

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Jan 17 2025

S.C. SUPREME COURT

Appeal from Horry County
Court of Common Pleas
Honorable H. Steven DeBerry, IV, Circuit Court Judge

Appellate Case No. 2024-001375

Desmond Collins,

Appellant,

vs.

The State,

Respondent.

APPENDIX



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Assistant Attorney General

Jimmy A. Richardson
Solicitor, Fifteenth Judicial Circuit

Attorneys for Respondent

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WITNESSES

J Crews Myrtle Beach Police Department

Cook

ARREST WARRANT NUMBER

2016A2620601584

CDR: 0287 44-53-0370(e)(3)(b)

DOA: 6/25/2016

ACTION OF GRAND JURY

TRUE BILL

Dea Harris

Foreperson of Grand Jury

Date:

SEP 15 2016

VERDICT

GUILTY

U.S.

Foreperson of Petit Jury

Date: 11-15-17

DOCKET NO. 2016-GS-26- 03956

The State of South Carolina

County of Horry

Gray Ervin

16H03303

COURT OF GENERAL SESSIONS

September, 2016 TERM

THE STATE

vs.

Desmond Shamaine Collins



ATTORNEY: *TRUSLOW, KIRK*

Indictment for

Trafficking in Heroin

Jimmy A. Richardson, II, Solicitor

ORIGINAL

FILED
HORRY COUNTY

2016 SEP 19 AM 8:52

CLERK OF COURT
DATE RECEIVED FROM

GRAND JURY

WITNESSES

J Crews Myrtle Beach Police Department

Cook

ARREST WARRANT NUMBER

2016A2620601584

CDR: 0287 44-53-0370(e)(3)(b)

DOA: 6/25/2016

ACTION OF GRAND JURY

TRUE BILL

Boo Harris

Foreperson of Grand Jury

Date:

SEP 15 2016

VERDICT

Guilty

U.S.

Foreperson of Petit Jury

Date: 11-15-17

DOCKET NO. 2016-GS-26-03956

The State of South Carolina

County of Horry

Gray Ervin

16H03303

COURT OF GENERAL SESSIONS

September, 2016 TERM

THE STATE

vs.

Desmond Shamaine Collins



ATTORNEY:

TRUSLOW, KIRK

Indictment for

Trafficking in Heroin

Jimmy A. Richardson, II, Solicitor

FILED
HORRY COUNTY

2016 SEP 19 AM 8:52

CLERK OF COURT
DATE RECEIVED FROM

GRAND JURY

ORIGINAL

STATE OF SOUTH CAROLINA

COUNTY OF Horry
STATE VS.Desmond Shamaine Collins

AKA:

Race: BLACK Sex: M Age: 35DOB: [REDACTED]Address: [REDACTED]City, State, Zip: [REDACTED]DL#: [REDACTED] SID#: [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Trafficking in Heroin/Morphine, etc., 14 to 28 gramsin violation of § 44-53-0370(e)(3)(b) of the S.C. Code of Laws, bearing CDR Code # 0287☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ § 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: [Signature]

SCB76913

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed X yearsand/or to pay a fine of \$ 200,000.00; provided that upon the service of X days/months/years and/or paymentof \$ X; plus costs and assessments as applicable*; the balance is suspended with probation for X

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:		\$200,000.00
§ 14-1-206 (Assessments 107.5 %)		\$215,000.00
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 61.6 (Public Def/Probation)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$ 150.00
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)		\$12,458.25

TOTAL

\$427,733.25 + \$40.00 =
\$427,773.25

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (07/2016)

Renee ElvisDixie Eubank

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2016GS2603956A/W#: 2016A2620601584Date of Offense: 6/24/2016S.C. Code § : 44-53-0370(e)(3)(b)CDR Code #: 0287

SENTENCE SHEET

(25 yrs.) ☒ CONVICTED OF or ☐ PLEADSWHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed X yearsand/or to pay a fine of \$ 200,000.00; provided that upon the service of X days/months/years and/or paymentof \$ X; plus costs and assessments as applicable*; the balance is suspended with probation for X

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

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Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:		\$200,000.00
§ 14-1-206 (Assessments 107.5 %)		\$215,000.00
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
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3% to County (if paid in installments)		\$12,458.25

TOTAL

\$427,733.25 + \$40.00 =
\$427,773.25

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (07/2016)

Renee ElvisDixie Eubank

Presiding Judge

Judge Code: 2148Sentence Date: NOV. 15, 2017

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ 25.00 beginning 12/15/2017

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
Proviso 61.6 requires \$500 be paid to Clerk
during probation and shall be collected before
any other fees.

Presiding Judge

Judge Code: 2148Sentence Date: NOV. 15, 2017

**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.

Desmond Shamaine Collins, Appellant.

Appellate Case No. 2017-002405

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Unpublished Opinion No. 2019-UP-387
Submitted October 1, 2019 – Filed December 18, 2019

AFFIRMED

Timothy Kirk Truslow, of T. Kirk Truslow P.A., of
North Myrtle Beach, for Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General William M. Blich,
Jr., both of Columbia; and Solicitor Jimmy A.
Richardson, II, of Conway, all for Respondent.

PER CURIAM: Desmond Shamaine Collins appeals his conviction of trafficking heroin, arguing the trial court erred in failing to conduct an evidentiary hearing of a 400-page cell phone report before ruling the report did not have any exculpatory

value. However, Collins did not make this argument at trial or request an evidentiary hearing. Thus, this argument is not preserved. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]."); *State v. Policao*, 402 S.C. 547, 556, 741 S.E.2d 774, 778 (Ct. App. 2013) ("The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal." (quoting *State v. Porter*, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct. App. 2010))); *State v. Thomason*, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (2003) ("For an appellate court to review an issue, a contemporaneous objection at the trial level is required."). To the extent Collins contends he did not have time to review the report, he could have requested a continuance but failed to do so. Finally, Collins stipulated at trial the evidence was not relevant. Thus, he waived his right to challenge it on appeal. *See State v. Benton*, 338 S.C. 151, 156-57, 526 S.E.2d 228, 231 (2000) (providing when a party concedes to an issue at trial and argues the issue on appeal, the issue is procedurally barred).

AFFIRMED.¹

LOCKEMY, C.J., and KONDUROS and HILL, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Desmond Collins,

Plaintiff(s)

vs.

State of South Carolina

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2020 - CP - 26-4318

APPLICATION FOR
POST-CONVICTION RELIEF

Submitted By: Dayne C. Phillips, Esq.
Address: 1614 Taylor Street, Ste. D.,
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SC Bar #: 77712
Telephone #: (803) 807-0234
Fax #: (803) 380-8035
Other: 803-272-4503
E-mail: dayne@pricebenowitz.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

☐ Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ General (130) ☐ Breach of Contract (140) ☐ Fraud/Bad Faith (150) ☐ Failure to Deliver/ Warranty (160) ☐ Employment Discrim (170) ☐ Employment (180) ☐ Other (199) _____	☐ Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20 -NI- _____ ☐ Notice/ File Med Mal (230) ☐ Other (299) _____	☐ Torts - Personal Injury ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Assault/Battery (370) ☐ Slander/Libel (380) ☐ Other (399) _____	☐ Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499) _____
☒ Inmate Petitions ☒ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599) _____	☐ Administrative Law/Relief ☐ Reinstate Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899) _____	☐ Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Other (799) _____	☐ Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm. (990) ☐ Employment Security Comm (991) ☐ Other (999) _____
☐ Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699) _____ ☐ Sexual Predator (510) ☐ Permanent Restraining Order (680)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Pre-Suit Discovery (670)		

Submitting Party Signature: 

Date: July 20, 2020

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
Desmond Sharmaine Collins,)
Applicant,)
v.)
State of South Carolina,)
Defendant.)

IN THE COURT OF COMMON PLEAS

FIFTEENTH JUDICIAL CIRCUIT

Case No. 2020-CP-

APPLICATION FOR
POST-CONVICTION RELIEF

FILED
HORRY COUNTY
2020 JUL 27 AM 8:06
RENEE N. BENNIS
CLERK OF COURT
HORRY COUNTY, SC

As required by Rule 71.1(b), SCRCP, this application is in conformity with Form 5 of the SCRCP Appendix of Forms.

1. **Place of Detention:** Applicant is detained in the South Carolina Department of Corrections at Lee County Correctional Institution, 990 Wisacky Hwy, Bishopville, SC 29010.
2. **Name and location of Court which imposed sentence:** Horry County Court of General Sessions, 1301 2nd Ave, Conway, SC 29526.
3. **Name(s) of co-defendant(s) (if any):** None.
4. **The indictment number(s) upon which and the offenses for which sentence was imposed:**
 - (a) 2016-GS-26-03956 (Trafficking Heroin).
5. **The date upon which the sentence was imposed and the terms of the sentence:**
 - (a) November 15, 2017.
 - (b) Twenty-Five (25) years (2016-GS-26-03956).
6. **A finding of guilty was made after:**
 - (a) A trial by jury before the Honorable Benjamin H. Culbertson (November 13-15, 2017).
7. **Did you appeal from the judgment of conviction and the imposition of the sentence?**
 - (a) Yes.

8. If you answered “yes” to number (7), list:
- (a) The name of each Court to which you appealed:
- i. South Carolina Court of Appeals.
- (b) The result in each Court to which you appealed:
- i. Affirmed (S.C. Court of Appeals).
- (c) The date of each result:
- i. December 18, 2019 (Appellate Case No. 2017-002405).
- (d) If known, citations of any written opinions or ordered entered pursuant to such result:
- i. *State v. Collins*, Op. No. 2019-UP-387 (S.C. Ct. App. filed December 18, 2019).
9. If you answered “no” to number (7), state your reasons for not appealing:
- (a) Not applicable. Applicant filed a Direct Appeal of his convictions and sentences.
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Trial Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. See S.C. Code § 17-27-20(A)(1), (4), and (6). Specifically, Trial Counsel's unreasonably deficient performance fell below an objective standard of reasonableness “under prevailing professional norms” and prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims); see also *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). Therefore, “counsel's conduct so undermined the proper functioning of the adversarial process

that the trial cannot be relied upon as having produced a just result". *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

- (b) Appellate Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. Specifically, Appellate Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Appellate Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991).

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

- (a) Trial Counsel's acts or omissions of ineffective assistance of counsel include but are not limited to the following allegations:
- (i) The South Carolina Court of Appeals found that Trial Counsel failed to preserve for appellate review the issue of whether the Trial Court erred in failing to conduct an evidentiary hearing before ruling a 400-page cell phone report did not have any exculpatory value. Specifically, the Court of Appeals found that Trial Counsel failed to make this argument at trial or request an evidentiary hearing. See *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]."); *State v. Policao*, 402 S.C. 547, 556, 741 S.E.2d 774, 778 (Ct. App. 2013) ("The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal."

(quoting State v. Porter, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct. App. 2010));
State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (2003) (“For an
appellate court to review an issue, a contemporaneous objection at the trial level is
required.”).

- (ii) The South Carolina Court of Appeals also found that Trial Counsel failed to move
for a continuance to allow him an opportunity to review the 400-page cell phone
report and that Counsel stipulated at trial that the 400-page cell phone report was
not relevant. Consequently, the Court of Appeals found that Counsel waived
Applicant’s right to challenge this issue on direct appeal. See State v. Benton, 338
S.C. 151, 156-57, 526 S.E.2d 228, 231 (2000) (providing when a party concedes to
an issue at trial and argues the issue on appeal, the issue is procedurally barred).
- (iii) Trial Counsel failed to properly raise, argue, and preserve for appellate review
whether the State committed a discovery violation by failing to disclose the 400-
page cell phone report.
- (iv) Trial Counsel failed to properly raise, argue, and preserve for appellate review
whether the State committed a discovery violation by failing to disclose the identity
of a material witness until a week before trial. In the event a discovery violation
did not occur, then Trial Counsel failed to file a motion to compel specifically
requesting disclosure of the passenger’s identity in a timely manner prior to trial.
- (v) Trial Counsel failed to properly raise, argue, and preserve for appellate review the
issue of whether the Trial Court erred in prohibiting him from cross-examining the
officer about the Solicitor’s Office dismissing the officer’s DUI charge prior to trial.
See U.S. Const. amends. V, VI, XIV.

- (vi) Trial Counsel failed to properly raise, argue, and preserve for appellate review the issue of whether the Trial Court erred in denying his motion to suppress the evidence seized by the police pursuant to an illegal search and seizure (no probable cause to support the traffic stop seizure). See U.S. Const. amends. IV, XIV.
- (vii) Trial Counsel failed to properly raise, argue, and preserve for appellate review whether Applicant voluntarily provided a statement to law enforcement. See U.S. Const. amends. IV; V, VI, XIV; *Jackson v. Denno*, 378 U.S. 368 (1964).
- (viii) Trial Counsel failed to challenge the admissibility of the drug evidence based on the police officer's handling and chain of custody of this evidence. Specifically, the police officer field tested the drug evidence numerous times, which could have affected the reliability and accuracy of the subsequent analysis.
- (ix) Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense. Specifically, Trial Counsel failed to hire an independent forensic examiner to review all the evidence seized by the police and failed to investigate the defense of Third-Party Guilt. See *Wiggins v. Smith*, 539 U.S. 510 (2003); *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).
- (x) Trial Counsel failed to adequately prepare for trial by not interviewing witnesses who could have testified regarding Applicant's good character and reputation when it was reasonable and necessary to present this evidence at trial and request a jury

instruction on good character and reputation. See State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000); Cf. Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009).

- (xi) Trial Counsel pursued an unreasonable trial strategy during his opening statement:
"If you do your job and you do it diligently, you find my client guilty, I'm gonna shake everybody's hand . . . When this trial is over, I go home; we all go home. Presumption of innocence means that from the day they charged him all the way up through this trial until and unless after everything, you do your job and you go by the law and you find him guilty. . . . I'm talking about a football field where Mr. Ervin [Prosecutor] is marching down with this evidence, he comes all the way down to the 20 yard line, 10 yard line, five yard line, end zone; he scored; he's guilty. . . . Who drives for people that are dealing drugs? The drug dealer or the heroin addict to get his heroin. The heroin addict to get his heroin. . . . I'm sitting at that table, I'm presumed innocent. In my head, I'm presumed guilty; that's what I think. . . . I ask you please, please, go by the law. Keep this system strong. And if you do that and find him guilty, great; you did your job." See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness"); Stacy v. Solem, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that "labeling counsel's actions as "trial strategy" does not automatically immunize an attorney's performance from sixth amendment challenges.").
- (xii) Trial Counsel failed to properly raise and argue the defense of mere presence.

(xiii) Trial Counsel pursued an unreasonable trial strategy in his closing argument: “Then you got other people that shoot it up their arms, killing themselves, overdosing, doing things they would ordinarily never think that they would do. I can’t imagine one people when they’re 8, 10, 12-years-old saying I want to grow up to be a heroin addict or drive a drug dealer around. . . . I’m asking you as a defense lawyer, a magician who’s gonna trick you, to look at the facts. . . . Now, if I go through that and you convict him, there’s nothing else I can do, but that’s what we’re here for, the facts. . . . [i]f you want to get to the truth or as close you can . . . My guess is a person with limited means was driving a drug dealer around, should probably get the three grams, if he’s responsible for anything. And I’m not conceding that he is . . . You know, these people are smart. They’re selling junk to people, they’re giving junk to people so that they’ll drive them around so they don’t get busted, because that person needs that drug.”

(xiv) Trial Counsel improperly shifted the burden of proof during his closing argument by imploring the jury to “get to the truth” based on the facts of the case: “I’m asking you as a defense lawyer, a magician who’s gonna trick you, to look at the facts. . . . Now, if I go through that and you convict him, there’s nothing else I can do, but that’s what we’re here for, the facts. . . . [i]f you want to get to the truth or as close you can.” See generally *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012).

(xv) Trial Counsel pursued an unreasonable trial strategy by essentially arguing the defense of mere presence when he also implied Applicant was the driver for a drug dealer (i.e., an aider and abettor who participated in the drug dealer’s criminal

activity).

(xvi) Trial Counsel pursued an unreasonable trial strategy by requesting that the Trial Court instruct the jury on the lesser-included offense of possession of heroin.

(b) Appellate Counsel's acts or omissions of ineffective assistance of counsel include but are not limited to the following allegations:

- i. Appellate Counsel failed to raise and argue the issue of whether the Trial Court erred in denying his motion for a continuance to investigate the discovery issue regarding the identity of a passenger in Applicant's car.
- ii. Appellate Counsel failed to raise and argue the issue of whether the Trial Court erred in refusing to dismiss, or in the alternative, declare a mistrial based on the untimely discovery issue regarding the 400-page cell phone report.
- iii. In the event Trial Counsel preserved the issue of whether the State committed a discovery violation by failing to disclose the 400-page cell phone report, Appellate Counsel failed to raise and argue this issue on appeal.
- iv. In the event Trial Counsel preserved the issue of whether the Trial Court erred in prohibiting him from cross-examining the police officer about the Solicitor's Office dismissing the officer's DUI charge prior to trial, Appellate Counsel failed to raise and argue this issue on appeal.
- v. In the event Trial Counsel preserved the issue of whether the Trial Court erred in denying Counsel's motion to suppress the evidence seized by the police pursuant to an illegal search and seizure (no probable cause to support the traffic stop seizure), Appellate Counsel failed to raise and argue this issue on appeal. See U.S. Const. amends. IV, XIV.

(xvii) In the event Trial Counsel preserved the issue of whether Applicant voluntarily provided a statement to the police. Appellate Counsel failed to raise and argue this issue on appeal.

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

(a) Any petition in a State Court under South Carolina Law? No.

(b) Any petition in State or Federal Courts for Federal Habeas Corpus or Post-Conviction Relief? No. Applicant has not previously filed an application for Post-Conviction Relief or Petition for Writ of Habeas Corpus in either state or federal court.

(c) Any petition in the Supreme Court of the United States for certiorari other than petitions, if any, already specified in number (8)? No.

(d) Any other petitions motions or applications in this or any other Court? No.

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

(a) The specific nature thereof: Not applicable.

(b) The name and location of the Court in which each was filed: Not applicable.

(c) The disposition thereof: Not applicable.

(d) The date of each such disposition: Not applicable.

14. Has any ground set forth in number (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No.

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

(a) The grounds which have been presented:

i. Not applicable.

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

i. Not applicable.

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

(a) Post-Conviction Relief is the proper forum and remedy for these allegations because the grounds for relief presented in this application are evidence of ineffective assistance of counsel, issues not preserved for appellate review, and/or were not appropriate to raise or were not properly raised on Direct Appeal.

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

(a) Your plea hearing? Not applicable.

(b) Your trial? Yes.

(c) Your sentencing? Yes.

(d) Your appeal, if any, from the judgment of conviction and/or imposition of the sentence? Yes.

(e) Preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? Yes.

18. If you answered "yes" to one or more parts of number (17), list:

(a) The name and address of each attorney who represented you:

(i) Timothy Kirk Truslow, 4209 Mayfair Street, Myrtle Beach, SC 29577.

(ii) Dayne C. Phillips, 1614 Taylor Street, Suite D., Columbia, SC 29201.

(b) The proceedings at which each attorney represented you:

(i) Timothy Kirk Truslow represented Applicant at trial and on direct appeal.

(ii) Dayne C. Phillips is currently representing Applicant on this application for Post-Conviction Relief.

19. State clearly the relief you seek in filing this application:

Applicant seeks Post-Conviction Relief by vacating his convictions and sentences and remanding the indictments for a new trial based on ineffective assistance of counsel.

20. Are you now under sentence from any other court that you have not challenged?

No. Applicant is not under sentence from any other court.

July 2, 2020

[Verification Page to Follow]

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Desmond Sharmaine Collins,

Applicant,

v.

State of South Carolina,

Defendant.

IN THE COURT OF COMMON PLEAS

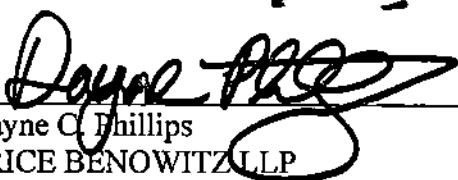
FIFTEENTH JUDICIAL CIRCUIT

Case No. 2020-CP-

26-4318

VERIFICATION

I, Dayne C. Phillips, Esq., on behalf of my client, Desmond Collins, 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 attached in this application; and that the matters and allegations therein set forth are true.

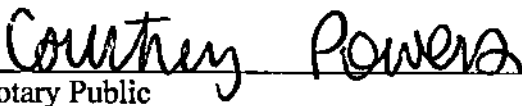

Dayne C. Phillips
PRICE BENOWITZ LLP
1614 Taylor Street, Suite D.
Columbia, SC 29201
O: 803-272-4503
C: 803-807-0234
F: 803-380-8035
dayne@pricebenowitz.com

July 2, 2020

SWORN to and subscribed before me this

2nd

day of July, 2020.

 (L.S.)
Notary Public

My Commission Expires: May 2, 2027.

FILED
HORRY COUNTY
2020 JUL 27 AM 8:06
RENEE N. ELYS
CLERK OF COURT
HORRY COUNTY, SC

CERTIFICATE OF SERVICE 20 20 CP26

I hereby certify that I have this date served the within and foregoing Application for Post-Conviction Relief by depositing a true and correct copy of the same via first-class mail, postage prepaid, upon all parties as follows:

Alan Wilson, Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

The Honorable Renee Elvis
Horry County Clerk of Court
P.O. Box 677
Conway, SC 29528-0677

FILED
HORRY COUNTY
2020 JUL 27 AM 8:06
RENEE H. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

By: Courtney Powers
Courtney Powers
Paralegal for Dayne C. Phillips, Esq.

1614 Taylor Street, Suite D.
Columbia, SC 29201
C: (803) 216-5561
F: (803) 380-8035
courtney@pricebenowitz.com

July 20, 2020

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT

) CASE No. 2020-CP-26-4318

)

)

1

)

)

Hon. H. Steven DeBerry, IV

Dayne C. Phillips, Esq.

Chelsey F. Marto, Esq.

Timothy K. Truslow, Esq.

December 2, 2022

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D. _____ 1. _____

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk of Court. During its September 2016 term, the Horry County Grand Jury indicted Applicant for trafficking heroin (2016-GS-26-03956). Applicant was represented by Trial Counsel. Fifteenth Circuit Assistant Solicitor W. Grayson Ervin prosecuted the case.

On November 13-15, 2017, Applicant proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. Applicant was found guilty as charged. Judge Culbertson sentenced Applicant to twenty-five (25) years imprisonment and ordered Applicant to pay a \$200,000 fine.

Applicant filed a timely Notice of Appeal on November 20, 2017. Trial Counsel perfected the appeal, raising the following issue:

The trial judge erred when he failed to conduct a full hearing on the evidence before ruling that an over 400-page cell phone report – which was not disclosed to defense counsel until after the start of trial – had not exculpatory value.

The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. State v. Collins, Op. No. 2019-UP-387 (Ct. App. filed Dec. 18, 2019). The Remittitur was returned to the circuit court on January 8, 2020.

FACTS GIVING RISE TO THE CONVICTION

Jeremy Crews, a former officer of the Myrtle Beach Police Department, was contacted by Officer Camacho, who smelled marijuana coming from a vehicle near where he was pumping gas and wanted Crews to initiate a stop. (Trial Tr. pp. 115 – 16, 175 – 76). After witnessing several traffic violations, Crews stopped the vehicle driven by Applicant. (Trial Tr. pp. 116 – 17). Upon approaching the vehicle, he immediately smelled marijuana. (Trial Tr. p. 117).

After detaining Applicant and a passenger, Crews began a vehicle search. During the

search, he located a bag containing a little over \$3000 in cash, a bag containing a light tan powdered substance, and small marijuana blunts on either side of the vehicle's interior, as well as a scale and two cell phones. (Trial Tr. pp. 119 – 21, 135 – 37, 177). The powdered substance would have been right where Applicant's feet were as the driver. (Trial Tr. p. 122). After being Mirandized, Applicant told Crews to "put it all on me." (Trial Tr. p. 121). The powdered substance tested as heroin. (Trial Tr. pp. 160, 244 – 45).

Both Crews and Camacho testified nothing was done with the cell phones. Later, during the trial, the State learned some files were obtained from one of the cell phones. (Trial Tr. p. 194). The State turned over a thumb drive containing the files. (Trial Tr. pp. 202 – 03). The trial court found the State could not use anything found on the cell phone and found no violation in failing to turn it over because nothing was found to be material to Applicant's guilt. (Trial Tr. pp. 208, 215).

CURRENT ACTION BEFORE THIS COURT

In his PCR application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel
 - a. "The South Carolina Court of Appeals found that Trial Counsel failed to preserve for appellate review the issue of whether the Trial Court erred in failing to conduct an evidentiary hearing before ruling a 400-page cell phone report did not have any exculpatory value. Specifically, the Court of Appeals found that Trial Counsel failed to make this argument at trial or request an evidentiary hearing. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]."); State v. Policao, 402 S.C. 547, 556, 741 S.E.2d 774, 778 (Ct. App. 2013) ("The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal." (quoting State v. Porter, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct. App. 2010)); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (2003) ("For an

appellate court to review an issue, a contemporaneous objection at the trial level is required.").

- b. The South Carolina Court of Appeals also found that Trial Counsel failed to move for a continuance to allow him an opportunity to review the 400-page cell phone report and that Counsel stipulated at trial that the 400-page cell phone report was not relevant. Consequently, the Court of Appeals found that Counsel waived Applicant's right to challenge this issue on direct appeal. See State v. Benton, 338 S.C. 151, 156-57, 526 S.E.2d 228, 231 (2000) (providing when a party concedes an issue at trial and argues the issue on appeal, the issue is procedurally barred).
- c. Trial Counsel failed to properly raise, argue, and preserve for appellate review whether the State committed a discovery violation by failing to disclose the 400-page cell phone report.
- d. Trial Counsel failed to properly raise, argue, and preserve for appellate review whether the State committed a discovery violation by failing to disclose the identity of a material witness until a week before trial. In the event a discovery violation did not occur, then Trial Counsel failed to file a motion to compel specifically requesting disclosure of the passenger's identity in a timely manner prior to trial.
- e. Trial Counsel failed to properly raise, argue, and preserve for appellate review the issue of whether the Trial Court erred in prohibiting him from cross-examining the officer about the Solicitor's Office dismissing the officer's DUI charge prior to trial. See U.S. Const. amends. V, VI, XIV.
- f. Trial Counsel failed to properly raise, argue, and preserve appellate review the issue of whether the Trial Court erred in denying his motion to suppress the evidence seized by the police pursuant to an illegal search and seizure (no probable cause to support the traffic stop seizure). See U.S. Const. amends. IV, XIV."
- g. Trial Counsel failed to properly raise, argue and preserve for appellate review whether Applicant voluntarily provided a statement to law enforcement. See U.S. Const. amends. IV, V, VI, XIV; Jackson v. Denno, 378 U.S. 368 (1964).
- h. Trial Counsel failed to challenge the admissibility of the drug evidence based on the police officer's handling and chain of custody of this evidence. Specifically, the police officer field tested the drug evidence numerous times, which could have affected the reliability and accuracy of the subsequent analysis.

- i. Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense. Specifically, Trial Counsel failed to hire an independent forensic examiner to review all the evidence seized by the police and failed to investigate the defense of Third-Party Guilt. See Wiggins v. Smith, 539 U.S. 510 (2003); Lounds v. State, 380 S.C. 354, 360 (2008); McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); Hicks v. State, 314 S.C. 280, 443 S.E.2d 907 (1994); Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).
- j. Trial Counsel failed to adequately prepare for trial by not interviewing witnesses who could have testified regarding Applicant's good character and reputation when it was reasonable and necessary to present this evidence at trial and request a jury instruction on good character and reputation. See State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000); Cf. Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009)."
- k. Trial Counsel pursued an unreasonable trial strategy during his opening statement: 'if you do your job and you do it diligently, you find my client guilty, I'm gonna shake everybody's hand . . . When this trial is over, I go home: we all go home. Presumption of innocence means that from the day they charged him all the way up through this trial until and unless after everything, you do your job and you go by the law and you find him guilty . . . I'm talking about a football field where Mr. Ervin [Prosecutor] is marching down with this evidence, he comes all the way down to the 20 yard line, 10 yard line, five yard line, end zone: he scored; he's guilty . . . Who drives for people that are dealing drugs? The drug dealer or the heroin addict to get his heroin. The heroin addict to get his heroin . . . I'm sitting at that table, I'm presumed innocent. In my head, I'm presumed guilty; that's what I think . . . I ask you please, please, go by the law. Keep this system strong. And if you do that and find him guilty, great; you did your job.' See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)(finding 'counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and were counsel articulates a strategy, it is measured under an objective standard of reasonableness'); Stacy v. Solem, 801 F.2d 1048, 1051 (8th Cir. 1986)(finding that 'labeling counsel's actions as 'trial

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strategy' does not automatically immunize an attorney's performance from sixth amendment challenges.').

- l. Trial Counsel failed to properly raise and argue the defense of mere presence.
 - m. Trial Counsel pursued an unreasonable trial strategy in his closing argument: 'Then you got other people that shoot it up their arms, killing themselves, overdosing, doing things that would ordinarily never think that they would do. I can't imagine one people when they're 8, 10, 12-year old saying I want to grow up to be a heroin addict or drive a drug dealer around . . . I'm asking you as a defense lawyer, a magician who's gonna trick you, to look at the facts . . . Now, if I go through that and you convict him, there's nothing else I can do, but that's what we're here for, the facts . . . [i]f you want to get to the truth or as close you can . . . my guess is a person with limited means was driving a drug dealer around, should probably get the three grams, if he's responsible for anything. And I'm not conceding that he is . . . You know, these people are smart. They're selling junk to people, they're giving junk to people so that they'll drive them around so they don't get busted, because that person needs that drug.'
 - n. Trial Counsel improperly shifted the burden of proof during his closing argument by imploring the jury to 'get to the truth' based on the facts of the case 'I'm asking you as a defense lawyer, a magician who's gonna trick you, to look at the facts . . . Now, if I go through that and you convict him, there's nothing else I can do, but that's what we're here for, the facts . . . [I]f you want to get to the truth or as close you can.' See generally State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), State v. Daniels, 401 S.C.251, 737 S.E.2d 473 (2012).
 - o. Trial Counsel pursued an unreasonable trial strategy by essentially arguing the defense of mere presence when he also implied Applicant was the driver for a drug dealer (i.e. an aider and abettor who participated in the drug dealer's criminal activity).
 - p. Trial Counsel pursued an unreasonable trial strategy by requesting that the Trial Court instruct the jury on the lesser-included offense of possession of heroin."
2. Ineffective Assistance of Appellate Counsel
 - a. "Appellate Counsel failed to raise and argue the issue of whether the Trial Court erred in denying his motion for a continuance to investigate the discovery issue regarding the identity of a passenger in Applicant's car.
 - b. Appellate Counsel failed to raise and argue the issue of

- whether the Trial Court erred in refusing to dismiss or, in the alternative, declare a mistrial based on the untimely discovery issue regarding the 400-page cell phone report.
- c. In the event Trial Counsel preserved the issue of whether the State committed a discovery violation by failing to disclose the 400-page cell phone report, Appellate Counsel failed to raise and argue this issue on appeal.
 - d. In the event Trial Counsel preserved the issue of whether the trial court erred in prohibiting him from cross-examining the police officer about the Solicitor's Office dismissing the officer's DUI charge prior to trial, Appellate Counsel failed to raise and argue this issue on appeal.
 - e. In the event Trial Counsel preserved the issue of whether the trial court erred in denying Counsel's motion to suppress the evidence seized by the police pursuant to an illegal search and seizure (no probable cause to support the traffic stop seizure), Appellate Counsel failed to raise and argue this issue on appeal. See U.S. Const. amends. IV, XIV.
 - f. In the event Trial Counsel preserved the issue of whether Applicant voluntarily provided a statement to the police. Appellate Counsel failed to raise and argue this issue on appeal."

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act¹ (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

- 1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
- 2. That the court was without jurisdiction to impose sentence;
- 3. That the sentence exceeds the maximum authorized by law;
- 4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- 5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
- 6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available

¹ S.C. Code Ann. §§ 17-27-10 to -160.

under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; accord Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be

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said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable." (citation and internal quotation marks omitted)).

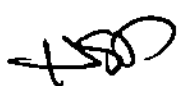
Regarding the deficiency prong of the Strickland analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, make every effort "to eliminate the distorting effects of hindsight," and "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if

professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625; see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S. at 112.

Finally, the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold



issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility.

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), SCRPC (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code:

INITIAL FINDINGS

This Court further finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant he rendered adequate assistance and exercised reasonable

professional judgment in her representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS ON THE MERITS

Applicant has alleged multiple claims of ineffective assistance of Trial Counsel and asserts that as a result of Trial Counsel's purported errors, he is entitled to a new trial. This Court finds Applicant has failed to meet his requisite burden of proof as to each allegation. Each allegation is addressed below:

Allegation 1a: Trial Counsel failed to preserve for appellate review the issue of whether the trial court erred in failing to conduct an evidentiary hearing before ruling that the 400-page cell phone report had no exculpatory value.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to preserve the issue of whether the trial court erred in ruling that the 400-page Cell Phone Report (CPR) had no exculpatory value without an evidentiary hearing. This Court finds this allegation is without merit.

To show prejudice where counsel fails to preserve an issue, an applicant must show the trial court would have sustained an objection, and the unpreserved issue would have been successful on appeal. Milledge v. State, 422 S.C. 366, 811 S.E.2d 796 (2018). A PCR court must view the trial court's ruling on an issue through the same lens applied on appeal, giving appropriate deference to the trial court's findings. Milledge, 422 S.C. at 380, 811 S.E.2d 804.

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PCR Evidentiary Hearing

On direct examination, Applicant testified when the CPR came out at trial, the court recessed to give the parties a chance to go over the report. (PCR Tr. p. 12). Applicant testified he contacted Trial Counsel afterward to see what was going on, but Applicant could not contact him, and they never discussed the CPR. (PCR Tr. p. 12). Applicant testified he never saw the report. (PCR Tr. p. 13).

On cross-examination, Applicant testified the CPR was not entered into evidence at trial, and it was not presented to the jury. (PCR Tr. pp. 29-20). Applicant testified Trial Counsel made a motion to dismiss based on the CPR. (PCR Tr. p. 30).

On re-direct examination, Applicant testified that he had not seen the CPR yet. (PCR Tr. p. 33).

On direct examination, Trial Counsel testified he recalled receiving the CPR in the middle of trial. (PCR Tr. p. 38). Trial Counsel testified neither of the parties had the opportunity to review the entire CPR. (PCR Tr. p. 38). Trial Counsel testified he made a motion to dismiss and possibly a motion for mistrial based on the CPR, but they were not successful. (PCR Tr. p. 39). Trial Counsel testified that over his objection, the trial court determined the CPR contained no exculpatory evidence, and the State was not going to use the CPR, but the Court of Appeals interpreted his response to the trial court as a stipulation. (PCR Tr. p. 39).

On cross-examination, Trial Counsel testified the CPR was on a jump drive that was not easily accessible. (PCR Tr. pp. 46 – 47). Trial Counsel testified he learned about the CPR after the prosecution argued they had not pulled an extraction from a particular phone, but one of the law enforcement officers stated that was not correct. (PCR Tr. pp. 47 – 48). Trial Counsel testified that in hindsight, he should have made the record clear, but the trial judge was upset, found the

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CPR was not exculpatory, and managed to get Trial Counsel to stipulate even though that was not his intention. (PCR Tr. pp. 48 – 49).

On re-direct examination, Trial Counsel testified he believed he acted reasonably at the time, and he did what he thought he should have done concerning the CPR. (PCR Tr. p. 62).

Applicant's Trial

At trial, on November 14, 2017, the Solicitor informed the trial court she became aware of cell phone data extraction that possibly contained exculpatory evidence, but she did not know of the existence of the CPR until that day and did not know what was in the extraction. (Trial Tr. p. 194). The trial court instructed the prosecution to check the extraction for exculpatory evidence. (Trial Tr. p. 194). The Solicitor informed the trial court she received the extraction from Melinda Shadoan, an evidence technician at Myrtle Beach Police Department, and the extraction was not turned over to Trial Counsel because the prosecution had just received the report. (Trial Tr. p. 195). The trial court gave a ten-minute recess so the prosecution could ascertain how long law enforcement had the report and what was in the report. (Trial Tr. pp. 196 – 97).

After the recess, the prosecution informed the trial court that law enforcement obtained a search warrant and conducted an extraction of the cell phone. (Trial Tr. p. 198). The trial court ordered the prosecution to turn over the search warrant and report to Trial Counsel and recessed the court until 9 AM the following day. (Trial Tr. p. 198).

On November 15, 2017, the prosecution informed the court they had turned over the search warrant and the report to Trial Counsel. (Trial Tr. p. 202). The prosecution informed the trial court that an extraction was done solely on Applicant's phone, and Officer Curry was prepared to testify to the technical data extracted from the phone. (Trial Tr. p. 203). The prosecution stated they did not intend to use the data from the cell phone extraction as the cell phone was not admitted

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into evidence. (Trial Tr. p. 203). The prosecution gave the trial court a summary of what they observed on Applicant's phone, as follows:

The other phone, we were able to get into and it is clear to the State and it should be clear to the Court that it is Mr. Collins' phone. There are multiple pictures of himself and his family on there. There are music files. There X-rated files on there and that's all that the State saw. There was possibly some inculpatory pictures on there of the Defendant. Again, the State does not intend to use any of that.

(Trial Tr. p. 204, ll. 3-10). The prosecution further represented to the trial court that the extraction did not show incoming and outgoing calls, and there were no text messages they could glean. (Trial Tr. pp. 204 – 05).

In response, Trial Counsel stated he overheard Officer Curry tell the prosecution he gave them a summary of the extraction, but there were files he had not turned over and requested to call Officer Curry to the stand. (Trial Tr. p. 205). The trial court denied Trial Counsel's request, and the prosecution represented to the trial court that they turned over everything they had to Trial Counsel. (Trial Tr. pp. 205 – 06). Trial Counsel moved the court to dismiss Applicant's case or declare a mistrial, arguing that some of the photographs looked exculpatory because they could reveal Lawyer, the passenger, was the owner of the drugs. (Trial Tr. pp. 207 – 10). The prosecution argued that the possible evidence Trial Counsel sought was not material to the charges against Applicant, and the evidence in the extraction was not favorable to Applicant. (Trial Tr. pp. 212 – 13). The trial court denied Trial Counsel's motion and found there was nothing exculpatory in the extraction. (Trial Tr. p. 215).

Findings

This Court finds Applicant has failed to establish Trial Counsel was deficient and resulting prejudice from Trial Counsel's performance. The Court of Appeals ruled Trial Counsel failed to preserve this issue for appellate review, but that does not automatically establish Trial Counsel

was deficient or that Applicant suffered prejudice. At trial, the trial court instructed the State to ascertain whether there was any exculpatory evidence on the extraction, and the State informed the trial court they found no exculpatory evidence but found potentially *inculpatory* evidence on Applicant's phone. This Court will not find Trial Counsel deficient for failing to preserve an issue that likely would have been more harmful than helpful to Applicant.

Additionally, Applicant cannot show he suffered resulting prejudice. First, it is evident from the record the trial court would not have sustained Trial Counsel's objection. Additionally, the State did not enter the cell phone into evidence nor use the data from the extraction in their case against Applicant at trial. At Applicant's trial, Trial Counsel moved the trial court to dismiss the case or declare a mistrial, arguing the existence of potentially exculpatory evidence. The trial court was not convinced by Trial Counsel's argument and denied his motion for a mistrial. Applicant is now attempting to receive a new trial on the same basis, the *potential* existence of *potentially* exculpatory evidence contained in the CPR. Applicant presently has the extraction in his possession and presented no actual exculpatory evidence to this Court, only pure conjecture. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice). Like the trial court, this Court is not convinced by Applicant's argument. Furthermore, this Court cannot ignore that the extraction was conducted on Applicant's phone, and if his phone contained exculpatory evidence, Applicant would be the one who would have knowledge of it.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or

omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation 1b: Trial Counsel failed to move for a continuance to allow him an opportunity to review the 400-page cell phone report and that Trial Counsel stipulated at trial that the 400-page cell phone report was not relevant.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to move for a continuance to allow him an opportunity to review the 400-page cell phone report and that Trial Counsel stipulated at trial that the 400-page cell phone report was not relevant. This Court finds this allegation is without merit.

Where the PCR applicant fails to establish what evidence he could have procured had counsel moved for a continuance, he fails to establish how he was prejudiced by counsel's preparation. Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997); Bozeman v. State, 307 S.C. 172, 175, 414 S.E.2d 144, 146 (1992) (trial courts denial of a continuance does not constitute reversible error where applicant cannot point to any other evidence that could have been produced had a continuance been granted).

PCR Evidentiary Hearing

On direct examination, Applicant testified there was never a discussion about requesting a continuance based on the CPR. (PCR Tr. p. 13).

On direct examination, Trial Counsel testified he did not see a reason to move for a continuance. (PCR Tr. p. 40).

On cross-examination, Trial Counsel testified in hindsight he should have moved for a continuance but noted the trial judge recessed to give the parties time to review the CPR. (PCR Tr. p. 50).

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Trial

At trial, after the prosecution notified the trial court of the existence of the CPR, the trial court ordered the prosecution to turn over the search warrant and CPR to Trial Counsel and recessed the court until 9 AM the following day. (Trial Tr. p. 198). Additionally, the trial court instructed the prosecution to check the extraction for exculpatory evidence. (Trial Tr. p. 194). After reviewing the CPR, the prosecution represented that the CPR did not contain exculpatory evidence to the trial court, and informed the trial court they did not intend to use the CPR in their case against Applicant even though it contained inculpatory evidence. (Trial Tr. pp. 203 – 05).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. Trial Counsel testified that at trial, he saw no reason to request a continuance regarding the CPR and testified the trial court recessed till the next day so the parties could review the CPR. The record provides that the trial court allowed the parties to review the CPR, and no exculpatory evidence was found. Additionally, Applicant did not present evidence to this Court of what Trial Counsel could have discovered had he requested a continuance to review the CPR more fully. See Skeen, *supra*.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

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- Allegation 1c:** Trial Counsel failed to properly raise, argue, and preserve for appellate review whether the State committed a discovery violation by failing to disclose the 400-page cell phone report.
- Allegation 1d:** Trial Counsel failed to properly raise, argue, and preserve for appellate review whether the State committed a discovery violation by failing to disclose the identity of a material witness until a week before trial. In the event a discovery violation did not occur, then Trial Counsel failed to file a motion to compel specifically requesting disclosure of the passenger's identity in a timely manner prior to trial.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to properly raise, argue, and preserve for appellate review whether the State committed a discovery violation by failing to disclose the 400-page cell phone report. Applicant also alleged Trial Counsel was constitutionally ineffective for failing to properly raise, argue, and preserve for appellate review whether the State committed a discovery violation by failing to disclose the identity of a material witness until a week before trial. In the event a discovery violation did not occur, then Trial Counsel failed to file a motion to compel specifically requesting disclosure of the passenger's identity in a timely manner prior to trial. This Court finds these allegations are without merit.

The United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83 (1963). The South Carolina Supreme Court has found: "A Brady claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Sheppard v. State, 357 S.C. 646, 659, 594 S.E.2d 462, 470 (2004). "Impeachment or exculpatory evidence is material only if there is a reasonable probability

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that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." State v. Davis, 420 S.C. 50, 62, 800 S.E.2d 138, 144 (Ct. App. 2017), citing State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996); Kyles v. Whitley, 514 U.S. 419, 434 (1995) ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

"The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." United States v. Aeurs, 427 U.S. 97, 109 – 10 (1976); Cone v. Bell, 556 U.S. 449, 491 (2009) ("It simply is not sufficient, therefore, to claim that 'there is a reasonable possibility that . . . testimony might have produced a different result [Petitioner's burden is to establish a reasonable probability of a different result.]" (quoting Strickler v. Greene, 527 U.S. 263, 291 (1999))).

CELL PHONE REPORT

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel mentioned the discovery violation during trial, but he never raised the issue. (PCR Tr. p. 13). Applicant testified when the CPR was brought up at trial, he pressured Trial Counsel about it, and Trial Counsel mentioned a possible Brady violation but did not go into detail about it. (PCR Tr. pp. 13 – 14).

On cross-examination, Applicant testified the CPR was not entered at trial, but Trial Counsel received the report and reviewed it. (PCR Tr. p. 30). Applicant testified that the CPR was not given to the jury, and Trial Counsel requested a mistrial based on the lateness of receiving the CPR. (PCR Tr. p. 30).

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On re-direct examination, Applicant testified that he knew nothing else about the CPR other than Trial Counsel received it at trial. (PCR Tr. p. 33).

On direct examination, Trial Counsel testified he recalled receiving the CPR in the middle of trial. (PCR Tr. p. 38). Trial Counsel testified that when he was given the CPR he overheard the officers attempting to tell the prosecutor there was additional "stuff" on a drive. (PCR Tr. p. 38).

On cross-examination, Trial Counsel testified that the CPR was on a jump drive, and the prosecution stated they saw parts of the CPR. (PCR Tr. p. 46). Trial Counsel testified he argued the trial court could not find the CPR did not contain exculpatory evidence as it had not been fully reviewed. (PCR Tr. p. 46). Trial Counsel testified that he could not recall whether he received a copy of everything, and it all happened very quickly. (PCR Tr. p. 47). Trial Counsel testified he does not believe he received everything because he heard two law enforcement officers talking about two phones, but the solicitor stated an extraction was only done on one phone. (PCR Tr. p. 47). Trial Counsel testified that he believed an officer tried to correct the solicitor, and he mentioned this on the record before the trial court. (PCR Tr. pp. 47 – 48).

Trial

At trial, after the prosecution notified the trial court of the existence of the CPR, the trial court ordered the prosecution to turn over the search warrant and CPR to Trial Counsel and recessed the court until 9 AM the following day. (Trial Tr. p. 198). Additionally, the trial court instructed the prosecution to check the extraction for exculpatory evidence. (Trial Tr. p. 194). After reviewing the CPR, the prosecution represented to the trial court that the CPR did not contain exculpatory evidence, and informed the trial court they did not intend to use the CPR in their case

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against Applicant even though it potentially contained inculpatory evidence. (Trial Tr. pp. 203 – 05).

Trial Counsel argued that the CPR contained photographs, including selfies of Applicant and images that looked like paperwork. (Trial Tr. pp. 207 – 08). Trial Counsel argued the images could be ledgers containing names, possibly listing the name of the owner of the drug. (Trial Tr, p. 208). In response, the trial court stated, "How is that exculpatory to your client in a trafficking in heroin, where the drugs are in the vehicle that he's driving." (Trial Tr. p. 208, ll. 9-11). Trial Counsel continued to argue the existence of possible exculpatory evidence but ultimately failed to preserve the issue for appeal. (Trial Tr. pp. 208 – 15).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe, supra*. This Court finds 1) No Brady violation occurred with which Trial Counsel could have reasonably objected to and been successful; 2) Trial Counsel attempted to garner a mistrial for the lateness of the CPR being provided and was unsuccessful; 3) Even if Trial Counsel has preserved the issue for appeal, the Court of Appeals would not have reversed and remanded Applicant's case for a new trial on this issue; and 4) Applicant failed to demonstrate to this Court that the evidence in the CPR was favorable to him nor that it was material to his guilt or punishment.

Notably, the record before this Court provides that the CPR contained potentially inculpatory evidence, and this Court will not find deficiency on Trial Counsel's part for not further pursuing something that was potentially detrimental to Applicant. Thus, Applicant has failed to overcome his burden in proving any prejudice flowing from Trial Counsel's alleged deficiency.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

IDENTITY OF THE PASSENGER

PCR Evidentiary Hearing

On direct examination, Applicant testified the name of the passenger is Darrin Lawyer (Lawyer). (PCR Tr. p. 16). Applicant testified that he asked Trial Counsel to find Lawyer, but at the time, Applicant knew Lawyer by his nickname, and they only received his full name during a pretrial hearing. (PCR Tr. p. 16). Applicant testified that Lawyer's nickname was Little D. (PCR Tr. p. 17). Applicant testified Trial Counsel learned the passenger's full name by pressuring the Solicitor to give it during pretrial. (PCR Tr. p. 17).

On cross-examination, Applicant testified the drugs found in the vehicle belonged to Lawyer. (PCR Tr. p. 27). Applicant testified that Lawyer sold drugs, and that day Applicant was not driving Lawyer around but taking him someplace and dropping him off. (PCR Tr. p. 27). Applicant testified Lawyer was not selling drugs at that time, and he did not know Lawyer had drugs on him. (PCR Tr. pp. 27 – 28). Applicant testified he knew Lawyer sold drugs, but he was not taking him to sell drugs. (PCR Tr. p. 28). Applicant testified Lawyer was not present at the evidentiary hearing to testify. (PCR Tr. p. 29).

On direct examination, Trial Counsel testified he was given a week's continuance by Judge John because of discovery issues related to the passenger's identity, and Judge John ordered the

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State to provide Trial Counsel with the passenger's name. (PCR RT. P. 40). Trial Counsel testified he was not sure if the identity of the passenger would have been helpful to his case, and if the passenger had been present at Applicant's trial and denied ownership of the drugs, it would have been hurtful to Applicant's case. (PCR Tr. p. 41).

Trial

At trial, Trial Counsel argued the State failed to disclose the identity of the passenger in a timely manner and asked for a continuance based on the late disclosure. (Trial Tr. pp. 25 – 29). The State informed the trial court they did not have possession of the identity of the passenger as he was not charged based on Applicant's claim of ownership over the drugs, and the passenger's information was not on the police report. (Trial Tr. p. 30). The State informed the trial court that after the hearing before Judge John, they called the arresting officer the week before trial to obtain the passengers' information, and once they had the information, they relayed it to Trial Counsel. (Trial Tr. p. 30).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court finds Applicant has failed to show Trial Counsel was deficient or resulting prejudice from his performance. This Court further finds 1) Trial Counsel cannot be deficient for failing to file a motion to compel when the identity of the passenger was unknown to the State and Applicant only knew his street name; 2) No Brady violation occurred with which Trial Counsel could have reasonably objected to and been successful; 3) The record provides the State did not have possession or knowledge of the identity of the passenger, and once the State learned this information, they shared it with Trial Counsel; 4)

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Applicant failed to show how the identity of the passenger was material to the constructive possession case against him, where Applicant had claimed ownership of the drugs to law enforcement; and 5) Applicant failed to demonstrate to this Court that Lawyer would have provided favorable testimony in his case.

Further, Trial Counsel credibly testified the passenger's absence at trial left room for doubt as to Applicant's guilt as he was not present to deny ownership of the drugs. Trial Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. See, e.g., Smith v. State, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (finding "In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis— and the analysis by the appellate court— is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks.").

Notably, Applicant failed to present testimony from the passenger, Lawyer, at the evidentiary hearing. See Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (holding that to show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing, or their testimony must otherwise be presented, consistent with the rules of evidence.). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render

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reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation 1e: Trial Counsel failed to properly raise, argue, and preserve for appellate review the issue of whether the Trial Court erred in prohibiting him from cross-examining the officer about the Solicitor's Office dismissing the officer's DUI charge prior to trial.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to properly raise, argue, and preserve the issue of whether the Trial Court erred in prohibiting him from cross-examining Officer Crews about the Solicitor's Office dismissing his DUI charge prior to trial. This Court finds this allegation is without merit.

Evidence that a witness has been convicted of a crime punishable by one-year imprisonment or more shall be admitted to attack a witness's credibility if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect. See Rule 609(a)(1), SCRE. "For the purposes of Rule 609, SCRE, a conviction includes a conviction resulting from a trial or any type of plea, including a plea of nolo contendere or a plea pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)." Rule 609(a), SCRE; see Michelson v. United States, 335 U.S. 469 (1948) ("Arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty. Only a conviction, therefore, may be inquired about to undermine the trustworthiness of a witness.").

Where a party seeks to impeach a witness on cross-examination of specific instances of conduct that do not constitute a criminal conviction, the inquiry must be *clearly* probative of the

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witness's character for truthfulness or untruthfulness. Rule 608(b), SCRE; See State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000) (The inquiry into specific instances of a witness's misconduct is limited to those instances which are clearly probative of truthfulness or untruthfulness such as forgery, bribery, false pretenses, and embezzlement).

A witness may also be impeached for bias by examination or other evidence, but determining the admissibility of testimony concerning bias is a matter within the trial court's discretion, as questions attempting to prove bias are not always proper. Rule 608(c), SCRE; State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012) (The Supreme Court will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion.); See State v. Burgess, 408 S.C. 421, 759 S.E.2d 407 (2014) (Trial court did not abuse its discretion in drug prosecution in prohibiting defendant from cross-examining arresting officer, the only law enforcement officer who testified to seeing defendant in actual possession of crack cocaine that was discovered lying on the ground, about that officer's personnel records in order to impeach his credibility and demonstrate bias; officer's disciplinary incidents and removal from Narcotics Enforcement Team occurred after defendant's arrest and did not involve defendant, and officer's hostile actions were directed at co-workers rather than at subjects of criminal investigations.).

Trial

At trial, the State moved to suppress Trial Counsel from questioning Officer Crews about his DUI arrest and noted Officer Crews was not convicted of DUI, and the charge was dismissed against Officer Crews. (Trial Tr. p. 33). In response, Trial Counsel argued that the fact the charge against Officer Crews was dismissed prior to trial by a prosecutor in the Fifteenth Circuit Solicitor's Office goes to the credibility of Officer Crews before a jury, and the jury should be able to consider

it. (Trial Tr. p. 35). The trial court granted the State's motion, noting the DUI did not constitute a prior bad act. (Trial Tr. pp. 36 – 38).

PCR Evidentiary Hearing

At the evidentiary hearing on direct examination, Applicant testified that he believed Trial Counsel was ineffective for failing to properly object to the trial court's order prohibiting Trial Counsel from cross-examining Officer Crews based on his DUI. (PCR Tr. p. 14).

On cross-examination, Trial Counsel testified that before trial the State moved to prevent Trial Counsel from questioning Officer Crews about his DUI arrest. (PCR Tr. p. 51).

Findings

At trial., Trial Counsel objected and argued that he should not be prohibited from cross-examining Officer Crews on his DUI arrest as the jury should be allowed to weigh the arrest in assessing Officer Crews's credibility. The trial court disagreed and limited Trial Counsel's cross-examination of Officer Crews. Directly following the trial court's ruling on the State's motion in limine, Officer Crews testified. State v. Wiles, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009) (Generally, a motion in *limine* is not a final determination; a contemporaneous objection must be made when the evidence is introduced. However, there is an exception to this general rule where a ruling on the motion in *limine* is made "immediately prior to the introduction of the evidence in question." This exception is based on the fact that when a trial court's ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew the objection.); see also State v. Forrester, 343 S.C. 637, 642-43, 541 S.E.2d 837, 840 (2001). Therefore, Trial Counsel cannot be deficient for failing to argue and preserve for appeal whether the trial court erred in limiting the cross-examination of Officer Crews.

Additionally, Trial Counsel did preserve this issue for appeal. Assuming, *in arguendo*, Trial Counsel had failed to argue and preserve the issue, evidence of Officer Crews's arrest is not admissible impeachment evidence as it does not constitute a prior bad act, go to his truthfulness, or show bias. Moreover, the trial court has broad discretion in limiting cross-examination, and the trial court's ruling will not be disturbed on appeal absent a manifest abuse of discretion. Here, the trial court reasonably limited the scope of Trial Counsel's cross-examination of Officer Crews, and the trial court's decision would likely not have been reversed on appeal.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation 1f: **Trial Counsel failed to properly raise, argue, and preserve for appellate review the issue of whether the Trial Court erred in denying his motion to suppress the evidence seized by the police pursuant to an illegal search and seizure (no probable cause to support the traffic stop seizure).**

Applicant alleged Trial Counsel was constitutionally ineffective for failing to properly raise, argue, and preserve for appellate review the issue of whether the trial court erred in denying his motion to suppress the evidence seized by the police pursuant to an illegal search and seizure (no probable cause to support the traffic stop seizure). This Court finds this allegation is without merit.

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"The Fourth Amendment does not proscribe all contact between police and citizens, but is designed 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" State v. Corley, 383 S.C. 232, 679 S.E.2d 187 (Ct. App. 2009), aff'd as modified, 392 S.C. 125, 708 S.E.2d 217 (2011), citing INS v. Delgado, 466 U.S. 210, 215 (1984). "[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Whren v. United States, 517 U.S. 806, 810 (1996).

"A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity." State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001). "If the officer's suspicions are confirmed or further aroused, the stop then may be prolonged and the scope enlarged." Corley, 383 S.C. at 240, 679 S.E.2d at 191. "Additionally, a minor traffic violation arrest will not be rendered invalid by the fact it was 'a mere pretext for a narcotics search.'" Id., (quoting Arkansas v. Sullivan, 532 U.S. 769, 772 (2001)).

In Corley, the officer stopped Corley for failure to use a turn signal. Corley, 383 S.C. at 236, 679 S.E.2d at 191. While the officer detained Corley, he observed that Corley was nervous, short of breath, avoided eye contact, and appeared fidgety. Id. The officer asked Corley to step out of the vehicle based on safety concerns, and questioned Corley, and Corley provided the officer with untrue information. Id. at 236-37. The officer advised Corley he knew Corley was being dishonest and that he had observed Corley leave an area with high drug activity; upon further questioning, Corley revealed he was in possession of crack cocaine, and the officer seized it. Id.

The Court of Appeals noted that "it is undisputed Officer Futch acted lawfully in stopping Corley's automobile for the traffic violation." Id. at 240.

Trial

At the pretrial hearing, Trial Counsel argued his motion *in limine* where he moved "to suppress any evidence gleaned from the stop of the vehicle, and to include but not limited to the detention of [Applicant], any statements made and any and all drug contraband or evidence to be used." (Trial Tr. p. 38). Trial Counsel argued law enforcement did not have probable cause to stop Applicant based on the language of the statute.² (Trial Tr. pp. 38 – 40). In addition to the traffic violations, Officer Jeremy Alan Crews (Officer Crews) testified that he and another officer smelled the odor of marijuana emanating from the vehicle Applicant was driving. (Trial Tr. pp. 45 – 47; 49). Officer Crews testified that after he ran Applicant's information, he had Applicant step out of the vehicle, and they searched the vehicle. (Trial Tr. pp. 49 – 51). Officer Crews testified the search revealed a large plastic sandwich bag with heroin on the driver's side floorboard. (Trial Tr. p. 52).

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On direct examination, Applicant testified there were no discussions concerning challenging the evidence seized during his traffic stop. (PCR Tr. p. 11). Applicant testified that Trial Counsel mentioned raising the issue of the evidence of his own accord to the trial court, but there were no discussions about it. (PCR Tr. pp. 14 – 15).

On direct examination, Trial Counsel testified he discussed the trial strategy with Applicant before trial, and that strategy would depend on what was suppressed. (PCR Tr. p. 35). Trial

² Law enforcement stopped Applicant for Unlawful Turning and Failure to Signal, in violation of S.C. Code Ann. § 56-5-2120.

Counsel testified the basis for the stop was a traffic situation and an officer stating he smelled weed in the car at a gas station before the stop. (PCR Tr. p. 37). Trial Counsel testified he challenged the stop based on probable cause, but he did not recall his suppression argument. (PCR Tr. pp. 37 – 38).

On cross-examination, Trial Counsel testified that in his suppression argument, he referenced the statute and made a probable cause argument, but he did not cite any case law. (PCR Tr. p. 52). Trial Counsel testified that he should have argued the trial court erred in denying his motion to suppress the evidence from the traffic stop based on the officer's statement as hearsay. (PCR Tr. p. 53).

Findings

As an initial matter, while this Court does not have the bodycam or dashcam videos entered into evidence at trial, this Court does have the record, and the record provides Applicant committed two traffic infractions before being pulled over: 1) a right turn on a red light with a sign that indicated no turn on red³; and 2) unlawful turning by moving from the far outside lane to the far inside lane without signaling.⁴ (Trial Tr. pp. 39 – 41). That in and of itself provided probable cause to conduct a traffic stop. Then, after approaching the vehicle, Officer Crews smelled the odor of marijuana, and that provided probable cause to search the vehicle. (Trial Tr. p. 49). From the record, this Court cannot reason any legal basis for suppression of the traffic stop or search of the vehicle.

³ The record provides Applicant did not stop at the red light—he kept moving through it. (Trial Tr. p. 40).

⁴ Of note, Applicant pled guilty on July 18, 2016, to the traffic violations prior to trial that he now contends there was no probable cause to even conduct the traffic stop. (Trial Tr. pp. 40; 42).

Nevertheless, Applicant's disputation arises from how Trial Counsel argued his motion. This Court is not persuaded and finds Trial Counsel's performance in this matter was reasonable under the circumstances. As noted *supra*, this Court cannot ascertain a legal basis that could be argued to suppress the evidence acquired from the legal traffic stop or the legal vehicle search. Even so, Trial Counsel still derived an argument—albeit an unsuccessful argument. This Court finds Applicant has failed to overcome his burden in proving Trial Counsel's performance was deficient.

Likewise, Applicant has failed to overcome his burden of proving any prejudice flowing from the alleged deficiency. This Court cannot ascertain any colorable argument that would have been successful in suppressing the evidence based on the legal traffic stop and legal search.

Additionally, whether this issue was preserved for appeal or not, it is clear from the record that the issue was preserved. Officer Crews had probable cause to stop Applicant for his traffic violations and had reasonable suspicion to search the vehicle based on the smell of marijuana coming from the vehicle. Upon conducting a search, Officer Crews discovered a transparent plastic bag on the driver's side with heroin. The trial court denied Trial Counsel's motion to suppress the evidence, and the Court of Appeals likely would have upheld the trial court's ruling as they did in Corely.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

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Allegation 1g: Trial Counsel failed to properly raise, argue and preserve for appellate review whether Applicant voluntarily provided a statement to law enforcement.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to properly raise, argue, and preserve for appellate review whether Applicant voluntarily provided a statement to law enforcement. This Court finds this allegation is without merit.

"The process for determining whether a statement is voluntary, and thus admissible, is bifurcated; it involves determinations by both the judge and the jury. First, the trial judge must conduct an evidentiary hearing, outside the presence of the jury, where the State must show the statement was voluntarily made by a preponderance of the evidence." State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (Ct. App. 2007), quoting Jackson v. Denno, 378 U.S. 368, 376 (1964). "Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." State v. Arrowood, 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct. App. 2007). "A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his or her rights under." Arrowood, 375 S.C. at 366, 652 S.E.2d at 442. Volunteered statements of any kind are not barred by the Fifth Amendment. Miranda, 384 U.S. at 436; United States v. Rhodes, 779 F.2d 1019, 1032 (4th Cir.1985) ("Miranda does not protect an accused 'from a spontaneous admission made under circumstances not induced by the investigating officers or during a conversation not initiated by the officers.'").

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not discuss the possibility of challenging his statements made to law enforcement. (PCR Tr. p. 11). Applicant testified there

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was no discussion with Trial Counsel about a possible "Denno hearing." (PCR Tr. p. 15). Applicant testified he wanted Trial Counsel to challenge the admissibility of his statements. Id.

On cross-examination, Applicant testified that he had a pretrial hearing. (PCR Tr. p. 31). Applicant testified he did not recall having a pretrial hearing on the statement he made, but he recalled one officer testifying. Id. Applicant testified the pretrial hearing concerned the traffic stop and everything that happened. Id.

On direct examination, Trial Counsel testified they had a Jackson v. Denno hearing, but it was not successful. (PCR Tr. p. 38).

On cross-examination, Trial Counsel testified that he believed the issue of the admissibility of Applicant's statements to law enforcement was preserved for appeal. (PCR Tr. p. 53). Trial Counsel testified he challenged the voluntariness of Applicant's statements, but he did not recall specifics. (PCR Tr. p. 54).

Trial

At trial, during the Jackson v. Denno hearing, Trial Counsel moved to suppress any statements made by Applicant during his traffic stop with law enforcement. (Trial Tr. p. 38). Officer Crews testified that once he realized there was a substance in the car, he secured Applicant and the passenger in the back of his patrol car, even though the passenger was not under arrest. (Trial Tr. p. 54). Officer Crews testified Applicant was advised of his rights, he understood his rights, he was not coerced or threatened, and he did not ask for an attorney. (Trial Tr. pp. 54 – 55). Officer Crews testified that while he was listing the contraband he found in the vehicle to Applicant, Applicant responded, "It's all mine, put it on me." (Trial Tr. p. 55).⁵ Ultimately, after

⁵ Notably, the State presented video from the traffic stop which showed Applicant making this statement. (Trial Tr. pp. 125 – 133; State's Exhibit 1, 2, 3).

hearing from Trial Counsel and the State, the trial court ruled that Applicant's statements made after he was given the Miranda warnings were admissible, including the statement, "It's all mine, put it on me." (Trial Tr. pp. 89 – 90).

When the State introduced the video wherein Applicant made the inculpatory statements, Trial Counsel objected to the admission of the videos based upon his pretrial motion objections. (Trial Tr. pp. 125; 130 – 32).

Findings

As an initial matter, this Court finds this issue was preserved for appellate review. Trial Counsel objected during the Jackson v. Denno hearing and contemporaneously as the evidence was entered at trial based on the same objections made at the Jackson v. Denno hearing. Thus, this Court finds Applicant's contention that the issue was not preserved is without merit.

Additionally, this Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, supra. Applicant has failed to overcome his burden in proving Trial Counsel was deficient and any resulting prejudice from Trial Counsel's performance. The record provides that there was a pretrial Jackson v. Denno hearing concerning Applicant's statements and Trial Counsel argued for the suppression of the statement. Ultimately, the trial court denied the motion. Additionally, Trial Counsel objected to the introduction of the evidence of Applicant's statements when the State admitted it, preserving the issue for appeal. Therefore, this Court cannot find Trial Counsel deficient in his performance.

The record provides that Applicant was advised of his Miranda rights before making the statement that the drugs were his and to "put it on" him. Miranda does not protect defendants when they have waived their right to remain silent and make voluntary statements. Furthermore, this

Court cannot find that the trial court's ruling would have been disturbed on appeal. Thus, Applicant cannot establish prejudice.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation 1h: Failure to challenge the admissibility of drug evidence based on chain of custody.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to challenge the admissibility of the drug evidence based on chain of custody issues. Specifically, Applicant asserted there was an officer who field-tested the evidence numerous times. (PCR Tr. p. 15). This Court finds this allegation is without merit.

The burden of preserving an item of real demonstrative evidence intact and free from alteration is upon the party offering the item into evidence. Sligh v. Johnson, 288 S.C. 364, 342 S.E.2d 620 (Ct. App. 1986). The chain of custody rule, however, does not require that every person associated with the procedure be available to testify or be identified personally, depending on the facts of the case. South Carolina Dept. of Social Services v. Cochran, 364 S.C. 621, 614 S.E.2d 642 (2005). While proof need not negate all possibility of tampering, the party offering the evidence must establish, as far as practicable, a complete chain of custody. State v. Williams, 297 S.C. 290, 376 S.E.2d 773 (1989). Whether the chain of custody has been established as far as practicable clearly depends on the unique factual circumstances of each case. Cochran, 364 S.C. 621, 614 S.E.2d 642.

Where the identity of the person who handled the evidence is established, the Court had found evidence regarding its care goes only to the weight of specimen as credible evidence—in other words, where there is a weak link in the chain of custody, not missing link, the question is only one of credibility and not admissibility. State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011); State v. Carter, 344 S.C. 419, 544 S.E.2d 835 (2001) (Court held the evidence of a discrepancy in the contents of the blood and saliva sample kit did not render the blood sample inadmissible but went only to its weight as credible evidence, where all custodians of the blood testified, and defendant had the opportunity to cross-examine each of them regarding care of the blood).

PCR Evidentiary Hearing

On direct examination, Applicant asserted there was a field officer who tested evidence numerous times, and there were potential issues with the chain of custody. (PCR TR. p. 15). Applicant testified that Trial Counsel never discussed the field testing done on the evidence and never mentioned the chain of custody. (PCR Tr. pp. 15 – 16).

On direct examination, Trial Counsel testified he did not recall challenging the admissibility of the drugs based on handling of the chain of custody. (PCR Tr. p. 45). Trial Counsel testified he did not know if challenging the evidence based on chain of custody would be successful. Id.

On cross-examination, Trial Counsel testified he did not recall a chain of custody issue or argument at trial. (PCR Tr. p. 54). Trial Counsel testified he always goes through the chain of custody because he has had success with it in the past. (Trial Tr. pp. 54 – 55). Trial Counsel testified he would have looked over the chain of custody in Applicant's case and he did not recall any chain of custody issues. (PCR Tr. p. 55).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court finds Trial Counsel was not deficient and Applicant has failed to establish resulting prejudice from Trial Counsel's performance. This Court finds Trial Counsel's testimony credible in that he always goes through the chain of custody, and he did not recall any issues with it. Furthermore, this Court cannot ascertain any legal basis Trial Counsel would have had to object to the chain of custody.

Additionally, in support of his contention, Applicant merely offered speculation that there was a chain of custody issue based on the handling and testing of the evidence by an officer. Applicant did not provide the name of the officer he alleges conducted the field testing, resulting in the alleged chain of custody issues, nor what specific issues there were with the chain of custody that would have affected the outcome of his trial. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation 1i: Failure to conduct a reasonable investigation and develop all reasonable available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to conduct a reasonable investigation and develop all reasonable available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense. Specifically, Applicant contends Trial Counsel failed to investigate the passenger of the vehicle and the defense of third-party guilt. This Court finds this allegation is without merit.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id.

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id. "In particular, what investigation decisions are reasonable depends critically on such information." Id.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more

prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

PCR Evidentiary Hearing

On direct examination, Applicant testified Trial Counsel never prepared for trial because he believed he could get Applicant to plea, but Applicant did not wish to plea. (PCR Tr. p. 11). Applicant testified there were no discussions related to trial. Id. Applicant testified he asked Trial Counsel to investigate the passenger of the vehicle he was driving. (PCR Tr. p. 16). Applicant testified he asked him to find Lawyer, but at the time, he only knew Lawyer by his nickname, "Little D." (PCR Tr. pp. 16 – 17). Applicant testified they discovered Lawyer's full name during pre-trial. (PCR Tr. p. 17). Applicant testified that the main reason he hired Trial Counsel was to investigate Lawyer. Id. Applicant testified that Trial Counsel pressured the solicitor during pre-trial to give the passenger's name, and that's how they got it, but he does not believe there was any additional investigation. Id. Applicant testified he had never seen anything about Lawyer or know anything about him. Id.

On cross-examination, Applicant testified he was driving Lawyer around, and he knew him from the neighborhood, and that Lawyer sold drugs. (PCR Tr. pp. 27 – 28).

Handwritten signature/initials

On direct examination, Trial Counsel testified that law enforcement allowed Lawyer to leave after stopping the vehicle and did not take his full name, but that opened up the defense for Applicant that the drugs were Lawyer's and not his. (PCR tr. p. 36). Trial Counsel testified Lawyer was not charged with anything based on Applicant saying "put it on me" when stopped by law enforcement, and Trial Counsel argued at trial that Applicant was merely covering for Lawyer and not taking ownership. (PCR Tr. pp. 36 – 37). Trial Counsel testified he discovered the passenger's identity a week before trial, and he attempted to contact Lawyer through his family and friends, but he did not hire an investigator. (PCR Tr. p. 40). Trial Counsel testified he did not know if Lawyer would have been helpful to Applicant's case because he could have denied ownership at trial, and his absence made it easier to cast doubt concerning Applicant's ownership. (PCR Tr. pp. 40 – 41). Additionally, Trial Counsel testified he never considered investigating a defense of third-party guilt, as he could not locate Lawyer in time for trial. (PCR Tr. p. 42).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe, supra*. This Court finds Trial Counsel adequately prepared for trial and conducted a reasonable investigation into Applicant's case. This Court finds Applicant's testimony in this matter generally **not credible**. Contrary to Applicant's testimony, this Court finds Trial Counsel **credibly** testified that he investigated the passenger's identity and attempted to locate him. Trial Counsel **credibly** testified he contacted family and friends to locate Lawyer but could not locate him. Additionally, Trial Counsel **credibly** testified that Lawyer's absence at trial made it easier to cast doubt on Applicant's ownership of the drugs, whereas if Lawyer had been present, he could have denied ownership. *Underwood v. State*, 309 S.C. 560,

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562, 425 S.E.2d 20, 22 (1992), citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) ("Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective.").

Regarding the defense of third-party guilt, Trial Counsel credibly testified he did not consider investigating the defense as he could not locate the passenger. Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992), citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) ("Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective.")); See, e.g., State v. Gregory, 198 S.C. 98, 16 S.E.2d 532, 534 (1941) ("[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible ... [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party") (emphasis added). This Court finds a third-party guilt defense would not have been viable as Lawyer was not charged in connection to the crime and was not present at trial.

Moreover, Applicant's assertion Lawyer would have been helpful to his case is pure conjecture. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice). Applicant testified he did not own the drugs and that Lawyer did. This Court was not persuaded by this testimony and as found *supra*, Applicant's testimony here was not credible. Notably, as Trial Counsel testified, had Lawyer testified at trial, he could have denied ownership and negatively impacted Applicant's defense. Further, Applicant

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did not present testimony or other evidence providing what Lawyer's testimony could have been or what Trial Counsel could have discovered from Lawyer had he more thoroughly investigated. See Harris, supra (An applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared.).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation 1j: Failure to interview witnesses that could have testified regarding Applicant's good character and reputation, do Trial Counsel could request jury instruction on good character and reputation.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to interview witnesses that could have testified regarding Applicant's good character and reputation, do Trial Counsel could request jury instruction on good character and reputation. This Court finds this allegation is without merit.

To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing, or their testimony must otherwise be presented, consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

"In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. See, e.g., Smith v. State, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); Edwards v. State, 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); Glover, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was not deficient by failing to call alibi witnesses when two witnesses who testified at PCR hearing did not establish the alibi).

Further, prejudice will generally be found if the testimony was significant and favorable enough to the Applicant so that the trial proceedings results may have been different because of the testimony. See, e.g., Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may have corroborated, or bolstered defendant's credibility so that the findings at trial could have been favorable to the defendant); Thomas v. State, 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial).

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The South Carolina Supreme Court has repeatedly held that a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony per the rules of evidence at the PCR hearing to establish prejudice from the witness' failure to testify at trial. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial testimony, he failed to establish prejudice).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not discuss calling witnesses to testify about his good character. (PCR Tr. pp. 17 – 18).

On cross-examination, Applicant testified he wanted Annette Grant and Teresa Collins to testify at trial and verify his character. (PCR Tr. p. 32). Applicant testified he told Trial Counsel he wanted people to testify, but he did not provide Trial Counsel with names. Id. Applicant testified Trial Counsel never told him he could not call witnesses. (PCR Tr. pp. 32 – 33).

On direct examination, Trial Counsel testified he did not recall discussing potential character witnesses with Applicant. (PCR Tr. p. 41). Trial Counsel testified he does not ordinarily call character witnesses, and his strategy to close last may have affected that decision. (PCR Tr. p. 42).

On cross-examination, Trial Counsel testified he and Applicant did not discuss potential character witnesses, but had he presented character witnesses he could have requested a jury instruction on good character. (PCR Tr. p. 55).

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Findings

As an initial matter, while Applicant named some people that could have testified to his character, he failed to present any of them or offer any of their testimony at the PCR evidentiary hearing. Failure to present purportedly favorable witnesses or evidence at the evidentiary hearing precludes a finding of prejudice. See, e.g., Martin v. State, 427 S.C. 450, 455, 832 S.E.2d 277, 279–80; Glover, supra.

Moreover, while no testimony was provided at the evidentiary hearing on this, this Court would be remiss if it did not point out that calling character witnesses and placing Applicant's character at issue would have opened the door for the State to introduce his prior convictions. The record provides that Applicant's prior convictions include 1) Assault and Battery of a High and Aggravated Nature in 2007; 2) Burglary-2nd Degree in 2009; 3) FTC Fraud; 4) MDP Crack in 2010; 5) Criminal Domestic Violence in 2011; 6) Possession of Marijuana in 2012; 7) Strong Arm Robbery in 2012; and 8) Receiving Stolen Goods in 2015. (Trial Tr. p. 304).

This Court finds that Trial Counsel was not deficient and Applicant failed to establish resulting prejudice from Trial Counsel's performance. Notably, Trial Counsel testified his strategy was to not present a defense and close last. Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992), citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) ("Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective."). Applicant also failed to prove any resulting prejudice where Applicant failed to present the witnesses he alleged would have testified favorably on his behalf and show how their testimony would have affected the outcome of his trial. Therefore, Applicant's "mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, supra, 318 S.C. at 498–99, 458 S.E.2d at 540.

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Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

- Allegation 1k:** Trial Counsel pursued unreasonable trial strategy during opening statement.
- Allegation 1m:** Trial Counsel pursued unreasonable trial strategy in his closing arguments.
- Allegation 1n:** Trial Counsel improperly shifted burden of proof in closing argument by imploring the jury to get to the truth based on the facts of the case.
- Allegation 1o:** Trial Counsel pursued unreasonable trial strategy in arguing Applicant was the driver for the drug dealer who participated in the drug dealer's criminal activity.

Applicant alleged Trial Counsel was constitutionally ineffective when he employed an unreasonable trial strategy in his opening and closing arguments. Specifically, Applicant asserted Trial Counsel employed an unreasonable trial strategy by stating he was a heroin addict, was driving around drug dealers, and by imploring the jury to seek the truth. This Court finds these allegations are without merit.

"The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 6 (2003); see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Review of counsel's actions is hallmarked by deference, as "it is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude

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that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Id. at 688– 89; cf. id. at 693 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). "Defense lawyers have 'limited' time and resources, and so must choose from among 'countless' strategic options." Dunn v. Reeves, 594 U.S. 731, 739 (quoting Harrington, 562 U.S. at 106– 107). "Such decisions are particularly difficult because certain tactics carry the risk of 'harm[ing] the defense' by undermining credibility with the jury or distracting from more important issues." Id. (quoting Harrington, 562 U.S. at 108).

Thus, a fair assessment of attorney performance requires every effort to be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689; see Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996) (declining "to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial"). The ultimate question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied Strickland's deferential standard.

OPENING STATEMENT

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel stated in his opening argument that Applicant was guilty by stating to the jury "If you do your job and do it diligently,

you find my defendant guilty, I'm going to shake everyone's hand." (PCR Tr. p. 18). Applicant testified that Trial Counsel made an analogy to a football field to explain to the jury what the State had to do to show Applicant was guilty. (PCR Tr. p. 19). Additionally, Applicant testified Trial Counsel put a question to the jury that characterized Applicant as a heroin addict. Id. Applicant testified these comments by Trial Counsel shifted the burden of proof. (PCR Tr. pp. 19 – 20).

On direct examination, Trial Counsel testified he does not recall his trial strategy in opening, but that he is certain he addressed his overall theory of the case and attempted to bolster Applicant's defense in opening. (PCR Tr. p. 43). Trial Counsel testified he was attempting to argue in opening that there was another person there who was a drug dealer. Id. Trial Counsel testified that he would not intentionally try to give a prosecutor an opening statement. (PCR Tr. p. 44).

On cross-examination, Trial Counsel testified that he has learned with juries it is important to remind them of the importance of their duty. (PCR Tr. p. 56). Trial Counsel testified he likes to bond with juries and express that he is not here to do a magic trick and that he is operating according to the rules and doing his job, and that's where Trial Counsel's comments in closing came from. Id. Trial Counsel testified that in hindsight, he would have removed some comments from his opening. (PCR Tr. p. 57). Trial Counsel testified he does not know if his comments diluted the burden of proof. Id. Trial Counsel testified he does not know if he needed to discuss his opening argument with Applicant, and he was attempting to make a distinction between Applicant and the passenger in his closing argument. (PCR Tr. p. 59).

Trial

At trial, in his opening argument, Trial Counsel stated the following:

You're gonna hear evidence in this case and I've tried to get to the bottom on it, I work hard on my cases. Somebody is missing in this

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trial. There's an individual, you'll hear testimony and questions and answers about, by the name of Lawyer. Now, this is not a, you pick-a-card type thing. And before I go on, let me tell you this too, I make a vow to you, I'm gonna do my job to the best of my ability. The only thing I ask you to do is the same thing. You have nobody, nobody to reward, to punish. *If you do your job and you do it diligently, you find my client guilty, I'm gonna shake everybody's hand. If you find him not guilty, I'm gonna shake everybody's hand, okay. That's your job.*

All I ask is that you listen to the legal terms and go by them. There's two terms I want to talk about just really briefly and we'll get started. One is *the presumption of innocence*... The State has the burden in this case and in every criminal case, to leave you firmly convinced of somebody's guilt. I'm not gonna get into the law now because the Judge will explain it to you.

(Trial Tr. pp. 103, l. 14 – 104, l. 4; 11. 17-20) (emphasis added). Trial Counsel then explained what the presumption of innocence means and beyond a reasonable doubt. (Trial Tr. p. 105 – 08). Additionally, Trial Counsel highlighted the missing passenger, characterizing the passenger as a drug dealer and Applicant as a heroin addict. (Trial Tr. pp. 109 – 11).

Findings

This Court finds Applicant has failed to meet his burden of proving Trial Counsel was deficient and that the alleged deficiency prejudiced him. See Butler, supra. The record provides Trial Counsel's opening statements, when read in its entirety, did not state to the jury that Applicant was guilty or shift the burden of proof; rather, he explained to the jury their duty under the law and important legal principles. At the evidentiary hearing, Trial Counsel credibly testified he makes it a practice to explain to the jury their duty under the law and bond with them, so they don't view him as someone trying to trick them. Trial Counsel credibly testified he was attempting to make a distinction between Applicant and the missing passenger, and the bulk of Trial Counsel's opening characterized the passenger as a drug dealer who was culpable for the crime. This Court finds

Trial Counsel articulated a reasonable strategy as to his purpose in his opening statement. This Court finds Trial Counsel's performance was not deficient and he did not shift the burden of proof.

Turning to Applicant's contention that Trial Counsel characterized him as a heroin addict, this Court finds Trial Counsel never directly stated Applicant was a heroin addict. Further, when read in full (Trial Tr. p. 109), it is evident that the context of Trial Counsel's statement is that Applicant was driving the drug dealer so the heroin addict could get his heroin. In other words, Applicant was driving the drug dealer around while he conducted his drug dealing business from the car. This Court cannot find Trial Counsel characterized Applicant as a heroin addict.

Furthermore, a fair assessment of attorney performance requires every effort to be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689; see Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996) (declining "to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial"). This Court finds Trial Counsel has reasonably satisfied Strickland's deferential standard.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.



Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

CLOSING ARGUMENT

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel's statements in his closing arguments shifted the burden of proof to Applicant. (PCR Tr. p. 20). Applicant, referencing the trial transcript, testified that Trial Counsel stated to the jury that to find Applicant guilty, the State would have had to present more evidence. (PCR Tr. p. 21). Applicant testified that Trial Counsel stated Applicant was doing drugs and driving around drug dealers, and he never discussed those things with Trial Counsel. (PCR Tr. pp. 22 – 23). Additionally, Applicant testified Trial Counsel implored the jury to seek the truth. (PCR Tr. p. 23).

On direct examination, Trial Counsel testified that his trial strategy in closing was to explain reasonable doubt and then point out the presence of another person in the vehicle, the passenger. (PCR Tr. p. 44).

On cross-examination, Trial Counsel testified he did not know if he needed to discuss his opening argument with Applicant, and he was attempting to make a distinction between Applicant and the passenger in his closing argument. (PCR Tr. p. 59). Trial Counsel testified that his statements concerning getting to the truth were made to let the jury know that sometimes you cannot find the truth and the focus is on if the State proved someone did something, not finding every missing piece of information. Id. Trial Counsel testified his comments in closing about drugs were to support the defense Applicant did not claim ownership of the drugs. (PCR Tr. p. 60).

Trial

At trial, in his closing arguments, Trial Counsel stated the following:

Mr. Ervin is telling you I'm a great lawyer; I hope he believes that. *I think what that means is that don't believe me, that defense lawyers try to trick people or play games. I'm not playing a game here. I told you from the very beginning I was gonna be straight with you.* Is there anything I've done in here today that would lead you to believe otherwise? I'm dealing with the facts. The last thing he just told you is accountability starts here today. Convict him because he said put it on me. That's just what he told you, convict him, give him what he wants. *That's not how you convict people. I know that sounds absurd, put it on me. Why not? Well, how about because he's not guilty.* That's a good reason for one. Okay?

(Trial Tr. p. 273, ll. 11-23) (emphasis added).

Then you got other people that shoot it up their arms, killing themselves, overdosing, doing things they would ordinarily never think that they would do. I can't imagine one person when they're 8, 10, 12-years-old saying I want to grow up to be a heroin addict or drive a drug dealer around. Unfortunately, some of these people can get in that position. Unfortunately, that drug takes precedence. Now, I don't think you should convict my client because he showed you a bag of heroin. I think it's a evil despicable thing. It's killing people. That didn't start today; it's been killing people for a long time, that drug and many others. I'm asking you as a defense lawyer, a magician who's gonna trick you, to look at the facts. *And you know with the evidence and facts in this case and any criminal trial come from right here, and I'm not gonna talk about anything except for what came from right here.* Now, if I go through that and you convict him, there's nothing else I can do, but that's what we're here for, the facts.

(Trial Tr. pp. 274, l. 10 – 275, l. 2) (emphasis added).

He's charged with 14 to 28. He's not charged with 4 grams to 14; it's 14 to 28. *That's why they're doing that, but I continue to try to point out to you, there was two bags.* One was 12-something and the other was like 3 grams. Okay. My guess is a person with limited means was driving a drug dealer around, should probably get the three grams, if he's responsible for anything. *And I'm not conceding that he is,* but you now, three grams, that's usually the person that's got to have the heroin. The guy in the passenger seat walked away, got to pick his phone, probably because he didn't do heroin. You

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know, these people are smart. They're selling junk to people, they're giving junk to people so that they'll drive them around so they don't get busted, because that person needs that drug.

(Trial Tr. pp. 278, l. 18 – 279, l. 6) (emphasis added).

I just ask you to use your common sense. We've got a lot of rules and procedure. *I can give you my theory of what I think happened, what I think I know happened. All I can do is try to point out things to you that leads you to have the same theory as me and I'm trying to the best I can because this is an important case.* My client, Desmond Collins, he's a real person. He looks pretty good today, too. This is about 18 months later, you know... I pointed out things to you. I've shown you some things because you know what? Nobody can prove a negative. It's an impossibility. There's no way I've had a case yet that was like Matlock on T.V. where by the end - - I would love one of those too, by the way -- where I wind up not only convincing you that it wasn't him, but I'll show you who it was. I kinda try to do that, but I can't really do that, you know. But I can't prove that he's innocent and how could I possibly do that unless I had a video tape of everything they talked about, everything that happened, I can't. That's why we have this system. Because before in this country, unlike the countries I told you about before, we do - - what happens to people after this part if they're found guilty, we require a lot. We require that the State and the State alone come in here and let you sleep good at night and give you everything you need to know that you were firmly convinced that my client is guilty, firmly convinced. And when I told you how important you are, I meant it. You're like a backstop. Nobody can do anything after this; it's on you. What you say, what you come up with; that's it. That's pretty important because we have nowhere else to turn.

(Trial Tr. pp. 280 – 81) (emphasis added).

I mean, talk about it, please, at least. *Please remember reasonable doubt, firmly convinced and please remember you have nobody to, to reward or punish.* You just need to do that. And oh, I remember the third thing and I'll sit down. *When we talked about it's your job to find the facts, I always say this because sometimes I fear that it makes you think that we've got to do something, you know.* The point is if you can't get there; you can't get there. If you're not firmly convinced, you're not firmly convinced. You are not under a requirement to come out and tell us exactly what happened and I think that's important to point out to you. *Sometimes you can't. Therein lies the point. You have to firmly convinced.* If you can't, then you're not.

(Trial Tr. p. 285, ll. 2-15) (emphasis added).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court finds Applicant has failed to overcome his burden and establish Trial Counsel was deficient, resulting in prejudice from Trial Counsel's alleged deficiency. Butler, *supra*. This Court further finds Trial Counsel's closing argument, when read in its entirety, does not shift the burden of proof or prompt the jury to "seek the truth." Rather, Trial Counsel stated multiple times that the State had failed to meet its burden, went through the evidence and suggested possible scenarios to the jury that did not point to Applicant's guilt. Trial Counsel **credibly** testified his comments were intended to create reasonable doubt.

Turning to Applicant's contention Trial Counsel characterized him as a heroin addict in closing argument—this Court cannot find any such comment in the records before it. Trial Counsel never directly stated Applicant was a heroin addict.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.



Allegation 11: Failure to properly argue defense of mere presence.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to argue the defense of mere presence. This Court finds this allegation is without merit.

The law to be charged to the jury is to be determined by the evidence presented at trial. State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989). A charge of mere presence to a jury is proper where the facts indicate a defendant was present during the commission of the crime in question and asserts the mere presence of the defendant at the scene is insufficient to show his or her guilt. § 2-31 Mere Presence - Accomplice Liability/Aiding and Abetting, Anderson, S.C. Requests to Charge - Criminal, § 2-31. Concerning possession of controlled substances, mere presence is insufficient to prove constructive possession. State v. Tabory, 260 S.C. 355, 364, 196 S.E.2d 111, 113 (1973). The State must prove actual or constructive possession, coupled with knowledge of the presence of drugs. State v. Halyard, 274 S.C. 397, 400, 264 S.E.2d 841, 842 (1980).

To prove constructive possession, the State must show the defendant had dominion and control over the substance, and such possession can be established through direct or circumstantial evidence. Halyard, 274 S.C. at 400, 264 S.E.2d at 842; State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976); See Brunson v. State, 324 S.C. 117, 119, 477 S.E.2d 711, 713 (1996) ("Mere presence instructions are required when evidence supports the conclusion that the defendant was merely present at the scene where drugs were found and it was questionable whether the defendant had a right to exercise dominion and control over them."); See also Lee, 298 S.C. at 365, 380 S.E.2d at 836 ("[M]ere presence was not an instruction supported by the evidence presented by the State at trial...Lee's testimony was that the officers knew he was not involved and were framing him, not that he just happened by when someone dropped the bag of cocaine or that he was standing by while others used or possessed cocaine." (internal quotation omitted)).

"Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." State v. Hudson, 277 S.C. 200, 203, 284 S.E.2d 773, 775 (1981). "Knowledge can be proven by the evidence of acts, declarations, or conduct of the accused from which the inference may be drawn that the accused knew of the existence of the prohibited substances." State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009).

PCR Evidentiary Hearing

On direct examination, Applicant testified there was no discussion with Trial Counsel about asserting the defense of mere presence. (PCR Tr. p. 20). Applicant testified he believes that mere presence would have been a viable defense. Id.

On cross-examination, Applicant testified that when he was stopped by law enforcement, he was "delusional" and told the officers to pin the drugs on him because he smokes weed. (PCR Tr. p. 27). Applicant testified they were not his drugs but the passengers, and they were the passengers because he sells drugs. Id. Applicant testified the passenger was not selling drugs when he drove him around, and he did not know about the drugs even though they were found on his seat. (PCR Tr. pp. 27 – 28). Applicant testified he knew the passenger from his neighborhood and knew he sold drugs. (PCR Tr. p. 28). Applicant testified he recalled Trial Counsel arguing the drugs belonged to the passenger and Applicant was merely driving. (PCR Tr. pp. 28 – 29).

On direct examination, Trial Counsel testified he did not consider the defense of mere presence, and he did not believe he asked for a mere presence charge. (PCR Tr. p. 42). Trial Counsel testified that the facts of Applicant's case would have fit a charge on mere presence, and the trial court might have given the charge, but he is not certain. (PCR Tr. pp. 42 – 43). Trial Counsel testified he does not know if mere presence would have been successful. (PCR Tr. p. 43).

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On cross-examination, Trial Counsel testified that his argument at trial was essentially one of mere presence. (PCR Tr. pp. 55 – 56). Trial Counsel testified that he did not have a strategy in not requesting a mere presence charge. (PCR Tr. p. 56). Trial Counsel testified that in hindsight, he would have asked for a jury instruction on mere presence. Id.

Trial

At trial, the State presented evidence that Applicant was stopped for multiple traffic violations. (Trial Tr. p.p. 116 – 17). Applicant was driving the vehicle. Id. Officer Crews testified he smelled marijuana coming from the driver's window, so he had Applicant and the passenger step out and conducted a search of the vehicle. Officer Crews discovered a bag containing over \$3,000 in cash, a bag containing a powdered substance, small marijuana blunts on either side of the vehicle interior, and a scale and two cell phones. (Trial Tr. pp. 119 – 21; 135 – 37; 177). The transparent bag with the powdered substance tested positive for heroin and was found on the driver's side at Applicant's feet. (Trial Tr. pp. 122 – 22; 160; 244 – 45).

Trial Counsel argued at trial that Applicant was not the actual possessor of the heroin, and that the passenger, a known drug dealer, was the actual possessor. Trial Counsel argued Applicant was merely driving the vehicle. However, the passenger was not charged with anything, and he was not a witness and could not be located in time for trial.

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court finds Applicant has failed to overcome his burden and establish Trial Counsel was deficient, resulting in prejudice from Trial Counsel's alleged deficiency. Butler, *supra*. Notably, this Court finds the State's evidence in this

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case overwhelmingly supported constructive possession, as Applicant was driving the vehicle, the heroin was in a clear bag at his feet, and he made a voluntary statement of ownership of the drugs to law enforcement. Trial Counsel cannot be deficient for failing to request a charge that is far removed from the facts presented at trial.

Moreover, a fair assessment of attorney performance requires every effort to be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689; see Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996) (declining "to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial"). While Trial Counsel testified that in hindsight, he would have asked for this charge, this Court is required to "eliminate the distorting effects of hindsight," and evaluate Trial Counsel's conduct at the time of trial. This Court finds Trial Counsel has reasonably satisfied Strickland's deferential standard.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED and DISMISSED WITH PREJUDICE**.

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Allegation 1p: Failure to request lesser included offense.

Applicant alleged that Trial Counsel was constitutionally ineffective for failing to request a charge of the lesser included offense, possession of heroin. This Court finds this allegation is without merit.

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel discussed requesting a charge on possession of heroin a few minutes prior to the jury being charged. (PCR Tr. p. 24).

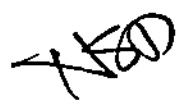
On direct examination, Trial Counsel testified he believed he requested a jury charge on the lesser included offense. (PCR Tr. p. 44). Trial Counsel testified he requested a charge on the lesser included offense because there were two separate amounts of heroin seized, and one of the amounts did not meet the weight for trafficking. Id.

Trial

At trial, Trial Counsel requested the jury be charged on the lesser included possession with intent to distribute on the basis that there were two occupants in the vehicle and two bags of heroin and that one could belong to each of them. (Trial Tr. p. 259). The State argued State v. Raffaldt⁶ and State v. Grandy⁷ precluded the trial court from charging the lesser included because the weight of the drugs exceeded the minimum amount for trafficking. Id. The trial court took it under advisement to review the case law and ultimately denied Trial Counsel's request. (Trial Tr. pp. 261 – 63).

⁶ State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995).

⁷ State v. Grandy, 306 S.C. 224, 411 S.E.2d 207 (1991).



Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court finds Applicant has failed to overcome his burden and establish Trial Counsel was deficient, resulting in prejudice from Trial Counsel's alleged deficiency. Butler, *supra*. The record provides that Trial Counsel requested the lesser included offense be charged and the trial court denied Trial Counsel's request.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

ALLEGATIONS RAISED AT THE EVIDENTIARY HEARING

Allegation: **Failure to advise Applicant about his right to testify.**

Applicant alleged that Trial Counsel was constitutionally ineffective for failing to advise him of his right to testify. This Court finds this allegation is without merit.

"The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. [However], if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). "If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner

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during its deliberations." Id. "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Id.

PCR Evidentiary Hearing

On direct examination, Applicant testified there was no discussion with Trial Counsel about his right to testify at trial. (PCR Tr. p. 11).

On cross-examination, Applicant testified he had considered testifying, but he had not been given guidance concerning testifying. (PCR Tr. p. 32). Applicant testified he was confused, and no one had advised him how testifying would help or hurt him. Id. Applicant testified he did not believe testifying would have hurt him. Id.

On re-direct examination, Applicant testified the passenger owned the drugs and he was merely taking the passenger from one location to the other. (PCR Tr. p. 33). Applicant testified he would testify to the same at trial. (PCR Tr. p. 34).

On cross-examination, Trial Counsel testified that he believed he discussed Applicant's right to testify with him. (PCR Tr. p. 58). Trial Counsel testified there were issues with Applicant's record, and he recalled thinking it was not worth it for Applicant to testify. Id. Trial Counsel testified his strategy was to close last, and he does not recall whether he expressed his strategy to Applicant. Id.

Trial

At trial, the following colloquy occurred between the trial judge and Applicant:

THE COURT:	All right. Sir, your name is Desmond Sharmaine Collins?
APPLICANT:	Yes, sir.
THE COURT:	All right. Mr. Collins, at this time, I'm going to explain to you certain rights that you have. If you do not understand anything I say, please let me know, and if you want me to explain anything in

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more detail, please let me know. Do you understand that?

APPLICANT: Yes, sir.

THE COURT: Okay. We've now reached the stage of the trial where you may present your defense. You have the right to claim the protections given to you by the Fifth Amendment to the United States Constitution, which states in part that no person shall be compelled in any criminal trial or in any criminal case to be a witness against himself. This means that you cannot be required to testify in this case. You have the right to testify on your own behalf. However, no one can make you testify. This is a personal right and no one can waive this right except for you. If you decide to testify, you will be subject to the same rules that govern other witnesses and you may be examined and cross examined on any relevant issue in this case. In addition, if you have any convictions involving dishonesty or false statement or for crimes punishable by imprisonment for more than one year and this Court determines that the probative value of admitting the evidence, outweighs its prejudicial effect to you, the Solicitor will be able to introduce your record to attack your credibility. Now are there any prior convictions that the State intends to use to attack his credibility, if he testified?

MR. ERVIN: There is, Your Honor.

THE COURT: All right. What is that?

MR. ERVIN: There is a 1999 grand larceny; 2009 financial transaction card fraud; and a 2015 receiving stolen goods.

THE COURT: All right. So, Mr. Collins, if you testify, they will be able to introduce these three convictions against you to attack your credibility. Okay?

APPLICANT: Yes, sir.

THE COURT: All right. Now, if you decide to testify, this decision on your part, must be freely, voluntarily, and intelligently made with knowledge of the protections given to you by the Fifth Amendment of the United State Constitution and the consequences of your decision to testify. If you decide not to testify, I will instruct the jurors that they cannot give the fact that you did not testify any consideration whatsoever and that there is to

be no, absolutely no prejudice to you because you did not testify. It is left entirely up to whether or not you testify. You may talk with your attorney, your family and friends, or anyone else, but the final decision will be left entirely up to you. Now, also if you testify, they will be able to introduce your record to attack your credibility but there will also be a charge to the jury that says that they cannot consider those prior convictions as to your guilt or innocence in this case. They can only consider them as to your credibility when you testify. Now, do you understand what I've explained to you?

APPLICANT: Yes, sir.

THE COURT: Do you have any questions about what I've explained to you?

APPLICANT: No, sir.

THE COURT: All right. Have you discussed this with your lawyer and anyone else you want to discuss whether or not you wish to testify?

APPLICANT: Yes, sir.

THE COURT: Okay. Do you need to discuss it further with your attorney or with anyone else?

APPLICANT: No, sir.

THE COURT: Okay. Do you wish to testify in this case?

APPLICANT: No, sir.

THE COURT: Okay. Is that your decision?

APPLICANT: Yes, sir.

THE COURT: Has anybody forced you into that decision?

APPLICANT: No, sir.

(Trial Tr. pp. 254, l. 11 – 257, l. 9).

Findings

This Court finds the record wholly refutes this allegation and Applicant has failed to overcome his burden and establish Trial Counsel was deficient, and any resulting prejudice from Trial Counsel's alleged deficiency. Butler, supra. The record provides Trial Counsel advised Applicant of his right to testify, and Applicant was aware it was his decision whether or not to testify and elected not to. Additionally, even if Applicant had not been advised by Trial Counsel, the error was cured by the colloquy between Applicant and the trial court. The record provides

that the trial court advised Applicant of his right to testify, advised Applicant of the consequences if he chose to testify and that it was his decision solely whether he wanted to testify. Further, Applicant informed the trial court he had discussed testifying with Trial Counsel, that he did not need to discuss it further with Trial Counsel, and that he did not want to testify.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation: **Failure to move for a continuance to investigate
the issue of the identity of the passenger.**

Applicant alleged Trial Counsel was constitutionally ineffective for failing to move for a continuance to investigate the issue of the identity of the passenger. This Court finds this allegation is without merit.

PCR Evidentiary Hearing

At the outset of the evidentiary hearing, Applicant raised the issue that Trial Counsel was ineffective for failing to move for a continuance to investigate the identity of the passenger, Lawyer. (PCR Tr. p. 9).

On direct examination, Applicant testified that Trial Counsel asked for a continuance to investigate the identity of the passenger, and it was denied. (PCR Tr. p. 29). Applicant testified Lawyer was not present at the hearing to testify. Id.

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Findings

As an initial matter, this Court finds the record wholly refutes this allegation and establishes Trial Counsel did move for a continuance, and the trial court denied his motion. (Trial Tr. p. 32 – 33). Thus, this Court finds Applicant has failed to overcome his burden and establish Trial Counsel was deficient, and any resulting prejudice from Trial Counsel's alleged deficiency. Butler, supra.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCR; Butler v. State, 286 S.C. 441, 441, 334 S.E.2d 813, 814 (1985). A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396-97 (1985) (citing Douglas v. California, 372 U.S. 353 (1963)). "However, appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 752-53 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C.

474, 476. 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy"))).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the courts apply the Strickland test just as they would when analyzing a claim of ineffective assistance of trial counsel: an applicant must show that appellate counsel's performance was deficient and that he or she was prejudiced by the deficiency. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

Allegation 2a:	Failure to raise the issue of whether the trial court erred in denying Trial Counsel's motion for a continuance to investigate the identity of the passenger in Applicant's car.
Allegation 2c:	Failure to raise the issue of whether the State committed a discovery violation by failing to disclose the 400-page cell phone report.
Allegation 2d:	Failure to raise the issue of whether trial court erred in limited cross-examination of Officer Crews.
Allegation 2e:	Failure to raise the issue of whether trial court erred in denying Trial Counsel's motion to suppress evidence seized by law enforcement.
Allegation 2f:	Failure to raise the issue of whether the trial court erred in determining Applicant's statement to law enforcement was voluntary.

Applicant alleges Appellate Counsel was constitutionally ineffective for failing to raise various issues on appeal. This Court finds these allegations are without merit.

NSD

PCR Evidentiary Hearing

On direct examination, Trial Counsel testified that he raised on appeal the glaring issue in his mind that he left with from Applicant's trial. (PCR Tr. p. 41). Trial Counsel testified he may have looked at other issues, and believes Applicant asked him to raise certain issues, but Trial Counsel decided to keep it simple and assert the issue he believed was good. Id. Trial Counsel testified he believed the issue he raised on appeal was the best issue. Id.

On cross-examination, Trial Counsel testified there were other issues he could have raised on appeal, and he does not recall his thought process in not raising other issues on appeal. (PCR Tr. p. 51). Trial Counsel testified he put all his eggs in one basket on appeal because it seemed like the best issue, but it was not preserved. (PCR Tr. p. 53). Trial Counsel testified that in hindsight, he would have raised other issues on appeal. (PCR Tr. pp. 50 – 53; 60 – 62).

Findings

This Court must first look at the issue raised on appeal and compare it to the viable issues raised by Applicant at the PCR evidentiary hearing to determine whether the pled issues are stronger than the one raised on appeal. This Court finds that because the issue raised on appeal was not preserved for appeal, then any other issue that could have been raised on appeal would have been a stronger issue than the one raised on appeal. Thus, this Court finds Trial Counsel's performance on this matter was deficient. However, a finding of deficiency only satisfies Strickland's first prong.

Turning to prejudice, this Court must determine whether the issue or issues, if raised, would have been successful on appeal. This Court finds Applicant was not prejudiced by Trial Counsel's deficiency. This Court further finds none of the issues pled at the evidentiary hearing regarding trial court error or the Brady violation would have been reversed on appeal. (Discussed *supra* in

XSD

Allegation⁸ 1c, 1d, 1e, 1f, 1g). State v. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 847-48 (2006), citing State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) and State v. Frank, 262 S.C. 526, 533, 205 S.E.2d 827, 830 (1974) ("[T]he admission or exclusion of evidence is a matter addressed to the sound discretion of the trial [court] and [its] ruling will not be disturbed in the absence of [a] manifest abuse of discretion accompanied by probable prejudice."). Based on a review of the record, the trial court's rulings had evidentiary support and were not erroneous as a matter of law. Thus, Applicant has failed in his burden of proving and prejudice from Trial Counsel's deficiency.

Accordingly, this Court finds Applicant proved Trial Counsel was deficient in this matter, however, Applicant failed to establish any prejudice flowing therefrom. Thus, these allegations must be **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation 2b: Failure to raise the issue of whether the trial court erred in refusing to dismiss or declare a mistrial based on untimely discovery regarding the 400-page Cell Phone Report.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to raise on appeal the trial court's denial of his motion for a mistrial based on the untimely discovery regarding the 400-page CPR. This Court finds this allegation is without merit.

As discussed in the previous allegation, Trial Counsel's performance in this matter was deficient as this was a preserved issue and the issue he raised on appeal was not a preserved issue.

Non-frivolous

⁸ The allegation concerning the denial of Trial Counsel's motion to continue to investigate the identity of the passenger is the second allegation addressed *supra* in **Allegation 1b**.

As addressed in **Allegation 1c**, Trial Counsel moved for a mistrial based on the State's failure to timely provide the CPR and the trial court denied his motion. (Trial Tr. pp. 211 – 15). Importantly, the CPR was not used in the State's case against Applicant.

Turning to prejudice, this Court must determine whether the issue or issues, if raised, would have been successful on appeal. This Court finds Applicant was not prejudiced by Trial Counsel's deficiency. This Court further finds this issue, even if raised on appeal, the lower courts ruling would be upheld. See State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) (finding "In order to receive a mistrial, the defendant must show error and resulting prejudice."); see also State v. Galbreath, 359 S.C. 398, 402, 597 S.E.2d 845, 847 (Ct.App.2004) (requiring the defendant to show a prejudicial abuse of discretion (citing State v. Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 69– 70 (Ct. App. 2000))). A mistrial is only proper where there is " manifest necessity", and whether a mistrial is manifestly necessary is a fact specific inquiry. State v. Rowlands, 343 S.C. 454, 539 S.E.2d 717 (Ct. App. 2000). Based on a review of the record, this Court finds Applicant has failed to show error by the trial court and any resulting prejudice that would have warranted a mistrial.

Accordingly, this Court finds Applicant proved Trial Counsel was deficient in this matter; however, Applicant failed to establish any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED WITH PREJUDICE**.

[CONCLUSION PAGE FOLLOWS]

NSD

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED WITH PREJUDICE**.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking a review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 26th day of July, 2024.


THE HONORABLE H. STEVEN DEBERRY, IV
Presiding Judge
Fifteenth Judicial Circuit

Florence, South Carolina

THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
Desmond S. Collins,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
Case No.: 2020-CP-26-4318

**MOTION TO ALTER OR AMEND
PURSUANT TO RULE 59(E), SCRPC**

FILED
JUL 31 2024
CLERK OF COURT
HORRY COUNTY, SC

The Applicant, by and through the undersigned Counsel, moves this Court to alter or amend the Order of Dismissal filed in the above-captioned case on July 30, 2024, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Rule 59(e), SCRPC; U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, §§ 3 and 14. In support of this motion, Applicant submits the following arguments and does not abandon or waive any previous arguments or issues raised in the prior pleadings, proposed orders, and evidentiary hearing in this PCR action:

- (1) Applicant incorporates by reference the issues and arguments raised in the pleadings and at the evidentiary hearing as if fully set forth verbatim into this motion (Attachment A: PCR Hearing Transcript).
- (2) Applicant incorporates by reference the issues addressed in the Applicant's Proposed Order Granting Applicant Post-Conviction Relief as if fully set forth verbatim into this motion. (Attachment B: Applicant's Proposed Order).

Therefore, this Court should reconsider its Order of Dismissal, withdraw that order, and enter an Order Granting Applicant Post-Conviction Relief.

[Conclusion and Signature Page to Follow]

CONCLUSION

Based on the foregoing reasons, the undersigned Counsel respectfully requests that this Court reconsider the Order of Dismissal, withdraw that order, and enter an Order Granting Applicant Post-Conviction Relief, reversing and remanding Applicant's convictions and sentences for a new trial.

IT IS SO MOVED.

Respectfully Submitted,

s/ Dayne Phillips


Dayne C. Phillips, Esq.

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C: 803-807-0234
F: 803-380-8035
dayne@pricebenowitz.com

ATTORNEY FOR THE APPLICANT

August 8, 2024

FILED
HONRY COUNTY
2024 AUG - 9 PM 2:03
RENEE N. EVANS
CLERK OF COURT
HONRY COUNTY, SC

THE STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Desmond S. Collins,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

FIFTEENTH JUDICIAL CIRCUIT

Case No.: 2020-CP-26-4318

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within and foregoing Motion to Alter or Amend pursuant to Rule 59(e), SCRCP, by depositing a true and correct copy of the same via first-class mail, postage prepaid, upon all parties as follows:

Russ Barlow, Esq.
SC Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

The Honorable Renee Elvis
Horry County Clerk of Court
PO Box 677
Conway, SC 29528-0677

The Honorable H. Steven DeBerry, IV
181 N. Irby Street, Ste. 3600
Florence, SC 29501

FILED
HORRY COUNTY
2024 AUG -9 P 2:04
RENEE H. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

By: _____

Courtney Powers

Paralegal for Dayne C. Phillips, Esq.

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August 8, 2024

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Desmond S. Collins,
Applicant,

vs.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS

ORDER

2020-CP-26-04318

The Respondent, Desmond S. Collins, requests the Court to reconsider the Order filed on July 30, 2024, in the Horry County Clerk of Court's office.

Having duly considered the motion of the Respondent, this Court has determined that its original ruling of July 30, 2024, is fully supported by the law and the evidence and is hereby ratified and reconfirmed. The motion is therefore DENIED.

AND IT IS SO ORDERED.

Florence, South Carolina

Dated: 8/9/2024


H. Steven DeBerry, IV
Presiding Circuit Court Judge

FILED
HORRY COUNTY
2024 AUG 12 P 12:57
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC



State of South Carolina
The Circuit Court of the Twelfth Judicial Circuit

H. Steven DeBerry, IV
Judge

181 North Irby Street
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Florence, SC 29501-3456
Phone: (843) 665-3020
Fax: (843) 665-3078
hsdeberryj@sccourts.org

August 9, 2024

The Honorable Renee Elvis
PO Box 677
Conway, SC 29528-0677

Re: Desmond Collins v. State

Dear Ms. Elvis:

Enclosed is an Order in the above-referenced case, signed by Judge DeBerry. Please file the Order, copy the parties and let us know if you should need anything further.

Thank you for your assistance.

Sincerely,

Stacey R. Minton
Administrative Assistant

Enc.

FILED
HORRY COUNTY
2024 AUG 12 P 12:57
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable H. Steven DeBerry, IV

Case No. 2020-CP-26-04318

Desmond S. Collins,

Petitioner,

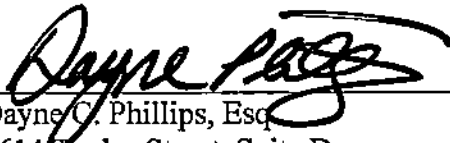
v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner Desmond S. Collins appeals the Honorable H. Steven DeBerry IV's Order Denying his Application for Post-Conviction Relief filed on July 30, 2024, and the Order Denying Applicant's Motion to Alter or Amend Judgment (Rule 59(e), SCRCP) filed on August 12, 2024, and received by the undersigned Counsel via email on August 21, 2024.


Dayne C. Phillips, Esq.
1614 Taylor Street, Suite D.
Columbia, SC 29201

ATTORNEY FOR PETITIONER

August 22, 2024

Other Counsel of Record:

D. Russell Barlow II, Assistant Attorney General
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211

cc:

Renee Elvis, Horry County Clerk of Court

FILED
HORRY COUNTY
2024 AUG 27 P 4:36
RENEE H. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable H. Steven DeBerry, IV

Case No. 2020-CP-26-04318

Desmond S. Collins,

Petitioner,

v.

State of South Carolina,

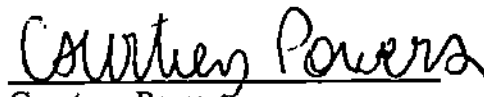
Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Assistant Attorney General D. Russell Barlow II, and Renee Elvis, Horry County Clerk of Court, by depositing a copy in the United States Mail, postage prepaid, on **August 22, 2024**, addressed to the following parties:

D. Russell Barlow II, Esquire, SC Attorney General's Office
PO Box 11549, Columbia, SC 29211

Renee Elvis, Horry County Clerk of Court
PO Box 677, Conway, SC 29528-0677


Courtney Powers
Paralegal for Dayne Phillips, Esq.
1614 Taylor Street, Suite D.
Columbia, SC 29201

August 22, 2024

FILED
HORRY COUNTY
2024 AUG 27 P 4:36
RENEE H. ELVIS
CLERK OF COURT
HORRY COUNTY, SC



Dayne Phillips <dayne@pricebenowitz.com>

D. Collins: Motion to Alter or Amend (2020-CP-26-04318)

DeBerry, H. Steven Law Clerk (Elizabeth Tucker) <hsdeberrylc@sccourts.org>

Wed, Aug 21, 2024 at 1:15 PM

To: Dayne Phillips <dayne@pricebenowitz.com>

Cc: "DeBerry, H. Steven" <hsdeberryj@sccourts.org>, Russ Barlow <RussBarlow@scag.gov>, Courtney Powers <courtney@pricebenowitz.com>, "Clio Maildrop Desmond.Collins.2020.06.00001" <800ca9c17+matter1223013514@maildrop.clio.com>, "DeBerry, H. Steven Secretary (Stacey R. Minton)" <hsdeberrysc@sccourts.org>

Good afternoon,

The motion has been denied. Please see attached order filed August 12.

Respectfully,

Elizabeth Tucker

Law Clerk to

The Honorable H. Steven DeBerry, IV

12th Judicial Circuit181 N. Irby Street, Ste. 3600
Florence, SC 29501
OFFICE: (843) 665-3020
FAX: (843) 665-3078

From: Dayne Phillips <dayne@pricebenowitz.com>**Sent:** Wednesday, August 21, 2024 11:49 AM**To:** DeBerry, H. Steven Law Clerk (Elizabeth Tucker) <hsdeberrylc@sccourts.org>**Cc:** DeBerry, H. Steven <hsdeberryj@sccourts.org>; Russ Barlow <RussBarlow@scag.gov>; Courtney Powers <courtney@pricebenowitz.com>; Clio Maildrop Desmond.Collins.2020.06.00001 <800ca9c17+matter1223013514@maildrop.clio.com>**Subject:** Re: D. Collins: Motion to Alter or Amend (2020-CP-26-04318)

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

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Price Benowitz LLP Mail - D. Collins: Motion to Alter or Amend (2020-CP-26-04318)

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10505 JUDICIAL DRIVE, SUITE 203
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August 22, 2024

Renee Elvis
Horry County Clerk of Court
PO Box 677
Conway, SC 29528-0677

Re: Desmond S. Collins v. State
NOTICE OF APPEAL
Case No. 2020-CP-26-04318

Dear Ms. Elvis:

I have enclosed two copies of the Notice of Appeal and Proof of Service in the above-referenced case that I am filing with the South Carolina Supreme Court. Please file one copy and return the clocked-in copy to me in the enclosed self-addressed, stamped envelope. Thank you for your assistance in this matter.

If you have any questions or concerns, please do not hesitate to contact me.

[Signature page to follow]

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CLERK OF COURT
HORRY COUNTY, SC

Desmond S. Collins v. State
NOTICE OF APPEAL
Case No. **2020-CP-26-04318**
August 22, 2024
Page 2 of 2

With best regards, I am,

Yours Sincerely,

s/ Dayne C. Phillips 
Dayne C. Phillips, Esq.

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Enclosures (noted)

cc: **Desmond S. Collins**
D. Russell Barlow, Esq.

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF HORRY

)

2016-GS-26-03956

STATE OF SOUTH CAROLINA,)

)

Plaintiff,)

Transcript of Record

)

vs.)

)

November 13-15, 2017

DESMOND SHARMAINE)

COLLINS,)

)

Defendant.)

B E F O R E:

Honorable Benjamin H. Culbertson
Horry County Courthouse
Conway, South Carolina

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

W. Grayson Ervin, Esquire
Attorney for Plaintiff

T. Kirk Truslow, Esquire
Attorney for Defendant

TAKEN BY:

Dixie C. Eubank
Circuit Court Reporter

PREPARED BY:

Kay H. Richardson
Circuit Court Reporter

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1 **(NOVEMBER 13, 2017 - DAY ONE)**

2 VOIR DIRE:

3 THE COURT: Good afternoon, ladies and gentlemen. I
4 appreciate everyone being on time, returning promptly. That's
5 great assistance to the Court, number 1. Number 2, I want to
6 apologize for keeping you down in the jury panel room for so
7 long, but we did have some other matters on other cases that
8 we needed to address before we got to this case.

9 Now we're getting ready to start the trial of the case of
10 The State of South Carolina versus Desmond Sharmaine Collins.
11 And before we get started on that case, as part of the jury
12 selection process, I've got to go over some questions with
13 you. All of you have been qualified to serve as jurors for
14 this term of court, but the next series of questions I have to
15 go over with you is called voir dire questioning. That is
16 determine whether or not you're qualified to serve as jurors
17 on this particular case and it also gives the attorneys some
18 additional information that assists them in the jury selection
19 process.

20 So, the first thing you're gonna learn as jurors, you had
21 to take an oath this morning. Just like witnesses, jurors are
22 constantly taking oaths. So, I'll please ask all members of
23 the jury panel to stand and raise your right hand. Thank you.

24 Do you solemnly swear or affirm that you will truthfully
25 answer the questions asked of you by the Court with the truth,

1 the whole truth and nothing but the truth? If so, say I do.

2 (REPORTER'S NOTE: Jury unanimously confirms.)

3 Thank you very much. You may put your hands down and be
4 seated. Is there any member of the jury panel that did not
5 respond to the oath by saying I do; if so, please stand?

6 (REPORTER'S NOTE: No response.)

7 THE COURT: Is there any member of the jury that did not
8 respond to the oath by saying I do? If so, please stand.

9 (REPORTER'S NOTE: No response.)

10 THE COURT: Very well. All right, ladies and gentlemen,
11 please listen up as I go over these questions with you and
12 respond when I direct you to do so.

13 This is the case of The State of South Carolina versus
14 Desmond Sharmaine Collins. Mr. Collins has been indicted on
15 the charge of trafficking in illegal drugs, being heroin. The
16 allegations in this case are that on or about June 24th, 2016
17 in Myrtle Beach, South Carolina, Mr. Collins is alleged to
18 have trafficked -- been trafficking in more than 14 grams but
19 less than 28 grams of heroin. That is alleged to have
20 occurred on June 24th, 2016. Is there any member of the jury
21 panel that has heard anything, read anything, discussed
22 anything, or knows anything about this case? If so, please
23 stand.

24 (REPORTER'S NOTE: No response.)

25 THE COURT: As I said, the Defendant is Desmond Sharmaine

1 Collins. Is there any member of the jury panel related by
2 blood or marriage, have a close personal relationship,
3 business relationship, social relationship, or any other type
4 of relationship with Desmond Sharmaine Collins? If so, please
5 stand.

6 (REPORTER'S NOTE: No response.)

7 THE COURT: All right. In addition to Mr. Collins, the
8 potential witnesses, who may testify in this case are Jeremy
9 Crews, formerly of the Myrtle Beach Police Department; Michael
10 Householder of the Myrtle Beach Police Department; Jeremy
11 Camacho or Camacho, C-A-M-A-C-H-O, of the Myrtle Beach Police
12 Department; Melinda Shadoan, S-H-A-D-O-A-N, of the Myrtle
13 Beach Police Department; Jackie Davis of the State Law
14 Enforcement Division; and Brittany Hill of the State Law
15 Enforcement Division. Is there any member of the jury panel
16 related by blood or marriage, have a close personal
17 relationship, business relationship, social relationship or
18 any other type of relationship with any of these potential
19 witnesses? If so, please stand.

20 Yes, ma'am; your name and number?

21 JUROR 321: 231, I mean 321, Diane Nordeen.

22 THE COURT: Hold for a second. All right, Ms. Nordeen,
23 who is it that you know?

24 JUROR 321: Melinda Shadoan.

25 THE COURT: All right. And how do you know Melinda

1 Shadoan?

2 JUROR 321: Just socially.

3 THE COURT: Okay. Is she someone that you see on a
4 regular basis or just occasionally or do you socialize
5 regularly together?

6 JUROR 321: We did socialize regularly on weekends, but I
7 haven't seen her in about a year.

8 THE COURT: Okay. And up until about a year ago, how
9 often would you see her?

10 JUROR 321: Every other week.

11 THE COURT: Okay. Would the relationship, since it's
12 been you say a year or longer since you've seen her?

13 JUROR 321: Yes.

14 THE COURT: Okay. Would the relationship be such that it
15 would affect your ability to give both the State and the
16 Defendant a fair and impartial trial?

17 JUROR 321: I don't think it would affect it.

18 THE COURT: Okay. And I appreciate your honesty in
19 saying you don't think it would affect it, but I have to be
20 sure that you're not influenced by anything that may have
21 happened or may have occurred or any association that you may
22 have had outside of the evidence presented during this trial.
23 Would you be able to disregard your association with Ms.
24 Shadoan in its entirety and base your decision in this case
25 exclusively on the testimony and evidence in this case?

1 JUROR 321: Yes.

2 THE COURT: Okay. Thank you very much for bringing that
3 to our attention. You may sit down. Thank you.

4 Anyone else any type of relationship with any of these
5 potential witnesses? If so, please stand.

6 (REPORTER'S NOTE: No response.)

7 THE COURT: All right. Prosecuting this case on behalf
8 of the State attorney Gray Ervin of the Fifteenth Circuit
9 Solicitor's office and defending this case for the Defendant
10 is attorney T. Kirk Truslow of the Law Office of T. Kirk
11 Truslow, P.A. in Myrtle Beach, South Carolina. Is there any
12 member of the jury panel related by blood or marriage, have a
13 close personal relationship, business relationship, social
14 relationship, or any other type of relationship with either
15 Mr. Ervin or Mr. Truslow? If so, please stand.

16 (REPORTER'S NOTE: No response.)

17 THE COURT: Has any member of the jury panel ever been
18 represented by either of these attorneys? If so, please
19 stand.

20 (REPORTER'S NOTE: No response.)

21 THE COURT: Has any member of the jury panel ever been
22 involved in any legal action, in which either of these
23 attorneys represented another party in that action? If so,
24 please stand.

25 (REPORTER'S NOTE: No response.)

1 THE COURT: Is there any member of the jury panel who
2 either personally has a family member or close personal friend
3 employed with the Fifteenth Circuit Solicitor's office or the
4 Law Office of T. Kirk Truslow, P.A.? If so, please stand.

5 (REPORTER'S NOTE: No response.)

6 THE COURT: Is there any member of the jury panel who
7 either personally has a family member or close personal friend
8 employed with the Myrtle Beach Police Department or the State
9 Law Enforcement Division? If so, please stand.
10 Yes, sir, your name and number?

11 JUROR 243: Gerard Larosa and it's 243.

12 THE COURT: Gerard Larosa?

13 JUROR 243: Yes, sir.

14 THE COURT: All right, Mr. Larosa, who is it that you
15 know? Is this you, a family member or who?

16 JUROR 243: A close personal friend in Myrtle Beach
17 Dispatch.

18 THE COURT: Okay. And what is that person's name?

19 JUROR 243: Megan Gardner.

20 THE COURT: Megan Gardner. Is Ms. Gardner involved in
21 this case?

22 MR. TRUSLOW: Not to my knowledge.

23 MR. ERVIN: No, sir.

24 THE COURT: I know she wasn't on the witness list.

25 MR. ERVIN: No, sir.

1 THE COURT: Okay. Would the fact that some of these
2 witnesses are employed with the Myrtle Beach Police Department
3 and you have a friend employed with that same department,
4 would that association affect your ability to give both the
5 State and the Defendant in this case, a fair and impartial
6 trial?

7 JUROR 243: No.

8 THE COURT: Would you be able to disregard your friend's
9 employment in its entirety and base your decision in this case
10 exclusively on the testimony and evidence in this case?

11 JUROR 243: Yes, sir.

12 THE COURT: All right. Thank you, Mr. Larosa, for
13 bringing that to our attention.

14 Anyone else?

15 (REPORTER'S NOTE: No response.)

16 THE COURT: Has any member of the jury panel, formed or
17 expressed an opinion about any issue or matter involved in
18 this case? If so, please stand.

19 (REPORTER'S NOTE: No response.)

20 THE COURT: Any member of the jury panel aware of any
21 bias or prejudice towards either the State of South Carolina
22 or the Defendant in this case? If so, please stand.

23 (REPORTER'S NOTE: No response.)

24 THE COURT: Was any member of the jury panel or was any
25 member of the jury panel a member of the Grand Jury that

1 issued the indictment in this case? If so, please stand.

2 (REPORTER'S NOTE: No response.)

3 THE COURT: Is any member of the jury panel a member of
4 or a contributor to any organization which has as its primary
5 concern, the promotion of law enforcement or victim's rights;
6 some of these organizations, this is not a complete list, but
7 some of the organizations are Mother's Against Drunk Driving
8 also called MADD; Student's Against Drunk Driving referred to
9 as SADD; Citizens Against Violent Crime also known as CAV; and
10 CASA, Citizens against Spousal Abuse or any similar
11 organization. Is any member of the jury panel a contributor
12 to or a member of such organizations? If so, please stand.

13 (REPORTER'S NOTE: No response.)

14 THE COURT: Does any member of the jury panel know of any
15 reason whatsoever why he or she should not serve as a juror in
16 this case with particular emphasis being placed on your
17 ability to be fair and impartial to both the State of South
18 Carolina and the Defendant? If so, please stand.

19 (REPORTER'S NOTE: No response.)

20 THE COURT: Any additional questioning from the State?

21 MR. ERVIN: No, Your Honor.

22 THE COURT: Any from the defense?

23 MR. TRUSLOW: None, Your Honor.

24 JURY SELECTION:

25 THE COURT: All right. All right, ladies and gentlemen,

1 the way we select juries in General Sessions trials is your
2 names have been generated on a list at random and the Clerk of
3 Court will call -- go down that list one by one and call your
4 name. When your name is called, if you would please come
5 forward, stand here in front of the attorneys, turn and face
6 the attorneys. Bring with you any pocketbooks and your
7 umbrellas, coats, or whatever you might have. Now, when you
8 get up here, you're gonna turn and face the attorneys. The
9 State's attorneys are gonna stare at you a little while and
10 then they're gonna look at their notes and then they're gonna
11 stare back at you a little while and decide whether or not
12 they want you as a juror. And if they want you as a juror,
13 then the Defense Attorney is gonna stare at you a while and
14 look at his notes a while and stare back at his notes and
15 decide if he wants you as a juror and we follow this process
16 until we get a jury of 12 people and one alternate.

17 Now, if you get struck by either the State or the
18 Defense, please do not take it personally. It just means that
19 for whatever reason, you do not fit a certain profile that
20 they're looking for in this particular case. I've had many
21 occasions where a potential juror has been struck in one case
22 and then taken by the same side in the following case, or
23 taken in the first case and struck in the second case. So,
24 there's really no rhyme or reason as to why you're accepted or
25 why you're struck; it just means that for whatever reason, you

1 don't fit a particular profile for this particular case. But
2 please listen carefully and if your name is called, please
3 come forward, stand in front of the attorneys and wait for
4 further instructions.

5 MR. TRUSLOW: Your Honor?

6 THE COURT: Yes.

7 MR. TRUSLOW: May we approach?

8 THE COURT: Yeah, come on up. Hold for a second.

9 (REPORTER'S NOTE: Bench conferenced held off the record in the
10 presence but outside the hearing of jury.)

11 THE COURT: All right. Please listen carefully. If your
12 name is called, come forward and stand in front.

13 This is five and five strike, right?

14 MR. ERVIN: Yes, sir.

15 THE COURT: All right.

16 CLERK: Number 115, Steven Douglas.

17 What say the State?

18 MR. ERVIN: Please seat the juror.

19 CLERK: Defense?

20 MR. TRUSLOW: Please excuse the juror from this
21 particular trial.

22 CLERK: You're excused from this particular trial.

23 Number 10, Keith Ater.

24 What say the State?

25 MR. ERVIN: Please seat the juror.

1 CLERK: Defense?

2 MR. TRUSLOW: I'm so sorry, the number?

3 CLERK: Number 10.

4 MR. TRUSLOW: Please swear the juror for this case.

5 CLERK: All right. Please be seated in the jury box.

6 Number 221, Caitlin Johnson.

7 What say the State?

8 MR. ERVIN: Please seat the juror.

9 CLERK: Defense?

10 MR. TRUSLOW: Please seat the juror.

11 CLERK: Please be seated in the jury box. Thank you.

12 Number 433, Gina Watkins.

13 What say the State?

14 MR. ERVIN: Please seat the juror.

15 CLERK: Defense?

16 MR. TRUSLOW: Please excuse the juror from this trial.

17 CLERK: You're excused from this particular case.

18 Number 320, Charles Nolan.

19 What say the State?

20 MR. ERVIN: Please excuse the juror.

21 CLERK: You're excused from this particular case.

22 Number 313, Patricia Murphy.

23 What say the State?

24 MR. ERVIN: I'm sorry, Madam Clerk, what was the number?

25 CLERK: Number 313. What say the State?

JURY SELECTION

1 MR. ERVIN: Please excuse the juror.

2 THE COURT: You're excused from this particular case.

3 Number 122, Stacy Eckel.

4 What say the State?

5 MR. ERVIN: Please seat the juror.

6 CLERK: Defense?

7 MR. TRUSLOW: Please seat the juror.

8 CLERK: Please be seated in the jury box.

9 Number 278, Beth McClure.

10 What say the State?

11 MR. ERVIN: Please seat the juror.

12 CLERK: Defense?

13 MR. TRUSLOW: Please seat the juror.

14 CLERK: Please be seated in the jury box.

15 Number 105, Richard Dew.

16 What say the State?

17 MR. ERVIN: Please seat the juror.

18 CLERK: Defense?

19 MR. TRUSLOW: Court's indulgence? Can I inquire from

20 which part of the county, Mr. Dew is from? I, I had missed

21 that and the juror after ---

22 THE COURT: All right. Where do you live?

23 JUROR 105: South Conway.

24 THE COURT: South Conway. All right.

25 MR. TRUSLOW: Please seat the juror.

JURY SELECTION

1 CLERK: Please be seated in the jury box.
2 Number 93, Angela Crawford.
3 What say the State?
4 MR. ERVIN: Please seat the juror.
5 CLERK: Defense?
6 MR. TRUSLOW: Please seat the juror.
7 CLERK: Please take a seat in the jury box.
8 Number 103, Patricia Deas.
9 What say the State?
10 MR. ERVIN: Please seat the juror.
11 CLERK: Defense?
12 MR. TRUSLOW: Please, please excuse Ms. Deas from this
13 trial.
14 CLERK: All right. You're excused from this particular
15 case.
16 Number 121, Elsa Eberle.
17 What say the State?
18 MR. ERVIN: Please seat the juror.
19 CLERK: Defense?
20 MR. TRUSLOW: Please seat the juror.
21 CLERK: Please be seated in the jury box.
22 Number 243, Gerard Larosa.
23 What say the State?
24 MR. ERVIN: Please seat the juror.
25 CLERK: Defense?

JURY SELECTION

1 MR. TRUSLOW: One second, Your Honor.
2 THE COURT: All right.
3 MR. TRUSLOW: Please seat the juror.
4 CLERK: Please be seated in the jury box.
5 Number 386, Betty Smigelski.
6 What say the State?
7 MR. ERVIN: Please seat the juror.
8 CLERK: Defense?
9 MR. TRUSLOW: Please excuse the juror from this trial.
10 CLERK: You're excused from this particular case.
11 Number 281, Lavern McCray. What say the State?
12 MR. ERVIN: Please seat the juror.
13 CLERK: Defense?
14 MR. TRUSLOW: Please seat the juror.
15 CLERK: Please be seated in the jury box.
16 Number 95, Jill Cribb.
17 What say the State?
18 MR. ERVIN: Please seat the juror.
19 CLERK: Defense?
20 MR. TRUSLOW: I'm sorry; what number?
21 CLERK: Number 95.
22 MR. TRUSLOW: Please seat the juror.
23 CLERK: Please be seated in the jury box.
24 Number 23, Thomas Bellamy.
25 What say the State?

JURY SELECTION

1 MR. ERVIN: Please seat the juror.

2 CLERK: Defense?

3 MR. TRUSLOW: Please seat the juror.

4 CLERK: Please be seated in the jury box.

5 Number 164, Charles Green.

6 What say the State?

7 MR. ERVIN: Please seat the juror.

8 CLERK: Defense?

9 MR. TRUSLOW: Please excuse the juror from this trial.

10 CLERK: You're excused from this particular case.

11 Number 382, Victoria Shultis.

12 What say the State?

13 MR. ERVIN: Please seat the juror.

14 CLERK: Defense?

15 MR. TRUSLOW: Please seat the juror.

16 CLERK: Please be seated in the jury box.

17 THE COURT: All right. Let's select an alternate. The

18 State gets one strike; Defense gets two.

19 CLERK: Okay. Number 196, Eric Heverly.

20 What say the State?

21 MR. ERVIN: Please seat the juror.

22 CLERK: Defense?

23 MR. TRUSLOW: Please seat the juror.

24 CLERK: Please be seated in the jury box.

25 BY THE COURT:

1 THE COURT: All right. Ladies and gentlemen, you will be
2 the jury that will preside over this case. I'm gonna excuse
3 you back to the jury room for a just a few minutes, while I
4 release the remainder of the jury panel. It'll give you an
5 opportunity to stretch your legs, whatever the case may be.
6 It'll only be a short break and we'll bring you back out in
7 just a minute. Thank you very much.

8 (REPORTER'S NOTE: Jury exits courtroom.)

9 THE COURT: All right. Any challenges to the selection
10 or composition of the jury by the State?

11 MR. ERVIN: No, Your Honor.

12 THE COURT: Any by the Defense?

13 MR. TRUSLOW: None, Your Honor.

14 THE COURT: All right. Ladies and gentlemen, those of
15 you who remain in the jury panel, we have our jury for this
16 first case so I'm going to excuse you for the remainder of the
17 day. You should've been given a phone number to the Clerk of
18 Court's Office. You'll need to call that number after 6:00
19 P.M. today and that will give you some further direction as to
20 when you need to return. As I told you this morning during
21 jury qualifications, even if you do not get selected this week
22 on a jury, please do not leave here thinking you have not
23 fulfilled your duty as jurors, because you have. You've been
24 a great assistance to the Court and I want to thank you for
25 being prompt this morning, being prompt this afternoon and

1 being willing to serve jury duty this week. You're free to go
2 for the remainder of the day and please call that number after
3 6:00 P.M. today.

4 Thank you very much.

5 (REPORTER'S NOTE: Jury Venire exits courtroom.)

6 THE COURT: All right. As I understand, we'll just bring
7 the jury back in, I'll release them until tomorrow morning and
8 then we'll take up pretrial matters and we'll wait and swear
9 them tomorrow morning; is that ---

10 MR. ERVIN: Yes, sir.

11 THE COURT: All right. Let's go ahead and bring the jury
12 back in.

13 (REPORTER'S NOTE: Jury enters courtroom. The following takes
14 place outside the presence of the jury.)

15 THE COURT: All right. Ladies and gentlemen, welcome
16 back. You will be the jury that will preside over this first
17 case, but we do have a number of matters on this case and on
18 some other cases that we need to address before we actually
19 get into the trial and that's gonna take up the balance of
20 this afternoon. So I'm gonna excuse you to go home for the
21 remainder of the evening and I'm gonna ask that you please be
22 back in the jury at 9:15 tomorrow morning. Okay? That'll
23 give you an opportunity to get back, get a cup of coffee,
24 they'll probably have biscuit or something of that nature for
25 you tomorrow morning. So, please be back at 9:15 tomorrow

1 morning. Now, when you come back, if you could do me a favor;
2 first of all that would be select a foreperson for this jury.
3 If you're not able to select a foreperson, don't worry about
4 it. I can appoint someone to serve as foreperson. Many
5 judges appoint their own foreperson. I like to give the jury
6 the opportunity to select one on their own accord if they're
7 able to do so.

8 Now, the foreperson has absolutely no more authority, no
9 more influence, no more importance than any other juror. The
10 purpose of the foreperson is to act as a liaison between the
11 Court and the jury. If the jury has a question, the
12 foreperson lets the Court know. If the jury has a need, the
13 foreperson lets the Court know. When it's time to deliberate
14 on a verdict, the foreperson will preside over the
15 deliberations and sign the verdict, but other than that, the
16 foreperson has no more authority, no more influence, no more
17 importance than any other juror. The only restriction is that
18 this time, Mr. -- is it Heverly?

19 JUROR 196: Yes, sir.

20 THE COURT: All right. Mr. Heverly, you're an alternate
21 at this time. So at this point in time, you would not be
22 eligible to serve as foreperson, but anyone else can serve as
23 foreperson. So, if you could select a foreperson, just write
24 his or her name on a sheet of paper with the juror number,
25 give it to the bailiff and we'll bring you back into the court

1 when you select a foreperson.

2 Now, when you come back into the courtroom, the
3 foreperson will always occupy the first seat on the front row
4 closest to the witness stand. Mr. Heverly, as long as you're
5 an alternate, you'll always occupy the alternate seat. The
6 rest of the jurors are at liberty to sit in whatever seat you
7 prefer. If you want to sit in the same seat throughout the
8 trial of the case, you can do that; if you want to alternate
9 seats during the trial of the case, you can do that as well.
10 The only restrictions is that we have the foreman or the
11 foreperson occupy the first seat on the front row and the
12 alternate occupy the alternate seat unless they become a part
13 of the 12-panel jury.

14 Now, I'm gonna release you for the remainder of the day,
15 but I caution you, don't discuss the case. Don't discuss it
16 with anyone. Don't conduct any investigations into the case.
17 Don't go looking through the internet, or through the
18 newspapers, or try to listen to any news reports if there is
19 any, don't try to find out anything about the case, because
20 everything you need to make a decision will be presented to
21 you during the trial of this case. So, don't talk about it,
22 don't conduct any investigations. I hope everybody has a good
23 evening and we'll see you back tomorrow morning at 9:15.
24 Thank you very much.

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

1 MOTIONS:

2 THE COURT: All right. I know we've got pretrial
3 motions. Before we get started into them, Mr. Truslow, we
4 dealt with this in chambers, your request on your Motion to
5 Continue to pursue further investigations as to someone else
6 or another passenger that was in the vehicle at the time of
7 the stop. I denied that motion. Anything further you want to
8 put on the record in that regard?

9 MR. TRUSLOW: Just one. Since we were in Chambers and I
10 got back out here and had a look at it, very, very short
11 addition.

12 THE COURT: All right.

13 MR. TRUSLOW: What I want to pass up the Court, this is
14 my Rule 5 *Brady* motion I filed September 20th of 2016. I can
15 find no authority that would work against me that would not
16 require them to have sent me that information a long time ago,
17 because it kind of got framed as if I'm thinking about it and
18 then I specifically say hey, supplemental discovery, give me -
19 - give me this, this and this. Well, I abandon that right
20 now. They should've given it to me based on that. I didn't
21 wait for anything. I filed that back in 2016. That covers
22 witnesses, potential suspects, other people. He's a fact
23 witness, Judge. He was in the car, dope in his lap and he
24 walked away. The problem is, we got down to it with the
25 trial, I still had nothing from them, I'm going back through

1 the file, there's no names and, you know, everything in these
2 reports I can show you say occupant single. So, and I
3 understand the video. You can glean from that, that's my
4 homeboy, referenced in there as somebody else. But, Judge, of
5 paramount importance in a case like this, to my defense, is
6 that person; not just there's a guy in the car, and, and if we
7 -- he should not be looked at, well, he's in his car so he
8 knows who he is, because that ain't true. The police took the
9 passenger out of the car, patted him down, and sent him on his
10 way. Said they said they didn't -- nothing to arrest him and
11 nothing to arrest him for. It's right -- Judge, the reports
12 say all the dope is in floorboards, all the marijuana is in
13 the passenger's floorboard. I don't know if he's a CI, I
14 don't know what's going on, but he just vanished. Now, if
15 he's a CI, I'm supposed to know that 10 days before trial.
16 That's in my motion as well on 5/20/16.

17 So last week, I get a call or Mr. Ervin makes a call to,
18 to the police involved in this. Eighteen months later, he
19 comes right back like that with the first name, middle name,
20 last name of the passenger, and the date of birth. Where did
21 that come from? I filed that discovery September 20, 2016; 18
22 months later, that officer had to go look at something and
23 whatever he looked at, I should have. And, if it's a CI, I
24 should have had it 10 days ago.

25 THE COURT: So, you're saying you get a CI's

1 identification even if he's not gonna be a witness in the
2 case?

3 MR. TRUSLOW: If -- yes, sir, absolutely. Absolutely,
4 because he is a fact witness in my case. My client is in a
5 car with a bunch of heroin and a bunch of marijuana in plain
6 view, touching both of them, and the police come up and don't
7 even write his name down. I have to assume that because every
8 report I got, they don't even mention him. All I got is what
9 I got. And they talked to him and they sent him walking on
10 his way. He leaves and just wanders off. They let him go.

11 Now, he's a fact witness, at least give me his name, make
12 some record -- and I think they did because somebody looked at
13 a record yesterday to get that name and date of birth. I
14 don't have it, I've never been told it, I've never seen it,
15 it's not been provided to me, I've never been told there was
16 one. But there has to be one because I cannot imagine the
17 officer remembers 18 months ago, a phone call last week from
18 Mr. Ervin, the first, middle, last name, and date of birth of
19 that guy. It just doesn't make sense. I should've had that.
20 If he's a CI, then I should've had it 10 days before,
21 regardless, I'm saying of whether he testifies or not because
22 CIs have been convicted of stealing money, setting people up,
23 pinching out a hand for themselves, a whole bunch of
24 implications that could affect my client. In my client's
25 defense, they're gone go all into it, but it's got to do with

1 this guy. He didn't know him, he tells me, but this guy has
2 some power, and this guy has some influence over him, over his
3 family. This guy is not a big time drug dealer. He's
4 driving. Why do you think he's driving? You know what they
5 do, Judge, the driver, they like to sit over in the passenger
6 seat or the back seat. He's driving, all he's ever done is
7 drive. If there was money in that car, it was that other
8 fellow's money. They can go get bank records, anything, he
9 doesn't have any money. He's on trial for trafficking heroin;
10 it wasn't his heroin.

11 THE COURT: All right.

12 MR. TRUSLOW: He could've had a gun to his head for all I
13 know, I have not been able to investigate. He could've been
14 threatened before. This guy may have a record where he's
15 killed somebody before. If I knew and had the time with his
16 name, I could've had an investigator go out and find other
17 people, beat the bushes where maybe he had threatened them the
18 same way. You get pinched, you do your 25 years, but you be
19 quiet or you're going and your family is going.

20 THE COURT: So, how does that prohibit you from your
21 client taking the stand and saying he was holding a gun to my
22 head and he was gonna kill me if I didn't do what he told me
23 to do?

24 MR. TRUSLOW: Because, Judge, number one, because I think
25 it's exculpatory, because if I had the guy and I had the

1 appropriate time to investigate him, anything else he did like
2 that, is good for me, and it bolsters -- not bolsters, but it
3 shows a pattern of somebody who is running drivers all over
4 the place. He happened to be in the car with this driver that
5 night. He walked away, again, I'm thinking, because he ain't
6 in prison and now my guy is looking at 25 years.

7 THE COURT: Well, I mean my understanding from in
8 chambers was they let him walk away because your client said
9 yeah, those are my drugs; is that correct?

10 MR. ERVIN: That's correct, Your Honor.

11 MR. TRUSLOW: And, Judge, that goes right back to what I
12 was saying.

13 THE COURT: All right.

14 MR. TRUSLOW: Why did he say that? And it may lead to
15 nothing. However, if I had discovery in accordance with Rule
16 5 and *Brady*, I could have spent more time on that and I
17 could've found out if in fact that's a MO of his.

18 THE COURT: All right.

19 MR. TRUSLOW: There's a lot of people -- he may've been
20 in four cases before where the driver said, well, that's all
21 mine not his and he walked off. I don't know.

22 THE COURT: All right.

23 Mr. Ervin?

24 MR. ERVIN: Thank you, Your Honor. The State disputes
25 several recitations of fact put forth by Mr. Truslow. But

1 with respect to the Rule 5 issue that we're dealing with, the
2 State was never in possession of the passenger's information.
3 It was not included in the police report and I've advised
4 officers, hey, in the future, it's probably best practice to
5 include a passenger's name, even if they're uncharged. But in
6 this case, the passenger was not charged because post-Miranda,
7 this Defendant did claim ownership of the drugs. And I would
8 submit to the Court that the officers took an extra reasonable
9 step in not charging someone that they could have. This is a
10 constructive possession case. They could have charged both
11 occupants of that vehicle; they charged the one who admitted
12 post-Miranda to ownership of the drugs and where the drugs
13 were in the immediate vicinity of. So, again, the State never
14 had possession of that information. I had to call the officer
15 after we spoke with Judge John last week and that's where I
16 got the information off of the S.C. DMV website about the
17 passenger and his information. I relayed it to Mr. Truslow.
18 Judge John put on the record that he would give Mr. Truslow
19 one week to perform his due diligence in, in finding out about
20 the passenger and any other information he wanted to do. So,
21 there was nothing exculpatory that the State failed to
22 disclose. I did not have that information. And again, we
23 were in chambers earlier with Your Honor and Your Honor saw
24 the video that was given to Mr. Truslow on October 18th of
25 2016 that had -- Your Honor only saw it reference to a

1 passenger. We will get into the video pretrial that actually
2 shows the passenger in the first five minutes of the stop from
3 Officer Crews' body camera.

4 THE COURT: Okay. And for the record, that was turned
5 over to the Defense when?

6 MR. ERVIN: That was turned over October 18th of 2016.

7 THE COURT: All right.

8 MR. ERVIN: And there were three discs; Officer Crews --
9 actually, there were six videos. Officer Crews had a body cam
10 and a mobile video; Officer Householder had the same, and
11 Office Camacho had the same.

12 THE COURT: And they all showed the occupant?

13 MR. ERVIN: They showed six different views of the
14 traffic stop.

15 THE COURT: All right.

16 MR. ERVIN: That included the passenger in there.

17 THE COURT: All right.

18 MR. TRUSLOW: Just three additional things?

19 THE COURT: Anything further?

20 MR. ERVIN: And I will put on the record, the passenger
21 is not a confidential informant.

22 THE COURT: All right.

23 MR. ERVIN: And we are not subject to the disclosure rule
24 under that ---

25 THE COURT: All right. Thank you.

1 All right. Anything in reply?

2 MR. TRUSLOW: Your Honor, just four things quickly. One,
3 last week, Judge John told me I, I'm gonna continue this for a
4 week. If you need more relief after using due diligence, you
5 file a written motion for a continuance. He was not happy
6 about this. He says, I need to have it, I need to have it
7 provided in writing. That video tape I got, there was no
8 identifying information from that guy, no name, no way for me
9 to find him. And then when he says last week, he called the
10 officer to find out the name, first, middle, last and date of
11 birth and he got it from the DMV. How do you do that if you
12 don't know the name? I don't get it. I mean, he had to get
13 the name from somewhere to put it in DMV to get his birth
14 date. Somebody had the name in a report somewhere. I mean,
15 how does that happen? I mean, do you just fish in names or is
16 it an algorithm. I've never seen that or heard it. He said
17 he got it from the DMV but he didn't know the name until the
18 DMV told him. That doesn't make sense.

19 MR. ERVIN: Your Honor ---

20 MR. TRUSLOW: The other -- the other -- the last ---

21 THE COURT: No, no, that's all.

22 MR. TRUSLOW: The other two things, Your Honor, was that
23 -- oh, in terms of, that's my homeboy, claimed the drugs.
24 Judge, he -- he's -- my position is, you know, it would've
25 been helpful if I had the other guy or had more time to

1 investigate him. He's trying to tip those cops off. He's
2 doing the right thing to take care of himself. But this guy,
3 I do not believe he said, that's all my heroin and that's all
4 my marijuana. He said that's my stuff. So, he didn't claim
5 the bulk which is trafficking heroin. Probably because he
6 knows how much heroin was in there and he smokes marijuana.
7 So, he's gonna take the marijuana; that's my stuff, makes that
8 guy happy, he walks away, but he didn't say, that's my heroin
9 and that's my marijuana, and I want to point that distinction
10 out, too.

11 THE COURT: All right.

12 MR. TRUSLOW: Thank you.

13 THE COURT: All right. I'm gonna stick to my prior
14 ruling and deny the motion to continue.

15 MR. TRUSLOW: Thank you, Your Honor.

16 THE COURT: All right. What do we need to take up next?

17 MR. TRUSLOW: Your Honor, I've got a motion.

18 MR. ERVIN: Your Honor, before we get into motions, I
19 would like to make mention, Officer Crews, who is present in
20 the courtroom, does have a prior DUI arrest. Obviously, it is
21 not a conviction, it's not impeachable. I would ask the Court
22 to direct Mr. Truslow to not make mention of that during the
23 course of this trial, and it has been dismissed also, Your
24 Honor.

25 THE COURT: All right. So this is the State's motion in

1 limine to suppress reference to the police officer's arrest
2 for driving under the influence?

3 MR. ERVIN: Yes, sir.

4 THE COURT: All right.

5 MR. TRUSLOW: I just want to be clear. The lead officer
6 in the case is charged with DUI. The DUI was then dismissed
7 by the Solicitor's office prior to trial?

8 MR. ERVIN: Yes.

9 MR. TRUSLOW: Manuela, who works for the Fifteenth
10 Circuit Solicitor's office?

11 MR. ERVIN: That's correct.

12 MR. TRUSLOW: I think that might be ripe in terms of
13 right before trial, he's facing DUI and not everybody walks
14 out of those things ---

15 MR. ERVIN: You Honor ---

16 MR. TRUSLOW: --- and a Solicitor, another Solicitor in
17 his office dismissed his DUI case.

18 MR. ERVIN: Your Honor ---

19 MR. TRUSLOW: That goes to credibility and believability.

20 MR. ERVIN: Officer Crews was ---

21 THE COURT: Wait a minute. He gets to argue in full.
22 I'll give you an opportunity to reply, but you don't get to
23 cut the other one off. This isn't you suppress the other
24 person's argument by speaking over them and interrupting them.

25 MR. ERVIN: Yes, sir.

1 THE COURT: All right. Mr. Truslow, go ahead.

2 MR. TRUSLOW: Well, that's my position, Your Honor.

3 Manuela Clayton works for the Fifteenth Judicial Solicitor's
4 office here in Conway. She is one of two lawyers,
5 prosecutors, who are in charge of the DUIs in Magistrate's
6 Court. This officer was arrested with DUI, we get to trial,
7 it's been dismissed. The person who dismissed it is a co-
8 worker of the prosecutor in this case, and I think that goes
9 to credibility, because I think it's relevant to the
10 credibility with the jury that do we size them up and believe
11 or do we pay any fact or attention at all that his DUI is gone
12 by the same Solicitor's office who is prosecuting this case.

13 THE COURT: All right.

14 MR. ERVIN: For the record, I have not had any
15 conversations with the prosecutor in our office who dealt with
16 that. I tried a case in May in front of Judge Russo and
17 Officer Crews was my lead officer in that and Judge Russo
18 directed Morgan Martin and Russell Long to not make mention of
19 that during the trial and they obviously adhered to that.

20 THE COURT: But I'm not bound by their decision.

21 MR. ERVIN: Yes, sir.

22 THE COURT: I'm bound by Appellant decision. Why was the
23 charge dismissed?

24 MR. ERVIN: Lack of evidence, I believe.

25 THE COURT: Okay. Well, that's what we need to find out.

1 Get in touch -- I'm not going on the officer's -- you get in
2 touch with the Solicitor that dismissed the charge and ask him
3 or her, why did you dismiss this officer's -- the charge
4 against this officer for driving under the influence.

5 MR. ERVIN: Your Honor, the State's position is it's not
6 a conviction and it's not an impeachable offense. There
7 should be no mention -- in balance on 403, there should be no
8 mention of that on my lead officer; it has no bearing on this
9 case.

10 THE COURT: And it may -- you may be right on that. How
11 does it affect credibility?

12 MR. TRUSLOW: It goes -- it goes -- this is gonna be a
13 close case. It goes directly to the credibility of this
14 officer as a witness.

15 THE COURT: But I mean it's not a prior bad act.

16 MR. TRUSLOW: It's ---

17 THE COURT: It's not an act that involves allegations --
18 -

19 MR. TRUSLOW: It's not. However, the jury would be
20 permitted to infer that they need to weigh his credibility a
21 little differently when this same office dismissed his
22 criminal case before trial. And I don't know that it was
23 dismissed at the time of Morgan Martin's trial or if it was
24 still pending either. I think that's relevant and goes to
25 credibility.

1 THE COURT: Well, if it's a prior bad act involving
2 dishonesty, stealing something, fraud or something of that
3 nature, but I don't see how DUI affects credibility.

4 MR. TRUSLOW: Yes, sir, and I -- all I'm doing is I'm
5 taking it out of the context of that analysis and putting it
6 straight into the context of what's relevant questions in
7 terms that go to the credibility of the witness, and I think
8 the fact that the Solicitor's office dismissed his criminal
9 case before we get to trial, where he is the lead officer to
10 give testimony, goes to credibility and should be
11 inadmissible.

12 THE COURT: How? How does that ---

13 MR. TRUSLOW: Because it is more like ---

14 THE COURT: --- you're implying that he is not credible
15 because the Solicitor dismissed a DUI charge against him.

16 MR. TRUSLOW: I'm saying that his testimony could be
17 changed or could be made better by the fact that his co-worker
18 dismissed his criminal case. Now, I'm not saying that
19 happened, but in terms of a jury trial, they should be able to
20 consider that. They may crucify me for even bringing it up,
21 if I do, but I think it's relevant if I wanted to use that.
22 It goes directly to relevant evidence making a fact -- more
23 likely not, they could find that, that they made him happy to
24 get his case dismissed, criminal case, he's an officer, right
25 before or soon before he comes in here to give testimony for

1 the same office.

2 THE COURT: Okay. All right. I'm gonna grant the
3 motion. There is to be no reference to the police officer's
4 dismissed driving under the influence charge.

5 MR. ERVIN: Thank you, Your Honor.

6 THE COURT: All right. Anything further from the State?

7 MR. ERVIN: Not -- I have a *Jackson v. Denno*.

8 THE COURT: Okay. *Jackson v. Denno*, but anything other
9 than besides a *Jackson v. Denno* hearing?

10 MR. ERVIN: I'm sure Mr. Truslow has a probable cause.

11 THE COURT: Any defense motions?

12 MR. TRUSLOW: Yeah, I've got a motion to suppress any
13 evidence gleaned from the stop of the vehicle, and to include
14 but not limited to the detention of my client, any statements
15 made and any and all drug contraband or evidence to be used.
16 I'd ask it all be suppressed. Your Honor, in terms of the
17 stop of the vehicle -- and that's one thing that changed, we
18 saw is the police, you know, when they pulled the car over --
19 my understanding it has to be one of two things happened.
20 One, they have to have articulable reasonable suspicion that
21 there was criminal activity afoot. I submit to Your Honor
22 there's no evidence of that in the record -- well not the
23 record but in evidence -- or has even been alleged. That
24 brings us back to and it's a very simple burden, if somebody
25 violates a traffic law, we don't have to guess why they did

1 it, do they follow him for 50 miles -- the Supreme Court made
2 it very simple; you violate a traffic law, they can stop you.
3 Okay. I'm suggesting from what you have captured on video,
4 there is not one criminal statute that my client violated to
5 be stopped in that vehicle. The closest thing I could find to
6 it -- and I'm just summarizing ---

7 THE COURT: So, you're saying the video has to show the
8 actual moving violation?

9 MR. TRUSLOW: I've been told that is the probable cause.
10 They stopped for that traffic violation.

11 THE COURT: And that's what I'm understanding, but as I
12 understand your argument ---

13 MR. TRUSLOW: I'm not saying it has to show it.

14 THE COURT: Okay. All right.

15 MR. TRUSLOW: I'm saying and maybe it puts the burden
16 back on them or I can call the officer. They stopped him for
17 a traffic violation.

18 THE COURT: Right.

19 MR. TRUSLOW: He came up the intersection, right blinker,
20 he turned right, he went into the inside lane, simultaneously,
21 and into the -- into the middle lane. It is one fluid
22 movement using his blinker. I didn't think he'd have time to
23 get to the left blinker by then. The only statute close as I
24 find to it does not make that illegal. It says that, and
25 that's 56-5-2120, as to right turns, both the approach for a

1 right turn and a right turn shall be made as close as
2 practical to the right-hand curb or edge of the roadway. Now,
3 that doesn't say he can't use his blinker and turn in and wind
4 up in a three-lane road or in the middle lane. I mean,
5 instantaneously right into the middle lane. I don't read it
6 that way. I don't think it makes that unlawful. So, unless
7 there's another statute for a traffic violation with which he
8 violated, there would've been no reason to stop his vehicle.

9 THE COURT: All right.

10 MR. ERVIN: Your Honor, there were in fact two moving
11 violations and, when we get to the video, I think it will be
12 clear that -- they are on video and I do have copies of the
13 uniform traffic tickets that were written, and I also have a
14 printout from the public index that show this Defendant pled
15 guilty to the failure to obey the traffic control device --
16 that was the first violation that occurred. He turned right
17 without even pausing at a red light that had a no-turn-on- red
18 symbol on it, and then he moved into the Number 1 lane from
19 the Number 3 lane as -- Mr. Truslow just admitted that he did
20 that continuously without putting a blinker on. That's
21 another violation in which he pled guilty to.

22 THE COURT: Violation of what statute?

23 MR. ERVIN: 56-5-2120, that's the failure to signal.

24 THE COURT: All right. Let me see where it is.

25 MR. ERVIN: That's (a), subsection (a).

1 THE COURT: No, that's a right-hand turn.

2 MR. ERVIN: Yes, sir, he was given a ticket, I'm sorry,
3 56-5-2120 was unlawful turning. That was going from the far
4 outside lane, the Number 3 lane, to the Number 1 lane without
5 signaling.

6 THE COURT: So where does the -- where is the signaling -
7 - all right. What are you saying he was stopped for?

8 MR. ERVIN: He was stopped for two traffic violations.

9 THE COURT: Okay, being what? Give me the violation and
10 the statute that makes it a violation.

11 MR. ERVIN: I'm sorry. Just to be clear, he was -- a
12 separate officer smelled marijuana coming from this
13 Defendant's vehicle.

14 THE COURT: I'm talking about the stop, the traffic stop.
15 The reason that they pulled him over to begin with. They had
16 to have a reason to pull him over.

17 MR. ERVIN: Yes, sir. He, he turned right on red light
18 at 10th Avenue and Highway 17 Bypass.

19 THE COURT: So you're saying he ran a red light.

20 MR. ERVIN: In essence he did. He did even slow down for
21 it.

22 THE COURT: Okay. So, he ran a red light. All right.

23 MR. ERVIN: He turned right on red that the light has a
24 no-turn-on-red ---

25 THE COURT: I understand that, but you're just saying he

1 ran the red light without even stopping.

2 MR. ERVIN: Yes, sir.

3 THE COURT: So, even if it was a right turn on red,
4 you've got to stop.

5 MR. ERVIN: Yes, sir.

6 THE COURT: Okay.

7 Mr. ERVIN: And he did not stop and that will be clear in
8 the video. And also, once he made that right going northbound
9 on 17 Bypass, he went from the far outside lane, the Number 3
10 lane, to the Number 1 lane without signaling and that was the
11 basis for a separate traffic ticket, 56-5-950.

12 THE COURT: All right.

13 MR. ERVIN: And he was also ticketed for a marijuana
14 charge and, as I said, he pled guilty to all those on July
15 18th, 2016.

16 THE COURT: All right. Anything in reply, Mr. Truslow?

17 MR. TRUSLOW: No, sir, really, except for the fact that
18 if something here is different, obviously I would bring it up
19 with the Court at the appropriate time. I don't think my
20 client pled guilty to those charges in the sense of what it
21 means to admit conduct when it comes to this level violation,
22 and I just need to look up 56-5-950. So, no.

23 THE COURT: All right. This is a motion in limine. I'm
24 gone deny it in limine. They've certainly got to make their -
25 --

1 MR. TRUSLOW: Yes, sir.

2 THE COURT: --- lay the foundation for probable cause to
3 stop the vehicle or to detain the vehicle. So, I'm not ruling
4 as a matter of law it's inadmissible, but they still have to
5 lay their groundwork during the trial. All right?

6 Anything else from the Defense?

7 MR. TRUSLOW: No, sir.

8 THE COURT: All right. You say we've got a *Jackson v.*
9 *Denno*?

10 MR. ERVIN: Yes, sir.

11 THE COURT: All right. Now is this an audio or a video
12 statement?

13 MR. ERVIN: It's a video. Well, there's audio on the
14 video statement ---

15 THE COURT: Okay.

16 MR. ERVIN: --- from - I've redacted it for Your Honor
17 and for Mr. Truslow, but I imagine for the purposes of this
18 hearing, we need to watch the entirety of the video?

19 MR. TRUSLOW: I can deal with that because if there's
20 something I need you to hear that I don't hear there, I'll let
21 you know. I'm pretty comfortable that he did it right though.

22 THE COURT: Okay.

23 MR. TRUSLOW: And I'll know if he didn't.

24 THE COURT: So, for purposes of this *Jackson v. Denno*
25 hearing he can just play his redacted version?

1 MR. TRUSLOW: Yes, sir.

2 THE COURT: Okay. As long as -- if I rule that it's
3 voluntary and admissible, the only thing coming in is gonna be
4 the redacted version unless the Defense wants to put it. Okay?

5 MR. ERVIN: Yes, sir.

6 THE COURT: Okay.

7 MR. ERVIN: That's what the State would prefer for
8 brevity purposes.

9 THE COURT: All right. All right. You can call your
10 first witness.

11 MR. ERVIN: The State calls Jeremy Crews.

12 THE COURT: All right.

13 CLERK: Please raise your right hand and place your left
14 hand on the Bible.

15 JEREMY ALAN CREWS, HAVING BEEN DULY
16 SWORN TESTIFIES AS FOLLOWS:

17 CLERK: State your full name and spell your last name for
18 the Court.

19 MR. CREWS: Jeremy Alan Crews, that's C-R-E-W-S.

20 DIRECT EXAMINATION OF JEREMY ALAN CREWS BY MR. ERVIN:

21 Q: Good afternoon, Officer Crews, but I'm gonna call you Mr.
22 Crews because you're no longer at Myrtle Beach; is that
23 correct?

24 A: Yes.

25 Q: Where are you currently employed?

1 A: DR Horton.

2 Q: Were you employed at the City of Myrtle Beach Police
3 Department on June 24th, 2016?

4 A: Yes.

5 Q: And did you have an occasion to become involved in the
6 case against this Defendant?

7 A: Yes.

8 Q: How did you become involved in this case?

9 A: I was coming up Joe White Avenue, and Officer Camacho
10 said he had I think pulled up to a gas pump at Seaboard and
11 Joe White. When he pulled up, he said he felt like he smelled
12 the odor of marijuana coming from a vehicle that was about to
13 pull out. He was on the phone with me. I said I was right
14 there on Joe White.

15 MR. TRUSLOW: Your Honor, I would object to hearsay and
16 ask him to at least do it where what he learned and then --
17 he's testifying to exactly what Officer Camacho said. Object
18 to hearsay.

19 THE COURT: Okay. I'm overruling it. Ask your question
20 again.

21 MR. ERVIN: I asked Mr. Crews how he became involved, but
22 I will specify.

23 THE COURT: All right.

24 BY MR. ERVIN:

25 Q: Were you instructed by another officer, Officer Camacho,

1 about smelling marijuana from a vehicle?

2 A: Yes.

3 Q: And was it this Defendant's vehicle?

4 A: It was a black Impala, yes.

5 Q: Okay. You later -- did you later ---

6 MR. TRUSLOW: I'm gonna object to non-responsive. He
7 said it was a black Impala. He didn't answer it was his
8 vehicle.

9 THE COURT: And you can cross examine him on that.

10 MR. TRUSLOW: Yes, sir.

11 THE COURT: All right. Go ahead.

12 BY MR. ERVIN:

13 Q: Okay. And so at some point, did you get behind the
14 vehicle that Officer Camacho instructed you that he smelled
15 marijuana coming from?

16 A: Yes.

17 Q: Where was that?

18 A: It was traveling on Joe White, just coming up to 17
19 Bypass.

20 THE COURT: Excuse me for interrupting. I just want to
21 make sure I'm following this right. You were told by another
22 officer that he smelled marijuana in the car?

23 A: Yes.

24 THE COURT: And then you got behind the car and started
25 following it?

1 A: When I -- when I first saw the vehicle, it had just
2 pulled out of the gas station and was traveling between
3 Seaboard Street and 17 Bypass right on Joe White.

4 THE COURT: So, another officer told you, radioed you?

5 A: He called me because he had just pulled up to the gas
6 pumps and they were about to pull away.

7 THE COURT: Okay. All right. Go ahead, now I've got it
8 straight. Go ahead.

9 MR. ERVIN: And just for court clarity and we'll get into
10 this in my case in chief, but that officer was pumping gas,
11 the pump was in his car, he had not paid so it was not
12 tactically feasible or practical for him to pursue this, this
13 vehicle so he radioed Officer or Mr. Crews.

14 THE COURT: All right. Go ahead.

15 BY MR. ERVIN:

16 Q: So, Mr. Crews, you got behind what you learned to be this
17 Defendant's vehicle where again?

18 A: Right there on Joe White as you're coming up to 17
19 Bypass.

20 Q: Okay. And how long -- did you observe the traffic
21 violations?

22 A: Within the first, I'd say 20 seconds of seeing the
23 vehicle, yes.

24 Q: All right. What time are we talking about; what time was
25 it?

1 A: I don't remember the time; it was nighttime.

2 Q: All right. So, you observed how many traffic violations?

3 A: When he came up to the stop light at 17 Bypass, it had

4 just turned red before he crossed the line and there's also a

5 no-right-on-red and when he made the right-hand turn, it's a

6 three lane road, he made a right-hand turn and went directly

7 into the middle lane, with state law he has to take the inside

8 innermost lane and then signal left, and when he was in the

9 middle lane he didn't use his left turn signal to get up to

10 the Number 1 lane.

11 Q: Okay. So that's two violations you observed. And did

12 you -- shortly after that, did you initiate a traffic stop?

13 A: Yes.

14 Q: Where did you eventually come to a stop?

15 A: He slowed down and made a right-hand turn on 21st Avenue

16 and then pulled into a gas station parking lot but the gas

17 station is connected with Burger King.

18 Q: Okay. And at that time of the initial stop, when you

19 exited your car towards the Defendant's car, were you by

20 yourself?

21 A: Yes.

22 Q: Okay. At what point -- did any other officers come to

23 back you up?

24 A: Officer Camacho came and backed me up, and then Officer

25 Householder came a little bit after that.

1 Q: Okay. What was the time frame between you initially
2 approached this Defendant's vehicle and when Officer
3 Householder arrived?

4 A: Householder was the third officer; Camacho was the second
5 one to show up. Householder, I don't know the exact time
6 frame.

7 Q: What about Officer Camacho?

8 A: I'd say maybe two minutes maybe, three minutes.

9 Q: Okay. Who was present in the Defendant's vehicle?

10 A: The Defendant was in the driver's seat and then the other
11 male was in the passenger seat.

12 Q: Okay. And did you smell marijuana yourself?

13 A: As soon as I got up to the driver window, I did.

14 Q: What did you tell the Defendant after you smelled
15 marijuana?

16 A: I got his information. I didn't say anything about
17 speaking of smelling marijuana. I got his information and
18 waited for Officer Camacho to pull up and then when I ran his
19 information, I went back up to the vehicle and got him out of
20 the vehicle.

21 Q: Your car -- is your car equipped with an in-car video
22 camera?

23 A: Yes.

24 Q: And is that kept in the normal course of business while
25 on patrol?

1 A: Yes.

2 Q: And can you explain to the Court, just briefly, how that
3 worked?

4 A: When you -- you can activate it manually or I believe if
5 you hit lights, it'll set back to record a certain amount of
6 time before it -- before the actual -- like a set amount of
7 time before the actual recording. I think it's maybe a
8 minute.

9 Q: All right. There was a recording made in this case?

10 A: Yes.

11 Q: Have you reviewed it?

12 A: Yes.

13 Q: Did you initial the disc?

14 A: Yes.

15 Q: And when you reviewed it, is that a fair and accurate
16 representation of your traffic stop on June 24th, 2016?

17 A: Yes.

18 Q: Were there any alterations or deletions made?

19 A: No.

20 MR. ERVIN: Your Honor, at this time the State would
21 admit Exhibit 1?

22 THE COURT: All right. Any objections to State's Exhibit
23 1 for purposes of this *Jackson v. Denno* hearing?

24 MR. TRUSLOW: No, sir.

25 THE COURT: All right. State's Exhibit 1 admitted into

1 evidence for purposes of *Jackson v. Denno* only.

2 MR. ERVIN: And, Your Honor, for the record, this is the
3 redacted version that Mr. Truslow and I have agreed upon ---

4 THE COURT: All right.

5 MR. ERVIN: --- for this motion.

6 THE COURT: All right.

7 STATE'S EXHIBIT NUMBER 1

8 ADMITTED INTO EVIDENCE

9 MR. ERVIN: Permission to publish?

10 THE COURT: All right.

11 COURT REPORTER: Sir, I need to mark the exhibit.

12 THE COURT: Yeah, she's got to mark it. I'm sorry, I
13 thought it was already marked. I mean, do you have the case?

14 MR. ERVIN: I think it's over there, Your Honor.

15 THE COURT: Can't you just mark the case or do you put it
16 on the disc?

17 COURT REPORTER: No, sir; I mark the case.

18 THE COURT: Okay.

19 MR. ERVIN: Your Honor, for the record, the State is
20 playing what's labeled Jeremy Crews in-car.

21 THE COURT: All right.

22 (REPORTER'S NOTE: State's Exhibit Number 1 published for the
23 Court.)

24 BY MR. ERVIN:

25 Q: Officer Crews, at some point in that stop, you found a

1 bag of money in the driver-side door; is that correct?

2 A: Yes.

3 Q: Do you know about how much it was?

4 A: It was a little over \$3,000.

5 Q: Then did you find something else pretty soon after you
6 had discovered the money?

7 A: Yeah, right on the floor board of the driver's seat,
8 there was a large plastic or sandwich baggie.

9 Q: And did you have an idea of what you thought that was
10 when you first discovered that?

11 A: At first, I thought it was heroin and had a ---

12 MR. TRUSLOW: Objection, Your Honor, he's not qualified
13 to testify that it was heroin.

14 THE COURT: Okay. I'll allow it for the purposes of this
15 hearing.

16 MR. TRUSLOW: Yes, sir.

17 THE COURT: But he want be able to render an opinion in
18 the trial.

19 BY MR. ERVIN:

20 Q: Mr. Crews, based on your prior training and experience,
21 did you have a reasonable belief as to what that substance was
22 in that bag that you found?

23 A: Yes, I believed it was gonna be a powder heroin. It had
24 a light brown color to it.

25 Q: Okay. And we heard in that video and actually saw

1 another officer field test it for cocaine?

2 A: Uh-huh (affirmative response).

3 Q: And we heard that did the field test positive for
4 cocaine?

5 A: It had a, like a ---

6 MR. TRUSLOW: Objection to the field test. It's not a
7 scientific test. The officer that did the test is not here.

8 THE COURT: All we -- yeah, and all we're dealing with in
9 the Jackson v. Denno, which is the voluntariness of his
10 statement.

11 MR. TRUSLOW: Yes, Your Honor.

12 THE COURT: So, let's go ahead.

13 BY MR. ERVIN:

14 Q: So, when you discovered that substance we saw on the
15 video, you approached the Defendant as he was standing in
16 front of your patrol car; what did you do when you approached
17 him?

18 A: Read him Miranda.

19 Q: All right. Did you read it from a card or by memory?

20 A: By memory.

21 Q: And is there a policy at Myrtle Beach Police as to the
22 advisement of rights?

23 A: No, not reading by a card.

24 Q: Okay. And was there any other officers present with you
25 when you were searching that car?

1 A: Officer Camacho and Householder.

2 Q: All right. Can you explain to the Court why there were
3 two officers there when this Defendant had already been
4 handcuffed and detained?

5 A: Just for a safety purpose so they don't do anything and
6 try to run off or something like that or you know, make a
7 situation out of it. When I realized there was a substance in
8 there, we took both Defendants and put them in the patrol car,
9 even though the other guy wasn't under arrest at the time, put
10 them in a patrol car to secure them so we could complete the
11 search.

12 Q: And again, that's for safety purposes?

13 A: Yes.

14 Q: Okay. And at the time of your advisement of his rights,
15 did, did Mr. Collins have trouble understanding any of those
16 rights?

17 A: No.

18 Q: Did his answers appear rational and responsive to what
19 you were asking him?

20 A: Yes.

21 Q: Did you threaten or coerce him in any way?

22 A: No.

23 Q: Did you make any promises to him?

24 A: No.

25 Q: How did he respond when you asked him whether he wanted

1 an attorney?

2 A: He -- the first thing, he looked down and said, you know,
3 when had it in my hand and said, what is that, and then when I
4 was asking him what it was, he said, you can test it.

5 Q: All right. To the best of your knowledge, was the
6 Defendant's statement to you freely and voluntarily given?

7 A: Yes.

8 Q: And you -- did you over overborne his will in any way?

9 A: No.

10 Q: Do you remember in that video, exactly what the Defendant
11 responded to you when you were listing the items that you
12 found, the contraband that you found in his car?

13 A: He said something in the nature of it's all mine, put it
14 on me.

15 Q: Okay. And where was the passenger in relation to you and
16 Mr. Collins when he said that statement?

17 A: He was in the other -- in Officer Camacho's vehicle, in
18 the back.

19 Q: So, did he -- did the passenger ever hear Mr. Collins
20 claim ownership of the drugs?

21 A: No.

22 Q: Did we -- did at some point in that video, you advise the
23 passenger of what Mr. Collins had told you about the ownership
24 of the drugs?

25 A: I don't know if I explained it to him exactly. I just --

1 I think after we ran him, we -- and he claimed the narcotics
2 were his, that we cut him loose.

3 Q: Did you charge the passenger with anything?

4 A: No.

5 Q: Why was that?

6 A: There was no charges; he wasn't driving. He didn't --
7 you know, we had somebody else in the vehicle in possession of
8 narcotics, that claimed the narcotics.

9 Q: Okay. Thank you, Mr. Crews.

10 THE COURT: Cross examination?

11 CROSS EXAMINATION OF JEREMY ALAN CREWS BY MR. TRUSLOW:

12 Q: You testified that you did not arrest the passenger
13 because he, in your opinion, had not committed a crime because
14 he wasn't driving?

15 A: Yes.

16 Q: Okay. Where did you find the heroin in the car?

17 A: The heroin was on the floorboard of the driver's seat.

18 Q: What about the marijuana?

19 A: There was one roach in the driver's panel and there was
20 small one, like, in between the crack of the passenger seat.

21 Q: Nothing in the passenger floorboard?

22 A: No.

23 Q: Okay. Where was the money?

24 A: The money was in the driver panel.

25 Q: Now the passenger -- I'm not gonna speculate his name

1 again, but let's call him the passenger, not my client. Did
2 he -- in that vehicle, did he have access to those drugs if he
3 wanted?

4 A: If he wanted to.

5 Q: Could he have reached and touched the bag of heroin?

6 A: He could've.

7 Q: Could he have reached and got marijuana?

8 A: You could speculate it.

9 Q: Okay. So, he had some dominion and control over the
10 drugs, right? I mean, and do you feel comfortable you
11 could've at least arrested him for possession of narcotics?

12 A: Well, when I gave the Defendant his -- when I read him
13 Miranda and I went back up to the vehicle and asked him if he
14 understands what I read him, and he said, yes, he said, that
15 was mine.

16 Q: Right. So, based upon his word, you let that guy leave?

17 A: Yes.

18 Q: So, if my client got up today and told you he didn't have
19 anything to do with it, does he get to leave?

20 A: That's not my decision.

21 Q: Well, would you unarrest him if he told you it wasn't
22 his; it was the other guys?

23 A: I wouldn't have that choice.

24 Q: Okay. If you were in the street and the passenger had
25 said it's mine, don't mess with him, I'm taking it; would

1 things have been reversed?

2 A: If the passenger claimed ownership, yes.

3 Q: Okay. So the difference is that he said don't mess with
4 the passenger and the passenger didn't say don't mess with
5 him, true? That's why he's arrested and the passenger wasn't?

6 A: What do you mean as far as ---

7 Q: The difference between who got arrested, right, it comes
8 down to who said I'll take responsibility?

9 A: He took ownership - ownership of the narcotics.

10 Q: And that is the sole reason that you arrested one and not
11 the other, correct?

12 A: And they were also in his vicinity.

13 Q: They were in the passenger's vicinity, also?

14 A: A small blunt of marijuana was tucked in the passenger
15 seat.

16 Q: Could he get to the heroin if he wanted it?

17 A: You could reach anywhere in the vehicle if you wanted to.

18 Q: So, if he wanted to shoot up heroin, he could reach over,
19 shoot it up, do whatever he wants to do, right?

20 A: Yes.

21 Q: He's in constructive possession, right?

22 A: Yes.

23 Q: Were there any drugs in my client's pocket?

24 A: No.

25 Q: Okay. So he was in constructive possession as well,

1 correct?

2 A: Yes.

3 Q: So, they were both similarly situated in the car prior to
4 any statements?

5 A: One was in the driver's seat; one was in the passenger
6 seat.

7 Q: Okay. Now, when you talk about the Miranda warnings --
8 and I heard you on here. Did you just watch the video we
9 watched?

10 A: Yes.

11 Q: Do you recall what warnings you gave to my client?

12 A: I advised him he had the right to remain silent, anything
13 he said or do can be held against him in a court of law. He
14 has the right to an attorney. If he can't afford one, one
15 will be appointed for him. At any point during questioning if
16 he wanted to stop talking at any point he could do so at that
17 time.

18 Q: Okay. So is it fair to consider that the five prongs of
19 Miranda, five statements of Miranda?

20 A: Yeah, I would say so.

21 Q: As opposed to 6; are there any more?

22 A: I don't recall that I know of.

23 Q: So, those are the only five Miranda warnings you're aware
24 of?

25 A: Yeah.

1 Q: You took my client out of the vehicle, correct?

2 A: Uh-huh, (affirmative response).

3 Q: So, you brought him back to your car, right?

4 A: Yes.

5 Q: He got handcuffed, right?

6 A: Yes.

7 Q: That all occurred before you said anything about smelling

8 marijuana; isn't that true?

9 A: I didn't wait -- I didn't tell him when I first made

10 contact with him because I was waiting for another officer to

11 get there.

12 Q: Was he taken out of the car, handcuffed, back at your car

13 prior to you mentioning anything about the odor of the

14 marijuana?

15 A: Yes.

16 Q: Okay. And in fact, prior to you mentioning marijuana,

17 you asked him if he sprayed something because something smells

18 sweet or, you know, something like that, right?

19 A: Uh-huh, (affirmative response).

20 Q: Okay. So, some kind of a deodorizer or some kind ---

21 A: Or cologne.

22 Q: --- cologne?

23 A: Yeah.

24 Q: Okay. So do you typically, when you stop somebody, if

25 they've got too much cologne on, is that a tip to you that

1 they're smoking marijuana in the car?

2 A: I smelled marijuana.

3 Q: All right. You didn't say that at first, did you? What
4 was paramount on your mind was the cologne, right?

5 A: In the video I think I said something about were -- have
6 you been smoking in the vehicle? It smells like you tried to
7 mask it with something.

8 Q: Do you -- how many years were you at the police
9 department?

10 A: I did eight-and-a-half at the County Police and a year
11 and a half at Myrtle Beach City.

12 Q: Okay. So, have you smelled marijuana a lot?

13 A: Oh, yeah.

14 Q: Okay. And sweet pungy, it's got it's own thing, right,
15 depending on the strain, right? I mean, it's got a smell. You
16 can identify it?

17 A: By strain?

18 Q: But you can identify marijuana, any marijuana by smell?

19 A: By smell, yeah.

20 Q: How close do you have to be to it?

21 A: It depends.

22 Q: Okay. You ever been to Georgetown?

23 A: Huh?

24 Q: You ever been to Georgetown?

25 A: I've driven through there.

1 Q: One of my favorite places to fish but, you know, the
2 paper mill, once in a while used to get a little smell going,
3 right?

4 A: Uh-huh, (affirmative response).

5 Q: Would that affect your ability to smell marijuana in a
6 car?

7 A: I don't know.

8 Q: You don't know. Would a whole bunch of spray or cologne
9 filtering up through your nose, would that affect your ability
10 to smell marijuana?

11 A: You could try to mask the smell but, I mean, if I've
12 smelled marijuana, I know what the odor of marijuana is.

13 Q: So, your nose just cut right through to the odor of
14 marijuana?

15 A: Huh?

16 Q: Your nose just cut right through to the odor of
17 marijuana?

18 A: I could smell the marijuana coming from the vehicle.

19 Q: Like a cologne marijuana or ---

20 MR. ERVIN: Your Honor, this has already ---

21 MR. TRUSLOW: This is more trial stuff. I'll get ---

22 THE COURT: Y'all don't talk at the same time.

23 Place your objection on the record; what's your
24 objection?

25 MR. ERVIN: Withdrawn.

1 THE COURT: All right. Go ahead.

2 BY MR. TRUSLOW:

3 Q: This marijuana, giving that it was mixed with cologne
4 smell different than usual marijuana you smelled?

5 A: No, it smelled like marijuana.

6 Q: Okay. So where does the cologne come into play?

7 A: I could just smell something like somebody had sprayed
8 something in the vehicle.

9 Q: All right. I hope this isn't stupid; it's the last
10 question about this. Do you think maybe, like, it didn't mix?
11 I mean, like the cologne went up one nostril and the marijuana
12 went up the other one?

13 A: I don't know.

14 Q: Because it was no mixture of smell, right; straight
15 marijuana, straight cologne?

16 A: I smelled marijuana but, at the same time, I smelled
17 cologne that it would seem like it was something or cologne or
18 something that was sprayed to try to mask the odor of
19 marijuana.

20 Q: Did you smell the cologne and then go back to smell for
21 marijuana?

22 A: I don't recall.

23 Q: You don't recall?

24 A: No.

25 Q: All right. Almost done. Would you consider the fact --

1 let's start with the passenger, was he under arrest?

2 A: He was detained at the time.

3 Q: And how do you define detained? I mean, what does that
4 mean to you in your work as a police officer?

5 A: As far as the safety purpose, if we're gonna search a
6 vehicle and it deals with narcotics, Myrtle Beach City liked
7 us to detain people and explain to them, hey, you're not under
8 arrest, you know you're being detained for safety purposes and
9 go about our investigation.

10 Q: Prior to you -- prior to you letting him leave, prior to
11 that, was he free to leave?

12 A: As far as being detained?

13 Q: Just get up and go?

14 A: No.

15 Q: Okay. Whose vehicle was he in?

16 A: He was in the Defendant's.

17 Q: No, the police vehicle.

18 A: Officer Camacho.

19 Q: Okay. Whose vehicle is my client in?

20 A: My vehicle.

21 Q: Okay. Were they parked next to each other?

22 A: Officer Camacho's vehicle was probably maybe 10 or 15
23 feet away to the back right of my vehicle.

24 Q: Okay. Now, do you remember the part of the video when
25 the three of you were out there searching the car and talking

1 about stuff?

2 A: Uh-huh (affirmative response).

3 Q: Could they yell at each other back there and hear each

4 other if they wanted to?

5 A: The windows were up.

6 Q: Okay. And that's sound proof windows?

7 A: They're not sound proof, but where it was, I think he was

8 on the right side of Officer Camacho's vehicle and he was on

9 my right side, so ---

10 Q: That would be the furtherest away?

11 A: Yeah.

12 Q: Okay. It's your testimony that as far as you know that

13 if he yelled at him about something or he yelled back, there

14 is no way they could hear each other back there?

15 A: No, I wouldn't be able they'd be able to.

16 Q: How many feet apart were the cars?

17 A: About 15 or so.

18 Q: And then my client was, you said, detained, right?

19 A: Yes.

20 Q: But he was actually handcuffed, correct?

21 A: Uh-huh, (affirmative response).

22 Q: Handcuffed in the front or the back?

23 A: The back.

24 Q: Was he free to leave?

25 A: No.

1 Q: Was he not only handcuffed but then put in the back of
2 the police car?

3 A: So we could investigate and search the vehicle.

4 Q: Did you -- do you recall if you read the Miranda rights
5 before or after the handcuffs?

6 A: After.

7 Q: Do you agree with me that he didn't have any Miranda
8 warnings, prior Miranda warnings to the ones we hear on here,
9 right?

10 A: Yeah.

11 Q: Any questions, stuff you're dealing with him, asking him
12 before that, then the Miranda, correct?

13 A: Correct.

14 Q: After he's handcuffed?

15 A: Uh-huh, (affirmative response).

16 Q: So, his freedom to leave is restricted by the handcuffs
17 and by your verbal command?

18 COURT REPORTER: Excuse me, yes or no, please.

19 BY MR. TRUSLOW:

20 Q: By the handcuffs he was restricted?

21 A: Yes.

22 Q: His -- he was restricted by being placed in the vehicle?

23 A: Yes.

24 Q: It wouldn't have been very easy for him to get out of the
25 vehicle, right?

1 A: No.

2 Q: Okay. When you detain people, do you always handcuff
3 them and put them in the vehicle, if you call for a drug dog
4 or something, or do they stay outside?

5 A: It depends on the situation and how many officers we have
6 there.

7 Q: Okay. And you had what, four?

8 A: No, there was three total.

9 Q: Three police cards, three officers?

10 A: Yeah, well, Officer Householder showed up, I believe,
11 after I located -- after I put him in the vehicle because
12 there was only two at the time I put him in the vehicle.

13 Q: Okay. So, you said that you got a tip, not a tip but a
14 interoffice law enforcement ID, he's coming out of the gas
15 station, right?

16 A: Uh-huh, (affirmative response).

17 THE COURT: I'm sorry, you've got to answer yes or no.

18 A: Yes.

19 Q: And that was Officer Camacho?

20 A: Yes.

21 Q: He was busy pumping gas, correct?

22 A: Yes.

23 Q: So he sent you on the way?

24 A: Uh-huh, (affirmative response). Yes.

25 Q: We watched the video when you can see my guy -- did you

1 see the video where you saw his brake lights before he turned?
2 A: Yes.
3 Q: Did you see his brake lights?
4 A: Yes.
5 Q: Did you see him turn?
6 A: Yes.
7 Q: So, is your argument, he did stop for that red light or
8 he didn't stop sufficiently for you?
9 A: He didn't stop at all and there was the white line where
10 the red light or the white line where you would stop it, he
11 had not passed that when the light turned from yellow to red.
12 Q: What do you think his brake lights came on for?
13 A: To slow down at that point.
14 Q: Okay. To do what, turn?
15 A: To turn.
16 Q: And did he turn?
17 A: Yes.
18 Q: How -- you saw the video, what would you estimate, how
19 far back you were from him when he -- his brake lights came
20 on?
21 A: I don't -- I couldn't -- I don't know how to estimate
22 that as far as feet or ---
23 Q: Football field?
24 A: No, not that far.
25 Q: A hundred feet? I mean, I don't have to hold you to it

1 because we've got the video tape; I'm just curious if you have
2 an idea.

3 A: No.

4 Q: How well could you see his brake lights?

5 A: Very well.

6 Q: You could see them well enough to see them go off,
7 couldn't you?

8 A: Yeah, close enough to see that he did not stop when the
9 light was red.

10 Q: That's good. From the video we watched -- let me ask you
11 this. How -- to what speed did he slow down to before he
12 turned?

13 A: I would probably estimate maybe 10 miles an hour.

14 Q: Ten miles an hour and you based that upon what?

15 A: Radar certification, just estimate the speeds, by
16 training.

17 Q: Radar certifications. You mean your estimate of?

18 A: My prior training and experience, yes.

19 Q: Okay. So not a machine?

20 A: No.

21 Q: Okay. Just you looking and, and, and usually when you do
22 that, am I correct, you track another device. You get an idea
23 of how fast you're going and then you can kind of gauge how
24 fast somebody else is going, correct?

25 A: As far as a radar?

1 Q: Estimating speed without radar, don't you need a fixed
2 object; don't you need to ---
3 A: You don't need a fixed object. You, you visually
4 estimate a moving vehicle.
5 Q: Okay. Would that have anything to do with how fast they
6 go by something like a tree; would that factor into it?
7 A: With the radar, you visually -- if you're sitting
8 stationary and you have one vehicle coming at you, you
9 visually estimate that vehicle and you confirm it with the
10 radar device.
11 Q: Okay. Without the radar that night, you estimated he
12 turned at 10 miles an hour after his brake lights, right?
13 A: Five to 10 miles an hour, yeah.
14 Q: Five to 10?
15 A: Yeah.
16 Q: Could it be zero to five?
17 A: He wasn't going zero.
18 Q: Was he going two?
19 A: Not that I ---
20 Q: Could he have been going two?
21 A: I, I don't know.
22 Q: But he could have been going five?
23 A: Somewhere in that vicinity.
24 Q: Which the vicinity would bring in four, right, possible;
25 five miles an hour. Now, what I want you to do very simply is

1 tell me how you arrived at five to 10 miles an hour without a
2 radar gun? Just give me an idea what -- what did you run
3 through to get that figure?

4 A: His vehicle was in motion; he came to the now-turned red
5 light and did not come to a stop.

6 Q: Okay. So, if you put him first 10 miles and now five to
7 10 miles an hour because he was in motion and because he
8 didn't come to a stop, do you know how fast he was going? I
9 mean, I'm just asking you what the criteria are when -- I know
10 what you're talking about, but when you estimate a speed
11 without radar, are there a couple of steps you go through to
12 get there? And if so, what are those steps?

13 A: All right. I mean, he wasn't -- I didn't write him for
14 speeding, so there would be no point why I was trying to
15 estimate his speed. You're asking me to estimate a speed on a
16 rolling vehicle.

17 Q: Is it pretty much the same -- is it much different than
18 if I was to guess a speed of a vehicle and you're interviewing
19 me about an accident and I said they were going about 60?

20 MR. ERVIN: Objection. This is outside ---

21 THE COURT: Yeah, what's the relevancy for Jackson v.
22 Denno? Let's move on.

23 BY MR. TRUSLOW:

24 Q: All right. Last thing, part of the statement or part of
25 your, your testimony, you testified and I didn't catch if you

1 said you were told this or you saw this, you thought it was a
2 black Impala?

3 A: I was told it was a black Impala.

4 Q: Told it was a black Impala. Okay. Was it a black
5 Impala?

6 A: Yes.

7 Q: Okay. Are you certain about that?

8 A: Yes.

9 Q: The vehicle they were driving was a black Impala?

10 A: Yes.

11 Q: A hundred percent?

12 A: It was a black vehicle; I believe it was an Impala, yeah.

13 Q: Was it an Impala?

14 A: I'd have to look at the report. I have all the vehicle
15 information on the report.

16 Q: Do you have any of your reports up there?

17 A: No, I don't have anything with me right now.

18 Q: I'm about to wrap it up.

19 THE COURT: All right.

20 Q: Some of this has to go to reliability of -- I'm sorry.
21 You didn't say anything; I shouldn't say it.

22 Do you recall who owned that vehicle?

23 A: I'd have to look at the report.

24 Q: All right. I just want to show you something solely for
25 identification purposes, it's not evidence, just to maybe to

1 refresh your memory. I received this in discovery. See if
2 you can identify that document; let me put some of that
3 information before you?
4 A: Okay.
5 Q: So, who owned that vehicle?
6 A: Carl Bullock.
7 Q: All right. And who is Carl Bullock?
8 A: I do not know.
9 Q: Is that the guy you let walk away?
10 A: I don't remember from the dispatch log, I'd have to see.
11 Q: Would you agree that that could've been Bullock and he
12 gave you a different name?
13 A: No.
14 Q: The guy you let leave?
15 A: The guy we let leave had an ID on him. We actually had a
16 physical ID.
17 Q: I saw that. All right. But when he showed you his ID,
18 did you write anything down?
19 A: We ran it through dispatch.
20 Q: Okay. Did that generate any type of report?
21 A: No, not -- I mean, generates a report into to dispatch, a
22 dispatch log.
23 Q: So, it's in the dispatch log. Do you have access to it?
24 A: If I needed it, yes.
25 Q: Did you need it last week when Mr. Ervin called you?

1 A: He didn't call me.

2 MR. ERVIN: Objection again, Your Honor, it's outside of
3 the view of Jackson v. Denno.

4 THE COURT: I'm gonna allow it. Go ahead.

5 BY MR. TRUSLOW:

6 Q: Did you get called last week as to the identity of this
7 stranger or the passenger in this case we're doing?

8 A: No.

9 Q: Okay. Do you know of any of your colleagues that were
10 called about that?

11 A: I don't know who it was that was called; I don't know.

12 Q: Did you know the next day what that guy's name was after
13 this happened?

14 A: After this happened, no.

15 Q: Okay. And then in terms of the log that you could
16 access, where is that kept?

17 A: Somewhere on dispatch computer, I'm thinking.

18 Q: In Myrtle Beach?

19 A: Yes.

20 Q: At 10th Avenue, the main Myrtle Beach Police Department?

21 A: Yes.

22 Q: What kind of car was it, at the bottom?

23 A: A Nissan Altima.

24 Q: What color?

25 A: Black.

1 Q: Okay. Is there a little difference between a Nissan
2 Altima and an Impala?
3 A: It's been a long time since that case, yeah.
4 Q: So, it wasn't an Impala?
5 A: No, it wasn't an Impala.
6 Q: You were wrong about that?
7 A: I'm wrong about that. If I could look at the video
8 closely, I'd be able to see it was a ---
9 Q: Well, okay, but that's my point, and you can, but what
10 I'm getting at is you looked at the video, I mean, that was
11 you looking at the car on video ---
12 A: Uh-huh, (affirmative response).
13 Q: --- right?
14 A: Yes.
15 Q: And you called it a black Impala, right?
16 A: Uh-huh, (affirmative response).
17 Q: And then you said it was going 10 miles an hour, right?
18 A: Yes.
19 Q: And then you said five to 10?
20 A: If you're asking me a ballpark range or an estimated
21 speed, I mean, I could probably give you a ballpark range of
22 estimated speed.
23 Q: But you couldn't even get the right kind of car it was,
24 so you must've been pretty far back because you didn't read
25 Impala or Altima, did you -- did you just guess body style?

1 A: As far as when I was called by the officer?

2 Q: When you're behind him before he turns right and he hits
3 his brakes, did you see the name of the car written on the
4 car?

5 A: When Officer Camacho called me and said, hey, this car
6 smells like marijuana and it's about to pull out of the gas
7 station, he was sitting at the gas pump and the car got onto
8 Seaboard Street, was making a left-hand turn on Joe White and
9 I was coming through the light at the same time and he says,
10 he's on the phone with me and says, that car just turned,
11 you're right behind it basically.

12 Q: And they're smoking dope?

13 A: He just said the smell of marijuana coming from the
14 vehicle.

15 Q: Go get them?

16 A: Or he said he smelled the odor of marijuana.

17 Q: Last question about that part though, when we watched
18 that, we'd already been through when you saw him hit his brake
19 lights, right?

20 A: Uh-huh (affirmative response).

21 Q: Then he turned, right?

22 A: Yes.

23 Q: I was trying to figure out if he could have been going
24 two miles an hour, you give five to 10. When he hit his brake
25 lights or any time before, could you identify what type of

1 vehicle that was based upon the branding of the vehicle? Did
2 it say Nissan Altima, Nissan, Impala, Chevy, anything?
3 A: From just watching the video now?
4 Q: No, from driving behind the vehicle and looking?
5 A: Prior training and experience, I mean, sometimes I was
6 able to identify cars by taillights and things like that.
7 Q: Could you identify that one?
8 A: If you said -- show me ---
9 Q: That night, I mean?
10 A: That night, I don't recall exactly what it was. Officer
11 Camacho directed me and said that car just pulled out, you are
12 basically right behind him.
13 Q: All right. Did you ever stop an Impala anytime that
14 night after him or ---
15 A: No.
16 Q: --- the same time?
17 A: No.
18 Q: Are you confident and agree with me that it was a Nissan
19 Altima and not an Impala?
20 A: If we look back at the video, I could tell you if it was
21 a Nissan or Impala.
22 Q: This is -- this is your report, you want to look at it
23 again?
24 A: As far as the dispatch log, yeah. The tag was correct on
25 there.

1 Q: You would agree with me that this report says that?

2 A: Yes.

3 Q: And Altima, okay.

4 A: The tag was correct on the vehicle and it matched the VIN
5 that we put in our report.

6 Q: All right. What was the passenger's name again in that
7 car?

8 A: I don't know his name.

9 Q: Okay. That's about it, Judge.

10 THE COURT: Redirect?

11 MR. TRUSLOW: I just said that's about it.

12 BY MR. TRUSLOW:

13 Q: What was the problem or what was the suspicion to have
14 him get out the car, the odor of the cologne or the odor of
15 the marijuana?

16 A: Odor of the marijuana.

17 Q: Okay. How confident were you at that point that it was
18 marijuana?

19 A: A hundred percent confident.

20 Q: Okay. And how confident were you at that time it was
21 cologne?

22 A: I don't know if it was cologne or if it was like a body
23 spray; I don't know exactly what it was.

24 Q: AXE or anything it could've been?

25 A: It could've been something.

1 Q: And your testimony is that those smells did not in any
2 way affect your ability to sniff out marijuana?
3 A: No.
4 Q: Why did you wait so long to ask him if he'd been smoking
5 marijuana in there?
6 A: Safety first.
7 Q: Why did you ask -- why didn't you ask him about that or
8 tell him you smelled marijuana before you took him out of the
9 vehicle?
10 A: Safety purposes.
11 Q: So your suspicion for getting him out of the vehicle is a
12 secret to you; nobody else knows? He doesn't know?
13 A: Other officers that work with me know how -- my routine.
14 Q: Okay. But I mean that night, he had no idea why you
15 asked him to get out of the vehicle?
16 A: No.
17 Q: Okay. Now, just this last thing, he said -- did you hear
18 on there where he says -- who is he; he's my homeboy?
19 A: Yes.
20 Q: He said that to you?
21 A: Yes.
22 Q: And that was before Miranda, though, right?
23 A: I believe so.
24 Q: Okay. We don't want you taking off running; remember
25 saying that to him?

1 A: Yes, I think that's when I was explaining why we handcuff
2 people.
3 Q: Yeah, procedurally why you do it?
4 A: Yes.
5 Q: He didn't show any indication of getting ready to run?
6 A: No.
7 Q: Who was that that did the field test on, on the hood of
8 the car?
9 A: Householder.
10 Q: Who field -- and was that the cocaine or heroin, alleged?
11 A: He used a, a cocaine swipe, which is like a wet nap,
12 almost kind of and it showed like a faint blue line to it.
13 So, that's why -- at first we thought it was cocaine.
14 Q: Okay. But it turned out to be heroin ---
15 A: I took it ---
16 Q: --- down the road?
17 A: Yeah, I actually took it back to the Myrtle Beach Police
18 Department and tried a couple of different kits on it. I
19 tried a cocaine kit that you would pop and then I also did the
20 heroin one and it field tested positive for heroin.
21 Q: And you did that at the Myrtle Beach P.D.?
22 A: Yeah.
23 Q: I'm assuming you have some record of doing that?
24 A: As far as?
25 Q: Working through two or three more kits doing drug tests

1 back there?

2 A: We don't save the kits, no.

3 Q: Okay. Did you document doing that?

4 A: I believe on my report I would've documented that it
5 field tested positive.

6 Q: This is going beyond so we'll get back to this, but you
7 believe you have documentation that documents you taking drugs
8 back to Myrtle Beach Police Department and doing two, maybe
9 three more drug tests on it yourself, not at the lab, but you?

10 A: I would have documentation that I had dropped the SLED
11 Best packet in a -- in our drug drop kit, yes.

12 Q: After you tested it?

13 A: After I tested it, yes.

14 Q: Two or three times?

15 A: I don't know exactly how many. I think it was -- I
16 remember retesting it for cocaine and then I tested it for
17 heroin and it tested positive for heroin.

18 Q: When you go back to the police department with the drugs,
19 how much time elapsed between you having it and you dropping
20 it?

21 MR. ERVIN: Judge, this is -- statements made ---

22 THE COURT: Sustained.

23 BY MR. TRUSLOW:

24 Q: All right. Four questions, Your Honor, short ones. Take
25 me through just real briefly what you found. Did you find

1 money?

2 A: Money, yes.

3 Q: Did you find a roach?

4 A: Yes.

5 Q: When I say roach, I mean a little marijuana cigarette?

6 A: Two of them, yes.

7 Q: Two roaches.

8 A: Uh-huh, (affirmative response).

9 Q: They weren't bagged up, just out?

10 A: Yes.

11 Q: Okay. You found -- how many bags did you find? Not the

12 money, not the 2 little roaches, how many other bags? One

13 bag?

14 A: There was a bag of -- a sandwich bag of heroin and inside

15 of it was another sandwich bag of the same powdered substance.

16 So, it was two bags in one.

17 Q: No cocaine?

18 A: No.

19 Q: So, isn't that just one bag of heroin or is it two bags

20 of heroin?

21 A: I'm telling you how it was packaged.

22 Q: Right.

23 A: One with powder in it and another one on top of it inside

24 with powder in it; so, two in one, I would say.

25 Q: Do you know -- do you have any hard evidence who put them

1 bags together like that?

2 A: No.

3 Q: Okay. And then I think it's you, if it's another
4 officer, please correct me. You walked back up from where
5 he's in the police car and say, he's claiming everything in
6 there, right?

7 A: That was me, yes.

8 Q: Okay. That was you. That statement is made based upon
9 him telling you stuff from the back of the car?

10 A: Yes, him telling me it's mine; it's all mine.

11 Q: Okay. Can -- I'm not gonna hold you to it, if you can,
12 if you remember because I can't - do you remember the exact
13 words how he put that?

14 A: No, I'd have to replay the video.

15 Q: Did it say it's all mine; did he say I'm claiming it; do
16 you recall?

17 A: You'd have to replay the video.

18 Q: Okay. Were you able to hear it or not?

19 A: With the radio traffic, sometimes it's kinda ---

20 Q: Because you -- he's in the backseat and you're back there
21 talking to him, right?

22 A: Yes.

23 Q: Okay. Could you have been back there talking to Mr.
24 Lawyer, the other passenger?

25 A: Talking to the passenger?

1 Q: Yeah, about the drugs?

2 A: No, I was talking to him.

3 Q: You're certain?

4 A: Yeah, you can check the body camera.

5 Q: Did you write down specifically what he said?

6 A: I don't remember if I did or not; I'd have to look at the
7 report.

8 Q: Is there anything I can get for you where you could tell
9 if you did or not, precisely his statement?

10 A: A copy of the police report.

11 Q: I'll find it for you. Let me ask you this, would it be
12 something tantamount to when you walked back out and said,
13 he's claiming everything. Would that be what you said or
14 would you have had a more recorded or just written out detail
15 of what he said word for word?

16 A: In my report, I would've probably put that he claimed
17 ownership of it.

18 Q: Of it?

19 A: The narcotics.

20 Q: Okay. Well, well narcotics, all the narcotics; did he
21 list the narcotics?

22 A: I did in my report.

23 Q: Okay. But did he said the heroin is mine, the marijuana
24 is mine, the money is mine, both the roaches are mine. Don't
25 give him -- they're both mine, everything, or did he itemize

1 the dope and tell you what was his?
2 A: He didn't itemize it, no.
3 Q: Okay. So consistent with his statement, he could've just
4 owned the marijuana, right, I mean, from what he told you,
5 subject to interpretation?
6 A: You can interpret it, I guess.
7 Q: Because he didn't tell you it was his heroin, right?
8 A: I think I asked him about -- post-Miranda, I asked him
9 about the bag with the powder substance.
10 Q: What did he say?
11 A: When I was -- when he was at the back of the car?
12 Q: When you asked him that, what did he say?
13 A: I'd have to go back and listen to the whole audio of it.
14 Q: Okay. But the only place where we're ever gonna hear it
15 or see it is on here as far as you know?
16 A: The body camera and the in-car camera.
17 Q: Okay. Was there anybody over in the other car talking to
18 Camacho?
19 A: Talking to Camacho's guy or Camacho?
20 Q: I mean, sorry, was Camacho or any other officer talking
21 to Mr. Lawyer in the other police vehicle?
22 A: I don't recall. I was mainly dealing with him and the
23 vehicle itself at the time.
24 Q: Okay. Could they have then?
25 A: Could have, yeah.

1 Q: And if there were, would they have likely, in their
2 routine duties, recorded that?

3 A: Yeah, it would probably be on the body camera and the in-
4 car.

5 Q: Nothing further.

6 THE COURT: All right. Redirect?

7 MR. ERVIN: Yes, sir.

8 REDIRECT EXAMINATION OF JEREMY ALAN CREWS BY MR. ERVIN:

9 Q: Mr. Crews, would it refresh your recollection to show you
10 your police report as to what the Defendant told you?

11 A: Yes.

12 MR. ERVIN: May I approach?

13 THE COURT: Yes.

14 MR. TRUSLOW: May I see this?

15 BY MR. ERVIN:

16 Q: Specifically, Mr. Crews, the second paragraph, the small
17 paragraph?

18 A: Okay. You want me to read it for you?

19 Q: Yes, sir.

20 A: It just says - you're talking about the third paragraph
21 down?

22 Q: Yes, sir.

23 A: It says RO, which means Responding Officer, read the
24 Defendant his Miranda rights and he agreed to talk. He
25 admitted that the blunts and the powder substance belonged to

1 him. The powder substance field tested positive for heroin in
2 each bag. The Defendant was taken into custody at the time
3 and transported to Myrtle Beach Police Department or Myrtle
4 Beach Jail.

5 Q: Thank you. So, in effect, he did itemize the marijuana
6 and the powder substance?

7 MR. TRUSLOW: I'm gonna object, Your Honor. He has not
8 -- he has not set a foundation that occupant is Desmond
9 Collins.

10 THE COURT: All right. Overruled. Go ahead.

11 BY MR. ERVIN:

12 Q: Was the only reason you arrested this Defendant because
13 he admitted to it?

14 A: It was in his possession below his seat and also the
15 admission of it.

16 Q: Okay. And again, just to be clear, where -- where was
17 the bag when you ---

18 A: Right at his feet where he was sitting.

19 Q: When you say his, you mean the Defendant?

20 A: The Defendant, yeah.

21 Q: And why was the Defendant handcuffed prior to you
22 searching the car?

23 A: Just safety reasons.

24 Q: With respect to the traffic violation, is there a no-
25 turn-on-red sign at that intersection?

1 A: Yes.

2 Q: So, assuming that the Defendant did come to a complete
3 stop, was he legally permitted to turn right on that?

4 A: No.

5 Q: And with respect to the make of the car, regardless of
6 the make of it, did you observe that vehicle commit those
7 traffic violations?

8 A: Yes.

9 Q: Thank you, Mr. Crews.

10 THE COURT: All right. You may step down.

11 The State can call your next witness.

12 MR. ERVIN: Your Honor, the State has no more witnesses.

13 BY THE COURT:

14 THE COURT: All right.

15 Mr. Truslow, anything?

16 MR. TRUSLOW: No, sir, nothing.

17 THE COURT: All right.

18 MR. TRUSLOW: Although, if you do allow some statements
19 in, I would like to have some input as to which part because
20 there's a lot of redaction and two of the officers are talking
21 amongst themselves and I think it's prejudicial. I'd just
22 like to know precisely is coming in.

23 THE COURT: Okay. Well, what's presented here is what's
24 coming in.

25 MR. TRUSLOW: Well, I'm gonna object to the hearsay of

1 the officers. I think it's prejudicial that they're saying
2 that he may run or at least let me itemize a little motion,
3 short one, what I think should be redacted further.

4 THE COURT: All right. Let me hear from you.

5 MR. TRUSLOW: Sir?

6 THE COURT: Let me hear ---

7 MR. TRUSLOW: Well, I think it might be better if I do
8 it, but I'll do it now, I just ---

9 THE COURT: I mean, this is the *Jackson v. Denno* to
10 determine the voluntariness of the statement. Well, I see
11 what you're saying. In other words, you want to suppress part
12 of the video outside the statement?

13 MR. TRUSLOW: Yes, sir. And, yes, sir, outside for
14 different reasons that the voluntariness of the statement, on
15 other legal ---

16 THE COURT: Okay. I see what you're saying. All right.
17 Well, this is *Jackson v. Denno* that only deals with the
18 voluntariness of the Defendant's statement when he identified
19 the drugs as being his. I find that that is a voluntary
20 statement and that is admissible. So, his statement that the
21 drugs are his is admissible. That doesn't necessarily mean
22 the entire video is admissible. You can still raise your
23 objection on that issue.

24 MR. TRUSLOW: Your Honor, would that be at the most,
25 after Miranda was given? Like anything from Miranda?

1 THE COURT: No, no, from the point of Miranda until he
2 says that's mine.

3 MR. TRUSLOW: Yes, sir. Thank you.

4 THE COURT: And that's admissible.

5 MR. ERVIN: Your Honor, I would propose to play that
6 whole -- that's the redacted version, play the whole video
7 because it does show the moving violations and it shows where
8 the bag was positioned in the car when Officer Crews found it.

9 THE COURT: Well, this is just for *Jackson v. Denno*, so
10 I'm ruling that that's admissible. You can lay the foundation
11 and try to present it during your case in chief. If the
12 Defense raises an objection, I'll deal with it then. If the
13 Defense has a motion in limine and they want to suppress any
14 part of it, we'll deal with that as well. The sole purpose of
15 this hearing is the Defendant's voluntariness and the
16 statement where he said the drugs are mine. I rule that that
17 was a voluntary statement given after Miranda warnings and so,
18 therefore, it's admissible. All right?

19 MR. TRUSLOW: Yes, sir, Your Honor.

20 THE COURT: All right. Anything further from the State?

21 MR. ERVIN: Well, not with respect to the statement, no.

22 THE COURT: All right. Anything from the Defense?

23 MR. TRUSLOW: Nothing, Your Honor.

24 THE COURT: All right. Anything further pretrial from
25 the State?

1 MR. ERVIN: Your Honor, just, I know we'll get to this
2 and that's obviously their decision, but the Defendant does
3 have a criminal history that we need to take up at the
4 appropriate time.

5 THE COURT: All right. We'll do that -- deal with that
6 when I'm questioning him on his right to testify unless ---

7 MR. ERVIN: Yes, sir.

8 THE COURT: I mean, you can go ahead and give them the --
9 what you intend to bring up. You want to go ahead and put on
10 the record?

11 MR. ERVIN: As far as impeachable offenses, it's a 1999
12 grand larceny, 2009 financial transaction card fraud, and a
13 2015 receiving stolen goods.

14 THE COURT: All right. I'll make a decision later as to
15 whether or not that's admissible when we question the
16 Defendant on his right to testify.

17 Anything further from the State?

18 MR. ERVIN: No, Your Honor.

19 THE COURT: Anything pretrial from the Defense?

20 MR. TRUSLOW: Nothing, Your Honor.

21 THE COURT: All right. Anything before we recess for the
22 evening?

23 MR. TRUSLOW: No, sir, Your Honor.

24 MR. ERVIN: No, Your Honor.

25 THE COURT: All right. We'll be in recess until 9:30

1 tomorrow morning.

2 MR. ERVIN: Thank you.

3 THE COURT: Thank you.

4 **(RECESS.)**

5 **END OF DAY ONE.**

6 *******OFF THE RECORD*******

7 **(On the Record.)**

8 **NOVEMBER 14, 2017**

9 **BY THE COURT:**

10 THE COURT: All right. The jury has selected Juror 382,
11 Victoria Shultis as the foreperson. Victoria Shultis is the
12 foreperson. It's just wrote on a sheet of paper and we'll put
13 that as Court's Exhibit 1.

14 **COURT'S EXHIBIT NUMBER 1**

15 **MARKED FOR IDENTIFICATION**

16 THE COURT: All right. Anything from the State before we
17 bring the jury in?

18 MR. ERVIN: No, Your Honor.

19 THE COURT: Anything from the Defense?

20 MR. TRUSLOW: Nothing, Your Honor.

21 THE COURT: All right. We'll bring the jury in, I'll do
22 the opening charges, we'll do opening arguments and go
23 straight into the case. All right?

24 MR. ERVIN: Yes, sir.

25 MR. TRUSLOW: Yes, sir.

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

2 (REPORTER'S NOTE: Jury enters courtroom.)

3 THE COURT: All right. Ladies and gentlemen, welcome
4 back. First of all, I want to thank everyone for being on
5 time. That's a great assistance to the Court and I appreciate
6 that.

7 I understand, Ms. Shultis, you have been selected as
8 foreperson; is that correct?

9 JUROR 382: Yes, sir.

10 THE COURT: All right. Thank you for serving in that
11 capacity. If you would always occupy the seat where you now
12 -- let's have order please.

13 MR. TRUSLOW: I'm sorry, Judge.

14 THE COURT: And if you'd would please always occupy the
15 seat where you now sit. As I said, Mr. Heverly, if you would
16 always occupy your seat. The rest of you are at liberty to
17 sit in whatever seat you like, whether it be the same seat or
18 different seats.

19 Now, we're getting ready to start the trial of the case
20 of the State of South Carolina versus Desmond Sharmaine
21 Collins. As I told you during jury qualifications and voir
22 dire, just like witnesses, jurors are constantly taking oaths.
23 So, I'll need all members of the jury to please stand and
24 raise your right hand while the Clerk of Court administers the
25 oath for you to serve as jurors on this specific case. All

1 right.

2 (REPORTER'S NOTE: Jury duly sworn by Clerk.)

3 CLERK: Please be seated.

4 THE COURT: Is there any member of the jury that did not
5 respond to the oath by saying I do? If so, please stand.

6 (REPORTER'S NOTE: No response.)

7 THE COURT: Thank you very much.

8 All right. Ladies and gentlemen, we're about to begin
9 the trial of the case of the State of South Carolina versus
10 Desmond Sharmaine Collins. Now, I know from reading books,
11 watching movies, watching T.V. shows, things of that nature,
12 trials are often full of a lot of suspense, a lot of anxiety,
13 a lot of action. While that might be the case in this trial,
14 it probably won't be. Your primary function in this case is
15 to determine whether or not the State can prove that the
16 Defendant has violated a criminal statute. That's often a
17 slow repetitive process; the exact opposite of what you might
18 be accustomed to when you watch movies or read books and
19 things of that nature, but I hope you find the trial
20 entertaining. I hope you find it educational. And I want to
21 thank you from the outset for serving as jurors on this case.

22 The attorneys appearing before you are advocates for the
23 parties they represent. But first and foremost, they are
24 officers of the court. They are sworn to uphold the integrity
25 and the fairness of our judicial system and to help you in the

1 search for the truth in this case. You should expect them to
2 be professional, competent, and ethical in the representation
3 of their clients' interests.

4 What I now say to you is intended to serve as an
5 introduction to the trial of this case. These remarks are not
6 a charge on the law in this case. I will instruct you on the
7 law applicable to this case at the end of the trial before you
8 retire to consider your verdict. This is merely an
9 explanation of the procedure that we will follow in this trial
10 so that you can better understand what's happening.

11 The Defendant is charged by an indictment. This is an
12 indictment filed with the Court, and he's charged with the
13 crime of trafficking in heroin. Now the elements of that
14 crime, I'll explain to you at a later time. This indictment
15 is simply the charge by which the case is brought into this
16 Court and it is not in any sense evidence of any of the
17 allegations it contains. The Defendant has pled not guilty to
18 this indictment. The State therefore has the burden of
19 proving each of the elements of the indictment beyond a
20 reasonable doubt. It will be your duty, ladies and gentlemen,
21 to determine and decide whether or not the State has met that
22 burden. Your purpose as jurors is to find and determine the
23 facts of this case. You are the sole judge of the facts of
24 this case. If at any time I make a comment regarding the
25 facts of this case, you must disregard my comments. You are

1 to determine the facts from the testimony you hear and other
2 evidence introduced during the trial of this case. It will be
3 up to you to determine the inferences that you feel may
4 properly be drawn from that evidence. It is especially
5 important that you perform your duty of determining the facts
6 diligently and conscientiously because ordinarily, there is no
7 way to -- excuse me -- there is no way to correct an erroneous
8 determination of the facts by a jury.

9 And on the other hand, and with equal emphasis, the same
10 law that makes you the judge of the facts of this case, makes
11 me the judge of the law. The law as given by the Court is the
12 only law that you can consider. You must accept and follow
13 the law as I give it to you, even though you may disagree with
14 it. Just as I cannot tell you what the facts of this case
15 are, you cannot disagree with me about the law to be applied
16 in this case. Your job is to take the law as I give it to you
17 and to apply it to the facts as you find those facts to be
18 from the testimony of witnesses and any other evidence that is
19 introduced. After doing that, you will then render your
20 verdict, a true and just verdict, under the solemn oath you
21 just took as jurors.

22 Now, until I advise you to begin your deliberations, you
23 must not discuss this case with anyone, including your fellow
24 jurors. Don't discuss it with any friends, family members, or
25 anyone involved in the case. After the case is submitted to

1 you, you can then discuss it, but only in the jury room with
2 your fellow jurors. The attorneys and parties in this case
3 have been advised that they're not to talk to you at all. So,
4 they're not being rude, they're just following the
5 instructions of the Court.

6 Now during the trial, you're not to read or listen to or
7 watch any news reports about the case, if there is any. This
8 includes anything that might be in the newspaper or on the
9 internet, radio, or television. You must not consider
10 anything that you may have read or heard about the case
11 outside of the courtroom, whether or not that be before or
12 during the trial of the case. It is important that you keep
13 an open mind and not decide any issue in this case until all
14 of the evidence has been presented, the parties have made
15 their closing arguments and I have instructed you on the law
16 to be applied in this case. It is your solemn responsibility
17 to determine the guilt or innocence of the Defendant and your
18 verdict must be based solely on the evidence as it is
19 presented to you in this trial and on the law as I instruct
20 you during and at the close of this trial.

21 Now, in just a moment, the Solicitor will make what is an
22 opening statement, in which the Solicitor will explain to you
23 the issues in this case or at least what the Solicitor thinks
24 the issues in this case are. The attorney for the Defendant
25 may also make an opening statement although he is not required

1 to do so. What the attorneys tell you during their opening
2 statements is not evidence in this case. It is only their
3 contention as to what they think the issues in this case are.
4 The evidence in this case will be presented to you by
5 testimony of sworn witnesses from the witness stand and any
6 exhibits that may be introduced during the trial.

7 Now, in determining what the true facts are in this case,
8 you must decide whether or not testimony of a witness is
9 believable. It will be my responsibility to rule as a matter
10 of law as to whether certain testimony is admissible at all or
11 not. But once testimony is admitted into evidence, whether or
12 not you believe it, is solely for you to determine. In
13 deciding whether to believe a witness, you have the right to
14 consider the interest of any witness, the bias of any witness,
15 the prejudice of any witness, the opportunity for the witness
16 to have seen the matters and things about which the witness
17 may testify and the way the witness acts on the witness stand.
18 You have the right to consider anything that is in the record
19 that will help you evaluate the testimony of the witnesses.
20 That means that it is your duty to pay close attention to
21 these witnesses, to observe them, to listen to them, and to
22 pay close attention to the attorneys and the Court. Don't let
23 your thoughts wander and give strict attention to the
24 testimony in this case, so at the end of all of the testimony,
25 after the arguments of counsel and a charge on the law by the

1 Court, you will then be in a position to determine what the
2 true facts are and to apply the law to those facts and thus
3 render a true and just verdict.

4 Now, is there any additional charges or challenges by the
5 State to the charges?

6 MR. ERVIN: No, Your Honor.

7 THE COURT: Any by the Defense?

8 MR. TRUSLOW: None, Your Honor.

9 THE COURT: All right. Ladies and gentlemen, at this
10 time we're gonna begin the trial with the attorneys opening
11 statements, and as I told you, these opening statements are
12 not evidence; it's just the attorneys' contention as to what
13 they think the issues in this case are.

14 All right. Mr. Ervin?

15 MR. ERVIN: Thank you. May it please the Court?

16 THE COURT: Yes, sir.

17 MR. ERVIN: Good morning, ladies and gentlemen.

18 JURY: Good morning.

19 OPENING BY ERVIN:

20 MR. ERVIN: You may have heard of the term, riding dirty?
21 Riding dirty has come in songs, movies, whatnot. It pretty
22 much means you're driving or riding in a car with something
23 illegal, usually drugs. This Defendant was riding dirty on
24 June 24th, 2016 just before midnight. Officer Jerry Camacho,
25 who is present in the courtroom, was pumping gas in Myrtle

1 Beach, smelled marijuana coming from a vehicle that was later
2 determined to be this Defendant's car. He had the gas nozzle
3 in the car, so it wasn't practical for him to initiate a
4 traffic stop so he called Officer Jeremy Crews, who was in the
5 near vicinity of that area to initiate a traffic stop. As
6 Officer Crews was coming behind the Defendant's car, he
7 observed the Defendant commit two traffic violations. So,
8 Officer Crews initiated a traffic stop, eventually coming to a
9 stop at 21st Avenue in Myrtle Beach.

10 Officer Crews approached the car, smelled marijuana
11 himself, talked to the Defendant, and asked him some initial
12 questions about where he was going, where he was coming from.
13 The Defendant told him I smoked marijuana in this car earlier.
14 So, further investigation determined that Officer Crews would
15 take this Defendant out of the car, detain him, based on the
16 smell of marijuana, investigate further, look through the car.
17 There was another passenger in that vehicle. Another Officer,
18 Camacho, did the same thing, detained that passenger. And
19 you'll hear them tell you that was for officer safety reasons.
20 You don't want one officer to detain one person and there's
21 another subject on the road that could pose a danger to those
22 officers. So there were two officers. Eventually, Officer
23 Michael Householder shows up and provides further backup.

24 Now, ladies and gentlemen, you'll hear these officers
25 testify, you'll see the videos. You will see the poison this

1 Defendant was riding dirty with. There were 15 grams of
2 heroin laying right at his feet. You'll see it on the video.
3 You'll also hear this Defendant tell the officer and, by way
4 of that video, essentially tell you, the jury, those drugs are
5 mine, put it on me, claim ownership.

6 Ladies and gentlemen, I ask you to use your common sense
7 in this. It's not a complicated case. Do not get diverted by
8 things that do not ultimately bear on the issue of this
9 Defendant's guilt, whether he possessed those drugs.

10 So, I thank you for your service on this jury. I thank
11 you for your attention. We'll look forward to presenting this
12 case to you.

13 THE COURT: Mr. Truslow?

14 OPENING BY TRUSLOW:

15 MR. TRUSLOW: Yes, Your Honor. If it please the Court,
16 Mr. Ervin, ladies and gentlemen of the jury, it's my privilege
17 today to represent Mr. Collins. I'm a criminal defense
18 attorney here in Myrtle Beach. This is not always an easy
19 job. This is a very serious case. The first thing I want to
20 impress on you is, this is a very serious case. Everything
21 bears on guilt or innocence. That's where we differ. There's
22 a lot in this case that you're gonna hear that you are going
23 to have to look at, consider, use your common sense. There's
24 nothing magical about what you do. Now that doesn't mean it's
25 easy; it's not. However, you were chosen as the jury and I

1 appreciate your service. I acknowledge you don't have a lot
2 of choice in the matter, okay, but it's a civic duty.

3 The longer I've done this job, and I'm at 23 years now
4 doing it. I do nothing but criminal defense work. The
5 importance of your job is -- I can't even put it in words
6 because a jury trial in a criminal case, you are the backdrop.
7 The buck stops with you. The Judge is the judge of the law,
8 what it says trafficking is or intent or any other legal
9 issue. If I object to something and he says no, you're wrong
10 or vice versa, that is his venue. As the Judge will tell you
11 when he gives you closing statements and he explains the law
12 to you is that you are the finders of the facts.

13 A very important thing to realize also is that you'll
14 hear it a lot and you'll hear it in closing, your job is to
15 determine the facts. Then he tells you the law, the Judge.
16 You take those facts and you apply it to the law and you
17 render a verdict. I find sometimes or at least me, it seems
18 to me too easy to say you have to find the facts, because to
19 me it seems like you must find the facts. That is not the
20 case. You can't always find the facts. You don't have to
21 settle upon A, B, C, D, that's what happened; let's agree to
22 that. If you can't decide, you can't decide. I only point
23 that out because through my experience, I have seen that work
24 to the advantage of some people who should not be convicted
25 because the jury thought I got to do something and they told

1 me to find the facts. That doesn't mean you get down to A and
2 B and you agree and say, well, I'm going with B. If you can't
3 decide beyond a reasonable doubt, which I believe will be
4 explained to you as being firmly convinced of A or B, you
5 don't have to pick one. You don't have to flip a coin. Okay?
6 That's not guilty. You're not required to pick one; it's not
7 a multiple choice test.

8 My client is charged with trafficking heroin. What that
9 means is he was either in possession or what they call
10 constructive possession, meaning it was around you as opposed
11 to in your pocket, constructive possession. There is no
12 difference; possession is possession. Whether it's actual in
13 your pocket, in your jacket, or your car, or your house.

14 You're gonna hear evidence in this case and I've tried to
15 get to the bottom on it, I work hard on my cases. Somebody is
16 missing in this trial. There's an individual, you'll hear
17 testimony and questions and answers about, by the name of
18 Darrin. Now, this is not a, you pick-a-card type thing. And
19 before I go on, let me tell you this too, I make a vow to you,
20 I'm gonna do my job to the best of my ability. The only thing
21 I ask you to do is the same thing. You have nobody, nobody to
22 reward, to punish. If you do your job and you do it
23 diligently, you find my client guilty, I'm gonna shake
24 everybody's hand. If you find him not guilty, I'm gonna shake
25 everybody's hand, okay. That's your job. All I ask is that

1 you listen to the legal terms and go by them.

2 There's two terms I want to talk about just really
3 briefly and we'll get started. One is the presumption of
4 innocence. Back many, many, many years ago, I might get
5 sappy, but 911 brought to light the Taliban in Afghanistan.
6 We always talk about we have the best judicial system in the
7 world. There's no perfect justice system, but I agree with
8 that; I agree. Because our founding fathers said, look,
9 that's why they fought against incredible odds to have this
10 country and they took the time to write out a Bill of Rights,
11 to write out a Constitution, because they didn't want to live
12 like that. See, what I learned was, in many countries, the
13 Taliban back then, even today, you can be convicted by
14 somebody accusing you of something and having one other person
15 vouch for it. Okay? And you're guilty. That's scary, very
16 scary. We don't do that.

17 The State has the burden in this case and in every
18 criminal case, to leave you firmly convinced of somebody's
19 guilt. I'm not gonna get into the law now because the Judge
20 will explain it to you. But what that means is they have a
21 duty and they owe you that because the decision you make, has
22 some big impact in a lot of people's lives, not necessarily
23 yours, not necessarily mine, though I do tend to take these
24 things personally when I know what I think and believe
25 happened -- the wrong thing happened, but still, I'm not going

1 anywhere. When this trial is over, I go home; we all go home.

2 Presumption of innocence means that from the day they
3 charged him all the way up through this trial until and unless
4 after everything, you do your job and you go by the law and
5 you find him guilty. Up until that time, throughout this
6 trial, he sits in that chair next to me innocent. That's one
7 of those legal things and it's a good system.

8 Before you impede upon or take away somebody's liberty,
9 before you do this to them, we want to be right. We've all
10 read, started about 10 years ago in New York, with Barry
11 Scheck's Innocence Project, people get off death row, got out
12 of prison 27 years later, 35 years later, on death row every
13 day, not looking forward to getting out, paroled, looking
14 forward to dying from either old age, and it takes a while, or
15 however -- you know, and I bring that up because the
16 importance of this, okay. He's not looking at death penalty,
17 you know, but we've got some tough laws. He's gonna be
18 impacted, his family is gonna be impacted; this is serious
19 stuff. I have found in my experience, it is very simple for
20 us to think we have police, most of them very well trained,
21 most of them hearts in the right place, serving us, protecting
22 us, doing their job. So, why would we think that they'd
23 arrest somebody and then go to trial, they're sitting there,
24 why would you not look at him and think, he probably did it.
25 Why the heck else would we be here? Okay? Let me tell you

1 the difference. The difference between sitting there and
2 there or there or out there, is this, an accusation, pointing
3 a finger at them. So, we got some evidence we think makes you
4 guilty; you're gonna get convicted; we're taking you to trial.
5 That's the difference, okay. It's up to you to require and
6 demand that before you make such a difficult decision, that
7 they do what they have to do. It should not be easy. It
8 should not be easy. God forbid any -- you get involved in
9 ant, your first reaction is probably gonna be, I'm not
10 worried; I know I didn't do this. Or I'm not worried; I know
11 I didn't do all of this. There's some other stuff going on in
12 here; I'm good. Today in this system. I'm gonna tell you,
13 it's painful to sit at that table because presumption of
14 innocence can get lost. We like to think human nature -- we
15 like a simple answer. That's just human nature. We want
16 things to make sense and we want them to make sense quickly
17 and easily. Okay? Your job is gonna be -- unfortunately,
18 this type of case and any criminal case is just not like that.
19 If you do your job that you said you would do when you held
20 your hand up and took that oath, all I can ask of you is to do
21 that; that's all. If you do that, whatever you do, whatever
22 your verdict is, I applaud you for your work because that's
23 your job; that's all you got to do. It sounds a little easier
24 than it is, but if you do it right, if you believe what you're
25 required to do and the presumption of innocence. If you

1 believe, which you're required to do, that you're innocent
2 until proven guilty beyond a reasonable doubt, until you are
3 firmly convinced that he's guilty, he's innocent or not
4 guilty. It hasn't happened a lot in 23 years. I've had cases
5 where the jury would come and talk with me after the trial,
6 the verdict was not guilty. I will never forget this older
7 lady came to me and said, we thought -- we thought your guy
8 was probably guilty, but we weren't firmly convinced and we
9 wanted to go by the law and do the right thing and preserve
10 this system. That is a beautiful thing. You know, it really
11 is. Because you know what, in a criminal case, with all
12 that's at stake -- it's not like a civil case, somebody gets
13 in a car wreck, they want some money, they sue for their
14 medical bills or whatever, it's a preponderance of evidence.
15 And, what that means is you just got to tip the scales, okay,
16 that it's more likely than not that that person is negligent
17 or whatever the civil issue is. A criminal case is far
18 different, two different burdens; preponderance of the
19 evidence, beyond a reasonable doubt. And, it's not tipping
20 the scales; it's this, this is important. I'm just asking you
21 please to do your job. Some of these terms aren't easy. The
22 only one I wanted to talk about was that presumption of
23 innocence and ask you from the start, because it's the law and
24 you're required to do it, get it in your head right now,
25 please; he's innocent. I can say that right now; that's the

1 law. He's innocent and he's innocent until that robe of
2 innocence is ripped off of him by enough evidence by the State
3 to leave you firmly convinced that he's guilty.

4 Beyond a reasonable doubt. The Judge will explain that
5 to you, he will define it, and he'll give you examples. It
6 doesn't mean any crazy doubt. If I doubted that there's salt
7 in the ocean, I can doubt all I want. Is that a reasonable
8 doubt? No. I'm pretty firmly convinced there's salt in the
9 ocean. Okay? That's the kind of thing I'm talking about.
10 I'm talking about a football field where Mr. Ervin is marching
11 down with his evidence, he comes all the way down to the 20
12 yard line, 10 yard line, five yard line, end zone; he scored,
13 he's guilty. It's a big deal and this is important.

14 I do not expect this to be a long trial. I think we've
15 got maybe six witnesses. Most of those witnesses are required
16 for procedural reasons in terms of what they do with the
17 evidence; where they brought it and that person took it in
18 here and stuff like that. I think we have two officers who
19 testify, who will be giving you evidence about the facts as
20 they see they it, what they saw, observed, heard. You also
21 have the benefit in this case of another type of evidence and
22 that's direct evidence; there's a video tape. The officers
23 now have body cameras. They've always -- but for a long,
24 long time they've had dash cams. You're gonna get to see
25 that. Okay.

1 I'm gonna try to help you a little bit here by telling
2 you it appears and they have to prove it, that there was dope
3 in the car. Okay? It appears my client was in the car, but
4 what I'm going to end with is this, Darrin was in the car.
5 Darrin was in the passenger seat. They come in, stop them,
6 talk to them, my guys handcuffed right away. Darrin, they
7 talk to him a little bit I think, he's handcuffed. They go to
8 Darrin, unlock the handcuffs and wave bye. Remember what I
9 told you about constructive possession; he's in the same car,
10 same dope in plain view, it's not like it was in the trunk, it
11 was riding in the cab or the interior of the vehicle, riding
12 with both of them. Who drives for people that are dealing
13 drugs? The drug dealer or the heroin addict to get his
14 heroin. The heroin addict to get his heroin. The drug dealer
15 is in the car, he's doing business, he's on the phone, he's
16 doing his thing, he's riding, he's driving. The passenger,
17 they just let him walk away. Now, you're gonna hear evidence
18 and you need to listen closely because one of two things
19 happened in my opinion and I think the evidence will show that
20 my client said, yeah, it's mine. Okay? I'm gonna suggest to
21 you that there were a number of reasons that he would say
22 that. Hey, man, I'll get you off; you'll get probation; you
23 can get a lawyer. Darrin left. Darrin ain't here. Guess
24 what else? I got police reports, narratives that they wrote
25 up. They didn't even write down his name. It took me a while

1 to figure out who he was. They didn't even write down his
2 name. They didn't write down anything about him as I can
3 recall and they certainly didn't write down his name, first,
4 middle, last, they looked at his ID to see who he was; they do
5 for everybody in the car. Nowhere in that report did they
6 even write his name down. They don't have any reference to.
7 We'll go through this and you'll have to decide for yourself.
8 I'm telling you how I see the evidence. Okay? Darrin leaves.
9 Last week I find out who he is because it came up because I'm
10 reading reports, I'm looking at the evidence and it dawns upon
11 me that I've got to find out who it is. Like that, a phone
12 call is made. I get the name, first, middle, last, birthday,
13 everything, 18 months later. How does that happen? Okay?
14 Like I said before, they owe you a lot more than that, okay, a
15 lot more than that. You're gonna see the stuff that they
16 didn't do that I wish they would have done, but I can't snap
17 my fingers and make it appear; they didn't do it. All right?
18 Does that make them bad? No. I respect the police, you know,
19 but this is my job, I defend people. I make sure people who
20 are charged with an offense if that ain't the right offense.
21 You are off the charts on this one. Okay? And I do the best
22 that I can and that's all I can tell you I'm gonna do. My vow
23 to you is I'm not gonna try to trick you. I'm not gonna lie
24 to you. I'm gonna go through this case and point out things I
25 think you need to consider. Then when everything is done, I'm

1 gonna get up here and give you my closing argument and I'm
2 gonna ask you to go back and talk about it and come back here
3 and render a verdict of not guilty because I'm gonna tell you
4 in my opinion, you can't m-- I'm not gonna say you can't be
5 firmly convinced because I don't want you to try to prove me
6 wrong, but my opinion is you can't be in this case.

7 Now what does it matter? There was dope in the car, he
8 was in the car, Darrin lucked out, you know, dealers know what
9 they're doing. He's gone; didn't even get arrested. Okay?
10 So what does it matter? I'll tell you why it matters, because
11 right now, all across this country, in the State Court and
12 Federal Court, there are trials going and there's 12 people
13 sitting there just like you. Okay? If you don't go by the
14 law and you don't do, sometimes the hard thing, and go by the
15 evidence, then if this system is not there and it doesn't work
16 like that for Desmond Collins, then it doesn't work for
17 nobody. See, that's the importance I told you about of you.
18 You keep this intact or you continue to let people flush it
19 down the toilet. And the more you flush it, the further away
20 it gets back and I can tell you, my opinion, the further it
21 goes, the harder it is to come back. That's true with a lot
22 of things in life, you know, you get rid of something, it's
23 hard to get back to square one. My opinion, we're going way,
24 way down that line. I would be petrified to go to trial if I
25 was innocent, I'll be honest with you. Because you know why?

1 Because what I told you before, I'm sitting at that table, I'm
2 presumed innocent. In my head, I'm presumed guilty; that's
3 what I think.

4 I ask you to please, please, go by the law. Keep this
5 system strong. And if you do that and find him guilty, great;
6 you did your job. But please don't jump to conclusions.
7 Please don't lighten up on the burden. Please don't convict
8 him because he's sitting at that table and he was in a car
9 with drugs. He's, Mr. Ervin, you heard what you heard. I do
10 not want to say something he didn't say, but he said, to me it
11 sounded like it's a pretty simple case. I don't think so. I
12 really don't think so. I believe my client and will defend
13 him to the best of my ability in this case and I think after
14 this trial, you're gonna find him not guilty. That's not
15 always easy to do. The officers are here, the prosecutors are
16 here, I'm here, but you know what, if you do like I said and
17 find him guilty and then you did it that -- and you went by
18 the law, I'm happy. I've got all the respect in the world for
19 you and I know it's not easy. If you find him not guilty,
20 they should have the same exact attitude. Okay? This is not
21 a competition between me Gray Ervin. This is not a one-on-one
22 basketball game or racket ball; it's not. I'm doing my job;
23 he's doing his job. Whatever you guys decide, we all go home;
24 that's it. Okay? I'm simply asking you to please listen to
25 all the evidence -- the State goes first, which means they put

1 on their case. All the witnesses you're gonna hear in the
2 beginning -- I might not even have any witnesses. He asked
3 them questions, they testify, I get to cross examine them, I
4 get to then ask the questions. So please withhold judgment
5 until we're done, please, because there's gonna be things when
6 you hear it, it's gonna be like, hmm, that sounds bad. But you
7 know what, a couple of witnesses down, if you do it the way
8 you're supposed to, you're gonna think back, well, wait, based
9 on that and you'll think back to that, and now it's making a
10 little less sense. Just please, it's only gonna be a day or a
11 day and a half; just give us that. He's a United States
12 citizen. He lives in our country like us; he deserves it.
13 Not only does he deserve it, but it's his constitutional right
14 and constitutional rights are important, and they've got to
15 stop being whittled down. Because I'm telling you, like I
16 said, the difference between sitting there, there, there, or
17 there is like pointing a finger at somebody; you didn't do it.
18 I didn't do it; we're going to trial. No way I can go to
19 prison. Remember what I just told you, you've watched the
20 news, people have been on death row for 30 years, DNA came
21 out, people have been exonerated; they did nothing. They
22 weren't just found not guilty, they were found innocent and
23 they spent 30 years in prison waiting to be executed, many of
24 them. So, please don't think that people do not go to trial
25 and plead not guilty and that they don't go to prison; it

1 happens. Please don't let it happen on your watch. Please.

2 Having said that, we're ready to start. Thank you so
3 much.

4 THE COURT: All right. Ladies and gentlemen, we'll now
5 begin the evidentiary portion of the trial of this case with
6 the presentation of the State's case in chief. State can call
7 your first witness.

8 MR. ERVIN: Thank you, Your Honor. The State calls
9 Jeremy Crews.

10 THE COURT: All right.

11 CLERK: Please raise your right hand and place your left
12 hand on the Bible.

13 JEREMY ALAN CREWS, HAVING BEEN DULY
14 SWORN TESTIFIES AS FOLLOWS:

15 CLERK: Please state your full name and spell your last
16 name for the Court.

17 MR. CREWS: Jeremy Alan Crews, C-R-E-W-S.

18 THE COURT: All right.

19 COURT REPORTER: Spell Alan.

20 MR. CREWS: A-L-A-N.

21 COURT REPORTER: Thank you.

22 DIRECT EXAMINATION OF JEREMY ALAN CREWS BY MR. ERVIN:

23 Q: Good morning, Mr. Crews?

24 A: Good morning.

25 Q: Where are you currently employed?

1 A: Construction Superintendent at DR Horton.
2 Q: And where were you employed on June 24th, 2016?
3 A: City of Myrtle Beach Police Department.
4 Q: What was your duty assignment there?
5 A: I was a patrol officer.
6 Q: And do you have any specialized training and/or
7 certifications?
8 A: As far as any certification through law enforcement
9 beyond the academy?
10 Q: Yes, sir.
11 A: Radar certification; I've been through a narcotics class;
12 I've been through Pipeline Interdiction Training, which is a
13 narcotics interdiction training. I'm trying to think of the
14 other certifications I had.
15 Q: That's okay. Any further schooling besides the police
16 academy?
17 A: Yes.
18 Q: Okay. Mr. Crews, did you become involved in this case
19 involving this Defendant?
20 A: Yes.
21 Q: Will you explain to the jury your initial call?
22 A: I was working patrol on the 24th of June. Officer
23 Camacho, who worked in the same rotation I did and he worked
24 in the same area I did, called me on the phone and said he had
25 a vehicle that was about to pull out of a gas station, asked

1 if I was near the area, said he had had smelled the odor of
2 marijuana coming from the vehicle while he was attempting to
3 pump gas. I was actually pretty close proximity to it. He
4 was on -- stayed on the phone with me, said that vehicle was
5 coming off Seaboard Street and pulling onto Joe White Avenue
6 going westbound. I was actually coming westbound past Dick's
7 Pawn Shop and the Master's Club area. The vehicle -- he said
8 -- he was on the phone with me and said the vehicle had made a
9 left-hand turn right there and as soon as the light turned
10 green for me, I was basically behind the vehicle almost as we
11 were approaching 17 Bypass.

12 Q: Did you get behind the vehicle that Officer Camacho
13 directed you to?

14 A: Yes.

15 Q: And what happened when you got behind that vehicle?

16 A: When I got behind him, he was in the right lane. He got
17 over into the right lane to make a turn, northbound 17 Bypass,
18 right there when he came up to the light, it was turning
19 yellow and it had turned red before he came up to the stop
20 line. He made a right-hand turn on the red light without
21 stopping and also there's a traffic signal or a sign that says
22 no right on red there as well.

23 Q: Okay. So, you observed the traffic violations?

24 A: Yes.

25 Q: And did you eventually initiate your blue lights?

1 A: Yeah, when I turned right on 17 North, he made an
2 improper turn by going to the middle lane instead of taking
3 the innermost lane. Then he also signaled or he didn't signal
4 and went over to the left lane, the Number 1 lane and made a
5 third traffic violation and I initiated a traffic stop shortly
6 after that.

7 Q: Where was that stop?

8 A: He ended up stopping at 21st avenue at the gas station
9 that connects to Burger King.

10 Q: All right. What did you do when you first walked up to
11 the car?

12 A: I walked to the vehicle, identified myself, asked him for
13 his license and registration and immediately smelled marijuana
14 that was emitting from the vehicle.

15 Q: And who was driving that car?

16 A: The Defendant.

17 Q: Was there someone else in that car?

18 A: Yes, there was a passenger.

19 Q: Did you - do you remember that passenger's information
20 today?

21 A: No, I think Officer Camacho got his ID and ran him
22 through our system.

23 MR. TRUSLOW: Objection, Your Honor, hearsay.

24 THE COURT: Sustained.

25 BY MR. ERVIN:

1 Q: Officer, Mr. Crews, did either one of the occupants, this
2 Defendant or the passenger, appear under duress; did they
3 appear to have threatened one another or was there any fear
4 that you sensed?

5 A: No.

6 Q: How as the Defendant's demeanor when you approached him?

7 A: He seemed very calm.

8 Q: So, what did you do after you smelled marijuana?

9 A: I waited for Officer Camacho to come to the scene. I
10 ended up getting the Defendant out of the vehicle and bringing
11 him to the back of the vehicle.

12 Q: What was your purpose in doing that?

13 A: To ask him about the odor of marijuana that was coming
14 from the vehicle, and then I was gonna end up detaining him
15 for safety purposes.

16 Q: Okay. And please explain to the jury shortly what
17 detained means?

18 A: Detained, well, as far as if we're gonna search a vehicle
19 or we had the probable cause to search a vehicle based on the
20 odor of marijuana or a situation where it's - for the safety
21 of an officer, we'll detain people. They're not under arrest,
22 but we'll detain the just so nothing as far as it protects us
23 safety wise.

24 Q: Okay. And what was your purpose in having Officer
25 Camacho arrive at the scene also?

1 A: To help me get a second passenger out of the vehicle,
2 detain him and then also perform a search of the vehicle.

3 Q: Okay. So, once you - well, in detaining the Defendant,
4 does that mean placing him handcuffs on him?

5 A: Yes.

6 Q: And what did you say to him when you placed the handcuffs
7 on him?

8 A: I advised him he was being detained and he was not under
9 arrest at the time.

10 Q: Okay. And what happened after that?

11 A: I think Officer, or Officer Camacho got the -- I signaled
12 him basically to get the passenger out, he ended up detaining
13 him, brought him back. Both of them were standing towards the
14 front of the vehicle or my vehicle while I started the search
15 of the vehicle.

16 Q: So, you were the one who searched the vehicle initially?

17 A: Yes.

18 Q: All right. And did you find anything illegal? Well,
19 let's -- I'm sorry, let's back up. What did you find when you
20 first started searching the car?

21 A: When I first when up to the vehicle and opened the
22 driver's door, there was a -- I think it was a Dollar General
23 bag and it had a large amount of money on that -- in there.

24 Q: Do you remember how much money?

25 A: It ended up being a little over \$3,000.

1 Q: I'm sorry?

2 A: 3,000.

3 Q: And was that cash?

4 A: Yes.

5 Q: Okay. So, after you found that, what did you do?

6 A: I ended up seeing, right on the driver's floorboard there

7 was a clear sandwich bag that was opened up at the top and it

8 contained a, like a light tan substance, like powder substance

9 in it and there was another bag inside of it that contained

10 the same substance inside of another bag.

11 Q: And based on your training and experience, did you feel

12 that that was some sort of controlled substance?

13 A: Yes.

14 Q: What did you do after you found that bag?

15 A: I brought the bag out of the vehicle, came up to the

16 Defendant, read him Miranda rights. He said something about

17 what is that, and I said -- I asked him what it was and he

18 said you can test it, and I ended up getting, at that point,

19 we took the Defendant back and secured him in the vehicle so

20 we could do a more in depth search of that vehicle.

21 Q: Did you Mirandize, read the Defendant his Miranda rights?

22 A: Yes.

23 Q: Did you do that from a card or from memory?

24 A: Memory.

25 Q: And is it Myrtle Beach Police Department's policy to use

1 a card or can you do it by memory?

2 A: You can do it by memory.

3 Q: Did the Defendant make any statements to you after you
4 did Mirandize him?

5 A: After I did Miranda, you talking about when he was --
6 before I put him in the car?

7 Q: Yes, sir.

8 A: Before I put him in the car, he made a -- he said - and
9 you know, when I asked him, he said you can test it. And I
10 think when I took him back and put him in the car, I went back
11 to Mirandize him or I went to go back to Mirandize him a
12 second time, once I went back to Mirandize him, I asked him if
13 he had -- if he remembered what I spoke to him about his
14 rights and he agreed, yes. He ended up telling me that it
15 was, to put it all on me is what he said.

16 Q: Okay. And what did you take put it all on me to mean?

17 A: The drugs. There was -- we found some marijuana in the
18 car and then the heroin in his car.

19 Q: Okay. Where did you -- where was the marijuana and how
20 much was it?

21 A: There was a small blunt that was in the -- in the driver
22 door panel near where your window switch is and then there was
23 a smaller one that was right in the gap of the passenger seat
24 on the passenger side.

25 Q: And you found that when?

1 A: I found that after I had secured him in the vehicle; I
2 did a further search of the vehicle.

3 Q: Okay. So just to be clear again, where was that bag of
4 powder that you found?

5 A: On the driver's floorboard, right where his feet would be
6 at.

7 Q: Okay. With respect to the Miranda warnings that you gave
8 the Defendant, who was present when you administered those
9 warnings to him?

10 A: I don't know how far the other Defendant was with --
11 standing with Officer Camacho.

12 Q: Okay. Was there another officer with you when you
13 administered the rights?

14 A: He would have been in close vicinity. I don't know how
15 close approximately.

16 Q: And at some point, did another officer appear?

17 A: Yes.

18 Q: Who was that?

19 A: Officer Householder.

20 Q: Okay. Was the Defendant -- at the time of your
21 questioning after your Miranda warnings, was the Defendant
22 free to go?

23 A: No.

24 Q: Did you advise him of the drugs that were found in his
25 car?

1 A: Yeah.

2 Q: Did he have trouble, appear to have trouble understanding
3 what you were asking him?

4 A: No.

5 Q: Did he appear intoxicated?

6 A: No.

7 Q: Did his answers appear rational and responsive?

8 A: Yes.

9 Q: Did you threaten him?

10 A: No.

11 Q: Did you coerce him?

12 A: No.

13 Q: Did you promise him anything?

14 A: No.

15 Q: How did he respond when you asked whether he wanted an
16 attorney?

17 A: The first thing he said was, what is that, and when I
18 started speaking or when I was finishing Miranda, he
19 immediately went to what the bag was that I had in my hand and
20 I said it was - well, I asked him what it was, and he said you
21 can test it. He didn't say anything about an attorney and
22 then when I went back the second time to -- after we had done
23 a field test on the hood of the vehicle, to question him and
24 advise him that you know, that we had, you know, if he
25 understood his Miranda rights. He basically, you know, he

1 just told me flat out basically, put it all on me.
2 Q: And again, put it all on me, what did you take that to
3 mean?
4 A: The narcotics.
5 Q: The marijuana and the ---
6 A: Yes.
7 Q: --- the powder substance?
8 A: Yeah.
9 Q: Did the Defendant ever stop or ask you to stop
10 questioning him?
11 A: No.
12 Q: To the best of your knowledge, was the Defendant's
13 statements to you freely and voluntarily given?
14 A: Yes.
15 Q: And were those statements recorded by video and audio?
16 A: Yes, body camera and in-car camera.
17 Q: And have you reviewed those discs with me?
18 A: Uh-huh, (affirmative response), yes.
19 Q: Did you mark those with your initials?
20 A: Yes, I did.
21 Q: And do those discs accurately and reflect the statements
22 that he provided to you?
23 A: Yes.
24 Q: Does it accurately reflect the scene that night?
25 A: Yes.

1 MR. ERVIN: Permission to approach?

2 THE COURT: All right.

3 BY MR. ERVIN:

4 Q: Officer Crews, I'm handing you what's been marked as
5 State's Exhibit 1 for identification purposes, do you
6 recognize that disc?

7 A: Yes.

8 Q: How do you recognize that?

9 A: That's the redacted version that we signed and initialed.

10 Q: Okay. So those are your initials on that?

11 A: Yes.

12 MR. ERVIN: Your Honor, at this time the State would
13 admit -- ask to admit Exhibit 1 for admission into evidence?

14 THE COURT: Any objection?

15 MR. TRUSLOW: Objection based upon the prior grounds I
16 argued in pretrial motions, Your Honor.

17 THE COURT: All right. I'm gonna admit State's Exhibit
18 Number 1 into evidence over Defendant's objection.

19 STATE'S EXHIBIT NUMBER 1

20 ADMITTED INTO EVIDENCE

21 MR. ERVIN: Permission to publish?

22 THE COURT: All right.

23 (REPORTER'S NOTE: State's Exhibit Number 1 published. Audio
24 not transcribed herein.)

25 BY MR. ERVIN:

1 Q: Officer Crews, I'm gonna stop you right here while this
2 rolls. Is that the Defendant's car right in front of you?

3 A: Yes, yes.

4 (REPORTER'S NOTE: State's Exhibit Number 1 published. Audio
5 not transcribed herein.)

6 MR. TRUSLOW: Your Honor, at the same time, I have an
7 objection. It's already been heard, but I'd ask you to
8 counsel the jury as far as the statement that I don't want you
9 running ---

10 THE COURT: Overruled, I'll allow it. All right. Now
11 ask your question so the Court Reporter can take down the
12 information ---

13 MR. ERVIN: Thank you, Your Honor.

14 BY MR. ERVIN:

15 Q: Officer Crews, we just heard you talking to someone and
16 explaining to them what was going on; who were you talking to?

17 A: I think I was talking to the second Defendant because we
18 were about to secure him in another vehicle.

19 Q: Okay.

20 (REPORTER'S NOTE: State's Exhibit Number 1 published. Audio
21 not transcribed herein.)

22 BY MR. ERVIN:

23 Q: Who was this?

24 A: Officer Householder.

25 Q: Okay. Where were you in relation to Officer Householder?

1 A: I was right there at the door of the vehicle.

2 Q: So, were you in his immediate vicinity?

3 A: Yeah.

4 Q: The whole time he was testing those drugs?

5 A: Yes.

6 (REPORTER'S NOTE: State's Exhibit Number 1 published. Audio
7 not transcribed herein.)

8 BY MR. ERVIN:

9 Q: Now, Mr. Crews, when you approached the other officers
10 and said he's claiming everything in there, who were you
11 referring to?

12 A: Mr. Collins.

13 Q: The Defendant?

14 A: Yes.

15 (REPORTER'S NOTE: State's Exhibit Number 1 published. Audio
16 not transcribed herein.)

17 BY MR. ERVIN:

18 Q: Who were you talking to there?

19 A: The passenger.

20 (REPORTER'S NOTE: State's Exhibit Number 1 published. Audio
21 not transcribed herein.)

22 BY MR. ERVIN:

23 Q: Mr. Crews, we heard you basically itemize what was found
24 in the car as far as drugs, which was marijuana and what
25 turned out to be the heroin, and just to avoid any confusion,

1 what did the Defendant say to you?

2 A: Put it all on me.

3 Q: Put it all on me. Can you explain, the jury may have a
4 question about why you told the Defendant that it field tested
5 positive for cocaine, can you explain that?

6 A: Officer Householder, at the time, used a cocaine swipe
7 kit and it was like a faint blue, not like a real dark blue
8 like it would normally be, so that's why ---

9 MR. TRUSLOW: Objection, Your Honor.

10 A: --- I first thought it was cocaine.

11 MR. TRUSLOW: That's hearsay what the other officer said.

12 THE COURT: Sustained.

13 MR. TRUSLOW: Thank you.

14 BY MR. ERVIN:

15 Q: So, it was field tested and tested positive for cocaine.
16 In your training and experience, sometimes do those field
17 tests pop positive for something that the substance is not?

18 A: They could.

19 Q: And in those circumstances, do you yield to what the
20 forensic chemist finds that those -- that that substance is?

21 A: Yes.

22 MR. ERVIN: Permission to approach?

23 THE COURT: All right.

24 BY MR. ERVIN:

25 Q: Mr. Crews, I'm handing you what's been marked as State's

1 Exhibit 2 for identification purposes, can you identify that?

2 A: Yeah, it's the body cam video.

3 Q: Okay. And did you initial that?

4 A: Yes.

5 Q: Did you review that with myself?

6 A: Yes.

7 Q: And are these body cam videos kept in the normal course
8 of business with Myrtle Beach Police Department?

9 A: Yes.

10 Q: And when you reviewed this, was there anything that was
11 altered or changed as you remember that scene on June 24th,
12 2016?

13 A: No.

14 Q: How are those -- how is the camera footage stored?

15 A: Stored on a file and if you want to download it, you can
16 just download it to a disc, but there's no way of editing the
17 footage on that when it's on that server.

18 Q: Okay. So how does the disc get from your car to the
19 storage to the trial here today?

20 A: The car automatically uploads when you're at the station.
21 The body cam, you plug it in and it uploads all your videos
22 throughout the night on there.

23 Q: And other than the redaction that was done to Exhibit 1,
24 has Exhibit 2 been altered in any way?

25 A: On that one?

1 Q: On the full version?

2 A: No.

3 MR. ERVIN: Your Honor, at this time, the State would
4 request Exhibit 2 admitted as evidence?

5 THE COURT: Any objection?

6 MR. TRUSLOW: Objection based upon the same grounds as
7 the redacted version.

8 THE COURT: All right. State's Exhibit 2 admitted into
9 evidence over Defendant's objection.

10 MR. ERVIN: Thank you, Your Honor.

11 STATE'S EXHIBIT NUMBER 2

12 ADMITTED INTO EVIDENCE

13 BY MR. ERVIN:

14 Q: Mr. Crews, I'm handing you what's been marked as State's
15 Exhibit 3, can you identify that?

16 A: Yeah, it's the in-car videos.

17 Q: And again, did you initial that?

18 A: Yes.

19 Q: Did you review that with me?

20 A: Yes.

21 Q: And does that fairly and accurately represent the scene
22 on June 24th, 2016?

23 A: Yes.

24 Q: Were any alterations or deletions made to this?

25 A: No.

1 Q: And are these kept in the normal course of business,
2 also?

3 A: Yes.

4 MR. ERVIN: Your Honor, at this time, the State requests
5 State's 3 ---

6 MR. TRUSLOW: Objection to the same grounds, Your Honor

7 THE COURT: All right. State's Exhibit 3 admitted into
8 evidence over Defendant's objection.

9 STATE'S EXHIBIT NUMBER 3

10 ADMITTED INTO EVIDENCE

11 BY MR. ERVIN:

12 Q: And, Mr. Crews, with respect to the body cam, did you
13 have yours activated that night?

14 A: Yes.

15 Q: And are those kept in the normal course of business?

16 A: Yes.

17 Q: And in your review of the body cam footage, was anything
18 altered or deleted?

19 A: No.

20 Q: Permission to publish the body cam footage from Exhibit
21 1?

22 THE COURT: All right. But you're gonna need to back
23 that up so that the Court can see it as well.

24 MR. TRUSLOW: I apologize, publishing Exhibit 1; is that
25 right?

1 THE COURT: I thought it was 2.

2 MR. ERVIN: I'm publishing 1. This is the body cam
3 footage that was added on to 1 along with the redacted in-car
4 footage. It's all in 1.

5 THE COURT: Let me see the attorneys.
6 Bench conferenced held off the record in the presence but
7 outside the hearing of jury.)

8 MR. TRUSLOW: For the record, objection ---

9 THE COURT: All right. Over Defendant's objection, go
10 ahead.

11 BY MR. ERVIN:

12 Q: And Mr. Crews, before we get this playing, was this
13 simultaneously recording with your in-car camera?

14 A: Yes.

15 Q: And the scene is not different, but would it show a
16 different angle?

17 A: A different angle, it's right on my chest basically.

18 (REPORTER'S NOTE: State's Exhibit Number 1 published. Audio
19 not transcribed herein.)

20 BY MR. ERVIN:

21 Q: Mr. Crews, can you see the bag of the powder that you
22 found?

23 A: Yes.

24 Q: And again, where is that?

25 A: It's on the driver floorboard.

1 (REPORTER'S NOTE: State's Exhibit Number 1 published. Audio
2 not transcribed herein.)

3 BY MR. ERVIN:

4 Q: Mr. Crews, just so we're clear for the jury, there was
5 more to that, but that was the essential part of the stop; is
6 that correct?

7 A: Yes.

8 Q: When Mr. Collins told you to put it all on him, where
9 was the passenger when he said that to you?

10 A: He was secured in Officer Camacho's vehicle in the back.

11 Q: We saw a time when the Defendant and the passenger kind
12 of walked by each other?

13 A: Yes.

14 Q: After you had discovered the drugs?

15 A: Yes.

16 Q: Did the passenger have a chance to tell you the drugs
17 were his if they were in fact his?

18 A: Yes.

19 Q: Again, I know I asked you that, but to avoid any
20 confusion, did the Defendant ever appear to be under duress or
21 like he was threatened by anyone

22 A: No.

23 Q: Did you find any weapons in the car?

24 A: On this Defendant? No.

25 Q: On the passenger?

1 A: No.

2 MR. ERVIN: Permission to approach?

3 THE COURT: Yes.

4 BY MR. ERVIN:

5 Q: Mr. Crews, I'm handing you what's been marked as State's
6 Exhibit 6 for identification purposes, can you identify that?

7 A: This is the BEST Packet that I sealed and signed.

8 Q: Okay. Can you explain to the jury what a BEST packet is?

9 A: Anything that's not marijuana related, it goes to SLED to
10 be tested. We do a BEST packet, weigh it, everything goes on
11 there as far as the case number, inventory, and then there's a
12 red seal on here that if it's disturbed, then somebody would
13 have opened it. So, you seal it this way and then we drop it
14 into the -- our drug drop at Myrtle Beach Police Department.

15 Q: Okay. So on the video, we saw that bag on your
16 dashboard?

17 A: Yes.

18 Q: In view of the camera?

19 A: Yes.

20 Q: What did you do with the bag after this incident?

21 A: It would've been -- I would take it to the police
22 department. I took it to the evidence locker or the evidence
23 room. I tested both bags with the heroin test kit because
24 there was two separate bags that were combined into one. I
25 tested both substances in each bag because they looked

1 similar, but I still tested both of them. I inventoried them,
2 weighed them submitted them in here and sealed the bag and
3 dropped it in the drug drop.

4 Q: Other than the field test and your additional test at the
5 police department, was that bag manipulated in any way?

6 A: No.

7 Q: Was anything added or taken away from it?

8 A: No.

9 Q: Can you read for the jury what the control number is on
10 that BEST kit?

11 A: B260706.

12 Q: And again, once you sealed that, what did you do with it?

13 A: It goes into a safe.

14 Q: Okay. And who has access to that safe?

15 A: The evidence, evidence personnel.

16 Q: Anybody else?

17 A: No.

18 MR. ERVIN: Permission to approach?

19 THE COURT: Yes.

20 BY MR. ERVIN:

21 Q: Mr. Crews, I'm handing you what's been marked as State's
22 Exhibit 4 for identification purposes; can you identify that?

23 A: I labeled it as AWS, it's a scale.

24 Q: Where was that scale found?

25 A: I'd have to look back on my report.

1 Q: Was it in the Defendant's vehicle?

2 A: Yes.

3 Q: And in your training and experience ---

4 MR. TRUSLOW: Objection, Your Honor. There's no
5 foundation that was his vehicle. So, rephrase the question.

6 THE COURT: Rephrase your question.

7 BY MR. ERVIN:

8 Q: Was that scale found in the vehicle the Defendant was
9 driving?

10 A: I believe so.

11 Q: If it was indicated in the report, would that be correct?

12 A: Yes, sir.

13 Q: In your training and experience, what does a scale
14 indicate?

15 A: Use for weighing and packaging narcotics.

16 Q: What did you do with that scale when you recovered it
17 from the car?

18 A: Submitted it into evidence.

19 Q: Okay. And who has it -- who has access to that evidence?

20 A: The evidence personnel.

21 Q: Anybody else?

22 A: No.

23 MR. ERVIN: Your Honor, at this time, the State would
24 request permission to admit State's Exhibit 4 into evidence?

25 THE COURT: Any objection?

1 MR. TRUSLOW: Your Honor, may we approach briefly?

2 THE COURT: All right.

3 (REPORTER'S NOTE: Bench conferenced held off the record in
4 the presence but outside the hearing of jury.)

5 MR. TRUSLOW: No objection.

6 THE COURT: All right. State's Exhibit 4 admitted into
7 evidence without objection.

8 STATE'S EXHIBIT NUMBER 4

9 ADMITTED INTO EVIDENCE

10 BY MR. ERVIN:

11 Q: Mr. Crews, did your report also indicate that you found
12 two cell phones in that vehicle?

13 A: Yes.

14 Q: And what did you do with those phones?

15 A: We seized the phones.

16 Q: Were the phones ringing at all during the course of this
17 traffic stop?

18 A: Probably 75 percent of the time; it constantly was
19 ringing.

20 Q: What did you do with the funds when you took them from
21 that vehicle?

22 A: I submitted them into evidence with the serial numbers.

23 Q: The same procedure as with the other?

24 A: Yes.

25 Q: Who -- who has access to that evidence?

1 A: Evidence personnel.

2 Q: Anybody else?

3 A: Unless you've signed it out, but you have to do a log if
4 signing something out.

5 STATE'S EXHIBIT NUMBER FIVE

6 MARKED FOR IDENTIFICATION

7 Q: Did you have any other involvement in this case, Mr.
8 Crews?

9 A: As far as?

10 Q: After you confiscated the drugs and the other evidence,
11 did you take the Defendant to jail?

12 A: Yeah, I transported him to jail. When I took him to
13 jail, I took the money and they counted it at the jail, and
14 then I went and spoke to him about the money situation as far
15 as the cash.

16 Q: To avoid any confusion that may come up later, why did
17 you let the passenger go?

18 A: Because the Defendant claimed the substances were his
19 when I described them and itemized them to him.

20 Q: Did the proximity of where you found the drugs have any
21 bearing on your decision to only arrest the Defendant?

22 A: Yes.

23 Q: No further questions. Please answer Mr. Truslow's
24 questions.

25 THE COURT: Cross examination?

1 MR. TRUSLOW: Yes, sir.

2 CROSS EXAMINATION OF JEREMY ALAN CREWS BY MR. TRUSLOW:

3 Q: Officer Crews or Mr. Crews, you're not a police officer
4 anymore?

5 A: No.

6 MR. TRUSLOW: Your Honor, we might need to approach on a
7 prior issue.

8 THE COURT: All right. Come on up.

9 (REPORTER'S NOTE: Bench conferenced held off the record in
10 the presence but outside the hearing of jury.)

11 BY MR. TRUSLOW:

12 Q: You currently work for DR Horton?

13 A: Yes, sir.

14 Q: That's a construction company?

15 A: Yes, sir.

16 Q: And what is your position?

17 A: Construction Superintendent.

18 Q: All right. I want to jump back to and I don't plan to go
19 back through the videos, just for brevity; we just watched
20 them.

21 A: Yes.

22 Q: You feel comfortable enough to answer questions about it?

23 A: Yes.

24 Q: Okay. If you need to see something just let me know.

25 A: Okay.

1 Q: You stopped him for turning right on red or not making
2 the complete stop?
3 A: Disregarding a traffic signal.
4 Q: Which means not making a complete stop?
5 A: Running a red light.
6 Q: Okay. Running a red light. And running a red light, he
7 made a right-hand turn?
8 A: Yes.
9 Q: He used his blinker?
10 A: I believe so.
11 Q: Can you estimate how far back you were from his vehicle?
12 A: Maybe a little over a hundred feet, maybe.
13 Q: Have you previously stated that although you say that he
14 ran the red light, you estimated he was going about 5 to 10
15 miles an hour?
16 A: When he made the right-hand turn, yes.
17 Q: Okay. Now when you identified his vehicle on video that
18 was in front of you, right?
19 A: Yes.
20 Q: And we've already established you can't give us an
21 estimate of how far back you were, right?
22 A: Not definite.
23 Q: Okay. You saw the brake lights, right?
24 A: Yes.
25 Q: Can you estimate how many seconds the brake lights were

1 on?

2 A: I'd have to look back at the video.

3 Q: Okay. So, you don't even want to venture an estimate

4 without looking at the video?

5 A: I'd have to look back at the video.

6 Q: But you do acknowledge the brake lights were on?

7 A: They were tapped, yeah.

8 Q: Before he turned right?

9 A: Yes.

10 Q: Tapped?

11 A: I'd have to look back and see how long he had them on.

12 Q: Well, if we -- let me think about that. Let me ask you

13 this. How fast is the vehicle going and the brake lights were

14 on?

15 A: It can be doing any speed.

16 Q: All right, sir. Now, when he turned, he uses his

17 blinker?

18 A: I believe so.

19 Q: Okay. And your issue, you took issue with him as a

20 traffic violation because when he turned, he turned into the,

21 the, the lane closest to him, closest to the curb, and then

22 into the middle lane?

23 A: He went directly into the middle lane.

24 Q: Well, he had to go into the -- didn't he have to go into

25 the first lane to get to the middle lane?

1 A: Yes, but as far as the state statute, you have to
2 establish that lane and use your left turn signal to get into
3 the middle lane.
4 Q: Didn't he have to go into that first lane to get to the
5 middle lane?
6 A: You would have to cross the first lane at some point.
7 Q: Okay. So, he was in, at some point in time, that lane,
8 further -- furtherest right lane, inside lane?
9 A: Yes.
10 Q: And then to the second lane?
11 A: Yes.
12 Q: There was no real period of time that he was driving that
13 lane and then moved over to the lane, right?
14 A: No, he never established the first innermost lane.
15 Q: Right, so it was kinda simultaneous. He actually turned
16 into that first lane and then right into the middle lane?
17 A: Yes.
18 Q: Okay. So he did not blinker to get into the middle lane?
19 A: No.
20 Q: And that's what you took issue with?
21 A: Improper turn, he didn't establish the innermost lane.
22 Q: How did you see that he didn't have his left blinker on
23 from where you were?
24 A: I could look out my right window in the windshield and
25 see because I was literally making the turn and almost the

1 same time.

2 Q: All right. Now we've seen the video, right?

3 A: Uh-huh (affirmative response).

4 Q: Do you want to look back at it and try to estimate how
5 far you were -- actually I don't want to do that. I'd take
6 that question back. Your testimony is, from where -- if the
7 jury goes back and watches the video from where you were
8 behind him, you saw him -- you saw the brake lights?

9 A: Uh-huh (affirmative response).

10 COURT REPORTER: Excuse me. Yes or no?

11 THE COURT: Is that a yes or a no.

12 A: Yes.

13 THE COURT: All right.

14 BY MR. TRUSLOW:

15 Q: He turned into -- he had to cross the furthest right
16 lane?

17 A: Yes.

18 Q: Right into the middle lane, correct?

19 A: Yes.

20 Q: So, you saw him use his right blinker, right?

21 A: Yes.

22 Q: Okay. And you're testifying that he did not use his left
23 blinker?

24 A: He never established the innermost lane as he went
25 directly into the middle lane.

1 Q: But we did establish, he was in the furthestest right
2 lane, had to be?
3 A: He could've crossed it at an angle and went straight to
4 the middle lane, yes.
5 Q: Right, which would still put him in that proper lane?
6 A: Maybe, yeah at an angle, yeah.
7 Q: Well, whatever period of time ---
8 A: Yes.
9 Q: --- he had to -- he had to have been in that time?
10 A: Yes, his tires touched the inner line.
11 Q: You are heading towards the light from where he just
12 turned?
13 A: Yes.
14 Q: And you're testifying, to a certainty that you know he
15 did not turn his left blinker on after he went that way?
16 A: I could see him out my window as I was coming up to the
17 light, yes.
18 Q: Okay. So you're -- I don't remember where we -- let's
19 assume you guys are going north. Okay?
20 A: Yes.
21 Q: Which means he turned east, right, if he makes a right-
22 hand turn, he's turning east if he's going north?
23 A: Which turn are you referring to?
24 Q: When he hits his brake lights for the first right turn he
25 makes when he gets in the middle lane.

1 A: He's going west and then he turns north.

2 Q: Okay. He's going west and he turns north, right? When

3 he turns north, you're going west?

4 A: Yes.

5 Q: And so you're going west, he turns north?

6 A: Yes.

7 Q: And you're telling me that you could see his left rear

8 blinker from there?

9 A: There's a gas station that sits there at that property

10 and there's no bush line or anything, it's just grass right

11 there. There's nothing that obstructs that view of it.

12 Q: Okay. So, all right. So, when an officer - is it

13 Camacho?

14 A: Yes.

15 Q: Officer Camacho, in essence, didn't he pretty much just

16 tell you stop that car?

17 A: He said he smelled the odor of marijuana coming from the

18 vehicle, yes.

19 Q: And he didn't have person-to-person contact prior to that

20 with them?

21 A: No.

22 Q: He just smelled marijuana in a -- in a gas station

23 parking lot?

24 A: I think you would have to ask him on his testimony on

25 that.

1 Q: Fair enough. Okay. In the vehicle, and your body cam is
2 the best, so I want to direct your attention back to that one,
3 when we're inside the vehicle. You see -- you see my client,
4 Desmond, right? Yes?

5 A: Yes.

6 Q: You see Darrin, in the passenger seat, right?

7 A: Yes, yes.

8 Q: You see the dope looks -- I guess it looks like, you said
9 it was in the driver's side floor board, right?

10 A: When we searched the car and found it, yes.

11 Q: And is it possible Darrin could take a bag of heroin and
12 put in the driver's side passenger seat?

13 A: Well, on my video, when I approached to take him out of
14 the vehicle, I have Officer Camacho go to the passenger side
15 to watch him as I'm making ---

16 Q: I mean, before you stopped him?

17 A: Before?

18 Q: Yeah?

19 A: Anything is possible.

20 Q: Okay. It's possible that the one roach, and when I say
21 roach, we're talking about a little marijuana cigarette?

22 A: Yes.

23 Q: Okay. One of the roaches, it's also possible then that
24 Darrin got that over on that side?

25 A: It could be an assumption.

1 Q: Okay. But he forgot -- isn't it possible he forgot the
2 second roach; it was on the passenger seat, wasn't it?
3 A: Yeah.
4 Q: Okay. If he did do what I'm saying he did, he forgot to
5 do that with the other joint, right, it was still in his seat?
6 A: You're getting me lost here. Will you repeat it?
7 Q: All right. One marijuana cigarette was still in Darrin's
8 seat?
9 A: Yes.
10 Q: So, if he did what I'm saying he did and moved stuff
11 over, if they -- it's a hypothetical, I'm not saying it
12 happened, but if it did, he would have then forgotten to move
13 that one, because it was still with him?
14 A: Yeah, that would be an assumption.
15 Q: You agree with me, prior to the limited investigation was
16 done after that, that these two individuals are in possession
17 of drugs?
18 A: They're both in the vehicle, yes.
19 Q: So, they're both in possession of that dope?
20 A: To an extent, yes.
21 Q: It wasn't hidden, was it?
22 A: It wasn't hidden, no.
23 Q: Okay. And -- and really fair -- is it fair to say, that
24 Darrin had access to grab the dope; he could touch it, right,
25 pick it up?

1 A: Yes.

2 Q: Okay. The first time you asked my client about money, he
3 said 1500?

4 A: Yes.

5 Q: Okay. A little bit further down the line, he said 3500?

6 A: Yes.

7 Q: Okay. The first time he said put it on me, you're asking
8 him about the cocaine, right?

9 A: In the beginning, yes, I asked him about the cocaine and
10 the two blunts that we found or the powder substances.

11 Q: Is it safe to say that it's possible he didn't know it
12 was cocaine or heroin at that point?

13 A: I guess that is an assumption.

14 Q: All right. Because you told him it was cocaine, right?

15 A: Yeah, I did tell him that on the video, yeah.

16 Q: And so he's gonna take responsibility and he's taking
17 responsibility for a drug that it wasn't even that drug?

18 A: It's just a field test at that time.

19 Q: I understand, but my question is, he's taking
20 responsibility, he said put it on me and he's talking about a
21 drug that's not in the car, right, at that point? Cocaine, it
22 wasn't cocaine?

23 A: Well when I -- when I approached him, I approached him
24 with the bag and he knew what I was holding when I exited the
25 vehicle with the bag and read him his Miranda rights.

1 Q: Well, your assumption is he knew what you were holding,
2 right? You don't know what he was thinking in his head?

3 A: No.

4 Q: Okay. You told him it was cocaine, right?

5 A: Uh-huh (affirmative response).

6 Q: And he said put it on me?

7 A: Uh-huh (affirmative response).

8 THE COURT: Is that a yes?

9 A: Yes.

10 Q: All right. So he -- and let me ask you this because I
11 think we can clarify it, but we're very clear, he said just
12 put it on me?

13 A: Yes.

14 Q: He didn't say put the heroin on me, put the cocaine -
15 well, no, because it wasn't -- put the heroin on me, put the
16 marijuana on me, put the -- he didn't detail or specify what
17 he was talking about, did he, itemize it?

18 A: I explained every -- all three of them and that's when he
19 said put it on me.

20 Q: All right. Is it possible he meant put the marijuana on
21 me?

22 A: You could assume that, I guess, yes.

23 Q: Did he say put it all on me?

24 A: I don't know if that was the exact words. I'd have to
25 play the video a couple of times.

1 Q: All right. And sure, the video speaks for itself. Now,
2 did he say those are my drugs?
3 A: He didn't say it in those words.
4 Q: Did he say that's my money?
5 A: Yes.
6 Q: Did he say those words?
7 A: Well, he didn't say those words, but when I asked him ---
8 Q: He said put it on me?
9 A: When I asked him about the money, he gave me a itemized
10 number of what he believed was in there.
11 Q: 1500 first, and then he said 35, right?
12 A: Yes.
13 Q: Is it a safe assumption that you could interpret that,
14 that he didn't know how much money was in there?
15 A: I don't think he would've answered the question if it
16 wasn't his money.
17 Q: No, I'm saying is it a safe assumption that he didn't
18 know how much money was even in the car?
19 A: I guess so, yes.
20 Q: Okay. Did he have the money in his pocket?
21 A: No, it was in the driver door beside him.
22 Q: Okay. Now, whose car was it?
23 A: I'd have to look at the report with the registration on
24 it.
25 Q: I'm gonna show - well, let me ask you first, do you

1 recall it being owned by a person with the last name of
2 Bullock; does that sound familiar?
3 A: I'd have to look at the report.
4 Q: All right. I've got it right here.
5 Court's indulgence?
6 THE COURT: All right.
7 Q: Thank you.
8 I'm gonna show you and ask you if you can identify that
9 document.
10 A: This top one?
11 Q: All three of them as part of the case file?
12 A: This is a supplemental report just like a secondary
13 report just saying that, you know, basically I presented the
14 warrant to ---
15 Q: Well, let me ask you this, is that a document associated
16 with the investigation of this case?
17 A: Yes.
18 Q: Okay. If you look at Page 2, can you please review Page 2
19 and tell me owned the vehicle?
20 A: The vehicle was owned by Carl Leshane Bullock.
21 Q: Okay. Do you know who that is?
22 A: No.
23 Q: So, it's not owned by my client?
24 A: No.
25 Q: It's not owned by Darrin, the passenger, right?

1 A: No.

2 Q: Okay. Do you recall giving prior testimony that it was
3 an Impala was the make of the vehicle?

4 A: I think during the pretrial, like I explained, it has
5 been a year since I reviewed this case.

6 Q: That you thought it was an Impala?

7 A: I was mistaken, but yeah, it had been a year since I've
8 reviewed this video.

9 Q: Right, but -- it has been some time, but yesterday you
10 said it was an Impala?

11 A: Yes.

12 Q: Okay. What kind of vehicle was it?

13 A: It is a Nissan Altima, 2003, black in color.

14 Q: So, you could not tell what kind of car it was, but you
15 could see that blinker going north, I mean, going west when
16 he's turning north?

17 A: That's the vehicle that was in front of me, yes.

18 Q: Okay. Which one, the Impala or the ---

19 A: The only vehicle that's on the camera.

20 Q: The Nissan Altima?

21 A: Yeah.

22 Q: Not an Impala?

23 A: No.

24 Q: Two phones in the vehicle, right?

25 A: Yes.

1 Q: Okay. And they were ringing off the hook, weren't they?
2 A: Yeah.
3 Q: Both texts and phone calls?
4 A: I don't -- I don't know.
5 Q: Making noise on both of them?
6 A: Yes.
7 Q: Noise that's consistent with incoming calls or texts?
8 A: Yes.
9 Q: Did you answer?
10 A: No.
11 Q: Did anybody answer?
12 A: No.
13 Q: Okay. Did you do a Cellbrite report or any type of
14 diagnostic run on those phones?
15 A: I don't remember if we did that at that point or not.
16 Q: Okay. If you did, would there be documentation of that?
17 A: There should've been.
18 Q: So, if there's no documentation of that, it wasn't done?
19 A: Yes.
20 Q: So, we don't know whose phones they were?
21 A: No.
22 Q: We don't know who was calling?
23 A: No.
24 Q: And we don't know who they were calling for?
25 A: No.

1 Q: Okay. We don't know if they were calling for Darrin?

2 A: No.

3 Q: And you say that you told him, hey, in South Carolina we
4 turn right on red unless I guess otherwise specified, correct?

5 A: By a sign that's posted in front of the traffic signal
6 itself.

7 Q: Is that a sign -- did you see that sign visible in this
8 video?

9 A: I don't know if it's even visible, I just know that that
10 sign is there and because I work that area.

11 Q: That you remember from 18 months ago, right.

12 A: The sign -- the right on red, yes.

13 Q: Okay. But you didn't remember what kind of vehicle it
14 was, but you remember there was a sign that said no turn on
15 red?

16 A: Yeah.

17 Q: All right. In terms of the odor of marijuana, based on
18 your experience and you've got eight, ten, how many years of
19 experience?

20 A: Ten years.

21 Q: Okay. Ten years' experience as an officer. You're
22 familiar with the odor of marijuana enough to identify it by
23 your nose; is that your testimony?

24 A: Yes.

25 Q: Okay. However, the first thing you're talking about is

1 cologne or freshener or something that's kind of a smell?
2 A: Yeah, it smelled like he tried to spray something to try
3 to mask it.
4 Q: How does something smell like it's masking something
5 else?
6 A: Well, as far as a drug stop, you know, if you know your
7 car smells like marijuana, they would try to mask the smell
8 with spraying something in the vehicle.
9 Q: But is it -- isn't it at least more valid to just say you
10 smelled an air freshener or cologne, right?
11 A: I just asked him if he tried to mask it with something,
12 yes.
13 Q: And you also said I smell air freshener or cologne or
14 something?
15 A: He said something on the air freshener thing; I didn't
16 say ---
17 Q: You asked him, Did you spray something in here; I smell
18 it?
19 A: Yes.
20 Q: Okay. So you did smell that?
21 A: Yes.
22 Q: All right. And at the same time, using your nose, I
23 wanted to use that word -- whatever they call it, you smelled
24 the cologne or freshener, whatever that was, right?
25 A: Yes.

1 Q: At the same time, you smelled marijuana?

2 A: Yes.

3 Q: Is it more safe to say you smelled a combination of
4 cologne and marijuana?

5 A: I don't know I how to answer that.

6 Q: Okay. Fair enough. Do you recall him telling you that
7 Darrin, he didn't even smoke marijuana?

8 A: Yes.

9 Q: Darrin don't know nothing, put it on me, right?

10 A: Yes.

11 Q: Is that consistent with trying to protect somebody, keep
12 them out of something; is that fair?

13 MR. ERVIN: Objection, speculation.

14 THE COURT: Overruled, I'll allow it.

15 BY MR. TRUSLOW:

16 Q: Is that consistent, at least consistent with trying to
17 keep another individual out of the mess, the problem?

18 A: To claim it, yes.

19 Q: All right. Do you recall testifying that you referred to
20 Darrin as the other Defendant on that video; do you remember
21 saying that?

22 A: I don't remember how I said that on the video.

23 Q: You don't think you did?

24 A: I don't know how I said it on the video.

25 Q: One second, Your Honor.

1 THE COURT: All right.

2 Q: That's in evidence, if the jury wants to see it, they can
3 see it. I'll let that go.

4 But, but he wasn't a defendant was he?

5 A: I don't know if I referred to him as -- I don't think I
6 referred to him as defendant.

7 Q: You don't think you called him the defendant?

8 MR. TRUSLOW: Judge, one second.

9 THE COURT: All right.

10 MR. TRUSLOW: Judge, I'd like, if you don't mind, to
11 republish just one small portion of that video?

12 THE COURT: All right.

13 MR. TRUSLOW: Just to refresh his memory. You mind
14 helping me? I wrote it down at 23. Start at 23.

15 BY MR. TRUSLOW:

16 Q: I'm gonna ask you to listen.

17 (REPORTER'S NOTE: Portion of State's Exhibit Number 1
18 published. Audio not transcribed herein.)

19 Q: Did you hear him say just now, we smoked it earlier?

20 A: Yeah.

21 Q: Okay. And you remember when -- then he said he didn't
22 smoke any marijuana with me?

23 A: Yeah, he said Darrin didn't smoke it.

24 Q: Okay. But there he said we smoked it earlier together?

25 A: Yes.

1 Q: Okay.

2 (REPORTER'S NOTE: Portion of State's Exhibit Number 1
3 published. Audio not transcribed herein.)

4 MR. TRUSLOW: Your Honor, out Court efficiency, I don't
5 need that, I'm gonna ask you another question, I'll move on.

6 THE COURT: All right.

7 MR. TRUSLOW: Judge, I should've paid better attention to
8 my notes.

9 BY MR. TRUSLOW:

10 Q: Do you remember Mr. Ervin asking you, he stopped the
11 video, he said who are you talking to at that point and you
12 testified -- your answer was I was talking to the second
13 defendant?

14 A: Yes.

15 Q: Okay. So, you referred to Darrin as a defendant?

16 A: That's the second person in the vehicle, the passenger,
17 yes.

18 Q: Okay. Now, but he wasn't a defendant; he was never
19 charged with anything, was he?

20 A: You asked me if I called him a defendant on the video.

21 Q: Yes, I know, I was wrong. I'm asking you, when he asked
22 you, who were you talking to then when he stopped the video,
23 you said I was talking to the second defendant?

24 A: I don't know exactly if I was out of my range; it was the
25 passenger I was talking to, the second person.

1 Q: Okay. But it's your testimony now that you just don't
2 recall whether or not you said I was talking to the second
3 defendant?

4 A: Are you saying that's how he asked me that and I
5 answered?

6 Q: Let me be more clear, I'm sorry. He stopped the video
7 because you were talking to one of them ---

8 A: Yes.

9 Q: --- and obviously we can't see?

10 A: Yes.

11 Q: He said who are you talking to there, do you recall your
12 answer being I was talking to the second defendant?

13 A: I don't recall.

14 MR. TRUSLOW: Okay. And I'm gonna let that go. I'm not
15 gonna ask to replay anything, Judge. I'm moving on. All
16 right.

17 BY MR. TRUSLOW:

18 Q: So, in terms of drug testing, you were present when that
19 drug was field tested on the hood of the car?

20 A: Yes.

21 Q: And it tested positive for cocaine?

22 A: It had a faint blue strip to it, yes.

23 Q: So, now we're in court today and at some point it was
24 tested positive for heroin, correct?

25 A: Yes, I ---

1 Q: I'm sorry?

2 A: Yes, I put that in my report, but I took it back to the
3 PD and field tested both bags with a heroin test kit and both
4 of them were positive.

5 Q: Okay. So, is it heroin or cocaine?

6 A: It's heroin on my field test.

7 Q: Well, on your field test it was cocaine?

8 A: He tested with a cocaine swipe kit, and then when I went
9 back to the PD, the reason I charged him with trafficking
10 heroin is because I ---

11 Q: Retested ---

12 A: --- retested to make sure.

13 Q: How many retests did you do when you got back to the
14 station; more than one?

15 A: I did the one for each bag, a heroin test for or heroin
16 test kit for each little bag.

17 Q: Is it true, when you did that, you just took out a small
18 little sample and tested it? I mean, you didn't test the
19 whole bag obviously?

20 A: No, I take a small sample out of each bag.

21 Q: And how much would that be, just a pinch?

22 A: Just a little ---

23 Q: Whatever you need?

24 A: --- just a little bit.

25 Q: Okay. So, if you're not the person that has this

1 knowledge, just let me know. Were you contacted by the
2 Solicitor's office and asked who is this other guy in
3 reference to Darrin?

4 A: No.

5 Q: Never. Okay. But that information is available, right?

6 A: I think on a dispatch log we ran his license and checked
7 him for warrants or anything and in the video at one point, I
8 told him he didn't have a license and he couldn't drive that
9 vehicle away.

10 Q: Okay. So from there, where does it go or where is it
11 maintained, that information?

12 A: A dispatch log.

13 Q: And so it's readily accessible?

14 A: If they need it.

15 Q: You could go get it?

16 A: You could, yeah.

17 Q: Okay. Now, who -- who entered that?

18 A: The dispatcher.

19 Q: Okay. Who told the dispatcher his name?

20 A: I don't know who ran the license, but somebody ran his
21 license.

22 Q: Okay. So, as of that night, 18, 16, 17 months ago, you
23 guys knew who this was?

24 A: We knew who he was at the time of the stop, yeah.

25 Q: All right. Did you run any reports on him to see if he

1 was a dealer?

2 A: No, we would run a criminal history if we had charge on
3 him.

4 Q: But since you didn't have a charge on him, you had no
5 need to see if he'd been to prison for trafficking, selling,
6 anything?

7 A: No.

8 Q: Nothing about him?

9 A: No.

10 Q: And you didn't generate any report about him?

11 A: No.

12 Q: All right. Are you aware that roughly within the last
13 week, you or somebody involved in this was asked do you know
14 who the passenger was?

15 A: I think y'all brought it up yesterday, but that's the
16 first of my knowledge about it, yeah.

17 Q: And that's the first of our knowledge, too, right?

18 A: If you're talking about yesterday, I don't know when you
19 got ahold of that.

20 Q: Well, had you or anybody you know ever provided that to
21 anyone, ever?

22 A: When I submitted my case file, he was the only defendant
23 as far as my arrest.

24 Q: Meaning that the answer being no?

25 A: No, I didn't provide it on the case file, no.

1 Q: Okay. Could there be any way outside of you or one of
2 your colleagues telling us who he is for me to know who he is?
3 A: I don't think so.
4 Q: Would you agree with me that the statement, put it on me,
5 is -- has a different connotation or meaning than I want to
6 confess I own these drugs; is there some difference there to
7 you connotation wise?
8 A: That would be an assumption but I ---
9 Q: Is it more akin to I'll take it; give it to me, the
10 charge?
11 A: Before he uttered that statement, I had listed what I had
12 located in the vehicle?
13 Q: Right. He said put it on me?
14 A: Yeah.
15 Q: Okay. Isn't -- you've got 10 years of experience, right?
16 A: Yes.
17 Q: That's a little different than a routine confession,
18 right?
19 A: I itemized the drugs that I found and he said put it on
20 me, those are mine.
21 Q: Meaning I'll take the charge?
22 A: Yes.
23 Q: If anybody here is gonna be arrested, arrest me?
24 A: Yes.
25 Q: Okay. He didn't say I broke the law, I own these drugs;

1 he said virtually, if anybody is getting arrested, take me?
2 A: Yeah, you could say that, yes.
3 Q: Do you have -- strike that. Is it -- now I'm just about
4 done. You heard him say that he smoked with him earlier,
5 right?
6 A: I heard him make the comment, we.
7 Q: And when he said that, put it on me, I'll take it, he
8 said Darrin didn't even smoke marijuana in the car, right?
9 A: Yeah, I asked him that numerous times.
10 Q: All right. So, in your ten years' experience as an
11 officer, did that not raise a red flag to you that, that he's
12 trying to keep this guy out of it?
13 A: No.
14 Q: And he's like, just take me, I'll take responsibility?
15 A: No.
16 Q: Okay. Not at all?
17 A: No, not at all.
18 Q: It doesn't strike you as odd at all the way he said that?
19 A: No, I mean he was calm, he didn't seem like he was
20 worried, and it wouldn't raise any kind of red flag to me.
21 Q: Is it possible, he ain't worried because now he ain't got
22 to face that guy because he did what that guy wanted him to
23 do; that would calm you, wouldn't it?
24 A: I mean, I don't know how you would answer that.
25 Q: Well, let's assume hypothetically, he doesn't do that and

1 he or somebody in his family gets a bullet in the head and now
2 he's not, that would be a calming effect, wouldn't it?

3 A: I would -- I haven't been in that situation, so I don't
4 know how to answer that.

5 Q: You haven't been in that situation, right?

6 A: No.

7 Q: So, you really don't have a good way to gage or give an
8 intelligent opinion on that subject, correct?

9 A: I can gage how their demeanor is while they're at
10 roadside with me, you know, both of them seemed calm as they
11 were standing there in handcuffs. There was nothing that
12 would throw me off any way like that.

13 Q: Well, Darrin was probably pretty calm, wasn't he?

14 A: I mean ---

15 Q: Was he calm?

16 A: Both of them were calm.

17 Q: Was he calm when he walked away?

18 A: Yeah.

19 Q: Was he happy?

20 A: I don't know how happy he was.

21 Q: Did he kick up his feet and just walk on down the road?

22 A: Not that I saw.

23 Q: All right. All right. When you said that ---

24 THE COURT: Excuse me for a minute. We need to take a
25 break. The jury has been at it a while. We're gonna ---

1 MR. TRUSLOW: I've got two questions.

2 THE COURT: We'll finish up.

3 All right, ladies and gentlemen, y'all have been at it a
4 long time. I apologize for keeping y'all for so long. We're
5 gonna go ahead and take a short break, give you an opportunity
6 to stretch your legs, use the restroom, whatever the case may
7 be. Do not discuss the case even among yourselves; it's too
8 early for deliberations. We'll take about a 15-minute break
9 and then we'll come back and get started. Okay? Thank you
10 very much.

11 (REPORTER'S NOTE: Jury exits courtroom.)

12 THE COURT: I apologize for interrupting your cross
13 examination, but they've been at it for well over two hours.
14 We just had to take break.

15 Mr. Crews, we're still in the middle of your testimony,
16 so you cannot discuss your testimony with anyone, even the
17 State's attorneys, whether that be what you've testified to
18 thus far or what you anticipate testifying to in the future.
19 I'll allow you to step off the witness stand but don't talk
20 about your testimony or anything about this case with anyone.
21 Okay?

22 MR. CREWS: I can go to the bathroom, right?

23 THE COURT: You can go to the restroom but talk about the
24 case with anyone.

25 Anything from the State before we recess or take a break?

1 Anything from the Defense?

2 MR. TRUSLOW: Nothing, Your Honor.

3 THE COURT: All right. Let's take about a 15-minute
4 recess and then we'll come back.

5 *****OFF THE RECORD*****

6 (On the Record.)

7 THE COURT: All right. Mr. Crews, you're still under
8 oath. Anything from the State before we bring the jury in?

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

10 THE COURT: All right. Anything from the Defense?

11 MR. TRUSLOW: No, Your Honor.

12 THE COURT: All right. Let's bring the jury back in.

13 (REPORTER'S NOTE: Jury enters courtroom.)

14 THE COURT: Ladies and gentlemen, welcome back. We're
15 ready to resume the trial of the case.

16 Mr. Truslow, you can continue with your cross
17 examination.

18 MR. TRUSLOW: Thank you, Your Honor.

19 BY MR. TRUSLOW:

20 Q: Do you recall on direct examination that you said that
21 the heroin was combined into one bag?

22 A: It was a bag, a light brown powder substance and another
23 bag in side of it with a light brown powder substance.

24 Q: Okay. So, the littler bag of heroin was stuck into the
25 bigger bag?

1 A: I don't know the exact weight, I'd have to look at a
2 report.
3 Q: Okay. One bag was stuck into the other bag?
4 A: Yes.
5 Q: So, it was two bags of heroin?
6 A: Yes.
7 Q: Two separate bags?
8 A: Yes.
9 Q: Okay. Is it possible that -- and I'm not conceding
10 anything -- but the little bag is his as a user and the big
11 bag is what Darrin is selling; is that possible?
12 A: That you'd have to -- I'd have to look at the weights,
13 but, as far as the user standpoint, that would probably be a
14 lot of heroin.
15 Q: Three grams?
16 A: I'd have to look at the weights that I put in the report.
17 Q: But is that a possible scenario? Stick them one bag
18 because you don't want bags everywhere, but that one would be
19 one person's and one would be the other persons?
20 A: Both bags looked like, at some point, they had been
21 knotted because they were like crinkled up together kind of.
22 Q: All right. But one bag could be one, and one other bag
23 could be the other person's? I could be?
24 A: I don't know at that point. I don't know.
25 Q: Is it possible?

1 A: If you assume that they're two separate bags and one was
2 combined with the other.

3 Q: All right. Well, let me ask you, were they two separate
4 bags?

5 A: There were two separate bags, but the one bag had the
6 other bag inside of it.

7 Q: I know.

8 A: It looked like they had been there for a while, like
9 together like they had not been knotted, untied, because it
10 was untied.

11 Q: Okay. But there's a bag of heroin and there's another
12 bag of heroin inside that one?

13 A: Yes.

14 Q: Okay. You guys fingerprint the scales?

15 A: No.

16 Q: You guys fingerprint the phones?

17 A: No.

18 Q: And again, you ran no Cellbrite report on either one of
19 the phones?

20 A: Not to my knowledge.

21 Q: Nobody answered the phones?

22 A: No.

23 Q: Anybody check the call logs?

24 A: No.

25 Q: Nobody did the work to identify, if they could, who owned

1 the phones?

2 A: No.

3 MR. TRUSLOW: That's all I have, Your Honor.

4 THE COURT: All right. Redirect?

5 REDIRECT EXAMINATION OF JEREMY ALAN CREWS BY MR. ERVIN:

6 Q: Mr. Crews, Mr. Truslow has pounded you with questions
7 about you making assumptions. So, let's focus on facts right
8 now. Okay?

9 A: Okay.

10 MR. TRUSLOW: I object to the form of the question, Your
11 Honor.

12 THE COURT: Overruled. Go ahead.

13 BY MR. ERVIN:

14 Q: Is it true that that vehicle you got behind, regardless
15 of your knowledge or recollection of that, was that the
16 vehicle that Officer Camacho directed you to initially?

17 A: Yes, when I was on the phone with him, as I was coming
18 past the gas station, through the light where he was at the
19 gas station, and I remember him telling me that you're behind
20 that vehicle, that's the vehicle, because it had just pulled
21 out and made the left turn.

22 Q: And was that the vehicle you saw commit the traffic
23 violations?

24 A: Yes.

25 Q: And was that the vehicle that you stopped?

1 A: Yes.

2 Q: Was that the vehicle this Defendant was driving?

3 A: Yes.

4 Q: And was that the vehicle that the drugs were found under
5 the driver's seat of?

6 A: Yes.

7 Q: All right. Now, as far as this itemization talk, when
8 you found the drugs, and we published it to the jury, they can
9 see it, when you found that bag under the driver's seat, you
10 turned around and you walked to the Defendant and you began
11 Mirandizing him?

12 A: Yes.

13 Q: What did he tell you?

14 A: When I was finished with reading Miranda, I turned him
15 back to his car and he -- when I was asking him what it was,
16 he said test it.

17 Q: Did you find any other powder substance in that car?

18 A: No.

19 Q: Okay. And we talked about the field test and how if it
20 is heroin, it can mistakenly field test for cocaine, which is
21 why you went back to the police department and retested it; is
22 that right?

23 A: Just because it had a light tan coloration to it, just
24 from my prior training and experience a light tan would be
25 powder heroin.

1 Q: And you yield to the forensic chemist as far as the
2 determination of what that substance is?

3 A: Yes, the final determination, yes.

4 Q: Now, as far as your mention of a second defendant or a
5 second whatever, you could have called him a second ---

6 MR. TRUSLOW: Objection, leading, Your Honor.

7 THE COURT: Sustained.

8 BY MR. ERVIN:

9 Q: Does it matter what you refer to the passenger as in that
10 video?

11 A: No.

12 Q: Does it have any bearing on this Defendant's guilt as far
13 as possessing that heroin?

14 A: No, not as far as the charge.

15 Q: And the Defendant, what did the Defendant tell you when
16 you asked him what the passenger was in relation to him?

17 A: His home boy.

18 Q: Did you take that to mean that he knew him?

19 A: Yes.

20 Q: Did their interaction indicate to you that they knew each
21 other?

22 A: I mean, they didn't really talk too much, but they didn't
23 talk too much together when I was at the vehicle.

24 Q: That's all I have, Mr. Crews. Thank you.

25 THE COURT: All right. You may step down.

1 BY THE COURT:

2 All right, ladies and gentlemen, it's 12:15, we're gonna
3 go ahead and take our lunch break now. I'm gonna let you go
4 to lunch on your own today. I'm gonna ask that you please be
5 back at 2 o'clock. That will give you an hour and 45 minutes
6 to eat lunch. We'll try to get started as soon as after that
7 as we can.

8 Do not discuss the case even among yourselves. Don't
9 conduct any independent investigation into the case. I hope
10 you have a good lunch and we'll see you back at 2 o'clock.

11 Thank you very much.

12 (REPORTER'S NOTE: Jury exits courtroom.)

13 THE COURT: Anything from the State before we recess for
14 lunch?

15 MR. ERVIN: No, Your Honor.

16 THE COURT: Anything from the Defense?

17 MR. TRUSLOW: Nothing, Your Honor.

18 THE COURT: All right. I've got them coming back at 2
19 o'clock. I'll try to take the bench as soon after 2 o'clock
20 as we can. Okay?

21 Thank you very much.

22 **(RECESS.)**

23 *******OFF THE RECORD*******

24 **(On the Record.)**

25 THE COURT: All right. Anything from the State before we

1 bring the jury in?

2 MR. ERVIN: No, Your Honor.

3 THE COURT: Anything from the Defense?

4 MR. TRUSLOW: Nothing Your Honor.

5 THE COURT: All right. Let's bring the jury in.

6 (REPORTER'S NOTE: Jury exits courtroom.)

7 THE COURT: All right. Ladies and gentlemen, welcome
8 back. I hope everybody had a good lunch. We're ready to
9 resume the trial of the case. Before we get started, I want
10 to thank you again for being so prompt. It is a great
11 assistance and I want to thank you for that.

12 All right, Mr. Ervin, the State can call your next
13 witness.

14 MR. ERVIN: Thank you, Your Honor.

15 The State calls Jerry Camacho.

16 CLERK: Please raise your right hand and place your left
17 hand on the Bible.

18 JERRY CAMACHO, HAVING BEEN DULY SWORN

19 TESTIFIES AS FOLLOWS:

20 CLERK: Please have a seat and state your full name and
21 spell your last name.

22 MR. CAMACHO: First name is Jerry, last name Camacho,
23 spelled C-A-M-A-C-H-O.

24 DIRECT EXAMINATION OF JERRY CAMACHO BY MR. ERVIN:

25 Q: Good afternoon, Officer Camacho. Where are you currently

1 employed?

2 A: The City of Myrtle Beach as a police officer.

3 Q: How long have you been employed there?

4 A: Approximately five years.

5 Q: What is your current duty assignment?

6 A: I'm a traffic officer for the Traffic Division.

7 Q: What was your duty assignment on June 24th of 2016?

8 A: Patrol.

9 Q: And what did you do before Myrtle Beach Police?

10 A: I was in the military for 14 years.

11 Q: What did you do there?

12 A: I was an instructor.

13 Q: Thank you for your service.

14 A: Thank you.

15 Q: Did you have occasion to become involved in this case

16 with this Defendant?

17 A: Yes.

18 Q: Can you explain to the jury how you became involved?

19 A: On June 24th at approximately 10:45 P.M. I had gone to a

20 gas station near, on the corner of Seaboard and Mr. Joe White

21 Avenue to get fuel for my police car. At that time, I

22 arrived there, I smelled an odor of marijuana coming -- at

23 that time I believed that it came from that vehicle because

24 that was the only vehicle around. They were parked on the

25 other side of the pump from my vehicle. I smelled the

1 marijuana. I already had my gas pump in my -- in my vehicle,
2 so I didn't try to initiate a traffic stop because that was
3 just a safety issue for me. I seen what I believed was one of
4 the occupants of the vehicle walking from the store to the
5 car; they were talking. I think they noticed me and I believe
6 one of them rolled up their window of the vehicle because
7 their windows were cracked.

8 Q: Let me stop you right there. Did you notice the
9 Defendant and the passenger interact with each other at all?

10 A: Yes, they were -- they were interacting.

11 Q: Did it appear to you that they knew each other?

12 A: Yes, yes.

13 Q: Did it appear to you that this Defendant was under any
14 type of duress or threatened in any way?

15 A: No.

16 Q: Okay. Please proceed. Thank you.

17 A: So, after I noticed that one of them kind of looked at
18 the other one, they rolled up the window of the vehicle and
19 they drove off. I had contacted Officer Crews, gave him a
20 description of the vehicle, I believe I might have even given
21 him the plate of the vehicle. They pulled out of the parking
22 lot and made a left and started traveling westbound on the Mr.
23 Joe White, and that's where a couple of seconds later, Officer
24 Crews coming westbound, got behind the vehicle.

25 Q: Okay. And when did you -- did you eventually arrive at

1 the stop?

2 A: Yes, after I finished fueling up my vehicle, I notified
3 dispatch that I was gonna go back him up on that traffic stop
4 and arrived shortly and positioned my car to the right of
5 Officer Crews' vehicle.

6 Q: When you arrived on the scene, what was taking place?

7 A: At that time, Officer Crews, I think had already made
8 contact with the -- with the driver and had me watch the
9 passenger, who was still seated in the passenger seat of the
10 vehicle.

11 Q: What was the purpose of that?

12 A: It was more for safety, because at that time he had the
13 driver out of the vehicle. So I had to keep my eye on the
14 passenger and make sure that he didn't pull out a weapon or
15 anything like that, just for safety purposes.

16 Q: Did you -- what did you do with the passenger?

17 A: After I got the go ahead from Officer Crews that he was
18 gonna search the vehicle, I instructed the passenger to get
19 out of the vehicle, told him I was gonna detain him, placed
20 the handcuffs on and walked him back to my vehicle, and we
21 stood in front of my vehicle.

22 Q: And we went over this earlier with Mr. Crews. Can you
23 explain to the jury what your idea of detaining someone is?

24 A: He's not under arrest, he's free to go after we've done
25 our investigation. He's just being detained while we're doing

1 our investigation. It was just more for safety purpose. When
2 there's kind of drugs are involved, usually we kind of figure
3 that there might be a weapon involved. So, we just -- we
4 detain them to make sure that for our safety and their safety,
5 no one runs away or no one pulls out a weapon or anything like
6 that.

7 Q: Okay. While we're on that subject, did you ever find a
8 weapon on the passenger?

9 A: No, I searched him. I patted him down for weapons prior
10 to putting him in the backseat of my vehicle.

11 Q: Okay. Did you ever find a weapon in that vehicle?

12 A: No.

13 Q: So, was there a point when you read Miranda rights to the
14 passenger?

15 A: Yes.

16 Q: And what was the reason for that?

17 A: I, usually when I go back up an officer, I usually take
18 cues off of them. I don't want to overstep because they have
19 their routine going. I seen Crews, Officer Crews at the time,
20 read Miranda to the driver. So, I began Mirandizing the
21 passenger as well.

22 Q: Did you see where the drugs were, the powder were in the
23 car, the powder substance?

24 A: I believe Officer Crews had already taken it out of the
25 vehicle and started walking back. I believe he informed me

1 that it was on the driver's side floorboard.

2 Q: Okay. So, is it fair to say that you saw the drugs after
3 they were discovered by Officer Crews?

4 A: Yes.

5 Q: So once you read the passenger his Miranda rights, what
6 did you do? Did he make any statements to you?

7 A: I don't -- I don't recall him making any statement to me.

8 Q: Okay. At some point, were you advised or did you become
9 aware that this Defendant claimed ownership of the drugs?

10 A: Yes.

11 Q: Okay.

12 A: Yes.

13 Q: What did you do with the passenger after that, after you
14 were advised of that?

15 A: I was advised by Officer Crews at the time that the
16 Defendant had took ownership of the drugs and to allow the
17 passenger that was on the passenger side seat to let him go.

18 Q: Okay. And what was the reason for charging this
19 Defendant and not the passenger?

20 A: The, the driver took ownership of the drugs. It would
21 just be reckless for us to charge someone that didn't take
22 ownership of it. He took ownership for all the drugs that
23 were in the vehicle, so we wouldn't charge the passenger.
24 He's a free man.

25 Q: Would the position of where the drugs were found have any

1 bearing on who was arrested also?

2 A: Yes.

3 Q: Did you ever touch the bag of drugs, the heroin?

4 A: I don't believe so.

5 Q: And during the course of that stop, did you ever hear the
6 passenger yell at or threaten the Defendant?

7 A: No, no.

8 MR. ERVIN: Permission to approach?

9 THE COURT: Yes.

10 BY MR. ERVIN:

11 Q: Officer Camacho, I'm handing you what's been marked as --
12 entered as State's Exhibit 2, can you identify that?

13 A: These are copies of our videos.

14 Q: Okay. And is this the copies of the body cam videos?

15 A: I believe so, yes.

16 Q: Okay. And did you initial that disc at some point?

17 A: Yes.

18 Q: Did you review it with me?

19 A: Yes.

20 Q: Okay. And is that a fair and accurate representation of
21 the video from your car, I'm sorry, from your body cam from
22 June 24th, 2016?

23 A: Yes.

24 Q: Were there any alterations or deletions made to that?

25 A: No, sir.

1 Q: And is this video kept in the normal course of Myrtle
2 Beach Police Department business?
3 A: Yes.
4 Q: I'm handing you what's been entered as State's 3, do you
5 recognize that?
6 A: Yes, it's a copy of more videos.
7 Q: And would that be the in-car video?
8 A: Yes.
9 Q: Okay. And again, did you review this with me?
10 A: Yes.
11 Q: And did you initial this disc?
12 A: Yes.
13 Q: And is it a fair and accurate representation of your
14 camera from June 24th, 2016?
15 A: Yes, sir.
16 Q: Were there any alterations or deletions?
17 A: No.
18 Q: And is that kept in the normal course of Myrtle Beach
19 Police Department business?
20 A: Yes.
21 Q: Thank you, Officer Camacho. Please answer Mr. Truslow's
22 questions.
23 THE COURT: Cross examination?
24 CROSS EXAMINATION OF JERRY CAMACHO BY MR. TRUSLOW:
25 Q: Good afternoon, Officer Camacho.

1 A: Good afternoon, sir.

2 Q: Just a few short questions for real, real quick. When
3 you testified that the Defendant took ownership of the drugs,
4 do you recall testifying to that?

5 A: Yes.

6 Q: Okay. In what way did he do that?

7 A: Officer Crews had told me that he took ownership.

8 Q: Okay. And you have not been sequestered, right, you've
9 been present for the trial?

10 A: Yes.

11 Q: You've heard everybody's testimony up to this point?

12 A: Yes.

13 Q: You heard your colleague-at-the-time's testimony that
14 what he says is, put it on me; I'll take the charge? Were you
15 here for that?

16 A: Yes, I was here for that.

17 Q: Okay. You did not hear any testimony, did you, that he
18 said I'm guilty of trafficking narcotics, these are my drugs,
19 did he?

20 A: No.

21 Q: Okay. You said that who is closest to the drugs has the
22 bearing -- has a bearing on who's arrested, correct, under
23 your direct testimony?

24 A: It has a bearing on the investigation.

25 Q: It has a bearing on the investigation; not on who's

1 arrested?

2 A: No, because we were still investigating.

3 Q: Okay. And that's part of the investigation?

4 A: Yes.

5 Q: All right. So, is it possible that if the heroin had
6 been in the passenger floorboard, that me and my client might
7 not be here and maybe Darrin and some lawyer would be here;
8 could that have been?

9 A: I'm not sure. I don't know. I wouldn't want to assume
10 what the other passenger would say if it was his or not.

11 Q: All right. Well, what if the other passenger said,
12 hypothetical situation, you know what ---

13 MR. ERVIN: Your Honor, I'm gonna object to ask for a
14 hypothetical.

15 THE COURT: Sustained.

16 BY MR. TRUSLOW:

17 Q: Okay. You testified that you didn't hear Darrin threaten
18 him or tell him what to do or anything like that, right?

19 A: Yeah, while I was in contact with him, yes.

20 Q: All right. So is it true that you did not hear what
21 Darrin said to him, if anything, or what their agreement was
22 or what was said from the time the blue lights were turned on
23 until they were stopped?

24 A: While I was out with them, they didn't -- they didn't
25 have a conversation while we were doing the traffic stop.

1 Q: I'm talking about before the stop?

2 A: Before the stop, no.

3 Q: Okay. And then the drugs found their way to the driver's
4 side, right? That's where they were; at least the heroin?

5 A: I wouldn't say they found their way, there were there.

6 Q: Well, they had to get there somewhere. I'm not saying
7 they walked themselves over there, but that's where they were?

8 A: Yes.

9 Q: All right. Okay. Do you have any evidence or knowledge
10 or where they were before the blue lights came on and the car
11 was stopped?

12 A: No.

13 Q: Could they have been in the back seat?

14 A: I wouldn't know why someone would want to put them from
15 the backseat to the front seat, but no, I don't know where
16 they were before that.

17 Q: Okay. That's true. Could have been in - could've been
18 inside Darrin's shirt, right? Could've been anywhere. You
19 don't know, you weren't in the car, correct?

20 A: Could've been, yeah.

21 Q: Thank you. Now, when you saw them at the store when you
22 were gassing up your patrol car, they appeared to know each
23 other is what you said, right?

24 A: Yes, they appeared to know each other. I believe one of
25 the Defendant's was still -- I believe that Defendant,

1 passenger, the passenger was outside of the car, I believe, or
2 vice versa and one was still at the car. So, when he walked
3 up, he walked into the car like he knew the person and they --

4 Q: They were riding together?

5 A: --- they must've spoke because, at that time, they rolled
6 up their window.

7 Q: Okay. You said they must have spoke; did you hear them
8 speak?

9 A: No, I didn't hear them speak, but I could see something
10 was said. I don't know exactly. It wasn't -- I know
11 something was said because their mouth - their mouths were
12 moving, but I don't know exactly; I couldn't hear it. But, I
13 know after that, shortly after that, they rolled up their
14 window of the vehicle.

15 Q: Which window?

16 A: I'm not -- I don't recall.

17 Q: Okay. So you don't know which window, but you know they
18 saw you and they talked and they rolled the window real quick?

19 A: Yes.

20 Q: Back window or the front windows?

21 A: I believe it was the passenger side.

22 Q: Okay. Where Darrin was sitting, not -- my guy was
23 driving, right?

24 A: I don't recall which side.

25 Q: Do you know who was driving when you saw them at that

1 store?
2 A: Yes.
3 Q: Was it my client?
4 A: Yes.
5 Q: So that puts him -- that puts Darrin in the passenger
6 seat, right?
7 A: Puts who?
8 Q: The other guy must've been in the passenger seat then if
9 he's driving or the back seat?
10 A: Okay.
11 Q: Okay. Did they pull up to the store -- let's take -- did
12 they pull up into a parking lot at the store?
13 A: No.
14 Q: Where did they park to go in the store?
15 A: They were already there when I arrived. They were parked
16 at a pump.
17 Q: So, they were getting ---
18 A: They were parked at that one pump.
19 Q: Right.
20 A: I parked on the other side, the opposite side of that
21 pump.
22 Q: Okay. You don't know what they said to each other, if
23 anything?
24 A: I remember one of them getting back into the vehicle and
25 I looked into the vehicle shortly after the window rolled up?

1 Q: Did you see any drugs in there when you looked in?

2 A: No.

3 COURT REPORTER: Excuse me?

4 A: No, ma'am.

5 BY MR. TRUSLOW:

6 Q: All right. You patted -- you're the one that patted down
7 Darrin, the passenger, correct?

8 A: Yes, sir.

9 Q: He had no weapons?

10 A: No weapons on him.

11 Q: No weapons in the vehicle?

12 A: No weapons in the vehicle.

13 Q: Okay. Let me ask you if you saw, I think, Darrin the
14 passenger, yelling at my client or anything like that; did you
15 see anything like that?

16 A: No, sir.

17 Q: Okay. You didn't hear Darrin threaten him, right?

18 A: No, sir.

19 Q: But then again, you don't know what transpired between
20 the time your colleague put the blue lights to pull them over
21 and when they were stopped, y'all weren't in the car?

22 A: Correct, we weren't in the car.

23 Q: Do you remember like Mr. Crews said, that -- that the two
24 phones in the car were just going off like crazy; do you
25 remember any of that?

1 A: Yes.

2 Q: All right. Did you -- and the phones were taken into
3 evidence, weren't they?

4 A: I believe so, yes.

5 Q: Did anybody -- do you know do any Cellbrite examination
6 of those phones?

7 A: Not that I know of. That I know of, no.

8 Q: Okay. Did you answer the phones?

9 A: No.

10 Q: Did you look in the phones?

11 A: No.

12 Q: Did -- okay. At all, you didn't look for numbers, you
13 don't know who's calling?

14 A: No, sir.

15 Q: Did you do anything to determine who owned the phones?

16 A: No.

17 Q: Okay. You've been in trial here, so you know this Mr.
18 Bullock, who's not Darrin or my client, owned that vehicle,
19 correct?

20 A: Say it again?

21 Q: Do you know that Mr. Bullock, the owner of the vehicle,
22 was neither one of these two, these two, my client or Darrin;
23 did you know that?

24 A: That he wasn't the owner of the vehicle.

25 Q: Yes.

1 A: Yes, sir.

2 Q: And Darrin wasn't the owner of the vehicle, correct?

3 A: No.

4 Q: Okay. Did you guys ever contact the owner of the
5 vehicle?

6 A: I didn't.

7 Q: Do you know if anybody did?

8 A: I don't know.

9 Q: Okay. And why would you have not done that?

10 A: Because I was just the assisting officer; I wasn't the
11 lead officer. That wasn't -- I was just the assisting
12 officer.

13 Q: So, should Mr. Crews have done that?

14 A: It's not a policy to. I don't -- I don't know if he
15 should've or didn't. I was just there more for a backup after
16 he did that.

17 Q: If you arrest somebody for trafficking narcotics in
18 somebody else's vehicle, wouldn't you want to find out if this
19 guy's car was stolen and call him?

20 A: Well, when we run the plate, they'll tell us if the
21 vehicle is stolen or not.

22 Q: Okay. Do you know if Mr. Bullock ever got his vehicle
23 back?

24 A: Say that again?

25 Q: Did Mr. Bullock ever got his car back, whoever he is,

1 Bullock?

2 A: I don't know. Like I said, I didn't follow up. I'm not
3 the lead officer.

4 Q: Okay. Okay. You just assisted in this thing, right?

5 A: Just assisted, yes.

6 Q: Okay. Do you believe Mr. Crews should have run a very
7 simple Cellbrite investigation on the cell phones to determine
8 whose they were, who they were calling, in your opinion as an
9 officer?

10 A: I probably wouldn't have. If someone is saying that the
11 drugs are mine or admitting that the drugs are theirs, I
12 probably wouldn't have.

13 Q: Did he say the drugs were his or did he say you can
14 arrest me for this?

15 A: Whatever ---

16 Q: Put it on me.

17 A: Pin it on me, whatever verbiage he used.

18 Q: Okay. If you were the lead investigator on this case,
19 would you have investigated those cell phones at all?

20 A: Probably not. I don't -- I don't work narcotics. I work
21 the roads. If I worked narcotics, I probably would go through
22 the phone.

23 Q: Okay. Would you then have expected a narcotics detective
24 to run a Cellbrite ---

25 A: Possibly.

1 Q: --- report to determine information on the phone, texts,
2 phone numbers?

3 A: Possibly.

4 Q: Okay. Do you know if any narcotics detective at Myrtle
5 Beach did that?

6 A: I don't know.

7 Q: You know if any narcotics detective, any type of
8 detective, contacted the owner of the vehicle, ever?

9 A: No, not that I know of.

10 Q: Do you know if there was any forensics done at all in
11 regards to fingerprints on the telephones?

12 A: Again, my investigation -- my part of the investigation
13 stopped ---

14 Q: Just that you know of?

15 A: No, I don't.

16 Q: Okay. Do you know if anybody ran fingerprints on the
17 scales that were found?

18 A: No, I don't.

19 Q: Nothing further.

20 THE COURT: All right. Redirect?

21 REDIRECT EXAMINATION OF JERRY CAMACHO BY MR. ERVIN:

22 Q: Officer Camacho, is it common for you to hear someone
23 tell you I'm guilty of trafficking drugs?

24 A: No, it's not common.

25 Q: Is it more common for someone to say those drugs are mine

1 or put it all on me?

2 A: Yes.

3 Q: Is it your practice to answer someone else's phone, even
4 if that persons charged with a crime?

5 A: No.

6 Q: Is the owner of the car relevant as to the possession of
7 the drugs and the admission of the drugs by this Defendant?

8 A: In most cases, no, because most of the time, the cars are
9 rentals, so we don't contact every rental agency.

10 Q: But in this case with the facts that you had, was the
11 owner of the car relevant as to this Defendant's ---

12 A: No, sir.

13 Q: Thank you.

14 MR. TRUSLOW: Your Honor, recross, Your Honor?

15 THE COURT: No, you don't get recross. You can raise
16 objections if he brought anything you didn't address on cross
17 examination.

18 THE COURT: You may step down.

19 MR. TRUSLOW: May I be heard on this, Your Honor.

20 THE COURT: Well, I'll let you put it on the record
21 later.

22 All right. The State can call your next witness.

23 MR. ERVIN: Your Honor, we have a matter we need to
24 address outside the presence of the jury.

25 BY THE COURT:

1 THE COURT: All right. Ladies and gentlemen, I'm gonna
2 excuse you back to the jury room for just a few minutes, while
3 we address this legal matter. And I tell you why we excuse
4 you to the jury room, it's not that we're trying to hide
5 anything from you, but as I told you, you decide the facts of
6 this case and you decide those facts based upon the testimony
7 and the evidence. Well, sometimes when there's a question of
8 law that arises, it requires me as the Judge and the attorneys
9 to reference factual issues. Well, what we say is not
10 evidence. So, we don't want you to be influenced by anything
11 that I might say or anything that the lawyers might say when
12 we decide the law to be applied in this case. We don't want
13 that to influence your decision on what the facts are and
14 that's why we excuse you to the jury room.

15 In any event, it'll give you a short break. We'll bring
16 you back out in just a minute. Don't discuss the case even
17 among yourselves.

18 Thank you very much.

19 (REPORTER'S NOTE: Jury exits courtroom. The following takes
20 place outside the presence of the jury.)

21 THE COURT: All right. Mr. Truslow, we don't have
22 recross examination. You got direct examination, cross
23 examination, redirect as to matters addressed on your cross
24 that he did not address in his direct. If he exceeds that,
25 you can raise an objection, but as I understand, there's no

1 right to recross.

2 MR. TRUSLOW: All right. I just want to put very -- on
3 the record, Your Honor.

4 THE COURT: All right.

5 MR. TRUSLOW: Just that he elicited something outside of
6 the bounds of where we'd been before that I wanted to address
7 two questions. He elicited testimony that my Defendant said
8 that I'm guilty of drug trafficking and he elicited testimony
9 that it has no bearing who owns the car in a drug case.

10 THE COURT: Okay.

11 MR. TRUSLOW: Those two questions, I think I should've
12 been permitted to go into.

13 THE COURT: Well, if he did address it on direct and you
14 didn't address it on cross, then you could have objected and
15 it would have been sustained. All right?

16 All right. What do we have to address, Mr. Ervin?

17 MR. ERVIN: Your Honor, with respect to the extraction of
18 cell phone data, I've been informed there has been a cell
19 phone dump in this and I don't know what's in it. I've never
20 seen it. I didn't know it was in existence until today.

21 I just raise that to the Court, you know, there's a
22 possibility there could be exculpatory evidence on that. So
23 in full disclosure, I just wanted the Court to know that.

24 THE COURT: All right. Have we got -- let's check it and
25 see if there's exculpatory evidence. We have to address it.

1 Let's go ahead and put on the record who you found out
2 from, who has that information, and how long they had that
3 information without turning it over. When did you get the
4 information, Mr. Ervin?

5 MR. ERVIN: Your Honor, I just found out today.

6 THE COURT: From whom?

7 MR. ERVIN: Melinda Shadoan at Myrtle Beach Police
8 Department, the evidence technician.

9 THE COURT: All right. Is she here?

10 MR. ERVIN: We're trying to find her.

11 THE COURT: All right. We need to get her and find out
12 how long she's had that information.

13 THE COURT: All right. So, they have -- so they did run
14 the calls on that cell phone and there was a report generated?

15 MR. ERVIN: That's what I've been told and, Your Honor, I
16 will ---

17 THE COURT: And that report was not turned over to the
18 Defense?

19 MR. ERVIN: The State never had that, Your Honor.

20 THE COURT: Well, you might not have had it in your
21 office, but law enforcement had it, so the State had it.

22 MR. ERVIN: All I can tell you is what I've been told
23 today, Your Honor, and I will say on Page 4 of the original
24 case report, the last paragraph does denote that Officer Crews
25 was going to obtain search warrants for the phones. When I

1 asked him -- I don't know when it was when I initially met
2 with him about this case -- he said he does not remember that
3 being done. So, therefore, I did not have knowledge of any
4 information extracted from that.

5 THE COURT: All right. I know you personally didn't have
6 it, but if law enforcement and they don't turn it over to you,
7 it's gonna -- it's the State's case?

8 MR. ERVIN: Yes, sir.

9 THE COURT: And so that's where it comes in.

10 MR. ERVIN: And that's why I wanted to bring it to the
11 Court's attention.

12 THE COURT: That's why they, you know, we need to find
13 out how long they've had it and what's in it and why they
14 didn't turn it over. Is that what we're trying -- is that
15 something that we're gonna be able to get readily available?

16 MR. ERVIN: I hope so, Your Honor.

17 THE COURT: Or do we need to go ahead and recess that. I
18 don't want to go forward in this case any further until we get
19 that information because if that is a report generated by the
20 police, it should've been turned over to the Defense and it
21 wasn't.

22 MR. ERVIN: Yes, sir.

23 THE COURT: We're gonna have to address it.

24 MR. ERVIN: Yes, sir.

25 THE COURT: We're gonna go ahead and recess now until you

1 get that information?

2 MR. ERVIN: I'd like to address it now if I can get her
3 over here.

4 THE COURT: And I understand that. I just don't want you
5 to have to -- if you can be more productive doing something
6 else, I don't mind taking a recess.

7 MR. ERVIN: Yes, sir. Court's indulgence?

8 THE COURT: All right.

9 MR. ERVIN: I apologize, Your Honor.

10 THE COURT: I tell you what, let's do this. Let's take
11 about a 10-minute recess and let you get your ducks in a row,
12 get the information. If you can do it within the 10 minutes
13 and then we'll come back in and take care of it. Okay?

14 MR. TRUSLOW: Yes, sir, Your Honor.

15 THE COURT: All right.

16 **(RECESS.)**

17 *******OFF THE RECORD*******

18 **(On the Record.)**

19 THE COURT: Gentlemen, as we discussed in chambers, I
20 understand that -- what is the term that happened with the
21 cell phone, what is it you call it?

22 MR. TRUSLOW: Cellbrite -- Cellbrite report, B-R-I-T-E.

23 THE COURT: Okay. So there was a -- there was, I guess,
24 a trace or whatever you call it, done on the cell phones and
25 produced a Cellbrite report, correct?

1 MR. ERVIN: All the State knows is that a matter of law
2 needs to be taken up with respect to some possible evidence.

3 THE COURT: Okay. The evidence that you have, what is it
4 you -- what is it?

5 MR. ERVIN: It's extraction from a cell phone.

6 THE COURT: Okay. So the police did extract information
7 from the cell phone, correct?

8 MR. ERVIN: Based on what I've been told, yes.

9 THE COURT: All right. And there has to be a search
10 warrant for that, correct?

11 MR. ERVIN: I believe so; yes, sir.

12 THE COURT: All right. So, we're gonna go ahead and
13 recess, you need to turn over to the Defendant the search
14 warrants, because if they got this information without a
15 search warrant, we're gonna have to address that. If they got
16 it pursuant to a search warrant, make sure the Defense has the
17 search warrant, give them the information, we'll recess until
18 tomorrow morning and then we'll address the issue then. Okay?

19 MR. ERVIN: Yes, sir. Thank you, Your Honor.

20 THE COURT: Anything further from the State?

21 MR. ERVIN: No, sir.

22 THE COURT: Anything further from the Defense?

23 MR. TRUSLOW: You want us here at 9:00, right? The jury
24 will be here at 9:30?

25 THE COURT: Y'all tell me. I don't know how much time

1 y'all need. Y'all tell me how long?

2 MR. TRUSLOW: I just thought if you had them come back at
3 9:30, if we're here at 9:00, maybe we can get everything
4 resolved before 9:30 and start right at 9:30.

5 THE COURT: Is that agreeable to the State?

6 MR. ERVIN: Yes, sir.

7 THE COURT: Okay. Because I'll be -- I'm the first to
8 admit, I don't know how long it's gonna take to get this
9 information. I don't know how readily available it is. I've
10 got to believe that the search warrant ---

11 MR. TRUSLOW: I think it's downstairs now.

12 THE COURT: Yeah, the search warrant, I'm sure is in the
13 file; it's either there or they didn't get one. So, if they
14 got one to get the information, that's pretty easy. Now, how
15 long it's gonna take to extrapolate what's in the report, I
16 don't know. Y'all are going to have to educate me on that.

17 All right. So, we'll go ahead and I'll excuse the jury
18 until 9:30 tomorrow morning. We'll be back at 9 o'clock and
19 decide what to go. All right.

20 All right. Anything from the State before we bring the
21 jury in?

22 MR. ERVIN: No, Your Honor.

23 THE COURT: Anything from the Defense?

24 MR. TRUSLOW: Nothing, Your Honor.

25 THE COURT: All right. Let's bring the jury in.

1 (REPORTER'S NOTE: Jury enters courtroom.)

2 THE COURT: All right. Ladies and gentlemen, I
3 appreciate your patience. An issue has come up where we're
4 gonna have to address some matters of law and it's gonna take
5 a little bit longer than I anticipated. I don't know how much
6 longer, but it is gonna take some time. So rather than
7 keeping you in the jury room just sitting there, I'm gonna go
8 ahead and let you go home for the day. I'm gonna ask that you
9 please be back at 9:30 tomorrow morning. Don't discuss the
10 case. Don't conduct any independent investigations. I hope
11 everybody has a good evening and we'll see you back at 9:30
12 tomorrow morning.

13 Thank you very much.

14 (REPORTER'S NOTE: Jury exits courtroom. The following takes
15 place outside the presence of the jury.)

16 THE COURT: All right. Anything from the State before we
17 recess?

18 MR. ERVING: No, Your Honor.

19 THE COURT: Anything from the Defense?

20 MR. TRUSLOW: No, Your Honor.

21 THE COURT: All right. We'll be in recess at least until
22 9:30 tomorrow morning or I'll be here at 9 o'clock, and so if
23 we need to do anything earlier than that, I mean anything
24 earlier than 9:30, I'll be here. Otherwise, we've got the
25 jury coming back at 9:30. Okay?

1 MR. ERVIN: Thank you, Your Honor.

2 THE COURT: All right. Thank you very much.

3 MR. TRUSLOW: Thank you.

4 THE COURT: We'll be in recess until then.

5 **(RECESS.)**

6 **END OF DAY TWO.**

7 *******OFF THE RECORD*******

8 **(On the Record.)**

9 **NOVEMBER 15, 2017 - DAY THREE**

10 THE COURT: All right. It's a little after 10:00. I
11 knew we would be in recess until 9:30 because of the events of
12 yesterday. I understand Mr. Truslow is not here; his client's
13 not here. I understand you have heard from him.

14 MR. CARAKER: Your Honor, I texted him just a little bit
15 ago. He said he was just getting by a wreck on 501 and he'd
16 be in in a few minutes.

17 THE COURT: Okay.

18 MR. CARAKER: He told me 10 minutes and I'll look and
19 tell you when I got that text, Your Honor. At 9:49 I got that
20 text.

21 THE COURT: Okay. All right. Well, all I know to do is
22 just let's wait until he gets here and then when he gets here,
23 we'll see what the status of everything is. okay?

24 MR. CARAKER: Yes, sir.

25 MR. ERVIN: Yes, sir.

1 THE COURT: All right. I'll do -- well, let's wait until
2 he gets here and we'll see.

3 **(RECESS.)**

4 *******OFF THE RECORD*******

5 **(On the Record.)**

6 THE COURT: Please be seated. All right.

7 All right. When we recessed yesterday, it was because
8 Officer Camacho and Mr. Crews had testified that there were
9 two phones taken from the vehicle in which the Defendant was
10 riding and, contrary to the incident report, search warrants
11 for extrapolation of the information on those phones was never
12 obtained and it was not done to their knowledge. However, Mr.
13 Ervin informed the Court that it came to his attention during,
14 I think, it was the testimony of Mr. Camacho, that in fact
15 that information had been extrapolated. And so we recessed
16 for the day so that the State could get that information
17 together and turn it over to the Defense; is that correct?

18 MR. ERVIN: Yes, Your Honor.

19 THE COURT: All right. So, where do we stand now?

20 MR. ERVIN: Your Honor, the State did retrieve the
21 information. The Court requested the extraction data and the
22 search warrants for both phones. We did turn that over to Mr.
23 Truslow yesterday afternoon as soon as we were able to get it.
24 We do have the -- it was a thumb drive and that includes
25 several PDF files on that. And Your Honor, we're not informed

1 enough to address the Court as to the technical data that was
2 extracted from the phone, but I do have Officer Curry from the
3 Myrtle Beach Police Department that is ready to address that.

4 THE COURT: Well, I mean the question is, is certainly
5 since it wasn't turned over, the State can't use anything that
6 was on there.

7 MR. ERVIN: Yes, Your Honor, the State does not intend to
8 use anything from those phones. The phones were not admitted
9 into evidence. If Your Honor believes a limiting instruction
10 or whatever may come from a mention of a phone. We do not
11 intend to use anything and I do have some case law that
12 addresses the materiality argument that I intend to pose.

13 THE COURT: But my question is, was there any exculpatory
14 information?

15 MR. ERVIN: Not that the State found.

16 THE COURT: Well what did the State find?

17 MR. ERVIN: Your Honor, the State found and has a
18 reasonable belief that it was Mr. Collins' phone.

19 THE COURT: Okay.

20 MR. ERVIN: Both phones. One phone, we were not able to
21 extract any data from.

22 THE COURT: So, nothing came off of it.

23 MR. ERVIN: We weren't able to get into, so we could not
24 extract data from that.

25 THE COURT: Okay.

1 MR. ERVIN: So, I -- I don't know what is on that.

2 THE COURT: All right.

3 MR. ERVIN: The other phone, we were able to get into and
4 it is clear to the State and it should be clear to the Court
5 that it is Mr. Collins' phone. There are multiple pictures of
6 himself and his family on there. There are music files.
7 There X-rated files on there and that's all that the State
8 saw. There was possibly some inculpatory pictures on there of
9 the Defendant. Again, the State does not intend to use any
10 of that.

11 THE COURT: So, there was nothing but photographs and
12 music?

13 MR. ERVIN: And videos.

14 THE COURT: And videos?

15 MR. ERVIN: Yes, sir.

16 THE COURT: Nothing in the phone log or anything that
17 would have been exculpatory?

18 MR. ERVIN: It was just the SD card, the SIM card that
19 stores data.

20 THE COURT: And what does that show?

21 MR. ERVIN: What I just said, Your Honor, the music files
22 and the pictures of the Defendant and his family members.

23 THE COURT: So, when the phones are ringing off there at
24 the scene the whole time, it doesn't show who was calling or
25 anything of that nature?

1 MR. ERVIN: No, sir.

2 THE COURT: Okay.

3 MR. ERVIN: And again, there's no text messages that we
4 were able to glean and we don't intend to use any of the
5 pictures that we could put forth an argument are inculpatory.
6 It's not gonna be part of our case.

7 THE COURT: All right.

8 Mr. Truslow?

9 MR. TRUSLOW: Your Honor, first I, and they were over
10 here talking about this. I'm not surprising them because I
11 just asked Mr. Caraker about this. He said he didn't know,
12 but I heard Officer Curry telling them that basically what
13 they had was kind of an outline or a summary, that there are
14 other reports that he just didn't give to them. So, I need to
15 first find out, is there still more?

16 THE COURT: Yeah, if there is anything out there that has
17 not been turned over and has not given, let's get that --
18 let's get that out.

19 MR. TRUSLOW: May I call Officer Curry, briefly?

20 THE COURT: No. Is there anything that has not been
21 turned over to the Defense?

22 MR. ERVIN: No, sir.

23 THE COURT: Okay. They're saying they gave you
24 everything. If it turns out that's not true, then that's --
25 that's your PCR and that's your appeal and that's all of that.

1 If they're withholding stuff ---

2 MR. TRUSLOW: It's in a different format they're saying
3 now, Your Honor.

4 THE COURT: Well, it doesn't matter if it's in a
5 different format. They're telling you they've given you
6 everything they have.

7 MR. TRUSLOW: But now they've just told me -- so you're
8 saying it's the same thing in a different format?

9 MR. ERVIN: Correct.

10 MR. CURRY: We generated three different reports.

11 THE COURT: Wait a minute. We're getting this on the
12 record. I've got to get all of this on the record.

13 Mr. Ervin, speak with your IT or whoever you need to talk
14 to. Find out is there anything in the police possession that
15 has not been turned over to the Defendant. And, if there is,
16 what is it and what does it show?

17 MR. ERVIN: What was turned over to Mr. Truslow in the
18 form of a thumb drive contained what I listed out, the
19 pictures of the Defendant and et cetera. This Blu-ray disc is
20 just basically those pictures and none of us can blow up -- we
21 can click on the pictures and blow those up to a size where
22 you can see everything in the picture. This Blu-ray disc
23 contains the blown-up pictures and they're on the Blu-ray disc
24 because of the file size. It obviously will not fit on the
25 thumb drive.

1 THE COURT: All right.

2 MR. ERVIN: So, yes, sir, everything has been turned
3 over.

4 THE COURT: All right.

5 Mr. Truslow?

6 MR. TRUSLOW: Your Honor, I would -- I'd like to make a
7 couple of motions.

8 THE COURT: All right.

9 MOTIONS:

10 MR. TRUSLOW: I've got the first motion I'd make is a
11 motion to dismiss this case. There's been some really abuses
12 of discovery here. I want to put on the record that they've
13 had all this material for about 16 months, everything that
14 we're talking about right here. That's the first point.

15 THE COURT: Well, first, their argument is is that it's
16 either inculpatory and they're not gonna use it and the Court
17 is not gonna let them use it and if there's nothing
18 exculpatory that you're really entitled to receive.

19 MR. TRUSLOW: Your Honor, I believe there is and I'll go
20 through that if you'd like.

21 THE COURT: All right. Just go ahead and just tell me
22 what's exculpatory that you are just now getting?

23 MR. TRUSLOW: There is -- and all these images and
24 photographs they're talking about, in addition two pictures of
25 my client, which does not look like a selfie, so somebody else

1 could've taken it, there is paperwork. To me it looks like
2 ledgers, potentially names. I cannot see -- I believe and
3 know the technology exists for me to blow that stuff up and I
4 could have and would have had 16 months to do it, and I
5 could've seen who owes who what; it could have said that
6 Darrin, he could've had his name on there and X, Y, Z owes him
7 \$1500 still, but there is at least, as I recall, four or five
8 ---

9 THE COURT: How is that exculpatory to your client in a
10 trafficking in heroin, where the drugs are in the vehicle that
11 he's driving.

12 THE COURT: If it establishes that Darrin is the -- the
13 owner of those drugs and my client, in a trial where he's
14 trying to say I'm a heroin addict and I've been for a long
15 time and I drive for him. I don't keep up with everything,
16 but I never had to fish around for a fix. That is exculpatory
17 for him, I believe, with a jury and I had -- I can give you
18 the date, I've got it somewhere here, but it's about 16
19 months. I also, when they say that they couldn't get the
20 phone numbers of all the people that were calling in that
21 night, all the text messages and all that, I don't know who
22 would've had time to delete them, okay, or why they wouldn't
23 have them. But, I've been involved in trials where expert
24 witnesses have gone and got the texts, they've gone and got
25 the phone numbers, they're somewhere. They can be obtained.

1 THE COURT: But they didn't obtain them. What prohibited
2 you from obtaining them?

3 MR. TRUSLOW: I didn't know about it.

4 THE COURT: You didn't know they had the two phones; they
5 never released to you that they had these two phones.

6 MR. TRUSLOW: They did -- they did release they took the
7 phones in possession.

8 THE COURT: Okay.

9 MR. TRUSLOW: They did. I had no idea that they'd done
10 these reports.

11 THE COURT: But, it doesn't matter, if you're just
12 wanting the numbers from the calls, let's assume for the sake
13 of argument they've never extrapolated any information from
14 the phones. You still could have requested and gotten those
15 numbers.

16 MR. TRUSLOW: Yes, sir.

17 THE COURT: All right. Go ahead.

18 MR. TRUSLOW: Well, I mean, that kind of covers that --
19 that other one. However, there are a number of items on the
20 phone that were deleted. Those could've been recovered, but
21 I'm -- that's gonna go back to what you said before. So, what
22 I'm gonna say is they did do a report. The report had in
23 there items that I would have taken action to do something
24 with. I know that's a little speculative, so I'm just gonna
25 focus just on the fact that -- that 16 months ago, they had

1 pictures of what appears to be in 5 to 10 ledgers. Now that
2 could've have been very exculpatory, very. It could've had
3 Darrin's handwriting; it could've had how much she was owed by
4 people; it could've had all that stuff. It could've said that
5 I owe him another couple grands of heroin because the last
6 three or four times, he's driven me around. It could've -- it
7 could've - you know. So, the thing is, I could've had those
8 blown up, I could've had a lot of evidence to say, well, who's
9 really running things here.

10 THE COURT: And I understand your -- the point you're
11 trying to make, Mr. Truslow. What I don't understand is how
12 is that exculpatory to your client in this case. He may have
13 had a drug problem. He may have been a mule or carrying drugs
14 for somebody else or scared of somebody else, but how is that
15 information that you're saying that you could've gotten, how
16 is that exculpatory to your client?

17 MR. TRUSLOW: Quite honestly, Your Honor, it is possible
18 and it may seem farfetched, that paperwork could've had
19 written on it, don't ever forget that I'm gonna shoot you in
20 the head if you don't, you know, do what I tell you to do, or
21 you're never gonna get any dope again, or it could've said
22 that, you know, I will provide you a defense. You're not
23 gonna go to prison but, if something happens, you take the
24 charges, or it could've -- you know, it could've indicated
25 that he doesn't know how much dope or that it's dope in there.

1 It could happen, you know, that he is a junky, he's driving me
2 around. There could've been a lot of things in there that
3 could have been exculpatory, even as to possession because
4 knowledge is a factor. He has to know that it's the dope. We
5 can all say, well, how could he not, but exculpatory evidence
6 could be something in that paperwork that indicates he did
7 know that was heroin. Now, if that's the case, that goes to
8 the charge we're talking about because it goes to the
9 knowledge element of the possession or trafficking, which is a
10 possessory crime, and I didn't get to see that and none of us
11 are ever gonna get to see it now.

12 THE COURT: All right.

13 MR. TRUSLOW: And in the alternative to dismissal, I
14 would ask for a mistrial based on that. I think that if you
15 cannot dismiss it or it doesn't rise to that level, I think it
16 rises to the level of a mistrial. That would be tantamount to
17 a continuance, maybe, when you have so much stuff over here --
18 and let me add for the record, as I told you in chambers,
19 somewhere over 400 pages worth of documentation. I stayed up
20 kind of late last night looking at it every which way and
21 going through. It was a lot of stuff and they've had it for
22 almost a year and a half. I've had it for about 10 hours, 12,
23 whatever, close, somewhere in there. Less than a day.

24 THE COURT: All right.

25 MR. TRUSLOW: So, I would move for a mistrial.

1 THE COURT: All right. Anything else?

2 MR. TRUSLOW: There is if -- unless you're gonna grant a
3 mistrial.

4 THE COURT: Let me -- let me hear from Mr. Ervin, first
5 on the motion to dismiss and then for the motion for a
6 mistrial?

7 MR. ERVIN: Thank you, Your Honor. Once again, we're
8 swimming in the land of hypotheticals and assumptions. The
9 United States Supreme Court did address this in *United States*
10 *v. Agurs*, A-G-U-R-S, that is 96 Supreme Court 2392 ---

11 COURT REPORTER: Excuse me, would you use your microphone
12 please? I missed that.

13 MR. ERVIN: *United States v. Agurs*, A-G-U-R-S 96 Supreme
14 Court 2392, that's from 1976. They address the mere
15 possibility of an item of undisclosed information might have
16 helped the defense or might have affected the outcome of the
17 trial does not establish materiality, and that's the central
18 issue in this argument, materiality. Now, the question is
19 whether the omitted evidence creates a reasonable doubt that
20 didn't otherwise exist. The allegation of ledgers or threats
21 or whatnot has no bearing on this Defendant's possession of
22 those drugs and claiming ownership of those drugs.

23 Now, furthermore, in *Arizona v. Youngblood*, 488 United
24 States 51, that's from 1989, a good faith failure to disclose
25 merely potentially useful material to a Defendant is not a

1 violation of due process. And again, material, materiality is
2 the issue here. This is not material to this case. There
3 could -- yes, there could be anything on anybody's phone, but
4 you cannot raise a mere suspicion of something that may be on
5 the phone that has no bearing on the central issues in this
6 case, which is this Defendant's possession and knowledge of
7 those drugs in that car.

8 And to Mr. Truslow's point about the possibility of Mr.
9 Collins being a junky, he knows the drugs are in there if he's
10 a junky. That's why he has them at his feet.

11 And, Your Honor, lastly, a true *Brady* violation requires
12 three things as this Court is aware of. The evidence at issue
13 must be favorable to the accused and, in the State's viewing
14 of this evidence, it is actually inculpatory. The second
15 prong, either because it is exculpatory or impeaching. The
16 evidence must have been suppressed by the State and the State
17 will bear the burden of -- of having that in their possession,
18 whether it be law enforcement or the State, but a good faith
19 failure to disclose a violation of this Defendant's due
20 process. And the third -- third prong in that test is
21 prejudice must have ensued. The State does not intend to use
22 the phones nor the contents of the phone, the data that was
23 extracted from them. So, there can be no prejudice to this
24 Defendant.

25 THE COURT: All right. Thank you.

1 Anything in reply?

2 MR. TRUSLOW: Yes, sir, Your Honor. First, real briefly,
3 the real problem here is the fact that what's to stop the
4 State from using this type of way to limit my constitutional
5 right to give him the best defense that he can have and to
6 defend himself by saying that you didn't get it, but you're
7 speculating saying that it would've helped you. I, I mean
8 that's the tail wagging the dog. I mean, they've had this for
9 16 months. And the three-prong analysis he's making, I take
10 issue with. He's talking about the nature of it. The whole
11 tantamount issue here is that we don't know what the nature of
12 it is. I mean that's my point; it's not -- the cases he's
13 talking about with good faith, which resolved three of those
14 cases talking about good faith, is that they're dealing with
15 issues that they know what they're talking about. They know
16 what you're looking at. And they're also weighing, looking at
17 how that changes things in terms of what you are already have
18 as well. They're doing a balancing. That's apples and
19 oranges here, because we don't know what it is still. The
20 point is -- and this really goes more towards the mistrial
21 portion of it. I don't know because I got it in the middle of
22 a trial, in the middle of the trial, so I -- how can we even
23 have the argument he's talking about on that analysis when we
24 don't know what it is. I don't know what it is because we're
25 in day three of trial and day two is when I learn about it.

1 And quite honestly, I have to concede, you know, I mean a
2 dismissal in a case like that, that is a pretty rare instance
3 and I get that. But I think in terms of mistrial, I think if
4 there's ever grounds for mistrial, this would be the type
5 situation for one. And, that's my argument as to that, Your
6 Honor.

7 THE COURT: All right. I'm gonna deny the motion to
8 dismiss as well as the motion for a mistrial. Certainly,
9 anything in there that's inculpatory is not gonna be used and
10 is excluded and I find that based upon their reports, there's
11 nothing exculpatory to the Defendant. So I'm gonna deny those
12 motions.

13 MR. TRUSLOW: One last motion, Your Honor.

14 THE COURT: All right. I would ask the Court, based upon
15 everything we've talked here without going back through it
16 again, for the simple remedy of permitting the Defense to
17 elicit testimony that the -- that there was three phones and
18 that -- that they gave one back and they tested the others
19 without opening the door as to the inculpatory evidence, given
20 the fact -- I'm not gonna go -- where we are with this case
21 and how I learned about it yesterday.

22 THE COURT: Okay.

23 MR. TRUSLOW: And not open hoping the door by simply
24 eliciting testimony of the -- as to the investigation or lack
25 thereof and the quality of the investigation.

1 THE COURT: Mr. Ervin?

2 MR. ERVIN: Your Honor, the State believes he would open
3 the door to the incriminating nature of the contents of the
4 phone and, again, the State does not intend to get into that.
5 The State will leave the phone issue alone and they are not
6 admitted into evidence.

7 THE COURT: All right. When we broke yesterday, Officer
8 Camacho was on the stand. That was a part of -- was it the
9 cross examination, I'm trying to recall. Had we concluded ---

10 MR. ERVIN: It was cross examination. I finished my
11 redirect. Mr. Truslow was ---

12 THE COURT: Okay. So, it was redirect, that's right.

13 MR. ERVIN: --- recross and Your Honor stopped that and
14 we excused Mr. Camacho. So, the State next calls Officer
15 Householder.

16 THE COURT: What's the technical term with these phones?
17 What is it, that you're to extrapolate the information; what
18 do they call that?

19 MR. ERVIN: Extraction.

20 THE COURT: Extractions. All right.

21 Mr. Ervin, let me ask you this, is the State willing to
22 stipulate that contrary to Officer Camacho's testimony and Mr.
23 Crews' testimony there was an extraction of the two phones
24 that were retained but that there was no information ---

25 MR. ERVIN: Extracted.

1 THE COURT: --- extracted that was pertinent to this
2 case?

3 MR. ERVIN: Yes, Your Honor, absolutely.

4 THE COURT: Okay. So, as far as your motion, we're gonna
5 either go with that stipulation and we'll do that on the
6 record or, if you want to recall Mr. Crews and Officer
7 Camacho, you can recall them and question them on the issue,
8 but if you do -- I'm not saying it's gonna open the door, I'm
9 not saying it's not gonna open the door but, if it does open
10 the door, you're gonna have to live with that as to the
11 pictures. And as I understand, the pictures you're talking
12 about, inculpatory pictures, are just pictures showing him
13 smoking pot; is that correct?

14 MR. TRUSLOW: Or pornographic -- no, it wasn't
15 pornographic, it's stuff like that.

16 THE COURT: Well, I mean, my question is ---

17 MR. ERVIN: Yes, sir.

18 THE COURT: --- are they any pictures that has anything
19 to do with him trafficking in heroin?

20 MR. ERVIN: No, sir.

21 THE COURT: Okay.

22 MR. ERVIN: Not that I saw.

23 THE COURT: So, there's really no door to open, because
24 if he's smoking a joint, it has nothing to do with whether or
25 not he's trafficking in heroin.

1 MR. TRUSLOW: For me the safest and easy way and my
2 choice would be to agree with the stipulation.

3 THE COURT: Okay.

4 MR. TRUSLOW: I just want to know how we're gonna word
5 it, but I'm fine with that.

6 THE COURT: What I'll do is I'll just call -- when the
7 jury comes back in and I'll just tell them that the parties
8 stipulate and I'll charge them on stipulations when I charge
9 them on the law, but the parties stipulate, which means they
10 have to accept as a fact that.

11 MR. TRUSLOW: Yes, sir.

12 THE COURT: Contrary to Officer Camacho and Mr. Crews'
13 testimony, there was an extraction of the information on the
14 two phones that were retained by the police at the scene.

15 MR. ERVIN: There was only extraction on one phone, but I
16 don't know how ---

17 THE COURT: Oh, I thought they did it on both of them,
18 but nothing was found pertinent to this case. Which, one,
19 there was nothing found, and the other one, there was nothing
20 pertinent to the case.

21 MR. CURRY: Your Honor, neither phone -- the physical
22 data from the phone was never extracted from either. There
23 was a micro SD card, which is a removable device, in one of
24 the phones, which is where all the photos and videos came
25 from. So, there was an extraction on that SD card and

1 extractions on the SIM cards, which only give you the carrier
2 information, basically the phone number on the two devices.

3 THE COURT: Well see, that's all Greek to me. I don't
4 know what that means. I don't know ---

5 MR. ERVIN: Your Honor, just to be clear for the record,
6 I believe, and I don't want to get too far into it if we can
7 come to a reasonable stipulation, but I believe both officers
8 testified that they did not know if the phone was extracted.
9 And once that was said by Officer Camacho ---

10 THE COURT: Well, I think their testimony was they did
11 not think so and to their knowledge it was not.

12 MR. ERVIN: Yes, sir, that's -- that's -- yes, sir.

13 MR. TRUSLOW: And, Your Honor, I'm also fine with not
14 being scientific with the jury and just telling them that both
15 phones, by an officer who deals with that kind of thing at the
16 department, looked into and investigated both phones and took
17 out what he could from them. You know, something like that.
18 I don't need to, whether it's an extraction or Cellbrite
19 report, I don't have a lot to work with.

20 THE COURT: Well, I used the term extraction because that
21 was the term given to me. If that's not right, let's get the
22 right terms and find out what was done so we can put it in the
23 stipulation.

24 MR. TRUSLOW: If you extract something you have
25 something. We've got all the photos and all this other stuff.

1 So, I don't know how that's not an extraction. I think that's
2 the proper terminology.

3 THE COURT: I have no idea.

4 MR. TRUSLOW: I would submit that did an extraction.

5 THE COURT: Well, and when I said that as a stipulation,
6 they jumped up and said no, no, no, that's not right; that's
7 not right. So, let's find out what's right.

8 Mr. Ervin, I mean ---

9 MR. TRUSLOW: Is that ---

10 THE COURT: The State's telling me that it's not an
11 extraction.

12 MR. CURRY: Of the phone itself, Your Honor.

13 COURT REPORTER: Sir, your name, please?

14 THE COURT: Hold for a minute. We've got to get his name
15 because we got to make a record on this.

16 COURT REPORTER: Come up to the microphone, please.

17 THE COURT: Your name?

18 MR. CURRIE: Detective Andrew Curry.

19 COURT REPORTER: I'm sorry?

20 THE COURT: I'm sorry, you gonna have to speak up where
21 we can hear you?

22 MR. CURRIE: Andrew Curry. Andrew Curry.

23 THE COURT: All right. So you're saying that the SIMS
24 card and this other thing are not part of the phone?

25 MR. CURRY: They're removable devices, yes, sir.

1 THE COURT: Okay. So you removed the SIMS card and what
2 else?

3 MR. CURRY: A micro SD card.

4 THE COURT: Okay.

5 MR. ERVIN: Your Honor, I do believe for simplicity
6 purposes for the jury, it would be best to just say nothing
7 was extracted from the phone. I think if we get too
8 technical, we're digging something up.

9 THE COURT: Yeah, but that kind of leads in to verifying
10 the police officer's report that the phone was not checked
11 into and that's not the case.

12 MR. TRUSLOW: Well, Your Honor, they -- they extracted
13 the SIM card and they extracted the micro SD card.

14 THE COURT: Is that accurate?

15 MR. CURRY: Yes, Your Honor.

16 THE COURT: To say there was an extraction of the SIM
17 card and the micro SD card in both phones and nothing was
18 found ---

19 MR. ERVIN: That will be fine; yes, sir.

20 THE COURT: --- relevant to this case.

21 MR. ERVIN: I don't believe it was contrary to the
22 testimony. The testimony was they did not know.

23 MR. TRUSLOW: Well, that's for the jury ---

24 THE COURT: Well, I don't think that was their testimony.
25 I think their testimony was, yeah, they -- I mean, you're

1 forgetting the second part of their testimony. I don't know,
2 I know I didn't do it, but I don't think it was done. That's
3 different than I don't know. That's trying to lead the jury
4 to believe nothing was done with the phone and that's not
5 true.

6 MR. ERVIN: Right.

7 THE COURT: All right. So, we're gonna enter into a
8 stipulation between the State and the Defendant that the SIM
9 card -- that contrary or that the SIM card and the micro SD
10 card for the two phones retained at the scene by the police
11 were extracted and no relevant information was found on them.

12 MR. ERVIN: Yes, sir.

13 THE COURT: All right. Is that right?

14 MR. ERVIN: Yes, sir, that's -- that's ---

15 MR. TRUSLOW: No relevant inf -- I would ask the Court
16 and say that that part is not necessary, because then that's
17 ---

18 THE COURT: Tell me what you want.

19 MR. TRUSLOW: Just that ---

20 THE COURT: No, give me the exact sentence of what you
21 want the stipulation to say.

22 MR. TRUSLOW: The Defense and the State stipulate that
23 the SIM card and the micro SD card from both phones were
24 extracted, taken out of the phone, period. That's all that
25 was done.

1 THE COURT: And just leave them hanging as to what was
2 found on it?

3 MR. TRUSLOW: Yes, sir, unless the want to call more
4 witnesses. I mean, because I don't want the Court to tell
5 them that no relevant evidence was found or that ---

6 THE COURT: Well, there is no relevant evidence found.

7 MR. TRUSLOW: Sir?

8 THE COURT: There is no -- I don't want you implying to
9 the jury that they extracted this information and they're
10 withholding it and it could help my client and, therefore, you
11 should find my client not guilty because they got this
12 information but they're not telling you what it is. I'm not
13 gonna allow that.

14 MR. TRUSLOW: Well, the flip side of that is I don't know
15 if it was relevant or not.

16 THE COURT: Well I'm making a decision that it was
17 irrelevant -- that it was not relevant and if I'm wrong, then
18 the Appeals Court can deal with that. I'm making the decision
19 that based upon the State telling the Court what they actually
20 found that it was not relevant in this case.

21 MR. ERVIN: Your Honor, could we say material.

22 THE COURT: I think it's not relevant; it has nothing to
23 do with the case, nothing on the phone had nothing to do with
24 the case.

25 MR. ERVIN: That's ---

1 THE COURT: Okay? That's why I'm -- you know, if you
2 want to recall the officers, I don't know that, you know, and
3 they can cross examine them, well, doesn't it show he was
4 smoking a joint, and I'll sustain the objection, because
5 whether or not he's smoking a joint has got nothing to do with
6 trafficking heroin.

7 MR. TRUSLOW: I'm with you on that, yes, sir. I'm good.

8 THE COURT: We're gonna do the stipulation?

9 MR. TRUSLOW: Yes, sir.

10 THE COURT: All right.

11 MR. ERVIN: Yes, Your Honor, thank you.

12 THE COURT: All right. Anything from the State before we
13 bring the jury in?

14 MR. ERVIN: Yes, sir. I would like to clear up for the
15 record ---

16 COURT REPORTER: Please use your microphone.

17 THE COURT: Yeah.

18 MR. ERVIN: Good? The admittance of Exhibits 2 and 3,
19 and they have been admitted into evidence. Exhibit 2 is the
20 full version of each or all three officers' body cams, and
21 Exhibit 3 is the full version of all three officers' in-car
22 videos. And, if Your Honor recalls, the State did not request
23 to publish that for the jury but for thoroughness, and so it
24 does not appear that the State is withholding anything from
25 the jury. I do want them to have the ability to look at the

1 complete videos in body cameras.

2 THE COURT: Okay.

3 MR. ERVIN: But Exhibit 1 is just the redacted version
4 that the State and Mr. Truslow agreed upon to publish for the
5 jury during this trial.

6 THE COURT: So, Plaintiff's Exhibit 1 is the redacted
7 versions of State Exhibit 2 and State Exhibit 3 that y'all
8 agreed to?

9 MR. TRUSLOW: Yes, sir.

10 MR. ERVIN: Yes, sir.

11 THE COURT: State's Exhibit 2 and State's Exhibit 3 are
12 the un-redacted videos.

13 MR. ERVIN: Full versions, yes, sir.

14 THE COURT: Okay.

15 MR. ERVIN: And just for brevity purposes, the State
16 chose not to play the whole video.

17 THE COURT: I gotcha.

18 MR. ERVIN: I just wanted to clear that up for the
19 record, Your Honor. Thank you.

20 THE COURT: Anything else?

21 MR. ERVIN: Not at this time, sir.

22 MR. TRUSLOW: Nothing from the Defense.

23 THE COURT: All right. So when we come back in, it'll be
24 the State's next witness is who we'll call.

25 MR. ERVIN: Yes, sir.

1 THE COURT: Okay. Let's bring the jury in.

2 (REPORTER'S NOTE: Jury enters courtroom.)

3 BY THE COURT:

4 THE COURT: Now, ladies and gentlemen, welcome back. I
5 hope everybody had a good evening. I apologize for keeping
6 you in the jury room for so long, but we did have some matters
7 that we did need to address and I want to thank you for your
8 patience and I want to thank you for your promptness again
9 this morning.

10 Now we're ready to proceed with the trial of this case,
11 but before we do so, we do need -- I do need to let you know
12 that there has been a stipulation reached between the State
13 and the Defendant, and I'll give you the law on stipulations
14 when I charge you on the law in the case. Basically, the
15 stipulation between the parties is that there was an
16 extraction performed by the police on the SIM card and the
17 micro SD card on the two phones that the police retained at
18 the scene, but that there was no relevant information or no
19 information relevant to this case derived from that
20 extraction. So, that is the stipulation. All you need to
21 know at this point in time is that that is a factual matter
22 that you have to take as a true fact, that they did perform an
23 extraction on the SD card -- on the micro SD card and the SIM
24 card but nothing relevant was found as a result of that
25 extraction.

1 All right. Anything in regard to that from the State?
2 MR. ERVIN: No, Your Honor.
3 THE COURT: Anything from the Defense?
4 MR. TRUSLOW: No, Your Honor.
5 THE COURT: All right. State can call your next witness.
6 MR. ERVIN: Thank you, Your Honor, may it please the
7 Court?
8 THE COURT: Yes.
9 MR. ERVIN: The State calls Officer Michael Householder.
10 CLERK: Please raise your right hand and place your left
11 hand on the Bible.
12 MICHAEL HOUSEHOLDER, HAVING BEEN DULY
13 SWORN TESTIFIES AS FOLLOWS:
14 CLERK: Please state your full name and spell your last
15 name for the Court.
16 MR. HOUSEHOLDER: Officer Michael Householder, H-O-U-S-E-
17 H-O-L-D-E-R.
18 DIRECT EXAMINATION OF MICHAEL HOUSEHOLDER BY MR. ERVIN:
19 Q: Good morning, Officer Householder.
20 Where are you currently employed?
21 A: I'm employed with the Myrtle Beach Police Department.
22 Q: How long have you been there?
23 A: I have been there a little over six years.
24 Q: What's your current duty assignment?
25 A: My current duty assignment is a canine officer.

1 Q: Do you have any special training or certifications to go
2 along with that?

3 A: I'm trained, like I said, as a canine officer. I'm
4 trained by Highway Patrol in the ACE Drug Interdiction School.
5 I also have a four-year degree from the University of Phoenix
6 in Criminal Justice.

7 Q: Officer Householder, what was your duty assignment on
8 June 24th of 2016?

9 A: I was assigned to the Canine Unit. I just basically
10 assist other officers when they need to call for the canines.

11 Q: And did you have occasion to become involved in the case
12 against this Defendant?

13 A: I did.

14 Q: Can you explain to the jury your involvement?

15 A: I was out on patrol. Officer Crews had stopped that
16 vehicle and he was radioing for a unit that had some test kits
17 because he had discovered what he believed to be narcotics.
18 So, at that time, I went to his scene -- went to the scene and
19 provided him with testing the narcotics that he had located
20 inside of the vehicle.

21 Q: So, your involvement happened after the stop occurred; is
22 that fair?

23 A: Yes, sir.

24 Q: All right. Could you explain to the jury what a field
25 test kit is?

1 A: A field test kit is a presumptive test. It is a test
2 that we use out, like I say, in the field to try to determine
3 what the narcotic that is there. Ultimately, the test, like I
4 said, it's presumptive; it's not a hundred percent positive.
5 That's why we have to send it off to SLED Lab and go back on
6 their official results because they have a controlled
7 environment.

8 Q: All right. And you were present here yesterday in court,
9 correct?

10 A: Yes.

11 Q: And were you present when the jury saw the videos?

12 A: Yes, sir.

13 Q: Did you see yourself in that video?

14 A: Yes, I did.

15 Q: And were you carrying something?

16 A: I was carrying a red box that I have the test kits in.

17 Q: Okay. And we can hear the video initially, that
18 substance that was found under the driver's seat tested
19 positive for cocaine?

20 A: Yes, sir.

21 Q: Can you explain why that field tested positive for
22 cocaine?

23 A: Like I said, it's a presumptive test and we're not in a
24 controlled environment. So sometimes the test kits may give
25 you a different positive on that. There also could've been

1 that baggie had cocaine in it beforehand. There's numerous
2 reasons that it could've tested.

3 Q: Okay. And you said it before, but to be clear, you yield
4 to the SLED forensic chemist for the ultimate determination of
5 the drugs; is that correct?

6 A: Yes, they are the ones to test that.

7 Q: Okay. Permission to approach, Your Honor?

8 THE COURT: Yes.

9 Q: Officer Householder, I'm handing you what's been admitted
10 as State's Exhibit 2, can you identify that?

11 A: It is a disc with the videos from our body cameras.

12 Q: Do you see your initials on that?

13 A: Yes, I do, sir.

14 Q: And did you review that disc with me?

15 A: Yes, I did.

16 Q: And is that disc an accurate -- a fair and accurate
17 representation of the scene from your in-car camera that
18 night?

19 A: Yes, it is.

20 Q: And I'm handing you what's been admitted as State's 3,
21 can you identify that?

22 A: It's another disc with the videos on it.

23 Q: And are your initials on that disc?

24 A: Yes, sir.

25 Q: And did you review this disc with me also?

1 A: I did, sir.

2 Q: And is that disc a fair and accurate representation of
3 your body cam video from that night?

4 A: It is, sir.

5 Q: Thank you. Now, when you were out field testing the
6 drugs and helping backup Officer Camacho and Mr. Crews, did
7 you see or hear interaction between this Defendant and the
8 passenger?

9 A: I was there; I didn't see any interaction between them.

10 Q: So, there was no yelling or threats from either party?

11 A: No, they were both in separate patrol cars for most of
12 the time I was there.

13 Q: Okay. And did it appear to you that they knew each
14 other?

15 A: Like I said, I didn't see their interactions, so I
16 couldn't testify to that.

17 Q: Okay. Did this Defendant appear to be under duress or
18 threatened in any way?

19 A: No, sir.

20 Q: Okay. Thank you, Officer Householder. Please answer Mr.
21 Truslow's questions.

22 MR. TRUSLOW: No questions from the Defense, Your Honor.

23 THE COURT: All right. You may step down. State can
24 call your next witness.

25 MR. ERVIN: The State calls Melinda Shadoan.

1 Your Honor, we would request Officer Householder be
2 excused.

3 MR. TRUSLOW: No objection.

4 THE COURT: You're free to go. Thank you.

5 CLERK: Please raise your right hand and place your left
6 hand on the Bible.

7 MELINDA SHADOAN, HAVING BEEN DULY
8 SWORN TESTIFIES AS FOLLOWS:

9 COURT REPORTER: Mr. Ervin, please use your microphone.

10 CLERK: Please state your full name and spell your last
11 name for the Court?

12 MS. SHADOAN: Melinda Shadoan, S-H-A-D-O-A-N.

13 DIRECT EXAMINATION OF MELINDA SHADOAN BY MR. ERVIN:

14 Q: Good morning, Ms. Shadoan.

15 | A: Good morning.

16 Q: Where are you employed?

17 A: At the City of Myrtle Beach Police Department.

18 Q: And how long have you been employed there?

19 | A: I'm in my 10th year.

20 Q: What is your -- what are your duties at Myrtle Beach
21 Police?

22 A: I am the property and evidence technician for the
23 department.

24 Q: And give a basic summation of those duties to the jury,
25 please.

1 A: I house all the lost and found that comes into the City
2 along with all items that are considered evidence for criminal
3 cases such as this.

4 Q: Thank you for that basic summary. Did you become
5 involved in this case with this Defendant?

6 A: I did.

7 Q: And what was your involvement?

8 A: I was mainly the one who housed all the evidence that
9 came in for this particular case and took the drugs to SLED.

10 MR. ERVIN: Permission to approach?

11 THE COURT: Yes.

12 BY MR. ERVIN:

13 Q: Ms. Shadoan, I'm handing you what's been marked as
14 State's Exhibit 6 for identification purposes.

15 A: Yes, sir.

16 Q: Do you recognize that?

17 A: I do.

18 Q: What is that?

19 A: This is considered a Best kit, which we house the drugs
20 other than the marijuana.

21 Q: And can you read the BEST kit number for the record?

22 A: It is B, as in bravo, 260706.

23 Q: And were you ever in custody of this?

24 A: I was.

25 Q: Who did you receive it from?

1 A: Can I refer to my notes?

2 Q: Sure.

3 A: It came in my Officer Jeremy Crews.

4 Q: When did Mr. Crews bring that to you?

5 A: I had processed it into our evidence room on June 27th,

6 2016 at 11:43 in the morning.

7 Q: What was the purpose of Mr. Crews submitting that to you?

8 A: It's considered evidence and, obviously, they can't hold

9 anything after duty, so they house it in a secure location,

10 which is my office, and then it's housed for criminal cases if

11 it goes to trial.

12 Q: And how was that packaged when you received it?

13 A: It is packaged in the first actual plastic inside. That

14 goes into a manila envelope that has the paperwork that will

15 include all the SLED information if I'm to take it to actually

16 the SLED analysis.

17 Q: And was it sealed when you received it?

18 A: It was. This red seal right here was not tampered with,

19 so I look at that to make sure it wasn't before I intake it

20 because I am not going to be responsible for something that

21 has been tampered with.

22 Q: Did you manipulate that package in any way?

23 A: None whatsoever.

24 Q: When did you take it to SLED?

25 A: It went to SLED on March 8th, 2017, and I was there at

1 11:35.

2 Q: And I'm sorry, I either missed it or must have skipped

3 it. What was the purpose of taking it to SLED?

4 A: It needed to be analyzed by the SLED, the State Law

5 Enforcement Division, other than our officers doing a field

6 test on it. It's a more accurate analysis of the drug.

7 Q: So, you did no testing on the drugs, right?

8 A: No, not at all.

9 Q: And was it in -- was that bag in your care and custody

10 the whole time you drove it to SLED?

11 A: It was.

12 Q: And once at SLED, did you relinquish custody of the bag?

13 A: I did.

14 Q: To whom?

15 A: Jackie Davis, who is a login tech.

16 Q: For what purpose? For what purpose did you give it to

17 Ms. Davis?

18 A: I gave it to her so she can house it in their secure

19 location until they give it to one of the drug analysts.

20 Q: And was the BEST kit sealed when you gave it to Ms.

21 Davis?

22 A: It was.

23 Q: Did it appear to have been tampered with or altered in

24 any way?

25 A: None whatsoever.

JACKIE DAVIS - DIRECT BY ERVIN

1 Q: Thank you, Ms. Shadoan. Please answer Mr. Truslow's
2 questions.

3 A: Okay.

4 MR. TRUSLOW: No questions from the Defense.

5 THE COURT: All right. You may step down.

6 A: Thank you.

7 MR. ERVIN: The State calls Jackie Davis.

8 CLERK: Please raise your right hand and place your left
9 hand on the Bible?

10 JACKIE DAVIS, HAVING BEEN DULY SWORN

11 TESTIFIES AS FOLLOWS:

12 CLERK: Please state your full name and spell your last
13 name for the Court.

14 MS. DAVID: Jackie Davis, D-A-V-I-S.

15 DIRECT EXAMINATION OF JACKIE DAVIS BY MR. ERVIN:

16 Q: Good morning, Ms. Davis?

17 A: Good morning.

18 Q: I want to thank you for joining us in Horry County.
19 Where are you employed?

20 A: SLED, South Carolina Law Enforcement Division.

21 Q: And where is that located?

22 A: Broad River Road in Columbia.

23 Q: And how long have you been at SLED?

24 A: Two years.

25 Q: What are your duty assignments at SLED?

1 A: Login and transfer evidence for criminal cases.
2 MR. ERVIN: Permission to approach?
3 THE COURT: Yes.
4 BY MR. ERVIN:
5 Q: Ms. Davis, I show you what's been marked as State's
6 Exhibit 6 for identification purposes; can you identify that?
7 A: I can. It is a BEST bag.
8 Q: Do you recognize it?
9 A: I recognize it by that unique lab number that we assign
10 to it when we log it in.
11 Q: Did you receive that BEST kit?
12 A: I did.
13 Q: When?
14 A: On 3/8/17 from Melinda.
15 Q: Melinda Shadoan?
16 A: Shadoan, yes.
17 Q: Where did you receive that?
18 A: In SLED.
19 Q: Was it sealed when you received it?
20 A: It was.
21 Q: What did you do with it?
22 A: What we do is we make sure it is sealed when we receive
23 it and then we log it in and then once it is logged in, we put
24 it in a secure evidence room with all the other drugs until
25 the analyst requests it.

1 Q: Did you ever manipulate that BEST kit in any way?

2 A: I did not.

3 MR. ERVIN: Permission to approach?

4 THE COURT: All right.

5 BY MR. ERVIN:

6 Q: Ms. Davis, I'm handing you what's been marked as State's
7 Exhibit 8 for identification purposes; do you recognize that?

8 A: I do.

9 Q: How do you recognize that?

10 A: It is a chain of custody. It has our logo on it and then
11 the lab number of that BEST bag.

12 Q: And is that document kept in the normal course of
13 business at SLED?

14 A: Yes.

15 Q: Is it in the regular practice of SLED to keep that
16 document?

17 A: Yes.

18 Q: Or to memorialize that document?

19 A: Yes.

20 Q: And is that document kept at or near the time of each
21 transaction?

22 A: Yes.

23 MR. ERVIN: Your Honor, at this time the State moves for
24 admission of State's 8 into evidence.

25 THE COURT: Any objection?

1 MR. TRUSLOW: I'm sorry, that's the chain of custody
2 form? No, Your Honor.

3 THE COURT: State's Exhibit 8 admitted into evidence
4 without objection.

5 STATE'S EXHIBIT NUMBER 8

6 ADMITTED INTO EVIDENCE

7 MR. ERVIN: Thank you, Your Honor.

8 BY MR. ERVIN:

9 Q: Ms. Davis, would you read that custody log for the jury,
10 please?

11 A: Yes, on 3/8/17 at 11:35, I logged in that BEST kit from
12 Melinda Shadoan, from the Myrtle Beach Police Department; and
13 then at 3/8/17 at exactly 11:36, I transferred it to the Drug
14 Evidence Intake; and then on 6/20/17 at 4 o'clock, I
15 transferred it to Brittnee Hill, the Forensic Scientist. She
16 had requested it to work on it.

17 Q: Okay. And so after Ms. Hill worked on it and tested it,
18 did you receive it again?

19 A: I did not.

20 Q: Okay.

21 A: It was returned to us on 6/28, but another technician
22 received it and transferred it back to the evidence room until
23 the agency picks it up.

24 Q: Okay. I have no further questions. Thank you.

25 THE COURT: All right. Cross examination?

BRITTNEE HILL - DIRECT BY ERVIN

1 MR. TRUSLOW: No questions, Your Honor.

2 THE COURT: All right. You may step down.

3 MR. ERVIN: The State calls Brittnee Hill.

4 CLERK: Please raise your right hand and place your left
5 hand on the Bible.

6 BRITTNEE HILL HAVING BEEN DULY SWORN

7 TESTIFIES AS FOLLOWS:

8 CLERK: Please state your full name and spell your last
9 name for the Court.

10 COURT REPORTER: First and last name, please, spelling?

11 MS. HILL: Brittnee Hill, H-I-L-L.

12 COURT REPORTER: First name?

13 MS. HILL: Brittnee.

14 COURT REPORTER: Spell it, please?

15 MS. HILL: B-R-I-T-T-N-E-E.

16 DIRECT EXAMINATION OF BRITTNEE HILL BY MR. ERVIN:

17 Q: Good morning, Ms. Hill?

18 A: Good morning.

19 Q: Welcome to Horry County. Thank you for coming.

20 What is your occupation?

21 A: I am a Drug Chemist at the South Carolina Law Enforcement
22 Division, commonly known as SLED.

23 Q: How long have you been at SLED?

24 A: A little over a year and a half.

25 Q: What are your duties there?

1 A: I analyze substances that are suspected to contain
2 controlled substances.

3 Q: Ms. Hill, what kind of training and/or certifications
4 must you hold to have your position?

5 A: I have bachelors of science from Wofford College in math
6 and chemistry. I went through extensive in-house training
7 with a senior drug chemist. I had multiple written and oral
8 examinations and I handled hundreds of samples in supervised
9 casework which a senior drug chemist would be supervising, and
10 then I went through a competency exam before being signed off
11 to analyze my own cases. I went to the Criminal Justice
12 Academy for basic legal and law training and I went to the
13 forensic chemist seminar put on by the DEA.

14 Q: Have you had an occasion to chemically analyze substances
15 to determine whether that substance contains a controlled
16 substance?

17 A: Yes, sir.

18 Q: All right. How many times? Let's specify it for heroin.

19 A: I'd say over a hundred maybe.

20 Q: And how many heroin analyses do you do in a given week?

21 A: I test usually about 30 different cases a week, and it
22 can range all over the place on what actually comes out in the
23 cases. So, I mean, maybe one or two cases might on average a
24 week, have heroin in them.

25 Q: Okay. And doing those analyses, is that a regular part

1 of your duties?

2 A: Yes, sir.

3 Q: Have you testified in trial before?

4 A: Yes, sir,

5 Q: How many times?

6 A: Twice.

7 Q: Have you been qualified as an expert in the field of
8 forensic drug chemistry before?

9 A: Yes, sir.

10 MR. ERVIN: Your Honor, at this time, the State would
11 move Ms. Hill to be declared an expert in the field of
12 forensic drug chemistry.

13 MR. TRUSLOW: No objection.

14 THE COURT: All right. Ladies and gentlemen, I'll charge
15 you on the law regarding expert testimony when I charge you on
16 the law in this case, but all you need to know at this point
17 in time is that ordinarily a person can only testify as to his
18 or her actual knowledge, what they tasted, what they saw, what
19 they smelled, things of that nature. There is an exception
20 for witnesses who are qualified as experts, which means that
21 in addition to her personal observations, this witness will be
22 allowed to testify or to render an opinion in the field in
23 which she is an expert.

24 I find this witness to be an expert in the field of
25 forensic chemistry.

1 MR. ERVIN: Thank you, Your Honor. Permission to
2 approach?

3 THE COURT: Yes.

4 BY MR. ERVIN:

5 Q: Ms. Hill, I hand you what's been marked as State's 6 for
6 identification purposes; do you recognize that?

7 A: Yes, sir.

8 Q: Based on your training and experience and your
9 qualifications as an expert in this field, do you have an
10 opinion as to what that substance is?

11 A: Yes, sir.

12 Q: Can you identify this exhibit?

13 A: Yes, sir.

14 Q: Did you mark that exhibit?

15 A: Yes, sir; I see my initials on it.

16 Q: All right. When did you receive that?

17 A: Can I refer to my notes?

18 Q: Sure.

19 A: I received on June 20th of this year.

20 Q: And how did that come into your possession?

21 A: I received it from Jackie Davis.

22 Q: And has that -- was that -- that exhibit under your care,
23 custody and control after Ms. Davis gave it to you from the
24 time you tested it until you sealed it back?

25 A: Yes, sir.

1 Q: And is it in the same condition now as it was when you
2 first received it?

3 A: Yes, sir.

4 Q: What was the purpose of you obtaining possession of that?

5 A: So I could upstairs in our drug lab and test it.

6 Q: Okay. And can you tell the jury what the weight of that
7 powder substance is?

8 A: So, in the BEST bag, they had a heat-sealed bag that
9 contained a plastic sandwich bag, and in that plastic sandwich
10 bag there was powder in it as well as a little plastic
11 sandwich bag that had more powder. So, the compressed powder
12 was 11.70 grams and the plastic sandwich bag that had the
13 powder in it was 3.62. So, it was a total weight of 15.32
14 grams.

15 Q: Okay. And is that the weight of the powder only?

16 A: Yes, sir.

17 Q: Okay. And can you tell the jury in the simplest terms
18 you can, what specific tests you performed?

19 A: Sure. So, when I get the BEST bag, the first thing I do
20 is make sure that the seal is intact. So, you'll see on the
21 BEST bag I wrote seal intact and initial it and put the date
22 that I worked it. And I cut it open at the bottom and I will
23 take it out and itemize it. So, in this case, like I said,
24 there's a heat-sealed bag that had a plastic sandwich bag in
25 it and then that plastic sandwich bag had powder as well as

1 another little bag with more powder in it. And so I take each
2 item and I weigh it on our scale and I take that weight, so
3 not including packaging, and then I do an indicative test on
4 it. So, we have, it's basically a color test that gives us an
5 indication of what it might be and it helps us pick the
6 extraction solvent for it. And then I'll take a little bit of
7 that and I will take -- I'll extract it on our instrument and
8 I'll confirm what the substance actually is.

9 Q: Thank you. That was as simple as I could have listened
10 to. And from these tests, were you able to form an expert
11 opinion as to what that substance is?

12 A: Yes, sir.

13 Q: And what is it?

14 A: Heroin.

15 Q: And what is the basis for your opinion?

16 A: Our confirmatory test.

17 MR. ERVIN: Your Honor, at this time, the State would
18 move to admit State's 6 into evidence.

19 THE COURT: Any objection?

20 MR. TRUSLOW: Yes, sir, I object to it based upon the
21 grounds I objected earlier as to the search.

22 THE COURT: All right. State's Exhibit 6 admitted into
23 evidence over Defendant's objection.

24 STATE'S EXHIBIT NUMBER 6

25 ADMITTED INTO EVIDENCE

1 MR. ERVIN: Thank you, Your Honor.

2 BY MR. ERVIN:

3 Q: Ms. Hill, I'm handing you what's been marked as State's 7
4 for identification purposes; do you recognize that document?

5 A: Yes, sir.

6 Q: How do you recognize that?

7 A: This would be our report that I sent out, and I have my
8 signature on the second page of it.

9 Q: And is that report generated in the normal course of your
10 duties at SLED?

11 A: Yes, sir.

12 Q: And is it a regular practice at SLED to generate a drug
13 report?

14 A: Yes, sir.

15 Q: Did you record your findings on that report from this
16 case?

17 A: Yes, sir.

18 Q: And does that report accurately reflect -- fairly and
19 accurately reflect your findings as to the substance in this
20 case?

21 A: Yes, sir.

22 MR. ERVIN: Your Honor, at this time, the State moves for
23 admission of State's 7 into evidence.

24 THE COURT: Any objection?

25 MR. TRUSLOW: Object based -- same objection, same

1 grounds as the previous objection, Your Honor.

2 THE COURT: All right. State's Exhibit 7 admitted into
3 evidence over Defendant's objection.

4 STATE'S EXHIBIT NUMBER 7

5 ADMITTED INTO EVIDENCE

6 BY MR. ERVIN:

7 Q: Ms. Hill, that's all the questions I have, thank you.

8 THE COURT: Cross examination?

9 MR. TRUSLOW: If it please the Court, Your Honor?

10 THE COURT: Yes.

11 CROSS EXAMINATION OF BRITTNEE HILL BY MR. TRUSLOW:

12 Q: Ms. Hill, you may have seen this. Do you recognize this
13 document; I think it was Exhibit 7?

14 A: Yes, sir.

15 Q: Okay. When you say that you took -- well, let me do this
16 first. How many bags were there?

17 A: There was a bag that had powder in it and then a smaller
18 bag in that.

19 Q: So, is that two bags?

20 A: Yes, sir.

21 Q: Okay. Did you take out the little bag from the big bag?

22 A: In order to weigh it?

23 Q: Yes.

24 A: Yes, sir.

25 Q: Okay. Now, when you say you take -- you took out, let's

1 start with the big bag. You took a little bit to test it,
2 right?
3 A: Correct.
4 Q: About how much did you take out?
5 A: I took a couple of grains of like salt.
6 Q: Okay. How, how much would that be like in terms of
7 grams, if you can tell me? Not even a gram, right?
8 A: No, sir -- oh, no, sir.
9 Q: Would it be a half a gram?
10 A: No, sir.
11 Q: Would it be 1/10th of a gram?
12 A: No, sir.
13 Q: Would it be 1/100th of a gram?
14 A: Possibly.
15 Q: Possibly 1/100th. So, you actually tested 1/100th of a
16 gram of this powder?
17 A: Possibly, we don't take our net weight until the end of
18 our testing; that's not part of our practice.
19 Q: But -- but if you can answer this, you only tested about
20 1/100th of a gram of this powder, correct?
21 A: Approximately.
22 Q: Somewhere in there. Okay. And in terms of the second
23 ---
24 COURT REPORTER: Answer yes or no, please.
25 A: Yes, ma'am.

1 Q: I'm sorry. In terms of the second bag, same practice?
2 A: Yes, sir.
3 Q: About 1/100th say of a -- a gram of that, of the little
4 bag you tested?
5 A: Yes, sir.
6 Q: Okay. In the report, which was Exhibit 7, I showed you,
7 let me ask you, if you want to see it again, it says net
8 weight, the first bag net weight 11.7 grams, right?
9 A: Yes, sir.
10 Q: Plus or minus 1/100th of a gram?
11 A: Yes, sir.
12 Q: So, is that the margin of error?
13 A: That's our balance and certainty.
14 Q: What does that mean?
15 A: It means ---
16 Q: Explain that?
17 A: --- yes, sir. So our balance is -- basically, what that
18 means is that 990 -- we have a confidence level, if you refer
19 to it on our report, for the weight is 99.7 percent. So, that
20 leaves 997 times out of a thousand that the weight is gonna be
21 11.70 plus or minus 0.01 grams.
22 Q: Okay. And so I don't have to go through all the same
23 questions, in terms of the second smaller bag, same answer?
24 A: Yes, sir.
25 Q: That's how you do it?

1 A: Yes, sir.

2 Q: Okay. So, you are pretty confident in the weight that
3 you're giving us, right?

4 A: Yes, sir.

5 Q: But you're not a hundred percent?

6 A: No, sir, my confidence level for the weight is 99.7
7 percent.

8 Q: Which is basically 3/10ths of a percent not confident?

9 A: Mathematically, yes.

10 Q: What it's saying. Okay. Do you recognize this document?

11 A: I recognize all but the receipt.

12 Q: Okay. Oh, yeah, that was just ---

13 A: I don't see that part.

14 Q: Now, on that document, am I correct that this is a
15 document that is submitted to your office when they send the
16 drugs to be tested and weighed?

17 A: Yes, sir; that is the drug analysis request form that
18 comes in the bag with it.

19 Q: Asking you to weigh and test it?

20 A: That would be correct.

21 Q: Okay. Now, does that indicate to you there was one bag
22 or two bags?

23 COURT REPORTER: Excuse me, that's not marked for ID.

24 MR. TRUSLOW: Huh?

25 COURT REPORTER: That's not marked for ID.

1 MR. TRUSLOW: Oh, I'm sorry.

2 COURT REPORTER: That you're talking about.

3 MR. TRUSLOW: I would like to mark this, Your Honor, for
4 identification purposes, Defendant's 1?

5 THE COURT: All right.

6 MR. ERVIN: Your Honor, I have not seen it.

7 MR. TRUSLOW: I'm sorry. Thank you.

8 THE COURT: All right. It's marked for identification.

9 DEFENDANT'S EXHIBIT NUMBER 1

10 MARKED FOR IDENTIFICATION

11 BY MR. TRUSLOW:

12 Q: Okay. In regards to that document ---

13 COURT REPORTER: Excuse me.

14 MR. TRUSLOW: Have you got a copy of it?

15 COURT REPORTER: Excuse me. Defendant's 1 for
16 identification.

17 MR. TRUSLOW: Defendant's 1. Thank you.

18 BY MR. TRUSLOW:

19 Q: Does it indicate that there's two separate bags they gave
20 you?

21 A: It says clear plastic bags; yes, sir.

22 Q: In your report there was one big bag and then there was
23 another smaller bag in the inside of the big bag?

24 A: Correct.

25 Q: Okay. So, there was -- and then so there was one bag

1 that had, according to you, 11 -- you're very confident, 11.7
2 grams?

3 A: Yes, sir.

4 Q: And the smaller bag that you think 3.-something grams,
5 correct, 3.62?

6 A: 3.62; yes, sir.

7 MR. TRUSLOW: That's all I have, Your Honor.

8 THE COURT: All right.

9 Redirect?

10 COURT REPORTER: Excuse me. Please leave the exhibit
11 with the Court Reporter.

12 REDIRECT EXAMINATION OF BRITNEE HILL BY MR. ERVIN:

13 Q: Ms. Hill, why is only testing that small amount
14 scientifically sufficient?

15 A: If we used all of it, we wouldn't have anything to show
16 you guys in court.

17 Q: And please state again for the record what the total
18 weight of the powder was?

19 A: 15.32 grams.

20 Q: Thank you, Ms. Hill, no further questions.

21 MR. TRUSLOW: One follow-up, Your Honor?

22 THE COURT: No.

23 You may step down.

24 All right. The State can call your next witness.

25 MR. ERVIN: Your Honor, at this time the State rests.

1 BY THE COURT:

2 THE COURT: All right. Ladies and gentlemen, the State
3 has rested their case, which means they've presented their
4 case in chief and now is the time of the trial where I have to
5 take up some matters of law with the attorneys. So, as we've
6 done earlier, I'm gonna excuse you back to the jury room. I
7 want to caution you, do not discuss the case even among
8 yourselves at this point in time.

9 We'll take a short break and bring you back in just a
10 minute. Thank you very much.

11 (REPORTER'S NOTE: Jury exits courtroom. The following takes
12 place outside the presence of the jury.)

13 THE COURT: All right. Any motions at this time?

14 MOTIONS:

15 MR. TRUSLOW: Yes, Your Honor, we would make a motion for
16 directed verdict based upon a lack of evidence. In addition
17 to that, Your Honor, I would renew my previous motions made in
18 this case.

19 THE COURT: All right.

20 MR. TRUSLOW: And that directed verdict motion based upon
21 there's not sufficient evidence to permit this to go to the
22 jury.

23 As well, Your Honor, when you want to, my client is not
24 gonna take the stand.

25 THE COURT: All right. All right. I'm gonna deny the

1 motion for a directed verdict. I'm also gonna stick by my
2 prior rulings on the prior motions.

3 THE COURT: All right. Let me question your client
4 regarding his right to testify and then we'll take a short
5 break.

6 All right, sir, if I could get you to raise your right
7 hand please.

8 DESMOND SHARMAINE COLLINS, HAVING
9 BEEN DULY SWORN TESTIFIES AS FOLLOWS:

10 BY THE COURT:

11 THE COURT: All right. Sir, your name is Desmond
12 Sharmaine Collins?

13 MR. COLLINS: Yes, sir.

14 THE COURT: All right. Mr. Collins, at this time, I'm
15 going to explain to you certain rights that you have. If you
16 do not understand anything I say, please let me know, and if
17 you want me to explain anything in more detail, please let me
18 know. Do you understand that?

19 MR. COLLINS: Yes, sir.

20 THE COURT: Okay. We've now reached the stage of the
21 trial where you may present your defense. You have the right
22 to claim the protections given to you by the Fifth Amendment
23 to the United States Constitution, which states in part that
24 no person shall be compelled in any criminal trial or in any
25 criminal case to be a witness against himself. This means

1 that you cannot be required to testify in this case. You have
2 the right to testify on your own behalf. However, no one can
3 make you testify. This is a personal right and no one can
4 waive this right except for you.

5 If you decide to testify, you will be subject to the same
6 rules that govern other witnesses and you may be examined and
7 cross examined on any relevant issue in this case. In
8 addition, if you have any convictions involving dishonesty or
9 false statement or for crimes punishable by imprisonment for
10 more than one year and this Court determines that the
11 probative value of admitting the evidence, outweighs its
12 prejudicial effect to you, the Solicitor will be able to
13 introduce your record to attack your credibility.

14 Now are there any prior convictions that the State
15 intends to use to attack his credibility, if he testified?

16 MR. ERVIN: There is, Your Honor.

17 THE COURT: All right. What is that?

18 MR. ERVIN: There is a 1999 grand larceny; 2009 financial
19 transaction card fraud; and a 2015 receiving stolen goods.

20 THE COURT: All right. So, Mr. Collins, if you testify,
21 they will be able to introduce these three convictions against
22 you to attack your credibility. Okay?

23 MR. COLLINS: Yes, sir.

24 THE COURT: All right. Now, if you decide to testify,
25 this decision on your part, must be freely, voluntarily, and

1 intelligently made with knowledge of the protections given to
2 you by the Fifth Amendment of the United State Constitution
3 and the consequences of your decision to testify.

4 If you decide not to testify, I will instruct the jurors
5 that they cannot give the fact that you did not testify any
6 consideration whatsoever and that there is to be no,
7 absolutely no prejudice to you because you did not testify.
8 It is left entirely up to whether or not you testify. You may
9 talk with your attorney, your family and friends, or anyone
10 else, but the final decision will be left entirely up to you.

11 Now, also if you testify, they will be able to introduce
12 your record to attack your credibility but there will also be
13 a charge to the jury that says that they cannot consider those
14 prior convictions as to your guilt or innocence in this case.
15 They can only consider them as to your credibility when you
16 testify.

17 Now, do you understand what I've explained to you?

18 MR. COLLINS: Yes, sir.

19 THE COURT: Do you have any questions about what I've
20 explained to you?

21 MR. COLLINS: No, sir.

22 THE COURT: All right. Have you discussed this with your
23 lawyer and anyone else you want to discuss whether or not you
24 wish to testify?

25 MR. COLLINS: Yes, sir.

BY THE COURT

1 THE COURT: Okay. Do you need to discuss it further with
2 your attorney or with anyone else?

3 MR. COLLINS: No, sir.

4 THE COURT: Okay. Do you wish to testify in this case?

5 MR. COLLINS: No, sir.

6 THE COURT: Okay. Is that your decision?

7 MR. COLLINS: Yes, sir.

8 THE COURT: Has anybody forced you into that decision?

9 MR. COLLINS: No, sir.

10 BY THE COURT:

11 THE COURT: All right. Anything further you want put on
12 the record in that regard, Mr. Truslow?

13 MR. TRUSLOW: No, Your Honor.

14 THE COURT: Anything further the State wants placed on
15 the record in that regard?

16 MR. ERVIN: No, Your Honor.

17 THE COURT: All right. Does the Defense intend to call
18 any witnesses?

19 MR. TRUSLOW: No, Your Honor.

20 THE COURT: Okay. So, all we have left now are closing
21 arguments and charges and deliberation?

22 MR. TRUSLOW: Yes, sir.

23 THE COURT: Okay. All right. It's gonna take me a while

24 ---

25 MR. ERVIN: Your Honor, I do have one motion.

1 THE COURT: Okay.

2 MOTIONS:

3 MR. ERVIN: At the end of close and charge, that you
4 extinguish the Defendant's bond and remand him to custody
5 until we get a verdict.

6 THE COURT: Okay. Well, the fact that there are -- and
7 that is typically my practice that since there's nothing else
8 to be presented, he will be -- he will be detained until the
9 jury comes back with a verdict. We will do that. Okay?

10 MR. ERVIN: Yes, sir. Thank you, Your Honor.

11 BY THE COURT:

12 THE COURT: All right. All right. Let's do this. It's
13 a quarter to 12:00. It's gonna take me a while to get these
14 instructions. Let me call the jury back in and excuse them
15 to go to lunch.

16 MR. ERVIN: Your Honor, I want to be clear about the
17 charges.

18 THE COURT: Okay.

19 MR. ERVIN: Firmly convinced is in the reasonable doubt
20 charge?

21 THE COURT: Yeah.

22 MR. ERVIN: And as Your Honor may be aware, the State --
23 our case law states that we cannot have any other charge other
24 the trafficking.

25 THE COURT: All right.

1 MR. TRUSLOW: Your Honor, I'm gonna ask you to charge
2 possession with intent to distribute heroin based upon
3 circumstantial evidence that there were two occupants in the
4 vehicle, both in constructive possession, and there were two
5 separate bags of heroin. I think that's circumstantial
6 evidence that a jury could look at and believe one bag to be
7 one person's and one to be the others.

8 THE COURT: Okay.

9 MR. ERVIN: Your Honor, I will state *State v. Raffaldt*,
10 318 S.C. 110, 1995, and *State v. Grandy*, 306 S.C. 224, where
11 the undisputed evidence is that the amount of drugs involved
12 exceeds the minimum trafficking amount, in this case 14 to 28,
13 and Ms. Hill did testify that it was 15.32, that only the
14 trafficking charge should be submitted to the jury.

15 THE COURT: All right. What is that case?

16 MR. ERVIN: *State v. Raffaldt*, R-A-F-F-A-L-D-T.

17 THE COURT: Okay. All right. I'll take a look at it.

18 MR. ERVIN: Yes, sir.

19 THE COURT: Anything else?

20 MR. TRUSLOW: Nothing from the Defense, Your Honor.

21 THE COURT: All right. Let's call -- I'm gonna call the
22 jury back in, release for lunch, come back at 2 o'clock.

23 MR. TRUSLOW: Do you want me to rest on the record?

24 THE COURT: Yeah, I guess the best thing to do is let's
25 go ahead and I'll say the State's rested.

1 MR. TRUSLOW: Yes, sir.

2 THE COURT: Defense, I'll let you rest on the record. Is
3 there any -- well, there's nothing to be -- no rebuttal, no
4 reply, so we'll go ahead and break for lunch.

5 Now, no defense, so the State will close in full?

6 MR. ERVIN: Yes, sir.

7 THE COURT: And the Defense will close in full?

8 MR. ERVIN: Yes, sir.

9 THE COURT: And that will be it.

10 MR. ERVIN: Yes, sir.

11 THE COURT: All right. Let's bring the jury back in.

12 (REPORTER'S NOTE: Jury enters courtroom.)

13 THE COURT: All right. Ladies and gentlemen, welcome
14 back. As before we broke, as you heard, the State rested
15 their case in full.

16 Mr. Truslow, the Defense have anything they wish to
17 present?

18 MR. TRUSLOW: Your Honor, Defense rests.

19 THE COURT: Okay. All right. Ladies and gentlemen, the
20 Defense has rested. So, all of the evidence to be presented
21 in this case to you has been presented to you. The only thing
22 remaining is for the attorneys to make their closing
23 arguments, for me to charge you on the law, and for you to
24 begin your deliberations. Given the time of day, I think
25 we're gonna go ahead and break for lunch. I'm gonna let you

1 go to lunch on your own. I'm gonna ask that you please be
2 back at 2 o'clock and we'll get started as soon after that as
3 we can.

4 I caution you again, do not discuss the case even among
5 yourselves. It's still too early for deliberations. Don't
6 conduct any independent investigation. I'm gonna give you a
7 two-hour lunch. Please be back at 2 o'clock.

8 Thank you very much.

9 (REPORTER'S NOTE: Jury exits courtroom. The following takes
10 place outside the presence of the jury.)

11 THE COURT: All right. Anything from the State before we
12 recess?

13 MR. ERVIN: Nothing in this case, Your Honor. I don't
14 know if it's the proper time to bring it up for the
15 alternate's sake, is it proper to excuse him?

16 THE COURT: Not now. When they go to -- when they're
17 told to begin their deliberations, then we'll excuse him.

18 MR. ERVIN: Yes, sir. Thank you.

19 THE COURT: All right. Anything from the Defense?

20 MR. TRUSLOW: Nothing, Your Honor.

21 THE COURT: All right. We'll be in recess until -- well
22 until 2 o'clock, but I'm gonna have a copy of my proposed
23 charges for y'all to review probably -- I have most of them
24 done -- probably within the next hour, hour and a half. Okay?

25 MR. ERVIN: Yes, sir.

1 THE COURT: And I'll just bring them in here to you,
2 okay?

3 MR. TRUSLOW: Yes, sir.

4 THE COURT: All right. Thank you.

5 **(RECESS.)**

6 *******OFF THE RECORD*******

7 **(On the Record.)**

8 CHARGE CONFERENCE:

9 THE COURT: All right, gentlemen, you should've been
10 given a copy of my proposed charges. I'll give you an
11 opportunity to raise any objections or challenges at this
12 time. Likewise, after I charge the jury, I'll give you
13 another opportunity to raise any objections because sometimes
14 it does sound differently when you hear it read versus reading
15 it on a sheet of paper. So, at this point in time, any
16 challenges from the State?

17 MR. ERVIN: No, Your Honor.

18 THE COURT: Any from the Defense?

19 MR. TRUSLOW: Yes, Your Honor, I read the case that was
20 cited.

21 THE COURT: All right.

22 MR. TRUSLOW: I'm sure Your Honor did, too. I think that
23 maybe I was wrong PWID. What I see in that case is one --
24 where it says in this case, all the evidence had to do with
25 possession. I would ask for a charge of possession of

1 possession of -- what I would like is trafficking 4 to 14
2 grams and possession of heroin.

3 THE COURT: All right. And I understand your rationale,
4 but I'm gonna deny it. I think the case basically what makes
5 it trafficking is if you possess ---

6 MR. TRUSLOW: Yes, sir.

7 THE COURT: --- or if you distribute or if you
8 manufacture, whatever, and it's over a certain amount, then
9 the amount is what makes it trafficking. So, so, as I read
10 the case law, the integral part of the trafficking is the
11 amount and that's what takes it out of the lessor included or
12 takes possession and distribution out of the lessor included.
13 So ---

14 MR. TRUSLOW: And that's despite the two separate amounts
15 in two separate bags?

16 THE COURT: Right.

17 MR. TRUSLOW: I understand.

18 THE COURT: They're all together.

19 MR. TRUSLOW: Yes, sir.

20 THE COURT: All right.

21 MR. TRUSLOW: Yes, sir.

22 THE COURT: All right. Anything further from the
23 Defense?

24 MR. TRUSLOW: Nothing, Your Honor.

25 BY THE COURT:

1 THE COURT: All right.

2 MR. ERVIN: Your Honor, I would want to bring up to the
3 Court before the jury comes in, please instruct Mr. Truslow to
4 make no mention of the phones or of threats during his
5 closing. There was no evidence presented of the threats. He
6 was the one that brought those up in his hypothetical
7 questions to the witnesses, which they did not acquiesce to.
8 I would request Your Honor instruct him to make no mention of
9 that in his closing argument.

10 THE COURT: Okay. Well, what about the phones? I mean
11 there is, there is evidence that there were phones. You have
12 stipulated that there was, you now, some extractions, so I'm
13 not gonna limit him on ---

14 MR. ERVIN: Well, I would ask Your Honor to limit him to
15 what his stipulation was and not go any further as to any
16 inference that we were hiding any information.

17 THE COURT: Well, yeah, I'm not gonna allow him argue
18 that you were hiding information, but I don't know what his
19 closing argument is gonna be. The fact of the matter is, is
20 that there were two phones that were taken. There were two
21 phones that they extracted information from the SIMS card and
22 all that and the parties have stipulated that there was
23 nothing relevant to this case that was generated from that
24 extraction.

25 MR. ERVIN: Yes, sir. The State would just request that

1 it -- if he does include his argument that it stops there.

2 THE COURT: I don't know.

3 MR. ERVIN: Ys.

4 THE COURT: Let me -- I'll -- I'll address that if ---

5 MR. ERVIN: And I will object if it ---

6 THE COURT: If it comes up, raise your objection and
7 I'll, I'll address it then. I hate for you to object during
8 his closing argument.

9 MR. ERVIN: I do, too, Your Honor.

10 THE COURT: But I'm not going to presume what he's gonna
11 say with regard and rule as a matter of law that it's
12 irrelevant, because the fact of the matter is, is that there
13 are two phones involved in this case.

14 MR. ERVIN: Yes, sir.

15 THE COURT: Now to what extent they're relevant in this
16 case, I don't know. But, I mean, basically you could follow
17 your argument to say he can't reference the other guy that's
18 in the car because that's irrelevant to this case. Well, I
19 don't know that that is and I'm gonna have to wait and see
20 what his argument is.

21 MR. ERVIN: Well, again, and I have case law to support
22 my position that any, any mention of threats or duress that
23 this Defendant was under is not permitted in his closing
24 because that's not part of the evidence.

25 THE COURT: Let me see your case.

1 MR. ERVIN: May I approach?

2 MR. TRUSLOW: Your Honor, I, I, I will stay within the
3 stipulation. I'm not gonna go outside that.

4 THE COURT: Okay. Well, then that's ---

5 MR. TRUSLOW: I mean, the -- I mean the stipulation as
6 far as the threats, I'd like you to see the case. I was just
7 letting you know the first part, I'll stay well away from
8 that.

9 THE COURT: Stay -- with the phones, the stipulation.
10 I'm gonna read the whole case cause I want to see if this is
11 ---

12 All right. Have you got the case?

13 MR. ERVIN: I just printed that out, Your Honor.

14 THE COURT: All right. Which one are you talking about?

15 MR. ERVIN: It was that second paragraph, the first
16 sentence in the second paragraph.

17 THE COURT: Okay. Well, it also says the Trial Judge is
18 vested with broad discretion in dealing with the range and
19 propriety of closing arguments. So, we'll bring it up and
20 then we'll see.

21 MR. ERVIN: And I just pose that to Your Honor because I
22 do not want to object in his closing. I don't like doing
23 that, but I ---

24 MR. TRUSLOW: It doesn't bother me.

25 THE COURT: If there is an objection, raise it, and I'll

1 either grant your objection or deny your objection and we'll
2 move from there. I'll have to wait and hear what his argument
3 is and what he says, but I'm not gonna rule as a matter of law
4 that he can't say certain things because I don't know what
5 he's gonna say. Okay?

6 MR. ERVIN: Your Honor, I will just state one more time,
7 there was no evidence of that in the record.

8 THE COURT: We'll see.

9 MR. ERVIN: Yes, Your Honor.

10 THE COURT: All right.

11 MR. ERVIN: Thank you, Your Honor.

12 THE COURT: All right. Anything else from the State
13 before we bring the jury in?

14 MR. ERVIN: No, Your Honor.

15 THE COURT: Anything from the defense?

16 MR. TRUSLOW: Just one quick thing in case it helps Mr.
17 Ervin just to avoid an objection. In regards to any threats,
18 he asked a lot of questions about did you hear them because --
19 you remember if they were separated by two cars, so they
20 weren't yelling at each other and things like that. So, that
21 brings up the issue whether he'd ever been threatened by him.
22 I wasn't even making it a point because then, just that --
23 that culture, how that works and, you know, different levels
24 of people and, you know, what the understood, understanding
25 could be between them.

1 THE COURT: Okay.

2 MR. TRUSLOW: Not to, you know, and really they brought
3 it up that way.

4 THE COURT: Yeah, I understand. We'll address it then
5 when it comes up.

6 MR. TRUSLOW: All right, sir.

7 THE COURT: Anything further from the Defense?

8 MR. TRUSLOW: No, sir.

9 THE COURT: All right. Let's bring the jury in.
10 I understand the State will close in full, the Defense
11 will close in full, and then that'll be it. We'll charge the
12 law we'll -- the deliberations then.

13 (REPORTER'S NOTE: Jury enters courtroom.)

14 THE COURT: Now, ladies and gentlemen, welcome back. I
15 hope everyone had a great lunch. We're ready to proceed with
16 the trial of this case. The parties have presented their
17 evidence to you and now is the time of the trial where the
18 attorneys will make their closing arguments.

19 Now, just like their opening statements, these closing
20 arguments are not evidence in this case. It is simply the
21 attorneys' contention as to what they feel the facts have been
22 proven in this case and the law to be applied in this case.
23 If at any time an attorney references a factual issue that is
24 different from the facts as you find them to be or references
25 the law that is different from that law as I will charge you

1 at the end of their arguments, then you are to disregard that
2 portion of their closing arguments because this is not a
3 charge on the law and it is not evidence in this case. It is
4 simply their contention as to what they think the issues are
5 and the law to be applied in this case.

6 All right. Mr. Ervin?

7 MR. ERVIN: Thank you, Your Honor, may it please the
8 Court?

9 THE COURT: Yes, sir.

10 CLOSING BY ERVIN:

11 MR. ERVIN: Ladies and gentlemen, this will be the last
12 time you hear from me. I'm sure you're happy about that.

13 It seems like we've had a lot of things thrown out during
14 the course of this trial, assumptions, hypotheticals, kind of
15 fuzzy things. You as jurors are the fact finders and that's
16 what I want to focus on, the facts. And I want to focus on
17 how those facts in the form of what came from this witness
18 stand, and what you saw on that T.V., and drug report, and
19 other evidence that we have. Those facts and how they mesh
20 with the law that the Judge is about to give to you and,
21 hopefully, when they mesh, I've met my burden and you will see
22 that. So, let's go through the elements of trafficking here.
23 They're pretty simple.

24 Number 1, I have to prove to you that it was heroin;
25 Number 2, I have to prove to you that that heroin weighed more

1 than 14 grams; and Number 3, I have to prove to you that this
2 Defendant was in possession of that heroin. So let's go
3 through those step by step and mesh the facts with those
4 elements.

5 I have to prove to you that it was heroin. You just
6 heard Ms. Hill a little while ago tell you, as an expert in
7 the field of Forensic Chemistry and as an employee of SLED,
8 that in her opinion, this is heroin. And you heard her say,
9 this is her memorialization of that in this drug report.
10 Pretty simple; we satisfied element 1.

11 Element 2, I have to show that the drugs weighed more
12 than 14 grams. Again, Ms. Hill said the total weight of the
13 powder that she tested and weighed was 15.32 grams. Pretty
14 simple, again memorialized in this drug report. You'll be
15 able to take that back with you.

16 The third element is possession. And you can probably
17 tell by now that's been the most contentious part of this
18 trial. So, I must prove to you that this Defendant was in
19 possession of that heroin. Now, possession is broken down
20 into two subsets; actual and constructive. Actual means you
21 have it on you; that's not what we have here. We're dealing
22 with constructive possession and that means the Defendant has
23 the dominion and control of that heroin, the ability to access
24 it to do what he wants with it in his wingspan so to speak.
25 And I must prove to you also that he had knowledge of it. So

1 how do I prove that? Well, you can see in the video, I don't
2 know how clear it was to you now but you can take those back
3 when you deliberate and see on Jeremy Crews' body cam, when he
4 turns into the car, you can see the bag sitting right there
5 under this man's seat, right at his feet, within his wingspan,
6 constructive possession.

7 How do I prove knowledge, that he knew that this was
8 heroin. He told the police and, by way of the video, he's
9 telling you, I claim those drugs, put it all on me. That's
10 knowledge. So, fairly simply, the facts that you've heard and
11 the law that you are gonna get, mesh together, and I submit to
12 you that should leave you firmly convinced of this man's
13 guilt.

14 Now, I think this saying that I like is pretty
15 appropriate in this situation. It goes, if the facts are on
16 your side, pound the facts; if the law is on your side, pound
17 the law; if neither is on your side, pound the table. And
18 that basically means you pound the table, you hope evidence
19 and issues that are brought up on the witness stand gets
20 scattered and they distract you, divert you, take your focus
21 away from what is presented and what the facts were and what
22 you heard.

23 Mr. Truslow is a great attorney, very good attorney. He
24 cannot take away any evidence that you saw or heard. He
25 cannot change any evidence that you saw or heard. So, I ask

1 you to keep your focus on what you heard and what you saw and
2 it will be fairly simple to you of this Defendant's guilt.

3 Now, let me pose this question to you. Let's assume that
4 the officers did arrest that passenger and he's sitting at
5 this table on trial. Who do you think his star number one
6 witness is gonna be; it's gonna be this man. And that
7 passenger's attorney is gonna parade this man up as a defense
8 witness in support of that passenger and they will show you a
9 blown up picture of the bag of heroin that was found under the
10 driver's seat and they will play for you as loud as they can
11 the statement of this man that says put it all on me. That's
12 how -- that's how this game works. So, any, any notion that
13 the passenger should've been charged or the police wrongly did
14 their job is absurd. I would submit to you, they went above
15 and beyond what they should've done. They could've charged
16 the passenger. He was actually in constructive possession,
17 too. Why would they do that if this man claimed the drugs?
18 That would put that passenger through some pretty unnecessary
19 things. So, they did a very reasonable job in handling this
20 case.

21 Now, Mr. Truslow said to you in his opening statement
22 that this is a very serious case, and it is, very serious.
23 This is serious stuff, too. It's about as serious as it gets.
24 This boy had this sitting right under his driver's seat.

25 Now, you've heard about the presumption of innocence and

1 you'll be instructed on the law here shortly, and this man is
2 presumed innocent until proven guilty. But you know what?
3 That presumption stops now, right now. The time for
4 accountability is right now. It's time to find him guilty,
5 right now. So, I ask you to do what he asked. Do what he
6 asked, put it all on me. Pretty simple.

7 Thank you.

8 THE COURT: Mr. Truslow?

9 CLOSING BY TRUSLOW:

10 MR. TRUSLOW: Yes, sir. If it please the Court, Mr.
11 Ervin, ladies and gentlemen of the jury. Mr. Ervin is telling
12 you I'm a great lawyer; I hope he believes that. I think what
13 that means is that don't believe me, that defense lawyers try
14 to trick people or play games. I'm not playing a game here.
15 I told you from the very beginning I was gonna be straight
16 with you. Is there anything I've done in here today that
17 would lead you to believe otherwise? I'm dealing with the
18 facts. The last thing he just told you is accountability
19 starts here today. Convict him because he said put it on me.
20 That's just what he told you, convict him, give him what he
21 wants. That's not how you convict people. I know that sounds
22 absurd, put it on me. Why not? Well, how about because he's
23 not guilty. That's a good reason for one. Okay?

24 He said that if the passenger was on trial, he would be
25 his best witness. He'd come in here. Well, maybe if the guy

1 didn't have bond and couldn't get to him, maybe he wouldn't.
2 All right. Let me tell you the game he's talking about that's
3 played out there, it's not a game, but there it's played.
4 It's played. And anytime that you have something, like
5 Shakespeare said, all the world's a stage and we're merely
6 players; they're players. And some of them have a lot of
7 money at the expense of people's lives, their health, the
8 community, their families, they trade all that for a bunch of
9 money.

10 Then you got other people that shoot it up their arms,
11 killing themselves, overdosing, doing things they would
12 ordinarily never think that they would do. I can't imagine
13 one person when they're 8, 10, 12-years-old saying I want to
14 grow up to be a heroin addict or drive a drug dealer around.
15 Unfortunately, some of these people can get in that position.
16 Unfortunately, that drug takes precedence.

17 Now, I don't think you should convict my client because
18 he showed you a bag of heroin. I think it's a evil despicable
19 thing. It's killing people. That didn't start today; it's
20 been killing people for a long time, that drug and many
21 others. I'm asking you as a defense lawyer, a magician who's
22 gonna trick you, to look at the facts. And you know with the
23 evidence and facts in this case and any criminal trial come
24 from right here, and I'm not gonna talk about anything except
25 for what came from right here. Now, if I go through that and

1 you convict him, there's nothing else I can do, but that's
2 what we're here for, the facts.

3 So, who were our witnesses? First was Officer -- Officer
4 Crews. He pulled them over. He got -- you know what, this is
5 an old, old, saying, but I think it's gone long enough, I can
6 use it again. It's not overdone. I heard an old lawyer when
7 I started say if you want to get to the truth or as close as
8 you can, you never look at the tree trunk, you look at the
9 tree leaves if you want to see where the wind's blowing. That
10 means, look at the little things. You know, if you're dealing
11 with somebody like we do every day in our lives and we have to
12 decide whether we want to believe them or not, you know what
13 you do, you use your common sense. You size them up, you
14 know, but you remember, hey, I remember that time, he sold
15 somebody something broken that wasn't -- you know, all these
16 things you know about them. You're looking at the little
17 things. Well, let's look at the little facts because they're
18 important. They give you a window into that person. Officer
19 Crews said he stopped them because, first of all, no turn on
20 red. All right. Look, this is not a murder case, but to my
21 client is about as serious as one. Okay? So, it's important
22 to look at everything and it's important for the officers to
23 do some work and investigation. Well, like I told you in the
24 opening statement, I'm not -- I'm not criticizing them. It's
25 a tough job. But I'm gonna tell you, if you're gonna come in

1 here and ask 12 people to convict somebody for something as
2 serious as this, that's gonna have the impact that this is
3 gonna have on him and his family, you've got -- you've got to
4 do more than what was done here. You don't come in and say
5 you're not allowed to turn right on red, not have a picture or
6 something. You don't say he took the turn going 10 miles an
7 hour when we all saw his brake lights on. You can go back and
8 watch the video, by the way. Any evidence you want to see
9 when you get together back there. We saw his brake lights on.
10 I don't know how many seconds, but not 10 miles an hour. So,
11 within the blink of an eye, he switched from 5 to 10 seconds,
12 somewhere in there; it could have been less. The little
13 things.

14 So, he gets my guy out. Let's look at this. He asked
15 him, what's that stuff in there? He didn't answer; he didn't
16 answer. And when the officer field tested the drugs and he
17 field tested it and it was cocaine, did my client say, no,
18 that's heroin, it's not cocaine. Did he look shocked or
19 surprised? That goes to knowledge. Knowledge is a big, big
20 element in this case, that's the law, knowledge. He didn't
21 look surprised. When he talked about the money, what did he
22 say? \$1500, then he said \$3500. How does he not know how
23 much money? But, that big of a gap? Because he don't know;
24 it ain't his money. You know whose money it is. It's the guy
25 who walked away. Three cell phones in this case. They took

1 two of them, extracted the information out of them. Okay?
2 Where's the third phone? You heard what the officer said. He
3 took the phone. Now I understand he took his phone. He took
4 whichever phone he wanted to. This guy is sitting in the car
5 with all of his dope, scales, money, and he walks away. You
6 know, that's the guys that make money in this business. I'm
7 not gonna call him smart, because I hate to even give him
8 that, okay, but somehow he walked away from this thing and he
9 got to pick out which phone he wanted to bring with him. So,
10 if it's so important to extract the information from these
11 cell phones, why did they say you take one and we'll test the
12 other two. Come on; this is a big case. Okay?

13 The next officer, how -- I'm not gonna go through every
14 single thing because I trust you guys paid attention. You,
15 you -- this has not been a two-week trial. That's why I don't
16 have a notepad in my hand. I mean, we haven't been here that
17 long. You heard everything. There wasn't much with the
18 second officer to me that's that important. I didn't glean a
19 lot from him. And, it may not be a good thing. Maybe he
20 should have had more. But he's on the scene. When I want
21 something from him, he doesn't know because he's just there
22 backing up. When they want stuff from him, then he starts
23 telling you what he would've done and what narcotics do and
24 all this stuff. You know, it's the State; they're the State,
25 they're officers of the State. Okay. You see how this works?

1 And we're just sitting over here trying to defend ourselves.
2 And I'm not looking for sympathy; I'm looking for you guys to
3 do the right thing. And, I told you from the very beginning,
4 I said, make them leave you firmly convinced that my client
5 was knowingly in possession of more than 14 grams of heroin.
6 That's what he's charged with.

7 Now, the next witnesses were what you call chain of
8 custody witnesses. They, in other words, to get that evidence
9 in, we have to follow it from this person to the drug locker
10 and then somebody's -- the next witness I think was brought it
11 to SLED, where it' tested. The SLED lady gets it out and she
12 tests it. They've been trying to combine these drugs by the
13 way, the whole trial. If you want -- if you want to talk
14 about who's being straight, okay, and who's -- who's into
15 trickery, they keep talking about -- I don't know if you
16 picked up on it, but trying to put it together and they're
17 doing that because there's a huge difference between 13 grams
18 of heroin and 14 grams of heroin. He's charged with 14 to 28.
19 He's not charged with 4 grams to 14; it's 14 to 28. That's
20 why they're doing that, but I continue to try to point out to
21 you, there was two bags. One was 12-something and the other
22 was like 3 grams. Okay. My guess is a person with limited
23 means was driving a drug dealer around, should probably get
24 the three grams, if he's responsible for anything. And I'm
25 not conceding that he is, but you now, three grams, that's

1 usually the person that's got to have the heroin. The guy in
2 the passenger seat walked away, got to pick his phone,
3 probably because he didn't do heroin. You know, these people
4 are smart. They're selling junk to people, they're giving
5 junk to people so that they'll drive them around so they don't
6 get busted, because that person needs that drug.

7 What about the car? The second officer, there is one
8 thing I remember. He told us, he didn't know if anybody every
9 even called the person who owned the vehicle, Mr. Bullock,
10 whoever that is. I don't know; do you? Did they tell you who
11 that is? Did they tell you anything about that? That's
12 because this Darrin fellow, who got to walk away, is shooting
13 heroin in that guy's veins, too, because he's not gonna drive
14 his car around doing what he does. So, this guy has got all
15 these people strung out on heroin so he can make that money.

16 MR. ERVIN: Your Honor, I'm gonna object. There's
17 nothing in evidence to that.

18 THE COURT: Sustained. Sustained.

19 MR. TRUSLOW: Common sense. You've got to use your
20 common sense; that's all I'm saying.

21 Now, I left off at the SLED chemist. She testified and
22 she said they take out some -- and I had to get her to agree
23 with me and she did, two bags, take out some and test it --
24 take out a little bit and test it. They weigh it. Right? I
25 say, you're a hundred percent on that weight? No, no. They

1 call it their confidence level. Okay? You need to have
2 confidence level today. I hope yours is a hundred percent.
3 Hers wasn't, because it can't be.

4 So, you ask yourself, if there was 14 grams. Please, I
5 ask you and beg you to remember that the chemist can't even
6 say that to a hundred percent, that it was 14 grams or 15
7 grams, whatever she says. Her confidence level, which I
8 admire because it's very ethical, but it's important in this
9 case, particularly when it's so close. Okay? So you take the
10 one hand -- which I submit to you the only person that knew
11 what was in them bags and what he's up to and making the money
12 and the drug deal that's tearing people's lives apart, is
13 Darrin.

14 MR. ERVIN: Objection again. No evidence.

15 THE COURT: Sustained.

16 MR. TRUSLOW: I just ask you to use your common sense.
17 We've got a lot of rules and procedure. I can give you my
18 theory of what I think happened, what I think I know happened.
19 All I can do is try to point out things to you that leads you
20 to have the same theory as me and I'm trying to the best I can
21 because this is an important case. My client, Desmond
22 Collins, he's a real person. He looks pretty good today, too.
23 This is about 18 months later, you know. One second.

24 When I told you -- see, I did get my notes because this
25 is an important case. When I told you in opening statement, I

1 said I was gonna come back and ask you for a not guilty
2 verdict. And I didn't say I was gonna come back and beg each
3 one or do it just to be nice or do it because I got a nice
4 beard for no-shave-November. I pointed out things to you.
5 I've shown you some things because you know what? Nobody can
6 prove a negative. It's an impossibility. There's no way I've
7 had a case yet that was like Matlock on T.V. where by the end
8 -- I would love one of those too, by the way -- where I wind
9 up not only convincing you that it wasn't him, but I'll show
10 you who it was. I kinda try to do that, but I can't really do
11 that, you know. But I can't prove that he's innocent and how
12 could I possibly do that unless I had a video tape of
13 everything they talked about, everything that happened, I
14 can't. That's why we have this system. Because before in
15 this country, unlike the countries I told you about before, we
16 do -- what happens to people after this part if they're found
17 guilty, we require a lot. We require that the State and the
18 State alone come in here and let you sleep good at night and
19 give you everything you need to know that you were firmly
20 convinced that my client is guilty, firmly convinced. And
21 when I told you how important you are, I meant it. You're
22 like a backstop. Nobody can do anything after this; it's on
23 you. What you say, what you come up with; that's it. That's
24 pretty important because we have nowhere else to turn. If I
25 get charged with a crime, you know what I could do? I can

1 come in and say, help him out here, you know, I'm guilty. All
2 right. Or I can say I didn't do it, man, and get a lawyer,
3 and come here. That's what -- that's two things you can do
4 and that's it. We came in here, we're here now, we're in a
5 trial; you're the only people that can render a decision.

6 The other thing I wanted to talk to you about and I think
7 it's the last thing, was I told you that, you know, when you
8 talk about reasonable doubt, in this country, it's either two
9 words or it's our justice system. It either is or it is not.
10 We either have it or we don't. And I've been involved where I
11 saw it and I've been involved in trials where I didn't. But
12 I'll tell you this, if it's not there like I told you in
13 opening statements, if it ain't here today, if it's not here
14 for him, then it's not here for anybody. There are guys like
15 me and women all over the country doing this same thing right
16 now and that's the system. That's what it is; it's you guys,
17 for real. That's what it is. There's nothing magical about
18 it, and it comes down to what you do, how seriously you take
19 reasonable doubt, and how much you require to convict somebody
20 in this country. Because, that's the only thing you can do
21 when you're charged with something is come to trial, and we
22 wind up, we sit in that chair and the only hope we've got if
23 we're innocent is that that system is strong enough to require
24 him to prove to you and give you so much evidence that you're
25 firmly convinced you're doing the right thing by finding him

1 guilty.

2 Now, when you look back and you look at this case, all I
3 can think of is really two or three main things. One, I don't
4 know why this one stuck with me, but it wasn't an Impala; it
5 was Nissan. Is that huge deal? Not really, but to me it was
6 a huge deal because he kind of sets the tone for how this case
7 was handled. Okay? It gives you an example of how important
8 it was to the officers -- and these are not narcotics
9 detectives where they've been watching somebody for a while.
10 They were patrol officers. They don't do this all the time.
11 Okay? So, they let the guy Darrin leave. Okay? They let him
12 take a phone with him. Who knows what would've been on that
13 one. We don't have it; he's got it wherever he is. I'm not
14 making up an invisible person. Everybody agrees Darrin was
15 there and Darrin got to leave. Are you satisfied with the
16 amount of information you received on why he got to leave?
17 Are you satisfied with the amount of information that you got
18 total to leave you firmly convinced enough to convict my
19 client? I hope not in this case. I hope you don't convict
20 him on this evidence. I hope it takes more than what we're
21 dealing with here today, because just because they sit
22 somebody at that table does not mean they're guilty. I told
23 you in my opening statement about how many people spend 20 or
24 30 years in prison only to have DNA show not that they were
25 not guilty but they were actually innocent, innocent. So,

1 please don't think people don't get convicted wrongly.

2 I said three things and I can only remember one other, so
3 I'll leave it at two things. I think if you get back and
4 start discussing this -- and before I tell you that last
5 thing, when you deliberate, I think the Judge's charge even
6 tells you, take turns talking, listen to each other, please
7 don't rush to judgment. Please use your common sense and --
8 and just, you know, look at everything and talk about it. And
9 please remember if there's some dispute or something that even
10 one person wants to hear or find out about, you're committed
11 to come ask the question or see a little piece of evidence.
12 If you can't remember exactly what somebody said, you can hear
13 it again. It doesn't take that long, they can cue it up and
14 you can get what you want.

15 But that last thing was put it on me. I think to me
16 that, that's strong. Now, right off the bat, it might not
17 seem like a big thing but put it on me, to me, is vastly
18 different than whatever is in that bag is mine. I'm a drug
19 dealer. I have 14 or more grams of heroin. Please think
20 about that when you discuss it. That term, that's what came
21 out of his mouth. I think honestly it just burst out of what
22 he said. He didn't say I'm a drug dealer, that's my heroin,
23 that's my money, the 1500 -- oh, I'm sorry the 3500. He said
24 put it on me. I interpret that to mean he's the drug dealer
25 but give me the charges. What else does that mean? Put it on

1 me.

2 I mean, talk about it, please, at least. Please remember
3 reasonable doubt, firmly convinced and please remember you
4 have nobody to, to reward or punish. You just need to do
5 that.

6 And oh, I remember the third thing and I'll sit down.
7 When we talked about it's your job to find the facts, I always
8 say this because sometimes I fear that it makes you think that
9 we've got to do something, you know. The point is, if you
10 can't get there; you can't get there. If you're not firmly
11 convinced, you're not firmly convinced. You are not under a
12 requirement to come out and tell us exactly what happened and
13 I think that's important to point out to you. Sometimes you
14 can't. Therein lies the point. You have to firmly convinced.
15 If you can't, then you're not.

16 So, I'm gonna wrap it up and I'm gonna go back and sit
17 down and remember the other three really important things that
18 I forgot to tell you. But thank you for your service. I
19 really want to walk out of here with my client today.

20 Thank you.

21 CHARGE TO JURY:

22 THE COURT: All right. Ladies and gentlemen, all the
23 evidence in this case has been presented to you, the attorneys
24 have made their closing arguments, and now is the time of the
25 trial when I charge you with the law to be applied in this

1 case.

2 The indictment in this case charges the Defendant with
3 trafficking in heroin. I remind you that the fact that the
4 Defendant was arrested, charged, and indicted in this case is
5 not evidence in this case and cannot be considered by you as
6 evidence of guilt in this case, nor does the Defendant's
7 arrest, charge, and indictment create any presumption or
8 inference of guilt. The indictment is simply the formal
9 written instrument which contains the charge made against the
10 Defendant. It is the formal document by which this case is
11 brought into this court. The Defendant pleads not guilty to
12 this indictment, and that plea puts the burden on the State to
13 prove the Defendant guilty. A person charged with committing
14 a criminal offense in South Carolina is never required to
15 prove his innocence. I charge you that an important rule of
16 the law is that a Defendant in a criminal trial, no matter
17 what the seriousness of the charge may be, will always be
18 presumed to be innocent of the crime for which the indictment
19 was issued unless guilt has been proven by evidence satisfying
20 you of that guilt beyond a reasonable doubt.

21 This presumption of innocence does not end when you begin
22 your deliberations, but it accompanies the Defendant
23 throughout the trial until you reach a verdict of guilt based
24 on evidence satisfying you of that guilt beyond a reasonable
25 doubt. The presumption of innocence is like a robe of

1 righteous placed about the shoulders of the Defendant
2 which remains with the Defendant until it has been stripped
3 from the Defendant by evidence satisfying you of the
4 Defendant's guilt beyond a reasonable doubt. The presumption
5 of innocence is not just a mere legal theory. It is not just
6 a legal phrase. It is a substantial right to which every
7 Defendant is entitled unless you, the jury, are satisfied from
8 the evidence of the Defendant's guilt beyond a reasonable
9 doubt.

10 Now, what is a reasonable doubt in the law? A reasonable
11 doubt is the kind of doubt that would cause a reasonable
12 person to hesitate to act. Proof beyond a reasonable doubt is
13 proof that leaves you firmly convinced of the Defendant's
14 guilt. You know very few things in this world with absolute
15 certainty and in criminal cases, the law does not require
16 proof that overcomes every possible doubt. If based on your
17 consideration of the evidence, you are firmly convinced that
18 the Defendant is guilty of the crime charged, you must find
19 the Defendant guilty. On the other hand, if you think a real
20 possibility exists that the Defendant is not guilty, you must
21 give the Defendant the benefit of that doubt and find him not
22 guilty.

23 I remind you that, during this trial, you and I have
24 certain duties to perform. As the Trial Judge, my
25 responsibility is to preside over the trial of this case. I

1 also have the duty to rule on the admissibility of evidence
2 offered during this trial. You are to consider only the
3 competent evidence before you. If any testimony was ordered
4 stricken from the record in this case during this trial, you
5 must disregard that testimony. You are to consider only the
6 testimony which has been presented from the witness stand, any
7 exhibits which have been made a part of the record in this
8 case, and any stipulations of counsel. I have the additional
9 duty to charge you the law applicable to this case. As the
10 Presiding Judge, I am the sole judge of the law of this case.
11 Your duty as jurors is to accept and apply the law as I now
12 state it to you. If you have any idea as to what the law is
13 or what the law ought to be and your idea is different from
14 what I now tell you the law is, you must disregard your idea
15 of what the law is or ought to be because you are sworn to
16 accept the law and apply the law exactly as I state it to you.

17 In every case tried in this court before a jury, the jury
18 is the sole and exclusive judge of the facts in a case. A
19 Trial Judge cannot intimate, state, comment on or make any
20 statement to a Trial Jury about the facts in a case. Since
21 you, the jury, are the sole judge of the facts in this case,
22 you're not to infer from what I have said during the progress
23 of this trial in ruling on the admissibility of evidence or
24 otherwise, or anything that I say now during the course of
25 this instruction to you that I have any opinion about the

1 facts in this case. The law does not allow me to have an
2 opinion about the facts in this case. This is a matter solely
3 for you, the jury, to determine. As jurors, your duty is to
4 determine the effect, value, weight, and truth of the evidence
5 presented during this trial.

6 Necessarily, you must determine the credibility of
7 witnesses who have testified in this case. Credibility simply
8 means believability. Your duty as jurors is to analyze and
9 evaluate the evidence and determine which evidence convinces
10 you of its truth. In determining the believability of
11 witnesses who have testified in this case, you may believe one
12 witness over several witnesses or several witnesses over one
13 witness. You may believe a part of the testimony of a witness
14 and reject the reject the remaining part of the testimony of
15 that same witness. You may believe the testimony of a witness
16 in its entirety or reject the testimony of a witness in its
17 entirety. You may consider whether any witness has exhibited
18 to you any interest, bias, prejudice, or other motive in this
19 case. You may also consider the appearance and manner of the
20 witness while on the witness stand.

21 The rules of evidence ordinarily do not permit witnesses
22 to testify to opinions or conclusions. An exception to this
23 rule exists for witnesses we call expert witnesses. A witness
24 who by education and experience has become expert in some art,
25 science, profession or calling, may state an opinion as to the

1 relevant and material matters in which the witness claims to
2 be an expert and may also state the reasons for the opinion.
3 You should consider any expert opinion received in evidence in
4 this case and like any other evidence, give it the weight you
5 think it deserves. If you decide that the opinion of an
6 expert witness is not based on sufficient education and
7 experience or if you conclude that the reasons given in
8 support of the opinion are not sound or that the opinion is
9 outweighed by other evidence, you may disregard the opinion in
10 entirely. An expert witness' testimony is to be given no
11 greater weight than that of any other witness simply because
12 the witness is an expert. Further, you're not required to
13 accept an expert's opinion even though it is not contradicted.

14 Now, I instruct you and emphasize that the fact that the
15 Defendant did not testify is not a factor to be considered by
16 you in any way in your deliberation and in your consideration
17 on the question of the guilt or innocence of the Defendant.
18 The Defendant's decision not to testify must not be considered
19 by you in any manner whatsoever. A Defendant has the
20 constitutional right to remain silent and the assertion of
21 this right must not be considered by you in your
22 deliberations. I repeat, under your oath, you are to draw no
23 conclusion whatsoever from the fact that the Defendant in this
24 case did not testify. The fact that the Defendant did not
25 testify should not even be discussed in the jury room. The

1 burden of proof as I have stated to you is on the State. The
2 Defendant is not required to prove his innocence. The burden
3 of proof remains on the State to prove guilt beyond a
4 reasonable doubt.

5 Now, in order to establish criminal liability, criminal
6 intent is required. For example, the mental state required to
7 be proven by the State for a particular crime might be
8 purpose, intent, knowledge, recklessness, or criminal
9 negligence. Criminal intent must be proven by the State
10 beyond a reasonable doubt. Criminal intent is always a matter
11 that must be determined by the jury from the circumstances
12 surrounding the situation. Criminal intent cannot be proven
13 to a mathematical certainty. Medical science cannot dissect a
14 person's brain and determine what the person had in mind. So,
15 the law says that criminal intent may be inferred from the
16 circumstances shown to have existed. This is how you make a
17 determination of whether or not the element requiring intent
18 was present. Criminal intent does not have to be established
19 by direct and positive evidence but intent may be established
20 by inference in the same way as any other fact by taking into
21 consideration the acts of the parties and all of the facts and
22 circumstances of the case. Criminal intent is a mental state,
23 a conscious wrongdoing. You must determine what the Defendant
24 intended to do based on the circumstances shown to have
25 existed. Criminal intent can arise from an action or a

1 failure to act. It may arise from negligence, recklessness,
2 or an indifference to duty, or to consequences that is
3 considered by law to be the equivalent of criminal intent.

4 Now, mere presence at the scene where a crime is
5 committed is not sufficient to prove someone guilty of the
6 crime. A defendant's presence where a crime is being
7 committed or mere association with a person who commits a
8 crime does not make a Defendant an accomplice or an aider and
9 abettor of the person committing the crime. The burden is on
10 the State to prove every element of the crime charged. If you
11 find, after reviewing all of the evidence, that the State has
12 proved that the Defendant was only present at the scene of a
13 crime and that the State has not proved beyond a reasonable
14 doubt any other participation in the crime, then you must find
15 the Defendant not guilty. The law is that proof of at the
16 scene of the crime is not sufficient to find someone guilty.

17 A statement alleged to have been made by the Defendant
18 has been admitted into evidence in this case. While the Court
19 has determined that the statement is admissible, I instruct
20 you that you make the ultimate decision of whether or not the
21 Defendant made the statement. If the Defendant did make the
22 statement, you must determine whether the statement was made
23 by the Defendant voluntarily and of his own free will. This
24 means that the statement was not caused by pressure, force,
25 fear, threats, coercion, or intimidation, or by hope or a

1 promise of leniency or reward of any kind. In determining
2 whether the statement was voluntary, you should consider both
3 the characteristics of the Defendant and the details of the
4 questioning. Some of the factors you must consider are the
5 age of the Defendant, the Defendant's education or lack of
6 education, the Defendant's mental ability or capacity, the
7 Defendant's IQ or intelligence, the Defendant's background and
8 environment, the place and length for detention, the nature of
9 the questioning, and the advice or lack thereof to the
10 Defendant of his constitutional rights including but not
11 limited to the right to remain silent, that any statement
12 could be used against him in a court of law, the right to have
13 a lawyer present, and that if he could not afford a lawyer a
14 lawyer would be pointed to represent him without any costs,
15 and that he could stop making his statement at any time. You
16 must carefully consider all of the surrounding circumstances
17 before you give any weight to an alleged statement. The State
18 has the burden of proving beyond a reasonable doubt that the
19 alleged statement was voluntary. If you determine it was, you
20 may give the statement any further consideration that you deem
21 proper. You must decide what weight, if any, should be given
22 to the alleged statement. If you determine the alleged
23 statement was not the free and voluntary statement of the
24 Defendant, you should not consider the statement at all.

25 Now, the Defendant is charged with trafficking in heroin.

1 To convict the Defendant of this crime, the State must prove
2 beyond a reasonable doubt that the Defendant knowingly sold,
3 manufactured, cultivated, delivered, purchased, or brought
4 heroin into this State, or provided financial assistance or
5 otherwise aided, abetted, attempted, or conspired to sell,
6 manufacture, cultivate, deliver, purchase, or bring heroin
7 into this State and was knowingly in actual or constructive
8 possession or knowingly attempted to become in actual or
9 constructive possession of heroin. The State must also prove
10 beyond a reasonable doubt that the amount of heroin was 14
11 grams or more but less than 28 grams. To prove possession,
12 the State must prove beyond a reasonable doubt that the
13 Defendant had both the power and the intent to control the
14 disposition or use of the heroin. Possession may be either
15 actual or constructive. Actual possession means that the
16 heroin was in the actual physical custody of the Defendant.
17 Constructive possession means that the Defendant had dominion
18 and control or the right to exercise dominion or control over
19 either the heroin itself or the property on which the heroin
20 was found. Mere presence at the scene where the drugs were
21 found is not enough to prove possession. The Defendant's
22 knowledge and possession may be inferred when a substance is
23 found on the property under the Defendant's control. However,
24 this inference is simply an evidentiary fact to be taken into
25 consideration by you along with the other evidence in the case

1 and to be given the weight you decide it should have.

2 Two or more persons may have joint possession of a drug.
3 To deliver means to actually, constructively, or attempt to
4 transfer the drug. Distribute means to deliver other than by
5 administering or dispensing the drug. Manufacture means to
6 produce, or bear, convert, process, plant, cultivate, grow, or
7 harvest a drug naturally or chemically. Manufacturing
8 includes any packaging or repackaging of the drug or labeling
9 or relabeling of the drug's container.

10 Now, there are two possible verdicts which you may find
11 in this case. No significance whatsoever is to be given to
12 the order in which I state these possible verdicts to you. I
13 simply have to state one first and one second. The possible
14 verdicts in this case are either guilty or not guilty.

15 Ladies and gentlemen, your verdict must be a unanimous
16 verdict. Ms. Shultis, when the jury agrees on a verdict, you
17 will write the verdict in the verdict portion here on the
18 indictment, and you sign your name and date it. Knock on the
19 door and advise the bailiff that the jury has reached a
20 verdict.

21 I'm gonna excuse you back to the jury room, but please do
22 not begin your deliberations now. I've got to go over with
23 the attorneys whether there are any additional charges or
24 corrections in the charges to be given to you. If there are
25 and I deem them appropriate, I'll bring you back into the

1 courtroom and I'll make those additional charges or
2 corrections. If there are none, the exhibits will be brought
3 back to you by the bailiff and the bailiff will instruct you
4 to begin your deliberations.

5 Now please do not begin your deliberations until you are
6 instructed to do so by the bailiff. Okay?

7 Thank you very much.

8 (REPORTER'S NOTE: Jury exits courtroom. The following takes
9 place outside the presence of the jury.)

10 BY THE COURT:

11 THE COURT: All right. Any exceptions to the jury charge
12 by the State?

13 MR. ERVIN: No, Your Honor.

14 THE COURT: Any by the Defense?

15 MR. TRUSLOW: No, Your Honor.

16 THE COURT: All right. Let's make sure we've got all the
17 exhibits so they can go back to the jury. Here's the verdict
18 for her to fill it in.

19 And if you could please go and bring Mr. Heverly out, the
20 alternate.

21 COURT REPORTER: Mr. Ervin, we need to review the
22 exhibits when you get a minute.

23 (REPORTER'S NOTE: Counsel reviews and agrees to exhibits.)

24 THE COURT: All right. Mr. Heverly, this is the part of
25 the trial I hate. As the alternate, since we still have our

1 12 jurors, the law says you cannot participate in
2 deliberations. I hate that because we make you sit through
3 the whole trial and then we don't let you make a decision.

4 JUROR 196: I understand.

5 THE COURT: You can do whatever you like. If you want to
6 stay and see the outcome, you can do that; if you want to
7 leave, you can do that. This will conclude your duty as a
8 juror not only in this case, but for this week. Okay?

9 JUROR 196: Okay.

10 THE COURT: And I want to thank you for your service.
11 Do you have anything in the jury room?

12 JUROR 196: I do.

13 THE COURT: Okay. How about go with him before they
14 start deliberations and let him get whatever he has and then,
15 as I said, if you want to stay, you can stay; if you want to
16 go, you're free to go. Thank you very much.

17 JUROR 196: Thank you.

18 THE COURT: All right. All right. Let's go ahead and
19 get these exhibits and take them back. Have we taken them
20 back yet?

21 COURT REPORTER: No, sir, Judge, I was waiting for him to
22 come back.

23 THE COURT: Okay, When he comes back.

24 COURT REPORTER: I told him to come back and get them.

25 THE COURT: Okay.

1 MR. TRUSLOW: Your Honor, are we at ease?

2 THE COURT: I'm waiting -- did they ever come back?

3 COURT REPORTER: He's got them and gone.

4 THE COURT: Oh, he's already gone and told them to begin
5 their deliberations.

6 COURT REPORTER: Yes, sir.

7 THE COURT: Okay. Yeah, we'll be in recess until we get
8 a verdict. Okay?

9 MR. ERVIN: Thank you, Your Honor.

10 THE COURT: All right. Thank you very much.

11 THE COURT: Thank you.

12 (REPORTER'S NOTE: Deliberations begin at 3:01 P.M.)

13 **(RECESS.)**

14 *******OFF THE RECORD*******

15 **(On the Record.)**

16 VERDICT OF THE JURY:

17 THE COURT: All right. I understand the jury has reached
18 a verdict.

19 Anything from the State before we bring the jury in?

20 MR. ERVIN: No, Your Honor.

21 THE COURT: Anything from the Defense?

22 MR. TRUSLOW: Nothing, Your Honor.

23 THE COURT: All right. Let's go ahead and bring the jury
24 in.

25 (REPORTER'S NOTE: Jury enters courtroom.)

1 THE COURT: All right. Ladies and gentlemen, welcome
2 back.

3 Ms. Shultis, I understand the jury has reached a verdict;
4 is that correct?

5 JUROR 382: Yes, sir.

6 THE COURT: Have you written the verdict on the back of
7 the indictment and signed your name?

8 JUROR 382: Yes, sir.

9 THE COURT: All right. If you would please hand it to
10 the bailiff.

11 All right. I'd ask the Clerk of Court if you'd please
12 publish the verdict. You want me to do it?

13 CLERK: Yes, sir.

14 THE COURT: All right. I don't mind doing it.

15 On indictment 2016-GS-26-3956, State of South Carolina
16 versus Desmond Sharmaine Collins. On the charge of
17 trafficking in heroin, the verdict of the jury is guilty.

18 If this is the verdict, please signify by raising your
19 right hand.

20 All right. Let the record reflect that all jurors raised
21 their right hand.

22 Any polling of the jury by the Defense?

23 MR. TRUSLOW: Please, Your Honor.

24 POLLING OF THE JURY:

25 THE COURT: All right. Ladies and gentlemen, we're gonna

1 poll the jury. Now, what that means is when I call your jury
2 number, I'm gonna ask that you stand, and I'm gonna ask you
3 two questions. First, I'm gonna ask you is this your verdict
4 and second I'm gonna ask you is this still your verdict. So,
5 please listen up and if -- when I call your number, stand and
6 answer those two questions.

7 Juror Number 10, is this your verdict?

8 JUROR 10: Yes, sir.

9 THE COURT: Is it still your verdict?

10 JUROR 10: Yes, sir.

11 THE COURT: Thank you.

12 Juror Number 221, is this your verdict?

13 JUROR 221: Yes, sir.

14 THE COURT: Is it still your verdict?

15 JUROR 221: Yes, sir.

16 THE COURT: Thank you very much.

17 Juror Number 122, is this your verdict?

18 JUROR 122: Yes, Your Honor.

19 THE COURT: Is it still your verdict?

20 JUROR 122: Yes, Your Honor.

21 THE COURT: Thank you very much.

22 Juror Number 278, is this your verdict?

23 JUROR 278: Yes.

24 THE COURT: Is it still your verdict?

25 JUROR 278: Yes.

1 THE COURT: Thank you.
2 Juror Number 105, is this your verdict?
3 JUROR 105: Yes, sir.
4 THE COURT: Is it still your verdict?
5 JUROR 105: Yes, sir.
6 THE COURT: Thank you.
7 Juror Number 93, is this your verdict?
8 JUROR 93: Yes, sir.
9 THE COURT: Is it still your verdict?
10 JUROR 93: Yes, sir.
11 THE COURT: Thank you.
12 Juror Number 121, is this your verdict?
13 JUROR 121: Yes, sir.
14 THE COURT: Is it still your verdict?
15 JUROR 121: Yes.
16 THE COURT: Thank you.
17 Juror Number 243, is this your verdict?
18 JUROR 243: Yes, sir.
19 THE COURT: Is it still your verdict?
20 JUROR 243: Yes, sir.
21 THE COURT: Thank you.
22 Juror Number 281, is this your verdict?
23 JUROR 281: Yes, sir.
24 THE COURT: Is it still your verdict?
25 JUROR 281: Yes, sir.

BY THE COURT

1 THE COURT: Thank you.

2 Juror Number 95, is this your verdict?

3 JUROR 95: Yes, sir.

4 THE COURT: Is it still your verdict?

5 JUROR 95: Yes, sir.

6 THE COURT: Thank you.

7 Juror Number 23, is this your verdict?

8 JUROR 23: Yes, Your Honor.

9 THE COURT: Is it still your verdict?

10 JUROR 23: Yes, sir.

11 THE COURT: Thank you.

12 And Juror 382, is this your verdict?

13 JUROR 382: Yes, sir.

14 THE COURT: Is it still your verdict?

15 JUROR 382: Yes, sir.

16 THE COURT: All right. Thank you very much.

17 BY THE COURT:

18 THE COURT: All right. Ladies and gentlemen, that will
19 conclude your duties not only on this trial, but for this week
20 and I want to thank you for your service as jurors. I know
21 it's not a fun thing to do and I know it's a hard thing to do,
22 but we do need you to perform this service and you've provided
23 an invaluable service to the citizens of Horry County and to
24 this Court, and I want to thank you. So, you're gonna be free
25 to go not only for the remainder of the day, but for the

1 remainder of the week. You've got a one-year disqualification
2 from serving jury duty in Circuit Court and you've got a three
3 year exemption. I hope you don't exercise your exemption
4 because we need good jurors and I want to thank you for your
5 service. But, you're free to go for the remainder of the day
6 and for the week.

7 Thank you very much.

8 (REPORTER'S NOTE: Jury exits courtroom.)

9 THE COURT: All right. Any post-trial motions at this
10 time?

11 MOTIONS:

12 MR. TRUSLOW: Yes, Your Honor. We make a motion for a
13 new trial. I renew all my previous motions as well.

14 THE COURT: All right. I'm gonna deny the motion, and
15 I'm gonna stand by my prior rulings on the other motions.

16 Anything else?

17 MR. TRUSLOW: No, sir.

18 SENTENCE OF THE COURT:

19 THE COURT: All right. Any reason why we can't go ahead
20 and impose sentence at this time?

21 MR. TRUSLOW: No, sir.

22 THE COURT: All right. Have we got a sentence sheet?

23 MR. ERVIN: Yes, sir. May I approach?

24 THE COURT: Yes. Thank you.

25 MR. ERVIN: Yes, sir.

1 THE COURT: All right. Mr. Truslow, anything in
2 mitigation?

3 MR. TRUSLOW: I'm aware of the sentence and the sentence
4 implications; there's not a lot of discretion. I would point
5 out to you that -- that nobody is one dimensional. Mr.
6 Collins, I've got to know over the last 16 or 17 months and
7 learned a lot about him. He's a -- outside of getting in
8 trouble with this issue here, he's a good father. He's got an
9 11-year-old son. He's got a lot of support, a lot of family.
10 They're here. That would be about it.

11 THE COURT: All right. Thank you.
12 Mr. Collins, anything you want to say?

13 MR. COLLINS: No.

14 THE COURT: All right. Prior record?

15 MR. ERVIN: Yes, sir. 1999 burglary second; 2007 DUS;
16 2007 ABHAN; 2009 burglary second -- and I'm sorry, Your Honor,
17 that '99 and '09 were both non-violent; as well as FTC fraud;
18 2010 MDP crack; 2011 CDV; 2012 possession of marijuana; 2012
19 strong armed robbery; and 2015 receiving stolen goods and DUS.

20 MR. TRUSLOW: Your Honor ---

21 MR. ERVIN: I would put on the record also, Mr. Collins
22 had two, I'm sorry, three separate charges aside from this one
23 and the State will obviously dismiss those.

24 THE COURT: All right.

25 MR. TRUSLOW: Your Honor, I wanted to ask you a question.

1 I want to place on the record an objection to the mandatory
2 minimum sentence associated with that statute.

3 THE COURT: Okay.

4 MR. TRUSLOW: I do that now or after the sentence or
5 both?

6 THE COURT: If you want to go ahead and put anything on
7 the record now, you can go ahead and do it.

8 MR. TRUSLOW: Well, I'm not gonna detail it, just based
9 on the constitution, separation of powers, I think that
10 mandatory minimum sentence is unconstitutional. That's it.

11 THE COURT: All right. Thank you.

12 What's the date, the 15th?

13 MR. TRUSLOW: Yes, sir.

14 MR. ERVIN: Yes, sir.

15 THE COURT: All right. Mr. Collins, you have been found
16 guilty by jury trial on the charge of trafficking in heroin
17 more than 14 grams but less than 28 grams. It is a mandatory
18 sentence. Mandatory minimum is 25 years and a \$200,000 fine.
19 So, I impose 25 years and a mandatory --- you're committed to
20 the State Department of Corrections for 25 years and ordered
21 to pay a fine of \$200,000.

22 Thank you.

23 (ADJOURNED.)

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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of State of South Carolina versus Desmond Sharmaine Collins, held in the Court of General Sessions for Horry County, Horry County Courthouse, Conway, South Carolina, on November 13-15, 2017, taken by Dixie C. Eubank.

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

Kay H. Richardson
Official Court Reporter

February 10, 2018.

1 STATE OF SOUTH CAROLINA) **TRANSCRIPT OF RECORD**
2 COUNTY OF HORRY) Case No. 2020-CP-26-4318

3 **ORIGINAL - PCR**

4 -----
5 December 2, 2022

6 **BEFORE:** The Honorable Steven DeBerry

7 -----
8 DESMOND COLLINS,

9 Applicant,

10 vs.

11 THE STATE OF SOUTH CAROLINA,

12 Respondent.
13 -----

14
15 APPEARANCES:

16
17 Dayne Phillips, Esq.
18 Appearing for the Applicant.

19 Chelsey Marto, Esq.
20 Appearing for the Respondent.

21 Official Court Reporter
22 Natalie Dahl, RPR
23
24
25

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EXHIBITS

(NONE)

P-R-O-C-E-E-DI-N-G-S

MS. MARTO: This is Desmond Collins. We are here today in Desmond Collins v. State of South Carolina, Docket No. 2020-CP-26-4318. He is presently confined in the South Carolina Department of Corrections. He was indicted for trafficking heroin in September of 2016. He was represented by Mr. Kirk Truslow, and Grayson Irvin prosecuted the case.

On November 13 through 15th of 2017, he proceeded to trial before Judge Culbertson. He was found guilty as charged and sentenced to 25 years imprisonment. He filed a timely Notice of Appeal, and was represented by counsel, Kirk Truslow, throughout the appellate process.

The South Carolina Court of Appeals dismissed the appeal by unpublished opinion because the issue raised was not preserved. The remittitur was issued January 8, 2020. This application was filed July 27, 2020, and the State's return was made May 26, 2021. With that, I'll turn it over to Mr. Phillips.

THE COURT: All right. Mr. Phillips.

MR. PHILLIPS: Good morning, Your Honor.

THE COURT: Good morning.

MR. PHILLIPS: I'll outline the allegations, just for the record, and then we'll go from there.

1 THE COURT: Let me first ask, Ms. Marto --

2 MS. MARTO: Yeah, my apologies, Your Honor.

3 THE COURT: All right. Mr. Phillips.

4 MR. PHILLIPS: Thank you, Your Honor. As I said,
5 if Your Honor wishes, I'll outline the allegations so
6 you will understand what we're going into as far as
7 testimony.

8 Specifically, Applicant alleged that trial
9 counsel denied his right to assistance of counsel as
10 guaranteed by the Sixth and Fourteenth Amendments to
11 the United States Constitution, and Article 1,
12 Sections Three and Fourteen, of the South Carolina
13 Constitution. Specifically, trial counsel's
14 unreasonably deficient performance failed below an
15 objective standard of reasonableness under prevailing
16 professional norms and prejudiced the Applicant
17 because there is a reasonable probability that but for
18 trial counsel's errors, the result of the proceeding
19 would have been different; citing the *Strickland*
20 *versus Washington* standard for ineffective assistance
21 of counsel. Therefore, counsel's conduct so
22 undermines the proper functioning of the adversarial
23 process that the trial cannot be relied upon as having
24 produced a just result.

25 We're also alleging -- in addition to ineffective

1 assistance of trial counsel, we're alleging the
2 ineffective assistance of appellate counsel and that
3 they denied the right of effective assistance of
4 counsel as guaranteed by the Sixth and Fourteenth
5 Amendments to the United States Constitution, Article
6 One, Section Three and Fourteen, as to appellant
7 counsel's representation; specifically, appellant
8 counsel's unreasonable deficient performance
9 prejudiced the Applicant because there is a reasonable
10 probability that but for appellate counsel's errors,
11 the results of the proceeding would have been
12 different.

13 With that, that is the umbrella, Your Honor, of
14 the allegations.

15 As to the specific allegations that we've raised,
16 it's that the South Carolina Court of Appeals found
17 that trial counsel failed to preserve for appellate
18 review the issue whether the trial court erred in
19 failing to conduct an evidentiary hearing before
20 ruling on a 400-page cell phone report -- did not have
21 any exculpatory value.

22 Specifically, the Court of Appeals found that
23 trial counsel failed to make this argument at trial or
24 request an evidentiary hearing; essentially, that it
25 was waived. The opinion number for that was

1 2019-UP-387, from the Court of Appeals, published on
2 December 18 -- unpublished, excuse me, on December 18
3 of 2019.

4 Next allegation is that the South Carolina Court
5 of Appeals also found that trial counsel failed to
6 move for a continuance to allow him an opportunity to
7 review the 400-page cell phone report and that counsel
8 stipulated at trial that the 400-page cell phone
9 report was not relevant; therefore, the Court of
10 Appeals found that counsel waived his right to
11 challenge that issue on direct appeal.

12 Next issue is that Applicant has alleged that
13 trial counsel failed to properly raise, argue, and
14 preserve for appellate review whether the State
15 committed a discovery violation by failing to disclose
16 the 400-page cell phone report; specifically, that in
17 addition to that, the trial counsel also failed to
18 raise, argue, and preserve for appellate review
19 whether the State committed a discovery violation by
20 failing to disclose the identity of the material
21 witness a week before trial.

22 Next allegation is that Applicant alleged trial
23 counsel failed to properly raise, argue, and preserve
24 for appellate review the issue of whether the trial
25 court erred in prohibiting him from cross-examining an

1 officer about the Solicitor's Office dismissing the
2 officer's DUI charge prior to trial.

3 Trial counsel failed to properly raise, argue,
4 and preserve for appellate review the issue whether
5 the trial court erred in denying his motion to
6 suppress the evidence seized by the police pursuant to
7 an illegal search and seizure; specifically, that
8 there was no probable cause to support the traffic
9 stop or to extend an unlawful seizure.

10 Next allegation is that trial counsel failed to
11 properly raise, argue, and preserve for appellate
12 review whether Applicant voluntarily provided a
13 statement to law enforcement.

14 Next allegation is trial counsel failed to
15 challenge the admissibility of drug evidence based on
16 the police officers' handling and the chain of custody
17 of the evidence.

18 Next allegation is that trial counsel failed to
19 conduct a reasonable investigation and to develop all
20 reasonable available, relevant, and admissible or
21 mitigating evidence in preparation of Applicant's
22 defense.

23 Next allegation is that trial counsel failed to
24 adequately prepare for trial by not interviewing
25 witnesses who could have testified regarding the

1 Applicant's good character and reputation, and it was
2 reasonable and necessary to present this evidence at
3 trial and request a jury instruction on good character
4 and reputation.

5 Next allegation is that trial counsel pursued an
6 unreasonable trial strategy during his opening
7 statement -- and I won't read the whole line, we'll
8 wait until we take testimony.

9 Next allegation is that trial counsel failed to
10 properly raise and argue the defense of mere presence.

11 Next allegation is that trial counsel pursued an
12 unreasonable trial strategy in his closing argument,
13 and I'll save the specifics for the testimony.

14 Next allegation is trial counsel improperly shift
15 the burden of proof during his closing argument by
16 imploring the jury to get to the truth based on the
17 facts of the case.

18 Next allegation is that trial counsel pursued an
19 unreasonable trial strategy by, essentially, arguing
20 the defense of mere presence without actually doing
21 so, but when he also implied that Applicant was the
22 driver for a drug dealer, essentially, an aider and
23 abettor, who participated in the drug dealer's
24 criminal activity, and that this was an unreasonable
25 trial strategy, and by failing to also put in the

1 position of a request for a lesser included offense.

2 As to ineffective assistance of appellate
3 counsel, the appellate counsel failed to raise the
4 issue whether trial court erred in denying its motion
5 for a continuance to investigate the discovery issue
6 regarding the identity of the passenger in the
7 Applicant's car.

8 Next allegation is that appellate counsel failed
9 to raise and argue the issue whether trial court erred
10 in refusing to dismiss, or in the alternative, declare
11 a mistrial based on the untimely discovery regarding
12 the 400-page cell phone report.

13 And then the other allegations are, really,
14 umbrella allegations; that that if they were
15 preserved, then they would be ineffective assistance
16 of appellate counsel because they were preserved and
17 not raised and ruled on at the direct appeal stage.

18 THE COURT: All right, sir.

19 MR. PHILLIPS: We call the Applicant.

20 (DESMOND COLLINS, having been duly sworn,
21 testified as follows:)

22 THE WITNESS: My name is Desmond Collins,
23 C-O-L-L-I-N-S.
24
25

DESMOND COLLINS - DIRECT EXAMINATION

1 **DIRECT-EXAMINATION**

2 BY MR. PHILLIPS:

3 Q Mr. Collins, if you could, explain how the
4 representation started with Mr. Truslow.5 A I went to see Mr. Truslow and a couple other
6 lawyers, and I choosed him because of his reputation.
7 I thought he was up to par. When I went to see him, I
8 only saw him a couple of times, few times actually.
9 Every time I went to see him, we really never discussed
10 anything about the case, only once when the State had
11 sent their discovery, and we really didn't go too much
12 over the case or trial or anything.13 Q To be specific, how many times did you meet with
14 him?

15 A Four times.

16 Q About four times?

17 A Uh-huh.

18 Q And you reviewed the discovery?

19 A Yes. That's it. We reviewed the discovery that
20 the State sent to him.21 Q Now, in the meetings where you reviewed discovery
22 and prepared for trial, kind of go into that; elaborate
23 what was discussed regarding the preparation for trial.24 A We never prepared for trial. Honestly, I was
25 thinking -- he was thinking he was going to get a plea,

DESMOND COLLINS - DIRECT EXAMINATION

1 and I was going to plea to something that I wasn't
2 going to, and so we never really even prepared for
3 trial.

4 Q When you said "never prepared," I'm really asking
5 you about when you were there in his office, what did
6 you discuss?

7 A We discussed what did -- once discovery came in,
8 and pretty much that was it. He only went over what
9 was in discovery.

10 Q All right. So was there any discussion regarding
11 having a suppression hearing; in other words,
12 challenging your statements, basically challenging
13 evidence?

14 A No.

15 Q Was there any specific discussion whether you
16 would testify, present evidence, present a defense?

17 A No.

18 Q And so was there any discussions related to the
19 trial itself?

20 A No. We never thought we would make it that far.

21 Q Now, again, going to specifically your trial, the
22 main issue we have here, what was ultimately raised to
23 the South Carolina Court of Appeals, you've had an
24 opportunity to review your appellate documents?

25 A Yes.

DESMOND COLLINS - DIRECT EXAMINATION

1 Q And you also had an opportunity to review your
2 trial transcript?

3 A Yes.

4 Q And at your trial, and of course you were there,
5 with the issue regarding the 400-page cell phone
6 report, is it your position when that was raised on
7 appeal -- ultimately, the Court of Appeals found that
8 that was not preserved for appellate review?

9 A Yes.

10 Q And so that is one of the issues that you raised;
11 that it's ineffective assistance of appellate counsel?

12 A Yes.

13 Q Now, as far as with the cell phone report, had
14 you had any discussions when this came up -- and it
15 occurred at the -- you know, essentially, when the cell
16 phone report became known to Mr. Truslow, did you have
17 any separate conversations about that report?

18 A That day when the report came up, they recessed
19 us early that day so we could go over that. But after
20 they let us go, I tried to contact Mr. Truslow to see
21 what is going on with everything, and he -- I couldn't
22 get in contact with him. I didn't see him, and we
23 never talked about it.

24 Q Was there any discussion about a continuance,
25 anything of that nature?

DESMOND COLLINS - DIRECT EXAMINATION

1 A No.

2 Q So as far as the 400-page report was concerned,
3 you and him never discussed any strategy or anything
4 about it?

5 A No, we didn't.

6 Q Did you ever see the report?

7 A No, I didn't. I saw it when he brought it in,
8 but I never read it, looked through it, none of it.

9 Q No back and forth between him --

10 A No.

11 Q -- as far as what was in there and the relevance?

12 A No.

13 Q Was there any discussion about any other issues
14 that he could raise, legal issues, regarding that?

15 A No.

16 Q Like a discovery violation?

17 A He mentioned that to me during trial, but he
18 never -- he never did anything about it.

19 Q At what point did he mention it?

20 A When they brought it in. When they brought it
21 in, he was like -- because I kind of pressured him for
22 it. When they did bring it in, he said that is
23 something about the Brady, ain't had a timely manner to
24 go over anything, but he didn't go into, really, any
25 detail because it was during trial.

DESMOND COLLINS - DIRECT EXAMINATION

1 Q And, ultimately, the Court of Appeals found that
2 he stipulated to that?

3 A Yes, sir.

4 Q And that is why they didn't rule on it?

5 A Correct.

6 Q There was an officer related to your case that
7 had a DUI dismissed. That wasn't raised to the South
8 Carolina Court of Appeals or properly objected to
9 regarding him having a prior charge for a DUI, being
10 able to cross-examine on that; is that one of the
11 issues you raised?

12 A Yes, it is.

13 Q And you believe that would have amounted to
14 ineffective assistance of counsel?

15 A Yes, I do.

16 Q Now, again, as far as a motion to suppress
17 related to the traffic stop and the seizure, did you
18 have any discussions regarding what a suppression
19 hearing was or how to challenge the admissibility of an
20 illegal evidence as far as your traffic stop?

21 A No, we did not have no discussion about it, but
22 during pretrial, he went on his own accord and
23 maybe mentioned something to the judge about that, but
24 we ain't never had no discussion about it.

25 Q And did he raise that on appeal?

DESMOND COLLINS - DIRECT EXAMINATION

1 A No, he didn't.

2 Q Ultimately, he only raised one issue?

3 A One issue.

4 Q And as far as -- is it your opinion that he
5 should have objected and made specific arguments as to
6 illegal search and seizure?

7 A Yes.

8 Q Now, as to statements provided to law
9 enforcement, was there any discussion regarding what
10 we call a "Denno hearing"; in other words, whether you
11 could challenge any statements made to law
12 enforcement?

13 A No.

14 Q Was that argued or raised to the appellate court?

15 A It wasn't.

16 Q It is your opinion that that was ineffective
17 assistance of counsel?

18 A Yes.

19 Q You wanted him to challenge your statement?

20 A Yes.

21 Q Now, in this case there was an officer who field
22 tested evidence numerous times, and there was potential
23 chain of custody issues. Was there any discussion of
24 the admissibility of the evidence itself based on the
25 field testing or a discussion of using the words "chain

DESMOND COLLINS - DIRECT EXAMINATION

1 of custody?" Had you had any discussions about that?

2 A No, we didn't.

3 Q At trial, and again on appeal, this issue
4 wasn't --

5 A Brought up, no.

6 Q And your position is that it should have been?

7 A It should have been.

8 Q As far as conducting an investigation, during
9 those four meetings, was there any specific witnesses
10 you told him to go track down and find?

11 A Yes.

12 Q Who are they?

13 A The passenger of the vehicle that was driving.

14 Q What is his name?

15 A Darrin Lawyer.

16 Q Spell that for us.

17 A D-A-R-R-I-N, Lawyer, L-A-W-Y-E-R.

18 Q Lawyer, like the same spelling as --

19 A Uh-huh, as a lawyer.

20 Q You asked him to find this individual?

21 A Yes. At the time, I only knew him by his
22 nickname, but during pretrial, we got the full name.

23 Q What was the nickname?

24 A Little D.

25 Q You said you found out during the trial the full

DESMOND COLLINS - DIRECT EXAMINATION

1 name?

2 A Pretrial.

3 Q How did --

4 A During pretrial I asked him about did they ever
5 find the passenger. That is one of the main reasons I
6 hired him, so he could do the investigation to get the
7 passenger, the guy. So he pressured the Solicitor
8 during pretrial, forced a name -- to give him a name
9 during pretrial, and that is how we got the name.

10 Q Okay. So that was the first you heard of it
11 there at the trial?

12 A Yes.

13 Q And, as far as you know, there was no additional
14 investigation as to this Darrin Lawyer or --

15 A As far as I know.

16 Q Have you seen anything about him or know anything
17 about him?

18 A No, I don't.

19 Q Now, as far as witnesses that could have come and
20 testified as to your character, did you have any
21 discussions about that?

22 A No, we didn't discuss bringing up no witnesses or
23 anything. We didn't discuss the trial at all.

24 Q So what I'm saying is, as far as good character
25 witnesses, that was not a discussion ever had?

DESMOND COLLINS - DIRECT EXAMINATION

1 A No.

2 Q And, again, you said you never discussed whether
3 you would actually present evidence?

4 A No.

5 Q During the opening statement, if you could, you
6 believe there was a portion of the opening statement
7 that was provided by your lawyer that, ultimately,
8 shouldn't have been presented?

9 A I do.

10 Q And if you could, do you have -- could you
11 describe that in detail.

12 A He kind of was telling the jury that I was
13 guilty, and pretty much that if you all find him -- if
14 you find me guilty, they are going to slap my hands or
15 something in that manner. He was pretty much saying I
16 was guilty during the opening statement.

17 Q So, like, say one -- you tell me if this is
18 incorrect, but one specific things is, quote, "If you
19 do your job and do it diligently, you find my defendant
20 guilty, I'm going to shake everyone's hand." Then,
21 later on, he says: "When this trial is over, I'll go
22 home. We all go home."

23 A Yes.

24 Q That is one of the lines?

25 A Yes. Yes.

DESMOND COLLINS - DIRECT EXAMINATION

1 Q And then there was a discussion regarding talking
2 about football fields where Mr. Ervin -- he is
3 referring to the Prosecutor as marching down with this
4 evidence, and he comes all the way down to the 20 yard
5 line, the 10 yard line, the 5 yard line, the end zone,
6 and he scores; he's guilty.

7 And then he poses a question: "Who drives for
8 people that are dealing drugs? The drug dealer or the
9 heroin addict to get his heroin"; that is one of the
10 quotes?

11 A Yes.

12 Q That is one of the quotes. Again, "The heroin
13 addict to get his heroin. I'm sitting at that table;
14 I'm presumed innocent. In my head, I'm presumed
15 guilty; that's what I think. I ask you please, please
16 go by the law. Keep the system strong if you do that.
17 If you find him guilty; great, you did your job";
18 that's the quote?

19 A That's the quote, yes.

20 Q And it is your opinion that that was an
21 unreasonable trial strategy to present that?

22 A Yes.

23 Q And is it also your argument that that shifts the
24 burden of proof?

25 A Yes.

DESMOND COLLINS - DIRECT EXAMINATION

1 Q Or dilutes the burden of proof of you being
2 presumed innocent?

3 A Yes.

4 Q Now, was there any discussion with your lawyer
5 regarding the defense of mere presence?

6 A No, there was not.

7 Q So the words "mere presence" as asserting a
8 defense, that was never discussed?

9 A Never discussed.

10 Q Are you aware of the defense of "mere presence"?

11 A Really, don't. I went through it, and now I
12 understand what mere presence is.

13 Q So it is your opinion it would have been a viable
14 defense to be presented?

15 A Yes.

16 Q Now, during your closing argument, there was
17 portions of it that you also believed should have been
18 objected to?

19 A Yes.

20 Q Could you elaborate on that some?

21 A During the closing statement, he kind of shift
22 the burden. Can I get my paper?

23 Q Yeah. You can refresh your recollection.

24 A Refresh my memory.

25 (A brief pause in the proceedings.)

DESMOND COLLINS - DIRECT EXAMINATION

1 A In the closing statement he --

2 Q (MR. PHILLIPS) Would it help if you saw your
3 transcript?

4 A Transcript, yeah; that's what I needed.

5 Q Just take your time and read it. You don't have
6 to read it out loud, just refresh your recollection
7 about the closing statement.

8 A (Witness examines document.)

9 (A brief pause in the proceedings.)

10 A Right here he says: "Well, like I told you in
11 the opening statement, not criticizing them, it's a
12 tough job, but I want to tell you, if you are going to
13 come in here and ask people to convict somebody for
14 something as serious as this that's going to have the
15 impact like this is going to have, him and his family,
16 you got -- you got to do more than what you've done
17 here. You don't come in here and say you are not
18 allowed to turn a raid and not have a picture of
19 something. You don't say he took turns going 10 miles
20 an hour when we all saw his brake light on. We could
21 go back and watch the video."

22 Q (MR. PHILLIPS) Now, let me stop you there. So
23 you are reading from the closing argument. Let me
24 kind of walk us through. So in the closing argument
25 itself, there is a discussion about, essentially, drug

DESMOND COLLINS - DIRECT EXAMINATION

1 addiction and people doing drugs; specifically, the
2 quote, "Then you got other people who shoot up in
3 their arms, killing themselves, overdosing, doing
4 things that they ordinarily never would think they
5 would do. I can't imagine when they are 8, 10, 12
6 years old saying I want to grow up to be a heroin
7 addict or drive a drug dealer around."

8 A Yes. There he was saying I was doing drugs, and
9 I know what was going on, driving drug dealers around,
10 which we never discussed him to say any of these
11 things.

12 Q There was also a quote in the closing argument
13 about -- and I think this was in response, obviously,
14 to the prosecutor's closing, and this is something they
15 typically do, and it is called defense attorneys
16 magicians, smoke in mirrors.

17 So in rebut of that, your lawyer says: "I'm
18 asking you as a defense lawyer, a magician who is
19 going to trick you, to look at the facts. Now, if I
20 go through all of that and you convict him, there's
21 nothing else I can do. That's what we're here for:
22 The facts."

23 And then, later, his quote is: "If you want to
24 get to the truth, or as close you can --

25 A Seek the truth, yes. He was telling them to seek

DESMOND COLLINS - DIRECT EXAMINATION

1 the truth.

2 Q That is another quote you had an issue with?

3 A Yes.

4 Q Another one: "My guess is a person with limited
5 means driving a drug dealer around should probably get
6 3 grams if he's responsible for anything"; is that
7 another quote?

8 A That is another quote he mentioned.

9 Q As far as -- again -- last one. Another quote
10 would be: "They are selling junk to people, giving
11 junk to people so that they'll drive around so they
12 don't get busted."

13 A Yes. Yes.

14 Q So you believe he should have objected to those?

15 A Yeah. He shouldn't have said any of those
16 things.

17 Q And then raise those on appeal, if they were
18 preserved?

19 A Yes.

20 Q Now, with the truth language -- again, I know you
21 are not a lawyer and I'm not asking you to make a legal
22 opinion, but you since have come to learn that being
23 presumed innocent, even the judge is not allowed to
24 tell the jury to seek the truth?

25 A Yes.

DESMOND COLLINS - DIRECT EXAMINATION

1 Q With the argument that the implication that you
2 are knowingly driving a drug dealer, was there any
3 discussion or authorization to make that argument?

4 A No, there wasn't.

5 Q As far as trial strategy, to request a lesser
6 included offense of possession of heroin, was there any
7 discussion regarding that?

8 A When he was doing the statement, when he was
9 charging the jury, I guess, he mentioned something to
10 me at that time, a few minutes before he was charging
11 the jury, but not prior.

12 Q So while you were in the trial?

13 A While in trial.

14 Q Now, on appeal, was there any discussions after
15 you were convicted with him regarding what issues he
16 planned to raise, what issues he thought were preserved
17 or had merit?

18 A I write him numerous times telling him what I
19 feel was wrong during the case. See, I didn't know too
20 much about having preserve, and he kind of explained
21 what was preserve and what he can bring up.

22 So when he finally got to the appeal, what he
23 wrote up, I see that the prosecutor came back saying
24 that it wasn't preserved. I asked him about that, and
25 he said it's okay, everything is fine. Everything is

DESMOND COLLINS - DIRECT EXAMINATION

1 going to go according to plan.

2 Q As far as the one issue that was raised and found
3 not preserved, that it was, essentially, waived by
4 defense counsel, your arguments are also that he should
5 have raised the other issues presented if they were
6 preserved?

7 A Yes. I asked him about those issues.

8 Q So for each allegation, if they were properly
9 preserved, you thought they had enough merit to be
10 raised on appeal?

11 A I definitely did.

12 Q As far as ones that arguably could be preserved,
13 as far as his motion of a continuance that was denied,
14 he didn't raise that to the appellate court?

15 A He did not raise that, and we needed time.

16 Q Do you believe that he should have raised it?

17 A Yes.

18 Q As to the issue of the trial court erred in
19 refusing to dismiss or declare a mistrial based on the
20 untimely discovery issue, did he raise that issue?

21 A He did not raise that either.

22 Q You believe he should have?

23 A He should have.

24 Q You believe if he would have, you would have
25 gotten a new trial?

DESMOND COLLINS - CROSS-EXAMINATION

1 A Yes.

2 MR. PHILLIPS: Just a second, Your Honor.

3 Q (MR. PHILLIPS) Is there anything else you would
4 like to present regarding his representation before
5 and after your trial, and then on appeal, as far as
6 issues that we haven't presented or discussed or
7 elaborated on or provide context? Now is the time to
8 provide that.

9 A Everything is taken care of.

10 MR. PHILLIPS: No further questions, Your Honor.

11 THE COURT: All right. Ms. Marto?

12 **CROSS-EXAMINATION**

13 **BY MS. MARTO:**

14 Q Good morning, sir.

15 A Good morning.

16 Q Do you recall what the State said the basis for
17 the stop was?

18 A The basis of the stop? That I committed a
19 violation, driving violation.

20 Q So they said there was a driver's violation?

21 A Yes, that is what they said.

22 Q Do you recall if one of the officers said they
23 smelled weed?

24 A Yeah, I recall them saying that.

25 Q And so was that the primary issue why they

DESMOND COLLINS - CROSS-EXAMINATION

1 decided to follow you?

2 A I can't say that for sure.

3 Q Is that what they said?

4 A That is what they said.

5 Q And, then, when you all were pulled over, did you
6 tell the police anything in regards to the drugs?

7 A See, I was kind of delusional. I thought -- I
8 was shocked a little bit. I told them to pin it on me
9 because I do smoke weed, and I be smoking a lot. So it
10 could have been anything. I tell them just put it on
11 me. I was kind of nervous and kind of frenzy at the
12 time, and I did say that.

13 Q Were they your drugs?

14 A No, they wasn't.

15 Q Who did they belong to?

16 A To the passenger.

17 Q Do you know why the passenger had drugs?

18 A Why?

19 Q Yes, sir.

20 A He does drugs, sells drugs. But, at the time, I
21 was not driving for him. I was taking him someplace,
22 dropping him off. He wasn't selling drugs at the time.
23 I was just taking him someplace. I didn't know he had
24 drugs on him. But when they found it on my seat, I
25 said put it on me. I froze and panicked.

DESMOND COLLINS - CROSS-EXAMINATION

1 Q So that I know I'm understanding you right, you
2 are driving him around knowing that he was a drug --

3 A I was not driving him around. I was driving him
4 to one spot. We came from down on 707, driving him to
5 one spot, dropping him off.

6 Q You knew he was a drug dealer?

7 A I mean, I saw him in my neighborhood. I knew he
8 sold drugs, but I wasn't taking him to sell no drugs;
9 you see what I'm saying?

10 Q Yeah. Right. Is that kind of the defense you
11 went to?

12 A We went with no defense. Because before trial, I
13 tried to contact with him so we could do a defense. On
14 the first day of trial, we came in there with blank
15 paper; nothing on it. We had no defense. There was a
16 blank paper. We had nothing.

17 Q Do you recall counsel tried to put the drugs on
18 the passenger?

19 A He did not -- well, I mean, he kind of did. He
20 kind of did. But he ain't really say they were his or
21 anything. He said he was a drug dealer, and I was the
22 driver. He ain't -- he ain't say, like, they his or
23 whatever, but pretty much he did.

24 Q And did he try to indicate that you were trying
25 to cover for the passenger when you said that first

DESMOND COLLINS - CROSS-EXAMINATION

1 statement to the police?

2 A Did he indicate that?

3 Q Yeah.

4 A Yeah; kind of. He kind of indicated that.

5 Q You stated that you wanted counsel to talk to the
6 passenger in this case?

7 A Yes.

8 Q Did counsel give you any indication of whether or
9 not he did that?

10 A Yeah. He said he couldn't get in contact. We
11 couldn't find him. A week before trial -- on pretrial
12 is when he came and he pressured the prosecution, and
13 the prosecution give him the name. That is one of the
14 things I wanted him to do: To get the guy. I didn't
15 know anything about it. But he only found a name out a
16 week before trial, and we only had a week to find him
17 from pretrial to trial. He couldn't find him at that
18 time, so he told me. He asked for a continuance, and
19 he couldn't get it.

20 Q And he is not here at the PCR hearing with us
21 today, right?

22 A No, he's not.

23 Q Are you saying you never reviewed the cell phone
24 report?

25 A No, I didn't.

DESMOND COLLINS - CROSS-EXAMINATION

1 Q And that report wasn't entered at trial?

2 A They brought it to trial, and he took it with him
3 at the trial, and he reviewed it. I didn't review it.
4 I wanted to review it with him, but he had so much
5 things going on, we didn't talk at the trial. He went
6 one way. I called him. Nothing. I couldn't get up
7 with him at all.

8 Q But it wasn't given to the jury?

9 A No, it wasn't given to the jury; it was given to
10 him.

11 Q Do you recall if counsel did anything about that
12 report?

13 A He asked for a mistrial.

14 Q Did he do a motion to dismiss the case?

15 A I guess that is the same time as a motion for
16 mistrial. He asked to dismiss the case; I think that
17 is what he did.

18 Q Do you think he did both?

19 A No, he ain't did both. I mean, he asked for -- I
20 mean, mistrial -- it could have been a dismissal. I'm
21 not really sure. I'm not really sure. One of the two.

22 Q You wouldn't be surprised if he did either one of
23 them, right?

24 A Yeah, I would, actually.

25 Q Do you recall if you had a Jackson v. Denno

DESMOND COLLINS - CROSS-EXAMINATION

1 hearing.

2 A A what?

3 Q Do you recall if you had a pretrial hearing?

4 A I had a pretrial.

5 Q About the statement that was given?

6 A That I give?

7 Q Yeah.

8 A We didn't discuss that at pretrial. I'm not
9 refreshed on that. I don't think we discussed that at
10 pretrial.

11 Q Do you recall if officers were called to testify?

12 A Yes; one officer was there.

13 Q And that was kind of concerning, what you told
14 them?

15 A It was kind of concerning with the traffic stop
16 and everything that happened, yeah.

17 Q Counsel was the one that chose the appeal issue,
18 right?

19 A What do you mean?

20 Q Did counsel --

21 A Yes. Yes, he choose the issue to raise on the
22 appeal.

23 Q Did he tell you why he chose that issue and not
24 others?

25 A No, he did not.

DESMOND COLLINS - CROSS-EXAMINATION

1 Q You also stated under direct that you didn't
2 discuss testifying, right?

3 A No, I did not.

4 Q Did you want to testify?

5 A I thought about it, but I ain't have no
6 professional guidance to know about what to do about
7 it. I thought about it, but I didn't know what to do.
8 I was confused. Ain't nobody really break it down to
9 me, what could be done during that time or how it is
10 going to help me, or how it's going to hurt me. So I
11 was still baffled on that. I didn't know what to do.

12 Q Were you aware if testifying would have been
13 hurtful to you?

14 A I don't think it would have been hurtful to me.

15 Q What character witness did you want?

16 A I had friends: Annette Grant, some family,
17 Teresa Collins. They could have verified my character.

18 Q Did you give Mr. Truslow those names?

19 A I tell him I have people that could, but I didn't
20 give him the names. He didn't seem like that that was
21 an interest to him. I told him about it, though.

22 Q Did he ever tell you, No, you couldn't enter
23 these witnesses?

24 A No. He didn't say no.

25 MS. MARTO: Nothing further, Your Honor.

DESMOND COLLINS - REDIRECT EXAMINATION

1 THE COURT: Mr. Phillips, is there anything
2 further?

3 **REDIRECT-EXAMINATION**

4 **BY MR. PHILLIPS:**

5 Q With the 400-page report, you said that the first
6 time, obviously, that you were involved with that is at
7 the trial itself?

8 A I never seen the report to this day. First I
9 seen it was the second day at trial when he brought it
10 to the table. After trial was over, he took it back
11 with him, and I never saw it.

12 Q As far as you are concerned, you don't know
13 anything else about it?

14 A I don't know nothing else about it.

15 Q You said the person whose drugs -- the ownership
16 of those drugs was the passenger?

17 A Yes.

18 Q And you had that discussion with your lawyer?

19 A Yes.

20 Q And you would explain to him that you are not
21 taking him to conduct a drug deal. You were just
22 taking him from one location to another location?

23 A Yes.

24 Q That is what you told him?

25 A Yes.

KIRK TRUSLOW - DIRECT EXAMINATION

1 Q Your testimony is under oath.

2 A Yes.

3 Q And you are telling the truth here today?

4 A Yes, sir.

5 Q Had you testified, would it be any different than
6 what you testified today?

7 A I would testify to the same exact thing.

8 MR. PHILLIPS: Nothing further.

9 MS. MARTO: Nothing further, Your Honor.

10 THE COURT: Mr. Collins, thank you for your
11 testimony. You may return to your seat.

12 MR. PHILLIPS: No additional witnesses on behalf
13 of the Applicant.

14 THE COURT: Okay. Ms. Marto?

15 MS. MARTO: We call Mr. Kirk Truslow to the
16 stand.

17 (KIRK TRUSLOW, having been duly sworn,
18 testified as follows:)

19 **DIRECT-EXAMINATION**

20 **BY MS. MARTO:**

21 Q You represented Mr. Collins in his trial and
22 appellate case?

23 A Yes.

24 Q Do you recall when you took over this case?

25 A Not really. But I think I represented him for at

KIRK TRUSLOW - DIRECT EXAMINATION

1 least -- about a year, maybe.

2 Q And do you recall, roughly, how many meetings you
3 had with him?

4 A I would actually defer to him. I mean, I think
5 he probably remembers as well as I do. Not a
6 tremendous amount, but not once. Probably consistent
7 with what he said.

8 Q Do you recall what those conversations were
9 about?

10 A They would have generally been about the case,
11 and then one time in particular, when the discovery
12 came in, you know, about the evidence. But it would
13 have been just about the case itself.

14 Q Did you discuss trial preparation?

15 A I probably did not do that at the office in that
16 way. The trial -- I don't think either one of us
17 thought we were going to trial that week, honestly. In
18 terms of a run-through type of trial preparation, no.
19 No.

20 Q Did you discuss trial strategy?

21 A Yeah. We did not in the office, again; but prior
22 to trial we did. Not in depth, but we had an
23 understanding of -- depending on what was suppressed,
24 if anything, what we were going to say; just a general
25 theory.

KIRK TRUSLOW - DIRECT EXAMINATION

1 Q I guess, what was your working theory of the
2 case?

3 A Yes. Yeah. Yeah.

4 Q What was it?

5 A Oh, I'm sorry. Well, it was going to be that it
6 wasn't his drugs. To this day, I mean, it may not have
7 been his drugs. But the passenger -- it was kind of
8 odd that they just let the passenger leave. I mean, it
9 opened that defense up, which may have actually been
10 what occurred. But the passenger was allowed to leave
11 with his phone and everything right from the scene,
12 which I thought was odd. They didn't take his name or
13 any of that. So that was kind of the theory of the
14 case.

15 Q Do you have any knowledge whether or not the
16 passenger was charged with anything?

17 A He was not, no. As far as I know, he wasn't
18 charged in that case, I don't believe.

19 Q And Mr. Collins told the police that they should
20 put the drugs on him, right?

21 A Yeah. Yeah.

22 Q How did that factor into your defense?

23 A We had to address it. He didn't take the stand,
24 so it came in through the State's evidence, and then we
25 used it -- I remember pointing out to the jury in

KIRK TRUSLOW - DIRECT EXAMINATION

1 closing that the way he said it, the language he used
2 was "put it on me," as opposed to "they are my drugs"
3 or whatever. It was like he was saying I will take the
4 charge. It was different, the way he said it, "these
5 are my drugs, and I'm a drug dealer"; it was "put it on
6 me."

7 Q So, basically, covering the other guy?

8 A Yeah. Yeah, for one reason or another. We
9 alluded to some reasons, but that was the idea.

10 Q Do you recall what the basis for the stop was?

11 A It was a traffic situation. I think it was maybe
12 not going to a complete stop, maybe; something like
13 that.

14 Q Do you recall if an officer smelled weed in the
15 car at a gas station?

16 A Yeah. Yeah. I think he pulled in -- when the
17 blue light came on, he pulled into a gas station
18 parking lot, and I believe the officer smelled
19 marijuana when he approached the vehicle, when he was
20 standing there.

21 Q Did you find a basis for challenging that stop?

22 A We did challenge it, yeah; but I don't know how
23 strong it was. It was a probable cause argument for
24 the stop, the traffic violation.

25 Q So your pretrial motion was unsuccessful?

KIRK TRUSLOW - DIRECT EXAMINATION

1 A Yes. Yes.

2 Q Do you recall if you did a Jackson versus Denno
3 hearing?

4 A Well, yeah, we did do one. I mean, I didn't call
5 it that. The judge referenced it as a "Jackson V.
6 Denno hearing." We made that motion and argued it.

7 Q Was that successful?

8 A No.

9 Q Do you recall when you found out about the cell
10 phone report?

11 A Yeah. I recall that pretty clear because it was
12 in the middle of trial, you know. I have had
13 situations in the past where I had discovery dumped on
14 me the day before trial, and I remember now I'm getting
15 discovery in the middle of the trial. I made it pretty
16 clear.

17 And the thing with that discovery is that there
18 -- a lot of it no one had seen. I hadn't even seen
19 it, because it came up -- when they had to give to me,
20 the judge asked if I got it, and I overheard the
21 officers talking, trying to get the prosecutor's
22 attention about something, and so they had additional
23 stuff, and that was on some kind of a drive. That was
24 not accessible at the time.

25 Q So was an issue raised about this?

KIRK TRUSLOW - DIRECT EXAMINATION

1 A Yeah. We made a motion to dismiss for the
2 discovery of uses, as I called it. I think a mistrial
3 motion maybe was made, too; maybe both for the
4 alternative.

5 Q Were either of those successful?

6 A No.

7 Q What was the ultimate resolution for that report?

8 A Well, you know, it's one of the situations where
9 I have to look back at it because, you know, it was
10 actually a pretty heated trial at times. Looking back,
11 I mean, if I'm being honest, I wish I would have
12 clearly made the record about it, because it came
13 across as a stipulation, you know. I remember the
14 judge at one point said, "Well, I'm just going to find
15 that the evidence on there is not exculpatory and it
16 takes care of everything."

17 Then I said something like, "You haven't even
18 seen it." I think he thought for a second about that,
19 and then he said, Well, they aren't going to use
20 anything on there, and then I kind of went along with
21 that. That was later seen as a stipulation, I guess,
22 by the Court of Appeals and not preserved.

23 Q Did you think there was a reason for moving to
24 continue the matter on that basis at that time?

25 A No. I think we should have had a continuance

KIRK TRUSLOW - DIRECT EXAMINATION

1 before trial but not then.

2 Q Do you recall when you found out about the
3 identity of the passenger?

4 A Yeah; a week before trial. I think it was a two
5 week-term of court. I appeared, and Judge John gave us
6 a continuance at that time, a one-week continuance,
7 because I was having trouble with discovery issues, and
8 he said, I'll continue it this week. Next week, if you
9 still have the same issues, I'll look at it again.

10 The next week it was a different trial judge, but
11 we made a motion for continuance. But I think Judge
12 John, the week prior, told them to give me the name of
13 that fellow. I don't think I got it until trial the
14 next week. So that is when they gave me the name of
15 the person.

16 Q Did you make any attempts to contact that person?

17 A Best I can recall, the only attempts I made was
18 through some of his family and friends, trying to
19 figure out if he was around. I didn't have an
20 investigator look for him or anything like that.

21 Q Did you think it would have been helpful to your
22 case?

23 A I don't know, really. It may not have been in
24 the sense that, you know, he's somebody who likely
25 owned those drugs. But, you know, you kind of remove a

KIRK TRUSLOW - DIRECT EXAMINATION

1 lot of doubt if he's on trial, he's there and denying
2 it. It adds more to the idea that they are
3 Mr. Collins'. So I'm not sure how that would have
4 played out.

5 Q You also represented him on appeal?

6 A Yes.

7 Q How did you go about deciding what issue to raise
8 on appeal?

9 A You know, I really don't know. I mean, I know
10 that was, in my mind, the glaring issue that I left the
11 trial with, in my head. I may have looked at some of
12 the other issues.

13 Mr. Collins did write me asking that some of the
14 other issues be put in that he's talking about today.
15 I didn't. Maybe I was keeping it simple and thought
16 it was a good issue and just went with that.

17 Q Do you recall at the time if you thought that was
18 the best issue out of --

19 A I thought so, yeah.

20 Q Do you recall talking to Mr. Collins about any
21 character witnesses, potentially?

22 A I don't remember that, no. I mean, we may have
23 talked about it, but I don't remember specifically.

24 Q Is it typically your practice to present
25 character witnesses at trial?

KIRK TRUSLOW - DIRECT EXAMINATION

1 A Well, I mean, if I think about it, I probably
2 haven't done a lot of that, no. I did think in this
3 trial of closing last and not putting on a defense;
4 that was in my head. That may have affected that, you
5 know.

6 Q Did you consider investigating the offense of
7 third-party guilt?

8 A No. You know, I didn't. Like I said, this trial
9 came up kind of quickly, and I still didn't know who
10 that other person was. I thought I had time to figure
11 it out. It was a week prior to when the judge finally
12 made them do that; so, no, I didn't.

13 Q Do you think the defense would have been helpful
14 at trial?

15 A Maybe. Maybe.

16 Q Did you consider the defense of mere presence at
17 trial?

18 A No. That got by me, no. I don't think I asked
19 for that charge.

20 Q Do you think that charge would have fit the facts
21 of the case?

22 A Yeah. I mean, it may have. I mean, the judge
23 would have probably given the charge, I think, with our
24 facts, but I'm not certain.

25 Q Do you think trial would have been successful on

KIRK TRUSLOW - DIRECT EXAMINATION

1 that charge?

2 A I don't know. I don't know. I mean, I was a
3 little surprised that they convicted him, but I'm an
4 eternal optimist. But, I mean, I felt like -- I felt
5 like he should have been found not guilty, but he is my
6 client. The way it was going, I thought we had a good
7 shot, and it should have been done, but....

8 Q Do you recall what your strategy was during
9 opening statements?

10 A Not really. I was listening to that. I don't
11 really recall it. In my head, I'm certain that what we
12 talked about is the overall theory. You know, it was
13 to bolster that up and set that up; that there was
14 another person there, and he's not -- I don't think he
15 was or is a drug dealer, but that this other fellow in
16 the car probably skated out somewhere.

17 Q You had a chance to, I guess, refresh your
18 recollection on the opening statement?

19 A Yeah. Yeah.

20 Q And do you agree with Mr. Collins' assertion that
21 the opening statement was used to indicate guilt on his
22 part?

23 A I would have to read the whole thing again. I
24 don't recall. But, I mean, it's right there. I mean,
25 I would not intentionally try to give a prosecutor an

KIRK TRUSLOW - DIRECT EXAMINATION

1 opening statement, but....

2 Q Do you recall your general approach to closing
3 argument?

4 A Yeah. That was kind of heavy on the law and
5 reasonable doubt and the importance of that and then
6 about the other person present, the passenger.

7 Q Did you request a lesser included offense
8 instruction?

9 A I think I did, yeah. I don't -- I didn't check,
10 but I don't think we got that charge, but I did request
11 that because there were two amounts of heroin together
12 -- I mean separate. One was -- would not be
13 trafficking weight. That's why I did that.

14 Q Do you recall if you requested a PWID
15 instruction?

16 A I don't think so.

17 Q Would it help if I refreshed your recollection?

18 A Yeah.

19 MS. MARTO: Your Honor, may I approach?

20 THE COURT: Sure.

21 Q (MS. MARTO) Page 259, Line 1; if you can read
22 that, the eight lines.

23 A "Your Honor, I'm going to ask you to charge
24 possession with intent to distribute heroin based on
25 circumstantial evidence, that there were two occupants

KIRK TRUSLOW - CROSS-EXAMINATION

1 in the vehicle, both in constructive possession, and
2 there were two separate bags of heroin. I think that
3 is circumstantial evidence that the jury could look at
4 and believe one bag to be one person's, and one to be
5 the other's."

6 Yeah, so I did.

7 Q Okay.

8 MS. MARTO: One moment, Your Honor.

9 Q (MS. MARTO) Did you attempt to challenge the
10 admissibility of the drugs based on the handling of
11 the chain of custody?

12 A I don't remember that.

13 Q Do you think it would have been successful?

14 A I don't know. I don't know.

15 MS. MARTO: Nothing further, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. PHILLIPS:

18 Q Thank you. Your Honor. Good morning.

19 A Morning.

20 Q Now, you said you didn't anticipate trial coming
21 up as fast as it did and that you didn't have an
22 opportunity to actually conduct trial prep in your
23 office?

24 A Right. Yes.

25 Q So at what point did you conduct trial

KIRK TRUSLOW - CROSS-EXAMINATION

1 preparation?

2 A In the sense of how we're describing it, what
3 that is, it wouldn't have happened, you know.

4 Q So, basically, once he was there at the trial, in
5 the courtroom, that is when the substantive discussion
6 occurred?

7 A Yeah; that's fair.

8 Q Now, with being also trial counsel and appellate
9 counsel, the issue had been raised regarding this
10 400-page cell phone report. You said that there was
11 additional stuff you had never seen?

12 A Yeah. Yeah.

13 Q Could you elaborate? Do you have any idea what
14 that is?

15 A Really, I'm talking about the whole mess of it.
16 I mean, it was on a jump drive. That was kind of what
17 I was talking to the judge about at trial, is that he
18 couldn't really make a decision that it was not
19 exculpatory because none of us had seen it. The
20 prosecution said that they saw maybe parts of it, but
21 as I recall, there needed to be something done to it to
22 see it better, to like blow it up. It was like minute
23 files in there.

24 Q So was this like their forensics?

25 A The extraction.

KIRK TRUSLOW - CROSS-EXAMINATION

1 Q Extraction from the phone?

2 A That's right. So it wasn't turned into a usable
3 copy, pretty much.

4 Q Again, I'll have to go back, but I don't think
5 there is any discussion, but like a Cellebrite or one
6 of those type of things where it comes out and you have
7 a program --

8 A That's right.

9 Q This jump drive, did they give you a copy of
10 everything?

11 A I'm trying to remember.

12 Q I don't have it in the order.

13 A I don't remember, honestly. It happened quickly.
14 Actually, the argument to the judge about it, and when
15 I learned from overhearing the officers talking with
16 the other prosecutor -- so I don't remember if it was
17 actually put in my hands, you know. I have not seen
18 it, I can tell you that.

19 Q Can you elaborate what the officers were
20 discussing, the additional things?

21 A Yeah. Like two phones and the prosecutor -- the
22 Solicitor was arguing that they did not pull an
23 extraction report from a particular phone. I could see
24 the officer trying to get the other prosecutor's
25 attention as if, No, that's not correct, we did. Then,

KIRK TRUSLOW - CROSS-EXAMINATION

1 I think on the record, even I mentioned that and told
2 the judge that, and he told the officer go talk to the
3 officer, and that is when that came up.

4 Q Ultimately, you decided to raise this issue
5 regarding the request for an evidentiary hearing, to be
6 able to see the jump drive, have time to review it, et
7 cetera?

8 A Yes.

9 Q And the court of appeals found you, essentially,
10 waived that issue?

11 A Yeah.

12 Q In hindsight, and in the clarity of it, do you
13 believe at this point that that was the appropriate
14 issue to raise -- let me take one step back.

15 Do you recall that you should have stipulated to
16 it?

17 A No. No. If I could do it over again, I would
18 have made a clear record what was going on so -- it is
19 one of those things that did not translate well into
20 the written record. I would certainly have been far
21 from a stipulation, you know, and made a record of what
22 was going on. I was thinking appeal in my head
23 already, and it just didn't happen. And the judge was
24 not having a good day. He was upset all of this was
25 happening. And I just kind of -- when he found it was

KIRK TRUSLOW - CROSS-EXAMINATION

1 not exculpatory, he kind of got a stipulation out of
2 me, I guess.

3 Q And just to clarify, your intent was not to
4 stipulate?

5 A Right. That is why I appealed it.

6 Q That is why you raised it on appeal?

7 A Absolutely.

8 Q As far as the strength of that issue, it was your
9 belief -- the reason you raised it --

10 A I thought it was definitely stuff on there that
11 would help Mr. Collins, stuff related to the other guy,
12 you know, that type of thing because there was two
13 phones, and it had all of the texts and pictures, and
14 this and that. I think it would have shown a lot of
15 support for what his role really was, or what he was up
16 to, versus the other passenger, honestly.

17 Q And at a minimum, you were asking for, at least,
18 the evidentiary hearing to get into it?

19 A Yeah, to at least know what the evidence is,
20 because it could have been exculpatory.

21 Q As far as the opportunity where you could have
22 moved for a continuance, again, another hindsight
23 question: Having that opportunity to sit back and look
24 at it, do you think you should have moved for a
25 continuance?

KIRK TRUSLOW - CROSS-EXAMINATION

1 A Probably. I think when that happened, the judge
2 broke for the day to give us some time. But, yeah, I
3 didn't move for a continuance.

4 Q Since you didn't have it, you never got your
5 hearing. Do you believe you should have had a
6 continuance?

7 A Yeah. Yeah. Again, I was just thinking about
8 how to win this trial at the time, and I think that is
9 how the stipulation kind of happened.

10 Q And you touched on it at the beginning regarding
11 potential a discovery violation, that you had this late
12 disclosure in the 11th hour -- really, the
13 12th hour disclosure?

14 A Right.

15 Q Ultimately, that argument wasn't necessarily
16 fleshed out, as far as the true discovery violation,
17 prosecutorial misconduct --

18 A Yeah. It wasn't properly laid out on the record
19 at all.

20 Q Again, in hindsight, looking back, if that was
21 raised and you felt it was preserved, would that have
22 been an issue you would have raised on appeal?

23 A Absolutely. And I think things would have been
24 different, and I think from all the research I did on
25 it, I think the court of appeals very well would have

KIRK TRUSLOW - CROSS-EXAMINATION

1 remanded it, at least for the evidentiary hearing. I
2 mean, legally, I think they would have had to if it was
3 preserved, and then who knows from there.

4 Q Now, you did raise this issue as to the officer
5 having a DUI dismissed. You asked, essentially, to
6 cross-examine him on it; but, ultimately, there wasn't
7 any specific arguments as far as denial of the
8 Sixth Amendment Right of Confrontation. You did use
9 the words "credibility," was kind of the lynchpin of
10 it. So looking back on it, this wasn't raised on
11 appeal. Was this an issue you didn't think was
12 preserved, or did you think -- I'm trying to -- you did
13 argue to do so?

14 A Yeah. Yeah. I'm not sure why that was the only
15 issue in the appeal. There were clearly other issues.
16 I don't know how to answer that other than I don't have
17 any memory of making a conscious decision to pick one
18 issue and leave others out. I'm not sure what that was
19 about. And that issue with the DUI, the Solicitor made
20 a motion to prevent me from going into that.

21 Q Right. He countered, essentially, because he
22 knew you were going to cross --

23 A Yeah. Yeah. Because I would have brought it up,
24 and then he could have done that in trial, but he beat
25 me to it.

KIRK TRUSLOW - CROSS-EXAMINATION

1 Q Do you think that should have been raised on
2 appeal?

3 A Yeah. Probably. Hindsight is 20/20. With all
4 of the other issues in here, it may have helped put
5 into play how bad this trial was going.

6 Q Just one extra --

7 A Yeah. Yeah, because it would have really laid it
8 out.

9 Q You made a motion to suppress the evidence;
10 essentially, it was an illegal stop. Could you walk
11 through the position that if it was preserved, it
12 wasn't raised on appeal, but with this position, there
13 wasn't any additional case law cited or any specific --
14 and correct me if I'm wrong -- I don't believe any
15 specific citations to the Fourth Amendment or Article
16 One, Section 10?

17 A I think it was just a reference to the statute
18 and the probable cause argument and not any case law
19 cited or anything.

20 Q Now, there was testimony that was taken during
21 the Denno hearing that kind of addressed the stop
22 itself. The probable cause -- essentially, one of the
23 things used for probable cause was this testimony
24 regarding the odor of marijuana. You objected to that
25 testimony as to hearsay because the officer was saying

KIRK TRUSLOW - CROSS-EXAMINATION

1 that another officer smelled marijuana, and that was
2 the probable cause, and you got overruled on that.
3 Ultimately, with this issue, do you think you should
4 have raised that on appeal?

5 A Yeah.

6 Q Now --

7 A I think we put all of our eggs in one basket with
8 that appeal, because it seemed like it was right on --
9 it wasn't preserved; that's the problem.

10 Q As far as the Denno hearing, the statement that
11 was provided to police, essentially, that issue -- same
12 thing as far as the argument whether it was preserved
13 or not, and whether it should have been raised because,
14 ultimately, that is a big issue whether he's claiming
15 ownership of the drugs, your position on how you argued
16 that motion, and whether it was preserved?

17 A I believed it was preserved.

18 Q So, in hindsight, do you think it should have
19 been raised on direct appeal?

20 A Yeah. Yeah. Probably.

21 Q Now, to be specific, in the voluntary statement,
22 as far as challenging -- again, proper Miranda and the
23 course of events -- do you have any memory as far as
24 the specifics of the challenge of the statement?

25 A Voluntariness. Voluntariness of it and, you

KIRK TRUSLOW - CROSS-EXAMINATION

1 know, whatever is in the record. I don't specifically
2 remember.

3 Q You stand what is in the transcript?

4 A Yeah. Yeah.

5 Q As far as, again, in trial related to any
6 contemporaneous objections when they try to admit it,
7 with motion in limine, as we all have learned the hard
8 way, those aren't preserved for appellate review, you
9 have to object, and so kind of the same thing as far
10 as --

11 A Sure. I think I moved on to how I would approach
12 and effectuate that issue and not, you know, preserve
13 it at the time it was entered.

14 Q And if that is -- again, your position about
15 whether it was a contemporaneous objection --

16 A Right.

17 Q Now, with the officer's handling, there was
18 numerous field testings. Did you ever, kind of, feel
19 that you could have made an issue regarding the
20 admissibility of evidence based on that?

21 A I do not -- I don't remember a chain of custody
22 issue or argument. I -- I always go through the chain
23 of custody. That's one thing I do because I have had
24 some success for some issues. But I would have looked
25 it over, and I don't recall any issues with it.

KIRK TRUSLOW - CROSS-EXAMINATION

1 Q There was a discussion about character witnesses.
2 Because you didn't meet in the office, there was no
3 sit-down meeting of who can we get here to say -- a
4 pastor or something?

5 A We talked, but we didn't do that, as we
6 discussed.

7 Q Ultimately, if you put up character witnesses,
8 you could get, at least arguably, back then you could
9 get the jury instruction on good character?

10 A Right.

11 Q There wasn't any specific discussions you had
12 with him about that?

13 A No.

14 Q Because the trial preparation, essentially,
15 occurred in the courtroom?

16 A Yeah. That's fair. That's fair.

17 Q This is really a case about credibility.
18 Obviously, the State is presenting a question,
19 essentially an issue, that he admitted ownership of the
20 drugs, and your defense, although not said, and that is
21 one of the issues, mere presence. Do you agree that
22 is, essentially, your argument, that he was a mere
23 presence defense?

24 A Yeah.

25 Q Now, is there any reasonable trial strategy not

KIRK TRUSLOW - CROSS-EXAMINATION

1 to ask for a jury instruction on mere presence?

2 A No, there wasn't a strategy. It just wasn't
3 done.

4 Q In hindsight, you feel like you should have asked
5 for a mere --

6 A Yeah. If it was today, I would have asked for
7 it, yeah.

8 Q In your opening statement, there is some lines
9 that kind of go over -- and you were in the courtroom
10 and heard them. Again, as far as the "if you do your
11 job, do it diligently, you find my client guilty, I'm
12 going to shake everyone's hand, and when the trial is
13 over, I go home; we all go home," and in the heat of
14 the moment, things get said and you --

15 A Well, yeah. And, you know -- I mean, one thing
16 I've learned with juries is, you know, I like to remind
17 them how important their job is. I try to bond with
18 them some. You know, I feel like it is leveling the
19 playing field with them when I tell them I'm not here
20 to do magic or trick them. It is just the rules, and
21 if you do your job, then it is that way. That is kind
22 of where that was coming from, probably.

23 Q And I know, again, we went over it in the
24 Applicant's testimony, but one of the issues we raised
25 was the, "please go by the law, keep the system

KIRK TRUSLOW - CROSS-EXAMINATION

1 strong," and in light of what you just said, "if you do
2 that, if you found him guilty, great, you did your
3 job" --

4 A That sounds bad like that, but I get what you are
5 saying.

6 Q In hindsight, would you have removed that from
7 your opening?

8 A Probably.

9 Q Do you feel it dilutes the burden of proof?

10 A It's not for me to say. I mean, maybe. I don't
11 know.

12 Q You agree it is, basically, depending on if you
13 presented certain evidence, that you could have been in
14 a position to ask for a mere presence jury charge?

15 A Yes. If I was typing out another statement to
16 memorize, I probably wouldn't have typed that sentence;
17 put it that way.

18 Q Now, if Mr. Collins would have testified, and
19 testified to the same things he was saying here, you
20 would have been able to request and obtain a mere
21 presence jury instruction?

22 A If he testified?

23 Q If he would have testified and presented that
24 testimony, you would have had that evidence?

25 A I imagine, yeah.

KIRK TRUSLOW - CROSS-EXAMINATION

1 Q Was there any discussion about that?

2 A I think we did talk about testifying. I don't
3 know if we had a long, serious talk about it, but there
4 was some issues with his record and all. I do remember
5 thinking that it wasn't worth it to keep going with the
6 trial and add to it. We could close and, you know -- I
7 don't know how much I expressed that to him, but I know
8 I was thinking that.

9 Q Was there any specific discussion that if he
10 testified, you could ask for the mere presence jury
11 instruction?

12 A No.

13 Q I apologize for talking over you. So you already
14 started to touch on it regarding the closing argument,
15 quotes that were raised like: "Then you got other
16 people that shoot it up in their arms, killing
17 themselves, overdosing, doing things they ordinarily
18 wouldn't think they would do." It says: "I can't
19 remember when they are 8, 10, 12 years old saying I
20 want to grow up to be a heroin addict or drive a drug
21 dealer around."

22 Again, do you feel that you should have had his
23 authorization to, essentially, claim that he's a drug
24 addict driving a drug dealer?

25 A Talked to him about that ahead of time? I don't

KIRK TRUSLOW - CROSS-EXAMINATION

1 know. I mean, maybe. In hindsight again. But that is
2 the direction I saw, the only direction I saw to try to
3 get a not guilty verdict, to make that distinction
4 between the two of them. At that point, everything
5 that transpired, that is the role that I saw him in and
6 it was, really, the only defense I had at that point.

7 Q Now, you also say: "If you want to get to the
8 truth, or as close as you can." In hindsight, and I
9 understand we're all seeking justice, but as a zealous
10 advocate, your argument is always going to be that the
11 State can't meet their burden of proof beyond a
12 reasonable doubt, but knowing the judge isn't even
13 supposed to instruct the law of seeking the truth --

14 A I mean, yeah. Generally what I do with that
15 truth issue would be to let the jury know that
16 sometimes you cannot find the truth, and that is the
17 whole point. You can't always go over who did what.
18 You have to prove this person did this. That may be
19 missing from that.

20 Q And then in closing, what we have listed in our
21 allegation, and of course what was reviewed in
22 testimony, one other issue or quote -- and there is
23 several -- but one is: "They are selling junk to
24 people, giving junk to people so that they'll drive
25 around so they don't get busted because that person

KIRK TRUSLOW - CROSS-EXAMINATION

1 needs a drug." That was your defense in a nutshell?

2 A It was in support of the defense. In other
3 words, "put it on me," that type of thing, which I
4 think was going towards the truth, actually.

5 Q Now, as far as requesting the lesser included
6 offense, again, essentially arguing a mere presence
7 defense and asking for the jury to have the opportunity
8 to even find him guilty of a lesser amount, could you
9 describe the thought process for that strategy?

10 A The thought process for that strategy was the
11 sentence for trafficking of 25 years mandatory, no
12 discretion. You know, I included that as maybe a
13 safety net, if need be.

14 Q Simply because of the mandatory minimum?

15 A Yeah.

16 Q And I'm sure we share the same feelings about
17 mandatory minimums.

18 A Yeah. Yeah. I thought it was un-Constitutional,
19 but we didn't appeal it.

20 Q And, I guess, going to the appellate counsel
21 issues, just to make sure, with that kind of being in
22 hindsight, you know, some of the issues that we
23 raised -- I mean, there is certainly more than just the
24 one issue raised. In hindsight, you would have raised
25 more on appeal?

KIRK TRUSLOW - CROSS-EXAMINATION

1 A In hindsight, yeah. I think this may be one I
2 didn't -- put them all in there, or most of them.

3 Q And specifically the -- more specifically, the
4 companion charges that go with the 400-page report,
5 denying the motion for a continuance, not asking for
6 additional time to do discovery, identity, and
7 everything as far as the initial investigation; that
8 would be necessary?

9 A Uh-huh. Yes.

10 Q As well as refusing to dismiss or declare a
11 mistrial on the untimely discovery issue?

12 A Yes.

13 Q Again, in failing to raise and argue and have
14 those preserved -- I know I'm beating a dead horse at
15 this point -- thinking that if you would have requested
16 the continuance, or ask to declare a mistrial,
17 depending if the judge felt that you crossed that
18 threshold that the trial has started -- again, in
19 hindsight, you thought it would be necessary to address
20 that big issue, the discovery violation?

21 A Yes.

22 Q Or raise the issue of a discovery violation,
23 potentially?

24 A Uh-huh.

25 MR. PHILLIPS: Just a moment, Your Honor.

1 THE COURT: Sure.

2 MR. PHILLIPS: No further questions.

3 THE COURT: Ms. Marto.

4 MS. MARTO: Just a few questions, Your Honor.

5 **REDIRECT-EXAMINATION**

6 **BY MS. MARTO**

7 Q Sir, concerning the things you stated you could
8 have done differently, is it fair to say that all of
9 that is made with the benefit of hindsight?

10 A Yeah. Yes. That's fair.

11 Q Did you think you were acting reasonably at the
12 time?

13 A Yes.

14 Q Did you think you were defending your client well
15 at the time?

16 A Yes. I mean, that was my intent. I mean, yeah.

17 Q Did you think that concerning the report, in
18 particular, you handled that situation as best you
19 could?

20 A I don't know as best as I could, but at the time
21 I did what I thought should be done make.

22 MS. MARTO: Nothing further, Your Honor.

23 MR. PHILLIPS: I'll be brief.

24

25

KIRK TRUSLOW - RECROSS EXAMINATION

RECROSS-EXAMINATION

BY MR. PHILLIPS:

Q To that same vein, having the time to reflect, looking at it and not being in the heat of the moment, do you believe that to be, in some respect, some of those issues, to be unreasonable to not have done some of those things?

A That may be fair, yeah. It is one of those -- it's one that has bothered me, this trial.

MR. PHILLIPS: Thank you.

THE COURT: Thank you, Mr. Truslow. You are welcome to step down.

THE COURT: Mr. Phillips, I'll give you an opportunity to close if you would like to, or if you would like to submit anything to the Court.

MR. PHILLIPS: I was going to pose that issue. I know some judges like to see a proposed order and then go from there. Our close is, basically, going to be a reiteration of everything you just heard; whereas, a posed order gives you a flowing outline of it.

One issue, not to try to throw a monkey wrench into everything, but the testimony that there was additional stuff never seen, that kind of, obviously, piqued my interest. I would ask if we could keep the record open. I would like the opportunity to go

1 further.

2 If there was additional stuff he had never seen
3 that's not even contained in the trial record, I think
4 that I have a duty to also further investigate that,
5 and at least obtain it and mark it as a Court's
6 exhibit to ensure that the appellate court -- in case
7 we lose -- that everything is preserved for the
8 appellate review. To cover myself, I think that would
9 be necessary. If there is additional stuff not ever
10 seen, that is our request. I know what the Attorney
11 General's Office position is, but I do think that is
12 necessary for me to at least raise that issue at this
13 time.

14 THE COURT: Is that the 400-page phone record or
15 report, is that in the record?

16 MR. PHILLIPS: It's not. As was the testimony
17 that we had -- do you have it?

18 MS. MARTO: I don't have a copy.

19 MR. PHILLIPS: He knew it was on a flash drive,
20 but never -- he never received it. I have his batch
21 of discovery, which does contain it. I would like to
22 have it marked for the appellate court's review, if
23 necessary. I just think that is appropriate. I've
24 argued up there several times, and we get that
25 argument about why certain things are not done down

1 here, and I'm trying to cover it.

2 THE COURT: I understand.

3 MR. PHILLIPS: From a housekeeping standpoint, is
4 it the State's position that they would object to its
5 admissibility?

6 MS. MARTO: Your Honor, we don't object to its
7 admissibility. I think it is highly relevant to the
8 issue before the Court. I guess my objection is
9 two-pronged.

10 First, we're objecting to keeping the record
11 open. This is the crux of the case. There is ample
12 time to prepare, and so we think that the record
13 should remain closed. The cell phone report is not a
14 new issue entirely. It is just a comment from the
15 stand that there is stuff in it that we haven't seen.

16 THE COURT: It seems -- go ahead.

17 MS. MARTO: If you are inclined to keep the
18 record open, we request a 60 or 90-day timeframe
19 because, otherwise, as Your Honor is well aware, and
20 Mr. Phillips is well aware of, once the record is left
21 open, you never know when it will be closed.

22 MR. PHILLIPS: To be more specific, not just the
23 400-page report, not just that itself, but there was
24 testimony that there was potentially another
25 extraction, two cell phones. So that is what I'm

1 talking about; in addition to, of course, the flash
2 drive.

3 If the State's is saying they have no objection
4 to it being admitted -- my other issue is, is there
5 another extraction we don't know about? That is my
6 question.

7 THE COURT: What I understood it to be is there
8 is a flash drive, and it has multiple files on it. I
9 don't understand if we knew about the 400-page file
10 that was contained within the flash drive, why didn't
11 we -- and we didn't -- or, you know, assume -- I'm
12 assuming that you didn't try to obtain that, but had
13 you tried to obtain that for this hearing, then it
14 would have contained the rest of it.

15 MR. PHILLIPS: I hate to make assumptions,
16 because I don't know what is in it. I'm hesitant in
17 that respect. But, certainly, I have to in full
18 candor say there could have been a motion on
19 authorizing discovery since defense counsel didn't
20 have access to it to try to compel the Solicitor's
21 Office to produce it, which is ultimately,
22 essentially, the argument being made now.

23 THE COURT: Yeah. I understand that. I'm
24 wondering why it is being made now, at the day of the
25 hearing.

1 MR. PHILLIPS: Hearing that there was additional
2 stuff never seen, again, that made me kind of
3 hyperaware that there would be additional stuff that
4 wasn't even discussed with this defense counsel at the
5 time, and then the preservation issue, the bell rang
6 at that point.

7 THE COURT: Tell me how this Court hearing a PCR
8 matter at this point in time could make a
9 determination that the phone record, a 400-page phone
10 record, that was essentially stipulated that it wasn't
11 relevant at trial and that it wasn't going to be used
12 because of that, is what I see in the appellate
13 record, how is that going to show prejudice, I mean,
14 in order to make a ruling to grant PCR on that issue?

15 MR. PHILLIPS: We always have the burden of the
16 second prong that Your Honor is talking about
17 regarding prejudice.

18 As far as that is concerned, again, what we did
19 have testimony from defense counsel today is that he
20 felt that there was exculpatory evidence on there.
21 Again, our other companion issues with that was not
22 only did he fail to raise the request for a
23 continuance, as well as discovery violation issue --
24 again, trying to keep it just to the report, not
25 trying to add all of the other allegations to it, but

1 that is our position as far.

2 As far as proving prejudice, without having
3 anything specific, there is no exculpatory -- you
4 know, the smoking gun of the exculpatory, we do not
5 have that. I believe that is exactly what Your Honor
6 is requesting.

7 THE COURT: Well, it is. I'm just trying to
8 decide how I'll ever make that determination if that
9 is not even in the record.

10 MR. PHILLIPS: Understood.

11 THE COURT: That is what I'm struggling with, not
12 having that. And then asking, you know, for time to
13 try to -- try to obtain something that should be
14 attached to that, from what we understand from the
15 testimony. You see where I'm struggling?

16 MR. PHILLIPS: Agreed. As far as where its
17 whereabouts, I believe the testimony was that the
18 defense counsel wasn't even sure that the prosecutors
19 were aware of it. There was a little bit of testimony
20 there. It was kind of confusing, but I understand
21 Your Honor's concern. I know that puts an interesting
22 position on it, which is why, again, I felt compelled
23 that I needed to do that.

24 As far as due process is concerned, the last
25 things I want to do is be in habeas position saying, I

1 should have done X, Y, and Z. So I'm asking for that
2 opportunity to make sure that the record is properly
3 done.

4 THE COURT: All right. How about if I'll agree
5 to leave it open for 60 days. If you want to submit a
6 proposed order -- I'm not saying you need to or have
7 to, but if you would like to, you are more than
8 welcome to do so. I'll give the State the same
9 courtesy. I'm not seeking for you to have to do this
10 extra work and submit orders. Obviously, one of them
11 is not going to be used. But I'll look at whatever
12 you want to submit.

13 MR. PHILLIPS: We don't believe that ineffective
14 assistance of counsel is just limited to this scope of
15 just this 400-page --

16 THE COURT: Oh, I understand. Yeah. I heard all
17 of them.

18 MR. PHILLIPS: In addition to that, I know the
19 Solicitor's Office, unless the State can get it
20 faster, I have to procedurally ask to get authority to
21 get it at this stage.

22 THE COURT: From whom? From me?

23 MR. PHILLIPS: Yes, Your Honor.

24 THE COURT: Why don't you get that order, and
25 I'll sign the order for you.

1 MR. PHILLIPS: We'll send one over.

2 THE COURT: Any objection from the State?

3 MS. MARTO: No, Your Honor. That's fair.

4 THE COURT: Thank you. Anything else?

5 MS. MARTO: No, Your Honor.

6 MR. PHILLIPS: No, Your Honor. We'll get you the
7 order right away.

8 (Whereupon the proceedings concluded.)

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CERTIFICATE OF REPORTER

State of South Carolina)

County of Horry)

I, Natalie Dahl, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Horry County, South Carolina, on the 2nd day of December, 2022.

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

October 27, 2024

Natalie Dahl, RPR

Court Reporter