

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Union County
Edgar W. Dickson, Circuit Court Judge

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S.C. Supreme Court

TIJUAN PEAKE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001271

A P P E N D I X

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF UNION) IN THE COURT OF GENERAL SESSIONS
3
4 THE STATE)
5 -vs-) TRANSCRIPT OF RECORD
6 TIJUAN PEAKE,) 2007-GS-44-332
7 Defendant.) 2007-GS-44-333
) OCTOBER 15, 2008
) Union, South Carolina

8
9 (VOLUME I)

10
11 B E F O R E:

12 THE HONORABLE JOHN C. HAYES, III, JUDGE. ; and a jury.
13

14
15 A P P E A R A N C E S:

16 JOHN ANTHONY, ASSISTANT SOLICITOR
 Attorney for the State

17 ROSS BURTON, PUBLIC DEFENDER
18 Attorney for the Defendant

19
20 Michael R. Watts
 Circuit Court Reporter
21
22
23
24
25

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(OCTOBER 16, 2008)

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1	EXHIBITS			
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1 (PROCEEDINGS, October 15, 2008)

2 THE COURT: Solicitor, you can call your next
3 case.

4 MR. ANTHONY: Yes, sir.

5 The next case is the State versus Tijuana Peake.
6 This is 2008-44-332 and 333, an indictment for distribution
7 of crack, and distribution of crack within proximity of a
8 school.

9 Both indictments have been True Billed to the
10 Grand Jury, and I am handing up the indictments and my
11 witness list and voir dire requests to the court.

12 THE COURT: These are cases of the State versus
13 Tijuana Duvall Peake. He's charged with distribution of
14 crack cocaine and he's charged with distributing crack
15 cocaine within the proximity of a school, park or
16 playground.

17 Are you Mr. Peake?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: If you will stand and face the jury.

20 All right. This is Mr. Peake and he's represented
21 by Mr. Burton.

22 The State is represented by Mr. Anthony.

23 And before I -- let me see counsel over here just
24 one minute.

25 (Whereupon, the lawyers approached the bench for

1 an off-the-record discussion)

2 THE COURT: Is anyone related by blood or marriage
3 to Mr. Tijuan Duvall Peake? If so, please stand.

4 Yes, ma'am, your name and number.

5 JUROR NUMBER 208: 208, Ursula Sumpter, and he's a
6 distant cousin.

7 THE COURT: I'll excuse you from sitting on the
8 trial. Don't leave, but just have a seat.

9 Any of you members of the Grand Jury that's passed
10 on this set of indictments at an earlier point in time? If
11 so, please stand.

12 No one stands.

13 THE COURT: Any of you know anything about this
14 case, heard about it from any source whatsoever, or have any
15 of you formed or expressed any opinion about any matter or
16 issue which would be involved in this case? If so, please
17 stand.

18 No one stands.

19 Do any of you have any philosophical, religious,
20 or any reason whatsoever why you do not believe that you
21 could give a fair and impartial in the trial such as this,
22 that is, a trial where an individual has been charged with
23 violating the laws, our drug laws?

24 Yes, ma'am, your name and number.

25 JUROR NUMBER 162: I'm not sure of my number, but

1 name is Carol Sanders and I would rather not sit on this
2 trial.

3 THE COURT: Okay. You sat on the earlier one?

4 JUROR NUMBER 162: Yes.

5 THE COURT: All right. Just have a seat. I'll
6 excuse you from sitting on this one.

7 No one else stands.

8 Are any of you or a member of your family, or has
9 any of you or a member of your family been charged with or
10 been a victim of what you consider a drug-related offense, a
11 crime? If so, please stand.

12 All right. I know we went through this, but we
13 have to make a new record for every trial, so your name and
14 number again?

15 JUROR NUMBER 145: Donna Queen, 147 (sic).

16 THE COURT: And based on this experience, would
17 you be able to be fair and impartial in the trial of this
18 case?

19 JUROR NUMBER 145: I doubt it.

20 THE COURT: I'll excuse you like I did in the case
21 before. We have to go through it every time.

22 JUROR NUMBER 273: 273, Lacey Whiting.

23 THE COURT: I couldn't hear your name.

24 JUROR NUMBER 273: Lacey Whiting.

25 THE COURT: All right. Do you think you could be

1 fair and impartial?

2 JUROR NUMBER 273: No.

3 THE COURT: All right. I'm going to excuse you
4 too. Don't leave. Just have a seat.

5 Are any of you members of or contributors to
6 organizations such as Students Against Drunk Drivers,
7 Mothers Against Drunk Drivers, Citizens Against Violence,
8 Troopers Association, Sheriffs Association, Fraternal Order
9 of Police? If so, please stand.

10 No one stands.

11 Are any of you related to Mr. Anthony from the
12 solicitor's office; or Mr. Burton; or have any of you been
13 represented by either the solicitor's office or Mr. Burton?
14 If so, please stand.

15 No one stands.

16 The possible witnesses in this case are a Kevin
17 Lindsey, Investigator Mickey Parker, Captain Greg Pickens,
18 Deputy Beth Stewart, Lieutenant Jeff Lawson. Those are the
19 possible witnesses in this case.

20 Are any of you related by blood or marriage or are
21 you a close personal friend or acquaintance of any of those
22 individuals? If so, please stand.

23 All right. Yes, sir, your name and number again?

24 JUROR NUMBER 175: Dennis Sherbert, 175. Jeff
25 Lawson is a neighbor of mine.

1 THE COURT: Would that affect your ability to be
2 fair and impartial in the trial of this case?

3 JUROR NUMBER 175: No, sir.

4 THE COURT: All right. You may be seated. Thank
5 you.

6 Are any of you or a member of your family involved
7 in law enforcement or the prosecution of criminal cases at
8 any level? If so, please stand.

9 All right. We will start here and work our way
10 back and then go over there.

11 Your name and number again?

12 JUROR NUMBER 221: Caroline Thomason. My nephew
13 is a trooper.

14 THE COURT: Would that affect your ability to be
15 fair and impartial in this trial?

16 JUROR NUMBER 221: No, sir.

17 THE COURT: All right. You can have a seat.

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

19 JUROR NUMBER 247: 247, Angelia Vassey. My nephew
20 works for the City of Union Public Safety.

21 THE COURT: I'm going to excuse you because this
22 is the Union Public Safety. Don't leave, but I'll excuse
23 you from sitting on this case.

24 Yes, ma'am.

25 JUROR NUMBER 354: 354. My brother-in-law is a

1 detective with the City of Union.

2 THE COURT: Well, I'll also excuse you, since this
3 is a City of Union case. Just have a seat. Thank you.

4 Yes, sir.

5 JUROR NUMBER 58: Number 58, Claude D. Hart, Sr..
6 My son is formerly with the city and my daughter-in-law
7 works for the sheriff's department.

8 THE COURT: I'm also going to excuse you, since
9 this is a city case, so you can be seated.

10 Thank you. No one else stands.

11 Anything further from the State?

12 MR. ANTHONY: No, sir.

13 THE COURT: Anything further from the defense?

14 MR. BURTON: No, Your Honor.

15 THE COURT: All right. Do any of you know of any
16 reason whatsoever why you could not or should not serve as a
17 fair and impartial juror in the trial of this case? If so,
18 please stand.

19 Yes, ma'am. Your name and number?

20 JUROR NUMBER 124: 124, Chasitty Norman. I don't
21 know him personally, but I know him from standing around.

22 THE COURT: Would that affect your ability to be
23 fair and impartial?

24 JUROR NUMBER 124: No.

25 THE COURT: Would you be able to be fair in this

1 case?

2 JUROR NUMBER 124: Yes.

3 THE COURT: All right. Thank you. I appreciate
4 it. I'm glad you shared that with us.

5 All right. No one else?

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

7 JUROR NUMBER 149: 148 -- 149. Deitrich Rice.

8 I'm not for sure, but I think I'm related to him, but I'm
9 not for sure.

10 THE COURT: Well, if you are not for sure, I'll
11 ask you this. Do you think you could be fair and impartial
12 in the trial of this case?

13 JUROR NUMBER 149: Yes.

14 THE COURT: You can remain with us then.

15 All right. You know what we do. You hear your
16 name called, come forward.

17 The strikes are five and five.

18 (Whereupon, the jury was impaneled)

19 THE COURT: Anything further from the State
20 involving the striking of the panel?

21 MR. ANTHONY: No.

22 THE COURT: Anything from the defense?

23 MR. BURTON: No, Your Honor.

24 THE COURT: All right. Those of you who were not
25 chosen, I'm going to allow you to leave, but call back

1 tonight after seven and you will receive instructions,
2 keeping in mind what I have told you about how important it
3 is to follow those instructions, and please leave quietly so
4 we can start working with this jury. Thank you.

5 (Whereupon, the jury venire panel left the
6 courtroom)

7 THE COURT: Members of the panel, thank you for
8 working with us.

9 If you will stand, the clerk will administer the
10 oath. And when you sit down, Ms. Stambaugh, I'm going to
11 ask you to be the forelady. If you would with lady with the
12 purple shirt on just switch. Why don't you go ahead and
13 switch now.

14 Ms. Forelady, you will always sit in that seat and
15 the alternate will always sit in that seat. It doesn't
16 really matter where the rest of you sit. There is really no
17 assigned seating, other than those two. And remain standing
18 and the clerk will administer the oath.

19 (Whereupon, the jury panel was sworn)

20 THE COURT: Please have a seat.

21 In just a minute I'm going to let the attorneys
22 come before you and make opening statements. They have a
23 right to do that. They have no obligation to do that. If
24 they do make -- those seats do go back. We have never had
25 one go all the way back, but they will attempt to, so be

1 careful. The forelady almost lost it. I apologize for
2 that. Just be careful.

3 The attorneys have a right to come before you and
4 make opening statements. They are not arguing their case.
5 They are not witnesses. They are simply giving you an
6 outline of the trial or a blueprint of the trial or a
7 preview of the trial.

8 The defendant, Mr. Peake, is charged with these
9 two drug-related offenses - distributing drugs and having
10 done that within one-half mile of a public middle school.
11 To these charges he has entered pleas of not guilty, which
12 places on the State the burden of proving his guilt beyond a
13 reasonable doubt.

14 You are the sole judges of the facts in this case
15 and I am the sole judge of the law.

16 Mr. Peake is presumed innocent of the charge. As
17 I said, you have to determine the true facts and apply the
18 law as I charge it. You must take and accept and apply the
19 law as I charge it, even if you think I charge the law in
20 error, or even if you think the law should be different.

21 You are not to infer from anything I say or do as
22 indicating an opinion of mine on the facts. I'm not allowed
23 to formulate or express to you an opinion on the facts.

24 It's solely up to you to determine the true facts,
25 apply the law, and return a verdict that speaks the truth.

1 In determining the true facts, it's up to you to
2 examine the evidence and give to the witnesses and the
3 evidence the effect, the value, and the weight and the truth
4 that you believe it should have. Use your common sense,
5 your sense the logic, your sense of reasoning, your
6 experiences in life as you analyze the evidence.

7 You must judge the believability of the witnesses
8 who testify in order to determine a true fact. In assessing
9 believability, credibility, use those things that I have
10 already discussed. Use those things that you in your
11 day-to-day life find as being indicative of truthfulness and
12 you can use certain evaluators: A witness' demeanor;
13 whether they have any bias or prejudice; are they hesitant
14 or straightforward. You can consider the opportunity a
15 witness had to actually know those things about which the
16 witness testified.

17 We take breaks about every hour and a half.
18 That's usually a good time to take a break. If you need a
19 break at any time, raise your right hand and we will take a
20 break, no questions asked. I extend that to counsel and to
21 Mr. Peake.

22 You don't need to take notes. You are not to make
23 up your own mind or discuss the case until we reach a point
24 in the trial where I instruct you to jointly deliberate and
25 return a unanimous verdict. Prior to that time you are not

1 equipped with all the tools that you need to make a fair and
2 reasonable decision, so don't try to make up your mind.
3 Don't discuss the case among yourselves.

4 When we break for the evening, and I believe this
5 case will go over into the morning, although we will finish
6 tomorrow, it will not go into Friday, but do not let anyone
7 outside the courtroom discuss this case with you. If anyone
8 tries to discuss this case with you, tell them that you are
9 seated as a juror and cannot. And report back to me if
10 anybody tries to discuss this case with you.

11 Again, don't make up your own mind or try to -- or
12 discuss the case among yourselves, until I instruct you to
13 do so.

14 Do not go to where this allegedly happened; that
15 is, don't go do any independent investigation. Don't go on
16 the Internet to try to find out anything about the case.
17 That would be improper. You must base your verdict solely
18 on the law and evidence in the trial.

19 I do not know that this case would receive any
20 coverage in the news. If it does, don't watch anything,
21 listen to anything, or read anything about this case. Your
22 oath requires you to take, accept, and apply the law as I
23 charge it.

24 Now, before the attorneys make their opening
25 statements, we are going to take short break, so I'm going

1 to let you go into the jury room. And then when you come
2 back out, the attorneys have a right to make their opening
3 statements.

4 (The following takes place outside the presence of
5 the jury panel)

6 THE COURT: We will be at ease for a few minutes.

7 MR. ANTHONY: Thank you, Your Honor.

8 (Whereupon, proceedings were recessed)

9 (Whereupon, proceedings were reconvened)

10 THE COURT: Are we ready for the jury?

11 MR. BURTON: Mr. Peake has a motion with respect
12 to my representation of him.

13 THE COURT: Mr. Peake, what's the motion?

14 THE DEFENDANT: I just don't feel comfortable with
15 a trial with him. He's trying to tell me if there is
16 something, and I wasn't going to say something that I know I
17 didn't do. I just don't feel comfortable in a trial with
18 him. I would like --

19 THE COURT: What are you going to do?

20 THE DEFENDANT: I want you to appoint me a new
21 attorney.

22 THE COURT: I'm not going to go that. You know
23 I'm not going to appoint you another attorney. We have
24 already tried the case -- I mean, we have already drawn the
25 jury, so you either go with Mr. Burton or you go without an

1 attorney.

2 Which do you want? Do you want to go without an
3 attorney? I'll have Mr. Burton sit beside you. Do you want
4 to be your own attorney?

5 THE DEFENDANT: No.

6 THE COURT: All right. Well, I deny your motion.

7 MR. ANTHONY: Thank you, Your Honor.

8 THE COURT: Bring in the jury.

9 (The following takes place in the presence of the
10 jury panel)

11 THE COURT: All right, Mr. Anthony.

12 MR. ANTHONY: Thank you, Your Honor.

13 (C.D. Marked as State's Exhibit No. 1 for
14 identification)

15 (Drugs marked as State's Exhibit No. 2 for
16 identification)

17 MR. ANTHONY: Good afternoon. My name is John
18 Anthony. I'm the deputy solicitor here in Union. I'll be
19 presenting the State's evidence to you in this case.

20 You know, one funny thing about people is that
21 people tend to like things that are bad for them. And for
22 some people that's drinking too much alcohol, or for some
23 people that's either too many sweets. For some people
24 that's other people, because some people just find it
25 certain other people are bad for them to be around.

1 But some people like things that are worse for
2 them than sweets or alcohol. Some people like illegal
3 drugs. And some people like illegal drugs so much that they
4 are willing to pay money to buy illegal drugs to use. And
5 one thing about life is anytime there is somebody willing to
6 spend money on something, there is somebody willing to sell
7 it. And that's the case with illegal drugs, because there
8 are people out there who make money for themselves by
9 selling drugs.

10 Now, if you're a police officer and you're charged
11 with enforcing the law, this creates quite a problem for
12 them, because the people who are out buying the drugs, they
13 don't want the people who are selling the drugs to get
14 caught, because they like what the person who is doing the
15 selling is selling. You know, if you get robbed, you are
16 going to call the police. Or if there is somebody breaks
17 into your house, you are going to call the police. But when
18 you see -- when you are out buying some drug and you see
19 people selling drugs, people are selling to you, you are not
20 going to call the police, because those people who are out
21 buying, they are like what's being sold. So what the police
22 have to do is they have to find somebody who will go out in
23 the places where drugs are being sold and who will buy the
24 drugs.

25 Back in November of last year, there was a name

1 named Kevin Lindsey, who was working with Investigator
2 Mickey Parker, who is sitting over there at the State's
3 table, who works for the Union Public Safety Department, and
4 Mr. Lindsey was working with Mr. Parker. And what Mr.
5 Lindsey was doing is he was going to places where people
6 were selling drugs and he was buying drugs and reporting
7 that, reporting who had sold him the drugs to Investigator
8 Parker of the Union Public Safety Department, so that he
9 could enforce the drug laws. And that's essentially what
10 happened in this case.

11 This case happened on November 9th of 2007, and
12 Mr. Lindsey made contact with the defendant in this case,
13 Mr. Peake, seated over there, and they worked out to meet at
14 the Dixie Curb Market in Union. Mr. Lindsey went to the
15 Dixie Curb Market. Mr. Peake was in the Dixie Curb Market.
16 They walked outside to Mr. Peake's car, and Mr. Peake's car
17 out right there outside the market, and Mr. Peake sold Mr.
18 Lindsey a \$20 rock of crack cocaine. That's what we are
19 going to prove to you in the presentation of this case.

20 Now, what we have to present to you is the
21 testimony of Mr. Lindsey, the testimony of Investigator
22 Parker. There is a video and an audio recording of what
23 went on inside the store and what went on out there in the
24 parking lot. We are going to present that to you. And we
25 are going to present a few witnesses to you who processed

1 these drugs and made a determination that the drugs that Mr.
2 Lindsey bought were crack cocaine. And we believe that once
3 you have heard the evidence in this case, that you will find
4 that Mr. Peake is guilty of distribution of crack cocaine
5 and distribution of crack cocaine within the proximity of a
6 school. Thank you y'all very much.

7 THE COURT: Mr. Burton.

8 MR. BURTON: May it please the court, Judge Hayes,
9 Mr. Anthony.

10 Madam Forelady, ladies and gentlemen of the jury,
11 my name is Ross Burton. I'm the only public defender for
12 Union County. Today I have the honor to defend Mr. Tijuana
13 Peake of the charge of distribution of crack cocaine and
14 distribution within half a mile of a school or park.

15 We are all pretty lucky folks here that we live in
16 a country that, despite what you hear about lawyer jokes,
17 and, you know, million dollars verdicts over nothing, we
18 live in a country that enjoys, not a perfect legal system,
19 but the best legal system that's ever been devised. I spent
20 a whole 20 year career in the Army and I traveled a lot of
21 places and I know a lot about other legal systems. And
22 although our legal system is flawed, it's the best system
23 known to man and it's the envy of the world.

24 And there is a couple of reasons why it's the envy
25 of world. The first reason is because of the presumption of

1 innocence. I love the presumption of the innocence. From
2 the moment Mr. Peake was arrested, the presumption of
3 innocence attached to him and placed him in the class of the
4 innocent. And he sits there right now an innocent man. Not
5 because I say so, but because our Supreme Court has said
6 that somebody charged with a crime wears a robe of
7 righteousness that stays with them throughout the period of
8 time they are charged. If they are out on bond, it stays
9 with them. It stays with them when they come into court to
10 be tried. It stays with them throughout the entire trial.
11 And as you walk into the jury room for the last time to
12 deliberate, he's still an innocent man. He only -- he can
13 only be convicted if that robe is stripped from him by the
14 State, and only the State, providing competent evidence that
15 convinces you twelve jurors of his guilt beyond a reasonable
16 doubt.

17 Now, that brings me to the second thing that I
18 love about our country, and that's not because Judge Hayes,
19 or because of me, or Mr. Peake, or Mr. Anthony, or
20 Investigator Parker, or anything like that, except because
21 of you, because nobody in America can be convicted of a
22 crime. Nobody can be set in front of that judge to be
23 punished unless and until the State has proven their guilt
24 beyond a reasonable doubt.

25 Now, at the end of the case Judge Hayes is going

1 to explain to you what reasonable doubt means. It's any
2 doubt that makes somebody hesitate to ask. It's such doubt
3 that leaves you firmly convinced of somebody's guilt.

4 Now, we have other levels of proof in other courts
5 and in other situations. We have, for example, if it was a
6 civil court. A civil court, when somebody is suing somebody
7 else for money judgments, the plaintiff has to prove against
8 the defendant by a preponderance of the evidence. Picture
9 the Scales of Justice. If the scales tip ever so slightly
10 towards the plaintiff, the plaintiff wins and collects their
11 money. If it tips ever so slightly in favor of the
12 defendant, the defendant wins the case. But that's not the
13 way it is in criminal court, because at some time in our
14 past our founding fathers decided that rather than to see
15 one citizen punished for -- punished -- one innocent person
16 punished, we would rather see X number of people who were
17 guilty not be punished. I don't know exactly what that
18 number is, but that's why that level of proof was
19 established and that's why the State is required to meet
20 that level of proof.

21 In other cases there is clear and convincing
22 evidence, where that kind of -- in certain evidentiary
23 rulings and certain Family Court matters one side would have
24 to prove against the other by clear and convincing evidence.
25 That's pretty powerful words, I think, and they mean what

1 they way. But guess what. That's not enough in this court.
2 The proof is beyond any reasonable doubt. Any doubt. If
3 it's a reasonable doubt, it must be construed in favor of
4 Mr. Peake and against the State. So those are some things
5 that I love about our country. It makes me proud to be an
6 American and proud to be doing the job that I do.

7 Now, this case is a pretty simple case, but your
8 job in this case is not simple. Your job is to dissect
9 every single piece of evidence in this case and decide
10 whether that evidence points to Mr. Peake's guilt beyond a
11 reasonable doubt. And it's not so much going to hinge on
12 Investigator Parker or Captain Pickens back there. It's
13 going to hinge on one fellow. His name is Kevin Lindsey.
14 Okay. Kevin Lindsey is -- the evidence will show that Kevin
15 Lindsey is a crusader and he's out there. He's out there
16 playing God with these people that he believes sells drugs.
17 He's out there. He loves his job. He's done it hundreds of
18 times. Maybe thousands of times. He's a professional at
19 this. He's professional, he wants you to believe, because
20 he's a crusader, but I think the evidence will show the real
21 reason he does this is because he's paid for it. He's paid
22 real well. He will tell you that he's paid forty bucks each
23 time that he goes and performs a controlled buy and that he
24 loves to do that. And if he does it a hundred times, that's
25 four grand in his pocket. If he does it a thousand times,

1 it's forty grand. I worked a long time before I was making
2 \$40,000, so that's pretty sweet. I think that will probably
3 cause some doubt in your mind about whether or not he's here
4 really to be a concerned citizen to help Union County with
5 the drug problem, or to come here and kind of do the job
6 that he was supposed to do for that money. And guess what?
7 Part of that job isn't just to go around and find people to
8 sell drugs. Part of the job is he has got to sit in that
9 chair. He's got to sit in that chair and he's got to point
10 towards somebody at that defense table and say they did it.
11 And I suspect that the evidence will show that his
12 motivation isn't his civic duty, but the fact that he's paid
13 for it and it's part of the deal. If he doesn't -- if he
14 doesn't start pointing fingers at those people, then he
15 doesn't get the sweet work any more.

16 You are also going to see a video. And except for
17 maybe some identification issues, that video is just
18 laughable. The State wants you to believe that video is
19 going to portray a drug buy. Okay. You are not going to
20 see any money. You are not going to see any drugs. You are
21 not going to see anything passing hand to hand. You are not
22 going to see anything that you can construe is a drug buy,
23 but that's what we want you to believe.

24 Now, here is this guy that's done this a whole lot
25 of times. Now, you know, and he's wearing some kind of

1 device, the evidence will show, that produces that video. I
2 want you to think to yourselves while you are watching that
3 video and you are listening to that man whether he's the
4 kind of guy that knows doggone well how to produce the kind
5 of video that would stand up in court and convince a jury of
6 a defendant's guilt beyond a reasonable doubt. He knows
7 what he's doing, you know. Certainly he knows enough to
8 show money.

9 MR. ANTHONY: I would object to this. This is
10 basically argument.

11 THE COURT: Yeah, I think -- let's wrap it up.

12 MR. BURTON: All right, Your Honor, I'll just move
13 on.

14 I think the evidence will show -- it's fair to say
15 that the evidence will show that he's in control of where
16 that camera is pointed. I want you to consider that while
17 you -- while you examine the testimony.

18 And also the State has to prove that this happened
19 within half a mile of a park. Now, the State is going to
20 want you to find that within half a mile of park means that
21 it's kind of a straight line, which means that Dixie Curb
22 and Excelsior Middle School, but I ask you to consider that
23 really the evidence will show that he just doesn't have the
24 power to follow that line. He has to go a more roundabout
25 route that I submit to you is going to be longer than half a

1 mile. So I just ask you to listen to the evidence and I'll
2 talk to you again at the end of the case. Thank you.

3 THE COURT: Call your first witness.

4 MR. ANTHONY: We call Investigator Parker.

5 INVESTIGATOR MICKEY PARKER, having been first duly
6 sworn, testified as follows:

7 DIRECT EXAMINATION BY MR. ANTHONY:

8 Q. State your name, please.

9 A. Mickey Parker.

10 Q. Mr. Parker, how are you employed?

11 A. Union Public Safety Department.

12 Q. How long have you worked there?

13 A. A little over seven years.

14 Q. What's your current position with the Union Public
15 Safety Department?

16 A. Narcotics investigator.

17 Q. How long have you held that position with them?

18 A. A little over two years.

19 Q. I want to take you back to November of 2007. Were you
20 working as a narcotics investigator at that time?

21 A. I was.

22 Q. And have you had contact at that time with Kevin
23 Lindsey?

24 A. Yes, sir.

25 Q. What was Mr. Lindsey doing in relation to the Union

1 Public Safety Department at that time?

2 A. He was making a controlled narcotics buy.

3 Q. I'm sorry?

4 A. A controlled narcotics buy, buying drugs.

5 Q. And taking you now to November the 9th of 2007. Did
6 you meet with Mr. Lindsey on that day?

7 A. I did.

8 Q. Where did you meet with him initially?

9 A. I picked him up at a location there in town and took
10 him to my office.

11 Q. And approximately what time was this?

12 A. It was later in the day. It had gotten dark. I don't
13 recall the exact time.

14 Q. And when you took Mr. Lindsey to the narcotics office,
15 what did you do there, as far as what was the nature of your
16 contact with him there?

17 A. He had called me wanting to make some buys that night.
18 Once I picked him up, I went to the office. We talked about
19 what we were going to do. I searched his person, made sure
20 he had no other money or any kind of weapons or drugs on his
21 person.

22 Q. And did you provide him with any kind of device to
23 record what he would be doing that night?

24 A. Yes, once that was completed, I put an audio video
25 camera on his person and supplied him with money to go out

1 and make these controlled buys.

2 Q. The camera that you gave him, once you attached the
3 camera, what is the mobility of it?

4 A. He's instructed not to move it, not to turn it on, not
5 to turn it off. He's not to mess with it in any way.

6 Q. And how much money did you give him to make the
7 purchase?

8 A. \$20.

9 Q. And what was -- what is the significance of \$20 in
10 regards to the sale of crack cocaine?

11 A. It's a distribution of crack.

12 Q. I'm sorry?

13 A. It's just a distribution of crack. I'm not sure.

14 Q. Well, as far as how cocaine is priced, in your
15 experience?

16 A. Oh, it's sold in 20's, 30's, 40's.

17 Q. And when you -- after you spoke to Mr. Lindsey that
18 night, where were you -- where was it your expectation he
19 would be purchasing crack?

20 A. At the Dixie Curb Market.

21 Q. And at that time were you expecting him to make a
22 purchase from a particular individual?

23 A. Yes, sir.

24 Q. And is the Dixie Curb Market in the City of Union?

25 A. It is.

1 Q. And is it in Union County?

2 A. It is.

3 Q. After you had taken Mr. Lindsey, or -- after you had
4 taken him to the narcotics office and you had gone through
5 your procedure with the search and the wiring and giving him
6 the money, what happened then?

7 A. We got in the car and I dropped him off within a block
8 or so of the Dixie Curb Market.

9 Q. After you dropped him off at the Dixie Curb Market,
10 what did you do?

11 A. I drove away. It's hard for us to sit around in the
12 area and actually observe the transaction, because most of
13 the people in that area know us and the vehicle that we
14 drive, so we have to just kind of get out of sight for a few
15 minutes.

16 Q. What was the next contact that you had with Mr. Lindsey
17 after you dropped him off?

18 A. He called me and told me that he had completed the
19 transaction and I was to pick him back up.

20 Q. And did you do that?

21 A. I did.

22 Q. Once you picked him up, what was provided to you?

23 A. He give me a white off-white rocklike substance that
24 appeared to be crack cocaine and I placed it into a small
25 evidence bag. We went back to the office.

1 Q. I want to show you what's been marked for
2 identification as State's Exhibit No. 2. I would ask you if
3 you could identify the item I have just handed you?

4 A. It's the crack cocaine that we recovered.

5 Q. And what -- as far as the individual bags that are in
6 that exhibit, what bag did you put the crack cocaine in
7 initially?

8 A. Initially I put it in this smaller bag. It's just got
9 a zip closure on the top. Once I got to the office, I
10 placed it inside this blue and white bag which has a seal
11 and -- that was at the narcotics office.

12 Once I get back to the Public Safety Department, I
13 place it in this bag, the white or clear and white, blue
14 lines around the bigger bag. That goes into what we call
15 the best pack, and it's sent off for a drug analysis.

16 Q. And did you -- with that bag, did you seal it up after
17 you placed it --

18 A. It is in the big bag, yes, sir.

19 Q. Okay. So after you secured the rock of crack from Mr.
20 Lindsey that night, what did you do next?

21 A. Once he got back to the office with me and I had
22 secured this evidence in this bag, I searched him again to
23 make sure he had no other contraband or anything else on him
24 that he wasn't supposed to. Filled out some paperwork with
25 him and paid him. I went to the Public Safety Department

1 and dropped it in the evidence.

2 Q. How much did you pay Mr. Lindsey?

3 A. I believe it was \$40.

4 Q. And did you do anything in regards to looking at the
5 videotape?

6 A. We did. We reviewed the tape after it was downloaded
7 and the person I saw I knew as Tijuan Peake.

8 Mr. Lindsey had given me a nickname and through further
9 investigation I found that I was correct on the real name by
10 the DMV photo.

11 Q. And what nickname did Mr. Lindsey give to you?

12 A. He said Little Man Mills.

13 Q. And what determination did you make about any -- about
14 the name, the last name Mills, in relation to Mr. Peake?

15 A. It's believed that his mother's maiden name was Mills.
16 His grandmother is a Mills. And Mr. Lindsey had knew his
17 family as Mills. That's why he presented that he went by
18 Mills.

19 Q. And did you recognize Mr. Peake as well when you looked
20 at the tape?

21 A. I did, yes.

22 Q. And how do you know Mr. Peake?

23 A. Just working the streets for several years you get to
24 know a lot of people, and that's a name and face that I had
25 come to know.

1 Q. And as far as reviewing the tape, how does the tape
2 appear when you watch it?

3 A. When it first comes on, it's pretty much black, because
4 there is no light on the camera. It doesn't pick up the
5 light until it gets to the store. There is not a -- it's
6 not an infrared camera. It's just really meant to be used
7 in the daytime.

8 Once he walks from where I let him out to the store,
9 you can see pretty much everything that goes on. He walks
10 into the store, walks in behind Mr. Mills and follows him
11 out to his car and makes the transaction.

12 Q. And after you had reviewed the tape and retrieved the
13 evidence from Mr. Lindsey, did you make any decision, as far
14 as charging anyone with any crimes for what had gone on at
15 the Dixie Curb Market that night?

16 A. After I reviewed the video and it appeared to be Tijuan
17 Peake to me on the video, I ran him through DMV, compared
18 that photo to the photo in the video and at that time I was
19 positive or had a positive identification and I had issued
20 warrants signed for the arrest of Mr. Peake.

21 Q. And is Mr. Peake here in court today?

22 A. He is.

23 Q. Would you point him out, please?

24 A. The defendant beside Mr. Burton.

25 MR. ANTHONY: I would ask that the record reflect

1 he's identified the defendant Mr. Peake.

2 THE COURT: All right.

3 MR. ANTHONY: Thank you. That's everything on
4 direct.

5 CROSS EXAMINATION BY MR. BURTON:

6 Q. Investigator Parker, Mr. Lindsey, the confidential
7 informant, he was acting as an agent of the police, right?

8 A. Yes.

9 Q. But he was posing as somebody who legitimately was
10 trying to buy drugs, right?

11 A. Yes.

12 Q. Okay. So the purpose of his actions was to create a
13 deception to make somebody sell him some drugs, right?

14 A. Yes, sir.

15 Q. All right. With respect to the camera, you have seen a
16 lot of these videos, haven't you?

17 A. I have.

18 Q. And some are better than others, no doubt?

19 A. Of course.

20 Q. And some of the videos that you have seen show that the
21 CI will make it a point to -- if there is money passing, to
22 show money in their hands, right?

23 A. I can't say that the CI actually does that. It's just
24 a lot of times the CI and the suspect are both moving and
25 sometimes you get a better video. Sometimes you don't.

1 Q. I mean sometimes you do see that, right?

2 A. Sometimes you do.

3 Q. And the CI knows where the camera is on their body,
4 right?

5 A. Yes.

6 Q. And sometimes the CI will make it a point to, you know,
7 show some little something in their hand?

8 A. I don't believe that they do it on purpose.

9 Q. But it happens though, right?

10 A. It does.

11 Q. Okay. With respect to -- your testimony was when Mr.
12 Anthony asked you whether you were going after a particular
13 individual and you responded in the affirmative. Now, it
14 was -- that was because Mr. Lindsey had said that "well, I
15 know this guy Peake and I think I can buy some drugs from
16 him," right?

17 A. Well, he said he knew a guy by the name of Little Man
18 Mills that he could buy some crack from.

19 Q. Okay. The same general person, though, right?

20 A. Yes, sir.

21 Q. So really -- it really wasn't so much you going after a
22 particular individual. He was the one going out there and
23 identified who might be a good target to --

24 A. Yes, sir.

25 Q. -- run a control buy from, right?

1 A. Yes, sir.

2 Q. He was kind of given pretty much free hand to do that,
3 right?

4 A. If he knew who he could buy from, then that's who I let
5 him buy from.

6 Q. I mean, that's something that you wanted him to do is
7 to go in the area of the Dixie Curb, a known drug area,
8 right?

9 A. Yes, sir.

10 Q. And find somebody that he thought he could buy some
11 drugs from, right?

12 A. Yes, sir.

13 Q. But the ultimate choice of who these people were was
14 his, right?

15 A. On this particular buy, it was, yes, sir.

16 Q. Okay. And Mr. Lindsey has done this for a lot of
17 times, right?

18 A. Yes.

19 Q. In fact, there are several cases this week that he was
20 the confidential informant, right?

21 A. Yes, sir.

22 Q. So you and he worked pretty closely together a lot of
23 times, right?

24 A. Yes, sir.

25 Q. Now, you, yourself, weren't a witness to this?

1 A. No, sir.

2 Q. You weren't an eyewitness to this, were you?

3 A. No, sir.

4 Q. And that's because if somebody sees you there, they are
5 not -- they are going to clam up and go away, probably,
6 right?

7 A. Yes, sir.

8 Q. So it's necessary for you to do this, but you,
9 yourself, to be somewhere out of sight of the location,
10 right?

11 A. Yes, sir.

12 Q. All right. And you paid Mr. Lindsey 40 bucks for his
13 work --

14 A. Yes.

15 Q. -- on this particular case.

16 How much did he get for the day's work?

17 A. That may have been the only case we done that day. I
18 would have to go back and look.

19 Q. What happened to the \$20 that allegedly Mr. Lindsey
20 paid Mr. Peake?

21 A. I guess Mr. Peake got it, or had it.

22 Q. You didn't try and recover it so you had marked money
23 to show to the jury?

24 A. We don't mark money.

25 Q. Why don't you mark money?

1 A. There is no need to.

2 Q. Wouldn't that be pretty good evidence, though?

3 A. If I was to buy-bust everyone on the spot, then I would
4 run out of informants.

5 Q. So the reason you don't do that is you want to keep the
6 same CI working, right?

7 A. Right.

8 Q. I mean, you admit that that would be pretty good
9 evidence if you had it?

10 A. Oh, it would.

11 Q. All right. And is it fair to say that the kind of
12 search that you did with Mr. Lindsey was kind of a pat-down
13 search with maybe a little bit of augmentation, like
14 checking the pockets, or something like that?

15 A. Checking pockets, waistband.

16 Q. And you will admit to the jury if Mr. Lindsey really
17 wanted to conceal something the size of that, what's in that
18 bag, he could have done it, right?

19 A. True.

20 Q. All right.

21 MR. BURTON: That's all the questions that I have.
22 Thank you.

23 THE COURT: Redirect?

24 MR. ANTHONY: Just briefly.

25

1 REDIRECT EXAMINATION BY MR. ANTHONY:

2 Q. In regards to you not arresting Mr. Peake immediately,
3 what would be the ramifications of that, in relation to your
4 ability to continue to use Mr. Lindsey, if you had done
5 that?

6 A. As I stated, if I were to arrest him on the spot, I
7 couldn't use Mr. Lindsey again.

8 Q. And why would that be?

9 A. Everybody would know what was going on.

10 MR. ANTHONY: Thank you. That's everything.

11 THE COURT: Mr. Burton?

12 MR. BURTON: No redirect.

13 THE COURT: You can step down and have a seat at
14 counsel table.

15 Call your next witness.

16 MR. ANTHONY: We call Mr. Lindsey.

17 THE COURT: Come up here and be sworn, please.

18 KEVIN LINDSEY, having been first duly sworn,
19 testified as follows:

20 DIRECT EXAMINATION BY MR. ANTHONY:

21 Q. Would you state your name, please?

22 A. Kevin Lindsey.

23 Q. Mr. Lindsey, where are you from?

24 A. Union, South Carolina.

25 Q. Back in the fall of 2007, did you have any interaction

1 with anybody from the Union Public Safety Department?

2 A. Yes, sir.

3 Q. What were you doing with the Union Public Safety
4 Department?

5 A. Working with the narcotics team.

6 Q. With their narcotics team?

7 A. Yes, sir.

8 Q. And who in particular were you working with?

9 A. Mickey Parker.

10 Q. And what were you doing with Investigator Parker?

11 A. Repeat the question, please.

12 Q. What were you doing with Investigator Parker?

13 A. Buying narcotics.

14 Q. And were you receiving anything from the Public Safety
15 Department as compensation for your work buying narcotics?

16 A. Yes, sir.

17 Q. And what was happening to compensate you?

18 A. Money.

19 Q. I want to take you back now to November 9th of 2007.

20 Did you have any contact on that day with Mr. Peake, the
21 defendant in this case?

22 A. Yes, sir.

23 Q. How did you initially contact him that day?

24 A. By phone.

25 Q. And how did you know him? What name did you know him

1 by?

2 A. I knew him as Little Man.

3 Q. And did you have an idea as to what his last name was?

4 A. I did have an idea what his last name was, but I
5 thought it was Mills, but I knew it was Peake.

6 Q. Why did you think at that time that his last name was
7 Mills?

8 A. Because of the family. I knew his family.

9 Q. Because of his mother's family?

10 A. Yes, sir.

11 Q. And when you contacted Mr. Peake on November 9th, what
12 did you talk to him about?

13 A. About purchasing crack from him.

14 Q. Did you agree to meet him at any particular place?

15 A. Yes, sir, the Dixie Curb Market on South Church Street.

16 Q. What arrangements did you make with him, as far as --
17 after the first contact, what arrangements did you make with
18 him, as far as meeting him the second time? Or what
19 arrangements did you make with him, as far as contacting him
20 again about coming to the Dixie Curb Market.

21 A. Repeat that one more time, please.

22 Q. After you talked to him the first time --

23 A. Right.

24 Q. -- did you say that you would contact him another time?

25 A. All right. Yes, after I got with the narcotics, with

1 Mr. Parker, I called him back after we had met and I told
2 him I would meet him in about two minutes at the Dixie Curb
3 Market.

4 Q. And when you talked to him the first time, did you tell
5 him that you would be calling him again?

6 A. Yes, sir.

7 Q. Okay. And once you talked to him, did you get in touch
8 with Investigator Parker?

9 A. Yes, sir.

10 Q. And what happened between you and Investigator Parker
11 when you contacted Investigator Parker?

12 A. You mean before, or after we met?

13 Q. Before. Like going back before you ever met him, when
14 you called Investigator Parker, what happened then?

15 A. He picked me up and we went to the office, put on the
16 device and proceeded to go to the -- to about a block away
17 from the Curb Market.

18 Q. Let's back up a little bit. When you get to the
19 office --

20 A. Right.

21 Q. -- Investigator Parker picks you up and takes you to
22 the narcotics office --

23 A. Uh-huh.

24 Q. -- what happened at the narcotics office?

25 A. I was searched and put a device on.

1 Q. And were you given anything to make your buy with?

2 A. I was given \$20.

3 Q. Once you had been to the narcotics offers and were
4 searched and had a camera placed on you and you were given
5 \$20, what did Investigator Parker and you do then?

6 A. We left the office and headed towards the Curb Market.

7 Q. And what happened as you got to the Dixie Curb Market?

8 A. I made -- I made a phone call.

9 Q. And who did you call?

10 A. I called Mr. Peake.

11 Q. What did you tell him?

12 A. I told him I would be there in two minutes.

13 Q. And then what happened when you and Investigator Parker
14 proceeded towards the market?

15 A. After I got out of the car, I walked on to the Curb
16 Market and met with Mr. Peake.

17 Q. When you got to the market and you went in, who did you
18 see?

19 A. I seen Mr. Peake.

20 Q. And what happened once you walked in and saw Mr. Peake?

21 A. We walked outside, I purchased the crack and I left.

22 Q. Where did you go outside?

23 A. Right to his car.

24 Q. And where was his car parked?

25 A. Right in front of the Curb Market.

1 Q. And as you went there to his car, what did Mr. Peake
2 give you?

3 A. He gave me a \$20 rock.

4 Q. And what did you give Mr. Peake?

5 A. I gave him \$20.

6 Q. And once you engaged in this transaction with him, what
7 did you do then?

8 A. Got on the phone and called Mr. Parker back and we met
9 about a block away and went back to the office and recorded
10 what we had did and I left.

11 Q. I'm sorry now, what?

12 A. I said we went back to the office. I gave him the
13 crack, we went back to the office, he paid me, and went and
14 dropped me back off.

15 Q. And when you met up with Investigator Parker, who did
16 you tell him that you bought from?

17 A. I told him I bought from Little Man.

18 Q. And what did you do with the crack?

19 A. I gave it to him. He put it in evidence.

20 Q. Okay. And once you got back to the narcotics office,
21 what happened in regards to you being searched?

22 A. Oh, when we got back to the office, I gave him the
23 crack, he searched me again and then I was paid.

24 Q. And what happened to the camera when you were --

25 A. The device was taken off of me.

1 Q. And how much were you paid?

2 A. \$40.

3 Q. I'm handing you what's been marked for identification
4 as State's Exhibit No. 1. I would ask you if you could look
5 at that CD and the markings on it and say if you have seen
6 the contents of that CD?

7 A. Yes, I have.

8 Q. All right. And what does that CD contain?

9 A. It contained the actual contact with me and him made.

10 Q. The actual buy?

11 A. The buy, yeah.

12 Q. And does that CD fairly and accurately depict your
13 transaction that night with Mr. Peake?

14 A. Yes, sir.

15 MR. ANTHONY: We move Exhibit No. 1 into evidence.

16 MR. BURTON: No objection, Your Honor.

17 THE COURT: It would be received without
18 objection.

19 MR. ANTHONY: I would ask to publish this to the
20 jury at this time.

21 THE COURT: Yes, sir.

22 (C.D. played to the jury panel)

23 (C.D. stopped)

24 BY MR. ANTHONY:

25 Q. Mr. Peake -- I'm sorry, where does that start off?

1 A. I was there at the office.

2 Q. In the office.

3 (C.D. played)

4 (C.D. stopped)

5 BY MR. ANTHONY:

6 Q. When your voice comes on the tape, what are you doing
7 right there?

8 A. I'm making the initial call.

9 Q. That's your call to Mr. Peake?

10 A. Yes, sir.

11 (C.D. played)

12 (C.D. stopped)

13 BY MR. ANTHONY:

14 Q. What just happened there?

15 A. I got out of the car.

16 Q. You just got out of the car?

17 A. Correct.

18 Q. So now you are walking up to the store?

19 A. Yeah, heading towards the Curb Market.

20 (C.D. played)

21 (C.D. stopped)

22 BY MR. ANTHONY:

23 Q. All right. Now, you just -- what did you just do?

24 A. Walked inside of the Dixie Curb Market.

25 Q. And that fellow standing there at the counter, who was

1 that?

2 A. That's Little Man.

3 Q. That's Mr. Peake?

4 A. Right.

5 (C.D. played)

6 (C.D. stopped)

7 BY MR. ANTHONY:

8 Q. Just as you walk out, what are you saying to him?

9 A. Excuse me?

10 Q. What are you saying to Mr. Peake as you walk out of the
11 store?

12 A. I don't actually recall what I was saying.

13 Q. Okay. What happened as you approached the car?

14 A. As I approached the car I asked for a rock.

15 Q. Okay.

16 (C.D. played)

17 (C.D. stopped)

18 BY MR. ANTHONY:

19 Q. So what is said between the two of you there?

20 A. I asked him if that was a 20 and he said yes and I told
21 him I would buy it.

22 (C.D. played)

23 (C.D. stopped)

24 BY MR. ANTHONY:

25 Q. All right. Now, what is that where I just froze it?

1 What's that a picture of?

2 A. The crack he handed to me.

3 Q. I'm sorry?

4 A. That is crack that he handed to me.

5 Q. And where is that?

6 If you would, you can just step down and just show the
7 jury where on that screen the crack is?

8 A. It's right there in his hand. You see it up there?

9 Q. There on the right-hand side?

10 A. Right here.

11 Q. Okay. That's in his hand?

12 A. Yes, sir, that's his hand. It's not mine.

13 Q. Okay.

14 (C.D. played)

15 (C.D. stopped)

16 BY MR. ANTHONY:

17 Q. And is that Mr. Peake?

18 A. Yes, sir.

19 (C.D. played)

20 (C.D. stopped)

21 BY MR. ANTHONY:

22 Q. Okay. So what is that, the white object there at the
23 bottom of the screen?

24 A. That's crack cocaine.

25 Q. Okay. And that's just -- what is happening to that

1 object now?

2 A. He's passing it to me.

3 Q. He's passing it? He's raising it up and passing it to
4 you?

5 A. Yes, sir.

6 (C.D. played)

7 (C.D. stopped)

8 BY MR. ANTHONY:

9 Q. Who are you talking to there?

10 A. I was talking to Mr. Parker.

11 (C.D. played)

12 (C.D. stopped)

13 BY MR. ANTHONY:

14 Q. And at this point you are back in the vehicle?

15 A. Yes, sir.

16 (C.D. played)

17 (C.D. stopped)

18 BY MR. ANTHONY:

19 Q. Mr. Lindsey, is the man that you bought crack cocaine
20 from on November 9th of 2007, here in the courtroom?

21 A. Yes, sir.

22 Q. And would you point him out, please?

23 A. Right there.

24 MR. ANTHONY: Your Honor, I would ask that the
25 record reflect that he's identified the defendant Mr. Peake.

1 THE COURT: All right.

2 MR. ANTHONY: Thank you very much. That's all on
3 direct.

4 MR. BURTON: Thank you, Your Honor.

5 For my cross-examination, I would need the video
6 to be brought back to that part where Mr. Lindsey alleges
7 that it's crack cocaine. I would ask Mr. Anthony could help
8 me with that?

9 MR. ANTHONY: Sure.

10 (C.D. played)

11 (C.D. stopped)

12 CROSS EXAMINATION BY MR. BURTON:

13 Q. Mr. Lindsey, you testified that that little white area
14 kind of close to the center of the screen is a rock of crack
15 cocaine, right?

16 A. Yes, sir.

17 Q. And specifically the one that's in evidence in this
18 case, insofar as you know?

19 A. Yes, sir.

20 Q. Okay. And let me just -- let me just show that to you
21 for a second. That's about a quarter in size of a pinky
22 fingernail, isn't it?

23 A. I don't know the weight on it at all.

24 Q. Sir?

25 A. I said I did not know the weight on it.

1 Q. I'm not saying about the weight. I'm saying about the
2 size of it, you know.

3 A. Might be the size of yours, but not mine.

4 Q. Okay. About a quarter of the size of my pinky finger?

5 A. You can say that.

6 Q. Okay. That is what you're saying this is right there,
7 right?

8 A. Yes, sir.

9 Q. Isn't it true that as the tape goes on, it evolves into
10 a fingernail on somebody's right there?

11 A. Excuse me?

12 Q. Doesn't that just evolve from a rock of crack cocaine
13 into somebody's fingernail? Can't you see that quite
14 clearly on there?

15 A. No, sir.

16 Q. Okay. I'm not surprised.

17 All right. Remember the second question Mr. Anthony
18 asked you is what are you doing this for, right, and your
19 answer was money?

20 A. Right.

21 Q. Okay. Didn't you just testify under oath yesterday
22 that you were doing this out of your civic duty to help cure
23 the drug problem?

24 A. And I also said -- and I also said money too. If you
25 recall, I also said money too.

1 Q. But you didn't tell this jury anything about your civil
2 duty, did you?

3 A. The question wasn't asked me. You asked the question
4 yesterday.

5 Q. Didn't Mr. Anthony ask you what was in it for you, what
6 were you doing it for?

7 A. No, he didn't.

8 Q. And you said money?

9 A. What I did it -- what I did it for at the time, yes.
10 When I was doing it just then, yes, money, but he asked me
11 specifically what I was doing it for. You asked me a
12 different question yesterday.

13 Q. Isn't it true when he asked you that question, the
14 first instinct that came into your mind, the Rorschach test,
15 was money? You know, what was the benefit to you I think
16 was his exact words, and you said money. The benefit to you
17 yesterday was, "well, the benefit to me is because there is
18 a drug problem and I'm doing my civic duty."

19 A. Yes, I did, but this isn't the same case yesterday.
20 It's a different case, don't you think?

21 Q. So yesterday's crack buy was for your civil duty, but
22 today's is for money?

23 A. Both of them are for civil duty, but he asked me a
24 specific question and I answered it. But you asked me a
25 different question yesterday and I told you what my civic

1 duty was.

2 Q. I thought you just told the jury that this is different
3 from yesterday was --

4 A. But this is not the same case from yesterday. You are
5 talking about another case that's done.

6 Q. All right. So you are telling this jury your
7 motivation for doing this case is different from your
8 motivation --

9 A. The motivation is the same as it was as always.

10 MR. BURTON: Your Honor, I would ask the witness
11 let me finish my question before he answers.

12 THE COURT: Let him finish his question.

13 A. Okay.

14 BY MR. BURTON:

15 Q. All right. You testified that your motivation for
16 doing yesterday's case was different from your motivation
17 from doing today's case?

18 A. All of it the same.

19 Q. All right. But now you are telling the jury that you
20 did it for civil duty and money?

21 A. Yes, sir.

22 Q. Okay. All right. But that wasn't the first thing that
23 came into your head when Mr. Anthony said what's the benefit
24 to you, right?

25 A. You are right, but I don't know if he asked me the

1 simple question he asked me.

2 Q. Now, with respect to who it was that you allegedly
3 attempted to buy drugs from, isn't it true that Mr. Parker
4 pretty much gave you a free hand to identify somebody that
5 you could make a buy from?

6 A. Pretty much gave me a free hand?

7 Q. Yeah.

8 A. Yeah, he -- if this is what you want to say is a free
9 hand, but I would always make contact, initial contact with
10 somebody before we even -- once we meet, we made initial
11 contact with whoever I decided to call.

12 Q. Who you decided to call?

13 A. Decided to -- that's right, who I decided to call.

14 Q. So Mickey Parker didn't say, you know, Joe Blow is a
15 real big drug dealer and we want to get him? He said, Mr.
16 Lindsey, can you help us make some drugs buys, and, you
17 know, you agreed to do that, right?

18 A. Of course.

19 Q. And he didn't say, you know, let's try and get Tijuana
20 Peake? He left it up to you who you were trying to -- who
21 you thought was worthy of buying drugs from and who you
22 thought wasn't, right?

23 A. Right, but what's your point?

24 Q. Sir?

25 A. What's your point?

1 Q. Well, my point is that you are going out and saying who
2 it is that ought to be a target of this investigation. You
3 know, your motivation on who ought to come to court and be
4 punished. Not his. Not the fact that it's a contributor to
5 this drug problem, but because of you.

6 A. My motivation --

7 Q. It's your opinion on who deserves to stand here and be
8 punished.

9 A. No, it's not. My motivation was whoever is dealing
10 drugs, get them off the street, case closed.

11 Q. And it was up to you who to get off the street, right?

12 A. Not necessarily.

13 Q. He didn't tell you who to get off the street, did he?

14 A. We discussed everything a lot at different times.

15 Q. The word Tijuana Peake never came out of his mouth, did
16 it?

17 A. It's not a certain individual.

18 Q. Sir?

19 A. No, no, not no certain individuals. No certain
20 individuals.

21 Q. All right. And you were acting as an agent of law
22 enforcement, correct?

23 A. Of course.

24 Q. Okay. You were doing this under the color of the law,
25 right?

1 A. Yes, sir.

2 Q. Okay. Did you tell Mr. Peake that?

3 A. I didn't have no right to tell him that.

4 Q. Well, I didn't ask you whether you had a right or not.
5 I asked you whether you did.

6 A. I wasn't asked that.

7 Q. I didn't ask you if you were asked that. I asked
8 you --

9 A. No, I didn't tell him that, if that's what you need to
10 know.

11 Q. Okay. That is what I need to know.

12 A. Okay.

13 Q. All right. So essentially you were perpetrating a
14 deception, right? You were posing as somebody who was a
15 buyer of drugs, not as a police officer, but as a buyer of
16 drugs, right?

17 A. Yes, sir.

18 Q. Okay. So you were kind of a wolf in sheep's clothing,
19 to put it one way, right?

20 A. No, I wouldn't put it that way. You would put it that
21 way, not me.

22 Q. Essentially what it was, you were there pretending you
23 were in some other role than you really were, right?

24 A. That was purpose of purchasing -- of buying narcotics.

25 Q. And you got to do that, you got to deceive them,

1 because if he knew that you were law enforcement, he
2 wouldn't have sold you the drugs, would he?

3 A. Right, there you go.

4 Q. Okay. That's pretty much the same every time that you
5 act as an informant? You are kind of perpetrating a
6 deception upon who you are turning in, right?

7 A. You consider this a deception, but it's not a deception
8 to me, because --

9 Q. It may well not be.

10 A. Correct.

11 Q. All right. With respect to the search, is it fair to
12 say that the search that Mickey Parker testified that he
13 performed upon you was essentially a pat-down search?

14 A. It was a search.

15 Q. A pat-down search?

16 A. A regular search. A full body search. Not no clothes
17 taken off me. Not no cavity search, but it was a search.

18 Q. And you will admit that if you really wanted to conceal
19 something the size of this on your person, you could have
20 done it, right?

21 A. No, I wouldn't even try or attempt to do it.

22 Q. That wasn't my question. The question was you will
23 admit that if you really wanted to --

24 A. I said I wouldn't have attempted to do it.

25 Q. I'm not -- I didn't ask you whether you would attempt

1 to do it.

2 A. It was an insinuation.

3 Q. My question is would it have been possible for you to
4 conceal something on your person?

5 A. It could be possible for anybody to conceal something
6 that small.

7 Q. Anybody could conceal something --

8 A. Yes, sir.

9 Q. -- this small.

10 A. Yes, sir.

11 Q. And you are a subset to anybody, right?

12 A. I'm one individual.

13 Q. Uh-huh. Okay.

14 And where was Mickey Parker all this time that you were
15 at the Dixie Curb?

16 A. He was about a block away.

17 Q. He was back at his office, probably?

18 A. No, sir, I said about a block away where he dropped me
19 off at.

20 Q. And it was dark out, right?

21 A. Yes, sir.

22 Q. So it's probably fair to say that Mickey Parker
23 couldn't see anything that was going on down there, right?

24 A. Possibly.

25 Q. All right. And you were wearing some sort of a video

1 device that ended up being -- resulting in what the jury
2 just saw on this screen, right?

3 A. It's the purpose of the camera, yes, sir.

4 Q. And where was that on your body?

5 A. Where was it on my body? Right in front of me.

6 Q. Right in front of you?

7 A. Yes.

8 Q. And you knew the whole time where it was, right?

9 A. Of course.

10 Q. And you knew the whole time which direction the lens
11 was pointing, right?

12 A. Of course.

13 Q. And you could have -- by moving your body or moving
14 something in front of where you knew the camera lens was,
15 you could pretty much manipulate what was seen on the
16 camera?

17 A. No, sir, you can't.

18 Q. I thought that you said you knew where the camera was?

19 A. I knew where the camera was, but you can't manipulate
20 no camera. Put your hand in front of it, don't you think?

21 Q. I thought that you said that you knew which direction
22 the camera was pointing?

23 A. Pointing straight ahead.

24 Q. Pointing straight ahead.

25 So if it's about here pointing straight ahead, if I put

1 my hand there, the camera with show my hand?

2 A. Yes, sir.

3 Q. And if I was shaking hands with somebody, I could
4 probably angle my chest a little bit to make sure that it
5 saw both hands?

6 A. Yes, sir.

7 Q. And if somebody was putting a rock of crack cocaine in
8 my hand, I could probably -- you could probably get a pretty
9 good shot of that, couldn't you?

10 A. You can see it on the camera this time.

11 Q. I'm not asking you what I saw. I'm asking you whether
12 you could --

13 A. It's a possibility, yes, sir.

14 Q. And money, you could have -- you could have had the
15 money kind of in the shot too, right?

16 A. Yes.

17 Q. And where was the money, by the way?

18 A. The money was in my hand.

19 Q. But we didn't see any money, did we?

20 A. I don't remember seeing any money.

21 Q. Neither do I.

22 And kind of this whole time you were kind of talking to
23 and cozying up to Mr. Peake to kind of put him at ease,
24 right?

25 A. That's the purpose of the buy.

1 Q. And you were kind of acting buddy buddy towards him,
2 right?

3 A. Of course.

4 Q. But you weren't really buddy buddy? You were his enemy
5 that day, right?

6 A. I wouldn't call him no enemy. I was somebody who was
7 paid to get drugs off the street, purchasing drugs.

8 Q. Do you think a good friend is going to make him sit
9 right there?

10 A. I can't consider nobody my friend. I don't have no
11 friends.

12 Q. I can understand that.

13 MR. ANTHONY: Objection.

14 THE COURT: Disregard the comment by Mr. Burton
15 about how he feels about it.

16 MR. BURTON: I apologize to the court, Your Honor.
17 I'm finished with Mr. Lindsey.

18 THE COURT: Redirect?

19 REDIRECT EXAMINATION BY MR. ANTHONY:

20 Q. Mr. Lindsey, a few minutes ago I asked you how you
21 were -- if you were being compensated for this, is that
22 correct?

23 A. That's all you said, yes, sir.

24 Q. And it's true that you were being paid?

25 A. Yes, sir.

1 Q. So that wouldn't necessarily be the only reason that
2 you were doing this?

3 A. No, sir, it wasn't.

4 Q. And you had some awareness of who in the City of Union
5 was dealing crack cocaine?

6 A. I had a very good awareness.

7 Q. And that's something that you have would passed on to
8 Investigator Parker?

9 A. Yes, sir.

10 Q. And on the tape, what I pointed out to you on the
11 tape --

12 A. Uh-huh.

13 Q. -- what exactly is that in his hand?

14 A. It was a rock of cocaine.

15 Q. Is it in -- was it contained in anything?

16 A. It was in a little bag.

17 Q. Okay. So it's not -- it wasn't just a rock?

18 A. Right.

19 Q. It was a bag?

20 A. A bag, too, yes, sir.

21 MR. ANTHONY: If I could have one moment?

22 (Off the record)

23 (Back on the record)

24 MR. ANTHONY: Thank you. That's all.

25 MR. BURTON: Brief recross, please, on what Mr.

1 Anthony said.

2 THE COURT: All right.

3 RECROSS EXAMINATION BY MR. BURTON:

4 Q. And you were making money doing this, right?

5 A. Yes, sir.

6 Q. And you have made money in the past doing this, right?

7 A. Yes, sir.

8 Q. Roughly forty bucks a whack, is that fair to say?

9 A. Possibly more.

10 Q. And you testified yesterday you have done this hundreds
11 of times?

12 MR. ANTHONY: Objection. That's beyond the scope
13 of redirect.

14 THE COURT: You asked him if he was doing it for
15 compensation. I'll allow it.

16 BY MR. BURTON:

17 Q. Is that true?

18 A. Yes, sir.

19 Q. In fact, you said you did this kind of an unaccountable
20 number of times, right?

21 A. Yes, sir.

22 Q. Could have been thousands of times, maybe?

23 A. I wouldn't say a thousand.

24 Q. But if you did it a hundred times, that would be four
25 grand, right, in your pocket?

1 A. Possibly.

2 Q. If you did it a thousand times, that's forty grand in
3 your pocket, right?

4 A. Yes, sir.

5 Q. Thank you, sir.

6 THE COURT: You can step down. We appreciate your
7 time. You can be excused.

8 Call your next witness.

9 MR. ANTHONY: We call Captain Pickens.

10 CAPTAIN GREG PICKENS, having been first duly
11 sworn, testified as follows:

12 DIRECT EXAMINATION BY MR. ANTHONY:

13 Q. Would you state your name, please?

14 A. Yes, I'm Captain Greg Pickens.

15 Q. Mr. Pickens, how are you employed?

16 A. I'm employed the Union Public Safety Department.

17 Q. And how long have you worked there?

18 A. To be exact, 21 years and two months.

19 Q. And what's your current position there?

20 A. I am captain of the uniform patrol division. I manage
21 the day-to-day operations of the uniform patrol division and
22 I also serve as the evidence and property manager for the
23 department as well.

24 Q. And as serving as the evidence and property manager,
25 what responsibilities do you have in regards to keeping the

1 evidence and taking it for testing?

2 A. In regards to the evidence, I ensure the integrity of
3 the evidence that's housed there at the Public Safety
4 Department. I'm responsible for it. Transportation of the
5 drug evidence from our drug evidence drop box to the
6 forensics lab.

7 Q. I'm showing you what's been marked for identification
8 as State's Exhibit No. 2. Could you identify that bag,
9 please?

10 A. Yes, sir, this is a drug evidence package what is
11 better known among law enforcement as a best pack. This is
12 a -- it's a numbered tamper-resistant evidence bag which the
13 drug evidence would be placed in and sealed by Investigator
14 Parker.

15 Q. And have you personally come into contact with that
16 particular item?

17 A. Yes, sir, I have. I retrieved this. I retrieved the
18 best bag from our drug evidence drop box.

19 Our drug evidence drop box is really a converted
20 mailbox, one of the huge mailboxes that has a pull down
21 lever on the top where you can drop it in. It has a lock on
22 the front of it and I have the key for it.

23 I retrieved this best bag from this -- from our drug
24 evidence drop box. I inspected the package. I inspected
25 the best pack, verified that Officer Parker had all of

1 his -- all of his paperwork in order. I inspected the best
2 pack for integrity to assure that there's been no tampering.
3 If anyone attempted to tamper with this, with this best
4 pack, the best pack was destroyed. There is no way that you
5 can attempt to open this thing without destroying the best
6 pack.

7 Q. And where did you take the best pack to?

8 A. I transported the best pack to the Spartanburg County
9 sheriff's office, to the forensics lab.

10 Q. What was the purpose of taking it there?

11 A. The Spartanburg County sheriff's office has a forensics
12 lab there, two chemists that provide the analysis for us.
13 There is SLED's, the South Carolina Law Enforcement
14 Division, they provide that service as well, but they
15 provide the service for the entire state. And there is a
16 monstrous backlog of the drug cases that they are dealing
17 with. Spartanburg County is very obliged to do this at a
18 much quicker rate.

19 Q. And so when you took it to Spartanburg County, what did
20 you ask them to do with it?

21 A. I asked them -- I submitted them and signed the custody
22 of the drugs over to them and requested an analysis.

23 Q. And when you sealed it over and turned that bag,
24 Exhibit No. 2, over to them, was it still in a sealed
25 condition and all that you found it in?

1 A. Yes, sir.

2 Q. Thank you.

3 MR. ANTHONY: That's everything on direct.

4 CROSS EXAMINATION BY MR. BURTON:

5 Q. Captain Pickens, you are not a witness to any sort of
6 drug buy or anything, are you?

7 A. No, sir.

8 Q. I mean, you -- you just received the drugs as they are,
9 right?

10 A. Yes, sir.

11 Q. And you don't -- other than from any report that you
12 read or anything, but from your own senses, you don't really
13 know if Tijuan Peake ever actually had anything to do with
14 what's in that bag, do you?

15 A. No, sir.

16 Q. Okay. And, in fact, other than from what you have
17 read, you don't even know if that's crack or not, right?

18 A. No, sir.

19 Q. Okay. Thank you, sir.

20 MR. ANTHONY: No redirect.

21 THE COURT: Appreciate your time. You can be
22 excused. Thank you.

23 Call your next witness.

24 MR. ANTHONY: May we approach?

25 (Whereupon, the lawyers approached the bench for

1 an off-the-record discussion)

2 THE COURT: Members of the jury panel, we will
3 take about a ten minute break. If you will follow the
4 bailiff to the jury room and we will take a break. Thank
5 you.

6 We will be at ease.

7 (The following takes place outside the presence of
8 the jury panel)

9 (Whereupon, proceedings were recessed)

10 (Whereupon, proceedings were reconvened)

11 THE COURT: Is the State ready?

12 MR. ANTHONY: Yes, sir, we are.

13 THE COURT: Defense ready?

14 MR. BURTON: Yes, sir, Your Honor.

15 THE COURT: Bring in the jury in.

16 (The following takes place in the presence of the
17 jury panel)

18 THE COURT: Call your next witness.

19 MR. ANTHONY: We call Deputy Stewart.

20 DEPUTY BETH STEWART, having been first duly sworn,
21 testified as follows:

22 DIRECT EXAMINATION BY MR. ANTHONY:

23 Q. Would you state your name, please?

24 A. Yes, it's Mary Elizabeth Stewart.

25 Q. And Ms. Stewart, how are you employed?

1 A. I am a lieutenant, a forensic chemist at the
2 Spartanburg County sheriff's office.

3 Q. And how long have you worked for the Spartanburg County
4 sheriff's office?

5 A. Pushing six years now.

6 Q. And what does a forensic chemist do?

7 A. We do drug analysis, fire debris analysis, poison
8 analysis, and we work on meth labs.

9 Q. And could you tell the jury what education and training
10 that you have had in the field of drug analysis?

11 A. Sure. I have a Bachelors of Science in Chemistry, a
12 Bachelors of Science in Biochemistry both from the College
13 of Charleston, and I have a Masters in Chemistry from the
14 University of South Carolina.

15 I also have done four months of drug analysis training.

16 I have been to the DEA forensic chemist school. I have
17 been to -- our instrument is made by a company called
18 Agilent. I have been to continuing education courses at
19 Agilent for our instrument.

20 Every year we are required to get 40 hours of
21 additional training on our certification.

22 Q. And have you testified in court before as an expert
23 witness in the field of drug analysis?

24 A. I have. Fifteen times in Spartanburg County and twice
25 in Federal Court.

1 MR. ANTHONY: Your Honor, at this time we submit
2 Lieutenant Stewart to the court, as an expert in the field of
3 drug analysis.

4 THE COURT: Any voir dire?

5 MR. BURTON: No, Your Honor.

6 THE COURT: I find she's qualified.

7 BY MR. ANTHONY:

8 Q. Lieutenant Stewart, I'm going to hand you what's been
9 marked for identification as State's Exhibit No. 2. I would
10 ask you if you could identify that bag, please?

11 A. I can. It's best bag number S010516, which
12 corresponded to the folder on this case. I can recognize it
13 because it has my initials on it and okay, and also along
14 the top of the bag my initials and a lab number and the
15 date.

16 Q. Okay. And when did you come into possession of the
17 Exhibit No. 2?

18 A. On the 13th of December in 2007.

19 Q. Okay. Where did you come into possession of it?

20 A. Mr. Pickens brought it to me into the lab.

21 Q. And what condition was it in when it was brought to the
22 forensics lab there in Spartanburg?

23 A. Sure. As standard operating procedures we won't except
24 any drugs from any agency unless they are properly sealed in
25 a best bag.

1 When we first accept it into the lab, we check the seal
2 on the top of the best bag. It's got a glue strip, so it
3 should be glued down.

4 Also along the sides are wavy lines. And if someone
5 were to try to rip it, tear it, they would distort it. We
6 checked that.

7 Then once again before we work the case, we check the
8 bag to make sure that it's completely intact, and we initial
9 it and date it and sign it with an okay.

10 Q. Okay. And was the bag intact when it came to you?

11 A. Yes, sir, we would not have accepted it.

12 Q. All right.

13 MR. ANTHONY: Your Honor, at this time we move
14 Exhibit No. 2 into evidence.

15 MR. BURTON: I don't know that she testified to
16 what's in there. Maybe I was sleeping but --

17 MR. ANTHONY: She hasn't. I just moved it into
18 evidence before she --

19 THE COURT: It's in evidence.

20 MR. ANTHONY: Okay.

21 THE COURT: Over objection.

22 BY MR. ANTHONY:

23 Q. Once you had the bag submitted to you at the drug lab
24 and made sure that it was still secure, what kind of testing
25 did you perform on the items inside?

1 A. Sure. We do a presumptive test and a confirmatory
2 test. Our presumptive is a chemical test, and our
3 confirmatory test is infrared and GCMS.

4 Q. And did you perform those tests on the rock item that's
5 inside the bag?

6 A. I did, yes, sir.

7 Q. Okay. And what -- how did those tests go when you
8 performed them?

9 A. I found it to be cocaine base, more commonly known as
10 crack, at a weight of 0.12 grams.

11 Q. And is it your opinion that the rock object in that
12 evidence bag is crack cocaine?

13 A. Yes, sir.

14 Q. Okay. Thank you.

15 MR. ANTHONY: That's everything on direct.

16 CROSS EXAMINATION BY MR. BURTON:

17 Q. You said your name was Mary Elizabeth Stewart?

18 A. Yes, sir.

19 Q. Who is Beth Ramsey Vaughn?

20 A. That's me before I got married in March.

21 Q. Congratulations.

22 You testified that you did a presumptive test, right?

23 A. Yes, sir.

24 Q. And on these -- you are familiar with the drug analysis
25 report?

1 A. Yes, sir.

2 Q. And one of the checked tests is the chemical test.

3 Would that be the presumptive test?

4 A. Yes, sir, it is.

5 Q. All right. And by a presumptive test, that rather than
6 a conclusive test would mean that the test would show

7 positive for crack cocaine, but may also show a positive
8 reason for something else, right?

9 A. Yes, sir, it's basically a field test. It's a color
10 change test and it gives me as a chemist an idea of what I
11 may be working with, so I go to that next step to base my
12 analysis.

13 Q. And the next two -- the next three tests were done
14 essentially on two different instruments, right?

15 A. Yes.

16 Q. The infrared spectroscope and the gas chromatograph and
17 the mass spectroscopy. The last two would kind of be in the
18 same machine, basically?

19 A. Yes, sir. They are hooked together, yes, sir.

20 Q. Okay. And these machines all require calibration,
21 right?

22 A. They do, yes, sir.

23 Q. And the reason they require calibration is that it just
24 kind of like your car needs maintenance sometimes, because
25 things go wrong, right?

1 A. Yes, sir.

2 Q. All right. And you are familiar with Form A, right?

3 A. Yes, sir.

4 Q. I imagine that you probably produced Form A, right?

5 A. Yes, sir.

6 Q. And the first few words of Form A are "I, Beth Ramsey
7 Vaughn," which is you, right?

8 A. Yes.

9 Q. And the last few words, paraphrasing a little bit, is
10 that "I am of the opinion that the items contains cocaine."
11 That was on the report, right?

12 A. Yes, sir.

13 Q. Okay. And kind of the difference between a fact and
14 opinion, isn't it a fact something that we know for a
15 hundred percent certainty?

16 A. Yes, sir.

17 Q. And an opinion is something that doesn't quite rise to
18 the level of a fact, right?

19 A. Yes, sir.

20 Q. Okay. Well -- all right.

21 So you are of the opinion it's crack cocaine, right?

22 A. Yes, sir, and I'm right.

23 Q. And others could have different opinions, right?

24 A. They would be wrong.

25 Q. Well, but, nonetheless, then why doesn't it say that

1 it's an absolute fact that this contains a controlled
2 substance?

3 A. Because I interpret the data, but I do review it five
4 times, and then it's reviewed by additional chemists in the
5 lab before it's ever sent out.

6 Q. And by interpret, it means that you use your senses,
7 right?

8 A. Yes, sir.

9 Q. And somebody else could use theirs and maybe not come
10 up with quite the same thing as you, right?

11 A. They would still be wrong.

12 Q. Well, I understand that. That's your opinion?

13 A. Yes, sir.

14 Q. Thank you a lot.

15 THE COURT: Mr. Anthony?

16 MR. ANTHONY: No redirect.

17 THE COURT: You can step down and be excused.

18 THE WITNESS: Thank you.

19 THE COURT: Appreciate your time.

20 Members of the jury panel, we are going to stop
21 for the day and adjourn until ten in the morning. I have a
22 hearing at ten, but I don't think it will take but a few
23 minutes, so I would like you to be here at ten, but I
24 can't -- I'll tell you in advance we probably won't start
25 right at ten on the dot, but I do want you here at ten and

1 the attorneys to be here at ten.

2 So keep in mind those things I have told you about
3 not discussing the case. Don't let anyone discuss the case
4 with you. Don't let yourself be exposed to anything about
5 the case outside the courtroom. And have a pleasant evening
6 and we will see you back at ten in the morning.

7 (The following takes place outside the presence of
8 the jury panel)

9 THE COURT: Anything from the State?

10 MR. ANTHONY: No, sir.

11 THE COURT: Anything from the defense?

12 MR. BURTON: Just one thing, Your Honor.

13 Mr. Peake has always been very good at appearing
14 when he's supposed to appear and has been very reliable. He
15 always comes when he's supposed to. I would ask Your Honor
16 to allow him to be free on bond tonight.

17 THE COURT: I'm going to require him to remain in
18 custody.

19 We will see you all at ten in the morning.

20 MR. ANTHONY: Thank you, Your Honor.

21 (Whereupon, proceedings were adjourned to October
22 16, 2008)

23

24

25

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF UNION) IN THE COURT OF GENERAL SESSIONS
3
4 THE STATE)
5 -vs-) TRANSCRIPT OF RECORD
6 TIJUAN PEAKE,) 2007-GS-44-332
7 Defendant.) 2007-GS-44-333
) OCTOBER 16, 2008
) Union, South Carolina

8 (VOLUME II)
9

10 B E F O R E:

11 THE HONORABLE JOHN C. HAYES, III, JUDGE. ; and a jury.
12

13
14 A P P E A R A N C E S:

15 JOHN ANTHONY, ASSISTANT SOLICITOR
16 Attorney for the State

17 ROSS BURTON, PUBLIC DEFENDER
18 Attorney for the Defendant

19
20 Michael R. Watts
21 Circuit Court Reporter
22
23
24
25

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1 (PROCEEDINGS, October 16, 2008)

2 THE COURT: Is the State ready?

3 MR. ANTHONY: I have a couple of matters that I
4 would like to bring up that might come up during the
5 presentation this morning of trial, to avoid problems in
6 front of the jury.

7 The informant testified that he knew Mr. Peake by
8 the name of Little Man and that he thought his last name was
9 Mills. We have two booking interview forms where Mr. Peake
10 was questioned in 2003, and 2000. And on one of those forms
11 he gave his alias as being Little Man, and on the other form
12 he gave an alias of The Man. And as to his next of kin, one
13 time he gave an alias -- he gave his next of kin as being
14 Kathy Peake, his mother. And the other occasion he gave the
15 next of kin as being Dorothy Mills, his grandmother.

16 And I also have -- well, as to these booking
17 interviews, what I would propose to do is call Lieutenant
18 Lawson from the jail and ask him about the two statements
19 made by Mr. Peake in those booking interviews, first of all
20 him saying that his alias was Little Man; and second of all,
21 him saying that on one occasion his next of kin was Kathy
22 Peake, and on another occasion his next of kin was Dorothy
23 Mills. And I would propose to have Lieutenant Lawson
24 testify in the matter where he just characterizes this as an
25 interview at the jail, rather than a booking involving an

1 arrest, because certainly we don't want to go into the fact
2 that he was arrested before, but I do believe there is a
3 question here where the defense is making an argument of
4 misidentification. And I think this evidence is quite
5 relevant to show that there was not a misidentification made
6 by the informant, given that Mr. Peake has made a statement
7 admitting to having the same alias as the name the CI knew
8 him by, and also given the fact that Mr. Peake identified
9 his grandmother as being a Mills.

10 And then where -- as far as the statement made
11 where he identified his mother as being Kathy Peake, I have
12 a certified driving record for a Kathy Peake, or a Kathy
13 Mills Peake, from Union. So I think I should be allowed to
14 tie in the fact that Kathy Peake, his mother, her middle
15 name is Mills, and prove that through the introduction of
16 his driving history.

17 THE COURT: Any objection to that?

18 MR. BURTON: Well, with respect to --

19 THE COURT: Any objection to it?

20 MR. BURTON: Yes, Your Honor, there is.

21 THE COURT: I sustain the objection. I think
22 that's -- to have an officer testify that he's had contact
23 with this man and he's got an alias, I think the prejudicial
24 value far outweighs the probative value, so I'm not going to
25 allow it in.

1 MR. ANTHONY: All right. If I could be just be
2 heard briefly again on that. I don't mean to argue, but --

3 THE COURT: Well, go ahead and put it on the
4 record, but I'm not going to let it in.

5 MR. ANTHONY: Well, our position is that there
6 obviously -- I would not be at all surprised if the
7 defense's argument to the jury is how do you know this is a
8 reliable identification, when the CI gives the name Little
9 Man Mills. And it would seem to me like if he's made a
10 statement saying my alias is Little Man, that that is quite
11 probative and relevant to making the -- to verify the
12 identification the informant made.

13 THE COURT: Well, I still am not going to allow it
14 in. Whatever his name was, this man pointed to him as being
15 the one who was in the picture. So we have got a picture of
16 him. We have got him pointing at this man saying he's the
17 man, regardless of his name. If it's Joe Schmo, he says
18 that's the man I knew as Little Man, so I'm not going to
19 allow it.

20 MR. ANTHONY: All right. Thank you.

21 One other matter that I wanted to bring up.

22 I would be making a request that the court
23 instruct Mr. Peake before the close of the State's evidence
24 to approach the jury and stand in front of the jury, giving
25 them a profile view of his face, given that that's the view

1 that they have on the videotape.

2 MR. BURTON: Well, I would object, Your Honor,
3 when he's here in the courtroom for them to see. Just to
4 model somebody and say this is what he looks like on the
5 videotape, I think that's greatly prejudicial, Your Honor.
6 It's up to them to decide whether it's him or not. It's
7 already been testified from an eyewitness who say it's him.
8 I just think that's overly suggestive, Your Honor.

9 THE COURT: Do you have case law on that? I know
10 there are some cases about requiring a defendant to exhibit
11 certain --

12 MR. ANTHONY: There is. There is a State v. Hart.
13 Let me just -- State v. Hart, which is 412 S.E. 2d 380. It
14 says that the display of physical -- or the court's
15 requiring the defendant to display physical characteristics
16 is not a violation of the right against self-incrimination.

17 THE COURT: This is kind of reversed. In this
18 case the petitioner, the defendant, wanted to be allowed to
19 exhibit his physical characteristics.

20 MR. ANTHONY: It is, Your Honor. It is, Your
21 Honor, but there is language in there. If you look at the
22 second page, when you get into the body of the opinion, it
23 would be the fourth paragraph that they say "we know the
24 Court of Appeals directly concluded the trial judge ruled
25 erroneous. It is well settled that the State's exhibition

1 of the defendant's physical characteristics does not
2 implicate the defendant's privilege against
3 self-incrimination, because such an exhibition is not
4 testimony."

5 THE COURT: Anything else?

6 MR. BURTON: I just say I don't think that's what
7 this case says.

8 Secondly, I think there is a another line of cases
9 that also say that in-court identification is disfavored
10 under our law.

11 I didn't anticipate this to be an issue in the
12 case. Otherwise, I would have brought some case law, but I
13 just think it's -- I think he's here --

14 THE COURT: I'm going to deny the motion on that
15 too. He's here and he's -- actually the way he's sitting,
16 they have got a profile and view of him just throughout the
17 whole trial, so rather -- I'm not going to allow you to call
18 him up to --

19 MR. ANTHONY: Okay. Yes, sir. Thank you.

20 That's everything we have before the jury comes
21 in.

22 THE COURT: Okay.

23 All right. Bring the jury in.

24 (Tax Map marked as State's Exhibit No. 3 for
25 identification)

1 (Tax Map marked as State's Exhibit No. 4 for
2 identification)

3 (The following takes place in the presence of the
4 jury panel)

5 THE COURT: All right. Call your next witness.

6 MR. ANTHONY: Yes, sir, we call Mr. Randall.

7 WILLIAM RANDALL, having been first duly sworn,
8 testified as follows:

9 DIRECT EXAMINATION BY MR. ANTHONY:

10 Q. Would you state your name, please?

11 A. Bill Randall.

12 Q. Mr. Randall, what's your occupation?

13 A. County tax assessor.

14 Q. And are you the tax assessor for Union County? You run
15 the office?

16 A. Yes, sir.

17 Q. And as far as your job being the tax assessor, does
18 that in any way require your office to keep any kind of
19 maps?

20 A. Yes, sir.

21 Q. And what kind of maps do you keep?

22 A. Aerial photographs.

23 Q. Of the whole county?

24 A. Yes, sir.

25 Q. I'm handing up two items marked State's Exhibit No. 3

1 for identification and State's Exhibit No. 4 for
2 identification. I'll show these two and ask you if you
3 recognize these two maps?

4 A. Yes, sir.

5 Q. And what are they?

6 A. Aerial photographs of two tracts in the city.

7 Q. Okay. And are those -- are those maps that are kept in
8 the tax assessor's office?

9 A. Yes, sir.

10 Q. And made for the purpose of assessing taxes?

11 A. Yes, sir.

12 Q. Okay. And do those two maps show the Dixie Curb Market
13 and Excelsior School?

14 A. Yes.

15 MR. ANTHONY: Your Honor, we would move Exhibits 3
16 and 4 into evidence.

17 MR. BURTON: I'm going to object on the basis that
18 they are hearsay, Your Honor, the documentary evidence. He
19 is the custodian for them, but he has no part in the
20 production of those maps, and I would object to them. They
21 are inadmissible.

22 THE COURT: Didn't he testify that they were kept
23 in the normal course of business of the records of Union
24 County?

25 MR. ANTHONY: Yes, sir.

1 THE COURT: I'll allow them in. Over objection
2 they are in.

3 MR. BURTON: Yes, sir, Your Honor.

4 BY MR. ANTHONY:

5 Q. I'm going to show you --

6 If you would, just down a moment, please, Mr. Randall.

7 (Witness off the witness stand)

8 BY MR. ANTHONY:

9 Q. I'm going to show you, first of all, Exhibit No. 4, and
10 I would ask if you could use this map to point out the --
11 you can come around the other side. Point out to the jury
12 the location of the Dixie Curb Market.

13 A. This is north side of the map and this is Dixie Curb,
14 and this would be Tabernacle, and this is Excelsior School
15 property.

16 Q. Okay. Let's move -- we'll move over here and we'll
17 show it -- do six jurors at a time. Just show them where is
18 Dixie Curb.

19 A. This is Dixie Curb. Coming south Tabernacle, and this
20 is Excelsior School property.

21 Q. And that's -- what have you done on that map to
22 indicate the location?

23 A. You see the line drawn is, it takes you a straight path
24 to -- from Dixie Curb to the school.

25 Q. Okay. And there is a box around the Dixie Curb Market,

1 is that correct?

2 A. Yes, sir, that's the whole piece of property. We
3 measured from the north side to about 200 foot inside of the
4 Dixie -- of the Excelsior School property. So we didn't go
5 from line to line. We went from this furthest point inside
6 here about 200 foot.

7 Q. Okay. And let's go down here to show the other end.

8 Once again, just point out the Dixie Curb Market.

9 A. This is the Dixie Curb. This is Excelsior School. You
10 have got a line drawn straight from north to south.

11 Q. And when you measured -- you talked about measuring.
12 When you are measuring here, how far did you go into that
13 Excelsior School property?

14 A. Measured from the northern side of Dixie Curb, further
15 side, 200 foot in to the Excelsior School property.

16 Q. Okay. And then show the jury now Exhibit No. 3. And I
17 would ask once again we go over here and to the others that
18 are down here and I would ask you, if you use Exhibit No. 3,
19 if you could just point out to the jury where Excelsior
20 School is?

21 A. This is Excelsior School. And this is where -- this is
22 the part where we measured to.

23 Q. And when you measured to the Dixie Curb Market, what
24 direction were you measuring in relation to that other map?
25 Like where would the Dixie Curb Market?

1 A. Dixie Curb is north. It's up here.

2 This is the south part.

3 So we came from north to south, and from Dixie Curb to
4 the field here, playground.

5 Q. And if you would, the very same thing show the jury.

6 A. This is Excelsior School. This is the point where we
7 measured to, which is the playing area. And Dixie Curb
8 would be north.

9 Q. Thank you. You can get back on the stand.

10 (Witness back on the witness stand)

11 BY MR. ANTHONY:

12 Q. And you were making comments to the jury about making a
13 measurement. Did you do anything to try to determine the
14 distance between the north end of the Dixie Curb Market
15 property and the Excelsior School?

16 MR. BURTON: Your Honor, I would object.

17 THE COURT: Before you answer, yes, sir.

18 MR. BURTON: I would object to any testimony
19 regarding the distance, Your Honor. The distance would be a
20 matter of opinion. Mr. Randall has not been qualified as an
21 expert in this case, nor has any kind of statistical
22 accuracy of these aerals have been established, or anything
23 else that would give him a way of accurately testifying to
24 this jury what that distance would be.

25 THE COURT: I will deny the motion. I mean I

1 overrule the objection.

2 BY MR. ANTHONY:

3 Q. Did you -- did you do anything to try to make a
4 determination of the distance between the Dixie Curb Market
5 and Excelsior Middle School property?

6 A. Did I do anything to try to make a determination?

7 Q. Yes, sir.

8 A. I just measured.

9 Q. Okay. Well, that's what I mean.

10 A. I just measured.

11 Q. Okay. And when you measured the distance, what did it
12 turn out to be?

13 MR. BURTON: Objection, Your Honor. I think the
14 State has to lay a foundation for how he established that
15 distance, how it was measured, any number of ways.

16 THE COURT: Ask him "did use a ruler? Did you --

17 BY MR. ANTHONY:

18 Q. How did you make the measurement?

19 A. This ruler.

20 Q. Okay. When you made that measurement, what did you --
21 what did you remember determine the distance to be between
22 the Excelsior Middle School property and the Dixie Curb
23 Market?

24 A. Around 2,000 foot.

25 MR. ANTHONY: If I could have one moment, please?

1 (Off the record)

2 (Back on the record)

3 BY MR. ANTHONY:

4 Q. All right. Thank you.

5 MR. ANTHONY: That's everything on direct.

6 CROSS EXAMINATION BY MR. BURTON:

7 Q. Could I see that device that you held up in the air?

8 You testified this is a ruler, right?

9 A. Yes, sir.

10 Q. It's not a --

11 A. That's what I call it.

12 Q. Isn't it --

13 A. It may be a measuring instrument.

14 Q. Isn't this a scale?

15 A. Scale, yes, sir.

16 Q. Is that what that is called?

17 A. Yes.

18 Q. Why didn't you tell the jury it was a scale?

19 A. I just give them my opinion what it was.

20 Q. You just said it was a scale.

21 A. My opinion was a scale. That's what I have called it
22 all my life.

23 Q. Okay. And are you a registered land surveyor, Mr.
24 Randall?

25 A. Sir?

1 Q. Are you a registered land surveyor?

2 A. No, sir, I'm a licensed real estate appraiser.

3 Q. Okay. Isn't it true that really the only way to make
4 an accurate measurement of anything on this is for a
5 registered land surveyor to go out and using their equipment
6 and their expertise to measure that distance?

7 A. To make an accurate measurement?

8 Q. Accurate, right.

9 A. My measurements are accurate, because we do it for
10 taxes.

11 Q. Please answer the question that I asked you. Isn't it
12 true that the only way to make a true and accurate
13 measurement is to go out there with survey instruments and
14 survey it?

15 A. If -- I don't really understand about being accurate.

16 Q. Well, you know, here we are not guessing. Here the
17 State has to prove beyond a reasonable doubt --

18 MR. ANTHONY: I would object to that. That's not
19 the question. That's a statement.

20 THE COURT: Ask the question. Just don't make
21 editorial comments.

22 MR. BURTON: Yes, Your Honor.

23 BY MR. BURTON:

24 Q. Now, you had testified to this court the distance was
25 around 2,000 feet, right?

1 A. Correct.

2 Q. That's exactly what your words were?

3 A. Yes.

4 Q. It's that around that we are worrying about.

5 Now, if you wanted to know exactly the distance, what
6 would be the best way to do that?

7 A. Survey.

8 Q. Survey, right. Okay.

9 And you used -- you used these maps, right?

10 A. Yes, sir.

11 Q. All right. And what's the scale of these maps?

12 A. One to 100.

13 Q. One to 100?

14 A. One inch is 100 feet.

15 Q. One inch equals 100 feet.

16 And these maps were produced, as you said, by an
17 airplane, right?

18 A. Yes, sir.

19 Q. Those photographs were taken overhead from an airplane,
20 okay. Right?

21 A. Yes, sir.

22 Q. And isn't it true that the scale of the map actually
23 varies from place to place on the map, depending on a lot of
24 factors; for example, the location of the airplane over the
25 zenith, the actual height of the airplane over the land? It

1 varies, right?

2 A. IT varies to what degree?

3 Q. Well, that's kind of the reason we are talking here.
4 It does vary?

5 A. That was four foot -- two to four foot on a 100 foot
6 scale.

7 Q. But it varies, right?

8 A. Yes, sir.

9 Q. Different parts of the maps, it varies.

10 In fact, when you look at the map, the only time that
11 you see exactly the -- nothing but the roof of the building,
12 for example, is when the plane is exactly over that
13 building, right?

14 A. No.

15 Q. Other parts of the map -- other parts of the map that
16 will show trees kind of skewed over, right, on one side or
17 the other, right?

18 A. I'm not looking at the map.

19 Q. I mean --

20 A. I don't --

21 Q. But you testified, though, that this is an air photo
22 that has some degree of accuracy, right?

23 A. Two to four percent on a one to 100.

24 Q. Okay. But that -- that varies, too, because the
25 airplane -- as the airplane is flying over, right? The

1 airplane is going to vary ever so slightly up and down,
2 right?

3 A. Two to four percent is what I was told.

4 Q. Some percentage, but it's going to vary, right?

5 A. Yes.

6 Q. Okay. And that variation of the airplane's height
7 above the ground is going to change the scale of that map,
8 right? In other words, as the plane is lower, things are
9 going to look bigger, right?

10 A. It's pretty accurate at two percent.

11 Q. No, no.

12 A. Two to four percent is all I know.

13 MR. ANTHONY: Your Honor, I would ask you to --

14 THE COURT: Please answer the questions he's
15 asking.

16 Ask it again.

17 BY MR. BURTON:

18 Q. If the plane is higher, the scale is going to be
19 smaller, right?

20 A. Yes.

21 Q. The plane is lower, the scale is going to be higher?

22 A. Yes.

23 Q. We don't know exactly the height of the plane when
24 these pictures were taken, do we?

25 A. I know it's one to 100.

1 THE COURT: You can say no. You weren't in the
2 plane, so I think everybody knows the answer to that.

3 A. All right.

4 BY MR. BURTON:

5 Q. And the reason that you can see kind of the sides of
6 buildings and some parts of the photos and not sides of the
7 buildings on the other parts of the photo is because they
8 are in different areas with relation to where the airplane
9 is in the sky, right?

10 A. Yes.

11 Q. Okay. Thank you.

12 And these photos are taken for the purposes of
13 assessing taxes. I believe that was your testimony, right?

14 A. Yes.

15 Q. They are not taken for the purpose of measuring
16 distance on the ground, are they?

17 A. The purpose for what?

18 Q. Measuring distance on a ground, right?

19 A. Yes, sir, I have to measure distance on the ground for
20 acreage.

21 Q. For acreage for the purposes of assessing taxes, right?

22 A. Yes.

23 Q. And did you use a planimeter for that?

24 A. Yes, sir.

25 Q. And you are probably familiar with how the Register of

1 Deeds works --

2 A. Yes.

3 Q. -- in Union County?

4 A. Yes.

5 Q. They wouldn't accept a deed description based on an air
6 photo, would they?

7 A. Sir?

8 Q. Have you ever seen a deed description that says, well,
9 this land is -- the metes and bounds of this land is what it
10 shows on an airplane?

11 A. I never one described from an air photo, no.

12 Q. Thank you, sir.

13 THE COURT: Redirect?

14 MR. ANTHONY: If I could have one moment?

15 (Off the record)

16 (Back on the record)

17 MR. ANTHONY: No redirect, Your Honor.

18 THE COURT: You can step down and be excused. We
19 appreciate your time.

20 Call your next witness.

21 MR. ANTHONY: Your Honor, that would be our
22 evidence.

23 THE COURT: All right. Members of the jury panel,
24 the State is resting. That means that they have presented
25 their case. They could under certain circumstances have a

1 right to present later testimony, but basically you have
2 heard their case.

3 We have to take up some matters of law outside
4 your presence at this time, so I'm going to send you to your
5 jury room for a short period of time. We will send for you
6 as promptly as we can.

7 (The following takes place outside the presence of
8 the jury panel)

9 THE COURT: Anything from the State?

10 MR. ANTHONY: No, sir.

11 THE COURT: Mr. Burton?

12 MR. BURTON: Respectfully, at this time, Your
13 Honor, I move for a directed verdict in this case. The
14 defense's position is that the State has failed to show or
15 to present any evidence, any direct evidence, against my
16 client, nor has the State produced substantial
17 circumstantial evidence in this case. Therefore, the
18 defendant is entitled to a directed verdict of not guilty.

19 THE COURT: I deny the motion. There is certainly
20 direct evidence to which the jury could conclude that your
21 client, Mr. Peake, did, in fact, distribute drugs to Mr.
22 Lindsey on the date and place alleged.

23 MR. BURTON: Thank you, Your Honor.

24 THE COURT: All right, Mr. Peake, can you hear me?

25 THE DEFENDANT: Yes.

1 THE COURT: All right. We have reached the point
2 in the trial where you have a right to present a defense, if
3 you wish. You are not required to present a defense,
4 because you are presumed innocent. However, you can call
5 witnesses, if you wish, or you can testify, if you wish.

6 If you testify, the State would be able to
7 cross-examine you, that is, ask questions about what
8 happened that evening.

9 Does he have any prior record?

10 MR. ANTHONY: Yes, sir.

11 THE COURT: What kind of impeachment?

12 MR. ANTHONY: He has a 2002 conviction for failure
13 to stop for a blue light.

14 And he has a 2005 conviction for distribution of
15 crack, distribution of crack within proximity of a school.

16 Then he has a second 2005 conviction for
17 distribution of crack and distribution of crack within
18 proximity of a school.

19 Were he to testify, I would ask the court to allow
20 me to ask if he's been convicted of a felony that carries
21 more than a year in regards to the drug convictions.

22 MR. BURTON: I agree with that impeachment, the
23 extent of his record, Your Honor.

24 THE COURT: Mr. Peake, the State would be able to
25 ask you questions concerning those offenses, were you to

1 take the stand.

2 If you choose to remain silent, I would tell the
3 jury that you have exercised your Constitutional Right to
4 remain silent. They could not use that against you. They
5 could not hold that against you in any way whatsoever and
6 that they could not in the jury room discuss or use in their
7 own mind your exercising your right to remain silent against
8 you in any way. Do you understand that?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Do you have any question about it?

11 THE DEFENDANT: No, sir.

12 THE COURT: What?

13 MR. BURTON: No, sir.

14 THE COURT: So do you plan to testify or exercise
15 your right to remain silent?

16 THE DEFENDANT: Exercise my right to remain
17 silent.

18 MR. BURTON: Could I have a moment to discuss with
19 him?

20 THE COURT: We will take a break to discuss that.
21 And, of course, it's your decision. It's not Mr. Burton's.
22 It's not mine. It's not the State's, and it's not the
23 friends, but you can get advice as you want. We can take a
24 short break. And when we come back, you will either be
25 prepared to go forward with the testimony, arguments and

1 charge.

2 Yesterday in a similar trial you requested the
3 entrapment charge. Are you requesting that again, Mr.
4 Burton?

5 MR. BURTON: I'm sorry, Your Honor?

6 THE COURT: Yesterday in a similar trial you
7 requested an entrapment charge.

8 MR. BURTON: Yes.

9 THE COURT: Are you requesting that again?

10 MR. BURTON: Well, let me -- let me talk with him
11 first. I may.

12 THE COURT: All right.

13 MR. BURTON: I think I'm going to request it
14 anyway, Your Honor, but let's --

15 THE COURT: All right. We will take a break.

16 MR. BURTON: Thank you, Your Honor.

17 (Whereupon, proceedings were recessed)

18 (Whereupon, proceedings were reconvened)

19 THE COURT: Mr. Burton?

20 MR. BURTON: Your Honor, the defendant elects to
21 remain silent.

22 THE COURT: That's your decision, Mr. Peake?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: All right. Obviously you have that
25 right, and I will inform the jury that you have exercised

1 that right. They will not use that against you and you are
2 presumed innocent.

3 Do you have any witnesses?

4 MR. BURTON: No, Your Honor.

5 THE COURT: All right. So we are ready to have
6 closing argument. Final argument would rest with the
7 defendant.

8 Any requests to charge from the State?

9 MR. ANTHONY: No, sir, nothing other than the
10 standard charge.

11 MR. BURTON: I will ask Your Honor to charge the
12 same entrapment charge that I had from yesterday.

13 THE COURT: I'm going to deny that for the same
14 reasons, and I'll put it on the record. I looked at the
15 entrapment law yesterday for awhile. That case and in this
16 one apparently this one first prong of the Ralph King
17 Anderson charge is met, but the second is lack of
18 predisposition is not. And I find that the same as present
19 here, that it's not a situation like a true entrapment,
20 where someone is baited into doing something that they would
21 not do but for law enforcement's solicitation, enticement.
22 I find complete disposition -- or a lack of predisposition
23 probe is lacking in this case.

24 All right. We'll bring the jury in for arguments
25 and charge. That's it.

1 You need to set up anything?

2 MR. ANTHONY: I just need five seconds, Your
3 Honor, to put the stuff in the right place.

4 (Whereupon, the following takes place in the
5 presence of the jury panel)

6 THE COURT: All right, members of the jury panel,
7 the State, as I told you, has rested, presented its
8 evidence, and so has the defense. So now you will hear the
9 arguments of the attorneys and then I will charge you the
10 law that you are to apply in this case.

11 MR. ANTHONY: Thank you, Your Honor.

12 Mr. Peake is charged with two crimes:
13 Distribution of crack and distribution of crack within
14 proximity of a school.

15 So to find him guilty of both these charges, you
16 have to find primarily that he distributed crack, that he
17 gave crack cocaine to Kevin Lindsey at the Dixie Curb
18 Market. There is three ways that you know this happened.

19 First of all, Kevin Lindsey says that's what
20 happened. Kevin Lindsey knew Mr. Peake. He knew him by his
21 nickname of Little Man, but he knew who he was. He talked
22 to him on the phone earlier that day, arranged a meeting at
23 the Dixie Curb Market. When he got there at the Dixie Curb
24 Market, he walked in, saw a man standing there at the cash
25 register. He knew who he was seeing. He knew that was

1 Tijuana Peake, and so that's who -- that's who he says he was
2 dealing with. That's who -- there is no reason to think
3 that's not who he was dealing with.

4 And you can hear on the tape where Mr. Lindsey
5 asked Mr. Peake "is that a 20?" And Mr. Peake says "yeah."
6 And Mr. Lindsey says "all right, baby, I'll holler back."
7 That's very clear on the tape. And Mr. Lindsey says that
8 right after you see that little bag in Mr. Peake's hand.
9 And I want to just play it for you here.

10 (C.D. played)

11 (C.D. stopped)

12 MR. ANTHONY: All right. Now, this is them right
13 outside the store. And I want to just forward the frames
14 here. You see the shot starts to go down and there is that
15 bag in Mr. Peake's hand. The bag comes up towards Mr.
16 Lindsey. And now, right -- right as you -- when I start to
17 play it, if you listen to that audio, Mr. Lindsey is going
18 to be saying something, and then real quickly Mr. Lindsey
19 says "is that a 20?" And Mr. Peake says, real gruff, almost
20 a mumble, "yeah." And then you hear Mr. Lindsey say "all
21 right, baby, I'll holler back," and then Mr. Lindsey walks
22 off. That's -- I'm going to just play that for you right
23 now.

24 (C.D. played)

25 (C.D. stopped)

1 MR. ANTHONY: There you go.

2 So when you listen to that conversation, there is
3 no question that Tijuana Peake is selling Kevin Lindsey
4 crack.

5 If somebody goes up to you at the counter at the
6 McDonald's and says I want a Big Mac, what do they order?
7 They all know what they order. Well, if somebody goes to
8 the Dixie Curb Market and stands outside in the parking lot
9 with somebody and says "is that a 20?" You know what they
10 are ordering. They are ordering a rock of crack cocaine.
11 Mr. Lindsey made order to Mr. Peake. Mr. Peake filled that
12 order. That's what this conversation proves when you listen
13 to it.

14 The second way that you know that Tijuana Peake
15 sold crack is that Mickey Parker says he did it.
16 Investigator Parker knows Tijuana Peake. He testified he has
17 seen him around before over a long period of time. He knows
18 who he is. He is familiar with him. And when he watched
19 the tape, he knew who he was looking at and he knew he was
20 looking at on that video, and that's why he went and got
21 warrants and charged Mr. Peake with distribution of crack
22 and distribution of crack within the proximity of a school.

23 So, the proximity charge, as you just heard Mr.
24 Randall, the tax assessor, told you that Excelsior Middle
25 School is approximately 2,000 feet away from the Dixie Curb

1 Market, from the for end of the Dixie Curb Market. And a
2 half mile is over 2,600 feet.

3 MR. BURTON: Objection, Your Honor. I don't think
4 that the State has established what the distance in feet a
5 half mile is in evidence.

6 THE COURT: I'll charge the jury that. I'll take
7 judicial notice of that.

8 MR. ANTHONY: A half mile is over 2,600 feet. So
9 this occurred well within a half mile of the school.

10 Now, the third way you know that Tijuana Peake is
11 guilty is because you can look at the tape too and see it.
12 Over there sits Mr. Peake. You have seen him the whole
13 trial.

14 (C.D. played)

15 (C.D. stopped)

16 MR. ANTHONY: Okay. There is Mr. Peake.

17 There is Mr. Peake.

18 Now, I'm not saying that if you don't know Mr.
19 Peake, that you could look at that picture and you could say
20 with a hundred percent certainty that that's him. Maybe
21 some of you think it's him, maybe some of you don't, but
22 that's because y'all don't know him. Y'all have never seen
23 him before. But if you know Mr. Peake, that it's very easy
24 to recognize him from that tape. And Mickey Parker and
25 Kevin Lindsey, they do know him. And when they say that's

1 Tijuan Peake, this tape does not create any kind of doubt or
2 any kind of reasonable doubt about whether they are right.
3 This tape is perfectly consistent with what you expect to
4 see from somebody who said they bought crack from Tijuan
5 Peake. This tape just verifies what Kevin Lindsey and
6 Investigator Parker told you, and this tape is in evidence.
7 So when you go back in the jury room, if you have a question
8 about it, or you want to see it again, or you want to hear
9 it again, you can ask the judge. You can come back out here
10 and you can watch this and you can look at it, hear it,
11 whatever, as much as you need to to come to a verdict in
12 this case.

13 I won't be able to respond to what Mr. Burton
14 argues to you. The rules say that I have to go first and I
15 don't get to reply to what he says, so I want to just make a
16 few points about some things that he brought up yesterday
17 that he might talk about. I don't know what he thinks
18 happened. I don't know if he wants you to think that this
19 isn't Mr. Peake in the parking lot, when the testimony of
20 Mr. Lindsey and Investigator Parker in the video says I'll
21 show it was Mr. Peake, or if he wants you to think that Mr.
22 Peake was there, but he didn't distribute, when the audio
23 proves that he was dealing. Mr. Burton was complaining
24 yesterday about the camera and how Mr. Lindsey didn't get a
25 shot of the crack and he didn't get a shot of the money.

1 Well, you just seen and heard how fast all this happens.
2 You know, Mr. Lindsey can't tell Mr. Peake "hey, Tijuana, can
3 you stop for a second so I can turn over here and get a shot
4 of this rock," or, "why don't you hold it still so I can get
5 a picture of me giving you this money?" You know, that's
6 not the way drug deals happen. Drug deals happen fast. Mr.
7 Peake wanted to do this just as fast as he could and Mr.
8 Lindsey just has to go along with it. So it's not realistic
9 to expect this tape to be shot like a movie scene. That's
10 not what's going on here. This is just Mr. Lindsey with a
11 camera on him trying to get what he can get, but it's not
12 going -- it's not going to happen in slow motion. It's not
13 going to be all choreographed out.

14 Now Mr. Burton also made a big to-do yesterday
15 about the deception and talked about how Mr. Lindsey
16 deceived Mr. Peake. Well, this is the only way to catch a
17 drug dealer. So maybe Mr. Burton doesn't think the police
18 should do anything to try and stop drug dealing. I don't
19 know. But if Mr. Peake was dealing drugs, then Mr. Peake
20 needed to be deceived, because he needed to be caught and he
21 needed to stop. And I'm sure we all know just because
22 somebody doesn't tell a drug dealer that they were working
23 for the police does not mean that they are going to lie to
24 you on the witness stand. One thing doesn't have anything
25 to do with the other. Buying drugs from the police is

1 dangerous. People aren't going to do it for no reason.
2 Some people may do it because they have been charged with a
3 crime themselves and they are trying to get their charges
4 reduced or dismissed, but Mr. Lindsey had not gotten in any
5 trouble. He wasn't doing this to get out of trouble. He
6 was just doing it for pay. And there is no reason to think
7 or no more reason to think he's lied than anybody else who
8 would come in here and tell you about something they did on
9 their job, because essentially that's what Mr. Lindsey was
10 doing. He was telling you what he was doing when he was
11 working that day at his job.

12 The word verdict comes from this Latin word that
13 means to speak the truth. And in a few minutes that's what
14 you are going to be asked to do. You are going to be asked
15 to say what happened on this day. And there is this old
16 song called The Trouble With the Truth, and there is a line
17 from that song that says "the trouble with the truth is it's
18 always -- "it's just what I need to hear. It rings so right
19 deep down inside my ear." In the long run we all need to
20 know the truth.

21 Well, we all need to know it and we all need to
22 hear it. And, you know, sometimes the truth hurts. And
23 it's the people that the truth going to hurt that really do
24 need to hear it. Tijuana Peake is one of those people.
25 Tijuana Peake just needs to be tapped on the shoulder and

1 told that he can't go around selling crack, because even
2 though the people that go out buying crack don't think so,
3 crack hurts people. Crack is addictive. Crack gets control
4 of you and it won't turn you loose. And when somebody sells
5 crack, he's doing something that's every bit as bad as
6 taking a bat and whacking somebody up side the head with it.
7 The only thing is the person that's hit up side the head,
8 he's paying for it. So Tijuan Peake needs to hear the
9 truth. He needs to hear that he can't be out hurting people
10 selling crack. You know, Mr. Peake may not be a bad fellow.
11 He may just see this as a way to make some extra money.
12 But, you know, there is a right way to make money and there
13 is a wrong way to make money, and selling crack is the wrong
14 way to make money, and somebody needs to tell Mr. Peake
15 that. And who is going to tell him, because right now there
16 is only twelve people in Union County that can tell Tijuan
17 Peake that he can't be going around selling crack.

18 So when you go back to that jury room, I just ask
19 that you discuss this evidence. I would ask that if you got
20 questions about it, that you come out here and you sit and
21 look at it again. And then I would just ask y'all to do the
22 right thing, because everybody here on this jury, all twelve
23 of you, you know what the right thing to do is in this case
24 is. You know. And all I'm asking you to do is just come
25 out here and do the right thing. Find Mr. Peake guilty of

1 distribution of crack and distribution of crack within the
2 proximity of a school. Thank y'all.

3 THE COURT: Counsel?

4 MR. BURTON: Judge Hayes. Mr. Anthony.

5 MR. ANTHONY: Did he want to me to leave this?

6 MR. BURTON: No, I don't think so, but if Your
7 Honor could indulge me for a moment to advance the video a
8 bit?

9 (Off the record)

10 (Back on the record)

11 MR. BURTON: Thank you, ladies and gentlemen of
12 the jury. The good news is we are almost done. My argument
13 is going to be the last thing that you hear, except for the
14 judge's charge, and I promise you I won't keep you any
15 longer than I need to, but there are some very, very
16 important points that need to be made in this case in order
17 for you to properly do your job.

18 And Mr. Anthony is right, that I do get the last
19 word in this case and that he's limited into how he can
20 respond to that, but generally the shoe is on the other
21 foot, so I do intend to take advantage of that. And I do
22 want to address some of the things that he said first.

23 One of the things that he said was that maybe Mr.
24 Burton doesn't like what Mickey Parker does out there.
25 Well, I'm here to assure you that's absolutely not the case.

1 You know, I, as a taxpayer, you know it costs me a lot of
2 money because of the drug problem. You know, I have to pay
3 for police. I have to pay for prisons. I have to pay for
4 scientists. I have got to pay for all kind of things and I
5 don't like that, but I like the fact that Mickey Parker is
6 out there. I mean, you know, you may not think so because
7 of what's happened in the courtroom, but he and I are pretty
8 good friends and we are going to be after this trial is over
9 with. I'm glad he's out there and I'm glad people like him
10 are out there.

11 But there is something that I'm not glad about at
12 all out there, is that they tend to hire people like Mr.
13 Lindsey, Mr. Lindsey I think you can infer from the evidence
14 in this case is vigilante, crusader. He kind of admitted to
15 you that from the stand. That's what he is. He got to
16 where he was with respect to Mr. Peake through lies and
17 deception.

18 Mr. Anthony said, well, you know, just because he
19 lied to Mr. Peake doesn't mean he's taking the stand, you
20 know, and told you a lie. Well, I submit to you a couple of
21 things here, that there is -- you know, like Mark Twain
22 said, there is lies, damn lies, and statistics.

23 Well, you know, well, there is couple of types of
24 lies, too. There is a direct lie and there is kind of lies
25 by omission, by that meaning you tell somebody something

1 that may technically be the truth, but it's not the whole
2 truth, like let's say some married guy seeing two women in
3 town and his wife hears rumors about that and confronts him
4 and says "darling, are you seeing another woman?" Well,
5 he's actually seeing two. So, no, he's not seeing another
6 woman. He sees a couple women. And he said "no, I'm not
7 seeing a woman." That's a lie by omission, because, well,
8 technically it's true, it's not the truth when viewed as the
9 whole truth here.

10 And that's what happened in this case. Mr.
11 Lindsey deceived Mr. Peake. He didn't say "oh, yeah, by the
12 way, I'm working for the cops here." No, he didn't do that.
13 He lied by omission by presenting himself as a -- when I say
14 legitimate buyer of drugs, I'm talking about somebody that's
15 in the normal course of the illegal drug dealing activity,
16 presents themselves as somebody who is buying it for their
17 own use or something like that, so I'm not suggesting that
18 it's legal; nor am I suggesting that he ever sold drugs,
19 but, nonetheless, presenting himself as something that he's
20 not is a lie by omission. Yet the solicitor wants you to
21 believe even though he lied to Mr. Peake, he's telling you
22 the truth on the stand. He lied to you, too, and I'm going
23 to point that out in a little bit.

24 And as far as whether a liar is a liar, there is
25 an old joke, kind of a little off-colored joke, and I

1 apologize, but, you know, a man goes into a bar and sits
2 down next to a pretty girl and they start talking. And at
3 some point he says "well, how about it if maybe you sleep
4 with me and I will give you a million dollars." And the
5 girl says, "well, okay." And then he says "well, how about
6 if you sleep with me and I'll give you \$50?" And she says
7 "what do you think I am." And the answer is, he says "well,
8 we have already established what you are. It's just a
9 matter of price now." The purpose of telling you that is
10 because if a guy is a liar, he's a liar. A leopard doesn't
11 change his spots, okay. That's reasonable doubt, number
12 one.

13 Reasonable doubt number two is the identification.
14 You have seen the tape. You know Mr. Peake has kind of a
15 fairly distinctive head shape, but it's a common head shape.
16 The solicitor said to you that it's clear, the video is
17 clear about this, it's clear about that. Well, I submit to
18 you you can watch that video all day long, if you want to,
19 and there is nothing clear on that video. The only kind of
20 little bit clear part is kind of inside the Dixie Curb where
21 there is some ambient light. And in that case, you know,
22 the person is they want you to believe that Mr. Mills -- or
23 Mr. Peake is kind of facing the other way.

24 And I almost misspoke and said Mills. Well,
25 that's another kind of reasonable doubt, point number three,

1 is that -- his name is Tijuana Peake. His name isn't Mills.
2 The fellow testified that, well, you know, the guy -- "the
3 guy that I was buying drugs from is Little Man Mills."
4 Okay. So he didn't even know who the guy was, but yet he
5 testified he had a long term personal relationship with this
6 guy and there wasn't any doubt in his mind. It was clearly
7 this. There is just a whole lot of doubt there. Clearly
8 that film -- like he said, your oath is decide this case
9 beyond a reasonable doubt. There is certainly reasonable
10 doubt that that was him on the tape.

11 And Mr. Anthony also said that the CI's -- that
12 Mr. Lindsey's voice was clear on the tape about what he was
13 saying and can -- I don't even think his voice was clear
14 when he was taking the stand. I mean, the guy talked real
15 fast and he mumbled. Do you remember that? I mean I had
16 trouble understanding what he was saying at some point.

17 And the solicitor was saying, you know, there is
18 something suspicious about this guy on the video and he's
19 having something in his hand. I'll just play that part for
20 you right now.

21 (C.D. played)

22 (C.D. stopped)

23 MR. BURTON: All right. First of all, it's my
24 argument that piece of white that they are suggesting to you
25 is drugs is just probably a fingernail, or something like

1 that, that certainly it bears no resemblance to that piece
2 of evidence that you are going to have with you in the jury
3 room.

4 Second of all, I ask you if you see anything kind
5 of changing hands? I mean, that's kind of the drug deal?
6 Is something changing hands? I don't think that you see
7 that.

8 And Mr. Peake, or whoever that person was coming
9 out, what was he doing? He was coming out of the
10 convenience store and he had something in his hand. Well,
11 dah? I mean, that's what you do at a convenience store is
12 you buy something and you come outside.

13 Mr. Anthony says this deal happened kind of fast
14 and, you know, that, you know, he didn't have any control
15 over it. But I submit to you that he had a whole lot of
16 control over it. Do you remember he testified that he had
17 the camera. He knew exactly where the camera was. He knew
18 where the camera was pointing kind of at all times, and he
19 did his best to avoid answering my questions, reasonable
20 doubt number four, but he did -- he was forced to admit
21 that, you know, he could kind of angle his body to show what
22 he wanted to show, you know, and I think he had a lot of
23 control over it. Like you know -- you know, \$20, and okay,
24 let's make sure, oh boy, isn't that pretty? Isn't that nice
25 how that color changing ink. And you see that little thread

1 in there, you know. He could have done that all day long,
2 if he wanted to, you know. Passed it on, and he says, "oh,
3 you know, gosh, is this really -- "is this really a \$20
4 piece of rock? You know, maybe you should give me a little
5 bit more," or something like that. He could have -- he
6 could have done if it was really a drug deal. I mean, he
7 could have done an awful lot to help out, you know, his
8 crusade. Why didn't he? Because it wasn't what he said it
9 was.

10 Part of your job in assessing whether there is
11 proof beyond a reasonable doubt is to assess the credibility
12 of witnesses taking the stand. And we kind of expect that
13 people who are policemen, people who are here, like
14 confidential informant, to convince you that they are here
15 to tell you the truth. You know, people like police
16 officers, whose job isn't to convict people. Their job is
17 to do justice. Right? They would come forth and they would
18 have enough confidence in their science, or their police
19 work, or their CI work, or whatever, that they have enough
20 confidence to directly testify, answer honestly questions
21 from both Mr. Anthony and from me. If they are doing their
22 jobs, they got nothing to hide. What would be lost by
23 answering defense questions directly? There is strengths
24 and weaknesses in every kind of case in everything, you
25 know. And, again, they are here mostly to do -- to do

1 justice in the case. But you noticed that a lot of them
2 really avoided giving straight answers to defense questions.
3 Sure, it's my job to cast doubt on the evidence. I'm here
4 to test the evidence. That's what protects you and me
5 from -- you know, from governmental intrusion. I mean, it's
6 built in to protect not just Mr. Peake, but everybody here
7 in the courtroom. You know, why doesn't a police officer
8 answer the questions directly? Why, if they are here to do
9 justice, you know, to take advantages of the strengths and
10 admit the weaknesses of their case? Well, they don't do
11 that. They just won't give straight answers to the defense.

12 You know, the scientist is here. You know, she
13 was there to give forth what she wants you to believe is
14 absolute true scientific evidence based on long established
15 chemical principles and all that kind of stuff. But, you
16 know, I pointed out to her that what she is here to do is
17 render an opinion. And an opinion is something that's
18 subject to other opinions. Otherwise it would be a fact,
19 right? And with respect to the drugs, she admits that it
20 was a matter of opinion. But then, you know, she said well,
21 if anybody else would have another opinion, it would be
22 wrong. Well, you know, why don't they state it is an
23 absolute fact that this is what they say it was? Okay.
24 Because she doesn't have confidence in her science. That's
25 why. That's reasonable doubt. I think we are up to about

1 six or seven now.

2 The confidential informant. Well, I understand
3 why he won't answer defense questions directly, because he's
4 a vigilante. He's here to cure the drug problem, you know,
5 all by himself. He's here to play God, to decide who is
6 worthy of coming to court and being punished and who is not.
7 Do you remember that Mickey Parker admitted that he was kind
8 of given fairly free hand to identify who would be a good
9 likely drug target and who is not. I think there is a whole
10 lot of doubt whether he's really acting in the best
11 interests of society or not. He's acting in whatever best
12 interests he thinks ought to be, so I think his credibility
13 is entirely suspect.

14 He lied to you, too, because do you remember Mr.
15 Anthony asked him "well, what was the benefit to you in
16 doing this? He said "money." Well, I mean, that came right
17 out of him. Do you remember that? It came right out of his
18 mouth first. Well, he testified also under oath in another
19 place that he was doing it to -- because he was so annoyed
20 by the drug problem in Union, he just felt he had to do
21 something about it. Well, you know, his reaction was
22 something different. You know, he certainly took their
23 money. He certainly took thousands of dollars of their
24 money. Do you remember he testified that, you know, he had
25 done this hundreds of times. Maybe not a thousand times,

1 but, you know, maybe. That's forty grand a year if you do
2 it a thousand times. That's pretty good money, pretty good
3 inducement for doing that. So I think you can accept that
4 his reaction probably was really the truth, that he's doing
5 it for the money, and that's just telling you a lie when he
6 tells you there, "oh, yeah, I am doing it for the benefit of
7 society." That's lying to you.

8 I just want to mention to you also the issue of
9 the money. Allegedly this was a \$20 crack buy, but do you
10 see -- do you see \$20 in this courtroom anywhere, other than
11 the \$20 I put in my pocket just to show as an example? I
12 don't see any money. Well, they could have arrested whoever
13 did it and had the money available to the court. They say
14 they don't do it to protect the identity of the CI, but, I
15 mean, just think about how much stronger the case would be
16 if they had a xerox of a \$20 bill and then they had that \$20
17 bill in the courtroom that somebody testifies, or a
18 policeman testified that they got from him. Boy, wouldn't
19 that be great? It sure would be great, but unfortunately we
20 don't have that.

21 I want to talk a little bit about the distance
22 from -- one of the indictments in the case is that this
23 happened within a half mile of a school or a park. And, of
24 course, if you find him not guilty of distributing drugs in
25 the first place, you don't even have to reach that. And

1 then we will all go home and watch Leave it to Beaver
2 reruns, or whatever you want to do. You won't even have to
3 get there. But let's say for the sake of argument you reach
4 this point. And the gentleman, Mr. Randall, testified that
5 he thought the distance was about 2,000 feet. Well, it's
6 kind of that about that we are dealing with. Remember,
7 every single element in this case has to be proven by a
8 reasonable doubt. We are not dealing with about's here. We
9 are not guessing. We are wanting to know pretty much
10 exactly what the fact is in the case and I just don't think
11 that you can reach that based on Mr. Randall's testify --
12 testimony, I'm sorry.

13 First off, these are -- these are aerial photos
14 that were produced for some other purpose than to be able to
15 measure exact distances. They are done to show kind of a
16 large area for which the county can assess taxes. You can
17 use your common sense, even though Mr. Randall wouldn't
18 really answer my questions directly. He had to admit some
19 things that he just simply couldn't deny to you, ladies and
20 gentlemen. That's the fact that these are -- these are air
21 photos, okay, and that an air photo -- there is one point on
22 an air photo that's accurate, and that's the point that's
23 directly below the airplane. The rest of it, you know, is
24 distorted because of the lens. And, you know, you can even
25 see that on the air photo where the shadow of the wall on

1 the building on the west side is on the east, and on the
2 west side it's on the east. That's because of the way that
3 the photo was taken. So it's accurate in one point on the
4 photo. The rest of it is not accurate and we don't know how
5 much that inaccuracy is.

6 Also he was forced to admit that these photos are
7 photos are taken by an airplane. And the elevation that the
8 airplane is flying is absolutely critical, as far as the
9 scale of that map goes. If the plane is flying a little too
10 low, then things look bigger on the map. If they are flying
11 a little too high, things look smaller on the map. We don't
12 know exactly what the altitude of that plane was. That's
13 kind of based on the instrument in the plane that, again, we
14 really don't know what the accuracy is. So there is --
15 there is any number of ways that it could be argued that
16 this -- that measuring off of this map is not accurate
17 enough to establish his guilt beyond a reasonable doubt.
18 Not even -- it's laughable, I think.

19 Also you notice that the way the fellow measured
20 was on a straight line. I submit to you that the judge --
21 the only instruction the judge is going to give you about
22 what a half mile means is a half mile. He's not going to
23 tell you that it's a half mile as to crow flies. He's not
24 going to tell you a half mile driving along the streets, the
25 shortest distance. He's not going to tell you that, because

1 our legislature hasn't defined that for us.

2 I would argue that if you look at that straight
3 line, that a person within a car or on foot simply wouldn't
4 have the power to go to that school or park following that
5 straight line. You look -- you will have this in the jury
6 room. You can look. The straight line goes through
7 buildings. It goes through trees. It cuts across peoples
8 land. He simply couldn't have got it that way. Getting way
9 that way, the shortest way he could have gotten there, I
10 don't know how long that is. I mean, that's certainly --
11 it's certainly reasonable doubt, and certainly all kinds of
12 doubt, as far as that goes. So whether or not he would have
13 traveled an extra 640 feet. Remember, the witness testified
14 approximately 2,000 feet. The State has established that a
15 half mile is 2,640 feet. Whether he would have had to go
16 around that extra 600 feet is up to you to decide, but I
17 suspect that you would find that he will. I expect that you
18 will find that the distance measurement is simply not
19 accurate enough to establish guilt beyond a reasonable
20 doubt.

21 The thing that most amazed me about Mr. Randall's
22 testimony was that he didn't know the difference between a
23 ruler and an engineer's scale. Yet he's coming in here to
24 testify to you kind of as a quasi expert.

25 All right. I have laid out for you any number of

1 ways where the State has failed to prove he's guilty beyond
2 a reasonable doubt.

3 Now, you may sit here, despite everything that I
4 have said, and be 'suspicious' that Mr. Peake was selling
5 drugs out there. Well, if that's the case, your job is over
6 with, because if that's all you can say is that you have
7 some suspicion about that, you don't have proof beyond a
8 reasonable doubt and we are done here.

9 If you think he probably did it, you think he
10 probably sold drugs out there, and that's all you can say,
11 that's where that preponderance of an evidence that might
12 cause you to act in a civil court, but it's not enough to
13 act here. It's not enough. It has to be proof beyond a
14 reasonable doubt.

15 You might be clearly convinced, and that's not
16 enough. You have to be firmly convinced of his guilt. The
17 judge is going to tell you that. He's going to say that the
18 proof has to rise to the level where you would hesitate to
19 act and you must be firmly convinced of his guilt before you
20 could find him guilty beyond a reasonable doubt.

21 I suggest to you that the proof doesn't even come
22 close here and I ask you to do the only reasonable thing in
23 this case and find Mr. Peake not guilty. Thank you.

24 (Whereupon, at 11:37 a.m., the Court instructed
25 the Jury Panel)

1 THE COURT: Members of the jury panel, I
2 appreciate the attention that you have given to all of us to
3 this point. It's now up to me to charge you the law which
4 you are to apply to the facts in this case and it's up to
5 you to follow the law, determine the true facts and return a
6 verdict that speaks the truth.

7 The fact that Mr. Peake is charged with two
8 offenses is of no importance; that is, the fact that he has
9 two charges, one each has to be examined individually; that
10 is, the State has the burden of proving the elements of each
11 offense before you could convict him of one. And the fact
12 that there are two charges does not mean that he does not --
13 is not any indication that he was more guilty than someone
14 who maybe would have one charge. It's just that as a result
15 of the alleged incident here the State has charged him with
16 two charges.

17 As I said, you may convict him of one, or you may
18 acquit him of one, or both. The State has to prove as to
19 each his guilt before you could convict him, and that proof
20 must be beyond a reasonable doubt. The only exception to
21 that is that should you not find him guilty of distributing
22 drugs, crack, within the proximity of a park or school if
23 you find him not guilty of distribution; that is, he could
24 not have distributed the substance within a certain radius
25 of a school if he didn't distribute it at all. So, that is,

1 if you find him not guilty as to distribution, you would
2 obviously have to find him not guilty as to having done that
3 within one-half mile of Excelsior School; although, you
4 could find him guilty of distribution and not guilty of it
5 occurring within that proximity.

6 The fact that he's been charged, the fact he's
7 been arrested, and the fact that he's been indicted is not
8 evidence. That's just the way our system works for someone,
9 if believed by law enforcement to have violated any of our
10 laws, that person is charged, arrested and brought to court
11 and tried. That is not evidence that they committed the
12 offense. The State still, despite all of that, must prove
13 their guilt beyond a reasonable doubt.

14 But to these charges Mr. Peake has entered pleas
15 of not guilty. His pleas of not guilty places the State
16 with the burden of proving his guilt beyond any reasonable.

17 Mr. Peake is presumed innocent of these charges.
18 Anyone charged with any offense in our system is presumed
19 innocent of the charge against him, or her, until such time
20 as the State had proven that person's guilt beyond a
21 reasonable doubt.

22 This presumption of innocence is not a mere legal
23 theory or a mere legal phrase. It is a substantial right.
24 It attaches to an individual at the time they are arrested.
25 It remains with them as the case is processed through our

1 court system. The presumption of innocence remains with Mr.
2 Peake as I speak. In fact, it remains with him as you
3 deliberate. The presumption of innocence is in Mr. Peake's
4 favor is removed if, and when, only if and when you as the
5 triers in this case determine that the State has proven his
6 guilt beyond a reasonable doubt.

7 Now, the State is not required to prove his guilt
8 beyond all or beyond every doubt, but beyond a reasonable
9 doubt.

10 Our courts have defined a reasonable doubt as the
11 kind of doubt that would cause a reasonable person to
12 hesitate to act. Proof beyond a reasonable doubt is proof
13 that leaves you firmly convinced of an individual's guilt.
14 There are very few things in our world that we can know with
15 absolute certainty. The law does not require absolutely
16 certainty.

17 If, based on your consideration of the evidence,
18 you are firmly convinced that Mr. Peake is guilty of one, or
19 both, of the charges for which he is charged, you must find
20 him guilty.

21 On the other hand, if you think there is a real
22 possibility that he is not guilty of one or both of the
23 charges, you must give him the benefit of that reasonable
24 doubt and find him not guilty. He is entitled to the
25 benefit of any reasonable doubt you have as to any issue in

1 this case.

2 I told you earlier that I am the sole judge of the
3 law. You must take, accept and apply the law as I charge
4 it. I'll remind you that this is true, even if you think I
5 charge the law in error or if you think the law should be
6 different. Your oath requires you to take, accept and apply
7 the law as I charge it.

8 You are not to infer from anything that I have
9 said or done or anything I now say or do as being an
10 indication of the opinion of my own facts. The law does not
11 allow a trial judge to formulate or to express to you any
12 opinion on the facts. That is solely your judgment.

13 As the trial jury in this case it's solely up to
14 you to examine the evidence, give to the evidence the
15 effect, the value, the weight, and the truth you believe
16 that evidence would have. In doing this you may believe one
17 witness as opposed to several, several witnesses as opposed
18 to one. You may believe all, or part, or none of a witness'
19 testimony. Analyze the evidence, use your common sense,
20 your sense or logic. Use your sense of reason and your
21 experiences in life.

22 As judges of the facts you must necessarily judge
23 the believability, that is, the credibility of the witnesses
24 who have testified.

25 In assessing credibility use those things that I

1 have already mentioned. Use those things that you in your
2 day-to-day life find as indicating to you truthfulness in a
3 person, and you can use certain evaluators: How a witness
4 acts on the stand, that is, their demeanor.

5 You can look at whether or not a witness would
6 have or look at what opportunity a witness had to actually
7 know the things to which a witness testified.

8 You can consider whether a witness has any bias or
9 prejudice, that is, whether they would wish to help or hurt
10 one side or the other.

11 You can look and see if a witness' testimony is
12 consistent or inconsistent.

13 All of these things you consider to determine the
14 true facts, apply the law, and you will be in a position to
15 return a verdict that speaks the truth.

16 And in this case we have had a witness who was
17 qualified as a drug -- in the area of drug analysis. She
18 was qualified by the court to testify and give an opinion.
19 Generally individuals can only testify as to something that
20 they have seen in one of their five senses. However, where
21 an individual has certain skill, training, experience, or
22 knowledge in a particular area, that person is allowed to
23 render an opinion.

24 Now, the opinions of experts are given to assist
25 you. They are not binding on you. You are the sole judges

1 of the facts. As to the opinion of an expert witness, you
2 are to look at that witness' testimony, just as you look at
3 the other witness' testimony. And, in addition, you can
4 look at the qualifications of that witness; that is, their
5 ability to render an opinion in that field. And also you
6 can look at the reasons they gave for reaching the opinion
7 that they reached. But you may accept in whole in or part
8 or reject in whole or in part the expert witness' opinion.
9 It is allowed into evidence to assist you. It's not binding
10 on you.

11 I instruct you and emphasize to you the fact that
12 Mr. Peake chose to exercise his Constitutional Right to
13 remain silent cannot and must not or will not be used by you
14 against him in any fashion whatsoever. Anyone charged with
15 any offense in our system has an absolute right to remain
16 silent. He does not have to prove his innocence. The State
17 must prove his guilt beyond a reasonable doubt.

18 You cannot discuss in the jury room the fact that
19 Mr. Peake exercised his Constitutional Right to remain
20 silent. You cannot factor it into your own consideration
21 the issue of whether or not the State has proven his guilt
22 beyond a reasonable doubt. You cannot use it against him in
23 any way whatsoever.

24 I repeat, he's presumed innocent, and the State
25 must prove his guilt beyond a reasonable doubt.

1 An issue in this case is whether or not an
2 individual that Mr. Lindsey said was Mr. Peake and was shown
3 in the video is, in fact, Mr. Peake. The burden of proving
4 identity beyond a reasonable doubt is on the State.

5 Identification testimony, that is, someone
6 identifying somebody as being a certain person, is an
7 expression of the belief or impression by the witness. You
8 must determine the accuracy of the identification of the
9 witness of Mr. Peake when determining whether to find him
10 guilty or not guilty. You can consider the believability of
11 the identification of the witness the same way as you
12 analyze other testimony.

13 You may also, in examining the witness'
14 identification of Mr. Peake, with other factors. You can
15 use such factors as opportunity the witness had to observe
16 the one he identified;

17 The lighting in that area;

18 The proximity of him, that is, how close or far
19 apart they were;

20 Any prior knowledge they had of who the individual
21 was.

22 All these things you can consider in determining
23 whether or not the person identified by Mr. Lindsey was, in
24 fact, the person on trial, Mr. Peake.

25 Mr. Peake is charged with distribution of crack

1 cocaine. Crack cocaine is a narcotic controlled substance
2 under the laws of our state.

3 In order for you to find him guilty, you must be
4 convinced as to this charge beyond a reasonable doubt that
5 Mr. Peake did, in fact, distribute the controlled substance
6 crack cocaine.

7 You would have to, of course, find that the
8 substance was, in fact, crack cocaine, and you would have to
9 find that he did distribute it.

10 Distribute means to actually, constructively, or
11 attempt to transfer the drug.

12 A transfer can involve exchange for money, but
13 there does not have to be anything in exchange for the drugs
14 for a transfer of the drugs from one person to another to
15 constitute distribution.

16 Again, the State must prove distribution beyond a
17 reasonable doubt.

18 The second charge against Mr. Peake is that he
19 committed this distribution that he's alleged to have done
20 within one-half mile of Excelsior School. Our law as passed
21 by our legislature makes that a separate offense.

22 As to this offense the State must prove beyond a
23 reasonable doubt that he distributed the drug and that he
24 did that within one-half mile of the school set forth in the
25 indictment, which was the Excelsior Middle School.

1 Now, the half mile distance set forth in the
2 statute is based on the straight line distance. It's
3 measured by straight line distance.

4 The term grounds of a public school or public park
5 or nearest public school, as it relates to that issue,
6 include all the school owned property contiguous to or
7 surrounding the school's physical plant, that being a school
8 building.

9 I charge you that one-half mile is 2,640 feet.

10 We have a video. You won't have it in the jury
11 room with you. It is in evidence. If you wish to review
12 the video, let me know and I will bring you back here in the
13 courtroom and we will allow you to view it here.

14 Now, your verdict must be unanimous. All twelve
15 jurors must agree.

16 Once you have, Madam Forelady, you will write the
17 verdict. I'll show you more about that in a moment, on the
18 jury's behalf.

19 Your verdict cannot be based on passion, sympathy,
20 public opinion, public feeling or matters outside the
21 record.

22 If you have questions while you are deliberating,
23 please write them down and send them out. Just knock on the
24 door and give them to the bailiff. I will consult with the
25 attorneys. If I can answer the note by simply writing an

1 answer on the note, I will do that and return it to you. If
2 I do that, just retain the note and return it with the
3 evidence, Madam Forelady.

4 I may have to bring you back out into the
5 courtroom and answer your question. And, of course, I will
6 do that, if necessary.

7 We can have testimony replayed, if you wish.

8 And in South Carolina we do not send in a written
9 charge on the law, but if you wish me to go over any part or
10 the law or my charge on the law, let me know and I'll bring
11 you out here in the courtroom and recharge you any part or
12 all of the law.

13 When you first go into the jury room, don't start
14 deliberating and don't get too comfortable, because I may
15 have to bring you back out. If I have made an error, I will
16 have to bring you back out and correct it, because you have
17 to follow the law as I charge it, so it's imperative that I
18 charge it to you correctly.

19 When you go out in just a moment, I want everyone,
20 but Mr. Pierce, you will remain in here as the alternate. I
21 will go over my charge with the attorneys. If I have made
22 an error, I will bring you back in and correct it. If not,
23 I'll send in the indictments and the exhibits and you can
24 start deliberating. The bailiff will tell you to do that.

25 And the indictments which you will have in the

1 jury are not evidence. They are simply the paperwork by way
2 of which this case is processed through our court system
3 and it contain the charges against Mr. Peake.

4 They also are where you, Madam Forelady, will
5 enroll when you reach your verdict. You will see on the
6 back the word verdict. There are four lines below there.
7 The bottom line is the place for you to sign. There is a
8 place for you to date it. Today's date is the 16th of
9 October. And on one line -- on one of the lines above the
10 word, between the word verdict and your signature, there
11 would be three lines left. On one of those lines you will
12 write the unanimous verdict of the jury.

13 If the State has failed to prove as to one or both
14 as to an indictment, the State has failed to prove the
15 charges of that indictment against Mr. Peake beyond a
16 reasonable doubt, your verdict would be two words - not
17 guilty.

18 If, on the other hand, a unanimous opinion of the
19 jury, a unanimous verdict of jury is that the State has
20 carried its burden of proof and proven Mr. Peake guilty
21 beyond a reasonable doubt to the particular offense, you
22 would simply write the word guilty on that indictment.

23 Now, I'm going to let you go to the jury room at
24 this time, every one of you but the alternate, Mr. Pierce,
25 and don't start deliberating yet. Thank you.

1 (Whereupon, at 11:53 a.m., the jury went to the
2 jury room, awaiting instructions to begin deliberating)

3 THE COURT: Just have a seat and I'll be with you
4 in just a second.

5 Any exceptions from the State?

6 MR. ANTHONY: No, sir, no exception.

7 THE COURT: Any from the defense?

8 MR. BURTON: No, Your Honor.

9 THE COURT: All right. Check the exhibits and
10 indictments. We will send them back in and ask the jury to
11 start deliberating.

12 Mr. Pierce, you are through for the week. We
13 appreciate your service. We are not going to start another
14 trial, since it's already Thursday afternoon. You will be
15 mailed a check.

16 (Whereupon, the alternate juror was discharged)

17 (Whereupon, at 11:55 a.m., the jury panel was
18 instructed to begin deliberations)

19 MR. BURTON: Your Honor, should I renew my motion
20 for a directed verdict?

21 THE COURT: Yes. Mr. Burton wants to renew his
22 motion. Of course, you made it at the end of the State's
23 presentation and there has been no evidence since that
24 point, but I don't know whether technically you would need
25 to renew it or not, but if you wish, that would be fine.

1 MR. BURTON: I think a little bit of time it would
2 take it would be worthwhile.

3 Your Honor, I would argue the same directed
4 verdict standard as it was, that the State has failed to
5 prove any direct evidence or substantial circumstantial
6 evidence and it's the defense's position that Mr. Peake is
7 entitled to a directed verdict of not guilty.

8 THE COURT: That motion is denied. I articulated
9 why earlier. Thank you.

10 MR. BURTON: Thank you, Your Honor.

11 (Whereupon, at 11:59 a.m., proceedings were
12 recessed, pending the verdict of the Jury Panel)

13 (Whereupon, at 12:15 p.m., proceedings were
14 reconvened).

15 THE COURT: We have been informed that the jury
16 would like to review the video, so if it could be set up, or
17 has it already been set up?

18 MR. ANTHONY: I have it. I have it set up.

19 Does the court want me to just play the whole
20 thing?

21 THE COURT: Yes, because we can't -- we can't
22 comment on it. It's in evidence. They said they want to
23 see it, so when they come in, we will start it. When it's
24 through, we will stop it.

25 MR. ANTHONY: Okay.

1 THE COURT: Bring the jury in.

2 (Whereupon, at 12:16 p.m., the jury panel returned
3 to open court)

4 THE COURT: Members of the jury panel, we are
5 going to play the video for you.

6 (Whereupon, the C.D., State's Exhibit No. 1, was
7 played to the jury panel)

8 THE COURT: All right. I'll let you go back in
9 the jury room and continue to deliberate.

10 Madam Forelady, it's 12:30. If you decide -- if
11 the jury decides that they need us to order a meal, let us
12 know. It takes about an hour. So if you decide that you
13 want -- if you are going to be working that long, let us
14 know and we will be glad to order something for you.

15 (Whereupon, at 12:24 p.m., the jury returned to
16 the jury room to continue deliberating)

17 THE COURT: Anything from the State?

18 MR. ANTHONY: No, sir.

19 THE COURT: Defense?

20 MR. BURTON: No, Your Honor.

21 (Whereupon, at 12:25 p.m., proceedings were
22 recessed, pending the verdict of the jury panel)

23 (Whereupon, at 1:05 p.m., proceedings were
24 reconvened)

25 THE COURT: I understand we have a verdict.

1 Bring in the jury.

2 (Whereupon, at 1:06 p.m, the jury panel returned
3 to open court to render its verdict)

4 THE COURT: Madam Forelady, I understand the jury
5 has reached a verdict?

6 JURY FORELADY: Yes, sir, we have.

7 THE COURT: Hand it to the bailiff.

8 Thank you.

9 THE CLERK: The State of South Carolina versus
10 Tijuan Peake, case number 2008-GS-44-332, for the indictment
11 of for distribution of crack cocaine, we, the jury, find the
12 defendant guilty.

13 State of South Carolina versus Tijuan Peake,
14 docket number 2008-GS-44-333, indicted for distribution of
15 crack within proximity, we, the jury, find the defendant
16 guilty.

17 Madam Forelady, ladies and gentlemen of the jury,
18 if this is your verdict, please raise your right hand.

19 All raised in the affirmative.

20 THE COURT: Anything from the State before the
21 jury is dismissed?

22 MR. ANTHONY: No, sir.

23 THE COURT: Anything from the defense?

24 MR. BURTON: No, Your Honor.

25 THE COURT: Members of the jury panel, this

1 finishes your work for the week. We will be working some
2 more, but we will be doing things for which we do not need a
3 jury. You will be mailed a check.

4 Do any of you need a statement to take to work?

5 All right. Okay. If you do, step down to --

6 THE CLERK: Yes, sir, to the clerk's office.

7 THE COURT: Just go to the clerk's office and ask
8 for one and they will give it to you.

9 We appreciate your help. You feel free to leave
10 and you go out this way. Thank you so much.

11 (Whereupon, at 1:06 p.m., the jury panel was
12 discharged)

13 THE COURT: Anything from the State?

14 MR. ANTHONY: No, sir, nothing as to the trial.

15 THE COURT: Anything regarding the trial?

16 MR. BURTON: No.

17 THE COURT: All right. Let's bring Mr. Peake
18 around for sentencing. And if you finish the sentencing
19 sheets and then I'll be glad to hear anything regarding his
20 past record or anything in mitigation.

21 What offense is this?

22 MR. ANTHONY: Your Honor, our position is it could
23 be considered as a second offense.

24 THE COURT: Second?

25 MR. ANTHONY: Yes, sir.

1 THE COURT: I'll first hear from the State
2 regarding any prior record and anything regarding
3 recommendations for sentencing.

4 MR. ANTHONY: Your Honor, he has two distribution
5 convictions. The offense dates on the convictions were both
6 in September of 2003. He pled guilty to both those
7 distributions on February 17th of 2005. He received a three
8 year sentence at that time.

9 He also at the time he pled on those, he pled
10 guilty to -- he pled guilty to a proximities accompanying
11 each of those distributions.

12 If I could just have one moment, I just want to
13 make sure I'm giving the court accurate information.

14 (Off the record)

15 (Back on the record)

16 MR. ANTHONY: Aside from those convictions, he
17 also had a failure to stop for a blue light in 2002, and he
18 also had a simple possession of marijuana conviction in
19 Magistrate's Court in 2003. We will not argue that that
20 aggravates this one. We would agree that it can be
21 sentenced as a second offense distribution, but we would ask
22 the court to take into account in his sentence that this is
23 his third true conviction for distribution of crack cocaine.

24 THE COURT: All right.

25 MR. BURTON: Thank you, Your Honor.

1 May it please the court, Mr. Peake is 30 years
2 old. He lives at in Carlyle, Your Honor.

3 He's here with his girlfriend Tequila Fleming, the
4 lady in the yellow there, and they live in the home with two
5 children - a son 11 and his son six.

6 Mr. Peake spent two days in jail before he was
7 bonded out.

8 He is unemployed at the moment. He lost his last
9 job because of his inability to get a ride to Spartanburg.
10 He worked for D&B Machinery in Spartanburg last, Your Honor,
11 as a grinder making \$8.75 an hour.

12 I would argue that but for the drug priors, his
13 record is relatively good.

14 Mr. Peake maintained his innocence throughout, and
15 I think he still does maintain his innocence, Your Honor.
16 We had an offer from the State of a plea to a first offense
17 for a cap of five years. Of course, he's been convicted on
18 the second. I understand Your Honor has to sentence him
19 that way, but I would still ask Your Honor to factor in that
20 even if you gave him the minimum sentence, that he would
21 have to serve 85 percent of that time, and I would ask Your
22 Honor to sentence him to the minimum.

23 THE COURT: All right. Do either one of these
24 ladies want to speak? If so, tell me who you are and what
25 you want to say.

1 TEQUILA FLEMING: I'm his girlfriend and he --

2 THE COURT: Your name?

3 TEQUILA FLEMING: Tequila Fleming.

4 And he have -- in the past he had -- well, he
5 admitted to it and he went and did his time for it. He has
6 changed. And I work third shift and he be at home with the
7 kids, he watch the kids. And I work six days a week at
8 Renfro in Whitmire and that's -- he be with the kids while I
9 work. He just got caught up at the wrong place at the wrong
10 time.

11 THE COURT: Thank you, ma'am.

12 Yes, ma'am, your name?

13 KATHY PEAKE: Kathy Peake.

14 THE COURT: Your name again?

15 THE DEFENDANT: Kathy Peake.

16 THE COURT: What do you want to say?

17 KATHY PEAKE: (No response)

18 THE COURT: She can't speak.

19 Mr. Peake, anything that you want to say?

20 THE DEFENDANT: I just ask you to go lenient on me
21 as possible so I can get out and get back to my kids.

22 THE COURT: These are to run concurrent.

23 You are given credit for two days that you have
24 served.

25 I'm going to recommend that you receive treatment

1 through the Addiction Treatment Unit.

2 Distribution of crack cocaine, the sentence is 20
3 years, and for the proximity 15 years.

4 Do you understand that?

5 THE DEFENDANT: (Shaking head yes)

6 THE COURT: He nodded in the affirmative.

7 Thank you.

8 (END OF REQUESTED TRANSCRIPT OF RECORD)

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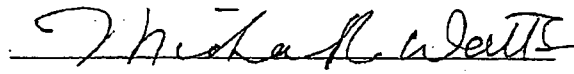
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CERTIFICATE.

I, the undersigned, Michael R. Watts, Official Court Reporter for the Sixteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Union County, South Carolina, on the 15th and 16th days of October, 2008.

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

December 26, 2008



Michael R. Watts
Circuit Court Reporter

2011-CP-44-489

FORM 5
FILE FOR RECORD

STATE OF SOUTH CAROLINA

County of UNION2011 DEC 19 10:03
THE COURT OF COMMON PLEASWILLIAM F. GAULT
CLERK OF COURTTIJUAN PEAKE

Full name and prison number (if any) of Applicant

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS B READ CAREFULLY

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

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

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

1. Place of detention PERRY CORRECTIONAL INSTITUTION
2. Name and location of Court which imposed sentence UNION COUNTY COURT OF GENERAL SESSIONS
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2008-CS-44-0332

A TRUE COPY

DEC 19 2011

WILLIAM F. GAULT
CLERK OF COURT

- (b) 2008-GS-44-0333
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 10-16-2008 20 years
- (b) 10-16-2008 15 years
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty x
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
- YES
8. If you answered Ayes@ to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Appeal Denied 6-14-2011 (2011-CP-297)
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. 6-14-2011
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- unknown
- i. _____
- ii. _____
- iii. _____
9. If you answered Ano@ to (7), state your reasons for not so appealing:
- (a) _____

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) I was provided ineffective assistance of Counsel
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Attached Memorandum
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? xxx no
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no
- (d) any other petitions, motions or applications in this or any other Court? no
13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. n/a
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. n/a
- ii. _____
- iii. _____

iv. _____

(c) the disposition thereof:

i. _____ n/a

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____ n/a

ii. _____

iii. _____

iv. _____

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

i. _____ n/a

ii. _____

iii. _____

iv. _____

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

_____ NO

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

(a) n/a

(b) _____

(c) _____

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

(a) your arraignment and plea? _____

(b) your trial, if any? Ross Burton Union County Public Defender's Office

(c) your sentencing? same as above

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? M. Cecelia Robinson Appellate Defense

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered Ayes@ to one or more parts of (17), list:

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

i. See above

ii. _____

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Appeal

ii. _____

iii. _____

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

A Reversal of my conviction and a new trial

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

No

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Union)

VERIFICATION

I, TIJUAN PEAKE # 307699, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

✓ Tijuan Peake

SWORN to and subscribed before me this 18TH
day of November, 2011.

~~Steph~~ Humble (L.S.)
Notary Public

My Commission Expires: February 21, 2012

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

I, TIJUAN PEAKE #307699, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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

✓ Tijuan Peake
Applicant

SWORN or affirmed to and subscribed before me this
18th day of November, 2011.

[Signature]
Notary Public

My Commission Expires: February 21, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF UNION	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
	)	
Tijuan Peake, #307699,	)	2011-CP-44-0489
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the Application for Post-Conviction Relief filed December 9, 2011, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Union County Clerk of Court. The Applicant was indicted at the March 2008 term of the Union County Court of General Sessions for Distribution of Crack Cocaine (2008-GS-44-0332) and Distribution of Crack Cocaine within proximity of a school (2008-GS-44-0333). He was represented by Ross Burton, Esq. On October 15, 2008, the Applicant underwent trial by jury, pursuant to which he was convicted of Distribution of Crack Cocaine, 2nd Offense and the corresponding proximity charge. The Honorable John C. Hayes, III sentenced Applicant to confinement for twenty (20) years for Distribution of Crack Cocaine, 2nd offense and fifteen (15) years, concurrent, for the proximity charge.

A Notice of Appeal was filed on the Applicant's behalf and an appeal perfected.. The South Carolina Court of Appeals affirmed his conviction. State v. Peake, 2011-UP-297 (filed June 14, 2011). The Remittitur was issued on July 1, 2011.

Attached herewith and incorporated herein by reference are the records of the Union County Clerk of Court regarding the subject conviction, the Applicant's records from the Department of Corrections, and the Record on Appeal. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. Ineffective Assistance of Counsel
 - a. "Counsel's failure to object to trial judge's improper comments on the facts"
 - b. "counsel's failure to object to the trial judge's erroneous instruction to the applicant that his prior drug convictions could be used to impeach him if he exercised his right to testify in his defense"
 - c. "Counsel conceded guilt [or] made improper comments that [were] damaging to Applicant"
 - d. "counsel elicited... testimony that bolstered the witness and testimony credibility"
2. Subject Matter Jurisdiction
 - a. "The Trial Court was not presented indictments on Applicant's drug distribution and drug proximity offense for trial of these offenses under its criminal jurisdiction."
3. Prosecutorial Misconduct
 - a. "Deputy Solicitor Anthony knew he was participating in an ex parte grand jury proceeding which was not being held at a Court of General Sessions in accordance with law..."

III.

The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal

cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Butler, Id. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, Id. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an

evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Applicant also asserts the indictments in his case were the products of fraud due to ex parte grand jury proceedings. The Respondent submits the Union County Grand Jury properly indicted the Applicant and this claim should be summarily dismissed.

A presumption of regularity attaches to proceedings in the Court of General Sessions. Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986). Absent evidence to the contrary, the courts will presume that a properly returned indictment is valid. "Thus, if the record does not reveal any irregularity in the proceedings affecting the indictment, this court must presume the trial court had subject matter jurisdiction." State v. James, 321 S.C. 75, 79, 472 S.E.2d 38, 40 (Ct. App. 1996).

Here, the Union County Clerk of Court's record of the indictment shows that it is regular on its face. "Speculation about 'potential' abuse of grand jury proceedings cannot substitute for evidence of actual abuse as grounds for quashing an otherwise lawful indictment." James, Id. The Applicant's bare "assertion, standing alone, is not sufficient to overcome the presumption of regularity and legality attending the proceedings before the Grand Jury, and simply based on that assertion, [this Court] cannot assume the State abused the grand jury process in order to obtain a finding of probable cause to prosecute." Id. Pursuant to Rule 56, SCRCP, this Court should grant summary judgment for the Respondent on this allegation.

V.

The Applicant further alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post conviction relief. Rather, this allegation is a direct appeal issues that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Pursuant to Rule 56, SCRCP, this Court should grant summary judgment for the Respondent on this allegation.

VI.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VII.

WHEREFORE, the Respondent requests an evidentiary hearing solely for the purpose of determining whether the Applicant's trial counsel was ineffective.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

March 23, 2012

STATE OF SOUTH CAROLINA

COUNTY OF UNION

IN THE COURT OF COMMON PLEAS

2011-CP-44-0489

TIJUAN PEAKE,

Applicant,

vs

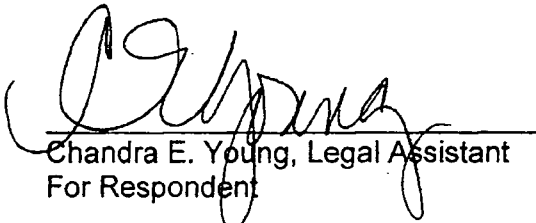
AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Caroline Horlbeck, Esquire
 101 Whitsett Street
 Greenville, SC 29601

DATED this 23rd day of March, 2012.


Chandra E. Young, Legal Assistant
 For Respondent

1 STATE OF SOUTH CAROLINA

2 -----x

3 TIJUAN PEAKE,

4 Applicant,

5 Case No.

6 -against-

2011-CP-44-489

7 STATE OF SOUTH CAROLINA,

8 Respondent.

9 -----x

10 October 9, 2012

11 York, S.C.

12

13 B E F O R E:

14 HONORABLE EDGAR W. DICKSON

15

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

17 J. RUTELDGE JOHNSON, Esquire

18 Attorney for the Respondent

19

20 CAROLINE HORLBECK, Esquire

21 Attorney for the Applicant

22

23 Aileen Butler

24 Official Court Reporter

25

1		<u>I N D E X</u>			
2	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
3	Tijuan Peake				
4	Ms. Horlbeck	5			
5	Mr. Johnson		26		
6	Ross Burton				
7	Mr. Johnson	33			
8	Ms. Horlbeck		41		
9					
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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVD.</u>
Applicant's 1	Crime report	9	

MR. JOHNSON: May it please the court?

THE COURT: Yes, sir.

MR. JOHNSON: This is Tijuán Peake versus
the State of South Carolina. This is case number

1 2011-CP-44-489.

2 Mr.. Peake was indicted March 2008 term of
3 the Union County Grand Jury for distribution of
4 crack cocaine and distribution of crack cocaine
5 within proximity of a school.

6 On October 15, 2008, Mr. Peake underwent a
7 trial by jury. He was convicted of the
8 distribution of crack cocaine second offense and
9 the corresponding proximity charge.

10 John C Hayes III sentenced him to
11 confinement for distribution of crack cocaine,
12 second offense and 15 years concurrent for
13 the proximity charge.

14 There was a notice of appeal filed on this
15 behalf and appeal perfected.

16 South Carolina Court of Appeals affirmed his
17 conviction and sentence. The remitter was
18 thereafter issued on January 30th.

19 Mr. Peake filed a PCR on December 9th and
20 the State filed its return on March 23rd
21 of 2012.

22 He is represented here today by Miss
23 Caroline Horlbeck.

24 THE COURT: All right.

25 THE COURT: Miss Horlbeck.

1 MS.HORLBECK: Yes, we are ready and I would
2 call Mr. Peake to the stand.

3 THE COURT: All right. Mr. Peake please
4 come forward sir.

5 TIJUAN DEVILLE PEAKE, called as a witness,
6 having been duly sworn by The Clerk, was examined
7 and testified as follows:

8 DIRECT EXAMINATION

9 BY ATTORNEY NAME:

10 Q. Mr. Peake give us your entire name for the
11 record?

12 A. Tijuan Deville Peake.

13 Q. And what is your age?

14 A. Thirty-four.

15 Q. Where are you currently incarcerated?

16 Q. Perry Correctional Institute?

17 Q. What sentence are you serving?

18 A. Serving a twenty-year sentence for distribution
19 of crack cocaine and 15 year sentence for proximity of a
20 school.

21 Q. Who represented you on those charges?

22 A. Ross Burton.

23 Q. Did you go to trial or was this a guilty plea?

24 A. I went to trial.

25 Q. And do you remember when Mr. Burton was appointed

1 to represent you?

2 A. I can't remember the exact date.

3 Q. That is okay. How about this, tell me just
4 approximately how many months Mr. Burton represented you
5 on these charges?

6 Was it six months? Nine months? A year?

7 A. Probably six months. Somewhere around there.

8 Q. Were you incarcerated or had you posted bond?

9 A. I had posted bond.

10 Q. How many times had you met with Mr. Burton to
11 discuss your charges?

12 A. Well, we didn't really meet until like October
13 the 10th. I seen him in General Sessions Court when I
14 reported to General Sessions. I was asking for my
15 motion of discovery and he was like he hadn't got it yet
16 and when he got it October 10th he sent me a letter and
17 that's when I met him on October the 10th. I got a
18 letter in the mail and I went back. I went to see him
19 on that Friday before Court the next week. The
20 following week.

21 Q. And when you say Court, was the following week
22 your trial?

23 A. Yes, ma'am.

24 Q. Did you met with Mr. Burton once or maybe twice
25 before your trial?

1 A. I am saying I had spoke to him a couple of times
2 during when Court was going on. I was asking for my
3 motion of discovery. He was like he hadn't got it yet.

4 Q. Okay. How far before your trial did you review
5 discovery with your attorney?

6 A. I reviewed it that Friday and went to trial that
7 next week that Wednesday.

8 Q. Okay. Were you given a copy of your discovery?

9 A. No, ma'am, not at the time. I was given a copy
10 when he sent some in the mail saying when it alleged
11 drug samples took place and was nothing else in it. Not
12 in the discovery. I obtained after my conviction.

13 Q. Okay. All right. Now in your petition, you
14 filed a petition that we are talking about today; is
15 that correct?

16 A. Yes, ma'am.

17 Q. And in your petition you listed a number of
18 reason that you believe Mr. Burton did not represent you
19 effectively; is that correct?

20 A. Yes, ma'am.

21 Q. All right. And one reason you listed is that you
22 believed that Mr. Burton should have elicited testimony
23 from the confidential informant?

24 A. What did you say now?

25 Q. Let me kind of publish a been a little more

1 definite about what I am asking you.

2 You had a confidential informant on your case; is
3 that correct?

4 A. Yes, ma'am.

5 Q. And did your confidential informant did that
6 person take the stand and testify against you?

7 A. Yes, ma'am.

8 Q. All right. And did Mr. Burton cross examination
9 the confident informant?

10 A. Yes, ma'am.

11 Q. Did he ask the confidential informant about any
12 prior record that he had?

13 A. No, ma'am.

14 Q. All right. After your trial did you become aware
15 of a prior record of the belonging to the confident
16 informant?

17 A. I had see it. Like the day of trial I asked Mr.
18 Burton about it but he was like he couldn't use.

19 Q. Okay. And what did he tell you about being
20 unable to use it?

21 A. That's all. Just that he couldn't use it.

22 Q. He just said he couldn't use?

23 A. He just said he couldn't use it.

24 Q. All right. And did you request a copy of the
25 CI's record from sled?

1 A. Yes, ma'am.

2 Q. All right. If I could approach and have this
3 marked as Applicant's 1.

4 (Applicant's 1 marked for identification as
5 of this date.)

6 Q. Mr. Peake, I am handing you Applicant's 1 and I
7 am asking you to identify that?

8 A. Yes, ma'am. This is crime report that I got from
9 sled.

10 Q. All right. Specifically you wanted your counsel
11 to cross examine the informant about a 1987 conviction
12 for burglary?

13 MR. JOHNSON: Your Honor, we would object to
14 that as outside the ten-year limit that you are
15 allowed to cross someone under 609 prior
16 convictions.

17 THE COURT: All right. I am aware of that.
18 I will let her ask questions about it.

19 MS. HORLBECK: I will keep it brief judge.

20 THE COURT: Okay.

21 Q. Did your counsel find out when the confidential
22 informant maxed out his sentence?

23 A. I don't know if he found out or not, but he just
24 told me he couldn't use it. I don't know if he found
25 out when he maxed out his sentence or not.

1 Q. But that is a 12-year sentence that we are
2 talking about, correct?

3 A. Well, he had convictions going all the way --

4 Q. Wait. I am just talking about the 1987 burglary.
5 Was that a 12-year sentence that he received?

6 THE COURT: Can I look at it. If you say
7 that is what it is.

8 MS. HORLBECK: Yes, sir.

9 THE COURT: I can review it and make it
10 easier.

11 MS. HORLBECK: All right.

12 Q. And Mr. Peake, your attorney didn't discuss with
13 you why thought that was an unimpeachable offense, did
14 he?

15 A. No, ma'am.

16 Q. And you're thinking is that should have been used
17 to try and impeach the informant; is that correct?

18 A. Yes, ma'am.

19 Q. Okay. All right.

20 Are there any other questions that you believe
21 your attorney should have asked the informant?

22 A. Yes, ma'am.

23 Q. Okay. Let's go through those just briefly.

24 Okay.

25 What else did you want him to ask that he didn't

1 ask?

2 A. About the different aliases he had given police?
3 He had given different names and what not.

4 Q. Okay. And he didn't ask him about that on cross
5 examination?

6 A. No, ma'am.

7 Q. Did he ask him about the different dates of birth
8 that the CI had listed on his record?

9 A. No, ma'am.

10 Q. Okay. All right. Is that all?

11 A. Yes. That was all the questions on the
12 impeachment. The laws.

13 Q. All right. Now, you also had listed that you
14 believe your attorney should have objected to some
15 improper comments that the judge made and let me direct
16 your attention to page 79, line 23, to the bottom of
17 page 80 lines one and two?

18 A. Could we just back up for a second about the
19 names?

20 Q. Okay. Sure.

21 A. See the reason I was thinking these names because
22 it showed that Mr. Lindsey had lied to the police
23 officers and maybe even the judge due to the convictions
24 and different aliases he got. And I thought his
25 credibility played a key role in my conviction.

1 Q. Okay.

2 THE COURT: Miss Horlbeck, before we go
3 forward you had mentioned page 79 and --

4 MS. HORLBECK: Yes, sir. These pages seem
5 to be strangely labeled.

6 THE COURT: All right. What I want to do is
7 make sure is it this page 79? (Indicating)

8 MS. HORLBECK: The big number 79. All I was
9 provided was the record of appeal.

10 THE COURT: So that is what we are dealing
11 with, the record of appeal?

12 MS. HORLBECK: Yes, sir.

13 THE COURT: Thank you, ma'am.

14 Q. Mr. Peake, on page 79 do you recall some
15 testimony about the plane and the scale and that kind of
16 thing? Do you have your transcript?

17 A. Yes, ma'am. Page 90 on my transcript, but yes
18 ma'am, I have it right here.

19 Q. Okay. And you think that your attorney should
20 have objected to that specifically and I am just going
21 to go by the transcript on appeal. It is page 79. The
22 judge -- it starts on page 79, but the judge's comments
23 are page 80, lines one and two and specifically the
24 Court says you can say no. You warranted the plane so
25 everybody knows the answer to that.

1 Is that what you are objecting to or is that what
2 you are referring to? Is that one of the things that
3 you believe your attorney should have objected too?

4 A. Yes, ma'am, that is one of them.

5 Q. And did your attorney object?

6 A. No, ma'am.

7 Q. And other area we are talking about is page 74,
8 the record on appeal.

9 A. Yes, ma'am.

10 Q. Lines 11 through 17?

11 THE COURT: What page again?

12 MS. HORLBECK: Page 74.

13 THE COURT: Page 74?

14 MS. HORLBECK: Yes, sir, and the large
15 numbers.

16 THE COURT: Yes.

17 Q. Lines 11 through 17. And specifically that is
18 where your attorney was discussing that a foundation
19 need to be laid?

20 A. Yes, ma'am.

21 Q. Okay. And what is your issue that you have with
22 regard to the way that was handled by your attorney?

23 A. I think he should have objected because it seemed
24 like the judge had laid the foundation for him and given
25 it was like asking how was the measurement made and it

1 is like I think the State has to lay a foundation how
2 indicia was established and how was the measurement.
3 The judge asked him did he use a ruler and I think that
4 laid a foundation and just putting it out there that the
5 measurement could have been counted on being accurate or
6 correct so it could have been relied on.

7 Q. And did your attorney object to the judge laying
8 the foundation?

9 A. No, ma'am.

10 Q. Okay. All right.

11 A. And on page -- let's see. He come back which he
12 said the accurate way to measure that was to go out and
13 survey. He come back and said the testimony from
14 William Randall, he come back and said on page -- it is
15 on my page 93, line seven?

16 THE COURT: That would be page 77.

17 MS. HORLBECK: Thank you judge.

18 THE COURT: Okay. If I am following
19 correctly.

20 MS. HORLBECK: Yes, sir, I believe so.

21 A. He stated that the best way to get exact distance
22 was to go out and survey. So I am thinking this is like
23 with him asking to use a ruler he could have said that
24 the measurement is accurate and correct but then he come
25 back and say the best way to do it is go out and survey

1 it. So I think it is contradicting right there.

2 Q. And did the attorney object to what the judge
3 said on page 77 on the record on appeal?

4 A. No, ma'am.

5 Q. All right. Also, I did want to bring up one
6 other thing. Did the informant know your true name?

7 A. No, ma'am.

8 Q. What did your informant know you as?

9 A. He said little man.

10 Q. Little man Mills?

11 A. Yes, ma'am.

12 Q. All right. But during the trial did the
13 informant keep referring to you by your real name which
14 is Mr. Peake?

15 A. I can't really recall.

16 Q. Okay.

17 A. But I think he was just saying that is what I
18 know me as or something.

19 Q. Okay. Do you recall whether or not your attorney
20 made that point during the closing argument that the CI
21 didn't know who you were?

22 A. Yes, ma'am.

23 Q. You think is that yes, he did or no he didn't?

24 A. I think he made a reference to it or something.

25 Q. Okay. All right..

1 Now prior to the trial beginning did your
2 attorney make a motion to review any deals that the
3 informant had with the State? Other than compensation.

4 A. No, ma'am.

5 Q. Okay. All right. And lets move on to your
6 closing argument.

7 Well, before I get there, you had also listed an
8 issue with regard to subject matter jurisdiction?

9 A. Yes, ma'am. That is related to my indictment.

10 Q. Okay.

11 A. Yes, ma'am. I was indicted when the -- I was
12 indicted on March the 27th and the Court of General
13 Sessions didn't start until March the 31st. So I was
14 indicted it wasn't a term of General Sessions going on
15 when I was in indicted. So I was asked could a
16 conviction be held upon a -- with the Grand Jury is
17 illegal and the indictment -- void the indictment. So,
18 could my conviction stand off of that.

19 Q. Okay. Did your attorney make that objection
20 before the trial began?

21 A. No, ma'am.

22 Q. Okay. And do you believe your attorney should
23 have done that?

24 A. Yes, ma'am.

25 Q. Okay. And your objection is specifically that

1 the Grand Jury didn't meet during regular --

2 A. Term.

3 Q. Term of General Sessions. Okay. All right. And
4 lets move on to your closing argument.

5 Are you alleging today in your petition that your
6 counsel's performance was deficient with regard to
7 argument during closing?

8 A. Yes, ma'am.

9 Q. All right. And what specifically?

10 A. Well --

11 Q. I got page fifty five.

12 A. It relate to page --

13 THE COURT: Page 72. Page number 55 is page
14 72.

15 MS. HORLBECK: I don't think that is
16 correct.

17 MR. PEAKE: It's 55 on mine.

18 THE COURT: Page five?

19 MR. PEAKE: Fifty-five on mine.

20 MR. JOHNSON: Excuse me. I don't mean to
21 interrupt.

22 Mr. Peake, do you have a full transcript.

23 MR. PEAKE: Yes, ma'am. I mean yes, sir.

24 MR. JOHNSON: I just provided counsel with
25 a transcript. I am sorry I didn't do it earlier.

1 So now you can reference.

2 MR. PEAKE: It is page fifty-five. It is
3 during the questioning, and I think it is with
4 the closing argument on page -- page 113.

5 BY MS. HORLBECK:

6 Q. Okay. When you say the closing argument on page
7 113, this is the actual transcript of the trial,
8 correct?

9 A. Yes, ma'am.

10 Q. Okay. What line are you talking about?

11 A. On 113, and that is what happened. I am talking
12 about line 10 through 14.

13 Q. Okay. And what is your objection? What is your
14 point that you are trying to make about what your
15 attorney should have done?

16 A. During the questioning on page 55, on line 25 and
17 on 56 he says and you got to do that. You got to
18 deceive them because if he knew that were you law
19 enforcement he wouldn't have sold you the drugs. And
20 the CI, right. There you go. Okay.

21 So, I am pretty much -- that pretty much painted
22 a picture of me as someone who sells drugs and he was
23 agreeing with the CI. This is what have to happen for
24 the drug sale to happen.

25 Him and the CI agree that I had to be deceived

1 and then he come back inclosing argument and say that is
2 what happened in this case. Mr. Lindsey deceived Mr.
3 Peake. He didn't say by the way I am working for the
4 police. He didn't do that. He lied by presenting
5 himself.

6 I am saying, he is telling the jury this is what
7 had to happened in order for the drug sale to happen and
8 then he come back in closing argument and say it did
9 happen. Do you know what I am saying. And just putting
10 it out there like that, that just gave the drug deal did
11 happen. If I was deceived by him or it was legit buy I
12 must have sold him some drugs.

13 Q. Okay.

14 A. And given that the State's case relied totally on
15 Mr. Lindsey, well, I'm thinking that helped covered up
16 some holes in the State case because the video tape
17 didn't show alleged drug transaction or anything. And
18 so I think that it help cover up the holes in State case
19 and giving the jury the vision that a drug sale did
20 happen on the 10th because he said I was deceived by him
21 presenting himself as legitimate buyer of drugs, which I
22 wasn't deceived by it because it wasn't a drug sale
23 happen.

24 Q. Your position in Court -- just let me make sure I
25 am understanding this.

1 Was it your position at trial that you never sold
2 any drugs?

3 A. Yes, ma'am.

4 Q. All right. And in your closing argument is your
5 argument that your counsel during closing said that you
6 did sell the drugs?

7 A. Well, he didn't say that I sold the drugs, but he
8 had stipulated to evidence that he said took me to sell
9 the drugs. You know what I am saying.

10 Q. Okay.

11 A. He didn't come back and say that evidence did
12 happen. So, you know, it is kind of contradicting
13 itself because he said this is what had to happened. It
14 happened but the drugs ain't -- the drugs weren't being
15 sold, you know. So I just think if he had just put in
16 the mind of the jury whether he was deceived he sold
17 some drugs, you know what I am saying. And then he said
18 I was deceived by him presenting himself as a legitimate
19 buyer of drugs.

20 He didn't present himself as a buyer of drugs,
21 really. He just presented himself as nobody. He didn't
22 even ask for no drugs, you know.

23 Q. Okay.

24 A. Just putting it out there like that, it is making
25 them assume that is what happened.

1 Q. All these things that you testified to, these
2 mistakes that your counsel made, do you believe that
3 they prejudiced you?

4 A. Yes, ma'am.

5 Q. And do you believe that if these things hadn't
6 happened, if your attorney had not done these things
7 that the outcome of your trial would have been
8 different?

9 A. Yes, ma'am.

10 Q. Okay.

11 A. Because the videotape wasn't clear. Mr. Anthony
12 he states in his closing argument that really the video
13 tape it really don't show anything. In around about way
14 he was showing you can believe it happened because this
15 is what Kevin Lindsey said happen. So with him just the
16 errors that he made and what not, caused them to find me
17 guilty. If not then my trial would have been different.

18 Q. Okay. Are there errors that I have not mentioned
19 or that you have not mentioned?

20 A. No, ma'am.

21 Q. Is there anything else you want to tell the
22 Court.

23 A. I think my conviction was in violation of the
24 Unites States Constitution. The constitution of this
25 state. That's all.

1 Q. Okay. Let me just ask you a couple more
2 questions.

3 Do you understand that the judge in this PCR
4 hearing can not change your sentence?

5 A. Yes, ma'am.

6 Q. Do you understand that the judge -- that the
7 Court today can only do one of two things. The Court
8 can either deny your petition which means you just have
9 to serve out your sentence.

10 Do you understand; just yes or no?

11 A. Yes, ma'am.

12 Q. Or the Court can grant your petition which means
13 that you are subject to a new prosecution on both of
14 these charges. Do you understand that?

15 A. Yes, ma'am. Yes, ma'am.

16 Q. Okay. Please answer any questions.

17 A. I had --

18 Q. I am sorry. Go ahead.

19 A. I had the issue with him failing to object to my
20 prior convictions too.

21 Q. Okay. I am sorry. Yes. Please explain to the
22 Court what you are talking about?

23 A. I had some prior convictions of a distribution
24 charge that Mr. -- that the State said they was going to
25 introduce for impeachment purposes. Mr. Burton failed

1 to object. Failed to weighing the balance and
2 probative value of the prejudice of my prior
3 convictions.

4 Q. Okay. When you talk about our prior convictions
5 you have got some convictions from 2005?

6 A. Yes, ma'am.

7 Q. And are they two counts of distribution of crack
8 and two counts of distribution of crack within a half
9 mile?

10 A. Yes, ma'am.

11 Q. Was a hearing held regarding these?

12 A. No, ma'am.

13 Q. Admissibility of these convictions?

14 A. No, ma'am.

15 Q. Okay. And is it accurate to say that the
16 prosecutor had you taken the stand was going to question
17 you about you having some felonies on your record?

18 A. Yes, ma'am.

19 Q. Okay. That carried over a sentence of over one
20 year?

21 A. Yes, ma'am. He was going to question me about
22 the drug conviction. If I took the stand it would be
23 brought out that I had some drug convictions. I don't
24 think I would have had a fair trial anyway.

25 Q. And did you want your counsel to insist that the

1 Court have a hearing?

2 A. Yes, ma'am.

3 Q. All right. And a hearing was not held, is that
4 correct?

5 A. No, ma'am. I am saying see I wasn't aware of a
6 hearing had to be held or what not. You know what I am
7 saying. But I was going to testify but when he told me
8 -- see he told that he was like going to impeach me with
9 these drugs convictions right here.

10 Q. All right.

11 A. See it was my idea not to testify, you know what
12 I am saying, but I was up under the presumption that if
13 I took the stand I would be impeached by my own prior
14 drug convictions.

15 Q. Okay. Let me get this straight. Did you want to
16 testify?

17 A. I would have testified if I would have known that
18 the prior drug convictions wouldn't have come in I would
19 have testified.

20 Q. And you didn't believe that the jury even needed
21 to know that you had any felony convictions that carried
22 a sentence of over one year?

23 A. No, ma'am, because the convictions they don't
24 related to credibility or what not. So I don't see what
25 role they had in the ---

1 Q. Did your counsel explain -- discuss that with you
2 at all?

3 A. He was just like if, you know, if I was to take
4 the stand the jury would hear that I had drug
5 convictions.

6 Q. Okay. Did he explain to you that the jury may
7 not necessarily hear all the details and that they may
8 just be told that you had some felony convictions that
9 carried a sentence of over one year?

10 A. No, ma'am.

11 Q. Okay. Your understanding then, if I correct, is
12 that you -- was your understanding that the jury was
13 going to find out all the details about your prior drug
14 convictions?

15 A. Yes, ma'am.

16 Q. And if you knew that was not necessarily the case
17 would you have taken the stand?

18 A. Yes, ma'am.

19 Q. All right. Do you think that not taking the
20 stand effected your case?

21 A. Yes, ma'am because me and Mr. Lindsey had got
22 into it a month prior to an alleged drug sale. And I
23 think that was crucial to my case. I asked Mr. Burton
24 to ask him questions that I wrote down. But he never
25 did ask them. When he came back I asked why he didn't

1 he was like he was afraid of what Mr. Lindsey might say.
2 And that is one of the questions that I had wrote down.
3 That me and Mr. Lindsey got in altercation. Do you
4 remember about getting into altercation, me and Mr.
5 Lindsey. But he never ask none of the questions I wrote
6 down.

7 Q. What effect do you think that had on your case?

8 A. I am thinking it played a great deal on it, you
9 know. It would show he had a motive to lie. So I am
10 thinking it played a great deal on it.

11 Q. All right. Is there anything else you like to
12 tell the Court?

13 A. No, ma'am.

14 Q. All right. Please answer any questions the
15 attorney general might have for you.

16 THE COURT: Mr. Johnson.

17 MR. JOHNSON: Thank you, Your Honor.

18 CROSS EXAMINATION

19 BY MR. JOHNSON:

20 Q. Mr. Peake, you just testified that had you
21 testified you would have shown that the confidential
22 informant had a motive to lie; isn't that correct.

23 A. Yes.

24 Q. You know your attorney actually cross examined
25 him about that and said he was a liar because he

1 deceived you?

2 A. Yes. Yes.

3 Q. And you as a matter of fact have two sets of
4 prior convictions; 2005, both for distribution of crack
5 cocaine and for distribution for proximity of a school;
6 isn't that correct?

7 A. Yes.

8 Q. So this isn't your first rodeo in the criminal
9 courts, is it?

10 A. No, sir.

11 Q. Or with crack charges?

12 A. No, sir.

13 Q. And actually -- (cough)-- excuse me, Your Honor.
14 If you were to get a new trial you go back and face a
15 third offense which means a mandatory minimum. Are you
16 aware of that?

17 A. Yes, sir.

18 Q. Because they actually let you plead, or you got
19 convicted under second offense?

20 A. Yes, sir.

21 Q. And you are willing to take that chance?

22 A. Yes, sir.

23 Q. Now you realize that this CI was being paid at
24 the Dixie Curb Market, are you aware of that?

25 A. That is what it says in the transcript.

1 Q. And he knew you before this ever happened? That's
2 his testimony at trial.

3 A. He knew my family.

4 Q. And your grandmother's last name is Mills?

5 A. Yes.

6 Q. So he knew you as little man Mills, is what his
7 testimony was?

8 A. Yes.

9 Q. Okay. And there was also a Mickie Parker who
10 says he know you and saw you on the video and recognized
11 you. Isn't that the testimony at trial?

12 A. Yes.

13 Q. Okay. And he also identified you in the
14 courtroom during the trial?

15 A. Yes.

16 Q. Okay. And your attorney cross examined both the
17 confident informant and Mr. Parker about the
18 identification? About whether there was hand-to-hand
19 transaction?

20 A. Yes.

21 Q. He got up and made the argument didn't he?

22 A. Yes.

23 Q. And like I said he called the CI a liar?

24 A. Yes.

25 Q. He also argued that you couldn't see any money

1 exchange on camera, didn't he?

2 A. Yes.

3 Q. Now you also claim that he was deficient in his
4 closing argument?

5 A. Yes.

6 Q. About maybe putting in the jury's mind that you
7 were the one that sold drugs?

8 A. Yes, he said I was deceived by Mr. Lindsey to by
9 drugs.

10 Q. He said were you deceived by the confident
11 information, right?

12 A. He said I was deceived by the confident informant
13 presenting him as a legitimate buyer of drugs.

14 Q. So he is arguing that Mr. Lindsey lied?

15 A. Sir?

16 Q. He was arguing that Mr. Lindsey, the confidential
17 informant was a liar?

18 A. He said I was deceived. I don't know what he was
19 arguing.

20 Q. He said you were you tricked?

21 A. Yeah, I was tricked. Deceived. Whatever.

22 Q. Which is basically calling the confidential
23 informant a liar?

24 A. Yes.

25 Q. That was his job, right? His job was to set up--

1 A. How can I be deceived if I didn't sell no drugs.

2 Q. But that is what he was arguing?

3 A. I don't know.

4 Q. But there was testimony that you sold drugs to
5 the CI, isn't that what the testimony at trial was?

6 A. From the CI, yes.

7 Q. Right. You are on video and identified from the
8 CI and from Mr. Parker?

9 A. Yes, but during the question -- if you look at
10 the questioning he said and this is what had to happen.
11 You had have to deceived him because if he knew you were
12 law enforcement he wouldn't have sold you the drugs
13 right and he say, right, there you go. He say okay. So
14 they agree this is what had to happen. I had to be
15 deceived to sell the drugs and then he come back and say
16 I was deceived by him presenting himself as a legitimate
17 buyer of drugs.

18 Q. That is what he argued?

19 A. Yes.

20 Q. Are you aware that your first allegation is that
21 should have elicited testimony from the CI about his
22 prior record. Are aware that wouldn't have come in
23 because it is over ten years old?

24 A. I saying, I don't think a ten-year old reflected
25 on the different alias. He had lied to the police and

1 judge and prosecutor.

2 Q. Do you have proof that he lied to the police?

3 A. I am saying --

4 Q. Do you have proof here today, sir?

5 A. I am saying it relates to the convictions. It is
6 on the conviction so most likely it is probably in the
7 record when he was convicted upon the different names or
8 what not.

9 Q. Where is it in the record may I ask?

10 Q. It's right here.

11 Q. That hasn't been moved into evidence. That is
12 not in the record, sir.

13 A. What I am saying -- I just got, well --

14 Q. And are you also aware that one of your
15 allegations -- let me step back -- is that the judge
16 made improper comments on how to prove the case?

17 A. Yes.

18 Q. Are you aware that the judge can ask any
19 questions he wants at any time?

20 A. Yes.

21 Q. Okay.

22 A. But --

23 Q. Thank you. Just to reiterate, you do have prior
24 convictions for distribution of crack cocaine and
25 distribution of crack within proximity?

1 A. Yes.

2 Q. Two of them?

3 A. Yes.

4 MR. JOHNSON: Thank you. Your Honor, no
5 further questions.

6 May we approach, Your Honor.

7 THE COURT: Sure.

8 (WHEREUPON an off-the-record discussion was
9 held.)

10 THE COURT: Anything on redirect?

11 MS. HORLBECK: No, Your Honor.

12 THE COURT: Thank you, sir. You may step
13 down. I appreciate it.

14 Any other witnesses, Miss Horlbeck?

15 MS. HORLBECK: No, Your Honor.

16 THE COURT: Mr. Johnson.

17 MR. JOHNSON: I call Mr. Burton to the
18 stand.

19 Ross A. Burton, called as a witness, having
20 been duly sworn by The Clerk, was examined and
21 testified as follows:

22 DIRECT EXAMINATION

23 BY MR. JOHNSON:

24 Q. Good evening Mr. Burton.

25 A. Goods afternoon.

1 Q. State your name for the record?

2 A. Ross A. Burton.

3 Q. How did you become involved in this case?

4 A. I was the public defender in Union County and I
5 was appointed through the clerk of Court to represent
6 him as the public defender.

7 Q. And how long have you practiced law?

8 A. I guess about 20 years now.

9 Q. How much of that has been criminal?

10 A. Almost all of it.

11 Q. And have you taken cases to trial before?

12 A. I think this was my 87th jury trial.

13 Q. How many drug cases have you taken to trial
14 before?

15 A. Many. Many.

16 Q. And can you tell us a little about -- did you get
17 discovery in this case?

18 A. Well, the case is four years old and I no longer
19 have access to the file, but I certainly wouldn't go to
20 court without discovery.

21 Q. So, your common practice is that you get
22 discovery?

23 A. Absolutely.

24 Q. Would you have met with Mr. Peake to discuss that
25 discovery?

1 A. I would and if he requested a copy of it I would
2 have seen to it that he got a copy.

3 Q. And specifically about the discovery, if there is
4 audio/video present, would you have gone over that with
5 him?

6 A. Yes. Normally, shortly after the case comes to
7 the solicitor's office, the solicitor in a confidential
8 informant drug case will send me the arrest warrant and
9 the rap sheet, and bonding documents if they have them
10 and that is about all you got at that time.

11 Then some time later on you generally get a copy
12 of the sled test, and the solicitor so far have been
13 successful in not being required to produce information
14 that would reveal a confidential informant often until
15 the morning of trial. So it could be very likely that I
16 didn't have any opportunity to show Mr. Peake the video
17 until hours before his trial.

18 Q. Do you remember viewing this video in this case?

19 A. I remember viewing it and it was a real week
20 video. It really was.

21 Q. And did you attack that video at trial?

22 A. Well, I attacked the confidential informant.
23 Really as far as the video comes in. The video is
24 admissible and it just goes to the weight that the jury
25 puts on it. So, I don't know how you would exactly

1 attack a video per se. I meant I certainly attacked
2 vigorously the confidential informant that was
3 testifying as to what the video showed.

4 Q. Did the video show Mr. Peake on it?

5 A. I think it showed a medium to small in stature
6 African American.

7 Q. And you tried to elicit the fact that it was a
8 weak video?

9 A. Certainly.

10 Q. And did you attack the credibility of the
11 confidential informant?

12 A. Very much. And nobody has been able to explain
13 satisfactorily to me how you arrive at the truth through
14 a series of lies, but that is exactly what happens in
15 every confidential informant case. And this particular
16 confidential informant sort of painted this picture as
17 this drug vigilante there, you know, and I tried to get
18 the jury to see that this was a guy with an agenda here
19 in trying to get the world's drug dealers off the street
20 and not just there to tell the truth. And I think I did
21 a pretty good job of that.

22 Q. As a matter of fact, he not only said he got paid
23 but he was also doing a civic duty?

24 A. Exactly.

25 Q. Now, about his prior record. Did you find

1 anything that you could use in his prior record?

2 A. You are talking about Mr. Peak's or the
3 confidential informant?

4 Q. No, the confidential informant.

5 A. No, unfortunately -- and I don't blame Mr. Peake
6 for not understanding that, but we have a rule that says
7 that any kind of prior record that you are intending to
8 use for impeachment has to carry more than one year and
9 has to be within the last -- the conviction has to be
10 within the last ten years of the day of trial. So that
11 one was much more than ten years old. So we could have
12 had all the hearings in the world and the judge would
13 have excluded it.

14 Q. Did you think about attacking him on the
15 different aliases or date of births as Mr. Peake has
16 alleged?

17 A. I may not have done that, although, you know, you
18 got to be very careful with a jury and with a judge.
19 You want to make the judge happy. You want to make --
20 you don't want to make the jury feel that they are
21 sitting there for nothing and I thought that that just
22 would have taken a lot of time and it wouldn't have been
23 of much interest to the jury and probably would have
24 made them less sympathetic to Mr. Peake had I followed
25 that particular tactic.

1 Q. So, it was tactical decision?

2 A. Well, I don't really remember Mr. Peake telling
3 me that. He says he did and I don't doubt it. But I
4 probably wouldn't have done that. I like to focus on
5 things that I think are very important to the jury and
6 not make them sit there over things that they might
7 consider trivial.

8 Q. Mr. Peake has also alleged that you should have
9 objected to the judge improperly commenting or telling
10 the attorney how to try the case. Did you find anything
11 objectionable there?

12 A. Well of course it is a well-settled matter of law
13 that it is improper for a judge to comment on the facts
14 of the case but in this -- the way I read the transcript
15 it appears that the judge was asking a question and
16 judges -- the courts are permitted to ask all the
17 questions they want.

18 Q. Pursuant to the subject matter of the indictment,
19 did you find anything that popped out where you would
20 have asked the Court to dismiss the case? He said that
21 there was something about the Grand Jury not meeting at
22 the time that it was it True Bill indicted?

23 A. Well, I mean of course, public defender's or
24 defense attorneys aren't invited to Grand Jury
25 deliberations. They are carried out in secret and is

1 the solicitor's thing entirely. So I wouldn't have been
2 invited. I wouldn't have known how and when. All I
3 would have known is that the foreman of the jury signed
4 it off as a true bill indictment which would give the
5 Court subject matter jurisdiction in my opinion.

6 Q. He also brings up -- makes a big stink about the
7 closing argument. Your closing argument that seemed to
8 say that he had to have sold the drugs. Please tell me
9 what you were trying to do in that closing argument?

10 A. What I was trying to do was sort of bolster my
11 argument that the confident informant has an agenda and
12 that he was lying. And I was trying to point out a
13 hypothetical scenario where he was presenting himself as
14 somebody wanting to buy some drugs. That was a
15 deception and deception is a lie and a jury shouldn't
16 believe somebody who is lying to you.

17 Q. And this is not the first case you tried where
18 that confident informant did the same thing? You had
19 him before and tried to show that he is a liar?

20 A. I can't remember to tell you the truth.

21 Q. Do you think Mr. Peake was prejudiced in the
22 case?

23 A. You would have make that a little more clear for
24 me.

25 Q. His overall claim that these mistakes prejudiced

1 his case?

2 A. Well no, I certainly would have put forth
3 anything that I possibly could to get the jury to acquit
4 him.

5 Q. He also explains that you advised him that his
6 prior record would have been used against him for
7 impeachment value had he testified. Can you explain
8 what advice you gave him concerning that?

9 A. I don't remember specifically what advice I gave
10 him, but usually one of the most important decisions in
11 a trial is whether the defendant takes the stand or not.
12 And it is not a decision that should be taken lightly
13 and there are some advantages.

14 The advantage of a defendant taking the stand is
15 he gets his story out in front of the jury and it is not
16 just arguing that the State hasn't proven beyond a
17 reasonable doubt. You get a little bit of extra help
18 there from the defendant. But one of the draw backs is
19 that if the your defendant has a criminal history the
20 solicitor under the same rule as the rule that puts Mr.
21 Lindsey's conviction as inadmissible makes his
22 admissible because they were within the last ten years
23 and they did carry more than a year. Normally what I
24 do, and I didn't read the transcript to see if I did it
25 in this case, I usually take that away from the

1 solicitor by once I personalized the defendant to the
2 jury I will ask them myself are you the same person that
3 has these other convictions. That way it is cumulative
4 and the solicitor can't put it in a worse light then it
5 needs to be.

6 Q. And to your knowledge did the judge ask him about
7 testifying?

8 A. In my experience Judge Hayes always advises the
9 client, whether they decide to testify or not about what
10 the ramifications are. I think every judge does.

11 Q. And whose decision is it to testify or not to
12 testify?

13 A. It is his.

14 MR. JOHNSON: Your Honor, I think that is
15 all I have right now.

16 THE COURT: Thank you. Anything on cross
17 examination?

18 MS. HORLBECK: Yes, sir. Just briefly.

19 THE COURT: Okay.

20 CROSS EXAMINATION

21 BY MS. HORLBECK:

22 Q. Do you recall Mr. Burton when you may have
23 received discovery in this case?

24 A. This was a 2008. Four years ago. I haven't the
25 slightest clue.

1 Q. Is it unusual to receive discovery the week prior
2 to the trial?

3 A. Well, paper discovery, it is pretty unusual. But
4 recorded discovery like audios or videos it is entirely
5 normal and I wish the chief justice would write us an
6 order to say that they got the same 30 days to release
7 that discovery as all the rest, but they haven't. So
8 you usually get that the day before or hours some times
9 before the trial.

10 Q. Can that make it difficult to prepare for a
11 client's trial?

12 A. Well, sure. I would like to know who the
13 confidential informant is so I can call him and talk to
14 them and ask other people about that. Sure.

15 Q. Do you recall whether or not you reviewed paper
16 discovery with Mr. Peake the week or days before the
17 trial?

18 A. I don't really remember at all.

19 Q. Do you recall going over discovery with Mr.
20 Peake?

21 A. No.

22 Q. All right. And when the State revealed to you
23 the identity of the informant did the State give you a
24 copy of the NCIC report?

25 A. I usually insist on it whether they give it to me

1 or no.

2 Q. Okay. And were you aware the informant had some
3 aliases and had some birth days that he had used.

4 A. I may not have been.

5 Q. And do you recall whether or not you impeached
6 him or tried to impeach him on that during the trial?

7 A. I don't think I did.

8 Q. Okay.

9 A. A lot of people who are sort of, I guess, of Mr.
10 Lindsey's ilk would normally have a lot of different
11 aliases.

12 Q. Right.

13 A. Mr. Peake had an alias. So that is not an
14 unusual thing and nothing that I care to bore the jury
15 with and that would be an strategic decision on my part.

16 Q. Do you think if you had brought that to the
17 jury's attention that might have further damaged the
18 informant's credibility?

19 A. Well, if I thought that I would have brought it
20 up. If his alias was liar man, yeah, I would have
21 brought that up.

22 Q. Do you recall asking the informant whether or not
23 he had a real job in addition to his government
24 informant job?

25 A. I don't recall. I guess that would be in the

1 transcript.

2 Q. All right. And if it is not in the transcript do
3 you agree with that then?

4 A. Yes. Sure.

5 Q. Do you recall whether or not you did a motion,
6 any motions prior to the hearing -- I mean the trial, to
7 try to convince the Court to weigh the prejudice over
8 the probative value of bringing in Mr. Peake's prior
9 convictions?

10 A. I wouldn't have done that because it is set out
11 very clearly in the rule. I have never done that.

12 Q. Okay. Do you believe that the prejudicial nature
13 of his prior convictions would have outweighed the
14 probative value of bringing in drug convictions in a
15 drug trial?

16 A. Well, if the jury knew he had two prior
17 convictions for selling crack that would have been
18 fantastically prejudicial.

19 Q. And do you just looking back do you think that
20 would have been a basis for a motion to try to keep out
21 those prior convictions?

22 A. It would have been a basis but in my experience
23 over 20 years of doing this no judge, that I have been
24 before has ever excluded prior convictions.

25 Q. Okay. And you and Mr. Peake discussed the fact

1 that he and the informant had a argument or disagreement
2 a bit before the alleged sale?

3 A. I don't recall any of that.

4 Q. You don't recall that? I am sorry I must have
5 misunderstood.

6 A. I think Mr. Peake said that.

7 Q. Okay. But you Mr. Peake did not discuss whether
8 or not Mr. Peake had an issue with the informant?

9 A. I am not saying Mr. Peake is wrong. I am just
10 saying I don't recall him telling me that and --

11 Q. And when Mr. Peake was sentenced, he was
12 sentenced as a second -- this was a second offense
13 conviction, correct?

14 A. I believe it was.

15 Q. Okay. All right. One moment Your Honor.

16 Just with the benefit of hind site would you have
17 argued any differently in your closing argument and
18 worded it any differently about the portion of the
19 closing where you conceded that Mr. Peake sold drugs?
20 Do you think that was damaging in any way.

21 A. I don't think I ever conceded that he sold drugs.

22 Q. Okay.

23 A. I think actually the closing argument was pretty
24 good.

25 Q. Okay. Well, I am not trying to -- -

1 A. So my answer would be, you know, I don't see
2 anything in there that I concedes that he sold drugs. I
3 would never say anything like that. But to tell you the
4 truth I don't really understand Mr. Peake's position.

5 Q. Okay. All right.

6 A. Now, I am sorry he got 20 years. I think that
7 he, you know, he may have been prejudiced by going to
8 trial and I am very sad about that. I really am.

9 If Judge Dickson had the power to lower a sentence
10 I would certainly like to see that happen.

11 A. Thank you.

12 THE COURT: But as you know Judge Dickson
13 doesn't. (Laughter)

14 MS. HORLBECK: I wish you did also.

15 THE COURT: And I appreciate you trying to
16 throw me under the bus.

17 Anything on redirect?

18 MR. JOHNSON: No, sir, Your Honor. I do
19 want to correct what I was saying. I just read
20 the transcript again. It seems that Mr. Peake
21 did plead guilty to both sets of distribution on
22 the same day.

23 THE COURT: Okay.

24 MS. HORLBECK: Yes, that is correct.

25 MR. JOHNSON: So it would be counted I guess

1 as a second.

2 THE COURT: All right. Thank you sir.

3 Thank you Mr. Burton.

4 All right. I will read over the record and
5 get back to you all with my decision.

6 MS. HORLBECK: Thank you judge.

7 THE COURT: Thank you so much, I appreciate
8 it.

9 MR.. JOHNSON: Thank you.

10 (END OF TRANSCRIPT)

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C E R T I F I C A T E

I, the undersigned Aileen Butler, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings in the captioned case, in the Circuit Court for York County, South Carolina, on the 9th day of October, 2012.

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

July 16, 2013

Aileen Butler

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD**EXHIBITS**Plaintiff(s) Tiguan Peake
vs
Defendant(s) State

Applicants

PLAINTIFF'S EXHIBITS	DEFENDANTS'S EXHIBITS	COURT'S EXHIBITS
1 <i>Arrest Record</i>	1	1
2	2	2
3	3	3
4	4	4
5	5	5
6	6	6
7	7	7
8	8	8
9	9	9
10	10	10
11	11	11
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19	19	19
20	20	20

Court Reporter
Clerk of Court*Debra Butler*FILE FOR RECORD
2012 OCT 24 PM 2:22
WILLIAM F. GAUL
CLERK OF COURT
FAIRFIELD COUNTY

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

MARK SANFORD
Governor

REGINALD I. LLOYD
Director



CRIMINAL RECORDS CHECK

404798

(Please print your completed form and submit to SLED. You may want to print a copy for your records.)

Full Name (with middle name):

Kevin Fitzgerald Lindsey

AKA and/or Maiden Names:

Kevin Fitzgerald Owens

DOB:

____/____/____

SSN:

____-____-____

(Federal law permits governmental agencies to require a social security number in order to conduct official business; however, private entities may only obtain social security numbers if given voluntarily.)

Name of Charitable Organization (if applicable):

Charitable Verification Account # (if applicable):

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S.C. LAW ENFORCEMENT DIVISION

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PAGE-01 DATE-01/27/2011 TIME-13:48:01
 REQ ORI-SCLED00000 S C LAW ENF DIV
 SID-SC00404798 FBI-926002AA1
 NAME-OWENS, KEVIN FITZGERALD SEX-M RACE-B
 HEIGHT-511 WEIGHT-160 EYES-BRO HAIR-BLK SKIN- BORN-SC
 FPC-PI08092115PM0706CI16 HENRY- 8 I 5 U IIO 15
 M 18 U III

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DATE RECORD ENTERED--04/21/1983 DATE OF LAST UPDATE--09/30/2006

ADDITIONAL IDENTIFIERS	BIRTH			
NAME	DATES	MARKS	SOC SEC	MISC NUM
OWEN, KEVIN F		TAT R ARM		
OWENS, KEVIN F		SC L ARM		
OWENS, KEVIN FITZGERALD		SC R WRIST		
LINDSEY, KEVIN FITZGERALD				

CONTRIBUTOR/SUBJECT	DOA/RCVD CHARGE/DISPOSITION/ETC
---------------------	---------------------------------

OWENS, KEVIN FITZGERALD	03/28/1983
SC0440100 UNION PD	
CASE-19694	
WARR-A823005	
CIT-SC16-11-320	

ARREST CHARGE 01-HOUSEBREAKIN
 G & GRAND LARCENY

WARR-A823011
 CIT-SC16-11-320

ARREST CHARGE 02-HOUSEBREAKIN
 G & PETTY LARCENY

WARR-A823006

ARREST CHARGE 03-STOREBREAKIN

210 WARR-A823007

WARR-A823009
CIT-SC16-11-320

WARR-A866099

WARR-A823004
CIT-SC16-11-320

WARR-A82 3008

WARR-A823010
CIT-SC16-11-320

WARR-A82 3002

G & GRAND LARCENY

ARREST CHARGE 04-STOREBREAKIN
G & GRAND LARCENY

ARREST CHARGE 05-B&E & GL

ARREST CHARGE 06-STOREBREAKIN
G & GL

ARREST CHARGE 07-HOUSEBREAKIN
G

ARREST CHARGE 08-STOREBREAKIN
G GL

ARREST CHARGE 09-B&E PETTY
LARCENY

ARREST CHARGE 10-STOREBREAKIN

WARR-A823003

G & PETTY LARCENY

ARREST CHARGE 11-STOREBREAKIN
G GRAND LARCENY
ARREST INFO-HELD;ADDITIONAL
OCA NUMBERS

CIT-SC16-11-320
WARR-A823005

COURT CHARGE 01-HOUSEBREAKING
& GRAND LARCENY
COURT DISP-MULTIPLE CHARGE
ONE DISPOSITION; 1Y-6Y
CONFINED; GUILTY PLEA;INDET
ERMINATE;YOA ALL CHGS TO
RUN CONCURRENT

WARR-A823011

COURT DATE-05/12/1983
COURT CHARGE 02-HOUSEBREAKING
& PETTY LARCENY
COURT DISP-MULTIPLE CHARGE
ONE DISPOSITION

COURT DATE-05/12/1983

WARR-A823006

COURT CHARGE 03-STOREBREAKING
& GRAND LARCENY
COURT DISP-MULTIPLE CHARGE

ONE DISPOSITION

COURT DATE-05/12/1983

WARR-A823007

COURT CHARGE 04-STOREBREAKING
& GRAND LARCENY
COURT DISP-MULTIPLE CHARGE
ONE DISPOSITION

COURT DATE-05/12/1983

WARR-A823009

COURT CHARGE 05-BREAKING &
ENTERING & GRAND LARCENY
COURT DISP-MULTIPLE CHARGE
ONE DISPOSITION

COURT DATE-05/12/1983

WARR-A866099

COURT CHARGE 06-STOREBREAKING
& PETTY LARCENY
COURT DISP-MULTIPLE CHARGE
ONE DISPOSITION

COURT DATE-05/12/1983

CIT-SC16-11-320
WARR-A823004

COURT CHARGE 07-HOUSEBREAKING
& GRAND LARCENY
COURT DISP-MULTIPLE CHARGE
ONE DISPOSITION

WARR-A823008

COURT CHARGE 08-STOREBREAKING
& GRAND LARCENY
COURT DISP-MULTIPLE CHARGE
ONE DISPOSITION
COURT DATE-05/12/1983

WARR-A823010

COURT CHARGE 09-BREAKING &
ENTERING & PETTY LARCENY
COURT DISP-MULTIPLE CHARGE
ONE DISPOSITION
COURT DATE-05/12/1983

WARR-A823002

COURT CHARGE 10-STOREBREAKING
& PETTY LARCENY
COURT DISP-MULTIPLE CHARGE
ONE DISPOSITION
COURT DATE-05/12/1983

WARR-A823003

COURT CHARGE 11-STOREBREAKING
& GRAND LARCENY
COURT DISP-MULTIPLE CHARGE
ONE DISPOSITION
COURT DATE-05/12/1983

OWENS, KEVIN F

05/16/1983

ARREST CHARGE 01-DATE OF

ARREST NOT DETERMINED
 PHOTOGRAPH AVAILABLE
 COURT CHARGE 01-HOUSEBREAKING
 & LARCENY 2 CTS
 COURT DISP-CONVICTED; INDETERM
 INATE; 6 YRS EACH CONSEC
 YOA 50 NOT TO EXCEED 12
 YRS
 CUSTODY STATUS-RECEIVED
 START DATE--05/16/1983

SC040055C R & E CENTER COLA
 CASE-116723

OWENS, KEVIN F

05/31/1984

ARREST CHARGE 01-DATE OF
 ARREST NOT DETERMINED
 COURT CHARGE 01-HOUSEBREAKING
 & LARCENY
 COURT DISP-CONVICTED; 5Y SUSP;
 4Y PROB; SPEC COND THIS
 SENT TO COMMENCE UPON
 RELEASE YOA
 CUSTODY STATUS-PROBATION
 START DATE--05/31/1984

SC040015G CENTRAL PPP

OWEN, KEVIN F

10/04/1984

ARREST CHARGE 01-DATE OF
 ARREST NOT DETERMINED
 COURT CHARGE 01-VIOLATION OF
 PROBATION
 COURT DISP-CONVICTED; FULL
 REVOCATION 5Y
 CUSTODY STATUS-PROBATION
 REVOKED
 START DATE--10/04/1984

SC040015G CENTRAL PPP

OWENS, KEVIN FITZGERALD

10/05/1984

ARREST CHARGE 01-DATE OF
 ARREST NOT DETERMINED
 PHOTOGRAPH AVAILABLE
 COURT CHARGE 01-HOUSEBREAKING
 & PETTY LARCENY
 COURT DISP-CONVICTED; 5Y CONFI
 NE
 CUSTODY STATUS-RECEIVED

SC004015C PERRY RECPT & EVAL

214

OWENS, KEVIN FITZGERALD

04/05/1987

SC0440100 UNION PD
CASE-29137
WARR-B728541

WARR-B728677

WARR-B728541

WARR-B728677

ARREST CHARGE 01-DISORDERLY
CONDUCT
PHOTOGRAPH AVAILABLE

ARREST CHARGE 02-1ST DEGREE
BURGLARY

ARREST INFO-HELD
COURT CHARGE 01-DISORDERLY
CONDUCT
COURT DISP-CONVICTED;30D
CONFINEMENT OR FINE
COURT DATE-05/10/1987
COURT CHARGE 02-BURGLARY 2ND
DEGREE
COURT DISP-CONVICTED;12Y
CONFINEMENT
COURT DATE-05/10/1987

LINDSEY, KEVIN FITZGERALD 01/03/1995

SC0440100 UNION PD
CASE-PD95007768
END OF PAGE 01 - PAGE 02 TO FOLLOW

IN Thu Jan 27, 2011 13:48:01 000275413103/220
OUT Thu Jan 27, 2011 13:48:01 REC21A MSG# 02028 SAN: 0PHDRTFAQP2B

TO: REC21A-02029 Thu Jan 27, 2011 13:48:02 0PHDRTFAQP2B
FROM: SCCH-00309 Thu Jan 27, 2011 13:48:02

PAGE-02 DATE-01/27/2011 TIME-13:48:01
REQ ORI-SCLED0000 S C LAW ENF DIV
SID-SC00404798 FBI-926002AA1

CONTRIBUTOR/SUBJECT DOA/RCVD CHARGE/DISPOSITION/ETC

WARR-E224681

ARREST CHARGE 01-PETTY LARCEN
Y
OFFENSE DATE-12/30/1994
PHOTOGRAPH AVAILABLE

CIT-16-13-30 MISDEMEANOR
WARR-E224681

COURT CHARGE 01-PETTY LARCENY
COURT DISP-CONVICTED;\$379/300
OR SUSPENDED TO RESTITUTI
ON & \$175

LINDSEY, KEVIN FITZGERALD 01/20/1995
SC0440100 UNION PD

CASE-PD95000210
WARR-E224706

ARREST CHARGE 01-ASSAULT AND
BATTERY
OFFENSE DATE-01/05/1995
PHOTOGRAPH AVAILABLE

LINDSEY, KEVIN FITZGERALD 06/15/1998
SC0440100 UNION PD

PHOTOGRAPH AVAILABLE

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JUDGEMENT ROLL NO. 2011 CP440489STATE OF SOUTH CAROLINA
COUNTY OF UNION) IN THE COURT OF COMMON PLEAS
) SIXTEENTH JUDICIAL CIRCUIT
)

Tijuan Peake, #307699,

) 2011-CP-44-0489
)

Applicant,

) ORDER OF DISMISSAL
)

v.)

State of South Carolina,

Respondent.
_____)WILLIAM F. GAULT
CLERK OF COURT
UNION, SCFILED FOR RECORD
2013 MAY 9 PM 1 29

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 9, 2011. The Respondent made its Return on March 23, 2012. An evidentiary hearing into the matter was convened on October 9, 2012, at the Moss Justice Center in York, SC. Caroline Horlbeck, Esquire represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Ross Burton, Esquire also testified. This Court had before it a copy of the records of the Union County Clerk of Court, records from the South Carolina Department of Corrections, and the trial transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Union County Clerk of Court. The Applicant was indicted at the March 2008 term of the Union County Court of General Sessions for Distribution of Crack Cocaine (2008-GS-44-0332) and Distribution of Crack Cocaine within proximity of a school (2008-GS-44-0333). He was represented by Ross Burton, Esq. On October 15, 2008, the Applicant

underwent trial by jury, pursuant to which he was convicted of Distribution of Crack Cocaine, 2nd Offense and the corresponding proximity charge. The Honorable John C. Hayes, III sentenced Applicant to confinement for twenty (20) years for Distribution of Crack Cocaine, 2nd offense and fifteen (15) years, concurrent, for the proximity charge.

A Notice of Appeal was filed on the Applicant's behalf and an appeal perfected. The South Carolina Court of Appeals affirmed his conviction. State v. Peake, 2011-UP-297 (filed June 14, 2011). The Remittitur was issued on July 1, 2011.

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

1. Ineffective Assistance of Counsel
 - a. "Counsel's failure to object to trial judge's improper comments on the facts"
 - b. "counsel's failure to object to the trial judge's erroneous instruction to the applicant that his prior drug convictions could be used to impeach him if he exercised his right to testify in his defense"
 - c. "Counsel conceded guilt [or] made improper comments that [were] damaging to Applicant"
 - d. "counsel elicited... testimony that bolstered the witness and testimony credibility"
2. Subject Matter Jurisdiction
 - a. "The Trial Court was not presented indictments on Applicant's drug distribution and drug proximity offense for trial of these offenses under its criminal jurisdiction."
3. Prosecutorial Misconduct
 - a. "Deputy Solicitor Anthony knew he was participating in an ex parte grand jury proceeding which was not being held at a Court of General Sessions in accordance with law..."

At the hearing, the Applicant proceeded on his claims of ineffective assistance of trial counsel and subject matter jurisdiction.

SUMMARY OF TESTIMONY

The Applicant testified he met with Counsel (Burton) and reviewed the discovery on the Friday before trial, although he claims he never received a copy of the discovery. He stated Counsel was ineffective for not eliciting testimony from the confidential informant (CI) in the case, and Counsel did not cross-examine the CI concerning his prior criminal record. The CI had a 1987 conviction for burglary, and the Applicant claimed Counsel never discussed with him why this conviction could not be used for impeachment of credibility. The Applicant also testified discussed the fact that the CI had different aliases and dates of birth, but Counsel failed to utilize this information at trial. The Applicant stated Counsel should have objected to the trial judge's improper comments, although he failed to point out exactly where in the transcript he was referencing. The Applicant further testified Counsel failed to object to the indictments as he claimed there was no term of general sessions during the time his indictment were 'true-billed' by the grand jury. The Applicant also stated Counsel, in closing argument, put in the minds of the jurors that the Applicant sold drugs by the way he presented his argument. Additionally, the Applicant testified Counsel failed to object to his prior convictions being admitted if he testified, and he stated he wanted to testify, but the jury did not need to hear about his prior convictions. He, lastly, stated Counsel failed to explain to him that his prior convictions would be admissible for impeachment.

On cross-examination, the Applicant admitted he had two prior 2005 convictions Distribution of crack cocaine and two 2005 convictions for Distribution of crack cocaine within proximity of a school or park. However, as the Applicant pled to both of these sets of charges at the same guilty plea, the current conviction was treated as a second offense.

Counsel testified he was appointed to this case as a public defender in Union County. He stated he has over twenty years of experience in criminal law and tried over eighty cases before a

jury. Counsel testified he met with the Applicant and gave him a copy of his discovery. Counsel also asserted he would have reviewed the audio and video recording with the Applicant, reviewed the SLED (South Carolina Law Enforcement Division) report, and discussed the entire case with the Applicant. He stated the solicitor did not give him the video recording until the morning of trial, which he then viewed and found to be a weak evidentiary video. Counsel testified he vigorously cross-examined the CI concerning the video and his role in this case. Counsel stated he thought the CI was acting as a vigilante in this case, using deception and lies as his means. Counsel also stated he could not use the CI's prior conviction for impeachment, as it was too remote under the rules of evidence. Counsel testified he did not attack the credibility of the CI using his various aliases or dates of birth because he did not want to upset the jury or the judge, thus, taking away from the real issue in the case. Counsel asserted this was a tactical decision.

Additionally, Counsel testified he did not object to the trial judge's 'comments' or questions as a judge is permitted to ask questions of the witnesses. Counsel also stated he found no issue with the indictments as they were signed by the foreman of the grand jury. Counsel testified during closing argument he tried to show that the CI was a liar and used a hypothetical situation to show the CI's deception should be viewed as a lie. He stated he does not think this hypothetical prejudiced the Applicant's case. Counsel testified it was the Applicant's decision not to testify and by doing so, the defense was able to keep the Applicant's prior conviction from being introduced to impeach the Applicant.

On cross-examination, Counsel testified he did not remember exactly when he received discovery in this case. He stated he normally received any audio or video recordings approximately one week before trial. Counsel also reasserted he strategically decided not to impeach the CI using his

aliases, and that he did not think this prejudiced the Applicant's case. Counsel also stated, as to the Applicant's prior convictions, that no judge would exclude prior conviction if they are within the last ten (10) years. Counsel, lastly, testified he believed his closing argument was proper and persuasive and that he did not concede the Applicant sold drugs, as the Applicant claimed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court also has read the trial transcript, all of which assists the Court in judging their credibility. The Court finds the testimony of Ross Burton, Applicant's trial counsel, very credible. This Court finds the Applicant's testimony concerning ineffectiveness of trial counsel is not credible.

Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing Strickland*. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

• Cross-examination of the CI

The Applicant alleges Counsel was ineffective for failing to elicit testimony from the CI and cross-examine concerning his prior record and his other aliases.

At the PCR hearing, the Applicant testified Counsel failed to elicit testimony from the CI concerning his prior 1987 conviction for burglary. He also stated Counsel did not discuss with him why Counsel could not use it for impeachment. The Applicant also testified Counsel did not utilize the CI's different aliases for impeachment.

Counsel testified he could not use the CI's prior conviction for impeachment as it is not permitted under the South Carolina Rules of Evidence. *See* SCRE 609(b). Additionally, Counsel stated he tactically decided not to cross-examine the CI concerning his other aliases and dates of birth as he did not want to upset the judge or jury and digress from the core issue of the case.

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel

undertaken the desired investigation, and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not proffer any questions Counsel allegedly failed to ask, and did not present any testimony showing the CI's answers at trial would have been different. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense.

Additionally, our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Counsel articulated valid strategic reasons for not cross-examining the CI concerning his aliases. Further, Counsel was able to discredit the CI using other tactics and angles. The Applicant has not shown that Counsel was deficient in that choice of tactics.

This Court finds the Applicant has failed to show that the outcome of his case would have been different had Counsel cross-examined the CI in a different manner. *Cherry, supra*. This Court also finds Counsel thoroughly discredited the CI in direct relation to the theory of the Applicant's defense: that the CI was a deceptive vigilante, only arranging drug deals to earn money. Additionally, the Applicant has failed to prove any resulting prejudice from Counsel's choice of tactics. Accordingly, this allegation is denied.

Failure to object to the trial court's comments concerning questioning a witness

The Applicant also alleges Counsel was ineffective for not objecting to the trial court's comments on the proper questioning of a witness.

The Applicant testified Counsel should have objected to the trial court's comments instructing counsel how to ask a certain question. On page 90 of the transcript, after Counsel objected to a question from the solicitor based on lack of foundation, the trial court stated: "Ask him, 'did you use a ruler?' Did you--." Whereupon the solicitor asked the witness how he took a measurement in relation to the proximity charge. Counsel testified although it is improper for a judge to comment on the facts of a case, it is proper for a trial judge to ask questions to a witness.

This Court finds Counsel was not ineffective for not objecting to the trial court's comments. The comment made by the trial court simply directed the solicitor to ask the question properly in order to lay a foundation for the witness's answer. Had it desired, the trial court could have properly asked this question itself. This Court finds the Applicant has failed to meet his burden of proving the outcome of his trial would have been different had Counsel objected to the trial court's comments. Cherry, supra. This Court further finds no resulting prejudice from this harmless comment. Accordingly, this allegation is denied.

Closing Argument

Additionally, the Applicant alleges Counsel was ineffective in his closing argument.

The Applicant testified Counsel, in his closing argument, admitted the Applicant's guilt. Specifically, the Applicant asserted, by the presentation of the argument, Counsel alluded to the fact that the Applicant sold drugs.

Counsel testified he used a hypothetical situation to support his claim that the CI was a liar. On pages 116-117 of the trial transcript, Counsel presented a hypothetical involving a twenty-dollar bill.

A court's review of closing arguments must be "highly deferential," for "counsel has wide latitude in deciding how best to represent a client" and "deference to counsel's tactical decisions in his [trial counsel's] closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." Yarborough v. Gentry, 540 U.S. 1, 5-6, 124 S.Ct. 1, 4 (2003).

This Court finds the Applicant's claim on this issue meritless. Counsel testified he used this hypothetical to discredit the CI concerning the drug deal. Counsel has wide latitude of argument which he deems most appropriate in defense of his client. Additionally, this hypothetical in no way even comes close to admitting the Applicant's guilty or proving the Applicant was selling drugs. It was simply utilized to argue the crack cocaine sold was not crack cocaine at all. This Court finds Counsel did not render ineffective assistance of counsel on this issue. Further, this Court finds no resulting prejudice from Counsel's closing argument. Accordingly, this allegation is denied.

Failure to object to the use of the Applicant's prior record

The Applicant alleges Counsel was ineffective for not objecting to the use of his prior record for impeachment purposes. Additionally, the Applicant wanted a hearing to address the prior convictions under a SCRE 403 analysis.

At the hearing, the Applicant testified he wanted to testify at trial, but did not want the jury to know about his prior convictions for two counts of distribution of crack cocaine and corresponding

proximity charges. The Applicant asserted Counsel was ineffective for not objecting to his prior convictions and for not asking for a hearing to determine whether the probative value of such convictions would be substantially outweighed by the unfair prejudice. On cross-examination, he admitted he had two prior crack cocaine convictions from 2005. Counsel testified it was the Applicant's decision not to testify. Counsel also stated, by not testifying, the Applicant was able to keep his prior convictions from the jury's knowledge.

This Court finds this allegation is also wholly 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. On the other hand, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions. Rule 609, SCRE." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Id. The Applicant was questioned by the trial court whether he understood the State could ask questions about his prior convictions if he testified, to which he replied he did. He also stated he understood his right to remain silent. (Tr. p. 99 line 24- p. 100 line 9). The Applicant also asserted he had no questions about his rights and then stated he wanted to exercise his right to remain silent. (Tr. p. 100 lines 10-17). The record demonstrates the Applicant decided not to testify understanding the consequences of his choice and directly refutes his claims. Moreover, the Applicant has presented no evidence to support how the outcome of his trial would have been different had Counsel moved for a hearing concerning his prior convictions. Further, the Applicant can prove no prejudice as he made an informed decision not to testify. Accordingly, this allegation is denied.

Subject Matter Jurisdiction

The Applicant further alleges Counsel is ineffective for failing to object to the subject matter jurisdiction in this case.

The Applicant testified Counsel failed to object to the indictments as he claims a term of general session was not convened during the time his indictment were issued by the grand jury. Counsel testified he did not object to them because he viewed them as proper, as the foreman of the grand jury had signed them.

Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong. Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994). An indictment is adequate and valid on its face if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent prosecution. State v. James, 472 S.E.2d 38 (S.C. 1996); State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952). Additionally, "whenever provision is made for holding the court of common pleas the presiding judge, during the time allowed for the holding of the court of common pleas, may open the court of general sessions and transact all or such business of the court of general sessions..." S.C. Code Ann. § 14-5-410 (1962).

This Court finds a review of the record clearly indicates that there is no basis upon which to conclude that the trial court lacked subject matter jurisdiction. The Applicant's indictments are facially valid and proper. The indictments in this case are facially valid because they contain all the necessary elements of the offenses intended to be charged, state the date of the offenses, and the

name of the accused. Further, because there was a term of common pleas during the week of March 24-28, 2008, a grand jury was permitted to convene pursuant to S.C. Code Ann. § 14-5-410. The foreman of the grand jury clearly signed the indictment, making it a properly 'true-bill' indictment. Thus, Counsel was not ineffective for not object to the indictments as they were properly signed by the foreman of the grand jury. Further, the Applicant cannot prove any resulting prejudice.

Accordingly, this allegation is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

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

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 Respondent.

AND IT IS SO ORDERED!

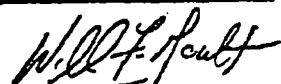


Edgar W. Dickson
Presiding Circuit Court Judge
Sixteenth Judicial Circuit

April 18, 2013

Orangeburg, South Carolina

JUDGEMENT SIGNED AND
ENTERED UP 5-9-13


CLERK OF COURT

CAROLINE M. HORLBECK

Attorney At Law

101 WHITSETT ST.
GREENVILLE, SOUTH CAROLINA 29601



Via Regular Mail

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

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.

Tijuan Peake, Appellant.

Appeal From Union County
John C. Hayes, III, Circuit Court Judge

Unpublished Opinion No. 2011-UP-297
Submitted June 1, 2011 – Filed June 14, 2011

AFFIRMED

Appellate Defender M. Celia Robinson, of
Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Deputy Attorney General Salley W. Elliott, and
Assistant Attorney General Julie M. Thames, all
of Columbia; and Solicitor Kevin S. Brackett, of
York, for Respondent.

PER CURIAM: Tijuan Peake appeals his convictions for distribution of crack cocaine and distribution of crack cocaine in proximity of a school. Peake argues the trial court erred in the following: (1) admitting tax maps into evidence because they constituted inadmissible hearsay; and (2) refusing to charge the jury on the law of entrapment. We affirm^[1] pursuant to Rule 220(b)(1), SCACR, and the following authorities:

1. As to whether the trial court erred in allowing the tax maps into evidence: S.C. State Highway Dep't v. Wilson, 254 S.C. 360, 369, 175 S.E.2d 391, 396 (1970) ("[T]he admission or exclusion of evidence is a matter which is addressed to the sound discretion of the trial judge and . . . in the absence of a clear abuse of such discretion, amounting to an error of law, his ruling will not be disturbed."); S.C. Code Ann. § 19-5-510 (1985) ("A record of an act, condition

or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."); Rule 803(6), SCRE ("A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, . . . made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.").

2. As to whether the trial court erred in refusing to charge the jury on the law of entrapment: State v. Johnson, 295 S.C. 215, 217, 367 S.E.2d 700, 701 (1988) ("It is a well settled principle of law that the defense of entrapment is not available to a defendant exhibiting a predisposition to commit a crime independent of governmental inducement and influence."); State v. Brown, 362 S.C. 258, 261-62, 607 S.E.2d 93, 95 (Ct. App. 2004) ("The law to be charged to the jury is determined by the evidence presented at trial.").

AFFIRMED.

SHORT, KONDUROS, and GEATHERS, JJ., concur.

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

WITNESSES

M. Parker/UPSD

ARREST WARRANT NUMBER

K279385

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

MAR 27 2008

VERDICT

Guilty

Foreperson of Petit Jury

Date:

DOCKET NO. 2008-GS-44-0332

The State of South Carolina

County of Union

COURT OF GENERAL SESSIONS

MARCH 31, TERM 2008

THE STATE

vs.

TIJUAN DAVAL PEAKE

Indictment for

DISTRIBUTION OF CRACK COCAINE

SC Code: 44-53-375

CDR Code: 3015

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plea guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF UNION)

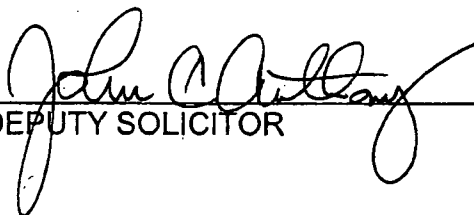
INDICTMENT

At a Court of General Sessions, convened on March 27, 2008, the Grand Jurors of Union County present upon their oath:

DISTRIBUTION OF CRACK COCAINE

That Tijuan Daval Peake did in Union County, South Carolina, on or about November 09, 2007, distribute, dispense, deliver or otherwise aid, abet, attempt, or conspire to distribute, dispense, or deliver a quantity of Crack Cocaine, a controlled substance under provisions of Section 44-53-110, et.seq., Code of Laws of South Carolina (1976, as amended), such distribution not having been authorized by law, in violation of Section 44-53-375, Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


DEPUTY SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Union
STATE VS.Tijuana Daval PeakeAKA: _____
Race: B Sex: M Age: _____
DOB: SS# _____
Address: _____
City, State, Zip Carlisle, SC 29031
DL# _____ SID# SC01014184

INDICTMENT/CASE#:

2008-GS- 44 - 0332A/W#: K-279385Date of Offense: 11/09/2007S.C. Code §: 44-53-375CDR Code #: 3 / 0 / 1 / 5

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Distribution of Crack Cocaine - 2nd Degree
in violation of § 44-53-375 of the S.C. Code of Laws, bearing CDR Code # 3015☐ 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 initial)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

John C. Anthony
Solicitor

Defendant

John C. Anthony
Attorney for DefendantWHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and
assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department
of Probation, Parole and Pardon 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. 2 days☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

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

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

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:	\$
§14-1-206 (Assessments 107.5%)	\$
§14-1-211(A)(1) (Conv. Surcharge)	\$100 \$ 100.00
§14-1-211(A)(2) (DUI Surcharge)	\$100 \$
§56-5-2995 (DUI Assessment)	\$12 \$
§35.13 (Public Def/Prob)	\$500 \$
§73.3, 1B TP (Law Enforce. Funding)	\$25 \$ 25.00
§33.7, 1B TP (Drug Court Surcharge)	\$100 \$ 100.00
§50-21-114(BUI Breath Test Fee)	\$50 \$
§56-5-2942(J) (Vehicle Assessment)	\$40/ea \$
3% to County (if paid in installments)	\$ 6.75
TOTAL	\$ 231.75

PTUP

_____ 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 \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: ATU☐ Appointed PD or appointed other counsel, §35.13 TP
Requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk

Court Reporter: _____

PRESIDING JUDGE

Judge Code: 2101608719Sentence Date: 10/16/08

WITNESSES

M. Parker/UPSD

ARREST WARRANT NUMBER

K279386

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

MAR 27 2008

VERDICT

Guilty

Foreperson of Petit Jury

Date:

DOCKET NO. 2008-GS-44-0333

The State of South Carolina

County of Union

COURT OF GENERAL SESSIONS

MARCH 31, TERM 2008

THE STATE

vs.

TIJUAN DAVAL PEAKE

Indictment for

**DISTRIBUTION OF CRACK COCAINE WITHIN
PROXIMITY OF A SCHOOL, PUBLIC PARK, OR
PUBLIC PLAYGROUND**

SC Code: 44-53-445

CDR Code: 108

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF UNION)

INDICTMENT

At a Court of General Sessions, convened on March 27, 2008, the Grand Jurors of Union County present upon their oath:

**DISTRIBUTION OF A CRACK COCAINE WITHIN PROXIMITY OF A
SCHOOL, PUBLIC PARK, OR PUBLIC PLAYGROUND**

That Tijuan Daval Peake did in Union County, South Carolina, on or about November 09, 2007, distribute a controlled substance, to wit; Crack Cocaine, while in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school, a public playground or park, a public vocational or trade school or technical education center, or a public or private college or university, to wit: Excelsior Middle School, such distribution not having been authorized by law, in violation of Section 44-53-445, Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


DEPUTY SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Union
STATE VS.Tijuana Daval PeakeAKA: _____
Race: B Sex: M Age: _____
DOB: _____ SS#: _____
Address: _____
City, State, Zip: Carlisle, SC 29031
DL# _____ SID# SC01014184

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

2008-GS- 44 - 0333A/W#: K-279386Date of Offense: 11/09/2007S.C. Code §: 44-53-445CDR Code #: 0 / 1 / 0 / 8

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Probation of Creek County within proximity of 2 Beholdin violation of § 44-53-375 of the S.C. Code of Laws, bearing CDR Code # 0108☒ 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 initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST

John C. Hargis
Solicitor

Defendant

John C. Hargis
Attorney for DefendantWHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$____; provided that upon the service of _____ days/months/years and/or payment of \$____; plus costs and assessments as applicable; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 10/16/08☒ 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. 2 days☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

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

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

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:	\$	
§14-1-206 (Assessments 107.5%)	\$	
§14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§14-1-211(A)(2) (DUI Surcharge)	\$100	\$ 100.00
§56-5-2995 (DUI Assessment)	\$12	\$ 12.00
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§33.7, 1B TP (Drug Court Surcharge)	\$100	\$ 100.00
§50-21-114(BUI Breath Test Fee)	\$50	\$ 50.00
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$ 40.00
3% to County (if paid in installments)	\$	\$ 6.75
TOTAL		\$ 231.75

PTUP

_____ 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 \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP
Requires \$500 be paid to Clerk during probation.Clerk of Court/ Deputy Clerk
Court Reporter: _____

PRESIDING JUDGE

Judge Code: _____

Sentence Date: 10/16/08