

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

Honorable Roger E. Henderson, Circuit Court Judge

HENRY LEE KINLAW, JR.,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001825

APPENDIX

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JOHNNY ELLIS JAMES, JR.
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF HORRY) 2012-GS-26-1700, 1698, 1699

STATE OF SOUTH CAROLINA,)

Plaintiff,)

Transcript of Record

vs.)

November 3, 2014

HENRY L. KINLAW,)

Defendant.)

B E F O R E:

Honorable John C. Hayes
Horry County Courthouse
Conway, South Carolina

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

J. Stephen Grooms, Esquire
M. Travis Hyman, Esquire
Attorney for Plaintiff

Russell B. Long, Esquire
Attorney for Defendant

Kay H. Richardson
Circuit Court Reporter

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VOIR DIRE

3

1 (November 3, 2014.)

2 THE COURT: Members of the jury panel, while the
3 Solicitor is bringing me the indictments and some other
4 material, I just want to introduce myself. I'm John Hayes
5 from Rock Hill. I'm a Circuit Court Judge. We travel all
6 over the state. I've been here in Horry County quite a number
7 of times and I always enjoy my stay. Give us a few minutes
8 and we'll get the, as my grandmother used to say, our ducks in
9 a row and we will go forward with the -- drawing the jury.

10 VOIR DIRE:

11 THE COURT: Members of the jury panel, this is the case
12 of the State of South Carolina versus Henry Lee Kinlaw, Jr.

13 Mr. Kinlaw, would you please stand and let the Jury see
14 who you are. This is Mr. Kinlaw. He is represented by Mr.
15 Russell Long. You may be seated. The State is represented by
16 Mr. Grooms.

17 MR. GROOOMS: Thank you, sir. I also have Travis Hyman
18 with me today.

19 THE COURT: All right. And Mr. Hyman is assisting.

20 Mr. Kinlaw is charged with a drug offense that occurred
21 on the 2nd day -- I'm sorry -- on the 29th day of February of
22 2012. It's alleged that this drug offense took place here in
23 Horry County.

24 Similarly to what Judge Culbertson did with you
25 downstairs, I'm going to ask you some questions. I'm going to

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VOIR DIRE

4

1 ask if you need to respond to any of these just to stand where
2 you are and I'll have some follow-up dialogue with you.

3 First, are any of you related by blood or marriage to Mr.
4 Kinlaw, his counsel or either one of the solicitors? If so,
5 please stand or are you a close personal friend of any of
6 those individuals, please stand.

7 All right. Yes, sir. Your name and number?

8 JUROR 176: David Gooden, 176. I am a close friend of
9 Mr. Long.

10 THE COURT: All right. Would that affect your ability to
11 be fair and impartial in the trial of Mr. Kinlaw?

12 JUROR 176: I don't think so.

13 THE COURT: Okay. You may remain with us. Thank you.
14 That's why I ask these questions. I want that kind of
15 information.

16 Any of you know anything about this case? Have you heard
17 about it from any source whatsoever or have any of you formed
18 or expressed an opinion about any matter or issue which will
19 be involved in this case? If so, please stand.

20 No one stands.

21 Were any of you members of the Grand Jury which passed on
22 this indictment at an earlier time? If so, please stand.

23 No one stands.

24 Are any of you or a member of your immediate family
25 involved in either law enforcement or in the prosecution of

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VOIR DIRE

5

1 criminal cases at any level? Anything from Judge Advocate
2 General or MP to Air Marshall to a Sherriff's officer, police
3 officer, anything like that? If so, please stand.

4 No one stands.

5 Are any of you members of or contributors to
6 organizations such as Students Against Drunk Drivers, Mothers
7 Against Drunk Drivers, Citizens Against Violence, Sheriff's
8 Association, Fraternal Order of Police, Trooper's Association,
9 anything like that? If so, please stand.

10 No one stands.

11 Any of you have any religious or theological or religious
12 or sociological or any other reasons why you could not be fair
13 and impartial for a trial of this type, that is the trial of
14 Mr. Kinlaw for drug offense? If so, please stand.

15 All right. Yes, sir. Your name and number?

16 JUROR 23: John Bartholomew. Let me look my number up.

17 THE COURT: Okay.

18 JUROR 23: 23.

19 THE COURT: All right. And you have some reason you
20 don't feel you could be a fair and impartial juror?

21 JUROR 23: Yes.

22 THE COURT: All right. You don't need to go into
23 details. If you tell you can't be fair and impartial, I'll
24 excuse you from serving. Don't leave. Just have a seat.

25 JUROR 23: Thank you.

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VOIR DIRE

6

1 THE COURT: Thank you. Yes, ma'am, your name and number.

2 JUROR 419: Cynthia Sherman, 419.

3 THE COURT: And you don't believe you could be fair and
4 impartial?

5 JUROR 419: No, Your Honor, I really don't.

6 THE COURT: All right. Well, I'll excuse you. Just
7 don't leave but you can have a seat also. Thank you.

8 CLERK: Judge, can I get the first juror's name?

9 THE COURT: The first juror's name again, sir? Yes, sir.

10 JUROR 23: John Bartholomew.

11 THE COURT: Bartholomew, is that right?

12 JUROR 23: Yes, sir.

13 THE COURT: Okay. The following -- any of you or a
14 member of your immediate family, I'm not gonna ask you to be
15 real particular about this because it does -- I don't want to
16 invade your privacy but I do have to ask this. Have any of
17 you or a member of your family been convicted -- charged with
18 a violation of the drug laws of this or any other state or
19 have any of you been impacted by the use of illegal drugs by
20 someone? If so, please stand.

21 No one stands.

22 The following are possible -- we'll you've already been
23 excused.

24 JUROR 23: Okay.

25 THE COURT: You've already been excused but thank you.

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VOIR DIRE

7

1 The following are possible witnesses in this case. I do not
2 know that all will testify but even if they don't testify,
3 their names may be mentioned. So, if you know any of these
4 individuals, particularly if you're related to them but even
5 if you know then, please stand. Steve Buffkin, then from --
6 he's not associated with law enforcement -- then from what's
7 known as the Drug Enforcement Unit here in Horry County, Chris
8 Thompson, Trevor Howlett, Phil Phillips, Randy Miller, Ryan
9 Mandala, Jeremy Brown. Then from the Horry County Police
10 Department, I guess, that's what that is, Sharon Lilly; the
11 chemist formerly of Horry County PD, Lisa Floyd; or finally,
12 not anyone associated with law enforcement Mayur, M-A-Y-U-R,
13 Patel. Anybody related by blood or marriage close personal
14 friend of any of those individuals?

15 No one stands.

16 Yes, ma'am, your name and number?

17 JUROR 148: I'm Juror 148, Kimberly Faircloth.

18 THE COURT: All right. Who do you know?

19 JUROR 148: I'm related to Jeremy Brown.

20 THE COURT: All right. How close related?

21 JUROR 148: My mom and his mom are sisters.

22 THE COURT: Okay. Here in the south, fourteenth cousins
23 are considered close. But, all right. I'll excuse you from
24 serving on this particular trial since you are that close in
25 kin. Well, let me ask you this. He's just a witness, he's

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VOIR DIRE

8

1 not charged with anything. Would the fact that he's related
2 to you, would that affect your ability to be fair and
3 impartial in this trial?

4 JUROR 148: No, sir.

5 THE COURT: All right. Well, I'll let you stay then.
6 I'll reverse myself. Thank you.

7 Anything further from the State?

8 MR. GROOOMS: No, sir, Your Honor.

9 THE COURT: Anything further from the Defense?

10 MR. LONG: No, Your Honor.

11 THE COURT: Any of you know of any reason whatsoever why
12 you could not or should not serve as a fair and impartial
13 juror in the trial of Mr. Kinlaw? If so, please stand.

14 No one stands.

15 Strikes are five and five.

16 MR. GROOOMS: Yes, sir, Your Honor.

17 MR. LONG: Yes, sir.

18 THE COURT: All right. Each side has the right to
19 excuse, or we call it strike, up to five individuals. When
20 you hear your name called, just stand where you are, you don't
21 have to come up forward. Of course, we used to do that. Now,
22 you can just stand where you are and the State, one of the
23 attorneys for the State will say either excuse the juror,
24 which means you may simply sit back down, or will say present
25 the juror. If you hear those words, turn and face the table

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JURY SELECTION

9

1 where Mr. Kinlaw and Mr. Long are seated. Mr. Long will say
2 either excuse the juror, again that means you may take your
3 seat, or he will say swear the juror. If you hear those
4 words, then work your way out and come over here and the
5 Bailiffs will tell you where to take a seat in the jury box.
6 We'll draw two alternates and the strikes on that will be one
7 and two.

8 So, please stand if you hear your name called.

9 JURY SELECTION:

10 CLERK: Juror Number 60, Albert Broughman. If you would
11 please come to the front of the courtroom, please.

12 MR. LONG: Madame Clerk, the Judge actually wanted them
13 to stay till we respond.

14 CLERK: All right. What say the State?

15 MR. GROOOMS: Please present this juror.

16 CLERK: Defense?

17 MR. LONG: Swear the juror, please.

18 CLERK: Please be seated in the jury box.

19 174, Delores Goldsmith. What say the State?

20 MR. GROOOMS: Sorry for the delay. Please present this
21 juror.

22 CLERK: Defense?

23 MR. LONG: Please swear Ms. Goldsmith.

24 CLERK: Please be seated in the jury box.

25 THE COURT: Counsel, you can remain seated.

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JURY SELECTION

10

1 MR. LONG: Thank you, sir.
2 CLERK: 307, Brenda Marlino.
3 MR. GROOOMS: Please present this juror.
4 CLERK: Defense?
5 MR. LONG: Please swear Ms. Marlino.
6 CLERK: Please be seated in the jury box.
7 422, Richard Silvis.
8 What say the State??
9 MR. GROOOMS: Please present this juror.
10 CLERK: Defense?
11 MR. LONG: Please excuse Mr. Silvis from the trial of
12 this case.
13 CLERK: You're excused from this particular case.
14 405, Donna Sarvis.
15 THE COURT: You can sit back down. Mr. Silvis, you can
16 sit back down. Thank you.
17 CLERK: What say the State?
18 MR. GROOOMS: Please present this juror.
19 CLERK: Defense?
20 MR. LONG: Please swear Ms. Sarvis.
21 CLERK: Please be seated in the jury box.
22 438, Kay Soltesz. What say the State?
23 MR. GROOOMS: Please present this juror.
24 CLERK: Defense?
25 MR. LONG: Swear her, please.

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JURY SELECTION

11

1 CLERK: Please be seated in the jury box.
2 497, Scott Wims.
3 What say the State?
4 MR. GROOOMS: Please excuse this juror.
5 CLERK: You are excused from this particular case.
6 237, Landon Johnson.
7 What say the State?
8 MR. GROOOMS: Please present this juror.
9 CLERK: Defense?
10 MR. LONG: Swear Mr. Johnson, please.
11 CLERK: Please be seated in the jury box.
12 430, Kenneth Smith.
13 MR. GROOOMS: Please excuse this juror.
14 CLERK: You are excused from this particular case.
15 256, Francis King.
16 What say the State?
17 MR. GROOOMS: Please excuse this juror.
18 CLERK: You are excused from this particular case.
19 232, Lawrence Joerres.
20 What say the State?
21 MR. GROOOMS: Please present this juror.
22 CLERK: Defense?
23 MR. LONG: Please swear the juror.
24 CLERK: Please be seated in the jury box.
25 182, Edsel Graves.

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JURY SELECTION

12

1 What say the State?

2 MR. GROOOMS: Please excuse this juror.

3 CLERK: You are excused from this particular case.

4 67, Samantha Brown.

5 What say the State?

6 MR. GROOOMS: Could I ask employment, please?

7 JUROR 67: Insurance adjuster.

8 MR. GROOOMS: Married, single?

9 JUROR 67: Single.

10 MR. GROOOMS: Please present this juror.

11 CLERK: Defense?

12 MR. LONG: Swear Ms. Brown, please.

13 CLERK: Please be seated in the jury box.

14 465, Mary Torrence.

15 What say the State?

16 MR. GROOOMS: Please present this juror.

17 CLERK: Defense?

18 MR. LONG: Please excuse Ms. Torrence from the trial of

19 this case.

20 CLERK: You are excused from this particular case.

21 381, Yohaina -- I'm sorry. Can you pronounce your name

22 for me?

23 JUROR 381: Yohaina Quezada.

24 CLERK: Thank you. What say the State?

25 MR. GROOOMS: Please excuse this juror.

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JURY SELECTION

13

1 CLERK: You are excused from this particular case.
2 105, Glenn Conklin.
3 What say the State?
4 MR. GROOOMS: Please present this juror.
5 CLERK: Defense?
6 MR. LONG: Swear Mr. Conklin, please.
7 CLERK: Please be seated in the jury box.
8 146, Jonathan Evans.
9 What say the State?
10 MR. GROOOMS: Please present this juror.
11 CLERK: Defense?
12 MR. LONG: Swear Mr. Evans.
13 CLERK: Please be seated in the jury box.
14 380, Brian Pruett.
15 What say the State?
16 MR. GROOOMS: Your Honor, can we approach?
17 THE COURT: Yes.
18 MR. GROOOMS: Thank you, Your Honor.
19 (REPORTER'S NOTE: A bench conference was held off the record
20 in the presence of but out of hearing of the Jury.)
21 THE COURT: I'll excuse this juror. Thank you. Just
22 have a seat.
23 CLERK: 289, William Loud.
24 What say the State?
25 MR. GROOOMS: Please present this juror.

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JURY SELECTION

14

1 CLERK: Defense?

2 MR. LONG: Please excuse Mr. Loud from the trial of this
3 case.

4 CLERK: You are excused from this particular case.

5 170, Douglas Gause.

6 What say the State?

7 MR. GROOOMS: Please present this juror.

8 CLERK: Defense?

9 MR. LONG: Swear Mr. Gause, please.

10 CLERK: Please be seated in the jury box.

11 106, Howard Cook.

12 What say the State?

13 MR. GROOMS: Please present this juror.

14 CLERK: Defense?

15 MR. LONG: Swear Mr. Cook.

16 CLERK: Please be seated in the jury box.

17 THE COURT: Alternate strikes will be one for the State,
18 two for the Defense.

19 CLERK: 235, Kelly Johnson.

20 What say the State?

21 MR. GROOOMS: Please present this juror.

22 CLERK: Defense?

23 MR. LONG: Swear Ms. Johnson.

24 CLERK: Please be seated in the jury box.

25 14, Sandra Avery.

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BY THE COURT

15

1 What say the State?

2 MR. GROOOMS: Please present this juror.

3 CLERK: Defense?

4 MR. LONG: Swear Ms. Avery.

5 CLERK: Please be seated in the jury box.

6 BY THE COURT:

7 THE COURT: Anything from the State involving the
8 striking of the panel?

9 MR. GROOOMS: No, sir, Your Honor.

10 THE COURT: Anything from the Defense involving the
11 striking of the panel?

12 MR. LONG: Yes, sir.

13 THE COURT: All right. I'm gonna let those of you who
14 were chosen go into the jury room. Do not start discussing
15 the case because you don't know yet what the case is about
16 other than the little bit I've told you but I have a matter of
17 law to take up. So, I'm gonna let you go into the jury room
18 but again don't get too comfortable because this won't take
19 long and also don't start discussing the case. So, I'll let
20 you go into the jury room.

21 Those of you who were not chosen, this is a little
22 awkward, not anything we're doing but the way we have to
23 handle this. I have to ask you to stand out in the hall for a
24 few a minutes while we take up a matter. Our bailiffs will
25 kind of be around to make sure that you don't wonder off. I

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MOTIONS

16

1 don't think any of you would but just stand out in the hall
2 for a few minutes.

3 (REPORTER'S NOTE: Jury panel and remaining jury venire exit
4 courtroom. 12:38 P.M.)

5 THE COURT: All right. The Jury is out. Mr. Long?

6 MOTIONS:

7 MR. LONG: Thank you, Your Honor. Juror Number 182, Mr.
8 Edsel Graves, is a black male and was struck by the State. As
9 the Court is aware, my client is a black male. I'd like to
10 point out before we hear the *Batson* motion, Judge, that out of
11 a 110 jurors downstairs, ten were African-American. We're
12 dealing with less than ten percent of the whole panel. And
13 then when they sent forty-five up here, only five of those
14 were African-American and one of which was struck, Juror 182.

15 THE COURT: Well, I appreciate that observation and it is
16 somewhat striking -- I'm not here all the time so I don't know
17 what the general makeup. I can tell you in York County, it's
18 about a third African-American population and I don't know
19 what it is down here, so I don't know whether it's
20 disproportionate but these are -- the drawings are done by
21 computer so there's no possibility of human error and -- well,
22 I guess there's a possibility of human error in anything but I
23 can't -- to the extent that you are making a motion involving
24 the small representation of African-Americans on the panel as
25 a whole and on this venire for this case, if you are making

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MOTIONS

17

1 such a motion, I -- are you making a motion and what relief
2 are you seeking?

3 MR. LONG: I'm not, Your Honor, I understand and I would
4 understand your judge's ruling if I made a motion as to the
5 entire panel, I just want to point out before you take up this
6 one issue under *Batson* that we had a very limited number of
7 African-Americans to begin with.

8 THE COURT: Okay.

9 MR. LONG: So, Juror Number 182, we would inquire as to
10 the non-racial reason for striking that juror.

11 THE COURT: All right. I need a racially neutral reason
12 for the State exercising a strike as to Mr. Graves.

13 MR. GROOOMS: Yes, sir, Your Honor. Your Honor, I struck
14 any juror with what I perceived to be a lower income job or
15 sometime of seasonal position, retail, that type of thing. If
16 you'll look back at the panel, I struck every single one of
17 them that had a job of that nature except for the last white
18 male and that's because I was told by my co-counsel I was out
19 of strikes or I would've struck him as well. So, it has
20 nothing to do with race, Your Honor.

21 THE COURT: All right. I find that is a race neutral and
22 Mr. Long can you show me any jurors that proceeded that would
23 fall into that low income other than the one who he couldn't
24 strike?

25 MR. LONG: Your Honor, I wouldn't know if it's low income

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MOTIONS

18

1 or not. He said he worked for the Nike store out at Tanger
2 Outlets and that his wife was an office manager but I can look
3 through -- Juror 60 that they accepted is a sales
4 representative at the Caterpillar diesel store; Number 174 is
5 an account manager; Number 307, that they accepted, works at
6 -- for Dr. Cane; Juror Number 405 is an optical tech; Juror
7 Number 438 is a college professor; Juror 237 is a special
8 education teacher; Juror Number 232 is retired from installing
9 countertops; Juror Number 67 is a claims adjuster; Juror
10 Number 105 works for Coastal Concrete; Juror Number 146 works
11 for Myrtle Beach Fire Department; Juror Number 170 works for
12 the Horry County School District in the lunchroom; Juror
13 Number 106 works at Burger King. I would point that there are
14 at least five that I would consider to be lower income jurors
15 that were not struck by the State. In fact, I would expect
16 that those five would be lower income than a manager at the
17 Nike store at the Tanger Outlets.

18 MR. GROOOMS: Your Honor, if you want to go through them
19 one by one, I'd be glad to. The last person at Burger King, I
20 was out of strikes or I would've struck him and that's what I
21 put on the record the first time. I believe each person he
22 listed was either a professional or retired, meaning that they
23 obviously have had somewhat of a decent job to where they're
24 able to retire. And the person who works at the lunchroom, as
25 he put it, actually worked for Horry County School System in

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MOTIONS

19

1 food and he's also an African-American individual, Your Honor,
2 but I'll be glad to address each one individually if you would
3 like me to. I have notes on each one of them.

4 THE COURT: Well, please do that.

5 MR. GROOOMS: All right. Can you give me the number and
6 I'll be glad to tell you.

7 THE COURT: All right. 60.

8 MR. GROOOMS: Your Honor, Number 60 is a Caterpillar
9 sales rep. Your Honor, that's heavy equipment and is high-
10 dollar equipment. You make -- you sell a lot of equipment,
11 you're making a lot of money, you must be doing something
12 right and I would consider you a professional. You're not
13 just standing behind a cash register somewhere.

14 THE COURT: All right. 174.

15 MR. GROOOMS: Your Honor, 174 was retired, married and
16 retired and I note that their spouse was retired indicating
17 both individuals had a successful career in some occupation.
18 That's all I have is retired.

19 THE COURT: All right. 307.

20 MR. GROOOMS: I do have that she is an office manager in
21 a dentist -- that was a dentist office or a doctor's office
22 one.

23 MR. LONG: I think it's a chiropractor.

24 MR. GROOOMS: Okay. Indicating she is in charge of an
25 entire medical office, which to me indicates that she is good

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MOTIONS

20

1 at her job, enough to be in charge or something important as a
2 doctor's office, she must make decent money was my thoughts.

3 THE COURT: All right. Which one -- that was 405 -- 438?

4 MR. GROOOMS: She's a professor, Your Honor.

5 THE COURT: All right. Go on. 237.

6 MR. GROOOMS: Your Honor, 237 is a special ed teacher,
7 he's married and his wife is a special ed teacher. Your
8 Honor, I think that's professional to the utmost degree.

9 THE COURT: All right. 67.

10 MR. GROOOMS: 67, I did not have her occupation and I
11 believe I may've been out of strikes at that point but I asked
12 her what she did ---

13 THE COURT: No, you had one left.

14 MR. LONG: Claims adjuster.

15 MR. GROOOMS: Claims adjuster, Your Honor. I made a
16 split decision on that one and I thought that was a
17 professional employment and accepted her as a juror. If she
18 had said I work at Burger King, I would've struck her if I had
19 a strike.

20 THE COURT: All right. 105.

21 MR. LONG: He was out of strikes at that point.

22 THE COURT: That's right. Okay.

23 MR. GROOOMS: And I have 105 is a manager of ---

24 THE COURT: Well, you were out of strikes then.

25 MR. GROOOMS: Yes, sir.

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MOTIONS

21

1 MR. LONG: The only one that he didn't cover, Your Honor,
2 for the record is 232.

3 THE COURT: Lawrence Joerres.

4 MR. GROOOMS: Your Honor, I also had him as retired as
5 well as his wife retired, the same reason as the other juror
6 that I felt they both must've had ---

7 THE COURT: Well, I find the reason given, things such as
8 lower income jobs are somewhat subjective but I find that that
9 is not pretextual, that is racial -- is racially neutral and
10 is not pretextual and therefore to the -- I deny the Batson
11 motion and we'll stick with the Jury that we have drawn. I
12 find that the -- well, I've made my finding.

13 MR. GROOOMS: Thank you, sir.

14 THE COURT: All right. We'll -- Roy, we can let the --
15 let those -- well, before -- All right. Tell them to call
16 back after 6:00 on Wednesday and they're free to go. Thank
17 them for me.

18 All right. Let's bring this Jury in and I'll -- we're
19 not gonna swear them in, I'll talk to them a minute but we'll
20 gonna cut them loose for lunch till 2:00, it's already ten
21 till 1:00 and we've got some work to do while they're not
22 here. So, let's bring in the Jury.

23 (REPORTER'S NOTE: Jury enters courtroom. 12:53 P.M.)

24 THE COURT: Members of the jury panel, we're gonna break
25 for lunch in just a minute. We're not gonna swear you in at

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1 this time. We have some matters to take up outside your
2 presence but still, I know we just did some but we've got some
3 other things to do that will take a little bit of time, so
4 we're not gonna swear you in.

5 Mr. Broughman, I'm gonna ask you to be the foreperson at
6 this time, so if you'll sit where this lady is seated. You
7 don't need to move now, not now, but from now on. Ms. Avery
8 and Ms. Johnson will always sit at those seats, they're the
9 alternates. The rest of you, there's no assigned seating.

10 Now, even though you haven't been sworn in, you are on
11 this jury panel. So, you're not to discuss the case or try to
12 make up your own mind until we come to trial and I instruct
13 you to join to deliberate and return with an unanimous
14 verdict. Prior to that time, you're not equipped with all the
15 tools you need to make a fair and reasonable decision. So,
16 don't try to make up your mind and don't discuss the case
17 until we reach that point. Do you not let anyone outside the
18 courtroom discuss this case with you. If anyone tries to
19 discuss this case with you, tell them you cannot as you're
20 serving as a juror and don't start a conversation with anyone
21 or let anyone start a conversation with you about this case.
22 Report back to me if anyone tries to discuss this case with
23 you, give me that person's identity because I'll have to
24 action against anyone trying to sway the Jury. I don't know
25 that this case will receive any news coverage, but it if does,

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1 don't let yourself be exposed to it. Don't read, write or
2 listen to anything that could remotely deal with this trial.
3 You must base your verdict solely on the law and the evidence
4 that's developed during the trial. Do not use any electronic
5 means to do any research about this case, don't go on-line in
6 any fashion to do research. That would be improper. Again,
7 you have to base your verdict solely on the law and the
8 evidence as it appears at trial. So, don't go Google or Cloud
9 or Instagram or anything to find anything about me, about Mr.
10 Kinlaw, about the attorneys, about the trial procedure, about
11 evidence. All that you need to hear here in the courtroom.
12 Don't even go online and say, on Instagram or Facebook, I'm
13 serving on a jury. That sounds pretty innocuous but someone
14 may send you back a message that would not be healthy for your
15 participation as a juror in this trial. So, just stay away
16 from anything like that. I think I -- I know this allegedly
17 took place at a motel. You'll be hearing about that later or
18 the motel, they'll be no reason for you to go check out the
19 scene, so if you, you won't have time over lunch, but we'll
20 tell you the name of that or one of the attorneys will later
21 but stay away from that area because things may've changed
22 since this allegedly occurred and you shouldn't be doing any
23 independent examination or investigation on your own anyway.
24 Anything else from the State before we take lunch?
25 MR. GROOOMS: No, sir, Your Honor.

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1 THE COURT: Anything from the Defense?

2 MR. LONG: No, sir, Your Honor.

3 THE COURT: Have a pleasant lunch and report back at
4 about, let's say, 2:15. It's almost 1:00, actually, it's
5 almost 2:00 -- 2:15, because we like to give you plenty of
6 time for lunch and give us some time to work on a couple of
7 things and also have some lunch and get back and we'll start
8 off with the opening statements by the attorneys. Well, we
9 won't start off with that. I have some things to talk to you
10 about and then we'll turn it over to the attorneys. So, have
11 a pleasant lunch, we'll see you about 2:15. Thank you.

12 (REPORTER'S NOTE: Jury exits courtroom. 12:56 P.M. The
13 following takes place outside the presence of the Jury.)

14 THE COURT: All right. We've got the three indictments.
15 They all allege that Mr. Kinlaw violated certain drug laws on
16 or about February 29th, 2012, trafficking cocaine, trafficking
17 cocaine base and distribution of cocaine base and I understand
18 that there are motions that need to be heard.

19 MR. GROOOMS: Yes, sir, Your Honor, several by the State.
20 I think we would probably agree the most important motion is
21 whether or not we can join these indictments. That'll
22 probably help us sort out the rest of the issues.

23 MR. LONG: It would and I would point out as Your Honor
24 just pointed out, that one of the distribution indictments is
25 not correct.

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1 THE COURT: Well, that's why I called them out because I
2 understand that one of these things happened one day and of
3 course the State says on or about.

4 MR. LONG: Right.

5 THE COURT: But ---

6 MR. LONG: The allegation is that the distribution
7 happened on the 28th, however -- and in fact, the arrest
8 warrant and the indictment happened on the date but that is
9 the case.

10 THE COURT: What's the State have to say about that?

11 MR. GROOOMS: Your Honor, this Defendant has certainly
12 been put on notice, this is a notice document, as to what he's
13 charged with. He knows when he was served and charged and the
14 on or about language, although it should've been more
15 specific, does tell you on or about the actual date being less
16 than twenty-four hours prior, Your Honor, and I do not believe
17 it to be a fatal flaw in the indictment.

18 THE COURT: All right. I'll -- what's the motion from
19 the Defense regarding that distribution of cocaine base and
20 the date?

21 MR. LONG: None, Your Honor, just that for the purposes
22 of his motion to consolidate them I wanted to point out to the
23 Court that they were actually on separate days.

24 THE COURT: All right. With consent, I'll go ahead and
25 change it to the 28th.

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1 MR. LONG: Correct, yes, sir.

2 THE COURT: As to the distribution. Okay. All right.

3 Now, motion for joinder. You said you had some case law?

4 MR. GROOOMS: Yes, sir, Your Honor.

5 THE COURT: If you'll go ahead and hand that.

6 MR. GROOOMS: I've got a few copies of the case. Your
7 Honor, this is *State v. Tucker* which was a case where they
8 tried a murder and a burglary together. Your Honor, the
9 reasons were because they could not try the murder without
10 giving the ID and the ID came from the burglary. Your Honor,
11 the Defendant in that case, he'd gone on the run, was
12 identified by people who saw him on the run. He had broken
13 into a home wearing the same clothes. Your Honor, the law as
14 laid out in this case states that charges can be joined at the
15 same indictment or tried together where, one, they arrived at
16 a single chain of circumstances. Your Honor, we would state
17 this is all out of the same set of circumstances, Your Honor.
18 The distribution indictment came as a result of him selling
19 narcotics to Heath Buffkin. Once they arrested the Defendant
20 on his person he had a key card and search of further evidence
21 of the distribution case they find the trafficking weight.
22 Your Honor, it would be very tough to try one case without
23 putting the facts in of the other. The second element, they
24 are proven by the same evidence, Your Honor, and we believe
25 they are. The baggies, the scales, the other drugs in the

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1 hotel room go to prove my distribution case. And the ID for
2 my distribution case, via the CI or witness, gives me my
3 trafficking case, so, are of the same or general nature. Your
4 Honor, they're both drug cases, both involving the sale of
5 narcotics. I mean, that's what we're here for, distribution
6 and naturally somebody that's trafficking cocaine, those are,
7 are for sale, they're not for personal consumption. And, Your
8 Honor, no real right of the Defendant has been prejudiced. He
9 has no right, no real right to demand a separate trial. I
10 don't believe that's a right of the Defendant. And, Your
11 Honor, there's multiple cases on this issue -- I'll hand up
12 the second one -- the *State v. Simmons* also states that the
13 State can argue for res gestae purposes to bring the
14 indictments together is probably more about what I was
15 alluding to earlier and we can't try one without the other.
16 Your Honor, that case states that where the offenses are
17 charged in separate indictments or the same in general nature
18 involving that transaction is closely related in time and
19 place and character, the Trial Judge has the power in his
20 discretion to order the indictments be tried together if the
21 Defendant's substantive rights would not be prejudiced. Once
22 again, Your Honor, we believe these to be connected closely in
23 nature. Certainly, the place, the distribution is at the same
24 place with the trafficking. And in time, Your Honor, we're
25 talking less than twenty-four hours. And character, certainly

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1 these are the same nature criminal offenses. Your Honor, we
2 believe it is in your discretion of whether or not to try
3 these cases together. No substantive right of the Defendant
4 will be violated and certainly, it would benefit the State in
5 terms of judicial economy to try these cases both together.

6 Your Honor, if I can give you the facts of the case, it
7 may be help ---

8 THE COURT: I'll have to have those, yes.

9 MR. GROOOMS: Yes, sir, Your Honor. Well, the DEU, Drug
10 Enforcement Unit, is sitting outside the hotel where the
11 Defendant is alleged to be staying and the Defendant --
12 watches him for a couple of days, they get a ---

13 THE COURT: Who watches him?

14 MR. GROOOMS: The DEU watches the Defendant for a couple
15 of days, they see his car in the parking lot, they run the
16 plates, come back to Kinlaw. One of the agents will testify
17 that he ID'd Kinlaw via the picture. They watched him for a
18 number of days, they were on surveillance before they do
19 anything. Once they see a lot of cars coming and going, and
20 Mr. Kinlaw's car being the only one in the parking lot other
21 than these cars coming and going, they determined we have
22 suspicion of drug activity. At that point, Agent Phillips
23 calls in other officers to help in surveillance. They make
24 the decision to follow one of these vehicles that comes and
25 goes, Keith Buffkin. He pulls up, he's by himself, he goes in

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1 the stairwell, he's in and out twenty or thirty seconds.
2 Agents follow him. Agents follow him down 17, he commits a
3 traffic violation, they pull him over. Agents approach him
4 and explain to him who they are and why they're there, they
5 say they're investigating narcotics activity, ask him if he
6 has any drugs on him. He says, yes, I do, I bought them at
7 the hotel, bought them in the stairwell. They say, who did
8 you buy them from, he says Gutter or Gunner, he has a nickname
9 for him. They show him the DMV photo, he says that's him.
10 The photo is Kinlaw. He goes on to say in his statement that
11 he's bought from Kinlaw up to eighteen times, six by himself,
12 twelve with somebody else. So, officers at that point -- he
13 does give them the drugs, it is crack cocaine or presumed to
14 be at that time, it does test positive a little bit later for
15 crack cocaine. Agents respond to the magistrate the next
16 morning to get a warrant for distribution of cocaine base.
17 That day, they continue surveillance. While they're doing
18 surveillance, one of the other agents just happens to be at
19 the same gym as the Defendant. He calls the lead agent and
20 says, hey, you're never gonna believe who is here, Kinlaw is
21 here. He says, all right, let's go ahead and take him down
22 today. All agents respond to the gym. Mr. Kinlaw is taken
23 into custody at that time. A search is done of him, he has a
24 key card in his pocket that goes to the Days Inn Motel. It
25 doesn't say a room number on it. Agents read him Miranda and

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1 ask him if he wants to cooperate. He says, I don't know what
2 you're talking about, I've never been to that hotel. Agents
3 respond immediately to the hotel, talk to the front desk and
4 they say, yep, Kinlaw has been here, he's been staying here,
5 he's in Room 205. Agents go up to Room 205, test the key and
6 make sure it works, they don't open the door, it does match.
7 They bring a drug dog who does alert on the door. With the
8 information, with the tip, the tip corroborated the
9 distribution and the key card. They get a search warrant as
10 well as the drug dog hit. And in that hotel room, he has
11 trafficking weight cocaine, trafficking weight crack cocaine,
12 scales, baggies, razor blades, residue, money, the whole nine
13 yards. There is nothing in that room that says the name Henry
14 Kinlaw. So, for me to try my trafficking case, I need to have
15 Keith Buffkin here to say I bought from Kinlaw when I was in
16 the hotel that day or that day before which corroborates my
17 agent's testimony that he's been watching Kinlaw at that
18 hotel. The CI would further testify that Kinlaw went upstairs
19 and he left that stairwell. Police put them on, not the first
20 floor, I think there's four floors. Your Honor, it would be
21 tough for the State to try the trafficking case without the
22 evidence of the distribution case. I wouldn't say it would be
23 impossible but it would be very, very difficult.

24 THE COURT: All right. Mr. Long?

25 MR. LONG: Thank you, Your Honor. These are two

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1 distinctly separate alleged crimes committed on two distinctly
2 separate days. I sat and listened to Mr. Grooms recite the
3 facts and I almost agree with, a hundred percent, I think we
4 can say he did recite the facts fairly well into the record.
5 What I want to point out, though, is when DEU made this
6 traffic stop on Mr. Buffkin miles away from the Days Inn, he
7 was asked the name of the person that he bought -- that he got
8 the drugs from and, of course, the only name he gave was a
9 nickname. Then they showed him a single photograph of my
10 client Henry Kinlaw and asked if that was this Gunner and he
11 agreed and he indicated yes. You can stop right there and try
12 that distribution case. No reason -- they don't need any of
13 what happened the following day to try that distribution case.
14 And I think it would be in -- in reverse, it would be wholly
15 prejudicial to my client because, Judge, the distribution case
16 then brings about multiple -- added more information beyond
17 the distribution case which is they sent a drug dog over to
18 the hotel. An agent asked the front desk the following day
19 after the distribution case, asked if they -- if, you know,
20 Henry Kinlaw was staying there and what room number he was
21 staying in. Keep in mind, Keith Buffkin didn't go in the
22 hotel room, never indicated -- never indicated that he ever
23 went in a hotel room, just that he was in the stairwell or
24 around the outer parts of the Days Inn hotel. After getting
25 that information from the front desk the day after the

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1 distribution case, they ran a drug dog by the front door of
2 Room 205 while my client was then -- and right after my client
3 was taken into custody on the arrest warrant. I would submit
4 that his arrest, based on what I read in the search warrant,
5 his arrest, the identification made in the distribution case,
6 and the drug dog sniff are the bases for the trafficking case.
7 There is not the same set, an identical set of facts to be
8 presented, in fact they're different and there are additional
9 facts to be presented to a jury -- additional evidence to be
10 presented to a jury on the trafficking case. If they're
11 allowed to try them both together, two criminal acts that
12 allegedly occurred on two separate days in two separate
13 locations, basically, is what we're talking about, then my
14 client is prejudiced because they're going to be able to
15 produce facts in the trafficking case that could prejudice the
16 Jury's decision making on this distribution case. They have
17 the evidence that they have, they've made an arrest on the
18 distribution case. I believe my client has a right to be
19 tried on that case, especially, Judge, since parts of that
20 distribution case, but not all of it were the basis for the
21 search warrant which brought about the trafficking case.

22 THE COURT: I'm gonna grant the motion for joinder under
23 the *State v. Simmons* and *State v. Tucker* cases. Citations for
24 *Simmons* is 352 S.C. 342 and *Tucker* is 324 S.C. 155. I find
25 that these charges are -- arise out of a single chain of

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1 circumstances. They're not proven by exactly the same
2 evidence, I can't go so far as to say that they are proven by
3 the same evidence but they are of the same general nature,
4 distribution and possession of -- trafficking, although the
5 trafficking is based on weight as opposed to distribution
6 being based on the actual distribution. I could not -- the
7 trial together, I find does not invade or prejudice Mr.
8 Kinlaw. Obviously, the fact that he was allegedly involved
9 and the State will be trying him on the two indicate that Mr.
10 Kinlaw did on successive days was involved in drug
11 transactions, but I don't believe that that is sufficient to
12 prejudice him in light of the other things I've already stated
13 which is the general nature of the charges and also they are
14 related in kind, place and character. They are in kind
15 because they involve drugs, again, even though one is
16 distribution and one is trafficking based on weight. Place
17 and character, the distribution occurred at the same place
18 that the drugs were allegedly found. And I find again that no
19 substantive right of Mr. Kinlaw is prejudiced by the cases
20 being tried together. In addition, while I cannot find that
21 this is a -- in the *Simmons* in the section headlined *res*
22 *gestae*, this I don't find that in *Simmons* that's what they
23 actually, that's what they said, they called this section but
24 I don't believe that's what they find. I do find as *Simmons*
25 allows that the evidence of the distribution on the 28th is

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1 necessary for full preservation of the case on the 29th. Mr.
2 Long, your arguments were kind of the reverse of that but I
3 find that for full presentation of the search, discovery at
4 the hotel on the 29th that the distribution is necessary for a
5 full presentation of the case without fragmentation. I find
6 that the distribution is inextricably intertwined with the --
7 with the possession of the two illegal substances, crack
8 cocaine and cocaine, at the location of the room rented in the
9 name of Mr. Kinlaw. Of course, he was not there when he was
10 arrested, so there are some issues with that, of course, and I
11 find that the evidence regarding distribution is -- will show
12 the complete, whole, unfragmented story regarding Mr. Kinlaw's
13 alleged crime. So, I will grant the State's motion for
14 joinder.

15 All right. What's next?

16 MR. GROOOMS: Thank you, sir. Your Honor, we also have
17 an issue with the search warrant. I imagine it will probably
18 be Mr. Long's motion but we've got witnesses available to
19 testify as to why the search warrant was gotten and the
20 proximate cause that they used to get it. Your Honor, that's
21 ---

22 THE COURT: All right. You may -- are you ready to call
23 your first witness?

24 MR. GROOOMS: Yes, sir, Your Honor.

25 That State would call Agent Phil Phillips to the stand.

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PHIL PHILLIPS - DIRECT BY GROOMS

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1 PHIL PHILLIPS, HAVING BEEN DULY

2 SWORN, TESTIFIES AS FOLLOWS:

3 THE COURT: After we finish this witness, we'll probably
4 break for lunch.

5 MR. GROOOMS: Yes, sir.

6 THE COURT: I know that's kind of in the middle of
7 something but I just realized -- I didn't realize what time it
8 was.

9 MR. GROOOMS: Yes, sir.

10 THE COURT: You may proceed.

11 MR. GROOOMS: Thank you, Your Honor.

12 DIRECT EXAMINATION OF PHIL PHILLIPS BY MR. GROOMS:

13 Q: Agent Phillips, will you please tell the Court where you
14 work?

15 A: I currently work for the South Carolina Law Enforcement
16 Division, better known as SLED.

17 Q: All right. Where were you working during 2012?

18 A: 2012, I was employed by the City of Myrtle Beach Police
19 Department and assigned to the 15th Circuit Solicitor's Drug
20 Enforcement Unit.

21 Q: All right. And what did you do with the Drug Enforcement
22 Unit?

23 A: We investigated large scale drug traffickers and
24 distributors and their organizations.

25 Q: All right. And how did you first start investigating Mr.

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1 Kinlaw?

2 A: That was in February of 2012 and I had received
3 information that there was in fact a black male with the
4 street name Gutter, G-U-T-T-E-R, or Gunner, G-U-N-N-E-R, the
5 intel stated either one of those names, was currently staying
6 in a hotel, at the Days Inn at the Waccamaw Boulevard Section
7 of Myrtle Beach, Horry County, and was currently selling
8 illegal drugs, specifically crack cocaine. The information
9 further stated that Gunner or Gutter drove and operated a blue
10 in color Chevy Impala.

11 Q: All right. Let me stop you right there.

12 A: Yes, sir.

13 Q: Where did you get your information?

14 A: This information came from an informant of mine at the
15 time that knew about Gutter or Gunner but could not buy
16 directly from him.

17 Q: Had she been a reliable informant in the past?

18 A: She was.

19 Q: How many times would you say?

20 A: I've probably made three to four cases with her.

21 Q: Okay. So, she gave you the information, did you conduct
22 an investigation at that hotel?

23 A: I did.

24 Q: And what day did that begin, roughly, if you don't know
25 the exact ---

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1 A: The date I don't know exactly because I received the
2 information -- it was in February, but like I said, the intel
3 came from an informant of mine that could not buy directly
4 from him, she just knew of incident and passed it on to me so
5 I had to do a little research myself and background.

6 MR. LONG: Your Honor, may I interject. I didn't get an
7 opportunity to object to hearsay because he didn't testify
8 about a statement that this person -- I don't -- this is the
9 first I've knew about a CI. There is nothing in the discovery
10 that was provided to me about a female CI that gave this
11 investigator information leading up to February 28th. I know
12 nothing about that. So, I would've been more prepared to
13 object to the -- I think it's just getting around hearsay by
14 not talking about a specific conversation he had with that
15 person. But he just testified that information he got from a
16 confidential informant that he was working with, a female, I
17 just gathered, led him to believe two things, that my client
18 -- or that Gunner or Gutter was selling drugs out of a hotel
19 and that he drove a specific car. So, first, I would move to
20 strike the testimony there as being hearsay. And then,
21 second, Your Honor, I think I've got a right to know about
22 this confidential informant. I've got a right to reach out to
23 this person. This is truly honestly a first. There's no
24 indicia in any -- not even in the search warrant that he's
25 testifying about that he actually had an informant. The

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1 search warrant, and I can read it to Your Honor, but it's
2 pretty broad stroke language that he says in his affidavit on
3 the search warrant that he had gathered the information from
4 sources that this -- somebody was selling drugs in this area.
5 So, based on that new information that I've got, of course, my
6 client turns to me and says, what's this about a female CI?
7 What I can tell him is, I knew nothing about it up until now
8 and I don't know how Your Honor wants to handle that. I think
9 he's got a right for me to figure out who that is and why they
10 said what they said, and where are they now, what is their
11 position or criminal record, did they work charges off.
12 That's gonna be pretty important to me and my client as we go
13 through this case itself, one; and it's also very important in
14 this search warrant motion because that's the beginning of the
15 basis for his knowledge in the case.

16 THE COURT: Let me hear from the State.

17 MR. GROOOMS: Thank you, Your Honor.

18 Your Honor, the first line of the case report says that
19 this agent received information about this hotel. So, he is
20 on notice that the information was received whether it was a
21 CI or an anonymous tip would be the question. So, he did know
22 the information was received that's how this investigation
23 began. And, Your Honor, I've handed up this -- I can't think
24 of the -- *U.S. v. Youngblood* in which an out-of-court
25 statement would show why an investigation was began. In the

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1 first place to show why an officer is there is not hearsay.
2 So, he can't say I'm there to investigate Mr. Kinlaw but he
3 can certainly say I received information from an informant
4 which is why we began the investigation. It explains why a
5 police officer was there in the first place.

6 THE COURT: All right. What do you have to say about not
7 providing that information as discovery?

8 MR. GROOMS: Your Honor, I didn't have that information.
9 My information was the same as Mr. Long's. The information
10 was given to DEU, they investigated it. I actually talked
11 with Mr. Phillips last night on his cell phone about where the
12 information came from. He said it was -- because I had his
13 questions printed out as an anonymous informant who sent this
14 information and asked him to correct it if I was wrong and he
15 said, well, the information wasn't anonymous, it's someone
16 that had told me or someone that I had used in the past. So,
17 if you want to strike that part from the trial, I understand
18 that, however I do believe he can say why they were there
19 because he was investigating the information that they
20 received which is in discovery.

21 THE COURT: All right. What's your motion, Mr. Long?

22 MR. LONG: Well, Your Honor, I -- I would actually move
23 for a continuance. We've got -- what if this -- what if this
24 mystery person has it out for my client. What if this is
25 somebody that, you know, rivals him in business or something?

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1 What if this person had conversations that ---

2 THE COURT: What's your motion? I understand all that
3 but what's your motion?

4 MR. LONG: My motion is based on the fact that I wasn't
5 provided this information in discovery. First, I would move
6 to dismiss the case but if Your Honor doesn't see fit to do
7 that, I would at least ask for a continuance in order to get
8 more information on this particular witness.

9 THE COURT: All right. I'm not gonna dismiss the case
10 and I'll take under advisement until I hear some more
11 testimony about this issue before I rule on a continuance.
12 Don't let me forget to rule on it at some point.

13 MR. GROOOMS: Thank you, Your Honor. Just for the
14 purpose of the record, that's the only time where that
15 information would ever even come out; why are they there,
16 because they received information from somebody and that is
17 provided in the discovery. The name of that person was not --
18 it was not provided to the State either.

19 THE COURT: Go ahead.

20 BY MR. GROOOMS:

21 Q: Agent Phillips, what did you see when you arrived at the
22 hotel?

23 A: I saw that the hotel, which was the Days Inn on the
24 Waccamaw Boulevard and I did see the blue in color Chevy
25 Impala with the South Carolina tag of H as in hotel, T as in

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1 tango, A as in alpha, 885 parked in the most western portion
2 of the parking lot -- it's a wide open parking lot -- the car
3 facing the building.

4 Q: Okay. Were there any other cars in the parking lot?

5 A: There was other cars in the parking lot in the front of
6 the building towards the office but none on the western
7 parking lot where the Defendant's car was parked.

8 Q: Okay. And did you run the tag that you saw?

9 A: Yes, sir, I did.

10 Q: And what were the results of that?

11 A: That tag came back to -- registered to the Defendant Henry
12 Lee Kinlaw, Jr.

13 Q: Okay. What did you do at this point?

14 A: At that point, I went back to my office and got on the
15 DMV. I obtained a photograph of Henry Lee Kinlaw, Jr. and
16 obtained a picture of the Defendant that corresponded with the
17 tag on the vehicle.

18 Q: Okay. Thank you. And did you ever identify Mr. Kinlaw on
19 the scene?

20 A: That day I did not.

21 Q: Okay. What day are we talking about?

22 A: Well, that -- I went back and did surveillance several
23 days throughout the month of February just because this was
24 very vague information that I had received originally. The
25 informant gave me the information, I couldn't do nothing with

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1 it. Didn't know him personally. He had just received the
2 information and passed it on to me. I could do nothing with
3 that on face value. I had to do my own investigation so
4 throughout the month of February, I had to do my own
5 surveillance. I set up -- I found the car and I set up and
6 watched the vehicle and I watched the hotel by myself several
7 times until I could get a more accurate judgment of what was
8 going on at the hotel and that vehicle.

9 Q: Okay. So, you did surveillance multiple times. Did you
10 see Mr. Kinlaw multiple times?

11 A: I did; yes, sir.

12 Q: And what was he driving?

13 A: The blue in color Impala.

14 Q: All right. Was there any other cars, while you see Mr.
15 Kinlaw being present?

16 A: None.

17 Q: Okay. So, if Mr. Kinlaw's car is not there, there's
18 nobody in the parking lot, no cars; is that what you're
19 testifying to?

20 A: No cars in the west part of that parking lot where the
21 guests would park their vehicles, no. If the blue Impala
22 wasn't there, it was the best way to describe it is it was
23 almost like a ghost town. There was nothing going on at the
24 hotel, no other cars. There may be a drive through car here
25 and there but nothing with any regularity, no cars parked and

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1 remaining stationary at the hotel as if it was a guest staying
2 there.

3 Q: All right. And when Mr. Kinlaw's car is there, is there
4 traffic in the parking lot?

5 A: There is. It's a much different situation when the car is
6 there and opposed to when the car is not there. When the car
7 is there, you see a flurry of activity, cars coming in, people
8 getting out of the car, going into the side door of the hotel,
9 staying for a few seconds and leaving. There is much more
10 activity when the car is there opposed to when the car is not
11 there, there is no activity at all.

12 Q: Okay. And would you say this raised suspicion with you?

13 A: Yes, sir.

14 Q: All right. And what was the next step in your
15 investigation?

16 A: Well, I continued with that surveillance to try to
17 understand what more I looking at seeing when the car was not
18 there I was still watching. Eventually, the car would show
19 up, Mr. Kinlaw would be the only one driving it. He would get
20 out and park generally in the same area every time in the
21 western parking lot facing the building, get out and go into
22 the side entrance, disappear to the right which was the
23 stairwell. And when I saw him leave, I would also watch him,
24 he would leave, he would come out the same door, get into the
25 vehicle and leave always by himself, always the driver of the

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1 car, never saw any other persons with him. That surveillance
2 continued for several days until, you know, I watched other
3 cars coming up, which I determined or believed to be buyers of
4 drugs. They would show up, like I mentioned, go into the
5 hotel very briefly, twenty to thirty seconds, forty at the
6 most and then leave again in their vehicle. I believed this
7 to be indicative of drug sales. That's when I called in my
8 partners in the drug enforcement unit and actually set up and
9 organized surveillance operation with the intent to stop the
10 potential purchaser and that date was the 28th of February.

11 Q: All right. And were you able to stop one of these
12 potential purchasers?

13 A: We were. Yes, sir.

14 Q: All right. And why did you stop them?

15 A: Like I mentioned, when he pulled in, parked his vehicle,
16 got out of the vehicle, went into the side entrance of the
17 hotel in the western parking lot. From my position where I
18 was sitting, I could see him with binoculars, they went into
19 the hotel, disappeared to the right, which was the stairwell.
20 Remained in there for twenty-seven seconds. I know it was
21 twenty-seven seconds because I timed it. He came back out,
22 got in his vehicle and left. In my experience, I believed
23 that to be indicative of drug transaction or drug activity.
24 Therefore, I called it out on the radio. I had fellow Drug
25 Enforcement agents, David Blue, Randy Miller, Ryan Mendola,

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1 Dan Roberts and Chris Thompson helping me that day.

2 THE COURT: You're gonna have to slow down a little bit
3 for the court reporter.

4 A: Would you like me to repeat those names? Okay. David
5 Blue, Randy Miller, Ryan Mendola, Dan Roberts, Chris Thompson,
6 all are agents with the Drug Enforcement Unit, all were
7 helping me that day. I explained that I saw what I had just
8 seen and asked them to follow the vehicle as it left the
9 parking lot, as I was still doing stationary surveillance on
10 the hotel and on the vehicle. They complied, did so and
11 advised me while following the vehicle they did observe a
12 traffic violation and I asked them to go ahead and conduct a
13 traffic stop on the vehicle due to that violation and they did
14 so.

15 Q: All right. Thank you. Do you know if the driver of that
16 vehicle was a sole occupant of the car?

17 A: Yeah, he was.

18 Q: Do you know if he had drugs on him?

19 A: He did, yes.

20 Q: Do you know if he told the agents where he got those
21 drugs?

22 A: I was told that he told Agent Randy Miller, who was on
23 scene at the traffic stop, that he did buy the drugs, as crack
24 cocaine, from a black male known to him as Gutter, G-U-T-T-E-
25 R, while he was visiting the Days Inn prior to the stop, just

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1 seconds before the stop.

2 Q: Was he arrested?

3 A: He was.

4 Q: And did you speak with him at the jail?

5 A: I did.

6 Q: Was he shown -- was he ever provided with an identity for
7 the Defendant?

8 A: He told me a street name and explained to me and that he
9 was a black male and he was staying at the Days Inn. I
10 suspected it was Henry Kinlaw, Jr. and I had a photograph of
11 Mr. Kinlaw. I presented that to the arrestee at the jail with
12 no identifying information on it, just a photograph and he
13 said, yeah, that's him. That's the guy I know as Gutter, G-U-
14 T-T-E-R.

15 Q: Okay. Did he tell you how many times -- did he tell you
16 if he knew the Defendant?

17 A: He did. He said he knew him as his supplier of crack
18 cocaine, the driver had a crack cocaine habit.

19 Q: Do you recall how many times he talked to him?

20 A: If I recall correctly he said he has purchased himself
21 individually six times and had visited the Defendant a dozen
22 other times with another person.

23 Q: Okay. And what did you do with this information?

24 A: With this information, I went and obtained an arrest
25 warrant for Henry Kinlaw, Jr. as I believed that he was in

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1 fact distributing crack cocaine to the driver of that vehicle
2 and on the date in which we were watching on the 28th, and I
3 received an arrest warrant for distribution of crack.

4 Q: All right. When was the Defendant arrested?

5 A: The Defendant was arrested the following day on the 29th.
6 That's the actual day that I received -- obtained and sought
7 and obtained an arrest warrant was the following day. So,
8 this incident happened on the 28th and I met a judge the very
9 next morning on the 29th and presented the case, what had
10 happened, and obtained an arrest warrant for Mr. Kinlaw on the
11 29th, the very next day.

12 Q: What was that warrant for?

13 A: Distribution of crack.

14 Q: All right. And when was that warrant -- or, I'm sorry,
15 when was he arrested for that warrant?

16 A: The 29th, the next day.

17 Q: Okay. And were you there when he was arrested?

18 A: I was.

19 Q: Did you read him Miranda?

20 A: I did.

21 Q: And did you tell him why you were there? Did you tell him
22 what you were investigating?

23 A: Yes, sir, I did.

24 Q: Did you ask him, do you want to give a statement?

25 A: I did.

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1 Q: What did he say?

2 A: He said, he had nothing to say and didn't know what I was
3 talking about.

4 Q: Says in your report, he said he didn't know anything about
5 the hotel.

6 A: Correct. That's when I arrested him and I explained to
7 him, I said, sir, this is from -- this is an arrest warrant
8 for distribution of crack that occurred at the hotel. We
9 believe there to be more drugs at the hotel. We believe you
10 to be staying at the hotel and could you tell us what room you
11 were in to further our investigation. He said, I've never
12 been to that hotel, I don't know what you're talking about.

13 Q: Okay. Did he have anything on his person linked to the
14 hotel?

15 A: He did.

16 Q: And what was that?

17 A: An electronic key card that locks and unlocked or unlocks
18 rather the electronic locks on the hotel doors and in bold
19 distinguishable letters it says Days Inn right on the card.

20 Q: All right. And what did you do with the key card?

21 A: This card was given to Deputy Commander Trevor Howlett
22 along with my arrest team and asked them to go back to the
23 hotel in an attempt to figure out which room that card was
24 associated to as I believed that the Defendant did have a room
25 there and was lying to me in order to conceal his involvement

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1 in that room. While they were going to figure out that room,
2 I was going to go meet with a judge, type up a search warrant
3 with the information that they could provide me from their
4 investigation at the hotel. They were to relay their
5 information to me and I was to seek a search warrant for the
6 room.

7 Q: So, you're already on your way to get a search warrant?

8 A: That is correct. When we leave, Mr. Kinlaw is transported
9 to the Myrtle Beach jail to be held there until he can get to
10 J. Reuben Long where I would serve him his distribution
11 warrant, his original charge. While that was going on, my
12 arrest team went to the hotel in order to try to figure out
13 the room and I left to go meet with the judge.

14 Q: Were you able to figure out what room corresponded to that
15 key card?

16 A: Yes, sir.

17 Q: And what room was that?

18 A: 205.

19 Q: And was that information you relayed to the Judge?

20 A: It was.

21 Q: Was there also a drug dog brought to that room?

22 A: There was.

23 Q: And was -- did the drug dog give a positive alert on that
24 room?

25 A: He did.

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1 Q: And what would that alert have indicated?

2 A: It indicated presence of narcotics inside the room.

3 Q: Did you explain -- everything you just told this Court,
4 did you explain that to the Magistrate when you got the search
5 warrant?

6 A: Yes, sir. And as well as the clerks at the hotel
7 confirming that Mr. Kinlaw does stay at that hotel and
8 believed to be in Room 205. Even more so, the key card when
9 tested on Room 205, did activate and unlock the door. So, it
10 did match up to 205.

11 Q: No one entered when they tested it?

12 A: No, sir. Just made sure it worked.

13 Q: All right. And when did you execute that search warrant?

14 A: At soon as it took me to write it, type it up, get it
15 signed by a judge and get back to the hotel, so it was the
16 same day on the 29th.

17 Q: All right. What did you find in the hotel room?

18 A: A quantity of illegal drugs specifically crack cocaine and
19 powder cocaine, approximately 70 grams, I want to give you
20 that information, 70 grams of crack, approximately 90 grams of
21 cocaine, both of which tested positive for cocaine, along with
22 drug paraphernalia we know to be used in the trafficking and
23 distribution of drugs such as baggies, scales, razor blades
24 and a little bit of cash money.

25 Q: Were these items checked into evidence?

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1 A: Yes, sir, they were.

2 Q: All right. Were additional warrants sought as a result of
3 this information?

4 A: Yes, sir.

5 Q: All right. Thank you. Nothing further.

6 THE COURT: Cross?

7 MR. LONG: Thank you, Your Honor.

8 CROSS EXAMINATION OF PHIL PHILLIPS BY MR. LONG:

9 Q: Agent Phillips, what's the name of the female informant
10 that you used for your first piece of information about my
11 client?

12 A: China Mathis.

13 Q: Do you know where she is now?

14 A: I do not.

15 Q: How long did she work for you?

16 A: A period of six months, approximately.

17 Q: Has she testified in the courtroom on any cases that
18 you've made?

19 A: No, sir.

20 Q: Has she provided information that led to convictions?

21 A: I don't have that information with me. I'm sorry. We've
22 never had a trial together.

23 Q: Okay. In your first testimony you said it was somebody
24 that was reliable to you and had given you good information
25 before, so that information has never come to fruition as far

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1 as criminal charges or ---

2 A: We've never had court cases, no, sir.

3 Q: What ---

4 THE COURT: You might break that up. You've got a
5 compound question. You said criminal charges for prosecution
6 ---

7 MR. LONG: I'll break that up.

8 BY MR. LONG:

9 Q: So, has she been helpful to you in bringing criminal
10 charges against anyone else?

11 A: She was more of a source of information that proved much
12 like this case proved to be accurate once I did my own
13 investigation. She was an active informant who could make
14 purchases if we deemed it necessary but she more had
15 information. She was more of an information source than a
16 hands-on informant.

17 Q: And then you -- I think you testified that she never
18 testified in a courtroom and never aided you in the
19 prosecution of ---

20 A: No, never.

21 Q: And was she charged with a crime at this time?

22 A: She was under a charge of distribution at the time, I
23 believe is her charge.

24 Q: Of What?

25 A: I believe it was meth.

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1 Q: Distribution of meth?

2 A: Correct.

3 Q: Do you know what happened to those charges?

4 A: I do not.

5 Q: Was it your case that distribution of meth case?

6 A: It was but I've never heard the outcome of that case.

7 Q: So, you never came and testified against her?

8 A: Never, no.

9 Q: And you don't know if she pled guilty or her case was
10 straight up dismissed?

11 A: I do not know.

12 Q: Okay. The -- Mr. Buffkin, the gentleman that y'all had
13 the traffic stop on and found that he had a little bit less
14 than a gram of crack cocaine. Did you ever know him before
15 February the 29th?

16 A: No, sir.

17 Q: Did any of your agents have any information about him at
18 all?

19 A: Not to my knowledge, no.

20 Q: You would agree he was a complete and total stranger to
21 you?

22 A: To me, yes, sir.

23 Q: And how would you -- have you met with him and talked to
24 him since this or is that the only encounter you had with him?

25 A: I may've spoken to him on the phone since then but I had

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1 no previous interaction with him.

2 Q: Okay. And was he charged with possession of crack
3 cocaine?

4 A: That's correct.

5 Q: What happened to his criminal charges?

6 A: That I don't know of either.

7 Q: Were you aware that he absconded, he took off and went
8 somewhere?

9 A: I was told he was out of state but I don't have any idea
10 where.

11 Q: Did you know that a judge issued a bench warrant for his
12 arrest to bring him back to South Carolina?

13 A: I did not.

14 Q: So, once you met with Mr. Buffkin and you asked him who he
15 received this crack cocaine from, he said Gunner, correct?

16 A: That's correct.

17 Q: You then showed him a photograph ---

18 A: Yes, sir.

19 Q: --- of Henry Kinlaw?

20 A: Correct.

21 Q: Did you show him a photograph of any other human beings at
22 that time?

23 A: I did not, sir.

24 Q: One single photograph?

25 A: Correct.

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1 Q: When you went to the judge, the Magistrate, to request the
2 search warrant in this case, did you tell the Magistrate that
3 Keith Buffkin was a total stranger to you, that he was not a
4 confidential reliable or you had no indication of his voracity
5 to tell the truth or his truthfulness?

6 A: I told the Judge that he was not an informant of mine, not
7 a documented CI but he was a cooperating witness but I had no
8 prior knowledge or contact of him prior to the 28th prior to
9 the traffic stop. But I did tell the Judge he was not a
10 documented informant.

11 Q: Okay. And did you also -- did you tell the Judge what
12 room number you believed to be searched at the time?

13 A: At the time of the search warrant?

14 Q: Yes.

15 A: Yes.

16 Q: Okay. How shortly before you met with the Judge and told
17 him Room 205 did you get the information from Howlett that he
18 believed it to be Room 205?

19 A: I was at my office, which is the same building as the
20 Judge's office and so as he relayed it to me in real time and
21 I typed it up, I met with the Judge directly afterwards. So,
22 it could've been a matter of thirty minutes, less than that to
23 get it typed up and presented to the Judge.

24 Q: Okay. Would you agree with me that the basis for your
25 request for this search warrant were these enumerated things:

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PHIL PHILLIPS - CROSS BY LONG

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1 One, your observing the Days Inn, the parking lot, for some
2 period of time -- how long would you say that period of time
3 was?

4 A: It was throughout the month of February on several
5 different days. I'd say I sat on it no less than six times.

6 Q: Okay. So, first you told the Magistrate that you watched
7 the parking lot and saw the vehicle. Second, that y'all had
8 made a traffic stop on a total stranger that told you that he
9 purchased from Gutter. Third, that you showed a single
10 photograph to this stranger and he -- and asked if that was a
11 photograph of Henry Kinlaw and he indicated that that was.
12 And then fourth, that he had a key in his pocket for Days Inn
13 which you then went -- had agents go to the Days Inn and ask
14 about the key and what room Henry Kinlaw was in. And then
15 last, fifth, the drug dog sniff of the door.

16 A: Well, I will say this, this is how I presented it to the
17 Judge, that I received the information about the drug deal at
18 the Days Inn. I conducted my own surveillance and
19 investigation. Throughout that investigation, we stopped Mr.
20 Buffkin leaving the hotel, would admit to having crack cocaine
21 in his possession, relinquished that to us, did test positive
22 for crack cocaine. He said he'd bought it at the Days Inn
23 from Gutter, G-U-T-T-E-R. He said he bought it in the
24 stairwell as he always does. Presented a photograph to Mr.
25 Buffkin who did say, yes, that's Gutter. And then I took

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1 that, got the arrest warrant for Mr. Kinlaw. During the
2 arrest of Mr. Kinlaw was found the key card to the Days Inn.
3 That key card was taken back to the hotel, hotel staff said,
4 yes, we know Mr. Kinlaw, he does stay here. We believe him to
5 be staying in Room 205. Agents went to the hotel room 205,
6 checked the key. The key did unlock the door and then they
7 put -- to add icing to the cake, put the drug dog on the door,
8 which did give a positive alert. All that information, yes,
9 sir, was presented to the Judge.

10 Q: That's all I have.

11 THE COURT: Any redirect?

12 MR. GROOMS: Just briefly.

13 REDIRECT EXAMINATION OF PHIL PHILLIPS BY MR. GROOMS:

14 Q: You said those were the reasons that you presented to the
15 Magistrate. Did you also tell the Magistrate that Mr. Kinlaw
16 denied ever being at the hotel?

17 A: I don't know if I ever mentioned that to him. I didn't
18 find that relevant.

19 Q: Okay.

20 A: I don't recall.

21 Q: Did you also tell the Magistrate that when you did
22 surveillance that you identified Kinlaw by his license plate
23 and by the DMV photo?

24 A: Yes, sir. And I went on to tell him that I witnessed him
25 coming and going from that hotel several times throughout the

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1 month of February.

2 Q: And did you talk about the -- what you believed to the
3 drug trafficking?

4 A: Oh, yes, sir.

5 Q: Okay. Thank you, sir. Nothing further.

6 BY THE COURT:

7 THE COURT: Anything further from the State?

8 MR. GROOOMS: Your Honor, I believe we've established
9 that this officer ---

10 THE COURT: Whoa, whoa, whoa, whoa.

11 MR. GROOOMS: I'm sorry. I thought you said anything
12 further.

13 THE COURT: Well, I'm gonna let him ---

14 MR. GROOOMS: I apologize, Your Honor.

15 MR. LONG: I don't have anything further, Your Honor.

16 THE COURT: All right. Let's let the witness step down.

17 MR. GROOOMS: I apologize, sir.

18 THE COURT: You can step down. Thank you, sir.

19 All right. Does the Defense have any -- did they say --
20 I took it that there's no ---

21 MR. LONG: Yeah, I don't have any questions, Your Honor,
22 but as argument and it's my motion to quash this search
23 warrant. Judge, the problem with -- there has to be a firm
24 finding of probable cause by the Magistrate in order to issue
25 a search warrant. This search warrant was issued on a total

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1 stranger's statement that he purchased crack cocaine from
2 Gutter. There's no reason to believe that person, that person
3 had never been asked to tell the truth before, they'd never
4 relied on that person before. There's no reason that that
5 statement from that person would rise to probable cause to
6 issue a search warrant on behalf of the Magistrate. Secondly,
7 the Magistrate was told that Henry Lee Kinlaw was positively
8 identified by Mr. Buffkin. Well, Your Honor, in one of my
9 later motions, that's the most suggestive photo lineup I've
10 ever heard of. They showed him one photo and said, is this
11 him. I move later on to exclude that identification and any
12 in-court identification by Mr. Buffkin but I pointed out to
13 the Court that that highly suggestive and improper photo
14 lineup was the second basis given to the Magistrate, asking
15 the Magistrate to find probable cause to issue a search
16 warrant. Then lastly, Your Honor, the drug dog sniff which,
17 again, I'll argue later, but I believe we have the absolute
18 right to have any evidence on the drug dog sniff excluded and
19 therefore it shouldn't have not been included on their request
20 for probable cause by the Magistrate. The State of -- the
21 case of *Florida vs. Jardines*, which came out in March of 2013,
22 clearly suggests that drug dog sniffs on the exterior of an
23 abode, a residence, an apartment, a hotel room, is a violation
24 of the occupant or the owner or the tenant's constitutional
25 rights to be -- to be safe from law enforcement in their

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BY THE COURT

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1 homes. I'll hand that case up to Your Honor, I'm sure you're
2 aware of it.

3 THE COURT: Well, I hadn't looked at it lately, so, yeah,
4 I would like a copy of it.

5 MR. LONG: I will. And then, Judge -- so, Judge, three
6 major bases for the requests -- for the search warrant. If
7 you'll look at them each on their own, I believe that not only
8 are they -- were the improper evidence collected, but they
9 should not indicate probable cause, in fact, the opposite.
10 We've got a total stranger that's got no reason -- no reason
11 to believe, says Gutter did it. We've got an improper photo
12 lineup that identifies Henry Lee Kinlaw and then we've got an
13 improper drug dog sniff on the exterior of the hotel room
14 door. Those were the major bases for the request for the
15 search warrant. Based on that, Your Honor, I believe that the
16 Magistrate should've found no probable cause and not issued a
17 search warrant. I would ask Your Honor to review that and
18 quash that search warrant and anything that they then
19 recovered in executing this warrant.

20 THE COURT: Briefly.

21 MR. GROOOMS: Yes, Your Honor, briefly. As far as Gutter
22 goes, the name Gutter, that was provided in discovery and is
23 information that officers were investigating. So, for this
24 person who was not asked, do you know Gutter, do you know
25 Kinlaw. They say, who is this and they say -- or who did you

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1 buy from and they say Gutter, that's one corroborating factor;
2 two is that he's bought from this guy up to eighteen times.
3 He knows what he looks like, he knows who he is, he just
4 happened to know him by his street name and not by his actual
5 name. Therefore, I think the photo lineup is not unduly
6 suggestive and as far as the drug dog goes, Your Honor, they
7 had PC long before the drug dog ever got there for their
8 search warrant as evidenced by the officers' surveillance,
9 watching the drug activity. The officer ID'd Kinlaw. Both
10 gave corroborating information that CI gave or the informant
11 gave, drugs on that person and later the key card matching to
12 the room, that and the Days Inn people saying, yep, Kinlaw
13 stays here. Thank you, Your Honor.

14 THE COURT: Well, let me take a look at *Jardines* over
15 lunch and if you've got a copy of the search warrant so I can
16 actually see it?

17 MR. GROOOMS: Yes, sir.

18 THE COURT: I apologize to the staff for going so late.
19 I just kind of lost track of time.

20 MR. GROOOMS: I want to make sure Mr. Long verifies this
21 before giving to you.

22 (REPORTER'S NOTE: Mr. Long reviews documents.)

23 MR. GROOOMS: All right. Thank you, sir. And for the
24 matter of the record, I believe the *Jardines* case dealt with a
25 dwelling and the expectation of privacy. I don't believe a

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1 hotel hallway has any expectation of privacy but that's
2 obviously not our argument on the search warrant anyway.

3 THE COURT: All right. We'll break for lunch. It's a
4 quarter till 2:00, we'll start back at 2:30, that's forty-five
5 minutes, I know that's sort of an abbreviated lunch but we can
6 move on.

7 MR. LONG: Thank you, Judge.

8 (RECESS - 1:46 P.M.)

9 *****OFF THE RECORD*****

10 (On the Record - 2:45 P.M.)

11 THE COURT: All right. If there's not anything else, I'm
12 ready to rule on the search warrant issue.

13 MR. GROOOMS: No, sir, Your Honor.

14 THE COURT: All right. Mr. Long is correct that there is
15 an identification issue that while it deals with the
16 distribution charge, it also, I think, deals with the issue of
17 probable cause and so I have analyzed it at this point solely
18 for the purpose of the hearing regarding the search warrant,
19 although very candidly, whatever I rule on this would most
20 probably be the same way I'd rule on the *Neil v. Biggers*
21 hearing. Given -- showing someone a single photo by its
22 nature is suggestive, standing alone it would be impermissibly
23 suggestive. However, based on the facts relayed to the Court
24 in this hearing, I find there's no substantive likelihood or
25 substantial likelihood of irreparable misidentification based

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BY THE COURT

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1 on the totality of the circumstances. I find affirmatively
2 that the identification by Buffkin of Kinlaw is reliable even
3 if suggested and I find the State has proven this by clear and
4 convincing evidence. And I find that Mr. Kinlaw was known to
5 Mr. Buffkin, again according to him, that -- and I hadn't
6 heard Buffkin's testimony but based on the information at this
7 time that I'm using on the probable cause issue that there was
8 a -- that Mr. Buffkin had interacted eighteen times with Mr.
9 Kinlaw involving drug transactions, either individually or
10 with others, and there was a close proximity in time between
11 the alleged distribution and the identification of the photo.
12 I also find that the search warrant is on probable cause. The
13 idea, the identification of Mr. Kinlaw as Gunner or Gunter --
14 Gutter, the identification of him, the -- I can't read my own
15 writing -- of the activity regarding the transaction with
16 Kinlaw, the key card being found on Mr. Kinlaw, key card
17 having worked the Room 205, having been ID'd by the owner or
18 the manager, I don't know if he was the owner, of the motel
19 and the -- with the confirmation by him that Kinlaw was the
20 individual in that room or at least not in the room but --
21 *Jardines* does not fly. It is a front porch case. It talks
22 about one's right of expectancy of privacy in their home or
23 its curtilage and I find that the right of privacy does not
24 extend to a Days Inn breezeway, walkway or a hallway. So, I
25 find there was probable cause and I find that the warrant is

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MOTIONS

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1 based on probable cause and will not be -- the items seized
2 will not be quashed.

3 All right. What's next?

4 MOTIONS:

5 MR. LONG: Your Honor, may we address my motion for a
6 continuance based on us not being given the information about
7 the initial confidential informant ---

8 THE COURT: You may.

9 MR. LONG: --- Ms. China Mathis. Without having that
10 information, without even knowing that it existed or knowing
11 that she existed, my client and I feel like given some time to
12 pursue information on her and on why she would have that
13 information, would be very beneficial to his defense. It
14 would be prejudicial to go forward since we weren't provided
15 that information, it would be prejudicial to him to go forward
16 without that. Therefore, we would ask for a continuance.

17 BY THE COURT:

18 THE COURT: I will deny the motion for continuance. The
19 only relevance of this so-called CI or Ms. China or whatever
20 her last name was, has to do with the instigation of
21 investigation, hard to say, and that her identity and her
22 involvement is limited to the extent that I'm not gonna grant
23 the continuance. As to the discovery issue, the State of
24 course is under a continuing obligation to provide information
25 and perhaps should have if they knew this last night, given

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BY THE COURT

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1 the information to Mr. Long prior to it coming out in the
2 witness but I find that -- I'm not gonna grant a continuance.

3 All right. Anything else before the Jury comes in?

4 MR. GROOOMS: Your Honor, we -- the Defendant made a
5 statement when he was arrested, so I don't know if we need to
6 have a *Jackson v. Denno* hearing. If we did, the officer has
7 already testified to what the Defendant said after being read
8 Miranda. He denied that he'd ever been to the hotel. We
9 would seek to have that entered at trial. Therefore, *Jackson*
10 *v. Denno* would be proper as a pretrial hearing.

11 THE COURT: Okay.

12 MR. GROOOMS: I don't know if you can rule on it based on
13 his prior testimony or not.

14 MR. LONG: And, Your Honor ---

15 THE COURT: Usually when I have *Jackson v. Denno* I don't
16 really on simply saying -- a witness simply saying I gave the
17 Miranda warnings. I like there to be testimony as to exactly
18 what that means.

19 MR. GROOOMS: Yes, sir.

20 THE COURT: I told him he had the right to remain silent,
21 have an attorney present, all of that, so I guess you need to
22 present further testimony.

23 MR. GROOOMS: Yes, sir. It would be rather short.

24 THE COURT: Mr. Long?

25 MR. LONG: Your Honor, before we take that up, may I have

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BY THE COURT

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1 a moment with my client ---

2 THE COURT: Sure.

3 MR. LONG: --- to see just where we are at this point.

4 THE COURT: That's okay, yes, sir.

5 MR. LONG: Okay. Thank you.

6 (REPORTER'S NOTE: Mr. Long confers with Defendant.)

7 MR. LONG: Your Honor, Mr. Kinlaw and I have an
8 opportunity to talk and based on what's happened so far in the
9 case, understanding where the case is framed now and what
10 we're gonna try, he wishes to change his plea to guilty.

11 THE COURT: All right. I'll give you time to get the
12 sentencing sheets prepared and let me know.

13 MR. GROOOMS: Yes, sir. It'll be about two minutes. I
14 can step right here.

15 THE COURT: Okay. We'll take a break until I hear from
16 you.

17 (RECESS - 2:45 P.M.)

18 *****OFF THE RECORD*****

19 (On the Record - 3:04 P.M.)

20 THE COURT: All right. Thank you, Your Honor. Your
21 Honor, the State versus Henry Kinlaw, Your Honor. The Defense
22 indicates that Mr. Kinlaw is ready to plead. We have three
23 indictments, first of which is true billed indictment 2012-GS-
24 26-01699, distribution of cocaine base, second offense. Your
25 Honor, the second indictment, 2012-GS-26-01698, trafficking in

State v. Kinlaw - 2012-GS-26-1700,1698,1699
HENRY L. KINLAW - BY THE COURT

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1 cocaine base, 28 grams or more, less than 100 grams, second
2 offense. Your Honor, he's also pleading to true billed
3 indictment 2012-GS-26-01700, trafficking in cocaine, greater
4 than 28 grams, less than 100 grams, second offense, Your
5 Honor.

6 CLERK: Sir, please raise your right hand.

7 HENRY L. KINLAW, HAVING BEEN DULY

8 SWORN, TESTIFIES AS FOLLOWS:

9 BY THE COURT:

10 THE COURT: How old are you, Mr. Kinlaw?

11 MR. KINLAW: Thirty-eight.

12 THE COURT: You are represented by Mr. Long?

13 MR. KINLAW: Yes, sir.

14 THE COURT: Are you satisfied with his services?

15 MR. KINLAW: Yes, sir.

16 THE COURT: I have these three indictments, I'm gonna go
17 over them. You've been indicted for on February 28th, 2012,
18 distributing cocaine base, commonly called crack cocaine, in
19 violation of the laws of this state. You understand that
20 charge?

21 MR. KINLAW: Yes, sir.

22 THE COURT: You also have been charged with on the 29th
23 of 2012, February, with trafficking in cocaine base between 28
24 and 100 grams. That alleges that you on that date did
25 knowingly sell, deliver, purchase or in actual or constructive

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HENRY L. KINLAW - BY THE COURT

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1 possession of a quantity of cocaine base in an amount of more
2 than 28 but less 100 grams. This was a controlled substance
3 and you were not authorized to have the possession of that
4 crack cocaine. Third indictment alleges that on or about that
5 same date, February 29th, 2012, you also had powder cocaine in
6 an amount between 28 and 100 grams and basically the same
7 allegation that you knowingly had to sell, deliver or had in
8 your actual or constructive possession a quantity of cocaine
9 between twenty -- in the amount of more than 28 grams but less
10 than 100 grams in violation of the laws of this state. Do you
11 understand those three charges?

12 MR. KINLAW: Yes, sir.

13 THE COURT: The -- let's see -- I've got a lot of
14 paperwork up here, excuse me just a moment.

15 As to the trafficking in cocaine, this carries from seven
16 to thirty years in jail as a felony. It is a serious offense.
17 A serious offense is the type of offence which if in your
18 lifetime you receive three serious or a combination of three
19 serious and most serious offenses, you'd be subject to being
20 incarcerated for life without parole. That is a true life
21 sentence. As to trafficking in cocaine, do you understand the
22 charge? Do you understand that?

23 MR. KINLAW: Yes, sir.

24 THE COURT: Also, in addition to being a serious offense,
25 it is a violent offense. A violent offense is a type of

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HENRY L. KINLAW - BY THE COURT

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1 offense which restricts an inmate's opportunities within the
2 Department of Corrections. That is there are certain programs
3 available to non-violent offenders which are not available to
4 violent offenders. This is also a parole ineligible offense,
5 that means that you would have to serve eighty-five percent of
6 your sentence before you would be eligible to be released into
7 a community supervision program with conditions and if you --
8 while on community supervision violated the provisions of that
9 community supervision, you could be reincarcerated for up to a
10 year and pattern could continue until you had served your
11 entire sentence. Do you understand that?

12 MR. KINLAW: Yes, sir.

13 THE COURT: How do you plead to trafficking in cocaine?

14 MR. KINLAW: Guilty.

15 THE COURT: You're also charged in trafficking in cocaine
16 base, crack cocaine. That carries from seven to thirty years
17 in jail. It's alleged -- I've told you what it alleged. It
18 is also a felony and it is also a serious offense. I told you
19 about that. It's also a violent offense; I've told you about
20 that. It is also a parole ineligible offense and I've told
21 you about that. Do you understand the charge involving
22 cocaine base, crack cocaine and the potential penalty?

23 MR. KINLAW: Yes, sir.

24 THE COURT: How do you plead to that?

25 MR. KINLAW: Guilty.

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HENRY L. KINLAW - BY THE COURT

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1 THE COURT: Finally, you are charged with possessing --
2 distributing crack cocaine. It's alleged -- I've already gone
3 over the allegations. This carries up to from five to thirty
4 years in jail. It is also a felony and it is also a serious
5 offense. Do you understand that?

6 MR. KINLAW: Yes, sir.

7 THE COURT: How do you plead to that?

8 MR. KINLAW: Guilty.

9 THE COURT: Any recommendation or negotiation?

10 MR. GROOOMS: Your Honor, just that this Defendant has a
11 prior, he has a trafficking in crack first from 28 grams to
12 100. He was sentenced in 2000 to ten years. Your Honor, he
13 was released in 2009. So, he's only been out a few years
14 before he reoffended. Your Honor, obviously, just the expense
15 to the State of a trial, working around the clock with these
16 gentlemen and bringing in out-of-state witnesses, Your Honor,
17 the chance for leniency from the State passed a long time ago.

18 THE COURT: Okay. So, you have no recommendation or no
19 negotiation?

20 MR. GROOOMS: No, sir.

21 THE COURT: All right. Mr. Kinlaw, are you -- has
22 anybody threatened you or promised you anything to get you to
23 enter today your plea of guilt to these three charges?

24 MR. KINLAW: No, sir.

25 THE COURT: Are you today, Mr. Kinlaw, under the

State v. Kinlaw - 2012-GS-26-1700,1698,1699
HENRY L. KINLAW - BY THE COURT

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1 influence of anything that would cause you to be intoxicated?

2 MR. KINLAW: No, sir.

3 THE COURT: Are you entering your plea to these three
4 charges today, Mr. Kinlaw, freely and voluntarily?

5 MR. KINLAW: Yes, sir.

6 THE COURT: You have a right, Mr. Kinlaw, to a trial by
7 jury on this charge and we've actually drawn a jury. You are
8 presumed innocent of this charge, these three charges, until
9 such time as the State is able to prove, if it can, your guilt
10 beyond a reasonable doubt. As to the charges, you have the
11 right to remain silent, the right to confront the witnesses
12 against you, and you have the right to have your witnesses
13 made to come to court to testify for you. Do you understand
14 you have these rights?

15 MR. KINLAW: Yes, sir.

16 THE COURT: Do you have any questions about them?

17 MR. KINLAW: No, sir. I ---

18 THE COURT: You may explain. Go ahead.

19 MR. KINLAW: No, sir. Just a few things with the
20 evidence that was presented to me, I didn't receive like all
21 the evidence, like the name that he gave, the new -- the new
22 informant and stuff like that. That was like new evidence
23 that we didn't get a chance to look at it before we went to
24 trial, the evidence, it wasn't presented to me.

25 THE COURT: I couldn't hear what he said. What did he

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HENRY L. KINLAW - BY THE COURT

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1 say, Mr. Long?

2 MR. LONG: Your Honor, I did explain that in my
3 presentation. He's just saying -- he saying based on
4 proceedings so far today, especially, you know, the witness,
5 the CI that we didn't have information on and, most
6 importantly, the combination of these to be tried together.
7 He's gone a long ways towards changing his plea from not
8 guilty to guilty.

9 THE COURT: All right. But you are pleading on your own;
10 is that correct?

11 MR. KINLAW: Yes, sir.

12 THE COURT: Okay. Mr. Kinlaw, I advise you that by
13 entering a plea of guilt to these charges and as to these
14 charges, you are giving up all those rights I've gone over and
15 you're also giving up any defense that you might have to the
16 charges; do you understand that?

17 MR. KINLAW: So, I'm giving up all my rights from the
18 motion hearing, too, pretrial motion?

19 THE COURT: Yes. Do you understand that?

20 MR. KINLAW: Yes, sir.

21 THE COURT: All right. Knowing all those things, do you
22 still wish to plead guilty?

23 MR. KINLAW: Yes, sir.

24 THE COURT: All right. To all three charges?

25 MR. KINLAW: Yes, sir.

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BY THE COURT

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1 BY THE COURT:

2 THE COURT: All right. Listen while I'm given the facts,
3 although I've pretty much heard them.

4 MR. GROOOMS: Thank you, sir. As you directed on the
5 indictment of distribution case comes from February 28th,
6 2012. Your Honor, this Defendant did distribute a small
7 amount of what was later tested positive as cocaine base to a
8 witness later to become a State's witness. Your Honor, he did
9 violate States Section 44-53-375(b)(2) in distributing this
10 quantity of cocaine base. Your Honor, this had taken place in
11 Horry County, as I stated, on or about February 29th -- the
12 actual date being February 28th. This took place at the Days
13 Inn hotel being in Horry County. Your Honor, that was
14 indictment 2012-GS-26-01699. As far as indictment 2012-GS-26-
15 01700, trafficking in cocaine 28 to 100 grams, second offense,
16 this Defendant did knowingly sell, deliver, purchase or bring
17 into the state or did aid one or was in actual or constructive
18 possession of an amount of cocaine being greater than 28
19 grams, less than 100 grams. Your Honor, I believe it was
20 roughly 90 grams. It was 91.67 grams, Your Honor, falling
21 under the trafficking weight of 28 to 100, this being his
22 second offense. This taking place in Horry County at the Days
23 Inn motel.

24 And Your Honor, the final indictment, indictment 2012-GS-
25 26-01698, trafficking in cocaine base greater than 28 grams,

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BY THE COURT

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1 less than 100 grams. This Defendant did on or about February
2 29th, 2012, knowingly sell, deliver, purchase or bring into
3 the state or did aid one in doing so or was in actual
4 possession or constructive possession of greater than 28
5 grams, less than 100 grams of what did test positive as
6 cocaine base. Your Honor, the exact amount being 70 grams.
7 These events happening in Horry County at the Days Inn motel
8 on February 29th, 2012.

9 THE COURT: All right. Mr. Kinlaw, do you agree with
10 those facts?

11 MR. KINLAW: Yes, sir.

12 THE COURT: Mr. Kinlaw, I accept your pleas. I find
13 they're freely, voluntarily, knowingly and intelligently
14 entered in with the advice of competent counsel with whom you
15 are satisfied. I find the facts support your pleas of guilt.

16 I don't know that the State wants to add anything, I
17 think you've pretty much ---

18 MR. GROOOMS: No, sir.

19 THE COURT: All right. Mr. Long?

20 MR. LONG: Thank you, Your Honor. Your Honor, Henry is a
21 life-long resident of this circuit. He was born and grew up
22 in Georgetown and graduated from Georgetown High. Did one
23 year at Spartanburg-Methodist College. Judge, he was -- he's
24 -- present in the courtroom with him and in support of him
25 today for his trial and now for his plea are his parents and

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BY THE COURT

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1 his brother who are seated over here in the back of the
2 courtroom on your left. His brother's name is Roderick and
3 his mother's name is Mary and they love and support him very
4 much.

5 Judge, this case, you know, you practiced law a long time
6 and know, as this case moved itself forward, getting close to
7 trial, Mr. Kinlaw and I spent a good bit of time together
8 trying to figure out what we had. And it appeared to us and I
9 did advise him that we had several close call issues, the
10 issues of joinder and the issue of the photo ID and the issue
11 of the search warrant and the dog sniff, all felt like we had
12 good arguable issues. He was offered by the Solicitor up
13 until maybe six months ago a reduction in charge to plead to
14 trafficking 10 to 28 grams and a recommendation of a five-year
15 sentence. Obviously, that's gone now. He understands that.
16 But, Judge, you know, we don't have -- we don't have the
17 avenue or we don't have a system set up where we can sort
18 these thing out pretrial in front of a judge well in advance
19 of trial and know what we've got before we get to trial. We
20 have to do it all right here at the beginning and so that's
21 what we end up doing in all these case. So, I would hope that
22 Your Honor would, would take into consideration the fact that
23 we -- he needed to get answers to some of the questions that
24 you've given answers to this morning. That's why the
25 reduction and the five-year recommendation was turned down

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BY THE COURT

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1 because he felt like, and I felt like, we had an opportunity
2 to bring this in front of Your Honor and sort it out and maybe
3 thin it out and give us a better picture of what we're looking
4 at. Now that we know what we're looking at, he was the first
5 to tell me, not me him, that if we try these cases together,
6 there's plenty of evidence in the distribution case that's
7 going to tend proof -- the trafficking case, there was a whole
8 lot of evidence in the trafficking case that's gonna tend to
9 prove the distribution case and his chances at trial with the
10 Jury had been diminished, you know, greatly by that ruling.
11 And we understand and appreciate that ruling, I just bring
12 that to your attention that this was the first chance we had
13 to have those things sorted out and to ask you not to punish
14 him, as Mr. Grooms suggested, that the chance for leniency has
15 passed. Well, he feels like he was just educated on his case
16 by Your Honor and given what the parameters of his case were,
17 he's stopping the case now so as not to waste that Jury's time
18 and not to waste Your Honor's time and not to waste any more
19 of the State's time and resources and belly up to the bar
20 based on what we're looking at and plead guilty. Considering
21 that, Judge, considering that that he has always been nothing
22 but respectful to me. You can tell by listening to him here
23 -- in the first part of this plea, he's a very soft-spoken, he
24 says yes, sir every time he says yes; no, sir, every time he
25 says no. Yes, he is a good person that has done some bad.

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SENTENCE OF THE COURT

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1 things. He's done quite very bad things. But considering
2 that the Legislature has given you the parameters of 0 to 30
3 and set the 30 years on these charges and considering that he
4 got those answers from you pretrial just now and has decided
5 based on that, based on where the case sits now, to go forward
6 with this plea, we would ask you consider not punishing him
7 for wanting to get those answers before he made that decision.
8 Based on that, Judge, and based on who he is as a person,
9 life-long resident and seems to be a good guy otherwise, we
10 would ask you to strongly consider sentencing him to the low
11 end of this range. We believe a seven-year sentence would be
12 appropriate in the matter and we would ask you to do so, sir.

13 THE COURT: All right. Mr. Kinlaw, anything you want to
14 say?

15 MR. KINLAW: Russell said about everything ---

16 THE COURT: I couldn't hear you.

17 MR. KINLAW: I said, Russell said most everything I want
18 to say, sir.

19 SENTENCE OF THE COURT:

20 THE COURT: Okay. All right. Well, I'm not punishing
21 him from coming to trial but the three offenses all carry up
22 to thirty years which would max out at ninety years and just
23 being a recent graduate of SCDC, I find that all these
24 sentences should run concurrent. If he's already served any
25 time on them, he gets credit for them and they are for fifteen

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BY THE COURT

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1 years each, fifteen years on each charge. Thank you.

2 MR. GROOOMS: Thank you, Judge.

3 THE COURT: We need to get the Jury in. Let's bring in
4 the Jury.

5 (REPORTER'S NOTE: Jury enters courtroom. 3:23 P.M.)

6 BY THE COURT:

7 THE COURT: Members of the jury panel, I bet y'all think
8 I missed that class in Kindergarten that taught you how to
9 tell time. Actually, we had some very complicated legal
10 issues to deal with. And based on my rulings, Mr. Kinlaw
11 decided rather than to go forward with the trial to plead
12 guilty. So, we have been working. We took a short lunch
13 break but we have not been playing checkers and drinking
14 coffee. We've been working. I'm going to excuse you for the
15 day and ask you to be back at 9:00 in the morning. We have
16 another trial lined up for 9:00 in the morning. So, is that
17 all right?

18 CLERK: Yes, sir.

19 THE COURT: So, I will excuse you for the day. I thank
20 you for your help and we'll see you back at 9:00 in the
21 morning and -- they report to the jury assembly room -- the
22 jury assembly room. Thank you. Have a pleasant evening. And
23 we wouldn't have gotten it resolved without y'all being
24 available.

25 (REPORTER'S NOTE: Jury exits courtroom. 3:25 P.M.)

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BY THE COURT

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1 (RECESS - 3:25 P.M.)

2 *****OFF THE RECORD*****

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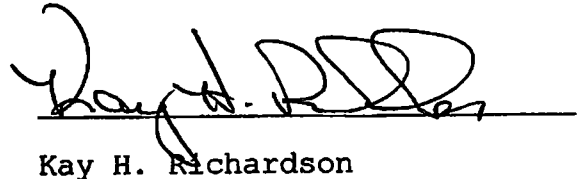
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CERTIFICATE OF COURT REPORTER

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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of State of South Carolina versus Henry L. Kinlaw, held in the Court of General Sessions for Horry County, Horry County Courthouse, Conway, South Carolina, on November 3, 2014.

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



Kay H. Richardson

Official Court Reporter

August 5, 2015.

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Henry Lee Kinlaw Jr. #271267)

Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

15

3714

APPLICATION FOR

POST-CONVICTION RELIEF

Horry County
26 MAY 19 PM 4:26
CLERK OF COURTINSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention SCDC - Lieber, P.O. Box 205 Ridgville, S.C. 29472
2. Name and location of Court which imposed sentence Horry County
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

- (a) 2012-GS-26-01698; Trafficking Cocaine Base/Meth, 28-100 grams (2nd offense)
- (b) Trafficking Cocaine, 28-100 grams
- (c) Distribution of Crack Cocaine

5. The date upon which sentence was imposed and the terms of the sentence:

- (a) November 3rd, 2014
- (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty ✓
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Informed counsel to file appeal/notice of appeal - counsel failed to file
appeal/notice of appeal
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. N/A
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. N/A
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. N/A
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) Informed counsel to file appeal/notice of appeal - but counsel failed to
file appeal/notice of appeal
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Involuntary Guilty Plea-Ineffective Assistance of counsel
 (b) grounds A-D
 (c) Ground E-failure to file appeal/notice of appeal

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

- (a) See attached pages-#3 1-39
 (b) _____
 (c) _____

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

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

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

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

iv. _____
 (d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

N/A

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Can only raise ineffective assistance of

(b) Counsel on PCR

(c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? yes
- (b) your trial, if any? no
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Counsel did not file appeal/notice of appeal
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? no
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Russell B. Long Esquire, 5307 North Kings Highway
- ii. Myrtle Beach S.C 29577
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. plea [guilty plea]
- ii. _____
- iii. _____
19. State clearly the relief you seek in filing this application: Convictions and sentences vacated or in the alternative, reversed and remanded for a new trial.
20. Are you now under sentence from any other court that you have not challenged?
No

STATE OF SOUTH CAROLINA)

County of Dorchester)

VERIFICATION

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

Henry L Kinlaw

SWORN to and subscribed before me this 14th
day of May, 2013.

Luduan Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

HORRY COUNTY
2015 MAY 19 PM 1:26
MELODY J. JORDAN
CLERK OF COURT

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

15

3714

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

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

Henry L Kinlaw

Applicant

SWORN or affirmed to and subscribed before me this
14th day of May, 2015.

Luduan Bryant
Notary Public

My Commission Expires: May 26, 2020

HORRY COUNTY
2015 MAY 19 PM 1:26
MELANIE HODGINS-WARD
CLERK OF COURT

10.(a) Involuntary Guilty Plea-Ineffective Assistance of Counsel

11(a) Applicant's guilty plea was not voluntarily, knowingly, or intelligently entered as a result of his being denied the effective assistance of counsel and Due Process of Law, in violation of his rights guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, as a result of trial counsel's failure to investigate, prepare for and motion to dismiss charges of distribution of crack cocaine; trafficking in crack-cocaine 28-100 grams; and trafficking cocaine 28-100 grams because arrest warrant and affidavit in support of was not supported by probable cause.

Facts

On February 29, 2012, the Applicant ("Kinlaw"), while living at the Days Inn located at 3650 Waccamaw Blvd. in Myrtle Beach was arrested and charged with distribution of crack cocaine; trafficking in crack cocaine 28-100 grams; trafficking in Cocaine 28-100 grams. indictment numbers: 2012-GS-26- as he was leaving the Crabtree Memorial Gymnasium located at 1004 Crabtree Lane located in Myrtle Beach as he proceeded to enter his vehicle.

During search incident to Kinlaw's arrest, Agent Philip E. Phillips, Fifteenth Circuit Drug Enforcement Unit ("DEU") seized a "Days Inn" Keycard from Kinlaw. Kinlaw was then transported to the Myrtle Beach Police Department awaiting transfer to J. Rueben Long Detention Center.

After it was determined that Kinlaw was staying in Room 205 at the Days Inn, DEU Agent Jeremy Brown deployed his drug detecting dog ("Jari"), which conducted a sniff of the exterior

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door of Room number 205. The drug dog gave a positive alert indicating the presence of drugs inside of Room number 205. DEU Deputy Commander T. Howlett then tested the Keycard that was in Kinlaw's possession and learned that it activated to Room number 205.

At this time, Agent Phillips sought and obtained a Search warrant for Room number 205 and executed it at approximately 3:00pm on February 29, 2012. Seizing the following items from within Room number 205:

- 1) Clear plastic baggie containing approximately 42.4 grams of an off-white in color rocklike substance;
- 2) Clear plastic baggie containing 70.6 grams of a white powdery substance;
- 3) Three (3) clear plastic baggies containing an off-white in color rocklike substance, approximately combined weight of 34.5 grams;
- 4) Two (2) clear plastic baggies, each containing a white powdery substance approximate combined weight of 22.6 grams.

(All items in #'s 1-4 above, field tested positive for cocaine and was found in top left drawer of dresser.)

5) One (1) box of sandwich bags;

6) Three (3) digital scales;

7) Four (4) plastic bags, each containing smaller ziplock style baggies

(All items in #'s 5-7 found in top left drawer of drawer.)

8) \$ 842.00 cash money found inside top drawer of nightstand

Agent Phillips then returned to the Crabtree Memorial Gymnasium where Kinlaw vehicle was parked. During inventory of said vehicle, Agent Phillips located \$ 138.00 cash money and seized Kinlaw's vehicle [2008 Chevy Impala] and all monies seized.

Kinlaw posted bond shortly thereafter and retained defense attorney Russell B. Long, Esquire, to represent him on said charges.

Defense counsel advised Kinlaw that the State would allow him to plead guilty to all charges for a five(5) year total sentence. Counsel did not inform Kinlaw when the plea offer expired.

Defense counsel advised Kinlaw that the drug evidence could be suppressed, that he could win at trial.

On November 3, 2014 Kinlaw went to trial but after Counsel raised a Batson issue concerning Kinlaw's jury pool which trial judge denied; Subjective one photo lineup, again denied by the trial judge; and a Motion to suppress the drug evidence which the trial judge denied and ruled "that he did not think a hotel door had the same rights as a house."

Counsel then coerce Kinlaw to enter a plea of guilty. Counsel did not advise me that I had a meritorious State and Federal Constitutional claim and that if I went on to trial, that I could challenge the trial judges denial of suppression motion.

Thereafter, on November 3, 2014, Kinlaw, at the advice of his attorney entered a guilty pleas before the Honorable John L. Hayes to distribution of crack cocaine; trafficking crack cocaine 28-100 grams, and trafficking cocaine 28-100 grams. Kinlaw was then sentenced to concurrent sentences of a total of fifteen(15) year sentence.

Kinlaw, upon sentencing then instructed counsel to file an appeal. Counsel did not file direct appeal.

Applicant asserts that his guilty plea was not voluntarily knowingly, or intelligently entered as a result of ineffective

assistance of counsel and counsel's failure to advise him that he had a meritorious state [Art. I, §10 of S.C. Const.] Federal [Fourth Amendment of the U.S. Const.] and statutory [§17-13-140 of the S.C. Code of Laws] challenge to the denial of suppression Motion on direct appeal, if I proceeded to trial and if convicted, challenge the denial of the motion to suppress drug evidence.

See Tollet v. Anderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) (A criminal defendant can only attack the voluntary and intelligent character of the guilty based on the advice of counsel.)

Claims of ineffective assistance of counsel are evaluated under a two-prong test set forth in Strickland v. Washington 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-74, 80 L.Ed.2d 674 (1984), and its progeny. "To succeed on any claim of ineffective assistance of counsel, a defendant must show that: (1) the attorney's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that except for the attorney's unprofessional errors, the results of the proceeding would have been different." In the plea and plea bargaining context, a petitioner seeking to establish ineffective assistance of counsel must demonstrate that: (1) counsel's advice and performance fell below an objective standard of reasonableness; and 2 the petitioner would not have pleaded guilty and would have insisted on going to trial in the absence of his attorney's errors.

Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370-71, 88 L.Ed.2d 203 (1985).

Kinlaw asserts that Arrest Warrant number 14-971717 for "Distribution of Crack Cocaine" was invalid and his arrest was illegal because the affidavit lacked probable cause. The affidavit for the aforereferenced warrant stated:

Within the past 72 hours, the Defendant (Henry Lee Kinlaw Jr) did sell and/or distribute a quantity of crack cocaine for the exchange of cash money from within the Days Inn Hotel located at 3650 Waccamaw Blvd in Myrtle Beach section of Horry County. Given the above facts, there is probable cause to believe the Defendant did violate the SC State Statute 44-53-275 "Distribution of Crack Cocaine."

The Record in this case is devoid of any evidence that the police had probable cause to arrest Kinlaw, for distribution of crack cocaine. DEU Agent Philip E. Phillips "Investigative Report" is void of any evidence that Kinlaw was selling drugs [crack cocaine or powder cocaine].

In Agent Phillips investigative report ("report"), Mr. Phillips says that he obtained information that a black male with the street name "Gutter" or "Gunner" was currently staying somewhere on the second floor of the Days Inn Hotel located at 3650 Waccamaw Blvd in Myrtle Beach. [That] according to the information, Kinlaw was actively selling crack cocaine to various buyers within the as they came to visit him. The information stated that the buyers would arrive at the hotel (typically in a vehicle), park in the western most portion of the property, exit their vehicle, then enter a side door on the westside of the building. The buyers would then enter a stairwell directly to the right side of the door and meet Gutter/Gunner inside of the stairwell on the second floor for the drug transaction to occur. After buying the drugs, the buyer would then walk back down the

Stairwell, exit through the door, re-enter their awaiting vehicle, and leave the property. Phillips had also gained information that Gutter/Gunner did own and operate a blue in color Chevy Impala (bearing S.C. registration HTA 885), which was typically parked in the western parking lot of the hotel, beside or near the side entrance.

Agent Phillips verified owner of vehicle, through S.C. Department of motor vehicles was Henry Lee Kinlaw Jr. and that Henry Lee Kinlaw Jr was subject known as "Gutter or Gunner."

Agent Phillips did conduct multiple surveillance sessions on the hotel's western most parking lot watching the blue Impala and the side door entrance.

[That] on numerous occasions, Phillip viewed multiple vehicles arrive in the western most parking lot and park near the side entrance door. [That] various persons would exit their vehicle, enter the side door, and turn immediately right into the stairwell. These persons would stay inside the the building for approximately 20-30 seconds, then, re-emerge through the side entrance out into the parking lot, enter their vehicles and leave.

On February 28, 2012, that Agent Phillips and Agent Dan Roberts were observing traffic entering and leaving hotel parking lot. Shortly thereafter, Phillips observed a vehicle arrive in the hotel's western parking lot and park in front of the side entrance door. The driver (who shall remain confidential) exited the vehicle, entered the side entrance door, and made an immediate right turn

in the hotel's stairwell. The driver remained in the building for 27 seconds (timed by Phillips) then re-emerged out the side entrance door, re-enter vehicle and leave the parking lot.

Phillips suspected that an illegal drug transaction occurred between the driver and Kinlaw while inside the stairwell. That they [while following] the driver observe the driver commit a lane change violation. And requested Agent Chris Thompson to conduct a traffic stop on the driver.

During the traffic stop of the driver, Agent Randy Miller introduced himself as an Agent with the Drug Enforcement Unit, explaining what they were investigating at the hotel and asked if the driver was in possession of any illegal drugs. The driver informed Miller that he/she was in possession of crack cocaine, that he/she had purchased it from a black male in the stairwell of the Days Inn Hotel for \$60.00 and that he/she knew the black male by the street name "Gunner" and knew him to drive the blue Impala that was parked in the lot. The driver told Miller the crack-cocaine was inside a small ziplock baggie inside his/her shoe. The driver then gave Miller custody of the crack cocaine. Driver was then arrested for "Possession of Crack Cocaine."

Phillips then interviewed driver at the Myrtle Beach Police Department. Driver gave statement that he/she had bought crack cocaine from Gunner on multiple occasions, always at the hotel, always in the stairwell. Then Phillips showed driver one photograph-photograph of Henry Lee Kinlaw Jr. At which time driver identified Kinlaw as "Gunner."

The affidavit underlying the arrest warrant lacked probable cause.

The Fourth Amendment guarantees "... no warrants shall issue but upon probable cause...." In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides... "no warrants shall issue but upon probable cause."

Additionally, §17-13-140 of the South Carolina Code of Laws (2003) governs arrest warrants as well as search warrants. Kinlaw asserts that he has only to show that the arrest warrant is invalid and under §17-13-140 need only show that the State had no evidence against him thus, did not have probable cause to arrest him.

The South Carolina Code §17-13-140 mandates that an [arrest]/search warrant "shall be issued" only upon affidavit sworn to before the magistrate... establishing grounds for the warrant.

A Magistrate may issue a search [arrest] warrant only upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). In Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.E.d. 2d 527 (1983), the United States Supreme Court adopted a "totality-of-the-circumstances" test for probable cause determinations:

The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

In the present case, Agent Phillips nor any other DeU agents observed any illegal drug transactions involving Kinlaw, no transaction between driver [who was subsequently arrested for possession of crack cocaine] and Kinlaw, nor any interactions with any other individuals at the hotel.

The police never conducted nor attempted to conduct a controlled buy with the driver, nor one of their CI's.

The driver was stopped for a lane change violation, gave an oral statement that he/she had crack cocaine in his/her shoe. And that he/she purchased the crack cocaine from someone known as Gunner later identified as Kinlaw.

There's absolutely no evidence of the driver's reliability, the only information given was that the driver was arrested for possession of crack cocaine.

The affidavit underlying the arrest warrant is defective because it sets forth no information on the reliability of the driver, nor does the affidavit set forth facts as to why the Police believed that Kinlaw sold drug [crack cocaine], or to who he sold drugs to.

These mere conclusory statements gave the magistrate no basis to make a judgement regarding probable cause. thus, insufficient to establish probable cause to arrest Kinlaw.

The only information in the affidavit about the events and circumstances of the alleged sale of crack cocaine at the hotel, and thus the only information provided to the Magistrate regarding probable cause, came from the driver. Thus, the existence of probable cause in this case depended entirely on the informant's hearsay statements to Agent Miller and Agent Phillips— whether the driver told the truth— particularly as to (1) whether there were any drugs purchased at all and (2) whether the drugs were

purchased from Kinlaw in the stairwell of the hotel.

Therefore, it was necessary that Agent Phillips demonstrate the driver's reliability to the judge [Magistrate judge].

Without any information concerning the reliability of the driver, the inferences from the facts which led to the complaint were not drawn by a neutral and detached Magistrate, as the Constitution requires, but instead, by a police officer engaged in the often competitive enterprise of ferreting out crime, or, in this case, by a person stopped for a traffic violation and charged with possession of crack cocaine.

(Underlining for emphasis).

Thus, arrest warrant was invalid and counsel should have objected to and motioned to dismiss warrant because of its invalidity.

Had counsel challenged the invalid unconstitutional arrest or advised Kinlaw that the warrant was invalid, Kinlaw would have insisted upon trial. Counsel's inaccurate advice and failure to thoroughly prepare for trial led to Kinlaw's guilty plea.

Kinlaw asserts that although he pled guilty and may have admitted guilt regarding the distribution of and trafficking of crack cocaine and cocaine, and expressed satisfaction with plea counsel's representation he lacked the necessary information to raise any challenge during the plea proceeding.

10.(b) Involuntary Guilty Plea - Ineffective Assistance of Counsel

11.(b) Applicant's guilty plea was not voluntarily, knowingly or intelligently entered as a result of being denied the effective assistance of counsel and Due Process of Law, in violation of his rights guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, as a result of trial counsel's failure to investigate, adequately prepare for and thoroughly argue the suppression of drug evidence because (1) unlawful search and seizure in violation of Article I, § 10 of the South Carolina Constitution and the Fourth Amendment to the United States Constitution; and (2) Search Warrant was defective because it was not supported by probable cause, in violation of Article I, § 10 of the South Carolina Constitution; Fourth Amendment of the United States Constitution.

Applicant ("Kinlaw") incorporates by reference the supporting facts presented in ground 10.(a) and 11.(a) above.

Kinlaw asserts that counsel was ineffective during his presentation regarding the suppression hearing. Counsel failed to investigate, adequately prepare and thoroughly argue the Suppression of the drug evidence.

Kinlaw was arrested on February 29, 2012, in the parking lot of the Crabtree Memorial Gymnasium located at 1004 Crabtree Lane in Myrtle Beach, and charged with distribution of crack cocaine, warrant number M-971717, an invalid arrest warrant, as previously argued in ground 10.(a) and 11.(a).

During search incident to Kinlaw's arrest, Agent phillips took a "Days Inn" keycard off the person of Kinlaw. After Kinlaw was transported to jail, DEU agents traveled to the Days Inn Hotel located at 3650 Waccamaw Blvd located in Myrtle Beach.

At that time, DEU agents and specifically, Agent Jeremy Brown conducted a "drug dog sniff" of the exterior door of Room Number 205 of the Days Inn Hotel without a search warrant.

Agents of the Horry County Fifteenth Circuit Drug Enforcement Unit ("DEU") violated Kinlaw's constitutional rights guaranteed by both the Fourth Amendment to the United States Constitution and Article I, § 10 of the South Carolina Constitution, and statutory right under § 17-13-140 of the South Carolina Code of Laws (2003).

The Fourth Amendment of the United States constitution guarantees "[t]he right of the people to be secure... [from] unreasonable searches and seizures." U.S. Const. IV. South Carolina's Constitution provides: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated." S.C. Const. Art. I, § 10.

Kinlaw asserts that the use of a drug-sniffing dog of his exterior hotel room door was a search within the meaning of the Fourth Amendment. Florida v. Jardines, — U.S. —, 133 S.Ct. 1409, 185 L.Ed. 2d 495 (2013) (133 S.Ct. at 1417-18.)

Kinlaw further asserts that, without a search warrant, the dog-sniff was an illegal warrantless search. Florida v. Jardines, — U.S. —, 132 S.Ct. 1409 (2013) the United States held that a dog sniff was an illegal search.

This action by law enforcement violated Kinlaw's Fourth Amendment right as well as his State Constitutional right and statutory right. "For searches conducted without warrants have been 'held unlawful' notwithstanding the facts unquestionably showing probable cause." Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4 (1925) for the Constitution requires "that the deliberate, impartial judgment of a judicial officer... be interposed between the citizen and the police..." Wong Sun v. United States, 371 U.S. 471, 481-82, 83 S.Ct. 407, 9 L.Ed. 2d 441, 451 (1963). "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes." United States v. Jeffers, 342 U.S. 48, 51, 72 S.Ct. 93, and that searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions [none applicable to Kinlaw's case.]. See Katz, 389 U.S. at 357, 88 S.Ct. 507 (1967).

Here, the trial judge's denial of suppression motion "that a hotel room door did not have the same rights as a house was incorrect and in violation of clearly established Federal Law."

Kinlaw asserts that "a motel [hotel] room is accorded the same Fourth Amendment consideration as a private home." "A guest in a hotel room shares in the Fourth Amendment protection against warrantless searches." Hoffa v. United States, 385 U.S. 293 (1966). See also Stoner v. California, 376 U.S. 483, 490, 84 S.Ct. 889 (1964) (same) and "travelers are entitled to be free from unreasonable government scrutiny in their hotel and motel rooms." See, e.g., Johnson v. United States, 451 U.S. 204, 211 (II), 101 S.Ct. 1642 (1981).

The Fourth Amendment safeguards the privacy interests of owners, Agnello v. United States, 269 U.S. 20, 33, 46 S.Ct. 4 (1925), boarders, McDonald v. United States, 335 U.S. 451, 454-56, 69 S.Ct. 191 (1948) and tenants, Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776 (1961), of a home, apartment, or other dwelling place. Co-tenants, co-owners, and co-occupants can also avail themselves of the Fourth Amendment's protections. See Georgia v. Randolph, 547 U.S. 103, 126 S.Ct. 1515, 1526 (2006).

Kinlaw further asserts that he had standing to challenge the search warrant, issued after the fact of an illegal drug-dog sniff, based upon (1) his expectation of privacy emanating from South Carolina Constitution and (2) South Carolina's warrant statute.

[T]he South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favor an interpretation offering a higher level of privacy protection than the Fourth Amendment," See State v. Forrester, 343 S.C. 637, 645, 541 S.E. 2d 837, 841 (2001). The South Carolina Supreme Court explained, "the drafters of our state constitution's right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government's ability to conduct searches." *Id.*, at 647, 541 S.E. 2d at 842⁹.

The ability of law enforcement to search for illegal drugs [or any other activity] falls square within our state Constitution's prohibition against unreasonable invasions of privacy and the concerns of the drafters regarding new technologies used by the government to conduct searches of its citizens.

Furthermore, the use of a drug-dog sniff falls squarely within the holding of Kyllo v. United States, 533 U.S. 27, 40,

① In her dissent, Justice Hearn provided an eloquent analysis and assessment of the growing threat of technological advances on individual liberty. She explained that the very concept of what we as citizens view as private is called into question by technology which facilitates unprecedented oversight of our lives." State v. Dykes, 403 S.C. 499, 511-522, 744 S.E. 2d 505, 511-17 (2013) (Hearn, J. dissenting).

121 S.Ct. 2038, 150 L.Ed. 2d 94 (2001) (holding that use of a device not in general public use, such as thermal imaging by the government to explore aspects of home not previously known without physical entry surveillance is a search) (Id. at 40).

Kinlaw asserts that he had a reasonable expectation of privacy in his hotel room, where he was a paid renter/boarder, based upon this state's protection of individuals against governmental invasions of privacy.

Additionally, Kinlaw had standing to challenge the search warrant based upon South Carolina's statutory provision governing search warrants. The South Carolina Supreme Court made clear that "the rights afforded by Section 17-13-140 are not dependent upon a showing of an expectation of privacy in the searched premises." State v. McKnight, 291 S.C. 110, 115, 352 S.E. 2d 471, 474 (1987). The Court explained "one contesting the legality of a search because of a defect under Section 17-13-140 need only show that the state

is attempting to introduce evidence against him." Id. The officers in the present case, did a dog-sniff search before obtaining the search warrant, the officers were required to satisfy South Carolina's statutory requirements, and Kinlaw had the authority to challenge the warrant and the trial judge's denial of suppression motion.

Kinlaw had standing to challenge the search warrant on the ground that the drug-dog sniff was an illegal warrantless search in violation of his Fourth Amendment right to be free of unreasonable searches and seizures as well as his constitutional right to privacy found in the South Carolina Constitution and the statutory provision governing search warrants.

The trial judge's denial of suppression motion was an error, and counsel failed to advise Kinlaw that he could go on to trial, because he had a meritorious Fourth Amendment claim as well as State constitutional and statutory claims, and if convicted, challenge the denial of the suppression motion on direct appeal.

Counsel advice to plead guilty was deficient, because Kinlaw had a valid legal challenge to the denial of the suppression motion on direct appeal.

Second, Kinlaw asserts that the underlying affidavit for the search warrant lacked probable cause, because the driver's allegation that Kinlaw sold him crack cocaine was not corroborated and his reliability was not set forth.

The affidavit states:

Throughout the course of an ongoing investigation, [of illegal drug sales at the Days Inn Hotel] agents of the 15th Circuit Drug Enforcement Unit learned that one Henry Lee Kinlaw, Jr (aka "Gutter" aka "Gunner" was staying at the hotel and actively selling illegal drugs (specifically crack cocaine) to various buyers as they came to visit him at said hotel. The agents further learned that the buyers would enter the hotel via side entrance and meet with Kinlaw in the stairwell of the hotel for the illegal drug transactions to occur. In addition, the agents learned that Kinlaw's primary mode of transportation was a blue in color 2008 Chevy Impala bearing SC registration HTA 885.

During the surveillance, the agents did positively identify Henry Lee Kinlaw as they observed him entering and exiting the hotel on multiple occasions by way of the side entrance. The agents also confirmed that Kinlaw did operate the above mentioned Chevy Impala as they viewed Kinlaw driving said vehicle on multiple occasions.

Throughout the course of the surveillance, the agents did observe multiple persons arrive at the hotel in various vehicles, park in the western most parking lot, exit their vehicle, and enter the hotel via the side entrance located on the westside of the hotel. These persons would stay inside of the hotel complex for approximately 20-30 seconds and then exit again via the side door. This activity was consistent with street level drugs sales and match the information gained by the agents of the DEU.

To further verify this information, the agents did conduct a traffic stop on one of the persons viewed leaving the hotel after visiting for mere seconds. During the stop, the agents did locate a quantity of crack cocaine on the person, who freely admitted to purchasing the drug from Kinlaw while inside the stairwell of the hotel.

The agents did seek an arrest warrant [M-971717] for Kinlaw for violating the SC State Statute 44-53-375 "Distribution of Crack Cocaine" on 02/28/2012.

On 02/29/2012, the agents did observe Kinlaw inside of the Crabtree Memorial Gymnasium located at 1004 Crabtree Lane in Myrtle Beach, S.C. Having an active arrest warrant [M-971717] for Kinlaw the agents decided to wait for Kinlaw to exit the gym and return to his vehicle (the 2008 blue in color Chevy Impala) where they would then approach and place Kinlaw under arrest.

At approximately 1300 hours, the agents did view Kinlaw exit the gym and approach the blue in color Impala. At this time, the agents approached Kinlaw, identified themselves, informed Kinlaw that they had an active arrest warrant, and successfully placed Kinlaw under arrest.

During a search incident to arrest, the agents did locate a "DAYS INN" keycard on Kinlaw's person. Suspecting that Kinlaw was storing more illegal drugs, specifically crack cocaine, inside his room at the Days Inn, the agents returned to the hotel and spoke with the front desk staff. After explaining the situation, the staff did confirm that Kinlaw was a resident of their hotel and provided Kinlaw's room number (205). The staff then confirmed that the keycard the agent's found on Kinlaw's person activated to room #205.

Agent J. Brown (DEU) then conducted a K-9 sniff of the exterior of Kinlaw's room door (#205). The K-9 Jari did give a positive alert indicating the presence of drugs inside of room #205.

Given the above information there is probable cause to believe that more illegal drugs (specifically crack cocaine) are being stored inside, and distributed from room #205 at the Days Inn Hotel located at 3650 Waccamaw Blvd in Myrtle Beach, SC 29579 (within the county of Horry).

In the instant case there's absolutely no evidence that the Police had probable cause to search and seize the drug evidence from Kinlaw's hotel room. Furthermore, the record in this case does not demonstrate that probable cause supported Kinlaw's arrest.

The Fourth Amendment to the United States Constitution guarantees "[the right of the people to be secure... [from] unreasonable searches and seizures; and [that] no warrants shall issue, but upon probable cause....]" U.S. Const. IV Amend. South Carolina's Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and invasions of privacy shall not be violated, and [that] no warrants shall issue but upon probable cause....." S.C. Const. Art. I, §10. (underlining for emphasis).

Kinlaw asserts that the search warrant was defective because it contained no sworn statement as to the reliability of the unidentified driver nor was there any declaration of corroboration.

Without any information concerning the reliability of the unidentified driver, "the inferences from the facts which lead to the complaint will be drawn not by a neutral and detached magistrate as the Constitution requires, but instead, by a police officer engaged in the often competitive enterprise of ferreting out crime; or, as in this case, by an unidentified informant." (Citations omitted). Aguilar v. Texas, 378 U.S. 108, 115, 84 S.Ct. 1509, 1514, 12 L.Ed. 2d 723 (1964).

The South Carolina Code Mandates that a search warrant shall be issued only upon affidavit sworn to before the Magistrate, municipal judicial officer, or a judge of a court of record." S.C. Code Ann. §17-13-140 1985; State v. Bellamy, 336 S.C. 140, 143, 519 S.E. 2d 347, 348 (1999). "The affidavit must contain sufficient underlying

factors and information upon which the Magistrate may make a determination of probable cause, State v. Gentile, 373 S.C. 506, 513, 646 S.E. 2d 171, 174 (Ct App. 2007). See also State v. Dupree, 354 S.C. 676, 684, 583 S.E. 2d 437, 441 (Ct. App. 2003) (citing State v. Philpot, 317 S.C. 458, 454 S.E. 2d 905 (Ct. App. 1995)).

The magistrate should determine probable cause based on all the information available to the Magistrate at the time the warrant was issued, Dupree, 354 S.C. at 684, 583 S.E. 2d at 441 (citations omitted).

An affidavit that is submitted in support of the issuance of a search warrant must set forth particular facts and circumstances underlying the existence of probable cause to allow the Magistrate to make an independent evaluation of the matter. Baccus 367 S.C. at 52, 625 S.E. 2d at 222; Dupree, 354 S.C. at 684, 583 S.E. 2d at 441; State v. Philpot, 317 S.C. 458, 461, 454 S.E. 2d 905, 907 (Ct App. 1995).

In State v. Smith, 301 S.C. 371, 373, 392 S.E. 2d 182, 183 (1990) the South Carolina Supreme Court held a search warrant defective where the affidavit set forth no facts as to why the police believed the defendant robbed the Motel. The affidavit provided a conclusory statement that the defendant had robbed the Motel and the police sought to search his room at another motel for a knife used in the robbery, Id. at 373, 392 S.E. 2d at 183.

In Baccus, the Court found the affidavit in support of the search warrant failed to set forth any facts as to why the police believed the defendant had committed the crime. The search warrant sought clothing and forensic evidence possibly connected to the homicide of the victim. The basis for the search warrant was that at the time of the defendant's arrest, a pile of what appeared to be clothing was lying on the ground beside the residence smoldering and the defendant's bloodstained vehicle was located a quarter mile from his residence. Baccus, 367 S.C. at 51-52, 625 S.E.2d at 221-222. The court found the affidavit failed to set forth any facts as to why police believed the defendant committed the crime. The Court explained "that [t]he language in the affidavit lack[ed] specificity and contain[ed] conclusory statements." Id. at 52, 625 S.E.2d at 222. Thus, the Court held the magistrate did not have a substantial basis to find probable cause for a search of the defendant's residence. Id.

Similarly, the South Carolina Supreme Court found a search warrant defective where the affidavit "failed to set forth any facts as to why police believed [the defendant] committed the Crumlin crime." State v. Weston, 329 S.C. 287, 291, 494 S.E.2d 801, 803 (1997). The affidavit provided that Crumlin was the victim of an armed robbery at a certain date, time and location. It further provided that the defendant was a suspect and the registered owner of the vehicle to be searched. A witness stated that the defendant was driving the vehicle at the time of the incident, it failed to link the defendant or his car to the crime itself. Id. at 291-292, 494 S.E.2d at 803.

Furthermore, it is necessary to examine the reliability and credibility of an informant for determining the existence of probable cause. Illinois v. Gates, 462 U.S. 213, 230-235 (1983). In determining whether the information relied upon by law enforcement is reliable, no one factor is necessary or sufficient to establish probable cause. Instead, probable cause arises from the totality of the circumstances, and "[a] deficiency in one factor may be compensated for in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of probability." Id.

As previously noted by our Supreme Court, [t]he task of the issuing Magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Weston, 329 S.C. at 290-91, 494 S.E.2d at 802-03 (quoting Illinois v. Gates, 462 U.S. 213 (1983)).

Kinlaw asserts that the affidavit used to obtain the search warrant for his hotel room was (1) an illegal drug dog sniff, thus, a warrantless search [as police obtained search warrant after the dog-sniff] and (2) failed to set forth any facts to establish probable cause that Kinlaw sold crack cocaine to the unidentified driver,

The only non-conclusory statements in the affidavit were that it was learned that Kinlaw was residing at the Days Inn Hotel located at 3650 Waccamaw Blvd in Myrtle Beach, S.C.; that Kinlaw drove a 2008 blue in color Chevy Impala; that police observed Kinlaw entering and exiting the hotel on multiple occasions by a side entrance; and that police conducted a dog-sniff [drug-dog] of the exterior door of Kinlaw's room door, room number 205, and the canine ("Jari") gave a positive alert indicating the presence of drugs inside of room # 205, after locating a "Days Inn Hotel" keycard on Kinlaw's person.

In a conclusory statement, the affiant [Agent Philip E. Phillips, DEU] stated "that Kinlaw was actively selling illegal drugs to various buyers who came to visit him... that said buyers met Kinlaw in the stairwell for the illegal drug transactions to occur and that police conducted a traffic stop on one of the persons viewed leaving the hotel after visiting for mere seconds. During the stop, the police located a quantity of crack-cocaine on the person who freely admitted to purchasing the drug from Kinlaw while inside the stairwell of the hotel.

The affiant provided absolutely no basis for these statements. There is no indication that the unidentified driver and Kinlaw spoke; no allegation of Kinlaw meeting any visitor to the hotel-no audio-video surveillance,

and, as a matter of fact, no cell phone(s) was seized from Kinlaw's hotel room, no sworn statements as to how these visitors to the hotel were arranging drug deals. The affidavit provided no reason to believe Kinlaw was selling drugs from his hotel room.

The affidavit failed to establish that the hearsay information provided by the unidentified driver was reliable. It was necessary to establish his reliability relative to the information he was providing and on which law enforcement was relying. The affidavit provided no reason to believe the unidentified driver - no indication that law enforcement checked Kinlaw's room 205 phone records and the unidentified driver's phone records to corroborate the driver story that he had been visiting Kinlaw, at a certain time or attempted to corroborate the driver's story with other witnesses [or buyers].

The affidavit failed to provide independent verification of what transpired in Kinlaw's hotel room or [the stairwell of the hotel].

The arrest of an alleged visitor of Kinlaw does not support finding of probable cause to search Kinlaw's hotel room [nor to arrest him].

Kinlaw asserts that according to the affidavit, the police discovered crack cocaine in possession of the driver after he allegedly visited Kinlaw at the hotel. [1] That the officers had no knowledge of whether the driver purchased crack cocaine from Kinlaw [2] because neither the driver nor his vehicle was searched prior to going to the hotel to allegedly purchase crack cocaine from Kinlaw.

The affidavit failed to provide probable cause.

Plea counsel rendered the ineffective assistance of counsel for [1] advising Kinlaw to plead guilty after the trial judge denied motion to suppress drug evidence, [2] and failing to advise Kinlaw that he had a meritorious Fourth Amendment and state constitutional claim, and [3] failing to advise Kinlaw to proceed to trial and, if convicted, Kinlaw could challenge the denial of the suppression motion on direct appeal. Kolle v. State, op. No. 26771 (S.C. 2010).

Plea counsel's failure to inform Kinlaw of the potentially meritorious Fourth Amendment challenge as well as state constitutional challenge to suppression motion on direct appeal had Kinlaw proceeded to trial. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. 2056.

Plea counsel's advice "fell below an objective standard of reasonableness" and that "but for" counsel's deficient representation, he would not have pled guilty. Hill v. Lockhart, 474 U.S. 52, 56-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

In Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009) the South Carolina Supreme Court held that a defendant, for a host of legitimate reasons, may plead guilty to an offense for which a valid legal challenge may exist (quoting Rollinson v. State, 346 S.C. 506, 510, 552 S.E.2d 290, 292 (2001)) ("A defendant may, as part of a plea bargain, agree to plead to a crime for which he has been indicted or to which he has waived grand jury presentment but of which is not guilty.")

and Anderson v. State, 535 S.E.2d 649, 651 (2000) ("We find the decision to accept a plea to voluntary manslaughter notwithstanding the lack of any provocation was simply a tactical maneuver to avoid the very real possibility that the jury might come back with a guilty verdict of murder. Accordingly, we find the plea knowing and voluntarily entered). Berry further held the difference between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea. It follows that deficient advice may deprive a defendant of his constitutional right "to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her behalf, or take an appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983).

Had counsel advised Kinlaw that if he proceeded to trial and was convicted, that he could challenge the denial of the suppression motion on direct appeal, Kinlaw would have insisted upon a trial. Plea counsel never advised Kinlaw that proceeding to trial was a realistic option.

Kinlaw pled guilty because of deficient advice, and lack of an alternative, and he did not do so voluntarily or knowingly.

Plea counsel's representation fell below an objective standard of reasonableness and prejudiced Kinlaw.

10.(c) Involuntary Guilty Plea-Ineffective Assistance of counsel

11(c) Applicant was denied the effective assistance of plea counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§3 and 14 of the South Carolina Constitution, as a result of plea counsel not advising him to when the guilty plea offer would expire.

Applicant ("Kinlaw") asserts that plea counsel was ineffective for advising him to plead guilty to distribution of crack cocaine, trafficking crack cocaine 28-100 grams and trafficking cocaine 28-100 grams, thus, rendering Kinlaw's plea involuntary.

First, Kinlaw asserts that plea counsel advised him that the State had offered him a five(5) year plea offer but counsel never informed him to when this five(5) year plea offer would expire.

Plea counsel had also filed Batson v. Kentucky and a Neils v. Biggers suppression motion, both of which the trial judge also denied.

After the trial judge denied the motion to suppress the drug evidence, plea counsel advised Kinlaw to plead guilty. But plea counsel misadvised Kinlaw, as Kinlaw received a total sentences of fifteen (15) years concurrent sentences.

In Lafler v. Cooper, 566 U.S. ___, 132 S.Ct. 1316 (2012) (the United States Supreme Court held that the Sixth Amendment right to effective assistance of counsel extends to situations where "inadequate assistance of counsel caused nonacceptance of a plea and further proceedings led to a less favorable outcome"); See also Missouri v. Frye, 566 U.S. ___, 132 S.Ct. 1399 (2012) (holding that the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected, and reaffirming Hill v. Lockhart, 474 U.S. 52 (1985) applying the ineffective assistance of counsel standard set forth in Strickland v. Washington, 466 U.S. 668 (1984) to guilty pleas.)

In Frye, the "case [arose] in the context of claimed ineffective assistance that led to the lapse of a prosecution offer of a plea bargain, a proposal that offered terms more lenient than the terms of the guilty plea entered later." Frye, 132 S.Ct. at 1404. There were two questions before the United States Supreme Court in Frye: (1) "Whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected[?]" and (2) If there is a right to effective assistance with respect to those offers... what a defendant must demonstrate in order to show that prejudice resulted from counsel's deficient performance." Id.

The United States Supreme Court noted that the "Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceeding [which]... include arraignments, postindictment interrogations, postindictment line ups, and the entry of a guilty plea." Id. at 1405 (citations and internal quotation omitted).

Ultimately, the Court held that the right to effective assistance of counsel extends not only to those situations in which a criminal defendant accepts a plea bargain and waives his right to trial,^① but also to situations where plea offers are rejected or allowed to lapse. Id. at 1410-11.

In support of its holding, the Court found:

The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours is for the most part a system of pleas, not a system of trials; Lafler, post, at 11, it is insufficient simply to point to the guarantee of a fair trial as a backdrop that inoculates any errors in the pretrial process.

① See Hill v. Lockhart, 474 U.S. 52 (1985) (finding ineffective of counsel from a guilty plea (1) where counsel's advice was not within the range of competence demanded of attorneys in criminal cases and (2) where "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial"); See also Padilla v. Kentucky, 559 U.S. ___, 130 S.Ct. 1473 (2010) (finding an attorney renders ineffective assistance of counsel by failing to advise a defendant that a guilty plea may subject the defendant to automatic deportation).

Id. at 1407. The Court further emphasized that "[I]n today's criminal justice system... the negotiation of a plea bargain rather than the unfolding of a trial, is almost always the point for a defendant." Id. Accordingly, "[a]nything less [than effective counsel during plea negotiations]... might deny a defendant effective representation by counsel at the only stage when legal aid and advice would have him." Id. at 1408 (citing Massiah v. United States, 377 U.S. 201 (1964) (quotation citation omitted)).

As the companion case to Frye, the Court in Lafler addressed when "the favorable plea offer was reported to the client but, on advice of counsel, was rejected, there was a full and fair trial before a jury. After a guilty verdict, the defendant received a sentence harsher than that offered in the rejected plea bargain." Lafler, 132 S.Ct. at 1383. However, in Lafler both parties agreed that counsel's performance was deficient based on his erroneous advice to reject the plea offer. Id. at 1384. Therefore the main inquiry was how to apply Strickland's prejudice prong where a defendant had rejected a plea offer based on ineffective assistance of counsel but was convicted after a full and trial. The prejudice analysis for this situation follows:

In contrast to Hill, here the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it is the prejudice alleged. In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented

to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgement and sentence that in fact were imposed.

Id. at 1385; Glover v. United States, 531 U.S. 198, 203 (2001) (finding "any amount of [additional] jail time has Sixth Amendment significance").

The Lafleur Court noted, The fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining." Id. at 1388. As for the remedy applied by the Court:

The specific inquiry suffered by defendants who decline a plea offer as a result of ineffective assistance of counsel and then receive a greater sentence as a result of trial can come in at one of two forms. In some cases, the sole advantage a defendant would have received under the plea is a lesser sentence... [and] In some situations it may be that resentencing alone will not be full redress for the constitutional injury.

Id. at 1389. In the first set of cases, this occurs "when the charges that would have been admitted as part of the plea bargain are the same as the charges the defendant was convicted after trial"

Id. In this situation the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he would have accepted the plea. If the showing is made, the court may exercise discretion in determining whether the defendant should receive the term of imprisonment offered in the plea, the sentence he received at trial or something in between." Id.

In the second set of cases, this occurs when "an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial or if a mandatory sentence confines a judge's sentencing discretion after trial, a resentencing based on the conviction at trial may not suffice." Id. (citations omitted). "In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." Id.

The Lafler Court noted, "In implementing a remedy in both of these situations, the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here... At this point, however, it suffices to note two considerations that are of relevance." Id. First, a court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second it is not necessary here to

decide as a constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea was made." Id.

The Lafler Court ultimately held that "[t]he correct remedy in these circumstances... is to order the State to reoffer the plea agreement." Id. at 1391. The Lafler Court noted, Presuming respondent accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed." Id.

In the present case, Kinlaw asserts that plea counsel's performance was deficient, as it fell below "an objective standard of reasonableness" when plea counsel failed to inform Kinlaw when the State's plea offer would expire. See State v. Alexander, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991) (finding that generally, constitutionally defective performance is found when defense counsel offers erroneous advice concerning an issue that is central to the defendant's decision to plead guilty.) Here, Kinlaw's case fits into the facts presented in Lafler and Frye as Lafler was informed of the correct plea offer, but given erroneous advice, and Frye resulted in a guilty plea. Kinlaw was prejudiced by plea counsel's deficient performance because both prongs of Strickland's adapted standard are satisfied, as there is a reasonable probability

Kinlaw would have pled guilty, "the court would have accepted its terms" and "that the sentence would have been less severe than under the judgment and sentence that in fact were imposed," Lafleur, 132 S.Ct. at 1385; See Glover v. United States, 531 U.S. 198, 203 (2001) (finding "any amount of [additional] jail time has Sixth Amendment significance").

Regardless of Kinlaw's initial rejection of the five (5) year plea offer, the focal point is that plea counsel never informed Kinlaw as to when the State's plea offer would expire and thus was an error by plea counsel.

A guilty plea must represent a voluntary and intelligent choice among alternative courses of action open to the defendant Hill v. Lockhart, 474 U.S. 52 (1985). Here, counsel's failure to inform Kinlaw as to when the State's plea offer would expire violated Kinlaw's right to receive effective legal assistance in his case by guarantee of the Sixth and fourteenth Amendments to the United States Constitution. See Hill v. Lockhart, supra. Kinlaw was prejudiced because he would have accepted the five (5) year plea offer and received a more lenient sentence if counsel had informed him of when the plea offer would expire.

10.(d) Involuntary Guilty Plea-Ineffective Assistance of Counsel

11.(d) Applicant's guilty plea was not knowingly, voluntarily, or intelligently entered as a result of his being denied the effective assistance of counsel and Due Process of Law, in violation of his rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, as a result of trial counsel's failure to investigate and thoroughly conduct discovery.

(1) Counsel failed to investigate the confidential driver, failed to do a supplemental Brady / Rule 5 motion, when five (5) days prior to trial, the State released the name of the confidential driver to counsel.

(2) Counsel failed to obtain the confidential driver's criminal history and any and all information concerning his being a potential confidential informant ("CI") and, if so, his credibility and reliability.

(3) Counsel failed to obtain any and all surveillance videos and audio recordings and any videos of the traffic stop of the driver; and

(4) Counsel failed to obtain any agreement for driver for his/her cooperation and agreement to testify against Kinlaw.

Counsel's failure to investigate and thoroughly conduct discovery and supplemental discovery denied the Applicant the ability to make an informed and knowing decision to plead guilty or go to trial.

Had counsel obtained the impeachment Material Kinlaw would have insisted upon going to trial.

Counsel's failure to request confidential driver's pertinent information denied Kinlaw his right to interview witnesses (or potential witness) against him. Counsel representing a criminal defendant has a duty to conduct a reasonable investigation, see Cobbs v State, 305 S.C. 299, 408 S.E.2d 223 (1991), which encompasses the defendant's right to interview potential witnesses against him. See State v. Williams, 326 S.C. 130, 485 S.E.2d 99 (1997).

Here, counsel's advice "fell below an objective standard of reasonableness" and that "but for counsel's deficient representation, Kinlaw would not have pled guilty. Hill v Lockhart, 474 U.S. 52, 56-59, 106 S.Ct. 366, 88 L.Ed. 2d (1985).

Kinlaw was prejudiced by counsel's deficient performance, Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. 2052.

10.) Ineffective Assistance of Counsel

11.) Applicant was denied the effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, as a result of plea counsel failing to file a direct appeal on Applicant's behalf.

FACTS

On November 3, 2014, Applicant's ("Kinlaw") counsel filed a written Motion to suppress drug evidence, which the trial judge denied after oral argument.

Counsel also filed motions pursuant to *Batson v. Kentucky*, and *Neil v. Biggers* hearing, which both were denied by the trial judge.

Counsel then advised Kinlaw to enter a plea of guilty.

Kinlaw then entered guilty pleas to distribution of crack cocaine, trafficking in crack cocaine 28-100 grams and trafficking in cocaine 28-100 grams. The Honorable John C. Hayes then sentenced Kinlaw to concurrent sentences totaling fifteen (15) years.

Kinlaw advised plea counsel to file an appeal before being transported back to J. Reuben Long Detention Center then to the South Carolina Dept. of corrections.

Plea counsel failed to file an appeal or notice of intent to appeal the convictions and sentences in order to protect Kinlaw constitutional rights, therefore plea counsel was constitutionally ineffective and as a result Kinlaw was denied his only appeal as matter of right.

Kinlaw asserts that the failure of plea counsel to file requested appeal that defendant desired to be filed denied him his constitutional right to counsel at a critical stage. In such cases, prejudice is presumed because rather than being denied the opportunity for a fair proceeding, Kinlaw was denied the opportunity for a proceeding at all, see Smith v. Robbins, 528 U.S. 259, 286, 120 S.Ct. 746, 765, 145 L.Ed.2d 756 (2000); Penson v. Ohio, 488 U.S. 75, 88-89, 109 S.Ct 346, 354, 102 L.Ed.2d 300 (1988); United States v. Cronin, 466 U.S. 648, 659, 104 S.Ct 2039, 2047, 80 L.Ed.2d 657 (1984).

Accordingly, to satisfy the prejudice prong of Strickland test, a defendant who shows that his attorney has ignored his wishes and failed to file the appeal or notice of intent to appeal his case need only demonstrate that, but for the attorney's deficient performance, he would have appealed.

Kinlaw asserts that he is entitled to a White v. State, 263 S.C 110, 208 S.E.2d 35 (1974), appeal, accord Davis v. State, 282 S.C 290, 342 S.E.2d 60 (1984); reaffirmed Wilson v. State 348 S.C. 215, 559 S.E.2d 581 (2002).

Kinlaw did not waive his appeal [his right to appeal] but desired to appeal his convictions and sentences, therefore, plea counsel was ineffective for failing to file an appeal in Kinlaw's case.

Kinlaw should be granted a belated direct appeal.

Henry Lee Kinlaw #271267
Lieber Corr. Inst. Cooper
P.O. Box 205
Ridgeville, S.C. 29472

Hon. Melanie Huggins-Ward
Clerk of Court for Horry County
P.O. Box 677
Conway, South Carolina 29528-0677

Re: Filing Application for - Post-Conviction Relief

Dear Ms. Huggins-Ward

Enclosed please find the original and one (1) copy of my
pro se APCR.

Please file the original with your Office and clock stamp
the copy and return to me in the enclosed prepaid paid postage
envelope, pre-addressed envelope.

Thank you for your assistance in this matter.

Sincerely,

Henry Kinlaw

Henry Lee Kinlaw
#271267
Lieber Corr. Inst.
P.O. Box 205
Ridgeville 29472

Hon. Melanie Huggins-Ward
Clerk of Court for Horry County
P.O. Box 677
Conway, South Carolina 29528

CLERK OF COURT
SEP 14 AM 8:10
HORRY COUNTY

Re: Motion to Amend P.C.R. Application

Dear Ms. Huggins-Ward

Enclosed please find the original copy.

Please file the original with your office and
clock stamp the copy and return to me.

Thank you for your assistance in this matter.

Sincerely,

Henry Kinlaw

STATE OF SOUTH Carolina }
COUNTY OF Horry }

IN THE COURT OF COMMON PLEAS

2015-CP-26-03714

Henry L. Kinlaw, 271267,
Applicant.

VS.

State of South Carolina
Respondent.

MOTION TO AMEND

2015 SEP 14 AM 8:10
Horry County
Clerk of Court

Applicant, pro se, hereby moves this Court, pursuant to Rule 71.1(d) SCRPC, for an order permitting him to amend the application for post-conviction relief to include the following additional grounds for relief:

10.(F) Involuntary Guilty Plea-Ineffective Assistance of Counsel

11.(F) Applicant's guilty plea was not voluntarily, knowingly or intelligently entered as a result of being denied the effective assistance of counsel and Due Process of Law, in violation of his rights guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, as a result of trial counsel's failure to thoroughly investigate, failure to thoroughly research the documented evidence and failure to raise Fourth Amendment claim on motion to suppress because (1) unlawful search and seizure in violation of Article I, § 10 of the South Carolina Constitution and the Fourth Amendment of the United States Constitution; and (2) because the search warrant was invalid because the search warrant affidavit did not set forth sufficient underlying facts so as to allow the magistrate to make a determination of the reliability of the K-9 "Jari" to establish probable cause for the alert.

Kinlaw asserts that the search warrant invalid because the search warrant affidavit did not contain any information to allow the Magistrate to make an independent determination of the K-9 "Jari" reliability.

Without any information concerning the reliability of the K-9 "Jari", "the inferences from the facts which lead to the complaint will be drawn not by a neutral and detached magistrate as the Constitution requires, but instead, by a police officer engaged in the often competitive enterprise of ferreting out crime or, as in this case by a K-9 with no indicia of reliability." (Citations omitted), Aquilar v. Texas, 378 U.S. 108, 115, 84 S.Ct. 1509, 1514 (1964)

The Fourth Circuit has acknowledged that an alert by a well trained K-9 Unit provides adequate probable cause to support issuance of a search warrant. United States v. Koon Chung Wu, 217 F.App'x 240, 245 (4th Cir. 2007) (per curiam) (unpublished opinion) (stating that "[t]he detection of narcotics by a trained dog generally sufficient to establish probable cause" so long as there some indicia of reliability for the alert - e.g., evidence of the drug-dog's training and certification). Eight other Circuit courts have adopted a similar position.

The Fourth Circuit and other circuits courts have addressed the question of what is required to establish that indicia of reliability when a K-9 Unit's alert serves as the basis for probable cause.

The Fourth Circuit stated that "the detection of narcotics by trained dog is generally sufficient to establish probable cause". United States v. Robinson, 707 F.2d 811, 815 (4th Cir. 1983), see also United States v. Jeffus, 22 F.3d 554, 557 (4th Cir. 1994) ("When the dog "alerted positive" for the presence of drugs, the officer was given probable cause for the search that followed.") The fundamental rule for the decision in Robinson is the assumption that a drug dog's positive alert for contraband must possess some indicia of reliability for the alert to establish probable cause.

The sister circuits have held that a search warrant based on a positive alert by a drug dog is sufficient on its face to establish probable cause "if" the affidavit supporting the warrant states that the dog is trained and certified to detect controlled substances. See, e.g. United States v. Kennedy, 131 F.3d 1371, 1376-77 (10th Cir. 1997) ("As a general rule, a search warrant based on a narcotics canine alert will be sufficient on its face if the affidavit states that the dog is trained and certified to detect narcotics"), United States v. Berry, 90 F.3d 148, 153 (6th Cir. 1996) (hold that an affidavit need not describe the particulars of the dog's training; an affidavit's description of a drug dog's positive alert for controlled substances coupled with a reference to the dog's training in narcotics investigations is enough to establish probable cause); United States v. Klein, 626 F.2d 22, 27 (7th Cir. 1980) (holding that a statement that a dog graduated from training class and has proven reliable in detecting drugs on prior occasions is sufficient to support probable cause); United States v. Lingenfelter, 997 F.2d 632 (9th Cir. 1993) ("A canine sniff alone can supply probable cause necessary for issuing search warrant "if" application for warrant establishes dog's reliability"). U.S. v. Florez, 871 F.Supp. 1411 (D.N.M. 1994) (hold that an alert by trained narcotics dog will establish probable cause only if reliability of dog is shown; and in the absence of records concerning dog's alerts, dog's alert was insufficient to establish probable cause. United States v. \$67,220, 957 F.2d 280, 285 (6th Cir. 1992) (For a positive dog reaction to support a determination of probable cause, the training and reliability of the dog must be established) (emphasis added);

United States v. Spetz, 721 F.2d 1457, 1464 (9th Cir. 1983) (A validly conducted dog sniff can supply the probable cause necessary for issuing a search warrant "only if sufficient reliability is established by the application for the warrant" (emphasis added); United States v. Colon, 845 F.Supp. 923, 928 (D.P.R. 1994) (Lack of evidence in the record pertaining... to general reliability of the canine unit performing the sniff precludes determination that government has shown probable cause); United States v. Venema 563 F.2d 1003 (10th Cir. 1977) (Statement in affidavit for search warrant that dog which had allegedly detected presence of marijuana in locker rented to defendant was a "trained, certified marijuana sniffing dog", sufficiently set forth underlying facts so as to allow issuing judge to exercise his independent judgment on the matter.)

As set forth in the opinion and order Circuit Courts have consistently found that a well-trained K-9 Unit's alert is sufficient to establish probable cause so long as there is some indicia of the alert's reliability.

The search warrant affidavit in Kinlaw's case states in pertinent part:

Agent J. Brown (DEU) then conducted a K-9 sniff of the exterior of Kinlaw's room door #205. The K-9 ("Jari") did give a positive alert indicating the presence of drugs inside of room #205.

This statement in the affidavit did not set forth sufficient underlying facts so as to allow the magistrate to make a determination of the reliability of the K-9 "Jari" to establish probable cause to issue the search warrant because:

1. Because the search warrant affidavit does not state how long the K-9 "Jari" has been working as a drug-detecting K-9.
2. Because the search warrant affidavit does not state how many hours of training the K-9 "Jari" has.
3. Because the search warrant affidavit does not state what type of contraband this K-9 "Jari" is trained to detect.
4. Because the search warrant affidavit does not even contain a statement that the K-9 "Jari" is a drug detecting K-9.

Without any of this information in the search warrant affidavit the magistrate had no way of making a determination of the reliability of the K-9 "Jari". Without such information, the affidavit did not provide the issuing magistrate a substantial basis for a finding of probable cause. Because of this defect this search warrant is invalid under the 4th amendment of the U.S. Const. and under Art I, §10 of the S.C. Const. and by law all evidence seized from this search must be suppressed.

Based on the fact the search warrant affidavit contain additional defects listed below:

1. The search warrant affidavit set forth no facts as to why D.E.U officers believed I committed the crime alleged in the search warrant affidavit "distribution of crack cocaine" on Feb 28, 2012 the crime I was arrested for.
2. The search warrant affidavit fails to provide any independent verification of the allegations set forth in the search warrant affidavit.
3. The search warrant affidavit does not set forth any information as to the reliability of the confidential informant (the driver of the car that was arrested after being found in possession of .9 grams of crack cocaine on Feb 28, 2012) who's information led to my arrest for distribution of crack cocaine.
4. There is no allegation in the search warrant affidavit that drugs was ever seen or bought from room 205 the location to be searched.
5. Also if the search warrant affidavit was supplemented with additional sworn oral testimony by the affiant officer Phillips these defects could not be cured.

A collective view of these defects in the search warrant affidavit including the search warrant affidavit failure to set forth sufficient underlying facts so as to allow the magistrate to make a determination of the reliability of the K-9 "Jari" to establish probable cause to issue the search warrant, clearly renders this search warrant invalid under the 4th amendment of the U.S. Const. and under Art I, § 10 of the S.C. Const. and by law all evidence seized from this illegal search must be suppressed.

Plea counsel rendered ineffectively assistance of counsel, for [1] not informing Kinlaw of a potential valid legal challenge of the search warrant, [2] and failing to raise valid Fourth Amendment claim on motion to suppress. Sikes v. State 448 S.E.2d 560 (S.C. 1994) (holding counsel was ineffective for failing to raise Fourth Amendment claim)

Plea counsel's performance "fell below an objective standard of reasonableness" and that "but for" counsel's deficient performance the evidence would have been suppressed. Strickland v. Washington, 466 U.S. 468 (1984)

As the Hill court recognized, a determination of prejudice in this context will depend on the likelihood that had counsel done that which the applicant asserts he should have, counsel's act would have been successful, i.e. had counsel raised a Fourth Amendment claim on motion to suppress would the judge have suppressed the evidence. This view of prejudice is judged by the "reasonable probability" standard, Hill v. Lockhart, 474 U.S. 52, 56-59 (1985)

Plea counsel was ineffective for failing to raise a valid Fourth Amendment claim and failing to present evidence at the suppression hearing to establish the fact the search warrant is invalid because [1] the search warrant affidavit did not set forth sufficient underlying facts so as to allow the Magistrate to make a determination of the reliability of the K-9 "Jari" to establish probable cause for the alert and [2] because the search warrant affidavit contained additional defects and based on a collective view of these defects in the search warrant affidavit including the affidavit not setting forth sufficient underlying fact so as to allow the Magistrate to make a determination of the reliability of the K-9 "Jari" to establish probable cause for the alert, rendered the search warrant invalid under the 4th amendment of the U.S. const. and under Art I § 10 of the South Carolina const. and by law all evidence seized from this illegal search must be suppressed. Kolle v. State 386 S.C. 578 (S.C. 2010)

Had counsel thoroughly investigated the case, thoroughly researched the documented evidence, properly prepared for trial and raised a valid Fourth Amendment claim on motion to suppress it's a "reasonable probability" the evidence would have been suppressed and if counsel had informed Kinlaw of this potential valid Fourth Amendment challenge, Kinlaw would have not pled guilty, Kinlaw would have demanded a trial.

Kinlaw pled guilty because of deficient advice and because he did not have accurate information prior to plea, and because of these errors by counsel Kinlaw's guilty plea was not voluntarily or knowingly made.

Plea counsel's representation fell below an objective standard of reasonableness and prejudiced Kinlaw.

10.(G) Involuntary Guilty Plea- Ineffective Assistance of Counsel

11.(G) Applicant's guilty plea was not voluntarily, knowingly or intelligently entered as a result of being denied the effective assistance of counsel and Due Process of Law, in violation of his rights guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, as a result of trial counsel's failure to thoroughly investigate, failure to thoroughly research the documented evidence and failure to raise Fourth Amendment claim on Motion to suppress because [1] unlawful search and seizure in violation of Art I. §10 of the South Carolina Constitution and the Fourth Amendment of the United States Constitution, and [2] because the search warrant affidavit contained misstatements which render the search warrant invalid under the analysis set forth in *Franks v. Delaware*.

Kinlaw asserts that the search warrant is invalid because the search warrant affidavit contain knowingly and intentionally, recklessly false information. Kinlaw asserts if the affidavit's false material are set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded.

In Franks v. Delaware 438 U.S. 154 1978 the United States Supreme Court held:

[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. *Id.* at 155-56, 98 S.Ct at 2676.

State v. Missouri 524 S.E.2d 394 (S.C. 1999) (holding that when affiant officer's false statement was excluded from, and exculpatory statements were inserted into, affidavit in support of warrant to search apartment, probable cause did not exist.)

State v. Jones 342 S.C. 121 (2000) (Defendant has the right to challenge misstatements in a search warrant affidavit.)

Kinlaw asserts the search warrant affidavit in his case has numerous false statements. One of the deliberate false statements in the search warrant affidavit is:

"During the [sic] stop, the agents did locate a quantity of crack cocaine on the person who freely admitted to purchasing the drug from [sic] Kinlaw while inside the stairwell of the hotel."

A review of the documented evidence specifically the 15th Circuit Investigative Report page 2, the 15th Circuit Drug Enforcement Unit Crime Report and the statement written by the confidential informant (the driver of the car) clearly confirms this statement in the search warrant affidavit is knowingly and intentionally false.

This deliberate false statement in the affidavit would mislead the Magistrate into thinking the confidential informant stated to the D.E.U officers "Henry Kinlaw" identified by a "Legal name" allegedly sold him/her the crack cocaine. For example by the Magistrate thinking this was the fact of the matter this would lead the Magistrate into thinking the informant showed a capacity and relationship with the alleged person by identifying him/her by a "Legal" name basis which would prompt belief in the confidential informant's (the driver of the car) opportunity to know other information thus making the information in the affidavit appear reliable. see e.g. State v. Owen, 275 S.C. 586, 274 S.E.2d 510 (1981). The status of the sheriff's informer (son of the alleged driver of the Marijuana laden truck) showed a capacity and relationship which would prompt belief in his opportunity to know the facts

and in the reliability of his information; the information given by the informer implicated his own father in a serious crime.)

This deliberate false statement is just one example of the numerous false statements in the search warrant affidavit. The affiant officer Phillips knew this was a false statement and the documented evidence will confirm this statement was deliberately false.

If the numerous false statements in the search warrant affidavit, are set aside, the remaining content in the search warrant affidavit will be insufficient to establish probable cause to issue a search warrant for room 205. Under a Franks analysis this will render the search warrant invalid under the Fourth Amendment of the U.S Constitution and under Art I, §10 of the South Carolina and the fruits of the search must be excluded.

Plea counsel rendered ineffective assistance of counsel, for [1] not discovering and informing Kinlaw of a potential valid legal challenge of the search warrant, [2] and failing to raise a valid Fourth Amendment claim on motion to suppress. Sikes v. State 448 S.E.2d 560 (S.C 1994)

Plea counsel's performance "fell below an objective standard of reasonableness" and that "but for" counsel's deficient performance the evidence would have suppressed. Strickland v. Washington, 466 U.S. 468 (1984)

Had counsel thoroughly investigated the case, thoroughly researched the documented evidence, properly prepared for trial and raised a valid Fourth Amendment claim on Motion to Suppress it's a "reasonable probability" the evidence would have been suppressed and if counsel had informed Kinlaw of the potential valid Fourth Amendment challenge, Kinlaw would have not pled guilty, Kinlaw would have demanded a trial.

Kinlaw pled guilty because of deficient advice and because he did not have accurate information prior to plea, and because of these errors by counsel Kinlaw's guilty plea was not voluntarily or knowingly made.

Plea counsel's representation fell below an objective standard of reasonableness and prejudiced Kinlaw.

10.(H) Involuntary Guilty Plea - Ineffective Assistance of Counsel

11.(H) Applicant's guilty plea was not voluntarily, knowingly or intelligently entered as a result of being denied the effective assistance of counsel and Due Process of Law, in violation of his rights guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, as a result of trial counsel's failure to thoroughly investigate, failure to thoroughly research the documented evidence and failure to inform applicant of a potential legal challenge because the chain of custody is defective.

Kinlaw asserts the chain of custody was defective because there was no connection between Kinlaw and the substance, and because the State could not offer proof the alleged substance was not tampered with or swap out for and replace with another substance.

"The Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007) "Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis." Benton v. Peltum, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957) The Courts have stated each case will be judged on the "unique" factual circumstances of each case.

The chain of custody is defective in Kinlaw's case because there is a missing link in the chain of custody. There is a missing link in the chain of custody because [1] the confidential informant, nor his/her vehicle was searched prior to going to the hotel, so at the bare minimum the State could not produce any conclusive evidence to show the confidential informant (the driver of the car) actually came into possession of the substance from Kinlaw at the hotel and [2] because the confidential informant was not under police control, e.g. he/she was not working for the D.E.U officers and he/she was not equipped with video or audio surveillance. Therefore the STATE also could not produce any evidence of proof if a substance was obtained, this substance was not tampered or swapped out for another substance.

To establish a "possible" complete chain of custody in Kinlaw's case the D.E.U officers would have had to first establish that the confidential informant (the driver of the car) left point A which would be the D.E.U officers custody with no substance in his/her possession and went straight to point B which is the hotel. Next they would have had to establish the informant left point B (the hotel) and came straight back to point A (the D.E.U officers custody) and turn over the substance.

For further proof of this fact a review of any case law in South Carolina in reference to a "possible" complete chain of custody of drug evidence obtained from confidential informant after the confidential informant alleges the drugs were obtained from another source or location will clearly establish the following facts:

Fact #1. The police officers will search the informant and the informant's vehicle prior to the confidential informant going to the location to purchase the allege substance. This confirms the informant does not have any other substance on his person to swap or substitute for the substance he allegedly obtains.

Fact # 2. The police officers will have some kind of surveillance on the informant after the informant leaves police "custody" for example the surveillance by officers maybe video, audio or visual. This is specifically done by police officers to confirm the informant goes to the specific location and obtains the allege substance from a specific person. Thus establishing the informant went to the specific location, comes straight back to police "custody" with the "untampered" substance and also establishing a connection between the defendant and the substance. See, e.g. State v. Sweet, 374 S.C. 1 (2007), State v. Valentine, 386 S.C. 499 (2010), State v. Hatcher, 392 S.C. 86 (2011)

The reason for this procedure is so the officers can establish conclusive evidence of a complete chain of custody, e.g. the substance is obtained from the defendant, the substance is not tampered or swapped or substituted for another substance. Based on the "unique" factual circumstances of Kinlaw's case the only way the state could have establish evidence of a "possible" complete chain of custody was if the D.E.U officers searched the informant (the driver of the car) and his/her vehicle prior to the informant going to the hotel, or if the officers had audio, video surveillance of the informant during the allege transaction.

Based on these "unique" factual circumstances the chain of custody in Kinlaw's case is filled with incomplete and inconclusive evidence [1] because the STATE has no evidence of proof to connect Kinlaw to the substance [2] because the STATE has no evidence of proof the evidence was not tampered with, swapped or substituted with another substance by the informant. In Kinlaw's case the STATE would be leaving it up to "conjecture" as [1] to whether the substance found in the possession of the confidential informant was obtained from Kinlaw at the hotel and [2] as to whether if a substance was obtained is it the same substance that was actually retrieved from the confidential informant, this would be in violation of the laws governing the evidence of chain of custody.

For the above listed reasons, the informant's possession of the drug evidence may not be reduced to an issue of mere credibility just because the informant is alleging the drugs were bought from Kinlaw and just because the informant was willing to testify in court the drugs were bought from Kinlaw.

Based on the above listed facts the drug evidence taken from the confidential informant which was .9 grams would have been inadmissible as evidence, also because of this defective chain of custody the STATE would have been unable to prosecute Kinlaw for "distribution of crack cocaine" arrest warrant M-971717. Also because other evidence was obtained after Kinlaw's arrest that evidence would also be inadmissible as fruits of the poisonous tree arrest warrant M-971729 "Trafficking Crack Cocaine 28-100 grams", arrest warrant M-971730 "Trafficking Cocaine 28-100 grams".

If plea counsel would have informed Kinlaw of this potential challenge to the chain of custody Kinlaw would have not pled guilty, Kinlaw would have went to trial. Berry v. State, 381 S.C. 630 (2009) (Plea counsel was deficient, as element of claim of ineffective assistance, in failing to inform defendant who pled guilty to a drug charge of a potential challenge to use of his prior conviction for possession of drug paraphernalia for sentencing enhancement purposes.)

10.(I) Involuntary Guilty Plea - Ineffective Assistance of Counsel

11.(I) Applicant's guilty plea was not voluntarily, knowingly or intelligently entered as a result of being denied the effective assistance of counsel and Due Process of Law, in violation of his rights guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, as a result of trial counsel's failure to thoroughly investigate, failure to thoroughly research the documented evidence, failure to properly prepare for trial and failure to object to and present evidence to refute the Misrepresentation of the material facts by the solicitor Mr. Grooms at the suppression hearing.

Kinlaw asserts counsel was ineffective for not objecting to and presenting evidence at the suppression hearing to refute the Solicitor's Mr. Grooms "Sole" reason for asking the trial court to allow the STATE to try the distribution of crack cocaine charge, the trafficking cocaine charge and the trafficking crack cocaine charges together. Mr. Grooms stated this was his reason the STATE should be allowed to try the cases together:

"Your Honor I'm asking that the STATE be allowed to try these cases together, because based on the fact the hotel room is not in Mr. Kinlaw's name, if these cases are not tried together it would be hard to convict Mr. Kinlaw on the trafficking charges, because the hotel room is not in Mr. Kinlaw's name."

The "sole" reason the solicitor Mr. Grooms requested that the cases be tried together was because the hotel room was not in Kinlaw's name and if the STATE was not allowed to try the cases together the STATE would have a hard time convicting Kinlaw on the trafficking charges because the hotel room is not in Kinlaw's name. The solicitor's "sole" reason for asking the court to allow the cases to be tried together clearly has to be false, because the STATE has receipts in their evidence files that was forwarded to Kinlaw's trial counsel in Kinlaw's discovery that clearly confirmed the hotel room was registered to Kinlaw. This was an error by counsel at the suppression hearing because "the failure to correct false evidence is as reprehensible as its presentation." This error prejudice Kinlaw because if counsel objected to and presented evidence to confirm this was a misrepresentation of the material facts by the solicitor Mr. Grooms it's a "reasonable probability" the trial judge would not have granted the solicitor's request to allow the STATE to try the cases together.

Based on the fact Kinlaw's counsel had evidence to refute the STATE'S "sole" reason for asking the court to allow them to try the cases together and if counsel had presented this evidence at the suppression hearing it's a "reasonable probability" the trial judge would not have granted the STATE'S request of allowing the cases to be tried together. This would have clearly diminished the STATE'S chance's of convicting Kinlaw on the trafficking charges. From this standpoint it's a "reasonable probability" Kinlaw would have not pled guilty but insisted on going to trial if the STATE was not allowed to try these cases together.

Plea counsel's performance "fell below an objective standard of reasonableness" and that "but for" counsel's deficient performance it's a reasonable probability the outcome of the proceeding would have been different.
Strickland v. Washington, 466 U.S. 468 (1984)

Counsel's failure to object to and present evidence to refute a clear misrepresentation of the material facts by the solicitor Mr. Grooms were not the result of any strategically formulated plan or rational trial strategy. Plea counsel's representation fell below an objective standard of reasonableness and prejudiced Kinlaw.

Respectfully submitted this 8 day of September, 2015

[Signature]
Applicant

SWORN or affirmed to and subscribed before Me this
8th day of September, 2015.

[Signature]
Notary Public

HURRY COUNTY
2015 SEP 14 AM 8:10
CLERK OF COURT

My Commission Expires: May 26, 2020

Henry L. Kinlaw
 #271267
 Lieber Corr. Inst.
 P.O. Box 205
 Ridgeville S.C. 29472

Hon. Melanie Huggins-Ward
 Clerk of Court for Horry County
 P.O. Box 677
 Conway, South Carolina 29528

HORRY COUNTY
 2016 JUN 23 PM 1:52
 MELANIE HUGGINS-WARD
 CLERK OF COURT

Re: Motion to Amend P.C.R. Application

Dear Ms. Huggins-Ward

Enclosed please find the original copy.
 Please file the original with your office
 and clock stamp the copy and return to me.
 Thank you for your assistance in this
 matter.

Sincerely,

Henry Lee Kinlaw

State of South Carolina }
County of Horry }

In the court of
Common Pleas

2015-CP-26-03714

Henry L. Kinlaw, 271267
Applicant.

Motion to Amend

vs.

State of South Carolina
Respondent

HORRY COUNTY
2016 JUN 23 PM 1:53
MELANIE HARRIS
CLERK OF COURT

Applicant, pro se, hereby moves this Court for an order permitting him to amend the application for post-conviction relief to include the following additional grounds for relief:

Respectfully submitted this 20 day
of June, 2016

Henry Kenlaw
Applicant

SWORN or affirmed to and subscribed
before me this 20th day of June, 2016

Ludrean Bryant
Notary Public

My Commission Expires: May 26, 2020

HORRY COUNTY
2016 JUN 23 PM 1:03
MELANIE JOHNSON-WARD
CLERK OF COURT

10(J) Involuntary Guilty Plea—Ineffective Assistance of Counsel

11(J) Applicant's guilty plea was not voluntarily, knowingly or intelligently entered as a result of being denied the effective assistance of counsel and Due Process of Law, in violation of his rights guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, as a result of trial counsel's failure to properly prepare, failure to thoroughly articulate the facts of the case at the suppression hearing, failure to present evidence and failure to point out discrepancies in that the State's case at the suppression hearing that would have established that the witness's out-of-court identification was unreliable as a matter of law when weighed against the factors set forth in Neil v. Biggers, 409 U.S. 188 (1972).

Kinlaw asserts the out-of-court identification by the witness is unreliable as a matter of law when weighed against the 5 factors set forth in Neil v. Biggers 409 U.S. 188 (1972) and the in-court identification of Mr. Kinlaw by the witness is inadmissible.

SINGLE PHOTO LINEUP PROCEDURE

A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). An in court identification of an accused is inadmissible if a suggestive

out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. *Id.* The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). First, a court must ascertain whether the identification process was unduly suggestive. The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Moore, 343 S.C. at 288, 540 S.E.2d at 448. "The central question is whether under the totality of the circumstances the identification was reliable even though

the confrontation procedure was suggestive" State v. Stewart, 275 S.C. 447, 450, 272 S.E.2d 628, 629 (1980).

The following factors are to be considered in evaluating the totality of the circumstances as to whether an identification is reliable:

(1) The opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, the (3) accuracy of the witness's prior description of the criminal, The (4) level of certainty demonstrated by the witness at the confrontation, and the length (5) of time between the crime and the confrontation.

The corrupting effect of a suggestive identification must be weighed against the 5 factors by a trial judge.

The facts of Kinlaw's case are unique based on the specific fact the witness in Kinlaw's case is not a citizen witnessing a crime or a victim of a crime. The totality of the circumstances test as to whether the identification is reliable must weigh in the unique facts of Kinlaw's case in totality with the 5 factors set forth in Neil v.

Biggers. Based on the unique facts of Kinlaw's case before a trial judge can begin to determine if the out-of-court identification is "reliable", he must first be able to conclude the witness that is picking out the photo from the unduly suggestive photo line-up is "reliable". If the witness that is picking out the photo from the unduly suggestive photo line-up

can not be confirmed as "reliable" than the identification by law can not be viewed as "reliable" because "reliability" is the linchpin in determining the admissibility of identification testimony. The State did not present any evidence at the suppression hearing to establish that the witness in Kinlaw's case is reliable for example the witness has provided information in the past that has been proven to be correct, the officer independently verified the incident by observing the witness interact with the subject at the scene of the crime, the witness was an identified victim of a crime, the witness was an identified citizen witnessing a crime, the witness was a identified family member or friend of the subject in the

Photo. None of these circumstances are present in Kinlaw's case, no substantial evidence was presented by the State at the suppression hearing to allow the trial judge to conclude the witness was "reliable".

This deficiency is clearly highlighted by the trial judge ruling at the suppression hearing transcript pg 63, line 4-6 "And I find that Mr. Kinlaw was known to Mr. Buffkin, 'again according to him' that and I hadn't heard Buffkin's testimony but based on the information at this 'time'".

The trial judge clearly stated "based on the information at this time" and "according to him (Mr. Buffkin)" meaning all of the information presented at this time is based

on if Mr. Buffkin was telling the "truth" to the officer at the time the officer conducted the unduly suggestive photo procedure and Mr. Buffkin alleged the subject in the single photo was "gunner or gutter" that sold him crack-cocaine, so the reliability of the witness is the linchpin of Kinlaw's case. This deficiency is critical based on the unique facts of Kinlaw's case in making a determination as to the reliability of the witness identification in accordance with the Neil v. Biggers factors. Reviewing the Neil v. Biggers factors and in combination with the unique circumstances of Kinlaw's case the only factor established by the State with any degree of reliability in this case is number 5, the amount of time between

the crime and the presentation of the single photo to the witness. As to the other 4 factors the witness in Kinlaw's case is not entitled to the inference that he was a "citizen witnessing a crime" or "a victim of a crime" who is more deserving of belief than the typical "informer of the criminal milieu" 1 Lafave, Search and Seizure § 3.3 (2ded. 1987). Based on the unique facts of Kinlaw's case the statements from the witness can not be leisurely weighed with the factors set forth in Neil v Biggers like the statements of an identified witness or victim of a crime. Specifically based on the fact the foundation of the evidence of the out-of-court identification is "according

to him (Mr. Buffkins)" and "the status of Mr. Buffkin" each out-of-court statement from this witness must be viewed with the highest scrutiny. Factor #1 The

opportunity of the witness to view the criminal at the time of crime was no more than 40 seconds confirmed by the documented evidence and the officer's testimony at the suppression hearing so this factor has no substantial showing of reliability. Factor

#2 The witness degree of attention was not support by sufficient evidence at the suppression hearing, furthermore the witness did not testify at the suppression hearing to allow the trial judge to weigh his testimony with this factor.

Factor #3 The accuracy of the witness's prior description of the criminal. The lack of evidence to support this factor clearly undermines the State's allegation that Mr. Kinlaw was known to Mr. Buffkin prior to the suggestive photo procedure and the trial judge's ruling that the State presented clear and convincing evidence that Mr. Kinlaw was known to Mr. Buffkin. The documented evidence confirms the following facts: (1) The witness did not give any prior "accurate detailed" description of the criminal, the witness only gave a broad statement that he bought the drugs from a black male at the hotel, (2) He gave no height, no weight, no facial features, no description of cloth of the black male,

(3) He gave no distinctive identifying features like a facial scar, hair style, or something like buck or gap teeth, the witness provided the officer with nothing to suggest he knew the subject in the single photo prior to suggestive procedure. Factor #4

The State did not present any evidence that would allow the trial judge at the in camera hearing to determine the level of certainty demonstrated by the witness at the confrontation, for example the witness did not testify at the in camera hearing to his degree of certainty so this factor has no substantial showing of reliability. The State's sole basis as

evidence the identification was nonetheless reliable was because "according to the witness (Mr. Buffkin)" he stated to have known the subject in the photo prior to the suggestive identification procedure. The documented evidence, and the facts of the case negates the State's sole basis of evidence. The fact that the witness could not give any prior detailed description of the subject notwithstanding he claimed to have seen and dealt with the subject 18 times prior to the suggestive photo lineup procedure, highlights both the inherent unreliability of the identification and

the completely suggestive nature of the photo lineup procedure. Under the totality of the circumstances the State only established factor # 5 with any degree of reliability, but this clearly is outweighed by the State's failure to establish the reliability of the remaining 4 factors. Based on the above listed facts the witness out-of-court identification is unreliable as a matter of law. Also the witness in-court identification of Mr. Kinlaw is inadmissible.

The out-of-court identification would have been found to be unreliable as a matter of law if trial counsel

would have thoroughly researched the documented evidence, properly prepared for trial, thoroughly articulated the facts of the case at the in camera hearing, pointed out the discrepancies in the documented evidence and pointed out the lack of evidence to support the State's "sole basis" for claiming the witness out-of-court identification was reliable outside of the suggestive photo-lineup procedure. If counsel would have presented the evidence to establish that the out-of-court identification was unreliable as a matter of law when weighed against the 5 factors set forth in Neil v. Biggers, also the witness in-court

identification would be inadmissible and the State would have had no evidence to prosecute Mr. Kinlaw for "distribution of crack-cocaine on Feb. 28, 2012 because the State's case was based solely on the witness's testimony in the distribution case. This clearly would have weakened the State's ability to prosecute Mr. Kinlaw in regards to the remaining charges, trafficking cocaine and crack cocaine. The deficient performance by counsel undoubtedly prejudiced Mr. Kinlaw. Counsel's performance fell below an objective standard of reasonableness and that but for Counsel's deficient performance the out-of-court identification would have been found to be unreliable as a matter of law. Strickland v. Washington, 466 U.S. 468 (1984)

10.(K) Involuntary Guilty Plea—
Ineffective Assistance of Counsel

11.(K) Applicant's guilty plea was not voluntarily, knowingly or intelligently entered as a result of being denied the effective assistance of counsel and Due Process of law, in violation of his rights guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, as a result of trial counsel's failure to thoroughly investigate, failure to thoroughly research the documented evidence, failure to discover a valid South Carolina Constitution "privacy provision" claim, failure to inform Kinlaw of a valid South Carolina Constitution "privacy provision" claim, failure to raise a valid South

Carolina Constitution "privacy provision" claim on motion to suppress (1) because the warrantless "Canine" sniff search conducted on the door of Kinlaw's hotel room violated his right to be protected from "unreasonable invasion of privacy" guaranteed under the South Carolina Constitution Art. I §10 "express right to privacy provision" and (2) because the warrantless "Canine" sniff search conducted on the door of Kinlaw's hotel room was an illegal search in violation of Kinlaw's right to be protected from "unreasonable invasion of privacy" guaranteed under the South Carolina Constitution Art. I §10 "express right to privacy

provision" specifically because there was "no substantial evidence" to conclude the canine "Jari" that conducted the sniff search was a "well-trained and certified narcotics-detection dog" one that "does not expose the odors of non-contraband items that other wise would remain hidden from public view."

1. Kinlaw asserts the warrantless canine sniff search conducted on the door of his hotel room was in violation of his right to be protected from "unreasonable invasion of privacy" guaranteed under the South Carolina Const. Art. I §10 "express right to privacy provision" specifically because the canine "Jari's" nose was physically

inserted into the 5 inch indentation that separates the hotel room door from the common area of the hotel to conduct a warrantless sniff search by doing so the Canine's nose was in an area that is intimately linked to the hotel room, both physically and psychologically and is where privacy expectations are most heighten. Kinlaw specifically points out the South Carolina right to privacy provision "creates a distinct privacy right that applies both within and outside the search and seizure context." All evidence discovered from this "unreasonable invasion of privacy" must be suppressed. Kinlaw also asserts the actions by the canine violated his expectation privacy guaranteed under the 4th Amendment of the U.S. Const.

2. Kinlaw asserts the warrantless canine sniff search conducted on the door of his hotel room was illegal and violated his right to be protected from "unreasonable invasion of privacy" guaranteed under the S.C. Const. Art. I § 10 "express right to privacy provision" specifically because there was no substantial evidence presented on record at any level of the judicial process, nor by documented evidence to conclude the canine "Jari" that conducted the search was a "well-trained and certified narcotics-detection dog-one that" does not expose the odors of non-contraband items that otherwise would remain hidden from public view" so as a

result the "Sui Generis" application "can not" apply so the search must be treated as an "unreasonable invasion of privacy" one that "does expose the odors of non-contraband items" that otherwise would remain hidden from public view. All evidence discovered from this "unreasonable invasion of privacy" must be suppressed. Kinlaw also asserts the warrantless sniff search by the canine violated his expectation of privacy guaranteed under the 4th Amendment of the U.S. Const.

South Carolina Constitution Art. I §10 Express Right to Privacy Provision

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...."

U.S. Const. amend. IV. The South Carolina Constitution also provides a safeguard against unlawful searches and seizures.

State v. Forrester, 343 S.C. 637, 541 S.E.2d 541 (2001) (citing S.C. Const. art. I §10).

The relationship between the two constitutions

is significant because "[S]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." Id. (quoting State v. Easler, 327 S.C. 121, 131, n.13, 489 S.E.2d 617, 625, n.13 (1997)). Therefore, this Court may interpret the state protection against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution. Id.

In addition to language that mirrors the Fourth Amendment, S.C. Const. art. 1 §10 contains an express protection of the right to privacy: "The right of the people to be secure in their persons, houses, papers, and effects

against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated...." State v. Forrester, supra (emphasis added). By articulating a specific prohibition against "unreasonable invasions of privacy," the people of South Carolina have indicated that seizures that do not offend the federal Constitution may still offend the South Carolina Constitution. *Id.* Accordingly, the South Carolina Constitution favors an interpretation offering a higher level of privacy protection than the Fourth Amendment. *Id.*

Well Trained And Certified Narcotics Detection Dog Sniff

The U.S. Supreme Court in United v. Place, 462 U.S. 696, 77 L.Ed. 2d 110, 103 S.Ct. 2637 (1983) categorized the sniff of the narcotics-seeking dog as "sui generis" under the Fourth Amendment and held it was not a search. At the heart of Place the Court's opinion is the proposition that sniffs by a "well trained-certified narcotics dog" "only trained to detect the presence of contraband odors" are sui generis because a reaction by the dog in going alert is a response to nothing

but the presence of "contraband odors." Hence, the argument goes, because the sniff can only reveal the presence of "odors" of "item devoid of any legal use", the sniff "does not implicate legitimate privacy interests" and is not to be treated as a search.

Issue #1 Facts

The officer J. Brown in Kinlaw's case "did not" allow the canine to begin its odor sniff search search by (1) sniffing the open air in a common area of the hotel, such as the hotel hallway and (2) then allowing the canine to alert to a specific airborne odor and (3) then allowing the canine to track

that specific airborne odor to a specific location in the hotel. If the former set of circumstances happened this would present a different set of facts for consideration under South Carolina State Constitution's "express right to privacy provision"

Jurisprudence. The facts of the canine's odor sniff search conducted in Kinlaw's case transpired in the following manner:

(1) The officer specifically took the canine to hotel room 205 a room rented by Kinlaw specifically to conduct a warrantless odor sniff search. (2) The officer then allowed the canine to put its nose on the

base of Kinlaw's hotel door room 205. I would like to specifically point out the base of this hotel door is separated from the common area of the hotel which is the hotel hallway by an 5 inch indentation. Each room in this hotel has a 5 inch indentation that separates the rooms from the common area the hallway of the hotel similar to the "curtilage of the home" but in applying the facts to a renter of a hotel room this 5 inch indentation is undoubtedly a "psychological curtilage", but also as small as it may seem a "physical curtilage" too. Kinlaw would like to specifically point out the canine "Jari" in his case

had its nose located in this "5 inch" indentation when the odor sniff search occurred. This 5 inch indentation can not be considered as a common area because when someone comes to perform a common task such as deliver pizza, a hotel worker bringing hotel supplies to a tenant, someone knocking on the door in hopes of selling something like girl scout cookies, none of these person's body parts are located inside this 5 inch indentation like their feet, torso, or ears during these routine tasks, so in no way can this area be considered a common area for law enforcement to go from door to door with

a canine inserting the canine's nose into this 5 inch indentation to conduct warrantless odor sniff searches as they please.

This area the 5 inch indentation that separates the hotel room 205 door from the public hallway is intimately linked to the hotel room, both physically and psychologically and is where reasonable privacy expectations are most heightened.

If someone were to discover some stranger with their ear stuck inside this 5 inch indentation of their hotel room listening to their private conversations as they please, society would recognize this act as an "unreasonable invasion of one's privacy." So there is no

doubt society would recognize the actions of Police officers using a canine to stick its nose into this 5 inch indentation to conduct warrantless odor sniff searches of the hotel room they were occupying as an "unreasonable invasion of one's privacy". The tactic of law officers using the canine to put its nose into this 5 inch indentation without a warrant solely to detect the odors from within the hotel room is no different than law enforcement sticking an eavesdropping device into this 5 inch indentation without a warrant only to pick up sound waves that reached the exterior of the hotel room that law enforcement could not hear with

their normal human hearing senses. The two set of circumstances are no different, the only difference is one tool uses scent enhancement to assist law enforcement, and the other tool uses sound enhancement to assist law enforcement thus both set of circumstances violates a person's right to be free from "unreasonable invasion of privacy" guaranteed under the S.C. Const. Art. I. § 10 "express right to privacy provision". This analysis does in no way hamper legitimate law enforcement but what it does is prevent "unreasonable invasion of a person's privacy" by law enforcement. This analysis falls squarely within the outlined parameters

guaranteed under the S.C. Const. Art. I §10 "express right to privacy provision" because the privacy provision "creates a distinct privacy right that applies both within and outside the search and seizure context," and also the South Carolina Constitution favors an interpretation offering a higher level of privacy protection than the Fourth Amendment of the U.S. Const.

Most importantly in Kinlaw's case the documented evidence confirms the officer "J. Brown did not have" the hotel owner's or hotel management's consent to bring the canine on the property to specifically conduct a warrantless canine

odor sniff search of room 205 Kinlaw's room. Kinlaw was already in the custody of law enforcement detained at the MBPD when this incident occurred. The officer had no legal right to go to the hotel to conduct any type of warrantless canine odor sniff searches specifically without the consent of the hotel's owner or Management. The scope of a license by Police officers in Kinlaw's case express or implied is limited not only to a particular area but also to a specific purpose. The officers in Kinlaw's case only had the legal right without a search warrant to (1) Go to the hotel, (2) Find out if Kinlaw was a resident of the hotel, (3) Find out

the specific room Kinlaw rented (4) Go to this specific hotel room 205 to conduct a knock and talk nothing more.

1. The officer J. Brown in Kinlaw's case violated Kinlaw's right to be protected from "unreasonable invasion of privacy" under the S.C. Constitution Art. I § 10 "privacy provision" because officer J. Brown "did not have the owner of the hotel consent or management consent to bring the canine on the hotel property to specifically conduct a warrantless odor sniff search of room 205 and all evidence discovered from this violation of Kinlaw's

South Carolina Constitution right must be suppressed. This was also a violation of Kinlaw's right to be secure against unreasonable searches and seizures under the 4th amendment of the U.S. Constitution and all evidence discovered from this violation must be suppressed.

2. The officer J. Brown in Kinlaw's case violated Kinlaw's right to be protected from "unreasonable invasion of privacy" under the S.C. Constitution Art. I § 10 "privacy provision" because the canine's nose was inserted into the "5 inch indentation" that separates the hotel room

door 205 from the common area the hall wall of the hotel to conduct a warrantless odor sniff search by doing so the canine's nose was in an area that was intimately linked to hotel room 205, both physically and psychologically and is where "privacy expectations" are most heightened and all evidence discovered from this violation of Kinlaw's South Carolina Constitution right must be suppressed. This was also a violation of Kinlaw's right to be secure against unreasonable searches and seizures under the 4th amendment of the U.S. Constitution and all evidence discovered from this violation must be suppressed.

3. The officer J. Brown in Kinlaw's case violated Kinlaw's right to be protected from "unreasonable invasion of privacy" under the South Carolina Constitution Art. I § 10 "privacy provision" because the officer used a canine assistants "to reveal within" the confines of hotel room 205 what they could not otherwise have found there without physically entering the hotel room and all evidence discovered from this violation of Kinlaw's South Constitution right must be suppressed. This was also a violation of 4th amendment rights of the U.S. Constitution and all evidence discovered from this violation of Kinlaw's rights must be suppressed.

ISSUE #2

There was no substantial evidence presented at any level of the judicial process to allow any judicial official to independently conclude that the canine "Jari" was a well trained and certified canine "one that specifically does not expose the odors of non-contraband items that otherwise would remain hidden from public view". Based on this lack of substantial evidence the odor sniff search must be treated as a warrantless search "one that does expose the odors of non-contraband items that otherwise

would remain hidden from public view" and all evidence discovered must be excluded as a result of a violation of Kinlaw's right to be protected from "unreasonable invasions privacy guaranteed under the South Carolina Constitution Art. I §10 "express right to privacy provisions."

Kinlaw is cognizant that a sniff by a "well train and certified narcotics canine" only trained to detect the odors of contraband" is sui generis under the Fourth Amendment of the U.S. Constitution. However, by articulating a specific prohibition

against "unreasonable invasions of privacy" the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution resulting in the exclusion of the discovered evidence.

Furthermore, many of the states that have adopted explicit state constitutional right to privacy provisions have read their constitutions as applying protection above and beyond the protection provided by the federal Constitution. See, e.g. State v. Church, 538 So.2d 993 (La. 1989) (disallowing a police roadblock under the state

Constitution's right to privacy even though it did not violate the Fourth Amendment).

The language of the law as out-lined by the U.S Supreme Court is plain and unambiguous, and conveys a clear and definite meaning: The sui generis rule applies when there is "substantial evidence on record" the canine is well trained and certified narcotics canine only trained to detect the specific odors of the presence of contraband items.

Kinlaw specifically points out in all cases where the Courts in any circuit applies the "Sui generis rule" when a "canine odor sniff search" is being challenged by a defendant the following facts are established in each case: (1) The magistrate judge that issued the Arrest/ Search warrant is provided with substantial information so that he can independently conclude that the canine is "well trained and certified only to detect the specific odors of contraband items" for example he is given information as to the specific odors the canine is train to detect such as the

odors of Marijuana, Cocaine, heroin, Methamphetamine from this information the magistrate judge can conclude the canine is "not trained" to detect any odors associated with "non contraband items"

(2) This substantial information as to the specific contraband odors the canine is train to detect is written in the underlying affidavit of the Arrest/search warrant (3)

This substantial information as to the specific contraband odors the canine is trained to detect is written in the police officer's investigative report, incident report or any documented report the officer

may have of the incident (4) If a suppression hearing is held to challenge the arrest/search warrant for a violation of a defendant's constitutional rights in regards to the "canine's odor sniff" and the officer claims he supplemented the arrest/search warrant with sworn oral testimony, the officer would be on record proven by the transcript from the suppression hearing as to what specific information was provided and it would be proven that substantial information was provided at every level of the judicial process that

clearly establish that the canine is only trained to detect the "specific odors of contraband items".

Based on the fact of South Carolina Constitution's "express right to privacy provision" and the heighten protection it offers against "unreasonable invasion of privacy" judicial officials of the South Carolina Courts can not leave it to conjecture everytime an Arrest/Search warrant involves "a canine odor sniff search" is the canine "only trained to detect the specific odors of the presence

of contraband items? For the State Constitutional right to privacy to have any significance there must be some minimum evidentiary standard met on record at every level of the judicial process to conclude the canine is "well trained and certified only to detect the specific odors of contraband items."

This conclusion can not be reasonably inferred from a conclusory statement that a "K-9" alerted to a specific person, property, vehicle. There must be substantial evidence presented to support this statement, for example a statement as to what specific

Odors the canine is trained to detect like the odors of cocaine, Marijuana, heroin, Methamphetamine which are all the odors of contraband items. If there is no substantial evidence on record to conclusively confirm the canine is only trained to detect the specific odors of the presence of contraband items then all judicial officials in the South Carolina Courts including the magistrate judge, trial judge, appeals court judges must treat the "odor sniff" as a warrantless search because the *sui generis* rule cannot be based on conjecture and the "odor sniff" must be

treated as a warrantless search because the canine sniff is not only revealing the presence of odors of contraband items, but also the presence of odors of noncontraband items in violation of a person's "express right to privacy" under the South Carolina Constitution. Because if a canine is alerting to the odors of noncontraband items the officer's are using the canine as a tool to circumvent the probable cause requirement that there must a "fair probability that contraband or evidence of a crime will be found in a particular place" before a warrant is issued. The

officers would then be procuring a warrant based on the fact that there is a "fair probability that non-contraband items" will be found in a particular place "not contraband evidence". If the courts of South Carolina allow this to happen then the rights of the people to be free from "unreasonable invasions of privacy" would not be protected as guaranteed under the South Carolina Constitution Art. I § 10 "express right to privacy provision".

Kinlaw specifically states in his case there is no substantial evidence on record and or at any level of the judicial process to conclude the canine "Jari" was "well trained and certified only to detect the odors associated with contraband items." See e.g., no evidence presented in the underlying affidavit of the search warrant, no evidence presented in officer's Phillips investigative report, arrest report, incident report, no evidence presented at the suppression hearing in the officer's testimony to the alleged oral information that was given to the

Magistrate judge to procure the search warrant. Based on the fact there is no substantial evidence to confirm the canine "Jari" was "not trained to detect non-contraband common household items" such as fruits, plants, flowers, bleach, meats, the odor sniff must be treated as warrantless search "that exposes the odors of non-contraband items that otherwise would have remained hidden from public view" which is also an "unreasonable invasion of a person's privacy." Based on the heightened protection under

the South Carolina Constitution Art. I. § 10 "express right to privacy provision" this warrantless search violated Kinlaw's right to be protected from "unreasonable invasions of privacy" and all evidence discovered must be excluded.

Counsel was ineffective for not thoroughly investigating the facts of the canine odor sniff search, (2) for not thoroughly researching the South Carolina constitution Art. I § 10 "express right to privacy provision", (3) for not discovering that the canine

odor sniff violated Kinlaw's rights under the South Carolina Constitution "express right to privacy provision". If counsel would have discovered these violations and raised them in a Motion to suppress at the suppression hearing the trial judge would have found that Kinlaw's right to be protected from "unreasonable invasion of privacy" guaranteed under the South Carolina Constitution Art. I §10 "express right to privacy provision" was violated and all evidence discovered would have

been excluded and the State would not have had any evidence to charge Kinlaw for trafficking crack-cocaine and trafficking cocaine. Strickland v. Washington, 466 U.S. 468 (1984)

If counsel would have informed Kinlaw of these valid South Carolina Art. I. §10 "express right to privacy" claims Kinlaw would have not pled guilty Kinlaw would have went to trial. Hill v. Lockhart, 474 U.S. 52, 56-59 (1985)

10.(L) Involuntary Guilty Plea
Ineffective Assistance of Counsel

11.(L) Applicant's guilty plea was not voluntarily, knowingly or intelligently entered as a result of being denied the effective assistance of counsel and Due Process of law, in violation of his rights guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution as a result of trial counsel's failure to motion to have the "officer's alleged source of his basis knowledge strike from being used as part of the

probable cause determination in regards to the search warrant by the trial judge at the suppression hearing."

Kinlaw asserts counsel failed to motion to have "officer's Phillips allegation that he recieved the information to start his investigation at the hotel in regards to drug activity from an informant of his" named China Mathis" a source that has provided information in the past", striked from being used as part of the probable

Cause determination in regards to the search warrant by the trial judge at the suppression hearing."

The affiant officer Phillips allege in his oral testimony at the suppression hearing for the first time unsupported by the documented evidence of the case or facts of that "This information came from an informant of mine at the time that knew about Gutter or Gunner but could not buy directly from him." See

transcript page 36, line 13-20.

If trial counsel would have motion to have the "officer's allege basis of knowledge striked from the probable cause determination the motion would have been granted based on the facts listed below:

1. Because the failure to disclose this alleged information was highly prejudicial to Kinlaw because Kinlaw had no opportunity to weigh the information in regards to the weight of evidence that

was presented to the Magistrate to establish probable cause, also this prevented Kinlaw from presenting a defense to challenge this claim.

2. Because the officer or the State could not give any valid legal reason if this information was true, why was it not in any of the documented evidence, See e.g., search warrant, investigative report, arrest report, arrest warrant.

3. Because the "status" of the source of information in regards to probable cause has an enormous effect on the determination of if probable cause exists when the source is someone that has provided information in the past oppose to an anonymous source of information.

4. Because the prosecutor Mr. Grooms conceded to the fact if the trial judge wanted to strike that part from trial he would understand that, Counsel just failed to request the motion. See page 39 of transcript, line 17-18.

5. Because Mr. Kinlaw was arrested on Feb. 29, 2012 and Mr. Kinlaw went to trial on Nov. 3, 2014 which is 2 years and 8 months later, so there is no logical reason if this allegation was in-fact true why wasn't it revealed prior to Nov. 3, 2014.

6. Because the trial judge clearly observed the fact that "As to the discovery issue, the State of course is under a continuing obligation to provide information and perhaps should have if they knew this last night, given the information to Mr. Long

prior to it coming out in the witness but I find that - I'm not gonna grant a continuance. See transcript page 64, line 23-25, transcript page 65 line 1-2.

7. Because most importantly based on the totality of the facts of the case, (1) The information not being in the discovery documented evidence, (2) The information was never presented by the officer at any prior hearings. See e.g. preliminary hearing, (3) The fact that the prosecutor Mr. Grooms did not know anything about this information until the night before trial, (4) The fact

of the time being 2 years and 8 months between the arrest of Kinlaw and the time he is taken to trial and no one has a clue that this information exist, not even the prosecutor Mr. Grooms, so it is highly likely this information is false.

If counsel would have requested the motion to strike the affiant's officer Phillips basis of knowledge from being used as part of the probable cause determination, the motion would have been granted

and the search warrant would have been found to be invalid for a lack of probable cause under the totality of the circumstances test based on the defects listed below:

1. The officer's reason for starting the investigation came from an anonymous unreliable source that alleged drug activity was going on at the hotel and this allegation was never independently verified because specifically there was no independent verification of what transpired within the hotel during the officer's allege numerous

surveillance of the hotel's parking lot. See, e.g., State v. Gentile, 373 S.C. 506 (App. 2007)

2. The underlying affidavit of the search warrant set forth no facts as to why D.E.U. officers believed Kinlaw committed the crime alleged in the affidavit "distribution of crack cocaine" on Feb 28, 2012 the crime Kinlaw was arrested for. See, e.g., State v. Weston, 494 S.E.2d 801 (S.C. 1997)

3. The search warrant affidavit does not set forth any information as to the reliability of the confidential informant

(the driver of the car that was arrested after being found in possession of .9 grams of crack cocaine on Feb 28, 2012) who's information led to Kinlaw's arrest for distribution of crack cocaine on Feb 28, 2012, this defect is critical because the entire case against Kinlaw is "solely" based on if this confidential informant (the driver of the car) "is telling the truth" as to whether he purchased crack-cocaine from Kinlaw inside the hotel stairwell on Feb. 28, 2012. See, e.g., State v. Robinson, 408 S.C. 268 (S.C. App. 2014)

4. Specifically because there was no independent verification of what transpired within the hotel on Feb. 28, 2012, the day the driver of the car was arrested with crack-cocaine and alleged he bought the crack from Kinlaw from within the hotel. See, e.g., State v. Gentile, 373 S.C. 506 (App. 2007)

5. There is no allegation in the search warrant affidavit that drugs was ever seen or bought from room 205 the location to be searched. See, e.g., State v. Hunt, 562 S.E.2d 597 (N.C. App. 2002)

6. The search warrant affidavit failed to set forth sufficient underlying facts so as to allow the magistrate to make an independent determination of the reliability of the K-9 "Jari" to establish probable cause based on the alert. See, e.g., U.S. v. Florez 871 F.Supp. 1411 (D.N.M. 1994)

7. Most importantly the oral testimony the affiant officer Phillips alleged he gave to the magistrate judge to supplement the search warrant did not cure any of these defects. See the transcript of the suppression hearing.

If trial counsel would have motion to have officer's Phillips alleged basis of knowledge stricken from being used as part of the probable cause determination, the motion would have been granted and the search warrant would have been found to be invalid for a lack of probable cause and all evidence discovered from this invalid search warrant would have been suppressed and the State would not have had any evidence to charge Kinlaw with trafficking cocaine, trafficking crack-cocaine. Strickland v. Washington, 466 U.S. 468 (1984)

Henry Lee Kinlaw
#271267
Lieber Corr. Inst.
P.O. Box 205
Ridgeville S.C 29472

Honorable Melanie Huggins-Ward
Clerk of Court for Horry County
P.O. Box 677
Conway, South Carolina 29528

2016 DEC -6 AM 10:22
MELANIE HUGGINS-WARD
CLERK OF COURT

Re: Motion to Amend P.C.R Application

Dear Ms. Huggins-Ward

Enclosed please find the original copy.
Please file the original with your office and
clock stamp the copy and return to me.
Thank you for your assistance in this matter.

STATE OF South Carolina }
 COUNTY OF HORRY }

IN The Court of Common
 Pleas

2015-CP-26-03714

Henry L. Kinlaw, 271267,
 Applicant,

VS.

STATE OF SOUTH CAROLINA

Respondent.

MOTION TO

~~AMEND~~

DEC-6 AM 10:22
 HUBBINS-
 CLERK OF COURT

Applicant, pro se, hereby moves this Court, for an order permitting him to amend the application for post-conviction relief to include the following documented evidence:

1. 15th Circuit Drug Enforcement Unit Investigative Report Confidential
2. 15th Circuit Drug Enforcement Unit: Statement from Confidential Source
3. Arrest Warrant M-971717: Drugs/manufacture, distribution, etc. of cocaine base, 1st
4. Arrest Warrant M-971729: Drugs/Trafficking in ice, crank or crack 28g or more, but less than 100g-1st
5. Arrest Warrant M-971730: Drugs/Trafficking in cocaine, 28g or more, but less than 100g-1st

6. 15th Circuit Drug Enforcement Unit: Grand Jury
Case Summary

7. Solicitor's Case Report

8. Horry County Police Department Drug Analysis
Laboratory: Drug Evidence Examination Request/
Chain of Custody Form

9. A copy of the Search Warrant issued for Hotel
Room 205

10. A Copy of the trial transcript



**15TH CIRCUIT DRUG ENFORCEMENT UNIT
INVESTIGATIVE REPORT
CONFIDENTIAL**



Offense(s): Distribution of Crack / Trafficking Crack Cocaine / Trafficking Cocaine

Case File Number: DEU 12-051.2

Defendant: Henry Lee Kinlaw Jr

Date of Incident: 02/28/2012 and 02/29/2012

Date of Arrest: 02/29/2012

Case Agent: P. Phillips

**** INVESTIGATIVE REPORT ****

February 2012:

In February of 2012, Agent Philip E. Phillips of the 15th Circuit Drug Enforcement Unit began investigating one HENRY LEE KINLAW JR in reference to his involvement in illegal drug trafficking.

Phillips had obtained information that a black male with the street name "GUTTER" or "GUNNER" was currently staying somewhere on the second floor of the Days Inn Hotel located at 3650 Waccamaw Blvd in the Myrtle Beach section of Horry County. According to the information, this subject was actively selling crack cocaine to various buyers from within the hotel as they came to visit him. The information stated that the buyers would arrive at the hotel (typically in a vehicle), park in the western most portion of the property, exit their vehicle, then enter a side door on the west side of the building. The buyers would then enter a stairwell directly to the right of the side door and would meet with GUTTER / GUNNER inside of the stairwell on the second floor for the drug transaction to occur. After buying the drug, the buyer would then walk back down the stairwell, exit through the side door, re-enter their waiting vehicle, and leave the property. Phillips had also gained information that GUTTER / GUNNER did own and operate a blue in color Chevy Impala (bearing SC registration HTA885), which was typically parked in the western parking lot of the hotel, beside or near the side entrance.

With this information, Phillips traveled to the Days Inn and did view a blue in color Chevy Impala bearing SC registration HTA885 parked in the lot beside the side entrance door. During a SC Department of Motor Vehicle (DMV) search, Phillips learned that the Impala was registered to one HENRY LEE KINLAW JR. Phillips was then able to retrieve a SC DMV photograph of KINLAW.

Throughout the course of the investigation, Phillips was able to positively verify that HENRY LEE KINLAW JR was the subject known as "GUTTER" or "GUNNER".

In order to validate the information above, Phillips did conduct multiple surveillance sessions on the hotel's western most parking lot, watching the above mentioned blue Impala and the side entrance door.

On numerous occasion, Phillips did clearly view multiple vehicles arrive in the western most parking lot and park near the side entrance door. Phillips continued to watch as various persons would exit their vehicle, enter the side entrance door, and turn immediately right into the stairwell. These persons would stay inside the building for approximately 20-30 seconds, then, re-emerge through the side entrance out into the parking lot. These visitors would then get back into their waiting vehicles and leave the property.

* Information Contained Here-In is Not to be Disseminated Outside the Realm of Law Enforcement Personnel; Confidential Material of a Sensitive Nature

On several occasions, Phillips did observe HENRY LEE KINLAW JR exit the same side entrance door, enter into the blue in color Chevy Impala, and drive it off the property.

Having viewed activity that was consistent with the information provided at the hotel, and having viewed HENRY LEE KINLAW JR operate the blue in color Chevy Impala, and having viewed HENRY LEE KINLAW JR exit and enter the hotel numerous times, Phillips then believed that illegal drug sales were being conducted from within the hotel by HENRY LEE KINLAW JR.

02/28/2012:

In an attempt to further the investigation, Phillips organized another surveillance operation at the Days Inn Hotel on 02/28/2012. It was on this day that Phillips recruited the assistance of fellow DEU Agents David Belue, Randy Miller, Ryan Mindala, Dan Roberts, and Chris Thompson. After briefing each agent on the activity viewed at the hotel, Phillips requested each agent to position themselves around the immediate area of the hotel in order to conduct mobile surveillance on any person leaving the hotel that was believed to be involved in the buying of illegal drugs from KINLAW. Each agent (operating separate undercover, unmarked, police vehicles) then proceed around the immediate area of the hotel and awaited further instruction from Phillips.

Meanwhile, Phillips and Roberts (riding together in the same undercover police vehicle) positioned themselves in a manner where they could observe all traffic entering or exiting the hotel parking lot, as well as a clear line of site to the side entrance door and the parked blue in color Chevy Impala.

Shortly after staging, Phillips did clearly observe a vehicle arrive in the hotel's western parking lot and park in front of the side entrance door. The driver (who shall remain confidential) then exited the vehicle, entered the side entrance door, and made an immediate right turn into the hotel's stairwell. The driver remained inside of the building for 27 seconds (timed by Phillips) then re-emerged out of the side entrance door. The driver then re-entered the vehicle and proceeded out of the parking lot.

Suspecting an illegal drug transaction had just occurred between the driver and KINLAW while inside of the stairwell, Phillips requested the agents to follow the driver as he left the hotel property. While following the driver, the agents did observe the driver commit a traffic infraction while on Highway 17 Bypass and Harrelson Blvd in Myrtle Beach, SC (lane change violation). Phillips then requested Agent Thompson (operating an unmarked Crown Victoria police cruiser) to conduct a traffic stop on the driver.

During the stop, Agent Miller arrived on scene to assist with the investigation. It was at this time that Miller identified himself as an agent with the Drug Enforcement Unit, explained as to what he and the other agents were investigating at the hotel, and inquired if the driver was in possession of any illegal drugs. The driver then freely informed Miller that he/she was in-fact in possession of a quantity of crack cocaine in which he/she had just purchased from a black male while inside of the stairwell at the Days Inn for \$60.00 cash. The driver further stated that he/she knew the black male by the street name "GUNNER" and knew him to drive the blue Impala that was parked in the lot.

The driver then informed Miller that the crack cocaine was packaged inside of a small zip-lock style baggie and was concealed inside of his/her shoe. The driver then retrieved the baggie and relinquished custody of it into Miller's possession. The baggie did contain a quantity of an off-white in color rocklike substance that field tested positive for the presence of cocaine and had an approximate packaged weight of 0.9 grams.

The driver was then placed under arrest for violating the SC State Statute 44-53-375 "Possession of Crack Cocaine". Miller then informed Phillips of the situation and explained that the driver was being transported to MBPD Jail for holding.

Phillips then left his surveillance location and met with the driver while inside of the MBPD Jail. While inside of the jail, Phillips did conduct an interview with the driver. During the interview, the driver did give a post-Miranda statement explaining that he/she has bought crack cocaine from GUNNER on multiple

* Information Contained Here-In is Not to be Disseminated Outside the Realm of Law Enforcement 2
Personnel; Confidential Material of a Sensitive Nature

different occasions, always at the hotel, and always in the stairwell. Phillips then presented a photograph of HENRY LEE KINLAW JR (with no identifying information) to the driver and inquired as to who this person was. The driver then positively identified HENRY LEE KINLAW JR as "GUNNER" and as the person who had sold him/her crack cocaine in the stairwell.

A written statement was collected from the driver.

With the above information, Phillips did seek and obtain an arrest warrant for HENRY LEE KINLAW for violating the SC State Statute 44-53-375 "Distribution of Crack Cocaine" (warrant # M-971717).

The seized crack cocaine was placed inside of the Horry County Best Packet # H009696 and was secured into the HCPD Drug Locker for safekeeping /evidence / testing.

02/29/2012:

Having obtained a warrant for the arrest of HENRY LEE KINLAW JR for "Distribution of Crack Cocaine", Phillips decided to conduct another operation at the Days Inn Hotel in order to take KINLAW into custody.

On 02/29/2012, while preparing for the operation, Phillips was contacted by Agent Miller via telephone. Miller informed that he had just spotted KINLAW inside of the Crabtree Memorial Gymnasium located at 1004 Crabtree Ln in the Myrtle Beach section of Horry County. Miller also informed that he had viewed KINLAW's blue in color Impala parked at the gymnasium on the south side of the complex.

With this information, Phillips decided to have himself and other agents of the Drug Enforcement Unit set-up surveillance around KINLAW's vehicle and take him into custody as he exited the gymnasium and made his way back to his vehicle. Phillips then contacted and recruited the assistance of fellow DEU Agents Jeremy Brown, David Belue, Randy Miller, Dan Roberts, Ryan Mindala, Jeremiah Beam, Chris Thompson, and Deputy Commander Trevor Howlett.

At approximately 1100 hours, all the agents arrived in the parking lot of the gymnasium and set-up in and around the immediate area of the blue Chevy Impala. It was at this time that Phillips walked into the gymnasium and did visually verify that KINLAW was inside the building.

At approximately 1300 hours, the agents did clearly observe KINLAW exit the gymnasium and proceed on foot towards the blue Impala. Once at the vehicle, KINLAW did open the driver's door and proceed to enter the vehicle. It was at this time that Phillips gave the order for all of the agents to converge on KINLAW and place him into custody.

Thompson (who was operating the unmarked Crown Victoria police cruiser) approached in his vehicle, activated his blue lights, and pulled in behind the Impala. Thompson then identified himself as police and informed KINLAW that he was under arrest for an outstanding warrant. The other agents and Phillips then arrived at the Impala and KINLAW was successfully placed under arrest.

During a search incident to arrest of KINLAW's person, Phillips did locate and seize a "DAYS INN" keycard. Phillips then explained to KINLAW as to what he was being arrested for. Phillips then advised KINLAW of his Miranda Rights and inquired if there were any illegal drugs inside of KINLAW's room at the Days Inn Hotel. KINLAW then refused to cooperate and denied that he had ever been to the Days Inn.

KINLAW was then transported to MBPD Jail for holding pending transfer to J. Reuben Long Detention Facility. Phillips then secured KINLAW's vehicle in the parking lot of the gym and requested all agents to travel to the Days Inn Hotel to assist with further investigation.

While at the Days Inn Hotel, Deputy Commander T. Howlett met with the front desk employees, identified himself as an Agent with the Drug Enforcement Unit, and explained as to what was being investigated. The employees then confirmed that KINLAW did in-fact have a room at the hotel and had been staying there for

an extended period of time. The employees then informed that KINLAW's room was located on the 2nd floor and they believed the number was 205.

At this time, Agent Jeremy Brown deployed his drug detecting canine ("Jari"), which conducted a sniff of the exterior door of room # 205. The canine did give a positive alert indicating the presence of illegal drugs inside of room # 205. T. Howlett then tested the keycard that was in KINLAW's possession and learned that it was correctly activated to room # 205 at the Days Inn Hotel.

With this information, Agent Phillips had probable cause to believe that illegal drugs were being stored inside of KINLAW's room at the Days Inn Hotel (#205). Phillips then sought and obtained a search warrant for said room and executed it on 02/29/2012 at approximately 1500 hours. The following is a list of items located and seized from within the room:

- 1.) A clear plastic baggie containing approximately 42.4 grams of an off-white in color rocklike substance. This substance did field test positive for the presence of cocaine. This substance was located inside of the top left dresser drawer.
- 2.) A clear plastic baggie containing approximately 70.6 grams of a white powdery substance. This substance did field test positive for the presence of cocaine. This substance was located inside of the top left dresser drawer.
- 3.) Three (3) clear plastic baggies, each containing a quantity of an off-white in color rocklike substance. These substances did field test positive for the presence of cocaine and had an approximate combined packaged weight of 34.5 grams. These baggies were located inside of a clear plastic cup inside of the top left dresser drawer.
- 4.) Two (2) clear plastic baggies, each containing a quantity of a white powdery substance. These substances did field test positive for the presence of cocaine and had an approximate combined packaged weight of 22.6 grams. These baggies were located inside of a clear plastic cup inside of the top left dresser drawer.
- 5.) One (1) box of sandwich bags, which housed the bags described in #1 and #2 above. This box was located inside of the top left dresser drawer.
- 6.) Three (3) digital scales. Each of which were located inside of the top left dresser drawer.
- 7.) Four (4) plastic bags, each containing smaller ziplock style baggies. These bags were located inside of the top left dresser drawer.
- 8.) \$842.00 cash money. This money was located inside of the top drawer of the nightstand.

Given the items located and seized, HENRY LEE KINLAW JR was subsequently charged with violating the SC State Statutes 44-53-370 "Trafficking Cocaine 28 – 100 grams" and 44-53-375 "Trafficking Crack Cocaine 28 – 100 grams".

Phillips placed all of the off-white in color rocklike substances and all of the white powdery substances into the Horry County Best Packet # H009697 and secured it into the HCPD Drug Locker for safekeeping / evidence / testing.

All of the non-drug evidence that was seized was secured into the HCPD Property Locker for safekeeping /evidence by Phillips.

Phillips then returned to the Crabtree Memorial Gymnasium where the blue in color Chevy Impala was parked. Given the fact that KINLAW was not (and is not) gainfully employed, and the fact that Phillips determined that KINLAW is a distributor of illegal drugs, Phillips seized the 2008 Chevy Impala as proceeds of illegal drug sales. During a inventory of the vehicle prior to tow, Phillips did locate \$138.00 cash money

in the center console of the vehicle. For the same reasons mentioned above, Phillips also seized this cash money as proceeds of illegal drug sales.

The 2008 Chevy Impala was successfully towed to a holding facility without incident. All of the seized money (from the hotel and the vehicle) was secured inside of two separate money bags and was deposited into the DEU Seizure Account by Deputy Commander T. Howlett.

03/01/2012:

On 03/01/2012, Agent Phillips did serve the following warrants on the Defendant HENRY LEE KINLAW JR while at the J. Reuben Long Detention Facility:

- M-971729 – Trafficking Crack Cocaine 28 – 100 Grams.
- M-971730 – Trafficking Cocaine 28 – 100 Grams.
- M-971717 – Distribution of Crack Cocaine.

15TH CIRCUIT DRUG ENFORCEMENT UNITStatement of: ☒ Victim ☒ Witness ☒ Defendant

Date & Time: 02/28/17 5:54 pm Case File Number: DEU-12-050
 Incident Location: Highway 17 Bypass & Harrison Blvd - Myrtle Beach, SC
 Statement of: [REDACTED]
 DOB: [REDACTED] Hgt: [REDACTED] Wgt: [REDACTED] Hair: [REDACTED] Eye: [REDACTED]
 Home Address: [REDACTED]
 Home Phone Number: [REDACTED] Work Phone Number: [REDACTED]

I spoke with Gunner on phone. Said I wanted
 9.60 he said come on. I called him again
 as I pulled into The Days Inn and told him
 I was walking up. I then entered the hotel
 stair case went up to the 2nd floor door & waited
 in staircase. He came into staircase exchanged
 money for the bag and then left. He walked
 up stairs and I left the hotel. I've bought
 from Gunner about 6 times by myself and
 over a dozen times in past with a friend.

Unlawful to Make False Complaint: It is unlawful for any person to knowingly make a false complaint, or after notice of a criminal investigation, to give false information to any law enforcement officer concerning the alleged commission of any crime by another. ... Any person violating the provisions of this section is guilty of a misdemeanor and upon conviction must be punished by a fine not to exceed two hundred dollars or by a term of imprisonment not to exceed thirty days. S.C. § 16-17-725.

By signing below, I certify that I have read the provisions of the above section (§ 16-17-725) and understand its contents. In addition, I certify I have read the above statement, and it is true and correct to the best of my knowledge and I have been furnished a copy of this statement.

[REDACTED]
 (signature of person making statement)

Page of

ARREST WARRANT

M-971717

STATE OF SOUTH CAROLINA

☒ County/☐ Municipality of

Horry

THE STATE

DEU 12-051.1

against

Henry Lee Kinlaw, Jr

Address: Waccamaw Blvd

Myrtle Beach, SC 29579-

Phone: SSN:

Sex: M Race: B Height: 5 7 Weight: 165

DL State: SC DL #: SC0260900

Agency ORI #: SC0260900

Prosecuting Agency: Horry County - Deu

Prosecuting Officer: P Phillips - 6840

Offense: Drugs/ manufacture, distribution, etc. of cocaine base, 1st

Offense Code: 3014

Code/Ordinance Sec: 44-53-0375 (B) (1)

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant on

Henry Lee Kinlaw Jr
03/01/12

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
PO Box 677
1301 2nd Avenue
Conway, SC 29528

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Horry

Personally appeared before me the affiant P Phillips who

being duly sworn deposes and says that defendant Henry Lee Kinlaw, Jr

did within this county and state on or about 02/29/2012 violate the criminal laws of the

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Horry)

in the following particulars:

DESCRIPTION OF OFFENSE Drugs/ manufacture, distribution, etc. of cocaine base, 1st

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

Within the past 72 hours, the Defendant (HENRY LEE KINLAW JR) did sell and/or distribute a quantity of crack cocaine for the exchange of cash money from within the Days Inn Hotel located at 3650 Waccamaw Blvd in the Myrtle Beach section of Horry County. Given the above stated facts, there is probable cause to believe the Defendant did violate the SC State Statute 44-53-375 "Distribution of Crack Cocaine".

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Horry

Affiant's Address 607 Main Street
Conway 29528-

Affiant's Telephone

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 2/29/2012 defendant Henry Lee Kinlaw, Jr

did violate the criminal laws of the State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Horry) as set forth below:

DESCRIPTION OF OFFENSE: Drugs/ manufacture, distribution, etc. of cocaine base, 1st

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.
Sworn to and subscribed before me on 02/29/2012Signature of Issuing Judge
Christopher John Arakas
Judge Code: 5080

(L.S.)

Judge's Address J. Ruben Long Detention Center
Conway, SC 29526-1071

Judge's Telephone (843)365-9222

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

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Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 518

AFFIDAVIT

FILED
MAR 12 AM 8:48
CLERK OF COURT

ARREST WARRANT

M-971729

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Horry

THE STATE

DEU 12-0512

against

Henry Lee Kinlaw, Jr

Address: Waccamaw Blvd

Myrtle Beach, SC 29579-

Phone: S.

Sex: M Race: B Height: 5 7 Weight: 165

DL State: SC DL #:

DOB: Agency ORI #: SC0260900

Prosecuting Agency: Horry County - Deu

Prosecuting Officer: Phil Phillips - DEU38

Offense: Drugs / Trafficking in ice, crack or crack - 28 g or more, but less than 100 g - 1st offense

Offense Code: 0392

Code/Ordinance Sec: 44-53-0375(C)(2)

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused

is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to

defendant
onHenry Lee Kinlaw Jr
03/01/12

Signature of Constable Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
PO Box 677
1301 2nd Avenue
Conway, SC 29528

ORIGINAL

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ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Horry

Personally appeared before me the affiant Phil Phillips

who

being duly sworn deposes and says that defendant Henry Lee Kinlaw, Jr

did within this county and state on or about 02/29/2012

violate the criminal laws of the

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Horry)

in the following particulars:

DESCRIPTION OF OFFENSE Drugs / Trafficking in ice, crack or crack - 28 g or more, but less than 100 g - 1st offense

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

On 02/29/2012, Agents of the 15th Circuit Drug Enforcement Unit did execute a drug related search warrant on the Defendant's hotel room (# 205) at the Days Inn located at 3650 Waccamaw Blvd in the Myrtle Beach section of Horry County. During a search of the room, the agents located and seized approximately 76.9 grams of an off-white in color rocklike substance, which field tested positive for the presence of cocaine. Given the above stated facts, there is probable cause to believe the Defendant did violate the SC State Statute 44-53-375 "Trafficking Crack Cocaine 28 - 100 grams".

R/O Phillips

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Horry

Affiant's Address P.O. Box 1276
Conway, SC 29528-

Affiant's Telephone

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 2/29/2012 defendant Henry Lee Kinlaw, Jr

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Horry) as set forth below:

DESCRIPTION OF OFFENSE: Drugs / Trafficking in ice, crack or crack - 28 g or more, but less than 100 g - 1st offense

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me
on 03/01/2012

Signature of Issuing Judge

Aaron C. Butler

Judge Code: 5022

(L.S.)

Judge's Address J. Reuben Long Detention Center
Conway, SC 29526-1071

Judge's Telephone (843)915-5145

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

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Form Approved by
S.C. Attorney General
April 21, 2003
SCGA 518

238

FILED
2012 MAR 12 AM 8:48
CLERK OF COURT
JUDICIAL BRANCH

ARREST WARRANT

M-971730

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Horry

THE STATE

DEU 12-051.2

against

Henry Lee Kinlaw, Jr

Address: Waccamaw Blvd

Myrtle Beach, SC 29579-

Phone: SSI

Sex: M Race: B Height: 5 7 Weight: 165

DL State: SC DL #:

DOB: Agency ORI #: SC0260900

Prosecuting Agency: Horry County - Deu

Prosecuting Officer: Phil Phillips - DEU38

Offense: Drugs / Trafficking in cocaine, 28 g or more, but less than 100 g - 1st offense

Offense Code: 2359

Code/Ordinance Sec: 44-53-0370(c)(2)

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant Henry Lee Kinlaw Jr on 03/01/12

Signature of Constable Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
PO Box 677
1301 2nd Avenue
Conway, SC 29528

ORIGINAL

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ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Horry

Personally appeared before me the affiant Phil Phillips whobeing duly sworn deposes and says that defendant Henry Lee Kinlaw, Jrdid within this county and state on or about 02/29/2012

violate the criminal laws of the

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Horry)

in the following particulars:

DESCRIPTION OF OFFENSE Drugs / Trafficking in cocaine, 28 g or more, but less than 100 g - 1st offense

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

On 02/29/2012, Agents of the 15th Circuit Drug Enforcement Unit did execute a drug related search warrant on the Defendant's hotel room (# 205) at the Days Inn located at 3650 Waccamaw Blvd in the Myrtle Beach section of Horry County. During a search of the room, the agents located and seized approximately 93.2 grams of a white in color powder substance, which field tested positive for the presence of cocaine. Given the above stated facts, there is probable cause to believe the Defendant did violate the SC State Statute 44-53-370 "Trafficking Cocaine 28 - 100 grams".

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Horry

Affiant's Address P.O. Box 1276
Conway, SC 29528-

Affiant's Telephone

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 2/29/2012 defendant Henry Lee Kinlaw, Jr

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Horry) as set forth below:DESCRIPTION OF OFFENSE: Drugs / Trafficking in cocaine, 28 g or more, but less than 100 g - 1st offense

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me

on 03/01/2012

Signature of Issuing Judge

Aaron C. Butler

Judge Code: 5022

(L.S.)

Judge's Address J. Reuben Long Detention Center
Conway, SC 29526-1071Judge's Telephone (843)915-5145Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

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AFFIDAVIT

Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 618FILED
2012 MAR 2 AM 8:48
CLERK OF COURT

15TH CIRCUIT DRUG ENFORCEMENT UNIT**Grand Jury Case Summary**

Case #: DEU 12-051

Name of Defendant (s): Henry Lee Kinlaw Jr

Name of Co-Defendant (s): N/A

Location of incident: 3650 Waccamaw Blvd. Room # 205, Myrtle Beach, SC

Date of Offense: 02/28/2012, 02/29/2012

Date of Arrest: 02/29/2012

Warrant #: M-971717, M-971729, M-971730

Offense (s): Distribution of Crack, Trafficking Crack, Trafficking Cocaine

Audio/Video: N/A

Investigator: P. Phillips

Brief Summary:

M-971717 - DISTRIBUTION OF CRACK COCAINE - On 02/28/2012, the Defendant HENRY LEE KINLAW JR did distribute approximately 0.9 grams of an off-white in color rocklike substance for the exchange of cash money while within the county of Horry. The substance did field test positive for the presence of Cocaine.

M-971729 - TRAFFICKING CRACK COCAINE - On 02/29/2012, Agents with the 15th Circuit Drug Enforcement Unit executed a search warrant on the Defendant's hotel room (#205) at the Days Inn Hotel located in the Myrtle Beach section of Horry County. During the search, approximately 76.9 grams of an off-white in color rocklike substance was located and seized. The substance did field test positive for the presence of Cocaine.

M-971730 - TRAFFICKING COCAINE - On 02/29/2012, Agents with the 15th Circuit Drug Enforcement Unit executed a search warrant on the Defendant's hotel room (#205) at the Days Inn Hotel located in the Myrtle Beach section of Horry County. During the search, approximately 93.2 grams of a white powdery substance was located and seized. The substance did field test positive for the presence of Cocaine.

SOLICITOR'S CASE REPORT

DEPARTMENT: 15th Circuit DEU

DATE OF ARREST: 02/29/2012

DEFENDANTS: Henry Lee Kinlaw Jr

CASE #: DEU 12-051

SOCIAL SECURITY NUMBER: [REDACTED]

DATE OF BIRTH: [REDACTED]

CHARGE: Distribution of Crack, Trafficking Crack, Trafficking Cocaine

CO-DEFENDANTS: N/A

Edited 12-20-03

YES	N/A	NO	DOCUMENTS
✓			Arrest Warrant(s) M-971717, M-971729, M-971730
✓			Incident Report
	✓		Completed Supplement Report
✓			Booking Report (Bond Information)
✓			Miranda Form For Each Defendant
✓			NCIC Report (For Each Victim & Defendants)
	✓		Certified Driving Record (Traffic Related Cases Only)
	✓		Statement Of Victim
	✓		Statement Of Witnesses
		✓	Statement of Defendants
	✓		Toxicology Report
		✓	Drug Report
	✓		Autopsy Report
✓			SLED Report (Completed) H-009697
	✓		DNA Report
	✓		Serology Report
	✓		Ballistic Report
	✓		Court Orders
✓			Search Warrants
	✓		Trace Evidence Report
	✓		Crime Scene Photographs Or Video
	✓		Autopsy Photographs
		✓	Tape Recorded Statements
	✓		Photographs Of Marked Money Or Other Exhibits
	✓		Sketch, Charts Or Maps Of Crime Scene (Depicting Where Each Witness, Suspect Or Victim Was Located)

**SOLICITORS CASE REPORT
CONTINUED**

YES	N/A	NO	DOCUMENTS
	✓		Sketch, Charts or Maps Of Crime Scene (Depicting Where Evidence Was Located)
	✓		Copy of Photoline Up Or Live Line Up
	✓		911 Tape (Required On All Violent Crimes If Exists)
	✓		Audio/Video Tape Of Crime
✓	✓		Current and Permanent Address Of All Potential Witnesses Including Date of Birth And Social Security Number
✓			Name, Titles, Addresses Of All Chain Of Custody Witnesses
	✓		Medical Records On Victim And Defendant, Including EMS Run Sheets And Hospital Emergency Room Report
✓			Evidence (Weapons, Money, Stolen Property, etc.) Seized Before, During Or After Arrest.
	✓		Photo's Of Any Items of Evidence Or Seized Property Returned To Victim, By Whom Returned And Date Returned

For Any Items Checked NO, Please Explain Why:

The drug analysis has not returned from the lab as of this date. The Defendant refused to make a statement to the arresting Agent.

SUMMARY:

See the detailed Follow-up and UCR

Chief Case Officer: P. Phillips

Date Of Report: 07/18/2011

Reporting Officer: P. Phillips

Reporting Officers Supervisor:

Approving Officer: _____

HORRY COUNTY POLICE DEPARTMENT DRUG ANALYSIS LABORATORY

DRUG Evidence Examination Request / Chain of Custody Form

Control Number #-009697 Lab Number (assigned by Lab) _____

Requesting Officer P. Phillips Case Number DEU-12-051.2

Agency DEU Offense TRAFFICKING COCAINE / TRAFFICKING CRACK

Agency Address PO Box 1276 Incident Date 2/29/12

COLUMBIA, SC 29227

Agency Phone Number _____

Subject(s) LAST NAME, FIRST NAME	GENDER	DOB
<u>KULAN, HANNAH</u>	<u>M</u>	<u>07/02/26</u>

Analysis Requested/ Instructions _____

EVIDENCE

The item(s) submitted below will be examined with your assurance that the submitted specimens have not nor will be submitted to any other laboratory or agency for examination.

<u>1) 0.5 LITERS IN CLEAR BOTTLE SUBSTANCE</u>
<u>2) WHITE POWDERY SUBSTANCE</u>

Evidence submitted in sealed container is provisionally accepted as being correctly described as listed above. Contributors agree that the actual inventory conducted by the examiner will be the correct inventory.

EVIDENCE CHAIN-OF-CUSTODY

Submitted By <u>P. Phillips</u>	Signature <u>[Signature]</u>	Date/Time <u>02/29/12 2001</u>
Submitted To <u>DEU Sate</u>	Signature <u>[Signature]</u>	Date/Time <u>02/29/12 2001</u>
Submitted By <u>D. Phillips</u>	Signature <u>[Signature]</u>	Date/Time <u>03/21/12 1000</u>
Submitted To <u>HCPD Drug Locked</u>	Signature _____	Date/Time _____
Submitted By _____	Signature _____	Date/Time _____
Submitted To _____	Signature _____	Date/Time _____
Submitted By _____	Signature _____	Date/Time _____
Submitted To _____	Signature _____	Date/Time _____
Received From _____	Signature _____	Date/Time _____
Returned To _____	Signature _____	Date/Time _____

HORRY COUNTY POLICE DEPARTMENT DRUG ANALYSIS LABORATORY **DRUG Evidence Examination Request / Chain of Custody Form**

Control Number H-009697 Lab Number (assigned by Lab) L120247
 Requesting Officer P. Phillips Case Number DEU-12-051,2
 Agency DEU Offense TRAFFICKING Crack / TRAFFICKING Cocaine
 Agency Address PO Box 1276 Incident Date 02/20/12
Cowley, SC 29522
 Agency Phone Number _____

Subject(s) LAST NAME, FIRST NAME	GENDER	DOB
<u>Lincoln, Henry</u>	<u>M</u>	<u>09/02/76</u>

Analysis Requested/ Instructions _____

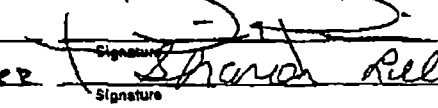
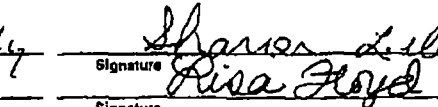
EVIDENCE

The item(s) submitted below will be examined with your assurance that the submitted specimens have not nor will be submitted to any other laboratory or agency for examination.

<u>1) OFFENSE IN COLOR Rockstar SUBSTANCE</u>
<u>2) White Powder Substance</u>

Evidence submitted in sealed container is provisionally accepted as being correctly described as listed above. Contributors agree that the actual inventory conducted by the examiner will be the correct inventory.

EVIDENCE CHAIN OF CUSTODY

Submitted By <u>P. Phillips</u> Print		Date/Time <u>02/29/12 2:00 hrs</u>
Submitted To <u>DEU SAFE</u> Print		Date/Time <u>02/29/12 2:00 hrs</u>
Submitted By <u>P. Phillips</u> Print		Date/Time <u>02/29/12 10:00 hrs</u>
Submitted To <u>HCPD Drug Locker</u> Print	<u>Sharon Kelly</u> Signature	Date/Time <u>03/02/12</u>
Submitted By <u>Sharon Kelly</u> Print	<u>Sharon Kelly</u> Signature	Date/Time <u>3-26-12 11:45</u>
Submitted To <u>Lisa Floyd</u> Print	<u>Lisa Floyd</u> Signature	Date/Time <u>3-20-12/11:45</u>
Submitted By _____ Print	_____ Signature	Date/Time _____
Submitted To _____ Print	_____ Signature	Date/Time _____
Received From _____ Print	_____ Signature	Date/Time _____
Returned To _____ Print	_____ Signature	Date/Time _____



Horry County Police Department Regional Drug Analysis Laboratory

Sandra Rhodes, Interim Chief

DRUG ANALYSIS DEPARTMENT

P. Phillips
15th Circuit DEU
PO Box 1276
Conway
SC 29526

Date: 7/23/2012
Lab Number: L120247
Incident Date: 02/29/2012 **051**
Case/Control #: DEU-12-015.2/H009697

(S): Kinlaw, Henry

The items submitted for analysis were examined with your assurance that the submitted specimens have not nor will be submitted to any other laboratory or agency for examination.

ITEMS OF EVIDENCE:

L120247

Item 1: Off-white rock substance in each of four sandwich baggies in impulse-sealed plastic "A"

Results: Cocaine base found

70.32 grams (1,085.03 grains)

C-II

Item 2: Powdery white rock substance in each of three bags in impulse-sealed plastic "B"

Results: Cocaine found

91.67 grams (1,414.46 grains)

C-II

I am a Chemical Analyst employed by the Horry County Police Department, certified through the Spartanburg County Sheriff's Office Forensic Lab as a chemist or analyst qualified to perform testing and analysis for controlled dangerous substances prohibited by law in this state by Title 44, Chapter 53 of the Code of Laws and Rule 61-4 of the Department of Health and Environment Control.

I used the following legally reliable forensic laboratory procedures in this analysis:

☒ Chemical Test

☐ Ultraviolet Spectroscopy

☐ Liquid Chromatography

☐ Microscopic Test

☒ Gas Chromatography

☐ Published Literature

☐ Infrared Spectroscopy

☒ Mass Spectrometry

☐ Other:

Place: Horry

Sworn before me on this 23 day of July, 2012

Notary Public for South Carolina

My commission expires: 7/18/20

Signature:

Lisa D. S. Floyd

Lisa D. S. Floyd

7-23-2012

Date

FORM A

REPORT OF ANALYSIS FOR
CONTROLLED DANGEROUS SUBSTANCES

I, *Lisa D. S. Floyd*, am a Chemical Analyst employed by the Horry County Police Department and trained by the Spartanburg County Sheriff's Office Forensics Laboratory as a chemist or analyst qualified to perform testing and analysis for controlled dangerous substances prohibited by law in this State by Title 44, Chapter 53 of the Code of Laws and Rule 61-4 of the Department of Health and Environmental Control.

I have *14 years and 8 month(s)* experience as a Chemical Analyst. During that period I have been qualified as an expert witness and testified in court no less than *46 times*. I have received the following training as a chemical analyst:

BS in Biochemistry, Clemson University, May 1995

Graduate Studies in Biochemistry (24 credit hours), Clemson University, May 1996

Extensive Training in Various Forms and Disciplines of Instrumentation

Method Development on Various Forms of Instrumentation

Certification in Forensic Drug Analysis at Spartanburg County Sheriff's Office Forensics Laboratory, April 2003

DEA Forensic Chemist Seminar, September 2003

American Academy of Forensic Sciences Annual Meetings and Workshops, February 2004 and 2005

On March 26, 2012, Sharon Lilly submitted the following item(s) to me for testing or analysis:

(Date)

(Name)

L120247

I tested this/these item(s) using the following legally reliable forensic laboratory procedures:

☒ Chemical Test

☐ Microscopic

☐ Infrared Spectroscopy

☒ Gas Chromatography

☒ Mass Spectrometry

☐ Ultraviolet Spectroscopy

☐ Published Literature

☐ Other: _____

and am of the opinion the item(s) contain(s) the controlled substance:

See Report

Lisa D. S. Floyd

Lisa D. S. Floyd
Chemical Analyst

July 23, 2012

Date

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

SEARCH WARRANT

DATE: 02/29/2012

AGENT: P. Phillips

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

AFFIDAVIT

DESCRIPTION OF PROPERTY SOUGHT

Any type of illegal substances to include but not limited to Crack Cocaine, Powder Cocaine, Marijuana, Heroin, Prescription Medication, and Ecstasy (MDMA). Furthermore, any monies and/or any paraphernalia specifically relating to the use, sale, manufacture, and packaging of said illegal substances. This paraphernalia includes but is not specifically limited to baggies, scales, pipes, and plastic containers (bags/bowls). In addition, any type of instrumentality used in connection with the use, sale, manufacture, and / or packaging of said illegal substances; to include but not limited to documentation, computers, radio transmission devices, and surveillance equipment. In addition, any type of weapons or ballistic resistant materials such as bullet proof vests that may be used in connection with the sale and distribution of said illegal substances. These weapons may include but are not limited to handguns and / or long guns. Any type of locked or unlocked compartments, containers, safes, etc; which may contain additional evidence of illegal criminal activity. Any currency, monies, or property directly related to the sale and distribution of illegal drugs and/or proceeds of such.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

The location to be searched is room # 205 at the Days Inn Hotel located at 3650 Waccamaw Blvd in the Myrtle Beach section of Horry County. The hotel complex is a multi-floor complex composed of six levels and has a light brown / tan exterior. The complex is designed in a elongated rectangle fashion with the front side of the room windows facing west. There is a main entrance to the hotel which is attached to the office section which faces out towards Waccamaw Blvd (south). The complex is also composed of a side entrance, which is a glass door that opens outward out towards the paved parking lot, on the west side of the building. The room to be searched (205) is located on the 2nd floor of the hotel. Room # 205 is equipped with a tan in color entrance/exit door that has metal keycard box and handle attached to the left side. There is a light tan in color placard affixed to the center of the door with the numbers "205" prominently displayed. There is a "no smoking" symbol sign affixed the door directly below the number "205" and a peephole directly below the "no smoking" sign.

Any persons inside of room # 205 are assumed to be involved in the sale and distribution of illegal drugs. Therefore, any person(s), and property belonging to said persons, inside or associated with the property are to be searched thoroughly for illegal contraband and/or drug evidence. In addition, any vehicles parked at the hotel that are directly related to the occupants or visitors of room # 205 are to be search for illegal contraband or items related to such.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

SEARCH WARRANT

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY OF HORRY COUNTY:

IT APPEARING FROM THE ATTACHED AFFIDAVIT THAT THERE ARE REASONABLE GROUNDS TO BELIEVE THAT CERTAIN PROPERTY SUBJECT TO SEIZURE UNDER PROVISION OF SECTION 17-13-140, 1976 CODE OF LAWS OF SOUTH CAROLINA, AS AMENDED, IS LOCATED ON THE FOLLOWING PREMISES:

DESCRIPTION OF PREMISES (PERSON, PLACE OR THINGS)
TO BE SEARCHED

The location to be searched is room # 205 at the Days Inn Hotel located at 3650 Waccamaw Blvd in the Myrtle Beach section of Horry County. The hotel complex is a multi-floor complex composed of six levels and has a light brown / tan exterior. The complex is designed in a elongated rectangle fashion with the front side of the room windows facing west. There is a main entrance to the hotel which is attached to the office section which faces out towards Waccamaw Blvd (south). The complex is also composed of a side entrance, which is a glass door that opens outward out towards the paved parking lot, on the west side of the building. The room to be searched (205) is located on the 2nd floor of the hotel. Room # 205 is equipped with a tan in color entrance/exit door that has metal keycard box and handle attached to the left side. There is a light tan in color placard affixed to the center of the door with the numbers "205" prominently displayed. There is a "no smoking" symbol sign affixed the door directly below the number "205" and a peephole directly below the "no smoking" sign.

Any persons inside of room # 205 are assumed to be involved in the sale and distribution of illegal drugs. Therefore, any person(s), and property belonging to said persons, inside or associated with the property are to be searched thoroughly for illegal contraband and/or drug evidence. In addition, any vehicles parked at the hotel that are directly related to the occupants or visitors of room # 205 are to be search for illegal contraband or items related to such.

NOW, THEREFORE, YOU ARE HEREBY AUTHORIZED TO SEARCH THE SUBJECT PREMISES FOR THE PROPERTY DESCRIBED BELOW, AND TO SEIZE SUCH PROPERTY IF FOUND:

DESCRIPTION OF PROPERTY

Any type of illegal substances to include but not limited to Crack Cocaine, Powder Cocaine, Marijuana, Heroin, Prescription Medication, and Ecstasy (MDMA). Furthermore, any monies and/or any paraphernalia specifically relating to the use, sale, manufacture, and packaging of said illegal substances. This paraphernalia includes but is not specifically limited to baggies, scales, pipes, and plastic containers (bags/bowls). In addition, any type of instrumentality used in connection with the use, sale, manufacture, and / or packaging of said illegal substances; to include but not limited to documentation, computers, radio transmission devices, and surveillance equipment. In addition, any type of weapons or ballistic resistant materials such as bullet proof vests that may be used in connection with the sale and distribution of said illegal substances. These weapons may include but are not

limited to handguns and / or long guns. Any type of locked or unlocked compartments, containers, safes, etc; which may contain additional evidence of illegal criminal activity. Any currency, monies, or property directly related to the sale and distribution of illegal drugs and/or proceeds of such.

THIS SEARCH WARRANT SHALL NOT BE VALID FOR MORE THAN TEN DAYS FROM THE DATE OF ISSUANCE.

A WRITTEN INVENTORY OF ALL PROPERTY SEIZED PURSUANT TO THIS SEARCH WARRANT SHALL BE MADE TO Judge Gregory Deak Blanton WITHIN TEN DAYS FROM THE DATE OF THIS WARRANT, AND A COPY OF SUCH INVENTORY SHALL BE FURNISHED TO THE PERSON WHOSE PREMISES ARE SEARCHED IF DEMAND FOR SUCH COPY IS MADE.

A COPY OF THIS SEARCH WARRANT SHALL BE DELIVERED TO THE PERSON IN CHARGE OF THE PREMISES SEARCHED AT THE TIME OF SUCH SEARCH IF PRACTICABLE, AND, IF NOT, TO SUCH PERSON AS SOON THEREAFTER AS IS PRACTICABLE. IN THE EVENT THE IDENTITY OF THE PERSON IN CHARGE IS NOT KNOWN OR IF SUCH PERSON CANNOT BE FOUND AFTER REASONABLE DILIGENCE IN ATTEMPTING TO LOCATE THE PERSON, A COPY SHALL BE ATTACHED TO A PROMINENT PLACE ON SUCH PREMISES.

HORRY COUNTY, S. C.

2/29/, 2012

2:24pm

Gregory Deak Blanton (L.S.)
SIGNATURE OF ISSUING JUDGE

REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY
SOUGHT IS ON THE SUBJECT PREMISES

During the month of February 2012, agents of the 15th Circuit Drug Enforcement Unit conducted multiple surveillance operations at the Days Inn Hotel located at 3650 Waccamaw Blvd in the Myrtle Beach section of Horry County in reference to illegal drug sales.

Throughout the course of the ongoing investigation, the agents learned that one HENRY LEE KINLAW JR (aka "Gutter", aka "Gunner") was currently staying at the hotel and was actively selling illegal drugs (specifically crack cocaine) to various buyers as they came to visit him at said hotel. The agents further learned that the buyers would enter the hotel via the side entrance and meet with KINLAW in the stairwell of the hotel for the illegal drug transactions to occur. In addition, the agents learned that KINLAW's primary mode of transportation was a blue in color 2008 Chevy Impala bearing SC registration HTA885.

During the surveillance, the agents did positively identify HENRY LEE KINLAW as they observed him entering and exiting the hotel on multiple occasions by way of the side entrance. The agents also confirmed that KINLAW did operate the above mentioned Chevy Impala as they viewed KINLAW driving said vehicle on multiple occasions.

Throughout the course of the surveillance operations, the agents did observe multiple persons arrive at the hotel in various vehicles, park in the in the western most parking lot, exit their vehicle, and enter the hotel via the side entrance located on the west side of the hotel. These persons would stay inside of the hotel complex for approximately 20-30 seconds and then exit again via the side door. This activity was consistent with street level drug sales and did match the information gained by the agents of the DEU.

To further verify this information, the agents did conduct a traffic stop on one of the persons viewed leaving the hotel after visiting for mere seconds. During the stop, the agents did locate a quantity of crack cocaine on the person who freely admitted to purchasing the drug from KINLAW while inside the stairwell of the hotel.

The agents did seek and obtain an arrest warrant for KINLAW for violating the SC State Statute 44-53-375 "Distribution of Crack Cocaine" on 02/28/2012.

On 02/29/2012, the agents did observe KINLAW inside of the Crabtree Memorial Gymnasium located at 1004 Crabtree Ln in Myrtle Beach, SC. Having an active arrest warrant for KINLAW, the agents decided to wait for KINLAW to exit the gym and return to his vehicle (the 2008 blue in color Chevy Impala) where they would then approach and place KINLAW under arrest.

At approximately 1300 hours, the agents did view KINLAW exit the gym and approach the blue in color Impala. At this time, the agents approached KINLAW, identified themselves, informed that they had an active arrest warrant, and successfully placed KINLAW under arrest.

During a search incident to arrest, the agents did locate a "DAYS INN" keycard on KINLAW's person. Suspecting that KINLAW was storing more illegal drugs, specifically crack cocaine, inside of his room at the Days Inn, the agents returned to the hotel and spoke with the front desk staff. After explaining the situation, the staff did confirm that KINLAW was a resident of their hotel and provided KINLAW's room number (205). The staff then confirmed that the keycard the agents found on KINLAW's person was activated to room # 205.

Agent J. Brown (DEU) then conducted a K-9 sniff of the exterior of KINLAW's room door (# 205). The K-9 ("Jari") did give a positive alert indicating the presence of drugs inside of room # 205.

Given the above listed information, there is probable cause to believe that more illegal drugs (specifically crack cocaine) are being stored inside, and distributed from room # 205 at the Days Inn Hotel located at 3650 Waccamaw Blvd in Myrtle Beach, SC 29579 (within the county of Horry).

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 29th DAY OF February, 2012

Shirley Hunt Blanton
SIGNATURE OF JUDGE

2:24 pm


AFFIANT
ADDRESS: PO BOX 1275.
CONWAY, SC. 29527
PHONE (843) 488-4351

STATE OF SOUTH CAROLINA)
 COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
 OF THE FIFTEENTH JUDICIAL CIRCUIT

Henry Lee Kinlaw,
 S.C.D.C. No. 271267,

Case No.: 2015-CP-26-3714

Applicant,

RETURN

v.

State of South Carolina,

Respondent.

2015 FEB 18 PM 1:35
 CLERK OF COURT

In response to the post-conviction relief application filed May 19, 2015 the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Horry County Clerk of Court's orders of commitment. The Horry County Grand Jury indicted the Applicant at the May 2012 term of General Sessions for trafficking cocaine base more than 28 grams, less than 100 grams, second offense (2012-GS-26-01698); distribution of crack cocaine, second offense (2012-GS-26-01699); and trafficking cocaine more than 28 grams, less than 100 grams, second offense (2012-GS-26-01700). Russell Blake Long, Esquire represented the Applicant.

On November 3, 2014 the Applicant pled guilty as indicted. The Honorable John C. Hayes sentenced the Applicant to fifteen (15) years imprisonment for trafficking in cocaine base 28 to 100 grams, second offense; fifteen (15) years imprisonment for possession with intent to distribute cocaine base or meth, second offense; and fifteen (15) years imprisonment for trafficking in cocaine, 28 to 100 grams, second offense, to be served concurrently. The

Applicant did not appeal.

Attached herewith and incorporated herein by reference are the records of the Horry County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript.

II.

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

1. Ineffective assistance of counsel.
 - a. "Failure to investigate, prepare for and motion to dismiss charges of distribution of crack cocaine: trafficking in crack-cocaine 28-100grams: and trafficking cocaine 28-100 grams because arrest warrant and affidavit in support of was not supported by probable cause."
 - b. "Defense counsel advised Kinlaw that the State would allow him to plead guilty to all charges for a five (5) year total sentence. Counsel did not inform Kinlaw when the plea offer expired."
 - c. "Counsel did not advise me that I had a meritorious State and Federal Constitutional claim and that if I went on to trial, that I could challenge the trial judges denial denial [sic] of suppression motion."
 - d. "Arrest warrant was invalid and counsel should have objected to and motioned to dismiss warrant because of its invalidity."
 - e. "Counsel was ineffective during his presentation regarding the suppression hearing. Counsel failed to investigate adequately prepare and thoroughly argue the suppression of the drug evidence."
 - f. "Plea counsel's representation fell below an objective standard of reasonableness and prejudiced Kinlaw."
 - g. "Plea counsel's performance was deficient as it fell below 'an objective standard or reasonableness' when plea counsel failed to inform Kinlaw when the State's plea offer would expire."
 - h. "Failure to investigate the confidential driver, failed to do a supplemental Brady/Rule 5 motion, when five 5 days prior to trial, the State released the name of the confidential driver to counsel."
 - i. "Failure to obtain confidential driver's criminal history and any all information concerning his being a potential confidential informat ("CI") and, if so, his credibility and reliability."
 - j. "Counsel failed to obtain any and all surveillance videos and audio recordings and any video(s) of the traffic stop of the driver; and"

- k. Counsel failed to obtain any agreement for driver for his/her cooperation and agreement to testify against Kinlaw."
- l. Failure to file direct appeal.
 - i. "Instructed counsel to file an appeal. Counsel did not file direct appeal."
 - ii. "Failed to file an appeal or notice of intent to appeal the convictions and sentences in order to protect Kinlaw constitutional rights, therefore plea counsel was constitutionally ineffective and as a result Kinlaw was denied his only appeal as matter of right."
- 2. Involuntary Guilty Plea
 - a. "Counsel coerce Kinlaw to enter a plea of guilty."
 - b. "Counsel's inaccurate advice and failure to thoroughly prepare for trial led to Kinlaw's guilty plea."
 - c. "Counsel advice to plead guilty was deficient, because Kinlaw had a valid legal challenge to the denial of the suppression motion no direct appeal."
 - d. "Kinlaw plead guilty because of deficient advice and lack of an alternative, and he did not do so voluntarily or knowingly."

III.

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

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

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

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

Respondent asserts that Applicant’s claim that he entered an involuntary guilty plea is without merit. In post-conviction relief cases, an Applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338

S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). An Applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the Applicant would not have pleaded guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An Applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985); Bennett v. State, 371 S.C. 198, 204, 638 S.E.2d 673, 675 (2006).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a criminal defendant must be advised of the constitutional rights he is waiving. Id. at 243, 89 S. Ct. at 1712. Specifically, the accused must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id. Moreover, a criminal defendant entering a guilty plea "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "must be established by a complete record and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29,

34, 528 S.E.2d 418, 421 (2000).

When determining issues relating to guilty pleas, the Court will consider the entire record, including the transcript of the guilty plea and the evidence presented at the PCR hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000).

The Respondent submits the record fully supports the knowing and voluntary nature of Applicant's plea. However, allegations regarding the voluntariness of the plea may raise a question of fact that is not conclusively refuted by the record. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. at 265, 305 S.E.2d at 248.

V.

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

VI.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

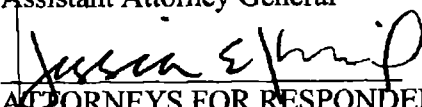
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

JESSICA E. KINARD
Assistant Attorney General

By:


ATTORNEYS FOR RESPONDENT
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

Feb 17, 2016

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

HENRY LEE KINLAW, #271267)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2015-CP-26-3714

AFFIDAVIT OF SERVICE BY MAIL

2016 FEB 18 PM 1:35

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Steven W. Fowler, Esquire
1019 Highway 17 South #222
North Myrtle Beach, SC 29582

DATED this 17th day of February, 2016.


 Norma Bigbee, Legal Assistant
 For Respondent

1 State of South Carolina) Court of Common Pleas
2 County of Horry) 2015-CP-26-03714

3

4

5 Henry L. Kinlaw)
6 vs.) Transcript of Record
7 State of South Carolina)

8

9

May 24, 2017
Conway, South Carolina

10

11 BEFORE:

12 Honorable Roger E. Henderson, Judge.

13

14 APPEARANCES:

15

Steven W. Fowler, Esq.
Attorney for the Applicant

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17 Johnny E. James, Jr., Esq.
Attorney for the State

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Teresa J. F. Bautz, RPR
Official Court Reporter

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23

24

25

1	I N D E X				
2	WITNESS	DIRECT CROSS REDIRECT RECROSS			
3	Henry L. Kinlaw				
4	Mr. Fowler	8	--	61	--
5	Mr. James	--	52	--	--
6	Russell B. Long				
7	Mr. James	63	--	86	--
8	Mr. Fowler	--	76	--	--

9

10

11

12

E X H I B I T S

13

NO.	DESCRIPTION	ID	EV

14

Plaintiff's-1	Pro Se Brief	8	--

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Exhibits retained by Clerk of Court.

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1 (The hearing commenced at approximately 2:01 p.m.)

2 THE COURT: You may be seated.

3 MR. JAMES: Your Honor, if it may please the
4 Court, this is the case of Henry Kinlaw versus State of
5 South Carolina, Docket No. 2015-CP-26-3714. Mr. Kinlaw
6 was indicted in May 2012 for trafficking cocaine
7 between 28 and 100 grams, trafficking cocaine base
8 between 28 and 100 grams and distribution of cocaine
9 base. He was represented on those charges by Russell
10 B. Long, Esquire. Mr. J. Stephen Grooms and Mr. M.
11 Travis Hyman represented the State.

12 On November 3rd, 2014, Mr. Kinlaw proceeded to
13 trial before the Honorable John C. Hayes. After a jury
14 was drawn and after the Court denied Mr. Kinlaw's
15 pretrial motions seeking separate trials, a continuance
16 and suppression of the evidence, he entered a straight
17 plea of guilty. Judge Hayes sentenced Mr. Kinlaw to 15
18 years. This PCR was filed May 19, 2015. Mr. Kinlaw is
19 present and he is represented by Stephen W. Fowler,
20 Esquire. Your Honor, the State is ready to proceed.

21 THE COURT: Mr. Fowler?

22 MR. FOWLER: Your Honor, before we get started, my
23 client, I am proposing him to take the stand, he needs
24 to be able to move his right arm a little bit. I was
25 wondering if he could have his right arm not completely

1 taken off the shackles, but if it could be loosened a
2 little bit, Your Honor?

3 THE COURT: How does security feel about that?

4 THE DEPUTY: We can loosen it, but we can't remove
5 it.

6 MR. FOWLER: And to be clear, I'm not asking for
7 it to be removed, just loosened a little bit.

8 (Discussion off the record.)

9 THE COURT: Thank you, sir. You can be seated.

10 MR. FOWLER: Your Honor, before we get started, I
11 have a brief that I'd like to submit to the Court.
12 I've provided this to the Attorney General's office
13 earlier today, and they should have had plenty of time
14 to take a look at it, Your Honor.

15 MR. JAMES: Your Honor, we did indeed receive this
16 just before we broke for lunch. Upon a extremely
17 summary review, because, again, we saw it today, it is
18 a 19-page typewritten document entitled, pro se brief,
19 the first 14 pages of which advance what appear to the
20 State to be direct appeal arguments against the various
21 aspects of Mr. Kinlaw's case.

22 And then the last, I believe, four pages of it
23 appear to be arguments to the tune of ineffective
24 assistance of counsel, which also moved back into those
25 first 15 pages. And though the State has had time to

1 glance over it very quickly, I have not had time to
2 investigate it fully and read up on the case law cited
3 in it. It is a -- frankly, this would be better than
4 some of the direct appeal briefs that I've looked at
5 while working at the Attorney General's office.

6 To the extent that the Court might interpret this
7 as an amendment to his application for post conviction
8 relief, the State would respectfully ask the Court to
9 strike it. It's the day of and it is entirely too late
10 to go about amending his application. To the extent --
11 furthermore, as I indicated, the first 15 pages are
12 arguments for direct appeal. PCR is not a substitute
13 for direct appeal.

14 And, therefore, to the extent he is directly
15 challenging these outside of context of ineffective
16 assistance of counsel, those claims would not be
17 cognizable anyway.

18 To the extent that the Court would like to
19 consider this as argument based on the allegations
20 already made which are voluminous, the State has much
21 less of a concern. Though I am somewhat alarmed that
22 this is another pro se filing by an individual who is
23 represented by counsel, and I am concerned about the
24 potential hybrid representation that I'm practicing
25 against both Mr. Fowler and Mr. Kinlaw working parallel

1 as opposed to as one.

2 So to the extent that the Court would consider
3 this in light of the allegations already made, the
4 State has no objection. To the extent that the Court
5 would consider this as an amendment in any way, shape
6 or form to add to the application, the State would
7 oppose that and we respectfully request that the Court
8 strike any portion of it that it would interpret as an
9 amendment.

10 MR. FOWLER: And, Your Honor, it's my
11 understanding this is not an amendment or a change.
12 This basically just continues on in terms of the case
13 law that he has provided the Court into the original
14 application for relief that he submitted to the Court
15 on May 19th, 2015, I believe is the date stamp from the
16 Horry County Clerk of Court.

17 So we would just as to the assuaging the fears of
18 the Attorney General's office, this is basically just a
19 continuance of what has been done. And there's no
20 hybrid representation, Your Honor, I'm the attorney.
21 He is very knowledgeable about the case. I encourage
22 him, I've encouraged him and all my clients in my
23 discussions with them to bring up any issues they feel
24 might be relevant for not only this Court but for any
25 appeals or what have you.

1 So, he is very intelligent, he's very
2 knowledgeable about the case law in this case, Your
3 Honor, as you can see from his 44-page application.
4 And we would like for it to be submitted, Your Honor.

5 THE COURT: All right. You can be seated, sir.
6 All right. With regards to this brief, I certainly
7 would not consider it an amendment because of the
8 timeliness of this being filed. This having been
9 sprung on you at the very last minute, if you would
10 like if you deem it appropriate or necessary, if you
11 would like to submit some sort of brief, you know,
12 setting forth your position at the conclusion of this
13 hearing, I'll give you several days to do that or as
14 much time as you need, quite frankly.

15 Because I'm sure he spent lots of time, you know,
16 preparing this document himself, so I'll give you
17 adequate time to do so. And so I'll now just basically
18 consider it argument in light of what's already been
19 filed.

20 MR. FOWLER: Yes, sir. All right.

21 THE COURT: And I will receive it and review it
22 and look at it.

23 MR. FOWLER: Your Honor, if I may approach, I have
24 provided the Attorney General with a copy, and I'm
25 providing you a copy, and I'm providing the clerk a

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1 copy for the record.

2 THE COURT: Okay.

3 (WHEREUPON, Plaintiff's Exhibit No. 1 was marked
4 for identification only.)

5 MR. FOWLER: If we may proceed, Your Honor, at
6 this time I'd like to call Mr. Henry Lee Kinlaw, Jr.,
7 to the stand, please.

8 THE COURT: All right. Come around, Mr. Kinlaw.

9 HENRY L. KINLAW, JR., after being duly sworn,
10 testified as follows:

11 THE CLERK: Please be seated.

12 DIRECT EXAMINATION

13 BY MR. FOWLER:

14 Q Mr. Kinlaw, if you would, please state your name
15 to the Court, please.

16 A Henry Kinlaw.

17 Q And that's junior; correct?

18 A Henry Kinlaw, Jr.

19 Q And you are under oath at this time and you are
20 speaking in a microphone. And if you would, in
21 response to my questions, please speak slowly and
22 deliberately so that the court reporter who's sitting
23 next to you and the clerk's office and the judge can
24 all understand and go forward with your testimony.

25 You basically, there was a -- you have made an

1 application in regards for an application of post
2 conviction relief; correct?

3 A Yes, sir.

4 Q And there are various issues that you feel in that
5 application are relevant; is that correct?

6 A Yes, sir.

7 Q Okay. And in the application you mentioned the
8 case of Strickland versus Washington; is that correct?

9 A Yes, sir.

10 Q What is your understanding of that case?

11 A My understanding of the case, I was just showing
12 that my attorney was ineffective. And I have to show
13 that prejudice due from this ineffective assistance of
14 counsel.

15 Q And you feel like your testimony perhaps -- well,
16 at this point relates back to Strickland and its
17 tenets; correct?

18 A Yes, all of my issues will.

19 Q Okay.

20 MR. FOWLER: May I approach the witness, Your
21 Honor?

22 THE COURT: Yes, sir.

23 Q And I'm not entering this into evidence, but I
24 think it's already on the record. Can you identify
25 this document, please.

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1 A Transcript of the record, November the 3rd, 2014.

2 Q Okay. And what is this document in your
3 knowledge?

4 A That's a transcript from our court hearing, the
5 suppression hearing, pretrial hearing, and I pled
6 guilty, sir.

7 Q Okay. And tell me a little bit about that
8 hearing. What is your recollection --

9 MR. FOWLER: And if I may approach the witness a
10 little bit liberally here, Your Honor?

11 THE COURT: Yes, sir.

12 Q Tell me a little bit about that hearing, what your
13 recollection of it was.

14 A My recollection of the hearing was my attorney
15 informed me of two issues prior to going to trial.
16 That was prior to going to trial the search warrant is
17 defective based on one defect, facial defect, was it
18 did not state forth any information to the reliability
19 of the informant. And it was no independent
20 verification of the informant allegations.

21 And number two was inform me of -- what was that.
22 I can't recollect. Oh, yeah, the Neil versus Biggers
23 hearing, out-of-court identification.

24 Q Okay. But you in my discussions with you and both
25 in your application you've listed several issues that

1 you have in terms of his representation of you; is that
2 correct?

3 A Yeah. I have mentioned several that counsel
4 failed to discover, counsel failed to inform me of and
5 counsel failed to raise that would have changed the
6 outcome of the proceeding.

7 Q Among others; correct?

8 A Yes.

9 Q Okay. Now, before this hearing on the 13th -- or
10 November 3rd, 2014, did your attorney share discovery
11 with you?

12 A Yes. He shared few of the discoveries, with me,
13 yes, sir.

14 Q But do you know if he received all the discovery
15 that he needed to properly defend you in this case?

16 A I don't know. All the stuff that I have I got
17 from him, so he should have most of the stuff, like the
18 arrest warrants and the search warrant.

19 Q Right. If you'll take a look at page 40 of the
20 transcript?

21 A Um-hum.

22 Q Could you read lines four through eight into the
23 record.

24 A Mr. Long: My motion is based on the fact that I
25 wasn't provided this information in the discovery.

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1 First, I would motion to dismiss the case. But if Your
2 Honor doesn't see fit to do that, I will at least ask
3 for a continuance in order to get more information on
4 this particular witness.

5 Q Okay. Well, now, tell me a little bit about that.
6 It sounds like your attorney did not have proper
7 discovery at that time; is that -- that's what you
8 read?

9 A Oh, yes, yeah. I guess the State failed to
10 disclose some information which seems like it was
11 highly false due to the facts of the case. Because in
12 the search warrant affidavit, the investigative report,
13 the crime report, there's no allegation that he
14 received the information about to start the
15 investigation from the office, received the information
16 from a confidential informant named China Mathis that
17 has provided information in the past. He has no
18 documentation of that.

19 And the case was -- I got arrested November
20 the 12th, 2000 -- I mean, yeah, November the 29th,
21 2012. And my case went to trial November the 3rd,
22 2014, which was two years and eight months later. And
23 that information never came out prior to the testimony
24 in trial.

25 Q So do you feel like that information was important

1 before you went to court that day?

2 A Yes, that information was very important because
3 it prevented me from making a defense to challenge
4 that. When it comes to dealing with probable cause of
5 the search warrant, because when you're dealing with
6 someone that has provided information in the past, as
7 opposed to an anonymous informant, it has a tremendous
8 effect on the probable cause determination when dealing
9 with an arrest warrant or search warrant.

10 Q Okay. So that discovery played a hand in terms of
11 what you did in court that day -- or strike that. That
12 lack of discovery played a hand in what you did in
13 court that day; is that correct?

14 A Yeah. That's the information was true. But I
15 mean, based on the facts, yes, he did have -- and
16 counsel just failed to motion to have that information
17 strike from being used as part of the probable cause
18 determination at the suppression hearing.

19 Q So --

20 A On the search warrant.

21 Q So do you think your lawyer was lacking in terms
22 of his -- did he not do the duty that he was supposed
23 to do in finding that information out?

24 A Yes, he failed to -- at that time the State
25 withheld the information, so he had no knowledge of it.

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1 So only thing he did at that time, he failed to request
2 the trial judge to strike the officer's base of
3 knowledge from being used as part of the probable cause
4 determination in regards to the search warrant.

5 Q Okay. Now, even in -- now, you did plead guilty
6 at this hearing; is that correct?

7 A Yes, I pled guilty. But I have numerous issues I
8 would like to present to the Court. The facts of the
9 Court would have clearly informed the Court the
10 information that I have, counsel would have done what I
11 said he should have done prior to the pleadings,
12 because I pled after the suppression hearing, counsel
13 had done the stuff that I say he should have done which
14 I will show later on as I get into my case, I would not
15 have pled guilty, I would have went to trial.

16 And most importantly, most of the facts of my case
17 would have got suppressed if my counsel would have
18 pointed out the defects in the illegal arrest based on
19 the invalid arrest warrant. And also counsel would
20 have pointed out defects in the search warrant.
21 Counsel would have thoroughly argued the suppression of
22 the out-of-court identification based on the fact it
23 really did not -- was not reliable under the standards
24 set forth in Neil versus Biggers.

25 And counsel would have pointed out the false

1 statements that was in the affidavit that due to Franks
2 versus Delaware. And if you exclude those false
3 statements, the Court would find to be invalid based on
4 those facts. If counsel would informed me of the
5 defect in the chain of custody, I would not have pled
6 guilty. If counsel would informed me of the defect in
7 the search warrant based on the fact that it did not
8 contain any information as to reliability of the canine
9 that was probable cause for the warrant, I would not
10 have pled guilty.

11 If he would have channelled that in a pretrial
12 hearing, the judge would have -- reasonable
13 probability, the judge would have found the warrant to
14 be invalid for lack of probable cause. And that would
15 have got it suppressed, which the State did not have no
16 evidence to convict me, try me for trafficking cocaine
17 or distribution -- or trafficking crack cocaine.

18 THE COURT: Mr. Kinlaw, back up just a hair.

19 THE APPLICANT: All right.

20 Q But a lot of this information came to you after
21 that day, November 3rd, 2014?

22 A Yeah. After that date when I got sentenced, got
23 my discovery and I started going to the law library.
24 And I discovered all these facts of the case, I mean.

25 Q Now, in your pleadings of that day, if you would

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1 take a look at page 71, lines 19 through 24, could you
2 read that to me, please.

3 A Mr. Kinlaw: No, sir, just a few things of the
4 evidence that was presented to me. I didn't receive
5 like the evidence like the name he gave, the new
6 informant and stuff like that. This was like new
7 evidence that we didn't get a chance to look at before
8 we went to trial. The evidence wasn't presented to me.

9 Q So even at court that day you indicated that there
10 was evidence lacking; is that correct?

11 A Yes.

12 Q And that made an impact on what you did that day;
13 correct?

14 A Yes. It made a tremendous impact on the stuff
15 that I did that day.

16 Q If you would take a look at page 72, lines two
17 through eight, initially if you could read that,
18 please.

19 A Mr. Long: Your Honor, I did explain that in my
20 presentation. He's just saying, he's saying based on
21 the proceedings so far, especially, you know, a
22 witness, the CI that we didn't have information on and
23 most importantly, the combination of these be tried
24 together. He's going a long ways towards changing his
25 plea from not guilty to guilty.

1 Q Okay. So in this paragraph you're basically
2 saying that didn't have the information on hand; is
3 that correct?

4 A Yes, none of the information. And I was, like I
5 said, what I would like to get into further --

6 Q We will.

7 A -- the details that -- numerous stuff he did not
8 inform me of prior to that suppression hearing.

9 Q All right. And then, lines 17 and 18 on page 72,
10 could you read that, please.

11 A Mr. Kinlaw: So I'm giving up all my rights from
12 the motion hearing to pretrial motion.

13 Q So even at that point, were you clear about what
14 you were giving up or not?

15 A No, not at the time. I was not informed of a lot
16 of specific things I could have went to trial and
17 appealed.

18 Q All right. Is that why you had some questions
19 there? I mean -- well, were you confused at that point
20 of the trial or the hearing in terms of giving up,
21 pleading guilty?

22 A Yes. I was confused because at that time I had no
23 intention of pleading guilty because this case, like I
24 said, I was arrested in November the 12th of --
25 November the 29th of 2012. And during that time they

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1 had numerous solicitors on the case, three different
2 solicitors, I think, starting with Mr. DeBusk. And I
3 had no intention of ever pleading guilty.

4 And then in November of -- not November, March
5 of 2014, I was informed by Mr. Long's secretary and
6 Mr. Long that a new solicitor had the case which was
7 the third solicitor which was Mr. Grooms. And
8 Mr. Grooms said -- he reviewed the case and he said the
9 distribution charge was no good, but the trafficking
10 charge was still good, which was confusing to me at the
11 time --

12 Q All right.

13 A -- because...

14 Q So you feel -- is it your statement to this Court
15 that you didn't feel that you were adequately
16 represented at that time?

17 A Yes. I was not informed of specific issues that
18 would change the outcome of the plea -- I mean, not the
19 plea but the proceeding of the trial because my
20 attorney would have done everything he was supposed to
21 do, the evidence would have got suppressed at the
22 suppression hearing and would never been a guilty plea.

23 Or if he didn't inform me of all the facts, I
24 would have went to trial. And I would have never plead
25 guilty if he informed me that I could raise each

1 specific issue on direct appeal if I was found guilty.

2 And I know I would not plead guilty.

3 Q Okay. And on page 76, line 15, could you read
4 line 15 to the start of 16, please.

5 A Well --

6 MR. JAMES: I'm sorry, counsel, what page was
7 that?

8 MR. FOWLER: I apologize, page 74.

9 MR. JAMES: Thank you.

10 Q Lines 15 to halfway through 16.

11 A He said, well, he feels like he just -- he was
12 just educated on this case by Your Honor.

13 Q Okay.

14 A And given the parameters of the case.

15 Q Okay. And that was Mr. Long saying that; is that
16 correct?

17 A I guess so.

18 Q Well, it was.

19 A All right.

20 Q So even at that crucial point you did not have a
21 good -- is it fair to say you did not have a good
22 understanding of what was going on at that time?

23 A No, I did not. Because at the time, like I said,
24 my case was dragged on from two years and eight months
25 before I went to trial. And they switched prosecutors

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1 numerous times, and the case was just being stalled out
2 for I don't know what specific reason.

3 Like I said, last time was the last prosecutor
4 with Mr. Grooms, he was informed -- I was informed by
5 my attorney and his paralegal that, they said the
6 distribution charges was no good, they was just going
7 to try me on the trafficking.

8 Q You said there were different solicitors on this
9 case; is that correct?

10 A Yes. Because the person that started the case was
11 Mr. DeBusk. And Mr. DeBusk, I don't know why they kept
12 switching prosecutors on my case over and over, until
13 they get Mr. Grooms like two years later. Mr. Grooms
14 got it in March of 2014, and I went to trial in
15 November -- I went to trial November 3rd, 2014.

16 MR. JAMES: I'm going to file an objection here,
17 Your Honor. I don't see how the prosecutor's office
18 switching people assigned to the case is at all
19 relevant to any allegation that is cognizable in a post
20 conviction relief action. It provides some color, but
21 we should probably get on it with it.

22 THE COURT: What purpose?

23 MR. FOWLER: If I may ask a question, Your Honor.

24 Q Do you think that the switching of the solicitors
25 caused any issues in you getting your discovery?

1 A No, I don't think so. I mean, it was just like
2 the State was stalling the case. I'm just presenting
3 all the facts to the case to the Court. That's why I'm
4 explaining from how long this case went on before we
5 get into it.

6 Q In your application and in your discussions with
7 me, you've indicated that there's several issues that
8 you feel are relevant to this case; is that correct?

9 A Yes, sir.

10 Q Okay. One of those issues you brought up to my
11 attention and is in the application is the invalid
12 arrest warrant; is that correct?

13 A Yes, sir.

14 Q Okay. Tell me a little bit about, now, you
15 earlier stated that your testimony is under Strickland,
16 and everything kind of points to Strickland in terms of
17 this case; correct?

18 A Yes, sir.

19 Q Okay. Tell me a little bit about the invalid
20 arrest warrant, and what are some issues you feel like
21 your attorney was lacking in that arrest warrant?

22 A Okay, I have some --

23 Q In defending you against that arrest warrant.

24 A Can I give a copy of the arrest warrant to the
25 Court?

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1 Q I think it's in the file, if I may approach.

2 THE COURT: Yes, sir.

3 THE APPLICANT: Is it in the file?

4 MR. JAMES: The Court's packet provided by the
5 State should have a copy of the arrest warrant among
6 all of the other records of the Clerk of Court. Front
7 page of the packet would be the sentencing sheet,
8 indictment behind that and then a variety of arrest
9 warrants.

10 THE COURT: I do, I have those.

11 Q Can you identify what arrest warrant you're
12 referring to specifically at this point.

13 A Arrest warrant M-971717, distribution of crack
14 cocaine. I have a few documents I would like to
15 present with this to support my argument to him with
16 this invalid arrest warrant. I have some case law I
17 would like to present. And the 15th circuit grand jury
18 case summary that would establish that this warrant was
19 solely based on information from an unreliable
20 confidential informant.

21 And I have a copy of page two of the investigative
22 report that would establish this case was totally based
23 on an unreliable confidential informant that was
24 arrested on February the 28th, 2012, and allegedly said
25 the drugs were bought from me.

1 Q Well, let's go over that at this point. What
2 you're --

3 MR. JAMES: Your Honor, before we proceed further,
4 I'm going to make a cautious objection here. Legal
5 argument from the stand is not appropriate. We
6 wouldn't permit an expert witness to do it, and --

7 THE COURT: I agree.

8 MR. JAMES: -- I'm sure a non-expert would do it
9 either.

10 THE COURT: That would be the purpose of his brief
11 that he's filed, I would think, that he's cited these
12 cases in his brief or he should have.

13 MR. FOWLER: Yes, sir.

14 THE APPLICANT: Okay.

15 THE COURT: No, I'm not going to allow argument
16 from the stand, no. He can testify to the facts, go
17 from there.

18 THE APPLICANT: So can I ask the Court one thing?
19 So I can't --

20 THE COURT: No, you can't ask me anything.

21 THE APPLICANT: I mean, can I...

22 Q Well, I guess my question is, how does this case
23 law relate to the faulty -- the alleged faulty
24 performance of your attorney?

25 A Okay. The case law is in information that I have

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1 on the staff that wasn't actually invalid, which would
2 prove that the issue has merit. And I will show that
3 my attorney was ineffective for failing to discover
4 each defect in the arrest warrant. For example, my
5 attorney was ineffective for failing to discover that
6 the arrest warrant was invalid because it did not set
7 forth any facts to allow the magistrate to make an
8 independent determination to probable cause to be --
9 that the crime has been committed, okay.

10 And oral testimony by the arresting officer did
11 not the cure this testimony because it was solely based
12 information that was provided by an unreliable
13 confidential informant.

14 Q Okay. And this relates to your case how exactly?

15 A Because it's to going to show that my issue has
16 merit, and it will show that my attorney failed to
17 discover each defect that I have that I would like to
18 point out to the Court that's in this arrest warrant.

19 Q Well, can you articulate that from the stand in
20 terms of how he allegedly was faulty in his
21 performance, you know, in conjunction with that case
22 law?

23 A Yes, sir.

24 Q Can you do that for us, please.

25 A Yes, okay. This arrest warrant right here states

1 that within the past 72 hours the Defendant, Henry Lee
2 Kinlaw, did sell or distribute a quantity of crack
3 cocaine for exchange of cash money within a days in the
4 hotel located at 3650 Waccamaw Boulevard in Myrtle
5 Beach, South Carolina, Horry County.

6 Given the above stated facts, there is probable
7 cause to believe that the Defendant did violate the
8 South Carolina Statute 45-53-375, distribution of crack
9 cocaine.

10 Now, this warrant right here is invalid for a lack
11 of probable cause because the underlying affidavit
12 lacked probable cause. The defect number one, the
13 warrant does not set --

14 Q Okay, hold on just a second, let me clarify.
15 Based on your last sentence there, I think you stated
16 that that warrant lacks probable cause; right?

17 A Yeah, based on numerous defects, six defects, six
18 facial defects.

19 Q Okay. Can you name those defects to the Court.

20 A Yeah. Defect number one, the warrant does not set
21 forth any information to allow the magistrate to make
22 an independent determination that there is probable
23 cause to believe a crime has been committed. And oral
24 testimony could not cure this. Oral testimony was
25 provided because this warrant is solely based on

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1 information provided by an unreliable confidential
2 informant which is in our investigative report that was
3 pulled over after he left the hotel. And he alleged
4 that drugs were bought from someone at the hotel.

5 But officers had no independent verification of
6 these allegations because they did not search the
7 informant prior to the informant going back to the
8 hotel or nor was he had any surveillance within the
9 hotel during this time. The officers did not send the
10 informant back to do a controlled buy to independently
11 verify that the informant actually did bought drugs
12 from someone at the hotel, okay.

13 Defect number two, this warrant does not set forth
14 any facts to allow a magistrate to make an independent
15 determination that there's probable cause to believe
16 the person to be arrested committed a crime, that they
17 say alleged in the affidavit. Oral testimony could not
18 cure this defect because the officers did not have any
19 independent verification that the person to be arrested
20 committed a crime because they did not see the
21 confidential informant interact with anyone at the
22 hotel, did not have surveillance within the hotel on
23 February the 20th, 2012. The officer did not send the
24 confidential informant back to make a controlled buy to
25 verify this person bought drugs from a specific person

1 at the hotel on February 20th, 2012.

2 Defect number three, this warrant, the warrant
3 does not set forth any source of the allegations in it.
4 Defect number four, this warrant does not set forth any
5 information that the source of the information is
6 reliable. Oral testimony could not cure this defect
7 because the source of the information in it is the
8 unreliable confidential informant that was caught with
9 drugs in his possession some miles away from the hotel
10 which is clearly in the investigative report.

11 And the officers did not have any independent
12 verification of this. The officers did not witness any
13 hand-to-hand transaction or did not have any
14 surveillance within the hotel. The officers did not
15 send this unreliable confidential informant back to the
16 hotel to independently verify that he purchased drugs
17 from someone at the hotel.

18 Defect number five is there is no independent
19 verification of what transpired, the allegations
20 alleged in this affidavit. Oral testimony cannot cure
21 this because the officers did not have independent
22 verification that drugs were bought from a hotel from
23 Henry Lee Kinlaw, Jr., on February the 20th, 2012.

24 Defect number six is this warrant is solely based
25 on information based on an unreliable confidential

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1 informant and the driver of the car that was arrested
2 February the 28th, 2012. And officers did not have any
3 independent verification of the informant's allegation
4 because the officers did not go back to the hotel to
5 independently verify this person bought drugs from a
6 specific person. The officers did not witness any
7 hand-to-hand transactions, the officers' surveillance
8 of the hotel did not witness me in any criminal
9 activity or anything that looked like any criminal
10 activity.

11 The only thing officers surveillance did was
12 witness me enter the hotel after getting out of my car
13 to exit the hotel, to leave the hotel property. And
14 based on all these defects in this search warrant -- I
15 mean, this arrest warrant, this warrant is invalid for
16 a lack of probable cause under the Fourth Amendment of
17 the US Constitution, invalid under 17-13 of the South
18 Carolina code of laws, invalid under Article 1, Section
19 10 of the South Carolina Constitution for a lack of
20 probable cause.

21 And based on the fact that this warrant is invalid
22 and my arrest was illegal, any evidence that was
23 obtained after this illegal arrest must be suppressed
24 from fruits of the poisonous tree. And based on the
25 fact this warrant is invalid, they cannot prosecute me

1 for distribution of crack cocaine. And based on the
2 fact that the evidence must be suppressed as fruits
3 from the poisonous tree, that means any evidence that
4 they discovered after my arrest that was from the
5 search warrant that was issued must be suppressed --
6 was trafficking crack cocaine and trafficking cocaine.

7 Q Very good. So you've listed six things that you
8 feel like, and am I correct in saying that your
9 attorney did not represent you correctly on that?

10 A Yes, he did not discover or inform me of.

11 Q Okay, all right. Is there any -- and you've
12 mentioned the case law, and you mentioned the statutes
13 here in your testimony -- is there anything else about
14 the invalid arrest warrant that you feel like needs to
15 be brought up in terms of your attorney not
16 representing you completely on that?

17 A Yes. If my attorney would have properly prepared
18 for trial, do all the research the facts of the case,
19 and he would have discovered that the arrest warrant
20 was invalid for lack of probable cause, under the
21 Fourth Amendment of the United States Constitution and
22 invalid under Article 1, Section 10 of the South
23 Carolina Constitution.

24 He would have discovered that based on the fact
25 that this warrant is invalid and my arrest was illegal,

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1 that they could not have prosecuted me for distribution
2 of crack cocaine. And he also would have discovered
3 that based on the fact that my arrest was illegal and
4 evidence that was discovered after my illegal arrest --

5 MR. JAMES: We're getting into the same materials
6 that we just went over at extraordinary length.

7 THE COURT: Yeah. He's repeating himself.

8 MR. FOWLER: Yes, sir, Your Honor.

9 Q So if you would, just in response to my question,
10 answer the question, and I'll guide you hopefully in
11 terms of questioning, okay.

12 But now, so you mentioned that there was an
13 invalid search warrant as well, that's the second
14 thing, correct? Not the arrest warrant, but there was
15 an invalid search warrant; correct?

16 A Yes. What I'm saying about the arrest warrant is
17 that if he would have discovered that this arrest
18 warrant was invalid, he would have discovered that all
19 the evidence to be discovered from this arrest must be
20 suppressed, which means the State would not have any
21 evidence to try to trafficking cocaine or distribution
22 of cocaine or trafficking crack cocaine, which means
23 the State would have no evidence to convict me on any
24 of these charges.

25 Q Okay.

1 A If he would have challenged this on a motion to
2 suppress at the suppression hearing.

3 Q And that's on the invalid arrest warrant; correct?

4 A Yes.

5 Q All right. So we've talked about the invalid
6 arrest warrant. Now, you've also mentioned to me and
7 in the application, PCR application, that you're
8 contending there was an invalid search warrant; is that
9 correct?

10 A Yes.

11 Q What was the search warrant about?

12 A The search warrant was about -- there should be a
13 copy inside my brief -- but the search warrant was
14 based on information that was provided by, I guess,
15 alleged sources or what after my arrest and went to the
16 hotel. And my attorney did raise one defect. He
17 informed me of one defect in the search warrant that
18 was on the point of the search warrant not setting
19 forth any information to reliability of the informant.

20 And they did not independently verify anything
21 from the allegation, that was the only defect that he
22 informed me of. But the search warrant had numerous
23 other defects that he failed to discover and failed to
24 inform me of.

25 Q Okay. Well, all right. Just what you said, other

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1 than that one issue he brought up on the invalid search
2 warrant, what are some of the other issues that you say
3 he did not defend you properly on with the invalid
4 search warrant?

5 A Okay. The search warrant had numerous defects,
6 like number one, the search warrant --

7 Q How many defects are there?

8 A Well, there are three, and there is another one
9 that I will get to on -- an unreliable canine, he
10 failed to discover.

11 Q Okay. Well, let's go over the three that you
12 mentioned on the invalid search warrant.

13 A Okay.

14 Q What was the first one?

15 A The first one, it does not set forth any
16 information as to why the DEU officer believed I
17 committed a crime alleging that the distribution of
18 crack cocaine on February the 20th, 2012.

19 Q Okay. All right, so that's the first one. The
20 second one, what was that?

21 A The second one was it does not set forth any
22 information to reliability of the confidential
23 informant, and no independent verification of the
24 allegations. But at the same time, all of the -- both
25 of the defects were not cured by the officer's alleged

1 oral testimony at the suppression hearing.

2 Q Okay. And what was the third one that you say
3 under the invalid search warrant that your attorney,
4 you're alleging he improperly represented you?

5 A It does not set forth any information that drugs
6 were ever bought or seen in room 205, the location to
7 be searched.

8 Q Okay. So that's -- is that your contention about
9 the invalid search warrant?

10 A Yes. And it does not contain any statement of
11 independent verification of what transpired on February
12 the 20th, 2012, the day the officer was doing the
13 surveillance and they allege that someone bought drugs
14 from the hotel.

15 Q Okay. Moving on, you mentioned earlier briefly
16 about the unreliable canine. That's another issue that
17 you've raised in the application. Can you tell me a
18 little bit about how your attorney did not represent
19 you properly in terms of the canine search, apparently,
20 of the -- was it the hotel room; is that correct?

21 A No. The canine search, I mean, there was a
22 statement in the search warrant that they're using a
23 canine to sniff out the door, which based on that
24 statement, that statement did not set forth any
25 information to allow the management to make independent

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1 determination of the canine's reliability to establish
2 probable cause based on alert..

3 Q So did --

4 A That was --

5 Q -- was the canine brought to the alleged scene
6 after a search warrant was issued, or was it brought
7 without a search warrant?

8 A The canine was brought prior to the search
9 warrant. They used that in the search warrant as
10 information to get -- part of the information to get
11 the search warrant. But the search warrant did not set
12 forth any information as to the reliability of the
13 canine jarring to establish probable cause based on
14 alert to allow -- let the magistrate make an
15 independent determination.

16 Q Okay.

17 A That's one of the defects, too.

18 Q So basically you're saying that there was no --
19 your attorney made no issue to suppress that canine
20 search?

21 A He did not raise that issue, he did not inform me
22 of that issue. He did raise that issue at the
23 suppression hearing and pointed out the facts that I
24 pointed out in the brief. The warrant was found to be
25 invalid at the suppression hearing in which once he

1 finds him invalid for lack of probable cause under the
2 Fourth Amendment of the United States Constitution, and
3 invalid under Article 1, Section 10 of South Carolina
4 Constitution, the judge would have suppressed the
5 evidence. And the State would have had no evidence to
6 try me for trafficking crack cocaine or trafficking
7 cocaine.

8 Q Okay. So as to the invalid search warrant or an
9 unreliable canine, is there anything else that you
10 failed to mention about your attorney's performance
11 or --

12 A Yeah. It deal with the arrest warrant and the
13 invalid search warrant, my counsel would have informed
14 me, specifically informed me of those defects and
15 informed me that I could have raised this issue with a
16 valid arrest warrant on a motion to suppress, and
17 there's a possibility that the judge might deny my
18 motion. But I can still can go to trial and if found
19 guilty, I could challenge these issues on direct
20 appeal, I would not pled guilty. Because based on the
21 fact the arrest warrant is invalid, if the arrest
22 warrant was filed --

23 THE COURT: He's already testified about this.

24 MR. FOWLER: Yes. All right.

25 THE COURT: About the search warrant.

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1 MR. FOWLER: Right, okay.

2 THE COURT: He's repeating himself again.

3 Q Yeah, let's not repeat ourselves. I mean, I want
4 you to make sure you get these issues out and answer my
5 questions, but I just kind of wanted to -- let's move
6 on to another topic.

7 One of the issues you raised in the application is
8 the failure for your attorney to strike an officer's
9 basis of knowledge; is that correct?

10 A Yes.

11 Q Okay. Now, you're saying an officer testified
12 against you or you had some discovery information.
13 Tell me little bit about that.

14 A He testified that his basis of knowledge in
15 dealing with the search warrant was provided to him by
16 an informant of his named China Matthews, who provided
17 information in the past.

18 But if you review any of the documented evidence,
19 that name is not in any of the documented evidence.
20 There's no indication that he received anything from a
21 confidential informant of his, which been reviewed,
22 like I said, the investigative report, the crime
23 report, search warrant affidavit, anything, there's no
24 information to that.

25 Q Okay. So you never received any discovery about

1 the informant; is that correct?

2 A No, there's no information pertaining to he
3 received information about an informant, and...

4 Q And according to the record, the informant who was
5 not mentioned in discovery was the basis for the
6 officer's testimony; correct?

7 A Yeah, the basis of knowledge of him starting the
8 investigation which he used in the search warrant, and
9 my attorney failed to motion to have the officer's base
10 of knowledge struck from being used as part of the
11 probable cause determination.

12 Q Okay.

13 A At the hearing, on the search warrant.

14 Q Okay. Now, moving on, you mentioned there are
15 some false -- well, some false statements on the search
16 warrant, but you mentioned that earlier in your -- on
17 discussing the search warrant; is that correct? Well,
18 let me rephrase it like this, I apologize.

19 You said there were some false statements on the
20 search warrant; is that correct?

21 A Yes, there are --

22 Q Okay. And who --

23 A -- seven false statements in the search warrant
24 affidavit, knowingly false statements by the affiant,
25 Officer Phillips, in the affidavit.

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1 Q Okay. Were the false statements by one person or
2 by several people?

3 A By one person, the person who provided the
4 warrant, Officer Phillips.

5 Q Okay. So it was Officer Phillips; is that
6 correct?

7 A Yeah. That's the one that provided the search
8 warrant, sir.

9 Q Okay. So you're basically saying that there was
10 no -- that your attorney made no effort to strike
11 Officer Phillips' statements from anything; correct?

12 A No. First of all, you do -- there were two
13 different issues, sir. The issue that you're talking
14 about is my officer's failure to strike the officer's
15 base of knowledge from being used as part of the
16 probable cause determination.

17 When he was at the suppression hearing, he should
18 have struck that from being used, which would have then
19 left the warrant, had defects in the warrant, which I
20 can discuss. But I don't know if I can elaborate on
21 it, all the details.

22 Q Well if you can elaborate briefly with the Court's
23 indulgence, I mean, I don't want to repeat, but there's
24 so many different issues here. Could you elaborate on
25 that briefly without repeating yourself.

1 A Well, I guess it's in the brief. I mean, you
2 don't want me to elaborate on it too deeply. But when
3 dealing with the false statements in the affidavit, I
4 would have to get my notes out so I can show the Court
5 the false statements. I have them highlighted in the
6 search warrant, so I can elaborate on those facts.

7 Q Well, can you read from that search warrant the
8 false statements.

9 A Yes.

10 MR. FOWLER: And, once again, the search warrant
11 is already in evidence with the packet.

12 Q And please let us know when you get there.

13 A I'm going to get it, sir.

14 Q Do you have it?

15 A Yes, sir.

16 Q Okay. Now, you said there were several false
17 statements; is that correct?

18 A Yes.

19 Q All right. Now, why are you contending they're
20 false statements?

21 A Because the misrepresentation of the facts which I
22 have the statements or the -- parts of the transcript
23 that would support my argument in this case. Okay,
24 false statement number one is --

25 Q Okay, let's -- okay. So you said there's seven;

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1 correct?

2 A Yes.

3 Q Okay, let's go through those as succinctly as
4 possible, but I want you to make sure you elaborate on
5 it to the Court. What's false statement number one?

6 A Throughout the ongoing -- throughout the course of
7 the ongoing investigation, the agents learned that one
8 Henry Lee Kinlaw, Jr., AKA Gutter, AKA Gunner, was
9 currently staying at the hotel and was actively selling
10 illegal drugs, specifically crack cocaine, to various
11 buyers as they came to visit him at the hotel.

12 Q All right, that's number one; correct?

13 A Yes. That statement is false because the person
14 who gave the information did not state that Henry
15 Kinlaw by a legal name basis was currently staying at
16 the hotel.

17 Q Okay.

18 A The person stated that someone named Gutter or
19 Gunner was currently staying at the hotel. When the
20 officer put this false statement in the affidavit, that
21 would mislead, intentionally mislead the magistrate
22 into thinking that the source gave identified a person
23 by a legal name basis which Henry Lee Kinlaw, Jr. And
24 that would make the magistrate think that the person is
25 supplying some hard-to-gain, specific details.

1 Q Okay. What was false statement number two?

2 A The agents further learned that the buyers entered
3 the hotel, who decided and who to meet with Kinlaw in
4 the hotel stairwell for illegal drug action to occur.
5 This false statement is intentionally false because the
6 person did not state Kinlaw would meet them in the
7 stairwell of the hotel. No one ever stated that there
8 would be someone -- meeting someone in the hotel --

9 Q Okay.

10 A -- stairwell.

11 Q Okay.

12 A This would mislead the magistrate into thinking
13 the person's still providing specific, hard-to-gain
14 details.

15 Q Okay. What's false statement number three?

16 A False statement number three, false statement
17 number three is intentionally false statements. In
18 addition, agent learned that Kinlaw's primary mode of
19 transportation was a blue in color 2008 Chevy Impala
20 bearing South Carolina registration HT8-885. This is
21 an intentionally false statement by the affiant because
22 the person did not state Kinlaw, which would be a legal
23 name, was driving a specific car with a specific date,
24 2008 Chevy Impala, or and the source did not state the
25 specific license plate tag.

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1 This would mislead the -- intentionally mislead
2 the magistrate into thinking that the source provided
3 hard-to-gain, specific details making this information
4 seem a little more reliable.

5 Q Okay.

6 A Now, the transcript page 36, two through ten, if I
7 can read it, it was specifically --

8 Q Well, let's --

9 MR. FOWLER: Let me approach the witness, Your
10 Honor.

11 Q And we're still on number three of seven.

12 A Yes.

13 Q What transcript line are you referring to?

14 A Transcript page 36, line two through ten, will
15 show that what was actually said, what the person said.

16 Q Okay, all right.

17 A What the source actually told him.

18 Q All right. So you mention that to the Court.

19 What about false statement number four?

20 A False statement number four is during the stop the
21 agent did locate a quantity of crack cocaine on the
22 person who freely admitted to purchasing the drugs from
23 Kinlaw while inside the stairway of the hotel. This is
24 a knowingly false statement because the informant, the
25 unreliable confidential informant that got stopped did

1 not state that he bought drugs from Kinlaw, Kinlaw. He
2 said he bought it from someone named Gunner or Gutter,
3 not no specific name. This would mislead the
4 magistrate into thinking that the informant provided
5 some hard-to-gain detail that would make the informant
6 seem reliable.

7 Q Okay. What's false statement number five?

8 A False statement number five is after explaining
9 the situation, the staff did confirm that Kinlaw was a
10 resident of the hotel and provided Kinlaw's room
11 number, 205.

12 This is a false statement because the person at
13 the desk did not say provided Kinlaw -- verified that
14 Kinlaw stayed at the hotel, he said he believed Kinlaw
15 stayed at the hotel. This false statement would
16 mislead the magistrate into thinking that the person at
17 the desk went to the computer or something like that
18 and verified that my room was 205.

19 Q Okay. What about number six?

20 A The staff did confirm that the key card that
21 agents found on Kinlaw's person could activate it to
22 room number 205.

23 This statement is false because the person
24 didn't -- said they believe that I was staying at the
25 hotel. And he was not able to confirm that the key

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1 card matched any specific agent. T. Holloway, if you
2 can read the investigative report, checked the hotel to
3 see if the key matched.

4 Q Okay. And finally in this section number seven,
5 what did you say?

6 A Agent J. Brown of DEU did conduct -- conducted a
7 canine sniff of the exterior of Kinlaw's room number
8 205. This is another false statement because this is
9 supporting the other false statement that the person at
10 the desk provided Kinlaw's room number. That's why
11 they're saying agent J. Brown, DEU, then conducted a
12 canine sniff of exterior of Kinlaw's room. That would
13 make the whole warrant seem like the person at the desk
14 independently verified that room 205 specifically
15 belonged to me. And that would mislead the magistrate
16 into thinking that.

17 Q Okay. So we've gone over your seven false
18 statements allegedly on the search warrant.

19 And you basically stated that, so in summary, you
20 feel like your attorney did not reasonably defend you
21 in terms of that? Or in conclusion on that section,
22 how did your attorney's performance fall below a
23 reasonable standard, in your opinion, on protecting you
24 from those false statements?

25 A Because he failed to thoroughly research the

1 documented evidence and regardless of this. Because if
2 he did thoroughly research the documented evidence, he
3 would have discovered each false statement. If he
4 would have took the time to raise these false
5 statements on a motion and show it to the trial judge
6 that this warrant contained knowingly false statements
7 by the affiant, Officer Phillips, that would have
8 removed --

9 MR. JAMES: Your honor, we've been through this
10 entire portion.

11 THE COURT: I'm still waiting for him to testify
12 to what he did wrong. Hasn't done anything to that
13 effect yet.

14 MR. FOWLER: We're getting there, Your Honor.

15 THE COURT: Let's get there.

16 Q In terms of a photo lineup, you're saying that he
17 didn't -- in response to that, you're saying your
18 attorney -- well, strike that. You mentioned there was
19 a photo lineup, and it's mentioned in your
20 application --

21 A Yes. What I'm saying, this specific issue right
22 here, I'm saying my attorney failed to discover these
23 false statements. If he would have discovered these
24 false statements and raised them on a motion to
25 suppress, the judge would have found that once these

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1 false statements were removed from the search warrant
2 affidavit, the remaining content would not establish
3 probable cause, which would led to suppression of the
4 evidence that was discovered, which was the crack
5 cocaine -- I mean, crack cocaine, trafficking crack
6 cocaine charge, in room 205, and the trafficking
7 cocaine charge, room 205. That one would have
8 happened. And my attorney would have also informed me
9 of these defects and informed me to the fact that I
10 could go to trial --

11 THE COURT: He's already testified to this, let's
12 move on.

13 MR. FOWLER: Okay.

14 Q Let's move on to the photo lineup question. You
15 stated that your attorney did not properly protect you
16 or defend you in terms of a photo lineup; is that
17 correct?

18 A Yes. He raised the photo lineup, but he did not
19 thoroughly articulate the facts of the photo lineup at
20 the suppression hearing.

21 Q How did he not do that at the suppression
22 hearing -- how did he negligently or potentially --
23 okay, you said he did not raise that issue at the
24 suppression hearing. Are you just -- did you go over
25 it with him; I mean, why did he not bring it up to you?

1 A I guess he failed to realize that the judge did
2 not rule on the five factors in Neil versus Biggers in
3 the -- when dealing with unreliable, out-of-court
4 identification.

5 Q Okay.

6 A Because of factor number one, the time, amount of
7 time to view the witness was not reliable, because it
8 was only 27 seconds confirmed by the documented
9 evidence. Factor number two --

10 THE COURT: We don't need to go through all the
11 factors of Biggers. You need to tell me why this guy,
12 why he didn't articulate to the judge. That's what you
13 said he did wrong. So what did he not articulate?

14 THE WITNESS: He didn't point out that the five
15 factors of Neil versus Biggers was not established.

16 THE COURT: Okay, I know what the five factors
17 are.

18 Q And the Court has indicated it is very
19 knowledgeable about that. Moving on to another topic,
20 the chain of custody, you mentioned there was an issue
21 with the chain of custody where your attorney did not
22 do something properly; is that correct?

23 A Yes. In the chain of custody, the chain of
24 custody was defective because there was not any
25 conclusive evidence to connect me to the drugs that

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1 were found on the confidential informant that was
2 arrested, sir.

3 Q Did you discuss that with your attorney at all?

4 A No. I was never informed, he never informed me of
5 the defective chain of custody.

6 Q Okay. All right. And moving towards the end of
7 your questions here, now --

8 A And going back to the chain of custody, if he
9 would have informed me that the chain of custody was
10 defective and I could go to trial and challenge it, I
11 would not have pled guilty. I would have went to trial
12 and due to the informant was a defective chain of
13 custody.

14 Q Okay. All right, very good. Now, something about
15 the -- and this might spill over to the invalid search
16 warrant or the canine -- you mentioned that there was
17 an expectation of privacy that you feel he did not
18 represent you adequately on?

19 A Under South Carolina law, it's constitutionally
20 you have a expressed right to privacy of greater
21 protection than the US Constitution. And based on the
22 fact that the officers did a illegal search with the
23 canine by putting it on the door of my hotel room which
24 was a search under -- it maybe was not under the Fourth
25 Amendment based on the higher protection guaranteed by

1 the South Carolina article 10, section -- expressed by
2 the privacy provision.

3 If he would have challenged it under that, he
4 would have -- the trial judge would have found that it
5 was a violation of my expressed right of privacy, which
6 would have led to suppression of the evidence that was
7 discovered from the illegal search by the canine.

8 Q So you feel he didn't adequately represent you on
9 that?

10 A No, he didn't raise those issues. He did not
11 inform me of those issues, the express right to privacy
12 provision.

13 Q Okay. And as a final question, you basically have
14 stated to me and you said in the application that your
15 counsel failed to thoroughly explain the plea agreement
16 to you. Could you articulate why you feel and have
17 said that counsel failed to thoroughly explain the plea
18 agreement to you based on that transcript that we
19 referred to today.

20 A Oh, yes. Because in July of 2014 after my last
21 roll call, he informed me that the State was offering a
22 five-year plea agreement. But my attorney did not
23 explain the specific details of the plea agreement to
24 me, did not inform me of the facts that well, if this
25 plea agreement would be a nonviolent five-year plea

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1 agreement which I have to do two years in a half, or
2 was it a violent plea agreement which I would have to
3 do four years and three months.

4 He specifically did not inform me that this was
5 the State's final plea agreement, and then if I did not
6 take it by a certain time, it would expire and there
7 would be no more plea agreement, I would have to go to
8 trial.

9 And during that time I went back to him end of
10 October, and that day he informed me that the plea
11 agreement has expired, and I'm not -- I have to go to
12 have to go to trial, which was a week prior to -- I
13 mean, a week later would be November the 3rd. But he
14 did not inform me of the actual details of the plea.

15 Q Okay.

16 A Based on the fact he did not inform me of the
17 details of the plea, I was not allowed to make a known
18 decision as to whether to accept the plea agreement or
19 to deny it when weighed against all the evidence and it
20 would expire.

21 Q Okay. So basically here on direct examination,
22 we've gone over several issues that you feel and you
23 articulated that your attorney was lacking in his
24 performance representing you; is that correct?

25 A Yes.

1 Q Okay. And once again, to kind of finish where we
2 started, do you feel like that your attorney's
3 representation fell below an objective standard of
4 reasonableness?

5 A Yes. Because my attorney would have challenged
6 any one of these issues for, like I said, with the
7 search warrant, the evidence would have got suppressed.
8 With the arrest warrant, I would have -- the evidence
9 would have all got suppressed on the arrest warrant --

10 THE COURT: All right, there we're plowing the
11 same ground again.

12 MR. FOWLER: All right, very good.

13 Q And just as a final brief question, do you feel
14 like that there's a reasonable probability that except
15 for the attorney's errors, these errors, the results of
16 the proceeding would have been different?

17 A Yes. The whole case would have been different
18 because I would have -- the evidence would have got
19 suppressed, which the State would have had no evidence
20 to try me for trafficking --

21 THE COURT: Testified to this already.

22 MR. FOWLER: Very good.

23 THE APPLICANT: Or and if he would have --

24 THE COURT: He's testified to this already.

25 THE APPLICANT: -- informed me I never would have

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1 pled --

2 THE COURT: Sir, I said you've already testified
3 to this.

4 MR. FOWLER: Okay. Very good.

5 THE COURT: I know where he's coming from.

6 MR. FOWLER: Yes. No further questions, Your
7 Honor.

8 THE COURT: Mr. James?

9 MR. JAMES: Your Honor, my questions will be very
10 simple and very straightforward.

11 CROSS-EXAMINATION

12 BY MR. JAMES:

13 Q Sir, how many times did you meet with your
14 attorney prior to your plea?

15 A Probably maybe eight times, probably something
16 like that, maybe eight times, eight.

17 Q Do you recall discussing with your attorney the
18 elements of the offenses charged?

19 A What you mean, the elements, sir?

20 Q The elements the State would have to prove in
21 order to convict you for trafficking and distribution
22 of cocaine base.

23 A No. I was never informed of the elements, no,
24 sir.

25 Q Do you recall discussing any possible defenses

1 with your attorney?

2 A Yes. Like I said, the only defense that he
3 informed me of was the search warrant being invalid
4 because the one defect based on the confidential
5 informant --

6 Q We don't need to go all the way back into the
7 details of it. It's a very simple yes or no question.
8 You've answered extremely thoroughly on direct
9 examination, sir.

10 Did your attorney -- or did you give your attorney
11 any leads or witnesses to investigate?

12 A No. Leads and investigation should be the
13 unreliable confidential informant and the discovery.

14 Q Sir, we're going to take a walk through your
15 guilty plea sheet. You recall waiving your
16 constitutional rights at your guilty pleas such as your
17 right to a jury trial?

18 A Right to a jury trial. Yes, I did.

19 Q And your right to remain silent?

20 A Yes.

21 Q And your right to confront the witnesses against
22 you?

23 A Yes.

24 Q And that you are giving up any defense that you
25 might have to these charges?

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1 A Yeah, any defense that I was aware of at the time.
2 The defenses, I was not aware of the defenses. If I
3 was aware of the defenses, I would have brought it to
4 the Court there, I would not have pled guilty, sir.

5 Q Mr. Kinlaw, isn't it true that you specifically
6 asked the Court whether you were giving up all of your
7 rights from the motion hearing, and the Court affirmed
8 as much. And you decided that you wanted to plead
9 guilty anyway?

10 A Yeah, the Court affirmed I was only giving up two
11 motions at the time because I was only aware of only
12 two motions. I was not aware of the other motions that
13 I presented to the Court today, the other nine issues,
14 that I was not aware that I had a right to go to trial
15 to specifically challenge each one of those issues. If
16 I did, I would not have pled guilty, sir.

17 Q Now, a moment ago you just said that you were
18 aware that you waived your right to a jury trial?

19 A I was aware of it -- I was not aware that I was
20 waiving my right to appeal these issues that I have
21 raised today. If my attorney would have specifically
22 informed me of these issues and I had a -- tell me that
23 I had a right to challenge them, if I went to trial I
24 would not have pled guilty, I would have went to trial,
25 sir.

1 Q Do you recall hearing the State present the facts
2 of your case and agreeing with them?

3 A The facts of the case? Can you...

4 Q I would direct your attention -- do you have a
5 copy of the transcript up there, sir?

6 A No, sir.

7 Q You said you do or do not?

8 A No, I don't have a copy.

9 Q You don't have a copy of the transcript of the
10 guilty plea?

11 THE COURT: Here's a copy. Page 74, I believe
12 you're looking at?

13 MR. JAMES: We are going to look at page 73 to 74.
14 Starts at the very top of 73, and then it rolls over to
15 page 74. You don't have to read all of that right now,
16 Mr. Kinlaw, but if you'll look at page 74, lines 9
17 through 11.

18 MR. FOWLER: Okay. He's looking at 74, lines 9 to
19 11; is that correct, totally?

20 MR. JAMES: Correct.

21 MR. FOWLER: Okay.

22 Q On those three lines it states, the Court: Quote,
23 "All right, Mr. Kinlaw, do you agree with those facts?"
24 Mr. Kinlaw: Quote, "yes, sir." Do you contest that is
25 what you said at the guilty plea proceeding?

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1 A Yes, I did say that.

2 Q And that was in acknowledgement of all the facts
3 that preceded back on page 73?

4 A 73. Yes. But like I said, at that time I pled
5 guilty because I was not aware of all of my potential
6 defenses at that time. If I was aware of my potential
7 defenses like I brought to the Court, I would not have
8 pled guilty to none of that, sir.

9 Q But do you contest that those facts are accurate?

10 A No, I cannot contest that all of those facts
11 that's a hundred percent accurate. I'm contesting to
12 the fact that I was not aware of all of my potential
13 defenses at the time. That's what I'm saying right
14 now, I would have never pled guilty. Because I would
15 have had a right to challenge each defect that I
16 brought up today and each issue on direct appeal.

17 Q I understand, Mr. Kinlaw. Do you recall telling
18 the plea judge that you were satisfied with your
19 attorney's services?

20 A Yes, I expressed satisfaction at that time because
21 I was not aware of my attorney's deficient performance.
22 I was unaware that he failed to discover each issue
23 that I brought to the Court today. If I was aware that
24 he could have discovered those issues, I would not have
25 pled guilty, I would not have expressed satisfaction

1 with him.

2 Q Respectfully, Mr. Kinlaw, I think that we all get
3 the idea very simply by pointing out that you were not
4 aware of the allegations you are making today?

5 A That's the only reason I expressed satisfaction at
6 that time.

7 Q I hesitate to rephrase your statements, but I
8 understand, we've been over much of this ground many
9 times over.

10 A I would like to repeat it, sir, for --

11 THE COURT: No, you're not going to repeat it
12 because I would like to think I'm somewhat intelligent
13 and I can remember that the first time.

14 THE APPLICANT: All right. I'm sorry, sir.

15 THE COURT: I don't need to hear it 14 times.

16 THE APPLICANT: I'm sorry, sir.

17 Q Do you recall telling the judge that no one was
18 promising or threatening you in order to plead guilty?

19 A Yes, sir.

20 Q And do you recall telling the plea judge that you
21 wished to plead guilty?

22 A Yes, sir, I did.

23 Q We're going to take a step back, Mr. Kinlaw, to
24 before you decided to plead. Isn't it true that your
25 attorney moved for a continuance based on not being

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1 provided the identity of the criminal informant?

2 A Yes, he moved for a continuance, but he failed to
3 motion for that -- if he couldn't get a continuance, a
4 motion for the base of knowledge being struck from
5 being used. He could have asked for that motion.

6 Q That's beyond the scope of my question, sir. Just
7 very simply answer the question. Isn't it true that he
8 also moved to try and dismiss the case based on the
9 fact that he was not provided the identity of that
10 confidential informant?

11 A Yes, he did that. But like I said, he failed to
12 motion to have the officer --

13 THE COURT: The answer is yes.

14 Q Isn't it true the Court denied those motions?

15 A Yes, to dismiss and the continuance.

16 Q Now, let's talk about the suppression hearing
17 generally. Isn't it true that your attorney argued
18 that there was no probable cause for the warrants?

19 A He only raised one defect, and I raised that. You
20 can review the record, he did not raise --

21 Q Well, sir, you say that he only raised one defect.
22 Let's go through some of the defects that he actually
23 argued in court that day. Isn't it true that he argued
24 the warrant was based on a, quote, "total stranger's
25 statement," end quote?

1 A That would be the reliability of the informant,
2 sir.

3 Q And isn't it true that he argued that the positive
4 identification of you was based on, quote, "the most
5 suggestive photo lineup I've ever heard of," end quote?

6 A That was in Neil versus Biggers, he wanted --

7 THE COURT: Just answer his question, you're not
8 answering his question.

9 THE APPLICANT: All right.

10 Q Did he or did he not argue that the positive
11 identification of you was based on, quote, "the most
12 suggestive photo lineup I've ever heard of," end quote?

13 A Yes. Like I said, that was not in the search
14 warrant.

15 Q And did he not argue that the drug dog sniff of
16 your hotel room was invalid under the case of Florida
17 versus Jardines?

18 A Yes. But he did not raise it under the South
19 Carolina Constitution, article 1, section 10, special
20 supervision. That's a Fourth Amendment violation he
21 raised.

22 Q Let's jump back forward again, and we're going to
23 go to near the end of your plea, Mr. Kinlaw. Do you
24 recall Mr. Long offering some statements in mitigation?

25 A Not a hundred percent. Could you read them, sir.

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1 Q On page 74 of the transcript running over to page
2 75, and very specifically looking at page 75, line 12;
3 do you have a copy up there? I couldn't tell earlier
4 if somebody handed you a copy of the transcript.

5 THE COURT: He's got my copy.

6 MR. JAMES: All right. Would Your Honor like an
7 additional copy of the transcript?

8 THE COURT: No, thank you.

9 MR. JAMES: Okay.

10 THE COURT: I've read it.

11 Q That's page 75, line 12, starting from there,
12 quote, "He was offered by the solicitor up until maybe
13 six months ago a reduction in charge to plead to
14 trafficking 10 to 28 grams and a recommendation of a
15 five-year sentence. Obviously that's gone now. He
16 understands that."

17 Do you contest any part of that statement?

18 A Yes. I contest the part where I was not informed
19 of when the P-3 was going to expire, sir.

20 Q All right. Do you recall -- on page 77 of the
21 transcript, do you recall the Court offering you an
22 opportunity to say something after Mr. Long finished
23 his mitigation?

24 A Yes.

25 Q All right. And do you recall telling the Court

1 that, quote, "Russell said most everything I want to
2 say, sir?"

3 A Yes, because at that time I was unaware of any of
4 these issues that I've discovered now since the went to
5 the Department of Corrections. That's why I said that,
6 sir.

7 MR. JAMES: If I may beg the briefest moment of
8 indulgence from the Court.

9 THE COURT: Yes, sir.

10 MR. JAMES: I have no further questions for this
11 witness, Your Honor.

12 THE COURT: Mr. Fowler?

13 MR. FOWLER: Just briefly, Your Honor.

14 REDIRECT EXAMINATION

15 BY MR. FOWLER:

16 Q So it's your contention that you -- okay. You did
17 plead guilty in this case; is that correct?

18 A Yes.

19 Q But it's your contention that you were not aware
20 of all of these potential defenses at the time you pled
21 guilty?

22 A Yes, sir. If I was aware, I would not have pled
23 guilty, sir.

24 Q Okay, very good. And your contention is that
25 there were only two motions that your attorney made on

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1 this; is that correct?

2 A He only filed -- he only informed me of the
3 out-of-court identification which he challenged and the
4 arrest search warrant being invalid because of one
5 defect, like I said with the --

6 Q So what are the two motions he filed, just briefly
7 for the Court?

8 A The search warrant issue and the Neil versus
9 Biggers -- I mean, he filed a Neil versus Biggers, and
10 I think he did a Batson, a Batson at the live
11 testimony, I guess, at that time he challenged the jury
12 selection.

13 Q All right. But it's your contention that these
14 issues that we raised today also should have had
15 motions?

16 A Yes.

17 Q Is that correct?

18 A He should have raised them, and he should have
19 informed me of them. If he had raised them, then like
20 I said, the outcome of this proceeding would be
21 different because the evidence would have got
22 suppressed. If he would have informed me of them, I
23 would have still went to trial, if I was found guilty.
24 And if he would have informed me I could have
25 challenged them on direct appeal, I would have went to

1 trial.

2 MR. FOWLER: Very good. No further questions.

3 THE COURT: Mr. James?

4 MR. JAMES: No further questions.

5 THE COURT: All right, you step down.

6 (Witness excused.)

7 THE COURT: Mr. Fowler?

8 MR. FOWLER: We have no further witnesses, Your
9 Honor.

10 THE COURT: Mr. James?

11 MR. JAMES: Well, the State would call to the
12 stand Mr. Russell B. Long.

13 THE COURT: Come forward, Mr. Long.

14 MR. JAMES: Esquire.

15 RUSSELL B. LONG, after being duly sworn, testified
16 as follows:

17 DIRECT EXAMINATION

18 BY MR. JAMES:

19 Q Mr. Long, I'm very sorry to have kept you waiting
20 all day today.

21 A It's okay, I'm used to it with PCRs. I think I've
22 been last like three times in a row, judge. I need to
23 get the late lottery numbers.

24 Q I will sincerely endeavor to remember that for
25 future terms, so that you don't necessarily have to

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1 wait through one.

2 A That's the only reason I brought it up.

3 Q How long have you been practicing law, Mr. Long?

4 A It's my 25th year.

5 Q And how much of that has been in criminal law?

6 A All of it.

7 Q Were you appointed or retained to represent
8 Mr. Kinlaw?

9 A Retained.

10 Q And how many times did you meet with Mr. Kinlaw in
11 the course of your representation?

12 A I would say 20. Certainly more than a dozen.

13 Q In the course of your representation, did you file
14 a request for discovery pursuant to Rule 5 and Brady?

15 A Yes, sir.

16 Q And did the State provide materials in response to
17 your request?

18 A Yes, sir.

19 Q Did you receive any photographic film evidence?

20 A Yes, sir.

21 Q And was there anything that you did not receive in
22 a timely manner before trial?

23 A Well, I mean, I complained about things that I
24 didn't receive that didn't exist. We complained about
25 -- this was a --

1 THE WITNESS: Judge, this was -- the allegation
2 was that the police, that drug enforcement unit was
3 watching a hotel based on information they had been
4 given from a female informant who could not directly
5 buy from the Defendant. So they were watching the
6 hotel. They saw someone come, park, go into the hotel.

7 MR. FOWLER: Your Honor, I would like to object to
8 this litigation. I think he has answered the question.
9 If he wants to ask those questions specifically, he can
10 do so. But I'll ask for this to be kind of cut down,
11 if possible.

12 THE WITNESS: Well, I was going to explain why
13 there was a video that was unachievable.

14 Q I'll simplify it and ask you generally what was
15 your understanding of the facts of this case, Mr. Long?

16 A So then the agents were watching the hotel, a car
17 came, stayed, left. They followed that vehicle, made a
18 traffic stop on that vehicle, was a total unknown
19 person to the police. They told that person, we know
20 what you just did. You just went in the hotel room,
21 205, or whatever it was, and just bought drugs, give
22 them up. And that person did.

23 And then they then began, you know, asking that
24 person who they did not know about who they bought the
25 drugs from, blah, blah, blah. And so throughout the

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1 defense of the case I was asking for a copy of the
2 in-car camera of the traffic stop. I wanted the
3 identity of the person that they stopped. I wanted all
4 of the information that that person, the unknown
5 person, might have provided to the police, statement,
6 anything along those lines. We were always told there
7 were none. There was no video, there were no
8 statements, there were nothing from that party,
9 nothing.

10 So I was given nothing on that person which was,
11 you know, if nothing exists -- I mean, we've had -- I
12 just tried a case last week where there were officers,
13 multiple officers testifying, but there were no reports
14 made by them. So their position was in the Kinlaw
15 case, those things didn't exist.

16 Q Did you object or seek a continuance on that
17 basis?

18 A Yes.

19 Q And did you object or seek a continuance on the
20 basis of not possessing the identity of the criminal
21 informant who, as you indicated, could not personally
22 buy drugs from Mr. Kinlaw?

23 A Yes. That criminal informant was one of the bases
24 for -- for going and getting the search warrant. There
25 were many other bases, but that was one of them. And

1 that was information that we learned from the witness
2 stand at the pretrial motion. We learned that there
3 was an informant, an unnamed informant, that they used.
4 So we asked for a dismissal based on the fact that we
5 didn't get the discovery, or we didn't get that
6 information in discovery, and in the alternative a
7 continuance so I could learn more about that informant
8 and what their basis of their knowledge was.

9 Q You usually get the identity of criminal
10 informants in cases where they are utilized?

11 A No. We usually don't get them up until close to
12 the end. But honestly we usually know who they are
13 because our client can usually help us determine who
14 that was.

15 Q Okay. Are you familiar with the case, State v.
16 Humphries?

17 A I am.

18 Q All right. And you are aware that it states
19 pretty plainly that an informant's identity may not be
20 disclosed where he possesses only a peripheral
21 knowledge of the crime or as a mere tipster who
22 supplies a lead to a law enforcement officer?

23 MR. FOWLER: Objection, Your Honor. This question
24 is, I think, stating acts that are not relevant here,
25 Your Honor. I think the question needs to be a little

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1 bit more succinct and ask Mr. Long's opinion of what
2 his understanding of it is instead of the attorney
3 general's understanding.

4 Q Would your understanding of the case State verse
5 Humphries have colored your decision as to what you
6 should and should not argue at the suppression hearing?

7 A Sure.

8 Q All right. Going back to what you did receive,
9 did you review those materials with your client?

10 A Yes.

11 Q Add did you conduct any additional investigation
12 into the facts either personally or through an
13 investigator?

14 A Not necessarily, no. There really wasn't anything
15 to expand on. We didn't have alibis so we didn't have
16 alibi witnesses. We didn't have -- there was not
17 another party involved, so there was nothing to
18 investigate.

19 Q All right. You already gave us a brief overview
20 of the State's evidence against Mr. Kinlaw. When you
21 went over all of this with your client, did you explain
22 the strengths and weaknesses of the case against him?

23 A Multiple times.

24 Q What if anything did Mr. Kinlaw tell you about
25 what happened?

1 A Very little. And that's common. We don't really
2 get facts from the client. We usually try to see what
3 the State's trying to prove. We don't get a whole lot
4 of information factually from the client. And I
5 definitely did not from Mr. Kinlaw. I think his
6 position was to deny it all, and it was consistent with
7 his position not to change that with his conversation
8 with me.

9 Q In light of the State's evidence and Mr. Kinlaw's,
10 well, lack of offering to you, could you conceive of
11 any defenses available to your client?

12 A Only, you know, all of the pretrial motion
13 matters. I had several conversations with Henry
14 especially during the time where he was offered five
15 years, and 85 percent five years that we made real
16 clear, I heard him testify to that. And we were
17 awfully aware of what carries -- what you serve
18 85 percent for and what you don't.

19 Obviously, with a five-year offer when he faced
20 two 30-year felonies, I was trying to do everything I
21 could to educate him and to get him in line. Because
22 that was a great offer, and it was one that he needed
23 to accept. So we spent a lot of time talking about
24 what our pretrial issues were, explaining to him that
25 if we lost our motions and if the judge allowed them to

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1 go forward with the trial itself, as soon as they
2 called the first witness it was going to be real hard
3 to get a jury to find him not guilty. So his entire
4 case was really resting on what we were able to do in
5 paring the case down at pretrial motions.

6 Q What generally was your argument to the Court in
7 the course of those pretrial motions?

8 A Well, first, they were trying to try the two cases
9 together. And they were -- the two things happened on
10 two separate occasions. On one occasion they were
11 watching a hotel and a person came, a person left, and
12 they did the traffic stop that I told you. And then
13 sometime much later they went and got a search warrant
14 and came back and executed the search warrant and ended
15 up with the trafficking case where they found something
16 like 97 grams of cocaine.

17 Q So you argued -- isn't it true that you argued
18 that there was not probable cause for the warrant
19 because the statement -- it was based on the statement
20 of somebody not proven to be reliable?

21 A Correct.

22 Q All right. And isn't it true that you argued that
23 the federal identification was highly suggestive?

24 A Absolutely. They showed the -- they showed the
25 fellow one picture of Henry Kinlaw and asked if that

1 was him, and he said yes. It was an awful lineup.

2 Q Okay. I think a line implies multiple points to
3 it, this is really just a single point.

4 A Right.

5 Q I don't know if you can call it a line.

6 A Right.

7 Q Isn't it true that you argued that the drug dog's
8 sniff was invalid under the case Florida versus
9 Jardines?

10 A Absolutely.

11 Q And that's a relatively recent case; is it not?

12 A It is.

13 Q So you've endeavored to stay on top of the
14 developments in the law of the Supreme Court as it
15 pertains to criminal law?

16 A Yeah. And I'll tell you, Henry was helpful in all
17 that. As you can tell, he's a -- you know, I may have
18 to give him a job when he ends up serving the rest of
19 his time because he's a student of the law. There's no
20 doubt about it. He was just as involved in the legal
21 research as I was. Every time we met -- that's why I
22 say 20 times, because every time we met, he had done
23 some more research and maybe come up with another case
24 that he wanted me to look at and see if it applied to
25 the facts of the case.

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1 Q All of those arguments made to the Court, the
2 Court denied you on all of those grounds; correct?

3 A Correct.

4 Q And we already talked briefly about the plea, but
5 I want to circle back around to it. Your client
6 explicitly rejected that plea offer of five years;
7 correct?

8 A Absolutely.

9 Q Okay. Did you tell your client that the offer
10 would expire and precisely when it would expire, or
11 that it would not be available to him once he
12 explicitly rejected it?

13 A I mean, I can't sit here and tell you on blank day
14 we had a conversation about the plea offer, and I
15 explained to him that it was going to expire. But
16 certainly he knew that when we were coming over here
17 the following week on a Monday to draw a jury, that his
18 plea offer was gone and he faced two 30-year felonies.

19 Q Ultimately, your client pled guilty. If you
20 could, Mr. Long, could you give us a brief overview of
21 how Mr. Kinlaw ultimately reached the decision to plead
22 guilty; what sort of conversations did you have with
23 him?

24 A We asked for a moment, we got together. I said,
25 Henry, you're running the risk of, now that the judge

1 is going to allow them to try these two cases together,
2 they're going to be able to use some of the weakness in
3 this case and the weakness in this case are actually
4 going to be cross used on you. So there's a real good
5 opportunity that a jury is going to convict you, and
6 you're going to face 30 and 30. And, you know, if a
7 judge is nice about it after we try this case, he might
8 give you 25 or 30 concurrent.

9 I think we've got -- you've got an opportunity now
10 knowing what we knew all along that the judge has ruled
11 against me on these motions. And honestly, if I would
12 have made more specific what I would consider to be
13 less important motions about warrants and search
14 warrants, you could see where we were going with the
15 judge. You could see that, you know, what -- not to
16 say that I can read a judge's mind and know what the
17 outcomes of my motions or his rulings are going to be,
18 but we were headed to trial.

19 You could tell that we were getting ready to call
20 the first witness. And it just made sense to me to
21 have one more hard conversation with Henry about the
22 fact that he had a chance to save some considerable
23 time. We didn't have any offer, we didn't have any
24 recommendation. But the judge was a super reasonable
25 person.

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1 And once we presented it to him, he should not
2 punish Henry for exercising his right to a trial by
3 jury, and that I honestly didn't think the judge would
4 give him 30 years if we pled. And we sat and we talked
5 about it, and he made the decision based on the judge's
6 rulings and based on our conversation that he needed to
7 go ahead and plead guilty.

8 Q And there was a granule in there that I want to
9 pull out and just point out and emphasize. You
10 indicated that you wouldn't necessarily go into every
11 single specific detail of every single argument. In
12 your course of practice, have you found it
13 strategically advisable to not necessarily go into
14 every detail and every possible argument under the sun
15 but rather emphasize the strongest arguments available
16 to you?

17 A Absolutely. Henry raised the point that I should
18 have objected to the search warrant because the search
19 warrant referred to an unknown male with a street name
20 Gunter, known as Henry Lee Kinlaw, Jr., and drove a
21 2008 Impala. His position today is that I should have
22 argued that those were false statements. I had no
23 idea, and in fact, those aren't false statements, those
24 are true. Every bit of that is true.

25 His argument was that he didn't believe that the

1 law enforcement officer presented those statements to
2 the magistrate in a correct way. The circuit judge,
3 the judge sitting on the bench was not going to dismiss
4 or throw out that search warrant because of those two
5 motions. I never would have made those. I've never
6 even thought about making those specific motions. They
7 seemed sort of petty, and I didn't think we would get
8 anywhere with them.

9 Q Whose decision was it to plead guilty in this
10 case?

11 A Henry Kinlaw's.

12 Q Did you explain to him all of his constitutional
13 right and what he was giving up by pleading guilty?

14 A Yes.

15 Q If Mr. Kinlaw had asked you to go ahead and
16 proceed to take this case to trial, would you have been
17 prepared to do so?

18 A We were ready. We had a jury waiting on us. Yes,
19 sir.

20 Q Somewhere in the many pages of the PCR application
21 and/or the brief that Applicant has provided to myself
22 and to the Court, Mr. Kinlaw alleges that he asked you
23 to file a notice of appeal on his behalf. Did he ever
24 do so?

25 A No, sir.

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1 Q All right. Would you have filed a notice of
2 appeal if he had asked you to do so?

3 A Of course. Yes.

4 Q But he was also imminently aware that the defenses
5 that were raised in the preliminary hearing, the Court
6 addressed him and told him they would not be available
7 to him any longer; correct?

8 A That's right, that is correct. He didn't ask me
9 that specifically. He and I never discussed whether or
10 not he would be able to argue his pretrial matters on
11 appeal. Obviously we didn't have -- we were right in
12 the middle of it, so we never had that conversation.

13 Q Would you normally have that conversation before
14 an adverse ruling of the Court?

15 A No.

16 Q Is there anything else that you can think of that
17 you would like to address the Court today that you
18 believe is relevant to this post conviction relief
19 hearing?

20 A No, sir.

21 MR. JAMES: I have no further questions at this
22 time.

23 THE COURT: Mr. Fowler?

24 CROSS-EXAMINATION

25 BY MR. JAMES:

1 Q So how many times did you meet with my current
2 client, Mr. Long?

3 A My testimony was about 20.

4 Q Okay. But you said also it was greater than 12.
5 Was it 20 or 12?

6 A I said I think about 20, certainly greater than
7 12.

8 Q Okay. Did you mail him any letters or e-mails or
9 anything like that in writing about following up on any
10 of your discussions?

11 A No.

12 Q Okay. So you don't -- so you did not provide my
13 client any written discussion about, you know, this is
14 the plea offer, if you don't take it, it's going to be
15 taken away?

16 A Absolutely not.

17 Q Okay. Why, why didn't you --

18 A I never do. Why would I? I never do. If I need
19 to discuss things with my client, he comes in the
20 office and sits down. The only people I send letters
21 to are in prison or in jail.

22 Q Okay. Well, was he in prison or jail at the time?

23 A No, he was not.

24 Q Okay. But so there's no paper trail of any -- to
25 verify anything that you've said to him in terms of

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1 your discussions; correct?

2 A There is no paper trail of our attorney/client
3 conversations.

4 Q Okay. Well, even non-attorney/client, I mean --

5 A How could we have a non-attorney/client
6 conversation?

7 Q I'm just saying -- I just want to be clear that
8 there was no paper trail of anything.

9 A There's none.

10 Q Okay. In terms of the statements -- the five
11 year -- well, strike that. In terms of the five-year
12 offer, when did that come to your attention? Well, in
13 reference to the November 2014 hearing, when were you
14 notified about the five-year?

15 A My answer is I'm not sure. But I'll continue to
16 look for if I have something in the file that gives me
17 that date while you ask other questions if you want.

18 Q Did -- well, let me ask you this, did the
19 solicitor's office articulate to you -- well, how did
20 they articulate to you about the five-year offer?

21 A Usually or in this case originally it was from a
22 conversation that I had with the solicitor about the
23 case. What are we going to do with this case. Do we
24 need to put it on the trial roster or are we going to
25 be able to work it out. You know, what are you

1 offering me. Well, we can do a five-year -- we can do
2 a five-year negotiated sentence.

3 And that came through a conversation. But I'm
4 looking at -- we usually follow that up with a written.

5 Q Right. And that's kind of --

6 A And I'm looking for it right now.

7 Q Yeah, that's what I'm getting at. Usually it's
8 been my experience that the solicitor's office, here at
9 least, provides some kind of written documentation
10 saying, you know, we would offer a five-year or
11 whatever. And then they say, this expires after so
12 many days, or sometimes they just kind of leave it
13 open, so --

14 A That's right.

15 Q Do you have that documentation?

16 A I agree with you that that's their common
17 procedure. And I'm looking right now to see if I have
18 it. I'm still looking if you want to ask another
19 question.

20 Q Well, with the judge's indulgence, I mean, I can
21 ask other questions, but I think that's a fairly
22 important document, so. And I don't want your --
23 personally, I don't want your concentration taken away
24 from anything else.

25 THE COURT: We'll give him a chance to look for

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1 it.

2 MR. FOWLER: Yes, sir, Your Honor.

3 THE WITNESS: I don't see it. It's not where it
4 would normally be in my file. It would normally be
5 right in front of discovery, and I don't see it.

6 Q So you're telling me that there's no written
7 documentation that you have in terms of offering a
8 five-year plea agreement; is that correct?

9 A That's correct.

10 Q Okay. So and you're saying it was an oral
11 agreement?

12 A Correct. Or an oral offer, not an agreement.

13 Q Oral offer. And which solicitor offered that to
14 you?

15 A Solicitor Grooms.

16 Q Okay. And how did they take away that five-year
17 offer?

18 A Put the case on the trial roster when I explained
19 to them that he was not going to plead.

20 Q How was that -- how did that -- well, once again,
21 I mean, did they send you a letter saying it was
22 withdrawn?

23 A No, sir.

24 Q Did they orally tell you it was withdrawn?

25 A I would just -- let's say orally.

1 Q Okay. And who orally told you that?

2 A Stephen Grooms.

3 Q And when did he tell you that?

4 A Can't give you the exact date. I would -- I would
5 guess, if I have to guess, if I can guess, I would tell
6 you it was at least a month before trial.

7 Q All right. So there's no paper trail on that
8 either, the withdraw; is that correct?

9 A The only trail that we sometimes have on withdraw
10 is we do arraignments. We do them a lot more now than
11 we used, where we bring the client into the courtroom
12 and explain the offer in open court and give them an
13 opportunity to accept it or deny it.

14 And I actually thought I remembered we did an
15 arraignment in this case, but I can't find an
16 arraignment order in my file either, so I guess we did
17 not.

18 Q On the day of the trial -- well, let me ask you
19 this question. With there being no paper to you or
20 either an offering or canceling it, did you ask Stephen
21 Grooms to revive that five-year offer on November 3rd,
22 2014, or did you just assume that it was gone?

23 A No. Literally on the morning of trial I tried to
24 see what kind of deal I could get and take it back to
25 Henry because he was making a mistake going to trial.

RUSSELL B. LONG-CROSS BY MR. FOWLER

1 Q Okay. So --

2 A Literally. And I went back, and they would not
3 put five years back on the table but would agree to,
4 you know, something a little bit more, somewhere near
5 closer to ten.

6 Q Okay.

7 A Obviously Henry was not interested in pleading to
8 five from the jump street, he was certainly not
9 interested in anything else.

10 Q So did you articulate that he had any offer of say
11 ten years on that, or did you just --

12 A We did not have an offer of ten years. In other
13 words, my conversation was, I'm not going to give
14 him -- he was not going to get the five-year offer
15 again.

16 Q Okay.

17 A If he does want to change his plea today, we can
18 discuss a recommendation around ten. That was
19 certainly nothing that Henry was interested in.

20 Q So there was no reopening the door by you with the
21 solicitor's office of, say, a ten-year plea; is that
22 correct?

23 A The door did not reopen, no, it did not.

24 Q And you didn't open it either; did you? You
25 didn't ask for something around ten years; did you?

1 A I tried to. But we didn't get anywhere.

2 Q And how did you try to?

3 A Tried to discuss it with Henry on the way in,
4 Henry, listen, is there some amount of time you can
5 handle accepting and let's doing this as a plea. And
6 he was not having any of it, he was ready for trial.

7 Q Okay. Tell me a little bit about the highly
8 suggestive lineup that's been mentioned several times,
9 that you said was a highly suggestive lineup. How did
10 you move to suppress that? Well, what was your
11 thinking in terms of trying to suppress that lineup or
12 lack thereof?

13 A Well, we would have elaborated more so during the
14 trial itself. During the pretrial we raised the issue.
15 I don't know what specifically, I can't recall exactly
16 my words, how I raised it. You have the transcript,
17 how it was raised.

18 Q Okay. Did you do anything in terms of Neil versus
19 Biggers on that highly -- on that, in your words,
20 highly suggestive lineup?

21 A We all operate under the Biggers case.

22 Q Right. But -- okay.

23 A Yes, absolutely. I mean, that's where we were
24 going with it. And I think the judge indicated in
25 his -- in the transcript that we would deal with that

RUSSELL B. LONG-CROSS BY MR. FOWLER

1 later. That would have been later during the trial.

2 Q Okay. And Mr. Kinlaw brought up the South
3 Carolina Privacy Provision. Did you mention that at
4 all in terms of that suggestive lineup?

5 A I didn't say anything about the --

6 Q I apologize, strike that. Strike that. You've
7 been in the court during this entire hearing; is that
8 correct?

9 A Yes, sir.

10 Q Okay. And you heard that there were several
11 issues that my client indicated that he would have
12 liked to have had raised; is that correct?

13 A I hear that, yes.

14 Q And you only did two of those; correct?

15 A I guess, yes.

16 Q Okay. And why didn't you -- I think you
17 elaborated on direct, why did you not bring up other
18 issues such as the chain of custody, canine, things
19 along those lines?

20 A Those are -- chain of custody is an issue that
21 would have been raised later in the trial. There was
22 no pretrial chain of custody issue. I was certainly
23 going to make them adhere to the chain. If there was a
24 flaw in the chain, we were certainly going to make a
25 big deal out of that and ask that the drugs not be

1 entered into evidence.

2 We still hadn't gotten to the point where they
3 offered anything into evidence, so I still had the
4 ability to argue against that during the trial.

5 Q But as to the search with the canine, you didn't
6 bring any of that up before trial; did you?

7 A Sure, we did.

8 Q Okay. And how did you do that again, please?

9 A Again, we made a motion to suppress. First we
10 made a motion to sever. They made a motion to combine
11 the cases.

12 Q Right.

13 A The opposite of a motion to sever from my point.
14 And we raised those -- we raised that dog sniff as
15 being part of the basis for the search warrant and that
16 it was flawed and it shouldn't be used.

17 MR. FOWLER: If I may have a moment with my
18 client.

19 (Discussion off the record.)

20 Q Just to be clear, you didn't challenge the
21 reliability of the canine; did you?

22 A No.

23 Q Or the reliability of the arrest warrant; is that
24 correct?

25 A No.

RUSSELL B. LONG-REDIRECT BY MR. JAMES

1 Q All right.

2 MR. FOWLER: Just a moment, Your Honor. No
3 further questions, Your Honor.

4 THE COURT: Mr. James?

5 REDIRECT EXAMINATION

6 BY MR. JAMES:

7 Q Earlier, Mr. Long, we indicated that the
8 confidential informant was one of the bases of the
9 search warrant; is that correct?

10 A Correct.

11 Q And bear with me, I understand we've been all over
12 the place today. Can you tell me what the other bases
13 for the search warrant were.

14 A The fact that they sat and watched someone come
15 and go and stopped them and asked them, you know, where
16 they were and what they had done was one. The question
17 of the people at the front desk about who was staying
18 in a certain room was two. I don't know if I can think
19 of the others.

20 Q Isn't it true that upon the arrest of Mr. Kinlaw,
21 that they found on his person a Days Inn key card?

22 A Yes.

23 Q And isn't it true that the officers took that key
24 card to Days Inn, Room 205, and tested it on that door?

25 A Yes.

1 Q Do you recall if that key matched or not?

2 A It did.

3 Q Do you recall if they were able to connect the
4 vehicle found in the parking lot outside of the Days
5 Inn back to Mr. Kinlaw?

6 A Yes.

7 Q Do you recall how it was that they were able to
8 connect it back to him?

9 A They ran the VIN check and a registration check,
10 and it came back to Henry Kinlaw.

11 Q Was there any reason to believe that the canine
12 that sniffed the door was unreliable?

13 A No. I don't -- we hadn't gotten into the details
14 about the canine yet, if -- no. I guess if I had moved
15 to quash the search warrant based on the unreliability
16 of the canine, the officer would have testified more
17 about the reliability of the canine. And the Court
18 would have determined the canine to be reliable.

19 Q So there was nothing to suggest to you that the
20 canine may have been old or poor in sense of smell?

21 A Exactly.

22 Q Okay.

23 A No.

24 Q And I would just -- do you have a copy of the
25 trial transcript up there?

RUSSELL B. LONG-REDIRECT BY MR. JAMES

1 A I do.

2 Q Okay. I would just direct your attention to pages
3 58 and 59 of the transcript. These are generally your
4 arguments to suppress the search warrant?

5 MR. FOWLER: Your Honor, I would like to object at
6 this time. I think we're going outside the scope of
7 redirect. I mean, these are issues that he could have
8 brought up on direct examination, and now we're
9 entering into new doors and new parts of the
10 transcript. So I would like to object to this as being
11 overly general on redirect.

12 MR. JAMES: Mr. Fowler questioned Attorney Long
13 during cross-examination as to the particular nature of
14 his argument that he offered in respect to the drug dog
15 sniff. I was hoping to go back into this issue and
16 confirm precisely what Mr. Long's argument was with
17 respect to that drug dog sniff?

18 MR. FOWLER: I don't think I asked a specific
19 question that specific about the drug dog sniff. I
20 just asked in general did he object to that.

21 THE COURT: I think that opens the door for him to
22 ask those questions. I overrule your objection.

23 MR. FOWLER: Okay. Thank you, Your Honor.

24 THE COURT: Proceed, Mr. James.

25 Q With page 59 open to you, looking roughly starting

1 at line 16, can you recall for the Court precisely what
2 your argument was with respect to that drug dog sniff.

3 A You want me to read or you want me to read it
4 silently?

5 Q If you have any difficulty remembering it, you can
6 perhaps refresh your recollection.

7 MR. FOWLER: And may I ask what lines we're
8 referring to, again, please.

9 MR. JAMES: Starting at line 16 forward through
10 the next page.

11 THE WITNESS: I'll answer by reading. I
12 apologize, Your Honor. Line 16 says, lastly, Your
13 Honor, the drug dog sniff which, again, I'll argue
14 later, but I believe we have the absolute right to have
15 evidence on the drug dog sniff excluded. And
16 therefore, it shouldn't have been included on the
17 request for probable cause by the magistrate.

18 Q And thereafter, you talk about Florida versus
19 Jardines?

20 A Correct. Which came out in 2013, suggests that
21 the drug dog sniff on the exterior of an abode, a
22 residence, an apartment, a hotel room, is in violation
23 of the occupant or the owner or the tenant's
24 constitutional rights to be safe from law enforcement
25 in their homes. I'll hand that case up, Your Honor.

1 I'm sure you're aware of it.

2 MR. JAMES: I have no further questions, Your
3 Honor.

4 THE COURT: Okay. Mr. Fowler, any recross?

5 MR. FOWLER: No, sir.

6 THE COURT: Okay. You can step down, sir.

7 (Witness excused.)

8 THE COURT: Any other witnesses, Mr. James?

9 MR. JAMES: No, Your Honor. That's the State's
10 only witness.

11 THE COURT: Okay. Counsel, you wish to make a
12 statement?

13 MR. FOWLER: Your Honor, in my years of doing
14 this, I've -- Mr. Kinlaw has provided about as thorough
15 information as has been possibly provided to me. My
16 understanding is, from my personal opinion is that the
17 application he has provided is very thorough, it
18 reveals several issues that were not gone into by my
19 client's prospective -- by his trial counsel, Your
20 Honor.

21 Today we have listed various issues that were not
22 touched on by the own admission of Mr. Long, that were
23 not touched on by my client. There's no paper trail in
24 terms of getting an offer, there's no five years.
25 There's no paper trail of a withdraw of an offer.

1 There's no real evidence of any discussion of any other
2 offers that might have been made, Your Honor.

3 Strickland, as you well know, provides a level of
4 reasonableness that an attorney must provide when
5 providing representation for a criminal defense client.
6 By my client's testimony today, Your Honor, there are
7 several items that could have been offered by the
8 attorney, his then attorney Mr. Long, that were not
9 gone into officially before the Court.

10 Now, Mr. Long said, well, I could read the
11 judge -- well, he didn't say this, but he said, you
12 know, I can't read the judge's mind, but I know which
13 way we're going. Well, Mr. Kinlaw, according to
14 Mr. Long, had provided a lot of information to
15 Mr. Long. And of those 20 or 12, or however many times
16 they met, I'm sure that he provided Mr. Long quite a
17 lot of information that he requested Mr. Long to go
18 into, Your Honor.

19 And to go that far into the motions and what have
20 you and then for him to plead, and as you look in the
21 transcript, Your Honor, several times, page 72, a
22 confusion about what's going on, Mr. Long saying that
23 no discovery was provided on certain elements of this
24 case that were crucially important, Your Honor.

25 My client was -- had a rush to judgment in terms

1 of offering a guilty plea, Your Honor. And he has
2 explained to the Court today that he was not aware at
3 the time of these potential defenses and that he both
4 before this hearing in November of 2004 -- or before
5 the hearing, that he wanted more done by his attorney.

6 And because of that lack of defense capability or
7 interest or what have you, Mr. Kinlaw feels like that
8 his attorney did not reach that reasonable standard.
9 And because of that lack of reasonable standard, he --
10 Mr. Long's performance meets the Strickland criteria.

11 Your Honor, we have the application in front of
12 you, we have the brief that goes over these things.
13 Mr. Kinlaw has articulated at length on the stand about
14 these issues, and we would ask for a ruling in our
15 favor, Your Honor.

16 THE COURT: Okay. Thank you, sir. Mr. James?

17 MR. JAMES: Your Honor, standard for ineffective
18 assistance of counsel is a showing of deficient
19 performance and prejudice therefrom. When considered
20 in the context of a guilty plea, Applicant must show
21 that this counsel's performance fell below an objective
22 standard of reasonableness and that but for counsel's
23 errors he would not have pled guilty but would have
24 insisted on proceeding to trial.

25 The burden for proving that is upon the Applicant,

1 and today he has failed to meet that burden. To the
2 contrary, the record before the Court and Mr. Long's
3 testimony showed that he received competent counsel.
4 Mr. Long met with Kinlaw 20 something times.
5 Mr. Kinlaw was offered a tremendously generous plea
6 deal and rejected it against the advice of counsel,
7 thereby terminating it.

8 He did this in favor of betting his future on the
9 pretrial motions. Before trial, Mr. Long told
10 Mr. Kinlaw that his entire case was on the success of
11 those pretrial motions. Mr. Long zealously argued
12 those motions and effectively advanced arguments in
13 support of them including the grounds raised by
14 Mr. Kinlaw in his application.

15 Mr. Long again impressed upon Mr. Kinlaw that he
16 had no chance in front of a jury after the failure of
17 the pretrial motions. Counsel was prepared to go to
18 trial and fight, but Mr. Kinlaw by his good reasoning
19 and upon good counsel wisely determined that it was
20 better to admit guilt in exchange for some degree of
21 leniency. Mr. Long testified that Mr. Kinlaw did not
22 ask for an appeal. Counsel could do no more than
23 achieve what was requested of him by his client, which
24 he did.

25 Furthermore, I would just like to emphasize this,

1 and it struck out at me, in opposing counsel's argument
2 there was no trail of the offer. Counsel on the stand
3 in his testimony explained all of the proceedings as to
4 an offer of a guilty plea, how it was communicated to
5 him, how he received it, how he communicated it to his
6 client, how it came to end.

7 Your Honor, for all of these reasons the State
8 respectfully asks this Court to deny Mr. Kinlaw's
9 motion for post conviction relief. And to the extent
10 that the Court would find it helpful, the State is
11 certainly willing to draft a memorandum in support of
12 its position.

13 In addition, Your Honor, the State has prepared a
14 small packet of case law in support of its position,
15 including the cases of Jackson v. State, State v.
16 Humphries, State v. Dupree, State v. Moultrie, State v.
17 Davis. And I have copies of those available to
18 opposing counsel as well, if I may approach.

19 THE COURT: Yes, sir.

20 MR. FOWLER: Your Honor, is this case law within
21 the scope -- why am I receiving this case law in the
22 concluding argument? I'd like to have some time to
23 take a look at it if at all possible, and my client as
24 well. I mean, earlier today I offered the brief. I
25 mean, I know it was just a few hours, but I gave

1 counsel time to take a look at it before we started on
2 this. And now in the concluding argument I'm getting
3 case law that apparently is relevant to his case. So
4 I'll --

5 THE COURT: Okay. Tell you what I'll do. You hit
6 him at the last minute, he's hit you at the last minute
7 with this case law. I'm going to take this matter
8 under advisement because I want thoroughly to read your
9 client's pro se brief.

10 MR. FOWLER: Yes, sir.

11 THE COURT: I want to read this case law. I'll
12 give you both 30 days, you can file a brief if you so
13 desire, and you are to address any issues in the case
14 law that was raised.

15 MR. FOWLER: Okay. Any issues in regards to this
16 case law?

17 THE COURT: This case law that he's handed up,
18 yes, sir.

19 MR. FOWLER: He's just handed up.

20 THE COURT: All right.

21 MR. FOWLER: Very good.

22 MR. JAMES: Thank you, Your Honor.

23 THE COURT: Okay.

24 MR. FOWLER: Thank you, Your Honor.

25 THE COURT: Okay. I'll give you till May the

1 26th, a little more than 30 days.

2 MR. FOWLER: Okay. So you mean June 26th?

3 THE COURT: I'm sorry, June 26th, yes.

4 MR. FOWLER: All right. So just to be clear, and
5 forgive me, Your Honor, so you're saying that if we
6 wish to submit briefs in regards to this -- these
7 documents?

8 THE COURT: What he just handed you.

9 MR. FOWLER: We can do so by June 26th.

10 THE COURT: 26th.

11 MR. FOWLER: Okay. And then after that, I mean, I
12 don't want to --

13 THE COURT: After that I'm going to rule on the
14 matter.

15 MR. FOWLER: Okay. And then after you rule, will
16 either party have 30 days to submit the order, or is
17 there a timeline that we can go by or you're just going
18 to rule?

19 THE COURT: I'll address that at the time.

20 MR. FOWLER: Okay.

21 THE COURT: I don't know how much time I want to
22 give at that point in time.

23 MR. FOWLER: Yes, sir.

24 THE COURT: Haven't crossed that bridge yet.

25 MR. FOWLER: June 26th is the deadline?

1 THE COURT: June 26th, couple days more than 30
2 days or whatever. So for you to file a brief if you so
3 desire, you can address this case law.

4 MR. FOWLER: This case law. Thank you, Your
5 Honor.

6 MR. JAMES: Thank you, Your Honor.

7 THE COURT: Thank you.

8 (WHEREUPON, the hearing concluded at approximately
9 3:45 p.m.)

10 (End of Transcript of Record)

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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

I, TERESA J.F. BAUTZ, Official Court Reporter for the Fifteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Horry County, South Carolina, on the 25th day of November, 2017.

I FURTHER CERTIFY that I am neither of kin, counsel nor interest to any party hereto.

S/Teresa J. F. Bautz

TERESA J.F. BAUTZ, RPR
Official Court Reporter

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FOR THE FIFTEENTH JUDICIAL CIRCUIT

Henry Lee Kinlaw,) Case No.: 2015-CP-26-03714
S.C.D.C. No. 271267,)

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of an application for post-conviction relief filed by Henry Lee Kinlaw ("Applicant") on May 19, 2015. Respondent made its return on or about February 17, 2016. The Court convened an evidentiary hearing into the matter on May 24, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Steven W. Fowler, Esquire. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Russell Blake Long, Esquire ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Horry County Clerk of Court regarding the subject convictions, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the May 2012 term of the Horry County Grand Jury trafficking cocaine base more than 28 grams, less than 100 grams, second offense (2012-GS-26-01698); distribution of crack cocaine, second offense (2012-

GS-26-01699); and trafficking cocaine more than 28 grams, less than 100 grams, second offense (2012-GS-26-01700). Russell Blake Long, Esquire represented Applicant; Steven Grooms and Travis Hyman, both of the Fifteenth Circuit Solicitor's Office, prosecuted the case.

At trial, during consideration of the State's motion for joinder, the State summarized, and Counsel largely agreed with, the following summation of the investigation:

MR. GROOMS: [...] [T]he DEU, Drug Enforcement Unit, is sitting outside the hotel where [Applicant] is alleged to be staying[.]

...

MR. GROOMS: The DEU watches [Applicant] for a couple of days, they see his car in the parking lot, they run the plates, come back to [Applicant]. One of the agents will testify that he ID'd [Applicant] via the picture. They watched him for a number of days, they were on surveillance before they do anything. Once they see a lot of cars coming and going, and [Applicant's] car being the only one in the parking lot other than these cars coming and going, they determined we have suspicion of drug activity.

At that point, Agent Phillips calls in other officers to help in surveillance. They make the decision to follow one of these vehicles that comes and goes, Keith Buffkin. He pulls up, he's by himself, he goes in the stairwell, he's in and out twenty or thirty seconds. Agents follow him. Agents follow him down 17, he commits a traffic violation, they pull him over. Agents approach him and explain to him who they are and why they're there, they say they're investigating narcotics activity, ask him if he has any drugs on him. He says, yes, I do, I bought them at the hotel, brought them in the stairwell. They say, who did you buy them from, he says Gutter or Gunner, he has a nickname for him. They show him the DMV photo, he says that's him. The photo is [Applicant]. He goes on to say in his statement that he's bought from [Applicant] up to eighteen times, six by himself, twelve with somebody else. So, officers at that point - he does give them the drugs, it is crack cocaine or presumed to be at that time, it does test positive a little bit later for crack cocaine.

Agents respond to the magistrate the next morning to get a warrant for distribution of cocaine base. That day, they continue surveillance. While they're doing surveillance, one of the other agents just happens to be at the same gym as [Applicant]. He calls the lead agent and says, hey, you're never gonna believe who is here, [Applicant] is here. He says, all right, let's go ahead and take him

down today. All agents respond to the gym. [Applicant] is taken into custody at that time.

A search is done of him, he has a key card in his pocket that goes to the Days Inn Motel. It doesn't say a room number on it. Agents read him Miranda and ask him if he wants to cooperate. He says, I don't know what you're talking about, I've never been to that hotel. Agents respond immediately to the hotel, talk to the front desk and they say, yep, [Applicant] has been here, he's been staying here, he's in Room 205. Agents go up to Room 205, test the key and make sure it works, they don't open the door, it does match. They bring a drug dog who does alert on the door.

With the information, with the tip, the tip corroborated the distribution and the key card. They get a search warrant as well as the drug dog hit. And in that hotel room, he has trafficking weight cocaine, trafficking weight crack cocaine, scales, baggies, razor blades, residue, money, the whole nine yards. There is nothing in that room that says the name [Applicant]. So, for me to try my trafficking case, I need to have Keith Buffkin here to say I bought from [Applicant] when I was in the hotel that day or that day before which corroborates my agent's testimony that he's been watching [Applicant] at that hotel. The CI¹ would further testify that [Applicant] went upstairs and he left that stairwell. The CI would further testify that [Applicant] went upstairs and he left that stairwell. Police put them on, not the first floor, I think there's four floors.

Tr. 28, l. 9 – p. 30, l. 20 (formatting added).

On November 3, 2014, after voir dire and rulings on Applicant's pre-trial motions, Applicant pled guilty as indicted. The Honorable John C. Hayes sentenced Applicant to imprisonment for concurrent terms of 15 years imprisonment for trafficking in cocaine base 28 to 100 grams, second offense; 15 years imprisonment for possession with intent to distribute cocaine base or meth, second offense; and 15 years imprisonment for trafficking in cocaine, 28 to 100 grams, second offense. Applicant did not appeal his plea or sentence.

¹ Contextually it appears that the State here refers not to the confidential informant who prompted the surveillance, but to the individual arrested, Mr. Buffkin.

Current Application

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

1. Ineffective assistance of counsel, in that:
 - a. Counsel failed to adequately prepare to argue his motion to suppress the search warrant;
 - i. "Failure to investigate, prepare for and motion to dismiss charges of distribution of crack cocaine: trafficking in crack-cocaine 28-100 grams: and trafficking cocaine 28-100 grams because arrest warrant and affidavit in support of was not supported by probable cause."
 - ii. "Arrest warrant was invalid and counsel should have objected to and motioned to dismiss warrant because of its invalidity."
 - iii. "Counsel was ineffective during his presentation regarding the suppression hearing. Counsel failed to investigate adequately prepare and thoroughly argue the suppression of the drug evidence."
 - iv. "Plea counsel's representation fell below an objective standard of reasonableness and prejudiced Kinlaw."
 - b. Counsel failed to communicate a plea offer of five years;
 - i. "Defense counsel advised Kinlaw that the State would allow him to plead guilty to all charges for a five (5) year total sentence. Counsel did not inform Kinlaw when the plea offer expired."
 - ii. "Plea counsel's performance was deficient as it fell below 'an objective standard or reasonableness' when plea counsel failed to inform Kinlaw when the State's plea offer would expire."
 - c. Counsel failed to investigate the confidential informant;
 - i. "Failure to investigate the confidential driver, failed to do a supplemental Brady/Rule 5 motion, when five 5 days prior to trial, the State released the name of the confidential driver to counsel."
 - ii. "Failure to obtain confidential driver's criminal history and any and all information concerning his being a potential confidential informant ("CI") and, if so, his credibility and reliability."
 - d. Counsel failed to investigate the traffic stop leading to the arrest of the individual who departed from the hotel searched;
 - i. "Counsel failed to obtain any and all surveillance videos and audio recordings and any video(s) of the traffic stop of the driver; and"
 - ii. "Counsel failed to obtain any agreement for driver for his/her cooperation and agreement to testify against Kinlaw."

- e. "Counsel did not advise me that I had a meritorious State and Federal Constitutional claim and that if I went on to trial, that I could challenge the trial judge's denial of suppression motion."
- f. "Failure to file direct appeal."
 - i. "Instructed counsel to file an appeal. Counsel did not file direct appeal."
 - ii. "Failed to file an appeal or notice of intent to appeal the convictions and sentences in order to protect Kinlaw constitutional rights, therefore pela counsel was constitutionally ineffective and as a result Kinlaw was denied his only appeal as matter of right."

2. Involuntary Guilty Plea

- a. "Counsel coerce Kinlaw to enter a plea of guilty."
- b. "Counsel's inaccurate advice and failure to thoroughly prepare for trial led to Kinlaw's guilty plea."
- c. "Counsel advice to plead guilty was deficient, because Kinlaw had a valid legal challenge to the denial of the suppression motion on direct appeal."
- d. "Kinlaw plead guilty because of deficient advice and lack of an alternative, and he did not do so voluntarily or knowingly."

At the outset of the hearing, Applicant's counsel offered to the Court a "Pro Se Brief" prepared by Applicant himself. Respondent objected to the brief to any extent it may be construed as raising new allegations not presented in the original application, and further objected that the brief constituted "hybrid representation." This Court agreed that it would not consider any portion of the brief as raising new allegations for reasons set forth in greater detail below.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Applicant's Briefs Are Not Properly Before This Court

As an initial matter, the Court is obliged to address the validity of two filings submitted in the course of this matter: Applicant's *pro se* brief submitted on the morning of the evidentiary hearing, and Applicant's "Brief in response to case laws submitted by the SC Attorney General at PCR hearing,"² initially filed by Applicant *pro se* on June 16, 2017, but thereafter filed by PCR counsel without meaningful modification on June 27, 2017. While this Court did grant both parties until June 26, 2017, to file briefs in support of their respective positions, it was clearly indicated that any such briefs must come from the attorneys for each party. It is clear from the face of the document that the June 16 and June 27 filings are not the work of counsel, but that of Applicant himself, in continuation of this matter's unfortunate trend of voluminous, last minute *pro se* filings.

The Court *cannot* consider these filings. The Supreme Court of South Carolina has repeatedly held that there is no right to hybrid representation, and that "substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel." Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010) (citing State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989)). The Court in Miller goes further to remind both judges and Clerks of Court that they are not to accept *pro se* filings of represented individuals unless the filing is a motion to relieve counsel. Id.

"[C]ounsel cannot serve as a mere conduit for *pro se* documents in an effort to avoid the prohibition against hybrid representation and the displeasure of his client." Jones v. State, 348

²At the end of Respondent's closing argument, Respondent provided to opposing counsel and the Court a number of cases in support of its position, which the Court accepted over Applicant's objection: Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); State v. Humphries, 354 S.C. 87, 579 S.E.2d 613 (2003); State v. Dupree, 354 S.C. 676, 583 S.E.2d 437 (2003); State v. Moultrie, 316 S.C. 547, 451 S.E.2d 34 (1994); State v. Davis, 354 S.C. 348, 580 S.E.2d 778 (2003); and State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (2002).

S.C. 13, 14, 558 S.E.2d 517 (2002). Counsel must "use professional judgment in reviewing the documents and [] submit the client's arguments only if relevant and only after they have been edited by counsel for review by the Court." *Id.*, 558 S.E.2d at 518, see also City of Columbia v. Assa'ad-Faltas, Op. No. 27723, 11 n.13, 2017 WL 2665155, 6 n.13 (S.C. Sup. Ct. filed June 21, 2017) ("Tails should not wag dogs. Merely because an appellant believes that the irrelevant is relevant is no reason to turn the system on its head and solemnly contemplate the wisdom of a person who does not have the sense to be guided by experts in an area where he himself possesses no expertise."); *Id.* at 17, 2017 WL at 9 (quoting *Jones* where abusive litigant continuously manipulated right to counsel to abuse the judiciary and others).

The "Brief in Response" from Applicant bears no indicia that PCR counsel reviewed or modified the documents using his professional judgment. The June 16, 2017, filing, as well as the "Pro Se Brief" submitted on May 24, 2017, are both rejected by this Court as impermissible hybrid representation pursuant to the above cited authorities.³

B. Ineffective Assistance of Counsel and Involuntary Guilty Plea

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." *Butler*, 286 S.C. at 442, 334 S.E.2d 441 (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. *Id.*

³ The Court notes, however, that much of the substance of the *pro se* brief provided at the evidentiary hearing was offered by Applicant in his exhaustive, if not repetitive, testimony.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (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 an 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; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[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, 386 S.E.2d at 625 (citing Strickland, 66 U.S. at 688). 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 (citing Strickland, 66 U.S. at 694). 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. Strickland, 66 U.S. at 696. 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. at 696-97.

Where an applicant alleges his guilty plea was not voluntarily and knowingly entered into, the record must establish Applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. See Harris v. Leeke, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he should be allowed to depart from the truth of his statements. See Crawford v. U.S., 519 F.2d 347, 350 (4th Cir. 1975) (overruled on other grounds by U.S. v. Whitley, 759 F.2d 327 (4th Cir. 1985)).

An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial instead. See Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001); see also Richardson v. State, 310 S.C. 360, 362 426 S.E.2d 795, 797 (1993). Given Applicant's burden of proof and the analysis to be applied to this claim, Applicant's claims of involuntary plea are, in essence, claims of ineffective assistance of counsel, and are treated as such.

IAC Allegation #1 – Failure to Prepare for Motion to Suppress Arrest & Search Warrants

The Court finds that Applicant has proven neither prong of Strickland through his allegation that Counsel failed to adequately prepare for his argument to suppress the search warrant for Applicant's hotel room. To establish counsel failed to adequately prepare for trial, an applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 131-32 (1997).

At the evidentiary hearing, Applicant testified to what he believed were deficiencies in the warrant for his arrest, such that there was not probable cause:

- 1) The warrant lacked sufficient facts to establish probable cause that a crime had been committed;
- 2) The warrant lacked sufficient facts to establish probable cause that Applicant was the person who committed the crime;
- 3) The warrant did not specifically identify the source of the allegations;
- 4) The warrant did not contain any information to establish the reliability of the confidential informant;
 - a. The warrant was based on an unreliable confidential informant.
- 5) There was no independent verification of the facts in the arrest warrant.

Applicant additionally testified to what he believed were deficiencies in the search warrant permitting law enforcement to search his hotel room:

- 1) The warrant lacked sufficient facts to show why officer would believe a crime had been committed;
- 2) The warrant did not contain any information to establish the reliability of the confidential informant;
- 3) The warrant did not set forth facts to show that drugs were ever bought or sold from the hotel room;
- 4) There was no independent verification of the facts in the search warrant;
- 5) There were no facts to establish the reliability of the canine who alerted to the presence of illegal drugs
- 6) The canine sniff was performed without a search warrant;

7) The warrant was supported by false statements and facts misrepresented by Officer Phillips:

- a. The confidential informant gave a nickname, "Gutter," not Applicant's legal name;
- b. The warrant indicated that Applicant was staying at the hotel;
- c. The drug transactions to support the warrant occurred in a stairwell near the room, not the room itself;
- d. The warrant indicated that the blue Chevrolet Impala was Applicant's vehicle;
- e. The warrant indicated that crack was found on a confidential informant who bought it from Applicant
- f. The keycard found in Applicant's possession belonged to the room to be searched;
- g. Law enforcement conducted a canine sniff of the room exterior.

Applicant testified to his belief that Counsel could have spent more time preparing for the motion to suppress and that, had he done so, Counsel could have raised each and every one of the above listed issues such that the warrants would have been suppressed. On cross-examination, Applicant conceded that Counsel argued to the court that the warrant was "based on a total stranger's statement,"⁴ that the identification was based on "the most suggestive lineup [Counsel had] ever heard of,"⁵ and that Counsel argued the drug dog sniff was invalid under Florida v. Jardines, 569 U.S. 1 (2013).⁶ Applicant further conceded that Counsel sought both a motion to dismiss based on the State's nondisclosure of the confidential informant's identity and, in the alternative, a continuance to further investigate the individual—both were denied.

Counsel testified that Applicant's entire case hinged on the outcome of the pre-trial motions to suppress the search and arrest warrants. Counsel reaffirmed his arguments made during the hearing on his motion: the warrants were based on information provided by total strangers; the photo "lineup" was the showing of a single photo of Applicant; and the drug dog

⁴ Tr. 58, l. 10-11.

⁵ Tr. 59, ll. 6-16.

⁶ Tr. 59, l. 16 - p. 60, l. 2.

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sniff was constitutionally suspect pursuant to Jardines. Counsel testified to his belief that had he made the "less important" arguments and motions as demanded by Applicant, that the proceeding would not have gone well. Counsel further testified that the statements in the warrants were all true, that he had no reason to believe them to be false, and that he did not know why Applicant claimed Officer Phillips made false statements. Counsel indicated Applicant was very involved with the law, but offered little to no facts to support his defense. Counsel's testimony demonstrated thorough command of the facts of the case.

The Court finds Counsel's testimony credible. Furthermore, the Court finds Applicant's testimony regarding the veracity of the information in the warrants not credible. Both the transcript and Counsel's testimony demonstrate that Counsel clearly, concisely, and effectively advanced the best available arguments against the validity of the warrants for Applicant's arrest and search of the hotel room. Counsel is not obliged to act as a conduit for every argument desired by his client, but must use his or her good judgment to communicate the best arguments available—Counsel did so. The Court concurs in Counsel's judgment that offering every argument provided by Applicant at the evidentiary hearing would have only hurt Applicant's cause—"[l]egal contentions, like the currency, depreciate through over-issue. [. . .] Multiplicity hints at lack of confidence in any one." Jones v. Barnes, 463 U.S. 745 (1983) (quoting Jackson, Advocacy Before the Supreme Court, 25 Temple L.Q. 115, 119 (1951)). The Court finds Counsel was thoroughly prepared to argue the motion. Accordingly, Applicant's request for relief based upon this allegation is **DENIED**.

IAC Allegation #2 – Failure to Explain Plea Offer

The Court finds that Applicant has proven neither prong of Strickland through his allegation that Counsel failed to adequately explain a plea offer of five years. "Defense counsel has the duty to communicate *formal* offers from the prosecution to accept a plea on terms and

conditions that may be favorable to the accused." Missouri v. Frye, 566 U.S. 133, 145 (2012) (emphasis added); see also Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009). "When a criminal defendant rejects a plea bargain, [the Court examines] separately whether trial counsel was ineffective with respect to both the defendant's rejection of the offer and his ultimate decision to plead guilty." Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012) (citing Kolle v. State, 386 S.C. 578, 590, 690 S.E.2d 73, 79 (2010)).

Applicant testified that though Counsel communicated to him the State's plea offer of five years, Counsel did not tell him when that plea offer would expire. Counsel testified that Applicant specifically and firmly rejected the State's offer of five years when it was presented, even though in Counsel's opinion it was a great offer that Applicant should have accepted. Counsel testified that he did indicate as a general principle that the offer would expire. On cross-examination, Counsel testified that he received the offer orally from Asst. Sol. Steven Grooms and that it was effectively dead when Applicant refused the offer and demanded a trial. The State orally withdrew the offer about a month before trial. Counsel tried to get another offer the morning of trial, but the State was disinclined to put five years back on the table. Finally, Counsel emphasized Applicant never wanted the five years, but wanted to proceed to trial.

The Court finds Counsel's testimony credible. Counsel adequately communicated the *informal* plea offer and Applicant threw it away on his own initiative. Notably, there is no evidence before the Court that the plea offer, orally communicated, ever had a fixed expiration date to communicate. Applicant has no constitutional entitlement to any particular plea offer. Accordingly, Applicant's request for relief based upon this allegation is **DENIED**.

IAC Allegation #3 – Failure to Investigate/Disclose Confidential Informant

The Court finds that Applicant has proven neither prong of Strickland through his allegation that the State failed to disclose, and that Counsel failed to adequately investigate, the

confidential informant ("CI"). An applicant may challenge the voluntary nature of his guilty plea in a PCR action by alleging a Brady violation. Hyman at 46, 723 S.E.2d at 380 (quoting Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999)). In evaluating whether a guilty plea was involuntary due to a Brady violation, the Court considers: "(1) whether the evidence in question was favorable to the applicant; (2) whether the prosecution knew of or had the evidence in its possession; (3) whether the prosecution suppressed the evidence; and (4) whether the evidence was material to Petitioner's guilty or punishment." Id. "[A]n informant's identity need not be disclosed where he possesses only a peripheral knowledge of the crime or is a mere 'tipster' who supplies a lead to law enforcement." State v. Humphries, 354 S.C. 87, 90, 579 S.E.2d 613, 615 (2003).

It is uncontested that the State did not disclose the identity of the CI to Counsel prior to the hearing on Applicant's motion to suppress. Counsel testified that he attempted to get the identity of the CI but was told nothing by the State. At trial, during the hearing on the motion to suppress, Counsel objected on hearsay grounds during law enforcement testimony that hinted to the substance of the tip that led them to surveil the Days Inn. Tr. 37-40. Counsel sought to dismiss the charges and, in the alternative, a continuance to investigate the CI. Judge Hayes denied both requests.

The Court is inclined to agree with the conclusion of Judge Hayes in denying Applicant's motion for a continuance: "The only relevance of this so-called CI or Ms. China or whatever her last name was, has to do with the instigation of investigation, hard to say, and that her identity and her involvement is limited to the extent that I'm not gonna grant the continuance." Tr. 64, ll. 18-23. The CI merely prompted law enforcement to begin surveillance at the Days Inn, at which point the information she provided was corroborated by independent observation. As the CI was merely a tipster, the State was under no obligation to disclose her identity at all under

Humphries. With the State under no obligation to disclose the identity of the CI, the Court can conceive of no honest means by which the identity of the CI could have been ascertained by Counsel. As such, Applicant demonstrate neither the factors set forth in Hayes nor satisfy the prongs of Strickland—the CI's identity was a peripheral matter and, even if Applicant were entitled to it, the lack of it caused him no prejudice. Accordingly, Applicant's request for relief based upon this allegation is **DENIED**.

IAC Allegation #4 – Failure to Investigate Traffic Stop

The Court finds that Applicant has proven neither prong of Strickland through his allegation that Counsel failed to adequately investigate the traffic stop of an individual departing from the Days Inn while it was under surveillance. As previously explained, to establish counsel failed to adequately prepare for trial, an applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998); Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.") (citation omitted); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (relief denied where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial).

As previously discussed in II.B.1, addressing the search warrant, Counsel argued during the suppression hearing that the warrant's reliance on Mr. Buffkin was deficient given Mr. Buffkin was "total stranger" and that his identification of Applicant was based on "the most suggestive lineup [Counsel had] ever heard of[.]" Mr. Buffkin did not testify at the evidentiary hearing.

Based on the record and testimony presented, the Court could only speculate as to what, if any, additional advantage Applicant would enjoy had Counsel conducted additional investigation of Mr. Buffkin. From the record it appears that Counsel effectively identified and argued the key weaknesses of the witness during the suppression hearing. Importantly, without any testimony from Mr. Buffkin, Applicant cannot demonstrate prejudice. Accordingly, Applicant's request for relief based upon this allegation is **DENIED**.

LAC Allegation #5 – Failure to Advise of Valid Constitutional Claim

The Court finds that Applicant has proven neither prong of Strickland through his allegation that Counsel failed to advise him that he had a valid grounds to appeal the Court's denial of the suppression motions. At the evidentiary hearing, Applicant testified broadly that Counsel failed to communicate with him. Applicant immediately thereafter conceded that Counsel shared and discussed discovery with him, but questioned whether Counsel had everything necessary given he lacked the CI's identity. Applicant claimed that he was not informed of the specific issues that would be raised in the suppression hearing and that he did not have a good understanding of his case. On cross-examination, Applicant conceded that Counsel did discuss possible defenses with him—namely that the search warrant was arguably invalid. Counsel testified that he timely received discovery and reviewed everything with his Client, and that his Client was very involved in the law of his case. Counsel explained to Applicant all of his constitutional rights prior to the guilty plea.

The Court finds Counsel's testimony credible and Applicant's testimony not credible. Counsel consistently demonstrated command of the facts and law in this matter and his communication of as much with his client. Counsel's testimony at the evidentiary hearing was consistent with statements Counsel offered in mitigation at the plea proceeding. See Tr. 75, ll. 5-15. Applicant is very clearly cognizant of his constitutional rights. In particular, the Court finds

that one exchange from the plea proceeding unequivocally demonstrates that Applicant was aware of his rights and that he was giving them up by pleading guilty:

THE COURT: Okay. [Applicant], I advise you that by entering a plea of guilt to these charges and as to these charges, you are giving up all those rights I've gone over and you're also giving up any defense that you might have to the charges; do you understand that?

[APPLICANT]: So, I'm giving up all my rights from the motion hearing, too, pretrial motion?

THE COURT: Yes. Do you understand that?

[APPLICANT]: Yes, sir.

THE COURT: All right. Knowing all those things, do you still wish to plead guilty?

[APPLICANT]: Yes, sir.

THE COURT: All right. To all three charges?

[APPLICANT]: Yes, sir.

Tr. 72, ll. 12-25. The Court finds Applicant knew what he had and what he gave up. Accordingly, Applicant's request for relief based upon this allegation is **DENIED**.

LAC Allegation #6 – Failure to File Notice of Appeal

The Court finds that Applicant has failed to meet his burden as to his allegation that Counsel failed to file a notice of appeal as instructed. Though counsel is required to make certain that a defendant is made fully aware of his or her right to appeal after a *trial*, a different standard applies to a guilty plea:

Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.

Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (citations omitted). Therefore, in a collateral action attacking a guilty plea, the "bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief." Jones v. State, 382 S.C. 589, 598, 677 S.E.2d 20, 23-24 (2009) (quoting Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995)).

In his application, Applicant alleges that he asked Counsel to file an appeal on his behalf and that Counsel failed to do so. At the evidentiary hearing, Applicant testified that *if* Counsel had informed him that the defects in the warrants could be challenged on appeal, then he would not have pled guilty, but proceeded to trial. Counsel testified that Applicant never asked for an appeal, but that if Applicant had done so, Counsel would have promptly filed a notice of appeal on his behalf.

The irreconcilable inconsistency between Applicant's allegations at the evidentiary hearing and the allegations set forth in the original application clearly demonstrates the specious character of his testimony. Put simply, the Court does not find Applicant credible as to this or any issue. The Court finds Counsel's testimony credible and finds that Applicant did not ask for an appeal or otherwise indicate his desire for one after the guilty plea. Accordingly, Applicant's request for relief based upon this allegation is **DENIED**.

B. Direct Appeal Issues

Throughout his pleadings and his testimony, Applicant consistently alleged, both in the context of ineffective assistance of counsel and independent of that context, that the trial court erred in denying his motion to suppress the search and arrest warrants, and in denying his attorney's request for a continuance. An application for post-conviction relief does not serve as a substitute for direct appeal, and an issue that could have been raised at applicant's trial or on appeal is not cognizable in an application for PCR. S.C. Code Ann. § 17-27-20(b); Simmons v.

State, 264 S.C. 417, 215 S.E.2d 883 (1974). Trial court error is not a cognizable claim for PCR. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). To the extent that Applicant seeks relief on the basis that the trial court erred in any of its rulings, this Court finds that those issues could have been raised at trial and thereafter on appeal. Therefore, Applicant's request for relief based upon his allegations that the warrants were defective is **DENIED**.

V. CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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 must be denied and dismissed with prejudice.

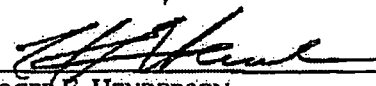
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

[Signature on following page]

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 31st day of July, 2017.


ROGER E. HENDERSON
Presiding Judge
Fifteenth Judicial Circuit

Chesterfield, South Carolina

FILED
2017 AUG 10 PM 4:30
CLERK OF COURT
HORRUM COUNTY, SC

Re: Brief in response to case laws
submitted by the SC Attorney
General at PCR hearing
Case No: 2015-CP-26-03714

FILED
HORRY COUNTY
2017 JUN 16 PM 2:34
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

Dear Melanie Huggins-Ward:

Enclosed you will find a case brief in response to the case laws provided by the Attorney General at my PCR hearing the week of May 22, 2017 in Horry County. Can you please add this brief to my PCR case file and send a clocked stamp copy back to me. Thank you for your time.

2015-CP-26-03714**HENRY KINLAW #271267**

Brief in response to the State's citation of case Laws.

ISSUE ILLEGAL ARREST

I Henry Kinlaw presented overwhelming argument in regards to arrest warrant M-97117 "Distribution of crack-cocaine" being invalid because the underlying affidavit lacked probable cause. The brief I provided to the P.C.R. Court specifically address every facial defect in the arrest warrant. The brief specifically address the fact that if oral testimony was provided by the Affiant Officer Phillips at the time the arrest warrant was procured, the facial defects still could not be cured based on the unique facts of the case. The brief specifically addressed how trial counsel was ineffective in regards to this issue. The brief specifically addressed how trial counsel's deficient performance prejudiced me. The live testimony I provided at the P.C.R. hearing specifically pointed out each facial defect in the arrest warrant. The live testimony I provided specifically pointed out to the P.C.R. Court that trial counsel was ineffective for not discovering, for not raising this valid Fourth Amendment claim on a motion to suppress at the suppression hearing, for not informing me of this valid Fourth Amendment claim. The live testimony I provided established that if trial counsel would have raised the defects in the arrest warrant on a motion to suppress the trial judge would have found the arrest warrant was invalid for a lack of probable cause under the 4th amendment of the U.S. Constitution, invalid under I §10 of the S.C. Constitution and all evidence discovered after my illegal arrest would have

been suppressed as fruits of the poisonous tree. The live testimony I presented at the P.C.R. hearing established trial counsel deficient performance prejudiced me because if trial counsel would have challenge this invalid arrest warrant on a motion to suppress, the warrant would have been found to be invalid and based on the evidence being suppressed from this invalid arrest warrant the state would not have any evidence to try or convict me of distribution of crack-cocaine, trafficking crack cocaine, trafficking cocaine. The live testimony I presented at the P.C.R. hearing established if trial counsel would have specifically informed me that the arrest warrant was invalid and because it was invalid all evidence discovered after my illegal arrest would have to be suppressed the state would not have had any evidence to try me or charge me with distribution of crack-cocaine, trafficking cocaine, trafficking crack-cocaine, I would not have plead guilty, I would have went to trial. I presented numerous authority in my brief to support my argument in regards to the illegal arrest and trial counsel being ineffective in regards to this issue. If the state is attempting to use *State v. Moultrie*, 316 S.C. 547 (1994) as authority to support its argument that my arrest was not illegal, the state's argument is misplaced because the facts of my case are clearly distinguishable from *State v. Moultrie* 316 S.C. 547 (1994). In *Moultrie* police officers had probable cause to conduct a warrantless arrest and perform search incident to arrest, supporting admission of cash found in defendant's wallet, where 'named informant' provided detailed first-hand information about defendant's mode of operations during his drug transactions, information was corroborated

by police officer who arrived on scene to find crowd of people surrounding defendant, package of marijuana at defendants feet, and paper bag filled with cocaine, crack-cocaine, and marijuana nearby. *Moultrie* is based on "if officers had probable cause to make warrantless arrest." The facts of my case is the underlying affidavit of arrest warrant M-971717 did not set forth substantial information to allow the "issuing magistrate to make an independent judgment that there was probable cause to issue the arrest warrant." Furthermore the informant in my case is confidential and the officers in my case did not independently verify the unreliable confidential informants bare bones statement that he bought .9 grams of crack-cocaine from "Henry Kinlaw from within the days in hotel on Feb 28, 2012. Based on the facts of my case *State v. Moultrie* is not controlling, The controlling cases in my case are ~~the~~ ^{the} following cases:

1. *Whiteley v. Warden* 401 U.S. 560 ("held Petitioners arrest violated his rights under the Fourth and Fourteenth Amendments and the evidence secured incident thereto should have been excluded from his trial because the complaint, which did not mention that the sheriff acted on an informers tip, and which consisted of no more than the sheriff's conclusion that the individuals named committed the offense, could not support the independent judgment of a disinterested magistrate.)
2. *State v. York* 156 S.E.2d 326 (held that search warrant which was issued on basis of affidavit based on information and belief which stated affiant had good reason to believe that defendant had concealed on her premises

certain contraband but set forth no facts or circumstances which engendered the affiants belief that contraband would be found other than naming affiants informers was nullity.)

3. *State v. Philpot* 454 S.E.2d 905 (S.C. App. 1995) (held that search warrant affidavit was insufficient to establish probable cause for search of defendants residence.)
4. *State v. Schroeder* 450 N.W. 2d 423 (N.D. 1990) (held that insufficient evidence was presented to county judge to establish probable cause for issuance of arrest warrant.)
5. *Chatham v. State* 746 S.E.2d 605 (Ga. App. 2013) (held that uncorroborated statements of a confidential informant (C.I.) whose reliability, credibility, and source of information were unknown were not sufficiently reliable for purposes of establishing probable cause necessary for issuance of warrant to search defendants residence.)
6. *State v. Adolphe* 441 S.E.2d 832 (S.C. App. 1994) (held that issuance of search warrant was not supported by probable cause, as affidavit coupled with hearing testimony of officer/affiant failed to establish confidentials informants reliability and informants allegations were never corroborated by any identifiable individuals.)
7. *Sikes v. State* 448 S.E.2d 560 (1994) (holding counsel was ineffective for failing to raise Fourth Amendment claim.)
8. *Berry v. State* 381 S.C. 630 (2009) (held plea counsel was deficient, as element of claim of ineffective assistance, in failing to inform defendant

who pled guilty to a drug charge of a potential challenge to use of his prior conviction for possession of drug paraphernalia for sentencing enhancement purposes.)

The State can not cite any authority to oppose the invalid arrest warrant. The State can not cite any authority to support an argument that trial counsel was not ineffective in regards to the invalid arrest warrant. Trial counsels testimony at the P.C.R. hearing did not establish any valid trial strategy for not challenging such a blatant violation of my "Fourth Amendment rights. Trial counsels testimony at the P.C.R. hearing did not establish that he informed me of my right to challenge this invalid arrest warrant. Based on the above listed reasons trial counsels performance prejudiced me (Henry Kinlaw) such that it rendered the proceeding fundamentally unfair.

ISSUE INVALID SEARCH WARRANT BECAUSE THE UNDERLYING
AFFIDAVIT LACKED PROBABLE CAUSE.

The State is attempting to present *State v. Davis* 354 S.C. (2003) in support of its argument that the search warrant in my case was based on probable cause. The facts of my case are clearly distinguishable from *State v. Davis* 354 S.C. 348 (2003), also the affidavit in the search warrant in my case is not as "specific) as the affidavit in *Davis*. The affidavit in *Davis* states the specific date "July 13, 2000" that the officer received the information about Davis allege drug activity. The affidavit in my case does not state a specific date officers received information about drug activity allegedly taking place at

the hotel. The affidavit in *Davis* states the source provided Davis "specific vehicle license number." The source in my case only gave the officer a color of a car and the model of the car. See transcript of suppression hearing page 36 line 2-10. The affidavit in *Davis* stated the affiant, is a sworn police officer with the York County Multijurisdictional Drug Enforcement Unit with over 20 years of narcotic experience. The affidavit in *Davis* states officers have personal knowledge that Quincy Davis is known as "Q" and has convictions for selling crack. The affidavit in my case does not contain information in regards to the officers experience in narcotics. The affidavit in my case does not allege officers have personal knowledge of I (Henry Kinlaw) to be known as "Gunner" or "Gutter", the affidavit does not state I had prior convictions for narcotics. No information was provided orally to the magistrate by the affiant in regards to officers having personal knowledge of I (Henry Kinlaw) being known to officers as "Gunner" or "Gutter" or me having prior convictions for narcotics. See transcript of suppression hearing. The affidavit in my case does not contain any information of "flight by me the defendant." The affidavit in my case does not contain any information "the affiant knew from his experience that drugs and proceeds of drug sales are often kept in motel rooms. The affiant in my case did not inform the magistrate I denied being at the hotel. See transcript of suppression hearing. In the case of *Davis* he was legally arrested because officers attempted to conduct a traffic stop and he fled and search incident to a "lawful" arrest revealed the motel key card among other items. The independent investigation by police in *Davis* case

revealed the vehicles license plate was suspended for failure to pay insurance. This provided a basis for a traffic stop once the police observed *Davis* driving the vehicle. My case is based on an "illegal arrest" based on an arrest warrant that did not set forth sufficient information to allow the issuing magistrate to make an independent determination that probable cause existed to issue the arrest warrant thus *State v. Davis* is not controlling in my case. The state also is attempting to use *State v. Dupree*, 354 S.C. 676 (2003) in support of its argument that the search warrant in my case is based on probable cause. The facts of my case are clearly distinguishable from *Dupree*. The affidavit in *Dupree* states "within the past (72) hours, a confidential and first time informant of the Richland County Sheriffs Department has purchased crack cocaine from the described location. The informant was searched before and after the purchase and was observed by narcotics agents while making the purchase entering and exiting the location." The affiant in *Dupree* "received several... different information sources that this particular residence was dealing narcotics." The affiant used a Confidential Informant to conduct a controlled buy at then residence to independently verify the information she received. Thus it is clear in *Davis* and *Dupree* that the magistrate had a "substantial basis" for concluding that there was a "fair probability that contraband or evidence of crime" would be found in *Dupree's* residence. The search warrant in *Dupree* was not upheld on the basis of the past credibility of the informant, but upon the independent verification of facts by the affiant. The officers in case my did not conduct any controlled buys at the hotel to

independently verify the information they received about allege drug activity they received about the hotel. Thus *State v. Dupree* is not controlling in my case.

The search warrant in my case is based on the following statements by the affiant Officer Phillips, (1) The Officers receive information about a black male named aka "Gunner" aka "Gutter" that drives a blue in color impala, that he is allegedly selling crack- cocaine from the days inn hotel, (2) The affiant verify that the car is registered to Henry Kinlaw, (3) The affiant observe Henry Kinlaw driving the on different occasions, (4) The affiant conduct surveillance at the hotel and verified a pattern of traffic at the hotel, (5) The Officer arrest a visitor seen leaving the hotel, (6) An unreliable confidential informant provides Officers with a bare bones statement that he/she bought drugs from a black male at the hotel named "Gunner," (7) An illegal arrest in which Officers discovered a Days Inn keycard on Kinlaws person, (8) A K-9 sniff of room 205 that did not set forth information to allow the issuing magistrate to make an independent determination of the K-9's reliability to establish probable cause based on the alert.

Based on the information provided in the search warrant affidavit in my case and based on the fact the affidavit in my case contain multiple additional facial defects the affidavit in my case did not set forth substantial information for the magistrate to conclude "that there was a fair probability that contraband or evidence of crime" would be found in my hotel room # 205.

The multiple facial defects in the underlying affidavit of the search warrant in my case are the following:

1. The search warrant is defective on its face because the search warrant affidavit set forth no facts as to why D.E.U. Officers believed I committed the crime alleged in the search warrant affidavit "Distribution of Crack Cocaine" on Feb 28, 2012 the crime I was arrested for on Feb 29, 2012. A review of the transcript from the suppression hearing will clearly establish that the alleged oral testimony the affiant said he gave to supplement the warrant did not cure this defect. The controlling case in regards to this defect is *State v. Weston* 494 S.E.2d 801 (S.C. 1997) which held that: (search warrant affidavit which failed to set forth any facts as to why police believed defendant committed crime alleged in affidavit was insufficient to support finding of probable cause to search defendants car.)
2. The search warrant is defective on its face because there was no independent verification of what transpired within the hotel on Feb 28, 2012 during the Officers surveillance and the day the unreliable confidential informant was arrested with .9 grams of crack-cocaine some miles away from the hotel. A review of the transcript from the suppression hearing will clearly establish that the alleged oral testimony the affiant said he gave to supplement the search warrant did not cure this defect and could not cure this defect because the officers did not have surveillance within the hotel on Feb 28, 2012 or on no other specific day. The controlling case in regards to this defect is *State v. Gentile* 373 S.C.

506 (App. 2007) which held that: (Arrest of one of defendants visitors did not support finding of probable cause to search defendants residence Officers discovered Marijuana in possession of driver after he left defendants residence, officers, however, had no knowledge of whether driver purchased Marijuana from defendant, neither driver nor his vehicle was searched prior to going to defendant residence, without surveillance within defendants residence, there was no verification that driver in fact purchased Marijuana from defendant.)

3. The search warrant is defective on its face because the affidavit does not set forth any information as to the reliability of the confidential informant the driver of the car that was arrested after being found in possession of 9 grams of crack-cocaine on Feb 28, 2012 who's information led to my arrest, this defect is critical because the entire case against me is based on the bare bones allegation of this unreliable confidential informant alleging that he/she bought drugs from inside the hotel stairwell on Feb 28, 2012. A review of the transcript from the suppression hearing will clearly establish that the alleged oral testimony the affiant said he gave to supplement the search warrant did not cure this defect and could not cure this defect because there was no independent verification by D.E.U. Officers of the unreliable confidential informant bare bones statements that he /she bought drugs from a " specific person" at the hotel on Feb 28, 2012. The controlling case in regards to this facial defect is *State v. Adolphe* 441 S.E.2d 832 (S.C. App. 1994) held that: (Issuance of the

search warrant was not supported by probable cause, as affidavit coupled with hearing testimony of officer/affiant failed to establish confidential informants reliability and informants allegations were never corroborated by any identifiable individuals.)

4. The search warrant is defective on its face because there is no allegation in the search warrant affidavit that drugs was ever seen or bought from room 205 the location to be searched. A review of the transcript from the suppression hearing will clearly establish that the alleged oral testimony the affiant said he gave to supplement the search warrant did not cure this defect and could not cure this defect because no one ever said they seen or bought drugs from room 205 the location to be searched. The controlling case in regards to this facial defect is *State v. Hunt*, 150 N.C. App. 101, 562 S.E.2d 597, 601-02 (2002) (reversing trial courts decision denying defendants motion to suppress drug evidence and stating all that the affidavit offers are complaints from citizens suspicious of drug activity in a nearby house. There is no mention of anyone ever seeing drugs on the premises. The citizens only reported heavy vehicular traffic to the house. The officer verified the traffic, his verification, as the trial court found, was not a conclusion.”)
5. The search warrant is defective on its face because it does not contain any information to allow the magistrate to make an independent determination of the K-9 Jari’s reliability to establish probable cause based on the alert. The specific reason this statement does not set forth facts to allow the

magistrate to make an independent determination of the reliability of the K-9 Jari to establish probable cause to issue the search warrant is because:

1. Because the search warrant affidavit does not state how long the K-9 "Jari" has been working as a drug-detecting K-9.
2. Because the search warrant affidavit does not state how many hours of training the K-9 "Jari" has.
3. Because the search warrant affidavit does not state what specific type of contraband this "K-9 Jari" is trained to detect.
4. Because the search warrant affidavit does not even contain a statement that the k-9 is "trained and certified."
5. Because the search warrant affidavit does not contain a statement that on prior occasions the K-9 sniffed to searches where drugs were found.
6. Because the search warrant affidavit does not contain a statement that the dog's handler was trained and certified to conduct K-9 narcotics investigations.

A review of the transcript from the suppression hearing will clearly establish that the alleged oral testimony the affiant said he gave to supplement the search warrant did not cure this facial defect because none of the above information was provided to the magistrate that issued the search warrant on Feb 29, 2012. See transcript page 49 line 21-25, transcript page 50 line 1-5, transcript page 57 line 7-9. The controlling case in regards to this defect is *United States v. Colon*, 845 F. Supp. 923, 928 (D.P.R. 1994) held that: (Lack of evidence in the record pertaining...

to general reliability of the canine unit performing the sniff precludes determination that government has shown probable cause.)

I presented evidence at the P.C.R. hearing to show that trial counsel was ineffective for failing to discover, for failing to inform me and failing to raise on a motion to suppress that the search warrant was invalid based on the following facial defects in the search affidavit:

1. The warrant is defective on its face because the search warrant affidavit set forth no facts as to why D.E.U. Officers believed I committed the crime allege in the search warrant affidavit "distribution of Crack-Cocaine on Feb 28, 2012 the crime I was arrested for.
2. The search warrant is defective on its face because there was no independent verification of what transpired within the hotel on Feb 28, 2012 during the officers allege surveillance of the hotel the day the unreliable confidential informant was arrested.
3. Then search warrant is defective on its face because there is no allegation in the search warrant affidavit that drugs was ever seen or bought from room 205, the location to be searched.
4. The search warrant is defective on its face because it does not contain any information to allow the magistrate to make an independent determination of the K-9 Jari's reliability to establish probable cause based on the alert.

During the P.C. R. hearing trial counsel was asked his reason for not raising these specific issues his response was "he was not gonna raise every little thing" and "he said he could see how the suppression hearing was going so he knew the trial judge was not gonna grant the motions if he did raise them." This response by trial counsel can not be considered a valid trial strategy when there are numerous case laws establishing that search warrants were found to be invalid for lack of probable cause based on each of those specific facial defects trial counsel failed to raise. Trial counsel clearly did not exercise reasonable professional judgment in making all significant decision in regards to my case. Trial counsel said he did not raise the facial defect of the search warrant affidavit failing to contain any information to allow the magistrate to make his own independent determination of the K-9 Jari's reliability to establish probable cause based on the alert, "because he know the officer would the officer would say the dog was reliable. Trial counsel response can not be considered a valid trial strategy because the specific issue of the case "is not if the officer would have said the K-9 was reliable or if the K-9 is reliable" but "the affidavit did not contain any information to allow the magistrate that issued the search warrant to make his own independent determination of the K-9 Jari's reliability to establish probable cause based on the alert" is the specific issue of the case. The transcript of the suppression hearing clearly shown the officer that acquired the search warrant did not orally provide any information to the

issuing magistrate to allow him to make his own independent judgment of the reliability of the K-9 Jari. The law is clear a search warrant based on a positive alert by a drug dog is sufficient on its face to establish probable cause "only if" the affidavit supporting the warrant states that the dog is "trained and certified" to detect controlled substances. Trial counsel failure to raise these valid 4th Amendment claims on a motion to suppress is an error because if trial counsel would have raise these issues the search warrant would have been found to be invalid for a lack of probable cause resulting in an exclusion of the evidence found from this invalid search warrant.

Issuing trial counsel was ineffective for failing to motion to have the officers basis of knowledge striked from being used as part of the probable cause determination in regards to the search warrant by the trial judge at the suppression hearing.

The State is attempting to cite *State v. Humphries*, 354 S.C. 87 (2003) as authority to supports its argument that trial counsel was not ineffective in regards to this issue, but the state's argument is misplaced. The facts of my case are clearly distinguishable from *State v. Humphries*. In *Humphries* a confidential informant informed law enforcement that a package containing drugs was going to be delivered by UPS to a specific automotive garage. Upon receiving this information law enforcement did its own investigation and seized the package containing drugs, and the package was later delivered to the garage by an undercover officer

disguised as a UPS employee. At the beginning of trial, Humphries requested the court to order the state to disclose the name of the confidential informant. The Court ruled a Confidential Informants identity need not be disclosed to the defendant where he possesses only a peripheral knowledge of the crime or is a mere "tipster" who supplies a lead to law enforcement.

The argument in my case is not that the State failed to disclose the name of the informant, but based on the totality of the facts in regards to this issue in which I thoroughly addressed in my brief a motion should have been made by my trial counsel at the suppression hearing to have the affiants allege basis of knowledge stricken from being used as part of the probable cause determination in regards to the search warrant. A careful review of the facts of my case would clearly establish that this claim by the affiant Officer Phillips in regards to who he received the information from to start his investigation of drug activity is more than likely false and this was an attempt by the affiant to try and save a search warrant that contained numerous facial defects from being quashed at the suppression hearing by the trial judge for a lack of probable cause because this would have resulted in all evidence seized in hotel room #205 being suppressed which was the bulk of the state's case against me. The main factor in my case is what information was provided to the issuing magistrate to allow him to make his independent determination of probable cause, unlike *Humphries* I'm not requesting the name of the

confidential informant be provided to me. Based on the different set of circumstances *Humphries* is not controlling in my case.

FILED
Horry County
2017 JUN 16 PM 2:35
NATHAN M. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

WITNESSES

Phil Phillips 15th Circuit Drug Enforcement Unit

DOCKET NO. 2012-GS-26- 01760

G

The State of South Carolina

County of Horry

George H. Debush

12H00891

COURT OF GENERAL SESSIONS

May, 2012 TERM

ARREST WARRANT NUMBER

M971730

CDR: 0388 44-53-0370(e)(2)(b)2

DOA: 3/1/2012

THE STATE

VS.

Henry Lee Kinlaw Jr
B/M



ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

MAY 24 2012

ATTORNEY: Long, Russell Blake

VERDICT

Indictment for

**Trafficking Cocaine
(28-100 Grams)**

J. Gregory Hembree, Solicitor

ORIGINAL

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on May 24, 2012, the Grand Jurors of Horry County present upon their oath:

TRAFFICKING COCAINE (28 - 100 GRAMS)

(CDR: 0388 44-53-0370(e)(2)(b)(2))

That Henry Lee Kinlaw Jr did in Horry County on or about February 29, 2012, knowingly sell, deliver, purchase or bring in this State, or aid, abet, attempt or conspire to sell, deliver, purchase or bring into this State, or was in actual or constructive possession, or attempted to become in actual or constructive possession of a quantity of Cocaine in an amount of more than twenty-eight (28) grams, but less than one-hundred (100) grams, same being a controlled substance all within the meaning of Section 44-53-370, et seq., S. C. Code of Laws, 1976, as amended, such possession not having been authorized, and being in violation of section 44-53-370(e)(2)(b), S. C. Code of Laws, 1976, as amended, for the crime of trafficking.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


 J. GREGORY PEMBREE
 FIFTEENTH CIRCUIT SOLICITOR

FILED
 HURRY COUN.
 2011 NOV -3 PM 4:30
 MELANIE HUGHES WARD
 CLERK OF COURT
 COURT DATE
 PLED GUILTY/TRIAL

WITNESSES

Phil Phillips 15th Circuit Drug Enforcement Unit

DOCKET NO. 2012-GS-28- 01698

The State of South Carolina

County of Horry

George H. Debusk

12H00891

COURT OF GENERAL SESSIONS

May, 2012 TERM

ARREST WARRANT NUMBER

M871729

CDR: 0389 44-53-0375(C)(2)(b)

DOA: 3/1/2012

THE STATE

VS.

ACTION OF GRAND JURY

Henry Lee Kinlaw Jr
B/M

TRUE BILL

Foreperson of Grand Jury
Date:

MAY 24 2012

ATTORNEY: Long, Russell Blake

VERDICT

Indictment for

**Trafficking Cocaine Base
More than 28 grams, less than 100 grams**

J. Gregory Hembree, Solicitor

Foreperson of Petit Jury
Date:

ORIGINAL

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on May 24, 2012, the Grand Jurors of Horry County present upon their oath:

TRAFFICKING COCAINE BASE
MORE THAN 28 GRAMS, LESS THAN 100 GRAMS

CDR: 0389 44-53-0375(C)(2)(b)

That Henry Lee Kinlaw Jr did in Horry County on or about February 29, 2012 knowingly, sell, deliver, purchase, or bring into this State; or did aid, abet, attempt or conspire to sell, deliver, purchase or bring into this State, or was in actual or constructive possession or attempted to become in actual or constructive possession of a quantity of Cocaine Base in an amount of more than twenty-eight grams but less than one-hundred grams, same being a controlled substance all within the meaning of Section 44-53-110, et seq., S. C. Code of Laws, 1976, as amended, such possession not having been authorized and in violation of Section 44-53-375(c)(2), S. C. Code of Laws, 1976, as amended, for the crime of trafficking.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


 J. GREGORY HEMBREE
 FIFTEENTH CIRCUIT SOLICITOR

HURRY COUN
 2014 NOV -3 PM 4:30
 MELANIE HUBBINS-WARD
 CLERK OF COURT
 COURT DATE
 PLED GUILTY/TRIAL

WITNESSES

P Phillips 15th Circuit Drug Enforcement Unit

DOCKET NO. 2012-GS-25-01699

The State of South Carolina

County of Horry

George H. Debusk

12H00991

COURT OF GENERAL SESSIONS

May, 2012 TERM

ARREST WARRANT NUMBER

M971717

CDR: 3015 44-53-0375 (B) (2)

DOA: 3/1/2012

THE STATE

VS.

Henry Lee Kinlaw Jr
B/ M



ACTION OF GRAND JURY

TRUE BILL

Brandon Lanna
Foreperson of Grand Jury

Date:

MAY 24 2012

ATTORNEY: Long, Russell Blake

VERDICT

Indictment for

Distribution Cocaine Base

J. Gregory Hembree, Solicitor

ORIGINAL

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on May 24, 2012, the Grand Jurors of Horry County present upon their oath:

DISTRIBUTION OF COCAINE BASE

CDR: 3015 44-53-0375(B)(2)

That Henry Lee Kinlaw Jr did in Horry County, on or about February 29, 2012, distribute, dispense or deliver, or did aid, abet, attempt or conspire to distribute, dispense or deliver a quantity of Cocaine Base, a controlled substance under provisions of Section 44-53-110, et. seq., Code of Laws of South Carolina, 1976, as amended, such distribution not having been authorized by law, and being in violation of Section 44-53-375(B), S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


J. GREGORY PEMBREE
FIFTEENTH CIRCUIT SOLICITOR

FILED
HURRY COUN.
2014 NOV -3 PM 4:30
MELANIE HUGGINS-WARD
CLERK OF COURT
COURT DATE
PLED GUILTY/TRIAL