

THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Michael G. Nettles, Circuit Court Judge

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Appellate Case No: 2017-002121

S.C. SUPREME COURT

NORRIS STEPLIGHT,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

APPENDIX

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1 Q. But you're not currently a pharmacist, correct?

2 A. I haven't filled a prescription in 25 years.

3 Q. Have you ever referred to yourself as a pharmacist
4 when testifying in court?

5 A. Yes.

6 Q. Have you ever held yourself out to the public as a
7 registered pharmacist on your web site?

8 A. Yes.

9 Q. Do you recall being issued an order to cease and
10 desist from the South Carolina Board of Pharmacy in
11 February of 2013 asking you to stop referring to yourself
12 as a registered pharmacist?

13 A. Yes.

14 Q. So you misrepresented yourself to the Court as a
15 pharmacist on prior occasions, correct?

16 A. No, no.

17 Q. Why were you issued that cease and desist from the
18 Board of Pharmacy then?

19 A. The definition of pharmacist from the Board of
20 Pharmacy is different from the definition of pharmacist
21 in the dictionary.

22 Q. And you don't meet those qualifications according
23 to the State Board?

24 A. According to their definition, to practice
25 pharmacy, you have to have continuing education courses

1 in the field of pharmacy to be able to fill
2 prescriptions.

3 Since I don't fill prescriptions, I don't maintain
4 the continuing education component that is required to be
5 called a registered pharmacist by their definition, but I
6 am registered with the State of South Carolina Board of
7 Pharmacy. It's license 5493, and that registration and
8 license is valid. It's just currently in an inactive
9 state because I don't fill prescriptions.

10 Q. How long was it -- how long has it been in an
11 inactive state?

12 A. Probably ten years or more.

13 Q. Are you a member of any professional organizations
14 or licensed groups?

15 A. No.

16 Q. Why not?

17 A. That's great if you want to go to conventions and
18 go to other places. I just don't do that. I used to,
19 but I just don't have the time anymore.

20 Q. Are you a certified toxicologist?

21 A. What do you mean by certification?

22 Q. Never mind. Strike that.

23 You're not a member of any professional
24 organizations or a licensed group now?

25 A. As I mentioned, not anymore.

CROSS-EXAMINATION - ROBERT BENNETT

1 Q. When was the last time you were?

2 A. I believe the last time I went to a national
3 convention is when I was invited to be a guest speaker at
4 the convention to discuss drug testing and legal
5 situations in Phoenix, Arizona.

6 Q. When was that?

7 A. Five or eight years ago.

8 Q. And that's the last time you were a member of a
9 professional organization or a licensed group?

10 A. Could have been.

11 Q. Well, was it or was it not? What do you mean by
12 could have been?

13 A. I just don't recall.

14 Q. You testified that you have been admitted as an
15 expert in common pleas, general sessions, family court
16 matters, and federal court in the state, correct?

17 A. Yes.

18 Q. Who were you offered by, the State or the defense?

19 A. It's been both, I believe.

20 Q. How many times have you testified for the State?

21 A. I don't recall.

22 Q. Can you give the Court an estimate?

23 A. I hesitate on giving an estimate.

24 THE COURT: This query is related to his
25 qualifications.

CROSS-EXAMINATION - ROBERT BENNETT

1 MS. JAMESON: Certainly, Your Honor.

2 BY MS. JAMESON:

3 Q. Have you ever been ruled unqualified by the Court?

4 A. There was one incident in which I was an expert
5 for the defense in the murder trial of Kate Waring in
6 which the defense attorney tried to qualify me both in
7 DNA and trace.

8 I explained to him that I'm not an expert in trace
9 analysis, but he said, We'll try anyway. The Court did
10 qualify me as an expert in DNA, but not trace, but every
11 other time I've been qualified.

12 MS. JAMESON: Court's indulgence, Your Honor.
13 No further questions.

14 THE COURT: Be glad to hear any motions with
15 regard to his qualifications.

16 MS. JAMESON: What is he being offered for,
17 specifically?

18 MR. THEOS: In the field of chemical
19 analysis.

20 MS. JAMESON: No objection, Your Honor.

21 THE COURT: All right. He is indeed
22 qualified and allowed to render his opinion in regard to
23 drug analysis.

24 MR. THEOS: Thank you, Your Honor.

25 DIRECT EXAMINATION (Cont'd)

CONTINUED DIRECT EXAMINATION - ROBERT BENNETT

1 BY MR. THEOS:

2 Q. Dr. Bennett, will you tell the judge when you were
3 engaged and by whom in this particular case.

4 A. I was engaged by you, Jerry Theos, around February
5 of this year.

6 Q. Okay. And what were you engaged for, what
7 specific purpose?

8 A. To analyze and weigh a specific evidence item
9 related to this case.

10 Q. I'll ask you to take a look at this. Is this a
11 copy of the order authorizing you to conduct the chemical
12 analysis, specifically the weighing and testing of the
13 evidence?

14 A. Yes, it is.

15 MR. THEOS: Judge, I believe you have a copy
16 of it.

17 THE COURT: Yes, I do. I'll be happy to
18 review that. Without any objection?

19 MS. JAMESON: Certainly not. It's in Your
20 Honor's packet.

21 THE COURT: This is a big old packet. I'm
22 going to look at it real quick.

23 Very good. Thank you.

24 MR. THEOS: And we would move this into
25 evidence as Applicant's Exhibit 1, please.

CONTINUED DIRECT EXAMINATION - ROBERT BENNETT

1 THE COURT: Any objection?

2 MS. JAMESON: No, Your Honor.

3 THE COURT: It's in evidence.

4 (Applicant's Exhibit 1 was marked for
5 identification and admitted into evidence.)

6 BY MR. THEOS:

7 Q. As a result of this Court order, did you perform a
8 chemical analysis, specifically testing and weighing the
9 evidence in this case?

10 A. I did.

11 Q. And on what day did you perform that analysis?

12 A. February 17th.

13 Q. Of which year?

14 A. 2017.

15 Q. In preparation for your analysis, please explain
16 what you did.

17 A. I initially prepared a standard protocol
18 worksheet. It's simply a scientific notebook, per se,
19 that allows me to document the data gain from the process
20 that I was tasked to do.

21 Q. Now, do you have that protocol worksheet in front
22 of you?

23 A. I do.

24 Q. And is that the original in front of you?

25 A. Correct.

CONTINUED DIRECT EXAMINATION - ROBERT BENNETT

1 MR. THEOS: I've already provided a copy of
2 this to opposing counsel, Your Honor, and we would move
3 this into evidence as Applicant's Exhibit 2, please.

4 MS. JAMESON: No objection, Your Honor.

5 THE COURT: Very good.

6 MR. THEOS: No objection to introducing a
7 copy of it rather than the original?

8 MS. JAMESON: No objection.

9 (Applicant's Exhibit 2 was marked for
10 identification and admitted into evidence.)

11 BY MR. THEOS:

12 Q. Dr. Bennett, if you could, take us through that
13 protocol that you followed and explain to the judge
14 exactly what was done with respect to that protocol.

15 A. Sure. As the protocol states, the first phase of
16 the process is to gather the appropriate equipment and
17 supplies that I'll need to perform the test, and a
18 standard list of those supplies are listed on the
19 worksheet under Phase I, equipment supplies. The most
20 important of the listed equipment is the balance that I'm
21 going to use to weigh the item, any chemicals that I
22 would need to perform the identification of the
23 substance.

24 Q. When you say the balance, do we refer to those in
25 lay fashion as a scale?

1 A. Yeah, the weighing instrument. We'll call it a
2 scale. All the items that I anticipated needing were
3 gathered in my office and packaged and transported to a
4 courtroom here at 100 Broad Street.

5 Q. And where was the testing done? Was it done here
6 in one of the courtrooms?

7 A. Yes, correct, it was.

8 Q. And to the best of your recollection, who was
9 present? And I don't mean by name, but representatives.

10 A. There were about 15 people there representing the
11 Charleston city police division, the prosecution, the
12 defense, I believe an evidence custodian, several
13 bailiffs. There were about 15 people there. I was not
14 introduced to all of them.

15 Q. And also, I believe that we had engaged a private
16 investigator, Mr. Dick Vance, who was the former head of
17 narcotics at the city of Charleston to record, video
18 record, the entire procedure; is that correct?

19 A. That's correct. He did do that. There was
20 another videographer there that was recording as well.

21 Q. So the entire process was recorded; is that --

22 A. Correct.

23 Q. Now, if you could explain to the judge exactly
24 what you did in your testing, step by step.

25 A. Okay. All right. In detail, the first thing I

CONTINUED DIRECT EXAMINATION - ROBERT BENNETT

1 did was go to the work station that was provided for me,
2 which is essentially a table covered in black plastic.
3 At that point, I put on top of that table some disposable
4 paper for cleanliness that I had brought with me, and
5 then I placed my scale on that table as well as some
6 various instruments such as tweezers, scissors, other
7 standard mechanical instruments used in the process.

8 The first task that I did was to balance the
9 scale. In other words, there's actually a bubble balance
10 built into the scale to level the balance. Once the
11 balance is levelled, it's sensitive enough to where it
12 required a perfectly flat level surface to give an
13 accurate reading. So after much activity and shaking on
14 the table, I was able to get the scale to be perfectly
15 level, and that was witnessed by several people, that the
16 scale was perfectly level and ready for operation.

17 At that point, I used what's called calibration
18 weights that I had brought with me. These are standard
19 weights that I use to calibrate the balance prior to each
20 use. That gives me assurance that the balance is
21 functioning and operating properly by giving an accurate
22 weight by placing the known calibrated weights on the
23 scale and seeing what they read, and as long as the
24 reading on the scale matches the calibration weight
25 that's recorded on the weight itself, then that gives me

1 assurance that the scale is functioning and accurate.

2 The calibration weights that I used were to
3 bracket the anticipated weight of the items I was going
4 to use. So what I did was use a calibrated 10-gram
5 weight and a calibrated 20-gram weight because the
6 evidence item was purported to weigh between those two
7 amounts, and when I placed the 10-gram weight on the
8 scale, it weighed 9.999 grams, so that's close to almost
9 perfect. There can be some slight fluctuation in weight
10 based on temperature. I did also record the temperature.
11 It was around 71 to 72 degrees.

12 I then placed a 20-gram calibrated weight on the
13 scale, and the reading was 19.999. These calibration
14 weighings were witnessed and observed and accepted as
15 accurate, and from that point on, the next step was to
16 actually weigh the evidence item.

17 Before I weighed the evidence item, there was
18 considerable discussion by the persons present as far as
19 once the evidence item is open, there might be a concern
20 of the release of some chemicals that are volatile,
21 meaning that the chemicals that are used in the process
22 of making the cocaine could evaporate off and create a
23 potential health hazard, and that's become more of a
24 problem with the use of certain drugs, such as fentanyl,
25 that during the production gives off a very hazardous

CONTINUED DIRECT EXAMINATION - ROBERT BENNETT

1 chemical solvent odor.

2 So there was quite a discussion on whether the
3 evidence item should be opened and whether that would
4 create a health hazard in the courtroom. After
5 significant discussions, it was decided to go ahead and
6 make an attempt to open the evidence item and see if
7 there was any potential release of any chemicals in the
8 evidence item.

9 At that point, the evidence item was provided to
10 me by who I believe was an evidence custodian. There was
11 a large brown paper envelope, and he removed from that
12 envelope a plastic bag containing the evidence item, and
13 hand delivered it to me. At that point, I cut open the
14 top of the bag that was heat sealed and removed the inner
15 bag, which was a zip-lock bag, and inside that zip-lock
16 bag were two -- what appears to appeared to be crack
17 cocaine that were each individually wrapped in what
18 appeared to be Saran wrap.

19 At the request of Ms. Fields, I weighed the
20 evidence bag in total before opening it and recorded that
21 weight, which is on this form to the right side of the
22 margin. The total bag itself weighed 21.649 grams, and
23 once I took the second bag out, which is the zip-lock
24 bag, that weighed 14.411 grams, and then the evidence
25 item in the two Saran wraps weighed 9.781 grams. Now,

1 those weights are not consequential to the final weight
2 of the evidence item itself, but they were just secondary
3 weighings that were performed.

4 Now, the evidence items were in two separate balls
5 that had a yellowish appearance of crack cocaine. I took
6 one of the evidence items and placed it in a weighing
7 container, which is a standard weighing container that is
8 essentially a plastic cup that is disposable. I placed
9 that weighing container on the scale and zeroed out the
10 weight of that weighed container, and that was witnessed
11 and observed, that the weighed-in container was zeroed
12 out. That eliminates the weight of the container from
13 measuring whatever is placed in the container.

14 At that point, the first piece of evidence item
15 was placed in the weighed-in container, and that weight
16 was recorded as 3.919 grams, and that weight was
17 photographed and witnessed by everyone there. The same
18 process was repeated on the second evidence item, and the
19 weight of that item was 5.325 grams for a combined total
20 weight of evidence itself alone of 9.244 grams.

21 Subsequent to that, I weighed the Saran wrap that
22 was surrounding the evidence items, and one of the Saran
23 wraps weighed .280 grams and the other weighed .255
24 grams. Again, that's the secondary weighing. The
25 important weighing is the weighing of the actual raw

CONTINUED DIRECT EXAMINATION - ROBERT BENNETT

1 evidence item itself showing a combined total weight of
2 9.244 grams.

3 At that point, after the weighing, the evidence
4 item was returned to its original packaging in reverse
5 direction of how it was unwrapped. In other words, I
6 returned it to the Saran wrap, returned that to the
7 zip-lock bag, returned that to the outer polyethylene
8 bag, and then provided that back to the person who had
9 provided me with the evidence item.

10 And then after that, I also performed a
11 qualitative detection of the substance itself in which an
12 insignificant amount of the drug, a pinhead size of the
13 drug in an amount that didn't even register on the scale,
14 placed that in a solution of isothiocyanate, which is a
15 standard agent used by law enforcement.

16 For example, to determine if the substance present
17 is cocaine, in the presence of cocaine, that substance
18 will give a blue color change, and when I placed a tiny
19 pinhead size in the solution, it did give the
20 characteristic blue color change, indicative that it was
21 cocaine in some amount. It's a qualitative test. It
22 doesn't tell us how much cocaine is there. It could be
23 100 percent cocaine, it could be just 2 percent cocaine,
24 but there was cocaine present in that substance.

25 THE COURT: Let me ask you a question: How

1 much is -- in the ordinary course of testing, how much
2 drug is wasted in the testing of -- in drug analysis,
3 generally?

4 THE WITNESS: Really, it depends on the
5 method of analysis. For example, the method that I use,
6 which is strictly qualitative, I actually tried to weigh
7 the pinhead size that I used, and it didn't even register
8 a weight. It was an insignificant amount, but other
9 methods of analysis can require more of the drug, but
10 that's accounted for in the analysis.

11 So if a certain chemical procedure requires a
12 certain weight of drug, then that specific weight is
13 weighed out, recorded, and documented as used in
14 analysis, and it becomes part of the permanent record,
15 according to standard scientific procedure.

16 BY MR. THEOS:

17 Q. Dr. Bennet, as a result of your analysis, did you
18 prepare a written forensic report?

19 A. I did.

20 Q. Do you have that before you?

21 A. I don't. I do now.

22 Q. Can you take a look at that and just verify that
23 that is, in fact, an accurate copy of your forensic
24 report?

25 A. It is.

CONTINUED DIRECT EXAMINATION - ROBERT BENNETT

1 MR. THEOS: Your Honor, I provided to
2 opposing counsel a copy as well, and we offer that and
3 move it into evidence as Exhibit 3.

4 MS. JAMESON: No objection from the State,
5 Your Honor.

6 THE COURT: It's in evidence as Applicant's
7 3.

8 (Applicant's Exhibit 3 was marked for
9 identification and admitted into evidence.)

10 BY MR. THEOS:

11 Q. Dr. Bennett, I won't ask you to go through the
12 entire report, but I will ask you if you would indicate
13 to the Court what the results of your testing were; in
14 particular the weight of the substance that you tested
15 first, and then, secondly, the identity of that
16 substance.

17 A. Well, first, if I may, the identity, as just
18 discussed, was shown to have some component of cocaine in
19 the substance because of the color change. That's a
20 fairly straightforward test with no interpretation other
21 than the color change. There was no ambiguity in that
22 reaction, and that was observed by witnesses in the
23 courtroom.

24 As far as the results of the weighing, again, this
25 was Charleston city police forensic division item number

1 151110885. That was what was labelled on the evidence
2 bag that I weighed, and after calibrating the scale as
3 previously mentioned, the item number one weighs 3.919
4 grams, and item number two weighed 5.325 grams, for a
5 total evidence weight of 9.244 grams. Now, that's just
6 the weight of the evidence itself, no container, no other
7 substance, just the evidence itself.

8 Q. Not the bag and not the Saran wrap?

9 A. Yeah, just the evidence.

10 Q. Now, did you have an opportunity to review the
11 Charleston police department forensic services division
12 report that is dated 31 May 2011?

13 A. I did.

14 Q. And I believe that was offered as State's Exhibit
15 1 during the trial itself?

16 A. Correct.

17 MR. THEOS: Your Honor, again, I believe
18 opposing counsel has a copy of this, so we would move
19 this into evidence as Applicant's Exhibit 4.

20 MS. JAMESON: No objection, Your Honor.

21 THE COURT: It's in evidence.

22 (Applicant's Exhibit 4 was marked for
23 identification and admitted into evidence.)

24 BY MR. THEOS:

25 Q. Dr. Bennett, did you have an opportunity to review

CONTINUED DIRECT EXAMINATION - ROBERT BENNETT

1 this -- not before today, but before and after your
2 testing?

3 A. I did.

4 Q. You see that the total weight reflected on our
5 exhibit, Applicant's Exhibit 4, which is this forensic
6 services division of Charleston police department report,
7 it reflects a number, a weight greater than what you just
8 testified to?

9 A. Correct.

10 Q. And how do you account for that difference in
11 weight?

12 A. I can't. There's no explanation on the report as
13 to why the weight reported on the report is different
14 from the weight that I weighed and documented.

15 Q. Were you present during the Charleston police
16 department's testing of the substance?

17 A. No.

18 Q. Do you know what method or what methodology was
19 used?

20 A. Well, the report itself specifically states that
21 the items that were examined as listed on State's Exhibit
22 5 is plastic bag with rock-like substance. Cocaine base
23 is the result of the examination, and the weight of that
24 is reported as 5.226 grams.

25 The method that was used is given a numerical

1 annotation of two and four, and that description is at
2 the bottom of the report under methods, where method
3 three is a color test and method four is FTIR, which
4 stands for fourier-transform infrared spectroscopy, which
5 is a standard method of chemical analysis.

6 Both of those would allow determination as to
7 whether the substance is cocaine or not, but neither of
8 those methods can provide a weight, so the method of
9 weighing is not listed on the report, so I do not know
10 how the weight was determined by the Charleston city
11 police.

12 Q. Now, there has been some discussion that there
13 could be some factors at play that could explain a
14 decrease in weight after the passage of a period of time.
15 Are you familiar with that hypothesis, or that assertion,
16 that has been made by the State?

17 A. Yes.

18 MS. JAMESON: Your Honor, I don't believe the
19 record reflects we have. We intend to in our case in
20 chief, but we have not yet.

21 THE COURT: I didn't recall such an
22 assertion, but I think it's a good question. I'll let
23 him ask it, even though they haven't asserted it.

24 MR. THEOS: Although, Judge, I will say I
25 anticipate it since I've been handed a copy of an article

CONTINUED DIRECT EXAMINATION - ROBERT BENNETT

1 that addresses it, so I thank you.

2 THE COURT: So maybe they assert it in the
3 article, but they haven't put it on the record.

4 MS. JAMESON: Just wanted to be clear for the
5 record's purposes, Your Honor.

6 THE COURT: I'm going to allow you to ask the
7 question.

8 BY MR. THEOS:

9 Q. Was that argument or hypothesis asserted initially
10 at your testing?

11 A. Yes.

12 Q. And today were you provided -- through me, were
13 you provided a copy of an article that was given to me
14 today by the State?

15 A. Yes. I was presented with a publication from you
16 that was presented to me within the hour.

17 Q. All right. Have you had a chance to read it?

18 A. Yes. I've had a chance to read it, yes.

19 Q. What does that article represent? What does it
20 stand for?

21 A. Well, the title of the publication is Crack
22 Cocaine: A Study of Stability Over Time and Temperature.
23 That was published in the Microgram Journal in 2008 from
24 a study that was done at the U.S. Department of Justice,
25 specifically the Drug Enforcement Administration and the

1 special testing and research laboratory.

2 Now, the abstract of the article states that
3 changes in the appearance, weights, purity levels, and
4 chemical profiles of crack cocaine stored in different
5 conditions were analyzed, and it gives the results of
6 that analysis, and it's my opinion that this --

7 Q. So what is the bottom line related to this
8 article? What is the proposition that it stands for --

9 A. It --

10 Q. -- or discusses?

11 A. I'm going to surmise that it's a way to explain a
12 drop in weight.

13 MS. JAMESON: Your Honor, I think he
14 testified he has not had an opportunity to fully review
15 it. If he's going to give a summation, I would like --

16 THE COURT: I will allow him to give whatever
17 understanding he has of the article, and you can
18 cross-examine him about it.

19 MS. JAMESON: Could it be made a Court's
20 exhibit?

21 MR. THEOS: I don't have an objection to it.

22 THE COURT: This is his time to present the
23 evidence. If you offer it into evidence, you may be able
24 to do it.

25 MS. JAMESON: I would ask he not read from

CONTINUED DIRECT EXAMINATION: - ROBERT BENNETT

1 it.

2 THE COURT: Probably -- judicial notice
3 probably would be the way to do it, not offer -- well,
4 either that or offer it through him as some sort of
5 learned treatise of some sort, but, at any rate, I'm
6 going to allow him to ask the question and give you an
7 answer.

8 BY MR. THEOS:

9 Q. I believe my question was, what is the bottom line
10 regarding the proposition that this article stands for?

11 A. Well, it's my opinion in order to answer that
12 question I need to state what the article says.

13 Q. Okay.

14 A. So --

15 Q. Go ahead. You can. The judge has ruled that you
16 can.

17 A. Okay. All right. The study itself, I have been
18 able to read through this and provide an opinion on it.

19 Q. What does the article state?

20 A. The article states that the conclusion is that
21 there can be weight loss and degradation, especially for
22 samples sealed in plastic bags or heat-sealed evidence
23 envelopes.

24 Q. All right. Now, understanding what the article
25 states, what is your opinion regarding that statement and

1 that conclusion?

2 A. That weight loss can occur, but the article
3 explains how that occurs.

4 Q. And how does that occur?

5 A. Well, the crack cocaine that was used in the
6 study, the article actually describes how it was
7 produced, and it states on page 116 that approximately
8 two kilograms of uncut cocaine hydrochloride were
9 dissolved in ten liters of water and that one batch was
10 immediately packaged into plastic bags while still wet,
11 and they refer to that as fresh. That's the label they
12 gave it. Seems like it would be more appropriate to call
13 it wet cocaine, and another batch was allowed to dry out,
14 and the researchers labelled that the dry batch.

15 So we have a fresh, or a wet, batch and a dry
16 batch, and those two batches were studied over an
17 extended time period over 12 months to determine, among
18 other things, the weight loss, and the article actually
19 provides in a table format the actual raw data of the
20 weight loss that was recorded.

21 And on page 121 of the article, table four, it
22 provided the percent weight change of crack that was
23 stored in plastic bags, and it delineates lot 1 through
24 lot 12, both dry and wet, and on the dry cocaine, the
25 percent of weight loss for the first month was 1.8

CONTINUED DIRECT EXAMINATION - ROBERT BENNETT

1 percent, and then it goes up to 2.6; in month four, 3.8;
2 month six, 3.2, but then it appears to level off after
3 that. So on month 12, 2.7, so it appears that after six
4 months, the drop in weight stabilized from that point
5 forward.

6 On the wet, or fresh, batch, the percent loss
7 started out on month one of 2.2 percent and then
8 increased. At month six, it was up to 4.6 percent but
9 then dropped to 3.7, 4.2 -- 4.4, 4.2. Seemed to have
10 levelled off around six months as well.

11 If I look at the actual numbers themselves and
12 take the worst case scenario of the maximum amount of
13 weight loss that occurred, it occurred in the wet batch,
14 and the maximum amount of weight loss was 4.7 percent, so
15 if we --

16 Q. And then the dry batch?

17 A. 3.2 percent. So if we up that to a round number
18 of 5 percent, a maximum of 5 percent weight loss that
19 occurred, if we take the amount that the Charleston city
20 police reported as 12 and a half grams and reduced that
21 by the maximum possible weight loss that occurred,
22 according to the study, of 5 percent --

23 Q. And that would, again, be in a fresh, or wet,
24 batch?

25 A. Correct. The maximum weight loss would be .725

1 grams. So the resultant reduction in weight would be
2 from 12 and a half grams to 11.9 grams, so that is still
3 significantly higher than the weight that I weighed.

4 Q. So applying that rationale and that logic, what is
5 your opinion regarding whether or not there was a
6 degradation, or a decrease in weight, of the cocaine base
7 in our particular case?

8 A. Well, the article that we just discussed could not
9 account for the weight loss in this particular case,
10 and --

11 Q. The weight loss or the difference or the disparity
12 in weight between the initial test conducted by the city
13 of Charleston police department and your testing is much,
14 much, much greater than that percentage?

15 A. Significantly greater, yes. I did read through
16 the article and try to determine what reason the
17 researcher gave for the weight loss of the wet batch, and
18 they do state on page 118 in the discussion that due to
19 the evaporative loss of water of one of the samples, and,
20 on the same page, they note that zip-lock plastic bags
21 are not impermeable to water vapors, so water can
22 permeate through the plastic.

23 And in their conclusion, the last statement is,
24 Finally, crack that contains large amounts of occluded
25 water, trapped water, may undergo significant weight loss

CONTINUED DIRECT EXAMINATION - ROBERT BENNETT

1 due to the evaporative loss of water.

2 So it appears that the only explanation I could
3 find in this publication was that the reason for the
4 weight loss was the evaporation of water of wet cocaine
5 that was sealed in the plastic bags.

6 Q. Are there any other explanations for how there
7 could be a decrease or degradation in weight of cocaine
8 base?

9 A. Well, there can be other solvents that are used in
10 the process of production of the final product.

11 Q. When you say solvents, do you mean substances or
12 chemicals that the cocaine is cut with, or cooked with?

13 A. Cooked with, yes, the liquid chemicals, and we're
14 familiar with some of these chemicals, like acetone,
15 fingernail polish remover, gasoline, and some of these
16 solvents are actually used in the production of cocaine.

17 These solvents are volatile, meaning they
18 evaporate easily, and so if some of these solvents are in
19 the final product when it is sealed and packaged, then
20 that could add to the weight of the product because the
21 solvents are not allowed to evaporate off. In other
22 words, the product is not allowed to dry off.

23 Q. In your testing, did you find any evidence that
24 there were solvents present in the sample that you
25 tested?

1 A. No. When I look at evidence, I'll do an empirical
2 evaluation. I'll look at it closely, and when I open the
3 package, I'll also smell the item to try to determine if
4 there is any solvent present because I have performed
5 other weighings for criminal cases in which there was a
6 significant amount of solvent still remaining in the
7 final product.

8 Q. These solvents that you're referring to, are they
9 distinguishable in any way?

10 A. Yeah. Most of them have a typical odor, and if
11 you work in the field of chemistry long enough, work in
12 enough chemistry labs, you learn to recognize what these
13 solvent smells are.

14 Q. Is there any evidence of a solvent being present
15 in the samples that you tested?

16 A. No.

17 Q. The weight of the substance that you performed
18 totalled what, one more time?

19 A. My final weight was 9.244 grams.

20 MR. THEOS: No other questions.

21 THE COURT: I have one question: It appears
22 that on this Charleston County police department report,
23 it seems to me that -- well, let me ask you this:
24 They've listed the item being submitted as a plastic bag
25 with a rock-like substance in it.

CONTINUED DIRECT EXAMINATION - ROBERT BENNETT

1 Is there any way you can tell from this
2 report whether or not the bag was weighed with the
3 cocaine?

4 THE WITNESS: The only thing that I can
5 report to is what is stated. The item itself does not
6 say crack cocaine. The item is described as plastic bag
7 with crack cocaine, so as to whether or not the item was
8 weighed with the bag or not, I can't distinguish. I can
9 only state what's on the actual report.

10 THE COURT: Very good.

11 MR. THEOS: Your Honor, could I follow up
12 with one question, please?

13 THE COURT: Yeah.

14 BY MR. THEOS:

15 Q. Did you weigh the plastic bag and/or the Saran
16 wrap in order to determine whether that weight would be
17 more consistent with the weight that was reported on the
18 forensic report?

19 A. Well, if the item had been weighed in the zip-lock
20 bag container that it was in, then it would significantly
21 increase the weight of the evidence item, so it would be
22 more in line as to reporting of a high weight.

23 Q. Did you weigh the individual Saran wrap or the
24 plastic bag to determine what those weights were?

25 A. I weighed the actual Saran wrap, but not the

CONTINUED CROSS-EXAMINATION - ROBERT BENNETT

1 zip-lock bag, and just the Saran wrap alone contributed
2 to the weight, but not up to the amount that is on the
3 Charleston city police report. I don't have the weight
4 of the zip-lock bag itself to add to that weight.

5 Q. What would be your opinion based upon your
6 experience with respect to the weight of that plastic
7 bag?

8 A. Based on the estimated weight of the zip-lock
9 plastic bag, I would not be surprised if adding that
10 weight to the evidence item weight would bring it to a
11 weight of -- as reported by Charleston city police.

12 MR. THEOS: No questions.

13 THE COURT: Cross-examination?

14 MS. JAMESON: Thank you, Your Honor.

15 CROSS-EXAMINATION (Cont'd)

16 BY MS. JAMESON:

17 Q. Good afternoon, Dr. Bennett.

18 A. Thank you.

19 Q. What other materials did you review in this case,
20 other than the original drug analysis, before your
21 testing?

22 A. Before my testing? I did review the order signed
23 by Judge Seals allowing the independent weighing to
24 occur, and other than the Charleston city police forensic
25 report, I believe that's it.

CONTINUED CROSS-EXAMINATION - ROBERT BENNETT

1 Q. Did you review the testimony of the CPD analyst
2 who testified at trial?

3 A. I did not.

4 Q. When you were retained in February of this year,
5 what were you told about this case by counsel?

6 A. That Mr. Norris Steplight was stopped in a vehicle
7 by the Charleston city police, and Mr. Steplight was
8 found in possession of drugs, and he was charged with
9 trafficking cocaine, that the amount that was reported
10 was 12 and a half grams, and that he was convicted of
11 trafficking cocaine of 10 to 25 years.

12 Q. Was your goal to establish the drugs were below
13 the 10-gram threshold for trafficking?

14 A. I didn't have a goal. My only purpose was to do a
15 weighing. The weight could have come out 12 and a half
16 grams. I have no way of knowing prior to actually doing
17 the weighing.

18 Q. And you weighed these drugs February 12 of this
19 year in this courthouse, correct?

20 A. Correct.

21 Q. And you testified it was on a table in a
22 courtroom, correct?

23 A. Correct.

24 Q. Was it a table like we have here today?

25 A. Yes.

1 Q. And you testified it was a shaky table?

2 A. No. The table didn't shake, but any table is
3 going to shake if you bump into it; therefore, when I use
4 a scale, I like to use the most solid surface available,
5 and a table, by its nature, is not going to be solid.

6 Q. So when you testified before it was a shaky table,
7 it's just because tables are inherently shaky?

8 A. Correct, yes. That particular table was not
9 shaky, per se. It didn't provide any level of shakiness
10 than any other table.

11 Q. And you testified you balanced with a bubble
12 balance, like a level?

13 A. Yes. That's built into the scale for the purpose
14 of levelling the scale.

15 Q. What measures did you take to ensure that the
16 bubble stayed right in the middle and it stayed balanced
17 all the time?

18 A. Well, once it was level, it was witnessed by the
19 people that it was level, and then frequent, or periodic,
20 monitoring through the process.

21 Q. And the shaky table didn't move at all during the
22 time you --

23 A. No, no, because nobody touched it. If somebody
24 bumped into the table, then that would be a concern of
25 mine, and I would want to start all over.

CONTINUED CROSS-EXAMINATION - ROBERT BENNETT

1 Q. So you didn't touch the table at all?

2 A. No.

3 Q. How long did it take you to do your entire
4 analysis in the courtroom?

5 A. I would estimate an hour.

6 Q. And that bubble stayed right in the middle the
7 whole hour?

8 A. Correct, and when I finished the weighing and went
9 to pack up the scale, I examined the bubble again, and it
10 was dead center.

11 Q. Let's talk about your scale. What type of scale
12 was it?

13 A. It is a Mettler Toledo PB303-1 analytical balance.

14 Q. How long have you had that scale, or balance?

15 A. Probably ten years.

16 Q. Are you aware if they are still in production?

17 A. Repeat that, please.

18 Q. Are those scales still made?

19 A. Mettler Toledo is the number one scale
20 manufacturer in the whole country, so yes, these scales
21 are still made. This particular model may have some
22 improvement variations over the years, some standard
23 procedure. Always trying to make a better product to
24 increase sales.

25 Q. And you testified that you calibrated with

1 calibration weights, correct?

2 A. Correct.

3 Q. The scale itself, is that calibrated?

4 A. Yes.

5 Q. Do you have a certification for that scale or
6 balance being calibrated?

7 A. What do you mean by certification?

8 Q. Are you aware that in law enforcements labs their
9 scales are normally calibrated by an outside source and
10 provided a certification of calibration?

11 A. Yes.

12 Q. Does your scale have one?

13 A. I calibrate the scale every time I use it, so as
14 far as having a person from the outside come in and use
15 calibrated weights, no.

16 Q. So you don't have it calibrated and certified by
17 an outside source?

18 A. Correct. There is no reason why I can't put
19 calibration weights on the scale and see if it measures
20 the same calibration weights. That is what a
21 certification would do, is someone from the outside would
22 come in, place weights on the balance, and see if it
23 measures the same weight as the calibration.

24 Q. Are you aware that many law enforcement agencies
25 do have them calibrated by outside sources and get

1 calibration?

2 A. Absolutely, yes.

3 Q. And you testified you used calibrated weights.

4 When were those last calibrated?

5 A. I'm confused by your question. You want to
6 calibrate the calibrators?

7 Q. Yes, yeah.

8 A. Okay. All right.

9 Q. When was the last time you had those verified for
10 the correct weight, other than weighing them on the scale
11 in the courtroom?

12 A. Right. I don't recall. I would have to check to
13 see when they were last calibrated.

14 Q. You were confused by my question before, so you do
15 have these weights calibrated?

16 A. Those weights have been calibrated, yes.

17 Q. Can you give the Court an approximation of when
18 the last time they were?

19 A. I can only estimate within -- I couldn't even
20 estimate. I would have to look and find records for when
21 they were last calibrated.

22 Q. Within the last five years?

23 A. Approximately. That sounds reasonable.

24 Q. So since they're not calibrated, you're just
25 placing them on the scale and seeing what the measurement

1 is when you were placing them on the scale, correct?

2 A. I'm confused by your question.

3 Q. You testified on direct that you placed these
4 known weights, but you just acknowledged they haven't
5 been calibrated in about five years, on the scale to get
6 a reading to see if the scale was correct, right?

7 A. Correct.

8 Q. And it was 9.99 for the 10-gram weight?

9 A. Correct.

10 Q. And then 19.99 for the 20-gram weight?

11 A. Correct.

12 Q. But those known weights haven't been calibrated in
13 at least five years?

14 A. That's possible, yes, but I'm confused because the
15 calibration weights, they don't loss mass over time.

16 Q. Are you aware law enforcement agencies often have
17 their calibration weights certified by an outside source?

18 A. Absolutely.

19 Q. And yours were not here, correct?

20 A. Correct.

21 Q. You testified when you placed weights on the scale
22 and the 10-gram one was 9.99 and the 20-gram one was
23 19.99, they were accepted as accurate?

24 A. Correct.

25 Q. Who accepted them as accurate?

CONTINUED CROSS-EXAMINATION - ROBERT BENNETT

1 A. Both me and the witnesses that were in the
2 courtroom.

3 Q. Which witnesses?

4 A. Representatives from Charleston city police. They
5 were allowed to observe and provide their opinion or
6 approval, and I got a nod to proceed.

7 Q. You testified after you went through that
8 certification or verification process, there was a
9 discussion about a concern about evaporation and a health
10 hazard due to noxious fumes?

11 A. Correct.

12 Q. So you admit there is evaporation from crack
13 cocaine over time, correct?

14 A. No. I do not state that there is evaporation from
15 solvents of crack cocaine over time. There can be, but
16 there not necessarily is in every case.

17 Q. But you acknowledge that phenomenon happens?
18 There is evaporation from crack?

19 A. That evaporation can occur.

20 Q. And there was concern about that happening in this
21 case?

22 A. There was a discussion about it, yes.

23 Q. Do you often test and weigh samples in a
24 courtroom?

25 A. No.

CONTINUED CROSS-EXAMINATION - ROBERT BENNETT

1 Q. How many times have you before?

2 A. In a courtroom, that was the first time. We
3 usually do it in a police laboratory or some other
4 central facility. One time in an attorney's office;
5 another time at police headquarters. A variety of venues
6 that I perform the weighing for.

7 Q. Have you ever performed testing at the Charleston
8 police department laboratories?

9 A. No.

10 Q. You would agree this isn't an ideal testing
11 scenario, correct?

12 A. I'm sorry. Say that again.

13 Q. You would agree this isn't an ideal scenario for
14 retesting?

15 A. The courtroom?

16 Q. Yeah.

17 A. It's just as ideal as any facility, so I disagree
18 with that statement.

19 Q. It's not lab conditions, correct?

20 A. What is your definition of lab conditions?

21 Q. A calibrated lab that has certification for all of
22 their weights that most law enforcement agencies have?

23 A. That's not specific to the laboratory facility.
24 That can be performed anywhere.

25 Q. I believe you testified that you put it in a

CONTINUED CROSS-EXAMINATION - ROBERT BENNETT

1 plastic weight container and zeroed it out, correct?

2 A. Correct.

3 Q. Did you then remove the container to add in the
4 crack substance, or did you leave the plastic weighted
5 container on the scales the entire time?

6 A. I removed the weighing container to place the
7 evidence item into the weighing container.

8 Q. Is that your standard practice?

9 A. Yes, depending on the item being weighed. If you
10 try to dump the evidence bag into the weighing container
11 while it's on the balance, you run the risk of
12 contaminating the balance.

13 Q. What do you mean by that?

14 A. Well, when you dump powder into the container on
15 the balance, some of it could splatter out on the
16 balance.

17 Q. But here we weren't dealing with the powder. I
18 think you testified it was yellow, rock-like substances,
19 correct?

20 A. Correct. I wouldn't take the chance of ruining my
21 balance.

22 Q. This is the third time the drugs in this case have
23 been tested, correct? Do you have any independent
24 knowledge of how many times the drugs were tested here?

25 A. I do not.

CONTINUED CROSS-EXAMINATION - ROBERT BENNETT

1 Q. And it's been six years since drugs were initially
2 recovered from Mr. Steplight, correct?

3 A. I don't know that as a fact, but it appears so,
4 yes.

5 Q. You were asked on direct examination about the
6 study from the Department of Justice. I have a question
7 to ask you about that. Do you still have a copy of that
8 up there?

9 A. Yes.

10 Q. If you'll turn to page 118.

11 A. Yes.

12 Q. And I believe you testified before that based on
13 your review of this study the net weight loss would be
14 anywhere from 5 to 10 percent, correct?

15 A. I'm sorry. Say that again.

16 Q. I believe that based on your review of the study,
17 the anticipated weight loss would be anywhere from 5 to
18 10 percent, correct?

19 A. No. The study itself, the actual data presented
20 on page 121 shows that on the wet batch, or fresh batch,
21 the maximum percent weight change was a decrease of 4.7
22 percent.

23 Q. Are you aware if that's weight change per month or
24 total weight change?

25 A. Are you asking me which?

CONTINUED CROSS-EXAMINATION - ROBERT BENNETT

1 Q. Yes. You testified it was total weight change.

2 A. That's how I read the table.

3 Q. If you'll review paragraph 2 of page 118, please,
4 I have a question to ask you about that.

5 A. Let me review it quickly. Okay.

6 Q. Does it indicate there that the weight loss can be
7 in excess of 30 percent?

8 A. It does.

9 MS. JAMESON: Court's indulgence, Your Honor.

10 BY MS. JAMESON:

11 Q. And, Dr. Bennett, you testified earlier about the
12 different ways that crack was made by the DEA in their
13 laboratory police report, correct?

14 A. Correct.

15 Q. And there was a whipping method and a more
16 standard method, correct?

17 A. Correct.

18 Q. You don't know how the crack here was made,
19 correct?

20 A. That is correct.

21 Q. Have you done any research on whether crack losses
22 volume over time, or weight over time?

23 A. I've done some literature searching but not actual
24 lab research, no.

25 Q. What were the results of literature searching?

1 A. Very little information on the phenomenon of
2 weight reduction of crack cocaine over time.

3 Q. You testified on direct about the evidence of
4 solvent in the substance and that you didn't detect any
5 solvent based on, you said, a nose test?

6 A. Solvents have very characteristic odors, and I've
7 worked with many solvents over the past 25 to 30 years,
8 so I recognize the smell of solvents.

9 Q. You testified before you don't know the purity of
10 these two samples of crack cocaine, correct?

11 A. Correct. I don't know the purity, the extent of
12 moisture, the extent of solvents. I have performed no
13 chemical analysis on the evidence item itself other than
14 what I previously reported with the qualitative analysis.

15 Q. So you don't know what's mixed in here with the
16 cocaine, you just know it's cocaine, based on your
17 presumptive field test?

18 A. Correct.

19 MS. JAMESON: No further questions, Your
20 Honor.

21 THE COURT: Any redirect?

22 MR. THEOS: Nothing, Your Honor.

23 THE COURT: Did the State retest these drugs?

24 MS. JAMESON: Your Honor, we are actually
25 calling someone from the Charleston police department.

DIRECT EXAMINATION - RICHARD VANCE

1 THE COURT: I'm asking, has it been done
2 today?

3 MS. JAMESON: Oh, no, Your Honor. It has
4 not.

5 THE COURT: All right. Very good. You may
6 call your next witness.

7 MR. THEOS: One second, Your Honor.

8 Your Honor, we would call Dick Vance to the
9 stand, please.

10 RICHARD ALLEN VANCE,
11 having been first duly sworn,
12 was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. THEOS:

15 Q. Where are you presently employed?

16 A. I own and operate Vance Investigations, a private
17 investigation company.

18 Q. And are you licensed and certified and is your
19 company?

20 A. Yes, sir, I am.

21 Q. And how long have you been in the private sector?

22 A. Since 2004.

23 Q. And prior to that, what was your position?

24 A. I was the head of the narcotics division for the
25 Charleston police department.

DIRECT EXAMINATION - RICHARD VANCE

1 Q. And how long were you at the police department?

2 A. From 1980 to 2004.

3 Q. And you retired?

4 A. Yes, sir, I did.

5 Q. Now, as part of your engagements in various
6 matters, are you called upon periodically to perform
7 video recordings of events or procedures?

8 A. Yes, sir, I am.

9 Q. And did you -- were you present on February the
10 17th of 2017 when Dr. Bennett performed his testing of
11 this evidence?

12 A. Yes, sir, I was.

13 Q. And why were you present?

14 A. To just make a video recording of the entire
15 event.

16 Q. And did you make that recording?

17 A. Yes, sir, I did.

18 Q. And did you convert or download that recording to
19 a DVD?

20 A. Yes, sir, I did.

21 Q. And I hand you a DVD and ask you to identify it.

22 A. This is a copy of the DVD that I made from my
23 video camera.

24 Q. And it an exact copy in duplicate of that video?

25 A. Yes, sir, it is.

DIRECT EXAMINATION - RICHARD VANCE

1 Q. Has it been altered or edited in any way from the
2 original video recording?

3 A. No, sir, it has not.

4 Q. And, again, would you just read what is written on
5 that.

6 A. It says Steplight, 2/17/17, and it has my
7 company's name, Vance Investigations, LLC, with our
8 address and telephone number.

9 Q. And was the entire testing procedure performed by
10 Dr. Bennett recorded?

11 A. Yes, sir, from start to finish.

12 Q. And is that a complete recording of that entire
13 testing procedure?

14 A. Yes, sir, it is.

15 MR. THEOS: At this time, we move to admit
16 this into evidence as, I believe, Applicant's Exhibit 5.

17 MS. JAMESON: Your Honor, the State hasn't
18 had an opportunity to view this video. It's about an
19 hour long, as counsel said, and we were just provided it
20 10 to 15 minutes before this hearing.

21 So because I haven't seen this entire video,
22 I don't know if I'm going to have an objection or not.
23 If the record could be left open, I could watch it this
24 evening as soon as court concludes and let Your Honor
25 know, but I'm not comfortable stipulating to it coming in

1 when I haven't seen a copy of it.

2 THE COURT: I'm going to allow it into
3 evidence, and I'll allow you to lodge an objection before
4 the end of this term of Court.

5 MS. JAMESON: Thank you, Your Honor.

6 MR. THEOS: Your Honor, I will state for the
7 record, opposing counsel is aware we attempted to
8 download it but were unsuccessful, so we provided her a
9 copy of it as quickly as we could.

10 I have no other questions for Mr. Vance.

11 (Applicant's Exhibit 5 was marked for
12 identification and admitted into evidence.)

13 MS. JAMESON: I have no questions.

14 THE COURT: You may step down.

15 THE WITNESS: Thank you.

16 THE COURT: You may call your next witness.

17 MR. THEOS: Your Honor, we have no other
18 witnesses.

19 MS. JAMESON: Your Honor, if I may have a
20 moment's indulgence to make sure my witnesses have
21 arrived in this courtroom.

22 MR. THEOS: I assume Ms. Jameson doesn't have
23 a problem with Mr. Vance being excused?

24 MS. JAMESON: Certainly. He's not under any
25 subpoena from our office. No objection.

DIRECT EXAMINATION - WENDY BELL

1 THE COURT: You're free to leave.

2 (Recess taken.)

3 MS. JAMESON: Your Honor, may it please the
4 Court: The State will call Captain Wendy Bell to the
5 stand.

6 WENDY BELL,
7 having been first duly sworn,
8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MS. JAMESON:

11 Q. Good afternoon, Ms. Bell. What's your occupation?

12 A. I'm a captain of forensic operations with the
13 South Carolina Law Enforcement Division.

14 Q. How long have you been in your role?

15 A. I've been in that role since 2014. I've been
16 employed by SLED since February 1998.

17 Q. What other roles have you had at SLED?

18 A. When I was first hired, I was hired as a forensic
19 toxicologist, and I held that role until 2007, and at
20 that time I was appointed as lieutenant, or the head, of
21 the drug chemistry unit. I supervised that department
22 for several years, two years, and in 2009, I was the
23 joint lieutenant of the toxicology and drug chemistry,
24 and then in 2013, I was promoted to captain of forensic
25 evaluations, so all the chemistry divisions at SLED in

1 the forensic laboratory fall underneath: Toxicology,
2 drug chemistry, trace analysis, implied consent, and I
3 also have the pleasure of supervising questioned
4 documents, which is not chemistry, but just under me.

5 Q. Where else have you been employed other than SLED?

6 A. SLED is the first place I came to after school.

7 Q. And you've been there approximately 19 years?

8 A. Nineteen and a half.

9 Q. What is your educational background?

10 A. I have a B.S. in chemistry from Furman University
11 and a PhD in analytical chemistry from the University of
12 South Carolina.

13 Q. When did you receive those degrees?

14 A. My B.S. in chemistry I received in 1993, and I
15 finished my PhD thesis work in 2001. I actually
16 completed my research prior to starting at SLED and then
17 had a child and built a house and defended it in 2001.

18 Q. Have you had an opportunity to chemically analyze
19 substances to determine whether they're narcotics?

20 A. Yes, I have.

21 Q. Have you weighed narcotics substances?

22 A. I have. Mainly my role in the drug lab has been
23 supervising, approving protocols, and that type of thing.
24 The bulk of my actual bench work was in toxicology, but,
25 again, I've supervised both the toxicology and the dug

DIRECT EXAMINATION - WENDY BELL

1 chemistry departments, and I'm aware of the proper
2 procedures and analytical protocols.

3 Q. Approximately how many times have you analyzed
4 chemical substances?

5 A. As a toxicologist, I've probably tested over 4,000
6 cases in the nine years on the bench. In drug chemistry,
7 we put out over 9,000 to 10,000 cases a year. I don't
8 personally do all those, but I supervised and reviewed
9 many of them. Again, I was more of a supervisor in the
10 drug chemistry laboratory.

11 Q. That's 9,000 to 10,000 a year?

12 A. Yes.

13 Q. When you were on the bench yourself, on average,
14 how many substances were you analyzing per week?

15 A. We did around 40 cases a month, and that was in
16 toxicology.

17 Q. Is analysis of narcotics part of your regular job
18 duties?

19 A. The direct analysis is not. I'm a supervisor now
20 with the department, but, again, I'm very aware, and I
21 had to take part of the training with the analysts
22 because toxicology, that was part of my role in that when
23 I was a bench chemist.

24 Q. You said you've taken part in the training. When
25 was the last time you had that type of training?

DIRECT EXAMINATION - WENDY BELL

1 A. I do continuing education all the time. I just
2 had two webinars this week for fentanyl and fentanyl
3 analogs for the drug chemistry unit.

4 Q. Have you ever been qualified as an expert in South
5 Carolina courts?

6 A. Yes, I have.

7 Q. What courts?

8 A. Civil, general sessions; in addition, I've been in
9 federal court and once in military court and done several
10 affidavits for civil as well as civil testimony, comon
11 pleas, and magistrate courts as well.

12 Q. Approximately how many times have you testified as
13 an expert?

14 A. I believe it's 37.

15 Q. Have you ever been deemed unqualified?

16 A. I have not.

17 MS. JAMESON: The State would move to admit
18 Captain Bell as an expert in the field of toxicology and
19 the analysis of narcotics.

20 THE COURT: Any query with regard to her
21 qualifications?

22 MR. THEOS: Just a couple of questions.

23 CROSS-EXAMINATION

24 BY MR. THEOS:

25 Q. Maybe I missed it, but in what fields, what areas,

CROSS-EXAMINATION - WENDY BELL

1 have you been qualified to testify?

2 A. I've been qualified in toxicology, drug analysis,
3 implied consent, which is breath analysis, which is a
4 branch of toxicology, and supervision of forensic
5 laboratory.

6 Q. Okay. And to make sure I understood your response
7 to one of the queries, did you state you were not
8 involved in the direct analyzing and/or testing of
9 narcotics but --

10 A. I did the training, so I was qualified to do it,
11 but I never had to actually do it because I was moved
12 from a bench chemist to supervisor, and in my supervisory
13 role, I was supervising two departments, so I never did
14 put out case work, but I did complete the training. I
15 approved all the protocols, and I was able to do
16 technical reviews for the department.

17 Q. But you don't do the testing and have never done
18 the testing or analysis yourself?

19 A. I -- no, sir, no.

20 Q. Okay.

21 MS. JAMESON: Your Honor, if I could clarify
22 quickly, I believe you testified you had done the testing
23 when you were a bench chemist, you just --

24 THE WITNESS: Not for drug chemistry. I have
25 for toxicology, which is very closely related. They use

CONTINUED DIRECT EXAMINATION - WENDY BELL

1 the same instrumentation, but not for drug chemistry.

2 MR. THEOS: If Ms. Jameson could just clarify
3 exactly what area of expertise she's attempting to
4 qualify her in.

5 MS. JAMESON: Toxicology.

6 MR. THEOS: No objection to that.

7 THE COURT: She is qualified to render
8 opinions in toxicology, in the field of toxicology.

9 DIRECT EXAMINATION (Cont'd)

10 BY MS. JAMESON:

11 Q. How many times have you analyzed crack cocaine?

12 A. Personally, I have not. My laboratory has tested
13 thousands of cases that I supervise and review the work
14 for. Again, my expertise is as an analytical chemist.

15 Q. These cases that you've supervised, what have you
16 done to oversee these cases?

17 A. I'm responsible for making sure that our
18 procedures are followed, proper analytical protocol, that
19 all of our procedures were properly validated. I did
20 assist with validations of those. I'm responsible for
21 reviewing those.

22 That's all a part of our accreditation under the
23 ASCLD/LAB-International accreditation program, and I
24 supervise the training of all of our drug chemists and
25 when they're signed off to be deemed competent. I do

CONTINUED DIRECT EXAMINATION - WENDY BELL

1 proficiency test for our drug laboratory to make sure
2 that all procedures are followed properly and analysts
3 are adhering to the prescribed protocols and procedures.
4 It's more of a managerial function.

5 Q. Do you do any peer review of the crack cocaine
6 analysis that's done at SLED?

7 A. I do, and any time there is an issue in any of our
8 cases, I have to study, you know, what might be going on.
9 As an analytical chemist, I do a lot of troubleshooting
10 in the laboratory, reviewing of scientific literature,
11 and review of other laboratories' procedures to make sure
12 we're following and using the best methods in the areas.

13 Q. Based on your role at SLED for the past 19 years,
14 do you have any familiarity with how crack is commonly
15 made?

16 A. I do.

17 Q. Can you describe some of the processes for the
18 Court.

19 A. Sure. I've had the opportunity to attend the
20 DEA's seminar for drug chemists, where they trained us
21 how to make crack. The most simple method to do that is
22 to take cocaine hydrochloride, which is the powder form
23 of cocaine that's commonly snorted, mix it with water,
24 and add a base. Usually the easiest one to get is sodium
25 bicarbonate, which is baking soda.

CONTINUED DIRECT EXAMINATION - WENDY BELL

1 That is added in, and the solution is heated to
2 make it dissolve, and essentially during that heating
3 process, that cooking with hydrochloride converts to
4 cocaine base. That base is no longer soluble in water so
5 it forms an oil that settles on the bottom.

6 From that point, it forms the basic cookie at the
7 bottom. You can pour the water off, or you can just let
8 it -- and let it harden, and it forms the crack cookie
9 that is then taken, dried, and split apart and sold.

10 There's a lot of different variations on that, as
11 Dr. Bennett described. There's a lot of different
12 solvents that can be used. There's a lot of different
13 techniques that can be used to enhance the volume. Drug
14 dealers can often put other cutting agents in it to
15 increase the bulk of the drug.

16 We're very familiar with the technique called
17 whipping, where they take it and actually -- as the
18 solution is falling out and solidifying, they whip the
19 solution as the cookie forms. It's no different than
20 whipping air into something like icing, where you have a
21 whipped icing or the whipped peanut butter.

22 THE COURT: Or whipped cream cheese.

23 THE WITNESS: Or whipped cream cheese.

24 You're basically fluffing it up, adding in extra volume.

25 With crack, that's done while it's a

CONTINUED DIRECT EXAMINATION - WENDY BELL

1 solution, and it traps the solvent inside the crack, and
2 that is a very commonly known procedure to increase bulk.
3 Again, it's not our job at the laboratory -- we really
4 can't tell what method was used to make the crack. We
5 just know we have to be familiar with all the different
6 ways. Sometimes it appears a little different; sometimes
7 it doesn't.

8 BY MS. JAMESON:

9 Q. In addition to trapping solvent inside the crack
10 cocaine, if this whipping procedure is used, can water
11 also be trapped inside?

12 A. Water is a solvent in that case, so, yes, water
13 can be trapped inside. It basically forms air pockets
14 inside the crack, and it can be trapped.

15 Q. Have you ever heard of crack being referred to as
16 wet?

17 A. Yes, I have.

18 Q. What does that mean?

19 A. Again, from the time that it was probably sold on
20 the street to the time that it's been examined, it's
21 starting to lose solvent, and in my experience in the
22 drug lab, I've been involved with the drug laboratory
23 since 2007, I'm aware of five cases at SLED where we've
24 had very wet crack that lost substantial amounts of
25 weight.

CONTINUED DIRECT EXAMINATION - WENDY BELL

1 There's probably more than that, but the reason
2 that we don't know of all of them is because typically
3 drugs are tested, they go to trial, and it's very rare
4 for drug cases to be retested. Again, if it's fairly
5 close proximity, a lot of weight's not going to be lost,
6 but over any amount of lengthy storage time, more and
7 more weight could be lost, depending on how much solvent
8 was trapped.

9 So we were made aware of cases at SLED because
10 submitting officers had weighed the drug before they
11 submitted it to our agency, and then when they received
12 the reports, there was a substantial difference than what
13 they were expecting, and in every one of those instances,
14 except for one, the drug was very wet when we received
15 it.

16 We made note of that, took pictures, and
17 photographed the change and the appearance of the drug
18 versus what was described when it was seized. We did
19 have one case where the drug did not change appearance
20 dramatically. It stayed in the rock form but lost
21 substantial weight, and when we first tested it, there
22 was moisture in the bag, but it didn't dissolve the drug.

23 Q. When you say substantial weight, can you give the
24 Court some figures from those five cases, sort of an
25 estimation of weight lose?

CONTINUED DIRECT EXAMINATION - WENDY BELL

1 A. We've had three this year, and two of them lost
2 almost 50 percent of their weight. The other previous
3 one -- those two were from Union County -- excuse me,
4 Lancaster County, and they were both taken from the same
5 individual. We had a third just in the past six months
6 that was from Union County, and that one lost about 30
7 percent.

8 Q. How long between when the officers initially
9 weighed them and they came to SLED for testing, what sort
10 of delay?

11 A. The Lancaster case I'm very familiar with because
12 we had a long discussion of that. It was a three-month
13 period.

14 Q. And it lost 50 percent of its weight in three
15 months?

16 A. It did.

17 Q. Based on your experience, is this a common
18 occurrence for crack cocaine to lose weight?

19 A. Again, I wouldn't say it's common because we know
20 a lot of it does not change, but if these different
21 manufacturing techniques are used, we know it's a
22 possibility. It's certainly not unheard of.

23 Q. You testified you've been to DEA training,
24 correct?

25 A. That's correct.

CONTINUED DIRECT EXAMINATION - WENDY BELL

1 Q. Are you aware of any reports by the DEA
2 investigating the phenomenon of crack losing weight?

3 A. I am, the study that was produced earlier on the
4 stability of crack cocaine over time and temperature.
5 This was published by John Casale, who is one of the
6 world's foremost cocaine experts.

7 Q. And have you had an opportunity to review that
8 report?

9 A. I have.

10 Q. How long have you been in review of that report
11 for?

12 A. I found it during my literature when the first
13 case was brought to my attention when this happened at
14 SLED, probably for the first time around 2009.

15 Q. And based on the DEA's experiment, what was the
16 maximum amount lost?

17 A. With standard crack cocaine, when they prepared it
18 in a traditional way, it lost 2 to 5 percent, but when
19 the whipping technique was incorporated, one sample lost
20 37 percent and one sample lost 32.5 percent, and that's
21 on page 118.

22 Q. In your laboratory, do you see a lot of crack
23 samples that have been whipped?

24 A. Again, it's very difficult to tell the
25 manufacturing process when you look at it. That is

CONTINUED DIRECT EXAMINATION - WENDY BELL

1 certainly not our intention. Our intention is to tell
2 what the substance is and how much is there.

3 Because of this wet drug coming into the
4 laboratory and the fact that we know it's changing, when
5 we encounter wet crack now, we take extra measures to
6 test it as soon as it comes into the laboratory because
7 it's in a state then as close as it is to the time it's
8 seized.

9 One of the reasons for doing this whipping
10 procedure is to increase the weight so the person on the
11 street can sell it as weighing more so that they make the
12 money as it being a heavier substance. Whether it was
13 solvent or cocaine, they're causing that weight. If it
14 was sold as a ten-gram rock, whether it was all cocaine
15 or not or any portion thereof, the law in South Carolina
16 states that if any portion of that rock, then the weight
17 of it all goes to cocaine.

18 So if we dried it out, which is a possibility, we
19 could put it in an oven and dry it, and you could lose
20 even more weight. You're then forcing all the solvent
21 out, but that is not how it would be sold on the street,
22 and also with marijuana. I mean, we could dehydrate
23 marijuana. Anything with moisture in it is going to
24 eventually, over time, lose that moisture.

25 Q. Is there a reason at SLED that you don't dry any

CONTINUED DIRECT EXAMINATION - WENDY BELL

1 substances out? Are there any ethical implications why
2 you don't?

3 A. We discuss whether or not we should, but, again,
4 it's our intention or our interpretation that we're just
5 trying to weigh it as close to how it's seized as
6 possible. We don't -- if there's water in the bag or
7 solvent in the bag, we certainly don't weigh that. We
8 only weigh the powder or the rock substance. The solvent
9 would not be weighed. But we take a timely weighing and
10 a good documentation of the appearance of the drug at the
11 time so we can photograph and that type of thing to
12 document that it's wet because we know it's going to be
13 changing over time.

14 Q. So your standard practice in SLED is to test it as
15 soon as possible?

16 A. Yes.

17 Q. Would you expect a more accurate weight four days
18 after the sample was collected or six years later?

19 A. Certainly four days is going to be more indicative
20 of how it was close to the incident.

21 Q. And I believe you testified you've documented this
22 phenomena happening in your lab at SLED?

23 A. Again, when samples have been reweighed for
24 different purposes, some have experienced this, not all.
25 We've certainly had some that weigh the exact same thing.

CONTINUED DIRECT EXAMINATION - WENDY BELL

1 It depends on the manufacturing process, and it's not
2 unheard of. It is well documented, again, as in this
3 DEA paper. This is one of the reasons this was
4 published, is because drug labs encounter this.

5 Q. Is this commonly known throughout the law
6 enforcement community?

7 A. I would say it's commonly known in forensic drug
8 laboratories.

9 MS. JAMESON: Moment's indulgence, Your
10 Honor.

11 BY MS. JAMESON:

12 Q. Have you attempted at SLED to replicate this
13 experience the DEA did in 2008?

14 A. We did put some different -- I mean, not whipping.
15 We have not done the replicative whipping experiment. We
16 did monitor some cocaine samples in different
17 environments over a year period that were basically from
18 cases that had been slated as destruction cases, so they
19 were already older cases.

20 We did see weight loss in all of those, but they
21 were not whipped crack cases, so these present their own
22 unique challenge. We have not tried -- again, we're not
23 really a research facility. Our job is more to do
24 testing for cases.

25 Q. But you testified in the older samples that were

1 set to be destroyed you did see a weight loss.

2 A. We did.

3 Q. You testified one of your roles as the supervisor
4 or captain of forensic labs at SLED is standards and
5 protocols, correct?

6 A. Correct.

7 Q. Can you describe your scale setup in your SLED
8 laboratory?

9 MR. THEOS: I'm going to object. That's
10 irrelevant to this particular case unless she's going to
11 attempt to offer evidence or testimony regarding the
12 protocol or the lab setup of the Charleston city police
13 department. It's irrelevant what happens in the SLED
14 laboratory.

15 THE COURT: I'll sustain the objection.

16 MS. JAMESON: May I be heard on the record
17 for that?

18 THE COURT: Typically, once I rule, you're
19 not supposed to be heard, but if you feel compelled and
20 if the spirit moves you, go ahead.

21 MS. JAMESON: That's all right, Your Honor.
22 I'll move on.

23 THE COURT: It's really not an issue in this
24 case.

25 MS. JAMESON: That is one of the arguments

CONTINUED CROSS-EXAMINATION - WENDY BELL

1 the State will be making later on.

2 THE COURT: About what SLED does?

3 MS. JAMESON: No, standard protocols that are
4 used in law enforcement agencies, about what they do in
5 their labs and that this was not an ideal lab scenario
6 that was conducted by Dr. Bennett here, and that kind of
7 affected the weight.

8 THE COURT: I think you made that point.

9 MS. JAMESON: Thank you, Your Honor. No
10 further questions, Captain Bell.

11 THE COURT: Okay.

12 CROSS-EXAMINATION (Cont'd)

13 BY MR. THEOS:

14 Q. Good afternoon, Dr. Bell.

15 A. Good afternoon.

16 Q. Other than my questioning you a little while ago,
17 you and I have never spoken with each other; is that
18 correct?

19 A. No, that's correct.

20 Q. We've never met?

21 A. No.

22 Q. As you stated when I did question you, your
23 position is more managerial and supervisory in nature; is
24 that right?

25 A. That's correct.

CONTINUED CROSS-EXAMINATION - WENDY BELL

1 Q. And much of what you do, and your CV is replete
2 with references to this, is related to protocol
3 procedure, reviewing, updating, writing, supervising,
4 monitoring, managing protocol procedures; is that
5 correct?

6 A. As an analytical chemist, it's my job to make sure
7 that we're doing the right thing and my folks are doing
8 the right thing, so yes.

9 Q. And as you also testified, since graduating and
10 receiving your diplomas, your various diplomas, your
11 employment has been throughout your career with SLED?

12 A. That's right.

13 Q. So the majority, if not all, of your work has been
14 related to supervising, managing, writing, et cetera,
15 protocol within SLED?

16 A. That's incorrect. I did -- I worked as an
17 analytical chemist on the bench doing case work for nine
18 years.

19 Q. At SLED?

20 A. At SLED, prior to becoming a manager. I was
21 promoted.

22 Q. Now, you were not involved in any fashion
23 whatsoever in the initial testing of the evidence of
24 drugs in this particular case; is that correct?

25 A. I have not been involved in this case.

CONTINUED CROSS-EXAMINATION - WENDY BELL

1 Q. You didn't speak to any of the chemical analysts
2 that performed the test prior to their conducting their
3 test, did you?

4 A. I did not.

5 Q. You didn't review or analyze the protocol that was
6 utilized for that testing? This was back at the time
7 that the initial testing was done by the Charleston city
8 police department, correct?

9 A. I have not.

10 Q. You haven't reviewed the protocol either since,
11 have you?

12 A. I have not.

13 Q. You didn't participate in the testing in any way?

14 A. No, sir.

15 Q. And, again, just to be clear, the chemical analyst
16 didn't consult with you or, to your, knowledge anyone at
17 SLED, regarding their protocol or their specific testing
18 of the substance, correct?

19 A. That's correct.

20 Q. So you cannot testify that proper protocol was
21 followed?

22 A. No, sir.

23 Q. Correct?

24 A. That's not my testimony.

25 Q. You can't testify that the testing was done

1 appropriately in accordance with whatever protocol there
2 may have been, correct?

3 A. That's correct.

4 Q. And you can't testify and have no opinion
5 regarding the accuracy of the test that was conducted,
6 correct?

7 A. I'm familiar with their laboratory, and they are
8 an accredited laboratory.

9 Q. But this specific testing, you certainly appear to
10 offer an expert opinion that the test results are
11 accurate.

12 A. I have no specific opinion about reviewing this
13 result.

14 Q. You haven't examined the substance, correct?

15 A. I have not.

16 Q. You therefore don't know whether any solvent
17 was -- or what solvent may have been used in the
18 preparation of this crack cocaine, correct?

19 A. No. That's not a standard test that most any drug
20 lab would --

21 Q. You don't know -- you were asked questions, and
22 you offered various opinions in your responses regarding
23 wet cocaine. You don't know whether this cocaine was wet
24 at the time that it was seized and/or at the time it was
25 tested, do you not?

CONTINUED CROSS-EXAMINATION - WENDY BELL

1 A. I do not.

2 Q. And have you reviewed any -- have you reviewed
3 anything other than an article in this case?

4 A. I was offering the experience that we are familiar
5 with crack cocaine losing weight and have had personal
6 experience with that phenomenon.

7 Q. That really wasn't my question. My question was,
8 have you reviewed anything other than the article that
9 you were questioned about? Have you reviewed anything
10 related to this case?

11 A. I've reviewed the weight. The weights were
12 provided to me and the weight changes and were they
13 reasonable.

14 Q. So you reviewed what's been marked, I believe, as
15 Applicant's Exhibit 4, which is the Charleston police
16 department's forensic services division report? Have you
17 reviewed that?

18 A. I haven't seen that document. I was given the
19 weights verbally.

20 Q. You have not seen it?

21 A. No. I was given the weights.

22 Q. Is this the first time you've seen it?

23 A. It is.

24 Q. If you would look at the items submitted, what
25 does it state?

CONTINUED CROSS-EXAMINATION - WENDY BELL

1 A. Plastic bag with rock-like substance.

2 Q. And is there any method reflected that was
3 utilized in performing -- in testing the weight of the
4 substance?

5 MS. JAMESON: Your Honor, I believe she
6 testified she is unfamiliar with any of the underlying
7 testing that went on here.

8 THE COURT: I believe the question is whether
9 the document says that. I'll allow you to ask the
10 question.

11 BY MR. THEOS:

12 Q. Do you see anywhere on this report what test
13 method was used for purposes of determining weight?

14 A. No, but I also don't see weighing as an option at
15 the bottom, so I guess it wasn't an option to select.

16 Q. But you do see that -- it states that plastic bag
17 with rock-like substance, presumably it was the item
18 tested, correct?

19 A. Yes, that's correct.

20 Q. And you also see next to that that the results of
21 the examination was that it was 5.266 grams, correct?

22 A. That's correct.

23 Q. Wouldn't it be reasonable to assume, based upon
24 what is written on this paper, that the cocaine base
25 was -- that the rock-like substance was weighed with the

CONTINUED CROSS-EXAMINATION - WENDY BELL

1 plastic bag, as it states?

2 A. No, no, sir. In fact, this is how our laboratory
3 reports it as well.

4 Q. Isn't that what this states?

5 MS. JAMESON: Your Honor, I'd ask the witness
6 be able to fully answer counsel's question.

7 THE COURT: Rephrase the question.

8 BY MR. THEOS:

9 Q. Doesn't this state that the plastic bag with
10 rock-like substance was weighed? Isn't that what it
11 says?

12 A. No, it doesn't say it was weighed. It says that
13 was the item that was submitted.

14 Q. And doesn't it say the result was 5.226 grams?

15 A. It says the cocaine base was 5.266 grams.

16 Q. So you disagree that this report states that the
17 plastic bag with rock-like substance was weighed?

18 A. No. It says that was the item that was submitted,
19 and drug labs typically put the packaging along with the
20 substance, because most everything we get is a white rock
21 or a white powder substance, with the exception of maybe
22 some green plant material mixed in. So if there is
23 something unique about that submission, like the bag it's
24 submitted in -- which sometimes it's a zip-lock bag;
25 sometimes it's a corner bag; sometimes just a plastic

1 bag -- that's usually included to provide some
2 individuality to the substance.

3 Q. Since you haven't reviewed the case file of the
4 police department and since you haven't had any
5 discussion with the chemist involved in this case, you
6 cannot state whether the bag was weighed with the
7 substance or not, can you?

8 A. No. That would not be mine.

9 Q. Now, with respect to Dr. Bennett's testimony, you
10 weren't present for that?

11 A. No, I was not.

12 Q. You haven't reviewed the video, of course?

13 A. No, I have not.

14 Q. You therefore -- let me put it this way: You
15 don't dispute the weight that was testified to by
16 Dr. Bennett, do you?

17 A. I have a few exceptions with some of the testimony
18 he gave. I don't think the weights that he gave were
19 terribly inaccurate, but this is not an ideal weigh
20 situation, and I'll disagree that he calibrated the
21 balance. He performed a verification the balance was
22 working properly. He did not calibrate it. Calibration
23 involves manipulating the internal workings of a balance.
24 When you put a check weight on a balance, that's simply
25 doing a verification that the balance is working

CONTINUED CROSS-EXAMINATION - WENDY BELL

1 properly. There's a lot of things -- but I don't think
2 it would be considerably off. It's not an ideal
3 situation, but it's --

4 Q. But you're aware of the fact that the Court
5 ordered the testing be done in the courtroom? It was
6 done pursuant to a Court order?

7 A. Yes, I am, but, again, it's not an ideal
8 scientific situation.

9 Q. And you're aware of the fact that since that day,
10 since February 17th of 2017, the drugs have not been
11 retested by SLED or by any other agency, to your
12 knowledge, correct?

13 A. I'm not aware that they have been.

14 Q. And, certainly, your lab is available to the
15 solicitor's office and Attorney General's office to
16 conduct an independent retesting of the substance,
17 correct?

18 A. If it's necessary, we could.

19 Q. But you have not been called upon -- your lab, to
20 your knowledge, has not been called upon to do that?

21 A. We have not.

22 Q. Correct?

23 A. That's correct.

24 Q. Now, I'm a little confused about the questions
25 related to this particular article, and if you look at

CONTINUED CROSS-EXAMINATION - WENDY BELL

1 page 18 of number 18 of that article, it states, does it
2 not, that, interestingly, the cocaine exhibit experienced
3 a net weight loss similar to the unsealed exhibit,
4 decreasing by 52.6 grams, or by 32.5 percent of the
5 initial weight?

6 A. The sample two, the second whipped sample,
7 decreases by 32.5, that's correct.

8 Q. It doesn't state --

9 A. 32.5 percent.

10 Q. It doesn't state that the cocaine component
11 decreased by 32.5 percent, does it?

12 A. No. They were doing the overall weight.

13 Q. So is there a difference -- or isn't there a
14 difference between degradation of a substance versus
15 decrease in weight of a substance?

16 A. A lot of different things can happen. A substance
17 could lose solvent and lose weight and not degrade, or it
18 could degrade --

19 Q. And not lose weight?

20 A. -- and not lose weight, or both could happen. It
21 could both lose weight and degrade, but, again, that
22 doesn't negate the original testing that was performed.
23 Changes can happen with time.

24 Q. Certainly -- and you have not seen any evidence or
25 been presented any evidence to indicate that there was

CONTINUED CROSS-EXAMINATION - WENDY BELL

1 any weight loss in this particular case due to
2 evaporation of a solvent, correct?

3 A. I think we do have evidence of that because it
4 lost a substantial amount of weight.

5 Q. Well, you're assuming that the initial -- assuming
6 that the initial weighing of the substance was accurate
7 and the proper protocol was followed, correct?

8 A. That would be making an assumption, yes.

9 Q. So, again, you haven't been presented any
10 physical -- now, I'm not talking about the reports
11 themselves. I'm talking about physical evidence to
12 support the contention that the substance lost weight
13 based upon evaporation or some other -- or based upon
14 some other factor. You haven't been presented any
15 physical evidence?

16 A. No, I have not.

17 Q. So the bottom line, I guess, Doctor, is you're
18 really not in a position to assess and you can't render
19 an opinion regarding the City of Charleston police
20 department's analysis of this particular substance?

21 A. I'm here to render a general opinion as to what
22 can happen to crack cocaine.

23 Q. But, again, you don't know whether or not that
24 happened in this case or not?

25 A. I'm not sure that we would ever know for sure what

REDIRECT EXAMINATION - WENDY BELL

1 exactly happened. We have to make assumptions.

2 Q. So you agree with me that it's possible that --
3 Dr. Bennett's testing and the weight that he concluded of
4 just under ten grams, you would agree with me that that
5 could, in fact, be the accurate weight and that his
6 testing was accurate and properly done and that the city
7 of Charleston's testing was inaccurate and the weight
8 reported was inaccurate? You agree with me that that's a
9 possibility, do you not?

10 A. It could be a possibility.

11 MR. THEOS: No further questions.

12 MS. JAMESON: Very briefly, Your Honor?

13 THE COURT: Go ahead.

14 REDIRECT EXAMINATION

15 BY MS. JAMESON:

16 Q. What other possibilities can you conclude looking
17 at the weight loss here?

18 A. It could be a possibility that it lost solvent and
19 the original weight was actually correct and over six
20 years the weight changed, which is, again, a phenomenon
21 we observe.

22 MS. JAMESON: No further questions, Your
23 Honor.

24 THE COURT: I have one question: When you
25 look at a rock of crack cocaine, can you tell whether or

1 not it's wet or dry?

2 THE WITNESS: There are -- you can -- there's
3 a scientific way to measure this?

4 THE COURT: Just looking at it. You're an
5 expert. When you eyeball it, can you say it's wet
6 cocaine or dry cocaine?

7 THE WITNESS: It depends on the degree. If
8 it's really wet, obviously, that's clear and it should be
9 notated, but a substance could contain moisture and not
10 look glistening and wet to the eye. So I've seen --

11 THE COURT: Now, did you look at the crack
12 cocaine in this case and determine whether or not it was
13 glistening and wet?

14 THE WITNESS: I have not looked at the
15 cocaine in this case.

16 THE COURT: Okay.

17 THE WITNESS: But I would argue that six
18 years in passing, it would not look the same as it did
19 when it was first submitted, necessarily. If it was wet,
20 water would not still be around six years later. It
21 would evaporate.

22 THE COURT: And I think it's apparent that we
23 don't know whether it was wet or glistening when they
24 weighed it the first time?

25 THE WITNESS: I would not be able to know

DIRECT EXAMINATION - JUDITH GORDON

1 that.

2 THE COURT: Okay. Thank you, ma'am.

3 Any objection to this witness excused?

4 MR. THEOS: No, Your Honor.

5 MS. JAMESON: No, Your Honor.

6 THE COURT: Thank you, ma'am.

7 You may call your next witness.

8 MS. JAMESON: The State would call Judith
9 Gordon.

10 JUDITH GORDON,
11 having been first duly sworn,
12 was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MS. JAMESON:

15 Q. Ms. Gordon, what's your occupation?

16 A. I'm the director of the forensic services division
17 for the Charleston police department.

18 Q. How long have you been in that role?

19 A. I have been in that role since 1995, so 22 years.

20 Q. What are your duties as the director of the
21 forensic services division of CPD?

22 A. I'm responsible for the management of the forensic
23 services division and the scientific disciplines in which
24 it performs case work. Those include drug analysis,
25 serology, fire debris, crime scene, forensic video

DIRECT EXAMINATION - JUDITH GORDON

1 analysis, digital evidence, and latent prints.

2 Q. Have you had any past positions at CPD?

3 A. Yes, ma'am. Prior to that, I was a bench chemist
4 in the laboratory performing drug analysis, serology, and
5 fire debris.

6 Q. How long were you a bench chemist?

7 A. Eleven years.

8 Q. Have you had any other relevant employment before
9 coming to CPD?

10 A. No.

11 Q. What's your educational background?

12 A. I have a bachelor of science in forensic chemistry
13 from Ohio University, and I have a master's degree in
14 public administration from the University of South
15 Carolina.

16 Q. Have you attended any training on drug analysis?

17 A. Yes. I've had quite a bit. I've had the forensic
18 chemist training course offered by the Drug Enforcement
19 Administration. I've had numerous training as far as
20 drug laboratories and drug manufacturing. I've also
21 recently had a lot of training in fentanyl and its
22 analogs and the dangers that it poses. I'm also
23 certified by the American Board of Criminalistics in the
24 analysis of controlled substances.

25 Q. How long have you been certified?

1 A. I believe since 1992.

2 Q. And has your certification ever lapsed?

3 A. No. There are requirements that must be performed
4 in order to keep it relevant, including continuing
5 education and annual proficiency testing.

6 Q. And you've kept that up-to-date since 1992?

7 A. I have.

8 Q. Have you had an opportunity in your current role
9 as director of the forensic services division to analyze
10 substances and determine whether they're narcotics?

11 A. I have.

12 Q. Have you also weighed narcotics in this role?

13 A. Yes.

14 Q. Approximately how many times have you analyzed and
15 weighed drug samples?

16 A. Over my career?

17 Q. Yes.

18 A. I would very conservatively say 10,000.

19 Q. Is analyzing narcotics part of your regular job
20 duties?

21 A. It isn't so much now because I'm in a managerial
22 role, but I do perform it. Like this year, for instance,
23 I have probably done 100 cases so far in 2017.

24 Q. Do you peer review work done by the analysts under
25 you?

DIRECT EXAMINATION - JUDITH GORDON

1 A. I do. I train them as well.

2 Q. How many peer reviews have you done this year in
3 addition to the 100 cases you've personally analyzed?

4 A. I probably maybe peer reviewed 50 this year.

5 Q. So out of this 150, have any of the samples been
6 crack cocaine?

7 A. Yes.

8 Q. Have you ever been qualified as an expert in South
9 Carolina courts?

10 A. Yes, I have.

11 Q. How many times?

12 A. I would say approximately 30, and that doesn't
13 include marijuana.

14 Q. So 30 for crack cocaine or --

15 A. 30 for different drugs of abuse. I've also been
16 certified in serology and fire debris.

17 Q. What courts have you testified in?

18 A. Many, many times in municipal court, but I've
19 testified in general sessions court and military court.

20 MS. JAMESON: At this time, the State would
21 move to admit Ms. Gordon in the field of toxicology.

22 THE COURT: Any inquiry with regard to her
23 qualifications?

24 MR. THEOS: No, sir.

25 THE COURT: She's so qualified in the field

DIRECT EXAMINATION - JUDITH GORDON

1 of -- in what fields do you tender her?

2 MS. JAMESON: Toxicology, Your Honor.

3 THE COURT: In toxicology. She may render
4 opinions in that field.

5 BY MS. JAMESON:

6 Q. Over the course of your career, how many times
7 have you analyzed crack cocaine, approximately?

8 A. We're a high volume laboratory, so it's hard to
9 say with any certainty, but easily 1,000.

10 Q. Are you familiar with how crack is commonly made?

11 A. I am.

12 Q. Were you present for the testimony of Captain Bell
13 before?

14 A. Yes, I was.

15 Q. Would you agree with her analysis of the whipping
16 method?

17 A. Yes, and I went through similar training at the
18 Drug Enforcement Administration where we made it
19 ourselves by the method she describes.

20 Q. Have you experienced crack that's been whipped
21 within your lab in Charleston?

22 A. We don't have means of determining the production
23 process. That's not really part of our analytical
24 scheme, but we know it to be a very common practice with
25 drug dealers in order to increase the weight of the

DIRECT EXAMINATION - JUDITH GORDON

1 sample and therefore make it sell for more on the street.

2 Q. How do you know what -- you just said it's a very
3 common occurrence among drug dealers in Charleston. How
4 do you know that?

5 MR. THEOS: I'm going to object. This is
6 cumulative testimony. Testimony has already been
7 offered. It's been testified to by Dr. Bell. I assume
8 it's -- based on what I've heard thus far, is she's going
9 to ask the same questions she asked Dr. Bell? Is there
10 some other purpose for this witness?

11 MS. JAMESON: This line of questioning, I
12 asked her specifically. She said she knew it was a very
13 common practice in the Charleston community, so I wanted
14 to ask her specifically about her experience in
15 Charleston.

16 MR. THEOS: Well, Your Honor. I object to
17 that. That's not the question in this case, what the
18 common practice is in Charleston. The question is what
19 took place in that lab on that day, not what occurs in
20 Charleston generally.

21 THE COURT: I'll allow her to ask the
22 question, but let's move on. I've heard a good bit of
23 this. It might be good to focus on something that has
24 not been testified to.

25 BY MS. JAMESON:

1 Q. Were you present for the drug retesting in this
2 case?

3 A. Yes, I was.

4 Q. And, again, it was tested in the courthouse, not a
5 laboratory, correct?

6 A. Correct.

7 Q. And the drugs here were tested at the Charleston
8 police department laboratory that you oversee, correct?

9 A. Yes, back in May of 2011.

10 Q. Can you describe the type of scales you use in the
11 CPD laboratory?

12 A. Yes. This particular sample was measured or
13 weighed on an A&D balance. The model number is GF-200P.
14 It is a standard analytical balance that we use to weight
15 drug exhibits prior to testing the drugs themselves.

16 Q. Are those scales calibrated by an outside source?

17 A. They are. This particular scale at the time was
18 calibrated by a company called Industrial Commercial
19 Scales.

20 Q. Did you receive a certificate of calibration?

21 A. We did.

22 MR. THEOS: Your Honor, I'm going to object
23 to this witness testifying to what was done and how it
24 was done unless she was present -- unless she performed
25 the testing or unless she was present during the testing.

DIRECT EXAMINATION - JUDITH GORDON

1 I mean, she certainly can't testify as to what somebody
2 else did.

3 THE COURT: I think the question had to do
4 with calibration.

5 MS. JAMESON: Yes, the overall procedures.

6 MR. THEOS: The overall procedure, and not
7 specifically the calibration that it performed --

8 THE COURT: I think the nature of the
9 question is what kind of machine did they use and had it
10 been calibrated.

11 BY MS. JAMESON:

12 Q. I believe you're providing testimony about the
13 specific scale that was used here, correct?

14 A. Right. I reviewed the calibration records on the
15 scale that was used in order to be able to provide this
16 testimony, and there was a calibration done on this scale
17 prior to this analysis, and we have one done annually,
18 but the one that was done prior to this analysis was done
19 by Industrial Commercial Scales.

20 Q. In May of 2011?

21 A. No. The analysis was performed in May of 2011.
22 This balance was put into service in September of 2010,
23 and the calibration was performed in October of 2010.
24 There was another one performed in October 2011, but that
25 happened after the weighing of that, so it isn't really

1 relevant to this case.

2 Q. And you testified you were present for
3 Dr. Bennett's reweighing of the drugs?

4 A. Yes, ma'am.

5 Q. Would you describe the process he employed as the
6 calibration?

7 A. No. He performed a verification.

8 Q. Can you explain the difference for the Court.

9 A. Calibration involves the assessment of a lot of
10 different characteristics of the scale. One of them is,
11 obviously, accuracy and precision, but also the
12 uncertainty of the balance, the acentricity of the
13 balance, the linearity, the repeatability. There's a lot
14 of different characteristics that are taken into account
15 and, oftentimes, internal manipulation of the balance
16 itself in order to ensure correct calibration. What Dr.
17 Bennett did and what we do on a monthly basis, we do the
18 exact same thing, it's called a verification, where you
19 take reference weights that have themselves been
20 calibrated by an external service and verify that they
21 check out as expected.

22 Q. And that's in addition to the calibration annually
23 at CPD?

24 A. Right. We perform a monthly verification, as
25 Dr. Bennett described, in our laboratory, in addition to

DIRECT EXAMINATION - JUDITH GORDON

1 the external calibration.

2 Q. Dr. Bennett testified he used plastic containers
3 to weigh the substances on the scale. Do you recall
4 that?

5 A. Yes.

6 Q. And I believe he testified before that he removed
7 the plastic containers to put the substance in.

8 A. Yes.

9 Q. Do you recall that from being present in February
10 at the retesting?

11 A. I do.

12 Q. Is that the practice you employ at CPD?

13 A. Well, we use similar substance containers. We
14 call them weighing boats, but when we place the boat on
15 the balance and we tear it, meaning zero it out, we
16 try -- it's not always practical, but we try to leave the
17 boat in place as we put the sample in, and that's because
18 of a characteristic of the scale called acentricity.

19 Depending on where you place your sample on the
20 weighing platform, it can slightly affect the weight of
21 the sample. Again, it's not a significant amount, but
22 there's a lot of things that go into accurate weighing on
23 an analytical basis, and that's one of them, acentricity.

24 MS. JAMESON: Your Honor, may I approach with
25 a copy of Applicant's Exhibit 4?

DIRECT EXAMINATION - JUDITH GORDON

1 THE COURT: Yes.

2 BY MS. JAMESON:

3 Q. Have you seen the lab report that was done from
4 your lab here?

5 A. Yes, I have.

6 Q. Is it common practice in the CPD lab to weigh the
7 drug substances in their plastic baggies?

8 A. No. We have never done that.

9 Q. What's your interpretation of items submitted and
10 the results herein? Do you interpret that meaning the
11 drugs were weighed in their bags?

12 A. No, I do not. The evidence item is a description
13 of the evidence as we received it, and we describe it
14 along with the packaging we received it in. If we
15 received a number of capsules, for instance, it would say
16 plastic bottle with, you know, ten capsules or whatever.
17 That doesn't describe what was weighed. That describes
18 what was submitted.

19 Q. And, to your knowledge, the drug substances are
20 never weighed in their outer packaging?

21 A. I have worked at the Charleston police department
22 since the day it opened, and we have never weighed drugs
23 in their packaging and reported the weight.

24 Q. Have you ever experienced weight loss of crack
25 cocaine within your laboratory at CPD?

1 A. We've never had an occasion to go back and weigh
2 something that we weighed before unless somebody asked
3 for a reanalysis, which has happened, based on maybe an
4 analyst is no longer able to testify. So we have done
5 that in certain cases, and we have seen a weight loss, as
6 we would expect to over time, but we haven't done any,
7 like, formal studies on it.

8 Q. When you say as you expect to, why would you
9 expect to see weight loss?

10 A. Because there's an inherent moisture in most
11 drugs; cocaine base, marijuana. It's similar to a fruit,
12 a grape. If you leave a grape sitting out for a while,
13 especially six years, it's going to shrivel up because
14 there is going to be a natural evaporation of the
15 moisture that's within it.

16 And all drugs have some inherent moisture, and
17 that inherent moisture is going to evaporate over time,
18 so if we're in a situation where we have to weigh a drug
19 months or years after we weighed it the first time, we
20 expect to see a weight loss.

21 MS. JAMESON: No further questions, Your
22 Honor.

23 THE COURT: All right. Cross-examination?

24 MR. THEOS: Yes, sir.

25 CROSS-EXAMINATION

1 BY MR. THEOS:

2 Q. Ms. Gordon, you didn't test this substance, did
3 you?

4 A. No, sir, I did not.

5 Q. And you weren't there when it was tested on May
6 the 31st of 2011, were you?

7 A. I was not present.

8 Q. And so therefore you cannot testify as to whether
9 proper procedure was followed in this particular testing,
10 correct?

11 A. Well, I am familiar with proper procedure and
12 protocol.

13 Q. But if you weren't present when a test was done,
14 then you cannot, based upon your own observations,
15 testify that proper procedure and protocol was followed
16 in this particular case, correct?

17 A. Not based on my own observations. I was not
18 there.

19 Q. All right. And so since you cannot testify based
20 upon your observations if proper protocol was conducted
21 and the test was conducted in accordance with that
22 protocol, you also can't attest to whether or not the
23 test results were accurate, correct?

24 A. I have no reason to believe they weren't accurate.

25 Q. That wasn't my question, what you believe. You

CROSS-EXAMINATION - JUDITH GORDON

1 cannot testify as to the accuracy of the test results in
2 this case because you were not present, correct?

3 A. I mean, I suppose that's always true.

4 Q. Well, is it true in this case? Let me rephrase
5 that.

6 Isn't it true in this case since you weren't there
7 you can't testify regarding accuracy?

8 A. I didn't do the analysis.

9 Q. You really don't want to answer my question, do
10 you?

11 A. Well, I mean, I don't think it's a fair question
12 because I can't say that it's accurate. I can't say that
13 it's inaccurate. I'm simply able to say what is done,
14 what the records indicate.

15 THE COURT: This is how it operates: He asks
16 the questions. You provide the answers. The lawyer will
17 handle any editorializing about the significance of your
18 answering. He asked the question. You provide the
19 answer.

20 THE WITNESS: Yes, Your Honor.

21 THE COURT: Ask it one more time.

22 BY MR. THEOS:

23 Q. You cannot testify that the test results as
24 reflected on this report, which is Exhibit No. 4, are
25 accurate, can you?

1 A. I cannot.

2 Q. Now, with respect to this wetness issue, I heard
3 your responses regarding presence of liquid or water,
4 whatever the substance may be. You never saw this
5 substance prior to Dr. Bennett's testing, did you?

6 A. No.

7 Q. So you don't know whether there was any wetness in
8 this particular sample that was tested on May the 31st of
9 2011, do you?

10 A. No.

11 Q. And even if it had been present, you certainly
12 couldn't testify as to what the -- to what degree it may
13 have been present, correct?

14 A. Correct.

15 Q. So since you don't know whether there was any
16 wetness in the crack cocaine that was tested on May the
17 31st of 2011, you cannot therefore render an opinion or
18 testify as to whether or not there was a weight loss
19 between 2011 and 2017 when it was retested, right?

20 A. Right. I know there was a weight loss based on
21 the report versus what I saw Dr. Bennett weigh, but
22 that's all I know.

23 Q. So assuming that the first test was accurately
24 done and the results are accurate.

25 A. That's right.

1 Q. All right. Now, you were present when Dr. Bennett
2 conducted his test. At any time did you voice any
3 concern or disagreement with his calibration or balancing
4 of the scales?

5 A. I did ask him if they were calibrated by an
6 external provider.

7 Q. But you didn't pose any concern or you didn't ask
8 any questions regarding his assertion that it was
9 properly calibrated and properly balanced, did you?

10 A. I did. I asked him if this balance had been
11 calibrated by an external provider and I asked him if his
12 weights had been calibrated by external provider, and, if
13 so, when?

14 Q. And he told you that he had calibrated them, did
15 he not?

16 A. He told me that he had not calibrated -- the scale
17 had not been calibrated by an external provider and that
18 the weights had but he wasn't sure when.

19 Q. You didn't disagree at the time that the scale was
20 properly calibrated or balanced, did you?

21 A. My role was to observe.

22 Q. But you didn't voice an objection or a
23 disagreement at the time, did you?

24 A. I did express that it wasn't a calibrated -- he
25 did not calibrate the scale, but that didn't stop the

1 process.

2 Q. Well, as you sit here today, you can't testify
3 that the scale was not properly calibrated or balanced,
4 can you?

5 A. Well, I know it wasn't properly calibrated.

6 Q. Well, properly calibrated and calibrated according
7 to Charleston city police department protocol may be two
8 different things.

9 A. The action that he performed is the verification.
10 It's not a calibration.

11 Q. So -- okay.

12 A. He properly verified the scale. He did not
13 calibrate it.

14 Q. Now, neither you nor your lab with the City of
15 Charleston police department have retested this
16 substance, right?

17 A. That's correct.

18 Q. And several months have passed since Dr. Bennett
19 tested the substance, correct?

20 A. Correct.

21 Q. Can you offer an explanation as to why the lab
22 itself hasn't taken it on its own initiative and retested
23 the substance?

24 A. The identity of the drug was never in question.

25 Q. But the weight, obviously, has been in question,

1 correct?

2 A. By you, yes, sir.

3 Q. Well, isn't that why you're here to testify,
4 regarding the weight and the weight loss issue?

5 A. It's not our role in the laboratory to weigh
6 something six years later. We weighed it when we
7 received it.

8 Q. So you have not been asked to retest and/or weigh
9 again the substance by the solicitor's office or the
10 attorney general's office?

11 A. Right. We have not been asked.

12 Q. And you haven't done it on your own in order to
13 attempt to determine whether Dr. Bennett's test was
14 accurate in your opinion or not?

15 A. No, I have not.

16 Q. Well, if you questioned, as you said, the
17 calibration of Dr. Bennett's scale, why would you not
18 have done that?

19 A. His scale wasn't calibrated, it was verified, and
20 I don't question the verification. He properly verified
21 his scale prior to performing the weighing.

22 Q. Just to be clear, then, you're not questioning the
23 results of his weighing.

24 A. No. I don't think it was under ideal
25 circumstances, but no, I don't think that -- I mean, his

1 weight might have been off a little bit one way or the
2 other, but, in general, I do not -- I don't think it was
3 off by a significant amount, based on what I saw.

4 Q. So you believed that his test results regarding
5 weight were accurate?

6 A. Accurate is a strong word. I don't believe they
7 were probably off by much, no.

8 Q. When you say off by much, you know, we lawyers and
9 judges and court personnel, that term could be much
10 different for us than it could be for chemists.

11 A. Plus or minus two tenths of a gram one way or the
12 other.

13 Q. So an insignificant difference?

14 A. Correct.

15 MR. THEOS: No further questions, Judge.

16 MS. JAMESON: No further questions, Your
17 Honor.

18 THE COURT: You may step down. Any objection
19 to this witness being excused?

20 MR. THEOS: No.

21 THE COURT: You're free to leave, but you're
22 welcome to stay if you want.

23 MS. JAMESON: The State would call James
24 Smiley.

25 THE COURT: All right. Mr. Smiley, please

DIRECT EXAMINATION - JAMES WATSON SMILEY, IV

1 come forward.

2 JAMES WATSON SMILEY, IV,
3 having been first duly sworn,
4 was examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MS. JAMESON:

7 Q. Mr. Smiley, how long have you been practicing law?

8 A. Since 1993.

9 Q. What percentage of your practice is criminal
10 defense?

11 A. 100 percent.

12 Q. Were you retained by Mr. Steplight?

13 A. I was.

14 Q. Did you represent him at his bond hearing?

15 A. Not at the bond hearing.

16 Q. Do you recall when you were retained?

17 A. Shortly after, within a month or so.

18 Q. How many times did you meet with Mr. Steplight
19 before the trial?

20 A. Mr. Steplight and I met often, not so much that we
21 would talk about the facts of the case. He would stop by
22 to make me a payment. I would talk to him on the phone,
23 but we probably discussed his case about two-and-a-half,
24 three hours of actual fact discussion.

25 Q. You just said you talked on the phone with Mr.

DIRECT EXAMINATION - JAMES WATSON SMILEY, IV

1 Steplight. Do you know how many times you talked to him?

2 A. Several. I mean, Norris had -- I still got his
3 phone numbers. He had two different phones, and I would
4 call him on either or. I would have a hard time reaching
5 him sometimes. Other times I wouldn't.

6 I would guess we talked roughly on a monthly
7 basis. He would come by and make a payment to me, or he
8 would come by to talk to me. He is one of the -- I can
9 count on one hand how many clients that actually had my
10 private cell number. I've had that phone since 1993, and
11 I actually gave it to Norris. I don't know if he used it
12 more than once or twice, but he had it.

13 Q. You testified he had two different phones.

14 A. Yeah.

15 Q. Did he ever change his phone number?

16 A. He had two different phones. My recollection is
17 that there was times that one of the phones would not
18 work. There would be other times when the voice mail
19 would be full and I would have to leave him a text. I
20 don't know if it was either full or not set up. I
21 remember I would have to text him from time to time.
22 Norris and I communicated well.

23 Q. Do you recall telling Judge Harrington that he had
24 changed his number multiple times?

25 A. Yeah. Judge Harrington that morning -- I had

DIRECT EXAMINATION - JAMES WATSON SMILEY, IV

1 several phones for him. I also had other people in his
2 family's phone number. It wasn't so much that I was so
3 frustrated that I could not reach him. I did not expect
4 for that trial to be first up that Monday.

5 Doing nothing but criminal defense, I do a lot of
6 homework and prep to see what's going to happen, and
7 there was a murder case in front of us that -- and it had
8 started. It was going the whole week. I had been told
9 that was a solid case. So Norris -- and it's just easier
10 if I go ahead and explain it.

11 Norris had been on the trial docket for over a
12 year. I mean, he had had not one, not two, not three --
13 he probably had gotten ten notices sent out from the
14 solicitor's office that his case was up for trial. It
15 came real close to getting tried once, but I was sick. I
16 came down with Rocky Mountain spotted fever and was out
17 for an extended period of time and it was continued.

18 So his case was one that was never first on the
19 docket, Your Honor. It was one that was put at the end
20 of the week, and it kept getting rolled over and over and
21 over. I did not make contact with him the week before
22 his -- this docket. I showed up because he was on the
23 docket and I wanted to make sure the murder case went on
24 Monday morning.

25 The client for the murder case, if my recollection

DIRECT EXAMINATION - JAMES WATSON SMILEY, IV

1 is correct, didn't show up, and so we're next up. As she
2 issued a bench warrant for the other one, I kept telling
3 her, I'm going to get Norris here if you can just wait,
4 because Angelica I know knew his family. And so when I'm
5 running around trying to qualify a jury, getting myself
6 together, getting my second chair here, I called Angelica
7 and said, Look, we're getting jerked up. Find Norris.
8 The numbers I've got aren't working today. I tried to
9 get him, and I couldn't get through.

10 So I asked her to get in touch with him, and he --
11 Norris had shown up every time. I mean, Norris was
12 involved in his case. It wasn't as if he was not
13 involved. From the day he was arrested, he asserted it
14 was a bad search for different reasons. He claimed, and
15 I think he probably would still claim, that he was
16 sodomized on the side of the road, okay, and that was his
17 word, okay? He kept saying about how the search went
18 down. That didn't end up being the issue, per se, at
19 trial, it was how the stop came about.

20 So the long and short of it is he had a notice,
21 but it's just like I had ten notices. I had checked into
22 it. I didn't expect this case to go that week, and I was
23 pretty certain it wasn't going. I was quite panicked
24 when I was told, You're going to be it, so get ready.

25 And I asked the judge for more time. I made a

1 continuance motion. I think the words were I strongly
2 asked her to wait till my client was present, and she
3 said, Nope, we're going.

4 Q. You objected numerous times on the record to going
5 forward without Mr. Steplight?

6 A. Absolutely, yes.

7 Q. And the Court overruled all those objections?

8 A. She did.

9 Q. And she even placed -- do you recall her making
10 any sort of commentary about you're protected from the
11 record, that you're vehemently opposed --

12 A. Yes, yes, and she said, You don't have to keep
13 making your motion for continuance from this point
14 forward. It's noted and continuing.

15 Q. At that point was there anything else you could do
16 to prevent the trial from going forward?

17 A. No. At that point, Judge Harrington made it quite
18 clear, we were going forward. I knew he would be there.
19 It was a matter of just getting some time to get there.

20 Q. I believe you testified before that it had been on
21 the docket for over a year, and he received multiple
22 notices from the solicitor's office.

23 A. Right.

24 Q. Did he receive one for that particular term of
25 court, the date of the trial?

DIRECT EXAMINATION - JAMES WATSON SMILEY, IV

1 A. I didn't get copied on it. I know that Judge
2 Harrington either in chambers inquired about it.
3 Ms. Linder, who tried the case, said she had --

4 MR. THEOS: Your Honor, I'm going to object
5 to what somebody told him.

6 THE COURT: Sustained.

7 BY MS. JAMESON:

8 Q. Have you had an opportunity to review the trial
9 transcript here?

10 A. I have read it.

11 Q. Would it reflect that the State let Judge
12 Harrington know that notice had been provided?

13 MR. THEOS: Your Honor, I object, unless she
14 can find it in the transcript. I certainly didn't.

15 MS. JAMESON: Moment's indulgence, Your
16 Honor.

17 THE WITNESS: May I refresh my memory, Your
18 Honor?

19 THE COURT: Yes.

20 MR. THEOS: I would say the only comment I
21 saw from Judge Harrington regarding notice is on page 77
22 of the transcript, if that's what she's referring to.

23 BY MS. JAMESON:

24 Q. If you could look at page 7 -- Court's indulgence,
25 Your Honor. Particularly, I'm looking at lines 6 and

DIRECT EXAMINATION - JAMES WATSON SMILEY, IV

1 then through 9:

2 Court: What time was he told to be here?

3 Ms. Linder: All the letters have him coming
4 in Monday morning, and everything says 9:00 tomorrow.

5 MR. THEOS: Well, then the question posed
6 mischaracterizes Ms. Linder having notified the Court
7 that a specific letter from that date was sent out, and
8 that's not the case. That's not what was stated on the
9 record, so I object.

10 MS. JAMESON: We can move along, Your Honor.

11 BY MS. JAMESON:

12 Q. When did Mr. Steplight arrive for his trial?

13 A. About 3:00, 3:30 that afternoon.

14 Q. Was it before the jury was sworn?

15 A. It was before they were sworn, but they had
16 already been selected.

17 Q. Do you recall at what point you were in the
18 suppression hearing?

19 A. I believe we had finished the first witness,
20 Officer Harrison, and the second witness -- actually,
21 backwards. I think Officer Ingalls had testified, and
22 the other officer that was on the scene, Officer
23 Harrison, was getting ready to testify when they arrived.

24 Q. Was Mr. Steplight present for your arguments on
25 suppression?

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1 A. Yes.

2 Q. Did you discuss that the suppression had been
3 denied at that point with your client?

4 A. Yes. I mean, he was present when she said that
5 she wasn't suppressing the drugs.

6 Q. Jumping back a little bit, did you file any Brady
7 or Rule 5 motions here?

8 A. Certainly.

9 Q. Did you review the discovery material with
10 Mr. Steplight?

11 A. Yes.

12 Q. Can you briefly characterize the State's evidence
13 against Mr. Steplight.

14 A. Mr. Steplight had two rocks, baggies, of crack
15 cocaine in his ass, for a lack of a better way to put it,
16 and it was found at the jail. Our attack was as to the
17 arrest itself. I had a problem with that, still to this
18 day have it, and I made my motion. I still think that it
19 was an illegal arrest.

20 Q. Did you discuss suppression with Mr. Steplight
21 prior to trial?

22 A. Yes. He may have heard different words, but when
23 he came to hiring me, this case was all about keeping the
24 drugs out. I mean, it had to be.

25 Q. Did he understand the importance of the motion to

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1 suppress?

2 A. Oh, absolutely.

3 Q. Did you communicate with him the implications or
4 likelihood of success at trial if suppression was denied?

5 A. He knew if we lost that it was going to be 25
6 years. Judge Dennis on the record some months prior had
7 discussed him rejecting the offer and what the punishment
8 would be at trial if he were convicted.

9 Q. And those discussions about the importance of the
10 suppression motion, do you recall when they took place?

11 A. That was -- the whole case was going to
12 suppression.

13 Q. Prior to trial?

14 A. From the day he hired me. He thought his rights
15 had been violated on the side of the road. I told him
16 that wasn't the criminal issue, that I saw, that the
17 criminal issue -- I mean, that was just an allegation.
18 The issue, I thought, was an illegal arrest, in my view.

19 Q. Did you discuss the elements of trafficking
20 cocaine base with him?

21 A. Yeah, real easy. If it's over ten grams and they
22 can show actual constructive possession, you're guilty of
23 trafficking.

24 Q. Do you think he understood this conversation?

25 A. He understood that.

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1 Q. This was a third or subsequent drug offense for
2 Mr. Steplight, right?

3 A. That's right.

4 Q. Do you remember how many prior convictions he had?

5 A. He had two adjudications. At the time I think he
6 pled to more than one drug on two occasions. He had
7 gotten a Youthful Offender Act sentence at one point in
8 time, I remember, and so it was -- he knew, going in,
9 that it was going to be third or subsequent offense.

10 Q. Based on your review of the evidence, did you see
11 any reason to challenge the weight of the crack cocaine?

12 A. I did not.

13 Q. Have you ever had drugs reweighed prior to trial
14 by an independent expert?

15 A. I have not.

16 Q. And I believe you testified that Mr. Steplight
17 arrived before the jury was sworn, but after it had been
18 selected, correct?

19 A. That's correct.

20 Q. Do you always listen to your clients' suggestions
21 on who to select for their jury?

22 A. Not always; however, if I could explain, Your
23 Honor, if a client, during the selection, leaned over and
24 said, I know that person, and I don't want them on my
25 jury, I would certainly take that into account. I didn't

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1 have that benefit here.

2 Q. Did Mr. Steplight ever tell you he knew anyone on
3 the jury?

4 A. No, he did not.

5 Q. Did he ever tell Judge Harrington?

6 A. No. Not that I know of, no, not when I was
7 present.

8 Q. And, again, he arrived before the jury was sworn?

9 A. He did.

10 Q. Do you recall whether alternates were selected for
11 this jury?

12 A. We had an alternate, as I think somebody got
13 excused and that's -- I don't remember exactly, but we
14 ended up running into a problem that we did not have an
15 alternate, and the judge, at the end of the case, was,
16 like, I'm not letting this jury go anywhere because we
17 don't have an alternate.

18 I don't remember what happened, but I know that we
19 used an alternate in the case.

20 Q. Did you ever consider requesting a jury
21 instruction on any lesser included offenses?

22 A. No, I did not.

23 Q. Why not?

24 A. The drugs were 12.2 grams, which was over the
25 10-gram threshold.

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1 Q. If you had made a request to the Court, do you
2 think it would have been denied for lesser included
3 offenses?

4 A. There was no evidence that would show that it was
5 less than ten grams. I wouldn't have gotten a lesser
6 included.

7 Q. Based on your conversations with Mr. Steplight and
8 your review of the discovery and evidence in this case,
9 did you have a valid challenge to the weight of these
10 drugs?

11 A. That wasn't the point that we were going -- we
12 were trying to suppress the drugs. I did not see -- once
13 the SLED -- not SLED, the city of Charleston report came
14 back at 12.2 grams, I didn't go forward thinking that the
15 weight was wrong, as I went forward with suppressing the
16 drugs.

17 Q. Did Mr. Steplight ever tell you he only purchased
18 nine grams of --

19 A. I do not remember that conversation.

20 Q. Did you ever consider calling him as a witness?

21 A. I considered it because they weren't going to be
22 able to use -- well, they had chosen not to use his prior
23 convictions against him. The only other thing that they
24 would have tried to use is the failure to stop for a blue
25 light but also had to consider how the jury would

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1 perceive what was going on in this case, and, truthfully,
2 this case, in my mind, and maybe -- and, again, I could
3 be dead wrong, Judge, it was about a suppression issue.
4 When we lost the suppression issue -- I mean, I was
5 creating a record for appeal on the suppression issue.

6 If I screwed up by not getting it tested, I
7 screwed up. That really was never the focus of anything
8 I did with it. It was about what happened on the side of
9 the road.

10 Q. Did Mr. Steplight understand this was your focus
11 and sole defense?

12 A. That's what we talked about.

13 Q. Was he on board with this defense?

14 A. He was up here. You could have asked him. To the
15 best that I knew, he understood what we were focussing
16 on.

17 Q. Do you recall giving closing arguments in this
18 case?

19 A. Yep.

20 Q. What was your plan or strategy regarding closing
21 arguments?

22 A. I didn't have much of anything at that point. It
23 was, like, Y'all heard it. Y'all decide. I wasn't going
24 to sit here and try to blow smoke up a jury because they
25 found the drugs on him.

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1 Once I had been overruled about the suppression
2 issue, I had explored with Your Honor, not on the record,
3 but in chambers, how far she would let me go into the
4 Fourth Amendment and what I want to argue, and I was
5 pretty much shut down. She said, You aren't going to
6 talk about it, so I didn't.

7 Q. Were you allowed to proffer some of that testimony
8 to preserve it?

9 A. No. That's not testimony. That would have been
10 closing argument.

11 MS. JAMESON: No further questions, Your
12 Honor.

13 THE COURT: Cross-examination.

14 MR. THEOS: Yes, sir.

15 CROSS-EXAMINATION

16 BY MR. THEOS:

17 Q. Mr. Smiley, first, you were asked by Ms. Jameson
18 regarding prior convictions. It's true, based on what
19 you stated in your direct examination, that Norris pled
20 guilty two times --

21 A. That's correct.

22 Q. -- to possession offenses?

23 A. That's correct.

24 Q. But when he pled guilty, both of those times
25 involved pleading to more than one charge each time?

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1 A. Two adjudications, four convictions.

2 Q. Okay. So for enhancement purposes, he had two
3 prior convictions?

4 A. After you get two, it doesn't matter whether you
5 have four, and I can't answer that question. I didn't
6 look into it because once you have two or more, it
7 doesn't matter, but on the adjudication that he got two
8 convictions, it may have been two separate arrest dates,
9 and I don't know off the top of my head, they would be
10 separate drug offenses.

11 Q. All right. Now, there is one exception to your
12 statement that it doesn't matter, and that is that if the
13 weight of the drugs is less than ten grams, then the
14 penalty is significantly less, correct, than trafficking
15 greater than ten grams on a third or subsequent offense?
16 I can show you the statute.

17 A. I know the statute. Listening to your question,
18 it makes a difference that a third offense trafficking is
19 a 25 to 30 crime.

20 Q. Right.

21 A. And that a possession with intent to distribute
22 less than 10 grams but more than 1 gram would be a 10 to
23 30, so yes.

24 Q. But if the prior convictions were for possession,
25 rather than distribution or trafficking, correct?

1 A. Correct.

2 Q. I believe that's the distinction. If the two
3 prior convictions were for possession, it falls within
4 that exception, correct?

5 A. Correct.

6 Q. Okay. So if it could have been established that
7 the weight of the drugs that were seized and he was
8 prosecuted for, if it could have been established that
9 the weight was actually less than ten grams, then you
10 would have certainly asked for --

11 A. Certainly.

12 Q. -- a charge on a lesser included offense?

13 A. Yeah. I would have had a different trial
14 strategy.

15 Q. Now, you represented Norris for -- was it almost
16 two years?

17 A. Yes.

18 Q. You said you had how many actual meetings with
19 him?

20 A. We met at my office at least six to nine times.
21 We only discussed his case in detail two or three times.

22 Q. The other times would have been for payment?

23 A. Payment, and he'd come by and we would talk. It
24 was -- Norris -- unlike some of my clients, Norris and I
25 would sit down and talk about things, about how he was

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1 doing, what was going on.

2 Q. You testified earlier on Ms. Jameson asking you
3 this question that you don't remember Norris telling you
4 that he had purchased only 9 grams or \$300. That being
5 the case, you certainly don't refute that Norris told you
6 that, do you?

7 A. I'm not saying he didn't tell me that. All I'm
8 saying is I don't remember. If it was told to me, I
9 certainly didn't go, Oh, there's another defense, and if
10 I didn't do that and I made a mistake, I made a mistake.

11 Q. Let's assume for argument's sake -- since you
12 can't recall and can't refute what Norris said in his
13 testimony, let's assume for argument's sake that he did
14 purchase nine grams, as he said, or he believed he
15 purchased nine grams, as he said. If you had had it
16 tested independently and verified that the weight was
17 less than ten grams, that would have been a defense to
18 the trafficking?

19 A. Yeah. I would have also gotten a lot better offer
20 from the State, and it might not have been a trial.

21 Q. So would you agree with me that, again, assuming
22 he told you that, that it would have been incumbent upon
23 you as the trial counsel to have the drugs independently
24 weighed?

25 A. Yes.

1 Q. And that wasn't done, was it?

2 A. It was not.

3 Q. Now, let's focus on the calling of the case for
4 trial. I understand, and you've testified, that there
5 were several notices that were sent to you, and you know
6 that Mr. Norris Steplight was copied on those notices,
7 correct?

8 A. Yep, because he would call me and say, Hey, do I
9 need to be in court this week?

10 And I would say, No, we're not going. Don't worry
11 about it.

12 Q. And as is the practice with our local solicitor's
13 office, when trial notices are sent out, they're sent not
14 only to defense counsel, but the defendants themselves
15 are copied, correct?

16 A. That's correct.

17 Q. I've got your file, or at least a copy of it, that
18 you provided.

19 A. I gave you my file.

20 Q. This is your file?

21 A. Yes.

22 Q. I've looked through that file, and I don't see
23 anywhere in that file that either you or Norris received
24 notice that the case was scheduled for trial on February
25 the 4th of 2011.

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1 A. All I can tell you is that it was on the docket.
2 That's all I can tell you.

3 Q. But based upon what is or --

4 A. Right.

5 Q. -- what is not in your file, you weren't provided
6 written notice by the solicitor's office in advance that
7 the case was scheduled for trial on that day?

8 A. I can't say that I was.

9 Q. Okay. And, in fact, my understanding is -- based
10 upon what's in the transcript, my understanding is, as
11 you notified the Court, that you received a text message,
12 I believe, either the night before or that morning that
13 the case was first up for trial?

14 A. Yeah, because, as I said, I did my homework the
15 week before. I had gone to check on the murder case that
16 was in front of me and told, Oh, there's no way it will
17 plead out. It's solid. It's going on Monday morning.
18 It's going to take all week.

19 On Friday, I had spoken to Ms. Linder and said,
20 Hey, if something changes, let me know. I'll be there
21 Monday just to make sure the murder case gets going.

22 Q. Ms. Linder, you're referring to Stephanie Linder
23 who is the assistant solicitor in this case?

24 A. Yeah. It was her case. Mr. Stony had taken it
25 over to get it ready for trial, and she became second

1 chair and she was lead counsel at trial.

2 Q. Okay. So February the 4th was a Monday?

3 A. Yes, sir.

4 Q. All right. So as of Sunday evening, you still had
5 no notice that the case was first up for trial, did you?

6 A. Oh, no, it wasn't first up the next morning. I'm
7 telling you, when I got here that morning, it might be,
8 might not be, but I had an inkling that something had
9 changed.

10 Q. If you were provided notice that the case was
11 first up for trial Monday morning, you certainly didn't
12 provide notice to Norris that the case was first up for
13 trial, correct?

14 A. No. If I -- the week before, I had reached out to
15 Norris, let him know it was on again, and I was going to
16 tell him, if I had reached him, that don't worry about
17 it. There's a murder case that's going to burn all week,
18 and I've already checked it out.

19 I didn't reach Norris, but I didn't really sweat
20 it because Norris, he -- Norris got tired of coming down
21 here and sitting around, quite frankly. He had been down
22 here ten times, and I don't exaggerate. Ms. Linder will
23 tell you, we tried to get this case tried a whole bunch,
24 and so if I didn't need to bother Norris, I tried not to
25 because he would come down here and sit and sit, and I

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1 would, Say go away, because it just wasn't going.

2 So not reaching him that Monday morning on that
3 short notice is -- I'm at fault in that I didn't chase
4 him that week before to make sure he was going to be
5 there on Monday morning.

6 Q. And you didn't send him a letter --

7 A. No.

8 Q. -- or provide him with any written notice in
9 advance that this case was up for trial?

10 A. I certainly didn't. We knew that it was on the
11 docket. I knew that it was on the docket for that week
12 and that it was most -- I think first it started out
13 third, moved up to second, but the first case was a
14 murder case that was going to burn all week, so I --
15 while I was ready for trial, I didn't call Norris. I
16 didn't reach Norris.

17 Q. And if you'll turn to page 77, please, of the
18 transcript, volume 1.

19 A. 77, yes.

20 Q. If you'll read from lines 8 to 17, please, just
21 read them aloud if you don't mind.

22 A. Thank you for a couple extra minutes.

23 Mr. Steplight arrived when I was downstairs. I had an
24 opportunity to explain to him what has happened so far in
25 details. He is now present. He didn't know. He just

1 didn't know. The bondsman found him. He came
2 immediately. He apologized, even though I guess,
3 technically, I have -- I needed to have gotten in touch
4 with him.

5 He did a letter from me -- I didn't send him a
6 letter. Let's be clear about that.

7 Q. That's my question.

8 A. Ms. Linder might have sent him a letter. I didn't
9 send him a letter. I wasn't in the practice of sending
10 letters. I'd get him on the phone or text him, so I did
11 not send a letter.

12 Q. That statement -- again, I'm not being critical of
13 you, but that statement was erroneous at the time. You
14 did not send him a letter, right?

15 A. I think that statement was misinterpreted, but
16 certainly I did not send him a letter.

17 Q. And, again, certainly if Ms. Linder had sent him a
18 letter, as was her practice, you would have been copied
19 on it?

20 A. Yes. That doesn't mean that it would have made it
21 in my file. That's why I hesitated. I'm not saying she
22 didn't send it to me, but there's not a letter in my
23 file, though.

24 Q. Your experience with Mr. Steplight is whenever he
25 receives such a letter, he would immediately communicate

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1 with you and question whether the case was up for trial
2 because there were so many letters coming, correct?

3 A. Certainly. It was more -- it was a more urgent
4 response in the beginning. You start to get dulled when
5 you've been noticed the seventh, eighth, or ninth time,
6 but whenever he got it -- and I don't say every single
7 time, but as a course, I always had contact with him and
8 he'd say, Do I need to be there? Do I need to show up?
9 And we would have a discussion about what I expected to
10 happen in the next week.

11 Q. And, again, your experience with Mr. Steplight was
12 that if he had received a letter, he would have been
13 there.

14 A. Yes, yes. I told the Court that he's always been
15 here, and Ms. Linder all but vouched for that. I mean, I
16 thought it was wrong that we picked the jury, but I
17 didn't get to say -- after I made my objection, I got to
18 do what I'm told to do.

19 Q. If you also look at page 45 of the transcript,
20 please.

21 A. Yes.

22 Q. Judge Harrington states that she -- and I believe
23 it begins on line 11. She states that, We are continuing
24 without your client, but I have heard nothing that
25 indicates to me that Mr. Steplight was not given notice

1 of today, correct?

2 She makes that statement?

3 A. She makes that statement.

4 Q. And in light of the fact that she found that
5 nothing was presented to her indicative of Mr. Steplight
6 not having been given notice, she continued on with the
7 trial and selection of the jury, motion hearing, et
8 cetera, correct?

9 A. You're asking me did I provide something to prove
10 a negative?

11 Q. No, I'm asking you -- I'm pointing out and asking
12 you whether that was her finding in light of the fact she
13 was not given any -- she was not presented with any
14 evidence or any argument that he did not have proper
15 notice.

16 A. Right. I didn't argue that, no, because -- and if
17 I could just fill in a little bit, because once -- at
18 least it's been the practice in Charleston County, and
19 it's changing now, but once you're on the docket, you
20 you're on the docket. They had argued that it rolled
21 over. I don't agree, but that had been argued.

22 Q. Of course you can't predict what the Court would
23 have done or not done if presented with that evidence?

24 A. No.

25 Q. But there was certainly no evidence at the time

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1 presented to her that he was given proper notice,
2 correct?

3 MS. JAMESON: Your Honor, I object. This
4 calls for speculation.

5 MR. THEOS: He was present.

6 THE COURT: I'll allow him to answer the
7 question.

8 THE WITNESS: I didn't make an argument that
9 he didn't have notice. I made an argument that I had not
10 gotten in touch with him to be there that morning, that I
11 had called the bondsman, and I was sure he was going to
12 be here shortly, and the bondsman would find him. Maybe
13 I'm not answering your question.

14 BY MR. THEOS:

15 Q. Do you believe, based upon the judge's ruling and
16 based upon -- in hindsight, based upon the fact that she
17 agreed -- that she had ruled to continue with the
18 proceeding because she did not receive any evidence that
19 he hadn't been given notice, that he should have made
20 that argument, Judge, I did not give him notice, and I
21 don't have any evidence to reflect that he was provided
22 notice?

23 A. But I did say that.

24 Q. Well, to the contrary, you said you provided him a
25 letter, you sent him a letter. It's later in the

1 transcript, but you did say you sent him a letter.

2 A. No, and if you'll let me, on that, you're
3 mischaracterizing what I said. It shows that in the
4 transcript, but I don't send letters, so I didn't say it.
5 If it came out of my mouth that way, then it wasn't that
6 I sent a letter, that Ms. Linder had sent him letters,
7 but I do not have in my file a copy of any letter from
8 Ms. Linder.

9 Q. Okay. As you sit here today, you don't dispute
10 the fact that Norris was not provided notice to be there
11 until he received a phone call from the bonds person,
12 correct?

13 A. And I called the bonds person, correct.

14 Q. I understand you did what you had to do at that
15 point in time.

16 A. Right.

17 Q. Now, and you've heard Norris testify that had he
18 been present, he would have -- that he wanted to be
19 present, number one; had he received notice, he would
20 have been present, number two, correct?

21 A. I agree.

22 Q. And had he been present that he would have wanted
23 to be involved in the selection of the jury, correct?

24 A. Absolutely.

25 Q. And you would agree, as a practicing criminal

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1 defense attorney, that it is essential that the client be
2 present, the defendant be present, during the selection
3 of a jury?

4 A. Yes.

5 Q. Especially if they know somebody on the jury, for
6 better or worse?

7 A. I wanted him there, yes.

8 Q. You heard Mr. Steplight testify that had he been
9 present, he would have told you not to select and to
10 strike juror number 373?

11 A. And he was right. He doesn't talk to me directly
12 in the courtroom. I have a second chair that sits with
13 me in every case, Ms. Hensley. He would have turned to
14 Laree Hensley and said, I don't want that one, and she
15 would have tapped me on the shoulder and said, Hey, he
16 knows, and I would have conferred with him at that point
17 in time. He's right there.

18 Q. So he was deprived of that opportunity to tell you
19 that he did not want that person on the jury?

20 A. Absolutely.

21 Q. And since he wasn't present with jurors that you
22 struck, he was deprived of the opportunity to determine
23 whether or not he agreed with you in striking them or
24 whether he actually wanted those jurors -- that juror,
25 correct?

1 A. I've always maintained that I pick the jury, but I
2 want their input. So he may say, I don't want this
3 person, and I'll turn to them and say, I want this person
4 for X, Y, and Z, and what I think would most likely rule
5 today. If he said, I know that person and there's bad
6 blood, I wouldn't have put them on the jury. It's just
7 that simple.

8 The other problem was he wasn't present during
9 voir dire. Norris Steplight, Jr. -- there is a Norris
10 Steplight, Sr. The person that ended up on the jury,
11 they didn't have Norris in front of them to go, oh, I
12 know him. There wasn't a client next to me to be
13 introduced to the jury. I told them who I was and told
14 them I represented Norris, but Ms. Gail Wright, or
15 Ms. Wright, she didn't get to look and say, Oh, I know
16 him, you know.

17 So it never came up during the trial. Maybe at
18 the point that she's in the jury box she doesn't feel
19 like she can say anything, I don't know, but it would
20 have been very helpful to have Norris sitting beside me
21 so he could face his jury pool.

22 Q. The bottom line is that you didn't have the
23 benefit of Norris's input --

24 A. Correct.

25 Q. -- in selecting the jury, and Norris was deprived

1 the opportunity to provide that, correct?

2 A. Absolutely.

3 Q. Now, if you'll look at page 46 and 47 and 48 of
4 the transcript, I believe that's when the judge had just
5 ruled that the trial would be continuing, even though
6 Norris was absent, correct, and at that time she
7 addressed the jury and gave both you Ms. Linder an
8 opportunity to address the jury and introduce yourselves,
9 correct?

10 A. That's part of voir dire, yes.

11 Q. Judge Harrington did not mention anything about
12 the fact that --

13 A. No.

14 Q. -- Norris wasn't present?

15 A. No.

16 Q. And that that certainly wasn't something they
17 should take into consideration in determining -- or
18 reaching a verdict; is that correct? She didn't make any
19 mention of that?

20 A. No, she didn't.

21 Q. When you introduced yourself, you didn't discuss
22 his absence and ask that the jury -- or indicate to the
23 jury that his absence shouldn't be considered in any way
24 adverse to Mr. -- to Norris, did you?

25 A. No.

1 Q. And neither did Rand Stony or Stephanie Linder,
2 correct?

3 A. No.

4 Q. Again, in hindsight, don't you believe and agree
5 with me that something should have been said either by
6 the Court or by you pointing out that Norris Steplight
7 wasn't there and that should not in any way be held
8 against him in any fashion?

9 A. I agree.

10 Q. Now, you agree with me, and I think you said it as
11 well, that your sole focus, your primary focus, if not
12 your sole focus in your whole case, hinged on your motion
13 to suppress?

14 A. That's correct.

15 Q. Understanding that, if Judge Harrington ruled on
16 that motion to suppress, then the only issue would have
17 been whether or not Norris possessed, either actually or
18 constructively, the cocaine?

19 A. That's correct.

20 Q. And we know, based upon where it was found, that
21 he couldn't argue possession, correct?

22 A. It's pretty tough.

23 Q. The only potential defense then, do you agree with
24 me, related to whether or not he was guilty of
25 trafficking 10 grams or more, up to 28 grams of cocaine,

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1 would have been the weight?

2 A. I agree. I was pretty screwed, or Norris was, at
3 that point. She ruled the drugs were coming in.

4 Q. So that the only way to pose that as a potential
5 defense, as we talked about before, to seek a lesser -- a
6 charge on a lesser included offense and/or make that
7 argument to the jury would have been one of two ways -- I
8 should say and or, would have been for either you didn't
9 have the drugs independently analyzed, which wasn't done?

10 A. No.

11 Q. Or to have Norris testify as to the weight and his
12 purchase of that particular weight, the basis for it,
13 correct?

14 A. Correct.

15 Q. And that wasn't done?

16 A. It was not.

17 Q. Now, the only other thing I'm going to ask you to
18 do -- and I apologize if it offends you or embarrasses
19 you in any way. If you would just turn your attention to
20 your closing statement, and I understand that you said,
21 based upon your focus and based upon the evidence as it
22 came in, without any defenses, as to the weight that
23 there wasn't much you could say.

24 A. There wasn't much that I did say.

25 Q. And it's on page 239. It's lines 8 through 13.

CROSS-EXAMINATION - JAMES WATSON SMILEY, IV

1 A. Yes. You want me to read them?

2 Q. If you don't mind.

3 A. As I told you, I'm an advocate for Mr. Steplight,
4 and when you said -- when he said he was not guilty, it's
5 the State's, their burden, and we went through it.

6 Y'all are the judges of the facts. The facts now
7 have been presented to you. Your Honor is the judge of
8 the law, and she has made some rulings in this case. As
9 if -- I'm sure y'all have all noticed it's hard sometimes
10 being a lawyer, making sure that each of us goes by the
11 rules of evidence and the rulings of Your Honor;
12 therefore, I submit to you it's all up to y'all to make a
13 determination. Y'all heard the evidence, and I know
14 y'all did the right thing.

15 That's my entire closing.

16 Q. With the words thank you.

17 A. Thank you.

18 Q. And you agree with me that had a defense been
19 presented as to the quantity or weight of the drugs that
20 you could have had a much more persuasive argument to
21 make to the jury?

22 A. Certainly.

23 Q. And you agree had that been the case that there is
24 a possibility that the outcome of the case may have been
25 different?

REDIRECT EXAMINATION - JAMES WATSON SMILEY, IV

1 A. Say it again? I want to make sure.

2 Q. You would agree with me that if that had been the
3 case, that you had presented evidence in one of two
4 fashions, either by retesting of the drugs or Norris's
5 testimony regarding the quantity that you purchased, that
6 you would have been able to have a much more persuasive
7 argument and that there would have been a probability
8 that the outcome of the trial would have been different.

9 A. Possibility, probability, yes.

10 MR. THEOS: No other questions, Your Honor.

11 MS. JAMESON: Very briefly, Your Honor.

12 REDIRECT EXAMINATION

13 BY MS. JAMESON:

14 Q. Mr. Smiley, you testified you don't have any
15 independent recollection of conversations with
16 Mr. Steplight regarding him purchasing nine grams. You
17 can't deny or --

18 A. I don't remember having that conversation. I
19 either wasn't listening when he told me, because if I was
20 listening -- I'm not dumb. I've been doing it a long
21 time. I would have come up with a second line of
22 defense, so I don't remember him telling me that. I'm
23 not saying he didn't say it. I can't say he didn't say
24 it, I'm just saying I didn't hear it. There's sometimes
25 we don't hear things, not that they weren't said.

REDIRECT EXAMINATION - JAMES WATSON SMILEY, IV

1 Q. If he would have told you that, would you have had
2 the drugs retested?

3 A. I would have created a second defense if I could,
4 certainly. I've never had drugs retested. I probably
5 would have said something to him that they were wrong. I
6 would have doubted that the city of Charleston didn't
7 weigh it correctly.

8 I'm just being straight. I would probably have
9 questioned it, but if he would have told me at the
10 beginning and if I had heard him that it was only nine
11 grams, then maybe, at that point in time, I would have
12 clued in.

13 Q. And you testified you met with him monthly to
14 either have him make payments, discuss the case, he would
15 come in monthly?

16 A. Pretty much. I'm not going to say he came in the
17 same day every month, because I was at the time on King
18 Street, and I had a porch and I use to sit out on my
19 porch, and Norris would come up, late in the afternoon,
20 evening, when he was getting off work. He'd stop by.
21 We'd sit out on the porch.

22 I was smoking back then. I'd smoke me a
23 cigarette. I'd talk to Norris. I'd get a payment. We
24 went in my office on two or three different occasions
25 where I tried to explain to him the search problem in the

REDIRECT EXAMINATION - JAMES WATSON SMILEY, IV

1 case, where I saw the illegal seizure, when they said it
2 was DUS, and I still don't think he was DUS. He had a
3 route restricted license. That was valid.

4 Q. I believe you testified on cross you didn't
5 receive notice yourself from the solicitor's office that
6 the case was on the docket for trial that week?

7 A. I don't remember -- I know it was on the docket.
8 I'm not going to sit here and tell you I didn't think it
9 was on the docket. Whether I got a letter or not, I
10 don't know. It wasn't in my file, I can tell you that.

11 Q. And I believe your testimony was you tried to
12 contact Mr. Steplight?

13 A. Yes. I tried to reach Mr. Steplight. I had two
14 or three different numbers. I know of two numbers that I
15 reached out for him on that week. I did not reach him.
16 It's my recollection that one of the numbers wasn't
17 working, and the other one, I couldn't leave a message,
18 but I wasn't real concerned, quite frankly, about it
19 because I didn't expect this case to go.

20 So it wasn't like I was panicked on Thursday the
21 week before going, Crap, I can't find Norris, because I
22 know he hadn't gone anywhere. Norris is always
23 available, and so I wasn't terribly panicked about it. I
24 didn't expect -- when I went home on Friday afternoon, I
25 wasn't trying the case on Monday. I wasn't trying a case

—REDIRECT EXAMINATION - JAMES WATSON SMILEY, IV—

1 the following week, not that I couldn't, but because
2 there was a murder case that was going to take the week.

3 MS. JAMESON: Moment's indulgence, Your
4 Honor.

5 THE WITNESS: I feel bad about Norris not
6 being there for the start of his trial, since this
7 happened. Norris was very -- and I'm sorry for not --
8 and it was wrong. I still think it was wrong. I did
9 what I could do. I feel bad about it. Norris should
10 have been there at the beginning of his trial, and I feel
11 responsible, and I am responsible, to a certain degree,
12 Judge.

13 He needed to be there at the beginning of his
14 case, and I'm still not quite sure why it was such -- why
15 I was getting jerked, is how I felt, when I assured her
16 he would be there, and he was, at 3:30 that afternoon.
17 So I feel bad to this day that Norris didn't get a fair
18 shake, I guess is how I feel. Sorry.

19 BY MS. JAMESON:

20 Q. Why do you feel he didn't get a fair shake?

21 A. Because he should have been there when his jury
22 was selected. He should have been there when the
23 suppression went forward, because it shouldn't have been
24 rushed. He shouldn't have been trying to catch up the
25 whole time. If I'm the reason for that, I screwed up,

REDIRECT EXAMINATION - JAMES WATSON SMILEY, IV

1 all right? Period. If he told me that the drugs were
2 nine grams and I didn't hear him, then I screwed up, not
3 Norris.

4 Q. And you have no independent recollection --

5 A. I do not. I do not because I can tell you this,
6 that Norris never took his case lightly. From the day he
7 got arrested and he came to me, he said he was basically
8 raped on the side of the road.

9 That wasn't the focus, though, because they felt
10 the objects in his pants on the side of the road, but
11 they didn't go get them. They left them in there until
12 they got him to the jail. This was about a pretextual
13 stop by a proactive unit that was sitting, waiting for
14 him to come by, that he was going down Rutledge, taking a
15 right on to Calhoun, and they pulled him because he
16 didn't -- they said he did a California stop. They
17 didn't have video, and instead of going into the closest
18 lane, you can't. I've tried to do it in preparation for
19 this case. He went into the center lane, and that was
20 the reason they pulled him, because they knew they were
21 going to mess with him about his provisional driver's
22 license. Sorry. I mean, that's just the truth.

23 Q. Was there any testimony from the officers that
24 they knew he had a provisional driver's license before
25 they pulled him over?

REDIRECT EXAMINATION - JAMES WATSON SMILEY, IV

1 A. There was no testimony but they knew. I didn't
2 elicit any testimony, you're right. This was pretextual
3 from the get-go. They admitted as much, I believe.

4 Q. Just to clarify, the officers didn't testify that
5 they knew he had a suspended license or they knew it was
6 Mr. Steplight before they pulled him over, correct? They
7 pulled him over for two traffic violations.

8 A. They knew Norris Steplight was in that pickup
9 truck.

10 Q. There is nothing in the record to suggest that.

11 A. Oh, I disagree with you. Let me find it. They
12 were in a unit called Power Shift. There's a unit of
13 officers that work inside of what's called Team One.
14 Their job is to go hunt crime, for lack of a better word.

15 They had gotten some anonymous tips about a house
16 on Morris Street. They had gone that day and talked to
17 narcotics about it. They were expecting Norris
18 Steplight. They dropped an officer off in front of
19 Morris. Then the other two officers, they knew when you
20 come out of Morris, you got to get on Rutledge. They
21 went down a half block and parked.

22 The officer said, The pickup truck just pulled
23 out. It's only been here a second. It's on its way out.
24 They were going to stop that car as soon as it made any
25 kind of infraction. I mean, they said so.

REDIRECT EXAMINATION - JAMES WATSON SMILEY, IV

1 Q. I don't refute that. My question is, was there
2 any evidence presented that they knew that Mr. Steplight
3 particularly was in that pickup truck and they knew he
4 had a suspended license?

5 A. Was there evidence presented to that? I would
6 have to review it all, but all I can tell you is that
7 they knew Norris was going to be in this car and they
8 were going to pull him that day.

9 Q. Norris particularly?

10 A. Yeah.

11 MS. JAMESON: No further questions, Your
12 Honor.

13 MR. THEOS: No questions, Judge.

14 THE COURT: All right. You may step down.

15 THE WITNESS: Thank you. May I be excused?
16 I hope y'all are done pretty soon.

17 MS. JAMESON: The State has no additional
18 witnesses, Your Honor.

19 THE COURT: Anything in reply?

20 MR. THEOS: Nothing in reply. Might counsel
21 approach the bench for me.

22 (Discussion held at sidebar.)

23 THE COURT: Yes, sir. You're recognized.

24 MR. THEOS: Thank you, Your Honor. Your
25 Honor, we've been going on for about four hours now, and

1 normally death penalty cases, which can take a couple
2 weeks, don't take this long, but I think everything that
3 you heard was exceptional from both sides.

4 THE COURT: This is an important case, and we
5 need to hear it out and hear it out thoroughly. I'll be
6 glad to hear from you.

7 MR. THEOS: And, Your Honor, the bases for
8 our application, as you heard from Ms. Jameson, are
9 contained in our application, but they include, first and
10 foremost, that Norris was deprived of the opportunity to
11 be present at the beginning of his trial. He was
12 deprived of the opportunity to be present during the
13 selection of the jury.

14 Now, the State might say, well, wasn't that
15 addressed in the direct appeal in which the case was
16 affirmed? But I think there is a distinction that the
17 Court needs to take into consideration, which is the
18 Court was operating under a misapprehension of the facts,
19 which is those facts weren't presented to the Court at
20 the time because at that point in time the details
21 related to those facts were not known.

22 Norris was not provided any sort of -- any
23 notice whatsoever, yet Mr. Smiley stated on the record
24 that he sent him a letter. I believe it was on page 45
25 or 46 of the transcript that I asked Mr. Smiley to read.

1 You saw that Judge Harrington's comment was, I have not
2 been provided with any information that Norris Steplight
3 did not receive notice.

4 Well, Mr. Smiley had that evidence. He just
5 didn't present it. In fact, to the contrary: He said he
6 sent him a letter. So, clearly, there was evidence that
7 could have been presented to the Court that Norris
8 Steplight did not receive any notice. If Ms. Linder, as
9 the State might argue, advised the Court that she sent
10 letters -- first of all, she didn't indicate -- at least
11 in the transcript, she didn't indicate that a letter was
12 sent for that particular trial, but certainly if she had
13 it, she would have presented it to the Court, showing the
14 Court, I did send him a letter. I sent Mr. Smiley one
15 too.

16 Mr. Smiley didn't know that the case was up
17 for trial, or first up for trial, until the morning of
18 February the 4th, that Monday morning, and I take his
19 word that he attempted to contact Norris. I also take
20 his word that he was unsuccessful in contacting him, and
21 he also testified that he didn't -- that as such, Norris
22 didn't receive notice, and that had Norris received
23 notice, as he then responded to the notice, he would have
24 been there.

25 Jury selection is a crucial, crucial stage of

1 a trial. It is absolutely imperative that a defendant
2 charged with a serious crime -- in this case, the crime
3 could carry the maximum mandatory of 25 years, that he be
4 allowed to be present and provide info about who was
5 going to make the decision regarding his life,
6 essentially, and he was deprived of that opportunity.

7 I don't know why Judge Harrington did not
8 hold off until later in the afternoon or the next
9 morning. In the scheme of things, it wouldn't have made
10 a darn bit of difference. For whatever reason, she
11 decided not to, but we know what that reason is, that she
12 wasn't provided any information that he did not receive
13 notice.

14 So we believe -- although I think the weight
15 is an important issue as well, we believe that that
16 issue, in and of itself, as detailed in our memorandum,
17 is sufficient to warrant your ruling in granting this
18 application. The cases that the Court of Appeals cited,
19 that our Court of Appeals cited, are distinguishable
20 because in our case, which didn't come to light until the
21 application for post-conviction relief was filed, there
22 was no evidence -- or the Court found there was no
23 evidence offered that he didn't receive notice. In those
24 other cases, that was not the case.

25 With respect to the issue of weight, it was

1 unrefuted, by Mr. Smiley, as Norris testified, I bought
2 nine grams. I paid \$300 for it, \$100 for a gram, or \$100
3 for every three grams. That's how much I paid for it.
4 That's how much I had on me.

5 And Mr. Smiley -- I understand he says he
6 doesn't remember, but when you're a defense lawyer and
7 you know or you believe that the likelihood is slim,
8 maybe even remote, that a Court is going to suppress
9 evidence in a case like this, then you look and explore
10 other potential defenses, certainly, and I've been
11 practicing law 35 years. We always, always challenge the
12 weight. That's just something we do routinely. I think
13 it's ineffective not to do it, certainly ineffective not
14 to do it when your client tells you that he only
15 purchased 9 grams and that he paid \$300 for that.

16 Even if Norris didn't have the wherewithal or
17 the intellectual understanding that he could ask for an
18 independent test, Mr. Smiley should have asked for it.
19 He should have sought it on his own. I think it's
20 incumbent on a practitioner to do that. Do whatever you
21 have to do to defend your client. Do whatever you have
22 to do to pose defenses, especially in a case in which you
23 believe the entire case hinges on suppression of the
24 evidence and there's no defense to that possession
25 charge.

1 THE COURT: What do you think about the
2 blue -- the evaporation or dissipation of the drug?

3 MR. THEOS: Well, what do I think? I think
4 it's possible that drugs -- that there can be evaporation
5 or condensation -- evaporation of wetness, as it was
6 referred to, or liquid, which could have an impact on the
7 weight of the substance; however, there's been no
8 evidence presented. The chemists that did the analysis,
9 why weren't they called? Why weren't they called
10 regarding the protocol they followed? Why weren't they
11 called regarding the tests that they conducted? Why
12 weren't they called whether or not this was wet cocaine?

13 The State certainly could have called them to
14 address all of those issues, and that may have put the
15 issue to rest. So we will never know, apparently,
16 whether or not that cocaine was wet, whether or not there
17 was any liquid or other solvent in that crack cocaine
18 that would have resulted in evaporation or a weight loss
19 over time. We'll never know, but that's not our burden
20 to show.

21 It's the State's burden to show that that is
22 a possibility, or even maybe a probability. To be quite
23 frank, Judge, and candid, I was absolutely surprised that
24 those analysts weren't called to testify, but the State
25 is stuck with it, as are we, and so we have no evidence

1 to support that hypothesis, because that's all it is, is
2 a hypothesis. It's a theory. In the absence of any
3 evidence to support it, then I don't believe --

4 THE COURT: It's your position, the
5 Applicant, that you have the burden of proof. Since you
6 proved that the weight was less than ten grams, you feel
7 as though the burden shifts to them to prove otherwise?

8 MR. THEOS: I think the burden shifts to them
9 to establish or at least attempt to establish the
10 accuracy of their initial weigh, which they didn't do.
11 They didn't do it in the trial. It wasn't challenged at
12 all by Mr. Smiley.

13 THE COURT: So you feel as though the fact
14 that you've shown it was less than ten grams, you've met
15 the burden?

16 MR. THEOS: I do.

17 THE COURT: And it would be incumbent upon
18 them to rebut that.

19 MR. THEOS: Yes, and, perhaps, the answer is
20 the fact that they didn't do so, meaning that they
21 couldn't establish that there was some sort of weight
22 loss during that time frame, and that's how I would look
23 at it. If they could have proven otherwise, they would
24 have put a witness on that stand to testify accordingly.
25 They didn't, which leads me to believe that they couldn't

1 establish that.

2 Now, the last point I will make, Your
3 Honor -- and certainly if Mr. Smiley had done either one
4 of those two, presented -- had an independent test
5 conducted or had Norris testify, he would have had a
6 basis on which to make a request for lesser included
7 offenses. Let's just assume for argument's sake,
8 though -- because I think the question is a good one.
9 Let's assume for argument's sake the State did present
10 evidence today that the test was properly conducted by
11 the city of Charleston and they presented their theory
12 that it was wet and, as such, that that accounted for the
13 decrease in weight.

14 That doesn't have a bearing on whether or not
15 Mr. Smiley was ineffective. At that point in time, if
16 Mr. Smiley had done those things, then he could have
17 still presented that evidence, and then he still would
18 have been able to get a lesser included offense charge.
19 He would have been able to argue to the jury. The jury
20 would have had two options at that point.

21 We don't know what a jury would have done.
22 This jury had one option, and one option only, so even if
23 the State was successful in establishing, in your opinion
24 or otherwise, that the initial test was done, the fact
25 that he didn't have that second test done or put him on

1 the stand deprived Norris, but also deprived the jury of
2 being able to find him guilty of a lesser offense.

3 So I think in that sense it's still
4 ineffective assistance of counsel, so, again, I think
5 they haven't met their burden, which I think shifted to
6 them, but even if they had, I don't think it would matter
7 because he still should have been given that option and
8 he was deprived of that.

9 Lastly, Your Honor, with respect to
10 Mr. Smiley's closing argument, understanding that he
11 didn't present any evidence, understanding he didn't do
12 any of the things we've been discussing, I've been
13 asserting, I have to say -- I didn't want to say it in
14 front of Mr. Smiley, but, again, I know you've presided
15 over hundreds of cases, I'm sure. I've tried hundreds in
16 state and federal courts, and that is undoubtedly the
17 absolute worst, ineffective closing argument I've ever
18 seen in my 35 years.

19 I'm not sure what he said, and I guess, in
20 all fairness to him, he put himself in a position, or he
21 put Norris in a position, that there wasn't anything he
22 could say, but to -- it just didn't make any sense. It
23 didn't make any sense at all, and it probably lasted 30
24 seconds. So I think that although it's a much weaker
25 argument regarding ineffective assistance of counsel, I

1 think when you look at the totality of the three issues;
2 i.e., again, no notice to be there, he wasn't present
3 during jury selection and a good portion of the motion to
4 suppress hearing, and his failure associated with the
5 drugs, coupled with the completely ineffective argument,
6 which was a product of his own ineffectiveness, I think
7 that there's a substantial basis to grant our
8 application.

9 THE COURT: I don't have the time to do that.
10 It would be interesting for us to give you the
11 opportunity to look at the transcript as it was and hear
12 you craft an argument that would have been a lot more
13 effective than that. Really and truly, the evidence, as
14 presented, there's really not a whole lot you can say.

15 MR. THEOS: No, but if you're asking me what
16 argument I would have made, I would have made sure my
17 client was there.

18 THE COURT: I understand all that, and you
19 are claiming that you would have perfected the transcript
20 because you would have done it different. You would have
21 either put him on the stand or tested the drugs.

22 MR. THEOS: I think I could have come up with
23 a better argument than was made.

24 THE COURT: All right. It would be
25 interesting to hear that, but it would be a difficult

1 task. Perhaps it could be done more artfully, is what
2 you're saying.

3 MR. THEOS: Yes.

4 MS. JAMESON: Your Honor, if it may please
5 the Court, I'm going to take the allegations the way that
6 they're are laid out in that order, if that's okay with
7 Your Honor.

8 Regarding the first allegation, that
9 Mr. Smiley failed to stay in touch with the Applicant and
10 properly inform him of his trial date, the State would
11 submit that Mr. Steplight was already on notice of his
12 trial date based on the bond form that he signed. State
13 v. Ferry, which is cited in the appellate documents that
14 are before Your Honor, makes it clear that a bond form is
15 enough notice of a trial date.

16 Additionally, the record is replete with
17 numerous letters from the solicitor's office. The
18 solicitor's office had sent numerous letters in the past
19 year-and-a-half. There might be some dispute about
20 whether they were current, but he certainly received
21 notice over the past year-and-a-half that his trial was
22 nearing the date to go.

23 Additionally, this issue has already been
24 addressed by the Court of Appeals in the direct appeal.
25 Although the State argued that it was not preserved for

1 review, it was not determined for the preservation by the
2 Court of Appeals. The Court of Appeals addressed the
3 merits of it and found that Mr. Steplight had adequate
4 notice and that any alleged error in proceeding -- in
5 going forward with the trial in Applicant's absence was
6 completely harmless, so the State's position is he
7 certainly did not establish any prejudice or any
8 ineffectiveness of Mr. Smiley because the Court already
9 reviewed the record and determined that it was harmless,
10 which is similar to the prejudicial analysis in
11 Strickland in a PCR context.

12 Additionally, there's nothing different Mr.
13 Smiley could have done. He objected numerous times on
14 the record. There's even a comment from Judge Harrington
15 noting that he is vehemently opposed to going forward.
16 He tried to contact Mr. Steplight the week before trial
17 and was not successful on either number that he tried.

18 I don't know what else counsel is supposed to
19 do at that point. He vehemently objected on the record.
20 Judge Harrington ruled they were going forward. At that
21 point, he's kind of tied with his hands to what he can
22 do.

23 Also, the State would submit there is no
24 prejudice -- from Mr. Steplight's own testimony, if he
25 didn't notice the juror that he was complaining of being

1 on his jury by sight, he hasn't spoken to her in years,
2 and so it wouldn't have made much difference if he was
3 there because he testified he didn't know her by sight.
4 It wasn't until afterwards when reviewing this
5 transcript.

6 In addition, it's speculative that this juror
7 had any bad blood with Mr. Steplight because, based on
8 his own testimony, they hadn't spoken in years. They
9 never had a conversation other than hello or goodbye, so
10 the State would submit you can't show prejudice from
11 that.

12 As far as allegation number two, failing to
13 advise Mr. Steplight of the implications of the
14 suppression motion, we don't even need to look at Mr.
15 Smiley's testimony. Page 11 of the record shows that Mr.
16 Smiley tells the Court he wishes his client was there
17 because this has been his client's concern the entire
18 time. Additionally, the testimony of Mr. Smiley is he
19 spoke with Mr. Steplight numerous times about how
20 important this was, so the State would submit that
21 allegation is meritless and it should be denied.

22 Moving to allegation number three, the
23 failure to discuss and prepare a defense of the drugs
24 were for personal consumption, the State submits that
25 based on our drug statute, and the particular one that is

1 relevant here is 44-53-375, it's based on weight, so it
2 wouldn't matter if Mr. Smiley had presented any sort of
3 evidence it was for personal consumption because it's
4 based on weight, based on our drug statute in South
5 Carolina, so the State would submit that should also be
6 denied without merit.

7 Allegation number four, failing to interview
8 witnesses and develop testimony that the drugs were for
9 personal use, again, based on our drug statute, that's
10 really irrelevant. He was found in actual possession
11 of -- the State presented evidence that he was in actual
12 possession of over ten grams of cocaine -- or crack,
13 excuse me, Your Honor, crack cocaine.

14 So what he planned to do with this crack
15 cocaine, whether he planned to distribute it or smoke all
16 over ten grams himself is really irrelevant, and, again,
17 he was in actual possession of more than ten grams of
18 cocaine on his person.

19 Regarding allegation number five, failure to
20 request jury instructions on lesser included offenses,
21 again, based on our statute, trafficking was the only
22 option available based on the evidence presented, and if
23 Mr. Smiley had moved for a lesser included offense, the
24 Court would have denied giving him a lesser included
25 offense because the only evidence presented was that it

1 was greater than ten grams.

2 I understand their argument that he should
3 have pushed through those defenses, but based on the
4 record the whole trial, if they moved, that would have
5 been denied. The Court would not have given those
6 instructions because all the evidence presented
7 established that he was guilty of the greater offense,
8 not any sort of lesser included offenses, such as he
9 would proffer possession.

10 Regarding allegation number six, failing to
11 have the drugs independently tested or analyzed, here, in
12 this case, the drugs were tested within four days of the
13 arrest. The evidence establishes he was arrested on the
14 27th and the drugs were tested on the 31st, and the State
15 submitted that's the most accurate testing that could
16 have been done, not the testing that was done six years
17 later.

18 And Mr. Smiley testified he had no reason to
19 think the weight was not accurate or challenge the
20 weight. He also testified it was not his common practice
21 to ever retest drugs. He had no reason to do so here, so
22 the State would submit the Strickland standard is based
23 on the reasonable prudence of an attorney, and Mr. Smiley
24 was in accordance with Strickland.

25 Also, the evidence presented doesn't

1 establish that the weight was less than ten grams at the
2 time of arrest. It establishes it six years later. They
3 might have been un-ideal circumstances, not a laboratory
4 circumstance. The State would submit the evidence from
5 their two experts tendered, Dr. Bell and Dr. Gordon,
6 about crack's inherent properties show it's likely to
7 lose weight. We have testimony that 30 percent over a
8 six-year time frame is not out of average.

9 Additionally, numerous federal Courts have
10 cited to this principle that crack loses weight over
11 time. U.S. v. Johnson, which is 434 F..2d 301, a 2006
12 case, as well as U.S. versus Thomas, which is cited 11
13 F.3d 2006, it's a 1993 case, those concerned crack's
14 inherent ability to lose weight over time, and the
15 convictions were still upheld, based on the challenge due
16 to weight loss.

17 And, with all due respect to opposing
18 counsel, the State has no burden in a post-conviction
19 relief action. We didn't have a duty to show that the
20 drugs currently still weigh more than ten grams. We
21 didn't have a duty to call the chemist. The State
22 doesn't have a burden in a post-conviction relief action.
23 It's Applicant's burden, and I'm unaware of any case law
24 before the Court that the burden shifts in a
25 post-conviction relief action to the State. I'm unaware

1 of any case law -- I would love to see any case law that
2 supports that kind of argument.

3 The State submits that the burden hasn't
4 shifted. We had no burden here, but even if we had, the
5 State would still submit that based on the testimony
6 presented from Dr. Bell and Dr. Gordon, we stand by the
7 original results from the Charleston lab.

8 And regarding allegation number seven,
9 failing to give an effective closing argument, the State
10 would submit there's overwhelming evidence of guilt here
11 and so no prejudice can be gleaned from the short closing
12 argument of Mr. Smiley.

13 THE COURT: All right. That was done with
14 speed and dispatch.

15 Well, I'm going to ask that each of you
16 submit a proposed order and send it to my office in
17 Florence in its original form. Mail it to me.

18 MR. THEOS: Yes, Your Honor. We intend on
19 asking for an expedited transcript of the hearing.

20 THE COURT: Okay.

21 MR. THEOS: I'd like to have the transcript
22 in preparing a proposed order. I just --

23 THE COURT: You know, this is real fresh, and
24 you have a good command of what's transpired here today.
25 And it might be a luxury, but I'm convinced that you know

1 what the evidence is, you kept copious notes, and I'm
2 convinced you can do that.

3 MR. THEOS: I think we can.

4 THE COURT: All right.

5 MR. THEOS: How much time do we have, Your
6 Honor, to prepare? I would ask for at least ten days.

7 THE COURT: All right. Fourteen days from
8 today's date.

9 MS. JAMESON: Thank you, Your Honor.

10 THE COURT: Good luck to you.

11 MR. THEOS: Thank you.

12 - - -

13 (Whereupon, the proceedings were concluded.)

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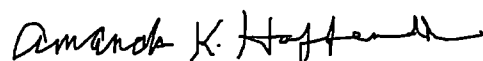
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25

I, the undersigned, Amanda Kelly Haffenden, RPR, CRR, Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 1st of August 2017.

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

January 15, 2018



Circuit Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Norris Steplight, SCDC ID 00279329

Applicant,

v.

State of South Carolina

Respondent.

IN THE COURT OF COMMON PLEAS

Case No.: 2015-CP-10-02362

FILED
2017 JAN 10 PM 4:11
JULIE J. ARMSTRONG
CLERK OF COURT
ORDER

This matter came before the Court on January 9, 2017, upon motion of the Applicant, Norris Steplight, to have an expert inspect, weigh and/or analyze the drugs that are in evidence at the Charleston County Courthouse relative to Applicant's underlying General Sessions matter, case number M611575. Present at the hearing were Jerry N. Theos and Jeff Buncher, Jr., for the Applicant and Alicia A. Olive for the Respondent.

After hearing the arguments of counsel, IT IS HEREBY ORDERED that Applicant's motion is granted and his expert is hereby allowed access to inspect, weigh and/or analyze the drugs that are in evidence relative to case number M611575. Said drugs are presently in the possession of the Charleston County Clerk of Court's Office and, as such, the Clerk of Court is hereby ordered to facilitate said inspection, weighing and/or analysis of the drugs in evidence.

IT IS SO ORDERED on this the 10 day of January, 2017, in Charleston County, South Carolina.

William H. Seals, Jr., Circuit Court Judge



Protocol for Drug Evidence Weighing and Evaluation

Robert Bennett, Ph.D. Forensic Scientist

Phase 1: Equipment & Supplies

Gather needed equipment & supplies -e.g lab notebook, pens, lab coat, safety glasses, latex gloves, camera, towel, large clean paper, scale / balance, calibration weights, moisture meter.

Phase 2: Preparation

1. Wear lab coat, safety glasses, and latex/vinyl disposable gloves.
2. Take photograph of each critical step.
3. Locate, secure, clean, and photograph workspace, free of air drafts, direct sunlight, and vibration.
4. Lay clean towel or paper foundation in workspace.
5. Lay thermometer on workspace and allow to equilibrate with room temperature.
6. Place scale/balance in suitable work area space, Stabilize scale/balance
7. Place calibration weights in work area.
8. Place any other instruments in work area.
9. Take photograph of prepared work area.
10. Record witnesses names: _____
11. _____

Phase 3: Weighing

- Phase 3: Weighing
12. Record ambient temperature. [Temp: ~ 78-79]
13. Record previously reported evidence weight [Weight: 12.48g] [Source: Chas City Police]
14. Use weights that bracket the anticipated weight, i.e. weights that weigh less AND weights that weigh more. [Choices: [wt #1: 10g] [wt 2: 20g] [wt #3:] [wt #4:]
15. If using *their* scale as confirmatory calibration, weigh *our* calibration weights on *their* scale. Record and document weight (wt). [wt #1:], [wt 2:] [wt #3:] [wt #4:] Photograph weighings, if required.
16. Weigh *our* calibration weights on *our* scale. Record and document weight (wt). [wt #1: 9.999], [wt 2: 19.999] [wt #3:] [wt #4:] Photograph weighings, if required. *w/af. on file*
17. Open evidence item. Photograph. Measure dimensions [Height/Length/Width: 8x24cm] *bag 21.649*
18. Tare evidence holder (weigh pan). Place evidence item on *our* scale in weigh pan, allow to stabilize *2nd bag*
19. Take photographs of weight of evidence item on *our* scale. [Record weight: 3.919g + 5.325g] *14.41*
- ~~20. If using *their* scale as confirmatory, Tare weigh pan. Place evidence item on to *their* scale in weigh pan, allow to stabilize. *second bag of evidence* Police weighings 5.266g 7.216g *same wt*~~
- ~~21. Take photographs of weight of evidence item on *their* scale. [Record weight: 5.919g 7.216g *9.244g* 9.781g]~~

Phase 4: Moisture Analysis *N/A*

22. Break, cut, or saw open evidence item in half using alcohol-cleaned tools.
23. IMMEDIATELY measure moisture content in center of cut-opened area.
24. Record and document reading. [Moisture reading: _____]
25. IMMEDIATELY measure moisture in center of OTHER SIDE of opened area. [Moisture reading: _____]
26. Take a photograph of each moisture reading. Inspect, document description, photograph opened area.
27. Record room temperature. [Temp: _____]

Phase 5: Conclusion

28. Clean instruments and tools with alcohol. Allow instruments to dry. Pack equipment. Exit.

Qual. isothiocyanate test
POS(+) for OC



Completed 2/17/17
 Dr. Robert Bennett
 100. BROAD ST
 Charleston, SC



MEDICAL-LEGAL SERVICES
 INDEPENDENT LABORATORY SERVICES
DNA TESTING, DRUG TESTING, AND FORENSIC ANALYSIS
 P.O. Box 32391, Charleston, SC 29417 Phone and Fax (843) 571-7488
 Offices in Greenville, Columbia, Savannah, Florence, Walterboro, Aiken and other cities Statewide

FORENSIC REPORT

CASE DESCRIPTION:

Norris Steplight vs. State of South Carolina

Charleston County Court Case Number: 2015-CP-10-02362

Charleston City Police Department Forensic Division Case number: 1108747

Mr. Norris Steplight was stopped in a vehicle by the Charleston City Police, upon which the Police found Mr. Steplight in possession of drugs. He was charged with trafficking of Cocaine, due to the amount reported as 12.5 grams. Mr. Steplight was convicted of Trafficking of Cocaine and was sentenced to 25 years in prison. He now seeks Post Relief Conviction.

EVIDENCE DESCRIPTION:

Charleston City Police Department Forensic Division Lab Number: 151110885

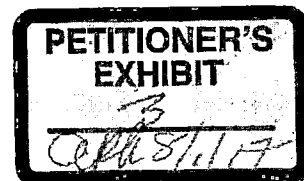
Two plastic bags filled with a rock-like substance, later to be recorded as cocaine base ("Crack"), was submitted and weighed for the case.

REASON FOR INCLUSION OF CASE:

At the request of Mr. Jerry Theos, attorney for Mr. Norris Steplight, I was asked to appear in courtroom setting with witnesses to reweigh the evidence items.

MATERIALS:

- Thermometer
- Protocol Worksheet
- Latex Gloves



- Camera
- Scale / Balance (Mettler Teledo, PB303-1)
- Qualitative Cocaine detection kit

METHODS:

The proceedings were video recorded. Photographs were taken. I initially recorded room temperature, as 71-72°F. Commencement time was recorded as 10:30am. Ending time was recorded as 11:55am. The location was recorded as 100 Broad St. Charleston, SC. Next, I used calibration weights that the witnesses agreed upon. The weights bracketed the expected weight of the evidence. Weight #1 was labeled as 10 grams and weight #2 was labeled as 20 grams. I then recorded the calibrated weight readings as: weight #1 = 9.999 grams, weight #2 = 19.999 grams.

RESULTS:

The evidence item was hand presented to me by representatives of the Charleston City Police. Chain-of-custody was maintained. The evidence bag dimensions were measured and recorded as 8 x 24cm. Afterwards, the two bags were weighed for the total weight of each bag. Bag #1 weighed a total of 21.649 grams and Bag #2 weighed a total of 14.411grams. Next, the contents of the two bags were each placed on the scale, weighed, and recorded as: Bag #1 contents weighed 3.919 grams and bag #2 contents weighed 5.325 grams, for a total evidence weight of 9.244 grams.

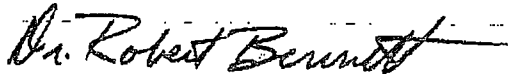
Secondary weighings: The total weight of the evidence items in their Saran wrap container was 9.781 grams. The weight of the two Saran wrap containers totaled 0.535 grams (0.280 + 0.255). Subtracting the weight of the Saran wrap containers from the total (9.781 grams - 0.535 grams) = 9.246 grams, which confirms the weighing of the evidence item only of 9.244 grams. (the 0.002 gram difference is insignificant)

A pinhead size of the evidence was placed in a solution of isothiocyanate, a compound that produces a color change from clear to blue in the presence of Cocaine. The Qualitative Cocaine detection kit was POSITIVE for the presence of Cocaine, by the production of a distinct presence of a blue color.

CONCLUSION:

The evidence item contains Cocaine. The Charleston City Police Forensic Service Division reported the two evidence items to weigh 5.266 grams and 7.216 grams, for a total of 12.482 grams. Reweighing of the two evidence items resulted in weights of 3.919 grams and 5.325 grams, which total 9.244 grams. There is 3.238 gram difference between my evidence weight and Charleston City Police Forensic Division weight. No account for the difference was provided at the time.

Respectfully submitted,

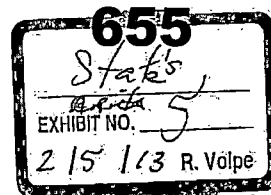
A handwritten signature in cursive script that reads "Dr. Robert Bennett". The signature is written in dark ink and is positioned above the printed name and title.

Robert Bennett, Ph.D.
Forensic Scientist



CHARLESTON POLICE DEPARTMENT
FORENSIC SERVICES DIVISION

180 Lockwood Boulevard
Charleston, SC 29403
(843) 792-4588



CASE NUMBER: 1106747	LAB NUMBER: 151110885	DATE: 31 May 2011	Page: 1 of 1
TO: Officer Sean Engles Team 1	LOCATION: Calhoun & Jonathan Lucas	SUBJECT(S): Norris Steplight	
		VICTIM(S): N/A	

CONFIDENTIAL This is an official report of the Charleston Police Forensic Laboratory and is to be used in conjunction with an official criminal investigation. The items and the results of laboratory examinations are reported below:

ITEM(S) SUBMITTED	RESULTS OF EXAMINATION(S)	METHOD
Plastic bag with rock-like substance	Cocaine base 5.266 grams	3, 4
Plastic bag with rock-like substance	Cocaine base 7.216 grams	3, 4
Plastic bag	No analysis	

On 31 May 2011, the above item(s) were received from Linda Wilson
Laboratory for examination(s). This (these) item(s) was (were) tested using accepted reliable forensic procedures and the above results reflect conclusions based on the examination(s).

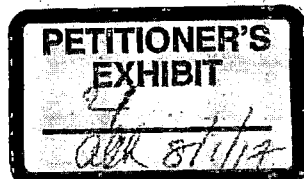
Methods:

1 - Visual Examination	2 - Published Literature	3 - Color Test
4 - FTIR	5 - GC/MS	6 - TLC
7 - Microscopy	8 - Catalytic Test	9 - AP Spot Test
10 - ABACard PSA Test	11 - ABACard HemaTruce	12 - N/A

Linda Wilson
Chemical Analyst

31 May 2011
Date

An ASCLD/LAB accredited laboratory since 1998



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF GENERAL SESSIONS
THE NINTH JUDICIAL CIRCUIT

Norris Steplight, SCDC ID 00279329,
☒ Plaintiff

CASE NO.: 2015-CP-10-02362

v.

MOTION INFORMATION FORM
AND COVER SHEET

State of South Carolina,
☐ Defendant.

Plaintiff's Attorney: Jerry N. Theos, Esquire Bar No.: 5518 Address: 17 1/2 Broad Street Charleston, South Carolina 29401 phone: (843) 723-7491 fax: 577-4179 e-mail: jerry@uricchio.com other:	Defendant's Attorney: Megan Harrigan Jameson, Bar No. Address: P O Box 11549 Columbia, South Carolina 29211 phone: (843) 734-3970 fax: e-mail: other:
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☒ ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: <u>ORDER</u> Estimated Time Needed: _____ Court Reporter Needed: ☐ YES / ☐ NO	
SECTION II: Motion Type	
☐ Written motion attached ☐ Form Motion -- I hereby move for relief or action by the court as set forth in the attached proposed order.	
<u>Jerry N. Theos</u> Signature of Attorney for ☒ Plaintiff / ☐ Defendant <u>9/18/17</u> Date submitted	
SECTION III: Motion Fee	
☐ PAID – AMOUNT: ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:	
JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE _____ CODE: _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____	
☐ MOTION FEE COLLECTED: _____	

STATE OF SOUTH CAROLINA)
 COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT

Norris Steplight, SCDC ID 00279329,)

2015-CP-10-02362

Applicant,)

v.)

ORDER

State of South Carolina,)

Respondent.)

FILED
 2017 SEP 18 PM 4:20
 JULE J. ARMSTRONG
 CLERK OF COURT
 BY _____

THIS MATTER came before the Court on August 1, 2017. Present at the hearing for the Applicant were Norris Steplight and his attorneys Jerry N. Theos and Jeff Buncher, Jr. Present at the hearing for the Respondent were attorneys Megan Jameson and Judah VanSyckel.

PROCEDURAL BACKGROUND

On May 28, 2011, Applicant was arrested and charged with Trafficking in Cocaine Base, more than 10 grams, but less than 28 grams, 3rd offense. Applicant's case was called for trial on February 4, 2013, and Applicant was found guilty of said offense on February 5, 2013. Applicant was sentenced to the mandatory minimum of 25 years and a \$50,000.00 fine was imposed. Applicant filed his Notice of Intent to Appeal on February 13, 2013. On April 30, 2014, the South Carolina Court of Appeals issued an unpublished opinion affirming Applicant's conviction. On April 27, 2015, Applicant timely filed his Application for Post-Conviction Relief. Respondent's Return to the application was filed on February 9, 2016. Applicant thereafter filed an Amended Application for Post-Conviction Relief on December 16, 2016. On January 10, 2017, the Honorable William H. Seals, Jr., entered an Order allowing Applicant to have an expert inspect and/or analyze the drugs that were the subject of Applicant's underlying criminal trial. (Exhibit 1).

FACTS

At the PCR hearing, the Applicant testified that he purchased only nine (9) grams of cocaine base for a total purchase price of \$300.00. Applicant further testified that he advised his trial counsel, James Smiley, that he had purchased less than ten (10) grams of cocaine base. Although he testified that he did not recall Applicant advising him as such, he did not refute it. Mr. Smiley acknowledged in his testimony that once the pre-trial motion to suppress was lost, the only defense Applicant would have had at trial was to show that he possessed less than ten (10) grams of cocaine base, such that he would have been entitled to a jury charge on the lesser included offense of possession with intent to distribute. Mr. Smiley further acknowledged in his testimony that if Applicant told him that he purchased nine (9) grams of cocaine base, that he erred in failing to pursue a different trial strategy than the one he employed.

With respect to Applicant's absence at the commencement of the trial and, in particular during the selection of the jury, Applicant's bondswoman, Angelica Desassure-Cooper, testified that she received a telephone call from Mr. Smiley on February 4, 2013, the first day of Applicant's trial. Mr. Smiley asked her to contact Applicant and advise him to go to the courthouse; however, to not let him know that his trial was already underway. Mrs. Desassure-Cooper then called Applicant, but, notwithstanding Mr. Smiley's request, advised him that his trial was, in fact, underway. This was Applicant's first notice that his trial was scheduled for that day and that it had already commenced. Upon receiving the phone call from Mrs. Desassure-Cooper, Applicant dressed and traveled directly to the courthouse. By the time Applicant arrived at the courthouse, his jury had been selected and a substantial portion of the pre-trial motion to suppress had already been heard. Mr. Smiley testified that the notice to Applicant provided by

Ms. Desasure-Cooper was, indeed, the first and only notice Applicant received that his case was scheduled for trial that day.

Applicant testified that juror number 373, Shalanda Wright, was a juror that he knew, that he had 'bad-blood' with and that he would have stricken her as a juror had he been present. Applicant did not tell the Court or Mr. Smiley that he knew Shalanda Wright as he did not recognize her (from her appearance) at the time of trial. The first time Applicant realized that Shalanda Wright was one of the jurors was when he read his trial transcript and saw her name. Mr. Smiley testified that if Applicant had told him that he knew Shalanda Wright and that he desired her to be stricken as a juror due to 'bad-blood', he would have stricken her as a juror.

During the course of the trial, Mr. Smiley made several motions to continue the case due to Applicant's absence. In continuing with Applicant's trial, the trial judge stated "I have heard nothing that indicates to me that Mr. Steplight was not given notice of today." (Tr. Vol. I of II: 45:12-13). Mr. Smiley failed to inform the Court at that time that he did not, in fact, give Applicant notice of the trial. To the contrary, Mr. Smiley advised the Court that he had sent Applicant a letter advising him of his trial date (Tr. Vol. I of II; 77:15). Mr. Smiley testified that this was not, in fact, the case and that he had not sent Applicant such a letter. He further ~~acknowledged that said representation to the Court was erroneous. Mr. Smiley further testified~~ that Applicant had appeared at the courthouse on numerous other occasions when Applicant had been provided written notice to be there. Mr. Smiley testified that he had attempted to call Applicant the week before to let him know his case was on the trial docket for the week of February 4, 2013, but did not reach Applicant. Mr. Smiley further testified that he did not think he needed to immediately contact Applicant as Applicant's case was behind a 'solid' week-long murder trial. Mr. Smiley admitted in his testimony that he did not reach Applicant, either orally

or in writing, to advise him that he was on the trial docket for the week of February 4, 2013, again, despite the fact that the record reflects that Mr. Smiley advised the Court that Applicant had received a letter from him. (Tr. Vol. I. of II: 77:15). With respect to the issue associated with the weight of the drugs, the alleged weight of the drugs as set forth in trial Exhibit 4, and relied upon in the prosecution of the criminal trial, was 12.482 grams. The City of Charleston forensic laboratory report for the drugs states that the items submitted for testing were "Plastic bag with rock-like substance." (Exhibit 4). Mr. Smiley admitted that he did not consider weighing the drugs prior to trial. Pursuant to the aforementioned Court order (Exhibit 1), Dr. Robert Bennett, engaged by Applicant's PCR counsel, tested the weight of the cocaine base at the Charleston County Courthouse on February 17, 2017. The testing was captured on videotape by private investigator Dick Vance, a retired Lieutenant and former head of the Charleston Police Department Narcotics Division. (Exhibit 5). The drugs were contained in two (2) individual packages: the contents of bag 1 revealed a weight of 3.919 grams and the contents of bag 2 revealed a weight of 5.325 grams, for a combined weight of 9.244 grams. (Exhibit 3). Mr. Smiley acknowledged that if the drugs were under ten (10) grams, Applicant would have been entitled to a jury charge on the lesser included offense of Possession With Intent to Distribute Cocaine Base. Further, Mr. Smiley acknowledged that, as such, he would also have attempted to negotiate a better plea agreement based upon the weight of the drugs being less than ten (10) grams. In addition to Dr. Bennett's testimony, his preparation sheet (Exhibit 2) and report (Exhibit 3) were entered into evidence thereby documenting and corroborating the aforementioned test results. The State presented two expert witnesses at the hearing, Captain Wendy C. Bell, Ph.D., from SLED and Judy Gordon, Forensic Services Director at City of

Charleston. Both Dr. Bell and Ms. Gordon testified that they had no reason to dispute the weight of the drugs as set forth by Dr. Bennett.

In an effort to provide an explanation for the disparity (decrease) in the weight of the drugs between the originally tested weight and Dr. Bennett's tested weight, Dr. Bell and Ms. Gordon set forth the hypothetical theory that if the cocaine base was "wet" or contained a solvent, then the weight of the cocaine base could decrease over time. However, neither Dr. Bell or Ms. Gordon could testify that the cocaine base in this case was "wet" or contained a solvent at the time of the original testing. Further, the State did not present any witnesses regarding either the original testing of the drugs or the condition of the drugs at the time of the original testing (i.e., whether the cocaine base was "wet" or contained a solvent).

LAW

1. PCR Standard

In a PCR proceeding, the Applicant bears the burden of establishing that he is entitled to relief. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). There is a two-prong test for evaluating claims of ineffective assistance of counsel. First, a PCR Applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); *Alexander v. State*, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991). Second, an Applicant must show there is a reasonable probability, but for counsel's unprofessional errors, that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; *Alexander*, 303 S.C. at 541-42, 402 S.E.2d at 485. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

2. There is a reasonable probability that had Applicant been provided notice by trial counsel that his trial was scheduled and had he been present, the proceeding would have been different.

"One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." *Illinois v. Allen*, 397 U.S. 337, 338 (1970); *see also, e.g., Rushen v. Spain*, 464 U.S. 114, 117 (1983), *overruled on other grounds*; *Ellis v. State*, 267 S.C. 257, 260, 227 S.E.2d 304, 305 (1976) (citing *Allen*) ("[T]he Sixth Amendment of the U.S. Constitution guarantees the right of the accused to be present at every stage of his trial, and is applicable to the States by reason of the Fourteenth Amendment. . . ."); S.C. Const. art. I, § 14 ("[A defendant has the right] to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both.").

The Supreme Court of the United States has made clear that a defendant's right to be present extends to jury selection, because his presence at that critical stage "bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend." *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) *overruled on other grounds by Mallory v. Hogan*, 378 U.S. 1 (1964); *see also id.* (observing that "it will be in [the defendant's] power, if present, to give advice or suggestion or even to supersede his lawyers altogether." (citing *Lewis v. United States*, 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1892))); *Gomez v. United States*, 490 U.S. 858, 873 (1989) (affirming that jury selection is "a critical stage of the criminal proceeding during which the defendant has a constitutional right to be present," and recognizing that it is "the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability."); *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (observing that defendant's presence at jury

selection has a "reasonably substantial" relation to his "opportunity to defend against the charge.").

It is equally well established that a proceeding on the admissibility of evidence against the accused constitutes a critical stage at which the defendant's presence is guaranteed. *See, e.g., Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004) ("The Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process."); *Kimmelman v. Morrison*, 477 U.S. 365 (1986), *overruled on other grounds* (Sixth Amendment right to effective assistance of counsel mandates competent representation in connection with motions to suppress unlawfully obtained evidence); *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) ("[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.").¹

An accused's right to be present at both jury selection and a pretrial motion to suppress derives from the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and S.C. Const. art. I, § 14, which provides that: "[a defendant has the right] to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both."

In *Commonwealth v. Campbell*, 83 Mass. App. Ct. 368, 369, 983 N.E.2d 1227 (2013), Campbell appealed from his convictions contending that he was deprived "of his right to be present at a critical stage of the proceedings, specifically at a hearing on the motion to suppress."

¹ *See also, e.g., Commonwealth v. Campbell*, 83 Mass. App. Ct. 368, 374, 983 N.E.2d 1227 (2013) (citing *Stincer, supra*) ("The United States Supreme Court has made clear that when a hearing involves evidence that is going to be used against the defendant at trial to prove his guilt, he has the right to a fair and just hearing under due process and his presence assures that result -- because he can consult with his lawyer, listen to the evidence, and assess the credibility of the witnesses (and the evidence) against him. In addition, his ability to have the full assistance of counsel may turn on his opportunity to see the evidence against him, with counsel, and to consult with counsel about the evidence and to better defend himself at trial.").

In deciding whether Campbell's deprivation of his right to be present at the pretrial motion to suppress was harmless beyond a reasonable doubt, the court noted that in a pretrial motion to suppress, the defendant "has the opportunity to listen to the strength (or weakness) of at least a part of the government's case and to assess the witnesses. He has the ability to consult with his attorney and, as a participant in the event under examination, offer a unique perspective." *Id.* At 373-74. In finding that the Commonwealth had not met its burden proving that the error was harmless beyond a reasonable doubt, the court stated that "the motion to suppress concerned evidence that was used against the defendant at trial and was the basis for his conviction. In these circumstances it is not for an appellate court or a motion judge to determine how a defendant's presence at a critical stage which concerns the evidence against him could have assisted his over-all defense. *Id.* at 374. *See also State v. Grey*, 256 N.W.2d 74, 77 (Minn. 1977) (defendant's absence at a hearing on a motion to suppress, a critical stage, was not harmless beyond a reasonable doubt because it is impossible on the record to determine what contribution or assistance to counsel defendant could have rendered had he been present to hear the oral testimony of the officer).

In *State v. Irby*, 170 Wn.2d 874, 877, 246 P.3d 796 (2011), the issue before the court was whether the trial court violated defendant's right to be present at trial by conducting a portion of the jury selection process by e-mail in defendant's absence. The court determined that the State did not meet its burden proving that the error was harmless beyond a reasonable doubt as the State could not show that the jurors excused in Irby's absence had no chance to sit on Irby's jury. *Id.* at 886. Likewise, in *USA v. Gordon*, 829 F.2d 119, 122-23, 264 U.S. App. D.C. 334 (1987), the court had to determine whether the trial court's impaneling a jury in Gordon's absence violated Gordon's rights. The court found that Gordon had a Fifth Amendment right to be

present at voir dire and noted that " 'what may be irrelevant when heard or seen by [defendant's] lawyer may tap a memory or association of the defendant's which in turn may be of some use to his defense.' " *Id.* at 124. In finding that the government did not meet their burden of showing that the error was harmless beyond a reasonable doubt, the court noted that Gordon did not observe a prospective juror, did not hear a single response to the court's questioning of jurors and did not participate in a single peremptory challenge. *Id.* at 128. The court further stated that "A defendant [] who does not make his appearance until midway through the first day of his trial is surely noticed by the jury, and it is not beyond a reasonable doubt that 'the jury speculated adversely to the defendant about his absence from the courtroom.' " *Id.* (citation omitted).

While Mr. Smiley moved for a continuance because Applicant was not present, the trial court was not presented with the fact that Applicant had neither received oral nor written notice from Mr. Smiley to be present for trial. To the contrary, the record shows that Mr. Smiley told the court that he had given Applicant a letter to be in court. Mr. Smiley acknowledged at the PCR hearing that he did not give Applicant a letter or oral notice and thus that he had not, in fact, provided any notice to Applicant. The trial court's denial of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion resulting in prejudice to the appellant. *State v. Williams*, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996).

In Applicant's direct appeal from his conviction, the Court of Appeals affirmed in an unpublished opinion dated April 30, 2014, on the basis that Applicant's absence from trial was harmless. The Court cited the cases of *State v. Fairey*, 374 S.C. 92, 100, 646 S.E.2d 445, 448 (2007), *State v. Shuler*, 344 S.C. 604, 626, 545 S.E.2d 805, 816 (2001), *State v. Gillian*, 360 S.C. 433, 455, 602 S.E.2d 62, 74 (Ct. App. 2004) and *State v. Whaley*, 290 S.C. 463, 465, 351 S.E.2d 340, 341 (1986). These cases stand for the basic proposition that: (1) a defendant cannot

voluntarily absent himself from the hearing and later claim error; and, (2) unless a defendant can show prejudice from his absence from the hearing, the error is harmless.

On August 16, 2017, the Court of Appeals issued an opinion in *State v. Wrapp*, Op. No. 5510 (S.C. Ct. App. filed August 16, 2017). The issue in *Wrapp* was whether Wrapp voluntarily waived his right to be present at trial and to be tried in his absence. Neither the State nor defense counsel provided any direct evidence indicating Wrapp had notice of the term of court in which his case would be tried. Notably, the Court of Appeals held: “It seems logical that for one to voluntarily fail to attend trial or otherwise waive his trial appearance, one must actually know when the trial is to occur.” Further, the Court of Appeals stated that it “need not undertake a harmless error analysis when, as here, the trial court erred in failing to make the requisite findings and the record is devoid of facts allowing us to discern whether Wrapp had notice of the term of court.” See *State v. Jackson*, 290 S.C. 435, 436–37, 351 S.E.2d 167, 167 (1986) (remanding for a new trial because there was no evidence in the record that the defendant was given notice of his trial and neither defendant nor his counsel were present at trial); *State v. Simmons*, 279 S.C. 165, 166–67, 303 S.E.2d 857, 858–59 (1983) (remanding for a new trial because the record was devoid of facts showing defendants had notice of their trial); see also *Ritch*, 292 S.C. 75, 354 S.E.2d 909; *State v. Fleming*, 287 S.C. 268, 335 S.E.2d 814 (1985).

In the instant case, the issue is not whether the trial court made the adequate findings, but whether the trial court had been provided accurate information to properly determine whether Mr. Steplight voluntarily waived his right to be present. While trial counsel represented to the trial court (Tr. Vol. I of II; 77:15) that Mr. Steplight had a letter advising him of the trial date, that was, in fact, not true. To the contrary, Mr. Smiley testified that he had not, in fact, provided Mr. Steplight with written notice or oral notice. Mr. Steplight had however appeared on

numerous other occasions for trial. The fact that Mr. Steplight did not have notice of the trial was further corroborated by the testimony of the bondswoman, Angelica Desassure-Cooper, whose testimony was that her phone call to Mr. Steplight was the first notice he had of the trial. Mr. Steplight immediately arrived at the court house upon notice that his trial was underway. Had the trial court been provided with accurate information, namely, that Mr. Steplight had not been given notice of his trial, the trial would have been continued thereby affording him the opportunity to participate in the selection of his jury and his pre-trial motion to suppress. Based upon the foregoing, the evidence is clear that Applicant did not voluntarily absent himself from his trial.

The *Wrapp* case further sets forth that a harmless error analysis need not be undertaken. Applicant can, nonetheless, show prejudice from his absence. The Court of Appeals did not have the benefit of Applicant's testimony that a juror was chosen with whom he had 'bad-blood' and whom he would have desired stricken and advised Mr. Smiley accordingly. Mr. Smiley testified that if Applicant had told him that, he would have stricken that juror. Further, Mr. Smiley acknowledged that there may have been different jurors stricken or selected had the Applicant been present to participate in jury selection. In addition, Applicant did not have an opportunity to observe, or participate in, the first phase of his motion to suppress. Indeed, if Applicant had seen the first portion of the pre-trial motion to suppress, he would, at the very least, have been in a better position to understand and evaluate the ten year plea offer which had been proposed by the State, as well as to determine whether he should testify in his own defense.

Moreover, as in *Irby*, jurors were excused in Applicant's absence. (Tr. Vol. I of II: 51:6-53:11, 57:16-59:14, 62:18-25, 63:3-9, 66:9-16, 66:19-67:1, 70:6-13). Furthermore, like *Gordon*, Applicant did not observe a single juror, did not hear the court's questioning of the prospective

jurors or their responses, nor did Applicant have the opportunity to participate in a single peremptory challenge in his trial. Finally, Applicant did not make his first appearance in front of the jurors until the day after jury selection.

Applicant was prejudiced by the denial of the continuance as he was not allowed to participate in the selection of his jury and he was not allowed to participate in the entirety of the pre-trial motion to suppress. If the trial court had been informed that Applicant had not, in fact, been notified of his trial date, there is a reasonable probability that the trial would have been continued. As such, Applicant was prejudiced by his trial counsel's failure to notify him, either orally or in writing, that his case was up for trial. Further, had the trial Court been fully and accurately informed of the facts regarding notice of Applicant's trial date, the Court would have in all probability continued the trial or not commenced the trial until Applicant appeared. Applicant would have thus been present and therefore able to observe and participate in the selection of his jurors and fully participate in the pre-trial motion to suppress.

3. There is a reasonable probability that had trial counsel sought and presented expert testimony as to the weight of the cocaine base, the proceeding would have been different.

Applicant was charged and convicted of trafficking in cocaine base, more than 10 grams but less than 28 grams, and sentenced to a mandatory minimum of 25 years and a fine of \$50,000.00. S.C. Code § 44-53-375(C)(1). The sentence for possession with intent distribute, more than 1 gram but less than 10 grams, is no less than ten years nor more than thirty years, or a fine of no more than fifty thousand dollars, or both. S.C. Code § 44-53-375(B). The difference between the two crimes is significant in that trafficking cocaine base is classified as a violent offense.

"The test for determining when a crime is a lesser included offense of the crime charged is whether the greater of the two offenses includes all the elements of the lesser offense. If the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater." *State v. Bland*, 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1995) (internal citations omitted). Possession with intent to distribute is a lesser included offense of trafficking. There must be evidence that the defendant committed the lesser-included offense to entitle him to a jury charge on the offense. *State v. Mathis*, 287 S.C. 589, 594, 340 S.E.2d 538, 541 (1986).

Pursuant to a Court order, Dr. Bennett, Applicant's expert, inspected and analyzed the drugs on February 17, 2017. His testing revealed that the weight of the drugs totaled 9.244 grams, less than the 10 or more grams required for the offense of trafficking cocaine base. Mr. Smiley testified that he could have had the drugs weighed, but he admitted he did not. The State's witnesses set forth a theory that the drugs could have decreased in weight if they had been "wet" or contained a solvent. However, none of the State's two expert witnesses could testify that the specific drugs in this case were "wet" or contained solvent at the time they were originally tested and weighed. Further, none of the original analysts of the drugs were presented as witnesses. As such, no testimony was presented that the drugs were "wet" or contained solvent as hypothesized by the State's two expert witnesses. Further, the State presented no forensic evidence to account of the discrepancy in weights. Finally, the State's witnesses did not disagree with the weight of the drugs as determined by Dr. Bennett.

As the weight of the drugs was a key issue in the underlying case, it would have been reasonable for trial counsel to have the drugs independently weighed by an expert. Applicant was prejudiced by trial counsel's failure to have the drugs weighed as there is a drastic disparity

between a conviction for trafficking cocaine base versus possession with intent to distribute cocaine base. Applicant would have been entitled to a jury charge on the lesser included offense of possession with intent to distribute cocaine base, third offense. There is thus a reasonable probability that Applicant would have been convicted of the lesser included offense.

4. There is a reasonable probability that had trial counsel presented evidence that Applicant possessed less than 10 grams of cocaine base, the proceeding would have been different.

As stated in paragraph 3, possession with intent to distribute cocaine base is a lesser included offense of trafficking in cocaine base. As actual or constructive possession was not an issue in the underlying criminal trial, the only defense trial counsel had would have been to challenge the weight of the drugs. Applicant testified at the PCR hearing that he purchased nine (9) grams of cocaine base. Mr. Smiley did not refute Applicant's assertion. Had Mr. Smiley presented evidence, through the testimony of Applicant and/or an expert witness, that the weight of the drugs possessed by Applicant was less than 10 grams of cocaine base, Applicant would have been entitled to a charge on the lesser included offense of possession with intent to distribute cocaine base.

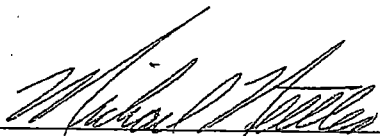
Applicant was therefore prejudiced by trial counsel's failure to introduce evidence or testimony that the weight of the drugs was less than ten (10) grams, as there are drastic distinctions between a conviction for trafficking cocaine base versus possession with intent to distribute cocaine base. Based upon the above, there is a reasonable probability that the result of the trial would have been different.

CONCLUSION

Based upon the foregoing, the Court finds and concludes that Applicant's trial counsel was ineffective and that, but for said ineffectiveness, there is a reasonable probability that the

result of the trial would have been different. As such, the Applicant was thereby prejudiced. I therefore hereby order that Applicant's Post-Conviction Relief application is GRANTED, and that Applicant is entitled to and hereby granted a new trial.

AND IT IS SO ORDERED on this the 6 day of Sept, 2017, in Charleston County, South Carolina.


The Honorable Michael G. Nettles,
Presiding Circuit Court Judge
Ninth Judicial Circuit

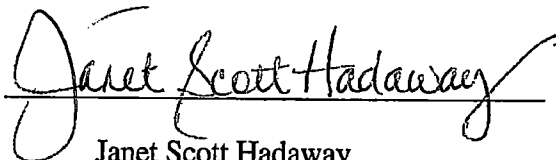
ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., C.S. & F.C.
By 
DEPUTY CLERK

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing has been served upon opposing counsel, via email communication and U.S. Mail, a copy properly addressed to the following address this 18th day of September, 2017:

VIA U.S. MAIL AND EMAIL

Megan Harrigan Jameson,
Senior Assistant Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Mjameson@scag.gov

A handwritten signature in cursive script, reading "Janet Scott Hadaway", written over a horizontal line.

Janet Scott Hadaway
Legal Assistant to Jerry Theos

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

NORRIS STEPLIGHT, #279329)

Plaintiff,)

vs.)

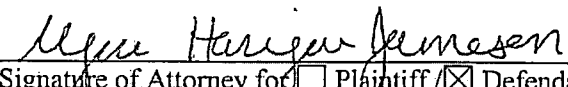
STATE OF SOUTH CAROLINA)

Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO: 2015-CP-10-2362

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: Jerry Nicholas Theos, Bar No. Uricchio Howe Krell Jacobson Toporek Theos & Keith, PA Address: PO Box 399 Charleston, SC 29402-0399 Phone: _____ Fax: _____ E-mail: _____ Other: _____	Defendant's Attorney: Megan Harrigan Jameson, Bar No. Address: PO Box 11549 Columbia, SC 29211 Phone: _____ Fax: _____ E-mail: _____ Other: _____
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: ☐ YES / ☒ NO	
SECTION II: Motion/Order Type	
☐ Written motion attached ☒ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for ☐ Plaintiff / ☒ Defendant September 28, 2017 Date submitted	
SECTION III: Motion Fee	
☐ PAID – AMOUNT: \$ _____ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☒ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____	
JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED – AMOUNT DUE: \$ _____	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
Norris Steplight, SCDC No. 279329,	)	Case No. 2015-CP-10-2362
	)	
Applicant,	)	RESPONDENT'S MOTION TO
	)	RECONSIDER, ALTER, OR AMEND
v.	)	PURSUANT TO RULE 59(e), SCRC
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent ("the State"), by and through undersigned counsel, making its Motion to Reconsider, Alter, or Amend, pursuant to Rule 59(e), SCRC, would respectfully show unto this Court:

PROCEDURAL HISTORY

This matter comes before this Court by way of an application for post-conviction relief filed April 27, 2015, by Norris Steplight (Applicant) alleging trial counsel was ineffective for failing to inform him of his trial date. Respondent made its Return on February 5, 2016, requesting an evidentiary hearing be held. Thereafter, on December 14, 2016, Applicant, through counsel, filed an amended application alleging seven grounds of ineffective assistance of counsel.

An evidentiary hearing into the matter was convened August 1, 2017, at the Charleston County Courthouse. Applicant was present at the hearing and represented by Jerry Theos, Esquire. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. Applicant testified on his own behalf and presented testimony from four witnesses. The State presented testimony from trial counsel and two additional witnesses. At the conclusion of the hearing, this Court requested

proposed orders from both parties. Applicant and Respondent both submitted proposed orders on August 15, 2017. Following the submission of proposed orders as requested by the Court, Applicant requested the Court consider the recent opinion from the Court of Appeals, State v. Stanley Lamar Wrapp, Op. No 5510 (S.C. Ct. App. filed Aug. 16, 2017), where the Court of Appeals reversed Wrapp's convictions and remanded his case back to the court of general sessions for a new trial after finding the trial court erred in allowing Wrapp's trial to proceed in his absence without a making a factual finding that he had actual notice of his trial date or that he could be tried in his absence. This Court asked both parties to submit amended orders addressing Wrapp. On September 5, 2017, both Respondent and Applicant submitted amended proposed orders.¹

On September 6, 2017, this Court signed Applicant's proposed order granting post-conviction relief on September 6, 2017. This order was filed by the Charleston County Clerk of Court on September 18, 2017. Respondent received copy of the order by electronic mail on September 18, 2017, and on September 19, 2017 by U.S. Mail. This motion to reconsider, alter, and amend follows.

ARGUMENT IN SUPPORT OF RECONSIDERATION

Respondent moves this Court to reverse its earlier decision and deny post-conviction relief where Applicant failed to meet his burden as set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, an applicant must first prove that counsel's performance was deficient as measured by its "reasonableness under professional norms." Id. Second, an applicant must establish that counsel's deficient performance prejudiced the applicant such that "there is a

¹ Respondent sent both proposed orders of dismissal (titled "Proposed Order of Dismissal" and "Amended Proposed Order of Dismissal") to the Charleston County Clerk of Court's office to be filed with an accompanying motion coversheets. However, Respondent was informed that the clerk's office refused to file either proposed order. A review of the public index for this case reflects that the clerk's office did not file either proposed order submitted by Respondent. Respondent has attached a copy of each proposed order to this motion as exhibits.

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.

In its order granting post-conviction relief, this Court found trial counsel was ineffective for: failing to adequately advise Applicant of his trial date and failing to have the drug evidence reanalyzed by an independent expert and present that testimony at trial.

Respondent respectfully asserts Applicant has failed to carry his requisite burden of proof regards to each prong for each of these allegations. In support of this motion, Respondent has attached its Proposed Order of Dismissal and Amended Proposed Order of Dismissal, setting forth its argument as to why this Court should deny post-conviction relief. Respondent requests that the arguments set forth in its proposed Order be incorporated fully into this Motion. Specifically, Respondent draws this Court's attention to the following:

Applicant failed to establish trial counsel was ineffective for failing to adequately advise him of his trial date

In his application for post-conviction relief, Applicant alleges trial counsel was ineffective for failing to adequately communicate with him regarding his trial date and allowing his trial to proceed forward without him present for all pre-trial hearings and jury selection. Specifically, Applicant alleges: "Applicant was not informed by trial counsel that he was up for trial. Applicant did not know his trial was under way until the bondsman informed Applicant later in the day on February 4, 2013. Upon being informed by the bondsman that his trial had begun, Applicant went straight to the court house. Applicant's entire jury was chosen without any input from Applicant. A member of the jury panel that was subsequently chosen to sit on Applicant's jury previously knew Applicant. Additionally, a majority of the pre-trial motion to suppress was conducted outside of Applicant's presence. Applicant had a constitutional right, as

guaranteed by the Fifth, Sixth and Fourteenth amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution, to be present during jury selection and his pre-trial suppression hearing. Counsel's failure to keep Applicant informed of his trial date was ineffective, resulting in prejudice to Applicant." (Amended APCR).

The record is replete with evidence clearly refuting this allegation. At 12:00 p.m. on Monday, February 4, 2013, the State called Applicant's case for trial. (Tr. 4). Applicant's counsel appeared in court and informed the trial court that his client was not present, had always been available in the past, had a non-working phone number on which counsel had left messages, and was currently being sought by his bondsman. (Tr. 4). When the trial court suggested picking the jury right then, defense counsel stated, "I'll have to pick without a client." (Tr. 5). He then stated, "I'm fine to go ahead and pick a jury. I would just ask, in an abundance of caution, if the murder case does take too long, that we don't swear the jury." (Tr. 5). The trial court agreed not to swear the jury. (Tr. 5). The trial court inquired what time Applicant was told to be there, and the assistant solicitor indicated the letters defendants receive request they arrive on Monday morning at 9:00 a.m. (Tr. 6). Trial counsel informed the trial court he was certain his client "had gotten a dozen letters over the last year and a half" and he "had never had a problem with him not showing up." (Tr. 6). He elaborated, "The only reason he's not here, is the number that he—he's changed phones three or four times. The last number I had, I called. It was disconnected. I called every other number, left messages. Then this morning, I contacted the bondsman—" (Tr. 6). Trial court stated Applicant's pre-trial motions would begin at 1:30 p.m. and broke for lunch at 12:30 p.m. (Tr. 10).

The trial court began Applicant's suppression hearing at 1:30 p.m., noting counsel's vehement objection to continuing without his client present. (Tr. 10). Trial counsel thanked the

court for noting his objection to going forward without Applicant present and stated, "I surely wish [Applicant] was here, so he could hear this part because this is what he has complained about the whole time. And just for the record, he has shown up—and Ms. Linder—he has shown up at least a half dozen times. This has been on the docket for an excess of a year. One time—. . . It's been called several—it's been close to being called several—it was actually called once, when I got Rocky Mountain Spotted Fever on Memorial Day, in front of Judge Nicholson, and we weren't able to go forward. So it's had stops and starts. And my client—that's why I said, he's not intentionally missing court. I feel like I've—I've done something wrong because he's not here, because I know he wants to be present. I understand this Court's position too. He has a letter and all. But I've usually never had a problem reaching him." (Tr. 11-12) (emphasis added). The trial court asked where the bondsman was, and counsel explained the bondsman had been trying to locate Applicant since 8:30 a.m. that morning. (Tr. 12).

Following this discussion, the State called Investigator Engles and began the suppression hearing. At 2:33 p.m., the trial court suspended the hearing to pick a jury for another case. (Tr. 44). At 2:50 p.m., the proceedings continued and Applicant was still not present. (Tr. 44-45). The following exchange took place:

[Trial counsel]: I do need to put on the record that I've asked you for a continuance because my client is not present, and that you've ruled against me and that we're going forward.

The Court: All right. At this stage and at every stage from now on, Mr. Smiley, I'm going to give you a continuing objection.

[Trial counsel]: Thank you.

The Court: We are continuing without your client, but I have heard nothing that indicates to me that [Applicant] was not given notice of today. So we are going to - - here's what we're going to do. We're going to pick the jury, let the jury go, and we'll start in the

morning. We're going to finish our pretrial motions and then give you a chance to e-mail your client.

(Tr. 45). The trial court then began jury selection. (Tr. 45-46).

At 3:51 p.m., Applicant arrived at the courthouse. (Tr. 77). Trial counsel explained to the trial court:

[Applicant] arrived when I was downstairs, and I had an opportunity to explain to him what has happened so far and the details. He's now present. He just didn't know. The bondsman found him; he came immediately. He apologizes, even though, I guess, technically, I need to have gotten in touch with him. He did get a letter from me. But he'd gotten so many of them, he didn't realize this case would be first this morning. We apologize, your Honor.

(Tr. 77) (emphasis added). The trial court then continued the suppression hearing. (Tr. 77).

During the evidentiary hearing, trial counsel testified he attempted to contact Applicant the week prior to Applicant's trial by telephone but was unable to reach him. He testified he attempted to get in touch of Applicant without success, and then called his bondswoman and asked her to track down Applicant to get him to the courthouse as soon as possible. He testified he objected to going forward without his client present numerous times and Judge Harrington made it clear the trial was proceeding forward. Counsel testified that at that point, there was nothing else he could do to prevent the trial from going forward. He testified Applicant was not present for jury selection or the first witness in his suppression hearing, but he was present for the rest of pre-trial and all of his trial.

In its order granting relief, this Court found trial counsel was ineffective for failing to provide the trial court with accurate information to properly determine whether Applicant waived his right to be present. The order overly focuses on whether trial counsel provided Applicant with written documentation of his trial date while ignoring the numerous references in both the

trial transcript and testimony presented at the evidentiary hearing that trial counsel attempted to contact Applicant numerous times prior to the start of his trial. The order also references that trial counsel was untruthful with the trial court. See Order Granting Relief p. 9, 10 (“While Mr. Smiley moved for a continuance because Applicant was not present, the trial court was not presented with the fact that Applicant had neither received oral nor written notice from Mr. Smiley to be present for trial. To the contrary, the record shows that Mr. Smiley told the court that he had given Applicant a letter to be in court. Mr. Smiley acknowledged at the PCR hearing that he did not give Applicant a letter or oral notice and thus that he had not, in fact, provided any notice to Applicant.” and “While trial counsel represented to the trial court (Tr. Vol. I of II; 77:15) that Mr. Steplight had a letter advising him of the trial date, that was, in fact, not true. To the contrary, Mr. Smiley testified that he had not, in fact, provided Mr. Steplight with written notice or oral notice.”) (emphasis added). Essentially, this Court has found trial counsel, an officer of the court, gave inaccurate and misleading information to the trial court during Applicant’s General Sessions proceeding by falsely informing the trial court he had provided Applicant with written notice of his trial date.

Respondent respectfully submits this Court’s findings regarding this allegation are not supported by the record. The record, both from the trial and the evidentiary hearing, both establish that trial counsel attempted numerous times to contact Applicant before his trial began without success.

Moreover, this Court’s order inaccurately finds it need not undertake a harmless error analysis based on State v. Stanley Lamar Wrapp, Op. No 5510 (S.C. Ct. App. filed Aug. 16, 2017). However, the Wrapp court did not state a harmless error analysis should not be undertaken when a defendant is tried in his absence. Rather, the Wrapp court noted it was not undertaking a

harmless error analysis because the record was devoid of facts allowing the appellate court to determine whether Wrapp had notice of the term of court. Here, the record is brimming with references to the notice Applicant had of his trial date and of counsel's numerous attempts to contact him prior to trial. Moreover, the Court of Appeals already determined any alleged error was harmless during Applicant's direct appeal. See State v. Steplight, Op. No. 184 (S.C. Ct. App. filed April 30, 2014). As the Court of Appeals has already reviewed Applicant's absence from the small portion of his pre-trial suppression hearing and his jury selection and found his absence harmless, the doctrine of collateral estoppel prevents Applicant from relitigating this same issue on post-conviction relief. "Collateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action." Koon v. State, 358 S.C. 359, 364-365, 595 S.E.2d 456, 459 (2004) (overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)) (citing Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281 (2003)); see State v. Snowdon, 371 S.C. 331, 334, 638 S.E.2d 91, 93 (Ct. App. 2006) ("Collateral estoppel can be used in a criminal proceeding."); see also State v. Brown, 201 S.C. 417, 424, 23 S.E.2d 381, 383 (1942) (holding that defendant was estopped from relitigating the value of stolen goods in magistrate court where circuit court determined value and remanded to magistrate court based on that determination). Applicant's new argument on appeal that he had "bad blood" with a particular juror is wholly without merit, as Applicant testified at the evidentiary hearing he had never had a conversation with this juror and did not recognize her by sight throughout the duration of his trial. In sum, this allegation of purported "bad blood" with a juror is simply not credible evidence that should be relied upon to reverse Applicant's convictions and grant a new trial.

In conclusion, the record is abundant with evidence of trial counsel's numerous efforts, starting the week prior to trial, to contact Applicant to inform him of his trial date. Trial counsel's performance was well within the established practices demanded from attorneys practicing within our State. Moreover, Applicant is unable to establish any resulting prejudice, as the Court of Appeals properly determined that any purported error in Applicant's absence from the small portion of his pre-trial matters was harmless and had no impact on his trial. Respondent requests this Court reconsider its grant of relief on this ground.

Applicant failed to establish trial counsel was ineffective for failing to have the drug evidence independently tested

Applicant alleges trial counsel should have retained an independent expert to re-analyze the drug evidence prior to trial to establish it was below the ten gram threshold for trafficking in crack cocaine. In support of this allegation, Applicant retained Dr. Robert Bennett, who re-weighed the drug evidence on February 17, 2017, and determined the current weight of the crack cocaine was total of 9.244 grams. Applicant asserts this establishes the original drug analysis conducted by the Charleston Police Department was inaccurate and he was improperly charged with and convicted of trafficking in crack cocaine when he was in possession of less than the ten gram threshold. He argues counsel should have retained an independent expert such as Dr. Bennett prior to his trial, and, had counsel done so, he would not have been convicted of trafficking in crack cocaine.

The record is replete with evidence clearly refuting this allegation. As an initial matter, Respondent notes Applicant has failed to establish the evidence weighed below the ten gram threshold for trafficking at the time of his arrest. The evidence, which was collected from Applicant's buttocks (an inherently moist area) on May 27, 2011, was weighed four days later on

CONCLUSION

Based on all the foregoing, Respondent respectfully requests this Court reconsider its prior ruling and deny Applicant's post-conviction relief. Respondent requests a hearing to fully argue this 59(e), SCRCF, motion and address each of the raised issues before this Court.

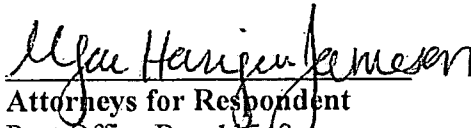
Respectfully submitted,

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September 27, 2017

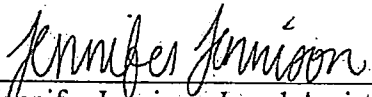
STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	2015-CP-10-2362
	)	
NORRIS STEPLIGHT, 279329	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent,	)	
_____	)	

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 **Respondent's Motion to Reconsider, Alter, or Amend Pursuant to Rule 59(e), SCRCP** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Jerry Nicholas Theos, Esquire
Jeffrey Buncher, Esquire
Uricchio Howe Krell Jacobson Toporek Theos & Keith, PA
PO Box 399
Charleston, SC 29402-0399

The Honorable Michael G. Nettles
Florence City-County Complex
180 North Irby Street, MSC-XX
Florence, SC 29501

DATED this the 27th day of September, 2017.



 Jennifer Jennison, Legal Assistant
 For Respondent

Exhibit A

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Norris Steplight, #279329,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2015-CP-10-2362

PROPOSED
ORDER OF DISMISSAL

This matter comes before this Court by way of an application for post-conviction relief filed April 27, 2015, by Norris Steplight (Applicant) alleging trial counsel was ineffective for failing to inform him of his trial date. Respondent made its Return on February 5, 2016, requesting an evidentiary hearing be held. Thereafter, on December 14, 2016, Applicant, through counsel, filed an amended application alleging seven grounds of ineffective assistance of counsel.

An evidentiary hearing into the matter was convened August 1, 2017, at the Charleston County Courthouse. Applicant was present at the hearing and represented by Jerry Theos, Esquire. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. Applicant testified on his own behalf and presented testimony from four witnesses. The State presented testimony from trial counsel and two additional witnesses. At the conclusion of the hearing, this Court requested proposed orders from both parties.

This Court had before it Applicant's trial transcript, Applicant's appellate records, Charleston County Clerk of Court's records regarding the subject conviction, Applicant's records

from the South Carolina Department of Corrections, and the Charleston County Clerk of Court records for this current proceeding. After reviewing the record in its entirety, along with the testimony and evidence presented at the evidentiary hearings, this Court finds Applicant has failed to establish any constitutional deprivations or other grounds entitling him to relief and is denying and dismissing this application with prejudice.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its October 2011 term of court, the Charleston County Grand Jury indicted Applicant for Trafficking in Cocaine Base—10-28 grams (Third Offense) (2015-CP-10-2362). He was represented by James W. Smiley, IV, Esquire. Assistant Solicitor Stephanie Linder prosecuted the case.

On February 4, 2013, Applicant proceeded to a jury trial before the Honorable Kristi L. Harrington, where he was convicted as indicted. Judge Harrington sentenced Applicant to the mandatory minimum sentence of twenty-five years imprisonment.

A notice of appeal was filed and an appeal perfected on Applicant's behalf by Barry Krell, Esquire, Jerry Theos, Esquire, and Jeff Buncher, Esquire. On appeal, Applicant argued the trial court erred in proceeding forward with his jury selection and a portion of his pre-trial motions in his absence. Following briefing, the Court of Appeals addressed the merits of Applicant's claim and affirmed Applicant's conviction and sentence in a summary opinion filed on April 30, 2014. State v. Steplight, Op. No. 2014-UP-184 (S.C. Ct. App. filed Apr. 30, 2014). The Remittitur was sent on May 16, 2014.

SUMMARY OF FACTS ADDUCED AT TRIAL

On May 27, 2011, Investigator Sean Engles and Detective Jeffery Harrison of the Charleston Police Department observed Applicant, who was driving a white Dodge truck, commit two traffic violations: failing to come to a complete stop at a red light and failing to turn into the immediate lane. (Tr. 136-37, 174). Investigator Engles and Detective Harrison pulled behind Applicant and turned on the patrol vehicle's blue lights to initiate a traffic stop. (Tr. 174). Investigator Engles observed Applicant shifting in vehicle in an apparent attempt to conceal something. (Tr. 174). When Applicant pulled over, Investigator Engles and Detective Harrison asked for his license and registration. (Tr. 175). Applicant handed Detective Harrison a route-restricted driver's license, and Detective Harrison discovered Applicant had violated the restrictions by dropping his girlfriend off at church instead of only driving to and from work. (Tr. 175, 179-83).

Detective Harrison arrested Applicant for driving under suspension. (Tr. 138, 175). Applicant consented to a search, and Investigator Sean Engles noticed an unnatural object between Applicant's buttocks. (Tr. 154-55). When Applicant was booked into the county jail, Engles confiscated two plastic bags from between Applicant's buttocks during a strip search. (Tr. 140-41, 175). The bags contained a white rock-like substance, and a presumptive field test confirmed the substance was crack cocaine. (Tr. 140-41). Four days later, on May 31, 2011, Criminalist Anita Moore with Charleston Police Department analyzed the rock-like substance and confirmed the two bags contained 5.266 grams and 7.216 grams of cocaine base.¹ (Tr. 204-

¹ At the time of Applicant's trial, Moore was no longer employed with the Charleston Police Department and was a crime scene technician for the North Charleston Police Department. (Tr. 204).

13). Applicant was indicted for trafficking in cocaine base—10-28 grams (third or subsequent offense).

At 12:00 p.m. on Monday, February 4, 2013, the State called Applicant's case for trial. (Tr. 4). Applicant's counsel appeared in court and informed the trial court that his client was not present, had always been available in the past, had a non-working phone number on which counsel had left messages, and was currently being sought by his bondsman. (Tr. 4). When the trial court suggested picking the jury right then, defense counsel stated, "I'll have to pick without a client." (Tr. 5). He then stated, "I'm fine to go ahead and pick a jury. I would just ask, in an abundance of caution, if the murder case does take too long, that we don't swear the jury." (Tr. 5). The trial court agreed not to swear the jury. (Tr. 5). The trial court inquired what time Applicant was told to be there, and the solicitor indicated the letters defendants receive request they arrive on Monday morning at 9:00. (Tr. 6). Trial counsel informed the trial court he was certain his client "had gotten a dozen letters over the last year and a half" and he "had never had a problem with him not showing up." (Tr. 6). He elaborated, "The only reason he's not here, is the number that he—he's changed phones three or four times. The last number I had, I called. It was disconnected. I called every other number, left messages. Then this morning, I contacted the bondsman—" (Tr. 6). Trial court stated Applicant's pre-trial motions would begin at 1:30 p.m. and broke for lunch at 12:30 p.m. (Tr. 10).

The trial court began Applicant's suppression hearing at 1:30 p.m., noting counsel's vehement objection to continuing without his client present. (Tr. 10). Trial counsel thanked the court for noting his objection to going forward without Applicant present and stated, "I surely wish [Applicant] was here, so he could hear this part because this is what he has complained

about the whole time. And just for the record, he has shown up—and Ms. Linder—he has shown up at least a half dozen times. This has been on the docket for an excess of a year. One time—. . . It's been called several—it's been close to being called several—it was actually called once, when I got Rocky Mountain Spotted Fever on Memorial Day, in front of Judge Nicholson, and we weren't able to go forward. So it's had stops and starts. And my client—that's why I said, he's not intentionally missing court. I feel like I've—I've done something wrong because he's not here, because I know he wants to be present. I understand this Court's position too. He has a letter and all. But I've usually never had a problem reaching him.” (Tr. 11-12) (emphasis added). The trial court asked where the bonds person was, and counsel explained the bondsman had been trying to locate Applicant since 8:30 a.m. that morning. (Tr. 12).

Following this discussion, the State called Investigator Engles and began the suppression hearing. At 2:33 p.m., the trial court suspended the hearing to pick a jury for another case. (Tr. 44). At 2:50 p.m., the proceedings continued and Applicant was still not present. (Tr. 44-45). The following exchange took place:

[Trial counsel]: I do need to put on the record that I've asked you for a continuance because my client is not present, and that you've ruled against me and that we're going forward.

The Court: All right. At this stage and at every stage from now on, Mr. Smiley, I'm going to give you a continuing objection.

[Trial counsel]: Thank you.

The Court: We are continuing without your client, but I have heard nothing that indicates to me that [Applicant] was not given notice of today. So we are going to - - here's what we're going to do. We're going to pick the jury, let the jury go, and we'll start in the morning. We're going to finish our pretrial motions and then give you a chance to e-mail your client.

(Tr. 45). The trial court then began jury selection. (Tr. 45-46).

At 3:51 p.m., Applicant arrived at the courthouse. (Tr. 77). Trial counsel explained to the trial court:

[Applicant] arrived when I was downstairs, and I had an opportunity to explain to him what has happened so far and the details. He's now present. He just didn't know. The bondsman found him; he came immediately. He apologizes, even though, I guess, technically, I need to have gotten in touch with him. He did get a letter from me. But he'd gotten so many of them, he didn't realize this case would be first this morning. We apologize, your Honor.

(Tr. 77) (emphasis added). The trial court then continued the suppression hearing. (Tr. 77).

Ultimately, the jury found Applicant guilty. (Tr. 250). During sentencing, Applicant told the trial court:

I just feel like I made a mistake. And that mistake, you know, the roads were rocky. It goes like this: I didn't get my suppression. I didn't get to pick my jury. I don't even know half of those people in this room. I don't even know who those people was [sic]. My suppression was hold [sic] without me. I - - I ain't even get to hear my whole suppression. I feel like - - as an example, I had fired my attorney, and you still give me him. And with that being said, I feel as if I get - - I get railroaded - - I get treated unjustly in this courtroom today. But I understand we have all got to go through and how you got to do your job. But understand that I got kids too. And with that, the questions that I would need to ask, for the jury, to hear my side, I didn't - - I didn't get that. And on top of that, I got sodomized. But I can understand, and pray for everybody, and everybody to do the same.

(Tr. 257). The trial court sentenced him to twenty-five years' imprisonment. (Tr. 258).

ALLEGATIONS RAISED

In his amended application, Applicant alleged he is being held in custody unlawfully based on allegations of ineffective assistance of counsel for:

- Failing to stay in touch with him and promptly inform him of his trial date
- Failing to advise him of the significance of the pre-trial suppression hearing and the ramifications if the motion was denied
- Failing to discuss and prepare a defense that the drugs were for personal consumption, not distribution
- Failing to interview witnesses and develop testimony that the drugs were not for distribution
- Failing to request a jury instruction on lesser-included offenses
- Failing to have the drugs independently tested or analyzed
- Failing to give an effective closing argument

Applicant proceeded forward on these seven grounds at the evidentiary hearing before this Court.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Applicant testified first. He testified he was arrested in May of 2011 following a stop for traffic violations and subsequent charged with driving under suspension because he was driving outside the scope of the limited driving privileges on his restricted license. He testified that following his arrest, he was taken to the detention center, where officers recovered two bags containing crack cocaine from his buttocks. He testified he never challenged the possession of the crack cocaine. He further testified he has multiple prior drug convictions and admitted on cross-examination that this conviction was his fifth drug-related conviction.

Applicant testified he retained trial counsel to represent him approximately one month after he was arrested and that this was after he had already been released on bond. He testified he met with counsel only two or three times before his trial and spoke by phone one or two times. He testified he had the same telephone number the entire time he was out on bond and denied that his phone was ever disconnected or that he changed phone numbers.

He testified he and counsel discussed the importance of the total weight of the drugs and he understood he had been charged with trafficking because the total drug weight was over ten grams. He testified he told counsel he purchased nine grams of crack cocaine and two separate

bags and paid three-hundred dollars for it. He testified he asked counsel to have the crack cocaine retested because of this and counsel told him he would have to pay an additional fee to if he wanted the drugs retested. He testified he understood this was his only possible defense if the suppression motion was denied. However, he also testified counsel never advised him of the importance of the suppression motion. He testified counsel also failed to advise him he would need to testify on his own behalf to argue he purchased less than ten grams of crack cocaine. He testified he did not testify at trial because counsel advised him it would not be a good idea.

He testified counsel told him he would be able to get the charge reduced to simple possession and he would likely serve a sentence of three to five years imprisonment. He testified counsel never explained the mandatory minimum sentence for trafficking cocaine—10-28 grams (third offense) was twenty-five years or discussed any other details of a possible punishment. He testified the State made him a ten year plea offer and he discussed this with counsel. However, he testified counsel never explained the State would withdraw the ten-year plea offer if the suppression motion was denied. He testified if counsel had explained the importance of the suppression motion to him, he would have accepted the State's ten-year plea offer.

Applicant testified he first learned his trial was going forward from his bondswoman when she called him on his cell phone at 3:00 p.m. on the day of his trial. He testified he got to the courthouse in less than an hour and was present for the second half of his suppression motion and for the entire trial. He testified he was not present for jury selection and was prejudiced by this because counsel did not get his input during jury selection and he knew juror number 373 (Sheila Wright). He elaborated he knew Ms. Wright because of a prior relationship through friends in common and that the two had "bad blood." However, he testified he did not know Ms.

Wright by sight, did not recognize her as a member of the jury at any point during his trial, and had never had a conversation with her. He testified he never told counsel or the trial court that he knew Ms. Wright or any other member of the jury. He acknowledged there was an alternate juror that could have been substituted in Ms. Wright's place. He testified the jury was not sworn in until after he arrived and that he was present for his entire trial.

Applicant acknowledged he signed a bond form advising him he would be tried in his absence if he failed to appear and read the following passage from his bond form: "I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend court, the trial will proceed in my absence." (ROA 4). He testified he had received several letters from the solicitor's office regarding his trial date, but denied receiving a letter for this term of court. He testified that he and counsel "rarely talked" during the nearly two years he was out on bond awaiting trial. He testified counsel never called him or any of his emergency contacts to inform him his trial started.

Applicant next presented his bondswoman, Angelica Desaussure-Cooper, to testify on his behalf. She testified she was Applicant's bondswoman the entire time he was out on bond. She testified he came to the office weekly to make payments. He testified Applicant had the same phone number the whole time, but acknowledged she never called him and cannot be certain his phone was always working and was never disconnected. She testified she received a phone call from counsel on February 4, 2013, and he told her Applicant's trial was underway and she needed to get Applicant to the courthouse. She testified counsel asked her not to tell Applicant his trial had begun. She testified she spoke with Applicant by phone and told him to come to the

courthouse. She elaborated Applicant was at home when she spoke to him and she had no trouble reaching him.

Applicant next called Dr. Robert Bennett, who was admitted as an expert in drug analysis without objection.² Dr. Bennett testified he was retained by Applicant's counsel earlier this year to re-analyze the drug evidence. He testified he reviewed the original drug analysis conducted by Charleston Police Department (admitted as Applicant's Ex. No. 4) and the court order for retesting (already part of the Clerk's records for this case, but also introduced as Applicant's Ex. No. 1). He testified he prepared a standard protocol worksheet prior to re-analysis, admitted as Applicant's Ex. No. 2, which also listed all the equipment he would need for retesting.

He testified he re-analyzed the drug evidence on February 17, 2017, in a courtroom at the Charleston County Courthouse. He testified approximately fifteen people were present, including clerk's office staff, prosecution staff, Applicant's counsel, and a private investigator who filmed the entire process. He testified his re-analysis was performed on a "shaky table" in the courtroom, but then explained that all tables are inherently shaking and he took proper measures to ensure the table was properly leveled and balanced before he began testing and remained properly balanced throughout testing. He testified he used calibration weights on his scale prior to re-weighing the drugs to ensure accuracy. He testified neither his scale nor his calibration weights have been calibrated by an independent third party recently and neither have certifications of calibration.

² During voir dire, Dr. Bennett admitted his is not a registered pharmacist, but has previously held himself out to be to the general public on his website and when testifying in court, resulting in an Order to Cease and Desist from the South Carolina Board of Pharmacy on February 4, 2013. He also acknowledged he is not a member of any professional organizations or groups because he does not want to keep up with the requirements to be a member of such organizations.

He testified there was concern amongst the observers present regarding the possibility of noxious fumes from the drug evidence when unsealed that could create a health hazard, which he acknowledged was a possibility, but that no such fumes were omitted when the sealed evidence bags were opened. He testified the drugs were in two separate plastic bags and the actual crack cocaine was in 2 balls. He testified he weighed each of the crack cocaine balls without their outer packaging, amounting to 3.919 grams and 5.325 grams, for a total of 9.244 grams. He testified that he also did a qualitative analysis which confirmed the substance contained cocaine. He testified his findings were put into a forensic report prepared after testing, introduced into evidence as Applicant's Ex. No. 3.

Dr. Bennett testified he is unsure why there is a discrepancy between the crack cocaine's weight when weighed by the Charleston Police Department on May 31, 2011, and his weight nearly six years later. He elaborated he was not present for the original testing and is not sure what methods were used because it is not listed on the original report. Dr. Bennett testified he is familiar with the hypothesis that crack cocaine loses weight over time, but that little research has been done on the topic. He testified he was provided with a report of a joint study by the Department of Justice and Drug Enforcement Agency shortly before the hearing, had not previously read it, and had not fully reviewed it in detail at the time of his testimony. Nonetheless, Dr. Bennett testified he was prepared to give an opinion regarding the article and concluded the article indicates there can be some weight loss from crack cocaine over time, but the weight loss would be between a 5-10% maximum. However, on cross-examination, he admitted the DOJ/DEA report indicates findings of greater than 30% weight loss in certain wet samples of crack cocaine over time. He testified possible weight loss would also vary greatly

depending on whether the sample was wet or dry when originally tested and that there is no documentation in the present case as to whether the crack cocaine was wet or dry when first tested in 2011.

Applicant next presented private investigator Dick Vance, who was retained by his current counsel. Vance testified he was previously employed by the Charleston Police Department from 1980 to 2004 and has been in the private sector since 2004. Vance testified he was present for the drug re-testing on February 17, 2017, and made a video recording of the entire process (admitted as Applicant's Ex. No. 4).

The State presented Wendy Bell, Ph.D, Captain of Forensic Operations at the South Carolina Law Enforcement Division (SLED), who was admitted as an expert in toxicology. Captain Bell testified she has been employed with SLED since 1998 and has been Captain of Forensic Operations since 2013. She testified she was formerly a forensic toxicologist at SLED and she routinely analyzes illegal drugs, including crack cocaine, as part of her current and past duties. She elaborated she has personally analyzed over four thousand narcotics samples and peer reviewed thousands more. She testified she has attended DEA training and is familiar with how crack cocaine is made. She testified crack cocaine is made by mixing cocaine with water and solvent (usually baking soda) and is heated until crack cocaine is formed into hard rock-like formations. She testified one of the common methods used by street level dealers is "whipping," where the maker whips excessive water or other solvent into the crack cocaine as it is forming to increase the weight without the use of additional cocaine so dealers can increase their profits.

Captain Bell testified she has personally experienced crack cocaine samples losing weight over time, including two cases this year out of Lancaster County where the drug evidence

lost more than 50% of its total weight in a few months. She testified her labs have been documenting this weight loss and although it does not happen with all samples of crack cocaine, the occurrence is commonly known throughout the forensic science and law enforcement communities. She referenced the DOJ/DEA study, which she testified is also widely known in the forensic science community, as supporting findings of large weight loss in crack cocaine samples, including more than 30%. She testified a weight loss of more than 30% over a six year period is possible and not surprising, but it is also possible the original weight was incorrect. She noted the Charleston Police Department laboratory is an accredited laboratory and that best practice is to test drug samples as soon as possible to get the most accurate weight. She elaborated a weight taken four days after the crack cocaine sample was collected would be more indicative of the correct weight at the time of sale than a subsequent weighing six years later.

The State next presented testimony from Judith Gordon, the Director of the Forensic Services Division at the Charleston Police Department, who was admitted as an expert in toxicology. She testified she has been with the Charleston Police Department since 1995 and oversees the forensic laboratories for the police department, including all drug analysis, DNA analysis, and other evidence analysis. She testified she was a bench chemist before becoming Director of the Forensic Services Division and she routinely analyzes narcotics as part of her job duties. Additionally, she testified she has attended DEA trainings on drug analysis.

Gordon testified she was not present when this particular sample was first tested by Criminalist Anita Moore at the Charleston Police Department Laboratory, but she has reviewed Moore's report (Applicant's Ex. No. 4). She testified she has no reason to believe the results of the initial analysis and report were inaccurate. When questioned as to whether the crack cocaine

samples were weighed in their outer packaging for the final weight (plastic bags and saran wrap) as Applicant has speculated, Gordon testified this is that has never been done in her lab in the more than twenty years she has worked there and she does not believe it occurred in this case because it is against Charleston Police Department lab protocols. She testified her lab is accredited and has protocols and procedures in place to ensure accuracy. She elaborated all scales in the lab are calibrated by an outside source annually and provided calibration certificates. She testified the particular scale used to test this drug evidence was a AMD balance, which she described as a standard analytical balance, and she testified this particular balance received its outside calibration in October 2010 prior to weighing this drug evidence. Additionally, she testified the Charleston Police Department lab does a monthly calibration internally in addition to the annual calibration to further ensure accuracy of their results.

Gordon testified she was present for the re-analysis of the drug evidence in this case in February 17, 2017. She testified Dr. Bennett did not perform a calibration of the scale as he has asserted, but rather, performed a verification where he placed known weights on his scales. She testified she questioned Dr. Bennett about this and he told her his scale had not been calibrated by an external provider or source. She testified Dr. Bennett also removed the containers to add the drug evidence once the scales had been verified, which is against best practices and is not what is done at the Charleston Police Department lab. She testified that although Dr. Bennett's testing was not in an ideal lab environment with properly calibrated scales, she ultimately does not believe his weights obtained during the re-analysis are off by much and are more or less accurate.

However, Gordon testified she is not surprised the crack sample has lost weight in six years. She testified she and her lab have re-analyzed crack cocaine samples and have seen weight loss in these samples. She elaborated this is not unexpected based on the way crack cocaine is made, often by whipping water or another solvent into the crack cocaine while it is forming. She testified she is familiar with research on the topic and it is commonly known that crack cocaine can experience weight loss over time. She testified she is unsure if the drug evidence in this case was wet when first tested, but would not expect to see any signs of wetness in the drugs six years later.

Finally, trial counsel James W. Smiley, IV, testified. Counsel testified he has been practicing law since 1993 and exclusively practices criminal defense. He testified he was retained to represent Applicant shortly after he was released on bond. He testified he met with Applicant often, usually when Applicant would come by his law office to make a payment and the two would sit on the porch at counsel's law practice and talk for extended periods of time while smoking cigarettes. However, he asserted he only spoke about the "actual facts" of Applicant's case for "two to three hours" throughout the entirety of their professional relationship. He testified he and Applicant got along well and that Applicant is one of the few clients who had counsel's personal cell phone number. He testified he and Applicant also spoke by phone frequently. He denied Applicant had changed his phone number or had a disconnected phone while he was out on bond, despite telling the trial court this on the record, but did admit he sometimes had a hard time reaching Applicant because he had two different phones and both were not always working. He testified he and Applicant generally communicated well.

Counsel testified he filed appropriate discovery motions and that he reviewed this material with Applicant. He testified the main evidence the State would be presenting against Applicant was the more than twelve grams of crack cocaine that was found in Applicant's buttocks when he was arrested. He testified he explained the elements of trafficking in cocaine to Applicant and that he was charged with trafficking based on the total weight of the crack cocaine recovered, regardless of how Applicant intended to use the drugs. He testified Applicant had four prior drug convictions, which were in two different drug adjudications, and he did not have any basis to challenge that this charge was a third or subsequent drug offense. He similarly testified he did not see any reason to challenge the drug's weight or have the drugs re-tested prior to trial. He testified he has never had drug evidence re-weighed in any of his cases. When questioned if Applicant had told him he only purchased nine grams of crack cocaine and therefore it was below the ten gram threshold for trafficking, counsel testified he did not have any independent recollection of this conversation.

He testified success of Applicant's hinged on suppression of the drug evidence and he fully explained this to Applicant. He testified he explained to Applicant that if they lost the suppression motion, he would likely be convicted and would be required to serve a mandatory minimum twenty-five year sentence. He testified because suppression was so critical, he spend significant time preparing for the motion. He testified the primary argument in support of suppression was that officers had no reason to arrest Applicant for driving under suspension because he was not driving outside the scope of his restricted route. He testified he fully made these arguments to the trial court, who ultimately denied his motion to suppress the drug evidence. He testified that after suppression was denied, conviction was all but certain and he

was trying to create a record upon which Applicant could appeal. Counsel testified he did not have much of a strategy for his closing argument because conviction was an almost certainty following the denial of his suppression motion.

He testified Applicant was out on bond for the entire time he represented Applicant. He testified Applicant's case had been on the trial docket multiple times, he had received numerous notices that his case was up for trial from the Solicitor's office, and Applicant appeared in court every term. Counsel testified because Applicant's case had been on the trial docket but had not gone forward so many times, he did research on all the cases above Applicant's on the trial docket and received assurances from counsel on those other cases that other cases would be going forward. He testified that based on these conversations, he did not personally contact Applicant the week before trial because he did not think Applicant's case was going forward. However, he later contradicted this testimony and stated he tried to call Applicant the week for trial without success, but that he is ultimately at fault for "not chasing" Applicant the week before trial. He testified he is unsure if Applicant received a notice of trial from the Solicitor's office for this particular term of court. He testified he asked the prosecuting assistant solicitor to let him know if anything changed regarding the scheduling of Applicant's case and as of Sunday evening, he had not heard that Applicant's case was going to be tried the following day.

Counsel testified he was very surprised the Monday of trial that Applicant's case was going forward. He testified he attempted to get in touch of Applicant without success, and then called his bondswoman and asked her to track down Applicant to get him to the courthouse as soon as possible. He testified he objected to going forward without his client present numerous times and Judge Harrington made it clear the trial was proceeding forward. Counsel testified that

at that point, there was nothing else he could do to prevent the trial from going forward. He testified Applicant was not present for jury selection or the first witness in his suppression hearing, but he was present for the rest of pre-trial and all of his trial. He testified he thinks Applicant was prejudiced by missing jury selection, but acknowledged he does not always listen to his clients' input as to whom to select for a jury. He testified Applicant never informed him or the trial court that he knew anyone on his jury. He testified if Applicant had informed him he knew a juror, he would have immediately informed the trial court and asked for the alternate juror to be seated in that juror's place.

Counsel testified he did not consider making a request for a jury instruction on any lesser-included offenses because no evidence supported such an instruction because all evidence established Applicant was in possession of more than ten grams of crack cocaine. He testified because his main focus was suppression of drug evidence and the thought he had a strong argument in support of suppression based on an unlawful arrest, he did not see any reason to have the drugs re-analyzed. He testified that once the suppression motion was denied, the only possible defense Applicant had was that the drugs were below the ten gram threshold for trafficking in hopes of being convicted of a lesser-included offense and acknowledged he did not present any evidence the drug evidence weighed less than ten grams. He testified he does not have any reasons to believe the initial drug analysis and weight determined by the Charleston Police Department was wrong or inaccurate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearings. This Court has further had the opportunity to

observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.

If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668. “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel. Below are this Court’s specific finding regarding each of Applicant’s allegations of ineffective assistance of counsel:

Allegation: Failure to stay in touch with Applicant and promptly inform him of his trial date

Applicant alleges trial counsel was ineffective for failing to adequately communicate with him regarding his trial date and allowing his trial to proceed forward without him present for all pre-trial hearings and jury selection. Specifically, Applicant alleges: “Applicant was not informed by trial counsel that he was up for trial. Applicant did not know his trial was under way

until the bondsman informed Applicant later in the day on February 4, 2013. Upon being informed by the bondsman that his trial had begun, Applicant went straight to the court house. Applicant's entire jury was chosen without any input from Applicant. A member of the jury panel that was subsequently chosen to sit on Applicant's jury previously knew Applicant. Additionally, a majority of the pre-trial motion to suppress was conducted outside of Applicant's presence. Applicant had a constitutional right, as guaranteed by the Fifth, Sixth and Fourteenth amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution, to be present during jury selection and his pre-trial suppression hearing. Counsel's failure to keep Applicant informed of his trial date was ineffective, resulting in prejudice to Applicant." (Amended APCR).

This Court finds this allegation is without merit and must be denied and dismissed with prejudice. As an initial matter, this Court finds this issue was already during Applicant's direct appeal by the Court of Appeals, who found any alleged error was harmless. See State v. Steplight, Op. No. 184 (S.C. Ct. App. filed April 30, 2014). As the Court of Appeals has already reviewed Applicant's absence from the small portion of his pre-trial suppression hearing and his jury selection and found his absence harmless, this Court finds Applicant cannot establish any prejudice flowing from trial counsel's alleged error on post-conviction relief.

Moreover, this Court finds counsel performance was in accordance with professional standards and refuses to find him deficient for failing to advise him of his trial date. The record, both from trial counsel's statements to the trial court and his testimony before this Court at the evidentiary hearing, establishes trial counsel attempted to contact multiple times, including the week before trial and numerous times the morning of trial without success, and when he was not

able to reach his client, he immediately called Applicant's bondswoman to bring him to court immediately. Counsel also strenuously objected to going forward with any portion of the trial in Applicant's absence, which was noted by the trial court and overruled. As counsel testified at the evidentiary hearing, there was nothing else he could do at that point but proceed forward with Applicant's suppression motion and diligently represent his client's interests until Applicant arrived. This Court finds Applicant's performance was reasonable, diligent, and in accordance with professional norms, and therefore, must be denied and dismissed with prejudice. See Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

Moreover, this Court finds Applicant has failed to meet this burden of establishing any resulting prejudice. Applicant asserts he was prejudiced by trial counsel's alleged deficiency because one of the jurors, (Juror number 373—Sheila Wright) was someone he knew and with whom he had "bad blood." However, Applicant conceded he did not recognize Ms. Wright at his trial and did not inform counsel or the court that he knew Ms. Wright. This Court finds Applicant has failed to establish any requisite prejudice and this allegation must be denied and dismissed with prejudice.

Allegation: Failure to advise him of the significance of the pre-trial suppression hearing and the ramifications if the motion was denied

Applicant alleges trial counsel was ineffective for failing to advise him of the importance of his suppression motion and the ramifications if this motion was denied. This Court finds this allegation is refuted by the record from trial and the testimony presented at the evidentiary hearing. During trial, counsel informed the plea court he did not want to proceed forward with the suppression hearing in his client's absence because it had been Applicant's primary concern throughout his representation of Applicant. See Tr. 11 ("I surely wish he was here, so he could

hear this part because this is what he has complained about the whole time.”). Additionally, Counsel testified he stressed the importance of the suppression motion to Applicant and Applicant understood a conviction and a twenty-five year sentence would be all but certain if the suppression motion was denied. While Applicant testified counsel did not explain the importance of the suppression motion or its impact on his case if denied, this Court finds Applicant’s testimony as to this allegation to be lacking in credibility and rebutted by the record. This Court finds this allegation is without merit and must be denied and dismissed with prejudice.

Allegation: Failure to discuss and prepare a defense that the drugs were for personal consumption

Applicant alleges trial counsel was ineffective for failing to discuss whether the crack cocaine was for personal use and prepare a defense accordingly. Applicant testified he purchased nine grams of crack cocaine for personal use and he told counsel this during their discussion before his trial. Trial counsel testified he has no independent recollection of Applicant telling him this.

Pursuant to S.C. Code Ann. § 44-53-375(C)(1)(c), “[a] person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine or cocaine base . . . is guilty of a felony which is known as “trafficking in methamphetamine or cocaine base” and, upon conviction, must be punished as follows if the quantity involved is . . . ten grams or more, but less than twenty-eight grams . . . for a third or subsequent offense, a mandatory minimum term of imprisonment of not less than twenty-five

years nor more than thirty years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars.” (emphasis added).

Based on the clear and unambiguous language of S.C. Code Ann. § 44-53-375(C)(1)(c), it is irrelevant if Applicant intended to personally consume the crack cocaine (or only nine grams of crack cocaine) because he was in actual possession of over ten grams of crack cocaine. Accordingly, any argument trial counsel could have made to the jury that Applicant should not be convicted because the crack cocaine was for personal consumption as opposed to distribution would have been legally inaccurate. This allegation is without merit and must be denied and dismissed with prejudice.

Allegation: Failure to interview witnesses and develop testimony that the drugs were not for distribution

Similar to the prior allegation, Applicant alleges trial counsel was ineffective for failing to interview witnesses and develop testimony that the drugs were not for distribution. As discussed above, it is irrelevant whether trial counsel presented witnesses or developed testimony that the crack cocaine was for personal consumption based on S.C. Code Ann. § 44-53-375(C)(1)(c). This allegation without merit and must be denied and dismissed with prejudice.

Allegation: Failure to request jury instructions on lesser-included offenses

Applicant alleges the counsel was ineffective for failing to request jury instructions on lesser-included offenses. The record and testimony presented establish counsel did not request a jury instruction on any lesser-included offenses such as possession with intent to distribute crack cocaine. Counsel and Applicant both testified no evidence was presented at trial that Applicant was in possession of less than ten grams of crack cocaine.

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). “No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence.” State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). “Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence.” State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). “A trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed.” State v. Green, 397 S.C. 268, 289, 724 S.E.2d 664, 674 (2012). “The mere contention that the jury might accept the State’s evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tends to show the defendant was guilty only of the lesser offense.” State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006).

In Applicant’s case, the only evidence presented established Applicant was in actual possession of more than ten grams of crack cocaine. Our appellate courts have consistently ruled that when the evidence presented at trial establishes Applicant is guilty of trafficking in crack cocaine, not a lesser-included offense, only trafficking should be charged. See State v. Taylor, 323 S.C. 162, 167, 473 S.E.2d 817, 819 (Ct. App. 1996) (holding that because “it is the amount of cocaine, rather than the criminal act, which triggers the trafficking statute, and distinguishes trafficking from distribution and simple possession. If the amount of cocaine, or any mixture containing cocaine, is ten grams or more the trafficking statute is applied” and is the trial judge correctly charged only the trafficking statute); State v. Raffaldt, 318 S.C. 110, 117 456 S.E.2d

390, 394 (1995) (holding defendant charged with trafficking in cocaine was not entitled to have jury charged on lesser included offenses of conspiracy to distribute, conspiracy to possess with intent to distribute or conspiracy to possess, where all the evidence indicated that defendant was dealing in quantities of cocaine of at least four ounces in connection with conspiracy, which implicated trafficking); State v. Grandy, 306 S.C. 224, 226, 411 S.E.2d 207, 208 (1991) (holding the trial court did not err in refusing to charge possession with intent to distribute controlled substance as lesser included offense to charge of trafficking in cocaine where the undisputed evidence was that amount involved exceeded minimum for trafficking, then only trafficking charge would be submitted to jury, and in present case evidence as to quantity involved did exceed minimum). Because the evidence established Applicant could only be guilty of trafficking in crack cocaine or not guilty, any request counsel could have made for jury instruction on a lesser-included offense would have been denied by trial court. Accordingly, this Court finds counsel was not deficient for failing to request a jury instruction on the lesser-included offenses.

Allegation: Failure to have the dug evidence independently tested

Applicant alleges trial counsel should have retained an independent expert to re-analyze the drug evidence prior to trial to establish it was below the ten gram threshold for trafficking in crack cocaine. In support of this allegation, Applicant retained Dr. Bennett, who re-weighed the drug evidence on February 17, 2017, and determined the current weight of the crack cocaine was total of 9.244 grams. Applicant asserts this establishes the original drug analysis conducted by the Charleston Police Department was inaccurate and he was improperly charged with and convicted of trafficking in cocaine when he was in possession of less than the ten gram

threshold. He argues counsel should have retained an independent expert such as Dr. Bennett prior to his trial, and, had counsel done so, he would not have been convicted of tracking in cocaine.

At the evidentiary hearing, counsel testified he had no reason to doubt the accuracy of the weights determined by the Charleston Police Department. He further testified he has never had a drug sample re-tested after it has been analyzed by the Charleston Police Department forensics laboratory. He also testified he did not recall Applicant telling him he had purchased less than ten grams of crack cocaine.

In response to Applicant's argument, the State presented two expert witnesses, Wendy Bell, Ph.D, Captain of Forensic Operations at the South Carolina Law Enforcement Division (SLED), and Judith Gordon, the Director of the Forensic Services Division at the Charleston Police Department, who both testified regarding the inherent properties in crack cocaine and the methods in which it is made that can result in significant weight loss over time. Both cited a DOJ/DEA joint study that focused on the stability of crack over time based on various production methods and concluded crack cocaine can lose significant weight (more than 30% of its total weight in certain circumstances) over time. Additionally, both testified to their own personal experiences with crack cocaine samples losing over time weight, including two examples cited by Captain Bell where samples lost more than 50% of its weight within a few months after the initial analysis. The State argued Applicant failed to establish original analysis of the crack cocaine, including a total weight of 12.482 grams, was incorrect when it was tested four days after Applicant's arrest and any weight loss was expected based on the inherent properties of crack cocaine. The State also argued numerous federal courts have recognized

crack cocaine's lack of stability and weight loss over time. See United States v. Johnson, 434 F. Supp. 2d 301 (D. Del. 2006), aff'd 292 F. App'x 178 (3d Cir. 2008) (discussing expert testimony presented by the State to account for significant weight loss of crack cocaine over time); United States v. Thomas, 11 F.3d 620 (6th Cir. 1993) (finding the district court did not err in basing sentence in drug possession case on defendants having more than 50 grams of cocaine, even though defendants' independent expert reweighing the cocaine six months after it was initially weighed, determined that the amount was 49.535 grams; there was evidence that testing to determine that substance was cocaine had consumed a minimum of 0.8 grams, and there was evidence that cocaine was subject to weight loss due to evaporation over time).

This Court finds Applicant has failed to meet his requisite burden of proof of establishing counsel was ineffective for failing to retain an independent expert to examine the drug evidence prior to his trial. Initially, this Court notes Applicant has failed to establish the evidence weighed below the ten gram threshold for trafficking at the time of his arrest. The evidence, which was collected from Applicant's buttocks (an inherently moist area) on May 27, 2011, was weighed four days later on May 31, 2011, and had a total weight of 12.482 grams. Through Dr. Bennett's testimony, Applicant merely established the evidence weighed less nearly six years later when weighed by Dr. Bennett in a less-than-ideal testing scenario. This Court agrees with the testimony presented by Captain Bell and Judith Gordon (and acknowledged by Dr. Bennett) that crack cocaine can lose significant weight over time. Moreover, this principle has been recognized or noted by numerous federal jurisdictions. See United States v. Roberson, 195 F. App'x 902 (11th Cir. 2006) (holding defendant failed to show that government acted in bad faith in storing crack cocaine sample, which had evaporated over time, as required to support due

process violation claim; record showed that the Drug Enforcement Agency's storage practices for evidence were consistent with procedures used in other storage laboratories, and record demonstrated that some loss of a crack cocaine sample due to evaporation through the permeable plastic bags was inevitable over time); United States v. Chavis, 296 F.3d 450 (6th Cir. 2002) (finding evidence was sufficient to support defendant's conviction for possession of in excess of five grams of cocaine base, despite fact that cocaine base recovered from defendant weighed only 4.13 grams at time of trial; criminologist who conducted testing on the cocaine base testified that when she examined it, the cocaine base weighed 5.1 grams, that a weight loss over time was not unusual, due to water evaporation, and that a small portion of the cocaine base was destroyed over time due to testing); Johnson, 434 F. Supp. 2d 301 (discussing expert testimony presented by the State to account for significant weight loss of crack cocaine over time); Thomas, 11 F.3d 620 (finding the district court did not err in basing sentence in drug possession case on defendants having more than 50 grams of cocaine, even though defendants' independent expert reweighing the cocaine six months after it was initially weighed, determined that the amount was 49.535 grams; there was evidence that testing to determine that substance was cocaine had consumed a minimum of 0.8 grams, and there was evidence that cocaine was subject to weight loss due to evaporation over time); see also United States v. Fox, 189 F.3d 1115, 1120 (9th Cir. 1999) ("[Officer] Bryant testified that in a laboratory there is typically a ten percent weight loss when cooking cocaine powder into crack, but that on the street one gram of powder cocaine typically converts into one gram of crack cocaine, because street cooks use baking soda and tap water to increase the weight."). This Court concludes Applicant has failed to establish the initial weight of crack cocaine was inaccurate or that counsel was deficient for

failing to retain an independent expert to re-analyze the drug evidence. This allegation must be denied and dismissed with prejudice.

Allegation: Failure to give an effective closing argument

Applicant alleges trial counsel was deficient for failing to give an effective closing argument. Counsel gave the following closing argument to the jury:

As I told you, I'm an advocate for Mr. Steplight, and when he said he was not guilty, it's the State's, their burden, and we went through it. Y'all are the judges of the facts. The facts have been presented to you. Your Honor is the judge of the law, and she's made some rulings in this case as if—I'm sure y'all have noticed, it's hard sometimes being a lawyer, making sure that each of us go by the rules of evidence, and the rulings of Her Honor. Therefore, I submit to you that it's up to y'all to make a determination. Y'all have heard the evidence, and I know you will do the right thing. Thank you.

(Tr. 239). Counsel testified he did not have much of a strategy for his closing argument because conviction was an almost certainty following the denial of his suppression motion.

This Court finds Applicant cannot establish any prejudice resulting from counsel's alleged deficiency in his closing argument. As counsel noted, there was overwhelming evidence of guilt presented to the jury that Applicant was in actual possession of more than ten grams of crack cocaine, so there is no reasonable likelihood the result of the proceeding would have been different absent counsel's allegedly deficient closing argument. See Hutto v. State, 387 S.C. 244, 249, 250, 692 S.E.2d 196, 198 (2010) (finding an applicant cannot establish prejudice when there is overwhelming evidence of guilt). This allegation must be denied and dismissed with prejudice.

CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this _____ day of _____, 2017.

 MICHAEL NETTLES
 Presiding Judge – Ninth Judicial Circuit

_____, South Carolina

Exhibit B

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Norris Steplight, #279329,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2015-CP-10-2362

**AMENDED PROPOSED
ORDER OF DISMISSAL**

This matter comes before this Court by way of an application for post-conviction relief filed April 27, 2015, by Norris Steplight (Applicant) alleging trial counsel was ineffective for failing to inform him of his trial date. Respondent made its Return on February 5, 2016, requesting an evidentiary hearing be held. Thereafter, on December 14, 2016, Applicant, through counsel, filed an amended application alleging seven grounds of ineffective assistance of counsel.

An evidentiary hearing into the matter was convened August 1, 2017, at the Charleston County Courthouse. Applicant was present at the hearing and represented by Jerry Theos, Esquire. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. Applicant testified on his own behalf and presented testimony from four witnesses. The State presented testimony from trial counsel and two additional witnesses. At the conclusion of the hearing, this Court requested proposed orders from both parties.

This Court had before it Applicant's trial transcript, Applicant's appellate records, Charleston County Clerk of Court's records regarding the subject conviction, Applicant's records

from the South Carolina Department of Corrections, and the Charleston County Clerk of Court records for this current proceeding. After reviewing the record in its entirety, along with the testimony and evidence presented at the evidentiary hearings, this Court finds Applicant has failed to establish any constitutional deprivations or other grounds entitling him to relief and is denying and dismissing this application with prejudice.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its October 2011 term of court, the Charleston County Grand Jury indicted Applicant for Trafficking in Cocaine Base—10-28 grams (Third Offense) (2015-CP-10-2362). He was represented by James W. Smiley, IV, Esquire. Assistant Solicitor Stephanie Linder prosecuted the case.

On February 4, 2013, Applicant proceeded to a jury trial before the Honorable Kristi L. Harrington, where he was convicted as indicted. Judge Harrington sentenced Applicant to the mandatory minimum sentence of twenty-five years imprisonment.

A notice of appeal was filed and an appeal perfected on Applicant's behalf by Barry Krell, Esquire, Jerry Theos, Esquire, and Jeff Buncher, Esquire. On appeal, Applicant argued the trial court erred in proceeding forward with his jury selection and a portion of his pre-trial motions in his absence. Following briefing, the Court of Appeals addressed the merits of Applicant's claim and affirmed Applicant's conviction and sentence in a summary opinion filed on April 30, 2014. State v. Steplight, Op. No. 2014-UP-184 (S.C. Ct. App. filed Apr. 30, 2014). The Remittitur was sent on May 16, 2014.

SUMMARY OF FACTS ADDUCED AT TRIAL

On May 27, 2011, Investigator Sean Engles and Detective Jeffery Harrison of the Charleston Police Department observed Applicant, who was driving a white Dodge truck, commit two traffic violations: failing to come to a complete stop at a red light and failing to turn into the immediate lane. (Tr. 136-37, 174). Investigator Engles and Detective Harrison pulled behind Applicant and turned on the patrol vehicle's blue lights to initiate a traffic stop. (Tr. 174). Investigator Engles observed Applicant shifting in his vehicle in an apparent attempt to conceal something. (Tr. 174). When Applicant pulled over, Investigator Engles and Detective Harrison asked for his license and registration. (Tr. 175). Applicant handed Detective Harrison a route-restricted driver's license, and Detective Harrison discovered Applicant had violated the restrictions by dropping his girlfriend off at church instead of only driving to and from work. (Tr. 175, 179-83).

Detective Harrison arrested Applicant for driving under suspension. (Tr. 138, 175). Applicant consented to a search, and Investigator Engles noticed an unnatural object between Applicant's buttocks. (Tr. 154-55). When Applicant was booked into the county jail, Investigator Engles confiscated two plastic bags from between Applicant's buttocks during a strip search. (Tr. 140-41, 175). The bags contained a white rock-like substance, and a presumptive field test confirmed the substance was crack cocaine. (Tr. 140-41). Four days later, on May 31, 2011, Criminalist Anita Moore with Charleston Police Department analyzed the rock-like substance and confirmed the two bags contained 5.266 grams and 7.216 grams of cocaine base.¹ (Tr. 204-

¹ At the time of Applicant's trial, Moore was no longer employed with the Charleston Police Department and was a crime scene technician for the North Charleston Police Department. (Tr. 204).

13). Applicant was indicted for trafficking in cocaine base—10-28 grams (third or subsequent offense).

At 12:00 p.m. on Monday, February 4, 2013, the State called Applicant's case for trial. (Tr. 4). Applicant's counsel appeared in court and informed the trial court that his client was not present, had always been available in the past, had a non-working phone number on which counsel had left messages, and was currently being sought by his bondsman. (Tr. 4). When the trial court suggested picking the jury right then, defense counsel stated, "I'll have to pick without a client." (Tr. 5). He then stated, "I'm fine to go ahead and pick a jury. I would just ask, in an abundance of caution, if the murder case does take too long, that we don't swear the jury." (Tr. 5). The trial court agreed not to swear the jury. (Tr. 5). The trial court inquired what time Applicant was told to be there, and the assistant solicitor indicated the letters defendants receive request they arrive on Monday morning at 9:00 a.m. (Tr. 6). Trial counsel informed the trial court he was certain his client "had gotten a dozen letters over the last year and a half" and he "had never had a problem with him not showing up." (Tr. 6). He elaborated, "The only reason he's not here, is the number that he—he's changed phones three or four times. The last number I had, I called. It was disconnected. I called every other number, left messages. Then this morning, I contacted the bondsman—" (Tr. 6). Trial court stated Applicant's pre-trial motions would begin at 1:30 p.m. and broke for lunch at 12:30 p.m. (Tr. 10).

The trial court began Applicant's suppression hearing at 1:30 p.m., noting counsel's vehement objection to continuing without his client present. (Tr. 10). Trial counsel thanked the court for noting his objection to going forward without Applicant present and stated, "I surely wish [Applicant] was here, so he could hear this part because this is what he has complained

about the whole time. And just for the record, he has shown up—and Ms. Linder—he has shown up at least a half dozen times. This has been on the docket for an excess of a year. One time—. . . It's been called several—it's been close to being called several—it was actually called once, when I got Rocky Mountain Spotted Fever on Memorial Day, in front of Judge Nicholson, and we weren't able to go forward. So it's had stops and starts. And my client—that's why I said, he's not intentionally missing court. I feel like I've—I've done something wrong because he's not here, because I know he wants to be present. I understand this Court's position too. He has a letter and all. But I've usually never had a problem reaching him.” (Tr. 11-12) (emphasis added). The trial court asked where the bonds person was, and counsel explained the bondsman had been trying to locate Applicant since 8:30 a.m. that morning. (Tr. 12).

Following this discussion, the State called Investigator Engles and began the suppression hearing. At 2:33 p.m., the trial court suspended the hearing to pick a jury for another case. (Tr. 44). At 2:50 p.m., the proceedings continued and Applicant was still not present. (Tr. 44-45). The following exchange took place:

[Trial counsel]: I do need to put on the record that I've asked you for a continuance because my client is not present, and that you've ruled against me and that we're going forward.

The Court: All right. At this stage and at every stage from now on, Mr. Smiley, I'm going to give you a continuing objection.

[Trial counsel]: Thank you.

The Court: We are continuing without your client, but I have heard nothing that indicates to me that [Applicant] was not given notice of today. So we are going to - - here's what we're going to do. We're going to pick the jury, let the jury go, and we'll start in the morning. We're going to finish our pretrial motions and then give you a chance to e-mail your client.

(Tr. 45). The trial court then began jury selection. (Tr. 45-46).

At 3:51 p.m., Applicant arrived at the courthouse. (Tr. 77). Trial counsel explained to the trial court:

[Applicant] arrived when I was downstairs, and I had an opportunity to explain to him what has happened so far and the details. He's now present. He just didn't know. The bondsman found him; he came immediately. He apologizes, even though, I guess, technically, I need to have gotten in touch with him. He did get a letter from me. But he'd gotten so many of them, he didn't realize this case would be first this morning. We apologize, your Honor.

(Tr. 77) (emphasis added). The trial court then continued the suppression hearing. (Tr. 77).

Ultimately, the jury found Applicant guilty. (Tr. 250). During sentencing, Applicant told the trial court:

I just feel like I made a mistake. And that mistake, you know, the roads were rocky. It goes like this: I didn't get my suppression. I didn't get to pick my jury. I don't even know half of those people in this room. I don't even know who those people was [sic]. My suppression was hold [sic] without me. I - - I ain't even get to hear my whole suppression. I feel like - - as an example, I had fired my attorney, and you still give me him. And with that being said, I feel as if I get - - I get railroaded - - I get treated unjustly in this courtroom today. But I understand we have all got to go through and how you got to do your job. But understand that I got kids too. And with that, the questions that I would need to ask, for the jury, to hear my side, I didn't - - I didn't get that. And on top of that, I got sodomized. But I can understand, and pray for everybody, and everybody to do the same.

(Tr. 257). The trial court sentenced him to twenty-five years' imprisonment. (Tr. 258).

ALLEGATIONS RAISED

In his amended application, Applicant alleged he is being held in custody unlawfully

based on allegations of ineffective assistance of counsel for:

- Failing to stay in touch with him and promptly inform him of his trial date
- Failing to advise him of the significance of the pre-trial suppression hearing and the ramifications if the motion was denied
- Failing to discuss and prepare a defense that the drugs were for personal consumption, not distribution
- Failing to interview witnesses and develop testimony that the drugs were not for distribution
- Failing to request a jury instruction on lesser-included offenses
- Failing to have the drugs independently tested or analyzed
- Failing to give an effective closing argument

Applicant proceeded forward on these seven grounds at the evidentiary hearing before this Court.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Applicant testified first. He testified he was arrested in May of 2011 following a stop for traffic violations and subsequent charged with driving under suspension because he was driving outside the scope of the limited driving privileges on his restricted license. He testified that following his arrest, he was taken to the detention center, where officers recovered two bags containing crack cocaine from his buttocks. He testified he never challenged the possession of the crack cocaine. He further testified he has multiple prior drug convictions and admitted on cross-examination that this conviction was his fifth drug-related conviction.

Applicant testified he retained trial counsel to represent him approximately one month after he was arrested and this was after he had already been released on bond. He testified he met with counsel only two or three times before his trial and spoke by phone one or two times. He testified he had the same telephone number the entire time he was out on bond and denied his phone was ever disconnected or that he changed phone numbers.

He testified he and counsel discussed the importance of the total weight of the drugs and he understood he had been charged with trafficking because the total drug weight was over ten

grams. He testified he told counsel he purchased nine grams of crack cocaine and two separate bags and paid three-hundred dollars for it. He testified he asked counsel to have the crack cocaine retested because of this and counsel told him he would have to pay an additional fee to if he wanted the drugs retested. He testified he understood this was his only possible defense if the suppression motion was denied. However, he also testified counsel never advised him of the importance of the suppression motion. He testified counsel also failed to advise him he would need to testify on his own behalf to argue he purchased less than ten grams of crack cocaine. He testified he did not testify at trial because counsel advised him it would not be a good idea.

He testified counsel told him he would be able to get the charge reduced to simple possession and he would likely serve a sentence of three to five years imprisonment. He testified counsel never explained the mandatory minimum sentence for trafficking cocaine—10-28 grams (third offense) was twenty-five years or discussed any other details of a possible punishment. He testified the State made him a ten year plea offer and he discussed this with counsel. However, he testified counsel never explained the State would withdraw the ten-year plea offer if the suppression motion was denied. He testified if counsel had explained the importance of the suppression motion to him, he would have accepted the State's ten-year plea offer.

Applicant testified he first learned his trial was going forward from his bondswoman when she called him on his cell phone at 3:00 p.m. on the day of his trial. He testified he got to the courthouse in less than an hour and was present for the second half of his suppression motion and for the entire trial. He testified he was not present for jury selection and was prejudiced by this because counsel did not get his input during jury selection and he knew juror number 373 (Sheila Wright). He elaborated he knew Ms. Wright because of a prior relationship through

friends in common and that the two had “bad blood.” However, he testified he did not know Ms. Wright by sight, did not recognize her as a member of the jury at any point during his trial, and had never had a conversation with her. He testified he never told counsel or the trial court that he knew Ms. Wright or any other member of the jury. He acknowledged there was an alternate juror that could have been substituted in Ms. Wright’s place. He testified the jury was not sworn in until after he arrived and that he was present for his entire trial.

Applicant acknowledged he signed a bond form advising him he would be tried in his absence if he failed to appear and read the following passage from his bond form: “I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend court, the trial will proceed in my absence.” (ROA 4). He testified he had received several letters from the solicitor’s office regarding his trial date, but denied receiving a letter for this term of court. He testified he and counsel “rarely talked” during the nearly two years he was out on bond awaiting trial. He testified counsel never called him or any of his emergency contacts to inform him his trial started.

Applicant next presented his bondswoman, Angelica Desaussure-Cooper, to testify on his behalf. She testified she was Applicant’s bondswoman the entire time he was out on bond. She testified he came to the office weekly to make payments. He testified Applicant had the same phone number the whole time, but acknowledged she never called him and cannot be certain his phone was always working and was never disconnected. She testified she received a phone call from counsel on February 4, 2013, and he told her Applicant’s trial was underway and she needed to get Applicant to the courthouse. She testified counsel asked her not to tell Applicant his trial had begun. She testified she spoke with Applicant by phone and told him to come to the

courthouse. She testified Applicant was at home when she spoke to him and she had no trouble reaching him.

Applicant next called Dr. Robert Bennett, who was admitted as an expert in drug analysis without objection.² Dr. Bennett testified he was retained by Applicant's counsel earlier this year to re-analyze the drug evidence. He testified he reviewed the original drug analysis conducted by Charleston Police Department (admitted as Applicant's Ex. No. 4) and the court order for retesting (already part of the Clerk's records for this case, but also introduced as Applicant's Ex. No. 1). He testified he prepared a standard protocol worksheet prior to re-analysis (admitted as Applicant's Ex. No. 2), which also listed all the equipment he would need for retesting.

He testified he re-analyzed the drug evidence on February 17, 2017, in a courtroom at the Charleston County Courthouse. He testified approximately fifteen people were present, including clerk's office staff, prosecution staff, Applicant's counsel, and a private investigator who filmed the entire process. He testified his re-analysis was performed on a "shaky table" in the courtroom, but then explained all tables are inherently shaking and he took proper measures to ensure the table was properly leveled and balanced before he began testing and remained properly balanced throughout testing. He testified he used calibration weights on his scale prior to re-weighing the drugs to ensure accuracy. He testified neither his scale nor his calibration weights have been calibrated by an independent third party recently and neither have certifications of calibration.

² During voir dire, Dr. Bennett admitted he is not a registered pharmacist, but has previously held himself out to be to the general public on his website and when testifying in court, resulting in an Order to Cease and Desist from the South Carolina Board of Pharmacy on February 4, 2013. He also acknowledged he is not a member of any professional organizations or groups because he does not want to keep up with the requirements to be a member of such organizations.

He testified there was concern amongst the observers present regarding the possibility of noxious fumes from the drug evidence when unsealed that could create a health hazard, which he acknowledged was a possibility, but that no such fumes were omitted when the sealed evidence bags were opened. He testified the drugs were in two separate plastic bags and the actual crack cocaine was in 2 balls. He testified he weighed each of the crack cocaine balls without their outer packaging, amounting to 3.919 grams and 5.325 grams, for a total of 9.244 grams. He testified he also did a qualitative analysis which confirmed the substance contained cocaine. He testified his findings were put into a forensic report prepared after testing, introduced into evidence as Applicant's Ex. No. 3.

Dr. Bennett testified he is unsure why there is a discrepancy between the crack cocaine's weight when weighed by the Charleston Police Department on May 31, 2011, and his weight nearly six years later. He elaborated he was not present for the original testing and is not sure what methods were used because it is not listed on the original report. Dr. Bennett testified he is familiar with the hypothesis that crack cocaine loses weight over time, but that little research has been done on the topic. He testified he was provided with a report of a joint study by the Department of Justice and Drug Enforcement Agency shortly before the hearing, had not previously read it, and had not fully reviewed it in detail at the time of his testimony. Nonetheless, Dr. Bennett testified he was prepared to give an opinion regarding the article and concluded the article indicates there can be some weight loss from crack cocaine over time, but the weight loss would be between a 5-10% maximum. However, on cross-examination, he admitted the DOJ/DEA report indicates findings of greater than 30% weight loss in certain wet samples of crack cocaine over time. He testified possible weight loss would also vary greatly

depending on whether the sample was wet or dry when originally tested and that there is no documentation in the present case as to whether the crack cocaine was wet or dry when first tested in 2011.

Applicant next presented private investigator Dick Vance, who was retained by his current counsel. Vance testified he was previously employed by the Charleston Police Department from 1980 to 2004 and has been in the private sector since 2004. Vance testified he was present for the drug re-testing on February 17, 2017, and made a video recording of the entire process (admitted as Applicant's Ex. No. 4).

The State presented Wendy Bell, Ph.D, Captain of Forensic Operations at the South Carolina Law Enforcement Division (SLED), who was admitted as an expert in toxicology. Captain Bell testified she has been employed with SLED since 1998 and has been Captain of Forensic Operations since 2013. She testified she was formerly a forensic toxicologist at SLED and she routinely analyzes illegal drugs, including crack cocaine, as part of her current and past duties. She elaborated she has personally analyzed over four thousand narcotics samples and peer reviewed thousands more. She testified she has attended DEA training and is familiar with how crack cocaine is made. She testified crack cocaine is made by mixing cocaine with water and solvent (usually baking soda) and is heated until crack cocaine is formed into hard rock-like formations. She testified one of the common methods used by street level dealers is "whipping," where the maker whips excessive water or other solvent into the crack cocaine as it is forming to increase the weight without the use of additional cocaine so dealers can increase their profits.

Captain Bell testified she has personally experienced crack cocaine samples losing weight over time, including two cases this year out of Lancaster County where the drug evidence:

lost more than 50% of its total weight in a few months. She testified her labs have been documenting this weight loss and although it does not happen with all samples of crack cocaine, the occurrence is commonly known throughout the forensic science and law enforcement communities. She referenced the DOJ/DEA study, which she testified is also widely known in the forensic science community, as supporting findings of large weight loss in crack cocaine samples, including more than 30%. She testified a weight loss of more than 30% over a six year period is possible and not surprising, but it is also possible the original weight was incorrect. She noted the Charleston Police Department laboratory is an accredited laboratory and that best practice is to test drug samples as soon as possible to get the most accurate weight. She elaborated a weight taken four days after the crack cocaine sample was collected would be more indicative of the correct weight at the time of sale than a subsequent weighing six years later.

The State next presented testimony from Judith Gordon, the Director of the Forensic Services Division at the Charleston Police Department, who was admitted as an expert in toxicology. She testified she has been with the Charleston Police Department since 1995 and oversees the forensic laboratories for the police department, including all drug analysis, DNA analysis, and other evidence analysis. She testified she was a bench chemist before becoming Director of the Forensic Services Division and she routinely analyzes narcotics as part of her job duties. Additionally, she testified she has attended DEA trainings on drug analysis.

Gordon testified she was not present when this particular sample was first tested by Criminalist Anita Moore at the Charleston Police Department Laboratory, but she has reviewed Moore's report (Applicant's Ex. No. 4). She testified she has no reason to believe the results of the initial analysis and report were inaccurate. When questioned as to whether the crack cocaine

samples were weighed in their outer packaging for the final weight (plastic bags and saran wrap) as Applicant has speculated, Gordon testified this is that has never been done in her lab in the more than twenty years she has worked there and she does not believe it occurred in this case because it is against Charleston Police Department lab protocols. She testified her lab is accredited and has protocols and procedures in place to ensure accuracy. She elaborated all scales in the lab are calibrated by an outside source annually and provided calibration certificates. She testified the particular scale used to test this drug evidence was a AMD balance, which she described as a standard analytical balance, and she testified this particular balance received its outside calibration in October 2010 prior to weighing this drug evidence. Additionally, she testified the Charleston Police Department lab does a monthly calibration internally in addition to the annual calibration to further ensure accuracy of their results.

Gordon testified she was present for the re-analysis of the drug evidence in this case in February 17, 2017. She testified Dr. Bennett did not perform a calibration of the scale as he has asserted, but rather, performed a verification where he placed known weights on his scales. She testified she questioned Dr. Bennett about this and he told her his scale had not been calibrated by an external provider or source. She testified Dr. Bennett also removed the containers to add the drug evidence once the scales had been verified, which is against best practices and is not what is done at the Charleston Police Department lab. She testified that although Dr. Bennett's testing was not in an ideal lab environment with properly calibrated scales, she ultimately does not believe his weights obtained during the re-analysis are off by much and are more or less accurate.

However, Gordon testified she is not surprised the crack sample has lost weight in six years. She testified she and her lab have re-analyzed crack cocaine samples and have seen weight loss in these samples. She elaborated this is not unexpected based on the way crack cocaine is made, often by whipping water or another solvent into the crack cocaine while it is forming. She testified she is familiar with research on the topic and it is commonly known that crack cocaine can experience weight loss over time. She testified she is unsure if the drug evidence in this case was wet when first tested, but would not expect to see any signs of wetness in the drugs six years later.

Finally, trial counsel James W. Smiley, IV, testified. Counsel testified he has been practicing law since 1993 and exclusively practices criminal defense. He testified he was retained to represent Applicant shortly after he was released on bond. He testified he met with Applicant often, usually when Applicant would come by his law office to make a payment and the two would sit on the porch at counsel's law practice and talk for extended periods of time while smoking cigarettes. However, he asserted he only spoke about the "actual facts" of Applicant's case for "two to three hours" throughout the entirety of their professional relationship. He testified he and Applicant got along well and that Applicant is one of the few clients who had counsel's personal cell phone number. He testified he and Applicant also spoke by phone frequently. He denied Applicant had changed his phone number or had a disconnected phone while he was out on bond, despite telling the trial court this on the record, but did admit he sometimes had a hard time reaching Applicant because he had two different phones and both were not always working. He testified he and Applicant generally communicated well.

Counsel testified he filed appropriate discovery motions and he reviewed this material with Applicant. He testified the main evidence the State would be presenting against Applicant was the more than twelve grams of crack cocaine that was found in Applicant's buttocks when he was arrested. He testified he explained the elements of trafficking in cocaine to Applicant and that he was charged with trafficking based on the total weight of the crack cocaine recovered, regardless of how Applicant intended to use the drugs. He testified Applicant had four prior drug convictions, which were in two different drug adjudications, and he did not have any basis to challenge that this charge was a third or subsequent drug offense. He similarly testified he did not see any reason to challenge the drug's weight or have the drugs re-tested prior to trial. He testified he has never had drug evidence re-weighed in any of his cases. When questioned if Applicant had told him he only purchased nine grams of crack cocaine and therefore it was below the ten gram threshold for trafficking, counsel testified he did not have any independent recollection of this conversation.

He testified success of Applicant's hinged on suppression of the drug evidence and he fully explained this to Applicant. He testified he explained to Applicant that if they lost the suppression motion, he would likely be convicted and would be required to serve a mandatory minimum twenty-five year sentence. He testified because suppression was so critical, he spent significant time preparing for the motion. He testified the primary argument in support of suppression was that officers had no reason to arrest Applicant for driving under suspension because he was not driving outside the scope of his restricted route. He testified he fully made these arguments to the trial court, who ultimately denied his motion to suppress the drug evidence. He testified after suppression was denied, conviction was all but certain and he was

trying to create a record upon which Applicant could appeal. Counsel testified he did not have much of a strategy for his closing argument because conviction was an almost certainty following the denial of his suppression motion.

He testified Applicant was out on bond for the entire time he represented Applicant. He testified Applicant's case had been on the trial docket multiple times, he had received numerous notices that his case was up for trial from the Solicitor's office, and Applicant appeared in court every term. Counsel testified because Applicant's case had been on the trial docket but had not gone forward so many times, he did research on all the cases above Applicant's on the trial docket and received assurances from counsel on those other cases that other cases would be going forward. He testified based on these conversations, he did not personally contact Applicant the week before trial because he did not think Applicant's case was going forward. However, he later contradicted this testimony and stated he tried to call Applicant the week for trial without success, but that he is ultimately at fault for "not chasing" Applicant the week before trial. He testified he is unsure if Applicant received a notice of trial from the Solicitor's office for this particular term of court. He testified he asked the prosecuting assistant solicitor to let him know if anything changed regarding the scheduling of Applicant's case and as of Sunday evening, he had not heard that Applicant's case was going to be tried the following day.

Counsel testified he was very surprised the Monday of trial that Applicant's case was going forward. He testified he attempted to get in touch of Applicant without success, and then called his bondswoman and asked her to track down Applicant to get him to the courthouse as soon as possible. He testified he objected to going forward without his client present numerous times and Judge Harrington made it clear the trial was proceeding forward. Counsel testified that

at that point, there was nothing else he could do to prevent the trial from going forward. He testified Applicant was not present for jury selection or the first witness in his suppression hearing, but he was present for the rest of pre-trial and all of his trial. He testified he thinks Applicant was prejudiced by missing jury selection, but acknowledged he does not always listen to his clients' input as to whom to select for a jury. He testified Applicant never informed him or the trial court that he knew anyone on his jury. He testified if Applicant had informed him he knew a juror, he would have immediately informed the trial court and asked for the alternate juror to be seated in that juror's place.

Counsel testified he did not consider making a request for a jury instruction on any lesser-included offenses because no evidence supported such an instruction because all evidence established Applicant was in possession of more than ten grams of crack cocaine. He testified because his main focus was suppression of drug evidence and the thought he had a strong argument in support of suppression based on an unlawful arrest, he did not see any reason to have the drugs re-analyzed. He testified once the suppression motion was denied, the only possible defense Applicant had was that the drugs were below the ten gram threshold for trafficking in hopes of being convicted of a lesser-included offense and acknowledged he did not present any evidence the drug evidence weighed less than ten grams. He testified he does not have any reasons to believe the initial drug analysis and weight determined by the Charleston Police Department was wrong or inaccurate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearings. This Court has further had the opportunity to

observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.

If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668. “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel. Below are this Court’s specific finding regarding each of Applicant’s allegations of ineffective assistance of counsel:

Allegation: Failure to stay in touch with Applicant and promptly inform him of his trial date

Applicant alleges trial counsel was ineffective for failing to adequately communicate with him regarding his trial date and allowing his trial to proceed forward without him present for all pre-trial hearings and jury selection. Specifically, Applicant alleges: “Applicant was not informed by trial counsel that he was up for trial. Applicant did not know his trial was under way

until the bondsman informed Applicant later in the day on February 4, 2013. Upon being informed by the bondsman that his trial had begun, Applicant went straight to the court house. Applicant's entire jury was chosen without any input from Applicant. A member of the jury panel that was subsequently chosen to sit on Applicant's jury previously knew Applicant. Additionally, a majority of the pre-trial motion to suppress was conducted outside of Applicant's presence. Applicant had a constitutional right, as guaranteed by the Fifth, Sixth and Fourteenth amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution, to be present during jury selection and his pre-trial suppression hearing. Counsel's failure to keep Applicant informed of his trial date was ineffective, resulting in prejudice to Applicant." (Amended APCR).

Following the submission of proposed orders as requested by this Court, Applicant requested this Court consider the recent opinion from the Court of Appeals, State v. Stanley Lamar Wrapp, Op. No 5510 (S.C. Ct. App. filed Aug. 16, 2017), where the Court of Appeals reversed Wrapp's convictions and remanded his case back to the court of general session for a new trial, finding the trial court erred in allowing Wrapp's trial to proceed in his absence without making a factual finding that he had actual notice of his trial date or that he could be tried in his absence. This Court asked both parties to submit amended orders addressing Wrapp.

This Court finds this allegation is without merit and must be denied and dismissed with prejudice. As an initial matter, this Court finds this issue was already during Applicant's direct appeal by the Court of Appeals, who found any alleged error was harmless. See State v. Steplight, Op. No. 184 (S.C. Ct. App. filed April 30, 2014). As the Court of Appeals has already reviewed Applicant's absence from the small portion of his pre-trial suppression hearing and his

jury selection and found his absence harmless, the doctrine of collateral estoppel prevents Applicant from relitigating this same issue on post-conviction relief. “Collateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action.” Koon v. State, 358 S.C. 359, 364-365, 595 S.E.2d 456, 459 (2004) (overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)) (citing Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281 (2003)). See State v. Snowden, 371 S.C. 331, 334, 638 S.E.2d 91, 93 (Ct. App. 2006) (“Collateral estoppel can be used in a criminal proceeding.”), see also State v. Brown, 201 S.C. 417, 424, 23 S.E.2d 381, 383 (1942) (holding that defendant was estopped from relitigating the value of stolen goods in magistrate court where circuit court determined value and remanded to magistrate court based on that determination).

Moreover, this Court finds counsel performance was in accordance with professional standards and refuses to find him deficient for failing to advise him of his trial date. The record, both from trial counsel’s statements to the trial court and his testimony before this Court at the evidentiary hearing, establishes trial counsel attempted to contact multiple times, including the week before trial and numerous times the morning of trial without success, and when he was not able to reach his client, he immediately called Applicant’s bondswoman to bring him to court immediately. Counsel also strenuously objected to going forward with any portion of the trial in Applicant’s absence, which was noted by the trial court and overruled. As counsel testified at the evidentiary hearing, there was nothing else he could do at that point but proceed forward with Applicant’s suppression motion and diligently represent his client’s interests until Applicant arrived. This Court finds Applicant’s performance was reasonable, diligent, and in accordance

with professional norms, and therefore, must be denied and dismissed with prejudice. See Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

Furthermore, this Court finds Applicant has failed to meet this burden of establishing any resulting prejudice. Applicant asserts he was prejudiced by trial counsel's alleged deficiency because one of the jurors (Juror number 373—Sheila Wright) was someone he knew and with whom he had “bad blood.” However, Applicant conceded he did not recognize Ms. Wright at his trial and did not inform counsel or the court that he knew Ms. Wright.

Finally, this Court finds the Court of Appeals' recent decision of Wrapp is not controlling on this case for several reasons. Initially, the Wrapp decision, which was decided more than three-and-a-half years after Applicant's trial, represents a stark contrast from longstanding precedent in South Carolina of affirming convictions where trial courts in South Carolina proceeded with trials *in absentia* based on the “actual notice” given in bond forms which are effectively identical to the one in Applicant's case. See, e.g. State v. Wright, 304 S.C. 529, 531, 405 S.E.2d 825, 826 (1991) (holding the trial court's denial of defense counsel's request for continuance, based on counsel's recent contact with defendant and belief that defendant could be located, was not an abuse of discretion, as defendant was aware of term of court and knew he would be tried in absentia if he failed to appear); State v. Fairey, 374 S.C. 92, 101, 646 S.E.2d 445, 449 (Ct. App. 2007) (“A bond form that provides notice that a defendant can be tried in absentia may serve as the requisite notice.”); State v. Barnette, Op. No. 2014-UP-146 (S.C. Ct. App. filed Apr. 2, 2014) (citing State v. Ravenell, 387 S.C. 449, 457, 692 S.E.2d 554, 558 (Ct. App. 2010) (finding that a bond form that informed the defendant of his obligation to appear “at such other times and places ordered by the court” and which provided notice that a defendant can

be tried in absentia may serve as the requisite warning that he may be tried in his absence should he fail to appear)); State v. Myers, Op. No. 2016-UP-123 (S.C. Ct. App. filed Mar. 2, 2016) (citing Ravenell, 387 S.C. at 457, 692 S.E.2d at 558 (finding that notice of the term of court in which a defendant will be tried is sufficient notice and a bond form that provides notice that a defendant can be tried in absentia may serve as the requisite warning that he may be tried in his absence should he fail to appear)); State v. Kimble, Op. No. 2016-MO-011 (S.C. Sup. Ct. filed Apr. 13, 2016) (citing Fairey, 374 S.C. 92, 646 S.E.2d 445, 449-50 (finding that a bond form providing notice that the defendant can be tried in absentia may serve as the requisite notice)); State v. Bell, Op. No. 2008-UP-249 (S.C. Ct. App. filed May 7, 2008) (finding it is well-settled a bond form that provides notice that a defendant can be tried in absentia may serve as the requisite notice and citing State v. Goode, 299 S.C. 479, 385 S.E.2d 844, 846 (1989); Fairey, 374 S.C. 92, 646 S.E.2d 445, 449-50; and City of Aiken v. Koontz, 368 S.C. 542, 547-49, 629 S.E.2d 686, 689-90 (Ct. App. 2006)); State v. O'Donald, Op. No. 2008-UP-007 (S.C. Ct. App. filed Jan. 2, 2008) (finding that in addition to appearing in court and telling the judge he did not wish to be present, the bond order Appellant signed acknowledged he had been informed he had a right and obligation to be present at trial and if he failed to attend, the trial would proceed in his absence, and quoting Fairey, 374 S.C. at 101, 646 S.E.2d at 449 ("A bond form that provides notice that a defendant can be tried in absentia may serve as the requisite notice.")); State v. Johnson, Op. No. 10210-UP-373 (S.C. Ct. App. filed July 21, 2010) (citing Ravenell, 387 S.C. at 457, 692 S.E.2d at 558 (finding defendant waived his constitutional right to be present at trial after he was notified of his right to attend and instructed his failure to appear would result in being tried in his absence, as well as noting defendant's bond form sufficiently warned him of being tried in his

absence for failing to appear)). Because the Court of Appeals panel in Wrapp has adopted a new standard for required notice before a defendant has been tried in his absence and this opinion comes more than three-and-a-half years after Applicant's trial, this Court cannot conclude, and refuses to conclude, that it can be used to hold Applicant's counsel deficient in the present case. See Frierson v. State, 417 S.C. 287, 299 n. 7, 789 S.E.2d 762, 768 n. 7 (Ct. App. 2016), reh'g denied (Aug. 18, 2016) (quoting Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454 (1994) overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) ("Our courts have 'never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial.' "); see also Robinson v. State, 308 S.C. 74, 77–78, 417 S.E.2d 88, 91–92 (1992) (holding defense counsel was not ineffective in failing to present evidence of battered woman's syndrome in support of wife's self-defense claim where trial took place six years before our supreme court recognized battered woman's syndrome as relevant to a claim of self-defense)).

Second, this Court finds reliance on Wrapp would be imprudent at this time as it is not a final decision. On August 31, 2017, the State filed a Petition for Rehearing *En Banc*, arguing that consideration of the full court may be necessary to secure or maintain uniformity of the Court of Appeals' decisions and the exceptional importance of resolving the incongruence of Wrapp with prior decisions of our appellate courts. Because Wrapp is not yet final, this Court finds reliance on it in Applicant's case would be misplaced.

Third, this Court finds Applicant would still not be entitled to post-conviction relief even if Wrapp were applicable to his case, as the present case is readily distinguishable from the facts presented in Wrapp. In Wrapp, the Court of Appeals noted, "the record is devoid of facts

allowing us to discern whether Wrapp had notice of the term of court.” Here, the record is abundant with facts establishing Applicant had notice of his trial date. Counsel informed the trial court he had left messages for Applicant and his bondswoman informing him that his trial was starting that morning. Additionally, the assistant solicitor and counsel informed the trial court letters indicating the trial date had been sent to Applicant. Therefore, even if this Court were to apply the holding in Wrapp to this case, Applicant would still not be entitled to relief.

In conclusion, this Court finds Applicant has failed to meet his burden of proof of establishing ineffectiveness of counsel for allowing a portion of his pre-trial hearing and jury selection to proceed in his absence. This allegation is denied and dismissed with prejudice.

Allegation: Failure to advise him of the significance of the pre-trial suppression hearing and the ramifications if the motion was denied

Applicant alleges trial counsel was ineffective for failing to advise him of the importance of his suppression motion and the ramifications if this motion was denied. This Court finds this allegation is refuted by the record from trial and the testimony presented at the evidentiary hearing. During trial, counsel informed the plea court he did not want to proceed forward with the suppression hearing in his client’s absence because it had been Applicant’s primary concern throughout his representation of Applicant. See Tr. 11 (“I surely wish he was here, so he could hear this part because this is what he has complained about the whole time.”). Additionally, Counsel testified he stressed the importance of the suppression motion to Applicant and Applicant understood a conviction and a twenty-five year sentence would be all but certain if the suppression motion was denied. While Applicant testified counsel did not explain the importance of the suppression motion or its impact on his case if denied, this Court finds Applicant’s

testimony as to this allegation to be lacking in credibility and rebutted by the record. This Court finds this allegation is without merit and must be denied and dismissed with prejudice.

Allegation: Failure to discuss and prepare a defense that the drugs were for personal consumption

Applicant alleges trial counsel was ineffective for failing to discuss whether the crack cocaine was for personal use and prepare a defense accordingly. Applicant testified he purchased nine grams of crack cocaine for personal use and he told counsel this during their discussion before his trial. Trial counsel testified he has no independent recollection of Applicant telling him this.

Pursuant to S.C. Code Ann. § 44-53-375(C)(1)(c), “[a] person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine or cocaine base . . . is guilty of a felony which is known as “trafficking in methamphetamine or cocaine base” and, upon conviction, must be punished as follows if the quantity involved is . . . ten grams or more, but less than twenty-eight grams . . . for a third or subsequent offense, a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars.” (emphasis added).

Based on the clear and unambiguous language of S.C. Code Ann. § 44-53-375(C)(1)(c), it is irrelevant if Applicant intended to personally consume the crack cocaine (or only nine grams of crack cocaine) because he was in actual possession of over ten grams of crack cocaine.

Accordingly, any argument trial counsel could have made to the jury that Applicant should not be convicted because the crack cocaine was for personal consumption as opposed to distribution would have been legally inaccurate. This allegation is without merit and must be denied and dismissed with prejudice.

Allegation: Failure to interview witnesses and develop testimony that the drugs were not for distribution

Similar to the prior allegation, Applicant alleges trial counsel was ineffective for failing to interview witnesses and develop testimony that the drugs were not for distribution. As discussed above, it is irrelevant whether trial counsel presented witnesses or developed testimony that the crack cocaine was for personal consumption based on S.C. Code Ann. § 44-53-375(C)(1)(c). This allegation without merit and must be denied and dismissed with prejudice.

Allegation: Failure to request jury instructions on lesser-included offenses

Applicant alleges the counsel was ineffective for failing to request jury instructions on lesser-included offenses. The record and testimony presented establish counsel did not request a jury instruction on any lesser-included offenses such as possession with intent to distribute crack cocaine. Counsel and Applicant both testified no evidence was presented at trial that Applicant was in possession of less than ten grams of crack cocaine.

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). “No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence.” State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). “Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence.” State v. Peer, 320 S.C.

546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). “A trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed.” State v. Green, 397 S.C. 268, 289, 724 S.E.2d 664, 674 (2012). “The mere contention that the jury might accept the State’s evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tends to show the defendant was guilty only of the lesser offense.” State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006).

In Applicant’s case, the only evidence presented established Applicant was in actual possession of more than ten grams of crack cocaine. Our appellate courts have consistently ruled that when the evidence presented at trial establishes Applicant is guilty of trafficking in crack cocaine, not a lesser-included offense, only trafficking should be charged. See State v. Taylor, 323 S.C. 162, 167, 473 S.E.2d 817, 819 (Ct. App. 1996) (holding that because “it is the amount of cocaine, rather than the criminal act, which triggers the trafficking statute, and distinguishes trafficking from distribution and simple possession. If the amount of cocaine, or any mixture containing cocaine, is ten grams or more the trafficking statute is applied” and is the trial judge correctly charged only the trafficking statute); State v. Raffaldt, 318 S.C. 110, 117 456 S.E.2d 390, 394 (1995) (holding defendant charged with trafficking in cocaine was not entitled to have jury charged on lesser included offenses of conspiracy to distribute, conspiracy to possess with intent to distribute or conspiracy to possess, where all the evidence indicated that defendant was dealing in quantities of cocaine of at least four ounces in connection with conspiracy, which implicated trafficking); State v. Grandy, 306 S.C. 224, 226, 411 S.E.2d 207, 208 (1991) (holding the trial court did not err in refusing to charge possession with intent to distribute controlled

substance as lesser included offense to charge of trafficking in cocaine where the undisputed evidence was that amount involved exceeded minimum for trafficking, then only trafficking charge would be submitted to jury, and in present case evidence as to quantity involved did exceed minimum). Because the evidence established Applicant could only be guilty of trafficking in crack cocaine or not guilty, any request counsel could have made for jury instruction on a lesser-included offense would have been denied by trial court. Accordingly, this Court finds counsel was not deficient for failing to request a jury instruction on the lesser-included offenses.

Allegation: Failure to have the dug evidence independently tested

Applicant alleges trial counsel should have retained an independent expert to re-analyze the drug evidence prior to trial to establish it was below the ten gram threshold for trafficking in crack cocaine. In support of this allegation, Applicant retained Dr. Bennett, who re-weighed the drug evidence on February 17, 2017, and determined the current weight of the crack cocaine was total of 9.244 grams. Applicant asserts this establishes the original drug analysis conducted by the Charleston Police Department was inaccurate and he was improperly charged with and convicted of trafficking in cocaine when he was in possession of less than the ten gram threshold. He argues counsel should have retained an independent expert such as Dr. Bennett prior to his trial, and, had counsel done so, he would not have been convicted of tracking in cocaine.

At the evidentiary hearing, counsel testified he had no reason to doubt the accuracy of the weights determined by the Charleston Police Department. He further testified he has never had a drug sample re-tested after it has been analyzed by the Charleston Police Department forensics.

laboratory. He also testified he did not recall Applicant telling him he had purchased less than ten grams of crack cocaine.

In response to Applicant's argument, the State presented two expert witnesses, Wendy Bell, Ph.D, Captain of Forensic Operations at the South Carolina Law Enforcement Division (SLED), and Judith Gordon, the Director of the Forensic Services Division at the Charleston Police Department, who both testified regarding the inherent properties in crack cocaine and the methods in which it is made that can result in significant weight loss over time. Both cited a DOJ/DEA joint study that focused on the stability of crack over time based on various production methods and concluded crack cocaine can lose significant weight (more than 30% of its total weight in certain circumstances) over time. Additionally, both testified to their own personal experiences with crack cocaine samples losing over time weight, including two examples cited by Captain Bell where samples lost more than 50% of its weight within a few months after the initial analysis. The State argued Applicant failed to establish original analysis of the crack cocaine, including a total weight of 12.482 grams, was incorrect when it was tested four days after Applicant's arrest and any weight loss was expected based on the inherent properties of crack cocaine. The State also argued numerous federal courts have recognized crack cocaine's lack of stability and weight loss over time. See United States v. Johnson, 434 F. Supp. 2d 301 (D. Del. 2006), aff'd 292 F. App'x 178 (3d Cir. 2008) (discussing expert testimony presented by the State to account for significant weight loss of crack cocaine over time); United States v. Thomas, 11 F.3d 620 (6th Cir. 1993) (finding the district court did not err in basing sentence in drug possession case on defendants having more than 50 grams of cocaine, even though defendants' independent expert reweighing the cocaine six months after it was initially

weighed, determined that the amount was 49.535 grams; there was evidence that testing to determine that substance was cocaine had consumed a minimum of 0.8 grams, and there was evidence that cocaine was subject to weight loss due to evaporation over time).

This Court finds Applicant has failed to meet his requisite burden of proof of establishing counsel was ineffective for failing to retain an independent expert to examine the drug evidence prior to his trial. Initially, this Court notes Applicant has failed to establish the evidence weighed below the ten gram threshold for trafficking at the time of his arrest. The evidence, which was collected from Applicant's buttocks (an inherently moist area) on May 27, 2011, was weighed four days later on May 31, 2011, and had a total weight of 12.482 grams. Through Dr. Bennett's testimony, Applicant merely established the evidence weighed less nearly six years later when weighed by Dr. Bennett in a less-than-ideal testing scenario. This Court agrees with the testimony presented by Captain Bell and Judith Gordon (and acknowledged by Dr. Bennett) that crack cocaine can lose significant weight over time. Moreover, this principle has been recognized or noted by numerous federal jurisdictions. See United States v. Roberson, 195 F. App'x 902 (11th Cir. 2006) (holding defendant failed to show that government acted in bad faith in storing crack cocaine sample, which had evaporated over time, as required to support due process violation claim; record showed that the Drug Enforcement Agency's storage practices for evidence were consistent with procedures used in other storage laboratories, and record demonstrated that some loss of a crack cocaine sample due to evaporation through the permeable plastic bags was inevitable over time); United States v. Chavis, 296 F.3d 450 (6th Cir. 2002) (finding evidence was sufficient to support defendant's conviction for possession of in excess of five grams of cocaine base, despite fact that cocaine base recovered from defendant weighed

only 4.13 grams at time of trial; criminologist who conducted testing on the cocaine base testified that when she examined it, the cocaine base weighed 5.1 grams, that a weight loss over time was not unusual, due to water evaporation, and that a small portion of the cocaine base was destroyed over time due to testing); Johnson, 434 F. Supp. 2d 301 (discussing expert testimony presented by the State to account for significant weight loss of crack cocaine over time); Thomas, 11 F.3d 620 (finding the district court did not err in basing sentence in drug possession case on defendants having more than 50 grams of cocaine, even though defendants' independent expert reweighing the cocaine six months after it was initially weighed, determined that the amount was 49.535 grams; there was evidence that testing to determine that substance was cocaine had consumed a minimum of 0.8 grams, and there was evidence that cocaine was subject to weight loss due to evaporation over time); see also United States v. Fox, 189 F.3d 1115, 1120 (9th Cir. 1999) (“[Officer] Bryant testified that in a laboratory there is typically a ten percent weight loss when cooking cocaine powder into crack, but that on the street one gram of powder cocaine typically converts into one gram of crack cocaine, because street cooks use baking soda and tap water to increase the weight.”). This Court concludes Applicant has failed to establish the initial weight of crack cocaine was inaccurate or that counsel was deficient for failing to retain an independent expert to re-analyze the drug evidence. This allegation must be denied and dismissed with prejudice.

Allegation: Failure to give an effective closing argument

Applicant alleges trial counsel was deficient for failing to give an effective closing argument. Counsel gave the following closing argument to the jury:

As I told you, I'm an advocate for Mr. Steplight, and when he said he was not guilty, it's the State's, their burden, and we went

through it. Y'all are the judges of the facts. The facts have been presented to you. Your Honor is the judge of the law, and she's made some rulings in this case as if—I'm sure y'all have noticed, it's hard sometimes being a lawyer, making sure that each of us go by the rules of evidence, and the rulings of Her Honor. Therefore, I submit to you that it's up to y'all to make a determination. Y'all have heard the evidence, and I know you will do the right thing. Thank you.

(Tr. 239). Counsel testified he did not have much of a strategy for his closing argument because conviction was an almost certainty following the denial of his suppression motion.

This Court finds Applicant cannot establish any prejudice resulting from counsel's alleged deficiency in his closing argument. As counsel noted, there was overwhelming evidence of guilt presented to the jury that Applicant was in actual possession of more than ten grams of crack cocaine, so there is no reasonable likelihood the result of the proceeding would have been different absent counsel's allegedly deficient closing argument. See Hutto v. State, 387 S.C. 244, 249, 250, 692 S.E.2d 196, 198 (2010) (finding an applicant cannot establish prejudice when there is overwhelming evidence of guilt). This allegation must be denied and dismissed with prejudice.

CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule

71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief must be denied and dismissed with prejudice; and
2. Applicant Norris Steplight shall remain in the custody of the State.

AND IT IS SO ORDERED this _____ day of _____, 2017.

MICHAEL NETTLES
Presiding Judge
Ninth Judicial Circuit

_____, South Carolina

Cc
AG
AT

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Norris Steplight, SCDC No. 279329,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

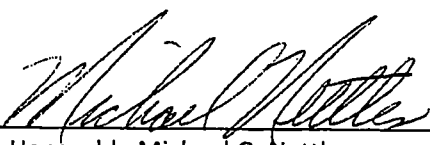
Case No. 2015-CP-10-2362

ORDER

FILED
2011 OCT -9 PM 12:02
JULIE J. ANTONIO
CLERK OF COURT

I have reviewed the State's brief to reconsider, alter, or amend pursuant to Rule 59(e). Pursuant to the text of Rule 59(e), this court opts not to conduct a hearing. Based on the hearing on the merits and the State's brief, the motion to reconsider is denied.

IT IS ORDERED!


The Honorable Michael G. Nettles
Chief Administrative Judge for the Twelfth Circuit