

ORIGINAL

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable C. Victor Pyle, Jr., Trial Judge
The Honorable John C. Few, Sentencing Judge
The Honorable R. Markley Dennis, Jr., Post-Conviction Relief Judge

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JUN - 7 2013

S.C. Supreme Court

Appellate Case No. 2011-CP-23-0382

Horace Abney, Jr., ... Respondent,

v.

State of South Carolina, ... Petitioner.

2013-000136

APPENDIX

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STATE OF SOUTH CAROLINA)
) COURT OF GENERAL SESSIONS
 COUNTY OF GREENVILLE) 2000-GS-23-4624

STATE OF SOUTH CAROLINA)
)
 VS.) TRANSCRIPT OF RECORD
)
 HORACE ABNEY, JR.)
)
)
)
)

ORIGINAL

DATE: MONDAY, SEPTEMBER 24, 2001

LOCATION: GREENVILLE COUNTY COURTHOUSE
 305 East North Street
 Greenville, South Carolina 29601

PRESIDING JUDGE: THE HONORABLE C. VICTOR PYLE, JR.

APPEARANCES: KEVIN C. ROMOSCA, Assistant Solicitor
 Attorney for the State

ANDREW R. MACKENZIE, Esquire
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REPORTED BY: DEBORAH SCHMIDT, CVR
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 13th Judicial Circuit, Greenville County
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(video tape)	

PROCEEDING

THE COURT: All right. Now, I have a motion in the State against Horace Abney, Jr., motion to suppress filed by Mr. Mackenzie. And Mr. Mackenzie you represent Mr. Abney?

MR. MACKENZIE: Yes, sir.

THE COURT: And he is present?

MR. MACKENZIE: He is, Sir.

THE COURT: All right. What are the underlying facts?

MR. MACKENZIE: Judge, this involves a vehicle stop on I-85, a warrantless search of an automobile. And we would -- there's opposition that there was no probable cause for the search.

THE COURT: What about was there any question about the validity of the stop? Was it a valid stop?

MR. MACKENZIE: We're not really contesting the validity of the stop, Your Honor, just the search. There also may be an issue about whether or not the search was consensual.

THE COURT: Okay.

MR. MACKENZIE: But the probable cause and ---

MR. ROMOSCA: Your Honor, the State intends to proffer the testimony of Trooper David Robinson and video tape.

THE COURT: Okay.

MR. ROMOSCA: May it please the court, Your Honor, state calls Trooper David Robinson to the stand.

DAVID E. ROBINSON, being duly sworn

1 testifies as follows:

2 DIRECT EXAMINATION BY MR. ROMOSCA:

3 Q. Trooper Robinson, how long have you been in law
4 enforcement?

5 A. Six years military police, and I'm on my fifteenth year
6 on the patrol.

7 Q. And what unit or team are you assigned to with the South
8 Carolina Highway Patrol?

9 A. I'm with the ACE Team.

10 THE COURT: Mr. Romosca, since there's no question
11 concerning the validity of the stop, all of the questions are
12 of the search and whether or not it was essential. Let's move
13 on.

14 MR. ROMOSCA: Yes, Your Honor. I was going to proffer
15 some testimony as to his experience with the detection of
16 drugs.

17 THE COURT: That's fine.

18 MR. ROMOSCA: Based upon all the case law that I have
19 submitted to you prior to the hearing.

20 THE COURT: Sure. That's fine.

21 Q. Please describe any special training you have endured as
22 to the detection of illegal drugs, specifically marijuana.

23 A. As being on the ACE Team, we go to numerous -- have
24 attended numerous drug conferences and classes. I'm also a
25 certified canine handler, which is dog handler.

1 Q. Okay. And in your job do you come in contact with
2 marijuana?

3 A. Yes, sir, I do.

4 Q. Okay. And in what capacity?

5 A. Marijuana is pretty frequent out there. It's not an
6 every day occurrence but three or four times a week
7 occurrence.

8 Q. And you say you come in contact with it three or four
9 times a week?

10 A. Yes, sir.

11 Q. Okay. And you have been on the job for 15 years.

12 A. Yes, sir.

13 Q. And do you know what raw marijuana smells like?

14 A. Yes, sir, I do.

15 Q. Do you know what burnt marijuana smells like?

16 A. Yes, sir, I do.

17 Q. And can you describe -- you know, what ---

18 A. They each have their own distinctive smell. As dog
19 handler, I have marijuana that is assigned to me that I train
20 with. And from just working out on the road, always finding
21 pipes and/or half smoked joints, which are marijuana
22 cigarettes, and/or cigar wrapped cigarettes.

23 Q. Okay. And are you able to distinguish the smell of
24 marijuana from that of, let's say, tobacco?

25 A. Yes, sir.

1 Q. And please describe some common ways marijuana is smoked
2 or ingested.

3 A. It can be eaten or smoked. It can be hand rolled into a
4 cigarette or cigar wrapped papers.

5 Q. Okay. And do you recall coming into contact with the
6 Defendant, Horace Abney, on January 10th of 2000?

7 A. Yes, sir, I do.

8 Q. And, briefly, what was the basis of this contact?

9 A. I was driving northbound on 85 and a vehicle passed me at
10 70 miles per hour. The speed limit posted in this area is 55,
11 and I stopped the vehicle.

12 Q. All right. And what did you do once you stopped the
13 vehicle?

14 A. I approached to the passenger side of the vehicle,
15 identified myself, and seen that there was one occupant in the
16 vehicle.

17 Q. When you approached the vehicle, was the window rolled up
18 or down?

19 A. His passenger side front window was down.

20 Q. And was it already rolled down when you approached him?

21 A. Yes, sir.

22 Q. And what month of the year was this stop made?

23 A. This was January.

24 Q. And was it cold that evening?

25 A. It was chilly, yes, sir.

1 Q. And what did you do next?

2 A. Just informed the driver, who was later I.D.ed as Mr.
3 Horace Abney, Jr., as to who I was and why I had stopped him
4 and asked him for his driver's license and registration.

5 Q. And as you were standing there having this conversation
6 with the Defendant, did you notice anything unusual?

7 A. Yes, sir, just the way he was moving around in the
8 vehicle, and that I could smell what appeared to me to be
9 burnt marijuana -- in other words, burnt marijuana, coming
10 from the vehicle.

11 Q. And how long did it take you to smell this odor coming
12 from the vehicle?

13 A. Immediately when I walked up to the window as I first
14 started my conversation with him.

15 Q. And describe how strong this odor was to you.

16 A. I could smell it over anything else. With the air
17 blowing and everything from outside and coming right out of
18 the vehicle, it's the only thing I could really smell.

19 Q. And what did this odor smell like?

20 A. Burnt marijuana that had been smoked or was being smoked.

21 Q. How sure were you that you ---

22 A. I was ---

23 Q. --- smelled marijuana? What did you do next?

24 A. I asked Mr. Abney to exit his vehicle and step to the
25 rear of his vehicle. During this time, I had a brief

1 conversation with him, explained to him that I was going to
2 write him a warning. I think I explained that to him before
3 he got out of the car and step out. I was going to write him
4 a warning. While I was writing the warning, I just noticed
5 Mr. Abney was nervous, kept looking around. He wanted to lean
6 against my vehicle, and I told him it would be fine. And that
7 would help from being nervous, I hoped.

8 Q. And during this -- while you're writing this warning
9 ticket, did you call for any assistance?

10 A. Yes, sir, I did. Another trooper who is on the ACE Team
11 is -- we try to stay a mile or two within each other. And I
12 knew that he was close by, so I asked him just to come in just
13 to provide assistance.

14 Q. Okay. And what was the -- and what was the reasoning for
15 that?

16 A. Just for safety for -- Mr. Abney, the way he was acting I
17 knew that he just wasn't a regular person that was nervous
18 about being stopped by the police.

19 Q. And how did you call for this assistance? Did you use a
20 code sign?

21 A. I used -- I believe it was 10-39 which -- I need you --
22 10-25 was just meet with me for a 10-39 which is -- so I can
23 conduct a search or investigation about the stop.

24 Q. Okay. And what was the basis for the search?

25 A. From the burnt smell of marijuana.

1 Q. Okay. And once Trooper Stevens arrived, what happened or
2 what did you do?

3 A. I issued Mr. Abney his warning, gave him license,
4 registration, everything back. I asked him could I search his
5 vehicle. He approached it, it's okay. But then he was
6 hesitant in it, and he asked me why. And I explained to him
7 that I could smell burnt marijuana coming from his vehicle. I
8 asked him again for consent. And he -- he never said no, but
9 he never said yes. So, I was still at that that I could --
10 you know, I informed him again that I could smell it was my
11 reason.

12 Q. And did you feel that you had gotten consent to search
13 his vehicle ---

14 A. Yes, sir.

15 Q. --- at that time?

16 A. Yes, sir.

17 Q. What happened when you searched it?

18 A. I had Mr. Abney stay with Officer Stevens while I
19 approached the driver -- excuse me -- the passenger side of
20 the vehicle again. I opened the door, got partially into the
21 vehicle. As I did, there was a jacket on the front seat. It
22 was draped over the front seat. And I put my hand against it,
23 and I noticed something hard inside the jacket. I then looked
24 briefly in the jacket. I couldn't find anything, but could
25 still feel it. I looked on the inside of the jacket and found

1 a pocket. Maybe it's factory, but maybe it -- I've never seen
2 it before on a jacket. I looked inside of it, and I found a
3 package.

4 Q. Please describe the -- what -- could you still smell the
5 marijuana when you went back to search ---

6 A. Yes, sir.

7 Q. --- the car?

8 A. Yes, sir. It was very strong.

9 Q. And where did you go to begin your search?

10 A. To the same area that I smelled the marijuana to start
11 with.

12 Q. Okay. And you say you felt something in a jacket.
13 Exactly where was that jacket?

14 A. It was on the passenger seat. As I leaned inside to look
15 in the console ashtray, the general area that -- from a burnt
16 marijuana or a burnt anything would be coming from an ashtray.
17 That was my first priority. As I leaned in, I could feel
18 something in the jacket.

19 Q. What -- describe the contents of the ashtray.

20 A. Ashes. I can't recall any cigarette wrappers or the ends
21 of cigarettes or anything like that, but it there was a bunch
22 of ashes that were in the ashtray.

23 Q. And please describe what you found in the jacket, again.

24 A. When I retrieved the jacket, I found approximately five
25 and a half inches by seven and a half inches, approximately an

1 inch and a half thick plastic vacuum-sealed bag containing a
2 white, powder substance. Also in the jacket, I found a cigar
3 which was still in the wrapper. And I think it's known as a
4 Philly's Bunt is the particular brand of that cigar.

5 Q. Okay. And is this the same type of cigar that can be
6 hollowed out and used to smoke marijuana?

7 A. Yes, sir. From time to time, we do come across that
8 particular brand. And it's in the vehicle -- ones where we
9 find a lot of wrappers that have the marijuana in it.

10 Q. And what did you do after you found the -- what appeared
11 to be cocaine?

12 A. I left the cocaine in the vehicle, walked back, arrested
13 Mr. Abney, and explained to my back-up what I had found and to
14 Mr. Abney as well. He seemed to be confused of what I had
15 found.

16 Q. And is your patrol car equipped with video equipment?

17 A. Yes, sir, it is.

18 Q. Okay. And was the traffic stop, in fact, videotaped?

19 A. Yes, sir.

20 Q. All right. Do you have this videotape with you today?

21 A. Yes, sir.

22 Q. Did you bring it with you today?

23 A. Yes, sir.

24 MR. ROMOSCA: Let's mark this for identification
25 purposes.

1 (MARKED STATE'S EXHIBIT NO. 1)

2 Q. Could you please identify what has been marked State's
3 Exhibit 1 for identification purposes?

4 A. Yes, sir. That's my tape that I take out of the vehicle.
5 I put it in on the 6th and took it out on the 19th of 2000.

6 Q. And when was the last time you viewed that tape?

7 A. I looked at it earlier today.

8 Q. And does it fairly and accurately represent the traffic
9 stop you made on the Defendant, Horace Abney?

10 A. Yes, sir, it does.

11 MR. ROMOSCA: At this time, Your Honor, I'd like to
12 publish the tape.

13 (AT THIS TIME THE VIDEO TAPE WAS VIEWED)

14 MR. ROMOSCA: With the Defense's consent, I'm going to
15 forward it to the trip back where these alleged statements
16 were made.

17 (AT THIS TIME THE VIDEO TAPE WAS VIEWED)

18 Q. Trooper Robinson, why didn't you confront the Defendant
19 right off the second you smelled the marijuana when you
20 approached the car?

21 A. Well, because I was the only one there. And it's not our
22 policy to do that until we have a back-up.

23 Q. So you don't -- procedures ---

24 A. Safety is the big thing. For my safety.

25 Q. So -- and the South Carolina Patrol -- Highway Patrol's

1 procedure is to call for back up before you confront a suspect
2 about drugs if you have reason to believe ---

3 A. Yes, sir.

4 Q. --- they have drugs?

5 A. Yes, sir. That's correct.

6 Q. Okay. And is that -- did you wait until Trooper Stevens
7 arrived before you confronted ---

8 A. Yes, I did.

9 MR. ROMOSCA: Answer any questions Defense has.

10 THE COURT: Mr. Mackenzie?

11 MR. MACKENZIE: Thank you, Judge.

12 CROSS EXAMINATION BY MR. MACKENZIE:

13 Q. Trooper Robinson, the main reason you searched the car
14 was because you -- there was an odor of marijuana?

15 A. Yes, sir.

16 Q. Okay. But there was some cigarettes and cigars in the
17 ashtray?

18 A. There was some ashes in there. I couldn't see any type
19 of cigarette, cigar wrapper or anything. It was just ashes in
20 the ashtray.

21 Q. Okay. And you did, in fact, search the car? You
22 searched it very thoroughly, didn't you?

23 A. Yes, sir.

24 Q. No marijuana was found?

25 A. No, sir.

1 Q. And isn't it true that on the tape you admitted that what
2 you really must have smelled was the cigar or cigarette smoke?

3 A. No, sir. That is not -- nothing what I admitted to. A
4 lot of the times people will take and -- the Philly and shake
5 all of the tobacco out of it and fill it strictly with
6 marijuana. Other occasions, they will take it all out and put
7 it back in mixed with marijuana trying to disguise the scent.
8 And it's very distinctive. You can tell the difference.

9 Q. But you admitted on the tape that what you really must
10 have smelled was the cigar.

11 A. If that's what he believes that's all he had, that's for
12 his belief.

13 Q. I'm asking you about the statement you made on the tape.
14 You admitted to him that you -- what you really must have
15 smelled was the ashes ---

16 A. That was only in his behalf. If that's all he thinks he
17 had in there, let him believe that's all I smelled. I said on
18 tape earlier I smelled marijuana to him. If he thinks I
19 smelled marijuana and I have a Blunt, let me think that it's
20 just cigar.

21 Q. Trooper, I'm not ---

22 A. I know what you're saying, but that was probably a
23 derogatory remark on my behalf towards him.

24 Q. I'm not asking ---

25 A. Nothing to do with ---

1 Q. I'm not asking you what he thought. I'm asking you about
2 the statement you made. You admitted on the tape that what
3 you really must have smelled was the cigar and the cigarettes.
4 Isn't that true?

5 A. That was in the car, yes, sir, after I previously said I
6 smelled marijuana a couple of times to him.

7 Q. Thank you. And there was no sort of a D.U.I.
8 investigation in this case at all was there?

9 A. No, sir.

10 Q. And there was no canine unit brought in?

11 A. No, sir.

12 Q. Is it true that the ACE Team often uses a canine?

13 A. I have a drug dog, but he was not able to work this week
14 in question.

15 Q. And you were searching for burnt marijuana?

16 A. I could smell marijuana. I was -- I could smell burnt
17 marijuana. I was trying to find it or the reason it was in
18 there.

19 Q. And -- all right. I going to ask you about the consent.
20 Now, you -- Horace, at the time of this arrest, was 24 years
21 old?

22 A. I guess. If you say so, yes, sir.

23 Q. Does that sound correct?

24 A. Yes, sir.

25 Q. And he had North Carolina tags?

1 A. Yes, sir.

2 Q. You asked him to step out of the car, and you patted him
3 down for weapons.

4 A. Yes, sir.

5 Q. He was not free to leave at that point, was he?

6 A. No, sir, not then.

7 Q. He was acting nervous?

8 A. Yes, sir.

9 Q. And what did you say in your report? That you were
10 nervous, too?

11 A. I became nervous watching him.

12 Q. And you called in back-up.

13 A. Yes, sir.

14 Q. So two troopers were present?

15 A. Yes, sir.

16 Q. You asked him for consent to search the car?

17 A. Yes, sir.

18 Q. At that point, you had not read him Miranda Rights, yet,
19 had you?

20 A. No, sir.

21 Q. And you certainly never informed him he had a right to
22 refuse the search?

23 A. No, sir.

24 Q. As far as we know -- I mean, we don't know whether he
25 knew that he had a right to refuse.

1 A. Well, if someone asks you a question, you know, could I
2 search your car, yes or no, it -- there's your answer there,
3 yes or no. And anybody would know yes or no is an answer. I
4 would imagine.

5 Q. Well, we don't -- we don't know from the evidence
6 presented whether or not he knew he had a right to refuse; is
7 that correct?

8 A. Other than what I asked him, no, sir.

9 Q. And he was very reluctant to let you search the car,
10 wasn't he?

11 A. Yes, sir.

12 Q. But nevertheless you kept asking, didn't you?

13 A. Yes, sir. I needed to get a yes or no.

14 Q. You pressed him on that issue, didn't you?

15 A. I needed to get a yes or no. That's the only answer we
16 could have had.

17 Q. And he started questioning you about, well, why? Why do
18 you want to search it?

19 A. Yes, sir.

20 Q. But he never said yes or no, did he?

21 A. No, sir.

22 Q. And he certainly never gave any kind of written consent
23 or anything like that, did he?

24 A. No, sir.

25 MR. MACKENZIE: I don't have any other questions, Your

1 Honor.

2 THE COURT: Thank you. Step down.

3 MR. ROMOSCA: I would like to have brief argument.

4 THE COURT: All right. Do you have anything to present
5 now?

6 MR. MACKENZIE: No, sir.

7 THE COURT: All right. What's your argument then?

8 MR. MACKENZIE: Your Honor, it's our position there was
9 no probable cause for the search. The law says that a trooper
10 can search the car if he has a reasonable belief that he
11 smells the odor of marijuana. It's our position that here the
12 trooper had no reasonable belief that he smelled marijuana,
13 first of all, because there was no marijuana smell. There was
14 no marijuana in the car. There was some cigars and ashes in
15 the ashtray. And the trooper obviously got confused about ---

16 (POWER FAILURE THROUGHOUT THE BUILDING)

17 MR. MACKENZIE: First of all, there was no marijuana for
18 him to smell in the car. Secondly, the trooper admitted on
19 the tape that what he must have really smelled was those
20 cigars and ashes in the ashtray which indicates that he is
21 unable to distinguish between tobacco and marijuana. And so,
22 therefore, he had no reasonable belief and the odor of
23 marijuana. Therefore, he had no probable cause.

24 It's not enough that he may have been acting in good
25 faith. But this is a warrantless search. So -- and the good

1 faith exception to the exclusionary rule has never been
2 extended to a warrantless search.

3 I would also submit that the search of -- was
4 unreasonable in scope. He was searching for burnt marijuana,
5 and he searched in the jacket of -- that was found in the car.
6 And that's not a place where someone would expect to find
7 burnt marijuana.

8 I would also submit this is not a consensual search. The
9 law says, you know, mere acquiescence to a search is not
10 enough. The State must prove that the search was voluntary
11 and that the Defendant gave affirmative consent to search.

12 In this case, the officer asked him to search the car.
13 Mr. Abney was very reluctant. He questioned the officer. He
14 never -- as the officer admitted, he never said yes or no. He
15 never gave affirmative consent to search the car. And
16 certainly there was no written consent.

17 That's all, Your Honor.

18 THE COURT: Solicitor?

19 MR. ROMOSCA: Your Honor, the State does rely on all the
20 case law that it previously handed up to you in this response
21 to Defendant's Motion to Suppress. It also relies on 5 ALR 4
22 681. And all of this we have handed up to you consistently
23 holds that marijuana alone by a qualified, experienced law
24 enforcement officer is enough for probable cause to search a
25 vehicle. As the scope, he searched the area where he smelled

1 the marijuana. He did not search the trunk until after he
2 found evidence of a crime and ruled that as possession of
3 cocaine.

4 Also, I want to point out Defense is saying that you want
5 -- that he wants you to rely on the fact that no marijuana was
6 ever found. What he is basically asking you to look at are
7 the fruits of the search to decide whether or not he had
8 probable cause. And, of course, the Court knows, and there's
9 plenty of case law to support it, that you don't look at what
10 was actually found. You look at the facts and the totality of
11 the circumstances surrounding the traffic stop as to whether
12 or not he had probable cause.

13 And I did hand up the case from the Fifth Circuit, The
14 United States of America versus Reed. It's 882 F.2d 147. And
15 the facts are identical. It is indistinguishable from these
16 set of facts. And the Court points that out. You don't look
17 at whether or not they found marijuana. You look at what they
18 have for probable cause. And in that case, he had a nervous
19 defendant. And he had the smell of marijuana.

20 Also, I would like to point out that there is evidence of
21 possible marijuana use. You have an open window in January.
22 He smells marijuana. He finds Blunts or cigars that are
23 common used to ingest or smoke marijuana. You have all those
24 facts present as well. With the open window, he could have
25 very easily thrown the marijuana out or he could have been

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1 airing out his car at the time of the traffic stop.

2 And that's the State's case, Your Honor.

3 MR. MACKENZIE: Could I respond that just briefly?

4 THE COURT: Sure.

5 MR. MACKENZIE: Thank you, Judge. He is not our position
6 It is not only our position that the results of the search
7 control whether or not it was legal. In addition to that, we
8 have the trooper on the tape admitting that he ---

9 THE COURT: He denies that though.

10 MR. MACKENZIE: Well, I would submit that it's on the
11 tape. And he said that on the tape. And, also, as far as the
12 Reed case, the -- I think that case is to be distinguished
13 from this one because in that case, as the Defendant points
14 out, the trial court made it's decision based on a credibility
15 issue between the officer and the defendant. I don't think we
16 have that to this extent in this case. And, also, there was
17 no allegation or evidence that the officer in that case was
18 incapable of distinguishing between the odor of marijuana and
19 tobacco.

20 THE COURT: Mr. Mackenzie, I'm going to deny your Motion
21 to Suppress. The only testimony in this record before me is
22 that the officer smelled marijuana. The only evidence in the
23 record is that he is a trained officer that knows the smell of
24 marijuana. And I will note South Carolina direct -- South
25 Carolina case directly in point. There is a South Carolina

1 case that holds that marijuana alone is a sufficient basis to
2 establish probable cause of -- for a search with respect to
3 real estate or to a house. I don't need to reach the issue of
4 consent in this case. And for the reasons stated, your Motion
5 to Suppress is denied.

6 MR. ROMOSCA: Your Honor, I have one other matter. I
7 would like to put it on the record that we have offered the
8 Defendant a plea agreement, and we have ---

9 THE COURT: Well, I don't need that.

10 MR. ROMOSCA: Well, what I'm asking you to do is retain
11 jurisdiction over this case for the week of December 3rd
12 through the 7th. You are currently scheduled to be here. I
13 have approved and we would like to call this case for trial
14 that week if the Defendant does not wish to take our plea
15 offer. And I would like to go ahead and serve him on the
16 record and make it clear that we intend to try him in his
17 absence if he does not show up for his trial date.

18 THE COURT: Mr. Mackenzie, question concerning that now
19 that he's been put on notice about a trial in absence?

20 MR. MACKENZIE: No, sir, Your Honor.

21 THE COURT: And you have the State's offer and plea
22 agreement? You've got that?

23 MR. MACKENZIE: Yes, sir, we do.

24 THE COURT: Okay. Thank you, gentleman.

25 (PROCEEDING CONCLUDED)

CERTIFICATE OF REPORTER

I, Deborah Schmidt, CVR, Official Circuit Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, and Notary Public for the State of South Carolina at Large, do hereby certify:

That the foregoing transcript is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the herein captioned case, relative to appeal, in the Circuit Court for Greenville County, on the 24th day of September, 2001, to the best of my ability.

I further certify that I am neither related to nor counsel for any party to this case or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 1st day of October, 2001, at Greenville, Greenville County, South Carolina.



Deborah Schmidt, CVR
Official Circuit Court Reporter,
Notary Public in for the
State of South Carolina at Large
My Commission expires
January 20, 2008

DEBORAH SCHMIDT, CVR
13th Judicial Circuit, Greenville County
Post Office Box 10102, Greenville, South Carolina 29603

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

COURT OF GENERAL SESSIONS
2000-GS-23-4624

STATE OF SOUTH CAROLINA,)

vs.)

TRANSCRIPT OF RECORD

HORACE ABNEY, JR.,)
DEFENDANT.)

ORIGINAL

December 11, 2002
Greenville, South Carolina

B E F O R E:

THE HONORABLE C. VICTOR PYLE, JR., JUDGE; and a jury.

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

ALLEN O. FRETWELL, ESQ.
Assistant Solicitor

ANDREW R. MACKENZIE, ESQ.
Attorney for the Defendant

HOLLIE M. JENKINS
Circuit Court Reporter

I N D E X

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

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Greenville County.

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1 THE COURT: Mr. Mackenzie, is your client here?

2 MR. MACKENZIE: No, sir.

3 MR. FRETWELL: Your Honor, I would like to go on the
4 record and bring my investigator in and have her --
5 question her about the notice that was given to
6 Mr. Mackenzie's client and then --

7 THE COURT: So you intend to try him in his absence;
8 is that correct?

9 MR. FRETWELL: Yes, sir.

10 If the Court permits, I'll go and retrieve my
11 investigator and bring her in here.

12 THE COURT: Sure. That's fine.

13 (Pause.)

14 MR. FRETWELL: Your Honor, the State calls Diane
15 DeKoeyer.

16 THE CLERK: Raise your right hand and place your left
17 hand on the Bible.

18 WHEREUPON,

19 REBECCA DIANE DEKOEYER,
20 after first having been duly sworn, testified as follows:

21 THE CLERK: Thank you.

22 Please be seated.

23 Ms. DeKoeyer, please state your full name for the
24 record.

25 THE WITNESS: Rebecca Diane DeKoeyer.

DIRECT EXAMINATION

BY MR. FRETWELL:

Q Good morning, Ms. DeKoeyer.

A Good morning.

Q Where are you employed?

A The Solicitor's Office here in the Thirteenth
Judicial Circuit.

Q And what are your responsibilities at the Solicitor's
Office?

A I'm a criminal investigator. And I help attorneys
prepare for trial by sending subpoenas, bond carding the
Defendant, the lawyer, and the bonding company.

Q Okay. And are you aware of the case of the State v.
Horace Abney?

A I am.

Q I'm going to show you what I will have marked as a
Court's Exhibit.

(WHEREUPON, Court's Exhibit No. 1 was marked for
identification and admitted into evidence.)

BY MR. FRETWELL:

Q I'm going to ask you to relate to the Court what that
item is and what it means.

A This is a card that is used to get the Defendant, the
attorney, and the bonding company to court. This one
is -- pertains to Horace Abney. I sent this card to

1 Mr. Horace Abney at [REDACTED] Road, and it's
2 [REDACTED] Road, Gulf, North Carolina, 27256.

3 It states that he is to be in Greenville County
4 Courthouse at General Sessions on Wednesday the 11th of
5 December, 2002, at 8:30. And it is stamped "Trial." He
6 is to see Solicitor Allen Fretwell. And it's dated
7 11-26-02 with my initials, "DEK," beside it.

8 Q Okay. And this morning, did you call that
9 Defendant's name out in front of the main courthouse up --
10 the courtroom upstairs and down on this floor?

11 A I did.

12 Q And was there any response?

13 A There was no response in either courtroom or in the
14 hallways.

15 Q I'll show you what --

16 MR. FRETWELL: I'd like to have this marked as
17 Court's Exhibit No. 2.

18 (WHEREUPON, Court's Exhibit No. 2 was marked for
19 identification and admitted into evidence.)

20 BY MR. FRETWELL:

21 Q I'll ask you if this is the bond sheet that you got
22 the address from?

23 A That is correct. It's the same as I put on the card
24 to come to court and also for Ace Bonding Company.

25 Q Okay. Would you -- just for the Court's information,

1 will you read the address that's on the bond sheet?

2 A [REDACTED], [REDACTED] Road, Gulf,
3 North Carolina, 27256, signed Horace Abney on the other
4 side.

5 Q And will you spell the word that you pronounce
6 "[REDACTED]"? I think it's, actually, [REDACTED]. But
7 would you spell that just for the record?

8 A Yes, [REDACTED] Road.

9 Q And does the Defendant, Horace Abney's name appear on
10 that?

11 A It does. It's the signature of the Defendant. And
12 he has signed beside that line.

13 MR. FRETWELL: I don't have any further questions,
14 Your Honor.

15 THE COURT: Any questions, Mr. Mackenzie?

16 CROSS-EXAMINATION

17 BY MR. MACKENZIE:

18 Q Could I just see the documents?

19 A Yes, sir.

20 Q When was the notice mailed out?

21 A It was mailed out 11-26-02.

22 Q And do you have any proof that Mr. Abney received
23 that notice?

24 A No, sir, I do not.

25 Q And this case is three years old; right? Do you

1 know?

2 A The date on the bond is 1-12 of 2000, yes.

3 Q I mean, next month, it will be three years old?

4 A Yes, sir.

5 Q And are you aware that -- whether or not there was a
6 suppression hearing in this case a year ago?

7 A Yes, sir.

8 Q And, at that point, the case was set for a date
9 certain trial in December of last year; is that correct?

10 A I do not know that for a fact, no, sir.

11 Q Okay. And do you know whether or not Mr. Abney has
12 always showed up for court in the past?

13 A I do not know that.

14 MR. MACKENZIE: That's all I have, Your Honor.

15 MR. FRETWELL: Nothing further, Your Honor.

16 THE COURT: Thank you.

17 Step down.

18 Anything else, Solicitor?

19 PRE-TRIAL MOTIONS

20 MR. FRETWELL: Your Honor, I just move, at this time,
21 that the Defendant be tried in his absence.

22 THE COURT: Mr. Mackenzie, do you have anything to
23 present?

24 MR. MACKENZIE: No, sir, Your Honor.

25 But I object to that motion.

1 THE COURT: Well, I understand that.

2 When were you appointed to represent him?

3 MR. MACKENZIE: I'm retained, Your Honor.

4 THE COURT: You're retained. Well, the question
5 before me is whether or not he received notice of his
6 right to be present at his trial and was warned that it
7 would proceed in his absence.

8 The bond, does it provide -- have the standard
9 language in there that the trial would proceed in his
10 absence if he failed to appear?

11 MR. FRETWELL: Yes, Your Honor.

12 On the bond card that we send out, it says, "Failure
13 to appear may result in trial being conducted" --

14 THE COURT: I'm talking about on the arrest warrant
15 and the bond.

16 Doesn't it --

17 MR. FRETWELL: Yes, sir.

18 It says, "I understand and have been informed that I
19 have a right and obligation to be present at trial. And
20 should I fail to attend court, the trial will proceed in
21 my absence." That's from State's Exhibit No. 2 -- I mean,
22 Court's Exhibit No. 2.

23 THE COURT: And the address listed on the bond was
24 what?

25 MR. FRETWELL: It's [REDACTED] Road in

1 the city of Gulf, North Carolina, 27256.

2 THE COURT: All right. Mr. Mackenzie, I find --

3 MR. MACKENZIE: Your Honor, can I just be heard on
4 that briefly?

5 THE COURT: Sure.

6 MR. MACKENZIE: I mean, I object to him trying him in
7 his absence. Because I don't think there's any proof that
8 he, actually, received any notice to be here.

9 THE COURT: But the State doesn't have to prove that.
10 I mean, they've just got to prove that they mailed it to
11 the address on the bond.

12 MR. MACKENZIE: Well, another point I'd like to make
13 is that this case is three years old. There was a
14 suppression hearing a year ago last -- 13 months ago.
15 And, at that point, they set it for a date certain in
16 December of 2001. And that never happened.

17 They put him on notice that if he didn't show up on
18 that day that they would try him in his absence. And,
19 now, it's a year later and nothing has happened in the
20 meantime. He's always been here in the past when they
21 summoned him to be here in court. And, for the record, I
22 object, Your Honor.

23 THE COURT: I find that he was advised on his bond
24 form that his trial would proceed in his absence upon his
25 failure to attend court. And he received notice of his

1 right to be present for his trial today. And, therefore,
2 I grant the State's motion for trial. And we'll try him
3 in his absence.

4 All right. Anything before I bring the panel of
5 jurors up?

6 MR. FRETWELL: Your Honor, I do want to address this
7 issue just for the Court's information and to refresh the
8 Court's memory from the suppression hearing that occurred
9 on Monday, September, 24, 2001, before Your Honor.

10 The State moved through Assistant Solicitor Kevin
11 Romosca -- actually, the Defense moved for a suppression
12 of the evidence in this case. And Your Honor denied that
13 motion. I can pass up to the Court your ruling in that
14 case. But I would like to bring the Court's attention to
15 the fact that nothing was ever -- in that suppression
16 hearing, nothing was ever addressed in the actual video
17 itself about the statements the Defendant made.

18 And, at this time, the State would seek, through a
19 motion in limine, to determine the admissibility of the
20 statements in the video itself. And if that requires
21 playing the video again or just simply having the officer
22 testify as to what statements he made and pointing those
23 out to the Court -- I just need some clarification since
24 the video was not put into evidence at the time of the
25 suppression hearing. It was only marked for

1 identification.

2 THE COURT: And what was my ruling at that time?

3 MR. FRETWELL: I can pass it to the Court or I can
4 read it to the Court.

5 THE COURT: Just read it.

6 MR. FRETWELL: Okay. Your Honor, you say, "The
7 Court: Mr. Mackenzie, I'm going to deny your motion to
8 suppress. The only testimony in this record before me is
9 that the officer smelled marijuana. The only evidence in
10 the record is that he is a trained officer that knows the
11 smell of marijuana. And I will note South Carolina
12 direct -- a South Carolina case directly on point. There
13 is a South Carolina case that holds that marijuana alone
14 is a sufficient basis to establish probable cause for a
15 search with respect to real estate or to a house. I don't
16 need to reach the issue of consent in this case. And for
17 the reason stated, your motion to suppress is denied."

18 Mr. Romosca then says, "I have one other matter."
19 And he addresses the issue of putting a plea agreement on
20 the record and setting this case for trial last December.

21 There's no mention at all of the statements made by
22 the Defendant and whether or not any or all of the
23 videotape would be redacted or adjusted. And I don't want
24 to get into a situation where I play something and Your
25 Honor determines that that is grounds for a mistrial. I

1 don't know if that's something that needs to be reviewed
2 by the Court.

3 THE COURT: So is the issue now whether or not he was
4 advised of his rights and made a statement and you need a
5 Jackson Denno hearing?

6 MR. FRETWELL: Well, the specific statement that I'm
7 referring to is a statement where the Defendant says, "May
8 I put my jacket on? Is it okay to put my jacket on?"
9 That statement is made before the trooper reads him his
10 rights. In fact, that's the very next thing he does is
11 read him his rights.

12 THE COURT: Well, why would that not be admissible,
13 Mr. Mackenzie?

14 MR. MACKENZIE: I haven't made any motion regarding
15 this, Your Honor.

16 THE COURT: All right.

17 MR. FRETWELL: I just -- I didn't want to get into a
18 situation, Your Honor, where I was playing something in
19 the presence of the jury --

20 THE COURT: Is that the only issue then?

21 MR. FRETWELL: I believe that's the only issue that I
22 have.

23 THE COURT: Okay. Bring the panel up, please.

24 (Brief recess.)

25 (WHEREUPON, the jury panel entered the courtroom.)

1 THE COURT: Ladies and gentlemen, if I can have your
2 attention. At this time, we will select a jury in the
3 case of the State against Horace Abney, Jr. Mr. Abney is
4 indicted for trafficking cocaine. The indictment alleges
5 that on or about January 10, in the year 2000, he knowingly
6 brought into this state, or aided, or abetted, or
7 conspired to bring into this state more than 400 grams of
8 cocaine.

9 Now, Mr. Abney is not present today for his trial.
10 That is a Constitutional right that he has. In the trial
11 of a criminal case, a defendant has absolutely no burden
12 whatsoever. A defendant does not have to appear and
13 participate in the trial to present testimony or other
14 evidence because that is a Constitutional right everyone
15 has. And I will charge the jury on this case further
16 concerning that issue during the course of my charge.

17 JURY QUALIFICATION

18 THE COURT: Now, potential witnesses in this case
19 will be: David Robinson, Tony Duarte, Ileana Hale, Mark
20 Knight, and Jeff Stevens. Now, I would inquire, at this
21 time, if any member of the jury panel is related by blood,
22 marriage, or connected by employment to Horace Abney, Jr.
23 or any potential witness in the case? Are you sensible or
24 aware of any bias or any prejudice with respect to the
25 Defendant, to the State, or to the subject matter of the

1 case, that being an alleged trafficking cocaine, or do you
2 know any reason why you could not give this Defendant and
3 the State a fair and impartial trial based on the law and
4 evidence to be presented? If so, would you, please, stand
5 and give me your name.

6 (There was no response.)

7 THE COURT: Do I have any member of the panel that
8 has any connection, family, business, social, or otherwise
9 with Bob Ariail, the Solicitor, or any member of his
10 staff, or with law enforcement, whether that be federal,
11 state, county, or municipal? If so, would you, please,
12 stand and give me your name.

13 (There was no response.)

14 THE COURT: Andrew Mackenzie represents the Defendant
15 in this case. Do I have any clients now or formerly of
16 Mr. Mackenzie? If so, please, stand and give me your
17 name.

18 (There was no response.)

19 THE COURT: Any other questions, gentlemen?

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

21 MR. MACKENZIE: Did you ask them if they were
22 affiliated with law enforcement?

23 THE COURT: I did.

24 MR. MACKENZIE: Okay. Thank you.

25 JUROR #187, DIANNE MCDAVID: I've got a question. Do

1 you have relatives that are in law enforcement?

2 THE COURT: Yes, ma'am.

3 JUROR #187, DIANNE MCDAVID: Oh, okay. I do.

4 THE COURT: All right. Your name, please, ma'am?

5 JUROR #187, DIANNE MCDAVID: I'm sorry. Dianne
6 McDavid.

7 THE COURT: All right.

8 JUROR #187, DIANNE MCDAVID: My daughter is a deputy
9 in Spartanburg County. My son --

10 THE COURT: In Spartanburg?

11 JUROR #187, DIANNE MCDAVID: In Spartanburg County.
12 My son-in-law is a deputy in Greenville County.

13 THE COURT: Your son-in-law --

14 JUROR #187, DIANNE MCDAVID: Yes.

15 THE COURT: -- is a deputy with Greenville County?

16 JUROR #187, DIANNE MCDAVID: Yeah. Both of them are.

17 THE COURT: Would that -- the fact that you have
18 children involved in law enforcement in any way interfere
19 with your ability to be a fair and impartial juror on this
20 case?

21 JUROR #187, DIANNE MCDAVID: I don't think so.

22 THE COURT: Thank you, ma'am.

23 You're qualified --

24 JUROR #187, DIANNE MCDAVID: I just wanted to tell
25 you --

1 THE COURT: Sure. Thank you for telling me that.

2 Ladies and gentlemen, when your name is called, I'll
3 ask that you, please, come forward to this microphone up
4 front, turn around, face counsel, and await further
5 instructions.

6 Thank you.

7 The strikes are five and five.

8 JURY SELECTION

9 THE CLERK: #207, Jacqui O'Neal.

10 (Jacqui O'Neal, a black female, came forward.)

11 THE CLERK: What says the State?

12 MR. FRETWELL: Present the juror.

13 THE CLERK: What says the Defendant?

14 MR. MACKENZIE: Please seat Ms. O'Neal.

15 THE CLERK: Ms. O'Neal, please, have a seat in the
16 jury box.

17 #205, Eric O'Berry.

18 (Eric O'Berry, a black male, came forward.)

19 THE CLERK: What says the State?

20 MR. FRETWELL: Present the juror.

21 THE CLERK: What says the Defendant?

22 MR. MACKENZIE: Please seat Mr. O'Berry.

23 THE CLERK: Mr. O'Berry, please, have a seat in the
24 jury box.

25 #190, James McGowans.

1 (James McGowans, a black male, came forward.)

2 THE CLERK: What says the State?

3 MR. FRETWELL: Present the juror.

4 THE CLERK: What says the Defendant?

5 MR. MACKENZIE: Please seat Mr. McGowans.

6 THE CLERK: Mr. McGowans, please, have a seat in the
7 jury box.

8 #103, Stephen Fowler.

9 (Stephen Fowler, a black male, came forward.)

10 JUROR #103, STEPHEN FOWLER: I need to say something.

11 THE COURT: You need to speak with me, sir?

12 JUROR #103, STEPHEN FOWLER: Yes.

13 THE COURT: Come around, sir.

14 Would counsel approach just a minute?

15 (WHEREUPON, a bench conference was held.)

16 MR. MACKENZIE: I'm sorry. Could we approach again?

17 THE COURT: Sure.

18 (WHEREUPON, a bench conference was held.)

19 THE CLERK: What says the State?

20 MR. FRETWELL: Present the juror.

21 THE CLERK: What says the Defendant?

22 MR. MACKENZIE: Please seat Mr. Fowler.

23 THE CLERK: Mr. Fowler, please, have a seat in the
24 jury box.

25 #313, Kathleen Willard.

1 (Kathleen Willard, a white female, came forward.)

2 THE CLERK: What says the State?

3 MR. FRETWELL: Present the juror.

4 THE CLERK: What says the Defendant?

5 MR. MACKENZIE: Please seat Ms. Willard.

6 THE CLERK: Ms. Willard, please, have a seat in the
7 jury box.

8 #93, Timothy Estes.

9 (Timothy Estes, a white male, came forward.)

10 THE CLERK: What says the State?

11 MR. FRETWELL: Please excuse the juror.

12 THE CLERK: Mr. Estes, you are excused from this
13 case.

14 #134, Gregory Horrocks.

15 (Gregory Horrocks, a white male, came forward.)

16 THE CLERK: What says the State?

17 MR. FRETWELL: Please present the juror.

18 THE CLERK: What says the Defendant?

19 MR. MACKENZIE: Please seat Mr. Horrocks.

20 THE CLERK: Mr. Horrocks, please, have a seat in the
21 jury box.

22 #316, Mary Williams.

23 (Mary Williams, a black female, came forward.)

24 MR. MACKENZIE: I'm sorry. What number?

25 THE CLERK: #316.

1 MR. MACKENZIE: Thank you.

2 THE CLERK: What says the State?

3 MR. FRETWELL: Present the juror.

4 THE CLERK: What says the Defendant?

5 MR. MACKENZIE: Please seat Ms. Williams.

6 THE CLERK: Ms. Williams, please, have a seat in the
7 jury box.

8 #112, Michael Gosnell.

9 (Michael Gosnell, a white male, came forward.)

10 THE CLERK: What says the State?

11 MR. FRETWELL: Present the juror.

12 THE CLERK: What says the Defendant?

13 MR. MACKENZIE: Please seat Mr. Gosnell.

14 THE CLERK: Mr. Gosnell, please, have a seat in the
15 jury box.

16 #329, Laura Holder.

17 (Laura Holder, a white female, came forward.)

18 THE CLERK: What says the State?

19 MR. FRETWELL: Please excuse Ms. Holder from the
20 trial of this case.

21 THE CLERK: Ms. Holder, you're excused from this
22 case.

23 #184, Patricia McCarter.

24 (Patricia McCarter, a white female, came forward.)

25 THE CLERK: What says the State?

1 MR. FRETWELL: Please present the juror.

2 THE CLERK: What says the Defendant?

3 MR. MACKENZIE: Please excuse Ms. McCarter from this
4 case.

5 THE CLERK: Ms. McCarter, you are excused from this
6 case.

7 #99, Amy Forrest.

8 (Amy Forrest, a white female, came forward.)

9 THE CLERK: What says the State?

10 MR. FRETWELL: Please present the juror.

11 THE CLERK: What says the Defendant?

12 MR. MACKENZIE: Please seat Ms. Forrest.

13 THE CLERK: Ms. Forrest, please, have a seat in the
14 jury box.

15 THE COURT: Ms. Forrest, take that first seat and
16 serve as foreperson on this case for me, please, ma'am.

17 THE CLERK: #240, Linda Rutland.

18 (Linda Rutland, a white female, came forward.)

19 THE CLERK: What says the State?

20 MR. FRETWELL: Present the juror.

21 THE CLERK: What says the Defendant?

22 MR. MACKENZIE: Please excuse Ms. Rutland from this
23 case.

24 THE CLERK: Ms. Rutland, you are excused from this
25 case.

1 #110, Melissa Gillespie.

2 (Melissa Gillespie, a white female, came forward.)

3 THE CLERK: What says the State?

4 MR. FRETWELL: Please excuse Ms. Gillespie.

5 THE CLERK: Ms. Gillespie, you're excused from this
6 case.

7 #192, Thomas McLaren.

8 (Thomas McLaren, a white male, came forward.)

9 THE CLERK: What says the State?

10 MR. FRETWELL: Present the juror.

11 THE CLERK: What says the Defendant?

12 MR. MACKENZIE: Please seat Mr. McLaren.

13 THE CLERK: Mr. McLaren, please, have a seat in the
14 jury box.

15 #233, Diane Robertson.

16 (Diane Robertson, white female, came forward.)

17 THE CLERK: What says the State?

18 MR. FRETWELL: Please present the juror.

19 THE CLERK: What says the Defendant?

20 MR. MACKENZIE: Please excuse Ms. Robertson.

21 THE CLERK: Ms. Robertson, you're excused from this
22 case.

23 #168, Bobbie Lollis.

24 (Bobbie Lollis, a white female, came forward.)

25 THE CLERK: What says the State?

1 MR. FRETWELL: Present the juror.

2 THE CLERK: What says the Defendant?

3 MR. MACKENZIE: Please seat Ms. Lollis.

4 THE CLERK: Ms. Lollis, please, have a seat in the
5 jury box.

6 #69, Luther Cudd.

7 (Luther Cudd, a white male, came forward.)

8 THE CLERK: What says the State?

9 MR. FRETWELL: Present the juror.

10 THE CLERK: What says the Defendant?

11 MR. MACKENZIE: Please excuse Mr. Cudd from this
12 case.

13 THE CLERK: Mr. Cudd, you are excused from this case.

14 #107, Lona Garrett.

15 (Lona Garrett, a white female, came forward.)

16 THE CLERK: What says the State?

17 MR. FRETWELL: Present the juror.

18 THE CLERK: What says the Defendant?

19 MR. MACKENZIE: Please seat Ms. Garrett.

20 THE CLERK: Ms. Garrett, have a seat in the jury box.

21 THE COURT: And give me one alternate, one for the
22 State and two for the Defense.

23 THE CLERK: #187, Dianne McDavid.

24 (Dianne McDavid, a black female, came forward.)

25 THE CLERK: What says the State?

1 MR. FRETWELL: Present the juror.

2 THE CLERK: What says the Defendant?

3 MR. MACKENZIE: Please excuse Ms. McDavid from this
4 case

5 THE CLERK: Ms. McDavid, you are excused from this
6 case.

7 #217, Sandra Powell.

8 (Sandra Powell, a white female, came forward.)

9 THE CLERK: What says the State?

10 MR. FRETWELL: Present the juror.

11 THE CLERK: What says the Defendant?

12 MR. MACKENZIE: Please seat Ms. Powell.

13 THE CLERK: Ms. Powell, please, have a seat in the
14 jury box.

15 Ladies and gentlemen, please, stand and raise your
16 right hand. The correct response after the oath in this
17 case is, "I will."

18 (WHEREUPON, the jury was sworn at 10:40 a.m.)

19 THE CLERK: Thank you.

20 Please be seated.

21 THE COURT: I'll give you a short recess before we
22 start, ladies and gentlemen. While on recess, do not talk
23 about this case. You don't begin discussing the facts
24 until you've heard all the testimony and the arguments by
25 the attorneys and my charge on the law.

1 So if you'll be at ease and follow the bailiff, we
2 will start shortly.

3 Thank you.

4 (WHEREUPON, the jury was excused from open court at
5 approximately 10:41 a.m.)

6 THE COURT: And for the balance of the panel, we can
7 excuse you for the balance of today. We need you to call
8 in after 6:00 p.m. this afternoon. Call in after 6:00.

9 Thank you very much.

10 (WHEREUPON, the jury panel exited the courtroom.)

11 THE COURT: All right. We'll take a very brief
12 recess before we start.

13 (WHEREUPON, a break was taken.)

14 THE COURT: All right. Do we have everybody in and
15 ready to go?

16 MR. FRETWELL: Yes, sir.

17 MR. MACKENZIE: Yes, sir.

18 THE COURT: Bring the jury in.

19 Do you want to make brief opening statements to the
20 jury?

21 MR. FRETWELL: Very briefly, Your Honor.

22 (WHEREUPON, the jury came into open court at
23 approximately 10:50 a.m.)

24 THE COURT: All right. Brief opening statement,
25 Solicitor.

OPENING STATEMENTS

MR. FRETWELL: Thank you, Your Honor.

May it please the Court?

Mr. Mackenzie.

Good morning, ladies and gentlemen.

My name is Allen Fretwell. And I'm an assistant solicitor here in Greenville. I work for Bob Ariail, who was elected by the people of Greenville County, where you reside, to prosecute criminal cases.

I also want to introduce to you a couple other people and tell you about two more that are on their way. This is Lance Corporal David Robinson with the South Carolina Highway Patrol. He's the arresting officer in this case. This is Tony Duarte. He's a special agent with the South Carolina Law Enforcement Division. At the time of this incident that we're talking about, which was January the 10th of 2000, he was the resident agent in charge of the Drug Enforcement Administration here in Greenville County. You'll also be hearing testimony from Ileana Hale. Ms. Hale is a forensic chemist with the Drug Enforcement Administration's laboratory in Miami, Florida. And you'll also be hearing from Mark Knight, who replaced Mr. Duarte as the resident agent in charge here in Greenville County for the Drug Enforcement Administration.

This is not a complicated case, nor a long case.

1 You'll hear testimony from this officer that he made a
2 traffic stop based on a speeding violation. During the
3 course of that traffic stop, he smelled burnt marijuana.
4 He then searched the vehicle. While he attempted to
5 search the vehicle, his arm brushed against a jacket that
6 was on the seat in which he found a package containing
7 cocaine.

8 That cocaine was sent to Mr. Duarte. Mr. Duarte
9 sealed the cocaine and sent it to the lab to be tested.
10 So you're hearing from Mr. Duarte and the chemist in
11 relation to the drugs themselves. Mr. Knight, Mark
12 Knight, that you'll be hearing from is bringing the drugs
13 to the courtroom today. And they're on their way.

14 As I said, this is not very complicated, nor is it
15 long. But it is very important. It's important to the
16 Defendant, Horace Abney. But it's also important to the
17 State.

18 And I would ask you, and the Judge will charge you,
19 that you're not to take into consideration the fact that
20 the Defendant is not here today. He has a right to not be
21 here or be here as he so chooses. But I would ask you
22 also to not hold that against the State, that just because
23 he's not here, you treat this case any less serious or you
24 give him any advantage for not being here.

25 I will thank you in advance for your careful

1 attention. And I'll be back to talk to you at the
2 conclusion of the case.

3 THE COURT: Mr. Mackenzie.

4 MR. MACKENZIE: Thank you, Your Honor.

5 May it please the Court?

6 Good morning, everybody. My name is Andrew
7 Mackenzie. I represent Horace Abney, the Defendant in
8 this case. He is not here today. We don't know why he's
9 not here. He's always been here in the past, you know,
10 emergencies come up from time to time. And I just ask
11 that you, please, not hold that against him. Because we
12 simply don't know why he wasn't able to make it this
13 morning.

14 But Horace is charged with trafficking cocaine. And
15 Horace pleads not guilty to this charge. He says he's not
16 guilty of trafficking in cocaine. Because he pleads not
17 guilty to this charge, the burden of proof shifts to the
18 State of South Carolina and to the Solicitor's Office.
19 They must prove him guilty of the crime beyond a
20 reasonable doubt. That means that before you could
21 convict Horace of this crime, the evidence must leave you
22 firmly convinced of his guilt.

23 I ask -- I just ask that you keep an open mind during
24 this case and wait until you hear all the evidence before
25 you make up your mind about what happened here. And I

1 just ask that you return a verdict that's fair and just in
2 this case.

3 Thank you.

4 THE COURT: All right. Solicitor.

5 MR. FRETWELL: Thank you, Your Honor.

6 May it please the Court?

7 The State would call Lance Corporal David Robinson.

8 THE CLERK: Place your left hand on the Bible and
9 raise your right hand.
10 WHEREUPON,

11 DAVID EUGENE ROBINSON,
12 after first having been duly sworn, testified as follows:

13 THE CLERK: Thank you.

14 Please be seated.

15 Please state your full name for the record.

16 THE WITNESS: David Eugene Robinson.

17 DIRECT EXAMINATION

18 BY MR. FRETWELL:

19 Q Good morning, Trooper Robinson.

20 A Good morning.

21 Q Trooper Robinson, I'm going to talk from over here.
22 And I'll ask you to keep your voice up the entire time and
23 speak into the microphone so all the members of the jury
24 can hear you.

25 A Yes, sir.

1 Q Trooper Robinson, can you tell the jury about your
2 career in law enforcement?

3 A In '79, I went into the Army. I was a military
4 policeman for six years. I joined the highway patrol in
5 '87. And I'm starting my 17th year in January on patrol.

6 Q And in January of 2000, what was your specific duty
7 with the highway patrol?

8 A I was with the ACE team, which is more of a drug team
9 that we have on the highway patrol.

10 Q And what are your responsibilities as an ACE team
11 member?

12 A Getting aggressive drivers off the interstates, the
13 highways, and different back roads and stuff like that.
14 Then we're retained in the detection of narcotics. And I
15 was a dog handler at the time, a narcotic dog handler.

16 Q And how are you, specifically, trained in the
17 detection of narcotics?

18 A We can see them -- visually see what they look like
19 and know what they look like, or smell them, and even
20 patting someone down, feel what they feel like on a
21 person.

22 Q Are you trained, specifically, in the smells of
23 marijuana?

24 A Yes, sir.

25 Q Okay. You said you were a dog handler at the time?

1 A A K-9 handler, yes. I had a narcotics dog at the
2 time.

3 Q Okay. And what kind of training was involved in
4 being a dog handler?

5 A It was 13 weeks. We went through different varieties
6 of search techniques with the dog to get us familiar with
7 him as he was getting familiar with us with his alerting
8 on the drugs -- different type of drugs.

9 Q And were you given any kind of drugs to use with the
10 dog and to train the dog?

11 A Yes, sir.

12 Q What kind of drugs were you given?

13 A I had crack, cocaine, cocaine powder, marijuana, and
14 some heroin.

15 Q So you, actually, had some marijuana that you trained
16 with your dog?

17 A Yes, sir.

18 Q Okay. Let me take you to January the 10th of 2000.
19 Were you on duty that day?

20 A Yes, sir, I was.

21 Q And where were you patrolling that day?

22 A Greenville County.

23 Q Did you have an occasion to come into contact with a
24 Defendant by the name of Horace Abney?

25 A Yes, sir.

1 Q Okay. Tell the jury about that contact.

2 A It was on January the 10th at approximately 6:40 in
3 the evening. I was on patrol on I-85 northbound when I
4 paced a vehicle traveling 70 miles per hour in a 55 zone.

5 Q Did you stop the vehicle then?

6 A Yes, I did.

7 Q What happened when you stopped the vehicle?

8 A After I stopped the vehicle, I exited my vehicle and
9 approached the vehicle on the passenger side. At the
10 time, I walked up to the passenger side. I noticed his
11 window was already down on the passenger side front door.

12 Q Did you see how many occupants were in the vehicle?

13 A Just one, Mr. Abney.

14 Q What did you do then?

15 A I identified myself as Trooper Robinson of the
16 Highway Patrol and explained to him why I had stopped him.
17 And I asked him for his driver's license.

18 Q Was he able to produce his driver's license?

19 A Yes, sir, he was.

20 Q And where was his driver's license -- what state was
21 his driver's license from?

22 A North Carolina.

23 Q And did the picture seem to identify the person that
24 was before you?

25 A Yes, sir.

1 Q Okay. And do you recall what name was listed on that
2 driver's license?

3 A Yes, sir.

4 Q What name was that?

5 A Horace Abney, Jr.

6 Q During your time and your conversation with
7 Mr. Abney, did you notice anything unusual about his
8 behavior?

9 A I noticed he was real nervous while he was inside the
10 car as I walked up to the car and after I was on the
11 passenger side of the vehicle.

12 Q Did you notice anything unusual about the vehicle
13 itself?

14 A Yes, sir. I noticed a smell of what appeared to me
15 to be burnt marijuana like someone had smoked marijuana.

16 Q Okay. What did you do with Mr. Abney at that point?

17 A I then asked him to exit his vehicle and return to
18 the right side of my vehicle so I could issue him a
19 warning for the speeding violation.

20 Q Okay. And while we're talking about the smell of
21 burnt marijuana, are you, specifically, trained to detect
22 the smell of burnt marijuana?

23 A Yes, sir.

24 Q Were you trained to distinguish that from the smell
25 of, let's say, raw marijuana?

1 A Yes, sir.

2 Q And also from the smell of tobacco?

3 A Yes, sir.

4 Q Okay. And there's no doubt in your mind that you
5 smelled --

6 MR. MACKENZIE: I object to leading questions.

7 THE COURT: Yes.

8 Don't lead, please.

9 BY MR. FRETWELL:

10 Q When you got the Defendant out of the vehicle, what
11 did you do then?

12 A I spoke with him briefly and advised him of why I had
13 stopped him and just -- I had not a big conversation, just
14 a general conversation about where he had been and stuff.
15 I noticed Mr. Abney was a little nervous while we were
16 there. After that, I called for a backup.

17 Q Okay. And did a backup arrive?

18 A Yes, sir.

19 Q At this point, had you decided whether or not you
20 were going to search the vehicle?

21 A Yes, sir, I did, from the way he was acting, real
22 nervous, and from the smell of the burnt marijuana in the
23 vehicle.

24 Q Did you go ahead and ask him if you could search his
25 vehicle?

1 A No, sir. I waited until my backup got there just for
2 safety purposes.

3 Q When the backup officer arrived, what did you do
4 then?

5 A The backup officer arrived. I gave Mr. Abney back
6 all of his driver's license, registration, and explained
7 the warning to him and gave him that. At that time, I
8 asked him could I conduct a search of his vehicle.

9 Q And what was his response?

10 A He was hesitant. He never said I couldn't. After I
11 explained to him why I wanted to, he kept asking about
12 probable cause and why I needed to search his vehicle. I
13 told him I could smell burnt marijuana. He gave me a head
14 nod, but he never said, no, and he never said I could. I
15 proceeded.

16 Q What did you determine from that head nod?

17 A That it was okay to conduct the search.

18 Q Okay. Where did you begin your search of the
19 vehicle?

20 A I went immediately to the window where I could smell
21 the burnt marijuana, the front passenger door. I opened
22 it, leaned across the seat to go to the ashtray where I
23 thought I would find a marijuana cigarette or pipe in the
24 vehicle. So I centered everything on the console, the
25 ashtray, and the front seats -- between the front seats.

1 Q And that was, again, for what reason?

2 A To locate burnt marijuana, which I had smelled.

3 Q And what happened as you went and approached that
4 area of the vehicle?

5 A As I leaned across the passenger seat, there was a
6 jacket that was draped over the seat. My arm rested
7 against the seat. And the jacket was between my arm and
8 the seat. I noticed something hard in the jacket. I
9 picked it up and located a pocket. It was an inside
10 pocket. I had to feel around to find the opening to it.
11 That's when I located a package inside of the coat.

12 Q Did you find anything else in the jacket?

13 A I found a package of white powder in the coat.

14 Q Anything besides the package of white powder?

15 A I found a cigar, yes, sir.

16 Q Do you recall what kind of cigar?

17 A It was a Phillies blunt.

18 Q A Phillies blunt?

19 A Yes, sir.

20 Q Okay. And what is significant about a Phillies blunt
21 from your training?

22 A We locate or we come across a lot of individuals who
23 will take a cigar and shake it, and roll it, and the
24 tobacco comes out. And they will mix marijuana with the
25 tobacco and stick it back into the cigar and smoke it so

1 it looks like the individual is smoking a cigar going down
2 the interstate. Sometimes it's all marijuana. But the
3 majority of the time, it's a mixture of tobacco and the
4 marijuana that's put back into the cigar.

5 Q Let's talk about each of these things that you found
6 separately. First of all, let's talk about the package of
7 white powder.

8 A Yes, sir.

9 Q Did you field-test that package?

10 A Yes, I did.

11 Q And what --

12 MR. MACKENZIE: Your Honor, I object to the
13 field-test.

14 THE COURT: What's your objection on? What's the
15 grounds?

16 MR. MACKENZIE: I object to the results of a
17 field-test. Because that kind of test -- in my -- that
18 kind of test has not been -- is not reliable.

19 THE COURT: Well, that's an issue for the jury. The
20 objection is overruled.

21 Go ahead, sir.

22 BY MR. FRETWELL:

23 Q Out of an abundance of caution, based on the results
24 of your field-test, did you believe it to be an illegal
25 substance?

1 A Yes, I did.

2 Q Okay. Now, let's move to the cigar. Did you take --
3 did you do any tests on the cigar?

4 A No, sir. It hadn't been rolled out or anything. It
5 was -- I just looked at it visually and could tell.

6 Q That it had not been tampered with?

7 A That's right, yes, sir.

8 Q Did you place the Defendant under arrest?

9 A Yes, I did.

10 Q Okay. And your vehicle, at the time, was it equipped
11 with videotaping technology?

12 A Yes, sir.

13 Q Okay. And did you turn -- or activate that
14 videotaping technology at the time of the stop?

15 A Yes, sir. Just prior to me exiting the vehicle and
16 from where we stopped at the jail, the whole time it's on.

17 Q Okay. And did you review the tape from that stop?

18 A Yes, sir.

19 Q Okay. Have you reviewed it recently?

20 A Yes, sir.

21 Q This stop occurred about two -- three years ago?

22 A Yes, sir.

23 Q And you've reviewed it in the last week?

24 A Yes, sir.

25 Q Okay. And let me show you what has been marked as --

1 MR. FRETWELL: I would like to mark this as State's
2 Exhibit No. 1.

3 (WHEREUPON, State's Exhibit No. 1 was marked for
4 identification only.)

5 BY MR. FRETWELL:

6 Q This is State's Exhibit No. 1 for identification, and
7 I ask you if you recognize this?

8 A Yes, sir. This is the videotape that I had the night
9 in question. I put the evidence tape in myself with the
10 date that I put it into the VCR and the date that I took
11 it out of the VCR.

12 Q And is -- when you reviewed this tape within the past
13 week, did it accurately reflect the events of the incident
14 on January the 10th of 2000?

15 A Yes, sir.

16 MR. MACKENZIE: No objection, Your Honor.

17 MR. FRETWELL: Your Honor, the State would move this
18 into evidence at this time.

19 THE COURT: Without objection.

20 (WHEREUPON, State's Exhibit No. 1 was admitted into
21 evidence.)

22 MR. FRETWELL: Your Honor, the State would also like
23 to set up video equipment to display this to the jury.

24 THE COURT: All right.

25 MR. FRETWELL: It might be appropriate for the jury

1 to, unfortunately, take another break while I do that. It
2 may take me a few minutes to get it set up.

3 THE COURT: Do you have to do any more than plug it
4 in?

5 MR. FRETWELL: I hope not.

6 THE COURT: All right. Then go ahead and pull down
7 the screen, please.

8 (Pause.)

9 BY MR. FRETWELL:

10 Q Trooper Robinson, before I play the tape, does this
11 tape have incidents other than this particular incident
12 with Defendant Horace Abney on it?

13 A Yes, sir. It reflects stops -- I think the dates are
14 1-6 up to the 19th of that month. There's a bunch of
15 different stops on that tape.

16 Q I'm going to try to queue it up here. And I'm just
17 going to ask you to tell me at the appropriate time when
18 to start it.

19 A Okay.

20 (Pause.)

21 (WHEREUPON, State's Exhibit No. 1 was played in open
22 court.)

23 THE WITNESS: That's not it, sir.

24 THE COURT: He said that's not the right tape.

25 MR. FRETWELL: Yes, Your Honor.

1 I just haven't queued it to the right point yet.

2 (Pause.)

3 BY MR. FRETWELL:

4 Q What was the approximate time of this stop?

5 A 18:50.

6 Q Okay. While this is being set, Trooper, I'll ask you
7 this question. Did you have your dog with you that
8 day?

9 A No, sir.

10 Q Where was the dog that day?

11 A He was off. He had cut his paw on another search and
12 he had some down time for a couple days for that to heal
13 up.

14 Q So he was not with you that day?

15 A No, sir.

16 Q I'm going to ask you, while the jury can see this,
17 what the words and different numbers up there mean? What
18 does the word "rock steady" mean?

19 A That's just from the military, just a saying and
20 slogan that I had there as sort of a nickname that stuck
21 with me.

22 Q And that refers to you?

23 A Yes, sir.

24 Q And the blinking "LTS" in the middle, what does that
25 mean?

1 A Just lights and siren. It just lets us know that the
2 lights are on.

3 I think this is the stop right here.

4 Q This is the stop here?

5 A Yes, sir.

6 Q Trooper Robinson, this incident location was exactly
7 where on Interstate 85?

8 A I-85 northbound right as you go under 185 before you
9 get to White Horse Road.

10 Q Is that location within Greenville County?

11 A Within Greenville County, yes, sir.

12 Q Okay. And when you talked to the Defendant, where
13 did he say he was coming from?

14 A Atlanta.

15 Q Trooper, why didn't you confront the Defendant when
16 you first smelled the marijuana?

17 A Just for safety. Where we were at, it wasn't lit.
18 And I didn't know exactly what all was in the vehicle and
19 what was on the subject. It's always safe and it's a
20 policy not to ask anyone to search a vehicle until you
21 have a backup up there.

22 Q And you did wait until your backup arrived?

23 A Yes, sir.

24 Q Okay. You didn't find any marijuana in the vehicle,
25 did you?

1 A No, sir.

2 Q Did you find any ashes in the ashtray?

3 A Yes, sir.

4 Q Okay. Were you able to test those ashes?

5 A No, I didn't, no, sir.

6 Q And was the passenger door -- window up or down when
7 you approached the vehicle?

8 A When I approached the vehicle, the window was already
9 down.

10 Q Why did you tell the Defendant it must have been
11 cigarettes in the car?

12 A Just because he kept on and on about, you didn't find
13 any marijuana in the vehicle. And I just wanted to
14 satisfy him and let that rest. Because that's all I heard
15 when he was outside the car when I said that.

16 Q When you asked the Defendant if he was responsible
17 for everything in the car, how did he respond?

18 A He said it was his car.

19 Q And how did the Defendant refer to the jacket where
20 you found the drugs?

21 A That it was his jacket.

22 Q And did you contact the resident agent in charge of
23 the Drug Enforcement Administration at that time, Tony
24 Duarte?

25 A Yes, sir, I did.

1 Q For what purpose?

2 A To see if the federal government would adopt the case
3 and exactly how to proceed further with it.

4 Q Did you turn your drugs over to him?

5 A Yes, I did, yes, sir.

6 (WHEREUPON, State's Exhibit Nos. 2-A and 2-B were
7 marked for identification only.)

8 BY MR. FRETWELL:

9 Q Trooper, I'm going to show you what has been marked
10 for identification. And just keep in mind that these
11 items are not in evidence yet. So if you'd just -- if you
12 would, review them or look at them. And if you'd look at
13 them down where you're seated and not in the presence of
14 the jury.

15 And I'll ask you to look at what's been marked as
16 State's Exhibit Nos. 2-A and 2-B for identification, and
17 ask you if you recognize those two exhibits?

18 A Yes, sir.

19 Q Okay. Can you tell me what State's Exhibit No. 2-A
20 is?

21 A State's Exhibit No. 2-A is the white powder and the
22 bag that it was in.

23 Q Okay. Does the white powder appear to be the same
24 type of white powder you saw that evening?

25 A Yes, sir.

1 Q And State's Exhibit No. 2-B is what?

2 A It's the actual sealed bag that the white powder was
3 in at the time of the stop. And it shows my duct tape on
4 it, as well as where I cut into the bag and put the duct
5 tape back over the hole.

6 Q Incidentally, where did you get that duct tape?

7 A Out of the subject's trunk.

8 Q And you used the duct tape to do what now?

9 A To seal up the hole which -- I took my pocket knife
10 out and cut the bag to field-test it and it -- to keep it
11 from falling out. I didn't have any tape with me. So I
12 used a piece of his tape to cover up the hole that I had
13 cut into the bag.

14 Q Okay. Now, were these drugs -- prior to you turning
15 them over to Mr. Duarte, were they always in your
16 possession?

17 A Yes, sir.

18 Q Okay. Was there ever a time when Trooper Stevens had
19 the drugs and you weren't around?

20 A No, sir.

21 MR. MACKENZIE: Can I see --

22 MR. FRETWELL: Yes.

23 Please answer any questions that Mr. Mackenzie might
24 have for you.

25 THE WITNESS: Yes, sir.

CROSS-EXAMINATION

BY MR. MACKENZIE:

Q Trooper Robinson, the main reason for your search of the car was what you perceived to be the odor of marijuana; is that correct?

A Yes, sir.

Q And there were some cigarette and cigar ashes in the ashtray?

A There was some ashes in the ashtray, yes, sir.

Q Okay. And there was a cigar present?

A Yes, sir.

Q And you issued Mr. Abney a warning for speeding; is that right?

A Yes, sir.

Q You didn't, actually, write him a ticket?

A I gave him a warning, yes, sir.

Q So this was not a search incident to arrest, was it?

A No, sir.

Q And his license was clear?

A Yes, sir.

Q And you searched the car thoroughly, didn't you?

A Yes, sir. That was the inventory of the vehicle later on after I arrested Mr. Abney.

Q Yes, sir. And you searched the cab and the trunk; right?

1 A Yes, sir.

2 Q And you searched his personal stuff?

3 A Yes, sir.

4 Q And no marijuana was ever found?

5 A No, sir.

6 Q Okay. And you certainly never charged him with
7 simple possession of marijuana or driving under the
8 influence or anything like that?

9 A No, sir.

10 Q And, as a matter of fact, he said to you that he had
11 not been smoking marijuana; is that true?

12 A He may have, yes, sir.

13 Q Okay. And the cigar that you found was unopened, it
14 was still in the package?

15 A It was still in the package, yes, sir.

16 Q And you admitted on -- or you stated on the tape that
17 it must have been the cigars or cigarettes that you
18 smelled?

19 A Yes, sir.

20 Q Okay. And there was certainly -- there was nothing
21 there to corroborate the odor of marijuana, was there?

22 A No, sir, just me smelling it.

23 Q And you are with the ACE team?

24 A No, sir, not now.

25 Q Oh, you used to be?

1 A I left there in January.

2 Q At the time, you were?

3 A Yes, sir.

4 Q That's called the Aggressive Criminal Enforcement
5 team?

6 A Yes, sir. Well, now, it's called the Advanced
7 Criminal Enforcement.

8 Q Did it used to be called Aggressive?

9 A Yes, sir.

10 Q You had your blue lights on?

11 A Yes, sir.

12 Q They remained on throughout this incident?

13 A Yes, sir.

14 Q And this happened at nighttime?

15 A Yes, sir.

16 Q And Mr. Abney was a young man in his early twenties?

17 A Yes, sir.

18 Q North Carolina plates?

19 A Yes, sir.

20 Q And you patted him down for weapons?

21 A Yes, sir.

22 Q And he was certainly not free to leave, was he?

23 A Not at that time, no, sir. I was -- I hadn't gave
24 him the warning or anything.

25 Q Okay. And you stated that he was nervous?

1 A Yes, sir.

2 Q And you were also probably somewhat nervous, weren't
3 you?

4 A I got a little nervous watching him, because I'm
5 watching traffic and I'm watching him, too.

6 Q You called in backup?

7 A Yes, sir.

8 Q So there were two troopers out there?

9 A Yes, sir.

10 Q Okay. And when you asked him for consent to search
11 the car, that was before you had read him his Miranda
12 rights; is that correct?

13 A Yes, sir.

14 Q And you never informed him that he had a right to
15 refuse a search of his car, did you?

16 A No, sir.

17 Q And isn't it true that he was reluctant to let you
18 search his car?

19 A Yes, sir.

20 Q But you pressed him on that, didn't you?

21 A I just tried to get him to say, "yes." And he shook
22 his head, yes, but never said "yes."

23 Q He never said "yes" or "no," did he?

24 A No, sir.

25 Q And he certainly never signed any kind of written

1 consent or anything like that?

2 A No, sir.

3 MR. MACKENZIE: Thank you.

4 That's all I have, Your Honor.

5 THE COURT: Redirect?

6 MR. FRETWELL: Very briefly, Your Honor.

7 REDIRECT EXAMINATION

8 BY MR. FRETWELL:

9 Q Trooper Robinson, even though the window was down,
10 you still smelled the marijuana?

11 MR. MACKENZIE: I object to the leading question,
12 Your Honor.

13 THE COURT: Well, that's all right.

14 Go ahead.

15 BY MR. FRETWELL:

16 Q And -- could you answer that question?

17 A Yes, sir, I did smell it.

18 Q And was it a -- what kind of a smell? Was it a weak
19 smell? Strong smell?

20 A It was a strong smell.

21 Q Okay. What's the speed limit in that area?

22 A 55.

23 Q And what did the Defendant say he was doing at the
24 time that you pulled him over?

25 A 70.

1 Q And as far as Trooper Stevens is concerned, is he
2 still with the highway patrol?

3 A No, sir. He's retired from the patrol.

4 MR. FRETWELL: No further questions, Your Honor.

5 THE COURT: Thank you.

6 You may step down.

7 MR. FRETWELL: The State would now call Tony Duarte,
8 Your Honor.

9 THE CLERK: Sir, please, raise your right hand.
10 WHEREUPON,

11 ANTHONY DUARTE,
12 after first having been duly sworn, testified as follows:

13 THE CLERK: Thank you.

14 Please be seated.

15 Please state your full name for the record.

16 THE WITNESS: It's Anthony Duarte.

17 DIRECT EXAMINATION

18 BY MR. FRETWELL:

19 Q Special Agent Duarte, good morning.

20 Special Agent, where are you currently employed?

21 A I'm currently employed with the South Carolina Law
22 Enforcement Division.

23 Q And where were you employed in January of 2000?

24 A I was employed by the Department of Justice, the
25 Federal Drug Enforcement Administration.

1 Q And what were your responsibilities in January of
2 2000?

3 A I was the supervisor for the DEA in the upstate.

4 Q What title did you have?

5 A I was the resident agent in charge.

6 Q How long were you with the Drug Enforcement
7 Administration?

8 A A little over 21 years.

9 Q When you were with the Drug Enforcement
10 Administration, what kind of relationship did you have
11 with the South Carolina highway patrol's ACE team?

12 A We worked with the ACE team on a weekly basis over a
13 number of years.

14 Q In January of 2000, did you know Trooper Robinson?

15 A Yes, I did. We worked with him regularly.

16 Q Were you contacted by Trooper Robinson concerning
17 cocaine seized from the Defendant, Horace Abney, in
18 January of 2000?

19 A Yes, I was.

20 Q And did you take possession of the seized package?

21 A I did.

22 Q What did you do with the seized package when you
23 received it?

24 A I took possession of the package at our office from
25 Trooper Robinson. At that point in time, we had a new

1 agent on board. And I believe we field-tested it. And
2 then we heat-sealed it and placed it into a DEA evidence
3 envelope. We put our stickers on it and attached one of
4 our numbers to it. And we placed it in our overnight
5 secure drug vault until we could forward it to our
6 laboratory in Miami.

7 Q Okay. When you say you placed a number on it, what
8 are you referring to?

9 A We placed a case number on it at that time. And our
10 office designated for Greenville is a "KW" number. I
11 believe we assigned KW2004 to that particular evidence.

12 Q And who comes up with that case number?

13 A It's sequentially numbered in our log sheets at our
14 office.

15 Q And do you assign that number?

16 A I assign the number.

17 Q And what's the purpose of that number?

18 A It's just a tracking device so we can track our case
19 numbers and the cases that we're involved in.

20 Q Where were you sending this package?

21 A All the drugs that we seize in this region, the
22 Atlanta field division, are sent to the southeast regional
23 laboratory in Miami.

24 Q I'm also going to remind you that these items are not
25 in evidence. So, if you could, review them outside the

1 presence of the jury.

2 I ask you to review State's Exhibit Nos. 2-A and 2-B,
3 and tell me if you recognize those items.

4 A Yes, sir.

5 Q What is State's Exhibit No. 2-A?

6 A State's Exhibit No. 2-A is a clear plastic baggy
7 containing a white powdery substance.

8 Q And is -- what is in State's Exhibit No. 2-B?

9 A And State's Exhibit No. 2-B is a clear plastic bag,
10 and it doesn't contain anything.

11 Q When you sent these drugs to be tested, can you
12 explain the process of heat sealing a bag?

13 A Basically, take a heat sealer like you would a heat
14 sealer if you had one at your house to heat seal food to
15 put in the freezer. And it just seals the bag shut, so.
16 And, at that point in time, we also put one of our
17 stickers at the top, our drug enforcement stickers, our
18 evidence stickers. And we place our initials and the --
19 our case number on it.

20 Q Okay. Are you able to identify State's Exhibit
21 No. 2-B as that bag?

22 A Yes. That's correct.

23 Q Is it in the same condition as when you sealed it?

24 A That's correct.

25 Q Are the items in the same manner as when you sent

1 them to the lab?

2 A Yes, they are.

3 Q Does it appear to be opened?

4 A No.

5 Q Okay. What is the purpose of sealing the bag?

6 A So that none of the evidence falls out of the bag.

7 And when it gets to the laboratory, they'll know it's
8 intact. It maintains the integrity of the evidence that
9 you send to the lab.

10 Q Okay. And what do you expect -- let me ask you this.
11 Have you ever worked in the lab down in Miami?

12 A No.

13 Q No?

14 A I've worked -- I've been to the lab on numerous
15 occasions in 20-plus years, 21 years, yeah.

16 Q Are you familiar with the process down there?

17 A Yes, I am.

18 Q Okay. What do you expect to happen to that bag when
19 that evidence is sent to the chemist or the lab in --

20 A Well, I know that, after working four and a half
21 years in Miami, that the bag -- the evidence comes into
22 our lab. At that point in time, the evidence technicians
23 would take custody of it. They'll open -- whether it's
24 Fed Ex, UPS, or U.S. Postal Service, they'll open the bag.
25 They'll see what office has sent the evidence to them.

1 They'll log it into their log sheet. And then, at that
2 point in time, the -- it's assigned to a particular
3 chemist or a section at the lab.

4 Q Does that chemist have to open the bag that you sent
5 down there?

6 A That's correct.

7 Q Okay. And is State's Exhibit No. 2-B opened as far
8 as the initial bag that you sent to Columbia -- to Miami?

9 A Well, it's been opened and resealed.

10 Q Okay. So it's sealed in another bag?

11 A That's correct.

12 Q And that's not the bag you sealed it in?

13 A No.

14 Q Okay. The -- State's Exhibit No. 2-A, the white
15 powdery substance, is that also sealed in a bag?

16 A That's correct.

17 Q A separate bag?

18 A Yes.

19 Q Okay. From the time that you received that item --
20 the initial item you sealed in State's Exhibit No. 2-B for
21 identification, from the time you received that from
22 Trooper Robinson, was it ever out of your sight or ever
23 out of your control from the time you received it until
24 the time you sealed it and sent it down to the lab?

25 A No.

1 Q Okay. Was there ever a time when Special Agent Russ
2 was with the drugs and you were not?

3 A No.

4 MR. FRETWELL: No further questions, Your Honor.

5 THE COURT: Mr. Mackenzie.

6 MR. MACKENZIE: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. MACKENZIE:

9 Q Agent Duarte, what was the weight of the substance
10 when you received it? Do you know?

11 A I believe it was 453 grams.

12 Q And who placed it in the vault?

13 A I did. At the time, Agent Russ was a brand new
14 agent, and he was with the U.S. Marshall's Service. And I
15 was supervising him and showing him how to process the
16 evidence. And I was with him during the whole time.

17 Q Okay. Once -- you took the item from Robinson and
18 put it in the vault?

19 A That's correct.

20 Q It was always with you in between those two times;
21 right?

22 A Yes, sir.

23 Q All right. What happened to the substance after --
24 how did it come out of the vault?

25 A I took it out of the vault and packaged it up to

1 prepare it to send to our laboratory with Agent Russ.

2 Q Okay. And how was it sent to Miami?

3 A At that time, we sent it through the postal service.

4 Q Okay. It was mailed to Miami?

5 A That's correct.

6 Q How was it mailed?

7 A Return receipt requested through the U.S. Postal
8 Service.

9 Q Did you personally mail it?

10 A Yes, sir.

11 Q And where did you mail it?

12 A I believe we mailed it from the federal courthouse
13 post office.

14 Q Okay. And it was sent certified to the lab in Miami?

15 A Yes, sir.

16 Q And did you receive certification that it was
17 received?

18 A Yes, sir. I believe we did.

19 Q You believe?

20 A Well, I -- if we did, it's in our case file. And
21 Agent Knight, who's the agent in charge with the DEA, has
22 that case file.

23 Q So you're saying you're not sure if you received the
24 return receipt?

25 A Well, it's standard procedure that we get a return

1 receipt from our lab.

2 Q Okay. But, I mean, I'm asking you, in this case, do
3 you recall, specifically, whether you received that return
4 receipt?

5 A I believe, at one point in time, we did receive it.
6 And our secretary logged it in and placed it into that
7 particular file.

8 Q Okay. But you don't have that here today?

9 A I don't have the case file, no, sir.

10 Q Okay. And it was received by whom?

11 A It was received by our regional laboratory in Miami.

12 Q Okay. But what person there signed for it?

13 A One of the technicians that's working the front lab,
14 the desk, at the time, would receive it in.

15 Q Okay. Do you know which one?

16 A No. There is a number of them down there.

17 MR. MACKENZIE: Thank you.

18 That's all, Your Honor.

19 MR. FRETWELL: Very briefly, Your Honor.

20 REDIRECT EXAMINATION

21 BY MR. FRETWELL:

22 Q Is there a difference between packaged weight and the
23 actual weight of the substance?

24 A Yes.

25 Q Okay. And when you weigh it and you record that

1 weight and send it down there, what are you referring to?

2 A We refer to the total weight of the package, the
3 container, and everything.

4 Q And you mentioned a KW number, is it -- are you able
5 to decipher from State's Exhibit No. 2-B for
6 identification what KW number you placed on there?

7 A KW00-0004 is placed on State's Exhibit No. 2-B.

8 Q Do you also fill out a lab request form?

9 A Yes.

10 (WHEREUPON, State's Exhibit No. 3 was marked for
11 identification only.)

12 BY MR. FRETWELL:

13 Q Let me show you what's been marked as State's Exhibit
14 No. 3 for identification, and ask you if you recognize
15 this document?

16 A This is a DEA Report of Drug Property Collected,
17 Purchased, or Seized. It's commonly referred to in the
18 DEA as Form #7.

19 Q Okay. And do you sign this form?

20 A Yes, I do.

21 Q Okay. Does it also -- does it bear a file unit
22 number starting with KW?

23 A Yes.

24 Q Okay. And what number does it reflect?

25 A KW00-0004.

1 Q It's the same as on State's Exhibit No. 2-B?

2 A That's correct.

3 Q You fill out the top portion of this form; is that
4 correct?

5 A Yes.

6 Q And then the bottom portion is left blank?

7 A The bottom portion from #22 on is filled in by our
8 lab technicians.

9 MR. FRETWELL: That's all the redirect I have, Your
10 Honor.

11 THE COURT: Thank you.

12 Mr. Mackenzie.

13 MR. MACKENZIE: Just briefly, Your Honor.

14 RECROSS-EXAMINATION

15 BY MR. MACKENZIE:

16 Q On the form, the Report of Drug Property Collected
17 Purchased, or Seized form, that y'all were just talking
18 about, I want to direct your attention to item #17 on that
19 form.

20 A Yes, sir.

21 Q All right. That item, that paragraph, or that box on
22 the form states that the item was submitted to the lab by
23 Eric Russ; isn't that correct?

24 A That's correct. But Eric Russ was a brand new
25 one-week-old special agent. And I was his supervisor.

1 And for practice, I supervised him submitting this. I
2 can't submit it and sign off as a supervisor. That's just
3 not policy. So I allowed him to be the submitting agent.
4 However, I assisted him in packaging and taking it to the
5 post office.

6 Q Okay. So --

7 A Because he had never done this before and so that was
8 my job.

9 Q He, actually, mailed it, but you were with him?

10 A I was with him the whole time.

11 MR. MACKENZIE: Thank you.

12 That's all.

13 THE COURT: Thank you.

14 Step down.

15 MR. FRETWELL: No further questions, Your Honor, of
16 this witness.

17 Your Honor, at this time, the State would call Ileana
18 Hale.

19 THE CLERK: Ms. Hale, please, place your left hand on
20 the Bible and raise your right hand.

21 WHEREUPON,

22 ILLEANA HALE,

23 after first having been duly sworn, testified as follows:

24 THE CLERK: Thank you.

25 Please be seated.

1 Please state your full name for the record.

2 THE WITNESS: Ileana Hale, H-A-L-E.

3 DIRECT EXAMINATION

4 BY MR. FRETWELL:

5 Q Good morning, Ms. Hale.

6 A Good morning.

7 Q Ms. Hale, let me stand over here. And I'll just ask
8 you to speak into that microphone as loudly as possible so
9 that all the members of the jury can hear you.

10 Ms. Hale, where are you currently employed?

11 A I'm employed at the southeast lab for the Drug
12 Enforcement Administration in Miami.

13 Q And what are your responsibilities at the lab?

14 A Currently, for the past year and a half, I've been a
15 group supervisor for the forensic chemists. And prior to
16 that, I was a forensic chemist.

17 Q And could you tell the jury a little bit about your
18 training in the area of forensic chemistry?

19 A I have a Bachelor's Degree in Criminal Justice and
20 Chemistry, and a Master's Degree in Forensic Science.
21 Prior to the Drug Enforcement Administration, I worked for
22 four years with the Illinois state police as a forensic
23 chemist. And then I worked for two and a half years as a
24 forensic chemist with the Drug Enforcement Administration
25 prior to becoming a supervisor.

1 Q And have you been qualified as an expert before in
2 the area of forensic chemistry?

3 A Yes, I have.

4 Q Have you been qualified in both state and federal
5 court?

6 A In both state and federal, correct.

7 Q Have you ever been -- has a judge ever declined to
8 qualify you as an expert in the field of forensic
9 chemistry?

10 A No, sir.

11 Q And approximately how many times have you been so
12 qualified?

13 A I cannot remember, but approximately about 20.

14 MR. FRETWELL: Your Honor, at this time, the State
15 would move to have the witness, Ileana Hale, qualified as
16 an expert in the area of forensic chemistry.

17 THE COURT: Any voir dire based on her expertise in
18 that area?

19 Mr. MACKENZIE: Just briefly, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. MACKENZIE:

22 Q When you testify, do you normally testify for the
23 Prosecution?

24 A I testify for whomever subpoenas me.

25 THE COURT: This is only as effects her

1 qualifications. You can cross-examine her later on.

2 BY MR. MACKENZIE:

3 Q How long have you been a forensic chemist?

4 A For about seven years prior to becoming a supervisor.

5 MR. MACKENZIE: Okay. Thank you.

6 I don't have any objection, Your Honor.

7 THE COURT: She's qualified.

8 Proceed.

9 MR. FRETWELL: Thank you, Your Honor.

10 FURTHER DIRECT EXAMINATION

11 BY MR. FRETWELL:

12 Q Ms. Hale, how did you get here today?

13 A Via plane through Atlanta.

14 Q You came straight from Miami to --

15 A Yes.

16 Q You, actually, work in Miami?

17 A Yes.

18 Q Okay. And were you assigned to analyze an item
19 labeled with the file number KW00-0004?

20 A Yes, I was.

21 Q I'm going to refer you to State's Exhibit No. 3 for
22 identification, and ask you if you recognize that form?

23 A Yes.

24 Q Okay. And is that form an original or a copy?

25 A That is a copy.

1 Q Okay. And who completed the bottom portion of that
2 form?

3 A It's signed by me and the lab director.

4 Q Okay. And is that a copy of your signature?

5 A Yes.

6 Q Have you reviewed the original form?

7 A The original form goes out. All I have is a copy.
8 The original form goes to the main office who submitted
9 the case.

10 Q Is that an accurate copy of the original?

11 A Yes.

12 Q And you prepared the bottom portion of that form; is
13 that right?

14 A I just signed it, yes.

15 Q Okay. Who was the -- who were the DEA agents that
16 submitted the form?

17 A In here -- the form was submitted by Eric Russ and
18 Anthony Duarte.

19 Q And what were you asked to analyze, specifically?

20 A In this case, I had received a heat-sealed package
21 with white powder inside. That's what I analyzed.

22 Q When you say a heat-sealed package, what is the
23 significance of being heat sealed?

24 A The heat seal, what that means is there's -- when
25 people -- when agents submit any evidence, they put it

1 inside a seal -- a sealed bag from the Drug Enforcement
2 Administration. And then they heat it. They heat seal it
3 on the top. And then they place a label with their
4 signature on top to make sure that seal is not tampered
5 with on top of the heat seal.

6 Q And when you received this package related to this
7 case, was it -- had it been tampered with?

8 A Not when I received it, no.

9 Q Okay. What would happen if you received a package
10 that was either not heat sealed or there was evidence of
11 tampering?

12 A I would not receive it. If it comes into the lab and
13 it's tampered with in any way or it's not sealed, it's
14 immediately sent back to the agent. By the time it gets
15 to the chemist, they have to be sealed. Because they
16 wouldn't go through the evidence technicians if it was
17 open.

18 Q Okay. So the fact that you received it means it was
19 not tampered with?

20 A Yes. But if there was any kind of open seals, I have
21 to write it in my notes. And, in this case, my notes
22 state that it was heat sealed.

23 Q I'm going to show you what's been pre-marked as
24 State's Exhibit Nos. 2-A and 2-B. Just keep them out of
25 the -- outside of the jury just for a moment.

1 And I ask you if you recognize those two items?

2 A Yes, I do.

3 Q And how do you recognize State's Exhibit Nos. 2-A and
4 2-B?

5 A By my markings on my seals.

6 Q Okay. And is there any markings on those two items
7 that will refer you to the report that you have before you
8 as State's Exhibit No. 3 for identification?

9 A It's got the case number and the lab numbers, yes.

10 Q Okay. And are they identical?

11 A Yes.

12 Q Okay. And what indeed is the KW number on both of
13 those?

14 A KW00-0004.

15 MR. FRETWELL: Your Honor, at this time, I would move
16 State's Exhibit Nos. 2-A, 2-B, and 3 into evidence.

17 THE COURT: Any objection?

18 MR. MACKENZIE: Yes, Your Honor.

19 I have a couple of objections. First of all, I want
20 to renew my objections, as stated in my pre-trial motion,
21 that these items were recovered pursuant to an unlawful
22 search --

23 THE COURT: All right. I understand. And you're
24 protected on that.

25 MR. MACKENZIE: All right. And also that it was not

1 a consensual search, Your Honor.

2 THE COURT: I beg your pardon?

3 MR. MACKENZIE: Part of that motion was also that it
4 was not a consensual search.

5 THE COURT: I understand that.

6 MR. MACKENZIE: Yes, sir.

7 At this time, I also have to object because the chain
8 is not complete. I don't think we've heard how the
9 evidence was brought here today.

10 THE COURT: The State doesn't have to negate all
11 possibility of tampering.

12 The objection is overruled.

13 (WHEREUPON, State's Exhibit Nos. 2-A and 2-B were
14 admitted into evidence.)

15 MR. MACKENZIE: Yes, sir.

16 And I object to the document, State's Exhibit No. 3,
17 at this point, because it contains information that has
18 not been established yet. I object to it at this time.

19 THE COURT: All right. Let me see it.

20 MR. FRETWELL: Your Honor, I'm going to agree with
21 defense counsel. I have not laid the proper foundation
22 completely for State's Exhibit No. 3. And I apologize.
23 And I'll continue to question the witness briefly.

24 THE COURT: All right.

25 BY MR. FRETWELL:

1 Q Ms. Hale, referring to State's Exhibit No. 3 for
2 identification, does that form contain the results of your
3 tests of State's Exhibit Nos. 2-A and 2-B, which I believe
4 are in evidence at this time --

5 MR. FRETWELL: Is that correct, Your Honor, State's
6 Exhibit Nos. 2-A and 2-B are in evidence?

7 THE COURT: Yes.

8 THE WITNESS: Yes.

9 BY MR. FRETWELL:

10 Q And what is the result of your testing of State's
11 Exhibit Nos. 2-A and 2-B as reflected on State's Exhibit
12 No. 3.

13 A There was 428.6 grams of cocaine hydrochloride.

14 Q Now, in addition to that conclusion, do you have any
15 other amounts and percentages on State's Exhibit No. 3 for
16 identification?

17 A As part of our analytical work, we have to determine
18 the purity of the sample. And it was 83 percent of
19 cocaine hydrochloride.

20 Q Okay. And the total amount of a compound containing
21 cocaine was what, specifically?

22 A You're just talking cocaine hydrochloride in this
23 case. There's several different forms of cocaine. But I
24 only identified the one that is the most common one within
25 the substance. The cocaine hydrochloride that was in that

1 package was 377 -- 355.7 grams. That's just cocaine
2 hydrochloride. That's the purity of it.

3 Q Okay. So what was the 420-odd grams? What does that
4 reflect?

5 A That's the net weight of the entire substance.
6 You'll never find an entire half kilo or kilo with a
7 hundred percent of cocaine hydrochloride. There's other
8 impurities of cocaine within that package. So I only
9 identified the cocaine hydrochloride in this case.

10 Q And prior to coming to testify today, were you given
11 the information -- a description of what I'm asking you
12 about when I refer to cocaine and its compounds?

13 A You -- I spoke with you in reference to the state
14 laws. I'm not as familiar with the state laws --

15 Q Let me --

16 A Go ahead.

17 Q Let me read to you a definition and ask you if the
18 426-gram number falls within that definition --

19 MR. MACKENZIE: Judge, I have to object to a leading
20 question like that.

21 THE COURT: No. That's all right.

22 Go ahead.

23 MR. FRETWELL: Coca leaves and any salt compound
24 derivative, or preparation of coca leaves and any salt
25 compound or derivative, or preparation thereof which is

1 chemically equivalent or identical with any of these
2 substances but not including decocainized coca leaves or
3 extractions which do not contain cocaine.

4 THE WITNESS: It, basically, states that a substance
5 is containing cocaine. And that's correct. That's
6 similar to the federal laws, yes.

7 BY MR. FRETWELL:

8 Q And what amount or what weight listed on State's
9 Exhibit No. 3 reflects what I've just described?

10 A 428.6 grams.

11 MR. FRETWELL: Your Honor, at this time, the State
12 would move State's Exhibit No. 3, previously marked for
13 identification, into evidence.

14 THE COURT: All right. Any objection?

15 MR. MACKENZIE: Can I have just a second?

16 THE COURT: Yes.

17 (Pause.)

18 MR. MACKENZIE: Judge, I have to object at this
19 point. Because I don't think they've established what
20 scientific tests were formed on the substance.

21 THE COURT: All right. You can cross-examine her on
22 that.

23 Subject to your objection, it's in evidence.

24 (WHEREUPON, State's Exhibit No. 3 was admitted into
25 evidence.)

1 BY MR. FRETWELL:

2 Q What did you do with the items -- what did you do
3 with the substance you received?

4 And I'll go ahead and ask you to pull these out.

5 A When a case comes into the lab, it's assigned by the
6 group supervisor to the chemist. Once it's assigned, the
7 chemist goes to the evidence technician and receives this
8 heat seal.

9 Is this -- it's already in evidence?

10 Q It's in evidence, 'yes, ma'am.

11 A This is the heat seal I was talking about. Once this
12 is received by the evidence technicians and assigned by
13 the chemist, I go to the vault and I get it from the
14 evidence technician. I make sure that all the seals are
15 intact. And I take away the entire bag, everything, with
16 bags, with powder, everything. Then I open it and I take
17 the contents out and I take the net weight of just the
18 powder.

19 Once that's completed, I do three tests, the gas
20 chromatograph, the mass spectrometer, and [inaudible].
21 Based on those three tests, I come to my conclusion.

22 Q And what is in the other bag that you did not hold
23 up?

24 A For fingerprint examination, what I did, I took the
25 bags -- the original bags that the powder came in and I

1 placed them in a new heat seal. And I transferred them to
2 the fingerprint department where the fingerprint analysts
3 did their analysis.

4 Q What is done with these two items when you're
5 finished with them?

6 A Once I finish with them, I seal them back and I place
7 a heat seal and my seal again. And then I return it to
8 the evidence technician.

9 MR. FRETWELL: Please answer any further questions
10 that Mr. Mackenzie might have.

11 THE COURT: Mr. Mackenzie.

12 FURTHER CROSS-EXAMINATION

13 BY MR. MACKENZIE:

14 Q Ms. Hale, on State's Exhibit No. 3 -- and if you have
15 already answered this, I apologize. But I want to ask you
16 about that. On the -- there's -- towards the top of the
17 page, there is a number that says, "Approximate gross
18 quantity." And it says, "Seized 456.7 grams"; is that
19 right?

20 A Yes.

21 Q But then down below that number is 482.4 grams?

22 A That's correct.

23 Q And did you explain why that is different?

24 A Well, the difference is mainly because the balances
25 where the offices that they first take the weight, they

1 don't calibrate their balances that they use for different
2 things. So they're not scientifically correct. That's
3 why we always take the weight again, once it gets to the
4 lab, of the entire package. Because our balances are
5 calibrated.

6 Q So you're saying there's a difference because
7 different scales were used?

8 A Yes.

9 Q And how did you, actually, receive these items? Who
10 did you get them from?

11 A I received them from Irene Mamie, our evidence -- one
12 of our evidence technicians. We have four.

13 Q Irene Mamie?

14 A Yes.

15 Q Is that her name, on this form?

16 A Yes, on 23.

17 Q Okay. And do you know whether or not she is the one
18 that received these items out of the U.S. mail?

19 A Yes, she did.

20 Q Okay. And -- I'm sorry. Did you explain what
21 cocaine hydrochloride is?

22 A Cocaine hydrochloride is just cocaine with the
23 hydrochloride attached. That's all that is.

24 Q Okay. Why is -- what is the purpose of hydrochloride
25 being attached?

1 A It's just a different kind of cocaine. Cocaine base
2 is cocaine in its free form. Cocaine hydrochloride has
3 the hydrochloride, cocaine base does not.

4 Q The tests that you performed on these substances, are
5 they reliable tests?

6 A Yes. They're scientifically proved.

7 Q Have they been verified scientifically?

8 A Yes.

9 Q And the bag was sent for fingerprint analysis?

10 A Yes, it was.

11 Q And do you know the results of that analysis?

12 A I would have to look at my notes because I didn't do
13 that.

14 Q Okay. Well, could you do that?

15 A The report says that they were not -- they didn't
16 find any suitable prints.

17 MR. MACKENZIE: Okay. Thank you.

18 That's all.

19 THE COURT: Any redirect?

20 MR. FRETWELL: No redirect, Your Honor.

21 THE COURT: Thank you.

22 You can step down.

23 MR. FRETWELL: And, Your Honor, I would ask that the
24 witness be excused.

25 THE COURT: Any objection to excusing this witness?

1 MR. MACKENZIE: No, sir.

2 THE COURT: Thank you.

3 You're excused.

4 MR. FRETWELL: Your Honor, may I have a brief moment?

5 THE COURT: All right.

6 (Pause.)

7 MR. FRETWELL: Your Honor, at this time, the State
8 would rest.

9 THE COURT: All right. Ladies and gentlemen, we will
10 recess, at this time, for lunch. And we'll pick back up
11 at 2:00.

12 During the lunch recess, do not talk about this case
13 among yourselves or with anyone else. If anybody contacts
14 you and tries to talk to you about this case, get their
15 names and addresses and report that to me.

16 Please keep your badges on during the lunch recess so
17 that everyone involved with this case will know that
18 you're a juror on the case and they should not discuss it
19 in your presence.

20 So I'll ask that you be back at 2:00 and report to
21 the jury room where you were on recess.

22 Thank you.

23 (WHEREUPON, the jury was excused from open court at
24 approximately 12:27 p.m.)

25 THE COURT: All right. See you back at 2:00.

1 (WHEREUPON, a lunch break was taken.)

2 THE COURT: Mr. Mackenzie, do you have any motions
3 before I bring in the jury?

4 MOTIONS

5 MR. MACKENZIE: Well, Judge, I just want to renew the
6 previous motions that I made regarding the search of the
7 vehicle and the issue of consent. I just want to make
8 sure I'm protected on the record on those issues.

9 THE COURT: You are.

10 MR. MACKENZIE: Thank you.

11 THE COURT: And you've got the final argument.

12 MR. MACKENZIE: Yes, sir.

13 THE COURT: Are you ready to go, Solicitor?

14 MR. FRETWELL: I am, Your Honor.

15 I was trying to see if the -- if Agent Duarte was
16 back yet. And I'll just check the hall, if that's all
17 right.

18 THE BAILIFF: He's not in the hallway.

19 THE COURT: Well, you can let him in when he comes.

20 THE BAILIFF: Yes, sir.

21 MR. FRETWELL: I'm ready to go, Judge.

22 THE COURT: All right. Bring the jury in.

23 (WHEREUPON, the jury came into open court at
24 approximately 2:00 p.m.)

25 THE COURT: Now, ladies and gentlemen, the testimony

1 in the case is complete. What we have remaining is the
2 final arguments by the attorneys and then my charge on the
3 law.

4 Solicitor.

5 CLOSING ARGUMENTS

6 MR. FRETWELL: Thank you, Your Honor.

7 May it please the Court?

8 Good afternoon, ladies and gentlemen.

9 Now is the time for the closing argument. What I'll
10 be relating to you will not be prolonged. I simply want
11 to go through for just a moment the elements of the
12 offense in this case. The Judge will charge you on those
13 elements. And you should take the law from him. I'm
14 going to tell you what I believe the law is and how the
15 facts of this case fit into the law and how I believe that
16 the State has proved that the Defendant, Horace Abney, is
17 guilty of the charge of trafficking more than 400 grams of
18 cocaine.

19 Before I do that, I do want to say this to you.
20 Sometimes it's easy to get kind of sidetracked, you know.
21 You see the prosecutor trip, fall, you see the prosecutor
22 do other things. The Defendant is not here and your mind
23 might be thinking, what's the point? He's not here, you
24 know. There's not really anybody you can see right now to
25 point at and take responsibility for this amount of drugs.

1 But I want you to look at this. And you'll see it
2 back in the exhibit room -- in your deliberation room.
3 This exhibit will be there with you. And I want you to
4 see how much cocaine that is. And this hasn't been a very
5 long trial. It hasn't been very complicated. But this is
6 serious, ladies and gentlemen. This is a lot of cocaine.
7 And I don't want you to lose track of that when we start
8 talking about the elements and going through the clinical
9 process of what's going on here. The heart of that -- the
10 heart of this whole situation are these drugs and somebody
11 bringing these drugs into the State and someone making
12 these drugs available to the people in this community.

13 So what I would like to address now are the elements
14 of this charge. Now, the Judge is going to charge you
15 that the elements of this case, as stated in the
16 indictment, is trafficking in cocaine.

17 I'm going to ask Ms. Sims if she'll get the lights
18 just for a moment.

19 We can review the elements of the charge of
20 trafficking in more than 400 grams of cocaine. The first
21 element being the fact that the Defendant even brings into
22 the State or he's in knowing, actual, or constructive
23 possession of more than 10 pounds of marijuana -- of
24 cocaine. And you might think, 10 grams of cocaine. Now,
25 you might think to yourself, wait a second, 400 was the

1 number that you all were talking about. And when I get
2 down to that weight point on this element chart, I'll
3 explain that to you.

4 But let's take them piece by piece. The first being,
5 the Defendant brings it into this state. You'll recall
6 that the trooper testified that when he asked the
7 Defendant where he was coming from, he said he was coming
8 from the State of Georgia. You'll recall that he had
9 North Carolina tags on his vehicle, that he was from North
10 Carolina, and that he had a North Carolina driver's
11 license. So this is not inter -- or inside the state, an
12 inner-state situation. This is coming from state to state
13 to state, from the State of Georgia into the State of
14 South Carolina transporting these drugs.

15 Now, the law allows and the indictment itself allows
16 that you can find on that basis or on the basis that he
17 was knowingly in possession -- and that possession I'll
18 break down in just a minute -- of this cocaine. It had to
19 be a certain weight amount and it has to be cocaine.

20 Let's look at possession itself. There are two parts
21 of two types of possession that I'll discuss. One is
22 actual possession. I am, actually, possessing this piece
23 of paper. I'm, actually, possessing this pen that's in my
24 pocket. It's on my person. The drugs, in this case, are
25 constructively possessed by the Defendant. They are in

1 his vehicle.

2 He admitted when the trooper asked him -- and you can
3 play back the video if your memory does not serve you --
4 are you responsible for everything in the vehicle? He
5 says, yes, it's my car. You'll remember he asked at the
6 end of the transport, he said, is your car paid for? He
7 said, no, I've got a few more payments left to go. So
8 it's his car. And this is also something else for you to
9 consider.

10 In the constructive possession element, did the
11 Defendant have dominion and control? Did he have dominion
12 and control of that coat that was on the seat next to him?
13 He was the only occupant in the vehicle. He's the driver
14 of the vehicle. It's his car. And he says, can I put my
15 jacket back on? At some point, he said, is it all right
16 if I go ahead and put my jacket back on? He claims the
17 jacket. He doesn't say that somebody else put that jacket
18 in my car or -- that's not the situation here.

19 So does he have dominion and control of the drugs, of
20 the jacket the drugs are in, of the car the jacket and the
21 drugs are in? Yes, he does. At the very least, of
22 course, he also has a right to exercise control. If he
23 wants those drugs out of the car, he can get them out of
24 there. If he wants to take them out of his jacket, he
25 certainly can do that. Nobody else is in the car.

1 This isn't a situation with three or four people in
2 the car where you have to figure out, well, who knew what
3 and whose drugs do they belong to? That's not the
4 situation we have here. One driver, one occupant. His
5 jacket, he claims it. One car, his car, he claims it and
6 the drugs that were in there. Can I put my jacket on?
7 It's cold out here. It's not, that's not my jacket, it
8 doesn't fit me. He doesn't realize and he didn't remember
9 he had a marijuana -- or a cigar in there. But he
10 remembers that the drugs were in there. Remember his
11 demeanor when he was talking to the officer of shock.
12 Remember his demeanor. And you can play that part of the
13 tape, if you'd like to see that.

14 So is he constructively possessing the drugs? Yes.
15 Could you argue based on the fact that he claimed the car
16 and he claimed the jacket that he was, actually,
17 possessing the drugs? You could find that. It's in his
18 jacket, not on his person, but it's in his jacket.

19 Now, the quantity of cocaine or any mixtures
20 containing cocaine -- the Judge is going to charge you
21 that the law says, in South Carolina, that it has to be
22 cocaine or any mixture containing cocaine.

23 Now, you'll recall from the chemist's testimony that
24 she talked about cocaine hydrochloride. She also told you
25 what free-base cocaine or pure cocaine is. And, remember,

1 she said that that's what they require in federal courts.
2 This isn't a federal court. The state law in South
3 Carolina talks about cocaine or any mixture containing
4 cocaine.

5 Listen to the Judge when he describes it. He's using
6 the same words that I asked the chemist about. I said,
7 which number or what weight on that sheet -- that y'all
8 will have in the jury room, it's the sheet right here --
9 which weight down there -- and you'll have a chance to
10 examine it closer in the jury room -- but what weight down
11 there applies to these drugs, according to the definition
12 given to you by the South Carolina statute. It's the
13 428.6 grams. So that's the cocaine. She explained to you
14 the hydrochloride cocaine was just a little -- with --
15 some cocaine with some impurities mixed in. So there's no
16 doubt that this is cocaine.

17 Now, let's look at the weight. I've got "Weighing 10
18 grams or more" up there. Why do I have that up there?
19 Because, in the State of South Carolina, possessing or
20 transporting into the State 10 grams or more is considered
21 trafficking. That's the first category. The second
22 category is at 28 grams or more. That's a different
23 category. The third is 100 grams. The fourth is 200
24 grams. The highest level of statutory language concerning
25 the weight of cocaine in the State of South Carolina is

1 400 grams. So this is it. This is the pinnacle. This is
2 the most recognized by the statute of cocaine that you can
3 possess. So is it a lot of cocaine? It's over 400 grams
4 of cocaine.

5 Finally, did it happen in the County of Greenville?
6 You'll recall where the trooper said he stopped him. And
7 if you're not familiar with that area yourself, you heard
8 the trooper testify that it is in the county of
9 Greenville. He also stated that it happened -- you'll
10 have the indictment or the information from the indictment
11 back with you in the jury room -- that it occurred on
12 January the 10th of 2000. And that is the date that the
13 officer testified to. And it is the date that is recorded
14 on this form. That is the evidence, ladies and gentlemen.

15 Now, again, I've asked you to not necessarily focus
16 on the fact that I may not be able to work this equipment
17 fast or I might trip over it, but to focus on the facts in
18 this case. But those are the facts. And I don't have an
19 opportunity to come back up here after Mr. Mackenzie is
20 finished and say, well, Mr. Mackenzie doesn't -- isn't
21 telling you about this or hasn't focused on this. And the
22 fact that he might come up and point out something about
23 the stop wasn't appropriate or something like that
24 shouldn't distract you from the elements of the offense.
25 That's what your oath is about. Were the -- are the

1 elements proven and are they proven in your mind beyond a
2 reasonable doubt? If they're proven, then your oath says
3 you must find this Defendant, even though he's not here,
4 guilty of the crime that he's been charged with.

5 Now, I'd like to show you just a brief clip from the
6 tape and that's it. We're talking about a couple of
7 seconds. I want to let you know, though, that if it --
8 that tape is in evidence if you want to come back into the
9 courtroom and have that replayed for any portion of it if
10 your memory isn't that good or if you wanted to have a
11 certain part of it played over again, just let the bailiff
12 know. And they'll bring you right back out and you can
13 review that evidence.

14 But I wanted you to hear the part -- and the specific
15 part I'm referring to is the part where he says, is it
16 okay to put my jacket on? I think it really gets to the
17 central issue here, was it his jacket and did he know what
18 was in it? He says, it's my jacket and I'm putting it
19 on -- or he wants to put it on. I think that's pretty
20 hard evidence that he knew what was in it and that he is
21 responsible and guilty of this crime.

22 So if I could get this to work, I'm going to try to
23 play that portion for you right now.

24 (WHEREUPON, State's Exhibit No. 1 was played in open
25 court.)

1 MR. FRETWELL: Thank you, ladies and gentlemen, for
2 your careful attention.

3 THE COURT: Mr. Mackenzie.

4 MR. MACKENZIE: Thank you, Your Honor.

5 May it please the Court?

6 Here is the Defendant Horace Abney's position in this
7 case. Horace would state he's not guilty of this charge
8 because he was subjected to an illegal search. He would
9 state that there was no marijuana in the car and there was
10 no odor of marijuana for the officer to smell. And he,
11 actually, says that on the tape, I wasn't smoking any
12 marijuana. And that position is corroborated by the fact
13 that no marijuana was ever found inside the car and the
14 fact that the trooper said later on the tape, okay, well,
15 it must have been the cigarettes or cigars that I smelled.
16 It wasn't marijuana.

17 He would also state that this was not a consensual
18 search of his car. He never gave affirmative consent for
19 them to search his car. That's the Defendant's position
20 in this case.

21 He requests -- he respectfully requests that you
22 return a verdict of not guilty.

23 Thank you for your time and attention.

24 THE COURT: All right. Counsel, approach just a
25 minute, please.

1 (WHEREUPON, a bench conference was held.)

2 CHARGE ON THE LAW

3 THE COURT: Now, ladies and gentlemen, the Defendant,
4 in this case, is charged with trafficking cocaine. This
5 is a statutory offense. And Section 44-53-370 of our Code
6 of Laws provides in part as follows, "A person who
7 knowingly sells, manufactures, cultivates, delivers,
8 purchases, or brings into this state or who provides
9 financial assistance or otherwise aids, abets, attempts or
10 conspires to sell, manufacture, cultivate, deliver,
11 purchase, or bring into this state, or who is knowingly in
12 actual or constructive possession, or who knowingly
13 attempts to become in actual or constructive possession of
14 10 grams or more of cocaine is guilty of a felony which is
15 known as trafficking in cocaine."

16 Now, ladies and gentlemen, it is the amount of
17 cocaine, rather than the criminal act itself, that
18 triggers the trafficking statute that I read to you, and
19 which distinguishes trafficking from simple possession or
20 distribution of cocaine. If the amount of cocaine or any
21 mixture containing cocaine is 10 grams or more, then the
22 trafficking statute I read to you is applied.

23 So what are the elements of this offense which the
24 State must prove to your satisfaction beyond a reasonable
25 doubt? First of all, the State must prove that the

1 substance in question is cocaine. Secondly, the State
2 must prove that this Defendant knowingly possessed the
3 cocaine. Knowingly, of course, means with knowledge, that
4 is, consciously done. And, third, the State must prove
5 that 10 or more grams of cocaine in pure form or in any
6 compound or mixture thereof was possessed.

7 Now, under the statute I read to you, possession may
8 be actual or it may be constructive. A person has
9 possession of a substance within the meaning of the
10 statute I read to you when he has both the power and the
11 intent to control its use or its disposition.

12 Now, ladies and gentlemen, where a substance is found
13 on the property, or on the premises, or on the place under
14 the control of a person, this fact in and of itself gives
15 rise to an inference of knowledge and possession on the
16 part of that person. Therefore, possession of a substance
17 may be inferred from the circumstances if the substance is
18 deemed to be in the constructive possession of the person
19 controlling the property, the premises, or the place of
20 where it is located.

21 Now, possession of drugs may be imputed to anyone who
22 has the power and the intent to control the disposition or
23 use of the substance.

24 Now, ladies and gentlemen, this inference that I just
25 told you about is one of fact and not of law. It is

1 evidentiary in nature and is not conclusive and should,
2 therefore, be taken into consideration by you along with
3 all of the other evidence in the case and is to be given
4 such weight as you determine it should receive.

5 Ladies and gentlemen, the actual possession of a
6 substance occurs where the substance is found to be in the
7 actual physical possession of the person charged with
8 possession. Constructive possession, on the other hand,
9 occurs when the person charged with possession has
10 dominion and control over either the substance, or the
11 property, or the place where it is located.

12 Now, ladies and gentlemen, I charge you that proof of
13 possession requires more than proof of mere presence at
14 the scene of a crime. Again, the State must prove that
15 the Defendant had dominion and control over the substance
16 allegedly possessed, that is, cocaine, or that he had the
17 right to exercise dominion and control over that
18 substance. Also in determining whether or not a substance
19 is possessed, you may consider the amount of the substance
20 alleged to have been possessed, the manner in which it was
21 allegedly possessed, the place where it is allegedly
22 possessed, and any other factor which you consider to be
23 important, provided, of course, that the factor is
24 supported by the evidence.

25 Now, ladies and gentlemen, I am the judge of the law

1 in this case. You are the judges of the facts. The
2 Constitution of our state does not allow me to charge you
3 on the facts of this case or to discuss the facts with
4 you, or in any way or manner let you know what my personal
5 feelings, if any, are about this case. That is because
6 you and you alone are the judges of the facts. Therefore,
7 if during the course of this trial or if during the course
8 of my charge, you have a feeling or you have been left
9 with the impression that I have a personal feeling about
10 this case one way or another, then you disregard that
11 feeling or that impression.

12 Now, it is your duty and your duty alone to weigh the
13 testimony and the evidence presented, in this case, and to
14 pass upon the credibility or the believability of the
15 witnesses you heard testify. In this connection, you have
16 the right to believe all that a witness told you or you
17 can disbelieve all a witness told you. You can believe a
18 part of what a witness told you and disbelieve a part of
19 what a witness told you. You can believe one witness
20 against several or you can believe several against one.
21 You also have the right to take into consideration any
22 bias, or prejudice, or interest you feel a witness in the
23 case might have.

24 Now, as I told you, I am the judge of the law in this
25 case. And I am required to charge the law that applies to

1 the facts. It is not a question of what you feel the law
2 might be or what it should be. It is not necessarily what
3 the lawyers may have told you it is. Because under your
4 oath, you are required to take the law as I give it to
5 you, apply that law to the facts as you determine those
6 facts to be, and to write your verdict accordingly.

7 Now, in this connection, ladies and gentlemen, I
8 charge you that you are not concerned with the legality of
9 the stop or the search in this case. That is a matter of
10 law. And I have ruled as a matter of law that the search
11 and the stop were lawful. Therefore, you're not concerned
12 with those issues. You are concerned only with whether
13 the State has proved beyond a reasonable doubt that this
14 Defendant had in his possession 10 or more grams of
15 cocaine and that he knowingly possessed that amount of
16 cocaine.

17 Now, ladies and gentlemen, in this case, as in all
18 criminal cases, this Defendant comes into this courtroom
19 presumed to be innocent. And this presumption continues
20 and carries through the entire trial until and unless it
21 is removed by evidence that satisfies you of his guilt
22 beyond a reasonable doubt.

23 The burden is on the State, in this case, to prove
24 this Defendant guilty and to prove each and every element
25 of the offense with which he is charged beyond a

1 reasonable doubt. Some of you may have served in the past
2 on civil cases. And, if so, you were most likely told
3 that it was only necessary that a fact was proved to be
4 more likely true than not true. But in criminal cases,
5 the State's proof must be more powerful than that. As
6 I've told you, it must be beyond a reasonable doubt.

7 Now proof beyond a reasonable doubt is proof that
8 leaves you firmly convinced of this Defendant's guilt.
9 There are very few things in this world that we know with
10 absolute certainty. And in criminal cases, our law does
11 not require proof that overcomes every possible doubt. If
12 based on your consideration of the evidence, in this case,
13 you are firmly convinced that this Defendant is guilty as
14 charged, then you must find him guilty. If, on the other
15 hand, you think there is a real possibility that he's not
16 guilty, then you must give him the benefit of the doubt
17 and find him not guilty.

18 Ladies and gentlemen, our law does not compel a
19 defendant in a criminal case to take the witness stand and
20 testify. And no presumption of guilt may be raised and no
21 inference of any kind may be drawn from this Defendant's
22 decision not to participate in his trial and testify or
23 otherwise present evidence. Our law never imposes upon a
24 defendant in a criminal case the burden or duty of calling
25 any witnesses, of producing any evidence, or of

1 testifying. Therefore, the decision of this Defendant not
2 to participate in his trial and take the stand and testify
3 on his behalf cannot be taken, held, discussed, or
4 considered against him in any manner whatsoever.

5 Now, under the oath, ladies and gentlemen, that you
6 took in this case, you swore to try the case based only
7 and solely on the testimony and evidence presented in this
8 courtroom. I tell you that it is your duty to lay aside
9 all outside opinions, bias, prejudice, or sympathy you may
10 have in reaching your verdict. The word "verdict" is
11 taken from the Latin word "veredicto." It means to speak
12 the truth. You have no friends to reward or enemies to
13 punish in this case. I charge you to abide by your oath
14 and return a verdict that speaks the truth.

15 You'll have in the jury room with you the indictment
16 in this case. This indictment does not constitute
17 evidence. It merely sets forth the allegations by the
18 State. This indictment is the legal document that brings
19 this case into the courtroom and presents it to you for
20 your determination.

21 Ladies and gentlemen, there are one of two possible
22 verdicts in this case, guilty or not guilty. And whatever
23 that verdict is, it must be unanimous, that is, all 12 of
24 you must agree.

25 Madam Forelady, whatever the unanimous verdict of the

1 jury is, guilty or not guilty, please, write it out on the
2 back of the indictment where it says "Verdict." And then
3 sign your name on the line where it says "Foreperson of
4 the Petit Jury."

5 Now, at this time, I'm required to go over my charge
6 with the lawyers. I need you to go back into your jury
7 room. But don't begin deliberating until I send word in
8 for you to do so.

9 Thank you.

10 (WHEREUPON, the jury was excused from open court at
11 approximately 2:26 p.m.)

12 THE COURT: Anything further from the State?

13 MR. FRETWELL: Your Honor, one thing I was thinking
14 was that it might be helpful to the record for you to put
15 on the record what that the nature of our bar conversation
16 was right before you charged insofar that I explained to
17 you that I was going to request that you charge the jury
18 that they are to disregard the legality of the stop and
19 just focus on the facts. And you're the law giver and you
20 did that. I just wanted to know -- maybe for the record
21 to reflect that.

22 THE COURT: All right. Anything else, Mr. Mackenzie?

23 MR. MACKENZIE: Judge, I think we may have an
24 Apprendi issue here.

25 THE COURT: A what?

1 MR. MACKENZIE: In the case of New Jersey v.
2 Apprendi, a Supreme Court case that came out a year or two
3 ago, it stated that any fact, other than a prior
4 conviction, which increases the statutory maximum penalty
5 in a case must be alleged in the indictment and proven to
6 the jury beyond a reasonable doubt.

7 Now, you charged them that they had to find over 10
8 grams. I think -- you know, actually, if Mr. Abney is
9 convicted, he's going to be sentenced to the maximum under
10 the 400-gram subsection.

11 Doesn't the jury have to pass on that?

12 THE COURT: My thought and position is that the State
13 has to prove over 10 grams, and then the penalty is
14 enhanced for possessing certain amounts over.

15 MR. MACKENZIE: I think that case --

16 THE COURT: Now, I'm not familiar with the case that
17 you are citing. You know, if you'll give it to me and let
18 me take a look at it --

19 MR. MACKENZIE: I don't have it with me, but I can
20 easily get it.

21 But I think what that case says is that it is not a
22 sentencing issue, it is a fact that the jury must pass on.

23 MR. FRETWELL: And one thing I think that might just
24 simplify the whole process, Judge, and that the State has
25 no objection whatsoever to is that you simply put a

1 requirement -- or put a paper along with the indictment
2 that asks the jury to find how much -- or if it's
3 satisfied with 400.

4 THE COURT: Are you telling me that, in this case, if
5 this jury should find that he did not possess 400 or more
6 grams that he's not guilty?

7 MR. MACKENZIE: No, sir. I'm not saying that.
8 I'm saying that --

9 THE COURT: You're saying the jury has to make an
10 affirmative finding as to the amount of cocaine possessed?

11 MR. MACKENZIE: Yes, sir, in order for him to be
12 subject to the 400-gram penalty.

13 THE COURT: Well, I don't have any objection to doing
14 that.

15 MR. FRETWELL: And, Judge, without, specifically,
16 looking at the case that defense counsel has referenced,
17 that seems vaguely familiar to me. I mean, I understand
18 the Court's position under South Carolina cases that
19 directly address and seem to indicate it's a sentencing
20 issue, especially as it relates to crack cocaine versus
21 regular cocaine.

22 But I think the case that Mr. Mackenzie is mentioning
23 is a Federal United States Supreme Court case and might
24 change that threshold. But out of an abundance --

25 THE COURT: Well, I'd like to see the case so I can

1 get familiar with it.

2 MR. FRETWELL: Judge, if I could be excused to call
3 my office and see if they can get a copy of that case up
4 here.

5 (Brief recess.)

6 THE COURT: All right. Bring the jury in right quick
7 for me, please.

8 (WHEREUPON, the jury came into open court at
9 approximately 2:36 p.m.)

10 THE COURT: Now, ladies and gentlemen, if you find
11 this Defendant guilty of trafficking cocaine, I need for
12 you to do one thing further for me. I need for you to
13 determine the amount of grams that the Defendant possessed
14 if you find that he possessed cocaine. And so I have
15 written out this, "If you find the Defendant possessed
16 cocaine, please, enter the amount of grams you find he
17 possessed." And then I've put, blank grams.

18 So, Madam Forelady, whatever the -- if you find him
19 guilty that he possessed, then I need for you -- for the
20 jury to unanimously find the total amount of grams that he
21 possessed and enter it on this note that I put in with the
22 indictment.

23 All right. Now, ladies and gentlemen, with the
24 exception of Ms. Powell, if you will retire to your jury
25 room and begin your deliberations. And when you've

1 reached a verdict, flip the light and we'll take your
2 verdict.

3 Thank you very much.

4 (WHEREUPON, the jury was excused from open court at
5 approximately 2:38 p.m.)

6 THE COURT: Ms. Powell, you're free for the rest of
7 the week. We have one more case to try tomorrow and we
8 have a panel coming back for that.

9 So thank you very much for serving with us. I've
10 enjoyed working with you. If you want to hang around and
11 see what the verdict is, you're certainly welcome to do
12 that. But if you don't want to, then you can go.

13 The clerk is going to mail a check to you for your
14 service this week.

15 JUROR #217, SANDRA POWELL: She's getting my coat.

16 THE COURT: Sure..

17 Any question I can answer for you while we're
18 waiting?

19 JUROR #217, SANDRA POWELL: Nothing. It's been
20 great.

21 THE COURT: Thank you so much.

22 All right. Folks, if you'll be at ease. Don't
23 stray. Stay close by in case they've got a question.

24 (WHEREUPON, the proceedings were recessed at
25 approximately 2:39 p.m.)

1 THE COURT: All right. The jury has a verdict.

2 Anything before I bring in the jury?

3 MR. FRETWELL: Nothing from the State, Your Honor.

4 MR. MACKENZIE: No, sir

5 THE COURT: Bring the jury in, please.

6 (WHEREUPON, the jury came into open court at
7 approximately 3:01 p.m.)

8 THE COURT: Madam Forelady, if you've reached a
9 verdict, would you hand it to the bailiff, please, ma'am.

10 All right. Would you publish the verdict, please.

11 VERDICT

12 THE CLERK: Your Honor, this is case 2000-GS-23-4624,
13 the State v. Horace Abney, Jr., indicted for trafficking
14 cocaine. The verdict is guilty, signed by Amy Forrest,
15 Foreperson. And as far as the grams of cocaine, it's
16 428.6 grams.

17 If this is your verdict, so say you all.

18 (All jurors said yes.)

19 THE CLERK: Thank you.

20 THE COURT: Anything further from the jury,
21 gentlemen?

22 MR. FRETWELL: Nothing from the State, Your Honor.

23 MR. MACKENZIE: No, sir, Your Honor.

24 THE COURT: Thank you, ladies and gentlemen, for your
25 service on this case.

1 And insofar as you're concerned, thank you for your
2 service this week. You don't have to come back tomorrow
3 or Friday.

4 So let me take this opportunity to thank you for
5 coming and serving. I want you to know that we are well
6 aware of the fact that jury service is a burden to you.
7 We know that it's difficult for you to take time off from
8 your jobs and families and spend it with us on jury duty,
9 especially around Christmastime. Normally, the service is
10 for a full week.

11 But I do hope you understand the importance of being
12 here this week. For without your presence, we simply
13 could not get off from our docket the cases that we do.
14 It is a very important service you have performed this
15 week. And I thank you very much for that service.

16 Now, the clerk will mail checks to you. And attached
17 to that check will be a slip for you to give to your
18 employer should you need that. Should you need one of
19 those slips today, then the bailiffs can provide one for
20 you.

21 Now, do I have any member of the panel who has any
22 question I can try to answer for you before letting you
23 go?

24 (There was no response.)

25 THE COURT: Well, I have certainly enjoyed working

1 with you, ladies and gentlemen.

2 Thank you so much.

3 You're free to go.

4 (WHEREUPON, the jury was excused at approximately
5 3:03 p.m.)

6 THE COURT: Any motions?

7 MR. FRETWELL: No motions, Your Honor.

8 I just have this bench warrant.

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

10 THE COURT: All right. And I will sentence and then
11 we'll seal it and a bench warrant will be issued.

12 MR. MACKENZIE: Yes, sir.

13 THE COURT: Thank you.

14 *****END OF TRANSCRIPT OF RECORD*****
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CERTIFICATE OF REPORTER

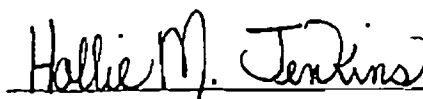
STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Greenville County, South Carolina, on the 11th day of December, 2002.

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

May 15, 2007



Hollie M. Jenkins, Court Reporter

My Commission Expires: 11-17-10

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF GREENVILLE	)	Case No(s) : 00-GS-23-4624
	)	
State of South Carolina	)	
	)	
Plaintiff,	)	
	)	
-VS-	)	TRANSCRIPT OF RECORD
	)	
Horace Abney	)	
	)	
Defendant.	)	

June 15, 2006
Greenville, South Carolina

B E F O R E:

HONORABLE JOHN C. FEW, Judge.

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

ALLEN O. FRETWELL, Esquire
Assistant Solicitor

ANDREW MACKENZIE, Esquire
Attorney for the Defendant

TERESA B. JOHNSON
OFFICIAL REPORTER

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EXHIBITS

3

1	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
2				
3		PLAINTIFF'S EXHIBITS		
4		No exhibits offered.		
5				
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7		No exhibits offered.		
8				
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10		No exhibits offered.		
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P R O C E E D I N G S

1
2 **THE COURT:** All right, Mr. Fretwell and Mr.
3 Mackenzie.

4 **MR. MACKENZIE:** Your Honor, we are here on --
5 this is the case of the State versus Horace Abney.
6 This is Indictment Number 2000-GS-23-4624, Trafficking
7 400 plus grams of cocaine. Mr. Abney was tried in his
8 absence back on December the 11th of 2002. He has not
9 yet been sentenced. It's a sealed sentence. The
10 sentence has not yet been posed.

11 There are also two pending motions on the case.
12 First of all, a motion to dismiss the case based on a
13 violation of the interstate agreement on the
14 detainers. There's also pending a motion for a new
15 trial based on the fact that Mr. Abney takes the
16 position that he did not voluntarily waive his
17 presence to be here at the trial of the case. Uh, --

18 **THE COURT:** With respect to your motion for a new
19 trial, I am prepared to rule on that. I have studied
20 both of your positions on that.

21 **MR. MACKENZIE:** Yes, sir.

22 **THE COURT:** I would deny that motion on the basis
23 that I made the proper findings during the trial. His
24 voluntarily leaving the state was a violation of the
25 bond. I will therefore deny the motion.

1 MR. FRETWELL: May it please the Court?

2 THE COURT: Yes, sir.

3 MR. FRETWELL: For procedural purposes, Judge, I
4 think it is important that the defendant be sentenced
5 on the charge. I say that because I think that the
6 motion, any motions --

7 THE COURT: I don't disagree with that. I agree.

8 MR. MACKENZIE: Can I be heard on that?

9 THE COURT: Sure.

10 MR. MACKENZIE: I take the position that the
11 motion to dismiss should be heard before the
12 sentencing. Part of the motion to dismiss for
13 violation of the interstate agreement on detainers is
14 that the trial is not yet complete. Therefore, that
15 makes the interstate agreement on detainers applicable
16 to this case and relevant to this case. I have cited
17 authority for that in my motion particularly under tab
18 number --

19 THE COURT: Yeah, but I disagree with that.

20 MR. MACKENZIE: I understand.

21 THE COURT: All right. Let's do the sentencing.
22 Then I will again rule on the motion for a new trial.

23 MR. FRETWELL: Do you want us to come around?

24 THE COURT: Yes. Do you have a sentencing sheet?

25 MR. FRETWELL: They should be with the

1 sentencing sheet. It is Horace Abney indictment.

2 **THE CLERK:** I'll go get it.

3 **THE COURT:** Okay.

4 (WHEREUPON, there was a pause.)

5 **THE COURT:** Mr. Abney, you were tried in your
6 absence back in December of the year 2002. You were
7 found guilty by the jury on the 11th day of December.
8 The sentence I imposed at that time which I will read
9 to you at this time is that you be committed to the
10 Department of Corrections for a period of 30 years and
11 pay the mandatory fine of \$200,000. All right.

12 Now, Mr. Mackenzie, you have filed a motion --

13 **MR. MACKENZIE:** Could I interject one thing?

14 **THE COURT:** Sure.

15 **MR. MACKENZIE:** One request that I was going to
16 make of the Court regarding sentencing was that, I
17 would inform the Court and I think Mr. Fretwell agrees
18 with me on this that a detainer from South Carolina
19 was placed on Mr. Abney on July the 21st of 2003 while
20 he was incarcerated in North Carolina. I was going to
21 ask the Court if it will consider giving him credit
22 for time served since that day. The detainer had been
23 lodged against him since that time. I have
24 documentation that shows that it was placed against
25 him.

1 **THE COURT:** What is the position of the State?

2 **MR. FRETWELL:** Your Honor, my position from a
3 legal standpoint is that I don't believe he is
4 entitled to the credit for the time. Certainly, he is
5 entitled to any and all credit for time that he has
6 served since the completion of his sentence in North
7 Carolina and his return to the State, to this state
8 probably six months or eight months ago.

9 **THE COURT:** I agree to that. He is certainly
10 entitled to that.

11 **MR. MACKENZIE:** The reason I said that is even if
12 he had been released on the North Carolina stuff, he
13 will still would have been incarcerated here because
14 that detainer was against him. I would say that he
15 should get credit for that.

16 **MR. FRETWELL:** The problem with that mindset,
17 Your Honor, is that it discounts the sentence that he
18 received for actions committed within the State of
19 North Carolina. First of all, as the State will get
20 into it a little bit later on the IAD motion for
21 dismissal, the fact that, number one, he was outside
22 of the state when he was on bond, it being a violation
23 of South Carolina and the conditions of his bond. The
24 choice he made to be involved in the activities up
25 there that lead to his arrest and subsequent

1 incarceration have no bearing on the process that was
2 pending against him as far as sentencing is concerned
3 in South Carolina. He had to resolve his problems up
4 there in North Carolina. And then come down here to
5 take care of his problems down here. For him to get
6 retroactive credit for his time in North Carolina
7 seems to be the wrong precedent.

8 I will admit that some of the cases that have
9 dealt with the interstate agreement on detainers
10 contemplate a restriction of liberty that is imposed
11 on prisoners when they are subject to the randomness
12 or the speculation of what will happen to untried
13 indictments. That seems to be a concern that has been
14 mentioned by courts. The further pertainment of
15 liberties by a prisoner is something that the court is
16 concerned with.

17 In that sense of the word, if the Court were to
18 give him credit for the time that he spent in North
19 Carolina, the State would have no real opposition to
20 that. But I think from a pure legal standpoint, he is
21 not technically entitled to it. Although I will be
22 quite honest with you because of the concern mentioned
23 in some of the cases with respect to the pertainment
24 of his liberties and we are on notice that his
25 liberties were in some aspect curtailed, that we would

1 have no real problem with giving credit for the time.

2 THE COURT: All right. I will do that. However,
3 I will caution you that my understanding is that
4 credit for jail time is now determined by the
5 Department of Corrections. Mr. Abney, I am not
6 guarantying you that you are going to receive all of
7 the credit that I'm giving you. If the Department of
8 Corrections takes issue with that, then you may have
9 to address that in another court. But yes, I will
10 grant you credit.

11 Mr. Mackenzie, can you tell me how much time --
12 could you give me the number of days?

13 MR. MACKENZIE: I can count them up for you.
14 Yes, sir.

15 THE COURT: All right.

16 MR. MACKENZIE: Since July the 21st of the year
17 2003.

18 THE COURT: Since July --

19 MR. MACKENZIE: The 21st.

20 THE COURT: 21 --

21 MR. MACKENZIE: of 2003.

22 MR. FRETWELL: Mr. Mackenzie, what exhibit on
23 your motion are you referring with that information?

24 MR. MACKENZIE: Number two.

25 MR. FRETWELL: Two, thanks.

1 **THE COURT:** I put on this indictment that the
2 Defendant is to be given credit since July 21, 2003.
3 Do I need to put anything else on it for
4 clarification?

5 **MR. MACKENZIE:** I don't believe so, Your Honor.

6 **THE COURT:** All right. Does that take care of
7 that now?

8 **MR. FRETWELL:** I have one issue about when that
9 detainer was lodged. I do recall seeing documentation
10 about when that detainer was lodged. My understanding
11 is that it was -- (Pause.)

12 The specific document, Your Honor, I am referring
13 to is contained within Mr. Mackenzie's motion. It is
14 item number nine where Mr. Abney under the alias of
15 Jamal Walker was given the opportunity, uh, actually
16 filed notice that he wanted to contest his detainer
17 status under the interstate agreement on detainers.
18 That is actually dated March the 11th of 2004. That
19 is the document I thought was --

20 **MR. MACKENZIE:** That is after the detainer was
21 lodged.

22 **MR. FRETWELL:** I am sorry. It is item number
23 eight, Your Honor. He makes a request for disposition
24 of his detainer on March the 9th of 2004. That is the
25 date that my understanding that he made some inquiry

25 HORACE ABNEY

1 having first being duly sworn testified as follows:

2 **THE CLERK:** Please state your full name for the
3 record.

4 **THE WITNESS:** Horace Abney, Junior.

5 **DIRECT EXAMINATION**

6 **BY MR. MACKENZIE:**

7 **Q** Horace, let me ask you a little bit about
8 yourself. How old are you?

9 **A** I am 30.

10 **Q** You are from Golfe, North Carolina?

11 **A** Originally, I am from New York. I was residing
12 in Golfe, North Carolina.

13 **Q** What kind of work do you do?

14 **A** I was doing maintenance work for my father's
15 company, trucking company.

16 **Q** How far did you go in school?

17 **A** I went to the 11th grade.

18 **Q** Did you finish the tenth grade?

19 **A** I finished the 10th but not the 11th, yes.

20 **Q** You have an alias of Jamal Walker?

21 **A** Yes. I do. That was given in 1995 to the
22 Department of Corrections in North Carolina. It just stuck
23 with me even after I let them know what my actual name was.

24 **Q** Okay. I want to ask you about your presence in
25 this court during the proceedings of when your case was

1 pending. You were arrested back in January the 10th of
2 2000, is that right?

3 A Yes, sir.

4 Q Of this case?

5 A Yes, sir.

6 Q You were subsequently released on bond just a
7 couple of days after that, is that right?

8 A Yes.

9 Q What address did you put on your bond?

10 A [REDACTED] Road, North Carolina.

11 Q After you were released, were you summoned to
12 come to court several times after that?

13 A Yes, I was.

14 Q What did they do? They sent you out a little
15 bond card --

16 A Yes.

17 Q -- to come to court?

18 A Uh-huh (affirmative response).

19 Q Did those bond cards go to the same address on
20 your bond?

21 A Yes, they did.

22 Q How many times do you estimate that you were
23 asked to be up here?

24 A Approximately anywhere from seven to nine times.

25 Q Did you always appear when you were asked to

1 come?

2 A Yes, I was.

3 Q Before the trial of this case was there ever a
4 bench warrant issued for your arrest?

5 A Not to my understanding, no.

6 Q Was there a preliminary hearing held in your case
7 back in August of 2000?

8 A Yes, there was.

9 Q Did you appear to that?

10 A Yes, I did.

11 Q Was there a hearing held in your case back in
12 September 2001?

13 A Yes, there was.

14 Q Did you appear for that?

15 A Yes, I did.

16 Q Then, the trial of your case took a place on
17 December the 11th of 2002, is that correct?

18 A Yes, sir.

19 Q Explain to the court why you did not appear for
20 that trial.

21 A I did not appear for that trial because I was
22 incarcerated in North Carolina on the date of the 11th.

23 Q Where were you incarcerated?

24 A And the Wake County Detention Center.

25 Q When were you incarcerated?

1 A I was incarcerated on January, no, excuse me,
2 December the 11th, December the 10th. I was incarcerated
3 on December the 10th.

4 Q Until when?

5 A Until December 13th.

6 Q Why were you incarcerated?

7 A Excuse me?

8 Q Why were you incarcerated?

9 A I was incarcerated for trying to obtain false ID.

10 Q Were you charged with anything else?

11 A No, not at present time, I wasn't.

12 Q Who charged you?

13 A I think if I am not mistaken, I think it was Wake
14 County Sheriff's Department of Kerrye, Kerrye Sheriff's
15 Department.

16 MR. MACKENZIE: May I have this marked, Your
17 Honor.

18 THE COURT: Sure.

19 (WHEREUPON, booking record was marked as Defendant
20 Exhibit 1 for identification.)

21 BY MR. MACKENZIE:

22 Q Horace, this has been marked as Defendant's
23 Exhibit number 1. Can you identify that?

24 A Yes, that was the date that I was incarcerated
25 and the date that I was released.

1 Q Is this a master of booking inquiry from the Lake
2 County detention's facility?

3 A Yes, it is.

4 MR. MACKENZIE: We would like to offer this.

5 THE COURT: All right. It is in evidence.

6 MR. FRETWELL: No objection.

7 (WHEREUPON, Defendant Exhibit 1 was admitted into the
8 record.)

9 BY MR. MACKENZIE:

10 Q Did you intend to be present at the trial of your
11 case?

12 A Yes, I did.

13 Q But you were not here. What was the reason that
14 you were not here?

15 A The reason I was not here was because I was
16 incarcerated in North Carolina.

17 Q If you had not been incarcerated, would you have
18 attended the trial?

19 A Yes, I would have.

20 Q After the trial, there was a period of time that
21 went by before anybody knew that you had been incarcerated
22 at the time of your trial?

23 A Right.

24 Q Isn't that true?

25 A Yes.

1 Q Why didn't you tell anybody about it?

2 A Honestly, sir, I did not know that I was supposed
3 to be here. During the time, I was going through changes
4 in my life with my dad. That is who I was staying with
5 740. That is where my mail was going. At the time, me and
6 him were going through problems. He did not let me know
7 that I had received mail.

8 He put me out of his place. I was not staying there.
9 So, when the card came, he did not inform he that I was
10 supposed to be in court. Honestly, when I did not show up,
11 I was incarcerated but I didn't know I was supposed to had
12 been here. I didn't know.

13 Q Okay. And when did you find out that you had
14 been tried in your absence?

15 A I did not find out of that until April the 10th
16 of 2003 when I had gotten rearrested again in the state of
17 North Carolina. I found out there was a warrant for my
18 arrest in South Carolina.

19 Q Okay. Thank you. That's all.

20 THE COURT: Okay. Cross-examination.

21 CROSS-EXAMINATION

22 BY MR. FRETWELL:

23 Q Mr. Abney, you indicated to the court just a
24 moment ago that at the time in December of 2002, you were
25 not living with your father there at [REDACTED]

1 Road, is that right?

2 A Yes.

3 Q About how long before your, prior to your arrest
4 on December 10th of 2002 did your dad put you out of that
5 place over there?

6 A Well, about, let me see. I would estimate that I
7 had not been living with him for about, about eight months.

8 Q For about eight months?

9 A Yes, sir.

10 Q What was the address that you, where you were
11 living? You indicated earlier on direct examination that
12 you was living somewhere else. What was that address?

13 A Honestly, I was staying at different places with
14 different friends, different homes. I really did not have
15 a set address at the time.

16 Q During that eight months, how many times did you
17 contact the Solicitor's office to apprise them that you
18 were no longer at [REDACTED] Road?

19 A None.

20 Q How many times during the eight months, sir, did
21 you contact the attorney Mr. McKenzie to apprise him that
22 you were no longer there?

23 A None.

24 Q How many times in the eight months did you
25 contact the Court, the Greenville South Carolina Clerk's

1 Office to advise them or anyone that you were no longer
2 staying at [REDACTED] Road?

3 A None.

4 Q So you indicated to your attorney that you wanted
5 to be present. You were present, Mr. Abney, for both your
6 August of 2002 preliminary hearing and also your September
7 of 2001 suppression hearing, is that correct?

8 A Yes.

9 Q Do you recall during your suppression hearing in
10 September of 2001 that you were represented by Mr. McKenzie
11 at that time, sir, were you not?

12 A Yes.

13 Q At that time, Mr. McKenzie was able to cross-
14 examine witnesses that were brought against you, is that
15 correct?

16 A Yes.

17 Q You were able to call any witnesses that you
18 wanted to testify on your behalf at that point, were you
19 not, sir?

20 A Yes.

21 Q You don't have any complaint against Mr. McKenzie
22 for how he conducted the suppression hearing, do you?

23 A Yes and no.

24 Q Okay. So what complaints do you have against Mr.
25 McKenzie for how he conducted that suppression hearing?

1 **A** During the suppression hearing, I had requested
2 of Mr. McKenzie to request the officer's background and
3 history. Mr. McKenzie informed me --

4 **MR. MACKENZIE:** Your Honor, I am going to have to
5 object. I don't think that it is relevant.

6 **THE COURT:** What is the relevance of this?

7 **MR. FRETWELL:** The relevance to this aspect
8 relates directly to the potential harmless error on a
9 new trial motion. There is case law that indicates
10 that even if there is an error by the Court with
11 reference to the Defendant's appearance, if that error
12 is harmless, then there should be no new trial
13 granted.

14 **THE COURT:** All right. Go ahead.

15 **BY MR. FRETWELL:**

16 **Q** So I will continue. You said you had a
17 conversation with Mr. McKenzie relating to --

18 **MR. MACKENZIE:** Your Honor, I will have to object
19 to conversations that he had with me.

20 **MR. FRETWELL:** Your Honor, he's waived that
21 right. He's on the stand and he is testifying.

22 **THE COURT:** Go ahead.

23 **BY MR. FRETWELL:**

24 **Q** Mr. Evans, the conversations that you had with
25 Mr. Mackenzie relating to these officers, could you tell us

1 the substance of that conversation with which you had a
2 problem?

3 MR. MACKENZIE: Your Honor, I have to object.

4 THE COURT: Yeah, I am not going to allow that.

5 Move on, Mr. Fretwell.

6 BY MR. FRETWELL:

7 Q Well, without disclosing the nature of those
8 conversations, you did have conversations with Mr.
9 McKenzie, is that correct?

10 A Yes, I did.

11 Q Mr. McKenzie was aware of the concerns you had at
12 that time?

13 A Yes, he was.

14 Q He made a choice not to do as you asked, is that
15 correct?

16 A At that time, yes.

17 Q Moving on, Your Honor.

18 You admit that at the time you were arrested -- is it
19 Wake County?

20 A Right.

21 Q At the time you are arrested in December of 2002,
22 you did not call your attorney to apprise him of the fact
23 that you had been incarcerated, is that correct?

24 A Yes.

25 Q You did not call the Solicitor's Office to let

1 the Solicitor know you were incarcerated?

2 A That is correct.

3 Q You did not contact the clerk's office or the
4 courts here in South Carolina in any way to apprise them
5 that you were incarcerated in the State of North Carolina?

6 A No, I did not know I was supposed to, sir.

7 Q Let me refer to you what I have previously marked
8 as Court's Exhibit 1 which is entitled, which is a copy of
9 your bond sheet. Do you recognize this sheet, sir?

10 A Yes, I do.

11 Q I will direct you right over here. Is that your
12 signature on this sheet?

13 A Yes, it is.

14 Q This appears to be a true and accurate copy of
15 what you signed and indicated to be the proper paperwork
16 for when you were arrested for this charge?

17 A Yes.

18 MR. FRETWELL: Your Honor, the state would move
19 Court's Exhibit 1 for evidence.

20 MR. MACKENZIE: No objection.

21 (WHEREUPON, Court's Exhibit 1 was admitted into the
22 record.)

23 BY MR. FRETWELL:

24 Q Okay. Mr. Abney, you signed this document right
25 here where it says signature of Defendant?

1 A Uh-huh (affirmative response).

2 Q And you are able to read and write, sir?

3 A Yes, I am.

4 Q If you would you the second line right there
5 starting with the words "I understand", sir?

6 A I understand and have been informed that I have a
7 right and an obligation to be present at trial and should I
8 fail to attend the court, the trial will proceed in my
9 absence.

10 Q You signed this document, is that correct?

11 A Yes, I did.

12 Q You provided this bond card address?

13 A Yes, I did.

14 Q You indicated to the Court that you were notified
15 at that address no less than maybe seven times. Is that
16 correct sir?

17 A Yes.

18 Q You received those notices and came to court?

19 A Yes, I did.

20 Q No problem with you receiving those notices
21 during that time period?

22 A No, sir.

23 Q I beg the Court's indulgence for just a moment.

24 (Pause.)

25 All right. One last thing, Mr. Abney, in North

1 Carolina, you indicated that you were incarcerated in
2 December of 2002 for trying to obtain a false
3 identification, is that correct?

4 A Yes.

5 Q Anybody force you to take that action?

6 A No.

7 Q And did you in fact try to obtain a false
8 identification?

9 A Yes.

10 Q And you did that on your own volition, your own
11 free will, is that correct?

12 A Yes.

13 Q You are aware Mr. Abney that it is against the
14 law in the State of South Carolina to leave the state when
15 you are on bond?

16 A That, I was not aware of, no.

17 Q You do admit that you did leave the state of
18 South Carolina while you were on bond?

19 A My residence was in North Carolina which South
20 Carolina was fully aware of.

21 Q Let me try one more time. You are aware that you
22 left the state of South Carolina while you were on bond, is
23 that correct?

24 A Yes.

25 Q Okay. No further questions, Your Honor.

1 **MR. MACKENZIE:** I don't have any.

2 **THE COURT:** Step down.

3 **MR. MACKENZIE:** That is all the evidence that I
4 intend to offer regarding the motion for a new trial.
5 I know that you are fully aware of what the law says.
6 The briefs that have been submitted and the issue has
7 been fully developed, I think, in the written motions.
8 I really don't have anything else to add to that.

9 **THE COURT:** All right. And the testimony of your
10 client does not change my mind as far as my ruling on
11 your motion to deny the new trial.

12 **MR. MACKENZIE:** Yes, sir.

13 **THE COURT:** It was absolutely his fault. It was
14 not anything that the State did.

15 **MR. FRETWELL:** Your Honor, May it please the
16 court.

17 **THE COURT:** All right.

18 **MR. FRETWELL:** For purposes of the record, I
19 would ask first of all that the State's memorandum and
20 its supplemental memorandum be made part of the
21 record.

22 **THE COURT:** We will make both yours and Mr.
23 McKenzie part of the record.

24 **MR. FRETWELL:** Thank you, Judge. Then the second
25 thing, I would like, in addition to the memorandum and

1 the arguments contained therein, I would put forth the
2 additional argument to the Court at this point given
3 the testimony of the defendant that he did change his
4 address, that he failed to notify the Solicitor's
5 Office as is he is required to do under the bond and
6 that had he not been incarcerated, according to the
7 defendants own testimony, he would not have been in a
8 position to know of his court appearance here in South
9 Carolina. Those actions were entirely and voluntarily
10 on his own free will.

11 **THE COURT:** Okay. All right. Where do we stand
12 now?

13 **MR. MACKENZIE:** We still have the motion to
14 dismiss on the interstate agreement of attainders.

15 **THE COURT:** All right.

16 **MR. MACKENZIE:** On this one, I do not intend to
17 offer any evidence, Your Honor. The written motion
18 and attachments there to can be made part of the
19 record.

20 **MR. FRETWELL:** I'm not sure if this has ever
21 happened before. But I firmly am in remembrance of
22 devoting three days pursuant to a directive by this
23 Court to brief this matter. I did brief the matter.
24 It is not contained in the clerk's office or any other
25 form that I could put my hands on. I would like to be

1 heard in pursuit of oral argument at this time if it
2 is appropriate.

3 THE COURT: Briefly.

4 MR. MACKENZIE: Can I just summarize my motion
5 for you?

6 THE COURT: Yes.

7 MR. MACKENZIE: The Act basically says that once
8 he makes his demand, the trial has to be had within
9 180 days. If not, the case will be dismissed with
10 préjudice. We have made the position that the Act
11 does apply to this case. We take the position that it
12 does, first of all, apply to sentencing proceedings.

13 Your Honor, the fact is that there is split
14 authority on that issue, the cases go in both ways in
15 different parts of the country. We would ask you to
16 consider the cases that do hold that the Act applies
17 to sentencing proceedings. And the bases for those
18 cases talks about the interstate agreement on
19 detainers, that there be fair treatment of prisoners.
20 Also, in this case, Horace had been denied his right
21 to a file an appeal on this case until we have finally
22 come to this stage. I have cited the authority for my
23 position in the motion and the brief that goes with
24 it. Also --

25 THE COURT: As I understand it, the Article 3 of

1 the IAD provides that it applies to any untried
2 indictment. You agree with that?

3 MR. MACKENZIE: Yes, sir.

4 THE COURT: But you are saying it goes further
5 and applies to sentencing.

6 MR. MACKENZIE: Yes, sir. There are cases that I
7 have cited in the brief.

8 THE COURT: I understand. Okay.

9 MR. MACKENZIE: Also, we are dealing with the
10 opinion -- the other reason we take the position that
11 the Act should apply in this case is that it was not
12 just the sentencing that had not yet happened but also
13 there was a pending motion for a new trial. We take
14 the position -- we understand the court has denied
15 that motion. But we take the position that he has a
16 legitimate basis for making that motion. That is
17 another reason why this has not yet been completed and
18 that the act should apply.

19 Now, the events that transpired that pertain to
20 the application of the interstate agreement of
21 detainers are laid out in the written motion. They
22 are well-documented in the attachments. I am not
23 going to rehash all of that. I would just as the
24 Court to consider that.

25 We take the position that he did properly invoke

1 the interstate agreement on detainers on previous
2 occasions. He did all that he could do invoke that
3 Act. The North Carolina complied with it. South
4 Carolina chose to enter into this interstate
5 agreement. Therefore, they must be bound by it. They
6 have not complied. We move to dismiss.

7 **THE COURT:** Okay. All right.

8 **MR. FRETWELL:** Before I begin, I just wanted to --
9 I didn't catch what Mr. McKenzie said as being the
10 secondary basis for a motion. Is that the motion for
11 a new trial?

12 **MR. MACKENZIE:** We take the position that this,
13 this case constitutes an untried case and the trial is
14 not complete for two reasons. We had not been
15 sentenced. Also there was a pending motion for a new
16 trial which are not been heard. I understand that it
17 is denied. We feel we have a legitimate made basis to
18 make that motion.

19 **MR. FRETWELL:** I'm going to address that point in
20 reverse order. On appeal, first of all, with the
21 motion for a new trial. According to the South
22 Carolina Rules of Criminal Procedure, that motion can
23 not be made until such time as the sentence is
24 imposed. That is the underground support for the fact
25 that Mr. McKenzie can even make that motion if it was

1 not filed in a timely manner if we consider the
2 sentence to be imposed at the time the sentence was
3 made.

4 **THE COURT:** I agree.

5 **MR. FRETWELL:** Moving back, Your Honor, to the
6 IAD itself, I passed up to the Court several things
7 that I want to call to the Court's attention. First
8 of all, in the Defendant's brief, he does cite Tennant
9 Telley which is a Ninth Circuit Appeals decision also
10 a decision out of Washington and out of Florida. Your
11 Honor, one of the things I will pass up to the court
12 is just a shepherdization of that opinion, just to
13 give the court flavor of the opinions that has been
14 cited.

15 There are numerous cases which the opinion is
16 discussed and then cited. Your Honor, in the opinion
17 it is interesting for the Court that not only just the
18 Ninth Circuit applied the IAD to the sentencing
19 provision, it does so on the basis that the Ninth
20 Circuit had previously included the sentencing aspect
21 in the trial aspect of the Sixth Amendment right to
22 trial. No other circuit had done that to my opinion
23 and cited itself for that authority.

24 The statement made by Mr. McKenzie that there was
25 split of authority on that comes also from that

1 decision. I offer to the Court and defense counsel
2 and I will cite it for the record, it is a Maryland
3 case out of the Fourth Circuit. It is 157 Maryland
4 Appellate 1. This is a Fourth Circuit case. If I can
5 call the court's attention to the very last page,
6 actually, it is the second to last page of the
7 compilation of pages that I have given to you. It is
8 footnote number 17.

9 I apologize. If I misled the Court in believing
10 this was a Fourth Circuit Court of Appeals case, I am
11 not saying that. It is within the Fourth Circuit.
12 Footnote number 17, the court dealing with the issue
13 of, actually in this case, of a 30-day rule is a
14 component of the IAD in many states. It makes some
15 appropriate kind comments that relate to this case.

16 Footnote 17 says in sum, Article 4 of the IAD
17 applies only to the detainer lodged against the
18 individual based on an, quote, "untried indictment" as
19 the court previously mentioned. Your Honor, skipping
20 down to the bottom of that page, the last word on that
21 first column. We hold that sentencing detainers do not
22 fall within the purview of the IAD. From an earlier
23 holding of this opinion that the term, quote, "trial"
24 the IAD is not sentencing. It follows that the IAD
25 does not also encompass detainers to secure prisoners

1 for that purpose.

2 **THE COURT:** I agree with that.

3 **MR. FRETWELL:** It continues to say the holdings
4 in many other states reaches that conclusion. All
5 jurisdictions that have considered whether the IAD
6 applies to sentencing has concluded that it does not.
7 That is the State's position.

8 **THE COURT:** I agree with that.

9 **MR. FRETWELL:** Numerous opinions that say that
10 because the statute has a plain meaning that it should
11 be asserted and that the IAD is not applicable in this
12 case

13 **THE COURT:** All right. Anything else, Mr.
14 Mackenzie.

15 **MR. MACKENZIE:** No, sir.

16 **THE COURT:** The plain language written is it
17 applies only to untried indictments. And this case
18 was tried on an indictment and the sentencing was
19 sealed because of his absence for trial. Therefore, I
20 hold that the Act does not apply in this case.

21 All right. Do we need anything else?

22 **MR. FRETWELL:** Nothing from the State.

23 **MR. MACKENZIE:** No. Thank you, Your Honor.

24 **THE COURT:** All right. All of this will be made
25 part of the record.

1 MR. FRETWELL: Thank you, Your Honor.
2 MR. MACKENZIE: Thank you, Judge.
3 END OF PROCEEDINGS
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CERTIFICATE

34

1 I, the undersigned, Teresa B. Johnson, Official Court
2 Reporter for the Thirteenth Judicial Circuit of the State
3 of South Carolina, do hereby certify that the foregoing is
4 a true, accurate and complete Transcript of Record of all
5 the proceedings had and evidence introduced in the trial
6 of the captioned case, relative to appeal, in the Court of
7 General Sessions for Greenville County, South Carolina, on
8 the 15th day of June, 2006.

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

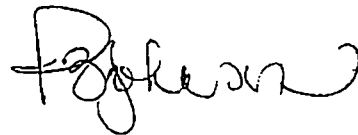
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December 5, 2006

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Teresa B. Johnson

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Official Court Reporter

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HORACE ABNEY,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court Judge err in denying appellant's motion for a new trial?
2. Did the Circuit Court Judge err in denying appellant's motion to dismiss the indictment with prejudice pursuant to the Interstate Agreement on Detainers (IAD)?

STATEMENT OF THE CASE

Horace Abney, appellant, was indicted by the Greenville County Grand Jury for distribution of cocaine. (2000-GS-23-4624). On September 24, 2001, a hearing was held on appellant's motion to suppress the drug evidence; appellant was present at the hearing along with counsel. On December 11, 2002, appellant's case was called for trial before the Honorable Victor C. Pyle, Jr.; however, appellant did not appear. Appellant was tried in his absence, convicted as charged by the trial jury, and the sentence sealed. On June 15, 2006, appellant was brought before the Honorable John C. Few for the imposition of sentence. Judge Few imposed the sealed sentence of a thirty year term of imprisonment and a \$200,000 fine.

ARGUMENT

I. The Circuit Court Judge erred in denying appellant's motion for a new trial.

Appellant was arrested for trafficking cocaine after an automobile stop. He was released on bond "just a couple of days after" his arrest. (R. p. 139). Appellant testified that the address given on his bond was [REDACTED] Road, North Carolina. Appellant testified that after he was released on bond, he was summoned back to court numerous times. Appellant testified that the procedure was that he received a "little bond card" notifying him to come to court. Appellant testified that the cards were delivered to the same North Carolina address used for his bond. He estimated that he was called back to court by receipt of a bond card some seven to nine times. Appellant testified that he always responded to the cards by appearing in court at the appointed time. (R. pp. 139-140).

Appellant recalled that he was present at the preliminary hearing held in August of 2000. (R. p. 140, lines 6-10). He was also present during the suppression hearing held in September 2001. (R. p. 140, lines 11-15). However, appellant agreed that the trial of his case commenced in his absence on December 11, 2002. Appellant testified that he was unaware of there being a bench warrant issued for his arrest. (R. p. 140, lines 3-5). However, in fact, a bench warrant was issued for his arrest on December 27, 2002.

Appellant testified that he had fully intended to appear for trial but that he was unable to be present. He explained the reason for his failure to appear at the time of trial: "I did not appear for that trial because I was incarcerated in North Carolina on the date of the 11th." (R. p. 140). Appellant testified that he was arrested on December 10, 2002, and he was incarcerated in North Carolina's Wake County Detention Center as of December 11, 2002. Appellant presented in evidence a booking record showing that he was taken into

custody and incarcerated in North Carolina on December 10, 2002, the day before his trial was held in Greenville County.

Counsel for appellant objected to the trial in absence, "Because I don't think there's any proof that he, actually, received any notice to be here." (R. p. 33). A trial judge must determine a criminal defendant voluntarily waived his right to be present at trial in order to try the case in absentia. See Rule 16, SCRCrimP; State v. Ritch, 292 S.C. 75, 354 S.E.2d 909 (1987); State v. Jackson, 288 S.C. 94, 341 S.E.2d 375 (1986). The judge must make findings of fact on the record that the defendant (1) received notice of his right to be present; and (2) was warned he would be tried in his absence should he fail to attend. State v. Castineira, 341 S.C. 619, 623, 535 S.E.2d 449, 451 (Ct.App. 2000).

This appellant testified that he had fully intended to appear for trial but that he was unable to be present. Appellant testified that if he had not been incarcerated and if he had received the notification, he would have attended his trial. (R. p. 176). However, appellant explained that he actually did not receive the notification of his trial date. He explained, "During the time, I was going through changes in my life with my dad. That is who I was staying with 740. That is where my mail was going. At the time, me and him were going through problems. He did not let me know that I had received mail. He put me out of his place. I was not staying there. So, when the card came, he did not inform me that I was supposed to be in court. Honestly, when I did not show up, I was incarcerated but I didn't know I was supposed to had been here. I didn't know." (R. p. 177, lines 2-12).

The State argued and the Circuit Court judge apparently agreed that appellant was not entitled to a new trial because he had changed his address and because he violated his bond by leaving the state of South Carolina. (R. pp. 184-186). However, the evidence

established that appellant did not change his address; his home address remained the same North Carolina address to which the State had been sending his bond cards for years. While appellant's bond was conditioned upon appellant not leaving the state, appellant indicated that he was unaware of this condition and the bond form itself listed appellant's home address in the state of North Carolina. (R. p. 184, line 16). As counsel for appellant argued, the State was fully aware that appellant would be returning to his home in North Carolina from the time bond was granted.

Appellant was released from North Carolina's custody on December 13, 2003. However, appellant remained unaware that his case had been called in Greenville County or that he had been tried in his absence. Appellant testified that he first learned that he had been tried in his absence on April 10, 2003, when he learned that there was a warrant for his arrest in South Carolina. (R. p. 177).

At the trial conducted in appellant's absence, the trial judge made a finding that appellant had voluntarily waived his right to be present at the trial of his case. However, to the contrary, appellant was not voluntarily absent and he did not voluntarily waive his right to be present at trial. The trial judge based his finding that appellant was voluntarily absent upon the fact that he was warned that he would be tried in his absence if he failed to attend trial and upon his finding that appellant received notice of his right to attend. The trial judge based his finding that appellant received notice on the fact that the State sent a bond card. However, this case was pending for two years and eleven months before it was finally called for trial.

On the seven previous occasions when the State sent bond cards requesting his presence in court, appellant appeared as instructed. After this pattern held over a period of

almost three years, when appellant for the first time did not appear in response to the eighth bond card which notified him of trial, it was unreasonable for the State and the trial judge to assume and conclude that appellant had voluntarily chosen to absent himself from trial. To the contrary, by his prior conduct, appellant established that he sought to comply with his bond and that he intended to appear for trial. See State v. Jacobs, 271 S.C. 126, 128, 245 S.E.2d 606, 608 (S.C. 1978)(The trial judge allowed a non-indigent appellant a reasonable time in which to retain counsel and appellant did not make a sufficient showing of reasons for his failure to have counsel present. He was on several occasions urged to retain counsel and a phone was made available to him and additional time was given him in order for him to make arrangements. When, on the day of trial, counsel was not present, appellant did not name his attorney, if one had been retained, nor did he indicate when counsel would be available. He gave no reasons for the absence of counsel other than that he had been expecting his brother to bring a lawyer. We conclude that, by his conduct, appellant waived his right to counsel.” Similarly, in this case, appellant’s prior course of conduct over a period of almost three years should have been found to support counsel for appellant’s argument that appellant had not voluntarily waived his right to be present and that he was not voluntarily absent from trial.

Counsel for appellant pointed out that the case had been set for a date certain in December of 2001, but that a year later, nothing had happened. Counsel argued, “He’s always been here in the past when they summoned him to be here in court.” (R. p. 33). As counsel argued, appellant did not voluntarily waive his right to be present at trial; he did not receive notice of trial and it was impossible for him to attend due to his incarceration in North Carolina.

Appellant had the right to be physically present at the trial of his case. Rule 16, SCRCrimP; Diaz v. United States, 223 U.S. 442, 32 S.Ct. 250 (1912). Appellant did not waive his presence voluntarily. Therefore, the Circuit Court judge erred in denying appellant's motion for a new trial.

- II. The Circuit Court Judge erred in denying appellant's motion to dismiss the indictment with prejudice pursuant to the mandate of the Interstate Agreement on Detainers (IAD).

Appellant was released from custody in North Carolina on December 13, 2003. Appellant testified that he first learned that he had been tried in his absence on April 10, 2003, when he learned that there was a warrant for his arrest in South Carolina. Appellant indicated that on April 19, 2003, he was arrested on new charges in North Carolina and again incarcerated in the Wake County Detention Facility. On June 13, 2003, the Governor of South Carolina made an extradition requisition for appellant to the Governor of North Carolina. The Governor's letter was copied to Solicitor Robert Ariail. On July 15, 2003, appellant filed the motion for a new trial on the grounds that he did not voluntarily waive his right to be present at trial. That motion was finally ruled upon and denied at the sentencing hearing on June 15, 2006.

A Governor's warrant and/or detainer was served on appellant at the Wake County Detention Facility on July 21, 2003. Appellant was convicted of the North Carolina charges on September 23, 2003. On November 19, 2003, counsel for appellant made a request pursuant to the Interstate Agreement on Detainers (IAD) to the Wake County Detention facility for final disposition of the detainer lodged against him. Counsel indicated that the appropriate prosecuting official was Solicitor Robert M. Ariail and provided the necessary address and identification of the Court where the charges were pending.

On December 3, 2003, appellant was transferred to the custody of the North Carolina Department of Corrections. On January 9, 2004, the North Carolina Department of Justice notified the North Carolina Department of Corrections of the detainer lodged against appellant by Greenville County. On January 29, 2004, the Greenville County Sheriff's Office mailed a warrant for detainer against appellant to the North Carolina Department of Corrections. On February 3, 2004, the North Carolina Department of Corrections mailed verification to the Greenville County Sheriff's Office that the North Carolina Detention Center had received the detainer.

On February 4, 2004, the North Carolina Department of Corrections notified appellant of the detainer lodged against him. On February 6, 2004, appellant received the notice of detainer and, pursuant to the IAD, he requested final disposition of the Greenville County charges which formed the basis of the detainer. On March 11, 2004, appellant made a formal request pursuant to the IAD for disposition of the Greenville County charges. On March 17, 2004, the North Carolina Department of Corrections mailed appellant's formal request for disposition, notice of his place of imprisonment, a certificate of inmate status and offer to deliver temporary custody of appellant to the solicitor's office pursuant to the IAD. (R. 202).

On April 8, 2004, the North Carolina Department of Corrections mailed notice of the relocation of appellant within the North Carolina Department of Corrections. On June 25, 2004, the North Carolina Department of Corrections mailed a letter to the Solicitor's office reminding the solicitor of appellant's request for disposition of the Greenville County charges pursuant to the IAD. The letter indicates that appellant's request for disposition was received by the solicitor's office on March 25, 2004. Therefore, the IAD allowed the

solicitor 180 days, until September 21, 2004, to dispose of the pending Greenville County charge.

On July 7, 2004, the solicitor responded to the North Carolina Department of Corrections, denying that the IAD was applicable to this case and refusing the retrieve appellant from North Carolina until the conclusion of his North Carolina sentence. On July 13, 2004, counsel for appellant made an IAD request to the North Carolina Department of Corrections for final disposition of the detainer lodged against appellant. On July 19, 2004, the North Carolina Department of Corrections responded to counsel for appellant's IAD request. (Exhibit 15). On August 11, 2004, counsel for appellant forwarded the North Carolina Department of Corrections' IAD response to the solicitor. The solicitor received the response on August 13, 2004.

On September 21, 2004, the IAD 180-day-deadline for final disposition of the Greenville County charge that formed the basis of the detainer passed without final disposition. On December 13, 2004, counsel for appellant filed a brief on the applicability of the IAD to the case. On October 28, 2004, appellant's North Carolina sentence ended and he was transported to the Greenville County Detention Center by the Greenville County Sheriff's Office. Appellant's motion for new trial was outstanding when the solicitor refused to comply with the IAD on the grounds that appellant's charge had been finally disposed of by the trial verdict.

Thus, a plain violation of the requirements of the IAD was established. South Carolina Code Ann. § 17-11-10 states that a person "shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment

and his request for a final disposition to be made of the indictment on the basis of which a detainer has been lodged against the person. Article V(c) states in relevant part: “if the appropriate authority shall refuse or fail to accept temporary custody of such person or in the event that an action on the indictment . . . on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III. . . hereof, the appropriate court of the jurisdiction where the indictment. . . has been pending shall enter an order dismissing the same with prejudice. . . .”

The IAD “creates uniform procedures for lodging and executing a detainer, i.e., a legal order that requires a State in which an individual is currently imprisoned to hold that individual when he has finished serving his sentence so that he may be tried by a different State for a different crime.” *Id.* Article I of the IAD indicates that its purpose is to “encourage the expeditious and orderly disposition” of “charges outstanding against . . . prisoner[s].” Alabama v Bozeman, 533 US 146, 148; 121 S Ct 2079; 150 L Ed 2d 188 (2001). Appellant fully complied with the requirements of the IAD. He properly had a written notice of his place of imprisonment and his request for final disposition of the indictment delivered to the solicitor. The North Carolina Department of Corrections also appears to have fully complied with the IAD: timely providing the required documents to the South Carolina solicitor. Upon receipt of appellant’s request for disposition, notice of place of imprisonment, certificate of inmate status, and the offer to deliver temporary custody of appellant from the North Carolina Department of Corrections, the solicitor had 180 days to dispose of the still pending charge against appellant. The South Carolina solicitor denied applicability of the IAD and refused to comply with its requirements. Thus, the South Carolina solicitor intentionally allowed the 180 day period to expire on September

21, 2004 without bringing the charge for final disposition. Therefore, under the plain language of the IAD, Judge Few erred as a matter of law in refusing to dismiss the indictment against appellant with prejudice. A defendant need not show prejudice before a trial court can dismiss an indictment where the State has violated a prisoner's rights under Article III of IAD. State v. Johnson, 278 S.C. 668, 669, 301 S.E.2d 138, 139 (S.C. 1983).

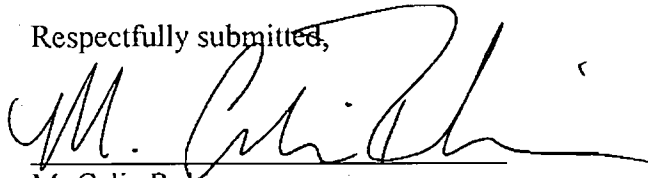
The IAD provides for expeditious delivery of the prisoner to the receiving State for trial prior to the termination of his sentence in the sending State. And it seeks to minimize the consequent interruption of the prisoner's ongoing prison term. The purpose of the act is to foster the expeditious disposition of charges outstanding against prisoners so as to eliminate the uncertainties which accompany the filing of detainers. State v. Allen, 269 S.C. 233, 237 S.E.2d 64 (1977). The goal of promoting prisoner rehabilitation programs is achieved by requiring the receiving state to dispose of the case within 180 days. State v. Patterson, 273 S.C. 361, 363, 256 S.E.2d 417, 418 (S.C., 1979). Article IV(e) prohibits return of the individual to the sending State before that trial is *complete*. Alabama v. Bozeman 533 U.S. 146, 148, 121 S.Ct. 2079, 2082 (U.S.,2001). In Pollard v. United States, 352 U.S. 354, 361, 77 S.Ct. 481, 486 (U.S. 1957), the Court indicated, "We will assume arguendo that sentence is part of the trial for purposes of the Sixth Amendment." Likewise, here, appellant's trial was not concluded and the charge was not disposed of pending the imposition of sentence. A detainer remains lodged against the prisoner until the underlying charges are finally resolved." United States v. Mauro, 436 U.S. 340, 362, 98 S.Ct. 1834, 1848, 56 L.Ed.2d 329 (1978). In this case, it is clear that the prosecutor lodged a detainer against appellant, that both the North Carolina Department of Corrections and appellant were aware of this detainer, that the prosecutor

was aware that the North Carolina Department of Corrections was in possession of the detainer, and that defendant caused a written request for a final disposition to be delivered to the prosecutor and the court while defendant was serving a term of imprisonment. Therefore, the IAD was clearly applicable, and Article III(a) was indisputably violated when appellant's Greenville charge was not brought before the court for final disposition within the required time frame.

CONCLUSION

The Circuit Court judge erred in denying appellant's motion for a new trial and further erred in refusing to dismiss the charge against appellant with prejudice as required by the IAD.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Celia Robinson', written over a horizontal line.

M. Celia Robinson
Appellate Defender

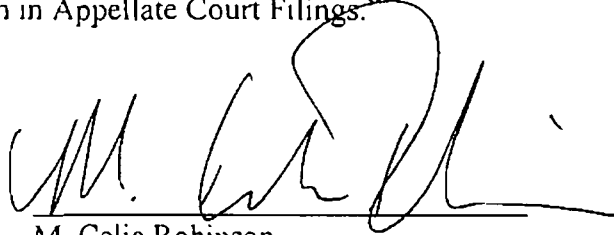
ATTORNEY FOR APPELLANT.

This 14th day of October, 2009.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 14, 2009

A handwritten signature in black ink, appearing to read 'M. Celia Robinson', written over a horizontal line.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

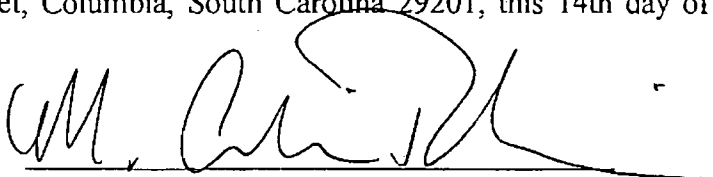
V.

HORACE ABNEY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina J. Catoc, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 14th day of October, 2009.



M. Celia Robinson
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 14th day of October, 2009.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: August 23, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable C. Victor Pyle, Jr., Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

HORACE ABNEY, JR.,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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AUTHORITIES CITED

Federal Cases:

<u>Carchman v. Nash</u> , 473 U.S. 716 (1985)	10-11
<u>Tinghitella v. California</u> , 718 F.2d 308 (9th Cir. 1983)	12
<u>U.S. v. Coffman</u> , 905 F.2d 330 (10th Cir. 1990)	11

State Cases:

<u>Blackwell v. State</u> , 546 S.W.2d 828 (Tenn.Crim.App. 1976)	10
<u>City of Aiken v. Koontz</u> , 368 S.C. 542, 629 S.E.2d 686 (Ct. App. 2006)	5-6
<u>Lancaster v. Stubblefield</u> , 985 S.W.2d 854 (Mo.Ct.App. 1998)	12
<u>Painter v. State</u> , 157 Md.App. 1, 848 A.2d 692 (Md. App. 2004)	11
<u>People v. Barnes</u> , 93 Mich.App. 509, 287 N.W.2d 282 (1979)	12
<u>People v. Castoe</u> , 86 Cal.App.3d 484, 150 Cal.Rptr. 237 (1978)	12
<u>People v. Randolph</u> , 85 Misc.2d 1022, 381 N.Y.S.2d 192 (1976)	12
<u>Prince v. State</u> , 118 Nev. 634, 55 P.3d 947 (Nev. 2002)	12
<u>State v. Barefield</u> , 110 Wash.2d 728, 756 P.2d 731 (1988)	11-12
<u>State v. Barnes</u> , 14 Ohio App.3d 351, 471 N.E.2d 514 (Ohio App. 1984)	12
<u>State v. Bates</u> , 689 N.W.2d 479 (Iowa App. 2004)	11
<u>State v. Burkett</u> , 179 Ariz. 109, 876 P.2d 1144 (Ariz. Ct.App. 1993)	12
<u>State v. Fairey</u> , 374 S.C. 92, 646 S.E.2d 445 (Ct. App. 2007)	5-7
<u>State v. Knowles</u> , 275 S.C. 312, 270 S.E.2d 133 (1980)	10
<u>State v. Miller</u> , 134 Idaho 458, 4 P.3d 570 (Idaho Ct.App. 2000)	12
<u>State v. Roberson</u> , 382 S.C. 185, 675 S.E.2d 732 (2009)	7
<u>State v. Shuler</u> , 344 S.C. 604, 545 S.E.2d 805 (2001)	9
<u>State v. Sparks</u> , 104 N.M. 62, 716 P.2d 253 (1986)	12
<u>State v. Williams</u> , 292 S.C. 231, 355 S.E.2d 861 (1987)	9
<u>Suggs v. Hopper</u> , 234 Ga. 242, 215 S.E.2d 246 (1975)	10

Rules and Statutes:

Rule 16, SCRCrimP	5; 7
Rule 29, SCRCrimP	12-13
S.C. Code Ann. § 17-11-10	10-11

STATEMENT OF ISSUES ON APPEAL

- I. **The trial court properly tried Appellant in his absence, and therefore properly denied his motion for new trial, where Appellant had been warned that he would be tried in his absence if he failed to appear, and where the solicitor sent notice of trial to the address provided by Appellant.**

- II. **The Interstate Agreement on Detainers did not apply where there were no pending untried indictments against Appellant for which he could be brought to trial.**

STATEMENT OF THE CASE

Appellant was indicted in Greenville County in June of 2000 for trafficking in cocaine, over 400 grams. (R. p. 37, lines 3-8). His motion to suppress the cocaine was denied after a hearing before the Honorable C. Victor Pyle, Jr., on September 24, 2001. (See R. p. 34, lines 8-13). He was tried and convicted in his absence on December 11, 2002, and Judge Pyle sealed the sentence. (See R. p. 123-25). The sentence of thirty years was opened and read on June 15, 2006. (R. p. 127-32). At that time, Appellant's motion for new trial and his motion to dismiss the indictment were heard and denied by the Honorable John C. Few. (R. p. 130-59; see p. 194-247). Thereafter, Appellant filed and served a timely Notice of Appeal.

ARGUMENT

- I. **The trial court properly tried Appellant in his absence, and therefore properly denied his motion for new trial, where Appellant had been warned that he would be tried in his absence if he failed to appear, and where the solicitor sent notice of trial to the address provided by Appellant.**

Although the Sixth Amendment guarantees a defendant's right to be present at trial, it is well established that this right may be waived. State v. Fairey, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct. App. 2007); City of Aiken v. Koontz, 368 S.C. 542, 547, 629 S.E.2d 686, 688 (Ct. App. 2006). Rule 16, SCRCrimP, provides that a defendant may waive his right to be present, and may be tried in his absence, upon the court's finding that the defendant received notice of his right to be present, and that he was warned the trial would proceed in his absence if he failed to appear. State v. Fairey, supra, at 99-100, 646 S.E.2d at 448. The judge must determine that the defendant voluntarily waived his right to be present in order to try the case *in absentia*. Aiken v. Koontz, supra, at 547, 629 S.E.2d at 689.

In the instant case, Appellant, who acknowledged that he could read and write, signed a bond form on January 12, 2000, indicating that he understood that he had a "right and obligation to be present at trial," and that if he failed to attend court, the trial would proceed in his absence. (R. p. 32, lines 8 - 22; p. 148, line 7 - p. 149, line 11). The bond required Appellant to promptly notify the solicitor upon a change of address. (See R. p. 148-152). On the bond form, Appellant provided a North Carolina address at [REDACTED] Road.¹ (R. p. 139, lines 9-10; p. 144, line 18). Appellant had

¹ The June 15, 2006 motions hearing transcript contains a typographical error on page 13, line 10. (R. p. 139, line 10). It lists Appellant's street address number as "1740" rather than "740." (R. p. 139, line 10). "740 Clarence McKeithen Road" appears to be the correct address that Appellant provided. (See R. p. 29-30).

been living with his father at that address. (R. p. 143, lines 3-5). Appellant in fact received correspondence from the solicitor at that address after he bonded out of jail. (R. p. 139, lines 11-24).

However, about eight months prior to his December 11, 2002 trial, Appellant's father "put him out" of the house, and Appellant was no longer staying at that address. (R. p. 143-44). Instead, he was staying with "different friends" at "different places." (R. p. 144, lines 13-15). Appellant failed to notify the solicitor's office, or his own attorney, that he was no longer living at [REDACTED] Road. (R. p. 144, lines 16-23). When Appellant's case came up for trial in December 2002, the solicitor's office sent a trial notice to that address, since it was the only address Appellant had provided. (R. p. 28-30). The trial notice was mailed to Appellant on November 26, 2002, and it specified that Appellant needed to appear for trial on Wednesday, December 11, 2002, at 8:30 am, at the Greenville County Courthouse. (R. p. 29, lines 3-7).

When Appellant failed to appear at trial, the court conducted a hearing to determine whether a trial in his absence was appropriate. (R. p. 27-34). After hearing testimony regarding the notice Appellant received, the judge made findings on the record that Appellant was advised, on his bond form, that his trial would proceed in his absence upon his failure to attend court. (R. p. 33, lines 23-25). See State v. Fairey, supra, at 101, 646 S.E.2d at 449; Aiken v. Koontz, supra, at 547-48, 629 S.E.2d at 689-90 (bond form that provides notice that a defendant can be tried *in absentia* can serve as sufficient notice). The court further found that Appellant "received notice of his right to present for his trial today." (R. p. 33, line 25 – p. 34, line 1). Therefore, the court granted the State's motion to try Appellant in his absence. (R. p. 34, lines 1-2).

Since the trial judge made the necessary findings pursuant to Rule 16, SCRCrimP, on the record, and since these findings are supported by the evidence set forth above, Appellant was properly tried in his absence. (R. p. 27-34). Contrary to Appellant's argument, the State needed not show that Appellant received actual notice of his trial date, where he waived his right to be present at trial by his own, unexcused conduct. See State v. Fairey, supra, at 101, 646 S.E.2d at 449 (where a trial notice was mailed to the last official address the defendant provided to the solicitor, defendant was placed on notice of trial); see also State v. Roberson, 382 S.C. 185, 675 S.E.2d 732 (2009) (S.C. Supreme Court found "waiver by conduct" of the defendant's right to counsel where he signed a bond form indicating he was to appear on his trial date; where he failed to appear at trial after the notice had been mailed to his last known address; and where he was familiar with the court system).

In the instant case, Appellant's conduct constituting willful ignorance of his trial date cannot excuse his failure to appear at trial. Had Appellant properly notified the solicitor's office - as his bond required him to do - of his admitted change of address, he would have been aware of the trial date. (R. p. 144-150). If he had elected to check his mail at [REDACTED] Road, or to call his father and ask about his mail, he would have been aware of his trial date. (R. p. 143, lines 2-12). If he had kept in regular contact with his attorney, he would have been aware of his trial date. (R. p. 142-44). Instead, the record reflects that he remained out of touch with his attorney for four more months after his trial, such that he was unaware that he was tried in his absence until he was again arrested on new charges in North Carolina. (R. p. 143, lines 13-18). By his own completely unexcused failure to exercise any degree of diligence in keeping

informed of developments in his case, he voluntarily waived his right to be present at trial.

Nevertheless, Appellant asserts that he “fully intended” to appear for trial, but he was “unable” to attend because he was incarcerated in North Carolina. However, Appellant’s actions belie this assertion. He admitted that he voluntarily violated North Carolina law by attempting to obtain a false identification, and, consequently, was arrested and incarcerated on December 10, 2002. (R. p. 150, lines 1-12). Further, Appellant admitted that he would not have been aware of his trial date *in any event*, and would not have been present at trial, because he had moved away from [REDACTED] [REDACTED] Road without telling anyone *and* he failed to check his mail there. (R. p. 143, lines 2-12). But for this unexcused conduct, he would have been aware of his trial date and could have decided to refrain from illegal conduct in North Carolina, or, at the very least, he could have immediately notified his attorney upon his incarceration. Accordingly, the lower court properly found that Appellant’s absence from trial was “absolutely his fault” and that his presence at trial was waived by his own voluntary conduct. (See R. p. 151, line 13). Thus, the trial court did not abuse its discretion in denying Appellant’s motion for new trial.

Finally, the State submits that because there was overwhelming evidence of Appellant’s guilt, his presence at trial could not possibly have changed the result. (See R. p. 146, lines 7-13). Evidence was presented at trial that 428.6 grams of cocaine was found in Appellant’s jacket, in his car, where he was the sole occupant.² (See R. p. 52-100). Both the stop and his subsequent arrest were videotaped and played for the jury.

² Appellant’s motion to suppress the drugs was previously denied after a hearing on September 24, 2001. (See R. p. 2-23). This issue was not raised on appeal.

(See R. p. 62-65). The jury could have reached no verdict other than guilty. Therefore, even had the trial court committed error in trying Appellant in his absence, such error would be harmless. See State v. Shuler, 344 S.C. 604, 626, 545 S.E.2d 805, 816 (2001); State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987); (no presumption of prejudice from a defendant's absence at trial; court's decision to try a defendant in his absence is subject to harmless error analysis). Appellant failed to point to anything he could have done to even attempt to alter the jury's verdict had he been present at trial. Accordingly, if this court finds any error, it should be deemed harmless beyond a reasonable doubt, due to the absolutely overwhelming evidence of Appellant's guilt on the charge of trafficking in over 400 grams of cocaine.

II. The Interstate Agreement on Detainers did not apply where there were no pending untried indictments against Appellant for which he could be brought to trial.

On January 29, 2004, the Greenville County Sheriff's Office sent a certified copy of a warrant for Appellant's detainer to the North Carolina Department of Corrections, where Appellant was incarcerated. (R. p. 217). The cover letter stated that Appellant was wanted for "failure to appear in court, original charges being trafficking cocaine." (R. p. 217). The detainer was lodged to secure Appellant's return to South Carolina, upon his release from custody in North Carolina, for imposition of his sealed sentence for trafficking in cocaine.³ (See R. p. 231). He had been previously tried and convicted on the trafficking cocaine indictment on December 11, 2002. (R. p. 123). No detainer was lodged on the basis of any untried indictments.

³ While it appears that North Carolina misinterpreted Greenville's requested detainer as indicating that there was an untried case pending in South Carolina, this has no bearing upon Appellant's entitlement to relief. (See R. p. 218-228).

Article III of the Interstate Agreement on Detainers (“IAD”) requires that if there is an “untried indictment, information, or complaint,” on the “basis of which” a detainer has been lodged, the defendant must be “brought to trial” within 180 days of requesting final disposition. See S.C. Code Ann. § 17-11-10, Article III (a). There are no cases in South Carolina specifically addressing whether the reading of a previously-determined, sealed sentence could constitute an “untried indictment” under Article III of the IAD. However, the South Carolina Supreme Court held that the IAD did not apply to a detainer issued on a conditional order of probation revocation for which a bench warrant had been issued. See State v. Knowles, 275 S.C. 312, 270 S.E.2d 133 (1980). The United States Supreme Court later agreed with this ruling, specifically citing to State v. Knowles, along with several other state and federal cases. Carchman v. Nash, 473 U.S. 716, 724 (1985) (*citing, inter alia*, Suggs v. Hopper, 234 Ga. 242, 215 S.E.2d 246 (1975) (the purpose of the IAD is to ensure speedy trial on pending charges before “staleness and difficulty of proof” set in; these are pre-trial considerations, not sentencing considerations); Blackwell v. State, 546 S.W.2d 828 (Tenn.Crim.App. 1976) (the term “untried” refers to matters that can be brought to “full trial,” not matters where the defendant has already been convicted)).

In the Carchman opinion, the U.S. Supreme Court held that the language of the IAD made it clear that “untried indictment” referred to criminal offenses for which a defendant would be “brought to trial,” and not offenses for which he had already been “tried and convicted.” Id. at 725; 728. The Court stated that, by its terms, “Article III does not apply to all detainers, but only those based on “any untried indictment, information, or complaint.” Id. at 727. The Court pointed out that the rationale behind

Article III of the IAD was to allow the inmate to more easily clear his record of detainers based on “unsubstantiated charges” – that is, charges for which the State could not offer sufficient proof. Id. at 729-30. This policy clearly does not apply when a defendant has already been found guilty of the charge in question and is merely awaiting sentencing. See id. at 729-30. A delay in *sentencing* does not impair a defendant’s ability to defend against charges at trial. See id. at 732-33. While a defendant does have a Sixth Amendment right to a “speedy trial,” there is no constitutional entitlement to a speedy sentencing hearing after guilt has been determined. See id. at 733.

Accordingly, the State submits that, based upon its plain language, the IAD did not apply in Appellant’s case, because there were no untried indictments for which Appellant was entitled to be “brought to trial” within 180 days. See S.C. Code Ann. § 17-11-10. An overwhelming majority of cases from other jurisdictions support this proposition. See State v. Bates, 689 N.W.2d 479, 481 (Iowa App. 2004) (concluding that, in keeping with the “majority of courts” that have considered the issue, that the IAD does not apply when a defendant has been convicted of a crime in another jurisdiction but not yet sentenced; the IAD “does not apply for purposes of expediting sentencing”); Painter v. State, 157 Md.App. 1, 20, 848 A.2d 692, 703 (Md. App. 2004) (since the term “trial” in Articles III and IV of the IAD does not encompass sentencing, it refers to the resolution of charges and not to the imposition of sentence); U.S. v. Coffman, 905 F.2d 330 (10th Cir. 1990) (“trial” in the IAD’s anti-shuffling provisions does not include sentencing); State v. Barefield, 110 Wash.2d 728, 734, 756 P.2d 731, 733-34 (1988) (pointing out that the IAD provides that the defendant must be “brought to trial” within 180 days, but does not require that the case be totally disposed of within that time frame,

and holding that “[t]he IAD does not apply to sentencing detainees.”); State v. Barnes, 14 Ohio App.3d 351, 471 N.E.2d 514 (Ohio App. 1984) (the specific language of the IAD shows that it was only meant to apply to “untried” indictments; once defendant was convicted, his case had been tried; the detainer placed upon him seeking his return for sentencing was not subject to the IAD); see also People v. Castoe, 86 Cal.App.3d 484, 150 Cal.Rptr, 237 (1978); People v. Barnes, 93 Mich.App. 509, 287 N.W.2d 282 (1979); State v. Sparks, 104 N.M. 62, 716 P.2d 253 (1986); People v. Randolph, 85 Misc.2d 1022, 381 N.Y.S.2d 192, (1976); Prince v. State, 118 Nev. 634, 55 P.3d 947, 949 (Nev. 2002); State v. Burkett, 179 Ariz. 109, 876 P.2d 1144, 1146 (Ariz. Ct.App. 1993); State v. Miller, 134 Idaho 458, 4 P.3d 570, 575 (Idaho Ct.App. 2000); Lancaster v. Stubblefield, 985 S.W.2d 854, 856 (Mo.Ct.App. 1998) (all holding that the IAD does not apply to sentencing hearings); but cf. Tinghitella v. California, 718 F.2d 308 (9th Cir. 1983). This Court should apply the sound reasoning of the majority of jurisdictions and hold that the IAD does not apply to sentencing hearings where the defendant has already been tried and convicted on the charge contained in the indictment. Such a holding would be particularly appropriate in Appellant’s case, where the only purpose of the sentencing hearing was to read to Appellant the previously-determined sentence.

Finally, Appellant’s alternative argument that his “pending” motion for new trial somehow rendered the indictment “untried” is also unavailing, especially where, as the solicitor pointed out, Appellant’s motion for new trial was not, in fact, “pending” because it could not be properly made until *after* sentencing. (R. p. 189, line 15 – p. 190, line 4). See Rule 29 (a), SCRCrimP (requiring the post-trial motion to be made within

ten days of imposition of sentence). In conclusion, because the IAD did not apply, the lower court properly denied Appellant's motion to dismiss the indictment.

CONCLUSION

The trial court properly denied Appellant's motion for new trial and properly denied his motion to dismiss the indictment. Therefore, Respondent requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

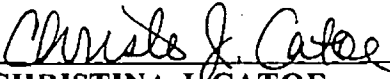
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ATTORNEYS FOR RESPONDENT

September 23, 2009

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable C. Victor Pyle, Jr., Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

HORACE ABNEY, JR.,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings**.


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ATTORNEYS FOR RESPONDENT

September 23, 2009

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable C. Victor Pyle, Jr., Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

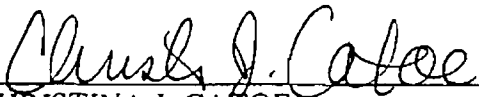
v.

HORACE ABNEY, JR.,

APPELLANT.

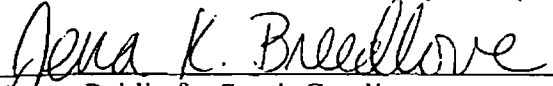
AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **M. CELIA ROBINSON**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **23rd day of September, 2009**.


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SWORN to before me this 23rd day of September, 2009.


Notary Public for South Carolina.
My Commission Expires: 4/22/2018

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Horace Abney, Jr.,

Appellant.

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge
John C. Few, Circuit Court Judge

Unpublished Opinion No. 2010-UP-414
Submitted September 1, 2010 – Filed September 20, 2010

AFFIRMED

Appellate Defender M. Celia Robinson, of Columbia,
for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Salley W. Elliott,

Assistant Attorney General Christina J. Catoe, of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

PER CURIAM: Horace Abney, Jr. appeals his conviction for trafficking cocaine and thirty-year sentence, arguing the trial court erred in denying his motion for a new trial and motion to dismiss pursuant to the Interstate Agreement on Detainers¹ (IAD). We affirm² pursuant to Rule 220(b)(1), SCACR, and the following authorities:

1. As to whether the trial court erred in denying Abney's new trial motion: State v. Garrett, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002) (stating generally, the grant or refusal of a new trial is within the trial court's discretion and will not be disturbed on appeal absent a clear abuse of that discretion); State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987) (finding an error in trying a defendant in his absence is subject to a harmless error analysis); see also State v. Shuler, 344 S.C. 604, 626, 545 S.E.2d 805, 816 (2001) (finding a defendant's absence during a Jackson v. Denno, 378 U.S. 368 (1964), hearing, if error, was harmless in light of the overwhelming evidence of guilt and the defendant's inability to contribute evidence that was not presented during his trial).

2. As to whether the trial court erred in denying Abney's motion to dismiss pursuant to the IAD: Carchman v. Nash, 473 U.S. 716, 725 (1985) ("The language of the [IAD] therefore makes clear that the phrase 'untried indictment, information or complaint' in Art. III refers to criminal charges pending against a prisoner.").

AFFIRMED.

WILLIAMS, PIEPER, and KONDUROS, JJ., concur.

¹ S.C. Code Ann. § 17-11-10 (2003).

² We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA) In the Court of Common Pleas

County of GreenvilleHorace Abney Jr., #316024

Full name and prison number, if any, of applicant.

v.

State of South Carolina

Name of Respondent

APPLICATION FOR

POST-CONVICTION RELIEF

2011-CP-23- 382INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Perry Correctional Institution
2. Name and location of Court which imposed sentence Court of General Sessions
In Greenville County
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 2000-GS-23-4624 (Distribution of Cocaine)
 - (b) _____
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) June 15, 2006 Thirty Years
 - (b) _____
 - (c) _____

5. Check whether a finding of guilty was made

(a) after a plea of guilty _____

(b) after a plea of not guilty ✓ _____

(c) after a plea of nolo contendere _____

6. Did you appeal from the judgment of conviction or the imposition of sentence? Yes _____

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. S.C. Court of Appeals _____

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Conviction was Affirmed _____

ii. _____

iii. _____

(c) the date of each such result:

i. Oct 13, 2019 _____

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Case was decided without oral argument pursuant to rule _____

ii. 215, SCAR _____

iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) N/A _____

(b) _____

(c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistance of Counsel. (Trial + Appellate) _____

(b) Subject matter Jurisdiction _____

(c) Violation of Constitutional Rights (4,5,6) _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) See Attachment

(b) Federal Government Processed Cases However State Tried and Convicted

(c) See Attachment

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law?

N/A

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

N/A

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) N/A

(d) any other petitions, motions or applications in this or any other Court?

N/A

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

- i. _____
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? Yes

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. Petition For new Trial
- ii. _____
- iii. _____

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

- i. S.C. Court of Appeals
- ii. _____
- iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) Ineffective Assistance of Counsel / PCR Matter
- (b) Subject Matter Jurisdiction / PCR Matter
- (c) Violation of Constitutional Rights (4 Counsel failed to Raise

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

- (a) your arraignment and plea? _____
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?
Yes
- (e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? Yes

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. Mr. Barrett Mackenzie (100 Mills Ave Greenville, S.C. 29605)
- ii. Ms. Celia Robinson (1530 Lady St Suite 401 Columbia, SC 29201-3322)
- iii. _____

(b) the proceedings at which each such attorney represented you:

- i. Trial Attorney
- ii. Appeal Attorney
- iii. _____

18. State clearly the relief you seek in filing this application.

That My conviction's be Reversed and Remanded
for a new trial

19. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)
)
 COUNTY OF Greenville)

VERIFICATION

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

Horace Abney

Sworn to and subscribed before me

This 6th day of January, 2011

[Signature] L.S.
 Notary Public for South Carolina

My Commission Expires May 12th, 2014

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

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

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

Horace Abney
 Applicant

Sworn to and subscribed before me

This 6th day of January, 2011.

[Signature] L.S.
 Notary Public for South Carolina

My Commission Expires: May 12th, 2014

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

In The Court of Common Pleas

Case No. : 2000-GS-23-4624

Horace Abney,
S.C.D.C. No. 316024,
Applicant,

Issues of Authority to Support
Post - Conviction relief.

VS.

State OF South Carolina,
Respondent.

Applicant, Horace Abney, submits these issues in support of his PCR Application

I - 9(A)

Ineffective Assistance of Trial Counsel.

Counsel failed to seek a continuance.

Counsel objected to clients trial in absentia, yet failed to seek a continuance. In order to contact client to find out why he didnt appear at trial.

Ineffective Assistance of Appellate Counsel.

On September 24, 2001, a hearing was held on applicant's motion to suppress the drug evidence that was seized during a traffic stop. In utilizing the procedures that has been established by the laws and rules of this state for issues to be reviewed by this states Appellate Courts, it is evident that this issue was preserved for the

Court of Appeals review. Thus, creating an argument concerning this point would be superfluous. When asked to raise this issue appellate counsel ignored request and failed to raise a valid issue.

II - 9 (B)

Subject Matter Jurisdiction.

Trial counsel failed to prepare for trial.

Right to effective assistance of counsel contemplates guiding hand of able and responsible lawyer devoted solely to interest of his client who has ample opportunity to acquaint himself with law and facts of case, and is afforded opportunity to present them to court or jury in their most favorable light. Counsel failed to prepare for trial, had he prepared he would have saw that two different agencies handled applicants case.

III - 9 (C)

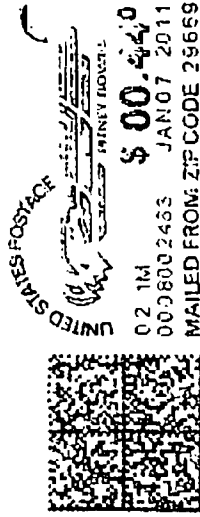
Violation of 4, 5, 6, and 14th Amendments

Applicant did not give consent to vehicle search nor was the proper procedures followed in a traffic stop.

Violation of applicant's 5, 6, and 14th amendment. A leading principle that pervades the entire law of criminal procedure is that after indictment has been found nothing shall be done in the absence of the accused whose duty is to be present

at all stages of the trial, The right of the accused to be present at the trial is grounded in common law and shall not be disturbed. Applicant was incarcerated in another state when trial was being held, Therefore one cannot waive his right to be present when one does not even have the right to move about freely.

Herace Abney (316024 022B204
430 Oaklawn Rd
Pelzer, S.C. 29669



RECEIVED

JAN 07 2011

P.C.I. MAILROOM

100 Greenville County Courthouse
305 East North Street
Greenville S.C. 29601

SCDC

JAN 29 '11

COMMISSARY

2960132021 100 Greenville County Courthouse Greenville S.C. 29601

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2011-CP-23-0382
COUNTY OF GREENVILLE	)	
	)	
Horace Abney, Jr.,	)	
S.C.D.C. No. 316024,	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed January 19, 2011, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the June 2000 term of General Sessions for trafficking cocaine (2000-GS-23-4624). Andrew R. Mackenzie, Esquire represented the Applicant.

On December 11, 2002, the Applicant was tried in absentia and convicted. The Honorable C. Victor Pyle, Jr. sealed his sentence. On June 15, 2006, the Applicant appeared before the Honorable John C. Few to be sentenced. The Applicant received a sentence of thirty (30) years imprisonment. On the same date, Judge Few denied the Applicant's motion for a new trial.

A notice of appeal was filed at the South Carolina Court of Appeals. M. Celia Robinson, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of

Appeals affirmed the Applicant's conviction and sentence. State v. Abney, Op. No. 2010-UP-414 (S.C. Ct. App. filed Sept. 20, 2010).

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

In his application for post-conviction relief the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
 - a. Failed to seek a continuance.
2. Ineffective assistance of appellate counsel;
 - a. Failed to raise an issue requested by the Applicant.
3. Subject matter jurisdiction.
4. Violation of Constitutional rights:
 - a. Violation of Fourth, Fifth, Sixth, and Fourteenth Amendments.

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation

within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of trial counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

In assessing a claim of ineffective assistance of appellate counsel, courts apply the

Strickland test to determine if appellate counsel was deficient for failing to raise an issue and whether the defendant was prejudiced from the failure to raise the issue. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). However, counsel is not required to raise every non-frivolous claim, but instead may select among them in order to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000) (citing Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308 (1983)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 at 265, 305 S.E.2d at 248.

V.

The Respondent submits the Applicant's assertion that the court lacked subject matter jurisdiction is without merit. The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet. State v. Gentry, 363 S.C. 93, 103, 610 S.E.2d 494, 500 (2005). The Respondent further notes that indictments are not evidentiary or jurisdictional documents – they are merely notice documents. Id. at 102, 610 S.E.2d at 500. The indictment in this case was true-billed and clearly sufficient to put the Applicant on notice of the charge he was facing.

VI.

The Respondent denies each allegation not expressly admitted, qualified or explained.

VII.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

Respectfully submitted,

ALAN WILSON
Attorney General

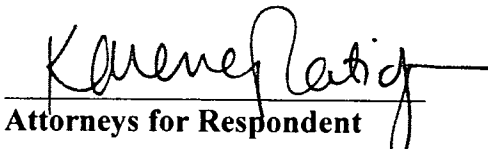
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

May 26, 2011

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

2011-CP-23-0382

HORACE ABNEY JR., 316024)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

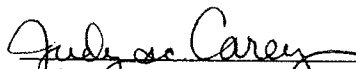
STATE OF SOUTH CAROLINA,)

Respondent.)
_____)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Horace Abney Jr., 316024
Perry Correctional Institution
430 Oaklawn Road
Pelzer SC 29669**

DATED this 26th day of May, 2011.


Judy A. C. Carey, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMONS PLEAS
	)	CASE NO: 2011-CP-23-382
COUNTY OF GREENVILLE	)	
	)	
Horace Abney, Jr. SCDC 317177,	)	AMENDMENTS TO
Applicant,	)	POST CONVICTION
	)	RELIEF APPLICATIONS
vs.	)	
	)	
THE STATE OF SOUTH CAROLINA,	)	
Respondent.	)	
_____	)	

The applicant hereby amends answers to number 9 and number 10 of his Application for Post-Conviction Relief to state the following:

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(A) The Applicant was denied effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of The South Carolina Constitution.

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) The applicant was provided with deficient representation by his attorney, in that the conduct of his attorney was objectively unreasonable under the circumstances. Strickland v. Washington, 466 U.S. 668 (1984). The outcome of the applicant's proceeding was prejudiced, and it is reasonable probable that the outcome would have been different had counsel's performance not been deficient. Strickland, 466 U.S. at 694. Defense counsel was ineffective based on one or more of the following:

1. My defense attorney failed to conscientiously discharge his professional responsibilities while he was handling my case.
2. My defense attorney failed to effectively challenge the arrest and seizure of Applicant.
3. My defense attorney failed to act as my diligent, conscientious advocate.
4. My defense attorney failed to give me his complete loyalty.
5. My defense attorney did not have my best interest in mind while he was supposed to be investigating and preparing my case.
6. My defense attorney failed to serve my cause in good faith.
7. My defense attorney neglected the necessary investigations and the preparation of my case.
8. My defense attorney did not do the necessary factual investigations on my behalf.
9. My defense attorney did not do the necessary legal research.
10. My defense attorney did not conscientiously gather any information to protect my rights.
11. My defense attorney did not try to have my case settled in a matter that would have been to my best advantage.
12. My defense attorney did not advise me of all my rights or take any of the actions that were necessary to protect preserve them; knowing that I was not versed in the law.
13. My defense attorney, knowing I was illiterate in the law, never properly ascertained whether or not I actually understood or comprehended all of the issues that were involved in my case.
14. My defense attorney never properly consulted with me or kept me informed with what was going on as far as my case was concerned.

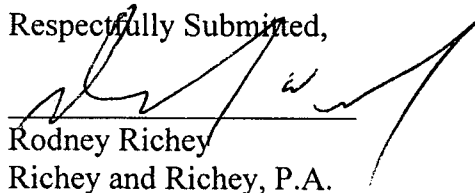
15. My defense attorney never explained to me or discussed with me any of the elements of the crime charged.
16. My defense attorney never made any attempt to ascertain whether or not I actually knew what the elements fo the crime charged were or whether or not I understood exactly what the term "criminal" element" actually meant.
17. My defense attorney never explained to me or discussed with me how the elements of the crime charge and the evidence that the prosecution planned to introduce into evidence against me related to one another and did not discuss how the sentencing would be done especially as it related to the elements of the crime as in State V. Boyd.
18. My defense attorney never informed me of any of the defenses that were available to me.
19. My defense attorney never intended to offer any defense to the court on my behalf.
20. My defense attorney never explained to me or discussed with me any kind of defense strategy.
21. My defense attorney never explained to me or discussed with me any of the tactical choices that they either made or were planning to make.
22. My defense attorney dictated to me exactly how my case was going to be handled and offered no alternative options.
23. My defense attorney failed to properly acquaint themselves with the law and the facts surrounding my case and as a direct result of their intentional negligence, there was a very serious error in their assessment of both the law and the facts.
24. Because of my defense attorney's gross neglect and his many legal errors no defense at all was put in issue for me during the Court proceedings.
25. My defense attorney did not subject the prosecution's case to any adversarial testing.
26. My defense attorney failed to oppose the prosecution's case with any adversarial litigation.

27. My defense attorney failed to function as the government's adversary in any sense of the word.
28. My defense attorney failed to pursue any of the legal recourse that were available to him.
29. The attorney that represented me on this charge in Court failed to function as the counsel that the Constitution's Sixth Amendment Guarantees.
30. My defense attorney failed to call alibi witnesses on my behalf which would have proven my innocence.
31. My defense attorney failed to appeal my case after I was convicted when I wanted to appeal.

His counsel's representation was not within the range and scope of competence demanded by Strickland and its progeny.

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction requires that the defendant show first, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Sosebee v. Leeke, S.C. 362, F. 2nd 221 (1987), citing Strickland v. Washington 46 S.E.2D. 813 (1984), See also Butler v. State 286 S.C. 441, 334 S.E. 2d 813 (1985), also, Hill v. Lockhart 474 U.S. 88 (1985).

Respectfully Submitted,



Rodney Richey
Richey and Richey, P.A.
Post Office Box 10916
Greenville, South Carolina 29603
Attorney for the Applicant

July 1, 2011

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)

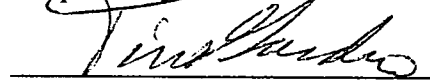
IN THE COURT OF COMMONS PLEAS
 CASE NO: 2011-CP-23-382

Horace Abney, Jr. SCDC 317177,)
)
 vs.)
)
 THE STATE OF SOUTH CAROLINA)

AFFIDAVIT OF SERVICE

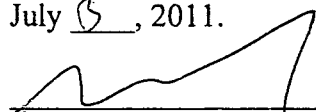
I certify that I have served the PCR Application on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on July 5 2011, addressed to their attorney of record, Karen Ratigan, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Respectfully submitted:



Tina Garduno, paralegal
 Richey and Richey, P.A.
 Post Office Box 10916
 Greenville, South Carolina 29603

Sworn to before me on
 July 5, 2011.



Notary Public of South Carolina

My Commission Expires: 3-18-14

1 STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS
2 COUNTY OF GREENVILLE) 2011-CP-23-0382

3)
4 Horace Abney, Jr.) TRANSCRIPT OF RECORD

5)
6 -vs-)

7 State of South Carolina)
8

9 October 30, 2012
Greenville, South Carolina

10 B E F O R E:

11 THE HONORABLE MARKLEY DENNIS, JR., Judge.

12 A P P E A R A N C E S

13 Rodney Richey, Esquire
Attorney for the Applicant

14 Karen Ratigan, Esquire
15 Assistant Attorney General
Attorney for the State

16
17 CAROLINE HISKELL
18 Thirteenth Circuit Court Reporter
19
20
21
22
23
24
25

I N D E X

WITNESSES

Horace Abney

Andrew Mackenzie

DIR

4

19

CROSS

23

REDIRECT

E X H I B I T S

IDENTIFICATION

Applicant's

1 Form 7

ID

22

IN EVD.

22

P R O C E E D I N G S

THE COURT: Ms. Ratigan.

MS. RATIGAN: Thank you, Your Honor. May it please the Court. This is the case of Horace Abney versus the State of South Carolina, Docket No. is 2011-CP-23-0382. Mr. Abney was indicted for trafficking cocaine. He was represented on that charge by Andrew Mackenzie. On December 11, 2002 he was tried in his absence and convicted. Judge Pyle sealed the sentence on that date.

On June 15, 2006, he appeared before Judge Few for sentencing. He received a sentence of 30 years. The Judge also denied a motion for a new trial on that date.

An appeal was timely filed. The Court of Appeals affirmed his conviction and sentence September 28, 2010. The State is ready to proceed although just for Your Honor's information the suppression hearing transcript, the trial transcript and the sentencing transcript are all contained in this one (inaudible).

THE COURT: Thank you.

Mr. Richey, you discussed this matter with your client?

MR. RICHEY: Yes, Your Honor.

THE COURT: Mr. Abney, are you ready to proceed, sir?

1 MR. ABNEY: No, sir, Your Honor, I'm not
2 ready to proceed. This documentation that Mr. Richey just
3 provided for me.

4 THE COURT: Yes.

5 MR. ABNEY: I have been writing different
6 agencies trying to obtain this documentation, Rule 6, and
7 the chain of custody and also the drug analysis sheet and
8 it was just provided for me. There are chain of custody
9 issues that I would like to raise today.

10 THE COURT: You don't get to raise them. You
11 got a lawyer?

12 MR. ABNEY: Yes, sir.

13 THE COURT: You can raise them through your
14 lawyer. You can talk through your lawyer. Thank you,
15 sir. We're ready to proceed. Call your first witness.

16 MR. RICHEY: I call Mr. Abney.

17 THE CLERK: Mr. Abney, please place your left
18 hand on the Bible and raise your right hand.

19 HORACE ABNEY, having been duly sworn,
20 testified as follows:

21 Thank you. You may be seated. State your
22 name for the record.

23 THE WITNESS: Horace Abney, Jr.

24 DIRECT EXAMINATION

25 BY MR. RICHEY:

1 Q. Sir, are you incarcerated right now?

2 A. Yes, sir.

3 Q. And where are you incarcerated?

4 A. Perry Institution.

5 Q. What type of sentence did you receive?

6 A. Thirty year sentence.

7 Q. And what was that for?

8 A. Trafficking cocaine.

9 Q. Who represented you on those charges?

10 A. Mr. Andrew Mackenzie.

11 Q. And you filed an application with this court
12 because you feel he did not effectively represent you; is
13 that correct?

14 A. Yes, sir.

15 Q. The simple facts is that you were allegedly
16 driving a car, police stop it, they search the vehicle; is
17 that correct?

18 A. Yes, sir.

19 Q. And upon that search, and I'm not getting into
20 the lawfulness of it, but as a result of that search it
21 was alleged that drugs were found, correct?

22 A. Yes, sir.

23 Q. Were you present for the trial?

24 A. No, sir.

25 Q. And why were you not present?

1 A. I was incarcerated in North Carolina at the time.

2 Q. As the time, was your lawyer aware of your
3 incarceration?

4 A. No, he was not.

5 Q. At any point did your lawyer become aware that
6 you were incarcerated?

7 A. Not until I was back into the custody of the
8 State of South Carolina.

9 Q. You were not able to participate at the trial,
10 correct?

11 A. No, sir.

12 Q. And at this trial, you realize there was a
13 suppression hearing; is that correct?

14 A. Well, the suppression hearing was prior to the
15 trial. I was present at the suppression hearing.

16 Q. Right. As part of the trial a suppression
17 hearing was held, right?

18 A. Correct.

19 Q. And at that suppression hearing the issue was
20 whether you consented to the search, is that correct?

21 A. Yes, sir.

22 Q. And can you just briefly tell me what happened
23 during that incident? Let me ask you this way, the cops
24 stopped your car, correct?

25 A. Yes.

1 Q. And when the officer stopped your car, it was
2 alleged that the officer said that he smelled cigarettes
3 at one point or marijuana at one point, correct?

4 A. He stopped my car and he said -- first he stopped
5 me saying that I was speeding. At the point where he
6 pulled me over when you're entering into Greenville
7 there's a point there where it tells you that it's time to
8 lower your speed right as you are approaching city limits
9 and that the speed limit will be dropping. But at the
10 point where he pulled me over I hadn't actually entered
11 into city limits yet where the speed limit actually
12 dropped. So he pulled me over in a neutral zone.

13 He hadn't pulled me over yet so the speed
14 limit should have still been 70 miles an hour. He says
15 that I was doing 70 in a 55 mile and hour zone. So when
16 he pulls me over he gets my documentation and proceeds to
17 go back to his vehicle. When he goes back to his vehicle
18 I guess he, you know, ran my information or whatever.
19 Everything was legit, my car was, my registration was
20 fine, my license was fine, all of that.

21 When he came back to the car, he asked me if
22 I could stop to the back of the vehicle but he's not at
23 the driver's side window, he's at the passenger's side
24 window. I told him for what reason is he asking me to
25 step to the back. He said it's just protocol so I said

1 okay.

2 So I step out of the vehicle, he hands me all
3 of my information back. Once he hands me all of my
4 information back, then he asked me if he could search my
5 vehicle. At that point right there I questioned him why
6 does he want to search my vehicle. He says, well, I
7 smelled marijuana when I searched the car. This is what
8 he said. He said he smelled marijuana. So at that point
9 right there I told him I wasn't smoking any marijuana and
10 that no I don't give him permission to search the car. So
11 he proceeds to keep badgering me and badgering me about
12 searching the vehicle.

13 At no point do I ever say it's okay for him
14 to search the vehicle. I may have made a hand gesture
15 like, you know, well you're going to do it anyway but I
16 never actually gave him verbal consent to search. So he
17 goes -- there's no dog on the scene so he goes and he
18 proceeds to search the vehicle.

19 Once he searches the vehicle, I guess he
20 found what he says is cocaine.

21 Q. During the suppression hearing there was actually
22 no testimony from the officer that you gave him explicit
23 permission to search the car?

24 A. No, sir, there wasn't. And at the point where he
25 was driving me back in the squad car there was a point in

1 there when I said you know you didn't smell no marijuana,
2 and then he said, well, maybe I didn't smell marijuana,
3 maybe it was cigarette smoke. And then later on in my
4 trial transcript, I can't exactly remember which page, he
5 goes on and says it may not have been marijuana that he
6 smelled, that it may have been cigarette smoke. So right
7 then and there he killed his probable cause because how
8 can you use probable cause saying that you smell marijuana
9 smoke to search the vehicle, but yet you're not sure if
10 you smelled marijuana or cigarettes. It's a distinct
11 smell. It's two totally different smells.

12 Q. In fact, on Page 17 on the transcript where
13 Mr. Mackenzie is questioning the officers in the
14 suppression hearing on Line 22, Mr. Mackenzie said, "He
15 certainly never gave any written consent or anything like
16 that? No." So the officer agreed that you didn't give
17 any written consent?

18 A. No, I didn't.

19 Q. And that was an issue that was preserved on the
20 transcript. It's on the transcript?

21 A. Yes.

22 Q. And you believe the appellate attorney should
23 have briefed that issue; is that right?

24 A. Yes, sir. As a matter of fact I actually spoke
25 to my appellate attorney and asked her would she raise

1 constitutional violation of the Fourth Amendment. The
2 Fourth Amendment constitutional violation, I asked her
3 would she raise that. She said that she would not. And
4 it was preserved in the transcript, it was preserved to be
5 raised, and she didn't raise that. She raised other
6 issues but I did bring it to her attention?

7 Q. In this case an Anders Brief was not filed; is
8 that correct?

9 A. An Anders Brief was not filed because there were
10 two other issues that were filed.

11 Q. What I'm saying to you is there was not an Anders
12 Brief so there was not a court review of all this issues.

13 A. No, there wasn't.

14 Q. Because there was two issues raised that had
15 merit, the Court only considered those two issues,
16 correct?

17 A. Exactly.

18 Q. And those issues the trial court erred in denying
19 those motions for a new trial and did the trial court err
20 in denying appellate's motion to dismiss the indictment
21 with prejudice pursuant to the Interstate Agreement of
22 Detainer, so those were the only two issues that were
23 raised?

24 A. Those were the two issues that were raised.

25 Q. And those are the only issues that the court

1 considered?

2 A. Yes, sir.

3 Q. So it's your position that your appellate counsel
4 was ineffective for raising that issue because it was an
5 issue with merit?

6 A. Yes, sir. And I also deem Mr. Mackenzie
7 ineffective for not moving for a continuance.

8 Q. We'll get to that. You believe that had your
9 appellate counsel raised that issue you would have won on
10 the issue?

11 A. Yes, sir. It was clear that it was Fourth
12 Amendment Violations. It was clear.

13 Q. You were not told why that issue was not going to
14 be briefed; is that correct.

15 A. She said in her determination, she would not
16 raise that issue due to the fact being that she feels like
17 the courts would rule against it anyway but that's not her
18 determination to make.

19 Q. At the time of the trial as you already testified
20 you were incarcerated in the State of North Carolina; is
21 that correct?

22 A. Yes, sir.

23 Q. And at the beginning of this trial, one of the
24 issues with Mr. Mackenzie is you believe he should have
25 moved the court for a continuance.

1 A. That's right.

2 Q. Would you tell the Court why you believe that?

3 A. Because well, one, he didn't know my whereabouts.
4 He did not speak to me a day or two prior to the trial. I
5 got incarcerated on a Monday, the trial was convened on a
6 Tuesday. He did not speak to me prior to the trial so he
7 did not know my whereabouts. And just to allow the trial
8 to be proceeded without requesting a continuance in order
9 to find out the whereabouts of your client, I felt as if
10 that was ineffective.

11 Q. Do you believe that if Mr. Mackenzie had, and I'm
12 going to outline to you on Page 8 as to what the
13 transcript reflects in pretrial, it says and this is
14 Mr. Fretwell, "Your Honor, at this time I just move at
15 this time that the defendant be tried in his absence.

16 "THE COURT: Mr. Mackenzie, do you have anything
17 to present?

18 "MR. MACKENZIE: No, sir, but I object to that
19 motion."

20 It is your position that Mr. Mackenzie should
21 have went farther than that?

22 A. Yes, sir. I do remember reading that in the
23 transcript to where he objected to me being tried in my
24 absence but he never moved for a continuance to find out
25 my whereabouts, to ask for more time to find out the

1 whereabouts of his client. He objected to me being tried
2 in my absence, but he never asked for a continuance.

3 Q. Also you believe that had he raised that issue it
4 would have been preserved for appellate counsel, is that
5 correct?

6 A. Yes, sir. And it may have granted -- the
7 continuance may have been granted and he may have found
8 out my whereabouts and I would have been able to be
9 present at my trial and possibly have been able to have
10 taken a plea instead of having a sealed sentence of 30
11 years waiting for me when they arrested me.

12 Q. Let's get to the sentencing part, do you believe
13 that Mr. Mackenzie should have asked the judge for the
14 minimum sentence?

15 A. Yes, sir. At the time of the sentencing we had
16 spoke about it. I had just done three years of
17 incarceration in the State of North Carolina before I was
18 extradited to the State of South Carolina. I had just
19 done three years prior. Now, when he came to see me in
20 the county jail, we spoke on it. I said I would like him
21 to request the three years that I had just done and I also
22 would like him to request that the judge drops the
23 sentence from the maximum, which was 30, to the minimum
24 which would have been 25, you know. And he agreed that we
25 would do that.

1 Once we actually got in front of the judge,
2 Mr. Mackenzie asked for the three years which was granted
3 but it was never requested that the judge show leniency
4 and give me the 25 instead of the 30. And when I asked
5 him, Mr. Mackenzie tells me just be happy that you go the
6 three taken off don't worry about that. I don't know the
7 reason but maybe to him five years of incarceration may
8 not mean nothing to him but it means an awful lot of me.

9 Q. And we talked about you being tried in your
10 absence. Mr. Mackenzie did make a motion to dismiss based
11 on Interstate Compact and that type of stuff. And do you
12 recall that on Page 4 of the motion transcript in front of
13 Judge Few that Judge Few made a determination on Page 4,
14 Line 23 through 25, that, in fact, you had voluntarily
15 left the state and that he was denying that motion -- that
16 was the part of basis that Judge Few determined that you
17 left the state in violation of your bond; is that correct?

18 A. Yes, sir, it was. But the courts were fully
19 aware of my residence. On the condition of the bond, when
20 I was granted the bond, the bondsman and everyone was
21 fully aware that I was returning to my residence in North
22 Carolina. That was the residence that I gave them in
23 order to be released.

24 Q. And as you refer to the transcript on Page 9 and
25 Page 10 of Judge Few's transcript, Mr. Fretwell says --

1 the Court says, "And the address listed on the card bond
2 was what?" And Mr. Fretwell says, "740 Clarence McKeith
3 Road in the City of Gulf, North Carolina, 27256." Was
4 that your address at the time?

5 A. Yes, sir, it was.

6 Q. So at that point the prosecutor's office had
7 acknowledged that you would be living out of State and
8 that's where they sent you notice; is that correct?

9 A. Yes, sir, and as a matter of fact I was contacted
10 to appear in court or for meetings with the solicitor --
11 with bond cards that were sent to that address on more
12 than one occasion.

13 Q. So the Solicitor's Office never filed a motion to
14 your bond violated because of your address?

15 A. No, sir, they didn't.

16 Q. So that statement that it was a condition of your
17 bond, is that true, to your knowledge, the condition of
18 your bond is to stay in the State of South Carolina?

19 A. No, sir, it wasn't. If that was the case I was
20 out on bond, if I'm not mistaken, three years prior to the
21 trial even being set.

22 Q. And do you believe that Mr. Mackenzie should have
23 brought that to the Court's attention that you resided in
24 the State of North Carolina and the Solicitor's Office
25 acknowledged it?

1 A. In all honesty, he did. In all honesty did raise
2 that. He did acknowledge to the Court that that was the
3 address that I was living at and the address that I was
4 contacted at whenever it was time for me to come to court.
5 He did acknowledge that.

6 Q. You believe the Court erred in that ruling; is
7 that correct?

8 A. Yes, sir.

9 Q. One of the issues you had in this case is that
10 the drugs that were supposedly seized were not tested by
11 SLED; is that correct?

12 A. Yes, sir.

13 Q. Who were they tested by?

14 A. They were tested by the DEA, FBI agent, sir.

15 Q. And it is your position that SLED had to be
16 involved with the testing; is that correct?

17 A. Yes, sir. To my understanding under SC Code
18 23-315 it is under the jurisdiction of SLED to test all
19 drugs in the State of South Carolina. My drugs, as a
20 matter of fact, was taken, seized, turned over to the DEA
21 and shipped off to Miami in order to be tested. I'm not
22 understanding how my drugs was seized in the State of
23 South Carolina was sent all the way to Miami in order to
24 be tested. That's another reason I wanted time to look
25 over the chain of custody.

1 Q. And if the drugs, as it is alleged in the
2 transcript and the documentation, they were tested in the
3 State of Florida, it is your position that the drugs
4 should have been suppressed based on the fact that SLED
5 had no involvement in the testing?

6 A. Yes, sir. Also, under my judgement ---

7 THE COURT: Mr. Richey, do you have a case to
8 support that position, sir?

9 MR. RICHEY: No, sir.

10 THE COURT: Well, I think you'd better be
11 careful what you're proffering to the Court because if you
12 can't support that, you know and I know that's not correct
13 unless you got a case that says so. You are an officer of
14 the court and he's not. You have to make the call as to
15 what you present.

16 MR. RICHEY: Yes, sir.

17 THE COURT: Thank you, sir. Just keep that
18 in mind.

19 MR. RICHEY: Yes, sir.

20 BY MR. RICHEY:

21 Q. So that's -- in terms of the chain of custody,
22 that's the issue that you're raising before the Court?

23 A. Yes, sir.

24 Q. And those are the grounds that you have alleged
25 against the defendant and your appellate counsel, is that

1 correct?

2 A. Yes, sir. It is my opinion that Mr. Mackenzie
3 should have noticed that the drugs that another agency
4 tested the drugs and they were tested in another state,
5 but Mr. Mackenzie never objected to that issue. He never
6 objected to that. Nor at the trial there was a Form 7
7 which was submitted at the trial. There was a Form 7 and
8 it's a federal document. It's not the Rule 6 or the drug
9 analysis. It's called a Form 7 which was, and it says it
10 in my trial transcript, that was submitted at the trial.
11 I feel Mr. Mackenzie should have objected to that form
12 even being submitted even into evidence because he was
13 given this form prior to the trial. It should have been
14 submitted to him prior to.

15 It was presented at the trial. The Form 7
16 was actually admitted into evidence on the day of the
17 trial. It's in the transcript.

18 Q. Thank you. Answer any questions Ms. Ratigan may
19 have for you.

20 MS. RATIGAN: I have no questions for
21 Mr. Abney, Judge.

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

23 MR. RICHEY: We call Andrew Mackenzie to the
24 stand.

25 THE CLERK: Mr. Mackenzie, please place your

1 left hand on the Bible and raise your right hand.

2 ANDREW MACKENZIE, having been duly sworn,
3 testified as follows:

4 Thank you. You may be seated. Please state
5 your name for the record.

6 THE WITNESS: Andrew Mackenzie.

7 DIRECT EXAMINATION

8 BY MR. RICHEY:

9 Q. Mr. Mackenzie, do you recall representing
10 Mr. Abney?

11 A. Yes.

12 Q. And did you represent him on drug cases?

13 A. A drug case.

14 Q. And I think you've heard the testimony here
15 today. Was there an issue as to the search of his vehicle
16 in his car?

17 A. Definitely.

18 Q. You've heard the issue being outlined that there
19 was never any explicit consent given by him. Were you
20 aware of any consent he gave to search his case, any overt
21 consent?

22 A. I don't believe he did.

23 Q. You went through the suppression hearing on this
24 motion, correct?

25 A. Yes.

1 Q. And do you believe that that was an issue that
2 should have been appealed or had merit to be appealed?

3 A. Yes. It was actually two issues, whether there
4 was probable cause -- that was the main issue if there was
5 probable cause to search and if there wasn't, did he
6 consent. Yes, I believe those were the central issues in
7 the case.

8 Q. And essentially in this case once the drugs were
9 admitted into trial then it was a tough trial to win,
10 correct?

11 A. Yes. The trial was really the suppression
12 hearing. That was going to determine the outcome of the
13 case.

14 Q. So with that being the central issue and you did
15 preserve that issue, correct?

16 A. I believe I did.

17 Q. And you do believe it was reasonable for him to
18 expect that issue to be appealed, would that be reasonable
19 for him?

20 A. Yes, I believe so.

21 Q. As to the issue of the continuance, I read the
22 part out in the transcript where you objected to him being
23 tried in his absence could you tell the Court anything
24 else that you could have done at that point?

25 A. I heard Horace's testimony about that. I

1 objected to him being tried in his absence. I think I had
2 told the Court that he had always been there before and I
3 did not know he wasn't there. I was a little surprised
4 that he was not there because he had always been there
5 before so I objected to him being tried in his absence. I
6 did not use the words I request a continuance. I thought
7 that implied that I was doing that be objecting to the
8 trial in absence. He wasn't there and I wanted to go
9 forward so I thought I was in effect asking for a
10 continuance?

11 Q. Do you believe that now what you asked for an
12 objected to, do you think that had any basis for appeal in
13 it?

14 A. Yes, and I thought that was raised on appeal.

15 Q. No, there was two issues. The issues that was
16 raised on appeal was the dismissal and Interstate Compact.
17 My question is when the judge said he was going to be
18 tried in his absence and you said I object to it, do you
19 believe if you had asked for a continuance would that have
20 been grounds for an appeal just asking for a continuance.

21 A. The fact that he was tried in his absence and
22 there was an objection to it and the whole issue of him
23 being tried in his absence, yes, I think that should have
24 been appealed.

25 Q. Mr. Mackenzie, are you familiar with the Form 7

1 that was admitted in this case? This document?

2 A. If I could look at it. I've got it right here I
3 think.

4 Q. Do you have the document?

5 A. Yes. When this --

6 THE COURT: Let's mark it. Let's make a copy
7 of it. Does anyone have an objection of having a copy of
8 this document and having it marked?

9 MS. RATIGAN: No, Your Honor.

10 MR. RICHEY: No, Your Honor.

11 (Form 7 marked as Applicant's Exhibit No. 1
12 for identification was admitted into evidence.)

13 BY MR. RICHEY:

14 Q. Mr. Mackenzie, I'm handing you up a copy of
15 what's been marked as Applicant's 1. Can you tell me at
16 what point in the trial you were provided with this drug
17 analysis?

18 A. I can't say for certain but I think this was
19 provided to us at pretrial.

20 Q. Right. Do you know the timing that it was
21 provided to you?

22 A. Before the trial?

23 Q. Yes. Was it a week or do you have any idea?

24 A. I honestly don't remember.

25 Q. Do you remember going over this drug information

1 with Mr. Abney?

2 A. I know that I would have mailed him a copy of it.
3 I can't remember if I actually went over it. And then he
4 wasn't there.

5 Q. Thank you. Answer any questions from the
6 Attorney General.

7 THE COURT: Ms. Ratigan.

8 CROSS-EXAMINATION

9 BY MS. RATIGAN:

10 Q. Mr. Mackenzie, were you appointed in this case or
11 were you retained?

12 A. I was retained.

13 Q. Did you file the usual Brady and Rule 5 motions?

14 A. Yes.

15 Q. Did you receive discovery from the State?

16 A. Yes.

17 Q. Did you review those documents with your client?

18 A. Yes.

19 Q. Did you do it in person or did you mail him a
20 copy, do you recall?

21 A. I definitely mailed him a copy. I think we
22 probably met in person and went over them. He came to my
23 office a few times.

24 Q. So you had more than one meeting with Mr. Abney
25 prior to trial?

1 A. Definitely.

2 Q. Did you discuss with him his version of what
3 happened during the traffic stop?

4 A. Very much.

5 Q. And I believe you testified that at the
6 suppression hearing you argued both no probable cause and
7 that there was no consent?

8 A. Really probably cause. I was prepared to argue
9 consent but Judge Pyle said there was probable cause so we
10 didn't even reach the consent issue.

11 Q. But you brought up the consent issue at the
12 trial; is that correct?

13 A. I think I probably did.

14 Q. Did you explain to Mr. Abney the impact that the
15 denial of the suppression issue would have in this case?

16 A. Yes.

17 Q. Did you tell him your opinion of how the trial
18 would go after the denial at that suppression hearing?

19 A. Yes.

20 Q. Do you recall why the drugs in this case were
21 tested by the DEA?

22 A. I assumed that initially the trooper was thinking
23 that the case would go federal because of the amount and
24 the fact that it was coming in from out-of-state and
25 things like that, but the feds didn't take it.

1 Q. And you were provided full chain of custody forms
2 as part of discovery; is that correct?

3 A. I believe I was.

4 Q. Do you recall when it was that Mr. Abney
5 explained where he was during the trial?

6 A. It wasn't -- the trial was in December of 2002.
7 It wasn't until May of 2003 that his girlfriend or a
8 family member called and told me that he had been in jail,
9 that he had been arrested in North Carolina the day before
10 the trial and got out a couple of days later after the
11 trial was over. Then he was arrested again in, I believe
12 in April of 2003, and they called me in May and told me
13 what happened. So then I took steps to verify all that to
14 get proof of all that and that's when I filed a motion for
15 retrial.

16 Q. So obviously you had to wait for him to serve out
17 his North Carolina sentence before y'all could go forward
18 on the information?

19 A. Yeah, we tried to invoke the Interstate Agreement
20 on Detainers but we had a really difficult time with that.

21 Q. Now, when he did come back to South Carolina for
22 sentencing, did you ever tell him at the sentencing
23 hearing that you would ask for the mandatory minimum?

24 A. I don't recall. I may have. I honestly don't
25 remember. I noticed that when I was reading back through

1 this transcript on this page yesterday I think what I
2 wanted to do was to focus on getting him as much credit
3 for time served as we could and I think we did well on
4 that. I think he had a good argument as far as motion for
5 a new trial and good argument on the Interstate Agreement
6 for Detainers and I think we decided that's where he
7 needed to make his argument. There was a large weight of
8 drugs and he had a prior record for drugs and not
9 appearing in court, so I think I decided to focus on
10 getting credit for time served and those motions.

11 MS. RATIGAN: That's all I have, Your Honor.

12 THE COURT: Redirect?

13 MR. RICHEY: No, Your Honor.

14 THE COURT: Any additional witnesses,
15 Mr. Richey?

16 MR. RICHEY: No, sir.

17 THE COURT: State have any witnesses?

18 MS. RATIGAN: The State would rest on the
19 record and Mr. Mackenzie's testimony.

20 THE COURT: Thank you, very much.

21 I'll be happy to hear from you, Mr. Richey.

22 MR. RICHEY: I would ask the Court to grant
23 Mr. Abney post conviction relief. I think the central
24 issue is an appellate counsel issue. The transcript
25 reflects clearly an issue of whether he consented to the

1 search.

2 In light of the totality of the case as
3 Mr. Mackenzie testified to and I think as the Court will
4 be aware the suppression here was the trial. The drugs
5 come in, it's done, and I believe it's reasonable for
6 appellate counsel to appeal that issue. One, he did not
7 have an Anders appeal so the Court did not do a full
8 review and so the Court focused on two issues. So I think
9 it's reasonable to ask for the appellate counsel to appeal
10 that issue. It's our position appellate counsel was
11 ineffective for doing so.

12 I think Mr. Abney eloquently testified that
13 he had talked to appellate counsel about doing that and it
14 was not done, and I just repeat that in totality looking
15 at the case that would be the main issue that is
16 reasonable for a lawyer doing an appeal in this case that
17 the suppression hearing would be one that they would look
18 to first.

19 Also, Your Honor, as to Mr. Mackenzie's
20 request for a continuance, I think he did object to it
21 being tried in his absence. In terms of asking for a
22 continuance and using those words that may have assisted
23 Mr. Abney.

24 As for asking for the minimum sentence,
25 Mr. Abney testified that he expected the lawyer to ask for

1 that, but I think the main issue here I think for the
2 Court to address is I believe this gentleman should have
3 the right to have the Court of Appeals or the Supreme
4 Court review the issue of the search. Thank you.

5 THE COURT: Thank you.

6 MS. RATIGAN: If it please the Court, very
7 briefly, I'll start off with ineffective assistance of
8 counsel. As Your Honor knows appellate counsel relies on
9 their experience and discretion in choosing what the
10 brief. The applicant did not subpoena appellate counsel
11 to come here today and explain why issues were raised over
12 other issues so we argue that he hasn't met his burden of
13 proof.

14 Furthermore, there's overwhelming evidence of
15 guilty. Mr. Abney was arrested with over 400 grams of
16 cocaine in his vehicle.

17 When it comes to trial counsel, Mr. Mackenzie
18 made all the proper motions and objections related to the
19 Fourth Amendment search and seizure issues in both the
20 suppression hearing and he renewed those motions at trial.
21 He made the consent motion specifically at trial before
22 the jury.

23 In terms of moving for a continuance, he did
24 object to the trial going forward in his absence and I
25 think that's correct that that's sort of an applied

1 request for continuance and Judge Pyle simply denied it
2 and they went forward with the trial that day in that he
3 did receive proper notice.

4 Regarding the asking for the maximum minimum
5 at sentencing, Mr. Mackenzie testified his trial strategy
6 was to try and get him three years time served credit for
7 the North Carolina incarceration which he was successful
8 at and he thought that the energy should be better made
9 focusing for his motion for a new trial argument in his
10 motion about the Interstate Detainers Agreement.

11 Finally, the issue about the drugs not being
12 tested by SLED, I think Mr. Mackenzie testified due to the
13 weight it likely was initially thought to be a federal
14 case. Mr. Abney has failed to prove there was any kind of
15 defect in the chain of custody. Mr. Mackenzie was well
16 aware of the chain and had no reason to object at trial.

17 We simply argue that he hasn't met either
18 prong under Stricklen.

19 THE COURT: Reply.

20 MR. RICHEY: In terms of appellate counsel,
21 Your Honor, I think in reviewing this record I think the
22 Court can look at this record and look at this case and
23 determine that any strategy that a lawyer would have in
24 this case would be superseded by the transcript in the
25 case itself. Because in this type of case, the search is

1 the who case so there's no strategy that appellate counsel
2 could tell this Court when they didn't appeal the whole
3 case. It would be like her not doing the appeal almost.
4 And that's our position.

5 THE COURT: Thank you. I agree. This case
6 is clearly a case to anybody that's handled one
7 understands if you have an issue on the search that's
8 where the case is one and loss. Clearly counsel did
9 everything in his power to prevail on that. He presented
10 succinctly the issues about the search, preserved the
11 record, protected the applicant in every respect even
12 throughout the trial.

13 I appreciate the applicant's position that he
14 should have continued it so he could find it out, but
15 people need to understand that somewhere along they line
16 they have a responsibility to keep the lawyer advised too.
17 It's not just a one way street, and there's an equal
18 burden. I didn't hear one word about I tried to get him,
19 I couldn't, they wouldn't let me call or anything of that
20 nature. Counsel is not supposed to be clairvoyant, I
21 don't believe, and presume that he's incarcerated
22 somewhere.

23 But the bottom line is anyone who sits on
24 this side of the bench knows that when that case is
25 called, the judge is going to make that call. I think

1 that's exactly what he said, I object, Your Honor, which
2 means go to your next case, I'm protecting my client, I
3 don't think this ought to be a trial in absence, it's
4 inappropriate. You don't need to make a motion for
5 continuance. Continuance is typically done before the
6 case is called anyway, but in this case the solicitor made
7 an initial threshold decision I'm going to try him in his
8 absence. And then it drops to the counsel, I object to
9 that and my client needs to be protected. I think he did
10 everything properly in the trial. I can't see anything he
11 did that was ineffective. I think he did a superb job
12 even after the fact of pursuing it, credit to the
13 profession in every respect. That's a great example of
14 how to deal with a case when the drugs and a suppression
15 hearing has been lost.

16 I agree wholeheartedly if there is ever an
17 issue where there is no strategy -- I can understand if it
18 hadn't been preserved but when counsel goes to the lengths
19 that Mr. Mackenzie did to preserve it to not go ahead to
20 brief it, that doesn't make any sense to me. I don't care
21 whether it's the least effective issue.

22 I'll give you an analogy. We here summary
23 judgment motions argued all the time on the civil side.
24 When you got the fifth or sixth you figure that's not the
25 strongest position for the summary judgment being granted

1 but they argue it because it might be what the court hangs
2 its hat on. A lawyer makes an assessment of what's the
3 essential and the strongest issues, but I don't at that
4 stage you rule out what's been protected as critical as
5 this was. There's no question about that.

6 Rather or not Judge Pyle was correct, that's
7 a discretionary ruling, but I think it should have been
8 addressed and appellate counsel was ineffective. Who
9 knows, maybe the Appellate Court may reverse it, may send
10 it back, but I think he's entitled to have that reviewed.

11 So you prevail on that aspect of it.
12 Mr. Richey if you would prepare an order to that effect.

13 MS. RATIGAN: Your Honor, I would note just
14 for Mr. Abney just so he's not confused, the actual remedy
15 for finding ineffective assistance of appellate counsel is
16 a new trial not a new appeal.

17 THE COURT: It is?

18 MS. RATIGAN: Yes, sir. Like I said just so
19 he's on notice.

20 THE COURT: I apologize for my misstatement
21 but I think he's entitled to it so we'll go from there.

22 Mr. Abney, they have a right of appeal. Do
23 you understand that?

24 MR. ABNEY: Yes, sir. Thank you.

25 THE COURT: Thank you. And thank you,

1 Ms. Ratigan, for calling that to my attention.

2 ---END OF TRANSCRIPT RECORD---

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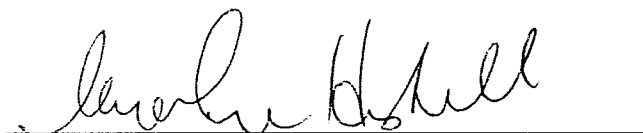
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I, the undersigned Caroline Hiskell, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas, Greenville, South Carolina on the 30th day of October, 2012.

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



Caroline Hiskell

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2011-CP-23-382
COUNTY OF GREENVILLE	)	
	)	
Horace Abney, Jr.,	)	
S.C.D.C. No. 316024,	)	
	)	
Applicant,	)	
	)	ORDER GRANTING POST-
v.	)	CONVICTION RELIEF
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

FILED-CLERK OF COURT
GREENVILLE CO S.C.
PAUL B. MACKENZIE
2013 JAN 14 AM 9:10

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 19, 2011. The Respondent made its return on May 26, 2011. An evidentiary hearing into the matter was convened on October 30, 2012 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Rodney W. Richey, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying were: (1) the Applicant's plea attorney, Andrew R. Mackenzie, Esquire. The Court had before it the records of the Greenville County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the trial transcript, and the Respondent's return.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the June 2000 term of the Greenville County Grand Jury for trafficking cocaine (2000-GS-23-4624). He was represented by Andrew R. Mackenzie, Esquire.

emo/1

On December 11, 2002, the Applicant was tried in absentia and convicted. The Honorable C. Victor Pyle, Jr. sealed his sentence. On June 15, 2006, the Applicant appeared before the Honorable John C. Few to be sentenced. The Applicant received a sentence of thirty (30) years imprisonment. On the same date, Judge Few denied the Applicant's motion for a new trial. The Applicant appealed his conviction and sentence.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel:
 - a. Failure to seek a continuance.
2. Ineffective assistance of appellant counsel:
 - a. Failed to raise an issue requested by Applicant.
3. Subject matter jurisdiction.
4. Violation of constitutional rights:
 - a. Violation of Forth, Fifth, Sixth, and Fourteenth Amendments.

The Applicant, through counsel, submitted an amendment to his application dated July 1, 2011 and filed July 8, 2011, in which he alleged the following:

1. Ineffective assistance of counsel:
 - a. Failed to conscientiously discharge professional responsibilities.
 - b. Failed to effectively challenge search and seizure.
 - c. Failed to act as a diligent and conscientious advocate.
 - d. Failed to give complete loyalty.
 - e. Did not have Applicant's best interest in mind.
 - f. Failed to serve the cause in good faith.
 - g. Neglected necessary investigations and preparation.
 - h. Did not do necessary factual investigations.
 - i. Did not do necessary legal research.
 - j. Did not conscientiously gather information to protect rights.
 - k. Did not try to have the case settled in a manner that would have been to my best advantage.
 - l. Did not advise me of all my rights or take any of the actions that

- were necessary to protect and preserve them.
- m. Never properly ascertained whether or not I actually understood or comprehended all of the issues involved in the case.
 - n. Never properly consulted with me or kept me informed.
 - o. Never explained to me or discussed with me any of the elements.
 - p. Never made any attempt to ascertain whether or not actually knew the elements of the crime charge or whether or not I understood exactly what "criminal element" meant.
 - q. Never explained or discussed with me how the elements of the crime charged and the evidence that the prosecution planned to introduce into evidence against me related to one another and did not discuss how the sentencing would be done especially as it related to the elements of the crime as in State v. Boyd.
 - r. Never informed me of any of the defenses that were available to me.
 - s. Never intended to offer any defense to the court on my behalf.
 - t. Never explained to me or discussed with me any kind of defense strategy.
 - u. Never explained to me or discussed with me any of the tactical choices that were made or planned to be made.
 - v. Dictated to me exactly how my case was going to be handled and offered no alternative options.
 - w. Failed to properly acquaint herself with the law and facts surrounding my case and, as a result, there was a very serious error in the assessment of both the law and the facts.
 - x. No defense at all was put in issue for me during the Court proceedings.
 - y. Did not subject the prosecution's case to any adversarial testing.
 - z. Failed to oppose the prosecution's case with any adversarial litigation.
 - aa. Failed to function as the government's adversary in any sense of the word.
 - bb. Failed to pursue any of the legal recourse that was available.
 - cc. Failed to function as the counsel that the Constitution's Sixth Amendment guarantees.
 - dd. Failed to call alibi witnesses on my behalf.
 - ee. Failed to appeal my case.

III.

The Applicant asserts his appellate attorney provided ineffective assistance of counsel below the standard of “reasonableness” within professional norms” for an appellate attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984); Butler v State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. at 2065). Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v State, 325 S.C. 182, 186, 480

S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Appellate Counsel

At the PCR hearing, the Applicant proceeded upon the allegation that he received ineffective assistance of appellant counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of appellant counsel, he must show both: (1) that his appellant counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

On September 24, 2011, a hearing was held in the Applicant's case. This hearing was held on the Applicant's motion to suppress drug evidence that was seized during a traffic stop. The Applicant's trial counsel argued this motion before Judge Pyle. At the conclusion

of this hearing, Judge Pyle ruled that the evidence would not be suppressed. At the Post Conviction Relief hearing, the Applicant testified that he requested the appellate counsel brief the issue that related to the denial of the suppression motion. Applicant testified that he believed that this was an important issue and that it had merit. He further testified that due to the nature of the case the drug evidence was critical for the prosecution.

The trial counsel testified that he believed the suppression motion had merit. He believed this issue should have been briefed and appealed by appellate counsel. Trial counsel stated he did not believe that the officer had Applicant's permission to search his car during the traffic stop. Moreover, he testified the drug evidence was critical in prosecuting the case.

This Court finds the Applicant met his burden of proving appellate counsel was ineffective. The Court finds that the prosecution of the Applicant hinged on the admissibility of the drugs recovered during the traffic stop. If this evidence was suppressed it would have greatly affected the State's efforts to prosecute the Applicant. Moreover, the Court finds this issue was properly preserved by trial counsel. This Court finds that appellate counsel's failure to brief the suppression issue prejudiced the Applicant.

Accordingly, this Court finds the Applicant met his burden of proving appellate counsel's performance was deficient under the first prong of the Strickland test. This Court also finds the Applicant has proven the second prong of Strickland - that he was prejudiced by counsel's performance. Accordingly, this Court finds the Applicant has met his burden of proving appellate counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

Ineffective Assistance of Plea Counsel

The Applicant alleges that trial counsel did not effectively represent him. The Applicant makes four assertions. (1) Trial Counsel should have moved for a continuance at the start of trial. (2) Trial counsel should have asked for the minimum sentence (25) at the time of sentencing. (3) Trial counsel should have argued that all parties knew prior to his trial that he was leaving the State thus it was not an issue of him voluntarily leaving the state before trial. (4) Trial counsel should have requested that the drug be suppressed because they were tested by the DEA instead of SLED and the State did not have the form 7 document before trial.

The Court heard the testimony, reviewed the evidence and reviewed the court file. The Court finds that the Applicant's allegations against trial counsel are without merit. The Court finds that trial counsel went over and beyond the standard as set for in Strickland. Therefore, the Court finds that the Applicant has not met his burden for ineffective assistance of counsel as to trial counsel.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

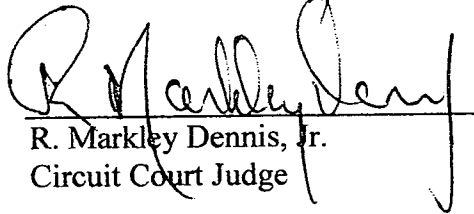
Based on all the foregoing, this Court finds and concludes the Applicant has met his burden of proving appellate counsel did not provide effective representation under the Strickland v. Washington standard. Therefore, the Applicant's convictions are vacated and

remanded for a new trial.

IT IS THEREFORE ORDERED:

1. That this application for post-conviction relief is granted; and
2. That the Applicant's convictions are vacated and remanded for a new trial.

AND IT IS SO ORDERED this 9th day of January, 2013.


R. Markley Dennis, Jr.
Circuit Court Judge

Markley Dennis South Carolina

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMONS PLEAS
CASE NO: 2011-CP-23-382

COUNTY OF GREENVILLE)

Horace Abney, Jr. SCDC# 316024,)

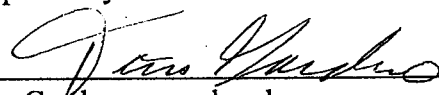
AFFIDAVIT OF SERVICE

vs.)

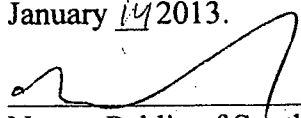
THE STATE OF SOUTH CAROLINA)

I certify that I have served the Order Granting PCR on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on January 14 2013, addressed to their attorney of record, Karen Ratigan, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Respectfully submitted:


 Tina Garduno, paralegal
 Richey and Richey, P.A.
 Post Office Box 10916
 Greenville, South Carolina 29603

Sworn to before me on
 January 14 2013.


 Notary Public of South Carolina

My Commission Expires: 5-18-14

STATE OF SOUTH CAROLINA)

IN THE FAMILY COURT

COUNTY OF GREENVILLE)

13th JUDICIAL CIRCUIT

Horace Abney, Jr. SCDC 317177)

MOTION AND ORDER INFORMATION

Plaintiff,)

FORM AND COVERSHEET

vs.)

State)

Defendant.)

Docket No. 2011-CP-23-382

FILED-CLERK OF COURT
GREENVILLE CO SC
PAUL B. HARRIS
2013 JAN 14 AM 9:10

Plaintiff's Attorney:

Rodney Richey, Bar No. 9506

Address:

PO Box 10916 Greenville, SC 29603

Phone: 864-467-0503 Fax 864-467-0646

E-mail: rodney@richeyandrichey.com Other: _____

Defendant's Attorney:

Karen Ratigan, Bar No. _____

Address:

PO Box 11549, Columbia, SC 29211

Phone: 803-734-4042 Fax 803-734-4113

E-mail: kratigan@scag.gov Other: _____

☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____

Estimated Time Needed: _____

Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

Date submitted 1-4-13

SECTION III: Motion Fee

☐ PAID - AMOUNT: \$ _____☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support☐ Domestic Abuse or Abuse and Neglect☐ Indigent Status ☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act ☒ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)☒ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.☐ Other: _____

JUDGE CODE _____

Date: _____

Judge Signature: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____☐ CONTESTED - AMOUNT DUE: \$ _____

Custodial Parent (if applicable): _____

STATE OF SOUTH CAROLINA

COUNTY OF Greenville

STATE VS.

ABNEY, HORACE JR

AKA:

Race: B Sex: M Age: 26

DOB: [REDACTED] SS#: [REDACTED]

Address: [REDACTED]
GULF, NC 27256

DL#: [REDACTED] SID#: [REDACTED]

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:

2000GS2304624

A/W#: G160007

Date of Offense: 01-10-2000

S.C. Code § : 44-53-0370(e)(2)(

CDR Code #: 0281

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was
TO: TRAFFICKING IN COCAINE, 400 GRAMS OR MORE

in violation of § 44-53-0370(e)(2)(of the S.C. Code of Laws, bearing CDR Code # 0281

☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45The charge is: ☒ As Indicted. ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor:

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed years(and/or to pay a fine of \$ 200,000; 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 formonths/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☐ The Defendant is to be given credit for Since July 21, 2003 days/months/jail time.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered
Total: \$ plus 20% fee \$

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:	\$ 300,000
§ 14-1-206 - Assessments 100 %	\$ 215,000
§ 14-1-211(A)(1) (Surcharge)	\$ 100.00
§ 14-1-211(A)(2) (Surcharge)	\$
§ 56-5-2995 (DUI Assessment)	\$
3% to County (if paid in installments)	\$
TOTAL	\$

Paul B. Wicksimer
Clerk of Court/Deputy Clerk

Court Reporter: H. Jenkins

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc Rehab. or Job Corps

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ beginning

\$ paid to Public Defender Fund.

Other:

PRESIDING JUDGE

Judge Code: 1-01714

Sentence Date: 6-15-03

SCCA217 (1/2001)

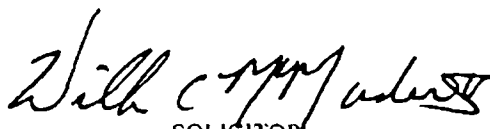
STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
TRAFFICKING COCAINE

At a Court of General Sessions, convened on JUNE 27, 2000 the Grand
Jurors of Greenville County present upon their oath:

That HORACE ABNEY JR. did in Greenville County, on or about the 10th day of January, 2000,
knowingly sell, manufacture, deliver or bring into the State of South Carolina, or did knowingly provide
financial assistance or otherwise aid, abet or conspire to sell, manufacture, deliver or bring into the State
or was knowingly in actual or constructive possession of more than 400 grams of Cocaine. This is in
violation of §44-53-370 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 case made and
provided.


SOLICITOR

DOCKET NO. 2000-GS-23-04624

WITNESSES

The State of South Carolina

County of Greenville

ROBINSON

SCHIP

01/10/00

COURT OF GENERAL SESSIONS

JUNE TERM 2000

THE STATE

vs.

HORACE ABNEY JR.

ARREST WARRANT NUMBER

G-160007

ACTION OF GRAND JURY

TRUE BILL

High & Low

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Guilty

Indictment for

0281

TRAFFICKING COCAINE

VIOLATION § 44-53-370

12/11/02

Date:

Arg. S.
Foreperson of Petit Jury

STATE OF SOUTH CAROLINA)
County/ ☐ Municipality of)
Greenville)
Personally appeared before me the affiant D E Robinson who
being duly sworn deposes and says that defendant Horace Abney Jr.
did within this county and state on 1-10-2000 violate the criminal laws of the
State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Greenville)
in the following particulars:

AFFIDAVIT

TRAFFICKING COCAINE

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts: The defendant did possess knowingly more than 20 grams of cocaine, a schedule II controlled substance under S.C. Law, without legal authority to so possess the substance.

D. E. Robinson

Sworn to and subscribed before me on 1-10-2000)
D. E. Robinson)
Signature of Issuing Judge (t-6.))
Signature of Affiant D. E. Robinson)
Affiant's Address 100 Executive Center Suite A1)
Affiant's Telephone Columbia SC 29210)
803-896-5528)

STATE OF SOUTH CAROLINA)
County/ ☐ Municipality of)
Greenville)
It appearing from the above affidavit that there are reasonable grounds to believe that on 1-10-2000 defendant Horace Abney Jr. did violate the criminal laws of the State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Greenville) as set forth below:

TRAFFICKING COCAINE

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

D. E. Robinson)
Judge's Address (L.S.))
Signature of Issuing Judge)
Judge Code: 544)
Issuing Court: ☐ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ARREST WARRANT 6667
G-160007 1-19-00
STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of Greenville

THE STATE
against

Horace Abney Jr.
Address: [REDACTED]
City: Greenville State: SC Zip: 29605
DL State: NC DL #: [REDACTED] Height: 6'2" Weight: 230
DOB: [REDACTED] Agency ORI #: SC01
Prosecuting Agency: SC01
Prosecuting Officer: Robinson
Offense: Trafficking Cocaine
Code/Ordinance Sec. 44-53-370

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality of
is to be arrested and brought before me to be dealt with according to law.

Signature of Judge (L.S.)

RETURN
A copy of this arrest warrant was delivered to defendant [REDACTED] on 1-10-2000 at 4:00 PM by Horace Abney Jr.
Signature of Constable/Law Enforcement Officer [REDACTED]

RETURN WARRANT TO:

Denenberg

CMTI330D SCDC OFFENDER MANAGEMENT SYSTEM 02/08/11
 OMCOMITA RELEASE DATE SCREEN C040481
 SCDC# > 316024 LOC: PERRY
 ABNEY JR, HORACE - SCDC CLASSIFICATION... VIOLENT
 OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL REGISTRY... N
 SEXUAL PREDATOR...: NOT APP
 DNA STATUS...: COMPLETED
 GPS REQUIREMENT...: N
 PREA DECISION...:
 CURRENT SENTENCE: 030-00-000 CONSECUTIVE SENTENCE ... N
 030-00-000 CURRENT SENT START DATE: 07/23/2003
 PROJECTED COMPLETION DATES
 MAXOUT DATE: 01/14/2029 CURRENT EWC ..: 3 F 5
 YOA SIX YEAR DATE: / / CURRENT EEC ..: NOT CURRENTLY EARNING EEC
 INITIAL PAROLE DATE: 00/00/0000 NEXT PAROLE HEARING DATE: 00/00/0000

 TOTAL GT DAYS EARNED: 000000 LABOR CREW/WORK PROG DATE: 99/99/9999
 TOTAL EARNED WORK CREDITS ...: 000646 LABOR CREW DISQ REASON:
 TOTAL EDUCATION CREDITS: 000000 CATEGORY 4 OR 5 OFFENSE
 TOTAL EXTRA EARNED CREDITS ..: 000
 TOTAL SERVICE TIME EARNED ...: 002715

PFKEYS: 5: HISTORY OF DATE CHANGES

4-© 1 Sess-1 167.7.50.33 SCDC1490 3/11

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

RECORD SUMMARY REPORT DATED 02/08/11

C0404

ABNEY JR, HORACE - FBI # 447158RA5 SID# SC01304287 SCDC # 316024

OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE

INSTITUTION ...: PERRY CORR INST

SECURITY/CUST.: 3 MINIMUM IN

CURR INCARC SENT...: 30 YRS 0 MOS 0 DYS

CENTRAL MONITORING.: NO

SOCIAL SECURITY #...: [REDACTED]

DORM.....: R4A0115B

RACE....: B SEX...: M

PROJ MAXOUT DATE: 01/14/2029

PROJ PAROLE DATE: 00/00/0000

EWC JOB...: LAUNDRY WORKER

EDUC PGM.: NO CURR EDUC PROGRAM

EWC LEVEL: 3F5 EEC LEVEL:

ASSIGNMENT...: COMMISSARY

CURRENT PROGRAM...: NO CURRENT PROGRAM

AGE...: 35 DATE OF BIRTH...: [REDACTED]

PREVIOUS NUMBERS:

** NO PREVIOUS NUMBERS **

CURRENT OFFENSES	SENTENCE			COUNTY	SENTENCE			V/NV	CATEGORY
	YRS	MOS	DYS		START				
TRAFFICKING IN COCAINE	30	0	0	GREENVILLE	7/23/20	3	U		4

PRIOR COMMITMENTS OVER 90 DAYS:

9/23/ 3	DAMAGED PROPERTY-NEC	0 YRS	10 MOS	0 DYS
9/23/ 3	*ASSAULT-UNKNOWN	2 YRS	2 MOS	0 DYS
12/10/ 2	OBTAIN GOODS FALSE PRETEN	0 YRS	10 MOS	0 DYS
8/14/95	*TRAFFICKING IN COCAINE	0 YRS	42 MOS	0 DYS

DETAINERS (HOLD, WANTED, NOTIFY):

NO DETAINEES

NO DETAINEES

ESCAPES:

4/19/90 OTHER ESCAPE RELATED CODE NOT IN TABLE

CRIMINAL CHARGES:

NO CRIMINAL CHARGES WHILE IN CUSTODY

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

NO ASSAULTIVE DISCIPLINARY HISTORY

NON-ASSAULTIVE DISCIPLINARIES:

6/19/10 POSSESSION OF CONTRABAND CONVICTED ADMIN

4/ 2/ 9 INTERFERING WITH COUNT OTHER

HISTORY OF MOVEMENTS:

DATE	LOCATION	STATUS	REASON
7/12/10	PERRY	INCARCERATED	ADMINISTRATIVE
7/12/10	KIRKLAND	INCARCERATED	MEDICAL
2/19/ 9	PERRY	INCARCERATED	ADMINISTRATIVE
2/18/ 9	LEE	INCARCERATED	ADMINISTRATIVE
2/18/ 9	TUOMEY REGIONAL	AUTH ABSENCE (AWL)	MEDICAL
2/17/ 9	LEE	INCARCERATED	MEDICAL
1/15/ 9	PERRY	INCARCERATED	ADMINISTRATIVE
1/14/ 9	KIRKLAND	INCARCERATED	MEDICAL
12/ 2/ 8	PERRY	INCARCERATED	ADMINISTRATIVE
12/ 2/ 8	KIRKLAND	INCARCERATED	MEDICAL
10/ 8/ 8	PERRY	INCARCERATED	ADMINISTRATIVE
10/ 8/ 8	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
8/21/ 8	PERRY	INCARCERATED	MEDICAL
8/21/ 8	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
7/22/ 8	PERRY	INCARCERATED	ADMINISTRATIVE
7/22/ 8	KIRKLAND	INCARCERATED	MEDICAL
5/29/ 8	PERRY	INCARCERATED	ADMINISTRATIVE
5/29/ 8	KIRKLAND	INCARCERATED	MEDICAL
7/11/ 6	PERRY	INCARCERATED	ADMINISTRATIVE
6/20/ 6	KIRKLAND	INCARCERATED	R&E PROCESSING
6/20/ 6	PERRY	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB

START

END

TERMINATION

JOB

ABNEY JR, HORACE - FBI # 647158RA5 SID# SC01304287 SCDC # 316024 (CONTINUED)

DESCRIPTION	DATE	DATE	REASON	LVL
LAUNDRY WORKER	10/08/09	0/ 0/ 0		3F5

HISTORY OF EARNED EDUCATION CREDITS:

EEC	START	END	TERMINATION
DESCRIPTION	DATE	DATE	REASON

NO SCHOOL ASSIGNMENTS

***** END OF REPORT *****

STATE OF SOUTH CAROLINA

COUNTY OF Greenville

STATE VS.

ABNEY, HORACE JR

AKA:

Race: B Sex: M Age: 26

DOB: [REDACTED] SS#: [REDACTED]

Address: 72 GULF, NC 27256

DL#: [REDACTED] SID#: [REDACTED]

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:

268

2000GS2304624

A/W#: G160007

Date of Offense: 01-10-2000

S.C. Code § : 44-53-0370(e)(2)(

CDR Code #: 0281

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was
TO: TRAFFICKING IN COCAINE, 400 GRAMS OR MORE

☐ CONVICTED OF or ☐ PLEADS

in violation of § 44-53-0370(e)(2)(of the S.C. Code of Laws, bearing CDR Code # 0281

☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted. ☐ Lesser Included Offense. ☐ Defendant Waives Presentment to Grand Jury.

The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor:

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$ 200,000; 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 Services standard conditions of
probation, which are incorporated by reference.

☐ The Defendant is to be given credit for Since July 21, 2003 days/months/jail time.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered
Total: \$ plus 20% fee \$

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine: \$ 200,000
§ 14-1-206 - Assessments 100 % \$ 215,000
§ 14-1-211(A)(1) (Surcharge) \$ 100.00
§ 14-1-211(A)(2) (Surcharge) \$
§ 56-5-2995 (DUI Assessment) \$
3% to County (if paid in installments) \$
TOTAL \$

Paul B. Wickens
Clerk of Court/Deputy Clerk

Court Reporter:

H. Jenkins

PRESIDING JUDGE

Judge Code: 1-1-1-1

Sentence Date: 6-15-06

SCCA217 (1/2001)