

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of General Sessions

Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2021-001232

Trial Court Case No. 2015-GS-36-0083

RECEIVED
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SC Court of Appeals

The State,

Respondent,

v.

Calvin Eugene Whitener,

Appellant.

RECORD ON APPEAL

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2015-GS-36-00083

State of South Carolina)
 vs.) Transcript of Record
)
)
Calvin Eugene Whitener)
 Defendant)

November 13th - 15th, 2017
Newberry, South Carolina

B E F O R E:

Honorable Frank R. Addy, Jr., Judge

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

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

Ricky Harris, Esq.
Attorney for the Defendant

Joy E. Holston
Official Court Reporter

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

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

(SW) Michael Claytor (Pretrial)

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(SW) Michael Claytor

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(SW) Lawrence Zivkovich

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(SW) Michael Stribble

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1 THE COURT: Ladies and gentlemen, we are about to
2 begin with jury selection in the case of the State of
3 South Carolina versus Calvin Eugene Whitener,
4 W-H-I-T-E-N-E-R. And the process that we are going to
5 use, ladies and gentlemen, is exactly the same as what we
6 were doing earlier. I will have a number of questions
7 that I have to ask you concerning this case specifically.
8 And if you need to respond to any of the questions I ask
9 simply stand up like you did earlier and give me that
10 response. Ladies and gentlemen, again, we are about to
11 begin with the jury selection in the case of Calvin Eugene
12 Whitener. If you are picked on this jury what we are
13 going to do is begin the case tomorrow at 10:00 o'clock.
14 So if you are selected on this particular jury you will
15 have to report back tomorrow morning at 10:00 o'clock. On
16 this case, ladies and gentlemen, Mr. Whitener is charged
17 with the offense of trafficking in cocaine. The State has
18 alleged in this case that Mr. Whitener did on or about
19 September the 3rd of 2014 in Newberry County willfully,
20 unlawfully and knowingly traffic in cocaine. And that he
21 did distribute, manufacture, cultivate, deliver, purchase
22 or bring into this State and or did provide financial
23 assistance or otherwise aid, abet, attempt or conspire to
24 distribute, manufacture, cultivate, deliver, purchase or
25 bring into this State and or was knowingly in actual or

1 constructive possession of cocaine in violation of the
2 statute provided against the peace and dignity of this
3 State. In this case, ladies and gentlemen, Mr. Whitener
4 is not present at the moment. That is one of the reasons
5 we are going to begin tomorrow. But he is, however,
6 represented by Mr. Harris of the Spartanburg bar. The
7 first question I have for you, ladies and gentlemen, is
8 there any member of the jury panel who is related by blood
9 or marriage or has any close business or personal
10 relationship with the Defendant in this case, Calvin
11 Eugene Whitener. If so, please stand.

12 (No response.)

13 THE COURT: No one is standing. Again, in this case,
14 ladies and gentlemen, Mr. Whitener is represented by Mr.
15 Harris. Mr. Harris, if you care to introduce yourself to
16 the jury now, sir.

17 MR. HARRIS: Thank you, Your Honor. Yes, ladies and
18 gentlemen, my name is Ricky Harris. As Your Honor has
19 indicated, I practice, I have a law office in Spartanburg,
20 South Carolina and I represent Mr. Whitener on this
21 charge.

22 THE COURT: The State of South Carolina is being
23 represented by Deputy Solicitor Dale Scott. Mr. Scott, if
24 you care to introduce yourself and any cocounsel.

25 MR. SCOTT: I am Dale Scott and Taylor Daniel is

1 going to help me try this case. Thank you.

2 THE COURT: Ladies and gentlemen, the next question,
3 is there any member of the jury panel related by blood or
4 marriage or has any close business or social relationships
5 with any of the lawyers involved in this case, either Mr.
6 Harris on behalf of Mr. Whitener; or Deputy Solicitor
7 Scott or Assistant Solicitor Daniel or is there any member
8 of the jury panel who has previously been represented by
9 any of the attorneys involved in this case. Anybody know
10 any of the lawyers in this case for whatever reason. If
11 so, please stand.

12 (No response.)

13 THE COURT: No one is standing. Possible witnesses
14 in this case, ladies and gentlemen, are the following
15 individuals. Michael Clayton, sorry Claytor. Michael
16 Claytor, C-L-A-Y-T-O-R, Newberry County Sheriffs Office.
17 Michael Stribble, S-T-R-I-B-B-L-E, also with Newberry
18 Sheriffs Department. And Lawrence Zivkovich,
19 Z-I-V-K-O-V-I-C-H who is with SLED. Is there any member
20 of the jury panel related by blood or marriage or anyone
21 who has any close business or social relationships with
22 any of those possible witnesses. If so please stand.

23 (No response.)

24 THE COURT: No one is standing. Again, the State
25 alleges that this incident took place on or about

1 September the 3rd of 2014. Solicitor, this was a traffic
2 checkpoint situation, can you give me some details on the
3 allegations.

4 MR. SCOTT: Yes, Your Honor, a traffic violation that
5 would have occurred, the incident location is Highway 56
6 at Mudlick Road in Chappells. Approximate time if 1:02
7 a.m.

8 THE COURT: 1:02 a.m.?

9 MR. SCOTT: Yes, sir..

10 THE COURT: Again, this incident is alleged to have
11 taken place on Highway 56, close to Mudlick Road near
12 Chappells at about 1:00 o'clock in the morning on
13 September the 3rd of 2014. Is there any member of the
14 jury panel who thinks that they may know anything about
15 the allegations in this case or has formed or expressed
16 any opinion concerning the allegations involved in this
17 case. If so please stand.

18 (No response.)

19 THE COURT: No one is standing. Is there any member
20 of the jury panel who knows any reason whatsoever why you
21 cannot give both the State of South Carolina and the
22 Defendant in this case, Mr. Whitener, a fair trial and
23 judge the case based solely on the evidence presented and
24 on the law as I instruct you at the conclusion of the
25 trial. Any reason that you do not want to serve on this

1 case. If so please stand.

2 (No response.)

3 THE COURT: No one is standing. Is there any member
4 of the jury panel who has any moral or religious beliefs
5 or any religious creed that prohibits you from serving on
6 a jury. If so please stand.

7 (No response.)

8 THE COURT: No one is standing. Any additional voir
9 dire from the State?

10 MR. SCOTT: No, Your Honor.

11 THE COURT: Mr. Harris?

12 MR. HARRIS: No, Your Honor.

13 THE COURT: Strikes are five and five. Ladies and
14 gentlemen, in a moment we are going to select a jury. If
15 you are called what I need for you to do is to come
16 forward, bring with you any items that you brought to the
17 Court House today, a book, a purse, whatever the case may
18 be. And if your name is called just come up here where
19 this microphone is right in front of you and I want you to
20 stand there and turn around and face the back. And the
21 State will be given an opportunity to either seat you or
22 excuse you and Mr. Harris will be given a similar
23 opportunity. Now, ladies and gentlemen, I am going to
24 tell you what I tell every jury. If for some reason one
25 of the lawyer's ask that you don't serve on this jury, for

1 some reason that you are excused, Folks, don't take it
2 personally, okay. I think we have 5 million in the State
3 and we have got about 13,000 lawyers in this State,
4 probably only a fraction of those are trial lawyers. And
5 I will tell you, every trial lawyer has got a different
6 way of picking a jury. So, if you are asked not to sit on
7 this jury, again, don't take it personal. Okay. Strikes
8 are five and five. Madam Clerk, at your leisure.

9 CLERK OF COURT: When I call your name if you will
10 come forward and stand and face your peers, bring all of
11 your personal belongings with you.

12 Juror number 36, Edlin Del Valle. What says the
13 State?

14 MR. SCOTT: Please present the juror.

15 CLERK OF COURT: What says the Defense?

16 MR. HARRIS: Swear the juror, please.

17 CLERK OF COURT: Ma'am, you can have a seat in the
18 jury box. Number 96, Deena Lewis. What says the State?

19 MR. SCOTT: Please present the juror.

20 CLERK OF COURT: The Defense?

21 MR. HARRIS: Excuse the juror, please.

22 CLERK OF COURT: You can go back and have a seat.

23 Thank you.

24 Number 99, Rodney Lindler. What says the State?

25 MR. SCOTT: Please present the juror.

1 CLERK OF COURT: The Defense?

2 MR. HARRIS: Excuse the juror, please.

3 CLERK OF COURT: You can go back and have a seat.

4 Number 154, Ciria Triplett. What says the State?

5 MR. SCOTT: Please present the juror.

6 CLERK OF COURT: The Defense?

7 MR. HARRIS: Swear the juror, please.

8 CLERK OF COURT: Okay, you can have a seat in the
9 jury box.

10 Number 2, James Aiken, Jr. What says the State?

11 MR. SCOTT: Present the juror.

12 CLERK OF COURT: The Defense?

13 MR. HARRIS: Excuse the juror, please.

14 CLERK OF COURT: Okay, you can go back and have a
15 seat. Thank you.

16 Number 130, Thomas Price. What says the State.

17 MR. SCOTT: Please present the juror.

18 CLERK OF COURT: The Defense?

19 MR. HARRIS: Swear the juror, please.

20 CLERK OF COURT: You can go have a seat in the jury
21 box.

22 Number 81, Ebony Jackson. What says the State?

23 MR. SCOTT: Please present the juror.

24 CLERK OF COURT: The Defense?

25 MR. HARRIS: Swear the juror, please.

1 CLERK OF COURT: You can have a seat in the jury box.

2 Number 80, Robert Icard. What says the State?

3 MR. SCOTT: Please present the juror.

4 CLERK OF COURT: The Defense?

5 MR. HARRIS: Swear the juror, please.

6 CLERK OF COURT: You can have a seat in the jury box.

7 Number 83, Kale Johns. What says the State?

8 MR. SCOTT: Please present the juror.

9 CLERK OF COURT: The Defense?

10 MR. HARRIS: Swear the juror.

11 CLERK OF COURT: You can have a seat in the jury box.

12 Number 29, Raymond Counts. What says the State?

13 MR. SCOTT: Please present the juror.

14 CLERK OF COURT: The Defense?

15 MR. HARRIS: Swear the juror, please.

16 CLERK OF COURT: You can have a seat in the jury box.

17 Number 41, Travis Duncan. What says the State?

18 MR. SCOTT: Please present the juror.

19 CLERK OF COURT: The Defense?

20 MR. HARRIS: Swear the juror, please.

21 CLERK OF COURT: You can have a seat in the jury box.

22 Number 138 Deron Shealy. What says the State?

23 MR. SCOTT: Please present the juror.

24 CLERK OF COURT: The Defense?

25 MR. HARRIS: Excuse the juror, please.

1 CLERK OF COURT: You can go back and have a seat.

2 Thank you.

3 Number 153, Rocky Trammell. What says the State?

4 MR. SCOTT: Please present the juror.

5 CLERK OF COURT: The Defense?

6 MR. HARRIS: Swear the juror, please.

7 CLERK OF COURT: You can have a seat in the jury box.

8 Number 5, Carl Baker. What says the State?

9 MR. SCOTT: Please present the juror.

10 CLERK OF COURT: The Defense?

11 MR. HARRIS: Excuse the juror, please.

12 CLERK OF COURT: You can go back and have a seat.

13 Thank you.

14 Number 49, Catherine Force. What says the State?

15 MR. SCOTT: Please present the juror.

16 CLERK OF COURT: Any challenge for cause?

17 MR. HARRIS: Swear the juror.

18 CLERK OF COURT: Okay. You can have a seat in the
19 jury box.

20 Number 54, Kirk Gallman. What says the State?

21 MR. SCOTT: Please excuse the juror from this trial.

22 CLERK OF COURT: You can go back and have a seat.

23 Thank you, Mr. Gallman.

24 Number 144, Mattie Stephens. What says the State?

25 MR. SCOTT: Please present the juror.

1 CLERK OF COURT: Any challenge for cause?

2 MR. HARRIS: Swear the juror.

3 CLERK OF COURT: You can have a seat in the jury box.

4 Number 7, Laquinta Bates. What says the State?

5 MR. SCOTT: Excuse the juror from this trial.

6 CLERK OF COURT: You can go back and have a seat.

7 Thank you.

8 Number 101, Calvin Long. What says the State?

9 MR. SCOTT: Please present the juror.

10 CLERK OF COURT: Any challenge for cause?

11 MR. HARRIS: Swear the juror.

12 CLERK OF COURT: You can have a seat in the jury box.

13 Do you want an alternate?

14 THE COURT: One alternates, strikes will be one and
15 two.

16 CLERK OF COURT: Okay. Number 42, Evelyn Dyke. What
17 says the State?

18 MR. SCOTT: I am going to excuse this alternate.

19 CLERK OF COURT: You can go back and have a seat.

20 Number 78, John Hughes. Any challenge for cause by
21 the State?

22 MR. SCOTT: Present the alternate.

23 CLERK OF COURT: What says the Defense?

24 MR. HARRIS: Excuse the juror.

25 CLERK OF COURT: You can go back and have a seat.

1 Number 44, Thomas Epps. Any challenge for cause by
2 the State?

3 MR. SCOTT: Present the alternate.

4 CLERK OF COURT: What says the Defense?

5 MR. HARRIS: Excuse the juror, please.

6 CLERK OF COURT: You can go back and have a seat.

7 Number 133, Megan Roland. Any challenge for cause by
8 the State?

9 MR. SCOTT: Please present the alternate.

10 CLERK OF COURT: Any challenge by the Defense?

11 MR. HARRIS: Swear the juror.

12 CLERK OF COURT: Okay. You can go have a seat in the
13 jury box.

14 THE COURT: Anything concerning jury selection
15 composition from the State?

16 MR. SCOTT: No, Your Honor.

17 THE COURT: From the Defense?

18 MR. HARRIS: No, Your Honor.

19 THE COURT: Ladies and gentlemen who were selected on
20 this case. If you would, adjourn briefly to the jury
21 room, I have got to give y'all some instructions before I
22 release you, it won't take long. Don't get too
23 comfortable but I want to go ahead and release the rest of
24 the panel and then I will give you those instructions.
25 Don't talk about the case yet, thanks.

1 (Whereupon, the jury was excused from open court.)

2 (Whereupon, the remaining jury pool was excused from
3 open court at approximately 12:07 p.m.)

4 THE COURT: Bring our jury in, please.

5 (Whereupon, the jury came into open court at
6 approximately 12:10 p.m.)

7 THE COURT: The record will reflect that the jury is
8 back and seated. Again, ladies and gentlemen, don't get
9 too comfortable because I am going to release you in a few
10 moments. I just need to give you a few instructions
11 before I let you go for the rest of the day. First,
12 please be back in the jury room tomorrow morning at 10:00
13 o'clock. At that point in time I anticipate proceeding
14 with the trial of this case, okay. This is one of the
15 cases that was further down on the trial docket, the other
16 cases have resolved themselves. We will start this one
17 tomorrow morning at 10:00 o'clock and that is when
18 witnesses, et cetera will be available. Okay. So be here
19 tomorrow morning at 10:00. Secondly, I don't anticipate
20 this case lasting more than a day. So I anticipate that
21 once the case is submitted to you, in all likelihood, you
22 will begin your deliberations at some time tomorrow.
23 Third and the most importantly, at least do not conduct
24 any sort of independent research concerning this case.
25 Okay. This is a standard instruction I give to all

1 jurors. When I first started practicing law in 1993, to
2 say the internet was in its infancy is an understatement.
3 It really didn't exist and most people were doing well to
4 work on, to work on a computer much less surf the
5 internet. Nowadays there is a lot of stuff that is out
6 there, ladies and gentlemen, I don't know if there have
7 been any previous news reports about this case or not. I
8 don't know if there is anything out there on the internet
9 or not. But as you well know, a lot of what is on line
10 just ain't true. Okay. The rules of court are designed
11 to try to give jury the best information possible. So,
12 please, do not undertake any kind of independent research,
13 don't go Googling anybody's name on this case. Because
14 obviously, what is on line may not be accurate. And I
15 will tell you that jurors in other cases that I have heard
16 in the State have received this instruction from the trial
17 Judge and decided to ignore that instruction and go ahead
18 and do some research, Google people's names, that kind of
19 thing. When it came to the Court's attention that this
20 happened, obviously the Judge wasn't at all thrilled with
21 that particular juror. I don't want to be put in that
22 position. Please don't, again, I assure you you are going
23 to get the information you need during the course of the
24 trial. With that, I am not going to keep you any longer.
25 We won't administer your oath as the jurors until tomorrow

1 morning. Just be back in the jury room at 10:00 o'clock
2 tomorrow. If any of you need an excuse for work, if you
3 need one today the Clerk can give you that today in just a
4 moment. We have four jurors. The rest of y'all, see
5 y'all tomorrow morning at 10:00 o'clock. If you need an
6 excuse come on down and the Clerk will order that up for
7 you right now.

8 (Whereupon, the jury was excused from open court for
9 the day at approximately 12:20 p.m.)

10 THE COURT: The record will reflect that the jury is
11 now outside the courtroom. And I want the record also to
12 reflect what was discussed before we proceeded in
13 selecting the jury on Mr. Whitener's case. Essentially it
14 was explained to the Court that the Defense, an issue for
15 Mr. Whitener some years ago, Mr. Harris became involved in
16 this case when contacted by Mr. Whitener's family, his
17 father, that is when Mr. Harris got essentially retained.
18 Mr. Harris explained to the Court, prior to moving forward
19 with the jury selection, that he has been in communication
20 with his client as recently as Friday and read him
21 verbatim the trial notice that was provided by the State
22 in this particular case. And Mr. Harris, I will let you
23 fill in the blanks there, the gaps that I may have left
24 out. What additional information can you give us about
25 your client's being notified to be here and obviously he

1 is not here, additional time to request Mr. Whitener to
2 join us and get up to speed on this case. The floor is
3 yours.

4 MR. HARRIS: By way of explanation, with respect to
5 my obligation to be candid with the Court, I did speak to
6 Mr. Whitener as recently as this past Friday. My
7 discussion with him, very clearly, indicated to him that
8 his presence was required in the Newberry County Court of
9 General Sessions on Monday, November 13th, 2017 at 9:30
10 a.m. I, as the Court has indicated, read to him pertinent
11 parts of the trial notice that I have received, that
12 indicated to him that his case was scheduled for trial
13 today. And that his failure to appear could result in a
14 trial in the absence. He said that he understood those
15 things and actually gave me assurances that he would
16 appear for a scheduled plea. That is the last direct
17 communication I have had with Mr. Whitener this morning.
18 When Mr. Whitener could not be found here in the Court
19 House I called the phone numbers that I had for him and I
20 was unable to reach him. Mr. Whitener, my client, I did
21 speak to Mr. Whitener's father. Senior Mr. Whitener was
22 unable to point me to the whereabouts of my client. Your
23 Honor, I don't know if there has been anything that would
24 excuse Mr. Whitener's absence. Today, as soon as I leave
25 here, I am going to continue to try to check on that and I

1 appreciate the Court's forbearance in allowing me to do
2 it. And also allowing me some additional time to prepare
3 for the trial which we have now selected a jury for. Your
4 Honor, I will keep the Solicitor's office advised of any
5 developments this afternoon, if there may be something
6 that might prevent us from going forward tomorrow.
7 Otherwise I will stand ready and as prepared as I can be
8 to go forward with Mr. Whitener's trial in the morning at
9 10:00 a.m.

10 THE COURT: Thank you. Solicitor, anything that you
11 need to supplement the record on as far as this case. I
12 know that you are going forward on the trafficking charge
13 and the State is alleging, this is technically a third
14 drug offense. And I think you indicated to the Court and
15 to Mr. Harris that the State is going to allow Mr.
16 Whitener to plead to a first, as opposed to a third in
17 lieu of going to trial. Anything else we need to put on
18 the record?

19 MR. SCOTT: No, Your Honor, I think that covers it.

20 THE COURT: Just so the record is clear. The Court
21 has had an opportunity to review the bond paper work
22 executed by Mr. Whitener. Second page of the bond form it
23 is listed, it states, it has been explained to me that if
24 I fail to appear before the Court as required a warrant
25 for my arrest will be issued. It also indicates on the

1 second line, I understand and informed I have a right and
2 obligation to be present at trial. Should I fail to be
3 present at court the trial will proceed in my absence.
4 The Court was also handed a letter, actually two letters
5 dated October the 27th. They are addressed to Mr. Harris,
6 the second one is addressed to Mr. Whitener. The address
7 that is listed is the exact same address as listed on the
8 bond paperwork, [REDACTED] Kings Mountain, North
9 Carolina, 28086. Both of those notices to Mr. Harris and
10 to Mr. Whitener direct these to appear here in Newberry on
11 November the 13th at 9:30. The letters speak for
12 themselves. The Court does find that Mr. Whitener has
13 received actual notice of the term of court in which this
14 case will be called to trial. He received those from the
15 Solicitor and from Mr. Harris. And he has previously been
16 admonished by both his attorney and obviously, if he fails
17 to appear the trial will proceed in his absence.
18 Obviously, Mr. Harris, I am very hopeful that you will
19 secure him for tomorrow morning. I will give you my cell
20 number, if you want to call or email, text, that is fine.
21 With that we will be adjourned on this case until tomorrow
22 morning at 10:00 o'clock. All right. We are off the
23 record on this.

24 (Whereupon, Court's Exhibit 1 was marked for
25 identification only.)

1 (Whereupon, the case will resume the next morning at
2 10:00 a.m.)

3 November 14, 2017

4 THE COURT: We will go on the record in the State
5 versus Whitener. The record should reflect that I did
6 have a conference with the attorneys in-chambers. Counsel
7 for Mr. Whitener has been in communication with his client
8 but his client is not here. Due to the fact that the SLED
9 analyst is unavailable, because he is on vacation, will
10 not be available until tomorrow. My intention is to go
11 ahead and release the jury, have them report back tomorrow
12 morning. I will take the heat on this one with them and
13 simply explain that it is something that no one had
14 anticipated happening in terms of this witness not being
15 here. After the jury is released we will move forward
16 with the suppression issue that was brought to the Court's
17 attention on an email string this morning. So that will
18 be the game plan. Okay. We will need to keep the two
19 officers who were involved in the actual stop around. We
20 can deal with the actual suppression issue this morning
21 and then start the trial in earnest, the State's
22 case-in-chief tomorrow. Let us have the jury out, please.

23 (Whereupon, the jury came into open court at
24 approximately 10:58 a.m.)

25 THE COURT: The record will reflect the jury is back

1 and seated. Ladies and gentlemen of the jury, first of
2 all, thank you for being here this morning and thank you
3 for being here on time. Some of you filtered in while I
4 was initially on the bench this morning. You noticed I
5 was taking some pleas and addressing a few other matters
6 before we get started earnest on this case. I am going to
7 begin this morning, and please don't get too comfortable.
8 I am going to begin this morning with an apology to you
9 and I will tell you that the frustration that you are
10 about to feel is valid. Okay. It is not the fault of the
11 partes or anyone involved in this action, what I am about
12 to tell you. But essentially, ladies and gentlemen, in a
13 nutshell one of the witnesses involved in this case,
14 unbeknownst to the parties involved, is on vacation and
15 will not be back until tonight, which means we cannot
16 start this case in earnest until tomorrow. Okay. And the
17 frustration that you are now feeling because I now have to
18 ask that you come back tomorrow morning at 10:00 o'clock.
19 I have got other stuff that I can be doing but I realize I
20 have taken an hour out of your morning today. I am going
21 to take two hours tomorrow once we begin this case in
22 earnest. Again, this case will not last long. That is
23 what I anticipate but it is a simple matter where, for
24 whatever reason, the witness did receive a subpoena but
25 for whatever reason it just didn't click and they are not

1 available until tonight. And so we can start this case
2 some time this evening which, you know, I know you guys
3 would probably rather be doing something else, we can
4 start tomorrow morning and try again. This happens from
5 time to time in cases. This is only the second time it
6 has happened to me where a witness that we thought was
7 coming, turned out to be on vacation and we had to take
8 the trial to another day, okay. So this is only the
9 second time for me. It happens to other Judges. Again, I
10 am sorry. Had I known I would have y'all come back
11 Wednesday but none of the parties were aware of this
12 situation until recently. Again, I am sorry. Please be
13 back in the jury room tomorrow morning at 10:00 o'clock.
14 You have my apologies, go about your business today. And
15 again, once this case begins I don't think it is going to
16 last terribly long. It shouldn't be a very long case. As
17 you heard yesterday, there are only a few witnesses that
18 are going to be called. So have a pleasant day and go to
19 work or don't go to work, I don't care. If you don't want
20 to go don't go to work, go home. But have a good day and
21 I will see y'all tomorrow morning. Again, I am sorry.

22 (Whereupon, the jury was excused from the trial of
23 the case for the day.)

24 THE COURT: Solicitor, are you ready to proceed with
25 the suppression hearing in this case?

1 MR. SCOTT: Yes, sir.

2 THE COURT: Very good. We will be back on the record
3 in 15-GS-83, the State versus Mr. Whitener. Of course,
4 Mr. Whitener is not present and the Court has already made
5 a ruling as to the actual notice to Mr. Whitener.
6 Solicitor, on the question of suppression, it will be okay
7 to go straight to testimony or did you want to give me an
8 overview before?

9 MR. HARRIS: Your Honor, I can just state grounds.

10 THE COURT: Go right ahead.

11 MR. HARRIS: If the Court, please. May it please the
12 Court, Your Honor. In the matter of State versus Calvin
13 Whitener, discovery reveals to the Defense that allegedly
14 on September 3rd of 2014 a car in which Mr. Whitener was a
15 passenger was stopped by a Newberry County Sheriffs Deputy
16 for speeding. The stop proceeded along the lines as it
17 normally would with the Deputy asking the driver of the
18 vehicle for license and other information. The driver of
19 the vehicle, after some brief hesitation, according to the
20 incident report, confessed that he had no valid drivers
21 license but produced an identification card. The stop
22 then proceeded with an arrest of the driver driving
23 without a license or driving under suspension. And then
24 proceeded beyond that to what we believe is an
25 impermissible discovery. During the course of the events

1 that followed other deputies came or were summoned to the
2 scene. Another passenger was removed from the vehicle, a
3 search on the basis of information that there was some
4 warrant outstanding for traffic tickets, I believe, in
5 Gaffney, South Carolina. And beyond that the stop
6 proceeded with the Defendant in this case, Mr. Whitener,
7 being removed from the vehicle and searched according to
8 the incident report, for weapons, a Terry frisk for
9 weapons ensued which resulted in-turn, according to the
10 incident report, in a soft object being found near Mr.,
11 allegedly near Mr. Whitener's inner thigh area. Mr.
12 Whitener then allegedly was asked, what is that. To which
13 he allegedly replied, a bag of powder. And then the
14 Deputy, according to the report, seized that item which
15 turned out to be allegedly a bag of powdered cocaine. The
16 grounds that we assert here are essentially three grounds.
17 First of all, that even if the initial of the vehicle for
18 a minor traffic violation was lawful, and for purposes of
19 this hearing we don't challenge the fact that it was with
20 probable cause for speeding, that by the time the scope of
21 the stop and the length of the stop extended to removing
22 Mr. Whitener from the vehicle, that there was no
23 justification, reasonable articulate suspicion that other
24 criminal activity was to extend the traffic stop to the
25 point that Mr. Whitener got -- had to be gotten out of the

1 car and searched. Beyond that, we allege that there was
2 no reasonable articulable suspicion that Mr. Whitener
3 himself as a passenger in the vehicle was involved in any
4 criminal activity which needed to be investigated on his
5 part. And beyond that, as an additional ground, that even
6 if Mr. Whitener was subject to a brief investigatory
7 detention beyond the detention he was already experiencing
8 in the car, by getting him out of the car, that there was
9 no reasonable articulable suspicion to believe, to believe
10 to lead a reasonable police officer in the circumstances
11 to believe that he was armed and dangerous and should be
12 frisked for weapons under Terry. Beyond that, Your Honor,
13 we answer that because of the nature and circumstances of
14 the detention that he was detained, he was not free to
15 leave and that he was detained to the extent that Miranda
16 was required before police in questioning or interrogation
17 would take place to discover the nature of the soft object
18 in his pants. So we believe for all of those reasons that
19 the search of -- the detention of Mr. Whitener, the search
20 of Mr. Whitener that yielded and the questioning of Mr.
21 Whitener that yielded the contraband was all in violation
22 of the Fourth Amendment of the Constitution of the United
23 States. And we ask for a suppression of the drug
24 evidence. Your Honor, we have presented, by email I have
25 copied the State. We do rely, essentially on four cases.

1 State v. Spears, State v. Blassingame, State v. Williams
2 and Terry versus Ohio. And, Your Honor, we believe the
3 Blassingame case probably has the best language that we
4 can locate to describe under what circumstances a police
5 officer may detain someone for investigatory purposes and
6 under what further circumstances they may frisk that
7 person. Thank you.

8 THE COURT: Thank you, sir. Solicitor, you want to
9 call your first witness.

10 MR. SCOTT: Yes sir, Your Honor. The State calls
11 Michael Claytor from the Sheriffs Department.

12 Michael Claytor, being
13 first duly sworn, testified as follows:

14 DIRECT EXAMINATION

15 By Mr. Scott:

16 Q Deputy Claytor, September 3rd of 2014, 1:00 a.m. in
17 the morning, where were you that night?

18 A I was conducting a radar in the Chappells area of
19 Newberry County on Highway 56.

20 Q Okay. At some point did you perform a traffic stop
21 for a speeding violation around that 1:00 a.m. time?

22 A Yes sir, I did.

23 Q Tell me about that.

24 A Myself and my trainee, Deputy Snelgrove, who was
25 fresh out of the Academy, we were on Highway 56 near

1 Mudlick Road. We were conducting radar on the side of the
2 roadway. And we clocked a vehicle, we were able to
3 confirm that by audio tone and visual readout on our
4 certified radar unit of 80 in a 55 mile per hour zone.

5 Q Snelgrove was riding with you. Is it typical to have
6 another Deputy riding in the car with you?

7 A It is not typical but I am a field training officer
8 and he was fresh out of the Academy. So he was, he was
9 riding with me and we were conducting his FTO program.

10 Q Describe that area, Highway 56 at Mudlick Road.

11 A Yes, sir. It is kind of a very rural area, it is
12 probably, I would call it probably the furthest outpost of
13 our County. It is right on the line of Greenwood County,
14 Saluda County and Laurens County.

15 MR. SCOTT: And Your Honor, is familiar with that
16 area?

17 THE COURT: I know exactly where he is talking about.

18 Q I think it is like, kind of like a wildlife
19 management area, somewhere right in here?

20 A Yes, sir.

21 Q You said 1:00 a.m. and you have got the trainee with
22 you. 80 miles an hour in a 55, at that point, what kind
23 of car was it?

24 A It was a white in colored Nissan Altima.

25 Q And did you activate your blue lights and sirens?

1 A I did, yes sir, I conducted a traffic stop on that
2 vehicle.

3 Q And the purpose was what, speeding?

4 A For speeding, yes sir.

5 Q All right. when you approached the car tell us what
6 you observed?

7 A I walked up to the vehicle, they pulled to the
8 shoulder of the road, actually was still a little bit in
9 the roadway. Foot still on the brake, the car never went
10 into park because I never seen the reverse lights come on.
11 Went up to the vehicle, there was four males in the
12 vehicle and I spoke with the driver.

13 Q Okay. The driver, Jacques Mincey?

14 A Yes, sir.

15 Q Tell me about the car, did you run the tags?

16 A I did, yes sir. It came back to be a rental car.

17 Q Out of South Carolina?

18 A I am not one-hundred percent sure. I don't recall
19 where the State was, I would have to check.

20 Q Go to the third sentence in your incident report.

21 A It is in North Carolina.

22 Q North Carolina tag?

23 A Yes, sir. I apologize.

24 Q Okay. Did you run, what did you do after speaking
25 with the driver?

1 A I went back and ran his license and it came back to
2 be suspended.

3 Q Okay. Did you, what about the other three
4 passengers, did you, what did you do with them?

5 A I identified them because we were in such a rural
6 area. And I was by myself with a trainee so I identified
7 them, got their ID's and ran those as well.

8 Q So the driver was suspended and you got the
9 identifications of the other people?

10 A Yes, sir.

11 Q What, if anything, did you learn about the other
12 passengers?

13 A I learned that the, it was the backseat driver's
14 side. He was wanted out of Gaffney or had a NCIC active
15 hit out of Gaffney.

16 Q Okay. So the driver is driving under suspension and
17 the other guy was wanted out of Gaffney?

18 A Yes, sir.

19 Q Okay. What did you do at this point?

20 A I removed the driver from the vehicle, placed him
21 under arrest for the driving under suspension. Then I
22 removed the backseat passenger from the vehicle and placed
23 him into detention.

24 Q Okay. So at this point, is it just you and the
25 trainee there?

1 A Yes sir, it is.

2 Q So you, for purposes of this hearing, subject three
3 in your report, is that the Defendant, Mr. Whitener?

4 A Yes sir, that is correct.

5 Q Where is he, you have already gotten the driver out,
6 you have gotten the other passenger out. Where is Mr.
7 Whitener?

8 A He's still seated in the back passenger side of the
9 vehicle.

10 Q Okay. So what are you having to do as far as process
11 this scene. You have already detained the driver?

12 A Yes.

13 Q And are you still, what are you doing with subject
14 two?

15 A I have got him out of the vehicle and I am getting
16 ready to attempt to detain him. And as I get him out of
17 the vehicle he had on some camouflage cargo shorts. The
18 cargo pocket was unbuttoned, it was hanging open. And it
19 was, I noticed a set of digital scales in there that is
20 commonly used, well we commonly find it when we find
21 drugs, to weigh drugs.

22 Q Let me ask you. So did you pat down the driver?

23 A I did, yes sir.

24 Q Did you find anything on him?

25 A No, sir.

1 Q So you are about to detain the other guy who was out
2 of Gaffney and you find digital scales in his pocket?

3 A I did, yes sir.

4 Q Did you find anything else of note?

5 A No, sir.

6 Q Tell me, let me find the -- the guy out of Gaffney
7 with the scales, that is Walker Camp. Is that right?

8 A Yes sir, that is correct.

9 Q You have got Mr. Camp and Mr. Mincey out. Tell me,
10 what are they doing, what did you observe as far as their
11 demeanor at that time?

12 A I could tell everybody got extremely nervous and I
13 could see heavy breathing and their chest moving in and
14 out. They kept kind of staring around looking at each
15 other, kind of deferred movement, I guess, you would call
16 it, just looking back at each other like, basically giving
17 me the thing like, oh crap, we are in trouble now. You
18 know. At that point in time it concerned me due to, you
19 know, with being technically 401, I guess you would say..
20 Because I am with a trainee out there. You know, I felt
21 that it was best that I got everybody out of the vehicle
22 and just checked them to be sure that they had nothing
23 that was going to hurt me because, you know, I have
24 already got a set of scales, could be potentially drugs in
25 the car, weapons are associated with drugs. These guys

1 are from out of town. I am miles and miles away from any
2 backup.

3 Q Okay. Did you call for backup?

4 A I did, yes sir.

5 Q Okay. Sergeant Fulmer responded?

6 A That's correct?

7 Q Had y'all decided who was going to take Mincey and
8 who was going to take Camp?

9 A No sir, not until he arrived there.

10 Q So you talk about Mincey and Camp being nervous and
11 breathing heavily, what else were they doing?

12 A They were looking around at each other, kind of, you
13 know, just looking back at each other like, you know.

14 Q What was Whitener and the other individual in the
15 car, what were they doing?

16 A They were all so nervous as well, I could tell they
17 were nervous, especially Whitener. He was sitting in the
18 backseat, he is kind of looking straight forward and he
19 wouldn't, he wouldn't really turn his head and look. But
20 I could see him turning his eyes and looking, you know,
21 over at my two guys I had gotten out, the two subjects.

22 Q Tell me, what was your concern at that point?

23 A My concern was for, I mean first off my safety and
24 their safety as well. Because I didn't know if they had
25 any type of weapons, if they were, you know, going to

1 attempt to run or what it was because, you know, I am a
2 long way away. They got, they are just a county line away
3 from escapement.

4 Q How long, let me ask you this. At that point did you
5 make a determination to have Whitener and the young guy
6 whose Bobby Gregory, did you make the determination to
7 have them step outside the car?

8 A I did, yes sir.

9 Q About how long had y'all been on the side of the road
10 at that point?

11 A I would say maybe, five to eight minutes.

12 Q Okay. And tell me what was the purpose of having
13 them step outside the car?

14 A Well, I wanted to be sure that, you know, that I was
15 safe. I mean, I am out in the middle of nowhere, there is
16 four guys against, you know, I say one because I am with a
17 trainee, a guy who is extremely green, who has, you know,
18 never really did any law enforcement, anything with law
19 enforcement until this point.

20 Q Okay. So you have Mr. Whitener, Mr. Gregory step
21 outside the car. What did you do next?

22 A I then frisked them for weapons.

23 Q Okay. Did you find anything on Bobby Gregory?

24 A No sir, I didn't.

25 Q Tell me about when you went to search Mr. Whitener,

1 tell me --

2 A -- I was checking, patting the outside, went down to
3 his ankle as I do with every search, go down to his ankle.
4 I come back up, as I come back up and get to the inner
5 thigh I felt a large bulge there at his inner thigh.
6 Obviously, I mean it is not anything of the human anatomy
7 because I can tell by feeling it due to prior training and
8 experience in law enforcement.

9 Q Okay. Well, you said it was, what was the texture of
10 it?

11 A It was very squishy, I guess you would say. It was
12 like, you could tell it was a powder substance or some
13 type of bag of substance.

14 Q Did you ask him what it was or what happened next?

15 A I did, yes sir.

16 Q And what did he say?

17 A He told me that, let me look at my report for the
18 exact wording of what he said. It is a bag of powder.
19 That is what he replied to.

20 Q And did you retrieve it at that point?

21 A Yes sir, I did. I felt, you know, for my safety and
22 his and with the scales and everything that it, I probably
23 needed to go ahead and retrieve that.

24 Q Okay. Did you locate any other contraband in the
25 vehicle?

1 A No, sir. Nothing other than, I think some cash.

2 Q What else did you locate on Mr. Whitener?

3 A It was a good amount of cash.

4 Q How much cash?

5 A I am trying to remember here. Let me look at my
6 paperwork. I think it was a little over \$700, \$790.00
7 dollars. There it is.

8 Q Okay. At some point, it looks like you asked the
9 occupants, was there any other contraband in the vehicle?

10 A Yes, sir.

11 Q What was their response?

12 A Actually it was Mr. Whitener. He stated to me, he
13 said, sir, there is nothing else in the vehicle. You got
14 me. That's all of it.

15 Q Okay. I guess for purposes of Denno, let's back up.
16 When you found the powder in his pocket, did you place him
17 under arrest at that point?

18 A After I removed it, yes sir.

19 Q Did you Mirandize him?

20 A No sir, I don't think, I don't think that he was
21 Mirandized at that point. I would have to look back and
22 be sure.

23 Q Okay. I guess, would you characterize him as, he was
24 detained at that point. After you found the powder you
25 detained him?

1 A Yes, sir.

2 Q Handcuffed him?

3 A Yes, sir. Yes, sir.

4 Q Then y'all asked him, is there contraband in the car?

5 A Right, yes sir.

6 Q I think that is all. Let me ask you, who went to

7 jail that night?

8 A The driver which would have been, let me find his

9 name here. Jacques Mincey and Mr. Calvin Whitener.

10 Q I think Jacques --

11 A -- Jacques, yes sir, that is correct.

12 Q J-A-C-Q-U-E-S?

13 A Yes sir that is correct.

14 COURT REPORTER: And how do you spell the last name?

15 MR. SCOTT: Mincey is M-I-N-C-E-Y.

16 Q He went for driving under suspension and then Mr.

17 Whitener went for the powder?

18 A Yes sir, that is correct.

19 Q We talked earlier about a Walker Camp, he was the guy

20 who had the hit from Gaffney. What ultimately, did you

21 arrest him?

22 A No sir, I didn't. I ended up releasing him because

23 Gaffney was unable to confirm those warrants at the time.

24 Q Okay.

25 A We have a ten minute window there and they were

1 unable to confirm within that ten minute window.

2 Q Okay. What does that mean, they couldn't find, put
3 their hand on the warrant?

4 A Yes, sir. They couldn't put their hand on the
5 warrant within the time limit that NCIC allows us.

6 Q Do you recall what he was wanted out of Gaffney for?

7 A No sir, I don't recall right off what it was.

8 Q I think that is all. So essentially the stop happens
9 and as you are checking information on the driver and you
10 are trying to confirm the hit out of Gaffney on the
11 passenger. Five minutes passed before you ordered Mr.
12 Whitener and Mr. Gregory out of the vehicle?

13 A Yes, sir.

14 Q Is that your testimony?

15 A Yes, sir.

16 Q Please answer any questions Mr. Harris has.

17 CROSS-EXAMINATION

18 By Mr. Harris:

19 Q Deputy, do I understand that if, it has been your
20 testimony that, you stated, I didn't know if they had
21 weapons. Is that correct?

22 A That is correct, yes sir.

23 Q So would it be correct to say that any time you stop
24 anybody for anything, you don't know if they have weapons?

25 A Correct, yes sir.

1 Q Correct?

2 A Yes, sir. But there is several clues there that,
3 that kind of cued me off to that once I got the other two
4 out that would maybe look a little deeper into these
5 things.

6 Q Well, just to be clear, your testimony as to the
7 occupants of this vehicle?

8 A Right.

9 Q Including Mr. Whitener, was you didn't know if they
10 had weapons?

11 A That's correct, yes sir.

12 Q Now, to go back, is it correct, they have been good
13 enough to give me your incident report. You did do a
14 incident report in this case?

15 A That's correct, yes sir.

16 Q That you stopped this vehicle for speeding. Is that
17 correct?

18 A Yes, sir.

19 Q And that you, in a routine fashion, approached the
20 drive of the vehicle and asked for his license and other
21 required information. Is that right?

22 A Correct.

23 Q And isn't it correct that the driver admitted,
24 volunteered to you that he did not have a valid driver's
25 license?

1 A That's correct.

2 Q So the driver of the vehicle, right off the bat, was
3 cooperative in, and forthright telling you he didn't have
4 a valid driver's license?

5 A That's correct, yes sir.

6 Q So he wasn't trying to hide that fact, was he?

7 A No, sir. He wasn't trying to hide that fact, no sir.

8 Q So you didn't have to run his license to discover
9 that, he told you.

10 A No, I did have to run his license to confirm that,
11 yes sir.

12 Q Well, to confirm it. But he had already said, I
13 don't have a valid driver's license?

14 A He did tell me that.

15 Q He was cooperative?

16 A He was.

17 Q Is that right?

18 A Yes, sir.

19 Q And during this time period, I assume because it is
20 not in your report anywhere, that you saw nothing
21 suspicious about the vehicle or its occupants beyond the
22 fact that the driver just confessed to you that he didn't
23 have a valid driver's license?

24 A Well, there is several things that I found to be
25 suspicious. Is when I walked up to the vehicle they told

1 me that, whenever I stopped them, he said, man, we are
2 just trying to get back from a funeral in Atlanta. He
3 goes into detail about this. Nobody is in any funeral
4 attire, what I would call funeral attire and what you
5 would call funeral attire. He also is in a rental vehicle
6 which is a clue to me. It is not common for someone to
7 have a driver's license, to be without a driver's license
8 to be driving a rental vehicle. I am in a very rural part
9 of the county with no lighting, we are on a back road, you
10 know. So there is several things that clue me off of
11 things like this and concern me for my safety.

12 Q Well, you unfortunately left out the part about the,
13 the story about the funeral in your formal report, didn't
14 you?

15 A Yes sir, it is not in the report, that's correct.

16 Q And you left that out in your direct answers to the
17 Assistant Solicitor just now?

18 A I wasn't asked anything about it.

19 Q You wasn't?

20 A No, sir.

21 Q Okay. So regardless of whether that's accurate
22 recollection of the part about the funeral story. The
23 driver stated he didn't have a valid driver's license and
24 was cooperative. Is that right?

25 A That's correct, yes sir.

1 Q And that after you confirmed that he didn't have a
2 valid driver's license you placed him under formal arrest.
3 Is that right?

4 A That's correct, yes sir.

5 Q And you searched him and found nothing?

6 A Yes, sir.

7 Q No weapons?

8 A No, sir.

9 Q No drugs?

10 A No, sir.

11 Q Nothing. And is it correct that the driver was -- he
12 didn't try to run, break away, resist, handcuffs or any of
13 the sort, did he?

14 A No, sir. I could tell he was very nervous.

15 Q Well, can you home in on this nervousness, you know,
16 I am sure you have arrested folks before, handcuffed them
17 in a remote part of the county?

18 A Yes, sir.

19 Q People do generally get a little upset and nervous
20 when they are being locked up?

21 A Not necessarily.

22 Q Not necessarily?

23 A No, sir.

24 Q How long have you been a police officer?

25 A For nine years.

1 Q And so, it is not your common experience that people
2 are often uneasy, nervous about being arrested?

3 A No, sir.

4 Q Okay. I see, I understand. And I believe your
5 report indicates that you had Officer Snelgrove, now he
6 was a police officer. Is that correct?

7 A That's correct.

8 Q He might not have had a lot of experience but he was
9 a police officer, correct, with a badge?

10 A Correct.

11 Q With a gun?

12 A Correct.

13 Q What else did he have. Nightstick, stun gun?

14 A I mean, I am sure he did, yes sir.

15 Q He had the full gear?

16 A Yes, sir.

17 Q That police carry?

18 A Yes, sir.

19 Q And he had been through police training, academy?

20 A That's correct.

21 Q He had successfully completed the academy training?

22 A He had.

23 Q So he had been trained?

24 A No, sir. He was going through a FTO process which is
25 required to be a certified officer through our department.

1 Q All right. But he had the full wear and all to
2 defend himself and you. Is that right?

3 A Yes, sir. With all due respect, we can dress up for
4 Halloween but that don't mean of what we dress up for.

5 Q Would you say that at Deputy Snelgrove?

6 A Yes, sir.

7 Q Okay. Well, despite your lack for faith and
8 confidence in your brother officer, he was there, he was
9 fully equipped and you thought enough of him to, I believe
10 your report indicates, have him stay with and detain the
11 driver of the vehicle?

12 A That's correct.

13 Q While you dealt with the others?

14 A Correct.

15 Q Is that right?

16 A That's correct.

17 Q Okay. And then you gathered all of the ID's and you
18 ran those and you got this information that the other
19 passenger had a traffic violation from Gaffney. Is that
20 right?

21 A I had no idea what the violation was.

22 Q And so you detained him?

23 A Yes, sir.

24 Q For that purpose?

25 A Yes, sir.

1 Q Searched him?

2 A Yes, sir.

3 Q So you found a set of scales?

4 A Correct.

5 Q You found no drugs?

6 A No, sir.

7 Q No weapons?

8 A No, sir.

9 Q And he was cooperative?

10 A For the most part, yes sir.

11 Q But nervous?

12 A Yes, sir.

13 Q I see. Did he make any threatening gestures toward

14 you or the other officer?

15 A No, sir.

16 Q Did he verbalize anything that could be taken as a

17 threat or an intention to flee?

18 A No, sir.

19 Q Did either of the driver or the other passenger, with

20 the situation from Gaffney, did any of them portray in any

21 way that they would be anything less than cooperative with

22 you?

23 A No, sir.

24 Q You are saying that those two individuals were

25 nervously looking at each other? Is that right?

1 A No sir, they was not looking at each other. They
2 were looking at the two passengers in the car.

3 Q Oh, okay. And so this remote area you are talking
4 about, you are in communications, radio communications, at
5 least communications?

6 A Not good, no sir. We have very, very poor radio
7 reception there.

8 Q So I guess it was just a miracle that you were able
9 to run the identifications and get all of that
10 information, it seemed like pretty quickly.

11 A On my car radio, yes sir.

12 Q It is not like you were out of touch with folks?

13 A If I went back to my car, yes sir, I could get out.
14 But I couldn't get out on my handheld radio when I was
15 outside with them.

16 Q And is it correct that Sergeant Fulmer actually
17 arrived on the scene before you were ever, gotten Mr.
18 Whitener out of the car?

19 A I have to look at my report.

20 Q Well, look at it. Top of page two.

21 A That's correct.

22 Q Okay. So you had yourself fully equipped to defend
23 yourself, correct?

24 A That's correct.

25 Q Officer Snelgrove, correct?

1 A Correct.

2 Q And Sergeant Hill?

3 A Fulmer, yes sir.

4 Q Fulmer, I am sorry. And do you consider Sergeant
5 Fulmer to be doing more than being dressed for Halloween?

6 A Yes sir, I would think so.

7 Q And so then it was pretty -- would you agree that the
8 Newberry County Sheriffs Department and communications
9 were aware of your location and that you were involved in
10 a traffic stop involving multiple suspects?

11 A That's correct.

12 Q So people knew where you were and what you were
13 doing?

14 A Right.

15 Q So you, you state in your report that due to the
16 remote location, the listed subjects nervous demeanor,
17 there I take it you mean the two, the driver and the other
18 person?

19 A Correct.

20 Q Not Mr. Whitener?

21 A He's looking out the corner of his eyes, looking over
22 at the other guys trying to possibly communicate.

23 Q When you state in your report the listed subjects
24 nervous demeanor, you are talking about the driver and the
25 other individuals --

1 A -- talking about the totality of all four.

2 Q And officer's safety, reporting Deputy, that you
3 removed subject number three to perform Terry frisk on him
4 for weapons?

5 A Okay.

6 Q So you did not suspect him of any criminal activity
7 at that point in time?

8 A No, sir.

9 Q So it is clear that if you have any justification,
10 the only justification you have for getting Mr. Whitener
11 out of the car, therefore further detaining him and
12 searching him was to determine if he had weapons?

13 A That is what I was going to search for.

14 Q All right. But you have stated you did not know if
15 he had any weapons?

16 A That's correct. That is why I performed the search.

17 Q So not knowing is not a reason, is it?

18 A I guess that is up to you to determine or a panel --

19 Q -- I am asking you.

20 A My safety is a reason, yes sir.

21 Q Well, what was it about the situation precisely that
22 would lead you to believe that Mr. Whitener possessed
23 weapons. What was it that had occurred that he had done
24 that would have led you to reasonably think that he had
25 weapons?

1 A It is a possibility. I have got a rental car out in
2 the middle of nowhere. I have got a guy that has got
3 active warrants on him. I have got one guy that is
4 suspended, he has got a set of digital scales in his
5 pocket. They are coming back from Atlanta. Their story
6 is not matching up. So, I mean there are several things.

7 Q Well, you had not questioned the individuals, had
8 you, to see if their stories matched up?

9 A He stated to me that he came from Atlanta at a
10 funeral.

11 Q Who stated that?

12 A The driver.

13 Q The driver?

14 A That's correct.

15 Q Okay. So that is one story?

16 A Correct.

17 Q So that's not -- these other people are not telling
18 you conflicting things, are they, because you hadn't
19 questioned them?

20 A I didn't say that they were giving me conflicting
21 stories.

22 Q Okay. So you, what about having a rental car, Mr.
23 Whitener was certainly not driving the rental car,
24 correct?

25 A Correct.

1 Q You had no information to base any -- form any belief
2 that he had anything to do with the rental car, did you?

3 A He was riding in the rental car.

4 Q Well, if you are riding in a rental car means you
5 know chapter and verse about the rental?

6 A No, sir.

7 Q And the point is, you didn't have that information,
8 did you?

9 A That he knew anything about it, no sir.

10 Q You had a hunch, is that right?

11 A I mean, you can say, you can call it what you want.

12 Q Well, what would you call it. Would you call it a
13 intuition or a hunch?

14 A I would say, due to my training I knew that something
15 wasn't right with this car and I had a concern for my
16 safety.

17 Q What about it being a rental car threatened you?

18 A Nothing about it being a rental car threatened me.

19 Q So it being a rental car didn't give you reason to
20 believe that Mr. Whitener had weapons?

21 A No, sir.

22 Q All right. The fact that you are in a supposed
23 remote location doesn't indicate anything to you about
24 whether Mr. Whitener has weapons?

25 A No, sir.

1 Q The fact that the driver of the vehicle didn't have a
2 valid driver's license doesn't indicate anything to you
3 about whether Mr. Whitener has weapons, does it?

4 A No, sir.

5 Q The fact that one of the passenger's had a minor
6 offense in Gaffney didn't lead you to believe Mr. Whitener
7 had weapons, did it?

8 A I don't know what kind of offense it was, it could
9 have been murder. It could have been a simple traffic
10 offense.

11 Q Whatever it was, whatever it was, that didn't give
12 you any reason to believe Mr. Whitener had weapons, did
13 it?

14 A No, but that would cue me of it could be a
15 possibility.

16 Q Well, there again, you are working on intuitions and
17 hunches?

18 A Reasonable suspicion.

19 Q What is reasonable about it, what is the -- what are
20 the actual reasons you --

21 A -- it is reasonable that we have showed criminal
22 activity in the car already. That you have got a driver
23 with no license; you have a guy in the backseat that is
24 wanted; you have got a guy in the backseat that has a
25 scale in his pocket.

1 Q But you, you had voluntary cooperation from the
2 driver about his criminal activity. You have searched him
3 and found nothing, correct?

4 A Correct.

5 Q You have the other individual who was, you have
6 already testified, totally cooperative. You searched him
7 and found one scale and no weapons, correct?

8 A Correct.

9 Q No drugs, correct?

10 A Correct.

11 Q So none of that would lead you to reasonably believe
12 Mr. Whitener possessed weapons, would it?

13 A That is a possibility.

14 Q Well, it is a possibility based not on a reason but a
15 intuition. Would you agree?

16 A No, sir. I would say I had reasonable suspicion.

17 Q You just wanted to see without the reason?

18 A No, sir.

19 Q Well, have you stated all of your reasons that would
20 justify you getting Mr. Whitener out of the vehicle and
21 searching him for drugs?

22 A All of them, yes sir, that I can think of right now.

23 Q Okay. All right. Now, is it correct that when you
24 did search Mr. Whitener, at that point in time he had --
25 he was seated in the car and he was told to get out of the

1 car?

2 A He was asked to get out of the car, yes sir.

3 Q How did you ask him?

4 A I said, Mr. Whitener, do you mind stepping out of the
5 vehicle for me.

6 Q All right, so what if he had of said, no, I'm not
7 getting out of the car.

8 A That didn't happen.

9 Q What I am saying, was he free to make a choice about
10 getting out of the car?

11 A I guess he could have been.

12 Q Well, tell me what would have happened had he told
13 you that he wasn't going to get out of the car?

14 A We would have had to address that however we --

15 Q -- well, how would you have addressed it, sir?

16 A I don't know. I can't make him get out of the car.

17 Q What would you have done? Would you have said, well,
18 Mr. Whitener, that is your choice, we don't want to bother
19 you. You are free to go about your business. Would you
20 have said that to him?

21 A I mean, you can't just walk down the side of a
22 roadway there.

23 Q I am sorry?

24 A He can't just walk down the side of a main highway.

25 Q So at the time that you asked Mr. Whitener to exit

1 the vehicle and at the time that you searched him for
2 weapons, Mr. Whitener was not free to leave. Is that
3 correct?

4 A He wasn't in any type of detention, no sir.

5 Q Was he free to leave the scene?

6 A He wasn't in any type of detention.

7 Q No, sir. Please answer my question. I can ask His
8 Honor to instruct you to answer it. My question is, at
9 the time Mr. Whitener was asked to get out of the vehicle
10 and was searched by you, was Mr. Whitener free to leave
11 the scene?

12 A I was not holding him against his will.

13 Q Was Mr. Whitener free to leave the scene --

14 MR. SCOTT: Judge --

15 Q -- yes or no.

16 MR. SCOTT: He has answered the question.

17 MR. HARRIS: Your Honor, he has not answered the
18 question.

19 THE COURT: Let's do this. Let's ask it this way.
20 If Mr. Whitener, while all of this was going on, simply
21 opened up the car door and start walking down the street,
22 what would you have done.

23 A I would have went and spoke with him and seen, you
24 know, why he was, why he decided to leave, if he was
25 trying to leave the traffic stop with something. You

1 know, I would have had to address the issue on why he was
2 trying to flee the traffic stop or leave the traffic stop.
3 But I mean, if I had no reason to hold him I wouldn't have
4 held him.

5 Q So picking up on that then. So if Mr. Whitener had
6 opened up the car door and started walking down the road
7 you would have stopped and detained him. Is that right?

8 A I would have spoke with him, yes sir.

9 Q You would have stopped him from leaving, wouldn't
10 you?

11 A I would have spoken with him.

12 Q Would you have just allowed him --

13 A -- would I have arrested him, no sir.

14 Q And you would have stopped him and detained and
15 questioned him. Is that correct?

16 A I would have questioned him, yes sir.

17 Q So Mr. Whitener was not free to leave, was he?

18 A I never said he was not free to leave. I explained
19 to you the answer to your question.

20 THE COURT: I think there is testimony, maybe we can
21 fast-forward here. I think his testimony to indicate that
22 although Mr. Whitener was not under arrest prior to the
23 drugs being discovered; that based on the circumstances,
24 location, et cetera, that the witness in all likelihood,
25 had the person opened the door and started walking down

1 the road at 1:00 o'clock in the morning in a very rural
2 area, that would have seemed somewhat strange, certainly
3 would have peaked this witness' interest. And in all
4 likelihood, he would have walked out with the person and
5 by definition, ask them to stop, ask the person why he is
6 leaving the car. Because I know on this particular
7 stretch of road, I don't think there is anything for a
8 good piece of distance. Whether that rises to the level
9 of the detention, that might be another question. But I
10 get your point, I get what he is trying to say.

11 MR. HARRIS: Your Honor, and I thank the Court and I
12 have to say for the record, for the protection of my
13 client's rights.

14 THE COURT: Sure.

15 MR. HARRIS: That the question and I will be happy to
16 put up the question again. The question put to the
17 witness requires a yes or no answer. If the witness wants
18 to explain further, of course, I assume the Court would
19 allow him. But to try to explain an answer that he has
20 not yet given, yes or no, I believe is unresponsive to the
21 question to the point that the witness should be
22 instructed to answer.

23 THE COURT: All right. Well if the question is, was
24 he free to leave. Clearly it doesn't sound, the officer
25 did not effect an arrest on your client until he found the

1 drugs. As a practical matter, there was no way for your
2 client really to leave because of this very rural stretch
3 of the roadway. I am sort of getting at both what you
4 guys are saying. If you want to ask the question again, I
5 think his answer is, he wasn't under arrest but he also
6 wasn't free to leave. What that makes it, whether it's a
7 Terry type stop like you have, I don't know, that is
8 subject to argument. If you want to pose the question one
9 more time, I don't know that there is necessarily a black
10 or white answer for that question.

11 MR. SCOTT: Judge, I think it has been answered would
12 be my argument. Furthermore, it is calling for
13 speculation, that did not happen. I mean, we can say what
14 would you have done if this or that. That is not what we
15 are arguing because none of that happened. He didn't get
16 out and start walking down the road.

17 THE COURT: I understand but it goes to the heart of
18 the question of whether he was under arrest, whether he
19 was detained, whether he was free to leave. That is the
20 reason he asked the question in that way.

21 MR. SCOTT: Yes, sir.

22 THE COURT: Ask it again.

23 Q Officer, I put to you a question, sir, with all due
24 respect that, to be answered yes or no. If you wish to
25 explain I am sure the Court will give you all the

1 opportunity you would like. My question again, sir, is on
2 your oath. At the time you asked Mr. Whitener to exit the
3 vehicle and at the time that you searched him for weapons,
4 was Mr. Whitener free to leave?

5 A He was not under arrest or any detention at that
6 time.

7 Q He was not under any detention at that time?

8 A No sir, I was not holding him against his will.

9 Q So he wasn't free to leave?

10 A Technically if you want to call it --

11 Q -- and this is under oath, sir.

12 A Yes, sir.

13 Q When you manipulated the object in, under his pants,
14 isn't it true that it was obvious to you that that, that
15 that soft object was not a weapon?

16 A I would say it wasn't a gun or a knife, yes sir.

17 Q It wasn't anything, all right -- so you then asked,
18 under the circumstances, Mr. Whitener, what is that or
19 something to that effect?

20 A That is correct, yes sir.

21 Q To which he allegedly replied a bag of powder?

22 A Yes, sir.

23 Q All right. None of this was with Miranda, correct?

24 A That's correct.

25 Q At the time that Mr. Whitener made the statement to

1 you in response to the question, is there anything else in
2 the car. And allegedly Mr. Whitener responded, there is
3 nothing else. Had Mr. Whitener, was Mr. Whitener free to
4 leave?

5 A No sir, not at that point.

6 Q Was he under formal arrest?

7 A Yes sir, at that point he was.

8 Q But he had not yet been Mirandized?

9 A That's correct.

10 Q Thank you, no further questions.

11 THE COURT: Redirect?

12 MR. SCOTT: Yes, sir.

13 REDIRECT EXAMINATION

14 By Mr. Scott:

15 Q They said they were coming from Atlanta. It is a
16 rental car from North Carolina and the driver is driving
17 under suspension. Was that your testimony?

18 A Yes, sir.

19 Q That road, what is that road called, 56?

20 A Highway 56.

21 Q 56. Is that a heavily traveled road?

22 A Not really. I mean, it runs in our County, it runs
23 from County line to County line, from Saluda up to Laurens
24 County.

25 Q Okay. You are going to, I guess to Kings Mountain,

1 kind of area of North Carolina or Shelby, North Carolina
2 from Atlanta, would that be a route you would typically
3 take?

4 A I am sure there is some way you could probably get
5 there but I mean that wouldn't be a route I would take.
6 Probably travel the interstate.

7 Q Okay. And you talked about, you asked them where
8 they are coming from. They said a funeral and describe
9 again during your cross-examination, when you were talking
10 to Mr. Harris. What was it that gave you some kind of
11 suspicion that wasn't quite adding up?

12 A They said they were coming from a funeral, there was
13 no funeral attire, I didn't see any dress clothes in the
14 vehicle. You know, when you go to a funeral you normally
15 try to dress up a little bit and be presentable. They
16 were not in dressy funeral type clothes.

17 Q You said one of the guy's had camo cargo shorts on?

18 A That's correct, yes sir.

19 Q And, well, you didn't see the trunk at that point,
20 did you see any luggage inside of the cab at all?

21 A No sir, I didn't.

22 Q Talk a little bit more about Mr. Whitener. You had
23 him step out, okay, he is on the side of the road. At
24 that point is he detained?

25 A No, sir.

1 Q Does he have handcuffs on?

2 A No, sir.

3 Q And then you again feel him for weapons you said?

4 A Yes, sir.

5 Q And that is when you come across the thing that is
6 kind of in his underwear?

7 A Yes sir, it was between his underwear and his pants.

8 Q Tell me about whenever you feel it, what does it feel
9 like?

10 A It is a large squishy ball, about the size of maybe a
11 small baseball.

12 Q Okay.

13 A Maybe not as big as a baseball.

14 Q Okay. And what did you suspect upon feeling that?

15 A I mean, I knew during my training that it was most
16 likely a type of drugs, probably cocaine.

17 Q Have you patted suspects down before?

18 A Yes sir, many.

19 Q And have you located contraband like that before?

20 A Yes sir, I have.

21 Q That being powder, was it wrapped up in a bag or
22 something?

23 A Yes sir, a plastic bag.

24 Q Have you encountered things like this on suspects
25 before?

1 A I have, yes sir.

2 Q Does it have a fairly distinctive kind of texture to
3 it?

4 A Yes sir, it does.

5 Q And at that point was he under arrest?

6 A Once I found the powder and removed it then, yes sir,
7 I did place him under arrest.

8 Q Once you removed, okay, let me ask you this. In your
9 report you describe how you feel something soft. Did you
10 ask him what it was or did he tell you what it was. How
11 does that work?

12 A Let me review my report real quick if you don't mind.
13 Yes sir, I did. I asked him what the object was.

14 Q And it is still in his pants?

15 A Yes, sir.

16 Q And then what does he say?

17 A He explained to me that it was a bag of powder. It
18 is a bag of powder was his exact words.

19 Q Okay. So what you are saying is you suspected it was
20 a bag of powder and he confirmed it?

21 A Yes, sir.

22 Q And then at that point, when was, when was he placed
23 under arrest?

24 A Let me review my report here. He was placed into
25 investigative detention first. And then I removed it

1 from, I removed the object from his pants.

2 Q Take your time, it is right in the middle there. I
3 know it is single spaced.

4 A Yes, sir. Okay. It would have been after it
5 actually tested positive. Once Sergeant Stribble got
6 there is when he was arrested and transported to the
7 Detention Center.

8 Q So correct me if I am wrong. I just want to get this
9 straight. You pat him down?

10 A Yes, sir.

11 Q You felt the powder thing?

12 A Yes, sir.

13 Q You suspected contraband?

14 A Right.

15 Q You ask him what it is?

16 A Yes, sir.

17 Q He tells you?

18 A Right.

19 Q Then you remove it?

20 A Yes, sir.

21 Q And then you field test it?

22 A Yes, sir.

23 Q And then you place him under arrest?

24 A Correct.

25 Q Tell me, just, you describe these four guys. What is

6 Q I am saying weights of 220, 200 pounds, 210 pounds.
7 These are full sized adult males?

9 Q And at least it is you and the trainee at first?

11 Q We have established the rural area. The driver is
12 DUS in a rental car. Is that something suspicious to you
13 in any way?

16 Q All right. And then the digital scales you locate in
17 the other guy's pocket. Tell me in your experience, what
18 is that, what are those typically used for?

22 Q Okay. And it is 1:00 a.m. Mr. Claytor, I think that
23 is all I have. Answer any recross that Mr. Harris may
24 have.

25 RECROSS-EXAMINATION

1 By Mr. Harris:

2 Q You did not find any weapons at all on Mr. Whitener
3 or anybody. Is that correct?

4 A That's correct, yes sir.

5 Q Thank you. No further questions.

6 THE COURT: You can step down.

7 MR. CLAYTOR: Thank you, sir.

8 THE COURT: Next witness?

9 MR. SCOTT: Your Honor, for this purpose and for this
10 hearing I think Mr. Claytor is it.

11 THE COURT: One point of clarification before you sit
12 down. I meant to ask you this. From start to finish, how
13 long did the whole stop take from when you made the stop
14 on the driver to the time that you patted Mr. Whitener
15 down and found the cocaine.

16 MR. CLAYTOR: I would say probably no more than ten
17 to twelve minutes.

18 THE COURT: Any follow-up questions. Anything from
19 the State?

20 MR. SCOTT: No because what I think I was asking
21 earlier was, what was the time from the stop to the time
22 that Whitener was ordered out of the car. Did you get
23 that?

24 THE COURT: I got that, I think he said about five
25 minutes.

1 MR. CLAYTOR: About five to eight.

2 MR. SCOTT: Nothing further.

3 THE COURT: Any follow-up, Mr. Harris?

4 MR. HARRIS: I don't have any questions.

5 THE COURT: Thank you. You may step down.

6 MR. CLAYTOR: Thank you, sir.

7 THE COURT: Any additional arguments?

8 MR. HARRIS: I think the cases that I asked the Court
9 to consider pretty thoroughly discussed the legal concept
10 here. I would just emphasize that language from
11 Blassingame, where the Court states, before the police may
12 frisk a Defendant they must have a reasonable belief that
13 defendant is armed and dangerous. And that can't be a
14 hunch, it can't be intuition and to say I don't know if
15 they have weapons is an admission that they don't have a
16 reasonable belief. So I think that the search of Mr.
17 Whitener, the Terry frisk of Mr. Whitener, was illegal
18 under the case law and under the Constitution.

19 THE COURT: Solicitor, any response?

20 MR. SCOTT: Judge, he says I don't know that they had
21 a weapon then why do we need Terry. Because if he knows
22 he has a weapon and then you are going to cuff him
23 immediately and go head and figure it out from there. But
24 I think he has articulated his reasonable suspicions. You
25 have got four guys on a, Your Honor is familiar with it

1 and I would classify it as a very rural area and, you
2 know, not a heavily traveled road, 1:00 a.m., coming from
3 a funeral in Atlanta. They are wearing street clothes,
4 cargo shorts on the one guy. The driver, that is
5 interesting, but he is in a rental car with North Carolina
6 tags and he is driving under suspension. So right off the
7 bat, how in the world did you rent the car. These guys,
8 once he is asked to step out and then the other one who is
9 wanted out of Gaffney. So you have one guy who is driving
10 a rental car under suspension. You have got another guy
11 who has got a ten minute hit out of Gaffney. Very fluid
12 situation, he is trying to figure out this and that. He
13 has got a trainee with him, he is on the side of the road,
14 he has got two guys still in the car, two guys who he has
15 out who are breathing heavily, they keep looking at the
16 passengers in the backseat of the car. One of them is
17 Whitener. That is reasonable suspicion right there all
18 day long. Why are they looking at these guys, something
19 is not adding up here, this is very particular. He has
20 got the digital scales on the one guy. He says in his
21 experience, that typically means dope is in the car
22 because those are typically used to weigh dope. There is
23 a very clear nexus usually between drugs and guns. And
24 there is case law that recognizes that. I have got this
25 case right here. U.S. Supreme Court case, Judge. It is

1 US v. Sakyi, S-A-K-Y-I. It is 106, it is Federal 3rd at
2 164. It is a Fourth Circuit case, Your Honor, I am sorry,
3 1998. But the proposition I wanted to read from, a
4 generalized concern for officer's safety during a lawful
5 traffic stop. That is not contested, that the traffic
6 stop was lawful, coupled with a reasonable suspicion that
7 drugs are located somewhere in the vehicle justifies a
8 frisk of passengers for weapons. Okay. So right off the
9 bat you have got this, generally just this weird
10 situation. And I know that is not the standard but I
11 think it does rise within reasonable suspicion. Then you
12 have got the scales on the one guy, okay. And that clues
13 him in to, hey, there is probably something in here and it
14 is probably drugs. And this case seems to justify frisk
15 of passengers. It is reasonably suspicious that drugs
16 would be located in the car. Judge, I think the testimony
17 kind of spoke for itself. He, just his, you know, asked
18 these guys, it is almost like they have to rely on their
19 senses to some degree. You know, it is kind of when the
20 hair on the back of their neck stands up and they are on
21 this rural road and these guys are acting nervous. Same
22 of them have contraband and they are, you know, we are
23 looking back at it in hindsight. Of course, that is
24 20/20. But I think he has shown all the reasonable
25 suspicion in the world for doing what he did. And

1 thankfully nobody had weapons, that is not the standard
2 though. It is a reasonable suspicion that some may, some
3 criminal activity may be afoot. But I think that, based
4 on all of that, Your Honor, I think that search was legal.

5 MR. HARRIS: Your Honor, I am sure that the officer
6 wished the Solicitor could testify for him like he just
7 did. Unfortunately that wasn't the testimony. But I find
8 that really, the analysis of the testimony is much more
9 here that all the things that took place during the
10 investigation of the two other individuals, the driver and
11 the other passenger, actually would lead a reasonable
12 officer, I don't know if this officer can be found
13 reasonable or credible, or credible based on his
14 testimony. But actually what was happening should have
15 dispelled any suspicion about somebody being, on the
16 question of whether anybody was armed and dangerous.
17 Everything that happened out there was consensual and
18 voluntary as to the two other individuals. The person
19 voluntarily gave up information about himself that he
20 didn't have a license, he gave no trouble, resisted not at
21 all, had no other contraband, no weapons on him. So if he
22 is the ring leader of some kind of nefarious thing going
23 on about the rental car, you know, then that certainly
24 believes any dangerousness. The other passenger, the same
25 thing, gave no trouble, was fully cooperative, had no

1 weapons, had no drugs. There was no investigation that
2 would lead a reasonable officer to believe beyond an
3 innocent suspension or hunch without particular suspicion.
4 So I would say, un-particular rise of suspicion, that
5 there was anything else in the car. And the officer never
6 said he believed that there were other drugs in the car.
7 He said, based on the remote location, the nervous
8 demeanor of the two other individuals and for officer's
9 safety. That is general, without a reason for it. I
10 didn't know if they had weapons so I got him out of the
11 car to see if he had weapons. Well, that's the dividing
12 line between permissible and impermissible. I think then,
13 the cases say that the officer must have reasonable
14 suspicion that an individual is, not might be, not might
15 possibly be, but is armed and dangerous. Then that kind
16 of intrusion on his Fourth Amendment rights can take
17 place, but only then. I think under the State's
18 formulation in this case, and under these facts, any time
19 an officer wants to search somebody for weapons all they
20 have to do is come into court and say, well, I just
21 thought for my safety, it was in a remote location. And
22 they get to search the people for weapons. I don't think
23 that our case law and the Fourth Amendment are intended to
24 be that weakened down. So I don't, I don't think there
25 was any reasonable suspicion here. And the witness

1 admitted on the stand, my recollection in
2 cross-examination, that he was operating on intuition and
3 hunch. So I don't think they have shown enough here.

4 THE COURT: All right. Well, I am going to take the
5 matter under advisement so I can review the cases that are
6 cited. I, you know, what is sticking out in my mind at
7 this particular point in time, again I will review the
8 cases. But again this is a 1:00 a.m. stop, the incident
9 location is Mudlick Road on 56 and I am familiar with this
10 stretch of road, where you take a left, I am sorry, where
11 you take a right when you are on 72 to go Chappells. You
12 pass through Chappells and then head up towards Kinards.
13 So to say this is a rural stretch of road is somewhat of
14 an understatement. The fact that it is 1:00 a.m. in the
15 morning and I am not sure that there is any case on point.
16 But you make a traffic stop at 1:00 a.m. in the morning in
17 a rural area, intuitively that just seems different to me
18 from a traffic stop in downtown Newberry or downtown
19 Columbia where there is a lot more visibility, there is a
20 lot more people going by. Certainly I would think any
21 reasonable officer would be prudent to take, perhaps more
22 precautions when there is nobody else around to see if
23 something, to see if something bad would gone down, to see
24 it happen. And so where there is nobody witnessing them
25 out on that stretch of road at 1:00 in the morning. And I

1 am curious whether there is law out there to that effect.
2 I think, perhaps the totality of the circumstances maybe
3 lends itself to that analysis. I will take the matter
4 under advisement and issue an, let y'all know where I come
5 down on this. Of course, I think is interesting is the
6 car is rented. Every time I have rented a car you have to
7 list all the drivers. And for that reason usually there
8 is sometimes an additional charge for an additional rider.
9 It is a little bit peculiar that the car is a rental and
10 that the driver doesn't have a driver's license, it is
11 under suspension. That is peculiar and obviously the
12 first two people this officer speaks to when he goes to
13 the car, one is driving under suspension, breaking the
14 law; and the other one has a warrant pending out of
15 Gaffney and some digital scales. I will need to look at
16 Blassingame and the Sakyi case and I will let y'all know
17 tomorrow.

18 MR. SCOTT: Can I give you one more Court of Appeals
19 case, Judge.

20 THE COURT: Sure.

21 MR. SCOTT: It is sort of kind of touching some of
22 the things you just mentioned. State v., I am going to
23 say Pichardo, P-I-C-H-A-R-D-O. That is a cite of 367 SC
24 84.

25 THE COURT: What year is that one?

1 MR. SCOTT: 2005.

2 THE COURT: 2005.

3 MR. SCOTT: Proposition in determining whether a
4 person is, "armed and dangerous". An officer may not be
5 absolutely certain that the person is armed, an issue of
6 whether a reasonably prudent man in the circumstances
7 would be warranted in a belief that his or others was in
8 dangerous based on specific and articulable facts, taken
9 together with rational inferences from those facts. Thank
10 you, Your Honor.

11 THE COURT: Good enough. We will be at ease on this.

12 MR. HARRIS: 10:00 in the morning, Your Honor?

13 THE COURT: Yes.

14 (Whereupon, the trial will resume the next morning at
15 10:00 a.m.)

16 THE COURT: We will go back on the record, if we may,
17 in case 15-GS-36-83. Mr. Harris is present. Before you
18 came in, Mr. Harris, I asked the Solicitor, after I
19 finished up those other pleas, what the situation, I
20 didn't see you in the courtroom. He informed me that you
21 were still trying to make some efforts to see where Mr.
22 Whitener might be, still no luck in securing the Defendant
23 here this morning?

24 MR. HARRIS: No, Your Honor. I have looked for him
25 in the building and here in the courtroom. When I left

1 here yesterday at mid-day I did speak to Mr. Whitener on
2 the phone. I explained to him everything that had
3 transpired and that he had an opportunity to appear this
4 morning and proceed with his jury trial or enter a plea of
5 guilty. And explained that the offer that had been
6 extended to him previously, he can still take advantage
7 of. He told me he would be here so I don't know if he has
8 an excuse when I didn't see him this morning when I
9 arrived and went outside and called the last telephone
10 number I had for him. I could not reach anybody at that
11 number. I tried it again, still couldn't reach anybody at
12 that number. I called my office to see if my office had
13 heard anything from him and we had not heard anything from
14 him at the office. So at this point he has not appeared
15 again today.

16 THE COURT: All right. You did look around outside
17 the building to make sure he was not just outside having a
18 cigarette?

19 MR. HARRIS: I actually looked around at the public
20 entrances for the building. I informed the Bailiff in the
21 courtroom to please be on the lookout for him and
22 described him and they said they would. The security
23 deputy downstairs, I did the same with. So I have made
24 every effort I can to locate him this morning. But I had
25 instructed him, so as there would be no missing each other

1 in the hallway kind of thing, to come to the building and
2 to come to the courtroom to check into the courtroom and
3 that I would see him here.

4 THE COURT: And just so that the record is clear. I
5 think, Solicitor, you were offering to allow him, allow
6 him to plead to a trafficking in cocaine first offense;
7 minimum three, maximum ten?

8 MR. SCOTT: Well, just due to the weight. It was
9 going to seven to twenty-five --

10 THE COURT: -- seven to twenty-five offense?

11 MR. SCOTT: About 35 grams.

12 MR. HARRIS: Your Honor, I will just say that, for
13 clarity, that I had advised, at this point in time had
14 advised Mr. Whitener several times in clearest terms that
15 I possibly could, that he faced the cost of the alleged
16 prior record, a number of drug offenses on his record that
17 he faced mandatory minimum 25 to 30 year sentencing if he
18 were found guilty by a jury and if the Court determined
19 that, in fact, he had qualifying prior offenses. And I
20 explained to him that he had an opportunity to plead to a
21 first offense, to a sentencing range of 7 to 25 years.
22 And that it would be in the discretion of the Court as to
23 what the sentence would be within that range. So he
24 clearly, in my opinion, understood the advantage,
25 potential advantage and a benefit to him of accepting the

1 plea offer. And yet he's, obviously not appeared to do
2 that.

3 THE COURT: All right. I do realize that a bench
4 warrant has already been issued for Mr. Whitener. That is
5 still outstanding?

6 MR. SCOTT: Yes, sir. It actually has been moved to
7 failure to appear. We restored it once we began talking
8 to Mr. Harris about a potential plea. But he still has a
9 bench warrant.

10 THE COURT: All right. Out of an abundance of
11 caution I am going to ask that the bailiff call his name
12 one more time at the steps at the Court House. So would,
13 somebody ask the Bailiff to go downstairs and call his
14 name. The record will reflect that the jury is not
15 present in the courtroom so they won't be privy to the
16 name being called. So we will be off the record for just
17 a moment until confirmation of Mr. Whitener is not in
18 earshot of the Court House.

19 (Whereupon, a short break was taken.)

20 THE COURT: We will go back on the record again in
21 the State versus Whitener. The Bailiff has called Mr.
22 Whitener's name at the Court House steps. There has been
23 no reply. Again, the Court reaffirms his rulings
24 concerning Mr. Whitener's absence, the same rulings the
25 Court made on Monday. He has been given two different

1 days to show up and given indication by his attorney.
2 Clearly Mr. Whitener knows this case is taking place, this
3 trial is going forward and by his absence, without any
4 justifiable excuse, by his absence he has voluntarily
5 decided to forego his presence here. And therefore this
6 case will go forward. The Court has reviewed the law, the
7 case law, the cases that were submitted on the issue of
8 the search as well as the Miranda issue. And the Court
9 would find that the evidence of the drugs is admissible.
10 This case more closely resembles the Sakya, S-A-K-Y-A
11 case, cited by the State than perhaps the Williams case,
12 the Court of Appeals in 2002. This is not a situation
13 where you have a mere traffic stop, the driver gets
14 ticketed and then stops. Under the totality of the
15 circumstances and under the facts of this particular case,
16 what we have is a stop taking place at 1:00 o'clock in the
17 morning; driver is under suspension; one of the
18 passenger's has an outstanding warrant. The stop takes
19 place on a very rural road in which the Court is very
20 familiar of that stretch of roadways, extremely
21 uninhabited, it is very bucolic. First it is strange that
22 a person without a driver's license would be able to rent
23 a car. The statement having been at a funeral, when the
24 driver and the occupants are not in, what one would
25 consider, minimally appropriate funeral attire. That

1 certainly would cause to peak the officer's interest. And
2 then, of course, the person, the individuals he speaks to,
3 one is actually engaged in violation of the law, driving
4 without a license, driving with a suspended license; the
5 other one has an outstanding warrant for him out of North
6 Carolina. Additionally the behavior of the occupants was
7 clearly suspicious, being on a deserted roadway the
8 officer was justifiably concerned for his own safety.
9 Many, many cases will site the proposition that typically
10 guns and drugs go hand in hand and in this case when the
11 driver's side backseat passenger was arrested he had
12 scales in his cargo pants that were readily apparent, in
13 plain view of the officer. Based on his training and
14 experience as well as his experience with digital scales,
15 simply go hand in hand with drugs. When you couple that
16 with the fact that the officer is with only a trainee and
17 I am sure the trainee was capable of his own right but
18 obviously who was still in training. The officer is
19 initially by himself at 1:00 o'clock in the morning, the
20 individuals in the car behaving suspiciously, glancing
21 out. The individual in question, Mr. Whitener, not really
22 making eye contact with the officer. Clearly there was
23 good reason, good cause for the officer to make an initial
24 pat down of the occupants, to make sure that no one had
25 weapons at that time of the night. I understand the

1 argument that perhaps the occupant, Mr. Whitener, was not
2 necessarily free to leave at the same time. I wouldn't
3 say that he was necessarily under arrest. The whole
4 question occurred to me last night, the question was, was
5 he free to leave. Based upon my knowledge of that stretch
6 of roadway I am not sure he would be free to leave really
7 to go anywhere. If he were to simply step out of that car
8 and start walking away that in and of itself, based upon
9 the fact there are no stores around there, there are no
10 residents really on that stretch of roadway where this
11 took place. That in of itself would probably be a little
12 bit suspicious if you were just at 1:00 o'clock in the
13 morning decide to start walking down an unlit deserted
14 highway. Nevertheless, the Court finds that there was
15 probable cause or a suspicion for the pat down of Mr.
16 Whitener. There are, there was, I think, suspicion.
17 Again, and the holding of Terry cited by the Defense
18 basically states and I, "the officer may not be absolutely
19 certain, an individual is armed. The issue is whether a
20 reasonably prudent man under the circumstances presented,
21 would be warranted and believed that his safety around
22 others was in danger." And firearms are frequently
23 present where drugs are present. Upon patting down the
24 individual he noticed a bulge in the individual's upper
25 leg area. I know the question was posed to the officer

1 yesterday as to whether he manipulated it or words to that
2 effect. And my recollection of the testimony was that
3 there was no manipulation. It did peak the officer's
4 curiosity at which point he asked the individual what it
5 was. And Mr. Whitener said, well, its cocaine. Miranda
6 was not required. Based upon that I don't believe that
7 that is focused solely on interrogation, suspicion,
8 sufficiently focused or sufficiently warrant giving
9 Miranda rights at that point in time. The officer was
10 trying to figure, confirm what that bulge was. He
11 suspected it was drugs, it turned out he was right.
12 Asking that question of Mr. Whitener, Miranda was not
13 required when, for him to ask that question. Mr.
14 Whitener, nevertheless, Miranda was not required. So
15 based upon the totality of the circumstances, based upon
16 the suspicion, reasonableness of the officer's conduct,
17 all of the other facts and circumstances that I have
18 reviewed, I do find that the drugs are admissible and not,
19 the drugs were not in violation of either Miranda or Terry
20 or any other applicable search and seizure law. With that
21 being the Court's ruling, Mr. Harris, I will tell you that
22 obviously when the State moves to introduce the evidence
23 you don't have to make a contemporaneous objection. But
24 when they make reference to the Miranda issue that you
25 raised earlier for Appellant purposes, you are protected

1 so you do not need to make contemporaneous objection. If
2 you want to but you don't have to is what I am telling
3 you, okay. This ruling will suffice.

4 MR. HARRIS: Thank you, Your Honor, and I appreciate
5 that. I probably will indicate an objection if the Court
6 would understand that to mean I am objecting without
7 stating grounds.

8 THE COURT: What I will do, if you want to just, when
9 we get into that, when they elicit the testimony about
10 the, move the introduction of drugs I will, simply stand
11 up and I will just note that you do object on that subject
12 on pretrial rulings.

13 MR. HARRIS: Thank you, Your Honor. Your Honor, the,
14 it is the Defendant's intention to also suppress the
15 statement allegedly made by the Defendant, Mr. Whitener.
16 After his formal arrest where he, he has alleged to have
17 made a statement that there is nothing else in the car,
18 you have got it all, it's mine. And the testimony of
19 Deputy Claytor, my recollection and my notes indicate was
20 that at that point in time Mr. Whitener was under arrest,
21 he had not been given Miranda and that this was in
22 response to a question posed by the officer about drugs
23 being in the car. So we would take the position that that
24 is an involuntary and inadmissible statement because it
25 was made without Miranda.

1 THE COURT: Does the State have a position on that?

2 MR. SCOTT: Just didn't, in reviewing the incident
3 report it appears that the powder was noted. He says, or
4 the value was felt. He says it is powder. Placed him in
5 investigative detention. They, remember we went through
6 the thing where they take it and they field test it. At
7 that point it says he was advised of his Miranda warnings.
8 And then they asked, is there any other contraband. And
9 that is when he pipes up with, sir, there is nothing else
10 in the vehicle; you have got me, that's all of it.

11 MR. HARRIS: Your Honor, what I am going on is the
12 sworn testimony of the witness. I put the question
13 directly to him. When that question was asked, was Mr.
14 Whitener under formal arrest, I believe is probably the
15 way I phrased the question. The answer was, yes. But he
16 had not been read his Miranda rights. The answer is, yes.
17 So now I would agree there might be some discrepancies
18 between the incident report and the officer's testimony.
19 But, of course, that pretty much characterized the
20 officer's testimony in its entirety that it was full of
21 discrepancies between what he wrote and did not write in
22 his report and what he testified to. But I, I believe
23 that what we are entitled to go forward on is the evidence
24 that was actually received from the witness.

25 THE COURT: My notes reflect that the Officer who

1 testified yesterday, and I am just quoting from the record
2 as to what I wrote down. The Officer asked if there was
3 any other contraband in the vehicle. Whitener said,
4 "that's all in the vehicle." Did not Mirandize Defendant,
5 found powder, retained and ask if any contraband in the
6 car. The driver and the Defendant and the backseat driver
7 passenger taken to jail, approximately five minutes
8 between the time -- I think the total stop indicated
9 yesterday it was about 12 minutes. This is going to be my
10 ruling on that. The testimony is that Miranda was not
11 given, he was under arrest at that point and time. It was
12 focused on custodial interrogation. I think that
13 statement, that second statement, in light of the
14 testimony yesterday, had not been Mirandized after he was
15 placed under arrest. The statement indicating that it was
16 powder and it was cocaine, that would be admissible.

17 MR. HARRIS: Thank you, Your Honor.

18 THE COURT: Are you ready to proceed?

19 MR. HARRIS: Your Honor?

20 THE COURT: Yes, sir.

21 MR. HARRIS: The Assistant Solicitor has provided to
22 me four proposed State's exhibits marked for
23 identification at this point. I would, I have advised the
24 Solicitor and will advise the Court that I will have an
25 objection to two of these exhibits as they are proposed.

1 THE COURT: What are the two --

2 MR. HARRIS: -- and I don't know the numbering, I
3 don't remember. But there is a proposed exhibit that is a
4 photograph of what appears to be a bag of white powdered
5 substance on a scale beside a stack of, what appears to be
6 a stack of money.

7 THE COURT: I see it now.

8 MR. HARRIS: This is State's exhibit 1 for
9 identification. Your Honor, I will object to the
10 admission of this exhibit on two grounds. The first
11 ground is that the money placed in the photograph next to
12 the drugs on the scale, of course, is not representative
13 of how these things were found in possession of Mr.
14 Whitener. That's the, that is the allegation. It is a
15 proposed picture intended to be incriminating against the
16 Defendant. I was not aware of no evidence that the State
17 would intend to introduce or could introduce that goes to
18 what the source of what this money is. And, of course, it
19 would be completely, that the money came from the drugs,
20 if you take money to get drugs you wouldn't have the
21 money. And if you gave drugs to get money you wouldn't
22 have the drugs. But there is no evidence at all of what
23 the source of this money was, there was no consensual
24 forfeiture of it that I am aware of. So I think it would
25 be inadmissible to place into evidence such a photograph

1 that would imply, I think impermissibly to the jury, that
2 these two items are inextricably somehow are linked beyond
3 just speculation. The second objection I have of the
4 photograph is that it has what appears to be the weight of
5 the drug. And I will say that this field weight that
6 appears in the discovery is different than the weight as
7 indicated on the SLED analysis. But I take the position,
8 Your Honor, on behalf of the Defendant that any
9 presumptive field test of this substance, whether it be
10 testing for the nature of the substance for its weight is
11 inadmissible as being scientifically unreliable. SLED,
12 itself, in its policies and procedures, I believe, would
13 recognize that a presumptive test is not admissible in
14 court for any purpose. They can't even use it at a
15 preliminary hearing. And that is what we have. And so
16 this photograph sort of brings in to focus another, I can
17 advise and I have advised the Solicitor, I will object to
18 any attempt to admit evidence about any kind of field,
19 presumptive field test or presumptive field weight of the
20 substance.

21 THE COURT: You want to speak to that, Solicitor.

22 MR. SCOTT: I don't need to get into presumptive
23 testing at the scene. I think the only, to do that is
24 just to give a reason why they arrest them. Of course,
25 SLED results will come out so I don't need to get anything

1 in presumptive testing at the scene. The picture, I think
2 we can probably edit it to some degree where you can't see
3 the field weight because it does, obviously, these things
4 lose weight once they dry out or the baggies is factored
5 out of it. But shows about 37 grams and I think SLED
6 tested about 35.99, something like that. So give or take
7 a gram off and it is right here so it can probably be
8 easily cropped out.

9 MR. DANIEL: Well, Your Honor, that is the weight of
10 the substance in the bag where SLED weighs it without the
11 bag. So that is --

12 MR. SCOTT: That is what I am saying. So that would
13 explain kind of the, within the threshold weight. So we
14 can crop that out.

15 THE COURT: I can barely make out the weight but I
16 think it is, on State's 1 it is very legible about 37
17 grams. So if you want to just sort of crop it out or use
18 a marker or something, scratch through. I think that
19 should be sufficient as far as the first objection about
20 the weight. The money issue, what is your take on that,
21 Solicitor?

22 MR. SCOTT: Well, probably I think everybody agrees
23 it is unfair to say that the Officer staged the picture to
24 infer that, whatever the inference would be. What they
25 are doing is documenting what they find on him. They find

1 close to \$800.00 dollars in cash and 36 grams of cocaine.
2 And I think the jury is entitled to see that. It is what
3 they, what they are doing here is just documenting
4 everything they found on Mr. Whitener. I don't see that
5 as prejudicial. I think the testimony would come out that
6 they got \$800.00 bucks off of him and this baggy of powder
7 that they, that we are going to hear about a lot. So I
8 think that picture is not prejudicial and I think it
9 should come in.

10 MR. HARRIS: Well, Your Honor, I just say. If they
11 want to document what they found on Mr. Whitener they
12 could have very easily, I mean, they have a camera. It
13 would have been very easy to take a photograph of the bag
14 of white powder substance and take a photograph of the
15 money. Now why, were they running out of battery in the
16 camera, I doubt it.

17 THE COURT: Let me ask you this. Is the actual
18 drugs, you do have those --

19 MR. SCOTT: Yes and the only reason, you know,
20 because he is going to describe, the Officer, I am just
21 looking ahead at testimony. He is going to describe what
22 he feels and he talks about a ball of powder. And that is
23 what you see here, when SLED breaks it down it is a little
24 bit different and it may not be, you know, anything to --

25 THE COURT: The photograph will go to corroborate to

1 some extent?

2 MR. SCOTT: Yes, sir. And the concern is that the
3 money is beside the dope. Again, we can amend this
4 picture, we can take some scissors and cut it right down
5 the middle and introduce them as two separate exhibits if
6 that's the, what the Court wants to do.

7 THE COURT: Let's do this. Cut the exhibit in half,
8 let the photo of the, since the evidence, since the
9 Clerk's, Court Reporter rather, indicates State's 1, that
10 can be State's 1 for ID, that will just be the money. And
11 then create a separate exhibit, the other half, showing,
12 State's 1 won't be in evidence. And then State's whatever
13 the next exhibit number is will be the actual photograph
14 of the baggie of the drugs on the scale. I will take care
15 of the picture.

16 (Whereupon, State's Exhibit 1 was marked for
17 identification only.)

18 MR. SCOTT: So 1 will be the cash.

19 THE COURT: Correct.

20 MR. SCOTT: And 2 is going to be the scale --

21 THE COURT: -- yes, you have got enough room to cut
22 that in half. So just take a pair of scissors and go
23 ahead and take care of it that way.

24 MR. SCOTT: Or rather it won't be 2, it is going to
25 be 5.

1 THE COURT: His objections, both of those will be
2 subject to his objections when they move the drugs into
3 evidence. I am asking you not to move the cash into
4 evidence. Okay. I am sustaining his objection on the
5 case.

6 MR. SCOTT: Okay.

7 THE COURT: And this is a situation where perhaps it
8 could be relevant like a trafficking or distribution
9 charge would be relevant, something like that.

10 MR. SCOTT: Well, why don't we do this. Can we just,
11 since this is premarked and this is 1, make this State's
12 1?

13 THE COURT: Make that State's 5.

14 MR. SCOTT: And, just to kind of make sure we are all
15 clear.

16 THE COURT: You can talk about --

17 MR. SCOTT: -- all right, I am crystal clear.

18 MR. HARRIS: Your Honor, I will have a continuing
19 objection that these items were allegedly found.

20 THE COURT: Correct.

21 MR. HARRIS: There is also been shown to me this
22 morning a proposed State's exhibit that purports to be
23 some type of booking information sheet or booking rather.
24 State's exhibit, marked for identification, State's number
25 2. It looks like this and I, and the Solicitor has also

1 been candid telling me that they know that they have a
2 potential ID problem in this case. But I have to object
3 to this record because it is not a genuine record on file
4 with the jail from any other criminal agency. Perhaps
5 part of it are to be found in the regularly kept records.
6 But this document is something that is just fabricated,
7 not that it is untrue.

8 THE COURT: May I see it. I assume, Solicitor, you
9 are seeking to introduce this because this is the only
10 photo you have got of Mr. Whitener?

11 MR. SCOTT: Yes, sir.

12 MR. HARRIS: I would, if they can present the actual
13 photo of Mr. Whitener and lay the proper foundation for
14 it, of course. Of course, the identifying information for
15 Mr. Whitener had to come from some source. We do not know
16 that that source is from this point, I do not know what it
17 is. I assume it either has to be from an ID card, a North
18 Carolina driver's license or from personal observation of
19 witnesses or a combination. But we don't know.

20 THE COURT: I understand your objection. Your
21 objection is going to be overruled. So long as the
22 Officer or somebody can testify this photo is Calvin
23 Whitener and that is the same as when he was arrested that
24 evening. Then the Court will allow submission. The
25 social security number of the driver's license number has

1 been redacted in the exhibit. One thing that I would ask
2 you to do though and it does concern me and I don't know
3 that Mr. Harris will pose this objection but has an FBI ID
4 number and then a number or numbers next to it and that is
5 probably, it indicates that maybe the FBI has a file on
6 him. So what I am going to ask you to do is simply cut
7 this.

8 MR. SCOTT: Okay.

9 THE COURT: And that way the State ID, birth place
10 and FBI ID, all of those are not in the exhibit.

11 MR. SCOTT: Okay. And I am trying to figure how we
12 are going to, I do think, you know, they arrest him for
13 trafficking. Of course, that is based on the weight. I
14 will ask him what they charged him with and why. So just
15 the quantity, maybe he will say something like that.

16 THE COURT: That is acceptable. He can testify to
17 the field weight and that can be dealt with. Because
18 obviously he has to have a reason to charge him with it.
19 The reason to charge him with trafficking is because of
20 the field weight and that is perfectly fine. I don't want
21 a repeat of that situation that happened in Greenwood
22 though, where to make sure he does not answer he was
23 charged with trafficking. We do not need that. Do you
24 have any more pretrial matters, Mr. Harris.

25 MR. HARRIS: Thank you, Your Honor. Also marked for

1 ID is the, what appears to be the SLED analysis report.
2 Of course, I have already indicated to the Court and to
3 the Solicitor's office that I do make a demand of an
4 in-court appearance by the chemist and by others in the
5 chain-of-custody under Rule 6 of the Rules of Criminal
6 Procedure. And I have also been provided what appears to
7 be the BEST evidence envelope, the BEST Kit envelope. I
8 don't know what is in it but of course my objection
9 continues there.

10 THE COURT: The agent will be here when -- that will
11 have to be dealt with when we take his testimony. May I
12 bring the jury out?

13 MR. HARRIS: The Defendant is ready for the jury,
14 Your Honor.

15 THE COURT: Very good. Let us have the jury, please.
16 (Whereupon, the jury came into open court at
17 approximately 11:08 a.m.)

18 THE COURT: The record will reflect that the jury is
19 back and seated. Ladies and gentlemen of the jury, first
20 of all, thank you very much for being here this morning.
21 I walked in for a few pleas and we needed to go ahead and
22 address and we had a few pretrial matters, some
23 housekeeping stuff we had to deal with that is related to
24 this trial. So, again, I apologize for keeping you
25 waiting. The first order of business is to appoint a

1 Foreperson of the jury. Are you Ms. Triplett?

2 MS. TRIPLETT: Yes, sir.

3 THE COURT: The Foreperson, you are in the lucky
4 seat. If it is all right with you I am going to appoint
5 you as a Foreperson. I will tell you that your primary
6 responsibilities is to make sure that everybody has an
7 opportunity to have their fair say on the case submitted
8 to you and sign the verdict form that I give to you at the
9 conclusion of the trial once you return a verdict. Okay.
10 The Foreperson, you will stay in that seat. Megan Roland,
11 you are the alternate. You are suppose to be sitting
12 somewhere else but we will figure that out later on after
13 we take a break. Okay. The rest of you, ladies and
14 gentlemen, during the course of the trial, if you have any
15 difficulty hearing, what is being said, simply raise your
16 hand. The acoustics in this courtroom are actually very
17 good but if you have any trouble hearing what is being
18 said by either of the attorneys or the witness just raise
19 you hand and I will ask them to speak up. If you need a
20 bathroom break sort of waive your hand or flag the bailiff
21 and she will let us know and we will take a brief comfort
22 break. Okay. Ladies and gentlemen, we are about to begin
23 the trial of the State of South Carolina versus Calvin
24 Eugene Whitener. And I will let you know, ladies and
25 gentlemen, that obviously this case is a good bit

1 different from what you see and watch trials being
2 depicted on the TV and movies. Ladies and gentlemen, this
3 is a very important case for the State of South Carolina
4 and to the Defendant involved. This is real life, this is
5 not TV, this is not movies. I want to thank you for your
6 patience with us these last three days. Thank you for
7 your understanding about the issue yesterday. And, again,
8 I apologize to you for any inconvenience. What you are
9 engaged here, ladies and gentlemen, is part of your
10 obligation as citizens of this State, citizens of this
11 Country. And, again, this case is very important to all
12 concerned. I want to thank you for doing your civic duty
13 and your willingness to bear with us and be patient with
14 us and get your attention to the testimony and the
15 evidence to be offered here shortly. With that I am going
16 to ask that you stand where you are and raise your right
17 hand so the Clerk can administer your oath as jurors,
18 please.

19 (Whereupon, the jury was sworn at approximately 11:12
20 a.m.)

21 THE COURT: Ladies and gentlemen, what I now state to
22 you is served as kind of an overview or an introduction to
23 the trial of this case and these remarks are not
24 instructions of the law. I will instruct you on the law
25 at the conclusion of the trial before you retire to

1 deliberate your verdict. Again, this is just an overview
2 of the procedures that we are going to use going forward
3 so that you can better understand what is taking place.
4 Ladies and gentlemen, you may have noticed that in this
5 case the Defendant, Calvin Eugene Whitener, is not present
6 for this trial. I will instruct you that under the laws
7 of this State a Defendant can be tried even if the
8 Defendant does not attend the trial. The fact, however,
9 that the Defendant is not present can not be considered by
10 you against him in any manner whatsoever. So the fact
11 that Mr. Whitener is not present for this trial, I tell
12 you procedurally everything has been done to allow this
13 case to go forward in a legal sense. But obviously the
14 fact that Mr. Whitener is not present does not alter the
15 State's burden of proving his guilt beyond a reasonable
16 doubt. Now in this case, ladies and gentlemen, the
17 Defendant, Mr. Whitener, is charged with trafficking in
18 cocaine. I will explain the elements to this charge to
19 you at a later point in time before you retire to
20 deliberate your verdict. Again, the indictment in this
21 case is merely the means by which the case is brought to
22 court. The indictment is not, in any sense of the word,
23 proof of any of the allegations contained in it. Okay.
24 Again, this is nothing more than a piece of paper that
25 contains the charges made against Mr. Whitener. Mr.

1 Whitener has pled not guilty and that plea puts the burden
2 of proof on the State. It will be your duty to determine
3 whether the State has met this burden of proving the
4 Defendant's guilt. Ladies and gentlemen, your purpose as
5 jurors is to find and determine the facts in this case.
6 Please understand that you are the sole judges of the
7 facts. So if at any time I make any comment concerning
8 the facts you have to disregard that comment. You are to
9 determine the facts from the testimony that you hear and
10 the other evidence which is introduced into the record
11 during the progress of the trial. I instruct you that it
12 is up to you to determine the inferences which you feel
13 properly is drawn from the evidence presented. Now,
14 ladies and gentlemen, it is especially important that you
15 perform your duty by determining the facts diligently and
16 conscientiously because ordinarily there is no way to
17 correct an erroneous determination of facts by a jury.
18 Ladies and gentlemen, the same law that makes you the
19 judge of the facts makes me the Judge of the law. The law
20 that is given by the Court is the only law you can
21 consider. You will have to accept it and apply it even
22 though you might disagree with it. Again, I am not
23 allowed to tell you what the facts are and you are not
24 allowed to disagree with me about what the law is or what
25 the law should be. Your job would be to take the law as I

1 give it to you, apply the facts as you find them to be and
2 thus render your verdict under the oath that you have just
3 taken. Now, please again, until you begin your
4 deliberation please don't discuss this case with anyone,
5 not friends, family members, not even your fellow jurors.
6 Okay. Ladies and gentlemen, it is very important that you
7 keep an open mind, don't decide any issue in this case
8 until you have heard all the evidence and the parties have
9 made their closing argument and you receive my instruction
10 on the law. Again, it is your solemn responsibility to
11 determine the guilt or the innocence of the Defendant and
12 your verdict has to be based solely on the evidence
13 presented during the trial and the law as I instruct you.
14 Now, in a moment the attorneys will make what is known as
15 an opening statement which they will explain to you what
16 the issues are, at least what they contend the issues are.
17 I instruct you that what the lawyers say in their opening
18 is not evidence. At the same time you should pay
19 attention to their openings because obviously it will be
20 kind of an overview or a roadmap of what the attorneys
21 contend will be proven. Ladies and gentlemen, in
22 determining what the facts are in this case you will have
23 to decide whether the testimony of witnesses is believable
24 or not. Understand it is my responsibility to rule on
25 whether certain testimony or evidence can be admitted.

1 However once you, once it is admitted, whether you choose
2 to believe it is solely up to you. Understand that in
3 deciding whether to believe witnesses who testify you can
4 consider the interest of a witness, bias of any witness,
5 prejudice of any witness, the opportunity for a witness to
6 have seen the matters and things about which they
7 testified and also consider the way they act on the
8 witness stand. Consider anything that is in the record in
9 this case that will help you evaluate the testimony of the
10 witnesses. That means it is your duty to pay attention,
11 listen to them and observe them and please pay close
12 attention to the attorneys and the Court. Try to keep
13 your thoughts from wondering, you do what I ask of you you
14 will be in the best position possible to render your
15 verdict under the oath that you have just taken. Now, in
16 order to preserve everyone's rights I will give the
17 attorneys an opportunity to object to anything I said
18 during these opening remarks and we will proceed with
19 opening statement. No objections from the State?

20 MR. SCOTT: No, Your Honor.

21 THE COURT: Any from the Defense?

22 MR. HARRIS: None, Your Honor.

23 THE COURT: Very good. Solicitor, you are
24 recognized, Mr. Taylor, you are recognized for, sorry, Mr.
25 Daniel, you are recognized for your opening, sir.

1 MR. DANIEL: Thank you, Your Honor. May it please
2 the Court?

3 THE COURT: Yes, sir.

4 MR. DANIEL: Madam Forelady, members of the jury,
5 good morning. As His Honor stated, thank you for your
6 patience and working with us this week. I know yesterday
7 there was a delay in the case so we appreciate your
8 diligence in working with us. For many of you or maybe
9 all of you, this might be your first time serving on a
10 jury. You know, serving on a jury is something you are
11 summoned to do, you don't want to do it. But it is a
12 civic responsibility. Many of you are not familiar with
13 the court system, lawyers, criminal justice system. And
14 that is fine. In fact, that is why we picked you to serve
15 on this jury because you are not involved in the system.
16 You might have a negative opinion of lawyers, typically
17 bad things happen and lawyers are involved. But we picked
18 you to serve on this jury because we thought you could be
19 fair and impartial. And it is a constitutional right of
20 every person such as Mr. Calvin Whitener, who is charged
21 with this offense, to have a case tried by a jury of his
22 peers. And that is you guys, that is residents of
23 Newberry County. So we want you guys to come in here,
24 look at the evidence because only you guys can make a
25 determination of guilt. That is exclusively your right as

1 a jury, to pass judgment on guilt. His Honor, the Judge
2 of the law, is going to give you instructions on what the
3 law is. And to determine whether Mr. Whitener is guilty
4 or not, that is you guys. You have the call. So don't be
5 in awe of your surroundings, all of the circumstances,
6 this Court House. It is a nice Court House. You can be
7 intimidated if you are not familiar with it. But we want
8 you guys to just apply your common sense because His Honor
9 gave you the preliminary instructions. I will break it
10 down for you. You have one position here, and that is all
11 of you have to agree whether you are firmly convinced that
12 Mr. Whitener is guilty of the crime he is charged with.
13 That's it. You are kind of sitting around, you are kind
14 of wondering, what am I even doing here. Just remember,
15 at the conclusion of this case you guys just have to
16 answer one question. Whether we are all firmly convinced
17 if he is guilty. If you all are firmly convinced the
18 verdict is guilty. If all of you are not firmly convinced
19 it is not guilty. And it has to be unanimous. So that is
20 it, that is what you have got to do. And so I ask you
21 guys two things when you are deliberating, two things. Go
22 where the evidence leads you and use your common sense to
23 guide you. And this case is very straightforward. No
24 matter how overwhelming the evidence is, you are still
25 entitled to a jury trial. It is not very efficient, is

1 it, because you -- it is your third day coming in here
2 now. It is inconvenience for you, so it is not very
3 efficient trying a case in front of a jury. But the
4 Constitution demands it. I think in other countries they
5 are not afforded these rights. Issues of guilt,
6 governmental officials make that determination in other
7 countries. The Philippines for instance. They have
8 judicial -- some are executions. There is no real system,
9 there is no protection or constitutional rights. And I am
10 a prosecutor in this case. I don't want my job to be
11 easy. I want you guys to have the final say on guilt or
12 innocence. In other countries where governmental
13 officials make that determination, that can lead to
14 tyranny. So that is why you are here really. But I
15 submit to you, there is overwhelming evidence of guilt.
16 So don't think that we are trying to trick you here
17 because things are very obvious in this case. But is a
18 process, fairness and that is why we are doing this even
19 though it is very obvious that Calvin Whitener, when we
20 present the evidence, is guilty. So don't be convinced by
21 persuasive arguments to the contrary or anything like
22 that. Focus solely on the evidence that is presented. So
23 this case, it is going to take you back over three years
24 ago, September 3rd of 2014. Calvin Whitener was traveling
25 in a vehicle, he was a passenger in a case, Nissan Altima,

1 white Nissan Altima, North Carolina tags; traveling about
2 1:00 in the morning on September 3rd of 2014, it was a
3 Wednesday morning on Highway 56, Mudlick Road, kind of
4 towards, I think it is towards the Laurens County line,
5 Laurens, Greenwood, Saluda, all meet there, Chappells is
6 really where he is. Pretty much the outer most point in
7 the County. Traveling in that vehicle Mr. Whitener is in
8 the backseat. The driver of that vehicle is pulled over
9 for speeding, going about 80 in a 55 zone. Deputy
10 Claytor, seated right here, our first witness. He is on
11 traffic duty that night, on that stretch of road. So he
12 makes the traffic stop, he has got another officer with
13 him who is training, excuse me, field training. They
14 initiate this traffic stop for speeding. The gentleman
15 driving this car is driving under suspended license after
16 they run the information. And, again, 1:00 in the
17 morning, has got a North Carolina tag so obviously the
18 Deputy finds this suspicious. They are in a rental car
19 and the guy driving the rental car don't have a valid
20 driver's license, has no driver's license. Again, there
21 are four adult males in this vehicle, 1:00 in the morning
22 on this kind of, a very rural stretch of road. So they,
23 the other occupants of the vehicle, they run their
24 information. And the front seat passenger, he has an open
25 warrant on him out of Gaffney. So he is taken out of the

1 car. They find a scale on this passenger. So, again,
2 this officer is outnumbered by the people in the car so he
3 does a frisk for weapons. And so Mr. Whitener is in the
4 back seat looking nervous. So he does a frisk for
5 weapons, Deputy Claytor does. He finds cash in his
6 pocket, about \$790.00 dollars, and as he searches kind of
7 the other area, around his upper thigh, the leg; finds a
8 baggy of white powder. And as soon as he does a pat down,
9 the Deputy knows what it is, he knows it is contraband
10 from his experience; pulls that out. Mr. Whitener says,
11 it is cocaine, it is powder, it is white powder. Pulls it
12 out, it is very heavy in weight. So at that point placed
13 under arrest. And that is the case, ladies and gentlemen.
14 We tested that substance and it turns out it was, in fact,
15 cocaine. We had it tested by SLED, South Carolina Law
16 Enforcement Division drug analyst. The weight of it was
17 about 36 grams, just under 36 grams. So that is
18 trafficking amounts of drugs. So that is what this case
19 is all about, possessing large quantities of cocaine.
20 That is trafficking. Whole sale amounts, not personal use
21 amounts kind of things. We are talking about a lot of
22 cocaine here and that is what trafficking is all about,
23 the weight. That is what you are here to determine. Mr.
24 Whitener admits to it, says it is cocaine when the Deputy
25 first feels it. Drugs found on his person, kind of

1 concealed. That is the case, ladies and gentlemen. I
2 can't stress it enough, that is all there is to it. But,
3 again, you have to decide this case. So it seems kind of
4 silly, maybe, decide on something so straightforward.
5 But, again, that is our system of justice where you guys
6 have to pass judgment on it. You are the residents of
7 Newberry County, this is your community, only you can make
8 that determination. So we just want a verdict that is
9 consistent with the evidence, speaks the truth and we want
10 you guys to just put your collective heads together and
11 render a verdict. And I submit to you evidence is only
12 going to point to one direction and that is guilty. That
13 is a logical and reasonable verdict. And that is all we
14 ask. We are not engaging in politics, politics here. We
15 are engaging on a decision based solely on the evidence.
16 So we appreciate your time and we will be asking for a
17 verdict of guilty in this case. Thank you.

18 MR. HARRIS: Your Honor, please, I have a matter I
19 need to take up with the Court.

20 THE COURT: Step up, please.

21 (Whereupon, a bench conference was held in the
22 presence of the jury but out of the hearing of the
23 jury.)

24 THE COURT: Ladies and gentlemen of the jury, before
25 we proceed further I want to instruct you and emphasize to

1 you just a couple of things. First of all, obviously this
2 is a very serious case. As I said earlier, this case is
3 very, very important to both the State of South Carolina
4 and certainly to the Defendant in this case, Mr. Whitener.
5 Additionally, I understand that at all points and times
6 the State has the burden of proving the Defendant's guilt
7 beyond a reasonable doubt. And under all circumstances,
8 individual desires of jury trials under the laws of our
9 States, they are certainly entitled to a jury trial
10 regardless of the nature of the case, regardless of the
11 nature of the evidence. Every one, every citizen of this
12 County is entitled to that right. To the extent that to
13 the Solicitor's opening statement could be interpreted by
14 you as any sort of indication that the State has a lessor
15 burden in this particular case, please don't accept his
16 comments in that way and disregard that portion of the
17 statement that may have alluded has a lessor burden of
18 some kind. Again, the State has the burden of proving the
19 Defendant's guilt beyond a reasonable doubt at all points
20 in time. And as I will instruct you at the conclusion of
21 the trial, the proof is always with the State, it is
22 always with the State of South Carolina and obviously the
23 Defendant is never required to prove himself innocent.
24 The burden is always with the State to prove his guilt
25 beyond a reasonable doubt. That is the standard of the

1 law, obviously it is a very serious matter. So I just
2 want to make sure you were clear on that before we proceed
3 any further. Mr. Harris, your objection is noted and we
4 will address and put that on the record formerly at a
5 break. If you will at this point proceed with your
6 opening statement.

7 MR. HARRIS: If it please the Court.

8 THE COURT: Yes.

9 MR. HARRIS: Solicitor. Ladies and gentlemen of the
10 jury, I want to begin my opening remarks to you on this
11 trial by reciting a phrase that I have no doubt you have
12 heard and heard many times before and perhaps in a variety
13 of contents. They cannot, this phrase that I am about to
14 cite for you cannot be stated enough in a criminal
15 courtroom like this today. It cannot be considered enough
16 by you to do it justice but I am going to ask you. It
17 cannot be emphasized enough for its vital importance, not
18 just for this trial, not just to this accused person, Mr.
19 Whitener, but to all of us, the citizens of the United
20 States of America. A great but flawed Country but we love
21 it, we support it and we hope for its continuing success.
22 But it cannot be successful unless jury's like you, ladies
23 and gentlemen, free, living and loving life for this
24 phrase and for this legal concept. Every time a citizen
25 of the United States is accused of a crime, no matter how

1 great or small, no matter how low they may possess in
2 life, no matter how little or how much they have; how high
3 on the hill they live, this applies to everybody. And it
4 applies to Calvin Whitener. It applies to you and me and
5 everybody beyond these walls and in this County. It
6 applies in Chappells and Mudlick Road, it applies to New
7 York City, Alaska and Hawaii and the Virgin Islands, and
8 Puerto Rico. All persons, here it is. All persons
9 accused of a crime in the United States are presumed
10 innocent of that crime. The presumption of innocence,
11 constitutionally mandated. So we don't just pick and
12 choose the cases to get a presumption of innocence. All
13 cases, the accused person is entitled to the presumption
14 of innocence. Calvin Whitener, in this case, no matter
15 how overwhelming the State may think its evidence could
16 be, all persons including Calvin Whitener are entitled to
17 the presumption of innocence. Why is this so important.
18 It is recognized that when the State puts the weight of
19 law enforcement and its resources up against a single
20 citizen, if that citizen may not have the power to
21 adequately challenge the State and defend himself or
22 herself against these allegations. So we have in our
23 Country established as a first principle, the presumption
24 of innocence. The presumption of innocence cast upon the
25 accuser. And in this case the State of South Carolina,

1 through the Newberry County Sheriffs Department, and
2 through the Solicitor's office cast a burden of proof upon
3 the State. That burden of proof is that they must present
4 evidence to this jury that satisfies this jury beyond a
5 reasonable doubt. A phrase that the Assistant Solicitor
6 did not want to use in his remarks to you just a few
7 moments ago. Did you hear, did you hear the Assistant
8 Solicitor say, Mr. Whitener is entitled to the presumption
9 of innocence. Did you heard him say that they have the
10 burden of proof, proving the case beyond a reasonable
11 doubt. Well, that is the burden. I have no doubt that
12 His Honor, at the end of this case, at the appropriate
13 time will recite those very words to you. What does this
14 burden of proof mean. It means two things. It first of
15 all means that you have already been told by His Honor,
16 that the accused person in this case never has the burden
17 of proof, never is required to come forward with any
18 evidence or any other proof, never is required to speak,
19 never is required to say anything at all if he chooses or
20 she chooses not to. The burden is always upon the State
21 to prove the case to the required standard beyond a
22 reasonable doubt. If at the end of this case, ladies and
23 gentlemen, you have any doubt that the State has failed to
24 prove any of the essential elements of this criminal
25 offense your obligation under the law, under the

1 Constitution, would be to find this accused person not
2 guilty. Now, I tell you and I feel like it is incumbent
3 upon me to tell you, set the record straight, that the
4 Assistant Solicitor made a remark to you as concerned that
5 you should not, I wrote it down. Don't be convinced of
6 persuasive arguments to the contrary. So if we take the
7 Assistant Solicitor at his word what he is telling you, no
8 matter how much doubt you might have about our evidence,
9 what it is or what it isn't, no matter how persuasive Mr.
10 Harris' arguments are to you, pay no attention. Don't be
11 convinced by persuasive arguments to the contrary. Well,
12 what is he really trying to say to you, ladies and
13 gentlemen. He is trying to say, let's pretend to have a
14 trial. Let's pretend to have a trial. Don't be convinced
15 by persuasive arguments, you know, by me I guess he is
16 talking about. I hope that I can make some persuasive
17 points to you. I think perhaps, I hope that in these
18 remarks you will see how committed we are to the rules of
19 the law and having a real trial and have a real
20 presumption of innocence and a real burden of proof and a
21 real standard. Ladies and gentlemen, I need not go
22 through the alleged facts and circumstances of this case.
23 We are getting ready to have a trial where witnesses are
24 going to come before you, no doubt, and give you testimony
25 and evidence of what was done, what was said. I will say,

1 I do agree, the circumstances seem to be that an
2 individual who the State identifies as Calvin Whitener, an
3 individual who the State identifies as Calvin Whitener was
4 allegedly a backseat passenger in a car driven by another
5 person and occupied by two other people. And that the
6 police stopped this vehicle, supposedly for speeding, no
7 other suspicion, supposedly for speeding and that that
8 somehow transported into everybody in the car being made
9 to give up identification and be subject to some
10 investigation. Perhaps they can explain the reasons for
11 this, perhaps you might -- or perhaps you might use that
12 common sense that has been said to you and figure out if
13 things may not be all what is portrayed to be. But I
14 won't try the case here, we are getting ready to try the
15 case. You can see, you can hear, all I ask is listen
16 attentively and with an open mind, not to just what the
17 witnesses say in response to the Solicitor's questions but
18 to the cross-examination of those witnesses. The
19 challenging of that evidence and the persuasive, I hope,
20 arguments that will come at the end of this case. The
21 State has to prove that Calvin Whitener, to prove that
22 Calvin Whitener possessed a certain quantity of an illegal
23 drug. In this case they claim to be cocaine. And he
24 possessed that sufficient quantity and you have to
25 consider whether or not you are convinced beyond a

1 reasonable doubt of all of those things. Ladies and
2 gentlemen, I thank you for your time and attention. I can
3 tell that you are paying attention and I have no doubt
4 myself that you now know that you full well, you are going
5 to give somebody the presumption of innocence for which
6 they are entitled and you are going to hold the State to
7 its burden, truth beyond a reasonable doubt. You will be
8 persuaded by persuasive arguments to the contrary and that
9 you will make this a real trial, not a pretend. Thank you
10 very much.

11 THE COURT: Solicitor.

12 MR. SCOTT: Your Honor, the State calls Michael
13 Claytor.

14 DIRECT EXAMINATION

15 By Mr. Scott:

16 Q Lieutenant Claytor?

17 A Yes, sir.

18 Q You are employed with Newberry County Sheriffs
19 Department?

20 A Yes sir, that is correct.

21 Q Okay. And back in September, September 3rd, 2014,
22 what was your rank?

23 A I was a Deputy at that point. Well, I actually was,
24 I just received a Sergeant, I believe around that time.

25 Q And now as a Sergeant with the Sheriffs Department,

1 what were your duties?

2 A I actually hadn't started yet. At that point I had
3 just received the rank and I was still working under
4 Sergeant Fulmer.

5 Q Okay. So you were just a Deputy?

6 A Yes sir, I was still a Deputy.

7 Q A road Deputy?

8 A Yes, sir.

9 Q Tell the jury, what is a road deputy, what kind of
10 things do you deal with?

11 A We patrol, we answer calls for service, do radar
12 operation. Basically anything a regular law enforcement
13 officer would do.

14 Q And that date, September 3rd, 2014 at 1:00 a.m.,
15 where would you have been?

16 A I was on the, Highway 56 near Mudlick Road section of
17 Newberry County.

18 Q And the lawyers were talking about a little bit in
19 opening but describe that stretch of road?

20 A It is probably the furthest outpost of the County.
21 It is dark, it is not very inhabited, it is more or less
22 just country, country road, old country road.

23 Q Okay. This is, I guess a stretch of 56 right before
24 you get in to Laurens County?

25 A Yes, sir. It actually runs between Saluda County

1 line and Laurens County line, kind of borders the
2 Greenwood County line.

3 Q Okay. So what do you do, who is with you?

4 A I have a trainee with me at the time, Deputy
5 Snelgrove.

6 Q All right. What does a trainee mean?

7 A Once you graduate the Criminal Justice Academy, to
8 complete your training to be a certified officer you have
9 to go through a eight week FTO process. And that is what
10 he was doing, I am a certified FTO officer and we were
11 currently conducting the FTO program.

12 Q And what does FTO mean?

13 A It is, it means field training. He has to go through
14 an eight week process with an officer, certified FTO
15 officer, who evaluates him, kind of shows him the ropes,
16 shows him how things are done to be sure he is able to
17 conduct his job before he is released on the road.

18 Q Okay. He basically rides along with you until he is
19 kind of clear to go on his own?

20 A Yes, sir. Per Academy standards, they consider us,
21 even though we have two people they consider, they still
22 consider us a one man unit because he is not technically
23 certified yet.

24 Q So what are you doing that night or early morning
25 hours at Highway 56 and Mudlick Road?

1 A I was running some radar, conducting a radar
2 operation.

3 Q Is that heavily traveled?

4 A It is not really a heavily traveled area, especially
5 not that time of night, usually maybe one or two, three
6 18-wheelers an hour, all depending.

7 Q Okay.

8 A It is not very heavily traveled.

9 Q At some point did you observe that white Nissan?

10 A Yes, sir. It was a Nissan Altima.

11 Q Tell us about that car?

12 A I was conducting radar operation. I was able to
13 clock a white Nissan Altima that displayed North Carolina
14 tag, [REDACTED] I was able to observe it speeding, 80 in a
15 55 mile-per-hour zone. I was able to confirm it by audio
16 tone and visual readout from my radar unit.

17 Q So 55 mile-an-hour speed limit, what did you do?

18 A I conducted a traffic stop on this vehicle.

19 Q Did it pull over?

20 A It did, yes sir.

21 Q Who was the driver?

22 A The driver was Mincey was his last name, first name
23 Jacques.

24 Q And what kind of information did you ask him for?

25 A I walked up to the window, ask him for his license

1 and vehicle information. He then advised me, actually his
2 front seat passenger advised me that it was a rental car,
3 that the agreement was in the door. He went to tell me,
4 went on to tell me about how they were on their way from
5 --

6 MR. HARRIS: Your Honor, I object to hearsay.

7 MR. SCOTT: This is part of his investigation at the
8 scene, why he is stopping the car.

9 MR. HARRIS: Well, he stopped the car --

10 THE COURT: Your objection is overruled. You can
11 proceed.

12 Q Okay. The passenger, the driver rather, doesn't have
13 a drivers license or a valid one. You were talking about
14 he had a rental car with North Carolina tags?

15 A Yes, sir. It was a rental car, North Carolina tag.
16 He advised me that they were on their way home from a
17 funeral in Atlanta. The driver, I could tell he was
18 nervous, he was breathing very heavily, much heavier than
19 we normally would if we were stopped. He tells that, he
20 was going to be honest with me, he didn't have a valid
21 license. So he gave me his South Carolina ID card.

22 Q Okay. And did you confirm or did you run any more
23 information?

24 A I did. I was able to confirm that through my
25 communications, my dispatch, they ran a DMV check, a

1 Department of Motor Vehicles check. And they were able to
2 confirm that his license was suspended.

3 Q So he wasn't suppose to be driving?

4 A No, sir.

5 Q And he was in a rental car?

6 A Yes, sir.

7 Q What did you do after you confirmed that he was
8 driving under suspension?

9 A Well, I asked everyone for their ID in the car,
10 because you know, we are kind of on a back road, very
11 dark. I have got a trainee with me that I also have to be
12 concerned about his safety. So I get everyone's ID just
13 in case. You know, so somebody knows who all is in this
14 vehicle.

15 Q Okay. So once you do that, you are getting
16 everybody's identification, do you call that in to
17 dispatch?

18 A I do. I actually had to head back to my patrol
19 vehicle because my handheld radio at that point, that far
20 outreach of the County wouldn't get out, so I had to go to
21 my patrol vehicle to call that in.

22 Q Okay. And you confirmed that the driver was under
23 suspension. Did you ask him to get out of the car?

24 A I did. I had him to step out of the vehicle and I
25 placed him under arrest for driving under suspension.

1 Q Okay. And you put somebody, when you put somebody
2 under arrest what do you do for safety or --

3 MR. HARRIS: Object to leading.

4 THE COURT: Overruled, go ahead.

5 A I placed him in handcuffs and I double lock it so the
6 handcuffs don't get any tighter on the wrist.

7 Q Is that all you do once you put handcuffs on?

8 A No, sir. I then pat them down to be sure they don't
9 have any weapons, anything like that on them, any type of
10 contraband or anything.

11 Q Is this standard procedure?

12 A Yes, sir. For everyone.

13 Q And tell me why is it standard procedure for an
14 officer to pat somebody down once they arrest them?

15 A It is for officer's safety. It is to be sure that
16 they don't have anything when they get in the car, they
17 don't have any contraband that they may take inside the
18 jail or they don't have anything on them, on themselves
19 that may hurt them.

20 Q Okay. There is an important subject of Walter Camp.
21 Did you run his ID or did you call dispatch on his ID?

22 A Yes sir, I did.

23 Q What did you learn about Mr. Camp?

24 A I found out that Mr. Camp was wanted for, had an
25 active warrant for unknown offense. I was not able to

1 tell what it is at that point in time, out of Gaffney. So
2 we sent a NCIC inquiry, which is just, we send a hit to
3 them to see if they would like to pick him up.

4 Q Okay. And once you found out he was wanted out of
5 Gaffney what did you have Mr. Camp do?

6 A I had him to step out of the vehicle and placed him
7 into investigative detention.

8 Q And, again, once he is placed into detention, same
9 kind of procedure that you did with the driver?

10 A Yes, sir. Actually when I had him to step out of the
11 vehicle he had on some camouflage cargo shorts that was
12 kind of weathered and worn. So the cargo pocket is
13 actually kind of hanging open a little bit on them so I
14 can visually see down in it without doing a pat down on
15 him. And I was able to see what appeared to me to be a
16 set of digital scales.

17 Q Okay. In your training and experience, what did you
18 think when you saw these digital scales?

19 A Well, a couple of things, I continued to get clue
20 after clue due to, you know, prior instances that I dealt
21 with, prior experience. You know, you are coming back
22 from Atlanta, you have got on, you are supposedly coming
23 back from a funeral, you have on weathered clothes that,
24 you know, that myself or, you know, any normal person
25 would not go to a funeral in. They are in a rental car,

1 he don't have a license; then he has got a set of digital
2 scales in his pocket. You know, digital scales kind of go
3 hand in hand with drugs, you don't normally take a set of
4 digital scales to a funeral with you.

5 Q But that is what I was asking. In your experience
6 have you, have you made arrests, how many years have you
7 been in law enforcement?

8 A Almost nine years now.

9 Q Okay. And during that time have you had occasion to
10 make arrests for illegal narcotics?

11 A Yes sir, several.

12 Q And during that time have you encountered these
13 digital scales before?

14 A Yes sir, almost every case.

15 Q And in your experience what are they typically used
16 for?

17 A They are used to weigh an amount of drugs to be sure,
18 either when you sell, you are given the right amount or
19 whenever you buy you are getting the right amount.

20 Q Okay. And so you are talking about these different
21 clues. Did that kind of peak your interest or your
22 suspicion, rather, at that time?

23 A Yes sir, very much so.

24 Q Okay. So at that point you confiscate the digital
25 scales, you still have a driver out in handcuffs?

1 A Correct.

2 Q Tell me what, what is the general demeanor of Mr.
3 Mincey, the driver, and Mr. Camp, the passenger you had
4 exit the car?

5 A They are very nervous. I can, you know, they are
6 still breathing very heavily. They are glancing around
7 looking at each other. They are actually looking back
8 into the vehicle to the two passengers that are still
9 seated in the vehicle, they are kind of giving me this
10 eerie feeling like, okay, something is going on here.

11 Q And what was your concern at that point?

12 A My concern was, you know, I have got my trainee's
13 safety, of course; my safety. And I didn't want them to
14 pop out with anything, you know, any weapons or anything
15 like that. So I was concerned there may be something else
16 in the car, weapons or something like that.

17 Q At that point, who is in the car. Who are these two
18 individuals that were still in the car?

19 A It was Mr. Calvin Eugene Whitener and Bobby Charles
20 Gregory, was the two still in the vehicle.

21 Q Okay. At that point, had they done anything illegal,
22 these two people at that point?

23 A No sir, not at this point.

24 Q Okay. Did you have them exit the car?

25 A I did have them to exit the vehicle, yes.

1 Q Okay. And were they under arrest at that point?

2 A No, sir.

3 Q What was the purpose of having them exit the car?

4 A I had them to exit the car to conduct a frisk on
5 them, a Terry frisk on them for weapons, just to be sure
6 that they didn't have anything on them that was going to
7 harm me or harm anybody else in the vehicle or harm my
8 trainee at the time.

9 Q And were you still in the process at that time of,
10 well I guess, processing Mr. Camp and Mr. Mincey and
11 getting their information and figuring out what you were
12 going to do with them?

13 A Yes sir, it all happened relatively quickly.

14 Q Okay. You know you are going to have to take Mr.
15 Mincey to the jail because he is driving under suspension?

16 A Yes, sir.

17 Q And were you still trying to figure out Gaffney's
18 hold on Mr. Camp?

19 A I was. We have, we have like a ten minute window
20 there that the State allows us to confirm a warrant to see
21 if they are going to pick him up. So, yes, I was still
22 within that ten minute window.

23 Q Okay. It is called a ten minute hit?

24 A Yes, sir. That is a ten minute hit.

25 Q And so basically if you can't confirm within ten

1 minutes whether they are going to pick him up or whether
2 you can locate that warrant, after ten minutes what do you
3 do, just let them go?

4 A I set them free unless I have charges on them, yes.

5 Q And you didn't have any charges?

6 A No sir, not at the time.

7 Q Okay. So Mr. Whitener and Mr. Gregory, they get out
8 of the car and did you put them in handcuffs at that
9 point?

10 A No sir, I did not.

11 Q But you said you were patting them down for, just to
12 check for weapons?

13 A Yes sir, that is correct.

14 Q Did you find anything on Mr. Bobby Gregory?

15 A No sir, I did not on Mr. Gregory.

16 Q And did you perform a pat down or frisk on Mr.
17 Whitener?

18 MR. HARRIS: Objection, Your Honor.

19 THE COURT: Subject to the earlier rulings,
20 overruled.

21 Q What I want you to do is describe the pat down or
22 frisk or whatever you call it?

23 A Yes, sir.

24 Q On Mr. Whitener. Describe to the jury how you do
25 that?

1 A Okay. The way I usually do it is I will have them
2 to, you know, lean up against the car. I will take them,
3 I usually start on their right side because I am right
4 handed. I go down their right side, down their thigh to
5 their ankle, check around their ankle, come back up
6 between the inner thigh and then the opposite on the other
7 side. I also check the waistband just to be sure they
8 don't have anything in there that may harm me.

9 Q Okay. And tell me, you started at the left side of
10 Mr. Whitener?

11 A Yes, sir. I started at his left side, I went down to
12 his ankle, came back up to his inner thigh and at that
13 point I felt a large ball.

14 Q Okay. Describe the ball, did it appear or did it
15 feel like part of his anatomy?

16 A No, it was definitely not part of the human anatomy.
17 It was a large ball. And when I came up, rubbed my hand
18 across it I was able to tell it was a, what appeared to be
19 a ball of a powder substance.

20 Q Is that something, again, in your nine years of
21 experience that you felt something like that before?

22 A Yes sir, many times.

23 Q Okay. And did you ask him what it was?

24 A I did --

25 MR. HARRIS: Objection, Your Honor.

1 THE COURT: The earlier objection. You may answer,
2 do you need to repeat it?

3 A No sir, I am good.

4 Q Let me repeat it.

5 A Yes, sir.

6 Q Did you ask him what it was?

7 A Yes sir, I did. He advised me, let me quote my
8 report. He said, it's a bag of powder.

9 Q Okay. And did you remove it or did he remove it?

10 A I did. I then placed on a pair of rubber gloves and
11 I removed the bag of powder from his, it was between his
12 undergarments and his pants.

13 Q Was he cooperative when he, when you found it as far
14 as letting you retrieve it?

15 A He was. He didn't give me any trouble. He actually
16 was a little more relaxed at that point in time.

17 Q Okay. After you found it?

18 A Yes, sir.

19 Q What else did you find on him?

20 A In his, let me confirm what pocket it was in here.
21 In his left, in his left pocket as well, I was able to
22 find a wad of cash, around \$790.00 dollars.

23 Q Let me show you State's number 5. Do you recognize
24 that?

25 A Yes sir, I do.

1 Q What is that?

2 A That is the bag that I removed from Mr. Calvin
3 Whitener.

4 Q And is that how it appeared that night when you
5 removed it out of his, what, underwear or something?

6 A It was between his underwear and his bluejeans. He
7 had on a pair of tight bluejeans so it was there between
8 that and that is what was holding it in. But, yes, it is
9 the bag with the powder.

10 MR. SCOTT: Your Honor, the State offers number 5 for
11 admission.

12 THE COURT: Subject to the earlier objection number 5
13 will be into evidence.

14 (Whereupon, State's Exhibit 5 was admitted into
15 evidence.)

16 Q Okay. At that point, after you pulled it out of his,
17 out of his pants, what did you do at that point?

18 A He was in detention, he was placed into detention and
19 I notified Investigator Stribble who is over our narcotics
20 division.

21 Q Okay. Did you, without saying what results you got,
22 did you weigh that bag?

23 A I did, I weighed and was able to find out that it
24 was, appeared to be a trafficking amount.

25 Q Okay. You arrested him for trafficking that night?

1 A I did, for trafficking.

2 Q Let me show you State's number 4. Do you recognize
3 this?

4 A Yes sir, I do.

5 Q What is that?

6 A This is the bag, well, the powder that was in the bag
7 which is also here, that I removed from Mr. Calvin
8 Whitener.

9 Q Okay. So it is, is it safe to say that State's
10 number 5 is represented in State's number 4 here?

11 A Yes sir, absolutely.

12 Q So this is what you, this is what you seized off of
13 him that night?

14 A Yes, sir.

15 Q Then what did you do after you seized it from Mr.
16 Whitener.

17 A I took possession of it. We did a presumptive test
18 on it, field test. And then he was placed under arrest
19 after he was, he was Mirandized and then placed under
20 arrest.

21 Q And what did you do with the powder?

22 A I took it into evidence, placed it into evidence.

23 Q You took it back to the Sheriffs Department?

24 A I did.

25 Q And let's see, I guess, what time did you end this.

1 What time did you get back, 4:00 a.m., is that right?

2 A That's correct, yes sir, 4:00 o'clock.

3 Q So 4:00 a.m, the Sheriffs Department is not open, is
4 it?

5 A Not for business, no.

6 Q So what do you do with the drug evidence?

7 A It gets sealed into an evidence bag and then it gets
8 placed into a lockbox.

9 Q Did you seal it in the evidence bag?

10 A I did.

11 Q Is that what we see?

12 A This, yes it is, this evidence here.

13 Q Okay. Did you initial or anything?

14 A Yes.

15 Q So that is pretty much your involvement after you,
16 you dropped it in the lockbox. At that point does the
17 evidence custodian take over the drugs?

18 A He does, the evidence custodian takes over the drugs
19 and then fill out all the paperwork for SLED processing.

20 Q Let me show you State's number 2. What is that?

21 A That is Mr. Whitener's booking photo, Mr. Calvin
22 Eugene Whitener's booking photo.

23 Q Do you recognize that to be Mr. Whitener?

24 A Yes sir, I do.

25 Q Is that how he appeared on the night of September

1 3rd, 2014?

2 A Yes, sir.

3 Q Did you escort him back to the detention center?

4 A Let me be one-hundred percent sure on that. No sir,
5 Sergeant Fulmer transported Mr. Whitener.

6 Q Okay. That is how he appeared when you encountered
7 him?

8 A It is, yes sir.

9 Q And tell us about the booking photo, at the time they
10 were booking him to the jail?

11 A What we do is we bring them into the jail --

12 MR. HARRIS: Your Honor, I have to object. The
13 witness has stated he wasn't present during the booking
14 process, Sergeant Fulmer was.

15 THE COURT: I think he sufficiently made the in-court
16 identification.

17 MR. HARRIS: Okay.

18 A I used to be a booking officer too as well, years
19 ago, I kind of know the process as well.

20 Q Just so long as we are clear. But that picture
21 there, that is Mr. Whitener?

22 A Yes, sir.

23 Q Okay.

24 MR. SCOTT: Your Honor, the State offers State's
25 number 2 for admission into evidence.

1 THE COURT: Subject to the pretrial rulings, State's
2 2 is admitted.

3 MR. HARRIS: Can I just see it, Your Honor.

4 THE COURT: Sure, would you hand it to Mr. Harris.

5 (Whereupon, exhibit was handed to Mr. Harris.)

6 MR. HARRIS: Thank you.

7 THE COURT: Your objection for State's 2 is noted.

8 (Whereupon, State's Exhibit 2 was admitted into
9 evidence.)

10 Q Do you have the case number just so we can --

11 A Yes sir, I do. The case number is 14-08454.

12 Q Okay. Thank you.

13 A Yes, sir.

14 Q Let me ask you this. I left this out. That stretch
15 of road, Highway 56 at Mudlick Road, what County is that?

16 A That is here in Newberry County.

17 Q Okay, that's Newberry, but close to Laurens County
18 line but that is Newberry County?

19 A We are, it is the furthest most out of point of our
20 County.

21 Q Okay. Thank you. Answer any questions Mr. Harris
22 has for you.

23 A Yes sir, thank you.

24 THE COURT: Mr. Harris.

25 MR. HARRIS: Thank you, Your Honor.

CROSS-EXAMINATION

1
2 By Mr. Harris:

3 Q Deputy, thank you. How are you today?

4 A I am quite all right, how about yourself.

5 Q I am in trial.

6 A I understand.

7 Q Are you, you have testified at length today about
8 your involvement in this case in response to the
9 Solicitor's questions. My first question to you is,
10 whether you have a clear personal recollection of the
11 events surrounding this incident?

12 A Yes sir, it is reasonably clear to have been back in
13 2014. So, yes, I do recall it.

14 Q Reasonably, what, define reasonably clear, the
15 meaning of that statement?

16 A I do remember it. I don't remember tiny, tiny, tiny
17 details of it as in every step that I took. But I do
18 remember it. Yes sir, it has been, like I said, back in
19 2014. So it has been several years ago.

20 Q You did generate an incident report of your
21 involvement in this case, is that correct?

22 A I did, yes sir.

23 Q And it appears you have been referring to that during
24 your testimony. Is that correct?

25 A I have been, yes sir.

1 Q And is it necessary for you to refer to your report
2 in order to refresh your recollection of the details of
3 this incident?

4 A Yes sir, just to confirm, yes.

5 Q All right. So would you say that you do not have a
6 clear enough personal recollection to be able to supply
7 the testimony you have supplied without the aid of your
8 report?

9 A That is why we conduct reports so we have everything
10 documented.

11 Q Yes, sir. Thank you but my question to you was, is
12 it correct that you do not have a clear enough personal
13 recollection of this incident to testify as you have
14 without the aid of your report?

15 A That's correct, I like to be sure that I am correct,
16 saying what is correct. Yes, sir.

17 Q And did you try to be, when you prepared your report,
18 and you testified, you are a police officer, as thorough
19 in your report as you could be?

20 A Yes sir, I thought I did pretty well.

21 Q Thought you did pretty well.

22 A Yes, sir.

23 Q Is it, can you say to the jury, just so they can
24 understand what you remember and what you have to rely on
25 your report about. Can you say what parts of the

1 testimony that you have just given to the Solicitor, that
2 you have to rely on your report to be able to testify as
3 opposed to what you just clearly remembered?

4 A Yes, I can tell you that, I want to confirm on my
5 report what exactly he said, I remember the gist of what
6 he said. I remember all four subjects very well. I
7 remember this traffic stop, you know, pretty well. But as
8 I said it has been 14, in 2014, so at least several years
9 ago.

10 Q And I assume that prior to this trial commencing, of
11 course we selected a jury on Monday for this trial, that
12 you spent some time discussing and preparing for your
13 testimony with the Solicitor's office?

14 A No sir, I have not.

15 Q Didn't talk to them at all?

16 A No sir, not other whenever we came in. I got the
17 report and that is pretty much it.

18 Q Okay. So as far as the Solicitor's office would
19 know, unless they did some independent investigation, what
20 they knew about this case prior to you testifying right
21 here now, was just what was in your report that's correct.

22 A That's correct.

23 Q Now, you, I lost track of the number of times that
24 you were asked about and emphasized this alleged statement
25 that was made by somebody in the car, about having been to

1 a funeral in Atlanta. You were asked and you described
2 that several times.

3 A Yes sir, that is what the driver explained to me,
4 that they had been to Atlanta.

5 Q And that seems like, would you agree that seems to
6 you at least like an important factual element in this
7 case?

8 A Regardless of where they had been. I mean, yeah,
9 that was one of my clues, yes sir.

10 Q Well, you seem to place a great deal of importance on
11 being suspicious about these people because of that story,
12 correct?

13 A Yes, sir.

14 Q And in your report that you have stated that you must
15 rely on to remember what happened, there is not a word
16 about the going to the funeral story in your report, is
17 there?

18 A No sir, there is not.

19 Q Nothing?

20 A No, sir.

21 Q So nobody knew, nobody at all involved in this case,
22 Solicitor's office, myself, whoever, nobody knew that
23 there was a supposed funeral story that you placed great
24 emphasis on until you uttered it in the courtroom?

25 A Yes sir, that is correct.

1 Q Just left that out in your detailed report?

2 A The officers on the scene knew about it, Investigator
3 Stribble also knew about it.

4 Q What else have, of great importance have you left out
5 of your report?

6 A Nothing that I recall.

7 Q Would it be possible, since we know that you left
8 that out, would it be possible that you left out things in
9 your report that would go to show that these people
10 weren't deserving of the kind of suspicion you seemed to
11 have placed on them for no reason?

12 A No, sir. I don't target people, I don't profile
13 people, I don't do anything like that. I have no reason
14 to, my pay remains the same whether I make a case or I do
15 not make a case.

16 Q Why do you use the terms, targeting and profiling, in
17 response to that?

18 A Because I feel like that is where you are leading.

19 Q So you know what is in my mind?

20 A I do, yes sir.

21 Q Oh, you do?

22 A Yes, sir.

23 Q Okay. Well, you are wrong.

24 A Okay.

25 Q Is it those kinds of reckless assumptions that you

1 operated on when you dealt with these four individuals in
2 this case?

3 A Absolutely not.

4 Q Absolutely not. Is there anything that you left out
5 of your detailed report that would be favorable to these
6 people to show that they weren't as suspicious as you
7 thought?

8 A No sir, not that I recall.

9 Q Not that you recall. You have to rely on your report
10 for your recall, correct?

11 A I have looked back at it, yes sir.

12 Q So how much of what you have said can we believe is
13 accurate?

14 A One-hundred percent of it, I have no reason to lie.

15 Q Well --

16 A -- I take my job --

17 Q -- might you, might you be trying to defend your
18 actions in court?

19 A No sir, absolutely not.

20 Q I mean, you couldn't be blamed for it, could you?

21 A No sir, absolutely not. I still have to go to work
22 whether we win this case or lost this case. Yes, sir.

23 Q I understand. I believe you have testified that you,
24 out of some fear for your safety, demanded and collected
25 identification from all of the occupants of the car?

1 A No sir, I did not demand. I asked for their
2 identification, yes.

3 Q Oh, I see. How did you ask, I am just curious. Like
4 Mr. Whitener, how did you ask Mr. Whitener, can you
5 remember that?

6 A No sir, I can't recall. But I am sure it was as I do
7 every other vehicle. I ask for everyone's ID.

8 Q You always do everything right --

9 (Whereupon, Mr. Harris and Mr. Claytor talking over
10 each other.)

11 THE COURT: Y'all don't talk over each other.

12 MR. HARRIS: I am very sorry.

13 Q So you asked Mr. Whitener for identification as well
14 as the other occupants of the vehicle. You didn't demand
15 it?

16 A That's correct, yes sir.

17 Q All right. So then let's just say hypothetically,
18 just to get a sense for the atmosphere, that Mr. Whitener,
19 who you say is Mr. Whitener, would have said, no sir, you
20 have no reason to ask for my identification, I am not
21 giving it to you. What would you have done?

22 A I can't tell you what I would have done because that
23 didn't occur.

24 Q You can't tell me?

25 A No, sir.

1 Q Or you don't want to say?

2 A No sir, I can't tell you because it didn't occur. I
3 can't testify to something that did not happen.

4 Q I am asking you hypothetically. You say you are an
5 experienced police officer. You ever have anybody not
6 give you their identification?

7 A I have.

8 Q Well, what was your response?

9 A Several different responses. I could ask them, do
10 you not have it with you; do you just not want to give it
11 to me.

12 Q But I bet you always got it, didn't you?

13 A No, sir.

14 Q Okay. But anyway, you did collect the identification
15 and you say that, you checked with somebody about it and
16 you found out that this one fellow had some kind of, I
17 believe a situation in Gaffney that he wound up not being
18 arrested for. Is that right?

19 A Yes sir, he was not arrested, they did not reply
20 within ten minutes.

21 Q And you checked Mr. Whitener out and he, there was
22 nothing against him?

23 A No, sir.

24 Q And you checked this other passenger out and there
25 was nothing against him. Is that right?

1 A That's correct.

2 Q So, I note on your report that you list out the names
3 of the people in the car. Is that correct?

4 A You are asking, are the names listed on the report?

5 Q I am asking you, did you list the names of the people
6 in the car on your report?

7 A Yes sir, they are all subjects.

8 Q They are all subjects?

9 A Yes sir, we list them as subjects through our system.

10 Q Okay. All right. And so for instance, subject
11 number one was the driver of the vehicle. Is that
12 correct?

13 A That's correct.

14 Q And you list that person's name as Jacques Dewan
15 Mincey, M-I-N-C-E-Y. Is that correct?

16 A Yes sir, that is correct.

17 Q All right. How did you get that name?

18 A Through his identification card.

19 Q And you also list certain identifying information
20 about Mr. Mincey. Is that correct?

21 A That's correct.

22 Q And there are, there is actually, appears to be
23 preprinted blocks on the report to indicate race, sex,
24 age, and something called ETA. Does that stand for
25 ethnicity?

1 A Yes, sir.

2 Q Date of birth, height, weight, hair and eyes. That
3 is all, that is filled in for Mr. Mincey. Is that
4 correct?

5 A That's correct.

6 Q And did you fill those, that information in?

7 A Yes sir, I did. For the most part. The jail goes
8 back, once they are booked in, if they go into the
9 detention center they take their photograph and then they
10 reenter the information again into our system.

11 Q Well, did you indicate that Mr. Mincey's race was
12 with the letter, B?

13 A I did.

14 Q And what does that stand for?

15 MR. SCOTT: Your Honor, can we have a sidebar.

16 THE COURT: I really don't see how this can be
17 relevant to anything.

18 MR. HARRIS: Well, I can explain.

19 THE COURT: Go ahead.

20 MR. HARRIS: We have already established that the
21 witness may or may not have a personal recall as opposed
22 to having to rely on the report. That calls into question
23 the accuracy and the reliability of his report to the
24 extent he has to rely on it for his testimony. We have
25 already established that there is a substantial factual

1 omission in this report. He has also indicated that these
2 individuals he considered posed some threat to his
3 personal safety and the safety of other people. I am
4 trying to establish whether or not the Officer's
5 testimony, his recall and the accuracy of his testimony,
6 it is, is substantial or flawed. And I am trying to
7 determine whether or not he can establish that he knows or
8 has the identity of these individuals.

9 THE COURT: The only individual that is on trial in
10 this case is Mr. Whitener. If there is some omission from
11 the incident report that should not, complete the
12 different blocks, what have you, as it relates to the
13 other subjects then certainly you can get into that. But
14 I think you are being a little bit far field, irrelevant
15 information to some of us. If all of the blocks are not
16 completed you can ask him about that but I don't know that
17 you need to get into the specifics of the other
18 individuals. I will sustain the objection with the caveat
19 I just put on the record.

20 Q Let me call your attention, sir, to the portion of
21 the report as concerned Calvin Eugene Whitener?

22 A Yes, sir.

23 Q You have indicated that his race is B. Is that
24 right?

25 A That's correct.

1 Q What does that stand for?

2 A It stands for he is black.

3 Q You have indicated that his sex is M. What does that
4 stand for?

5 A He is a male.

6 Q You have indicated his age, his age, does that say
7 39?

8 A Yes sir, that is 39.

9 Q Where did you get that information?

10 A From his date of birth.

11 Q Where did you get his date of birth?

12 A He told it to me, off his ID card and he was able to
13 confirm that at the detention center.

14 Q Well, you said you weren't at the detention center?

15 A I understand that but he always, they always rebook
16 them under that and their system updates our system to the
17 correct information.

18 Q Okay. So you are saying that although you didn't
19 accompany Mr. Whitener to the detention center and you
20 weren't there, that you know what was told to people at
21 the jail?

22 A No sir, I do not know what was told to people at the
23 jail.

24 Q Okay, all right. So you are just supplying that
25 detail?

1 A Excuse me?

2 Q You are just supplying that detail without --

3 A -- I am explaining the process.

4 Q What is, there is a letter N under ethnicity. What
5 does that mean?

6 A It means he is not any Hispanic or Latino origin.

7 Q So he is not Hispanic or Latin?

8 A Yes, sir.

9 Q Did you keep Mr. Whitener's identification card?

10 A No sir, I did not.

11 Q Did the jail keep it?

12 A No, sir.

13 Q Was it taken into evidence?

14 A No, sir.

15 Q So we don't have it today?

16 A No, sir.

17 Q Now, you answered in response to the Solicitor's
18 question, was it true that at the time you asked Mr.
19 Whitener and the other gentleman, Mr., Bobby Charles
20 Gregory to exit the vehicle. At that time they had done
21 nothing illegal?

22 A No, sir.

23 Q In fact, they had supplied you with identification as
24 you asked?

25 A Correct.

1 Q You had checked their identification and found that
2 there was nothing against them?

3 A That's correct.

4 Q You had conducted a search of two other, the driver
5 and the other passenger in the car and found no weapons?

6 A No weapons, no sir.

7 Q In fact, those individuals had not done any, made any
8 threatening gesture or action toward you or anybody else,
9 had they?

10 A No, sir.

11 Q Yet for whatever reason you decided that you would
12 ask Mr. Whitener, who by your own admission, had done
13 nothing wrong, to get out of the car and be subject to a
14 search. Is that right?

15 A It was a frisk and it was for the totality of
16 everything that I was seeing including the digital scales,
17 the location that I was at, the trainee who was with me,
18 my safety, for their safety. You know, there is several
19 things that come into place. It is just not how you put
20 it, I got him out to search him, no.

21 Q He had done nothing wrong?

22 A No, sir.

23 Q Mr. Whitener had done absolutely nothing wrong?

24 A No, sir.

25 Q But he got, as you call it, frisked?

1 A That's correct.

2 Q And is it correct that the sole purpose for frisking
3 Mr. Whitener, in fact the sole justification for doing so
4 would be just to see if he had any weapons?

5 A To be sure he did not have any weapons on him, yes
6 sir.

7 Q Okay. And he did not?

8 A He did not have any weapons.

9 Q When you discovered this bag, white powder, whatever
10 it is; you stated that you took into evidence. Is that
11 right?

12 A That's correct.

13 Q And at what point in time did you seal it up in this
14 evidence bag?

15 A It gets sealed into the evidence bag before it goes
16 to evidence, before I place it into the lockbox.

17 Q I am asking you, at what point in time did you
18 actually, in fact, seal the bag within the plastic bag, if
19 you remember?

20 A It would have been at 06:30, whenever it was sealed
21 into this bag.

22 Q 6:30 in the morning?

23 A That's correct.

24 Q And when did you take possession, take possession of
25 the white powder substance?

1 A I can't give you an exact time when I took
2 possession. I can give you an approximate time. It would
3 have been between the 1:02 in the morning and 4:00 that
4 morning whenever I cleared the call from Chappells.

5 Q Okay. So if I understand your testimony just now.
6 You stated that the best you can do in answering when
7 exactly did you first take possession of the white powder
8 substance was to provide, roughly three hour timeframe?

9 A That's correct. I would say that it was, I got him
10 out of the car, everything within the first ten minutes, I
11 would say by 1:12, 1:15 when I took possession of the bag.
12 But I can't give you the exact time because I didn't
13 remove the bag and look at my watch.

14 Q Okay. So, but you now can narrow it down to, roughly
15 ten or fifteen minutes within the time you stopped the
16 car?

17 A That's correct. Because I removed him out of the
18 vehicle.

19 Q If that is so and you knew it was so, why did you say
20 this three hour window?

21 A Because I looked, I referred back to my report time
22 to get an around about time, an approximate time.

23 Q So you don't remember?

24 A I just advised you what I remember.

25 Q And so another, so let's say 1:12, okay. Where was

1 the bag with the white powdered substance between 1:12
2 a.m. when you may have first possessed it and 6:30 in the
3 morning when you say you sealed it in this bag?

4 A It was secured into my patrol vehicle.

5 Q Secured in your patrol vehicle?

6 A Correct.

7 Q Where and in what manner?

8 A It was sealed into this bag here and then it was
9 placed into my patrol vehicle trunk.

10 Q When you say this bag here, what are you referring
11 to?

12 A The bag on the inside of the large bag.

13 Q Well, I thought you said you sealed it in the bag at
14 6:30 a.m.

15 A When I called it sealed, I mean this bag, sealed.

16 Q Okay. All right. So there is two bags?

17 A Yes, sir.

18 Q And so part, so what secure part of your patrol car
19 did you put that bag?

20 A The trunk.

21 Q The trunk?

22 A Yes, sir.

23 Q Okay. And it remained on the scene until what time?

24 A Until approximately 4:00 o'clock.

25 Q Then you went back to the jail and sealed it in

1 another bag at 6:30?

2 A No sir, not at the jail. I have, I would have to
3 come from Chappells, I would go into the jail, fill my
4 paperwork out there, issue my tickets there. Then I would
5 have to come all the way back to the Sheriffs Office,
6 complete some paperwork before I can seal it into the
7 actual evidence bag and place it into evidence.

8 Q And when you say place it into evidence, of course it
9 already is suppose to be in evidence because it is in your
10 possession, right?

11 A Into the evidence lockbox.

12 Q Where is the evidence lockbox?

13 A It is located at the Sheriffs Office in the evidence
14 room.

15 Q What do you do, it is just like a mailbox or
16 something?

17 A It is a, we actually have a complete room for it with
18 lockers and so forth.

19 Q Where did you place the bag with the white powder
20 substance?

21 A It was in the evidence lockbox at the Sheriffs
22 Office.

23 Q Well, in a room where there are many of these
24 lockboxes?

25 A That's correct.

1 Q Okay. And after that did you have any further
2 contact with the bag or the contents of the bag?

3 A No, sir.

4 Q Do you know who had access over this lockbox?

5 A It is the evidence custodian.

6 Q Who is the evidence custodian?

7 A Lieutenant Chapman and he has to, Investigator
8 Stribble would have to go through Lieutenant Chapman, get
9 his approval before he is able to remove anything.

10 Q So would it be accurate to say then that from the
11 time you placed the evidence into the lockbox in the
12 evidence room that officer, Lieutenant, was it Lieutenant
13 Chapman?

14 A That's correct..

15 Q Lieutenant Chapman had possession of the evidence?

16 A No, sir.

17 Q Been nobody had possession of it?

18 A It would be in a lockbox where nobody had access to
19 it.

20 Q Well, but you say Lieutenant Chapman had access to
21 the lockbox?

22 A Correct.

23 Q Is he the only person who had access to the lockbox?

24 A I am unsure of that, that is an admin --

25 Q -- you don't know?

1 A -- over there --

2 Q So the chain-of-custody for the evidence was you and
3 then into the lockbox that is controlled by Lieutenant
4 Chapman. Is that correct?

5 A You have to have his approval, yes.

6 Q Thank you, no further questions.

7 THE COURT: Any redirect?

8 REDIRECT EXAMINATION

9 By Mr. Scott:

10 Q What do you call this outside bag here, State's
11 number 4, outer bag?

12 A That is a vacuumed sealed bag.

13 Q Okay. And if you look inside there is another one,
14 these spiral kind of outlines?

15 A Yes, sir.

16 Q What is that?

17 A That is a drug evidence bag that we use to just stick
18 stuff in on the scene there and it has a piece of tape on
19 it that you can pull off and is able to shut it.

20 Q And tell me what tamper evident tape is, or tampered
21 evident bag is?

22 A If anyone could tear that open or pull it open that
23 it will show tamper on the back.

24 Q Okay. So there is a way, the bag is designed that if
25 somebody opens it or the outside is compromised some way

1 it is evident, you can tell if somebody has tampered with
2 the bag?

3 A Yes sir, if I am not mistaken.

4 Q When you took control of this powder, off of Mr.
5 Whitener, what did you put it in?

6 A I then placed it into that bag, initial bag there.

7 Q Which one?

8 A This one.

9 Q The tamper evident bag?

10 A Let me be sure there, yes.

11 Q And then did you write the identifying characters on
12 that tampered evidence bag?

13 A I am pretty sure I did at that time, I am not
14 one-hundred percent sure but I am sure I probably did.

15 Q Is that typically what you would do?

16 A Yes, at that point in time, right. It is actually
17 three bags in there. This is the actual bag, the small
18 bag should be the bag, I believe, I placed it in. And
19 then it is this bag, I think this is the BEST Kit bag.
20 And then this is a sealed bag as well.

21 Q And then you would put it in the BEST Kit bag?

22 A No, it would be Investigator Stribble who completes
23 the BEST Kit.

24 Q Okay. What did you put in, which bag here?

25 A It should be the bag here that I placed it in.

1 Q Show me, point.

2 A This bag.

3 Q Okay. But that is a tamper evidence bag, correct,
4 one with the spiral on it?

5 A Yes sir, it should be.

6 Q Okay. And you take that and you put it in the drop
7 box, you described?

8 A Right.

9 Q Let me ask you. Nine years being on the force, you
10 have ever been involved in a situation where somebody
11 fired a gun at you or one of your officer's?

12 A Yes, sir.

13 Q In fact you dove up under the guy and he shot over
14 you and hit a shield --

15 MR. HARRIS: Objection to leading.

16 A That is correct.

17 THE COURT: Sustained as to leading. If you want to
18 relate to sequence of events that is fine.

19 Q Tell me about that incident, tell me what happened.

20 A It was an eyeopening incident. There was, you know,
21 it opens your eyes as to how quick things can change, how
22 quick you can lose your life.

23 Q Tell us about it.

24 A We were responding to a call out on Chapman Park
25 Drive, suicidal subject and he had his girlfriend held

1 hostage. He wished to kill himself in front of her. We
2 were able to remove the girlfriend from the residence and
3 myself and my Lieutenant at the time, Lieutenant Floyd
4 were able to stand in the house for about two hours and
5 talk with him, kind of keep him calm, keep him from doing
6 this. When the CERT team got there, when they were able
7 to get there we formulated a plan and we ended up using a
8 non-lethal round on him to disorient him. And when I went
9 to go for him, to disarm him he was able to gather his
10 senses and was able to fire a shot, as I hit the gun up
11 and just barely missed my back.

12 Q Okay. Do you think about that very often?

13 A Oh, yes sir.

14 Q When you went to work that day did you know that you
15 were going to get shot at?

16 A No sir, absolutely not.

17 Q Are you on duty today?

18 A I am. I would be tonight.

19 Q Do you know whether or not you may encounter somebody
20 who may shoot at you or wish you harm?

21 A No sir, absolutely not.

22 Q Are you ever fully sure of that?

23 A No, sir.

24 Q If somebody were to minimize it and somebody was to
25 ask you, why would you search this person for guns. I

1 mean, that is part of your job, is it not?

2 MR. HARRIS: Your Honor, objection, leading question.
3 It is getting almost testimonial.

4 THE COURT: Sustained. And I think we, if you want
5 to ask the question that is fine but I think you made your
6 point.

7 MR. SCOTT: Okay.

8 Q So let me ask you. What was your concern on the
9 night of September 3rd when you have two people you have
10 identified as possibly committing illegal acts, acting
11 very nervous on the side of a road, giving you information
12 that is not checking out and they nervously keep looking
13 at two other individuals in a car. It is just you and a
14 trainee, very rural area. What is your concern at that
15 point?

16 A My concern is to myself and my trainee, also the
17 safety of the other people, there at the traffic stop. As
18 I said earlier, that is a very rural area, we are getting
19 upgraded radios now thanks to the one percent sales tax.
20 But at the time my handheld radio absolutely would not
21 pick up at all in that area. So I would have to go back
22 to my car to radio for any type of assistance, any type of
23 help or anything. So, of course, I am concerned for my
24 safety.

25 Q So if somebody would insinuate you were just looking

1 to make some kind of charge, willy nilly, was that your
2 concern, just to make a charge on somebody?

3 A Absolutely not. It does not affect my career in any
4 way whether I make an arrest or I do not make an arrest.
5 I don't get any incentive, we don't have any quotas, we
6 don't have anything, it doesn't matter. As long as I go
7 home at 6:00 o'clock in the morning, that is the only
8 thing that matters to me.

9 Q As a matter of fact, Walker Camp, the guy that you
10 thought Gaffney had a hit on or Gaffney said they had a
11 hit on. After that ten minutes was up and they were
12 unable to provide the information to confirm that he was
13 wanted, what did you do with him?

14 A Mr. Camp was released.

15 Q He was released, free to go that night. Is that
16 correct?

17 A That's correct.

18 Q What about Bobby Gregory. He didn't have anything on
19 him?

20 A No, sir.

21 Q What did you do with him?

22 A He was released as well.

23 Q Mincey, the driver. You had to take him in right,
24 because he was driving under suspension?

25 A I did.

1 Q Okay. Let me ask you this. Since the Defense ask
2 you hypothetical's. Can I ask you a hypothetical?

3 A Yes, sir.

4 Q All right. If you had patted Calvin Whitener down
5 and you hadn't found that large bag of powder, that he
6 admitted to being powder. If you hadn't found that,
7 hypothetically what would you have done with him?

8 A If I don't have any reason to arrest him I would have
9 turned him loose, I would have set him free.

10 Q So he could have gotten back in the car with Walker
11 Camp and his buddy, Bobby Gregory and been free to go back
12 to North Carolina, where ever they were going?

13 A Absolutely.

14 Q Okay. But it is problematic when you find that
15 powder in his underwear, is it not?

16 A Yes, sir.

17 Q Okay. And your job dictates that once you find that,
18 he admits that its on his person, what does your job tell
19 you you have to do when you find illegal narcotics on
20 somebody?

21 A I have to make an arrest and make an appropriate
22 charge.

23 Q Okay. Thank you. Nothing further.

24 MR. HARRIS: Nothing further, Your Honor, thank you.

25 THE COURT: Officer, thank you. You can step down,

1 you are free to stay, free to go, your choice. We have
2 been at it, ladies and gentlemen, for about an hour and
3 thirty minutes. I desperately need a brief break. We
4 have one additional witness I would like to take before
5 lunch. We may have to take him out of order. So, if you
6 need to adjourn to the back to have a confront break feel
7 free to do that. We will go back on the record in about
8 five minutes. Don't talk about the case. I anticipate
9 taking lunch about 1:00 o'clock.

10 (Whereupon, the jury was excused from open court for
11 a break.)

12 THE COURT: Let's bring the jury in, please.

13 (Whereupon, the jury came into open court at
14 approximately 12:59 p.m.)

15 THE COURT: The record will reflect the jury is back
16 and seated. Ladies and gentlemen, sorry about that delay.
17 We do have one additional witness that I want to get
18 through which should not take very long and they are
19 needed in another part of the State. So we need to go
20 ahead and get this witness done before lunch. So,
21 Solicitor, call your next witness please.

22 MR. DANIEL: The State calls Lawrence Zivkovich.

23 Lawrence Zivkovich, being
24 first duly sworn, testified as follows:

25 DIRECT EXAMINATION

1 By Mr. Daniel:

2 Q Mr. Zivkovich, where are you currently employed?

3 A South Carolina Law Enforcement Division commonly
4 known as SLED.

5 Q And what is your position at SLED?

6 A I am a forensic chemist.

7 Q And what are your duties as a forensic chemist with
8 SLED?

9 A We analyze evidence submitted to the lab for
10 controlled substances.

11 Q So basically you are the guy who when law enforcement
12 makes an arrest has, what they believe to be a controlled
13 substance, you test it?

14 A Yes, sir.

15 Q And you can tell us whether it is, in fact, a
16 controlled substance?

17 A Yes, sir.

18 Q So I guess it has to meet certain chemical criteria?

19 A That's correct.

20 Q So you can tell us the difference between if it is
21 cocaine or say, baby powder?

22 A Yes, sir.

23 Q Okay. And what is your background, your educational
24 background?

25 A I received a Bachelor's in Science from the

1 University of South Carolina. Then when I was hired at
2 SLED I received a six month course in forensic chemistry
3 and I have also taken courses at the Drug Enforcement
4 Administration at the University of West Virginia.

5 Q And your Bachelor's Degree was in what field?

6 A Chemistry.

7 Q How long have you been employed at SLED as a drug
8 analyst?

9 A Approximately 11 and a half years.

10 Q Okay. Have you ever been qualified as an expert
11 witness in the Court's of this State?

12 A I have.

13 Q And in what particular field?

14 A In the analysis of controlled substances.

15 Q So that is the term, the particular field that you
16 have been qualified as an expert in?

17 A Yes, sir.

18 Q Approximately how many times have you been qualified
19 as an expert, how many different cases?

20 A 43.

21 Q 43 times?

22 A Yes, sir.

23 MR. SCOTT: Your Honor, at this time I would offer
24 Mr. Zivkovich as an expert in the field of chemistry as it
25 pertains to the analysis of controlled substances.

1 THE COURT: Any objection?

2 MR. HARRIS: No objection.

3 THE COURT: Ladies and gentlemen, in this case the
4 parties agree that Mr. Zivkovich is an expert in the field
5 of chemical analysis of narcotic substances. So he can
6 give opinion testimony in that area. Normally a witness
7 who testifies about something they saw, heard, et cetera
8 can't give opinion testimony. An exception for that rule
9 does exist for experts and the parties agree that Mr.
10 Zivkovich is an expert in the field of chemical analysis.
11 You may proceed.

12 MR. DANIEL: Thank you, Your Honor.

13 Q Mr. Zivkovich, your involvement in this case that we
14 are trying today, how did you become involved in this
15 case, generally what happens where you become involved in
16 a drug case?

17 A Outside agencies will submit evidence which is logged
18 in by our log in technicians. Once it is received they
19 make sure that the evidence is sealed, then they sign it
20 with a unique SLED lab number. And once they decide which
21 department needs to analyze the evidence they put
22 assignments on the evidence. The department will pick
23 them up and analyze them.

24 Q So in this particular case, for ID purposes, State's
25 number 4. Do you recognize State's number 4?

1 A Yes, sir.

2 Q And what is State's number 4?

3 A It is a heat sealed pouch that contains another heat
4 sealed pouch which I sealed on January 20th, 2015 which
5 contains a BEST Kit.

6 Q Okay. And I guess let me back up. When did you
7 first receive State's number 4 or when did SLED, your
8 agency, first receive State's number 4?

9 A The evidence was submitted to SLED on September 25th,
10 2014.

11 Q Okay. And do you have a chain-of-custody that you
12 can verify who has handled this drug evidence?

13 A I do.

14 Q So according to your internal records at SLED, that
15 is when this item was submitted for testing to your
16 agency?

17 A Yes sir, it was submitted by Mike Stribble of the
18 Newberry County Sheriffs Office to Amy Stephens.

19 Q And who is Amy Stephens?

20 A Amy Stephens is one of our log in technician's.

21 Q And so, we are talking about heat sealed bags. And I
22 think you used the word, BEST Kit bag?

23 A Yes, sir. The heat sealed bag would be the one that
24 I generated to put the BEST Kit in. The BEST Kit is what
25 we submit to outside agencies for the specific submission

1 of drug evidence.

2 Q Okay. So SLED gets Amy Stephens, forensic technician
3 at SLED receives the drug evidence on September 25th,
4 2014?

5 A Yes, sir.

6 Q And the individual who submitted that to SLED was
7 Michael Stribble of the Newberry Sheriffs Office?

8 A That's correct.

9 Q All right. And where is SLED located?

10 A It is on Broad River Road, Columbia, South Carolina.

11 Q Okay. All right. Now, what point did you actually
12 receive State's 4, the substance in question?

13 A I actually received the evidence on January 20th of
14 2015.

15 Q And who did you receive that from?

16 A I received it from Douglas Robinson.

17 Q Who is Douglas Robinson?

18 A Douglas Robinson is one of the other tenants that
19 works in my lab section. And Douglas Robinson was
20 originally assigned the case and he picked it up on
21 December 31st, 2014. And as a matter of backlog reduction
22 we are allowed to work overtime. And when we work
23 overtime we will pick up other people's evidence and work
24 any other backlog cases that we currently have.

25 Q Okay. And describe the substance you received for

1 testing?

2 A When I received it it was in a sealed BEST Kit with
3 the number, B242283. And it contained an evidence bag
4 that contained a plastic bag that contained powder
5 substance.

6 Q Okay. And did you have an occasion to test the
7 substance?

8 A I did.

9 Q And on what date did you actually perform chemical
10 testing of this substance?

11 A On January the 20th, 2015.

12 Q And describe the process of testing and the analysis
13 of a controlled substance?

14 A First thing we do when we pick up the evidence is
15 doublecheck to make sure that the bag is still sealed.
16 And then we annotate on the bag where the bag is sealed
17 and that you check the seal. And once we have done that
18 then we verify the contents of the bag that was submitted
19 and we decide whether, which type of test it requires.
20 This particular one had a spot test performed on it and
21 then a instrumentation analysis.

22 Q I guess, I am familiar with putting chlorine in a
23 pool, that kind of stuff. I guess describe how you do
24 your tests to show that it is or is not a controlled
25 substance.

1 A A spot test is just an indicative test. It doesn't
2 qualify as proof, it just gives you an indication of what
3 type of substance it may be. And when I performed the
4 chemical test on this particular substance it gave the
5 indication, presence of cocaine. After that I took a
6 small amount of the sample and ran it in our
7 instrumentation and confirmed the presence of cocaine.

8 Q Okay. And do you weigh the substance in question?

9 A I do.

10 Q Do you weigh the substance in a bag or without the
11 bag?

12 A Without the bag.

13 Q Without the bag?

14 A Yes, sir.

15 Q And is your scale you use properly calibrated?

16 A Yes, sir.

17 Q All right. And so you did weigh the substance,
18 purely the substance, no bag?

19 A That's correct.

20 Q What weight did you come up with?

21 A 35.99 grams.

22 Q So 35.99 grams, just under 36 grams?

23 A Yes, sir.

24 Q And you have a positive test for cocaine?

25 A That's correct.

1 Q So all the tests that you ran indicated this was, in
2 fact, cocaine?

3 A Yes, sir.

4 Q Meets the chemical criteria for being cocaine?

5 A That's correct.

6 Q And on the bag you received from Douglas Robinson on
7 January 20th, was there any indication looking at the bag
8 that they had been tampered with in any way?

9 A No, sir. I can't actually see the front of this bag.
10 On the front of the bag I write that the seal is intact
11 and I initial and date it. But also on my work sheet when
12 I performed the analysis, we have a section on our
13 worksheet that ask if the evidence was sealed and I
14 indicated, again, that the evidence was, in fact, sealed.

15 Q So all the procedures and protocol appear to be in
16 place when you tested the substance?

17 A Yes, sir.

18 Q Appeared to be followed?

19 A Yes, sir.

20 Q Did you generate a drug analysis report?

21 A I did.

22 Q And is there a case number associated with the drug
23 evidence in this case?

24 A The SLED lab number was L14-12235.

25 Q And the submitting agency would have Newberry

1 Sheriffs Office?

2 A That's correct.

3 Q Do they have a different case number assigned to the
4 drugs?

5 A Their case number was 1408454.

6 Q And what other information do they provide about this
7 evidence?

8 A It has an incident date of 9/03/2014. And a suspect,
9 Calvin Whitener, W-H-I-T-E-N-E-R.

10 Q So you have got a positive test for cocaine, 35.99
11 grams on January 20th, 2015?

12 A That's correct.

13 Q And is that the date that you issued a written report
14 in this case?

15 A The report was finalized and peer reviewed on January
16 23rd, 2015.

17 Q So someone else within your agency reviewed your
18 findings?

19 A Yes, sir.

20 Q Who reviewed your findings?

21 A That is not listed on the form, it is listed in our
22 internal paperwork. We have one-hundred percent review
23 policy. So every analyst that issues a report has their
24 work reviewed by another analyst.

25 Q And your written report you reference. I will show

1 you State's number 3. Do you recognize this?

2 A Yes sir, this is the report that I issued for SLED
3 lab number, L14-12235.

4 MR. DANIEL: Your Honor, I offer State's number 3 for
5 admission into evidence.

6 THE COURT: Any objection?

7 MR. HARRIS: Can I see it. This is a three-page
8 document that I have been handed. I have to object to the
9 third page of it as I don't believe, the Court has
10 received any testimony concerning some of these scientific
11 terms.

12 THE COURT: Let me take a look at the report.

13 MR. HARRIS: I don't offer any objection to the first
14 two.

15 THE COURT: This is the, just a format?

16 MR. DANIEL: Yes, sir.

17 THE COURT: Objection is noted, overruled. State's 3
18 is in evidence.

19 (Whereupon, State's Exhibit 3 was admitted into
20 evidence.)

21 Q Mr. Zivkovich, it is your testimony that State's
22 number 4 is the drug evidence you tested in this case,
23 correct?

24 A That's correct.

25 Q And the weight of that drug evidence is 35.99 grams?

1 A That's correct.

2 Q You weighed that yourself?

3 A Yes, sir.

4 Q And in your expert opinion is that substance, in
5 State's number 4, cocaine?

6 A Yes, sir.

7 Q And that is a scheduled two controlled substance?

8 A That's correct.

9 MR. DANIEL: Your Honor, at this time I offer State's
10 number 4 for admission into evidence.

11 MR. HARRIS: Subject to continuing objection.

12 THE COURT: State's 4 is the actual BEST Kit?

13 MR. DANIEL: Yes sir, it is all the sealed bags and
14 the drug evidence itself.

15 THE COURT: All right. We have one chain witness
16 left to go. So introduce it after the chain witness.

17 MR. DANIEL: Yes, sir. I believe that is all the
18 questions I have, Your Honor.

19 THE COURT: Anything in cross?

20 MR. HARRIS: Thank you, yes sir.

21 CROSS-EXAMINATION

22 By Mr. Harris:

23 Q You have indicated by your testimony that the
24 substance in question here weighed 35.99 grams. Is that
25 correct?

1 A Yes, sir.

2 Q But your report indicates that the net weight is
3 34.99 plus or minus somehow?

4 A 34 or 35?

5 Q 35.99 plus or minus, is that correct?

6 A That's correct. That is called a confidence
7 interval.

8 Q I am sorry?

9 A That is called a confidence interval.

10 Q Confidence interval?

11 A Yes, sir.

12 Q So you are not one-hundred percent confident about
13 your weight?

14 A There can never be a one-hundred percent accuracy on
15 anything that is scientifically measured. Even the speed
16 of light has a confidence interval. There is no
17 measurement on earth that isn't done without a confidence
18 interval.

19 Q So there is always a doubt about it?

20 A There is no doubt about that, no sir. The
21 measurement that day was 35.99 grams.

22 Q I guess your confidence level is 99.7 percent?

23 A No, sir.

24 Q Why did you write that in your report?

25 A That is part of the verbiage.

1 Q Part of the verbiage?

2 A Yes.

3 Q That is something you do in every case whether it is
4 true or not?

5 A The .997 is the confidence interval. What that means
6 is, every time you weigh a substance, you can put the same
7 exact calibrated weight on a scale a hundred times and
8 99.997 percent of the time it will weigh exactly the same
9 thing with a plus or minus confidence interval.

10 Q Thank you, nothing further.

11 THE COURT: Sir, you are free to go. Judge Steve
12 John wants you in Georgetown. I told him you would text
13 when you leave. That is his cell number, safe travels.
14 And try not to exceed the speed limit too badly. All
15 right, ladies and gentlemen, I am starving and you are
16 too. We will break for lunch. If you would be back in
17 the jury room around 2:15. Thank you and don't discuss
18 the case with anyone over break and I will see you at
19 2:15. Thank you.

20 (Whereupon, the jury was excused from open court for
21 a lunch break.)

22 THE COURT: Okay, let's bring the jury in.

23 (Whereupon, the jury came into open court at
24 approximately 2:23 p.m.)

25 THE COURT: The jury is back and seated. Ladies and

1 gentlemen, we are still in the State's case-in-chief at
2 this point. So, Solicitor, please call your next witness.

3 MR. DANIEL: Your Honor, the State calls Michael
4 Stribble.

5 Michael Stribble, being
6 first duly sworn, testified as follows:

7 DIRECT EXAMINATION

8 By Mr. Daniel:

9 Q Detective or Investigator Michael Stribble, correct?

10 A Yes, sir.

11 Q You work with the Newberry Sheriffs Office?

12 A I do.

13 Q How long have you been with the Sheriffs Office?

14 A Approximately 17 years.

15 Q And what is your rank or position at the Sheriffs
16 Office?

17 A I am a Sergeant but my position is Investigator, I do
18 narcotics investigation.

19 Q You are the lead narcotics investigator?

20 A Yes.

21 Q Do you investigate exclusively in drug cases?

22 A Yes sir, predominately.

23 Q For the most part?

24 A For the most part, yes, small town.

25 Q How long have you been in that particular division?

1 A Approximately five years as the lead guy, off and on
2 my entire career.

3 Q Okay. And describe some of the cases you made?

4 A I also handle, actual distributions where I initiate
5 the case or work with CI's to initiate a case. In this
6 particular case it was a case made in the road where I
7 just basically handled getting the warrant on the suspect
8 and also handling the evidence to SLED.

9 Q Okay. Predominantly, you mentioned something about
10 CI's, is that a confidential informant?

11 A That's correct.

12 Q And that is in distribution cases?

13 A That's correct.

14 Q Somebody is making an undercover buy?

15 A That's correct.

16 Q But this particular case that we are here today for.
17 This was a case made by a road deputy, correct?

18 A Yes sir, Deputy Claytor.

19 Q And you still have some involvement in, correct?

20 A I did.

21 Q So September 3rd, 2014, around 1:00 in the morning,
22 were you on duty?

23 A I wasn't on duty but I was contacted by him.

24 Q You were contacted by?

25 A Deputy Claytor.

1 Q What was it in reference to?

2 A In reference to a traffic stop he made.

3 Q And where was this traffic stop made?

4 A It was on Highway 56 at Mudlick Road which is in
5 Newberry County, Chappells.

6 Q And what, why did you respond to this call?

7 A It was in reference to the amount of drugs that he
8 had seized on the scene. And also I was, I had a field
9 test kit that could presumptively test for drugs, for the
10 type of substance that he had to see if cocaine was
11 present in it.

12 Q So being that you are the narcotics investigator you
13 were contacted by Deputy Claytor on September 3rd of 2014?

14 A Yes, sir.

15 Q So you bring the field test kit?

16 A That's correct.

17 Q So when you arrive on the scene, about what time did
18 you arrive on the scene on September 3rd?

19 A I would, approximately 2:00 a.m., maybe. That is a
20 good ways from my house as well, so I would say
21 approximately 2:00 a.m.

22 Q When you arrive on the scene what do you observe?

23 A I observed Deputy Claytor with the traffic stop. The
24 lights are going and all of that. And, you know, he comes
25 to me and says, this is the type substance that we found.

1 It was a bag of white powder substance. And he asked me
2 did I have a field test kit. And I said, yes. And I
3 tested it.

4 Q And did you have information about how the drugs were
5 seized?

6 A At that particular time I don't recall.

7 Q You don't recall if Deputy Claytor told you where he
8 found the drugs?

9 A That's correct. That's correct.

10 Q So you weren't aware of any suspects who were
11 detained in relationship to these drugs?

12 A Yes, I was. The guy that was detained was Mr. Calvin
13 Whitener. I did see him.

14 Q I am going to offer you State's number 2, it has been
15 admitted into evidence. Do you recognize that?

16 A I do.

17 Q What is that?

18 A That is Calvin Eugene Whitener.

19 Q Okay. All right. So you were handed or you observed
20 the drugs that was already in possession, Deputy Claytor
21 already had possession of the drugs when you arrived?

22 A Yes, sir.

23 Q Okay. And what was, describe the drugs?

24 A It was a plastic baggy sandwich bag contained in a
25 white powder, a white powder substance. It appeared to be

1 a pretty good substantial quantity. Just from my
2 experience you can tell whether it was, it was trafficking
3 amounts.

4 Q Okay. State's number 5 has been admitted into
5 evidence. Do you recognize that?

6 A I do.

7 Q What is that?

8 A It is the plastic bag, white powder substance that
9 was found and was later identified as cocaine.

10 Q Okay. And is that on a scale, the drugs, on that
11 photograph?

12 A Yes, sir.

13 Q So y'all did have to weigh the substance that
14 evening?

15 A Yes, sir.

16 Q Or that morning, I should say?

17 A That morning, yes sir.

18 Q Okay. And did that confirm it was trafficking
19 amounts?

20 A That's correct.

21 Q All right. So at that point who logs this into
22 evidence?

23 A Deputy, the arresting Deputy does their initial
24 evidence log.

25 Q So Deputy Claytor would have logged the drugs into

1 evidence initially?

2 A That's correct.

3 Q Do you have like internet records you keep for
4 chain-of-custody purposes on drug evidence?

5 A I do.

6 Q All right. Let's go through that, what you have in
7 your records. So when were the drugs logged into the
8 evidence locker. Is that the terminology you use?

9 A That's right. Give me one second, I want to pull
10 that. They are initially logged in on September 3rd, 2014
11 at 06:30.

12 Q Okay. And who logged that into evidence?

13 A Deputy Claytor.

14 Q And the evidence room, is it a secured facility?

15 A Yes, sir.

16 Q It is at the Sheriffs Office?

17 A At the Sheriffs Office.

18 Q On Wilson Road?

19 A That's correct.

20 Q And is that under lock and key?

21 A Yes sir, it is under lock and key and the lockers
22 itself is, it is a number of lockers. And the individual
23 locker that this was put in was locker ten. Locker ten
24 was where it was placed and then the Deputy then fixed the
25 lock so no one could open from the outside. It only could

1 be opened by the evidence custodian.

2 Q Who is the evidence custodian?

3 A Lieutenant Ben Chapman.

4 Q Would he only have access to the drugs?

5 A At that particular time.

6 Q And you would have to get permission from Lieutenant
7 Chapman in order to access the drugs?

8 A That's correct. In cases like that I would then go
9 to Ben Chapman, let him know that we had a case, that a
10 BEST Kit needs to be filled out. And I completed the BEST
11 Kit and it would stay in evidence until I take to SLED,
12 physically drive it down to SLED.

13 Q Is there a case number associated with this drug
14 evidence?

15 A Yes, sir.

16 Q What is the number?

17 A It is 14-08454.

18 Q So that is how you used to identify what that case,
19 those drugs are associated with?

20 A That's correct.

21 Q Okay. And then you said the bag when it was seized,
22 the drugs were located in a plastic bag?

23 A That's correct.

24 Q Do you still maintain the drugs are in that original
25 bag from the scene or do you put it in anything, a

1 separate container?

2 A I am not sure I am following.

3 Q Do you put it in another container or you keep it in
4 the original bag when drugs are seized?

5 A They stay in the same bag. They then put it in a
6 BEST bag and send to SLED.

7 Q All right. When did you, when did you first access
8 the drugs following the initial seizure?

9 A On September 8th, 2014 at 10:08 a.m.

10 Q You got permission from Lieutenant Chapman --

11 MR. HARRIS: Objection, leading.

12 THE COURT: Overruled.

13 Q You got permission from Lieutenant Chapman to access
14 the drugs?

15 A We both went to evidence. I completed the BEST Kit,
16 the BEST Kit was then placed back into evidence and then
17 on September, on September 25th it was then taken to SLED.

18 Q What does it mean to BEST Kit drug evidence?

19 A What that is, we complete a series of forms, it is a
20 request. If we can't test our own evidence as far as
21 controlled substances and other, so everything else,
22 crack, cocaine, heroin, whatever, any type of prescription
23 filled has, all has to go to some lab. We use SLED and
24 that BEST paperwork has to be completed. They consist of
25 the analysis request form and also proof of chain of

1 physical custody or control form, these two forms. These
2 are the two forms that I completed, once they are
3 completed and the chain is notated where it was sent by
4 Michael Claytor to drug evidence; then drug evidence to me
5 and then from me to SLED. All of that is documented on
6 this form and it is submitted to SLED.

7 Q And the purpose of a BEST Kit bag is SLED requires it
8 to be in that particular bag before they will test it?

9 A That's correct.

10 Q Is that to ensure, I guess, the integrity of the
11 evidence?

12 A That's correct. The BEST Kit bags are also numbered
13 and so the bag and the envelope go together. And once,
14 that actually helps the integrity of it as well. And it
15 all goes together.

16 Q So you seal the evidence in the bag?

17 A That's correct. There is a tampered proof seal on
18 it.

19 Q What does tamper proof mean?

20 A If it is tampered with then it is easily identified
21 that someone has tampered with the seal.

22 Q So I guess the only way you could open it would be to
23 cut it and then you know somebody opened the bag?

24 A That's correct.

25 Q Okay. So it is not like a hefty bag where you can

1 seal it and unseal it?

2 A It is not nothing like a sandwich bag. It is
3 actually glue on one side and it sticks down.

4 Q So September 8th, when you accessed the drugs, that
5 was just for the purpose of putting it into SLED BEST Kit
6 bag?

7 A That is it.

8 Q Then you put it back in the evidence locker at the
9 Newberry Sheriffs Office?

10 A That's correct.

11 Q And then you took it to SLED for testing on what
12 date?

13 A September 25th, 2014.

14 Q So you personally got it out of the Newberry evidence
15 locker?

16 A Well, Ben got it for me, yes.

17 Q Ben gets it, gives it to you on September 15th?

18 A Yes. Ben, we only, we are not going to just take one
19 case at a time. Okay, that is not productive. It takes a
20 long, a good little while just to take one case. So we
21 try to take, you know, if we get six to eight or ten we
22 take them all at the same time. It would be more
23 productive.

24 Q All right. Because you are the narcotics
25 investigator?

1 A That's correct. I am the only one that handles any
2 drug evidence at Newberry Sheriffs Office as far as taking
3 it to SLED.

4 Q September 25th, 2014 you take drug evidence to SLED
5 for testing?

6 A That's correct.

7 Q And where is that SLED facility located?

8 A On Broad River Road. It is right down below the
9 Academy.

10 Q In Columbia?

11 A Yes, I don't know the exact address off the top of my
12 heard.

13 Q So September 25th you submitted this drug evidence to
14 SLED?

15 A That's correct.

16 Q State's 4 for ID purposes, I will show you that. Do
17 you recognize that?

18 A I do.

19 Q What is that?

20 A That is the BEST Kit, the BEST bag.

21 Q And that is what you submitted to SLED on September
22 25th?

23 A That's correct.

24 Q Okay. And that is the drug evidence associated with
25 Calvin Whitener?

1 A That's correct.

2 Q Okay. Who did you give it to at SLED on September
3 25th?

4 A Amy Stephens.

5 Q Who is she, what is her position?

6 A She is a SLED technician at the lab.

7 Q All right. And at that point it goes, it eventually
8 goes to a drug analyst?

9 A That's correct.

10 Q And did you receive any reports from a SLED drug
11 analyst in this case?

12 A I did.

13 Q Who was the SLED analyst who issued a drug report?

14 A Lawrence Zivkovich.

15 Q Okay. And he issued a report indicated a positive
16 test?

17 A That's correct.

18 Q All right. At that point, once testing is over with
19 or once they complete their testing and a report is issued
20 are you contacted by SLED to pick up the drugs?

21 A That's correct.

22 Q All right. And did you pick up the drugs in this
23 case?

24 A I did.

25 Q What date did you pick up the drug evidence from

1 SLED?

2 A March 17, 2015.

3 Q All right. And then you bring the drugs straight
4 back to the Sheriffs Office?

5 A That's correct. And it is placed back into our
6 evidence.

7 Q So March 17th, 2015 the drugs go back to you and you
8 log them back into evidence?

9 A That's correct. And it went into the evidence bin in
10 narcotics.

11 Q And when were the drugs moved again?

12 A During the trial.

13 Q Today?

14 A Today.

15 Q And who brought the drugs here today?

16 A I did.

17 Q Okay. To your knowledge has that drug evidence,
18 State's number 4, been tampered with in any way?

19 A No. You can tell, the BEST Kit, its signature is
20 sealed and cannot be touched. You could tell easily if
21 that happened.

22 Q Has anything been added to it to your knowledge?

23 A No, sir.

24 Q Anything been taken away from it?

25 A No, sir.

1 MR. DANIEL: Your Honor, at this time I offer State's
2 4 for admission into evidence.

3 MR. HARRIS: Your Honor, I object based on continuing
4 objection as to the drug evidence and I have an additional
5 objection related to the chain-of-custody.

6 THE COURT: Let's handle it this way. The motion has
7 been made, before I rule on the admissibility why don't
8 you go ahead and cross the witness and then we will take
9 it from there. Go ahead, please.

10 MR. DANIEL: Thank you, Your Honor.

11 THE COURT: Do you have any other questions?

12 MR. DANIEL: One more, Your Honor.

13 Q Investigator Stribble, this case was a traffic stop?

14 A Yes.

15 Q Do we have in-car video of this traffic stop?

16 A No.

17 Q Why don't we?

18 A At the time we didn't have it, it was not available.

19 Q Okay. Patrol cars aren't equipped with that?

20 A That's correct, yes sir.

21 Q And at this time were any deputies equipped with body
22 cameras?

23 A No, sir.

24 Q They have them now, body cameras, is my
25 understanding?

1 A Yes. Just this past Thursday.

2 Q So 2014 y'all didn't have body cams?

3 A No, sir.

4 Q And no dash cams?

5 A No, sir.

6 Q Okay. Thank you, Investigator Stribble. Answer any
7 questions Mr. Harris has for you.

8 THE COURT: Mr. Harris.

9 CROSS-EXAMINATION

10 By Mr. Harris:

11 Q Yes sir, for clarity is it correct that the drug
12 evidence related to this traffic stop and seizure occurred
13 on September 3rd, 2014?

14 A That's correct.

15 Q And the seizing officer was Deputy Claytor?

16 A That's correct.

17 Q And Deputy Claytor works for the Newberry County
18 Sheriff's Department?

19 A That's correct.

20 Q All right. And is it correct that if protocol was
21 followed for the handling of controlled substance evidence
22 that Deputy Claytor would have been required to document
23 what, when he came into possession of the drug evidence
24 and what he did with it?

25 A I mean, he documented the evidence, yes.

1 Q So the answer is yes, he has to document when that
2 evidence came into his possession and when it left his
3 possession?

4 A That is how it was --

5 Q -- so the answer is, yes?

6 A Yes.

7 Q That is the protocol?

8 A Yes.

9 Q And is it correct that the protocol required to be
10 followed is that every person who has control or custody
11 of the controlled substance evidence, from there on out
12 has to likewise document when that evidence came into
13 their possession and control and when it left their
14 possession and control?

15 A Yes.

16 Q Yes is the answer?

17 A Yes.

18 Q All right. And is it correct that it is your
19 understanding at least that Deputy Claytor took the drug
20 evidence into his possession on September 3rd, 2014 and
21 relinquished possession of it to the drug evidence locker
22 on the same day?

23 A Yes, sir.

24 Q I have been, for your information, provided with
25 certain forms in response to a request I had made about

1 the evidence in the case. And one of the forms is a SLED
2 drug analysis request. Are you familiar with that form in
3 this case?

4 A This form right here?

5 Q Yes, that has been provided to me and that is a form
6 that you filled out. Is that correct?

7 A Yes, sir.

8 Q And did you fill that form out on September 8th,
9 2014?

10 A Yes, sir.

11 Q But the form itself bears no date, does it?

12 A No, this form and this form go together.

13 Q May I see it?

14 A These two forms go together with the evidence bag,
15 the BEST bag.

16 Q I understand. I understand. And so what you are,
17 the form you are providing, the form goes together with
18 the SLED drug analysis, is entitled certification of proof
19 of chain of physical custody or control?

20 A Yes, sir.

21 Q And this would have been filled at least, in part, by
22 you?

23 A That's correct.

24 Q I will give that back to you. Oh, may I see it?

25 A Yes, sir.

1 Q Okay. Thank you. And that form likewise has been
2 provided. And so I call your attention then, sir, to the
3 portion of the second form, the chain-of-custody,
4 certification of chain-of-custody form. Under the portion
5 that reads, subsequent chain-of-custody, following
6 seizure. Are you with me?

7 A Yes, sir.

8 Q This basically is to provide a way to document what
9 you have already said is the protocol. Each person that
10 comes into possession or control of controlled substance
11 evidence documents when this evidence came into their
12 possession and when it left their possession?

13 A Yes, sir.

14 Q Now, there is several spaces to fill out and is it
15 correct that on the certification chain of form that we
16 have in this case, that you are, you referred to. In box
17 number one it is a box that says relinquish and then it
18 has the signature of Mr. Claytor. His name is Michael?

19 A Yes, sir.

20 Q So it reads Michael Claytor. And then he prints his
21 name as well and to, for clarity, I guess?

22 A Yes, sir.

23 Q And then there is a category for company and there is
24 written for Deputy Claytor's entry, the Newberry County
25 Sheriffs Office. Is that right?

1 A That's correct.

2 Q And the date and time is referenced as 9/3/2014,
3 02:00. Is that correct?

4 A Yes, sir.

5 Q Does that indicate to you that that is when Deputy
6 Claytor first came into possession of the evidence or
7 relinquished possession of the evidence?

8 A I think he just made a mistake as far as the time
9 goes.

10 Q Explain how you see the mistake?

11 A Over 17 years I have never seen two different times
12 on that. I will just be honest.

13 Q That is why I pointed it out to you.

14 A I have never seen that, maybe he just made a mistake.
15 Generally speaking the time that goes there is the time it
16 goes into evidence like for safety which would reflect on
17 the chain-of-custody. At this point, the form is 06:30.
18 I can't testify to his paperwork on that part.

19 Q I am just asking you, is the form you have. And then
20 there is a second area under the same for Mr. Claytor
21 relinquished by Claytor, he puts, you believe by mistake,
22 9/3/2014.

23 A The date is correct.

24 Q But the time?

25 A The time, yes sir. And that is the approximate time

1 that, you know, I agree that they are different.

2 Q Then there is a second block. So you are putting, I
3 have received at this point and time and I relinquished, I
4 gave it up and I gave it to these people at a certain
5 point in time?

6 A That's correct.

7 Q So in that box Deputy Claytor appears to have written
8 drug evidence. Is that correct?

9 A That's correct.

10 Q And you would feel that that is intended to mean the
11 drug locker?

12 A Yes, sir.

13 Q And then it likewise has --

14 A Can I explain something real quick on that. Prior to
15 us moving into a new building we had a mailbox, it said
16 drug evidence. Okay. That is why he wrote drug evidence.
17 Now we have the evidence room that has evidence lockers.
18 We write evidence. So there is two different things, I am
19 telling you that is what happened. He got, that is why he
20 wrote drugs.

21 Q Thank you for that. So at the time these events were
22 occurring on September 3rd of 2014 is what I illuded to
23 earlier in the trial. You deposit this in a mailbox type
24 arrangement?

25 A Prior we used to.

1 Q Oh, okay.

2 A This was actually put in the lockers.

3 Q But drug evidence on this form, to the point, is
4 intended to mean a physical location from the Sheriff's
5 Department?

6 A Sure.

7 Q And there again, the Newberry County Sheriffs Office,
8 and this is them saying, 9/3/2014, 05:00.

9 A That's correct.

10 Q So is that, is the form then to be read that the
11 evidence was placed into the drug locker at 5:00 o'clock
12 in the morning?

13 A That is the way I assume, you know, again I can't, I
14 am not sure what he was trying to infer there. These
15 forms can be kind of hard to interpret and try to fill out
16 to some people that don't do them every day.

17 Q Your information is that --

18 A It would appear that it was relinquished, the drug
19 evidence at 05:00.

20 Q The form says 05:00. Your testimony has been 06:30?

21 A 06:30 is what the, is what the law track evidence is
22 showing.

23 Q Can you explain the gap?

24 A No, sir.

25 Q So the evidence to that extent is not clear what

1 happened to the evidence?

2 A I mean, I know that the incident report, from my
3 experience he left at 04:00. He testified he went to the
4 jail, that generally takes approximately an hour. And he
5 went to the office to start the paperwork, generally an
6 hour, maybe a little more. So I would assume that he did
7 approximately 05:00 because of that. Why he put that on
8 the law track form, the 06:30 is probably the time that he
9 finally got a chance to actually do the law track evidence
10 part of it. And that may have been the time, it was at
11 that particular time. So that may be why he listed 06:30.

12 Q But there is no question that the certification for
13 the chain-of-custody, in your opinion, is wrong as to the
14 times and date?

15 A As far as his time, approximate time that he placed
16 it into evidence, I mean, I don't know, I wasn't there.

17 Q Okay.

18 A I can tell you when I was on the scene, that is the
19 way it went.

20 Q So, now, my question to you would be, if you know,
21 when the bag that is in the photograph, when the bag of
22 white powder substance was taken into evidence by Deputy
23 Claytor and when it was placed into the drug locker,
24 whatever time of day it was, was the bag with white powder
25 substance, at that time, in a tampered proof or tamper

1 evident container?

2 A Yes.

3 Q Okay.

4 A When you place it into evidence, this bag right here,
5 it has got the red on it right there.

6 Q Okay.

7 A And then the evidence technician had to take,
8 actually cut it out of that bag and get to the bag you see
9 here.

10 Q I understand. Thank you. All right. Now, is it
11 correct that Lieutenant Ben Campbell --

12 A Chapman.

13 Q Chapman, I am sorry. Chapman was at that time the
14 evidence custodian for the Sheriffs Department?

15 A Yes.

16 Q All right. Now, Lieutenant Chapman's name appears no
17 where on this chain-of-custody?

18 A That's correct.

19 Q But yet he had control of the drug evidence?

20 A No sir, he didn't.

21 Q Well, if he is the evidence custodian why don't he
22 have control --

23 A Well, the point I am making is, when he took me down
24 to the evidence, he opens the locker, he tells me to grab
25 the bag. I then complete the BEST Kit, put the completed

1 BEST Kit back into evidence. And then on September 25th I
2 take that envelope along with however many other ones I
3 had and take to SLED.

4 Q So between September 3rd, 2014 at either 5:00 o'clock
5 in the morning or 6:30 in the morning, until September
6 8th, 2014 at 10:08 a.m. If we wanted to know had anybody
7 done anything with the drugs we would have to ask
8 Lieutenant Chapman. Is that correct?

9 A The drugs stayed in that evidence locker until I took
10 control of them and take to SLED.

11 Q How do you know that?

12 A Because they were in the same bag, they were the same
13 way. Listen, let me finish, I will explain this. When I
14 move it into the BEST Kit you cannot tamper with it
15 without someone knowing it. And when SLED got it it was
16 sealed intact. So there was no way anyone messed with it.

17 Q You assume but we don't have --

18 A -- we agree to disagree.

19 Q We are not going to have Lieutenant Chapman here to
20 say what he --

21 A -- I am testifying to what I know.

22 Q Okay. So the second entry on the certification of
23 chain-of-custody is an entry by you. Is that correct?

24 A Yes, sir.

25 Q That drug evidence to take it to mean the drug

1 locker, gave up the evidence to Newberry County, at the
2 Newberry County Sheriffs Office at, on 9/8/2014 at 10:08
3 a.m. Is that correct?

4 A Yes sir, that is when the SLED investigator --

5 Q -- so are you saying that that, and then the
6 subsequent, it appears to be your signature and your name,
7 received the evidence from the drug locker on September
8 8th, 2014 at 10:08 a.m.

9 A Yes.

10 Q But actually you have testified under direct
11 examination that you received the drug evidence from
12 Lieutenant Chapman, correct?

13 A I think that is a misunderstanding. The way it was
14 is, I am trying to explain to you, it is in a locker. He
15 has the only, he has the only, the only person that has
16 the availability to that locker. Okay. We go in the
17 locker, then I do the BEST Kit and it is put back there
18 until I take it to SLED.

19 Q Well, sir, did you --

20 A I am not understanding what you are saying.

21 Q Well, okay. Did you not testify under direct
22 examination today that on September 8th, 2014, that you
23 received from Lieutenant Chapman this evidence?

24 A I don't know how to answer that.

25 Q Well, do you remember what you testified to?

1 A I do remember. But what I am trying to tell you is
2 that the BEST Kit was completed on September 8th, placed
3 back in the evidence locker and then on September 25th
4 taken from the evidence locker to SLED. That's it.

5 Q For clarity, I am not asking you when the BEST Kit
6 was completed. I am asking you, isn't it true that you
7 received the drug evidence in this case on September 8th,
8 2014 from Lieutenant Chapman?

9 A No, I received it from the drug evidence locker.

10 Q So you, yourself, got a key, went to the locker,
11 turned the key --

12 A No, sir.

13 Q Are you just not wanting to admit --

14 A -- no, sir.

15 COURT REPORTER: Judge, talking over each other.

16 A On September the 8th, 2014 Lieutenant Chapman and I
17 go to the evidence room. He opens the locker, we sit in
18 that room, complete the BEST Kit, put it back in the
19 locker. Then on September 25th it is taken from that
20 locker to SLED.

21 Q Did Lieutenant Chapman, did these drugs pass through
22 Lieutenant Chapman's hands?

23 A No.

24 Q Did he reach into the locker and hand you the
25 evidence or did he put it back into the locker?

1 A No, neither.

2 Q All right. But the form doesn't indicate any
3 involvement?

4 A The form doesn't indicate any on Chapman.

5 Q Okay. Now, is it correct that on the certification,
6 chain-of-custody form that you have, that the dates and
7 times of when the evidence was placed and taken are
8 written for boxes one and two. That's Claytor and
9 September 8th for you, are written in black ink?

10 A Yes, sir.

11 Q And is it correct that section three, box three of
12 the form is also filled out, your name, Newberry County
13 Sheriffs Office and having been received by SLED at SLED
14 in dates and times written in blue ink?

15 A Yes.

16 Q And the only way I have to do this.

17 MR. HARRIS: Solicitor, do you have a hard copy of
18 what you emailed me? The certification, chain-of-custody.

19 MR. DANIEL: The witness will have it.

20 MR. HARRIS: The witness has it.

21 Q All right. So, let me show you this. Sir, I have to
22 ask you this question. I am going to show you, I don't
23 have a copy of it, of something I received from the
24 Solicitor's office at my request on Monday. And that is
25 the image that is displayed and we agree that at least on

1 that copy of the form, there is no date or time for when
2 you gave, took the evidence to SLED?

3 A Yes, sir. And the reason is is because the
4 Solicitor's office wants our case file within ten days of
5 the actual arrest. So what happens is, when this form is
6 initially completed, that date and time for me to release
7 to SLED is not filled out because a lot of times it hasn't
8 been taken to SLED yet. So with that being said, yes,
9 they have a copy of this but they don't have it when I
10 actually take it to SLED until after I take it to SLED.
11 And that is when they get all of it together. That is the
12 only reason.

13 Q Okay. Well, thanks for clarifying that.

14 A Yes, sir.

15 Q No further questions.

16 THE COURT: Nothing on redirect?

17 MR. DANIEL: Just renew my motion to have State's
18 number 4 admitted into evidence.

19 THE COURT: Subject to the Defendant's objection
20 State's 4 will be admitted. All right, sir, you can step
21 down.

22 (Whereupon, State's Exhibit 4 was admitted into
23 evidence.)

24 THE COURT: Any more witnesses from the State?

25 MR. DANIEL: The State rest at this time.

1 THE COURT: Ladies and gentlemen of the jury, I have
2 to take up a few motions. This won't take more than about
3 five or ten minutes or so, maybe a little bit longer.
4 Adjourn to the back and we will have this case to you
5 shortly but don't talk about the case yet. Will have you
6 back out here as soon as possible. Adjourn to the back
7 and don't discuss the case.

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

9 THE COURT: All right, Defense renews all prior
10 motions, the same rulings as before. And I assume you
11 want to move for a directed verdict in this case as well?

12 MR. HARRIS: Yes, Your Honor. The State having
13 rested the Defendant would move for a directed verdict of
14 acquittal. Your Honor, I am mindful of the standard
15 review for the Court at this juncture of the trial. And
16 so I move as a way of making very clear to preserve our
17 objections to the receipt of certain evidence in the trial
18 and as indicated pretrial and during the trial. Your
19 Honor, I would like to also make clear as to the matter
20 that we just addressed, that my objection to the drug
21 evidence itself not only goes to the search and seizure
22 issues but goes to the effective chain-of-custody. We
23 review Lieutenant Ben Chapman as an essential
24 chain-of-custody witness. So thank you for allowing me to
25 do that. And, Your Honor, whatever time the Court thinks

1 is appropriate, I do want to return and state formally my
2 grounds for a mistrial related to the opening statement.

3 THE COURT: Right. As it relates to the
4 chain-of-custody issue, the Court is very familiar with
5 recent case law concerning that. Obviously not every
6 witness or not every individual who necessarily handles
7 the evidence has to be called as a witness. In this case
8 the testimony is that Chapman, although he, of course, was
9 in charge of the evidence room overall he never laid his
10 hands on the evidence. The evidence passed through law
11 enforcement to SLED, it was not tampered with, the BEST
12 pack was not tampered with. I find that the State, along
13 those lines has sufficiently demonstrated a safe and
14 secure chain-of-custody to warrant the admission of
15 State's 4, subject to your objection. As it relates to
16 the objection at the conclusion of the Solicitor's opening
17 statement. We did have a sidebar. And at that point in
18 time Mr. Harris did object to the Solicitor's statement
19 that he made during the course of his opening and
20 requested a mistrial. I indicated to Mr. Harris that he
21 was protected and that at a later point in time he would
22 be allowed to put the nature of that objection in a motion
23 for a mistrial on the record. In the five seconds, I also
24 offered, of course, a curative instruction which he felt
25 would not be sufficient to cure the alleged prejudice. In

1 the five seconds that it took me to walk back from the
2 sidebar to the chair, I formulated in my head the curative
3 instruction I gave to the jury. But you want to state for
4 the record your issues and your motion on that?

5 MR. HARRIS: Yes, Your Honor, please. So at this
6 time the Defendant formally moves, objects to the, certain
7 statements made by the Solicitor in its opening statement,
8 as indicated contemporaneously at that stage of the trial
9 and move for a mistrial and continue to assert that the
10 Defendant is entitled to a mistrial. Your Honor, the
11 specific concerning statement that is the subject of the
12 objection is the statement of the Solicitor wherein he
13 stated to the jury, it seems kind of silly to have to
14 prove a case like this, or some words to that effect. But
15 I think that is, the record, of course, will reveal that.
16 Your Honor, we object to that on the basis that it is a
17 wholly improper statement to make to a jury, that it would
18 tend to diminish, in the jury's eyes, the importance of
19 the case; tend to diminish in the jury's eyes the
20 necessity for even having a trial in the case, is what it
21 says. It seems silly to have to prove a case like this.
22 It infers to the jury that this is not truly an exercise
23 in proof beyond a reasonable doubt or the presumption of
24 innocence but rather just something we have to go through,
25 a lot of trouble that we ought not have to go through.

1 Your Honor, we feel this goes to the heart of insuring a
2 fair trial. To tell a jury before any evidence is ever
3 heard that, it is silly to have to even be here. It is
4 silly to have to even offer proof is the kind of thing we
5 view as something, that once said cannot be unsaid, cannot
6 be explained. And although the Court did attempt, did
7 deliver a curative instruction, we view the curative
8 instruction as ineffective and insufficient to cure the,
9 we can't think of a curative instruction that would cure
10 that kind of prejudice. So I thank the Court for allowing
11 me to state more fully on the record the grounds for
12 objection and we are asking for a mistrial.

13 THE COURT: And just so the record is clear, I think
14 it says, I did reassure Mr. Harris, at the time that we
15 had the sidebar that we did not need to take a break, that
16 you would be protected and need not move for a mistrial
17 formerly at that point in time. I indicated that as soon
18 as we got a break we would put all of this on the record.
19 At the sidebar I sort of take the same position that I
20 take now. The comment that the Solicitor made, I consider
21 that more of a, more of a passing comment along the lines
22 of our evidence in this case is very, very strong as
23 opposed to suggesting we need a lessor burden of proof is
24 required, what is required. To the extent that the
25 statement could infer, or that one could infer from the

1 statement, this is not proof beyond a reasonable doubt
2 kind of case or to the extent that the comments on the
3 necessity of the trial, I think there might, that my
4 instructions to the jury emphasized the State's burden
5 that everyone has a right to a jury trial. But the, as to
6 who has the burden, I think that was sufficient to cure
7 assuming for the moment that the -- was inappropriate in
8 the first place. Again, I take it as being more of a
9 statement of, hey, the drugs were found in the guy's
10 groin. That is a pretty strong case for possession, that
11 is how I took his comment. But your point is well made.
12 Do y'all want to supplement the record with anything
13 further, Solicitor?

14 MR. SCOTT: Just, I agree and I think it was more
15 passing. It was kind of to the extent of, some of you may
16 wonder why a trial is necessary. And then he went into to
17 exalt our judicial system. He referenced other countries
18 with much lower standards. He referenced our burden,
19 proof of the case which is beyond a reasonable doubt and
20 said we fully accept that. In fact, he made the comment,
21 we relish having a hard case because, you know, that means
22 the system is working. We have this high standard, you
23 have to be firmly convinced. I think, I think, I agree
24 with Your Honor, it was more, it wasn't to lessen our
25 burden. In fact, it was to magnify how our burden is.

1 THE COURT: I do appreciate your position, Mr.
2 Harris. My mind is not changed but your objection and
3 motion for a mistrial is noted.

4 MR. HARRIS: Thank you, Your Honor.

5 THE COURT: I previously provided copies of the jury
6 instruction. And I am assuming, Mr. Harris, that you will
7 not be offering any witnesses and will be going straight
8 to closings. Have y'all had a chance to review those, any
9 issues, anything comes out at you that you have a problem
10 with?

11 MR. SCOTT: No, not from the State, Your Honor.

12 MR. HARRIS: Your Honor, I reviewed the written
13 instructions and I would just point out a clerical error
14 on page 11, in paragraph, just before jury verdict. It is
15 methamphetamine.

16 THE COURT: Oh, okay. Thank you, I am sorry.

17 MR. HARRIS: Your Honor, I do have an additional
18 request and that is that the Court instruct the jury that
19 the offense of possession with intent to distribute as
20 described in 44-53-370(a) is a lesser included offense to
21 the offense of trafficking based upon possession. Of
22 course, that is specifically provided for in 44-53-370 and
23 370 in its permutation says, becomes so convoluted. I
24 struggle to point to the exact section but I can show it
25 to you. It comes, basically after the paragraph having to

1 do with the weight of any controlled substance including
2 substance in pure form or any compound or mixture. It
3 appears, that appearing in the paragraph immediately after
4 the definition of mandatory terms of imprisonment,
5 mandatory minimum terms of imprisonment, parole,
6 probation, eligibility. I can hand a copy up, Your Honor,
7 if you need me to.

8 THE COURT: I think you are referencing the same law
9 that Rauch Wise referenced last year in that case that we
10 tried in Laurens. I know you are at a disadvantage but we
11 had this issue, the first time it was brought to my
12 attention was a case that Mr. Scott and I tried involving
13 this --

14 MR. SCOTT: I dug up a few more cases since then,
15 Your Honor. It is the same proposition essentially, if
16 weight is not an issue, then essentially PWID would not be
17 given as a lessor. Of course, below that threshold mark
18 is to be considered. Some sort of evidence to that effect
19 and we would agree that PWID would be proper, lessor
20 included. I have got a number of cases.

21 THE COURT: Anything terribly recent that I must have
22 missed?

23 MR. SCOTT: I have got a 2005 case. Then the newer
24 ones.

25 THE COURT: The change of law that postdates 2005,

1 doesn't it. That change that you are referencing is in,
2 is it 2010?

3 MR. HARRIS: Your Honor, the copy, I am unable to
4 say, I am sorry. But I mean I make reference and I rely
5 on the clear language of the statute itself. There is not
6 any indicating that it is based on the weight of a
7 substance or whether there is a challenge to the weight.
8 The language is that the offense of possession with intent
9 to distribute is a lesser included offense to the defense
10 of trafficking based upon possession. And I take that to
11 mean, when the State has introduced no other evidence; in
12 other words, this is not a distribution case or anything
13 of the sort where there is some active exchange of drugs.
14 So that is beyond possession, that when the possession of
15 an amount of a controlled substance is the State's theory
16 for trafficking that a jury is entitled to consider the
17 lesser included offense of possession with intent to
18 distribute. But I cannot say when that specific statutory
19 provision came into effect. I don't have that
20 information. I do know that the two most recent
21 amendments to the section were in 2010 and 2012. But I
22 don't know if they relate to this section.

23 THE COURT: I have got the book open now. You are,
24 point me to the, hold on.

25 MR. HARRIS: Your Honor, under the (e) part, the

1 trafficking part and then after all of the substances
2 including the, after all the substances are listed and the
3 subsequent offenses then there is a paragraph that begins,
4 a person convicted and sentenced under this section to a
5 mandatory term of imprisonment of 25 years, et cetera. It
6 talks about parole eligibility and the like.

7 THE COURT: Got you.

8 MR. HARRIS: And then the following, one paragraph
9 sentence has to do with the consideration of the weight of
10 the controlled substance in its pure form or any compound
11 or mixture. And then the very next paragraph being with
12 the offense of possession with intent to distribute.

13 THE COURT: Solicitor, I will be instructing the jury
14 on the lessor included as contained in this, or as
15 requested by Mr. Harris. One of the main reasons I am
16 doing so, quite candidly, is I had a chance to review the
17 briefs on that case that we tried with Mr. Wise last year
18 and the brief from the Attorney General, I am not going to
19 say it exceeds error.

20 MR. SCOTT: I have got it here, I am not reading it
21 that way. I have got the memo and their analysis to the
22 contrary. I mean, they cited cases that are still good
23 law. And these cases were Fault, (phonetic), and Sellers.
24 Sellers was authored by Jean Toal, or Chief Justice Toal.
25 And, again, it says PWID is not a lessor included if

1 weight is not contested. These are all good cases.

2 THE COURT: I know. I ruled for you last time with
3 Mr. Wise. I think I made a mistake, I am going the other
4 way on this case. That is where we are.

5 MR. SCOTT: I can't figure out how we are going to
6 explain to them, PWID is this, did he possess with intent
7 to distribute but the weight is this. I don't, what are
8 they going to, how do you explain the difference to them,
9 weight is the triggering factor.

10 THE COURT: In 2010 the General Assembly decided to
11 make it a lessor included and it is not my place to argue
12 about it.

13 MR. SCOTT: DV has all the lessor included. We don't
14 charge DV, all the way down to DV third, if you have a
15 DVHAN, likewise with A and B. Unless the evidence, some
16 confident evidence. That is built into those statutes as
17 well. We don't charge those lessors.

18 THE COURT: I know. I agree with you.

19 MR. SCOTT: All right.

20 THE COURT: Mr. Scott, I agree with you. I am
21 thinking that there is a good chance that that case is
22 coming back and I am not going to make the same mistake
23 twice. But I agree with you one-hundred percent, there is
24 absolutely zero reason for the lessor included of PWID to
25 be included as a lessor included offense but for the black

1 letter law. It goes contrary to everything that I have
2 been taught. It goes contrary to everything I have
3 learned about in law school and they still put it in the
4 law book. And I appreciate your position and I think the
5 cases rely on predate and change in that section.

6 MR. SCOTT: It is still good law. But, just instruct
7 everybody not to laugh at me when I make my closing
8 argument and I am trying to distinguish why they should
9 pick trafficking based on a triggering threshold weight as
10 opposed to PWID. It won't make any sense.

11 THE COURT: I will be instructing the jury should
12 they fail to find that the State has proven the necessary
13 elements of trafficking then they may consider the lessor
14 included of possession within intent to distribute
15 cocaine. That is how, and what they do is what they do.
16 Quite honestly, Solicitor, I am trying to eliminate issues
17 at this point.

18 MR. SCOTT: I understand.

19 THE COURT: And I also agree with him with Rauch
20 Wise. So, Mr. Harris, I have changed my mind. We will
21 take five minutes. If you are satisfied with my
22 instructions, my clerk is going to add the PWID language
23 that Mr. Harris wants.

24 (Whereupon, a short break was taken.)

25 THE COURT: Let's bring the jury in.

1 (Whereupon, the jury came into open court at
2 approximately 3:30 p.m.)

3 THE COURT: Let the record reflect the jury is back
4 and seated. At this point, Mr. Harris, the Defense rest.
5 Correct, sir?

6 MR. HARRIS: That is correct, Your honor.

7 THE COURT: Ladies and gentlemen of the jury, you
8 have now received all the evidence that you are going to
9 have in order to judge this case. And in a few minutes
10 the attorneys are giving you their closing arguments or
11 their closing summation. Of course, like I said this
12 morning, with respect to the opening argument, what the
13 attorneys say during their closing is not evidence. You
14 will need to judge the case on your recollection of what
15 the testimony and the evidence is. Certainly it is normal
16 for the attorneys to reference testimony or talk about
17 testimony during their closings, discuss the evidence.
18 But if anything they say about the evidence is, differs
19 from what you recall the testimony or evidence being go
20 with your recollection as opposed to what they say. Of
21 course, you are the finders of the facts in this case.
22 Okay. The order that we will proceed in, the State will
23 go first. And then Mr. Harris and then I will give you
24 instructions on the law. Solicitor, you are recognized
25 for your closing, sir.

1 MR. SCOTT: Thank you. May it please the Court.

2 THE COURT: Yes.

3 MR. SCOTT: Bad timing, that is kind of what this
4 case is about. Being in the wrong place at the wrong
5 time, doing the wrong thing. That is what this case is
6 about. As badly as the Defense wants this case to be
7 about a road deputy, it is not. As badly as this Defense
8 attorney wants this case to be about other people involved
9 in that Nissan, it is not. As badly as he wants this to
10 be about the Assistant Solicitor and his opening
11 statements, it is not even about that. You know, it is
12 about Calvin Whitener and what he was up to that night,
13 September 3rd, 2014 about 1:00 a.m. in Chappells. That is
14 Deputy Claytor, you heard from him earlier today. He
15 testified, he is running radar, he has got a trainee with
16 him on a rural stretch of roads. I don't know if you guys
17 know where it is, I am not from Newberry. Generally
18 familiar with what he is talking about but heading towards
19 Laurens, Greenwood County line, Laurens County line,
20 Newberry County line kind of comes together around there.
21 But it is rural and it is 1:00 a.m. There he is with his
22 trainee, this guy fresh out of the Academy, he is trying
23 to learn the ropes with a nine-year vet. This Nissan
24 comes flying by, 80 miles-an-hour, you have got to stop
25 him. It is a 55 mile-an-hour zone. We all hate to get a

1 ticket, we all hate to get stopped for speeding. But we
2 understand that is their job. Blue lights, you know, at
3 this point you got of kind of think about this. They
4 don't know what they are about to encounter, you know. I
5 mean, we are hearing about a traffic stop, speeding
6 situation, it is a minor traffic violation. But when they
7 are pulling these guys, they don't know, they don't know
8 who is in that car, don't know what they are capable of.
9 So that is the situation when you pull a car on the side
10 of the road. And he sees these four guys in there. He is
11 outnumbered, he is on the side of the road in this rural
12 area, late at night. And things kind of get more and more
13 strange. Something doesn't quite seem right because the
14 driver, he says, oh yeah, we are coming from this funeral
15 over in Atlanta. And he looks around and they are wearing
16 cargo shorts and camo and things that most people don't
17 wear at funerals. And he says, okay, well, can I see your
18 driver's license. You know, you are going 80
19 miles-an-hour down the road, let me see your driver's
20 license. I don't have them, my driver's license and my
21 privileges have been suspended, I am not even suppose to
22 be driving a car. Uh oh. It is a rental car. And you
23 are sitting there thinking, well, how is this dude who
24 doesn't even have a driver's license get to rent a car.
25 Things aren't checking out already, okay. Senses are kind

1 of kicking in, maybe we better take it slow. Let's handle
2 this thing strategically. Gets the driver out of the car,
3 confirms through dispatch, yeah, this guy isn't suppose to
4 be driving. Hey, man, I am going to have to take you, you
5 are driving under suspension, got to take this guy in.
6 ID's the other passenger, he is wanted out of Gaffney. Uh
7 oh. Takes him out and has to detain him briefly until he
8 can figure this thing out with Gaffney. What is the
9 warrant from and confirming all of this. Meanwhile there
10 are two other guys in the car, right. There he is at 1:00
11 a.m. on the side of this dark road, rural stretch of road.
12 What he sees is two guys sitting in the car, looking back
13 and forth at one another. The two guys he has got outside
14 of the car keep nervously looking back inside of the car.
15 Pats the dude down who is wanted out of Gaffney, he has
16 got digital scales in his pocket. Uh oh. You know, the
17 thing is, if you do enough drug cases, you been on the
18 road long enough, you investigate these kind of cases long
19 enough you start seeing things that you and I might not
20 find to be significant. Maybe would be weird if I saw
21 somebody with some digital scales in their pocket, maybe
22 they have a reason for it. But to a guy who had done
23 enough narcotics investigations, you see these a lot.
24 Because he explained, people who have large amounts of
25 dope, they want to weigh it out to make sure they have got

1 the right amount, they want to see exactly how much they
2 have. And so, again, these senses are kicking in. And
3 the other thing, a lot of times when you see dope you see
4 guns. Okay. So he does the only thing that is really
5 logical, the smart thing, the sensible thing. The
6 Defense, he made a lot of fun about the weapons. Why did
7 you feel the need to check for weapons, they didn't have
8 weapons. I mean, think about that. Isn't it the sensible
9 thing to do, based on all of those things, all of that
10 weird stuff going on. And then you got these guys, one
11 with a scale in his pocket; and one out of Gaffney; and a
12 DUS; these weird stories, keep looking back at each other.
13 The sensible officer takes him out, pats him down and
14 makes sure they are safe. Guess what, gets one of them
15 out, he doesn't have anything on him. You are pretty
16 good, Mr. Gregory. Mr. Whitener, do you mind if I pat you
17 down to make sure you don't have anything that is going to
18 hurt me. Pats Mr. Whitener down and starts on the right
19 side, goes up and down his body making sure there is
20 nothing on him, no weapons. Pats the left side, \$790.00
21 bucks in his pocket, that is not illegal. He keeps
22 patting him down, that is when he feels that thing he
23 described as a ball, a ball shaped object, it is in his
24 pants. We all kind of know what a bag of powder, bag of
25 sugar, anything like that substance feels like. If you do

1 enough dope cases, uh oh, I think I know what that is.
2 Mr. Whitener, what is that? It is a bag of powder. He
3 takes it out, he gives it to the other officer. Mr.
4 Whitener, you are under arrest. That is a lot of cocaine
5 you have got there. You are under arrest for trafficking.
6 That is the case, guys. I mean, we can make it about a
7 deputy or we can try to make it about these other guys but
8 really that is as simple as that. The people in the car
9 who didn't do anything, they got to go home that night.
10 The people who were driving 80 miles-an-hour without a
11 driver's license, they had to go to jail. And the guy
12 with trafficking amounts of cocaine, he has to go to jail.
13 This wasn't some distraction he can make it about, he is
14 going to get up here and do that. That is what he is
15 going to do. Because you know what you do, you get the
16 evidence sitting on your side and if the evidence shows
17 your client did this you distract it, okay. That was the
18 one thing he didn't want to talk about. He didn't want to
19 talk about that either, what they found in this guy's
20 pants. Okay.

21 MR. HARRIS: I object, Your Honor, to the extent the
22 Solicitor is arguing that the Defense has some burden of
23 proof.

24 THE COURT: I will instruct the jury on the question
25 of burden of proof. Obviously, I have already done that.

1 The burden is always on the State on each and every
2 element. Solicitor, with that caveat please continue.

3 MR. SCOTT: I am going to get to that in a minute,
4 the burden of proof is on us, okay. But you are going to
5 see there is a lot of distraction, okay and deflection.
6 Okay. I want you guys to keep your eye on the ball and
7 what makes sense. Keep your eye on what the evidence was,
8 okay. Let me tell you something. In his opening, he says
9 I hope to convince you with persuasive argument. I want
10 you to listen to my persuasive argument. The Judge has
11 already said twice, what the lawyers say, that is not
12 evidence. Let me tell you what he will tell you though.
13 The Judge is going to tell you, when you are deciding your
14 case, don't listen to persuasive argument. He said that
15 is what he is going to try to give you, persuasive
16 argument. That means deflection, distracting. Okay.
17 What the Judge is going to tell you, your job is to render
18 a verdict based solely upon the evidence presented,
19 evidence presented, that is stuff that came from witnesses
20 up here that testified and that is stuff that was admitted
21 by the Judge. That is evidence. His persuasive argument
22 is not, his deflection and distraction is not evidence.
23 Okay. He is going to try to give you some persuasive
24 argument. Mr. Daniel in his opening, he talked about our
25 burden of proof. Okay. It is the highest in the world

1 and we relish that because they do have a presumption of
2 innocence and they wear it like a robe, the Judge is going
3 to tell you that. And the best way I think to describe
4 reasonable doubt is this. Present the evidence and after
5 you hear all of that evidence and testimony you are firmly
6 convinced of guilt, you convict. Okay. If after hearing
7 all of the evidence you have some reasonable doubts, you
8 have doubts that are logical and reasonable, whether he,
9 in fact, had all of this dope on him, then you find him
10 not guilty. It is real easy, that firmly convince though
11 is our standard. The Judge is going to tell you that
12 twice, he will use that term twice. That if you are
13 firmly convinced of guilt find him guilty of the crime
14 charged. That is what the burden of proof is. That is
15 what Mr. Daniel said. The Defense talked about the
16 presumption of innocence. He has it during the entire
17 trial, he has it and wears it like a robe unless guilt has
18 been proven beyond a reasonable doubt, firmly convinced.
19 It is proven by evidence satisfying you of guilt beyond a
20 reasonable doubt. You see, the evidence is crystal clear
21 in this case. I mean we spent a day, three witnesses
22 talking about it. I don't know what persuasive argument
23 he will have to deflect from the evidence and to hide the
24 ball and to distract you that this amount of cocaine was
25 found in his client's pants. I just don't know what

1 persuasive argument he will have. The law, he is charged
2 with trafficking, okay. Trafficking is, if you have a
3 certain amount of illegal narcotics it triggers the crime
4 of trafficking, okay. If we prove to you that the
5 Defendant in this case had between 28 grams and 100 grams
6 of cocaine it is trafficking, okay. That is one of the
7 elements, the weight. 28 grams here, anything over that
8 is trafficking; 100 grams, trafficking; somewhere in
9 between there, okay. You heard that SLED expert testify,
10 it was 35.99 grams. Okay. 28 grams, he had about 36
11 grams. Okay. That is trafficking. He possessed it, this
12 is what the Judge is going to read to you. If he sold,
13 manufactured, cultivated, delivered, purchased, brought to
14 this State, provided financial assistance or otherwise,
15 aided, abetted, attempted or conspired to sell. I am
16 sorry, you guys, I have got my Judge's instructions mixed
17 up here. Attempted to sell, manufacture, cultivate,
18 deliver, purchase or bring into this State or was
19 knowingly in actual or constructive possession or
20 knowingly attempted to become in actual or constructive
21 possession of cocaine. Possession, that is really all of
22 those things, he didn't cultivate, we don't have any proof
23 that he sold, we are not saying that he manufactured
24 cocaine, he possessed it. And that is one of the
25 elements, he possessed 28 grams or more of cocaine which

1 is trafficking, that is the charge. You are going to get
2 a lessor that he possessed with intent to distribute. We
3 have no evidence that he intended to distribute that. And
4 so that is why the Officer didn't charge with that.
5 Trafficking is very simple to understand crime. If you
6 possess a certain weight of cocaine, crack,
7 methamphetamine, something like that, it is trafficking.
8 Okay. That is what he is guilty of, trafficking. He
9 possessed over 28 grams of cocaine. That is the evidence.
10 So, guys, I am not going to belabor this, I think I made
11 my point and I, you guys have been watching, you have been
12 attentive. I know it has been about a day long trial but
13 sometimes we have these things that last over a week. So
14 y'all got lucky, coming back and forth to the Court House
15 this week. I am going to sit down now, he has got the
16 last word, that is how these things work. And so I can't
17 really stand up when he says something and say, wait a
18 minute, wait a minute. I want to talk again, I want to
19 answer what he just said. I don't get to do that. I
20 think I made my point. More important, the evidence
21 speaks for itself. Okay. I don't know how you have
22 better evidence than the guy admitted to having the things
23 and then it being in his pants. That is what it is, guys.
24 You all go back there and after you talk to one another,
25 respect each other's opinions and I think the Judge will

1 tell you that. Talk it out. Some guys might have a
2 different view of the evidence or the facts or a different
3 recollection than another one. But all you guys come
4 together and y'all represent really collective
5 consciousness of this County. You are members of Newberry
6 County serving on this jury. Just common sense is going
7 to be your best friend here, logical, rational thinking.
8 I think you are going to go back there and you will
9 deliberate and be firmly convinced that he is guilty of
10 trafficking. Thank you.

11 THE COURT: Mr. Harris, you are recognized for your
12 closing, sir.

13 MR. HARRIS: Thank you, Your Honor. May it please
14 the Court and the Solicitors. Ladies and gentlemen of the
15 jury, we started this trial with the Solicitor making an
16 appeal to the members of the jury to have a pretend trial.
17 You know, that old thing about, we know he is guilty,
18 sorry we have to go through this trouble, have to go
19 through the motions, never mentions the presumption of
20 innocence. Never asking you to consider the burden of
21 proof. Why?

22 MR. SCOTT: Your Honor, I just object. That is a
23 gross mischaracterization of the opening statement. And I
24 know it is not evidence but he went over the burden of
25 proof in depth.

1 THE COURT: This is argument. I instruct the jury it
2 is argument. Noted. Please continue, Mr. Harris.

3 MR. HARRIS: When the question comes, you know that
4 the Solicitor knows better. Why would he suggest to the
5 jury, don't give him a real trial. Why do you think --

6 MR. SCOTT: Judge, nobody ever said that. I am going
7 to object again. No one said, don't give him a real
8 trial, to the contrary.

9 THE COURT: Mr. Harris, why don't we move along. I
10 don't believe that that was verbatim, what was said. I
11 understand that is your position. Again, I instructed the
12 jury on the burden, their obligation at the close of the
13 State's opening. I think that is water under the bridge.
14 I don't know that, we need to move along.

15 MR. HARRIS: Thank you, Your Honor.

16 THE COURT: Yes, thank you.

17 MR. HARRIS: Well, see when we start a case, any case
18 like this the lawyers know a whole lot more about the case
19 and the evidence, or the lack of evidence or problems with
20 the evidence in a case. You don't know anything about it.
21 You couldn't know anything about it or you wouldn't be
22 allowed to sit on the jury if you were to have some prior
23 knowledge. We know what is there and what is not there
24 and where the problems are. And I would suggest to you
25 that the Solicitor knew from the start that the problems

1 that you have seen with the witnesses and the evidence
2 were the problems they had and he knew they were serious.
3 We can't ignore the problems with the evidence because
4 ignoring the problems with the evidence is not requiring
5 proof beyond a reasonable doubt. Ignoring the problems
6 with the witnesses, consistency, inconsistency, lack of
7 information, multiple explanations, never making any
8 sense, covering up or obvious admitted in this case that
9 they made all with, it doesn't matter, convict him. Well,
10 the jury, you as the jury in this case have taken an oath
11 that requires you to consider the problems in this case.
12 You can't ignore it no matter how much they ask you to,
13 you can't brush it under the table like it doesn't exist
14 in the name of, let's get on with this and find him
15 guilty. You can't do that. You can't ignore the obvious
16 mistakes that the main arresting officer, Deputy Claytor,
17 made in the case. You can't ignore his lack of personal
18 recall, you can't ignore the deficiencies and what he said
19 from the stand today and what he documented in his report
20 that was suppose to be extremely well prepared. You can't
21 ignore the problems with the chain-of-custody of the
22 evidence in the case because that's what gives you the
23 required confidence that the substance that you have today
24 is the same one that allegedly was seized, if any was.
25 That is how you have the confidence in it to consider,

1 ever consider it, much less believe it is strong enough
2 evidence to prove something beyond a reasonable doubt.
3 You can't ignore the failure and the admission of, for
4 instance, Deputy Stribble, Investigator Stribble to admit
5 he can't explain why his fellow officer made the mistakes
6 he did, but obviously erroneous, illogical information on
7 a certification of chain-of-custody form. Not just notes,
8 certification of chain-of-custody, like the document, the
9 document, if you don't have that you don't have it. They
10 want you to ignore all of that but you can't ignore it,
11 you cannot ignore it. This is not a distraction, this is
12 just whole hard reality slapping the State in the face.
13 This is a cold hard reality in what a law, police
14 investigation is in a case like this. This is the problem
15 that the State has in proving a case beyond a reasonable
16 doubt and stripping a citizen of their presumption of
17 innocence by failing to call essential witnesses. That is
18 up to them who they present in court. It is their burden
19 of proof, it is up to them how they go about it. You, the
20 jury, have a right to consider what they present and the
21 problems that they have with it. It is up to you to
22 consider witnesses they present and it is equally up to
23 you to consider what they don't present and the witnesses
24 they don't put up on the witness stand and make subject to
25 cross-examination. All right, so, let's talk about, what

1 we have to talk about is the first, as I said before and I
2 meant it. You can't say presumption of innocence never,
3 you can't emphasize presumption of innocence enough, you
4 can't say that the State has the burden of proof beyond a
5 reasonable doubt enough. It is that important. So when I
6 say to you, ladies and gentlemen, that what we are after
7 here is a fair and impartial trial, that is exactly what
8 we would need to be doing. Can anybody disagree with
9 that. Now you make sure you give the accused person in
10 this case a fair and impartial trial. You make certain
11 that you give him the presumption of innocence. You make
12 absolutely certain that you test the State's evidence, you
13 make absolutely certain that you don't ignore all of the
14 problems that have been pointed out. Has there been a
15 single witness that you have heard in the case, you have
16 only heard three law people involved. You only heard
17 three, did any of those witnesses not have some
18 substantial problem to explain away. And the answer is,
19 no, they all had problems, they all stumbled around and
20 tried to explain something that they had done that wasn't
21 right or an error they had made or whatever. Well, that
22 is not proof beyond a reasonable doubt. That is
23 reasonable doubt, that right there is a reasonable doubt
24 because to believe a message, the State's message they are
25 trying to deliver to you is wrong. You know, this

1 convicting, overwhelming, this convicting, if that is the
2 message they are trying to convey then you have to
3 consider the messengers, you know, the witnesses. Because
4 if you can't believe the witnesses you can't believe the
5 messenger. So I ask you, you will be the judges of the
6 facts of the case. That is the phrase we use and that is
7 the best way we can describe it. His Honor, no doubt, is
8 going to tell you, you are the sole judges of the facts of
9 the case and as part of that function you are the sole
10 judges of the credibility and believability of the
11 witnesses in the case. You have to judge whether the
12 witnesses in the case, on the essential points of proof
13 that they were offered for, can be believed and believed
14 beyond a reasonable doubt. And you can't fill in the
15 blanks for them, you can't give them the benefit of the
16 doubt, they don't get the benefit of the doubt under the
17 law. My client gets the benefit of the doubt, your fellow
18 citizen gets the benefit of the doubt. The accused person
19 in a criminal case gets the benefit of the doubt. I am
20 not trying to be hard on police officers by saying this
21 but they just don't get the benefit of the doubt. The
22 accused person does. If you try to fill in the blanks
23 with these police officers and ignore their shortcomings
24 and their investigation of this case as it bears on the
25 accused person in this case having a fair trial, then I

1 have to respectfully suggest that you need to take another
2 look. Now, Deputy Claytor, about as confident of a
3 witness as you can ever ask for, if you are the State. He
4 is infallible according to them. Now not, according to
5 his fellow officers, Investigator Stribble, he didn't like
6 it but he had to point out the obvious mistakes that
7 Deputy Claytor made in documenting the handling of the
8 evidence. And if you have a reasonable doubt about the
9 handling of the evidence that is reasonable doubt. If you
10 have identified reasonable doubt, your verdict would be
11 not guilty. Deputy Claytor says that he remembers some
12 things and relies on his report to other things. He has
13 done a thorough report, that is what a police officer
14 would say. Except for the first time, according to his
15 testimony, he gives the story about coming from the
16 funeral. Not a word of that is in his report, that is how
17 the whole case went from a speeding case to whatever other
18 thing it was, the funeral story. Doesn't make any sense
19 to me. We don't have any details about that. We know
20 that the first time anybody heard about the funeral story
21 was, under oath, was today. You heard it, it wasn't in
22 anybody's report. So I ask you again, and I suggest this
23 is a good way to go about jury deliberations, why, why
24 would something so important, something that he place such
25 great emphasis on, that is how he justifies everything he

1 did after that, the funeral story. He stops four people
2 in a car, 1:00 o'clock in the morning in Chappells, where
3 ever that is, I don't doubt that it is out in the country
4 but I don't know what real difference it makes. They
5 patrol all parts of the County I believe, suppose to. I
6 don't know why people have to get treated differently in
7 one part of the County than another. I don't know why
8 people have to get treated a certain way if they have got
9 a rental car. Of course, we don't have a rental agreement
10 do we, no. I don't know why those people have to be
11 subject to some higher treatment, it hasn't been
12 explained. But the funeral story, the funeral story came
13 from the mind of Deputy Claytor. He kept it to himself,
14 something that important. He kept it to himself. Why.
15 Well, I don't know why, I just know that that is a reason,
16 that right there, that discrepancy is a reason not to
17 believe anything. If you can't trust messenger Deputy
18 Claytor then you can't accept what he says as believable
19 beyond a reasonable doubt. You can't trust what he says.
20 Your verdict has to be not guilty. It is just a matter of
21 that Deputy Claytor admits that he had Deputy Snelgrove
22 with him. We didn't have Deputy Snelgrove in court, did
23 we. Now, why, why, he was there, he saw it, he witnessed
24 it. He might, or we don't know because he wasn't here, I
25 mean did he hear the story about the rental car; did he

1 hear the story about the funeral, going to the funeral.
2 We don't know because that witness was not presented for
3 consideration. And I say to you, not presented for
4 cross-examination. Why do I bring this up, because as the
5 judges of the credibility and believability of the
6 witnesses you have to consider if anything supports the
7 testimony of Deputy Claytor. That is what we call
8 corroboration. You may have heard that term, that is what
9 that means. A Deputy gets up there and says all of these
10 things and then they bring the other Deputy up to back him
11 up, right. To say, yeah, that is exactly the way it
12 happened. He was definitely speeding out there in the
13 country, I saw it myself, I was there, I saw it. He could
14 have said, I heard this thing about the rental car, I
15 heard this story about the funeral. I saw all of that.
16 you know, he could have said, I saw him get Calvin
17 Whitener out of that car, at least they say it is Calvin
18 Whitener. I saw him search, I saw him pull that bag of
19 white powder out of his pants. But they don't have any of
20 that. Actually, you know, there is no witness other than
21 Deputy Claytor on the subject of how and who had any white
22 powder substance and who kept up with it. We don't have
23 any corroboration, just Deputy Claytor. Deputy Claytor
24 who conveniently forgets to write down the most important
25 facts in the case, who makes all the errors on the

1 chain-of-custody document. You know, who couldn't really
2 even remember what time he even came into possession of
3 this white powder substance. But he did admit, Deputy
4 Claytor did admit that Calvin Whitener had done absolutely
5 nothing wrong to get him searched, absolutely nothing
6 wrong. How is it that somebody that is one-hundred
7 percent in compliance with the law, has done absolutely
8 nothing wrong and has to get frisked for weapons. What
9 about Calvin Whitener, how is that. I understand that
10 being a police officer is a dangerous job. But I also
11 understand, it is a little dangerous to be a citizen right
12 now. So you decide what you can and cannot believe that
13 Deputy Claytor did anything. You decide as the sole
14 judges of the facts and the credibility of the witnesses
15 in the case, whether you are going to require in order to
16 find guilt beyond a reasonable doubt, whether you are
17 going to require, as a jury, any kind of corroboration of
18 Deputy Claytor. And I would suggest to you that you can
19 trust things that people say if they just simply call
20 another witness for backing up. You have a right to say,
21 why didn't they call that witness, why they didn't call
22 Officer Snelgrove. Why didn't they do that. Is there a
23 problem. All right, then we have got the SLED agent
24 coming in saying he tested these drugs and I am going to
25 point out a couple of things to you that are technically

1 important. All right, in evidence you have the Agent's
2 report. Okay. You heard them question him about, why
3 can't you be, have one-hundred percent confidence about
4 even the weight of this powder substance. You know, you
5 can go to a doctor's office and they tell you to get on
6 the scale and see how much you weigh and that is what you
7 weigh. Well, why is it that they put something, I guess
8 what is suppose to be a really precise scale. They have
9 got one of the best ones. Why can't they do -- he says,
10 well, I am just not, I can't say one-hundred percent. You
11 can listen to this back if you want to, I mean if you need
12 to hear what witnesses say you can ask for it, I believe,
13 you can get it. But you might recall that when the
14 Solicitor was questioning the SLED agent, when did you get
15 this, when did you receive this. He said, well, we got it
16 on September, I believe he said September the 25th, 2014.
17 And I got ahold of it after it had been through Amy
18 Stephens hands who logged it in and Douglas Robinson, I
19 may be wrong about the name, another tenant, another
20 analyst who passed it on. It was not explained if that
21 person did anything with it or not. But went through
22 those two people's hands and then he finally got out of
23 him and said, January. And he said he did three tests on
24 it. He said he did a chemical test and I think he
25 referred to that as a spot test. I don't know if you

1 recall, he said spot test. Do you remember what he said
2 about the spot test, he said but a spot test is a
3 presumptive test, it can't be proven. That is from SLED
4 himself, that can't be proven. He was never asked to
5 describe the other two tests and describe what the result
6 of them were. There were a couple of questions given to
7 the benefit of the doubt to the State, suppose to be; that
8 said, well, in your opinion was this cocaine; in your
9 opinion based on the test. But you never heard those two
10 tests described in detail. So do you have proof beyond a
11 reasonable doubt from the SLED agent about what the
12 substance was or do you just have a spot test that he
13 admits himself can't be proven. Now, why do I point this
14 out. It is a failing of proof, it is a failure of proof
15 on the State's part. You can't cover that up, fill in the
16 blank form, you can't do that. That is where you go
17 wrong. All right, Investigator Stribble. He gets up and
18 he says that he can't explain why it is that Deputy
19 Claytor made mistakes that he made. All right, so what do
20 we do in a criminal case on a major point like handling of
21 the evidence, safekeeping of the evidence in this case,
22 where there is an error that can't be explained. I think
23 we have to find reasonable doubt, don't we. There is a
24 problem with the case, the State has a problem with the
25 case, they can't get it right. Now, it stretches any

1 belief that Lieutenant Ben Chapman who is the evidence
2 custodian, the only person in this entire case that has
3 been identified as being the evidence custodian. He is
4 the one that makes sure that the evidence is kept safe and
5 secure. We have no testimony from the evidence custodian.
6 He is the only one with the key, supposedly. Ladies and
7 gentlemen, what we are after here, contrary to my friend,
8 the Solicitor, is not distraction but a clear focus on
9 really testing the State's evidence. Seeing the problems,
10 understanding the problems, understanding the lack of
11 witnesses. You are just simply doing your duty. You
12 can't fill in the blanks for them. A verdict of not
13 guilty means that they haven't proven the case, they
14 haven't brought the witnesses they need to bring. They
15 haven't cleared up the questions and the discrepancies and
16 the problems, they haven't explained the serious errors.
17 That is not your fault, that is not my fault, that is
18 their fault. So I ask you, ladies and gentlemen, to give
19 my client the presumption of innocence, require the State
20 to prove beyond a reasonable doubt, that the State has
21 given that kind of proof. And I, don't just ignore, do
22 what they ask you to do from the start. We need you, we
23 need jury's all over this County, this State, this
24 Country, we need more than ever in our Country, we need
25 jury's just like you to stand up and demand more and

1 better before we send people to convictions like this. If
2 we do demand better we might get better, but if we don't
3 demand better we will get hardly anything, it will get
4 worse. So I am asking you to find reasonable doubt in
5 this case for many reasons and render a verdict of not
6 guilty. Thank you.

7 THE COURT: Thank you, sir. Ladies and gentlemen, it
8 now becomes my instruction or my responsibility to
9 instruct you on the law involved in this case. And Madam
10 Forelady, I will tell you, I will you give you a copy of
11 these written instructions that you can refer to during
12 your deliberations if you feel the need to. Okay.
13 Please, of course, consider the instructions as a whole
14 and don't simply call on some portions of the
15 instructions. And when you are done just return these
16 instructions to the Court. Now, ladies and gentlemen, I
17 will tell you, if you have any questions about the law
18 that applies, the law that I am going to instruct you on
19 in a few moments, just send me a note and let me know what
20 it is you are wrestling with legally and I will try and
21 clarify that for you. So I can probably help you with any
22 legal issue or legal problem you are having. However,
23 understand at this point in time it is not possible for us
24 to reopen the case or produce additional evidence. You
25 will have to judge the case based solely on the evidence

1 which has been presented thus far. So if you have a
2 factual question odds are I am not going to be able to
3 help you, okay. But any legal question I am more than
4 happy to try and assist you.

5 Now, ladies and gentlemen, the indictment in this
6 case charges the Defendant with the offense of trafficking
7 in cocaine, 28 grams or more but less than 100 grams. I
8 instruct you that the fact that Mr. Whitener was charged,
9 arrested and indicted in this case is not evidence and
10 cannot be considered by you as evidence of guilt nor does
11 the indictment create any inference or presumption of
12 guilt. Again, the indictment is merely the formal written
13 instrument contained in the charges against the
14 Defendant's means by which a case is brought to court.

15 The Defendant in this case has pled not guilty to the
16 indictment and that plea puts the burden on the State to
17 prove his guilt. I instruct you, a person charged with
18 committing a crime in this State is never required to
19 prove himself innocent. It is an important rule of law,
20 the Defendant in a criminal trial, no matter what the
21 seriousness of the charge may be, will always be presumed
22 to be innocent of the crime for which the indictment was
23 issued unless guilt, unless guilt has been proven by
24 evidence satisfying you of guilt beyond a reasonable
25 doubt.

1 Again, ladies and gentlemen, this presumption of
2 innocence does not end when you begin your deliberations
3 but it accompanies the Defendant throughout the trial
4 until you reach a verdict of guilt based on evidence
5 satisfying you of his guilt beyond a reasonable doubt.
6 The presumption of innocence sometimes is described as
7 being like a robe of righteousness placed about the
8 Defendant's shoulders and remains with him unless it is
9 stripped from him by evidence satisfying you of his guilt
10 beyond a reasonable doubt. The presumption of innocence,
11 ladies and gentlemen, is not merely a legal theory, it is
12 not just a legal phrase. It is a substantial right to
13 which every Defendant is entitled unless you are satisfied
14 from the evidence of his guilt beyond a reasonable doubt.

15 Well, what is a reasonable doubt in the law. A
16 reasonable doubt is the kind of doubt that would cause a
17 reasonable person to hesitate to act. The State has the
18 burden of proving the Defendant's guilt beyond a
19 reasonable doubt. Some of you may have served as jurors
20 in civil cases where you were told that it is only
21 necessary to prove that a fact is more likely true than
22 not true such as by the greater weight or preponderance of
23 the evidence. In criminal cases the State's proof must be
24 more powerful than that. It has to be proof beyond a
25 reasonable doubt. Proof beyond a reasonable doubt is

1 proof that leaves you firmly convinced of the Defendant's
2 guilt. Now, there are very few things that we know in
3 this world with absolute certainty and in criminal cases
4 the law does not require proof that overcomes every
5 possible doubt. If based on your consideration of the
6 evidence you are firmly convinced that the Defendant is
7 guilty of the crime charged you should find him guilty.
8 On the other hand, you think there is a real possibility
9 that the Defendant is not guilty you should give him the
10 benefit of the doubt and find him not guilty.

11 Again, ladies and gentlemen, during this trial you
12 and I have certain duties to perform. As the trial Judge,
13 it has been my responsibility to preside over the trial of
14 this case and rule on the admissibility of evidence
15 offered. You are to consider only the competent evidence
16 before you. You are to consider only the testimony which
17 has been presented from the witness stand and any exhibits
18 which have been made a part of the record in this case.

19 Again, I have the duty to charge you the law. As the
20 Judge, I am the sole Judge of the law. It is your duty to
21 accept and apply it as I now state it to you. So if you
22 already have any idea you think you know what the law is
23 or what it ought to be and it doesn't agree with what I
24 now instruct you the law is, you have to abandon this idea
25 because you are sworn to accept and apply the law as I

1 state it to you.

2 Again, you are the sole and exclusive judges of the
3 facts. Understand that a trial Judge cannot intimate,
4 state, comment on or make any statement to a trial jury
5 about the facts in a case. Since you, the jury, are the
6 sole judges of the facts please don't think or infer from
7 what I said during the progress of this trial in ruling
8 upon the admissibility of evidence or otherwise, that I
9 have any opinion about the facts in this case. Ladies and
10 gentlemen, the law does not permit me to have an opinion.
11 This is a matter solely for you to determine. As jurors,
12 it is your duty to determine the effect, value, weight and
13 truth of the evidence presented.

14 Typically there are two types of evidence which are
15 generally presented during a trial, direct evidence and
16 circumstantial evidence. Direct evidence directly proves
17 the existence of a fact and does not require deduction
18 such as testimony by an eye witness. Circumstantial
19 evidence is a proof, or is proof of a chain of facts and
20 circumstances which indicate the existence of a fact. I
21 instruct you that crimes may be proven by circumstantial
22 evidence and the law makes no distinction between the
23 weight or value to be given to either direct or
24 circumstantial evidence. However, to the extent the State
25 may rely on circumstantial evidence, all of the

1 circumstances must be consistent with each other and when
2 taken together point conclusively to the guilt of the
3 accused beyond a reasonable doubt. If circumstances
4 merely portray the Defendant's behavior as suspicious then
5 the proof has failed. Again, I instruct you that the
6 State has the burden of proving the Defendant's guilt
7 beyond a reasonable doubt. This burden rests with the
8 State regardless of whether the State relies on direct
9 evidence, circumstantial evidence or some combination of
10 the two.

11 Now again, ladies and gentlemen, you have to
12 determine the credibility of witnesses who have testified
13 and credibility simply means believability. It becomes
14 your duty to analyze and to evaluate the evidence and
15 determine which evidence convinces you of its truth. In
16 determining the believability of witnesses who have
17 testified you can believe one over several or several
18 witnesses over one. You may believe the part of the
19 testimony of a witness and reject the remaining part of
20 the testimony of that same witness. You may believe the
21 testimony of a witness in its entirety or reject that in
22 its entirety. You may consider whether any witness has
23 exhibited to you any interest, bias, prejudice or other
24 motive in this case. You may also consider the appearance
25 and manner of a witness while on the witness stand.

1 Again, ladies and gentlemen, in this case the
2 Defendant is not present for this trial. I instruct you
3 that under the laws of this State a Defendant may be tried
4 even if the Defendant does not attend the trial. But the
5 fact that the Defendant is not present may not be
6 considered by you against him in any manner whatsoever.

7 Similarly I instruct you and emphasize that the fact
8 that the Defendant did not testify is not a factor to be
9 considered by you in any way in your deliberations. It
10 must not be considered by you in any manner whatsoever.
11 The Defendant has the constitutional right to remain
12 silent and the assertion of this right must not be
13 considered by you during your deliberations. Again, under
14 your oath you are not to draw any conclusion whatsoever
15 from the fact that the Defendant did not testify. The
16 fact that he did not testify should not even be discussed
17 in the jury room. As I said before, the burden of proof
18 is on the State. The Defendant is not required to prove
19 his innocence. The burden of proof remains on the State
20 to prove the Defendant's guilt beyond a reasonable doubt.

21 Ladies and gentlemen, in this case the Defendant is
22 charged with the offense of trafficking in cocaine, 28
23 grams or more but less than 100 grams. The State must
24 prove beyond a reasonable doubt, therefore, that the
25 Defendant knowingly sold, manufactured, cultivated,

1 delivered, purchased, brought into this State, provided
2 financial assistance or otherwise aided, abetted,
3 attempted or conspired to sell, manufacture, cultivate,
4 deliver, purchase or bring into this State; or was
5 knowingly in actual or constructive possession, knowingly
6 attempted to become in actual or constructive possession
7 of cocaine. The State must also prove beyond a reasonable
8 doubt that the amount of the cocaine was 28 grams or more
9 but less than 100 grams.

10 If you find that the State has not proven trafficking
11 in cocaine beyond a reasonable doubt, find that the State
12 has not met that burden, you may then consider whether the
13 State has proven beyond a reasonable doubt that the
14 Defendant is guilty of possession with intent to
15 distribute cocaine. Possession with intent to distribute
16 contain is all of the elements of trafficking except the
17 amount of the cocaine. In addition, the State must prove
18 beyond a reasonable doubt that the Defendant had the
19 intent to distribute the cocaine. Distribution is defined
20 as to deliver, other than by administering or dispensing a
21 drug. I instruct you that intent may be shown by acts and
22 conduct of the Defendant and other circumstances from
23 which you may naturally and reasonably infer intent. In
24 determining whether the Defendant had the intent to
25 distribute the cocaine consider the circumstances

1 surrounding the Defendant's alleged possession. You may
2 consider the amount of the substance alleged to have been
3 possessed, the manner in which it was allegedly possessed,
4 the place where it was allegedly possessed and other
5 factors which you consider to be important. You must find
6 that the Defendant did not intend, did not intend to have
7 the cocaine solely for his own personal use. I instruct
8 you that possession of more than ten grams of cocaine
9 creates an inference that the Defendant possessed the
10 cocaine with the intent to distribute it. This inference
11 does not relieve the State from proving beyond a
12 reasonable doubt that the Defendant had the intent to
13 distribute it. It is simply an evidentiary fact to be
14 taken into consideration by you along with the other
15 evidence in this case and to be given the weight you think
16 it should deserve.

17 Now, ladies and gentlemen, there are two possible
18 verdicts in this case. Madame Forelady, I have worked out
19 this verdict form that you can use to render your verdict
20 once the jury is free. The first option states, we, the
21 jury, in the above caption case on the charge of
22 trafficking, excuse me, on the charge of trafficking in
23 cocaine unanimously find Calvin Eugene Whitener; and then
24 there are two options, not guilty or guilty. Okay. If
25 you find the State has failed to meet its burden of

1 proving the Defendant guilty beyond a reasonable doubt you
2 would initial not guilty, sign your name and knock on the
3 door and let us know. On the other hand, if you find the
4 State has met its burden of proving the Defendant is not,
5 or the Defendant's guilt beyond a reasonable doubt, you
6 find the State has met its burden of proving his guilt
7 beyond a reasonable doubt you will initial guilty, sign
8 down here and knock on the door. If you find him not
9 guilty, rather, ladies and gentlemen, if you find him not
10 guilty of trafficking then you can consider the second
11 option here, okay. Obviously if you find the Defendant
12 guilty of trafficking you don't go to the second option.
13 Is that clear enough. The second option says, we, the
14 jury, in the above captioned case on the charge of
15 possession with intent to distribute cocaine unanimously
16 find Calvin Eugene Whitener and then again, the same two
17 options, guilty or not guilty. Sign your name, knock on
18 the door and let us know.

19 Now, ladies and gentlemen, your verdict has to be a
20 unanimous one. Other States have majority verdicts where
21 a verdict of five to seven, or eight to four, or eleven to
22 one and will still result in a verdict. In this State all
23 twelve of you have to agree on the verdict. Okay. It has
24 to be unanimous. Again, all twelve of you have to agree.
25 Should you have any issue or any question about the law in

1 this case, Madam Forelady, simply send me a note, let me
2 know what it is you are struggling with. I don't know
3 that you necessarily will have any problem with these
4 instructions. So should you, give the note to the
5 Bailiff. Certainly if y'all deliberate for a while and
6 you need to communicate with me please, at no point in
7 time should you ever tell me what the split is among the
8 jury. So if you have got eleven to one; or six, six; or
9 five, seven. I don't need that information, so never
10 include that correspondence with me. Ladies and
11 gentlemen, I remind you that you have been chosen as fair
12 and impartial, you have no friends to reward, you have no
13 enemies to punish in this case. Your job is to render a
14 verdict based solely on the evidence and the testimony
15 which is presented on the law that I have instructed you
16 on. Ladies and gentlemen, I want you to go ahead, one
17 more thing. From time to time, I have been doing this
18 full time about seven years now. I have had jury's
19 inquire about how long they have to deliberate. Once I
20 submit a case to you, ladies and gentlemen, we are on your
21 time table and the law does not say that you have to
22 deliberate five minutes, fifteen minutes, five hours, five
23 days, five weeks. You better not deliberate five weeks.
24 However long you choose to deliberate is entirely up to
25 y'all. There is no set amount of time for any

1 deliberations. So I just want to let you know that. I
2 have had jury's ask how long they have to, in fact,
3 deliberate. Ladies and gentlemen, go head and adjourn to
4 the back. Your cue to begin your deliberations, Madam
5 Forelady, will be receipt of these instructions and the
6 verdict form and the other evidence involved in this case.
7 One other caveat with respect to the evidence. The
8 State's exhibit number 4 which I think is the cocaine.
9 That will go back there with you. I feel stupid having to
10 say this but we have had an incident in another part of
11 the State last year, don't open that BEST Kit, okay, don't
12 mess around with that. All right. I am not going to tell
13 you details about what happened down there, I just prefer
14 that you not open up the envelope that contains State's
15 number 4. Okay. With that, you know what your cue is to
16 begin your deliberations. Go on back there, you will have
17 this case in just a moment. Okay.

18 (Whereupon, the jury was excused from open court.)

19 THE COURT: Aside from the Court instructing on PWID,
20 Solicitor, no other objections?

21 MR. SCOTT: No, sir.

22 THE COURT: And aside from the previous objections,
23 will there be any additional objections from the
24 instructions, Mr. Harris?

25 MR. HARRIS: Well, Your Honor, I do feel as an

1 officer of the court to point out, I believe that in terms
2 of the PWID instruction, that the Court erroneously stated
3 that the inference occurs at ten grams, that occurs at one
4 gram.

5 THE COURT: Is it ten grams of cocaine or is it one
6 gram?

7 MR. SCOTT: Trafficking is ten, it is one per
8 inference of PWID.

9 THE COURT: You are right. What I am going to do is
10 just bring the Forelady out, since I am sending the
11 instructions back with them. I am just going to say I
12 misspoke and she can then be aware that I simply misspoke.
13 Any objections?

14 MR. HARRIS: That is okay, Your Honor.

15 THE COURT: I will handle it that way. Y'all make
16 sure everything is right as far as the evidence. We will
17 submit this to the jury. Thank you, Mr. Harris, for that.
18 Let me have the Forelady and the Alternate.

19 (Whereupon, the Forelady enters the court room at
20 approximately 4:34 p.m.)

21 THE COURT: I will talk to the Forelady real quick, I
22 have one correction, Ma'am. I misspoke. When I was
23 describing the lessor offense, I misspoke. Okay. For
24 possession of intent to distribute, if you get to that
25 point and find him not guilty on the trafficking you then

1 consider that one. But the threshold amount is one gram,
2 I said ten. I think you can probably tell them I was
3 wrong when I said that. Okay. So here is everything.
4 Thank you.

5 (Whereupon, the jury started deliberations at
6 approximately 4:35 p.m.)

7 (Whereupon, the Alternate was excused from the trial
8 of the case.)

9 (Whereupon, A note was sent to the Court from the
10 jury. Note reads, is trafficking the lesser charge
11 vs. intent to distribute.)

12 (Whereupon, the Court talks to the Forelady and says,
13 trafficking is higher, distribution is lessor.)

14 (Whereupon, a break was taken awaiting verdict of the
15 jury.)

16 (Whereupon, Court's Exhibit 2 was marked for
17 identification only.)

18 THE COURT: We will go back on the record. I have
19 received communication from the Forelady indicating that
20 the jury is struggling to reach a verdict or least that is
21 what I take her communications means. There are some
22 folks hesitant to change their minds. My intention is to
23 go ahead and proceed with a Allen charge. Any objection
24 to that from the State?

25 MR. SCOTT: No, sir.

1 THE COURT: From the Defense?

2 MR. HARRIS: No, Your Honor.

3 THE COURT: Let's go ahead and have the jury in.

4 (Whereupon, the jury came into open court at
5 approximately 5:30 p.m.)

6 THE COURT: Madam Forelady and ladies and gentlemen
7 of the jury, I received your note and let me give you some
8 additional instructions that perhaps will assist you as
9 you continue your deliberations. Okay. Of course, please
10 accept these instructions in concert together, the
11 instructions that I have sent to the back. Now, ladies
12 and gentlemen, it has been indicated to me that you have
13 been unable or had some difficulty in agreeing on a
14 verdict in this case. And as I told you earlier, the
15 verdict of the jury in this case has to be unanimous. And
16 certainly when a matter is in dispute, it is not all easy
17 for even two people to agree. So when twelve people have
18 to agree it becomes even more difficult, even more
19 challenging. In most cases absolutely certainty cannot be
20 reached or expected. However, understand that you have
21 got a duty to make every reasonable effort to reach a
22 unanimous verdict in this case. When doing this, of
23 course, you should continue to consult with each other,
24 express your own views and listen to the opinions of your
25 fellow jurors. So each of you tell each other how you

1 feel or why you feel that way and discuss your differences
2 with open minds. Now, ladies and gentlemen, although the
3 verdict of the jury in this case has to be unanimous,
4 every one of you has the right to your own opinion. The
5 verdict you agree to must be your own verdict, the result
6 of your own convictions and you should not give up your
7 firmly held beliefs merely to be in agreement with your
8 fellow jurors. What I am saying is that the majority
9 should consider the minorities position and the minority
10 should consider the majorities position. You should
11 carefully consider and respect the opinions of each other
12 and reevaluate your position, reasonableness, correctness
13 and impartiality. You have to lay aside all outside
14 matters and reexamine the question before you based upon
15 the law and the evidence as I have instructed you. Now,
16 ladies and gentlemen, let me explain, that if you do not
17 agree on a verdict in this case I have to declare what is
18 known as a mistrial. Okay. And in that case it doesn't
19 mean that anybody wins, it doesn't mean that either party
20 prevails. It just means that at some future time I will
21 come back and I will try this case with some other jury
22 sitting where you now sit. The same participants will
23 come here, the same lawyers, we will ask basically the
24 same questions and get basically the same answers. And we
25 will go through this process all over again. Now, you

1 were selected in the same manner and from the same source
2 as any future jury will be and there is really no reason
3 for me to suppose or believe that the case will ever be
4 submitted with twelve more intelligent and impartial,
5 conscientious and competent jurors than yourselves or that
6 clear evidence will be presented in the future. Therefore
7 I ask that you would put, please do return to your
8 deliberations taking into account what I just ask you to
9 consider and just let me know when you have a verdict or
10 when you are hopelessly at the end. So with that, if you
11 will just return to your deliberations with what I said to
12 you. Thank you very much for your continued working with
13 us.

14 (Whereupon, the jury continued deliberations at
15 approximately 5:35 p.m.)

16 (Whereupon, Court's Exhibit 3 was marked for
17 identification only.)

18 THE COURT: We will remain at ease.

19 (Whereupon, at ease until the jury reaches a
20 verdict.)

21 THE COURT: I am told the jury has reached a verdict.
22 Anything before we receive the jury back in the courtroom
23 from the State?

24 MR. SCOTT: No, Your Honor.

25 THE COURT: Nothing from the Defense?

1 MR. HARRIS: No, Your Honor.

2 THE COURT: Let's have them, please.

3 (Whereupon, the jury came into open court at
4 approximately 6:10 p.m.)

5 THE COURT: The record will reflect that the jury is
6 back. Madam Forelady, I am told that the jury has reached
7 a verdict. Is that correct?

8 MADAM FORELADY: Yes, sir.

9 THE COURT: And all twelve of you agree as to the
10 outcome?

11 MADAM FORELADY: Yes, sir.

12 THE COURT: If you would, hand the verdict form,
13 please, to the Bailiff.

14 (Whereupon, the Forelady handed the verdict form to
15 the Bailiff. The Bailiff handed the verdict form to
16 the Court.)

17 THE COURT: All right, Madam Clerk, if you will
18 publish.

19 CLERK OF COURT: Indictment number 2015-GS-36-83.
20 The State of South Carolina versus Calvin Eugene Whitener.
21 We, the jury, in the above case on the charge of
22 trafficking in cocaine unanimously find Calvin Eugene
23 Whitener guilty. Signed, Ciria Triplett. Ladies and
24 gentlemen of the jury, if this is your verdict please
25 indicate by raising your right hand.

1 (Whereupon, all twelve jurors raised their hands.)

2 THE COURT: The record will reflect that all twelve
3 jurors did raise their right hands. Anything prior to
4 discharging the jury from the State?

5 MR. SCOTT: No, sir. I want to thank them for their
6 service. Thank you.

7 THE COURT: Anything from the Defense?

8 MR. HARRIS: No, Your Honor.

9 THE COURT: Ladies and gentlemen of the jury, I want
10 to thank you for your attention in this case. I want to
11 thank you again for your patience with us this week. I
12 will let you know that your jury service has concluded
13 with this case. And procedurally what I have to do now is
14 the Solicitor will inform me of Mr. Whitener's prior
15 criminal history, if any. And because he is not present
16 State law requires that any sentence that I impose be
17 sealed and be known only to me and me alone. And then at
18 some point the Solicitor will likely notify the
19 appropriate federal authorities and see about perhaps
20 eliciting their agent in taking Mr. Whitener into custody.
21 So what I am saying is very often I do allow jury's to
22 stick around for sentencing. There will be sentencing but
23 it will be placed in an envelope and I will not pronounce
24 sentence. So you probably just want to go ahead and go
25 home and leave and get out of here and take care of your

1 kids. Okay. You are free now to talk to anyone you want
2 to about this case. Attorneys, friends, family members,
3 you can speak to anyone you wish, anyone tries to talk to
4 you about it and you wish not to speak to them, just
5 politely thank you and say, hey, I have had enough. And
6 they will leave you alone. I want to let you know that I
7 genuinely appreciate your service here this week. As I
8 told the jury panel earlier this week, there are only
9 three things that our Country makes us do against our
10 will. If we go to war, they draft you and put a gun in
11 your hand. Okay. They make you show up in April 15th and
12 pay taxes and they can force you to be a juror. All
13 right. If you think about it, in the grand scheme of
14 things and I know nobody looks forward to jury service but
15 based upon the unpleasantness of all of those three
16 things, going to war, paying taxes and jury service, maybe
17 jury service isn't so bad after all. You did get some
18 donuts this week. Okay. With that I will tell you the
19 Clerk has printed your checks, if they are available.
20 They will be \$15.00 dollars a day, \$45 bucks plus whatever
21 mileage at the applicable State rate. So it is not a lot
22 of money. Tomorrow go by the bank, cash that sucker and
23 blow it on something stupid. Okay. Don't use it to pay
24 any bills, please. Again you have my appreciation, you
25 have my support. The Clerk has your checks and you are

1 excused. Y'all have a great week, you are done for the
2 week and if you are summoned for the next three years let
3 the Clerk know for General Sessions, Common Pleas. Tell
4 the Clerk you have served and then in 2017 you won't even
5 have to show up at the first day of trial. With that
6 y'all take care. Madam Forelady, I need you to sign the
7 actual indictment and the rest of you can go on out.

8 (Whereupon, the jury was excused from open court at
9 approximately 6:13 p.m.)

10 THE COURT: Of course, Mr. Harris, all prior motions
11 are renewed and I assume you would move for a new trial.
12 Is that correct, sir?

13 MR. HARRIS: I move for a new trial, renew my request
14 for a mistrial and we assert all other evidentiary
15 motions.

16 THE COURT: Very good, sir. Motion for a new trial
17 denied, the same rulings as before on all prior motions
18 including the motion for a mistrial. Solicitor, you
19 indicated to me that Mr. Whitener does have a prior
20 criminal history and you indicated previously that this
21 was a, constitutes a third offense?

22 MR. SCOTT: Yes, sir. I have got the certified
23 convictions out of Cleveland County, North Carolina. He
24 is a North Carolina residence or resident, as far as I
25 know. In October of 2008 he was convicted of sell or

1 deliver scheduled two controlled substance as well as a
2 possession with intent to sell or distribute cocaine. And
3 that is October 10th of 2008. And in 2011, February 16th
4 of 2011 he was convicted of selling cocaine. And then
5 February 18th of 2011, selling cocaine and a possession
6 with intent to sell or distribute cocaine. It looks like
7 five offenses in all, drug offenses. I am going to pass
8 those up to Your Honor.

9 THE COURT: Those are all out of North Carolina?

10 MR. SCOTT: Yes, sir.

11 THE COURT: I will ask that these be made a part of
12 the record. Court's exhibits whatever we are up to.

13 (Whereupon, Court's Exhibits 4, 5 and 6 were marked
14 for identification only.)

15 THE COURT: Solicitor, obviously this is a minimum of
16 25, maximum of 30. Potential for a substantial fine,
17 anything further from the State on this issue?

18 MR. SCOTT: No, Your Honor.

19 THE COURT: Mr. Harris, anything you want to present
20 or offer, sir?

21 MR. HARRIS: Your Honor, none other than just to
22 state for the record that I am not in the position to
23 evaluate the efficacy of the prior, the alleged prior
24 convictions. And so I, out of an abundance of caution and
25 the protection of my client's rights, to later challenge,

1 I would assert that my client objects to the admission of
2 those records and reserves any right he has to challenge
3 whether those convictions are qualifying convictions and
4 whether they were obtained with due process of law.

5 THE COURT: All right, very good. The convictions,
6 because they are certified and they appear to be certified
7 true and accurate, sentencing sheets out of North Carolina
8 indicating his convictions for those prior offenses, the
9 Court will consider those in sentencing. But your
10 objection is noted.

11 MR. HARRIS: Thank you.

12 THE COURT: The Court imposed the sentence on a
13 sealed sentence in an envelope with the case caption,
14 Calvin Whitener; case number, today's date and my name.
15 And on the back of the envelope where the seal is, I will
16 sign my name. And when Mr. Whitener is taken into
17 custody, of course, any Judge may open this sealed
18 sentence. All right, gentlemen, it has been a pleasure
19 and thank you very much for your courtesies.

20 MR. SCOTT: Thank you, Judge.

21 MR. HARRIS: Same to you, Your Honor. Thank you.

22 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
23
24
25

1 CERTIFICATE OF REPORTER
2
34 State of South Carolina)
5 County of Newberry)
6
78 I, Joy E. Holston, Official Court Reporter for the
9 Eighth Judicial Circuit of the State of South Carolina, do
10 hereby certify that the foregoing is a true, accurate and
11 complete transcript of record of the proceedings had and
12 evidence introduced in the trial of the captioned case,
13 relative to appeal, in the County of Newberry, South
14 Carolina on the dates of November 13th through 15th, 2017.15 I do further certify that I am neither of kin,
16 counsel nor interest to any party hereto.
17
18

19 January 8, 2022

20 *Joy E. Holston*
21 _____

22 Joy E. Holston, Court Reporter

23 My Commission expires: May 2, 2026
24
25

1
2 STATE OF SOUTH CAROLINA)
3)
4 COUNTY OF NEWBERRY)

COURT OF GENERAL SESSIONS
2015-GS-36-0083

5
6 STATE OF SOUTH CAROLINA,)
7)
8 Plaintiff,)
9)
10 vs.)
11)
12 WHITENER, CALVIN E.,)
13)
14 Defendant)

TRANSCRIPT OF RECORD

15
16 October 20, 2021, Newberry,
17 South Carolina

18 B E F O R E:

19 HONORABLE FRANK R. ADDY, JR., JUDGE

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

21 Dale C. Scott, Esquire
22 Attorney for the State

23 Ricky K. Harris, Esquire
24 Attorney for the Defendant

25
Lisa G. Amick
Family Court Reporter

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(NO EXHIBITS INTRODUCED.)

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1 **THE COURT:** Solicitor, apparently we've got a sealed
2 sentence that needs to be opened?

3 **MR. SCOTT:** Yes, sir, Your Honor. This will be the
4 State versus Calvin Whitener. A TIA was conducted involving
5 Mr. Whitener back on -- is found guilty by a jury to
6 trafficking cocaine, 28 to 100 grams, third offense, Your
7 Honor. And that, that verdict came in on November 16th, 2017.
8 So he's tried in his absence, represented by Mr. Ricky Harris
9 over in the seventh circuit where Mr. Harris primarily
10 practices. But you were the trial Judge, Your Honor, back in
11 2017 for this TIA and we're unsealing a sentence, it looks like
12 he was booked in in the Newberry jail, Mr. Whitener was, on
13 October 8th. But it looks like he was originally taken into
14 custody, this is just per his NCIC rap sheet. I see, it looks
15 like he was arrested in North Carolina in January of this year.
16 So of course, we have a hold, we have a bench warrant, so it
17 looks like that's when he may have been initially taken into
18 custody out of state, waived extradition, and that's how we got
19 him on October 8th in our jail. But it is a mandatory 25 years
20 he was looking at. And the docket number, Your Honor, is 2015-
21 GS-36-0083.

22 **THE COURT:** Okay. The envelope with the sealed
23 sentence, I read the wrong the wrong indictment number, I have
24 2014 instead of 2015, but it is 83. Anything prior to the
25 Court unsealing the sentence, Mr. Harris?

1 **MR. HARRIS:** Your Honor, I've discussed with
2 Mr. Whitener the purpose, the sole purpose of this hearing this
3 morning is for the Court to unseal the sentence and to hand
4 down the sentence pursuant to the conviction by jury trial.

5 **THE COURT:** Alright. And the Court has the sealed
6 sentence. My signature appears on back of the envelope where
7 the envelope is sealed and it would appear that, of course,
8 this is my handwriting, it would appear that the conviction did
9 take place on November the 15th of 2017. Alright.
10 Mr. Whitener, the sentence of the Court which was imposed on
11 November the 15th of 2017 is that you be committed to the
12 Department of Corrections for 25 years. I did check indicating
13 that you're entitled to credit for time and pretrial
14 incarceration against that 25-year sentence. Do we know what
15 that time was that you would be entitled to both in the
16 detention center and prior to his extradition?

17 **MR. HARRIS:** Your Honor, I do not know ---

18 **THE COURT:** Okay.

19 **MR. HARRIS:** --- because I was really not fully aware
20 of the circumstances. I was aware from his father that he had
21 been arrested in North Carolina, I don't know for what purpose,
22 but apparently, that was from, according to his father in
23 talking to him recently was January ---

24 **THE COURT:** Okay.

25 **MR. HARRIS:** --- of this year. He, of course,

1 he was on bond when his case was called for trial, and he
2 failed to appear.

3 **THE COURT:** Okay. I'm going to make a notation on
4 the sentencing sheet that he's entitled to credit for any time
5 served since he was taken into custody in North Carolina and if
6 you need to send me an order clarifying that at some later
7 point in time, if SCDC can't define it, then I'm more than
8 happy to sign that order and expressly give him credit for
9 that. So it was January of this year?

10 **MR. HARRIS:** I believe that's correct.

11 **MR. SCOTT:** Your Honor, it does say in the arrest
12 date on his NCIC of January 12th, 2021, in North Carolina,
13 Cleveland County, and it was, he was arrested for a, it looks
14 like a felony drug charge, a felony cocaine charge.

15 **THE COURT:** Okay.

16 **MR. HARRIS:** Mr. Whitener's just told me it was
17 January 12th, 2021.

18 **THE COURT:** That's what he indicated? Alright.
19 Anything further from the Defense?

20 **MR. HARRIS:** No, Your Honor.

21 **THE COURT:** Mr. Whitener, I do wish you luck. As
22 your lawyer has probably already explained to you, you've got
23 10 days to file any notice of intent to appeal from these
24 proceedings. If need be, I'm happy to sign an order indicating
25 that Mr. Whitener is indigent for purposes of appellate

1 counsel, appointed appellate counsel assuming that you're not
2 going to be in a position to pursue that appeal. But,
3 obviously, you've got 10 days to file any notice of intent to
4 appeal. Your lawyer will be happy to do that on your behalf
5 after the exhaustion of any appeal or one year from today's
6 date you have the obligation to file an action for post-
7 conviction relief if you want to pursue that route, okay? I
8 wish you luck,
9 Mr. Whitener, take care, sir.

10 (Whereupon proceedings were concluded at 11:23.)
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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF NEWBERRY)

I, the undersigned Lisa G. Amick, Official Court Reporter for the Eighteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the County of Newberry, South Carolina, on the 20th day of October 2021.

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

January 12, 2021


Court Reporter

My commission expires: June 30th, 2025

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF NEWBERRY
STATE VS.

CALVIN EUGENE WHITENER

AKA: _____
 Race: Black Sex: M Age: 42
 DOB: _____ SS#: _____
 Address: _____
 City State Zip: Kings Mountain, NC 28086
 DL# _____ SID# _____

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Traff Cocaine 28g but <100g 3rd Offense

In violation of § 44-53-370(e) of the S.C. Code of Laws, bearing CDR Code # 0148

2015
 INDICTMENT/CASE#: 10GS36-0083
 A/W: 2014A3610100560
 Date of Offense: 09/03/2014
 S.C. Code §: 44-53-0370
 CDR Code #: 0148

SENTENCE SHEET

25-30 yrs
\$50K☒ CONVICTED OF or ☐ PLEADS

(Trial in Absentia)

☐ 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:

100588
 Taylor Daniel, Assistant Solicitor SC Bar #

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 25 (Twenty-Five) 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. Including credit for time since his arrest in NC in Jan, 2021.☐ 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 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing

Total: \$ _____ plus 20% fee: \$ _____

☐ Ordered PTUP _____ days/hours Public Service Employment

Payment Terms: _____

Obtain GED ☐☐ Set by SCDPPPS _____

Attend Voc. Rehab. Or Job Corp. _____

Recipient: _____

May serve W/E beginning _____

*Fine: _____ \$ _____

Substance Abuse Counseling ☐

§14-1-206 (Assessments 107.5%) \$ _____

Random Drug/Alcohol Testing ☐§14-1-211 (A)(1)(Conv. Surcharge) \$100 \$ 100.00

Fine may be pd. in equal consecutive weekly/monthly

§14-1-211 (A)(2)(DUI Surcharge) \$100 \$ _____

pmts. of \$ _____ Beginning _____

§56-5-2995 (DUI Assessment) \$12 \$ _____

\$ _____ Paid to Public Defender Fund

§56-1-286 (DUI Breath Test) \$25 \$ _____

Other: _____

Proviso 61.6 (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 \$ _____

3% to County (if paid in installments) \$ \$ 3.75TOTAL \$ 128.75☐ Appointed PD or appointed other counsel,

Proviso §61.6 requires \$600 be paid to Clerk
 during probation and shall be collected before
 any other fees.

Clerk of Court/Deputy Clerk: Beverly BratcherCourt Reporter: Trial - Jay Holston

SCCA/217 (07/2016)

Sentence - Lisa Amick

Presiding Judge: Julius J. Smith

Judge Bar ID: _____

Sentence Date: 11-15-17Judge Code: 2657

WITNESSES

Robert Dennis
Newberry County Sheriff

WARRANT NUMBER

2014A3610100560

TRUE BILL

Phyllis Sanders

Foreman of the Grand Jury

Date: *2-13-15*

VERDICT

Guilt.

Circ. 7/11/17

Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

COURT OF GENERAL SESSIONS

February Term, 2015

Indictment # 15GS36-0083

THE STATE

vs.

Calvin Eugene Whitener

BW 1/15/15

INDICTMENT FOR

Drugs / Trafficking in cocaine, 28 g or more, but less than

100 g

\$44-53-0370

CDR: 0148

ETA
Is move:
4/16/2015
asst. solicitor, Taylor Dennis

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

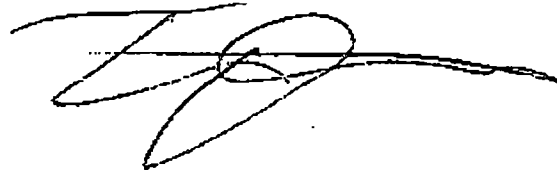
INDICTMENT FOR

Drugs / Trafficking in cocaine, 28 g or more, but less
than 100 g
§44-53-0370

At a Court of General Sessions, convened on the 13th day of February, 2015, the Grand Jurors of Newberry County present upon their oath:

That Calvin Eugene Whitener did, on or about September 3, 2014, in Newberry County, willfully, unlawfully, and knowingly traffic in cocaine, in that the said defendant(s) did distribute, manufacture, cultivate, deliver, purchase, or bring into this State, and/or did provide financial assistance or otherwise aid, abet, attempt, or conspire to distribute, manufacture, cultivate, deliver, purchase, or bring into this State, and/or was knowingly in actual or constructive possession of more than 28 grams of cocaine, in violation of Section 44-53-370(e)(2) of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.



Assistant Solicitor

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



Dayne C. Phillips, Esq.
SC Bar No. 77712
Price Benowitz LLP
1614 Taylor Street, Suite D
Columbia, SC 29201
(803) 807-0234

ATTORNEY FOR APPELLANT

October 3, 2022

RECEIVED
OCT 06 2022
SC Court of Appeals