

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

R. Knox McMahon, Circuit Court Judge

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S.C. Supreme Court

OCTAVIUS LIVINGSTON

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001221

APPENDIX

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STATE OF SOUTH CAROLINA	)	
	)	COURT OF GENERAL SESSIO
County of Richland	)	08-GS-40-1666
	)	
THE STATE OF SOUTH CAROLINA,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
OCTAVIUS LIVINGSTON,	)	
	)	
DEFENDANT,	)	

September 11, 2008
Columbia, South Carolina

BEFORE:

THE HONORABLE JAMES R. BARBER, JUDGE, and a jury.

APPEARANCES:

THEODORE LUPTON, ASSISTANT SOLICITOR
Attorney for the State

MARCUS WHITLARK, ESQ.
Attorney for the Defendant

KAREN TRACY
Official Court Reporter

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<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
1	aerial diagram	45	52
2	cocaine	45	133
3	video (C.D.)	59	59
4	drug analysis	134	134

COURT'S EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
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1 THE COURT: All right. We have had a few minutes
2 pretrial conference with Mr. Whitlark and Mr. Lupton, and
3 Mr. Whitlark had made a motion in limine concerning the
4 prior record of the defendant, and the State has indicated
5 they do not intend to go into that matter. So
6 Mr. Whitlark, we have handled that.

7 MR. WHITLARK: Yes, sir.

8 THE COURT: Then mr. Whitlark submitted some voir
9 dire, and I indicated that I probably would not ask
10 questions four, six, and seven. Although, I will tell you
11 that one of the inquiries I do make, Mr. Whitlark, is that
12 they have to follow the rule -- I mean the law as I give
13 it to them.

14 So I do ask can they give them a fair and impartial
15 trial, if they know of any reason they can't give the
16 defendant a fair and impartial trial.

17 Do we have the indictment?

18 MR. LUPTON: Your Honor, I --

19 THE COURT: Do we have a clerk?

20 MR. LUPTON: The indictment we're going forward on is
21 2008-GS-40-1666.

22 THE COURT: All right. And where is the original
23 indictment?

24 MR. LUPTON: The clerk's office. I can hand it up,
25 for the court's reference, a copy.

1 THE COURT: Well, you need to get the original.

2 All right. The charge is distribution of cocaine,
3 third offense or above. Is the State ready to proceed?

4 MR. LUPTON: The State is ready to proceed, Your
5 Honor.

6 THE COURT: Is the defendant ready, Mr. Whitlark?

7 MR. WHITLARK: Ready, Your Honor.

8 THE COURT: Any other matters we need to take up
9 before we call the jury panel up, Mr. Lupton?

10 MR. LUPTON: Your Honor, the -- I don't believe
11 there's any matters. I don't think identification is at
12 issue. He was on video, so I don't think identification
13 is an issue. So I don't think there's a need for Neil vs.
14 Biggers. If the defense is making an issue of that, if
15 they could let us know.

16 MR. WHITLARK: No, we're not, Your Honor.

17 MR. LUPTON: And as far as statements other than what
18 was said during the process of the buy, I don't believe
19 that there are statements in this case.

20 So I don't think that since the buy was made by an
21 undercover officer, and his law enforcement capacity was
22 not known and there was no custody, I don't believe a
23 Jackson V. Denno would be necessary either.

24 THE COURT: All right.

25 MR. WHITLARK: Your Honor, I -- we had reports. I

1 don't see where there's any reference to my client saying
2 anything to them. So if there's some sort of admission or
3 something I don't know about, they're going to --

4 MR. LUPTON: The discussion of the buy itself.

5 THE COURT: The only thing they're offering is the --
6 is whatever audio is in the -- is the tape.

7 MR. WHITLARK: Yes, sir. That's -- I have no problem
8 with what's on the video.

9 THE COURT: I don't know what that is, but apparently
10 their position is it's not subject to the Jackson V.
11 Denno.

12 MR. WHITLARK: Yes, sir. Anything else out of that,
13 no. What's in the -- the audio would be fine. We don't
14 have an objection to that.

15 THE COURT: All right. Well, let's -- Madam Clerk,
16 can we bring the jury up?

17 MR. LUPTON: And, Your Honor, I am informing the
18 officers and they understand that they cannot make
19 reference to the defendant's prior record at all or any
20 prior or subsequent --

21 THE COURT: Prior or related bad acts.

22 MR. LUPTON: Yes, Your Honor, unless the defense
23 opens the door by saying that he has never sold or
24 something of that nature.

25 THE COURT: That's always -- everybody is always

1 subject to opening the door.

2 MR. LUPTON: I understand but, Your Honor, they
3 understand they cannot mention any of the other buys or
4 his prior record. In fact, this was more than a first
5 offense.

6 THE COURT: All right.

7 (The jury panel was brought into the courtroom).

8 All right. Good morning, ladies and gentlemen. I'm
9 Jim Barber. I'm a judge here in the Fifth Judicial
10 Circuit, which is Richland County. I'm here to preside
11 over a case entitled the State of South Carolina vs.
12 Octavius Livingston.

13 Mr. Livingston has been charged in the bill of
14 indictment with the offense of distribution of cocaine.
15 The indictment alleges that Mr. Livingston did in Richland
16 County on or about January 23, 2007 manufacture,
17 distribute, dispense, deliver, purchase or aid, abet,
18 attempt, or conspire to manufacture, distribute, dispense,
19 deliver, or purchase, or possess with intent to
20 manufacture, distribute, dispense, deliver, or purchase a
21 controlled substance, that being cocaine.

22 Now, to this indictment, ladies and gentlemen, the
23 defendant has entered a plea of not guilty which now
24 places upon the State the burden of proving the defendant
25 guilty and proving him guilty beyond a reasonable doubt.

1 Now, ladies and gentlemen, this indictment, the
2 document that I just read to you, is a notice document.
3 It is the document that puts the defendant on notice of a
4 particular charge so that he has the opportunity to know
5 what he has been charged with and deal with it
6 accordingly.

7 As I said, the defendant has pled not guilty, and
8 therefore, we're going to select a jury and let the jury
9 listen to the evidence, determine what the jury believes
10 to be the facts, apply the law, and ultimately render a
11 verdict in this matter.

12 Now, before we begin, ladies and gentlemen, I want to
13 ask you certain questions, and I want to introduce you to
14 some individuals who may be involved in this trial.

15 First, let me introduce you to Mr. Livingston, who is
16 the defendant. Mr. Livingston, if you'd please stand and
17 face the jury.

18 This is Mr. Octavius Livingston, ladies and
19 gentlemen. I would inquire at this time is there any
20 member of this jury panel or any member of the jury
21 panel's immediate family who is related by blood or
22 connected by marriage or either now or in the past has had
23 a close personal relationship with Mr. Livingston or
24 either now or in the past has had an employment or a
25 business relationship with Mr. Livingston? If so, please

1 stand.

2 (There was no response).

3 All right. Thank you, sir.

4 MR. WHITLARK: Thank you.

5 THE COURT: Ladies and gentlemen, in most instances
6 when parties come into court, both on the civil side and
7 on the criminal side, they're represented by attorneys.
8 That is the situation here today.

9 The State of South Carolina is represented by the
10 Solicitor's Office of the Fifth Judicial Circuit. The
11 Assistant Solicitor who is handling this matter here today
12 on behalf of the Solicitor's Office is Mr. Ted Lupton.

13 Mr. Lupton, would you please stand? This is
14 Mr. Lupton, ladies and gentlemen. He is a member of the
15 South Carolina bar.

16 I would inquire at this time, is there any member of
17 this jury panel or any member of the jury panel's
18 immediate family who is related by blood or connected by
19 marriage or either now or in the past has had a close
20 personal relationship with Mr. Lupton or anyone in the
21 Solicitor's Office of the Fifth Judicial Circuit or either
22 now or in the past has had an employment or a business
23 relationship with Mr. Lupton or with the Solicitor's
24 Office? If so, please stand.

25 (There was no response).

1 All right. Thank you.

2 Ladies and gentlemen, representing Mr. Livingston is
3 Mr. Mark Whitlark. Mr. Whitlark is a member of the South
4 Carolina Bar, as well. His office is in Columbia, South
5 Carolina, but he practices throughout the State.

6 I would inquire at this time is there any member of
7 this jury panel or any member of the jury panel's
8 immediate family who is related by blood or connected by
9 marriage or either now or in the past has had a close
10 personal relationship with this -- with Mr. Whitlark or
11 either now or in the past has had an employment or a
12 business relationship with Mr. Whitlark or been
13 represented by Mr. Whitlark? If so, please stand.

14 Yes, ma'am. If you'd please stand and tell me your
15 name.

16 PROSPECTIVE JUROR: Joanna Ellis.

17 THE COURT: What is your situation?

18 PROSPECTIVE JUROR: I don't personally know
19 Mr. Whitlark, but I do know his brothers and his eating
20 establishment, Rockaways.

21 THE COURT: All right. The fact that you know of
22 Mr. Whitlark, his relatives and some of their business,
23 would that prevent you from listening to the evidence in
24 this case and based upon such evidence render a fair and
25 impartial verdict?

1 PROSPECTIVE JUROR: No, sir.

2 THE COURT: All right. Thank you.

3 All right. Ladies and gentlemen, I'd like to read to
4 you the names of some potential witnesses who may testify
5 in this trial. Of course, if any of those witnesses are
6 here, I'd ask that they please stand so that the jury can
7 see who they are. There may be some names I read to you
8 that the witness is not here because they will not be
9 available until the time that they are called.

10 First, I'd like to call -- I'd ask -- read the name
11 of Jason Williams with the Richland County Sheriff's
12 Department. That's Deputy Williams over here. Mr. John
13 Lutz of the Richland County Sheriff's Department, Deputy
14 Lutz; Tena Goff with the Richland County Sheriff's
15 Department; Alvester Stewart with the Richland County
16 Sheriff's Department; Andy Farmer with the Richland County
17 Sheriff's Department; Curtis Burnette with the Richland
18 County Sheriff's Department; Quidrona Bryce, and Ruby
19 Livingston.

20 All right. Ladies and gentlemen, I would inquire at
21 this time is there any member of this jury panel or any
22 member of the jury panel's immediate family who is related
23 by blood or connected by marriage or either now or in the
24 past has had a close personal relationship with any of
25 these potential witnesses or either now or in the past has

1 had an employment or a business relationship with any of
2 them?

3 Yes, ma'am, the young lady in the front row. Tell me
4 your name.

5 PROSPECTIVE JUROR: I'm Deputy Miranda Friday, deputy
6 with the Richland County Sheriff's Department.

7 THE COURT: I'm sorry. Tell me your name.

8 PROSPECTIVE JUROR: Miranda Friday, deputy with the
9 Richland County Sheriff's Department.

10 THE COURT: All right. You're a deputy with the
11 Richland County Sheriff's Department?

12 PROSPECTIVE JUROR: Yes, sir.

13 THE COURT: All right. I'm going to excuse you from
14 service on this jury.

15 (Juror number 1, Black female).

16 Yes, sir, your name?

17 PROSPECTIVE JUROR: Robert Barnwell.

18 THE COURT: All right. Mr. Barnwell, what is your
19 situation?

20 PROSPECTIVE JUROR: I'm a sales manager for Long
21 Safety and Supply that deals with Richland County a lot.

22 THE COURT: All right. So you sell to the sheriff's
23 department from time to time?

24 PROSPECTIVE JUROR: Yes, sir.

25 THE COURT: All right. The fact that you're employed

1 in this occupation, would that prevent you from listening
2 to the evidence in this case and based upon such evidence
3 rendering a fair and impartial verdict?

4 PROSPECTIVE JUROR: No, sir.

5 THE COURT: All right. Thank you.

6 Yes, ma'am, your name?

7 PROSPECTIVE JUROR: Joyce Loper, 184. I'm a nurse,
8 and I have experience with his mother.

9 THE COURT: You've had experience with what?

10 PROSPECTIVE JUROR: With Ruby Livingston.

11 THE COURT: All right. I mean, you have treated her
12 before?

13 PROSPECTIVE JUROR: Yes.

14 THE COURT: All right. The fact that you have
15 provided some medical care to Ms. Livingston, would that
16 prevent you from listening to the evidence and based upon
17 such evidence rendering a fair and impartial verdict?

18 PROSPECTIVE JUROR: No, absolutely not.

19 THE COURT: All right. Thank you, ma'am.

20 All right. Ladies and gentlemen, is there any member
21 of this jury panel who is related by blood or marriage
22 with anyone involved in law enforcement? If so, please
23 stand.

24 (There was no response).

25 All right. Yes, ma'am. Tell me your name, if you

1 would.

2 PROSPECTIVE JUROR: Brenda Roberts.

3 THE COURT: All right. Ms. --

4 PROSPECTIVE JUROR: Brenda Roberts. My son used to
5 be a deputy. Now he's a reserve deputy.

6 THE COURT: All right. The fact that you have a son
7 that's formerly a deputy, is now a reserve deputy, would
8 that prevent you from listening to the evidence in this
9 case and based upon such evidence rendering a fair and
10 impartial verdict?

11 PROSPECTIVE JUROR: No.

12 THE COURT: Thank you.

13 Yes, ma'am?

14 PROSPECTIVE JUROR: I'm juror 272. I have two
15 cousins that work for the Richland County Sheriff's
16 Department.

17 THE COURT: All right. You have two cousins that are
18 employed with the sheriff's department. All right. The
19 fact that you have two cousins employed at with the
20 sheriff's department, would that prevent you from
21 listening to the evidence in this case and based upon such
22 evidence rendering a fair and impartial verdict?

23 PROSPECTIVE JUROR: No, it does not.

24 THE COURT: All right. Thank you, ma'am.

25 Yes, ma'am, your name?

1 PROSPECTIVE JUROR: Rebecca Wood.

2 THE COURT: All right. Ms. Wood, what's your
3 situation?

4 PROSPECTIVE JUROR: My brother-in-law is with the
5 Department of Public Safety.

6 THE COURT: All right. The fact that you have a
7 brother-in-law that's employed in law enforcement, would
8 that prevent you from listening to the evidence in this
9 case and based upon such evidence rendering a fair and
10 impartial verdict?

11 PROSPECTIVE JUROR: No, sir.

12 THE COURT: All right. Thank you, ma'am.

13 All right. Is there any member of this jury panel
14 who is friends with or attends church or social clubs,
15 that you know of, with a member of law enforcement or with
16 the solicitor's office? If so, please stand.

17 (There was no response.)

18 PROSPECTIVE JUROR: What was -- I'm sorry. What was
19 the -- if you attend church with a member of law
20 enforcement?

21 THE COURT: Yeah, you're friends with someone who is
22 in law enforcement or you attend church with someone who
23 is in law enforcement or a social club with someone that's
24 in law enforcement.

25 PROSPECTIVE JUROR: So it's not work closely with?

1 THE COURT: No.

2 PROSPECTIVE JUROR: Okay, sorry.

3 THE COURT: Yes, ma'am. Tell me your name again?

4 PROSPECTIVE JUROR: Joyce Loper.

5 THE COURT: All right.

6 PROSPECTIVE JUROR: 184. I have a friend that's with
7 the Richland County Sheriff's Department.

8 THE COURT: All right. The fact that you have a
9 friend that's employed in the Sheriff's Department, would
10 that prevent you from listening to the evidence in this
11 case and based upon such evidence rendering a fair and
12 impartial verdict?

13 PROSPECTIVE JUROR: No.

14 THE COURT: All right. Thank you.

15 Yes, ma'am, your name?

16 PROSPECTIVE JUROR: Buford Darnell, 76. One of the
17 children my son grew up with is a highway patrolman, and
18 we're very close with him.

19 THE COURT: All right. The fact you had -- I assume
20 this is one of your children?

21 PROSPECTIVE JUROR: It's my children's best friend,
22 They all grew up together. We've gone to the beach
23 together for years but...

24 THE COURT: You don't have a child old enough to be a
25 friend of a highway patrolman.

1 PROSPECTIVE JUROR: I'm afraid I do, okay.

2 THE COURT: Okay. The fact that you have a
3 relationship, or one of your children does, with somebody
4 in law enforcement, would that prevent you from listening
5 to the evidence in this case and --

6 PROSPECTIVE JUROR: No, I wouldn't --

7 THE COURT: -- based up such evidence render a fair
8 and impartial verdict? And tell me your name again,
9 please.

10 PROSPECTIVE JUROR: Buford Darnell.

11 THE COURT: Yes, sir. Your name?

12 PROSPECTIVE JUROR: Joe Zokan, juror 300. Barney
13 Geise, church, and kids go to school together.

14 THE COURT: Well, do you ever see Barney Geise at
15 church or do you just...

16 PROSPECTIVE JUROR: Yes, sir.

17 THE COURT: All right. Well, the fact that you
18 attend the same church the solicitor does, would that
19 prevent you from listening to the evidence in this case
20 and based upon such evidence rendering a fair and
21 impartial verdict?

22 PROSPECTIVE JUROR: No.

23 THE COURT: All right. Thank you.

24 All right. Ladies and gentlemen. At the end of this
25 trial I'm going to charge you or instruct you on the law

1 as it applies to this type case. You are to take the law
2 as I give it to you and apply it to the facts that you
3 determine them to be in this case.

4 Is there any member of this jury panel who believes
5 you will not be able to comply with my instructions? By
6 that I mean accept the law as I give it to you and apply
7 it to the facts as you determine them to be? If you
8 cannot comply with my instructions, please stand at this
9 time.

10 (There was no response.)

11 Has any member of this jury panel formed or expressed
12 an opinion as to the guilt or the innocence of
13 Mr. Livingston? If so, please stand.

14 (There was no response.)

15 Is there any member of this jury panel who is
16 conscious of any interest or any bias or any prejudice for
17 or against either the defendant, Mr. Livingston, or the
18 State? If so, please stand.

19 (There was no response.)

20 Can each member of this jury panel give the State and
21 the defendant a fair and impartial trial? If you cannot,
22 please stand.

23 (There was no response.)

24 All right. Any further inquiry from the State?

25 MR. LUPTON: No, Your Honor.

1 THE COURT: From the defendant?

2 MR. WHITLARK: None from the defense, Your Honor.

3 THE COURT: All right. Thank you.

4 Madam Clerk?

5 THE CLERK: Ladies and gentlemen, as I call your name
6 and number, please come to the microphone, state your name
7 and your occupation. Bring all your personal belongings
8 with you.

9 Annie Williams, 295.

10 (Black female).

11 THE COURT: Number one, is she the one that was
12 struck?

13 THE CLERK: Yes, sir.

14 PROSPECTIVE JUROR: Good morning. My name is Annie
15 Williams, and I'm employed at Fort Jackson as a nurse.

16 THE CLERK: What says the State?

17 MR. LUPTON: Please excuse this juror.

18 THE CLERK: Have a seat in the back of the courtroom,
19 please.

20 Number 222.

21 (MaiLi Munoz-Adams, black female).

22 THE COURT: Come on, pronounce her name.

23 (Pause).

24 THE CLERK: I can't.

25 THE COURT: Is it MaiLi Munoz-Adams?

1 PROSPECTIVE JUROR: Yes.

2 (Pause).

3 Good morning. I'm MaiLi Munoz-Adamas. I am a major
4 gifts officer at the University of South Carolina.

5 THE CLERK: What does the State say?

6 MR. LUPTON: Please present the juror.

7 THE CLERK: What says the defense?

8 MR. WHITLARK: Please seat this juror.

9 THE CLERK: Have a seat in the jury box.

10 THE BAILIFF: Watch your step going up.

11 THE CLERK: Teddy Morris, 220.

12 (Black male).

13 PROSPECTIVE JUROR: Good morning. My name is Teddy
14 Morris, juror number --

15 (A cellphone rang).

16 -- 220. I'm presently unemployed.

17 THE CLERK: What says the State?

18 (A cellphone rang).

19 MR. LUPTON: Please excuse this juror.

20 (A cellphone rang).

21 THE COURT: Get that telephone.

22 (Pause).

23 THE BAILIFF: Whose phone is that?

24 PROSPECTIVE JUROR: Sorry.

25 THE COURT: All right. If you'll give it to the

1 bailiff, please.

2 THE BAILIFF: I need that phone.

3 PROSPECTIVE JUROR: It's not mine. I shut mine off.

4 THE COURT: And someone get Mr. Martin a hearing aid.

5 THE CLERK: Terry Lynn Dichiarà, 84.

6 (White female).

7 PROSPECTIVE JUROR: I'm Terry Lynn Dichiarà, number
8 84.

9 THE CLERK: What says the State?

10 MR. LUPTON: Please present the juror.

11 THE CLERK: What says the defense?

12 MR. WHITLARK: Please excuse the juror, Your Honor.

13 THE CLERK: Susanne Wessel, 289.

14 PROSPECTIVE JUROR: Susanne Wessel, general
15 financials, juror number 289. I'm an operations manager.

16 (White female).

17 THE CLERK: What says the State?

18 MR. LUPTON: Please present the juror.

19 THE CLERK: What says the defense?

20 MR. WHITLARK: Please excuse this juror, Your Honor.

21 THE CLERK: Have a seat in the back of the courtroom.
22 Linzie Staley, 267.

23 (White female).

24 PROSPECTIVE JUROR: I'm Linzie Staley. I'm a retired
25 sales manager from the staffing industry.

1 THE CLERK: What says the State?

2 MR. LUPTON: Please present the juror.

3 MR. WHITLARK: Yes, please seat this juror, Your
4 Honor.

5 THE CLERK: Have a seat in the jury box.

6 Ronda Davisson, 79.

7 (White female).

8 PROSPECTIVE JUROR: I'm Ronda Davisson. I work for
9 C.V.S. Pharmacy as a Pharmacy Technician.

10 THE CLERK: What says the State?

11 MR. LUPTON: Please present the juror.

12 THE CLERK: What says the defense?

13 MR. WHITLARK: Please present this juror, Your Honor.

14 THE CLERK: Jeanne Ashley, 14.

15 (White female).

16 PROSPECTIVE JUROR: I'm Jeanne Ashley, juror number
17 14, presently unemployed.

18 THE CLERK: What says the State?

19 MR. LUPTON: Please present the juror.

20 MR. WHITLARK: Please seat this juror, Your Honor.

21 THE CLERK: Shakiera Squire, 266.

22 (Black female).

23 PROSPECTIVE JUROR: Shakiera Squire, juror number
24 266. I'm an independent distributor for Metro Market.

25 THE CLERK: What says the State?

1 MR. LUPTON: Please excuse this juror.

2 THE CLERK: Have a seat back there.

3 Rebekah Wood, 297.

4 (White female).

5 PROSPECTIVE JUROR: Rebekah Wood. I work for Blue
6 Cross, Blue Shield.

7 THE CLERK: What says the State?

8 MR. LUPTON: Please present the juror.

9 THE CLERK: What says the defense?

10 MR. WHITLARK: Please excuse this juror, Your Honor.

11 THE CLERK: Have a seat in the back of the courtroom.

12 Glenda Badgerow, 15.

13 (White female).

14 PROSPECTIVE JUROR: My name is Glenda Badgerow, and
15 I'm a shoe supervisor for security at the Village at
16 Sandhill.

17 THE CLERK: What says the State?

18 MR. LUPTON: Please present the juror.

19 THE CLERK: What says the defense?

20 MR. WHITLARK: Please excuse this juror, Your Honor.

21 THE CLERK: Have a seat in the back of the courtroom.

22 Allow me to review your strikes: State three,
23 Defendant four.

24 Denita Brown, 48.

25 (Black female).

1 PROSPECTIVE JUROR: Denita Brown, United States
2 Postal Service.

3 THE CLERK: What says the State?

4 MR. LUPTON: Please present the juror.

5 MR. WHITLARK: Please seat this juror, Your Honor.

6 THE CLERK: Ralph House, 141.

7 (Black male).

8 PROSPECTIVE JUROR: My name is Ralph House. I'm
9 currently employed with All Metal.

10 THE CLERK: What says the State?

11 MR. LUPTON: Please excuse this juror.

12 THE CLERK: Have a seat in the back of the courtroom.

13 Joseph Marlowe, number 192.

14 (White male).

15 PROSPECTIVE JUROR: Joseph Marlowe, Purchasing
16 Officer for the State Budget and Control Board.

17 THE CLERK: What says the State?

18 MR. LUPTON: Please present the juror.

19 THE CLERK: What says the defense?

20 MR. WHITLARK: Please excuse this juror, Your Honor.

21 THE CLERK: Joseph Zokan, 300.

22 (White male).

23 PROSPECTIVE JUROR: Joe Zokan. I'm in heating and
24 air conditioning.

25 THE CLERK: What says the State?

1 MR. LUPTON: Please present the juror.

2 THE CLERK: Does the defense challenge for cause?

3 MR. WHITLARK: Please seat -- please present this
4 juror.

5 THE CLERK: Allen Jones, number 157.

6 (White male).

7 PROSPECTIVE JUROR: Allen Jones, retired telephone
8 man.

9 THE CLERK: What says the State?

10 MR. LUPTON: Please excuse this juror.

11 THE CLERK: Deborah Summers, 272.

12 (Black female).

13 PROSPECTIVE JUROR: Deborah Summers, 272, South
14 Carolina Department of Motor Vehicles, Administrative
15 Assistant.

16 MR. LUPTON: Please present the juror.

17 MR. WHITLARK: Please excuse this juror, Your Honor.

18 THE COURT: Whoa, whoa, whoa. You don't have any
19 more strikes.

20 THE CLERK: Right.

21 MR. WHITLARK: That was my last one.

22 THE COURT: You had five. You already used five.

23 Ma'am?

24 MR. WHITLARK: Yes. Well, please seat the juror
25 then, Your Honor.

1 THE BAILIFF: This way. Watch the steps.

2 THE CLERK: Natalya Hickmon, number 133.

3 (Black female).

4 PROSPECTIVE JUROR: Natalya Hickmon. I work as a
5 nurses' aid.

6 MR. LUPTON: Please present the juror.

7 THE COURT: Whoa, whoa, whoa, whoa. The clerk will
8 tell you all when to have a seat. If you'll come back
9 here, please.

10 THE CLERK: Does the defense challenge for cause?

11 MR. WHITLARK: No, no problem.

12 Have a seat.

13 THE CLERK: You can have a seat.

14 PROSPECTIVE JUROR: Okay.

15 Cynthia Devlin, 81.

16 (White female).

17 Cynthia Devlin. I work for South Carolina D.H.E.C.

18 MR. LUPTON: Please -- please present the juror.

19 THE CLERK: Does the defense challenge for cause?

20 MR. WHITLARK: Yes. Please -- please have a seat in
21 the jury box.

22 THE CLERK: Have a seat in the jury box.

23 Mary Amaker, eight.

24 (White female).

25 PROSPECTIVE JUROR: Mary Amaker. I'm a substitute

1 teacher and tutor.

2 THE CLERK: Does the State challenge for cause?

3 MR. LUPTON: Please present the juror.

4 THE CLERK: Does the defense challenge for cause?

5 MR. WHITLARK: No, seat this juror. Thank you.

6 THE CLERK: Have a seat in the jury box.

7 Barbara Bratcher, 45.

8 (White female).

9 PROSPECTIVE JUROR: Barbara Bratcher, self-employed.

10 THE CLERK: Does the State challenge for cause?

11 MR. LUPTON: Please present the juror.

12 THE CLERK: Does the defense challenge for cause?

13 MR. WHITLARK: Yeah, please present the juror.

14 THE CLERK: Have a seat in the jury box.

15 Ricky Mott, 221.

16 (Black male).

17 PROSPECTIVE JUROR: My name is Ricky Mott, Otis

18 Spunkmeyer.

19 MR. LUPTON: Please present the juror.

20 MR. WHITLARK: Yes. Please seat this juror.

21 THE CLERK: Have a seat in the jury box.

22 Is this for the alternate?

23 THE COURT: Each one gets a strike on the alternate.

24 THE CLERK: Stephen Wessinger, 290.

25 (White male).

1 PROSPECTIVE JUROR: Juror 290, Stephen Wessinger,
2 Medical Center, multimedia coordinator.

3 THE CLERK: What says the State?

4 MR. LUPTON: Please present the juror.

5 MR. WHITLARK: Please excuse the juror, Your Honor.

6 THE CLERK: Have a seat in the back of the courtroom.

7 Buford Darnell, 76.

8 (White female).

9 PROSPECTIVE JUROR: Buford Darnell, Thomas and
10 Howard.

11 THE CLERK: What says the State?

12 MR. LUPTON: Please present this juror.

13 THE CLERK: What says the defense?

14 MR. WHITLARK: Please seat this juror.

15 THE CLERK: Have a seat.

16 THE COURT: All right. Anything from the State with
17 respect to the selection of the jury.

18 MR. LUPTON: No, Your Honor.

19 THE COURT: Anything from the defense?

20 MR. WHITLARK: No, Your Honor.

21 THE COURT: Thank you all very much for making
22 yourselves available. I'm going to ask that you would
23 return back down to the jury assembly room. You will get
24 further instructions at that time. You all have a nice
25 afternoon.

1 (Whereupon, the unselected members of the jury left
2 the courtroom.)

3 All right. Madam Clerk, can you swear the jury?

4 THE CLERK: Please stand and raise your right hand.

5 Upon completion if you do, just respond with "I do".

6 Do you swear or affirm that you shall well and truly
7 try and true deliverance make, between the State of South
8 Carolina, and the defendant at bar, whom you shall have in
9 charge, and a true verdict give, according to the law and
10 the evidence, so help you God?

11 (All responded affirmatively).

12 Thank you.

13 PRETRIAL CHARGE:

14 THE COURT: All right. Ladies and gentlemen, before
15 we begin the trial I'm going to take a few minutes and
16 introduce some individuals who are going to be involved in
17 working with you and also tell you a little bit about this
18 process in case you have not had a chance to serve on a
19 jury before or it's been some time since you have served
20 on a jury.

21 The first thing I want to tell you, ladies and
22 gentlemen, this case is very important to both the State
23 and the defendant. It is their one opportunity to come
24 before you, an independent fact-finding body, so that you
25 can listen to the evidence in the case, determine what you

1 believe to be the facts and apply the law and ultimately
2 resolve this dispute that exists between the State and the
3 defendant.

4 As I told you, Mr. Livingston has been charged with
5 the offense of distribution of cocaine. I'm going to read
6 to you, again, the indictment which says that
7 Mr. Livingston did in Richland County on or about January
8 23rd, 2007 manufacture, distribute, dispense, deliver,
9 purchase or aid, abet, attempt or conspire to manufacture,
10 distribute, dispense, deliver or purchase or possess with
11 intent to manufacture distribute, dispense or deliver a
12 controlled substance, that being cocaine.

13 As I also told you earlier, this indictment is a
14 notice document. It is the piece of paper that puts the
15 defendant on notice of the particular charge against him.
16 It is not evidence. It is not to be considered by you for
17 any purpose other than to put the defendant on notice of
18 this charge.

19 Now, to the charge, the defendant has entered a plea
20 of not guilty which now places upon the State the burden
21 of proving this defendant guilty and proving him guilty
22 beyond a reasonable doubt.

23 We have two basic principles in our criminal justice
24 system that I want you to keep in mind throughout the
25 course of this trial.

Pretrial charge

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1 The first is in every instance, the State has the
2 burden of proving a defendant guilty of the elements and
3 the charge and proving him guilty beyond a reasonable
4 doubt. The defendant has no burden whatsoever. The
5 defendant doesn't have to do anything in a case. It all
6 falls upon the State of South Carolina.

7 The second principle that you need to keep in mind is
8 that in every instance, a defendant comes into this
9 courtroom presumed to be innocent. That presumption of
10 innocence remains with this defendant throughout the
11 course of the trial and only would change if a jury, after
12 hearing the evidence, determined that the defendant was,
13 in fact, guilty.

14 Now, ladies and gentlemen, the way a trial takes
15 place is the first thing that happens is the parties,
16 through their attorneys, have an opportunity to get up and
17 make an opening statement to you.

18 The State will go first in the opening statement.
19 The State will go first throughout the course of the
20 trial, because as I told you, the burden falls upon the
21 State. Because of that, they have the opportunity to go
22 first throughout the course of the trial.

23 The opening statement is a chance for these lawyers
24 to introduce themselves and tell you a little bit about
25 this case so that you have some understanding or some idea

1 of how the trial will unfold.

2 After both sides have made their opening statements,
3 then the State will go forward with the presentation of
4 its evidence.

5 I assume that most of the evidence will come in from
6 the State by way of testimony from witnesses. They will
7 be put under oath. They'll get into this witness box
8 right here, and they will tell you what information, what
9 knowledge they have about this case. They've seen
10 something, they've heard something, they've smelled
11 something, they tasted something, they felt something.
12 They have some knowledge from one of their senses, and
13 they will tell you what that information is.

14 Now, another type of evidence that might -- I mean,
15 another type of witness that might testify, in addition to
16 a fact witness, would be what we call an expert witness.

17 An expert is somebody who has special knowledge or
18 skill or training in a particular field and as a result
19 can offer an opinion in his or her areas of expertise.
20 Normally, a fact witness can't offer opinions. They just
21 tell you facts. Expert witnesses can offer opinions.

22 The second type of evidence that might come in is
23 things like pictures, documents, things of that nature.
24 That type of evidence is actually introduced. It's given
25 an exhibit number, and it will go with you to the jury

Pretrial charge

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1 room for you to review during the course of your
2 deliberations.

3 The testimony, ladies and gentlemen, will go with you
4 in your memory, so it's absolutely essential that you pay
5 close attention to what is being said here in the
6 courtroom.

7 If you can't hear something, don't understand
8 something, having some difficulty, please let me know in
9 some way, raise your hand, let me know somehow. We will
10 attempt to address that problem, the witness, the lawyer
11 whoever speaks up or speaks more clearly, whatever the
12 situation may be.

13 Now, the third type of evidence that could come in is
14 what we call a stipulation, and that's where the parties
15 stipulation or agree as to some fact or some matter.

16 If, in fact, there is a stipulation, the lawyers will
17 tell me, and I will tell you, and you are to accept that
18 fact or matter as though it has been proven in the
19 courtroom.

20 Now, ladies and gentlemen, after the State has put up
21 whatever evidence it wishes to offer, the defendant is
22 given an opportunity to put up its -- his evidence.

23 The defendant may elect not to put up any evidence.
24 The defendant, as I said, has no burden whatsoever in this
25 case. It all falls upon the State.

1 The defendant, for whatever reason, may elect not to
2 put up any evidence because it doesn't think the State has
3 met its burden.

4 If the State -- I mean defendant puts up evidence, it
5 would be of a particular nature to the State. I would
6 assume most of it would be testimony from witnesses who
7 will tell you what information or facts they have about
8 the case.

9 When both sides have concluded the presentation of
10 their evidence, ladies and gentlemen, the lawyers are
11 given another opportunity to speak to you. This is what
12 we call a closing argument, and it is different from the
13 opening statement in that the closing argument is a chance
14 for these lawyers to attempt to summarize what they think
15 came out during the course of the trial, to point out to
16 you various aspects of the testimony or evidence that they
17 think you need to seriously consider and discuss while
18 you're in the jury room. It is their chance to attempt to
19 convince or persuade you as to why you should not -- or
20 you should return a verdict for their respective client.

21 When both sides have concluded their closing
22 arguments, then I will charge you or instruct you as to
23 the law. You will then retire to the jury room, begin
24 your deliberations and ultimately return a verdict in this
25 case.

1 As I told you earlier, ladies and gentlemen, your
2 responsibility or your job is that of the fact finders.
3 You are the sole fact finders in this case. Nobody else
4 will participate in this -- in that process.

5 My role is different from yours. My role is twofold.
6 My first responsibility is I'm sort of the referee in this
7 matter.

8 In most structured events, we have rules. In South
9 Carolina, we have rules of evidence and rules of procedure
10 that dictate how we try a case. It's my responsibility to
11 see that those rules are complied with.

12 My other role is, as I told you earlier, to charge
13 you or to instruct you as to law so that you will take
14 that law and apply it to the facts that you have in this
15 case.

16 Now, ladies and gentlemen, you're going to hear from
17 these lawyers during this case. I want you to pay close
18 attention to what these lawyers have to tell you, but
19 understand that what the lawyers say in this case is not
20 evidence.

21 They are advocates for their respective clients.
22 It's their responsibility to put forth whatever they think
23 is in their client's best interest in this case, but they
24 are not offering evidence, and you need to keep that in
25 mind.

1 Okay. I think with that said, I'll ask Mr. Lupton,
2 are you prepared to go forward at this time?

3 MR. LUPTON: The State is ready, Your Honor.

4 THE COURT: All right. If you would, please, sir.

5 MR. LUPTON: Thank you, Your Honor. May it please
6 the Court.

7 THE COURT: Let me say one other thing before you get
8 up. Ladies and gentlemen, one of the things I want to
9 tell you, we want to do everything we can to make sure
10 that the State and the defendant both have a fair and
11 impartial trial here.

12 One of the ways I ask you to do that is please don't
13 discuss this case with each other or with anyone else at
14 any time until you have been given instructions that you
15 can begin your deliberations.

16 So if we take a break and you go back to the jury
17 room, don't talk about the case at all. If you -- we go
18 to lunch sometime earlier -- later today, you see somebody
19 you know or you go with somebody on the jury panel, don't
20 talk about the case at all.

21 The reason I ask you to do this, if you start talking
22 about it right now, you may begin to formulate some
23 opinion about it, and both sides haven't had the
24 opportunity to put up whatever evidence they wish to
25 offer. That's not fair to either side.

1 If you talk to somebody on the outside, they may
2 offer opinions about it even though they're not here to
3 listen to the evidence, to observe the witnesses,
4 determine their credibility.

5 You may be influenced by them, and again, that's not
6 fair. So please don't discuss it. You will have all the
7 time in the world to talk about it when you begin your
8 deliberations.

9 When the case is over, you can talk about it to
10 anybody you want to talk to outside the courtroom. So
11 we'll give you an opportunity to chat about it if that's
12 what you'd like to do. Until then, please don't discuss
13 the case.

14 I'm sorry, Mr. Lupton. If you would, please.

15 MR. LUPTON: Thank you, Your Honor.

16 THE COURT: Yes, sir.

17 OPENING STATEMENT:

18 MR. LUPTON: Ladies and gentlemen, during the course
19 of this trial I will prove to you beyond any reasonable
20 doubt that the defendant, Octavius Livingston, is guilty,
21 guilty of distribution of cocaine.

22 What does that mean? Under the laws of the State of
23 South Carolina, distribution is selling, giving or
24 otherwise transferring a controlled substance to another
25 person. It doesn't have to be for profit. In this case,

1 it was.

2 The evidence will show to you that on the night of
3 January 23, 2007, here in Richland County that the
4 defendant sold just over six grams of cocaine to
5 Investigator Jason Williams. Jason Williams was an
6 undercover investigator with the sheriff's department
7 narcotic's unit at the time.

8 The defendant, obviously, did not know he was a
9 police officer. He thought he was just another person
10 involved in the drug business. He set up a deal with the
11 officer to sell him just over six grams of powder cocaine.

12 The deal -- the defendant set the deal up to take
13 place in Lowe's out on Two Notch Road just after 7:30 on
14 the night of the 23rd.

15 The evidence will show that the officer met the
16 defendant at that location. There was an informant who
17 was known to the defendant who made the introductions and
18 set up the buy that was there. The officer showed up at
19 the place requested by the defendant and bought the
20 cocaine.

21 There's going to be a videotape that shows the
22 transaction. You will see the defendant on videotape.
23 Now, the videotape you will see, the camera is angled up.
24 It's a hidden camera, obviously, can't bring your Fox news
25 crew in to film the drug buy.

1 You have got to expect that the quality isn't going
2 to be what you see on T.V. and in the movies. They angle
3 this up for a reason, to catch the faces so that you know
4 you have got the right person. The officer will explain
5 that.

6 So you will see the videotape, have a chance to look
7 at it and listen to it. You'll have it in evidence.
8 You'll see the defendant. You will not be able to see the
9 drugs because the drug deal doesn't take place up here.
10 It takes place down here.

11 But at the end of this case after you have heard from
12 the officer, after you have seen the tapes, after you have
13 seen the C.D., there will be no question in your mind as
14 to what happened.

15 At the end of this case, the State will return to
16 you. I will come back before you, and I'll ask you to
17 render a just verdict.

18 Thank you.

19 THE COURT: All right. Mr. Whitlark?

20 MR. WHITLARK: May it please the Court, Your Honor.

21 THE COURT: Yes, sir.

22 OPENING STATEMENT:

23 MR. WHITLARK: Good morning. As you know, I'm Marcus
24 Whitlark. I represent Mr. Octavius Livingston. He's here
25 from Columbia.

1 Now, this is a case about a long-time friend of
2 Mr. Livingston who works for the police who made money by
3 turning people in, and that's what he did here. He set
4 this up. His name is Alvester Stewart.

5 You're going to see him, and you're going to hear him
6 testify in this case. A long-term friend set this whole
7 thing up.

8 These agents over here didn't know anything about
9 Octavius Livingston before this -- these events occurred,
10 January 2007.

11 Now, he wasn't arrested for 14 months. They didn't
12 arrest him that night. They arrested him 14 months
13 later -- or 13 months later.

14 Now, you're going to learn from the evidence that
15 Mr. Alvester Stewart had been a long time, what they call
16 snitch, C.I., and he has set up many, many people in his
17 community, friends.

18 Like I said, once he had set up every person he knew,
19 the last person was actually a friend of his. He said,
20 "Do you want to make some quick money," and you're going
21 to learn that from the evidence.

22 Now, ladies and gentlemen, you have a very, very big
23 responsibility here, a big duty here today. You have a
24 chance to bring justice to this -- to a fellow human
25 being, a chance to see what it is that occurred in this

1 case on this video.

2 They said the video shows a transaction. No, it
3 doesn't. There is no transaction. My client didn't hand
4 this narcotic's agent any drugs.

5 You will see Alvester Stewart there. As far as my
6 client setting anything up, he didn't set any of this up.
7 You'll learn that. Mr. Alvester Stewart did.

8 Now, it's really, ladies and gentlemen, a case about
9 betrayal and somebody so greedy for money that they'll do,
10 and you're see that person today, do anything to get some
11 money. You'll learn why during the testimony.

12 Now, the judge has mentioned to you about the rights
13 of American citizens, and although we don't have a perfect
14 system of justice, we have the best system of justice in
15 the world. It's not perfect by any means, but it is the
16 best.

17 It's the best, ladies and gentlemen, because a man
18 like Octavius Livingston, a man who drives a truck for a
19 living who has children and is here with his family today,
20 can get a fair hearing from you.

21 You will see by the end of this that not only have
22 they not proven that my client did a transaction, that my
23 client is a drug dealer, they haven't proven beyond a
24 reasonable doubt any of this.

25 The only thing that's going to be proven here today

1 is that a man who had -- he has known and helped his whole
2 life betrayed him. That's what we're going to prove.

3 There is nothing on this videotape showing drugs
4 transferring. The only thing it shows here is my client
5 talking to these guys at a Lowe's.

6 You'll see more of Alvester Stewart on this thing
7 than you do my client. So give a fair hearing to the
8 State, ladies and gentlemen, but I submit to you that this
9 whole thing was manufactured. They weren't searching for
10 Octavius Livingston.

11 This fellow came to them and said, "Hey, I got
12 another one for you." He gets whatever he gets, 200,
13 whatever he gets. He gets paid to do it. This is the
14 last man standing that this fellow knew. Every
15 acquaintance, friend, everything. He has turned in 50 or
16 60 people. You'll learn that from the evidence.

17 I want you to remember, ladies and gentlemen, about
18 the presumption of innocence. The judge mentioned that to
19 you. These are the substantial rights of all Americans.
20 These aren't just words.

21 We are presumed innocent, all of us, until -- unless
22 and until they prove beyond a reasonable doubt to a moral
23 certainty the guilt and the meaning of all of these things
24 they're saying.

25 They're not going to be able to show you a

Opening - Whitlark

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1 transaction with my client giving anybody anything.

2 They're already going to fail there. They'll admit that.

3 The bottom line is, ladies and gentlemen, they can't
4 prove this case because it's not what they're saying.

5 It's not what happened, when he made it very simple in the
6 opening statement. It's not that simple.

7 It's about a man believing in a friend and a friend
8 who has a need to have money, and you'll learn why. At
9 the end of the day, at the end of this case, you're going
10 to know one thing for certain, there is no crime that has
11 been proven beyond a reasonable doubt in this case.

12 I ask you to give a fair hearing to the State, but
13 keep in mind beyond a reasonable doubt to a moral
14 certainty because they can't do it in this case.

15 Thank you.

16 Thank you, Your Honor.

17 THE COURT: Thank you.

18 All right. Mr. Lupton, are you ready to call your
19 first witness?

20 MR. LUPTON: The State calls investigator Jason
21 Williams.

22 JASON WILLIAMS, after being duly
23 sworn, testified as follows:

24 THE CLERK: Have a seat in the witness box. State
25 your full name for the record, please.

1 THE WITNESS: Jason Williams.

2 (WHEREUPON, State's Exhibits Nos. 1, 2 were marked
3 for identification only.)

4 DIRECT EXAMINATION:

5 BY MR. LUPTON

6 Q Investigator, could you tell the jury where it is you
7 work?

8 A I work for the Richland County Sheriff's Department
9 narcotics unit.

10 Q How long have you been in law enforcement?

11 A Three years.

12 Q And could you tell the jury a little bit about your
13 training and background?

14 A Prior to me being with the Richland County Sheriff's
15 Department, I served in the military for five years on the
16 gang task force.

17 Q When you say three years of law enforcement
18 experience --

19 A As working with the Sheriff's Department.

20 Q And when you say law enforcement --

21 A And I was in the military, five years as a military
22 policeman, then I got moved to Military Police
23 Investigations when I was part of the gang unit.

24 From -- once I left the military, I got training from
25 senior officers. I went to undercover narcotics class,

1 and I went through some schooling on different drugs that
2 are being sold out in the community.

3 Q So you have got five years of military law
4 enforcement and three years in the Sheriff's Department
5 law enforcement?

6 A Yes, sir.

7 Q Okay. And back in January of 2007, what were your
8 duties back then?

9 A I was an undercover police officer. That basically
10 means I could go out and play the role of being a drug
11 dealer, and I buy drugs from different individuals
12 making -- making them think I'm going to sell back and
13 make money off of them.

14 Q And was this -- how long was this undercover
15 operation that you were involved in going?

16 A I was undercover for two years.

17 Q And during that period -- how long during that period
18 were you making buys?

19 A I was making buys constantly, every day, for two
20 years straight, nonstop.

21 Q In January of 2007, was this towards the beginning,
22 towards the end?

23 A It was still -- it was in the middle, actually,
24 because -- I actually started buying February of 2006, so
25 it was the middle part.

1 Q When -- when did you finish buying? When did you
2 come out from undercover?

3 A February of 2008.

4 Q And the -- being an undercover officer, is that in
5 any way dangerous?

6 A Yeah. It depends. Usually you don't want people to
7 know you're the police or they won't sell to you or
8 something like that.

9 If you go into a situation where they know you're the
10 police, they might try to hurt you or harm you or
11 something of that nature. So it can be dangerous. That's
12 why I didn't have contact with many investigators. I
13 mean, I didn't have contact with anybody.

14 Only three investigators knew who I was, along with
15 Investigator Lutz, my sergeant, my two sergeants and my
16 lieutenant, and the sheriff. That's it. Nobody else knew
17 that I worked for the sheriff's department.

18 Q And did you -- when you made these buys from people,
19 did you arrest anyone right away?

20 A No. The purpose for that is because I was
21 continuously making buys from different individuals, so
22 nobody could be arrested until I was done with my
23 undercover buy operations.

24 I would have to be completely out because once they
25 started arresting people, people would know who I was, and

1 I wouldn't no good to the sheriff's department as far as
2 buying drugs undercover.

3 Q You wouldn't be able to make any more undercover
4 buys?

5 A No, sir.

6 Q Would you also be in any physical danger?

7 A Possibly. I could have been hurt, stepped into a
8 situation where they thought I was a drug dealer or I go
9 into a house or something like that, and they might try to
10 kill me or stab me or something like that.

11 Q And has there been a police officer in the last ten
12 years working for the sheriff's department who did die
13 under suspicion --

14 MR. WHITLARK: Objection, Your Honor.

15 THE COURT: Sustained.

16 BY MR. LUPTON

17 Q But that is the reason why you did -- that nobody was
18 arrested right away, is that what you're saying?

19 A Yes, sir. It's big safety issue they have.

20 Q All right. Now, directing your attention
21 specifically to January 23, 2007, do you recall that date?

22 A Yes, sir.

23 Q And did you come in contact with the defendant in the
24 courtroom on that date?

25 A Yes, sir.

1 Q And could you tell the jury why it is that you were
2 in contact with the -- what it was that you were intending
3 to do with the defendant on January 23, 2007?

4 A I was being introduced or I met with the defendant in
5 order to buy a quantity of narcotics from him that was set
6 up by an informant.

7 Q All right. And normally, do you keep the identities
8 of informants secret?

9 A Yes, sir. They are categorized under a number or
10 something like that.

11 Q And what's the purpose for that?

12 A So that their identities can be kept a secret and so
13 they can be used because a lot of these people live in the
14 community, and they're trying to clean up the community.
15 So they become informants to tell you, "Hey, this is going
16 on over here, or this is going on over here." We keep
17 them secret so we can still use them. They can still give
18 us good information.

19 Q Is there also a safety factor?

20 A Yes.

21 Q Now --

22 A Their safety is greater than mine because most people
23 would hurt a normal individual before they'd hurt a police
24 officer.

25 Q In this case is the identity known because of the

1 activities?

2 A The defendant and the C.I. knew each other, but he
3 didn't know the C.I. was working with the sheriff's
4 department.

5 Q At the time he didn't?

6 A No.

7 Q But obviously, they've mentioned the name in the
8 opening statement?

9 A Yes, sir.

10 Q So they know who the C.I. is in this case?

11 A Yes, sir.

12 Q And the C.I. in this case was Alvester Stewart; is
13 that correct?

14 A Yes, sir.

15 Q And you said that Mr. Stewart introduced you to the
16 defendant?

17 A Yes, sir.

18 Q And had Mr. Stewart worked with you in the capacity
19 as an informant for a long time?

20 A Yes, sir.

21 Q And in that capacity, did he introduce you to a
22 number of people?

23 A Yes, sir.

24 Q And in that capacity, in your capacity as an
25 undercover officer, did he ever introduce you to anyone

1 that you did not make a hand-to-hand buy from?

2 A No, sir.

3 Q In this situation here specifically, the night of the
4 23rd, what was the purpose of your meeting this defendant?

5 A I met with him to buy a quantity of cocaine from him.

6 Q And could you tell the jury about that purchase,
7 please?

8 A Basically, what happened is that the C.I. set up a
9 deal with the defendant. He made a phone call to him.
10 The defendant set up the location, which was going to be
11 the Lowe's, which is the one that's right there on O'Neil
12 Court next to the Applebee's off of Two Notch.

13 Q Just down from the mall?

14 A Yes, sir.

15 Q I'll show you what's been marked as State's
16 Exhibit 1.

17 A Yes, that big building right there.

18 MR. LUPTON: And, Your Honor?

19 MR. WHITLARK: No objection.

20 THE COURT: So admitted.

21 MR. WHITLARK: No objection, Your Honor.

22 MR. LUPTON: We'd offer this as State's Exhibit one.

23 THE COURT: So admitted.

24 (WHEREUPON, State's Exhibit No. 1 was admitted into
25 evidence.)

1 BY MR. LUPTON

2 Q And this is where you met?

3 A Yes, sir. We met in Lowe's inside by the home and
4 garden section.

5 Q And just to -- as you're looking at this, where is
6 the -- could you orient what is nearby there?

7 A Okay. This is the Lowe's right there. This is that
8 HoneyBaked restaurant right there on Two Notch right
9 there. That's O'Neil court. If you come right here,
10 that's the Applebee's right here. That's the new Auto
11 Zone that's right there, and that's Bank of America right
12 there, and this is the Lowe's parking lot.

13 Q And where is -- where is the mall in relation to
14 Lowe's?

15 A Okay. The mall is inbound going...

16 Q Over --

17 A Down this way.

18 Q A little bit of --

19 A Yeah.

20 Q It's about where my hand would be, somewhere?

21 A Yeah, that's Two Notch.

22 Q All right.

23 A And it's going that way.

24 Q All right. And what time was this that this was set
25 up?

1 A 19:30, a little after 19:30, 7:30.

2 Q 7:30 civilian time?

3 A Yes.

4 Q A little bit after?

5 A Yes.

6 Q And what happened?

7 A Okay. We made the phone call. The defendant had set
8 up the meeting location, said he wanted to meet inside the
9 Lowe's. We said that was fine.

10 Once we got to the Lowe's, meaning the C.I. and I,
11 once we got to Lowe's, we walked inside. I spotted Mr. --
12 the defendant walking back down. He made a right down an
13 aisle.

14 I told the C.I., "There he goes right there," so we
15 started walking down the aisle towards -- well, towards
16 the main aisle towards where -- the aisle where the
17 defendant turned and walked down.

18 As we turned down an aisle, the defendant reached
19 into a box that had like plastic tubing or some type of
20 material in there.

21 As we approached him, he pointed at the box. At that
22 time, I walked over, grabbed a small bag of cocaine out of
23 the box. Once I looked at it and observed it, I gave the
24 defendant U.S. currency for the package.

25 Q All right. Let me show you what's been marked as

1 State's Exhibit two. Do you recognize that?

2 A Yes.

3 Q And what is that?

4 A That's the bag that was inside the box.

5 Q All right. That's what you got from the location?

6 A Yes.

7 Q From the defendant?

8 A Yes.

9 Q Your Honor, this is marked State's Exhibit 2 for
10 identification at this point.

11 So you recovered that white powder from the box?

12 A Yes, sir.

13 Q Did you see the defendant putting that into the box?

14 A Yes, sir.

15 Q Was the -- was Mr. Stewart near the box when you did
16 that?

17 A No. Mr. Stewart was walking with me.

18 Q Had he been near the box prior to that?

19 A No.

20 Q Did he go near the box before you got to the box?

21 A No. Actually, Mr. Stewart was a little bit behind me
22 as we were walking down.

23 Q All right. So is there any way -- based on your
24 observations, is there any way from the time you saw the
25 defendant put it in to the time you pulled it out that

1 Mr. Stewart could have switched it, tampered with it or
2 altered it in any way?

3 A No, that's impossible.

4 Q And you said the defendant pointed to it after he
5 placed it in?

6 A Yes.

7 Q And then what did you do with the money?

8 A I took the money out of my pocket, and I handed it to
9 him. He did a quick little count real quick and then --

10 Q Where did -- where did you put the money? Did you
11 give it to him in his hand?

12 A No. No. I put it back in the box because I assumed
13 that's the way he wanted to do the deal. He didn't want
14 to seem like he was handing me the drugs, and I wouldn't
15 hand him the money. So I put it right back in the box --

16 Q All right.

17 A -- and then he reached in there and grabbed it.

18 Q So you gave it to him by putting it back into the
19 box?

20 A Yes.

21 Q And did you watch him do that?

22 A Yes.

23 Q And what did -- did you observe what he did after you
24 put the money into the box?

25 A Once I put it in the box, he grabbed it.

1 Q And how much money was it?

2 A It was 225, \$225.

3 Q Now, is there -- the person that you bought from, is
4 that person in the courtroom?

5 A Yes, sir.

6 Q Could you point out that person?

7 A He's right there, the guy in a tan outfit and I
8 believe a black shirt, goatee, short hair sitting next to
9 that guy.

10 MR. LUPTON: Your Honor, I'd ask the record to
11 reflect he has identified the defendant.

12 THE COURT: He has identified the defendant.

13 BY MR. LUPTON

14 Q And is there any doubt in your mind that that is the
15 person you saw that you bought from that night?

16 A No.

17 Q All right. Is there any doubt that that is the
18 person that put the drugs in the box that you recovered?

19 A No.

20 Q Now, were you wearing a recorder of any type during
21 all of this?

22 A Yes. I was wearing a video camera device that
23 records audio and video.

24 Q All right. Without going into the technical details,
25 was that on at the time?

1 A Yes.

2 Q And did it record?

3 A Yes.

4 Q Have you seen that recording since then? Have you
5 watched it recently to verify that it accurately recorded
6 what happened?

7 A Yes.

8 Q Your Honor, at this time, I'd like to admit the video
9 C.D. of the incident as State's Exhibit 3.

10 MR. WHITLARK: No objection.

11 MR. LUPTON: And publish it for the jury.

12 THE COURT: All right.

13 MR. LUPTON: And your Honor, it's in the computer
14 ready to go, so if we could mark it actually, physically
15 mark it once we've played it, if that would be acceptable.

16 THE COURT: We can do that.

17 MR. WHITLARK: Excuse me, Your Honor, may I approach
18 the bench?

19 (WHEREUPON, a bench conference was held in the
20 Presence, but not within the hearing, of the jury).

21 THE COURT: Ladies and gentlemen, we're going to take
22 a little bit of a break to allow them to get this video
23 set up. I'm going to send you back, let you take about a
24 15-minute break, have some refreshments.

25 Before you do, let me introduce you to the people

1 that you're going to have the most contact with. That's
2 our bailiffs. We have good bailiffs in this case.

3 This is Mr. Broom right here that's standing in front
4 of you. Behind you is Mr. Dye. He's in the box back
5 there, and Mr. Martin is all the way in the back.

6 They'll help you get out of the courtroom and into
7 the jury room. They'll help you get from the courthouse,
8 outside and back. They'll bring you refreshments and
9 answer any questions you have. Anything you need, please
10 feel free to bring it to their attention, and they'll
11 assist you.

12 This young lady seated to my left is Karen Tracy, who
13 is our court reporter, and the young lady seated in front
14 of me is Christine Tull who is our -- I assume she is
15 there. I was hoping she would grow a little bit. She
16 hasn't done that. She is our court clerk, and she helps
17 me do a number of things during the course of the trial.

18 So all right. Don't discuss the case. We'll bring
19 you back in just a few minutes and resume.

20 THE BAILIFF: Follow me, please.

21 (WHEREUPON, the jury left open court at approximately
22 11:12 a.m.)

23 THE COURT: All right. You can step down. Don't
24 discuss your testimony while we're off the bench. You can
25 go ahead and leave. Your client is going to have to stay

1 in the courtroom.

2 MR. WHITLARK: Yes. I understand.

3 THE COURT: All right. We'll take about a 15-minute
4 break.

5 MR. WHITLARK: Thank you, Your Honor.

6 MR. LUPTON: Thank you, Your Honor.

7 (WHEREUPON, a short break was taken.)

8 (WHEREUPON, State's Exhibit No. 3 was marked for
9 identification and received into evidence.)

10 THE COURT: All right. Let's bring the jury in.

11 THE BAILIFF: Yes, sir.

12 (WHEREUPON, the jury came into open court at
13 approximately 11:39 a.m.)

14 THE BAILIFF: Your Honor, the jury is present.

15 THE COURT: All right.

16 MR. LUPTON: Your Honor, the State is ready. Your
17 Honor, during the break we marked the sleeve for the video
18 as State's exhibit three, so we're ready to proceed.

19 THE COURT: All right.

20 MR. LUPTON: Your Honor, at this time the State
21 wishes to publish the video.

22 (Whereupon, the video was played for the jury).

23 BY MR. LUPTON

24 Q Can you tell the jury what's going on at this point?

25 A Basically, the way the camera works, the camera works

1 on a specific beam of light. You have to have light for
2 the camera to work. Where it's too dark, that's where
3 you're going to get this fuzz right here.

4 Basically, we're en route to get there. That's me
5 and the C.I. just talking, having a general conversation.

6 Okay. Right there he's shooting the phone call to
7 the C.I. We're coming up the street. We'll be there in a
8 few minutes, telling him what we're passing, where we are
9 in the area.

10 Right there he's telling him to come to the Lowe's.

11 MR. WHITLARK: Objection, Your Honor.

12 THE COURT: You can't testify to what anybody says.

13 THE WITNESS: Yes, sir.

14 BY MR. LUPTON

15 Q As a result of that phone call, where did you go?

16 A We went to Lowe's on O'Neil Court.

17 Q Is that where you're at now on the video?

18 A No. I'm still driving, getting there.

19 THE COURT: Mr. Lupton, it's very difficult for him
20 to answer questions when the video -- when the audio is
21 playing. So please don't ask him any questions while
22 we're playing it.

23 (Whereupon, the video was continued to be played for
24 the jury.)

25 MR. LUPTON: Pause. Pause it.

1 BY MR. LUPTON

2 Q That person that was just shown, who was that person?

3 A Just Octavius Livingston.

4 Q And is this location where you're at in the video
5 right now, where is that?

6 A That's the aisle where he put the drugs into the
7 little box that had tubing or something inside of it.

8 Q In what County?

9 A Richland County.

10 Q Please continue.

11 (The video was continued to be played for the jury.)

12 Pause the video again.

13 Who was that other person?

14 A That's Alvester Stewart, the C.I.

15 Q Play it again.

16 (The video was continued to be played for the jury.)

17 The other person that was briefly shown the video, is
18 that person related to the buyer?

19 A No.

20 Q And why is it that there are two separate files?

21 A Because the way the stuff is stored on the -- it
22 stores it in increments. After it gets so long, they have
23 to do it to another file and start recording it. It
24 continues recording. It's continuous recording, but it
25 has to jump to another -- like a folder so it can --

1 because the file was just too long.

2 Q Just a separate digital file, the same recording
3 process?

4 A Yes.

5 Q Okay. Please continue.

6 (The video was continued to be played for the jury.)

7 Now, on the video, what direction was the camera
8 pointed?

9 A It's -- it's supposed to be pointed forward, but it
10 was angled to the left.

11 Q All right. What direction as far as up and down?

12 A It's pointed up.

13 Q And what is the purpose for it being up?

14 A The purpose of it being up is so you can get the
15 person's face, not necessarily what their hands are doing,
16 but you want to get their face on the camera.

17 Q Why is that?

18 A Because if -- if you're doing a deal or something
19 like that, you can identify them.

20 Q And the person that was on that video, who was that?

21 A It was Octavius Livingston and Alvester.

22 Q And which one put the drugs in the bin that you
23 recovered?

24 A Octavius Livingston.

25 Q Any question in your mind about that?

1 A No.

2 Q And that was -- State's Exhibit 2 is what you
3 recovered from the bin?

4 A Yes.

5 Q Now, let's talk a minute about the procedures you
6 followed with -- with Mr. Stewart. Was he searched prior
7 to completing this -- to this transaction taking place?

8 A He was searched before the deal took place by
9 Investigator Lutz.

10 Q All right. And were you present during that?

11 A Yes.

12 Q And were any drugs on the defendant -- on the
13 informant at that time, on Mr. Stewart?

14 A No.

15 Q And what is the purpose for doing that?

16 A Basically, he can't have any drugs or any weapons on
17 him, for safety reasons, of course, about the weapons and
18 the drugs just in case -- if he were to come in contact,
19 you know, the evidence would be tainted or anything like
20 that.

21 He can't -- you know, like if he has fake drugs on
22 him, possibly, he could switch the real stuff with fake
23 stuff, if he ever came in contact with it or anything like
24 that. You have to make sure he doesn't have anything that
25 could jeopardize the investigation, i.e. drugs, money,

1 anything.

2 Q And that was done in this case prior to Mr. Stewart
3 getting in the car with you?

4 A Yes.

5 Q And after that was done, was he in your presence the
6 entire time until after the buy took place?

7 A Yes.

8 Q And did he get drugs or anything resembling drugs
9 afterwards, after the search?

10 A No.

11 Q And how much did you pay Mr. Livingston for these
12 drugs again?

13 A \$225.

14 Q Now, once you recovered the drugs, what did you do
15 with them?

16 A I placed them inside of my pocket when he gives them
17 to me so we can walk out, and once I get outside, take
18 them outside my pockets, put them in the car. I don't
19 like having that stuff in my pockets and stuff.

20 I go back to the rally point, meet with Investigator
21 Lutz. Investigator Lutz then calls, gets a case number,
22 puts it in a bag in front of me, seals it up.

23 Q Before we get to that, any possibility that you
24 already had cocaine in your pocket?

25 A No.

1 Q Was there anything in that pocket that you could
2 have -- that could have in any way tampered with the drugs
3 that you got out of the bin?

4 A No.

5 Q You talked about you turned it over to Investigator
6 Lutz at the rally point. What happens at the rally point?
7 What happens there?

8 A Basically, what you do is you meet with the lead
9 investigator and you talk about what -- the deal that
10 happened or what didn't happen or what went wrong or what
11 went right.

12 He takes the drugs, and he puts it into a Richland
13 County evidence bag. It has the case number, the location
14 where it was collected, the officers involved, the subject
15 and stuff like that on it, just basic information. He'll
16 seal it up.

17 Once he seals it up, he'll call dispatch and get a
18 case number from them, and that case number is in sequence
19 with that case and that location, but like I said, he
20 seals it up, takes it to the Richland County evidence,
21 either drops it into the drop box, or he'll give it to one
22 of the evidence custodians there.

23 Q All right. You talk about the evidence bag. Is that
24 what I'm holding here?

25 A Yes.

1 Q And this one is a copy of the video, but it's similar
2 to this?

3 A Yes.

4 Q And is that what's inside of State's Exhibit 2?

5 A Yes.

6 Q Is that bag?

7 A Yes.

8 Q All right. And did you observe him seal the bag
9 after placing the cocaine that you provided him?

10 A Yes.

11 Q Did you observe -- did you tamper with it in any way
12 from the time you got it out of the bin until the time you
13 gave it to Investigator Lutz?

14 A No.

15 Q And did you observe Investigator Lutz tampering with
16 it?

17 A No. I think he performed a field test. That's about
18 it.

19 Q All right. Other than performing a field test, did
20 he tamper with it or switch it out or alter it in any way?

21 A No.

22 Q All right. And all of this happened in Richland
23 County?

24 A Yes, sir.

25 MR. LUPTON: Beg the Court's indulgence.

1 (Pause).

2 Thank you, Your Honor, nothing further.

3 THE COURT: All right. Mr. Whitlark?

4 MR. WHITLARK: May it please the Court, Your Honor.

5 CROSS-EXAMINATION:

6 BY MR. WHITLARK

7 Q Officer Williams, how long had you been doing
8 undercover work when this allegedly occurred in January of
9 2007?

10 A Yes, sir.

11 Q All right. How long had you been doing undercover
12 work?

13 A Since February of '06.

14 Q Okay.

15 A Actually, January of '06 because I got out of the
16 military. I was on military leave.

17 Q All right. And isn't it true you did a lot of cases
18 with Mr. Alvester Stewart?

19 A Yes, sir.

20 Q Okay. As a matter of fact, it would be upwards of
21 over 50 cases?

22 A Yes, sir.

23 Q And in those cases he would contact you and say,
24 "I've got somebody for you"?

25 A He wouldn't contact me, no.

- 1 Q Well, he would contact the department and say, "I've
2 got somebody," and then you would go to work, right?
- 3 A No. He'd contact Investigator Lutz.
- 4 Q Okay. All right. So you didn't -- before Alvester
5 Stewart, you didn't know Octavius Livingston before
6 Mr. Stewart's bringing him over to Lutz, right?
- 7 A No.
- 8 Q All right. As a matter of fact, you -- you had to go
9 pick him up out of a photo lineup, didn't you?
- 10 A Yes, sir.
- 11 Q Why did you do that?
- 12 A To make sure that the person I was buying from is the
13 person that was in the photo. It wasn't -- so you
14 wouldn't mistake the identity and charge the wrong person.
- 15 Q All right. Well, you weren't sure, were you?
- 16 A What's that?
- 17 Q You weren't sure, were you?
- 18 A When?
- 19 Q When you went to do the -- when you went to do this
20 alleged transaction, you didn't know that Mr. Livingston
21 was -- was going to be in the store. Is that what you're
22 saying?
- 23 A (There was no response).
- 24 Q Did you know he was going to be in that store?
- 25 A No.

- 1 Q Okay. But Alvester Stewart set this whole thing up,
2 didn't he, sir?
- 3 A Yes, sir.
- 4 Q And he rode there with you, right?
- 5 A Yes, sir.
- 6 Q But he left with Mr. Livingston, didn't he?
- 7 A Yes, sir.
- 8 Q All right. And when you went in the store, you saw
9 Octavius Livingston, right?
- 10 A Yes, sir.
- 11 Q And he was walking away from you, wasn't he?
- 12 A Yes, sir.
- 13 Q And he turned down an aisle, right?
- 14 A Yes, sir.
- 15 Q All right. Now, sir, isn't it true that you didn't
16 actually see him put anything in that box?
- 17 A No, sir.
- 18 Q That's not true?
- 19 A That's not true, sir.
- 20 Q Well, sir, would you agree with your report, and
21 would you believe me if I told you your report says you
22 turned down an aisle, you had -- he went down an aisle and
23 then you went down an aisle?
- 24 A Yes, sir.
- 25 Q All right. And your report does not state that you

1 then saw him put anything in a box, does it?

2 A I would have to see it, sir.

3 Q Okay.

4 MR. LUPTON: No problem. It's his report.

5 BY MR. WHITLARK

6 Q Right here. Do you recognize that document?

7 A Yes, sir. That's a report pulled off of ACISS.

8 Q Okay. Can you read in there what happened? Read it
9 to the jury, please.

10 A Do you want me to read the whole thing?

11 Q Yes, sir.

12 A Okay. On 1/23/2007 between the hours of 19:35 and
13 19:41, C.I. and I drove --

14 THE COURT: Slow down. Slow down. She has to get
15 your...

16 THE WITNESS: Oh, I'm sorry. "A C.I. and I drove to
17 7441 Two Notch Road, which is the Lowe's, in order to buy
18 a quantity of cocaine, a quarter of an ounce of cocaine,
19 from Octavius Livingston, A/K/A (unintelligible).

20 THE COURT REPORTER: I'm sorry, A/K/A what?

21 THE WITNESS: Just, J-U-S-T.

22 "Once we arrived, the C.I. and I exited the vehicle
23 and walked inside the Lowe's in order to conduct a deal.
24 As we were walking in, we saw Livingston walking down
25 towards the home and garden area.

1 Once we made eye contact, Livingston walked down one
2 of the aisles and placed a small plastic bag containing a
3 white powdered substance into a box that contained small
4 pieces of plastic tubing.

5 Once the C.I. and I turned down the same aisle,
6 Livingston pointed at the box that had the cocaine sitting
7 in it. After I looked at the bag, I placed \$225 in the
8 same box that I got the cocaine out of.

9 Livingston then reached into the box and got the
10 money. Once he placed the money into his pocket, we all
11 walked towards the main entrance.

12 The C.I. got into the car with Livingston, and I told
13 them both that I would talk to them later. I returned to
14 the rally point and turned the drugs over to Investigator
15 Lutz for further processing. The deal was captured on
16 audio and video surveillance.

17 BY MR. WHITLARK

18 Q All right, sir. You claimed in the report that you
19 had the transaction on audio and video, didn't you?

20 A Yes, sir.

21 Q But that's not exactly correct, though, is it,
22 Officer Williams? It's not on the video, is it?

23 A The transaction is on the video, the deal.

24 Q It is? It's on this video?

25 A The actual hand-to-hand is not on there, no.

1 Q Right. That's what I'm saying. The transaction is
2 not on there, is it?

3 A No, sir.

4 Q As a matter of fact, neither him reaching in to put
5 drugs or take money out is on any video, is it?

6 A No, sir.

7 Q All right, sir. Isn't it true that in your report
8 that you just read he turned down an aisle, didn't he?

9 A Yes, sir.

10 Q That's what you say in your report, and then you came
11 behind him down that same aisle.

12 A Yes, sir.

13 Q And your report says he turned towards the box,
14 right?

15 A Yes, sir.

16 Q Well, sir, isn't it true that you didn't actually see
17 him put anything in that box?

18 A Yes, sir, I did. When I got to the aisle, sir, I was
19 standing right there, and I looked down there. I turned
20 into the aisle. He was standing there, and he was already
21 -- his hand was already over at this particular box.

22 I didn't see exactly what box it was because there
23 were several boxes on that same counter. Once I got up
24 close to him, he pointed directly at which box he was
25 talking about.

1 Q Sir, didn't you have to stop and look and see what
2 was in there?

3 A Did I have to stop and look?

4 Q Yes, sir. You said you looked in the box to see what
5 was in there, right?

6 A Yes.

7 Q And you claim that Mr. Livingston put it in there
8 while you were walking behind him, and he went down an
9 aisle without you behind him, correct?

10 A What's that now?

11 Q He turned down an aisle, did he not, sir?

12 A Yes, sir.

13 Q Down the aisle at Lowe's?

14 A Down an aisle.

15 Q Okay. And then you came behind him?

16 A Yes, sir.

17 Q And he pointed towards something, right?

18 A Yes, sir.

19 Q All right. But you didn't actually see him put
20 anything in that box, though, did you, sir?

21 A Yes, sir.

22 Q All right.

23 A I saw him put it in the box. His hand was standing
24 over the box. I didn't know particularly which box it
25 was, but there were several boxes there.

1 Q You --

2 A There's no way I could have seen. I was too far
3 away.

4 Q Right.

5 A There was no way I could have picked out exactly
6 which box it was.

7 Q I got you. Are you saying he held his hand over the
8 box?

9 A Yes. He put it in the box. He held it in the box
10 like this (indicating).

11 Q Did he hold his hand like that over the box?

12 A He didn't -- he didn't use but two fingers. He had
13 it in his hand.

14 Q And was he holding it over the box?

15 A Yes.

16 Q For how long?

17 A Into the box.

18 Q For how long?

19 A Probably about a second. It didn't take long.

20 Q You searched Alvester Stewart before this, didn't
21 you?

22 A Investigator Lutz.

23 Q All right. Just because you don't exactly trust
24 Mr. Stewart, do you, as far as drugs go?

25 A No. It's policy and procedure that you search all

1 C.I.'s regardless of if you trust them or not.

2 Q Mr. Stewart still does drugs, doesn't he, sir? You
3 know that, don't you?

4 A I cannot testify to that, what Mr. Stewart does.

5 Q You paid him to set people up, right?

6 A I didn't pay him anything.

7 Q All right. Well, who did pay him?

8 A Investigator Lutz did.

9 Q Do you know how much?

10 A No.

11 Q You have no idea?

12 A No.

13 Q Do you know if it was as much as \$500?

14 A I have no clue.

15 Q You knew he was being paid when you went down there
16 with him, didn't you?

17 A Yes, sir. He was a paid informant.

18 Q Okay. And you know you have done about 50 or so
19 cases that he's done that you know about?

20 A With me, yes, yes, sir.

21 Q Fifty. These are all people he knows, right?

22 A It's people he introduced me to. I don't know how
23 well he knows them.

24 Q Okay. And before he said anything to you, you didn't
25 know anything about Octavius Livingston before Stewart

1 came to you, did you? Before Stewart came to Lutz and
2 then they came to you, right?

3 A No, sir. I didn't know anything about that.

4 Q All right, sir. Now, you -- you told us that
5 Mr. Livingston was always behind you, but the fact is he
6 was in front of you for part of this time, wasn't he, sir?

7 A He was always behind me.

8 Q He was?

9 A Mr. Stewart.

10 Q Yes, Mr. Stewart, the C.I., the snitch fellow.

11 A Yeah, he was behind me.

12 Q Okay. Well, how are you videotaping him in the
13 store? That's him you see up here several times with the
14 cap on, right?

15 A Yes, sir.

16 Q Well, how are you videotaping him? Are you moving
17 your videotape around?

18 A If you notice the way the videotape is, when I stop
19 walking, you see Mr. Stewart is walking up. As we're
20 walking down the aisle toward Mr. Livingston, he is behind
21 me.

22 After the deal is over, we are standing at the end of
23 the aisle, and Mr. Stewart is in front of him. That's --
24 the deal is past that. Mr. -- as we're walking towards
25 Mr. Livingston, Alvester is behind me.

1 Q Would you agree with me that there's no transaction
2 on the videotape you made?

3 A Yes, sir. I agree with you on that.

4 Q Would you agree with me that you don't have any store
5 videos. They make videos in the store, don't they, sir?

6 A Yes, sir.

7 Q You didn't go with them and get their videotape of
8 what was going on at that time, did you?

9 A No, I didn't.

10 Q All right. You didn't even check that, did you?

11 A It's not my job to check it.

12 Q Okay. You saw this video, didn't you?

13 A Yes, sir.

14 Q You've seen it before today, right?

15 A Yes, sir.

16 Q Okay. Now, Mr. Stewart was down that aisle with you,
17 though, wasn't he, sir?

18 A Yes, sir, he was.

19 Q All right. And he -- sir, you know he sold drugs in
20 the past, hasn't he, sir, that you know of?

21 A Sir, I cannot testify to what Mr. Livingston has done
22 in his past -- I mean, Mr. Stewart.

23 Q Do you -- did you yourself search Stewart before you
24 all went in that store?

25 A No, I did not.

1 Q All right. Did you pay him before you went into the
2 store?

3 A I didn't pay him anything.

4 Q All right. Do you know about him being paid before
5 then?

6 A No, I do not.

7 Q All right. All right. You don't know for a fact
8 whether or not he set this deal up and he provided drugs,
9 do you?

10 A Do I know that Alvester --

11 Q You don't know for a fact that Alvester Stewart
12 didn't provide the drugs that you got out of that box, do
13 you?

14 A Well, it would be kind of weird for Alvester to get
15 the drugs and get it from him so he could sell it to me.
16 That would be ridiculous.

17 Q It wouldn't be ridiculous to make \$220, wouldn't it?

18 A I think it possibly would.

19 Q He's in it for the money, isn't he?

20 A Yeah, but not \$225 off of one deal.

21 Q So you all are paying him more than that, more than
22 500?

23 A If he does multiple buys, which he has done with me,
24 it's a lot -- for what he gets paid -- if you say he has
25 done 50 more, what would be the purpose of doing one deal

1 for \$225 when you get paid more over a longer period of
2 time? Me and Alvester did this for two years.

3 Q I got you. There's something called "greedy". You
4 have heard of greed before, haven't you?

5 A Oh yes, I've heard of greed.

6 Q All right. Well, if he's being paid by you, and he
7 also got the money, the \$225 from this transaction, he's
8 cleaning up pretty good, isn't he, if he's doing it?

9 A Yeah, if he's doing it. He is.

10 Q Okay. And you all did check him before you left,
11 right, or --

12 A That --

13 Q Or Investigator Lutz did.

14 A Yeah. He checked him before we went to the Lowe's,
15 yes, sir.

16 Q Did he check you? Did lutz frisk you?

17 A No.

18 Q But he frisked Stewart, didn't he?

19 A Yes.

20 Q Okay. Would you agree with me that Stewart has
21 turned in just about everybody that he knows, that you
22 know of in Columbia, neighbors, friends?

23 A Sure. I don't know how well he knows these people.

24 Q All right. You do know that he does -- he smokes
25 crack, don't you?

1 A I told you I cannot testify to what he does in his
2 personal time. He don't do it with me.

3 Q Do you know nothing else about him other than doing
4 these deals with him?

5 A He's a pretty fun guy to talk to.

6 Q Have you ever gone and made an arrest at a house and
7 seen him inside?

8 A No, sir.

9 Q Now, you -- normally, you have done cases where you
10 go in the houses with warrants, right?

11 A Not until recently, yes, sir.

12 Q Okay. Were you doing that back then?

13 A No.

14 Q You did not do surveillance and bust people inside of
15 houses, a drug dealer?

16 A No.

17 Q Okay. Did Stewart approach you or Lutz about setting
18 people up?

19 A He was an informant of Investigator Lutz's for a
20 while.

21 Q Okay. All right.

22 Beg the Court's indulgence.

23 (Pause).

24 You say that there was marked money used in this --
25 in this transaction, right?

1 A Yeah, yes, sir.

2 Q What was the purpose of that?

3 A The purpose of marking the money is just in case
4 we -- if he gets arrested or a search warrant is done, if
5 we can recover our money and he says, "Well, I never sold
6 to the police," well, that's impossible because you have
7 our money here and here are the serial numbers. You know,
8 just as an added insurance policy.

9 Q You didn't arrest him that night though, did you?

10 A Nope, couldn't.

11 Q As a matter of fact, he wasn't arrested for how long,
12 about 14 months or so?

13 A I believe that's what you said.

14 Q Do you know?

15 A No.

16 Q Is this your case?

17 A No.

18 Q This is not your case?

19 A No.

20 Q Whose case is it?

21 A It's Investigator Lutz.

22 Q All right.

23 A The undercover officer is not allowed to be lead case
24 agent on a case.

25 Q Okay. How long have you known Alvester Stewart?

1 A Let's see. I met Alvester, I think, in March. I met
2 Alvester in March, and I've known him until the present
3 time.

4 Q Okay. All right. Would you agree with me, sir, that
5 you stated previously in your testimony that you've never
6 had a case where you didn't do a hand-to-hand buy? Is
7 that what you said?

8 A Yeah, that's true.

9 Q Well, you didn't do one in this case, did you, sir?

10 A Yes, I did.

11 Q All right. You're saying that Mr. Stewart handed you
12 the drugs?

13 A A box can't hand you drugs.

14 MR. WHITLARK: All right.

15 MR. LUPTON: Your Honor, if we can approach?

16 (WHEREUPON, a bench conference was held in the
17 presence, but not within the hearing, of the jury)

18 BY MR. WHITLARK

19 Q It's true, isn't it, Investigator Williams, that he
20 did not hand you the drugs, did he?

21 A Not directly to me.

22 Q Okay. And you did not hand him money for them, did
23 you?

24 A No.

25 Q And Stewart stayed with him afterwards, didn't he?

1 A Yes, sir.

2 Q All right. And you don't know for a fact that
3 Stewart didn't get that money afterwards, do you?

4 A No, I don't know that.

5 Q Okay. Again, sir, I ask you this: Do you have no
6 knowledge of Alvester Stewart being -- smoking crack?

7 A No knowledge.

8 Q What does he do for a living other than set people
9 up?

10 A You'd have to ask him.

11 Q You have no idea?

12 A I don't get into his personal business.

13 Q Was he directing you that night -- wasn't he?

14 A Was he what?

15 Q He was directing you that night where to go, what to
16 do, wasn't he?

17 A He was telling me the meet location, yes.

18 Q Okay. Sir, wasn't he in front of you in that aisle
19 for a period of time?

20 A Yes, once we stopped walking, he was.

21 MR. WHITLARK: Okay. Beg the Court's indulgence.

22 Your Honor.

23 (Pause).

24 That's all I have, Your Honor.

25 THE COURT: Thank you.

1 Mr. Lupton?

2 REDIRECT EXAMINATION:

3 BY MR. LUPTON

4 Q Defense counsel asked if Investigator Lutz frisked
5 you prior to the buy. So I have to ask did you plant
6 those drugs?

7 A No.

8 Q Are you sure?

9 A Positive.

10 Q Okay. The box that the cocaine was in, did anyone
11 point to that box?

12 A Yes, one particular person.

13 Q Who?

14 A Mr. Livingston.

15 Q And the box he pointed to, was it the box with the
16 cocaine in it?

17 A Yes, it was.

18 Q And was it where you saw the defendant reach in or
19 placing his hand over the box?

20 A Yes.

21 Q And when you say hand over the box, how could you
22 describe that? What was it consistent with?

23 A You know how you got -- like you got a -- if you take
24 a whole box, and you know how you can rip the front off,
25 kind of like a -- you've got a garbage bag or something?

1 Q You're talking about a display box?

2 A No. It's actually a box like a -- a large quantity
3 of objects are in one box. So people can just get however
4 many they need. They'd rip the top off.

5 Q That's what --

6 A And it's staying on the shelves.

7 Q I'm going to refer to it as a display box.

8 A Yes, yes.

9 Q One of those that the -- you have sections of a pipe
10 or whatever --

11 A Yes.

12 Q -- in it and you take one out?

13 A Yes.

14 Q So it was one of those type of boxes?

15 A Yes.

16 Q Where items that were on sale are displayed?

17 A Yes.

18 Q And how was the hand motion? If this projector was
19 the box and you say over it, was it way up over it, two
20 feet, three feet?

21 A No. It was close down. You know, real quick like
22 boom and --

23 Q What did it appear he was doing when you nabbed him?

24 A He was putting the drugs into the box or placing them
25 so I guess he wouldn't have to touch my hands or

1 something.

2 Q And you saw that; is that correct?

3 A Yes, I saw it.

4 Q And you saw him point to the box?

5 A Yes.

6 Q And who took the money out of the box?

7 A Mr. Livingston.

8 Q And it was \$225; is that correct?

9 A Yes, sir.

10 Q Now -- now, the defendant -- the defense counsel
11 asked you whether or not you had prior knowledge of who
12 the defendant was before the introduction. Before this
13 transaction occurred, did you have a name?

14 MR. WHITLARK: No, sir, that's -- that's a
15 mischaracterization of what I said to him.

16 BY MR. LUPTON

17 Q I'll rephrase.

18 Before you had conducted this transaction, did you
19 have a name of who you were going to meet?

20 A They told me a nickname.

21 Q All right. And is there any question that the person
22 that you did the deal with was the defendant in this
23 courtroom?

24 A No.

25 Q The prior occasions and subsequent occasions that you

1 did undercover operations with Alvester Stewart, the
2 people that you were introduced to by him, did all of
3 those people sell you drugs?

4 A Yes.

5 Q And there's been several questions about what the
6 defendant -- excuse me, what the informant, Mr. Stewart...

7 (There was a disruption).

8 THE COURT: Excuse me. I couldn't see you.

9 BY MR. LUPTON

10 Q What the informant, Mr. Stewart, may or may not smoke
11 when he's not in your presence. Is it possible that he
12 has or may still use drugs?

13 A Yeah, anything is possible.

14 Q What is the C.I.'s function? What does he do in the
15 process as far as -- well, let me phrase that a little bit
16 better. Do you rely upon C.I.'s to make introductions to
17 drug dealers?

18 A Yes.

19 Q And is the -- do they serve any function as far as
20 getting the drug dealers to trust you?

21 A Sometimes they do, sometimes they don't. Basically,
22 if -- it's pretty much on the officer. The officer has to
23 establish a rapport with whatever drug dealer they come in
24 contact with, and once they get that working relationship
25 that they can work together, the C.I. normally just fades

1 out.

2 Q All right.

3 A You don't even use them anymore.

4 Q But you use the C.I.'s to introduce you to drug
5 dealers?

6 A Yes.

7 Q Do priests make good drug -- C.I.'s?

8 A I don't know. I never met one.

9 Q Who makes C.I.'s?

10 A The best C.I.'s are drug users or drug dealers.

11 Q People who know drug dealers?

12 A Yeah.

13 Q So the fact that -- that it's possible that he may
14 use or have used in the past drugs, does that mean that he
15 is not a good C.I. or that he doesn't know drug dealers?

16 A No. That doesn't make him a bad C.I. That makes him
17 a great C.I. because he knows the lingo. He knows the
18 people. He knows the areas.

19 MR. LUPTON: Nothing further, Your Honor.

20 THE COURT: Anything?

21 MR. WHITLARK: Yes. Briefly, Your Honor.

22 RECROSS-EXAMINATION:

23 BY MR. WHITLARK

24 Q You don't know if he smokes crack now. You don't
25 know?

- 1 A No, sir.
- 2 Q And you don't know if he sells drugs, do you?
- 3 A No. No, sir, I don't.
- 4 Q He just happens to know all of these people, though,
5 does he not?
- 6 A Yes, sir.
- 7 Q He told you Octavius Livingston was a friend of his,
8 didn't he?
- 9 A Yes, sir.
- 10 Q He said Octavius Livingston had helped him get his
11 commercial driver's license, didn't he?
- 12 A No, he didn't tell me that.
- 13 Q Okay.
- 14 A Actually, when I was working with Mr. Stewart, he
15 didn't have a commercial driver's license.
- 16 Q Okay. He didn't have a job at all except this, did
17 he, right?
- 18 A I don't know. I don't know if he worked.
- 19 Q Well, would you agree with me that he was very
20 dishonest in these transactions with these people?
- 21 A What do you mean?
- 22 Q When you set them up.
- 23 A No. That's not dishonest.
- 24 Q He wasn't being dishonest when he brought you in
25 there to arrest them?

1 A No.

2 Q He wasn't being dishonest with them?

3 A No.

4 Q He just forgot to tell them "I'm setting you up,
5 right?"

6 A Cleaning up the community.

7 Q In the entire time you worked with Stewart, did you
8 know a regular job that he had?

9 A I think he was a -- he always came with like dirty
10 clothes like he was a handyman or a painter or something
11 like that.

12 Q Would you agree with me that based upon the number of
13 cases that Stewart did that he could have made upwards of
14 between 25 and \$50,000 being paid by the Sheriff's
15 Department for turning people in?

16 A No, I wouldn't say that much.

17 Q Of course, if he's selling drugs, he's making double
18 that, isn't it, sir?

19 A If he is.

20 Q Oh, by the way, you -- you had an experience using
21 videotapes before this, did you not, sir?

22 A Yes, sir.

23 Q How many times before this case?

24 A I use it on every buy.

25 Q All right. And you previously gotten transactions on

1 there, have you not, hand-to-hand transactions on film?

2 A Yeah, I've got a couple.

3 Q We can agree this was not a hand-to-hand transaction,
4 though. Would you agree with that?

5 A No, I can't agree with that.

6 Q Okay. You had a video. You could have shot down
7 that aisle, right, but you didn't, right?

8 A No. I can't control where the camera points.

9 Q And you waited 14 months to arrest this fellow,
10 right?

11 A I assume they did.

12 MR. WHITLARK: All right. That's all I have, Your
13 Honor.

14 THE COURT: All right. Thank you, sir. You may step
15 down.

16 MR. LUPTON: Your Honor, the State calls Investigator
17 John Lutz.

18 JOHN LUTZ, after being duly sworn,
19 testified as follows:

20 THE CLERK: Have a seat in the witness box. State
21 your name for the record, please.

22 THE WITNESS: It's John Lutz.

23 DIRECT EXAMINATION:

24 BY MR. LUPTON

25 Q And could you tell the members of the jury where it

1 is you work?

2 A I'm employed at the Richland County Sheriff's
3 Department.

4 Q And what is your law enforcement background and
5 experience?

6 A I've been employed at the Sheriff's Department for
7 the past 13 -- just over 13 years, and prior to that, I
8 was in the United States Army as a military police
9 investigator for eight years.

10 Q So just over 20 years?

11 A Yes, sir.

12 Q Twenty-one years. And in that capacity, how much of
13 that has been in narcotics?

14 A Just over nine years. The past nine years have been
15 in narcotics.

16 Q And were you employed -- in what capacity were you
17 employed in January of 2007?

18 A As a narcotic's investigator.

19 Q And did your duties include riding in undercover
20 operation involving Investigator Jason Williams?

21 A Yes, it did.

22 Q And specifically on January 23rd of 2007, were you
23 the case officer for an undercover buy he made with
24 Octavius Livingston?

25 A Yes, sir, I was.

1 Q Can you tell the jury what you did as far as
2 preparing the C.I. prior to that buy taking place?

3 A Yes, sir. We met at a predetermined location. I
4 spoke briefly with the informant, searched him from top to
5 bottom, made sure he had nothing illegal on him, no
6 weapons or drugs, keys.

7 Investigator Williams, had the U.S. currency that I
8 prerecorded on a notebook, the serial numbers, and then
9 they went and made a call and went to the location to meet
10 Mr. Livingston.

11 Q Investigator Williams was wearing a hidden camera?

12 A Yes, he was.

13 Q And this is a hidden camera, is it not?

14 A Yes, it is.

15 Q It's not a camcorder that he can direct wherever he
16 wants? Is that fair to say?

17 A No. It's a hidden camera.

18 Q The buy, did you witness any of that itself?

19 A No. I was actually parked at the Chinese restaurant
20 on the hill. As you're facing the Lowe's, it's right
21 there to the right, don't know the name of it. It's a
22 Chinese buffet restaurant and actually runs right beside
23 the I-20 exit ramp when you get off of I-20 onto Two
24 Notch.

25 Q And why is it that you're not present at the buy

Lutz - direct (Lupton)

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1 itself?

2 A I'm well known as a police officer, and if people
3 were about to do a deal and they saw me, they more than
4 likely wouldn't do it.

5 Q And once the deal took place, what happened?

6 A Agent Williams contacted me on the Nextel that you'll
7 hear at the end of that video and let me know. We met
8 back at the same location that we had earlier me. That's
9 where I retrieved the drugs from Mr. -- or Investigator
10 Williams.

11 Q And what did you do with the drugs?

12 A I conducted a field test on them with a little packet
13 that they give us. Basically, you just touch the
14 substance and if the --

15 Q All right. And what is the -- the field test, can
16 you describe it a little bit better than that? I mean
17 what does the field test kit look like? What does it do?

18 A It's actually a little -- like a one-by-one square
19 package. You open it. There's a pink piece of paper in
20 there that has liquid on it. You dab it onto the
21 substance, and if it indicates a positive reaction for
22 cocaine, it turns blue, and it turned blue.

23 Q Kind of like -- when you're talking about a package,
24 you're talking about like the little Handy Wipe packages?

25 A Yes, it's about like that.

1 Q All right. And you say you did that?

2 A Yes, sir.

3 Q And did you -- how much of the cocaine did you touch
4 with that?

5 A Oh, I just dabbed it on the very edge of the bag, the
6 most minute amount that I can.

7 Q And does that change the chemical composition of the
8 substance you're testing?

9 A No. It's just a field test.

10 Q So would it change something that was not cocaine
11 into cocaine?

12 A No.

13 Q Would it alter it in any way?

14 A No, sir. It just gives us an indication of if the
15 substance is real or not.

16 Q And once you did that, what did you do with the
17 substance that was brought to you by Investigator
18 Williams?

19 A I placed it on a scale and took a picture of it on
20 the scale to document the -- what the condition of how it
21 looked at the time, and I placed it into the evidence bag
22 and sealed it.

23 Q And that -- you took a picture of it inside the bag.
24 Is that --

25 A Yeah, the bag that was given to me.

1 Q So that would not be an accurate way. It would
2 include the bag, would that be fair to say?

3 A Correct.

4 Q Now, what did you do with it at that point?

5 A Placed it in the bag and sealed it, and after the
6 buy, I took it to the sheriff's department.

7 Q Well, hold on. When you're talking about in the bag,
8 what bag are you talking about? You have got State's
9 Exhibit 2.

10 A The bag is inside of this plastic right here that's
11 folded with the blue on the exterior of it.

12 Q All right. And I -- that's the -- does that look
13 like this bag here?

14 A Yes, it is.

15 Q The property bag for the C.D.?

16 A Yes, sir.

17 Q And can you tell what the -- can you describe that
18 bag and explain its functions.

19 A This is the bag -- once you place the substance in it
20 and you remove the liner on the top and press it together,
21 it's sealed so you can't reopen it. Once it's sealed, if
22 you were to try to tamper with it, it would be obvious
23 because the bag -- it's extremely difficult to pull apart,
24 so that is why we sealed it, for protection.

25 Q For protection so that nobody can tamper with the --

1 A Yes, sir.

2 Q -- stuff inside? All right. And you write on the
3 bag; is that correct?

4 A Yes, sir. I fill out the information.

5 Q And can you see writing on the evidence bag, the blue
6 bordered evidence bag inside that larger heat sealed bag?

7 A This is my handwriting inside -- or on the bag.

8 Q And is that the -- is State's Exhibit 2 the substance
9 that was turned over to you by Investigator Williams?

10 A Yes, it is.

11 Q And you sealed it without -- did you tamper with it
12 in any way?

13 A Correct.

14 Q Did you tamper with it in any way, I'm sorry?

15 A I did a field test. Other than that I placed it in
16 the bag and turned it in.

17 Q So did you change it, alter it --

18 A No, sir.

19 Q Destroy it, add to it, take away from it?

20 A No, sir.

21 Q And once you sealed it up and filled up the bag, what
22 did you do with the evidence?

23 A I took it to the sheriff's department and dropped it
24 into the drop box.

25 Q And is that a secure location?

1 A Yes, it is.

2 Q And once you turned in the evidence, did you at some
3 point after that arrest the defendant?

4 A Yes, sir.

5 Q And when was that?

6 A That was February 18th, 2008 at one p.m.

7 Q And why is it that you waited so long to arrest the
8 defendant?

9 A We waited until the undercover is no longer
10 undercover for his safety.

11 Q And the -- Mr. Stewart, there's been a lot of talk
12 about him being a paid informant. Was he a paid
13 informant?

14 A Yes, he is a paid informant.

15 Q And for this buy, do you know how much he was paid?

16 A Yes. He was paid \$40 for the buy, for his help with
17 the buy.

18 Q And would that have been -- was that -- how was that
19 number arrived at?

20 A It's something that's preapproved by our supervisors.
21 They tell us what we can pay and that's --

22 Q Is that a standard fee, or do you just make it up
23 every time?

24 A No. It's a standard fee.

25 Q So he knew -- did he know going into it what he was

1 going to get paid for this?

2 A Yes, he did.

3 Q And how much was the value of the drugs?

4 A About \$225.

5 MR. LUPTON: Beg the Court's indulgence.

6 THE COURT: Yes, sir.

7 (Pause).

8 MR. LUPTON: Nothing further, Your Honor.

9 THE COURT: All right. Mr. Whitlark?

10 MR. WHITLARK: May it please the Court.

11 CROSS-EXAMINATION:

12 BY MR. WHITLARK

13 Q Do you know whether or not Alvester Stewart is
14 currently using drugs?

15 A No, I do not.

16 Q Okay. Do you know if in the past he has done so?

17 A No, I do not.

18 Q Okay. Sir, isn't it a part of your routine when you
19 search these men before they go -- this fellow before he
20 goes in there, you search them when he gets back, don't
21 you?

22 A Yes, typically.

23 Q Well, he didn't come back, did he?

24 A No, not after this one.

25 Q Okay. So you don't know what was on him or so forth

1 after this, right?

2 A I know that going into it, he had nothing on him.
3 Then after -- what he did after, I have no knowledge of
4 that.

5 Q And you have no idea whether or not he directed
6 Mr. Livingston to help him do something, do you? Did he
7 ever tell you that Mr. Livingston helped him sell drugs?

8 A No, he didn't.

9 Q You have no evidence of that?

10 A No, I don't.

11 Q Okay. Did you work with Alvester Stewart during his
12 course of turning people in?

13 A I've known Alvester Stewart my entire time assigned
14 in narcotics.

15 Q Has he, in fact, turned in 50 or 60 people?

16 A More than that, yes, sir.

17 Q All right. Did he tell you he didn't want to testify
18 against Mr. Livingston because Mr. Livingston helped him
19 get a driver's license?

20 A He told me that Mr. Livingston did, in fact, want --
21 or helped him with a driver's C.D.L., but he is prepared
22 to testify.

23 Q All right, good enough. Wasn't Mr. Stewart's brother
24 killed because he was a snitch?

25 A I don't know all of the details in that, but I know

1 his brother was murdered.

2 Q All right. And is it your testimony that Mr. Stewart
3 was not under arrest when he came to work for y'all?

4 A Correct.

5 Q In other words, he wasn't working off to get some
6 charges off of him?

7 A He is a paid informant.

8 Q All right. And he was paid for every single time he
9 turned somebody in?

10 A Yes.

11 Q Okay. So you don't know whether or not he supplied
12 the drugs for -- at least for this transaction, do you?

13 A I don't believe he did.

14 Q All right. But you don't know he did not, do you,
15 sir?

16 A I don't know for a fact.

17 Q All right. He did stay with Mr. Livingston, though,
18 didn't he? He didn't come back that time?

19 A He departed that location with Mr. Livingston,
20 correct.

21 Q All right. So you didn't search him or check him
22 after that, did you?

23 A No.

24 Q Are you all -- do you have a tampering problem with
25 evidence at the Richland County Sheriff's Department?

1 A No.

2 Q All right. You sealed up that bag pretty good,
3 though, to keep people from tampering with it, right?

4 A Yeah. I don't order the bags. We just use what they
5 supply us with.

6 Q Who did you give the bag to?

7 A I placed it in the drop box at the sheriff's
8 department.

9 Q Okay. Did you give it to a specific individual?

10 A I placed it in a secure container at the sheriff's
11 department --

12 Q Uh-huh.

13 A -- and I assume one of the evidence custodians later
14 retrieved it out of that secure location.

15 Q All right. But you, yourself, did not transfer to
16 another unit, did you?

17 A A unit to the drop box.

18 Q All right. The drop box is not a human being, right?

19 A Correct.

20 Q Okay. So you didn't hand it to a person?

21 A Correct.

22 Q All right. Begging the Court's indulgence.

23 (Pause).

24 You checked Mr. Stewart from head to toe. Is what
25 that your testimony was?

1 A Yes, sir, every time.

2 Q Every time. You never let it slide, maybe just pat
3 him a couple of times and let him go out there?

4 A We don't pat him down. We searched him..

5 Q Okay. And you searched him thoroughly every single
6 time that he set somebody up?

7 A Yes, sir.

8 Q Head to toe?

9 A Every time when he use him, we search him and any
10 other informant that the sheriff's department employs.

11 Q He didn't have a job, did he, other than this that
12 you know of?

13 A He had a job the majority of the time I knew him at
14 John Harris Body Shop.

15 Q He worked at John Harris Body Shop?

16 A For -- I'd say the -- the period of time I knew him,
17 correct.

18 Q Okay. Was he working at John Harris Body Shop when
19 this allegedly occurred in January of 2007?

20 A No, I don't believe so.

21 Q Okay. Did you investigate Mr. Stewart's background?

22 A I have run his rap sheet in the past.

23 Q Okay. You knew that he had a propensity to sell
24 narcotics, didn't you?

25 A I don't recall ever seeing any drug related stuff on

1 his rap sheet.

2 Q Okay. Did you -- did you tell Alvester Stewart that
3 he better not be selling drugs while he was working for
4 you?

5 A No.

6 Q You told him it's all right to do that?

7 A When -- he signs an agreement with us saying he can't
8 commit crimes, but I've never told him what he can and
9 can't do other than what the agreement says.

10 The agreement is specific you can't break the law
11 outside of when he's helping with us, so if he -- if he
12 chooses to do something out there on his own, he's exactly
13 like that, on his own.

14 Q You don't know whether or not he recruited
15 Mr. Livingston to help him do a drug deal then, don't you
16 -- do you?

17 A I don't have any knowledge of what they did together.

18 Q Okay. All right. Now, Mr. Livingston had to be
19 picked up out of a photo lineup, right?

20 A That's part of the procedure, yes.

21 Q Okay. You didn't know him before Alvester Stewart
22 came to you with his name, do you?

23 A Not before that, no.

24 Q Okay. Is it true that Mr. Stewart turned in his own
25 cousins for narcotics?

1 A I'm not sure of -- of his family line. I know we
2 arrested numerous people, but I don't know of any actual
3 relatives that there were.

4 Q Do you remember the last time you made a case with
5 Mr. Stewart setting somebody up?

6 A I know a lot of incidents where we used Mr. Stewart.

7 Q Do you still use him?

8 A Yeah.

9 MR. WHITLARK: One moment, please, Your Honor.

10 (Pause).

11 Begging the Court's indulgence, Your Honor.

12 (Pause).

13 BY MR. WHITLARK

14 Q Would you agree with me that the video is not very
15 good in this case as far as showing what's going on over
16 there?

17 A Actually, it's very good because it does show
18 Mr. Livingston on there, and given the fact that, you
19 know, the size of the video system and what it can
20 capture, it actually really is great, in my opinion.

21 Q Sir, isn't it true that this whole transaction took
22 place in less than four or five minutes, this whole time
23 that you were with Mr. -- or your agent was with
24 Mr. Livingston?

25 A Yes, sir, most drug transactions are rather quick.

Lutz - cross (Whitlark)

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1 Q And you did not go to the store and get their video
2 tape that they make of the floor and so forth, did you?

3 A No, I did not.

4 Q Would you agree with me that they do have those,
5 don't they?

6 A Yes, I do.

7 THE COURT: All right. Mr. Lupton, anything?

8 MR. WHITLARK: That's all I have, Your Honor.

9 MR. LUPTON: Nothing, Your Honor. Nothing further.

10 THE COURT: All right. Thank you, sir. You may step
11 down.

12 THE WITNESS: Thank you, Judge.

13 THE COURT: All right. Ladies and gentlemen, we're
14 going to go ahead and break for lunch. I'm going to ask
15 that you all be back here before --

16 MR. LUPTON: Your Honor.

17 THE COURT: -- we start back up at two o'clock.
18 Please do not discuss the case with each other or with
19 anyone else while you're gone.

20 Mr. Broom?

21 Ms. Devlin, if you'll hold on, we'll give this back
22 to you. Make sure it's turned off when you come back.

23 THE JUROR: Sorry, sir.

24 (WHEREUPON, the jury left open court at approximately
25 12:43 p.m.)

1 THE COURT: All right. We'll be back here at
2 two o'clock.

3 MR. WHITLARK: Your Honor, excuse me. Your Honor, do
4 you want him to say?

5 THE COURT: He's in our custody.

6 MR. WHITLARK: Yes, sir.

7 (WHEREUPON, a lunch break was taken.)

8 THE COURT: Okay. Are you ready to go?

9 MR. LUPTON: The State is ready.

10 THE COURT: Are you ready to go?

11 MR. WHITLARK: We're ready to go.

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

13 THE BAILIFF: Yes, sir.

14 (WHEREUPON, the jury came into open court at
15 approximately 2:06 p.m.)

16 THE COURT: All right. Ladies and gentlemen, I hope
17 you had a nice lunch. If you recall when we broke, the
18 State was in the midst of presenting its evidence in its
19 case in chief.

20 Mr. Solicitor, are you ready to call your next
21 witness?

22 MR. LUPTON: The State is ready, Your Honor. May it
23 please the Court. The State calls Tena Goff.

24 THE COURT: Ted, you and -- you all step up here one
25 second.

1 (WHEREUPON, a bench conference was held in the
2 Presence, but not within the hearing, of the jury).

3 TENA GOFF, after being duly sworn,
4 testified as follows:

5 THE CLERK: Have a seat in the witness box. State
6 your name for the record, please.

7 THE WITNESS: Tena Goff.

8 DIRECT EXAMINATION:

9 BY MR. LUPTON

10 Q Where are you employed?

11 A The Richland County Sheriff's Department.

12 Q What capacity are you employed at the sheriff's
13 department?

14 A I am the evidence custodian.

15 Q And are you the head evidence custodian?

16 A I am.

17 Q How long have you been at the sheriff's department?

18 A Fifteen years.

19 Q And have you been in the evidence room the whole
20 time?

21 A For 12.

22 Q Twelve of those years?

23 A Yes, sir.

24 Q And were you evidence custodian at the time of this
25 case, January, end of January, 2007?

1 A Yes, sir.

2 Q And in connection with your duties as evidence
3 custodian -- well, first of all, can you generally give a
4 general overview of what your duties as evidence custodian
5 are for the jury?

6 A My job is to supervise the activities of evidence
7 room and make sure that the policies and procedures are
8 followed, as well as accept, store and maintain a chain of
9 custody of the evidence and then produce it at court when
10 asked.

11 Q And in that capacity, did you come in contact with
12 the evidence in this case?

13 A I did.

14 Q And could you tell the jury when that was and how
15 that took place?

16 A January 24th of 2007 I retrieved an evidence bag or
17 pouch from our drop box, which is a temporary locker set
18 outside of the evidence room to store evidence temporarily
19 for after hours or on weekends when the evidence room is
20 closed.

21 Q All right. And this evidence box -- first of all,
22 when would somebody place evidence in that -- is that
23 always, sometimes, when would it be?

24 A When the evidence room is closed and there's no one
25 to take it hand-to-hand or person-to-person.

Goff - direct (Lupton)

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1 Q All right. So it would go to you if you were there
2 or hand it to a technician if somebody were physically
3 present. Otherwise, it goes into the box; is that
4 correct?

5 A Yes.

6 Q And this box, is it a secure location?

7 A It is.

8 Q Could you describe this box to the jury?

9 A If you look across Assembly Street at the main post
10 office, you will see mailboxes on the sidewalk. Our drop
11 box is exactly like that.

12 If you want to deposit your mail or your evidence,
13 you'll pull the handle down, put your evidence in, let the
14 handle go up. Pull the handle down, make sure that it's
15 dropped. It will drop down into the body of it. It's
16 locked. Unless you have a key or are assigned to the
17 evidence room, you cannot retrieve that evidence.

18 Q All right. Is there -- and these -- the mailbox
19 you're talking about, these are the R2-D2 looking
20 mailboxes?

21 A Yes.

22 Q And the -- is -- is these -- are these boxes
23 reinforced in any way greater than what you see across the
24 street?

25 A Yes.

1 Q And could you explain that?

2 A We have a -- not -- it has a lock on it, and we have
3 a metal bar that comes across with a padlock. That's the
4 only way that you can get in. On top of that, we have
5 security cameras that are focused in on that box to see
6 who drops their evidence, but more likely who is tampering
7 with it or trying to do something they're not supposed to
8 do.

9 Q When you say likely, does that happen?

10 A Dropping evidence off or trying to get it?

11 Q Somebody tries to get it --

12 A No.

13 Q -- or tamper with it.

14 All right. Now, when the evidence is dropped in the
15 box, how is it packaged?

16 A Depending on the type of evidence it is, it may be
17 packaged in a plastic evidence bag or...

18 Q Is it --

19 A Maybe in a --

20 Q I'm sorry. Typically drug evidence like you received
21 in this case, how would that typically be packaged?

22 A It's what a -- in a heat sealed pouch that we call an
23 evidence bag.

24 Q All right. And I show you State's Exhibit 2. Do you
25 recognize that?

1 A I do.

2 Q And the blue bordered baggie that's inside, evidence
3 bag that's inside, is that what you're talking about?

4 A Yes.

5 Q And showing you the one from the C.D. in this case,
6 is this what it looks like when it's not inside the bag?

7 A Yes.

8 Q And obviously, the bottom has been cut out to get a
9 C.D. out, but this is what you're talking about when you
10 talk about the bags?

11 A Yes.

12 Q Now, in the process of accepting this evidence that
13 you're talking about, could you explain the procedures
14 that you followed?

15 A Well, first we end up with the drop box because many
16 officers use it after hours and on weekends. We want to
17 make sure that all the items that have been dropped in a
18 particular case are put together so we don't misplace or
19 we forget to log in one.

20 We look at all the bags. At the top of the bag, it
21 has the case number, type of offense, where it was
22 collected, the prudent information that we need.

23 Once we verify that we've had all the -- all the
24 blanks are filled in, then we proceed to go ahead and log
25 it in. Not only does the bag have to be filled out

1 properly, but it also has to be sealed and not been
2 tampered with.

3 Q All right. And you talk about after hours. When,
4 typically, do you all close?

5 A Our hours are from seven to 8:30 every night, Monday
6 through Friday. Saturdays and Sundays we're closed.

7 Q So a case -- if somebody came in after you were
8 closed, that's when they would put it in the box?

9 A Yes, sir.

10 Q And you talked about inspecting the bag. Do you
11 inspect the bag --

12 A Yes.

13 Q -- prior to logging it into evidence?

14 A Yes.

15 Q What happens if the bag is not properly sealed?

16 A It doesn't get accepted.

17 Q And is it -- is there anything about the bag that
18 allows you to be able to tell if it has been tampered
19 with?

20 A Yes. Along the top -- when officers are filling out
21 all the blanks, once they filled it out --

22 Q This will help you.

23 A Thank you. There is a seal on the bottom that goes
24 along like this. This top is open. Once an officer has
25 filled out all of the information on the front, he or she

1 then deposits their evidence into it.

2 They rip off a blue piece, and then they seal it
3 because this red line is a glue type seal that seals this
4 bag together. Then you can check it to make sure that
5 it's not -- hasn't been broken.

6 Q And --

7 A We make sure that that's done, as well as everything
8 on the front is filled out properly.

9 Q And can you open that up without damaging the bag?

10 A No, you cannot.

11 Q So is there any way to tamper with what's inside of
12 one of those bags that's been sealed without it being
13 evidence?

14 A No.

15 Q And did you receive the evidence in this case?

16 A I did.

17 Q I believe you testified already that it was the
18 morning of the 24th?

19 A Yes, January 24th.

20 Q And at what point in the day do you typically
21 retrieve the evidence from the drop box?

22 A As soon as we get in the office and we disarm the
23 alarm and open the doors and get our computers going,
24 that's when we go out and check the drop box and lockers.

25 Q All right. And you inspect it at that time?

1 A Yes.

2 Q And once you inspect it, assuming it passes
3 inspection, you talked about logging it in, what happens
4 at that point?

5 A We sit at the computer and do the database. I mean,
6 we do data entry. We enter it in, put it in the -- on the
7 shelf until it's requested to be signed out for testing.

8 Q In the place where you put it, the shelf, does that
9 location happen there?

10 A In this case, the evidence was put -- item one was
11 put on the hard drug test bin. It's a temporary bin for
12 hard drug testing, and I believe the C.D. was put in the
13 E-Drawer which was a specific location inside the drug
14 room.

15 Q All right. As far as the drugs are concerned, the
16 hard drug test bin, is that a secure location?

17 A Yes.

18 Q And who has access to that location and to the drop
19 box?

20 A Myself and my two partners who are assigned to the
21 evidence room.

22 Q And do you all tamper with, alter or change the items
23 in any way while they're in your custody?

24 A No.

25 Q In these particular drugs, did you at some point turn

1 them over to somebody else?

2 A I did.

3 Q And based on your records, do you know who that was
4 and when it was?

5 A I signed item one, the drugs, to Investigator Andy
6 Farmer on July 9th, 2007 at 1:16 in the afternoon.

7 Q All right. And Andy Farmer was this individual over
8 here?

9 A Yes.

10 Q In what capacity does he work at the sheriff's
11 department?

12 A He's one of our drug chemists.

13 Q And what does -- what do they do?

14 A Test the drugs.

15 Q And prior to turning over the drugs to Andy Farmer,
16 is there any procedure you follow?

17 A In order for him to sign them out, we have to log
18 them in electronically in the computer, and then once the
19 transaction has taken place, I have to put my unique
20 password in. He also has to enter his unique password in
21 before the transaction is complete.

22 Q In regards to the evidence itself, is there anything
23 that is done with that?

24 A Just verifying that we're giving him the right item.

25 Q Do you expect it in any way?

1 A Just make sure it still hasn't been tampered with.

2 Q If it has been tampered with, if there has been any
3 evidence of tampering on the bag or any other indication
4 of tampering, would you turn it over to Andy Farmer or
5 anyone else?

6 A No.

7 Q And in this case did you inspect the bag for
8 tampering prior to turning it over to Andy Farmer?

9 A Yes, because I gave it to him.

10 Q And can you say whether or not there was any evidence
11 of tampering?

12 A It was not tampered with.

13 MR. LUPTON: Beg the Court's indulgence.

14 (Pause).

15 THE COURT: Mr. Whitlark?

16 MR. WHITLARK: Thank you, Your Honor.

17 CROSS-EXAMINATION:

18 BY MR. WHITLARK

19 Q When narcotics agents for Richland County -- they
20 sell drugs on occasion in their work, right, to people on
21 their cases. Do they get it from you?

22 A (There was no response).

23 Q Do you know where they get that?

24 A I do not.

25 Q You don't talk about that, right? I mean, they

1 sometimes not just buy drugs but they sell drugs in
2 transactions?

3 A I don't -- I don't have any knowledge of that.

4 Q Okay. All right. Did you know exactly where the --
5 where this evidence sat, I believe it was until July,
6 right?

7 A It sat -- you're talking about item number one?

8 Q The drugs that you took to Mr. -- or Dr. Farmer.

9 A Yes. They were sitting in the hard drug temporary
10 bin.

11 Q Okay. That was for how many months did they sit in
12 there?

13 A According to my records, I received them
14 January 24th, and Investigator Farmer got them out on
15 July 9th.

16 Q Okay. Did you get these narcotics directly from
17 Investigator Lutz?

18 A I did not.

19 Q Okay. And do you have your record from that day, the
20 24th of January?

21 A For this particular case, I do.

22 Q It does say up top that he -- it was collected by
23 Lutz and then received by you, right?

24 A Yes, sir.

25 Q But he didn't actually hand it to you, right?

1 A No, sir.

2 Q Okay. All right. Were you asked to check for
3 fingerprints or anything like that when you took this to
4 Farmer? Was there a request for that?

5 A I would not know unless I opened this up and looked
6 at the bag itself.

7 Q Okay. Well, if they want to get fingerprints, they
8 can though, right?

9 A Yes, sir.

10 MR. WHITLARK: All right. Thank you. That's all I
11 have.

12 THE COURT: Anything, Mr. Lupton?

13 MR. LUPTON: No, Your Honor.

14 THE COURT: All right. Thank you, ma'am. You may
15 step down.

16 MR. LUPTON: Your Honor, the state calls Curtis
17 Burnett.

18 CURTIS BURNETT, after being duly
19 sworn, testified as follows:

20 THE CLERK: Have a seat in the witness box. State
21 your name for the record, please.

22 THE WITNESS: I'm Curtis Lee Burnett, it's
23 B-U-R-N-E-T-T.

24 DIRECT EXAMINATION:

25

1 BY MR. LUPTON

2 Q And where are you employed, sir?

3 A I'm part time with the Richland County Sheriff's
4 Department.

5 Q And in what capacity?

6 A As the evidence technician.

7 Q And were you employed as the evidence technician back
8 in January of -- or excuse me, during 2007?

9 A Yes, sir.

10 Q And in that capacity, did you have an opportunity to
11 receive drugs back from somebody in this case?

12 A Yes, from Andy Farmer on July 12th at 9:08 in the
13 morning.

14 Q All right. And Andy Farmer is this individual here?

15 A Correct.

16 Q Drug chemist at the sheriff's department?

17 A Yes, sir.

18 Q Now, I show you State's Exhibit 2. Do you recognize
19 it?

20 A Yes, sir. What it is, is we -- that's the one that I
21 got back from him sealed after testing.

22 Q All right. And when you received it back from Andy
23 Farmer, did you do anything prior to taking control of it
24 from Andy Farmer?

25 A Anything prior, no.

1 Q When you received it, did you do anything with the
2 drugs itself?

3 A Nothing other than enter it into a computer that I'm
4 actually receiving it from him, yes.

5 Q Did you look at it in any way?

6 A Well, I examined this package to make sure it was
7 sealed all the way around.

8 Q Okay. That's what I'm talking about.

9 A Oh, okay.

10 Q Did you inspect it?

11 A Yes.

12 Q Look at it?

13 A Yes, sir.

14 Q And was it?

15 A Yes, sir. And from there, it's after I get it logged
16 in, it goes into evidence E-Drawer.

17 Q All right. And was it in --

18 A Which is --

19 Q -- the condition that you see it in today?

20 A Yes.

21 Q Has it been changed in any way since when you
22 received it back into evidence?

23 A No, sir, because right there is where he sealed it.

24 Q Okay. So you say you got it from him, inspected it,
25 and then you logged it into the computer?

1 A Right.

2 Q Is that the same procedure that Tina Goff just
3 testified about?

4 A Basically, just the opposite or just receiving it
5 from someone, except I received it from him instead of the
6 box.

7 Q All right. It was just the reverse of what she did?

8 A Right. All I was doing was receiving it back from
9 him after testing to go into storage.

10 Q And from the time you received it back, you say you
11 logged it back into -- put it back into the evidence room.

12 A Right.

13 Q Was it kept in a controlled and secure location?

14 A Yes, sir.

15 Q Was it kept in that location until it came to court
16 for trial?

17 A Yes, sir.

18 Q And did anybody tamper with it in any way, change it,
19 alter it, do anything to it --

20 A No.

21 Q -- while it was in y'all's custody and control?

22 A Not to my knowledge.

23 Q And if they had, would it be evident from the bag?

24 A Yes, sir.

25 MR. LUPTON: Nothing further, Your Honor.

1 THE COURT: All right. Mr. Whitlark, anything?

2 CROSS-EXAMINATION:

3 BY MR. WHITLARK

4 Q Officer Burnett, are how are you doing?

5 A Fine, sir. How are you?

6 Q Good. How many of these do you do every year?

7 A I have no earthly idea..

8 Q Thousands, a lot?

9 A Yes, sir.

10 Q Okay. You deal with Andy Farmer quite a bit, right,
11 the chemist?

12 A Yes, sir.

13 Q I mean, this is what's written on here. It's -- all
14 right. Did you sign this?

15 A No. I don't need to sign this one.

16 Q Okay.

17 A It's only -- the only time it's signed is when it's
18 actually brought into the room to start with --

19 Q Okay.

20 A -- from us. Other than that, it's electronically
21 signed in and out.

22 Q Okay. Did you -- I mean, you don't actually remember
23 this? You'd have to check your log and stuff to remember
24 stuff like this, right? I mean, you don't actually
25 remember, "Oh, I remember this"?

1 A Not nothing other than I can say this is one that I
2 actually logged in because of the electronic signature on
3 here. It won't -- it doesn't show up unless I got it from
4 Andy, and he had to use his password. Then I have to use
5 my password for it to go in here as a -- as the signature.

6 Now, when this is scanned, it's scanned with a bar
7 code on it.

8 Q Uh-huh.

9 A That's why I said it's this item of evidence.

10 Q Yes, sir. Yes, sir. Where was it taken to?

11 A We have what's called a drug room.

12 Q Yes, sir.

13 A And there's a drug in the E -- what we call the
14 E-Drawer.

15 Q I'm sorry. I didn't hear you.

16 A The bins are set up differently, okay. This one is
17 called a drawer because it slides in and out.

18 Q Uh-huh.

19 A And they're in a door. There's several in the
20 drawer, and they're by sequence of a bar code.

21 Q I got you. You all do it all by bar codes?

22 A Yes, sir.

23 Q Okay. Did you bring it up to court today?

24 A No, sir.

25 Q Do you know who did?

1 A I have no idea.

2 MR. WHITLARK: All right. Thank you. That's all I
3 have.

4 THE COURT: Anything?

5 REDIRECT EXAMINATION:

6 BY MR. LUPTON

7 Q Any question that that's the evidence that you
8 received back from Andy Farmer?

9 A No, sir.

10 Q Has it been tampered with or changed since you
11 received it back?

12 A No, sir.

13 MR. LUPTON: Nothing further, Your Honor.

14 THE WITNESS: There's no other seal broken.

15 THE COURT: All right. Thank you. You may step
16 down.

17 THE BAILIFF: Watch your step.

18 MR. LUPTON: Your Honor, may this witness be excused?

19 THE COURT: He may. You're free to leave. Thank
20 you, sir.

21 THE WITNESS: Thank you, sir.

22 MR. LUPTON: Your Honor, the State calls Andy Farmer.

23 ANDREW FARMER, after being duly sworn,
24 testified as follows:

25

1 THE CLERK: Have a seat in the witness box. State
2 your name for the record, please.

3 THE WITNESS: James Andrew Farmer.

4 DIRECT EXAMINATION:

5 BY MR. LUPTON

6 Q Where are you employed?

7 A I'm currently employed with the Richland County
8 Sheriff's Department.

9 Q And what capacity are you employed there?

10 A I am a forensic chemist.

11 Q Could you tell the jury what that means, please?

12 A As a forensic chemist, I receive evidence from the
13 evidence section. Any type of suspected illegal drug is
14 submitted to the department. We actually do the analysis
15 on it to determine whether there is an illegal substance
16 present. We will issue reports based on that and return
17 the evidence.

18 Q And what kind of training and experience have you had
19 in order to be qualified for this job?

20 A I have a bachelor of science degree in chemistry
21 which I received from Landrum University in May of 1993.
22 I have training in forensic chemistry from the South
23 Carolina Law Enforcement Division Forensics Laboratory,
24 Department of Drug Analysis.

25 I have training in forensic chemistry from the

1 Department of Justice, Drug Enforcement Division Special
2 Research and Testing Laboratory, and I have training from
3 the South Carolina Criminal Justice Academy.

4 Q And how about experience?

5 A Total years experience, I have nine-and-a-half years
6 experience as a forensic chemist, and I've been recognized
7 as an expert in court in South Carolina 24 times and twice
8 federally.

9 MR. LUPTON: Your Honor, at this time I would ask
10 that this witness be qualified as an expert in forensic
11 chemistry and toxicology.

12 MR. WHITLARK: No objection.

13 THE COURT: All right. Ladies and gentlemen, I think
14 I told you in my comments earlier one of the types of
15 witnesses we have is an expert in scientific, technical or
16 specialized knowledge will assist you, the trier of facts,
17 in understanding any evidence or determining any fact that
18 is at issue.

19 A witness may be qualified as an expert by virtue of
20 his or her knowledge, skill, experience, training or
21 education and may testify as an expert in his or her areas
22 of expertise and give an opinion in that area of
23 expertise.

24 I find this witness to be qualified as an expert in
25 the field of forensic chemistry and toxicology. You are

1 to give his testimony such weight and credibility as you
2 deem appropriate, as you will with all witnesses who
3 testify in this trial.

4 Mr. Lupton.

5 BY MR. LUPTON

6 Q Thank you, Your Honor.

7 Now, specifically with regards to this case, did you
8 receive evidence in this case?

9 A I did.

10 Q And you have before you State's Exhibit Number 2.
11 Can you look at that, please?

12 (Complies).

13 Is that the evidence you received in this case?

14 A It is.

15 Q In what way can you tell that that's the evidence you
16 received?

17 A The variety of indicators on this package let me know
18 that I was the one who received the evidence. The initial
19 Best Bag, which is the blue bag that's inside, I actually
20 initial the bar code as well as underline the bar code
21 having verified the case number and the bar code match.
22 Also, the packaging that was inside the evidence, I have
23 the case number where I have written on there as well as
24 my initials.

25 The bag that contains the items of evidence now has a

1 label that I placed on here, as well as my initials, the
2 date and seal inside the bag where I -- after I finish the
3 analysis, I signed inside the bag.

4 Q Is there any question that those are the drugs that
5 you receive and tested in this case?

6 A There's no question.

7 Q Now, when you received these drugs, did you do any
8 kind of inspection or do anything related to the packaging
9 of the drugs themselves prior to accepting?

10 A When I'm at the evidence section in the evidence
11 department and I'm actually receiving the evidence, as I'm
12 receiving the items, I will verify that the items have not
13 been tampered with, the package is intact and that the
14 item of evidence is correctly associated with the case
15 number. If there is any indication or any problem with
16 it, I will not receive the evidence.

17 Q And you did that in this case?

18 A I did.

19 Q And once you received it and you take control of it,
20 do you test it immediately?

21 A Typically not. Once I receive the evidence, I take
22 it up to our drug analysis department which is a secured
23 area inside the sheriff's department. Only drug chemists
24 have access to that area, and we have individual bins,
25 drawers that are lockable that we maintain our evidence

1 in.

2 I will take the evidence upstairs, and I will
3 actually log it into my spread sheet and will keep it
4 there until I'm ready to actually do the analysis on it.

5 Q So the area in which the drug lab was located, you
6 say that's a secure area?

7 A Yes, it is.

8 Q And even within that area, the box that -- the drawer
9 that you're talking about, is that also secure?

10 A Yes, it is.

11 Q And how many people have access to that drawer?

12 A I would be the only one to have access to that
13 drawer.

14 Q All right. And did you keep it in that drawer when
15 you were not testing it?

16 A I did.

17 Q And did you or anyone else alter it or tamper with
18 it, change it or do anything with it in any way other than
19 the tests you performed to determine what the substance
20 was?

21 A There was no other tampering with it whatsoever.

22 Q How many items of evidence do you open at one time
23 for testing?

24 A As I'm processing the evidence, I will only open one
25 item of evidence at a time. That prevents any items from

1 being mixed up or confused. I am not -- I will not open
2 anything -- have anything else opened until I'm prepared
3 with this next item to actually do my testing on it.

4 Q So only one item unseal at a time?

5 A That's correct.

6 Q And in this specific case when you did the testing,
7 could you explain that the jury what it is you did with
8 this -- as far as testing on this item?

9 A In this case I did both a chemical and instrumental
10 test on it. The chemical test requires just a very small
11 portion of sample, typically only about the size of a
12 couple grains of salt.

13 It's a chemical test. It's presumptive. It gives me
14 an idea of what the substance is. Based on that
15 presumptive test, I then take another small portion of
16 sample to extract and run on one of our instruments.

17 The instrument is referred to as a G.T.M.S. for
18 short. It's gas chromatograph mass spectrometry. That is
19 a confirmatory test. It will give me a definitive answer
20 as far as what the sample is. I only need about a couple
21 of grains of salt, again, to actually process that. Based
22 on the instrumentation and the chemical test, I'm able to
23 determine what the substance is.

24 Q And is that -- what level of certainty on that second
25 test?

1 A There is no`doubt.

2 Q And in this case, the presumptive test you talked
3 about, the chemical test, what did it indicate?

4 A The presumptive test was indicative of cocaine.

5 Q And what about the other test?

6 A The confirmatory test or the instrumental test
7 provided me the information that it was cocaine.

8 Q Any question about whether or not it's cocaine?

9 A No question in my mind whatsoever.

10 Q And with regards to the drugs, do you do any other
11 tests on it after that?

12 A Once I've actually taken the samples that I need to
13 actually do my testing, I will then weigh the sample
14 without any packaging. It's just the substance itself and
15 will obtain a weight from that.

16 Once I have obtained the weight, I will reseal the
17 sample, package it so it will not be tampered with or
18 anything and then store it until I'm prepared to turn it
19 back to evidence.

20 Q And in this case, what was the weight of the cocaine?

21 A The results from the analysis was -- it was a Ziploc
22 with a corner bag containing powder substance. The
23 results were cocaine 6.64 grams, which is 102.45 grains.
24 That's a schedule 2 or C-2 drug.

25 Q All right. So the 6.64 grams is after you have taken

1 the samples out for the testing?

2 A That's correct.

3 Q Now, did you prepare a report?

4 A Yes, I did.

5 Q And do you have that with you?

6 A This is the official report.

7 Q And Your Honor, this has been marked for
8 identification at this point as State's Exhibit 4.

9 Is that the report that you prepared, the original
10 report that you prepared and signed in this case?

11 A Yes, it is.

12 MR. LUPTON: Your Honor, at this point I would move
13 for State's Exhibit 3 and State's Exhibit 4 to be admitted
14 into evidence.

15 MR. WHITLARK: No objection.

16 THE COURT: So admitted.

17 THE COURT REPORTER: I'm sorry, number 3 was the C.D.

18 MR. LUPTON: Okay. Number two, I'm sorry. I
19 apologize, number 2, the cocaine and number 4, the drug
20 report.

21 THE COURT: All right. So admitted without
22 objection.

23 (WHEREUPON, State's Exhibits Nos. 2 was admitted
24 into evidence.)

25

1 (WHEREUPON, State's Exhibit No. 4 was marked for
2 identification and received into evidence.)

3 BY MR. LUPTON

4 Q And once you -- once you finished the testing, you
5 said you resealed it. Where did you return it to?

6 A Once I've actually finished my analysis and the
7 testing, the item will actually stay in the drug analysis
8 section until I've actually completely finished the
9 analysis on it which includes verifying the
10 instrumentation, the instrumental data, as well as
11 generating the report.

12 After the report has been generated, I pass it to
13 another competent chemist who then reviews my data, as
14 well as my report to verify that everything is correct.

15 They will sign off that they have reviewed it. I
16 will sign the report and issue the report. At that point,
17 I can take the evidence back to Evidence and Property
18 section.

19 Q All right. And in this case, do you recall who you
20 turned it back over to?

21 A That would be Curtis Burnett.

22 Q And that was when it was sealed as it is today?

23 A That's correct.

24 Q And you have examined this today, have you not?

25 A Yes, sir.

1 Q Is it changed or altered in any way from the time
2 that you resealed it?

3 A No, sir. That's not been changed.

4 MR. LUPTON: Nothing further, Your Honor.

5 THE COURT: All right. Mr. Whitlark?

6 MR. WHITLARK: Yeah, just briefly, Your Honor.

7 CROSS-EXAMINATION:

8 BY MR. WHITLARK

9 Q Is it Officer Farmer?

10 A Officer Farmer is fine, yes, sir.

11 Q Okay. How are you doing?

12 Officer farmer, do you do any work with
13 fingerprinting or anything like that, ever do that?

14 A No, sir.

15 Q Do -- where do they do that?

16 A The fingerprinting section is next to the drug
17 analysis section. It is the crime scene section. They're
18 the ones that actually do all the fingerprint analysis.

19 Q Have you ever seen fingerprints taken off of bags,
20 drug bags and things like that? Do -- are you aware of
21 that? Do they do that?

22 A It's actually outside my purview, but it can be done
23 sometimes.

24 Q Okay. Did anybody ask you to do that in this case?

25 A It would not have come to me for that.

1 Q Okay. Did you touch that with your hand, or did you
2 have gloves on when you were doing this?

3 A Whatever I deal with any type of evidence that is
4 suspected drug, I always wear gloves because until I've
5 done the complete analysis, there's no telling what I may
6 be handling. I always wear gloves when I'm dealing with
7 these cases.

8 Q Based on what you testified to today, if -- you did
9 not touch it with your hand, right?

10 A Correct. I didn't touch it with my hands.

11 Q You didn't see anybody touch it with their hands?
12 You were the only one that had it?

13 A That's correct.

14 Q And then you sealed it up. How many days did you
15 have it, do you know?

16 A I received it July 9th, '07, and I believe I would
17 have returned it, based on the report, July 12th, I'm
18 guessing.

19 Q Okay. Did you make a close examination of the
20 container it was in or the baggie it was in?

21 A Well, I would have verified the bag. I also had my
22 initials and things --

23 Q Okay.

24 A -- along those lines, on the bag itself where I
25 received it.

1 Q Okay. So anybody who touches that -- I'm just going
2 to ask a question in your opinion. Anybody who touches
3 that without gloves on there, their fingerprints would
4 still be on it there, wouldn't it?

5 A I'm not sure because I'm not a fingerprint expert.

6 MR. WHITLARK: Okay. Thank you very much. That's
7 all I have.

8 THE COURT: Anything, Mr. Lupton?

9 MR. LUPTON: Your Honor, the State rests.

10 THE COURT: Let's let the witness step down.
11 You're free to leave.

12 THE WITNESS: Thank you, sir.

13 THE COURT: All right. Ladies and gentlemen, the
14 State has rested which means they have now presented their
15 case in chief.

16 I need to take up some matters with the attorneys.
17 I'm going to ask that you all step back to the jury room
18 for a few minutes. Please don't discuss the case while
19 you're there.

20 Let me ask you a question. Ms. Staley, would you
21 mind serving as forelady of this jury?

22 THE FOREMAN: I will.

23 THE COURT: All right. I appreciate that.

24 All right. You all step back to the jury room.
25 Please don't discuss the case.

1 (WHEREUPON, the jury left open court at approximately
2 2:40 p.m.)

3 THE COURT: All right. Anything?

4 MR. WHITLARK: Your Honor, at this time, we'd make a
5 motion to dismiss the case based on insufficiency of
6 evidence.

7 Despite the fact that they had video cameras
8 available to them and despite the fact they had a C.I.
9 there, he has not testified today.

10 They haven't -- they don't have anything on film
11 showing my client doing anything. As a matter of fact, I
12 think the officer testified that he actually did not
13 get -- was not handed the drugs by my client.

14 Based upon the fact that they don't have the C.I.
15 here who set this whole thing up testifying, I move to
16 dismiss it for insufficiency of evidence, Your Honor.

17 THE COURT: I assume that means a directed verdict?

18 MR. WHITLARK: Yes, sir; yes, sir.

19 THE COURT: All right. Mr. Lupton, anything you want
20 to say?

21 MR. LUPTON: Your Honor, obviously in the light most
22 favorable to the State, there is sufficient evidence for
23 it to go forward to the jury.

24 I do also want to make a record that the defense does
25 know who the C.I. is. This isn't a document issue. They

1 are aware, and I have offered to make the C.I. available.

2 If they want to call him, we will get him in.

3 THE COURT: Well, the question is, is there any
4 direct evidence or any substantial circumstantial
5 evidence. There is.

6 Deputy Williams testified that he observed the person
7 putting the drugs in a box and that they put money into
8 the box, and then they observed him picking up, the
9 defendant picking up, the box.

10 So there is some evidence. Now, whether it's
11 credible or not, it's a question for the jury. So I'm
12 going to deny your motion.

13 All right. Let me ask something. Is your client
14 going to testify?

15 MR. WHITLARK: No.

16 Your Honor, no. This is a -- there's been an
17 occurrence now without the -- Mr. Stewart testifying. If
18 the Court can give me just a couple of minutes to talk
19 with my client about the implications of that, about him
20 not testifying. We thought he was going to testify as a
21 witness.

22 THE COURT: Well, do you want Mr. Stewart available?

23 MR. WHITLARK: Well, we don't -- I don't want to put
24 any evidence in if I'm not going to put my client up
25 because I want the final argument.

1 THE COURT: All right. I need to know what you're
2 going to do about your client because I need to --

3 MR. WHITLARK: Yes, sir. I have explained to him
4 that you'll be asking some questions about that.

5 THE COURT: All right. Well, let me -- while we're
6 taking a few minutes when you talk to him, let me tell you
7 a couple of things. One, anybody have any charges they
8 wanted me to look at?

9 MR. LUPTON: Your Honor, I'm familiar with your
10 standard charges. The State is happy with your standard
11 charges.

12 THE COURT: All right. Anything from you?

13 MR. WHITLARK: Your Honor, if I understand -- I know
14 about your charge on the standard of proof beyond a
15 reasonable doubt. I'm just requesting the Court put "to a
16 moral certainty" at the end of that. Beyond a reasonable
17 doubt is --

18 THE COURT: I'm going to charge State v. Manning, and
19 that's what I charge, hesitate to act.

20 All right. So it's either guilty or not guilty.
21 There's no lesser-included. There's -- if your client
22 doesn't testify, I'll give him a charge on failure --
23 election not to testify, Mr. Whitlark.

24 MR. WHITLARK: Yes, sir.

25 THE COURT: I'm just going to charge a very simple

1 distribution. "The defendant is charged with distribution
2 of cocaine. The State must prove beyond a reasonable
3 doubt that the defendant distributed cocaine. To find
4 distribution, delivering and transferring," and that's it.

5 I can't think of anything else. There's not really
6 been a record of witnesses or there's no identification
7 charged. There's no statement charged. There's not -- I
8 can't -- this will be a very simple charge. So talk to
9 your client, and I'll go do a verdict form. All right.

10 MR. WHITLARK: Yes, sir.

11 THE COURT: I'll be back in about five, ten minutes.

12 (WHEREUPON, a short break was taken.)

13 All right. Mr. Livingston, let me get you to stand,
14 if you would, please, sir. Raise your right hand.

15 OCTAVIUS LIVINGSTON, after being duly
16 sworn, testified as follows:

17 THE COURT: All right. Mr. Livingston, you can put
18 your hands down.

19 I spoke with Mr. Whitlark moments ago, and he advised
20 me that you, after due consultation with your attorney,
21 have decided that you didn't -- were electing not to
22 testify at the trial; is that correct?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: All right. Now, you have discussed this
25 with Mr. Whitlark; is that correct?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: And you understand, of course, that you
3 have a right to testify. You have a right to get up and
4 tell your side of the story, if that's what you'd like to
5 do. Do you understand that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Of course, if you do, you're subject to
8 being cross-examined. The State can ask you questions. I
9 don't know if there's anything that they could use to try
10 and impeach your testimony, but if there were, they would
11 be able to do that or attempt to impeach your testimony.
12 Do you understand that?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: That's a substantial right that you have.
15 Do you understand?

16 (There was no response).

17 I need you to answer. The court reporter has to put
18 it down.

19 THE DEFENDANT: Yes, sir.

20 THE COURT: All right. You also have the right not
21 to testify. You know, under the constitution of this
22 state and the United States, you don't have to testify.
23 You don't have to say anything, do anything, to help the
24 State in any way.

25 In fact, if you elect not to testify, I will instruct

1 the jury they can't even consider that fact during the
2 course of their deliberations. Do you understand?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: And I'm sure your attorney has advised
5 you of this. If you don't testify and haven't offered any
6 other evidence, then your attorney will have the
7 opportunity to make the last argument to the jury. Do you
8 understand that?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Although, sometimes the lawyers and
11 defendants think it's in their best interest to go ahead
12 and offer the testimony from the defendant or from other
13 witnesses, as well. Do you understand?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: All right. Now, do you feel like you
16 have been thoroughly advised and counseled by
17 Mr. Whitlark?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Has he answered all your questions?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Has anybody threatened you, coerced you,
22 forced you or pressured you into making this decision?

23 THE DEFENDANT: No, sir.

24 THE COURT: You're doing so freely and voluntarily?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: All right. You're not under the
2 influence of any kind of alcohol or drugs here today, are
3 you?

4 THE DEFENDANT: No, sir.

5 THE COURT: Is there anything further you want to
6 inquire of Mr. Whitlark?

7 THE DEFENDANT: No, sir.

8 THE COURT: At this time, Mr. Whitlark, anything
9 further you want to ask of your client or you think the
10 court should ask of your client regarding this situation?

11 MR. WHITLARK: No, sir. It's been thoroughly covered.

12 THE COURT: All right. Do you think he understands
13 his rights with respect to testifying and not testifying?

14 MR. WHITLARK: Yes, sir. I've explained it to him
15 fully, Your Honor.

16 THE COURT: All right. Do you feel like the two of
17 you have had an adequate amount of time to review that
18 process?

19 MR. WHITLARK: Yes, sir.

20 THE COURT: Okay. All right. My understanding is
21 you have elected not to testify. That would be fine.
22 I'll give a charge to the jury concerning your election
23 not to testify. All right?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: All right. Thank you, sir. I'm going to

1 find that you -- the decision not to testify has been made
2 knowingly and intelligently and freely and voluntarily and
3 make that a part of the record.

4 All right. Are we ready to go? You're going to open
5 and -- I guess you're going to go last. You'll get your
6 one argument.

7 All right. Are you ready to go?

8 (There was no response.)

9 THE COURT: Are you ready to go?

10 MR. LUPTON: The State's ready, Your Honor.

11 THE COURT: Mr. Whitlark, are you ready?

12 MR. WHITLARK: Yes, sir, Your Honor.

13 THE COURT: All right. Mr. Broom, if we could bring
14 the jury in.

15 THE BAILIFF: Yes, sir, Your Honor.

16 (WHEREUPON, the jury came into open court at
17 approximately 3:14 p.m.)

18 THE COURT: The jury is aware the State has rested,
19 and that concludes their presentation of their evidence.

20 Anything from the defense? Mr. Whitlark, anything
21 from the defense?

22 MR. WHITLARK: Nothing from the defense, Your Honor.

23 THE COURT: All right. Ladies and gentlemen, that
24 means we have now concluded the presentation of all the
25 evidence in this case, and the next phase of the trial is,

1 as I told you this morning, an opportunity for these
2 lawyers to speak to you one last time.

3 It is their closing argument. After that, then I
4 will instruct you as to law and you will retire to the
5 jury room to begin your deliberations.

6 So with that said, I'll ask Mr. Lupton, are you ready
7 to proceed?

8 MR. LUPTON: The State is ready, Your Honor.

9 THE COURT: All right. If you would.

10 MR. LUPTON: Thank you, Your Honor. May it please
11 the Court.

12 CLOSING STATEMENT:

13 MR. LUPTON: Ladies and gentlemen, during the course
14 of this trial, I told you I was going to prove the
15 defendant was guilty beyond a reasonable doubt. I believe
16 the evidence has shown that.

17 In this trial, the evidence has shown the defendant
18 is guilty beyond a reasonable doubt. Now, what does
19 reasonable doubt mean? Reasonable doubt is something that
20 the law struggles to define.

21 The Supreme Court of the United States, the Supreme
22 Court of South Carolina has defined it differently over
23 time as the kind of doubt that causes a person to hesitate
24 to act, or the most recent way that the Supreme Court has
25 defined it, is proof that leaves you firmly convinced of

1 the defendant's guilt.

2 There is -- nothing is certain in life. Nothing is
3 proven. You can't prove something to a moral certainty.
4 There's always the potential for doubt, but is it a
5 reasonable doubt?

6 In this case, there is no reasonable doubt. The
7 defendant wants to try and argue rabbit trails, smoke
8 screens, but none of it is reasonable.

9 Evidence in this case shows that on January 23rd,
10 2007 the defendant set up the drug deal through Alvester
11 Stewart, a man he knew.

12 The defendant showed up at Lowe's, the place where he
13 picked to meet. Investigator Williams saw him putting the
14 drugs into a bin with little plastic tubes, one of those
15 little display boxes, and that as Jason Williams,
16 Investigator Williams, came down the aisle to it, the
17 defendant pointed to the box with the cocaine in it.

18 Jason Williams got cocaine out of the box, put the
19 money in and watched the defendant take the money right
20 back out, put it in his pocket. That's distribution.

21 Now, there is no question in this case that it was
22 the defendant. The defendant was on video. The video is
23 aimed up so you get people's faces for that very reason,
24 so that you can be certain that the right person is before
25 you.

1 There is no question. There's been no dispute in
2 this case as to whether or not this was the right person.
3 It was this defendant.

4 Now, because the video is angled up and because drug
5 deals are surreptitious, they're secretive by their very
6 nature, the drugs were not on video.

7 Drug deals take place on the sly, down low, so that's
8 not on video. You have to ask yourself what would you
9 rather see, the drugs and no way to tell who had done it
10 or the person's face and then know who did it?

11 You have to take the officer's word for it one way or
12 the other. Would you rather take the officer's word that
13 he got the right person out of thousands in this city,
14 hundreds of thousands in this city or that the drugs were
15 there? There's no question there were drugs in that box.
16 The officer didn't plant those drugs.

17 There's no question that Alvester Stewart didn't
18 plant those drugs, despite the rabbit trail they tried to
19 put out. That smokescreen. He was searched beforehand.
20 He didn't get near the box before Jason Williams got the
21 drugs out, and Jason Williams saw the defendant put the
22 drugs in and saw the defendant take the money out.

23 They want to talk about the C.I., just another rabbit
24 trail. The C.I. has passed. While we don't know, there's
25 some talk about whether or not he was employed. He was

1 employed for part of the time, how much he made. None of
2 that is important.

3 What's important is you see on the video the
4 defendant. You've heard the testimony of Jason Williams
5 as to what he saw the defendant putting drugs into the box
6 and him getting it out, the defendant getting the money
7 out.

8 Like I said in -- when I was asking the officer, you
9 don't get priests as C.I.'s. You want to catch a drug
10 dealer, you have got to find somebody who knows who the
11 drug dealers are, who the drug dealers trust, because
12 they've sold it to them before. That's who you get to be
13 C.I.'s, people who are from the streets and know the
14 people you're trying to catch.

15 Now, they want to try to make it out that it was
16 actually Alvester Stewart that did this. He's the master
17 mind of this somehow.

18 Well, first of all, you know he couldn't have planted
19 the drugs because as I've already said, he was searched
20 beforehand. He wasn't nearby the box. In fact, the
21 defendant is the one who was seen putting the drugs in.

22 So then they come up with the idea and the story that
23 maybe it was Alvester that set this up and that he
24 provided the drugs to the defendant for the defendant to
25 turn around and sell to the officer.

1 Well, does that make any sense? The drugs were worth
2 \$240. He got paid \$40 for doing this. Would a man plant
3 \$40 -- \$225 worth of drugs to make \$40? No.

4 Would he recruit somebody to come in and sell the
5 stuff for him to a guy standing with him? Think about
6 that from the drug dealer's point of view.

7 Somebody approaches a drug dealer and says, "Hey,
8 I've got \$225 worth of drugs. I'm going to bring you a
9 guy. I'm going to hand you these drugs. You hold onto
10 them for a little while and then sell them to this guy I
11 bring you."

12 Don't you think that would set off huge warning bells
13 in the defendant's mind? He supplies drugs to the
14 defendant and then brings the guy for the defendant to
15 sell those drugs back to. Don't you think the defendant
16 would be saying, "Hey, wait a second. This sounds like a
17 set up"? Of course he would. It would obviously be a
18 setup, and he wouldn't do it.

19 Common sense tells you that's not what happened, but
20 just imagine for a moment that that is what happened; that
21 as the defendant's lawyer asked, "How can you be certain
22 that Alvester Stewart didn't recruit the defendant to help
23 this drug deal," would that matter? Not a bit. He would
24 still be guilty.

25 Even if you accepted that ludicrous story as being

1 true, the defendant would still be guilty because he would
2 have still distributed those drugs. He would have still
3 sold those drugs.

4 Distribution, as I told you, and I had no idea what
5 the defense was going to be ahead of time. So I didn't
6 tell you that for a reason, but it turns out to be
7 appropriate.

8 Distribution doesn't just include selling for profit.
9 Anytime somebody sells -- delivers to somebody else drugs,
10 that's distribution.

11 So even if that wild, crazy story were true, the
12 defendant still, no question about it, distributed those
13 drugs.

14 Now, obviously, I'm not suggesting the story is true.
15 You can judge for yourself how silly it is, but one way or
16 the other, the defendant is guilty.

17 Now, they talk about some other smokescreens,
18 fingerprints. Well, first of all, C.S.I. is a T.V. show.
19 This isn't Hollywood. This is Columbia.

20 If this were C.S.I. Hollywood, we would not only have
21 the video, we would have D.N.A., fingerprints. We would
22 have that sepia or whatever that strange color is where
23 they always show the videos of the reenactment of the
24 crime.

25 You'd have that, but this is real life. Officers saw

1 him put those drugs in there. He knew who it was through
2 investigation. You don't need to take fingerprints to
3 tell somebody -- to tell who somebody is when you already
4 know who they are.

5 The defendant doesn't account for the fact Jason
6 Williams wasn't wearing gloves. Whose fingerprints are
7 going to be on there after he picks it up out of the bin
8 and puts it in his pocket?

9 It's going to be his. It's not like he can wear
10 latex lab gloves when he's doing these deals. That would
11 be awfully suspicious. You're not going to have the
12 ability to get fingerprints. That's just a smokescreen.

13 Now, as I said, as the judge said, the State goes
14 first in this case. The State has the burden of proof, so
15 we go first. The defendant gets to can come up last.

16 As I told you some things in the opening, not knowing
17 that it was going to become relevant, I'm stuck in the
18 course of the trial not knowing what's going to be raised
19 as an issue.

20 One of the things that came up was the procedure.
21 Now, I'm sure I bored you from spending half an hour plus
22 talking about the procedures for handling evidence.

23 There's no problem with the evidence in this case.
24 You have heard about the procedures and how they were
25 followed, but I don't get to tell what's going to be

1 argued after, so I have to cover all of that and prove to
2 you that these drugs were handled correctly, and they
3 were.

4 You heard from everybody who touched those drugs from
5 the time they left the defendant's hand to the time that
6 they appeared before you, still sealed up.

7 These are the drugs that the defendant placed in that
8 bin, in that display box, in Lowe's just after 7:30,
9 January 23rd, 2007. This is the cocaine he put in that
10 bin. This is the cocaine Jason Williams got out of the
11 bin, being replaced with \$225. These are the drugs that
12 the defendant sold to the undercover officer.

13 Ladies and gentlemen, there is no question in this
14 case. There is no reasonable doubt no matter how many
15 smokescreens you put up, that the defendant delivered
16 these drugs to Jason Williams, and under the laws of the
17 State of South Carolina, that makes the defendant guilty
18 of distribution.

19 After you heard all of the evidence, all the
20 arguments, the charge on the law, I would ask you to go
21 back in the jury room and render a just verdict in this
22 case. In this case, a just verdict is guilty.

23 I'm not asking you to judge the defendant, but you
24 are the judge of the facts. The facts are in this case
25 the defendant is guilty of distribution of cocaine.

1 Thank you.

2 THE COURT: All right. Mr. Whitlark?

3 MR. WHITLARK: May it please the Court, Your Honor.

4 THE COURT: Yes, sir.

5 CLOSING STATEMENT:

6 MR. WHITLARK: Good afternoon.

7 I can't begin to tell you the responsibility you have
8 not only to Octavius Livingston but to our system of
9 justice.

10 I thank you for your service today, and I always
11 thank juries because you are the first thing done away
12 with in a dictatorship or a communist nation. It's the
13 first thing they do, juries, gone, jury of your peers.

14 This is the greatest service you can give to your
15 nation and your community, ladies and gentlemen, except
16 for fighting the front line of a war.

17 I thank you for your service, and I tell you that
18 it's an extremely heavy responsibility to decide the fate
19 in the life of a person.

20 Now, I talked to you earlier today about the rights
21 of American citizens. We have -- there's three main
22 rights in a criminal case for you to be concerned with.

23 The judge is going to give you a detailed charge on
24 that, but the first one is you are presumed innocent
25 until -- unless and until proven guilty by proof beyond a

1 reasonable doubt.

2 Now, these are not just words that you say well
3 beyond a doubt, but a reason -- beyond a reasonable doubt
4 to a moral certainty is an extremely high standard, and
5 the reason it's so high is because in our country, we
6 believe -- and from our history, we believe that it is
7 better, and you have heard this probably, to let 100
8 guilty men go free than to convict one innocent one.
9 That's why this burden is so high. That's why we're one
10 of the few countries that has a presumption of innocence
11 and the cloak of righteousness around our citizens.

12 Now, the State says that they have proven beyond a
13 reasonable doubt in this case that he's guilty of a drug
14 dealing.

15 Now, the evidence of that video, I don't know if you
16 got a chance to take a good look at it, but you can take a
17 good look at it back in the jury room because in your
18 service as jurors, I want you to think about something.
19 They were with him for four minutes. He was with him for
20 four minutes.

21 Now, we've been in here for just a few hours, and his
22 life is on the line on this. I'm asking you, you take a
23 look at that video. That video doesn't show anything.

24 They claim that he went down an aisle, that's Officer
25 Williams, he went down the aisle, and he put it in the box

1 and then I came down the aisle behind him. He couldn't
2 see him do that, ladies and gentlemen.

3 Officer Williams is a good officer and a good man,
4 but when you look at the videotape that they looked at
5 when they got back there, it didn't exactly work out the
6 way they had it planned. So they didn't have him on
7 videotape doing anything. They don't have Alvester
8 Stewart in here saying he did it.

9 I mean, the State could have brought a lot more
10 evidence in here and they didn't. They all admitted that
11 Lowe's has videotapes. Why not get that and have it
12 covered? They didn't do it, and they made fun of the idea
13 of checking for fingerprints on this, but they didn't even
14 know him well enough to not go in front and pick him out
15 of a lineup. They don't even know who he is. Jason
16 Williams didn't know Alvester -- I mean, Octavius
17 Livingston. He doesn't know him.

18 This guy made money doing this, and he didn't testify
19 today. He has used this system to rat out all of these
20 people. You heard the police, probably more than 60 or 70
21 people, and he gets paid for it. One of them says it has
22 to be more than a drug buy. The other one says it's \$40.
23 Whatever it is, he's being paid to do it.

24 Does he have a motive and an opportunity to do this?
25 Yes, he does. This man wants money. He said he was never

1 in front of him. Look at the video. He is in front of
2 him several times, and he's right up there with him.

3 If he's doing this, ladies and gentlemen, I don't
4 know whether or not Officer Williams looks into his
5 background, whether or not Officer -- or Investigator Lutz
6 looks into these men's backgrounds but obviously, they've
7 already said he's not an angel.

8 Well, he's using them. He's using them, and he's
9 using his friends because they said why would he go up
10 there? Why wouldn't he just go up there by himself? He
11 doesn't have a third party. They know it's you.

12 It would be a neat trick to sell the drugs to the
13 police and get the money. You noticed they say they had
14 marked money in this case. What's the purpose of marked
15 money? Well, you heard it. So you can see if something
16 goes wrong you can arrest them, they have the money. They
17 didn't arrest him, though, for 14 months.

18 There's something wrong with this case, ladies and
19 gentlemen. They have innuendo, and they have allegations,
20 and they want this to be a good case but it didn't work
21 out that way.

22 To convict this man on this lack of evidence would be
23 against our oath as jurors and as citizens and of what we
24 believe in, in this country because you can't get somebody
25 in the penitentiary.

1 You don't -- you don't look at somebody's face and
2 say they're guilty or not guilty. Look at this evidence
3 when you go back there. I call it, quote, evidence
4 because there isn't any.

5 They spent most of the trial trying to prove that
6 some drugs were drugs. They tested it with all these
7 people. Why didn't they go take a fingerprint? One
8 fingerprint would have solved this, and we wouldn't even
9 be here, one fingerprint.

10 They spent all of that money in their labs with all
11 of these people and everything else. It would have taken
12 ten minutes to do that, and they did not. Neither did
13 they arrest him right away.

14 They could have gotten marked money, fingerprints,
15 Lowe's. The guy said he walked around the corner and then
16 re-walked -- he walked around an aisle then re-walked
17 around, but he says he put it in there when he walked down
18 that aisle.

19 He could have seen him. You all have been in Lowe's.
20 I'll just ask you to think about what it's like. This guy
21 is way up in front of him, and he's pointing at something.

22 Whether or not he is helping out Alvester Stewart,
23 there's no evidence of that except for Stewart set the
24 whole thing up, directed it, and they stated in closing,
25 counsel stated, that my guy set this up, but that's not

1 what the police said. The police said Alvester Stewart,
2 the snitch, set this up, not my client, not Octavius
3 Livingston.

4 If -- if we are to hold true to our oaths as jurors
5 in this case, the fact that you might think he was
6 involved, he might have been doing something, he knows
7 he's got -- it's not good enough.

8 They don't have proof in this case beyond a
9 reasonable doubt that this man did this crime they're
10 saying, and that's a fact and that's the standard. You
11 set the rules right here in this jury box.

12 Every single time a jury meets in this country, you
13 are reaffirming what we believe in as people. This is it.
14 This is the highest expression of who we are as people, as
15 citizens in this world. It's the proudest I could be of
16 our nation. That's why I do this for a living. I'm proud
17 of this system. Why? Because this system is fair.

18 It's not a contest between me and the prosecutor.
19 It's somebody's life here. This -- we are searching for
20 truth, and the truth cannot be found in this case,
21 although it was available.

22 If -- if we begin to convict people because a
23 statement was made during closing, I'm going to read it to
24 you, whatever it was, it doesn't matter, "He's guilty, one
25 way or another, the defendant is guilty."

1 Now, Mr. Lupton is a good prosecutor, but that's not
2 exactly what this is all about. There's a saying in the
3 courthouse of the United States that says, "Whenever
4 justice is done, the State wins."

5 Mr. Lupton has been doing this a long time. He's a
6 good lawyer, like I said, but one way or the other, the
7 defendant is guilty. Then he explained to you about the
8 other things that he tried to debunk, but he could not.
9 The witness who could do it, they didn't bring him here.
10 He didn't appear.

11 It would be a cruel injustice, ladies and gentlemen.
12 Beside the fact that they haven't proven this would be a
13 cruel injustice for Alvester Stewart to be operating out
14 of here the way he does, and this man be convicted of
15 this.

16 We are a country that believes in fairness, and every
17 time you meet as a jury, you give a verdict, you are
18 setting the standard.

19 (There was a noise disruption).

20 What do we believe in, what do we believe in here?
21 The fact that he knew him, the fact that they got his head
22 on a video, in American law, that's not sufficient.

23 (There was a noise disruption).

24 Under your oath and under your duty as jurors, you
25 have -- you cannot find this man guilty beyond a

1 reasonable doubt.

2 (There was a noise disruption).

3 THE COURT: Is Christine there?

4 (There was no response).

5 Do you know what we can do with this mic, crazy
6 thing?

7 THE COURT REPORTER: I suspect it's these two are too
8 close together, but that's my guess. I don't know.

9 Can you put one maybe down on the table?

10 (The bailiff complied).

11 THE COURT: That's good. Thank you.

12 MR. WHITLARK: Ladies and gentlemen, the judge is
13 going to charge you about reasonable doubt. It is the
14 standard applied here.

15 The only way, I've been doing this for 26 years that,
16 I can describe to you. I'll give you a couple of examples
17 that may help you.

18 Number one is, let's say you're buying a house. You
19 want to buy a brand new house. When you go, and you're
20 looking at it. While you're inspecting it, you notice
21 that the foundation has some cracks in it or some defects.
22 Now, you see some evidence of that.

23 Now, that's a reasonable doubt as to whether or not,
24 you know, are you going to buy that house with that in it?
25 Probably not.

1 Maybe some doubt about, you know, the condition of
2 it, but there's another one. It is this: Let's say you
3 have a bottle of aspirin, 100 aspirin. You take one of
4 them out and you put a sign out there that looks just like
5 those aspirin. You put it in there. That's 99 percent
6 good ones, one poison, cyanide.

7 Now, if you know this, there's no way you're going to
8 take two aspirin out of there, there's no way, even though
9 the chance is only one percent. That's a reasonable
10 doubt, ladies and gentlemen. That's what this case is
11 about here.

12 They want you to leap forward and say, "Well, it all
13 appears this way. It all appears like he did it," but if
14 you look at what the testimony of Jason Williams is, and
15 this is the only thing they have: "I saw him put it in a
16 bin. I saw him do this," ladies and gentlemen, he wasn't
17 down that aisle when he says he did it.

18 Why would he point to something they saw him doing?
19 You see, these are all doubts. Also, the fact of does it
20 create in your mind reasonable doubt, you know, where is
21 Mr. Stewart to say that my guy did it? He's not here.

22 He didn't appear, but he's out there operating in the
23 world, out there operating in the world. He's a fellow
24 they don't take a very good close look at.

25 They say that they frisk him from head to toe before

1 he goes in there, and then they don't check him when he
2 comes out. There's marked money on him. That would have
3 solved this very quickly if they had done that, but he
4 doesn't even go back with them.

5 They have been working with him for a number of
6 years. They don't know what his habits are. They don't
7 know what he does. They get to pay attention to what he
8 does. He has put 60 or 70 or 80 people, according to
9 them, in the penitentiary on stuff just like this.

10 This man was down at that store for four minutes.
11 Have they proven, "Oh, he transferred this and that" based
12 on eye witness testimony of a guy who admits that he
13 wasn't down the aisle with him when he did this. He's
14 presuming this, ladies and gentlemen.

15 Like I said, Officer Williams is a good officer, but
16 when they don't have the evidence, the video is completely
17 useless in this case. I'll just say it. That's evidence.

18 You all look at it back there and you tell me that
19 that -- that they -- it shows anything other than Alvester
20 Stewart, the snitch, is in front of him. He is down that
21 aisle. He is hanging around there. He does not leave
22 with the police.

23 Now, this case has way too many reasonable doubts to
24 convict this man of a serious crime here. At this point,
25 at this point, if you look at what the real evidence is in

1 this case, they don't have enough to quick him beyond a
2 reasonable doubt.

3 You, as your oath as jurors, if you have any doubt, a
4 reasonable doubt like that, you have to acquit him under
5 your oath. The judge will tell you about that.

6 You -- if anything -- if there's two ways to look at
7 something in this case, you have to look at it in favor of
8 Octavius Livingston. That's our law. You have to look
9 for it as if he was innocent. That's what the law
10 provides for in this country.

11 Like I said, these men where a rough job here, and
12 they're good men. They're good policemen. They made a
13 mistake here. They didn't sew this case up. They didn't
14 wrap this case up. They didn't arrest him at the scene.
15 The case is faulty and it's defective. On that grounds,
16 you should acquit him. He's not proven. This case is not
17 proven.

18 Verdict is a -- it's from a Latin word veredicto. It
19 means "I speak the truth." When you leave here today, ten
20 years from now, five years from now when you're doing your
21 hair shaving or something, look at yourself, be able to
22 look yourself in the eye and go, "I did justice according
23 to our laws, according to what we believe in," because to
24 convict this man of that would be contrary to our laws and
25 what we believe.

1 Like I said, they talked about smoke and mirrors.
2 That's what their case is. They're just up here saying
3 that with an innuendo, and Jason Williams is a good man,
4 and he wants to do his job right, but he sees things that
5 I don't think he sees.

6 It's inconsistent for him to say that he saw this guy
7 doing this and that. I mean, it doesn't make sense,
8 ladies and gentlemen. It doesn't make sense.

9 The one thing you have to remember is Alvester
10 Stewart was down that aisle, was down that lane. We know
11 what he does for a living. They tried to say he was
12 working, but the only work he was doing is turning in all
13 of his friends and his neighbors, every one of them.

14 You're getting ready to go back there to decide this
15 case, ladies and gentlemen. This is the life of a human
16 being, and I know that this has been grueling for you.

17 It's been somewhat painful, but it's been a quick
18 trial, but as I told you, every trial is important because
19 we reaffirm as Americans what we believe in and who we
20 are.

21 The judge is going to tell you, again, if you have a
22 doubt, even if you're thinking, "Oh, he's guilty or not,"
23 but if you have a doubt under your oath, you should and
24 you must acquit him and you should acquit him in this
25 case.

1 It wasn't done right. I'm not saying anything bad
2 about these men. They do good. They didn't do good in
3 this case.. They made mistakes.

4 Now, as far as smoke and mirrors, I'll say this:
5 They say we were doing it but a long time ago, ladies and
6 gentlemen, there was an Indian nation about 1,000 years
7 ago, and I've leave you with this. That nation was ruled
8 by a wise old chief.

9 He ruled the counsel, and there was a young brave who
10 was desirous of taking over. The way he would do that is
11 if he fooled, fooled the chief at a counsel meeting, their
12 law was, he took his place.

13 So he was desirous of getting this power. He didn't
14 really like the wise old chief, so he came up with a plan,
15 and his plan was this: He said, I've got a -- I can trick
16 him, pull him from the counsel.

17 He said, I'll catch a bird, and I'll put it in my
18 hands. Then at the next counsel meeting I'll go up and
19 ask the old man, I'll say old man, what do I have in my
20 hands? If he tells me it's a bird, then I'll say, Well,
21 is it alive or is it dead?

22 If he says it's alive -- I mean, If he says it's
23 dead, I'll open my hands and let it fly away. If he says
24 it's alive, I'll crush it and throw it on the ground.
25 That's foolproof. That's what he thought.

1 The next counsel meeting, the young brave walked up
2 with his hands, and he asked the chief in front of all the
3 other counsel leaders and chief saying, Old man, tell me,
4 what do I have in my hand?

5 The chief looked at him and said, My son, you have a
6 bird in your hands.

7 He said yes, but is it alive or is it dead? The
8 chief knew what he was up to, the wise old chief. He was
9 a righteous and good man.

10 He had a tear coming down his eye because he knew
11 what the young brave was about, and he said to him, as he
12 looked up, he said, My son, the answer is your hands.

13 Ladies and gentlemen, the life and future of Octavius
14 Livingston are in your hands. They haven't proven it.
15 Find him not guilty.

16 Thank you.

17 Thank you, Your Honor.

18 THE COURT: All right. Thank you.

19 JURY CHARGE:

20 THE COURT: Madam forelady and members of the jury,
21 the indictment charges the defendant with distribution of
22 cocaine.

23 The fact that the defendant was arrested, charged and
24 indicted in this case is not evidence and should not be
25 considered by you as evidence of guilt, nor does it create

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1 any presumption or inference of guilt.

2 The indictment is simply the formal written
3 instrument which contains the charge made against the
4 defendant. It is the formal document by which this case
5 is brought into this court.

6 Now, to the indictment, the defendant has entered a
7 plea of not guilty which places upon the state the burden
8 of proving the defendant guilty.

9 A person charged with committing a criminal offense
10 in South Carolina is never required to prove himself
11 innocent.

12 I charge you that it is a vital important rule of the
13 law of evidence that the defendant in a criminal trial, no
14 matter how great or serious may be the offense for which
15 he is charged must always be presumed innocent until his
16 guilt has been proven beyond a reasonable doubt.

17 This presumption of innocence remains with the
18 defendant at all times from the moment of his appearance
19 in this court throughout the trial and until the jury has
20 upon the testimony and the evidence presented reached a
21 verdict of guilty beyond a reasonable doubt.

22 For it is the solemn duty of this jury, if not
23 clearly convinced of the defendant's guilt beyond a
24 reasonable doubt, to acquit the defendant.

25 So the burden of proof is upon the state to establish

1 by evidence to your satisfaction the guilt beyond a
2 reasonable doubt of this defendant here on trial for the
3 crime of distribution of cocaine.

4 Now, what is a reasonable doubt? A reasonable doubt
5 is the kind of doubt that would cause a reasonable person
6 to hesitate to act.

7 If you have such a doubt as to the guilt of the
8 defendant, then he would be entitled to a verdict of not
9 guilty. Reasonable doubt may arise from evidence which is
10 in the case or from the absence or lack of evidence in the
11 case.

12 You alone must make the determination of whether or
13 not reasonable doubt exists as to the guilt of the
14 defendant.

15 Now, there are two types of evidence which are
16 generally presented during a trial: Direct evidence, and
17 circumstantial evidence.

18 Direct evidence is the testimony of a person who
19 claims to have actual knowledge of a fact, such as an
20 eyewitness. It is evidence which immediately establishes
21 the main fact to be proved.

22 Circumstantial evidence is proof of a chain of facts
23 and circumstances indicating the existence of a fact. It
24 is evidence which immediately establishes collateral facts
25 from which the main fact may be inferred.

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1 Circumstantial evidence is based on inference and not
2 on personal knowledge or observation. The laws makes
3 absolutely no distinction between the weight or value to
4 be given either direct or circumstantial evidence. Nor is
5 a greater degree of certainty required of circumstantial
6 evidence than of direct evidence.

7 You should weigh all of the evidence in this case.
8 After weighing all of the evidence, if you are not
9 convinced of the guilt of the defendant beyond a
10 reasonable doubt, you must find the defendant not guilty.

11 Now, Madam Forelady, members of the jury, under the
12 constitution and laws of South Carolina, you are the
13 finders of facts in this case.

14 I do not have the right to pass upon the facts or
15 even to express any opinion I may have as to those facts.
16 Nor may I intimate in any way what I may think about the
17 guilt or the innocence of the defendant.

18 You are also the sole judges of the credibility, and
19 by that I mean the believability of the witnesses who have
20 testified in this case.

21 In passing upon their credibility, you may take into
22 consideration many things such as the demeanor or the
23 manner of testifying of the witness.

24 You can consider whether the witness had reason to be
25 bias or prejudice or whether a witness's testimony was

1 contradicted on the one hand or supported and corroborated
2 on the other hand.

3 You certainly do not determine credibility by
4 counting the number of witnesses for either side. You may
5 believe a small portion of a witness's testimony and
6 disregard the larger or vice versa.

7 You have also heard the testimony of a witness who
8 has special knowledge, skill, experience, training or
9 education in a particular profession or occupation who has
10 given his opinion as an expert as to matters in which he
11 is skilled.

12 In determining the weight to be given such an
13 opinion, you should consider the qualifications and the
14 credibility of the expert and the reasons given for the
15 opinion. You are not bound by such opinion. Give it the
16 weight, if any, to which you deem it is entitled.

17 All these things you will consider bearing in mind
18 that you should give the defendant the benefit of a
19 reasonable doubt.

20 Now, ladies and gentlemen, I instruct you and
21 emphasize that the fact that the defendant elected not to
22 testify is not a factor to be considered by you in any way
23 in your deliberations and in your consideration on the
24 question of guilt or innocence.

25 It must not be considered by you in any manner

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1 whatsoever. A defendant has the constitutional right to
2 remain silent, and the assertion of this right must not be
3 considered by you in your deliberation.

4 I repeat: Under your oath, you are to draw no
5 conclusion whatsoever from the fact that the defendant in
6 this case did not testify.

7 The fact that the defendant did not testify should
8 not even be discussed by you in the jury room.

9 The burden of proof, as I have stated to you, is on
10 the state. The defendant is not required to prove his
11 innocence. The burden of proof remains on the state to
12 prove guilt beyond a reasonable doubt.

13 Now, the same constitution and laws which make you
14 the finders of the facts and the evidence as I discussed
15 with you make me the sole and only instructor of the law.

16 You must accept as correct the law which I charge and
17 apply it to the evidence as you find it and reach your
18 verdict.

19 I charge you in this regard that you should not be
20 concerned about what you think the law ought to be or what
21 you wish the law were, but rather what I charge you the
22 law to be.

23 Now, the defendant is charged with distribution of
24 cocaine. The state must prove beyond a reasonable doubt
25 that the defendant distributed cocaine.

1 Distribute means to deliver or to actually
2 constructively or attempt to transfer a drug other than by
3 administering or dispensing. Deliver means to actually
4 constructively or attempt to transfer a drug.

5 A transfer can involve an exchange for money, a
6 barter or a gift. It does not have to be given anything
7 in exchange for the drugs for a transfer to constitute
8 distribution.

9 Now, you have been selected as fair and impartial
10 jurors sworn to impartially try and determine the facts of
11 this case, and when you comply with your oath to do so,
12 then no one will have a right to criticize your verdict,
13 and you will have fully discharged your duty as jurors.

14 You are to decide this case according to the
15 testimony that you have heard from the lips of the sworn
16 witnesses along with other evidence introduced.

17 I charge you that as jurors you must decide the
18 issues in this proceeding without bias and without
19 prejudice to any party.

20 You cannot allow yourself to be governed by sympathy,
21 by prejudice, by passion, by public opinion or by any
22 other arbitrary factor.

23 Both the state and the defendant have the right to
24 expect that each of you will carefully and impartially
25 consider all of the evidence in this case and that you

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1 will follow the law as I have explained it to you.

2 Madam Forelady and ladies and gentlemen of the jury,
3 I have prepared a verdict form here. There are two
4 possible verdicts that you can find in this case.

5 There is no significance whatsoever by what order
6 goes on this verdict form. It is simply that one must go
7 first, and one must go second. The two possible verdicts
8 that you can find are: The first possibility is "We, the
9 jury, unanimously find the defendant guilty" and the
10 second one is "We, the jury, unanimously find the
11 defendant not guilty."

12 Now, as this verdict form says, Madam Forelady and
13 ladies and gentlemen of the jury, your verdict must be the
14 unanimous verdict of all 12 jurors. I cannot be 11/1,
15 7/5, 9/3. It has to be the unanimous verdict of all 12
16 jurors.

17 Now, what I'm going to ask you to do, Madam Forelady,
18 is when you have reached a verdict in this case, whatever
19 that verdict is, I'm going to ask that you circle the
20 whole verdict.

21 I'm going to ask that you sign the verdict form as
22 forelady of the jury and that you date the verdict form.
23 When you have completed that, if you will have someone
24 knock on the door or you knock on the door.

25 There will be a bailiff seated outside the jury room.

1 Advise the bailiff, "We have reached a verdict." We will
2 bring the jury back so the verdict can be published.

3 Now, I'm going to ask you to step back in just a
4 moment, but do not begin your deliberations. I must
5 review with the attorneys the instructions that I have
6 given with you. If they think I have failed to instruct
7 you in some manner or that I instructed you incorrectly
8 and they convince me of such, I will bring you back and
9 give you whatever additional instructions are necessary.

10 If no additional instructions are necessary, Madam
11 Forelady, I will have the bailiff bring this verdict form
12 along with all evidence introduced into the case brought
13 back to the jury room. You can begin your deliberations
14 at that time.

15 Now, everyone -- Madam Alternate, if you will stay
16 here with me -- I'm going to let the jury go back to the
17 jury room. Please do not begin your deliberations until
18 you get further instructions, either from having the
19 verdict form and the evidence brought back or you be
20 brought back into the jury room. All right. If you will
21 step back into the jury room.

22 (WHEREUPON, the jury left open court at approximately
23 3:58 p.m.)

24 THE COURT: All right. Ms. Darnell, apparently, the
25 jurors were able to survive the process, so I'm going --

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1 I'm going to be able to let you go.

2 Do we need -- what do we need to do with the --

3 Ms. Darnell? What happened? Is our clerk up here?

4 MR. WHITLARK: Pay her, Your Honor.

5 ALTERNATE JUROR: Yes. I need that.

6 THE COURT: Well, that doesn't come quickly.

7 THE CLERK: She needs to go downstairs.

8 THE COURT: All right.

9 THE CLERK: You're going to need to go back
10 downstairs.

11 THE COURT: You probably need to go back downstairs.
12 They're probably going to turn you loose for the rest of
13 the week.

14 ALTERNATE JUROR: Okay.

15 THE COURT: I want to thank you very much for your
16 willingness to serve on the jury. Don't know what happens
17 to jurors sometimes. That's why we pick an alternate, in
18 case --

19 ALTERNATE JUROR: I've actually been an alternate
20 once before.

21 THE COURT: Oh, yeah? Maybe one of these days you'll
22 get to go back there and vote. I thank you for your
23 service. You have a nice time -- weekend. If you go back
24 downstairs, they'll give you further instructions.

25 ALTERNATE JUROR: Thank you.

1 THE COURT: All right. Anything from the State with
2 respect to instructions?

3 MR. LUPTON: Nothing, Your Honor.

4 THE COURT: Anything from the defendant?

5 MR. WHITLARK: No, Your Honor.

6 THE COURT: All right. If you'll get with Karen, and
7 let's make sure we have all of the exhibits and send them
8 back. We will wait and see what happens.

9 MR. LUPTON: Your Honor, the only thing is that the
10 video itself is on a C.D., and the laptop would have to be
11 used for playing it.

12 If they want to play the video, I think we're going
13 to have to either bring them out here to see it or send
14 the video back in with the laptop and --

15 THE COURT: Do you have an objection to bringing them
16 back in here to let them --

17 MR. WHITLARK: I have no objection to it, Your Honor.
18 I just want to make sure they know -- you know, that they
19 know it's not a problem not to look at it.

20 THE COURT: Well, if you all don't have a problem,
21 I'll go back there and tell them that the video will be
22 available for them. Because it's a C.D. we'd have to
23 bring them back out here to look at it, and we will
24 certainly make that opportunity available for them, if
25 they let us know.

Jury charge

177

1 Any objection to that?

2 MR. LUPTON: None from the State.

3 MR. WHITLARK: None from the defendant, Your Honor.

4 THE COURT: All right. Otherwise, if you'll take
5 the -- if you'll get the exhibits and...

6 (WHEREUPON, the jury began their deliberations at
7 four o'clock p.m.)

8 (WHEREUPON, a short break was taken.)

9 THE COURT: All right, folks. Got a note from the
10 jury. They want to view the video. Do you have the man
11 here in?

12 MR. LUPTON: Your Honor, I'll see about getting him
13 here.

14 THE COURT: Not much good if he's going to skip out.
15 (Pause).

16 Are we ready to go? Are you sure?

17 MR. LUPTON: Yes, Your Honor.

18 THE COURT: Mr. Whitlark, where are you?

19 MR. LUPTON: He's right here, Your Honor.

20 MR. WHITLARK: Right here, Your Honor.

21 THE COURT: Are you ready to go?

22 MR. WHITLARK: Yes, sir.

23 THE COURT: All right. Let's bring the jury in.

24 THE BAILIFF: Yes, sir.

25

1 (WHEREUPON, the jury came into open court at
2 approximately 4:15 p.m.)

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

5 THE JUROR: We didn't feel that we could hear it last
6 time because they were talking, the video.

7 THE COURT: Well, the audio will come out this time,
8 and we'll see if we can get Mr. Lupton to fermerz la
9 bouche. That's French.

10 THE COURT REPORTER: I was going to say, please don't
11 speak another language.

12 THE COURT: Here we have Lir.

13 THE JUROR: We don't need to see the whole thing.

14 THE COURT: All right. Ladies and gentlemen, as I
15 explained to you when I went back to the jury room with
16 the permission of the lawyers, if you wanted to watch the
17 video, we would have to bring you back out here because of
18 the set up.

19 You have indicated by note from the forelady that you
20 would like to view the video. Again, I ask you not to
21 discuss anything about this while you're observing it.
22 When you want to go back and talk about it, we'll let you
23 go back to the jury room.

24 All right. Are we ready to go?

25 MR. LUPTON: Yes, Your Honor.

1 THE COURT: All right. Now, no talking from anybody
2 so they can hear what's being said on the video and audio.

3 (Whereupon, the video was replayed for the jury.)

4 Is that it? All right. If you all will retire back
5 to the jury room and begin your deliberations again.

6 Thank you.

7 (WHEREUPON, the jury left open court at approximately
8 4:27 p.m.)

9 THE COURT: All right. It's been reported that the
10 jury has reached a verdict. Is the State ready to receive
11 the verdict?

12 MR. LUPTON: The State is ready, Your Honor.

13 THE COURT: Is the defendant ready to receive the
14 verdict?

15 MR. WHITLARK: The defendant is ready, Your Honor.

16 THE COURT: All right. Let's bring the jury in,
17 please.

18 THE BAILIFF: Yes, sir.

19 (WHEREUPON, the jury returned to open court with the
20 verdict at 4:40 p.m.)

21 THE BAILIFF: Your Honor, the jury is present.

22 THE COURT: All right. Thank you.

23 Madam Forelady, it's been reported the jury has
24 reached a verdict.

25 THE FOREMAN: Yes, sir.

1 THE COURT: It's the unanimous verdict of all 12
2 jurors?

3 THE FOREMAN: Yes, sir.

4 THE COURT: All right. If you would hand the verdict
5 to Mr. Broom, please.

6 THE CLERK: Publish?

7 THE COURT: Please.

8 THE CLERK: The State of South Carolina vs. Octavius
9 Livingston, indictment number 2008-GS-40-1666 for
10 distribution of cocaine, "We, the jury, unanimously find
11 the defendant guilty," signed by the foreperson Linzie
12 Staley, on September 11th, 2008.

13 THE COURT: All right. Anything from the State with
14 respect to the jury?

15 MR. LUPTON: No, Your Honor.

16 THE COURT: Anything from the defendant with respect
17 to the jury and the verdict?

18 MR. WHITLARK: No, Your Honor.

19 THE COURT: All right. Madam Forelady and ladies and
20 gentlemen of the jury, I thank you very much for your
21 service.

22 I hope you realize how important you are to the whole
23 process and that it wasn't too much of an inconvenience to
24 you to have to be here this week, but we obviously can't
25 operate our court system without members of the community

1 participating in the process.

2 What do you want them to do, go back downstairs or do
3 you want to meet them in the jury room?

4 THE CLERK: I can meet them in the jury room.

5 THE COURT: If you'll meet Ms. Tull in the jury room,
6 she'll talk to you about what time to be back here
7 tomorrow afternoon so you can find out what time to be
8 here this weekend.

9 (Pause).

10 No. I'm sure you'll be finished for the week.
11 You're free to leave. If you can go back to the jury
12 room. Ms. Tull will meet you there.

13 (WHEREUPON, the jury left open court at approximately
14 4:42 p.m.)

15 THE COURT: All right. Anything from the State with
16 respect to the verdict, Mr. Lupton?

17 MR. LUPTON: Nothing with respect to --

18 THE COURT: Anything from the defendant?

19 MR. WHITLARK: Oh, I'd ask for ten days to file --
20 well, I make a motion for a new trial, Your Honor, based
21 on the insufficiency of the evidence in this case.

22 It was not proved beyond a reasonable doubt of his
23 distribution in this case despite the fact that they had
24 videos and all these other things and didn't bring a key
25 witness.

1 I think it's probably very important considering
2 that, but they had available direct evidence and didn't
3 put it up. I'd ask the Court to grant a new trial on that
4 basis.

5 THE COURT: All right. As I said when I addressed
6 your directed verdict motion, there was some evidence of a
7 question of fact for the jury.

8 They obviously believed the defendant was guilty and
9 there was sufficient evidence for them to have reached
10 that conclusion. I'm going to deny your motion.

11 MR. WHITLARK: Thank you, Your Honor.

12 THE COURT: All right. Let's come on up here. Do
13 you have anything you want to tell me, Mr. Lupton, about
14 this defendant?

15 MR. LUPTON: Your Honor, you have heard the evidence
16 in the case. I'm going to put on the record that this is
17 one of three buys that Jason Williams made from the
18 defendant. The other occurring the day before this
19 incident on January 22nd, 2007.

20 It was a 6.37 gram buy. The other one on January
21 28th, 2007 was 11.36 gram buy, so it would have been a
22 trafficking cocaine, third offense, would have carried 25
23 to 30 years, 85 percent time.

24 It is a result of this conviction and the fact that
25 he's facing 15 years mandatory minimum up to 30 years.

1 The State is nolle-prossing those two indictments on this
2 conviction.

3 Obviously, if for some reason an appellate court or a
4 P.C.R. court reversed this case, then those cases could be
5 reindicted.

6 THE COURT: What about his prior record?

7 MR. LUPTON: Your Honor, as far as prior record, he
8 shows convictions from '89 public disorderly; 1990,
9 burglary second, malicious injury to personal property;
10 1992, a federal distribution of cocaine and larceny; a
11 1997 P.W.I.D. marijuana, and that's the last conviction on
12 his record.

13 THE COURT: All right. Mr. Livingston, if you can
14 step up here please, sir.

15 Can you bring the sentencing sheet?

16 MR. WHITLARK: Yes, sir.

17 THE COURT: All right. Mr. Whitlark, as I know
18 you're aware, and I'm sure you advised your client, this
19 is a distribution third of cocaine. The sentence is 15 --
20 minimum of 15, up to 30 years and/or a fine of \$50,000.
21 The Court can't suspend or grant any probation. Do you
22 understand that?

23 MR. WHITLARK: Yes, sir.

24 THE COURT: I'm sure you explained that to your
25 client.

1 MR. WHITLARK: Yes, sir.

2 THE COURT: All right. Anything you want to tell me?

3 MR. WHITLARK: Yes, sir, Your Honor. May it please
4 the Court. Your Honor, Mr. Livingston has been -- been
5 working hard and been out of the streets, as they say, for
6 quite a while now, about 14 months.

7 He did this with the -- at the urging of Mr. Alvester
8 Stewart, although he's guilty of it. It was a quick way
9 to make money, and actually, Your Honor, the reason he
10 needed the money is because he was a trucker who was
11 leaving town for two weeks.

12 He was taking care of his mother, Ms. Ruby
13 Livingston. He wanted to pay her rent and didn't have
14 enough money because he was just getting back with the
15 trucking company after a lay off. He did it for that
16 reason, and it was wrong, period.

17 He has had no difficulties. He's been fairly stable
18 for the last ten years. I'd ask the Court to consider
19 that and sentence in the fact that he does have a special
20 needs daughter he's very close to, Your Honor, and he's
21 very supportive of her.

22 He financially takes care of her and also
23 emotionally, and he loves her very much. I'd hate to see
24 him be away from her for longer than necessary, Your
25 Honor.

1 He does have the support of his family here, Your
2 Honor. He does work, Your Honor. He has a job. As a
3 matter of fact, the fellow who didn't testify helped him
4 get a commercial driver's license so he could drive a
5 truck and make some money.

6 He wants to speak to the Court, Your Honor.

7 THE COURT: Sure.

8 MR. WHITLARK: But basically, Your Honor, we would
9 ask, you know, that the Court consider the fact that he
10 has had no troubles, really, in the last ten or so years,
11 and that this was an anomaly for him. He did it for the
12 reason he did it, was to get money to pay a quick fix on
13 his mother's rent before he left town.

14 THE COURT: All right, Mr. Livingston. Anything you
15 want to tell me?

16 THE DEFENDANT: Yeah. I'd like to apologize to the
17 State, Your Honor. I mean, it wasn't something that I was
18 committed to doing.

19 Like my attorney said, I changed my life for the
20 last -- past ten years, and I finally found something that
21 I like doing, which is driving trucks.

22 At this time when I ran across Alvester Stewart, I
23 had lost my job. The only reason why I turned back to the
24 street, I couldn't leave my mom home. I couldn't leave --
25 couldn't leave the house without paying my bills, without

1 making sure she was secure. That's the only reason.

2 THE COURT: Well, unfortunately, now you have gotten
3 yourself in a position where you're going to have to leave
4 the house.

5 THE DEFENDANT: Yeah, now, yes.

6 THE COURT: It's unfortunate. Well, my hands are
7 pretty much tied. You have to do a minimum of 15 up to 30
8 years.

9 I've certainly heard a lot worse record, but you do
10 have some history of both drugs, and apparently, you have
11 a burglary in there.

12 All right. Anything further, Mr. Whitlark?

13 MR. WHITLARK: No, Your Honor, except again, his
14 wife -- or his ex-wife and his daughter would have been
15 here but they --

16 THE MOTHER: She went to work.

17 MR. WHITLARK: She went to pick her up.

18 Yes, sir, just to let you know he does have family,
19 and he's a member of a family.

20 THE COURT: I want you to understand this is a
21 serious offense. If you get a third serious, you're
22 looking at potentially life without parole. I don't know
23 if you have anything in your past. Unfortunately, it's
24 85 percent before you're eligible for parole.

25 The sentence of this Court is you be committed to the

1 Department of Corrections for a term of 15 years plus
2 costs and assessments as applicable.

3 MR. WHITLARK: Thank you, Your Honor.

4 THE COURT: Good luck to you.

5 MR. LUPTON: Thank you, Your Honor.

6 THE COURT: Were you in jail at all?

7 MR. WHITLARK: How long were you in jail?

8 THE DEFENDANT: A year-and-a-half.

9 THE COURT: No, on this charge.

10 MR. WHITLARK: Not on this charge.

11 THE DEFENDANT: No, sir, just a day.

12 THE COURT: Well, whatever you were, I'll give you
13 credit for whatever time you served. All right. Good
14 luck to you.

15 (Whereupon, the proceedings were concluded.)
16
17
18
19
20
21
22
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24
25

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Tracy, Official Court Reporter for the 5th
Judicial Circuit of the State of South Carolina, do hereby
certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of General Sessions for
Richland County, South Carolina, on the 11th day of
September, 2008.

January 14th, 2008

Karen Tracy

Karen Tracy, Court Reporter

My Commission Expires: 04/01/14

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

OCTAVIUS LIVINGSTON,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the undercover police officer's testimony about the contents of a video/audio tape containing conversations between the undercover police officer and a confidential informant violate the defendant's rights under the Confrontation Clause when the State refused to call the confidential informant as a witness?

STATEMENT OF THE CASE

In April of 2008, the Richland County Grand Jury indicted Livingston for distribution of cocaine third offense. On September 11, 2008, Livingston proceeded to jury trial before the Honorable James R. Barber. The jury returned a verdict of guilty and Judge Barber sentenced Livingston to fifteen years. A timely notice of intent to appeal was filed on September 22, 2008. This appeal follows.

ARGUMENT

Allowing the undercover officer to testify about the contents of a video/audio tape containing conversations between the undercover police officer and a confidential informant violated the defendant's rights under the Confrontation Clause when the State refused to call the confidential informant as a witness.

The jury convicted Livingston of distribution of cocaine based on a buy arranged by the confidential informant [C.I.], Alvester Stewart, between Livingston and Jason Williams, an undercover officer from the Richland County Sheriff's Department. At trial Williams testified that the C.I. set up a deal to buy cocaine from Livingston at the Lowe's on Two Notch road. (R. p. 49, lines 12 – p. 50, lines 1-13). Williams testified that he and the C.I. followed Livingston down an aisle inside Lowe's. (R. p. 52, lines 7-17). Williams testified that Livingston reached into a box of tubing and then pointed at the box. Williams then removed cocaine from the box. (R. p. 52, lines 18-24). Williams testified that after getting the cocaine he placed money in the box where the cocaine had been and Livingston then removed the money. (R. p. 54, lines 10-25).

Williams testified that while inside Lowe's he wore a video camera that recorded both audio and video. (R. p. 55, lines 20-23). The recording was saved on a C.D. and admitted in evidence without objection as State's exhibit #3. (R. p. 56, lines 8-10). The State played the C.D. for the jury. (R. p. 58, lines 20-22). While the C.D. was playing the prosecutor asked Williams, "Can you tell the jury what's going on at this point?" (R. p. 58, line 24). Williams discussed how the camera worked and then testified, "Basically, we're en route to get there. That's me and the C.I. just talking, having a general conversation. Okay. Right there he's shooting the phone call to the C.I. We're coming up the street. We'll be there in a few minutes, telling him what we're passing, where we are in the area. Right there he's telling him to come to Lowe's." (R. p. 59, lines 4-10). Counsel for

Livingston objected and the judge stated, "You can't testify to what anybody says." (R. p. 59, lines 11-12).

The remainder of the C.D. was played for the jury. Counsel for Livingston did not object on confrontation grounds. During voir dire the judge read a list of potential witnesses and asked if the jurors knew any of the witnesses. The C.I., Alvester Stewart, was included among the State's witnesses. (R. p. 11, lines 3-19). The State, however, refused to call Stewart as a witness at the trial. The State's failure to call Stewart as a witness after eliciting hearsay testimony from Williams violates Livingston's rights under the Confrontation Clause.

The Confrontation Clause of the Sixth Amendment, which was extended to the states by the Fourteenth Amendment, guarantees the right of a criminal defendant to confront witnesses against him, and this includes the right to cross-examine witnesses. Richardson v. Marsh, 481 U.S. 200, 206, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). Although the Confrontation Clause is not identical to the hearsay rule, when the State offers hearsay evidence in a criminal case, the accused's Sixth Amendment right to confront accusers is directly implicated. See Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). "Hearsay is an out of court statement, offered in court to prove the truth of the matter asserted." State v. Townsend, 321 S.C. 55, 467 S.E.2d 138 (Ct.App. 1996).

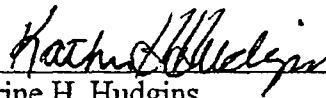
Williams' hearsay testimony about the C.I. allegedly setting up the deal with Livingston violates Livingston's right to confront his accusers when the State refused to call the C.I. as a witness. The error can not be deemed harmless. "An error is harmless when it 'could not reasonably have affected the result of the trial.' " State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)).

The hearsay testimony about the C.I. allegedly setting up the deal with Livingston was critical to the State's case and the omission of the evidence reasonably could have affected the result of the trial.

CONCLUSION

Based on the above argument, Livingston's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of December, 2009.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

OCTAVIUS LIVINGSTON,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Octavius Livingston states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge James R. Barber, III, which was held on September 11, 2008, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Octavius Livingston.

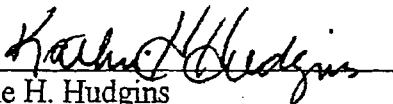
Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 22, 2009


 Kathrine H. Hudgins
 Appellate Defender

S.C. Commission on Indigent Defense
 Division of Appellate Defense
 1330 Lady Street, Suite 401
 Post Office Box 11589
 Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

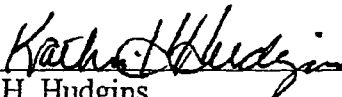
V.

OCTAVIUS LIVINGSTON,

APPELLANT

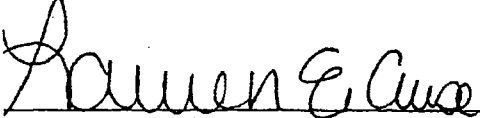
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Final Anders Brief of Appellant and Record on Appeal have been served on Octavius Livingston, #330587 at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010 this 22nd day of Decmeber, 2009.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
his 22nd day of December, 2009.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

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.

Octavius Livingston, Appellant.

Appeal From Richland County
James R. Barber, III, Circuit Court Judge

Unpublished Opinion No: 2011-UP-019
Submitted January 1, 2011 – Filed January 25, 2011

APPEAL DISMISSED

Appellate Defender Kathrine H. Hudgins, of
Columbia, for Appellant.

Attorney General Henry Dargan McMaster,
Chief Deputy Attorney General John W.
McIntosh, Assistant Deputy Attorney General
Salley W. Elliott, and Solicitor Warren Blair
Giese, all of Columbia, for Respondent.

PER CURIAM: Octavius Livingston appeals his conviction for distribution of cocaine, third-offense. Livingston argues the trial court violated his confrontation clause rights by admitting the police officer's testimony regarding the video tape of an undercover officer's conversation with a confidential informant. After a thorough review of the record, counsel's brief, and Livingston's pro se brief pursuant to Anders v. California, 386 U.S. 738 (1967), and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss^[1] the appeal and grant counsel's petition to be relieved.

APPEAL DISMISSED.

FEW, C.J., SHORT and WILLIAMS, JJ., concur.

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

2011CP4004375

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of Richland)Octavius Livingstone #330584)

Full name and prison number, if any, of applicant.)

v.)

South Carolina)

Name of Respondent)

APPLICATION FOR

POST-CONVICTION RELIEF

JEANNETTE W. NOBRIDE
C.C.P. & G.S.

2011 JUL -7 AM 10:20

RICHLAND COUNTY
FILEDINSTRUCTIONS - 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 Lee County Correction Institution
2. Name and location of Court which imposed sentence Richland County Judicial Center 1701 Main St Columbia, SC 29202
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 2008 - GS 40 - 1666
 - (b) _____
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) September 11th 2008
 - (b) 15 years pre-sent 85 percent
 - (c) _____

5. Check whether a finding of guilty was made

(a) after a plea of guilty _____

(b) after a plea of not guilty yes

(c) after a plea of nolo contendere _____

6. Did you appeal from the judgment of conviction or the imposition of sentence? yes

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Appeal dismissed

ii. _____

iii. _____

(c) the date of each such result:

i. January 25, 2011

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

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) Ineffective Assistance of Trial Counsel

(b) Ineffective Assistance of Appellate Counsel

(c) _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9)
- (a) My defensive Counsel failed to object to confrontation grounds when the State presented a case of mine
- (b) Appellate counsel failed to find my merits in my case when my constitutional rights been violated
- (c) _____

11. Prior to this application have you filed with respect to this conviction

- (a) any petition in a State Court under South Carolina Law ?
yes
- (b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

- (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?

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. Direct appeal
- ii. _____
- iii. _____
- iv. _____

(b) the name and location of the Court in which each was filed:

- i. The south Carolina Court of Appeals
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. Conviction confirm
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. ~~_____~~
- ii. _____
- iii. _____

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

- i. _____
- ii. _____
- iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) _____
- (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? _____
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?
yes
- (e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? _____

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. Mark Whitlock 1708 Main St Columbia, SC 29202
- ii. Katharine Rodgers Division of Appellate Defense 1530 Lady St Columbia, SC 29201
- iii. _____

(b) the proceedings at which each such attorney represented you:

- i. Mark Whitlock (Trial), Lawyer
- ii. Katharine Rodgers Appellate Attorney
- iii. _____

18. State clearly the relief you seek in filing this application.

The case to be dismissed

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

No

STATE OF SOUTH CAROLINA)
)
 COUNTY OF _____)

VERIFICATION

I, _____, 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.

Octavus Lys

Sworn to and subscribed before me

This 1 day of July, 2011.

Debra Sims L.S.

Notary Public for South Carolina

My Commission Expires 11-4-2015

RICHLAND COUNTY
 FILED
 2011 JUL -7 AM 10:21
 JEANNETTE W. MCBRIDE
 C.C.P. & G.S.

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
 OF COSTS AND AFFIDAVIT
 IN SUPPORT THEREOF**

I, Octavus Livingston # 32557, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

Octavus Lys
 Applicant

Sworn to and subscribed before me

This 1 day of July, 2011.

Debra Sims L.S.

Notary Public for South Carolina

My Commission Expires: 11-4-2015

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
LIVINGSTON Octavius -	)	2011CP4004375
# 00330587,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed July 7, 2011, would respectfully show this Court:¹

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. The Applicant was represented by j Marcus Whitlark, Esquire. On September 11, 2008, following a trial, the Applicant was sentenced by The Honorable James R. Barber, III. The Applicant had been indicted and/or convicted of the following: Dist. of

¹

<http://www4.rcgov.us/publicindex/PICaseDetails.aspx?County=40+&Casenum=2011CP4004375&CourtType=G&CaseType=Civil&CourtAgency=40002>

State's Return - (2011CP4004375) – Applicant: LIVINGSTON Octavius

Page 1 of 5

Cocaine 3rd Offense or Above - (2008-GS-40-1666). Offense Mdp Narc Sched-3rd,subse
Sentence Start Date 09/11/2008 Sentence Length 15 YRS, 0 MOS, 0 DYS.²

II.

Attached herewith and incorporated herein are the records of the Richland County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the trial transcript, and the Applicant's applicable direct appeal files. The Respondent reserves the right to amend this Return upon receipt of any relevant materials or submit an amended Return to reflect any amended allegations and/or to provide a more detailed procedural history.

Direct Appeal

The Applicant did not appeal his conviction and/or sentence.

The application for post conviction relief (PCR) was filed July 7, 2011.

III.

For the purposes of this Return, the Respondent interprets each of the Applicant's allegations to be claims that he received ineffective assistance of counsel. The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence

² <https://sword.doc.state.sc.us/scdc-public/inmateDetails.do?id=+00330587>

required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied. The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held. The Respondent will coordinate with the Applicant's attorney who is, according to the Respondent's file, William C. Wood, Jr., Esquire regarding when the hearing should be set.³

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737
bpetrano@scag.gov

September 15, 2011

³ The current PCR Roster for the 5th Circuit is available at <http://www.scag.gov/criminal-litigation/postconvictionrelief>
State's Return - (2011CP4004375) – Applicant: LIVINGSTON Octavius
Page 5 of 5

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

LIVINGSTON Octavius -
00330587,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

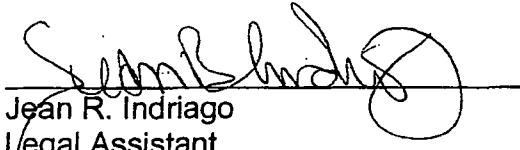
2011CP4004375

CERTIFICATE OF SERVICE

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 a letter in the above-captioned matter on the following person(s) by routing the same to the United States mail, postage prepaid:

William C. Wood, Jr.
Post Office Box 11070
Columbia, SC 29211

DATED September ¹⁹~~18~~, 2011.


Jean R. Indriago
Legal Assistant

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
Octavius Livingston, # 330584,	)	Civil Action No. 2011 CP 40 4375
	)	
Plaintiff,	)	
	)	
vs.	)	<u>AMENDMENT TO THE</u>
	)	<u>APPLICATION FOR POST-</u>
State of South Carolina,	)	<u>CONVICTION RELIEF</u>
	)	
Defendant.	)	
	)	

Pursuant to S.C. Rule of Civ. P. 71.1(d), Plaintiff Octavius Livingston, by appointed, undersigned counsel, amends his Application for Post-Conviction Relief filed July 7, 2011, paragraphs 9 and 10, to assert the following additional claim:

9. (c) The amendments to S.C. Code Ann. § 44-53-370 (the statute under which Plaintiff was convicted) which were enacted pursuant to 2010 S.C. Act 273, effective June 2, 2010, and which reduced the mandatory minimum sentence from 15 to 10 years and provided for the possibility of parole and other ameliorative sentencing measures, applied to Plaintiff's case, which was not final, but was pending on direct appeal from the conviction on the effective date of the amendments. The sentence (not the conviction) should be vacated and the matter remanded to the General Sessions Court for resentencing under the amended statute.

10. (c) Plaintiff was convicted by a jury and sentenced on September 11, 2008. He timely appealed his conviction. The judgment of conviction did not become final until January 25, 2011, when the Court of Appeals affirmed the judgment.

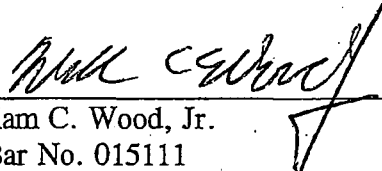
2010 S.C. Act 273, section 37, which amended S.C. Code Ann. § 44-53-370 as stated above, became immediately “effective upon the signature of the Governor” on June 2, 2010, as stated in section 66 of the Act, while Plaintiff’s case remained pending. Section 37 of the Act was located in Part I of the Act. Under this particular Act, when the General Assembly intended that the amendments apply only prospectively, and not to pending matters such as Plaintiffs, it specifically so stated. Thus, in Section 66, in the third sentence, the Act specifically states that the amendments contained in Part II of the Act became effective only “for offences occurring on or after” a particular date.

This application of 2010 S.C. Act 237 is entirely consistent with the stated purposes and intent of the Act as a whole as expressed in sections 1 and 2 of the Act. As stated in section 1, the Act was designed to provide “effective sentencing options....” Application of the Act in this instance increases the flexibility of the General Sessions Court to tailor the sentence to the circumstances of each person, including Plaintiff. As stated in section 2, the General Assembly intended to “provide proportional punishments for the offenses committed” as opposed to the “one-size-fits-all” type of punishment imposed by the prior version of the statute. Applying the statute to pending matters furthers this intent. To the extent the statute is ambiguous as to its application to pending matters, the rule of leniency dictates that the ambiguity as to this criminal statute be resolved in favor of Plaintiff.

Plaintiff reiterates, and incorporates by reference, all other averments, claims, and statements set forth in his original application.

Wherefore, Plaintiff requests that the Court set aside the conviction and order a new trial, or alternatively, set aside the sentence and remand the matter to the Court of General Sessions for resentencing in accord with S.C. Code Ann. § 44-53-370 as amended by 2010 S.C. Act 273.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

William C. Wood, Jr.

SC Bar No. 015111

E-Mail: bill.wood@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for Octavius Livingston

Columbia, South Carolina

8/8, 2012

CERTIFICATE OF SERVICE

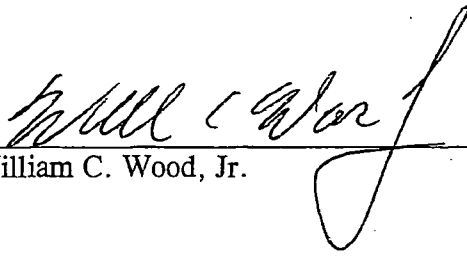
I, the undersigned, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Octavius Livingston, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Amendment to the Application for Post-Conviction Relief

Counsel Served:

Robert Corney
Office of the S.C. Attorney General
P.O. Box 11549
Columbia, SC 29211



William C. Wood, Jr.8/8

, 2012

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2011-CP-40-4375
	)	
OCTAVIUS LIVINGSTON,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Defendant.	)	
	)	

August 17, 2012
Columbia, South Carolina

B E F O R E:

THE HONORABLE R. KNOX MCMAHON, Judge

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

WILLIAM C. WOOD, JR., Esquire
Attorney for the Plaintiff

ROB CORNEY, Esquire
Office of the Attorney General
Attorney for the Defendant

KRYSTAL J. SMITH
Court Reporter

I N D E XWITNESS/DESCRIPTIONPAGE NUMBER

Arguments of Counsel

Mr. Wood..... 4

Mr. Corney..... 9

Court Reporter Certification..... 16

E X H I B I T SNO.DESCRIPTIONID.EV.

(No Exhibits Presented)

1 AUGUST 17, 2012

2 (WHEREAS this matter was scheduled for a post-conviction
3 relief hearing, the applicant appeared along with his
4 counsel of record. The hearing began at 10:10 a.m.)

5 MR. CORNEY: Your Honor, if I may approach with the
6 packet ---

7 THE COURT: Sure.

8 MR. CORNEY: --- for Mr. Livingston, your next case in
9 front of you.

10 THE COURT: All right.

11 MR. WOOD: Your Honor, if I may approach?

12 THE COURT: Yes, sir.

13 MR. WOOD: I've got a brief here of cases and materials.

14 THE COURT: All right. Thank you very much.

15 MR. CORNEY: May it please the Court, Your Honor.

16 THE COURT: Yes, sir.

17 MR. CORNEY: Your Honor, this is the PCR of Octavius
18 Livingston. It's Docket Number 2011-CP-40-4375. Mr.
19 Livingston was true billed indicted at the April 2008 term of
20 the Richland County Grand Jury for distribution of cocaine,
21 third offense. He was represented by Mr. Marcus Whitlark on
22 the charges.

23 He proceeded to jury trial September 11th, 2008, before
24 Judge Barber, where he was found guilty as indicted and
25 sentenced to fifteen years imprisonment. There was one count

1 of trafficking cocaine, third offense, and one additional
2 count of distribution, third offense, both null prossed by the
3 State.

4 There was a -- there was an appeal filed and Anders brief
5 submitted on Mr. Livingston's behalf. The appeal was
6 dismissed by order dated January 25th, 2011. Mr. Livingston
7 filed a timely PCR application July 7th, 2011. He is
8 represented here today by Mr. William Wood.

9 THE COURT: All right. Thank you very much. Yes, sir,
10 Mr. Wood?

11 MR. WOOD: Your Honor, there was a grounds stated in the
12 PCR application that asserted ineffective assistance of
13 counsel and it had to do with challenging some hearsay
14 evidence that came in. We are going to be dropping --
15 withdrawing that ground today.

16 There's an amended petition which I filed I believe it
17 was two weeks ago -- it should be in the file -- where we
18 asserted an additional ground. It's a pure question of law, a
19 statutory ground that has to do with the fact that there was
20 an amendment to the statute under which he was convicted while
21 his appeal was pending, and we would like to make the argument
22 that that -- and that -- and that amendment, Your Honor,
23 ameliorated the sentencing that was available for this crime.
24 It lowered the mandatory minimum.

25 Judge Barber had sentenced him to the mandatory minimum,

1 and if you look at the transcript, it appeared Judge Barber
2 did not desire to throw the book at him, so to speak. He
3 commented upon his past record and went to the mandatory
4 minimum. We'd like the opportunity to go back, but not -- not
5 have the conviction overturned, but have the sentence vacated
6 and an opportunity to go back and argue for a lower sentence.

7 The amendment also had some ameliorative sentencing
8 options that were not available under the original statute.
9 He would be eligible -- potentially eligible for probation,
10 suspended sentence. Those options were not available under
11 the original sentencing scheme, Your Honor.

12 As a question of law, I've submitted a brief. I've given
13 you the copy of the Act that did the amending and some case
14 law that would be cited in the brief, Your Honor. I'm going
15 to be the -- I read this Act. When I got this case, I looked
16 through it. I was looking for things and I went back and I
17 realized there had been an amendment.

18 I went and looked. I looked at the end. Section 66 of
19 the Act talks about the effective date. This was the Omnibus
20 Crime Reform Act back in 2010. I mean it kind of went all
21 over the criminal code and changed a lot of things. One of
22 its key features was backing off several of the sentences,
23 mandatory minimums and things like that.

24 I have -- I'm not generally a criminal practitioner. I
25 have -- I actually have a federal prisoner who I have been

1 appointed to represent and we've had these same kind of issues
2 even in the federal law. It backed off on some of the
3 severity of the punishments, and our state chose to do the
4 same thing.

5 An amendment went into effect. If you read Section 66,
6 the plain language of it says that amendment that affected
7 this -- the amendment that affected the statute he was
8 convicted on is in Section 37 of the Act, which is in Part One
9 of the Act, and if you go back and read Section 66, it says
10 that part of the Act is effective upon signature of the
11 governor.

12 The governor signed it on June 2nd, 2010. His case was
13 still -- still on appeal, not final at that point. Our
14 argument is you apply that straight language and it should be
15 effective then. He should have an opportunity to benefit from
16 the mitigated sentencing that was made available by that
17 amendment.

18 Now, Your Honor, in my brief I'm going -- I point out
19 there's a common law presumption when you have that language
20 that doesn't apply. *State v. Varner*, I put it in there, Your
21 Honor. I think that presumption does not apply here because,
22 as I point out in the brief, when you look at that enacting
23 section, when the General Assembly wanted it to only apply
24 prospectively, they said so directly in the statute.

25 So if you look at the third effective date sentence in

1 the statute, it says -- I mean I don't remember the sections.
2 I think it was Part Two of the Act. It says this Act -- this
3 Part Two of the Act will be effective on a certain date and
4 will only apply to cases or criminal charges arising on or
5 after that date. It had very specific prospective only
6 language, unlike all the rest of the sentences.

7 So I don't think -- I think, Your Honor, using basic
8 statutory construction principles, you can't imply prospective
9 only, which would be the common law rule, for the other parts.
10 I think you give them their plain meaning, which is it's
11 effective immediately and available to all non-final sentences
12 pending or otherwise.

13 There is a savings clause in the statute, Your Honor.
14 I've cited a case, *Pierce v. State*, that talks about what the
15 purpose of a savings clause is. A savings clause doesn't
16 negate the effective date clause; it saves the statute. In
17 other words, should -- and I think it's the *Thrift Brothers*
18 case I cited there. I can't remember if I cited it or another
19 case that was citing it, but the -- in the *Pierce* case, it
20 talks about the purpose of the savings clause is to -- when
21 there's a change in the statute like that, it's so you don't
22 have to open all of the jail doors and let everybody go based
23 on an argument, well, you were convicted under this statute
24 and it doesn't exist anymore. That's the purpose of that
25 language in the statute. The purpose of that language is not

1 to negate the effectiveness of the statute as expressed in
2 Section 66.

3 THE COURT: Is that William Pierce?

4 MR. WOOD: I don't know the person's first name.

5 MR. CORNEY: Hang on, Your Honor.

6 THE COURT: George Pierce. That's all right. I see it.
7 It's George Pierce. Go right ahead.

8 MR. WOOD: It was ---

9 THE COURT: It's George Pierce.

10 MR. WOOD: George Pierce. It's *Pierce v. State*.

11 THE COURT: All right.

12 MR. WOOD: It describes what a savings clause is intended
13 to accomplish and -- and it's intended to accomplish, like I
14 said, you don't go into -- an amendment occurs to a criminal
15 statute and it has a savings clause, you don't throw the doors
16 open and let everybody out. The law doesn't vanish. It's
17 merely amended or repealed or whatever effective going
18 forward. But here, we've got effective date and I think our
19 statutory construction rules suggest -- strongly suggest that
20 we should make it effective immediately to everything pending
21 then.

22 Your Honor, my fallback on that -- and it's the last
23 paragraph in my brief -- is at the very least, there's
24 ambiguity here about whether it should affect him, and the
25 rule of lenity says the criminal statute should be construed

1 strictly against the State, and I believe in that instance you
2 would construe it to be immediately effective. That would be
3 what's more favorable.

4 We're merely looking for a chance to go back, ask Judge
5 Barber in his discretion -- or whatever judge in General
6 Sessions might handle his sentencing -- to possibly offer him
7 a reduced sentence. He's currently on a fifteen year, eighty-
8 five percent sentence.

9 THE COURT: All right. Thank you, thank you very much.

10 MR. CORNEY: And, Your Honor, the State would submit that
11 the language set forth in the Omnibus Crime Reduction and
12 Sentencing Reform Act of 2010 is pretty clear that this
13 doesn't apply to Mr. Livingston's scenarios. I have a copy of
14 it right here in front of me, the entire packet. I did only
15 print one copy of it. I don't know if opposing counsel would
16 be okay with me handing it up to the Court.

17 MR. WOOD: I gave him the whole Act.

18 MR. CORNEY: He has a copy.

19 MR. WOOD: I gave him it.

20 MR. CORNEY: Okay, perfect. I would just point the
21 Court's direction. First of all, in Part One under Section 37
22 is where this change takes place. It essentially says for
23 third and subsequent offenses, the mandatory minimum on these
24 drug charges is going to be reduced to ten years from fifteen
25 years, and that's what we're dealing with here.

1 Under Part Four, as Mr. Wood pointed out a minute ago,
2 under Section 66 there is a provision talking about -- it says
3 the remaining provisions of Part One become effective upon
4 signature of the governor. About five lines down from that,
5 it says cases in appeals arising or pending under the law as
6 it existed prior to the effective date of this Act are saved.

7 Mr. Livingston had already -- had already been convicted
8 of this -- of this crime in July of 2008 -- or September 11th
9 -- I'm sorry -- of 2008, nearly two years before this was
10 passed. His case was pending on appeal at the time that this
11 sentencing format was passed.

12 Clearly, the time effective for that based on that last
13 line right there, it doesn't apply to this. It says appeals
14 arising or pending under the law as it existed prior to the
15 effective date of this Act are saved. The savings clause also
16 specifically says the repeal or amended by provisions of this
17 Act or any law would not affect any pending actions -- and I'm
18 paraphrasing, Your Honor. After the effective date of this
19 Act, all laws repealed or amended by this Act must be taken
20 and treated as remaining in full force and effect for the
21 purposes of -- it says some things. It says for the purposes
22 of criminal prosecution or appeals existing at the time of the
23 effective date of this Act.

24 Clearly, the savings clause and Section 66 both apply to
25 this. Mr. Livingston's case was pending on appeal at the time

1 that this passed two years after he was convicted and it
2 doesn't apply to him. He is -- he was sentenced correctly by
3 Judge Barber to the mandatory minimum fifteen years, which was
4 the law at the time, Your Honor.

5 Further, I don't think there's been anything set forth to
6 show that Judge Barber would have sentenced him to anything
7 other than the mandatory minimum had this -- had the mandatory
8 minimum been ten years. He could have given him anywhere up
9 to the maximum. There is nothing in the record to show that
10 Judge Barber would have sentenced him any differently had the
11 mandatory minimum been ten versus fifteen.

12 Specifically, in the transcript on page 182, the
13 solicitor makes note that Mr. Livingston had made two other
14 drug -- had performed two other drug sales within that same
15 kind of sting operation they were running, one of which was an
16 11.36 gram sale of cocaine, which met the inference weight for
17 a trafficking charge. That's what carries the mandatory
18 minimum of twenty-five years. And the other was also a
19 possession with intent to distribute, third offense, which
20 would have carried the mandatory minimum of fifteen at the
21 time.

22 The State specifically says we are null crossing the
23 trafficking charge, which carries a mandatory minimum of
24 twenty-five years because the charge that he was found guilty
25 of carries the mandatory minimum of fifteen years. So there's

1 nothing to say that if he would have been facing only ten
2 years as opposed to fifteen years, the State would have
3 pursued that trafficking charge under which he would have
4 gotten at least twenty-five years if convicted.

5 The State made it pretty clear the only reason they were
6 null crossing that charge was because they were certain he was
7 going to get at least fifteen years on the mandatory minimum.
8 So I think that that needs to play into effect in this regard
9 also, and it should be placed -- I want to place that on the
10 record and let the Court be aware that I think that that
11 should play into the Court's decision. If he goes back for
12 resentencing, that might change the decision the State makes
13 on these null crossed charges and I think they should have the
14 ability to bring these charges back out if they so wish to
15 prosecute him for a trafficking cocaine, third offense, charge
16 which carries a mandatory minimum of twenty-five years, Your
17 Honor.

18 And for those reasons, the State would ask that you
19 dismiss -- deny and dismiss this PCR application. Thank you
20 very much.

21 THE COURT: So if he would have committed this same
22 offense that he committed on January 23rd of 2007, if he would
23 have committed it two years later, the minimum mandatory would
24 have been ten? Is that -- is that what you -- is that the
25 bottom line?

1 MR. CORNEY: Yes, Your Honor. If he would have committed
2 this crime after the effective date of June 1st, 2010, when the
3 governor signed this law into effect, he would be eligible for
4 the ten year mandatory minimum. Now, whether the State
5 decides to pursue the trafficking, third offense, which
6 carries a mandatory minimum of twenty-five based on that
7 change in the mandatory minimum from fifteen to ten, that -- I
8 mean the solicitor very well may prosecute him for these other
9 two charges that they specifically noted they were null
10 crossing because they were certain he was going to do at least
11 fifteen years if convicted on that charge.

12 So I think that needs to play into the analysis also,
13 Your Honor. Thank you very much.

14 THE COURT: Either one of y'all have any case where
15 someone pled guilty post the Sentencing Reform Act -- or I
16 always call it the Ominus -- the Ominus Crime Bill. Has
17 anybody pled after it was enacted for a crime that occurred
18 prior to its enactment that preserved that issue if some judge
19 gave them fifteen years or something like that? Is there any
20 way to back -- to become ripe in any appellate capacity?

21 MR. WOOD: Not that I'm aware of, Your Honor. The Varner
22 case would suggest if he had committed before and before he
23 was sentenced they amended, then you would sentence him under
24 the new Act.

25 THE COURT: Right. So there's almost no way for that to

1 ever be ripe.

2 MR. WOOD: It would be very difficult for that kind of
3 situation to occur. I'm not saying it couldn't, but it would
4 be ---

5 THE COURT: About the only way it could occur is if
6 somebody, you know -- I guess if somebody's plea had been
7 accepted and qualified and sentence deferred, say to testify
8 against a co-defendant or something like that, and then not be
9 sentenced until after the Act was enacted.

10 MR. WOOD: The Varner case points out some old procedure
11 from back in the 1800's I believe where you used to -- they
12 didn't pronounce. The conviction was final on the conviction
13 without the pronouncement of sentence, and then the appellate
14 court would pronounce the judgment, and in Varner they're
15 distinguishing that situation and saying back then, since the
16 sentence hadn't been pronounced, then there was a change in
17 the law in the intervening time, but that's not the procedure
18 anymore. They're saying the general rule is that you use
19 sentencing unless the statute says otherwise.

20 And our argument is we make to you, Judge, is this one
21 does say otherwise. We should get -- get that opportunity.

22 THE COURT: All right. Thank you, thank you very much.
23 I'll take it under advisement.

24 MR. CORNEY: Thank you, Your Honor.

25 THE COURT: You want to send proposed orders?

1 MR. CORNEY: That would be fine.

2 MR. WOOD: We can do that, Your Honor.

3 THE COURT: How much time?

4 MR. WOOD: Can we have fifteen days?

5 THE COURT: Sure.

6 MR. WOOD: Thank you.

7 THE COURT: Thank you. Good luck to you, Mr. Livingston.

8 THE APPLICANT: Thank you, sir.

9 (Whereupon, the proceedings end at 10:28 a.m.)

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11 --- END REQUESTED TRANSCRIPT ---

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1 STATE OF SOUTH CAROLINA)
2) CERTIFICATE
3 COUNTY OF FLORENCE)
4

5 I, the undersigned, Krystal J. Smith, Official Court
6 Reporter for the Twelfth Judicial Circuit of the State of
7 South Carolina, do hereby certify that the foregoing is a
8 true, accurate, and complete Transcript of Record of all the
9 proceedings had and evidence introduced in the hearing of the
10 above captioned case, relative to appeal, in the Court of
11 Common Pleas for Richland County, South Carolina, on the 17th
12 day of August, 2012.

13 I do further certify that I am neither of kin, counsel,
14 nor interest to any party hereto.

15

16

Krystal J. Smith

17

Court Reporter

18

19 Florence, South Carolina

20 September 6, 2013

21

22

23

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
Octavius Livingston,	)	Civil Action No. 2011 CP 40 4375
	)	
Applicant,	)	
	)	
vs.	)	<u>Order of Dismissal</u>
	)	
State of South Carolina,	)	
	)	
Defendant.	)	

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 FILED
 RICHLAND COUNTY
 JENNIFER W. McBRIDE
 C.P. & G.S.

This post-conviction relief matter was heard on August 17, 2012. Applicant was represented by appointed counsel William C. Wood, Jr., of Nelson Mullins Riley & Scarborough, LLP. The State was represented by attorney Robert Corney of the Attorney General's office. At the hearing, Applicant withdrew claims of ineffective assistance of trial and appellate counsel based on their failure to effectively object or argue against the admission of certain hearsay evidence at trial on Confrontation Clause ground. Instead, Applicant chose to pursue only the ground for relief asserted through counsel in his amended application for relief.

Applicant requests that the Court vacate his sentence (not his conviction) and return the case to the General Sessions Court for resentencing based upon a change in the law under 2010 S.C. Acts 273 which amended S.C. Code Ann. § 44-53-370 to lower the mandatory minimum sentence from 15 to 10 years and provided eligibility for various ameliorative sentencing options such as a suspended sentence, probation, and parole not previously available to Applicant at the time of his original sentencing.



SCANNED

At the hearing, the Court had before it a copy of the transcript of the proceedings against Applicant, the records of the Richland County Clerk of Court, and Applicant's records from the South Carolina Department of Corrections.

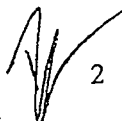
PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted at the April 2008 term of the Richland County Grand Jury for Distribution of Cocaine – Third Offense (2008-GS-40-001666). Marcus Whitlark, Esquire, represented Applicant on the charge. On September 11, 2008, Applicant appeared before The Honorable James R. Barber, III, where he proceeded to jury trial and he was found guilty of the charge as indicted. Applicant was sentenced to fifteen (15) years imprisonment on the charge. The State *nolle prossed* one count of Trafficking Cocaine – Third Offense and one count of Distribution of Cocaine – Third Offense subsequent to the conviction.

A Notice of Appeal was filed and an Anders brief submitted on Applicant's behalf by Katherine Hudgins, Esquire, of the South Carolina Commission on Indigent Defense. By order dated January 25, 2011, the South Carolina Court of Appeals granted Ms. Hudgins motion to be relieved and dismissed the appeal. The Remittitur followed thereafter.

FINDINGS OF FACT

Applicant was arrested February 18, 2008, for Distribution of Cocaine (Warrant No. I- 891813). According to the Richland County Clerk's records, the charge was "received" and "filed" on February 26, 2008. On April 16, 2008, the Richland County



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Grand Jury true bill indicted Applicant for Distribution of Cocaine – Third Offense or Above (2008-GS-40-1666). Applicant was called to stand trial on the charge on September 11, 2008, at which time he was found guilty by a jury and sentenced to fifteen (15) years imprisonment, the mandatory minimum at the time under S.C. Code § 44-53-370(b)(1) (2003) (“A person who [distributes] a controlled substance classified in Schedule II...is guilty of a felony and, upon conviction, for a...third or subsequent offense....must be imprisoned not less than fifteen years nor more than thirty years...”). A Notice of Appeal was filed on September 22, 2008, and a final Anders brief was submitted to the South Carolina Court of Appeals on December 22, 2009.

On February 9, 2010, during the pendency of Applicant’s appeal, the South Carolina Senate read for the first time Senate Bill No. 1154, introduced as the “Omnibus Crime Reduction and Sentencing Reform Act”. On June 2, 2010, Act 273 cited as the “Omnibus Crime Reduction and Sentencing Reform Act of 2010” was signed into effect by the Governor. Roughly seven and a half months later, Applicant’s appeal was dismissed by the South Carolina Court of Appeals by order dated January 25, 2011.

ISSUE

Applicant contends that because his case was pending on direct appeal at the time the Act was signed into effect by the Governor, he should be afforded the benefit of the changes made thereto. Specifically, under Section 37 of the Act, S.C. Code § 44-53-370(b)(1) was amended to require a person convicted of distribution of a Schedule II drug as a third offense “be imprisoned not less than ten years nor more than thirty years”. It is this change in the mandatory minimum sentence *from* fifteen (15) *to* ten (10) years which Applicant seeks to take advantage of through this PCR action.

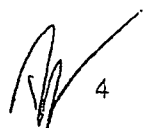


LEGAL ANALYSIS

Generally, "[i]n the absence of a controlling statute, the common law requires that a convicted criminal receive the punishment in effect at the time he is sentenced" *State v. Varner*, 310 S.C. 264, 265, 423 S.E.2d 133, 133 (1992). Prospective application of amending statutes passed after sentencing is ordinarily presumed. *Id.* at 266, 423, S.E.2d at 134. However, a person may be entitled to the benefit of mitigated punishment enacted by the legislative amendment while a conviction is on appeal if the statute so provides *only* when the amendment becomes effective *before* sentence is pronounced." *Id.* "In *Varner*, the Court stated that '[i]n the absence of a controlling statute, the common law requires that a convicted criminal receive the punishment in effect at the time he is sentenced, unless it is greater than the punishment provided for when the offense was committed.' " *State v. Gay*, 343 S.C. 543, 553, 541 S.E.2d 541, 546 (2001) (citing *Varner* at 265, 423 S.E.2d at 133).

The South Carolina Supreme Court's recent decision in *State v. Dawson*, 27238, 2013 WL 1319782 (S.C. Apr. 3, 2013) further clarifies the law on this issue. In *Dawson*, the Court determined that the Defendant was not entitled to be sentenced under the Omnibus Crime Reduction and Sentencing Reform Act of 2010, S.C. Acts NO. 273, which became effective after the Defendant committed the crime but *before* she was sentenced. The Act contained a savings clause identical to the savings clause at issue in the present case. The Court in *Dawson* held that

the Act unambiguously states its sentencing amendments do not apply to actions arising under the amended laws. Specifically, the Act's savings clause states the Act 'does not affect pending actions' founded on 'an amended or repealed law' or alter, discharge, release, or extinguish any penalty...incurred under the repealed



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or amended law, unless the repealed or amended provision shall so expressly provide.

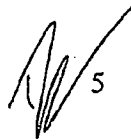
Id. The Court went on to hold that "because Appellant committed [the offense] in October 2009-prior to the Act's effective date-her criminal prosecution arose from, and her penalty was incurred under, the former version of [the section]." *Id.*

When applied to the present case, *Dawson* makes clear that Applicant was still subject to the penalties set forth in S.C. Code § 56-1-745(a). According to the record before this Court, the Applicant was arrested on February 18, 2008. The charge appears to have been filed on February 26, 2008. Applicant was sentenced by the trial judge on September 11, 2008, roughly twenty-one (21) months before the June 2, 2010, effective date of 2010 Act 273. Therefore, Applicant was correctly sentenced under the statutory scheme in effect at the time of his sentencing, which carried a mandatory minimum fifteen (15) year sentence for Distribution of Cocaine – Third Offense.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise all additional allegations raised in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an

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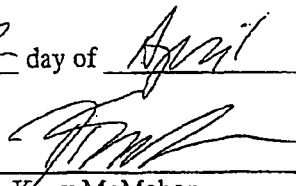
intentional relinquishment of a right is reasonably inferable." *Lyles v. BMI, Inc.*, 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987).

The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

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

IT IS THEREFORE ORDERED that the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and the Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 12 day of April, 201~~2~~³.


 R. Knox McMahon
 Presiding Judge
 Fifth Judicial Circuit
 Columbia, South Carolina.

WITNESSES

John
(s) LUTZ - RCSD

DOCKET NO. 2008-GS-40-1666

The State of South Carolina
County of Richland

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

COURT OF GENERAL SESSIONS

APRIL TERM 2008

I
hereby appear in my own proper person and f
guilty to the within indictment or to

Defendant

ARREST WARRANT NUMBER

812

THE STATE
vs.

Witness:

C.C.C. PLS. AND G.S.

OCTAVIUS LIVINGSTON

ACTION OF GRAND JURY

Person of Grand Jury

APR 16 2008

VERDICT

guilty

Indictment for

DISTRIBUTION COCAINE 3RD OFFENSE OR ABOVE

SC Code: 44-53-370(b)(1)

CDR Code: 0185

Class FEL/A

Person of Petit Jury

9-11-08

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on April 16, 2008, the Grand Jurors of Richland County present upon their oath:

DISTRIBUTION COCAINE 3rd OFFENSE OR ABOVE

That Octavius Livingston did in Richland County on or about January 23, 2007, manufacture, distribute, dispense, deliver, purchase or aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with intent to manufacture, distribute, dispense, deliver, or purchase a controlled substance, to wit: Cocaine, such being more than a first offense. All in violation of SC Code of Laws § 44-53-370.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

W. B. Giese

WARREN B. GIESE, SOLICITOR