 A No. Not at the time. I don't recall us having a
7 conversation about needing the judge to recuse himself or
8 needing to ask the judge to recuse himself.

9 Q Did you see there to be any detriment in Judge Few's
10 decision to incorporate the suppression hearing testimony
11 into the bench trial?

12 A No. Primarily because what ended up happening was all
13 the issues related to the suppression came in, and then
14 there were additional issues that would have been necessary
15 for the State to prove at the trial. Well, all the extra
16 issues that they needed to prove there was questioning on,
17 which we then cross-examined on. And so because the
18 structure of the trial was going to be that we weren't
19 going to be limited on our ability to cross-examine, it
20 didn't seem to me to be a problem to deal with it that way.
21 And he did not lose any preserved issues that I could see
22 from doing it that way.

23 MS. RATIGAN: That's all I have, Your Honor.

24 MS. HORLBECK: I don't have any questions.

25 THE COURT: So it's clear, you went through the

1 suppression hearing, and the judge then -- y'all picked a
2 jury, right?

3 THE WITNESS: Before. Before we did it, yes. And
4 then ---

5 THE COURT: No, no. I'm looking at the transcript.
6 You went through the suppression hearing, and then you pick
7 a jury, and then ---

8 THE WITNESS: It may have been that Judge Few
9 initially was reluctant to just do it as a bench trial, but
10 I don't remember for sure.

11 THE COURT: Here's -- I've lost the page. I'm sure
12 Mr. Nicholson knows where it is. But it goes through, he
13 hears the suppression hearing. Here it is. Page 85. "In
14 order to go forward with a bench trial, you would have to
15 waive your right to a trial by jury, but in light of the
16 way the suppression hearing went and I already determined
17 that I find the officers to be credible, it really puts me
18 in a position that I don't choose to be put in. I'm going
19 to let the jury decide the case."

20 You pick a jury. This is one of his grounds. He says
21 you should have moved to have him recused because he'd
22 already made up his mind about the testimony. Well, he
23 heard the testimony, and that's who he chose to believe.

24 You pick a jury. And then you go and -- Mr. Nicholson
25 is the one that says, "I want a bench trial. I'm guilty."

1 You don't remember that?

2 THE WITNESS: Not personally. I mean, I've got the
3 transcript here.

4 THE COURT: I mean, he -- well, okay. I don't know
5 why I got off into that.

6 THE WITNESS: I know it was unusual because
7 Judge Few ---

8 THE COURT: He didn't want to be the one to decide
9 guilt or innocence, is what it looks like. And then
10 Mr. Nicholson was insistent that -- go with a bench trial
11 because it was legal issues, with a jury struck and ready
12 to go. I think Judge Few was very meticulous in examining
13 him about what he was doing, and, I think, clearly after
14 his -- he's an intelligent man and made an intelligent
15 choice.

16 Okay. Any other questions of Mr. Scalzo?

17 MS. RATIGAN: No, Your Honor.

18 THE COURT: Okay. Thanks.

19 THE WITNESS: Thank you.

20 THE COURT: Anything else from the State?

21 MS. RATIGAN: No, Your Honor. We would rest.

22 THE COURT: What?

23 PETITIONER NICHOLSON: Can I say something?

24 THE COURT: Yeah.

25 PETITIONER NICHOLSON: Well, in light of the way the

1 suppression hearing went and the judge asked me did I want
2 to still let him go and decide the facts I had told him,
3 the facts had already been decided. And I also had told
4 Scalzo that being that he already chose -- already got his
5 mind made up, we need another judge. And we ain't get no
6 other judge. He didn't ask the judge to recuse himself.

7 THE COURT: Why would he recuse himself? He picked a
8 jury. He wasn't going to be the decider.

9 PETITIONER NICHOLSON: I would rather let another
10 judge hear the facts and let us point out the real facts
11 from the inconsistencies in the officers' testimony because
12 the officers just lied.

13 THE COURT: Well, that's what you call forum shopping,
14 and we don't -- we frown on that. You don't get to just
15 pick and choose your judge when you know after a judge has
16 indicated how he's going to rule.

17 All right. Mr. Nicholson, you know, you're an
18 intelligent man. You have presented -- articulated and
19 presented your position very well, but I don't find that
20 Mr. Scalzo's conduct fell below an objective standard of
21 reasonableness, and I'm going to deny your petition. Okay.

22 PETITIONER NICHOLSON: What about the other
23 enhancement?

24 THE COURT: What about the enhancement?

25 PETITIONER NICHOLSON: Well, they enhanced me

1 unlawfully, 44 -- 44-53-470 tells you what they can enhance
2 you for as far as my drug charge -- trafficking charge.

3 THE COURT: Well, you didn't raise that in your
4 direct. What is it? Why do you say they improperly
5 enhanced your ---

6 PETITIONER NICHOLSON: Because they enhanced me due to
7 an uncounseled plea, and it was even -- it was irrelevant
8 to my case. It wasn't even relevant. He argued it under
9 State vs. Spratt. That's irrelevant, uncounseled plea
10 through enhanced. He should have raised 44-53-470 or the
11 State vs. Scott case which would have showed that you can't
12 be enhanced for a bond forfeiture or blue ticket that I
13 paid. I asked her to get the evidence, but she said she
14 couldn't get it. Just like she didn't get the court
15 orders.

16 THE COURT: Ms. Ratigan, what about the enhancement?
17 I hadn't, ---

18 MS. RATIGAN: The transcript reflects that Mr. Scalzo
19 challenged the enhancement.

20 PETITIONER NICHOLSON: On noncounseled plea. It was
21 the wrong way to challenge it.

22 THE COURT: Just let her speak, okay? One at a time.
23 Go ahead.

24 MS. RATIGAN: And I haven't really understood
25 Mr. Nicholson's arguments to really add anything to what

1 Mr. Scalzo brought up at the hearing.

2 PETITIONER NICHOLSON: Page 128, line 18, he argued
3 under uncounsel misdemeanor. It wasn't an uncounseled
4 misdemeanor. It was a forfeiture that I paid a fine on, a
5 blue ticket for simple possession of marijuana. They used
6 this to enhance my trafficking. 44-53-470(c) says they
7 can't do this.

8 MS. HORLBECK: Judge, just for the record,
9 Mr. Nicholson had asked me to look up some information on,
10 I think, a 2001 conviction. It was for a different year.

11 PETITIONER NICHOLSON: 2007.

12 MS. HORLBECK: Well, you told me a different year.
13 That's why I couldn't find it. We had the wrong year.

14 PETITIONER NICHOLSON: It's a 2007 marijuana
15 forfeiture. Miscommunication.

16 He wasn't even prepared right, because under the
17 issues, the judge told him that this doesn't even have
18 anything to do with this. Page 130, lines 25 to page 131,
19 he said -- line 5 on page 131, he said, "I have not read
20 those two." The judge was letting him know that this has
21 nothing even to do with this case. He said, "All right.
22 It's a second offense. I'm ready to impose a sentence as a
23 second." The case to use would have been State vs. Scott,
24 513 S.E.2d 100, 1999 case. That's the ruling case on a
25 bond forfeiture.

1 THE COURT: Well, certainly -- he certainly argued it.

2 And ---

3 PETITIONER NICHOLSON: Yeah. He argued it, but it
4 wasn't the proper argument.

5 THE COURT: Well, in your opinion, not in my opinion.

6 Relief denied. I ask the State to please prepare an
7 order. Thank you.

8 MS. RATIGAN: Thank you, Your Honor.

9 *****END OF TRANSCRIPT OF RECORD*****
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 CERTIFICATE OF REPORTER

2
3 STATE OF SOUTH CAROLINA)4 COUNTY OF GREENVILLE)
5
6

7 I, CHERYL A. SMITH, Official Court Reporter for the
8 Thirteenth Judicial Circuit of the State of South Carolina,
9 do hereby certify that the foregoing is a true, accurate
10 and complete Transcript of Record of the proceedings had
11 and evidence introduced in the trial of the captioned case,
12 relative to appeal, in the Court of Common Pleas for
13 Greenville County, South Carolina, on the 21st day of
14 April, 2015.

15 I do further certify that I am neither of kin,
16 counsel, nor interest to any party hereto.

17

18 June 29, 2015
19
20
21

22 _____
23 Cheryl A. Smith, CVR-M

24 Court Reporter
25

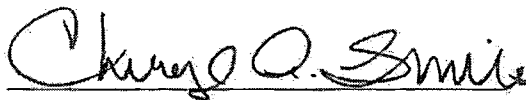
1 CERTIFICATE OF REPORTER

2
3 STATE OF SOUTH CAROLINA)4 COUNTY OF GREENVILLE)
5
6

7 I, CHERYL A. SMITH, Official Court Reporter for the
8 Thirteenth Judicial Circuit of the State of South Carolina,
9 do hereby certify that the foregoing is a true, accurate
10 and complete Transcript of Record of the proceedings had
11 and evidence introduced in the trial of the captioned case,
12 relative to appeal, in the Court of Common Pleas for
13 Greenville County, South Carolina, on the 21st day of
14 April, 2015.

15 I do further certify that I am neither of kin,
16 counsel, nor interest to any party hereto.
17

18 June 29, 2015
19
20

21 
22

23 Cheryl A. Smith, CVR-M

24 Court Reporter
25

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Lorenzo Rantelle Nicholson,)
 S.C.D.C. No. 273996,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2014-CP-23-3378

ORDER OF DISMISSAL

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL E. WICKENSJIMER
 2015 MAY 19 AM 9 52

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 17, 2014. The Respondent made its return and partial motion to dismiss on November 22, 2014. An evidentiary hearing was held on April 21, 2015 at the Greenville County Courthouse. The Applicant was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Christopher D. Scalzo, Esquire. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, the return and partial motion to dismiss, and the appellate records.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the April 2009 term of the Greenville County Grand Jury for possession of a weapon during

commission of a violent crime (2008-GS-23-4268, count 1) and trafficking cocaine (2008-GS-23-4268, count 2). He was represented by Christopher D. Scalzo, Esquire.

Though the case began as a jury trial, the Applicant eventually opted to have the matter proceed as a bench trial. On August 13, 2009, the Honorable John C. Few found the Applicant guilty and sentenced him to concurrent terms of 5 years for possession of a weapon during commission of a violent crime and 13 years for trafficking cocaine, second offense.

A notice of appeal was filed at the South Carolina Court of Appeals. Kathrine H. Hudgins, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Nicholson, Op. No. 2011-UP-588 (S.C. Ct. App. filed Dec. 21, 2011). The South Carolina Supreme Court denied the Applicant's subsequent petition for writ of certiorari by order dated July 25, 2013. The Remittitur was sent on July 31, 2013.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:¹

1. Illegal search and seizure of the Applicant's home.
2. Ineffective assistance of counsel.
3. "[W]as unlawfully sentenced."
4. "The Courts did not have proper Jurisdiction to impose a sentence on the [A]pplicant."
5. "[S]entence ws unlawfully enhanced."
6. "[D]eprived of the right to have meaningful access to the Courts."
7. Deprived of equal protection and due process.

On December 31, 2014, the Applicant filed a pro se amendment to his PCR application that contained an additional 157 issues. The Applicant, however, was represented by counsel at

¹ The Applicant raised 237 issues in his PCR application.

that time, so this Court will not consider the issues raised in this amendment. See Rule 11(a), SCRCF; Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) (holding there is no constitutional right to hybrid representation either at trial or on appeal).

At the beginning of the PCR hearing, counsel for the Applicant listed the sole issues they would be proceeding on in this action. Aside from the issues listed below, this Court finds the Applicant abandoned all other issues:

1. Ineffective assistance of trial counsel:
 - a. Failed to raise a violation of § 22-5-180.
 - b. Failed to object to the judge's abuse of discretion.
 - c. Failed to adequately attack the search and seizure.
 - d. Failed to move for the trial judge to recuse himself.
 - e. Failed to object to the trial judge's decision to incorporate the testimony from the suppression hearing.
 - f. Failed to properly argue against sentence enhancement.
2. The Grand Jury did not have permission to meet when they did.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he

must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated he had two meetings with trial counsel. The Applicant stated they reviewed some evidence but did not outline a strategy. The Applicant stated he received three plea offers but that he always wanted a trial. The Applicant stated he and plea counsel decided together to proceed with a bench trial because the trial judge "knew the law best." The Applicant stated trial counsel failed to raise a violation of S.C. Code Ann. § 22-5-180 at the suppression hearing. The Applicant stated trial counsel failed to object to the trial judge's abuse of discretion in denying the motion to suppress. The Applicant stated trial counsel failed to argue the officers had an arrest warrant (not a search warrant) but searched the entire residence. The Applicant stated trial counsel should have impeached the officers regarding where the arrest took place. The Applicant stated trial counsel should have asked the trial judge to recuse himself. The Applicant stated he was prejudiced when the trial judge incorporated the suppression hearing testimony into the bench trial. The Applicant stated trial counsel did not properly argue against sentence enhancement.

Trial counsel testified he filed discovery motions and received those materials. Trial

counsel testified he met with the Applicant at the detention center and reviewed: the State's evidence, the Applicant's version of events, and the possibility of the Applicant's sister as a witness. Trial counsel testified that, once the case was on the trial docket, the Applicant's primary concern was arguing the search and seizure issues. Trial counsel testified the case hinged on a legal issue and so they decided to proceed with a bench trial. Trial counsel testified he was not familiar with § 22-5-180 before the PCR hearing but that, upon review, he did not believe it would apply in this case. Trial counsel stated they did not discuss asking the trial judge to recuse himself. Trial counsel testified there was no detriment to incorporating the suppression hearing into the bench trial.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have argued there was a violation of S.C. Code Ann. § 22-5-180. While the Applicant argues this this would have shown the police officers "broke the law" in his case, trial counsel testified he believed this was a vague statute and would not be applicable. This Court agrees with trial counsel's assessment. This Court finds raising this statute in the suppression hearing would not have led to the suppression of the evidence. This Court finds the Applicant failed to demonstrate either that § 22-5-180 was applicable or that arguing a violation of this statute would have changed the outcome of his case. See Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded.") (citation omitted).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the trial judge's alleged abuse of discretion. Specifically, the Applicant argues

trial counsel should have objected when the trial judge denied the motion to suppress and that the failure to do so meant he could not argue this issue on appeal. (Trial transcript, p.75, lines 2-6). This Court finds there was no error and that it was not incumbent upon trial counsel to have objected and argued an abuse of discretion. The suppression issue was preserved and was, in fact, the subject of the Applicant's appeal.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly argue the search and seizure issues in his case. The Applicant argued the arrest was completed outside or in the threshold of the door but that the officers searched the entire house. This Court finds the Fourth Amendment issues in question were the subject of the Applicant's direct appeal. This Court finds the Applicant has failed to articulate what else trial counsel should have argued in order to challenge the arrest and search in this case. See Sikes v. State, 323 S.C. at 30, 448 S.E.2d at 562.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have moved for the recusal of the trial judge. Specifically, the Applicant points to a section of the transcript – after the denial of the suppression motion but before jury selection and the judge's eventual decision to have a bench trial² – where the trial judge stated he did not wish to have a bench trial at that time because “it puts me in a position that I don't choose to be put in.” (Trial transcript, p.85, lines 10-14). This Court finds trial counsel did not err in failing to move for recusal. “A motion to recuse may not be predicated on the judge's rulings in the case before him or on rulings in a related case, nor on his demonstrated tendency to rule in any particular manner, or on a particular judicial leaning or attitude derived from his experience on the bench.” Mallet v. Mallet, 323 S.C. 141, 146-47, 473 S.E.2d 804, 808 (Ct. App. 1996). This Court further

² Trial transcript, p.109.

finds the Applicant has failed to demonstrate any evidence the trial judge was, in fact, biased or prejudiced against him. See Patel v. Patel, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004) (stating “[i]t is not sufficient for a party seeking disqualification to simply allege bias; the party must show some evidence of bias or prejudice.”).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected when the trial judge incorporated the suppression hearing testimony into the bench trial. Specifically, the Applicant points to the trial judge’s comments that he would “incorporate by reference the testimony from the suppression hearing.” (Trial transcript, p.113, line 14 – p.114, line 11). Trial counsel testified there was no detriment to incorporating the suppression hearing testimony because he was able to cross-examine the witnesses on those issues. This Court finds the Applicant has failed to present a cognizable basis upon which trial counsel could have made a successful objection. Further, this Court finds the Applicant failed to demonstrate he suffered any prejudice from the incorporation of the suppression hearing testimony. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

This Court finds the Applicant failed to meet his burden of proving both that trial counsel did not properly argue against sentence enhancement and that he was prejudiced as a result. Specifically, the Applicant argues trial counsel should not have argued State v. Spratt, 383 S.C. 212, 678 S.E.2d 266 (Ct. App. 2009). (Trial transcript, pp.130-31). The Applicant argues he should have been sentenced as a first offense. This Court finds the Applicant was properly sentenced as a second offense and has failed to produce any evidence that the sentence enhancement in his case was improper.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under

prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

Grand Jury

The Applicant argued the Grand Jury did not have permission to convene when they considered the indictments in his case. This Court finds this allegation is without merit. A grand jury may meet at any time ordered by a circuit judge. See S.C. Code Ann. §§ 14-5-910 to -940 (allowing for terms of court not provided for by law); see also Order No. 2011-02-04-01 (S.C. Sup. Ct. Order dated Feb. 4, 2011) (authorizing chief judge for administrative purposes to “determine the dates for the convening of the grand jury in the various counties within the judicial circuit”). Accordingly, a grand jury is not unlawfully impaneled simply because it does not meet during a term of court as provided for in sections 14-5-620 to -820. See State v. Jeffcoat, 26 S.C. 114, 1 S.E. 440, 441 (1887) (“[M]erely changing the time for holding the court did not make the grand jury illegal.”).

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 12 day of May, 2015.



Edward W. Miller
Presiding Judge
Thirteenth Judicial Circuit

G. Hill, South Carolina.

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

Nicki Cunningham

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

VIOLATION § 16-23-0490 and § 44-53-0370

Date:

Foreperson of Petit Jury

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.

W. B. Paulini
 SOLICITOR