

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County
D. Garrison Hill, Circuit Court Judge

RECEIVED

JAN 29 2016

SC SUPREME COURT

EDWARD ANDRELL WHITNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2006-034694

APPENDIX

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

COURT OF GENERAL SESSIONS

2004-GS-23-0081

2004-GS-23-0082

2004-GS-23-0083

2004-GS-23-0084

STATE OF SOUTH CAROLINA,

vs.

TRANSCRIPT OF RECORD

EDWARD ANDRELL WHITNER,
DEFENDANT.

ORIGINAL

March 8 and 9, 2006
Greenville, South Carolina

B E F O R E:

THE HONORABLE C. VICTOR PYLE, JR., JUDGE; and a jury.

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

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Assistant Solicitor

CHRISTOPHER D. SCALZO, ESQ.
Attorney for the Defendant

HOLLIE M. JENKINS
Circuit Court Reporter

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(DW) - Denotes Defense Witness

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All Exhibits were retained by the Clerk of Court for Greenville County.

1 THE COURT: Go ahead and bring the jury panel in.

2 (WHEREUPON, the jury panel entered the courtroom.)

3 THE COURT: Good afternoon, ladies and gentlemen.

4 At this time, we will select a jury in the case of
5 the State against Edward Andrell Whitner.

6 Is it Whitner or Whitener?

7 DEFENDANT WHITNER: Whitner.

8 THE COURT: Would you stand up for a moment and turn
9 around face the jury panel for me, please, sir?

10 Thank you.

11 You can be seated.

12 Now, Mr. Whitner is indicted for trafficking crack
13 cocaine on or about August the 2nd, 2003. The indictment
14 alleges that on or about that date that he knowingly sold,
15 manufactured, delivered, or brought into this state or was
16 in actual or constructive possession of more than ten
17 grams of crack cocaine. He also is indicted for
18 possession of marijuana with intent to distribute on that
19 same date. He is also indicted for possessing crack
20 cocaine and marijuana with intent to distribute within
21 close proximity of a school.

22 JURY QUALIFICATION

23 THE COURT: Potential witnesses in this case will be:
24 Torrence White, Jim Proctor, Kerry Avery, Jim Debrun,
25 Claude Todd, all with the Greenville County Sheriff's

1 Office; Warren Carmen, formerly with the Sheriff's Office;
2 James Armstrong; Eddie Hucks; Caroline Morris; Dana Lewis;
3 Edward Whitner, Jr. and Sr.; Brenda Whitner; Aaron
4 Garrison; Lakeisha Gordon; Tad Allen; H. Dillard; and
5 Teresa Smiley.

6 I would inquire, at this time, if any member of the
7 jury panel is related by blood or marriage or connected by
8 employment to the Defendant or to any potential witness in
9 the case? Are you sensible or aware of any bias or any
10 prejudice with respect to the Defendant, to the State, or
11 to the subject matter of the case, that being an alleged
12 series of drug offenses, or do you know any reason why you
13 could not give this Defendant and the State a fair and
14 impartial trial based on the law and evidence to be
15 presented? If so, would you, please, stand and give me
16 your name.

17 (There was no response.)

18 THE COURT: Do I have any member of the panel who has
19 any connection, family, business, social, or otherwise
20 with Bob Ariail, the Solicitor, or any member of his
21 staff, or with law enforcement whether that be federal,
22 state, county, or municipal? If so, would you, please,
23 stand and give me your name.

24 (There was no response.)

25 THE COURT: Chris Scalzo with the Public Defender's

1 Office represents the Defendant in this case. Do I have
2 any clients now or formerly of the Public Defender's
3 Office? If so, would you stand and give me your name.

4 (There was no response.)

5 THE COURT: Do I have any member of the panel who
6 belongs to MADD, Mother's Against Drunk Driving, or any
7 similar organization dealing with alcohol and/or drugs?
8 If so, would you, please, stand and give me your name.

9 Does anyone contribute to any of those organizations?
10 If so, please, stand and give me your name.

11 Yes, ma'am. Your name?

12 JUROR #103, KATHLEEN C. SAUNDERS: Your Honor, I'm
13 Kathleen Saunders. And it's not MADD, but it is Green
14 Light, which is a group that works with the Phoenix Center
15 and the school district of Greenville County.

16 THE COURT: Now, my question to you, would that fact
17 in any way interfere with your ability to be a fair and
18 impartial juror on this case?

19 JUROR #103, KATHLEEN C. SAUNDERS: No, sir.

20 THE COURT: Thank you, ma'am.

21 Your name, please ma'am?

22 JUROR #37, GERALDINE COX: I'm Geraldine Cox. And I
23 contribute to MADD.

24 THE COURT: And would that fact in any way interfere
25 with your ability to be a fair and impartial juror on this

1 case?

2 JUROR #37, GERALDINE COX: No, it would not.

3 THE COURT: Thank you, ma'am.

4 All right. The strikes are five for the State and
5 five for the Defense.

6 Ladies and gentlemen, when your name is called, I'd
7 ask that you, please, come forward to this podium, turn
8 around, face counsel, and await further instructions.

9 JURY SELECTION

10 THE CLERK: No. 31, Sandra Campbell.

11 (Sandra Campbell, a white female, came forward.)

12 THE CLERK: What says the State?

13 MR. NEWKIRK: Please present Ms. Campbell.

14 THE CLERK: What says the Defendant?

15 MR. SCALZO: Please excuse the juror.

16 THE CLERK: You're excused from this case.

17 Number 142, Kathy Stokes.

18 (Kathy Stokes, a white female, came forward.)

19 THE CLERK: What says the State?

20 MR. NEWKIRK: Please present Ms. Stokes.

21 THE CLERK: What says the Defendant?

22 MR. SCALZO: Please swear the juror.

23 THE CLERK: You may have a seat in the jury box.

24 Number 153, Jesse Watts.

25 (Jesse Watts, a white male, came forward.)

1 THE CLERK: What says the State?
2 MR. NEWKIRK: Please present Mr. Watts.
3 THE CLERK: What says the Defendant?
4 MR. SCALZO: Please swear the juror.
5 THE CLERK: You may have a seat in the jury box.
6 Number 126, Pamela Rish.
7 (Pamela Rish, a white female, came forward.)
8 THE CLERK: What says the State?
9 MR. NEWKIRK: Please present Ms. Rish.
10 THE CLERK: What says the Defendant?
11 MR. SCALZO: Please swear the juror.
12 THE CLERK: You may have a seat in the jury box.
13 Number 103, Kathleen Saunders.
14 (Kathleen Saunders, a white female, came forward.)
15 THE CLERK: What says the State?
16 MR. NEWKIRK: Please present Ms. Saunders.
17 THE CLERK: What says the Defendant?
18 MR. SCALZO: Please swear the juror.
19 THE CLERK: You may have a seat in the jury box.
20 Number 128, Michele Rogers.
21 (Michele Rogers, a white female, came forward.)
22 THE CLERK: What says the State?
23 MR. NEWKIRK: Please present Ms. Rogers.
24 THE CLERK: What says the Defendant?
25 MR. SCALZO: Please excuse the juror.

1 THE CLERK: You're excused from this case.
2 Number 11, Norma Bell.
3 (Norma Bell, a white female, came forward.)
4 THE CLERK: What says the State?
5 MR. NEWKIRK: Please present Ms. Bell.
6 THE CLERK: What says the Defendant?
7 MR. SCALZO: Please swear the juror.
8 THE CLERK: You may have a seat in the jury box.
9 Number 166, Jason Styles.
10 (Jason Styles, a white male, came forward.)
11 THE CLERK: What says the State?
12 MR. NEWKIRK: Please present Mr. Styles.
13 THE CLERK: What says the Defendant?
14 MR. SCALZO: Please swear the juror.
15 THE CLERK: You may have a seat in the jury box.
16 Number 154, John White.
17 (John White, a white male, came forward.)
18 THE CLERK: What says the State?
19 MR. NEWKIRK: Please excuse Mr. White.
20 THE CLERK: You're excused from this case.
21 Number 44, Judy Davidson.
22 (Judith Davidson, a white female, came forward.)
23 THE CLERK: What says the State?
24 MR. NEWKIRK: Please present Ms. Davidson.
25 THE CLERK: What says the Defendant?

1 MR. SCALZO: Please swear the juror.
2 THE CLERK: You may have a seat in the jury box.
3 Number 144, Lowell Swiger.
4 (Lowell Swiger, white male, came forward.)
5 THE CLERK: What says the State?
6 MR. NEWKIRK: Please present Mr. Swiger.
7 THE CLERK: What says the Defendant?
8 MR. SCALZO: Please excuse the juror.
9 THE CLERK: You're excused from this case.
10 Number 159, Janice Wilson.
11 (Janice Wilson, a white female, came forward.)
12 THE CLERK: What says the State?
13 MR. NEWKIRK: Please present Ms. Wilson.
14 THE CLERK: What says the Defendant?
15 MR. SCALZO: Please swear the juror.
16 THE CLERK: You may have a seat in the jury box.
17 Number 37, Geraldine Cox.
18 (Geraldine Cox, a white female, came forward.)
19 THE CLERK: What says the State?
20 MR. NEWKIRK: Please present Ms. Cox.
21 THE CLERK: What says the Defendant?
22 MR. SCALZO: Please excuse Ms. Cox.
23 THE CLERK: You're excused from this case.
24 Number 167 -- 125, Richard Ridgill.
25 (Richard Ridgill, a white male, came forward.)

1 THE CLERK: What says the State?

2 MR. NEWKIRK: Please present Mr. Ridgill.

3 THE CLERK: What says the Defendant?

4 MR. SCALZO: Please swear the juror.

5 THE CLERK: You may have a seat in the jury box.

6 Number 104, Christopher Miller.

7 (Christopher Miller, a white male, came forward.)

8 THE CLERK: What says the State?

9 MR. NEWKIRK: Please present Mr. Miller.

10 THE CLERK: What says the Defendant?

11 MR. SCALZO: Please swear the juror.

12 THE CLERK: You may have a seat in the jury.

13 Number 114, Hudell Oxendine.

14 (Hudell Oxendine, a white male, came forward.)

15 THE CLERK: What says the State?

16 MR. NEWKIRK: Please present Mr. Oxendine.

17 THE CLERK: What says the Defendant?

18 MR. SCALZO: Please swear the juror.

19 THE CLERK: You may have a seat in the jury box.

20 Number 48, Delores Donaldson.

21 (Delores Donaldson, a white female, came forward.)

22 THE CLERK: What says the State?

23 MR. NEWKIRK: Please present Ms. Donaldson.

24 THE CLERK: What says the Defendant?

25 MR. SCALZO: Please excuse the juror.

1 THE CLERK: You're excused from this case.

2 Number 79, Larry Holmes, Jr.

3 (Larry Holmes, Jr., a white male, came forward.)

4 THE CLERK: What says the State?

5 MR. NEWKIRK: Please excuse Mr. Holmes.

6 THE CLERK: You're excused from this case.

7 Number 33, Tommy Chapman.

8 (Tommy Chapman, a black male, came forward.)

9 THE CLERK: What says the State?

10 MR. NEWKIRK: Please excuse Mr. Chapman.

11 THE CLERK: You're excused from this case.

12 Number 61, Eric Glass.

13 (Eric Glass, a white male, came forward.)

14 THE CLERK: What says the State?

15 MR. NEWKIRK: Please present Mr. Glass.

16 THE CLERK: What says the Defendant?

17 MR. SCALZO: Please swear the juror.

18 THE CLERK: You may have a seat in the jury box.

19 THE COURT: Ms. Rish, will you take that first seat
20 and serve as foreperson for me, please, ma'am?

21 And one alternate. One for the State, two for the
22 Defense.

23 THE CLERK: Number 158, Dorothy Wilson.

24 (Dorothy Wilson, a white female, came forward.)

25 THE CLERK: What says the State?

1 MR. NEWKIRK: Please present Ms. Wilson.

2 THE CLERK: What says the Defendant?

3 MR. SCALZO: Please excuse the juror.

4 THE CLERK: You're excused from this case.

5 Number 136, Dorothy Smith.

6 (Dorothy Smith, a white female, came forward.)

7 THE CLERK: What says the State?

8 MR. NEWKIRK: Please excuse Ms. Smith.

9 THE CLERK: You're excused from this case.

10 Number 52, Wanda Durham.

11 (Wanda Durham, a white female, came forward.)

12 THE CLERK: What says the State?

13 MR. NEWKIRK: Please present Ms. Durham.

14 THE CLERK: What says the Defendant?

15 MR. SCALZO: Please excuse the juror.

16 THE CLERK: You're excused from this case.

17 Number 34, Brandon Coker.

18 (Brandon Coker, a white male, came forward.)

19 THE CLERK: What says the State?

20 MR. NEWKIRK: Please present Mr. Coker.

21 THE CLERK: What says the Defendant?

22 MR. SCALZO: Please swear the juror.

23 THE CLERK: You may have a seat in the jury box.

24 THE COURT: The balance of the panel, I can excuse
25 you for the rest of today -- hold on just one minute.

1 (Pause.)

2 THE COURT: I'm sorry. What I need for you to do
3 right now is to go back downstairs to the jury assembly
4 room, just report back to the jury assembly room.

5 Thank you very much.

6 (WHEREUPON, the jury panel exited the courtroom.)

7 THE COURT: Okay. Swear the jury, please.

8 THE CLERK: Ladies and gentlemen, please raise your
9 right hand for the oath in this case.

10 (WHEREUPON, the jury was sworn at 12:26 p.m.)

11 THE CLERK: Thank you.

12 You may be seated.

13 THE COURT: All right. Ladies and gentlemen, I'm
14 going to give you a very short recess before we start.
15 You don't know any more about this case other than what
16 I've briefly told you. But I need to instruct you from
17 this point on, don't talk about this case. You don't
18 discuss the facts of the case until you've heard all of
19 the testimony, the arguments by the attorneys, and my
20 charge on the law.

21 So if you'll be at ease, follow the bailiff, and
22 we'll start very shortly.

23 Thank you.

24 (WHEREUPON, the jury was excused from open court at
25 approximately 12:28 p.m.)

1 THE COURT: I've got a question from my jury that's
2 deliberating, so sit tight for a minute.

3 MR. SCALZO: Do you want us to move, Your Honor, or
4 do you want us to --

5 THE COURT: No. Let's wait and see what the question
6 is.

7 The lunch is here for the other jury. So I think
8 I'll go ahead and let your jury go to lunch.

9 Is that all right?

10 MR. SCALZO: What time do you want us back?

11 THE COURT: How about 2:00? Does that give you
12 enough time?

13 MR. NEWKIRK: Yes, sir.

14 THE COURT: Okay. Bring in this jury so I can let
15 them go to lunch.

16 (WHEREUPON, the jury came into open court at
17 approximately 12:41 p.m.)

18 THE COURT: Ladies and gentlemen, I was in error, we
19 are going to recess, at this time, for lunch. And we'll
20 start the case after lunch.

21 During the lunch recess, do not talk about this case
22 among yourselves or with anyone else. If anybody contacts
23 you and tries to talk to you about this case, get their
24 names and addresses and report that to me.

25 Please keep your badges on during the lunch recess.

1 I ask that you do that so everyone involved with this
2 case, including witnesses, will know that you are jurors
3 on this case. It would be improper for them to discuss
4 the case or talk about it in your presence. So if you
5 leave your badges on, they'll know you are jurors and they
6 should not talk about this case.

7 I'll ask that you be back in your jury room at 2:00,
8 2:00 this afternoon.

9 Thank you.

10 (WHEREUPON, the jury was excused from open court at
11 approximately 12:42 p.m.)

12 (WHEREUPON, a lunch break was taken.)

13 THE COURT: You want to make brief opening statements
14 to the jury, I assume?

15 MR. NEWKIRK: Yes, Your Honor.

16 MR. SCALZO: Yes, sir.

17 THE COURT: Okay. Bring the jury in.

18 (WHEREUPON, the jury came into open court at
19 approximately 1:57 p.m.)

20 THE COURT: All right. Solicitor, brief opening
21 statement.

22 OPENING STATEMENTS

23 MR. NEWKIRK: May it please the Court?

24 Ladies and gentlemen of the jury. my name is John
25 Newkirk. And I'm the Prosecutor in this case. It's my

1 job to work with law enforcement, witnesses, and victims
2 in order to prosecute individuals who have been charged
3 with violating South Carolina laws. After I talk to you,
4 you're going to get a chance to hear from Mr. Chris
5 Sclazo. And it's his job to zealously represent the
6 interest of his client.

7 And there's two things I want to ask before we get
8 started today. First of all, I want to ask you to listen
9 attentively throughout the trial to all the witnesses that
10 testify. Second, I ask that all of you treat this case
11 with the same level of importance that both the State
12 treats this case and the Defendant treats this case.

13 Now, as Judge Pyle has told you, this Defendant has
14 been charged with four crimes. He's been charged with
15 trafficking crack cocaine. He's been charged with
16 possessing marijuana with the intent to distribute. And
17 he's been charged with possessing marijuana with the
18 intent to distribute within a half mile of a school and
19 possessing crack cocaine with the intent to distribute
20 within a half mile of a school.

21 And I want to talk to you a little bit about the law
22 in my opening statement. But what I want to -- what I
23 want everybody to remember is, at the conclusion of this
24 trial, Judge Pyle is going to instruct you, specifically,
25 on what law you are to use to determine this Defendant's

1 guilt. So if at any time during the trial, I comment on
2 the law or Mr. Scalzo comments on the law, remember, if
3 there's anything different, you must follow what Judge
4 Pyle tells you on the law.

5 Today, the first thing the Defendant is charged with
6 is trafficking in excess of ten grams of crack cocaine.
7 In order to prove someone is trafficking, the State must
8 prove that the Defendant is either selling, manufacturing,
9 bringing into the State, or providing financial
10 assistance, or aiding and abetting, doing all of those
11 things, and ten grams of crack cocaine are involved. Or
12 the State has to prove that the Defendant was in
13 possession of greater than ten grams of crack cocaine.

14 As far as possessing marijuana with the intent to
15 distribute, the State must prove that the Defendant
16 possessed marijuana and all the factors with which when he
17 was found with the marijuana indicate that he had an
18 intent to distribute that marijuana. As far as the school
19 charges go, the State must prove that the Defendant
20 possessed marijuana with the intent to distribute and
21 possessed crack cocaine with the intent to distribute
22 within a half mile of a school or park.

23 Ladies and gentlemen, today, you are going to hear
24 from Deputy Tori White of the Greenville County Sheriff's
25 Office. He's going to explain to you that on August 2nd

1 of 2003, he obtained a search warrant for the residence of
2 [REDACTED] He's going to tell you that he, along
3 with other deputies, went to [REDACTED]

4 Those deputies are going to go into detail about
5 entering that house and searching the house. They're
6 going to tell you that this Defendant was in the house
7 along with Teresa Smiley and Aaron Garrison. They're also
8 going to tell you that when they searched the house, one
9 deputy went to the bedroom. And in the bedroom of the
10 house, they located a quantity of marijuana. They also
11 located a quantity of crack cocaine in the bedroom. The
12 deputies are going to explain to you they also located a
13 quantity of crack cocaine in the hallway adjacent to the
14 bedroom. Further, these deputies are going to testify
15 that they searched the living room of this residence. In
16 that living room, they found another quantity of crack
17 cocaine and more marijuana. Ladies and gentlemen, these
18 deputies are also going to tell you the other things they
19 found in that house.

20 And after you hear from the deputies, you're going to
21 hear from Mr. James Armstrong. Mr. Armstrong is a chemist
22 with the Greenville County crime lab. And he's going to
23 explain to you that he tested the substances that were
24 found in this house and they tested positive as marijuana
25 and as crack cocaine. And, ladies and gentlemen, after

1 you've heard all of the evidence -- or heard all of the
2 testimony and seen all the evidence, you will be convinced
3 beyond a reasonable doubt that this Defendant is guilty of
4 all charges.

5 Thank you very much.

6 THE COURT: Mr. Scalzo.

7 MR. SCALZO: May it please the Court, Your Honor?

8 Good afternoon. What you heard from the Prosecutor
9 was an assertion or an argument for what they intend to
10 prove to you today. And I'd like you to take this frame
11 of mind at the beginning of this trial and as the trial
12 proceeds is evidence that proves a conclusion is not the
13 conclusion first.

14 We're very used to in our everyday life just kind of
15 talking amongst each other and saying, well, he did this,
16 which is the conclusion. And we kind of get used to being
17 loose with the evidence of how things happened and whether
18 they did happen. Because everyday life is not a court of
19 law. And it's not the same level or requirement of
20 evidence. We're in a court of law and there is a level of
21 evidence that is required, proof beyond a reasonable
22 doubt, as the Solicitor mentioned to you.

23 Well, what I'd like you to do is before you get to
24 the conclusion, listen to the evidence. And then your
25 conclusions come later on when you're deliberating. The

1 State has to present you with evidence. So they've got to
2 bring in this piece of evidence, and then this piece, and
3 then this piece, and then those pieces together have to
4 formulate the basis for a conclusion. We all know that's
5 how it works. It's just that in everyday life, we're not
6 always used to requiring all the little steps before we
7 get to a conclusion. That's why I talk to you about it
8 now because it's very important.

9 What you will hear from the Defense today is that
10 Mr. Whitner did not know about the drugs, was not in
11 possession of the drugs, did not live at the residence,
12 and that although he was there, he is not the drug dealer.
13 He doesn't live in the residence. He was not aware of the
14 drugs that were found, as the Solicitor says, they're
15 going to show in different places within the house.

16 What you will learn is that he does have a drug habit
17 and that he's had one for quite some time, crack cocaine
18 being the primary problem. You will hear that evidence
19 today. And you will also hear evidence that he did not
20 live at that residence, you'll hear evidence of it. The
21 conclusion is he didn't live at that house. We're going
22 to provide some evidence to support that.

23 So we have to live up to a standard as well. But
24 don't forget that they're -- the State is making the
25 assertion that he's guilty of the charges that have been

1 described. So before they can get anywhere close to
2 proving the guilt, they need to establish the evidence.
3 And that evidence has to be credible.

4 And so I ask you just to pay attention, which I know
5 you will, and that's almost redundant, but to the little
6 steps along the way and don't jump to the conclusion too
7 quickly.

8 Thank you.

9 THE COURT: Okay. Solicitor.

10 MR. NEWKIRK: The State calls Deputy Tori White.

11 THE CLERK: Please place your left hand on the Bible
12 and raise your right.

13 WHEREUPON,

14 TORRENCE WHITE,
15 after first having been duly sworn, testified as follows:

16 THE CLERK: State your full name for the record,
17 please.

18 THE WITNESS: Torrence White.

19 DIRECT EXAMINATION

20 BY MR. NEWKIRK:

21 Q Deputy White, where do you work?

22 A Greenville County Sheriff's Office.

23 Q How long have you been with the Sheriff's Office?

24 A Nearly four years.

25 Q And what are your duties at the Sheriff's Office?

1 A I'm assigned to uniform patrol, which we respond to
2 calls and various other complaints.

3 Q What kind of training did you complete to become a
4 Sheriff's deputy?

5 A I went through the academy, the South Carolina Police
6 Corp., which is a federal program that gives training to
7 law enforcement officers.

8 Q And were you on duty on August 2nd of 2003?

9 A Yes, sir, I was.

10 Q And on August 2nd of 2003, did you obtain a search
11 warrant?

12 A Yes, sir, I did.

13 Q And for what building did you obtain a search warrant
14 for?

15 A I obtained a search warrant for [REDACTED]
16 which is located in Greenville, South Carolina.

17 Q What county is [REDACTED] located?

18 A Greenville County.

19 Q And [REDACTED] what kind of building is that?

20 A It's a residence. It's the second house from the
21 corner of -- on the corner of Mack and Walcott, if you
22 came from Walcott Street.

23 Q And after obtaining the search warrant, did you
24 respond to [REDACTED]

25 A Yes. We responded after having a briefing before

1 executing the search warrant.

2 Q And when you execute a search warrant, is that
3 something that you do alone?

4 A No, sir.

5 Q Were there other deputies there?

6 A Yes, sir. At the briefing, we had a group of
7 deputies that met up with the supervisor and other
8 deputies and went over a pre-execution plan and then
9 executed a search warrant.

10 Q And what was your job in executing the search
11 warrant?

12 A Being that I was the lead officer, initially, in
13 executing the search warrant, we went to secure all the
14 parties in the residence and advise them that we did have
15 a search warrant for the residence.

16 Q Okay. Did you enter the residence of [REDACTED]

17 [REDACTED]

18 A Yes, I did.

19 Q And what did you, initially, observe when you came in
20 the residence?

21 A When I, initially, went in the residence, I went to
22 the rear of the residence where I found Teresa Smiley
23 standing in the doorway of the back bedroom in the
24 hallway.

25 Q After finding -- what did you do with Ms. Smiley?

1 A I then detained Ms. Smiley and brought her around to
2 the front room of the residence where we had two other
3 defendants detained, Aaron Garrison and Mr. Edward
4 Whitner.

5 Q Was the Defendant in the house when you entered?

6 A Yes, he was.

7 Q After you brought Ms. Smiley out to the living room,
8 what did you do?

9 A At that time, I explained to all parties inside the
10 residence that we had a legal search warrant to search the
11 residence for narcotics. At that time, I asked whose
12 residence was it. Ms. Smiley stated it was hers and
13 Mr. Whitner's.

14 Q And after speaking with the subjects, what did you
15 do?

16 A At that time, we began executing the search warrant.
17 I began searching the kitchen area of the residence while
18 other deputies that were there executing the warrant
19 searched other parts of the house.

20 Q Did you find anything in the kitchen?

21 A Initially, there was nothing found. The first 30
22 minutes or so as we searched the residence, there was
23 nothing found. There was -- Deputy Carmen was standing
24 with the subjects in the front room and alerted me and
25 said he found some narcotics in a basket in the front

1 room.

2 Q Where was the next place that you searched in the
3 house?

4 A I then went to the rear of the residence, where
5 Ms. Smiley was when I entered the residence, and began
6 searching that back bedroom.

7 Q What was in this bedroom generally?

8 A When you first walked in, immediately to your right,
9 there was a dresser. A couple of feet from that in the
10 middle of the bedroom, there was a bed. There was also a
11 bathroom in the far left corner of the bedroom with a
12 closet at the far back left corner of the bedroom.

13 Q Did you look in the closet?

14 A Yes, I did.

15 Q Were there clothes in the closet?

16 A Yes, sir.

17 Q Were they women's clothes?

18 A Men's and women's clothes.

19 Q Did you search that back bedroom?

20 A Yes, I did.

21 Q And what did you -- what, if anything, did you locate
22 in that back bedroom?

23 A The back bedroom, located on the dresser, I found a
24 black pocketbook on the dresser and it had a South
25 Carolina driver's license of Teresa Smily inside of it.

1 Also, in that purse, I found \$514 in cash.

2 Also, there in the back bedroom just at the door
3 frame of the bedroom, I found a Chapstick tube containing
4 a white rock-like substance that field-tested positive for
5 crack cocaine and later weighed out to 5.7 grams.

6 Q And where was this Chapstick tube found?

7 A Just as you enter the bedroom in the threshold of the
8 door, the Chapstick tube was laying on the floor not far
9 from the back door of the residence.

10 Q And did you search anywhere else in the residence?

11 A At that time, I continued my search and didn't find
12 any other items. I also then went back to the front room
13 where I spoke with Mr. Whitner. And on his person, I
14 found \$455 dollars in his pocket. It, actually, was in
15 his left front pocket. ✓

16 Q After searching Mr. Whitner's pocket, did you search
17 anywhere else?

18 A In the residence -- I didn't search anywhere else in
19 the residence. I took all the items that I found and
20 turned them over to Master Deputy Avery, who was scribing
21 what was found in the residence.

22 Q When you say "scribing," what do you mean by that?

23 A When he scribes, he writes down where exactly we
24 found each individual item, inventorying what we found.

25 Q Did you ask Ms. Smiley what her address was?

1 A Yes.

2 Q Did you ask Mr. Whitner what his address was?

3 A Yes, I did.

4 Q And did he give you his address?

5 MR. SCALZO: Objection, Your Honor.

6 THE COURT: What's your objection?

7 MR. SCALZO: Can we approach?

8 THE COURT: Yes.

9 (WHEREUPON, a bench conference was held.)

10 THE COURT: Take the jury out a minute, please.

11 (WHEREUPON, the jury was excused from open court at
12 approximately 2:15 p.m.)

13 THE COURT: All right. Mr. Scalzo.

14 MR. SCALZO: Thank you, Your Honor.

15 At this point, the Defense would move to suppress any
16 statements made by Mr. Whitner with regard to Deputy White
17 asking him about where he lived. That is based on the
18 fact that it has not been established that his Miranda
19 rights were read to him prior to the making of that
20 statement. I believe, Your Honor, that would be a crucial
21 point in time in the investigation, particularly, when the
22 residence -- nothing is found on him. All this contraband
23 is found throughout the house.

24 They're trying to establish a link between him and
25 that residence. I think that's crucial at that point.

1 And I think he should have been Mirandized at that point.
2 So that's the basis of my motion.

3 THE COURT: I disagree with you. Objection
4 overruled.

5 All right. Bring the jury in.

6 (WHEREUPON, the jury came into open court at
7 approximately 2:17 p.m.)

8 THE COURT: You may continue, Solicitor.

9 BY MR. NEWKIRK:

10 Q Deputy White, did you ask Mr. Whitner for his
11 address?

12 A Yes.

13 Q Did he provide you with his address?

14 A Yes.

15 Q And what address was that?

16 A [REDACTED] He also stated there while we were
17 executing the warrant -- he, as well as Mr. Garrison,
18 stated there was no drugs in the residence, as well as
19 Ms. Smiley.

20 Q What did you do with the money you found?

21 A All the money that was seized in the residence was
22 added to the inventory list for the search warrant and
23 placed in property and evidence.

24 (WHEREUPON, State's Exhibit No. 1 was marked for
25 identification only.)

1 BY MR. NEWKIRK:

2 Q Deputy White, let me show you State's Exhibit No. 1.

3 Do you recognize what is depicted in State's Exhibit No. 1?

4 A Yes, sir, I do.

5 Q And what is depicted in State's Exhibit No. 1?

6 A It's the awning of the porch located at [REDACTED]

7 [REDACTED]

8 Q And does this photograph accurately represent [REDACTED]

9 [REDACTED] on the night that you were there?

10 A Yes.

11 MR. NEWKIRK: Your Honor, at this time, the State
12 would offer State's Exhibit No. 1 into evidence.

13 THE COURT: Any objection?

14 MR. SCALZO: No, Your Honor.

15 (WHEREUPON, State's Exhibit No. 1 was admitted into
16 evidence.)

17 BY MR. NEWKIRK:

18 Q Again, Deputy White, can you identify this picture?

19 A Yes, I can.

20 Q What is this?

21 A That's the awning of the front porch at [REDACTED]

22 [REDACTED].

23 Q Is this the residence you executed the search warrant
24 at?

25 A Yes, it is.

1 (WHEREUPON, State's Exhibit No. 2 was marked for
2 identification only.)

3 BY MR. NEWKIRK:

4 Q Deputy White, are you familiar with the area of Mack
5 Street?

6 A Yes, sir.

7 Q Do you regularly patrol that area?

8 A Yes, sir. That's the current beat area that I'm
9 currently assigned.

10 Q Let me show you what's been marked as State's Exhibit
11 No. 2. Do you recognize what is depicted in State's
12 Exhibit No. 2?

13 A Yes, sir, I do.

14 Q And what does State's Exhibit No. 2 represent?

15 A It shows the area on which the house is located there
16 on Mack Street.

17 Q Does this picture accurately represent the area of

18 

19 A Yes, it does.

20 MR. NEWKIRK: Your Honor, at this time, the State
21 would offer State's Exhibit No. 2 into evidence.

22 THE COURT: Any objection?

23 MR. SCALZO: No, Your Honor.

24 (WHEREUPON, State's Exhibit No. 2 was admitted into
25 evidence.)

1 MR. NEWKIRK: Your Honor, may the witness step down?

2 THE COURT: Yes.

3 BY MR. NEWKIRK:

4 Q Deputy White, can you point out where [REDACTED]
5 is on this map?

6 A I can't quite reach it. If you're looking from the
7 top street, which is Walcott, take a left on that, and
8 it's on the corner --

9 THE COURT: Do you have a pointer?

10 MR. NEWKIRK: Your Honor, I don't think I have
11 pointer.

12 BY MR. NEWKIRK:

13 Q Can you identify where Mack Street is?

14 A This is Mack Street.

15 Q Does this map show the Bruton Town Community Center?

16 A Yes, it does.

17 Q And where is that located?

18 A This is the parking lot here and it's that building,
19 the Bruton Town Community Center.

20 Q And is there a park at the Bruton Town Community
21 Center?

22 A Yes, there is. Here is the basketball court here,
23 the field's here, and the playground equipment is here.

24 Q All right. Deputy White, on this map, can you point
25 out to the jury where [REDACTED] is?

1 A (Witness complied.)

2 Q Deputy White, are you -- do you know if the Bruton
3 Town Community Center is -- how far that is from [REDACTED]
4 [REDACTED]?

5 A It's approximately --

6 MR. SCALZO: Objection, Your Honor.

7 THE COURT: What's your objection?

8 MR. SCALZO: Proper foundation for how he would know
9 that -- lacks a proper foundation for how he would know
10 that.

11 MR. NEWKIRK: I can do that.

12 THE COURT: All right.

13 BY MR. NEWKIRK:

14 Q Deputy White, have you driven from [REDACTED] to
15 Bruton Town Community Center?

16 A Yes, sir, I have.

17 Q And have you checked your odometer as you were
18 driving from [REDACTED] to Bruton Town Community
19 Center?

20 A Yes, I have.

21 Q And how far is it from [REDACTED] to the Bruton
22 Town Community Center?

23 A Approximately one-fifth of a mile.

24 (WHEREUPON, State's Exhibit No. 3 was marked for
25 identification only.)

1 BY MR. NEWKIRK:

2 Q Deputy White, let me show you what's been marked as
3 State's Exhibit No. 3, along with the corresponding
4 property and evidence sheet.

5 Does State's Exhibit No. 3 correspond with the
6 property and evidence sheet?

7 A Yes, it does.

8 Q And without telling me what State's Exhibit No. 3 is,
9 do you recognize State's Exhibit No. 3?

10 A Yes, I do.

11 Q And what is State's Exhibit No. 3?

12 A It's the Chapstick tube that I located in the
13 residence that contained a white rock-like substance that
14 field-tested positive for crack cocaine.

15 Q And where did you find this again?

16 A It was located at the doorway of the back bedroom at
17 the rear of the residence.

18 Q And after you found it, what did you do with it?

19 A I took it and informed Master Deputy Avery, who was
20 scribing in the front room where he had a central location
21 where the property seized was placed on the inventory
22 list.

23 MR. NEWKIRK: Okay. Thank you.

24 Nothing further, Your Honor..

25 THE COURT: Mr. Scalzo.

1 MR. SCALZO: May it please the Court, Your Honor?

2 CROSS-EXAMINATION

3 BY MR. SCALZO:

4 Q Deputy White, you wrote an incident report in
5 relation to this case; correct?

6 A Yes, I did.

7 Q And that's a standard form that you utilize at the
8 Sheriff's Office?

9 A Yes, sir.

10 Q And you wrote that incident report close in time to
11 this incident, August 2nd, 2003; isn't that correct?

12 A Yes, sir.

13 Q And you would have written that later on that night
14 or that day?

15 A Yes, sir.

16 Q And that -- we know that because at the bottom of
17 your report, you put a date of 8-2-03; isn't that right?

18 A Yes, sir.

19 Q And at the top of the report where there's a section
20 called "Event," you have in there the incident date being
21 August 2nd, 2003?

22 A Yes, sir.

23 Q And within the body of the report, you're making and
24 taking notes about different pieces of information
25 regarding this case?

1 A Yes, sir.

2 Q And that -- making reports is part of a procedure
3 that's required in the Sheriff's Office; isn't that right?

4 A Yes, sir.

5 Q To maintain information regarding a case?

6 A Yes, sir.

7 Q In your report -- and I'll direct you to Page 3 of 6.
8 Do you have that in front of you?

9 A Yes, sir, I do.

10 Q At the top, you refer to obtaining a legal search
11 warrant on August 2nd for [REDACTED] isn't that
12 right?

13 A Yes, sir.

14 Q And then you describe meeting Deputy Waters at a
15 predetermined location?

16 A Yes, sir.

17 Q Is that sort of for the briefing?

18 A Yes, sir. We met at Cherrydale Cinemas.

19 Q Okay. And then you refer to the deputies that are
20 listed below as being present for the briefing and
21 execution of the warrant; isn't that right?

22 A Yes, sir.

23 Q Then you indicate you arrived at [REDACTED]

24 A Yes, sir.

25 Q And then you indicate that upon arrival of the front

1 door, it was announced that it was the Sheriff's Office
2 and you had a search warrant. You, actually, put that in
3 quotes; isn't that correct?

4 A Yes, sir.

5 Q And then the door was forced open by Deputy Debruyn?

6 A Yes, sir.

7 Q Did I say it right?

8 A Debruyn, yes, sir.

9 Q And then we'll go down a little bit further. You
10 indicated that after all the subjects that are in the
11 house are located -- and the subjects we're talking about,
12 you found Ms. Smiley in the back of the house in the
13 bedroom; correct?

14 A Yes, sir.

15 Q She was by herself?

16 A Yes, sir.

17 Q Then you bring her to the front of the house where
18 you then encounter the other deputies?

19 A Yes, sir.

20 Q And the other two defendants?

21 A Yes, sir.

22 Q You're indicating in your report that you informed
23 them of what you were there to do in terms of executing
24 the search warrant?

25 A Yes, sir, I did.

1 Q And that they were in investigative detention?

2 A Yes, sir.

3 Q You indicate in your report that Smiley, the owner of
4 the residence, was informed that the warrant was -- and
5 then you explained why the warrant was obtained; isn't
6 that right?

7 A Yes, sir.

8 Q And you indicate in your report that Smiley stated
9 there was "no drugs in the house"; is that right?

10 A Yes, sir.

11 Q The next sentence, you indicate Whitner and Garrison
12 were also asked if there were any drugs in the house;
13 isn't that correct?

14 A Yes, sir.

15 Q And both of them said, "There ain't no drugs in the
16 house"; is that right?

17 A Yes, sir.

18 Q Now, let me ask you, you were asked by the Solicitor
19 during your direct examination whether you asked
20 Ms. Smiley if that was her residence or what her address
21 was --

22 A Yes.

23 Q -- something to that effect?

24 A Yes.

25 Q You did not indicate that in your report; isn't that

1 correct?

2 A It's a standard question when executing a search
3 warrant.

4 Q Well, that's not what I asked you. You did not
5 indicate in your report that you asked her if it was her
6 residence?

7 A No, sir.

8 Q Okay. You also did not indicate in your report that
9 you asked Mr. Whitner what his address was or whether that
10 was his residence?

11 A Yes, sir.

12 Q That's not in your report?

13 A No, sir. That's information that's obtained when we
14 get an identity of a subject.

15 Q Okay. But that's not in your report?

16 A (Witness shook head.)

17 Q You mentioned when the Solicitor was asking you
18 questions about searching the back bedroom --

19 A Yes, sir.

20 Q -- he asked you about what you found, and one of the
21 things you mentioned was the Chapstick?

22 A Yes, sir.

23 Q Found near the doorway, I guess it was?

24 A Yes, sir.

25 Q And you mentioned -- besides the drugs that were

1 found, you said men's clothes; correct?

2 A Yes.

3 Q That you looked in the closet and you found men's
4 clothing, as well as women's clothing?

5 A Yes.

6 Q You did not mention in your report that you found any
7 clothing, men's or women's; is that right?

8 A Yes, sir.

9 Q You describe, I believe, Deputy Avery as the scribe?

10 A Yes, sir.

11 Q And he's the person who's writing down the things
12 that you or the other deputies find?

13 A Yes, that we took from the residence.

14 Q When you opened the door to that closet and you look
15 in there and you see the different clothing, you didn't
16 make any notes about the size of that clothing, did you?

17 A No, sir.

18 Q And you didn't take any of that clothing into
19 evidence?

20 A No, sir. The clothing was observed on the protective
21 sweep of the residence for any other persons hiding in the
22 residence.

23 Q Bear with me one moment.

24 Go to the next page, which is Page 4 of 6.

25 A Yes, sir.

1 Q And you have listed down there items, it looks like A
2 through D. And then on the next page up to J?

3 A Yes, sir.

4 Q And what you've done there in your report is document
5 all the different items that were seized from the house?

6 A Yes, sir.

7 Q And it's specific, you would say, this is what I
8 found, this is where I found it, or where it was found?

9 A Yes, sir, who found it.

10 Q On Page 5, you indicate that all three defendants
11 were Mirandized and then arrested for the charges which
12 we've heard about; isn't that correct?

13 A Yes, sir.

14 Q Among the things that were listed as far as taking
15 into evidence were the drugs, the money that we heard
16 about; isn't that correct?

17 A (Witness nodded.)

18 Q You have to answer.

19 A Yes, sir.

20 Q What is not indicated in there and what neither you
21 or any of the other deputies took into evidence were any
22 letters, no letters or envelopes were taken into evidence;
23 is that correct?

24 A No, sir.

25 Q No bills?

1 A No, sir.

2 Q Other than the -- you said you saw the ID of
3 Ms. Smiley?

4 A Yes.

5 Q It was a driver's license or ID?

6 A South Carolina driver's license.

7 Q And you saw that in a pocketbook?

8 A Yes.

9 Q That pocketbook was in the back bedroom?

10 A On the dresser, yes, sir.

11 Q Where you found her?

12 A Yes, sir.

13 Q You didn't take that into evidence, but you observed
14 it?

15 A Yes.

16 Q But that's not in your report. Your observation of
17 that and that note that you saw her ID and looked at it
18 and made note of it, that's not in your report?

19 A No, sir.

20 Q Okay.

21 A It's noted in the items seized in the black
22 pocketbook on the dresser with the South Carolina driver's
23 license of Teresa Smiley.

24 Q So you noted that you opened it up, saw it, and you
25 saw a driver's license that was Teresa Smiley's?

1 A Yes.

2 Q That driver's license said [REDACTED]

3 A I don't recall what the address was on the driver's
4 license. I noticed it was her driver's license.

5 Q No pictures or photographs or anything like that were
6 taken into evidence, were they?

7 A There were photos taken, yes.

8 Q I'm not saying photographs taken by the Sheriff's
9 Department, I'm saying photographs that may have been in
10 the house?

11 A No, sir.

12 Q That were already there before you got there?

13 A No, sir.

14 Q None were seized as evidence?

15 A No, sir. We did not seize any photographs.

16 Q Did you -- speaking of photographs taken by the
17 Sheriff's Office, did forensics come out there to the
18 house?

19 A Yes, they did.

20 Q And forensics, just to make sure we know what they
21 do, they collect evidence related to a case?

22 A They can.

23 Q They can?

24 A Yes.

25 Q Like fingerprints or take pictures, things like that?

1 A Yes.

2 Q Did you or anybody else that you're aware of with the
3 Sheriff's Department instruct them to take -- forensics to
4 take any fingerprint swabs on the interior of the house?

5 A No, sir, not that I recall.

6 Q Okay. Are you aware if any were -- any swabs were
7 taken of the interior of the house?

8 A Not that I recall, sir.

9 MR. SCALZO: I don't have any further questions, Your
10 Honor.

11 MR. NEWKIRK: Short redirect, Your Honor.

12 THE COURT: All right.

13 REDIRECT EXAMINATION

14 BY MR. NEWKIRK:

15 Q Deputy White, when you looked in the closet of the
16 master bedroom, what was in there?

17 A I observed some clothing items, men's and women's
18 clothing. It was on a protective sweep of the residence
19 to see if there were any other individuals that may be
20 hiding in closets, under the bed, et cetera.

21 Q And when you spoke with Mr. Whitner, what did he give
22 as his address?

23 MR. SCALZO: Objection. I renew my prior objection.

24 THE COURT: That's been asked and answered, has it
25 not?

1 MR. NEWKIRK: Yes, Your Honor, it has.

2 THE COURT: Anything further?

3 MR. NEWKIRK: Nothing further.

4 THE COURT: Thank you.

5 You can step down.

6 MR. NEWKIRK: The State calls Deputy Jim Proctor.

7 THE CLERK: Deputy Proctor, if you'll step up to the
8 Bible.

9 Please place your left hand on the Bible and raise
10 your right hand.

11 WHEREUPON,

12 JAMES CHARLES PROCTOR,
13 after first having been duly sworn, testified as follows:

14 THE CLERK: Thank you.

15 You may be seated.

16 State your full name for the record, please.

17 THE WITNESS: James Charles Proctor.

18 THE CLERK: Thank you.

19 DIRECT EXAMINATION

20 BY MR. NEWKIRK:

21 Q Deputy Proctor, where do you work?

22 A I work for the Greenville County Sheriff's Office.

23 Q And what are your duties with the Sheriff's Office?

24 A Currently?

25 Q Currently.

1 A I'm the school resource officer at Wade Hampton High
2 School.

3 Q And what were your duties on August 2nd of 2003?

4 A I was with Charlie shift uniform patrol at the
5 Sheriff's Office.

6 Q Okay. What kind of training did you complete to
7 become a police officer?

8 A I went to the South Carolina Criminal Justice
9 Academy.

10 Q And were you on duty on August 2nd, 2003?

11 A Yes, I was.

12 Q And on August 2nd, 2003, did you respond to [REDACTED]
13 [REDACTED]?

14 A Yes, I did.

15 Q And why did you respond to [REDACTED]

16 A I, normally, work up around Marietta, but I was
17 called down to assist in the execution of the search
18 warrant.

19 Q And what was your role in the execution of the search
20 warrant?

21 A My role in the execution of the search warrant was to
22 assist with the searching for illegal drugs or narcotics.

23 Q And when you entered the residence, what part of the
24 residence did you search first?

25 A When I, initially, went in, I hesitated at the living

1 room just to make sure they had enough personnel in there
2 to control the people that were being detained. And then
3 I proceeded to the back bedroom.

4 Q And who was in the living room?

5 A The Defendant was in the living room and there was
6 another black male and a black female.

7 Q You say that you went into the back bedroom?

8 A Yes, I did.

9 Q And did you search the back bedroom?

10 A Yes, I did.

11 Q And what did you find in the back bedroom?

12 A Initially, I started moving some stuffed animals and
13 pillows that were on the bed, and I located a -- some may
14 call it pink, but it was a reddish, light red bowl,
15 plastic bowl, that contained some marijuana and it
16 contained scissors. It contained some plastic wrapping.
17 There were several items in that bowl.

18 Q And what exactly was in the bowl?

19 A There was smaller baggies of marijuana packaged.
20 There was a Ziplock bag in there with marijuana in it.
21 There was Tuff Stuff sandwich bags for packaging and the
22 whole marijuana. There was a nine of hearts playing card.
23 There were scissors with blue handles. There were
24 scissors with orange handles. There was a silver in color
25 hand scale. And there was U.S. currency, \$647. There was

1 a baggy of rock cocaine.

2 Q Okay. Where did you find this bowl?

3 A Under the stuffed animals and pillows.

4 Q Okay. After you searched -- after you found that,
5 did you continue to search the room?

6 A Yes, sir. And I did misspeak. The currency was
7 located in a dresser, on top of a dresser.

8 Q And where was this dresser?

9 A I believe it was to the right of the bed, as you walk
10 in the bedroom to the right of the bed.

11 Q Did you find anything else in the bedroom?

12 A There was some rock cocaine in there. And I did
13 misspeak. The rock cocaine I found was also in the
14 dresser -- on the dresser.

15 Q Was this found on the dresser or in the dresser?

16 A The baggies with the white rock cocaine was found on
17 the left top portion of the dresser in the dresser drawer.

18 Q And what about the currency?

19 A The currency was found in the top left dresser
20 drawer.

21 Q And approximately how much money was found?

22 A \$647.

23 Q After you found these items, what did you do with
24 them?

25 A What I did was I directed the items to the attention

1 of Deputy White, who then took possession of them and took
2 them up to Deputy Avery to be scribed.

3 Q After finding those items, did you participate any
4 further in the search of the residence?

5 A Yes, sir, I did. I walked out to the kitchen and I
6 just started going through cabinets and whatnot. And I
7 looked out on the floor and saw a black Chapstick
8 container. And I pointed that out to Deputy White, who
9 took possession of that.

10 (WHEREUPON, State's Exhibit No. 4 was marked for
11 identification only.)

12 BY MR. NEWKIRK:

13 Q Let me show you what has been marked as State's
14 Exhibit No. 4 and a corresponding property and evidence
15 sheet. And without taking that out of the bag, can you
16 examine State's Exhibit No. 4 and the property and
17 evidence sheet.

18 Does State's Exhibit No. 4 correspond with the
19 property and evidence sheet?

20 A I remember looking at it previously and I believe it
21 does. Yes, it does.

22 Q And what is State's Exhibit No. 4?

23 A This is the items that were taken that were under the
24 stuffed animals and pillows in the bedroom.

25 Q And exactly what were those items.

1 A The pink reddish bowl; Tuff Stuff sandwich bags or
2 baggies; a nine of hearts playing card; two pairs of
3 scissors, one with blue handles, one with orange handles;
4 and a silver-colored hand scale.

5 Q And State's Exhibit No. 4, is it in substantially the
6 same condition as when you found it on August 2nd, 2003?

7 A Yes.

8 MR. NEWKIRK: Your Honor, at this time, the State
9 would offer State's Exhibit No. 4 into evidence.

10 THE COURT: Any objection?

11 MR. SCALZO: Yes. I don't think the proper
12 foundation has been laid after it left his hands.

13 MR. NEWKIRK: Your Honor, I would submit that these
14 are -- that he testified these are the items he found
15 and --

16 THE COURT: Your objection is to the chain?

17 MR. SCALZO: Yes, Your Honor.

18 THE COURT: I'd overrule that, Mr. Scalzo. They
19 don't have to disprove all possibility of tampering.

20 Go ahead, Solicitor.

21 (WHEREUPON, State's Exhibit No. 4 was admitted into
22 evidence.)

23 BY MR. NEWKIRK:

24 Q Can you take out State's Exhibit No. 4?

25 A (Witness complied.)

1 Q Can you explain to the jury what those items are?

2 A This is the initial bowl -- or the bowl that the
3 items were found in underneath the stuffed animals and the
4 pillows. This is the Tuff Stuff sandwich bags, Ziplock
5 bags, nine of hearts playing card, scissors with blue
6 handles, scissors with orange handles, and silver in color
7 hand scales.

8 (WHEREUPON, State's Exhibit Nos. 5, 6, and 7 were
9 marked for identification only.)

10 BY MR. NEWKIRK:

11 Q Deputy Proctor, let me show you what's been marked as
12 State's Exhibit Nos. 5, 6, and 7 and corresponding
13 property and evidence sheet.

14 Can you examine those?

15 A (Witness complied.)

16 Q Do State's Exhibit Nos. 5, 6, and 7 correspond with
17 the property and evidence sheet?

18 A Yes.

19 Q And do you recognize State's Exhibit Nos. 5, 6, and
20 7?

21 A Yes, I do.

22 Q And what are State's Exhibit Nos. 5, 6, and 7?

23 A That's marijuana, as is that, and that's rock
24 cocaine.

25 Q And --

1 MR. SCALZO: Objection, Your Honor. He can't
2 identify what they are.

3 THE COURT: Well, he's already done it without
4 objection, but I sustain the objection.

5 MR. SCALZO: Then I'll move to strike his answer,
6 Your Honor.

7 THE COURT: I instruct the jury to disregard the last
8 answer.

9 BY MR. NEWKIRK:

10 Q Where did you find State's Exhibit Nos. 5, 6 and 7?

11 A That was found in the pink bowl under the stuffed
12 pillows and stuffed animals -- I'm sorry, the pillows and
13 stuffed animals. That was found in the top left dresser
14 drawer. And that was found in the top left dresser
15 drawer.

16 Q And after you found State's Exhibit Nos. 5, 6, and 7,
17 what did you do with them?

18 A Again, that was in the bowl. The bowl was identified
19 to Deputy White, who took it up to Deputy Avery to be
20 scribed in or logged in. Again, once these were located
21 in the top left dresser drawer, they were pointed out to
22 Deputy White, who took them up to Deputy Avery to be
23 scribed in.

24 Q And are State's Exhibit Nos. 5, 6, and 7 substantially
25 in the same or similar condition as when you found them?

1 A Yes, sir.

2 MR. NEWKIRK: Nothing further, Your Honor.

3 THE COURT: Mr. Scalzo.

4 MR. SCALZO: May it please the Court, Your Honor?

5 CROSS-EXAMINATION

6 BY MR. SCALZO:

7 Q Deputy Proctor, let me first ask you -- let me try to
8 find it first. On direct examination by the Solicitor,
9 you said that the black Chapstick container was found on
10 the floor when you were searching the kitchen. I think
11 that was --

12 A Okay.

13 Q -- a mistake by you, because in your report, it
14 doesn't indicate that -- I looked -- do you have your
15 report in front of you?

16 A Yes.

17 Q Isn't it true it says, "I looked on the floor by the
18 back door and found the black Chapstick container"?

19 A Yes. It was the door. There was a -- I don't know
20 if you would call it a hallway, I'm not sure what you
21 would call it. There was a door that went from the
22 kitchen into a space into the living room, and that's
23 where it was. It was on the kitchen side by the door.

24 Q All right. So, in essence, it was in a hallway?

25 A No. It was, actually, in the kitchen, but it was

1 kind of like -- actually, either one, I guess you could
2 say, almost in the door jam.

3 Q Okay. I just wanted to make sure I didn't
4 misunderstand what you said.

5 You said the pink or reddish bowl that you found and
6 the other items that were in that bowl that they were
7 found in the back bedroom?

8 A Yes, sir.

9 Q Or a back bedroom?

10 A The back bedroom. There was a bedroom on the left
11 as -- that ran off the living room.

12 Q Okay.

13 A You went off the living room into the kitchen and
14 then into the back bedroom.

15 Q And the bedroom that you searched, that is not the
16 bedroom where Deputy White found Ms. Smiley?

17 A I believe so.

18 Q You're saying that's the same?

19 A I believe so, but I didn't go in when he went in.

20 Q So you don't know whether or not that's the same
21 bedroom or not?

22 A No, sir, I don't.

23 Q So let's talk about what you find when you're in the
24 bedroom. As we said, the reddish bowl with the items that
25 are inside of it. You found that under some pillows as

1 well as stuffed animals?

2 A Correct.

3 Q And that's something you had to pull that stuff away
4 and then find the bowl?

5 A Yes.

6 Q Was that on the bed?

7 A Yes.

8 Q You also said that you found items inside the
9 dresser?

10 A The top left dresser drawer, yes.

11 Q You had to open the dresser drawer and look inside to
12 see it?

13 A Correct.

14 Q Among the items found in that bowl, I believe there
15 are two kinds of scissors?

16 A Yes.

17 Q You have the bowl itself and then there was some hand
18 scales?

19 A Yes, sir.

20 Q A little metal, small little item that you kind of
21 hold with your fingers to weigh things?

22 A Right.

23 Q Did you instruct anybody or ask anybody or are you
24 aware of anybody instructing forensics to examine those
25 items for fingerprints or any forensic information?

1 A Not that I recall, no.

2 Q Other than looking on the bed and then looking in
3 that left -- top left drawer, did you search anywhere else
4 in the room?

5 A Not that I recall. I remember there was something on
6 the floor I looked through, but I don't remember what it
7 was.

8 Q And I think it's obvious, but I'll ask the question,
9 you did not recover any letters or utility bills or
10 anything like that?

11 A No.

12 Q It was only those items that were just talked about?

13 A Correct.

14 Q There were two bedrooms in that house?

15 A That I recall.

16 Q Did that appear to be a young person's room or could
17 you tell?

18 A The --

19 Q The bedroom you searched, yeah.

20 A It didn't have toys or whatnot laying around that I
21 recall. I don't remember any adolescent posters or
22 anything along those lines, no.

23 Q Just stuffed animals on the bed?

24 A Right.

25 MR. SCALZO: Thank you.

1 No further questions.

2 THE COURT: Any redirect?

3 MR. NEWKIRK: No, Your Honor.

4 THE COURT: Step down.

5 MR. NEWKIRK: The State calls Warren Carmen.

6 THE CLERK: Mr. Carmen, place your left hand on the
7 Bible and raise your right hand.

8 WHEREUPON,

9 WARREN EARL CARMEN, III,
10 after first having been duly sworn, testified as follows:

11 THE CLERK: Thank you.

12 You may be seated.

13 State your full name for the record, please.

14 THE WITNESS: Warren Earl Carmen, III.

15 THE CLERK: Thank you.

16 DIRECT EXAMINATION

17 BY MR. NEWKIRK:

18 Q Mr. Carmen, where do you work?

19 A I'm currently unemployed.

20 Q And where did you work on August 2nd of 2003?

21 A The Greenville County Sheriff's Office.

22 Q And why do you no longer work at the Greenville
23 County Sheriff's Office?

24 A I had an opportunity to make more money.

25 Unfortunately, obviously, it didn't pan out since I'm not

1 working.

2 Q Were you on duty on August 2nd, 2003?

3 A Yes, sir, I was.

4 Q And on August 2nd, 2003, did you respond to [REDACTED]
5 [REDACTED]?

6 A Yes, I did.

7 Q And why did you respond to [REDACTED]

8 A To assist in the service of a search warrant.

9 Q And what was your job in serving the search warrant?

10 A My job was to be the first one through the door. It
11 was my job to make sure that myself and everyone behind me
12 were as safe as possible in such a dynamic situation.

13 Q And why were you chosen to be the first person in the
14 door?

15 A Because I was a member of the SWAT and sniper teams.

16 Q And what did you observe when you, initially, entered
17 the room?

18 A As soon as I went through the door, I encountered a
19 black male subject in the living room, which is the room
20 you come into as you go through the front door. I ordered
21 him to the ground. He, initially, did not comply. I
22 ordered him again. He still wasn't complying, but he
23 started to move towards the ground. At that point, I
24 guided him to the ground and left him there for the
25 deputies behind me to secure. And I continued through the

1 living room and into the kitchen.

2 Q And what did you do when you got into the kitchen?

3 A As I entered the kitchen, I encountered another black
4 male subject. Again, I ordered him to the ground. He did
5 not comply. I ordered him again, he still did not comply.
6 And by that point, I was able to close the distance
7 between us and take him to the ground and secure him. At
8 that point, I had to stay with that subject since he was
9 not complying.

10 Q And what did you do after that?

11 A After I secured him, I walked him back out into the
12 living room. There was some soft furniture there, I
13 believe it was a couch, where we had the subjects in the
✓ 14 house seated for their safety and the safety of the other
15 officers while the rest of the team executed the search
16 warrant.

17 Q And what happened -- did you stay with those subjects
18 in the living room?

19 A I did.

20 Q And what happened as you were in the room with the
21 subjects?

22 A I was just kind of standing in the room. And there's
23 an entertainment center up against the wall between the
24 living room and the kitchen. And I put my hand up there
25 to rest it to get more comfortable standing there, and

1 when I did, I saw the two large plastic bags. One was
2 partially full of green leafy plant-like substance that
3 field-tested positive for marijuana. The other was
4 partially full of white rock-like substance that
5 field-tested positive for crack cocaine.

6 Q And, again, where were these found?

7 A On an entertainment center up against the wall
8 between the living room and the kitchen.

9 (WHEREUPON, State's Exhibit Nos. 8 and 9 were marked
10 for identification only.)

11 BY MR. NEWKIRK:

12 Q Mr. Carmen, let me show you what's been marked as
13 State's Exhibit Nos. 8 and 9 and the corresponding
14 property and evidence sheet.

15 Can you examine those?

16 A Yes.

17 Q Does State's Exhibit Nos. 8 and 9 correspond with the
18 property and evidence sheet?

19 A Yes, sir, they do.

20 Q And do you recognize State's Exhibit Nos. 8 and 9?

21 A I do.

22 Q And what is State's Exhibit Nos. 8 and 9?

23 MR. SCALZO: Objection, Your Honor, if he's going to
24 identify the items for what they are.

25 THE COURT: Correct.

1 THE WITNESS: State's Exhibit No. 8 is an off-white
2 rock-like substance.

3 BY MR. NEWKIRK:

4 Q And where did you find this?

5 A The entertainment center up against the living room
6 and kitchen wall.

7 Q And what is State's Exhibit No. 9?

8 A Green plant-like material. And that, too, was found
9 in the entertainment center up against the wall in the
10 kitchen and living room.

11 Q And after finding State's Exhibit Nos. 8 and 9, what
12 did you do with those?

13 A I notified the Master Deputy. I did not collect
14 them.

15 Q And State's Exhibit Nos. 8 and 9, are they in
16 substantially the same or substantially similar condition
17 as when you found them?

18 A Yes, sir, they are.

19 MR. NEWKIRK: Nothing further.

20 THE COURT: Mr. Scalzo.

21 MR. SCALZO: May it please the Court, Your Honor?

22 CROSS-EXAMINATION

23 BY MR. SCALZO:

24 Q Mr. Carmen, it was Mr. Whitner who you first
25 encountered in the living room; isn't that correct?

1 A I don't know. My primary objective, at that point,
2 was to secure whoever I came into contact with as quickly
3 as possible to make it safe for the guys behind me.

4 Q And other than identifying the location, you said you
5 didn't take the items into evidence, you let Deputy Avery
6 take them into evidence?

7 A That is correct.

8 Q And the entertainment center that you were talking
9 about, that was on a wall in the living room or in the
10 kitchen?

11 A It was in the living room.

12 Q Okay. And is it kind of just -- let me ask it this
13 way, the living room and the kitchen sort of share a
14 similar area, they run into each other?

15 A Yeah. As you come through the door, you come into
16 the living room and then out of the living room. As
17 Deputy Proctor said, there's a bedroom off the living
18 room. As you come through the living room, the backside
19 of the living room, you come into the kitchen.

20 Q So this entertainment center was on its way -- or
21 would be located when you're on your way towards the
22 kitchen?

23 A Correct, but it's kind of straight back.

24 MR. SCALZO: Right. I understand.

25 Thank you.

1 THE COURT: Thank you.

2 Step down.

3 MR. NEWKIRK: The State calls Deputy Kerry Avery.

4 THE CLERK: Deputy Avery, place your left hand on the
5 Bible and raise your right hand.

6 WHEREUPON,

7 KERRY SCOTT AVERY,

8 after first having been duly sworn, testified as follows:

9 THE CLERK: Thank you.

10 You may be seated.

11 State your full name for the record, please.

12 THE WITNESS: My name is Kerry Scott Avery.

13 THE CLERK: Thank you.

14 DIRECT EXAMINATION

15 BY MR. NEWKIRK:

16 Q Deputy Avery, where do you work?

17 A I work for the Greenville County Sheriff's Office.

18 Q And how long have you worked for the Sheriff's
19 Office?

20 A I've been with Greenville County for a little over 11
21 years now.

22 Q And what are your duties with the Sheriff's Office?

23 A Right now, I'm currently assigned to uniform patrol
24 on Charlie shift.

25 Q And were you on duty on August 2nd of 2003?

1 A Yes, I was.

2 Q And did you respond to [REDACTED] on August 2nd,
3 2003?

4 A That is correct.

5 Q And why did you respond to [REDACTED]

6 A Deputy White had obtained a search warrant from the
7 night magistrate in reference to some illegal narcotics
8 that were supposed to be inside this residence.

9 Q And what was your role in the search warrant?

10 A My role, I had -- actually, I had gotten there just
11 after entry was made into the house. And it had already
12 been predetermined that I was going to be the scribe on
13 the search warrant. I was going to be the one, actually,
14 signing my signature for the execution of this warrant and
15 listing every item that was seized from that residence,
16 both on the original search warrant and on copies of the
17 search warrant, one to be left either with the house or
18 occupants of that house.

19 Q And when you first entered into the residence, where
20 did you go?

21 A When I first entered in, I went straight to the back
22 left bedroom.

23 Q And what did you do when you got to that bedroom?

24 A I observed Deputy Proctor locate the pinkish red bowl
25 in the center of the bed that was partially hidden by

1 stuffed animals and pillows.

2 Q Did you search the bedroom?

3 A I assisted Deputy Proctor and Deputy White in the
4 search of that bedroom, yes, I did.

5 Q And did you yourself find anything in that bedroom?

6 A Yes, sir, I did. I located a .38 caliber Rossi
7 pistol that was located between the mattress and box
8 springs on that same bed that Deputy Proctor had located
9 the other State's Exhibits.

10 Q And after finding that gun, did you search anymore?

11 A After I had found that weapon, pretty much the
12 remainder of that room had been searched. So, at that
13 point, I advised Deputy Proctor and Deputy White, leave
14 the pistol where it's at because we're going to want to
15 get pictures of it from our forensics unit.

16 And from there, I went back out to the living room
17 and took up a position at the coffee table just inside the
18 doorway as to where I was going to be scribing, where
19 everybody was going to be bringing items to me that were
20 being seized on this search warrant.

21 MR. NEWKIRK: Your Honor, could we have a brief recess?

22 THE COURT: Sure.

23 Take the jury out a minute, please.

24 (WHEREUPON, the jury was excused from open court at
25 approximately 3:12 p.m.)

1 MR. NEWKIRK: Your Honor, I just want to make sure
2 this gun is secured.

3 THE COURT: I think we, certainly, need to make sure
4 it's not going to happen again.

5 We'll take a short recess.

6 (WHEREUPON, a break was taken.)

7 THE COURT: Okay. Let's get started back.

8 (WHEREUPON, the jury came into open court at
9 approximately 3:20 p.m.)

10 THE COURT: All right. You may continue, Solicitor.

11 (WHEREUPON, State's Exhibit No. 10 was marked for
12 identification only.)

13 BY MR. NEWKIRK:

14 Q Deputy Avery, let me show you what's been marked as
15 State's Exhibit No. 10 and the corresponding property and
16 evidence sheet.

17 Can you examine them?

18 A I do recognize them.

19 Q Does State's Exhibit No. 10 correspond with the
20 property and evidence sheet?

21 A Yes, it does.

22 Q And what is State's Exhibit No. 10?

23 A That would be .38 caliber Rossi revolver, serial
24 number D, delta, 607763 and five rounds of .38 caliber
25 Winchester ammunition.

1 Q And where did you find State's Exhibit No. 10?

2 A This was located in the back left bedroom in between
3 the mattress and box springs.

4 Q What did you do with State's Exhibit No. 10 after you
5 found it?

6 A After I found it, I left it there until forensics
7 photographed it. And then after forensics photographed
8 it, I personally went to the back bedroom and recovered
9 this item myself.

10 Q And after you recovered this item, what did you do
11 with it?

12 A I brought it up to the front -- well, first, after
13 they took the photographs of it, I went ahead and made it
14 safe. I opened the cylinder and removed any live rounds
15 from the cylinder. At that point, I separated the rounds
16 from the gun. The rounds went in my pocket and the gun
17 stayed in my hand. I then took it back out to the front
18 living room area where I had been scribing other items
19 that were being brought to me and entered it onto the
20 search warrant.

21 Q And what did you do with it after you left the
22 residence?

23 A After we left the residence, I took all items that
24 were seized in that search warrant to property and
25 evidence myself and logged every item into property and

1 evidence.

2 Q Did you log State's Exhibit No. 10 into property and
3 evidence?

4 A Yes, I did.

5 Q And on what date did you do that?

6 A It was logged in on August 2nd, 2003, at 4:55 a.m.

7 Q Okay. And State's Exhibit No. 10, is that in the
8 same or substantially similar condition as when you found
9 it?

10 A Yes, it is.

11 MR. NEWKIRK: Your Honor, at this time, the State
12 would offer State's Exhibit No. 10 into evidence.

13 THE COURT: Any objection?

14 MR. SCALZO: No, Your Honor.

15 (WHEREUPON, State's Exhibit No. 10 was admitted into
16 evidence.)

17 BY MR. NEWKIRK:

18 Q Deputy Avery, let me show you what has been marked as
19 State's Exhibit Nos. 5, 6, 7, 8, and 9, and the
20 corresponding property and evidence sheet.

21 A Okay.

22 Q Do all of these exhibits correspond with the property
23 and evidence sheet?

24 A Yes, they do.

25 Q And do you recognize all of these exhibits?

1 A Yes, I do.

2 Q And where did you get State's Exhibit No. 5 from?

3 A Let's see here. I believe that that would have been
4 brought to me by Deputy Proctor.

5 Q And where did you get State's Exhibit No. 3 from?

6 A State's Exhibit No. 3 was brought to me by Deputy
7 White.

8 Q And where did State's Exhibit No. 6 come from?

9 A That would either be Deputy Proctor or Deputy Carmen.

10 Q Okay. State's Exhibit No. 7, where did that come
11 from?

12 A That would have come from Deputy Proctor.

13 Q And State's Exhibit No. 8?

14 A That would have come from Deputy Carmen.

15 Q And State's Exhibit No. 9?

16 A I believe that came from Deputy Proctor.

17 Q And what did you do with all of these exhibits when
18 they were given to you?

19 A All these items were personally written down on the
20 narrative section -- or the items seized section of the
21 search warrant. And, like I said, it's -- you always have
22 to duplicate your effort when you're the scribe of a
23 search warrant because it has to go down on the original
24 search warrant and then it has to go down identically on a
25 copy of the search warrant that's going to be left either

1 at the residence or with property -- or owner of the
2 house, lessee of the house, renter of the house, whoever
3 is in charge of the house or a household member.

4 Q Did you take these exhibits from the house?

5 A Yes, I did.

6 Q And where did you take these exhibits?

7 A I took these items down to property and evidence
8 where I personally logged them in.

9 Q And how did you put them into property and evidence?

10 A With any of the narcotics, it doesn't matter whether
11 it's marijuana, crack cocaine, or methamphetamine, they
12 all have to be sealed inside a bag. And inside of that
13 seal before you seal it, of course, you're going to take
14 the weight of -- the weight of whatever is in it or the
15 quantity and the weight. You will take and put your
16 initials on the inside of the bag, as well as the date on
17 the inside of the bag, as well as the case number on the
18 inside of the bag. And then you heat seal the bag shut so
19 that, in other words, nobody can come back behind me and
20 change my date, my case number, or my initials off of the
21 item that I personally put in property and evidence.

22 Q And when you entered these exhibits in property and
23 evidence, did you make a log of that?

24 A Yes, sir.

25 Q And on what form did you make a log of that?

1 A That would be on the property and evidence sheets.

2 Q And did you state at what time you placed them in
3 property and evidence?

4 A Yes, sir. Any time that we do enter stuff into
5 property and evidence, whether we're putting it into a
6 drop box or whether it's, actually, going downstairs into
7 the main section of property and evidence, the clerks
8 upstairs in the records department where our drop boxes
9 are, they have to log our drops in and their times. And
10 their log corresponds with our time on our property
11 and evidence sheets as to when we, actually, made the
12 drop.

13 Q And does the property and evidence sheet indicate who
14 from property and evidence checked these items in?

15 A Yes, it does.

16 Q And what name is that?

17 A V.L. Rampey.

18 Q And at what time?

19 A That would have been at 4:55 a.m. on 8-2-03.

20 Q And are all of these exhibits in substantially
21 similar or the same condition as when you found them?

22 A Yes, sir.

23 MR. NEWKIRK: That's all.

24 THE COURT: Mr. Scalzo.

25 MR. SCALZO: May it please the Court, Your Honor?

CROSS-EXAMINATION

1
2 BY MR. SCALZO:

3 Q Deputy Avery, with regard to the gun --

4 A Yes, sir.

5 Q -- I believe you said that you were the one that
6 found the gun?

7 A That is correct.

8 Q And you found it between the mattresses?

9 A That is correct.

10 Q So you had to move the mattress to find it?

11 A Correct.

12 Q And I believe the gun is the only thing you found
13 yourself; is that right?

14 A Correct.

15 Q Did you instruct forensics or anybody to analyze the
16 gun?

17 A No, sir, I did not. I instructed them to take
18 photographs of it.

19 Q Okay. So other than photographs -- the only thing
20 you instructed forensics to do is take a photograph?

21 A That is correct.

22 MR. SCALZO: I don't have any further questions.

23 THE COURT: Thank you.

24 Step down.

25 MR. NEWKIRK: The State calls Eddie Hucks.

1 THE CLERK: Mr. Hucks, if you'll place your left hand
2 on the Bible and raise your right hand.

3 WHEREUPON,

4 EDDIE HUCKS,
5 after first having been duly sworn, testified as follows:

6 THE CLERK: Thank you.

7 You may be seated.

8 And state your full name for the record, please.

9 THE WITNESS: Eddie Hucks.

10 THE CLERK: Thank you.

11 DIRECT EXAMINATION

12 BY MR. NEWKIRK:

13 Q Mr. Hucks, where do you work?

14 A I work for the Department of Public Safety.

15 Q And what are your duties there?

16 A Right now, my duties are in records. But, at that
17 time, my duties was in property and evidence.

18 Q And where were you working on August -- in August of
19 2003?

20 A At that time, my duties were to receive evidence at
21 the police department -- or Sheriff's Office and secure it
22 and store it.

23 Q And can you explain to the jury what the property and
24 evidence room is?

25 A Yes. We have an office and we have storage areas all

1 behind it. What it is, during the day, property will be
2 received and stored. And the way it works during off
3 hours, our records clerk will receive it and store it in
4 secure locations until someone comes in at 7:00 and then
5 take it from the secured location and store it
6 permanently.

7 Q And where are drugs stored in property and evidence?

8 A The drugs are stored in the vault with money and
9 things like that, drugs and money.

10 Q And is that a secure location?

11 A Yes, it is.

12 Q And who has access?

13 A About four people that work there. That's all.

14 Q And were you working on August 4th of 2003?

15 A Yes.

16 Q Mr. Hucks, can you examine State's Exhibit Nos. 3, 5,
17 6, 7, 8, and 9, and the corresponding property and
18 evidence sheet?

19 A Okay.

20 Q Did you check these exhibits into property and
21 evidence?

22 A Yes, I did.

23 Q And when did you?

24 A I received -- on 8-4-03 at 11:38, I took the property
25 from the secure lockers and stored them.

1 Q Okay. And --

2 A Permanently.

3 Q And who did you take these from?

4 A I came in at -- well, it could have been taken -- the
5 person -- we have a person that comes in at 7:00 and will
6 empty the lockers. It could have been me that got the
7 property out or the person that came in at 7:00. I'm not
8 sure whether I worked that day.

9 Q But you did --

10 A Yes, I did. It did come from the secure locker.

11 Q And do you recognize -- there's another name on that
12 property and evidence sheet before yours?

13 A Yes, V.L. Rampey. She was the records clerk working
14 during the off hours. She received it and secured it
15 until we came in.

16 MR. NEWKIRK: Nothing further, Your Honor.

17 THE COURT: Mr. Scalzo.

18 MR. SCALZO: I don't have any questions of Mr. Hucks.

19 THE COURT: All right.

20 MR. NEWKIRK: I've got one more thing, Your Honor.

21 THE COURT: All right.

22 BY MR. NEWKIRK:

23 Q Mr. Hucks, I want to show you copies of property and
24 evidence sheets, do you recognize those?

25 A Yes, I do.

1 Q And what is listed on those property and evidence
2 sheets?

3 A Different amounts of money.

4 Q And does the property and evidence sheet indicate
5 that the money was checked into property and evidence?

6 A Yes, it was.

7 Q And what amounts?

8 MR. SCALZO: Objection.

9 THE COURT: What's your objection?

10 MR. SCALZO: Well, right now, that document is a
11 hearsay document.

12 THE COURT: I sustain the objection.

13 THE WITNESS: The amount is --

14 THE COURT: No, sir.

15 BY MR. NEWKIRK:

16 Q Mr. Hucks, on August 4th, did you check money into
17 property and evidence?

18 A Yes, I did.

19 Q What happens to money when it's checked into property
20 and evidence?

21 A Well, I received the money from the secured locker
22 from where it was first stored, and I took it and stored
23 it in the secured vault.

24 Q And what, generally, happens to money put in property
25 and evidence?

1 A The money will, generally, stay there until it can be
2 deposited in the bank and the check will be issued if it's
3 returned, or it can be deposited, or it can be returned to
4 the owner, one of those two things.

5 MR. NEWKIRK: Nothing further, Your Honor.

6 THE COURT: Anything, Mr. Scalzo?

7 CROSS-EXAMINATION

8 BY MR. SCALZO:

9 Q The only question I have out of curiosity, is there
10 any serial numbers written down or any documentation made
11 of the money?

12 A No.

13 MR. SCALZO: No further questions.

14 THE COURT: Thank you.

15 You can step down.

16 MR. NEWKIRK: Your Honor, the State calls James
17 Armstrong.

18 THE CLERK: Mr. Armstrong, place your left hand on
19 the Bible and raise your right hand.

20 WHEREUPON,

21 JAMES ARMSTRONG,

22 after first having been duly sworn, testified as follows:

23 THE CLERK: State your full name for the record,
24 please.

25 THE WITNESS: James Armstrong.

DIRECT EXAMINATION

1

2

BY MR. NEWKIRK:

3

Q Mr. Armstrong, where are you employed?

4

A I'm employed with the Greenville County Department of Public Safety, forensics division crime laboratory.

6

Q And how long have you worked there?

7

A Just two weeks shy of ten years.

8

Q And what's your current position?

9

A I'm a forensic chemist and firearms examiner.

10

Q And how long have you held this position?

11

A I've been a forensic chemist right at ten years, a firearms examiner for six years.

12

13

Q And what kind of training did you do to become a crime lab chemist?

14

15

A I have a Bachelor of Science Degree in chemistry from Erskine College. I've attended the forensic chemist seminars sponsored by the Drug Enforcement Administration in Washington DC. I trained in the area of drug identification approximately one year under the direction of a lab supervisor. I've attended numerous instrumental schools concerning the instruments I use in my analysis. And I've testified no fewer than 85 times in federal, state, and local courts as an expert in the area of drug identification.

16

17

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Q And do you still receive training on occasion?

1 A Yes, sir.

2 Q Okay. And in the years that you've been a chemist,
3 how many times have you been asked to analyze chemical
4 substances?

5 A Oh, thousands.

6 Q How many cases have you analyzed a chemical substance
7 that's turned out to be crack cocaine?

8 A Thousands.

9 Q And how many cases have you analyzed a substance
10 that's turned out to be marijuana?

11 A Thousands.

12 Q And how many times have you testified in court about
13 your findings?

14 A No fewer than 85.

15 Q Have you ever been qualified by a court to be an
16 expert in chemical analysis?

17 A All 85 times, yes, sir.

18 Q Have you ever not been qualified as an expert?

19 A No, sir.

20 MR. NEWKIRK: Your Honor, at this time, the State
21 would move to have Mr. Armstrong qualified as an expert in
22 the field of chemical analysis.

23 MR. SCALZO: No objection.

24 THE COURT: He's qualified.

25 Proceed.

1 BY MR. NEWKIRK:

2 Q Mr. Armstrong, were you asked to perform an analysis
3 in this case?

4 A Yes, sir, I was.

5 Q And how did you obtain the substances to analyze?

6 A All the evidence is stored in our property and
7 evidence room. My office is also in the basement of the
8 law enforcement center. I'd walk to the property and
9 evidence room and ask them to retrieve my box, which is --
10 they just keep the evidence in boxes for us. They
11 retrieve them from the vault, bring them to us at the
12 counter. We go through them and sign them out via the
13 property and evidence sheet.

14 Q And when did you check the substances out of property
15 and evidence?

16 A I received them on August the 11th of 2003, at 10:40
17 a.m.

18 Q And what is marked as State's Exhibit Nos. 3, 5, 6,
19 7, 8, and 9, is that what you checked out of property and
20 evidence?

21 A Yes, sir, it is.

22 Q And how do you know that's what you checked out of
23 property and evidence?

24 A All of the bags have my initials and the date which I
25 opened them that correspond with the case number along

1 with the property and evidence sheet with my printed name,
2 signature, and reason for obtaining the evidence.

3 Q And were all these bags sealed when you picked them
4 up?

5 A Yes, sir, they were.

6 Q And what do you do if the bag is not sealed?

7 A I make a notation on the bag as well as the property
8 sheet that one of the items or all of the items were not
9 sealed at the time of analysis.

10 Q And after you got this substance out of P & E, what
11 did you do with it?

12 A I took it back to my office to do the analysis, where
13 I take the item according to the property sheet inventory,
14 the first item, weigh it, write down my notes, perform my
15 analysis, and seal that one item up before I go to the
16 next item. And then I go on through the entire case until
17 it's completed.

18 Q And after you analyze this material, what do you do
19 with it?

20 A Once my analysis is completed, I generate a report.
21 The report is generated. The evidence is then returned to
22 the property and evidence room for storage.

23 Q And where did you return these items?

24 A To the property and evidence room.

25 Q And on what date did you return these items?

1 A I returned them on August 11th at 5:14 in the
2 afternoon.

3 Q And are all of those exhibits what you turned into
4 property and evidence?

5 A Yes, sir.

6 Q And are they in the same or substantially the same
7 condition as when you got them out of property and
8 evidence?

9 A Well, yes, sir, they are.

10 MR. NEWKIRK: Your Honor, at this time, the State
11 would offer State's Exhibit Nos. 3, 5, 6, 7, 8, and 9 into
12 evidence.

13 THE COURT: Any objection?

14 MR. SCALZO: No, Your Honor.

15 (WHEREUPON, State's Exhibit Nos. 3, 5, 6, 7, 8, and 9
16 were admitted into evidence.)

17 BY MR. NEWKIRK:

18 Q Mr. Armstrong, how did you analyze these substances?

19 A Depending on what the substance is depends on the
20 actual type of tests we have to perform. The substances
21 that are like plant material or suspected marijuana, those
22 are -- once the bag is cut open, we dump the plant
23 material into a weigh pan and weigh just the plant
24 material, not the package that's it in. We do a
25 microscopic examination to look for three of the four

1 plant characteristics. We then do a chemical spot test.
2 From that, we make a confirmation that it is marijuana or
3 not. And that item is completed. It is sealed back into
4 the container and then go to the next item.

5 Items such as rock substances, which is suspected
6 crack cocaine, those items, once again, are cut open,
7 inventoried, and weighed. And once the weight is done, we
8 do a chemical spot test. That spot test gives us an idea
9 of what we may or may not have. From there, I determine
10 which instrument to go to. Then I perform an instrumental
11 analysis for confirmation.

12 Q Can you tell the jury the results of your analysis?

13 A Yes, sir, I can. On State's Exhibit No. 3, which is
14 my Item G, the vial container of rock substance was found
15 to be crack cocaine with a weight of 1.42 grams. State's
16 Exhibit No. 5, which is Item C-1, is a bag containing ten
17 bags of plant material found to be marijuana with a weight
18 of 27.56 grams. State's Exhibit No. 6, which is described
19 as item C-2, I found it to be marijuana with a weight of
20 113.68 grams. State's Exhibit No. 7 is my Item D-1, which
21 is a bag containing a rock substance. I found it to be
22 crack cocaine with a weight of 2.31 grams. State's
23 Exhibit No. 8, which is my Item A, which is a bag
24 containing a rock substance. I found it to be crack
25 cocaine with a weight of 23.78 grams. And State's Exhibit

1 No. 9 is my Item B, which is a bag containing plant
2 material. I found it to be marijuana with a weight of
3 17.19 grams.

4 MR. NEWKIRK: Nothing further, Your Honor.

5 THE COURT: Mr. Scalzo.

6 MR. SCALZO: I don't have any questions for
7 Mr. Armstrong.

8 THE COURT: Thank you.

9 You can step down.

10 MR. NEWKIRK: The State calls Sergeant Dana Lewis.

11 THE CLERK: Sergeant Lewis, would you place your left
12 hand on the Bible and raise your right hand.

13 WHEREUPON,

14 DANA ARMSTRONG LEWIS,
15 after first having been duly sworn, testified as follows:

16 THE CLERK: Thank you

17 You may be seated.

18 State your full name for the record, please.

19 THE WITNESS: Dana Armstrong Lewis.

20 THE CLERK: Thank you.

21 DIRECT EXAMINATION

22 BY MR. NEWKIRK:

23 Q Sergeant Lewis, where do you work?

24 A Greenville County Detention Center.

25 Q And how long have you worked at the detention center?

1 A It will be 12 years in April.

2 Q And what are your current duties at the detention
3 center?

4 A I'm the population management sergeant. I am the
5 liaison between the court system and the inmates. And
6 part of my duties are dealing with the jail records for
7 each of the inmates.

8 Q And prior to becoming a sergeant, did you have other
9 duties in the detention center?

10 A Yes. I was a booking corporal. I worked in booking
11 for four years before being promoted to sergeant.

12 Q And are you familiar with the day-to-day records
13 maintained by the detention center?

14 A Yes.

15 Q Okay. And as part of your duties as a sergeant at
16 the detention center, do you have custody, supervision,
17 and control over records maintained by the detention
18 center?

19 A Yes.

20 Q And are you familiar with those records?

21 A Yes.

22 Q And do you have access to those records?

23 A Yes.

24 (WHEREUPON, State's Exhibit No. 11 was marked for
25 identification only.)

1 BY MR. NEWKIRK:

2 Q Sergeant Lewis, let me show you State's Exhibit No.

3 11. Do you recognize State's Exhibit No. 11?

4 A Yes.

5 Q And is this document maintained in the normal course
6 of business at the detention center?

7 A Yes.

8 Q And is it normal practice of the detention center to
9 create documents such as these?

10 A Yes.

11 Q And, again, as part of your role as a sergeant at the
12 detention center, do you exercise custody and control and
13 maintain records such as that?

14 A Yes.

15 MR. NEWKIRK: Your Honor, at this time, I would offer
16 State's Exhibit No. 11 into evidence.

17 THE COURT: What is it?

18 BY MR. NEWKIRK:

19 Q Sergeant Lewis, what is State's Exhibit No. 11?

20 A This is an inmate booking report. Every inmate that
21 gets booked into the jail, after we enter all of their
22 data, it's printed out and is placed in their record. We
23 commonly call it the inmates cover sheet. Because it
24 gives all their information on two sheets of paper instead
25 of having -- because you may have five or six documents

1 that all get compiled into the computer system. And this
2 is the printout from that computer system.

3 THE COURT: Any objection?

4 MR. SCALZO: I do, Your Honor. And we may have to
5 put some items on the record.

6 THE COURT: All right. Take the jury out, please.

7 (WHEREUPON, the jury was excused from open court at
8 approximately 3:50 p.m.)

9 THE COURT: All right. Mr. Scalzo.

10 MR. SCALZO: Thank you, Your Honor.

11 There's some foundational problems with the record
12 itself and it primarily comes from how the State intends
13 to use it. Information on that record that they -- that
14 the State intends to use is the address. And while
15 Sergeant Lewis is in charge of the actual record, she's
16 not the person who took the information. So, in essence,
17 we have a double hearsay issue.

18 They may satisfy the single hearsay issue of the
19 actual document by the business record, which is where
20 they're going, but what they're offering is that very
21 specific piece of evidence taken not by Sergeant Lewis,
22 but by a different person. And that very specific piece
23 of evidence, the address, that they're then intending to
24 use for the truth of the matter --

25 THE COURT: How about that, Solicitor?

1 MR. NEWKIRK: Your Honor, it's my contention that
2 under the business records exception, this would come in
3 as an exception to hearsay. And I think that it's
4 documents like these that the business records exception
5 are made and has been created for.

6 There's no opinions or anything like that stated in
7 this record. This record was maintained by the law
8 enforcement center -- or by the detention center. She's
9 got custody of it. She knows it's there. And it's got
10 something with an address on it.

11 MR. SCALZO: And, Your Honor, I believe that Page 400
12 where the business record exception is --

13 THE COURT: What rule?

14 MR. SCALZO: 803(6), I believe is the section they're
15 relying on. And in that section, "One of the
16 qualifications, unless a source of information or method
17 or circumstances in preparation in the case, lack of
18 trustworthiness," but that's the business record itself.
19 The information contained in the business record could be
20 hearsay. Some information may not be hearsay and other
21 information could be a double hearsay problem. And that's
22 a double hearsay problem that we have in this case.

23 They're trying to prove residence by purely the
24 existence of that information. It would be different, I
25 guess, if the person who's taking the information is

1 testifying how they took it and that this record is for
2 the corroboration of the accuracy of what they've taken.
3 But they're going a step further and trying to prove
4 actual residence based on information in what is a hearsay
5 document unless it's satisfied by other foundational
6 evidence.

7 So the foundational evidence of the document may not
8 be hearsay, but what's in the document could be hearsay.
9 And I contest --

10 THE COURT: Let me read the exception.

11 MR. SCALZO: Thank you, Your Honor.

12 THE COURT: All right. Mr. Scalzo, based on what I
13 have heard so far, there's no way I can hold that this
14 document indicates a lack of trustworthiness. It contains
15 no subjective opinion or judgment. The testimony is that
16 it was kept in the course of regular conducted business.

17 So I would overrule your objection and I would admit
18 it. I think it complies with the exceptions to the
19 hearsay rule.

20 MR. SCALZO: And, Your Honor, can I get a
21 clarification in terms of how it may be used? Because
22 part of my point is not only as a business record, but
23 there's a hearsay problem within the business record.
24 What they're offering it as is this is proof of where he
25 resided. It would be different than saying this is a

1 notation that says this is what the address is.

2 THE COURT: All right. You've made your point, but
3 you're objection is overruled.

4 MR. SCALZO: Thank you.

5 THE COURT: Bring the jury in.

6 (WHEREUPON, the jury came into open court at
7 approximately 3:57 p.m.)

8 THE COURT: All right. Solicitor.

9 It's admitted in evidence.

10 (WHEREUPON, State's Exhibit No. 11 was admitted into
11 evidence.)

12 CONTINUED DIRECT EXAMINATION

13 BY MR. NEWKIRK:

14 Q Sergeant Lewis, can you tell the jury what State's
15 Exhibit No. 11 is?

16 A It is an inmate booking report.

17 Q And what kind of information does State's Exhibit No.
18 11 contain?

19 A It contains their personal information, name,
20 address, social security number, date of birth, any
21 aliases, their next of kin. We enter that information.
22 It contains their charges, what the bond amounts are,
23 which judge arraigned them. It also contains if there's
24 any alias. All the general information on all the
25 records, the documents that we receive from the arresting

1 agency and from the judicial services give those documents
2 to us. All that information is entered into the computer
3 and it prints out a record. And this is all the
4 information that is entered and printed on this report.

5 Q And does State's Exhibit No. 11 have a name on it?

6 A Yes.

7 Q And what name is that?

8 A Edward Andrell Whitner.

9 Q And what date is listed on this document?

10 A The booking date?

11 Q Yes.

12 A 8-2-03.

13 Q Does this document have an address on it?

14 A Yes.

15 Q And what is that address?

16 A [REDACTED] Greenville, South Carolina, 29609.

17 MR. NEWKIRK: Nothing further, Your Honor.

18 THE COURT: Mr. Scalzo.

19 MR. SCALZO: May it please the Court, Your Honor?

20 CROSS-EXAMINATION

21 BY MR. SCALZO:

22 Q Sergeant Lewis, as the Solicitor had asked you
23 earlier, part of your responsibility is to be in charge of
24 the actual records?

25 A Yes, sir.

1 Q You have sort of a supervisory role over the records?

2 A Yes, sir.

3 Q You're not necessarily the record keeper. You didn't
4 necessarily make the notations on the record?

5 A Correct.

6 Q Or create the record itself?

7 A Correct.

8 Q And in this case, you were not the person who entered
9 the information that created this booking sheet?

10 A That's correct.

11 Q Your job was you were -- the Solicitor asked you to
12 bring that record into court?

13 A Yes, sir.

14 Q So you went and retrieved the record?

15 A Right.

16 Q That had been created by somebody else?

17 A Correct.

18 MR. SCALZO: I don't have any further questions.

19 THE COURT: You can step down.

20 MR. NEWKIRK: The State calls Caroline Morris.

21 THE CLERK: Ms. Morris, place your left hand on the
22 Bible and raise your right hand.

23 WHEREUPON,

24 CAROLINE MORRIS,

25 after first having been duly sworn, testified as follows:

1 THE CLERK: Thank you.

2 You may be seated.

3 And state your full name for the record, please.

4 THE WITNESS: Caroline Morris.

5 THE CLERK: Thank you.

6 DIRECT EXAMINATION

7 BY MR. NEWKIRK:

8 Q Ms. Morris, where do you work?

9 A The Greenville County Clerk of Court's Office
10 criminal records.

11 Q And how long have you worked at the Clerk's Office?

12 A 31 years.

13 Q And what is your job at the Clerk's Office?

14 A Administrative assistant.

15 Q And are you familiar with the day-to-day records
16 maintained by the Clerk of Court's Office?

17 A Yes, I am.

18 Q And as a part of your job at the Clerk of Court's
19 Office, do you have custody, supervision, and control over
20 documents?

21 A We do.

22 Q And are you familiar with the records that are
23 maintained?

24 A Yes.

25 Q Do you have access to the records that are maintained

1 at the Clerk's Office?

2 A Yes.

3 (WHEREUPON, State's Exhibit No. 12 was marked for
4 identification only.)

5 BY MR. NEWKIRK:

6 Q Let me show you what's been marked as State's Exhibit
7 No. 12. Do you recognize State's Exhibit No. 12?

8 A Yes.

9 Q And is this document maintained in the normal course
10 of business conducted by the Greenville County Clerk's
11 Office?

12 A Yes, it is.

13 Q And is it the normal practice of the Clerk's Office
14 to maintain these types of documents?

15 A Yes, it is.

16 Q And as a part of your job at the Clerk's Office, do
17 you maintain custody, supervision, and control over
18 documents such as State's Exhibit No. 12?

19 A We do.

20 Q And is State's Exhibit No. 12 a public record?

21 A It is.

22 Q And State's Exhibit No. 12, has it been certified?

23 A Yes, it has.

24 Q And what is State's Exhibit No. 12?

25 A It is a bail proceeding form two.

1 MR. NEWKIRK: Your Honor, the State would seek to
2 admit this into evidence.

3 THE COURT: Any objection?

4 MR. SCALZO: Yes, on the same grounds.

5 THE COURT: Overruled.

6 Put it in.

7 (WHEREUPON, State's Exhibit No. 12 was admitted into
8 evidence.)

9 BY MR. NEWKIRK:

10 Q And, again, Ms. Morris, can you tell the jury what
11 State's Exhibit No. 12 is?

12 A It is an order specifying methods and conditions of
13 release, and it is the bond form on Edward Whitner.

14 Q And, again, what was the name on it?

15 A Edward Whitner.

16 Q And can you read the sentence that is marked number
17 four, right there?

18 A That the Defendant will notify the Court promptly if
19 he changes his address from the one contained in this
20 order and he will comply with those conditions described
21 on the reverse side which are marked.

22 Q And what -- is there a signature on the document?

23 A The signature of the judge.

24 Q Is there any other signatures on that document?

25 A Of the Defendant.

1 Q And what signature is that?

2 A Edward Whitner.

3 Q Is there an address on the document?

4 A [REDACTED] Greenville.

5 Q And what date is that?

6 A 11-21-03.

7 MR. NEWKIRK: Thank you.

8 Nothing further.

9 THE COURT: Mr. Scalzo.

10 MR. SCALZO: May it please the Court?

11 CROSS-EXAMINATION

12 BY MR. SCALZO:

13 Q Ms. Morris, you, actually, work in the courthouse?

14 A Yes, sir.

15 Q And you're not present when this document is filled
16 out by anybody?

17 A No.

18 Q You get the document from some other agency?

19 A I do.

20 Q And the agency you get it from, is it, actually, from
21 the judge who issues the bond?

22 A No.

23 Q That you receive it from?

24 A Well, at times, yes.

25 Q Are you able to tell from this document where exactly

1 you received it from?

2 A I believe Judge Cagle's office.

3 Q Okay. So a magistrate forwards their copy or a copy
4 of this document to criminal records?

5 A Uh-huh.

6 Q And criminal records maintains it?

7 A That's true.

8 Q And when the Solicitor asked you -- subpoenaed you to
9 come in and bring this record with you, you went to the
10 files in the criminal records department?

11 A Yes.

12 Q And retrieved it?

13 A Uh-huh.

14 Q And then brought that with you?

15 A Uh-huh.

16 Q And so you're not present when this is filled out?

17 A No.

18 Q You will not be able to tell us whether the items are
19 filled out by the judge, the police officer, Mr. Whitner,
20 or anything?

21 A No.

22 Q You indicated that there was a signature on the sheet
23 of a judge; isn't that right, in the middle?

24 A Uh-huh.

25 Q And there's a date next to that, that's November

1 21st, 2003?

2 A Uh-huh.

3 Q And that's, obviously, several months after August
4 2nd, 2003; correct?

5 A Right.

6 Q And if I can retrieve our last exhibit, I believe,
7 that's in front of you. That's the booking report. If
8 you'll look on there, the booking report has a section
9 in there that has the date 11-21-2003; isn't that
10 correct?

11 A (There was no response.)

12 Q If you'll look sort of in the middle of the page.

13 A Yes.

14 Q It says, arrest August 2nd, 2003?

15 A Uh-huh.

16 Q And then it says, RR 11-21-2003; is that correct?

17 A That's right.

18 Q Okay. And as you described the sheet that you
19 brought with you today, that's a bond sheet?

20 A That's right.

21 Q That's for when somebody is released from jail, this
22 is information regarding their release?

23 A That's true.

24 MR. SCALZO: I don't have any further questions.

25 THE COURT: Thank you.

1 You can step down.

2 MR. NEWKIRK: Your Honor, may we approach?

3 THE COURT: Sure.

4 (WHEREUPON, a bench conference was held.)

5 THE COURT: Ladies and gentlemen, normally, the State
6 would conclude all of its testimony before the Defense
7 presents its testimony, if any. Mr. Scalzo has two
8 witnesses here who cannot be here tomorrow and the State
9 possibly may have maybe one more witness before it
10 concludes its case, so they have agreed that we will take
11 these two witnesses out of order and will allow them -- to
12 accommodate them and will allow them to testify at this
13 time.

14 MR. SCALZO: Thank you, Your Honor.

15 The Defense calls Mr. Dillard to the stand.

16 THE CLERK: Come right up here to the Bible.

17 Place your left hand on the Bible and raise your
18 right hand.

19 WHEREUPON,

20 HAROLD LAWRENCE DILLARD,
21 after first having been duly sworn, testified as follows:

22 THE CLERK: Thank you.

23 You may be seated.

24 State your full name for the record, please.

25 THE WITNESS: Harold Lawrence Dillard.

1 THE COURT: Mr. Dillard, is your cell phone off?

2 THE WITNESS: Yes, sir.

3 THE COURT: Good.

4 Thank you.

5 DIRECT EXAMINATION

6 BY MR. SCALZO:

7 Q Mr. Dillard, do you live here in Greenville County?

8 A I do.

9 Q And do you own some properties in Greenville County?

10 A I do.

11 Q Do you rent those properties out?

12 A I do.

13 Q Do you own [REDACTED] here in Greenville County?

14 A Yes, the corporation does, yes.

15 Q Are you the part owner of that corporation?

16 A Yes.

17 Q In 2003, specifically, in August of 2003, was your
18 corporation an owner of [REDACTED]

19 A Yes, sir.

20 Q Are you in charge of the records kept by your
21 corporation regarding properties?

22 A Well, I'm not the president anymore. My son is the
23 president now. I'm the vice president. But I do keep all
24 the records as far as the collecting of the rent.

25 Q Did I ask you to bring a record with you today?

1 A Yes, you did. And I have it here in front of me.

2 Q What record did I ask you to bring with you?

3 A A record on [REDACTED] Greenville.

4 Q And is that the record you brought with you?

5 A Yes.

6 Q That record, is that created by you or somebody in
7 your corporation?

8 A By me.

9 Q And is that record created and kept in the regular
10 course of your business activities?

11 A It is.

12 Q Is it kept as you record information progressively?

13 A Yes, it does, yes.

14 MR. SCALZO: At this time, Your Honor, we'd offer
15 Defendant's Exhibit No. 1.

16 MR. NEWKIRK: No objection.

17 THE COURT: Without objection, put it in.

18 (WHEREUPON, Defendant's Exhibit No. 1 was marked for
19 identification and admitted into evidence.)

20 MR. SCALZO: Is there any objection to using the
21 copies?

22 MR. NEWKIRK: No objection.

23 BY MR. SCALZO:

24 Q Referring to Defendant's Exhibit No. 1, Mr. Dillard,
25 is there an entry in that document for [REDACTED]

1 A Yes, there is, at the very top of the page.

2 Q In that entry, what information does it have on
3 there?

4 A It has the address and the tenant's name and the
5 amount of money that the tenant pays us. And --

6 Q Did -- I'm sorry. Finish what you were saying.

7 A As I receive the money each month, I apply it at
8 the -- it's marked off each month at the very top of the
9 page. And as I collect January's rent, I put it here the
10 amount of money I've received.

11 Q Okay. Before we talk a little bit more about the
12 rent, there's a box on there that indicates who the renter
13 is, isn't there?

14 A Correct, right here at the very beginning.

15 Q Who is the renter?

16 A Amanda McCarroll.

17 Q Are you looking at [REDACTED]

18 A I am.

19 Q Teresa Smiley is listed on there; is that correct?

20 A Teresa Smiley lived there prior to Amanda McCarroll.
21 She moved there in January because, you see, I made these
22 up prior to January.

23 Q I understand.

24 A And then I crossed it out and wrote her name in.

25 Q So when Ms. Smiley moved out, Ms. McCarroll --

1 A Moved in.

2 Q -- moved in? Okay.

3 A Yes. If I had the previous year with me, you could
4 see that she moved out and the property stayed vacant for
5 three months.

6 Q Okay.

7 A Because I checked it before I came.

8 Q And in 2003, Ms. Smiley was the renter?

9 A No.

10 Q She was not the renter in 2003?

11 A No. She was the renter in 2002.

12 Q In 2002?

13 A At the beginning of 2003, Amanda McCarroll started
14 renting there, in January.

15 Q Okay. The documents have rent stopping in September
16 of 2003; isn't that correct?

17 A Correct.

18 Q And there is a couple of months after that where
19 there are no entries?

20 A Correct.

21 Q Until the end of 2003?

22 A Right.

23 Q Does that indicate somebody stopped living there in
24 September of 2003?

25 A That, I don't remember. I guess it does because

1 there's no rent collected in October, November, and
2 December. So I assume she moved out then. I don't
3 remember, to be honest with you.

4 Q When Ms. Smiley was living there, who else was living
5 there with her, to your knowledge?

6 A I really couldn't answer that question. I don't
7 know.

8 Q Was anybody other than Ms. Smiley supposed --

9 A Her family, her children. But I can't tell you if
10 anybody else was living there or not. I don't know.

11 Q Okay. Was there anybody else that was supposed to be
12 living there other than Ms. Smiley and her children?

13 A No, definitely not.

14 MR. SCALZO: No further questions.

15 THE COURT: All right. Solicitor.

16 CROSS-EXAMINATION

17 BY MR. NEWKIRK:

18 Q Mr. Dillard, so Teresa Smiley lived at [REDACTED]
19 [REDACTED] in 2003; correct?

20 A No, sir.

21 Q Okay. But Teresa Smiley did live there at some
22 point?

23 A In 2002.

24 Q Okay. And you just testified that you didn't know if
25 anybody else lived there with her; is that correct?

1 A To my knowledge, no.

2 Q Okay. Just prior when Mr. Scalzo was questioning
3 you, you said you couldn't answer that question?

4 A I really can't answer the question. I don't know.
5 But they wasn't supposed to be living there.

6 Q Okay. So somebody else wasn't supposed to be living
7 there, but you don't know if somebody else was, actually,
8 living there?

9 A That's true.

10 Q Okay. And how did tenants pay rent to you?

11 A How did they pay rent to me?

12 Q Yeah.

13 A They mailed me a check each month.

14 Q Okay. So when Ms. Smiley paid her rent, she mailed
15 you a check?

16 A Correct.

17 Q You didn't go to the house and pick it up?

18 A No, I do not.

19 MR. NEWKIRK: Nothing further.

20 THE COURT: Thank you.

21 You can step down.

22 MR. SCALZO: Your Honor, the Defense calls Tad Allen.

23 THE CLERK: Mr. Allen, would you step up here and
24 place your left hand on the Bible and raise your right
25 hand.

1 WHEREUPON,

2 TAD ALLEN,

3 after first having been duly sworn, testified as follows:

4 THE CLERK: Thank you.

5 You may be seated.

6 State your full name for the record, please.

7 THE WITNESS: Tad Allen.

8 DIRECT EXAMINATION

9 BY MR. SCALZO:

10 Q Mr. Allen, can you tell the jury where you work?

11 A Duke Power.

12 Q Here in South Carolina?

13 A Here in Greenville, yes, sir.

14 Q How long have you been there?

15 A I've been at Duke right at 11 years.

16 Q And what's your job there now?

17 A Currently, I'm executive response.

18 Q What does that mean? What does that entail?

19 A I respond to any written or telephone correspondence
20 from customers that's directed toward the president or one
21 of the executives of the company.

22 Q In your role and your position right now, are you
23 responsible for any records?

24 A Sure, yes, sir.

25 Q Did I send a request to Duke Power for records?

1 A To Duke Power, yes, sir.

2 Q Did you respond to that request?

3 A I am responding now, yes.

4 Q Did I ask you to do some research regarding the
5 address of [REDACTED] in Greenville County?

6 A Yes, sir.

7 Q Did you do that research?

8 A Yes, sir.

9 Q Did you create a document after you did that
10 research?

11 A Actually, the research was done for me. But I did
12 verify the research was correct, yes.

13 Q Okay. Was a document created with that information?

14 A Yes, sir.

15 Q Do you have that document?

16 A I do.

17 MR. SCALZO: Your Honor, I'd like to have this marked.

18 THE COURT: Any objection?

19 MR. NEWKIRK: No objection, Your Honor.

20 (WHEREUPON, Defendant's Exhibit No. 2 was marked for
21 identification only.)

22 BY MR. SCALZO:

23 Q I'm going to show you what's been marked as
24 Defendant's Exhibit No. 2. Would you look at that? Do
25 you recognize that document?

1 A Yes, sir.

2 Q Without telling us what's in it, just tell us what it
3 is.

4 A It's a document that indicates the -- who was
5 responsible for power at a given location for a specified
6 period of time.

7 Q Does that -- the information contained in that
8 document, is that the information we were just talking
9 about as far as your research?

10 A Yes, sir. That's correct.

11 Q Was that information or that document created in the
12 regular course of your business?

13 A Yes.

14 Q Was that document created at the time that that
15 information was collected?

16 A It's, actually, an ongoing -- it's an ongoing billed
17 account, but this is a summation of that.

18 Q Okay. Are you saying that the information that's
19 contained in there is pulled from other information that
20 you already have?

21 A Yes.

22 MR. SCALZO: Your Honor, at this time, the Defense
23 would offer Defendant's Exhibit No. 2.

24 THE COURT: Any objection?

25 MR. NEWKIRK: No objection.

1 THE COURT: Without objection.

2 (WHEREUPON, Defendant's Exhibit No. 2 was admitted
3 into evidence.)

4 THE COURT: Has it been marked?

5 MR. SCALZO: It has been, Your Honor.

6 BY MR. SCALZO:

7 Q Can you tell the jury, who was the customer for Duke
8 Power at [REDACTED] in 2003?

9 A There were, actually, two customers of record.

10 Q Who was the first one?

11 A We have Teresa Smiley.

12 Q Can you tell me the dates of her being a customer?

13 A She was the customer of record on January 1, 2003,
14 and she ceased responsibility for the bill on September
15 the 8th of 2003.

16 Q Who picked up the service after that in 2003?

17 A Betty McKinney in October of 2003 and it was still in
18 her name on December 31st of 2003.

19 MR. SCALZO: Thank you.

20 No further questions at this time.

21 THE COURT: All right. Solicitor.

22 CROSS-EXAMINATION

23 BY MR. NEWKIRK:

24 Q Mr. Allen, so this document states that Teresa Smiley
25 was a Duke Power customer starting January 1st, 2003,

1 until September 8th, 2003; correct?

2 A Well, not necessarily beginning on January 1. The
3 information that we received was they wanted to know who
4 the customer of record was for the entire year of 2003.
5 So she could have been a customer prior to January 1.

6 Q Okay. But in 2003, Teresa Smiley was the customer of
7 record?

8 A Yes, that's correct.

9 Q And so Teresa Smiley is who would -- who signed up
10 for the power?

11 A That would be correct.

12 Q And she's the one that pays the bills?

13 A Well, we were billing her, but I don't know who paid
14 for the bills, but, yes.

15 Q So you don't know who paid the bills?

16 A That's correct.

17 Q And you don't have any idea if anybody else lived in
18 the house?

19 A No, sir.

20 Q Do you have any idea if Ms. Smiley, actually, lived
21 in the house?

22 A No.

23 Q And if Ms. Smiley did live in the house, you would
24 have no idea of any other individuals who lived in the
25 house; correct?

1 A That's correct. We ask when applications are taken
2 if there are any other adults. But if they indicate none,
3 then that's what we would have.

4 MR. NEWKIRK: Nothing further, Your Honor.

5 THE COURT: Thank you.

6 Step down.

7 MR. SCALZO: Your Honor, that's all.

8 THE COURT: All right. Now, ladies and gentlemen,
9 we'll suspend for the day. We'll pick back up at 9:00
10 tomorrow morning.

11 Now, when you leave, please, remember, do not talk
12 about this case among yourselves or with anyone else.
13 This includes even members of your own family. You can
14 tell family members that you're serving on this case, what
15 kind of case it is, but don't discuss the facts with them
16 or, as I said, anyone else.

17 If anybody contacts you and tries to talk to you
18 about this case, get their names and addresses and report
19 that to me. Please keep your badges on and have them on
20 tomorrow morning when you report back so that everyone
21 involved with this case will know that you're a juror and
22 they shouldn't discuss it in your presence.

23 See you back at 9:00 in the morning. Please be
24 prompt.

25 Thank you.

1 (WHEREUPON, the jury was excused from open court at
2 approximately 4:24 p.m.)

3 THE COURT: All right. See you all in the morning.

4 (WHEREUPON, the proceedings were concluded at
5 approximately 4:24 p.m., to be reconvened on
6 Thursday, March 9, 2006.)

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1 THURSDAY, MARCH 9, 2006

2
3 THE COURT: Solicitor, are you ready to proceed?

4 MR. NEWKIRK: Yes, sir.

5 We have one more witness, Your Honor.

6 THE COURT: Okay. Bring the jury in.

7 Hold on a minute. Hold on a minute.

8 Will counsel approach for just a minute, please?

9 (WHEREUPON, a bench conference was held.)

10 THE COURT: Bring the juror in, please.

11 (Pause.)

12 THE COURT: Mr. Glass, for the record and for the
13 benefit of the attorneys, will you tell me just what you
14 told me out in the hallway?

15 JUROR #61, ERIC G. GLASS: I recognized one of the
16 witnesses, but not by the name. Ms. or Mrs. Dana -- I
17 think she was Sergeant Lewis. I knew her from high
18 school. Her name was Dana Armstrong, I believe, at the
19 time. I didn't recognize her immediately. It took me
20 some time to recognize her, but it's been some 16 years.

21 THE COURT: I asked you and I'll ask you again, the
22 fact that you went to school with her and knew her 16
23 years ago, would that in any way interfere with your
24 ability to be a fair and impartial juror in this case?

25 JUROR #61, ERIC G. GLASS: No, sir.

1 THE COURT: Good. Thank you so much.

2 I appreciate it.

3 Bring the jury in, please.

4 (WHEREUPON, the jury came into open court at
5 approximately 9:20 a.m.)

6 THE COURT: Good morning.

7 I'm sorry I held you up this morning. We were
8 handling some matters unrelated to this case and that is
9 the reason for the delay.

10 All right. Solicitor, you may proceed.

11 MR. NEWKIRK: Your Honor, the State calls Teresa
12 Smiley.

13 THE CLERK: Ms. Smiley, place your left hand on the
14 Bible, please, and raise your right hand.

15 WHEREUPON,

16 TERESA SMILEY,
17 after first having been duly sworn, testified as follows:

18 THE CLERK: Thank you.

19 You may be seated.

20 And state your full name for the record, please.

21 THE WITNESS: Teresa Smiley.

22 THE CLERK: Thank you.

23 DIRECT EXAMINATION

24 BY MR. NEWKIRK:

25 Q Ms. Smiley, what do you do for a living?

1 A I'm a first assistant store manager at McDonald's.

2 Q How old are you?

3 A 39.

4 Q And do you have any kids?

5 A I have three.

6 Q And, Ms. Smiley, have you been convicted of passing
7 fraud checks before?

8 A Yes, sir.

9 Q Do you know the Defendant, Edward Whitner?

10 A Yes, sir.

11 Q And how do you know Mr. Whitner?

12 A We used to go together.

13 Q And how long have you known him?

14 A About -- as of now, probably like five years.

15 Q And were the two of you in a relationship?

16 A Yes, sir.

17 Q Has Mr. Whitner ever lived with you?

18 A Yes, sir.

19 Q And where did you live on August 2nd of 2003?

20 A [REDACTED]

21 Q And who lived there with you?

22 A Me, Edward, and my three kids.

23 Q And as of August 2nd, 2003, how long had Mr. Whitner
24 lived at [REDACTED]

25 A Excuse me?

- 1 Q How long had Mr. Whitner lived at [REDACTED]
- 2 A As of August the 2nd?
- 3 Q Yes.
- 4 A Almost a year.
- 5 Q Did Mr. Whitner sleep at [REDACTED]
- 6 A Yes, sir.
- 7 Q And where did he sleep?
- 8 A In the back bedroom with me.
- 9 Q Did Mr. Whitner have a key to the house?
- 10 A Yes, sir.
- 11 Q And did he come and go as he pleased?
- 12 A Yes, sir.
- 13 Q Did he have control over the house?
- 14 A Basically.
- 15 Q And did you pay rent at [REDACTED]
- 16 A Yes, sir.
- 17 Q Did Mr. Whitner pay any rent?
- 18 A He helped out occasionally, if I needed help.
- 19 Q Did you have a job on August 2nd, 2003?
- 20 A I had two jobs.
- 21 Q Where did you work?
- 22 A I worked at Ryan's Steak House on Laurens Road, and I
- 23 worked at KFC on Cedar Lane Road.
- 24 Q When Mr. Whitner lived with you, did he have a job?
- 25 A No, sir.

1 Q Were you at the house on August 2nd of 2003?

2 A Yes, sir.

3 Q Was Mr. Whitner at the house on August 2nd of 2003?

4 A Yes, sir.

5 Q Were you there when the police arrived?

6 A Yes, sir.

7 Q And was an Aaron Garrison at the house?

8 A Yes, sir.

9 Q Who is Aaron Garrison, first of all?

10 A He lived like three doors up from us with his mother.
11 He had just came and knocked on the door. And I was in
12 the bathroom.

13 Q How long had Aaron Garrison been there before the
14 police came?

15 A I'd say a minute and a half.

16 Q And tell me what happened when the police entered the
17 residence.

18 A Well, the police came in as we was playing cards.
19 And, actually, I was going to the bathroom and I heard a
20 knock on the door. Edward was in the living room and his
21 brother and his other brother had done left. So there
22 wasn't nobody in the house but me, him, and my two kids.
23 Because my other son was staying with a little friend.

24 So when Aaron came in, I heard a big boom at the
25 door. And I had just pulled my pants down to use the

1 bathroom. I come back out of the bathroom and Aaron was
2 right there. And when he was coming through the kitchen,
3 I was coming out of the bedroom and he threw a tube. And
4 that's when the police came in and said, get down, get
5 down. So we all like got down on the floor.

6 Q Did you know that there were drugs in your house on
7 August 2nd of 2003?

8 A Yes, sir.

9 Q Did you know the exact location of the drugs?

10 A No, sir. I didn't know the exact location, but I
11 knew there were drugs in the house.

12 Q Were those your drugs?

13 A No, sir.

14 Q And whose drugs were those?

15 A They belonged to Edward.

16 Q Besides Edward Whitner, did anybody else live in the
17 house?

18 A My three kids.

19 Q Were you charged as a result of this incident?

20 A Yes, sir. I asked them why did they charge me. And
21 they said because I was the owner of the house.

22 Q And have you pled guilty to these charges?

23 A Yes, sir.

24 Q Have you been sentenced?

25 A No, sir.

1 Q Has the State made any promises to you in exchange
2 for your testimony?

3 A No, sir.

4 MR. NEWKIRK: Nothing further, Your Honor.

5 THE COURT: Mr. Scalzo.

6 MR. SCALZO: May it please the Court?

7 CROSS-EXAMINATION

8 BY MR. SCALZO:

9 Q You rented [REDACTED] correct?

10 A Yes, sir.

11 Q And you rented from Mr. Dillard?

12 A Yes, sir.

13 Q And you had power, electricity?

14 A Yes, sir.

15 Q And the account with Duke Power was in your name;
16 correct?

17 A Yes, sir.

18 Q You also had water?

19 A Yes, sir.

20 Q The account was in your name?

21 A Yes, sir. Everything was in my name.

22 Q Everything was in your name?

23 A Well, I was living there first.

24 Q Okay. And -- well, let's talk about the fraud
25 checks. The Solicitor asked you if you were convicted of

1 some fraud checks; is that correct?

2 A Yes, sir.

3 Q And, in fact, there are multiple times that you were
4 convicted of fraudulent checks; isn't that correct?

5 A Yes, sir, like 15 years ago.

6 Q In 1990; is that right?

7 A Yes, sir. That's about right.

8 Q And there were 21 counts, does that sound accurate?

9 A I guess, if that's what the papers say. I can't
10 count how many it was.

11 Q Now, you said that you were in the bathroom and the
12 police came in?

13 A No, sir. I said I was coming out of the bathroom.

14 Q You were coming out of the bathroom when the police
15 came in?

16 A When Aaron was at the door -- Aaron had come in
17 first. And he was out there about a minute and a half.
18 And then the police came in. And then he told everybody
19 to get down on the floor.

20 Q Okay. The same police officer that's telling Aaron
21 to get down on the floor is telling everybody to get down
22 on the floor?

23 A He didn't say no specific names. He said, everybody
24 get down on the floor.

25 Q But it was that same police officer?

1 A Uh-huh.

2 Q You said, at the time, you were working at Ryan's and
3 KFC; is that right?

4 A Yes, sir.

5 Q Did you bring any pay stubs with you today?

6 A No, sir.

7 Q Any records about your jobs?

8 A Well, KFC had closed down. And then I had a pay stub
9 in my pocketbook, at that time, when the police went in my
10 pocketbook.

11 Q But you don't have any of that with you today?

12 A No, sir.

13 Q Okay. You said that you knew the drugs were in your
14 house; correct?

15 A Yes, sir.

16 Q But they're not yours?

17 A Yes, sir.

18 Q That's what you testified to?

19 A Yes, sir.

20 Q And you pled guilty; right?

21 A Yes, sir.

22 Q In fact, you pled guilty yesterday?

23 A Yes, sir.

24 Q Before the trial of Edward started, you stood up here
25 and pled guilty in front of Judge Pyle; isn't that correct?

1 A Yes, sir.

2 Q And you pled guilty to trafficking in crack cocaine;
3 is that right?

4 A Yes, sir.

5 Q Possession with intent to distribute marijuana?

6 A Yes, sir.

7 Q Possession with intent to distribute marijuana within
8 proximity of a school or park; is that correct?

9 A Yes, sir.

10 Q And possession with intent to distribute crack
11 cocaine within proximity of a school or park; is that
12 right?

13 A Yes, sir.

14 Q And you were not sentenced; right?

15 A Yes, sir.

16 Q And, in fact, the Solicitor -- the Judge asked, do
17 you want to defer sentencing? Do you recall that?

18 A Yes, sir.

19 Q Meaning, they were going to wait to sentence you
20 until after this trial?

21 A I understand what you're saying.

22 Q Is that right?

23 A Yes, sir.

24 Q That's what you understood was going to happen?

25 A Yes, sir.

1 Q And you've talked with the Solicitor about what
2 you're doing up here today, testifying; is that correct?

3 A Yes, sir.

4 Q Now, when you were on -- when the police arrested you
5 back in August of 2003, what you're saying now, you did
6 not say to them; is that correct?

7 A To the officer?

8 Q Yeah.

9 A The officer did not ask me no questions.

10 Q I didn't ask you if they asked you any questions.
11 I'm asking you, did you tell them anything that you're
12 telling us today?

13 A They wouldn't let me speak.

14 Q They wouldn't let you speak. They had their hand
15 over your mouth?

16 A No. They was, hush, we're not talking.

17 Q Isn't it true that sitting up there testifying today,
18 what you're hoping is that if you can help the Prosecutor
19 win his case that he's going to help you when you're in
20 front of the Judge and get sentenced?

21 A No, sir. I'm just up here to tell the truth.

22 Q You're just up here to tell the truth? You're not
23 hoping by getting up there and telling what you say is the
24 truth that you're not going to get a benefit out of that?

25 A What benefit am I going to get out of it?

1 Q You're going to tell the jury that you're not hoping
2 that the Judge might not punish you as much as if you
3 didn't help the State?

4 A I pray to the Lord like anybody else do.

5 Q So the answer is, no, you're not hoping that the
6 Prosecutor might talk a little bit on your behalf for
7 helping him out?

8 A I'll leave it in the hands of the Lord.

9 Q Do you know how much time you're looking at in
10 prison?

11 MR. NEWKIRK: Objection.

12 THE COURT: I sustain the objection and instruct the
13 jury to disregard the question.

14 BY MR. SCALZO:

15 Q There was a card game going on at your house; isn't
16 that right?

17 A Yes, sir.

18 Q And there are a lot of people that were there that
19 day?

20 A No, sir. It was like five people there.

21 Q Five?

22 A (Witness nodded.)

23 Q You claim that you and Edward were dating, that's
24 what you were saying? You first said you used to go
25 together, but what you meant was you were dating?

1 A That's the same thing, dating and go together. I
2 don't claim that, we was going together.

3 Q But, again, you didn't tell the police that that
4 night?

5 A Did I tell the police? They did not ask me that.

6 Q There are how many bedrooms in that house?

7 A Three bedrooms.

8 Q Did you bring any pictures with you of you and Edward
9 at any time?

10 A No, sir. But I can get them in about three minutes.

11 Q In about three minutes, but you don't have them?

12 A No, sir.

13 Q Edward is not the father of any of your children?

14 A No, sir.

15 Q You paid the rent; right?

16 A I paid Mr. Dillard. He came to my house to pick it up.

17 Q Mr. Dillard would come to your house to pick it up?

18 A Yes, sir.

19 Q And you'd give him the money?

20 A He always came to everybody's house to get the money
21 himself.

22 MR. SCALZO: One moment, Your Honor.

23 (Pause.)

24 MR. SCALZO: I don't have any further questions, Your
25 Honor.

1 THE COURT: Anything else, Solicitor?

2 MR. NEWKIRK: Nothing else from the State.

3 THE COURT: Thank you.

4 You can step down.

5 MR. NEWKIRK: The State rests, Your Honor.

6 THE COURT: All right. Take the jury out, please.

7 (WHEREUPON, the jury was excused from open court at
8 approximately 9:37 a.m.)

9 MOTIONS

10 THE COURT: Any motions, Mr. Scalzo?

11 MR. SCALZO: Your Honor, we move for a directed
12 verdict for lack of sufficient evidence to go forward by
13 the State.

14 THE COURT: And I would deny your motion.

15 Do you have some additional testimony?

16 MR. SCALZO: We do, Your Honor.

17 THE COURT: Are you ready to go?

18 MR. SCALZO: Yes.

19 THE COURT: Bring them back in, if they're ready.

20 (WHEREUPON, the jury came into open court at
21 approximately 9:40 a.m.)

22 THE COURT: All right. Mr. Scalzo.

23 MR. SCALZO: Your Honor, the Defense calls Captain
24 Kellett.

25 THE CLERK: Place your left hand on the Bible and

1 raise your right hand.

2 WHEREUPON,

3 JACKIE F. KELLETT,

4 after first having been duly sworn, testified as follows:

5 THE CLERK: Thank you.

6 You may be seated.

7 MR. NEWKIRK: Your Honor, may we approach?

8 THE COURT: Sure.

9 (WHEREUPON, a bench conference was held.)

10 THE CLERK: State your full name for the record,
11 please.

12 THE WITNESS: Jackie F. Kellett.

13 THE CLERK: Thank you.

14 DIRECT EXAMINATION

15 BY MR. SCALZO:

16 Q Captain Kellett, where do you work?

17 A I work for the Greenville County Department of Public
18 Safety forensic division. I'm captain over the crime
19 scene section, the crime lab section, and the latent print
20 identification section.

21 Q How long have you held that position?

22 A I have worked for Greenville County since 1982. I
23 have been a certified police officer since 1978.

24 Q And what kind of training do you have?

25 A I've had, of course, basic training from the South

1 Carolina Criminal Justice Academy as a police officer and
2 was certified by them in 1979. And since that time, I've
3 had numerous courses on fingerprint identification, latent
4 print comparison, advanced latent print comparison, and
5 been certified by SLED to operation of the fingerprint
6 computer system.

7 Q Can you describe for the jury what latent print --
8 describe that for us.

9 A A latent print is a print that -- latent means
10 hidden. You normally can't see a fingerprint. When you
11 touch something, most of the time, people leave an oily
12 residue behind, not every time. That's one of the
13 falsehoods that the CSI thing has put out there for us
14 that everybody leaves a fingerprint, and that's not true.
15 Sometimes you do and sometimes you don't. It just depends
16 upon the type of surface you touch, how you touch it, is
17 it dirty, is it clean, how much pressure is applied, are
18 your hands dirty or clean, the time of year that it is.
19 There's a lot of factors that come into it.

20 So when someone touches something, sometimes they'll
21 leave an oily residue behind. And when our crime scene
22 technicians go out to process a crime scene, they use a
23 variety of fingerprint powders that when you apply a
24 powder, it will stick to the oils that's left behind by
25 the hand and you can see the fingerprint or a partial

1 print. And that's what we call latent. It's a hidden
2 print that must be made visible through means of either
3 fingerprint powders or chemicals that we use.

4 Q And as you described, one of your duties is to be
5 involved with latent fingerprint analysis?

6 A That's correct. Once our technicians go out and
7 process a scene, any latent prints they develop they place
8 in an envelope and turn it into my office. And another
9 one of my many functions is to try to determine who made
10 those fingerprints, either through looking at known
11 suspects that are provided by the Sheriff's Office or city
12 or other law enforcement agency, just whatever way we can
13 to try to determine who left those prints on that scene.

14 Q Did I ask you to bring a report with you today to
15 court?

16 A Well, you didn't ask me, but I brought it.

17 Q I'm sorry. I should have asked you, but you were
18 good enough to bring it with you. The report I'm
19 referring to is from February 20th, 2006?

20 A That's correct.

21 Q That's the report that you have?

22 A Yes, sir, it is.

23 Q And you created the report?

24 A Yes, sir.

25 Q And when you created that report, is that stored or

1 kept somewhere?

2 A Yes, it is.

3 Q And where is that kept or stored?

4 A We have an in-house data base. It's called our
5 AS-400 system. And any time we create a written report on
6 looking at latent prints on a case or making a fingerprint
7 match on a case, we type the report and save it in that
8 data base.

9 Q Is that part of the regular course of your business
10 activities to create and generate that report?

11 A Yes, it is.

12 Q As well as keep it?

13 A Yes, it is.

14 Q And in this case, the report that you have up there,
15 was that filed in the same manner as you do in any other
16 report?

17 A Yes. Once we create this report, I sign off on it
18 and then it's turned into our records section where it is
19 made part of this original record.

20 MR. SCALZO: Your Honor, I'm going to have a copy
21 marked. I'll ask the State if they have an objection.

22 MR. NEWKIRK: No objection to a copy.

23 THE COURT: No objection.

24 (WHEREUPON, Defendant's Exhibit No. 3 was marked for
25 identification only.)

1 BY MR. SCALZO:

2 Q Captain Kellett, would you take a look at that copy?
3 Is what's been marked as Defendant's Exhibit No. 3 a copy
4 of your report that you brought with you?

5 A Yes, it is.

6 Q Is there anything different about it?

7 A The only thing that's different is mine has the nice
8 pretty color seal, which, of course, came from our color
9 printer. And you have a copy, which makes it the black
10 and white.

11 Q But the information and how it's set up is exactly
12 the same?

13 A Yes. It's the very same report.

14 MR. SCALZO: Your Honor, at this time, the Defense
15 would offer Defendant's Exhibit No. 3 into evidence.

16 THE COURT: Subject to objection, put it in.

17 (WHEREUPON, Defendant's Exhibit No. 3 was admitted
18 into evidence.)

19 BY MR. SCALZO:

20 Q That report, Captain Kellett, is that a summary of
21 something that you did?

22 A Yes. The crime scene technician that processed this
23 scene developed some latent prints as a result of some
24 fingerprint processing. And we had received a request to
25 conduct a fingerprint comparison of those latent prints

1 against three known suspects. I pulled the fingerprint
2 cards of those known suspects and conducted a comparison
3 against the latent prints and made the determination that
4 the latent prints that were developed in this case were
5 not made by these three individuals.

6 Q Okay. And does your report tell you or does it
7 document where the fingerprints came from, the latent
8 fingerprints?

9 A It doesn't spell out the exact location of where the
10 latents came from. I have brought the latents with me.

11 Q Are you able to tell from your report or from the
12 latents the item from which those latent fingerprints came
13 from?

14 A No. The only thing that we say in this standard
15 report is that a request was made to conduct a fingerprint
16 comparison against the latents. All of the latents that
17 were lifted in this case, I did that and no match was
18 made.

19 Q And the three individuals listed in your report, is
20 one of them Edward Whitner?

21 A Yes, it is.

22 Q And you may have already said that, but just to be
23 clear, what does the report say about the comparison of
24 the latent prints to Mr. Whitner's prints?

25 A The latent prints that were developed at this scene

1 were not made by Mr. Whitner.

2 Q The latent prints that you have in here, that is
3 given to you by a different officer?

4 A Yes. The original responding technician, who is
5 Technician Thrasher, he developed those latents. He
6 places them in this envelope and puts all the pertinent
7 case information on it. And then they are placed in a
8 locked box at the crime scene section office where only
9 myself and two other latent print examiners have a key.
10 And then it's our responsibility every morning to go to
11 this lock box, remove the latent prints, and bring them up
12 to our office for evaluation and comparisons.

13 Q Okay. Can you show us the prints?

14 A In this case, Technician Thrasher developed five
15 latent lifts. And latent lift 1 came off the side of a
16 cartridge from a Rossi .38 caliber handgun. So this came
17 off the cartridge itself from the handgun. Latent lift 2,
18 he developed on the side of a cartridge from the Rossi .38
19 caliber handgun, so this is another cartridge. Latent
20 lift 3, same thing, side of a cartridge from a Rossi .38
21 caliber handgun. And latent lift 4 came off the right
22 side of the frame of the handgun itself, so this came off
23 the weapon. And latent lift 5 came off the left side of
24 the frame of the weapon. So this came off the weapon
25 itself. So you've got three from cartridges and two from

1 the weapon.

2 Q Okay. And to be clear to the jury, the latent print,
3 as you described earlier, was sort of a hidden print?

4 A Correct.

5 Q That's an actual print from some person that was
6 taken?

7 A And don't think of it as a whole, you know, entire
8 impression. It's just a partial impression. It's very
9 rare to get something and you've got the whole finger
10 rolled out there for you. Most of the time, there are
11 just bits and pieces. And that's what these latents are.
12 But I have determined that these latents were not made by
13 Mr. Whitner.

14 MR. SCALZO: Thank you.

15 I don't have any further questions.

16 THE COURT: All right. Solicitor.

17 CROSS-EXAMINATION

18 BY MR. NEWKIRK:

19 Q Captain Kellett, you said there was three -- you
20 compared these latents to three sets of known prints?

21 A Yes, sir.

22 Q Who are the other two known prints that you compared
23 those latents to?

24 A They were also compared to Aaron Vernon Garrison and
25 a Teresa Gary Smiley.

1 Q Did these latent prints match the known prints of
2 those two individuals?

3 A No, sir, they did not.

4 Q And, Captain Kellett, when someone touches an object,
5 do they always leave a fingerprint?

6 A No, sir, they do not. As I explained to you earlier,
7 some people leave prints, some people don't. Handguns are
8 extremely hard to get latent prints off of. A lot of
9 times, it's the ridges on the gun itself, the oils that
10 are on the gun. Fingerprint oil and oils off weapons
11 don't mix. And it's hard to leave a fingerprint behind on
12 a weapon. I'm not saying that it can't be done, but we
13 just have gotten bits and pieces off of this one, which is
14 normally what you get when you process a weapon.

15 MR. NEWKIRK: Nothing further, Your Honor.

16 THE COURT: Thank you.

17 You can step down.

18 All right. Take the jury out for a recess, please.

19 (WHEREUPON, the jury was excused from open court at
20 approximately 9:53 a.m.)

21 THE COURT: All right. We'll take a short recess.

22 MR. NEWKIRK: Your Honor, can Captain Kellett be
23 excused?

24 THE COURT: Yes. I need to talk with her.

25 (WHEREUPON, a break was taken.)

1 THE COURT: Mr. Whitner, before I bring the jury
2 back -- no, you can be seated. I have a few questions I
3 wanted to ask you.

4 When it comes time for you to testify, you don't have
5 to.

6 Do you understand that?

7 DEFENDANT WHITNER: Yes, sir.

8 THE COURT: You have a Constitutional right not to
9 take the stand and testify or present evidence because
10 that's your Constitutional right. The burden is always on
11 the State to prove you guilty beyond a reasonable doubt.

12 Do you understand that?

13 DEFENDANT WHITNER: Yes, sir.

14 THE COURT: Now, you -- of course, you can -- you've
15 got a perfect right to take the stand and tell the jury
16 your side of the story.

17 Do you understand that?

18 DEFENDANT WHITNER: Yes, sir.

19 THE COURT: And if you do take the stand and testify,
20 then you become like any other witness, subject to
21 cross-examination. I don't know whether you have any
22 prior criminal record that the State could use to impeach
23 you, but if you do, then they could go into that.

24 Do you understand that? -

25 DEFENDANT WHITNER: (Defendant nodded.)

1 THE COURT: Have you made a decision, at this point,
2 as to whether you will or will not testify?

3 DEFENDANT WHITNER: Yes, sir.

4 THE COURT: What is that decision?

5 DEFENDANT WHITNER: I will.

6 THE COURT: And that is a decision you yourself have
7 made?

8 DEFENDANT WHITNER: Yes, sir.

9 THE COURT: Mr. Scalzo has not put any pressure on
10 you to take the stand and testify?

11 DEFENDANT WHITNER: No, sir.

12 THE COURT: So this is your decision?

13 DEFENDANT WHITNER: Yes, sir.

14 THE COURT: Are you under the influence of any
15 alcohol, drug, or any other substance right at this
16 moment?

17 DEFENDANT WHITNER: No, sir.

18 THE COURT: You're sober, you know what you're doing,
19 and you have made the decision yourself to testify?

20 DEFENDANT WHITNER: Yes.

21 THE COURT: All right.

22 MR. NEWKIRK: Your Honor, the Defendant does have a
23 prior record. He's got a possession of crack from where
24 he pled guilty on November of 2005; possession of crack,
25 he pled guilty on February of 2001 -- two possessions of

1 crack from February of 2001. And I intend just to ask him
2 if he's been convicted of a crime that carries greater
3 than one year.

4 THE COURT: Okay.

5 MR. NEWKIRK: And he also has a false information to
6 police from 2003.

7 THE COURT: All right. Bring our jury in.

8 (WHEREUPON, the jury came into open court at
9 approximately 10:05 a.m.)

10 THE COURT: All right. Mr. Scalzo.

11 MR. SCALZO: May it please the Court, Your Honor?
12 The Defense calls Loretta Baldwin.

13 THE CLERK: Place your left hand on the Bible and
14 raise your right hand.

15 WHEREUPON,

16 LORETTA BALDWIN,
17 after first having been duly sworn, testified as follows:

18 THE CLERK: State your full name for the record
19 please. And spell your last name.

20 THE WITNESS: Loretta Baldwin, B-A-L-D-W-I-N.

21 THE CLERK: Thank you.

22 DIRECT EXAMINATION

23 BY MR. SCALZO:

24 Q Ms. Baldwin, will you tell the jury where you work?

25 A I work for the Greenville Water System.

1 Q How long have you worked there?

2 A 15 years.

3 Q What's your current job?

4 A I supervise the customer service department.

5 Q And can you tell the jury some of your
6 responsibilities?

7 A I handle the cashiering group, customer service
8 group, the telephone group. We have about 20 employees
9 and I'm responsible for all of those duties that they
10 perform.

11 Q Okay. Are you responsible for any document keeping
12 or recordkeeping?

13 A We're responsible for entering it into our system.
14 We're responsible for preparing it for our billing
15 department. And when it goes to billing, that's when it's
16 entered into the system.

17 Q Did I ask you to bring some documents with you today?

18 A Yes, you did.

19 Q And did you bring those documents?

20 A I did.

21 Q Just to make sure we're looking at the same document,
22 because I know you have more than one up there, i'm going
23 to mark this Defendant's Exhibit No. 4.

24 (WHEREUPON, Defendant's Exhibit No. 4 was marked for
25 identification only.)

1 BY MR. SCALZO:

2 Q I ask you to take a look at that.

3 A It's an application for water service.

4 Q Is that a copy of the record that you brought with
5 you?

6 A Yes, that is.

7 Q Is there anything different about it?

8 A No. I don't see anything.

9 Q Okay. You said that it was an application?

10 A It's an application for water service.

11 Q Is that like the initial application?

12 A In other words, the customer calls in, we take the
13 application, they're requesting water at a specific
14 address. We get specific information from them to put on
15 our application. We set up the date to turn the water on.

16 Q And when that information is taken and the
17 application is generated --

18 A Yes.

19 Q -- what's done with that application?

20 A What happens is we send a turn-on order out with the
21 meter reading department. They get a meter reading. They
22 return the work order and we attach it to the contract.
23 It then goes to our billing department and is imaged and
24 then the account is set up in their name.

25 Q Okay. So when I asked you to bring some documents,

1 what did you have to do to bring the documents?

2 A All I had to do is go into our imaging department.
3 Every document we have is copied into an imaging system.

4 Q And is the copying and putting into imaging part of
5 your regular course of business?

6 A That goes -- our billing department does that, yes,
7 any turn on, any turn off, or any application for water
8 service.

9 MR. SCALZO: Your Honor, at this time, we'd offer
10 Defendant's Exhibit No. 4 into evidence.

11 THE COURT: Any objection?

12 MR. NEWKIRK: No objection.

13 THE COURT: Without objection.

14 (WHEREUPON, Defendant's Exhibit No. 4 was admitted
15 into evidence.)

16 BY MR. SCALZO:

17 Q Referring to Defendant's Exhibit No. 4 right now,
18 does it indicate on there who the customer is with
19 Greenville Water?

20 A Teresa M. Smily. She called and requested the
21 service.

22 Q Is there an address associated with this contract?

23 A Yes, [REDACTED] Greenville.

24 Q And about halfway down, it has an indication where it
25 says, rental agent?

1 A Yes.

2 Q And what does rental agent mean? What does that
3 reference?

4 A Well, we ask that for everyone. There's always a
5 possibility there may be what we call a fraudulent
6 situation where we have to verify who the legal tenant is
7 at an address, so we do ask that.

8 Q And in this case, was there information given as far
9 as a rental agent?

10 A No. We didn't have any reason to call.

11 Q No. What I'm asking is, were you given a rental
12 agent's name?

13 A Yes, we were.

14 Q Who was that?

15 A Harold Dillard.

16 Q And rental agent, would that be the same as landlord?

17 A Yes.

18 MR. SCALZO: I don't have any further questions, Your
19 Honor.

20 THE COURT: Any questions, Solicitor?

21 MR. NEWKIRK: Yes, Your Honor.

22 CROSS-EXAMINATION -

23 BY MR. NEWKIRK:

24 Q Ms. Baldwin, do you have any idea who, actually,
25 lived at [REDACTED]

1 A We take the customers word for it unless there is
2 something that would prompt us to investigate it further,
3 like tampering with the meter or we have a customer who's
4 had previous service we're trying to call to verify.
5 That's the only time we do.

6 Q If a customer signs up for water service, you don't
7 know who the other people living in the house are, do you?

8 A No.

9 MR. NEWKIRK: Nothing further, Your Honor.

10 THE COURT: Thank you.

11 You can step down.

12 MR. SCALZO: Your Honor, at this time, the Defense
13 would call Aaron Garrison.

14 THE CLERK: Mr. Garrison, place your left hand on the
15 Bible and raise your right hand.

16 WHEREUPON,

17 AARON GARRISON,

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

19 THE CLERK: Thank you.

20 You may be seated.

21 State your full name for the record, please.

22 THE WITNESS: Aaron Garrison.

23 DIRECT EXAMINATION

24 BY MR. SCALZO:

25 Q Mr. Garrison, do you live here in Greenville County?

- 1 A Yes, sir, I do.
- 2 Q Where do you live at?
- 3 A [REDACTED]
- 4 Q How long have you lived there?
- 5 A About 15 years.
- 6 Q How old are you?
- 7 A 44.
- 8 Q Does anybody else live there with you?
- 9 A My mom and dad.
- 10 Q Speak up a little bit.
- 11 A My mom and my dad.
- 12 Q Are you familiar with [REDACTED]
- 13 A Yes, I am.
- 14 Q Where is that in relation to your house?
- 15 A It's about a block from my house, right up the
- 16 street.
- 17 Q Can you see [REDACTED] from your house?
- 18 A Yeah.
- 19 Q Have you ever been to [REDACTED]
- 20 A Yes, sir.
- 21 Q On August 2nd, 2003, you were at [REDACTED]
- 22 A Yes, sir.
- 23 Q You were there when the police came in?
- 24 A Yes, sir.
- 25 Q Where were you located inside the house?

1 A I was in the kitchen.

2 Q Was Mr. Whitner present in the house?

3 A Yes, sir.

4 Q Where was he?

5 A In the front room.

6 Q Ms. Smiley, she was in the house?

7 A Yes, sir.

8 Q Where was she?

9 A She was in the back bedroom.

10 Q What time did you arrive at that house about, if you
11 can remember?

12 A About 1:00, 1:30, somewhere along in there.

13 Q In the afternoon?

14 A At night.

15 Q Say it again.

16 A At night, in the morning.

17 Q All right. And how long were you there before the
18 police arrived?

19 A About three, four minutes.

20 Q Why were you there?

21 A I had came by to help clean up after the card party.

22 Q Did you -- were you there earlier or is that the
23 first time you were there?

24 A Yeah. I had -- yes, sir, I had stopped by earlier.

25 Q About what time did you stop by?

- 1 A Probably about 6:00, 7:00.
- 2 Q And when you stopped by, what was going on?
- 3 A There was a card party going on.
- 4 Q A card party like poker kind of cards?
- 5 A Well, you could say that, cards. They were playing
- 6 cards.
- 7 Q And about how many people were there?
- 8 A Seven, eight, ten, something like that.
- 9 Q Was Ms. Smiley there?
- 10 A Yes, sir.
- 11 Q Was Mr. Whitner there?
- 12 A Yes, sir.
- 13 Q At the card game?
- 14 A Yes, sir.
- 15 Q And did you stay?
- 16 A No, sir, I didn't.
- 17 Q After you left, when is the next time you returned,
- 18 at 1:00 or 1:30?
- 19 A 1:00, 1:30.
- 20 Q All right. Had you -- now, you said you returned to
- 21 help clean up?
- 22 A Right.
- 23 Q Had you done that before, helped clean up?
- 24 A Well, I have -- no, no.
- 25 Q No?

1 A No.

2 Q Well, you knew Ms. Smiley?

3 A Yes, sir, I knew her.

4 Q Had you -- and you know Mr. Whitner?

5 A Yes, sir.

6 Q Did Ms. Smiley live at that address as far as you
7 knew?

8 A Yes, sir.

9 Q Did Mr. Whitner live there?

10 A Not that I can recall at that time.

11 Q Okay. You were inside the house; correct?

12 A When the police come?

13 Q Yes.

14 A Yes, sir.

15 Q Can you describe what kind of items were inside that
16 house, like appliances, TV's, what kind of things like
17 that?

18 A Well, when you come in -- I've never really been
19 through the whole house.

20 Q Okay. Just what you've seen.

21 A She got -- when you come in the front door, there's
22 an entertainment system over on your right.

23 Q Now, when you say entertainment system --

24 A I mean a -- something like a -- yeah, entertainment
25 system.

1 Q Okay. What kind of things are in that entertainment
2 system?

3 A Television.

4 Q Big television, little television, what kind of
5 television?

6 A About medium size. It's not really that big.

7 MR. SCALZO: I don't have any further questions, Your
8 Honor.

9 THE COURT: Solicitor.

10 CROSS-EXAMINATION

11 BY MR. NEWKIRK:

12 Q Mr. Garrison?

13 A Yes, sir.

14 Q Isn't it true that you live at Scott Street?

15 A Yes, sir.

16 Q Isn't it true that you are a -- you're friends with
17 Edward Whitner?

18 A I know Edward.

19 Q He's your boy?

20 A What you mean by "boy"?

21 Q He's your friend, isn't he?

22 A Yes, sir.

23 Q And you don't want to see anything happen to him, do
24 you?

25 A I don't want to see nothing bad happen to nobody.

1 Q And you were at [REDACTED] in August back in
2 2003; correct?

3 A Yes, sir.

4 Q And you were there when the police came; correct?

5 A Yes, sir.

6 Q And Mr. Whitner was there when the police came;
7 correct?

8 A Yes, sir.

9 Q Teresa Smiley was there; correct?

10 A Yes, sir.

11 Q And when Mr. Scalzo asked you if Mr. Whitner had
12 lived there, you said not that you recall?

13 A Not that I can recall.

14 Q So you don't remember at all? You don't remember if
15 he lived there or he didn't live there?

16 A Just like I told him, not that I can recall.

17 Q Do you remember if he lived there or not? "Yes" or
18 "no."

19 A No. He didn't stay there. Is that what you want to
20 hear?

21 Q I'm asking you "yes" or "no."

22 A No, he didn't stay there.

23 Q Mr. Garrison --

24 A Yes, sir.

25 Q -- is it true that in 1997, you were convicted of

1 escape?

2 A What does that got to do with this here? That's
3 true.

4 Q And is it true that also in 1997, you were convicted
5 of possession of crack cocaine?

6 A Yes, sir.

7 Q Today, you have you said that Mr. Whitner didn't live
8 there; correct?

9 A (Witness nodded.)

10 Q Have you ever told anybody else that he has lived
11 there in the past?

12 A No.

13 Q You haven't?

14 A (Witness shook head.)

15 Q Do you remember writing a letter to Deputy White?

16 A I remember that letter. That was -- I was mad and I
17 was pissed off because I was locked up for no reason.

18 Q So you did write that letter?

19 A I didn't write it. I had it wrote. I didn't write
20 it.

21 Q You didn't write it?

22 A No. I had it wrote.

23 Q You had it wrote. But did you tell someone what to
24 put in it?

25 A No, no, I didn't.

1 Q So did you write the letter or didn't you write the
2 letter?

3 A I just sit here and told you I didn't write it. I
4 had it done for me.

5 Q You had it done for you. Did you tell someone what
6 to write in the letter?

7 A No.

8 Q So you don't know -- you just -- you had a letter
9 sent and you don't know what was put in it, but you told
10 someone to write a letter?

11 A I had the letter wrote, a friend of mine wrote the
12 letter.

13 Q For you?

14 A Yes.

15 Q Okay. And how -- and so you told that -- your friend
16 what to put in the letter?

17 A I didn't say that. You're putting words --

18 Q Well, I'm asking you that, did you tell your friend
19 what to put in the letter?

20 A No, I didn't.

21 Q So then why did you ask your friend to write a letter
22 to Deputy White if you didn't tell him what to put in
23 there?

24 A I just sat here and told you, because I was locked up
25 for no reason. There wasn't none of it mine. I sat at

1 the detention center for 14 months for nothing.

2 Q So how did your friend know what to write in the
3 letter if you didn't tell them?

4 A I don't know.

5 Q You don't know?

6 A No.

7 Q Did you sign the letter? Let me show you the letter.
8 Is that your signature on it right there?

9 A Yeah. That's my signature.

10 Q So you signed this letter?

11 A Yes, sir.

12 Q And you sent it to Deputy White?

13 A Right.

14 Q Can you read?

15 A I can't read. No, I can't read or write.

16 Q You can't read or write. Okay. Then I'll read it.

17 "I don't know if you remember this case, but it
18 occurred at [REDACTED] I had two co-defendants,
19 Teresa Smiley is one and Edward Whitner. The address
20 above is their address."

21 Did you sign the letter?

22 A I signed the letter.

23 Q Okay.

24 A But I just told you I can't read.

25 Q But you had to tell someone what to write in the

1 letter?

2 A No. You're putting words in my mouth. I just sat
3 here and told you I didn't tell them what to write. I
4 just told them what happened. I didn't tell them what to
5 write.

6 Q But you told them -- you told your friend what
7 happened?

8 A I told them about how the police come in the house.

9 Q And you told your friend that night that [REDACTED]
10 [REDACTED] was Edward Whitner's residence and Teresa Smiley's
11 residence; isn't that correct?

12 A No. I didn't tell them that.

13 MR. NEWKIRK: Nothing further, Your Honor.

14 MR. SCALZO: Your Honor, could I have quick redirect?

15 THE COURT: All right.

16 REDIRECT EXAMINATION

17 BY MR. SCALZO:

18 Q Mr. Newkirk was asking you about the letter.

19 A Right.

20 Q Tell the jury, what were you trying to accomplish by
21 having your friend write this letter.

22 A I was trying to get out of jail.

23 Q What were you trying to tell Deputy White through the
24 letter?

25 A What was I trying to tell him?

1 Q Yes.

2 A I was trying to tell him none of the drugs wasn't
3 mine. That's all I was trying to tell him.

4 Q Before you had the friend write it for you --

5 A Right.

6 Q -- did you tell him about what had happened?

7 A I told him what had happened, how the police come in
8 the house and everything.

9 Q And did you ask him to help you write a letter to
10 Deputy White?

11 A Yes, sir.

12 Q Did he know why you were writing it?

13 A He knew why I was writing it.

14 Q Okay. When you arrived -- you said you arrived at
15 1:30?

16 A Somewhere along there.

17 Q Was Mr. Whitner already there -- or was Edward
18 already there?

19 A Edward was coming down the street. Because he asked
20 me who was -- asked me who I was when he was coming down
21 the street. Because I was talking to him from up the
22 street.

23 Q And did you go in together or one first?

24 A We went in together.

25 Q You went in together?

1 A We went in together.

2 MR. SCALZO: Thank you.

3 THE COURT: Step down.

4 MR. SCALZO: Judge, can I have one moment?

5 THE COURT: Yes, sir.

6 (Pause.)

7 MR. SCALZO: Your Honor, the Defense calls Edward
8 Whitner, Sr.

9 THE CLERK: Mr. Whitner, if you'll step up here and
10 place your left hand on the Bible and raise your right.
11 WHEREUPON,

12 EDWARD WHITNER, SR.,
13 after first having been duly sworn, testified as follows:

14 THE CLERK: State your full name for the record,
15 please.

16 THE WITNESS: Edward Whitner.

17 THE CLERK: Thank you.

18 DIRECT EXAMINATION

19 BY MR. SCALZO:

20 Q Mr. Whitner, is Edward sitting over there in the
21 white shirt your son?

22 A Yes, he is.

23 Q How old are you?

24 A I'm 54 years old.

25 Q Do you have other children?

1 A I do.

2 Q How many other children do you have?

3 A Two more.

4 Q What kind of work do you do?

5 A I do landscaping.

6 Q Any other kind of work?

7 A I do most any kind of work, any construction work.

8 Q Are you familiar with [REDACTED]

9 A What do you mean by familiar?

10 Q Well, do you know that address?

11 A I know where it is, yes.

12 Q Have you ever been there before?

13 A Yes, I have.

14 Q When were you there?

15 A I was there the day the police had come there.

16 Q Were you there -- and that's August of 2003?

17 A Yes.

18 Q Were you there even before that?

19 A Yes.

20 Q What was the reasons for being there?

21 A Card game, card parties, cookouts, and stuff like
22 that.

23 Q Card parties?

24 A Yes, sir.

25 Q What do you mean by card parties? What goes on at a

1 card party?

2 A We just play cards. That's all.

3 Q And who is "we"?

4 A Just me and some friends.

5 Q Do you -- was Teresa Smiley there?

6 A Yes.

7 Q Was this by specific invitation or open to more
8 than -- to anyone?

9 A Just invitation mostly.

10 Q Say that again.

11 A Invitation.

12 Q Invitation?

13 A Yes.

14 Q When you were there in August, are we talking about
15 August 1st or August 2nd?

16 A August 2nd.

17 Q And Edward was arrested August 2nd at night or in the
18 early morning hours. Were you there before or after that?

19 A I wasn't there when the police come. I had probably
20 been gone. I wasn't nowhere around at that particular
21 time, so I can't say.

22 Q Okay. I'm trying to make sure I understand what
23 you're saying. Were you there before the police came or
24 after?

25 A Before.

1 Q Okay. How long were you there?

2 A Approximately about 10 or 15 minutes.

3 Q Why were you there such a short time?

4 A Because I couldn't get at the table to play cards, so
5 I left.

6 Q How many people were playing cards when you arrived?

7 A I believe they had a table full, three or four, maybe
8 five. I don't know.

9 Q What kind of card games would they play?

10 A They played Tunk.

11 Q Tunk. What's Tunk?

12 A It's a card game, Tunk.

13 Q How does that work? I've never played that.

14 A It's five-hand cards.

15 Q Five-hand card game?

16 A Yes.

17 Q Like poker?

18 A It's not similar to poker. It's a whole lot
19 different between poker and Tunk.

20 Q Do you play for money?

21 A Yes, we do.

22 Q Have you had a problem with crack cocaine in your
23 life?

24 A I do.

25 Q Do you know if your son has had a problem with crack

1 cocaine?

2 A Yes.

3 Q Do you know about how long?

4 A No, sir. I don't know.

5 Q But you're aware that he's had a problem?

6 A Yes.

7 Q In August of 2003, do you know where your son was
8 living?

9 A 2003?

10 Q Yes.

11 A I'm pretty sure he was living with his grandmother.
12 But I was locked up in jail at that time, so I don't know.

13 Q Okay. Did you ever know him to have lived at 202
14 Mack Street?

15 A No.

16 MR. SCALZO: I don't have any further questions at
17 this time.

18 THE COURT: Any questions, Solicitor?

19 MR. NEWKIRK: Briefly, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. NEWKIRK:

22 Q Mr. Whitner, you're the Defendant's father, isn't
23 that correct?

24 A That's right.

25 Q And you love your son, don't you?

1 A Of course, I do.

2 Q And you don't want to see anything bad happen to him,
3 do you?

4 A I don't want to see anything bad happen to nobody.

5 Q And your son was in a relationship with Teresa
6 Smiley; isn't that correct?

7 A I don't know about that, sir.

8 Q And you just testified that in 2003, you were locked
9 up; correct?

10 A Right.

11 Q And you testified that in 2003, you really didn't
12 know where your son was living; correct?

13 A I said he was living with his grandmother, but I
14 don't know for sure because I was locked up.

15 Q So your testimony is you don't -- you don't know for
16 sure where your son was living in 2003; correct?

17 A That's right.

18 Q And when you went over to [REDACTED] on August
19 2nd, 2003, your son was there; correct?

20 A Yes, he was there.

21 Q And Teresa Smiley was there; correct?

22 A Yes.

23 Q And you only stayed 10 or 15 minutes; correct?

24 A Yes.

25 Q You weren't there when the police came; correct?

1 A No.

2 MR. NEWKIRK: Nothing further, Your Honor.

3 THE COURT: Step down.

4 MR. SCALZO: Your Honor, the Defense calls Brenda
5 Whitner.

6 THE CLERK: Ms. Whitner, if you'll step up here,
7 please, and place your left hand on the Bible and raise
8 your right hand.

9 WHEREUPON,

10 BRENDA WHITNER,
11 after first having been duly sworn, testified as follows:

12 THE CLERK: Thank you

13 You may be seated.

14 State your full name for the record, please.

15 THE WITNESS: Brenda Whitner.

16 THE CLERK: Thank you.

17 DIRECT EXAMINATION

18 BY MR. SCALZO:

19 Q Ms. Whitner, are you Edward's mother?

20 A Yes, I am.

21 Q And how old are you?

22 A 48.

23 Q Do you have other children?

24 A Yes, three more.

25 Q Where is Edward in the line?

- 1 A He's in the middle.
- 2 Q Are you employed?
- 3 A Yes, I am.
- 4 Q Where do you work?
- 5 A Prime Plaza Motel.
- 6 Q How long have you worked there?
- 7 A 17 years.
- 8 Q What's your position there?
- 9 A I'm assistant and I kind of run errands, fill out
- 10 papers, so kind of like an assistant.
- 11 Q Is that your husband that just testified?
- 12 A Yes.
- 13 Q He testified that he's had problems with crack as
- 14 well as your son, are you aware of that?
- 15 A Yes.
- 16 Q Have you and your husband remained together?
- 17 A Well, we break up on and off on account of drugs.
- 18 Q And tell me a little bit about the breaking up on
- 19 account of drugs.
- 20 A Well, we've been together 33 years, but on and off.
- 21 He gets addicted and I give him an ultimatum and then we
- 22 breakup and I take the kids.
- 23 Q Okay. Edward, are you aware of him having a problem
- 24 with crack cocaine?
- 25 A (Witness nodded.)

1 THE COURT: You have to answer so the court reporter
2 can get it.

3 THE WITNESS: Yes, sir.

4 BY MR. SCALZO:

5 Q Let me pull your attention to the year 2003. Where
6 was Edward -- if you know, where was Edward living in
7 2003?

8 A With his grandmother.

9 Q Where did she live?

10 A [REDACTED]

11 Q Is that your mother or his father's mother?

12 A My mother.

13 Q Who else lived at that house?

14 A My two brothers.

15 Q And are they older than you, younger than you?

16 A Well, one is about around my age, he's 40, and the
17 other one is 36.

18 Q Is Edward close with them?

19 A Yes.

20 Q Did he hang around them?

21 A Yes, sir.

22 Q Did Edward ever stay at your house?

23 A Yes.

24 Q Did he have clothes at your house?

25 A Yes, sir.

1 Q Do you know if he had clothes at his grandmother's
2 house?

3 A Yes.

4 Q Did he have -- or does he have a good relationship
5 with your mother?

6 A Yes, sir.

7 Q Did you ever know Edward to live at [REDACTED]

8 A No, sir.

9 Q Let's talk about the beginning of August 2003. Did
10 you have any plans at the beginning of that month?

11 A Yes, sir.

12 Q What -- tell the jury what your plans were at the
13 beginning of August.

14 A We have a family reunion every August, the 2nd, 3rd,
15 4th, and 5th.

16 Q And where is the reunion held?

17 A They move around. But during that year, it was in
18 Orlando.

19 Q Florida?

20 A Yes.

21 Q Were you planning to go to that reunion?

22 A Yes, sir.

23 Q When were you planning to leave to go there?

24 A I was going to leave August the 2nd about 6:00 in the
25 morning.

1 Q How were you going to get there?

2 A We was renting a car.

3 Q And you said "we," who was going with you?

4 A Me, my cousin, and two uncles.

5 Q Edward was not going?

6 A No, he wasn't going.

7 Q Did you give Edward any specific instructions because
8 you were leaving?

9 A Well, yes.

10 Q Tell the jury what you -- what instructions you gave
11 him.

12 A I had gave him some money to get his daughter some
13 clothes for school and to pay a bill for me, because I was
14 planning on staying a week.

15 Q Had you given him money before for your
16 granddaughter?

17 A Yes.

18 Q Had you ever asked him to pay a bill for you before?

19 A Yes, sir. Because I go out of town a lot.

20 Q How many times would you say you had asked him to pay
21 a bill for you?

22 A I can't say, a number of times.

23 Q All right. Do you recall how much money you gave
24 him?

25 A During August, do you mean?

1 Q Yes, just before you were going to go away on your
2 family reunion trip.

3 A It was around five and some change. I'm not sure how
4 much change.

5 MR. SCALZO: I don't have any further questions,
6 Judge.

7 THE COURT: Solicitor.

8 CROSS-EXAMINATION

9 BY MR. NEWKIRK:

10 Q Ms. Whitner, so you're the Defendant's mom?

11 A Yes, sir.

12 Q Okay. And you don't want to see anything happen to
13 him, do you?

14 A Not to anyone.

15 Q Okay. You testified that the Defendant stayed at
16 your house?

17 A Yes, sir.

18 Q And that he stayed at his grandmother's house?

19 A Yes, sir.

20 Q So would it be fair to say he moved around a lot?

21 A No, sir. He stayed with my mother most of the time.
22 I moved around a lot. So it was kind of hard, you know,
23 my address and when he find it, then he would come stay
24 with me.

25 Q And when did you -- when exactly did you give him the

1 money to pay the bills?

2 A That was that evening, because I had a lot to do.

3 Q On which evening?

4 A August the 1st.

5 Q And what bills did you need paid?

6 A Well, light bill and my car. I was going to get my
7 car fixed. I had wanted him to go ahead and take it to
8 the shop for me.

9 Q What was wrong with your car?

10 A Oh, Lord. The brakes, it was ticking. So I told him
11 just have whatever he needed to do done to it.

12 MR. NEWKIRK: Nothing further, Your Honor.

13 THE COURT: Thank you.

14 You can step down.

15 MR. SCALZO: Your Honor, could I have one second?

16 THE COURT: Yes.

17 (Pause.)

18 MR. SCALZO: Your Honor, the Defense would call
19 Lakeisha Gordan..

20 THE CLERK: Ms. Gordon, place your left hand on the
21 Bible and raise your right hand.

22 WHEREUPON,

23 LAKEISHA C. GORDON,

24 after first having been duly sworn, testified as follows:

25 THE CLERK: Thank you

1 You my be seated.

2 State your full name for the record, please.

3 THE WITNESS: Lakeisha C. Gordan.

4 DIRECT EXAMINATION

5 BY MR. SCALZO:

6 Q Ms. Gordon, do you know Edward Whitner?

7 A Yes, sir.

8 Q How do you know him?

9 A We go together. Actually, we've got a baby together.

10 Q You said "go together," do you mean you date?

11 A Yes, sir.

12 Q How old is your child --

13 A We, actually, live together.

14 Q Say it again.

15 A We, actually, live together.

16 Q How old is your child?

17 A He's one.

18 Q How long have you known Edward?

19 A All my life. We went to school together, elementary
20 school, middle school, the first year of high school.

21 Q What area of town did you all live in?

22 A Bruton Town.

23 Q Do you work?

24 A Yes, sir, I do.

25 Q Where do you work at?

1 A At the Greenville News.

2 Q How long have you been there?

3 A I've been there two years and four months.

4 Q What do you do?

5 A I'm a production inserter.

6 Q What is that?

7 A That's like, we take the sales brochures like you get
8 from Wal-Mart or somewhere and we put them in the machine
9 and the machines will run them and they come out.

10 Q Okay. How long have you been dating Edward?

11 A We've been together, actually, I'd say two years or
12 so.

13 Q During the time when you were not dating, did you
14 still live in the Bruton community?

15 A Yes, sir. Actually, I stayed next door to
16 Ms. Brenda. Ms. Brenda stayed in the apartments beside my
17 grandma's house. I lived with my grandma at the time,
18 which was [REDACTED] And Ms. Brenda, she stayed in
19 the apartments that was right beside my grandma's house.

20 Q And Ms. Brenda, you mean Edward's --

21 A Edward's mom.

22 Q Did you see Edward often?

23 A Yeah, every day.

24 Q Are you familiar with [REDACTED]

25 A Yeah, definitely.

1 Q How is it that you're familiar with that?

2 A Me and Teresa were friends.

3 Q When?

4 A A long time. We went clubbing, school -- not school,
5 but clubbing. And we went to Job Corp. in Louisville,
6 Kentucky.

7 Q Did you ever know Edward to live at [REDACTED]?

8 A I've never known Edward to live at [REDACTED].

9 Q Were you aware if Edward was dating, going with or --

10 A Actually, [REDACTED] was the local hang out for
11 everybody in the neighborhood. Everybody in the
12 neighborhood hung at Teresa's house as far as parties.
13 She always threw parties, you know, like birthday parties
14 and so forth and cookouts. If you wanted to have a good
15 time, Teresa's house was the place to go.

16 Q Did it have a reputation in the Bruton community?

17 A Actually, it did, to be honest, yeah.

18 Q What kind of reputation?

19 A Whatever you want. If you want to have fun, you go
20 to Teresa's house, basically. That's the hang out,
21 everybody went there, including me. Everybody went there,
22 including his brothers, sister, my brothers and sisters.

23 Q You said "his," are you referring to Edward?

24 A Yes.

25 Q I was asking you about -- you've known Edward, you

1 said, all your life?

2 A Uh-huh.

3 Q And you lived next to his mother?

4 A Correct. The apartments she lived in was right here
5 and then maybe a house, a green house, beside the
6 apartments and then my grandmother's house, which was gray
7 and white in front of the basketball court.

8 Q Do you know friends that also are friends with
9 Edward?

10 A Yeah.

11 Q Did you have friends that were friends with Edward
12 before you were dating?

13 A Yeah.

14 Q Did you ever know Edward to have a relationship with
15 Teresa Smiley?

16 A No, sir. I've known her to have a relationship with
17 his brother.

18 Q Okay. What's his brother's name?

19 A James Green.

20 Q Is James' mother, Brenda?

21 A No. His mother is Ms. Francis.

22 Q Okay. Is he older or younger?

23 A He's older than Edward.

24 Q I may have asked you this, just to cover myself, did
25 you ever know him to live at [REDACTED]

1 A No, sir. He never lived at [REDACTED] as far as
2 I know.

3 MR. SCALZO: I don't have any further questions, Your
4 Honor.

5 THE COURT: Solicitor.

6 CROSS-EXAMINATION

7 BY MR. NEWKIRK:

8 Q Ms. Gordon, you and the Defendant have a baby
9 together; is that correct?

10 A Yes, sir. He's one year old. He turned one on the
11 31st of December.

12 Q And you guys live together?

13 A Yes, sir, we do. We currently live together.

14 Q And you've been together for only about two years?

15 A Yes, sir, actually, going on three. December the
16 13th, it will be three years, December the 13th.

17 Q So, again, you love Mr. Whitner, don't you?

18 A Definitely.

19 Q And you don't want to see anything bad happen to him?

20 A Neither one of them. Like I stated before, Teresa
21 and I was friends, also, so I don't want to see nothing
22 bad happen to her either.

23 Q Were you at [REDACTED] on August 2nd of 2003?

24 A No. I wasn't there that day.

25 Q Did you --

1 MR. NEWKIRK: I have nothing further, Your Honor.

2 THE COURT: Step down.

3 MR. SCALZO: Your Honor, the Defense would call
4 Edward Whitner to the stand.

5 THE CLERK: Mr. Whitner, if you would place your left
6 hand on the Bible and raise your right hand.

7 WHEREUPON,

8 EDWARD ANDRELL WHITNER,
9 after first having been duly sworn, testified as follows:

10 THE CLERK: Thank you.

11 You may be seated.

12 And state your full name for the record, please.

13 THE WITNESS: Edward Andrell Whitner.

14 THE CLERK: Thank you.

15 DIRECT EXAMINATION

16 BY MR. SCALZO:

17 Q Edward, how old are you?

18 A 31.

19 Q First of all, let me ask you, do you understand what
20 you're charged with today?

21 A Yes, sir.

22 Q Describe to the jury your understanding of what your
23 charges are.

24 A Trafficking crack cocaine and trafficking marijuana,
25 I think, into a school zone charges.

1 Q The that were found in that house, do you know
2 anything about those drugs?

3 A No.

4 Q I'm going to talk a little bit more about that in a
5 bit. Let me first introduce you a little bit to the jury.
6 You said you're 30 years old?

7 A 31.

8 Q 31. Ms. Gordon that just testified, is that your
9 girlfriend?

10 A Yes.

11 Q You two do have a child together?

12 A Yes.

13 Q It's a boy?

14 A Yeah, a boy.

15 Q What's his name?

16 A Braylon.

17 Q Do you have any other children?

18 A Yes.

19 Q How many?

20 A Just one more.

21 Q And is it a boy or girl?

22 A A girl.

23 Q How old is she?

24 A She's 13.

25 Q You grew up in the Bruton community?

1 A Yeah.

2 Q You went to school with Ms. Gordon?

3 A Yeah.

4 Q What kind of work have you done?

5 A Nothing really special. Like my family, they've got
6 their own construction business. And we like whenever
7 we're down and out, we just go and help them and make
8 money off of that. So no big special job or nothing like
9 that.

10 Q I'm going to ask you, you've been convicted of a
11 crime before?

12 A Yeah.

13 Q You've been convicted of possession of crack cocaine,
14 in fact; is that right?

15 A Yes.

16 Q Twice?

17 A Yes.

18 Q In recent years?

19 A Yeah, just, I think, like 90 days ago. I went in
20 front of Judge Patterson.

21 Q Let me ask you, do you have a problem with crack
22 cocaine?

23 A I did. But since I've been placed on house arrest,
24 I'm clear. I don't do nothing.

25 Q Okay. But let's talk about your prior history with

1 crack cocaine. How long had you had a problem with it?

2 A Well, I started out when I was like 14, 15. I used
3 to smoke weed and stuff like that with my friends.

4 Q How did you get introduced to it?

5 A I mean, you know, pretty much everywhere I went, it
6 was there. From the neighborhood I come from, you don't
7 have to go too far.

8 Q Okay. And you're familiar with [REDACTED]

9 A Yeah.

10 Q You, in fact, were there on August 2nd, 2003?

11 A Yeah.

12 Q Do you recall when the police came in?

13 A Yeah.

14 Q Tell the jury where you were standing when the police
15 entered that house.

16 A Actually, I was on my way to the door. But by the
17 time I got to the door, they was kicking it off the
18 hinges. And they grabbed me and threw me down on the
19 ground and put me in cuffs.

20 Q Okay. How long were you there prior to the police
21 coming in the door?

22 A Not too long. I had -- probably about 20 minutes.

23 Q Do you know Teresa Smiley?

24 A Yeah, I know her.

25 Q Did you know her before that day?

1 A Actually, I met her when I got out of jail on some
2 other charges and all my friends and everybody was hanging
3 at her house.

4 Q Okay. Did you ever date her?

5 A No.

6 Q Did you ever live at [REDACTED]

7 A No.

8 Q Now, I've got to ask you -- I guess I'll use the
9 exhibit. State's Exhibit No. 12, I want you to take a
10 look at that. Do you recognize that?

11 A Yes.

12 Q Is that the bond sheet that we heard about earlier?

13 A Uh-huh.

14 Q On that bond sheet, it has an address on there; isn't
15 that right?

16 A Yeah.

17 Q The address is [REDACTED]

18 A Uh-huh.

19 Q You signed that with that address?

20 A Yes.

21 Q Did you tell whoever filled that out that that was
22 your address?

23 A No. It was really like, I guess, you could say a
24 kind of mistake. I figured if I didn't have an address to
25 get out on bond, then I probably wouldn't get out. And I

1 didn't know my momma's address.

2 Q Why didn't you know your mother's address?

3 A She had just moved in apartments. And I didn't know
4 -- I knew the number of it, but I didn't know the road
5 address of it at the particular time.

6 Q The number, do you mean the apartment number?

7 A Yeah. I knew the apartment number, but I didn't know
8 the address of the apartments.

9 Q That document has a date of November 21st, 2003?

10 A Yeah.

11 Q Is that the day you got out of jail?

12 A Yeah, I think so.

13 Q And you were in from August 2nd, 2003?

14 A From the date, yeah, we got locked up together.

15 Q Let me show you State's Exhibit No. 11. Take a look
16 at that. That's the booking information that Sergeant
17 Lewis testified about. Do you see that?

18 A Yes.

19 Q It has [REDACTED] on there; is that right?

20 A Uh-huh.

21 Q When you were booked into the jail, did they ask you
22 about your address?

23 A Well, I think they did. But, you know, like I say, I
24 didn't have any other address to put on there besides the
25 address I got locked up at.

1 Q Okay.

2 A I didn't know my mother's address and my
3 grandmother's house was being tore down.

4 Q What do you mean your grandmother's house was being
5 torn down?

6 A They tore the whole block down, all the houses.

7 Q Was she moving to a different place?

8 A Yeah. But I don't know if she was in that house by
9 then or not.

10 Q Okay. Had you had contact with her?

11 A I would call every now and then. I didn't call on
12 like no everyday basis or nothing like that.

13 Q All right. But did you live at [REDACTED]

14 A No.

15 Q Did you have clothes there?

16 A No.

17 Q But you spent time there?

18 A Yeah. I mean, I've been there a number of times.

19 Q Why?

20 A Just because it was the local hang out. Like I said,
21 when I got out of jail, my brother was hanging there, my
22 cousin was there, three or four of my friends.

23 Q Did you ever date Ms. Smiley?

24 A No.

25 Q Did you ever have -- what kind of relationship, if

1 any, did you have with her?

2 A Just like we became friends because our birthday was
3 on the same day. And, you know, we went in on parties
4 together and stuff like that.

5 Q Did you go -- the party that was happening that
6 night, were you in on the party together?

7 A No.

8 Q The drugs that were in that house, did you know the
9 drugs were in there?

10 A No.

11 Q Why were you there?

12 A Just, basically, because there wasn't nowhere else to
13 go. Like, our old hang out, you know, it was kind of hot
14 back then with police riding around and stuff like that.
15 So I figured I would go where everybody else was.

16 Q When you arrived there, was there anybody there
17 besides Ms. Smiley?

18 A No, everybody was leaving.

19 Q Okay.

20 A Or had already left.

21 Q Did you have any intention on using crack cocaine
22 that night?

23 A Yeah, if I could have got some.

24 Q Did you think you could get some from Ms. Smiley?

25 A I figured I could get it from anybody that was down

1 there.

2 Q All right. Is that what you were planning on doing?

3 A Yeah.

4 Q Had you done that before?

5 A I had.

6 Q Had you gone to [REDACTED] or to Ms. Smiley's to try to get
7 some crack?

8 A Not to her, but I had been down to that house.

9 Q That house?

10 A Yeah.

11 Q Were you and Ms. Smiley in any kind of conspiracy or
12 plan together to sell drugs that were in that house?

13 A No.

14 Q To sell any kind of drugs together?

15 A No.

16 Q Do you know if Teresa, Ms. Smiley, was dating anybody
17 at that time in August 2003?

18 A No. Actually, when I met her -- when I first met
19 her, she had a boyfriend. I think his name was Bernard or
20 something like that.

21 Q But at the time when you all were arrested, do you
22 know if she was dating anybody?

23 A No.

24 Q When the police came in, you said they put -- made
25 you get on the ground, did they ask you about where you

1 lived?

2 A No.

3 Q Did Deputy White ask you about where you lived?

4 A No. I think they was more like they already knew
5 what they was coming for. They didn't want nothing to
6 slow them down.

7 Q Well, Deputy White mentioned when he testified and he
8 also mentioned in his report that they asked you about the
9 drugs in the house. Do you remember being asked about
10 that?

11 A Yeah.

12 Q Do you remember -- did you answer them?

13 A Yeah.

14 Q Did you -- they said you said, there ain't no drugs
15 in this house. Is that what you said?

16 A Exactly.

17 Q Okay. Do you have an ID?

18 A No. Actually, I had one years ago, but I let my
19 friend use it to go to a club and he never brought it
20 back.

21 Q Do you have a driver's license?

22 A No. I've never had a driver's license.

23 Q In 2003 when you were arrested, did you have an ID or
24 driver's license?

25 A No.

1 Q Did you have anything that would have had -- on you
2 that would have had your address on it?

3 A No.

4 Q You had some money on you; isn't that right?

5 A Yes.

6 Q Where did you get the money from?

7 A My mother.

8 Q Was all of it from your mom?

9 A Yeah, most of it. I probably had a couple of dollars
10 before that, but not too much, probably about \$25 or
11 something like that.

12 Q Of your own money?

13 A Yeah.

14 Q What were you planning -- there was a card game
15 supposedly going on, were you going to be involved in the
16 card game?

17 A No, not really, I hadn't planned on it.

18 Q Mr. Garrison, Aaron Garrison, was there?

19 A Yeah.

20 Q And what was he doing when he was there? What did
21 you see him do?

22 A It looked to me like he was cleaning up, taking out
23 trash, and stuff like that.

24 Q Did you talk to each other?

25 A Yeah. I mean, I spoke to him. I know him. We've

1 been good friends for a little while.

2 Q And how long before the police arrived is it that --
3 wait, that didn't come out right.

4 When Aaron Garrison arrived, how long after he
5 arrived was it before the police arrived? Do you know?

6 A I would say about 10 or 15 minutes.

7 Q And when the police arrived, you were where?

8 A Almost at the front door.

9 Q And what room would you have been in in the house?

10 A The living room.

11 Q The front door -- when you come in the front door,
12 what room are you in?

13 A The living room.

14 Q And then where's the kitchen?

15 A Right next to the living room.

16 Q Had you been in the bedroom at all?

17 A No.

18 Q Did you have any clothes at that house?

19 A No.

20 Q When the police came in, where was Ms. Smiley?

21 A I think she was in the back room.

22 Q Was she in the bathroom?

23 A I don't think so. Actually, I think she left -- she
24 left out of the kitchen and went to the back room.

25 MR. SCALZO: I don't have any further questions, Judge.

1 THE COURT: All right. Solicitor.

2 CROSS-EXAMINATION

3 BY MR. NEWKIRK:

4 Q Mr. Whitner, on August 2nd, 2003, you were at [REDACTED]
5 [REDACTED] correct?

6 A Yes, sir.

7 Q You were there with Teresa Smiley; correct?

8 A No. I wasn't there with her. I was at her house.

9 Q And Teresa Smiley was there; correct?

10 A Yeah.

11 Q Aaron Garrison was there; correct?

12 A Yes, sir.

13 Q And you were there when the police came; correct?

14 A Uh-huh.

15 Q And you saw all the drugs the police found in the
16 house; correct?

17 A Yeah.

18 Q And you testified that you didn't remember giving
19 Deputy White your address?

20 A I don't remember him asking me for my address. The
21 only thing he asked me for was to get down on the ground.
22 And I'm not sure if it was him, it was whoever came
23 through the door first.

24 Q But you didn't have any ID on you at that time?

25 A No.

1 Q You didn't have any driver's license on you?

2 A No.

3 Q So Deputy White couldn't have gotten your address
4 from your driver's license; right?

5 A Huh-uh.

6 Q He couldn't have gotten it from an ID, could he?

7 A Huh-uh.

8 Q But he could have gotten it from asking you; correct?

9 A Yeah, he could have.

10 Q And I want to talk to you about this bond sheet.

11 A Uh-huh.

12 Q You testified that you signed this bond sheet;
13 correct?

14 A Yeah.

15 Q And that the address on it when you signed the bond
16 sheet was [REDACTED] correct?

17 A Uh-huh.

18 Q And you say that you just said, oh, that's all right,
19 whatever address is on there?

20 A No. Actually, I knew if I didn't have an address to
21 give on there. I wouldn't be getting out of jail. And I
22 had been locked up for almost six months.

23 Q You didn't remember your mother's address?

24 A No.

25 Q You didn't remember your grandmother's address?

1 A It was being tore down. I couldn't have got no mail
2 there no way.

3 Q You didn't remember your father's address?

4 A My father stayed with my mother.

5 Q You didn't remember any of your friends' addresses?

6 A I don't hang out at their house like that.

7 Q How about your brother?

8 A My brother, he usually stay with my momma. He sleep
9 on the couch.

10 Q So you chose [REDACTED] as the address?

11 A No. Actually, I didn't choose it. I just -- it was
12 the first thing that came to mind, you know. I mean,
13 that's where I went to jail at. I figured it wouldn't
14 hurt if I put it down there. I didn't know it would harm
15 me like that.

16 Q Did you read number four listed on the bond sheet
17 that says this Defendant will notify the Court promptly if
18 he changes his address?

19 A Uh-huh.

20 Q So you read that saying this address?

21 A Uh-huh.

22 Q And you signed as [REDACTED] as your address?

23 A Yeah. But like I said, I signed it because I wanted
24 to get out of jail. And it was probably the only way I
25 could get out.

1 Q So you just had been arrested where you said the
2 police found all these drugs, and you pick that address to
3 put down as your address when you couldn't think of
4 anything else?

5 A It was the only one I could think of. I ain't going
6 to lie to you.

7 Q And then let me show you State's Exhibit No. 11, the
8 booking report.

9 A Yeah.

10 Q And you said that you gave the detention center your
11 address as [REDACTED] isn't that correct?

12 A Yeah.

13 Q And you just picked this address out of thin air?

14 A I just picked it. I couldn't think of not one other
15 one to put down there. Every day, I'm out there. I'm
16 from my momma's house to the street where they stayed at,
17 my friend stayed beside theirs. I didn't know the address
18 to their house, so I just put it down there.

19 Q So you just said sometimes you're at [REDACTED]
20 You said you go from your grandma's house; correct?

21 A Yeah.

22 Q You stay at your grandma's house?

23 A Yeah.

24 Q And then you stay at [REDACTED] sometimes?

25 A No. I didn't say that.

1 Q So when they booked you in, again, you didn't
2 remember your mom's address?

3 A No. I never knew it, to be honest.

4 Q Did you ever live there?

5 A Yeah. I've lived there.

6 Q And you didn't know the address?

7 A But I never had any mail or nothing come there.

8 Q You didn't remember your father's address?

9 A It's the same as my mother's.

10 Q When you were booked, you didn't remember your
11 grandmother's address?

12 A Like I said, I knew my grandmother's house. But at
13 the time, they were tearing every house that she lived --
14 around down there. They was tearing them down. So I
15 wouldn't have been able to get mail there no way.

16 Q And when you were booked in, you didn't remember any
17 of your friends' addresses?

18 A I never asked them. I never got their address, no.
19 We just, basically, were in and out of their houses.

20 Q But the address you chose to put down was [REDACTED]
21 [REDACTED]?

22 A It was the only one I could think of.

23 Q And when the police came into [REDACTED] you
24 were in the living room; correct?

25 A Yeah. Actually, I was getting ready to answer the

1 door. Because they hit it and like it didn't come open
2 the first time, so I started walking towards the door.
3 And by the time I got like a foot away, that's when the
4 door came flying open. And they grabbed me and threw me
5 down to the ground.

6 Q Do you normally answer the door at a residence where
7 you don't live?

8 A Yeah. I mean, it's -- when you're around a friend,
9 it's normal.

10 Q And you stated when Mr. Scalzo asked you that you had
11 never gotten crack cocaine from Ms. Smiley before;
12 correct?

13 A Did you say have I?

14 Q Have not, you told Mr. Scalzo you have not.

15 A Yeah.

16 Q And as you told Mr. Scalzo, isn't it true that in
17 2005, you were convicted of possession of crack cocaine?

18 A I didn't hear you.

19 Q Isn't it true that in 2005, you were convicted of
20 possession of crack cocaine?

21 A Yeah.

22 Q And isn't it true that in 2001, you were convicted of
23 possession of crack cocaine twice?

24 A Yeah. I admit I've got drug problems. I don't got
25 no drug selling problem.

1 Q In 2003, you were convicted of giving false
2 information to law enforcement?

3 A Yeah.

4 MR. NEWKIRK: Nothing further, Your Honor.

5 MR. SCALZO: Just redirect.

6 THE COURT: All right.

7 REDIRECT EXAMINATION

8 BY MR. SCALZO:

9 Q When you got out of jail, where did you stay?

10 A With my mother.

11 Q And, I think, you have the booking sheet up there,
12 State's Exhibit No. 11?

13 A Yeah.

14 Q On this booking sheet, it says next of kin, Williams,
15 Burnell, who's that?

16 A My grandmother.

17 Q And then it has [REDACTED] Greenville. Did
18 you give the jail that address?

19 A They've always had it.

20 Q All right.

21 A Like I said, the only reason I didn't put it down
22 that time is because they was tearing her house down.

23 MR. SCALZO: No further questions.

24 THE COURT: Thank you.

25 Step down.

1 MR. SCALZO: The Defense would rest.

2 THE COURT: Anything in reply, Solicitor?

3 MR. NEWKIRK: Nothing in reply, Your Honor.

4 THE COURT: Take the jury out.

5 (WHEREUPON, the jury was excused from open court at
6 approximately 11:09 a.m.)

7 MOTIONS

8 THE COURT: Any motions?

9 MR. SCALZO: I would simply renew my motions from
10 previously in the trial.

11 THE COURT: I deny your motion.

12 Any requests to charge?

13 MR. NEWKIRK: Your Honor, I'm not sure if this is
14 part of your normal charge on drug cases, but I would
15 request the charge that two people can possess the same
16 drugs.

17 THE COURT: Joint possession?

18 MR. NEWKIRK: Yes, sir.

19 THE COURT: Okay. Do you waive opening argument,
20 Solicitor?

21 MR. NEWKIRK: Yes, Your Honor.

22 THE COURT: We'll take a very short recess and then
23 we'll start.

24 (WHEREUPON, a break was taken.)

25 THE COURT: Okay. Bring the jury in.

1 (WHEREUPON, the jury came into open court at
2 approximately 11:16 a.m.)

3 THE COURT: Mr. Scalzo, you may proceed.

4 CLOSING ARGUMENTS

5 MR. SCALZO: May it please the Court, Your Honor?

6 You didn't hear it yesterday, but when Mr. Dillard
7 said Teresa Smiley lived there in 2002, I was saying to
8 myself, Chris, you look like an idiot in front of this
9 jury right now. And it took me some time to kind of
10 process that through. And that was completely unplanned.
11 And I really didn't want it to happen, but I'm kind of
12 glad it happened. Because that little event is a
13 demonstration about what I was talking about in the
14 beginning of this trial. His conclusion was that she
15 didn't live there in 2003. That was his conclusion. He
16 was very sure about that. But the evidence says that's
17 not right. He was mistaken.

18 Now, he didn't intentionally lie. That's not what
19 I'm saying here. But he was mistaken. He had his own
20 sheet, which is Defendant's Exhibit No. 1. You'll get to
21 see it. And on the second page, it has [REDACTED]
22 Teresa Smiley has a phone number. And then it was crossed
23 out, and next to it was written Amanda McCarroll or
24 whatever.

25 Now, for whatever reason, he didn't remember -- he

1 didn't write down any information. He just wrote names
2 and that's it. So he had some difficulty remembering.
3 But the other evidence we have, clearly, indicates that
4 she had to have been living there. Why would she contact
5 Duke Power, Greenville Water, and have an account with
6 them in 2003, and owe them money for a house she wasn't
7 living in?

8 So we know it had to be true. We know she had to be
9 living there in 2003. And Mr. Dillard simply made a
10 mistake. Greenville Water System confirmed that she was
11 renting from him. And I go over that to point out that we
12 can be pretty sure about a conclusion, but we've got to
13 look at the evidence, and we need to look at all the
14 evidence and the whole picture.

15 Now, the Government's conclusion is that Edward
16 Whitner was living at [REDACTED] Their evidence is
17 a bond sheet and a booking printout from the jail. And
18 then we have statements by two other witnesses. So let's
19 kind of handle those separately.

20 The bond sheet, what is the bond sheet? That's I've
21 been in jail since August. I'm about to get out. I need
22 to sign all the paperwork before they let me out. If I
23 don't give them an address where they can contact me, I
24 can't think of one -- and if you look at the bond sheet,
25 look at it back there. What you'll notice is the

1 signature of the judge, the date, the address. That
2 information is all in the same handwriting, the same
3 thickness of pen. Edward's signature is in completely
4 different writing. So we know who filled that out. Is
5 that of any consequence? Is this really reliable proof of
6 where he lived?

7 See, Duke Power, I think that's reliable. Because
8 Duke Power has a money interest in making sure that
9 they're going to get paid for the service they provide.
10 They're not just going to let anybody do it. They did do
11 a background check. They're going to make sure they're
12 getting paid. What's to say they ever checked that out?
13 I mean, how do we know they didn't check it out? Because
14 we know Teresa Smiley wasn't living there this past
15 September. She was arrested in August. The Duke Power
16 service ends -- let me make sure I'm accurate. Duke Power
17 disconnected on September 8, 2003, and put in a different
18 person's name of Betty McKinney.

19 So the accuracy of that document is what? Not very
20 accurate as compared to the other documents, Greenville
21 Water, Duke Power. Those are accurate because there's
22 motivation for the people taking that information to be
23 accurate about it.

24 Now, you know Edward's been in trouble before. Do we
25 not think he understood the sort of system there? He

1 needed an address to give them so he could get out of
2 jail. Does that mean he was going to live there? Does
3 that mean he could even go back there if he ever lived
4 there? No. That's not proof that he lived there.

5 Let's talk about the statements. Deputy White
6 says -- I, specifically, asked Mr. Dillard if she lived
7 there in 2003, and he said, no, it was 2002. Now, I'm not
8 saying that Deputy White is lying. But two and a half
9 years ago, they're executing a search warrant, running
10 through a place, searching all sorts of things. He
11 doesn't have an ID on him. They've got three people
12 there. If he never asked him the address or really wasn't
13 very cooperative, maybe he just wrote down [REDACTED]. And
14 maybe, now, what Deputy White remembers is it had to have
15 been. Just like it had to have been from Mr. Dillard that
16 she didn't live there in 2003. But even that is not proof
17 that he lived there.

18 Okay. Deputy White says he saw clothing, men's
19 clothing. There's a couple of problems with that. One,
20 remember what Deputy White is describing to you is going
21 on when he says he saw the men's clothing. He's come in
22 the back and he finds Teresa Smiley in the back bedroom.
23 They secure the people that they see out in the open.
24 Now, what are they doing? They use the phrase "protective
25 sweep." They're looking for people in the house that they

1 couldn't see. Because they don't want somebody jumping
2 out of the closet with a gun shooting them. That makes
3 perfect sense. That seems like perfect police procedure.

4 So when he opens the door, do you think he's going,
5 that's men's pants and that's a dress? No. He's opening
6 the door, is there anybody in there, closing it. Because
7 if he's got his back to the room too long, what if
8 somebody else walks in? So if he's doing what they do in
9 a protective sweep, he's not paying attention to men's
10 clothing.

11 And I asked him a lot of questions. He didn't write
12 this down and he didn't write that down. Maybe it sounded
13 nit picky. But there was a reason I asked him that,
14 because he chose to write some things down and he didn't
15 write other things down. Why?

16 There's a big deal about who lived there. That's a
17 big issue in this case. To say that you sat three people
18 down and asked them, what's your address, do you live
19 here, and asked them questions -- you're asking them
20 questions, you're investigating a crime, and you're not
21 keeping track of what they said and who said what, that
22 doesn't make any sense. Because we know he did do that.

23 He said, specifically -- I asked him about his
24 six-page report. And I asked him, specifically, you wrote
25 down that you asked Teresa Smiley, were there any drugs in

1 the house or whose drugs were they? And he put quotation
2 marks around her response. He, specifically, wrote in his
3 report that he asked Aaron Garrison and the Defendant, are
4 there any drugs in the house? And both of them, "There
5 ain't no drugs in the house." So we know that he was
6 keeping track of information and things that were being
7 said. Lo and behold, probably the most important issue in
8 the case, who lived there and whether Edward lived there,
9 nowhere is it mentioned.

10 Now, again, I'm going to go back. I'm not saying
11 he's lying. But it's very easy to go back two and a half
12 years ago and say it had to have been the case. I had to
13 have asked him that. Why do I believe he lived there? I
14 had to have asked him. But the police are in there
15 scribing, they're writing everything down. They're
16 keeping track of all sorts of stuff. To think that they
17 wouldn't have kept track of doing that seems inconsistent
18 with everything else that they did.

19 Let's talk about proof -- well, I'm getting ahead of
20 myself. Let me talk about Teresa Smiley a little bit.
21 And I'll come back to her later as well. She says he
22 lived there today. Today, she said he lived there. Not
23 then, today. Why? Because yesterday she pled guilty.
24 And yesterday, they deferred her sentence. Yesterday, she
25 admits to the trafficking and possession with intent to

1 distribute. Today, it's, I knew they were there, but they
2 weren't mine, and I didn't know what they were for.

3 And you heard me ask her the question because it's
4 obvious, what is she hoping will happen? She is
5 desperate. She's in a situation where she's already pled
6 guilty. The only thing that is left is what will her
7 punishment be. And one of most influential people
8 involved in what the punishment will be is the Prosecutor.
9 Now, did he promise her anything? There's no evidence of
10 that. But to act as if that just simply isn't true and
11 she's only up there to do her civic duty and she wants to
12 tell the truth now, that's just not believable.

13 There are a lot of problems with what she said
14 besides her motivation to put it all on Edward, because
15 you notice that's what she did. You know, you would
16 expect somebody, what we call a co-defendant, two people
17 involved in the same crime, when they own up to what
18 they're doing and they're testifying, you'd expect them to
19 say, well, here's what we did. And they incriminate
20 themselves. Because they've already pled guilty, they're
21 admitting it.

22 So they tell their side of it. And they're being
23 honest because they're telling their side of it. But she
24 didn't do any of that. She did her best to have her cake
25 and eat it, too. She did her best because she was scared

1 to say, I'm going to help the State as much as I can so
2 that they have a good case, but I'm going to put myself as
3 far away from it as I possibly could. I knew the drugs
4 were there, but I didn't know what they were for. They
5 weren't mine. I don't know. The drugs are all over the
6 place. There's money all over the place.

7 The money is an interesting thing because she was
8 asked about -- she said she had two jobs. And whether she
9 paid the bills and whether Edward paid any of the bills --
10 what did she say? She said, I paid the bills. He really
11 only helped out every now and then. There's money all
12 over the house stuffed in drawers that she, obviously,
13 knew about. Does that make any sense? Would that make
14 any sense that he's not helping? That, oh, she's the sort
15 of single mom, working two jobs, trying to keep it afloat
16 when there's money all over her house. Why would she say
17 that Edward didn't really help? That doesn't really make
18 any sense.

19 Edward just wasn't involved with her. And, at that
20 point, she hadn't thought about that. All she knew is
21 what I've got to say is that he lived there and it was his
22 drugs because that helps me. One, because it helps the
23 Prosecutor say that he lived there; and, two, because it
24 makes me look like I'm not a drug dealer. That's her
25 motivation. That's why she's up there saying all that.

1 The gun was an interesting piece of evidence. If
2 you'll notice -- and I'm not going to pull it out. The
3 gun was put into evidence by the State because it was one
4 of the things that they found in the house. Very -- it
5 sounds bad, money, drugs, gun. And it is. You're a
6 prosecutor and you want to put all that in and you're
7 creating this mystique of drug dealers and guns, money and
8 drugs go together.

9 Interestingly enough, the State did not put into
10 evidence it's own tests. You recall the first witness I
11 called today to the stand was Captain Kellett, who
12 testified, I'm the one that does the tests. I didn't ask
13 her to do the tests. She works for the State. She works
14 for the Sheriff's Office. She tested the fingerprints
15 that existed on the gun and said -- and you can look at
16 her report. Her report says that those fingerprints don't
17 match the three co-defendants. I think that brings up an
18 interesting point. It's found in the bed. It wasn't
19 found on anybody. It was found between the two mattresses
20 with fingerprints on it.

21 So this is not a situation where you have a gun that
22 has no fingerprints on it and that we just don't know who
23 touched it. What we have is a gun that has fingerprints
24 on it. It just doesn't -- we just don't have the
25 fingerprints who touched it to match them up, which puts a

1 fourth person involved. Somebody touched that gun and put
2 the fingerprints on it and put it in that bed. That
3 person wasn't there and was not arrested. Perhaps, Teresa
4 Smiley knows who that person is. Perhaps, that's the
5 person whose drugs she was sharing, or dealing, or
6 whatever that relationship is. And look how easy it is
7 now for her to sit on the stand to protect that person.
8 Yet, another motivation for her to lie.

9 Let's talk about Edward and his situation. Was he
10 there? No doubt. Was Aaron Garrison there? No doubt.
11 Is this a drug house or a party house? That's the
12 reputation. We know it was a drug house. There were all
13 sorts of drugs found there. Why were Aaron and Edward
14 there? Do you think it might be because of drugs? It's a
15 pretty good chance. It's a pretty good chance that they
16 were looking to score some drugs. And they knew one of
17 the good places to get it would be to go to Mack Street.
18 So they go and they show up. Maybe Aaron didn't have the
19 money to buy it, so he was trying to help out. And maybe
20 she was going to give him a deal on the drugs or just give
21 him a little bit.

22 Aaron [sic] had a little bit of the money.
23 Unfortunately, it was the money his mother gave him. But
24 being a drug addict, he doesn't do everything honorably.
25 So he had some money. But you notice he's got money and

1 then all the other money is strewn throughout the house.
2 But what is he doing in the living room with money in his
3 pocket? He, supposedly, and, apparently, if you believe
4 Ms. Smiley, is the ring leader. What's he doing standing
5 in the living room with his money? Why isn't he in the
6 back putting all the money together, counting it, you
7 know, kind of keeping track of his stuff?

8 What they're saying here is it's a business. You
9 know, the dealing of the drugs is like a business: You've
10 got the product, you've got the money. You're not going
11 to just let it lay around and not even keep track of it.
12 You're going to be on top of it. You're talking about
13 valuable things to the dealer. What is he doing just
14 standing around?

15 There's another interesting thing about his location
16 in the house compared to everybody else's location. If
17 somebody were to just walk into anyone's house, your house
18 or my house, randomly, unexpected and they found a person
19 in a bedroom, a person in the living room, and a person in
20 the kitchen, and you have to figure out, based on that
21 information, who probably lived there. You're more likely
22 to believe that the person who was in the bedroom is the
23 resident, because that's a private area.

24 We don't just walk people through our bedrooms and
25 let guests come in our bedrooms. That's a private area.

1 But the living room and the kitchen are areas that we
2 allow guests to come into. That's the whole point of
3 those rooms. So it was perfectly consistent that Edward
4 was found in the living room. And it's perfectly
5 consistent that Aaron is found in the kitchen. He's
6 cleaning up. Edward is standing around waiting to see
7 what he could get, and Teresa is in the back.

8 Now, one thing that everybody agrees on, except for
9 Teresa Smiley, is where she was. Deputy White comes in
10 the back, and the first person he encounters is her. I
11 forget which deputy it was, I think it was Carmen who said
12 he was the guy that went in first from the front of the
13 house. He puts two men right there, one in the living
14 room and one in the kitchen. He couldn't describe which
15 one it was because he wasn't paying -- he didn't pay
16 attention to their face.

17 He was trying to make sure everything is secure
18 because he's the first one in. But he did not know that
19 there was just those two guys there. Deputy White had
20 somebody else at the back. Edward Whitner says she's in
21 the bedroom. Aaron Garrison says she's in the bedroom.
22 The police say she's in the bedroom. Teresa Smiley says
23 she's in the bathroom.

24 And she's like just coming out. She's just in the
25 hallway and she sees Aaron Garrison throw something down.

1 How could that all happen at the same time? How could
2 Deputy White walk -- come rushing through the back of the
3 house and catch her standing there and not also catch
4 Aaron Garrison standing there if she's close enough to
5 Aaron Garrison to see him throw something down? Because
6 that's not where she was.

7 And it's a little thing like that that tells you
8 about her story and tells you about what she's trying to
9 do. She's trying to put everybody she can as close to the
10 drugs and the bad aspect of what was going on and push
11 herself as far away from it as possible. That's why she
12 testified that way. And she made a mistake. She didn't
13 think it all the way through. It's an inconsistency
14 that's corroborated. It's an interesting thing when you
15 have the police and the Defendant, basically, agreeing on
16 something. Because, usually, they're not agreeing.

17 There are other aspects of Edward's life and what's
18 going on. His dad wasn't really the kind of dad you would
19 expect to come up here and testify. He told you he had a
20 crack problem. He told you he had been to that house.
21 And he's a good example of what's happened to a person
22 who's used drugs and living in that kind of environment.
23 And you see Edward kind of similar.

24 He's a little bit more firm about what he remembered,
25 but it's still hopping from one place to another, not a

1 lot of consistency there. He can't tell you his friends'
2 address. He's running around. He's got money in his
3 pocket looking for drugs. That's a drug addict. Compare,
4 Ms. Smiley was up there with a pretty nice suit, red
5 shirt. It doesn't look like he's wearing a suit that's
6 pressed, that's nice and neat. He doesn't look nice and
7 neat. Because he has a drug problem. That's why he's at
8 that house.

9 We start to get to the women in the case, and mom
10 testified. Mom has been working at a hotel for 17 years.
11 Therese's' no indication she has any drug problem. Her
12 drug problems are her son and her husband. That's a
13 problem. But she doesn't use. But she's got a problem
14 with them. But she's consistent, she's been working.

15 And, now, she's got her son, yes, her son is on
16 trial. Is she afraid for her son to go to jail? No
17 doubt. It would be ridiculous to say that she wasn't.
18 But she didn't get up there and tell a fantastic story.
19 She didn't overreach. She didn't try to develop this
20 great grand story as to what was going on. If she really
21 was going to lie about it, why didn't she just say I saw
22 Edward, he wasn't there, or come up with something else
23 that completely contradicted? She didn't say that.

24 She gave a very reasonable explanation because that's
25 what the truth was. I'm going to a family reunion, one

1 that happens all the time. It was in Orlando. I'm
2 leaving, Edward is staying. I've given him money and
3 asked him to pay a bill. And I also gave him money for my
4 granddaughter. Did she probably tell him, you must spend
5 that money where he was supposed to? I'm sure she did.
6 Was she a little bit blind to the problem? Probably. But
7 that is, obviously, a little bit more believable than he
8 writes his address on a bond sheet and, therefore, he
9 lives there. Or from somebody who wants to get as far
10 away from drugs that -- she can't get away from because
11 they are in her house. And there's no question it is her
12 house. She's trying to push herself away and make sure
13 everybody else is closer to the drugs. So what she said
14 was a lot more believable simply because it's a mundane,
15 regular old story, something that would happen to all of
16 us in every day life.

17 Ms. Gordon testified. It was kind of interesting
18 because she didn't get up there, I don't believe Teresa
19 Smiley. I hate her. No. She said, we're all in the same
20 community. We've known each other. I've known Edward
21 since we were young. We all went to school together and
22 hung around in the same community. You know, I don't
23 really wish any bad on her.

24 Now, if she's lying, if her motive is only to lie to
25 protect Edward, why didn't she just get up there and trash

1 Teresa Smiley? Why didn't she just get up there and say
2 she was mean and I saw her do this, that, and the other
3 thing? She didn't say any of that. She was trying to
4 tell the truth. She was trying to tell what she knew from
5 her experience.

6 And while she didn't start dating Edward until later
7 on, she certainly lived in the community and lived next to
8 his mother and was familiar enough with Edward and the
9 people around him to have seen something, some indication
10 that he might have been with Teresa Smiley, something.
11 And she didn't see it. And so it's different pieces of
12 evidence that you start to put together. Putting that
13 together as a whole, just because it's written down on the
14 bond sheet isn't convincing. Not to mention that the
15 times put on the bond sheet, [REDACTED] is being
16 rented to somebody completely different.

17 There are some problems I need to point out with
18 regard to the State's case and what they're trying to
19 prove. The State is trying to prove to you that he lived
20 there. They've known that. They know. They didn't start
21 this case yesterday and say, oh, yeah, we've got to prove
22 he lived there. That's, obviously, something they've been
23 thinking about. Here's the evidence that's been
24 collected. Particularly, you've got this bag.

25 And when you look in this bag, you've got some items

1 in there. Red bowl, Deputy Proctor talked about he found
2 the red bowl. The scissors. Guess what? No forensics
3 done on that. What about some fingerprints from the
4 counter top or the glass inside the house that say that
5 Edward was in there? You know, it would be one thing if
6 they said, hey, we didn't find any fingerprints that
7 matched him. But it's even worse, they didn't even look.
8 You don't want to get fingerprints, okay, you didn't think
9 about it. You're in the house. You're rummaging through
10 it. You're finding drugs all over the place. Do you
11 think you might find a picture? How about a letter? How
12 about some document with somebody's name on it? Nothing.

13 There was not one document, other than what was
14 written on after the fact, that says he lived there. It's
15 hard pressed to say you're going to walk into a place
16 where somebody has been living and not find something
17 of -- something tangible, physical, a letter, a picture,
18 something that connects them to that place. How about a
19 neighbor? How about somebody who lived right next door or
20 directly across the street? I mean, we all know that our
21 neighbors know we get up at 8:00. We get in our car and
22 we drive to work. They see us, we see them. None of
23 that. No witnesses that said any of that. That's the
24 problem.

25 You need some evidence to draw the conclusion. And

1 the evidence on our side to draw the correct conclusion is
2 that he had a drug problem and that he was really there to
3 try to score some drugs. What did he look like? Is he
4 scoring? He certainly didn't make up that he had been
5 convicted of possessing crack cocaine on a couple of
6 occasions. It kind of sounds like a drug user. And his
7 dad admits he's using drugs. That's consistent. That's a
8 story that makes sense. But you've got nothing that is
9 credible to say that he lived at that residence.

10 It's important to know what's going on here. It's
11 important to sort of step back, look at it from a broader
12 perspective and say, what is it that the State is really
13 saying? They're saying he's a drug dealer. It's a large
14 quantity of crack cocaine, a large quantity of marijuana,
15 a large quantity of money. Have they -- besides bringing
16 in all of that, because it's always an overwhelming thing,
17 if I can overwhelm you with the amount of drugs, the
18 amount of money, you focus on that, then you don't focus
19 on what else isn't there. And that's not right.

20 Yeah. Okay. We've got all these drugs. You found
21 them. No disputing that you found all these drugs. Okay.
22 What about some more evidence about the drug dealing
23 scheme that's, supposedly, going on? Where is the fancy
24 car? Where is the suits or where is the proceeds of all
25 this drug dealing? It doesn't appear like he has any.

1 And the State hasn't brought any in. So they're asking
2 you to say, hey, this guy is a drug dealer. But all
3 they're showing you is the drugs.

4 Well, there's a couple of steps in between that
5 they've got to prove to you beyond a reasonable doubt.
6 And it's no trick. That's the whole point of beyond a
7 reasonable doubt. It's got to be reasonable. So they're
8 saying that people from Mars planted the drugs in there.
9 That's not reasonable. But what is reasonable is somebody
10 who has got a demonstrated history of being a drug addict
11 and is in a drug house with another guy who doesn't live
12 there, that nobody is disputing doesn't live there, right
13 after a party that's been going on at a place where
14 parties take place and drugs get exchanged and money.
15 That makes sense. So that's reasonable. It makes sense.

16 Now, the State wants to get you to the point of
17 saying it's beyond reasonable to say that he lived there.
18 They don't have that. They have two documents that,
19 admittedly, he's saying, yeah, I just told them that
20 address. Big whoopy. To me, all I need to do is get out
21 of jail. I'm not concerned about paying my bills. It
22 doesn't prove I live there. What proves I live there?
23 And that's what's required of the State. They're saying
24 he lived there. What proves I live there? Neighbors who
25 saw me staying there, people that have no interest in the

1 case, not somebody who is a co-defendant and is trying to
2 get off. Neighbors that said, I saw him go in there.
3 I've seen him go there this day, that day. He was there,
4 at least, that whole month now.

5 Go get some clothing. I mean, Deputy White said,
6 hey, I found some clothing. Well, okay, great. Was it a
7 size 40 or was it a size 28? Was it a size 34? What?
8 Men's clothing means nothing without the context of what
9 kind of clothing are we talking about.

10 So don't allow the Government to overwhelm you with
11 evidence of drugs, which we don't like, nobody likes, to
12 kind of in a sense cover up the fact that there really
13 isn't a whole lot of evidence to show that he lived there.
14 That's not -- you don't bear the burden of responsibility
15 for not bringing the evidence in. It's their job to bring
16 the evidence in. It's your job to weigh the evidence
17 that's been presented to you. And the evidence that's
18 been presented to you is not proof beyond a reasonable
19 doubt that he lived there. I think the evidence that has
20 been presented to you really does prove that he's a drug
21 addict and that he was looking to score and that's why he
22 was there.

23 Now, did he know her? Yeah. Did he have money in
24 his pocket? Yeah, he did, because he was looking to
25 score. And that's what's going on. He's not a big drug

1 trafficker.

2 So I ask you to recognize their conclusions. You
3 have to, it's part of your job. But look at, you know,
4 it's a table or a building or however you want to think
5 about it. The conclusions at the top, but they've got to
6 have something to support it. You know, you don't just
7 put a roof on the ground and call it a house. Let's build
8 it up, something that really shows you what's going on.

9 So I ask you to think about that. And I trust that
10 if you do that, you're going to come to the correct
11 verdict, which is not guilty on any of these charges.

12 Thank you.

13 THE COURT: Solicitor.

14 MR. NEWKIRK: May it please the Court?

15 Ladies and gentlemen, one of the most important parts
16 of this trial is over. And I say one of the most
17 important parts because it is you, the jury, who gets the
18 chance to hear the testimony and see the evidence. And
19 that's so important because it is that and only that, that
20 you are to use to determine if this Defendant is guilty or
21 not guilty.

22 I say it's one of the most because it's not the most
23 important. The most important part of this trial is yet
24 to begin. And that is you, the jury, going back to your
25 jury deliberation room, taking all the evidence, all the

1 testimony that you heard, and making the final decision of
2 whether or not this Defendant is guilty.

3 What I want to do first is I want to tell you a
4 little bit about the law. What I want to do is tell you
5 about the law and then tell you how the State has proved
6 each element of the law. Like I told you in my opening
7 statement, just remember that at the conclusion of this
8 trial, Judge Pyle is going to instruct you on the law. So
9 if I make any mistakes or anything differs from what I
10 tell you and what Judge Pyle tells you, you must follow
11 what Judge Pyle tells you.

12 This Defendant has been charged with trafficking
13 crack cocaine. Now, there are many different parts of the
14 trafficking statute. The State has to prove that the
15 Defendant sold, manufactured, brought into the State, or
16 provided financial assistance of 10 grams of crack
17 cocaine. Or the State has to prove that this Defendant
18 had in his possession 10 grams or more of crack cocaine.

19 And there are two types of possession. There's
20 actual possession. Actual possession is if a defendant
21 has it on his person or if he has the drugs in his pocket.
22 Constructive possession is when the defendant has --
23 exercises dominion and control over the drugs or he
24 exercises dominion and control over the area where the
25 drugs were found. Constructive possession is what you

1 have in this case. It's what happens when drugs are found
2 in someone's car or drugs are found in someone's house.

3 What evidence did the State present to you that this
4 Defendant is guilty of trafficking in ten grams of crack
5 cocaine? First of all, you heard from Deputy Proctor.
6 Deputy Proctor testified that when he entered into the
7 residence at [REDACTED] he went to the back bedroom
8 and started searching in the back bedroom. In the back
9 bedroom, he located an amount of crack cocaine,
10 approximately, a little more than two grams of crack
11 cocaine.

12 You heard testimony from Warren Carmen, the former
13 employee -- former deputy of the Greenville County
14 Sheriff's Office. He testified that on August 2nd, 2003,
15 it was his job to kind of watch over everybody, all the
16 occupants of the residence in the front room. He said
17 that while he was doing that, he almost stumbled -- he put
18 his hand up on the entertainment system. And what did he
19 find, ladies and gentlemen? He found another bag of crack
20 cocaine. A bag of crack cocaine weighing almost 24 grams.

21 The second thing that this Defendant has been charged
22 with is possessing marijuana with intent to distribute.
23 Possession of marijuana with intent to distribute, the
24 State must prove the Defendant possessed marijuana the
25 same way it proved he possessed the crack cocaine. But

1 the State must also prove that he intended to distribute
2 that marijuana by the circumstances surrounding where it
3 was found.

4 Judge Pyle is going to explain to you that there is a
5 permissive inference with marijuana. You, the jury, can
6 infer that the Defendant possessed more than 28 grams of
7 marijuana and that he intended to distribute that
8 marijuana. And on that alone, you can convict him of
9 possessing marijuana with intent to distribute.

10 And you heard testimony, again, from Deputy Proctor
11 and Deputy Carmen. Deputy Carmen said along with this bag
12 of crack cocaine, he found another bag of marijuana on top
13 of the entertainment center weighing approximately 17
14 grams. In the bedroom, the master bedroom, of this
15 residence, [REDACTED] Deputy Proctor located more
16 marijuana. He located over 100 grams of marijuana. So
17 right there, ladies and gentlemen, you have 28 grams of
18 marijuana.

19 But the State presented more that shows that the
20 Defendant intended to distribute. I want to show you what
21 else Deputy Proctor found in the master bedroom. He found
22 sandwich bags, a rather innocuous thing, but these
23 sandwich bags weren't found in the kitchen in a drawer.
24 They were found with over 100 grams of marijuana. That's
25 because these plastic bags were going to be used to

1 package the marijuana for sale.

2 What else did Deputy Proctor find? Scissors. Again,
3 a very innocuous thing if found anywhere else in the
4 house, but not when they're found with over 100 grams of
5 marijuana and plastic bags. These were going to be used
6 to cut the marijuana up and then put it in the bags for
7 packaging. What else did Deputy Proctor find? He found a
8 scale. Again, maybe something you would find in the
9 kitchen to cook with. But this scale was found, again,
10 with 100 grams of marijuana. Why? Because after the
11 Defendant cut the marijuana up, after the Defendant
12 packaged it in plastic baggies, he had to weigh out the
13 marijuana before he sold it.

14 Ladies and gentlemen, the Defendant is also charged
15 with two proximity charges -- or he's charged with
16 possessing crack cocaine with intent to distribute within
17 a half mile of school or park and he's charged with
18 possessing marijuana within a half mile of a school or
19 park. Again, that proves the same thing as to possession.
20 With the crack -- with the possession of crack with intent
21 to distribute, you have a permissive inference of one
22 gram. So if the State proves that he possessed one gram,
23 on that alone, you can infer that he possessed with the
24 intent to distribute. But the State must also prove that
25 he did both of these within a half mile of a public school

1 or park.

2 You heard testimony from Deputy White that he's
3 driven from [REDACTED] to the Bruton Town Community
4 Center. He testified that the Bruton Town Community
5 Center has a park. He testified that that was less than a
6 half mile, it was a fifth of a mile away. He also pointed
7 out to you on the map, which I didn't have a pointer so
8 you couldn't see it very well. But he pointed out how
9 close [REDACTED] -- the residence on [REDACTED]
10 was to the Bruton Town Community Center.

11 Ladies and gentlemen, this case -- oh, two other
12 things. The State must also prove that this incident
13 occurred within Greenville County. You heard Deputy White
14 testify that [REDACTED] is, in fact, in Greenville
15 County.

16 The State must also prove that all of these
17 substances that the police found, the crack cocaine and
18 the marijuana, is, actually, crack cocaine and marijuana.
19 And yesterday, you heard from Mr. James Armstrong, who is
20 a chemist with the Greenville County crime lab. And he
21 testified that he tested this material and the
22 marijuana -- what was purported to be marijuana did test
23 positive as marijuana. And what was purported to be crack
24 cocaine did, in fact, test positive as crack cocaine. And
25 that there was more than 10 grams. There was close to 26

1 grams of crack cocaine, and there was well over 28 grams
2 of marijuana.

3 But in the end, as Mr. Scalzo has told you, this case
4 comes down to who lived at the house. Who lived at [REDACTED]
5 [REDACTED]? And I want to first address some of the
6 people who the Defense brought in to tell you about [REDACTED]
7 [REDACTED]. They brought in the power company. They
8 brought in the water company. They brought in the
9 landlord. The power company said, yeah, the power was in
10 the name of Teresa Smiley. The power company -- the
11 official from the power company testified he had no idea
12 who lived at [REDACTED] The landlord came in here
13 and testified Teresa Smiley is the person who rented the
14 house from him. He testified that he, himself, didn't
15 know who lived at [REDACTED] He didn't know who
16 lived there with Teresa Smiley. He, himself, said that he
17 didn't even go to the house to collect the bills, that the
18 bills were mailed to him. You also heard from a
19 representative from the water company. Again, the
20 water -- the representative from the water company
21 testified that the water bill was in the name of Teresa
22 Smiley at [REDACTED] But the representative from
23 the water company couldn't tell you and had no idea who,
24 actually, lived at [REDACTED] These people couldn't
25 even tell you if Teresa Smiley was the one, actually,

1 paying the bills. All they could tell you is that it was
2 in the name of Teresa Smiley.

3 And I want you to remember that when Teresa -- and I
4 will come back to Teresa Smiley. When Teresa Smiley
5 testified, she testified that she started to rent [REDACTED]
6 [REDACTED] prior to this Defendant living there. So she's the
7 one that signs up for the -- gets the power turned on,
8 turns the water on, pays the rent. When she signs all
9 that stuff up, she said she lived there, but she did all
10 that before Edward Whitner moved in. So there's not going
11 to be somebody else's name on there to begin with.

12 And the State also -- or, excuse me, the Defendant
13 also called -- the Defendant's father testified that --
14 first, he was going to -- kind of hedging on whether or
15 not his son lived at [REDACTED] But then he said he
16 really didn't know because he was in jail at the time. So
17 he doesn't know where his son lived.

18 What we do know, ladies and gentlemen, is that on
19 August 2nd, 2003, when the police came to [REDACTED]
20 Deputy White spoke with this Defendant. This Defendant --
21 you heard Deputy White testify, this Defendant told him
22 his address was [REDACTED] Why did he say that?
23 Because he lived there, ladies and gentlemen. If the
24 police had just busted in the house and found all these
25 drugs in the house and he didn't live there, wouldn't he

1 say he didn't live there? He told Deputy White he lived
2 at [REDACTED]

3 I also want to point out two things that the
4 Defendant said when he was on the stand and that Deputy
5 White testified -- when Deputy White testified -- or the
6 Defendant -- first of all, the Defendant said when they
7 heard the knocking on the door as the police were coming,
8 he went to answer the door. Now, I submit to you that you
9 don't answer the door in a house that you don't live in.
10 Also, when the police came in that night, Mr. Whitner --
11 when Deputy White asked, is there drugs in the house, this
12 Defendant said, there ain't no drugs in the house. If he
13 didn't live there, wouldn't he have said, I don't know if
14 there's any drugs in the house?

15 Ladies and gentlemen, you also heard from Sergeant
16 Dana Lewis from the Greenville County Detention Center.
17 She brought in this document, which is a booking report,
18 dated August 2nd, 2003. And on this booking report, it
19 has the name Edward Whitner and has the address of 202
20 Mack Street. When Mr. Whitner testified, he testified he
21 told the detention center when he was booked in that his
22 address was [REDACTED] He tries to leave you -- he
23 wants you to believe that he couldn't think of anything
24 else, so he just threw out an address. Ladies and
25 gentlemen, use your common sense. When asked for an

1 address where he lived, that's what he gave them, [REDACTED]
2 [REDACTED]. Why? Because he lived there.

3 Likewise, on November 21st, 2003, he signed a bond
4 sheet, a bond form. What address is on this bond form?
5 [REDACTED] Whose name is signed on it? Edward
6 Whitner. Again, the Defendant said, well, I couldn't
7 think of anything else. I couldn't think of any other
8 address. I couldn't remember my own address. I couldn't
9 remember my mother's address, my grandmother's address, so
10 I just pulled one out, [REDACTED]

11 Ladies and gentlemen, he lived at [REDACTED]
12 That's why he continued to give his address as [REDACTED]
13 [REDACTED]. And if he didn't live at [REDACTED] but he
14 was at the residence when the police busted in and found
15 all these drugs, wouldn't he try to stay as far away from
16 [REDACTED] as he could? He would, but for the fact
17 that that was his residence, that was his house. He lived
18 there with Teresa Smiley.

19 Ladies and gentlemen, you also heard from the
20 deputies that when they entered the house, they found
21 women's clothing as well as men's clothing in the house.
22 Why did they find men's clothing in the house? Because
23 the Defendant lived there.

24 You heard from Teresa Smiley. You heard her testify
25 that she has pled guilty. You heard her testify she has

1 not been sentenced. And you heard her testify that no
2 promises have been made to her. Ladies and gentlemen, she
3 is a witness who knows more about this than everybody
4 else. Is she an angel? Probably not. But this is the
5 drug business, ladies and gentlemen. The witnesses -- the
6 people that witness these kinds of things that are
7 involved in drugs are not going to be angels.

8 She testified that this Defendant lived at [REDACTED]
9 [REDACTED] for seven months prior to August 2nd of 2003. She
10 testified that he lived there and he slept in the master
11 bedroom where they both slept. She testified that he had
12 control over the house. She testified that he had a key
13 to the house. She testified that he came and went as he
14 liked because it was his house. He lived there with
15 Ms. Smiley. Ms. Smiley said there was no one else that
16 lived there but for this Defendant, her, and her children.

17 Ladies and gentlemen, Teresa Smiley also testified
18 that she, in fact, knew there was drugs in the house. She
19 also testified that those drugs weren't hers. They were
20 his, but she knew the drugs were in her house. That's why
21 she pled guilty, ladies and gentlemen. She had knowledge
22 that the drugs were there.

23 And I submit to you that this Defendant lived there.
24 He knew all these drugs were there because they're his.
25 These are a lot of drugs and they're hidden. It's not

1 like they're just sitting out. They're hidden in the
2 entertainment system. They're hidden in the drawers. All
3 of this stuff was covered up with pillows and stuff,
4 stuffed animals when the police came in.

5 One other thing that Judge Pyle is going to instruct
6 you on is joint possession. Two people can be guilty of
7 possessing the same drugs. And that's what we have in
8 this case. Teresa Smiley is guilty and she's pled guilty.
9 And this Defendant is also guilty of possessing all of
10 these drugs.

11 Ladies and gentlemen, the State must prove to you
12 beyond a reasonable doubt. And I want to talk to you
13 about what reasonable doubt is. The State does not have
14 to prove to an exact certainty that this Defendant is
15 guilty. Because there are few things in life that we know
16 for certain. If the State makes you firmly convinced of
17 this Defendant's guilt, then you have to find him guilty
18 of all four charges.

19 A trial is like a puzzle. And what the pieces of the
20 puzzle tell you is, yes, this Defendant has a crack
21 problem. He said he's got a crack problem. He said he's
22 pled guilty to crack charges in the past. He is not
23 someone from Bogota, Columbia. He is a drug dealer in
24 Greenville, South Carolina, who uses crack cocaine, but
25 also sells crack cocaine in order to support his habit.

1 He sells crack cocaine and he sells marijuana.

2 Teresa Smiley testified he had no job while he lived
3 there. She paid all the bills. Then why did he have the
4 money in his pocket? He had the money in his pocket
5 because that's the fruit of his labor for someone who
6 sells drugs. The Defendant's mother said she came up and
7 gave him money to go get her car fixed and pay bills. The
8 Defendant said he had no ID and had no driver's license.
9 How was he going to take the car to get it fixed?

10 Ladies and gentlemen, you've got all the pieces to
11 the puzzle. That's what all this evidence is, it's what
12 all the testimony is that you've heard yesterday and
13 today. Now, it's your turn to take all of these pieces of
14 the puzzle back to the jury deliberation room and put it
15 together. And I submit that the puzzle will be that this
16 Defendant is guilty.

17 Thank you very much.

18 CHARGE ON THE LAW

19 THE COURT: Ladies and gentlemen, the Defendant, in
20 this case, is first indicted for trafficking in crack
21 cocaine. This is a statutory offense. And Section
22 44-53-375 of our Code of Laws provides as follows, "A
23 person who knowingly sells, manufactures, cultivates,
24 delivers, purchases, or brings into this state, or who
25 provides financial assistance or otherwise aids, abets,

1 attempts, or conspires to sell, manufacture, cultivate,
2 deliver, purchase, or bring into this state, or who is
3 knowingly in actual or constructive possession, or who
4 knowingly attempts to become in actual or constructive
5 possession of 10 grams or more of crack cocaine is guilty
6 of a felony, which is known as trafficking in crack
7 cocaine."

8 Now, ladies and gentlemen, it is the amount of crack
9 cocaine, rather than the criminal act, that triggers the
10 trafficking statute that I read to you and distinguishes
11 trafficking from distribution and simple possession of
12 drugs. If the amount of crack cocaine or any mixture
13 thereof is 10 grams or more, then the trafficking statute
14 I read to you is applied.

15 So what are the elements of this offense which the
16 State must prove to your satisfaction beyond a reasonable
17 doubt? First of all, the State must prove that the
18 substance in question is crack cocaine. And, secondly,
19 the State must prove that this Defendant knowingly
20 possessed the crack cocaine. Now, knowingly means with
21 knowledge, that is, something consciously done. And,
22 third, the State must prove that 10 or more grams of crack
23 cocaine was possessed by this Defendant.

24 Now, ladies and gentlemen, under the statute I read
25 to you, possession can be actual or it can be

1 constructive. A person has possession of a substance
2 within the meaning of our law when he has both the power
3 and the intent to control its disposition or its use.

4 Now, where a substance is found on the property or on
5 the premises or the place under the control of a person,
6 this fact in and of itself gives rise to an inference of
7 knowledge and possession on the part of that person.
8 Therefore, possession of a substance may be inferred from
9 the circumstances. And the substance is deemed to be in
10 the constructive possession of the person controlling the
11 property, the premises, or the place where it is located
12 or where it is found. Possession of drugs may be imputed
13 to anyone who has the power and the intent to control the
14 disposition or the use of that substance.

15 Now, this inference is one of fact and not of law.
16 It is evidentiary in nature and is not conclusive and
17 should, therefore, be taken into consideration by you, the
18 jury, along with all the other evidence in the case and is
19 to be given such weight, if any, as you determine it
20 should receive.

21 Now, ladies and gentlemen, actual possession of a
22 substance occurs when the substance is found to be in the
23 actual physical possession of the person charged with
24 possession. As I said, constructive possession, on the
25 other hand, occurs when the person charged with possession

1 has dominion and control over either the substance itself
2 or the place, property, or premises where it was found or
3 where he was a joint participant in committing the
4 offense.

5 I charge you, ladies and gentlemen, that proof of
6 possession requires more than proof of mere presence at
7 the scene of a crime. Again, the State must prove that
8 this Defendant had dominion and control over the
9 substance, actually, possessed, that is crack cocaine, or
10 that he had the right to possess dominion and control over
11 it.

12 Ladies and gentlemen, I charge you also in
13 determining whether or not a substance is possessed, you
14 may consider the amount of the substance alleged to have
15 been possessed, the manner in which it was allegedly
16 possessed, the place where it was allegedly possessed, and
17 any other factors which you consider to be important,
18 provided, of course, that that factor is supported by the
19 evidence.

20 Now, the Defendant is further indicted for possession
21 of marijuana with the intent to distribute. This, too, is
22 a statutory offense. And our Code of Laws provides that
23 it shall be unlawful for any person to distribute or
24 possess with the intent to distribute a controlled
25 substance. And I charge you, ladies and gentlemen, that

1 under our code marijuana is a controlled substance. And
2 our code further provides that possession of more than 28
3 grams or one ounce of marijuana gives rise to an inference
4 that the person intends to distribute the controlled
5 substance in his possession. Distribute, of course,
6 ladies and gentlemen, means to deliver from one person to
7 another a controlled substance, whether it be done
8 gratuitously or for money or for profit.

9 Now, as I've told you, this indictment charges this
10 Defendant with possessing marijuana with the intent to
11 distribute it. What then are the elements of this offense
12 which the State must prove beyond a reasonable doubt?
13 Again, the State must prove that the substance in question
14 was marijuana. And, secondly, that this Defendant
15 possessed the substance.

16 And in this connection, I charge you that possession
17 can be active or constructive, as I earlier defined those
18 terms to you. The next element that the State must prove
19 is that this Defendant possessed the substance in question
20 with the intent to distribute it to someone else. In
21 other words, you must find that he did not intend to have
22 the substance solely for his own use.

23 Now, as I told you or read to you, the law provides
24 you with a tool to help you in consideration of this
25 element of the offense. If you find that marijuana was

1 possessed by this Defendant in excess of 28 grams or one
2 ounce, then you may find that he possessed it with the
3 intent to distribute it.

4 Now, again, I tell you, ladies and gentlemen, this
5 inference from possessing 28 grams or one ounce or more of
6 marijuana is one of fact and not of law. It is simply an
7 evidentiary fact to be taken into consideration by you,
8 the jury, along with all the other evidence in the case
9 and is to be given such weight as you determine it should
10 receive.

11 The Defendant then is lastly indicted for possessing
12 with the intent to distribute crack cocaine and marijuana
13 within close proximity of a school. This, too, is a
14 statutory offense. And Section 44-53-445 provides in part
15 as follows: "It is a separate criminal offense for a
16 person to unlawfully possess with intent to distribute a
17 controlled substance while in, on, or within one half mile
18 radius of the grounds of a public or private elementary,
19 middle, or secondary school."

20 So with respect to these two charges, ladies and
21 gentlemen, what the State must prove, first of all, is
22 that this Defendant possessed the crack cocaine and the
23 marijuana with the intent to distribute it as I have
24 defined that to you. And, next, that this was done within
25 one half mile radius of a public or private elementary,

1 middle, or secondary school.

2 Now, ladies and gentlemen, I am the judge of the law
3 in this case. You are the judges of the facts. The
4 Constitution of our state does not allow me to charge you
5 on the facts of this case or to discuss the facts with you
6 or in any way or manner let you know what my personal
7 feelings, if any, are about this case. That is because
8 you and you alone are the judges of the facts. Therefore,
9 if during the course of this trial or if during the course
10 of my charge, you have a feeling or you have been left
11 with the impression that I have a personal feeling about
12 this case one way or the other, then you disregard that
13 feeling or that impression.

14 Now, it's your duty and your duty alone to weigh the
15 testimony and evidence presented in this case and to pass
16 upon the credibility or the believability of the witnesses
17 you heard testify. In this connection, you have the right
18 to believe all that a witness told you or you can
19 disbelieve all a witness told you. You can believe a part
20 of what a witness told you and disbelieve a part of what a
21 witness told you. You can believe one witness as against
22 several or you can believe several as against one. You
23 also have the right to take into consideration any bias,
24 prejudice, or interest you feel a witness in the case
25 might have.

1 Now, ladies and gentlemen, with respect to witnesses
2 and, in particular, the testimony as to this Defendant's
3 prior criminal record, that can only be considered by you
4 in determining or deciding his credibility or his
5 believability as a witness in this case. It cannot be
6 considered by you as evidence, having any bearing on the
7 question of his guilt of these offenses with which he
8 stands charged today.

9 Now, as I told you, I am the judge of the law. And I
10 am required to charge the law that applies to the facts in
11 this case. It is not a question what you feel the law
12 might be or what it should be. It is not necessarily what
13 the lawyers may have told you it is. Because under your
14 oath, you are required to take the law as I give it to
15 you, apply that law to the facts as you determine those
16 facts to be, and to write your verdict accordingly.

17 Ladies and gentlemen, in this case, as in all
18 criminal cases, this Defendant comes into this courtroom
19 presumed to be innocent. And this presumption continues
20 and carries through the entire trial until and unless it
21 is removed by evidence that satisfies you of his guilt
22 beyond a reasonable doubt. The burden is on the State in
23 this case to prove this Defendant guilty and to prove each
24 and every element of the offenses for which he is charged
25 beyond a reasonable doubt.

1 Now, some of you in the past may have served as
2 jurors on civil cases. And if so, you most likely were
3 told it was only necessary to prove that a fact was more
4 likely true than not true. But in criminal cases, the
5 State's proof must be more powerful. As I told you, it
6 must be beyond a reasonable doubt.

7 Now, proof beyond a reasonable doubt is proof that
8 leaves you firmly convinced of this Defendant's guilt.
9 There are very few things in this world that we know with
10 absolute certainty. And in criminal cases, our law does
11 not require proof that overcomes every possible doubt.
12 If, based on your consideration of the testimony and
13 evidence in this case, you are firmly convinced that this
14 Defendant is guilty as charged, then you must find him
15 guilty. If, on the other hand, you think there is a real
16 possibility that he is not guilty, then you must give him
17 the benefit of that doubt and find him not guilty.

18 Ladies and gentlemen, under the oath you took in this
19 case, you swore to try this case based only and solely on
20 the testimony and evidence presented in this courtroom. I
21 tell you that it is your duty to lay aside all outside
22 prejudice, bias, or opinion in reaching your verdict. The
23 word "verdict," ladies and gentlemen, is taken from the
24 Latin word veredicto. It means to speak the truth. You
25 have no friends to reward in this case or enemies to

1 punish. I charge you to abide by your oath and return
2 verdicts that speak the truth.

3 Now, you will have in the jury room with you the four
4 indictments in this case. These indictments do not
5 constitute evidence. They simply set forth the
6 allegations by the State. These indictments are the legal
7 documents that bring this case into the courtroom and
8 presents it to you for your determination.

9 Now, ladies and gentlemen, with respect to each
10 indictment, there are one of two possible verdicts, guilty
11 or not guilty. Whatever your verdict is, it must be
12 unanimous.

13 Madam Forelady, whatever the unanimous verdict of the
14 jury is, you'll find a place on the back of the indictment
15 where it says, "Verdict," please write out that verdict,
16 guilty or not guilty. And then sign your name on the line
17 where it says, "Foreperson of the petty jury."

18 Now, at this time, I'm required to go over my charge
19 with the lawyers. I need for you to go back in your jury
20 room, but do not begin deliberating until I send word in
21 for you to do so.

22 (WHEREUPON, the jury was excused from open court at
23 approximately 12:30 p.m.)

24 THE COURT: Anything further from the State?

25 MR. NEWKIRK: One thing briefly, Your Honor.

1 As to 44-53-445, distribution near a school, I would
2 just request that you charge within a one half mile radius
3 of the grounds of a public or private elementary, middle,
4 or secondary school, or public playground, or park, or a
5 public vocational trade school.

6 THE COURT: All right. I thought it was a school
7 that was testified to in this case.

8 MR. NEWKIRK: It was testified as a park.

9 THE COURT: Oh, I'm sorry. Sure, I can do that.
10 Anything further from the Defense?

11 MR. SCALZO: No, Your Honor.

12 Do you intend to just read that language?

13 THE COURT: Yes.

14 Okay. Bring them back, please.

15 (WHEREUPON, the jury came into open court at
16 approximately 12:31 p.m.)

17 THE COURT: Ladies and gentlemen, when I was charging
18 you on the last of these indictments concerning the
19 possession or distribution within close proximity of a
20 school, my recollection was that the testimony was that
21 this allegedly occurred within one half mile of a school.
22 The indictment alleges that it occurred within one half
23 mile from Bruton Town Community Center.

24 And the statute -- and I'll just read it again to
25 you. I just read you a part of it. "It is a separate

1 criminal offense for a person to distribute, sell,
2 purchase, manufacture, or to unlawfully possess with
3 intent to distribute a controlled substance while in, on
4 or within one half mile radius of the grounds of a public
5 or private elementary, middle, or secondary school, a
6 public playground or park, a public trade school or
7 technical educational center, or a public or private
8 college or university."

9 So if you find in this case beyond a reasonable doubt
10 that this Defendant possessed crack cocaine and marijuana
11 with intent to distribute it and that it occurred within
12 one half mile of Bruton Town Community Center, then he
13 would be guilty as charged. Bruton Town Community Center
14 is a park.

15 All right. Mr. Coker, as my alternate, you may
16 remain.

17 And the balance, ladies and gentlemen, if you'll
18 retire to your jury room and begin your deliberations.
19 I'll have the indictments and all the exhibits brought
20 into you shortly.

21 Thank you.

22 (WHEREUPON, the jury was excused from open court at
23 approximately 12:33 p.m.)

24 THE COURT: Since our 12 jurors have successfully
25 made it through this case, this will conclude your service

1 on this case and for the week. You don't have to come
2 back. You're certainly free to go.

3 The Clerk will mail a voucher to you and attached to
4 that will be a slip to give to your employer, if you need
5 that. If you want to hang around and wait and see what
6 the verdict of the jury is, you're certainly welcome to do
7 that. But as I say, if you don't want to do that, you're
8 free to go.

9 Thank you so much.

10 I enjoyed working with you.

11 (WHEREUPON, the proceedings were recessed at
12 approximately 12:34 p.m.)

13 QUESTION FROM THE JURY

14 THE COURT: All right. The jury has a question.
15 They want some testimony of Officer White played back.
16 They particularly have asked for testimony regarding his
17 interview of the Defendant immediately upon entrance to
18 the house in question. I think that came early on in his
19 testimony.

20 MR. NEWKIRK: I believe so, Your Honor.

21 MR. SCALZO: Yes.

22 (WHEREUPON, Court's Exhibit No. 1 was marked for
23 identification and admitted into evidence.)

24 (WHEREUPON, the jury came into open court at
25 approximately 1:47 p.m.)

1 THE COURT: Madam Forelady, you've sent in the
2 question you need to review the transcript of Officer
3 White's testimony regarding his interview of the Defendant
4 immediately upon entrance to the house in question. What
5 I'm going to do is play back from the backup tape his
6 testimony.

7 Now, as soon as you've heard what you need to hear,
8 if you'll just give me a signal and then we'll stop and
9 then you can retire and continue with deliberations.
10 Okay.

11 (WHEREUPON, the requested testimony was played in
12 open court.)

13 THE COURT: Okay. Is that enough, ladies and
14 gentlemen?

15 (All jurors said yes.)

16 THE COURT: Thank you.

17 If you'll please retire and continue with your
18 deliberations.

19 (WHEREUPON, the jury was excused from open court at
20 approximately 1:52 p.m.)

21 THE COURT: All right. If you folks will, please,
22 continue to be at ease.

23 (WHEREUPON, the proceedings were recessed at
24 approximately 1:53 p.m.)

25 THE COURT: We've got a verdict, gentlemen.

1 Bring the jury in, please.

2 (WHEREUPON, the jury came into open court at
3 approximately 2:48 p.m.)

4 THE COURT: Madam Forelady, if you've reached a
5 verdict, would you hand it to the bailiff, please, ma'am.

6 All right. Publish the verdicts, please.

7 VERDICT

8 THE CLERK: Your Honor, this is indictment number
9 2004-GS-23-0081, the State v. Edward Whitner. He is
10 indicted with possession of marijuana with intent to
11 distribute within close proximity of a school. The
12 verdict is guilty.

13 2004-GS-23-0082, he's indicted for possession of
14 crack cocaine with intent to distribute within close
15 proximity of a school. The verdict is guilty.

16 2003 -- I'm sorry. 2004-GS-23-0083, he's indicted
17 for possession of marijuana with intent to distribute.
18 The verdict is guilty.

19 2004-GS-23-0084, he's indicted for trafficking in
20 crack cocaine. The verdict is guilty.

21 All four indictments are signed by Pamela Rish, the
22 Foreperson.

23 If this is your verdict, so say you all.

24 (All jurors said yes.)

25 THE CLERK: Thank you.

1 THE COURT: Anything further from the jury,
2 Mr. Scalzo?

3 MR. SCALZO: Not from the jury, no, sir.

4 THE COURT: Thank you, ladies and gentlemen, for your
5 service on this case. And insofar as you're concerned,
6 thank you for your service this week. You're through, you
7 don't have to come back today or tomorrow.

8 So I want to take this opportunity to thank you for
9 coming and serving. I want you to know that we are well
10 aware of the fact that jury service is a burden to you.
11 We know that it's difficult for you to take time off from
12 your jobs and families and spend it with us on jury duty.
13 But I do hope that you understand the importance of being
14 here this week. Because without your presence, we could
15 not get off from the docket the cases that we do. It's a
16 very important service you have performed this week and I
17 thank you very much for that service.

18 Shirley has vouchers for you. And attached to that
19 voucher is a slip for you to give to your employer should
20 you need that. Before I let you go, do I have any member
21 of the panel that has any question that I could try to
22 answer for you?

23 (There was no response.)

24 THE COURT: Thank you so much.

25 I've enjoyed working with you. You're free to go.

1 If you'll go out in the hallway, she'll come out and give
2 you your vouchers.

3 Thank you.

4 (WHEREUPON, the jury was dismissed at 2:51 p.m.)

5 MOTIONS

6 THE COURT: All right. Any motions, Mr. Scalzo?

7 MR. SCALZO: I do have motions, Your Honor.

8 I would renew my prior motions.

9 THE COURT: All right.

10 MR. SCALZO: And I would also make a motion for a new
11 trial notwithstanding the verdict and a more specific
12 motion with regard to the State's objection to my question
13 to the co-defendant as far as the penalty that she was
14 looking at. You sustained the State's objection. I just
15 wanted to place on the record, there are two cases that
16 address that issue that say that it would be proper
17 cross-examination. That's State v. Brown and State v.
18 Mozel. And on those grounds, I would move for a new
19 trial.

20 THE COURT: All right. Your motion is denied.

21 For sentencing purposes, what offense is this?

22 MR. SCALZO: Third offense, Your Honor.

23 THE COURT: Anything else you need to say, Solicitor,
24 before I sentence him?

25 MR. NEWKIRK: Your Honor, I was going to put on the

1 record his prior convictions.

2 THE COURT: That would be good.

3 MR. NEWKIRK: Your Honor, the Defendant has two prior
4 convictions for possession of crack cocaine in 2001. He's
5 got a conviction for possession of crack cocaine in 1995.
6 He's got a conviction for possession of crack cocaine in
7 2005.

8 THE COURT: Mr. Scalzo.

9 MR. SCALZO: May it please the Court, Your Honor?

10 You heard a lot of the biographical information
11 regarding Mr. Whitner at the trial. I'll remind you,
12 Judge, you presided over a prior trial, possession with
13 intent to distribute, where he was convicted of
14 possession. You placed him on home incarceration for
15 three years, which is what he is on -- currently on now
16 and has not had any problems and, actually, has been drug
17 tested while on home incarceration without any problems.

18 Some background from a dispositional standpoint,
19 yesterday, both co-defendants were placed on the trial
20 docket. The co-defendant who testified against
21 Mr. Whitner decided yesterday to testify and -- plead
22 guilty and then testify. That was not something that was
23 previously known to us. It was sort of an immediate
24 decision on her part. She pled guilty as a first offense.

25 Prior to the start of this trial, we proposed to the

1 State that they treat this charge as a second offense to
2 give you some discretion in sentencing or, at least, a
3 little bit more discretion. The State rejected that. I
4 would ask Your Honor to consider -- given his history and
5 his problem with drugs, consider ordering that he be
6 screened for drug court. You can't order that he go into
7 it, but, perhaps, you can order that he would be screened
8 for consideration. Short of that, I'd ask you to consider
9 giving him the minimum sentence on a third offense
10 trafficking, which would be the charge that carries the
11 most penalty.

12 THE COURT: Mr. Whitner, anything now you want to
13 say, sir, before I sentence you?

14 DEFENDANT WHITNER: No, sir.

15 SENTENCE

16 THE COURT: All right. Mr. Whitner, on the
17 indictment for trafficking cocaine, the sentence of the
18 Court is you be committed to the Department of Corrections
19 for a period of 25 years and pay the mandatory fine of
20 \$50,000.

21 On each of the other three indictments, the sentence
22 of the Court is you be committed for a period of ten years
23 concurrent to that other sentence.

24 *****END OF TRANSCRIPT OF RECORD*****
25

CERTIFICATE OF REPORTER

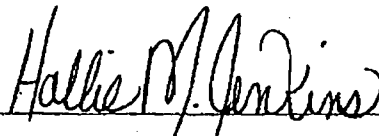
STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Greenville County, South Carolina, on the 8th and 9th days of March, 2006.

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

August 14, 2006



Hollie M. Jenkins, Court Reporter

My Commission Expires: 11-17-10

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EDWARD WHITNER,

APPELLANT

FINAL BRIEF OF APPELLANT

ELEANOR DUFFY CLEARY

Appellate Defender

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STATEMENT OF THE CASE

Edward Whitner was indicted by the Greenville County grand jury in January 2004 for possession with intent to distribute (PWID) marijuana, PWID marijuana in proximity of a park, PWID crack cocaine in proximity of a park, and trafficking in more than ten grams of crack cocaine. ROA p. 209. He proceeded to trial before the Honorable C. Victor Pyle, Jr. on March 8, 2006. The jury found him guilty as charged and Judge Pyle sentenced him to ten years for each PWID charge and twenty-five years in prison for trafficking. ROA p. 217.

This appeal follows.

STATEMENT OF THE FACTS

Appellant Edward Whitner and Anthony Garrison were at Teresa Smiley's house at [REDACTED] in Greenville County on August 2, 2003 -- the day the police executed a search warrant for illegal drugs. The police found large quantities of marijuana and crack cocaine, as well as a gun, scales and baggies.¹ No drugs were found on Whitner, who claimed he was visiting but the police charged him, as well as Smiley, for trafficking and possessing illegal drugs.

The police searched the entire apartment for at least thirty minutes and found no papers with Whitner's name or photographs of him. ROA p. 21, line 20 – p. 22, line 2. They found male clothes in the closet but never even attempted to prove they were Whitner's size. ROA p. 6, line 18. The police were unable to find Whitner's fingerprints on any items in the house – not even the scales or guns. ROA pp. 105-110.

The state's evidence that Whitner lived there came from Smiley's testimony, given after her guilty plea but before her sentencing, and the fact that Whitner listed [REDACTED] as his address when he was booked and when he bonded out. Whitner testified that he was at Smiley's but that he has never dated her or lived with her. ROA p. 153, lines 1-5. In his testimony, he explained that he provided her address because his mother, with whom he lived, had just moved and he did not know her new address by number and that his grandmother, with whom he also lived, was in the process of moving. ROA pp. 154-155.

¹ Specifically, the police found a chap stick tube with 1.42 grams of crack in the doorway of the back bedroom; 27.56 grams of marijuana, sandwich bags, scissors, and a scale in a bowl under pillows in the back bedroom; 113.68 grams of marijuana in a dresser drawer; 2.31 grams of crack cocaine in a dresser drawer; 23.78 grams of crack cocaine in an entertainment center in the living room; 17.19 grams of marijuana in the entertainment center; and a .38 pistol with ammunition under the mattress in the back bedroom. ROA p. 15, lines 8-17; p. 29, line 18 – p. 30, line 4; p. 32; pp. 40-41; p. 45, lines 6-9; pp. 63-64.

Deputy Torrence White of the Greenville Sheriff's Department testified that when he executed the warrant he asked who resided at the address. Smiley stated it was "hers and Mr. Whitner's." ROA p. 5, lines 12-13. He did not include this in his incident report. ROA p. 19, lines 4 – 7. Over defense objection, White also testified that he asked Whitner what his address was and Whitner replied "[REDACTED] None of this information was in his incident report and was unknown to defense counsel prior to trial. ROA p. 19, lines 8-14. White also testified that Whitner, Garrison, and Smiley stated there were no drugs in the house. ROA p. 9, lines 10-19

When he was arrested, the police seized \$455 from Whitner's front left pocket. ROA p. 7, lines 13-15.

Smiley testified that Whitner lived with her and her three children and that they slept in the back bedroom together. ROA p. 94, lines 7-8. She said that she knew there were drugs in the house but they were Whitner's. ROA p. 96, lines 6-15. She pled guilty to trafficking and possession with intent to distribute crack and marijuana before his trial and her sentencing was deferred until after his trial. She also had twenty-one counts of fraudulent check charges on her criminal record. ROA p. 98.

Whitner presented evidence that Smiley was listed as the leaseholder on the property. The landlord testified that nobody else was supposed to be living in the house. ROA pp. 80 – 84. A representative of Duke Power and the water company testified that utilities were in Smiley's name. ROA p. 89; p. 117.

Garrison testified that he came to Smiley's house to clean up after a card party and that Whitner did not "stay there." ROA p. 125, lines 17-22. Whitner's father testified that Smiley's house was a party house that he frequented and that believed his son lived with his

grandmother. He admitted he was locked up most of the time and was not sure. ROA pp. 132-135. Whitner's mother testified that the money Whitner had on him was from her. She gave it to him to pay bills. ROA p. 141. She stated that Whitner stayed with her and at his grandmother's house. ROA p. 139, lines 8-25. Brenda Gordon, the mother of Whitner's child, testified that Smiley, her friend, often threw parties in the neighborhood. ROA p. 146, lines 7-22. She stated that Whitner did not live with Smiley at [REDACTED] ROA p. 146, lines 7-8. She said that his brother dated Smiley but not Whitner. ROA p. 147, lines 8-19.

ARGUMENT

I. The trial judge erred in permitting the police to testify to a statement allegedly made by Whitner when the search warrant was executed that he lived in the house. The state failed to affirmatively show the statement was voluntary and made in compliance with *Miranda v. Arizona*.

The judge overruled Whitner's motion to suppress his statement to police without a hearing on the issue, even though defense counsel argued that it had not been established that Whitner's *Miranda*² rights had been read to him prior to making the statement. During the state's case, the solicitor asked Deputy White if he asked Whitner his address. He replied "yes" and the solicitor asked "[a]nd did he give you his address." ROA p. 8, lines 2-4. Defense counsel objected and after the jury was excused, he moved to suppress any statements made by Whitner because the state had failed to establish that his *Miranda* rights were read to him prior to the statement being made. ROA p. 8, lines 5-23. Defense counsel pointed out that the state was trying to establish a crucial link between Whitner and the drugs, i.e. his residency in the house where they were found. ROA p 8, line 20 – p. 31, line 2. The judge overruled his objection and White testified that Whitner said he resided at the house where the warrant was being executed. This was error.

The Fifth Amendment to the United States Constitution provides, in relevant part, that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Article 1, Section 12, of the South Carolina Constitution contains a similar provision. S.C. Const. Art. I, § 12 ("... nor shall any person be compelled in any criminal case to be a witness against himself.").

To “secure the admission of a defendant's statement, the State must affirmatively show the statement was voluntary and taken in compliance with Miranda.” State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981); State v. Callahan, 263 S.C. 35, 208 S.E.2d 284 (1974). “Such is required due to the broad protection of Miranda in contrast to the traditional concept of voluntariness.” State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986).

In Middleton, the defendant argued “the trial judge erred in admitting his confession without having first found that the confession had been taken in compliance with the requirements of Miranda.” The Supreme Court reversed his conviction and held that the trial judge must make “an affirmative finding under Miranda” that the statement was taken in compliance with Miranda.” As in Middleton, the trial court erred by refusing to make such a finding.

Whenever evidence is introduced that was allegedly obtained by conduct violative of the defendant's constitutional rights, the defendant is entitled to have the trial judge conduct an evidentiary hearing out of the presence of the jury to establish the circumstances under which the evidence was seized. State v. Banda, 371 S.C. 245, 639 S.E.2d 36 (2006).

In this case, it is clear that the statement allegedly made by Whitner to the police as they executed a search warrant would have been made when he was not free to go and was in custody for the purposes of Miranda. The police officer testified that he detained Whitner when he first came in to the house. ROA p. 5, lines 1-4. He told them about the search warrant and then began questioning them. He did not read them their Miranda rights. ROA p. 5, lines 9-13.

² Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Interrogation “is defined as express questioning, or its functional equivalent which includes words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response.” State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991) (citing Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)). *See also* State v. Binney, 362 S.C. 353, 608 S.E.2d 418 (2005). Here, asking appellant whether he lived in the house was not a routine question, but instead went to the heart of the issue of who had constructive possession of the drugs the police expected to find based on the reasons given in the search warrant. Clearly, the police knew that his answer would elicit an incriminating response and he should have been given his Miranda warnings before such questioning.

Though it is clear that Whitner was “in custody” when the police questioned him, there is precedent for remanding this issue for a greater development of the facts. State v. Primus, 312 S.C. 256, 440 S.E.2d 128 (1994). At a minimum, Whitner’s case should be remanded for a hearing on the issue of whether Miranda was complied with.

However, because the questioning was clearly in violation of Miranda, Whitner is entitled to a new trial. This improper admission of this evidence was not harmless error. In determining whether an error is harmless, the test is whether there is a reasonable probability that the statements contributed to the defendant’s conviction of the crime, or if the defendant’s statements were merely cumulative. State v. Bernotas, 277 S.C. 106, 283 S.E.2d 580 (1981). Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed. State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996); State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct.App.2002).

In this case, it is unmistakable that the officer's testimony about Whitner's alleged statement contributed to the verdict. The jury deliberated for an hour and ten minutes before asking the judge if it could "review the transcript of Officer White's testimony regarding his interview of the Defendant immediately upon entrance to the house in question." ROA p. 203, lines 1-6. At that point, the judge played a tape of White's testimony for the jury and the jury returned with a guilty verdict less than an hour later. ROA pp. 203-204.

The state's case against Whitner was not overwhelming. The state had very weak evidence connecting Whitner to the house and that he was in constructive possession of the drugs. Smiley had an extremely strong motive to lie, an issue that was not fully developed as discussed in Issue II. Whitner's explanation for putting the address on the bond form was plausible and lent credibility to his assertion that he was a crack user and not the brains behind a large trafficking organization.

The police presented no forensic evidence showing Whitner lived in the house, failing to verify the clothes in the closet were his and failing to produce any mail or indicia of residency. The error was clearly not harmless as the entire record shows that evidence was not overwhelming.

II. The trial judge erred in refusing to allow appellant to question Smiley, the state's chief witness, about the length of the sentence she was facing on the trafficking charge. The judge violated appellant's right to cross-examine the witness concerning bias under the Sixth Amendment's Confrontation Clause.

Defense counsel asked Smiley if she was hoping that the judge might not punish her as much if she helped the state. ROA p. 102, lines 1-3. Smiley replied that she "pray[ed] to the Lord like anybody else do." He asked her if she knew how much time she was "looking at in prison." ROA p. 102, lines 9-10. The solicitor objected and the judge sustained the objection and instructed the jury to disregard the question. ROA p. 102, lines 11-13. After the verdict, defense counsel stated that he wanted to put on the record that State v. Brown and State v. Mizzell, discussed *infra*, allowed him to cross-exam Smiley on her potential sentence. ROA p. 206, lines 11-19. He moved for a new trial and the judge denied the motion. ROA p. 206, lines 18-20. This was error.

A defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause. U.S. Amend. VI. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002); State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991). On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness." Mizzell, 349 S.C. at 331, 563 S.E.2d at 317. Rule 608(c), SCRE, provides that "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced."

In Brown and Mizzell, the Supreme Court made it clear that the right to cross-examine a witness on the amount of the prison term she was facing outweighed the need to

exclude evidence of the defendant's possible sentencing. As in Mizzell and Brown, Smiley was facing the same charges as Whitner. The trial court erred in excluding this questioning which was crucial to show the jury her tremendous motive to engage in biased testimony in order to obtain a future recommendation for leniency. See Mizzell, 349 S.C. at 333, 563 S.E.2d at 318.

The denial of Whitner's rights under the Confrontation Clause was not harmless error. "Harmless beyond a reasonable doubt" means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt. Mizzell, 349 S.C. at 334, 563 S.E.2d at 319; Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). As in Brown and Mizzell, Smiley provided crucial testimony that Whitner had constructive possession of the large quantities of drugs found in what was indisputably her home. It was clearly to her advantage to place the blame on Whitner in exchange for a lighter sentence. The jury needed to know that if she had not testified for the state, she faced twenty-five years in prison for trafficking. In fact, after Whitner's trial, Smiley was sentenced to a mere three years in prison for trafficking. See <https://sword.doc.state.sc.us/incarceratedInmateSearch>.

CONCLUSION

Based on the foregoing, appellant is entitled to a new trial.

Respectfully submitted,



Eleanor Duffy Cleary
Appellate Defender

ATTORNEY FOR APPELLANT.

This 17th day of December, 2007.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

December 17th, 2007



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EDWARD WHITNER,

APPELLANT

CERTIFICATE OF SERVICE

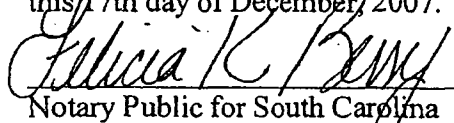
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Harold M. Coombs, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17th day of December, 2007.



Eleanor Duffy Cleary
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 17th day of December, 2007.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: August 15, 2010.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
Honorable C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

EDWARD WHITNER

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. The defendant says that the state failed to show his statement was voluntary and in compliance with Miranda and asks whether the trial judge erred admitting the statement - that he lived in the house - made when the police executed the search warrant.

2. The defendant says that the trial judge did not allow him to question the state's chief witness (Smiley) about the length of the sentence she was facing for trafficking and asks whether the trial judge denied him the right to cross examination under the Sixth Amendment's Confrontation Clause.

ARGUMENT

I.

The police detained the occupants of a house in one room for everyone's safety while searching pursuant to a warrant. At trial the defendant did not claim there was custodial interrogation during the investigation.

The defendant says the trial judge did not hold a hearing on his motion to suppress his statement - admitting that he lived in the house where the police found the drugs - even after counsel noted the lack of Miranda rights, and the defendant was clearly in custody when the police questioned him. (Initial Brief of Appellant).

Officers executed the search warrant for narcotics and initially secured the people inside the residence. They detained Teresa Smiley, Aaron Garrison, and the defendant in the front room for their mutual safety. Defense counsel termed this "investigative detention." Officer White asked "whose residence was it," and Smiley said it was hers and the defendant's. The officers then began searching the house. (R. p. 2 - p. 5, line 19; p. 17, line 9 - p. 18, line 2). After about thirty minutes, one officer found narcotics in a basket in the front room. A Chapstick tube of crack cocaine was just on the floor near the back door and bedroom door. Officer White found \$455 cash in the defendant's pocket. He asked the defendant for his address. The defendant objected. (R. p. 5, line 21 - p. 8, line 8). In camera defendant's counsel stated his grounds. There was no testimony the defendant received Miranda rights before being asked for his address. That was "a crucial point in time in the investigation" when the officers were finding contraband and trying to link the defendant with the residence. Counsel thought the defendant should have been given his Miranda rights. The court disagreed and overruled the objection. (R. p. 8, line 15 - p. 9, line 5).

The trial continued. Officer White affirmed asking the defendant's address, and the defendant gave the same address as on the search warrant. The address was for identification. The defendant volunteered that there were no drugs. (R. p. 3; p. 9, lines

10-19; p. 19, lines 8-16). Officer White's report documented the seized items - what was found, where it was found, and who found it. All three defendants were given their Miranda rights and then arrested. (R. p. 21). Later, the defendant objected to his booking report at the jail that had the same address. (Tr. pp. 88-93). Still later, the defendant objected to his bail form, months after his arrest, with the same address. (R. pp. 73-78).

The defendant testified he did not live at the house, and he did not know about the drugs. He had been to the house. Smiley and he had the same birthday, and the house was the local hangout. As far as the booking report and bond form, he needed an address to get out on bond, and the booking address was where he got locked up. Also, his mother had just moved. He has never had a driver's license and has had no identification for years. (R. pp. 149-159).

While appellate counsel says that the defendant was clearly in custody when he was asked for his address, this was not the position of trial counsel. At trial defense counsel used the term "investigative detention" for keeping the occupants of the house safely in one room during the search. The ground for defense counsel's contention that the defendant should have been given his Miranda rights was that the defendant was asked for his address at "a crucial point in time in the investigation." Miranda rights are required only when the police interrogate a person who is in custody. Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977)(state supreme court found interrogation took place in a coercive environment - to which Miranda was intended to apply - and reversed the conviction; the Court found that state court "read Miranda too broadly" and reversed its judgment; Miranda warnings are required only when there has been restriction on person's freedom that renders him "in custody"). Further, the trial judge held an in camera hearing in response to the defendant's general trial objection. If the defendant wanted either to claim that he had been interrogated while in custody or to offer testimony to that point, he had the opportunity. Similarly, he could have raised

other grounds and proffered other testimony. The defendant shows no trial error. State v. Silver, 314 S.C. 483, 431 S.E.2d 250 (1993).

II.

The defendant says that during the trial he was not allowed to cross examine a witness about the time she was "looking at in prison." Then, after the verdict he moved for a new trial and raised authority for the first time. (Initial Brief of Appellant).

Teresa Smiley testified that the defendant and she lived where the police searched, and the drugs belonged to him. (R. pp. 92-97). The day before her trial testimony, she pled guilty to trafficking crack cocaine, possession with intent to distribute marijuana, possession with intent to distribute marijuana within proximity of a school or park, and possession with intent to distribute crack cocaine within proximity of a school or park. She had talked with the Solicitor about testifying. She had not been sentenced, and she was going to be sentenced after the trial. She was testifying to the truth, and hoping for the best with her sentence. Defense counsel asked her whether she knew how much time she was "looking at in prison." The assistant solicitor objected. The court sustained the objection and instructed the jury to disregard the question. (R. pp. 99-102). After the verdict, defense counsel allowed that he had "a more specific motion" about asking Smiley for the "penalty she was looking at." He had two cases, State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002); State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991), saying it would be proper cross examination. (R. pp. 204-206).

Defense counsel was correct; the motion after the verdict was more specific. The authority at the time of the assistant solicitor's objection would have lent weight to the defendant's position. It is also true the jury knew that Smiley had talked to the Solicitor about testifying, and, after pleading guilty to numerous charges, she was looking forward to her sentencing and hoping for the best. The police found the defendant in the same house where they found the drugs and where the defendant had an address - at least for the purpose of identification, booking, and bonding. It is difficult to understand how the defendant suffered any prejudice, and the defendant did not suggest any for the trial

judge's consideration. "The conduct of the trial and the admission or exclusion of evidence is left largely to the discretion of the trial judge. In order to justify relief by way of a new trial it must be demonstrated not only that the trial judge committed error, but also that the error was prejudicial and denied to an accused person his right to a fair trial." State v. Greene, 255 S.C. 548, 180 S.E.2d 179 (1971). There was no prejudice and no denial of the defendant's right to a fair trial.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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December 14, 2007

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
Honorable C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

EDWARD WHITNER

Appellant.

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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December 14, 2007

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
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THE STATE,

Respondent,

vs.

EDWARD WHITNER

Appellant.

PROOF OF SERVICE

I, Harold M. Coombs, Jr., certify that I have served the within Final Brief of Respondent on Appellant by depositing three copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Eleanor Duffy Cleary, Esquire. South Carolina Commission on Indigent Defense. Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211 .

I further certify that all parties required by Rule to be served have been served.

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

The State,

Respondent,

v.

Edward Whitner,

Appellant.

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 4436
Heard June 4, 2008 – Filed September 24, 2008

AFFIRMED

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KONDUROS, J.: Edward Whitner appeals his convictions for (1) possession with the intent to distribute (PWID) marijuana within close proximity of a school; (2) PWID crack cocaine within close proximity of a school; (3) PWID marijuana; and (4) trafficking crack cocaine. Whitner contends the trial court erred in failing to suppress a statement he made before he was informed of his Miranda¹ rights. Whitner further argues the trial court violated his Sixth Amendment right to confrontation by limiting his cross-examination of a witness. We affirm.

FACTS

On August 2, 2003, the Greenville County Sheriff's Office executed a search warrant for narcotics at [REDACTED] in Greenville, South Carolina. Upon entering the house, the officers secured all individuals in the residence and advised them of the search warrant. The lead officer, Officer Torrence White, entered the house and found Teresa Smiley standing in the doorway of the back bedroom. He escorted Smiley to the front room of the residence, where the officers already had detained Aaron Garrison and Whitner, who were in the house when the police arrived. The three individuals remained detained together in the front room for over thirty minutes.

After searching the house and finding large quantities of narcotics, Officer White approached Whitner and asked him for his address. Whitner responded "[REDACTED]". Whitner gave the address again on his booking form later that day. A few months later, Whitner gave the same address on his bond form. The bond form contained the statement "the Defendant will notify the Court promptly if he changes his address from the one contained in this order."

Subsequently, both Smiley and Whitner were charged with trafficking and PWID illegal drugs. The day before Whitner's trial, Smiley pled guilty to (1) trafficking in crack cocaine; (2) PWID marijuana; (3) PWID marijuana in the proximity of a school or park; and (4) PWID crack cocaine in the

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

proximity of a school or park. However, she was not sentenced until after Whitner's trial.

At Whitner's trial, Whitner objected to and moved to suppress Officer White's testimony regarding Whitner's providing [REDACTED] as his address during the search. Whitner argued the State did not meet its burden of establishing Whitner was informed of his rights as required by Miranda v. Arizona, 384 U.S. 436 (1966), before eliciting the statement. The trial court overruled the objection. Additionally, Officer White testified Smiley informed him while they were executing the search warrant she and Whitner lived at the residence.

Smiley testified for the State, alleging she and Whitner were in a romantic relationship and lived together at [REDACTED]. She further testified the drugs found in the house belonged to Whitner. During her cross-examination, Whitner questioned Smiley about the possibility of receiving a diminished sentence for testimony favorable to Whitner's conviction. Additionally, Whitner asked, "Do you know how much time you're looking at in prison?" The State objected to the question and the trial court sustained the objection. The jury convicted Whitner of all of the charges. Whitner moved for a new trial notwithstanding the verdict, maintaining cross-examination of Smiley to determine potential bias was proper. The motion was denied. The trial court sentenced Whitner to twenty-five years imprisonment for the trafficking crack cocaine offense and three concurrent terms of ten years imprisonment for the remaining offenses. This appeal followed.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). A trial court abuses its discretion when its conclusions are controlled by an error of law or lack evidentiary support. State v. Sweet, 374 S.C. 1, 5, 647 S.E.2d 202, 204-05 (2007).

LAW/ANALYSIS

I. Statement During Execution of Search Warrant

Whitner contends the trial court erred in admitting his statement giving [REDACTED] as his address during the execution of the search warrant because the State failed to show the statement was voluntary and made in compliance with Miranda v. Arizona, 384 U.S. 436 (1966). We disagree.

“If a defendant makes a custodial statement, then the trial court must not only make an inquiry into the voluntariness of the statement, but also conduct an inquiry to ensure the police complied with the mandates of Miranda and its progeny.” State v. Ledford, 351 S.C. 83, 88, 567 S.E.2d 904, 906-07 (Ct. App. 2002). “In order to secure the admission of a defendant’s statement, the State must affirmatively show the statement was voluntary and taken in compliance with Miranda.” State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986).

Custodial interrogation entails questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way. Miranda, 384 U.S. at 444. Interrogation can be either express questioning or its functional equivalent and includes words or actions on the part of police (other than those normally attendant to arrest and custody) the police should know are reasonably likely to elicit an incriminating response. State v. Kennedy, 333 S.C. 426, 431, 510 S.E.2d 714, 716 (1998). Whether a suspect was in “custody is determined by an objective analysis of ‘whether a reasonable man in the suspect’s position would have understood himself to be in custody.’” Ledford, 351 S.C. at 88, 567 S.E.2d at 907 (quoting State v. Easler, 327 S.C. 121, 128, 489 S.E.2d 617, 621 (1997)). “To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning.” State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003).

However, a ruling to admit or exclude evidence must affect a substantial right to constitute error. Rule 103(a), SCRE; State v. Johnson,

363 S.C. 53, 60, 609 S.E.2d 520, 524 (2005). No definite rule of law governs finding an error harmless; “rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.” State v. Reeves, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990). Generally, an appellate court will not set aside a conviction because of an insubstantial error not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). In State v. Gillian, this court found the trial court’s error harmless because the testimony was “largely cumulative” to testimony from other witnesses and even omitting the testimony at issue, “abundant evidence upon which one could find Gillian guilty of murder” remained. 360 S.C. 433, 456-57, 602 S.E.2d 62, 74-75 (Ct. App. 2004), aff’d as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007).

The trial court’s admission of the statement is not reversible error because the statement is merely cumulative, as (1) Whitner gave the address again on both his booking and bond forms; (2) Smiley testified he lived there; and (3) Officer White testified Smiley had informed him during the execution of the search warrant Whitner lived there. See State v. Price, 368 S.C. 494, 499-500, 629 S.E.2d 363, 366 (2006); see also State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003) (holding the admission of improper evidence is harmless when the evidence is merely cumulative to other evidence); State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (finding any error in the admission of testimony that is merely cumulative is harmless); State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983) (“It is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence.”); State v. Evans, 378 S.C. 296, 299, 662 S.E.2d 489, 491 (Ct. App. 2008) (holding the admission of testimony that was merely cumulative, insubstantial, and not affecting the result of the trial was harmless). Accordingly, the trial court did not commit reversible error in failing to suppress the statement.

II. Cross-Examination of Smiley

Next, Whitner alleges the trial court violated his Sixth Amendment right to confrontation by prohibiting him from questioning Smiley concerning her potential sentence. We disagree.

The scope of cross-examination is left to the trial court's discretion. Sherard, 303 S.C. at 174, 399 S.E.2d at 596. Under the Confrontation Clause, a defendant has the right to cross-examine a witness and elicit any fact showing interest, bias, or partiality of that witness. State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002). "Considerable latitude is allowed in the cross-examination of an adverse witness for the purpose of testing bias." State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991). The record must clearly show the cross-examination is inappropriate before the trial court may limit a criminal defendant's right to engage in cross-examination to show bias on the part of the witness. Mizzell, 349 S.C. at 331, 563 S.E.2d at 317. If the defendant establishes the limitation unfairly prejudiced him, the error is reversible. Id.

In the present case, the trial court did not provide an explanation for sustaining the objection or denying Whitner's motion for a new trial. Generally, the jury is not entitled to learn the possible sentence of a defendant because the sentence is irrelevant to finding guilt or innocence and could prejudice the State. Id. at 331-32, 563 S.E.2d at 317-18. However, the Confrontation Clause limits the applicability of this rule when the defendant's right to effectively cross-examine a co-conspirator witness about possible bias outweighs the need to exclude the evidence. Id.

Nevertheless, "[a] violation of the defendant's Sixth Amendment right to confront the witness is not per se reversible error," and we must determine if the "error was harmless beyond a reasonable doubt." State v. Graham, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)). "[T]he denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case." Van Arsdall, 475 U.S. at 682. Error is harmless when it could not reasonably have affected the trial's outcome. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). Whether an error is harmless depends on the particular facts of each case and factors including: (1) the importance of the witness's testimony in the State's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the State's case. Mizzell, 349 S.C. at 333, 563

S.E.2d at 318; see also State v. Clark, 315 S.C. 478, 482, 445 S.E.2d 633, 635 (1994).

The trial court's refusal to allow Whitner to cross-examine Smiley on her possible sentence was not reversible error. At trial, Smiley's testimony was not the only evidence Whitner lived at [REDACTED] Whitner gave the address as his address on multiple occasions. Smiley's testimony was merely cumulative to Whitner's own statements. Further, the trial court only prevented Whitner from asking the question at issue; the trial court permitted him to elicit testimony from Smiley she had pled guilty to the same charges as those with which Whitner was charged and ask her if she was hoping testifying against Whitner would help her when she was sentenced. Therefore, because the limitation of the cross-examination could not have reasonably affected the outcome of the trial, the trial court did not commit reversible error. See State v. Curry, 370 S.C. 674, 682, 636 S.E.2d 649, 653 (Ct. App. 2006).

CONCLUSION

Because Whitner gave [REDACTED] as his address two additional times after his statement to Officer White, the testimony regarding the statement was cumulative. Thus, the trial court did not commit reversible error in failing to suppress the statement. Further, the trial court's failure to allow Whitner to cross-examine Smiley regarding her potential sentence was not reversible error because Whitner's own statements indicated he lived there, and he was allowed to ask Smiley if she was hoping for a reduced sentence for her testimony. Accordingly, the decision of the trial court is

AFFIRMED.

HEARN, C.J., and SHORT, J., concur.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 4436 (S.C. Ct. App. filed 9/24/2008)

04-GS-23-81 to 84

THE STATE,

RESPONDENT,

V.

EDWARD WHITNER,

APPELLANT

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

KATHRINE H. HUDGINS
Appellate Defender

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

ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 1/7/2009.

QUESTION PRESENTED

Did the Court of Appeals err in affirming the trial judge's refusal to allow appellant to question Smiley, the state's chief witness, about the length of the sentence she was facing on the trafficking charge, in violation of appellant's right to cross-examine the witness concerning bias under the Sixth Amendment's Confrontation Clause?

STATEMENT OF THE CASE

Edward Whitner was indicted by the Greenville County grand jury in January 2004 for possession with intent to distribute (PWID) marijuana, PWID marijuana in proximity of a park, PWID crack cocaine in proximity of a park, and trafficking in more than ten grams of crack cocaine. ROA p. 209. He proceeded to trial before the Honorable C. Victor Pyle, Jr. on March 8, 2006. The jury found him guilty as charged and Judge Pyle sentenced him to ten years for each PWID charge and twenty-five years in prison for trafficking. ROA p. 217.

On September 24, 2008, the South Carolina Court of Appeals affirmed the sentence and conviction. State v. Whitner, 380 S.C. 513, 670 S.E.2d 655 (Ct.App. 2008). The petition for rehearing was denied on January 7, 2009. This petition for writ of certiorari follows.

STATEMENT OF THE FACTS

Appellant Edward Whitner and Anthony Garrison were at Teresa Smiley's house at [REDACTED] in Greenville County on August 2, 2003 -- the day the police executed a search warrant for illegal drugs. The police found large quantities of marijuana and crack cocaine, as well as a gun, scales and baggies.¹ No drugs were found on Whitner, who advised he was visiting, but the police charged him, as well as Smiley, for trafficking and possessing illegal drugs.

The police searched the entire apartment for at least thirty minutes and found no papers with Whitner's name or photographs of him. ROA p. 21, line 20 -- p. 22, line 2. They found male clothes in the closet but never even attempted to prove they were Whitner's size. ROA p. 6, line 18. The police were unable to find Whitner's fingerprints on any items in the house -- not even the scales or guns. ROA pp. 105-110.

The state's evidence that Whitner lived there came from Smiley's testimony, given after her guilty plea but before her sentencing, and the fact that Whitner listed [REDACTED] as his address when he was booked and when he bonded out. Whitner testified that he was at Smiley's but that he has never dated her or lived with her. ROA p. 153, lines 1-5. In his testimony, he explained that he provided her address because his mother, with whom he lived, had just moved and he did not know her new address by number and that his grandmother, with whom he also lived, was in the process of moving. ROA pp. 154-155.

¹ Specifically, the police found a chap stick tube with 1.42 grams of crack in the doorway of the back bedroom; 27.56 grams of marijuana, sandwich bags, scissors, and a scale in a bowl under pillows in the back bedroom; 113.68 grams of marijuana in a dresser drawer; 2.31 grams of crack cocaine in a dresser drawer; 23.78 grams of crack cocaine in an entertainment center in the living room; 17.19 grams of marijuana in the entertainment center; and a .38 pistol with ammunition under the mattress in the back bedroom. ROA p. 15, lines 8-17; p. 29, line 18 -- p. 30, line 4; p. 32; pp. 40-41; p. 45, lines 6-9; pp. 63-64.

Deputy Torrence White of the Greenville Sheriff's Department testified that when he executed the warrant he asked who resided at the address. Smiley stated it was "hers and Mr. Whitner's." ROA p. 5, lines 12-13. He did not include this in his incident report. ROA p. 19, lines 4 - 7. Over defense objection, White also testified that he asked Whitner what his address was and Whitner replied "[REDACTED]". None of this information was in his incident report and was unknown to defense counsel prior to trial. ROA p. 19, lines 8-14. White also testified that Whitner, Garrison, and Smiley stated there were no drugs in the house. ROA p. 9, lines 10-19

When he was arrested, the police seized \$455 from Whitner's front left pocket. ROA p. 7, lines 13-15.

Smiley testified that Whitner lived with her and her three children and that they slept in the back bedroom together. ROA p. 94, lines 7-8. She said that she knew there were drugs in the house but they were Whitner's. ROA p. 96, lines 6-15. She pled guilty to trafficking and possession with intent to distribute crack and marijuana before his trial and her sentencing was deferred until after his trial. She also had twenty-one counts of fraudulent check charges on her criminal record. ROA p. 98.

Whitner presented evidence that Smiley was listed as the leaseholder on the property. The landlord testified that nobody else was supposed to be living in the house. ROA pp. 80 - 84. A representative of Duke Power and the water company testified that utilities were in Smiley's name. ROA p. 89; p. 117.

Garrison testified that he came to Smiley's house to clean up after a card party and that Whitner did not "stay there." ROA p. 125, lines 17-22. Whitner's father testified that Smiley's house was a party house that he frequented and that believed his son lived with his grandmother. He admitted he was locked up most of the time and was not sure. ROA pp. 132-135. Whitner's

mother testified that the money Whitner had on him was from her. She gave it to him to pay bills. ROA p. 141. She stated that Whitner stayed with her and at his grandmother's house. ROA p. 139, lines 8-25. Brenda Gordon, the mother of Whitner's child, testified that Smiley, her friend, often threw parties in the neighborhood. ROA p. 146, lines 7-22. She stated that Whitner did not live with Smiley at [REDACTED] ROA p. 146, lines 7-8. She said that his brother dated Smiley but not Whitner. ROA p. 147, lines 8-19.

ARGUMENT

The Court of Appeals erred in affirming the trial judge's refusal to allow appellant to question Smiley, the state's chief witness, about the length of the sentence she was facing on the trafficking charge, in violation of appellant's right to cross-examine the witness concerning bias under the Sixth Amendment's Confrontation Clause.

The Court of Appeals held that the trial court's refusal to allow Whitner to cross examine Smiley, who lived with Whitner in the home where drugs were found and testified that the drugs belonged to Whitner, about the possible sentence she was facing was not reversible error as the testimony was "merely cumulative" to Whitner's own statements. This was error. While Smiley's testimony that she and Whitner lived in the home together may have been cumulative to Whitner's statements about his address, Smiley's critical statement that the drugs belonged to Whitner was clearly not cumulative to any statement by Whitner.

The ruling of the Court contradicts the settled law established in State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002). A defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause. U.S. Amend. VI. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002); State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991). " 'On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness." Mizzell, 349 S.C. at 331, 563 S.E.2d at 317 (internal citations omitted). Rule 608(c), SCRE, provides that "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced."

In Brown and Mizzell, the Supreme Court made it clear that the right to cross-examine a witness on the amount of the prison term she was facing outweighed the need to exclude evidence of the defendant's possible sentencing. As in Mizzell and Brown, Smiley was facing the same

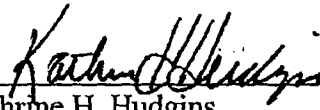
charges as Whitner. The trial court erred in excluding this questioning which was crucial to show the jury her tremendous motive to engage in biased testimony in order to obtain a future recommendation for leniency. *See Mizzell*, 349 S.C. at 333, 563 S.E.2d at 318.

The denial of Whitner's rights under the Confrontation Clause was not harmless error. "Harmless beyond a reasonable doubt" means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt. *Mizzell*, 349 S.C. at 334, 563 S.E.2d at 319; *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). As in *Brown* and *Mizzell*, Smiley provided crucial testimony that the drugs found in the home belonged to Whitner. It was clearly to her advantage to place the blame on Whitner in exchange for a lighter sentence. The jury needed to know that if she had not testified for the state, she faced twenty-five years in prison for trafficking. In fact, after Whitner's trial, Smiley was sentenced to a mere three years in prison for trafficking. *See <https://sword.doc.state.sc.us/incarceratedInmateSearch>*.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 8th day of May, 2009

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 4436 (S.C. Ct. App. filed 9/24/2008)
04-GS-23-81 to 84

THE STATE,

RESPONDENT,

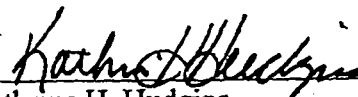
V.

EDWARD WHITNER,

APPELLANT

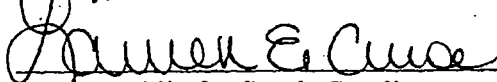
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Harold M. Coombs, Jr., Esquire, and the S.C. Court of Appeals this 8th day of May, 2009.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of May, 2009.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.



RECEIVED

NOV 05 2009 #

The Supreme Court of South Carolina

GENERAL
OFFICE

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 4, 2009

Appellate Defender Kathrine H. Hudgins
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Whitner, Edward
2004-GS-23-00081, 00082, 00083 and 00084

Dear Counsel:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ of Certiorari Denied.

s/ Jean H. Toal C.J.
For the Court

November 4, 2009."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

CLERK

DES/dmh

Appellate Defender Kathrine H. Hudgins
Page Two
November 4, 2009

cc: The Honorable Robert Mills Ariail
The Honorable Paul B. Wickensimer
The Honorable Jeanette Barber
✓ Senior Assistant Attorney General Harold M. Coombs, Jr.

FORM 5

STATE OF SOUTH CAROLINA)
County of Greenville 2010 AUG -5 PM 4:03 IN THE COURT OF COMMON PLEAS

FILED-CLERK OF COURT
Edward A. Whitner GREENVILLE CO. S.C.
Full name and prison number (if any) of Applicant)

2010-CP-23-6401

v.)

State of South Carolina)

APPLICATION FOR
POST-CONVICTION RELIEF

INSTRUCTIONS B READ CAREFULLY

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

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

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

1. Place of detention McCormick Corr. Institution Dorm F-2B Room 112
386 Redemption Way, McCormick, S.C. 29879
2. Name and location of Court which imposed sentence Greenville Courthouse
3. Name(s) of co-defendant(s) (if any) Teresa Smiley, Aaron Garrison
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2004-GS-23-0081, 2004-GS-23-0082, 2004-GS-23-0083
2004-GS-23-0084

- (b) NA
- (c) NA
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: ineffective assistant counseling
- (a) trial: ineffective assistant counseling
- (b) trial counsel failed to challenge validity of search warrant
- (c) ineffective assistant counseling
trial counsel failed to challenge veracity of warrant affidavit
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) _____
- (b) "See Attachment" failed to challenge warrant
- (c) "See Attachment" failed to challenge affidavit for search warrant
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NA
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NA
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NA
- (d) any other petitions, motions or applications in this or any other Court? NA
13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. NA
- ii. NA
- iii. NA
- iv. NA
- (b) the name and location of the Court in which each was filed:
- i. NA
- ii. NA
- iii. NA

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) PCR next step Appellate process
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? NR
- (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 application with respect to this conviction, which you filed? YES
18. If you answered Ayes@ to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Christopher D. Scalzo, Greenville Bar Assoc.
- ii. Eleanor Duffy Cleary Appellate Defense
- iii. ~~Kathrine~~ Kathrine H. Hudgins Appellate Defense
- (b) the proceedings at which each such attorney represented you:
- i. trial
- ii. direct appeal
- iii. writ of certiorari

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

I, Edward Whitner, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of n 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.

Edward Whitner
Applicant

SWORN or affirmed to and subscribed before me this
2 day of August, 2010.

Joyce L. Young
Notary Public

My Commission Expires: 8 28 2011

After signing off on two waiver of rights signed by Deputy White and Deputy Todd, Hollingsworth's statement is thought to be true and it's clear that Deputy Todd wrote the statement as Hollingsworth told it to him. The affidavit was misleading because it did not reveal the correct address that was given to them by Hollingsworth. The information that Deputy White put in the affidavit was false and reckless and also a violation of the 4, 14 Amendment.

Law

An informant's hearsay statement must pass to be credited in supplying probable cause, in that the information supplied was obtained in a "reliable" way. An affidavit in support of search warrant must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter. In *Franks v. Delaware* 98 S. Ct. 2674 (1978)

Search and Seizures - Key 7(5) where defendant makes substantial preliminary showing that false statements knowingly and intentionally, or with reckless disregard for the truth, was included by affiant in search warrant affidavit, and if alleged false statement is necessary to finding of probable cause, Fourth Amendment requires that hearing be held at defendant's request. U.S.C.A. Const.

Amend. 4, 14. Criminal Law - Key 394.4(6)

Search and Seizures - 3.6(2) If, after evidentiary hearing defendant establishes by a preponderance of evidence that false statements knowingly and intentionally, or with reckless disregard for the truth, was included by affiant in search warrant affidavit and, with false material set to one side, the affidavit's remaining contents is insufficient to establish probable cause, search warrant must be voided and fruits of search excluded to the same extent as if probable cause was lacking on the face of the affidavit. U.S.C.A. Const Amend 4

STATE OF SOUTH CAROLINA

COUNTY OF Greenville

SEARCH WARRANT

Form Approved
S.C. Attorney Gen.
Section 17-13-
March 15, 1

ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY
OF _____

It appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premise

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

_____ Greenville, SC 29609. Further described as single story, single family dwelling with white wood siding and black shutters. The residence is clearly marked number _____ with black letters on the roof above the front door. The residence in question is the 2nd residence on the left on Mack St from Walcott St. Any out-buildings, storage containers, trash receptacles, and/or vehicles designated for _____ And/Or its Occupants.

Now, therefore, you are hereby authorized to search the subject premises for the property described below, and to seize such property if found:

DESCRIPTION OF PROPERTY

Crack Cocaine, Paraphernalia, Papers, Monies, and Effects Related to the Use, Packaging, Storage, and/or Distribution of Crack Cocaine. Any Items of Personal Property Tending to Identify Subject(s) in Control of the Premises and/or Areas to be Searched.

This Search Warrant shall not be valid for more than ten days from the date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to

Issuing Magistrate and Occupants

within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such search if practicable, and, if not, to such person as soon thereafter as is practicable; in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to a prominent place on such premises.

Greenville, S. C.
2003

[Signature]
Signature of Judge

(L. S.)

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

SO 03-114259

I, DONALD EUGENE HOLLINGSWORTH, do hereby give freely and voluntarily this statement
T. WHITE and C. J. TODD

who have identified themselves to me to be Deputies of the Greenville County Sheriff's Office, Greenville, S. Carolina. I have been advised that I do not have to make this or any other statement, and that what I say be used against me in a Court of Law. I have been advised that I have the right to Counsel with an Attorney of my choice, that if I am financially unable to obtain an Attorney the Court will appoint an Attorney to represent me. I have not been threatened or promised any reward to make this statement.

I am 41 years old and I reside at [REDACTED] GRUL, SC
I have a 9th grade education, and I can read and write.

I WAS ON MY HOPED TONIGHT AND I WENT BY THE HOUSE AT THE CORNER OF OLD PARTS Mtn. Rd. AND ATTO ST. WHERE I HAVE PURCHASED COCAINE FOUR OR FIVE TIMES IN THE PAST I STOPPED IN FRONT OF THE HOUSE OUT IN THE ROADWAY AND A BLACK MALE CAME OUT OF THE HOUSE CAME UP TO ME. I ASKED IF HE WOULD GIVE ME ONE CRACK ROCK FOR \$1300 I GAVE HIM THE \$1300 AND HE GAVE ME ONE ROCK OF CRACK COCAINE I THEN LEFT AND WAS STOPPED BY DEPUTY WHITE AT PLEASANTBURG. I STOPPED IN THE ECKERS PARKING LOT AND I SPOT A ROCK OF CRACK COCAINE ON THE GROUND. DEPUTY WHITE TOLD ME WHEN HE STOPPED ME AND HE ASKED IF HE COULD SEARCH ME. I TOLD HIM YES, HE FOUND MY CRACK PIPE IN MY POCKET. I THEN TOLD HIM WHERE I HAD SPOT THE CRACK ON THE GROUND AT. DEPUTY WHITE FOUND THE CRACK AND ARRESTED ME AT THAT TIME. DEPUTY WHITE ADVISED ME OF MY MIRANDA RIGHTS AND I AGREED TO SPEAK WITH HIM AT THAT TIME. I TOLD DEPUTY WHITE THAT I HAD JUST PURCHASED THE CRACK COCAINE AND WHERE I HAD PURCHASED IT. I WAS THEN TRANSPORTED TO THE DETENTION CENTER AND DEPUTY TODD ADVISED ME OF MY MIRANDA RIGHTS BOTH VERBALLY AND IN WRITTEN FORM. I AGREED TO SPEAK WITH DEPUTY TODD AND DEPUTY WHITE AT THAT TIME AND I SIGNED A WAIVER OF RIGHTS. DEPUTY TODD WROTE THIS STATEMENT FOR ME. I TOLD IT TO HIM. END OF STATEMENT.

I have read the above statement of 10/1 pages and it is true and correct as best I recall.

WITNESS:

[Signature]

[Signature]
I HAVE RECEIVED A COPY OF THIS STATEMENT
[Signature]

Sworn before me this _____ day of _____ 19 _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2010-CP-23-6408
COUNTY OF GREENVILLE	)	
	)	
Edward Andrell Whitner,	)	
S.C.D.C. No. 214145,	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

In response to the post-conviction relief application filed August 5, 2010, 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 January 2004 term of General Sessions for possession with intent to distribute (PWID) marijuana within proximity of a school (2004-GS-23-0081), PWID crack cocaine within proximity of a school (2004-GS-23-0082), PWID marijuana (2004-GS-23-0083), and trafficking crack cocaine (2004-GS-23-0084). Christopher D. Scalzo, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On March 9, 2006, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to concurrent terms of ten (10) years for PWID marijuana within proximity of a school, ten (10) years for PWID crack cocaine within proximity of a school, ten (10) years for PWID marijuana, third offense, and twenty-five (25) years for trafficking crack cocaine.

A notice of appeal was filed at the South Carolina Court of Appeals. Eleanor Duffy Cleary, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences on September 24, 2008. State v. Whitner, 380 S.C. 513, 670 S.E.2d 655 (Ct. App. 2008). Kathrine H. Hudgins, Esquire of the South Carolina Office of Appellate Defense filed a petition for writ of certiorari at the South Carolina Supreme Court. The Supreme Court denied the petition by order dated November 4, 2009.

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 reason:

- I. Ineffective assistance of counsel:
 - a. Failed to challenge the validity of the search warrant.
 - b. Failed to challenge the veracity of the search warrant affidavit.

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 criminal 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

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.

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

V.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

Respectfully submitted,

ALAN WILSON
Attorney General

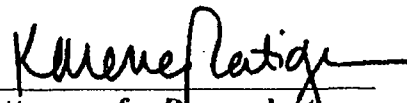
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P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

February 4, 2011

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

2010-CP-23-6408

EDWARD ANDRELL WHITNER, 214145)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

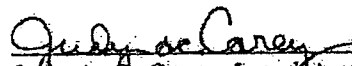
STATE OF SOUTH CAROLINA,)

Respondent.)

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

Edward Andrell Whitner, 214145
 McCormick Correctional Institution
 386 Redemption Way
 McCormick SC 29899

DATED this 4th day of February, 2011.


 Judy A. C. Carey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

COURT OF COMMON PLEAS
2010-CP-23-06408

EDWARD ANDRELL WHITNER,
APPLICANT,)

vs.)

TRANSCRIPT OF RECORD

STATE OF SOUTH CAROLINA,
RESPONDENT.)

ORIGINAL

February 29, 2012
Greenville, South Carolina

B E F O R E:

THE HONORABLE D. GARRISON HILL, JUDGE.

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

MATTHEW P. HEAD, ESQ.
Attorney for the Applicant

KAREN C. RATIGAN, ESQ.
Assistant Attorney General

HOLLIE M. JENKINS
Circuit Court Reporter

I N D E X

(AW) - Denotes Applicant's Witness
(RW) - Denotes Respondent's Witness

Page No.

(AW) EDWARD ANDRELL WHITNER:

Direct Examination by Mr. Head.....4

(AW) CHRISTOPHER DOMINICK SCALZO:

Direct Examination by Mr. Head.....11

Cross-Examination by Mr. Ratigan.....20

E X H I B I T S

(There were no exhibits introduced.)

P R O C E E D I N G S

MS. RATIGAN: May it please the Court, Your Honor.

THE COURT: Yes, ma'am.

MS. RATIGAN: This is the case of Edward Whitner v.
the State. The docket number 2010-CP-23-06408.

Mr. Whitner was indicted for possession with intent to distribute marijuana within proximity of a school, possession with intent to distribute crack cocaine within proximity of a school, possession with intent to distribute marijuana, and trafficking crack cocaine. He was represented on those charges by Mr. Scalzo. The case was brought to trial on March 8th of 2006. The Applicant was found guilty of the charges as indicted. Judge Pyle sentenced him to concurrent terms of 10 years for PWID marijuana within proximity, 10 years for PWID crack cocaine within proximity, 10 years for PWID marijuana, and 25 years for trafficking crack cocaine.

A timely notice of appeal was filed and perfected by the Office of Appellate Defense. The Court of Appeals affirmed Mr. Whitner's convictions and sentences on September 24th of 2008. Appellate Defense then filed a timely writ of certiorari with the Supreme Court. The Supreme Court denied that petition on November 4th of 2009. This application was timely filed. And the State is ready to proceed.

1 THE COURT: Yes, sir, Mr. Head.

2 MR. HEAD: Thank you, Your Honor.

3 Matthew Head. I represent Mr. Edward Whitner. And
4 we're ready to proceed.

5 THE COURT: Okay. You may call your first witness.

6 MR. HEAD: Thank you, Your Honor.

7 I call Edward Whitner.

8 THE CLERK: Mr. Whitner, place your left hand on the
9 Bible and raise your right hand.
10 WHEREUPON,

11 EDWARD ANDRELL WHITNER,
12 after first having been duly sworn, testified as follows:

13 THE CLERK: Thank you.

14 You may be seated.

15 Please state your full --

16 THE OFFICER: Slide up and speak into the microphone.

17 THE CLERK: Please state your full name for the
18 record.

19 THE WITNESS: Edward Andrell Whitner.

20 DIRECT EXAMINATION

21 BY MR. HEAD:

22 Q Mr. Whitner, in your trial, you were represented by
23 who as your attorney?

24 A Chris Scalzo.

25 Q And Mr. Scalzo, was he retained by you or appointed?

1 A Appointed.

2 Q And, during his representation of you, how long did
3 that last from when you first met him until the trial of
4 your case?

5 A I don't remember. I didn't meet him but like twice
6 from 2003 to 2006. And it was towards the end before I
7 went to trial.

8 Q Did you meet him in 2003?

9 A No, not that I know of.

10 Q But later on?

11 A Yeah.

12 Q And how long did you meet with him for?

13 A Maybe an hour.

14 Q Total or each time?

15 A Each time.

16 Q And did you discuss the evidence in your case?

17 A Not really. We talked about it. But, I mean, as far
18 as paperwork and stuff like that, I never seen nothing.

19 Q Did you discuss the search warrant for the premises
20 at Mack Street?

21 A No.

22 Q Okay. Can you tell us who Donald Hollingsworth is?

23 A He's the guy that they pulled over on the moped.
24 They say they got the search warrant from using his
25 statement.

1 Q Did he -- he gave the statement that the police got
2 the search warrant from?

3 A Yeah.

4 Q Did you tell this to -- or how did you learn this?
5 How did you learn that Mr. Hollingsworth gave that
6 statement?

7 A Oh, when I got my discovery when I got to McCormick.

8 Q When did you get that discovery?

9 A 2006.

10 Q Were you aware of Mr. Hollingsworth before 2006?

11 A No. I had never heard of him.

12 Q Did you ever -- did Mr. Scalzo ever discuss
13 Mr. Hollingsworth with you?

14 A No.

15 Q Did -- was there any discussion about questioning the
16 validity of that warrant?

17 A No.

18 Q Let's understand correctly. Mr. Scalzo did question
19 whether you lived or not at [REDACTED] is that
20 correct?

21 A Yeah.

22 Q But this is a separate issue, is it not?

23 A Yeah.

24 Q You wished for him to question the validity of the
25 underlying warrant; is that correct?

1 A Uh-huh.

2 Q And what's the issue in reviewing that warrant that
3 you wanted to point out?

4 A Excuse me?

5 Q What's the issue you wanted to point out to the
6 Court?

7 A I wanted to point out that Donald Hollingsworth told
8 him that he bought drugs from a house on the corner of Old
9 Paris Mountain Road and Attu Street. And I was trying to
10 figure out how did they come to [REDACTED] and serve
11 a warrant for that.

12 Q And you attached a copy of that warrant to your
13 petition for --

14 A Right.

15 Q -- post-conviction relief; is that correct?

16 A Yeah.

17 Q At the trial of your case, there were other parties
18 when you were arrested that were, also, charged in the
19 similar occurrence; correct?

20 A Yeah.

21 Q Was one of those Teresa Smiley?

22 A Yes.

23 Q And she was a co-defendant; correct?

24 A Yes.

25 Q And she was called as a witness at your trial?

1 A Yes.

2 Q And did Mr. Scalzo examine her as a -- cross-examine
3 her at the trial?

4 A Yes.

5 Q Did he inquire into her past criminal infractions?

6 A Well, they talked about her having fraudulent checks,
7 or something like that.. But they were saying they was
8 old.

9 Q Were you aware of any other significant criminal
10 infractions that Ms. Smiley had committed?

11 A Yeah. Possession of marijuana and giving false
12 information to the police officer.

13 Q Did you tell Mr. Scalzo about the false information
14 to police?

15 A Did I tell him?

16 Q Yes, sir.

17 A No.

18 Q Do you know if he was aware of the false information
19 to police charge?

20 A Nah. I don't know.

21 Q When did you find out about the false information to
22 police?

23 A They sent me a copy of her RAP sheet.

24 Q And when did he send that to you?

25 A 2006.

1 Q Before or after your trial?

2 A After.

3 Q And can you tell me who Aaron Garrison was?

4 A My other co-defendant.

5 Q And did there come a time that you were with
6 Mr. Garrison at Mr. Scalzo's office?

7 A Yes. I took him there to talk to him.

8 Q And did Mr. Scalzo represent Mr. Garrison as well?

9 A No.

10 Q He only represented you?

11 A Yeah.

12 Q Was there a conversation where Mr. Scalzo met with
13 Mr. Garrison without you present?

14 A Yeah. We got up, and as we got ready to go to the
15 back, he told me he wanted to talk to him in private.

16 Q Okay. And you were excluded from that
17 conversation?

18 A Yeah.

19 Q Were you ever told what that conversation was about?

20 A Huh-uh.

21 Q And what happened with Mr. Garrison at trial?

22 A He got on the stand and testified. And they brought
23 some kind of -- some letter he had wrote to the arresting
24 officer or something about him saying I lived at the house
25 and the drugs was mine, something like that.

1 Q Is that the first you were aware of that letter was
2 at trial?

3 A Yeah.

4 Q Do you feel that Mr. Scalzo should have told you
5 about that before trial?

6 A Of course.

7 Q Do you have any other matters you'd like to bring to
8 the attention of the Court?

9 A No, sir.

10 MR. HEAD: Thank you.

11 Your witness.

12 MS. RATIGAN: I have no questions of this witness,
13 Your Honor.

14 THE COURT: Thank you, Mr. Whitner.

15 You can step down, sir.

16 Mr. Head, you may call your next witness.

17 MR. HEAD: Thank you, Your Honor.

18 I'd like to call Christopher Scalzo, please.

19 WHEREUPON,

20 CHRISTOPHER DOMINICK SCALZO,

21 after first having been duly sworn, testified as follows:

22 THE CLERK: Thank you.

23 You may be seated.

24 Please state your full name for the record.

25 THE WITNESS: Christopher Dominick Scalzo.

DIRECT EXAMINATION

BY MR. HEAD:

Q Thank you, Mr. Scalzo.

Mr. Scalzo, did you represent Mr. Whitner in connection with the charges that have been discussed?

A Yes.

Q And when did you begin that representation?

A I'll have to refer to my file to be able to tell you the exact date. According to my file, it would have been May 10th of 2004, which is when the file was opened and I would have gotten it.

Q Okay. And when did you first meet with Mr. Whitner?

A According to my notes, it looks like he must have had court in September of 2004. And that probably was come to court, kind of identify who we are, and we'll come back at a later date. So that would have been probably the first time we met.

Q And how many times in the course of your representation of Mr. Whitner did you meet with Mr. Whitner?

A I've got '04, September 13th, we -- it looks like we checked in March of '05 to see if the case was active -- warrants were still active, because we hadn't heard anything in the case for quite a while. I've got August 24th of '05, he did not show up for a visit. So I guess

1 we didn't meet at that point. I've got October 28th of
2 '05, that we met and we talked about a trial that had been
3 scheduled for November 2nd, 2005.

4 And I'll have to go through. I usually put a date on
5 my notes when I talk to somebody. And we would have met
6 prior -- there were two trials I represented him on, the
7 one on November 2nd of 2005 is not the trial of this case
8 that we're talking about. That was a possession with
9 intent to distribute crack cocaine case. That was a
10 separate charge. I don't know if I answered your question
11 or not.

12 Q Yes, sir. Thank you.

13 And, at that point, in 2004, how long had you been
14 with the Public Defender's Office?

15 A I started in 2002, October of 2002.

16 Q And approximately how many cases do you handle?

17 A Do I handle, or did I handle at the time?

18 Q How many did you handle at that time?

19 A It's hard to say in terms of what I handled at that
20 time. But I averaged somewhere around 175 clients at any
21 given moment during the course of those years in pending
22 cases.

23 Q Okay. And, in this case, did you have an opportunity
24 to review the search warrant for Mack Street?

25 A Yes.

1 Q Were you aware of who Donald Hollingsworth was?

2 A I guess I was aware based on what I got in discovery.
3 I know his statement is in there.

4 Q Okay. And, in that statement, was there any
5 discussion with my client or any concern over the
6 identification of the property?

7 A The identification of what?

8 Q Of the property, Mack Street.

9 A That was a central issue for us once we got to the
10 point where we were at trial. I mean, for us, my
11 recollection is -- and I looked up the transcript of the
12 trial in my notes. Our theory of defense was he didn't
13 live there.

14 And so we, obviously, definitely talked about how do
15 we prove that you didn't live there? What was the issues
16 about living there? I do not have a specific recollection
17 about Mr. Hollingsworth and that issue in his statement.
18 But, certainly, that was the prime issue in the trial for
19 us.

20 Q With that issue, was there any discussion of
21 attacking the validity of the underlying search warrant?

22 A I don't have a specific recollection of whether or
23 not we talked about that. But I can't imagine we didn't.
24 It was the basis of our defense.

25 My analysis then and from what I could tell even

1 still now is our defense was he didn't live there. For us
2 to come into court and make a motion to say the --
3 challenge the validity of the warrant, we would have been
4 talking out of two sides of our mouth and we would have
5 had a standing issue from a legal standpoint.

6 So we had to decide what was our defense going to be,
7 challenge the warrant and, essentially, concede that he
8 lived there, or challenge the fact that he lived there.
9 We went forward with challenging the fact that he lived
10 there.

11 Q I see. So, in your opinion, challenging the
12 identification of which -- of Mack Street would have been
13 mutually exclusive of being able to challenge him living
14 there or not?

15 A Yeah.

16 Q Is that correct?

17 A Yes.

18 Q And you did challenge at trial the identification of
19 Mack Street; is that correct?

20 A Yeah -- the fact that he lived, is that what you're
21 asking?

22 Q Yes.

23 A Yes, absolutely.

24 Q And Teresa Smiley, she was a co-defendant?

25 A Yes.

1 Q Okay. Was she tried at the same time?

2 A She was -- I believe she was scheduled for trial at
3 the same time. And, essentially, right before they called
4 the trial, they advised us that she was going to testify
5 against Mr. Whitner. And that's what ended up happening.
6 So she wasn't called to trial at the same time. She pled
7 guilty right before the trial started.

8 Q And did you call her on -- when you cross-examined
9 her, knowing just before trial that she was going to
10 testify against him and receiving that news just before
11 trial, did you feel like you had an appropriate amount of
12 time to prepare to cross-examine her?

13 A Yes. Because we -- up until that point, it was going
14 to be a trial where she was a co-defendant. And we knew
15 what, essentially, was going on. I did try to get the
16 State to stop the trial and consider renegotiating being
17 that day on the day -- the eve of trial brought us with
18 new news that they were going to call a new witness. But
19 they declined to take that opportunity.

20 Q Was any sort of motion for a continuance made with
21 the Judge?

22 A No. I didn't think there was a reason to continue
23 it.

24 Q Were you aware of Ms. Smiley's criminal background?

25 A I believe I was. I would have been provided -- and

1 I'll have to look through here -- but I would have been
2 provided with a RAP sheet at the time. And I think I
3 cross-examined her on her prior record.

4 Q If she had a charge for false information to police,
5 that would have been important -- would that have been
6 important to Mr. Whitner's defense?

7 A I think it would have probably been something I would
8 have asked her about, if I was aware of it.

9 Q But you don't think you were aware of it?

10 A I can't say I would have -- what I would have done at
11 trial would have been when I received the RAP sheet, I
12 would have gone through the RAP sheet and looked at what
13 was in there, seen on direct whether or not the State
14 addressed that prior record or not, and either
15 cross-examined based on what they asked, or raised it
16 myself in cross-examination.

17 Q And the other co-defendant, Aaron Garrison, did you
18 ever meet with that defendant?

19 A I think I did. I think Mr. Whitner is right that I
20 did. I'd have -- and if you'll bear with me for a moment,
21 I think I do have notes.

22 I have notes -- my handwritten notes where I titled
23 it "Aaron Garrison," which tells me that that's the person
24 I was talking with. And it just looks like notes from my
25 conversation that I had with him. Mr. Whitner may have

1 been present. I don't have any notes to say whether he
2 was or wasn't present.

3 Q So you're not positive that you had a meeting with
4 Mr. Garrison?

5 A No. I'm positive I had a meeting with Mr. Garrison.
6 But I'm not sure if Mr. Whitner was present the entire
7 time, or, as he said, whether me and Mr. Garrison met
8 afterwards. I don't have a specific recollection, and my
9 notes don't reflect whether that happened or not.

10 Q What would have been a reason to meet with
11 Mr. Garrison without Mr. Whitner being present?

12 A If that happened -- and I'm not necessarily saying
13 that it didn't happen -- that would have probably been for
14 the purposes of my being able to really gauge the witness
15 for myself without any influence positive or negative of
16 anybody else in the room. I would have probably wanted to
17 sort of size him up for myself. And that's why I probably
18 would have talked to him on my own at some point.

19 Q Is this something that's commonly done in these types
20 of cases, interviewing witnesses?

21 A It would be probably commonly done for me. I would
22 prefer to be able to make my own assessment of a witness
23 that I'm going to either call or cross-examine in a case.

24 Q Have you done it in other cases?

25 A Sure. I've, certainly, met with witnesses alone or

1 with my own investigator, but not necessarily with my
2 client.

3 Q Do you discuss your conclusions from those meetings
4 with your client later?

5 A Some probably, not necessarily all.

6 Q What would be a reason not to discuss it with your
7 client?

8 A The relevance of it. I mean, some of it is just I'm
9 getting an impression about what I -- how I think this guy
10 is going to testify, what he might say, you know, how do I
11 sort of get under his skin, or how do I get him to do what
12 I want him to do in terms of questioning, and do I believe
13 him, that kind of thing. A lot of that may not be really
14 relevant to my discussion with Mr. Whitner in terms of the
15 details of it. It may just be that I say to Mr. Whitner,
16 look, he's bad for us, or he's good for us, or that kind
17 of a conclusion.

18 But in terms of what Mr. Garrison would testify to, I
19 would relate that to Mr. Whitner, and I probably did. The
20 other thing is Mr. Whitner brought Mr. Garrison to me. So
21 a lot of that would have been -- he would have already known.

22 Q Were you aware of a letter that Mr. Garrison had
23 written to the police?

24 A I don't have a specific recollection of it. But, in
25 my notes, I have a copy of it. And the date of the fax

1 from the Solicitor's Office looks to be about a month or
2 so before the trial. So I, certainly, received it and
3 would have reviewed it, and would have tried to use it, I
4 guess, or been prepared for it.

5 Q Do you have any notes reflecting that you had
6 discussed that letter as a potential impact with
7 Mr. Garrison -- I'm sorry, with Mr. Whitner?

8 A No. But I may need to look through the notes to see
9 if I have any specific note referring to it. I don't have
10 a memory of us talking about that letter, specifically.

11 Q Mr. Whitner, it appears he post-trial filed a
12 grievance with the Bar; is that correct?

13 A Yes.

14 Q Do you recall what the basis of that grievance was?

15 A The basis of the grievance was that he had said that
16 he asked me -- I'm not sure if it said he wrote me a
17 letter or called me for a copy of his discovery. And that
18 was my understanding of the basis of the grievance. And I
19 had, in essence, not responded to him.

20 Q And having had a grievance filed, does that effect
21 your opinion in any way?

22 A No.

23 Q If you had to have this case to try over again, is
24 there anything you'd do differently?

25 A I don't know. It's hard to say. I can't think of

1 something that materially I would do differently. I don't
2 know. I really don't -- can't think of something I would
3 do differently that's material. I mean, we'd all do it
4 differently like -- I could be wrong, but I think you're
5 asking me would I do something materially different --

6 Q Are there any substantive issues that you would have
7 raised?

8 A Differently?

9 Q Yes, sir.

10 A No. I think our main substantive issue was the fact
11 that he did not live at [REDACTED]. And then the other issue
12 that came across at trial was the fact that I couldn't
13 cross-examine the witness testifying against him about the
14 sentence she was looking at. Judge Pyle had ruled against
15 me going into the fact that she was looking at,
16 specifically, 30 years.

17 Q That was Ms. Smiley?

18 A Yes, sir.

19 MR. HEAD: Thank you.

20 I have no further questions.

21 MS. RATIGAN: Just a few questions.

22 CROSS-EXAMINATION

23 BY MS. RATIGAN:

24 Q So after you -- after the PD's office was appointed,
25 you would have filed the usual Brady and Rule 5 motions?

1 A Yes, ma'am.

2 Q And you received those materials from the State all
3 the way up to trial?

4 A Yes, ma'am.

5 Q Would you have reviewed those with Mr. Whitner, the
6 police reports, any statements, things of that nature.

7 A Yes.

8 Q Did you review with him his version of what had
9 happened at [REDACTED]

10 A Yes. I've got my notes. Like I wrote Aaron Garrison
11 on one, the next one I didn't write anything. And
12 that's -- from the context of my notes, that tells me that
13 I'm talking to Mr. Whitner about his version of what's
14 going on.

15 Q And, basically, the police showed up at [REDACTED]
16 [REDACTED] with a search warrant for that residence, your
17 client was there, drugs were found, and that's how he
18 picked up these charges. Would that be a fair summation?

19 A That's the skinny on it, yeah.

20 Q Okay. And so you did receive that search warrant as
21 part of discovery?

22 A Yes, ma'am.

23 Q And did you review that search warrant with
24 Mr. Whitner?

25 A Do I have a specific memory of us reviewing it? No.

1 Do I expect that I did? Yes. My standard operating
2 procedure would have been to go through the discovery.
3 Usually, I read as much of the discovery to my client as I
4 can. I, actually, do it -- I try to do it the same way
5 every time. I don't a lot of times go over the discovery
6 until my client comes in and we go over it together. I'm
7 almost learning it at the same time that he's learning it,
8 unless it's a very complicated case. And this doesn't
9 strike me as something I would have done differently.

10 So I probably would have read the police reports to
11 him, any witness statements. The search warrant I may not
12 have read verbatim to him, but I probably would have
13 reviewed it just simply flipping page to -- one page to
14 the next to make sure I had gone through everything that
15 was there, and used that as the way to begin the
16 conversation. That's my standard operating procedure. I
17 can't tell you that I did that exactly in this case from
18 memory, but that's what I usually do.

19 Q So even if you didn't necessarily go through the
20 search warrant and affidavit line by line, you would have
21 discussed with him how the police ended up at [REDACTED]
22 [REDACTED] that night and how he got where he's at?

23 A Yeah. For me, the search warrant, I would have
24 looked at it and tried to figure out do I think that
25 there's a legal challenge to be made based on the search

1 warrant. And if there was some factual problem that I
2 needed him to help me clarify with, I would have asked him
3 to help me clarify the facts. That's usually what I do
4 with a search warrant.

5 Q And you discussed with Mr. Whitner that the Defense
6 case -- basically, the Defense theory at trial would be
7 that that was not his residence?

8 A Yeah. I almost didn't -- I mean, in the
9 conversation, he was saying to me, That's not my
10 residence. So, to that extent, yes, we discussed it.

11 Q And you don't have any independent recollection of
12 Donald Hollingsworth's statements?

13 A No. I just have what's written down and the copies
14 from the discovery.

15 Q And you don't have any independent recollection if,
16 in fact, you did speak to Aaron Garrison separately?

17 A No, I don't. I know I spoke to him, but I don't know
18 if it was separate or not.

19 Q And do you have any independent recollection of
20 whether you would have discussed Aaron Garrison's letter
21 with your client after you got it from the Solicitor's
22 Office?

23 A I think that I would have. But, again, I don't have
24 a specific memory of it only because Aaron is,
25 essentially, saying here is what I would testify to you,

1 the State. And in anticipation of what the testimony was
2 going to be, I would have thought -- I would think we
3 would have discussed that. Certainly, if I had talked to
4 Aaron prior to that and he said one thing and now he was
5 saying something different, I would anticipate having
6 talked about that.

7 But we would have had not a whole lot of
8 opportunities to change a lot of things. Because from the
9 letters I have from the Solicitor's Office, they say,
10 We're putting this case on the trial docket. And I think
11 it was two or three times where it was not reached on the
12 trial docket. We tried to reopen negotiations. That
13 didn't happen. So there were several times where we went
14 back and forth about starting a trial, but not, actually,
15 getting to a trial.

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

17 THE COURT: Redirect?

18 MR. HEAD: No, Your Honor.

19 THE COURT: Thank you, Mr. Scalzo.

20 THE WITNESS: Thank you.

21 THE COURT: You may call your next witness.

22 MR. HEAD: Mr. Whitner rests, Your Honor.

23 THE COURT: Thank you.

24 Ms. Ratigan, you may call your next witness.

25 MS. RATIGAN: Your Honor, we'd rest on the record.

1 before Your Honor and the testimony here today.

2 THE COURT: Okay. I'm going to review the petition
3 in light of what I've heard here today. And I'll let you
4 know my decision in the next several weeks.

5 Thank you.

6 *****END OF TRANSCRIPT OF RECORD*****
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CERTIFICATE OF REPORTER

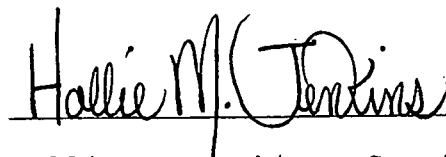
STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 29th day of February, 2012.

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

October 1, 2012



Hollie M. Jenkins, Court Reporter

My Commission Expires: 09/24/20

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Edward Andrell Whitner,)
 S.C.D.C. No. 214145,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2010-CP-23-6408

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 5, 2010. The Respondent made its return on February 4, 2011. An evidentiary hearing into the matter was convened on February 29, 2012 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Matthew P. Head, 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 records of the Greenville County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the Respondent's return, 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 January 2004 term of the Greenville County Grand Jury for possession with intent to

distribute (PWID) marijuana within proximity of a school (2004-GS-23-0081), PWID crack cocaine within proximity of a school (2004-GS-23-0082), PWID marijuana (2004-GS-23-0083), and trafficking crack cocaine (2004-GS-23-0084). He was represented by Christopher D. Scalzo, Esquire.

After the State called the case to trial, the Applicant was found guilty. On March 9, 2006, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to concurrent terms of ten (10) years for PWID marijuana within proximity of a school, ten (10) years for PWID crack cocaine within proximity of a school, ten (10) years for PWID marijuana, third offense, and twenty-five (25) years for trafficking crack cocaine.

A notice of appeal was filed at the South Carolina Court of Appeals. Eleanor Duffy Cleary, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences on September 24, 2008. State v. Whitner, 380 S.C. 513, 670 S.E.2d 655 (Ct. App. 2008). Kathrine H. Hudgins, Esquire of the Office of Appellate Defense filed a petition for writ of certiorari at the South Carolina Supreme Court. The Supreme Court denied the petition by order dated November 4, 2009.

ALLEGATIONS

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

- I. Ineffective assistance of counsel:
 - a. Failed to challenge the validity of the search warrant.
 - b. Failed to challenge the veracity of the search warrant affidavit.

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 only had two (2) meetings with trial counsel before the case went to trial. The Applicant stated they discussed the case but never reviewed the State's evidence. The Applicant stated the police used Donald Hollingsworth's statement to get a search warrant but that he did not know this person. The Applicant stated that, while trial counsel challenged whether he lived at the address in question, he never challenged the validity of the search

warrant. The Applicant stated that trial counsel failed to cross-examine co-defendant Teresa Smiley about her prior criminal record. The Applicant stated trial counsel spoke privately with co-defendant Aaron Garrison, but he did not know what they discussed. The Applicant stated the first time he heard about Garrison's letter to the police was during trial.

Trial counsel testified he filed discovery motions and reviewed those materials with the Applicant. Trial counsel testified he had several meetings with the Applicant in which they reviewed the State's evidence, the Applicant's version of events, and trial strategy. Trial counsel testified he had reviewed the search warrant and that the central issue in this case was that the address in the warrant was not the Applicant's residence. Trial counsel testified he was aware of Hollingsworth (and his statement) through the discovery materials but had no independent recollection of his involvement in the case. Trial counsel testified he was aware of Smiley and had her NCIC report because she was a co-defendant. Trial counsel testified Smiley was to have been jointly tried with the Applicant, but then she decided to testify against him. Trial counsel testified he had enough time to prepare for Smiley's cross-examination and asked her some questions about her prior record. Trial counsel confirmed he spoke to Garrison (probably in an attempt to "size him up") and that he would have discussed this conversation with the Applicant. Trial counsel testified he received a faxed copy of Garrison's letter to the police approximately one (1) month before trial and that he would have discussed it with the Applicant.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not

properly challenge the search warrant in this case. Trial counsel testified the key issue in this case – and the defense theory – was that the residence at the address in the search warrant was not the Applicant's residence. This Court notes trial counsel developed this argument through both direct and cross-examination. (Trial transcript, pp.41-16; pp.102-06; pp.109-11; pp.143-44; p.149; pp.165-66; pp.171-72). The Applicant argued, however, that trial counsel should have challenged the validity of the warrant itself because it was based on a statement from Donald Hollingsworth (whom the Applicant did not know). This Court finds the Applicant has failed to produce any evidence to corroborate his argument that investigation this aspect of the case would have resulted in a different outcome at trial. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (finding the failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial).

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly cross-examine Teresa Smiley about her criminal record. Trial counsel testified he had been provided a copy of Smiley's NCIC report. This Court notes trial counsel questioned Smiley on cross-examination about her 21 prior counts of having issued fraudulent checks. (Trial transcript, pp.121-22). This Court finds trial counsel's failure to question Smiley about a prior conviction for giving false information to police did not change the outcome of this case. See Cherry v. State, 300 S.C. at 11-7-18, 386 S.E.2d at 625.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly handle issues related to Aaron Garrison. The Applicant argued: (1) he did not know

the substance of the conversation between Garrison and trial counsel and (2) he was not aware of Garrison's letter until the trial. Trial counsel testified, however, that he discussed his conversation with Garrison with the Applicant, was aware of Garrison's letter, and would have told the Applicant about the letter. This Court finds trial counsel's testimony is more credible. Regardless, this Court finds the Applicant failed to prove how his case was prejudiced by the manner in which Garrison and the letter were handled by trial counsel.

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.

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 evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

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 21ST day of June, 2012.

D. Garrison Hill

D. Garrison Hill
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

STATE OF SOUTH CAROLINA
 COUNTY OF GREENVILLE
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2010CP2306408

Edward Andrell Whitner vs. South Carolina State Of

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this 25th day of June, 2012.

Court Reporter: _____

PRESIDING JUDGE - D Garrison Hill

This judgment was entered on the 25th day of June, 2012, and a copy mailed first class this 25th day of June, 2012, to attorneys of record or to parties (when appearing pro se) as follows:

Matthew Paul Head Head Law Firm, LLC 16
 Whitsett Street Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

Karen Christine Ratigan Attorney Generals Office
 Po Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer, Greenville County Clerk Of Court

RECEIVED
 JUL 23 2012
 SC Court of Appeals

842

WITNESSES

T. WHITE *Perron / s*

GCSO

08/02/03

ARREST WARRANT NUMBER

H 466388

ACTION OF GRAND JURY
TRUE BILL

[Signature]

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Guilty

[Signature]
Foreperson of Petit Jury

3-9-06
Date:

DOCKET NO. 2004-GS-20-000081

JDN

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

JANUARY TERM 2004

GUILTY

THE STATE

vs.

EDWARD ANDRELL WHITNER

Indictment for

POSSESSION OF MARIJUANA WITH INTENT TO
DISTRIBUTE WITHIN CLOSE PROXIMITY OF A
SCHOOL

VIOLATION § 44-53-445

A Certified Copy
Paul B. Wilkerson
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated *10-31-12*

55

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

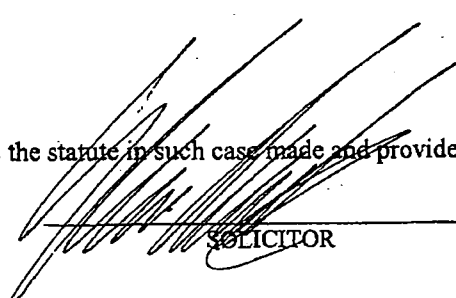
INDICTMENT FOR
POSSESSION OF MARIJUANA WITH INTENT TO
DISTRIBUTE WITHIN CLOSE PROXIMITY OF A
SCHOOL

At a Court of General Sessions, convened on JANUARY 5, 2004 the

Grand Jurors of Greenville County present upon their oath:

That EDWARD ANDRELL WHITNER did in Greenville County, on or about the 2nd day of August, 2003, willfully and unlawfully possess with the intent to distribute a quantity of Marijuana. This incident occurred within one-half (½) mile from Bruton Town Community Center. This is in violation of §44-53-445 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.



SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Greenville
STATE VS.Edward Whitner

AKA:

Race: B Sex: M Age: 31DOB: [REDACTED] SS#: [REDACTED]Address: GREENVILLE, SC 29609DL#: [REDACTED] SID#: [REDACTED]

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

2004GS2300081A/W#: H466388Date of Offense: 08-02-2003S.C. Code §: 44-53-0445(B)(2)CDR Code #: 0108☐ CASE RESTORED
SENTENCE☐ PLEA ☐ TRIAL☒ CONVICTED OF or ☐ PLEADSIn disposition of the said indictment comes now the Defendant who was
TO: PWID CRACK W/ CLOSE PROXIMITY OF A SCHOOLin violation of § 44-53-0445(B)(2) of the S.C. Code of Laws, bearing CDR Code # 0108☒ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

[Signature]
Scriber[Signature]
Defendant[Signature]
Attorney for DefendantWHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 35.13 (Public Def/Prob)	\$500	\$
§ 73.3, 1B TP (Law Enforce. Funding)	\$25	\$ 25.00
§ 33.7, 1B TP (Drug Court Surcharge)	\$100	\$ 100.00
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	\$	\$
TOTAL	\$	

Paul B. Wickham
Clerk of Court/ Deputy ClerkCourt Reporter: H. Jenkins

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol testing _____

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

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP
Requires \$500 be paid to Clerk during probation.PRESIDING JUDGE [Signature]Judge Code: 210 107 10Sentence Date: 3/9/06

SCCA/217 (2/2006)

WITNESSES

T. WHITE

Perron /s

GCSO

08/02/03

ARREST WARRANT NUMBER

H 466385

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Guilty

Foreperson of Petit Jury

3-9-06
Date:

DOCKET NO. 2004-GS-23-

JDN

000082

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

JANUARY TERM 2004

GUILTY THE STATE
vs.

EDWARD ANDRELL WHITNER

Indictment for

POSESSION OF CRACK COCAINE WITH
INTENT TO DISTRIBUTE WITHIN CLOSE
PROXIMITY OF A SCHOOL
VIOLATION § 44-53-445A Certified Copy
Paul B. Wilkerson
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated 10-31-12

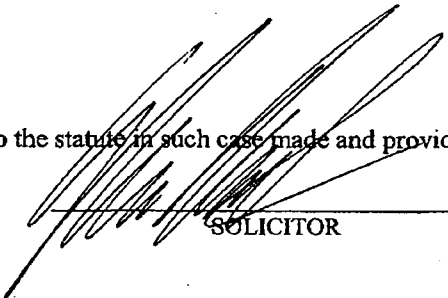
STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE) INDICTMENT FOR
 POSSESSION OF CRACK COCAINE WITH INTENT TO
 DISTRIBUTE WITHIN CLOSE PROXIMITY OF A
 SCHOOL

At a Court of General Sessions, convened on JANUARY 5, 2004 the

Grand Jurors of Greenville County present upon their oath:

That EDWARD ANDRELL WHITNER did in Greenville County, on or about the 2nd day of August, 2003, willfully and unlawfully possess with the intent to distribute a quantity of Crack Cocaine, a controlled substance. The incident occurred within one-half (½) mile from Bruton Town Community Center. This is in violation of §44-53-445 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.


SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Greenville

STATE VS.

Edward Whitner

AKA: _____

Race: B Sex: M Age: 31DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED]
GREENVILLE, SC 29609DL#: [REDACTED] SID#: _____

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

2004GS2300082A/W#: H466385Date of Offense: 08-02-2003S.C. Code § : 44-53-0445(B)(1)CDR Code #: 0107☐ CASE RESTORED
SENTENCE☐ PLEA ☐ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: DRUGS / DIST WITHIN PROX OF SCHOOL PARKin violation of § 44-53-0445(B)(1) of the S.C. Code of Laws, bearing CDR Code # 0107☒ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: _____

[Signature]
Solicitor_____
Defendant_____
Attorney for DefendantWHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services' standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: _____

§ 14-1-206 (Assessments 107.5 %) \$ _____

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

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

§ 56-5-2995 (DUI Assessment) \$12 \$ _____

§ 35.13 (Public Def/Prob) \$500 \$ _____

§ 73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00§ 33.7, 1B TP (Drug Court Surcharg) \$100 \$ 100.00

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

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

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

TOTAL \$ _____

Paul B. Wickens
Clerk of Court/ Deputy ClerkCourt Reporter: H. Jenkins

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol testing _____

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

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP

Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE C. V. [Signature]Judge Code: 210110Sentence Date: 3/9/06

000083

DOCKET NO. 2004-GS-23-

JDN

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

JANUARY TERM 2004

GUILTY

THE STATE

vs.

EDWARD ANDRELL WHITNER

WITNESSES

T. WHITE

Perron / S

GCSO

08/02/03

ARREST WARRANT NUMBER

H 466382

ACTION OF GRAND JURY
TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Guilty

Foreperson of Petit Jury

3-9-06

Date:

✓ 0188
-0186

Indictment for

POSSESSION OF MARIJUANA WITH INTENT TO
DISTRIBUTE

VIOLATION § 44-53-370

A Certified Copy
Paul B. Williams
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated 10-31-12

STATE OF SOUTH CAROLINA)

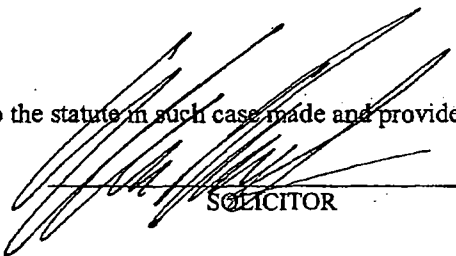
COUNTY OF GREENVILLE)

INDICTMENT FOR
POSSESSION OF MARIJUANA WITH INTENT TO
DISTRIBUTEAt a Court of General Sessions, convened on JANUARY 5, 2004 the

Grand Jurors of Greenville County present upon their oath:

That EDWARD ANDRELL WHITNER did in Greenville County, on or about the 2nd day of August, 2003, possess with intent to distribute or aid, abet, or conspire to possess with the intent to distribute a quantity of Marijuana, a controlled substance, such possession not having been authorized by law. 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.


SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Greenville
 STATE VS.
Edward Whitner

AKA: _____

Race: B Sex: M Age: 31

DOB: _____ SS#: _____

Address: _____
GREENVILLE, SC 29609

DL#: _____ SID#: _____

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

2004GS2300083A/W#: H466382Date of Offense: 08-02-2003S.C. Code § : 44-53-0370(B)(2)CDR Code #: 0186
☐ CASE RESTORED
 SENTENCE

☐ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
 TO: PWID MARIJUANA 3RD OFFENSE

in violation of § 44-53-0370(B)(2) of the S.C. Code of Laws, bearing CDR Code # 0186 0188 JAN
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
 The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
 ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

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

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

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

☐ set by SCDPPPS _____

Recipient: _____

*Fine: _____

§ 14-1-206 (Assessments 107.5 %)	\$	\$
§ 14-1-211(A)(1) (Conv Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 35.13 (Public Def/Prob)	\$500	\$
§ 73.3, 1B TP (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 33.7, 1B TP (Drug Court Surcharge)	\$100	\$ <u>100.00</u>
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	\$	\$
TOTAL	\$	\$

Paul B. Wickhamer
 Clerk of Court/ Deputy Clerk

Court Reporter: Jenkins

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

☐ Appointed PD or appointed other counsel, §35.13 TP
 Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE C. V. B. B. B.Judge Code: 2 10 17 10Sentence Date: 3 9-06

WITNESSES

T. WHITE

Perron 15

GCSO

08/02/03

ARREST WARRANT NUMBER

H 466379

ACTION OF GRAND JURY
TRUE BILL*Paul G. Smith*
FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

*Guilty**Patricia K. Rios*

Foreperson of Petit Jury

3-9-06

Date:

DOCKET NO. 2004-GS-23-000084
JDN

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

JANUARY TERM 2004

GUILTY

THE STATE

vs.

EDWARD ANDRELL WHITNER

0450
0450 Indictment for

TRAFFICKING CRACK COCAINE

VIOLATION § 44-53-375

A Certified Copy
Paul B. Williams
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated *10-31-12**38*

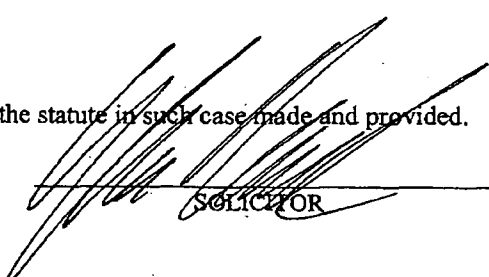
STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
TRAFFICKING CRACK COCAINE

At a Court of General Sessions, convened on JANUARY 5, 2004 the
Grand Jurors of Greenville County present upon their oath:

That EDWARD ANDRELL WHITNER did in Greenville County, on or about the 2nd day of August, 2003, knowingly sell, manufacture, deliver or bring into the State of South Carolina or did knowingly provide financial assistance or otherwise aid, abet 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 crack cocaine. This is in violation of §44-53-375 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.


SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF GreenvilleSTATE VS.Edward Whitner

AKA: _____

Race: B Sex: M Age: 31DOB: [REDACTED] SS#: [REDACTED]Address: GREENVILLE, SC 29609DL#: [REDACTED] SID#: _____

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

2004GS2300084A/W#: H466379Date of Offense: 08-02-2003S.C. Code, § : 44-53-0375(C)(2)CDR Code #: 0392☐ CASE RESTORED
SENTENCE☐ PLEA ☐ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: DRUGS / TRAFFICKING IN ICE, CRANK, CRACKin violation of § 44-53-0375 of the S.C. Code of Laws, bearing CDR Code # 04152☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: _____

Prosecutor:_____
Defendant_____
Attorney for DefendantWHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 2.5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ 50,000; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)		\$ 50,000.00
§ 14-1-211(A)(1) (Conv Surcharge)	\$100	\$ 53,750.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$ 100.00
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 35.13 (Public Def/Prob)	\$500	\$
§ 73.3, 1B TP (Law Enforce. Funding)	\$25	\$ 25.00
§ 33.7, 1B TP (Drug Court Surcharge)	\$100	\$ 100.00
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)		\$
TOTAL		\$

Paul B. Wickersham
Clerk of Court/ Deputy ClerkCourt Reporter: Juhino

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol testing _____

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

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP
Requires \$500 be paid to Clerk during probation.PRESIDING JUDGE [Signature]Judge Code: 2 10 17 10Sentence Date: 3-9-06

RECEIVED

JAN 29 2016

SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

D. Garrison Hill, Circuit Court Judge

EDWARD ANDRELL WHITNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212576

SUPPLEMENTAL APPENDIX

SUSAN B. HACKETT
Appellate Defender

ALAN WILSON
Attorney General

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

KAREN RATIGAN
Senior Assistant Deputy Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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FORM 5

STATE OF SOUTH CAROLINA

County of Greenville 2010 AUG -5 PM 4: 02

IN THE COURT OF COMMON PLEAS

Edward A. Whitner FILED CLERK OF COURT
Full name and prison number (if any) 2010 CP-23-6408
DAVID B. WICKERS JR

2010-CP-23-6408

v.

State of South Carolina

APPLICATION FOR
POST-CONVICTION RELIEF

INSTRUCTIONS B READ CAREFULLY

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

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

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

1. Place of detention McCormick Corr. Institution Dorm F-2B Room 128
386 Redemption Way, McCormick, S.C. 29899
2. Name and location of Court which imposed sentence Greenville Courthouse
3. Name(s) of co-defendant(s) (if any) Teresa Smiley, Aaron Garrison
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2004-GS-23-0081, 2004-GS-23-0082, 2004-GS-23-0083
2004-GS-23-0084

- (b) _____
 (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 (a) March 8 and 9, 2006 25 years
 (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 Ayes@ to (7), list:
 (a) the name of each Court to which you appealed:
 i. Court of Appeals - South Carolina
 ii. Writ of Certiorari
 iii. _____
 (b) the result in each such Court to which you appealed:
 i. affirmed
 ii. affirmed
 iii. _____
 (c) the date of each such result:
 i. September 2008 - Filed
 ii. November 4, 2009 - Certiorari denied
 iii. _____
 (d) if known, citations of any written opinion or orders entered pursuant to such results:
 i. Opinion No - 4434 Heard June 4, 2008 - Filed September 24, 2008
 ii. Dont Know
 iii. _____
9. If you answered Ano@ to (7), state your reasons for not so appealing:
 (a) NA

- (b) NA
- (c) NA
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: ineffective assistant counseling
- (a) trial ineffective assistant counseling
- (b) trial counsel failed to challenge validity of search warrant
- (c) trial counsel failed to challenge veracity of warrant affidavit
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) _____
- (b) "See Attachment" failed to challenge warrant
- (c) "See Attachment" failed to challenge affidavit for search warrant
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NA
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NA
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NA
- (d) any other petitions, motions or applications in this or any other Court? NA
13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. NA
- ii. NA
- iii. NA
- iv. NA
- (b) the name and location of the Court in which each was filed:
- i. NA
- ii. NA
- iii. NA

iv. NA

(c) the disposition thereof:

i. NA

ii. NA

iii. NA

iv. NA

(d) the date of each such disposition:

i. NA

ii. NA

iii. NA

iv. NA

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

i. NA

ii. NA

iii. NA

iv. NA

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?

NA

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

(a) which grounds have been presented:

i. NA

ii. NA

iii. NA

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

i. NA

ii. NA

iii. NA

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) PCR next step Appellate process
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? NA
- (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 Ayes@ to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Christopher D. Scalzo, Greenville Bar Assoc.
- ii. Eleanor Duffy Cleary Appellate Defense
- iii. ~~Kathrine~~ Kathrine H. Hudgins Appellate Defense
- (b) the proceedings at which each such attorney represented you:
- i. trial
- ii. direct appeal
- iii. writ of certiorari

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

Vacate conviction and sentence

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

No

Revised 3/2003

STATE OF SOUTH CAROLINA

County of McCormick

VERIFICATION

I, Edward Whitner

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.

Edward Whitner

SWORN to and subscribed before me this 2
day of August, 2010.

Joyce L Young (L.S.)
Notary Public

My Commission Expires: 8 28 2011

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

I, Edward Whitner

, 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.

Edward Whitner
Applicant

SWORN or affirmed to and subscribed before me this
2 day of August, 2010.

Joyce L Young
Notary Public

My Commission Expires: 8 28 2011

Attachment for #11 of P.C.R Application

1. Trial counsel was ineffective because he failed to challenge validity of the search warrant.
2. Trial counsel was ineffective because he failed to challenge veracity of search warrant affidavit.

Facts

In a Greenville County Sheriff's Office Supplemental Report, Deputy Torrence White stated "with Hollingsworth's statement and my observation of the transaction I obtained a legal search warrant for 202 Mack Street Greenville S.C. from Judge Keaton."

Donald Eugene Hollingsworth was stopped Deputy White on August 2, 2003 for a traffic violation. He was taken into custody and was advised that he was under arrest for possession of crack cocaine and possession of drug paraphernalia. Hollingsworth signed off on a waiver of rights form and agreed to give a statement. In that statement Hollingsworth clearly stated "I was on my moped tonight and I went by the house at the corner of Old Paris Mtn. Rd. and Attu St. where I have purchased crack cocaine four or five times in the past." Hollingsworth also stated "I told Deputy White that I had just purchased the crack cocaine and where I had purchased it."

In the search warrant affidavit Deputy White stated "the white male subject advised me he just had purchased the crack-cocaine from the black male subject at the residence on Mack St. where I had observed him. The white male subject also advised me that he had purchased crack cocaine from this residence at least 4-5 times."

Deputy White misled the magistrate judge in the affidavit by making false statements because Hollingsworth didn't say that he purchased crack cocaine from 202 Mack St.. In fact he told Deputy White that he purchased the crack cocaine from the corner of Old Paris Mtn. Rd. and Attu St.

After signing off on two waiver of rights signed by Deputy White and Deputy Todd, Hollingsworth's statement is thought to be true and it's clear that Deputy Todd wrote the statement as Hollingsworth told it to him. The affidavit was misleading because it did not reveal the correct address that was given to them by Hollingsworth. The information that Deputy White put in the affidavit was false and reckless and also a violation of the 4, 14 Amendment.

Law

An informant's hearsay statement must pass to be credited in supplying probable cause, in that the information supplied was obtained in a "reliable" way. An affidavit in support of search warrant must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter. In *Franks v. Delaware* 98 S. Ct. 2674 (1978)

Search and Seizures - Key 7(5) where defendant makes substantial preliminary showing that false statements knowingly and intentionally, or with reckless disregard for the truth, was included by affiant in search warrant affidavit, and if alleged false statement is necessary to finding of probable cause, Fourth Amendment requires that hearing be held at defendant's request. U.S.C.A. Const.

Amend. 4, 14. Criminal Law - Key 394.4(6)

Search and Seizures - 3.6(2) If, after evidentiary hearing defendant establishes by a preponderance of evidence that false statements knowingly and intentionally, or with reckless disregard for the truth, was included by affiant in search warrant affidavit and, with false material set to one side, the affidavit's remaining contents is insufficient to establish probable cause, search warrant must be voided and fruits of search excluded to the same extent as if probable cause was lacking on the face of the affidavit. U.S.C.A. Const. Amend. 4, 14

Daniel v. State 359 S.E. 2d 735 (Ga. App. 1987)

Criminal Law - Key 394.4

Search and Seizures - Key 112 Search warrant would be voided and fruit of search excluded, where challenged information in affidavit regarding alleged reliable informant was known by affiant to be false and was essential to establishment of probable cause.

Here, Deputy White's affidavit failed to set forth any facts as to why he believed crack cocaine would be found at 202 Mack St. If Deputy White's false statements are set aside from the affidavit the remainder of the affidavit is insufficient to establish probable cause because 202 Mack St. was not the address where Hollingsworth said he purchased crack cocaine.

United States Ex Rel. Petillo v. State of N.J.

Criminal Law - 394.4.(6) Search and Seizures 7(7)

Fourth Amendment is violated, and proceeds of search must be suppressed, when materially inaccurate affidavit, knowingly submitted, formed basis for issuance of search warrant, U.S. C. A. Const. Amend. 4.

Trial counsel was ineffective because he didn't challenge the validity of the search warrant and the veracity of the affidavit that Deputy White submitted. This would have shown that Deputy White misled the magistrate judge by misrepresenting the facts. By "reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw." To allow magistrate to be misled in such manner could denude the probable cause requirement of all real meaning.

STATE OF SOUTH CAROLINA
COUNTY OF Greenville

SEARCH WARRANT

Form Approved by
S.C. Attorney General
Section 17-13-160
March 12, 1918

ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY
OF _____

It appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

202 Mack St Greenville, SC 29609. Further described as single story, single family dwelling with white wood siding and black shutters. The residence is clearly marked number 202 with black letters on the roof above the front door. The residence in question is the 2nd residence on the left on Mack St from Walcott St. Any out-buildings, storage containers, trash recepticals, and/or vehicles designated for 202 Mack St. And/Or its Occupants.

Now, therefore, you are hereby authorized to search the subject premises for the property described below, and to seize such property if found:

DESCRIPTION OF PROPERTY

Crack Cocaine, Paraphernalia, Papers, Monies, and Effects Related to the Use, Packaging, Storage, and/or Distribution of Crack Cocaine. Any Items of Personal Property Tending to Identify Subject(s) in Control of the Premises and/or Areas to be Searched.

This Search Warrant shall not be valid for more than ten days from the date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to

Issuing Magistrate and Occupants

within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such search if practicable, and, if not, to such person as soon thereafter as is practicable; in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to a prominent place on such premises.

Greenville, S. C.
Aug 1 2003

[Signature]
Signature of Judge

(L. S.)

STATE OF SOUTH CAROLINA

COUNTY OF Greenville

AFFIDAVIT

Personally appeared before me, one Deputy T. White who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

Crack Cocaine, Paraphernalia, Papers, Monies, and Effects Related to the Use, Packaging, Storage, and/or Distribution of Crack Cocaine. Any Items of Personal Property Tending to Identify Subject(s) in Control of the Premises and/or Areas to be Searched.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

202 Mack St Greenville, SC 29609. Further described as single story, single family dwelling with white wood siding and black shutters. The residence is clearly marked number 202 with black letters on the roof above the front door. The residence in question is the 2nd residence on the left on Mack St from Walcott St. Any out-buildings, storage containers, trash recepticals, and/or vehicles designated for 202 Mack St. And/Or its Occupants.

REASON FOR AFFIANT'S BELIEF THAT THE
PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

On August 1, 2003 while responding to a disturbance call in the area of Mack St. I Deputy White observed a white male drive up to the residence of 202 Mack St. Greenville, SC on a black moped. While observing I saw a black male subject exit the residence wearing a grey t-shirt and dark colored pants walk over to the white male subject riding the black moped. The black male took a quantity of cash from the white male subject riding the moped and handed him a unknown substance. The black male then proceeded to go back into the residence at 202 Mack St. The white male subject riding the black moped then drove off headed in the direction of Poinsett Hwy. I Deputy White then conducted a traffic stop based on the fact that the white male subject riding the moped did not have a vehicle license displayed on the rear of the black moped in which he was riding. While on the traffic stop it was determined that the white male subject was in possession of a quantity of a white rock substance that did field test positive as crack cocaine. The white male subject was advised of his Miranda Rights and that time agreed to waive his rights to speak with me without his lawyer present. The white male subject advised me he just had purchased the crack cocaine from the black male subject at the residence on Mack St. where I had observed him. The white male subject also advised me that he had purchased crack cocaine from this residence at least 4-5 times. It is the affiants belief that further contraband will be located within the above described residence.

Sworn to and Subscribed before me

this

1st

Signature of Judge

20 03

(L.S.)

Signature of Affiant

Affiant

Address 4 McGee St.Greenville, SC 29601Phone (864) 271-5210

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

SO 03-114259

I, DONALD EUGENE HOLLINGSWORTH, do hereby give freely and voluntarily this statement to
T. WHITE and C.J. TODD
who have identified themselves to me to be Deputies of the Greenville County Sheriff's Office, Greenville, South Carolina. I have been advised that I do not have to make this or any other statement, and that what I say can be used against me in a Court of Law. I have been advised that I have the right to Counsel with an Attorney of my choice, that if I am financially unable to obtain an Attorney the Court will appoint an Attorney to represent me. I have not been threatened or promised any reward to make this statement.

I am 41 years old and I reside at 308 Von Hullen Dr. GRUL, SC
I have a 9th grade education, and I can read and write.

I WAS ON MY MOVED TONIGHT AND I WENT BY THE HOUSE AT THE CORNER
* OF OLD PARTS HTA. RD. AND ATTU ST. WHERE I HAVE PURCHASED CRACK
COCAINE FOUR OR FIVE TIMES IN THE PAST. I STOPPED IN FRONT OF THE
HOUSE OUT IN THE ROADWAY AND A BLACK MALE CAME OUT OF THE HOUSE AND
CAME UP TO ME. I ASKED IF HE WOULD GIVE ME ONE CRACK ROCK FOR \$13.00.
I GAVE HIM THE \$13.00 AND HE GAVE ME ONE ROCK OF CRACK COCAINE.
I THEN LEFT AND WAS STOPPED BY DEPUTY WHITE AT PAINSETT AND
PLEASANTBURG. I STOPPED IN THE ECKERS PARKING LOT AND I SPIT THE
ROCK OF CRACK COCAINE ON THE GROUND. DEPUTY WHITE TOLD ME WHY HE
STOPPED ME AND HE ASKED IF HE COULD SEARCH ME. I TOLD HIM YES AND
HE FOUND MY CRACK PIPE IN MY POCKET. I THEN TOLD HIM WHERE I
HAD SPIT THE CRACK ON THE GROUND AT. DEPUTY WHITE FOUND THE CRACK
AND ARRESTED ME AT THAT TIME. DEPUTY WHITE ADVISED ME OF MY
MIRANDA RIGHTS AND I AGREED TO SPEAK WITH HIM AT THAT TIME. I
TOLD DEPUTY WHITE THAT I HAD JUST PURCHASED THE CRACK COCAINE
AND WHERE I HAD PURCHASED IT. I WAS THEN TRANSPORTED TO THE
DETENTION CENTER AND DEPUTY TODD ADVISED ME OF MY MIRANDA
RIGHTS BOTH VERBALLY AND IN WRITTEN FORM. I AGREED TO SPEAK WITH
DEPUTY TODD AND DEPUTY WHITE AT THAT TIME AND I SIGNED A
WAIVER OF RIGHTS. DEPUTY TODD WROTE THIS STATEMENT FOR ME AS
I TOLD IT TO HIM. END OF STATEMENT.

I have read the above statement of 10/6/ pages and it is true and correct as best I recall.

WITNESS

[Signature]

[Signature: Don Hollingsworth]

I HAVE RECEIVED A COPY OF THIS STATEMENT

[Signature: Don Hollingsworth]

Sworn before me this _____ day of _____ 19 _____

RECEIVED

JAN 29 2016

SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

D. Garrison Hill, Circuit Court Judge

Opinion No. 2015-UP-474 (S.C. Ct. App. filed Oct. 7, 2015)

10-CP-23-06408

EDWARD ANDRELL WHITNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000091

SECOND SUPPLEMENTAL APPENDIX

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

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

Edward Andrell Whitner, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212576

ON WRIT OF CERTIORARI

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge
D. Garrison Hill, Post-Conviction Relief Judge

Unpublished Opinion No. 2015-UP-474
Heard May 4, 2015 – Filed October 7, 2015

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia,
for Petitioner.

Attorney General Alan McCrory Wilson, Senior
Assistant Deputy Attorney General Karen Christine

Ratigan, and Assistant Attorney General John Walter Whitmire, all of Columbia, for Respondent.

PER CURIAM: In this action for post-conviction relief (PCR), Edward Andrell Whitner (Whitner) argues his Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated by trial counsel's failure to challenge the validity of the search warrant for a private residence. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *Strickland v. Washington*, 466 U.S. 668, 687 (1984) ("First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense."); *Bagwell v. State*, 410 S.C. 259, 264, 763 S.E.2d 630, 633 (Ct. App. 2014), *cert. denied* (Feb. 27, 2015) ("To show counsel was deficient, the applicant must establish counsel failed to render reasonably effective assistance under prevailing professional norms. To show prejudice, the applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." (citations omitted)); *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) ("Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice."); *Underwood v. State*, 309 S.C. 560, 562, 405 S.E.2d 20, 22 (1992) (finding where trial counsel articulates a valid reason for employing a certain trial strategy, such conduct will not be deemed ineffective assistance).

AFFIRMED.

SHORT, LOCKEMY, and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

EDWARD ANDRELL WHITNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212576

Certiorari to Greenville County

D. Garrison Hill, Circuit Court Judge

Opinion No. 2015-UP-474

PETITION FOR REHEARING

On October 7, 2015, this Court affirmed the post-conviction relief (PCR) court's denial of relief to Petitioner in an unpublished opinion. Whitner v. State, 2015-UP-474 (S.C. Ct. App. filed Oct. 7, 2015). Pursuant to Rule 221(a), SCACR, Petitioner seeks rehearing in light of significant points overlooked and/or misapprehended by this Court in rendering its opinion. This Court cited several cases expressing a PCR applicant's burden in order to receive relief. Further, this Court cited Kimmelman v. Morrison, 477 U.S. 365, 375 (1986) for the proposition that "[w]here defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and

that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.” Additionally, this Court cited Underwood v. State, 309 S.C. 560, 562, 405 S.E.2d 20, 22 (1992) for the proposition that “where trial counsel articulates a valid reason for employing a certain trial strategy, such conduct will not be deemed ineffective assistance.” Thus, it appeared this Court held Petitioner had not shown his Fourth Amendment claim was meritorious and that trial counsel articulated a valid reason for employing a certain trial strategy. A review of the record and governing case law disputes both points.

Reasonable trial strategy

Turning first to trial counsel’s “strategic reason” for not challenging the search warrant based upon Petitioner’s status as a guest, trial counsel’s stated reason demonstrated deficient performance. According to trial counsel, the defense theory of the case was Petitioner did not live at the location searched. As a result, the discussions between Petitioner and trial counsel centered on proving Petitioner did not reside at that location. When asked specifically if he discussed attacking the validity of the search warrant, trial counsel responded “I don’t have a specific recollection of whether nor not we talked about that. But I can’t imagine we didn’t. It was the basis of our defense.” He elaborated “For us to come into court and make a motion to say the - - challenge the validity of the warrant, we would have been talking out of two sides of our mouth and we would have had a standing issue from a legal standpoint.” App. 320, line 20 – App. 321, line 5. According to trial counsel, he had to decide whether to challenge the warrant and “concede that he lived there, or challenge the fact that he lived there.” App. 321, lines 6-10. In trial counsel’s opinion, challenging Petitioner’s residency at the Mack Street house and challenging the validity of

the warrant based upon its identification of the property were “mutually exclusive.” App. 321, lines 11-15.

Trial counsel’s strategy was based upon an incomplete understanding of the governing law, and his misapprehension of the law was unreasonable under prevailing professional norms. Trial counsel believed that he could not contest the validity of the search warrant because Petitioner had no expectation of privacy unless he lived there, and the defense theory was that Petitioner did not reside at the house searched. Trial counsel’s analysis was flawed. The evidence presented an obvious opportunity for trial counsel to challenge the validity of the search warrant while remaining consistent with the defense theory that Petitioner did not reside there, but had an expectation of privacy as a guest. As reflected in his testimony, trial counsel also believed he could not present competing and conflicting theories. However, trial counsel could have argued during the pre-trial hearing that Petitioner lived at the residence in order to challenge the warrant, but this concession could not have been used against Petitioner during the trial.

The Fourth Amendment guarantees individuals the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. South Carolina’s Constitution guards against unreasonable searches and seizures as well as unreasonable invasions of privacy. S.C. Const. art. I, § 10. Protection under the Fourth Amendment is afforded to those who have a legitimate expectation of privacy in the place searched. Rakas v. Illinois, 439 U.S. 128, 143 (1978). To demonstrate an expectation of privacy, the defendant must show he had a subjective expectation of not being discovered and the expectation was one that society recognized as reasonable. Oliver v. United States, 466 U.S. 170, 177 (1984). The essence of the Fourth Amendment is to protect a person’s right to be free from unreasonable government intrusions in his own home. Kyllo v. United States, 533 U.S. 27, 31 (2001). The exclusionary rule prohibits the use of evidence obtained

through an unlawful search and/or seizure. Wong Sun v. United States, 371 U.S. 471, 484-485 (1963); State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); State v. Nelson, 336 S.C. 186, 192 n.3, 519 S.E.2d 786, 789 n.3 (1999); State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996).

“[T]he Fourth Amendment protects people, not places.” Katz v. United States, 389 U.S. 347, 351, (1967). The Fourth Amendment is a personal right and an individual must invoke its protections. Minnesota v. Carter, 525 U.S. 83, 88 (1998).

[I]n order to claim the protection of the Fourth amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has ‘a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.’

Id. (quoting Rakas, 439 U.S. at 143-144, and n.12). The contours of the Fourth Amendment’s protections depend upon the “whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.” Katz, 389 U.S. at 351; Rakas, 439 U.S. at 143. A subjective expectation of privacy is legitimate if it is “one that society is prepared to recognize as reasonable.” Rakas, 439 U.S. at 143-144.

In Minnesota v. Olson, 495 U.S. 91, 94 (1990), the United States Supreme Court held that an overnight guest had a reasonable expectation of privacy in another’s home. Olson’s status as an overnight guest was enough to show he had a legitimate expectation of privacy that society recognized as reasonable. Id. at 96. Therefore, Olson was permitted to challenge the search. Id. at 100.

To hold that an overnight guest has a legitimate expectation of privacy in his hosts’ home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another’s home is a longstanding social custom that serves functions recognized as valuable by society. We stay in others’ homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or

when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home.

Id. at 98. The fact that “the guest has a host who has ultimate control of the house is not inconsistent with the guest having a legitimate expectation of privacy.” Id. at 99. Guests “are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household.” Id.

The South Carolina Supreme Court found an individual had a reasonable expectation of privacy in an apartment where he was a guest. State v. Missouri, 361 S.C. 107, 603 S.E.2d 594 (2004). The Court was persuaded that Missouri expected privacy in the apartment of his “good friend,” with whom he had grown up and frequently visited. In the past, Missouri had spent the night occasionally. Missouri explained he felt comfort at the apartment. He had a key and kept a change of clothes there. He was present in the apartment as a social guest and had been there for at least seven hours prior to the execution of the search. Id. at 115, 603 S.E.2d at 597. The Court held “[b]y choosing to share the privacy of their home with [defendant] on several occasions in the past and on the occasion in question, both the [homeowners] and [defendant] demonstrated a subjective expectation of privacy, and that expectation, we hold is one that society is prepared to recognize as reasonable.” Id. at 115, 603 S.E.2d at 597-598. In Kolle v. State, 386 S.C. 578, 590, 690 S.E.2d 73,79 (2010), the South Carolina Supreme Court re-affirmed its holding in Missouri, supra, that an overnight guest has a reasonable expectation of privacy and is afforded protections pursuant to the Fourth Amendment as a result.

However, the United States Supreme Court found defendants who were not overnight guests and were in the home for a few short hours for a business transaction had no reasonable expectation

of privacy. Carter, 525 U.S. at 90. Citing O'Connor v. Ortega, 480 U.S. 709 (1987) to recognize that property used for commercial purposes is treated differently for Fourth Amendment purposes and that in some circumstances a worker can claim Fourth Amendment protection over his workplace, the Court found no indication the defendants had “nearly as significant a connection to [the home searched] as the worker in O'Connor had to his own private office.” Id. The Court then discussed the continuum of privacy rights for individuals in others’ homes explaining that an overnight guest “typif[ies] those who may claim the protection of the Fourth Amendment in the home of another, and one merely ‘legitimately on the premises’ [typifies] those who may not do so.” Id. at 91. The Court determined the case before it was “obviously somewhere in between.” Due to the “purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between [the defendants] and the householder,” the Court held the “situation is closer to that of one simply permitted on the premises.” Id.

Several courts throughout the United States have concluded that individuals who were guests, even if not overnight guests, in a person’s home had a reasonable expectation of privacy. United States v. Gray, 491 F.3d 138, 144-146 (4th Cir. 2007)(detailing the distinctions between business and social guests for purposes of Fourth Amendment protections); United States v. Paradis, 351 F.3d 21, 27 (1st Cir. 2003)(finding Paradis was entitled to Fourth Amendment protection in his girlfriend’s home because Paradis lived there when the two were not fighting and he kept possessions there); United States v. Rhiger, 315 F.3d 1283, 1286-1287 (10th Cir. 2003)(holding that a social guest has a sufficient expectation of privacy to challenge unreasonable searches of his host’s home); United States v. Fields, 113 F.3d 313, 320-321 (2d Cir. 1997)(holding Fields had a reasonable expectation of privacy in the place searched where he had a key, paid the owner weekly

to use the apartment, had used the apartment forty or fifty times, could bring guests, and could come and go as he pleased with minor restrictions despite the fact that Fields did not sleep at the place and used it for illegal activity); Bonner v. Anderson, 81 F.3d 472, 475 (4th Cir. 1996)(holding that Bonner, who was not an overnight guest, had an expectation of privacy in the home of a neighbor because Bonner was a frequent visitor who ran errands for her elderly neighbor); United States v. Foster, 654 F.Supp.2d 389, 395 (E.D.N.C. 2009)(holding the defendant had standing to challenge the search of his fiancé's apartment where the record suggested that he had moved into the apartment or was, at a minimum, a frequent visitor); Nieves v. New York City Police Dept., 716 F.Supp.2d 299, 307 (S.D.N.Y. 2010)(finding Nieves had a legitimate expectation of privacy in his friend's apartment where Nieves had been friends with the owner for several years, spent the night in the apartment about five times a month, had a key to the apartment, kept personal items there, and was the sole occupant when the police arrived to search); State v. Cuntapay, 85 P.3d 634, 641-642 (Hawai'i 2004)(holding that a guest had a reasonable expectation of privacy in his friend's home where the guest visited once or twice a week to play cards and darts); In re Welfare of B.R.K., 658 N.W.2d 565, 578 (Minn. 2003)(holding that a juvenile remaining at the home of another minor after a party without adult supervision or authorization – a short term social guest – had a reasonable expectation of privacy in the other minor's home and was afforded the Fourth Amendment's protections); United State v. Tullous, 692 N.W.2d 790, 794 (S.D. 2005)(holding that the defendant had a reasonable expectation of privacy in the home of another where the defendant was a regular social guest at the home, who occasionally babysat for the homeowner and knew the location of the hidden key); State v. Trecroci, 630 N.W.2d 555, 569-570 (Wis. Ct. App. 2001)(holding that a defendant had a reasonable expectation of privacy in the attic space of her fiancée's apartment

building even though the attic was not used as an attic and the defendant was not an overnight guest).

Trial counsel here incorrectly believed he could not contest the validity of the search warrant because Petitioner had no expectation of privacy unless he lived there and the defense theory was that Petitioner did not reside at the house search. Trial counsel's belief was a misapprehension of the law and was unreasonable under prevailing professional norms. Ample evidence in the record supported that Petitioner was a social guest entitled to an expectation of privacy. See State v. Robinson, 410 S.C. 519, 529-530, 765 S.E.2d 564, 569-570 (2014)(delineating factors for courts to consider when determining whether a person had an expectation of privacy in the place searched, including whether the person was an overnight guest, how long the person had been at the home, and whether the person engaged in typical domestic activities at the home). Petitioner admitted to spending a lot of time at the residence because it was a "local hangout." App. 181, lines 17-22. In fact, Petitioner testified, "Every day, I'm out there." App. 190, line 15. On the night the police searched the house, Petitioner was present as a guest. App. 182, lines 2-15. Lakeisha Gordon, the mother of Petitioner's child, recalled that Teresa Smiley, the undisputed lessee of the home, had a romantic relationship with Petitioner's older brother. App. 173, lines 14-23. Aaron Garrison, who was present when the police arrived, explained that a party took place earlier in the evening at the residence. Petitioner was present for the party at least as early as 6:00 p.m. or 7:00 p.m. App. 147, line 22 – App. 148, line 12. Garrison did not stay at the house during the party, but he returned at 1:00 a.m. or 1:30 a.m. to assist in cleaning up. App. 148, lines 17-22. Petitioner was still present even though the party had ended. App. 151, lines 3-8. Although Garrison claimed Petitioner did not live at the address searched, he was impeached with a letter written on his behalf to law

enforcement in which he referred to the address for Petitioner and Smiley. App. 151, line 22; App. 154, lines 16-22.

Further, trial counsel believed that arguing during the motion to suppress that Petitioner resided at the home and arguing during the course of the trial that Petitioner did not reside at the home would not have been permissible. However, our law permits inconsistent arguments. The South Carolina Supreme Court recognized that factors to consider in determining whether a person had an expectation of privacy in the premises search included whether the person “alleged a proprietary or possessory interest in the premises and property seized (*even if only at a motion to suppress, where that admission cannot be used against him to determine his guilt*).” Robinson, 410 S.C. at 529, 765 S.E.2d at 570 (emphasis added). Ample evidence in the record supported a claim that Petitioner lived at the residence. See Id. (delineating factors for courts to consider when determining whether a person had an expectation of privacy in the place searched, including whether the person had a key, how long the person had known the homeowner and whether the person engaged in typical domestic activities at the home). In fact, it was the state’s contention that Petitioner lived at the residence and the state presented substantial evidence to prove such. The prosecution introduced Petitioner’s booking report showing his address as the same as the address for the location searched. App. 92, line 14 – App. 93, line 16. The prosecution also introduced Petitioner’s bond form showing his address as the same as the address for the location searched. App. 97, line 10 – App. 98, line 6. Teresa Smiley, Petitioner’s co-defendant, testified on behalf of the state. She claimed that she and Petitioner were romantically involved and that Petitioner and she lived together at the residence in question. At the time of the execution of the search warrant, Petitioner had lived there approximately one year. App. 117, line 9 – App. 118, line 6. Smiley

testified Petitioner had a key, slept in the bedroom, and had control over the house. App. 118, lines 5-14.

Without doubt, the Fourth Amendment jurisprudence permits individuals to challenge search warrants where individuals have an expectation of privacy. Without doubt, a guest in a home has an expectation of privacy in the home and may contest the validity of the search. Trial counsel's stated strategic reason for not challenging the validity of the search warrant was his belief that Petitioner did not have an expectation of privacy in the place searched because he did not live there. Further, counsel testified that he believed he could not assert that Petitioner resided in the place searched during the pre-trial hearing if his theory at trial would be that Petitioner was not a resident of the house on Mack Street. The case law conclusively demonstrated trial counsel's beliefs were false and his reliance upon that mistaken belief was deficient performance.

Petitioner respectfully requests this Court rehear this matter concerning the significant points overlooked or misapprehended concerning the governing case law and trial counsel's unreasonable strategic choice in light of that case law and the factual record that would have supported a challenge to the validity of the search warrant. Consideration of the case law indicating the ability of a social guest to challenge a search warrant and case law permitting a defendant to admit a possessory interest during a pre-trial hearing that could not be used to determine guilt conclusively demonstrate trial counsel's unreasonable strategy and tactical choice.

Meritorious Fourth Amendment Claim

On August 1, 2003, Torrence White, an employee of the Greenville County Sheriff's Office, obtained a search warrant for a residence in Greenville County. He described it as "the second house ... on the corner of Mack and Walcott, if you came from Walcott Street." App. 24, line 21 – App. 25, line 22. The search warrant described the house as "single story, single family dwelling

with white wood siding and black shutters. The residence is clearly marked number 202 with black letters on the roof above the front door. The residence in question is the 2nd residence on the left on Mack St. from Walcott St.” Supp. App. 11.

According to the affidavit to support the search warrant, Deputy White “observed a white male drive up to the residence of 202 Mack Street” on a black moped. Deputy White saw a “black male subject exit the residence” and walk over to the white male subject riding the moped. “The black male took a quantity of cash from the white male subject riding the moped and handed him an unknown substance.” The black male returned to the residence. The white male drove off in the direction of Poinsett Highway. Deputy White conducted a traffic stop of the white male and discovered he was in possession of crack cocaine. The white male then gave a statement saying he had purchased the cocaine from the residence on Mack Street where Deputy White had observed him. In fact, the white male said he had purchased crack at the residence four or five times. Supp. App. 13.

A handwritten statement by Donald Hollingsworth told a slightly different story. Hollingsworth’s statement matched White’s affidavit in almost every respect, except in the most critical area – the location of the house where he purchased the drugs. Hollingsworth’s statement aligned with White’s in multiple ways, including (1) he said he had purchased crack at the residence “four or five times in the past,” (2) he purchased crack from a black male; (3) the black male exited the home to make the sale; (4) Hollingsworth gave the black male money and the black male gave him crack; (5) White made the traffic stop on Poinsett; (6) White advised him of his rights and he waived them; and (7) he told White he had just purchased the crack and the location of where he purchased the crack. Supp. App. 13. However, according to Hollingsworth, he “went by the house at the corner of Old Paris Mtn. Rd. and Attu Street” where he purchased crack cocaine. Supp. App.

14. This was in sharp contrast to White's sworn statement that the purchase occurred at 202 Mack Street.

White and other deputies executed the search warrant on the residence at 202 Mack Street. App. 26, lines 5-9. Officers found drugs in the home. App. 27, line 21 – App. 28, line 1; App. 29, lines 2-5; App. 49, line 12 – App. 50, line 20; App. 61, line 22 – App. 62, line 8. Officers found a handgun under a mattress in a bedroom as well. App. 67, lines 5-9. As a result, Petitioner was charged with possession of the drugs.

At the PCR hearing, trial counsel testified that he reviewed the search warrant in the case and was aware of Hollingsworth's statement. App. 319, line 23 – App. 320, line 3. However, trial counsel admitted that he may not have read the search warrant verbatim to Petitioner, and would have reviewed it just simply flipping the pages. App. 329, lines 10-16.

Petitioner testified that while he was in prison,¹ he learned the search warrant used by the police to search the house where he was found had been based upon a statement by Donald Hollingsworth. Petitioner was unaware of the basis for the search warrant and had not discussed this aspect of the case with trial counsel prior to trial. App. 312, line 22 – App. 313, lines 17.

The Fourth Amendment requires an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued. U.S. Const. amend. IV. The South Carolina Code mandates that a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record" S.C. Code Ann. § 17-13-140 (1985). "The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. State v.

¹ Trial counsel acknowledged that Petitioner filed a complaint with the Commission on Lawyer Conduct alleging trial counsel had not responded to Petitioner's requests for his discovery. App. 319, lines 11-19.

Dupree, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003) (citing State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995)). A magistrate may issue a search warrant only upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued.” Dupree, 354 S.C. at 684, 583 S.E.2d at 441 (citations omitted). Oral testimony may also be used in to supplement search warrant affidavits which are facially insufficient to establish probable cause. See State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997). However, “sworn oral testimony, standing alone, does not satisfy the statute.” State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678-79 (2000) (citing State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987)).

In terms of a court’s review of the magistrate’s decision, “[t]he duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed.” State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). In determining whether a substantial basis exists, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched. Zurcher v. Stanford Daily, 436 U.S. 547, 556 & n. 6 (1978). “This determination requires the magistrate to make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying the information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002).

The statement by Hollingsworth was undated. Therefore, there was no indication from the document itself that Hollingsworth had purchased crack from a particular residence on the same

date or even in close temporal proximity to the date of the execution of the search warrant. Hollingsworth's statement clearly explained that he purchased crack cocaine from a house on the corner of Old Paris Mountain Road and Attu Street. The record clearly showed the house search was not at the place described by Hollingsworth. White described the house search as "the second house ... on the corner of Mack and Walcott, if you came from Walcott Street." There is simply no way the house search could be both on the corner of Mack and Walcott and the corner of Old Paris Mountain Road and Attu Street. Had trial counsel challenged the validity of the search warrant, he would have been successful and the evidence secured by the search warrant would have been suppressed. See Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994) (finding prejudice where trial counsel failed to challenge the legality of a traffic stop resulting in a search and the finding of drugs, which was the only evidence that Sikes possessed drugs). Prejudice is clear because the prosecution would have been forced to drop the charges against Petitioner if the drugs obtained during the search warrant were suppressed.

Petitioner respectfully requests rehearing on the prejudice prong of his claim of ineffective assistance of counsel in light of the clear record evidence supporting the merits of his Fourth Amendment claim.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

This 22nd day of October, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Greenville County

D. Garrison Hill, Circuit Court Judge

RECEIVED
OCT 22 2015
SC Court of Appeals

EDWARD ANDRELL WHITNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212576

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Edward Andrell Whitner #214145, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 22nd day of October, 2015.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of October, 2015.

Karen Mendez (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

The South Carolina Court of Appeals

Edward Andrell Whitner, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212576

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul G. Short, Jr. J.

James E. Cook J.

Stephanie P. McDermott J.

Columbia, South Carolina

cc:

Karen Christine Ratigan, Esquire
Susan Barber Hackett, Esquire
Alan McCrory Wilson, Esquire
John Walter Whitmire, Esquire
The Honorable D. Garrison Hill

FILED

December 18, 2015

RECEIVED

JAN 29 2016

SC SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Greenville County
D. Garrison Hill, Circuit Court Judge

EDWARD ANDRELL WHITNER,

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Appellate Case No. 2012-212576

BRIEF OF PETITIONER

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ATTORNEY FOR PETITIONER.

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ISSUE PRESENTED

Were Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel violated by trial counsel's failure to challenge the validity of the search warrant based upon trial counsel's misapprehension of the status of the law concerning Petitioner's standing to challenge the search of a private residence?

STATEMENT OF THE CASE

During its January 2004 term, a Greenville County Grand Jury indicted Petitioner for possession with intent to distribute marijuana with close proximity of a school (2004-GS-23-0081), possession of crack cocaine with intent to distribute within close proximity of a school (2004-GS-23-0082), possession with intent to distribute marijuana (2004-GS-23-0083), and trafficking crack cocaine (2004-GS-23-0084). App. 342-343; App. 345-346; App. 348-349; App. 351-352. The prosecution, represented by John D. Newkirk, called Petitioner to trial on the charges on March 8, 2006 before the Honorable C. Victor Pyle, Jr. and a jury. Christopher D. Scalzo represented Petitioner. App. 1. The jury found Petitioner guilty as to all counts. App. 241, lines 8-22. Judge Pyle sentenced Petitioner to twenty-five years' imprisonment and a fine of \$50,000 on the trafficking charge. He sentenced Petitioner to ten years' imprisonment on each of the other charges, and ordered all sentences to run concurrently. App. 245, lines 16-23; App. 337; App. 340; App. 343; App. 346.

Petitioner filed a timely notice of appeal, which was perfected by Eleanor Duffy Cleary, formerly an attorney at the Office of Appellate Defense. App. 247-262. This Court affirmed Petitioner's convictions. App. 275-281. Subsequently, Kathrine H. Hudgins filed a petition for writ of certiorari on Petitioner's behalf. App. 282-293. On November 4, 2009, the Supreme Court denied the petition for writ. App. 294-295.

On August 5, 2010, Petitioner filed an application for post-conviction relief (PCR). App. 296-302. The matter proceeded to an evidentiary hearing on February 29, 2012 before the Honorable D. Garrison Hill. Matthew P. Head represented Petitioner, and Karen C. Ratigan represented the state. App. 308. By order filed June 25, 2012, Judge Hill denied Petitioner relief from his convictions and sentences. App. 334-340.

Petitioner filed a timely notice of appeal. On March 5, 2013, Petitioner filed a petition for writ of certiorari in the South Carolina Supreme Court. On May 20, 2013, Respondent filed its return. On July 29, 2013, the Supreme Court transferred the petition to this Court pursuant to Rule 243(l), SCACR. On June 17, 2014, this Court granted the petition for writ of certiorari. This brief follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated by trial counsel's failure to challenge the validity of the search warrant based upon trial counsel's misapprehension of the status of the law concerning Petitioner's standing to challenge the search of a private residence.

Relevant facts

Evidence presented at trial

On August 2, 2003, Torrence White, an employee of the Greenville County Sheriff's Office, obtained a search warrant for a residence in Greenville County. He described it as "the second house ... on the corner of Mack and Walcott, if you came from Walcott Street." App. 24, line 21 – App. 25, line 22. After a briefing, White and other deputies executed the warrant on the residence. App. 26, lines 5-9. White found Teresa Smiley standing in the doorway of the back bedroom in the hallway. He detained her and moved her to the front room of the residence where two other individuals - Aaron Garrison and Petitioner - were located. App. 26, line 19 – App. 27, line 4. White claimed that Smiley informed him that the residence belonged to her and Petitioner. He further claimed that Petitioner admitted to living there. App. 27, lines 7-13; App. 31, lines 10-19. Officers found drugs in the home. App. 27, line 21 – App. 28, line 1; App. 29, lines 2-5; App. 49, line 12 – App. 50, line 20; App. 61, line 22 – App. 62, line 8. Officers found a handgun under a mattress in a bedroom as well. App. 67, lines 5-9.

Anticipating Petitioner's defense would be that he did not reside at the location where the drugs and handgun were found, the prosecution introduced Petitioner's booking report showing his address as the same as the address for the location searched. App. 92, line 14 – App. 93, line 16.

The prosecution also introduced Petitioner's bond form showing his address as the same as the address for the location searched. App. 97, line 10 – App. 98, line 6.

Teresa Smiley, Petitioner's co-defendant, testified on behalf of the state. She claimed that she and Petitioner were romantically involved and that Petitioner and she lived together at the residence in question. At the time of the execution of the search warrant, Petitioner had lived there approximately one year. App. 117, line 9 – App. 118, line 6. Smiley testified Petitioner had a key, slept in the bedroom, and had control over the house. App. 118, lines 5-14.

Petitioner countered Smiley's testimony in multiple ways, including his own testimony. Petitioner denied ever living at the residence searched. App. 179, lines 6-7; App. 181, lines 13-14. Petitioner admitted to spending a lot of time at the residence because it was a "local hangout." App. 181, lines 17-22. In fact, Petitioner testified, "Every day, I'm out there." App. 190, line 15. On the night the police searched the house, Petitioner was present as a guest. App. 182, lines 2-15. Lakeisha Gordon, the mother of Petitioner's child, recalled that Smiley had a romantic relationship with Petitioner's older brother. App. 173, lines 14-23. Aaron Garrison, who was present when the police arrived, explained that a party took place earlier in the evening at the residence. Petitioner was present for the party at least as early as 6:00 p.m. or 7:00 p.m. App. 147, line 22 – App. 148, line 12. Garrison did not stay at the house during the party, but he returned at 1:00 a.m. or 1:30 a.m. to assist in cleaning up. App. 148, lines 17-22. Petitioner was still present even though the party had ended. App. 151, lines 3-8. Although Garrison claimed Petitioner did not live at the address searched, he was impeached with a letter written on his behalf to law enforcement in which he referred to the address for Petitioner and Smiley. App. 151, line 22; App. 154, lines 16-22.

Evidence presented at the PCR hearing

Petitioner testified that while he was in prison,¹ he learned the search warrant used by the police to search the house where he was found had been based upon a statement by Donald Hollingsworth. Petitioner was unaware of the basis for the search warrant and had not discussed this aspect of the case with trial counsel prior to trial. App. 312, line 22 – App. 313, lines 17. Trial counsel failed to question the validity of the underlying warrant. Specifically, Petitioner indicated that Hollingsworth stated he bought drugs from a house on the corner of Old Paris Mountain Road and Attu Street. The address for the residence of the house searched was **not** on the corner of Old Paris Mountain Road and Attu Street. App. 314, lines 5-11. The undated statement by Hollingsworth used to support the search warrant clearly indicated Hollingsworth bought a crack rock for \$13 on some unknown date from a house at the corner of Old Paris Mountain Road. App. 302.

Trial counsel testified that he reviewed the search warrant in the case and was aware of Hollingsworth's statement. App. 319, line 23 – App. 320, line 3. According to trial counsel, the defense theory of the case was Petitioner did not live at the location searched. As a result, the discussions between Petitioner and trial counsel centered on proving Petitioner did not reside at that location. When asked specifically if he discussed attacking the validity of the search warrant, trial counsel responded "I don't have a specific recollection of whether or not we talked about that. But I can't imagine we didn't. It was the basis of our defense."² He elaborated "For us to come into

¹ Trial counsel acknowledged that Petitioner filed a complaint with the Commission on Lawyer Conduct alleging trial counsel had not responded to Petitioner's requests for his discovery. App. 319, lines 11-19.

² Trial counsel testified that he may not have read the search warrant verbatim to Petitioner, and would have reviewed it just simply flipping the pages. App. 329, lines 10-16.

court and make a motion to say the - - challenge the validity of the warrant, we would have been talking out of two sides of our mouth and we would have had a standing issue from a legal standpoint.” App. 320, line 20 – App. 321, line 5. According to trial counsel, he had to decide whether to challenge the warrant and “concede that he lived there, or challenge the fact that he lived there.” App. 321, lines 6-10. In trial counsel’s opinion, challenging Petitioner’s residency at the Mack Street house and challenging the validity of the warrant based upon its identification of the property were “mutually exclusive.” App. 321, lines 11-15.

Order Denying Relief

The order explained that Petitioner’s claim for relief concerned trial counsel’s failure to “challenge[] the validity of the search warrant.” App. 336-337. The order further explained that trial counsel “testified he had reviewed the search warrant and that the central issue in this case was that the address in the warrant was not [Petitioner]’s residence.” App. 337. According to the order, trial counsel was aware of Hollingsworth and his statement but had no independent recollection of Hollingsworth’s involvement in the case. App. 337. The PCR judge found Petitioner’s testimony not credible, but found counsel’s testimony credible even when the testimony was not conflicting. App. 337. The PCR judge found Petitioner failed to meet his burden of proving trial counsel did not challenge the search warrant properly. The judge credited trial counsel’s testimony that the defense theory was that Petitioner did not live at the residence searched. The court found that Petitioner “failed to produce any evidence to corroborate his argument that investigation [of] this aspect of the case would have resulted in a different outcome at trial.” App. 337-338.

Discussion

The Fourth Amendment guarantees individuals the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. South Carolina’s Constitution guards against

unreasonable searches and seizures as well as unreasonable invasions of privacy. S.C. Const. art. I, § 10. Protection under the Fourth Amendment is afforded to those who have a legitimate expectation of privacy in the place searched. Rakas v. Illinois, 439 U.S. 128, 143 (1978). To demonstrate an expectation of privacy, the defendant must show he had a subjective expectation of not being discovered and the expectation was one that society recognized as reasonable. Oliver v. United States, 466 U.S. 170, 177 (1984). The essence of the Fourth Amendment is to protect a person's right to be free from unreasonable government intrusions in his own home. Kyllo v. United States, 533 U.S. 27, 31 (2001). The exclusionary rule prohibits the use of evidence obtained through an unlawful search and/or seizure. Wong Sun v. United States, 371 U.S. 471, 484-485 (1963); State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); State v. Nelson, 336 S.C. 186, 192 n.3, 519 S.E.2d 786, 789 n.3 (1999); State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996).

The Fourth Amendment also requires an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued. U.S. Const. amend. IV. The South Carolina Code mandates that a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record" S.C. Code Ann. § 17-13-140 (1985). "The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. State v. Dupree, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003) (citing State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995)). A magistrate may issue a search warrant only upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued." Dupree, 354 S.C. at 684, 583 S.E.2d at 441

(citations omitted). Oral testimony may also be used in to supplement search warrant affidavits which are facially insufficient to establish probable cause. See State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997). However, “sworn oral testimony, standing alone, does not satisfy the statute.” State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678-79 (2000) (citing State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987)).

In terms of a court’s review of the magistrate’s decision, “[t]he duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed.” State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). In determining whether a substantial basis exists, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched. Zurcher v. Stanford Daily, 436 U.S. 547, 556 & n. 6 (1978). “This determination requires the magistrate to make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying the information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002).

“[T]he Fourth Amendment protects people, not places.” Katz v. United States, 389 U.S. 347, 351, (1967). The Fourth Amendment is a personal right and an individual must invoke its protections. Minnesota v. Carter, 525 U.S. 83, 88 (1998).

[I]n order to claim the protection of the Fourth amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has ‘a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.’

Id. (quoting Rakas, 439 U.S. at 143-144, and n.12). The contours of the Fourth Amendment's protections depend upon the "whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Katz, 389 U.S. at 351; Rakas, 439 U.S. at 143. A subjective expectation of privacy is legitimate if it is "one that society is prepared to recognize as reasonable." Rakas, 439 U.S. at 143-144.

In Minnesota v. Olson, 495 U.S. 91, 94 (1990), the United States Supreme Court held that an overnight guest had a reasonable expectation of privacy in another's home. Olson's status as an overnight guest was enough to show he had a legitimate expectation of privacy that society recognized as reasonable. Id. at 96. Therefore, Olson was permitted to challenge the search. Id. at 100.

To hold that an overnight guest has a legitimate expectation of privacy in his hosts' home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home.

Id. at 98. The fact that "the guest has a host who has ultimate control of the house is not inconsistent with the guest having a legitimate expectation of privacy." Id. at 99. Guests "are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household." Id.

The South Carolina Supreme Court found an individual had a reasonable expectation of privacy in an apartment where he was a guest. State v. Missouri, 361 S.C. 107, 603 S.E.2d 594 (2004). The Court was persuaded that Missouri expected privacy in the apartment of his "good

friend,” with whom he had grown up and frequently visited. In the past, Missouri had spent the night occasionally. Missouri explained he felt comfort at the apartment. He had a key and kept a change of clothes there. He was present in the apartment as a social guest and had been there for at least seven hours prior to the execution of the search. Id. at 115, 603 S.E.2d at 597. The Court held “[b]y choosing to share the privacy of their home with [defendant] on several occasions in the past and on the occasion in question, both the [homeowners] and [defendant] demonstrated a subjective expectation of privacy, and that expectation, we hold is one that society is prepared to recognize as reasonable.” Id. at 115, 603 S.E.2d at 597-598. In Kolle v. State, 386 S.C. 578, 590, 690 S.E.2d 73,79 (2010), the South Carolina Supreme Court re-affirmed its holding in Missouri, supra, that an overnight guest has a reasonable expectation of privacy and is afforded protections pursuant to the Fourth Amendment as a result.

However, the Court found defendants who were not overnight guests and were in the home for a few short hours for a business transaction had no reasonable expectation of privacy. Carter, 525 U.S. at 90. Citing O’Connor v. Ortega, 480 U.S. 709 (1987) to recognize that property used for commercial purposes is treated differently for Fourth Amendment purposes and that in some circumstances a worker can claim Fourth Amendment protection over his workplace, the Court found no indication the defendants had “nearly as significant a connection to [the home searched] as the worker in O’Connor had to his own private office.” Id. The Court then discussed the continuum of privacy rights for individuals in others’ homes explaining that an overnight guest “typif[ies] those who may claim the protection of the Fourth Amendment in the home of another, and one merely ‘legitimately on the premises’ [typifies] those who may not do so.” Id. at 91. The Court determined the case before it was “obviously somewhere in between.” Due to the “purely commercial nature of the transaction engaged in here, the relatively short period of time on the

premises, and the lack of any previous connection between [the defendants] and the householder,” the Court held the “situation is closer to that of one simply permitted on the premises.” Id.

Several courts throughout the United States have concluded that individuals who were guests, even if not overnight guests, in a person’s home had a reasonable expectation of privacy. United States v. Gray, 491 F.3d 138, 144-146 (4th Cir. 2007)(detailing the distinctions between business and social guests for purposes of Fourth Amendment protections); United States v. Paradis, 351 F.3d 21, 27 (1st Cir. 2003)(finding Paradis was entitled to Fourth Amendment protection in his girlfriend’s home because Paradis lived there when the two were not fighting and he kept possessions there); United States v. Rhiger, 315 F.3d 1283, 1286-1287 (10th Cir. 2003)(holding that a social guest has a sufficient expectation of privacy to challenge unreasonable searches of his host’s home); United States v. Fields, 113 F.3d 313, 320-321 (2d Cir. 1997)(holding Fields had a reasonable expectation of privacy in the place searched where he had a key, paid the owner weekly to use the apartment, had used the apartment forty or fifty times, could bring guests, and could come and go as he pleased with minor restrictions despite the fact that Fields did not sleep at the place and used it for illegal activity); Bonner v. Anderson, 81 F.3d 472, 475 (4th Cir. 1996)(holding that Bonner, who was not an overnight guest, had an expectation of privacy in the home of a neighbor because Bonner was a frequent visitor who ran errands for her elderly neighbor); United States v. Foster, 654 F.Supp.2d 389, 395 (E.D.N.C. 2009)(holding the defendant had standing to challenge the search of his fiancé’s apartment where the record suggested that he had moved into the apartment or was, at a minimum, a frequent visitor); Nieves v. New York City Police Dept., 716 F.Supp.2d 299, 307 (S.D.N.Y. 2010)(finding Nieves had a legitimate expectation of privacy in his friend’s apartment where Nieves had been friends with the owner for several years, spent the night in the apartment about five times a month, had a key to the apartment, kept personal items there, and

was the sole occupant when the police arrived to search); State v. Cuntapay, 85 P.3d 634, 641-642 (Hawai'i 2004)(holding that a guest had a reasonable expectation of privacy in his friend's home where the guest visited once or twice a week to play cards and darts under the state's constitution); In re Welfare of B.R.K., 658 N.W.2d 565, 578 (Minn. 2003)(holding that a juvenile remaining at the home of another minor after a party without adult supervision or authorization – a short term social guest – had a reasonable expectation of privacy in the other minor's home and was afforded the Fourth Amendment's protections); United State v. Tullous, 692 N.W.2d 790, 794 (S.D. 2005)(holding that the defendant had a reasonable expectation of privacy in the home of another where the defendant was a regular social guest at the home, who occasionally babysat for the homeowner and knew the location of the hidden key); State v. Trecroci, 630 N.W.2d 555, 569-570 (Wis. Ct. App. 2001)(holding that a defendant had a reasonable expectation of privacy in the attic space of her fiancée's apartment building even though the attic was not used as an attic and the defendant was not an overnight guest).

To prove ineffective assistance of counsel, Petitioner must establish that counsel's performance was unreasonable under prevailing professional norms, and that counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984). A two pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). "Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different

absent the excludable evidence in order to demonstrate actual prejudice.” Kimmelman v. Morrison, 477 U.S. 365, 375 (1986).

Trial counsel’s misapprehension of the law was unreasonable under prevailing professional norms. Trial counsel believed he could not present competing and conflicting theories. In other words, he felt that he could not contest the validity of the search warrant because Petitioner had no expectation of privacy unless he lived there, and the defense theory was that Petitioner did not reside at the house searched. Trial counsel’s analysis is flawed. The evidence presented an obvious opportunity for trial counsel to challenge the validity of the search warrant while remaining consistent with the defense theory that Petitioner did not reside there, but had an expectation of privacy as a guest. As explained supra, the Fourth Amendment affords an expectation of privacy to guests.

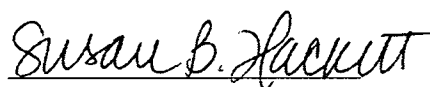
The statement by Hollingsworth was undated. Therefore, there was no indication from the document itself that Hollingsworth had purchased crack from a particular residence on the same date or even in close temporal proximity to the date of the execution of the search warrant. Hollingsworth’s statement clearly explained that he purchased crack cocaine from a house on the corner of Old Paris Mountain Road and Attu Street. The record clearly showed the house search was not at the place described by Hollingsworth. White described the house search as “the second house ... on the corner of Mack and Walcott, if you came from Walcott Street.” There is simply no way the house search could be both on the corner of Mack and Walcott and the corner of Old Paris Mountain Road and Attu Street. Had trial counsel challenged the validity of the search warrant, he would have been successful and the evidence secured by the search warrant would have been suppressed. See Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994)(finding prejudice where trial counsel failed to challenge the legality of a traffic stop resulting in a search and the finding of drugs,

which was the only evidence that Sikes possessed drugs). Prejudice is clear because the prosecution would have been forced to drop the charges against Petitioner if the drugs obtained during the search warrant were suppressed.

CONCLUSION

Petitioner respectfully requests this Court reverse the decision of the lower court and remand the matter for a new trial.

Respectfully submitted,

A handwritten signature in cursive script that reads "Susan B. Hackett".

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 4th day of August, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Greenville County

D. Garrison Hill, Circuit Court Judge

EDWARD ANDRELL WHITNER,

PETITIONER,

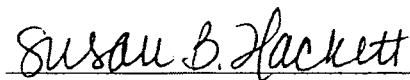
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

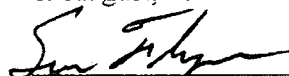
I certify that a true copy of the brief of petitioner, in this case has been served on Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Edward Andrell Whitner #214145, at McCormick Correctional Institution 386 Redemption Way, McCormick, SC 29899, this 4th day of August, 2014.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of August, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022

RECEIVED

JAN 29 2016

SC SUPREME COURT

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable C. Victor Pyle, Jr., Trial Judge
The Honorable D. Garrison Hill, Post-Conviction Relief Judge

Appellate Case No. 2012-212576

Edward Andrell Whitner, ... Petitioner,

v.

State of South Carolina, ... Respondent.

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STATEMENT OF ISSUE ON APPEAL

1. Were Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel violated by trial counsel's failure to challenge the validity of the search warrant based upon trial counsel's misapprehension of the status of the law concerning Petitioner's standing to challenge the search of a private residence?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the January 2004 term of General Sessions for possession with intent to distribute (PWID) marijuana within proximity of a school (2004-GS-23-0081), PWID crack cocaine within proximity of a school (2004-GS-23-0082), PWID marijuana (2004-GS-23-0083), and trafficking crack cocaine (2004-GS-23-0084). (App.pp.342-43; pp.345-46; pp.348-49; pp.351-52). Christopher D. Scalzo, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On March 9, 2006, the Honorable C. Victor Pyle, Jr. sentenced Petitioner to concurrent terms of ten years for PWID marijuana within proximity of a school, ten years for PWID crack cocaine within proximity of a school, ten years for PWID marijuana, third offense, and twenty-five years for trafficking crack cocaine, third offense. (App.p.344; p.347; p.350; p.353).

A notice of appeal was filed at the South Carolina Court of Appeals. Eleanor Duffy Cleary, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. (App.pp.247-62). The Court of Appeals affirmed Petitioner's convictions and sentences on September 24, 2008. State v. Whitner, 380 S.C. 513, 670 S.E.2d 655 (Ct. App. 2008). (App.pp.275-81). Kathrine H. Hudgins, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense filed a petition for writ of certiorari at the South Carolina Supreme Court. (App.pp.282-93). The Supreme Court denied the petition by order dated November 4, 2009. (App.pp.294-95).

Petitioner filed an application for post-conviction relief (PCR) on August 5, 2010

(2010-CP-23-6408). (App.pp.296-302). A hearing was held at the Greenville County Courthouse on February 29, 2012. (App.pp.308-32). Petitioner was present and represented by Matthew P. Head, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable D. Garrison Hill denied relief in an order filed June 25, 2012. (App.pp.334-40).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

The PCR judge did not err in finding Petitioner failed to meet his burden of proving ineffective assistance of trial counsel.

Petitioner argues trial counsel's defense theory was flawed and he should have challenged the validity of the search warrant because of its reliance on a statement from Donald Hollingsworth. (Brief of Petitioner, p.17). This argument is without merit.

A.

At trial, Deputy Torrence White testified she obtained a search warrant¹ for a residence and was present when the warrant was executed. (App.pp.25-26). Deputy White testified Petitioner, Teresa Smiley, and another individual were detained inside the

¹ The warrant was attached to the PCR application. (App.p.301).

house. (App.p.27). Deputy White testified she “explained to all parties inside the residence that we had a legal search warrant to search the residence for narcotics. At that time, I asked whose residence it was. Ms. Smiley stated it was hers and [Petitioner]’s.” (App.p.27). Deputy White testified narcotics were found in the both the front room and back bedroom of the residence. (App.pp.27-29). Deputy White testified \$455 in cash was found in Petitioner’s pocket. (App.p.29). Over trial counsel’s objection, the State asked Deputy White if Petitioner provided his address, and she replied he stated this residence was his address. (App.pp.30-31).

Deputy James Proctor, James Carmen, and Deputy Kerry Avery testified they assisted in the execution of the search warrant. Deputy Proctor testified he found marijuana and rock cocaine in the back bedroom. (App.pp.49-51). Carmen testified he found marijuana and rock cocaine in the living room. (App.pp.60-62). Deputy Avery testified he was the scribe in this case, but also located a pistol and observed Deputy Proctor find the marijuana. (App.pp.66-67). Deputy Avery transported all of the items recovered to property and evidence. (App.p.72). The search of the residence yielded 27.51 grams of crack cocaine and 158.43 grams of marijuana. (App.pp.85-86).

Petitioner’s booking form at the detention center and a subsequent bond form both listed the searched residence as Petitioner’s residence. (App.pp.92-93; pp.97-98). Teresa Smiley testified Petitioner lived at the residence with her and had done so for almost one year. (App.pp.117-18). Smiley testified Petitioner slept in the back bedroom with her. (App.p.117). Smiley testified the drugs found in the residence belonged to Petitioner. (App.p.120).

As will be noted more specifically infra, the defense put up several witnesses in an attempt to demonstrate Petitioner did not live at the residence in question. In addition, Petitioner stated he did not live at the residence in question and that he used this address on his booking form because he did not have another address to provide. (App.pp.179-80). Petitioner stated he used the residence as his address on the bond form because “it was the first thing that came to mind.” (App.pp.188-89).

B.

At the PCR hearing, Petitioner argued Hollingsworth was “the guy that they pulled over on the moped. They say they got the search warrant from using his statement.” (App.p.312). Petitioner argued he did not know Hollingsworth and never discussed him with trial counsel. (App.p.313). Petitioner argued that, while trial counsel challenged whether he lived at the residence in question, he should have questioned the validity of the search warrant. (App.pp.313-14).

Trial counsel testified he had reviewed the search warrant and Hollingsworth’s statement. (App.pp.319-20). Trial counsel testified he would have also reviewed these items – as well as the other discovery materials – with Petitioner. (App.pp.328-29). Trial counsel testified that, while he did not have a specific recollection about the Hollingsworth statement, the “prime issue” at trial was arguing Petitioner did not live at the residence. (App.p.320). Trial counsel testified they had to decide whether to challenge the validity of the search warrant and concede Petitioner lived there or challenge that he did in fact live at this residence. Trial counsel testified they went forward with the latter defense strategy at trial. (App.pp.320-21).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner "failed to meet his burden of proving trial counsel did not properly challenge the search warrant in this case." The PCR judge noted trial counsel pursued a defense theory at trial of arguing Petitioner did not live at the residence in question. The PCR judge found Petitioner "failed to produce any evidence to corroborate his argument that investigation [of Hollingsworth's statement] would have resulted in a different outcome at trial." (App.pp.337-38).

C.

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. 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).

D.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel's representation was deficient. Petitioner failed to demonstrate trial counsel did not render reasonably assistance under prevailing professional norms. See

Strickland v. Washington, 466 U.S. at 688, 104 S. Ct. at 2064.

Petitioner's entire argument rests upon the assumption that trial counsel was deficient because he could have successfully challenged the validity of the search warrant in this case by questioning Hollingsworth's statement. There is no evidence, however, that Hollingsworth's statement provided the basis for the search warrant. Deputy White testified she obtained the search warrant but this Court cannot speculate on the basis for that warrant, as she was not questioned at trial on the matter and Petitioner did not present her, another officer, or the magistrate judge as a witness at the PCR hearing in order to determine the basis for the search warrant. Cf. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial."). There is no indication on the search warrant that it was obtained in reliance upon Hollingsworth's statement and the search warrant affidavit was not admitted into evidence at the trial or PCR hearing. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense). As such, this Court cannot speculate as to the potential impact Hollingsworth's statement may or may not have had upon the issuance of the search warrant.

Further, trial counsel testified he believed the key issue in Petitioner's case was whether the State could demonstrate Petitioner lived on the residence where the search

warrant was executed. (App.p.320). Trial counsel developed the defense strategy that the drugs could not have been Petitioner's as they were found hidden in a home he was merely visiting. At trial, four witnesses testified Petitioner did not live at this residence. (App.pp.149-51; p.161; pp.165-66; pp.172-74). Trial counsel also presented evidence that Smiley's name was on the lease, electric bill, and water application for the residence. (App.pp.102-06; pp.108-11; p.143). The Strickland court held:

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland v. Washington, 466 U.S. at 689, 104 S. Ct. at 2065. Given the information, evidence, and witnesses available to trial counsel at the time, it is clear his decision to challenge residency instead of the search warrant fell "within the wide range of reasonable professional assistance." Id.

Therefore Petitioner has failed to meet his burden of proving trial counsel was deficient in not challenging the validity of the search warrant. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.²

² To the extent Petitioner is arguing trial counsel should have challenged inconsistencies between the address in Hollingsworth's statement and the address of the residence searched, this issue was not addressed in the order of dismissal. As such, it is not preserved for appellate review. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); see also Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding that where a trial court does not explicitly rule on an argument raised, and appellant makes no Rule 59(e) motion to obtain a ruling, the appellate court may not address the issue).

E.

Regardless, Petitioner also failed to meet his burden of proving prejudice. See Strickland v. Washington, 466 U.S. at 694, 104 S. Ct. at 2068. Petitioner failed to demonstrate that, but for trial counsel's performance, there was a reasonable probability the outcome of his trial would have been different. Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.

As noted supra, trial counsel testified the defense strategy was to argue Petitioner did not live at the residence searched. In support of the defense theory, the following evidence was offered at trial: (1) Petitioner testified he did not live at the residence and explained why he provided this address for his booking and bond forms (App.pp.179-81); (2) four witnesses testified Petitioner did not live at the residence (App.pp.149-51; p.161; pp.165-66; pp.172-74); (3) the lease and electric bill for the residence were in Smiley's name (App.pp.102-06; pp.108-11); (4) the application for water service at the residence was made by Smiley (App.p.143); and (5) the fingerprints lifted from the pistol Deputy Avery found at the residence did not match Petitioner (App.pp.135-36). Based upon this evidence, trial counsel formulated a valid trial strategy in this case and cannot be found to have rendered deficient representation. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel); see also Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) ("Counsel's strategy will be reviewed under an objective standard of reasonableness.") (internal citation omitted). Regardless of the strong defense case presented by trial

counsel, however, the jury simply did not accept Petitioner's version of events. See Craven v. Cunningham, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987) ("The credibility of witnesses is for the triers of fact."); see also Bruno v. State, 347 S.C. 446, 556 S.E.2d 393 (2001) (noting that, by its verdict, the jury clearly rejected the defendant's account of what transpired). This Court must "eliminate the distorting effects of hindsight" and, as such, cannot conclude trial counsel was ineffective simply because his trial strategy was unsuccessful. Strickland v. Washington, 466 U.S. at 689, 104 S. Ct. at 2065.

Nevertheless, even assuming arguendo this Court determines this was not a valid trial strategy, trial counsel's performance cannot be found to have prejudiced Petitioner. Petitioner cannot demonstrate a motion to suppress the search warrant based on Hollingsworth's statement would have been successful. "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." Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) (citation omitted). As noted supra, however, Petitioner has failed to demonstrate Hollingsworth's statement was relied upon in the search warrant affidavit. Without being able to demonstrate Hollingsworth's statement was the sole basis for the search warrant and there were no other informants, statements, surveillance, or officers' observations that led to the issuance of the warrant, Petitioner cannot meet his burden of proving the items seized pursuant to the search warrant should have been excluded.

Further, the State presented overwhelming evidence of guilt. Petitioner was

arrested in the residence where 27.51 grams of crack cocaine and 158.43 grams of marijuana were found. One of the locations the narcotics were located was in a bowl that contained: marijuana, sandwich bags, two pairs of scissors, a hand scale, \$647, and rock cocaine. (App.pp.49-50; pp.51-52). Petitioner had \$455 in cash in his pocket. Smiley testified Petitioner lived at the residence and owned the drugs. Petitioner told Deputy White he lived at the residence and provided that address as his home address to be used on both his booking and bond forms. Male and female clothing was found in the back bedroom closet. (App.p.28; p.46). Petitioner cannot demonstrate trial counsel's failure to file a motion to suppress the search warrant based on Hollingsworth's statement prejudiced his case. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). Especially, as noted supra, when Petitioner cannot prove he would have prevailed upon a such a motion.

F.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in

denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

CONCLUSION

For the reasons stated above, this Court should affirm the lower court's ruling and deny the requested relief.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

October 10, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable C. Victor Pyle, Jr., Trial Judge
The Honorable D. Garrison Hill, Post-Conviction Relief Judge

Appellate Case No. 2012-212576

Edward Andrell Whitner, ... Petitioner,

v.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Brief of Respondent upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This 10th day of October, 2014.


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