

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM YORK COUNTY
Court of Common Pleas
Post-Conviction Relief

S.C. SUPREME COURT

G. Thomas Cooper, Jr., Circuit Court Judge

Case No.: 2017-002180

Demario Cunningham #296848,..... Appellant,

vs.

State of South Carolina, ...Respondent.

APPENDIX

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State of South Carolina.,)
)
)
County of York.)

In the General Sessions
Court of York

Case No.: 2015-GS-46-01542;
2015-GS-46-01542(A)

State of South Carolina.,)
)
Plaintiff.,)
)
-vs-)
)
Demario Jamel Cunningham.,)
)
Defendant.)

Transcript of Record

January 11, 12, 2016
York, South Carolina

B E F O R E:

The Honorable John C. Hayes, III., Judge.

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I-N-D-E-X

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Reporter's Note: All Exhibits were filed with the York County Clerk of Court's Office.

1 (COURT IN SESSION MONDAY, JANUARY 11, 2016 AT 03:49
2 PM.)

3 THE COURT: Thank you. You may take your seats.

4 Good afternoon. I believe we've got the case of the
5 State versus Demario Jamel Cunningham.

6 Is Mr. Cunningham present?

7 SOLICITOR ROBINSON: Yes, sir.

8 THE COURT: All right. And he's represented by Ms.
9 Lipinski?

10 SOLICITOR ROBINSON: Yes, your Honor.

11 THE COURT: All right. Unless the -- I'll let the
12 Solicitor tell me where we are. I do have two reports on
13 Mr. Cunningham regarding his having been sent for a mental
14 evaluation as to competency and criminal responsibility and
15 ability to conform which I have reviewed, and they've been
16 handed up. With that said I'll turn the matter over to Ms.
17 Robinson.

18 SOLICITOR ROBINSON: Yes, your Honor. As you
19 mentioned this is the State versus Demario Cunningham.
20 We're specifically here on Indictment 2015-GS-46-0-1-5-4-2
21 and that is a two count indictment so the same count being
22 0-1-5-4-2-A trafficking in cocaine and possession of a
23 weapon during the commission of a violent crime.

24 He has indicated he would like a jury trial in this
25 matter. As your Honor mentioned I do believe we do need to

1 have a Blair Hearing before we can even bring up the jury
2 panel to ensure that he can participate in this process.
3 We do have a number of other pretrial matters but the
4 thought was that we could pick the jury perhaps and release
5 them while we address the other matters.

6 In addition to the Blair Hearing before the jury panel
7 comes up I have one matter to address while the jury panel
8 is coming up and I'm gonna do Blair first and then -

9 THE COURT: Yeah, let's go ahead and do the Blair
10 Hearing. Ms. Lipinski, I have received the two reports.
11 One was actually addressed to you and the other one to Ms.
12 Robinson. The one addressed to you is one from Allison
13 Sipes and the State of South Carolina Department Mental
14 Health. The letter itself is dated November 9, 2015 and it
15 has attached there to it a report signed by Cole - Can't
16 really read his first name but he's a doctor, Doctor of
17 Psychology Sutton S-u-t-t-o-n, from Forensic Evaluation
18 Service. And that report is not clear exactly what date
19 it was generated but it's attached to that September 9th
20 letter.

21 I also have another September 9th letter from Doctor
22 Sipes regarding addressed to Ms. Robinson dealing with
23 competency to stand trial and it's also signed by Ms. Colbi
24 I think it is. C-o-l-b-I Sutton. And I'm not exactly sure
25 - Oh, here date of report September 9, 2015 for the second

1 one and the same date for the first one.

2 All right, Ms. Lipinski, my question is do you have
3 any objection to the Court adopting these and utilizing
4 them in determining the issues of which they deal?

5 MS. LIPINSKI: I have no objection to the reports,
6 your Honor. I made Ms. Robinson aware she would need to
7 call the doctor's for any - I think the subject matter is
8 kind of addressed in there. I would like to put some
9 matters on the record before the Court makes a decision.
10 Other than that -

11 THE COURT: All right. Ms. Robinson, do you object to
12 either or both of these being placed in - or both of these
13 or either of these?

14 SOLICITOR ROBINSON: No, your Honor. We would ask
15 that you -

16 THE COURT: All right. Well I'll put them both in the
17 record. The finding as to competency by Doctor Sutton is
~~18~~ that Mr. Cunningham is competent to stand trial on these
19 charges set forth in this indictment. And he also found -
20 I don't know if he or she but this particular Doctor Sutton
21 found that at the time of the offense Mr. Cunningham was
22 not suffering from any mental defect that would make him
23 not criminally responsible nor did he lack any capacity to
24 conform. All right.

25 Now, Ms. Lipinski.

1 MS. LIPINSKI: Just briefly, your Honor. I
2 represented Demario since the time of his arrest. I will
3 state that when I originally was meeting with him talking
4 to him was brought with somewhat more difficulty. It took
5 a while to just kind of get him up to speed on some of the
6 issues. And that kind of gave rise; that and the finding
7 of not competent in the past was just a concern enough the
8 attorney, yeah, I wanted to have him evaluated and try to
9 see where they go.

10 I have reviewed the report. I do note that they find
11 him competent to stand trial and also criminally
12 responsible among other things. One of the things that
13 they find in there is just kind of general inconsistency in
14 how he presents that at times he says he can read and write
15 and other times he cannot. The times he's able to engage
16 in a conversation with them and make appropriate and
17 textual responses to questions regarding the legal process
18 I have experienced that inconsistency myself.

19 I have no psychological training and can't subscribe
20 malingerer but there are days that are better that I can
21 talk to Demario. There are other days where it is much
22 more difficult to talk to him. And while he can obviously
23 meet -- and I think it's, you know, a very low threshold to
24 determine competency in terms of understanding the process
25 or the role of the judge and the role of the jury and the

1 solicitor and the defense attorney. I do think that there
2 are certain mental deficits there that do compromise that
3 situation at times and have been of concern to the defense
4 for quite some time.

5 He is able to kind of repeat those terms and carry on
6 a basic understanding but it wasn't any type of in depth
7 questioning with Demario. There are times where it falls
8 apart rather quickly and I think compromises our ability to
9 kind of have a productive relationship.

10 That being said, I've talked to him today. I met with
11 him last week and I met with his mother as well. And most
12 recently our conversations have been appropriate.

13 Protectual he's been responding appropriately and
14 understands what's going on and has been very active in his
15 defense in coming up with his defense strategy. So I do
16 make those acknowledgments to the Court but I did for the
17 purposes of the record want to state that there are times
18 that I have had those difficulties.

19 Cited in the report I don't reach the same conclusion
20 that its malingering. I do think that Demario does have
21 good days or bad days. He did not graduate from high
22 school according to his mother; I think did attend special
23 education classes and I believe that's noted in the report
24 just from the social worker. So I think that they are just
25 kind of certainly inherent mental deficient that are -----

1 your Honor, and wanted to explain why we sought the
2 evaluation and our progress since that time.

3 THE COURT: Well I did have some concerns, obviously I
4 don't have a report, but it did catch my eye just as you
5 had mentioned that he was by court order of June 4th, I'm
6 sorry, by court order - by the court dated September 19th,
7 2012 about two years before the current incidences was
8 found by competent and that's all I know about that. I
9 don't have anything further. I don't have anything about
10 the charges. It does appear that he ended up at -----
11 Brown Hospital from April 3rd of 2013 to May 31st, 2013 and
12 don't have anything about that other than he had a
13 reevaluation in May of 2013 for competency. And it doesn't
14 say what the finding was.

15 MS. LIPINSKI: I'll report to the court, your Honor,
16 when I first was assigned to Mario I became aware of his
17 mental health history. I actually ask them to pull the old
18 file. I may be able to put my hands on it if the court
19 would like to review it, but says that he was originally
20 found not competent but likely to become competent. They
21 returned him to the hospital. They tweaked his meds and
22 did some other things. They finally rendered him competent
23 to stand trial and I believe he pled guilty to time served
24 on one of the two charges for which he at that time was
25 incarcerated and then was released.

1 So I believe that he was restored to competency and
2 did subsequently enter a plea and then came back out. I
3 think that's also indicated in the report that he's at time
4 met compliant and a time not met compliant that they
5 adjusted over time the drugs that he the side affects don't
6 bother him versus other drugs that he has more objection to
7 taking. I'll also put on the record that he's recently -
8 according to him and he hadn't brought me paperwork which
9 substantiates that was put on disability for mental health
10 issues. I ask for and he has not brought me the actual
11 finding of the administrative law judge but he had brought
12 me paperwork that he is on disability at this time or
13 mental health issues such that he is unable to work and now
14 receiving SSI income. And so I haven't been able to
15 confirm this getting SSI income but the specific findings
16 of the nature of the hearing I haven't been able to obtain
17 the terms.

18 THE COURT: Anything else, Ms. Robinson?

19 SOLICITOR ROBINSON: Your Honor, I just was going to
20 as Ms. Lipinski's indicated she does - she has had access
21 to - I do have physical copies of them here if you are
22 interested.

23 THE COURT: I don't really need it; it's just in my
24 history of doing this it appears that the patterns just
25 what was related by Ms. Lipinski.

1 SOLICITOR ROBINSON: Yes, your Honor.

2 THE COURT: There is a finding of not competent and
3 then he went to work with Ryan and then he came out and
4 then reevaluated and it really didn't say what happened
5 after that but it would appear to have that pattern.

6 I find that Mr. Cunningham by virtue of the reports
7 from the Department of Mental Health is competent to go
8 forward; proceed to trial on these charges or if he were
9 inclined to plead guilty. I find he is competent; that the
10 finding of Doctor Sutton was that he, Mr. Cunningham, could
11 understand the proceedings against him and was aware of the
12 charges against him and the possible consequences. And he
13 was able to apply legal knowledge to his case and assist in
14 his own defense.

15 I therefore find that he is competent to proceed to go
16 to trial and based on the other report from September 9th I
17 find that there is no -- that this - in this report there
18 is nothing set forth that would give rise to a criminal
19 responsibility under McNaughton under the McNaughton Rule
20 lack of or nor the grounds for Mr. Cunningham to proceed
21 under guilty but mentally ill standard as the records
22 indicates, the reports individually and together indicate
23 he did have the capacity at the time to understand right
24 from wrong and to give - legal right from legal wrong and
25 it does need to conform his conduct to the requirements of

1 law so I find he can proceed to trial with no mental legal
2 aid defenses. All right.

3 (WHEREUPON, COURT'S EXHIBITS NUMBER ONE AND TWO,
4 IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

5 SOLICITOR ROBINSON: Your Honor, as I mentioned we do
6 have one issue I want to address before the jury panel is
7 in the room.

8 THE COURT: All right.

9 SOLICITOR ROBINSON: Judge Griffith specifically
10 declined to ask the large panel if any of them had
11 convictions that - offenses that would carry more than a
12 year in reference to their ability to be qualified as
13 jurors. I did receive from the Clerk of Court the list
14 that - of the thirty-five we would have - would have coming
15 up for our trial and one of those jurors, Number Sixty-
16 four, Franklin Dobson -

17 THE COURT: All right, give me a minute. All right,
18 Franklin Dobson, Computer Support.

19 SOLICITOR ROBINSON: He is one we would have actually
20 normally brought up to ask the question. He has a
21 conviction out of Ohio for dangerous drugs and it's listed
22 as a felony but I do not know exactly how much it carried.
23 In Ohio at the time it is relatively low from 1977. But I
24 wanted to make the Court's aware of that before we have him
25 in the courtroom because we do believe he may be

1 disqualified from service.

2 THE COURT: Ms. Lipinski, do you have any thoughts on
3 that?

4 MS. LIPINSKI: She did show me the rap sheet, your
5 Honor. I would ask that you put on the record that there
6 is no similar concerns about any of the other jurors and we
7 that we are not privy to those records as well. And I have
8 no reason to assume that but we'd just like to have that,
9 your Honor.

10 THE COURT: All right. Well the - Since I understand
11 it the question - the quiry was not - the question was not
12 even ask.

13 SOLICITOR ROBINSON: Correct, your Honor.

14 THE COURT: Just that no one had the opportunity and
15 it wasn't called to Judge Griffith's attention.

16 SOLICITOR ROBINSON: Your Honor, we did call it to
17 Judge Griffith's attention. His position - and I was not
18 right next to him as he was explaining this to Mr. Epting,
19 but his position was that he prefers for them to be left in
20 the pool and to be brought up and to witness the court
21 process just the same as everyone else. And if they failed
22 to bring it to his attention independent of being ask I was
23 --

24 THE COURT: Well if they're not qualified and we know
25 then we make a big mistake if we allow them to remain on

1 the panel so I will - if he's drawn, if he's on thirty-five
2 but not necessarily would be drawn in the draw I'll ask the
3 Clerk to put him aside. That is Number Sixty-four,
4 Franklin Dobson.

5 SOLICITOR ROBINSON: Thank you, your Honor.

6 THE COURT: All right. You ready -

7 MS. LIPINSKI: He did for the record say I have the
8 solicitor's office here I expect them to bring me anyone -
9 anyone to his attention and that's why he didn't ask the
10 question but it was as you know just kind of one of those
11 systems down there which was different than I think what
12 Mr. Epting was used to. But he did welcome that. If they
13 would have given him the news I think he would have then
14 drawn them out. But he said if they did not affirmatively
15 respond that's why he ask them to sit there.

16 THE COURT: All right. Then you ready for the panel
17 to come up?

18 MS. LIPINSKI: Your Honor, we do have a motion before
19 you bring the panel up.

20 THE COURT: All right. Ms. Robinson, anything else
21 from the State?

22 SOLICITOR ROBINSON: No. As I mentioned I do believe
23 there is a pretrial that needs to be addressed. My thought
24 was most of it could be addressed once we pick our panel
25 and release them for the day. I understand Ms. Lipinski

1 wants to make a motion.

2 THE COURT: All right.

3 SOLICITOR ROBINSON: I know there is a Jackson v.
4 Denno and some other matters.

5 THE COURT: Ms. Lipinski, what do you want to talk
6 about before we call the jury?

7 MS. LIPINSKI: I have a copy of the State's voir dire.
8 I don't have any objection. I think some of these are
9 contained in your normal colloquy with the jury but I think
10 that was something else we just kind of wanted to ---

11 THE COURT: All right.

12 MS. LIPINSKI: --- if you wanted to check off your
13 list but we have no objection to those, your Honor.

14 THE COURT: Okay.

15 MS. LIPINSKI: The first question that says Do you
16 have a family that's ever been arrested for drugs you might
17 ask if drug or alcohol just to clearly establish that
18 precedent that was the only

19 THE COURT: Okay.

20 MS. LIPINSKI: Your Honor, I was present downstairs
21 during jury qualification and went through jury
22 qualification and as you know the individual colloquy they
23 have. When I got back to my office and I sat down with my
24 investigator and tried to then develop a strategy in terms
25 of jury selection, what we determined is that there are

1 actually no African-American men in the entire jury pool.
2 There were none downstairs today. There were two hundred
3 and fifty people summonsed as is usual there are and I'll
4 represent to the Court twelve African-American men who are
5 on that list. There is no explanation as to why they did
6 not appear, not adhere to their summons, are they even
7 still residents of York County. But the State obviously
8 still only called twelve out of two hundred and fifty and
9 for some reason even those twelve not one of them did
10 appear and none of them are part of the pool from which
11 they drew this panel of thirty-five.

12 I will also note that of the panel list of thirty-five
13 that I have been given there are only two African-American
14 females that even make that even further cut, your Honor.
15 At this time the Defense would make a motion that
16 comprising of the Vinery does violate the Defendant's
17 Fourteenth Amendments rights because he has no ability
18 whatsoever to pick a jury that isn't even close to being a
19 jury of his peers and that it does not contain any members
20 of similar race and gender that Mr. Cunningham is. I think
21 that - I reviewed the case law and I understand he's not
22 entitled to get them on his jury but I think they
23 nonetheless need to be at least a potential juror or at
24 least an option from which he could - they could be
25 selected.

1 And I think the absence whatsoever an American men in
2 the entire jury pool that was summonsed for the week the
3 two hundred fifty that came that we have not one who might
4 even finally make the thirty-five cut let alone be placed
5 on Mr. Cunningham's jury does violate his Fourteenth
6 Amendment rights of protection. I think it also creates an
7 appearance of impropriety such that the public's faith in a
8 verdict could be compromised. I tried to research this
9 issue and cannot find where certainly just no African-
10 American men even made it to the pool. There's obviously a
11 lot of challenges that would suggest that there's no --
12 compromise; it's difficult, or these are the reasons why
13 the population of African-American men in the venire is not
14 necessarily representative of the society of the community
15 of the whole and I understand he doesn't have the
16 Constitutional right to that mere image and racial makeup
17 but I do think the complete absence of them in totality
18 does rise to the level that it creates a Fourteenth
19 Amendment violation for my client.

20 I would ask of the Court and require of the Clerk what
21 gave rise to this. Mr. O'Kelly and I tried to and they for
22 the most part could offer no explanation. I do know that
23 this first jury pool of the year has had experienced
24 technical difficulties in the past such that that issue may
25 have been - even when that was done I don't think there was

1 a complete absence of African-American men in the entire
2 venire. And for that reason we would challenge the
3 composition of the entire jury pool. We think it gives
4 rise to the Fourteenth Amendment violation and we would ask
5 that the case be continued and determine where there are
6 African-American men at least to the option to make the cut
7 into the pool from which Mr. Cunningham will ultimately
8 select his jury.

9 THE COURT: And how many African-American men would it
10 take, one, two, six, eight, ten?

11 MS. LIPINSKI: I'd take one. I understand there's no
12 magic number.

13 THE COURT: I'm not asking what you'd take. I'm
14 asking what would be in your opinion Constitution muster.

15 MS. LIPINSKI: I think that the Court's have said
16 there is no magic number and so I can't give that to the
17 Court because the Court's have refused to identify that and
18 refused to say that it must mirror the original composition
19 of the jury. But I do think a complete absence; not just a
20 disparity or inequality in number, does give rise to a
21 Constitutional violation such that Mr. Cunningham's case
22 should be continued until there is at least one African-
23 American man in the venire from which he could potentially
24 pick this jury. And the complete absence of them as a
25 whole is concerning enough and it rises to the level of

1 Constitutional violations.

2 THE COURT: Do you have any affirmative information
3 that the larger panel pool if we get a list from Columbia
4 as I understand it, Ms. Naylis, do you know how all that
5 works?

6 STEPHANIE NAYLIS: Not exactly. I know they're on a
7 disc from Columbia.

8 THE COURT: Could we get a disc that we relied on from
9 - Not the election commission. I can't remember who it
10 comes from. And one year there was a problem. They had
11 messed - the people in Columbia messed up the disc
12 information that was sent to us and when we found it we
13 were able to correct it. I haven't heard any of that in
14 any other time and in any other county; certainly had not
15 heard that being the situation at this time. That would
16 were it in fact a fact would be a concern but I have
17 nothing - I can't speculate to that. I have to go on the
18 assumption - not assumption - reliability of where we are
19 with the disc from Columbia and the drawing of the panel.

20 Does the State have anything to add?

21 SOLICITOR ROBINSON: No, your Honor, other than just
22 to point out there has either been any presentation of case
23 law that would state that this would be a continuance at
24 this time to the Court. To the extent the Court is
25 considering that I would beg the Court's indulgence to at

1 least consult with Solicitor Brackett as honestly this
2 could impact other trials for the week and we would need
3 some time to respond.

4 THE COURT: Yeah, and whether you consult with Mr.
5 Brackett or not it very likely is going to impact whatever
6 trials this week. And if there was a problem in the
7 drawing and then futurely but as far as this week and as
8 far as this trial I'm not gonna grant the motion to
9 continue. There is no indication of any affirmative action
10 by the State or even any negative action by the State that
11 resulted in the panel as it's constituted and therefore I
12 find no constitution - this lack of African-American men on
13 the entire venire. It is puzzling as to how twelve did not
14 show up. That's another issue. But I will go forward. I
15 deny the motion for a continuance.

16 MS. LIPINSKI: Your Honor, if I could just put a
17 couple of other things, I understand the Court's ruling on
18 that. We would feel that you - he would be entitled to
19 that. There are only ten or twelve African-American men;
20 there is only twenty-seven African-American women of the
21 two hundred and fifty that were summoned. I do think the
22 complete absence of them and as for a continuance I think
23 he's entitled - I understand, I don't have that evidence
24 yet, this is the first jury we've drawn and I know that
25 your experience similar to mine is we didn't find out about

1 the mistake until half way through. A jury is not a court
2 term the last time that this similar irregularity occurred.
3 And I don't know that any irregularity or I think that the
4 complete absence of them, not just a low number, doesn't
5 necessarily create a prime facie case. The defendant
6 should have the time in order to investigate that and make
7 sure of that so that the Court can feel confident in that.
8 And would give him the opportunity as I said once again to
9 at least draw a pool from which African-American men or at
10 least a potential candidate.

11 THE COURT: Well I'm not gonna grant a continuance.
12 Anything else?

13 SOLICITOR ROBINSON: Not before we bring up the panel,
14 your Honor.

15 THE COURT: All right. Well we'll take a short break
16 while we bring up the panel. Let me know when the panel is
17 up.

18 SOLICITOR ROBINSON: Thank you, your Honor.

19 THE COURT: Do you have any voir dire?

20 MS. LIPINSKI: No, your Honor.

21 (COURT AT EASE AT 04:14 PM.)

22 (JURY ENTERS COURTROOM AT 04:18 PM.)

23 (COURT BACK IN SESSION AT 04:23 PM.)

24 THE COURT: Members of the jury panel, I'm John Hayes
25 from Rock Hill. I am along with Judge Hall who are circuit

1 resident judges here in York County and I am holding court
2 this week along with Judge Griffith from Newberry County
3 who you met this morning. I have been doing other things
4 until this point but I am now going to draw a jury for the
5 first trial this week in this courtroom.

6 This is the case of the State against Mr. Demario
7 Jamel Cunningham. Mr. Cunningham, would you please stand?

8 (DEFENDANT DEMARCO CUNNINGHAM STOOD.)

9 THE COURT: This is Mr. Cunningham and he's
10 represented by Ms. Mindy Lipinski who is assisted by her
11 investigator Mr. Barton O'Kelly.

12 (ATTORNEY LIPINSKI AND INVESTIGATOR O'KELLY STOOD/ALL
13 PARTIES STANDING NOW SEATED.)

14 THE COURT: The State is represented by Leslie
15 Robinson and Hannah Grove.

16 (SOLICITORS ROBINSON AND GROVE STAND.)

17 THE COURT: You may be seated.

18 (SOLICITOR'S ROBINSON AND GROVE NOW SEATED.)

19 THE COURT: The charges against Mr. Cunningham are
20 that he on November 26, 2014 - not the last November but
21 the November before - was involved in trafficking cocaine
22 in violation of the laws of our state. And there is a
23 second count that alleges that at the time he was
24 trafficking in cocaine - and cocaine is a violent crime -
25 and he at that time possessed a weapon during the

1 commission of that violent crime.

2 At this time to these charges he is entered a plea,
3 Mr. Cunningham has, of not guilty which places on the State
4 the burden to prove his guilt beyond a reasonable doubt
5 before a trial to convict him. I am going to go over some
6 questions similar to what Judge Griffith did this morning
7 but what I am going to do is ask that if you need to
8 discuss any of these with me just simply stand up and we'll
9 have a dialogue from where you're standing to hear if any
10 of these apply to you.

11 First, are any of you related by blood or marriage,
12 or, are you a close personal friend or acquaintance of Mr.
13 Cunningham, Mr. O'Kelly, Ms. Lipinski, Ms. Robinson or Ms.
14 Grove; if so, please stand?

15 No one stands.

16 Have any of you worked with either our Public Defender
17 Office at any time, being a witness for them, or served as
18 some sort of volunteer; or, has anybody been a witness for
19 or a victim and worked or volunteered with our Solicitor
20 Mr. Brackett's office; if so, please stand?

21 No one stands.

22 I told you the charge and the date that the
23 indictments allege that Mr. Cunningham committed these
24 offenses. Have any of you heard about these offenses or
25 the charges against Mr. Cunningham from any source

1 whatsoever; or, have any of you formed or expressed an
2 opinion about any matter or issue which would be involved
3 in this case; if so, please stand?

4 No one stands.

5 Were any of you members of the Grand Jury which passed
6 on this indictment at an earlier time; if so, please stand?

7 No one stands.

8 Are any of you members of, contributors to
9 organizations such as Mother's Against Drunk Drivers;
10 Student's Against Drunk Drivers; Citizen's Against
11 Violence; Trooper's Association, Sheriff's Association or
12 Fraternal Order of Police; if so, please stand?

13 All right. Yes, sir, your name and number.

14 A. Juror Number - I apologize, your Honor, Sixty-nine.

15 I support York County Sheriff's.

16 THE COURT: All right. You gave us your number;
17 what's your name?

18 A. Charles Eaton. I apologize.

19 THE COURT: That's fine. Would the fact that you
20 belong to that would that affect your ability to be fair
21 and impartial in the trial of this case?

22 JUROR SIXTY-NINE: No, sir. It's mostly youth
23 programs.

24 THE COURT: Okay. Thank you. You can be seated. But
25 thank you, I appreciate your standing with that

1 information.

2 Are any of you or a member of your immediate family
3 involved in law enforcement or in the prosecution of
4 criminal cases at any level? Anything like - Anything from
5 an MP to a Sheriff's deputy; a city policeman, air
6 Marshall, or anything like that, stand please.

7 And or, any law enforcement or any prosecuting
8 authorities such as a solicitor, attorney general, judge
9 advocate general or anything like that.

10 Now what I will do, the three of you, I will ask each
11 of you to give me your name and your number and a little
12 more information such as Uncle Joe's a FBI agent if it's
13 something like that and then I'll come back and ask you
14 about your ability to be fair.

15 So let's start, we'll work our way in and we'll work
16 our way back and in. So the last lady that stood up your
17 name and number.

18 A. Two twenty-three, Lori B. Fisher. My mother-in-law was
19 a probation officer.

20 THE COURT: All right.

21 A. Two twenty-eight, Susan Tuthill. My husband was a --
22 a New York City police officer.

23 THE COURT: All right. Yes, ma'am, the last lady that
24 stood up.

25 A. One fifteen, Sandra Kesler. My son was a police

1 officer in the accident investigation reconstruction.

2 THE COURT: And where?

3 JUROR ONE FIFTEEN: In Florida.

4 THE COURT: Okay.

5 A. Kimberly Phillips, One Seventy-six. My brother-in-law
6 is currently a corrections officer here at the Moss Justice
7 Center.

8 THE COURT: The last lady in the back.

9 A. Juror Number Two thirty-eight, Melody Wagner, my mom
10 works at the Sixth Circuit Solicitor's Office.

11 THE COURT: And from which?

12 JUROR TWO THIRTY-EIGHT: Sixth.

13 THE COURT: Sixth. Okay. Would the fact that you
14 have this in your family if that would prevent you from
15 being fair and impartial please raise your right hand?

16 No one does. All five will remain with us. Have a
17 seat. Thank you so much for sharing that information with
18 us.

19 Are any of you, or a member of your family, or have
20 any of you or a member of your family ever been arrested
21 for a drug or alcohol related offense; if so, please stand?

22 And I'm not gonna ask you to tell me all the facts
23 about it, just if you stand you've told me enough.

24 A. What was that question?

25 THE COURT: If any of you or a member of your family

1 ever been arrested for a drug or alcohol offense?

2 All right. I'm not gonna ask you to bear your souls
3 or tell me anything about your family situation. Simply
4 give me your name and number. You've told me enough by
5 standing. Going back give me your name and number and then
6 I'll ask all of you about your ability to be fair and
7 impartial. So this lady will start and we'll work our way
8 back.

9 (BLACK FEMALE STANDS.)

10 A. Number Thirty-nine, Michelle Carter.

11 THE COURT: All right. Thank you. Yes, sir.

12 (WHITE MALE STANDS.)

13 A. Juror Eighty-five, Michael Greek.

14 (WHITE MALE STANDS.)

15 A. Fifty-two, James Croom.

16 (WHITE MALE STANDS.)

17 A. Sixty-four, Franklin Dobson.

18 (WHITE FEMALE STANDS.)

19 A. One Twenty-one, Elizabeth Leach.

20 (WHITE MALE STANDS.)

21 A. One Seventeen, John Kirell.

22 (WHITE MALE STANDS.)

23 A. Two Thirty-nine, Robert Werner.

24 (WHITE MALE STANDS.)

25 A. One eighteen, Kenneth Koellner.

1 THE COURT: All right. Those of you who are standing,
2 if, that life experience would prevent you from being fair
3 and impartial in Mr. Cunningham who's charged with a drug
4 offense, if that would prevent you from being fair and
5 impartial please raise your right hand?

6 No one does. All right, you may be seated. Thank you
7 so much.

8 Do any of you have any religious beliefs or any other
9 beliefs that would prevent you from entering - being fair
10 and impartial in the trial of Mr. Cunningham for these
11 offenses; if so, please stand?

12 No one stands.

13 Anything further from the State?

14 SOLICITOR ROBINSON: Your Honor, you to read the
15 witness list?

16 THE COURT: Yes, I do. Thank you.

17 Anything further?

18 MS. LIPINSKI: Nothing from the Defense.

19 THE COURT: The following are possible witnesses.

20 If you know - I don't know that all these witnesses
21 will be called but even if they're not called their names
22 may come up during the testimony so if you know - of course
23 if you're related, or if you just simply know one of these
24 individuals or any or all of these individuals, please
25 stand.

1 D. Heath Clevenger. The first five are from the Drug
2 Enforcement Unit of our county. Heath Clevenger, Brandon
3 Avidon, Vince Holland, Marvin Brown, Daniel Burkhart.

4 And then from our York County Sheriff's Office,
5 Patrick Patterson and Cynthia Mitcham. Do any of you know
6 any of these or related to them; if so, please stand?

7 All right. And you just stood and we've got to make a
8 record everytime so your name and number again.

9 A. James Croom, Fifty-two.

10 THE COURT: All right. Who are you - Who do you know?

11 JUROR FIFTY-TWO: Dan Burkhart, I'm his neighbor, used
12 to be. He used to live next door.

13 THE COURT: Okay. Just remain standing a minute.

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

15 A. Amanda Stack, Two fifteen. Heath Clevenger, we're
16 mutual friend.

17 THE COURT: All right. The two of you who are
18 standing, if either or both of you would be unable to be
19 fair and impartial please raise your hand?

20 Neither does. Thank you. You may be seated.

21 Anything further from the State?

22 SOLICITOR ROBINSON: Nothing, your Honor.

23 THE COURT: Defense?

24 MS. LIPINSKI: Nothing, your Honor.

25 THE COURT: Do any of you know of any reason

1 whatsoever why you could not or should not serve as a fair
2 and impartial juror in the trial of this particular case;
3 if so please stand?

4 No one stands. Now the way we draw jurors in this
5 courtroom is that names will be drawn at random. If you
6 hear your name called simply stand where you are and face
7 first the table where the Solicitor's are seated and one of
8 them will say either present the juror or excuse the juror.

9 If you hear the words excuse the juror you may simply
10 sit back down. Excuse the juror doesn't mean to leave. If
11 you hear the words present the juror, turn and face the
12 table where Mr. Cunningham and his counsel are seated. Ms.
13 Lipinski will either say excuse the jury. Again, that
14 means you may take your seat; or, swear the juror. If you
15 hear the words swear the juror then work your way out to
16 the aisle come forward and the bailiff will show you where
17 to sit in the jury box.

18 The State and the Defense each have the right to
19 excuse up to five people and then we will draw one
20 alternate. As to the alternates the State can exercise one
21 strike and the Defense two.

22 Madam Clerk.

23 MADAM CLERK: Number Two thirty-eight Melody Weidner.

24 (WHITE FEMALE STANDS.)

25 MADAM CLERK: What say you for the State?

1 SOLICITOR ROBINSON: Please present this juror.

2 MADAM CLERK: Defense?

3 MS. LIPINSKI: Please excuse the juror.

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

5 Number Two thirty-nine Robert Werner.

6 (WHITE MALE STANDS.)

7 MADAM CLERK: What say you for the State?

8 SOLICITOR ROBINSON: Please present this juror.

9 MADAM CLERK: Defense?

10 MS. LIPINSKI: Please present the juror.

11 MADAM CLERK: Please come up and have a seat in the
12 jury box. Number Two twenty-eight Susan Tuthill.

13 (WHITE FEMALE STANDS.)

14 MADAM CLERK: What say you for the State?

15 MS. LIPINSKI: Your Honor, have we stopped when
16 they're coming up forward? Every time I turn around I just
17 see the bailiff.

18 THE COURT: All right. Well the bailiff will just
19 have to move.

20 MS. LIPINSKI: Sorry, your Honor, it's just hard to -

21 THE COURT: Okay.

22 (BAILIFF MOVED.)

23 THE COURT: That's better. Thank you.

24 MS. LIPINSKI: That's better, your Honor. I'm just
25 working around him.

1 SOLICITOR ROBINSON: Please present this juror.

2 MADAM CLERK: Defense?

3 MS. LIPINSKI: Please excuse the juror.

4 MADAM CLERK: You are excused from this case.

5 Number One twenty-six, Debra Linton.

6 (WHITE FEMALE STANDS.)

7 MADAM CLERK: What say you for the State?

8 SOLICITOR ROBINSON: Please present this juror.

9 MADAM CLERK: Defense?

10 MS. LIPINSKI: Please present the juror.

11 MADAM CLERK: Please come up and have a seat in the
12 jury box. Number One twenty-one, Elizabeth Leach.

13 (WHITE FEMALE STANDS.)

14 MADAM CLERK: What say you for the State?

15 SOLICITOR ROBINSON: Please present this juror.

16 MADAM CLERK: Defense?

17 MS. LIPINSKI: Please present the juror.

18 MADAM CLERK: Please come up and have a seat in the
19 jury box. Number Fifty-two, James Croom.

20 (WHITE MALE STANDS.)

21 MADAM CLERK: What say you for the State?

22 SOLICITOR ROBINSON: Please present this juror.

23 MADAM CLERK: Defense?

24 MS. LIPINSKI: Please excuse the juror, your Honor.

25 MADAM CLERK: You are excused from this case.

1 Number Forty-six, Kenneth Comer.

2 (WHITE MALE STANDS.)

3 MADAM CLERK: What say you for the State?

4 SOLICITOR ROBINSON: Please present this juror.

5 MADAM CLERK: Defense?

6 MS. LIPINSKI: Please present the juror.

7 MADAM CLERK: Please come up and have a seat in the
8 jury box.

9 THE COURT: Come on up.

10 MADAM CLERK: Number Sixty-nine, Charles Eaton.

11 (WHITE MALE STANDS.)

12 MADAM CLERK: What say you for the State?

13 SOLICITOR ROBINSON: Please present this juror.

14 MADAM CLERK: Defense?

15 MS. LIPINSKI: Please present the juror.

16 MADAM CLERK: Please come up and have a seat in the
17 jury box. Number Sixty-five, Amy Douglas.

18 (WHITE FEMALE STANDS.)

19 MADAM CLERK: What say you for the State?

20 SOLICITOR ROBINSON: Please present this juror.

21 MADAM CLERK: Defense?

22 MS. LIPINSKI: Please present the juror.

23 MADAM CLERK: Please come up and have a seat in the
24 jury box. Number One eleven, Robert Jones.

25 (WHITE MALE STANDS.)

1 MADAM CLERK: What say you for the State?

2 SOLICITOR ROBINSON: Please present this juror.

3 MADAM CLERK: Defense?

4 MS. LIPINSKI: Please excuse the juror.

5 MADAM CLERK: You're excused from this case.

6 Number One forty-three, Joseph McGee.

7 (WHITE MALE STANDS.)

8 MADAM CLERK: What say you for the State?

9 SOLICITOR ROBINSON: Please excuse this juror.

10 MADAM CLERK: You are excused from this case.

11 Number One seventy-five, Annie Philbeck.

12 (WHITE FEMALE STANDS.)

13 MADAM CLERK: What say you for the State?

14 SOLICITOR ROBINSON: Please present this juror.

15 MADAM CLERK: Defense?

16 MS. LIPINSKI: Please present the juror.

17 MADAM CLERK: Please come up and have a seat in the
18 jury box. Number Thirty-eight, Mark Carter.

19 (WHITE MALE STANDS.)

20 MADAM CLERK: What say you for the State?

21 SOLICITOR ROBINSON: Please present this juror.

22 MADAM CLERK: Defense?

23 MS. LIPINSKI: Please present the juror.

24 MADAM CLERK: Please come up and have a seat in the
25 jury box. Number Two twenty-three, Lori Fisher.

1 (WHITE FEMALE STANDS.)

2 MADAM CLERK: What say you for the State?

3 SOLICITOR ROBINSON: Please present this juror.

4 MADAM CLERK: Defense?

5 MS. LIPINSKI: Please excuse the juror.

6 MADAM CLERK: You are excused from this case.

7 Number One eighteen, Kenneth Koellner.

8 (WHITE MALE STANDS.)

9 MADAM CLERK: What say you for the State?

10 SOLICITOR ROBINSON: Please excuse this juror.

11 MADAM CLERK: You are excused from this case.

12 Number One sixty-seven, Jenae Pannell.

13 (WHITE FEMALE STANDS.)

14 MADAM CLERK: What say you for the State?

15 SOLICITOR ROBINSON: Please present this juror.

16 MADAM CLERK: Defense?

17 MS. LIPINSKI: Present the juror.

18 MADAM CLERK: Please come up and have a seat in the

19 jury box. Number Forty-eight, Lori Conrey.

20 (WHITE FEMALE STANDS.)

21 MADAM CLERK: What say you for the State?

22 SOLICITOR ROBINSON: Please present this juror.

23 MADAM CLERK: Defense?

24 MS. LIPINSKI: Please present the juror.

25 MADAM CLERK: Please come up and have a seat in the

1 jury box. Number Eighty-five, Michael Greek.

2 (WHITE MALE STANDS.)

3 MADAM CLERK: What say you for the State?

4 SOLICITOR ROBINSON: Please present this juror.

5 MADAM CLERK: Defense?

6 MS. LIPINSKI: Please present the juror.

7 MADAM CLERK: Please come up and have a seat in the
8 jury box. Number One fifty-nine, Matthew Nelson..

9 (WHITE MALE STANDS.)

10 MADAM CLERK: What say you for the State?

11 SOLICITOR ROBINSON: Please present this juror.

12 MADAM CLERK: Defense?

13 MS. LIPINSKI: Please present the juror.

14 MADAM CLERK: Please come up and have a seat in the
15 jury box.

16 THE COURT: The alternates will be strikes one and
17 two.

18 MADAM CLERK: Number Forty-three, Brian Childers.

19 (WHITE MALE STANDS.)

20 MADAM CLERK: What say you for the State?

21 SOLICITOR ROBINSON: Please present this juror.

22 MADAM CLERK: Defense.

23 MS. LIPINSKI: Please present the juror.

24 MADAM CLERK: Please come up and have a seat in the
25 jury box.

1 THE COURT: Anything from the State involving the
2 striking of the panel?

3 SOLICITOR ROBINSON: No, your Honor.

4 THE COURT: Anything from the Defense involving the
5 striking of the panel?

6 MS. LIPINSKI: No, your Honor. Just simply to our
7 previous objection.

8 THE COURT: All right. Ms. Naylis.

9 Those of you who were not chosen I'm going to allow
10 you to leave. Please call back tonight after seven and
11 follow whatever instructions. The instructions may be to
12 return at a certain time. They may be to call at a certain
13 time. It is very important that you follow the
14 instructions that you receive. I'm going to ask you to
15 leave as quietly as you can so I can start talking to this
16 jury. Thank you.

17 (JURY EXITS COURTROOM AT 04:44 PM.)

18 THE COURT: All right. Those of you who were chosen
19 we're not gonna start into the trial today. It's almost
20 five o'clock and we actually have some legal matters to
21 take up before we put -- start presenting evidence. So I'm
22 going to in just a moment let you leave for the day and be
23 back at eleven. We usually start a little earlier than
24 that but I have to see the dentist at eight o'clock and so
25 I want to leave enough time for me to get here. I may be

1 running a few minutes late but I anticipate knowing what's
2 going on that I'll be back by eleven, so please be here by
3 eleven and ready to go forward.

4 I will appoint a foreperson in the morning. Now even
5 though we're not going to swear you in this afternoon, you
6 are officially on this jury panel so do not discuss the
7 case among yourselves or try to make up your own mind until
8 we reach the point in the trial where I instruct you to
9 jointly deliberate and return a unanimous verdict. Prior
10 to that time you're not equipped with all the tools you
11 need to make a fair and reasonable decision. So don't try
12 to make up your mind or discuss the case.

13 Do not let anyone outside the courtroom discuss this
14 case with you. You have to base your verdict solely on the
15 law and the evidence that's developed here in the
16 courtroom. If anyone tries to discuss this case with you
17 tell them you cannot do so as you are serving as a juror.
18 And report back to me if anyone tries to discuss the case
19 with you hopefully giving me that person's identification.

20 Do not use any electronic means or social devices or
21 any kind of media regarding information about this case.
22 Don't Google or go on any line in any way or use any sort
23 of media to find out anything that could remotely deal with
24 this trial. That is don't look up anything about court
25 procedure, about court rules, about the solicitor, about

1 Mr. Cunningham, about me, or about anything. That, again,
2 would not be fair because you have to base your verdict
3 solely on the law and the evidence.

4 I do not know that this case will receive any news
5 coverage but if it does do not let yourself be exposed to
6 it. Don't read, watch, or listen to anything that would
7 remotely deal with this trial. If your eye or ear catches
8 anything that could deal with this trial don't let yourself
9 be exposed to it. When I talked about the media and Google
10 and those sort of things, I'm going to ask you to while
11 you're on this jury and I don't know this case I'm sure we
12 will finish it at least sometime Wednesday if not tomorrow,
13 while you're serving as a juror don't go to any social
14 media simply to say I'm on the jury. That is don't go to
15 Face book and say Guess what, I'm serving on a jury or
16 tweet anybody or anything like that.

17 That sounds pretty obnoxious but somebody may tweet
18 back with some comment or remark that is not healthy for
19 your serving as a juror so just stay away from that for a
20 day or two if you would. I'm not saying you can't go on
21 those, just don't do anything regarding your service as a
22 juror.

23 Anything further from the State before we stop for the
24 day?

25 SOLICITOR ROBINSON: No, your Honor.

1 THE COURT: From the Defense?

2 MS. LIPINSKI: No, your Honor.

3 THE COURT: All right, again, the bailiff will show
4 you how to get in and out while you're serving as a juror.
5 Have a pleasant evening. My teams not playing tonight but
6 if you want to pull for a team you might want to pull for
7 the South Carolina team. But I may even do that. Be hard,
8 but I may do that. So we'll see you in the morning around
9 eleven o'clock.

10 (JURY EXITS COURTROOM ON EVENING RECESS AT 04:48 PM.)

11 THE COURT: All right, I understand we have a Jackson
12 versus Denno matter.

13 SOLICITOR ROBINSON: Yes, your Honor, and Ms. Lipinski
14 had previously made me aware that she was willing to raise
15 some issues in regard to discovery on the distribution
16 we're not trying here today as it relates to the search
17 warrant so I'm not sure what order we'll do that on those
18 matters.

19 THE COURT: All right. Well if their her motions I'll
20 let her proceed.

21 MS. LIPINSKI: Thank you, your Honor. The first
22 motion and I'll talk about the - we'll get to that but this
23 is a little bit more complicated. The Defense would make a
24 motion to determine whether or not the State has complied
25 with Rule Five and Brady so they have given us anything and

1 everything they have that they both intend to use at trial
2 and also which may or may not lead to exculpatory evidence.

3 I don't have any reason to believe Ms. Robinson has
4 been very forthright with me and provided me even
5 additional items late on Friday but nonetheless I do think
6 to cover the record I have to make that motion.

7 THE COURT: All right. Discovery?

8 SOLICITOR ROBINSON: Yes, your Honor, we have complied
9 with discovery other than I know she wants to raise some of
10 these issues about the search warrant that I don't believe
11 that our Rule Five or Brady -

12 THE COURT: Next.

13 MS. LIPINSKI: Motion to determine the prior record of
14 the defendant the State would intend to introduce or rely
15 on if he chose to testify.

16 THE COURT: Impeachment?

17 SOLICITOR ROBINSON: Your Honor, my reading of his
18 record he has a throwing bodily fluids conviction from 2006
19 which I believe would fall under a felony conviction rule
20 for impeachment. And then he has a prior conviction for
21 either a PWID or a distribution of crack and a proximity
22 charge from 2003. I know that that is taken outside the
23 ten calendar year rule. He did receive an SCDC sentence on
24 that. He was not released from the Department of
25 Corrections until March of 2016 so I believe that also

1 qualifies a felony conviction.

2 THE COURT: 2016?

3 SOLICITOR ROBINSON: Sorry, 2006. I apologize, your
4 Honor.

5 THE COURT: All right. March?

6 SOLICITOR ROBINSON: March 1st of 2006 is when he was
7 released, your Honor.

8 THE COURT: Which is just under the wire. And that
9 was for drugs. All right. Anything else?

10 SOLICITOR ROBINSON: Those are the ones I believe fall
11 under Rule 609 for impeachment purposes.

12 THE COURT: Any comment, Ms. Lipinski?

13 MS. LIPINSKI: No, your Honor, just that she would
14 intend -- when we get to that point and at this point I'm
15 not sure that my client would testify. I think we ought to
16 resolve exactly what his drug conviction is but beyond that
17 no. She's given me a list of witnesses, your Honor. I
18 believe they are all law enforcement and not any lay
19 witnesses so to the extent that the defense makes a general
20 motion for the criminal history of any witnesses that they
21 intend to enter to rely on.

22 SOLICITOR ROBINSON: Your Honor, we do not have any
23 lay witnesses we intend to call.

24 THE COURT: All right.

25 MS. LIPINSKI: Your Honor, at this point we would move

1 to sequester the witnesses for the State including during
2 pretrial and motions.

3 THE COURT: All right. That will be granted with the
4 exception of the case agent. And it will be reciprocal
5 although I don't have the witnesses for the Defense.

6 THE COURT: Next.

7 MS. LIPINSKI: A motion to determine any prior bad
8 acts that they would intend to introduce.

9 THE COURT: Any Lyle or prior bad acts.

10 SOLICITOR ROBINSON: Your Honor ---

11 THE COURT: 404.

12 SOLICITOR ROBINSON: --- I don't know that it tends to
13 fall under prior bad acts and we'll get into this more in
14 the Denno hearing, the Defendant did make a statement that
15 he traded cocaine to obtain the firearm that is at issue in
16 this case. My position is although it references a prior
17 trading of cocaine but it is still evidence of an offense
18 in this case. It's a constructive possession case so it's
19 reflective of his ownership and control of both the gun and
20 cocaine that were seized from his residence at the time.

21 Other than that we do not intend to get into prior bad
22 acts, your Honor.

23 THE COURT: Ms. Lipinski, you have anything, any
24 comment on that?

25 MS. LIPINSKI: Not at this time, your Honor. I'll

1 think about that over night. I wasn't quite sure how they
2 would characterize it. Might be able to bring it up
3 succinctly and briefly in the morning.

4 THE COURT: Okay.

5 MS. LIPINSKI: Other than that statement I believe
6 just to determine what statements are going to be the
7 subject of Jackson v. Denno. I'm aware of his ---- in the
8 statement or in the report about the statement he made at
9 booking but any other statements the State would intend to
10 introduce.

11 SOLICITOR ROBINSON: Your Honor, also mentioned in the
12 summary is statements by the defendant at the execution of
13 the search warrant which took place at the residence that
14 he did in fact claim the cocaine and the firearm that were
15 discovered at the residence, so it would be those
16 conversations that took place in the residence. And then
17 back at the law center was the comment about the trading of
18 cocaine for the firearm. Those are the only one's, your
19 Honor.

20 MS. LIPINSKI: Just to be sure, they also ask him at
21 the roadside; there were statements at the roadside the
22 State would intend to introduce.

23 SOLICITOR ROBINSON: No, your Honor. All statements
24 were made back at the residence.

25 THE COURT: Call your first witness in Jackson versus

1 Denno.

2 SOLICITOR ROBINSON: Your Honor, that would be Officer
3 Avidon.

4 MS. LIPINSKI: Your Honor, while Investigator Avidon
5 is coming to the stand, I just want to make sure I have not
6 been provided with any written statements that my client
7 signed or endorsed and I just want to make sure none exist
8 as far as the State is aware.

9 SOLICITOR ROBINSON: No, your Honor. These all were

10 --

11 THE COURT: Put your left hand on the Bible and raise
12 your right.

13 (WHEREUPON, BRANDON AVIDON, BEING
14 FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

15 MADAM CLERK: Please have a seat.

16 DIRECT EXAMINATION

17 OFFICER BRANDON AVIDON BY SOLICITOR ROBINSON:

18 Q. Good afternoon. Could you please state your name for
19 the record.

20 A. Officer Brandon Avidon.

21 Q. And what is your occupation?

22 A. I - Police officer with the Rock Hill Police
23 Department

24 Q. Were you involved in the arrest of Demario Cunningham
25 and the execution of a search warrant at [REDACTED] [REDACTED]

1 [REDACTED] on November 26, 2014?

2 A. Yes, ma'am.

3 Q. Where did you first come into - into contact with the
4 defendant Demario Cunningham on that day?

5 A. He was placed under arrest on a traffic stop.

6 Q. Okay. And where was that?

7 A. On Porter Road just right near Castlewood Circle.

8 Q. And that's the residence where you're going to be
9 executing a search warrant that day?

10 A. Yes, ma'am.

11 Q. Okay. Now you mentioned it was a traffic stop. About
12 what time was it on that day?

13 A. I don't recall.

14 Q. Was it evening?

15 A. Evening. Evening night.

16 Q. Are you aware of whether or not Mr. Cunningham was
17 advised of his Miranda rights at the time of that traffic
18 stop?

19 A. He was.

20 Q. And who personally advised him of those rights?

21 A. I did.

22 Q. Was anyone else present besides yourself and Demario
23 Cunningham at the time that you advised him on his Miranda
24 rights?

25 A. Lieutenant Holland.

1 Q. Any other lay individuals?

2 A. I believe Investigator Clevenger was there, Officer
3 Burkhart, and also Commander Brown.

4 Q. And you went - this was a traffic stop. Were there
5 any other occupants of the vehicle that would have been
6 present?

7 A. Yes.

8 Q. Was - How many occupants in the vehicle were there
9 that day?

10 A. It was Demario Cunningham and Tomeano Cunningham.

11 Q. And you indicated that you yourself are the one who
12 advised Mr. Cunningham of his Miranda rights?

13 A. I did.

14 Q. How did you go about advising individuals of their
15 rights? Do you read them from a card or from memory?

16 A. From a card.

17 Q. Okay.

18 SOLICITOR ROBINSON: May I approach, your Honor?

19 THE COURT: Yes.

20 MS. LIPINSKI: Your Honor, instead of walking all the
21 way back here, is that the card?

22 SOLICITOR ROBINSON: Yes.

23 MS. LIPINSKI: Okay.

24 SOLICITOR ROBINSON: Sorry.

25 Q. Officer Avidon, is that indicating when you read

1 Miranda rights from a card, is that the card that you're
2 speaking of?

3 A. Yes, ma'am.

4 Q. And how can you tell that would have been a card that
5 you read that night?

6 A. Because this is the card I carry and because of the
7 note 7/8 down at the bottom of the copy.

8 Q. So you made a copy of that the night of the

9 A. I did.

10 Q. And what rights does that card include?

11 A. Suspects Miranda rights.

12 Q. Can you read those for the Court please?

13 A. Yes. "Number One: "You have the right to remain
14 silent. Two: You have - Anything you say can and will be
15 used against you in a court of law. Three: You have the
16 right to talk to an attorney and have him or her present
17 with you while you are being questioned. Four: If you
18 cannot afford to hire an attorney one will be appointed for
19 you before any questioning if you wish. Five: You can
20 decide at any time to exercise these rights and no answer
21 any questions or make any statements. Six: Do you
22 understand these rights that I've explained to you?"
23 Q. Okay. And you indicated that when you read these
24 rights to the defendant there were other officers present;
25 is that correct?

1 A. Yes, ma'am.

2 Q. Would any of you have been armed with firearms at that
3 time?

4 A. We all would have.

5 Q. Okay. Were any of you holding them in your hands or
6 brandishing them or pointing them in any way at Demario
7 Cunningham when you provided him with his rights?

8 A. No, ma'am.

9 Q. Roughly how old was Demario Cunningham at the time you
10 had this contact with him?

11 A. Approximately thirty years of age.

12 Q. Did he appear to be under the influence of drugs or
13 alcohol at that time?

14 A. No, ma'am.

15 Q. Did he appear to be mentally handicapped in any way?

16 A. No, ma'am.

17 Q. From what you were able to observe did he appear to
18 understand what you had told him about his rights?

19 A. Yes, ma'am.

20 Q. Did he at that time or any time that night that you're
21 aware of refuse to speak with you or other officers or ask
22 for an attorney?

23 A. No, ma'am.

24 Q. At any time that night that you're aware of did you or
25 any other officers threaten or coerce Mr. Cunningham into

1 speaking?

2 A. No.

3 Q. To your knowledge did you or any other officers make
4 any promises to Demario Cunningham in exchange with him
5 speaking that night?

6 A. No, ma'am.

7 Q. Did you personally speak with him or obtain any
8 statements from him that night?

9 A. I read his Miranda rights and he made the statement
10 that he understood his rights.

11 Q. Okay. Beyond that did you take any statements from
12 him personally?

13 A. No, ma'am.

14 SOLICITOR ROBINSON: No other questions for this
15 witness, your Honor.

16 THE COURT: All right.

17 CROSS-EXAMINATION

18 OFFICER BRANDON AVIDON BY MS. LIPINSKI:

19 Q. So, it's a traffic stop on the roadside. Correct?

20 A. Yes, ma'am.

21 Q. And it's dark at that point?

22 A. Yes, ma'am.

23 Q. And I believe your notes reflect it happened
24 approximately 8:00 pm in November so we're talking total
25 darkness at that point?

1 A. Uh-huh.

2 Q. And for the most part -

3 THE COURT: You got to try to say yes or no.

4 A. Oh. Yes, ma'am.

5 Q. And you're still in somewhat of a residential area I
6 believe where you stopped at?

7 A. There's a few houses, not - I mean I wouldn't say
8 a neighborhood.

9 Q. But we're not out on Dave Lyle where there are street
10 lights everywhere. You're still in predominately a
11 residential area?

12 A. That's correct.

13 Q. All right. And you stated that you stopped him.
14 Were you driving a marked patrol car at the time?

15 A. I was not.

16 Q. All right. What were you driving?

17 A. A silver Malibu.

18 Q. So a unmarked car?

19 A. Yes, ma'am.

20 Q. Is it equipped with any type of camera or recording
21 device?

22 A. No, ma'am.

23 Q. Were any of the officers out there that night have any
24 cars or body cams or other ability to record this encounter
25 that you have testified to?

1 A. No, ma'am.

2 Q. However you do know that Rock Hill does have officers
3 who do have that equipment in their cars who can initiate
4 traffic stops. Correct?

5 A. Yes, ma'am.

6 Q. All right. And you stated that he was arrested for a
7 traffic violation. Demario was actually the passenger was
8 he not?

9 A. I didn't testify he was arrested for a traffic
10 violation.

11 Q. Okay. I thought that you stated he was stopped and
12 arrested for a traffic stop. Placed under arrest at a
13 traffic stop.

14 A. He was placed under arrest at a traffic stop.

15 Q. Okay. But he was actually the passenger in the car?

16 A. That's correct.

17 Q. Tomeano would have been the driver of that vehicle?

18 A. That's correct.

19 Q. All right. And were you the one that initiated the
20 traffic stop or did someone else?

21 A. I did.

22 Q. And who was riding in the car with you?

23 A. Lieutenant Holland.

24 Q. All right. And you stated that there was also Officer
25 Clevenger, Burkhardt, and Marvin Brown?

1 A. Yes, ma'am. They arrived a short time later.

2 Q. And were they driving separately or together?

3 A. I believe Officer Clevenger was with Officer Burkhart.
4 and I believe Commander Brown was by himself.

5 Q. So you have three cars surrounding this Honda Accord
6 yours, Clevenger's, and Marvin Brown's. Correct?

7 A. Marvin - Commander Brown kind of stayed further back.
8 I don't believe he ever even approached where we were
9 at.

10 Q. Okay. But just say that he came on the scene.

11 A. Right.

12 Q. Did he pull up near you and not get out of the car?
13 I'm confused.

14 A. Yeah, he was in the general area.

15 Q. Near enough to witness your encounter?

16 A. Yes, ma'am.

17 Q. And is he still driving the SUV?

18 A. Yes, ma'am.

19 Q. All right. And you get out with Demario and Tomeano
20 you state. Correct?

21 A. Yes, ma'am.

22 Q. Immediately handcuffed both of them?

23 A. I don't recall how long it took us to handcuff them.

24 Q. All right. At the time of the - the time that you
25 Marandized him Demario was in cuffs wasn't he?

1 A. That's correct.

2 Q. He was placed under arrest based on a preexisting
3 warrant. Correct?

4 A. That's correct.

5 Q. And I believe that you arrested Tomeano as well?
6 Correct?

7 A. Yes, ma'am.

8 Q. And you stated that as you and these other five
9 officers are surrounding Mario and Tomeano you read him his
10 rights?

11 A. I did.

12 Q. All right. And you stated that the only thing he
13 stated to you was he understood his rights or did you just
14 say do you understand and he nodded yes?

15 A. We talking about --

16 Q. Demario.

17 A. Yeah. He verbally acknowledged that he understood his
18 rights.

19 Q. By saying yes?

20 A. Some form of yes whether it yes, yeah. I don't recall
21 which word was used but he verbally stated it.

22 Q. So you did not interrogate him then?

23 A. No.

24 Q. Correct?

25 A. No, ma'am.

1 Q. So - And to the most part you're verbal encounter
2 was with him let me Mirandize your rights and do you
3 understand them, yes. Correct?

4 A. Yes, ma'am.

5 Q. All right. So when the prosecutor ask you questions
6 like he didn't appear to be under the drug - influence of
7 drugs or other alcohol you really didn't have a lengthy
8 conversation with him in order to access that did you?

9 A. No, ma'am.

10 Q. All right. And when she states if whether or not he
11 was acting under any type of mental handicap or anything,
12 again, you really didn't have any conversation with him to
13 access that either did you?

14 A. No, ma'am.

15 Q. You didn't ask him what his level of education was;
16 how far did he go in school or any of those questions did
17 you?

18 A. No, ma'am.

19 Q. And you didn't ask him anything about his health
20 history, physical or mental health at that time did you?

21 A. I did not.

22 Q. So you have an officer surrounding by five other
23 officers; you've got three cars in the immediate vicinity;
24 you read him this card and you say you understand, and he
25 says yes?

1 A. That's correct.

2 MS. LIPINSKI: The Court's indulgence one moment, your
3 Honor.

4 That's all we have, your Honor.

5 THE COURT: Redirect?

6 SOLICITOR ROBINSON: No redirect, your Honor.

7 THE COURT: You can step down. Thank you.

8 (WITNESS LEAVES WITNESS STAND.)

9 THE COURT: Call your next witness.

10 SOLICITOR ROBINSON: All right, your Honor, the next
11 would be Officer Vince Holland.

12 (WHEREUPON, VINCE HOLLAND,
13 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

14 SOLICITOR ROBINSON: May it please the Court.

15 THE COURT: Yes, ma'am.

16 DIRECT EXAMINATION

17 OFFICER VINCE HOLLAND BY SOLICITOR ROBINSON:

18 Q. Could you please state your name for the record?

19 A. Vince Holland.

20 Q. And what is your occupation?

21 A. Investigative Lieutenant with Tega Cay.

22 Q. Okay. Have you previously been assigned to the Drug
23 Enforcement Unit?

24 A. I have.

25 Q. Were you involved in the arrest of Demario Cunningham

1 and the execution of a search warrant at [REDACTED]

2 [REDACTED] on November 26, 2014?

3 A. I was.

4 Q. Where did you first come into contact with the
5 defendant Demario Cunningham on that day?

6 A. On a car stopped just above the house.

7 Q. Okay. And about what time was it?

8 A. I think it was approximately eight o'clock.

9 Q. Do you know if the defendant Demario Cunningham was
10 advised of his rights at that time?

11 A. He was.

12 Q. Were you the one who advised him of those rights?

13 A. No I did not.

14 Q. Who advised him of his rights at first?

15 A. Officer Avidon.

16 Q. Were you present -

17 MADAM COURT REPORTER: Just a minute.

18 THE COURT: Do you need a break?

19 MADAM COURT REPORTER: No, sir.

20 I need you to slow down, ---

21 THE COURT: Okay.

22 MADAM COURT REPORTER: --- Madam Solicitor.

23 BY SOLICITOR ROBINSON:

24 Q. Were you present when Officer Avidon advised the
25 defendant of his rights?

1 A. Yes I was.

2 Q. Who else would have been present at that time?

3 A. Commander Marvin Brown, Officer Clevenger, and Officer
4 Burkhart.

5 Q. You mentioned that this was a traffic stop. Was there
6 anyone else in the vehicle involved in the traffic stop
7 besides Demario Cunningham?

8 A. It was a relative of his.

9 Q. Okay. And was that person also present at the time of
10 the Miranda right?

11 A. Yes.

12 Q. Okay. You mentioned there being other officers on
13 scene. At any time while he was being advised of his
14 Miranda rights and by him I mean Demario did any of the
15 officers brandish the weapons or point them at Demario
16 Cunningham in any way?

17 A. No, it was not.

18 Q. Do you know roughly how old Demario Cunningham was at
19 that time?

20 A. Mid to late twenties.

21 Q. Did he appear to you to be under the influence of
22 drugs or alcohol?

23 A. No he did not.

24 Q. Did he appear to you to be mentally handicapped in
25 any way?

1 A. No he did not.

2 Q. From what you observed did he appear to understand
3 what Officer Avidon had told him about his rights?

4 A. Yes he did.

5 Q. Was that the only time that night that Demario
6 Cunningham was advised of his rights?

7 A. No, ma'am, he was advised later on.

8 Q. Where did that take place?

9 A. At 460 Castlewood.

10 Q. And what were you doing at that residence?

11 A. Executing a search warrant.

12 Q. Who advised Demario Cunningham of his rights back at
13 the residence?

14 A. I did.

15 Q. And who else was present at that advisement of rights?

16 A. Commander Marvin Brown, Officer Clevenger; Officer
17 Burkhart, Officer Avidon. His - I think it was his mother
18 and his step-father.

19 Q. Okay. And what about the relative from the traffic
20 stop?

21 A. The relative from the traffic stop was there as well.

22 Q. Okay. So several law enforcement officers and four
23 total individuals at the house including the defendant?

24 A. Yes.

25 Q. During that time you advised him of rights at the

1 residence, did you or any of the other officers brandish
2 your firearm or point them at any of the occupants of the
3 house in any way?

4 A. No we did not.

5 Q. At that time did Demario again appear to understand
6 what he had been told about his rights?

7 A. He did.

8 Q. Did he in fact sign a form to indicate that he
9 understood his rights?

10 A. He did.

11 Q. I've handed you what's been marked as Court's Exhibit
12 Three. Do you recognize that?

13 A. I do.

14 Q. What is it?

15 A. It's our Rights Form. This is the standard form we
16 use at the Drug Unit for all search warrants.

17 Q. Okay. And can you explain a little bit of the
18 contents on that form for the Court?

19 A. It advises the person of their Constitutional rights.

20 And also the acknowledgment of their rights and they
21 sign saying they acknowledge those rights that we have read
22 to them.

23 Q. Okay. And as you indicated is that the form that you
24 had Demario sign when you said he signed?

25 A. It is.

1 Q. Now did he at that time or anytime that night that you
2 might have observed, refused to speak with you, or the
3 other officers, or ask for an attorney?

4 A. No he did not.

5 Q. Did you personally obtain any statements from him that
6 night?

7 A. No I did not.

8 Q. Were you present when he spoke with other officers
9 who obtained statements?

10 A. I was at the residence.

11 Q. Okay. So the conversation took place at the
12 residence that you witnessed?

13 A. Yes.

14 Q. And who else was present for that conversation?

15 A. Commander Brown, his mother and step-father. I can't
16 remember if there was any other law enforcement in the room
17 at the time.

18 Q. Was the other occupant from the traffic stop still on
19 scene as well?

20 A. Yes he was. Sorry.

21 Q. Okay. At any time that night did you or any of the
22 other officers to your knowledge threaten or coerce Mr.
23 Cunningham into participating in that conversation?

24 A. No we did not.

25 Q. To your knowledge did anyone make any promises to

1 Demario Cunningham in exchange for him speaking at that
2 time?

3 A. No we did not.

4 Q. How would you describe the general atmosphere that
5 took place during that discussion in the home?

6 A. Casual conversation.

7 Q. How long were you in the kitchen with the defendant
8 and those other individuals that night?

9 A. Approximately twenty; twenty-five minutes.

10 Q. At any time during your time in the kitchen with those
11 individuals did Demario Cunningham ever ask for any breaks
12 during the conversation or for food or drink?

13 A. No he did not.

14 Q. So to the best of your knowledge was his participation
15 in the conversation that you witnessed freely and
16 voluntary?

17 MS. LIPINSKI: Your Honor, I object to the leading.

18 THE COURT: Yeah, rephrase the question.

19 BY SOLICITOR ROBINSON:

20 Q. Did you observe anything that led you to believe that
21 he was coerced into speaking in that conversation?

22 A. No.

23 Q. Did you have any further contact with Demario
24 Cunningham after the service of the search warrant was
25 complete at that residence that night?

1 A. No.

2 SOLICITOR ROBINSON: Your Honor, that would be the
3 questions for this witness.

4 THE COURT: All right. Cross.

5 MS. LIPINSKI: The Court's indulgence, your Honor.

6 CROSS-EXAMINATION

7 OFFICER VINCE HOLLAND BY MS. LIPINSKI:

8 Q. Investigator Holland, were you with Tega Cay back
9 then when this happened or you'd switched agencies?

10 A. I was employed by Tega Cay.

11 Q. But working with the DEU?

12 A. But assigned to the Drug Unit.

13 Q. Are you still working with the DEU?

14 A. No I'm not.

15 Q. Even not even occasionally? You're just clearly now
16 supervisor at Tega Cay?

17 A. Yes. Yes.

18 Q. All right. And you stated that -- Are you -- You were
19 there for the traffic stop that occurs 8:00 pm.

20 A. Uh-huh.

21 Q. Correct? And you were driving a separate car from
22 Officer Burkhardt I believe.

23 A. Yes.

24 Q. All right. And then also Commander Brown's SUV was
25 also there?

1 A. If I remember correctly, yes.

2 Q. And you all surrounded this car; initiated a traffic
3 stop. You get out Clevenger is there; Avignon, Burkhardt
4 and Brown are all there at the roadside?

5 A. I didn't say the fact that we surrounded the car. I
6 said a traffic stop was conducted.

7 Q. But did you park five hundred yards and walk up on
8 them or you pretty much all pulled in the general vicinity?

9 A. We were all there at the same time. I pulled up and
10 myself and Officer Avidon stopped the vehicle maybe a
11 minute or so later, a couple of more officers show up, and
12 then another officer shows up.

13 Q. All right. So let me get this chronology straight.

14 You and Investigator or Officer Avignon are in one
15 car or two cars?

16 A. One car.

17 Q. All right. You initiate the traffic stop. Correct?

18 A. Yes.

19 Q. You two get out. Correct?

20 A. Yes.

21 Q. Get the two passengers out or the two occupants out.
22 Right?

23 A. Uh-huh.

24 Q. Two codefendant's Tomeano and Demario. Correct?

25 A. Yes.

1 Q. You state then sometime what other two officers arrive
2 next?

3 A. Officer Clevenger and Officer Burkhart arrive next.

4 Q. And are they in the same car or separate cars?

5 A. Same car.

6 Q. All right. But they pull up near the car you have
7 stopped.

8 A. Right. Yes.

9 Q. Correct?

10 A. Uh-huh.

11 Q. And then at some point -

12 THE COURT: Try to say yes or no instead of uh-huh or
13 huh-huh.

14 A. I'm sorry.

15 THE COURT: That's fine.

16 BY MS. LIPINSKI:

17 Q. And then at some point Commander Brown pulls up as
18 well.

19 A. Yes.

20 Q. Gets out of the vehicle?

21 A. Yes.

22 Q. All right. And that point you place the two of them
23 under arrest. Correct?

24 A. They were detained.

25 Q. Right. But you have preexisting warrants on

1 Demario. Right? He wasn't just detained he was arrested.

2 A. Yes.

3 Q. All right. And so Tomeano I believe the basis of
4 arresting him was that he had a DUS warrant or something
5 like that outstanding for him.

6 A. If I recall correctly, yes.

7 Q. All right. And so they're both placed in cuffs?

8 A. Uh-huh.

9 Q. And -

10 THE COURT: Not uh-huh.

11 A. Sorry. Yes.

12 MS. LIPINSKI: Sorry, Your Honor. He's talking into
13 the microphone. I'm just hearing and it's kind of bringing
14 my concentration.

15 Q. Officer Avidon pulls out - and reads him his Miranda
16 rights. Correct?

17 A. Yes.

18 Q. And then clearly though they're not free to go.

19 A. Correct.

20 Q. And clearly you're not kind of talking to them down
21 the street. You have them surrounding so they can't flee.

22 A. Correct.

23 Q. All right. And are the patrol cars one behind the
24 other and then the defendant's car or is there one to the
25 side or one in front?

1 A. No. The defendant's car and then the rest are lined
2 up behind his.

3 Q. All right. And you all get out surround the defendant
4 and Mirandize him and then take him and Tomeano the
5 codefendant back to the house.

6 A. Correct.

7 Q. And it's not a big house. Right?

8 A. No it's not.

9 Q. A little mill house basically ---

10 A. Yes.

11 Q. --- is what I would describe it as.

12 A. Yes.

13 Q. More or less four, maybe five rooms total? I know
14 you didn't memorize it.

15 A. Approximately. Yes.

16 Q. But not a big house?

17 A. That's correct.

18 Q. Maybe not even five hundred square feet. Again you're
19 not an architect but a fairly small house.

20 A. You could be absolutely correct.

21 Q. All right. And you state that in the kitchen is you.
22 Right?

23 A. Correct.

24 Q. Demario. Correct?

25 A. Correct.

1 Q. Tomeano?

2 A. Correct.

3 Q. His mom?

4 A. Correct.

5 Q. Michael Brown the stepfather or owner of the
6 residence?

7 A. Correct.

8 Q. Commander Marvin Brown?

9 A. Correct.

10 Q. Burkhart?

11 A. Correct.

12 Q. And Clevenger?

13 A. Correct.

14 Q. Are all in the kitchen?

15 A. Correct.

16 Q. And the Solicitor ask you some questions about
17 evaluating his mental health. You're not trained to
18 evaluate his mental health in any way are you?

19 A. No I'm not.

20 Q. You're not a mental health professional?

21 A. No I'm not.

22 Q. And you didn't do any type of specific questioning of
23 Demario to ascertain his mental health did you?

24 A. No I did not.

25 Q. You didn't ask him his level of education?

1 A. No I did not.

2 Q. You did not ask him if he could read or write?

3 A. No I did not.

4 Q. All right. And the Solicitor has handed you a form;
5 you stated it's a standard Rock Hill PD form. Right?

6 A. Drug Enforcement Form.

7 Q. Drug Enforcement Form?

8 A. Yes.

9 Q. All right.

10 Q. Well I think it mirror some Rock Hill language.
11 Not a Tega Cay Form?

12 A. No.

13 Q. All right. And you have on here the Constitutional
14 rights. Correct?

15 A. That's correct.

16 Q. And it reads to you "You have the right to remain
17 silent, anything you say can be used against you in court.
18 You have the right to talk to a lawyer for advice before
19 answering any questions or have your lawyer present during
20 questioning. You have the right to -

21 THE COURT: Try to slow down a little bit.

22 MS. LIPINSKI: I'm Sorry. I forgot about Wanda.

23 Q. "You have the right to the advice and presence of a
24 lawyer even if you cannot afford to hire one but we have no
25 way of appointing you a lawyer." That's what it says?

1 A. That's correct.

2 Q. Okay. And then it says "One will be appointed for you
3 in Court if you wish you may answer questions with or with
4 out or may stop answering at any time." Correct?

5 A. Correct.

6 Q. And Demario is not the first signature. Correct?

7 A. That's correct.

8 Q. He's not the second signature. Correct?

9 A. That's correct.

10 Q. He's not even the third signature. Right?

11 A. That's correct.

12 Q. So you guys had been passing this form around to
13 everybody at the table and ask them to sign it. Correct?

14 A. I ask for their information and then ask them to
15 sign beside their information.

16 Q. And the whole thing --

17 A. In no particular order.

18 Q. The whole caveat about we can't give you a lawyer
19 even if you want one is because you wouldn't have brought
20 one out there at that point would you?

21 A. Probably not.

22 Q. Because you had no way of gettin' 'em?

23 A. Probably not. Had no way of getting one.

24 Q. And in fact your experienced because you've been
25 through this process of questioning suspects, booking them,

1 processing them, attending bond hearings and all of that,
2 is that all of that happens before the Court even starts to
3 appoint one to them. Correct?

4 A. Correct.

5 Q. And did you explain that in detail to Demario or his
6 family?

7 A. I read what was on the paper.

8 Q. Do you or anyone of the number of officers present at
9 the time where any body cams or other audio or video
10 recording equipment in your presence in order to
11 memorialize this encounter with Demario and his family?

12 A. No, ma'am.

13 Q. But nonetheless you are aware of DEU -- You all have
14 that equipment. Correct?

15 A. Excuse me. Could you repeat that? I'm sorry, I
16 didn't hear the first part of that.

17 Q. Sure. The Drug Enforcement Unit has any number of
18 means to record audio or video. Correct?

19 A. Correct.

20 Q. And you stated those are the only statements that you
21 recall hearing Demario make him acknowledging to you he
22 understood his rights. Right?

23 A. No. I stated I heard other statements provided to
24 other officers at the residence but.

25 Q. Okay. What are those statements?

1 A. He admitted to some cocaine that was in his room.

2 Q. He admitted to some cocaine?

3 A. Uh-huh.

4 THE COURT: Yes or --

5 Q. Are those his words, I admit to cocaine?

6 THE COURT: You need to say yes or no, not uh-huh.

7 A. Oh. I'm sorry. I apologize, sir.

8 He was ask what drugs were found in the room,
9 marijuana and cocaine, whose drugs were they. I don't
10 remember his exact wording of what his statement was but he
11 admitted to the cocaine being his.

12 Q. You don't remember his exact wording but you remember
13 generally he admitted to the cocaine being his?

14 A. Yes.

15 Q. And that is all?

16 A. Yes.

17 Q. And you don't recall any other conversations by
18 Demario Cunningham other than that one statement at the
19 kitchen table?

20 A. Correct.

21 Q. And did you prepare at any time a supplemental report
22 regarding your involvement in this case?

23 A. No I did not.

24 Q. That details in any way your involvement with any
25 of the evidence or anything of that nature?

1 A. No I did not.

2 MS. LIPINSKI: The Court's indulgence one moment,
3 your Honor.

4 (PAUSE.)

5 MS. LIPINSKI: That's all we have, your Honor.

6 SOLICITOR ROBINSON: Just a few brief questions, your
7 Honor.

8 THE COURT: All right.

9 REDIRECT EXAMINATION

10 OFFICER VINCE HOLLAND BY SOLICITOR ROBINSON:

11 Q. You mentioned that there was cocaine found at the
12 residence and that was discussed in your presence. Were
13 you aware that a firearm was located at the residence?

14 A. Yes.

15 Q. Were there any discussions regarding a firearm while
16 you were at the residence?

17 MS. LIPINSKI: Your Honor, I object as to beyond the
18 direct examination. She didn't ask him any of those
19 questions during direct about a gun.

20 THE COURT: Well, I think the question that you ask
21 regarding what his statements were was drawn enough to
22 allow her to ask that.

23 SOLICITOR ROBINSON: Thank you, your Honor.

24 Q. Was there any conversation while in your presence in
25 regard to a firearm?

1 A. Yes.

2 Q. Were you the person directing that conversation?

3 A. No I was not.

4 Q. Did you hear any statements from the defendant
5 regarding the firearm?

6 A. The defendant admitted the gun was his.

7 Q. Okay. So again do you remember his exact words?

8 A. I don't remember the exact wording.

9 Q. That was the nature of the conversation?

10 A. The nature of the conversation.

11 SOLICITOR ROBINSON: Your Honor, that's all for
12 questions. I would move to admit Court's Exhibit Three for
13 the Court's consideration.

14 THE COURT: Any objection to the exhibit?

15 MS. LIPINSKI: Not as a Court's Exhibit, your Honor.

16 THE COURT: Okay.

17 (WHEREUPON, COURT'S EXHIBIT NUMBER THREE, IDENTIFIED
18 AND MARKED, RECEIVED INTO EVIDENCE.)

19 THE COURT: Any cross or recross?

20 RE CROSS-EXAMINATION

21 OFFICER VANCE HOLLAND BY MS. LIPINSKI:

22 Q. I'm a little confused. I ask you if he made any
23 other statements and the only thing you told me was he
24 claimed the cocaine. Now you're telling me he claimed the
25 firearm?

1 A. Yes.

2 Q. But that's it?

3 A. That's it.

4 Q. You're certain this time?

5 A. I'm certain.

6 Q. No more statements?

7 A. No more statements.

8 Q. No where else? At the car, in the house?

9 A. Nope.

10 MS. LIPINSKI: Thank you, your Honor.

11 THE COURT: You can step down. Thank you.

12 (WITNESS LEAVES WITNESS STAND.)

13 THE COURT: Call your next witness.

14 SOLICITOR ROBINSON: Your Honor, the next witness
15 would be Commander Marvin Brown.

16 MS. LIPINSKI: Your Honor, before we call Commander
17 Brown, can we - I need to personally take a break. I think
18 it might help Wanda.

19 THE COURT: All right. We'll take about a five minute
20 refresher break.

21 MS. LIPINSKI: Thank you, your Honor. I appreciate
22 it.

23 (COURT IN RECESS AT 05:22 PM.)

24 (COURT BACK IN SESSION AT 05:31 PM.)

25 THE COURT: Thank you. You may take again your seats.

1 Thank you. All right, Commander Brown is here, come
2 up and be sworn.

3 (WHEREUPON, MARVIN BROWN,
4 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

5 DIRECT EXAMINATION

6 COMMANDER MARVIN BROWN BY SOLICITOR ROBINSON:

7 Q. If you could please state your name for the record?

8 A. Marvin Brown.

9 Q. And what is your occupation?

10 A. I'm the Commander - I'm assigned as the Commander of
11 the Drug Unit. I'm the Captain of the investigations with
12 the Solicitor's office.

13 Q. All right. Were you involved in the arrest of
14 Demario Cunningham and the execution of the search warrant
15 at [REDACTED] on November 26, 2014?

16 A. Yes.

17 Q. And during that investigation when was the first time
18 you would have come into contact with the defendant Demario
19 Cunningham?

20 A. I saw the car, the first time I came in contact is
21 when we stopped the car. Going back to the residence I got
22 out. The car stopped - the Honda car that Mr. Cunningham
23 was in and I got out but I stood back at a distance.

24 Q. Okay. During that time of the traffic stop were you
25 aware of whether or not the defendant was advised of his

1 Miranda rights?

2 A. Yes, he was.

3 Q. And who advised him of those rights?

4 A. Officer Avidon and Officer Holland was standing
5 beside him when he did so. I could hear it. I was
6 standing back but I could hear it.

7 Q. Okay. Was that the only time that night that Mr.
8 Cunningham was advised of his rights?

9 A. No. We went back to his residence and at his
10 residence Officer Holland read the search warrant and the
11 rights at the residence.

12 Q. Okay. And you were present for the reading of those
13 rights?

14 A. I was.

15 Q. Okay. Who else was present during that time?

16 A. Well several officers. It was Mr. Cunningham's mom,
17 Barbara Cunningham; Michael Brown her boyfriend. Officer's
18 were Clevenger, myself, Holland, Avidon, about five of us
19 in there.

20 Q. Okay. And you mentioned Mr. Cunningham's mother and
21 stepfather. Is that who you --

22 A. Yes. And his cousin was there too.

23 Q. His cousin as well. And where in the residence was
24 that?

25 A. We were in the kitchen.

1 Q. Now, during either time that you witnessed the
2 defendant being advised of his rights, did you or any of
3 the other officers present have your firearms in your hands
4 or brandish them in any way?

5 A. No.

6 Q. About what age was the defendant at that time?

7 A. About thirty I believe.

8 Q. And during either of the times you saw him being
9 advised of his rights, or anytime that night, did he appear
10 to you to be under the influence of drugs or alcohol?

11 A. No he did not.

12 Q. Did he appear to you to be mentally handicapped in
13 any way?

14 A. No.

15 Q. From what you observed did he appear to understand his
16 rights when he was advised by Officer Avidon?

17 A. Yes.

18 Q. And when he was advised by Officer Holland?

19 A. Yes.

20 Q. Did you observe the defendant at any time that night
21 refuse to speak with you or any of the other officers?

22 A. No. He was fairly quiet but he didn't refuse to
23 speak.

24 Q. Okay. Did he at any time that night, that you're
25 aware of, ask for an attorney?

1 A. He did not.

2 Q. Did you personally obtain any statements from him
3 that night?

4 A. Three.

5 Q. Okay. Where did you initial conversations where he
6 would have made a statement take place?

7 A. The first two were at the kitchen table. I was
8 sitting at the table; his mother, Barbara Cunningham who
9 I've known for years and years was there. I call him the
10 step dad, Michael Brown was there. Mr. Cunningham and his
11 cousin were also there at the table and we were just
12 sitting at the kitchen table having a conversation with the
13 tone of voice like I'm right now talking about the old days
14 for the most part. But he was at the table also.

15 Q. Okay. And were there any other officers in the
16 kitchen with you when that conversation was taking place?

17 A. Officer Holland had been in there and read the rights
18 and the search warrant. He may have still been in there
19 and Officer Avidon was in there. In the room, his bedroom
20 was being searched to the right was right there at the
21 kitchen. I could hear the officers in his bedroom.

22 Q. Okay. So some officers were in other rooms of the
23 house but not necessarily in the kitchen the entire time?

24 A. Correct. And it was a small house.

25 Q. Okay. At any time that night did you or any of the

1 officers threaten or coerce the defendant into speaking to
2 your knowledge?

3 A. No.

4 Q. Are you aware of any officers or yourself making the
5 defendant any promises in exchange for speaking?

6 A. No.

7 Q. How long were you in the kitchen with these
8 individuals that night?

9 A. Twenty, thirty minutes.

10 Q. Okay. And did the defendant ever ask for any breaks
11 during the conversation or for any food or drink or
12 anything of that nature?

13 A. No he did not.

14 Q. What was the general topic of conversation that you
15 were having in the kitchen with the other individuals?

16 A. I was talking to Ms. Cunningham and Michael Brown
17 about the old days when people we had in common, people we
18 knew. And then when the officers in the bedroom said they
19 found some cocaine and marijuana that's when I had the
20 conversation with Mr. Cunningham and with his cousin.

21 Q. Okay. And so you were the one initiating that
22 conversation as far as the officers go?

23 A. I did once the officers came back and told me they
24 had found some cocaine and marijuana in the bedroom.

25 Q. Okay. And did the defendant make any statements at

1 that time regarding the contraband that had been located?

2 A. He did. He said that the cocaine and the gun was his
3 and his cousin said that the marijuana belonged to him.

4 Q. Okay.

5 A. That each cousin took responsibility for what they
6 perceived - what they said was theirs.

7 Q. Okay. So just to clarify that. You have Demario
8 Cunningham, the defendant in this case claimed the cocaine
9 and the gun.

10 A. Yes.

11 Q. He did not claim the marijuana?

12 A. That is correct.

13 Q. All right, now, did - Again, what did you describe as
14 being the atmosphere during the conversation in the
15 kitchen?

16 A. Pretty much like it's in here now. Ms. Cunningham
17 answered very nice to me. We've known each other for years
18 and Mr. Brown was -- The conversation was between us three
19 most of the time. Demario, Mr. Cunningham was sitting at
20 the kitchen table and he said very little until they told
21 me what they had found and then I had a conversation with
22 him and his cousin. And then before we left I had a second
23 conversation with him.

24 Q. Okay. And you indicated at one point I believe your
25 testimony was that there were three statements. How many

1 of those statements are you referring to as taking place in
2 the kitchen?

3 A. Two in the kitchen. I talked to him; we set there a
4 few more minutes and then when we were ready to leave the
5 officers came out and they had the evidence and they placed
6 it on the kitchen table. And I said to be clear who -- I
7 told them don't claim anything but who owns what and at
8 that point seeing the drugs he claimed the cocaine and the
9 gun and the other gentleman claimed the marijuana. They
10 were cousins.

11 Q. Okay. So you described different statements; it was
12 all one larger conversation?

13 A. In the kitchen yes.

14 Q. One was just verbally. We've heard that something
15 was found, what is yours? If you can answer for the court
16 reporter.

17 A. Yes. The first conversation the officers told me
18 they found some cocaine and marijuana. Kind of explained
19 to me what was going on. At that point I ask them -- it
20 was two cousins in there cause we're trying to verify who
21 owns -- who's responsible for what drugs - and the cousins
22 took responsibility for what they said belonged to them.
23 It was a ten minutes or so lapse before we left. I could
24 look at the evidence chain and see exactly when the cocaine
25 was found. There was a little lapse there and then before

1 we left - I usually do this and I did it on this case - I
2 showed them the drugs which is all in the same time frame.
3 I showed them the drugs and said to be clear who owns what.

4 Q. So that's what you were referring to as the second
5 statement?

6 A. Yes. At the second time he said that's my cocaine and
7 my gun.

8 Q. Okay. Now, was that the conclusion of your
9 involvement at the residence there?

10 A. Yes. We went downtown from there.

11 Q. Okay. And when you got back to the law center did
12 you have any further conversations with the defendant?

13 A. Yes. We went into the conference room area of the
14 Drug Enforcement office. We didn't go to the jail and we
15 did the standard booking sheet with name, address, that
16 type thing. And when we walked him back to the jail had
17 another conversation with him right beside the copy machine
18 as we was walking out the door of the officer to walk back
19 to the jail. The jail is in the same building.

20 Q. Okay. And what was the nature of that conversation?

21 A. I ask him about the gun and he told me that he had
22 traded cocaine for the gun.

23 Q. And -- Now you indicated this was a conversation
24 that's taking place as you're walking towards a hallway; is
25 that correct?

1 A. Yes. Officer Clevenger and myself were walking him
2 back to the jail and when we got to the copy machine as
3 we're going out the door that's when I ask him about the
4 gun. Once he made the conversation about the gun or the
5 cocaine then Officer Clevenger walked him on to the jail
6 and I went back into the office.

7 Q. Okay. Was he handcuffed at that time?

8 A. No. The cuffs were taken off in the conference room.
9 He was walking back to the jail; he was not
10 handcuffed.

11 Q. Okay. And he had not made it to the jail yet. This
12 wasn't taking place in a cell or anything? It's not in a
13 cell?

14 A. No. We were in the conference room when we talked.
15 We were in a conference room when he was booked. We were
16 standing in the office beside the copy machine when he made
17 that statement.

18 Q. And throughout your conversations with the defendant
19 that night did he appear to understand the nature of the
20 conversations and what was going on?

21 A. Yes. He was fairly quiet but I was - I'm confident
22 that he understood what was going on. And he had a
23 conversation with us. We booked him in and he gave us his
24 name, address, and that type thing.

25 SOLICITOR ROBINSON: That's all for this witness, your

Honor.

CROSS-EXAMINATION

COMMANDER MARVIN BROWN BY MS. LIPINSKI:

Q. So, you're saying now that there are three statements that Demario made?

A. Yeah. I'm not stating now. It's two different encounters but he made three different -- Twice he claimed the cocaine and once he said he traded the gun for some cocaine, not that cocaine. But it was three different

Q. So that -

A. --- admissions to cocaine at some point, yes.

Q. All right. But there's three statements. There's the initial conversation, the conversation when the drugs are on the table, and then the conversation about the gun at Rock Hill PD?

A. Yes.

Q. So three separate statements. Correct?

A. Yes but two were in the kitchen.

Q. I get that.

A. We could consider that as one I guess but two was in the kitchen. There was three different statements about the cocaine that is correct.

Q. Two conversations; three statements. Would that be fair? Conversation at the kitchen table and one at

1 booking?

2 A. Yes. Actually - Yes. It was two conversations at the
3 kitchen table.

4 Q. But you're stating at this point he made two claims
5 of ownership of the gun and the drugs at the kitchen table?

6 A. Yes.

7 Q. Did he initially just claim the drugs and then claim
8 the drugs and the gun or did he claim them both on both
9 occasions?

10 A. On both occasions I was told what was found. He
11 claimed the gun and the cocaine. Before we left like I
12 always do we laid it on the table so we'll be absolutely
13 clear, he claimed the gun and the drugs again. And then at
14 the police department when he was taken back to the jail he
15 said that he traded cocaine for the gun.

16 Q. Right. But your officers go in and they search the
17 room. Right? And then they tell you we got cocaine and we
18 got marijuana; that kind of thing. At that point you're
19 trying to figure out who the drugs belong to and then they
20 do. Is the gun found before the drugs or after the drugs?

21 A. I don't know. It was a small room. They were all
22 found about the same time but exactly what was found and
23 when I don't know. I don't know if the marijuana was found
24 before. When they were - When they found what they found
25 they was wrapping it up and they came and told me. I ask

1 them about the drugs then I ask them a second time when we
2 leaving I showed it to him.

3 Q. Okay. And you didn't do any reports in this particular
4 case did you?

5 A. Sure. I reviewed all of them.

6 Q. You reviewed all of them?

7 A. Yeah.

8 Q. All right. But you didn't personally author any.

9 Would that be fair to say?

10 A. That's true.

11 Q. So even though you're Commander you do have officers
12 who do supplemental reports that say I did this; Burkhardt
13 did that, Avidon did that. You even though you personally
14 participate in this and you don't do that in every drug
15 investigation did not personal narrative is that fair to
16 say?

17 A. That is correct.

18 Q. All right. But you did review the General Sessions
19 Case Summary?

20 A. I did.

21 Q. And it's states that Commander Marvin Brown talked
22 with Tomeano and Demario at the kitchen table. He ask them
23 what belonged to them.

24 A. Yes.

25 Q. Tomeano claimed the ownership of the black bag and the

1 marijuana that was located inside the bag. Demario claimed
2 ownership of the cocaine and the stolen pistol.

3 A. That's true.

4 Q. Period.

5 A. That's true.

6 Q. All right. So in the report though it only indicates
one statement is made. Would you agree with that?

8 A. It depends on how you read it and that might be the
9 way you read it. Yes, he took ownership of the gun and the
10 drugs at the table twice. It says that he claimed
11 ownership. It didn't say how many times. You can read it
12 as once but I didn't write that. That's a summary. That's
13 not a statement; it's a summary of what the officer wrote.
14 I don't necessarily disagree with that but he did tell me
15 twice. I was sitting at the table, it was one officer
16 there the first time and a second officer there the second
17 time.

18 Q. Yes. But, Commander Brown, you've been doing this a
19 long time. You understand. Right?

20 A. Uh-huh.

21 Q. The defendant's statements are pretty important
22 pieces of evidence. Correct?

23 A. Uh-huh.

24 Q. And it's important to document those as specifically
25 as we can. Correct?

1 A. I think they documented that he admitted to the gun
2 and the cocaine.

3 Q. All right. But no where in this report does it
4 indicate that he made two statements; it only says he
5 claimed ownership of -- Doesn't say he did it twice. It
6 just makes a general statement that he claimed the
7 ownership of the cocaine and the gun.

8 A. I'm not sure if it says he did once either. I have to
9 read it again. I took -- I took it to be that he claimed
10 ownership of the gun and the drugs at the kitchen table.
11 Once, twice, ten times he claimed ownership of the gun and
12 the drugs. I'd have to look at it again to see if it looks
13 like it just meant one time.

14 Q. Well does it say two times?

15 THE COURT: He's already admitted it doesn't.

16 MS. LIPINSKI: Okay. Thank you, your Honor.

17 Q. And then you state there is another conversation at
18 booking. Correct?

19 A. It was at the booking when we were walking into the
20 jail.

21 Q. At Rock Hill P D?

22 A. Yes. I believe that's on that writing -- that write
23 up also.

24 Q. Right. And who is present for that conversation?

25 A. There was several officers in the office but who

1 actually heard it Officer Clevenger and myself were walking
2 him back to the jail and the copy machines at the door
3 where you exit the office, at that point I was not going
4 all the way to the jail. We stopped and had a short
5 conversation right beside the copy machine and I ask him
6 about the gun, except the gun - except the gun.

7 Q. And while you stated that in your opinion Demario
8 seemed to understand your conversation with him. You
9 didn't do anything in terms of asking him about his
10 education?

11 A. I was there when he was booked and I talked to him and
12 his mother had a conversation with him at the kitchen
13 table. She was talking to him about various things and
14 there was no red flags about that he didn't know what was
15 going on; didn't understand what was going on. His mother
16 had the conversation with him about, you know, she was
17 disappointed in what he did. And then during the booking I
18 was there when he answered the questions. I'm sitting at
19 the round table and I can see in the booking room and he
20 answered the questions with no problem. So I didn't see
21 any red flags but I did not ask him his grade level.

22 Q. You ask him anything in terms of his background or
23 anything of those comments. Correct?

24 A. I didn't.

25 Q. And other than to sign his name Demario never wrote

1 anything. Right?

2 A. I don't -- He didn't give us a written statement.

3 Q. All right. And never signed or reviewed a written
4 statement by you. Correct?

5 A. I don't -- I don't think it was a written statement
6 other than the summary.

7 Q. But certainly your back at Rock Hill PD. Correct?

8 A. Uh-huh.

9 Q. And so certainly you had the capability to reduce
10 these statements to writing and have Demario write them?
11 Correct?

12 A. Yes. But I didn't -- It's just -- I guess it was
13 my fault. I didn't get the impression that he was gonna
14 put it in writing so I didn't ask.

15 Q. Well you stated that he was very quiet and for the
16 most part he made these statements with you and it was very
17 conversational in nature, so you didn't say anything that
18 said that he gave you the impression he would have signed
19 anything.

20 A. I didn't ask him to sign a statement.

21 Q. So that was just basically your executive decision
22 you weren't gonna ask him to sign a written statement.

23 Correct?

24 A. I didn't ask him. I'm not sure if the other officers
25 ask him or not but I didn't ask him.

1 Q. And obviously with law enforcement at Rock Hill PD
2 in particular if not there at the house you have the
3 ability to audio or video record any statements Demario
4 made. Correct?

5 A. Yes.

6 Q. And you chose not to do that either?

7 A. That's correct.

8 MS. LIPINSKI: The Court's indulgence one moment.

9 THE COURT: All right.

10 (PAUSE.)

11 MS. LIPINSKI: That's all we have, Commander Brown.

12 SOLICITOR ROBINSON: No redirect, your Honor.

13 THE COURT: You can step down. Thank you.

14 (WITNESS LEAVES WITNESS STAND.)

15 SOLICITOR ROBINSON: The State's ready for motions.

16 THE COURT: All right. And what's the position on the
17 defense?

18 MS. LIPINSKI: Your Honor, just because we're gonna
19 get into argument and there is a sequestration I'll wait
20 for Commander Brown to get outside just because he will
21 testify again. Just out of the abundance of caution.

22 (COMMANDER BROWN EXITS COURTROOM.)

23 THE COURT: All right.

24 MS. LIPINSKI: Your Honor, at this time I would move
25 to exclude the statements as not being knowingly and

1 intelligently and voluntarily made. The Court's been made
2 aware of other documents that the defendant does have
3 certain mental deficient. Those reports indicate that he
4 was in special ED classes; those type of things. These
5 officers never did anything to ascertain whether he was
6 really understanding what was going on; the nature of what
7 he was acknowledging; the ramifications of that, or, if he
8 understood exactly how he could get a lawyer. Matter of
9 fact the form that they used in the kitchen while it tells
10 them they have a right to a lawyer so far is to say but we
11 really can't get you one which deminimizes that right.
12 Makes it like you have a right to one but you're not gonna
13 get one so that doesn't really create the impression in
14 anyone's mind to believe that they have a right to speak
15 with one before going further.

16 In addition, your Honor, we make the motion that the
17 statement should be excluded because we don't actually know
18 the words Demario used. All of the officers testified that
19 he admitted or he claimed guns but nobody is able to come
20 in here today and testify as to his exact word choice which
21 I think is something else the Court should consider in
22 terms of actually making these statements. Are these words
23 that Demario would even use innocently or

24 We don't know what statements he's making. We just
25 know that he's making statements in the general subject

1 area of them. I think in order to go forward and to put a
2 statement in the defendant's mouth in front of the jury
3 they should be able to state with some specificity were the
4 actual words that the defendant uses. Otherwise we're kind
5 of speculating as to what he said or at least we'll give
6 you the general nature but that's as far as we can go. I
7 think that fails to meet any initial or trustworthiness or
8 reliability and I think it underlines the fact that he was
9 making these statements knowingly and intelligently or
10 voluntarily.

11 SOLICITOR ROBINSON: Your Honor, the purpose of this
12 hearing is to determine if the statements were voluntary
13 made for purposes of admitting them at trial. Most of what
14 Ms. Lipinski is arguing at this point would be arguments
15 for the jury to decide how reliable they think these
16 statements might be. But these are not people who are
17 trained to do a mental health evaluation. The best that we
18 can do at this point is to ask them what they're
19 impressions were of this conversation and there was no
20 indication that any of these officers that he wasn't
21 understanding what was going on. There has been no
22 evidence that he was threatened; that he was coerced, that
23 it was a hostile situation and he was provided his rights.

24 He - Although that form does say that they can't
25 appoint him a lawyer, it kind of also tells him he can

1 refuse to answer questions; he can not participate in the
2 conversation. And so for purposes of determining if these
3 are voluntary statements there's just been nothing to
4 suggest to the court that these should be inadmissible for
5 consideration by the jury.

6 As to the precise words used in the statement, most
7 conversations are give and take exchange and so deciphering
8 what word was here and there can be difficult. And what
9 we have consistently from everyone is that Demario
10 Cunningham claimed ownership of the cocaine and the
11 firearm. That is what he is being alleged to have made a
12 statement about. And the words back at booking are
13 specific. He said that he traded cocaine for the firearm.

14 So the State feels that it's met it's burden to have
15 the statements be admissible for consideration by the jury.

16 THE COURT: All right.

17 MS. LIPINSKI: Just briefly in response, your Honor.

18 I won't belabor the issue but it's hard for them to
19 not follow counter coercions. So you have two individuals
20 stopped on the dark of night beside the road surrounded by
21 law enforcement; there's three cars around them including a
22 big black SUV. The officers are all standing around them
23 they *Mirandized* them; they handcuffed them then they claim
24 they don't say anything else to them. They haul them back
25 to the residence. They in fact ---- the residence with law

1 enforcement officers as upwards of five if not more
2 officers plus the occupants in this very small house and
3 then telling them, you know, claim it and do whatever.

4 To say that that's not coercive I think belies the
5 context in which they claim the conversations were made.
6 It doesn't have to rise to the level that somebody took out
7 a gun or threatened to shoot somebody or threaten to take
8 somebody's mom to jail before we got to that particular
9 stance before a situation can become coercive such that it
10 over comes. And while you're right these officers don't
11 have any training I have been involved with a number of
12 trials and I suspect that the court has as well, where
13 detectives do go further in trying to access just the
14 clarity of the mind of the suspect that they are
15 questioning by asking them to read certain parts of the
16 *Miranda* forms back to them and asking them whether or not
17 they graduated from high school; asking them what kind of
18 work they've done, those kind of things which do allow the
19 officers to make that. But to sit there and say the
20 officers did -- didn't have any of those concerns in this
21 particular case, they didn't do anything to determine
22 whether or not those concerns may or may not have been
23 present because they didn't go to that level.

24 So I think for them to say that that somehow sways
25 support of those issues suggest that they did something

1 that they did not do. For that reason the defense would
2 ask that the statements be suppressed.

3 THE COURT: All right. The Motion to Suppress is
4 denied. I find by the greater weight of the preponderance
5 of the evidence that the statements given -- were given by
6 Mr. Cunningham were freely and voluntarily and knowing and
7 intelligently. That the Fifth and Sixth Amendment rights
8 to remain silent and the right to counsel were - have not
9 been violated. That he was given the benefit of those
10 rights. And the Miranda versus Arizona he was advised
11 before he made any of the statements and read vided at the
12 kitchen table in a written form that he had the right to
13 remain silent and that any statement he made would be used
14 against him in a court of law and he had the right to talk
15 to an attorney and have an attorney present while he was
16 being questioned.

17 That the State would be required to appoint an
18 attorney for him if he wanted one and could not afford one.
19 And that he had the right to exercise those rights at any
20 time. And then he was asked if he understood his rights
21 and he indicated he did. I find there was no coercion;
22 there is no indication that there was any guns displayed.
23 I find that he was never - that his approximate age of
24 thirty; I've seen enough to access that myself. There have
25 been three people testify that he was in his late twenties,

1 early thirties. There is no indication of any drugs or
2 alcohol or mental health issues. Mr. Cunningham responded
3 to questions, responded to the recitation of his rights to
4 him; that he understood them. He never refused to answer
5 any questions; he never ask for an attorney. There is no
6 evidence of threats or promises. Again he said he
7 understood his rights. I therefore find that he was
8 properly advised under the Fifth and Sixth Amendment as to
9 his Fifth and Sixth Amendment rights. And that within the
10 perimeters of Miranda. And that again by the greater
11 weight of the preponderance of the evidence that the
12 statements were freely knowingly intelligently and
13 voluntarily given by Mr. Cunningham.

14 Now at trial of course the jury will access that. A
15 lot of the arguments you made very - to use your earlier
16 comment - brief and succinct were very well taken but they
17 are more for the presentation to the jury than they are for
18 the Court. So, anything else before we stop for the day
19 from the State?

20 MS. LIPINSKI: Your Honor, we have one more motion
21 which I believe Ms. Robinson had alluded to. We kind of
22 got a little bit of a taste of that. Mr. Demario and
23 you've kind of heard this, was arrested on a prior
24 distribution charge, a distribution of cocaine charge, that
25 under cover buy which involved a CI gave rise to this

1 search warrant. It is for the most part all that is in the
2 search warrant that he had made this under cover buy and
3 that that gave rise for them to believe that there were
4 drugs or other drug related evidence at this house.

5 Prior to this at some point in the early prosecution I
6 was made aware by Ms. Robinson that they were gonna dismiss
7 the distribution. Not contemporaneous with the plea
8 although at one point that was an offer that if he pled to
9 the trafficking they would dismiss the distribution charges
10 but did hear that they were gonna dismiss the distribution
11 and it has been nolle prossed according to the public index.

12 I have made repeated comments to Ms. Robinson that I
13 would like to review the tape in some form or fashion and
14 in order to further identify why this charge was dismissed.
15 I believe that my ability to challenge the search warrant;
16 the perimeters of the search warrant, those type things
17 require my ability to view this tape, access this tape, and
18 determine whether or not the content made in the search
19 warrant and claiming that is what occurred in this under
20 cover buy which is the probable cause for the search
21 warrant are there and do support the search warrant. But
22 without my ability to view that tape I think that my hands
23 are tied because I don't know in essence what was there or
24 what was the problems that gave rise to the state
25 dismissing it even in the events of this trial or prior to

1 any plea on any other charges.

2 I've been informed by Ms. Robinson we've dismissed it
3 you're not entitled to anything and I'm not giving you
4 anything. So the fact that ----- make the motion here

5 before the court that I believe that I should be allowed to
6 view the tape and to determine if there are any pause in
7 there that would give rise to any challenges to the search
8 warrant or lead to any exculpatory evidence with which
9 otherwise allow me to challenge the search warrant and
10 therefore challenge the evidence which will be admitted at
11 this trial against my client.

12 THE COURT: Ms. Robinson.

13 SOLICITOR ROBINSON: Your Honor, the informant
14 involved in the distribution is not going to be a witness
15 in this case. He was not present at the time of the
16 execution of the search warrant. So to that extent I don't
17 believe that she's entitle to know the identify - know the
18 CI's identity. And obviously a big concern for the State
19 releasing the videos and showing those with defense counsel
20 is any risk of determining the identity of the informant.

21 THE COURT: Well we can take care of that. We can --
22 We do that all the time. For lack of a better word is the
23 confidentiality, agreement or order of the court, that -
24 but surely you can't - the State regardless of whether it
25 would implicate some third party surely the defense has the

1 right to go behind the search warrant to determine the
2 validity of it.

3 SOLICITOR ROBINSON: Your Honor, and I would like the
4 ability to address that. In regards to challenging the
5 search warrant, the case law is clear that a controlled buy
6 is sufficient information to obtain a search warrant. And
7 in the cases that discuss that what typically gets
8 presented to a magistrate to obtain a search warrant is the
9 officer's affidavit of what happened. The confidential
10 informant remains confidential at that time.

11 THE COURT: Well but doesn't he have the right to see
12 whether the affidavit is an appropriate affidavit or
13 whether or not the affidavit is - has flaws in it?

14 SOLICITOR ROBINSON: Your Honor, I think the method of
15 challenging the search warrant she has seen the affidavit.
16 She has the affidavit in her possession. What we would be
17 looking at to determine if the search warrant was validly
18 issued would be what was presented to the magistrate and
19 the video is presented to the magistrate.

20 So from the State's perspective it's not exculpatory;
21 it's a distribution video. There's nothing exculpatory
22 about that related to the execution of a search warrant
23 where cocaine is found and a firearm is found in the
24 defendant's room.

25 It is not impeachment because the confidential

1 informant will not be testifying in this trial; is not a
2 participant in the trafficking and firearm charge. And
3 because it was not considered by the magistrate that is not
4 something that would go towards determining the video
5 itself is not what would go towards determining if the
6 search warrant was valid.

7 I will say, your Honor, in this case while I have not
8 provided the video for viewing to Ms. Lipinski I did
9 provide her still shots from the video that did reflect her
10 client's appearance in that video. And in all candor to
11 the court the dismissal of the distribution charge is in
12 this case strictly out of concern for the confidential
13 informant and that is why I am reluctant to release
14 anything. It was not a position where there was some fatal
15 flaw and represent as an officer of the court with a
16 distribution video. We are particularly concerned about
17 the confidential informant and we are trying to make sure
18 that person amenity remains protected.

19 If the court is particularly concerned I would propose
20 an alternative. If the court would view the distribution
21 video in chambers itself to determine if there are any
22 concerns. But again that was not considered by the
23 magistrate in issuing the search warrant and so that would
24 not be in consideration in a suppression hearing because
25 that was not was before the magistrate. And it is not

1 required in the application for the search warrant that
2 they present these things.

3 MS. LIPINSKI: Briefly, your Honor. You're not
4 familiar with defense strategy; you're not just reviewing
5 this. Does it match up? There might be other things that
6 are nonetheless exculpatory that may nonetheless be
7 pertinent to the defense. It is the ground part for which
8 they get a search warrant and go into my client's house and
9 obtain these drugs. I understand there are concerns about
10 confidential informant. As the court says there are
11 protective orders designed to preclude against that. I'm
12 asking for the opportunity to view that tape. I've been
13 asking for it before this trial; I think it's pertinent to
14 the reliability to engage in pretrial motions, and I think
15 the defense ought to be able to see it in order to
16 ascertain are there any issues.

17 I don't think its just that, you know, well we're
18 doing this to protect the CI. Well, but that's what the
19 search warrant is based on the CI; it's not based on
20 anything else. It's not like we did this with the CI and
21 we got this and then we pulled some trash and we found
22 these other things and then we corroborated this. The
23 search warrant is limited to the under cover buy and the
24 statements of the CI and so for that reason the Defense
25 feels that the only way in order to adequately prepare for

1 the defense is to view the tape by the defense. I don't
2 think the court viewing it gets it there, your Honor.

3 SOLICITOR ROBINSON: If I could just add one thing,
4 your Honor. In doing a controlled buy to obtain a search
5 warrant it is not even a requirement under the law that it
6 would have been recorded. We know there is a video in this
7 case because a warrant was obtained and he was served with
8 that warrant. Short of that there would have been no
9 requirement under law that there be a video and that it be
10 shared to determine whether they ask for the search
11 warrant. I don't believe the State should be put in a
12 different position just because when subsequent acts
13 transpired in a way that they did. The search warrant was
14 obtained; the defense has presented no evidence to suggest
15 that that was obtained by falsely presented information or
16 the standards that require overcoming informant privilege
17 or I believe it's a Frank's hearing to challenge the search
18 warrant. We don't have any of that here and I don't
19 believe the State should be required to go into an extra
20 step just because of the procedural background of this
21 case.

22 THE COURT: All right. Well let me -- I'll ask each
23 of you to hand up cases or if you have any for me to look
24 at in the morning and provide me with the DVD so I can take
25 a look at it. And I understand, Ms. Lipinski, that I can't

1 be placed in the position of making a decision on behalf of
2 the defense but I think I need to review it and I think I
3 can to the extent that whatever case law leads me to
4 conclude and make a determination as to whether or not it
5 should be - the DVD should be - the filming should be made
6 available to the defense. So I'll take a look at it the
7 first thing in the morning. Hopefully I'll be here about
8 ten thirty. And if any of you have any case law that will
9 assist me would be great and I would greatly appreciate it.

10 MS. LIPINSKI: Just briefly, your Honor. There is
11 also a charge that he was charged with possession of a
12 stolen pistol in this particular case. I've been advised
13 by the State that they are opting not to proceed on that
14 particular charge I think mainly because it was out of
15 Charlotte and that involves witnesses out of state and
16 those type things. But in that they are not proceeding on
17 that charge they admit they don't have enough evidence at
18 this particular time to proceed on that charge the Defense
19 would make a motion to preclude any of the witnesses from
20 referring to the gun as being stolen or making any
21 characterizations that the gun was stolen. Beyond the
22 statement of the defendant I think you've already ruled on
23 it.

24 THE COURT: That okay with you?

25 SOLICITOR ROBINSON: I understand, your Honor, yes,

1 sir.

2 THE COURT: All right.

3 SOLICITOR ROBINSON: Your Honor, I do have two cases I
4 can bring up with you now. I may have another one to
5 provide in the morning but I can go ahead and provide these
6 now.

7 THE COURT: Okay.

8 SOLICITOR ROBINSON: Would you like the citation on
9 that?

10 THE COURT: No. And make sure Ms. Lipinski has her
11 copies. All right, anything else before we break for the
12 evening?

13 SOLICITOR ROBINSON: Nothing from the State, your
14 Honor.

15 MS. LIPINSKI: One final motion, your Honor.

16 In the reports it indicates that in a not standing
17 drawer where the drugs were found there was some baggies
18 found. Those baggies were not collected into evidence and
19 not preserved in any way and based on that the defense
20 would move to exclude any reference to those and that
21 evidence would be spoiled and our ability to look at
22 that evidence or evaluate it in any way has been
23 compromised by the law enforcement's failure to preserve
24 it.

25 SOLICITOR ROBINSON: Your Honor, there were pictures

1 taken during the execution of the search warrant and the
2 box of baggies is apparent in the picture. And so although
3 they were not seized as evidence I believe it would be
4 appropriate for the officer to be able to discuss the
5 baggies next to his cocaine.

6 THE COURT: Were they in the same box as the cocaine?
7 You said something about a box.

8 SOLICITOR ROBINSON: It's a drawer. It's a drawer.

9 THE COURT: Were they in the same drawer?

10 SOLICITOR ROBINSON: There is the cocaine and the box
11 of sandwich baggies is right next to it.

12 THE COURT: Well I over rule the motion. I'll allow
13 them to testify

14 MS. LIPINSKI: And, your Honor, just this is a box of
15 baggies. There is a corner of a box there; it's not
16 obvious that it's a box of baggies that sets there.

17 THE COURT: Well let me take a look at the pictures.

18 (PHOTOS RECEIVED UP BY THE COURT.)

19 MS. LIPINSKI: Thank you.

20 THE COURT: I'm gonna allow it. There is more than a
21 corner. In fact you can see the word bags. I don't know
22 that it says sandwich or what size but I over rule your
23 motion to suppress.

24 SOLICITOR ROBINSON: Thank you, your Honor.

25 THE COURT: Anything else?

1 SOLICITOR ROBINSON: Your Honor, would be okay if I
2 drop the video off in your chambers in the morning?

3 THE COURT: Probably the only way I'll get it.

4 SOLICITOR ROBINSON: I didn't know if you were wanting
5 to stay and wait for it, your Honor.

6 THE COURT: No. All right. And I'm gonna require Mr.
7 Cunningham to remain incarcerated because of the nature of
8 the charges.

9 MS. LIPINSKI: Your Honor, he's appeared and every
10 time he's been very active in his defense. The jury has
11 not been sworn so at this point the defense would ask you
12 to consider allowing him to stay out.

13 THE COURT: Well I'm gonna require him to remain.
14 We'll see you all in the morning.

15 SOLICITOR ROBINSON: Thank you, your Honor.

16 (COURT IN EVENING RECESS AT 06:10 PM.)

17 (COURT BACK IN SESSION TUESDAY, JANUARY 12, 2016 AT
18 11:38 AM..)

19 THE COURT: Thank you, you may take your seats.
20 Bring in Mr. Cunningham.

21 (DEFENDANT, DEMARIO CUNNINGHAM, BLACK MALE, ENTERS
22 COURTROOM.)

23 THE COURT: Ms. Robinson.

24 SOLICITOR ROBINSON: Your Honor, this is the matter of
25 State versus Demario Cunningham, he is represented by Mindy

1 Lipinski from the Public Defender's Office. We obviously
2 had started pretrial issues yesterday and had picked but
3 not sworn our jury. This morning upon arriving I did hear
4 from Ms. Lipinski that there was potentially in some
5 interest in Mr. Cunningham changing his plea of not guilty
6 to guilty. At this time we have worked out an agreement
7 whereby he'll be pleading to the Indictment for the
8 trafficking cocaine which is count one. And possession of
9 a weapon during the commission of a violent crime which is
10 count two on that same indictment for a cap of ten years.

11 And the State would like to be heard as to sentencing
12 at the appropriate time.

13 THE COURT: All right, Mr. Cunningham, you're thirty
14 years old? Now old are you?

15 MR. CUNNINGHAM: Thirty.

16 THE COURT: All right. You're represented by Ms.
17 Lipinski?

18 MR. CUNNINGHAM: Yes, sir.

19 THE COURT: Are you satisfied with her services as
20 your
21 attorney?

22 MR. CUNNINGHAM: Yes, sir.

23 THE COURT: I have in front of me these two charges we
24 talked about yesterday. One is for distribution - I mean
25 trafficking in cocaine in an amount of from ten to or more

1 grams in violation of the laws of this state. This is your
2 second offense so it would carry up to thirty years in jail
3 and a minimum of five years.

4 It's alleged that this occurred here in York County on
5 or about November 26, 2014 when you did possess actually or
6 constructively ten or more grams of cocaine which in this
7 state constitutes trafficking. Do you understand the
8 charge and the potential penalty?

9 MR. CUNNINGHAM: Yes, sir.

10 THE COURT: How do you plead to that?

11 MR. CUNNINGHAM: I plead guilty.

12 THE COURT: You're also charged in the second count of
13 that indictment for on that same day having a pistol with
14 you and it's alleged that the offense of trafficking is a
15 non-violent crime which it is under the laws of this state and
16 therefore that is a separate crime on November 26, 2014 you
17 possessed a handgun while trafficking in cocaine. Again
18 that carries up to five years in jail. Do you understand
19 that charge and the potential penalty?

20 MR. CUNNINGHAM: Yes, sir.

21 THE COURT: How do you plead to that charge?

22 MR. CUNNINGHAM: I plead guilty.

23 THE COURT: Other than the recommendation that
24 whatever sentence you receive not exceed ten years has
25 anyone made any other promise or threats to cause you today

1 to enter your plea of guilt to these two charges?

2 MR. CUNNINGHAM: No, sir.

3 MS. LIPINSKI: Your Honor, just - cause it is an
4 abnormality and I did want to bring it to your attention,
5 on the plea waiver form that you have under that clause he
6 did put that he could receive even more at trial, he wanted
7 that notated there and so I did. I don't consider that a
8 threat but that is a reality to which obviously I discussed
9 with him because it's not something you typically get int
10 hat section I did want to bring it to the court's
11 attention.

12 THE COURT: All right. So you do understand that if
13 you went to trial and found guilty you would be - and this
14 is not by way of any threat - but just as your attorney
15 says a matter of fact up to thirty years on the drug charge
16 and an additional five on the weapon?

17 MR. CUNNINGHAM: Yes, sir.

18 THE COURT: All right. In addition to carrying five
19 to thirty years the trafficking charge is a violent
20 offense. A violent offense means that while one is
21 incarcerated for a violent offense their ability to
22 participate in certain programs or they're not permitted to
23 participate in certain programs that other inmates may
24 participate in. And also it requires that in this
25 particular offense requires that if it's a no parole

1 offense which means an individual would have to serve at
2 least eighty-five percent of the time of their sentence
3 before they could be released under a early release
4 program. And if that person were early released it would
5 be into a community supervision program similar to
6 probation if the conditions of that community supervision
7 were violated then that person could be put back in jail
8 for up to a year and that pattern could continue until that
9 person serves their entire sentence. Do you understand
10 that?

11 MR. CUNNINGHAM: Yes, sir.

12 THE COURT: It's also a serious offense. A serious
13 offense is the type of offense which if in your life time
14 you receive three serious or a combination of three serious
15 and most serious offenses you'd be subject to being
16 incarcerated for life without parole. It is a true life
17 sentence. Do you understand that?

18 MR. CUNNINGHAM: Yes, sir.

19 THE COURT: Are you today under the influence of
20 anything that would cause you to be intoxicated?

21 MR. CUNNINGHAM: No, sir.

22 THE COURT: Are you entering your plea today, Mr.
23 Cunningham, freely and voluntarily?

24 MR. CUNNINGHAM: Yes, sir.

25 THE COURT: Mr. Cunningham, you have a right to a

1 trial by a jury and you are presumed innocent of the
2 charges against you until a jury were convinced of your
3 guilt beyond a reasonable doubt. And in fact we have drawn
4 a jury in this case. You also have the right to remain
5 silent; the right to confront witnesses against you, and
6 you have the right to have your witnesses made to come to
7 court to testify for you. Do you understand you have these
8 rights?

9 MR. CUNNINGHAM: Yes, sir.

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

11 MR. CUNNINGHAM: No, sir.

12 THE COURT: I advise you that by entering a plea of
13 guilt to these charges that as to these charges you're
14 giving up these rights and you're also giving up any
15 possible defense to the charge. Do you understand that?

16 MR. CUNNINGHAM: Yes, sir.

17 THE COURT: Knowing all those things I ask again, how
18 do you plead to trafficking in cocaine?

19 MR. CUNNINGHAM: Guilty.

20 THE COURT: And how do you plead to possessing a gun,
21 a weapon, at that time?

22 MR. CUNNINGHAM: Guilty.

23 THE COURT: All right. Ms. Robinson, I can
24 incorporate if I - Do you want to add any additional facts?
25 We have the - on the record testimony from the officers

1 that I heard yesterday about the search and the search
2 resulting in the finding of marijuana, cocaine and the gun
3 and Mr. Cunningham; the testimony is, took responsibility
4 for the cocaine and the gun but not the marijuana. So I
5 know those facts, would you want to elaborate on them, I'll
6 be glad to hear from you?

7 SOLICITOR ROBINSON: Just a few points, your Honor.

8 Just the weight of that cocaine did come back as
9 twenty-one point one eight grams which puts us in the ten
10 to twenty-eight range for trafficking. But you did hear
11 about the marijuana. I would just for the Court's
12 information that was claimed by the cousin that was
13 referenced at times, Tomeano Cunningham, he was charged
14 with that cocaine. He has failed to appear for his charges
15 so there are warrants outstanding for his arrest and that's
16 where that matter was not relevant to him but just so the
17 Court understands that was how the marijuana was brought up
18 and has leads to this.

19 THE COURT: So you agree that at that time, Mr.
20 Cunningham, you -- the cocaine and the gun were yours; is
21 that correct?

22 MR. CUNNINGHAM: Yes, sir.

23 THE COURT: Well I accept your plea - pleas. I find
24 they are freely voluntarily knowingly and intelligently
25 entered; entered with the advice of competent counsel with

1 whom you're satisfied, I find the facts support your pleas
2 and you've signed pleas of guilt. I'll be glad now to hear
3 from your attorney and then from anybody on your behalf and
4 then from you yourself.

5 MS. LIPINSKI: I don't know if that was what the State
6 wanted to say on sentencing or?

7 SOLICITOR ROBINSON: If I could be heard on sentencing
8 just briefly.

9 THE COURT: Okay.

10 SOLICITOR ROBINSON: Your Honor, I just want to say
11 obviously this is -- sets of charges carry five to thirty
12 years and then the possibility of additional five years on
13 the gun. We have at this point after been quite a long
14 haul getting to this point; the State feels that we have
15 given significant concessions in getting this to this point
16 and that the ten year sentence would be appropriate.

17 He previously was convicted of either a PWID and a
18 distribution and a proximity charge that he did get ten
19 years suspended on three years and from the SCDC records it
20 appears he basically served the entirety of the three years
21 on that sentence. At this time we do feel the ten year
22 sentence would be appropriate. And the State took into
23 consideration his mental health and everything else that
24 has got to this point in agreeing to come down that far to
25 a cap of ten.

1 THE COURT: All right. And, Ms. Lipinski, I've got he
2 served two hundred and seventy-five days?

3 MS. LIPINSKI: I think it's two hundred and seventy-
4 nine and I say that because of the night - last night.

5 SOLICITOR ROBINSON: I did, when I calculated I
6 calculated November 26th which was the day of the service
7 of the search warrant to August 16 which was the date he
8 bonded out in 2015 and then I added a day for last night.
9 That's where I --

10 MS. LIPINSKI: I was - and I can run the numbers
11 again.

12 THE COURT: I'll give him two seventy-nine.

13 SOLICITOR ROBINSON: Yes, your Honor, and I won't
14 bicker over it.

15 THE COURT: I'll give him the benefit of the doubt on
16 that. All right. Now, Ms. Lipinski, you or anyone on his
17 behalf and then Mr. Cunningham.

18 MS. LIPINSKI: May it please the Court, Your Honor.

19 This is Demario; I've represented Demario since the
20 time of his arrest. I can tell you that despite the fact
21 that we've had several kind of heated conversations he is
22 as passionate and strong willed individual. He has at all
23 times been very respectful to me. In some respects he
24 really is a kind of gentle giant. Whenever I felt that
25 things were getting out of field or anything like that I

merely had to say to Demario I think we need to take a step back or time out and immediately he became at all times respectful. He's never cursed at me or anything. He's been very polite with me the entire time.

As you did hear he does have some mental deficits. He did go through special ED classes. I don't even think he got kind of a completion certificate in school. The area that he was living in at the time is a fairly impoverished area. Demario did not get the best cards dealt to him.

He is somebody who is in my opinion he's easily influenced. And I think that explains that when his family can kind of keep him on the straight and narrow. He'd been living at home and doing right he can be a productive member of society. Unfortunately as you might imagine on the streets he's somebody that people can easily convince to go along with things, get involved in trouble and go the wrong way. And unfortunately I think due to some of his deficits that compromises his ability to make the best decisions in his behalf.

I have talked to him, your Honor. I will put on the record originally he was offered seven on a trafficking first offense and that would have given him even below the floor on a second offense and I tried my best to talk Demario into that deal. I thought it was in his best interest given the evidence against him. What we didn't

1 get to in a pretrial testimony that you heard is there are
2 some minor clerical issues with some of the ways the
3 evidence was inventoried and those kind of things.

4 There's two bags seized at the scene and then there's
5 one bag and two bags; it goes back and forth, but it
6 certainly did create some confusion with Demario and I when
7 we went over the evidence. I think he kind of latched onto
8 that and more so than a person operating with all their
9 faculties would. And he even went so far as to actually
10 call SLED and try to file a complaint.

11 They did agree to meet with him and talk to him. I
12 think in part trying to help out Commander Brown in his
13 case thinking they would get Demario to come in and he'd
14 make these statements about the drugs and that would make a
15 good case even better. Unfortunately when they did that I
16 think it gave Demario some false hope that there was
17 something really there to be had because really leading up
18 to try and discuss the plea that was really where the focus
19 of the crux of our disagreements were.

20 But that being said, he did read the handwriting on
21 the wall that we saw it yesterday. And I would ask the
22 Court to award him for that and take that into
23 consideration. Demario had ask me to - ask the Court to
24 consider the five year sentence because it in essence is
25 the spirit of the original deal he was offered by the State

1 and I would ask the court to at least consider that because
2 at one point the State was satisfied with that. Even on a
3 five year sentence the weapons charges you know is day for
4 day; he's gonna do a significant chunk of that.

5 So it's not gonna be an eighty-five time it's even
6 gonna be a day for day time. And so Demario would ask the
7 Court to consider that taking into consideration the mental
8 health limits that he does have.

9 I'd also like the Court to take into consideration
10 that his co-defendant isn't here and I understand that he
11 claimed to go pay him and the co-defendant claimed the weed
12 and he does have bench warrant. It's my understanding he
13 actually even has new charges out. Demario's been out
14 since August of last year and hasn't gotten into any more
15 trouble. He's gotten disability for the first time in his
16 life as an adult and I think finally can do because Demario
17 does struggle. I will say to the Court all my time I've
18 spent with him I don't know that he could keep an honest
19 nine to five job or even something working at McDonald's.

20 I think it's just the things he does have the
21 attention deficient disorder, the compromised faculties, I
22 think really do impair his ability. And I think him
23 getting disability really was gonna put him on a path more
24 so than ever to be self-sufficient and a legal law abiding
25 life. And as the Court is aware I believe him going to

1 jail is gonna throw that all out of whack. That's gonna
2 get cut off and he's gonna have to go through that long
3 arduous process even again.

4 I would ask the Court to consider a seven year
5 sentence. I think its in the middle of the five to ten.
6 It's still almost double what he was originally offered on
7 the original seven and day for day it's hard time. He now
8 has two strikes on his record. We have had a long and
9 frank conversation that if he does this again they will not
10 hesitate to give him life without parole.

11 I think the prox charge, the prior prox charge may be
12 a strike and I think this is it and I think he needs to see
13 that reality. I don't think he's ever done violent time
14 and eighty-five percent time so I think that's gonna be a
15 new taste for him. He is a good person. He does have a
16 lot of redeeming qualities. His momma came in and met with
17 me, she's a good woman and she is very scared about that
18 prospects life have for Demario.

19 With his mental deficits and his criminal record I
20 think he's unemployable and I think this is gonna be his
21 only option and I think it just becomes awful easy if
22 somebody comes and dangles a quick way to make money in
23 front of him unfortunately for Demario to go along with
24 that plan. But if he can stay under the influence of good
25 people in his life he can be a good help to his mom and

1 help to his family and those kind of things. His step dad
2 Mr. Brown is here, your Honor. He's seated in the sweat
3 shirt and his brother is here as well. They came here and
4 they were influenced, your Honor, in helping me talk to
5 Demario and explain to him the circumstances that might
6 exist.

7 So I would ask the court to give him the benefit of
8 the doubt that he did plead guilty and throw himself on the
9 mercy of the Court and consider a seven year sentence which
10 I think is still quite a heavy sentence especially for
11 somebody of Demario's situation.

12 I was gonna check with his family and see if they want
13 to speak real quick.

14 Do you want to say anything? You don't have to but
15 you're fine. This is his brother. If you could just state
16 your name for the record. If you stand there you're just
17 gonna have to speak loud. Okay.

18 A. My name is James Cunningham.

19 THE COURT: Wait a minute, the court reporter --

20 MADAM COURT REPORTER: I got it, Judge.

21 JAMES CUNNINGHAM: I would like to ask for the mercy
22 of the court. I know he made a mistake but ever since he
23 came home he's been doing good. I just like to ask for
24 mercy from the Court.

25 THE COURT: Thank you.

1 MS. LIPINSKI: I will say, your Honor, even in our
2 conversations with the family they refer to Tommy the co-
3 defendant as "T" and has said that, you know, he led you
4 astray again. And Demario's got to man up. He's thirty
5 years old, he's got enough to say no and know when to say
6 no. Its hard in his situation with the limited financial
7 realities he deals with so I'd ask the Court for whatever
8 mercy you might consider, your Honor.

9 Do you want to talk?

10 Demario said he wanted to talk.

11 THE COURT: Yes, sir.

12 MR. CUNNINGHAM: I had - I had came to - I had no - no
13 - no reason to run. You know I was gonna face justice.
14 And I came to about ten or fifteen, you know, roll calls
15 appointments to let you know that I had negative on my mind
16 about running, you know, running out on the police, you
17 know, the judicial system or none of that. And, you know,
18 I been honest from the start and, you know, I even started
19 going back to school cause I had like a third grade
20 education, like a third, fourth grade education. Ever
21 since that I been to school, you know, my mental health
22 counselor was helping me with that. And you know I haven't
23 been in trouble since like 2002, 2003, with a felony but
24 that's about thirteen years. And, you know, I didn't have
25 - I didn't have no foul play or nothing. I came to every

1 trial, I mean every date and sat in the lobby yesterday for
2 over fourteen hours yesterday. And I wasn't going - I
3 wasn't going to waste your time. When I went down there so
4 I didn't waste no time and I just want to get home to my
5 family quick cause I haven't been around them in a long
6 time, you know, said nothing with them, you know, due to my
7 situation, you know. And you know, you know, I'd like to
8 get there real fast.

9 THE COURT: All right. Well of course of possession
10 of a weapon during the commission of a violent crime the
11 sentence is five years and that's to run concurrent with
12 the sentence on the trafficking and they are to run
13 concurrent and I'm giving you credit for two hundred and
14 seventy-nine days. I think the ten years is very generous
15 but I am going to I think under the circumstances I'm going
16 to sentence you to eight years on the trafficking in
17 cocaine. Again giving you credit for two hundred and
18 seventy-nine days. Do you understand that?

19 MR. CUNNINGHAM: Yes, sir.

20 THE COURT: Okay. Thank you.

21 SOLICITOR ROBINSON: Thank you, your Honor.

22 THE COURT: Let's get the jury in.

23 While the jury's coming in I was going to rule against
24 you on the search warrant issue. I found a case --
25 somebody found a case and handed it up. The State versus

1 Dupree, 354, S.C. 676 that I think some language in there
2 indicates I shouldn't go behind the magistrate's finding,
3 but you can take a look at that. As to the other two cases
4 they were really CI cases. I didn't see it as a CI issue
5 quite frankly. I saw it as a little different issue.

6 (JURY REENTERS COURTROOM AT 11:57 AM.)

7 THE COURT: I know you all are convinced I missed that
8 class in kindergarten where you learned how to tell time.
9 But actually and you also can look at the defense table and
10 you see the landscape has changed. Mr. Cunningham is not
11 present. He determined over night that he would enter a
12 plea of guilt to the two charges. I sentenced him to eight
13 years on the drug charge and five on the pistol to run
14 concurrent. He had a prior drug offense several years ago.
15 The minimum he could receive was five years and the maximum
16 was thirty years so I sentenced Mr. Cunningham and that
17 ends the case.

18 So I need to check with the Clerk and see -- and the
19 solicitor -- and see what time we need the jury to call
20 back.

21 SOLICITOR ROBINSON: They're to call back this evening
22 at seven.

23 THE COURT: All right. So you can leave for the day
24 and appreciate your assistance and call back tonight after
25 seven. Thank you.

1 (JURY DISMISSED AT 11:58 AM.)

2 THE COURT: All right. Anything else?

3 SOLICITOR ROBINSON: Not from the State, your Honor.

4 MS. LIPINSKI: Nothing from the Defense, your Honor.

5 I'm not making exception to the search warrant. I've
6 given you the cases I found that's for academic curiosity
7 more than anything. It did talk about giving it to the
8 defense under a protective order where they either edited
9 audio not giving the CI's identity. Of course my client
10 got caught up in the plea thing that hit me cause they
11 waited on me when I got out of the car this morning.

12 THE COURT: Yeah. Well I'm inclined to agree that the
13 CI - I did not see this as a CI issue. I saw it as an
14 issue of the validity of the information made to the
15 magistrate and an issue as to what I can look at as far as
16 the basis for the search warrant which is the affidavit of
17 the officer. I mean as to whether a reliable confidential
18 informant is a reliable confidential informant that is
19 something that usually comes out in the affidavit itself if
20 I'm using this pistol -- a was used six times or you
21 confirmed the information he gave us and those sort of
22 things. That's not revealing who that informant was; who
23 the confidential reliable informant was. I see it as a
24 little different issue. Maybe I'm having a hard time
25 articulating it but I see it more in the eyes Ms. Robinson

1 saw it than a CI issue as you argued it although you argued
2 it excellent.

3 MS. LIPINSKI: Well I appreciate that, your Honor.

4 And I understand but I did you know like I said just
5 acted out of curiosity more than anything. And it is kind
6 of one of the situations I'm not sure there is a clear
7 answer. It's kind of a case by case though.

8 THE COURT: Well we'll see it again I'm sure. Thank
9 everybody for their curtsies and we'll take a break and see
10 if the solicitor has anything for us to do.

11 Ms. Robinson, you want to get the DVD back? I did -
12 This could be off the record.

13 (COURT IN RECESS AT 12:01 PM.)

14 (COURT BACK IN SESSION AT 02:38 PM.)

15 (DAVID DICKERSON BOND MATTER WITH NATHAN SHELDON.)

16 (JENNIFER WILSON PLEA WITH NATHAN SHELTON.)

17 (COURT IN EVENING RECESS AT 03:00 PM.)

18 (END OF TRANSCRIPT OF RECORD.)
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

State of South Carolina)
)
County of York)

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for 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 General Sessions Court for York County, South Carolina, on 11th and 12th days of January, 2016.

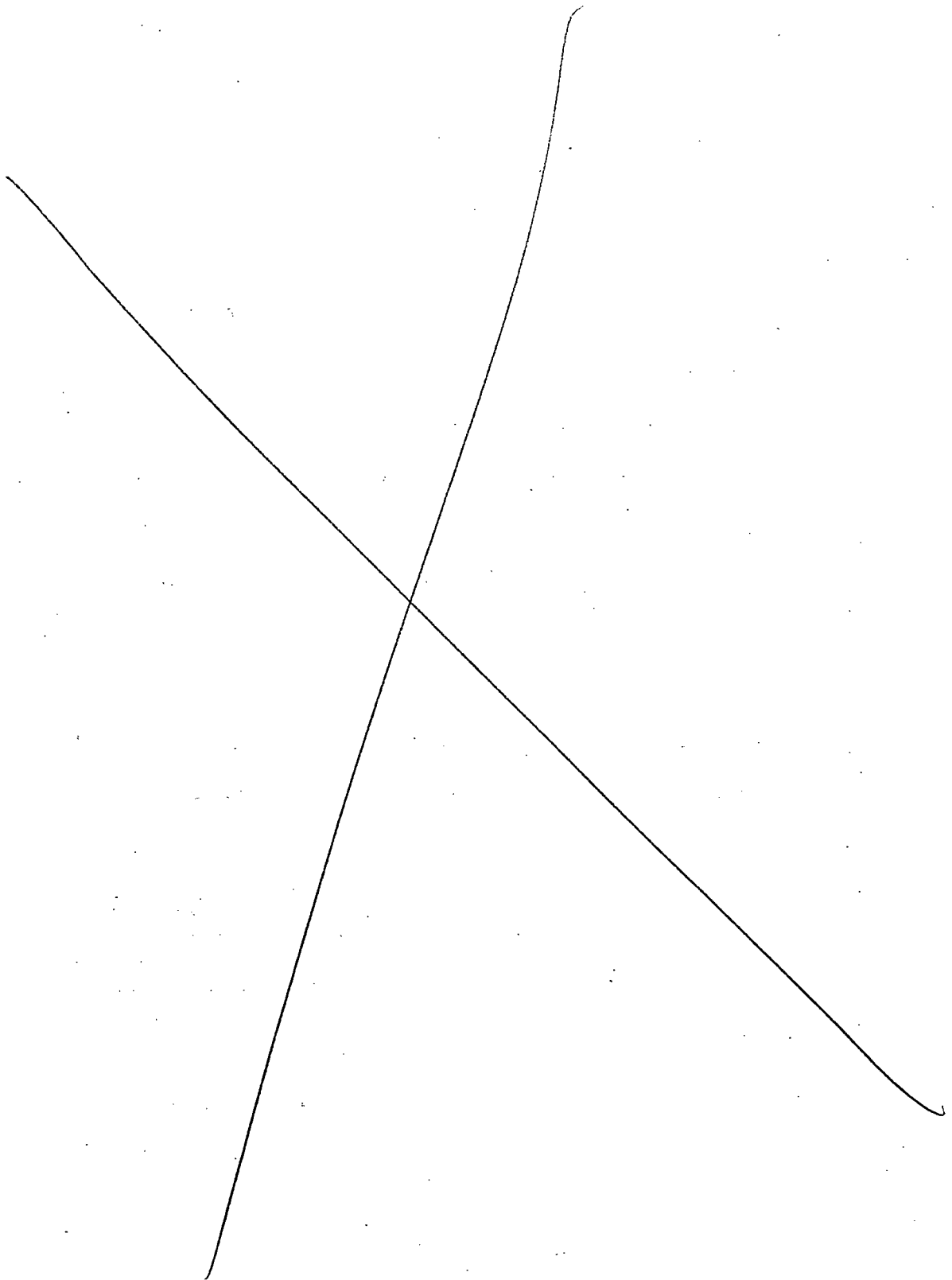
I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Wanda Nelson
Wanda Nelson, CVR-M
Certified Verbatim Reporter,
Official Court Reporter,
Notary Public, in and for
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE:

July 17 1 2016



State of South Carolina.,)
)
)
)
 County of York.)

In the Court of Common
 Pleas of York

Case No. 2016-CP-46-01915

Demario Jamel Cunningham.,)
)
 Applicant.,)
)
 -v-)
)
 State of South Carolina.,)
)
 Respondent.)

Transcript of Record
 Post Conviction Relief

April 18, 2017
 York, South Carolina

B E F O R E:

The Honorable G. Thomas Cooper, judge.

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 Official Court Reporter
 To The Honorable John C. Hayes, III
 Sixteenth Judicial Circuit
 Union and York Counties

I-N-D-E-XE-X-A-M-I-N-A-T-I-O-NWITNESSBY:PAGE NO.

Demario Cunningham

Mr. Thomas P.

P.

Mr. Hunter P.

Mindy Lipinski

Mr. Thomas P.

P.

Mr. Hunter P.

James Cunningham

Mr. Thomas P.

Mr. Hunter P.

I N D E XE X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
App.1	Photo of Drugs (11-26-14)		P.
App.2	Applicant's Letter to York County Clerk of Court clocked January 9, 2017		P.

DEMARIO CUNNINGHAM: DIRECT BY MR. THOMAS

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1 (COURT IN SESSION, ON THE RECORD AT 10:36 AM.)

2 (APPLICANT, DEMARCO CUNNINGHAM, BLACK MALE, ENTERS
3 COURTROOM.)

4 THE COURT: Mr. Hunter, you may proceed.

5 MR. HUNTER: Yes, sir. May it please the court, your
6 Honor. The next case is Demario Cunningham versus the
7 State of South Carolina, 2016-CP-46-1915. Your Honor, he
8 was indicted in May 2015 in York County for trafficking
9 cocaine ten to twenty-eight grams second offense and
10 possession of a weapon during a violent crime.

11 He was represented by Ms. Mindy Lipinski. On January
12 12, 2016 he pled guilty before Judge Hayes and pursuant to
13 a recommendation he was sentenced to eight years for
14 trafficking and five years on the weapons charge to run
15 concurrently.

16 He did not file a direct appeal. He filed this
17 current action June 23rd, 2016, present today represented by
18 Mr. Tommy Thomas.

19 THE COURT: Mr. Thomas.

20 MR. THOMPSON: Yes, sir. Your Honor, if it please the
21 Court we'd call Demario Cunningham to the stand.

22 MADAM CLERK: Mr. Cunningham, if I can have you step
23 here to be sworn... I'll have you place your left hand on
24 the Bible and raise your right as far as you can.

25 (WHEREUPON, DEMARIO

DEMARIO CUNNINGHAM: DIRECT BY MR. THOMAS

1 CUNNINGHAM, BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS
2 FOLLOWS:)

3 MADAM CLERK: Thank you. Have a seat and just watch
4 your step.

5 MR. THOMAS: Your Honor, may it please the Court.

6 THE COURT: Yes, sir, you may proceed.

7 DIRECT EXAMINATION

8 DEMARIO CUNNINGHAM BY MR. THOMAS:

9 Q. Mr. Cunningham, you - What are you serving time for?

10 A. Trafficking cocaine and possession of a gun.

11 Q. All right. Now you're serving trafficking cocaine
12 first offense or second?

13 A. Second.

14 Q. Second offense. And what was your sentence?

15 A. Eight years.

16 Q. All right. And then you got a five years on the
17 possession of a weapon?

18 A. Yes, sir.

19 Q. But a total of eight?

20 A. Yes, sir.

21 Q. And you're serving five, five day-per-day?

22 A. Yes, sir.

23 Q. All right, sir. And you also received some credit
24 for jail time?

25 A. Yes, sir.

DEMARIO CUNNINGHAM: DIRECT BY MR. THOMAS

1 Q. Quite a bit of jail time. Two hundred and seventy-
2 nine days?

3 A. Yes, sir.

4 Q. Now what's your max out?

5 A. 2022.

6 Q. Okay. Mr. Cunningham, I don't mean to embarrass you
7 at all, and you know you and I talked about this, what is
8 your educational level?

9 A. I think I quit going to school around fourth or
10 fifth grade.

11 Q. All right, sir. Have you gotten your GED?

12 A. No, sir.

13 Q. Have you been able to get it?

14 A. No, sir.

15 Q. All right. And when you were in public school you
16 were in classes for public school educationally challenged?

17 A. Yes, sir.

18 Q. Special needs type thing?

19 A. Yes, sir.

20 Q. All right, sir. And do you understand what's going
21 on today?

22 A. Yes, sir.

23 Q. And in your -- When you were arrested I think you
24 were sent for a mental evaluation?

25 A. Yes, sir.

DEMARIO CUNNINGHAM: DIRECT BY MR. THOMAS

1 Q. All right. And you cooperated with them?

2 A. Yes, sir.

3 Q. Were you found fit to stand trial?

4 A. Yes, sir.

5 Q. Okay. All right, I just want to know, I just want
6 to make sure you understand what's going on, what's going
7 on today.

8 A. Okay.

9 Q. Okay. Now, do you understand that you're asking for
10 a post-conviction relief which is saying that you'd like
11 either a new -- basically you're asking for a new trial?

12 A. Yes, sir.

13 Q. And you understand that that carries some risk?

14 A. Yes, sir.

15 Q. If you received a sentence of eight years, you could
16 potentially get more at trial?

17 A. Yes, sir.

18 Q. Do you understand that risk and you want to go
19 forward today?

20 A. Yes, sir.

21 Q. All right, sir. Now, Demario, when you were arrested
22 were you appointed an attorney or you retained an attorney?

23 A. I was appointed.

24 Q. And who were you appointed?

25 A. Ms. Lipinski.

1 Q. Now did you ever make bond?

2 A. Yes, sir.

3 Q. And how long were you out on bond?

4 A. About four or five months.

5 Q. All right. Now, while you were out or while you
6 were in the Detention Center, were you able to meet with
7 Ms. Lipinski?

8 A. A few times.

9 Q. How many times did you meet with her?

10 A. I think she might have come two times.

11 Q. Okay.

12 A. Within ten months.

13 Q. Now, you talked about your case?

14 A. Not before trial. It's like -- It was like, you know,
15 she -- she wouldn't write nothing down or, you know, try to
16 prepare my defense, you know, like whenever.

17 Q. Did you talk about the State's evidence, which we
18 call the discovery? Did you talk about that with her?

19 A. Yeah, a little. A little bit.

20 Q. Okay. Did you see the discovery? Did she give you
21 copies of that?

22 A. Yes, she gave me -- she gave me a copy of motion to
23 discovery.

24 Q. Okay. And what was your position? Did you want to
25 take a -- Did you want to go to trial or you wanted a plea?

DEMARIO CUNNINGHAM: DIRECT BY MR. THOMAS

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1 A. Yeah, I was wanting to go to trial.

2 Q. All right. Now, so did you receive -- During this
3 period of time did you receive a plea offer from the State?

4 A. Yes.

5 Q. Do you remember that?

6 A. Yes.

7 Q. And do you remember what that plea offer was?

8 A. Yes, sir. First offense -- second -- first offense
9 seven years.

10 Q. On the trafficking?

11 A. Yeah. She said it would be non-violent. The
12 trafficking would be non-violent and -- Well she said that
13 after I got sentenced so if I would a took that.

14 Q. All right. And then also you would have had to plead
15 to the gun charge; is that correct? On the plea offer.

16 A. She just told me that it would all -- She never really
17 told me nothing like that.

18 Q. All right.

19 MR. THOMAS: Your Honor, just kind of in my pattern
20 just to help the court, if it please the court, just to
21 quote these pages of the transcript rather than bringing
22 that up and showing it to him if that suits the Court, your
23 Honor?

24 THE COURT: Any objection?

25 MR. HUNTER: No objection.

1 THE COURT: All right. If you'll refer to the pages.
2 and line, I have the transcript.

3 MR. THOMAS: Yes, sir. Your Honor, just for the
4 court's attention it's page 117, lines 20 through 25.

5 Q. Now, Demario, how did you -- Did you turn that plea
6 offer down?

7 A. Yes, sir.

8 Q. Okay. And how did you -- What did you do then to
9 prepare for trial?

10 A. I came up here around about ten -- about -- about --
11 about ten or eleven times within the months of being out on
12 bond.

13 Q. All right, sir.

14 A. Probably more than that. You know we never wrote
15 nothing down or nothing. They'd just call me in a room ask
16 me one question and then send me back out. Then I was
17 like if I'm going to trial maybe, you know, so I contacted
18 -- I contacted I think Mr. Barrowclough, the supervisor,
19 and I told him I said you know my attorney is failing to
20 prepare for my defense for trial, you know. They not
21 asking me no questions. They just ask me one question and
22 send me out and you know.

23 Q. So you were concerned about the trial; correct?

24 A. Yeah. Very concerned.

25 Q. All right. Now, how about in regards to, were there

DEMARIO CUNNINGHAM: DIRECT BY MR. THOMAS

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1 drugs seized in this case?

2 A. Not -- Was it drugs -- See, I had got pulled over on
3 the interstate then they searched me then I didn't have
4 nothing.

5 Q. Okay.

6 A. Yeah.

7 Q. But what happened from there after you were -- after
8 you were pulled over? Were you placed under arrest?

9 A. Yes. Yeah.

10 Q. And why were you placed under arrest?

11 A. I don't even know. They said we didn't have nothing
12 but they say -- they say -- I was on the passenger side and
13 they said I was driving with no license.

14 Q. Okay. Now, what happened if anything after you were
15 placed under arrest alongside the road traffic stop?

16 A. They then drove us to a house.

17 Q. Drove you where?

18 A. To a house.

19 Q. To whose house?

20 A. My mom.

21 Q. Your mother's house?

22 A. Yeah.

23 Q. Okay. And what happened if anything at your mother's
24 house?

25 A. They told us that -- They told us that they had us on

1 a video tape selling drugs out of the house.

2 Q. All right. Did they search the house?

3 A. Yes, sir.

4 Q. And did they get a search warrant for the house?

5 A. I didn't really get to see all of that. They just ---

6 Q. All right.

7 A. --- had us sign something.

8 Q. Did --- Now, in that house did they find any drugs?

9 A. Might -- They allegedly found some.

10 Q. Okay. Did they take pictures of drugs?

11 A. Yes.

12 Q. And, so you received your discovery from your defense
13 attorney?

14 A. Yes, sir.

15 Q. All right.

16 MR. THOMAS: Your Honor, may I approach?

17 THE COURT: Certainly.

18 MR. THOMAS: Okay.

19 Q. Mr. Cunningham, I want to show you this picture.

20 A. Yes, sir.

21 Q. Ask you if you can identify that?

22 A. I see what it is, yes, sir.

23 Q. What is it?

24 A. Two plastic bags.

25 Q. All right. Are these the drugs that were seized in

DEMARIO CUNNINGHAM: DIRECT BY MR. THOMAS

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1 that house, to the best of your knowledge?

2 A. Yes, sir.

3 Q. Okay. And is this an accurate picture of what you
4 believed to have been in that house?

5 A. Yes, what the police found.

6 Q. All right. And you received this in your discovery
7 from your attorney?

8 A. Yes. Yes, sir.

9 MR. THOMAS: Your Honor, we'd like to move at this
10 time as Applicant's One please.

11 MR. HUNTER: No objection.

12 THE COURT: Without objection.

13 (WHEREUPON, APPLICANT'S EXHIBIT NUMBER ONE, IDENTIFIED
14 AND MARKED, RECEIVED INTO EVIDENCE.)

15 BY MR. THOMAS:

16 Q. Mr. Cunningham, did you discuss that picture with your
17 attorney ---

18 A. Yes, sir.

19 Q. --- of the drugs? And did you have any concerns
20 about that?

21 A. Yes, sir.

22 Q. What were your concerns?

23 A. From the -- From the seven minute ride to the police
24 station the -- the -- the -- that the description had
25 changed.

1 Q. Now what had changed?

2 A. The description of it.

3 Q. How did the description change?

4 A. It said it only had like one plastic bag and on the
5 arrest warrant was seized and one -- and only one went to
6 lab and, you know, so I reported suspicious activity to the
7 SLED's.

8 Q. And what happened with that? Don't tell me what
9 anybody told you but what did you learn from that?

10 A. Okay. I went to Bush River Road talked to the SLED's
11 and when I went to Bush River Road I talked to the SLED's
12 compared everything and they said yes. They ask me
13 evidence changed, it has been altered, changed,
14 manipulated, and they ask me one hundred percent changed.

15 Q. That's what you believed?

16 A. That's what I was told by -- It was either a captain
17 or a lieutenant of SLED's office.

18 Q. Now did you talk to Ms. Lipinski about that?

19 A. Yes, sir.

20 Q. And what did she say about that?

21 A. She said I know that might be the law in South
22 Carolina but this is Hayes' courtroom.

23 MR. THOMAS: Judge, referring to Judge Hayes.

24 A. Yes, sir.

25 Q. All right. Now, --

DEMARIO CUNNINGHAM: DIRECT BY MR. THOMAS

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1 MR. THOMAS: Your Honor, if it please the court, there
2 is indication that this is discussed in the transcript at
3 page 118, lines 1 through 25.

4 Q. Now, Mr. Cunningham, why did you decide to enter into
5 this plea if you were saying that you wanted to go to trial
6 and you were not guilty?

7 A. After we -- After we picked the jury she had pulled
8 me in there and she was like that all-white jury is gonna
9 find you guilty.

10 Q. All right. And did you discuss -- Did you participate
11 with her in regards to jury selection or jury strikes or
12 anything? Were you sitting with her when that happened?

13 A. I was sitting with her but they told me I wasn't
14 allowed to say nothing.

15 Q. Okay. Did she ask any questions when the jurors were
16 coming up?

17 A. No, sir, no questions.

18 Q. Were you concerned about the jury structure?

19 A. Yes, sir. Once she bring it to my attention. Once
20 she bring it to my attention then, you know, that informs
21 me to believe that there wouldn't be no fair trial. When
22 she was like you gonna go in that courtroom a little black
23 boy like you and that all-white jury's gonna find you
24 guilty.

25 Q. Okay. Now the -- She made -- Your defense attorney

1 made some pretrial motions; is that correct?

2 A. Yes, sir.

3 Q. All right, sir. And, so allegedly you had given three
4 statements; is that correct?

5 A. Allegedly. No, I never gave a statement.

6 Q. All right. Now, the statements were two -- Tell me
7 what the statements allegedly were? What do they say you
8 said?

9 A. They said that I -- I never -- I never really -- I
10 never really paid attention to what they said cause, you
11 know, I never made a statement.

12 Q. Okay.

13 A. Yeah.

14 Q. All right. And -- But Ms. Lipinski tried to keep
15 those, to suppress those; is that right?

16 A. I believe so, yeah.

17 Q. Okay. Did you ever make a written statement? Did you
18 ever sign anything?

19 A. No. No, sir.

20 Q. Okay. And was she successful with keeping those
21 statement out having them suppressed?

22 A. No, no, sir. Hayes -- Hayes then -- Judge Hayes then
23 told them, you know, he just --

24 Q. So he allowed -- He allowed them go forward?

25 A. Yeah, he allowed 'em to go forward with no official

DEMARIO CUNNINGHAM: DIRECT BY MR. THOMAS

1 documents.

2 Q. Okay. Now, you indicated to me that you had some
3 concern about the search warrant. Can you tell the court
4 what your concern was about that?

5 A. About I ask him when my previous attorney she had
6 challenged the search warrant by saying, you know, she came
7 -- you know the reason why, you know, like, you know, about
8 them dropping the charge what they based probable cause on
9 to believe a crime was committed. And you know they
10 excluded any crime was -- They said that it wasn't no crime
11 committed and a charge that they based probable cause on to
12 get a search warrant no activity so they was dismissing
13 that charge.

14 Q. All right. So was it your understanding that the
15 search warrant of the house was based upon that arrest
16 warrant that they had for you when they pulled you over?

17 A. Yes, sir.

18 Q. And that arrest warrant was for distribution of
19 cocaine; is that correct?

20 A. Yes, sir.

21 Q. And was that charge later dismissed?

22 A. Yes, sir.

23 Q. And you believe that the search warrant was based
24 upon that dismissed charge?

25 A. Yes, sir.

1 Q. Did you talk to Ms. Lipinski about that?

2 A. Yes, sir. No -- Did I talk -- I talked to her but she
3 -- she like during the argument I heard her say she wanted
4 to challenge the search warrant since they dismissing the
5 charge that they based probable cause on.

6 Q. Did you and she discuss at all about what evidence,
7 what discovery that she had received on that distribution
8 charge?

9 A. She told me that it was something in there and now
10 it ain't there and now it's come back and it's just a empty
11 place to bury a gun or something, somebody, you know, all
12 she told me.

13 Q. All right. Did she discuss with you about her not
14 being able to see one of the videos from that charge?

15 A. She never discussed with me but I heard her mentioning
16 it to Judge Hayes that she would like to see it.

17 Q. Okay. Now, let me ask you a few more questions,
18 Mr. Cunningham. You and I discussed this about the guilty
19 plea that you entered into. Do you believe that you
20 entered into this plea freely and voluntarily?

21 A. No, sir.

22 Q. And why don't you believe that you entered into it
23 freely and voluntarily?

24 A. Because she influenced me to plead guilty. I was
25 gonna get thirty years, you know, cause it wasn't no way

1 that I was gonna make it out the courtroom cause I have a
2 all white jury and no black and Judge Hayes who been here
3 for years and she seen Judge Hayes do, you know, she been
4 around Judge Hayes for years.

5 Q. Do you feel like you had a choice at that point?

6 A. I feel like I was being railroaded and like I -- I
7 feel like I been -- I was being -- No, I ain't feel like I
8 had no choice. I feel like I was cornered in.

9 Q. All right. Now, also a plea has to be knowingly and
10 intelligently given. Do you feel like in this situation
11 that your plea was knowingly and intelligently given?

12 A. No, sir.

13 Q. And why not?

14 A. Because I was feeling like, you know, they was putting
15 pressure on me cause they -- they brung me like -- about
16 like, you know, they brung me about like two or three
17 different pleas and tried to tell me I'm going to trial
18 and, you know, no matter what, and I was trying to get time
19 and they'll be ready in about twenty minutes.

20 Q. Do you feel like you knew all the facts about your
21 case?

22 A. No, sir.

23 Q. And why not?

24 A. Because just like I told Harry Dest or BJ
25 Barrowclough that my attorney kept failing, you know,

1 prepare for my defense before trial, you know, we headed to
2 trial.

3 Q. Now, after all this was over and you got -- you did
4 the plea and you got time from Judge Hayes, did you ask
5 your attorney to appeal this decision for you?

6 A. Yes. I had my brother call several times and I
7 actually then -- then -- then he said he kept leaving
8 messages and messages and he -- he said, you know, they
9 still ain't done with, you know, process, you know, so I
10 wrote and filed for one.

11 Q. And what happened after you wrote and filed for one?

12 A. I never -- I never heard anything about it so I wrote
13 -- I wrote -- I wrote about a year later to see what was
14 going on and why haven't they came up yet. Then they told
15 me that I have not filed for one. Then I sent 'em -- I
16 wrote 'em another letter to show them the paperwork that I
17 filed it on. Then they say yes we do see your desire to
18 file for an appeal.

19 Q. Now, but did you ever have an appeal?

20 A. No, sir.

21 Q. All right. And why would you have wanted an appeal
22 if you had pled guilty to this?

23 A. To come back with some better representation.

24 Q. Okay. And did you -- you had a concern about things
25 that happened in the courtroom?

1 A. Yes, sir.

2 MR. THOMAS: Your Honor, if I could beg the Court's
3 indulgence just one second.

4 THE COURT: Sure.

5 MR. THOMAS: Your Honor, may I approach?

6 THE COURT: Sure.

7 BY MR. THOMAS:

8 Q. Mr. Cunningham, I'm gonna show you this. And do you
9 know what that is? Can you identify that?

10 A. Yes. Yeah, that is the letter that I wrote, yeah,
11 within the first five days, I mean ten days. "I wish to

12 file an appeal within the first ten days." They right.

13 Q. All right. And who did you write that letter to?

14 A. Clerk of Court. It was --

15 Q. And - Go ahead.

16 A. Clerk of Court.

17 Q. And when was it clocked? Is it clocked by the Clerk
18 of Court?

19 A. Yeah. January 9th, --- I meant January 9th, 2017?

20 But it was wrote on the 16th. 2016.

21 Q. '16? Okay.

22 A. A year later.

23 Q. All right. So that is -- Is that the letter -- one
24 of the letters you were talking about that you inquired
25 from the Clerk of Court about an appeal?

DEMARIO CUNNINGHAM: DIRECT BY MR. THOMAS

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1 A. Yes, sir. Yes, sir.

2 Q. All right.

3 MR. THOMAS: Your Honor, if it please the court we'd
4 like to introduce that as Applicant's Second.

5 MR. HUNTER: No objection.

6 THE COURT: Without objection.

7 (WHEREUPON, APPLICANT'S EXHIBIT NUMBER TWO, IDENTIFIED
8 AND MARKED, RECEIVED INTO EVIDENCE.)

9 BY MR. THOMAS:

10 Q. Mr. Cunningham, you and I talked about this. This is
11 your day in court and I know that you've been waiting and
12 anxious about being here today and being able to testify in
13 front of the court. I'm not implying that I have left
14 anything out that you and I have talked about, but this is
15 your opportunity. Is there anything that I have failed to
16 raise on your behalf or is there anything else that you
17 think that is important for the court to hear today?

18 A. No, sir. I feel -- I feel everything --

19 Q. You're satisfied with what you've been able to say?

20 A. I'm satisfied yes, sir.

21 Q. All right.

22 MR. THOMAS: Your Honor, we have no further questions.

23 MR. HUNTER: May it please the court, your Honor.

24 THE COURT: All right.

25 CROSS-EXAMINATION

1 DEMARIO CUNNINGHAM BY MR. HUNTER:

2 Q. Mr. Cunningham, how many times did you meet with your
3 attorney before trial?

4 A. It was numerous times I had to come like -- It was
5 numerous times.

6 Q. And you say y'all talked about the evidence during
7 those meetings?

8 A. They never wrote nothing down. I contacted a Deputy
9 Attorney and let her know. I was like, you know, they
10 failing to, you know, prepare for my defense. You know, I
11 don't know what's going on. They won't write nothing down
12 or nothing.

13 Q. When you met with your attorney did you give her
14 your side of the story?

15 A. I gave them my side of the story and they -- they told
16 me what they want to go with instead of what I want to go
17 with.

18 Q. They being your defense attorney?

19 A. Yeah, the defense attorney and the -- the public
20 defender and the investigator. They told me what -- I
21 meant I told them what I want to go with and they told me
22 what they want to go with and how it should go.

23 Q. Okay. Now you said that she, I guess, relayed that
24 first plea offer to you that was seven years non-violent?

25 A. Yes, sir.

DEMARIO CUNNINGHAM: CROSS BY MR. HUNTER

1 Q. And you turned that down?

2 A. Yes, sir.

3 Q. Because you wanted to go to trial?

4 A. Yes, sir.

5 Q. Okay. And I guess after a pretrial hearing or
6 pretrial hearings you decided to plead guilty?

7 A. They told me that there was an initial trial like
8 that was the trial there.

9 Q. Right. So after the I guess the hearing about your
10 picking a jury and then having a hearing about your
11 statements after that you decided to plead?

12 A. Now they told me that I was getting sentenced that
13 morning.

14 Q. So did you fill out a -- I believe it was attached to
15 your application. Do you remember filling out a plea
16 waiver form?

17 A. No, sir.

18 MR. HUNTER: If I may approach?

19 Q. Do you remember seeing that?

20 A. Naw, I never seen that.

21 Q. Is that your signature?

22 A. Yes, that's mine. Yeah.

23 Q. Okay. And you testified you don't recall this
24 document?

25 A. I remember she ask me those questions right there.

DEMARIO CUNNINGHAM: CROSS BY MR. HUNTER

1 Q. One more. Are those your initials in these boxes?

2 A. Yes, she ask me those.

3 Q. She being Ms. Lipinski?

4 A. Yes.

5 Q. Okay. So she went over this with you?

6 A. Yes, sir.

7 Q. And did she go over with you I guess the charges
8 you were facing and the time you were looking at?

9 A. Yes, sir.

10 Q. And she discussed that the recommendation from the
11 State was a cap of ten years?

12 A. No, they told me fourteen.

13 Q. They told you the plea offer was fourteen years?

14 A. Yeah. Then they came back and said, oh, Lord, we
15 done -- We done -- We done -- We thought -- We thought it
16 was crack cocaine when it been cocaine the whole time.

17 Q. Okay. So during the plea hearing itself the judge
18 went over with you that the State was recommending ten
19 years, a ten year cap?

20 A. Fourteen.

21 Q. Okay. Do you remember that he went over I guess the
22 trafficking was violent and serious?

23 A. Yeah. Yes.

24 Q. Okay. And he went over your I guess the rights that
25 you were giving up by pleading guilty?

1 A. Yeah. Yes.

2 Q. And you remember saying yes when the judge ask you
3 if you were pleading freely and voluntarily, correct?

4 A. On the sentencing sheet she had -- If you can look at
5 the sentencing sheet she ask me was I feeling like I been
6 railroaded or, you know, forced into a plea and, you know,
7 I did give her an answer then she said well I'm just gonna
8 put this, you know, out of my words. But I told her yeah I
9 did feel that I was, you know, being forced into a plea.

10 Q. Well do you remember telling the judge that you were
11 entering it freely and voluntarily?

12 A. No. She mentioned that I was being forced into a
13 plea that I felt.

14 MR. HUNTER: And, Judge, this is page 112, lines 22
15 through 24.

16 Q. And you said you never gave any statement to the
17 police officers, correct?

18 A. No, sir.

19 Q. But you had conversations with them, correct?

20 A. No, sir. No, sir.

21 Q. You didn't have any conversations with them in the
22 kitchen?

23 A. No, sir.

24 Q. So you just sat there and didn't say a word to 'em?

25 A. Yes. Just like they said, I was fairly quiet.

DEMARIO CUNNINGHAM: CROSS BY MR. HUNTER

1 Q. So when they said that you made -- Okay, and the
2 occasion that the cocaine was yours and the gun was yours
3 that was a lie?

4 A. Yes, sir. Never made a statement.

5 Q. Did you tell your attorney that the State had lied
6 about that?

7 A. Yes, sir.

8 Q. And you told your attorney I guess the issue you had
9 with the bags from this photo, you brought that to your
10 attorney's attention?

11 A. Yes, sir.

12 Q. Okay. Prior to the trial?

13 A. Yes, sir.

14 Q. Okay. Now do you recall -- This is on page 114, the
15 judge ask, "So you agree at that time, Mr. Cunningham, the
16 cocaine and the gun were yours; is that correct?" Do you
17 recall saying yes, sir, to that?

18 A. No, sir.

19 Q. Okay.

20 MR. HUNTER: And again, Judge, that's page 114, lines
21 19 through 22.

22 Q. So if the transcript reflected that that would be
23 incorrect?

24 A. Yes, sir.

25 Q. Now regarding your appeal, did you ever contact Ms.

1 Lipinski after your plea?

2 A. I might a wrote her a letter but the -- to make sure
3 that, you know ,that it was, you know, done. And I had to
4 get my mother and them to call a couple of times. But they
5 said they can't get in contact with her. All I can get is
6 contact with the secretary.

7 Q. So did you ever contact someone from her office?

8 A. Yes.

9 Q. Okay. Basically saying that you wanted to appeal
10 this case?

11 A. Yes.

12 Q. And you just never heard back?

13 A. Yeah, that's when I wrote on my own.

14 Q. And that was the letter that -- the other letter
15 entered into -- the exhibit, that was the letter you wrote
16 to the Clerk?

17 A. Yes, sir.

18 Q. Okay.

19 MR. HUNTER: Beg the Court's indulgence one second.

20 Q. Now you testified you didn't have all the facts of
21 the case. Did you ever tell your attorney that you needed
22 more time?

23 A. Yes, sir. I told her that we need to prepare for my
24 defense and, you know, I was contacting her supervisor's
25 and letting them know that, you know, they failing to

DEMARCO CUNNINGHAM: CROSS BY MR. HUNTER
REDIRECT BY MR. THOMAS

1 prepare for my defense to go to trial.

2 Q. But during the plea hearing itself, did you ever stop
3 and say you weren't ready?

4 A. They told me that I no longer had that option.

5 Q. They told you you had to go forward?

6 A. Yeah, they told me I had to go to court or be
7 sentenced in my absence.

8 MR. HUNTER: That's all I have. Thank you, sir.

9 MR. THOMAS: Your Honor, if it please the court.

10 REDIRECT EXAMINATION

11 DEMARIO CUNNINGHAM BY MR. THOMAS:

12 Q. Mr. Cunningham, you said that it was your position
13 that these officers were lying about these statements that
14 you allegedly made?

15 A. Yes, sir.

16 Q. All right. And you never did -- In fact there was no
17 written statement; is that correct?

18 A. No, sir.

19 Q. And they admitted that to the Court?

20 A. Yes, sir.

21 MR. THOMAS: Your Honor, and that's page 91, lines
22 13 through 14.

23 Q. So you never signed a written statement?

24 A. No, sir, I made a statement, sir.

25 Q. Now, you entered into this plea. Did you understand

DEMARIO CUNNINGHAM: REDIRECT BY MR. THOMAS

1 what was going on at the time?

2 A. Like we had opening arguments and we had the opening
3 arguments and they had -- that's when she pulled me in and
4 it was like, you know, they done picked a all white jury
5 and, you know, you know, she tried to talk to me before I
6 go out there, you know, cause she done been around Hayes
7 for years, Judge Hayes for years.

8 Q. Now you said -- You keep saying that they picked an
9 all white jury. Do you know whether or not there were any
10 African Americans to pick from?

11 A. I believe it was two or three.

12 Q. All right.

13 MR. THOMAS: Your Honor, I have no further questions.

14 MR. HUNTER: No followup.

15 THE COURT: Come down. Thank you, sir.

16 MR. CUNNINGHAM: All right.

17 (WITNESS LEAVES WITNESS STAND.)

18 MR. THOMAS: Your Honor, if it please the court, we'd
19 call Ms. Lipinski to the stand.

20 THE COURT: Come around, Ms. Lipinski.

21 MADAM CLERK: Ms. Lipinski, if I can have you place
22 your left hand on the Bible and raise your right.

23 (WHEREUPON, MINDY LIPINSKI,
24 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

25 MR. THOMAS: Your Honor, if it please the court.

MINDY LIPINSKI: DIRECT BY MR. THOMAS

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1 THE COURT: You may proceed.

2 DIRECT EXAMINATION

3 MINDY LIPINSKI BY MR. THOMAS:

4 Q. Ms. Lipinski, you had an opportunity to represent Mr.
5 Cunningham?

6 A. I did.

7 Q. And were you appointed?

8 A. Yes.

9 Q. All right. Through the Public Defender's Office?

10 A. Yes.

11 Q. Okay.. Now, he was in jail for quite some time?

12 A. Yes..

13 Q. All right. And then he did finally get out on bond?

14 A. Yes.

15 Q. All right. And during the time I guess you went to
16 see him while he was in jail?

17 A. Yes.

18 Q. And then you also saw him while he was out on bond?

19 A. Yes.

20 Q. There was an initial plea offer in the case?

21 A. Yes.

22 Q. And what was that plea offer?

23 A. Seven.

24 Q. And that was for the trafficking and the gun charge?

25 A. Yes.

MINDY LIPINSKI: DIRECT BY MR. THOMAS

1 Q. And in putting this case together for trial, were
2 there any concerns that you had about the chain of custody
3 or about the drugs or anything like that?

4 A. He -- When we initially went over discovery when he
5 got the discovery in jail, he brought it to my attention or
6 became I would say somewhat fixated on the fact that on the
7 evidence sheet for the trafficking case it listed, you
8 know, Item 1, bag of cocaine and listed it in a singular
9 context.

10 And when we went over the photographs you can see in
11 the drawer there it appears at least to be what would have
12 been two bags of cocaine. He told me that he believed that
13 that was evidence that they had contaminated the evidence
14 or tainted the evidence or planted drugs on him. And I
15 told him that I didn't necessarily see it the same way he
16 did; that I felt that if it was one bag of cocaine that
17 magically became two that that was something I thought the
18 jury would so to speak latch onto but that I didn't
19 necessarily think it would.

20 I did go down to property and evidence and viewed the
21 evidence and did -- what happened was what I suspected
22 happened. Because they were somewhat tied together or
23 possibly tied together or just found together that they had
24 placed the two bags within one heat sealed bag and then
25 later submitted it. I thought it was probably shotty

1 record keeping. They should have indicated that there were
2 two bags of cocaine within that but that didn't happen.
3 But I didn't think that it was necessarily would be
4 evidence that -- evidence had been planted or contaminated
5 because it was consistent with what you see in the
6 photograph in the drawer.

7 I then -- So I took a picture of that, the front and
8 back of the heat sealed envelop, showed it to Mr.
9 Cunningham; showed him that the labeling on the bag
10 indicates that there were two bags placed within a bigger
11 bag and that we would raise it in terms of cross-examining
12 those witnesses and the accuracy of their work, but that I
13 did not think that it would give rise to an argument that
14 they had planted evidence on him or contaminated his
15 evidence or tampered with his evidence in any way. And
16 that I thought that if we went to that level it would
17 undermined the bite of the argument that we could make.

18 Q. All right.

19 A. He disagreed. It was something he talked about in
20 may of our conversations but it was something that we
21 talked about and discussed and how to use it and how to get
22 the most leverage out of it at trial.

23 MR. THOMAS: May I approach, your Honor.

24 THE COURT: Yes.

25 BY MR. THOMAS:

1 Q. I want to show you a copy of the picture that's been
2 admitted as Petitioner's One. Is that one of the pictures?
3 Is that the picture ---

4 A. Yes.

5 Q. --- with the two bags?

6 A. Yes.

7 Q. Okay. All right. Thank you. And -- Now, there was
8 -- He was sent for an evaluation, ---

9 A. Yes.

10 Q. --- another evaluation.

11 A. Yes.

12 Q. Did you have any concern about his mental capacity?

13 A. Yes. I was aware that he had been evaluated in the
14 past. I was aware that the person who had represented him
15 previously was still in our office at that time; had told
16 me that he had been originally found not competent to stand
17 trial, but likely to become competent, and that they
18 eventually did find him competent and that basically at
19 that point he had spent so much time in jail being
20 evaluated and being sent back and then coming back
21 competent that they basically just sentenced him to time
22 served and he had gotten out.

23 Q. And that was on a previous charge?

24 A. That was a previous time.

25 Q. All right.

1 A. But she was still in our office and had told me that
2 there were mental health issues and that he would need to
3 be evaluated again in all likelihood. Initially when I met
4 with him it was more difficult to communicate with him. I
5 would say his thoughts were somewhat more erratic and so we
6 sent him for an evaluation.

7 And a large part of the time he spent in jail was
8 waiting for that evaluation to get scheduled; having him go
9 down there and then waiting on those reports to come back
10 because that would largely determine in some respect if he
11 was found not competent, again, I think the track of the
12 case.

13 Q. Did you have difficulty with issues or items when you
14 would discuss it with him with him understanding?

15 A. As I said at the time of the plea when I initially
16 started to represent Demario I was aware that he should be
17 on medication. His father came to see me; I think his
18 mother reached out to me once, or a female family member,
19 stating that they had concerns about Demario being in jail.

20 And certainly at the get go prior to the evaluation it
21 was difficult. I do think that once he went down there for
22 evaluation and there were some I think more sophisticated
23 psychiatric contact with him and the jail, or, he just got
24 leveled off of his meds and became more med compliant it
25 became easier to communicate with Demario.

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1 He was never an easy client to communicate with but I
2 would say that his thoughts definitely became more complex;
3 more coherent. And there are times he, you know, he often
4 times talked about how he communicated with the Supreme
5 Court; how he had reached out to other lawyers. Some of
6 that may have been jail house lawyers but that he had
7 reached out to SLED on his own. I mean he certainly
8 demonstrated a significant involvement in his case and his
9 defense which I thought, you know, no low threshold for
10 competency would be things that a psychiatrist would latch
11 onto. And then the report came back that they felt that he
12 was malingering and this time they found him just straight
13 up competent to stand trial.

14 Q. All right. Did he in fact go to SLED?

15 A. Yes, he did.

16 Q. Okay.

17 A. I was never able to locate that.. The problem is
18 Demario would come back often times and tell me I've talked
19 to the Supreme Court, I've talked to so and so, but he was
20 never good at telling you this is the name of the guy I
21 spoke with. He would just give you agencies versus
22 individuals and so I attempted to and I was not able to.

23 Prior to the trial I saw Marvin Brown in the hallway
24 or Commander Brown and he had told me that -- I said, you
25 know, I said, did you ever get any indication that he had

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1 called SLED and he said yes. Commander Brown indicated to
2 me that SLED had called him; that they had talked to him,
3 but it kind of never went anywhere; that SLED told
4 Commander Brown they weren't going to investigate and that
5 was never really reported to me. I think it kind of never
6 got off the ground.

7 Q. Okay. Now you made some motions to -- pretrial
8 motions. One of 'em was to suppress. Did you make a
9 motion to suppress based upon any kind of chain problem or
10 problem with the two bags versus one bag?

11 A. I did not.

12 Q. Okay. Now, --

13 MR. THOMAS: Your Honor, I beg the Court's indulgence
14 just for a second.

15 Q. Before I forget let's go ahead and we'll talk about
16 that. As a matter of fact you used this -- the incidence
17 or the -- I guess the fact regarding the two bags, one bag,
18 those pictures. You used those at the sentencing phase?

19 Do you remember?

20 A. I remember brining it up. yes.

21 Q. All right.

22 MR. THOMAS: And, your Honor, for the court's
23 indulgence that information, that is page 118, lines 1
24 through 25.

25 Q. And I think you described that at that point in time

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1 is a minor clerical issue?

2 A. I felt that it would go to the weight versus the
3 admissibility that would have give rise to cross-
4 examination material. But I did not find any sufficient
5 kinks or breaks in the chain that I felt legally gave rise
6 to a motion to exclude the evidence on that basis.

7 Q. But you did in fact talk to the judge about or bring
8 it to Judge Hayes' attention about the one bag two bag
9 issue?

10 A. I did as evidence that Demario and I had discussed
11 his defense, discussed issues that we would raise to
12 demonstrate that he was aware that he was giving up those
13 defenses and pleading guilty. And that that was something
14 he kind of continued to be an issue of concern for him.

15 Q. Okay. Now talking about pretrial issues. You
16 brought the issue of -- you raised the issue of competency
17 to the court?

18 A. Yes.

19 Q. Okay. And then the court found him competent to stand
20 trial?

21 A. Yes.

22 Q. And then there was some odd issue about
23 qualifications, about convictions. Do you remember that?

24 A. Yes. They had -- They raised the issue -- and I don't
25 remember who was the other judge if it was Judge Griffith

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1 or Judge Gibbons -- had not -- When we -- We do jury
2 qualifications downstairs in a big room and he at that
3 point did not raise what was a kind of a typical question
4 of does anyone here have a -- have a conviction for which
5 they could have done more than one year. And so that was
6 just his -- He felt that that was something you addressed
7 at a small panel once you brought the small panel up.

8 And so prior to them bringing the small panel up the
9 Solicitor's office indicated that there was one member of
10 the small panel list we had been given that which should
11 have been excused for that reason. They moved to exclude
12 her and I moved -- I wanted them to put on the record that
13 there was no one else of similar concern in the venire
14 because those rap sheets are NCIC records with things we
15 didn't have access to the Solicitor's office here has
16 fought tooth and nail about turning over.

17 Q. So was that ever resolved to your satisfaction or was
18 that --

19 A. I think she put on the record that there was nobody
20 else but that was kind of the farthest --

21 Q. But that was just what you --

22 A. That is what she put on the record but we have fought
23 to get that in front of Judge Hayes before and never gotten
24 any leverage.

25 Q. All right.

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1 MR. THOMAS: And, your Honor, that issue is page 12,
2 lines 9 through 13.

3 Q. So, in talking about the jury pool, and I was a little
4 bit confused in reading the transcript, as far as selection
5 were there no African American's at all in the pool?

6 A. There were that showed up that day there were no
7 African American men, period.

8 Q. Right.

9 A. Downstairs at all in the big room. There were I want
10 to say two to three African American females of various age
11 and background but there were two to three females but
12 there were no men which was not something I have ever seen
13 a complete, you know, blanket because I remember talking to
14 Demario and he even thinking that the jury -- When he heard
15 jury of his peers he thought that meant that there would be
16 a jury of all African American men and we had gone over the
17 discussion that that was not going to happen; that it was
18 going to be this kind of larger makeup of the community and
19 while there could be some African-American men on there
20 that would come down to the selection process but not
21 having any men.

22 The year before the year Demario's trial came to case
23 there were problems with how they summoned the jurors in.
24 They download the information in terms of motor voter and
25 driver's license and all that from Columbia and they had

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1 only downloaded registered voters. So all the motor voter
2 information had not downloaded and it did significantly
3 affect the makeup of the venire and the Grand Jury venire
4 and all that kind of thing. And they had actually like in
5 the middle of a trial that had come to someone's attention
6 and they declared a mistrials in those trials.

7 Demario's I think was fairly early on in the year and
8 that was a concern of mine that perhaps something else had
9 happened again in the downloading of information because I
10 just found it to be so statistically improbable that none
11 would appear.

12 Q. Right.

13 A. And so I went down to even see if we could get
14 information because sometimes they are excused ahead of
15 time if they provide travel information or they provide
16 proof to the clerk that they moved out of the county and
17 their, you know, updated DMV is now Lancaster County or
18 something like that. We weren't able to get that
19 information but I did make the pretrial motion that I felt
20 that the fact that the venire did not comprise of any let
21 alone one I thought violated Demario's constitutional
22 rights. I thought it jeopardized his due process rights
23 and I thought just the appearance of imperpriarty alone.
24 Q. And you in fact made that motion. Actually you made
25 a motion for a continuance.

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1 A. Right.

2 MR. THOMAS: And, your Honor, that's page 16 and 15
3 lines 15 through 20.

4 Q. And you had ask for a continuance too for what reason?

5 A. A: To get him in a venire that did have African-

6 American men in it. And B: To examine if there were

7 irregularities once again in downloading this information

8 at the start of the year.

9 Q. And what did Judge Hayes, how did he rule?

10 A. No.

11 Q. All right.

12 MR. THOMAS: Your Honor, and that's -- the motion is
13 denied on page 20.

14 Q. Now, your other motion. You did a *Jackson versus*
15 *Denno* hearing and that was in regard to the statements?

16 A. Yes.

17 Q. All right. And there were supposedly three statements
18 made?

19 A. Yes.

20 Q. And do you remember what those statements, what they
21 were, or where they were given?

22 A. I remember the bulk of their contact with Demario
23 the testimony of Commander Brown was that it happened
24 around the kitchen table at the house.

25 Q. Right. And then he made some other statement in the

1 booking area; is that correct?

2 A. Yes.

3 Q. All right. And do you remember what the statements
4 were? I know it's been a long time.

5 A. That he was claiming the drug -- He was claiming the
6 cocaine and the gun and that the marijuana or whatever
7 belonged to his cousin Tomeano.

8 Q. All right. And the -- What was your objection in
9 regards to those statements?

10 A. In part whether or not Demario necessarily understood
11 his *Miranda* warnings given his border-line competency on --
12 to stand trial and those type things. In general I've been
13 here now almost ten years, I've never seen a written
14 statement from a defendant from the Drug Enforcement Unit.
15 I've never seen a audio recorded statement from the Drug
16 Enforcement Unit. It's always this is what he said
17 paraphrased. Never even really word for word verbatim.
18 And challenging that aspect.

19 When I talked to Demario about it he stated that
20 Commander Brown had sat him down at the table; that he had
21 had a lengthy conversation with his mom that he either went
22 back or knew his mom somehow through the community or
23 something. And that when they found the cocaine in the
24 drawer versus the marijuana in the backpack that he had
25 basically looked at Demario and said, you know, we know

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1 that either the cocaine is yours or you're the cocaine guy.
2 And then Tomeano you're the weed guy and that they had just
3 basically affirmed those statements or just felt that they
4 really, you know, couldn't deny it; didn't want to throw it
5 on the other one, but that they did it. They hadn't just,
6 you know, yes, Commander Brown, the cocaine is mine and I
7 would like to claim ownership of it. That it hadn't been
8 the way that Commander Brown is in essence presenting it.

9 Q. Right..

10 A. So --

11 MR. THOMAS: Your Honor, may I approach?

12 THE COURT: Yes, sir.

13 MR. THOMAS: Your Honor, for the court's attention
14 its page 91, lines 12 through 14.

15 Q. I want to show this to you. It's a statement by the
16 Commander.

17 A. Yes.

18 Q. I thought that was kind of a frank statement in that
19 he was saying that he didn't get any written statements
20 because he didn't think he would sign it.

21 A. I think at that point Demario would have signed
22 pretty much anything they put in front of him just because
23 it was not somebody who I -- I think -- I think that had he
24 made that statement Demario would have signed it.

25 Q. Okay.

MINDY LIPINSKI: DIRECT BY MR. THOMAS

1 A. But I don't think that that was the reason he didn't
2 and I think that is their practice and procedure having
3 witnessed hundreds if not thousands of drug cases in the
4 past ten years. I've never seen them have a written
5 statement.

6 Q. But then you're depending upon what the Drug Task
7 Force says your client said?

8 A. Right. And we routinely go, you know, they have more
9 audio and video recording equipment than any other agency
10 even prior to body cam era. They, you know, have -- You
11 know Marvin Brown has a pen where the top of the pen
12 records. They all have cell phones if not multiple cell
13 phones where they very easily could have recorded in part
14 any of those conversation and there is never any of it.

15 Q. And what did Judge -- How did Judge Hayes rule on the
16 motion?

17 A. He denied the motion or found that it was freely and
18 voluntarily made as is pretty much par for the course.

19 MR. THOMAS: And, your Honor, that is on page 97,
20 lines 4 through 7.

21 Q. Counsel, you also, I think, raised an interesting
22 issue in regards to the search warrant. What were your
23 concerns if any about a search warrant?

24 A. There were some issues with the search warrant but
25 the main issue we had always gone after was that we wanted

1 access to the buy videos that gave rise to the search
2 warrant to see if the information contained within the
3 affidavit was factually accurate. And they had always said
4 they were not gonna proceed on the distribution; they were
5 gonna proceed solely on the trafficking which is very
6 typical.

7 Q. Now, I'm sorry, just to kind of clarify. Was the
8 distribution charge was that what -- why he was arrested at
9 the stop?

10 A. Yes.

11 Q. He was arrested on a warrant for distribution?

12 A. I -- To the best of my recollection yes.

13 Q. All right.

14 A. They had outstanding warrants against him.

15 Q. Is that what we're talking about now, that
16 distribution charge?

17 A. Yes. And that was the basis of the affidavit for
18 the search warrant.

19 Q. All right.

20 A. And so we had ask subject to a protective order,
21 subject to anything, give us access to the buy video. In
22 this case I believe they actually gave me the buy report.
23 I've had other cases where they won't even give us the
24 report on the buy. And they said no. I stated that it,
25 you know, substantially precluded my ability to do a

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1 competent *Franks v. Delaware* hearing because if there were
2 any factual inaccuracies to that affidavit I would not be
3 able to raise those and it just didn't go anywhere.

4 MR. THOMAS: And, your Honor, for the court's
5 information we're talking about page 99, one through 25 and
6 page 100, lines 1 through 11.

7 Q. Were you ever allowed to see that video?

8 A. No.

9 Q. Did you think it was important to see it?

10 A. Yes.

11 Q. And why?

12 A. For that very reason. That -- We have recovered, we
13 do know not necessarily out of any malfeasance, but we do
14 know that the DEU like any law enforcement agency makes
15 mistakes. They do thousands of these cases. Things get
16 reported wrong; things are uncovered later. And our
17 ability to challenge the veracity of that information I
18 think would depend on that.

19 I understand their need to protect the CI; I think
20 they could have done it. We often view video tapes
21 pursuant to protective order when the buy is all they have.
22 We felt we could have done it in this case. I don't think
23 I ask for it in this case but a case after this that
24 followed a very similar standpoint. I even defaulted back
25 to asking Judge Hayes to do an in-camera review of the tape

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1 just because I feel that at some point that fact-finding
2 mission needs to happen and I don't think the Solicitor's
3 office can be relied upon to examine whether or not there
4 is Brady material. I don't know if Solicitor Robinson
5 never even looked at the tape.

6 Q. And that was my next question. I think the
7 Solicitor's office makes the statement in the transcript
8 that there is no exculpatory evidence in that video.

9 A. Right. But I don't think they -- I don't know that
10 they look at it the same way we do and I know they don't.
11 There is always times that we've pointed out stuff that
12 they don't notice that we notice. When I got here I was
13 with the Solicitor's office for a while and we had video of
14 -- You know I had a CSC case where I didn't think it was
15 necessarily germane but they brought to my attention that
16 he had braids in one video and didn't have braids in
17 another and that was inconsistent with what the victim had
18 talked about and it was based on that makes it more complex
19 to that.

20 But until Deputy Barrowclough brought that to my
21 attention I didn't necessarily see it as exculpatory
22 information. But once he did I dismissed the case. So I
23 mean it's just that you don't think in the same mind set on
24 separate sides of the aisle.

25 Q. And basically in this case you just have to rely

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1 upon the State's judgment to tell you whether or not
2 there's exculpatory evidence or not?

3 A. Right.

4 Q. Just take their word for it?

5 A. Right.

6 Q. And at that point was -- Well at that point was the
7 decision made whether or not to enter into a plea or to
8 continue with the trial?

9 A. Demario had very actively participated in plea
10 negotiations. He always wanted a non-violent plea. We
11 were never offered a non-violent seven but he wanted that.
12 He started out wanting a much lower number. And so he came
13 back and wanted -- We were never able to get there. And
14 based on that it was kind of that and his fixation with the
15 evidence and the one versus two bags issue he wanted to
16 trial.

17 Q. When we went to trial I think as is often the case you
18 start seeing the writing on the wall and he's not winning a
19 lot of pretrial motions. The jury makeup was not favorable
20 or at least something where I can see an African-American
21 man would be concerned that that was the makeup of his jury
22 and so he started asking about getting the offer back.

23 A. Originally they did put fourteen back on or they came
24 to us with fourteen. They put that on the table and he
25 turned that down. There was some discussion with Judge

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1 Hayes I believe in chambers and then they came back with a
2 cap of ten argument. He also had -- there were two male
3 family members, I believe his brother and or a cousin came.
4 They were talking to me in the hallway that they felt that
5 he needed to plea that they were concerned that he was
6 gonna get upwards of double digits, fifteen to twenty if he
7 went to trial. And they wanted to know if we could put the
8 offer back on the table. So based on all of that, and I
9 don't remember really who initiated it, they came back to
10 the cap of ten.

11 I remember Demario wanted to talk to his family and we
12 made arrangements so that he could stay at counsel table
13 and the family could stay on the other side of the bar and
14 I actually even left the courtroom. And so, talk to your
15 family and, you know. Security was here. I think Mr.
16 O'Kelly remained in the room, my investigator, but so that
17 there was no I'm the only one, you know, brow beating you
18 or pushing you into this, you have this conversation with
19 your family.

20 Q. Okay.

21 A. And subsequent to that he made the decision to take
22 it. I think I had prepared him that I thought he would
23 get the full ten in front of Judge Hayes. I remember being
24 somewhat relieved that he only got eight.

25 Q. Yeah, he got less.

MINDY LIPINSKI: DIRECT BY MR. THOMAS

1 A. Right.

2 Q. And did Judge Hayes --

3 MR. THOMAS: And, your Honor, this is page 123, lines
4 20 through -- 23 through 25 and 124, 1 through 5.

5 Q. At the end of the plea did Judge Hayes indicate in his
6 ruling on the issue about the DVD, the video? I'm sorry, I
7 didn't bring that up.

8 A. No, that's okay. I got it. What's the page number
9 again?

10 Q. It's --

11 THE COURT: One twenty-three. Starts on one twenty-
12 three.

13 Q. Yeah, starts on page 123 down at the bottom.

14 A. Oh, Dupree. Yes. They gave him *State v. Dupree*. I
15 remember that now.

16 Q. All right. And his ruling was that he was not gonna
17 give it to you?

18 A. Yes.

19 Q. All right. Now in regards to motions that you made,
20 you got a ruling on the *Jackson v. Denno* about the
21 statements ---

22 A. Right.

23 Q. --- from the court. You also got a ruling about the
24 makeup from the jury from the court?

25 A. Yes.

1 Q. And you got an issue -- you got a ruling from --
2 I'm sorry, your Honor.

3 THE COURT: A ruling from the court ---

4 MR. THOMAS: Yes sir.

5 THE COURT: --- on the makeup of the jury?

6 MR. THOMAS: Sir?

7 THE COURT: What's the question that she got a ruling
8 from the court on the make up of the jury, what was that
9 about?

10 MR. THOMAS: Yes, sir.

11 THE COURT: What was that about?

12 MR. THOMAS: She made a motion about asking for a
13 continuance because saying that there were no African-
14 American's in the jury pool.

15 THE COURT: Okay. All right. I heard her talking
16 about it but I didn't remember that there was a motion.

17 MR. THOMAS: All right. I'm sorry, your Honor.

18 THE COURT: That's all right. Go ahead.

19 BY MR. THOMAS:

20 Q. And you also put in your motion regarding asking --
21 asking for the ability to look at the DVD, I guess it would
22 be a DVD. The video?

23 A. Right.

24 Q. And the probable cause issue, you got a ruling from
25 the Court. Judge Hayes indicated at the end what his

MINDY LIPINSKI: DIRECT BY MR. THOMAS

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1 ruling was gonna be on that?

2 A. Yes. He had kind of taken it under -- Basically he
3 indicated he wasn't going to rule with us. He wanted to
4 look at some additional case law. The State came up with
5 *State v. Dupree*. I think we cite -- and I don't remember
6 the name of the case -- but it was a case out of Greenville
7 where they determined that what a witness says in a search
8 warrant isn't what law enforcement knew; that she had said
9 she had seen the guy with the gun before but not that day
10 and in the search warrant it says that day.

11 And there is another case where the -- an under-cover
12 buy is used and it's cloaked under the terms of a
13 confidential agent where the magistrate testifies that he
14 believes that the confidential agent was a narcotics
15 officer making an under-cover buy where the narcotics
16 officer goes in under disguise and later it was determined
17 that it was a CI and there was nothing about the
18 reliability of the CI. But Judge Hayes did put on the
19 record that he ultimately would have followed *Dupree* and he
20 has in subsequent cases.

21 Q. All right. And the purpose of that -- those questions
22 is that there were appealable issues in this case?

23 A. Yes.

24 Q. Okay. And do you remember whether or not the
25 defendant had ask you to appeal?

MINDY LIPINSKI: DIRECT BY MR. THOMAS

1 A. I do not.

2 Q.. All right.

3 A. I do not remember him doing so. I remember going
4 over it in the plea waiver form that he signed. I tell
5 them they have ten days to appeal. The standard kind of
6 spill is that -- I don't think they necessarily understand
7 appeal all the time so I actually use much more lay terms
8 about you have ten days to complain about it or to bitch
9 about it in essence and after that you can't any more.

10 That you don't have to do anything, you don't have to call
11 me and convince me I was wrong or I didn't do anything.

12 All you have to do is call our office tell anyone you want
13 to appeal. They'll file the paperwork and you get a new
14 lawyer in Columbia. So that's kind of it. I remember I
15 saw Demario immediately after the plea. I went back and
16 explained to him the sentence but I don't' remember really
17 having any contact with him after that.

18 Q. Okay.

19 MR. THOMAS: Your Honor, if I can beg the Court's
20 indulgence.

21 (PAUSE.)

22 MR. THOMAS: Your Honor, I have no further questions.

23 THE COURT: Mr. Hunter.

24 MR. HUNTER: May it please the Court, your Honor.

25 CROSS-EXAMINATION

MINDY LIPINSKI: CROSS BY MR. HUNTER

1 MINDY LIPINSKI BY MR. HUNTER:

2 Q. So going to the appeal. Were you ever made aware that
3 he had contacted any of your co-workers?

4 A. I was not. I mean our paralegal's are pretty well
5 versed but if that happens I can see Demario getting
6 confused about who to contact in that he often times would
7 write the Clerk of Court about any number of issues
8 including the one bag, two bag issues. He contacted the
9 Supreme Court prior to the trial. He even claimed he
10 contacted the U.S. Supreme Court prior to the trial. So I
11 can see at least from Demario's perspective if he thought
12 writing the Clerk was enough I don't know that that would
13 shock me.

14 Q. But he had your contact information?

15 A. Did he have my contact information? What he had at
16 jail I don't know. Certainly on the outside he called me
17 somewhat frequently. You know everybody knows numbers on
18 the outside because they get programed in their phone and
19 then they get down to the jail and, you know. He would not
20 have been able to call me from the jail. He would have had
21 to write me from the jail or he would have had to got one
22 of his family members to call me from the jail because
23 they're not allowed to call us directly the way the phone
24 systems work.

25 Q. Okay. Now the plea waiver form. You went over that

MINDY LIPINSKI: CROSS BY MR. HUNTER

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1 with him?

2 A. Yes.

3 Q. Y'all did that together. You explained everything to
4 him?

5 A. Yes.

6 Q. Was that -- You know was that right before his actual
7 plea?

8 A. Yes.

9 Q. Okay. Did he ever indicate that he didn't understand
10 what was going on during that time?

11 A. No.

12 Q. So at the end of the day was it his decision to plead?

13 A. At the end of the day was it his decision to plead?

14 Yes.

15 Q. Did you ever pressure him into pleading guilty?

16 A. I did not pressure him. I told him that we would go
17 to trial; I was prepared and ready to go to trial. Mr.

18 Kelly and I had spent a significant amount of time getting

19 ready for trial. I did tell Demario on a number of times

20 that I thought that the low range of trafficking was

21 something I thought he should consider; that I thought the

22 jury would convict him. And that I was concerned that

23 Judge Hayes would sentence him at least ten to fifteen if

24 not above that. And I thought if he could stay in single

25 digits that that was a gift.

MINDY LIPINSKI: CROSS BY MR. HUNTER

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1 To say that I pressured him. I don't know. We did at
2 times have a unusual relationship. I remember when --
3 Cause he would -- He would kind of talk out of both sides
4 of his mouth in terms of he would talk about wanting to
5 plea and talk about wanting to go to trial. And I remember
6 that was based -- part of the reason we left him alone with
7 his family so that I thought maybe he would come to a more
8 natural decision or get a decision I guess.

9 And I remember even when I left he was, you know, can
10 you go get me a non-violent seven or can you go get me four
11 and I remember saying to him, Demario, when I come back I
12 either want you to say I want to go to trial or I'll take
13 the cap of ten. Like we've got to get to some - Because
14 Judge Hayes also was getting impatient, like he'll give you
15 some amount of time to work out a deal but at some point
16 the jury is waiting and he feels that this time should have
17 come a long time ago and if you're not gonna get there then
18 we need to put twelve in a box and go forward.

19 Q. Okay. So I guess after pretrial, after that first
20 day of all those hearings, did you think that he would fair
21 better on a plea than a trial?

22 A. When they came off of fourteen and came down to ten,
23 yes. I at least felt even that probably would have been
24 better than what he would have received if they heard the
25 entire thing.

1 Q. Well did you think that, I guess, based on the
2 evidence presented that a trial would be unsuccessful?

3 A. I had concerns that it would be unsuccessful. We
4 didn't have a lot to work with. The kind of dark horse was
5 that his cousin Tomeano we knew that he was arrested with
6 was on the run; that there was a bench warrant out for him,
7 and they weren't trying them together or trying Tomeano in
8 his absence. And we were kind of gonna make a hail marry
9 pass that maybe all the drugs belonged to Tomeano and they
10 had just kind of put half on each in order to, you know, to
11 have drugs on both of them to kind of in essence get two
12 birds with one stone which I didn't think the prosecution
13 would see coming. But I also really didn't know what a
14 jury would do with it.

15 Q. Now with his statements, and you argued pretty hard
16 that there were no actual recorded statements, correct?

17 A. Yes.

18 Q. And you explained all that to him, correct?

19 A. Yes. And that was something he understood.

20 Q. Okay. Was there a misunderstanding of whether or not
21 he had a discussion that night with the officers?

22 A. I don't really understand what you mean by that. And
23 I'm not trying to be difficult.

24 Q. No, no. During those I guess the state said that he
25 talked to officers that night?

MINDY LIPINSKI: CROSS BY MR. HUNTER

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1 A. Yes.

2 Q. Was he ever unaware that that's -- that's what was
3 going on that night?

4 A. I think he knew he was talking to law enforcement.

5 Q. Okay.

6 A. Do I think that the conversation may have happened
7 more closely to what Demario said or that Commander Brown
8 said, you know, based on who did what in the under-cover
9 buys. You know I know you're the cocaine guy and you're
10 the weed guy and did they just adopt that or not; dispute
11 it or not felt like they could really get up in Commander
12 Brown's face and say, you know, no that's not mine or the
13 cocaine's not mine. I think Demario was probably further
14 somewhat hampered by the fact that he was using his momma's
15 house that he's concerned that somebody else in his
16 family's gonna get charged; are they gonna charge everybody
17 else with the drugs. I certainly think that could have
18 been closer to the truth than the way Commander Brown
19 dressed it up.

20 Q. Okay. And that's what you argued during the Denno
21 hearing?

22 A. Right.

23 Q. And again just to go over his competency. And I'm
24 specifically talking about the plea. Did you have any
25 concerns during the plea hearing that he did not know what

MINDY LIPINSKI: CROSS BY MR. HUNTER

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1 was going on?

2 A. No. I believe he did know what was going on.

3 Q. Okay. And you believe he understood the judge's
4 questions and all that?

5 A. Yes.

6 Q. Okay. And just to clarify, your motion was for a
7 continuance as far as the jury pool was concerned?

8 A. I think it violated his constitutional rights. Judge
9 Hayes -- I remember he ask me well how many African-
10 American men would you want in the jury and very probably
11 far too flippantly said I'll take one; that I just want at
12 least one in the jury pool. And he ruled well you're not
13 entitled to a constitutional number which I knew was the
14 case law. I had read it going into the motion.

15 And when that didn't seem to really start holding
16 teeth or getting any traction I made a motion for a
17 continuance hoping that maybe he would at least say,
18 because he was aware of the irregularities so it happened
19 the year before, maybe out of the abundance of caution he
20 would at least give me that and, you know, lightning never
21 strikes the same place twice would we get a more colorful
22 venire the next time. That was my hope.

23 Q. And regardless you were one-hundred percent ready for
24 trial, correct?

25 A. Oh, yeah. I mean there's notes in the file where I

MINDY LIPINSKI: CROSS BY MR. HUNTER

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1 have cross-examination questions and opening was written
2 out.

3 Q. Okay. And just to go over again the, I guess, the
4 issue with the drugs that were packaged. At the end of the
5 day did you not see that as something you should object to,
6 I guess, had it gone to trial?

7 A. I think they got to the point we were putting the
8 drugs into evidence, yes. I don't think we ever really got
9 there. Judge Hayes -- I -- I've been doing this almost
10 twenty years now, I've been in this circuit for roughly ten
11 of that; I've seen broken chain and things like that. I
12 didn't have that. I mean I think their explanation was
13 going to be exactly what it was was that we put two bags in
14 one greater heat-sealed bag. And I've seen them do that
15 before.

16 And when you look at the photos I took you can see
17 very clearly there's two plastic bags within the bigger bag
18 and one is labeled B 1 and one is labeled B 2, and I felt
19 that was gonna be what we were gonna get, I didn't really
20 feel that I had a legal basis to object to their
21 admissibility. I felt that it was fodder for cross-
22 examination; that it was poor record keeping; that it was
23 haphazard law enforcement; it was cutting corners, it was
24 lack of accuracy; that it begged for, you know, problems or
25 issues. But at the ultimate day kind of what they weighed

MINDY LIPINSKI: CROSS BY MR. HUNTER

1 on the scene was very close to what it weighed out by the
2 chemist. I mean I was even gonna attack the chemist
3 because the chemist writes Item 1 is -- and I don't
4 remember the exact number but, you know, twenty point
5 something grams of cocaine. I even felt as a chemist who
6 writes on both bags of her own initials, you know, B 1 and
7 B 2, that she should have in her drug report written bag
8 one is fourteen, bag two is seven and that's how we get to
9 the big number and that, her, not doing that I thought was
10 something we could may hay of.

11 But again, it was the weight of the evidence more so
12 than the admissibility of the evidence. But we probably
13 would have objected just to, you know, once we got to that
14 point in the trial. I didn't think it was a pretrial
15 ruling motion as suppress motion.

16 Q. Okay. So basically you had no problem with him
17 pleading guilty that day even given that issue?

18 A. Yes, I didn't have any problem.

19 Q. Okay.

20 MR. HUNTER: Beg the court's indulgence for one
21 second.

22 That's all I have. Thank you.

23 MR. THOMAS: Your Honor, may it please the court.

24 Just two questions.

25 THE COURT: Go ahead.

MINDY LIPINSKI: REDIRECT BY MR. THOMAS

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REDIRECT EXAMINATION

MINDY LIPINSKI BY MR. THOMAS:

Q. You were talking about, I guess, and then you said on cross about the defendant's whether or not they would say something in, I guess, stand up to Commander Brown. Is he -- He's a fairly powerful person?

A. He is well known throughout the community as the guy who is in control of our narcotics officers.

Q. All right.

A. He's well known to control deals, he's well known to control new works, he's well known to control any aspect of narcotic investigation prosecution in York County and more so than any other county in the state because whereas every other narcotics officer commander works for some member of law enforcement he works for Solicitor Brackett.

Solicitor Brackett signs his pay check. He travels with the solicitor. He socializes with the solicitor.

It's a unique relationship and that is something that is widely known in Rock Hill in particular but county wide certainly if you've ever kind of come into contact with a drug investigation.

Q. So he is the commander. What does that mean? Is that a rank or what?

A. It's a position they created so every law enforcement agency in York County based on -- I don't know if it's

MINDY LIPINSKI: REDIRECT BY MR. THOMAS

1 based on per capita or based on per officer -- has an
2 obligation to provide Commander Brown with a certain number
3 of man power. And for York County Sheriff's Office in Rock
4 Hill that's literally full time bodies. Some of the lesser
5 municipalities like Tega Cay or Fort Mill or Winthrop have
6 our quotas so their people like give him like twenty hours
7 a week or forty hours in a month and those kind of things
8 to work at his direction in law enforcement.

9 And the idea is good; it's that you know drugs don't
10 stay in Rock Hill in York County so there needs to be this
11 kind of greater over-sight of drug trafficking and drug
12 possession in the county and let's bring it all under one
13 umbrella. I've seen it in other counties where they put
14 'em -- I think Greenville at one point had one working for
15 -- there's a separate agency called the Department of
16 Public Safety that runs the jail forensics and they had a
17 couple of over-sight drug officers.

18 Here they work for the solicitor's office. So he is
19 known as Commander Brown, there are people who know that on
20 the street; people know what he looks like. I mean I think
21 he's been in law enforcement upwards of over thirty years
22 the last time I ask him how much experience he had. And as
23 I said my recollection is that he had some kind of
24 relationship with Demario's mom. I don't think criminal
25 relationship. He's known in the community for some good

MINDY LIPINSKI: REDIRECT BY MR. THOMAS

1 things that he does with the Boys and Girls Club and those
2 kind of things and, you know, went to school with people
3 and coached some kid, you know, in little league or things
4 like that. It doesn't all have to be criminal.

5 Q. All right. And I -- Basically is it your testimony
6 that you felt like that the motion in regards to
7 suppression of the drugs caused the chain problems, or
8 whatever, was more prudent to do in trial rather than
9 pretrial?

10 A. Yes.

11 Q. Okay. All right.

12 MR. THOMAS: Your Honor, I have no further questions.

13 MR. HUNTER: Nothing else, your Honor.

14 THE COURT: All right, you may come down, ma'am.

15 MS. LIPINSKI: Thank you, your Honor.

16 (WITNESS LEAVES WITNESS STAND.)

17 MR. THOMAS: Your Honor, may I beg the court's
18 indulgence just for one second?

19 THE COURT: Okay.

20 MR. THOMAS: Your Honor, if it please the court, we
21 have one other short witness.

22 THE COURT: All right.

23 MR. THOMAS: Your Honor, we call Mr. Cunningham's
24 brother to the stand.

25 MADAM CLERK: Sir, if I can have you step forward here

JAMES CUNNINGHAM: DIRECT BY MR. THOMAS.

1 to be sworn. Place your left hand on the Bible and raise
2 your right.

3 (WHEREUPON, JAMES CUNNINGHAM,
4 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

5 MADAM CLERK: Thank you. Have a seat and watch your
6 step up there.

7 MR. THOMAS: May it please the court.

8 DIRECT EXAMINATION

9 JAMES CUNNINGHAM BY MR. THOMAS:

10 Q. Would you please state your full name for the record?

11 A. Yeah. My name is James Cunningham.

12 Q. James Cunningham. James, you are related how to
13 Demario?

14 A. His brother.

15 Q. And you understand that you are under oath to tell
16 the truth?

17 A. Yes, sir.

18 Q. And you intend to tell the truth today?

19 A. Yes, sir.

20 Q. All right, sir. I wanted to ask you, there was
21 testimony by your brother in regards to you calling
22 the public defender's office about a possible appeal.

23 A. Yes, sir, I called numerous times and left voice mails
24 for to get his appeal started. I never got no response
25 back ---

JAMES CUNNINGHAM: DIRECT BY MR. THOMAS

1 Q. All right, sir.

2 A. --- telling 'em to write.

3 Q. But you personally called about the appeal?

4 A. Yes, sir.

5 Q. All right. And did anyone ever get back with you?

6 A. No, sir.

7 Q. All right.

8 MR. THOMAS: Your Honor, I have no further questions.

9 A. I'd like to make another statement. When he was
10 going to trial she had came and got me and my step-pops. I

11 had to make him take that guilty plea because they was
12 telling me that it was thirty years or he was going to
13 trial take the eight years or thirty years going to trial.

14 Q. So you --

15 A. So I had to come out here. They came and got me from
16 outside to talk to him cause he wasn't gonna take the plea.

17 Q. All right. And you --

18 A. I had to talk him into taking the plea.

19 MR. THOMAS: Thank you, your Honor.

20 Keep your seat.

21 THE COURT: Do you have any questions.

22 MR. HUNTER: Just real quick, just a couple of
23 questions.

24 CROSS-EXAMINATION

25 JAMES CUNNINGHAM BY MR. HUNTER:

JAMES CUNNINGHAM: CROSS BY MR. HUNTER

1 Q. You called the public defender's office?

2 A. Yeah.

3 Q. Did you know Ms. Lipinski's name?

4 A. Yes, cause I talked to her and the investigator when
5 they came and got me to talk him into taking the plea.

6 Q. Okay. And you were never able to speak to a person,
7 just voice mails?

8 A. No, I talked to the secretary. She sent me to the
9 office and I got the voice mail and I left a message.

10 MR. HUNTER: That's all I have. Thank you.

11 (WITNESS LEAVES WITNESS STAND.)

12 MR. THOMAS: Your Honor, if it please the court,
13 that's the Applicant's case.

14 THE COURT: And the State?

15 MR. HUNTER: The State has no witnesses, your Honor.

16 THE COURT: All right. Thank you very much.

17 Thirty days?

18 MR. THOMAS: Yes, your Honor, that's fine.

19 MR. HUNTER: Yes, sir.

20 THE COURT: Anybody care to make closing arguments?

21 MR. THOMAS: Your Honor, I normally don't because it's
22 not in front of a jury but I would like just to say one
23 thing if it pleases the court.

24 THE COURT: Yes, sir.

25 MR. THOMAS: This case is a little bit unusual. I

1 mean I'm not gonna address the post-conviction relief
2 issues because I think the Court certainly understands
3 those.

4 The issue about the -- We would also ask for a belated
5 appeal. I do believe that there are viable issues that --

6 THE COURT: I wondered about that.

7 MR. THOMAS: Yes, sir. That were preserved and I do
8 believe that there was an attempt to appeal this and I do
9 believe that this would certainly not be a friverlous
10 appeal.

11 THE COURT: All right. What's the State's position?

12 MR. HUNTER: Your Honor, just on that issue.

13 At the end of the day this was a negotiated plea and
14 by pleading guilty he waives evidentiary issues so the
15 State does not believe that it would be successful anyway.

16 THE COURT: All right. Thank you very much.

17 Thirty days?

18 MR. HUNTER: Yes, sir.

19 THE COURT: Thank you very much.

20 MR. THOMAS: Yes, sir.

21 THE COURT: Let's take a ten minute break.

22 (COURT IN RECESS AT 12:04 PM.)
23
24
25

CERTIFICATE OF REPORTER

State of South Carolina)
)
County of York)

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for 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 York County, South Carolina, on the 18th day of April, 2017.

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

Wanda Nelson
Wanda Nelson, CVR-M
Certified Verbatim Reporter,
Official Court Reporter,
Notary Public, in and for
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE: 7-18 / 2017

COUNTY OF YORK
STATE VS.

DEMARIO JAMEL CUNNINGHAM

AKA: Demario Cunningham, Mario Cunningham

Race: Black Sex: M Age: 30

DOB: 1985 SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip: Rock Hill, SC 29730

DL# [REDACTED] SID# SC01386645

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Trafficking Cocaine 10g but <28g 2nd Offense

In violation of § 44-53-370(e) of the S.C. Code of Laws, bearing CDR Code # 0387

INDICTMENT/CASE#: 2015GS4601542
A/W: 2014A4610201947
Date of Offense: 11/26/2014
S.C. Code §: 44-53-370(e)
CDR Code #: 0387SENTENCE SHEET
ORIGINAL☐ CONVICTED OF or ☒ PLEADS☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45(CSC w/minor 1st or Lewd Act)The charge is: ☒ As indicted, ☐ Lesser Included Offense,☐ Defendant Waives Presentment to Grand Jury. (def.'s initials)The plea is: ☐ Without Negotiations or Recommendation,☐ Negotiated Sentence, ☒ Recommendation by the State.

ATTEST:

Leslie D. Robinson, Assistant Solicitor SC Bar # 80151

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center,
for a determinate term of 10.9 days/months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for
months/years and subject to South Carolina Department of Probation, Parole and Pardon Service standard conditions of probation, which
are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: 279 days☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. 279 days☒ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives HearingTotal: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDPPPS Recipient: *Fine: \$ §14-1-206 (Assessments 107.5%) \$ §14-1-211 (A)(1)(Conv. Surcharge) \$100 \$ 100.00§14-1-211 (A)(2)(DUI Surcharge) \$100 \$ §56-5-2995 (DUI Assessment) \$12 \$ §56-1-286 (DUI Breath Test) \$25 \$ Proviso 47.9 (Public Def/Prob) \$500 \$ §14-1-212 (Law Enforce. Funding) \$25 \$ 25.00§14-1-213 (Drug Court Surcharge) \$150 \$ 150.00§50-21-114 (BUI Breath Test Fee) \$50 \$ §56-5-2942(J) (Vehicle Assessment) \$40/ea \$ Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.003rd County (if paid in installments) \$ AL \$ 280.00

David Hamilton

Clerk of Court/Deputy Clerk:
Court Reporter: Wanda Nelson
SCCA/217 (03/2011)☐ Ordered PTUP
days/hours Public Service EmploymentObtain GED ☐Attend Voc. Rehab. Or Job Corp. May serve W/E beginning Substance Abuse Counseling ☐Random Drug/Alcohol Testing ☐

Fine may be pd. in equal consecutive weekly/monthly

pmts. of \$ Beginning \$ Paid to Public Defender FundOther: ☐ Appointed PD or appointed other counsel,
§47.12 requires \$500 be paid to Clerk
during probation.Presiding Judge: John Hays
Judge Bar ID: 2061 Judge Code: 2049
Sentence Date: 12-16

ARREST WARRANT

2014A4610201947

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

York.

THE STATE

2014-38403

against

Demario Jamel Cunningham

Address:

Rock Hill, SC 29730-

Phone: SSN: [REDACTED]

Sex: M Race: B Height: 6 1 Weight: 275

DL State: SC DL #: [REDACTED]

DOB: 1985 Agency ORI #: SC0460000

Prosecuting Agency: York County Sheriff

Prosecuting Officer: W R Gibson - G0072

Offense: Drugs / Trafficking in cocaine, 10 g or more, but less than 28 g - 2nd offense

Offense Code: 0387

Code/Ordinance Sec: 44-53-0370(e)(2)(a)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 11/26/14
on Demario Jamel CunninghamD.H. Clewinger
Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

York County General Sessions
1675 York Hwy
York, SC 29745

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

York

AFFIDAVIT

ORIGINAL

Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 515

Personally appeared before me the affiant W R Gibson who

being duly sworn deposes and says that defendant Demario Jamel Cunningham
did within this county and state on or about 11/26/2014 violate the criminal laws of theState of South Carolina (or ordinance of ☒ County/ ☐ Municipality of York)
in the following particulars:

DESCRIPTION OF OFFENSE: Drugs / Trafficking in cocaine, 10 g or more, but less than 28 g - 2nd 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:The defendant did willfully and unlawfully violate SC Drug Laws by having in his possession approximately 22 grams of cocaine.
The defendant also had in his possession packaging materials and a digital scale. This incident occurred at 460 Castlewood Circle
Rock Hill, County of York, South Carolina.

**Police Investigation

**Recovery of Evidence (appx. 22 grams of cocaine)

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

York

Affiant's Address Moss Justice Center

York, SC 00000-000

Affiant's Telephone (803)628-3059

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 11/26/2014 defendant Demario Jamel Cunningham

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of York) as set forth below:

DESCRIPTION OF OFFENSE: Drugs / Trafficking in cocaine, 10 g or more, but less than 28 g - 2nd 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 11/26/2014

Signature of Issuing Judge

Norman Richard Watkins Jr.

Judge Code: 7054

(L.S.)

Judge's Address Moss Justice Center

York, SC 29745-7423

Judge's Telephone (803)628-3095

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

COUNTY OF YORK
STATE VS.

DEMARIO JAMEL CUNNINGHAM

AKA: Demario Cunningham, Mario Cunningham

Race: Black Sex: M Age: 30

DOB: 11/26/1985 SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip: Rock Hill, SC 29730

DL# [REDACTED] SID# SC01386645

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

☐ CONVICTED OF or☒ PLEADS

TO: Possession Of A Weapon During The Commission Of A Violent Crime

In violation of § 16-23-0490 of the S.C. Code of Laws, bearing CDR Code # 0549

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45(CSC w/minor 1st or Lewd Act)The charge is: ☒ As indicted, ☐ Lesser Included Offense,☐ Defendant Waives Presentment to Grand Jury. (def.'s initials)The plea is: ☐ Without Negotiations or Recommendation,☐ Negotiated Sentence, ☒ Recommendation by the State.

ATTEST:

Leslie D. Robinson, Assistant Solicitor SC Bar # 80151

Defendant

Attorney for Defendant SC Bar # 14704

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center, for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Service standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 1/12/16☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. 279 days☒ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives HearingTotal: \$ plus 20% fee: \$ Payment Terms: ☐ Ordered PTUP days/hours Public Service EmploymentObtain GED ☐☐ Set by SCDPPPS Recipient: *Fine: \$ §14-1-206 (Assessments 107.5%) \$ §14-1-211 (A)(1)(Conv. Surcharge) \$100 \$ 100.00§14-1-211 (A)(2)(DUI Surcharge) \$100 \$ §56-5-2995 (DUI Assessment) \$12 \$ §56-1-286 (DUI Breath Test) \$25 \$ Proviso 47.9 (Public Def/Prob) \$500 \$ §14-1-212 (Law Enforce. Funding) \$25 \$ 25.00§14-1-213 (Drug Court Surcharge) \$150 \$ §50-21-114 (BUI Breath Test Fee) \$50 \$ §56-5-2942(J) (Vehicle Assessment) \$40/ea \$ Proviso 90.5 (SCJA Surcharge) \$5 \$ 5.00? County (if paid in installments) \$ JAL \$ 130.00

Clerk of Court/Deputy Clerk: David Hamilton

Court Reporter: Wanda Nelson

SCCA/217 (03/2011)

00201

INDICTMENT/CASE#: 2015GS4601542A

A/W: 2014A4610201946

Date of Offense: 11/26/2014

S.C. Code §: 16-23-0490

CDR Code #: 0549

SENTENCE SHEET

#2

Presiding Judge: John H. TaylorJudge Bar ID: 2267Sentence Date: 1-12-16Judge Code: 2049

ARREST WARRANT

2014A4610201946

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

York

THE STATE
against

2014-38403

Demario Jamel Cunningham

Address:

Rock Hill, SC 29730-

Phone: SSN: [REDACTED]

Sex: M Race: B Height: 6' 1" Weight: 275

DL State: SC DL #: [REDACTED]

DOB: [REDACTED] 1985 Agency ORI #: SC0460000

Prosecuting Agency: York County Sheriff

Prosecuting Officer: W R Gibson - G0072

Offense: Weapons / Possession of weapon during violent
crime, if not also sentenced to life without parole

Offense Code: 0549

Code/Ordinance/Sec: 16-23-0490

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality ofThe 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 11/26/14

on Demario Jamel Cunningham

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

York County General Sessions
1675 York Hwy
York, SC 29745

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

York

Personally appeared before me the affiant W R Gibson who

being duly sworn, deposes and says that defendant Demario Jamel Cunningham

did within this county and state on or about 11/26/2014 violate the criminal laws of the

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of York)

in the following particulars:

DESCRIPTION OF OFFENSE: Weapons / Possession of weapon during violent crime, if not also sentenced to life without parole or
deathI 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:The defendant did willfully and unlawfully violate SC Guns Laws by having in his possession a 9mm Secy Industries Model CPX-1
(serial#029779) pistol while trafficking approximately 22 grams of cocaine, which is a violent crime. This incident occurred at 460
Castlewood Circle Rock Hill, County of York, South Carolina.

**Police Investigation

**Recovery of Evidence: 9mm Secy Industries Model CPX-1 (serial#029779)

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

York

Affiant's Address Moss Justice Center

York, SC 00000-000

Affiant's Telephone (803)628-3059

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 11/26/2014 defendant Demario Jamel Cunningham

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of York) as set forth below:DESCRIPTION OF OFFENSE: Weapons / Possession of weapon during violent crime, if not also sentenced to life without parole or
deathHaving 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 11/26/2014

Signature of Issuing Judge (L.S.)

Norman Richard Watkins Jr.

Judge Code: 7054

Judge's Address Moss Justice Center

York, SC 29745-7423

Judge's Telephone (803)628-3095

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 518

AFFIDAVIT

DAVID HATHORN
CLERK OF COURTS
YORK COUNTY
YORK, SOUTH CAROLINA2016 JUN 24 10:08:03 AM
2014 DEC 12 12:10 PM

PCX

FILED - RECEIVED

00203
WITNESSES

DEU / Vinesett

ARREST WARRANT NUMBER

COUNT ONE 2014A4610201947
COUNT TWO 2014A4610201946

ACTION OF GRAND JURY

TRUE BILL

Shiley Sanders
Foreperson of Grand Jury
Date: 5/14/15

VERDICT

Foreperson of Grand Jury
Date:

DOCKET NO: 2015-GS-46-01542
2015-GS-46-01542 A

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

MAY 14, TERM 2015

THE STATE

VS.

DEMARIO JAMEL CUNNINGHAM

INDICTMENT FOR

COUNT ONE - TRAFFICKING COCAINE

SC Code: § 44-53-370(e)
CDR Code: 0387

COUNT TWO - POSSESSION OF A
WEAPON DURING THE COMMISSION OF
A VIOLENT CRIME

SC Code: § 16-23-490
CDR Code: 0549

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead guilty to the within indictment or to

[Signature]
Defendant

Witness:

[Signature] - At. Spec.
C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA
COUNTY OF YORK

CERTIFIED TRUE COPY INDICTMENT
2015 JUN 24 AM 8:34

DAVID HAMILTON
CLERK OF COURT

At a Court of General Sessions, convened on May 14, 2015, the Grand Jurors of York County present upon their oath:

COUNT ONE - TRAFFICKING COCAINE

The defendant, Demario Jamel Cunningham, did on or about November 26, 2014, in York County, South Carolina, knowingly sell, manufacture, cultivate, deliver, purchase, or bring into this State, or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive possession of ten (10) grams or more of Cocaine or any mixtures containing cocaine, as provided in 44-53-210(b)(4). All in violation of 44-53-370(e), *South Carolina Code of Laws* (1976, as amended).

COUNT TWO - POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME

The defendant, Demario Jamel Cunningham, did on or about November 26, 2014, in York County, South Carolina, while committing the violent crime of trafficking cocaine, possess a handgun. All in violation of 16-23-0490, *South Carolina Code of Laws* (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



LESLIE D. ROBINSON
ASSISTANT SOLICITOR

2016CP4601915

00205

STATE OF SOUTH CAROLINA
COUNTY OF

FILED - RECEIVED
2016 JUN 23 PM 1:00
CLOCK IN TIME
CANCELLED
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

FILED - RECEIVED
2016 JUN 23 PM 2:15
CLOCK IN TIME
CANCELLED
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC
CERTIFIED TRUE COPY
2016 JUN 23 PM 4:08

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

Demario Cunningham #296848

State of South Carolina

APPLICATION FOR
POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make 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 *Wateree River C.I. S.C.D.C.*
2. Name and location of Court which imposed sentence *York County, South Carolina*
3. Name(s) of co-defendant(s) (if any) *N/A*
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) *15-GS-46-01542*
 - (b) *15-GS-46-01542A*
 - (c) *—*
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) *1/12/16*
 - (b) *8 yrs. & 5 yrs*

FILED - RECEIVED
2016 JUN 23 PM 2:15
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC
Revised 2003

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty ~~12~~ _____
- (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?
~~no~~ ~~yes~~ yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. ~~State of New York Court of Appeals~~ _____
- ii. York County _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. ~~Still pending~~ Still pending _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. ~~Still pending~~ Still pending _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: Illegal search & procedure, forced into a plea as stated on the sentencing sheet, Sentenced with no provable cause, tampering with evidence, conflict of interest, railroaded, racial profiling, unlawfull arrest, false arrest

- (a) Forced into a plea
 (b) Tampering with evidence
 (c) Prosecuted without probable cause

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

(a) See Attached Sheets

(b) _____

(c) _____

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

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

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

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

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

~~Yes~~ No

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

(a) which grounds have been presented:

i. ~~Change of attorney for the pending case~~

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) Because my Attorney was failing to prepare for my defense(b) Because my attorney was failing to prepare for my defence(c) Because my attorney was failing to prepare for my defence in which I contacted her supervisor B.J. Barclaw and filed a complaint.

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

Answer for Question 11A.b.c.

(A) Forced into a plea as stated on the sentencing sheet that the judge also observed before signing off on the sentencing sheet.

(B) As you observe, the photos of the alleged substance that was taken on the ^{scene} of the arrest, that the picture clearly was 2 baggies, but was able to change description and do totally different packaging before making it to the police station. As you observe, the arrest warrant and lab report to the trafficking charge that the was not preserved and changed description to only one single unit, and with no indication as to how and what it was changed and appeared in a different packaging, which was observed, confirmed, and verified by the Sheriff's office within a short 6 or 7 minute drive to the police station, that the evidence one hundred percent had been changed.

(C) Sentenced without probable cause on account not being guilty of the charge that probable cause was based on, which was the distribution of cocaine^{2nd}, in which the solicitor ruled out any drugs or any drug activity was present in the audio and video, where she dismissed the charge due to no crime ever being committed on the charge that I was accused of, and probable cause was based on.

(D) Conflict of interest due to the judge failing to dismiss irrelevant witness in trial, due to every witness making a statement stating that they "do not remember, can't say, or don't know exactly" what was said at the scene.

Continue for Question 11, C

00210

in the pre-trial. So, the judge took what the witness's was assuming and guessing and made the determination that what the witness's was saying was statements, when they deliberately all stated that they "don't know exactly, don't remember and can't say what was said." And the judge still keep them as witness's when they stated themselves that they was irrelevant to testifying or remembering anything that was said on the scene through their own statements at pre-trial, which led me to believe that the trial was not going to be fair, for a Black man in front of an all white jury, because it gave me the impression that the judge was to try to use the irrelevant witness that he failed to dismiss, to help influence the jury in hope to railroad me. And also for that unfairness and unlawfulness, I would like to file for a change of venue.

- (a) your arraignment and plea? yes
 (b) your trial, if any? yes
 (c) your sentencing? yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? no
 (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. Mindy Lipinski, 1675 York Highway, York, SC 29745
 ii. _____
 iii. _____
 (b) the proceedings at which each such attorney represented you:
 i. Arraignment, ~~plea~~
 ii. preliminary hearing
 iii. trial, plea

19. State clearly the relief you seek in filing this application:
Overturned/dismissed/appealed/re-trialed/change of venue

20. Are you now under sentence from any other court that you have not challenged?
no

STATE OF SOUTH CAROLINA

VERIFICATION

County of

I, _____, 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.

SWORN to and subscribed before me this 31st
day of May, 2016.

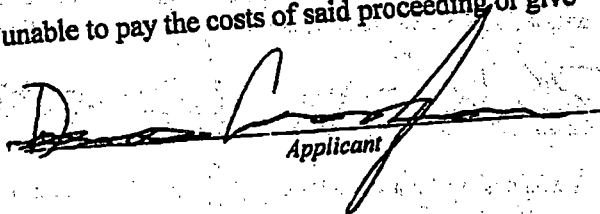
Phenece H. Barber (L.S.)
Notary Public

My Commission Expires: May 13, 2024

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

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

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


Applicant

SWORN or affirmed to and subscribed before me this
31st day of May, 2016.


Notary Public

My Commission Expires: May 13, 2024

COUNTY OF YORK
STATE VS.

DEMARIO JAMEL CUNNINGHAM

AKA: Demario Cunningham, Mario Cunningham

Race: Black Sex: M Age: 30

DOB: 1985 SS: [REDACTED]

Address:

City, State, Zip: Rock Hill, SC 29730

DL# [REDACTED] SID# SC01386645

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Trafficking Cocaine 10g but <28g 2nd Offense YORK COUNTY SC

In violation of § 44-53-370(e) of the S.C. Code of Laws, bearing CDR Code # 0387

INDICTMENT/CASE#: 2015GS4601542
A/W: 2014AA610201947
Date of Offense: 11/26/2014
S.C. Code §: 44-53-370(e)
CDR Code #: 0387SENTENCE SHEET
ORIGINAL☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45
(CSC w/minor 1st or Lewd Act)The charge is: ☒ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (def's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.

ATTEST:

Leslie D. Robinson, Assistant Solicitor SC Bar # 80151

Defendant

Attorney for Defendant SC Bar # 14704

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center, for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Service standard conditions of probation, which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. 279 days☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Ordered PTUP

_____ days/hours Public Service Employment

Obtain GED ☐☐ Set by SCDPPPS _____

Attend Voc. Rehab. Or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol Testing ☐

Fine may be pd. in equal consecutive weekly/monthly

pmts. of \$ _____ Beginning _____

\$ _____ Paid to Public Defender Fund

Other: _____

Recipient: _____

*Fine: \$ _____

§14-1-206 (Assessments 107.5%) \$ _____

§14-1-211 (A)(1)(Conv. Surcharge) \$100 \$ 100.00

§14-1-211 (A)(2)(DUI Surcharge) \$100 \$ _____

§56-5-2995 (DUI Assessment) \$12 \$ _____

§56-1-286 (DUI Breath Test) \$25 \$ _____

Proviso 47.9 (Public Def/Prob) \$500 \$ _____

§14-1-212 (Law Enforce. Funding) \$25 \$ 25.00

§14-1-213 (Drug Court Surcharge) \$150 \$ 150.00

§50-21-114 (BUI Breath Test Fee) \$50 \$ _____

§56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.00

3% to County (if paid in installments) \$ \$ _____

TOTAL \$ 282.00

☐ Appointed PD or appointed other counsel,

§47.12 requires \$500 be paid to Clerk

during probation

Clerk of Court/Deputy Clerk: _____

Court Reporter: Wanda Nelson

SCCA/217 (03/2011)

David Hamilton

Presiding Judge: _____

Judge Bar ID: _____

Sentence Date: _____

Judge Code: 2049

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
OF THE SIXTEENTH JUDICIAL CIRCUIT

COUNTY OF YORK)

2016-CP-46-1915

Demario Cunningham,
S.C.D.C. No. 296848,)

Applicant,)

RETURN

v.)

State of South Carolina,)

Respondent.)

Respondent, making its Return to the application for post-conviction relief (PCR) filed June 23, 2016, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the May 2015 term of the York County Grand Jury for trafficking cocaine (2015-GS-46-1542) and possession of a weapon during the commission of a violent crime (2015-GS-46-1542A). Applicant was represented by Mindy Lipinski, Esquire. On January 11, 2016, Applicant began a trial before the Honorable John C. Hayes, III. On January 12, 2016, Applicant pled guilty as indicted. Pursuant to a recommendation, Judge Hayes sentenced Applicant to imprisonment for eight years for trafficking cocaine and five years for the weapons charge.

Applicant did not file a notice of appeal.

II.

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

1. "Illegal search and procedure, forced into a plea as stated on the sentencing sheet, sentenced with no probable cause, tampering with evidence, conflict of interest, railroaded, racial profiling, unlawful arrest, false arrest."
2. "Forced into plea"
3. "Tampering with evidence"
4. "Prosecuted without probable cause"

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at evidentiary hearing. All amendments should be made well in advance of hearing and should be filed as required by Rule 11, SCRCP(a).

Attached herewith and incorporated herein are the York County Clerk of Court records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the trial transcript. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent construes Applicant's application to allege that his plea counsel was ineffective. Respondent submits plea counsel rendered effective assistance of counsel. In a Post-Conviction Relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent construes Applicant's application to allege that his guilty plea was not voluntarily made. Respondent submits that this allegation is without merit. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant 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 defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

Respondent submits that the record fully supports the knowing and voluntary nature of Applicant's plea. However, allegations regarding ineffective assistance of counsel and the voluntariness of the plea may raise a question of fact which is not conclusively refuted by the record. Accordingly, Respondent requests an evidentiary hearing on this allegation. Sharper v. State, 305 S.E.2d 247.

[Signature block on following page]

V.

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

VI.

WHEREFORE, Respondent requests an evidentiary hearing for the purpose of determining whether the Applicant's counsel was ineffective.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

& JUSTIN J. HUNTER
Assistant Attorney General

By: PLS
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

November 9, 2016

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

2016-CP-46-1915

DEMARIO CUNNINGHAM, #296848

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

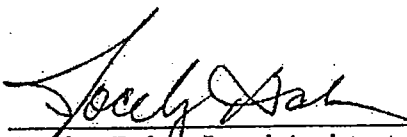
STATE OF SOUTH CAROLINA,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
PO Box 1015
Rock Hill, SC 29731-7015

DATED this 9th day of November, 2016.


Jocelyn Baker, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Demario Cunningham,
S.C.D.C. No. 296848,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
OF THE SIXTEENTH JUDICIAL CIRCUIT

2016-CP-46-1915

ORDER OF DISMISSALFILED-RECEIVED
2017 JUL -3 PM 3:38
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed June 23, 2016. An evidentiary hearing into the matter was convened on Tuesday, April 18, 2017, at the Moss Justice Center in York, South Carolina before the Honorable G. Thomas Cooper, Jr. Applicant was present at the hearing and represented by Tommy Thomas, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Mindy Lipinski, Esquire, and James Cunningham also testified. This Court also had before it a copy of the records of the York County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Respondent's Return, and the plea transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the May 2015 term of the York County Grand Jury for trafficking cocaine (2015-GS-46-1542) and possession of a weapon during the commission of a violent crime (2015-GS-46-1542A). Applicant was represented by Mindy Lipinski, Esquire. On January 11, 2016, Applicant began a

trial before the Honorable John C. Hayes, III. On January 12, 2016, Applicant pled guilty as indicted. Pursuant to a recommendation, Judge Hayes sentenced Applicant to imprisonment for eight years for trafficking cocaine and five years for the weapons charge. Applicant did not file a notice of appeal.

Allegations

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

1. "Illegal search and procedure, forced into a plea as stated on the sentencing sheet, sentenced with no probable cause, tampering with evidence, conflict of interest, railroaded, racial profiling, unlawful arrest, false arrest."
2. "Forced into plea"
3. "Tampering with evidence"
4. "Prosecuted without probable cause"

II. SUMMARY OF EVIDENCE PRESENTED AT PCR HEARING

Applicant's Testimony

Applicant testified that his education level is around a fourth or fifth grade and he does not have a GED. He testified that he was in special education classes growing up but understands the PCR hearing and the risk of proceeding with his PCR. He testified that he met with Counsel numerous times, discussed the evidence and gave his side of the story. Applicant testified that he wanted a trial. He testified that Counsel said he had a non-violent plea offer but did not know how many years it carried. He testified that he turned down the original offer for trafficking, first offense, for seven years.

Applicant testified that he did not know why he was placed under arrest and that law enforcement officers took him to his mother's house and searched the house, eventually finding drugs. He testified that the description of the drugs had changed because the arrest warrant said



one bag of drugs but SLED showed two bags. Applicant testified that he never gave a written statement to law enforcement

Applicant testified that he had issues with the search warrant because it was based on a prior charge that was dropped. He was also concerned because Counsel was unable to see the buy video that eventually led to his arrest.

Applicant testified that he pled guilty because an all-white jury would find him guilty. He testified that he did not plead freely, voluntarily, knowingly, or intelligently. Applicant further testified that he did not know all of the facts of the case. Applicant testified that he did not admit to the plea judge that the cocaine and gun were his. He also testified that he did not tell the judge that he was pleading freely and voluntarily.

Applicant testified that he wanted to appeal his case and his brother left messages for Counsel. He testified that he filed for an appeal but did not hear anything about it and wrote to the clerk for information.

Counsel Mindy Lipinski's Testimony

Counsel testified that she was appointed as Applicant's attorney. She testified that the initial plea offer was for a seven-year sentence. She testified that Applicant was fixated on an evidentiary issue because the evidence form noted one bag of cocaine but the drawer in the house showed two bags. She testified that Applicant believed this was proof that the police planted the drugs. Counsel testified that she viewed the evidence and it appeared to show two bags that were placed in one together. She testified that she believed this was probably careless recordkeeping but not evidence contamination by the police. Counsel further testified that the labelling on the evidence bag shows two bags of cocaine within it and she did not think that this would be a good

ER 3

argument at trial. She testified that she had no legal basis to challenge the admissibility of the cocaine.

Counsel testified that she was aware Applicant had been evaluated for mental competency in the past and that he was previously found not competent. She testified that although he was better on medication, she did not have trouble with Applicant understanding his case. She testified that Applicant showed serious involvement in his case including communicating with SLED about his evidence. Counsel testified that she did challenge Applicant's competency pretrial.

Counsel testified that she made a pretrial motion for a continuance because of an issue about the jury pool since no African American men were present for the pool.

Counsel testified that a Jackson v. Denno hearing was held on three of Applicant's statements. She testified that she objected to the statements coming in on the basis of Applicant not understanding his Miranda rights and that Applicant informed her that the statement was an inexact paraphrase of his words. Counsel testified that Applicant would have signed a written statement but law enforcement did not let him. She testified that her motion to suppress the statements was eventually denied.

Counsel testified that she raised an issue with the search warrant. She testified that she wanted access to view the buy video that led to the search warrant to see if the search warrant was justified. She testified that the State eventually dropped the distribution charge that stemmed from the buy video. Counsel testified that the plea judge ruled against her regarding the search warrant issue.

Counsel testified that Applicant was never offered a non-violent plea. She testified that Applicant turned down a fourteen-year plea and was then offered a cap of ten years. She testified

that she gave Applicant time to talk to his family and that he ultimately made the decision to plead. She testified that she did not pressure him to plead but told him that Judge Hayes would probably give him ten to fifteen years after trial based on the evidence.

Counsel testified that she told Applicant he would have ten days to file an appeal and this was also written on the plea waiver form. She testified that she did not recall him ever asking to appeal and told him that all he had to do was call her office to get an appeal filed. She testified that she was never made aware that Applicant called her office.

James Cunningham's Testimony

Applicant's brother, James Cunningham, testified. He testified that after the plea hearing, he called the public defender's office numerous times to ask about an appeal and left voicemails, but no one returned his calls. He testified that he assisted in telling Applicant to plead guilty.

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

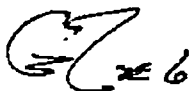
The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

IV. 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 Clerk of Court records regarding the subject convictions, the guilty plea transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

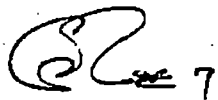


Ineffective Assistance of Counsel

Applicant alleges Counsel was ineffective regarding his guilty plea. This Court finds that Applicant failed to meet his burden of proving that his plea counsel was ineffective. This Court finds Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813.

An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969).

This Court finds that Counsel's actions were not deficient in her representation. This Court finds that Counsel properly made a motion to suppress the statements pursuant to Jackson v. Denno and argued on behalf of Applicant. This Court also finds, and the record reflects, that Counsel challenged the search warrant and her ability to see the buy video. This Court further finds that Counsel also moved for a continuance and argued on behalf of Applicant as there were no African American men in the jury pool.

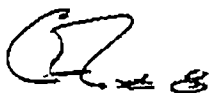


This Court finds that Counsel negotiated on Applicant's behalf and relayed all plea offers, including the final offer of a cap of ten years. This Court finds that Counsel was not deficient in relaying the plea offer and did not force or coerce Applicant into pleading guilty.

This Court finds Applicant has failed to satisfy his burden of proving that he did not knowingly and intelligently waive his right to appeal his plea. Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470 (2000). 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, 670 S.E.2d 373, (2008).

The record and testimony of Counsel and Applicant demonstrate that Applicant accepted an offer to plead guilty with a recommended sentence of a cap of ten years of active time. This Court finds Applicant failed to prove by a preponderance of the evidence that he was not advised of the right to appeal. In addition, Applicant failed to prove he reasonably demonstrated to Counsel he was interested in timely appealing, or that there was reason to think a rational defendant would want to appeal. Counsel credibly testified that Applicant did not ask her to appeal. Further, there is no indication in the record Applicant had any basis to appeal from his guilty plea. Accordingly, Applicant's requested relief is denied.

Overall, this Court finds that Applicant has failed to show that Counsel was deficient or that he was prejudiced by Counsel's actions. Applicant has failed to show that he otherwise



would have elected to go to trial, especially considering Applicant decided to plead guilty after jury selection and pretrial motions. Likewise, Applicant has not shown any error in Counsel's assistance that led him to plead guilty instead. Applicant admitted guilt in the plea hearing and the PCR hearing and made no indication that he would have gone to trial but for Counsel's actions. Therefore he cannot prove any prejudice. Accordingly, all claims regarding ineffective assistance of counsel are denied and dismissed with prejudice.

Involuntary Guilty Plea

Applicant alleges that he was forced to plead guilty. This Court finds that Applicant's allegation must be dismissed.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). A defendant's knowing and voluntary waiver of statutory or constitutional rights 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) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)).

A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L.Ed.2d 136 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975). "A guilty plea constitutes a

waiver of nonjurisdictional defects and claims of violations of constitutional rights." Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 129 (2014) (citing State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013); Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Notably the South Carolina Supreme Court has held "[a] guilty plea represents a break in the chain of events which has preceded it in the criminal process." Id. (citations omitted). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Id. (citing Rice, 401 S.C. at 332, 737 S.E.2d at 486).

This Court finds, and the record reflects, Applicant was fully advised that he was pleading guilty and therefore waiving any challenges to the evidence against him. The plea court's thorough colloquy with Applicant demonstrates that he understood the consequences of pleading guilty and the potential sentences he could receive. Applicant advised the plea court that no one had promised him anything or threatened him in order to get him to plead guilty. Applicant also advised the plea court that he was pleading guilty freely and voluntarily. The record also reflects that Applicant fully admitted his guilt to the plea court and agreed with the State's version of the facts. Applicant presented no credible evidence at the PCR hearing as to why he should be able to depart from his statements at the plea hearing. This Court finds credible Counsel's testimony regarding her preparation and advice to Applicant prior to the guilty plea. After a full review of the guilty plea transcript, this Court finds the plea judge correctly found Applicant's plea was freely, voluntary, and intelligently made. This Court also finds that Applicant has presented no evidence that he did not understand the plea proceeding or that his



plea was not freely, voluntarily, or intelligently made. Accordingly, this allegation must be dismissed.

All Other Allegations

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

V. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 27 day of JUNE, 2017.



G. THOMAS COOPER, JR.
Presiding Judge
Sixteenth Judicial Circuit

Clemson, South Carolina

STATE OF SOUTH CAROLINA)

THE COURT OF COMMON PLEAS

COUNTY OF YORK)

CASE NO.: 2016-CP-46-1915

DEMARIO CUNNINGHAM,)
#296848)

Applicant,)

vs.)

State of South Carolina,)

Respondent.)

**NOTICE OF MOTION AND
MOTION TO ALTER OR
AMEND THE JUDGMENT**FILED-RECEIVED
2017 JUL 19 PM 3:20
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

PLEASE TAKE NOTICE that the Applicant, through his undersigned attorney will move before the Honorable G. Thomas Cooper, Jr. to alter or amend the judgment entered in this action on June 27, 2017. A copy of the Order of Dismissal was received by the undersigned attorney on July 10, 2017.

That the Applicant wishes for the Court to reconsider the issue of the Belated Appeal. The Applicant is informed and believes that the issue of the Belated Appeal is meritorious and would respectfully request that the Court reconsider its decision.

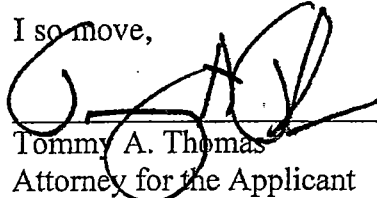
The Applicant would highlight that there is evidence on the record that indicates that the Applicant had discussed an Appeal with his Defense Counsel and that he had requested that an Appeal be requested on his behalf. There is also credible testimony by the Applicant's brother, who testified that he had made numerous calls to the Public Defender's Office requesting that this matter be appealed.

Defense Counsel's testimony at the Post-Conviction Relief hearing illustrates that there are potential viable issues for which an appeal could have been taken. Counsel testified regarding the following issues:

1. The Court's denial to grant a continuance based on the fact that there were no African American's at all in the Jury Pool. Defense Counsel brought this to the Courts attention, and also that there had been other technical problems in the past, which had excluded African Americans from the Jury selection process.
2. That the State did not allow Defense Counsel to view the "buy video" from a Distribution charge. This Distribution charge appears to be part of the basis for granting a search warrant. The reasoning for the State's not allowing Defense Counsel to view this video, was that the Distribution charge was being nol prossed as a result of the plea.

THEREFORE, based upon the foregoing the Applicant prays that the Court alter or amend the Order of Dismissal and Grant a belated Direct Appeal.

I so move,



Tommy A. Thomas
Attorney for the Applicant
7588 Woodrow Street
Irmo, SC 29063

July 11, 2017

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Demario Cunningham,
#296848)

Applicant,)

v.)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2016-CP-46-1915

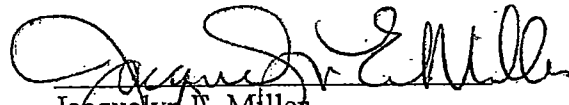
CERTIFICATE OF SERVICE

FILED-RECEIVED
2017 JUL 19 PM 3:20
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

I, Jacquelyn E. Miller, Secretary to Tommy A. Thomas, Esq., certify that I have served a copy of a Notice of Motion and Motion to Alter or Amend by depositing a copy of it in the United States Mail, postage prepaid and the return address clearly shown on said envelope to:

Justin Hunter, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

The Honorable G. Thomas Cooper, Jr.
Judge of the Fifth Judicial Circuit
P.O. Box 192
Columbia, SC 29202


Jacquelyn E. Miller
Tommy A. Thomas, Esq.
Attorney at Law
7588 Woodrow Street
P.O. Box 88
Irmo, S.C. 29063
(803) 732-5507

July 11, 2017

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK)

C/A No. 2016-CP-46-1915

DEMARIO CUNNINGHAM,
#296848)

Applicant,)

**ORDER DENYING PLAINTIFF'S
MOTION TO ALTER OR AMEND
THE JUDGMENT**

v.)

State of South Carolina)

Respondent.)

After careful consideration of the Applicant's Motion and the record in this case, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby DENIES Applicant's Motion pursuant to Rule 59(e) SCRPC to Alter or Amend Judgment of this Court's Order entered on or about July 3, 2017. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.


 G. Thomas Cooper, Jr.
 Presiding Judge, Fifth Judicial Circuit
September 14, 2017
 FILED-RECEIVED
 2017 SEP 18 PM 2:58
 DAVID HAMILTON
 C.C.P. & GS
 YORK COUNTY, SC