

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Newberry County

Honorable G. Thomas Cooper, Jr., Circuit Court Judge **SC SUPREME COURT**

DERRICK EUGENE VELASQUEZ,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001986

APPENDIX

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State of South Carolina)
) Court of General Sessions
 County of Newberry)
 2015-GS-36-269,270

State of South Carolina)
) Transcript of Record
)
 Derrick Eugene Velasquez)
)
 _____ DEFENDANT _____)

August 3, 2015
 Newberry, South Carolina

B E F O R E:

Honorable Eugene C. Griffith, Jr., Judge

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

Dale Scott, Deputy Solicitor
 Taylor Daniel, Assistant Solicitor
 Attorneys for the State

Charles Verner, Public Defender
 Attorney for the Defendant

Joy E. Holston
 Official Court Reporter

I N D E X O F W I T N E S S E S

(IC) - Denotes In Camera
(DW) - Denotes Defense Witness
(SW) - Denotes State's Witness

(SW) Pete Johnson

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(SW) Clayton Babb

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(DW) Derrick Velasquez

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<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>Page#</u>
1 - 39	Photographs	X		4
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Court's

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>Page#</u>
1	Incident Report	X		4
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1 (Whereupon, State's exhibits 1 through 41 and Court's
2 exhibits 1 through 3 were marked for identification
3 only.)

4 THE COURT: Ladies and gentlemen, I have a pretrial
5 issue that I need to put on the record meaning Ms. Holston
6 needs to be present. A legal issue which the Court get to
7 decide and rather than run y'all out of the courtroom and
8 do it in here, we are going to step back in my chambers
9 and do it, just the lawyers and the client, trying to save
10 y'all from getting up and down and back in the courtroom.
11 I am not trying to ignore but it is something that I need
12 to put on the record, I didn't realize it was an issue
13 until a moment ago. I have been out of town and holding
14 court elsewhere and I am not really apprized to the roster
15 in Newberry until I get here this morning and they say,
16 first case, second case. So that is how it works. We
17 will step in chambers for a couple of minutes and y'all
18 stand at ease.

19 (Whereupon, motion in-chambers was heard.)

20 THE COURT: This is State v. Derrick Velasquez,
21 2015-GS-36-269 and 270. Mr. Verner, it is my
22 understanding that you have a motion you want to put on
23 the record. We don't want to do it in the presence of the
24 jury so we have convened this hearing in the Judge's
25 chambers. And in the chambers my Court Reporter, Law

1 Clerk, Mr. Verner and your client, and the two prosecutors
2 and the investigating officer. So, Mr. Verner, let's hear
3 your motion.

4 MR. VERNER: Judge, he is asking me and asking for a
5 continuance for this trial. It is a fairly, he was
6 arrested in May, I think around May 1st. It is a traffic
7 safety checkpoint, basically a possession trafficking
8 case. Factually it is a fairly simple case, the legal
9 issue would be the legal, the validity of the traffic
10 safety checkpoint. He would like more time to prepare, he
11 is actually spoken to the attorney, Mr. Littlejohn and is
12 attempting to retain him to represent him on the case.
13 But would just like a little bit more time to prepare. It
14 is a serious case, Your Honor. It is a mandatory 30 year
15 sentence in this charge. The only evidence that I am
16 aware of that I hadn't seen, there is new photographs I
17 haven't seen. They don't really help me with the
18 case-in-chief. It will be cumulative to what I have
19 already seen in other evidence. There would be one
20 photograph that I saw just from looking that would relate
21 to my central argument about the traffic safety
22 checkpoint. I think one of them is a photograph of a sign
23 that was placed outside of it. Most of them are just,
24 what I would consider cumulative, photographs of the drugs
25 or the car. But he would like a little more time to

1 prepare. The State has, in my opinion, disclosed all of
2 the evidence that I am aware of that they have. The only
3 other evidence I have asked the State about was if there
4 are written guidelines for traffic safety checkpoints. I
5 would like to see those. The State has indicated to me
6 that the officers would have to testify about what the
7 guidelines they were following.

8 THE COURT: The Court of Appeals came out not too
9 long ago about that, a Greenwood County case, I believe.

10 MR. VERNER: We are all aware of the Vickery case,
11 Judge. Now the State has produced the actual statistical
12 evidence.

13 THE COURT: You mean the empirical data.

14 MR. VERNER: The empirical data which is basically
15 just one page but then it is supplemented with the
16 incident report of other arrests. And I think some data
17 that they have given me about a traffic accident that
18 justified placing it at this location. But it is a
19 mandatory 30 years in prison. It would be my argument
20 that the empirical data form doesn't match the number of
21 incident reports but that would be something --

22 THE COURT: That is a legal issue.

23 MR. VERNER: Yes, sir. My understanding is they have
24 given me incident reports of all the arrests made and the
25 justification for putting it in. They have also done the

1 empirical on the stop itself. I would argue it does seem
2 to, there is some discrepancy in numbers. But it is my
3 understanding just given the state of this case, Your
4 Honor, it is relatively new. I understand the State's
5 concern, I don't want to speak for them but I
6 understand --

7 THE COURT: Let's hear from them.

8 MR. SCOTT: Judge, he has got trafficking of crack on
9 his person. And really the essential issue is going to be
10 the suppression hearing. I feel pretty confident about
11 it. I understand he is potentially wanted out of
12 Baltimore. He has got a record in Texas, Florida, New
13 York.

14 THE COURT: He is currently not out on bond.

15 MR. SCOTT: He is not right now. He had an attorney
16 for a bond hearing and then he jumped off the case.
17 Verner has had it for a little while now. He has been on
18 two different trial dockets and it has been continued
19 twice.

20 THE COURT: How did it hit the trial docket so quick.

21 MR. VERNER: The State indicated to me their first
22 concern was they thought he was going to make bond and be
23 a flight risk. He is still in jail on bond. It appears
24 he has got open Magistrate level charges in Maryland where
25 they say they will not extradite him for. So it appears

1 to be Magistrate level blue tickets or something.

2 MR. DANIEL: Didn't he consent to a continuance in
3 the July term, Charles?

4 MR. VERNER: I did, they did call him for trial in
5 July. I don't think it, I wouldn't characterize it as the
6 State consenting to, they did call him for trial in July.
7 Judge Hocker did indicate that he would continue at least
8 until August. But they did notify him he was wanted for
9 trial in July and Judge Hocker did grant a continuance
10 until a later term of court. I think he wants to be
11 heard, Your Honor. If you can entertain what he wants to
12 say.

13 THE COURT: Sure.

14 MR. VALESQUEZ: Your Honor, in July 3rd, in July we
15 came before, Judge Hocker also indicated that August 3rd
16 he didn't believe it would be enough time for us to
17 prepare for trial of this magnitude. And I am saying that
18 we just been provided with new information that we need to
19 go over and we haven't been provided with all of the
20 empirical data. We haven't been provided the names of
21 whoever submitted the empirical data.

22 THE COURT: That is a legal issue.

23 MR. VALESQUEZ: Well, are we entitled to at least get
24 a complete form?

25 MR. VERNER: The empirical data, Your Honor,

1 generally on the bottom of it has a place where the
2 officer to sign and date who submits it. It appears the
3 signature is either missing but it is likely that it was
4 cut off because there is, like an inch and a half of white
5 space across the top. And I indicated to Mr. Velasquez
6 that I would ask to see, I see Mr. Scott has got the same
7 copy I do. The standard form does have a place for the
8 officer to sign and date. My copy is cut off. But they
9 may have a different copy or an original.

10 THE COURT: What is the other case, burglary?

11 MR. SCOTT: Burg second.

12 THE COURT: Both of these cases are four witness
13 cases?

14 MR. SCOTT: They are both what?

15 THE COURT: Four witness cases?

16 MR. SCOTT: Yes.

17 THE COURT: How old is the burglary case?

18 MR. DANIEL: About a year old, seven or eight months.

19 MR. VERNER: I would say older but it is not eye
20 opening old. But I would say it is older.

21 THE COURT: It is incredible that it is 90 days from
22 arrest and you call the case for the second time when
23 first appearances generally are 90 days from arrest.

24 MR. SCOTT: All discovery has been provided. Direct
25 possession plus constructive possession of crack on his

1 person and cocaine right beside him.

2 THE COURT: Have y'all been able to try to resolve it
3 otherwise? I mean, I don't want to suggest y'all have got
4 to resolve it, what I am saying, have y'all talked about
5 resolving this outside of trial?

6 MR. VERNER: Your Honor, they made him a plea offer,
7 really his first court appearance which was probably in
8 June. They made him, or July, they must have made him a
9 plea offer in July. They have made him a plea offer today
10 of, originally his plea offer was 7 to 25 or 7 to 30, on
11 one of the lower counts. Today it was a straight 15 years
12 if he resolved it prior to trial. But they made him plea
13 offers. My concern, it is basically a life in prison type
14 drug charge, that is a mandatory 30. I don't think it
15 goes any higher, goes any lower, does it, Mr. Taylor. It
16 is a straight 30. If he is convicted, Your Honor, it is a
17 straight no discretion sentence. I am satisfied, I
18 believe the State has given me the evidence they believe
19 they have. I didn't see the photographs until today. I
20 would characterize of them are just cumulative, what I
21 have already seen. There was only one that would have
22 been new to me and that is a picture of the traffic safety
23 checkpoint sign ahead of time. The issue, the empirical
24 data is missing the officer's signature and as a legal
25 issue, Your Honor, just a cursory reading of the incident

1 reports of all the arrests made that day, they don't match
2 up perfectly with the empirical data.

3 THE COURT: I think the empirical data also comes
4 from prior arrests, trouble, incidences in the area to
5 justify placement.

6 MR. VERNER: This is the second, Judge. My
7 understanding is one and I might be wrong. But the law is
8 that they, the State, the police can do a safety
9 checkpoint for any reasons, they don't need a reason.
10 They can say today we are going to do a traffic safety.
11 But they need some data on where to locate it. And then
12 the second prong is was it effective if they have to
13 produce empirical data as to how this particular traffic
14 safety checkpoint did and that is the report I am talking
15 about. And from my looking at it it really only lists his
16 arrest as the, again that would be an issue for the
17 suppression motion. It is early, Your Honor, they did
18 give us trial notice for several months that they intended
19 to try it. It is still a relatively new case and it is a
20 lot of, it is, a high penalty case.

21 THE COURT: You have gotten discovery?

22 MR. VERNER: Everything that the State says they
23 have, the only issue is some of these photographs, Your
24 Honor, that we just saw today. And I, if it does go
25 forward, have time to look at those. I am not aware of

1 any evidence the Sate hasn't given me unless there are
2 written guidelines for how Newberry County handles traffic
3 checks.

4 THE COURT: All right. I am going to decline to
5 continue the case. But I would like to pick a jury this
6 morning, excuse them and do the legal issues this
7 afternoon before swearing the jury. Let's deal with them
8 and see what issues we can resolve or not resolve with the
9 checkpoint issue.

10 MR. VERNER: So the Court is indicating that you are
11 going to hold the motion for continuance in abeyance until
12 after the hearing today?

13 THE COURT: Yes, so we are going to go forward with
14 the jury selection this morning, select the jury and not
15 place them under oath and then work on a come back plan
16 with them, deal with the legal issues we have got and then
17 move forward, depending on how those are presented. All
18 right.

19 MR. VALESQUEZ: Your Honor, I am entitled to hire an
20 attorney.

21 THE COURT: Sure, you are entitled to hire an
22 attorney.

23 MR. VALESQUEZ: Okay. I have one I would like, this
24 is all very sudden.

25 THE COURT: You talk with your lawyers without me, I

1 am not going to prevent you from talking to any lawyer in
2 here, Mr. Verner included. Mr. Verner, I will give you a
3 few minutes.

4 MR. VERNER: We have already gone over it, Judge.
5 Mr. Littlejohn has met with me and indicated he spoke to
6 the girlfriend on Friday and that he would be agreeable to
7 meet with them to discuss taking the case. And I have
8 explained to Derrick that that is depending on the,
9 basically the motion to continue. I would love for that
10 to happen, Judge. Mr. Littlejohn is here to meet with
11 him.

12 THE COURT: I will give y'all a few minutes to meet
13 before we select the jury because I have one other thing I
14 need to deal with. All right, we are done.

15 (Whereupon, in-chambers motion is adjourned. Parties
16 moved back into the courtroom.)

17 (Whereupon, the jury panel came into open court at
18 approximately 12:00 p.m.)

19 THE COURT: Solicitor, are we ready to call the first
20 case?

21 MR. SCOTT: We are, Your Honor.

22 THE COURT: Mr. Verner, are you ready to go?

23 MR. VERNER: Yes, Your Honor.

24 THE COURT: All right, call it, please.

25 MR. SCOTT: The first case we intend to call is the

1 State versus Derrick Eugene Velasquez indicted on two true
2 billed indictments. The first is for trafficking in
3 cocaine, 400 grams or more on indictment 15-GS-36-0269.
4 The second is trafficking in crack between 10 and 28
5 grams. That is 15-GS-36-0270.

6 THE COURT: All right, ladies and gentlemen of the
7 jury, the first case called is entitled the State versus
8 Derrick Eugene Velasquez. Mr. Velasquez is in the
9 courtroom represented by Mr. Verner, if y'all will stand.
10 Mr. Velasquez has tendered a plea of not guilty to these
11 two indictments. The indictments are presentments of fact
12 to the Grand Jury, the Newberry County Grand Jury. And
13 true billed or not means that the Grand Jury of 18 people
14 is considered whether or not there is sufficient facts to
15 bind the case over for trial. That is all the Grand Jury
16 does. Now, the indictments, two pieces of paper, these
17 are the formal allegations that the State must prove at
18 trial in order to sustain a conviction. They are proof of
19 nothing else, they are allegations from the State, seated
20 to my right, against Mr. Velasquez seated to my left. Mr.
21 Velasquez doesn't have to prove or disprove either, he has
22 plead not guilty and that places the burden upon the State
23 to prove his guilt beyond a reasonable doubt. So I tell
24 you that any factual allegations in the body of these
25 indictments are just that, they are allegations to tell

1 him and his attorney what to be prepared to defend himself
2 in court. So, the two charges are on indictment 270, is
3 trafficking in crack cocaine in more than 10 grams but
4 less than 28. That indictment reads that he, while in
5 Newberry County on the 1st of May of '15 did knowingly
6 traffic in crack cocaine by having upon his person in
7 actual, constructive possession or become in possession of
8 10 grams or more but less than 28 grams of crack cocaine.
9 This being in violation of health code provision
10 44-53-375. The other indictment, indictment 269 for
11 trafficking in cocaine. That indictment alleges that Mr.
12 Velasquez on the 1st of May of '15 did knowingly traffic
13 in cocaine in that he did distribute or cultivate or bring
14 into the State or conspire to do such in being in actual
15 or constructive possession of 400 grams or more of
16 cocaine. This in violation of health code provision
17 44-53-370. Now, these allegations are made by the State.
18 Mr. Velasquez has plead not guilty. So, y'all have met
19 the lawyers in this case. Mr. Scott, introduce yourself
20 so I can ask my next question.

21 MR. SCOTT: My name is Dale Scott, I am the Deputy
22 Solicitor here in the Eighth Circuit. The Eighth Circuit
23 is comprised of Newberry, Laurens, Abbeville and Greenwood
24 Counties. Assisting me here today is Taylor Daniel, he is
25 the Assistant Solicitor of the Eighth Circuit. Also is

1 our investigator, Walter Bentley. Mike Stribble with the
2 sheriffs department.

3 THE COURT: All right. Mr. Verner, you stand and
4 introduce your client again.

5 MR. VERNER: My name is Charles Verner, I am a lawyer
6 here in Newberry. I practice with my father, Jay Verner
7 across the street. And this is Derrick Velasquez is my
8 client.

9 THE COURT: Ladies and gentlemen of the jury, as I
10 ask these questions, what I don't need is too much
11 information. I need yes or no answers and let me rephrase
12 my question because, as I told you my goal is to have
13 twelve people on the jury that know very little and are
14 good listeners who can be fair and impartial. I had a
15 case here in Newberry one time, it was a car wreck case
16 and I had one juror who did not want to serve and he got
17 up and told me all insurance companies are crooks and they
18 all don't want to pay money and this and that and the
19 other. He wouldn't hush, I about held him in contempt for
20 volunteering too much information and the other jurors
21 were there listening to his go on and on and on about
22 insurance companies. And well, insurance company was an
23 issue I had in that trial and it wasn't helping me give
24 the other side a fair trial at all. So, with that caveat
25 let me ask the questions, stand up and say yes or no, let

1 me ask the next question and if I need to get further
2 information I may call you up and talk to you one on one
3 where I can get full information. That way the rest of
4 the jury doesn't have to hear everything you may or may
5 not know about this case because Newberry is a small
6 community. So, the first question, any member of this
7 jury panel know anything about the incident on May 1st,
8 2015 involving this incident with the sheriffs office and
9 Mr. Velasquez, please stand.

10 (No response.)

11 THE COURT: Any member of the jury panel ever been
12 represented by any of the three attorneys who just stood
13 and introduced themselves, please stand. Yes sir, which
14 attorney have you been represented by?

15 JUROR: Mr. Verner.

16 THE COURT: Is that matter still being handled?

17 JUROR: No, it was years ago.

18 THE COURT: Now, based upon your having Mr. Verner
19 assist you in legal matter and that matter is now
20 concluded can you be fair and impartial in this case?

21 JUROR: Sure.

22 THE COURT: There you go. Thank you so much. All
23 right. Tell me your name.

24 JUROR: Carl Lominick.

25 THE COURT: Which lawyer?

1 JUROR: Mr. Verner.

2 THE COURT: And is that legal matter still ongoing?

3 JUROR: No, sir.

4 THE COURT: It is now ended?

5 JUROR: Yes, sir.

6 THE COURT: Now in light of your past represented by
7 Mr. Verner can you step that relationship aside and be
8 fair and impartial to both the State and Mr. Verner?

9 JUROR: Yes, sir.

10 THE COURT: Thank you. Ma'am, tell me your name.

11 JUROR: Terry Ward.

12 THE COURT: Ms. Ward, which attorney?

13 JUROR: Charles Verner.

14 THE COURT: And is that matter still ongoing?

15 JUROR: No, sir.

16 THE COURT: It has ended?

17 JUROR: Yes, sir.

18 THE COURT: Now, since you have been represented by
19 Mr. Verner in the past can you set that relationship aside
20 and be fair and impartial to both the State and Mr.
21 Verner's client today?

22 JUROR: Yes, sir.

23 THE COURT: Any member of the jury panel related by
24 blood or marriage, close personal friends to any of the
25 parties seated within the courtroom, please stand.

1 (No response.)

2 THE COURT: No one is standing. I am going to read a
3 list of potential witnesses and ask the same question
4 basically, related by blood or marriage or close personal
5 friends. Potential witnesses, Ebony Joyner, Deputy Clay
6 Babb, Deputy Pete Johnson, SLED Analyst Lynn Black and
7 Deputy Investigator Mike Stribble. Any member of the jury
8 panel related by blood or marriage or close personal
9 friends to any of those potential witnesses, please stand.

10 (No response.)

11 THE COURT: No one is standing. Any member of the
12 jury panel, a member of your immediate family employed in
13 any capacity by a law enforcement agency, please stand.
14 Tell me your name.

15 JUROR: Lynn Graham, 64.

16 THE COURT: Ms. Graham, which, you or a member of
17 your family?

18 JUROR: Member of my family.

19 THE COURT: And is employed where?

20 JUROR: Newberry County, sheriffs department.

21 THE COURT: A spouse or a child?

22 JUROR: Niece.

23 THE COURT: Niece. Does not live in your household?

24 JUROR: No, sir.

25 THE COURT: Now, that fact that your niece works with

1 the sheriffs department, can you set that fact aside and
2 listen --

3 JUROR: Married to a deputy sheriff. She is
4 deceased.

5 THE COURT: She is a niece by marriage?

6 JUROR: Married.

7 THE COURT: Married or no longer married?

8 JUROR: Yes, sir. My niece is deceased.

9 THE COURT: Okay, I am with you. Now, the fact that
10 your niece, now deceased, was married to a deputy sheriff,
11 how long ago did she pass?

12 JUROR: This year.

13 THE COURT: Okay. Would that relationship with your
14 niece and your nephew by marriage, would that affect your
15 ability to be fair and impartial in this case?

16 JUROR: No, sir.

17 THE COURT: Okay. Tell me your name.

18 JUROR: Linda Miller.

19 THE COURT: Ms. Miller, you or a member of your
20 immediate family in law enforcement?

21 JUROR: A member of my family.

22 THE COURT: Which department does your family work?

23 JUROR: Sheriffs department.

24 THE COURT: Currently employed there?

25 JUROR: Yes.

1 THE COURT: And what relationship in your family?

2 JUROR: Nephew.

3 THE COURT: Would that fact that your nephew is
4 employed with the sheriffs department affect your ability
5 to be fair and impartial to both sides?

6 JUROR: No, sir.

7 THE COURT: Thank you. Ma'am, tell me your name.

8 JUROR: Teresa Senn. 130.

9 THE COURT: You or a member of your family employed
10 in law enforcement capacity?

11 JUROR: I have two step-children with law
12 enforcement. One at the detention center, the other in
13 the county.

14 THE COURT: Now, the fact that you have two
15 step-children, do they live in your household still?

16 JUROR: No, sir.

17 THE COURT: Would that affect your ability to be fair
18 and impartial in this case?

19 JUROR: No, sir.

20 THE COURT: Thank you. Any member of the jury panel,
21 a member of your immediate family a member of any
22 organizations such as Citizens Against Commission of
23 Violent Offenses such as CAVE. Any organizations such as
24 MADD mothers, SADD students, organizations organized for
25 victim's rights such as the Bikers Against Child Abuse or

1 any type of victim's advocacy groups, if so please stand.

2 (No response.)

3 THE COURT: No one is standing. Any member of the
4 jury panel know any reason whatsoever they cannot give
5 both the State of South Carolina and Mr. Velasquez a fair
6 and impartial trial in this matter please stand.

7 (No response.)

8 THE COURT: No one is standing. Any further voir
9 dire from either side? Y'all can come up.

10 (Whereupon, a bench conference was held in the
11 presence of the jury panel but out of the hearing of
12 the jury panel.)

13 THE COURT: All right, ladies and gentlemen of the
14 jury, does any member of the jury panel have a belief that
15 illegal drugs should not be against the law, should not be
16 illegal but they should be legalized. And that this would
17 prevent you from being fair and impartial in this case,
18 please stand. Does any member of the jury panel going to
19 have difficulty accepting an oath to accept the law
20 instructed by the Court and in this capacity I am the
21 instructor of the law in this case, is my job and duty as
22 the trial Judge to instruct the law consistently and
23 properly with the law as it currently stands. Thus I have
24 to ask jurors each time we have a jury to understand that
25 part of their oath would be to accept the law as

1 instructed by the Court even if you disagree with it or
2 didn't have an awareness to that that was actually the
3 law. Is there any member of the jury panel going to have
4 difficulty accepting that oath, please stand.

5 (No response.)

6 THE COURT: No one is standing. Anything else?

7 MR. SCOTT: No, Your Honor.

8 MR. VERNER: No, Your Honor.

9 THE COURT: Okay. Let's get a list, please. What is
10 going to happen, the Clerk of Court will generate a list
11 randomly from your number. It will take a moment to do
12 that. You will come up one at a time and the lawyers get
13 an opportunity to seat the juror or please excuse the
14 jurors. And we will do this until we have selected 12
15 jurors and one alternate. All right, give us a jury.

16 CLERK OF COURT: Juror number 29, Beverly Chapman.
17 What says the State.

18 MR. SCOTT: Please present the juror.

19 CLERK OF COURT: The defense.

20 MR. VERNER: Seat Ms. Chapman.

21 CLERK OF COURT: Number 93, Carl Lominick. What says
22 the State.

23 MR. SCOTT: Please seat this juror.

24 CLERK OF COURT: The defense.

25 MR. VERNER: Seat Mr. Lominick.

1 CLERK OF COURT: Number 108, Jessica Morris. What
2 says the State?

3 MR. SCOTT: Please present the juror.

4 CLERK OF COURT: The defense.

5 MR. VERNER: Please seat Ms. Morris.

6 CLERK OF COURT: Number 144, Jenna Tudor. What says
7 the State.

8 MR. SCOTT: Please present the juror.

9 CLERK OF COURT: The defense.

10 MR. VERNER: Please excuse Ms. Tudor from the trial
11 of this case.

12 CLERK OF COURT: Number 117, Johnnie Pitts. What
13 says the State.

14 MR. SCOTT: Please present the juror.

15 CLERK OF COURT: The defense.

16 MR. VERNER: Please seat Mr. Pitts.

17 CLERK OF COURT: Number 149, Marilyn Walker. What
18 says the State.

19 MR. SCOTT: Please present the juror.

20 CLERK OF COURT: The defense.

21 MR. VERNER: Please seat Ms. Walker.

22 CLERK OF COURT: Number 97, Kelli Crowe. What says
23 the State.

24 MR. SCOTT: Please present the juror.

25 CLERK OF COURT: The defense.

1 MR. VERNER: Please seat Ms. Crowe.

2 CLERK OF COURT: Number 32, Otis Coleman. What says
3 the State.

4 MR. SCOTT: Please excuse this juror.

5 CLERK OF COURT: Number 43, Travis Doolittle. What
6 says the State.

7 MR. SCOTT: Please present the juror.

8 CLERK OF COURT: The defense.

9 MR. VERNER: Excuse Mr. Doolittle from this case.

10 CLERK OF COURT: Number 102, Cynthia McGovern. What
11 says the State.

12 MR. SCOTT: Please present the juror.

13 CLERK OF COURT: The defense.

14 MR. VERNER: Please seat Ms. McGovern.

15 CLERK OF COURT: Number 164, David Wolff. What says
16 the State.

17 MR. SCOTT: Please present the juror.

18 CLERK OF COURT: The defense.

19 MR. VERNER: Please seat Mr. Wolff.

20 CLERK OF COURT: Number 130, Teresa Senn. What says
21 the State.

22 MR. SCOTT: Please present the juror.

23 CLERK OF COURT: The defense.

24 MR. VERNER: Please excuse Ms. Senn from this case.

25 CLERK OF COURT: Number 18, Brittany Brown. What

1 says the State.

2 MR. SCOTT: Please present the juror.

3 CLERK OF COURT: The defense.

4 MR. VERNER: Please seat Ms. Brown.

5 CLERK OF COURT: Number 64, Lynn Graham. What says
6 the State.

7 MR. SCOTT: Please present the juror.

8 CLERK OF COURT: The defense.

9 MR. VERNER: Please excuse Ms. Brown from today's
10 case.

11 CLERK OF COURT: Number 62, Lakeshia Glasgow. What
12 says the State.

13 MR. SCOTT: Please excuse Ms. Glasgow.

14 CLERK OF COURT: Number 127, Stuart Ruelle. What
15 says the State.

16 MR. SCOTT: Please present the juror.

17 CLERK OF COURT: The defense.

18 MR. VERNER: Please seat Mr. Ruelle.

19 CLERK OF COURT: Number 44, Tammie Doran. What says
20 the State.

21 MR. SCOTT: Please present the juror.

22 CLERK OF COURT: The defense.

23 MR. VERNER: Please seat Ms. Doran.

24 CLERK OF COURT: Number 165, Matthew Wooten. What
25 says the State.

1 MR. SCOTT: Please present the juror.

2 CLERK OF COURT: The defense.

3 MR. VERNER: Please seat Mr. Wooten.

4 THE COURT: One alternate.

5 CLERK OF COURT: Number 69, Deborah Hartness. What
6 says the State.

7 MR. SCOTT: Please seat the juror.

8 CLERK OF COURT: The defense.

9 MR. VERNER: Please excuse Ms. Hartness from today's
10 case.

11 CLERK OF COURT: Number 123, Wendy Roberts. What
12 says the State.

13 MR. SCOTT: Please present the juror.

14 CLERK OF COURT: The defense.

15 MR. VERNER: Please present Ms. Roberts.

16 THE COURT: Gentlemen, are there any matters of law
17 the Court needs to take up regarding the selection,
18 process employed or the composition of this jury from the
19 State or the defense?

20 MR. SCOTT: None from the State, Your Honor.

21 MR. VERNER: No, Your Honor.

22 THE COURT: All right. Folks, y'all not so lucky to
23 be selected. I will give instructions to y'all. Does
24 every member of the jury panel have a jury information
25 card which has Ms. Bowers' Clerk of Court number,

1 321-2110. That is her number. I am going to excuse you
2 for the day and ask you to call in tonight and listen to
3 the instructions. Call after 6:00. That is important,
4 don't call before 6:00. The reason being is, Ms. Bowers
5 is the Clerk of Court and she is seated here. Her two
6 deputy clerks are seated up here with me. When court is
7 being conducted they are in the courtroom. And while I am
8 conducting court I don't know what is going to happen
9 first thing in the morning until very late in the day. If
10 you call at 4:30 you are going to get one of the ladies
11 downstairs, we are not in communication with them all the
12 time. They won't know what I have decided. So call after
13 6:00 for instructions for tomorrow. It will be three
14 options, please call back, please come in tomorrow at a
15 certain time or thank you for your service, you need not
16 to report back. One of those three things will be on the
17 recording tonight. I will excuse you for the day.

18 (Whereupon, the remaining jury panel is excused from
19 open court.)

20 THE COURT: All right, folks, a couple of things for
21 you. I have got a couple of legal matters without your
22 participation. I am going to excuse you for lunch until,
23 be back at 3:00 o'clock. Don't talk about the case.
24 Thank you. Everything you need to hear about this case is
25 right there, don't go outside and do anything, no

1 research, don't look up the law, don't let anyone else try
2 to influence you about this case. Don't go on Facebook,
3 Instagram and say I am on the jury. And you may get a
4 response, is that case about so and so. So they may try
5 to influence you. Do not tell anybody anything or comment
6 about it other than I am on the jury and the Judge says
7 don't discuss the case. You are excused until 3:00.

8 (Whereupon, the jury was excused from open court for
9 lunch.)

10 THE COURT: Okay, about an hour, we will start back
11 about 1:30. We will see you then.

12 (Whereupon, a lunch break was taken.)

13 THE COURT: All right, pretrial motions.

14 MR. VERNER: Yes, sir. I had three motions, really
15 four, three are the same, motion to suppress, just
16 different searches. The defendant challenges the initial
17 stop, Your Honor, as a violation of his Fourth Amendment
18 rights. Secondly he was individually searched where
19 contraband was found on his person which is my
20 understanding being sought to be introduced. We would
21 challenge that search. We would allege that that would be
22 in the nature of a Terry Frisk type search. The third one
23 would be when the actual, there was a backpack found in
24 the back seat of the car, that backpack was individually
25 searched. We would challenge that. And the fourth, Your

1 Honor, is a Jackson v. Denno on his statement, any
2 statement elicited about marijuana which he is not going
3 to trial on today but was part of the State's
4 justification for either arrest or for searching. But
5 those would be the pretrial matters, Your Honor.

6 THE COURT: All right, Solicitor.

7 MR. SCOTT: Judge, we are going to proffer some
8 testimony from some witnesses.

9 THE COURT: All right.

10 MR. SCOTT: Let's call Pete Johnson.

11 PETE JOHNSON, being
12 first duly sworn, testified as follows:

13 DIRECT EXAMINATION

14 By Mr. Scott:

15 Q State your name.

16 A Lieutenant William P. Johnson.

17 Q Mr. Johnson, did you work the checkpoint May 1st of
18 2015?

19 A Yes sir, I did.

20 Q Y'all determined that to be a safety checkpoint, is
21 that what y'all determined?

22 A Yes, sir.

23 Q And tell me the location of that safety checkpoint?

24 A We were on Highway 76, maybe three quarters of a mile
25 to a mile West of Pete Harris Road in the vicinity of

1 Wicker Greenhouses.

2 Q And what was the, when did the checkpoint begin?

3 A We started probably roughly around 9:30.

4 Q A.M.?

5 A Yes, sir.

6 Q And this was in response to what, in other words, why
7 does the sheriffs department determine that they are going
8 to have a safety checkpoint at that location?

9 A Not quite two weeks prior to the date of the
10 checkpoint we had a wreck at that same location that
11 involved a fatality. While responding and dealing with
12 that wreck we received numerous, numerous complaints about
13 problems with speeding and unsafe driving techniques that
14 was going on in that area.

15 Q As a matter of fact, the Sheriff, Sheriff Foster sent
16 y'all an email regarding this?

17 A I don't recall if it was directly sent to us but it
18 was discussed within the office and that I know there was
19 an email sent to highway patrol.

20 Q So April 22nd, is that when that fatality was?

21 A Yes sir, it occurred just after 9:00 a.m.

22 Q So the fatality did?

23 A Yes, sir.

24 Q The same time in the morning y'all did the
25 checkpoint?

1 A Yes, sir.

2 Q And what else you said, that same period of time and
3 that same stretch of road you received some complaints
4 from the community about motorists in that area?

5 A Yes, sir. I was alerted by one of the other officers
6 that there had been some complaints to her as well. Like
7 I said, once we were dealing with the actual fatal wreck
8 and things kind of slowed down and we knew there was no
9 way, nothing life saving that could be done for the victim
10 we begin speaking with some of the people trying to round
11 up witnesses and all for highway patrol and several of
12 them made complaints to us that we needed to do something
13 about the speeding and the unsafe driving.

14 Q So, the checkpoint was determined to be made first,
15 you said it begin at 9:30. And let me show you State's
16 number 3. What is that a picture of?

17 A This is a picture of one of our safety checkpoint's,
18 a sign and this sign is actually located directly in front
19 of Wicker Greenhouses. You can actually notice that the
20 mailbox has fresh mud and everything around it because
21 that mailbox was taken out during the fatal collision.

22 Q And this would have been, would that have been taken
23 May 1st when y'all had a checkpoint there?

24 A It was.

25 Q So y'all basically had the checkpoint almost in the

1 exact spot as the fatality?

2 A Yes sir, we did.

3 Q And the patrol car is up there, is that the view you
4 would be looking as you approach the checkpoint?

5 A Yes sir, it is.

6 Q What was the procedure y'all were implementing May
7 1st. Did you stop every motorist as they went through the
8 checkpoint?

9 A We did. Every motorist was stopped, every motorist
10 was ID'd by drivers license. If they did not possess a
11 license then we basically took them to the side of the
12 road to confirm that if they did have a license or if they
13 were suspended or if there was some other, something that
14 arose. We basically checked the drivers license and then
15 take a look at the tag to make sure that it was up to
16 date.

17 Q Y'all were just checking for drivers license, were
18 y'all asking for registration, proof of insurance?

19 A Just the drivers license.

20 Q And what else were y'all doing, were y'all checking
21 for safety belts and stuff like that?

22 A Did make sure that they were on. If not then of
23 course we told them to get the safety belt on. But,
24 again, we were primarily looking for that and then just
25 kind of speaking with some of the drivers. We were

1 actually complimented by some of the drivers for being
2 there.

3 Q Okay. So what, tell me again, what is the purpose of
4 the safety checkpoint on that particular date?

5 A That particular date, due to the fatality and the
6 numerous complaints about people pulling into Wicker
7 Greenhouses and issues with vehicles that were passing, as
8 soon as they come out of the curve and what they felt like
9 was unsafe conditions. We wanted to set up a checkpoint
10 that allowed us the opportunity to have contact with the
11 majority of the drivers that were coming through at that
12 time so that they knew we had a presence there and that we
13 were trying to do something that would combat the problem.

14 Q You were saying, so they would know you have a
15 presence there. Is it a fair statement that once y'all
16 have a checkpoint, at least for some period of time after
17 the checkpoint motorist tends to be probably more careful
18 on that stretch of road at that particular time?

19 A Yes, sir.

20 Q They know that there is a police presence there that
21 may have an affect on motorists where they probably slow
22 down and watch their speed a little bit more?

23 A Yes, sir.

24 Q Tell me, at some point did you have an incident where
25 you stopped a rental car out of New Jersey?

1 A Yes sir, we did. The actual initial contact was by
2 Sergeant Babb but I was present when he made contact with
3 that vehicle.

4 Q What was the vehicle?

5 A I believe, if I recall right, it was a black, I
6 remember it was a foreign made car, it did have a New
7 Jersey tag. I would have to refer to my report for the
8 actual make and model.

9 Q Let me show you State's number 5.

10 A Yes, sir.

11 Q Is that familiar to you?

12 A Yes, sir. This is the black Nissan Altima that we
13 got out with and the passenger side backdoor is open and
14 that is the defendant, he was seated.

15 Q So this Altima that comes through and has New Jersey
16 tags. And tell me how you became involved with that
17 particular automobile?

18 A Again, Sergeant Babb had made contact with the
19 driver. My back was actually to him when the car first
20 pulled up. I did alert, just based on past experiences
21 and knowledge of the smell of marijuana, that I thought I
22 had caught the smell of it as the car went by. Sergeant
23 Babb did ask me if I smelled marijuana and I indicated
24 that I did. At that point we had the car pull over to the
25 side, the driver was a black female. After discussing

1 with her it was determined that she claimed to not have a
2 license on her, also gave a name to Sergeant Babb that we
3 were trying to run and we couldn't get anything back. At
4 that point we asked her to step out of the vehicle to
5 basically gain some separation between her and the
6 defendant, so to look for inconsistencies in stories. And
7 while Sergeant Babb was talking with her I then positioned
8 myself at the back passenger side of the car where the
9 defendant was seated because his window was half down just
10 to watch his movement as much for safety as anything.

11 Q So you got a black female driving the vehicle and
12 where is Mr. Velasquez?

13 A He is in the back passenger seat.

14 Q Back passenger seat?

15 A Yes, sir.

16 Q And who is in the front passenger seat?

17 A Nobody.

18 Q So you have got the woman driving the car and he is
19 just in the back seat by himself?

20 A Yes, sir.

21 Q And you said you thought you smelled some marijuana
22 and so at that time you determined or you guys together
23 determined you were going to have her exit the car because
24 also you said she didn't have a drivers license and she
25 had provided some kind of alias?

1 A Yes, she had provided the name, I think it was
2 Jennifer Boyd to Sergeant Babb with a date of birth that
3 we were unable to get anything or our dispatch was unable
4 to get anything to my recollection that matched that
5 through DMV.

6 Q How were you ever able to get her true identity?

7 A If I recall, when she was processed through our
8 detention center we use an electronic form of
9 fingerprinting and upon fingerprinting her I believe was
10 when they determine that she was not Jennifer Boyd. And
11 at that point she confessed to the jail staff that she was
12 someone else and Sergeant Babb went out and issued her
13 citations for those violations.

14 Q Okay. Let me back up to what you were saying. Babb
15 had taken the female driver out to speak with her and you
16 said you went around to the rear of the vehicle to speak
17 to Mr. Velasquez?

18 A I didn't actually speak with him, it was more just so
19 that I could watch him for safety measures while Sergeant
20 Babb was speaking with the driver. Because where they
21 pulled the vehicle over to the front of Sergeant's Babb's
22 vehicle was maybe five, six feet and he was standing in
23 front of his vehicle and I was watching the defendant
24 because I noticed that he was, he seemed very intent on
25 listening to what was going on with Sergeant Babb and he

1 had his ear and body leaned over toward the window. And
2 in fact I even alerted Sergeant Babb that the window was
3 partially down and he appeared to be trying to listen to
4 what was being said.

5 Q Was the female under arrest at this point?

6 A No sir, she was not.

7 Q You said he is still sitting in the back of the
8 Altima?

9 A Yes, sir.

10 Q What happened next?

11 A Sergeant Babb told, or excuse me, asked the driver
12 about the smell of marijuana and at that point the
13 defendant immediately held up a blue ashtray.

14 Q Is that what this is, State's number 1?

15 A Yes, sir. It is one of them that sits down inside
16 the cup holder. He immediately held up this ashtray and
17 asked me if, or excuse me, stated that he had just smoked
18 some marijuana earlier. And basically the lid was off at
19 that point and he was showing me what would be, what I
20 would call two roaches that were in the bottom of the
21 ashtray.

22 Q So, that was in response, I guess, to a question of
23 yours. One of you said, tell me about the marijuana and
24 that is when he volunteered that?

25 A Right. Sergeant Babb was interviewing the driver

1 when he asked her about the marijuana. That is when the
2 defendant made the statement that they had smoked some
3 earlier and then proceeded to hold up the ashtray showing
4 me the two roaches of marijuana at the bottom of the
5 ashtray.

6 Q Okay. So, the question wasn't really to him, it was
7 to the female driver and he volunteered that information?

8 A Yes, sir. And once he did that then I extracted him
9 from the vehicle and immediately placed him under arrest
10 for simple possession.

11 Q An incident to arrest, what do you do anytime you are
12 about to arrest somebody?

13 A Before they are placed in a vehicle they are searched
14 to make sure there is no weapons or any other contraband
15 on them.

16 Q And so you did a pat down on him and what, if
17 anything, did you find?

18 A When I reached into the defendant's right front
19 pocket I could immediately tell that there was some, well
20 actually when I patted it first I could tell that there
21 was some cellophane or plastic in that pocket. I then
22 reached in and retrieved that since he was under arrest.
23 And when I pulled it out I found a bag of a white
24 rock-like substance that appeared to be packaged as crack
25 cocaine.

1 Q Did you give him any Miranda warnings?

2 A At that point I did not because we were not
3 questioning him. Once we found the crack cocaine and
4 subsequent to the other things that were found than at
5 that point we Mirandized both of them. Well, I believe
6 Ms., the driver was actually Mirandized by Sergeant Babb
7 right off the bat. We did not Mirandize the defendant
8 initially because we were not questioning him. Once we
9 found the crack after he made the statement about the
10 marijuana then at that point he was Mirandized but he, as
11 we say, lawyered up.

12 Q Did he make any statements about the crack you just
13 found in his front pocket?

14 A He didn't really seemed concerned. But the fact that
15 I found the crack in his pocket, he didn't make any
16 remarks when Sergeant Babb reached in the car for the
17 duffle bag that was right at his feet. At that point then
18 he became very verbally in opposition to us searching him
19 or his backpack.

20 Q State's number 32, does that fair and accurately
21 represent the crack that you found in his pocket?

22 A Yes sir, it does.

23 Q And then, so after that you put the cuffs on him and
24 what are you telling him, you are under arrest for what?

25 A At that point I told him he was under arrest for the

1 simple possession as well as, excuse me, the crack
2 cocaine, we told him he was under arrest. We were still
3 standing at the back of the car when Sergeant Babb reached
4 in for the book pack, that he began to become much more
5 verbal and his opposition to what we were doing.

6 Q So you think his behavior, in your opinion, seemed to
7 change somewhat when y'all focused on this bag?

8 A Most definitely it escalated.

9 Q If he is in the rear passenger seat where is this
10 backpack. This is State's number 40, I believe.

11 A That backpack was at his feet and appeared that he
12 had tried to stuff it actually under the front passenger
13 seat.

14 Q And were you present when Sergeant Babb retrieved
15 State's 40?

16 A Yes, sir. He had pulled the backpack up onto the
17 back seat. When he opened up the backpack he told me that
18 he had more drugs. At that point I saw what he was
19 talking about and we immediately went ahead and seized the
20 search of the vehicle since we were at his immediate area
21 and went ahead and called for an investigator.

22 Q What about money, did y'all find any money?

23 A Yes sir, actually in the same pocket with the crack,
24 whenever I reached in I found one \$100.00 dollar bill, one
25 \$50.00 dollar bill, 14 \$20.00 dollar bills, one \$5.00

1 dollar bill and one \$1.00 dollar bill. That by my total
2 was \$436.00 dollars in cash in the same pocket with the
3 crack.

4 Q In the backpack?

5 A No sir, that was in his pocket on his person.

6 Q Let me show you State's number 37. Does that fairly
7 and actually represent the items found within the
8 backpack, State's number 40?

9 A Yes, sir. Again, other than the money and the crack
10 that was in the picture, those were found on his person.
11 The two brick forms and the two bags of the white powder
12 were all found in the backpack. I can't speak on the
13 scale, excuse me, the two scales and the cell phone
14 because like I said, as soon as we opened up the backpack
15 and saw the two brick forms and the two baggies with the
16 white powder myself and Sergeant Babb immediately stopped
17 and went ahead and called for Sergeant Stribble which is
18 our narcotics investigator. I think when we actually
19 tried to call him he was busy so we were then reverted to
20 Lieutenant Lominick who is the Lieutenant over
21 investigative division. So that we could get one of them
22 out to assist us with processing as well as a search
23 warrant if need be.

24 Q Okay. Were you able to obtain a search warrant for
25 the car?

1 A I believe Sergeant Stribble actually obtained the
2 search warrant. What we did was once he came up and knew
3 what we had we called for a wrecker service. At that
4 point the defendant and the female driver were already
5 taken into custody, taken to jail. And then once the
6 wrecker service got there we put one patrol car in front
7 of it and one behind it just from the magnitude of the
8 amount and we followed the wrecker driver back to his
9 location at his business and then actually took periodic
10 photographs as we went up the road to be able to show that
11 we maintained contact with that vehicle because we also
12 had that backpack in the vehicle until such time that the
13 search warrant was secured.

14 Q Okay. And did you, I guess what happened with the
15 safety checkpoint after Mr. Velasquez rolled through?

16 A Basically once the defendant come through and we
17 realized that we had what we had at the magnitude that we
18 did, even though there was initially five us there, the
19 other two deputies as well as a trainee, were already on
20 another traffic stop that they had to make an arrest. So
21 basically our checkpoint came to a stop.

22 Q Let me show you State's number 41. Do you recognize
23 what this is?

24 A Yes, sir. This is a, it is actually called an
25 alcohol enforcement team checkpoint form. It is a form

1 that we use at the end of every checkpoint where we give a
2 tally of everything that we have done during that
3 checkpoint, any cases, numbers of vehicles; ratio of male
4 and female; black, white; how many Hispanics were involved
5 as well as the ages of the people that may have some
6 through; everything on that part is actually an estimation
7 other than the cases we made.

8 Q Who filled out that data sheet?

9 A I filled this form out.

10 Q Would you read into the record some of the stats
11 y'all came up with?

12 A Yes, sir. Indicated we had two fugitives
13 apprehended. Again, like I said, just prior to Mr.
14 Velasquez there was a female that came through. We had
15 released her and then moments later dispatch came back and
16 indicated that she was actually wanted. So one of our
17 deputies had to go and invoke a traffic stop on her. She
18 was actually wanted, I believe, out of the town of
19 Clinton. It indicates a second one because Mr. Velasquez
20 was actually coming back and wanted out of Maryland.
21 However they indicated they didn't want to extradite him.
22 One of the others is three drug possessions. I believe
23 one of these is due to the female that the other deputies
24 went after. I believe it was a meth case or something
25 that they got off of that vehicle. And then the other two

1 would have been Mr. Velasquez as well as his female
2 driver. Three felony arrests, just give you the magnitude
3 of the charges we made. We had two other, one being
4 again, there was, I believe a Hispanic male came through
5 that had a permit violation. He didn't have a licensed
6 driver with him, he was cited and released. And then the
7 vehicles that the deputies had to go stop because the
8 driver was wanted had a stolen tag on it. And then we
9 estimated, in that small amount of time we actually
10 checked close to 100 vehicles.

11 Q About 100 vehicles and approximately how many were
12 male?

13 A It was about a 50/50 ratio on male, female. Like I
14 said, it was very low on the Hispanic, we had maybe a 5
15 percent, 95 percent was either black or white. And we
16 actually had a 75 percent to 25 percent ratio on white and
17 black.

18 Q Okay. Start at 9:30, about what time did y'all have
19 to shut it down?

20 A The end time indicates 11:00 o'clock but that was due
21 to the fact, again, once we made contact with Mr.
22 Velasquez at about 9:30, going on 10:00 o'clock,
23 everything was there, we had to wait on the wrecker, wait
24 on the investigator to come up and meet us, that there was
25 a lot of time on the side of the road. And then once we

1 all cleared and left there it was approximately 11:00.
2 And then we followed the wrecker service which is why it
3 indicates 11:00 o'clock. And then at that point we
4 followed the wrecker service back to his business where he
5 was going to impound the vehicle and hold on to it. And
6 then we stayed with that vehicle until such time that
7 search warrant arrived.

8 Q And were you present when the search took place?

9 A Yes sir, I was.

10 Q Did y'all find anything else?

11 A If I remember correctly there was some scales found
12 and then a grinder was found in the center console that
13 had a green leafy residue. And it had a peace symbol on
14 one side that was in red, yellow and green color with a
15 black background.

16 Q Well, the backpack, State's number 40, the crack was
17 found in. Did you get to open this up and search further
18 after the search warrant was obtained?

19 A I was not the one that actually further searched
20 that.

21 Q So the checkpoint only lasted about thirty minutes by
22 the time Velasquez came through?

23 A We weren't there long because we had a high magnitude
24 of vehicles. And then we had two back to back cases that
25 were going to tie up officers so we had to terminate the

1 checkpoint.

2 Q Okay. State's number 2, Court's number 2, I
3 apologize, is that the report of the 18 Wheeler fatality
4 you were talking about?

5 A Yes, sir. This is the report that I actually wrote,
6 my name is chopped off at the bottom but I did this report
7 with assisting highway patrol on this fatality.

8 Q And then you referenced this Hispanic, I think it was
9 a learners permit he was driving around on?

10 A Yes, sir.

11 Q And exhibit number 1, is that a report from that?

12 A Yes, sir. This is also a report that I wrote where I
13 issued him a citation for violating a beginners permit.

14 Q And the female you talked about was wanted and she
15 came through the checkpoint and then y'all stopped her and
16 she had methamphetamine. Her name is Kim Dawkins, does
17 that sound familiar to you?

18 A That does sound familiar, yes sir.

19 Q Court's exhibit number 3, does that accurately
20 reflect her involvement in the safety checkpoint?

21 A Yes, sir. It was Deputy Rembisz that actually took
22 off after her and stopped her, she was, moments later was
23 assisted by a deputy and a trainee, Deputy Davis.

24 Q That checkpoint was in Newberry County, is that
25 right?

1 A Yes, sir. Newberry County, just West of the Jalapa
2 community towards Kinards.

3 Q Answer any questions Mr. Verner may have for you.

4 CROSS-EXAMINATION

5 By Mr. Verner:

6 Q Lieutenant, when was it decided that you were going
7 to set up this safety checkpoint on Highway 76 on May 1st?

8 A As far as the location it may have been decided
9 either the day before or that morning. We consistently
10 hold checkpoints throughout the county.

11 Q Do you recall have a meeting about this particular
12 checkpoint?

13 A Yes, sir. My shift and all, we discuss everything
14 that we are going to do typically in the mornings before
15 we go out.

16 Q So, the morning of May 1st you would have definitely
17 met with your shift and discussed this is where we are
18 going to put the safety checkpoint?

19 A Yes, sir. Every morning my shift and all, we either
20 meet or discuss at least by phone, not necessarily by
21 person but everything is handled by phone.

22 Q How many people, are you the shift supervisor?

23 A I am.

24 Q How many people would be on your shift, how many
25 officers?

1 A If nobody is off then I typically have four.

2 Q Four?

3 A In the daytime, yes sir.

4 Q So it would be five counting--

5 A No, sir. Typically it is four including me. The
6 split shift comes out at 2:00, on this particular day
7 there was five but only because we had a gentleman that
8 had just recently graduated from the Criminal Justice
9 Academy. Because he can't go out on his own so we were
10 doing a two-man car and he was assigned to somebody for
11 training.

12 Q So, he would still be basically in one car with
13 another deputy in training?

14 A Yes, sir.

15 Q Now, my question, before May 1st do you recall
16 whether you and the sheriff had decided to where this
17 checkpoint would be?

18 A As far as where we locate our checkpoints, I don't
19 necessarily have to go to the higher ups as a shift
20 supervisor. I can kind of assist and determine that.
21 Based on the fatality and the numerous complaints we chose
22 that day to set up there.

23 Q And so I am taking your testimony is that you would
24 have been the one who made the decision to set it up at
25 that location?

1 A Yes, sir.

2 Q Do you recall that you were the one that made the
3 decision?

4 A I can't tell you, Mr. Verner, that I made the exact
5 decision that is where we were going. It has been my
6 practice as a supervisor that even though I have the final
7 say so I do allow the officers under me to have input on
8 what we do that day or where we may go.

9 Q Is it possible you made the decision on your own this
10 is where the location would be?

11 A It could be possible, I am not going to tell you that
12 I did.

13 Q But you consult with officers and get some input with
14 the lower ranks?

15 A Yes, sir. It has been my experience, like I said, as
16 a supervisor that I like to get the input of my officers
17 and I like for them to feel like they are included and
18 have some say so on what we do. Over all I do have to
19 approve that.

20 Q And what is the purpose, your understanding of a
21 traffic safety checkpoint?

22 A It is, primarily we are out there basically letting
23 the public know that we are out there. We often times we
24 will set them up in areas where we have had some major
25 incidents, allows us to have contact with the public and

1 let them know that we are there for their safety and that
2 we are there with them.

3 Q Are you aware, were there prior checkpoints in the
4 location where you were located on May 1st?

5 A I can't tell you that there was a prior checkpoint at
6 that location by us. No sir, but as a result of all the
7 other complaints we chose to set up there.

8 Q And Highway 76 would be, is that a road that
9 completely goes across Newberry County?

10 A Yes, sir.

11 Q Not a short road, it traverses the whole county?

12 A Yes sir, it covers the entire length of the county.

13 Q And I believe some of the factors you said you
14 considered was there was a car, truck fatality?

15 A Yes, sir.

16 Q And some people were complaining about speeding?

17 A We got numerous complaints the day of as well as
18 there was another incident report filed and I believe
19 Sheriff Foster was directly contacted with some
20 complaints.

21 Q Do you know if either the car or the truck that were
22 involved with the fatality were unlicensed drivers?

23 A To my knowledge both were licensed. It is my
24 understanding from the witness testimony I talked to, I
25 don't want to use the word unfortunates or fortunate but I

1 happened to be at a call directly across from Pete Harris
2 road with a lady that was complaining about a civil
3 matter. When they gave me the call about the wreck I told
4 her I had to go, and then jumped in my vehicle because
5 they told me it was an extremely bad wreck and was
6 actually was on the scene, by this report in two minutes.

7 Q And I understand that the Highway Patrol MATE Team
8 took over that investigation?

9 A Yes, sir. They did, I did see members of the Mate
10 Team.

11 Q In a nutshell can you tell me what was the nature of
12 the wreck with the truck and the car, what caused it?

13 A The car, according to witness testimony and all, she
14 was traveling towards Kinards, away from Jalapa, she was
15 slowing down, turn signal on to turn into Wicker
16 Greenhouses, an 18 Wheeler failed to apply his brakes and
17 slammed into the back of her, sending her off the right
18 side of the road, overturned the vehicle and taking her
19 life.

20 Q Was there an indication that the truck was following
21 too close?

22 A That I don't know, I don't know what the MATE Team's
23 report was. I can tell you, her windshield was intact, I
24 remember that. I got there, the motor was still running,
25 wheels were still turning and I actually started the

1 process of trying to get the windshield off the car to try
2 to get to her.

3 Q Do you recall if the truck driver was cited?

4 A I do not. Again, State Transport Police arrived,
5 they inspected the truck, the MATE Team arrived. The MATE
6 Team actually got there, I am guessing close to lunch time
7 and I actually left while they were in the very prenatal
8 part of their investigation.

9 Q And that would be turned over to the Highway Patrol
10 of the transport team?

11 A Yes, sir. All wrecks in Newberry County are
12 investigated by South Carolina Highway Patrol, if they
13 occur in the county unless they involve a trooper or an
14 immediate family member.

15 Q If there were complaints about speeding in the area,
16 an officer with a radar would be an appropriate response
17 for cars traveling at excessive speeds?

18 A I am not going to say it is appropriate, Mr. Verner,
19 the only problem with running radar is we don't make
20 contact directly with the citizens. You contact far less
21 unless there is excessive stops from that one area. We
22 are out there with everybody, that they know we are there
23 and we make contact with directly everybody that knows why
24 we are there.

25 Q So the main reason for the traffic safety checkpoint

1 is to be seen in the area?

2 A We do want to be seen, we do want them to know we are
3 out there and we are trying to make a difference in all
4 and saving lives. But, of course, we are not going to
5 allow obvious violations to pass by either.

6 Q And you do have a general crime prevention too. If a
7 neighborhood is suffering from a theft ring or burglary
8 ring you would station visible patrol units in that
9 location, I would suppose, too?

10 A We have set up checkpoints to indicate to check with
11 the public to see if they see anything, otherwise we
12 wouldn't know. Yes sir, we have done that in the past.

13 Q But if you had a neighborhood or an area of the
14 county that there was an unusual theft or crime waive you
15 would want your units to be seen in that location, right?

16 A Yes, sir.

17 Q Can you tell me how many units initially set up the
18 safety checkpoint?

19 A Again, it was five people, four cars.

20 Q You would have had four cars?

21 A Yes, sir.

22 Q Where would the deputy cars be parked?

23 A Off on the shoulder of the road. In fact, in one of
24 the pictures there is actually a good shot of some of the
25 police cars that are seen off the side of the road.

1 Q Tell me the number on the back of that picture so we
2 know what you are talking about.

3 A It is exhibit number 3.

4 Q Okay. And may I see that.

5 A Yes, sir. In fact if you look real close I believe
6 that is Deputy Babb's car and directly in front of it you
7 can just barely see the defendant's car in front.

8 Q Now, there appears to be a white SUV on the other
9 side of the road. Is that also a deputy's vehicle?

10 A No, sir. That is actually Sergeant Stribble's
11 vehicle. This photograph was taken once we were at the
12 stages of like stopping the checkpoint. And as I indicted
13 earlier, you have got mud here and paint marks from the
14 fatality two weeks prior.

15 Q Was this sign put out prior to you conducting the
16 checkpoint?

17 A Yes, sir. Those signs are always posted on each end
18 of any checkpoint we do.

19 Q Prior to the beginning?

20 A Yes, sir.

21 Q Do you know if you had advertised to the public by
22 any media, radio, newspaper ad, social media, Facebook.
23 The sheriffs uses Twitter account, doesn't he, sometimes
24 for that?

25 A I am not sure as far as that part goes. But as far

1 as us doing something for this individual checkpoint, no
2 sir. But it is understood that we regularly hold
3 checkpoints.

4 Q And you would have been the supervisor deputy on the
5 scene?

6 A Yes, sir.

7 Q Now, it is a fact that there were only two deputies
8 on the scene when my client, Mr. Velasquez--

9 A Yes, sir.

10 Q What is that?

11 A Again, there was, I believe it was a Jeep Cherokee
12 came through. Deputy Barnwell made contact with that
13 driver, dispatch indicated that there was some delay in
14 getting the information back so therefore that driver was
15 released. Moments later they came back with the
16 information, told us that she was a wanted person and that
17 the tag on the vehicle was stolen.

18 Q And that is Kimberly Dawkins?

19 A Yes, sir. At that point Deputy Rembisz got into her
20 vehicle and tried to go up and catch back up with the
21 Jeep. Deputy Barnwell also went with her in order to back
22 her up and then we had already indicated to Mr. Davis
23 since he was in training, we wanted to give him as much
24 exposure as possible. So therefore we sent him as a, with
25 one of them so he could observe everything that went on

1 and at that point that left me and Sergeant Babb at the
2 checkpoint.

3 Q And when it is just the two of you officers, how were
4 you conducting, the chase with that vehicle with Kim
5 Dawkins, that occurred prior to the Velasquez car?

6 A Going after Ms. Dawkins was prior to Mr. Velasquez
7 and the female driver coming through, yes sir.

8 Q So how, when it is just the two officers how would
9 you conduct--

10 A At that point pretty much, if I remember correctly,
11 Sergeant Babb was checking anything coming toward the
12 Jalapa area. I checked everything coming towards Kinards.
13 And we would alternate and turn if we had excessive number
14 of cars on one side or the other of the road so that every
15 car was checked. Once we got Mr. Velasquez and realized
16 we were needed to both concentrate on that then the
17 checkpoint seized so that both officers could be
18 concentrating on that due to the fact that we had two
19 passengers, smell of marijuana, for officers safety
20 reasons the entire checkpoint seized.

21 Q Is that the only time cars were let through without
22 being stopped?

23 A Yes, sir.

24 Q And when you had all of the officers, deputies at the
25 roadblock, how was the traffic safety checkpoint

1 conducted?

2 A Again, it was in the same manner. If we had two or
3 three, we would have two officers on one side and two to
4 the other. If we had multiple vehicles the one officer
5 could check one and the other one would check the one
6 behind it. And then running them like two at a time.
7 Again, Mr. Davis was still in training, more so then him
8 being actually checking cars, we did allow him to check
9 them but kind of had someone over his shoulder watching
10 everything he did.

11 Q I believe you testified to the Solicitor that, on
12 this day y'all primarily are just asking for drivers
13 license alone?

14 A We ask for drivers license and looked at the tag to
15 make sure that it was up-to-date.

16 Q So if a car or if the driver showed you a valid
17 drivers license were they immediately let through?

18 A If on face value that drivers license looked valid
19 and the tag appeared clear than, yes sir, they were let
20 go. We did not run every drivers license through DMV.

21 Q So you wouldn't call in a tag or a license if
22 somebody had both of them and they appeared to be--

23 A Yes, sir.

24 Q Okay. Did you record any information for people who
25 were stopped who had valid drivers license?

1 A If we ran anybody who couldn't provide it right off
2 the bat or something about them appeared suspicious or if
3 they didn't have it then we may run them. But aside of
4 that, no sir, everyone was, just like I said, they were
5 looked at and let go.

6 Q You would have kept any kind, nobody was counting a
7 tally or anything like that, you didn't have a notebook or
8 anything like that?

9 A No, sir. We don't stand there and actually count
10 everyone, we make a rough estimate as far as how many cars
11 and then how many black, white, Hispanic, male, female.
12 The only thing, you know, we would actually keep a tally
13 on is at the end of the checkpoint we do tally up what
14 charges are made.

15 Q And you were the one who did the final report, what
16 is labeled the Alcohol Enforcement Team Checkpoint Form?

17 A Yes, sir.

18 Q And you have got a copy of it?

19 A I do.

20 Q Is there normally a place for you to sign that form?

21 A The newer forms do have a place to sign them. The
22 older ones did not. This was an older form and it was
23 filled out but I can tell you by the handwriting it is
24 definitely my handwriting.

25 Q So the signature is not cut off by copy machine. It

1 is just at this time the form--

2 A To my knowledge, no sir, it is not. I don't recall
3 signing the form.

4 Q And would you have also gotten a list of the 911
5 calls that were made, do you recall getting a list of the
6 calls that, not 911, but dispatch calls that you made at
7 the checkpoint?

8 A Did I get a copy, no sir, I didn't.

9 Q Ignore the handwriting, but do you recognize these
10 forms?

11 A This is a typical printout from, it looks like from
12 dispatch and all, but various things that would have been
13 run.

14 Q Is that the dispatch report for this day in question?

15 A This was done on that day, yes sir.

16 Q So there are a list of cars that you would have
17 called in or somebody would have called in?

18 A It could be, without the officer's number indicating
19 beside it, I can't tell you who actually called it in. It
20 could be the City Police, it could be Prosperity, it could
21 be Whitmire, it could be us. Typically if we need
22 something, if we run something through DMV and we need it
23 held for any reason we would tell them to print and hold
24 it. And when they hold it they actually put our call sign
25 number on the top of that piece of paper for us to pick up

1 later.

2 Q And Mr. Scott handed you a form where there was a
3 Hispanic man that had a violation of a beginners permit?

4 A Yes, sir. He was given a citation for violation of
5 beginners permit and instructed to go directly home and
6 not drive again.

7 Q On the alcohol enforcement checklist is his citation
8 noted?

9 A Yes, sir. If you notice down here where it has got
10 the estimated number of cars, it says 100 and then it says
11 other. And it says stolen tag and then there is a space
12 between there that says permit. The permit is indicating
13 his permit violation. There is not an actual place up
14 here where it says the total number of tickets by offense
15 per a violation of a beginners permit.

16 Q So a stolen tag is one separate entry and then the
17 permit violation would be a second?

18 A Yes, sir. And both of those are indicated under the
19 other part.

20 Q If that is Mr. Rodriguez, that would be listed on the
21 other report. And we know Kim Dawkins which is the lady
22 who went down, who was released and then chased again?

23 A She was released and then the violation was
24 discovered shortly after she was released. And then a
25 deputy restopped her for that violation.

1 Q And she was cited for a stolen tag?

2 A I don't have that copy of that report.

3 Q If the incident report indicates that she was, stolen
4 tag and meth, that would reflect on your report too?

5 A Yes, sir. That is why, again, where it says that
6 there was two fugitives apprehended, one of those was
7 considered to be Mr. Velasquez, the other was considered
8 to be Ms. Dawkins. Because she was wanted under the
9 felony arrest because she was going to be charged with
10 possession, meth, a controlled substance. And as well,
11 basically something that wasn't Magistrate's level.

12 Q So she shows up twice on the report, once for drug
13 possession and once for stolen tag?

14 A Some degree, yes sir. You indicate all charges made.

15 Q And then I am going to ask you, I am going to start
16 where I have written in A, you are looking at the dispatch
17 report right now, right?

18 A Yes, sir.

19 Q The one that I have marked as A indicates that Jalia,
20 (phonetic), Adams was cited for suspended drivers license?

21 A I can't say that she was cited for suspended drivers
22 license. This does indicate that someone ran her and that
23 she came back suspended. But I can't tell you that this
24 was on our checkpoint.

25 Q It doesn't list any kind of location?

1 A No, sir.

2 Q But that would have been at the time the checkpoint
3 was being conducted?

4 A I don't see an actual time on here that this one was
5 ran.

6 Q Who uses the county dispatch other than the sheriffs
7 department?

8 A The City police, Newberry City Police Department,
9 Prosperity Police Department, Whitmire Police Department
10 and occasionally if the troopers need something printed
11 out it is not uncommon for one of them to stop by our
12 dispatch center and get something because they used to be
13 dispatched out of Greenwood, but now they are dispatched,
14 the center is located in Greenville.

15 Q So if a city police officer had pulled somebody on
16 Main Street downtown they would use the same dispatch call
17 the sheriffs department would use to information about the
18 validity of a tag or a drivers license?

19 A Yes, sir. Everything would go through our dispatch.
20 Typically what our dispatch center does, is when they come
21 to work, one dispatcher is assigned to the sheriffs office
22 channel, one dispatcher is assigned to the city police
23 channel, one dispatcher is assigned to fire and EMS. The
24 dispatcher that gets the sheriffs office also gets
25 Prosperity and Whitmire.

1 Q The suspended license for Jalia Adams could be
2 anywhere from Whitmire to Prosperity to the city police to
3 the highway patrol to the sheriffs department?

4 A Exactly.

5 Q Do you keep a tally at the scene of cars that you do
6 cite. I understand if the car has a valid drivers license
7 and tag they go through and they are not really marked?

8 A There is not a tally kept on scene. If we issue a
9 citation, it is sheriffs office policy if you write a
10 ticket for anything or if you need to get a warrant for
11 anything, an incident report is required to go along with
12 that ticket. In order for that incident report there is a
13 case number, then at the end of the shift I can get what
14 is called a full shift summary and I can go through that
15 full shift summary because I have to account for every
16 report, it is part of my duty as a supervisor before I can
17 go home. And then we actually turn around and generate an
18 email because every deputy given kind of a synopsis of
19 what went on on shift so every deputy kind of gets an idea
20 of what we have done. If they don't assign the case
21 number, the case number is not here, they don't know what
22 officer ran it, I have no way of knowing. I am not
23 telling you our dispatch can go back and pull the
24 information but I can't.

25 Q What I have lettered B, appears to be a person named

1 Darashawn Destopa. And there was no violation listed on
2 that?

3 A Right.

4 Q That would indicate maybe an officer was suspicious
5 or wanted to investigate further?

6 A That is a possibility. It is also a possibility that
7 a lot of times our officers in the office that are
8 working, say, warrants or whatever, if we get a warrant on
9 someone they will check their drivers license, run it and
10 see if they can get an updated addresses, things like
11 that. There is so many things that NCIC is used for or
12 DMV is used for but every one of them has to be justified.
13 They also have to justify what they are doing but looking
14 at it I can't tell you whether this was from a traffic
15 stop or if it was an NCIC check, it could even possibly be
16 an employment check.

17 Q So on top of the traffic violation you could also
18 have investigators or process servers for the department?

19 A Yes, our civil process provision, anyone of them,
20 school resource officers, if school is in session, if they
21 have got a suspicious on school grounds they could turn
22 around and find it. Anybody that is there that doesn't
23 have a child for any reason. I mean, it is a great law
24 enforcement tool that is not just strictly to traffic
25 stops.

1 Q C would be a gentleman named Davon Lewis and it
2 indicates no driving violations?

3 A Right. And backing up to C, to reiterate your
4 statement and all. He was run at some point by his name
5 and date of birth, so there is a possibility, it looks
6 like they were having no match found. That he may not
7 have had his license on him so they run name and date of
8 birth. That is pure speculation.

9 Q If you don't have a drivers license is that grounds
10 to take custody, what would you do if somebody did not
11 have their drivers license?

12 A I will ask them for their name and date of birth, I
13 will turn them through DMV and then I am going to ask him
14 for their last four numbers of their social security
15 number. Because a lot of times that is indicated on some
16 of this as well. And then if that pops up or I can ask
17 for height, weight, other little factors that proves that
18 they are really who they say they are. I have in the
19 past, I will take my camera, take a picture of them, and
20 when they come to court they prove to me that is who they
21 are and they have got their license then I can nolle pros
22 the ticket and throw it out.

23 Q So if you had a person who drove through the safety
24 checkpoint and they did not have a physical drivers
25 license in their possession, you would ask them enough

1 questions until you had some kind of idea that you thought
2 they were pretending to be somebody else or whether you
3 thought they were genuine and didn't have a license?

4 A Yes, sir.

5 Q And if they didn't have their drivers license would
6 they always be cited?

7 A I can't tell you that it is always because I don't
8 always write people. I have written citations to people
9 and basically tell them, just like an expired tag, I tell
10 them, you are getting a citation. Do me favor and go get
11 it cleared up. I will be more than happy to tear the
12 ticket up because I am more interested in them being
13 lawfully on the highway versus getting a fine.

14 Q Now E, is Joseph Lindsey, no violations?

15 A It looks like he has had a prior violation.

16 Q But no current suspensions?

17 A Right.

18 Q F is Timothy Adams, also no current violations or
19 suspended?

20 A Yes, sir.

21 Q G is a little bit of a confusing one. It indicates
22 that it was for Saul Rodriquez but then a second name is
23 checked as Cruz Rodriquez?

24 A Yes, sir. This one is actually from the checkpoint.

25 Q What is the factor on that one?

1 A This was the gentleman cited for violating the
2 beginners permit and released and instructed to go
3 directly home and not drive the vehicle again until such
4 time he had a licensed driver with him or got his license.

5 Q And that is in the report by the Solicitor?

6 A Yes, sir.

7 Q And H would be a Jennifer Boyd?

8 A This would be in relation to Mr. Velasquez. The
9 female drivers, Ms. Ebony Maria Joyner--

10 Q No, I am talking about H, Jennifer Boyd?

11 A Yes, sir. That is the name that she gave Sergeant
12 Babb when she was giving false information about who she
13 was.

14 Q And in that one, Jennifer Boyd actually had a valid
15 drivers license, right?

16 A She did, indicates she is 5'2", hazel eyes, brown
17 hair and those were some factors that just didn't meet up.
18 And if I remember right, we were going to ticket her, she
19 was ticketed under Jennifer Boyd and then under the
20 fingerprinting process is when it was discovered that was
21 not who she said she was.

22 Q But in and of itself, Jennifer Boyd, if that name was
23 run would have come up as a person entitled to be driving?

24 A It is possible, yes sir.

25 Q If there are ten names given in those reports, three

1 of them would be listed as white or Caucasian drivers.

2 The report is listed with the race people called in to?

3 A Right.

4 Q And five would be African American or Black?

5 A I am going to assume you are right.

6 Q But you can look at those reports and determine the
7 race and sex of all the drivers, right?

8 A Yes, sir. You can determine the race.

9 Q And if I count Hispanic separately with the report,
10 it has a separate category, one of the nine was Hispanic?

11 A Yes, sir. But in the report he has also indicated as
12 a white because typically what you get into is Hispanic is
13 considered to be white versus black. But then when you
14 get into the ethnicity is when you, we would indicate a H
15 for being under the Hispanic ethnicity.

16 Q And the alcohol form seems to, black and white or
17 Asian and then a separate category for Hispanic?

18 A Yes, sir.

19 Q So if the people called in, one of nine would have
20 been Hispanic, just from the report that you have?

21 A Yes, sir. But again, what you have given me is kind
22 of misleading.

23 Q And slightly over half of them would be African
24 American of the names that were called in?

25 A What you gave me, yes sir, but none of these, not all

1 of these are related to our checkpoint.

2 Q Well, they may not be. You don't know how many of
3 them are not?

4 A I am fairly certain because if Jalia Adams came back
5 suspended she would, I would have a report here or there
6 would be a report dealing with a charge.

7 Q Does the sheriffs department have a standard
8 operating procedure for traffic safety checkpoint?

9 A Yes sir, we do.

10 Q And what is the form that you are looking at that I
11 handed up to you?

12 A This is operation order.

13 Q Does that govern how traffic safety checkpoints
14 should be maintained?

15 A Yes, it basically gives each officer an idea of the
16 problem, the procedure we go about and then things that
17 have to be followed as well as considerations.

18 Q Do you know when the sheriffs department came up
19 with, were you part of the--

20 A I was not part of the one that filled it out but I
21 have been there about 17 days shy of 21 years and as long
22 as I can remember we have had some form of an operation
23 order. I would say this one has at least been adapted or
24 changed since somewhere right around 2005 because the
25 sheriffs office did not start running radar until about

1 that time period.

2 Q And on the first page it lists the appropriate
3 locations for traffic safety checkpoints?

4 A Not necessarily appropriate but potential, possible
5 places we could set up but not limited to.

6 Q What does it say, is there a sentence leading up to,
7 page one lists, a long list of addresses for appropriate
8 checkpoints?

9 A You want me to read it from the top?

10 Q Is there a sentence, is there anything indicating why
11 those locations were chosen?

12 A It just says, the potential locations for checkpoints
13 have been established as.

14 Q Why do you think those locations were chosen?

15 A Because there are places, again, over time have
16 demonstrated a problem, either traffic, crime, other
17 things that dictated that we needed to set up there.

18 Q I am going to ask you, the location where your
19 checkpoint was set up is not one of the listed locations?

20 A Not on this form, no sir.

21 Q Okay. Can you, where it says once on the location,
22 the following procedures will be followed. Can you read
23 the following procedures that must be followed?

24 A It says every car will be stopped, the driver will be
25 requested to produce a valid drivers license, proof of

1 insurance, vehicle registration. Officers will also be
2 alert for any violations, local, state and federal law.
3 There will be a zero tolerance on all violations of law at
4 this checkpoint. No motorist should be detained more than
5 one minute without probable cause for a search or arrest.

6 Q But, again, none of the officers are keeping a tally
7 on how many cars they stopped?

8 A Not as far as like somebody sitting there making one,
9 no sir.

10 Q Right. They might be, memorizing but they are not
11 making a physical tally of people?

12 A Right.

13 Q Is there anybody monitoring, if a stop is taking
14 particularly long, before the cars are stopped are they
15 stopped in the middle of the road or when are they pulled
16 over to the side?

17 A Initially they pull up, they are still in the lane of
18 traffic. We ID the driver, check the tag. As long as
19 there is nothing that indicates that we need to hold them
20 up any further, we give them their license back and they
21 are allowed to leave. Typically takes really no more than
22 thirty seconds or more to detain somebody.

23 Q And who is responsible for making sure that the
24 length of time is kept?

25 A Every officer knows that if they have got a violation

1 then we get them off to the side of the road. If it is a
2 DUI we get them out right there. You make a charge, you
3 move the vehicle, you don't allow them to or get another
4 officer to move it. DUS's, everything else, we get them
5 off to the side of the road.

6 Q But as far as how long they are initially detained,
7 it is up to each officer to basically keep his own flow
8 moving?

9 A Well, we are kind of in a nucleus right together so
10 we are going to keep it rolling. And if I think an
11 officer is taking a little bit long, I will ask, what have
12 you got. And if they have got a violation or dispatch may
13 be taking a little long to get the drivers license,
14 whatever number they are checking for then we have them
15 pull over to the side of the road so we don't interrupt
16 the flow of regular traffic.

17 Q But your supervision also, you can also stop a car
18 yourself?

19 A Yes, sir.

20 Q Both supervision--

21 A Even on regular road patrol, as supervisor, I am
22 entitled, I am in task with the same job that all of my
23 deputies are but at the same time I have to control what
24 is going on with the shift.

25 Q Now, if people didn't have drivers licenses but they

1 provided sufficient, an indication to you that they were
2 who they said they were or that they were licensed. You
3 were saying that you may let those people through?

4 A There has been occasion that we have. If there is an
5 extreme number of vehicles but typically we will also
6 write them and then allow them to come to court.

7 Q But technically that would violate the standing
8 office of orders that all cars with a zero tolerance,
9 would that seem to at least be inconsistent with that?

10 A Somewhat, yes sir.

11 Q So there is some discrepancy for the supervising
12 officers or even arresting officers for citations or
13 arrest?

14 A Yes, sir. Everything you have got rules and then you
15 have got, you know, things you have to do to stay as close
16 within the rules as possible without violating them.

17 Q Okay. At this time, the report, the final report
18 would be turned into Lieutenant Eigner?

19 A What that refers to is this form here, once this form
20 is completed at the end of the shift then we basically, my
21 shift, we take one copy and put it in Lieutenant Eigner's
22 box. And we maintain one especially if is something, you
23 know, a report of whatever. We maintain a copy and then
24 we also make sure Lieutenant Eigner gets an original copy.

25 Q And it indicates that all violations will be

1 documented by a report?

2 A And that is what all of these are.

3 Q And so we have got the incident report with this
4 Hispanic male with a violation of a permit and we have got
5 the incident report for the Kim Dawkins?

6 A Yes, sir.

7 Q And she had both, grounds to be arrested on the scene
8 as well as outstanding warrants?

9 A Yes, sir.

10 Q And it was really outstanding warrants?

11 A If I remember right, I was not out on the scene for
12 that one but if I remember right it was a deal where they
13 took her into custody because she was wanted and then a
14 search incident to arrest they found narcotics.

15 Q And the report also indicates that the officer on the
16 traffic safety checkpoint will be alert for any violation
17 of local, state and federal law?

18 A Yes, sir.

19 Q Which is basically for traffic but also there for
20 general crime?

21 A Yes, sir.

22 Q And so an officer should familiarize themselves with
23 the Newberry County Sheriffs Office Policy Manual?

24 A Yes, sir.

25 Q Is that document with you?

1 A No, sir. Our policy manual is probably consistent
2 with a couple of hundred pages.

3 Q Okay. And are the officers, how often would deputies
4 go over the policy manual?

5 A Each officer is issued a policy manual and then every
6 year each officer is basically given a test on the policy
7 manual.

8 Q So that would be a yearly?

9 A Yes, sir.

10 Q If you didn't pass it what would happen?

11 A I am not sure, Mr. Verner, I am sure there would be
12 some restraining or something dealing with that but that
13 is actually a question that our training officer would
14 have to answer.

15 Q And deputies should review the Newberry County
16 Sheriffs Office use of force policy?

17 A Yes, sir. That is contained within the policy
18 procedure manual.

19 Q That is something kind of independent of the traffic
20 safety checkpoint. That is something that you would have
21 to go over yearly?

22 A Yes, sir.

23 Q And then the officer should review the Newberry
24 Sheriffs Office Pursuit Policy?

25 A Yes, sir.

1 Q Is that also part of the general manual?

2 A Yes, sir. That is part of the general manual.

3 Q And do you have training on that on a regular basis?

4 A Yes, that is actually included in with the, the use
5 of force and training manual are all into one, integrated
6 into that one test that we take every year.

7 Q And it says the officer should be aware of the
8 Michigan v. Sitz case?

9 A That is up to the officer to read and stay abreast
10 on.

11 Q Do you recall going over with any troopers what the
12 Michigan v. Sitz case is about?

13 A I do not recall right off.

14 Q It says the deputies should review the Terry Doctrine
15 and any other applicable governing law. Do you recall
16 having any kind of meetings discussing the Terry Doctrine?

17 A I don't recall having meetings on it, Mr. Verner.
18 Like I say, each one of my officers are tasks with certain
19 amount of stuff they have to do on their own. And it is
20 up to me to lead them but not necessarily hold their hand
21 and make sure they read every little work of stuff.

22 Q And finally says deputies should be basically aware
23 of applicable search and seizure laws?

24 A Yes, sir.

25 Q Are there separate classes for those, search and

1 seizure or is that in general training?

2 A It is general training.

3 Q And it includes a declaration. It is a declaration
4 of the Newberry County Sheriffs Office that we have
5 complied with the requirements set forth in Michigan v.
6 Sitz to conduct a traffic safety checkpoint. We have
7 established an operation order with the clear expectation
8 and guidelines, we have established a need, reason and
9 purpose for the checkpoint and we have published the times
10 and location of the checkpoint to the print, radio or
11 television outlets for this area. Now, I think we went
12 over the operation order and you testified a little bit
13 about the need or reason for this checkpoint?

14 A Yes, sir.

15 Q And I think you, on the third prong that there was in
16 your knowledge no advance notice of this checkpoint other
17 than the signs?

18 A Not at that exact location.

19 Q And I will make this a Court's exhibit if I may.

20 (Whereupon, Court's Exhibit 4 was marked for
21 identification only.)

22 Q Lieutenant, I am going to hand you what appears to be
23 a NCIC check report. Is that what that is?

24 A Yes, sir.

25 Q And that would be on Derrick Velasquez on May 1st?

1 A Yes, sir.

2 Q And just, what time did the dispatch report, that
3 there was the Maryland warrant on him?

4 A It indicates here about 11:20 a.m.

5 Q Do you know if he was still on the scene at that time
6 or was that conducted after he was back at the detention
7 center?

8 A I can't tell for sure that he was on the scene, he
9 may have already been taken to jail at that time.

10 Q I am going to hand you the dispatch call history.
11 What time does it indicate that the wrecker arrived on the
12 scene?

13 A It indicates the wrecker service was on scene at
14 11:49.

15 Q And so the car, do you recall towing any other cars
16 other than the Valesquez's vehicle?

17 A I can't tell you if the Jeep was towed or not but as
18 far as me personally, no, this was the only vehicle that
19 day that we towed.

20 Q And the Jeep stop was actually slightly earlier?

21 A Yes, sir.

22 Q Who went with the vehicle to the tow yard, did you
23 go?

24 A No, sir. What we did, because we had Mr. Davis with
25 us, Davis was in training, he was a certified law

1 enforcement officer but was still undergoing some field
2 training. We allowed him, if I remember correctly, to
3 drive Sergeant Babb's vehicle and transport one of them to
4 the county detention center. I don't recall if he
5 transported the male or the female. At that point
6 Sergeant Babb rode with Deputy Rembisz and they were in
7 front of Leo's tow service, I was behind them in the tow
8 service and using my camera to take pictures from the back
9 of the vehicle as we progressed to Leo's to show that we,
10 at no point, was out of sight of that car.

11 Q So between 9:30 and 11:00 your report indicates you
12 estimate that 100 vehicles passed through that location?

13 A It was actually, like I said, it was probably a
14 little bit before 9:30 and then I had to look again at the
15 call log as to what time we started dealing with Mr.
16 Velasquez.

17 Q If I submit to you that the incident report says 9:39
18 was when he approached the traffic checkpoint.

19 A That is very possible. In fact if I recall, I was
20 actually trying to deal with the Hispanic with the
21 violation, with the beginners permit. I was dealing with
22 him at the point where they actually pulled up. Once we
23 realized it was a violation with the driver not having her
24 license on her and getting her to pull to the side and the
25 detection of marijuana was probably about the time that

1 card was actually started.

2 Q And I am going to hand you Deputy Babb's incident
3 report and you were the supervising officer for this
4 report?

5 A Yes sir, I am.

6 Q What time does it indicate that the dispatch or the
7 Velasquez reached the traffic safety checkpoint?

8 A The indicated dispatch time is 9:37.

9 Q And is that the time that he was likely to have
10 reached the checkpoint?

11 A I would say within five to ten minutes of that time
12 for the simple fact that, you know, we were dealing with
13 things and then once we realized that we needed an actual
14 card that is going to require a case number then at that
15 point we are advising dispatch we need that card started.

16 Q So, once Mr. Velasquez was arrested on the scene did
17 the traffic safety checkpoint continue on or was that
18 pretty much, I thought you indicated earlier that is when
19 we decided--

20 A Once the odor of marijuana was detected and then
21 Sergeant Babb was getting to speak to her I had to go over
22 to basically, for officer's safety reasons, watch Mr.
23 Velasquez while he was trying to interview the driver.
24 So, yes sir, at that point the safety checkpoint for all
25 practical purposes stopped because I had no manpower of

1 officers to check cars.

2 Q It would be you and Deputy Babb would stay at the car
3 and the other officers would have assisted you?

4 A Once they got back, they were all still tied up with
5 the Jeep at that time.

6 Q And that would have been y'all's primary concern up
7 until it indicates, the wrecker arrived at 11:49, 11:49 is
8 what time the wrecker arrived?

9 A Yes, sir.

10 Q So from the time, basically that Velasquez was
11 stopped until the wrecker arrived on the scene, and even
12 after the wrecker left several of you followed the wrecker
13 to maintain the custody?

14 A Yes, sir.

15 Q That is basically what time the traffic safety
16 checkpoint broke down?

17 A Again, technically would have stopped the moment that
18 I had to stop checking cars and go to help Sergeant Babb
19 because there was no one to check cars, for an officers
20 safety issue. To tell you the exact time I couldn't tell
21 you because--

22 Q Well, without telling me the exact time but once you
23 decided that you got a big enough case that you can call a
24 narcotics officer, Mr. Stibble, that was the fact, as a
25 matter of fact that was the time that the traffic safety

1 checkpoint really seized?

2 A Yes sir, at that point it was completely over because
3 the other deputies were still tied up and then they had to
4 do transports and we actually had to shuffle some officers
5 around so we could do what we needed to finish up with Mr.
6 Velasquez and the driver.

7 Q And how many deputies accompanied the wrecker?

8 A It was a total of three because Sergeant Babb gave up
9 his regular assigned vehicle so that Deputy Davis could
10 transport one of them to jail. I believe, I can't
11 remember if he took one to jail and came back and got
12 another one or exactly what we did. But Deputy Rembisz
13 and Sergeant Babb, if I remember correctly, were in her
14 car and then I was behind them in my car following them,
15 they were in front of the wrecker, I was behind the
16 wrecker.

17 Q And that is just to maintain custody of the car and
18 prevent people from going in or out?

19 A Right. Two units were used, one in front and one in
20 behind. I was in the vehicle behind it, again Sergeant
21 Babb and Deputy Rembisz in front of it.

22 Q And one or two of the other units would have taken
23 the suspect to the detention center?

24 A Yes, sir.

25 Q So that basically accounts for everybody at the

1 roadblock?

2 A I can't tell you who took the female and then either
3 came back for him or exactly how that was done. But I do
4 know that Deputy Davis, I mean, yes, Deputy Davis used
5 Sergeant Babb's truck and Sergeant Babb became a passenger
6 in Deputy Rembisz's car for a short time.

7 Q I want to move now to the actual arrest of Mr.
8 Velasquez.

9 THE COURT: Let's take a break.

10 MR. VERNER: Procedurally, Your Honor, that would
11 wrap up my questions as far as, I guess, the traffic
12 safety checkpoint. And I would intend now to move on to
13 the search of the defendant and the bag.

14 THE COURT: Let's take about ten minutes.

15 (Whereupon, a short break was taken.)

16 CONTINUE CROSS-EXAMINATION

17 By Mr. Verner:

18 Q I want to turn now to your interaction with Derrick
19 Velasquez, not the roadblock itself. Tell me again, were,
20 you were not the officer who stopped the car driven by
21 Ebony Joyner?

22 A No, sir. That was Sergeant Babb that had the initial
23 interaction with Ms. Joyner.

24 Q And at that time it was just the two of you deputies?

25 A Yes, sir.

1 Q That involved the apprehension of the third party,
2 Kim Dawkins lady, correct?

3 A Yes, sir.

4 Q And you would have been doing one lane of traffic and
5 how far away would Babb have been from you?

6 A He was pretty much beside me and just facing the
7 opposite direction.

8 Q What was your involvement with this car?

9 A I was interacting with another vehicle. The vehicle
10 came up, kind of behind me--

11 Q You are talking about the vehicle, you are talking
12 about your car or the other car?

13 A The car being driven by Ms. Joyner.

14 Q Okay.

15 A At that point I thought I caught the whiff of
16 marijuana and I did turn around but I was also still
17 interacting with the vehicle. Then within a matter of
18 moments Sergeant Babb asked me if I could step over and
19 see if I smelled marijuana like he did from the car. I
20 told him that I smelled it when it came by. I then
21 finished up with the interaction that I had with the
22 vehicle I was dealing with. And at that point, walked
23 over with Sergeant Babb and when he got to the point that
24 he was ready to pull Ms. Joyner out and talk with her
25 because I suggested let's get them separated so that we

1 can talk with them individually. He carried Ms. Joyner
2 back to the front of his truck which was only about four
3 to five feet behind where Ms. Joyner pulled the black
4 Nissan over--

5 Q Do you know why he had pulled Ms. Joyner out of the
6 car?

7 A Why?

8 Q Why he had asked the driver to--

9 A So he could interview her separate than Mr. Velasquez
10 after smelling the odor of marijuana coming from the car.

11 Q So you could clearly smell marijuana or what you
12 believe to be marijuana at that time?

13 A Yes, sir.

14 Q And I am sure, as a 21-year deputy officer that you
15 have smelled marijuana probably thousands of times?

16 A Roughly, yes sir.

17 Q Pretty much you know it when you smell it, right?

18 A Yes sir, kind of like burning rubber.

19 Q And that would be grounds to arrest either the
20 passenger or the driver at that time, not the smell of it
21 but the fact that you could smell marijuana and then find
22 the marijuana?

23 A Yes, sir.

24 Q But that would be an arrestable offense?

25 A Yes, sir.

1 Q Did you do any part of the interview with the driver?

2 A I did not. Sergeant Babb, again, took her back to
3 the front of his vehicle. At that point I went around to
4 the passenger rear side of the black Nissan which is where
5 Mr. Velasquez was sitting, positioned myself and was
6 actually my back to Ms. Joyner and Sergeant Babb so that I
7 could watch Mr. Velasquez as a matter of officers safety.

8 Q At that time it was just limited to officers safety,
9 just keeping an eye on everybody?

10 A Yes, sir.

11 Q Could you smell marijuana from where you were
12 standing?

13 A At that point I did not but I was not right up on it,
14 I was standing back so I could still see Mr. Velasquez
15 through the back window, I could tell that he was leaning
16 over so as to put himself right up next to the window,
17 granted when he pulled up he acted like he was asleep. I
18 did see him laying over on the seat. When Sergeant Babb
19 spoke to him I would see him look up as if, you know, he
20 was just laying his head over but not asleep. But when,
21 like I said, that was on the initial. When Sergeant Babb
22 was speaking to her I heard Sergeant ask her about the
23 detection of the smell of marijuana coming from the
24 vehicle. And at that point that is when Mr. Velasquez
25 made the statement that they had smoked a little bit

1 earlier, pulled up the ashtray, showed it to me with the
2 top off and I could see the two, what we call roaches of
3 marijuana in the bottom of the ashtray.

4 Q And that was initiated by Mr. Velasquez overhearing
5 Deputy Babb?

6 A Yes, sir.

7 Q Was the car on or off at that time?

8 A I do not recall, I want to think the vehicle was off
9 because typically if we really believe that we are about
10 to get into something with a lot of potential there I
11 usually will ask them to cut the car off and pull the keys
12 out of the switch. Again, as a matter of officers safety,
13 I have had too many take off and nearly run over my toes.

14 Q Did you hear what the driver of the car, if anything,
15 about, when asked about marijuana?

16 A I did not, again all of my focus was on Mr. Velasquez
17 and then when he made the statement that they had smoked
18 some earlier and showed me the two partial roaches in the
19 bottom of the ashtray, at that point it looked like he was
20 about to spill and I actually told him not to spill it and
21 took the ashtray from him, recapped it, set it on top of
22 the car. And at that point I had Mr. Velasquez step out
23 of the car and he was immediately placed in handcuffs.

24 Q Did you see where he had taken the blue plastic cup
25 from?

1 A I did not. Like I said, I was, enough back that I
2 could see if shoulders were to dip or where his head went,
3 I did not see what was in his hands or what he was doing
4 at that point. But based on the fact that it was in that
5 ashtray I believe him and Ms. Joyner were both charged
6 under constructive possession.

7 Q And was there any kind of cover over the blue cup?

8 A When he showed it to me it was not. He had it turned
9 over, it was to the point it was about to spill.

10 Q There was a cover, it was just in the open position?

11 A Right, right, it was open because I could easily see
12 the two roaches. It looked like that they were about to
13 spill about from the angle he had it so I took it from
14 him, capped it and put it back on top of the car.

15 Q Do you recall how large the roaches were or how would
16 you describe?

17 A They were very small, maybe a half inch,
18 three-quarters, if I remember correctly. They weren't,
19 not like what we would call a joint, it was, you could see
20 it had already been smoked.

21 Q If he had admitted smoking marijuana in the past,
22 that that would not have been an arrestable offense?

23 A No, sir. It is not illegal to smoke marijuana, it is
24 illegal to possess it.

25 Q Did you do anything to verify that once you saw the

1 cup, it was actually marijuana?

2 A Just based on my training, past experiences of what
3 it looked like when he showed it to me, him telling me it
4 was marijuana. At that point I went ahead, like I said,
5 tried to secure it and take him into custody.

6 Q And what specially that you said that he said, as
7 best you can in his words what he said.

8 A Just, he said we smoked some earlier and held the
9 ashtray up so that I could see it.

10 Q Was there anything else in the cup other than the
11 roaches?

12 A If I remember right there was some type of pink
13 looking, either pink or purple looking material that
14 actually I wasn't exactly sure what it was. And then, of
15 course, some ashes. But there some type, I can't remember
16 if it was pink or purple, but it was kind of a loose,
17 almost the consistency of like vermiculite if you had it
18 in soil.

19 Q Is it possible that he said she had smoked some
20 earlier, are you sure of what he said?

21 A No, sir. I am certain he indicated that he had
22 smoked some marijuana earlier.

23 Q And so what did you do, did he hand the blue, he was
24 still in the car at that point?

25 A He was still seated in the car, he held it up. The

1 window, I think, about half way down, he held it up.

2 Q The door was completely closed?

3 A The door was shut at that point, the window was half
4 down, he was leaning over to be able to hear what was
5 going on. When he indicated that they had smoked
6 marijuana and showed me the roaches I immediately took
7 those from him, set them on top of the car, pulled him
8 from the vehicle, placed him into handcuffs. We took
9 about two, three steps back, started patting him down and
10 that is when, like I said, I found the bag of crack
11 cocaine in his right front pocket along with the cash.

12 Q Was your intention to, and I am not sure, if somebody
13 had a small amount of marijuana on them, does that require
14 you to take them to the detention center or can you blue
15 ticket that?

16 A I am not going to tell you by State law it is
17 required but it is my general practice that if I get
18 marijuana, then yes sir, they go to jail.

19 Q So that is not, that you would blue ticket for--

20 A -- from my personal experiences, no sir.

21 Q Do you know if there is a policy if the sheriffs
22 department has on that or has anybody explained this is
23 how we are going to handle these type?

24 A No, sir. Typically, we have a lot of officers issued
25 out to them, sort of cheat sheet with a lot of the

1 charges. The State law, what the recommended fine is.

2 And typically has in quotations RJ which means recommended
3 jail.

4 Q So there could be some scenario where you would just
5 determine that just to blue ticket somebody if it was, but
6 that is against your general inclination?

7 A Yes, sir. I can tell you that one-hundred percent of
8 the time, Mr. Verner, that I have charged people simple
9 possession and arrested them. Sometimes there are
10 extenuating circumstances where perhaps, you know, I will
11 still write them a ticket but not necessarily jail them.
12 But, like I said, in this case he indicated that they had
13 smoked marijuana, showed them to me, I got him out, placed
14 him in cuffs and then started patting him down is when I
15 found the crack.

16 Q Now, if I can approach. And I understand Deputy Babb
17 did the incident report, the primary incident report on
18 this one.

19 A Yes sir, he was the initial reporting officer.

20 Q And you would have supervised his incident report?

21 A Yes, sir. I typically sign off on them.

22 Q What does he indicate about the use of drugs, as far
23 as Mr. Velasquez?

24 A When we go through doing reports there is a place to
25 check, but if we don't know for a fact that they are we

1 don't typically check yes. He indicated that he had been
2 but to say that he definitely was--

3 Q But the, just in summary the incident report he is
4 not using drugs?

5 A By that, yes sir.

6 Q And I understand that is inconsistent to what you
7 testified to but that was Deputy Babb's interpretation of
8 his incident report?

9 A Yes, sir. I can testify to what he told me, and
10 again, it is not illegal to use drugs, it is illegal to
11 possess them.

12 Q Do you recall what the weather was on this day, May
13 1st?

14 A I can't tell you temperature wise but it would have
15 certainly been, to my knowledge, it was sunny.

16 Q It would not be a rainy day?

17 A No, sir.

18 Q Do you recall what Mr. Velasquez was wearing?

19 A I do not.

20 Q Do you know if he was wearing long pants or short
21 pants?

22 A I do not recall directly, I want to think long pants
23 but I am not positive.

24 Q Do you recall whether he had any kind, outer clothing
25 like a light jacket or a sweatshirt or any type?

1 A Again, I don't recall.

2 Q Do you recall whether he had a hat, a head item on?

3 A I don't recall. I don't think he did, he had his
4 head laid over on the door frame initially but I don't
5 recall.

6 Q And in candor, I am assuming you make several arrests
7 per day as a deputy?

8 A I can't say I make an arrest every day but over the
9 21 years, yes sir, I have had my fair share.

10 Q Okay. Tell me again how you pulled him out of the
11 car?

12 A Once he indicated he had smoked marijuana and showed
13 me the roaches so that I knew that he was still in
14 possession of some form of marijuana. I took those from
15 him, secured them on top of the car and got him out,
16 immediately handcuffed him and then began to search him
17 pursuant to the arrest for simple possession.

18 Q At that point had you told him what he was being
19 arrested for or you were going to conduct a pat down first
20 prior?

21 A I don't recall for sure if I told him. You know, he
22 is definitely under arrest, I turn him, I told him to turn
23 around and put his hands behind his back and then cuffed
24 him.

25 Q Do you know if Ebony was under arrest at that point,

1 the driver?

2 A She was not immediately placed into custody. But she
3 was shortly thereafter placed in handcuffs as well.

4 Q Tell me what items you specifically found or recall
5 specifically finding on the person of Derrick Velasquez?

6 A When I began to search him after cuffing him, in his
7 right front pocket was a bag that contained white
8 rock-like substance that I believed to be crack cocaine
9 and he also had \$436.00 dollars in cash in that same
10 pocket. The rest of his, whatever was in his pockets I
11 don't recall.

12 Q But that is the only contraband you remember taking
13 from him?

14 A Yes, sir.

15 Q What did you do with the contraband after you pulled
16 it off of him?

17 A Initially when I took it off of him, I actually
18 placed those things into the cargo pants pocket of my
19 pants in order to secure them until such time as I could
20 get back to my patrol car and they were secured inside of
21 my car.

22 Q So you would have put the stuff in the your pocket,
23 your cargo, your pants?

24 A Yes, typically my right, I am left handed, my right
25 cargo pocket. The only thing in that pocket is a set of

1 keys which is my spare keys and I keep that pocket empty
2 for that reason.

3 Q And then what did you do?

4 A Again, once he was secured and I knew that
5 everything, officer safety wise was okay then I went and
6 secured the money and the crack and all, cocaine, on the
7 back seat of my patrol car. My patrol car has a function
8 where I don't have to use the keys to enter the car or
9 exit the car, as long as they are on me I can hit a
10 bottom, unlock the car, put that in there, hit the button
11 and the car locks. As long as I am not right there at the
12 car, the car won't unlock for anybody.

13 Q Was he taken back to the car, when you said he was
14 secured what does that mean?

15 A He was secured into a vehicle, I don't recall if I
16 put him in mine or exactly whose car we put him in.

17 Q You recall ever reading his Miranda rights to him?

18 A I did not read those. After the crack and all was
19 found, Sergeant Babb Mirandized both of them together. I
20 believe originally Ms. Joyner was Mirandized initially.
21 Once we found the crack Mr. Velasquez was Mirandized but
22 it was almost, like the moment he asked about the
23 marijuana that went straight into the crack and all
24 because I got him out to cuff him and found the crack. He
25 was immediately, like I said, at that point Sergeant Babb

1 Mirandized both of them.

2 Q You say as soon as you saw the roaches you believe
3 you had probable cause to arrest him based on the
4 possession of marijuana?

5 A Yes, sir.

6 Q And then when you found the crack cocaine you
7 believed you had probable cause to arrest him for
8 possession or more of the cocaine, the crack cocaine on
9 him?

10 A That's right. At that point I felt like at the very
11 least it was possession with intent to distribute.

12 Q And then you put him in the back of a patrol unit?

13 A He was actually standing right at the back corner of
14 the car, once I got him out and cuffed him and found the
15 crack and at that point, I mean, we had seen the bag that
16 he was trying to stuff under the seat.

17 Q That is the question I am trying to get to. But when
18 did you search the car?

19 A While he was standing right there with me, I didn't
20 actually search the car itself. Once I found the crack my
21 hands were on him and then I was holding onto to him and
22 watching Ms. Joyner and that is when Sergeant Babb started
23 in his general area where he was sitting. And then that
24 is when, he pulled the bag and immediately upon opening it
25 saw the magnitude of cocaine.

1 Q So you physically didn't search the contents of the
2 car?

3 A I did not until after the search warrant was
4 obtained.

5 Q Okay. But Deputy Babb came over and he conducted a
6 preliminary search?

7 A At that point just, and the exact immediate area
8 where Mr. Velasquez was seated he did check that and that
9 is when the, he pulled the book bag he was trying to stuff
10 under the seat.

11 Q Had you pointed out the backpack under the seat?

12 A At that point, no sir. I mean, it was pretty much
13 kind of bam, bam and we had it.

14 Q That would have been personally observed by Deputy
15 Babb?

16 A Yes, sir.

17 Q Where was Ms. Joyner during the search, when Deputy
18 Babb came over and searched the car what did he do with
19 Ms. Joyner?

20 A She was instructed to continue to stay at the very
21 front corner of his truck, his patrol truck. At that
22 point, again, I had my hands on Mr. Velasquez watching her
23 and she was instructed to keep her hands out of her
24 pockets where we could see them.

25 Q Now, tell me about what you saw as far as the

1 searching of the car?

2 A I remember, like I said, Sergeant Babb--

3 Q Had he gone through the passenger, back passenger
4 door where you pulled Mr.--

5 A --yes sir, that back door was still open.

6 Q The same door that Mr. Velasquez came out of is where
7 Deputy Babb would have entered?

8 A It is my practice, when I pull somebody out of a car,
9 I don't allow them to get away from the car, I kind of
10 keep them cornered in that triangle because that way they
11 have only got one option, or two options. That is either
12 to consent to my cuffing or they have got to go through me
13 and at least at that point, I have got a decision of
14 grabbing them before they have a chance to run or get
15 away.

16 Q Tell me about Deputy Babb searching the back of the
17 car?

18 A Again, I had Mr. Velasquez, I recall him bending
19 over, stooping into the back seat of the car. Almost
20 immediately he told me he had more drugs and that is when
21 he had pulled the backpack from under the seat where Mr.
22 Velasquez had stuffed it, opened it up, saw what we had,
23 immediately stopped and called for investigations for a
24 search warrant.

25 Q The backpack was not immediately apparent to you?

1 A Not immediately apparent to me but I was not checking
2 the vehicle at that point. Again, my eyes were on Mr.
3 Velasquez, at the point he showed me the marijuana and
4 then my objective at that point was to get Mr. Velasquez
5 into handcuffs, for officers safety. I was searching him
6 when I found the drugs and indicated to Sergeant Babb that
7 I had drugs because at that point it can escalate even
8 from not so much from Mr. Velasquez's position but
9 including Ms. Joyner because we don't know if she knows
10 the drugs are there or if she doesn't.

11 Q But it is clear that after Deputy Babb had gone in
12 that neither defendants were in custody or control of the
13 vehicle?

14 A As far as that goes, I mean no sir, she was at the
15 very front of his car, and I had Mr. Velasquez handcuffed.

16 Q So at the time Deputy Babb found the bag the car was
17 completely under the control of law enforcement at that
18 point in terms of having access to it?

19 A Other than at that point and time we can't know for
20 sure that we had anything on Ms. Joyner, was still
21 following up on the drivers license. Of course, she was
22 looking at the marijuana charge.

23 Q And prior to Deputy Babb's search, at the very least
24 you had made the decision to arrest Velasquez?

25 A Once he showed me the marijuana, yes sir.

1 Q What about Ms. Joyner?

2 A We were still working through that because we were
3 still trying to determine exactly whether he was in the
4 full physical possession of the marijuana or if it was
5 just being kept in the ashtray in the car.

6 Q But there, there was at least enough evidence to
7 charge her if you wanted to based on the fact that you
8 found marijuana in the--

9 A At that point in time, again, Mr. Velasquez was still
10 in physical possession of the marijuana because it was in
11 the ashtray in his hand. We didn't necessarily have
12 anything on Ms. Joyner at that particular moment. It was
13 late determined that there was going to be a constructive
14 possession of the marijuana.

15 Q And I assume Deputy Babb said, I found something or
16 he indicated to you?

17 A He indicated he did and we immediately both agreed
18 that we needed to just go ahead and stop the search and go
19 ahead and call Sergeant Stribble because we knew we still
20 had the rest of the vehicle. So we went ahead and stopped
21 because at that point we were also getting outside of the
22 area of the immediate control of Mr. Velasquez.

23 Q Now, did others officers arrive to search the
24 vehicle. Was the vehicle searched before it was towed off
25 with the tow truck?

1 A No, sir. The moment that we saw the cocaine in the
2 book pack all searches ceased, some photographs was done
3 of the vehicle, just the inside, I can't even say for sure
4 we photographed the inside of the book bag. But at that
5 point we notified Sergeant Stribble, or excuse me,
6 attempted to notify Sergeant Stribble and I believe he was
7 in court with the Grand Jury if I remember right. And had
8 to notify Lieutenant Lominick. A short time later
9 sergeant Stribble contacted me, I told him what I had
10 because at first he was telling me he might not be able to
11 come and I told him we definitely need him and gave him an
12 idea of how much we were looking at and the volume of
13 drugs. And a short time later he arrived and proceeded
14 for the search warrant. We waited for the wrecker service
15 and followed it and photographed it from where we left on
16 76 until we got his tow service.

17 Q Did you help Officer Stribble search the vehicle?

18 A When we got it to the impound lot and the search
19 warrant, yes sir, I did help. At that point I believe my
20 area was, I did search some of the trunk and I searched
21 the front drivers side seat and center console.

22 Q And your report indicates that, you report in the
23 center console and you found a grinder?

24 A Yes, sir.

25 Q What is a grinder?

1 A There are various shapes. This particular one was
2 round, you open it up, you can put the marijuana inside of
3 it, it has got little spikes sticking up and then as you
4 turn it it tends to cut the marijuana stems and pieces
5 down to the point it becomes almost the size of like
6 tobacco for a cigarette so that it can be rolled up and
7 smoked.

8 Q Are those immediately apparent to you what they are
9 or do you have to look at them?

10 A Typically once I see one, no sir, I have to kind of
11 look at it a little bit and see if the top comes off. And
12 then once it comes off and all then I can actually tell if
13 that is what it is. I knew this one was a grinder for
14 marijuana because there was actually some marijuana
15 residue inside of it.

16 Q And I think you indicated this one had a peace symbol
17 on it?

18 A It did.

19 Q Do you recall finding anything else in the vehicle.

20 A Without checking my notes on my report I can't say
21 there was anything else that I personally found.

22 Q Do you recall finding any kind of photograph
23 container with marijuana in it?

24 A I do not. I believe the photograph container you may
25 be talking about, we will occasionally take the old

1 cannister that the old 35mm film is in and sometimes place
2 marijuana in that so that we can keep up with it if it is
3 a small piece of it so that we don't lose it for
4 evidentiary value.

5 Q So the black photograph cannisters are law
6 enforcement cannisters?

7 A Yes, sir.

8 Q That you use?

9 A Right, so that we don't lose pieces of marijuana.

10 Q I believe you indicated you found \$436.00 dollars in
11 cash in Mr. Velasquez, on his person?

12 A Yes, sir.

13 Q And you found the plastic bag containing the crack
14 cocaine?

15 A Yes, sir.

16 Q And I think you indicated that he had handed you the
17 blue ashtray?

18 A Yes, sir.

19 Q Now, where did you find the grinder. Did you find
20 the grinder on his person of Mr. Velasquez?

21 A No, sir. The grinder was actually found during the
22 search of the vehicle after the search warrant was
23 obtained and that was found, if I remember correctly I
24 believe it was in the center console.

25 Q And do you recall finding more than two roaches of

1 marijuana?

2 A I do not recall more than just the two that were in
3 the, again, I would have to go back and read the report
4 but I want to think the two roaches were both inside that
5 ashtray.

6 Q And is it possible that you put those in a black
7 photograph container?

8 A Yes sir, it is very possible, in order to keep from
9 losing.

10 Q Did you take the keys of the vehicle that was
11 stopped, Ms. Ebony Joyner?

12 A I don't recall but it is not uncommon for me to ask
13 the driver to cut the car off and ask them to hand them to
14 me and put them on top of the car if I think there is a
15 possibility that they are going to try to drive off or do
16 something that could injure one of our officers.

17 Q If your report indicates that you were the one
18 maintaining physical custody of the key fob until the
19 search warrant was executed, is it possible that you did
20 activate the key?

21 A That is possible. Again, my car operates a lot the
22 same way as this Nissan would. My patrol car has a key
23 fob that I can walk up to my car, never take the keys out
24 of my pocket, I can unlock my car, I can get in and start
25 my car and then I can actually get out of my car and push

1 a button and it locks my car down and no one can get into
2 without me ever having to take the key fob out of my
3 pocket. And it is possible, like I said, that I secured
4 that fob until such time as a wrecker service arrived and
5 then I may have let him use it long enough to load the
6 vehicle, staying with me and then resecured that fob so
7 that no one could enter that vehicle and it stayed locked
8 until such time as that search warrant was obtained.

9 Q Is it possible that you also took his drivers license
10 from him as well, from him, Mr. Velasquez?

11 A That is certainly possible.

12 Q Did you notice any problems with his identification
13 that he had handed you?

14 A I don't recall, Mr. Verner, but at the same time he
15 would not have been charged with any traffic offense off
16 of his license because he wasn't the driver.

17 Q Thank you.

18 REDIRECT EXAMINATION

19 By Mr. Scott:

20 Q What would you say the average time each motorist was
21 detained?

22 A 30 seconds to a minute unless there was some
23 indicator that there was a problem.

24 Q Thank you, that is all I have.

25 MR. SCOTT: Judge, I have got Sergeant Babb here, I

1 feel like most of his testimony would largely be
2 redundant. But certainly if the Court has any questions,
3 I think we have pretty much, at this point, established
4 the legality of the search. I am prepared to argue. The
5 statement, there is nothing, as far as Denno, I think the
6 testimony was that in speaking with codefendant, officers
7 asked her, tell me about the weed. He voluntarily, he is
8 not in detention at that point, but the testimony is he is
9 still in the back of the car so there is no containment to
10 arrest at that point. The codefendant is asked, he kind
11 of says right then, I just smoked some marijuana. And I
12 think that statement certainly is, that should come in.
13 And I don't know of any statements after that.

14 THE COURT: Mr. Verner, any statements you are
15 concerned about other than the voluntary or comments?

16 MR. VERNER: No, Your Honor. I think the Solicitor
17 is right, that if there is a Jackson v. Denno issue it
18 would be Lieutenant Johnson and I am not aware of any
19 statement that he made, any statement to offer after that
20 initial statement. Johnson testified, excited utterance
21 or voluntary statement. The only issue, Deputy Babb would
22 be, his search of the vehicle. But I do challenge his
23 search of the bag that Lieutenant Johnson has testified.
24 I guess I would call him as a witness on that.

25 MR. SCOTT: We will call Clay Babb.

1 CLAYTON BABB, being
2 first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 By Mr. Scott:

5 Q Officer Babb, you were here during that testimony,
6 you were also present at the safety checkpoint May 1st on
7 Highway 76?

8 A Yes, I was.

9 Q And do you recall Mr. Velasquez and his codefendant
10 arrived with the black Altima?

11 A I do.

12 Q And tell me about what you recall once the vehicle
13 stopped at the checkpoint?

14 A They approached me from Newberry headed towards
15 Laurens County line. The female driver rolled her window
16 down, she advised she did have a drivers license with her.
17 But also while talking with her I smelled what seemed to
18 be consistent with that of marijuana. At that point I
19 instructed her to pull over on the side of the road so we
20 could at least verify whether or not she had a valid
21 drivers license.

22 Q And did she ultimately have a valid drivers license?

23 A She did not. She just gave me a name and date of
24 birth which is usually is all that is required to run, to
25 verify through DMV.

1 Q Were you successful in running that name and date of
2 birth?

3 A She gave me the name of Jennifer Boyd and a date of
4 birth but I believe she told me her drivers license was
5 through the State of North Carolina. So, I instructed my
6 dispatch to try running it through North Carolina.

7 Q But ultimately did she kind of fess up that that
8 identity was fraudulent?

9 A No, she did not. She maintained that her name was
10 Jennifer Boyd.

11 Q At the checkpoint?

12 A Yes.

13 Q So, but the marijuana that you smelled, you had them
14 pull over to the side of the road once you felt like you
15 smelled marijuana?

16 A Yes.

17 Q Where was Derrick Velasquez?

18 A He was in the back passenger seat. Back seat over
19 towards the passenger side.

20 Q Was there anything that you could see why he wouldn't
21 be sitting in the front seat?

22 A Nothing appeared to be on the front passenger seat.
23 I found it odd that he was in the back seat but I don't
24 know what would have made him sit there.

25 Q And once you had her, the driver pull over to the

1 side of the road did you continue questioning her?

2 A I told her to turn the car off and she did. And she
3 stepped out to the rear of the vehicle which would have
4 been near the front of my truck that I was driving. I was
5 talking to her.

6 Q And what were y'all talking about?

7 A I was wanting to gain a little more information to
8 try to verify whether or not she did have a valid license
9 but I also wanted to ask her about the odor of marijuana
10 that I smelled.

11 Q What happened when you asked her about the smell of
12 marijuana?

13 A When I asked her about that she told me she had no
14 knowledge of any marijuana and the vehicle was not her's,
15 it belonged to someone named Jasmine.

16 Q Okay. What, if anything, did Mr. Velasquez say once
17 you asked her about the marijuana?

18 A At that point Lieutenant Johnson was already over
19 there near his door and I am not sure of the conversation
20 that took place between them but Lieutenant Johnson
21 informed me that he did have some, he located some
22 marijuana.

23 Q Okay. Did you ultimately get to see, there was some
24 testimony about some roaches found?

25 A I looked at them, I am not exactly sure if I looked

1 at them right then.

2 Q Let me show you State's number 38. So you recognize
3 that?

4 A Yes.

5 Q What is that?

6 A That looks like the materials that was inside the
7 portable ashtray, he removed it from the vehicle and
8 handed it to Lieutenant Johnson.

9 Q If you look at the picture to the right, is that
10 the--

11 A Yes, that appears to be the roaches.

12 Q And did you determine that those did, in fact,
13 contain what you felt to be marijuana?

14 A We felt it was marijuana.

15 Q All right. At that time did you determine you were
16 going to make some arrests?

17 A At that time there were, there was going to be at
18 least one arrest made for possession of marijuana, simple
19 possession.

20 Q Okay. And that was going to be with Mr. Velasquez?

21 A Yes, yes.

22 Q And who had him step out of the car?

23 A Lieutenant Johnson.

24 Q You were there watching that though?

25 A I was still standing toward the rear of the vehicle

1 with Ms. Joyner as Lieutenant Johnson asked him to step
2 out of the vehicle.

3 Q Were you able to witness Johnson do the pat down on
4 Mr. Velasquez?

5 A I don't think I was watching the whole time but I was
6 there because I was still having to talk with her as well.

7 Q At some point did you become aware that Lieutenant
8 Johnson had found some contraband on Mr. Velasquez?

9 A Yes, he actually told me he had found some crack and
10 actually held the bag up and I could see it.

11 Q At that point did that have an effect on how y'all
12 were going to be able to treat the codefendant, Ms.
13 Joyner?

14 A At that time she was still not under arrest, however
15 she was being detained. We had not made a determination
16 of what the outcome was going to be as far as she went.
17 So, as far as what happened with her at that point, we
18 hadn't decided.

19 Q All right, so at this point Velasquez has admitted of
20 smoking some marijuana and produced some blunts and at
21 this point Lieutenant Johnson had found what you thought
22 was crack cocaine in his picket?

23 A My understanding it was removed from a pocket, I
24 don't know what pocket it was removed from.

25 Q At what point did you determine that it was

1 appropriate to search the area where he had been seated?

2 A Once Mr. Velasquez was removed from the vehicle and
3 he was brought toward the rear of the vehicle I went up to
4 the back passenger seat where he was sitting and I just
5 looked over the immediate area and the only thing I saw
6 was the brown book bag.

7 Q State's 40?

8 A Yes. In the floorboard and it appeared to, attempted
9 to be shoved up under the front passenger seat.

10 Q Okay. And did that appear to be something
11 significant to you after finding the crack in his pocket?

12 A It did. The simple fact was the only thing in the
13 area and it also appeared he tried to conceal to by
14 putting it under the front seat.

15 Q What did you do, did you open it up?

16 A I pulled it out, I don't recall whether it was zipped
17 or unzipped. I did pull it out and sit it on the back
18 passenger seat where he had been sitting.

19 Q And what did you find inside of it?

20 A When I looked inside I saw ziplock type bags that
21 appeared to have cocaine in it and also almost looked
22 like, I referred to them as bricks, small type bricks of
23 what I thought was cocaine. At that time I immediately
24 just left it alone, backed off and I went ahead and
25 removed my Miranda rights card from my pocket and

1 Mirandized both parties there, Ms. Joyner and Mr.
2 Velasquez. And at that point she was placed, I put her in
3 handcuffs also.

4 Q Okay. State's 28, is that consistent with what you
5 observed that day?

6 A Yes.

7 Q You can't recall whether it was open, zipped or
8 unzipped you said?

9 A I don't recall.

10 Q Certainly in that picture it appears to be unzipped?

11 A Yes, it is unzipped in that picture, that appears to
12 be Investigator Stribble with me there.

13 Q So, after you located that you said you placed her
14 under arrest as well and then you told Stribble?

15 A Yes, yes.

16 Q Any other involvement you had at that checkpoint?

17 A No, I just stood by there until the wrecker got there
18 and once the wrecker got there and the car was loaded I
19 assisted with the escort to Leo's shop where we waited for
20 a search warrant to arrive to continue with further search
21 of the vehicle. As far as any other action on my part,
22 there was none.

23 Q Thank you, please answer any questions that Mr.
24 Verner may have for you.

25 CROSS-EXAMINATION

1 By Mr. Verner:

2 Q Deputy, when you first saw the backpack there was at
3 least some portion of it, I believe you testified,
4 sticking out?

5 A It wasn't completely under the seat, that is why I
6 was able to see it, part of it was sticking out from under
7 the passenger seat.

8 Q At that point Derrick Velasquez was already in
9 handcuffs and he was being at least monitored, supervised
10 by Lieutenant Johnson?

11 A That's correct.

12 Q And Ebony Joyner, the driver, was not in handcuffs
13 but she was between your vehicle and the front of the, she
14 was clearly out of the vehicle?

15 A She was out of the vehicle, she was not handcuffed,
16 she was actually leaning up against the front of my truck.

17 Q So you pulled the backpack out from underneath the
18 front seat and you examined it from outside of the car or
19 you kind of put it on the seat?

20 A The back passenger door was still open so I just
21 stood in the apex of the door and I lifted it up, sat it
22 down on the back seat and I just kind of leaned in the
23 vehicle. I never had physically, other than leaning in, I
24 never got inside the vehicle.

25 Q Does the backpack have like a zipper that keeps it

1 shut or are there straps or do you recall how you could
2 open it up?

3 A I believe gained access to the inside and then you
4 have to access it through the zipper.

5 Q Have you got the backpack. I think, have you had a
6 chance to look at the backpack the State brought in?

7 A Not since that, not since May 1st I haven't.

8 Q Does this appear to be the same?

9 A That appears to be it.

10 Q And you would agree with me it has a zipper for all
11 of the contents, I guess, to keep it closed up?

12 A To the main compartment, yes.

13 Q It had kind of a mesh net in front of it?

14 A Right.

15 Q But the drugs are not in the mesh net?

16 A No, it was in the main large inside.

17 Q Which would require you to open the pack to see the
18 contents?

19 A Right.

20 Q And in fact when Officer Stribble arrived, one of the
21 first things he said was, we need a search warrant to get
22 into this?

23 A I don't think Officer Stribble responded to the scene
24 where we were, I believe it was Lieutenant Lominick that
25 responded. And I think he is the one who suggested the

1 search warrant.

2 Q Looking at your report kind of refresh your
3 recollection of who responded?

4 A It does say Stribble was advised and he did respond,
5 yes.

6 Q So you think probably it was actually Stribble now
7 that you have looked at your report?

8 A I am not saying Lominick didn't respond. He could
9 have responded first, I am not sure how it happened but
10 according to the report it does say Stribble did respond.

11 Q So at that time you noted, was Stribble the head of
12 the narcotics with the sheriffs department at that time?

13 A Stribble was head of the narcotics. I think as far
14 as hierarchy goes he stills answers to Lieutenant
15 Lominick.

16 Q But he has got kind of specialized role where he
17 concentrates primarily on the narcotics contraband?

18 A Yes, sir.

19 Q And probably was in May of this year, just a few
20 months ago?

21 A Yes, sir.

22 Q And are narcotic cases typically, unless they are
23 something simple like simple possession of marijuana but
24 are more serious narcotics, he would ordinarily be
25 referred in to investigate?

1 A It is a case by case.

2 Q But it wouldn't be uncommon for him to be notified,
3 particularly if you want to search for more narcotic type?

4 A We notified him just for the quantity that we
5 believed to be there.

6 Q Did you feel it was necessary at that time for a
7 search warrant to be obtained?

8 A Yes, I did.

9 Q And was that one of the reasons he was notified to
10 come?

11 A Yes, well that and the fact of the quantity of
12 substance that we believed we had.

13 Q Is it probably Lieutenant Johnson agreed with your
14 decision to call him in to obtain a search warrant?

15 A I am sure, yes. I am sure we discussed it.

16 Q And now did you participate in the search of Derrick
17 Velasquez's person?

18 A No, I didn't.

19 Q Did you participate in the search of the vehicle
20 beyond your initial entry to find the book bag under the
21 seat?

22 A No, once I saw what was in the bag and I stepped out
23 I never, I don't believe I ever accessed the vehicle.

24 Q So that was the extent of your search?

25 A That's correct.

1 Q Did you accompany the vehicle to the tow yard?

2 A I did, I rode with Deputy Rembisz.

3 Q Rembisz, he was not the training officer at the time,
4 he would have been an active patrol officer?

5 A Rembisz?

6 Q Yes, sir.

7 A That, she is a FTO, she is a training officer.

8 Q But she wasn't the trainee?

9 A No, that would have been Davis.

10 Q Okay. Was your vehicle used to transport people to
11 the NCSO?

12 A I have a truck, and it is used occasionally to
13 transport people to the detention center, yes.

14 Q And is it possible was being used to transport Ebony
15 or Derrick?

16 A More than likely would have been used to transport
17 either, we would not have left it on the side of the road
18 so I could ride with the Deputy.

19 Q That was my question.

20 A It would not have been left.

21 Q And did you return to the location of the traffic
22 safety checkpoint that day?

23 A To my knowledge we didn't return that day.

24 Q As far as, after this arrest, finalized, that pretty
25 much took everybody's time away from the traffic safety?

1 A For that day it did.

2 Q And you recall what time the, the vehicle, where
3 Velasquez was the passenger, do you recall what time it
4 came through the traffic safety checkpoint?

5 A I would say around 10:00, maybe a little before 10:00
6 a.m.

7 Q Did you indicate on your report it was about 9:37?

8 A That is the dispatch time, I am not sure if that is
9 the time he came through or the actual time we set up our
10 checkpoint. If you look over to the right of that it has
11 10:00 o'clock and that could possibly be the time that the
12 contact began with Mr. Velasquez.

13 Q So you believe he was somewhere between 9:37 and
14 10:00 o'clock?

15 A Yes.

16 Q And, again, the 9:37 you have got indicated under the
17 dispatch time?

18 A Right.

19 Q Which ordinarily indicates the time that the 911
20 communicator calls the report into?

21 A Right.

22 Q And arrival time would typically indicate if you were
23 on patrol and arrived at a crime scene or location?

24 A Right, that would be our arrival time.

25 Q But your testimony you believe that in this instance

1 you used 10:00 o'clock to estimate the time that you most
2 likely encountered the vehicle?

3 A Right, right.

4 Q It says you departed about 13:57, would that be 1:57?

5 A Yes.

6 Q Is it possible part of that time was at a different
7 location such as following the tow truck?

8 A Right, that would be, our departure time would have
9 been at Leo's towing.

10 Q And from the dispatch, it appears that Leo's tow
11 truck arrived on the scene about 11:49?

12 A I am not sure, I would have to look at that form, I
13 am not doubting it.

14 Q Do you recall Leo's towing being called out there for
15 any other vehicles?

16 A I don't recall them responding for any other vehicle
17 and it does appear by the form here 11:49 is what time
18 they arrived on the scene.

19 Q So I understand you are not testifying to one-hundred
20 percent certainty but most probably, that is what time the
21 tow truck arrived for this vehicle?

22 A For that vehicle, yes.

23 Q Do you recall what time Derrick and Ebony were taken
24 to the detention center, were they out there until the tow
25 truck arrived or had they already been taken in?

1 A If we had the means to transport them we would have
2 probably transported them before then, just due to the
3 time and not keeping them out there any longer than we had
4 to.

5 Q Do you recall writing any other citations that day?

6 A I do, I wrote Ms. Joyner and Mr. Velasquez several--

7 Q Not counting these two people. I am talking about
8 the third party, any other citations?

9 A I don't recall citing anyone else that day.

10 Q Now, it does appear to me, the driver was Ebony
11 Joyner, right? That is who you later identified?

12 A That is who we later identified as Ebony Joyner.

13 Q When she was initially charged she identified herself
14 as Jennifer Boyd?

15 A That's correct.

16 Q And in fact you called that name but she didn't have
17 a drivers license on her?

18 A She claimed she didn't have it with her.

19 Q So you called in the name--

20 A I called in the name that she gave.

21 Q But she did provide you a date of birth?

22 A Yes.

23 Q And actually it would have shown up that Jennifer
24 Boyd was, in fact, a licensed driver, held a valid drivers
25 license?

1 A If she, if Jennifer did it would have shown up valid.

2 Q I am going to ask you if you can identify this?

3 A This appears to be a copy of a North Carolina drivers
4 license for a Jennifer Nicole Boyd and the same date of
5 birth that was given.

6 Q And it appears that she, I understand Ebony is not
7 Jennifer. But at that time you didn't have anything to
8 indicate that Ebony was not, in fact, Jennifer Boyd?

9 A Not at that time. At that time I thought she was
10 Jennifer Boyd.

11 Q And you, in fact, with the information that was
12 provided called it in and she would have checked out as a
13 licensed driver in North Carolina?

14 A Right.

15 Q And in fact Jennifer Boyd is on the NCIC hit
16 identified as an African American or a black female?

17 A Yes. Her race is listed as black on the paperwork.

18 Q And what is her height indicated?

19 A 5'2".

20 Q Now, Ebony Joyner would have been a black female?

21 A Yes.

22 Q And what is her listed height according to your
23 incident report?

24 A Her listed height on the report is 4'10.

25 Q So they would have been, of the corroborating

1 characteristics, it would have been kind of a short
2 African American female?

3 A That's right.

4 Q And she had provided her correct date of birth and
5 name?

6 A She provided me a date of birth and name, yes.

7 Q So, if a driver had come through the traffic
8 checkpoint without a drivers license but had provided
9 suitable information to you that confirmed that that was
10 likely the driver, would they have been automatically
11 cited or that would have been in your discretion?

12 A It is a discretionary issue but typically if we can
13 verify that they do have a valid license we will just give
14 them a verbal warning and let them go.

15 Q Or a step up from that you would have, it would be a
16 blue ticket or not possessing your drivers license while
17 driving?

18 A Right.

19 Q And then the third option it would be within your
20 discretion to actually physically apprehend somebody?

21 A That is an option but an option rarely taken.

22 Q That would just depend on everything but would that
23 violation in itself, have you actually taken somebody into
24 custody for just no drivers license?

25 A I can't recollect doing that but I have issued blue

1 tickets.

2 Q That would be a multi circumstance thing where you
3 just evaluate more than one situation?

4 A Correct.

5 Q So it is possible, without the odor, tell me about
6 what you smelled in the marijuana, when you first think
7 that you had smelled marijuana?

8 A As soon as she pulled up and rolled the window I
9 smelled it. She was still in the lane of traffic, I
10 didn't ask her to pull over.

11 Q Where was Deputy Johnson compared to you in terms in
12 the traffic?

13 A If I was facing her vehicle he would have been
14 standing behind me but relatively close, I would say
15 within, tops, six or eight feet maybe.

16 Q Would the car have passed him to arrive to you,
17 before it was initially stopped?

18 A Probably not.

19 Q I would think if the officers were facing different
20 directions you would stop the car before it reached an
21 officer who was not facing that lane?

22 A That's correct.

23 Q So it is unlikely that a car would have passed
24 Lieutenant Johnson?

25 A I would, it would have passed me first.

1 Q And then, I would assume it could have passed him but
2 that would only be after you made the decision to tell the
3 car to pull up and pull over?

4 A That's correct.

5 Q And then it could have passed him?

6 A It could have.

7 Q So when you first encountered the car, when you
8 stopped the car how far ahead of you does the car, do they
9 pull up exactly beside you?

10 A Usually pull up beside me and if they stop short I
11 walk up to them, it is usually close either way.

12 Q Do you recall what happened in this incident?

13 A I don't, I don't know if I had to walk to the window
14 or she pulled directly beside me, I don't know.

15 Q Do you remember Ms. Ebony Joyner rolling down the
16 window?

17 A I don't remember.

18 Q So it is possible she could have done that before she
19 even got there?

20 A That's correct.

21 Q It is possible she didn't roll it down until you
22 actually walked up to the side?

23 A It is possible, that's right.

24 Q But as soon as the window came down you smelled what
25 you believed to be marijuana?

1 A That's correct. As soon as I walked up to the window
2 I, is when I smelled it, right.

3 Q Did you indicate to Lieutenant Johnson what you had
4 found?

5 A I just, I smelled what I thought was marijuana and I
6 turned around and ask him if he smelled marijuana and he
7 said he, he advised me he smelled it too.

8 Q That was after he talked back over to you?

9 A He wasn't that far away from me to start with.

10 Q You had the car pull over to the side of the road?

11 A Yes, sir.

12 Q And that was to investigate the marijuana or was it
13 to investigate the drivers license?

14 A For both.

15 Q Had the back seat passenger down, anything at that
16 time to have warranted him being seen as a suspect?

17 A We didn't have any violations on him yet. It seemed
18 suspicious, as far as violation, no.

19 Q But when you smelled marijuana you are at least are
20 under the impression that you might be making an arrest of
21 both driver and passenger?

22 A It is possible, that is something we have to
23 determine later.

24 Q But he would had been at least a suspect at that
25 time?

1 A At that time, yes.

2 Q So the driver pulled up to the side of the road and
3 you pulled her out or you asked her to--

4 A I asked her to cut the car off and step out of the
5 vehicle and we walked back to the front of my truck.

6 Q So your investigation of her was outside of the
7 vehicle, she was pulled out of the vehicle?

8 A Immediately, she was asked to step out.

9 Q Do you recall seeing the blue cup in the console?

10 A No.

11 Q Were you observing Lieutenant Johnson with Derrick
12 Velasquez in the back when he made the decision to pull
13 Velasquez out of the car?

14 A I didn't have visual contact with them the whole time
15 because I was trying to talk to Ms. Joyner also.

16 Q Did you overhear Derrick Velasquez make any comments
17 about the marijuana roaches or the blue cup?

18 A I couldn't hear anything that was said by Mr.
19 Velasquez.

20 Q So you weren't, you didn't see him being cuffed by
21 Lieutenant Johnson?

22 A I don't remember the exact point the cuffs were put
23 on him so I can't say I actually saw the handcuffs go on.

24 Q In your report you indicate Lieutenant Johnson
25 removed the back seat passenger identified as Derrick

1 Velasquez, cuffed him and then did a pat down. So it is
2 possible that you did see?

3 A It is possible.

4 Q Or are you just going by what--

5 A It is possible I did see it, but like I say, I do
6 know at one point the cuffs were put on him.

7 Q Did Lieutenant Johnson ask you to search the vehicle
8 or that was just, on what basis did you search the
9 vehicle?

10 A Lieutenant Johnson did ask me to search the vehicle
11 once Mr. Velasquez was removed.

12 Q But he didn't indicate that he found cocaine, or
13 crack cocaine?

14 A Right, this was before I looked inside the vehicle,
15 the crack cocaine was found.

16 Q At best you remember, was Lieutenant Johnson
17 directing you to search the vehicle or just, it was kind
18 of understood when he said he was arresting him for
19 contraband that you would search the vehicle?

20 A I was never directed by Lieutenant Johnson and at
21 that time Mr. Velasquez was in custody so that just left
22 me, so at that time is when I began to search the vehicle.

23 Q That is just something over the years, that is just
24 how it is typically done?

25 A I would think so and Lieutenant Johnson has worked

1 for 20 years so we kind of work well together in that
2 manner.

3 Q But is it possible that he said, come look here?

4 A I am not doubting he did say that but if I guess, I
5 would say he didn't say it, that would be a decision I
6 made on my own.

7 Q Now, the crack cocaine, not the crack cocaine but the
8 brick cocaine, how was that packaged?

9 A To the best of my memory it was in cellophane or
10 ziplock type bag down inside the backpack.

11 Q Clear bags?

12 A Pretty much clear, yes.

13 Q Was it in any kind of separate container inside of
14 the book bag other than the cellophane?

15 A No, just the ziplock, the clear plastic bags were, I
16 think to the best of my knowledge they were just down
17 inside of the bag.

18 Q And once you found what you identified as possibly
19 cocaine that is when you stopped searching. So you didn't
20 actually go back and search the bag at a later time?

21 A No, I backed off and I never touched the bag again.

22 Q Thank you.

23 THE COURT: You can step down. Anything else, Mr.
24 Scott.

25 MR. SCOTT: I don't have any other witnesses.

1 THE COURT: Mr. Verner, are you going to present any
2 testimony?

3 MR. VERNER: Your Honor, I will call Mr. Velasquez.
4 I have explained to him this is for the limited purpose of
5 suppression motion.

6 DERRICK VELASQUEZ, being
7 first duly sworn, testified as follows:

8 DIRECT EXAMINATION

9 By Mr. Verner:

10 Q Mr. Velasquez, do you remember May 1st of this year?

11 A Yes.

12 Q In fact that was fairly close in time to today's
13 date, just three months ago?

14 A Yes.

15 Q Do you remember approaching the traffic safety
16 checkpoint in Newberry County?

17 A Yes, vaguely because I was asleep in the back seat.
18 The officer indicated I was laying across the back seat, I
19 was sleeping at the time when we actually approached the
20 checkpoint.

21 Q What was your first interaction with the deputies?

22 A My first interaction with the deputy was when
23 Lieutenant Johnson came over to the back passenger window
24 and asked me for my identification. At that point I
25 handed him a New York State drivers license and at that

1 point he opened the back door and told me to step out of
2 the car and put handcuffs on me.

3 Q Did he ask you about the smell of marijuana in the
4 car at that time?

5 A Yes, and I told him I did not have any marijuana and
6 I was not smoking any marijuana. And Sergeant Babb's
7 report indicates that I wasn't using any marijuana at the
8 time.

9 Q Back up again. You indicated that Lieutenant Johnson
10 asked you for your identification?

11 A Yes.

12 Q Did you hand it to him?

13 A Yes.

14 Q Did you leave to go run that?

15 A No, he immediately saw my identification, he opened
16 the backdoor and told me to step out and put my hands
17 behind my back.

18 Q Did he pat you down?

19 A Yes.

20 Q Did he indicate to you why he was patting you down?

21 A No.

22 Q Do you believe it was for the officer's safety?

23 A Well, I didn't know what he was searching me for. As
24 he indicated I asked him, you know, why was he searching
25 me. And he told me I was being placed under detention,

1 investigative detention. But I was clueless after that,
2 why was he patting me down or why was he putting me in
3 handcuffs to begin with.

4 Q Did you hand him the blue cup?

5 A Absolutely not, I didn't hand him anything. As soon
6 as I was escorted out of the car I was placed in
7 handcuffs. And Sergeant Babb's reports indicates I was
8 placed in handcuffs. I was searched and then Lieutenant
9 Johnson produced the blue ashtray out of the vehicle. He
10 doesn't say out of the vehicle but he said--

11 Q --I am not asking you what the report says, I am
12 asking you what happened?

13 A No, no, I didn't hand him anything. I was placed in
14 handcuffs, I couldn't hand anything, I couldn't do
15 anything, I was immediately detained.

16 Q Well, did they show you or talk to you about a blue
17 cannister?

18 A No, no.

19 Q Did he ask you about marijuana?

20 A Yes, he asked me about marijuana. I told him I was
21 not smoking any marijuana.

22 Q When did he ask you about marijuana?

23 A He asked me, has anybody in the car been smoking
24 marijuana. And I said, no. And then he escorted me out
25 of the car and placed me in handcuffs.

1 Q In your opinion was there an odor of marijuana in
2 your car?

3 A No, I couldn't smell it, like I said, I was in the
4 back seat sleeping. I woke up to the officer basically
5 questioning me and I was a little confused as to what had
6 actually taken place. I knew that we had been actually
7 pulled over but at that point, I mean, I didn't have any
8 concerns because I wasn't doing anything. And I felt like
9 it was just a routine stop or whatever. And I didn't
10 bother getting alarmed for any purpose because, you know,
11 I had my identification, I wasn't doing anything. And I
12 felt like I was just, you know, was at the checkpoint.

13 Q Did you give the officer consent to search your
14 person?

15 A No, absolutely not. He never asked me, he never
16 asked me if he could search me or whatever.

17 Q Did you give the officer consent to search the
18 vehicle after he had pulled you out?

19 A No.

20 Q Are you aware of whether Ebony ever gave consent to
21 search the vehicles?

22 A I don't know because Ebony was asked to leave the car
23 and the conversation between her and Officer Babb took
24 place in the back of the car which I was unable to hear
25 regardless as to what the officer testified--

1 THE COURT: You testify to what you know. You can't,
2 I heard this. It is what you know.

3 A Okay.

4 Q The identification you showed Lieutenant Johnson was,
5 in fact, a valid license?

6 A Well, it was a valid ID.

7 Q Identification?

8 A Yes, it was a valid ID.

9 Q Did you observe when Sergeant Babb searched the
10 vehicle in the back seat?

11 A Yes.

12 Q Were you in handcuffs at that time?

13 A Yes.

14 Q Where were you located?

15 A I was located basically, maybe about, three or four
16 feet from the car, maybe five feet from the car, facing
17 the car.

18 Q Kind of looking back?

19 A Yeah, looking, pretty much at the back kind of,
20 looking, you know, directly into the car.

21 Q And Lieutenant Johnson is in your close proximity,
22 standing near you or beside you?

23 A Yes. He actually had physical possession of me.

24 Q Okay. By that, he was touching you?

25 A Yes, he actually, I was handcuffed and he had his

1 hand on my arm.

2 Q Do you recall whether there were other cars at the
3 scene when you came to the traffic safety checkpoint?

4 A No, I was in the back seat laying down so the only
5 recollection I really had is officers approaching me. I
6 noticed that we were gradually slowing down but the first
7 Officer, Sergeant Babb--

8 Q How many officers were at the scene when you were
9 there?

10 A Two.

11 Q Just two?

12 A Yes.

13 Q Were you ever presented with a search warrant for the
14 car?

15 A No.

16 Q Do you recall how long, were you still at the scene
17 at the roadblock at the time the tow truck arrived?

18 A No.

19 Q Do you recall how long you were standing beside the
20 car before the officers took you to the back of their
21 patrol vehicle?

22 A Approximately three or four minutes.

23 Q How long were you in the back of the patrol until
24 before they took you to the detention center?

25 A Approximately 15, 20 minutes.

1 Q Did anybody talk to you after you were put in the
2 back of that patrol unit?

3 A No.

4 Q Could you hear the conversation between Deputy Babb
5 and Ebony Joyner?

6 A No, I could not.

7 Q Do you recall where he was interviewing her, where
8 they were located?

9 A When I got out of the car Ebony was leaning on the
10 hood of one of the police cars, that is all I remember
11 about her location.

12 Q When you say leaning on the hood--

13 A Her butt was leaning on the car.

14 Q Her back side, not like leaning forward?

15 A No, no. Her back side was leaning on the car.
16 Leaning against the trunk of one of the police car's.

17 Q Do you recall seeing any other cars at the checkpoint
18 when you were there for that 15, 20 minutes?

19 A Yes, every car that came past, some slowed down and
20 took pictures, put them on Facebook.

21 Q Were any cars stopped?

22 A No, every other car was told to go ahead, was waived
23 on, consecutively waived on and permitted to go throughout
24 the checkpoint, unchecked.

25 Q If Mr. Taylor or Mr. Scott has questions for you.

CROSS-EXAMINATION

By Mr. Scott:

Q Mr. Velasquez, you are from New York?

A That is where my address is but I haven't been residing there for quite some time. I am going through a divorce, you saw the paperwork. But my ID has that just to pretty much let people know, you know, who I say I am for identification purposes. But I don't reside there, no, we are going through a divorce at the time.

Q But your ID does say you are from New York?

A Yes.

Q And you indicated that I should know that because my paperwork says that. And you have got on my paperwork here and that is what you have been carrying around?

A Yes, the address is not on there and neither is your picture indicated where you live or nothing.

Q But you know all the stuff I have because you have all of your discovery in that packet right there, you have had it in jail for sometime now?

A Yeah, but that doesn't tell me who you are. If you are asking does that identify you. What are you asking, I am sorry.

Q You have had your discovery and you have read over these reports multiple, multiple times, have you not?

A Yes.

1 Q You are very familiar with them?

2 A Yes.

3 Q And you have referenced them a number of times from
4 the stand, correct?

5 A Yes.

6 Q What I want you to do for me, is your recollection of
7 the events, not what an officer said in the reports, your
8 recollection of May 1st. Okay. You were asleep in the
9 back of that automobile is what you are saying?

10 A Yes.

11 Q And where were you coming from?

12 A Well, I wasn't--

13 MR. VERNER: Your Honor, that is beyond the
14 suppression.

15 THE COURT: I agree. Move on.

16 Q What was your state of mind right then, were you
17 asleep, you kind of indicated you were asleep and later
18 you said you recognized that y'all were slowing down
19 approaching something?

20 A Right.

21 Q Because you were awake when y'all approached the
22 checkpoint, is that correct?

23 A Well, usually if there is a disturbance in, like
24 velocity or something, people usually wake up if they are
25 sleeping, they come to a stop there and they immediately

1 wake up. It was kind of like that, automatic reaction.

2 Q So you were awake when you approached the checkpoint?

3 A No, I was asleep throughout the whole time. When we
4 approached the checkpoint, when we came to a stop, yes, I
5 did pop up, I popped my head up to see what was going on
6 and then I continued to lay back down.

7 Q And you saw the officers once you came to a stop?

8 A I saw one officer, yes.

9 Q And you had your window down?

10 A My window was cracked, yes.

11 Q And you don't deny that there was some marijuana
12 found in your car?

13 A Excuse me, I don't deny it?

14 Q You don't deny that?

15 A I don't know where that marijuana was found.
16 Actually there was, reports that marijuana was found.

17 Q I want your recollection?

18 A I have to be specific because--

19 Q Did you know there was marijuana in the car?

20 A No, I did not know that there was any marijuana in
21 the car whatsoever.

22 Q This is an Altima?

23 A Yes, I believe so.

24 Q It is not a big car, is that correct?

25 A It was comfortable enough for me to sleep in the back

1 seat.

2 Q There was one other occupant, is that right?

3 A One other occupant, yes.

4 Q And it is your testimony to this Judge that you
5 didn't smell any marijuana in that car?

6 A No, I didn't.

7 Q And how long had you been in that car?

8 A Sleeping, probably about, maybe four or five hours.

9 Q It was a rental car, correct?

10 A Yes.

11 Q Where did y'all rent it from?

12 MR. VERNER: Again, Your Honor,--

13 A Wait,--

14 THE COURT: Hang on. How is that relevant?

15 MR. SCOTT: We are talking now about expectations of
16 privacy. We are talking about him being completely
17 unaware of what is going on in this car. I am attempting
18 to have him testify how long he has been in it.

19 THE COURT: He said four or five hours.

20 MR. SCOTT: Oh, he has already testified to that.

21 THE COURT: Yes, he said that. You asked where they
22 rented it, that is not relevant.

23 Q It was a rental car, is that correct?

24 A Yes.

25 Q And it didn't belong to you?

1 A No.

2 Q And who rented it?

3 A A girl in New York by the name of Jasmine.

4 Q Who is Jasmine?

5 A Jasmine, she is a girl that I know.

6 Q And she rented it before you guys?

7 A No, she didn't rent it from me. I am not licensed.

8 Q It is your testimony you are sleeping, Officer
9 Johnson asked you for an ID and immediately arrested you?

10 A Yes, he asked me for my identification, opened the
11 passenger door, told me to step out and put my hands
12 behind my back.

13 Q Was this before or after he found the crack in your
14 pocket?

15 A I am not saying he found anything. This was way
16 before, he asked me immediately, as soon as he got my ID
17 he opened the door, told me to put my hands behind my back
18 and then did a pat down.

19 Q Were you aware that you were, you had pending
20 warrants out of Baltimore?

21 A Absolutely. And I am aware that Baltimore has
22 refused to extradite me in any circumstances because I
23 also did prison in New York where they did not want to
24 extradite me and any place because the warrant is 20 years
25 old. And it was a probation situation that it was a

1 discrepancy on the time I was suppose to go to probation.
2 And it wasn't for failure to appear in court, or anything
3 like that. So, they know pretty much that it is not a
4 serious offense at all. Actually they just told me to
5 come and clear it up.

6 Q And did the officers indicate to you that they had
7 knowledge that you had pending warrants?

8 A Absolutely not. And there was no warrant ran on my
9 name because I was immediately placed in handcuffs and it
10 was impossible for him to get my license, go back to the
11 car, run the warrant and then come back and say, oh, you
12 have warrants and now I am going to place you under
13 arrest. In fact, the reports indicate that--

14 THE COURT: We have testified to that, so ask another
15 question.

16 Q Pictures on Facebook, what was that about, you were
17 testifying people taking pictures of you and putting it on
18 Facebook?

19 A Yes, because when I was in the holding cell in
20 Newberry County jail people came in and said, you know,
21 pretty much, I know you, I saw your picture on Facebook
22 and you got more hits than the ride in Baltimore. And
23 also said that my face was pictures of me and Ms. Joyner
24 were posted on telephone--

25 MR. VERNER: Your Honor, this is, the fact that the

1 sheriff may have put out--

2 MR. SCOTT: This is not relevant, I was just curious.

3 A Because cars were able to come by and take pictures,
4 nobody else could stop, came by and took pictures and it
5 started to be a little traffic jam so the officers just
6 waived the cars along.

7 THE COURT: The pictures doesn't matter.

8 MR. SCOTT: It doesn't, you are right. It just came
9 up in direct.

10 THE COURT: I understood was passersby taking
11 pictures, he has explained one of the officer's took a
12 picture and put on the sheriff's website. And both of
13 those are not relevant.

14 MR. SCOTT: I agree.

15 Q The testimony is simply that you were asleep in the
16 car, you went through the checkpoint, you were immediately
17 taken out of the car and was arrested and not told why you
18 were arrested?

19 A Right, my ID was gotten first.

20 Q And then they arrested you?

21 A Right and then he opened the car door and asked me to
22 put my hands behind my back and at that point--

23 Q And never told you why?

24 A No, actually I didn't know what happened or what was
25 going on between, you know, Ebony. I didn't know what was

1 going on. I was a passenger in a car just getting a ride.

2 Q I don't have anything else.

3 MR. VERNER: I don't have anything else.

4 THE COURT: Let's go back to the motions.

5 MR. VERNER: Yes, sir. If the Court is inclined to
6 hear from us.

7 THE COURT: Sure.

8 MR. VERNER: As far as the initial stop itself, and I
9 am very aware that the Court is familiar with this issue,
10 a decision put out just recently, discussed on appeal. My
11 understanding of the law is and we don't really, we don't
12 stipulate to but we don't really, the first and third
13 prongs, that is that the State has the right to issue a
14 traffic safety checkpoint pretty much without cause and
15 that it serves a public interest to monitor the people who
16 are using the highway and driving. The second issue and
17 it is, the Vickery case doesn't make it completely clear
18 to me. Without a need to have empirical evidence but
19 there still needs to be some basis to choose the location
20 and we obviously heard testimony about the car, truck/car
21 collision and people complaining about speeding. In this
22 case, Your Honor, the sheriffs department was operating
23 under a written guideline for the locations of stops which
24 I have made a Court's exhibit. And I do believe that the
25 sheriffs department would have to comply with their

1 written directive which I would assume would be available
2 to the public either under FOIA or that there is not
3 evidence that this was advertised as a traffic safety
4 checkpoint prior to the date. There is some evidence,
5 Your Honor, to indicate that this was being set up as a
6 general criminal checkpoint to monitor any kind of
7 criminal behavior. But I think my best argument is, the
8 Court has to find, by my understanding, using empirical
9 data that the actual traffic checkpoint in this particular
10 case was an effective, had been advanced law enforcement
11 that there has to be some empirical evidence that this
12 was, in fact, an effective traffic safety checkpoint. I
13 would note, Your Honor, in the Vickery case which was also
14 a fairly limited in time, I think it was set up at 9:00
15 o'clock at night until maybe 3:00 in the morning type
16 situation. And in fact they were using several locations.
17 In Vickery they actually issued 48 tickets, 8 criminal
18 charges, 2 of which would be drug related charges. And in
19 this case, using the data, we have offered the alcoholic
20 enforcement checklist into the evidence, Your Honor. I do
21 submit to the Court that it appears to be a very rough
22 estimate in terms of percentages. I submit they are
23 fairly generic male, female, 50/50; black, white, 25/75;
24 Hispanic, 5/95; that it does appear to be general in terms
25 of the percentages used. Without this arrest in itself,

1 the Officer Johnson testified that in his opinion about
2 100 vehicles passed through. And I would challenge that
3 number because the first indication is that the officers
4 set up the roadblock about 9:30, they may have been there
5 a little before then, may have been there a little after
6 then. But they would have arrived on the scene about, in
7 fact I believe Deputy Babb indicates that he probably
8 thinks they set up around 9:37 is when they arrived to do
9 the roadblock. This car would have arrived about 10:00
10 o'clock on the scene. So, in that 23 minute's that they
11 would have stopped 100 cars on this rural interstate or
12 rural highway, is to me not plausible. Particularly given
13 the evidence that once this car arrived at the scene that
14 the traffic safety checkpoint had seized to operate in
15 that capacity. If you look at the report, the numbers,
16 Your Honor, without this arrest, without the one Hispanic
17 vehicle that had been cited for the negligent or the
18 deficient beginners permit, and the one vehicle that had
19 been allowed to go through but then determined to have
20 warrants out of Clinton County that was pending. The
21 thing involving the Kim Dawkins, this is really the only
22 traffic or drug offense that was cited from the case. Of
23 100 cars, Your Honor, the one beginners permit and one car
24 that had a hit out of Clinton that was actually allowed to
25 proceed through, numerically and using empirical data does

1 not appear to be an effective use of the traffic safety
2 point as waiving his Fourth Amendment rights, to be free
3 of the seizure. I do challenge the numbers but even if
4 the numbers are true they don't support that this was an
5 effective checkpoint. The only real arrest made from it
6 was this particular vehicle with the two additions of the
7 other vehicles. So, we would ask for the Court to find
8 that the traffic safety point was not being, in this case,
9 the Fourth Amendment protections, it is not an effective
10 traffic safety point.

11 THE COURT: Let's talk about that one first. In the
12 Vickery case, I heard testimony about when a traffic
13 safety checkpoint is made in several Greenwood
14 neighborhoods over a one night's period and they wrote
15 numerous citations. The empirical data I was listening
16 for was the reasoning behind to put the roadblock where
17 they placed it. And the testimony was, we had some
18 telephone calls, some complaints about some bad driving in
19 the area, didn't know when they came in, didn't know who
20 made them, didn't know who received them. After that the
21 data on the backside, as to the effectiveness, I took a
22 break and allowed the State to go back and look and see
23 any other data. I was presented no data as to any arrest
24 other than the defendant, no other data other than the
25 complaints in the area. And I decided that wasn't

1 sufficient and the Court of Appeals says, certainly that
2 is sufficient. This case far surpasses that case with
3 reason for the location of the site, there was a fatal
4 wreck there two weeks prior, as a result of complaints
5 received of people who were asking and testimony as to the
6 wreck, comments about the wreck, there is all kinds of mad
7 driving out here according to the neighbors and I guess
8 lack of surprise that there was an action caused by the
9 poor driving in the community's estimation. After that
10 only the arrest at the roadblock, inside of thirty minutes
11 they made three arrests. That's triple what I had in the
12 Vickery case. And so it appears to me empirical data,
13 prevalent for the location and the reasoning and the
14 justification of the roadblock. And it appears it was
15 justification of the roadblock and its effectiveness was
16 clearly proved by the State. And so based upon Michigan
17 versus Sitz and the limited opinion of the Vickery case
18 provides, I think the roadblock was properly placed by the
19 and in compliance with the sheriff's operating procedure,
20 straightaway, no hidden cars, that was part of the
21 protocol. It appears from my knowledge of the testimony
22 in the area the roadblock was properly placed with the
23 empirical data supporting the placement there that
24 morning. And it was, the sign was out, daylight, good
25 weather, all of those sort of things to go into the safety

1 of the checkpoint to safety check cars for licensed
2 drivers, licensed tags, and in the presence of the
3 community of the police or the sheriffs department to
4 reduce future occurrences of careless operations of the
5 cars. For all of those reasons I believe the sheriffs
6 department complied with the requirement of Michigan
7 versus Sitz as well as Vickery as well as the protocol for
8 setting up those roadblocks. All right. Next issue.

9 MR. VERNER: Your Honor, I would challenge the search
10 of the defendant himself.

11 THE COURT: The defendant is not required to present
12 anything on the reasonableness of the search. The two
13 police officers testified they smell marijuana. Somehow a
14 ashtray in the car was acquired by Detective Johnson and
15 Lieutenant Johnson, he says it was provided to him. The
16 defendant says unaware where that ashtray came from. How
17 Lieutenant Johnson got it, upon smelling marijuana,
18 speaking with the, the testimony was it was volunteered,
19 by Johnson. The ashtray, I don't know where it was, there
20 was no testimony to where it was originally other than
21 Lieutenant Johnson's testimony that it was handed to him
22 by the defendant. And basically shown the marijuana,
23 notwithstanding that, Detective Johnson got it in his hand
24 and, just don't know the facts.

25 MR. VERNER: Provided he didn't search the car. I

1 acknowledge, Your Honor, that once the officer has what is
2 probable cause to believe marijuana, he has got the right
3 to arrest the defendant.

4 THE COURT: It seems like a technical thing.
5 Marijuana, separate the witnesses, talk to them and see
6 what they start telling you.

7 MR. VERNER: That is provided that the officer hadn't
8 gone in to search on his own for the contraband.

9 THE COURT: I understand the State presented the
10 testimony justified, the witnesses are believed just to
11 that end, it appears he had probable cause to place the
12 defendant under arrest for the possession of marijuana.

13 MR. VERNER: I disagree, Your Honor, to the extent
14 that this isn't an issue whether it goes to the jury in
15 which case the Court just determines there is enough
16 weight to get it to the jury. I think the Court actually
17 has to find clearly or convincingly that that is how it
18 happened. The Court is saying there is just enough
19 evidence in the record where I can find that the State--

20 THE COURT: What Detective Johnson testified to as
21 what he was presented, uncontradicted, that is enough for
22 him to proceed on with the arrest, to effect the arrest.
23 He smelled marijuana, he saw some behavior and
24 communication from the defendant, placed him under arrest
25 and saw the marijuana was in the ashtray. That gives him

1 enough to place and take into custody and deprive him his
2 freedom right then.

3 MR. VERNER: If the Court finds that the, greater
4 weight of the evidence or clear and convincing evidence,
5 the Court says there has got to be some evidence?

6 THE COURT: I am not saying that. I think he had
7 ample evidence.

8 MR. VERNER: I think the standard for the trial
9 Court, would at least be beyond the greater weight of the
10 evidence.

11 THE COURT: That would be my finding, that based upon
12 the testimony, two officers, what they saw, their
13 testimony being consistent. He acted reasonably to place
14 the defendant under arrest for that charge.

15 MR. VERNER: And the third issue would be the
16 independent search inside the car, once both officers, I
17 would argue that the State would have the burden, as
18 Officer Stribble indicated at the time, that they would
19 have a search warrant for the private contents.

20 THE COURT: Sergeant Babb testified to that based
21 upon this. He goes on and works closely with Lieutenant
22 Johnson for 10 or 15 years. His interaction, working
23 relationship with Lieutenant Johnson, that he went over to
24 assist him, told the young lady to stay where she was to
25 assist him in effecting, securing the defendant. He

1 testified when he went to the rear door, it remained open,
2 the defendant being close by, the bag was the only item in
3 his area and he noticed that the defendant was trying to
4 conceal it under the seat. Those two factors themselves
5 give him the right to retrieve that bag. That search is
6 proper on that basis.

7 MR. VERNER: And I don't think the Deputy testified
8 that he saw the defendant do anything to try to conceal
9 it. I think he testified by the virtue of its location
10 being shoved under the seat. But I don't think he
11 actually testified, I saw anybody kick it under the seat
12 or make any attempt.

13 THE COURT: I wrote this in my notes. It appeared he
14 was trying to conceal it under the seat. That is, I
15 thought that is what he testified to, I am not positive.

16 MR. VERNER: I think his intention was by virtue of
17 where it was located, shoved under the seat.

18 THE COURT: All I heard was facts. Lieutenant
19 Johnson, and Sergeant Babb, their close working
20 relationship, handling of the scene at this checkpoint,
21 assisting one another. They did everything almost
22 textbook, reasonable in effecting the placement of
23 custody, give him Miranda rights, pulling the bag out,
24 stopping immediately upon unzipping it, looking in it.

25 MR. VERNER: Your Honor, on the last, the statement

1 that I raised for Miranda violation was, assuming Officer
2 Johnson was correct that he smelled marijuana almost
3 immediately which would alert an officer, a reasonable
4 officer that he has got probable cause to search for, a
5 suspect for it.

6 THE COURT: Investigate further.

7 MR. VERNER: Yes, sir. That he had a duty at that
8 point that he should Mirandize because both would be
9 suspects.

10 THE COURT: His testimony, Lieutenant Johnson's
11 testimony was, Sergeant Babb was questioning the girl,
12 Johnson was standing and observing, back to the interview
13 watching the defendant. And I believe Johnson said he
14 could hear the questions and as a result of a question by
15 Babb to the young lady who was the driver that it was a
16 response not to a question presented to the defendant, he
17 responds to a question presented to the young lady. He
18 provided the ashtray and the explanation and was not being
19 substitutive to an interrogation. I don't see how he was
20 afforded any Miranda warnings at that time. He wasn't, no
21 question he was not provided Miranda at that time. He
22 volunteered a statement and a presentation of an ashtray
23 according to Lieutenant Johnson.

24 MR. VERNER: I will agree with the Court with the
25 exception that I think Lieutenant Johnson said as soon as

1 the car was passing him by I smelled the marijuana coming
2 from the open windows. So even prior to the investigation
3 of the lady he would have been aware of the likelihood
4 that one or both, by the virtue of the smell of the
5 marijuana. But I understand the Court.

6 THE COURT: I am going to deny your motions for
7 suppression on all three basis. All right, are we done
8 for today?

9 MR. SCOTT: Yes, sir.

10 THE COURT: All right. The jury has already been
11 told to come back at 1:00 o'clock tomorrow.

12 MR. VERNER: My client is asking for a continuance.

13 THE COURT: I understand your request for a
14 continuance. I am going to respectfully deny it albeit it
15 is understandable there is a lot of time exposure, the
16 discovery was properly given, it was given timely prior to
17 this term of court, he was given proper notice to be ready
18 for trial. And therefore I am going to decline his
19 request for a continuance because it doesn't appear, it is
20 unnecessary. The State is ready to go, they are ready to
21 go, basically the continuance, on my discretion the case
22 needs to proceed on.

23 MR. VERNER: My client was also trying to hire
24 indigent counsel, was part of his basis for a continuance,
25 Your Honor.

1 THE COURT: And changing lawyers right before trial
2 is a delayed tactic in some cases and this case is ready,
3 you are ready, your client is ready, we will go forward
4 and we will start tomorrow at 1:00 o'clock.

5 August 4, 2015

6 THE COURT: All right, Solicitor.

7 MR. SCOTT: Judge, Derrick Eugene Velasquez, two
8 indictments he was, began trial on yesterday,
9 15-GS-36-0269 and 0270, he is here to tender a plea. In
10 regards to the trafficking in crack cocaine charge, that
11 was a trafficking between 10 and 28 grams, that is a third
12 offense for him. That would have been a 25 to 30 year
13 range. We have reduced that to a second offense. I
14 believe that carries 5 to 30. And then as far as the
15 trafficking over 400 grams, another, the way these drug
16 laws are, when you get to that kind of level, weight, it
17 was over 400 grams, that would have been 25 to 30 years.
18 What we have done is reduced that to trafficking, 28 to
19 100 second offense which is a 7 to 30 year range. And
20 what I have talked to Derrick and Charles about today was
21 a 15 year recommendation based on all the weight and his
22 prior history and everything else.

23 THE COURT: So the minimum range of the entire level
24 offense is 7 to 30.

25 MR. SCOTT: He was going to trial on, I hate to

1 predict what a jury would do, it was relatively
2 straightforward. I felt pretty confident he would have
3 been convicted. It would have been one of those ones like
4 we had back in October, your hands would have been tied,
5 25 years would be pretty much the best.

6 THE COURT: All right. Your name is Derrick Eugene
7 Velasquez?

8 MR. VALESQUEZ: Yes.

9 THE COURT: Swear him, please, Ms. Folk.

10 DERRICK E. VELASQUEZ, being
11 first duly sworn, testified as follows:

12 THE COURT: I am going to read your indictments,
13 first trafficking in cocaine, 400 grams or more. It reads
14 that you while in Newberry County on the 1st of May of
15 '15, did knowingly traffic in cocaine, that you would
16 bring in the State or attempt to distribute or knowingly
17 being in actual constructive possession 400 grams or more
18 of cocaine in violation of the health code provision,
19 44-53-370, subpart, (e) (2) (e). It is my understanding you
20 wish to plead guilty to the lesser offense of trafficking
21 in crack, trafficking in cocaine more than 28 but less
22 than 100, second offense.

23 Also, indictment 270, trafficking in crack cocaine.
24 And it reads that you while in Newberry County on the 1st
25 of May of '15 did knowingly traffic in crack cocaine. You

1 did have on your person actual constructive possession of
2 more than 28 but less than, more than 10 but less than 28
3 grams of crack cocaine in violation of the health code
4 provision 44-53-375(c)(1). It is my understanding you are
5 pleading guilty on that indictment to trafficking in
6 crack, second offense, 10 to 28. Is that right, Mr.
7 Verner?

8 MR. VERNER: Yes, Your Honor.

9 THE COURT: That carries a range of 5 to 30 and a
10 fine. Is that your understanding, Mr. Velasquez?

11 MR. VALESQUEZ: Yes.

12 THE COURT: Mr. Verner, you represent Mr. Velasquez?

13 MR. VERNER: I do, Your Honor.

14 THE COURT: You have explained to him the elements of
15 both of these offenses and his potential punishment?

16 MR. VERNER: Yes, I have.

17 THE COURT: Do you have a belief, based upon your
18 investigation, the State's discovery, your own
19 investigation, that if the State went to trial on this
20 your client would more probably than not be convicted?

21 MR. VERNER: I believe, with the motion to suppress I
22 believe, Your Honor, he would be convicted.

23 THE COURT: And you agree with his decision and the
24 negotiations of this charge?

25 MR. VERNER: I do, Your Honor.

1 THE COURT: Mr. Velasquez, in the last twenty-four
2 hours have you taken any alcohol, drugs or medications?

3 MR. VALESQUEZ: No, sir.

4 THE COURT: Are you clearheaded today?

5 MR. VALESQUEZ: Yes.

6 THE COURT: Do you suffer from any disabilities which
7 would affect your understanding of what we are doing here
8 today?

9 MR. VALESQUEZ: No.

10 THE COURT: In order for me to take the plea you have
11 got to waive your constitutional rights, the jury has
12 already been selected but not yet sworn. So, if you
13 proceeded on it would be the State's burden or
14 responsibility to call its witnesses and submit the
15 evidence for the jury's consideration. Mr. Verner, on
16 your behalf, could challenge the State, cross-examine the
17 witnesses, challenge the introduction of their evidence,
18 he could present defenses you may have, the motion to
19 suppress which he already did. During that time and that
20 trial you could not be called to testify in any way
21 whatsoever. The State is not allowed to comment on your
22 silence, call you as a witness or utilize your silence
23 against you in any way. In order for me to accept your
24 plea on these two offenses you must give up the right to
25 confront those accusing you of committing these two

1 offenses. Do you understand those rights?

2 MR. VALESQUEZ: Yes.

3 THE COURT: Understanding your rights to defend
4 yourself at trial do you today waive those rights in order
5 to enter these two pleas?

6 MR. VALESQUEZ: Yes.

7 THE COURT: Are you waiving these rights freely and
8 voluntarily?

9 MR. VALESQUEZ: Yes.

10 THE COURT: Tell me what happened, Mr. Scott.

11 MR. SCOTT: Judge, May 1st the sheriffs department
12 responds to some complaints of unsafe driving on Highway
13 76 near Pete Harris Road. They, between I think, 9:00
14 a.m. and 11:00 a.m. planned a safety checkpoint on that
15 particular road. The purpose was to make sure everybody
16 was driving safely, establish their presence and they were
17 going to be checking licenses. Mr. Velasquez and the
18 codefendant passed through the checkpoint in a rental car.
19 Mr. Velasquez being out of New York and the rental car, I
20 think, coming out of New Jersey, they just happened to
21 pass through. The driver of the automobile was unable to
22 produce a drivers license. The officers at the checkpoint
23 did detect an odor of marijuana. Taking the driver out
24 and then subsequently Mr. Velasquez out, he was in the
25 back seat of the car. Upon taking him out and after he

1 had, either he had produced some marijuana or officers had
2 been shown some marijuana in the car, they patted Mr.
3 Velasquez down for safety purposes. At that point they
4 located crack cocaine in his front right pocket, put him
5 in the patrol car and search incident to arrest they were
6 able to find a backpack that contained over 400 grams of
7 the powdered cocaine, it was actually in a compressed
8 form, a brick shape compressed form. Those are the facts,
9 Your Honor. Just an actual possession, constructive
10 possession case that has been presented and felt like it
11 was a pretty strong case. His prior history is on the
12 guilty plea sheet. Those are the subsequent facts, Your
13 Honor.

14 THE COURT: Mr. Velasquez, you heard the facts
15 outlined by the State and I have heard more testimony
16 yesterday during that pretrial hearing. Are those facts
17 accurate as to your pleas on these two offenses, having
18 crack in your pocket and then the powdered cocaine in the
19 zipped up bag in the floorboard?

20 MR. VALESQUEZ: Yes.

21 THE COURT: Now, my understanding is that both of
22 these pleas have been stepped down, from third offense to
23 second offense and one was stepped down, the weight to,
24 reduced exposure to allow some lower exposure, rather than
25 25 years minimum, it is reduced down to a 7 year minimum.

1 Has any other promises been made to get you to plead
2 guilty other than pleading down to allowing lower
3 exposure?

4 MR. VALESQUEZ: No.

5 THE COURT: Has anybody threatened you or coerced you
6 to plead guilty?

7 MR. VALESQUEZ: No.

8 THE COURT: Now, you understand that if I accept
9 these pleas this will be two serious crimes on your
10 record. Having two convictions will give you two strikes
11 on your record meaning that in the future if you get
12 accused of a most serious offense or a future serious
13 offense the State can ask for a sentence of life without
14 parole for the third conviction. Do you understand that?

15 MR. VALESQUEZ: Yes.

16 THE COURT: So, the State will attempt to utilize
17 your prior record, like your prior convictions have been
18 used, these serious offenses, the State can do so, likely
19 to use them against you for their advantage in your
20 sentence. Do you understand that?

21 MR. VALESQUEZ: Yes.

22 THE COURT: All right. Understanding the nature of a
23 serious conviction on your record do you still want to
24 plead guilty?

25 MR. VALESQUEZ: Yes.

1 THE COURT: Also, once you are placed in the
2 Department of Corrections, there is a, violent offender is
3 classified as such, you will not be entitled to what
4 non-violent offenders are entitled to particularly parole.
5 You will be entitled to community supervision release as a
6 violent offender, meaning that whatever the sentence
7 imposes you will have to serve eighty-five percent of your
8 time before you are eligible for community supervision
9 release. Do you understand that?

10 MR. VALESQUEZ: Yes.

11 THE COURT: So understanding you will be classified
12 as a violent offender do you still wish to plead guilty?

13 MR. VALESQUEZ: Yes.

14 THE COURT: Are you on supervision anyway?

15 MR. VALESQUEZ: No.

16 THE COURT: No probation, no parole?

17 MR. VALESQUEZ: No.

18 THE COURT: Other than those outstanding charges,
19 they are not coming to get you on.

20 MR. VALESQUEZ: Right.

21 THE COURT: What State was that?

22 MR. VERNER: Maryland, they did appear to be
23 Magistrate level.

24 THE COURT: And they have already had an opportunity
25 to extradite him and chose not to do so is what I

1 understood. Is that right? I am not concerned about
2 those, apparently they are not. Now, you are pleading
3 guilty on these two offenses. Do you have any complaints
4 against the Eighth Circuit Solicitor's office and Newberry
5 County Sheriffs Office of the investigation or prosecution
6 of you on these two charges?

7 MR. VALESQUEZ: No.

8 THE COURT: Now, you are represented by Mr. Verner
9 and have you had enough time to discuss with him your plea
10 here today?

11 MR. VALESQUEZ: Yes.

12 THE COURT: You have understood your conversations
13 with him as he explained your right to trial and the right
14 to defend yourself?

15 MR. VALESQUEZ: Yes.

16 THE COURT: Are you satisfied with his advice to you?

17 MR. VALESQUEZ: A lot of the time, yes.

18 THE COURT: So, assuming the negotiations and
19 reduction, more satisfied than if there were no
20 negotiations?

21 MR. VALESQUEZ: Yes.

22 THE COURT: Do you need any more time with him?

23 MR. VALESQUEZ: No.

24 THE COURT: Now, have I gone over anything yet in
25 this plea that you need to ask him about, if you need time

1 with him I will give it to you.

2 MR. VALESQUEZ: No.

3 THE COURT: Having sufficient time with him are you
4 pleading guilty freely and voluntarily of these two
5 offenses?

6 MR. VALESQUEZ: Yes.

7 THE COURT: And you are pleading guilty because you
8 are in fact guilty as having these drugs on you that day?

9 MR. VALESQUEZ: Yes.

10 THE COURT: You understand, that if I have done
11 something procedurally improper that you have a limited
12 number of days in which to file a notice of intent to
13 appeal?

14 MR. VALESQUEZ: Yes.

15 THE COURT: Regarding indictment 15-GS-36-indictment
16 269 and 270, I find that Derrick Eugene Velasquez has made
17 a free, knowingly and intelligent plea of guilt, one count
18 of trafficking in cocaine, more than 28 but less than 100
19 grams, second offense. Additionally made a plea of guilt
20 of trafficking in crack cocaine, more than 10 but less
21 than 28 grams. He has entered both of these pleas with
22 advice of counsel, an attorney, of whom he states he is
23 satisfied and the State has laid out ample facts to
24 support this plea. All right, Mr. Verner.

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

1 Derrick is 45 years old, he is a resident of New York. He
2 has been in detention since May 1st, I counted 95 days
3 today. As the Court remarked early he has kind of been
4 put on an expedited trip through the judicial system here
5 but the case is pretty much as the solicitor said.
6 Derrick really doesn't have, his record is primarily just
7 narcotics type offenses. I don't see too much
8 non-narcotic record. I think he just got caught in the
9 roll, as kind of a middle man between people. There was a
10 large amount, got caught, bad luck. His only prior
11 incarceration was he did a two and a half year sentence
12 for drugs in the past. That is really the only time he
13 was caught, incarceration of a penalty. I will say he has
14 been a good client in terms of intelligent and helpful and
15 friendly in that regard.

16 THE COURT: I noticed his participation throughout.

17 MR. VERNER: I think he is very bright, I think he
18 probably with a better hand in life earlier, he had done
19 better things, he is one of my more intelligent clients.
20 That might get you in trouble sometimes too. I would ask
21 the Court, Your Honor, to consider that, given that this
22 is an eighty-five percent offense, he would like any
23 leniency the Court could give him. I would ask the Court
24 anywhere between 9 to 12 years. He may want to address
25 the Court.

1 THE COURT: I will be glad to hear from you, Mr.
2 Velasquez.

3 MR. VALESQUEZ: Well, Your Honor, I take full
4 responsibility for this and I made those decisions. It
5 was very turbulent times and I felt like I had nothing to
6 lose at the time. I committed a wrongful act, I knew
7 there was consequences and penalties. When I look in the
8 mirror I ask myself, I can't think of any reason of why I
9 was going to do what I was going to do. So, it didn't
10 work out and the only reason I put up such a fight in the
11 beginning is because, I thought I had a shot at this. And
12 I wanted to, to expose me to more time but my decision was
13 based on, I would rather do 7 years, I didn't want to do 7
14 years and think I could have won. I gave it all I could,
15 you know. And with that hopefully I can pick up some
16 different skills and that is what I intend to do.
17 Whatever you impose on me I will use that time wisely and
18 skillfully and I will come out a better person.

19 THE COURT: Take what you got coming to you but take
20 it and learn from it and improve yourself. That is
21 wonderful. I commend you for thinking that way. Anything
22 else?

23 MR. VALESQUEZ: No, sir.

24 THE COURT: I accept the plea. Considering the
25 negotiations in place and the exposure you have lost I am

1 going to give you 15 years on both, and those both run
2 concurrent. Credit for time served.

3 All of the exhibits will be returned back to the
4 Solicitor's office except for the Court's exhibits.

5 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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1 CERTIFICATE OF REPORTER
2
34 State of South Carolina)
5 County of Newberry)
6
78 I, Joy E. Holston, Official Court Reporter for the
9 Eighth Judicial Circuit of the State of South Carolina, do
10 hereby certify that the foregoing is a true, accurate and
11 complete transcript of record of the proceedings had and
12 evidence introduced in the trial of the captioned case,
13 relative to appeal, in the County of Newberry, South
14 Carolina on the 3rd day of August, 2015.15 I do further certify that I am neither of kin,
16 counsel nor interest to any party hereto.
1718 July 17, 2016
1920 *Joy E. Holston*
21

22 Joy E. Holston, Court Reporter

23 My Commission expires: May 2, 2026
24
25

STATE OF SOUTH CAROLINA

In the Court of Common Pleas

County of Newberry

2016-CP-36-00154

Derrick Eugene Velasquez #365000

Full name and prison number, if any, of applicant.

v.

State of South Carolina

Name of Respondent

APPLICATION FOR

POST-CONVICTION RELIEF

JACQUE S. BOWERS
CLERK OF COURT

2016 MAR 7 AM 11 43

FILED
NEWBERRY COUNTY

SCANNED

INSTRUCTIONS - READ CAREFULLY

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

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

If the applicant 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 applicant was convicted.

1. Place of detention Lee Correctional Institution
990 Wiscaky Hwy, Bishopville, S.C. 29010
2. Name and location of Court which imposed sentence Newberry County
Court, 1226 College St Newberry, S.C. 29108/2910
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 15-GS-36-269
 - (b) 15-GS-36-270
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) August 4, 2015 - 15 yrs no parole
 - (b) _____
 - (c) _____

5. Check whether a finding of guilty was made

- (a) after a plea of guilty plea of guilty
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____

6. Did you appeal from the judgment of conviction or the imposition of sentence? yes

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

- i. SC. Court of Appeals
- ii. _____
- iii. _____

(b) the result in each such Court to which you appealed:

- i. order of dismissal by Court of Appeals
- ii. _____
- iii. _____

(c) the date of each such result:

- i. September 2, 2015
- ii. _____
- iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. Not Known
- ii. _____
- iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

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

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) ineffective assistance of counsel
- (b) due process violations
- (c) denied equal protection under the law

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) _____

SEE ATTACHMENT

(b) _____

(c) _____

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law ?

No

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

No

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) **No**

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

No

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

N-A

ii. _____

iii. _____

iv. _____

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

i. _____

N-A

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

N-A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

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

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

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

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? NO

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

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

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

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

15. If any ground set forth in (9) 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) SEE ATTACHMENT
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? yes
- (b) your trial, if any? yes-plea bargain
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?

NO

(e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? NO

17 If you answered "yes" to one or more parts of (16), list:

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

- i. Bakari Sellers - 2110 Beltline BLVD Columbia S. 2921
- ii. Charles Verner - P.O. Box 484 Newberry
- iii. S.C. 29108

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

- i. bond hearing
- ii. motion to suppress / sentencing
- iii. _____

18. State clearly the relief you seek in filing this application.

to readdress the facts and legalities
according to common law and U.S. Constitu

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

NO

STATE OF SOUTH CAROLINA)

) VERIFICATION

COUNTY OF _____)

I, Derrick Velasquez, 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.

Derrick Velasquez

Sworn to and subscribed before me

This 1st day of March, 2016

Veretha J. Gill

L.S.

Notary Public for South Carolina

My Commission Expires 3/29/2016

JACQUES S. BOWERS
CLERK OF COURT

2016 MAR 7 AM 11:43

NEWBERRY COUNTY

FILED

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

I, Derrick Velasquez, 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 proceeding or give security therefor.

Derrick Velasquez
Applicant

Sworn to and subscribed before me

This 1st day of March, 2016

Veretha J. Gill

L.S.

Notary Public for South Carolina

My Commission Expires: 3/29/2016

Attached Answers To Question #10

Ground - (ineffective assistance of counsel)

- a) failure to obtain field drug test kit analysis. (Scott Reagents test)
- failure to obtain lab analysis from G.L.E.D.

- failure to obtain a continuance
- failure to investigate, plan, and prepare a defense strategy
- failure to challenge illegally insufficient empirical data

FILED
NEWBERRY COUNTY
2016 MAR 7 AM 11 43
DEANE S. BOWERS
CLERK OF COURT

Ground - (violation of due process)

- b) woefully insufficient evidence submitted by the Newberry Sheriff's Office.
- incomplete discovery submitted by the Solicitor
- only given one hour to prepare a motion to suppress by the Judge.

←

FILED
NEWBERRY COUNTY
2016 MAR 27 AM 11:11
JACQUE S. BOWERS
CLERK OF COURT

Attached Answers To Question 1.5

a) ineffective assistance of counsel issue has not been raised because this is my first opportunity to address this issue with the filing of this P.C.R. application.

b) due process violation issue was not raised because defense counsel did not make the court aware that the solicitor veered astray from proper procedure and constitutional law.

c) denied equal protection issue was not raised because I had no access to law library and discovered the law was not applied evenhandedly only after my sentencing phase. I was arrested and railroaded into a plea and sentenced 60 days later.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	OF THE EIGHTH JUDICIAL CIRCUIT
COUNTY OF NEWBERRY	)	
	)	2016-CP-36-154
Derrick Eugene Velasquez,	)	
S.C.D.C. No. 365000,	)	
	)	
Applicant,	)	
	)	RETURN ¹
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent, making its Return to the application for post-conviction relief (PCR) filed March 7, 2016, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Newberry County Clerk of Court. Applicant was indicted at the June 2015 term of the Newberry County Grand Jury for trafficking in crack cocaine (10 g. or more, but less than 28 g.) (2015-GS-36-270) and trafficking in crack cocaine (400 g. or more) (2015-GS-36-269). Applicant was represented by Charles Verner, Esquire. On August 3, 2015, Applicant began a trial before the Honorable Eugene C. Griffith, Jr. On August 4, 2015, Applicant pled guilty to trafficking in crack cocaine (10 g. or more, but less than 28 g.) and to trafficking in cocaine (28 g. or more, but less than 100 g.) as a lesser included offense of trafficking in cocaine (400 g. or more). Applicant was sentenced pursuant to a recommendation to imprisonment for fifteen years on each charge to run concurrently.

Applicant filed a notice of appeal, which was served on opposing counsel on August 17, 2015. Applicant's counsel filed a Motion to Allow Late Filing, stating that he was made aware on

¹ Respondent requests that counsel be appointed.

August 17, 2015 that Applicant desired an appeal. On September 2, 2015, the South Carolina Court of Appeals issued an order stating that it cannot extend the time for service of the notice of appeal, denying Applicant's motion and dismissing the appeal. The remittitur was sent September 18, 2015.

II.

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

1. Ineffective Assistance of Counsel
2. Due Process Violations
3. Denied equal protection under the law
4. (See Application's attachment for specific grounds)

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at evidentiary hearing. All amendments should be made well in advance of hearing and should be filed as required by Rule 11, SCRCP(a).

Attached herewith and incorporated herein are the Newberry County Clerk of Court records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the plea transcript. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent submits plea counsel rendered effective assistance of counsel. In a Post-Conviction Relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be

relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced 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. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

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

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held. ✓

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

JUSTIN J. HUNTER
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

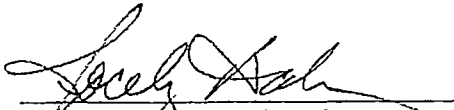
November 1, 2016

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF NEWBERRY	)	
	)	
	)	2016-CP-36-0154
DERRICK VELASQUEZ, #365000,	)	
	)	
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:

**Derrick Velasquez, #365000
Lee Correctional Institution
990 Wisacky Hwy
Bishopville, SC 29010-1775**

DATED this 1st day of November, 2016.


Jocelyn Baker, Legal Assistant
For Respondent

SCANNED

STATE OF SOUTH CAROLINA
COUNTY OF NEW BERRY

COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

DERRICK EUGENE VELASQUEZ,

Applicant,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

Case No.

2016CP3600154

ELIZABETH P. FOLK
CLERK OF COURT

2017 APR 20 PM 4:07

FILED
NEWBERRY COUNTY

APPLICANT'S MOTION TO AMEND PCR

COMES NOW, Derrick Eugene Velaquez, the Applicant pro se in the above-captioned case, and respectfully moves under Rule 15(a), SCRCivP, requesting leave to amend his previously filed application for post-conviction relief.

For GOOD CAUSE in this court granting such relief, the Applicant would show as follows:

I. BACKGROUND/FACTS

1. The Applicant's PCR was filed on 03/09/2016 by the Newberry County Common Pleas court and assigned civil case No.: 2016 CP 3600154
2. The Respondent made Return in response to applicant's PCR on 11-02-2016.
3. The Applicant has not filed any Reply, nor has he been appointed PCR attorney;
4. The Respondent has requested that an evidentiary hearing be conducted in this PCR matter;

5. The Respondant would not be prejudiced by this Court allowing pro se Applicant opportunity to amend his PCR in order to correct deficiencies and include all available grounds for relief.

II. LAW/ARGUMENTS

The S.C. Rules of Civil Procedure shall apply to Post Conviction applications to the extent that such rules are not inconsistent with PCR statute. Arnold v. State, 420 S.E.2d 834, 836 (1992); Rule 71.1(a), SCRCivP.

Pursuant to Rule 15(a) SCRCivP, a Court is to freely grant leave to amend when justice requires, and there is no prejudice to any other party. Harvey v. Strickland, 566 S.E.2d 529, 535 (2002).

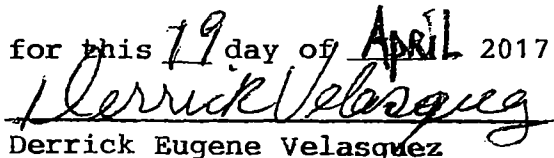
In this PCR case the Applicant is acting pro se without benefit of an attorney, and would respectfully request leave to amend his originally filed PCR application to better articulate grounds for relief, correct deficiencies identified by the Respondent's Return and to properly include all PCR grounds available for relief prior to any evidentiary hearing being held in this matter.

The Applicant has attached herewith his "Amended PCR Application" which has been filed with this motion and duly served on the Respondent.

CONCLUSION

WHEREFOR, the Applicant prays this Court will grant leave to amend PCR as requested herein.

Respectfully prayed for this 19 day of April 2017.


Derrick Eugene Velasquez

7-27-2016

PCR Amendment
CASE# 2016CP3600154

FILED
NEWBERY COUNTY
2016 AUG 2 AM 10:43
JACKIE S. BOWERS
CLERK OF COURT

Ground - Ineffective Assistance of Counsel.

Issue: - Conflict of interest.

My attorney also represented my co-defendant and worked to protect her rights and secured her freedom while providing a sub-par performance for my defense. I believe my attorney violated Rule #4 (1.7) of professional conduct.

Please Amend this Ground and issue.

Sincerely
10/7/18

SCANNED

FORM 5

STATE OF SOUTH CAROLINA)

County of NEWBERRY)DERRICK VELASQUEZ)

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

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2016-CP-36-154

AMENDED

APPLICATION FOR

POST-CONVICTION RELIEF

2017 MAY -4 PM 12:02

FILED
NEWBERRY COUNTYINSTRUCTIONS - 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 Lee Correctional Institution - 990 Wisacky Hwy, Bishopville, S.C. 29010
2. Name and location of Court which imposed sentence Newberry General Sessions Court,
Newberry, South Carolina
3. Name(s) of co-defendant(s) (if any) Ebony Joyner
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2015-GS-36-269 - Trafficking Cocaine 28-100 grams
 - (b) 2015-GS-36-270 - Trafficking Crack Cocaine 10-28 grams

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) August 4, 2015 - 15 years - concurrent _____
- (b) August 4, 2015 - 15 years - concurrent _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty Yes _____
- (b) after a plea of not guilty No _____
- (c) after a plea of nolo contendere No _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?

8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. Court of Appeals _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Case Dismissed as not timely filed _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. September 2, 2015 _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. None known _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Legal Counsel
- (b) Violation of Right to due process, Equal protection and
- (c) Right against unlawful search and seizure
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a)(1) Lawyer had actual conflict of interest as he represented my Co-Defendant
- (b)(1) The Court erred when it ruled the checkpoint stop was constitutionally valid
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Filed Notice of Appeal, pro se that was dismissed as untimely filed
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. SC Court of Appeals
- ii. _____
- iii. _____
- iv. _____

11 (a)

- (2) Trial Counsel failed to ask the Court to allow him to withdraw as counsel due to the actual conflict of interest as he represented my Co-Defendant
- (3) Trial Counsel failed to ask for a continuance so that Defendant could obtain a conflict –free attorney
- (4) Trial Counsel failed to adequately prepare and present Defendant's Motion to Suppress the drugs seized from the vehicle Defendant was a passenger in due to an unconstitutional driver license checkpoint
- (5) Trial Counsel failed to discuss or even show the Defendant the evidence the State had against him, including the results of any tests of the drugs seized
- (6) Trial Counsel failed to inform Defendant he had a right to a conflict-free lawyer

11 (b)

- (2) The Court erred when it denied Defendant's Motion for a continuance when the State called his case for trial less than 90 days after his arrest thus violating Defendant's right to due process, equal protection and right to a fair trial by not allowing Defendant sufficient time to investigate and prepare for trial

(c) the disposition thereof:

- i. Dismissed as untimely filed
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. September 2, 2015
- ii. _____
- iii. _____
- iv. _____

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

- i. unknown
- ii. _____
- iii. _____
- iv. _____

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

Yes

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

(a) which grounds have been presented:

- i. Motion to Suppress evidence seized at Driver's License checkpoint was
- ii. made before trial Judge
- iii. _____

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

- i. At trial with PreTrial Motion
- ii. _____
- iii. _____

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

- (a) Ineffective assistance of counsel could not be raised before PCR
- (b) Other issues could not be presented as Notice of Appeal was untimely filed
- (c) _____

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

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

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

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

- i. Charles Verner, Esquire - P.O. Box 484, Newberry, SC 29108
- ii. _____
- iii. _____

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

- i. Trial; sentencing
- ii. _____
- iii. _____

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

Vacation of plea and sentence

New trial

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

No

FILED
NEWBERRY COUNTY

2017 MAY -4 PM 12: 02

ELIZABETH P. FOLK
CLERK OF COURT

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Newberry)

I, Derrick Velasquez, 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.

Derrick Velasquez

SWORN to and subscribed before me this 28th
day of March, 2017.

[Signature] (L.S.)
Notary Public

My Commission Expires: 02-1-2027

I.

14-154

SCANNED

State of South Carolina
County of Newberry

In the
Common Plea
8th Judicial
Circuit

Derrick Eugene Velasquez
SCDC#365000.

Applicant

Case No:

2016-CP-36-015

V.S.

State of South Carolina
Respondent

ELIZABETH P. FOLK
CLERK OF COURT

APR 20 PM 4:57

FILED
NEWBERRY COUNTY

"Amended Applicant
For Post-Conviction
Relief"

1. Place of confinement: Lee Correction
Inst. 990 W. Sack Hwy Bishopville SC 291

2. Name/Location of Court: Newberry
County General Sessions, 8th Judicial
District, Newberry, S.C.

3. Indictment #: 15-GS-36-269/
Drugs, Trafficking Cocaine, 28g-100g;
15-GS-36-270/Drugs Trafficking
Crack 10g-28g.

II.

4. Sentence date: August 4, 2015
(15 YRS. imprisonment)

5. Finding of Guilty = Guilty Plea

6. Appeal taken yes, but "Dismissed"

7. a) S.C. Court of Appeals

(b) Dismissed

(c) September 2, 2015

(d) unknown.

8. N - A.

9. Grounds for PCR Relief:

A) Guilty Plea not entered knowingly, intelligently, or voluntarily.

B) Counsel labored under actual conflict of interest

C) deprived of effective assistance of counsel.

10. Facts Supporting PCR Grounds.

performance and conflict of interest as set forth below in 10(b) & (c) the applicants guilty plea was not entered according to law See:

Boykin v. Alabama, - 395 U.S. 238 (1969); Smith vs State, 631 S.E. 2d 26 (SC 2006); Holloway vs. Arkansas 435 US 475, 484-85 (1978).

("Courts failure to inquire into conflict of interest after defense counsel's pretrial warnings violated right to effective assistance of counsel because the court had duty to avoid potential conflicts").

(b) The Circuit Court appointed Charles Verner, Newberry County Public Defenders Office to represent the Applicant. Attorney Charles Verner represented Applicant in all criminal proceedings up to, and including, sentencing in August 4, 2015.

Applicant was arrested in May 1,

IV,

2015 and charged in this case with his girlfriend and co-defendant, Bone Joyner. The Court appointed Attorney Verner to represent Applicant's co-defendant during the same time attorney Verner was representing Applicant. In other words, Attorney Verner concurrently and simultaneously represented both the Applicant and the Applicant's girlfriend/Co-defendant. Attorney Verner was laboring under an "actual conflict of interest" at the same time counsel was actively representing Applicant. At no time was Applicant properly advised by counsel with respect to this conflict of interest, nor did Applicant waive conflict-free representation. Counsel's simultaneous representation of Applicant and Applicant's girlfriend/Co-defendant was fraught with conflicts of interest. For example, attorney Verner advised Applicant to plead guilty knowing that such strategy

would help Ebony Joyner avoid criminal liability. It was not in Applicant's best interest to claim contraband that may well have belonged to Attorney Verner's other client. The courts have concluded that Co-defendants represented by the same defense attorney creates an actual conflict of interest depriving client of due process and effective assistance of counsel. See Lomax vs State, 665, S.E.2d 164 (2008); State vs Gregory, 612 S.E.2d 449 (2002 S.C.), ("defendant need not demonstrate prejudice if there is an actual conflict of interest.")

C) Attorney Verner failed to provide the Applicant with information and knowledge required to make an informed decision whether to exercise right to jury trial or waive rights and plead guilty. Had Attorney Verner provided

IV.

Applicant with effective representation the Applicant would not have plead guilty but rather continued with his jury trial as initially intended. (Will vs Lockhart 474 U.S. 52, 56-58 (1985); (Smith vs Sta 631 SE.2d 260, 261 (SC 2006).

Specifically, Attorney Verner failed

(1) to investigate and research Applicant's prior criminal history which resulted in counsel's failure to object/argue against Applicant being treated as 2nd/3rd offender under trafficking statute;

(2) to advise Applicant correctly with respect to sentence exposure if convicted as charged. Attorney Verner erroneously advised Applicant that he (Applicant) was exposed to "life" without parole if convicted at trial.*

* The records contain references from "mandatory 30 years" to "life" imprisonment. (Trial. Vol. 8-3-15. pp. 9-11)

Attorney Verner essentially coerced the Applicant to waive his constitution rights - including trial by jury - and accept an unfavorable plea agreement offer.

Contrary to counsel's advice, the Applicant was not facing life imprisonment as a first offense drug trafficking defendant. Moreover, the prosecution had not served / filed any notice of intent of enhanced sentence as required by S.C. Code Ann. 17-25 assuming that Applicant qualified for life imprisonment without parole. The record reflects that the prosecution agreed to drop Applicant's drug trafficking 3rd offense to drug trafficking 2nd offense. (Trial 8-4-15 pp 156-57). However the Applicant has never been convicted of any drug trafficking offense, much less (2) two prior drug trafficking offenses. Counsel's failure to investigate applicants

prior drug conviction record and failure to object to the prosecutio unlawful coercion of Applicant, was deficient performance. And counsel's deficient performance in this regard prejudiced Applicant's criminal proceedings in so much as Applicant would not have waive his right to jury trial and plead guilty but for counsel's erroneous advice.* The Applicant was in process of exercising his right to a jury trial prior to pleading guilty. The court has already empaneled a jury to hear Applicant's case. (Trial Vol 8-3-15 pp 14-29)*

(d) failed to properly investigate, research and prepare for suppression hearing. Applicant moved to suppress contraband seized during traffic stop in Newberry County on May 1, 2015. Counsel was not adequately prepared for suppression

IX,

hearing and refused to call Applicants Co-defendant and driver of the vehicle Ebony Joyner as witnesses. During cross-examination of witness at suppression hearing counsel was unprepared and failed to adequately question witnesses. (Trial Vol 8-3-15, pp 29-150).

(E) to prepare, research and present probative evidence supporting motion for continuance. The Applicant's criminal case was called for trial approximately (90) ninety days after Applicant's arrest. Counsel moved for a continuance on August 3, 2015 (92 days after arrest on May 1 2015) (Trial Vol 8-3-15, pp 4-12). The court "denied" Applicant's request for a continuance (pp 12). Applicant repeatedly told Attorney Verner that he (Applicant) wanted time to prepare for suppression hearing and trial - to include calling witness and Co-defendant Ebony

X.

Joyner, the driver of the vehicle. Moreover, Applicant advised attorney Verner that he (Applicant) had contacted another criminal attorney to take the case. *Attorney Cam Littlejohn who was present in courthouse at time (Trial Vol. pp 1. Nevertheless, Attorney Verner inform the court he was ready to proceed. The Circuit Court denied applicant request for continuance (Trial Vol 8-34 pp 12) and went on to find - without any evidence - that Applicant's request for continuance and request for a change of counsel was a "delay tactic". (Trial Vol. 8-3-15- pp 156)

- (11) Prior PCR Applications: Applicant has not filed any prior PCR application aside from the PCR form related to this case on March 7, 2016. This PCR is an amendment to that pleading. Rule 15(a)(c), SCR Crim P.

12) N-A.

13) Any Ground Set forth in (a) previously presented; NO.

14) N-A.

15) N-A

16) Attorneys:

(a) arraignment/plea: Yes

(b) trial; Yes

(c) sentence: Yes

(d) Appeal; NO

(e) Petition; NO

17) list;

(a) Bakari Sellers | 2110 Beltline BLVD
Columbia, SC 2920

(b) Charles Verner, | P.O. Box 484
Newberry, SC 29108

18) Relief requested:

(a) vacate conviction and sentence

19) Other Sentences; NONE.

XII -

"Verification of Truth"

I, Derrick Velasquez, being duly sworn upon my oath, depose and state that I have subscribed the foregoing Amended PCR application that I know the contents thereof; that it includes every ground known to me as a pro-se litigant for vacating the conviction and sentence attached in this PCR application; and that the matters and allegations therein set forth are true and correct to the best of my ability.

X Derrick Velasquez

DERRICK E. VELASQUEZ

Applicant, pro se

~~Sworn~~ to and SUBSCRIBED

Before me this 18 day of April 2017

Debra Eastledge
NOTARY Public

Commission Expires 3/3/2021

April 19 2017

Derrick E. Velasquez
#Lee Ct 990 Wiskey Hwy.
Bismarck, SC 29010Clerk of Court Newberry Co.
Common Pleas Div 2
1226 College ST
Newberry, SC 29108FILED
NEWBERRY COUNTY
2017 APR 20 PM 4:06
ELIZABETH P. FOLK
CLERK OF COURTRE: Velasquez v. State,
PCR Case # 2016-CP-36-154

Dear Hon. Clerk:

Please find enclosed for filing my pro se
"Motion To Amend PCR" and "Amended PCR" along
with "Certificate of Mailing" showing service
on AG's office.

I trust everything is in the proper order to be
filed at this time. PLEASE return "clock-filed"
copy of both motions. I have enclosed a SASE
for your convenience.

Thank you for your time + concern in this
matter.

Respectfully,

/s/ Derrick Velasquez
Applicant, Pro Se

" CERTIFICATE OF MAILING "

I, Derrick E. Velasquez, do hereby certify that I have this same day served, mailed and filed the attached "Motion To Amend PCR" and "Applicant's Amended PCR" in this case # 2016-CP-36-154 by depositing such in the PRISON'S legal mailbox with 1st class prepaid postage affixed and addressed:

S.C. Attorney General's Office
Dennis Bldg, Box 11549
Columbia, SC 29211

FILED
NEWBERRY COUNTY
2017 APR 20 PM 4:06
ELIZABETH P. FOLK
CLERK OF COURT

Clerk of Court
Newberry Circuit Court
Common Pleas Division
1226 College ST.
Newberry, SC 29108

DONE This 19 day of APRIL, 2017

s/ Derrick Velasquez
Applicant, pro se
Derrick E. Velasquez
990 Wuscky Hwy
Bishopville, SC 29010

State of South Carolina	)	
	)	Court of Common Pleas
County of Newberry	)	
		2016-CP-36-00154
		Post Conviction Relief
Derrick Velasquez	)	
vs.	)	Transcript of Record
	)	
State of South Carolina	)	
	)	
Defendant	)	

June 6, 2017
Laurens, South Carolina

B E F O R E:

Honorable G. Thomas Cooper, Jr., Judge

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

Judah VanSyckel, Assistant Attorney General
Attorney for the State

Wayne Floyd, Esq.
Attorney for the Applicant

Joy E. Holston
Official Court Reporter

I N D E X O F W I T N E S S E S

(IC) - Denotes In Camera
(AW) - Denotes Applicant's Witness
(SW) - Denotes State's Witness

(AW) Charles Verner

Direct examination by Mr. Floyd: 5
Cross-examination by Mr. VanSyckel: 28
Redirect examination by Mr. Floyd: 44

(AW) Derrick Velasquez

Direct examination by Mr. Floyd: 47
Cross-examination by Mr. VanSyckel: 63

Certificate of Court Reporter: 71

E X H I B I T SApplicant's

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE#</u>
1	Letter/Joe St. Pierre		X	9
2	Operation Order		X	26

1 THE COURT: Is the State ready to proceed?

2 MR. VANSYCKEL: Yes, Your Honor. May it please the
3 Court. This is Derrick Eugene Velasquez, SCDC number
4 365000, versus the State of South Carolina. The Applicant
5 is present, he is confined at the South Carolina
6 Department of Corrections pursuant to orders from the
7 Newberry County Clerk of Court. The Applicant was
8 indicted on the June 2015 term of Newberry County Grand
9 Jury for trafficking in crack cocaine, 10 grams or more
10 but less than 28 grams; trafficking in crack cocaine, 400
11 grams or more; 2015-GS-36-269. The Applicant was
12 represented by Charles Verner, Esquire. On August 3rd,
13 2015 the Applicant being in trial before the Honorable
14 Eugene C. Griffith. On August 4th, 2015 Applicant plead
15 guilty to trafficking in crack cocaine, 10 grams or more
16 but less than 28 grams; and in trafficking cocaine, 28
17 grams or more but less than 400 grams; 28 grams or more
18 but less than 100 grams is a lesser included offense of
19 trafficking in cocaine, 400 grams or more. And I believe
20 I misspoke just a moment ago when I said that his second
21 indictment was for trafficking in crack cocaine, 400 grams
22 or more. I believe it was just trafficking cocaine, 400
23 grams or more.

24 THE COURT: Anything else?

25 MR. VANSYCKEL: Nothing further, Your Honor.

1 THE COURT: All right. Mr. Floyd.

2 MR. FLOYD: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MR. FLOYD: Are you ready for us to proceed, Your
5 Honor?

6 THE COURT: Yes.

7 MR. FLOYD: Your Honor, we would call Mr. Charles
8 Verner.

9 CHARLES VERNER, being
10 first duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 By Mr. Floyd:

13 Q Good morning, Mr. Verner.

14 A Good morning.

15 Q Mr. Verner, were you appointed to represent Derrick
16 Velasquez in Newberry?

17 A Yes, as Public Defender.

18 Q And now I want to run down kind of a chronology of
19 it. Was he arrested May the 1st of 2015?

20 A Off the top of my head I don't remember but I am sure
21 that's right.

22 Q And he was first called for trial July 6th of '15,
23 wasn't he, about two months later? If you don't remember
24 I can understand that.

25 A I don't remember, I doubt he would have been called

1 for trial two months later. That sounds more like a roll
2 call. That sounds unlikely that he would have been called
3 to trial two months after his arrest.

4 Q Would you be surprised if you actually asked for a
5 continuance with Judge Hocker at that time, July 6th, when
6 they first called it for trial?

7 A If that is what it shows. But I don't disagree with
8 what you--

9 Q --okay. And then he was eventually called back to
10 trial on August 3rd of 2015, is that correct?

11 A If that is what the record reflects.

12 Q And you filed a motion, both a motion to suppress and
13 a motion for a continuance at that time?

14 A I remember that.

15 Q Do you recall that?

16 A Yes, sir.

17 Q And the motion for continuance was denied, wasn't it?

18 A The August term, I am sure it was, by Judge Griffith.

19 Q By Judge Griffith, that's correct. So he actually
20 went to trial within basically three months?

21 A If that is the trial date.

22 Q And did you have enough time in that three-month
23 period to accurately investigate and prepare the case for
24 trial?

25 A Yes, sir. I think the, that seems very quick

1 turnaround on the SLED drug result too. The facts of the
2 case are very simple. But that is quicker than I would
3 have remembered.

4 Q Okay. In fact, didn't you ask for a continuance on
5 August the 3rd with Judge Griffith?

6 A If that is what the record, I remember asking for a
7 continuance and I believe that is on the transcript.

8 Q And if you had been adequately prepared would you
9 have asked for a continuance?

10 A I am very confident that I requested a continuance at
11 the Griffith trial at the request of Mr. Velasquez.

12 Q He was in jail, wasn't he?

13 A He was.

14 Q He never was able to make bond?

15 A I don't think he ever made bond.

16 Q Okay. Did he have a codefendant in the case, Ebony
17 Joiner?

18 A He had a codefendant.

19 Q And were you also appointed to represent her?

20 A No. She was a defender client when I found out he
21 was her codefendant. I met her once, found out she was
22 her and that I assigned her to a conflict attorney,
23 probably Joe St. Pierre but I am not one-hundred percent
24 sure.

25 Q I will show you a document and ask if you can

1 identify it?

2 A Okay, it is a copy of a letter by me to Joe St.
3 Pierre. I can identify it, it looks like my, a copy of a
4 letter that I would have sent Joe St. Pierre on June 23rd,
5 2015 assigning him to represent, okay. Yeah, the letter
6 of June 23rd assigns Joe St. Pierre to represent Derrick
7 Velasquez. Derrick raised this issue at a grievance with
8 the Office of Disciplinary Counsel. I first assigned Joe
9 St. Pierre to represent Derrick. Joe indicated or because
10 Derrick was the one that law enforcement was primarily
11 thought was the more culpable person on the same day I
12 rescinded the appointment to Derrick Velasquez. And I
13 assigned him to the codefendant, Ebony Joiner, probably
14 within an hour, a couple of hours or maybe the next day, I
15 rescinded it that day and the following day I sent a
16 letter saying you are actually representing the other
17 codefendant. And the reason for that was, because Derrick
18 Velasquez was considered the more culpable person and I
19 would have kept him.

20 Q No question that this says that you represent Derrick
21 Velasquez?

22 A I initially--

23 Q Did you refer him rather because you represented the
24 codefendant?

25 A That is true, I initially assigned Derrick to Joe St.

1 Pierre.

2 MR. FLOYD: Your Honor, I would like to offer this as
3 an exhibit.

4 MR. VANSYCKEL: Without objection.

5 THE COURT: Without objection.

6 (Whereupon, Applicant's Exhibit 1 was admitted into
7 evidence.)

8 Q So, Mr. Verner, no question this says that you
9 referred Derrick Velasquez, you appointed Mr. St. Pierre
10 to represent Derrick Velasquez?

11 A That's right. Joe St. Pierre is the conflict
12 attorney, he is not affiliated with the Public Defender's
13 office but he is the contract conflict attorney.

14 Q And in this document you said you represented Ebony
15 Joiner?

16 A That's right, I was going to represent the
17 codefendant.

18 Q Now, did you ever meet with Ebony Joiner?

19 A I met with her once briefly and she identified
20 herself as the codefendant of Derrick Velasquez. So when
21 I was at the jail I certainly did meet with her and that
22 is generally how I meet new clients is by going to the
23 jail and, you know, who is new, who needs to speak to an
24 attorney.

25 Q So did you discuss the case with Ebony Joiner?

1 A No. The first time I would have met her at the jail
2 would be, it wouldn't be an in-depth meeting. It would be
3 basically, you know, I would have discussed what are your
4 charges, what are you in here for, do you have any
5 codefendants, can I have your biographical information.
6 So I would have, I would have had a brief discussion with
7 her about the case but it would be just primarily who are
8 your codefendants, what are you charged with doing. I
9 would have to meet with them briefly to find out, you
10 know, who is the conflict defendant, you know, who has
11 codefendants.

12 Q So you met with her just one time?

13 A The only time I remember meeting with her is the one
14 time.

15 Q And how many times did you meet with Mr. Velasquez?

16 A Several times, many times. Derrick was a, I would
17 say a high intensity client where he was initiating
18 contact and letters sporadic, not sporadically but
19 heavily. He was a labor intensive client.

20 Q Now, did you provide Mr. Velasquez copies of any
21 evidence you got from the Solicitor's office?

22 A I did.

23 Q Now, did I also subpoena a copy of your file?

24 A I don't know if you subpoenaed it but I gave you a
25 copy, you came in person to meet with me and discuss the

1 case and you asked for a copy of the full file and I gave
2 you everything. In fact, I turned over the file to you.
3 But, yes sir, I think there was a subpoena. You actually
4 sent, before you came in, you sent a office assistance
5 with a subpoena and then you came in personally to get
6 copies of everything.

7 Q And did you have anything of substance in the file?

8 A I gave you the entire file. I think I briefly went
9 over everything I had in the file with you and I turned
10 over every document I had to you.

11 Q Did you have any of the evidence in the file?

12 A I think there was some, after Derrick's plea, Derrick
13 asked me to give him the entire file. So I had turned
14 over the initial trial file entirely to Derrick. The
15 copies I had and I still had like letters from him, both
16 after conviction and extra copies. But everything that I
17 had left I turned back over to you, Mr. Floyd. But after
18 Derrick was convicted he asked for and I gave him the file
19 and then his fiance came and asked for more materials.
20 They were continually to kind of collaterally fight his
21 conviction after he plead. And so I produced even more
22 documents for his fiance and then the last of it I turned
23 over to you.

24 Q I am going to ask if you can identify these
25 documents?

1 A Everything in here?

2 Q Yes.

3 A These appear to be photocopies of the documents I
4 would have supplied to you, Mr. Floyd. I don't know if
5 this is all of them or not, but this is about the extent
6 of what, so I am assuming this is everything I turned over
7 to you.

8 Q Okay.

9 A And it has got my, I recognize the documents and it
10 has got my Public Defender file number on the bottom.

11 Q Okay. And there is none of the evidence in this case
12 in there, was it?

13 A I thought there was some but, but they would have
14 been duplicate copies. I defer to you, I don't see any, I
15 see the notes on the jury selection. I see my notes, my
16 interview notes that I would have referred to. But the
17 actual evidence from the State, I do not see from what you
18 have copied.

19 Q Okay.

20 A And I don't think there was much left because I
21 remember I turned over the file to Derrick and his fiance.

22 Q Did you ever show Derrick a copy of any type of drug
23 results?

24 A I don't remember. It was a drug case and they were
25 calling it for trial so it is unlikely that we would not

1 have seen it. But I don't specifically recall showing him
2 the drug, I feel likely we would have but I cannot testify
3 with that certainty.

4 Q And you mentioned, you said you turned over some of
5 his file to his fiance?

6 A He wrote me a letter after he was arrested, after he
7 plead I gave him basically the full, he wanted all of the
8 trial exhibits. His primary concern was challenging the
9 legality of the law enforcement safety road block. But
10 his fiance came over several times and Derrick was
11 contacting me from jail, both by phone and by letter,
12 asking me to turn over stuff to his fiance. So I found
13 more documents for them and I turned over other stuff back
14 to them.

15 Q Did, can you tell me what your investigation
16 consisted of?

17 A Derrick was traveling on I-26 from New York, New
18 Jersey to Florida. He left the Interstate in Newberry
19 County, probably to travel to Saluda, he had a female
20 passenger he met in Charlotte. I think she was driving at
21 the time. They encountered a safety checkpoint in
22 Newberry County, on the rural highway, some kind of
23 between Saluda and Newberry. At the safety checkpoint
24 Derrick was a passenger. I think he was in the back seat.
25 He had a marijuana joint and loose marijuana on a little

1 plate in the back seat. The officer asked him to hand him
2 the plate and show him what it was. And Derrick fairly
3 cavalierly just handed the marijuana to the officer and
4 seemed to be surprised that the officer then pulled the
5 people out of the car and searched the car for drugs. On
6 his person was a large amount of crack cocaine or cocaine
7 and then there was over 400 grams of cocaine in a block
8 form under his seats. He wanted to challenge both the
9 search of the car and the legality of the roadblock. That
10 was basically it. The drugs were drugs in the case, it
11 was just a question whether they were his, her's or a
12 third parties. That answer was fairly easy to answer as
13 he was wearing a large amount of drugs, trafficking an
14 amount of drugs were on his clothes. His legal challenges
15 were primarily to the search and to the legality of the
16 safety enforcement checkpoint.

17 Q Wasn't it their position that there was no marijuana?

18 A Well, he admitted to me there was marijuana but it is
19 likely at the search that we might have challenged that.

20 I remember, I remember discussing with Derrick that if
21 there was marijuana and it was in the little plate in the
22 car that would be grounds for law enforcement, in my
23 opinion, to search the vehicle that was in plain sight. I
24 remember Derrick not disputing that there was marijuana
25 but we may have at the trial. I am not going to

1 absolutely as a matter of fact state that. But I will
2 defer to the record if we challenged the, and I can't
3 remember at trial whether the State introduced the actual
4 marijuana residue. If they didn't I am sure I would have
5 brought that up at the suppression motion.

6 Q And would you agree with the transcript to tell us
7 whether you admitted or denied the marijuana?

8 A I defer with the transcript.

9 Q Now, did you challenge the officer's testimony as to
10 whether or not he saw marijuana in plain view?

11 A I have to defer to the transcript.

12 Q Now, did you ever get any drug result of any
13 marijuana in the car?

14 A Of marijuana. Not to my memory and probably not. I
15 don't think we were going to trial on the marijuana
16 charge. It was an issue as far as the suppression motion.
17 But it wasn't a trial issue so I doubt I had a field
18 result on the marijuana.

19 Q Okay. Now would you agree with me that the marijuana
20 gave him the basis to make a search?

21 A Probable cause, the officer testified was that
22 Derrick handed him, that Derrick, he could smell
23 marijuana, he saw the marijuana joint and loose marijuana
24 on the little plate. He asked Derrick to hand it to him,
25 Derrick handed him the plate and then that is what the

1 officers used to justify the expansive search of the
2 vehicle.

3 Q I understand that was the officer's testimony but if
4 Derrick testified that there was no marijuana in the car
5 and he had not smoked marijuana, whether or not it was
6 marijuana would be crucial to determining that conflict in
7 the testimony, wouldn't it?

8 A I agree that theory, it would be, it would help.

9 Q In fact, it may be dispositive, wouldn't it?

10 A I would assume the officer could argue good faith
11 that he thought it was marijuana but it would certainly be
12 important if it turned out not to be marijuana.

13 Q And you never got, you never checked to see whether
14 the marijuana had been tested, what the results were?

15 A I don't think I ever got a marijuana field result. I
16 thought, off of the top of my head, Derrick also had a
17 marijuana charge, it might have been crack cocaine, I
18 thought there was a marijuana charge too but not the
19 marijuana in the plate. But I might be mistaken.

20 Q But in any event you never checked for any results?

21 A No, the marijuana that was used to justify the search
22 of the vehicle I did not get a field result on.

23 Q Okay. Now, after y'all lost the suppression hearing,
24 the next day a plea was entered, was it not?

25 A Yes, sir.

1 Q And was it to, do you recall what he plead to?

2 A The trafficking cocaine and they had reduced the
3 amount, the threshold amount to, he was charged with
4 second offense, 400 grams or more which was a mandatory 25
5 year sentence. I remember asking them several times to
6 let us work it out shorter. He had a 7 year offer
7 originally. I did reduce the amount after the jury was
8 sworn and then he plead and he got a 12 year sentence. I
9 can't remember if that was from Judge Griffith or that was
10 the negotiated term.

11 Q Would you agree, he was originally charged with
12 trafficking third offenses, both of them?

13 A Might have been third.

14 Q And then reduced to second and also reduction in the
15 quantity?

16 A Yes, sir. Even if it was a first offense, the amount
17 of cocaine he had would have triggered the mandatory 25
18 year, but they did reduce the degree.

19 Q Now, were you convinced it was his third offense
20 before trial?

21 A Off the top of my head I want to say that we might
22 have been thinking it was a true second offense case
23 anyway. I seem to recall that we had some, because his
24 convictions were out-of-state. And I think we had some
25 disagreement about whether it would be a true second or a

1 third offense.

2 Q Were you ever provided a certified copy of his
3 out-of-state record?

4 A Prior to the trial, I don't remember, I doubt it. I
5 am sure I would have had the rap sheet. I think I
6 remember challenging about whether it would actually be a
7 true second or third which based on the amount, again,
8 was, the threshold sentence would be the same regardless.
9 But I think, the answer to your question is no, I don't
10 think I got a certified copy of his record at that time.

11 Q Would you agree with me, if you don't recall I got a
12 copy of it for you, that he had no other trafficking
13 offenses on his record?

14 A That he was convicted of, yes.

15 Q That he was convicted of. Now, can you use a
16 possession charge to enhance a trafficking?

17 A Of crack cocaine or cocaine, yes.

18 Q You can use it to enhance a charge?

19 A You could have used, within 10 years you could use a
20 prior possession of cocaine or crack to enhance a
21 trafficking.

22 Q And under what statute would that be?

23 A 44-35-370, I would, the general cocaine statute. And
24 the actual cocaine, crack cocaine statute itself,
25 44-35-370(a).

1 Q I am going to ask you to identify this.

2 A This looks like a rap sheet.

3 Q Could you look through it and let us know whether or
4 not he has got any other drug convictions other than
5 possession?

6 A I remember he had Florida charges but they were, I
7 think, he won a suppression motion. I seem to remember
8 that he only had, what I thought was the prior possession
9 charge. And off of the top of my head I can't even
10 remember his possession charge. I want to say it was
11 probably from New York. He has got the narcotics charges
12 from Baltimore County in Maryland. He has got a third
13 offense or a third degree, criminal possession of
14 narcotics or contraband from New York. He has got a
15 possession of a controlled substance fifth degree from New
16 York. It appears he has got a criminal possession of a
17 controlled substance, cocaine, from New York. And I
18 misspoke, there is not a, if it is a trafficking or
19 distribution, there is not a 10 year window. I think it
20 is actually a permanent, that can go back to your entire
21 criminal history. He has got a confusing record because
22 mostly out-of-state, entirely out-of-state from New York.
23 But it appears he has got several simple possessions of
24 narcotic charges on him. I couldn't tell you whether
25 those are marijuana or other but it appears he probably

1 got a third, at least two prior drug possessions.

2 Q But they are all possessions, aren't they?

3 A Yes, sir.

4 Q So all he has is possessions on his record?

5 A I think so. In Maryland it says MFRG, which possibly
6 could be manufacturing but they all appear to be
7 misdemeanor possession charges.

8 Q And did you challenge whether or not they could be
9 used to enhance his current charges to third degree, to
10 third offense?

11 A I know I would have. They would not have been
12 allowed to convict him of a second degree or a third
13 degree unless they had certified copies of the
14 convictions. I want to say they had them but I can't say
15 that for a fact. Obviously I don't go by rap sheets when
16 people, often I do at pleas, if people plead to second
17 offense or third offense, I don't insist on seeing the
18 certified copies. If he was going to trial on a case like
19 this, without out-of-state convictions, we would have, at
20 any trial they would of had to produce certified copies of
21 convictions.

22 Q Did you ever see those?

23 A I am sure we did. And the reason I say that is
24 because I remember we were challenging whether this would
25 have been a third offense or not. I can't remember and

1 testify to that to the top of my head. And it is possible
2 did not produce those. I am sure that they had them but
3 it is possible they did not turn those over because I
4 doubt, often times they won't have those until the actual
5 trial.

6 Q Well, his plea colloquy is in the record, there is no
7 mention of certified copies of out-of-state record, is it?

8 A If it is not in the record it is not in the record.

9 Q And I am asking this differently. So is it your
10 position that if they had the certified copies, that those
11 possession charges would allow them to enhance this to a
12 third offense of trafficking?

13 A If they were possession of controlled substance,
14 marijuana may or may not. The marijuana can enhance it
15 too but the cocaine, prior convictions of cocaine or other
16 controlled substances certainly enhance a trafficking to a
17 second degree.

18 Q And were you ever provided any kind of documentation
19 that these offenses from out-of-state would have involved
20 those drugs which you say could be used for enhancement?

21 A I don't recall ever getting the certified copies of
22 the prior convictions and I probably didn't. Would not,
23 obviously they didn't have them before trial. We would
24 have, you know disputed what offense it was. You know, I
25 never stipulate that it is a second degree, third offense

1 or second offense. They would have had them for trial or
2 it would have been a first offense if he was convicted of
3 anything.

4 Q In fact the Judge never asked him whether or not he
5 had these other convictions, did he?

6 A If it is not on the record it is not on the record.
7 I doubt it, that is not something that a Judge usually
8 asked but it is possibly he did. But if it is not on the
9 record it is not on the record.

10 Q Did you ever file any motions on Mr. Velasquez's
11 behalf?

12 A Other than the motion to suppress and the oral motion
13 for continuance. Those would be, and requesting the
14 discovery. I don't recall any other.

15 Q Did you file a Rule 5 Brady?

16 A I am sure I did. Again, I turned over my file to Mr.
17 Velasquez in full. But if we are going to trial I would
18 have filed the Rule 5 and Brady motion. But I will
19 testify, I believe I had the complete from the State. And
20 in fact, I filed multiple subpoenas for the suppression of
21 the search, the safety checkpoint. I remember going to
22 the sheriffs department and serving subpoenas for all of
23 their records on prior stops. That was challenged
24 in-depth and we made the sheriffs department produce all
25 the documents on prior safety checkpoints and arrests and

1 that type stuff.

2 Q In fact y'all had a suppression motion?

3 A We did.

4 Q On the checkpoint?

5 A We did.

6 Q And that was a fairly extensive hearing, wasn't it?

7 A I think it was a contested hearing, yes sir.

8 Q And in that case, would you agree and of course the
9 record will reflect that the checkpoint was not in strict
10 compliance with the Newberry Operations Order?

11 A I wouldn't quite say that. But I would think that
12 it, there was a lot of details of it that were left to the
13 subjective judgment of the chief, the officer in charge of
14 it. I remember, they didn't have a whole lot of paperwork
15 and forms for it. And I think it was testified a lot,
16 that a lot of decisions they made were the shift
17 supervisor, either the Lieutenant or Sergeant was in
18 charge of decisions on that. But I don't know that I can
19 testify it wasn't in strict compliance but it seemed like
20 we argued at the time that it left a lot of subjective
21 decisions to the Sergeant in charge of the roadblock.

22 Q Now, who was this fiance that you said you--

23 A -- I don't recall but, I want to say she was maybe
24 the sister of Ebony Joiner but the, there was a woman who
25 participated and helped Derrick a lot at the trial. I

1 want to say her name was something like Destiny, I have
2 got the record. The records I turned over to you should
3 have, because she sent me a lot of emails, my email
4 referred to her by name.

5 Q I will give you this back.

6 A Okay. I want to say Derrick was married and had a
7 wife in New York or New Jersey but he was separated and he
8 had a girlfriend in Charlotte. And I want to say that
9 Ebony was her sister but she participated a lot on
10 Derrick's behalf. I want to say Ebony's, or he had a
11 girlfriend named Jennifer who would be Ebony's sister and
12 that is part of at the roadblock, Ebony gave the officers
13 a false name also at the, she identified herself as being
14 somebody else which was probably part of the probable
15 cause to stop him. There was a young lady and I have got
16 a lot of emails to, I would have to find. But there was a
17 lot of emails from a lady who was, I think Derrick
18 identified as his fiance who was helping him research the
19 traffic stop. She also got materials from my file for
20 him. She in fact sent me several letters, certified
21 letters on his behalf.

22 Q Did you just give her the file and let her take what
23 she wanted out of it?

24 A Well, I gave Derrick the initial file but I did send
25 stuff to his fiance. In fact Derrick had sent me a letter

1 that she had brought in requesting me to turn over the
2 rest of my file to her.

3 Q Is that letter in there?

4 A Let's see. It is possible her name was Jennifer but
5 I don't think it was. I think it was a third lady that
6 was actually the one who was, I had a lot of emails to and
7 from. I can't remember the lady's name but it was a woman
8 he had identified as his fiance who participated pretty
9 much from the beginning of the trial. I don't see that, I
10 gave you copies of my emails.

11 Q And you don't have that letter in there, in the file?

12 A I don't see it off the top of my head. Derrick wrote
13 a lot of letters, probably 25 to 50 either grievances or
14 letters to the Clerk of Court. He was a voluminous writer
15 of pro se legal documents. Here is a letter dated January
16 18th, 2016. I finally received your mail but you don't
17 have all the material I requested on the guidelines for
18 checkpoints. And he is listing, my family is going to
19 keep following up. Put your request in writing. So the
20 letter I am referring to is the one postmarked January
21 18th, 2016 where he talks about sending the materials to
22 his family member. But that he didn't get everything that
23 he has asked for and that he ask me to not send him
24 irrelevant materials. I cannot remember the lady's name
25 but there would be a lady who also came by in person and a

1 lot of emails and some letters to her too where he was
2 primarily interested in challenging the roadblock, the
3 legality of the roadblock.

4 Q And as to that roadblock, you didn't make a motion on
5 that. Isn't it true that you didn't get some of the
6 photographs of the roadblock until the day of the hearing?

7 A I think that, the day of the suppression hearing I
8 think the officer may have brought photographs with him.
9 I can't, if that is what the record reflects I would agree
10 with that. And it is very possible they brought
11 additional photographs to the suppression hearing.

12 Q I am going to show you another document and it does
13 have a stamp on it as a Court's exhibit. It that the
14 Newberry County guidelines for traffic checkpoints?

15 A I think that this is what, their operating order for
16 traffic safety checkpoints.

17 MR. FLOYD: Your Honor, we are going to admit this
18 also.

19 (Whereupon, Applicant's Exhibit 2 was admitted into
20 evidence.)

21 A I don't know if that was their general operating
22 order or that was just for this particular time period for
23 this location.

24 Q It was admitted into evidence that day?

25 A Okay. This appears to be for the specific, this

1 would not be their general, for all, I think this was the
2 one that was specifically for that portion of the County.
3 But it is a general operating order but it does, it is
4 limited in geography to that portion of the County.

5 Q It is the one that they were operating under?

6 A Yes, sir. For Mr. Velasquez arrest, yes sir.

7 Q Okay. Now, the Judge denied the suppression motion,
8 didn't he?

9 A He did.

10 Q Then after Mr. Velasquez plead did you file an
11 appeal?

12 A I want to say I did. And I think I saw a copy of an
13 appeal in your paperwork that I handed to you. I am
14 pretty sure he asked me to file an appeal and I feel like
15 I did. But I can't recall one-hundred percent.

16 Q The appeal was dismissed, wasn't it?

17 A I don't think, it certainly wasn't, I don't know what
18 happened on his appeal. I don't follow the appeals but
19 the case never came back.

20 Q And was it dismissed because the appeal wasn't timely
21 filed?

22 A It might be.

23 Q Is this your motion here?

24 A Let me see. It was filed out of time and I think on
25 my appeal I noted that he contacted me by telephone on

1 August the 17th, by Appellant's girlfriend. Counsel for
2 appellant was contacted by telephone today, August 17th,
3 2015 by Appellate's girlfriend who indicated that
4 Appellate desires to appeal his guilty plea but he has
5 been unable to contact his attorney through his
6 incarceration. Counsel would note that Friday, August
7 14th would mark the ten day deadline to file an appeal.
8 The date of my motion appeal is Monday, August 17th. So
9 in my appeal I noted that his girlfriend contacted me on
10 August 17th to file an appeal on his behalf. So I did
11 file an appeal but not until he asked me about one, and
12 that was after the ten day. So it was denied based on not
13 being filed timely.

14 Q Okay. No other questions.

15 CROSS-EXAMINATION

16 By Mr. VanSyckel:

17 Q Mr. Verner, I will give you an opportunity to review
18 the transcript very briefly.

19 MR. VANSYCKEL: Your Honor, may I approach the
20 witness.

21 THE COURT: Yes.

22 Q View 5 through 12, just look over that very closely.

23 A Okay.

24 Q After having reviewed it do you recall making a
25 motion for a continuance in this case?

1 A Yes.

2 Q And did you indicate to Judge Griffith that you had
3 just received some photographs as Mr. Floyd was talking
4 about earlier?

5 A Right. I indicated to the Judge that they had just
6 produced a few photographs on the day of the motion,
7 correct.

8 Q And did you indicate to Judge Griffith at that time
9 that those photographs affected your motion to challenge
10 the traffic stop greatly or were you satisfied that you
11 could go forward that day?

12 A I think part of the reason I was asking, he was
13 asking me for the continuance was that he was trying to
14 hire a private, he had a private attorney for pretrial,
15 for his bond, for his preliminary hearing and he was
16 trying to hire or reach an agreement with, an attorney,
17 Cam Littlejohn to represent his case. And that was part
18 of the grounds for it. I do indicate, the only evidence
19 that I am aware of that I haven't seen are new photographs
20 I haven't seen. They don't really help me, my
21 case-in-chief. And I indicated they are cumulative to
22 what I have already been, what I did. And so that is what
23 I indicated to the Judge at the time.

24 Q So the photographs that you have not gotten that day
25 were not that, dispositive in any way of any issues that

1 you were arguing?

2 A I think I indicated to the Judge that I considered
3 them cumulative photographs to what I had already had,
4 additional photographs of the drugs.

5 Q Okay.

6 A And I indicated that they are more on the
7 case-in-chief and not on the motion to suppress.
8 Apparently there were additional photographs taken of the
9 car and the drugs that I hadn't been produced prior to the
10 trial.

11 Q So you did make the motion for a continuance and
12 ultimately it was the Judge's decision not to grant that
13 continuance?

14 A He denied the continuance.

15 Q So you did represent your client in that you tried
16 to, you tried to obtain a continuance as he wished but you
17 did not have the control of whether or not a continuance
18 was granted?

19 A Well, ultimately it is the Court's decision.

20 Q Okay.

21 MR. VANSYCKEL: May I approach, Your Honor.

22 Q Can I see that transcript, Mr. Verner. Mr. Verner, I
23 am going to ask you to refer to pages 48 through 84 of the
24 transcript.

25 A Are you asking me to do this to have them available?

1 Q Yes, sir. Mr. Verner, the traffic stop was one of
2 the main things of the defense that you were attempting to
3 put out, is that correct?

4 A The heart was the legality of the search of the car,
5 yes. And to some extent the legality of the checkpoint.

6 Q Because it is kind of a two-part issue first, can the
7 car be stopped and then once the car was stopped at the
8 safety checkpoint was there the ability to actually
9 search?

10 A It was two separate motions. One was the suppression
11 motion for the searching of the car and the other was the
12 legality of the traffic safety check.

13 Q Okay. And would you, you challenged the legality of
14 the safety, of the traffic safety checkpoint?

15 A I think we had a fairly lengthy multi-witness motion
16 that the safety checkpoint was illegal.

17 Q And your questioning went into multiple aspects of
18 the traffic safety checkpoint, did it not?

19 A I am sure it did.

20 Q Okay. And did you review, did you inquire as to that
21 the reason of the traffic safety check-point was selected?

22 A Yes.

23 Q Did you inquire as to the empirical data that was the
24 basis for the traffic safety checkpoint?

25 A We did.

1 Q Did you inquire as to the empirical data that
2 resulted from the traffic safety checkpoint?

3 A Would you rephrase that?

4 Q Did you inquire as to the empirical data that
5 resulted from the traffic safety checkpoint?

6 A From the, yes, they have to give a result, the
7 results of that day, what they did that particular day as
8 well as what justified. So, yes.

9 Q Okay. And did you also go into the fact that shortly
10 after Mr. Velasquez was arrested, the traffic safety
11 checkpoint ultimately was stopped for the day?

12 A They pretty much ended up, closed up shop when they
13 arrested him.

14 Q And do you remember why that was?

15 A I think, indicated because it was just intensive,
16 they had to send officers to take him to the detention
17 center, take Ebony to the detention center. They had post
18 officers at the car, I think the car was towed so officers
19 had to go with the car. So I think just manpower wise the
20 officers dispersed because taking him and his codefendant
21 to jail. And then there were at least two officers that
22 who went with the vehicle while it was being searched with
23 the tow truck and they just didn't have the manpower.

24 Q Was there possible that there was even another arrest
25 made that day?

1 A There was another completely unrelated arrest. But
2 there was only really one other arrest other than Derrick
3 that day that we were challenging.

4 Q It says three arrests for the, around the same time
5 led to the loss of manpower to continue the checkpoint?

6 A It was essentially, they said that they lost manpower
7 to keep the safety checkpoint up because they had to go to
8 the jail and they had to go and stay with the car and
9 whatnot.

10 Q Okay.

11 MR. VANSYCKEL: Your Honor, may I approach the
12 witness again.

13 THE COURT: Yes.

14 Q Mr. Verner, I am going to make, refer you to pages 84
15 to 86 of the transcript for your review as I can ask you
16 questions. So 84 to 106.

17 A 106.

18 Q Yes. Mr. Verner, did you challenge the search of Mr.
19 Velasquez and the discovery of the drugs after you
20 challenged, in a separate motion from the actual traffic
21 safety checkpoint?

22 A Yes. As I recall the motions were one, the legality
23 of the safety checkpoint. And then there was a separate
24 issue, even if it was a legal checkpoint the search could
25 still be an unlawful, unconstitutional search.

1 Q Okay. And is it their testimony that the officer
2 smelled marijuana?

3 A Yes. The Lieutenant testified, in fact several
4 officers testified they smelled marijuana.

5 Q And was there testimony from the officers that Mr.
6 Velasquez admitted to smoking marijuana?

7 A My recollection was he admitted it but the, I don't
8 recall whether the officers testified he admitted to them
9 he had been smoking. But I am looking, I am looking
10 through the transcript.

11 Q Let me ask this. At some point did Mr. Velasquez
12 hand to the officers or present to the officers what he
13 indicated was marijuana?

14 A There was, the officers testified that there was a
15 small plate of marijuana beside him in the back seat, they
16 could smell the marijuana, see the joint. They asked him
17 to hand them the plate and he did.

18 Q Marijuana is illegal in South Carolina?

19 A It would be, if it was in plain view it certainly
20 does justify a search of the car.

21 Q And if it was handed over by Mr. Velasquez to the
22 officers that would give him grounds to arrest Mr.
23 Velasquez. Is that correct?

24 A I believe if it was in plain view they would probably
25 have probable cause to arrest Mr. Velasquez and probable

1 cause to search the vehicle.

2 Q Okay. And there was testimony presented as to that,
3 correct?

4 A At least one of the officers and I thought there were
5 more. Okay, we did, there was some quibbling about, the
6 officers testified he admitted he was smoking marijuana
7 and then we, he was cross-examined by me about whether
8 that meant he had smoked marijuana earlier that day or
9 whether he was smoking marijuana at the time the car was
10 stopped. But the officer testified he told him he was
11 smoking marijuana. And I brought up in cross that
12 basically what time was he talking about smoking marijuana
13 earlier in the day. So we got into a little bit of a
14 debate about the timing of when the admission of marijuana
15 in relation to the arrest. And the officer testified, he
16 just said he smoked some earlier and held up the ashtray
17 so I could see it.

18 Q Mr. Verner, you then recall what the officers did
19 after that, what they testified they did?

20 A The officer indicated when he handed over the
21 marijuana I immediately took those from him, put them on
22 top of the car, pulled him out of the vehicle, put him in
23 handcuffs, patted him down and at that point found the bag
24 of crack cocaine in his right front pocket along with
25 cash. So they took them immediately into custody.

1 Q So to be clear the officers not only had marijuana
2 but then immediately had, after patting him down found
3 crack cocaine as well. Is that correct?

4 A On his person, yes sir.

5 Q On his person. Okay. And then do you recall where
6 the larger amount of cocaine was found?

7 A I thought there was a book bag in the back seat. I
8 am going by memory but I thought there was a brick of
9 cocaine in a book bag, it was either under the seat or in
10 the back seat of the vehicle. It is possible it was in
11 the trunk but I can't, I think it came out of a backpack.

12 Q And you ultimately challenged both the traffic safety
13 checkpoint, you made that motion to challenge the legality
14 of the traffic safety checkpoint. And then you made a
15 motion to challenge the search?

16 A Okay. I did and the officer indicated at the
17 suppression motion, that when he approaches the car and he
18 saw Derrick kind of kicking or pushing a bag under the
19 seat in front of him and so that was, it was a black
20 backpack that he pulled out and found the drugs in. And I
21 think the officer testified at the suppression motion he
22 had seen him kind of push it under the chair or kick it
23 under the chair in front of him.

24 Q Okay. And is that where the larger amount of cocaine
25 was found?

1 A That was a 400 gram block of cocaine.

2 Q What they identified as a 400 gram block, is that
3 correct?

4 A Yes, sir. And I was referred to a drug test, it
5 indicated it was. It was a large amount.

6 MR. VANSYCKEL: May I approach, Your Honor?

7 THE COURT: Yes.

8 Q Mr. Verner, could you identify that document for me?

9 A This is a SLED forensic result, the results of the
10 drugs.

11 Q And is that a multi-page document?

12 A It appears to be five pages.

13 Q And does it, does it on different pages identify
14 different items of drugs?

15 A Page one is 17 grams of crack cocaine which would
16 have been in his pocket. Page two is 364 grams of
17 cocaine. And then a separate container with 14 grams of
18 cocaine. And then a third item is 21 grams of cocaine.

19 Q So the cocaine, the 360 grams and the other cocaine,
20 crack, would that have been the basis for the 400 grams or
21 less indictment?

22 A I think the total weight was just slightly over 400
23 grams, the two separate bags was the brick.

24 Q Can you tell me what the penalty for trafficking 400
25 grams first offense would be?

1 A I was thinking it was, 25 is the minimum and 30 is
2 the maximum.

3 Q And second offense?

4 A I am thinking at second offense it is the same, I am
5 thinking when it is trafficking 400 grams that the penalty
6 is the same, first offense, second offense and third
7 offense. And it is 25 to 30. I don't get that many
8 trafficking cases of that amount so I am going by my
9 memory. But I remember he was trafficking a mandatory,
10 minimum of 25 years in prison, at the minimum. And I am
11 thinking at that level, first offense, second offense,
12 third offense is largely irrelevant because it is a weight
13 phase. But I am not one-hundred percent sure.

14 Q And so a reduction to the lessor amount would have
15 provided Mr. Velasquez the significant benefit?

16 A Had took the mandatory 25 year sentence he was
17 looking at off of the--

18 Q --and what did he receive?

19 A He received 12 years.

20 Q So that is an 18 year difference?

21 A From the minimum it would be a 13 year.

22 Q From the maximum?

23 A 18 years from the maximum.

24 Q Okay.

25 A He had a plea offer before trial for 7 but they would

1 never come down to a first offense. He plead on
2 basically, at a lower amount where the second offense and
3 the third offense do matter. But I think they insisted on
4 the second offense to make it the eighty-five percent
5 sentence.

6 Q Okay. And did you convey that plea offer?

7 A I did.

8 Q Did you meet with Mr. Velasquez regularly?

9 A Intensively at that time, yes.

10 Q There was some questioning about Mr. Velasquez's
11 record. At the plea is it normal to require certified
12 copies of convictions at a plea?

13 A Not unless I'm, prior to a plea if we, if it matters
14 and we are legitimately arguing about whether it would be
15 a true first offense or second offense, then I would
16 require to see proof of it. But ordinarily, no. At a
17 plea we just go by the rap sheet and by the client's
18 recollection of whether he has got a prior.

19 Q And so at a plea you would have spoken with your
20 client and you would have agreed as to what the facts
21 actually were?

22 A Right.

23 Q And then at trial is when you would have required the
24 State to prove the certified convictions?

25 A It is very rare to get certified copies of the

1 convictions until they actually going to trial. And then
2 will get the certified copies. If we are legitimately
3 arguing about a true first offense, second offense, either
4 we will research it more or run a separate rap sheet. But
5 I never get the certified copies of prior convictions,
6 usually until the week of trial.

7 Q And you had notice as to Mr. Velasquez's prior
8 convictions based on the rap sheet that was provided to
9 you?

10 A We had a rap sheet at his, his recollection of what
11 he was being arrested for and hadn't been.

12 Q Okay. You had corroboration of his rap sheet based
13 on his own statements?

14 A Yes. But at trial I would have insisted on certified
15 copies of convictions to support a first, second, third
16 offense.

17 Q Let's talk about the SLED analysis sheet that you
18 were just looking at. At trial would you have required
19 that a SLED analyst testify as to the drugs, would you
20 have objected if they had of tried to introduce the drugs
21 without an analyst's testimony regarding them?

22 A I don't stipulate to anything at a criminal trial.
23 So they would have had to have a chemist to come in and
24 they would have had to have the analysis performed. But I
25 don't stipulate chain of custody and I have never

1 stipulated to the results of a drug test at trial. So
2 they would have had to have the chemical analyst.

3 Q Okay. And you believed, based on your investigation,
4 that the items that were seized were, in fact, crack
5 cocaine and cocaine?

6 A Yes. He didn't challenge whether they were drugs. I
7 don't think he necessarily agreed automatically.
8 Sometimes I will have clients say, you know, it wasn't
9 even really cocaine I had, it was Ecstasy or something
10 else. And I will look at those more thoroughly but the,
11 we weren't stipulating that they were drugs either but we
12 had the chemical analysis that they would have been
13 cocaine.

14 Q So had you gone to trial you would have challenged
15 their introduction and you would have forced the State to
16 have the analyst and put into the chain of custody. At
17 the plea you were satisfied based on your conversations
18 with Mr. Velasquez that they were, in fact, crack cocaine
19 and cocaine of the weights necessary for it to make sense
20 for you to take the plea?

21 A I wouldn't have forced the State to call the chemical
22 analyst in their case but I certainly would have moved for
23 a directed verdict if they didn't have the evidence in
24 there. I was satisfied beyond a reasonable doubt that
25 they could prove that it was cocaine.

1 Q Did you feel that if there were no search issues
2 regarding the traffic safety checkpoint or if there were
3 no issues regarding the search of Mr. Velasquez and the
4 backpack that the case against Mr. Velasquez was
5 overwhelming?

6 A I told Derrick I didn't feel strongly about
7 challenging the safety, the validity of the traffic safety
8 checkpoint. That was more at his, he had done a lot of
9 research and in jail research and had material sent to him
10 and read on that. Because he believed it was important
11 and I thought it was worth challenging, I didn't think it
12 was frivolous, I just didn't think it was a strong
13 argument. He had a better chance at the actual search of
14 the car to deny. But those were really his two primary
15 defenses was the, to attack the arrest.

16 Q So apart from those two legal issues which the Court
17 ruled against your motions on, the rest of the State's
18 case against Mr. Velasquez you felt was very strong
19 against him?

20 A I felt certain that he would be convicted.

21 Q Okay. Do you believe that not seeing the certified
22 copies of the convictions, if you hadn't seen them before
23 trial would have made any difference in Mr. Velasquez
24 case?

25 A No. I have never not insisted on them introducing at

1 sentencing. Those would have been an issue for sentencing
2 and not for the jury. But they would have had to have
3 certified copies of it. And my recollection is at that
4 level of cocaine the penalties were the same. I am not
5 one-hundred percent sure but I think it is a 25 to 30, at
6 400 grams even if it is a first offense.

7 Q Did Mr. Velasquez indicate within the, to you within
8 the ten day time period after his plea that he wanted an
9 appeal?

10 A No.

11 Q Okay. And when you found out via second party that
12 he potentially wanted an appeal what did you do?

13 A His girlfriend called me, said he wanted me to file
14 an appeal and I filed an appeal that same day. I noted on
15 my appeal the, because I knew it was outside the ten day
16 window. I noted on the copy of my, itself, that I had not
17 been contacted on his behalf to file an appeal the day
18 that I filed it. So I would have put that on the face of
19 the appeal. And I also moved for a motion to extend the
20 time to let him file the appeal based on the fact that he
21 was incarcerated and said he couldn't reach me or his
22 girlfriend stated that he couldn't, he was unable to reach
23 me. But I put that on the copy of the appeal itself and I
24 filed a separate motion asking them to extend the date and
25 let him appeal on that basis. And the Court of Appeals

1 denied that motion.

2 Q Do you believe there were any appealable issues?

3 A Well he had a motion to suppress that was overturned,
4 that was not granted, I didn't think that they were
5 strong, I don't think he would have won an appeal. He was
6 focused on challenging the legality of the traffic stop
7 itself. I think he had a better suppression of the actual
8 search of the car. I think the search of the car, the
9 Court was probably legally right that it was justified by
10 probable cause. And the, there was evidence supporting.
11 You don't need a whole lot to support a traffic safety
12 checkpoint requirement. But he would have two appealable
13 grounds on there. But the, I don't think he would have
14 prevailed an appeal.

15 MR. VANSYCKEL: Your Honor, we have no further
16 questions.

17 REDIRECT EXAMINATION

18 By Mr. Floyd:

19 Q Mr. Verner, did you personally discuss with Mr.
20 Velasquez his appeal right?

21 A I am certain I discussed that if we went to trial and
22 they denied your motion and we lost at trial that I would,
23 anybody who loses at trial I automatically file an appeal
24 regardless. But I feel strongly that we probably did
25 discuss that if he had lost at trial I would have filed an

1 appeal on his behalf based on those, specifically those
2 two issues.

3 Q Going back to the search of the vehicle, would you
4 agree with me that the bulk of the drugs, 400 grams, was
5 in a book bag inside the vehicle?

6 A That's right.

7 Q Would you agree with me also that at trial the
8 officer testified that he opened the book bag and looked
9 in it and saw the drugs?

10 A That's right.

11 Q Did he have a search warrant at that time that he
12 opened that bag?

13 A No, he testified what he saw and recognized it as
14 possibly being a brick of cocaine. He pulled the officers
15 away from the car and sent somebody to get a search
16 warrant and do a full inventory search of the car. But he
17 had already done the search without the search warrant at
18 that point.

19 Q That is where you felt you had a good argument?

20 A That's right. And then when he realized he had
21 substantial weight of drugs that is when he felt that he
22 probably needed to get a search warrant to justify.

23 Q Because to do an inventory search they would have to
24 open the bag, wouldn't they?

25 A Would not necessarily have to open the bag but I

1 don't really believe law enforcement does inventory
2 searches on a regular basis. I never see where they have
3 a list of what they have taken in inventory. But to
4 justify legally they can do an inventory search. They
5 would have searched the car incident to arrest, they were
6 looking for drugs. They weren't trying to keep the car
7 safe on an impound lot, they were looking for drugs that
8 would have been a search incident to arrest.

9 Q And that search incident to arrest allows them to
10 search the person?

11 A They had grounds to do a search on Derrick when they
12 found, even the marijuana they alleged they found or the
13 cocaine in his pocket, they could go ahead and do the
14 search on him. There is a case that got overturned by the
15 US Supreme Court that allows the search to, the police to
16 search the grab area of a car. That has been overturned
17 by the Supreme Court. But they probably have grounds to
18 search the cab area just by the fact that he has got drugs
19 on his pocket, person.

20 Q Do you think that would include the right to search
21 closed up containers in the cab?

22 A Probably but I would challenge that. I don't think
23 they do but I seen the courts where they do allow searches
24 of book bags.

25 Q No further questions.

1 THE COURT: Anything further?

2 MR. VANSYCKEL: Nothing from the State, Your Honor.

3 THE COURT: You may come down, thank you very much.

4 Can this witness be excused without objection?

5 MR. FLOYD: No objection, Your Honor.

6 MR. VANSYCKEL: Without objection.

7 THE COURT: Next witness.

8 MR. FLOYD: I would call Mr. Derrick Velasquez.

9 DERRICK VELASQUEZ, being
10 first duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 By Mr. Floyd:

13 Q Would you state your name for the record.

14 A Derrick Velasquez.

15 Q And, Mr. Velasquez, where do you currently reside?

16 A I am at Lee County Correctional Facility in
17 Bishopville.

18 Q And what type of sentence are you serving?

19 A 15 years.

20 Q And is that 15 year sentence as a result of this
21 conviction in Newberry County?

22 A Yes.

23 Q Do you recall your trial and your arrest and all of
24 that?

25 A Yes.

1 Q First of all, let's go to the traffic stop, okay?

2 A Yes.

3 Q There was testimony that you were, admitted to
4 smoking marijuana, that you turned over roaches to the
5 officer. Is that accurate?

6 A No, that is not accurate. And, in fact, in a police
7 report what the officer asked me, was there, was I under
8 the influence of drugs or was I using any drugs. He put,
9 no. I didn't turn over any marijuana to that officer at
10 all, at any time.

11 Q So was there any odor of marijuana in the vehicle?

12 A I wouldn't know because I was asleep in the back
13 seat. When I awoke at the traffic checkpoint is when kind
14 of all hell broke lose.

15 Q What were you doing before the checkpoint?

16 A I was sleeping, I was in the back seat asleep.

17 Q And then you woke up after the vehicle stopped at the
18 checkpoint?

19 A Right.

20 Q Did you hand any roaches to anybody?

21 A No.

22 Q Did you smoke any marijuana in the car that morning?

23 A No.

24 Q Once you woke up was there any odor of marijuana in
25 the car?

1 A No.

2 Q Now, you got arrested and was carried to the jail,
3 were you not?

4 A Yes.

5 Q And after, do you recall May 1st, 2015?

6 A Do I recall what?

7 Q May 1st of 2015?

8 A Yes.

9 Q Now, did you ever have a bond hearing?

10 A Yes.

11 Q Do you recall when your bond hearing was?

12 A June 1st, 2015.

13 Q And did you get a bond set?

14 A Yes.

15 Q How much was the bond?

16 A \$175,000.00 dollars.

17 Q Were you able to get out of jail?

18 A No.

19 Q Did you have a private lawyer for the bond hearing?

20 A Yes.

21 Q Did you eventually meet Mr. Verner?

22 A Yes.

23 Q And how soon were you arrested that you met Mr.
24 Verner?

25 A I know the first time I met Mr. Verner would have

1 been, I think at a General Sessions date where he informed
2 the Court that he was going to hand me over to a conflict
3 attorney. That would have been the very first time, at a
4 General Sessions hearing.

5 Q When was the next time that you met him?

6 A At a motion to continue in front of Judge Hocker, I
7 believe. This was in July, this would have been July 3rd,
8 I think.

9 Q That was the first time the case was called for
10 trial?

11 A Yes.

12 Q Had you met with Mr. Verner before that date?

13 A No.

14 Q So you--

15 A Oh, wait, wait, wait. I can't really recall, it has
16 been a very, very, dramatic experience. But on the case
17 notes, on the case details, if you could provide me with
18 that it has it listed where he came, I believe his first
19 visit was June 2nd, the first visit was June 2nd, July
20 2nd, excuse me. On the case detail where it has my actual
21 conviction, the time I was given and stuff like that. It
22 has, on the bottom, the case notes.

23 Q So you were called for trial July 6th. So you met
24 with him one time before that?

25 A Right.

1 Q The continuance was granted for that trial, was it
2 not?

3 A Yes.

4 Q Did you meet with him again between that hearing and
5 your August trial?

6 A Yes. He came to see me in Newberry County jail to
7 discuss what a strategy might be and then the next time I
8 saw him we were going to trial. I was visited, I believe,
9 twice. I want to speak accurately so is it possible for
10 me to have the case file detail, could you give me that,
11 no?

12 Q I am not sure what you are referring to exactly.

13 A It has case detail on the heading of it. I was given
14 15 years. I was given second drug offense. And on the
15 back page of it it had that conflict letter concerning Mr.
16 Verner saying that he was representing Ebony Joiner. The
17 first page was the case details. And the back page was
18 the conflict.

19 Q While I look for that. Your recollection then, on
20 top of your head, you met with him twice?

21 A Yes.

22 Q Did you feel he was prepared to try your case?

23 A No.

24 Q At any one of those meetings did you, were you ever
25 shown any kind of drug analysis?

1 A No.

2 Q When is the first time you seen a drug analysis?

3 A Five minutes ago inside the holding cell back there,
4 you just brought it to me.

5 Q Okay. And that is the first time you had seen that
6 drug analysis?

7 A Yes.

8 Q You testified at the suppression hearing, did you
9 not?

10 A Yes.

11 Q And in that suppression hearing did you testify that
12 you were not smoking marijuana that day in the car and
13 that there was no roaches in the car?

14 A Yes.

15 MR. VANSYCKEL: Your Honor, I would like a chance to
16 see--

17 MR. FLOYD: Sure, it came out of Mr. Verner's file.

18 Q Is this the document you were talking about?

19 A Now, I just want to be clear that the very first time
20 I met with Verner was July 3rd and then July 29th. July
21 16th I didn't meet with him. It said the case detail. I
22 didn't meet with him on that day. I met with him on July
23 3rd and July 29th.

24 Q Now, did you ask him for the drug results?

25 A Yes.

1 Q Did you also ask him for the drug results of the
2 marijuana?

3 A Yes.

4 Q And were you ever provided those?

5 A No.

6 Q So have you yet to be provided any drugs results of
7 the marijuana?

8 A No.

9 Q And, of course, those were crucial into the probable
10 cause for the arrest?

11 A Yes. It was the impetus for him escalating it from a
12 regular traffic stop to something else.

13 Q Were you aware that Mr. Verner was also representing,
14 at some point and time, your codefendant, Ebony?

15 A Yes.

16 Q Did that give you concern?

17 A I am not very knowledgeable about the law so I wasn't
18 aware of a conflict of interest issue until I got his
19 letter indicating that it was, that he recognized the
20 potential conflict. Once he recognized the potential
21 conflict, that that was a matter. But to answer your
22 question, I wasn't aware of a conflict of interest. But
23 had I known I would have definitely brought it up because
24 it was an issue that once I was made aware I did bring it
25 up. But I didn't do it the proper way.

1 Q Had you known that you had a right to have a attorney
2 without a conflict of interest what would you have done?

3 A I would have most certainly requested a conflict free
4 attorney because I felt like his loyalty would have been
5 solely to me instead of, in this case I felt like
6 loyalties were divided in some respects.

7 Q Do you know what happened to Ebony Joiner?

8 A Yes. She was fined \$133.00 dollars and allowed to go
9 home.

10 Q And that was your codefendant?

11 A Yes.

12 Q Who was also at some point and time represented by
13 Mr. Verner?

14 A Yes. By his own admission.

15 Q Now, you ended up pleading guilty, did you not?

16 A Yes.

17 Q Why did you plead guilty if you felt you had a good
18 case?

19 A Well, Mr. Verner indicated that if I lost the
20 suppression hearing I was going to lose the trial. And I
21 would be threatened with life in prison. Although Mr.
22 Verner said that he was aware that the traffic statute was
23 25 to 30 years. On page 10 of the transcript, line 13 he
24 indicates that this is a life type prison charge and it
25 wasn't. So I was in fear of maybe never, ever seeing the

1 street again. So, I was felt threatened and that is
2 pretty much.

3 Q How old are you now, Derrick?

4 A 47.

5 Q So you would have been 45 at the time?

6 A Yes.

7 Q So the life sentence, the thought that you might get
8 a life sentence is what prompted you to plead guilty?

9 A Yes. And the fact that Mr. Verner said that he
10 didn't think we would win at trial. And if he doesn't
11 feel confident then it imposed on my confidence level as
12 well. Because prior to that I said that I didn't have
13 anything, the drugs weren't mine. I didn't know what the
14 officer was talking about, the marijuana. And I was
15 willing to put everything on the line. But after I was
16 represented, the way I was represented I kind of knew that
17 things were not going to turn out right because after all
18 I was only given 66 business days before I was sent to
19 prison. And I believe I wasn't given enough time to
20 prepare. And I had an attorney who was going to take the
21 case. Verner indicated to the Court that he was satisfied
22 and that he was ready to proceed. And I believe that the
23 Judge took that instruction and just moved ahead. But I
24 never wanted Verner to represent me whatsoever. And I was
25 forced by not being given a continuance and to have the

1 Judge label request for a change of counsel and a change
2 of, and for a continuance, a delay tactic although I had
3 only been to court maybe twice.

4 Q And did you have, was Mr. Littlejohn there to
5 represent you?

6 A Yes, he was willing to take the case but he said that
7 he could not take my case if I was not going to be granted
8 a continuance because there is no way he could take my
9 case today and go to trial today. That was his position.

10 Q Now, Mr. Verner, if you had had the continuance would
11 you have gotten private counsel, Mr. Littlejohn?

12 A Absolutely. And I would have been able to make bond
13 as well. I was making bond the following week, my bond
14 was pretty much secured and I would have been able to take
15 this from the outside instead from the inside where I had
16 limited resources. And inside of Newberry County you
17 don't have access to law library and you don't have any
18 kind of material to start formulating and strategizing a
19 defense or to find out what the laws are. So you are at
20 quite a disadvantage from being able to represent
21 yourself. So Mr. Verner went on to explain that I was a
22 voluminous writer and that is only because I didn't have
23 any help. I didn't have any counsel or an assistance of
24 it so I felt like I had to take matters in my own hands
25 and that is what I did.

1 Q Once you entered your plea did you wish to file an
2 appeal?

3 A Absolutely. And in fact Verner told me in his office
4 after that he was going to file the appeal and that I
5 didn't have to do anything. So I thought that that
6 process had been underway. However, after speaking to
7 some of my family and I asked them to call and inquire if
8 my appeal was in. They told me that it wasn't in and then
9 I asked that it be put in. So I filed it myself and it
10 was denied because it was filed untimely.

11 Q Did your family also contact Mr. Verner to get him to
12 file also?

13 A Yes. But that was only after, you know, I realized
14 that it hadn't been done and I hadn't inquired prior to
15 the deadline because he had told me that he was going to
16 do it.

17 Q And would you agree with me, when the Judge took your
18 plea he didn't inform you of how many days you had to file
19 an appeal?

20 A I do remember the Judge saying I had a certain amount
21 of days. However through the error of my own I thought he
22 said 30 days when he actually said 10 days. So when I was
23 in Kirkland I tried to file the appeal but I was informed
24 that it was filed late.

25 Q But you felt that Mr. Verner told you he was going to

1 take care of it anyway?

2 A Yes, and that is the only reason I didn't pursue it.
3 Had I know that he wasn't going to do it I would have done
4 it immediately.

5 Q Now, did you discuss with Mr. Verner about the fact
6 that you had never been convicted of trafficking before,
7 was he aware of that?

8 A Yes. I believe that at one of our meetings he asked
9 me if I ever had a trafficking charge and I told him I had
10 a trafficking charge out of Florida but it was dismissed
11 and I didn't have anything on my record in terms of
12 trafficking. So, I told him I didn't have any
13 trafficking, it is not on my record. Like I said, I
14 wasn't aware of the fact that they were charging me, I
15 mean, like second and third. I was under duress for the
16 entire time. So anything that I may have done it wasn't
17 in my best interest is because, like I said, I was under
18 extreme stress and duress.

19 Q If it had not been for Mr. Verner's representation
20 how would you have approached the case?

21 A Well, I would have gotten competent counsel first
22 that would have went through all of the evidence and not,
23 you know, determine what was important and what wasn't
24 important. I would have attempted to go through the file
25 with this attorney. I never wanted Verner, I told Verner

1 I didn't want him. And he told me, if you don't have the
2 money to buy an attorney you are going to deal with me.
3 So I told him I was going to hire an attorney. So that is
4 what I went to go do but they didn't give me the
5 continuance so that I could hire Mr. Littlejohn who came
6 to the court that day because this was going to happen.

7 Q And explain to the Court why you feel Mr. Verner's
8 representation was deficient?

9 A Well, for a number of reasons. We never had a
10 strategy. We never had evidence. We never had evidence
11 of the marijuana, we didn't have evidence of where it was
12 found in the car. I don't think that he engaged my case
13 with any professionalism. I was never, he never filed a
14 Brady motion, a Rule 5 which is pretty much the first
15 thing you do. And in my notes that I had and the
16 paperwork he sent me actually, he gave me the Brady motion
17 that he never filed. Do you remember, you saw it too as
18 well. Because I asked him, I said, listen, I don't know
19 about none of this stuff. I want you to submit a motion
20 to inspect all of this stuff that they said that they
21 found. He didn't do that either. So when it came to him
22 meeting me inside the jail it was quick and he didn't
23 offer me anything in terms of information on what the law
24 is. You know, how much time I am really facing. And even
25 in court, like I said, he went on the record and even

1 said, you know, I was facing a life type drug type charge
2 and that is not what this is. It is a lot of time but it
3 is not life. And so I feel his performance was deficient
4 because I was charged with trafficking in the third,
5 trafficking in the second without ever being charged with
6 trafficking in the first. He said it doesn't matter but
7 it does because if I am ever in trouble again, if I have
8 trafficking third then they can offer me a life sentence.
9 I was never given notice of intent that my sentence would
10 be enhanced to a life or without parole. There are a
11 number of other things I can think of but I didn't, I have
12 it written down but, to the process of getting me here
13 they didn't allow me to pack any of my notes and stuff,
14 the prison that I am in. So I wasn't able to bring stuff,
15 I was well prepared but just thinking off the top of my
16 head some of the things that he did that were deficient,
17 but not examining the evidence himself. Things like that.

18 Q If the evidence had been examined that was seized,
19 how would that have helped you?

20 A If the evidence was examined that was seized I
21 believe the case would have been dismissed because, like I
22 said, the whole impetus for this whole stock was the
23 marijuana. Everybody was talking about marijuana,
24 marijuana, marijuana, I hadn't seen any yet. And the only
25 marijuana I have seen is in photographs. And the

1 marijuana that they have is that in a tow yard inside of a
2 black photo container. And I am totally clueless as to
3 how that happened. But I don't think I would have been
4 given 15 years had I had adequate representation. And I
5 don't think that another attorney would have allowed me to
6 go to trial in such a short time span without thoroughly
7 investigating everything. And although it is, probably is
8 a no, is an exercise of futility but the fact of the
9 matter the Judge based his decision and his rulings on the
10 empirical data which was legally insufficient. Nobody is
11 trying to challenge it but I am saying it because it is
12 relevant. The Judge made his decision based on the arrest
13 that was made and at the end of the day that empirical
14 data sheet that is suppose to be turned into Lieutenant
15 Eigner and signed and therefore that is when this,
16 "checkpoint", is officially over and the data is
17 submitted. There was no check-in-balance system on the
18 empirical data. And I felt like Verner should have did a
19 better job of even going out to that site that he said he
20 was going to send a private investigator to sit there and
21 clock the number of cars that come through that period to
22 even determine whether 100 cars can pass through Highway
23 76 in ten minutes. So by his own admission he didn't do a
24 good job. And the conflict is a whole, another issue but
25 I felt like that was part of his strategy. After he

1 decided that he was going to represent Ebony, my
2 codefendant, everything he did after that was a strategy
3 to help her because the same way he wrote that letter of
4 conflict--

5 MR. VANSYCKEL: Objection, Your Honor. He is talking
6 at this point, he is not answering any questions.

7 THE COURT: Ask a question.

8 Q Let me give you another question, okay. So you
9 disagree with the Judge's ruling on traffic checkpoint,
10 did you not?

11 A Yes, I disagree with it.

12 Q And you wanted to appeal that, did you not?

13 A Yes.

14 Q And you discussed appealing that with Mr. Verner?

15 A Yes.

16 Q And did he appeal it in a timely fashion?

17 A No.

18 Q Now, if you had, did his deficient performance cause
19 you to plead guilty?

20 A Yes.

21 Q And if you had not had deficient performance would
22 you have plead guilty?

23 A No.

24 Q And you understand, do you not, that if you were to
25 prevail here today you would have to come back in court

1 and face these charges?

2 A Yes.

3 Q Now are you asking this Court to grant you a new
4 trial in this matter?

5 A Yes.

6 Q Is there any other matters you wish to bring to the
7 Court's attention concerning this?

8 A Can I have a minute to think. And we are talking
9 about considerations, I mean what is there--

10 Q Anything you feel the Court needs to know about this
11 matter?

12 A About this matter. No, I think I have covered the
13 basis.

14 Q Answer any questions Mr. VanSyckel has.

15 CROSS-EXAMINATION

16 By Mr. VanSyckel:

17 Q Mr. Velasquez, I just have a quick question for you.
18 On July 7th of 2011 were you convicted of criminal
19 possession controlled substance, 50 grams?

20 A July 7th, 2011? Where?

21 Q Let me rephrase it. Do you not recall that, do you
22 recall being convicted, would it have been July 25th,
23 2012?

24 A July 25th of 2012. If that is what is on the rap
25 sheet. You know, I have been in trouble before so the

1 dates and dates and dates, I mean--

2 Q Prior to this case were you a felon?

3 A Yes.

4 Q Okay. And how old are you now?

5 A 47.

6 Q And how old would you be 30 years from now, from
7 August 3rd, 2015?

8 THE COURT: That's irrelevant, let's move on.

9 Q No further questions.

10 THE COURT: Anything further?

11 MR. FLOYD: Thank you, no further questions.

12 THE COURT: You may come down.

13 MR. FLOYD: Your Honor, I have no more witnesses but
14 I would like to just point out a few things from the
15 transcript.

16 THE COURT: Let me find out if the State has any
17 witnesses. Anything?

18 MR. VANSYCKEL: No witnesses from the State, Your
19 Honor.

20 THE COURT: You may conclude.

21 MR. FLOYD: Thank you, Your Honor, first I would like
22 to address the suppression hearing. Your Honor, I assume
23 you have a transcript.

24 THE COURT: I am looking at it. I have been looking
25 at it for the last hour.

1 MR. FLOYD: Your Honor, a couple of points we would
2 like to address. We put into the evidence the operation
3 order which was part of the, which was a Court exhibit.

4 THE COURT: I have not seen that.

5 COURT REPORTER: Here you go.

6 THE COURT: All right, go ahead.

7 MR. FLOYD: It sets out the procedure for checkpoint
8 cases in Lexington County and that was agreed by Mr.
9 Verner that it does. There are a couple of ways in which
10 this checkpoint violated the operation order. First of
11 all, their checkpoint has specific locations that are
12 approved for checkpoint stops. However, this case, this
13 checkpoint was not at one of these approved locations.
14 Lieutenant Johnson, page 49 and 50, testifies that he made
15 the decision to locate the checkpoint simply because of a
16 traffic fatality that had occurred at that location some
17 two weeks earlier. But it is not one of the approved
18 checkpoint locations therefore it is in violation of the
19 Newberry County checkpoint policy. Furthermore, he
20 admitted they did not advertise the checkpoint in advance
21 as required by the operation policy. He did admit, that
22 was on page 55, line 21. On page 70, line 13 through 16--

23 THE COURT: 7-0?

24 MR. FLOYD: 7-0, lines 13 and 16. The operation
25 order governs the checkpoint procedure and that is the

1 operations order that is a Court's exhibit. He admits on
2 page 71, line 19 and 20. That the checkpoint location was
3 not one listed on the operations order. So in several
4 crucial ways the checkpoint violated the checkpoint
5 operations procedure. And according to the checkpoint,
6 the evidence seized at the checkpoint should have been
7 suppressed. Now Mr. Velasquez, of course, wanted to
8 challenge the Judge's order. However he was unable to
9 challenge it in an appeal because the appeal was not
10 timely filed. Now he has testified that he was provided
11 the assurances that it would be filed by Mr. Verner after
12 the trial but it wasn't done. And if you look on page
13 165, line 10 through 12, which was, when he was doing the
14 sentencing hearing.

15 THE COURT: I have got it.

16 MR. FLOYD: And the Judge was talking about his right
17 of appeal. And the Judge never told him either it had to
18 be done within ten days.

19 THE COURT: Right, it just says limited number.

20 MR. FLOYD: It says you have a limited number. And
21 Mr. Verner never said he told him he had ten days either.
22 So he never was advised of his right to appeal. We
23 suggest that he is entitled to relief in that fashion.
24 Your Honor, as to the, whether or not Mr. Verner was
25 effective or not. I think several, several deficiencies

1 were noted throughout the testimony. First of all, I
2 think we would all agree this was a very quick trial, from
3 May to July, for a big case, for a case of trafficking in
4 400 grams. I know of none that have been that quick and
5 maybe Your Honor often has it that quick, I have never
6 known of one of these that quick. So there is a question
7 there of whether or not everything was properly done in
8 order to assure continuances long enough for Mr. Verner to
9 get prepared for Mr. Velasquez to retain a private lawyer,
10 as he had a private lawyer there that day. Secondly, he
11 never even provided Mr. Velasquez a copy of the drug
12 analysis. In fact we never got a copy of the drug
13 analysis until this morning even though we have been
14 requesting them through Mr. Verner's file and through the
15 Solicitor's file. And we was just provided it this
16 morning. Very crucial part of the suppression motion was
17 the fact about the marijuana because there is a dispute in
18 the evidence. And though the officer testified that he
19 smelled marijuana and that Mr. Velasquez handed him an
20 ashtray with two roaches in it, there is no, the evidence
21 of the marijuana has never been produced. Mr. Verner's
22 failure to investigate that crucial dispute likewise is
23 deficient because if Mr. Velasquez's version is correct
24 there would be no probable cause to confront Mr. Velasquez
25 search and lead to the discovery of the drugs in the

1 vehicle. There is another basis, Your Honor, that we feel
2 that if he had an appeal he could have also raised the
3 issue as to whether or not the search of the bag, the book
4 bag was valid. Because the book bag is what contained the
5 400 grams of cocaine. It was a, the record will show it
6 was zipped up, it was closed up and so there was no reason
7 for them to go in that bag without a search warrant which
8 they admittedly did. They opened that bag, looked in it,
9 saw there were drugs. Realized they needed a search
10 warrant, closed it back up, then got a search warrant to
11 search the book bag. Since the book bag was not on his
12 person and was not clearly visible to contain any type of
13 illegal substances it is our position they could not enter
14 that bag without a search warrant and therefore that
15 search was invalid also. And, of course, he has lost his
16 ability to challenge that because he lost his ability to
17 file an appeal. Furthermore, Your Honor, it is our
18 position that he was deficient in allowing them to charge
19 him with third offense and mention to plead to second
20 offense because he had never been convicted of trafficking
21 before. And the only thing on his record was possession
22 cases. So it our position that the possession case cannot
23 be used to enhance a trafficking case to raise it to a
24 second or third or whatever. And accordingly the Court
25 really lacked jurisdiction to sentence him to a second

1 offense because he never had a first offense. And the
2 only thing on his record was simple possession. Thank
3 you, Your Honor.

4 THE COURT: Anything from the State?

5 MR. FLOYD: Your Honor, before we start I did forget
6 to mention one thing. Of course there is the issue of
7 conflict of interest that was present in the case. You
8 have up there your evidence and he sent out an email
9 saying that he represented Ebony Joiner and he was
10 referring Mr. Velasquez to Mr. St. Pierre. It is in his
11 own writing there, he had a conflict. It is our position
12 that once you have a conflict you can't unconflict it.
13 And therefore he had a right to be represented by a
14 conflict free lawyer. Nobody ever told him that and it is
15 obvious that once he had the conflict he would be unable
16 to represent Mr. Velasquez.

17 THE COURT: Anything from the State?

18 MR. VANSYCKEL: Your Honor, we would ask to respond
19 with our proposed order.

20 THE COURT: All right, that will be fine. All right,
21 counsel, how much time do you need to draft proposed
22 orders?

23 MR. FLOYD: What is your normal timeframe, Judge?

24 THE COURT: 30 days.

25 MR. FLOYD: That would be sufficient for us.

1 MR. VANSYCKEL: 30 days works, Your Honor, thank you.

2 THE COURT: Thank you very much.

3 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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1 CERTIFICATE OF REPORTER
2
34 State of South Carolina)
5 County of Newberry)
6
78 I, Joy E. Holston, Official Court Reporter for the
9 Eighth Judicial Circuit of the State of South Carolina, do
10 hereby certify that the foregoing is a true, accurate and
11 complete transcript of record of the proceedings had and
12 evidence introduced in the trial of the captioned case,
13 relative to appeal, in the County of Newberry, South
14 Carolina on the day of June 6, 2017.15 I do further certify that I am neither of kin,
16 counsel nor interest to any party hereto.
1718 January 24, 2018
1920 *Joy Holston*
21

22 Joy E. Holston, Court Reporter

23 My Commission expires: May 2, 2026
24
25

8th Circuit Defender

Case File Detail

Page: 2 of 2

7/2/2015

CASE NOTES

Charles Verner

06/23/2015 03:39 PM

June 23, 2015

[illegible]

Mr. Joseph St Pierre, Esquire
Attorney at Law
235 W. Laurens Street
Laurens, SC 29360

144

Re: State vs DEREK EUGENE VELASQUEZ

WIND 2015 GS-36 269WAW: 2015A36-1010-020711 Trafficking Cocaine

UIND. 2015-GS-36-270UAW. 2015A36-1010-0208U(Trafficking Cocaine BaseU

Dear Mr. St Pierre:

My office is unable to represent the above-named defendant because of a conflict of interest. This letter is to inform you that you have been appointed to represent DEREK EUGENE VELASQUEZ. I represent the co-defendant Ebony Joyner.

My understanding is that Derek also has to magistrate tickets (36137FG and 36138FG (possession marijuana and paraphernalia). Please try to have those tickets transmitted to General Sessions if they are still pending.

⚡Please contact me if you have any questions or concerns

With kindest regards, I am

Truly yours,

Newberry County Public Defender

*****Charles Verner

CV/em

PD File No.: A



FILED
NEWBERRY COUNTY
2017 JUN 12 PM 3:57

OPERATION ORDER

Problem: The number of traffic accidents, alleged speeding and impaired drivers, and other traffic problems has occurred in certain areas of the county. The holidays continues to be more of the most dangerous periods for traffic fatalities caused by intoxicated drivers, speeders, and other traffic violators. The South Carolina Highway Patrol is extremely understaffed and unable to provide adequate coverage to these potential problem areas.

Purpose: The purpose of these check points will be to enforce all local, state, and federal laws in an effort to reduce traffic accidents and deaths because of unchecked traffic conditions.

Location: The potential location for check points have been established as:

HIGHWAY 34 AND HIGHWAY 176 KIETT'S CROSSROADS

MACEDONIA CHURCH ROAD AND SEIBERT ROAD, PROSPERITY

HIGHWAY 176 AND HIGHWAY 202, POMARIA

HIGHWAY 34 BY PASS AND ADELAIDE STREET, NEWBERRY

HIGHWAY 34 AND HIGHWAY 39, CHAPPELLS

HIGHWAY 72 AND DUCKETT AVENUE, WHITMIRE

MT. BETHEL GARMANY ROAD AND WHITENER ROAD, NEWBERRY

COTTAGE AVE AND GRAY STREET, NEWBERRY

DREHER ISLAND ROAD AND STATE PARK ROAD, PROSPERITY

HIGHWAY 76 AND BEACON LANE, NEWBERRY

HIGHWAY 219 AND ST PHILLIPS CHURCH ROAD, NEWBERRY

NEW HOPE ROAD AND BROAD RIVER ROAD

KENDALL ROAD AND BELFAST ROAD

2017 JUN 12 PM 3:57

FILED
NEWBERRY COUNTY

BUSH RIVER ROAD AND DEVINE DRIVE**BUSH RIVER ROAD AND AIRPORT ROAD**

These locations have been selected because of lighting, the terrain, road traffic, safety of officers, safety of motorists, and other factors.

Procedures: There will be a mandatory briefing conducted before going to the check point location. Once arrived at the check points, blue lights will be activated so that motorists are able to see the check point and reduce their speed on approaching the checkpoint. Officers will place signs at all locations approaching the check points indicating the police check point ahead. This again will enable motorists the opportunity to see and reduce their speed on approaching the check point. All officers will wear their traffic safety vest and flashlight issued cones so that they are immediately visible and identifiable as police officers.

Once on location the following procedures will be followed:

- Every car will be stopped
- The driver will be requested to produce a valid driver's license, proof of insurance, and a vehicle registration.
- Officers will also be alert for any violations of local, state, and federal law.
- There will be a zero tolerance on all violations of law at this check point.
- No motorists should be detained more than one minute without probable cause for a search or arrest.

Other Considerations:

- Officers should remain alert at all times.
- Officers should at all times obey all policies and procedures of the Newberry County Sheriff's Office.
- Officers should at all times obey and be in compliance with all local, state, and federal laws.

- Officers should familiarize themselves with the Newberry County Sheriff's Office policy manual.
- Officers should review the Newberry County Sheriff's Office use of force policy.
- Officers should review the Newberry County Sheriff's Office pursuit policy.
- Officers should review Michigan V. Sitz.
- Officers should review the Carroll Doctrine as well as other applicable governing law.
- Officers should review applicable search and seizure laws.

Documentation: A safety check point form will be filled out by the end of shift and turned into Lt. Eigner. All violations will be documented by a report for each case.

Declaration: It is the declaration of the Newberry County Sheriff's Office that we have complied with the requirements set forth in Michigan V. Sitz to conduct a traffic check point. We have established an operation order with clear expectations and guidelines, we have established a need, reason, and purpose for the checkpoint, and we have published the times and location of the check point to the print, radio, and television outlets for this area.

STATE OF SOUTH CAROLINA)
COUNTY OF NEWBERRY)
) IN THE COURT OF COMMON PLEAS
) FOR THE EIGHTH JUDICIAL CIRCUIT

Derrick Velasquez, SCDC # 365000)

Applicant)

Case No.: 2016-CP-36-154

v.)

State of South Carolina)

Respondent)

ORDER OF DISMISSAL

FILED
NEWBERRY COUNTY
2017 AUG 31 AM 11:00
ELIZABETH P. FOLLO
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed March 7, 2016. An evidentiary hearing into the matter was convened on June 6, 2017, at the Laurens County Courthouse in Laurens, South Carolina. Applicant was present at the hearing and represented by Wayne Floyd, Esquire. Assistant Attorney General Judah N. VanSyckel, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Charles Verner, Esquire, also testified. This Court had before it a copy of Applicant's records from the Newberry County Clerk of Court; Applicant's records from the South Carolina Department of Corrections; the trial transcript, which included the record of the Motion for a Continuance, jury selection, suppression hearing, and Applicant's Guilty Plea; Applicant's PCR Application; and Respondent's Return:

I. Procedural Posture

Applicant is presently confined in the South Carolina Department of Corrections pursuant to Orders of commitment of the Newberry County Clerk of Court. Applicant was indicted at the June 2015 term of the Newberry County Grand Jury for trafficking in crack cocaine (10 g. or more, but less than 28 g.) (2015-GS-36-270) and trafficking in crack cocaine (400 g. or more)

(2015-GS-36-269). Applicant was represented by Charles Verner, Esquire. On August 3, 2015, Applicant began a trial before the Honorable Eugene C. Griffith, Jr. The State was represented by Deputy Solicitor Dale Scott, Esquire, and Assistant Solicitor Taylor Daniel, Esquire.

At the beginning of the proceedings, Applicant moved for a continuance. (Tr. p. 4-12). One of the grounds for the motion was on the basis of the fact that the case was relatively new. Id. Another was that they felt that the data regarding the traffic stop was insufficient. Id. The Court held that the insufficiency of the data was a legal matter that should not be a basis for a continuance. Id. at 8. The Court denied the motion as to the other grounds but ultimately held that the Court would go forward with jury selection and move forward with the suppression motion, and then evaluate the case from there. Id. at 12.

~~Applicant's suppression motions were denied. (Tr. p. 155.) The Court also again denied~~ the request for a continuance, even on the grounds that Applicant wanted to hire a new lawyer. (Tr. p. 155-156.)

On August 4, 2015, Applicant pled guilty to trafficking in crack cocaine (10 g. or more, but less than 28 g.) and to trafficking in cocaine (28 g. or more, but less than 100 g.) as a lesser included offense of trafficking in cocaine (400 g. or more). Applicant was sentenced pursuant to a recommendation to imprisonment for fifteen years on each charge to run concurrently.

Applicant filed a notice of appeal, which was served on opposing counsel on August 17, 2015. Applicant's counsel filed a Motion to Allow Late Filing, stating that he was made aware on August 17, 2015 that Applicant desired an appeal. On September 2, 2015, the South Carolina Court of Appeals issued an order stating that it cannot extend the time for service of the notice of appeal, denying Applicant's motion and dismissing the appeal. The remittitur was sent September 18, 2015.



II. Facts of the Case from the Guilty Plea

On May 1, 2015, the Applicant, a non-resident of South Carolina, trafficked powder and crack cocaine and possessed marijuana in this State in defiance of the laws created to protect the citizens of South Carolina from the evils of these dangerous substances. (Tr. p. 160-161.) The Applicant was riding in a car which was stopped at a traffic checkpoint in Newberry, S.C. (Tr. p. 161.) During the stop, officers lawfully searched Applicant and discovered crack cocaine in the Applicant's front right pocket. Id. Officers subsequently also lawfully discovered a brick shaped package containing over 400 grams of powder cocaine in a backpack. Id.

III. Applicant's Guilty Plea Statements

Applicant admitted to these facts at the guilty plea. (Tr. p. 161). At the plea, Applicant stated at the plea the following as part of his mitigation:

"Well, Your Honor, I take full responsibility for this and I made those decisions. It was very turbulent times and I felt like I had nothing to lose at the time. I committed a wrongful act, I knew there was consequences and penalties. When I look in the mirror I ask myself, I can't think of any reason of why I was going to do what I was going to do. So, it didn't work out and the only reason I put up such a fight in the beginning is because, I thought I had a shot at this. And I wanted to, to expose me to more time but my decision was based on, I would rather do 7 years, I didn't want to do 7 years and think I could have won. I gave it all I could, you know."

(Tr. p. 167).

IV. Applicant's PCR Filings

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

1. Ineffective Assistance of Counsel.
2. Due Process Violations.
3. Denied equal protection under the law.

Applicant alleges that Counsel provided ineffective assistance of counsel in the following ways:

1. Counsel failed to obtain the field drug test kit analysis, otherwise known as the Scott's Reagent Test.
2. Counsel failed to obtain a continuance.
3. Counsel failed to investigate, plan, and prepare a defense strategy.
4. Counsel failed to challenge legally insufficient empirical data.

Applicant alleges that he was denied Due Process in the following manner:

1. There was woefully insufficient evidence submitted by the Newberry Sheriff's Office.
2. ~~Incomplete Discovery Submitted by the Solicitor.~~
3. Only given one hour to prepare a motion to suppress by the Judge.

Applicant claimed that he was denied Equal Protection under the Law because his case was called for trial more quickly than others similarly situated were.

At the hearing, Applicant also alleged that Counsel was ineffective for:

1. Failing to file an appeal.
2. Having a conflict with his co-defendant.

V. Summary of Hearing Testimony

A. Applicant's Testimony

At the hearing, Applicant testified that he discussed the conflict issue with Counsel, Charles Verner. Applicant also testified that he never got the drug results for the marijuana test. Applicant testified that he pled based on Counsel's assertion that if he lost the suppression

CT

hearing, then he'd lose at trial and be subject to a significant sentence and because Counsel asserted that Applicant would likely lose at trial.

Applicant testified that Counsel said he would file an appeal. Applicant testified that Applicant thought Counsel said he had thirty days to appeal. Applicant testified that he wanted to hire another attorney. Applicant testified that he had prior felony charges.

B. Counsel's Testimony

Counsel, Charles Verner, testified that he had the case for three months and that he had enough time to prepare this case. Counsel testified that this was a quick case, but that the facts were simple.

Counsel testified that he did originally assign the co-defendant's case to himself and assigned Applicant's case to Joseph St. Pierre, Esquire. Counsel then explained that he met with the co-defendant to understand the nature of the charges and after meeting with the co-defendant, realized that the Applicant was more culpable. Counsel explained that the meeting with the Applicant was only to understand the nature of the charges in the case. Counsel testified that shortly after that meeting, he assigned Applicant to himself and assigned the co-defendant to Mr. St. Pierre.

Counsel testified that he met with Applicant numerous times and that Applicant was a high-intensity client in terms of the amount of attention that Applicant desired. Counsel testified that he turned over his entire case file to Applicant's girlfriend at request of Applicant after the plea. Counsel testified that he could not recall showing Applicant the results of the drug tests. Counsel testified that he specifically challenged both the legality of the traffic checkpoint and the search of Applicant. Counsel testified that he did move for a continuance and that that request was denied.



Counsel testified that he would have challenged the State's position regarding Applicant's prior drug convictions had Applicant gone to trial. Counsel testified that he would have objected had the State not provided certified copies of the prior convictions. Counsel testified that Applicant's own statements corroborated the RAP sheets.

Counsel also testified that regardless of Applicant's prior convictions, Applicant would have been facing at least twenty-five years on the powder cocaine due to the weight of the powder cocaine. Counsel testified that by pleading to a lesser weight, even as a second offense, Applicant received the benefit of being able to be sentenced to 15 years. Counsel testified that at the suppression hearing, law enforcement testified that there was a smell of marijuana in the vehicle in which Applicant was riding.

Counsel testified that Applicant never asked him for an appeal, but that Applicant's girlfriend contacted him with Applicant's request to appeal. Counsel testified that he filed a Notice of Appeal the same day and moved for permission to file outside of time as well. Counsel noted the timeline in the appeal. Counsel testified that he was not contacted until August 17, 2015, when the ten day deadline was August 10, 2015.

Counsel testified that the only appealable issue was the suppression motion and that he did not believe it to be a strong appeal. Counsel testified that he did have the results of the chemical analysis of the seized drugs. Counsel testified that he felt certain that Applicant would be convicted at trial.

VI. Applicable Law

A. Law regarding claims of Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the

application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 386 S.E.2d at 625.

The United States Supreme Court held that the Strickland v. Washington standard applies in guilty pleas. Hill v. Lockhart, 474 U.S. 52 (1985). The Court further held that for guilty pleas, in order to show the prejudice requirement in the second prong of Strickland, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59. The test for the prejudice inquiry of the Court is dependent upon the particular facts of each claim of ineffective assistance of counsel. Claims of failing to investigate or discover evidence are subject to an analysis by the

Court as to the probability that “discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.” *Id.* But the prejudice analysis changes “where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the “prejudice” inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.” *Id.* This is an inquiry that the trial court must make regarding the evidence presented before it as “these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the “idiosyncrasies of the particular decisionmaker.”” *Id.* at 59-60 (quoting Strickland v. Washington, 466 U.S. 668, 695 (1984)).

Additionally, in *claims of ineffective assistance of counsel due to a conflict of interest*, “An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant’s.” Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). This Court has further stated that a conflict of interest occurs when “a defense attorney places himself in a situation inherently conducive to divided loyalties.” Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); see also Burger v. Kemp, 483 U.S. 776, 783 (1987)). “The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction.” State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450

(2005). A defendant need not demonstrate prejudice if there is an actual conflict of interest." Id., 364 S.C. at 153, 612 S.E.2d at 450.

B. Law regarding claims of Due Process Violations and violations of the Right of Equal Protection

The South Carolina Supreme Court has held that "Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." Simmons v. State, 264 S.C. 417, 423 (1975). See also Drayton v. Evatt, 312 S.C. 4, 8 (1993). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973).

VII. Findings of Facts and Conclusions of Law

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the transcript of the motions and plea proceedings, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Counsel's testimony to be credible and persuasive on all matters. This Court finds Applicant's testimony to be lacking credibility. These credibility findings have been applied to the Court's findings and conclusions set forth below.

A. The claim of Ineffective Assistance of Counsel

This Court finds that Counsel demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted).

An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). For guilty pleas, in order to show the prejudice requirement in the second prong of Strickland, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59. The test for the prejudice inquiry of the Court is dependent upon the particular facts of each claim of ineffective assistance of counsel. Claims of failing to investigate or discover evidence are subject to an analysis by the Court as to the probability that "discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." Id. But the prejudice analysis changes "where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." Id. This is an inquiry that the trial court must make regarding the evidence

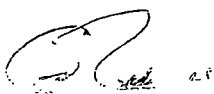


presented before it as "these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the "idiosyncrasies of the particular decisionmaker.'" Id at 59-60 (quoting Strickland v. Washington, 466 U.S. 668, 695 (1984)).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). This Court finds that Applicant has failed to prove that Counsel was ineffective.

This Court finds that Applicant has failed to prove that Counsel was ineffective for failing to obtain the results of the field drug test kit. Applicant provided no evidence as to what probative value it would have provided that was not otherwise provided, and failed to show any way in which Applicant was prejudiced. Counsel testified that he would have challenged the drug evidence at trial and that he would object to the introduction of the drugs as evidence without the State producing testimony from South Carolina Law Enforcement Division analyst. This Court is aware that the regular practice in the criminal courts in this state is to present the ultimate laboratory tests, which are of a higher quality and are required for criminal prosecution, and not to present the field drug test kit results. Counsel was not deficient in relying upon the lab results.

This Court also finds that Counsel was not ineffective for failing to obtain the field drug test kit for purposes of the suppression motion. This Court finds that Counsel had a copy of the laboratory analysis of the drugs which confirmed their makeup. Additionally, this Court finds that Officer Pete Johnson testified that Applicant himself identified the marijuana as being marijuana. (Tr. p. 90.) This Court finds that Applicant has failed to show the relevance of the field test kit or how it would have affected his decision to go to trial.



This Court finds that Applicant has failed to prove that Counsel was ineffective for failing to obtain a continuance. Counsel did request a continuance on the grounds that the case was relatively new, that Applicant wished to hire a different lawyer, and that the discovery provided was insufficient as to the empirical data provided regarding the checkpoint. (Tr. p.4-12, 155-156.). The Trial Court ruled against the request. Id. This decision was within the discretion of the Trial Court and Counsel could not control it. State v. Meggett, 398 S.C. 516, 523 (Ct. App. 2012). Since Counsel made the requested motion to the Court, the Applicant has failed to prove deficiency.

Applicant has failed to prove that Counsel was ineffective for failing to investigate, plan, and prepare a defense strategy. This Court finds that Counsel reviewed all the available evidence, identified what he felt was the strategically best decision, and acted accordingly. Specifically, Counsel reasonably realized that the evidence of Defendant's guilt was overwhelming. Except for the pre-trial legal challenges, which were brought in good faith and which were rejected by the trial court, regarding the traffic safety checkpoint and the search of Applicant, there was no factual defense. Neither deficient performance nor prejudice was shown under the two prong test of Hill. Hill v. Lockhart, 474 U.S. 52 (1985).

Applicant has failed to prove that Counsel was ineffective for failing to challenge the traffic checkpoint as having legally insufficient empirical data to justify the checkpoint. The trial transcript reveals that Counsel did challenge the checkpoint for having legally insufficient empirical data and the Trial Court ruled against Applicant. (Tr. 145-150.) The factual claim is without merit and must be dismissed.

Applicant has failed to prove that Counsel was ineffective in failing to file a notice of appeal from the guilty plea. The record of the plea reflects that the plea court advised Applicant



that Applicant had “a limited number of days in which to file a notice of appeal.” “if I have done something procedurally wrong. (Tr. p. 165.) The Applicant testified that he thought he had 30 days to appeal from the August 4, 2015 plea and sentence. When Counsel was notified on or about August 17, 2015 of the Applicant’s desire to appeal for the first time, he immediately filed the Notice of Appeal. Importantly, Counsel further noted that he was aware of no appealable issue preserved for review although Applicant’s motion to suppress the search of his person and property were raised and ruled upon by the sentencing judge the day before Applicant’s plea. As this Court is aware, there are no conditional guilty pleas in South Carolina and this plea was plainly unconditional. See State v. Rice, 401 S.C. 330 (2013). See also Rivers v. Strickland, 264, S.C. 121 (1975).

As set forth, the standards of Roe did not require Counsel to consult in a different manner after the plea.

“We instead hold that counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known. *See id.*, at 690, 104 S.Ct. 2052 (focusing on the totality of the circumstances). Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights. Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal.”

Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000)(citing to Strickland v. Washington, 466 U.S. 668 (1984)).



The Applicant has failed to show, under Roe v Flores-Ortega, that Counsel had a duty to inquire of whether the Applicant wanted to appeal his guilty plea or sentence. 528 U.S. 470 (2000). As Counsel stated in his belated Notice, no appealable issues were raised in the plea. The record reflects the plea, subsequent to the denial of the suppression hearings, was fully and voluntarily entered on admission of guilt. Further, the sentence given was within the terms of the plea negotiations. (Tr. p. 167-168). No objection was made to the sentence.

Counsel's actions were reasonable when until August 17, 2015, he had no understanding of the Applicant's desire to appeal, and then, on instruction, he immediately appealed, albeit out of the ten day period. Under the circumstances, the Court cannot find Counsel deficient when the record reveals nothing to have demonstrated to Counsel an interest, of Applicant, in appealing prior to the ten day deadline where the plea resulted in an unobjected sentence within the terms of the negotiation. Applicant failed to meet his burden of proof that Counsel's actions were unreasonable.

Applicant has failed to prove that Applicant was ineffective for having an ethical conflict in the representation of Applicant's co-defendant. Counsel's testimony indicates that he did not "actively represent" Applicant's co-defendant, rather he was still in the process of evaluating the case and the conflicts in the case in order to determine his representation and did not fully enter into representation of Applicant's co-defendant. Langford v. State, 310 S.C. 357 (1993). The Applicant has failed to prove an actual conflict of interest that adversely affected his representation prior to the plea.

B. The claims that the Defendant's Rights to Due Process and to Equal Protection under the Law were violated

Applicant's claims that his rights to Due Process under the Law were violated because:



1. There was woefully insufficient evidence submitted by the Newberry Sheriff's Office.
2. Incomplete Discovery Submitted by the Solicitor.
3. Only given one hour to prepare a motion to suppress by the Judge.

Applicant claims that he was denied Equal Protection under the Law because his case was called for trial more quickly than others similarly situated were.

This Court finds that these claims of violations of the Applicant's rights to Due Process and Equal Protection are matters that could have been raised at trial and on appeal. However, Applicant waived his rights to raise these claims when he pled guilty. See Rivers v. Strickland, 264 S.C. 121 (1975). See also State v. Rice, 401 S.C. 330 (2013).

The South Carolina Supreme Court has held that "Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." Simmons v. State, 264 S.C. 417, 423 (1975). See also Drayton v. Evatt, 312 S.C. 4, 8 (1993). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). As Applicant could have previously raised these claims as part of the trial or appellate process, they are ineligible to be addressed as part of the Post-Conviction Review proceedings.

VIII. Conclusion

Based on the foregoing facts, the Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Applicant failed to demonstrate that Counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Additionally, Applicant's



claims as to being denied his rights to Due Process and Equal Protection under the Law are not allowed under the South Carolina Uniform Post-Conviction Procedures Act when they could have been asserted on appeal. Simmons v. State, 264 S.C. 417, 423 (1975). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 24 day of August, 2017.

At: COLUMBIA, SOUTH CAROLINA


 G. Thomas Cooper, Jr.
 Presiding Judge
 Eastern Judicial Circuit

WITNESSES

Michael Stribble
Newberry County Sheriff

WARRANT NUMBER

2015A3610100207

TRUE BILL

Phyllis Sanders

Foreman of the Grand Jury

Date: 6-12-15

VERDICT

Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

COURT OF GENERAL SESSIONS

June Term, 2015

Indictment # 15GS36-0269

THE STATE

vs.

Derrick Eugene Velasquez

INDICTMENT FOR

Trafficking in Cocaine

400 g or more

§44-53-0370

CDR: 0281

THE STATE OF SOUTH CAROLINA

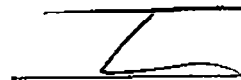
COUNTY OF NEWBERRY

INDICTMENT FOR**Trafficking in Cocaine,
400 g or more
§44-53-370**

At a Court of General Sessions, convened on the 12th day of June, 2015, the Grand Jurors of Newberry County present upon their oath:

That Derrick Eugene Velasquez did, on or about May 1, 2015, in Newberry County, willfully, unlawfully, and knowingly traffic in cocaine, in that the said defendant(s) did distribute, manufacture, cultivate, deliver, purchase, or bring into this State, and/or did provide financial assistance or otherwise aid, abet, attempt, or conspire to distribute, manufacture, cultivate, deliver, purchase, or bring into this State, and/or was knowingly in actual or constructive possession 400 grams or more of cocaine, in violation of Section 44-53-370(e)(2)(e) 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 cases made and provided.



Assistant Solicitor

WITNESSES

Michael Stribble
Newberry County Sheriff

WARRANT NUMBER

2015A3610100208

TRUE BILL

Phyllis Sanders

Foreman of the Grand Jury

Date: 6-12-15

VERDICT

Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

COURT OF GENERAL SESSIONS

June Term, 2015

Indictment # 15GS36-0270

THE STATE

vs.

Derrick Eugene Velasquez

INDICTMENT FOR

Trafficking in Crack Cocaine,
10 g or more, but less than 28 g

§44-53-0375

CDR: 0452

THE STATE OF SOUTH CAROLINA**COUNTY OF NEWBERRY****INDICTMENT FOR****Trafficking in Crack Cocaine,
10 g or more, but less than 28 g
§44-53-0375**

At a Court of General Sessions, convened on the 12th day of June, 2015, the Grand Jurors of Newberry County present upon their oath:

That Derrick Eugene Velasquez did, on or about May 1, 2015, in Newberry County, willfully, unlawfully, and knowingly traffic in cocaine base (crack cocaine), in that the said defendant(s) did sell, manufacture, deliver, purchase, or bring into this State, or provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or was in actual or constructive possession or did knowingly attempt to become in actual or constructive possession of 10 grams or more, but less than 28 grams of cocaine base (crack cocaine), in violation of Section 44-53-375(C)(1) 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 cases made and provided.



Assistant Solicitor