

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenwood County

R. Lawton McIntosh, Circuit Court Judge

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S.C. Supreme Court

BARRY D. WILLIAMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001392

APPENDIX

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STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF GREENWOOD) 8TH JUDICIAL CIRCUIT

THE STATE) TRANSCRIPT OF RECORD
-VS-) 07-GS-24-926
BARRY DWAYNE WILLIAMS,) 07-GS-24-927
DEFENDANT.)

JANUARY 22 - 23, 2008
GREENWOOD, SOUTH CAROLINA

B E F O R E:

THE HONORABLE JOHN C. HAYES, JUDGE

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

ELIZABETH PHILLIPS-WHITE, ASSISTANT SOLICITOR
ATTORNEY FOR THE STATE

CHARLES GROSE, PUBLIC DEFENDER
ATTORNEY FOR THE DEFENDANT

SHARON L. VIZER-HANKS
CIRCUIT COURT REPORTER

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(SW) - DENOTES STATE'S WITNESS

(DW) - DENOTES DEFENSE WITNESS

(IC) - DENOTES IN CAMERA

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1 Tuesday, February 22, 2008

2 THE COURT: Members of the jury panel, we're going
3 to start our first trial.

4 I'm going to ask the solicitor to call the case.

5 MS. WHITE: Your Honor, the State calls The State of
6 South Carolina vs. Barry Dwayne Williams, indictment
7 2007-GS-24-926 for distribution of crack cocaine; and
8 2007-GS-24-927, distribution of crack cocaine within a half
9 mile of a school or playground.

10 MR. GROSE: Your Honor, Mr. Williams pleads not
11 guilty.

12 THE COURT: All right. Counsel, I'm going to ask
13 you to introduce yourself and who is with you, and the
14 individuals seated behind you.

15 MS. WHITE: Good afternoon, ladies and gentlemen.
16 My name is Elizabeth Phillips White. I'm an assistant
17 solicitor with the 8th Judicial Circuit Solicitor's Office.

18 To my left is Deputy Solicitor Andrew Hodges.
19 Seated right here is Major Kevin Fallaw with the Greenwood
20 Police Department, Chief Investigator Dusty Strickland with
21 the 8th Circuit Solicitor's Office, and Detective Steve McGee
22 with the Greenwood Police Department.

23 THE COURT: Mr. Williams, would you please stand so
24 we can see who you are.

25 (The defendant stood.)

1 THE COURT: This is Mr. Barry Dwayne Williams. He's
2 represented by Mr. Grose.

3 And I'm going to ask you to introduce yourself and
4 Ms. Nelson.

5 MR. GROSE: My name is Charles Grose, and this is
6 Janna Nelson who works with me. We represent Barry Williams
7 who has pled not guilty to these charges.

8 THE COURT: All right. Members of the jury panel,
9 I'm going to ask you to listen. I've got some more questions
10 to go over concerning -- not the general that I went over
11 earlier but more specific questions about this case..

12 Mr. Williams is charged with distribution of crack
13 cocaine. It's alleged that this occurred here in Greenwood
14 County on the 24th day of January 2007. It's alleged at that
15 time he did distribute a controlled substance, crack cocaine,
16 in violation of the laws of this State.

17 The other indictment alleges that he did this within
18 one half mile -- one half mile radius of a public or private
19 school in violation of the laws of this State. It doesn't say
20 what school or park.

21 What school or park is it?

22 MS. WHITE: Your Honor, it's the Seaboard Recreation
23 Center.

24 THE COURT: Seaboard Recreation Center. This is
25 supposed to have happened on that date, January 24th of last

1 year, within one half mile of the Seaboard Recreation.

2 First, are any of you aware, heard anything about
3 this case, know anything about it from any source whatsoever?
4 Have any of you formed or expressed an opinion about any
5 matter or issue which would be involved in this case? Any of
6 you know anything about it? If so, please stand.

7 No one stands.

8 Were any of you members of the grand jury which
9 passed on this indictment at an earlier time -- or these
10 indictments at an earlier time? If so, please stand.

11 No one stands.

12 Are any of you aware of any bias or prejudice that
13 you would have toward the State, the solicitor's office or
14 Mr. Williams and his counsel? Are any of you aware of any
15 bias or prejudice towards those individuals and entities? If
16 so, please stand.

17 No one stands.

18 Have any of you been represented in any capacity by
19 anyone from the 8th Circuit Solicitor's Office, Greenwood, and
20 that includes Abbeville and Laurens and Newberry? Have any of
21 you been a witness for the 8th Circuit Solicitor's Office or
22 any of you worked in any volunteer capacity or are any of you
23 represented by blood or marriage to anyone who works in that
24 office? If so, please stand.

25 (There was no response.)

1 THE COURT: Have any member of you or a member of
2 your family -- and I'm not going to ask you to go into
3 particulars of this, because it could be personal, but I am
4 going to ask you to stand. If any of you or a member of your
5 immediate family has been prosecuted by the solicitor's
6 office, 8th Circuit Solicitor's Office, if so, please stand.

7 No one stands.

8 Are any of you related by blood or marriage to
9 Mr. Williams or either of his counsel, or have you been
10 represented by either Mr. Grose or Ms. Nelson? If so, please
11 stand.

12 No one stands.

13 Are any of you members of or contributors to
14 organizations such as Mothers Against Drunk Drivers; Students
15 Against Drunk Drivers; Citizens Against Violence, sometimes
16 called CAVE; Trooper's Association; Fraternal Order of Police;
17 or the Sheriff's Association? Are any of you members of or
18 contributors to any of those organizations? If so, please
19 stand.

20 All right. What we'll do now is I'll ask your name
21 and number, and you tell me that and remain standing, and tell
22 me why you're standing.

23 POTENTIAL JUROR: My name is Timothy Jones, juror
24 number 61, and I'm a member of the Trooper's Association.

25 THE COURT: Just remain standing.

1 Did you all get that?

2 Yes, ma'am?

3 POTENTIAL JUROR: My name is Kathryn West and I'm
4 juror 143, and I'm a member of Mothers Against Drunk Driving.

5 THE COURT: The two of you who are standing, if your
6 being involved in those associations, if that would prevent
7 you from being fair and impartial, please raise your right
8 hand.

9 MS. WEST: I'm sorry?

10 THE COURT: If the fact that you contributed to or
11 belonged to Mothers Against Drunk Driving, and this gentleman,
12 the law enforcement, if that would prevent you from being fair
13 and impartial, please raise your right hand.

14 (There was no response.)

15 THE COURT: If you could not base your verdict on
16 the law and the evidence in a trial, please raise your right.

17 Neither does. So you can remain with us, but that's
18 exactly the information I'm asking for.

19 Are any of you or a member of your immediate family
20 involved in law enforcement or the prosecution of criminal
21 cases at any level, anything from city policeman to a county
22 policeman, to a U. S. Marshal, U. S. district attorney, to a
23 solicitor, to a judge advocate general, anybody, member of
24 your immediate family or you involved in or have you or a
25 member of your immediate family been involved in any

1 prosecutorial or any law enforcement capacities? If so,
2 please stand.

3 All right. Your name and number?

4 POTENTIAL JUROR: Sharon Smith, juror number 122. I
5 have a brother-in-law that's a county deputy.

6 THE COURT: In Greenwood?

7 MS. WEST: Yes, sir.

8 THE COURT: Is this a county case?

9 MR. HODGES: No, sir. It's a city.

10 THE COURT: This is a city case not a county case.
11 Would the fact that you have that relationship affect your
12 ability to be fair and impartial?

13 MS. WEST: No.

14 THE COURT: Would you be able to base your verdict
15 on the law and the evidence?

16 (There was no verbal response.)

17 THE COURT: Would you be able to base your verdict
18 on the law and the evidence in the trial?

19 MS. WEST: Oh, yeah.

20 THE COURT: Okay. That's what I thought you were
21 saying but I wasn't picking it up completely.

22 The following are possible witnesses in this case.
23 If you have -- if you know these witnesses, if you go to
24 church with them, are related to them by blood or marriage,
25 close personal friend, belong to any social clubs with them,

1 went to high school with them, do drama club, whatever, if you
2 have any relationship whatsoever with any of these witnesses,
3 please stand.

4 From the Greenwood Police Department, Sergeant Steve
5 McGee.

6 POTENTIAL JUROR: I know Mr. Williams.

7 THE COURT: You know Mr. Williams. All right. Your
8 name and number?

9 POTENTIAL JUROR: 147, Angela Williams Laster.

10 THE COURT: How do you know him?

11 MS. WILLIAMS: Through basketball.

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

14 MS. WILLIAMS: I believe it will, Your Honor.

15 THE COURT: All right. Well, I just want you to be
16 honest. You know better than I. So I'm going to excuse you.
17 Just have a seat. Don't leave, but I'm not going to put you
18 in the draw.

19 But that's -- I mean, if I ask the questions I want
20 the answers. Don't be bashful.

21 Again, any kind of relationship or knowledge, even
22 hi, know them well enough to say hi on the street to them.
23 Sergeant Steve McGee, Lieutenant Travis Clark, Major Kevin
24 Fallaw, Lieutenant Chris Gray, Officer Kenya Griffin. All of
25 those from the Greenwood Police Department.

1 And then just remain standing. Some woman got up
2 and sat back down. Just remain standing, if you would.

3 From the State Law Enforcement Division, Lawrence
4 Zivkovich, Z-i-v-k-o-v-i-c-h; and then a Derrick Nicholson.
5 Any of you related by blood or marriage, close personal friend
6 or acquaintance? I've gone through that.

7 MR. GROSE: Your Honor, one more on the third page
8 of what was provided.

9 THE COURT: Also, a Jeffrey Naylor of J. A. Naylor
10 Investigations. Naylor is N-a-y-l-o-r.

11 Thank you. I didn't see that. Thank you.

12 All right. I'm going to go up this way and work our
13 way back this way. Just tell me who you are, your number and
14 why you're standing, that is who it is that you have some
15 relationship with and why.

16 POTENTIAL JUROR: My name is Tracy Minick. I'm
17 number 85. And Kevin Fallaw is involved with Greenwood Little
18 League, and my son plays little league.

19 THE COURT: Okay. Remain standing. I'll ask all of
20 you a wrap-up question.

21 POTENTIAL JUROR: My name is Michael Kunkle. I'm
22 juror number 68. And I know Kevin Fallaw. We went to school
23 together.

24 THE COURT: From where?

25 MR. KUNKLE: Went to school together.

1 THE COURT: Okay.

2 POTENTIAL JUROR: I'm Janet Latham, juror number 70.
3 I also attended high school with Kevin Fallaw.

4 THE COURT: We'll have a class reunion here in a
5 minute.

6 POTENTIAL JUROR: I'm Angela Jones, number 59. I'm
7 employed by the City of Greenwood, which also employs the
8 officers here from the police department.

9 THE COURT: Okay.

10 POTENTIAL JUROR: My name is James M. Rhodes. I'm
11 number 106. I know Mr. Fallaw and his wife.

12 THE COURT: All right.

13 POTENTIAL JUROR: I was the one that sat back down.
14 I'm number 137. I didn't know if the question was were we
15 related or did we know them.

16 THE COURT: Both.

17 POTENTIAL JUROR: Okay. Well, I have spoken to -- I
18 think it was McGee, a warrant thing, about somebody else. So.
19 I just wanted you to know.

20 THE COURT: It was McGee?

21 POTENTIAL JUROR: McGee. I'm not sure which one it
22 was.

23 THE COURT: Okay. All right.

24 We have one more person. Just everybody remain
25 standing.

1 POTENTIAL JUROR: My name is Philip Unrue, number
2 135. I coached little league baseball, acquainted with
3 Mr. Fallaw, and I attend church with Mr. Stickland.

4 THE COURT: Now, those of you that are standing for
5 the reasons you've stated, if that connection would prevent
6 you from being fair and impartial, please raise your right
7 hand.

8 (There was no response.)

9 THE COURT: If you would be unable to base your
10 verdict on the law and the evidence in the trial, please raise
11 your right hand.

12 (There was no response.)

13 THE COURT: No one does. All right. You can be
14 seated. Thank you.

15 THE COURT: I've gone over the list. Anything else
16 from the State?

17 MS. WHITE: Nothing from the State, Your Honor.

18 THE COURT: Anything else, Mr. Grose?

19 MR. GROSE: Your Honor, may we approach?

20 THE COURT: Yeah.

21 (WHEREUPON, a bench conference was had.)

22 THE COURT: The lady that works for Greenwood,
23 please stand. I'm going to excuse you. You said you can be
24 fair and impartial, and I have no doubt whatsoever in my mind
25 that you could, but you work for the same entity that cuts

1 your paycheck and all that stuff, from the same crowd. I'm
2 going to excuse you. Don't leave, but just have a seat. We
3 will not include you in the possible draw.

4 Anything further from the State?

5 MS. WHITE: Nothing from the State.

6 THE COURT: Anything from the defense?

7 MR. GROSE: No, sir.

8 THE COURT: Do any of you know any reason whatsoever
9 why you should not or could not serve and be a fair and
10 impartial juror in the trial of this case? If so, please
11 stand.

12 No one stands.

13 The way we draw juries in this type court is as
14 follows. Names will be drawn at random, and I believe it's
15 five and five for strikes. Each side has the right to strike,
16 remove from this group that's called up one at a time, up to
17 five individuals.

18 When you come up if you'll just stand right there
19 with the bailiff and face first the table where the solicitor
20 is seated, and one of the solicitors will say either present
21 the juror or excuse the juror.

22 If they say present the juror turn and face the
23 table where Mr. Williams and his counsel are seated. If they
24 say excuse the juror, please return to your seat. If they say
25 present the juror turn to the table where Mr. Williams and his

1 counsel are seated and one of them will say either excuse the
2 juror, which again means you may return to your seat, or swear
3 the juror. If you hear the word swear the juror, please come
4 over and Mr. Willingham will show you where to sit in the jury
5 box.

6 Bring with you your pocketbook, or any reading
7 material, or a jacket or anything that you may have so that if
8 you're chosen you don't have to go back and get them.

9 Both sides consent to the clerk drawing the jury?

10 MS. WHITE: Yes, sir.

11 MR. GROSE: Yes, sir.

12 THE CLERK: 130, Sherrie Thompson.

13 (A black female came forward.)

14 THE CLERK: What say the State?

15 MS. WHITE: Please present Ms. Thompson.

16 THE CLERK: What say the defense?

17 MR. GROSE: Please seat Ms. Thompson.

18 THE CLERK: 61, Timothy Jones.

19 (A white male came forward.)

20 THE CLERK: What say the State?

21 MS. WHITE: Please present Mr. Jones.

22 THE CLERK: What say the defense?

23 MR. GROSE: Please seat Mr. Jones.

24 THE CLERK: 133, Marcus Thomas.

25 (A white male came forward.)

1 THE CLERK: What say the State?

2 MS. WHITE: Please present Ms. Thomas.

3 THE CLERK: What say the defense?

4 MR. GROSE: Please seat the juror.

5 THE CLERK: 49, Douglas Gunnoe.

6 (A white male came forward.)

7 THE CLERK: What say the State?

8 MS. WHITE: Please present Mr. Gunnoe.

9 THE CLERK: What say the defense?

10 MR. GROSE: Please seat the juror.

11 THE CLERK: 57, Dorothy Johnson.

12 (A black female came forward.)

13 THE CLERK: What say the State?

14 MS. WHITE: Please present Ms. Johnson.

15 THE CLERK: What say the defense?

16 MR. GROSE: Please seat Ms. Johnson.

17 THE CLERK: 106, James M. Rhodes.

18 (A white male came forward.)

19 THE CLERK: What say the State?

20 MS. WHITE: Please excuse Mr. Rhodes from the trial

21 of this case.

22 THE CLERK: 32, Sara Day.

23 (A black female came forward.)

24 THE CLERK: What say the State?

25 MS. WHITE: Please present Ms. Day.

1 THE CLERK: What say the defense?
2 MR. GROSE: Please seat Ms. Day.
3 THE CLERK: 91; Kathy Ouzts.
4 (A black female came forward.)
5 THE CLERK: What say the State?
6 MS. WHITE: Please present Ms. Ouzts.
7 THE CLERK: What say the defense?
8 MR. GROSE: Please seat Ms. Ouzts.
9 THE CLERK: 144, David White.
10 (A white male came forward.)
11 THE CLERK: What say the State?
12 MS. WHITE: Please present Mr. White.
13 THE CLERK: What say the defense?
14 MR. GROSE: Please seat the juror.
15 THE CLERK: 14, Rebecca Brown.
16 (A white female came forward.)
17 THE CLERK: What say the State?
18 MS. WHITE: Please present Ms. Brown.
19 THE CLERK: What say the defense?
20 MR. GROSE: Please excuse this juror from this case.
21 THE CLERK: 66, Margie Kinion.
22 (A white female came forward.)
23 THE CLERK: What say the State?
24 MS. WHITE: Please present Ms. Kinion.
25 THE CLERK: What say the defense?

1 MR. GROSE: Please seat this juror.

2 THE CLERK: 137, Maxine Walker.

3 (A black female came forward.)

4 THE CLERK: What say the State?

5 MS. WHITE: Please excuse Ms. Walker from the trial
6 of this case.

7 THE CLERK: 99, Rose Pinkney.

8 (A black female came forward.)

9 THE CLERK: What say the State?

10 MS. WHITE: Please excuse Ms. Pinkney from the trial
11 of this case.

12 THE CLERK: 19, Joyce Butler Warren

13 (A black female came forward.)

14 THE CLERK: What say the State?

15 MS. WHITE: Please excuse Ms. Warren from the trial
16 of this case.

17 THE CLERK: 36, Deborah Erskine.

18 (A white female came forward.)

19 THE CLERK: What say the State?

20 MS. WHITE: Please present Ms. Erskine.

21 THE CLERK: What say the defense?

22 MR. GROSE: Please seat the juror.

23 THE CLERK: 89, Shou Morris.

24 (An Asian female came forward.)

25 THE CLERK: What say the State?

1 MS. WHITE: Please excuse Ms. Morris from the trial
2 of this case.

3 THE CLERK: 22, John Carter.

4 (A black male came forward.)

5 THE CLERK: Any excuse for cause from the State?

6 MS. WHITE: None from the State.

7 THE CLERK: What say the defense?

8 MR. GROSE: Please seat the juror.

9 THE CLERK: 54, Lawanda Holden.

10 (A black female came forward.)

11 THE CLERK: Any excuse for cause from the State?

12 MS. WHITE: Not from the State.

13 THE CLERK: What say the defense?

14 MR. GROSE: Please seat the juror.

15 THE COURT: We'll draw one alternate. The strikes
16 will be 1 and 2.

17 THE CLERK: 9, Frank Bolton.

18 (A white male came forward.)

19 THE CLERK: What say the State?

20 MS. WHITE: Please present Mr. Bolton.

21 THE CLERK: What say the defense?

22 THE COURT: Strikes are 1 and 2.

23 MR. GROSE: Please seat the juror.

24 THE COURT: Anything from the State involving the
25 striking of the panel?

1 MS. WHITE: Nothing from the State, Your Honor.

2 THE COURT: Defense?

3 MR. GROSE: No, sir.

4 THE COURT: All right. Let me see counsel up here
5 just for a minute.

6 (WHEREUPON, a bench conference was had.)

7 THE COURT: Those of you who were not chosen, this
8 completes your service as a juror for Greenwood County this
9 week, this year. I appreciate it. And this was an extra
10 short week. I enjoyed meeting you.

11 But I'm going to let you leave, but I'm going to ask
12 you to leave quietly because we're going to start working with
13 this panel. You'll be mailed a check. It's not a lot but
14 it's a check.

15 (WHEREUPON, the jury venire leaves the courtroom.)

16 THE COURT: Those of you who are seated, Mr. White,
17 I'm going to ask you to be the foreman, and that will be your
18 seat.

19 And, Mr. Bolton, that will be your seat back there.

20 And everybody else doesn't have a seat. Just
21 wherever you happen to come. Those are the only 2 assigned
22 seats.

23 Now, at this time, I'm going to ask you all to stand
24 and raise your right hand and the clerk will administer the
25 oath.

1 (WHEREUPON, the jury panel was sworn.)

2 THE COURT: And let me see you all again.

3 (WHEREUPON, a bench conference was had.)

4 THE COURT: Members of the jury panel, I'm just
5 trying to get a little logistics.

6 To the charges that I read to you earlier,
7 distribution of a controlled substance and having done that
8 within a half mile of a private or public park or school,
9 Mr. William pleads not guilty. His pleas of not guilty place
10 upon the State the burden to prove him guilty beyond a
11 reasonable doubt.

12 He is presumed innocent. He doesn't have to prove
13 anything. Under our law, anyone charged with any offense is
14 presumed innocent until the State can prove, if it can, that
15 person's guilt beyond a reasonable doubt.

16 Now, we're going to stop in just a few minutes, but
17 when we come back in the morning the attorneys have the right,
18 but no obligation, to come before you and make what is called
19 opening statements. They are not arguing anything at this
20 time. They are not trying to convince you of a certain
21 verdict. They are simply telling you what the trial is about,
22 giving you a blueprint or a road map of the trial.

23 At a later point in the trial they have an
24 opportunity to argue their case, we call it, or sum up their
25 case, and at that point they will be telling you why the

1 evidence that you've heard or seen should lead you to a
2 certain verdict.

3 I am the sole judge of the law in this case. You
4 must take and accept the law as I charge it. This is true
5 even if you think I charge the law in error or even if you
6 think the law should be different. Your oath requires you to
7 apply the law as I charge it to the facts as you determine
8 them to be.

9 I'm giving you some legal principles now and may
10 during the course of the trial give you some. At the end of
11 the trial I'll give you a precise and comprehensive charge on
12 the law that you are to apply to the facts as you determine
13 them to be in this case.

14 Do not infer from anything I say or do at any time
15 as indicating an opinion of mine on the facts. Our law does
16 not allow the trial judge to formulate or express to a jury
17 any opinion on the facts. That is solely your job. It is
18 solely up to you to examine the evidence and give to the
19 evidence the effect, the value, the weight and the truth you
20 believe it should have.

21 Now, during this you may believe one witness as
22 opposed to several, several witnesses as opposed to one. You
23 may believe all, part or none of a witness's testimony. In
24 judging the facts, you must judge the credibility, that is the
25 believability of the witnesses who testify.

1 In assessing the believability you use things I just
2 talked about. You use your common sense, your sense of logic,
3 your sense of reason, your experiences in life. Use those
4 things as indicators that you find in your day-to-day life as
5 being indicators of truthfulness.

6 You can use certain evaluators, which is the
7 demeanor, how they act on the stand, whether they're hesitant
8 or straightforward, consistent or inconsistent. Consider the
9 opportunity the witness has to know these things to which the
10 witness testified.

11 And you can consider the bias or prejudice. That is
12 whether a witness would wish to help or hurt one side or the
13 other. All these things you consider, determine the true
14 facts, apply the law and you'll be able to return a verdict
15 that speaks the truth.

16 Do not discuss the case among yourselves or try to
17 make up your own mind until I instruct you to jointly
18 deliberate and return a unanimous verdict, and prior to that
19 time you're not equipped with all the tools you need to make a
20 fair and reasonable decision.

21 Do not let anyone discuss this case with you outside
22 the courtroom. If anyone tries to discuss this case with you
23 tell them you cannot do it, as you are sitting on the jury.
24 Report back to me if anyone tries to discuss this case with
25 you. Hopefully, you'll have the identity of that person

1 because I will have to take action against them for talking to
2 you or at least trying to talk to a seated juror.

3 I do not know that there will be any news coverage
4 of this case but don't let yourself be exposed to it. If
5 there's anything in the paper, on the radio or on the
6 television that could remotely deal with this trial don't let
7 yourself be exposed to it. You have to base your verdict on
8 the law and the evidence that developed here in the trial.

9 We'll start back at 9:30 in the morning. I believe
10 we can finish this case in one day.

11 Mr. Foreman, you will preside over the jury's
12 deliberation. You'll be the liaison between the jury and
13 myself, and ultimately you will sign the unanimous verdict of
14 the jury.

15 When you report, be here by 9:30 and we'll try to
16 start as promptly at 9:30 as we can. You'll report to this
17 room. The bailiffs as you leave will tell you how best to get
18 in and out as you are serving on the jury.

19 We take breaks about every hour and a half. I find
20 that's a good comfort level. If you can't see, can't hear let
21 me know. Cup your ear, voice raising gesture, a nudging
22 gesture and we'll correct whatever is interfering with your
23 ability to see or hear.

24 Anything else from the State before we stop?

25 MS. WHITE: Nothing from the State, Your Honor.

1 THE COURT: Defense?

2 MR. GROSE: No, sir.

3 THE COURT: All right. I'm going to let you leave,
4 and the bailiff will show you where you are to report and how
5 best to get in and out while you're serving on the jury.

6 (WHEREUPON, the jury leaves the courtroom at
7 approximately 4:03 p.m.)

8 THE COURT: All right. We'll be at ease in this
9 trial until 9:30 in the morning. And we have motions that we
10 need to --

11 MR. GROSE: We have some motions.

12 THE COURT: Okay. There was some discovery that we
13 had talked about, a motion involving some discovery that I, in
14 chambers, had indicated that I would take a look at, perhaps
15 in-camera, if there is still a dispute.

16 MR. GROSE: Your Honor, this is our written motion,
17 and if we go through some of these items, let me make one
18 point, and I plan on at some point marking the policies and
19 procedures that are at issue.

20 When I was drafting this motion I was looking at
21 procedures that had been revised post the incident date. The
22 procedures from beforehand have been provided and more or less
23 the same. But I have those if you would want to look at them.

24 The first one -- you know, I want to be real clear
25 about what type of consideration this informant has received.

1 He was charged with possession with intent to distribute
2 marijuana in proximity of a school or playground, and those
3 charges have disappeared. I can't find a record of them in
4 the clerk's office. I want to know exactly what was done,
5 including whether or not he was still on parole, because
6 that's unclear from his criminal history.

7 He received an armed robbery conviction prior to the
8 no-parole statute, and so he may very well have been on a
9 parole -- facing a parole violation should those have been
10 prosecuted.

11 MS. WHITE: Your Honor, regarding that issue,
12 there's nothing in the C. I.'s file regarding that. However,
13 it's my understanding that he was not on parole at the time
14 this came up, and the PWID marijuana was dismissed with leave,
15 to the best of my understanding.

16 MR. GROSE: All right. The second issue is report
17 of the informant's involvement in this operation. According
18 to the procedures, there should be some report in the file.
19 It's not clear whether or not that would be the incident
20 report which I've been provided or if it should be some other
21 type of report.

22 MS. WHITE: Your Honor, the only report in the file
23 is the incident report which Mr. Grose has been provided.

24 MR. GROSE: There should be -- the next item is the
25 sworn statement of the confidential informant. I indicated

1 that we have been provided with the chain of custody
2 materials. There's actually not even a statement from the
3 informant about the chain of custody. So I've not been
4 provided with any sworn statement of the confidential
5 informant, which is part of the policy.

6 MS. WHITE: There is no sworn statement from the
7 informant.

8 MR. GROSE: The next item is the debriefing of the
9 confidential informant. This is something that's done at the
10 time that he becomes an informant, and I would believe there
11 could be information in that that's of potential impeachment
12 value, prior bad acts and things that go to his motive, that
13 sort of thing. I understand that they do have this but they
14 object to providing this.

15 MS. WHITE: That's correct, Your Honor. To the best
16 of my understanding, the debriefing is once the confidential
17 informant has indicated that he would like to work they sit
18 down and find out exactly what he knows.

19 In this case, that information would contain
20 additional people in the community who the informant could
21 make buys from. That's not relevant to this case and could
22 jeopardize those potential cases. I believe some of those
23 cases are pending.

24 The only thing in there relevant to this case is
25 that the informant did say that he could make a buy from Barry

1 Williams, and I believe Mr. Grose already had that
2 information.

3 THE COURT: Well, I'll take a look at whatever this
4 document is in-camera. It may be that it lacks relevance or
5 may be that if it has some relevance there can be some
6 redaction done, but I'll take a look at it.

7 MR. GROSE: The next is the documentation of the
8 drug buy money. I believe that does exist and I'd let them
9 explain that.

10 MS. WHITE: Your Honor, the only documentation that
11 exists is Major Fallaw is over the detectives division and
12 he's responsible for where the money goes. He has to have an
13 accounts for it. He has a receipt book that just indicates
14 that money was given to Detective Chris Gray to make buys.

15 There's nothing in there about the confidential
16 informant, there's nothing in there really that would be
17 exculpatory or of any impeachment value. It just shows a
18 receipt for both this case and another case. It was a
19 40-dollar receipt, and 20 dollars in both cases.

20 THE COURT: Okay.

21 MR. GROSE: If that's all it is I don't know that I
22 necessarily need that. I just want to make sure we are clear
23 about what they have and don't have.

24 This other one is a little bit more nebulous.
25 According to their procedures this informant file should

1 contain information, reports of his involvement in all
2 activities. It should have a sworn statement of his
3 involvement in all activities. It really should be a summary
4 of all payments, including money that was used for buy money.

5 It's my understanding from Ms. White that there is
6 incident reports from other cases that this informant has been
7 involved in. My contention would be that these go to the
8 extent of his motive.

9 He certainly has a motive not to be prosecuted, and
10 with his record, I mean, with it being a possession with
11 intent to distribute, you know, he was looking at maybe going
12 to jail, maybe going back to prison over all of this. And I
13 believe I should be entitled to review those to determine
14 whether or not there's anything of cross-examination value in
15 those for the defense.

16 MS. WHITE: Again, Your Honor, I don't see how this
17 informant's involvement in other cases is going to be relevant
18 to the fact at issue, which is whether or not this defendant
19 sold crack.

20 Also, there's a case, State V. Wright, 322 S. C.
21 484, that basically says when weighing discovery issues the
22 Court should balance public policy with disclosure. In this
23 case, public policy favors the free exchange of information
24 between the informant and the police department. It favors
25 protecting those cases that have not come up for trial yet

1 where those defendants don't know who their informant was.

2 This informant lives in the community. I'm
3 concerned about this information getting out and jeopardizing
4 those cases before those are ripe for trial.

5 THE COURT: All right. Well, I'll look at this
6 document and that case in-camera.

7 MR. GROSE: And my understanding is according to
8 their procedures before somebody can be wired up to comply
9 with the state law and the federal law they have to give
10 permission to wear a body wire.

11 To my understanding, this does exist. It may not be
12 of much value to it but I also don't know of any reason why it
13 should be protected either. So I would like for the Court to
14 at least review that.

15 MS. WHITE: Your Honor, the permission for the
16 surveillance is contained in a packet. It's got a lot of
17 other information. I believe it's got background information,
18 a lot of information regarding this informant that is not
19 exculpatory or impeachable.

20 As far as whether he gave them permission for him to
21 wear a body wire, he obviously wore it on the day. There's a
22 video. He knew they were wiring him up. I just don't see
23 where the discovery of this is relevant. It's not really
24 impeachment evidence nor is it exculpatory.

25 THE COURT: Well, should there be a document that

1 can be extracted from the file and I should be able to look at
2 it in-camera, also.

3 MR. GROSE: And I would disagree. I would like to
4 -- well, I disagree with some of this she just said a minute
5 ago about background information of the informant not being
6 exculpatory or of impeachment value.

7 You know, we're getting into some pretty serious
8 areas when talking about right to confront and cross-examine,
9 and I would feel more comfortable if the Court reviewed the
10 entire file to determine whether or not there's anything in
11 this background information that they are talking about that
12 should be disclosed.

13 MS. WHITE: Your Honor, we have no problem with you
14 reviewing the file. Just with regard to his background
15 information, Mr. Grose has had his name for at least a month
16 now. He could have conducted his own investigation.

17 THE COURT: I'll take a look at it. I'll take a
18 look at that in-camera, also.

19 MR. GROSE: Thank you, Your Honor. That's all I
20 have.

21 THE COURT: All right.

22 MS. WHITE: Your Honor, the State has a motion in
23 limine to exclude the defense expert's testimony. I believe
24 Mr. Grose is going to call a man by the name of Jeffrey
25 Naylor. I haven't been provided with a report so I don't know

1 exactly what the substance of his testimony is going to be,
2 but I believe he's going to testify as to police procedures.
3 Mr. Grose had indicated that.

4 I don't believe that this testimony is relevant to
5 the fact in issue, which was whether or not Barry Williams
6 sold crack cocaine. Whether the police department followed
7 procedure is more likely to confuse the jury, to confuse the
8 issues than to actually lead to assisting them in determining
9 the ultimate issue in the trial, which is whether or not he
10 sold crack. So I would ask the Court to exclude his testimony
11 on that basis.

12 MR. GROSE: Your Honor, my response at this time is
13 that I don't think this motion is ripe. My position is going
14 to be that, you know, potentially that their procedures are
15 not adequate, but certainly they didn't follow the procedures
16 that they had.

17 If they are candid and forthcoming with that on
18 cross-examination and I decide that I'd like to have the final
19 argument I'm probably not going to call the expert. And I
20 wouldn't be in a position to argue why it's relevant until I
21 hear their testimony, including the answers to cross. So I
22 would ask that you delay ruling on that until it becomes ripe.

23 THE COURT: I think I will, because I probably need
24 a proffer on it anyway to protect the record for you and also
25 to know what I'm really ruling on. So we'll deny that until

1 it is ripe, if it ever ripens.

2 MS. WHITE: Your Honor, the only copy of the C. I.'s
3 file we have is in Major Fallaw's possession right now. So
4 I'll hand it up to the Court. I'll just ask that since it
5 it's the only copy we not make any markings on it.

6 THE COURT: All right. Well, I'll take a look at it
7 right now.

8 Have you all got some pleas lined up?

9 MR. HODGES: Not that I'm aware of.

10 THE COURT: Well, I'll take a look at it. We'll
11 stop for the day in this trial. I'll take a look at it and if
12 there are things we need -- if you all will all stick around,
13 counsel for both sides, and maybe we can resolve all that at
14 least this afternoon. And then if there's any material that's
15 discoverable Mr. Grose will at least have an opportunity
16 overnight to look at it.

17 MR. GROSE: Thank you, Your Honor.

18 THE COURT: So we'll be at ease. Don't shut down
19 yet, but we'll be at ease.

20 (WHEREUPON, a brief recess was taken.)

21 THE COURT: I have done an in-camera review of the
22 packet I was given.

23 Now, do you have a copy of the C. I.'s N. C. I. C.
24 rap sheet?

25 MR. GROSE: I do have that, Your Honor.

1 THE COURT: Okay. Well, I am going to require with
2 redaction certain documents to be provided. I'm not going to
3 provide these documents, but just for information the file
4 indicates that he was not on probation or parole as of January
5 24th, '07, and I'm noting the next only because I find it to
6 be --

7 MR. GROSE: I was going to say that the relevant
8 date for whether he was on parole would be September 24th,
9 2006, because that's when he was charged with P. W. I. D.

10 THE COURT: Well, I don't have that. That
11 information is not in here.

12 MR. GROSE: Okay.

13 THE COURT: But this is the date, as I understand
14 it, the date that he -- this is the date that's on his packet.
15 You might not have known that. But that's the date,
16 apparently, of the arrest of your client, and that apparently
17 is the date of the information of this packet. So that's all
18 I got to go on.

19 MR. GROSE: Okay.

20 THE COURT: I will note this as a discrepancy. I
21 don't know if it's any -- matters one way or the other, but
22 the charge description on the confidential source worksheet,
23 which I'm not going to require them to give you, but I'm just
24 noting this states P. W. I. D. marijuana as the charge. The
25 N. C. I. C. indicates a different drug.

1 MR. GROSE: Right.

2 THE COURT: I'm going to make all of this -- make
3 copies and seal it for the Court's record. There is a
4 permission to intercept oral communication. I'm going to
5 require that to be -- a copy to be given.

6 There's a statement of confidential source that has
7 four entries. I'm going to allow the State to redact three of
8 the entries leaving only the entry dealing with Barry Williams
9 at Chipecy [sic] Street. I can't read somebody's writing here.
10 So there will be a redaction on that.

11 There's a C. I. contact sheet, and the same for
12 that. The top entry just says packet completed and then it's
13 got a reference to Mr. Williams. There are two other
14 references. They can be redacted.

15 I understand you already have the incident report on
16 your client?

17 MR. GROSE: Yes, sir.

18 THE COURT: All right. There are other incident
19 reports but I'm not going to require the State to divulge
20 those. They are different individuals, and that's all I'm
21 going to say about that, and I read those. I read the two
22 other ones and did not find them to have any relevant
23 information. But all of that will be sealed and somebody else
24 can look at it.

25 All right. Anything else?

1 MR. GROSE: What about the debriefing?

2 THE COURT: There is no debriefing in here that I
3 can find. The only thing that comes close to a debriefing,
4 there is an incident report. There is the permission to
5 intercept, and then there's this document that I mentioned
6 called statement of confidential source. I don't think that's
7 a debriefing, and then the C. I. conduct. I don't see
8 anything that purports -- that has a caption of that or that
9 looks like any kind of what I would consider a debriefing.

10 MS. WHITE: Your Honor, the one you just referenced,
11 the statement of confidential source, I believe that's the
12 document generated at the debriefing. So that would be the
13 document from the debriefing.

14 THE COURT: Again, there's not a lot of information
15 on it, quite frankly, but if that's what it is, it is. But
16 there's nothing that's denominated debriefing and there's
17 nothing that I -- I've never been debriefed or debriefed
18 anybody but I think I'd recognize a debriefing statement if I
19 saw it and I don't see anything that looks like would fall
20 into that category, other than perhaps the incident report is
21 something that's in the nature of what I would call a
22 debriefing type statement. But it's not reflected anywhere
23 else other than in the incident report.

24 MR. GROSE: Thank you.

25 THE COURT: All right. Is that it for the day?

1 MR. HODGES: Yes, Your Honor.

2 MS. WHITE: We need to make a copy of that?

3 THE COURT: Yeah, you need to make a copy of the
4 whole thing to be sealed for the record, and give them to the
5 clerk and redact and make copies of those and give them to
6 Mr. Grose.

7 And everybody have a pleasant evening.

8 (WHEREUPON, the trial of this case was recessed for
9 the day.)

10 Wednesday, February 23, 2008

11 (WHEREUPON, State's Exhibits Numbers 1 through 3
12 were marked for identification only; and Defendant's Exhibits
13 Numbers 1 through 2 were marked for identification only.)

14 (WHEREUPON, a female juror was escorted into the
15 courtroom.)

16 THE COURT: Step over here, if you would, Ms. Day.
17 Your name?

18 FEMALE JUROR: Sara Day.

19 THE COURT: Ms. Day is on this jury panel --
20 Mr. Grose, you need to hear this.

21 And you have now indicated that you forgot that you
22 had a son that was arrested at some point?

23 MS. DAY: Uh-huh. I don't know when.

24 THE COURT: Is he in jail or is he out --

25 MS. DAY: No, he out. He just got a trial coming up

1 in March, I think.

2 THE COURT: All right.

3 THE CLERK: He was arrested November, James L.
4 Day, Jr.

5 MS. DAY: Yes, sir.

6 THE COURT: All right. For what?

7 THE CLERK: C. D. V. is one charge. There's a few.
8 But a C. D. V.

9 THE COURT: All right. You think the fact that he
10 has been arrested would affect your ability to be fair and
11 impartial to this gentleman?

12 MS. DAY: Uh-uh.

13 THE COURT: And the State?

14 MS. DAY: No.

15 THE COURT: You think you'd be able to base your
16 verdict on the law and the evidence in the trial?

17 MS. DAY: Yeah.

18 THE COURT: Okay. I'm going to let you go back in
19 there.

20 MS. DAY: All right.

21 (WHEREUPON, Juror Day leaves the courtroom.)

22 THE COURT: Ms. White?

23 MS. WHITE: Your Honor, I'm going to move to strike
24 Ms. Day for cause. I believe that's a city case. Also, when
25 she said the name James Day, I think I've had some contact

1 with him. I don't think I'm the prosecutor on the case but I
2 believe I've had contact with him in discussing his case
3 during appearances.

4 THE COURT: Mr. Grose?

5 MR. GROSE: She said she could be fair and
6 impartial, Your Honor.

7 THE COURT: Well, it's one of these things it's sort
8 of like the case you handed me from Abbeville that you were
9 involved in. Maybe they should have known if they were
10 prosecuting him. But even though she said she'd be fair and
11 impartial out of an abundance of caution I'm going to excuse
12 her and seat the alternate.

13 All right. Will you bring Ms. Day back out.

14 (WHEREUPON, Juror Day enters the courtroom.)

15 THE COURT: Ms. Day, I'm going to excuse you. I
16 appreciate you bringing that to our attention. And I know
17 you'd be fair and impartial, but just out of an abundance of
18 caution the people sitting at that desk may end up prosecuting
19 or be the ones prosecuting your son and it might just be
20 better if you're not involved. But I hope things go well for
21 you, and I appreciate it. Thank you.

22 MS. DAY: All right. Thank you.

23 (WHEREUPON, Juror Day was excused.)

24 THE COURT: Anything else before the jury comes out?

25 MS. WHITE: Not from the State, Your Honor.

1 MR. GROSE: No, sir.

2 THE COURT: All right. Bring out the jury.

3 (WHEREUPON, the jury enters the courtroom at
4 approximately 9:50 a.m.)

5 THE COURT: Mr. Bolton, you're now on the jury.

6 Good morning. I've excused Ms. Day. She didn't do
7 anything wrong. She just thought of something that she should
8 have probably told us yesterday, so I've excused her. So
9 Mr. Bolton is now on the panel. That's the only thing that's
10 changed. And now I'll turn it over to the attorneys for their
11 opening statements and then the presentation of evidence.

12 MS. WHITE: May it please the Court.

13 On January 24th, 2007, the defendant, Barry
14 Williams, sold crack cocaine to Derrick Nicholson. That's all
15 this case is about, period.

16 Now, how do we know he sold crack? Derrick
17 Nicholson had gotten in some trouble. You're going to hear
18 that he had a charge pending and that he had a bit of a
19 record. So he agreed to help the police out in exchange for
20 some help with his charge.

21 So on January 24th, 2007, he met up with the police
22 officers. They wired him up. They searched him, they
23 searched his driver, they searched the car. He had 20
24 dollars. He didn't have any crack.

25 He left. They kept him under constant surveillance.

1 He went to Barry Williams' house, bought crack cocaine from
2 Barry Williams, met back up with the police officers. He
3 didn't have the 20 dollars, he did have the crack and he did
4 have a video of the entire transaction. So that's all this
5 case is about.

6 Like I said, Derrick was in some trouble, and that's
7 how probably 80 percent of the drug cases in Greenwood County
8 are made. Somebody gets in trouble --

9 MR. GROSE: Objection.

10 THE COURT: Let's just go over the facts -- well,
11 the evidence and the issues.

12 MS. WHITE: Yes, sir.

13 Like I said, that's all this case is about. Barry
14 Williams sold crack to Derrick Nicholson. It's
15 straightforward. At the end of the day I'm going to ask you
16 to come back with a straightforward verdict finding him guilty
17 of selling that crack and of doing it within a half mile of
18 the Seaboard Recreation Center.

19 THE COURT: Mr. Grose?

20 MR. GROSE: May it please the Court.

21 Policy, observation and documentation. Policy,
22 observation and documentation. The prosecutor wants you to
23 believe that this is a straightforward Barry Williams sold
24 crack to their undercover operative and it's all on videotape.

25 I want you to look at that videotape because all

1 this comes down to is policy, observation and documentation.
2 They have policies in place because they know that working
3 with informants can be problematic. They have policies to
4 document what they do and to observe what's going on with the
5 informant because they know that that could raise questions
6 about the quality and the integrity of the evidence.

7 And what she stood up here and told you was is that
8 this is a nice, neat little package, that their informant gets
9 in a car, after he's already been in trouble, so we know he's
10 got a motive, goes down, goes in a house, buys drugs, and she
11 said it's all on videotape.

12 There are four things that I'm going to ask that you
13 pay attention to in this case. Number one is the credibility
14 of the informant, what you find out about his background.
15 Number two, what kind of motive that he has, and we already
16 know right now that he has motive because Ms. White just told
17 you about it, that he had gotten in trouble and was going to
18 do some work to get out of trouble.

19 The third thing is you're not going to see a
20 hand-to-hand transaction of drugs on that videotape. And the
21 fourth thing is you're going to see there's somebody else in
22 that house that's a much stronger candidate that could have
23 sold those drugs. And those things, those four things are
24 reasonable doubt, because they have policies to document
25 things, to observe things and to document things, and you're

STEVE MCGEE - DIRECT BY MS. WHITE

1 going to have that to look at.

2 And once you look at that the only possible verdict
3 is going to be to find Barry Williams not guilty because they
4 don't prove their case in this courtroom here today.

5 THE COURT: Call your first witness.

6 MS. WHITE: Your Honor, the State calls Detective
7 Steve McGee to the stand.

8 THE COURT: Please come up and be sworn.

9 STEVE MCGEE, after having been duly sworn,
10 testified as follows:

11 DIRECT EXAMINATION

12 BY MS. WHITE:

13 Q. Would you please state your name and occupation.

14 A. My name is Steve McGee. I'm a detective for the
15 Greenwood City Police Department. I currently hold the rank
16 of sergeant.

17 Q. How long have you worked for Greenwood Police
18 Department?

19 A. Over ten years.

20 Q. Have you worked with any other law enforcement
21 agencies?

22 A. No, solely to Greenwood City.

23 Q. What are your current duties?

24 A. I'm assigned to an investigations division.

25 Q. Have you ever worked narcotics cases?

STEVE MCGEE - DIRECT BY MS. WHITE

1 A. I have.

2 Q. How many narcotics cases would you say you worked?

3 A. I couldn't say an exact number, but I'd say easily
4 within a hundred.

5 Q. Are you familiar with the term controlled buy?

6 A. I am.

7 Q. What is a controlled buy?

8 A. A controlled buy is when the police department
9 utilizes an informant to enter a residence and make a purchase
10 of illegal narcotics.

11 Q. How many controlled buys would you say you've been
12 involved in?

13 A. Without stating an exact number I'd say easily a
14 hundred or more.

15 Q. You mentioned a confidential informant. What is a
16 confidential informant?

17 A. A confidential informant is one who works for the
18 city police department or a law enforcement agency in an
19 undercover capacity.

20 Q. Could you speak up a little bit.

21 A. Yeah, I'm sorry.

22 Q. How does someone usually come to be a confidential
23 informant?

24 A. Usually somebody gets in trouble, and they in
25 essence want to work their charges off.

STEVE MCGEE - DIRECT BY MS. WHITE

1 Q. Were you working on the morning of January 24th,
2 2007?

3 A. I was.

4 Q. What were you doing that morning?

5 A. That morning we had made plans to make an undercover
6 narcotics buy from Barry Williams.

7 Q. Who was going to make that buy?

8 A. Derrick Nicholson.

9 Q. How did you come to know Derrick Nicholson?

10 A. We had made an undercover purchase from Derrick
11 Nicholson in the past, and upon his arrest he had wanted to
12 work his charges off as well.

13 MR. GROSE: Your Honor, I have a matter of law.

14 THE COURT: All right. Let me let the jury go to
15 the jury room one minute while we take up a legal matter.

16 (WHEREUPON, the jury leaves the courtroom at
17 approximately 9:58 a.m.)

18 THE COURT: All right.

19 MR. GROSE: Your Honor, I believe that the testimony
20 from Mr. McGee was is that he had made -- had somebody make an
21 undercover buy from Derrick Nicholson in the past. I've not
22 been provided with that.

23 I've been provided with where they served a search
24 warrant, where they made a buy of alcohol from somebody else
25 in the residence but not -- and they found Derrick Nicholson

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1 in possession of marijuana. I've not been provided with the
2 undercover buy of narcotics from Derrick Nicholson.

3 MS. WHITE: Your Honor, my understanding is that the
4 undercover buy was used to do a search warrant of the
5 residence, that it wasn't, necessarily, I believe, an
6 undercover buy from Mr. Nicholson.

7 The charge that he was working off came up based on
8 the search warrant. The buy was probable cause for the search
9 warrant. So that's the only charge he was facing, and I don't
10 think the buy was even from Mr. Nicholson.

11 MR. GROSE: Well, all I know is that he testified
12 just a second ago that they made a buy from Mr. Nicholson, and
13 that's different than what I've got. And if it's something in
14 addition to what I've got then I think they should be required
15 to turn it over.

16 MS. WHITE: Your Honor, I'm happy to ask Mr. McGee
17 right now to clear that up.

18 THE COURT: Go ahead.

19 BY MS. WHITE:

20 Q. Have you ever made an undercover buy from
21 Derrick Nicholson?

22 A. No, I did misspeak. That was an undercover purchase
23 made from the residence in which he resided, and upon serving
24 the search warrant we charged him with the marijuana.

25 Q. So the only charge he was facing was the P. W. I. D.

STEVE MCGEE - DIRECT BY MS. WHITE

1 marijuana?

2 A. Yes.

3 MR. GROSE: Thank you, Your Honor.

4 THE COURT: All right. Either you can clear it up
5 when the jury comes back in or cross, Mr. Grose, you have the
6 opportunity to clear it up.

7 All right. Bring the jury back in.

8 (WHEREUPON, the jury enters the courtroom at
9 approximately 10:00 a.m.)

10 THE COURT: Members of the jury panel, I did not go
11 over it yesterday but one of my jobs is to rule on questions
12 of law. That is if there is some evidence or some legal point
13 that one side or the other thinks that I need to resolve then
14 that's part of my job. And once it's resolved by me it's
15 binding on everybody, you and the witness and the attorneys.

16 When we do this I have to excuse you and take this
17 up outside your presence. Now, don't hold against any
18 attorney who asks me to do that, don't hold that against them.
19 That's their job and it allows me to do my job.

20 So this has occurred, I've made -- actually, didn't
21 have to make a ruling because it resolved itself, involving
22 some testimony that will be clarified in just a few minutes,
23 I'm sure. But if an attorney asks for me to take up something
24 outside of your presence don't hold that against the attorney
25 or their client.

STEVE MCGEE - DIRECT BY MS. WHITE

1 BY MS. WHITE:

2 Q. Detective McGee, a few minutes ago you said that you
3 had made an undercover buy from Derrick Nicholson; was that
4 correct?

5 A. No, I misspoke. We had made an undercover purchase
6 in the residence in which he resides, and upon serving the
7 search warrant there he was charged with marijuana that we had
8 found at the residence.

9 Q. So what were you doing on the morning of January
10 24th, 2007?

11 A. We were planning on making an undercover purchase
12 from Mr. Nicholson -- I'm sorry, Mr. Williams.

13 Q. What happened that morning?

14 A. We met with the informant and the driver of the
15 informant's car. We searched the informant, Mr. Nicholson,
16 prior to providing him with 20 dollars. We searched his
17 driver's vehicle. The driver was searched. We wired him with
18 a body wire. I gave him instructions on how to get to the
19 target location.

20 He proceeded to the target location under constant
21 surveillance by myself and other officers in my division. He
22 exited his vehicle, went inside , made the
23 purchase, returned from the residence, got in his vehicle,
24 followed the route in which I instructed him on, back to the
25 predesignated location.

STEVE MCGEE - DIRECT BY MS. WHITE

1 We arrived there simultaneously. He got out of the
2 vehicle and presented to me an off-white color rock-like
3 substance which he stated and I believed to be crack cocaine.

4 Q. You said he was wearing a body wire. What kind of
5 wire was that?

6 A. It was an audio and visual recording device.

7 Q. You said you searched him. Where did you search
8 him?

9 A. I conducted a search of his outer garments, his
10 pockets, his socks, his shoes, did a thorough search to make
11 sure he didn't have money or other contraband on his person.

12 Q. Did you find anything when you searched him?

13 A. I did not.

14 Q. Did you find anything when you searched the vehicle?

15 A. I did not.

16 Q. Did you provide any money to make the buy?

17 A. I did.

18 Q. Was that the only money on his person at the time?

19 A. It was.

20 Q. Was that the only money in the vehicle?

21 A. It was.

22 Q. You said there was a driver. Who was the driver?

23 A. Teresa Lipskum.

24 Q. Why was she there?

25 A. Derrick doesn't have a driver's license. She is his

STEVE MCGEE - DIRECT BY MS. WHITE

1 girlfriend, and they reside together so she was providing a
2 ride for him.

3 Q. Did you check the wire to make sure it was working
4 before you placed it on the informant?

5 A. We did.

6 Q. Was it working?

7 A. It was.

8 Q. When Mr. Nicholson returned did he have crack in his
9 possession?

10 A. He did.

11 Q. Where was it?

12 A. It was in his hand when he got out of the vehicle.
13 He walked directly to me and gave it to me.

14 Q. What did you do with it once you had it?

15 A. It was field tested and entered into evidence.

16 Q. What's a field test?

17 A. A field test is an on-site chemical analysis where
18 you test a portion of the substance to ensure that it is crack
19 cocaine.

20 Q. How do you tell if it's a controlled substance or
21 not? What does the test do?

22 A. Once you activate the capsules that are inside the
23 testing kit it will turn blue in color to indicate that it's a
24 true test.

25 Q. After you field tested it what did you do?

STEVE MCGEE - DIRECT BY MS. WHITE

1 A. Process it into evidence by completing a best pack.

2 Q. What is a best pack?

3 A. It's a pack of information that we complete. We
4 seal the narcotics inside a plastic envelope. I sealed it
5 myself and signed that I sealed it, and it was entered into
6 evidence to be sent to SLED for analysis, chemical analysis.

7 Q. Are you familiar with ?

8 A. I am.

9 Q. Is that the incident location?

10 A. It was.

11 Q. How far is that location from Seaboard Recreation
12 Center?

13 A. I drove the distance from the parking lot of
14 Seaboard Recreation in my unmarked police car. It's just over
15 two-tenths of a mile.

16 Q. Is that in Greenwood County?

17 A. It is.

18 Q. Do you have any specialized training in narcotics
19 investigation?

20 A. I do.

21 Q. What types of training do you have?

22 A. I've completed several portions through the South
23 Carolina Criminal Justice Academy from street level
24 interdiction in narcotics through narcotic commanders class.

25 Q. From your education, training and experience in

STEVE MCGEE - DIRECT BY MS. WHITE

1 Greenwood are you familiar with any slang terms for crack
2 cocaine?

3 A. I am.

4 Q. What are some slang terms?

5 A. Rock, hard, 20, crack.

6 Q. When you make an undercover buy, typically speaking
7 how much do you give the informant to make the buy?

8 A. Typically we give them 20 dollars in order to
9 purchase a 20-dollar crack rock.

10 Q. I'm going to show you what's been previously marked
11 as State's Exhibit Number 3.

12 May I approach the witness?

13 THE COURT: Yes, you may.

14 Q. Can you identify that exhibit?

15 A. I can.

16 Q. How can you identify it?

17 A. It has my name and my signature on it.

18 Q. Why does it have your signature on it?

19 A. This was the actual envelope that I completed after
20 receiving the crack cocaine from the informant. It was
21 weighed and field tested, and entered into this envelope and
22 sealed in order to be sent to SLED for chemical analysis.

23 Q. When you weighed it what was the weight?

24 A. It was approximately .2 grams.

25 Q. Did you weight it with -- how was it packaged when

STEVE MCGEE - CROSS BY MR. GROSE

1 you received it?

2 A. When I received it from the informant it was
3 packaged in this clear, mostly -- mostly clear packaging.
4 It's also included in the best bag.

5 Q. Did you take it out of that packaging to weigh it?

6 A. No, it's weighed with the packaging.

7 Q. Did you seal that envelope?

8 A. I did.

9 Q. Is a best pack tamper proof once it's been sealed?

10 A. It is. You can see the evidence strip, the sticky
11 pad on this one that's not -- it hasn't been used. You peel
12 this adhesive cover off, you fold it over and you seal it.
13 And if it's been tampered with it's pretty obvious that
14 somebody has had to cut the packaging open to get to it.

15 MS. WHITE: Thank you, Sergeant McGee. Please
16 answer any questions Mr. Grose may have.

17 MR. GROSE: May it please the Court?

18 THE COURT: Yes, sir.

19 CROSS-EXAMINATION

20 BY MR. GROSE:

21 Q. I think you would agree that while confidential
22 informants can be an effective tool in investigations they can
23 also -- investigations could also be undermined by misconduct
24 of the informant?

25 A. I have not had that happen.

STEVE MCGEE - CROSS BY MR. GROSE

1 Q. But you would agree that that's a concern?

2 A. It is a possibility.

3 Q. I'm going to hand you what's been marked as
4 Defendant's Exhibit 1 for identification. You recognize that
5 document, don't you?

6 A. I do.

7 Q. And that document is the Greenwood Police
8 Department's policies for use and control of confidential
9 informants?

10 A. It is.

11 Q. Okay. And if you'll look under the section that's
12 marked policy on that first page. If you look at the second
13 sentence, you would agree with me, that while the use of
14 confidential informants is an effective tool in investigations
15 it can be undermined by the misconduct by either the
16 confidential informant or the officer utilizing the informant.

17 A. It says that.

18 Q. It's a direct quote out of Greenwood's policy?

19 A. It is.

20 Q. Okay. And when informants are used sometimes they
21 come into contact with official funds from the department,
22 don't they?

23 A. They do.

24 Q. And sometimes they come into contact with illegal
25 drugs?

STEVE MCGEE - CROSS BY MR. GROSE

1 A. They do.

2 Q. And when that happens there's procedures in place,
3 right?

4 A. There are.

5 Q. And you've talked about some of those already, I
6 believe; is that correct?

7 A. I believe so.

8 Q. Okay. And part of it is is searching the informant,
9 right?

10 A. Yes.

11 Q. And part of it is keeping the informant under
12 constant surveillance?

13 A. Yes, sir.

14 Q. And those are in those policies that you have in
15 your hand? You might check page four.

16 A. Yes, sir.

17 Q. And the reason that this is done is to preclude
18 questions as to the validity and the integrity of the
19 evidence; is that correct?

20 A. That's correct.

21 Q. And that's stated in the policy?

22 A. It is.

23 Q. Now, you have a lot of documentation that goes with
24 cases sometimes, right?

25 A. Yes, sir.

STEVE MCGEE - CROSS BY MR. GROSE

1 Q. Have you reviewed your incident report for today?

2 A. I have.

3 Q. Okay. Now, you talked about searching the
4 informant, didn't you?

5 A. Yes, sir.

6 Q. All right. That's in your incident report?

7 A. Yes, sir.

8 Q. You talked about searching the car that the
9 informant was in?

10 A. Yes, sir.

11 Q. That's not in your incident report, is it?

12 A. No, sir, it is not.

13 Q. You talked about searching Ms. Lipskum, didn't you?

14 A. That's correct. I did.

15 Q. That's not in your incident report, is it?

16 A. It is not.

17 Q. Let's talk about Ms. Lipskum. On direct examination
18 you testified that her role was to be a driver for Derrick
19 Nicholson?

20 A. That's correct.

21 Q. Ms. Lipskum was in a little bit of trouble, too,
22 wasn't she?

23 A. That's also correct.

24 Q. You talked about a controlled buy from the residence
25 where Derrick Nicholson lives, right?

STEVE MCGEE - CROSS BY MR. GROSE

1 A. Yes, sir.

2 Q. And this is Derrick Nicholson back here, isn't it?

3 A. That's correct.

4 Q. And this is Ms. Lipskum in the brown jacket sitting
5 next to him?

6 A. That is also correct.

7 Q. And they live at the same residence?

8 A. They do.

9 Q. And the controlled buy that you are talking about is
10 is that you had somebody go in there and buy some alcohol from
11 Ms. Lipskum?

12 A. That is correct.

13 Q. And this was an illegal sale of alcohol?

14 A. It was.

15 Q. And based on this illegal sale of alcohol you went
16 and got a search warrant, didn't you?

17 A. I did.

18 Q. And what a search warrant is is when you have
19 evidence that a crime has taken place you can get a judge to
20 authorize that you go and search for other evidence of crimes?

21 A. That is correct.

22 Q. And you were involved in serving that search
23 warrant, weren't you?

24 A. I was.

25 Q. And when you served that search warrant you found

STEVE MCGEE - CROSS BY MR. GROSE

1 quite a large quantity of marijuana in that house?

2 A. No, sir, I wouldn't classify as a large quantity.

3 Q. Well, you charged Derrick Nicholson with possession
4 with intent to distribute marijuana, didn't you?

5 A. I did.

6 Q. How much total did you find?

7 A. Without reviewing the incident report I believe it
8 was a couple of ounces maybe.

9 Q. A couple of ounces. And one ounce is enough to
10 charge somebody with possession with intent to distribute?

11 A. It is.

12 Q. And Mr. Nicholson, Derrick Nicholson claimed that
13 marijuana, didn't he?

14 A. He did.

15 Q. All right. Now, part of dealing with confidential
16 informants is, as you've already said, they don't work for
17 free?

18 A. That's correct.

19 Q. And occasionally they work for cash money?

20 A. Occasionally.

21 Q. But what happened in this case is is Mr. Nicholson
22 worked so that he could have his charges of attempting to
23 distribute marijuana dismissed?

24 A. That's correct.

25 Q. Now, you talked about wiring him up with a device

STEVE MCGEE - CROSS BY MR. GROSE

1 that recorded video and audio?

2 A. That's correct.

3 Q. And part of the policies is to keep somebody under
4 constant surveillance?

5 A. That is correct.

6 Q. And like we talked about, that's so there's not
7 questions about the validity and integrity of the evidence?

8 A. Correct.

9 Q. But nobody from the police department was in the
10 vehicle with Teresa Lipskum and Derrick Nicholson, were they?

11 A. No.

12 Q. All right. And part of using these surveillance
13 equipment, the video camera, is that you can document
14 sometimes what's going on when these people are outside of
15 your eyesight?

16 A. Correct.

17 Q. Because while you could observe the car driving down
18 the road you couldn't see what was going on inside the car,
19 could you?

20 A. No.

21 Q. And while you could observe the house, nobody from
22 the police department was inside the house?

23 A. No.

24 Q. And so this video camera is to observe and document
25 that?

STEVE MCGEE - CROSS BY MR. GROSE

1 A. Correct.

2 Q. And that's part of your policies?

3 A. It is.

4 Q. Now, Ms. White showed you some drugs there and asked
5 you about those. There's documentation that goes with that as
6 well, right?

7 A. Correct.

8 Q. If I could hold these, please.

9 I mean, there's documentation that's filled out on
10 this bag?

11 A. There is.

12 Q. And what you are doing with the documentation in the
13 case in using these bags like this is you're documenting what
14 you have, right?

15 A. Correct.

16 Q. Now, I believe you said you field tested these,
17 correct?

18 A. Yes, sir.

19 Q. And I believe that your weight that you assigned to
20 that was 2/10ths of a gram?

21 A. .2.

22 Q. .2. So 2/10ths of a gram?

23 A. Yes.

24 Q. And part of the reason that you handle the evidence
25 this way, with these plastic bags, is so that there's not

STEVE MCGEE - CROSS BY MR. GROSE

1 questions about the integrity or the quality of the evidence

2 later on; is that correct?

3 A. Correct.

4 Q. And there's forms that are filled out to document

5 what you do with the evidence?

6 A. There are.

7 Q. And you filled out an affidavit in this case, didn't

8 you?

9 A. I did.

10 Q. And I believe that's a copy of your affidavit,

11 right?

12 A. It is.

13 Q. All right. And what this is part of is what's

14 called the chain of custody?

15 A. Correct.

16 Q. So that you can tell about that what you sent to

17 SLED is the same thing that came back from SLED?

18 A. That's correct.

19 Q. And that goes to the validity and the integrity of

20 the evidence?

21 A. Yes.

22 Q. And that's notarized?

23 A. It is.

24 Q. And so from that we can tell, you know, how you came

25 into contact with the evidence and who you gave it to, right?

STEVE MCGEE - CROSS BY MR. GROSE

- 1 A. Correct.
- 2 Q. And what date you gave it to them on?
- 3 A. Yes.
- 4 Q. And that's just part of this documentation that you
- 5 do?
- 6 A. Yes, sir.
- 7 Q. There is not an affidavit like that from
- 8 Mr. Nicholson, is there?
- 9 A. There is not.
- 10 Q. And, in fact, your policies and procedures require a
- 11 sworn statement from the informant to be placed in the
- 12 informant's file?
- 13 A. It doesn't require it.
- 14 Here's your policy manual, if you're looking for
- 15 that.
- 16 Q. Huh?
- 17 A. Here's a copy of your policy, if that's what you're
- 18 look for.
- 19 Q. If you look at page two of that. If you look at
- 20 one, two, three, four, five, about six lines down, There can
- 21 be copies of statements by the informant with an unsigned copy
- 22 placed in the investigative file and a signed copy placed in
- 23 the informant's file.
- 24 A. Correct.
- 25 Q. That wasn't done in this case, was it?

STEVE MCGEE - REDIRECT BY MS. WHITE

1 A. No, sir.

2 Q. Okay. And there's no -- like I said, there's not
3 even a chain of custody affidavit from him, is there?

4 A. No.

5 MR. GROSE: Beg the Court's indulgence for a moment.

6 [PAUSE]

7 That's all I have at this time, Your Honor. Thank
8 you.

9 THE COURT: Redirect?

10 MS. WHITE: Briefly, Your Honor.

11 REDIRECT EXAMINATION

12 MS. WHITE:

13 Q. Do you still have a copy of the policies

14 Mr. Grose --

15 A. I do.

16 Q. About six lines down, that paragraph he was just
17 referencing, does it say -- could you read that line for me.

18 A. Copies of any statements signed by the informant.
19 Unsigned copies will be placed in appropriate investigative
20 file.

21 Q. Does anything in that sentence say that you have to
22 take a sworn statement?

23 A. No, ma'am.

24 Q. What cases do you typically take sworn statements
25 in?

STEVE MCGEE - RECROSS BY MR. GROSE

1 A. Typically, we take sworn statements on cases where
2 the event occurred solely by audio. In this case, it was
3 audio and video, so I didn't do a sworn statement.

4 Q. Have you ever done a sworn statement in a video
5 case?

6 A. No.

7 MS. WHITE: Thank you.

8 RECROSS-EXAMINATION

9 BY MR. GROSE:

10 Q. You've never done a sworn affidavit of a chain of
11 custody in a video case; is that what you're telling this
12 jury?

13 A. I personally have not, from an informant.

14 Q. You're saying that's never done?

15 A. I'm not saying it's never done. I'm saying I
16 personally have not done it.

17 MR. GROSE: Nothing further.

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

19 MR. MCGEE: Thank you, Your Honor.

20 THE COURT: I appreciate your time.

21 Call your next witness.

22 MS. WHITE: Your Honor, the State calls Officer
23 Kenya Griffin to the stand.

24 KENYA GRIFFIN, after having been duly sworn,
25 testified as follows:

KENYA GRIFFIN - DIRECT BY MS. WHITE

DIRECT EXAMINATION

1

2 BY MS. WHITE:

3 Q. Would you please tell us your name and your current
4 occupation.

5 A. Kenya Griffin. I'm a patrol officer with the City
6 of Greenwood.

7 Q. How long have you worked for the City?

8 A. A little over four years.

9 Q. What are your current duties?

10 A. I'm assigned to the patrol division.

11 Q. Would you speak up a little bit.

12 THE COURT: Yeah, you have to speak up a little bit
13 and get closer to the mic.

14 Q. Were you working on January 24th, 2007?

15 A. Yes, I was.

16 Q. Were you involved in the incident that we're here
17 about today?

18 A. I was called to search the driver, Ms. Teresa
19 Lipskum.

20 Q. Did you search the driver?

21 A. Yes, ma'am, I did.

22 Q. Where did you search her?

23 A. A location that we typically use. It's off of Oak
24 Street, down by the railroad tracks.

25 Q. Did you physically search her body?

KENYA GRIFFIN - CROSS BY MR. GROSE

1 A. Yes, I did.

2 Q. What areas did you search?

3 A. I checked her shirt. She didn't have any pockets, I
4 don't believe. Her bra line and her pants pockets, socks and
5 shoes.

6 Q. Why would you have been called in to search
7 Ms. Lipskum?

8 A. She was a female, so they usually call a female
9 officer to search so it's more thorough.

10 Q. Did you find anything when you searched her?

11 A. No, I did not.

12 MS. WHITE: Please answer any questions Mr. Grose
13 has for you.

14 CROSS-EXAMINATION

15 BY MR. GROSE:

16 Q. Your search is not documented in the incident
17 report, is it?

18 A. No, sir, it's not.

19 Q. And the reason for doing these searches is so later
20 on there wouldn't be any questions about the validity or the
21 integrity of evidence, right?

22 A. That's correct.

23 Q. And the only role that you had was searching
24 Ms. Lipskum?

25 A. That is correct.

KENYA GRIFFIN - CROSS BY MR. GROSE

1 Q. And that's all your involvement in this case is?

2 A. Correct.

3 MR. GROSE: Nothing further.

4 MS. WHITE: I have no redirect, Your Honor.

5 THE COURT: You can step down and be excused. We

6 appreciate your time. Thank you, ma'am.

7 Call your next witness.

8 MS. WHITE: May we approach just a minute, Your

9 Honor?

10 THE COURT: Yes.

11 (WHEREUPON, a bench conference was had.)

12 THE COURT: We'll take a break. This will be our

13 morning break, for about 10 minutes.

14 (WHEREUPON, the jury leaves the courtroom at

15 approximately 10:25 a.m.)

16 THE COURT: We'll be at ease for about 10 minutes.

17 MS. WHITE: Your Honor, may Ms. Griffin be excused?

18 THE COURT: Who?

19 MS. WHITE: Ms. Griffin.

20 MR. GROSE: The lady that just testified.

21 THE COURT: Oh, I said she could be excused. Yeah.

22 MR. GROSE: I don't have any objection.

23 (WHEREUPON, a brief recess was taken.)

24 THE COURT: The State ready?

25 MS. WHITE: Yes, Your Honor.

DERRICK NICHOLSON - DIRECT BY MS. WHITE

1 THE COURT: The defense ready?

2 MR. GROSE: Yes, sir.

3 THE COURT: Bring in the jury.

4 (WHEREUPON, the jury enters the courtroom at
5 approximately 10:45 a.m.)

6 THE COURT: The jury is present. Call your next
7 witness.

8 MS. WHITE: Your Honor, the State calls Derrick
9 Nicholson to the stand.

10 DERRICK NICHOLSON, after having been duly
11 sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MS. WHITE:

14 Q. Mr. Nicholson, have you ever been used as a
15 confidential informant by Greenwood Police Department?

16 A. Have I ever?

17 Q. Have you ever?

18 A. No, this is my first time.

19 Q. How did you become involved this time?

20 A. I got busted with some marijuana.

21 THE COURT: You got to speak up into the microphone.

22 A. I got busted with some marijuana and alcohol.

23 Q. Okay. Were you assisting the police department on
24 January 24th, 2007?

25 A. Ma'am?

DERRICK NICHOLSON - DIRECT BY MS. WHITE

1 Q. Were you assisting the police department on January
2 24th, 2007?

3 A. Yes, ma'am.

4 Q. What were you doing that day?

5 A. They wired me up, get ready to make a bust.

6 Q. Who did you -- did you meet them somewhere?

7 A. Yes, ma'am.

8 Q. Who did you meet?

9 A. Steve McGee and Mitch, and somebody else. I can't
10 recall the name of that officer.

11 Q. What happened when you met them?

12 A. Went to the location. They wired me up and, you
13 know, gave me the money. And they told me where to meet them
14 at and where to make the bust at, and come back to the
15 location.

16 Q. Did they search you?

17 A. Yes, ma'am.

18 Q. Did they search your car?

19 A. Yes, ma'am.

20 Q. Was anyone with you?

21 A. My girlfriend, Teresa.

22 Q. Why was she with you?

23 A. Ma'am?

24 Q. Why was she with you?

25 A. She was driving the car.

DERRICK NICHOLSON - DIRECT BY MS. WHITE

1 Q. Do you have a license?

2 A. No, ma'am.

3 Q. What happened after you left, where they had met
4 you?

5 A. When they met me, they searched the car. They
6 searched me. I gave them the package when I got out of the
7 car. They searched everything, and they searched Teresa down.

8 THE COURT: All right. You need to speak a
9 little --

10 A. They searched Teresa down.

11 Q. Okay. I'm talking about when you first met with
12 them, after that. What happened after that?

13 A. After that?

14 Q. Yes, sir.

15 A. After that, everything was over with.

16 Q. No. After you first met with them that morning.

17 Did you go anywhere after they had wired you up?

18 A. No, ma'am. They wired me up and they told me where
19 to go at. So they followed us. You know, we went to the
20 house and made the buy and came back to Oak Street, the
21 location

22 Q. Whose house did you go to?

23 A. Barry Williams' house.

24 Q. You said you made the buy. Who did you make the buy
25 from?

DERRICK NICHOLSON - DIRECT BY MS. WHITE

1 A. Barry Williams.

2 Q. What happened when you got to the house?

3 A. I knocked on the door. Oatha Mae, she was there.
4 She let me in. So I went inside and I spoke, you know. Went
5 in there and asked if he had a 20 hard. He said yeah, and he
6 sold it to me. Then I got the hard and left.

7 Q. What's a 20 hard?

8 A. It's like crack cocaine. I asked for a 20.

9 Q. What was he doing when you got to the house?

10 A. Well, he was sitting at the table. He was cutting
11 it up. He didn't have that much.

12 Q. What was he cutting up?

13 A. Crack, hard.

14 Q. When he sold you the crack was it -- how was -- was
15 it packaged in anything?

16 A. It was in a little plastic like -- plastic bag like.

17 Q. What did you do with it after he handed it to you?

18 A. Put it in my side pocket.

19 Q. How do you know the defendant?

20 A. It's my cousin.

21 Q. After you bought the crack, what did you do then?

22 A. Went back to the location and gave it to them.

23 Q. Is Barry Williams in the courtroom today?

24 A. Yes, ma'am.

25 Q. Could you point him out for us.

DERRICK NICHOLSON - DIRECT BY MS. WHITE

1 A. Right there (indicated).

2 Q. Is he sitting at defense table?

3 A. Yes, ma'am.

4 Q. The record will reflect that you pointed out the
5 defendant.

6 Q. Were you wearing a wire the entire time?

7 A. Yes, ma'am.

8 Q. During the buy?

9 A. Yes, ma'am.

10 MS. WHITE: May I approach the witness, Your Honor?

11 THE COURT: Yes, ma'am.

12 BY MS. WHITE:

13 Q. I'm going to show you what's been marked as State's
14 Exhibit 2 for identification. Have you ever seen that before?

15 A. Yes, ma'am.

16 Q. How do you know you've seen that before?

17 A. We looked at it yesterday, and I got it, date it --
18 signed and date it.

19 Q. What is that that you are holding?

20 A. That's evidence, a videotape.

21 Q. Could you speak up.

22 A. That's a videotape of the transaction.

23 Q. Does it contain a complete, accurate recording of
24 what happened that day?

25 A. Yes, ma'am.

DERRICK NICHOLSON - DIRECT BY MS. WHITE

1 MS. WHITE: Your Honor, the State moves State's
2 Exhibit Number 2 into evidence.

3 MR. GROSE: No objection.

4 THE COURT: It will be received without objection.

5 (WHEREUPON, State's Exhibit No. 2, a Videotape, was
6 admitted into evidence.)

7 MS. WHITE: Your Honor, at this time, I'd ask to
8 publish this for the jury.

9 THE COURT: Members of the jury panel, she's going
10 to now show this C. D. The screen is behind you, so you'll
11 have to spin around and see it.

12 [PAUSE]

13 Members of the jury panel, we're going to take a
14 break and see if we can get this in operation.

15 (WHEREUPON, the jury leaves the courtroom at
16 approximately 10:58 a.m., and a brief recess was taken.)

17 (WHEREUPON, the jury enters the courtroom at
18 approximately 11:00 a.m., and State's Exhibit No. 2 was played
19 for the jury.)

20 BY MS. WHITE:

21 Q. Mr. Nicholson, did you know you were wearing a
22 camera that day?

23 A. No, ma'am.

24 Q. What did you think you had on?

25 A. Just a wire.

DERRICK NICHOLSON - CROSS BY MR. GROSE

1 Q. So you didn't know the seatbelt was covering up the
2 camera?

3 A. No, ma'am.

4 Q. I'm going to show you what's been premarked as
5 State's Exhibit 1. Do you recognize this picture?

6 A. Yes, ma'am.

7 Q. Is that a fair and accurate representation of what
8 happened on January 24th, 2007?

9 A. Yes, ma'am.

10 MS. WHITE: The State moves exhibit 1 into evidence
11 at this time, Your Honor.

12 MR. GROSE: No objection.

13 THE COURT: It will be received without objection.

14 (WHEREUPON, State's Exhibit No. 1, a Photograph, was
15 admitted into evidence.)

16 BY MS. WHITE:

17 Q. And what did you do with the crack when you met back
18 up with Detective McGee?

19 A. Gave it to McGee.

20 Q. Please answer any questions Mr. Grose has for you.

21 A. Yes, ma'am.

22 CROSS-EXAMINATION

23 BY MR. GROSE:

24 Q. You've been convicted of armed robbery, haven't you?

25 A. Yes, sir.

DERRICK NICHOLSON - CROSS BY MR. GROSE

1 Q. And your involvement in this case started after a
2 search warrant was served where you and Teresa Lipskum lived
3 together?

4 A. Yes, sir.

5 Q. They had caught her selling illegal alcohol?

6 A. Yes, sir.

7 Q. And they had caught you possessing marijuana?

8 A. Yes, sir.

9 Q. And they charged you with possession with intent to
10 distribute marijuana within proximity of a school or a
11 playground?

12 A. Yes, sir.

13 Q. And the person who charged you was Mr. McGee over
14 here?

15 A. Yes, sir.

16 Q. And you wanted to keep from getting convicted of
17 that charge, didn't you?

18 A. Yes, sir.

19 Q. And, in fact, that's what is promised to you for
20 your involvement in this case, isn't it?

21 A. Yes, sir.

22 Q. And that it would be what they call dismissed with
23 leave, correct?

24 A. Right.

25 Q. And dismissed with leave means they can bring the

DERRICK NICHOLSON - CROSS BY MR. GROSE

1 charges back if they are not satisfied with your cooperation?

2 A. Right.

3 Q. And we just saw the video of your involvement in
4 this case, didn't we?

5 A. Yes, sir.

6 Q. And we see where it's wired up with you getting in
7 the car, correct?

8 A. Yes, sir.

9 Q. Okay. And then for a long time it's blank, isn't
10 it?

11 A. Right.

12 Q. The screen is blank?

13 A. Yes, sir.

14 Q. While the screen is blank we hear a lot of shuffling
15 around?

16 A. Uh-huh.

17 Q. And when you get to the house Barry Williams is not
18 the only person in that house, is he?

19 A. No, sir.

20 Q. In fact, there's somebody else at the door, right?

21 A. Yes, sir.

22 Q. He's not the only person who stays there?

23 A. No.

24 Q. Oatha Mae Tucker stays there?

25 A. Right.

DERRICK NICHOLSON - CROSS BY MR. GROSE

1 Q. And while you are in the house, in the room, we see
2 the curtains for a long period of time, don't we?

3 A. Yes, sir.

4 Q. And we see some shelves for a long period of time,
5 don't we?

6 A. Right.

7 Q. And we never see a transaction, hand-to-hand
8 transaction on that tape, do we?

9 A. No. Not on the tape.

10 Q. It's not on that tape?

11 A. No.

12 Q. But as you are leaving the house we see another
13 person walk in front of the camera, don't we?

14 A. Yes, sir.

15 Q. And he's holding a wad of money, isn't he?

16 A. Right.

17 Q. And you hear him say I gave him a 20 instead of a
18 10, don't you?

19 A. Right.

20 Q. And then you go get back in the car, right?

21 A. Yes, sir.

22 Q. And there's blank again --

23 A. Right.

24 Q. -- for a long period of time. And we hear the same
25 shuffling on the tape; is that correct?

DERRICK NICHOLSON - CROSS BY MR. GROSE

1 A. Yes, sir.

2 Q. And the tape ends when you get back to where
3 Detective McGee is?

4 A. The location, yes, sir.

5 Q. You've not filled out any sworn statements in this
6 case, have you?

7 A. No, sir.

8 Q. You've not filled out a chain of custody form in
9 this case, have you?

10 A. No, sir.

11 Q. You met with the prosecutor yesterday, didn't you?

12 A. Yes, sir.

13 Q. I believe you testified that you reviewed the tape?

14 A. Yes, sir.

15 Q. And she told you in that meeting that if you didn't
16 testify she could have you arrested and brought here?

17 A. True. Correct.

18 Q. And she told you that if you didn't cooperate and
19 testify she could move to have you held in contempt of court?

20 A. Yes, sir.

21 MR. GROSE: Beg the Court's indulgence.

22 [PAUSE]

23 Nothing further.

24 THE COURT: Redirect.

25 REDIRECT EXAMINATION

TRAVIS CLARK - DIRECT BY MS. WHITE

1 BY MS. WHITE:

2 Q. Mr. Nicholson, at our conversation yesterday the
3 reason I told you you had to be here is because you are under
4 subpoena, correct?

5 A. Yes, ma'am.

6 THE COURT: Recross?

7 MR. GROSE: No, sir.

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

9 MS. WHITE: Your Honor, the State asks that
10 Mr. Nicholson be excused from that subpoena.

11 THE COURT: He'll be excused.

12 MR. NICHOLSON: Thank you.

13 THE COURT: Call your next witness.

14 MS. WHITE: Your Honor, the State calls Travis
15 Clark.

16 TRAVIS CLARK, after having been duly sworn,
17 testified as follows:

18 DIRECT EXAMINATION

19 BY MS. WHITE:

20 Q. Please state your name and occupation.

21 A. My name is Travis Clark. I'm a police officer with
22 the Greenwood Police Department.

23 Q. What's your current rank?

24 A. I hold the rank of lieutenant.

25 Q. What are your current duties?

TRAVIS CLARK - DIRECT BY MS. WHITE

1 A. I'm assigned to work with the Solicitor's Office in
2 General Sessions Court. I'm also assigned as the evidence
3 custodian and crime scene technician.

4 Q. When an officer makes a narcotics arrest what's the
5 process for submitting those narcotics into evidence?

6 A. They submit to me a best pack, which contains the
7 evidence that they put in there. For narcotics purposes, they
8 put the narcotics in the best pack then submit the best pack
9 to me.

10 Q. I'm going to show you what's been marked as State's
11 Exhibit Number 3. Do you recognize that exhibit?

12 A. I do.

13 Q. How do you recognize that exhibit?

14 A. All these best packs are serialized. There's a
15 number on here. It's actually on here twice. In this case
16 it's B-182-194. You can see it's printed on here. It's also
17 on a sticker. When the officer submits it to me he's got the
18 paperwork completed that says he is submitting to me a best
19 pack number B-182-194, then I take that and place it in the
20 evidence room.

21 Q. Has that exhibit ever been in your possession?

22 A. Yes, it has. I took it in from -- into evidence
23 January 24th, 2007, and I maintained it in my possession until
24 I transported it to the State Law Enforcement Division in
25 Columbia for analysis.

TRAVIS CLARK - CROSS BY MR. GROSE

1 Q. Was it sealed when you received it?

2 A. Yes, it was sealed. I also examined the -- these
3 rings on the outside. If you stretch them or cut into them
4 they start to bend and pull out. And I examined that to make
5 sure it has not been tampered with, and I also make sure that
6 the seal is on there and intact before I accept it.

7 Q. And did you make any changes to that before you took
8 it to SLED?

9 A. I did not. I maintained it in the evidence room in
10 the state it was given to me and I maintained it in my
11 possession in that state until I transported it to SLED.

12 Q. Today, is it in substantially the same condition as
13 when you saw it last?

14 A. Yes, it is.

15 MS. WHITE: Please answer any questions Mr. Grose
16 has for you.

17 MR. GROSE: May it please the Court.

18 CROSS-EXAMINATION

19 BY MR. GROSE:

20 Q. I believe you have that exhibit in front of you?

21 A. Yes, sir.

22 Q. And you talked about how it's sealed in a plastic
23 bag and numbered?

24 A. Yes, sir.

25 Q. And that's so it doesn't get mixed up with any

TRAVIS CLARK - CROSS BY MR. GROSE

1 similar type evidence, correct?

2 A. Yes, sir, that's correct.

3 Q. And the purpose of doing that is to preclude any
4 questions about the validity or the integrity of the evidence
5 later on; is that correct?

6 A. Yes, sir, that's correct.

7 Q. And there's also chain of custody documents that you
8 fill out?

9 A. Yes, sir.

10 Q. And, again, the purpose of that is to preclude any
11 questions about the validity or integrity of the evidence?

12 A. Yes, sir, that's correct.

13 Q. And you can tell when you received it, where you
14 received it, who you gave it to, and that sort of thing?

15 A. Yes, sir, that's correct.

16 MR. GROSE: I beg the Court's indulgence.

17 [PAUSE]

18 Nothing further. Thank you.

19 MS. WHITE: Nothing from the State, Your Honor.

20 THE COURT: You can stand down and be excused.

21 Thank you for your time.

22 Call your next witness.

23 MS. WHITE: Your Honor, the State calls Lawrence
24 Zivkovich to the stand.

25 LAWRENCE ZIVKOVICH, after having been duly

LAWRENCE ZIVKOVICH - DIRECT BY MS. WHITE

1 sworn, testified as follows:

2 DIRECT EXAMINATION

3 BY MS. WHITE:

4 Q. Would you please tell us your name and current
5 occupation.

6 A. My name is Lawrence Zivkovich, and I work with SLED,
7 South Carolina Law Enforcement Division, as a chemical
8 analyst.

9 Q. How long have you been at SLED?

10 A. About one year and ten months.

11 Q. Would you please tell us about your education.

12 A. I received a bachelor of science in chemistry from
13 the University of South Carolina. I've received legal
14 training from the South Carolina Criminal Justice Academy, and
15 I've also received chemical analyst certification from the
16 South Carolina Law Enforcement Division.

17 Q. So you are certified by SLED to perform drug
18 analysis?

19 A. Yes, ma'am.

20 Q. And what's the process for being certified by SLED
21 to do that?

22 A. Well, you go through the usual background checks and
23 everything for anybody applying to a SLED position, then you
24 go through a program certified by SLED and by the Criminal
25 Justice Academy, and once you perform a proficiency test then

LAWRENCE ZIVKOVICH - DIRECT BY MS. WHITE

1 you're certified by SLED.

2 Q. How many analyses have you performed since you've
3 been at SLED? Just a round number.

4 A. A couple thousand.

5 Q. Have you ever analyzed a substance that was reported
6 to be a controlled substance and found that it was not a
7 controlled substance?

8 A. Yes, ma'am.

9 Q. How many times has that happened?

10 A. Hard to guess. It happens, but not frequently.

11 Q. Have you ever testified in General Sessions before?

12 A. Yes, ma'am.

13 Q. How many times?

14 A. Two times.

15 MS. WHITE: Your Honor, at this time the State moves
16 Mr. Zivkovich as an expert in the field of drug analysis.

17 THE COURT: Any voir dire?

18 MR. GROSE: No, sir. No objection.

19 THE COURT: I find he's qualified.

20 BY MS. WHITE:

21 Q. I'm going to show you once again what's been marked
22 as State's Exhibit Number 3. Have you ever seen that exhibit?

23 A. Yes, ma'am.

24 Q. How can you identify it?

25 A. It's a best pack that's usually given with evidence

LAWRENCE ZIVKOVICH - DIRECT BY MS. WHITE

1 to SLED, and it also has my initials on it.

2 Q. When did you receive that exhibit?

3 A. I originally picked it up from the log-in on March
4 19th.

5 Q. Was it sealed when it came into your possession?

6 A. Yes, ma'am.

7 Q. Has it continuously been under your care, custody
8 and control?

9 A. While I was working on the case, yes, ma'am.

10 Q. What did you do with that --

11 Well, before I get to there. Your Honor, the State
12 moves Exhibit Number 3 into evidence at this time.

13 THE COURT: Any --

14 MR. GROSE: No objection.

15 THE COURT: It will be received without objection.

16 (WHEREUPON, State's Exhibit Number 3, Crack Cocaine,
17 was admitted into evidence.)

18 BY MS. WHITE:

19 Q. What did you do with that exhibit once you received
20 it?

21 A. Well, what I do is I go down to the log-in and pick
22 it up and make sure, the first thing is that it's sealed. And
23 when I open up it comes with a best request form from the
24 submitting agency. And so I check the request form to make
25 sure that what's on the request form is what's actually in the

LAWRENCE ZIVKOVICH - DIRECT BY MS. WHITE

1 bag itself, and then I perform whatever analyses that I need
2 to perform. And then once I'm done analyzing all the evidence
3 then I put it back in a bag and seal it and initial it.

4 Q. Did you perform any analysis on that substance?

5 A. Yes, ma'am.

6 Q. What test did you perform?

7 A. If you don't mind if I refer to my notes.

8 I performed a spot test or a color test, and I also
9 performed an instrument analysis on it.

10 Q. With the color test, kind of briefly walk me through
11 that. What is that?

12 A. A color test is something we do with any unknown
13 substance that comes into SLED, and that just gives us a
14 general idea of what it may or may not be. It's not a
15 definitive thing but it just gives us an idea of what
16 instrumentation to use.

17 Q. From the name I assume it turns a color --

18 A. Yes, ma'am.

19 Q. -- if it's a certain substance?

20 What about the instrument test; what is that?

21 A. The instrumentation test is just what we call
22 positive identification. It's basically like a fingerprint.
23 It gives us an exact name for a controlled substance.

24 Q. Are these generally accepted scientific methods for
25 testing controlled substances?

LAWRENCE ZIVKOVICH - CROSS BY MR. GROSE

1 A. Yes, ma'am.

2 Q. Have these tests revealed fake narcotics in the
3 past?

4 A. Yes, ma'am.

5 Q. Based on your tests and observations do you have an
6 opinion to a reasonable degree of scientific certainty as to
7 what that substance is?

8 A. Yes, ma'am.

9 Q. What is that opinion?

10 A. It was identified as cocaine or crack.

11 Q. Did you ever weigh that substance?

12 A. Yes, ma'am.

13 Q. When you weigh it, did you weigh the entire package,
14 if you will, or do you just weigh the substance itself?

15 A. We just weigh the substance itself.

16 Q. What was the weight on that?

17 A. The weight was found to be 0.12 grams.

18 MS. WHITE: Please answer any questions Mr. Grose
19 has for you.

20 MR. GROSE: May it please the Court.

21 CROSS-EXAMINATION

22 BY MR. GROSE:

23 Q. Just, I guess, to cover the obvious, you work for
24 SLED down in Columbia, right?

25 A. That's correct, sir.

LAWRENCE ZIVKOVICH - CROSS BY MR. GROSE

1 Q. And you weren't part of any of the undercover
2 operation, were you?

3 A. No, sir.

4 Q. So you have no knowledge of what happened or didn't
5 happen in that house that day, do you?

6 A. That's correct.

7 Q. And you talked about how you receive that evidence
8 all packaged up, correct?

9 A. Yes, sir.

10 Q. And you receive it with chain of custody affidavits?

11 A. Yes, sir.

12 Q. And in this case you had one from Mr. Clark and
13 Mr. McGee?

14 A. Yes, sir.

15 Q. And then you documented in your report how you
16 received it and when you received it, right?

17 A. Yes, sir.

18 Q. And all of this is done to preclude any questions
19 later on about the validity or the integrity of the evidence,
20 correct?

21 A. That is correct.

22 Q. And that's part of the policies you have to document
23 things --

24 A. That's correct, sir.

25 Q. -- at SLED?

LAWRENCE ZIVKOVICH - CROSS BY MR. GROSE

1 A. Yes, sir.

2 MR. GROSE: Beg the Court's indulgence.

3 [PAUSE]

4 Nothing further. Thank you, Your Honor.

5 MS. WHITE: Your Honor, I'd ask that Mr. Zivkovich
6 be excused from his subpoena.

7 THE COURT: You'll be excused. Appreciate your
8 time.

9 MR. ZIVKOVICH: Thank you, sir.

10 MS. WHITE: The State rests, Your Honor.

11 THE COURT: Members of the jury panel, the State has
12 rested. That is, the State has told us presented the evidence
13 it intends to present. Under certain circumstances to State
14 could present other evidence but basically you've heard the
15 testimony and received the State's evidence.

16 Before we go further we have to take up a matter
17 outside of your presence. So I'm going to let you go to the
18 jury room just for a few minutes.

19 (WHEREUPON, the jury leaves the courtroom at
20 approximately 11:32 a.m.)

21 THE COURT: Anything from the State?

22 MS. WHITE: Your Honor, I would, at this time, renew
23 my motion in limine to exclude the testimony of the defense
24 expert.

25 MR. GROSE: Can I have just a moment, Your Honor?

1 THE COURT: Yes, sir.

2 [PAUSE]

3 MR. GROSE: Your Honor, I have a motion, and once I
4 make that motion it's my intent to rest. So I think her
5 motion is moot.

6 THE COURT: At some point I've got to talk to your
7 client, but let's make the motion first. I think procedurally
8 we need to hear your motion.

9 MR. GROSE: Yes, sir. My motion would be for a
10 directed verdict based on the fact that the State has failed
11 to present substantial evidence, either direct or
12 circumstantial based upon which a jury could convict beyond a
13 reasonable doubt of either charges for which Mr. Williams is
14 on charge for.

15 THE COURT: I deny the motion. This is not a
16 circumstantial evidence case but there is testimony from a
17 witness. Whether you believe them or not is up to the jury --
18 whether they believe them or not is up to the jury, that
19 testified of a hand-to-hand transaction with the defendant.
20 So I deny the motion.

21 Mr. Williams, can you hear me?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: We've reached a point in the trial where
24 you have a right to present a defense, if you wish, but you
25 don't have to present a defense because you are presumed

1 innocent of this charge. If you choose to testify, the
2 State --

3 Let me ask, are there any impeachable offenses?

4 MS. WHITE: Yes, Your Honor.

5 THE COURT: What are they?

6 MS. WHITE: He has a distribution of cocaine from
7 1990 that he was still serving, within the 10 years;
8 conspiracy to commit armed robbery, an armed robbery
9 conviction from 1993. He received a 10-year sentence and was
10 still serving that, within the 10 years.

11 A number of other convictions, a second degree
12 burglary from 2002; failure to stop for a blue light from
13 2002; possession of a stolen vehicle 2004. That appears to be
14 it, Your Honor.

15 MR. GROSE: And just for the record, so there's no
16 misunderstanding later, I don't think that the drug conviction
17 would be admissible under the Coif [ph] and Green line of
18 decisions, but I don't think we really need to get into that
19 since he's not testifying.

20 MS. WHITE: The State would just ask him if he had a
21 felony.

22 THE COURT: Whether or not he had a felony. Right.

23 The State could -- if you testify, you'd be under
24 oath, have to answer questions asked by the State. The State
25 could go over that record. They could go over the record and

1 call it to the jury's attention, those offenses.

2 As to the drug offense, they can simply ask whether
3 or not you had a felony conviction from 1990. They cannot
4 designate it as a drug offense because that's what you are on
5 trial for today.

6 If you took the stand and that evidence was
7 presented I would tell the jury that that evidence was
8 admissible for their consideration only as to your
9 believability. Not as to whether or not you committed this
10 crime but whether or not they would believe what you have to
11 say since you have a prior record. I could tell them they
12 could not use this against you as to evidence of this offense
13 but only as to whether to believe you or not.

14 Now, if you exercise your right to remain silent I
15 will tell the jury that that is what you've done, that you've
16 exercised your constitutional right to remain silent, that
17 they cannot hold that against you, that you have an absolute
18 right to remain silent.

19 You do not need to prove your innocence. The State
20 must prove your innocence beyond a reasonable doubt, and I
21 will tell the jury they could not factor into their
22 consideration or discuss in any way your exercise of your
23 constitutional right to remain silent.

24 Do you understand all that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Do you have any questions about it?

2 THE DEFENDANT: No, sir.

3 THE COURT: Are you going to testify or exercise
4 your right to remain silent?

5 THE DEFENDANT: Exercise my right.

6 THE COURT: Okay, to remain silent. All right. You
7 may be seated.

8 All right. The State's resting -- I mean, the
9 defense is resting.

10 MR. GROSE: The defense is resting, and we're
11 prepared to go into closing now, Your Honor.

12 THE COURT: All right. Let's take a short break so
13 the jury will be -- now, before we do that, any particular
14 requests for charge?

15 MR. GROSE: Mere presence.

16 THE COURT: Well, that's included. I'll have that
17 included.

18 MS. WHITE: Nothing from the State.

19 THE COURT: And no lesser -- what about, I don't
20 think any lesser included. He either distributed it or --
21 they didn't catch him in possession of anything.

22 MR. GROSE: What do you charge on reasonable doubt?
23 Is it the Manning or Victor vs --

24 THE COURT: Mine is a hybrid that Judge Alford had
25 came up with several years ago. I charge the reasonable doubt

1 has been defined as something that would cause a reasonable
2 person to hesitate to act.

3 And then I also charge the part of a Manning charge
4 that -- I don't have it in front of me but it deals with --
5 let me see.

6 MR. GROSE: Is it firmly convinced language?

7 THE COURT: I don't know if I actually used firmly
8 convinced. I think I do. I think I do, but let me make sure.

9 Yes. Proof beyond a reasonable doubt is proof that
10 leaves you firmly convinced of the defendant's guilt.

11 Then I go down if based on your consideration of the
12 evidence you are firmly convinced of his guilt you must find
13 him guilty. If on the other hand you think there's a real
14 possibility that he's not guilty you must give him the benefit
15 of that doubt.

16 MR. GROSE: Thank you, Your Honor.

17 THE COURT: All right. We'll take a short break.

18 (WHEREUPON, a brief recess was taken.)

19 THE COURT: The State ready proceed?

20 MS. WHITE: Yes, Your Honor.

21 THE COURT: The defense ready to proceed?

22 MR. GROSE: Yes, Your Honor.

23 THE COURT: And just for the record, the defense is
24 resting?

25 MR. GROSE: Yes, sir.

1 THE COURT: And I'll let you do that in front of the
2 jury.

3 MR. GROSE: I'm sorry?

4 THE COURT: I'll let you do that in front of the
5 jury, if you'd like, also.

6 MR. GROSE: Thank you, Your Honor.

7 THE COURT: And so the State will open and the
8 defense has closing arguments.

9 MR. GROSE: Thank you.

10 THE COURT: Bring in the jury.

11 (WHEREUPON, the jury enters the courtroom at
12 approximately 11:55 a.m.)

13 THE COURT: Mr. Grose?

14 MR. GROSE: Your Honor, Mr. Williams rests.

15 THE COURT: Okay. The State had rested, now the
16 defense has rested. So what you will hear now are the closing
17 arguments of the attorneys.

18 Earlier you heard what I call opening statements,
19 just outlining the case. Now the attorneys will be arguing
20 their position and telling you why your verdict should be a
21 certain verdict. After that, I will charge you the law that
22 you are to apply.

23 Counsel?

24 MS. WHITE: Thank you, Your Honor. May it please
25 the Court.

1 Just because you can't see something happen doesn't
2 mean it didn't happen. When I got up this morning there was
3 rain on my car. There was water.

4 Now, I didn't see it rain last night, but when I got
5 up my husband told me it rained last night. I knew there was
6 a chance it could rain last night. And when I got out, going
7 out to get in my car to come to work there was water on it.
8 So I know beyond a reasonable doubt that it rained last night.
9 Reasonable doubt doesn't mean all doubt because we could never
10 prove that. I'm just going to say that at the outset.

11 Now, in this case, the State has to prove beyond a
12 reasonable doubt that Barry Williams sold or distributed crack
13 cocaine, that the substance he sold or distributed was crack
14 cocaine and that he did it in Greenwood County, and we've done
15 all of that.

16 To prove the proximity charge we have to prove that
17 he did it within a half mile of a playground or school,
18 specifically, in this case, the Seaboard Recreation Center.
19 And you heard Officer McGee testify that he drove it
20 yesterday. It's well within a half mile. I believe he said
21 it was a little over two tenths of a mile. So that's what we
22 have to prove.

23 Now, how have we done that? You saw the video and
24 you heard the testimony from Derrick Nicholson that he bought
25 crack cocaine on January 24th, 2007 from Barry Williams.

1 You'll have the video back there. You all can watch it if you
2 want to. But you see on the video he goes in asking for
3 Barry, where's cousin Barry at.

4 He finds Barry sitting at a table. He testified
5 that he was sitting at a table cutting crack. You can't see
6 the crack on the video but you see him sitting at a table.
7 You hear Derrick ask for a 20. We know that a 20 from the
8 testimony that you've heard on the stand is what a rock of
9 crack cocaine is typically called on the street.

10 He asks Barry Williams for a 20. He doesn't ask
11 Oatha Mae Tucker. He doesn't ask the fellow in the Georgia
12 cap who comes in when he's leaving. He asks Barry Williams.
13 The bulk of that video when he's in the house is him talking
14 to Barry Williams.

15 But that's not all you hear. You also hear Barry
16 tell Derrick not to get messed up. I think we can infer from
17 that he's talking about selling the crack.

18 We also know that Officer McGee -- excuse me,
19 Detective McGee and Officer Griffin had searched both this
20 confidential informant and his driver before they left. We
21 know they didn't have crack on them when they left but they
22 did have that 20. We know when they got back he had crack.
23 He didn't have the 20.

24 Derrick testified that Barry handed it to him. He
25 put it in his side pocket. On the video you can hear, I got a

1 little side pocket I can put it in. He testified that he gave
2 it to Officer McGee when he got back to the meeting site.

3 And I know Mr. Grose is going to get up here and
4 he's going to tell you some bad things about Derrick
5 Nicholson, and he's right. He does have a record. And he did
6 have a possession with intent to distribute marijuana charge.
7 But you know what else? He got on that stand and he admitted
8 it. He looked you in the face. He didn't try to hide it. He
9 wasn't hiding anything.

10 He didn't try to hide from you all that he had a
11 record. He didn't try to hide that he had that charge
12 pending. And everything he told you on that stand was borne
13 out by that video. No discrepancies. It's up to you to judge
14 Mr. Nicholson's credibility that he was up-front with you all
15 for every question he was asked.

16 All this other stuff that Mr. Grose is going to
17 argue is just that, stuff. It doesn't matter that there
18 wasn't a sworn statement from the confidential informant. It
19 doesn't matter that certain things weren't noted in the
20 incident report. That has nothing to do with whether or not
21 Barry Williams sold crack. That's the only issue.

22 That's what I told you all at the beginning, that's
23 what I'm telling you now. Whether or not somebody wrote it
24 down in a report later, not the issue.

25 Now, Mr. Grose, I don't know what he's going to say.

1 He gets to go last. But I suspect he's going to try to say
2 well, Oatha Mae Tucker could have done it, or the fellow who
3 came in as Derrick Nicholson was leaving the house, he's the
4 one that could have given him the crack. But like I said, if
5 you watch that video you can tell the bulk of his interactions
6 in that house are with Barry Williams.

7 He didn't spend more than five seconds with Oatha
8 Mae. There's not a conversation about a drug deal, just
9 basically a hi, how are you, make sure you lock the door
10 behind me. And he didn't say one word to the guy who was
11 coming in as he was leaving. That guy was talking to Barry.
12 He never talked to the C. I.

13 Ladies and gentlemen, it's as clear as the rain that
14 was on my car this morning. When you watch that video and
15 when you hear Derrick Nicholson's testimony, when you hear the
16 testimony of the officers who searched him before and after
17 it's as clear as the rain on my car that Barry Williams is the
18 one who sold the crack in this case, and that he did it within
19 a half mile of Seaboard Recreation Center.

20 Ladies and gentlemen, like I said, this is my last
21 chance to talk to you so I'm just going to ask that when you
22 go back there you look at all the evidence, watch the video
23 again if you need to, and find Barry Williams guilty of
24 distribution of crack cocaine and distribution of crack within
25 a half mile of the Seaboard Recreation Center. Thank you.

1 MR. GROSE: May it please the Court?

2 THE COURT: Yes, sir.

3 MR. GROSE: You know, I really, really wish that we
4 were here to talk about the rain on the windshield of the
5 prosecutor's car. It would be a whole lot less serious than
6 what we're here about. We're here to talk about whether or
7 not the State of South Carolina has proved their case beyond a
8 reasonable doubt.

9 They come in here and tell you that this is about
10 Barry Williams selling crack cocaine and to ignore the things
11 that I bring to your attention. It's because they don't want
12 you to pay attention to those things because they know that it
13 doesn't help their case.

14 We're not talking about the rain on the window
15 shield of a car. We're talking about rights that people have
16 had in this Country for hundreds of years, that people have
17 gone to war and died for. And that's the right to be presumed
18 innocent and the right to have the government to prove a case
19 beyond a reasonable doubt, beyond a reasonable doubt.

20 The Judge is going to tell you about those two
21 things and he's going to tell you that reasonable doubt can be
22 defined a couple of ways. It can be defined as something that
23 causes somebody to hesitate to act. It's a doubt -- beyond a
24 reasonable doubt means that you are firmly convinced.

25 And after looking at those videos and hearing

1 everything that's been presented in this courtroom there's
2 plenty to hesitate over, hesitate at, hesitate to convict, and
3 there's plenty of things that say that you should not be
4 firmly convinced in the proof that they brought here today.

5 The Judge is going to tell you that if you have a
6 reasonable doubt that you are supposed to give Barry the
7 benefit of that doubt. That's where the statement the
8 benefit of the doubt comes from, is that people charged with a
9 crime get the benefit of the doubt if the State fails to prove
10 their case.

11 When I started I told you that this case was about
12 policy, observation, and documentation. And a lot of the
13 questions went to what the policies were, what the
14 observations were and what the documentation is. Because if
15 you'll remember, I put those policies in Mr. McGee's hand, and
16 what it stated in there on the front page of that policy is is
17 that while informants can be useful these operations can be
18 compromised by the misconduct of the informant.

19 And they also stated that the reasons for
20 observation and documentation in their policies is to preclude
21 questions about the quality and the integrity of the evidence.
22 Because they know, as Ms. White acknowledged, that they are
23 working with somebody who is not credible.

24 Oh, yeah, he got up there and gave all that stuff
25 because he knew I had that information, and he couldn't run

1 from it. There's a record that he's convicted of armed
2 robbery. There's a record that he was charged with possession
3 with intent to distribute marijuana.

4 And so that gives him credibility issues, that gives
5 him issues of motive to try to get those charges dismissed.
6 And that motive is still present here today because he told
7 you number one, that they dismissed those with leave, which
8 means they can bring them back if they are not satisfied with
9 what he's done for them.

10 And two, he told you that yesterday he was told that
11 he could be arrested and charged with contempt of court if he
12 didn't come here. Why would he not want to come here? Why
13 would there be no sworn statement? Why would he not want to
14 come here? Because he's got credibility problems and he's got
15 motive problems.

16 And the whole purpose of these procedures to
17 preclude questions about the quality and the integrity of the
18 evidence are designed to try to overcome those problems
19 because they know it's in their policy that these operations
20 can be compromised by misconduct of the informant. So they
21 know that when they come in here they are starting off with
22 problems that they've got to overcome, and they do that with
23 observation and they do that with documentation.

24 You're going to have the C. D. with the video, and
25 you come out here and have it played and look at it again.

1 They talked about keeping him under surveillance, following
2 them where they were going but admitted they couldn't see what
3 was going on in the car.

4 The only documentation of what went on in that car
5 is that blank videotape coming and going and the shuffling
6 that you hear. What's going on? I mean, who knows. They
7 told you that they weren't in the house. They can't observe
8 what was in the house. The policy is to have the video to
9 observe and document so that you can see the hand-to-hand
10 transaction, which you never see on that tape.

11 You can look at it over and over again. You think
12 if they had a hand-to-hand transaction on videotape they would
13 come up with a picture like that, that doesn't show anything,
14 doesn't show what we are here about, doesn't show anybody
15 distributing crack cocaine?

16 What you see at the end of that tape, they talk
17 about the money. They talk about the money, giving him the
18 20. The only money you ever see on that tape is that guy
19 walking in at the end, not Barry Williams, saying I gave him a
20 20. I gave him a 20.

21 You know, they can say all they want about how it
22 was wired up or how it's not wired up. Why would you not tell
23 somebody that it's on video to get it on video? That just
24 doesn't make any sense, because that's how they observe when
25 they are not there and that's how they document it.

1 There's four reasons why there's reasonable doubt in
2 this case. Number one, you got credibility problems with the
3 informant. He's been convicted of armed robbery, a crime of
4 dishonesty, stealing, and he's charged with another crime,
5 intending to distribute marijuana in a school zone.

6 He has a motive. The motive is to get that
7 marijuana charge dismissed. You never see the transaction on
8 the videotape and you see somebody else on that tape who's
9 more likely the person who sold the drugs.

10 And they can talk about what you see, but remember,
11 Derrick Nicholson is a deceitful man, and there's no limit to
12 what he can be able to pull off.

13 The burden is always on the State, and those
14 policies and procedures are important because when they start
15 off with problems, credibility and motive problems in the
16 case, this is how they try to overcome it, and they didn't do
17 that. They didn't do that.

18 The issue is not whether they come in here and say
19 Barry Williams sold crack cocaine, because saying something
20 doesn't make it true. The issue is is whether they came in
21 here and proved it, and they didn't do that. And we ask that
22 you find Barry Williams not guilty.

23 THE COURT: Members of the jury panel, I appreciate
24 the attention you've given to me, and the witnesses, and
25 counsel. Now I'm going to ask you to give me your attention

1 for a few more minutes while I charge you the law which you
2 are to apply to the facts as you determine the facts to be in
3 this case.

4 As you know, Mr. Williams is charged with
5 distribution of crack cocaine; and also a second offense, a
6 separate offense established by our legislature of
7 distribution of crack cocaine within one half mile of a
8 public park.

9 The fact that Mr. Williams has been arrested, the
10 fact that he has been indicted, the fact that he is on trial
11 is not evidence. That's just the way our system works. An
12 individual is arrested when the State believes they have
13 committed an offense but it is up to the State to prove that
14 to you beyond a reasonable doubt. It does not create any
15 presumption of guilt or any inference of guilt simply because
16 he has been charged.

17 The indictments you will have with you in the jury
18 room, and I'll tell you, Mr. Foreman, later about how to
19 enroll the unanimous verdict of the jury, are not evidence.
20 They are simply the charging papers by way of which this case
21 is processed through our court system. So do not consider
22 them as evidence. They are formal documents.

23 Mr. Williams has entered a plea of not guilty to
24 these charges. He is presumed innocent of the charges.
25 Anyone charged with any offense in our system is presumed

1 innocent of that charge unless the State can prove that
2 person's guilt beyond a reasonable doubt.

3 This presumption of innocence is a substantial
4 right. It is not a mere legal theory or mere legal phrase.
5 It is a substantial right which inures to and attaches to the
6 benefit of anyone arrested and charged in our system.

7 When an individual is arrested -- here, that, of
8 course, is Mr. Williams, the presumption of innocence
9 attaches. It remains with him as his case is processed
10 through our court system. It remains with him as he sits at
11 the counsel table now.

12 The presumption of innocence in his favor is removed
13 if and when, and only if and when you as the trial jury in
14 this case determine that the State has proven his guilt beyond
15 a reasonable doubt.

16 Now, the State does not have to prove his guilt
17 beyond all and beyond every doubt, but beyond a reasonable
18 doubt. Our courts have defined a reasonable doubt as the kind
19 of doubt that would cause a reasonable person to hesitate to
20 act. Proof beyond reasonable doubt is proof that leaves you
21 firmly convinced of an individual's guilt.

22 There are very few things in our world that we can
23 know with absolute certainty and absolute certainty is not
24 required by our law in a criminal case. If based upon your
25 consideration of the evidence you are firmly convinced that

1 Mr. Williams is guilty of one or both of these offenses you
2 must find him guilty.

3 If on the other hand you think there's a real
4 possibility that he is not guilty you must give him the
5 benefit of that doubt and find him not guilty. He is entitled
6 to the benefit of any reasonable doubt as to any issue that
7 you may have in the case.

8 Now, the fact that there are two indictments is not
9 evidence either. They are just separate charges that our
10 legislature has allowed the State to bring.

11 The indictments are to be examined separately. That
12 is, to State has to prove what it alleges as to each. Your
13 verdicts do not have to be the same as to each with one
14 exception. If you find Mr. Williams not guilty of
15 distribution of crack cocaine then, of course, you could not
16 find him guilty of having done that within the proximity of
17 the Seaboard Park. But you could find him guilty of the
18 distribution of crack cocaine, and if the facts and the law
19 convince you, not guilty of what we call the proximity charge,
20 the offense which is alleged to have occurred within one half
21 mile of Seaboard Park.

22 I remind you I am the sole judge of the law in this
23 case and you must take, accept and apply the law as I charge
24 it, and this is true even if you think I charge the law in
25 error or even if you think the law should be different.

1 You are not to infer from anything I have said or
2 done or anything I now say or do as indicating an opinion of
3 mine on the facts. Our law does not allow a trial judge to
4 formulate or express to a jury any opinion on the facts. That
5 is solely your job. It is solely up to you as the trial jury
6 in this case to examine the evidence, give to the evidence the
7 effect, the value, the weight and the truth you believe it
8 should have.

9 In doing this you may believe one witness as opposed
10 to several, several witnesses as opposed to one. You may
11 believe all, part or none of a witness's testimony.

12 Use your common sense, your sense of logic, your
13 sense of reason, your experiences in life as you analyze the
14 evidence. As judges of the facts, you must determine the
15 credibility, that is the believability of the witnesses who
16 have testified.

17 In assessing believability use those things that I
18 have just mentioned. Use those things that you in your
19 day-to-day life find as indicating truthfulness, and you can
20 use certain evaluators, how a witness acts on the stand; are
21 they hesitant or straightforward; is their testimony
22 consistent or inconsistent?

23 You can consider the opportunity a witness has to
24 know those things about which the witness testified. You can
25 consider any bias or prejudice a witness may have. That is

1 whether a witness would wish to help or hurt one side to the
2 other. And where the witness has an existing criminal record
3 you can examine that record in determining what degree of
4 believability, if any, to give to a testifying witness.

5 In this case, we had an individual who testified
6 about chemical analysis. Generally, an individual can only
7 testify about facts they've observed, something they observed
8 with one of their five senses. That's usually something
9 that's been seen or heard.

10 However, where an individual has knowledge, skill,
11 experience, training and expertise in a certain area they are
12 allowed to take facts and from those facts give to a jury an
13 opinion about what those facts mean.

14 This evidence is allowed in for your consideration.
15 It is not binding on you. You may accept or reject in whole
16 or in part the testimony of the expert, the chemical
17 analyst -- the chemist.

18 In assessing what weight, if any, to give to the
19 expert, the chemist's testimony, you use those same evaluators
20 that I mentioned for looking at any witness. They are, of
21 course, a witness.

22 But in addition, as to the chemist, you can look at
23 the chemist's qualifications. That is, the ability to give
24 and render an opinion such as they rendered. And also you can
25 take a look at and consider the reason -- look at the

1 qualifications and determine what weight to give their
2 testimony, and you can look at the reasons they gave for
3 reaching the opinion they reached. And, again, you may reject
4 or accept the testimony of an expert.

5 Now, I charge you, instruct you and emphasize to you
6 the fact that Mr. Williams exercised his constitutional right
7 to remain silent cannot, must not and will not be used by you
8 in your deliberations. It cannot be considered by you in any
9 manner whatsoever.

10 Mr. Williams has a constitutional right to remain
11 silent. He cannot be penalized and it cannot mitigate against
12 him by his exercising that right. You are to draw no
13 conclusions whatsoever from the fact that he exercised his
14 right to remain silent.

15 You cannot discuss it in the jury room, you cannot
16 factor it into your own consideration. It cannot be used
17 against him in any way whatsoever. He is presumed innocent
18 and the State must prove his guilt beyond a reasonable doubt
19 before you can convict him.

20 Mr. Williams is charged with distribution of crack
21 cocaine. This, as I said, is an offense that our legislature
22 has enacted and made into the law. In order to find
23 Mr. Williams guilty of this you must be convinced by the
24 State's proof beyond a reasonable doubt that he distributed
25 crack cocaine.

1 They must prove that the substance was, in fact,
2 crack cocaine. They must prove beyond a reasonable doubt that
3 Mr. Williams distributed it.

4 Distribute means to deliver or to actually
5 constructively transfer or attempt to transfer a drug.
6 Deliver means to actually, constructively attempt or transfer
7 a drug.

8 A transfer can involve an exchange for money.
9 However, there does not have to be anything given in exchange
10 for the drugs to transfer a complete distribution.

11 Now, in addition, there is another legislative --
12 another law passed by legislature that makes it a crime to
13 distribute certain controlled substances, including crack
14 cocaine, within one half mile of a public park.

15 In order to prove or to find the defendant,
16 Mr. Williams, guilty of this offense you must be satisfied
17 that the State has proven beyond a reasonable doubt that
18 Mr. Williams distributed or sold crack cocaine within one half
19 mile of the grounds of a public playground or park. Here that
20 would be the Seaboard Recreational area.

21 Now, mere presence at the scene where a crime takes
22 place is not sufficient to prove the guilt of someone. A
23 defendant's presence where a crime is being committed or mere
24 association with individual s who commit crimes do not make
25 that defendant an accomplice or an aider or abetter of the

1 person committing the crime. The burden is on the State to
2 prove every element of the crime charged.

3 If you find after reviewing all the evidence that
4 the State has proven Mr. Williams was only present at the
5 scene of a crime then they have not proven beyond a reasonable
6 doubt -- and if they have not proven beyond any reasonable
7 doubt any other participation in the crime then you would find
8 Mr. Williams not guilty. The law is that proof of someone
9 being at the scene of the crime alone is not sufficient to
10 find someone guilty of that offense.

11 Now, your verdict must be unanimous. All 12 jurors
12 must agree. Once all 12 have agreed the foreman will write
13 the verdict.

14 And I'll tell you more about that in a minute,
15 Mr. White.

16 If you have any questions while you are
17 deliberating, please knock on the door and let the bailiff
18 know, and write the question down and send it out.

19 I will consult with the attorneys. After that, I
20 will respond. It may be that I can write an answer on the
21 note itself, it may be that I'll have to bring you back here
22 in the courtroom and answer your question. We can have
23 testimony replayed or read back to you if you have some
24 question about testimony.

25 In South Carolina we do not send a written charge of

1 the law in with the jury but if you wish for me to go over any
2 part or all of the verdict -- I mean, any part or all of the
3 charge just let me know and I'll bring you back here in the
4 courtroom and recharge any part or all of the law.

5 I'm not going to send in any video equipment but if
6 you wish to have the video and audio replayed ask me and I'll
7 bring you back in and we'll have it done here in the
8 courtroom.

9 We'll be providing lunch. You can work during lunch
10 or you can break during lunch. That's your decision.
11 However, if you determine you want to take a break all 12 of
12 you should take a break. That is, either you're all working
13 or you're all on break. We can't have some of you working and
14 some of you not working because your verdict must be
15 unanimous. All 12 jurors must agree on your verdict.

16 When you've each reached a verdict, knock on the
17 door, tell the bailiff. I may be doing some other work but
18 I'll send for you as soon as possible and bring you back in
19 and receive the verdict here in open court.

20 When you first go into the jury room do not start
21 deliberating, do not get too comfortable because I may have to
22 send for you. I have to go over with the attorneys my charge.
23 If I have made an error I'll have to bring you back in and
24 correct it. If not, we will send into the jury room the
25 exhibits and the indictments and the bailiff will tell you to

1 start deliberating at that time.

2 And, as I said, when you've reached a verdict, knock
3 on the door, let me know, and we will send for you as promptly
4 as we can.

5 Now, on the indictments, on this bottom left-hand
6 corner you will see the word verdict, and there are five lines
7 thereunder. The bottom line is for you to sign, Mr. Foreman,
8 and place the day, today, I believe is the 23rd, under your
9 signature. On one of the other four lines you will write the
10 unanimous verdict of the jury.

11 If the State has failed to prove to the jury
12 Mr. Williams' guilt beyond a reasonable doubt as to an
13 indictment your verdict would be the two words not guilty.

14 If, on the other hand, the State has proven
15 Mr. Williams guilty of one or both of the indictments you
16 would write on one of those lines the one word guilty.

17 Now, I'm going to let you go into the jury room.
18 Don't start deliberating or get too comfortable yet.

19 (WHEREUPON, the jury leaves the courtroom at
20 approximately 12:25 p.m.)

21 THE COURT: Any exceptions or additions from the
22 State?

23 MS. WHITE: Not from the State, Your Honor.

24 THE COURT: Any from the defense?

25 MR. GROSE: No, sir.

1 THE COURT: If you'll check the exhibits and the
2 indictments we'll send them in and tell them to start
3 deliberating. We'll be at ease for a little bit.

4 (WHEREUPON, the trial of this case was in recess
5 while awaiting a verdict from the jury.)

6 THE COURT: We have two questions -- three questions
7 -- or two questions and a request from the jury. I've gone
8 over in-chambers with counsel the questions are, has
9 Mr. Williams ever been in trouble with the law before; second,
10 is the place where the crime allegedly took place
11 Mr. Williams' home.

12 Of course, I have to answer both of those by telling
13 them they have to rely on the evidence that's in the record.

14 The third is a request to see the video again, and
15 it indicates just the part at the home, at the house.

16 So we had that queued up, I understand. And it's
17 functional and operational. All right, we'll give it a shot.

18 Let me do it this way. Anything from the State
19 before I bring them in?

20 MS. WHITE: No, sir.

21 THE COURT: Yes, sir?

22 MR. GROSE: With regard to question number one, I
23 mean, there's nothing in the record about that, and wouldn't
24 it be improper for that to even enter into their deliberations
25 based on the posture of the case?

1 THE COURT: Well, it would be, but if I tell them
2 that they've got to rely on the evidence then -- I mean, I
3 can't tell them he hadn't been in trouble.

4 MR. GROSE: Right.

5 THE COURT: And I can't tell them he has been in
6 trouble. I can tell them whether or not he's been in trouble
7 is not any consideration.

8 MR. GROSE: I would prefer that you tell them that
9 that's a matter that should not enter into their
10 deliberations, I think.

11 THE COURT: Any objection?

12 MS. WHITE: No, sir.

13 MR. GROSE: Can I have just a second?

14 THE COURT: Sure.

15 [PAUSE]

16 MR. GROSE: I'm concerned that it's already entered
17 their deliberations, and I don't want them back there
18 speculating about that. So I think that that would be the
19 best way to handle it.

20 THE COURT: That what? Here's what I'm going to
21 say, not in evidence; not an issue; not a factor to be -- not
22 a factor in your deliberations.

23 MR. GROSE: That little sequence of things, that's
24 good.

25 THE COURT: Okay. Bring in the jury.

1 (WHEREUPON, the jury enters the courtroom at
2 approximately 12:45 p.m.)

3 THE COURT: Members of the jury, we have -- starting
4 at the third comment, we will view the video again. And I
5 understand you just want the part at the house, not all the
6 rest.

7 You've also asked has Mr. Williams ever been in
8 trouble with the law before, and also you've asked is the
9 place where the crime allegedly took place Mr. Williams' home.

10 As to both of these, there's nothing in the record,
11 no evidence as to either of those matters. Neither of those
12 matters are an issue in this case, and neither should be
13 factored or could be factored -- or not to be factored into
14 your deliberations in any way whatsoever. They are not
15 relevant to the issue before you. All right.

16 (WHEREUPON, the video was played for the jury.)

17 THE COURT: Stop it just a minute.

18 Yes, sir?

19 THE FOREMAN: Do you want to watch it again?

20 (Jurors answered in the affirmative)

21 THE FOREMAN: Let's watch it again.

22 (WHEREUPON, State's Exhibit No. 2 was played for the
23 jury.)

24 THE COURT: All right. If you need to watch it
25 again let me know. But I'll let you return to the jury room

1 at this time.

2 (WHEREUPON, the jury leaves the courtroom at
3 approximately 12:55 p.m.)

4 THE COURT: Anything from the State?

5 MS. WHITE: Your Honor, just in regard to the second
6 question, when you instructed the jury so there was no
7 evidence in the record and regarding whether or not he lived
8 at , there actually was testimony from the record
9 from Derrick Nicholson that he went to Barry Williams' house.

10 THE COURT: All right. Anything from the --

11 MR. GROSE: I don't have anything, Your Honor.

12 THE COURT: Well, I don't know how to correct it.
13 I'll probably just have to leave it like it is. I had
14 forgotten that they had that as his address. What do you
15 suggest?

16 MS. WHITE: I hate to bring them back out for that
17 one minor bit. So I just wanted to bring that to the Court's
18 attention.

19 THE COURT: Well, thank you. My error.

20 All right. We'll be at ease.

21 (WHEREUPON, the trial of this case was in recess
22 while awaiting a verdict from the jury.)

23 THE COURT: I understand the jury has reached a
24 verdict.

25 Bring them in.

1 (WHEREUPON, the jury enters the courtroom at
2 approximately 1:34 p.m.)

3 THE COURT: Mr. Foreman, I understand the jury has
4 reached a verdict?

5 THE FOREMAN: Yes.

6 THE COURT: If you'll hand them up to the bailiff,
7 and hand them up to me.

8 Madam Clerk.

9 THE CLERK: The State of South Carolina, County of
10 Greenwood, in the Court of General Sessions, The State of
11 South Carolina vs. Barry Dwayne Williams. We, the jury,
12 unanimously find Barry Dwayne Williams guilty in distributing
13 -- distribution of crack cocaine. We, the jury, unanimously
14 find Barry Dwayne Williams guilty of distributing crack
15 cocaine within a school or playground.

16 Ladies and gentlemen of the jury, if this is still
17 your verdict will you please signify by raising your right
18 hand.

19 All jurors have raised their right hand.

20 THE COURT: Anything from the State before the jury
21 is dismissed?

22 MS. WHITE: No, Your Honor.

23 THE COURT: Anything?

24 MR. GROSE: I'd request the jury be poled, Your
25 Honor.

1 THE COURT: Members of the jury, the clerk is going
2 to ask you a question, and when each of you are questioned
3 she'll tell you how -- not what the answer is, because the
4 answer is yours, but what the choices are as far as the
5 answers.

6 (WHEREUPON, the jury was poled, all answering in the
7 affirmative.)

8 THE COURT: Anything else?

9 MR. GROSE: Not at this time.

10 THE COURT: Members of jury panel, thank you for
11 your help. This concludes -- as I told you, this was going to
12 be a short week. We're going to do matters that we don't need
13 a jury for today and for awhile in the morning. Then, as I
14 think I told you, I have to be in Charleston in the middle of
15 the afternoon for a meeting.

16 So we're going to excuse you. Thank you for your
17 help, and you'll be mailed a check. If any of you need an
18 excuse for something, a statement -- oh, she's got them.
19 She's going to hand them out as you leave. Thank you an awful
20 lot. Turn in your badge, and she'll give you a check as you
21 leave.

22 (WHEREUPON, the jury was excused.)

23 THE COURT: The jury has been dismissed. Anything
24 from the State?

25 MS. WHITE: No, Your Honor.

1 THE COURT: Anything from the defense?

2 MR. GROSE: Your Honor, at this time, we would renew
3 our directed verdict motions, and we would move for a new
4 trial based on the grounds that the State failed to present
5 substantial evidence that a jury could convict beyond a
6 reasonable doubt.

7 THE COURT: That motion is denied. I think there
8 was ample evidence. This was a hand-to-hand transaction, and
9 the question basically boiled down to whether they believed
10 the C. I. or not.

11 Now, what offense is this?

12 MS. WHITE: Your Honor, this is a second offense.

13 THE COURT: Second offense.

14 All right. Bring Mr. Williams around for
15 sentencing.

16 MS. WHITE: And he does have an additional record
17 that I would like to read at the appropriate time.

18 THE COURT: Yeah, I'm going to let you go over it.
19 I heard a good bit of it.

20 Do you have sentencing sheets prepared?

21 THE CLERK: Yes, sir.

22 MS. WHITE: The clerk has them.

23 THE COURT: Anything else from the State? Let me
24 hear his record.

25 MS. WHITE: Your Honor, his record begins in 1984

1 with a fraudulent check conviction; 1985, false information to
2 police officer, received a fine; driving under suspension,
3 received 6 months suspended to a year probation and a fine;
4 failed to stop for law enforcement vehicle, a year probation
5 and a fine.

6 In 1988, he has a grand larceny and an auto
7 breaking, received a Y. O. A. suspended to probation. He also
8 has a petit larceny and several counts of auto breaking that
9 were run concurrent with that sentence. Also in 1988 a
10 C. P. U., received a 6-month sentence. It looks like it's
11 suspended on a fine, a 400-dollar fine.

12 In 1990, distribution of cocaine, 5 years suspended
13 to 4 years -- it looks like 6 years suspended to 4 years and 5
14 years probation, from looking at the record; a failure to stop
15 for law enforcement vehicle, received a 3-year sentence.
16 1990, grand larceny and use of vehicle without permission,
17 received a 2-year sentence. It looks like all of that was ran
18 concurrent.

19 In 1991, failure to return a rent videotape, 15 days
20 suspended upon restitution. 1993, conspiracy to commit -- or
21 excuse me, criminal conspiracy, received a 7-year sentence;
22 also an armed robbery, received a 10-year sentence. Those
23 were concurrent with each other.

24 In 2000, a purse snatching, received a 60-day
25 sentence. In 2001, driving under suspension, 400 dollars or

1 30 days; open container, 225 dollars or 30 days; another
2 driving under suspension and open container. All of that was
3 concurrent, it looks like.

4 In 2002, petit larceny; 2 counts of petit larceny; 2
5 counts of malicious injury to property; an open container and
6 D. U. S., received a 60-day sentence. The malicious injury,
7 30-day sentence consecutive, petit larceny another 30 days
8 consecutive. 2002, 2nd degree burglary, received an 18-month
9 sentence; driving under suspension, 60 days; and failed to
10 stop for blue light, 18 months.

11 In 2004, possession of stolen vehicle, received a
12 1-year sentence. In 2005, received 5 days for a miscellaneous
13 traffic offense, 30 days for false information to police, 90
14 days consecutive for driving under suspension, 30 days
15 consecutive for operating uninsured motor vehicle.

16 Two counts of contempt of court in 2005, served 30
17 days consecutive on each. Entering premises after warning in
18 2005; another failed to comply with direction of a police
19 officer in 2005. And that brings -- excuse me, an entering
20 premises after warning. It looks like another one in 2005.
21 And that brings us to today.

22 THE COURT: All right, Mr. Grose.

23 MR. GROSE: Your Honor, I don't have a whole lot to
24 add. I just would ask that you take into account that this is
25 an 85-percent service of any sentence and, you know, ask that

1 you impose a sentence that's merciful under the circumstances.

2 THE COURT: Mr. Williams, anything you want to say?

3 THE DEFENDANT: No, sir.

4 THE COURT: It's hard to be merciful to somebody
5 with that record. So the sentence -- these will run
6 concurrent, 30 years on the distribution, 15 on the proximity.
7 They are to run concurrent.

8 MS. WHITE: Your Honor, there might be a mistake. I
9 believe the distribution only carries 25.

10 THE COURT: Second offense I've got 5 to 30 years,
11 effective June 7th, 2005. I don't want to give him more than
12 the law allows, but you got something different?

13 MR. GROSE: I'll check it again, Your Honor, and if
14 we do we'll let you know.

15 THE COURT: All right. The old -- the prior to June
16 7th, 2005 it was 25 years.

17 So, Mr. Williams, you understand that?

18 THE DEFENDANT: No. Could you repeat that?

19 THE COURT: A 30-year sentence, 15 on the proximity.
20 They are to run concurrent. Thank you.

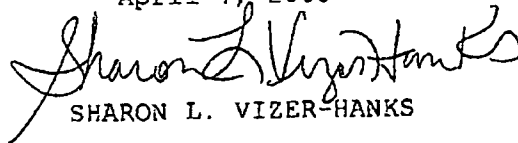
21 (WHEREUPON, the trial was concluded.)
22
23
24
25

C E R T I F I C A T E

I, Sharon L. Vizer-Hanks, Official Court Reporter
for the 8th Judicial Circuit of the State of South Carolina,
do hereby certify that the foregoing is a true, accurate and
complete transcript of record of all the proceedings had and
the evidence introduced in the trial of the captioned case in
Circuit Court on the 22nd and 23rd day of January 2008.

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

April 7, 2008


SHARON L. VIZER-HANKS

CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BARRY DEWAYNE WILLIAMS,

APPELLANT

FINAL BRIEF OF APPELLANT

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
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ATTORNEY FOR APPELLANT.

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STATEMENT OF ISSUES ON APPEAL

Was the evidence presented at trial sufficient to survive Williams's motion for a directed verdict where the "hand-to-hand" transaction was not recorded on the videotape, and the jury was left to rely on the word of a convicted armed robber who was working off his own charges?

STATEMENT OF THE CASE

Barry Dwayne Williams was indicted by the Greenwood County Grand Jury of Distribution of Crack Cocaine (07-GS-24-926), and Distribution within Proximity of a Park or Playground (07-GS-24-927). He was tried on January 22nd and 23rd, 2008 before the Honorable John C. Hayes and a jury. He was represented by Charles Grose, Esquire. He was convicted, and sentenced to thirty (30) years for the distribution charge, and fifteen (15) for the proximity count. The sentences were ordered concurrent.

This appeal timely follows.

ARGUMENT

The evidence presented at trial was not sufficient to survive Williams's motion for a directed verdict where the "hand-to-hand" transaction was not recorded on the videotape, and the jury was left to rely on the word of a convicted armed robber who was working off his own charges.

Williams was set up by his cousin. (ROA. page 29, lines 19-20). His cousin, a snitch working off his own charges, and previously convicted of an armed robbery (ROA. page 32, lines 24-25), wore a "wire" as he visited Williams's house. Other people were present at the house (ROA. page 29, lines 3-6; page 35, lines 12-16), and the videotape did not capture the image of Williams selling any drugs to the snitch. (ROA. page 35, lines 7-9). Another, unidentified person was at the house. He was holding a "wad of money" and said "I gave him a 20 instead of a 10" (ROA. page 35, lines 12-18). This apparently, was caught on the tape, but the identity of that person was never disclosed at trial. Instead, the confidential informant (who was not so confidential), testified that Williams was the person who gave him the requested crack cocaine. (ROA. page 28, line 22 to page 29, line 1). The C.I. had his charges dismissed entirely. (ROA. page 33, lines 13-24). He had been charged with possession with intent to distribute marijuana, and an associated proximity charge. (ROA. page 33, lines 9-12).

Williams is serving thirty (30) years for selling .2 grams of crack (including the packaging) to a convicted felon. (ROA. page 10, line 23 to page 11, line 6).

Defense counsel made a motion for a directed verdict based on the lack of evidence upon which a jury could convict Williams beyond a reasonable doubt. (ROA. page 48, lines 9-14). The judge denied the motion. (ROA. page 48, lines 15-20). Williams did not offer

any evidence at trial. Counsel renewed the directed verdict motion after the jury's verdict. (ROA. page 79, lines 2-6). It was again denied. (ROA. page 79, lines 7-10). This was error. The judge should have granted Williams' motion for a directed verdict, and Williams should have his convictions reversed.

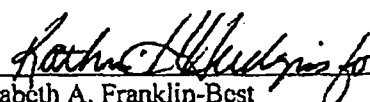
A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. State v. McKnight, 352 S.C. 635, 642, 576 S.E.2d 168, 171, *cert. denied*; State v. Rothschild, 351 S.C. 238, 243, 569 S.E.2d 346, 348 (2002). The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. State v. Mitchell, 341 S.C. 404, 409, 535 S.E.2d 126, 127. "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001). *See also State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004).

In this case, the evidence presented by the State did not rise above the level of mere suspicion. The snitch was entirely unreliable since he was both, an armed robber, and working off his own charges. If he had not been successful in this exchange, *he* would be in prison for *his* crimes. Given the inconclusiveness of the videotape, and the C.I.'s abominable criminal record, the judge should have granted the motion for a directed verdict. For these reasons, Williams's convictions should not stand. Respectfully, Williams asks this Court to reverse his convictions.

CONCLUSION

For the preceding reasons, Williams respectfully asks this Court to reverse his convictions.

Respectfully submitted,

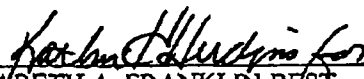

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT.

This 2nd day of April, 2009.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."


ELIZABETH A. FRANKLIN-BEST
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BARRY DEWAYNE WILLIAMS,

APPELLANT

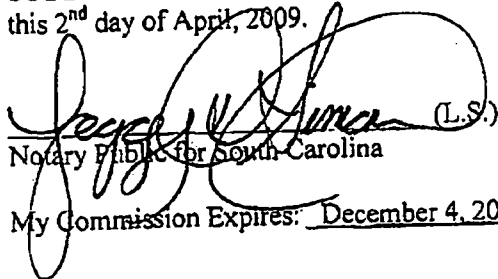
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Julie M. Thames, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 2nd day of April, 2009.


Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 2nd day of April, 2009.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Greenwood County
John C. Hayes, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

BARRY DWAYNE WILLIAMS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge properly deny Williams' motion for a directed verdict and send the case to the jury when there was evidence that Williams distributed the drugs and it was up to the jury to weigh that evidence?

STATEMENT OF THE CASE

Barry Dwayne Williams was indicted during the June term 2007 of the Greenwood County Grand Jury for distribution of crack cocaine (2007-GS-24-926) and distribution of crack cocaine within proximity of a school or park (2007-GS-24-927). Williams proceeded to trial by jury before the Honorable John C. Hayes, III, and was convicted as indicted. He was represented by Charles Grose, Esquire. Judge Hayes sentenced Williams to thirty (30) years for the distribution charge, and to fifteen (15) years, concurrent, for the proximity charge.

This appeal follows.

STATEMENT OF FACTS

Greenwood City Police Officer Steve McGee testified that on January 24, 2007, he planned to make an undercover narcotics buy from Williams using a confidential informant (C.I.). The C.I. had some charges pending and was willing to make a buy for law enforcement in order to gain favor on his own charges. McGee met with the confidential informant and searched the C.I. and the vehicle to be used in the buy to ensure that the C.I. did not bring any illegal substances with him. The C.I. was wired with audio and video recording devices and was given \$20. The C.I.'s girlfriend drove because the C.I. did not have a driver's license. She was also searched. The C.I. and his girlfriend drove to a predetermined location. The C.I. went inside, made the purchase, got back in the vehicle, and then he and the girlfriend drove to a predesignated location to meet McGee. The C.I. gave McGee the drugs. McGee field tested the drugs, and then placed them in a tamper resistant evidence bag. He also drove the distance from the location where the drugs were purchased to the Seaboard Recreation Center and logged the distance at just over two tenths of a mile. (R.pp.3-9; pp.14-18).

The confidential informant testified that he had been "busted with some marijuana and alcohol" and was assisting the police department in order to avoid getting convicted of those charges. He testified essentially the same as Officer McGee; that he was searched, was given money, was wired up, and then went to Williams' residence and purchased crack cocaine. The C.I. testified he did not have a license so his girlfriend drove after she was also searched by law enforcement. He testified that when he got to the residence, he was let in and Williams was sitting at the table cutting up the crack cocaine. He asked for a 20 hard, which is a \$20 rock of crack cocaine. When Williams sold it to the C.I., it was wrapped up

in a little plastic bag. The C.I. then drove to the agreed upon location and gave the drugs to Officer McGee. The C.I. testified that he knew he was wired for audio but did not know he was also wired for video and did not know the seatbelt was covering the camera during the time that he was in the vehicle. (R.pp.26-36).

The drugs that were purchased by the C.I. were tested by Lawrence Zivkovich, a chemical analyst from SLED (South Carolina Law Enforcement Division) and found to be crack cocaine weighing 0.12 grams. (R.pp.41-45).

ARGUMENT

The trial judge properly denied Williams' motion for a directed verdict and sent the case to the jury when there was evidence that Williams distributed the drugs and it was up to the jury to weigh that evidence.

The Respondent submits that evidence was presented that Williams sold crack cocaine to the confidential informant. Two law enforcement officers testified about the buy; about how it was set up; about how the informant was wired for sound and video; and about how the informant brought crack cocaine back to them after being under constant surveillance during the buy. The confidential informant testified that he made the purchase from Williams using money provided by the officers and that he gave the crack cocaine to the officers immediately upon returning from the buy. Evidence existed to support the charge; it was for the jury to weigh that evidence. Thus, the Respondent submits the trial judge correctly sent the case to the jury.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). Furthermore, a defendant is entitled to a directed verdict at the trial level when the State does not produce evidence of the offense charged; however, if the State presents *any* evidence at trial which reasonably tends to prove the defendant's guilt, the case must go to the jury. State v. Gentry, 363 S.C. 93, 103, 610 S.E.2d 494, 500 (2005); State v. Ezell, 321 S.C. 421, 468 S.E.2d 679 (Ct. App.1996) (emphasis added).

In deciding whether the trial court erred in failing to direct a verdict in favor of a defendant in a criminal case, the appellate court must view the testimony in the light most favorable to the State. State v. Massey, 267 S.C. 432, 229 S.E.2d 332 (1976). If there is any

direct or substantial circumstantial evidence tending to prove the guilt of the accused, or from which guilt may be fairly and logically deduced, the case should be submitted to the jury.

Sellers v. State, 362 S.C. 182, 607 S.E.2d 82 (2005).

There was evidence presented at trial that reasonably tended to prove Williams distributed crack cocaine to the C.I. The confidential informant testified that he gave the money to Williams and that Williams gave him the rock of crack. (R.pp.28-29). The C.I. was wired for sound and video and while the video did not capture the hand to hand exchange of the drugs, it did show Williams in the residence. The C.I. testified that he asked for a "20" and told Williams he had a side pocket he could put the drugs in. (R.pp.6; p.29). Officer McGee testified that he and Officer Griffin searched the C.I., the C.I.'s girlfriend and the vehicle they used. They did not find anything during the searches. (R.pp.6-7; pp.23-24). They sent the C.I. to Williams' residence. The C.I. remained under constant surveillance by law enforcement. (R.p.6). The C.I. then brought the substance to Officer McGee and the substance was tested and found to be crack cocaine. (R.p.8; pp.28-29; p.45).

Clearly, there was evidence that Williams distributed the drugs. Williams' argument is merely that the evidence was not enough, that the jury should have found the C.I. not credible because he was working off charges of his own. Williams argues the evidence did not rise above a mere suspicion. However, the fact that the C.I. was attempting to gain favor on his own charges was brought out in front of the jury and the judge instructed the jury that they were to judge the credibility of the witnesses and that they could consider bias or prejudice of the witnesses. They were thoroughly instructed that they were to give the evidence the weight they felt it deserved. (R.pp.26-27; pp.33-34; pp.66-67). They obviously found the evidence credible as they returned with a verdict of guilty.

The Respondent submits the trial judge properly denied the motion for a directed verdict when evidence was presented that Williams sold a rock of crack cocaine to the confidential informant and that the case was properly submitted to the jury.

CONCLUSION

Based on the foregoing, Respondent respectfully submits that Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

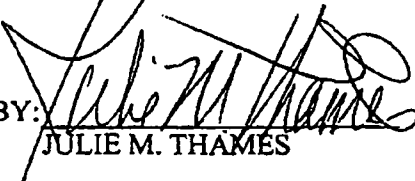
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Chief Deputy Attorney General

SALLEY W. ELLIOTT
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Assistant Attorney General

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March 26, 2009.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenwood County
John C. Hayes, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

BARRY DWAYNE WILLIAMS,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

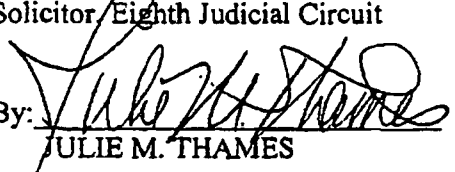
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March 26, 2009.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County
John C. Hayes, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

BARRY DWAYNE WILLIAMS,

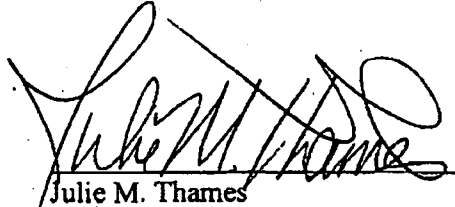
Appellant.

PROOF OF SERVICE

I, Julie M. Thames, certify that I have served the Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Elizabeth A. Franklin-Best, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211.

I further certify that all parties required by Rule to be served have been served.

This 26th day of March, 2009.



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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.

Barry Dewayne Williams,

Appellant.

Appeal From Greenwood County
John C. Hayes, III, Circuit Court Judge

Unpublished Opinion No. 2010-UP-010
Submitted January 4, 2010- Filed January 21, 2010

AFFIRMED

Appellate Defender Elizabeth A. Franklin-Best, of
Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Salley W. Elliott,
Assistant Attorney General Julie M. Thames, all of

Columbia; and Solicitor Jerry W. Peace, of Greenwood, for Respondent.

PER CURIAM: Barry Dewayne Williams was convicted of distribution of crack cocaine and distribution of crack cocaine within proximity of a public playground or park. The trial court sentenced Williams to concurrent terms of thirty years on the distribution charge and fifteen years on the proximity charge. Williams appeals arguing the trial court erred in denying his motion for a directed verdict. We affirm pursuant to Rule 220(b), SCACR and the following authorities: State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) (in ruling on a motion for a directed verdict, a trial court is concerned with the existence or nonexistence of evidence, not its weight); State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001) (noting that, in regard to appellant's argument the State's case was based on unreliable evidence, in ruling on a directed verdict motion the trial court is concerned with the existence of evidence, not its weight); State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009) (on appeal from the trial court's denial of a motion for a directed verdict, an appellate court must view the evidence in the light most favorable to the State); State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002) (an appellate court may only reverse the trial court's denial of a motion for directed verdict if there is no evidence to support the trial court's ruling); State v. Gaines, 380 S.C. 23, 32, 667 S.E.2d 728, 733 (2008) (if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury).¹

AFFIRMED.

HUFF, A.C.J., GEATHERS, J., and CURETON, A.J., concur.

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

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of GREENWOOD)10 ~~CP-24~~ 00389South Carolina 29646)

Full name and prison number, if any, of applicant.)

v.)

APPLICATION FOR

POST-CONVICTION RELIEF

Barry Wayne Williams 5171034)

Name of Respondent)

2010 MAR 29 PM 3 48

8TH JUDGE
GREENWOOD, S.C.INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly, handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention Greenwood County (Court)
2. Name and location of Court which imposed sentence Greenwood County House
Greenwood, South Carolina 29646
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 07-GS-24-926
 - (b) 07-GS-24-927
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) January 23, 2008
 - (b) 30 years - Distribution
 - (c) 15 years - proximity sentence Run Concurrent

5. Check whether a finding of guilty was made

(a) after a plea of guilty _____

(b) after a plea of not guilty ✓ AFTER the plea of not guilty

(c) after a plea of nolo contendere _____

6. Did you appeal from the judgment of conviction or the imposition of sentence? YES

imposition of sentence

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Affirmed

ii. _____

iii. _____

(c) the date of each such result:

i. January 26, 2010 - Affirmed Date

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. NO precedential value

ii. _____

iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) WASN'T NO transaction of money OR Drugs during the Video

(b) Someone on the Video Had a wad of money saying he gave M2 A 20,

(c) Why And How Can the Drugs be two different weights

.2 grams AND 0.12 grams

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

- (a) WASNT NEVER ONCE A HAND-TO-HAND TRANSACTION SEEN
PERIOD AFTER THE JURY WATCHED THE VIDEO "3" TIMES
- (b) THE C.I. ADMITTED WASNT A TRANSACTION SEEN. ON THE VIDEO
GREENWOOD DETECTIVE STEVE MCGEE STATED THE CRACK WEIGHT TO BE .2 grams
- (c) SLED ANALYSIS STATED THE CRACK WEIGHT TO BE 0.12 grams. A BIG DIFFERENCE
THE CREDIBILITY OF THE C.I. AND HIS MOTIVE

11. Prior to this application have you filed with respect to this conviction

- (a) any petition in a State Court under South Carolina Law?

COURT OF APPEALS

- (b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

NO

- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)

- (d) any other petitions, motions or applications in this or any other Court?

NO

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

- (a) the specific nature thereof:

- i. the Appeal was Affirmed
- ii. _____
- iii. _____
- iv. _____

- (b) the name and location of the Court in which each was filed:

- i. Greenwood County Court
- ii. Court of Appeals Columbia South Carolina
- iii. _____
- iv. _____

- (c) the disposition thereof:

- i. Greenwood County - Denied the motion
- ii. Appellate Court - Affirmed
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. Denied - at trial by Judge John C. Hayes
- ii. Greenwood, S.C. Date January 23, 2008
- iii. Affirmed By Appellate Court January 26, 2010
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? yes

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. Not enough Evidence to support the charge
- ii. _____
- iii. _____

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

- i. Wasn't no Hand-to-Hand transaction Recorded on the Videotape
- ii. The C.I. was an convicted armed Robber, working off his own charge.
- iii. The Evidence wasn't Based on Facts, but Suspicion which isn't proof

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) _____
- (b) _____
- (c) _____

16. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?
imposition of sentence.
- (e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? _____

17. If you answered "yes" to one or more parts of (16), list:

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

- i. MR. Charles Grose JR Esquire Greenwood S.C. 29646
- ii. 600 Monument St. Box P-133
- iii. Elizabeth A Franklin-Best Appellate Defender

(b) the proceedings at which each such attorney represented you:

Columbia, S.C.

i. _____

ii. _____

iii. _____

18. State clearly the relief you seek in filing this application.

A New trial OR a lesser sentence

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

NO

STATE OF SOUTH CAROLINA)
) VERIFICATION
 COUNTY OF Greenwood)

I, Barry Dwayne Williams, 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.

Barry Dwayne Williams

Sworn to and subscribed before me
 This 12 day of March, 2010

Sylvia Jones L.S.
 Notary Public for South Carolina
 My Commission Expires 1/24/2018

APPLICATION TO PROCEED WITHOUT PREPAYMENT
 OF COSTS AND AFFIDAVIT
 IN SUPPORT THEREOF

I, BARRY DWYANE WILLIAMS, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty or perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

Barry Dwayne Williams
 Applicant

Sworn to and subscribed before me
 This 12th day of March, 2010

Sylvia Jones L.S.
 Notary Public for South Carolina
 My Commission Expires: _____

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Barry Dwyane Williams, #350338,

2010-CP-24-0389

Applicant,

v.

RETURN AND MOTION TO DISMISS

State of South Carolina,

Respondent.

The Respondent, making its Return to the application for post conviction relief (PCR) filed March 29, 2010¹, would respectfully show this Court:

I.

The Applicant is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Greenwood County. The Applicant was indicted at the June 2007 term of the Greenwood County Grand Jury for Distribution of Crack Cocaine (2007-GS-24-0926) and Distribution of Crack Cocaine within proximity of a school or park. The Applicant was represented by Charles Grose, Esquire. On January 23, 2008, the Applicant proceeded to jury pursuant to which he was found guilty of both charges as indicted. The Honorable John C. Hayes, III sentenced Applicant to a period of confinement for thirty (30) years for Distribution of Crack Cocaine, 2nd offense and fifteen (15) years for Distribution of Crack Cocaine within a half of a mile of a school.

The Applicant filed a timely Notice of Appeal with the South Carolina Court of Appeals.

¹ Application was not received by the S.C. Attorney General's Office until July 20, 2012.

The South Carolina Court of Appeals affirmed his conviction and sentence. State v. Williams, Op. No. 2010-UP-10 (S.C. Ct. App. Filed January 21, 2010). The Remittitur was sent on February 8, 2010.

Attached herewith and incorporated herein are the records of the Greenwood County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections and the application. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Wasn't no transaction of money or drugs during the video"
 - a. "Wasn't never once a hand-tot-hand transaction seen period after the jury watched the video 3 times."
2. "Someone on the video has a wad of money, saying he gave me a 20"
 - a. "The C.I. admitted wasn't a transaction seen on the video. Greenwood Detective Steve McGee stated the crack weight to be .2 grams"
3. "Why and how can the drugs be two different weights .2 grams and .12 grams"
 - a. "SLED analysis stated the crack weight to be .12 grams. A bug difference. The credibility of the C.I. and his motive."

The Applicant fails to allege a claim of ineffective assistance of counsel. The Respondent submits that this Application for Post-Conviction Relief should be summarily dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -

160. An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;

3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. *Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.*

[Emphasis supplied.] S.C. Code Ann. § 17-27-20 (1976).

These facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. Therefore, the Court should summarily dismiss this application for post-conviction relief.

III.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

IV.

WHEREFORE, having made its Return and Motion to Dismiss, the State requests that the Applicant's current application for PCR be summarily denied and dismissed.

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: J. R. Johnson
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

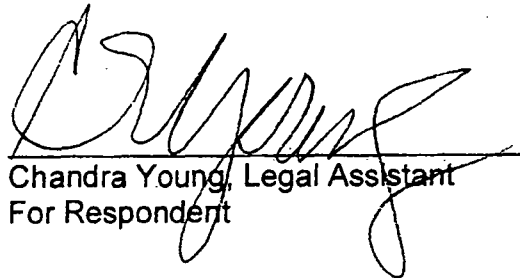
September 4, 2012

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	)	
	)	
	)	2010-CP-24-0389
	)	
BARRY D. WILLIAMS,	)	
	)	
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 and Motion to Dismiss in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Weston Rochester, Esquire
 PO Box 1563
 Greenwood, South Carolina 29648

DATED this 4th day of September 2012.


 Chandra Young, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

Barry Dwyane Williams, #350338,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

2010-CP-24-0389

**REPLY TO RESPONDENT'S
RETURN AND MOTION TO DISMISS**

2012 SEP 12 PM 4 00

FILED
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

Post-Conviction Relief Counsel, Weston B. Rochester, acting on behalf of the Applicant and making his Reply to the State's Return and Motion to Dismiss, states to this Court as follows:

1. That the Applicant, Barry Dwyane Williams, filed his Application for Post-Conviction Relief on March 29, 2010.
2. That attorney, Weston B. Rochester, was subsequently appointed as Post-Conviction Relief Counsel on August 14, 2012.
3. That the State of South Carolina submitted its Return and Motion to Dismiss on September 4, 2012.
4. That counsel for the Applicant has not yet met with the Applicant, but has scheduled an appointment to meet the Applicant on September 13, 2012.
5. That counsel for the Applicant has not yet received or had opportunity to review the Applicant's General Sessions trial transcript.
6. That counsel for the Applicant has not yet received or had opportunity to review any materials from the Applicant's direct appeal.

WHEREFORE, having made this Reply to the State's Return and Motion to Dismiss, counsel for the Applicant respectfully requests that this matter not be summarily dismissed until counsel has had ample opportunity to meet with the Applicant, review the Applicant's file (including the General Sessions trial transcript and materials from the direct appeal), and ascertain what specific allegations should be made in an amended application for relief.

Respectfully submitted,


Weston B. Rochester, Bar #100404
Attorney for Applicant
P.O. Box 1563
Greenwood, SC 29648
Telephone: (864) 396-5125
Fax: (864) 396-5185
rochester.law@gmail.com

Greenwood, South Carolina

September 12, 2012

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

Barry Dwyane Williams, #350338,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

2010-CP-24-0389

CERTIFICATE OF MAILING
(Reply to Respondent's Return
and Motion to Dismiss)

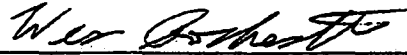
2012 SEP 12 PM 4 00

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

I, Weston B. Rochester, attorney for Applicant, Barry Dwyane Williams, hereby certify that I served the Respondent with a copy of the Reply to Respondent's Return and Motion to Dismiss by first class mail in the United States Mail, with proper postage attached, on September 12, 2012, addressed as follows:

Mr. J. Rutledge Johnson
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Respectfully submitted,



Weston B. Rochester, Bar #100404
Attorney for Defendant
128 Maxwell Avenue
Greenwood, SC 29646
Telephone: (864) 396-5125
Fax: (864) 396-5185
rochester.law@gmail.com

Greenwood, South Carolina

September 12, 2012

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

Barry Dwyane Williams, #350338,
Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

2010-CP-24-0389

CONDITIONAL ORDER OF DISMISSAL

FILED
8TH JUDICIAL CIRCUIT
GREENWOOD, SC
2012 SEP 24 PM 11 48

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 29, 2010¹. The Respondent made its Return and Motion to Dismiss on

September 4, 2012

PROCEDURAL HISTORY

The records before this Court indicate that the Applicant is ~~not~~ presently incarcerated. The Applicant is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Greenwood County. The Applicant was indicted at the June 2007 term of the Greenwood County Grand Jury for Distribution of Crack Cocaine (2007-GS-24-0926) and Distribution of Crack Cocaine within proximity of a school or park. The Applicant was represented by Charles Grose, Esquire. On January 23, 2008, the Applicant proceeded to jury pursuant to which he was found guilty of both charges as indicted. The Honorable John C. Hayes, III sentenced Applicant to a period of confinement for thirty (30) years for Distribution of Crack Cocaine, 2nd offense and fifteen (15) years for Distribution of Crack Cocaine within a half of a mile of a school.

The Applicant filed a timely Notice of Appeal with the South Carolina Court of Appeals. The South Carolina Court of Appeals affirmed his conviction and sentence. State v. Williams, Op. No. 2010-UP-10 (S.C. Ct. App. Filed January 21, 2010). The Remittitur was sent on February 8, 2010.

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Wasn't no transaction of money or drugs during the video"
 - a. "Wasn't never once a hand-tot-hand transaction seen period after the jury watched the video 3 times."
2. "Someone on the video has a wad of money, saying he gave me a 20"
 - a. "The C.I. admitted wasn't a transaction seen on the video. Greenwood Detective Steve McGee stated the crack weight to be .2 grams"
3. "Why and how can the drugs be two different weights .2 grams and .12 grams"
 - a. "SLED analysis stated the crack weight to be .12 grams. A bug difference. The credibility of the C.I. and his motive."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b) (2003), the Court makes the following findings of fact and conclusions of law:

This Court finds that this matter should be summarily dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160. An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;

1 Application was not received by the S.C. Attorney General's Office until July 20, 2012.

ATTEST A TRUE COPY
Angela Woodhurst
 ANGELA WOODHURST
 CCCP AND GS
 GREENWOOD COUNTY
 S.C.

4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. *Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.*

[Emphasis supplied.] S.C. Code Ann. § 17-27-20 (1976).

These facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. Therefore, this Court summarily dismisses this application for post-conviction relief.

CONCLUSION

S.C. Code Ann. § 17-27-70(b) states in pertinent part:

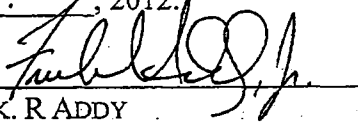
When a court is satisfied, on the basis of the application, the answer or motion, and on the record, that Applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and give its reasons for so doing. Applicant shall be given an opportunity to reply to the proposed dismissal.

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any

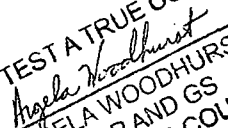
reasons he may have with the Greenwood County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: J. Rutledge Johnson, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 6th day of Sept., 2012.


FRANK. R ADDY
Chief Administrative Judge
Eighth Judicial Circuit Court

Greenwood, South Carolina.

ATTEST A TRUE COPY

ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNT
S.C.

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

Barry Dwyane Williams, #350338,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

2010-CP-24-0389

**RESPONSE TO CONDITIONAL
ORDER OF DISMISSAL
[AMENDED APPLICATION]**

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
SEP 28 PM 2:15

The Applicant, making his Response to Conditional Order of Dismissal [Amended Application], would respectfully show this Court as follows:

I. PROCEDURAL HISTORY

The Applicant, Barry Dwyane Williams, was indicted at the June 2007 term by the Greenwood Grand Jury on the charges of Distribution of Crack Cocaine (07-GS-24-926) and Distribution within Proximity of a Park or Playground (07-GS-24-927). He was tried on January 22nd and 23rd, 2008 before the Honorable John C. Hayes and a jury. The Applicant was represented by Charles Grose, Esquire. He was convicted by a jury and sentenced to thirty (30) years for the distribution charge and fifteen (15) years for the proximity count. These sentences were ordered concurrent.

The Applicant filed a timely Notice of Appeal with the South Carolina Court of Appeals. The South Carolina Court of Appeals affirmed his conviction and sentence. State v. Williams, Op. No. 2010-UP-10 (S.C. Ct. App. Filed January 21, 2010). The Remittitur was sent on February 8, 2010.

The Applicant is currently confined by the South Carolina Department of Corrections at the Lieber Correctional Institution located in Ridgeville, South Carolina. The Applicant initiated

the present action by filing a timely Application for Post-Conviction Relief on March 29, 2010. He completed and filed this Application without the advice of counsel. Weston B. Rochester was appointed as counsel in this post-conviction relief matter by Order of this Court on August 14, 2012.

On September 4, 2012, the Respondent submitted for filing its Return and Motion to Dismiss, along with a corresponding proposed Conditional Order of Dismissal. Respondent's Motion to Dismiss argues that the Application for Post-Conviction Relief fails to state any cognizable claim pursuant to the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 et. seq. In particular, Respondent argues that the Applicant fails to allege a claim of ineffective assistance of counsel.

The Conditional Order of Dismissal was signed by the Honorable Frank R. Addy on September 6, 2012. Respondent submitted this signed Order to the clerk of court for filing on September 18, 2012.

On September 12, 2012 (prior to receiving the signed Order), the Applicant filed a Reply requesting that this matter not be summarily dismissed until post-conviction relief counsel has had ample time to meet the Applicant, read the case materials, and further investigate. Having met with counsel and after further investigation, the Applicant now states additional grounds for post-conviction relief based on ineffective assistance of counsel, which are further described herein below.

II. RELEVANT FACTS

The Applicant alleges the following additional facts regarding the assistance of trial counsel, Charles Grose, for the criminal case described above. The Applicant recalls meeting with trial counsel briefly on only two occasions prior to his trial in General Sessions.

At the first meeting, trial counsel informed the Applicant of the initial plea bargain offered by the solicitor. The solicitor offered a plea bargain under which the Applicant would plead guilty and serve ten (10) years prison time. On the advice of trial counsel, the Applicant rejected the plea offer.

At the second meeting, trial counsel informed the Applicant of the second and final plea bargain offered by the solicitor. The solicitor offered a second plea bargain under which the Applicant would plead guilty and serve seven (7) years prison time. Again, the Applicant rejected the plea offer on the advice of trial counsel. Specifically, trial counsel advised the Applicant of his belief that they could beat the charges based on the weakness of the video evidence against the Applicant and the credibility issues regarding the State's confidential informant.

At no point during either of these two meetings did trial counsel advise the Applicant of the possible results and consequences of proceeding to trial. In particular, trial counsel never advised the Applicant concerning the maximum sentence he could receive if convicted at trial. Thus, the Applicant was never made aware that he could receive a sentence of up to thirty (30) years imprisonment, which Judge Hayes in fact ordered based on his conviction in this matter. If the Applicant had been advised that he could potentially be sentenced to a term of thirty (30) years, he would not have risked the consequences of trial, but instead would have accepted the plea bargain offered by the solicitor.

In addition, trial counsel did not discuss with the Applicant any factors which could have mitigated the Applicant's sentence. To the Applicant's knowledge, trial counsel did not conduct an independent investigation of any such mitigating factors. During the sentencing phase of the Applicant's trial, the solicitor introduced the Applicant's prior record, which included a number

of prior offenses. When given opportunity to respond, trial counsel offered no mitigating evidence whatsoever on the Applicant's behalf. Trial counsel merely asked that the judge impose a merciful sentence under the circumstances.

III. LEGAL STANDARD FOR POST-CONVICTION RELIEF

To obtain post-conviction relief for ineffective assistance of counsel, the Applicant must show both: "(1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective assistance claim." Judge v. State, 321 S.C. 554, 557-58 (S.C. 1996) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

VI. ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

The Applicant sets forth the following claims of ineffective assistance of trial counsel. The applicant respectfully requests that this Court accept these claims as his Amended Application for Post-Conviction Relief.

- A. Trial counsel was ineffective in advising the Applicant to reject a plea agreement offered by the solicitor, which the Applicant would have rejected had he fully understood the potential results of trial.

The Supreme Court of South Carolina has held that the Sixth Amendment "protects criminal defendants against ineffective assistance of counsel during the plea bargaining process, even if the plea offered is ultimately rejected. Id. at 560; see also Missouri v. Frye, 132 S.Ct. 1399 (2012). The Court in Judge v. State explained that defense counsel's advice regarding plea offers should reflect a proper balance between the certainty of a guilty plea, the uncertain results of trial, and "the worst possible penalties that could result from trial." Id. at 560.

In the present case, trial counsel provided ineffective assistance during the plea bargaining stage by advising the Applicant to reject both the ten (10) year plea and the seven (7)

year plea offered by the solicitor. Trial counsel was ineffective, among other things, by failing to advise the Applicant of the worst possible penalty that could result from trial, in particular, that the Applicant could receive a maximum sentence of thirty (30) years imprisonment. The Applicant was prejudiced by this ineffective assistance in that he had inadequate information to properly balance the plea offer against the uncertain risks of trial. Had the Applicant been properly advised of the risks of trial, he would have accepted the plea offer for seven (7) years rather than assuming the risks of trial.

B. Trial counsel provided ineffective assistance by failing to present an effective plea in mitigation of the Applicant's sentence.

The Supreme Court of South Carolina and the United States Supreme Court have both held that trial counsel's failure to adequately investigate and present mitigating evidence at sentencing deprives a criminal defendant of his right to effective assistance of counsel. Council v. State, 380 S.C. 159, 170 (S.C. 2008) (holding that "the PCR judge correctly determined that trial counsel was ineffective in failing to adequately investigate and present mitigating evidence"); Wiggins v. Smith, 539 U.S. 510, 534 (2003) (holding that trial counsel was unreasonable to end its investigation into evidence that could potentially mitigate defendant's sentence).

In the present case, trial counsel was ineffective in his failure to investigate and present mitigating evidence at sentencing. Prior to trial, trial counsel never discussed mitigation with the Applicant and never asked the Applicant about any factors that could potentially mitigate his sentence. To the Applicant's knowledge, trial counsel never conducted any independent investigation into the Applicant's background to discover any mitigating factors. At trial, trial counsel presented no evidence whatsoever in mitigation of the Applicant's sentence. Instead,

trial counsel merely requested a merciful sentence. The Applicant was prejudiced in that he received the maximum sentence of thirty (30) years in this case. Had any mitigating evidence been presented, there is a reasonable probability that he would have received a lesser sentence.

- C. The Applicant reserves the right to assert additional grounds for ineffective assistance of counsel that may become apparent upon further investigation of this case.

Post-Conviction Relief Counsel for the Applicant has not yet had the opportunity to investigate this case fully. Additional grounds for post-conviction relief may become apparent during this investigation, particularly in regard to trial counsel's impeachment of the confidential informant and the chain of custody regarding the video evidence offered against the Applicant. The Applicant reserves the right to assert such grounds for ineffective assistance of counsel as they become apparent.

V. CONCLUSION

After an initial investigation of this case, the Applicant now asserts two cognizable claims for post-conviction relief based on ineffective assistance of trial counsel. First, trial counsel failed to advise the Applicant of the worst possible penalties that could result from proceeding to trial, and was thus ineffective in advising the Applicant to reject the plea bargains offered by the solicitor. Second, trial counsel provided ineffective assistance by failing to investigate and present an effective plea in mitigation of the Applicant's sentence. Therefore, the Applicant respectfully requests that this matter not be summarily dismissed pursuant to Respondent's Conditional Order of Dismissal. Instead, this court should consider this Response as Applicant's Amended Application and allow this matter to proceed to trial based on Applicant's cognizable claims of ineffective assistance of counsel.

Respectfully submitted,



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Greenwood, South Carolina

September 27, 2012

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

Barry Dwyane Williams, #350338,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

2010-CP-24-0389

CERTIFICATE OF MAILING
(Response to Conditional Order
of Dismissal)

2012 SEP 28 PM 2 15

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

I, Weston B. Rochester, attorney for Applicant, Barry Dwyane Williams, hereby certify that I served the Respondent with a copy of the Response to Conditional Order of Dismissal by first class mail in the United States Mail, with proper postage attached, on September 18, 2012, addressed as follows:

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Greenwood, South Carolina

September 17, 2012

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
 COUNTY OF GREENWOOD) 2010-CP-24-00389
 (HEARD IN COUNTY OF LAURENS)

BARRY DeWAYNE WILLIAMS)
)
 PLAINTIFF,)
)
 vs.) TRANSCRIPT OF RECORD
)
) (ORIGINAL)
 THE STATE OF SOUTH CAROLINA)
)
 DEFENDANT.)

NOVEMBER 28, 2012
 LAURENS, SOUTH CAROLINA

B E F O R E:

THE HONORABLE R. LAWTON McINTOSH, JUDGE.

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

WES ROCHESTER, ESQ.,
 Attorney for The Applicant.

J. RUTLEDGE JOHNSON, ESQ.,
 Attorney for The State.

VIVIAN H. CROSS
 OFFICIAL COURT REPORTER

NOVEMBER 28, 2012
 (BARRY WILLIAMS v. STATE OF SOUTH CAROLINA)
 (PCR HEARING)
 (CASE NO. 2010-CP-24-00389)

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P R O C E E D I N G S

(NOVEMBER 28, 2012 - 11:20 A.M.)

(CASE NUMBER: 2010-CP-24-0389

THE COURT: Good morning; is this Williams?

MR. JOHNSON: Yes, sir. May it please The Court, Your Honor?

THE COURT: Yes, sir.

MR. JOHNSON: This is the case of *Barry D. Williams vs. State of South Carolina*, it's case number 2010-CP-24-0389.

Mr. Williams was indicted at the June, 2007 term of the Greenwood County Grand Jury for distribution of crack cocaine, and distribution of crack cocaine within proximity of a school or park.

He was represented by Mr. Charles Grose on January 23, 2008. He proceeded to jury trial pursuant to which he was found guilty of both charges as indicted. The Honorable John C. Hayes, III sentenced him to a period of five to thirty years for distribution of crack cocaine second offence and fifteen years for crack co- -- for distribution of crack cocaine within half-a-mile of a school.

We filed a Notice of Appeal with the South Carolina Court of Appeals which confirmed -- which affirmed his conviction and sentence. The remittitur was thereafter issued on February 8, 2010.

He filed a PCR Application on March 29th of 2010. Our

1 office did not receive this Application until July 20th 2- -- of
2 this year, 2012. And then we filed a Return September 4, 2012
3 and he is represented here today by Mr. Wes Rochester.

4 THE COURT: Mr. Rochester?

5 MR. ROCHESTER: May it please The Court?

6 THE COURT: Yes, sir.

7 MR. ROCHESTER: Uh -- I have met with Mr. Williams on a
8 couple of occasions now. I've discussed with him the
9 essential consequences of proceeding with this hearing and it's
10 my understanding that he is prepared now to proceed to put
11 evidence on the record.

12 THE COURT: Okay, sir; would you come---

13 MR. ROCHESTER: And I call---

14 THE COURT: ---you want to call your first witness then?

15 MR. ROCHESTER: ---I would call my first witness,
16 Mr. Williams.

17 THE COURT: Come around, please, sir.

18 (WITNESS FORWARD)

19 THE COURT: Mr. Williams, will you place your left hand on
20 the Bible and raise your right hand?

21 (WHEREUPON, BARRY DeWAYNE WILLIAMS WAS DULY SWORN AND
22 TESTIFIED AS FOLLOWS:)

23 THE COURT: Thank you very much; you may have a seat.

24 BAILIFF: Come around; have a seat.

25 BARRY DeWAYNE WILLIAMS, DIRECT EXAMINATION BY MR. ROCHESTER:

1 Q. Mr. Williams?

2 A. Yes, sir?

3 Q. Could you state your full name for The Court please?

4 A. Barry DeWayne Williams.

5 Q. And are you currently incarcerated?

6 A. Yes, I am, sir.

7 Q. And---

8 THE COURT: Could -- would you step back just so as not --
9 just go back. She's just -- just -- it's kind of reverberating
10 and---

11 MR. WILLIAMS: Okay.

12 THE COURT: Thank you.

13 Q. And -- and where are you currently housed?

14 A. At Ridgeville Correction Center.

15 Q. And is that at Ridgeville, South Carolina?

16 A. Yes, sir; it is.

17 Q. Okay. On the underlying charges for why we're here today;
18 did you proceed to trial or did you, uh, take a plea offer?

19 A. Uh -- trial.

20 Q. Okay. And, were you convicted of both charges by a jury?

21 A. Yes, I was.

22 Q. Okay. And, uh, the two charges for which you were
23 convicted, the first was distribution of crack cocaine; is that
24 correct?

25 A. Yes, sir.

1 Q. And were you convicted for a second offense for proximity
2 to a school or recreational area?

3 A. Yes, I was.

4 Q. Okay. And, uh, thirty years on the first and fifteen
5 years on the second; is that correct?

6 A. Yes, sir.

7 Q. Okay. And who was your attorney for, uh, this preceding
8 case?

9 A. Excuse me?

10 Q. Who was the attorney for your criminal trial? What---

11 A. Um -- that was Mr. Charles Grose.

12 Q. Okay. And was he appointed for you, uh, from the Public
13 Defender's Office?

14 A. Yes, he was.

15 Q. All right. Uh -- just a very quick background of, uh,
16 what happened at the trial beforehand -- the evidence that was
17 presented against you. Uh -- was there a confidential
18 informant involved in your previous case?

19 A. Yes, there was.

20 Q. Okay. And did this, uh, confidential informant testified
21 against you at the trial?

22 A. Yes, sir.

23 Q. And -- and, uh, did he testify as to, uh, purchasing a
24 quantity of drugs from you?

25 A. I wouldn't say a quantity, but---

1 Q. Some?

2 A. Yes.

3 Q. Okay. Now -- and again, I'm not asking you to admit
4 whether this is right or wrong, just say what happened at
5 trial. Uh -- and that confidential informant, um, did, uh --
6 was he wired at the time of this---

7 A. Yes, he was.

8 Q. So---

9 A. Audio and video.

10 Q. Okay. There was audio and video and there was evidence of
11 audio and video presented at trial?

12 A. (Nod.)

13 Q. Okay. Did, uh -- please say yes or no.

14 A. Yes, sir.

15 Q. Okay. Now, the reason we're here today, you filed an
16 Application for Post-Conviction Relief?

17 A. Yes, sir.

18 Q. All right. And, as part of that Application are you uh,
19 alleging that your attorney, Mr. Grose, provided you
20 ineffective assistance of counsel?

21 A. That is correct.

22 Q. Okay. And is one of those reasons that Mr. Grose failed
23 to properly advise you as to whether to accept a---

24 MR. JOHNSON: Objection, Your Honor, this is leading.

25 THE COURT: Overruled.

1 Q. Okay.

2 THE COURT: Go ahead.

3 Q. Oh, okay. Uh -- as to whether to accept the plea offer,
4 um, or to, uh, proceed to trial?

5 A. (No response.)

6 Q. Do you want me to repeat the question?

7 A. Would you please repeat that, sir?

8 Q. And, is one of the reasons why we are here today is that
9 you believe Mr. Grose was ineffective in advising you as to
10 whether or not to accept the plea offer or go to trial?

11 A. Well, I took it upon myself to go to trial after, um,
12 concern with Mr., um, Grose (after pause) but, um -- (after
13 pause) I'm not really sure what you're asking.

14 Q. Okay, we can move on. Uh -- prior to going to this trial,
15 uh, did you have a bond hearing?

16 A. No. No, sir, I didn't.

17 Q. Okay. But -- so bond was, uh, the bond was set for you?
18 Is that correct?

19 A. Yes.

20 Q. Okay. At any point in time preceding your, uh, meetings
21 with Mr. Grose -- whether for, uh, bond or whatever -- had
22 anybody indicated to you what the maximum sentence was for
23 these charges that you were facing?

24 A. No one.

25 Q. Okay. How many meetings did you have with Mr. Grose

1 before---

2 A. I recall twice.

3 Q. Two meetings, okay. Uh -- the first meeting,
4 approximately when did that take place?

5 A. The first meeting after being incarcerated?

6 Q. Yes.

7 A. I say, three -- between three and four months.

8 Q. Uh -- three or four months after your incarceration?

9 A. Exactly.

10 Q. Okay. And -- and where was the location of that, uh,
11 meeting?

12 A. It was at, uh, the county jail.

13 Q. Okay.

14 A. We was in a -- a conference room.

15 Q. Who was present for the meeting? Was it, uh---

16 A. Just, uh, Mr. Grose and myself.

17 Q. No other people besides the two of you?

18 A. (Nod.)

19 Q. Okay. Uh -- tell me what happened at that meeting.

20 A. Well, the meeting, which never last from (sic) -- I'd say
21 twenty minutes tops. We, um, discussed briefly about the
22 charge itself. But at that time, um, we didn't talk about the
23 sentencing or -- or the amount of time that I can get at
24 pleading.

25 Q. Okay. So, uh, did, uh, Mr. Grose inform you of the

1 charges that The State was, uh, charging you with?

2 A. Yes.

3 Q. Okay. What else happened at that first meeting?

4 A. Uh -- you know, I recall he said that The State was
5 offering me ten years.

6 Q. Okay. So, uh, who -- was it your understanding at that
7 time that The State had made a -- a formal plea offer of ten
8 years?

9 A. Yes.

10 Q. Okay.

11 A. And I denied it.

12 Q. And you denied it at that time; okay. Uh -- what else
13 happened at that meeting?

14 A. Didn't too much happen at that first meeting.

15 Q. Okay.

16 A. 'Cause it didn't last about twenty minutes.

17 Q. At that point in time had The State provided any of the
18 discovery materials, uh, that would be evidence against you?

19 A. No, not at that time. It was a while before they came up
20 with the -- the tape.

21 Q. Okay.

22 A. And he kept saying that they were -- they had evidence but
23 he never, um, revealed it.

24 Q. Okay. So, at that time did you know that there was a tape
25 in existence?

1 A. Uh -- not really, I didn't.

2 Q. Okay. Did you---

3 A. Not until -- not until a subsequent visit.

4 Q. ---did you know that there was a -- a confidential
5 informant involved at that time during the first visit?

6 A. Yes; I knew that.

7 Q. Okay. Did you know the identity of this---

8 A. No, I didn't know that until after watching the video.

9 Q. Okay. Um -- during this, uh -- uh, first meeting with
10 Mr. Grose, did he ever, uh, specifically inform you of the, uh,
11 possible penalties that you could receive if convicted of these
12 charges?

13 A. Not once.

14 Q. Okay. Uh -- so he never said, uh -- or did he ever say
15 you could be sentenced to up to thirty years?

16 A. No; because if -- if he had-a said that, I -- I feel
17 like -- not incriminating myself, but I would at least, I'm
18 saying, thought about it. I would-a considered it -- the plea,
19 you know?

20 Q. Uh -- did Mr. Grose even suggest, you know, if you -- if
21 you go to Court, there -- it's likely that the Judge would hand
22 out this type sentence against you?

23 A. No, never.

24 Q. Okay. Uh -- at this point in time, did Mr. Grose, uh,
25 explain to you about the, you know, the uncertainty of going to

1 trial -- the risk of going to trial?

2 A. Well, just taking as Mr. Grose's exact words, he said, I
3 think we can win, but it's your life.

4 Q. Okay. Was that at the first meeting?

5 A. It's the second meeting.

6 Q. Okay. Um -- and, uh, state again -- did you say -- how --
7 how long was this first meeting?

8 A. Like, the time that we met?

9 Q. Yes; about how long did you meet?

10 A. It was about twenty minutes.

11 Q. Okay.

12 A. The first meeting.

13 Q. Gotcha. And then, prior to trial, did -- you indicated
14 that there was a second meeting; is that correct?

15 A. Right.

16 Q. Okay. Um -- the second meeting, a- -- approximately when
17 did that take place?

18 A. That happened, I'd say, between one and two months before
19 the actual trial.

20 Q. Okay. And, uh, where was that meeting?

21 A. It was, um, at the courthouse, in a conference room.

22 Q. Okay. And who was present for this meeting?

23 A. Me, Mr. Grose and, um, Miss Elizabeth White, um, the
24 Assistant Prosecutor.

25 Q. Okay. Uh -- was the Solicitor, Mrs. White, was she

1 present for this entire meeting?

2 A. The whole time.

3 Q. Okay. So, uh, did you have any time whatsoever alone with
4 Mr. Grose during this meeting?

5 A. No, I didn't.

6 Q. Okay. Tell me what happened at this meeting.

7 A. Um -- me and Mr. Grose, we stopped and they produced a,
8 um, a laptop and we, um, proceeded to watching a video and Miss
9 White, the Assistant Prosecutor, she stood there and watched
10 while we watched. Uh -- we watched it approximately two to
11 three times because Mr. Grose and myself, we -- we was trying
12 to see where this transaction take place at. And Miss White,
13 she just stood there.

14 Q. Okay. Uh -- and -- and what -- what is this video? What
15 exactly did this video show?

16 A. It shows the, um, the confidential informant, um, enter
17 the resident (sic) and, um, he come in contact with the owner
18 of the resident (sic), Miss Tucker. And he come in the house
19 saying he wanted a twenty, which a twenty could be a twenty
20 dollar bill; it could be anything. But the video show he come
21 in the bedroom and I'm sitting there. We have a conversation
22 and the conversation was never about drugs or anything. But,
23 um, just the results from the -- the actual sale or whatever
24 happened.

25 Q. This video, was it clear throughout in terms of the visual

1 picture that you observed?

2 A. Very.

3 Q. Okay.

4 THE COURT: So what was your response, please, sir?

5 MR. WILLIAMS: Sir, I said very.

6 THE COURT: It is very clear?

7 MR. WILLIAMS: Yes; clear.

8 THE COURT: Okay.

9 MR. WILLIAMS: Yes, sir.

10 THE COURT: All right.

11 Q. Uh -- but were there times when the video was blocked out?

12 A. When, um, the confidential informant, um, returned back
13 to his vehicle, it -- the camera was off from four to seven
14 minutes -- black. You -- you -- the only thing you could hear
15 was shuffling around in the car -- moving around with
16 no picture until he, um, got back with, um, Mr., um --
17 Mr., um, McGee and it come back on.

18 Q. And---

19 A. And he hand him a package.

20 Q. During the -- the scope of this interaction with the
21 confidential informant in -- in this video, are there other
22 people present at the house in the video?

23 A. Yes.

24 Q. Besides just you and a confidential informant?

25 A. Yes, there was.

1 Q. Okay. And does this video ever show any type of hand-to-
2 hand transaction between the two of you?

3 A. None whatsoever.

4 Q. Okay. So -- so you watch this video. Uh -- after
5 watching the video, uh, what did you discuss with Mr. Grose and
6 with Mr., uh -- with the Solicitor who was present? What
7 happened after that?

8 A. What happened after that?

9 Q. Yeah, what happened after you watched the video?

10 A. Me and Mr. Grose, we, um, conversated (sic) about the --
11 the video and Miss White, she stood there. And Mr. Grose asked
12 me what did I see? I say I see -- I don't see nothin (sic).
13 He say me either. And that's when he stated that, um, I think
14 we can win. I say, I do too. He said well, it's your life. I
15 said well, let's roll with it -- with it.

16 Q. Okay. Now, at this point in time, was, uh, the previous
17 ten-year plea offer from The State still on the table? Was --
18 was The State still offering that to you?

19 A. No, not at the time. Um -- I denied the ten years and
20 Mr. Grose, um, came back and said -- it was at the same -- the
21 same meeting -- he said, um, they -- they won't go no lower
22 than seven years.

23 Q. Okay.

24 A. And this was after we watching the video.

25 Q. So was it your -- your understanding at that time that

1 there was -- that you could still enter a plea offer with The
2 State? There -- that option was still available?

3 A. Yes, sir.

4 Q. And -- and it -- was it your understanding that the lowest
5 that they would go on the plea offer was seven years?

6 A. Right.

7 Q. Okay. Uh -- do you know whether there was ever any formal
8 offer of seven years?

9 A. I'm not sure, sir.

10 Q. Okay. Uh -- this, um, this second meeting, about -- hum,
11 let me step back. Okay; this, uh -- this second meeting, about
12 how long was it?

13 A. Well, I say it was about -- about thirty -- thirty/thirty-
14 five minutes, because we had to watch the video. We watched it
15 a couple of times. And that's when we conversated (sic) about
16 the results of it.

17 Q. Okay. And how long, approximately, was the video of that
18 meeting?

19 A. The video, I can't say exactly, but it should have been
20 about -- about twelve minutes.

21 Q. Uh -- so, you, uh, make this decision not to accept the,
22 uh, plea offer. Prior to making that decision, again, did
23 Mr. Grose ever inform you of the maximum penalty that you were
24 facing on the charges against you?

25 A. No, he didn't.

1 Q. Okay. Uh -- did he ever, um, in- -- inform you of any
2 likely penalty the Judge, you know, was likely to give if you
3 were convicted at the trial?

4 A. No. Like I said before, um, I would have considered it; I
5 would have considered the plea. Not saying pleading to any
6 guilt, but I would at least considered it had I known
7 otherwise.

8 Q. Right; okay. And, uh, did -- you know, you had --
9 obviously, you watched this video. Did you discuss any further
10 evidence that The State was gonna present against you at this
11 second meeting?

12 A. No, sir; no.

13 Q. Did you talk about the confidential informant?

14 A. Yeah, we talked about that, but not at any length. We
15 talked about it because of -- we talked about the credibility
16 of his, um, you know, testifying and he been in trouble. He
17 had priors.

18 Q. Okay. Now, after, uh, this meeting, was there any third
19 meeting? Any other meeting before actually getting to your
20 trial?

21 A. No.

22 Q. Okay. So, you arrive on -- at trial on the day of your
23 trial. Did you have any time to meet with, uh -- uh, Mr. Grose
24 prior to the hearing?

25 A. Like I said, we met twice. No disrespect to Mr. Grose, um,

1 but his case load was so full until he just didn't really have
2 a lot of time to just, you know, divide among all of his case
3 load.

4 Q. Well now, see, when you showed up into -- in Court on the
5 day of your trial, did Mr. Grose meet with you right before the
6 trial? Were there and di- -- other discussions?

7 A. No. He just had a brief discussion about the trial itself
8 that was about to take, uh, place. But other than that, no.

9 Q. But he -- did he discuss -- at that time, at trial, did he
10 discuss the maximum penalties against you?

11 A. No.

12 Q. Okay. Uh -- so, um, at -- at this point in time, you
13 know, you're going into trial, you must have had some thoughts
14 about what could of -- you know, could happen at trial?

15 A. Of course.

16 Q. Okay, well, what were your -- what were your expectations?
17 You're, um, heading into this trial, what did you think could
18 happen if the jury convicted you?

19 A. I always knew it was a possibility that I may get
20 convicted, but, like I said, I didn't never think that thirty
21 years, whether that's the max or not. I ain't think I'd end up
22 with no thirty years.

23 Q. Okay. Well, had you known that the max., uh -- you could
24 receive up to thirty years -- had you known maximum penalties,
25 uh, that you could receive in this case, how would that have

1 changed your decision-making process prior to trial?

2 MR. JOHNSON: Objection, Your Honor; that's been asked and
3 answered three different times.

4 THE COURT: Ov- -- overruled.

5 A. Had I known -- yeah, in hindsight, now I say I doubt if I
6 would-a -- I -- I doubt I would-a, um, went to trial. But, at
7 the same time, by me looking at that video, I doubt -- I --
8 I -- I think I would have proceeded with -- with the trial.
9 Because that's like saying I actually did it.

10 When I'm looking at video and even the confidential
11 informant stated that he didn't see himself make a transaction
12 in the video, so why would I plead guilty to something and I'm
13 looking at it?

14 Q. Okay. Um -- do you feel that Mr. Grose properly advised
15 you prior to your trial as to the, uh, penalties against you?
16 The pos- -- or, let me...

17 Do you -- do you feel that Mr. Grose, uh, properly advised
18 you as to the strength of the case against you?

19 A. (After pause.) No.

20 Q. Okay. Uh -- and for that reason you feel that he was
21 ineffective?

22 A. Yes, sir.

23 Q. Okay. Um -- from this point, you, uh, got -- went to
24 trial. The trial took place; the jury reached its verdict,
25 which was a verdict convicting you of both counts here.

1 At that point in time we have the sentencing of this case.

2 Uh -- at the -- the sentencing, do you remember what The State,
3 uh, said -- what Mrs. White said at the sentencing?

4 A. Far as -- concerning what the -- the -- the time -- the
5 amount of time?

6 Q. Did, uh, -- did Mrs. White, uh, read your prior
7 convictions---

8 A. Yes, she did.

9 Q. ---at that point in time? Okay. And after that, uh,
10 did The, uh, Court -- did the Judge offer your attorney,
11 Mr. Grose, time to speak on your behalf at sentencing?

12 A. Yes, he did that.

13 Q. And do you remember what, uh, Mr. Grose said?

14 A. Oh, um, Mr. Grose said, Judge would you be lenient to
15 Mr. Williams? And the Judge responded, how can I be lenient
16 with a record like that?

17 Q. Okay. I -- I have---

18 THE COURT: What -- what did the Judge say?

19 MR. WILLIAMS: He said, how can I be lenient with a record
20 like that?

21 THE COURT: Okay.

22 MR. JOHNSON: I think that'll be a Direct Appeal issue
23 then.

24 THE COURT: Note your objection.

25 Q. I have, uh, the record here -- the trial transcript. Page

1 one-twenty-five, um, The Court offered Mr. Grose time to speak
2 and it, uh -- Mr. Grose said, Your honor, I don't have a whole
3 lot to add. I just would ask that you take into account that
4 this is an eighty-five percent service of any sentence and, you
5 know, ask that you impose a sentence that's merciful under the
6 circumstances.

7 Does that sound accurate to you? Is that what you recall?

8 A. It's very accurate.

9 Q. Okay. And, uh, at any time prior to the case uh -- prior
10 to your trial, did Mr. Grose explain to you that there was
11 gonna be a sentencing phase of this trial if you were
12 convicted?

13 A. No.

14 Q. Okay. Did he ever explain that, uh -- did Mr. Grose ever
15 explain that he, Mr. Grose, would have the opportunity to
16 present information or evidence on your behalf that could
17 potentially lead the Judge to reduce your sentence? Or, offer
18 a lower sentence?

19 A. No, sir.

20 Q. Did Mr. Grose ever ask you what information about your
21 background or circumstances or anything that he could offer
22 that would speak well on your behalf to the Judge?

23 A. No, I don't---

24 Q. Now, if, uh, you were asked that question, if you had the
25 opportunity to have Mr. Grose, uh, provide some mitigating

1 evidence on your behalf at the sentencing, what is it that you
2 would tell the Judge that would potentially lead a judge to
3 provide you with a lower sentence?

4 A. First, I would say, um, what I'm being convicted for
5 shouldn't have nothing to do with my priors. It should have
6 something to do with here and now, because, like I said, um,
7 the Judge saying how he -- how can he be lenient with a record
8 like that. I thought I was being, um, prosecuted for the
9 alleged crime itself instead of my past.

10 Q. Okay; is there anything else that you would say?

11 A. No, sir.

12 Q. Okay. Did you have a, uh -- um -- were you a drug dealer?

13 A. Never.

14 Q. Do you have a drug problem?

15 A. Still have one.

16 Q. Okay. And is that something that you've struggle with?

17 A. Yes, sir; I'm struggling now.

18 Q. Okay; and do you think that that's something that you may,
19 uh, could have said that, uh, could have lead the Judge to take
20 more pity on you?

21 A. Yes, sir.

22 Q. Okay. Is there anything else that you would like to say
23 at this time in favor of your petition for, uh, Post Conviction
24 Relief? Anything we haven't covered?

25 A. Naw, nothin (sic) -- nothin I could think of. You

1 did -- you did everything that was supposed to.

2 Q. I have no further questions at this time, Judge.

3 THE COURT: Cross-examination.

4 MR. JOHNSON: Yes, sir; briefly.

5 BARRY DeWAYNE WILLIAMS, CROSS-EXAMINATION BY MR. JOHNSON:

6 Q. Mr. Williams, you just testified that you think that you
7 were prosecuted for your past crimes instead of the crime
8 you're accused of; is that correct?

9 A. Yes, sir.

10 Q. Um -- do you realize that all those past crimes came in
11 after you were convicted? That was just to the Judge; that was
12 during the sentencing phase and not during the actual trial?

13 THE COURT: I've got it; one-twenty-four.

14 MR. JOHNSON: Yes, sir. Your Honor, you said you noted
15 that?

16 THE COURT: (Nod.)

17 MR. JOHNSON: Okay; thank you.

18 Q. And during your testimony you admitted the decision to
19 reject the ten-year offer from The State was your decision,
20 right?

21 A. Yes, sir.

22 Q. (After pause.) And you're quite familiar with the Court
23 System, are you not?

24 A. Somewhat.

25 Q. You've been convicted may times before?

1 A. I have been in the Courtroom a few times.

2 Q. Including, uh, giving false information to police?

3 A. I can't recall.

4 Q. Was that read at the sentencing phase?

5 A. It's possible.

6 Q. In 2005, you had a conviction for giving false information
7 to the police?

8 A. Possible.

9 Q. And that's not the first time it's happened?

10 A. I can't recall.

11 Q. Was that read that in 1985 you were and it was an old
12 conviction, a good -- dishonesty? Uh -- you've been convicted
13 for lying, haven't you?

14 A. Possible.

15 Q. You also talk about, uh, Mr. Grose, uh, at trial --
16 talking about, you know, the -- the video, the -- the
17 confidential informant, and that you didn't see a hand-to-hand
18 transaction; isn't that correct?

19 A. Yes, sir.

20 Q. Okay. Didn't Mr. Grose argue that at trial? That there
21 wasn't -- you couldn't see that?

22 A. Yes, sir, he did.

23 Q. And that there was that four-minute -- seven-minute gap
24 that you couldn't see anything? That's what he argued, that
25 the evidence was weak against you?

1 A. But, um, I didn't actually do it.

2 Q. But he argued that, um---

3 A. Right; that's the sole purpose of any type of surveillance
4 is to capture the desired event that's happened. So---

5 Q. I understand; my only question is, Mr. Grose argued that
6 thought, didn't he?

7 A. Right.

8 Q. Okay. (After pause.) And he also argued that the
9 confidential informant was not credible because he had been in
10 trouble before, didn't he?

11 A. That's the sole purpose of him trying to -- to -- to make
12 a buy.

13 Q. But Mr. -- Mr. Grose argued that? That's all I'm saying
14 is he brought it up at trial; that he argued on his behalf?

15 A. Yes, sir.

16 Q. (After pause.) And he did ask for leniency at the
17 sentencing hearing, didn't he? Or, the sentencing phase of the
18 trial?

19 A. Leniency could be any number.

20 Q. But he asked for lenience, did he not? He said, be
21 merciful under the circumstances?

22 A. He say that; yes, sir.

23 MR. JOHNSON: That's all I have, Your Honor.

24 THE COURT: Redirect?

25 MR. ROCHESTER: Uh -- one question.

1 BARRY DeWAYNE WILLIAMS, REDIRECT BY MR. ROCHESTER:

2 Q. Uh -- I understand that you said that the, uh, decision
3 whether to accept or reject the plea offer that was available
4 was your decision?

5 A. Right.

6 Q. Did you have the information necessary before you to make
7 an educated decision as to whether or not to accept that plea
8 offer?

9 A. No, I didn't.

10 Q. And, uh, is that because, uh, Mr. Grose failed to---

11 A. Because I didn't---

12 Q. ---provide information to you?

13 A. ---I didn't know what was available for me at the time.
14 Otherwise I would at least consider it.

15 Q. Okay.

16 MR. ROCHESTER: I have no further questions.

17 THE COURT: Thank you, sir, you may step down.

18 MR. WILLIAMS: Thank you.

19 THE COURT: Yes, sir.

20 (WHEREUPON, WITNESS STEPPED DOWN AT 11:48 A.M.)

21 THE COURT: Call your next witness please, sir.

22 MR. ROCHESTER: I have no further witnesses.

23 MR. JOHNSON: Call Mr. Grose to the stand, Your Honor.

24 (WITNESS FORWARD)

25 THE COURT: Mr. Grose, would you put your left hand on the

1 Bible and raise your right hand, please sir?

2 (WHEREUPON, E. CHARLES GROSE WAS DULY SWORN AND TESTIFIED
3 AS FOLLOWS:)

4 THE COURT: Thank you, sir.

5 E. CHARLES GROSE, DIRECT EXAMINATION BY MR. JOHNSON:

6 Q. Good morning, Mr. Grose.

7 A. Good morning.

8 Q. Could you start off by telling The Court how long you've
9 been practicing criminal law?

10 A. Um -- exclusively, since, uh, 1996. Um -- I did handle a,
11 um, Post Conviction Relief case prior to that, but exclusively
12 since 1996.

13 Q. And what was your capacity as Mr. Williams' attorney at
14 this -- at this time? The time of the trial?

15 A. I'm not sure I understand your question.

16 Q. Where you the Head Public Defender at the Eighth Circuit?

17 A. Um -- no. Um -- I was the Chief Public Defender for
18 Greenwood and Abbeville. This trial would have been, um,
19 before the Circuit Defender System was implemented in the
20 Eighth Circuit. Um -- and I was the Chief Public Defender for
21 the Eighth Circuit, um, beginning in August of 2008, running
22 through, um, August, um, 16th of this year.

23 Q. Okay. Can you tell The Court how many cases you've taken
24 to trial?

25 A. I have no idea.

1 Q. Would---

2 A. I mean, I, uh, I -- I don't have -- I haven't kept count.

3 Q. So many that you can't count?

4 A. Well, no. I -- I -- I mean, I don't mean to be flippanant;
5 I mean, it probably could be counted. I -- it -- I have taken
6 many cases to trial, if -- if -- that's what you're asking.

7 Q. Yes, sir; so you have extensive experience taking cases to
8 trial?

9 A. Yes, sir.

10 Q. Do you have experience, uh, with drug case?

11 A. Um -- yes. Although there had -- and -- and this could be
12 a little bit irrelevant. I mean, there have been times in my
13 practice where I didn't handle a lot of drug cases, um, because
14 I was focused on other things. That's kind of come and gone
15 over the years.

16 Q. Have you handled a case with a confidential informant
17 before?

18 A. I have.

19 Q. Were you appointed in this case?

20 A. Um -- yes.

21 Q. And can you tell me a little bit about, uh, the first
22 meeting? Or, how many times did you meet with Mr. Williams?

23 A. I do not know. Um -- the, uh -- you know, during this
24 period of time, um, we had a -- a lawyer, Megan -- well, she
25 wasn't a lawyer at that point, but, uh, a -- a law graduate,

1 Megan Flannery, that was working in our office, and, um, she
2 was keeping some of the notes. Um -- our notes and our Case
3 Management System, um, began about October 11th. Um -- but I --
4 I don't have any count of when the meetings are or when the
5 first one would have taken place.

6 Q. Would your -- Miss Flannery or yourself would of met with
7 him more than twice prior to trial?

8 A. I think I probably did, and she would have been present at
9 some of the meetings. But she -- I was the lawyer and -- and I
10 probably met with him by myself and, you know, with -- with her
11 present.

12 Q. And would you have discussed the charges in this case?

13 A. I would have.

14 Q. Would you have discussed the pending penalties in this
15 case?

16 A. I -- I -- I would have, but there is a good probability
17 that I might have told him incorrectly. (After pause.) And the
18 reason I say that is, is after looking at the sentencing
19 hearing at one-twenty-six, um, at lines eight and nine, uh,
20 Miss White had indicated to The Court that there might be a
21 mistake in sentence and that distribution only carries twenty-
22 five years. And my recollection is, is my discussions with
23 Miss White that, um, we were probably mistaken about that.

24 At one time it did -- and this gets you back to me going
25 in and out of handling drug cases. At one time it did carry

1 twenty-five years and then it was changed to -- to five to
2 thirty. And it's -- it still carries five to thirty, but the
3 aspects of that have been changed. You know, even since
4 Mr. Williams' trial.

5 Q. But you would have discussed with him that carried up to
6 twenty-five years? Even if you were---

7 A. I -- I believe---

8 Q. ---you would have discussed that?

9 A. Yes; I -- I -- we would have discussed that and I believe
10 it's probable that I told him twenty-five years based on the
11 transcript refreshing my memory about what Miss White and my
12 understanding was.

13 Q. And as you heard today, it was Mr. Williams' decision to
14 reject that ten-year plea offer?

15 A. That's correct.

16 Q. Okay. (After pause.) Talk a little bit about the trial in
17 this case. Uh -- and you don't have to tell me your trial
18 strategy, but, uh, what was the overall theme in this case as
19 far as the defense---

20 A. Um---

21 Q. ---was concerned?

22 A. ---and -- and I -- I've, uh -- I've not gone back and read
23 the -- the entire trial. And -- and I think my -- my strategy
24 would have been, um, you know, pretty well contained in what
25 was -- was in the trial.

1 Q. Okay.

2 A. My -- my recollection of it was -- is -- is -- is like
3 Mr. Williams, um, talked about. Um -- now, I -- I dispute that
4 Miss White was there the whole time we were looking at the
5 video and talking about it. I think that was Miss Flannery
6 that was in the room. But -- but we did go through the video
7 and we did have an opportunity to stop it and start it and
8 replay, you know, key parts.

9 And, um, I -- I had forgotten about the blacked-out
10 portion of it until he testified about it, but I think that,
11 you know, was part of it.

12 Um -- but significantly, um, you know, I don't think there
13 was ever any dispute that Mr. Williams was in this house.
14 Um -- but what you could not see on the video was any drug
15 transaction between Mr. Williams and the informant. Um -- in
16 fact, it was -- was -- as -- as I recall, it was -- I don't
17 remember it being quite as clear as he said. I mean, it was
18 clear, but -- but you -- but you couldn't look at it and
19 clearly determine everything that was happening in that
20 apartment, if it makes -- or, that house, if it makes sense.

21 Um -- it wasn't clear that the informant was ever actually
22 close enough to Mr. Williams to of engaged in a hand-to-hand
23 transaction. And, one of the things that I remember about the
24 video -- and I think the transcript will probably bear this
25 out -- is that there was other people. I -- I -- I vaguely

1 remember the owner, Ms. Tucker. But what I do remember more
2 clearly is, is that near the end of it there was another person
3 who came into the room where the informant was and was, um --
4 that in the -- in the vicinity of the informant and that if any
5 transaction took place, um, it could have very easily taken
6 place between this other person, um, and the informant.

7 Now, that being said, I'm -- I'm -- the -- the video
8 wasn't clear that it was actually a drug transaction. But if
9 one took place, um, it would -- I think it was more probable
10 that it happened between this other person other than
11 Mr. Williams and the informant.

12 Q. And, in fact, you argued that in closing, did you not?

13 A. I haven't read the closing, but that's my recollection,
14 yes.

15 MR. JOHNSON: Your Honor, I believe it's around page
16 one-o-six is where Mr. Grose---

17 A. And -- and -- and -- and I would also add this, as
18 far as this trial strategy and the theme. Um -- also what
19 Mr. Williams testified to earlier that there were -- because of
20 the -- not only the prior record, um -- but the -- I'm not even
21 sure if it was a prior record or just an arrest -- but the, um,
22 informant's involvement in drugs and, um -- in -- in fact, I
23 think it was in a record. I think it was an arrest that they
24 were using as leverage, um, to get his cooperation to set up
25 these alleged drug buys. Um -- the point being is, is that,

1 you know, his credibility was in question and that he had a
2 motive to, you know, fabricate false evidence because of -- of
3 his own troubled situation.

4 Q. And also, I -- I believe, if I may not be mistaken, that
5 his girlfriend was involved because he didn't have a driver's
6 license? I think you argued her credibility as well?

7 A. Um -- I don't recall that, but, I mean, if that's in the
8 transcript, that's the case.

9 Q. Okay. And you did ask for leniency at the, uh,
10 sentencing? Or at least mercy?

11 A. Yes. I mean it wasn't -- I mean, I agree it wasn't much
12 of a -- a sentencing hearing.

13 Q. The Court's indulgence, Your Honor.

14 **THE COURT:** Yes, sir.

15 Q. That's all I have for you right now, Mr. Grose. Thank you
16 very much.

17 **THE COURT:** Cross-examination?

18 **MR. ROCHESTER:** Just a few questions, Your Honor.

19 **E. CHARLES GROSE, CROSS-EXAMINATION BY MR. ROCHESTER:**

20 Q. Good morning, Mr. Grose.

21 A. Good morning.

22 Q. Uh -- first of all, I obtained the file from this case
23 from the Public Defender's Office. Do you have the file here
24 with you today, or have you had an opportunity to look at it?

25 A. I have the file. Um -- I have not been through all of it.

1 Um -- but I have it; I have it here.

2 Q. Okay.

3 A. I have what they -- they gave me. Um -- I don't remember
4 if I had a notebook for this trial or not. I might not have,
5 but I don't see any evidence of that being here. But, uh --
6 but I -- looks like I probably have, you know, everything.

7 Q. Okay. Uh---

8 A. Now, I don't know if you had this, which was the printout
9 from our Case Management System. Um -- I asked them to do that
10 when they gave me the file.

11 Q. Okay.

12 A. So if you want to look at that, I -- it's available.

13 Q. I don't believe that I do have that.

14 A. Okay.

15 Q. I may look at it, if The Court will allow, a few minutes.
16 Let me just, uh, go ahead and ask a few questions, um, based on
17 priority.

18 First of all, did you look up, or do you recall looking
19 up, the maximum penalties, uh, for Mr. Williams? Printing off
20 any paperwork or anything like that?

21 A. Um -- now, I -- I'd -- I normally would not have printed
22 off paperwork. Um -- whether I -- I looked at something or
23 not, I -- I don't recall. But, going back to my earlier
24 answer, I -- it does appear that Miss White and I were
25 operating under a -- a -- a misimpression---

1 Q. Okay.

2 A. ---about the -- the penalty.

3 Q. In looking through the file, I haven't seen any notes of
4 any type of conversations, uh, prior to trial. So do -- do you
5 have any notes of your meetings prior to this trial?

6 A. Well, the -- you know, to the extent that there notes,
7 they are some of the notes that are in the Case Management
8 System. Um -- I, a lot of times, don't make extensive
9 handwritten notes. In fact, I would say the majority of time I
10 do not make extensive handwritten notes of the meetings with
11 clients.

12 Q. All right.

13 A. I did try to focus on talking rather than writing.

14 Q. So, in this file you don't have any notes of preparing for
15 a meeting, for example, for Mr. Williams?

16 A. Um -- no. And I -- I don't think it would have taken much
17 preparation for any of the meetings with him actually, so...

18 Q. And, uh, again I -- I didn't see anything in the file.
19 Is -- is it accurate to say that you don't have any notes
20 anywhere before you today showing that you actually did inform
21 Mr. Williams of the maximum penalties against him? You know,
22 even if it was twenty-five years, you don't have those notes
23 of---

24 A. I -- I -- I don't -- I don't have any notes one way or the
25 other, but what I can tell you is, is that I -- I normally, uh,

1 what? I mean, sometimes I write that down but probably more
2 often than not I do not write that down. Um -- I can tell you
3 that it is my practice at some point to, you know, talk about
4 that. If anybody is going to trial, to make certain that they
5 know what they are facing.

6 Um -- and he referred to a conversation, um, about it
7 being his life and having to make that decision. And that --
8 that's probably when that conversation took place, or at least
9 one of the times it took place.

10 Um -- so, I have no notes one way or the other but my
11 practice is, is that we would have talked about it. In this
12 case, looking at the transcript, it appears I might have been
13 mistaken or was mistaken in what I told him.

14 Q. Okay. Um -- as to the sentencing stage of the trial, um,
15 do you recall doing anything to prepare Mr. Williams for the
16 sentencing stage of trial?

17 A. Um -- not specifically, no.

18 Q. Okay. Did you ask him anything about his background that
19 would have been useful to present to the Judge at sentencing?

20 A. I -- I -- I don't recall. I mean, I -- I probably knew,
21 um -- I -- and I think that I did know from conversations with
22 him that he might have a, you know, a drug problem. That he
23 was a user and not a seller as was alleged in this case.

24 And he's nodding, so it was -- prob- -- we probably had
25 that conversation.

1 Q. Okay. Um---

2 A. His -- his situation, unfortunately, is -- is not
3 uncommon.

4 Q. Okay. Uh -- did you do any type of independent
5 investigation into his background or social history or anything
6 like that?

7 A. A -- only would have been what conversations that -- that
8 we -- we would have had between me and him. I don't recall
9 talking, if you are asking -- I don't recall talking to any
10 other family members or anything like that.

11 Q. And, uh, did you ever inform Mr. Williams that he would
12 have any opportunity to speak on his own behalf at the
13 sentencing stage of trial? Any recollection of that?

14 A. Um -- no, I have no recollection one way or the other.

15 Q. Okay. And, uh, can you speak to, uh, the offers? I -- I
16 have here -- and I don't know if any of them have been admitted
17 into evidence -- but there was a formal offer for a ten-year,
18 uh, plea agreement; is that accurate?

19 A. Uh -- I believe so. I am trying to look at my notes. I
20 be- -- I believe that's the -- the case. And I -- I'm just
21 looking at the -- if you want to show me that I'll be happy to
22 look at it.

23 Q. Okay. Here's a copy of this.

24 A. Okay. All right, in looking, what this is, is this is
25 the, um -- a document that would be given to, um, the defense

1 by the Solicitor at the initial appearance, um, with their
2 initial offer, which would be ten years.

3 Q. Okay. And so, this was a formal ten-year offer?

4 A. Yes, sir.

5 Q. Uh -- I didn't spy anything else in the file. Do you know
6 if there was any other type of offer, uh, in this case? Uh --
7 any other plea offer from the Solicitor?

8 COURT REPORTER: Your Honor, is this to be marked as an
9 exhibit?

10 THE COURT: Ma-am?

11 COURT REPORTER: Is this to be marked as an exhibit?

12 THE COURT: Did you---

13 MR. ROCHESTER: I -- I pre-marked that as Applicant's
14 exhibit one, if that's okay with you?

15 THE COURT: Very well; thank you. That'll be---

16 MR. ROCHESTER: Okay.

17 THE COURT: ---then, exhibit number one unless there is
18 objection to it.

19 MR. JOHNSON: None from The State, your Honor.

20 THE COURT: Admitted without objection.

21 (WHEREUPON, APPLICANT'S EXHIBIT 1 WAS ADMITTED INTO
22 EVIDENCE.)

23 A. I -- I -- I -- I don't recall, um, sitting here -- I mean,
24 there's been some discussion that there was a seven-year offer.

25 Um -- I -- I don't dispute that. I -- I do see in my notes

1 where, you know, there was, um -- and -- and it would probably
2 have been made by Miss Flannery, but that there was a, um,
3 discussion of, you know, him being willing to take a five-year
4 offer or five years suspended on something. There was
5 discussions and notes where we were looking at whether or not
6 it should have been a -- not necessarily technically, but a
7 first or a second offense, you know, if we could get it reduced
8 to something less. Um -- I don't know if that helps answer the
9 question.

10 Q. It does. And so, is it accurate to say, okay, the --
11 there was at least a meeting in which, uh, you and Mr. Williams
12 and perhaps others watched the video that The State had against
13 him of this alleged transaction?

14 A. I -- I -- I recall that.

15 Q. Okay.

16 A. I have some---

17 Q. And -- and is it fair to say that at that point in time
18 when you were having this meeting, watching this video, that
19 The State did have -- still had some plea offer on the table?
20 Or, that The State was willing to enter into some type of plea
21 offer, whether it was ten years or some amount less than that?
22 Is that accurate to say?

23 A. I -- I think that is accurate, yes.

24 Q. Okay.

25 MR. ROCHESTER: I have no further questions.

1 THE COURT: Redirect.

2 E. CHARLES GROSE, REDIRECT EXAMINATION BY MR. JOHNSON:

3 Q. Uh -- just from that last point, um, I think it was the
4 Applicant's testimony and your testimony here today that he
5 actually rejected those plea offers? It was his decision to
6 reject those plea offers?

7 A. That's correct.

8 MR. JOHNSON: No further questions, Your Honor.

9 THE COURT: Thank you, Mr. Grose. You may step down.

10 (WHEREUPON, WITNESS STEPPED DOWN AT 12:06 P.M.)

11 THE COURT: Anything further from The State?

12 MR. JOHNSON: Uh -- nothing, Your Honor.

13 THE COURT: Any reply?

14 MR. ROCHESTER: No, Your Honor.

15 THE COURT: All right. Counsel, I'd like to hear from
16 you. In -- in the Petition filed by Mr. Williams, he alleges
17 essentially that there is not enough evidence to support the
18 charge, or support the conviction.

19 MR. ROCHESTER: Yes, Sir; and, uh, I -- I hope this
20 information got to the file. At that point in time I met with
21 Mr. Williams. Um -- we discussed the other allegations of, uh,
22 ineffective assistance of counsel that we discussed here today.
23 And, uh, in the file there should be -- let me get to it here.
24 When -- when I first realized that this was gonna be a problem,
25 'cause they had filed a Motion to Dismiss, I filed -- let me

1 get to it here -- a Reply which in its essence states that I
2 hadn't had time to meet with him; please give me time to meet
3 with, uh, my client before this case is dismissed. I then met
4 and -- with him, and I discussed with, uh -- uh, Mr. Johnson
5 that I would file a response that would also be an Amended
6 Application and I have that here. Um -- I can provide you with
7 a copy.

8 THE COURT: That --- that's okay. Just so the record's
9 clear now, as to the Petition filed by Mr. Williams himself,
10 uh, to the extent he says there's insufficient evidence to
11 support -- support a conviction, I'm going to deny any relief
12 on those grounds under---

13 MR. ROCHESTER: I understand.

14 THE COURT: ---17-27-10, sub-section 6. Now, uh, according
15 to my notes, Mr. Williams also, without objection of The State,
16 asserted ineffective assistance of counsel in that Mr. Grose
17 allegedly failed to properly advise him of the potential
18 sentence range that was before him in making his decision of
19 whether or not to entertain a plea offer or to go to trial; is
20 that correct?

21 MR. ROCHESTER: Yes, Sir.

22 THE COURT: Other ground other than that?

23 MR. ROCHESTER: Uh -- his, uh -- the failure to
24 investigate and offer any evidence in mitigation of sentencing.

25 THE COURT: I'm gonna deny those grounds as well. I'll be

1 glad to hear from you, but I -- I didn't hear anything on that
2 except you ask him about his social background. I just don't
3 see that being available to you. Okay, Sir?

4 MR. ROCHESTER: I understand.

5 THE COURT: All right, now, that doesn't prevent you from
6 arguing on the record, and I certainly note your objection to
7 my ruling.

8 I'm really interest in, um, the Defendant -- I made a note
9 of this -- that said, I took it upon myself to go to trial.
10 That was a quote from the Defendant. Now, granted, that
11 doesn't obviate the duty of Mr. Grose, or any Defense Attorney,
12 to advise their client of the -- of the range that they're
13 looking at so they make an informed decision.

14 But according to Mr. Grose, he quite candidly testified
15 that he and The State were under the, um, impression that they
16 were still working with a five to twenty-five-year range as
17 opposed to five to thirty. Is that -- is that -- wasn't that
18 the range, Mr. Grose, that you were saying?

19 MR. GROSE: I -- and -- and the old law might have been
20 zero to twenty-five---

21 THE COURT: Zero to twenty-five?

22 MR. GROSE: ---then twenty-five to thirty---

23 THE COURT: Okay.

24 MR. GROSE: ---but that -- that -- but that's -- that
25 caveat, that's accurate, Your Honor.

1 **THE COURT:** Okay; thank you. Um -- so what I'm gonna ask
2 you to address to me, um -- and I want to look a little bit
3 more at the transcript; I haven't looked at the whole thing, in
4 fairness to Mr. Williams, on whether it was twenty-five years
5 or thirty years -- what prejudice resulted to Mr. Williams,
6 which would be his burden to me, when he said I took it upon
7 myself to go to trial. Okay, sir? I'll be glad to hear you on
8 those lines.

9 **MR. ROCHESTER:** Right. And -- and, uh, my understanding
10 of the way I heard my client's testimony is that, yes, I think
11 that he understood that he made a decision to go to trial, and
12 he took it upon himself to go to trial. The issue is, did he
13 have the proper information before him as provided by Defense
14 Counsel to make an educated decision? And that's what I would
15 have argued, uh, no to. Uh -- sure, he made the decision on
16 his own, but it was not an educated decision because he didn't
17 have the proper information, uh, before him.

18 **THE COURT:** Well, if we assume for the purposes of our
19 argument---

20 **MR. ROCHESTER:** Uh-huh?

21 **THE COURT:** ---I know -- I've got Mr. Williams' testimony,
22 it says he didn't tell him about the time at all, okay? Um --
23 we have Mr. Grose who said that, uh, he did not tell him -- you
24 know, twenty-five instead of thirty. Assume for the sake of
25 this argument, and not for the sake of this hearing, that, uh,

1 he was advised it's a twenty-five-year range when in fact it
2 was a thirty-year range. What prejudice would that have made
3 to this Defendant? Now that's the question I'm asking.

4 MR. ROCHESTER: Okay. Well, I believe that, um, my client
5 testified---

6 THE COURT: You have -- talk to him.

7 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A CONFERENCE,
8 OFF THE RECORD.)

9 (WHEREUPON, PROCEEDINGS CONTINUED.)

10 MR. ROCHESTER: And I believe -- if, um -- if I could
11 speak out loud, and just, uh, perhaps -- if -- you correct me
12 if what I saying is wrong. I believe what the Judge---

13 THE COURT: I'm not gone try---

14 MR. ROCHESTER: Okay.

15 THE COURT: ---to advise you of the law. That'd be---

16 MR. ROCHESTER: I believe what the Judge is asking you is,
17 assuming that Mr. Grose is correct here in his testimony, and
18 that he did advise you as to a maximum penalty, but it was
19 wrong -- it was twenty-five years instead of saying thirty
20 years -- then how are you prejudiced? How are your harmed?
21 And, my -- my assessment is the way that you would be harmed is
22 that your, uh, decision to go to trial would have been
23 different.

24 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A CONFERENCE,
25 OFF THE RECORD.)

1 (WHEREUPON, PROCEEDINGS CONTINUED.)

2 MR. ROCHESTER: Okay. Okay, if -- if -- if, in fact, um,
3 like, uh -- if -- if you had known that, uh, you could be
4 sentenced to thirty years -- okay? But we -- we assumed that
5 he, uh, said that you could go twenty -- that you could be
6 sentenced to twenty-five years. But that extra five years,
7 would you have made a decision differently? Would you have
8 decided not to go to trial based on the fact that, uh, you
9 could be sentenced to an additional five years over what
10 Mr. Grose allegedly told you? Does that question make sense to
11 you?

12 MR. WILLIAMS: Yes and no. I can't say that I wouldn't
13 went to trial, but had I know beforehand, I would-a considered
14 it.

15 Even the Assistant Solicitor and Mr. Grose, neither did --
16 the -- the two of them, they wasn't sure if it was twenty-five
17 or thirty, so you know I wasn't sure. If they didn't know, you
18 know, I -- I had no way of knowing.

19 MR. ROCHESTER: Right.

20 MR. WILLIAMS: So, I would have at least considered it.

21 THE COURT: Okay. Anything you want to add to that?

22 MR. ROCHESTER: Uh -- I mean, I would just further state,
23 uh, our position that he wasn't informed of, you know, any time
24 period. And based on that, uh, he was not able to make an
25 educated decision. Certainly, you know, he has stated that he

1 would consider making a different decision based on having that
2 knowledge.

3 THE COURT: All right. And -- and -- and for the record,
4 first, Mr. Johnson, I'll be glad to hear from you before I
5 state what I was gonna say.

6 MR. JOHNSON: Just to restate the testimony, uh, you know,
7 Mr. Grose got up there and said this is what---

8 THE COURT: I don't need you to repeat the testimony; I
9 already have it down.

10 MR. JOHNSON: Okay. Then, The State would, you know,
11 assert that there is no prejudice in this case. Mr. Grose has
12 testified that he, in his normal practice, uh, he advises his
13 clients of the potential penalties when they -- when he meets
14 with them. So, we would, uh -- and also, Mr., uh, Williams has
15 admitted to lying previously. So, we would ask the credit
16 (sic) -- ask The Court to find he is not credible and that, uh,
17 Mr. Grose is credible in that he advised, uh, Mr. Williams,
18 prior to the plea offer -- or, prior to trial, at least -- uh,
19 and so that he made an educated decision to reject those plea
20 offers and go to trial on his own. Thank you.

21 THE COURT: Anything further?

22 MR. ROCHESTER: No, Your Honor.

23 THE COURT: Thank you gentlemen. Um -- I'm gonna -- I'm
24 gonna look at the transcript further, but I am gonna make some
25 preliminary rulings first.

1 Uh -- I do know that Mr. Williams has quite an extensive
2 record. Uh -- some of which has to do with his propensity for
3 truthfulness, uh, which would be relevant to this inquiry, uh,
4 today as it relates to his allegation, unsupported by any other
5 evidence, that Mr. Grose failed to advise him of the range of
6 which, uh, he was facing.

7 Uh -- on the other hand, you have, uh, Mr. Grose who quite
8 candidly said, uh, I -- I improperly told him twenty-five as
9 opposed to thirty.

10 Uh -- I'm gonna look at the case based on, uh, Mr. Grose
11 advising him improperly on twenty-five as opposed to thirty to
12 see if there is any prejudice to Mr. Williams.

13 I -- I -- I find that Mr. Williams' testimony is he was
14 not advised of any timeframe. It's not credible, uh,
15 especially considering his record and his extensive involvement
16 into the Court System. Mr. -- it is beyond the pale that, uh,
17 one of the first things that would not come out of their mouths
18 is what am I looking at? Uh -- so I just find that's totally,
19 uh, not credible.

20 Uh -- also, Mr. Williams has, uh, candidly admitted on the
21 record that, I took it upon myself to go to trial. If you look
22 at his Petition, it appears that, uh, basically it was, uh,
23 almost a roll of the dice, for lack of better terms. In fact,
24 he didn't think the evidence was sufficient to support a
25 conviction. In fact, that's what he said in his Petition.

1 Um -- that being said, I am gonna look at whether or not
2 there is any, you know, prejudice from the five year
3 differential based on him turning down a, uh, formal offer of
4 ten years, and a potential range of seven.

5 Uh -- with that being said, if anybody has any cases they
6 want to give to me in that regard, I'll be glad to entertain
7 them. Um -- I don't anticipate it being very long. If you
8 would get them to me by the end of the week, I'd appreciate it.

9 MR. ROCHESTER: Yes, Sir.

10 THE COURT: Okay. Anything further from The State?

11 MR. JOHNSON: No.

12 THE COURT: From the Defense?

13 MR. ROCHESTER: No, Your Honor.

14 THE COURT: Thank you. Thank you, Mr. Williams; and you,
15 Mr. Grose.

16 (WHEREUPON, HEARING ENDED AT 12:15 P.M.)

17 *****END OF REQUESTED TRANSCRIPT*****
18
19
20
21
22
23

STATE OF SOUTH CAROLINA)
COUNTY OF GREENWOOD)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED VIVIAN H. CROSS, OFFICIAL COURT REPORTER FOR THE TENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF THOSE PROCEEDINGS REQUESTED AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF COMMON PLEAS FOR GREENWOOD COUNTY (HEARD IN LAURENS COUNTY), SOUTH CAROLINA, ON THE 28th DAY OF NOVEMBER 2012.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

OCTOBER 30, 2012

Vivian H. Cross
VIVIAN H. CROSS
CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Barry Dwyane Williams, #350338,

2010-CP-24-0389

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
2013 JUN 11 PM 3:49

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 29, 2010. This application was not received by the Respondent until July 20, 2012. Respondent made its Return and Motion to Dismiss for failure to state a claim cognizable in a PCR action on September 4, 2012. An evidentiary hearing into the matter was convened on November 28, 2012, at the Laurens County Courthouse. Weston B. Rochester, Esquire represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, Applicant testified on his own behalf. Charles Grose, Esquire also testified. This Court had before it a copy of the records of the Greenwood County Clerk of Court, records from the South Carolina Department of Corrections, and the trial transcript.

PROCEDURAL HISTORY

The Applicant is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Greenwood County. The Applicant was indicted at the June 2007 term of the Greenwood County Grand Jury for Distribution of Crack

APPROPRIATE COPY
FILED
JUL 11 2013
CLERK OF COURT
GREENWOOD COUNTY
S.C.

Cocaine (2007-GS-24-0926) and Distribution of Crack Cocaine within proximity of a school or park.

The Applicant was represented by Charles Grose, Esquire. On January 23, 2008, the Applicant proceeded to jury pursuant to which he was found guilty of both charges as indicted. The Honorable John C. Hayes, III sentenced Applicant to a period of confinement for thirty (30) years for Distribution of Crack Cocaine, 2nd offense and fifteen (15) years for Distribution of Crack Cocaine within a half of a mile of a school.

The Applicant filed a timely Notice of Appeal with the South Carolina Court of Appeals. The South Carolina Court of Appeals affirmed his conviction and sentence. State v. Williams, Op. No. 2010-UP-10 (S.C. Ct. App. filed January 21, 2010). The Remittitur was sent on February 8, 2010.

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

1. "Wasn't no transaction of money or drugs during the video"
 - a. "Wasn't never once a hand-to-hand transaction seen period after the jury watched the video 3 times."
2. "Someone on the video has a wad of money, saying he gave me a 20"
 - a. "The C.I. admitted wasn't a transaction seen on the video. Greenwood Detective Steve McGee stated the crack weight to be .2 grams"
3. "Why and how can the drugs be two different weights .2 grams and .12 grams"
 - a. "SLED analysis stated the crack weight to be .12 grams. A bug difference. The credibility of the C.I. and his motive."

Respondent filed a Return and Motion to Dismiss arguing the Applicant's claims were not cognizable under S.C. Code Ann. § 17-27-10 et seq. (1976).

Applicant, through counsel, filed a Return to Respondent's Motion to Dismiss (construed as an amended Application) alleging:

1. "Trial counsel was ineffective in advising the Applicant to reject a plea agreement offered by the solicitor, which the Applicant would have rejected had he fully understood the potential results of trial."
2. "Trial counsel provided ineffective assistance by failing to present an effective plea in mitigation of the Applicant's sentence."

At the PCR hearing, Applicant proceeded on both of the above-stated claims of ineffective assistance of counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. 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), SCRCP). 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 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.

Rejection of plea agreement

The Applicant alleges Counsel was ineffective for advising him to reject a plea offer from the State because Counsel did not make the Applicant fully aware of the potential sentences he was facing. At the PCR hearing, the Applicant testified he met with Counsel on only two occasions. During these meetings, the Applicant stated he and Counsel did not discuss the potential sentences for the charged crimes. He testified Counsel relayed a ten-year plea offer from the State, but he rejected it. The Applicant stated at their second meeting, he and Counsel viewed and discussed the video, which was introduced at trial, in terms of its strengths and weakness. The Applicant stated the video was clear, but did not show a hand-to-hand drug transaction and based upon this, he decided to reject the plea offer and proceed to trial. The Applicant also testified Counsel said, "I think we can win [the trial], but it's your life." The Applicant further testified he told Counsel, "Let's roll with it," meaning he wanted to proceed with a trial. The Applicant testified the State offered a plea for seven years, but he rejected this offer as well.

Additionally, the Applicant stated he knew there was possibility he could get convicted at trial, but did not think he would receive a thirty-year sentence. He also testified, in hindsight, he doubted he would go to trial again. However, the Applicant stated because of the video, he still thinks trial was the correct avenue.

On cross-examination, the Applicant admitted he has many prior convictions. Quite a few of these prior convictions include crimes of dishonesty such as giving false information to police and fraudulent check. He also admitted it was his decision to reject both plea offers and proceed to trial. The Applicant further testified, because of his prior convictions, he is quite familiar with the criminal system.

Counsel testified he met with the Applicant on multiple occasions and while he does remember the exact conversations with the Applicant, he would have discussed the charges and penalties as is custom in his practice. Counsel stated he believes he might have told the Applicant the distribution charge carried a maximum twenty-five year sentence, although he is now aware the charge carries up to thirty years. Counsel also testified it was the Applicant's decision to reject the plea offers.

This Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. This Court had a copy of the Clerk's records and has read the trial transcript, all of which assists the Court in judging the witnesses' credibility. This Court finds Applicant's testimony, regarding Counsel's ineffectiveness, is not credible while also finding Counsel's testimony credible.

Counsel testified he advised the Applicant that Distribution of Crack Cocaine carried a sentence of five to twenty-five years. Counsel admitted he now knows the sentence is actually five to thirty years. As such, this Court finds Counsel was deficient in his sentencing advice to the

Applicant. However, under Strickland, the Applicant must also prove prejudice for this Court to grant relief. This Court finds the Applicant has not met his burden of proof that he was prejudiced by Counsel's erroneous advice.

At the PCR hearing, the Applicant admitted he decided to reject the plea offers from the State of ten and seven years. He also admitted that after he watched the video tape in the case two to three times, he told Counsel, "Let's roll with it," in reference to his trial. Additionally, he stated had he known of the maximum penalties, he would have considered pleading guilty, but still would have pursued a trial because of the video tape.

To prove prejudice, the Applicant must show that but-for counsel's errors, there exists a reasonable probability the outcome of the trial would have been different under Cherry and Strickland. In this case, the Applicant must show that but-for Counsel's erroneous sentencing advice, the outcome of his trial would have been different. He cannot do this. First, any advice Counsel rendered to the Applicant concerning sentencing, would have no effect on the trial itself. This Court finds Counsel was effective in his representation throughout the actual trial, and the Applicant can prove no resulting prejudice from Counsel's performance at trial. Nevertheless, the effect of sentencing advice would be a stronger factor in a guilty plea case, where the applicant is deciding whether or not to plead guilty. That is not the case in the case at bar because the Applicant testified he wanted a trial, even if Counsel had properly advised him on the penalties. Second, Counsel advised the Applicant, albeit erroneously, concerning the maximum penalties the Applicant faced at trial. In turn, the Applicant admittedly rejected both offers from the State. At no point during the PCR hearing did the Applicant claim that but-for Counsel's advice, he would have accepted the State's plea offer. To the contrary, the Applicant admitted, based on the video, that

even had he known the maximum penalty for Distribution of Crack Cocaine, 2nd offense was thirty years, he still would have pursued a trial. Based on the Applicant's own testimony, no prejudice can be shown where the Applicant pursued a trial after voluntarily rejecting the plea offers and admitted that even if he had known the correct maximum penalties, he still would have pursued a trial. Accordingly, the Applicant has failed to meet his burden of proof in this case.

Plea in mitigation of sentence

The Applicant alleges Counsel was ineffective for failing to offer an effective plea in mitigation of the Applicant's sentence. At the PCR hearing, the Applicant testified that Counsel did not offer any information during the sentencing phase of trial that potentially could have reduced his sentence. The Applicant stated that Counsel merely requested a lenient sentence under the circumstances.

The Applicant testified that he and Counsel never discussed the sentencing phase of trial. More specifically, the Applicant stated that Counsel did not advise him that both the Applicant and Counsel would have the opportunity to offer mitigating factors during sentencing. The Applicant further testified that Counsel did not ask the Applicant what mitigating factors Counsel could present on his behalf. The Applicant testified that, in retrospect, he would have told the Judge that he is not a drug dealer, but a drug user. He stated that he had struggled with drug addiction for quite some time.

On cross-examination, the Applicant admitted he has many prior convictions. The Applicant further testified that, because of his prior convictions, he is quite familiar with the criminal system.

Counsel testified that he does not recall discussing the sentencing phase of trial with the Applicant. Counsel stated that he does not recall asking the Applicant about mitigating factors that

Counsel could offer on his behalf. Counsel further testified that he does not recall advising the Applicant that both he and Counsel would have the opportunity to offer information in mitigation of his sentence at this stage of the trial.

Under Strickland, the Applicant must prove both that counsel's performance was deficient and that this deficiency caused prejudice to the Applicant. To prove prejudice, the Applicant must show that but-for counsel's errors, there exists a reasonable probability the outcome of the trial would have been different under Cherry and Strickland. In this case, the Applicant must show that but-for Counsel's omission of mitigating factors, the Applicant would have received a lesser sentence. This Court finds that the Applicant has not met his burden of proof to show that he was prejudiced by Counsel's omission of mitigating factors during the sentencing phase of trial.

First, the Applicant had many prior convictions, which the trial judge took under consideration in issuing the Applicant's sentence. Second, the Applicant offered only one possible mitigating factor at the PCR hearing: that he was a drug user rather than a drug dealer. In the face of the Applicant's criminal history, the Applicant was not prejudiced by the omission of this one potentially mitigating factor, as this would be insufficient to persuade a trial judge to reduce the Applicant's sentence. Accordingly, the Applicant has failed to meet his burden of proof in this case.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

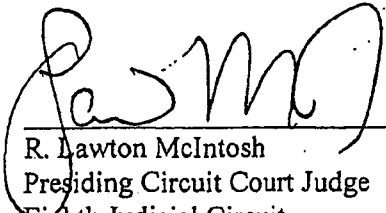
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate

appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on 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!


R. Lawton McIntosh
Presiding Circuit Court Judge
Eighth Judicial Circuit

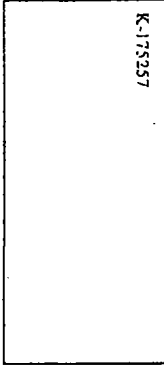
6-6, 2013
Anderson, South Carolina

WITNESSES

Travis Clark

WARRANT NUMBERS

K-175257



Shirley W. Palmer
Foreman of the Grand Jury

Date: 6-15-07

VERDICT

Guilty

David M. Hester
Foreman
1-23-08

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

COURT OF GENERAL SESSIONS

June Term, 2007

Indictment # 07GS24-926

THE STATE

vs.

BARRY DWAYNE WILLIAMS

INDICTMENT FOR

DISTRIBUTION OF CRACK COCAINE

ATTEST A. TRUE GORMAN

Angela M. Gorman
CLERK OF COURT
COOP AND GR
GREENWOOD COUNTY
S.C.

THE STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

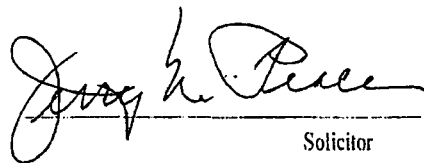
INDICTMENT FOR
DISTRIBUTION OF CRACK COCAINE

At a Court of General Sessions, convened on the 15th day of June, 2007, the Grand Jurors of Greenwood County present upon their oath:

COUNT ONE

That BARRY DWAYNE WILLIAMS, did in Greenwood County, state aforesaid, on or about the 24th day of January, 2007, wilfully, unlawfully and knowingly manufacture, distribute, dispense, deliver, purchase, or otherwise aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase a quantity of Crack Cocaine, a Schedule II controlled substance in violation of the provisions of Title 44, Chapter 53, Article 3 of the South Carolina Code of Laws, 1976, as amended

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.


Solicitor

WITNESSES

Travis Clark

WARRANT NUMBERS

K-175262

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

COURT OF GENERAL SESSIONS

June Term, 2007

Indictment # 07GS24- 927

THE STATE

VS.

BARRY DWAYNE WILLIAMS

Shirley D. Putman
Foreman of the Grand Jury

Date: 6-15-07

VERDICT

Guilty

Paul H. Clark
Foreman
6-23-08

INDICTMENT FOR

VIOLATION SECTION 44-53-445 (Proximity)

ATTEST A TRUE COPY
Shirley D. Putman
FOREMAN
COOP AND GAS
GREENWOOD COUNTY
S.C.

07-0000863

**THE STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD**

INDICTMENT FOR

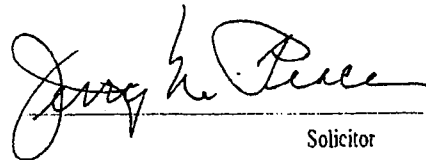
VIOLATION SECTION 44-53-445 (Proximity)

At a Court of General Sessions, convened on the 15th day of June, 2007, the Grand Jurors of Greenwood County present upon their oath:

COUNT ONE

That BARRY DWAYNE WILLIAMS, did in Greenwood County, state aforesaid, on or about the 24th day of January, 2007, wilfully, unlawfully and knowingly distribute, sell, purchase, manufacture, or possess with intent to distribute, a quantity of Crack Cocaine, a Schedule II controlled substance, while in, on, or within a one-half mile radius of the grounds of a public or private school; a public playground or park; a public vocational or trade school or technical educational center; or a public or private college or university, in violation of Section 44-53-445 of the South Carolina Code of Laws, 1976, as amended

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.


Solicitor