

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from Horry County
Honorable Edward B. Cottingham, Circuit Court Judge
Appellate Case No. 2014-001545

THE STATE,

Petitioner,

vs.

ALEX LORENZO ROBINSON,

Respondent.

APPENDIX (Part 2 of 2)

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KENNETH LEVON DURANT - CROSS BY MR. RICHARDSON

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1 name.

2 THE COURT: Well, ask him ---

3 MS. BASS: Your Honor, I'm gonna object to the -- I'm
4 gonna object to the relevance at this point because we're
5 already past -- may we approach?

6 THE COURT: No, ma'am. Let's get on -- be on the record.

7 MS. BASS: Okay. On the record then, this happened in
8 2008, he's asking about 2009. I've already asked him, he said
9 he didn't remember and ---

10 THE COURT: Well, you asked him; he's entitled to ask
11 him, too.

12 MS. BASS: Okay, but Your Honor we're -- I'm just
13 objecting as to going beyond the dates.

14 THE COURT: You want to say you can ask him but you want
15 to say he can't ask him; that's not proper. He can ask him
16 too.

17 MR. RICHARDSON: And Your Honor, previously he said I
18 sold it to a good friend. I'm asking the identity of the
19 friend.

20 A: Jamie Eaddy.

21 BY MR. RICHARDSON:

22 Q: Jamie who?

23 A: Eaddy.

24 Q: Eaddy?

25 A: Yes.

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- 1 Q: And you say that was approximately in the fall of 2009?
- 2 A: Yes.
- 3 Q: And now until that fall of 2009, did the manufactured
- 4 home or mobile home stay at [REDACTED] -- not [REDACTED],
- 5 I'm sorry -- [REDACTED]?
- 6 A: Yes.
- 7 Q: The whole time?
- 8 A: Of the fall, yes. 2009?
- 9 Q: Did you or anyone else at that address ever get served
- 10 with an eviction notice?
- 11 A: Yes.
- 12 Q: When was that?
- 13 A: It's probably in the fall of 2009?
- 14 Q: Probably in the fall of 2009. And who was served with
- 15 that eviction notice?
- 16 A: I was.
- 17 Q: Okay. And whenever you were served with that, who did
- 18 you identify yourself as being?
- 19 A: Alex Robinson.
- 20 Q: So, you identified -- and who did you identify that to?
- 21 A: When they come to me, they thought I was my brother, I
- 22 said he was locked up and I was taking care of the payments.
- 23 Q: So, a Sheriff's deputy -- you identified yourself as Alex
- 24 Robinson to a Sheriff's deputy?
- 25 A: Yes. Cause, I mean, I was taking over the payments, I

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KENNETH LEVON DURANT - CROSS BY MR. RICHARDSON

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1 was making all the payments, I was paying all the bills and I
2 took -- when I got the eviction notice, it came Alex Robinson,
3 they didn't ask me who I was, I just told them I was Alex
4 Robinson.

5 Q: No doubt about it you lied to a law enforcement officer
6 that day?

7 A: Yes. Cause I knew he was locked up so it wouldn't have
8 been -- no way he could've got the letter.

9 Q: Now, Roland Robinson, when did you -- your brother got
10 locked up September 30th - October 1st on this charge,
11 correct?

12 A: Correct.

13 Q: And you got locked up on the 25th of September?

14 A: Correct.

15 Q: How long did you stay in jail?

16 A: I think I stayed in jail for about a week, week or two.

17 Q: So, where you there whenever your brother got booked in?

18 A: No.

19 Q: So, you stayed there a week or two, your brother is
20 booked in five days later. So you bonded out before your
21 brother got booked into J. Reuben?

22 A: Yes.

23 Q: Did you know he got arrested?

24 A: No, not at that time.

25 Q: When did you find out about it?

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KENNETH LEVON DURANT - CROSS BY MR. RICHARDSON

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- 1 A: I didn't find out until I got out.
- 2 Q: Okay. But before February, 2009 you knew your brother
- 3 had been arrested on these charges?
- 4 A: Before February?
- 5 Q: Yeah.
- 6 A: Yes.
- 7 Q: And you never wrote an affidavit saying it wasn't his
- 8 drugs?
- 9 A: Did I ever write a what -- say that again?
- 10 Q: Did you ever write another affidavit like you did for
- 11 your girlfriend?
- 12 A: No, I wrote -- I didn't write nothing for him or Roland
- 13 Robinson because neither one of them was there as I stated
- 14 before.
- 15 Q: But you knew your brother got locked up on these charges
- 16 for the dope found in that bedroom?
- 17 A: Yes.
- 18 Q: And your brother, he did date Gil Yakoel, correct?
- 19 A: That was his baby's -- his girlfriend, baby-momma,
- 20 whatever.
- 21 Q: She was pregnant at this time?
- 22 A: I think so.
- 23 Q: Those party pictures we saw, you don't appear in them,
- 24 correct?
- 25 A: No.

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1 Q: Were you part of Red Monkey Entertainment?

2 A: Red Monkey what?

3 Q: Red Monkey Entertainment, I believe that's -- was
4 discussed earlier, some entertainment group?

5 A: No, never heard of it.

6 Q: You never heard of it?

7 A: No.

8 Q: So, if there was anything found at the mobile home with R
9 -- I believe it's RME, Red Money Entertainment or RM --
10 whatever it was, that wouldn't be yours?

11 A: No.

12 Q: I belonged to whoever was part of that group?

13 A: Like I said, I never heard of it so...

14 Q: You say you found the shotgun shells?

15 A: Yeah.

16 Q: You found a box of shotgun shells?

17 A: It was laying around and I picked them up one day.

18 Q: Inside or outside?

19 A: It was on the outside.

20 Q: So, that nice pristine crisp box of shotgun shells on
21 State's Fourteen, that was just laying around outside?

22 A: It look like that on the picture but it's not that nice
23 and crisp if you looked at it at person.

24 Q: And how long did you say Ms. Yakoel had been living over
25 at ---

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KENNETH LEVON DURANT - CROSS BY MR. RICHARDSON

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- 1 A: About two months.
- 2 Q: About two months. So, that takes us back to July, she
3 moved in in July?
- 4 A: She moved -- yeah, basically she'd been staying there for
5 a while. She'd been in and out of there -- might as well she
6 was staying there because she was in and out of there all the
7 time and then she got to the point that she just started
8 staying.
- 9 Q: And who let her in?
- 10 A: I did.
- 11 Q: And you weren't dating her?
- 12 A: No.
- 13 Q: Your brother was dating her?
- 14 A: He was -- I guess, I don't know what they relationship
15 was at the time.
- 16 Q: Did he buy her a car?
- 17 A: No, not that I know of.
- 18 Q: Well, that Hyundai that was parked at [REDACTED] whose
19 was that?
- 20 A: I don't know.
- 21 Q: You don't know?
- 22 A: Huh-uh (negative response).
- 23 Q: You never saw anybody driving it?
- 24 A: No. I had my own car, that's the only one I worried
25 about.

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KENNETH LEVON DURANT - CROSS BY MR. RICHARDSON

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1 Q: Where was your car?

2 A: My car was at my father's house at the time. It was kind
3 of -- it wasn't running that good.

4 Q: So, there was another car that was available at the house
5 that was not there when they served the search warrant?

6 A: Say that -- repeat that question again.

7 Q: Typically, there was another car at the house?

8 A: It probably was.

9 Q: And that morning, your car wasn't at the house?

10 A: I think my car was at the house. I had a Cadillac.

11 Q: You just said you thought it was over at your dad's?

12 A: No, my car was at my dad's, that's what I said, it was --
13 not that morning, you didn't say the morning of the search
14 warrant, you said -- you trying to confuse me, man.

15 Q: Where did you park?

16 A: I parked right in the back like beside the A/C unit.

17 Q: But we don't have any record of that car being there,
18 correct?

19 A: I guess not.

20 Q: And that monitor, State's Number Twenty-seven, it's not
21 in your bedroom, correct?

22 A: No, it's not in no bedroom; it was in like the front
23 living room.

24 Q: It was in the living room, okay. No doubt about it you
25 pled to the drugs that were in your room?

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KENNETH LEVON DURANT - CROSS BY MR. RICHARDSON

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- 1 A: Yes.
- 2 Q: And you cleared Tiffany from the charges, correct?
- 3 A: Yes, because she was in the room with me.
- 4 Q: And you didn't clear anybody else?
- 5 A: I was in the room where Tiffany was at, that's who I
- 6 cleared. Nobody else was in the house but Tiffany Smith and
- 7 Gil.
- 8 Q: Where were you working at the time?
- 9 A: I'm not sure. I think I was doing landscaping or Storm
- 10 Water Management; I'm not sure.
- 11 Q: You're not sure on where you working, correct?
- 12 A: No, sir.
- 13 Q: Not sure of whether your car was there or not that day,
- 14 correct?
- 15 A: Oh, I know my car was there that day because I had just
- 16 brought it back over there.
- 17 Q: Not sure exactly what your address was from February 2010
- 18 to October 2010?
- 19 A: February 2010?
- 20 Q: Uh-huh (affirmative response). You said you got out and
- 21 moved to Carolina Forest but you put a different address when
- 22 you signed in.
- 23 A: Yeah, because that was my -- I never had changed my
- 24 address at the time.
- 25 Q: Okay.

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KENNETH LEVON DURANT - REDIRECT BY MS. BASS

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1 A: I had just got out of prison so I had -- I didn't have to
2 time to just change my address right then and there which that
3 ain't really my address where I stay at. Like I said, it was
4 my girlfriend house.

5 Q: So, you're not sure about these but you're real sure
6 about what happened in September of 2008 who was coming and
7 going?

8 A: Yes.

9 Q: You want to help your brother out, correct?

10 A: I'm up here to answer your question.

11 Q: Thank you. That's enough. Your Honor, I have no further
12 questions.

13 MS. BASS: Your Honor, I may just have two questions.

14 REDIRECT EXAMINATION OF KENNETH LEVON DURANT BY MS. BASS:

15 Q: I just have one question for you. The lady that was
16 living -- the lady that moved out -- that lived with Alex and
17 moved out in 2006 that I asked you about, Ms. Alicia Black, do
18 you see her present in the courtroom?

19 A: Yes.

20 Q: All right. Would you identify her for the record,
21 please.

22 A: She's right there with the pink/grey and striped shirt.

23 Q: Okay. And just one more question.

24 THE COURT: You understand the rule, now, your further
25 redirect has got to be -- to his cross?

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KENNETH LEVON DURANT - REDIRECT BY MS. BASS

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1 MS. BASS: Yes, sir. I'm looking for one -- God bless
2 you -- I'm looking one picture and that's it and I'll be
3 through, I promise, Your Honor.

4 BY MS. BASS:

5 Q: I want to show you what's been marked as State's Number
6 Six, okay. And what was that drawer kept for?

7 A: Mail.

8 Q: Okay. And the Alicia Black that's been identified in the
9 courtroom ---

10 MR. RICHARDSON: Your Honor, I didn't cover any of this
11 in cross.

12 MS. BASS: I'll stop, Your Honor.

13 THE COURT: You're not following the rules.

14 MS. BASS: I'll stop, Your Honor.

15 THE COURT: That's fine.

16 MS. BASS: No further questions, Your Honor.

17 THE COURT: Okay. Thank you. You may come down.

18 Thank you, ma'am.

19 Please call your next witness, Ms. Bass?

20 MR. HILLIARD: We'll call Ms. Lisa Rabon.

21 MR. RICHARDSON: Lori.

22 MR. HILLIARD: Lori Rabon, I'm sorry.

23 MS. BASS: Your Honor, we would move to have Mr. Durant
24 relieved from his subpoena so he can return to work.

25 THE COURT: You may do so. He is relieved.

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LORI RABON - DIRECT BY MR. HILLIARD

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1 MR. HILLIARD: Thank you, Your Honor.

2 (REPORTER'S NOTE: Witness leaves the witness stand.)

3 LORI RABON, HAVING BEEN SWORN,

4 TESTIFIED AS FOLLOWS:

5 CLERK: If you'll state your full name and spell your
6 last name.

7 MS. RABON: Lori Rabon, R-A-B-O-N.

8 DIRECT EXAMINATION OF LORI RABON BY MR. HILLIARD:

9 Q: Ms. Rabon, you are the chief evidence person for the
10 Horry County Police Department; is that correct?

11 A: Yes, I am. My position is Property and Evidence
12 Supervisor.

13 Q: And all the evidence custodians work for you?

14 A: That's correct.

15 THE COURT: Please talk into the microphone for us.
16 Thank you.

17 Q: In connection with that, do you have a document that is
18 the evidence log for this case?

19 A: What do you mean evidence log? The ---

20 Q: Do you have a list of the things that were taken into
21 evidence in connection with the search warrant that was
22 executed at [REDACTED]?

23 A: Yes. There's a evidence record for every case that our
24 department comes in contact with.

25 Q: And do you have that with you here today?

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LORI RABON - DIRECT BY MR. HILLIARD

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- 1 A: No, I don't have it with me.
- 2 Q: You don't have it with me?
- 3 A: No, I do not.
- 4 Q: In connection with this case, the [REDACTED] [REDACTED]
- 5 have spoken about it in the past; is that correct?
- 6 A: Yes, we have.
- 7 Q: And as it turns out when we were there looking at the
- 8 evidence, there is evidence connected to this case that was
- 9 gathered at the Stoneybrook residence that was inadvertently
- 10 destroyed; is that correct?
- 11 A: Yes, it is.
- 12 Q: And that's not to say that you did anything wrong in this
- 13 case but it is a fact that there are -- let me show you
- 14 State's Exhibit Number Six, a photograph of a lot of letters.
- 15 One of the things that we determined that was in fact
- 16 destroyed was a number of letters; is that correct?
- 17 A: If I remember correctly the evidence log said various
- 18 paperwork; that's correct.
- 19 Q: And there were a number of things that were taken into
- 20 evidence that are not available to us for the purpose of this
- 21 trial that were returned to people that would come in and say,
- 22 well, that's mine; is that correct? Return to owner, I think
- 23 is the ---
- 24 A: There were some items that by request of the
- 25 investigating officer were returned to the owner; that is

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LORI RABON - DIRECT BY MR. HILLIARD

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1 correct.

2 Q: And the investigating officer indicates that this
3 gentleman here, is that ---

4 A: Yes, it was Detective Donald.

5 Q: Detective -- so Detective Donald released some of the
6 things that were taken into evidence in this case back to the
7 individuals; is that correct?

8 A: Detective Donald authorized for our section to release
9 the property.

10 Q: And you actually were the one that released it?

11 A: I believe so, yes.

12 Q: Right. And the -- the shotgun shells, do you remember us
13 talking about the shotgun shells and they had been identified
14 on the return to the search warrant as 12 gauge shotgun
15 shells, do you remember us talking about that?

16 A: Yes, I do.

17 Q: And in fact they were not 12 gauge, they were 20 gauge
18 shotgun shells?

19 A: Yes, I do.

20 Q: But those were the shotgun shells?

21 A: Yes.

22 Q: In connection with this case, there was no clothing taken
23 into evidence; isn't that correct?

24 A: That is correct.

25 Q: And do you remember other than the paperwork that was

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LORI RABON - DIRECT BY MR. HILLIARD

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1 destroyed, what else was destroyed? Do you remember what else
2 was done away with?

3 A: The -- there were pipes and an ashtray, I think, that
4 were also destroyed; however that was not an inadvertent
5 thing. We have an agreement with the solicitor's office that
6 we do not retain paraphernalia.

7 Q: Okay. So, of the evidence that was collected in
8 connection with this search warrant, some of it was
9 inadvertently destroyed, some if it was destroyed by agreement
10 with the solicitor's office and some of it was returned to
11 various individuals by the permission of the investigating
12 officer; is that correct?

13 A: That's correct.

14 Q: Excuse me just one second, please. And one other
15 question, when you say that it was various paperwork that was
16 destroyed, there was never any detailed list of what was taken
17 from the Stoneybrook search; is that correct?

18 A: The paperwork had an item number beside it and was
19 labeled various paperwork.

20 Q: And it was in a box?

21 A: Yes.

22 Q: And nobody did anything other than just destroy what was
23 in the box?

24 A: That's correct.

25 Q: Thank you, ma'am. That's all the questions I have and I

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LORI RABON - CROSS BY MR. RICHARDSON

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1 think you for coming.

2 THE COURT: Do you have any questions?

3 MR. RICHARDSON: Your Honor, I just want to get a little
4 specific on the various paperwork. I ask her to identify ---

5 STATE'S EXHIBIT NUMBER FORTY-FIVE

6 MARKED FOR IDENTIFICATION

7 CROSS EXAMINATION OF LORI RABON BY MR. RICHARDSON:

8 Q: State's Number Forty-five for identification, do you
9 recognize that item?

10 A: Yes, I do.

11 Q: How do you recognize it?

12 A: It has Horry County Police Evidence Record with a -- with
13 this coinciding case number.

14 MR. RICHARDSON: I've shown it to Defense counsel, Your
15 Honor.

16 BY MR. RICHARDSON:

17 Q: Do you see the paperwork Mr. Hilliard was asking about
18 listed there?

19 MR. HILLIARD: I would object to her publishing that
20 document, Judge.

21 MR. RICHARDSON: All right, Your Honor, then I move it
22 into evidence at this time.

23 THE COURT: What's the basis for your objection?

24 MR. HILLIARD: Our objection is that she testified that
25 she didn't know what was in the box that she destroyed and

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LORI RABON - CROSS BY MR. RICHARDSON

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1 that document purports to characterize what was in the box and
2 she's not the person that put it in the box.

3 THE COURT: What you say about that, solicitor?

4 MR. RICHARDSON: Your Honor, she said she destroyed what
5 was in the box, the box is entitled however it is on the
6 evidence sheet.

7 THE COURT: I can let her testify as to what she
8 personally destroyed.

9 MR. RICHARDSON: She indicated that she was the one that
10 destroyed this and it goes by the item number and it's listed
11 as it is on the sheet.

12 THE COURT: Well, I'll permit that testimony if she
13 herself destroyed it.

14 BY MR. RICHARDSON:

15 Q: Ms. Rabon, the titles that appear on the evidence sheet,
16 is that what appears on the box or the UPC code that you see
17 on it?

18 A: Yes. When we enter evidence at the Horry County Police
19 Department each item is individually bar coded and it would've
20 been bar coded with our case number and a coinciding Item
21 Twenty-two and the description would be various paperwork in
22 the name of Alex Robinson on the description portion of the
23 barcode label.

24 Q: And that's what you destroyed?

25 A: That's exactly what it was.

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LORI RABON - CROSS BY MR. RICHARDSON

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1 Q: And that's how you can identify that ---

2 A: Yes, it is.

3 Q: --- that you destroyed? And once again why was that
4 destroyed?

5 A: There were co-defendants on this case and the solicitor's
6 office sends over monthly dispositions that during the month
7 have -- the cases have been cleared. When our office receives
8 the dispositions from the solicitor's office that property is
9 pulled and the cases are disposed. In this situation, the
10 various paperwork was located in our warehouse housing area
11 for evidence, that's the reason that's the only item that was
12 destroyed at that time.

13 Q: You can only carry so much?

14 A: Exactly.

15 Q: And you -- and because of my office's actions, you
16 thought that the case was resolved?

17 A: Exactly.

18 Q: And with regard to what evidence was destroyed in what
19 fashion, what's the first evidence that typically gets
20 destroyed?

21 A: General property.

22 Q: General property, paperwork?

23 A: Exactly.

24 MR. RICHARDSON: No further questions, Your Honor.

25 THE COURT: Confine your redirect now to his cross

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LORI RABON - REDIRECT BY MR. HILLIARD

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1 examination and don't go into new matters.

2 MR. HILLIARD: Nothing new, Judge.

3 REDIRECT EXAMINATION OF LORI RABON BY MR. HILLIARD:

4 Q: State's Exhibit Number Forty-five, this is the paper that
5 I asked you did you have, right?

6 A: Yes, it is.

7 Q: And you didn't have it?

8 A: I didn't have it.

9 Q: That guy had it?

10 A: Yes.

11 Q: Okay. But now we got it. And the -- where it says there
12 box of 12 -- Remington 12 gauge shotgun shells; that's wrong,
13 right? That's just flat -- number twenty-one, box of
14 Remington 12 gauge shotgun shells typed, that is wrong.

15 A: The description of the shotgun shells is noted beside it
16 indicated by the evidence technician as 20 gauge instead of
17 12.

18 Q: Right. So, they corrected it. And where it says, number
19 twenty-two, various paperwork in the name of Alex Robinson,
20 that doesn't necessarily mean that the only thing in that box,
21 you got a box, right?

22 A: That is actually what is inside that box. We have to
23 inventory the property that comes in as it comes in. We don't
24 just take the word for the paperwork, we have to actually
25 physically see what we're signing for.

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LORI RABON - REDIRECT BY MR. HILLIARD

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1 Q: Okay. And when I say in the box, the -- you didn't
2 review the paperwork to determine that in fact it was only
3 paperwork with Alex Robinson's name on it.

4 A: No, we would not have done that.

5 Q: All right. And so my question to you is just because
6 that piece of paper says Alex Robinson paperwork does not mean
7 that it's only Alex Robinson paperwork from your ability to
8 swear under oath to these twelve people?

9 A: Are you asking me can I definitively say that that's the
10 only name that was on the paperwork that was in the box?

11 Q: Right.

12 A: No, I can't say that.

13 Q: And you destroyed what was in the box?

14 A: Under item twenty-two.

15 Q: And the only person who could say what was actually in
16 item twenty-two is the person that put the stuff in item
17 twenty-two, right?

18 A: That's correct.

19 Q: If he remembered?

20 A: That's correct.

21 Q: Were you here when he testified that he didn't remember?

22 A: I just walked in the door; no, sir, I was not.

23 Q: This is not your first opportunity to testify in this
24 case?

25 A: No, it's not.

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SERGEANT KENT DONALD - DIRECT BY MR. HILLIARD

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1 Q: And on the other occasion were you ---

2 MR. RICHARDSON: Your Honor, we're going beyond ---

3 THE COURT: Yes, sir. You're going beyond ---

4 MR. RICHARDSON: Well beyond.

5 THE COURT: You're going beyond his cross examination.

6 MR. HILLIARD: The only thing -- very well.

7 Thank you, ma'am.

8 THE COURT: All right. You may come down. Thank you.

9 Can this witness be excused?

10 MR. HILLIARD: Without objection.

11 THE COURT: All right. Thank you. Thank you so much.

12 (REPORTER'S NOTE: Witness leaves the witness stand.)

13 Call your next witness, please.

14 MR. HILLIARD: Kent Donald.

15 SERGEANT KENT DONALD, HAVING BEEN

16 SWORN, TESTIFIED AS FOLLOWS:

17 CLERK: State your full name and spell your last name.

18 SERGEANT DONALD: Kent Donald, D-O-N-A-L-D.

19 DIRECT EXAMINATION OF SERGEANT KENT DONALD BY MR. HILLIARD:

20 Q: Mr. Donald -- I'm sorry, Sergeant?

21 A: Yes.

22 Q: Thank you. We've talked about item twenty-two on State's

23 Exhibit Number Forty-five before; is that correct?

24 A: Yes.

25 Q: And as I understand it, you don't recollect what all

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SERGEANT KENT DONALD - DIRECT BY MR. HILLIARD

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- 1 paperwork was in item twenty-two; is that correct?
- 2 A: That is correct.
- 3 Q: And just because that says Alex Robinson on that document
- 4 that does not mean that the only documents in item twenty-two
- 5 were Alex Robinson; that doesn't mean that?
- 6 A: No.
- 7 Q: And in fact, there was at least one document in there
- 8 that you recollected, I believe, from a Ms. Black, Alicia
- 9 Black, do you remember one Alicia Black document in there; is
- 10 that correct?
- 11 A: It might've been in there. I know we took a picture of
- 12 Alicia Black and that's it right there.
- 13 Q: Right here?
- 14 A: Yes.
- 15 Q: And that would've been part of the paperwork that was
- 16 connected to that?
- 17 A: I don't know if I took that.
- 18 Q: All right, sir. And in connection to the drawer of
- 19 documents that was part of what you collected and ---
- 20 A: Some of it, yes.
- 21 Q: All right, sir. And so when there is a destruction of
- 22 item twenty-two, that doesn't necessarily mean only Alex
- 23 Robinson documents were destroyed?
- 24 A: Yes.
- 25 Q: I am correct in what I said?

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SERGEANT KENT DONALD - CROSS BY MR. RICHARDSON

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1 A: Yes.

2 Q: Okay. Very good. Thank you, sir. That's all I have.

3 THE COURT: Do you have any questions, Mr. Richardson?

4 MR. RICHARDSON: Very briefly.

5 CROSS EXAMINATION OF SERGEANT KENT DONALD BY MR. RICHARDSON:

6 Q: Was the reason you didn't photograph more pictures of
7 Alex Robinson documents was because you took a lot of those
8 documents?

9 A: Yes, sir.

10 Q: And in the search of the trailer, did you find any
11 identification belonging to one Roland Robinson?

12 A: No, sir.

13 Q: Did you find anything that you recall at all with the
14 name Roland Robinson on it in that apartment -- that mobile
15 home?

16 A: No, sir.

17 MR. RICHARDSON: Thank you, Your Honor.

18 THE COURT: Come down. Thank you. Call your next
19 witness.

20 Thank you, sir.

21 (REPORTER'S NOTE: Witness leaves the witness stand.)

22 MR. HILLIARD: That's the matter that we were speaking
23 about earlier, Judge.

24 THE COURT: Sir?

25 MR. HILLIARD: I say that's the matter that we were

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BY THE COURT

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1 THE COURT: All right. 9:30 in the morning.

2 MR. RICHARDSON: Thank you, Your Honor.

3 (RECESS.)

4 *****OFF THE RECORD*****

5 (On the Record.)

6 (NOVEMBER 9, 2011)

7 THE COURT: Defense ready to proceed?

8 MR. HILLIARD: Yes, Your Honor.

9 THE COURT: All right. Bring my jury in, please.

10 DEPUTY: Yes, sir.

11 THE COURT: Who is here with the high school group,
12 please?

13 MS. HICKMAN: Hi, this is the Academy for Technology and
14 Academics, I'm ---

15 THE COURT: Come forward, please, ma'am.

16 Bring the jury in.

17 MS. HICKMAN: Pardon me?

18 THE COURT: May I have your -- come forward. May I have
19 your name?

20 MR. RICHARDSON: He's calling the jury, too.

21 MS. HICKMAN: Nora Hickman.

22 THE COURT: Ma'am?

23 MS. HICKMAN: Nora, N-O-R-A, Hickman.

24 THE COURT: Ms. Hickman.

25 MS. HICKMAN: Uh-huh (affirmative response).

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BY THE COURT

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1 THE COURT: And what is your class?

2 MS. HICKMAN: It's the prelaw class.

3 THE COURT: Of where?

4 MS. HICKMAN: The Academy for Technology and Academics.

5 THE COURT: Academy, where is that academy?

6 MS. HICKMAN: Out on 701 and 22 in Conway.

7 THE COURT: Prelaw?

8 MS. HICKMAN: You've had us in here before, Judge
9 Cottingham.

10 THE COURT: I know I have.

11 MS. HICKMAN: And you've had -- we're real excited to be
12 in your courtroom again.

13 THE COURT: Well, when we take the morning break, I'll be
14 glad to bring your class back and talk to them.

15 MS. HICKMAN: Well, thank you very much. They'd be very
16 excited.

17 THE COURT: Are you bringing the jury in?

18 MS. HICKMAN: Thank you, sir.

19 THE COURT: Okay.

20 (REPORTER'S NOTE: The jury returns to the courtroom.)

21 THE COURT: Good morning, ladies and gentlemen. Prior to
22 proceeding, let me introduce to you a class of prelaw
23 students. Please stand. (REPORTER'S NOTE: JURY CLAPS)
24 They're here with Ms. Hickman. Ms. Hickman -- you may be
25 seated. It's my pleasure to have this class here and as is my

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BY THE COURT

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1 policy at the morning break I will ask that you come with your
2 class to my chambers and we'll have a question and answer
3 period and I always appreciate the fact that teachers bring
4 their students to observe their court in session. This is not
5 my court; this is the people's court. And this is the jury
6 who has kindly given of their time to be here this week to
7 participate in our judicial process and we are indeed grateful
8 to all of these twelve folks who have given of their time and
9 left their jobs and their family and their work to come here
10 and to be a part of their judicial system.

11 On yesterday or last evening, I've been advised that
12 there was some TV statement about the trial of this case. My
13 inquiry is, Did any of you happen to see that TV interview.
14 (REPORTER'S NOTE: Jury unanimously indicates in the
15 negative.)

16 THE COURT: If so please stand. Anybody happen to see
17 it?

18 (REPORTER'S NOTE: No response.)

19 THE COURT: Anybody know anything about it or anybody
20 have anything to discuss with you about that TV interview?

21 (REPORTER'S NOTE: Jury unanimously indicates in the
22 negative.)

23 THE COURT: Okay. Any other questions as to that issue?

24 MR. RICHARDSON: No, sir. The State is fully satisfied.

25 MR. HILLIARD: Satisfied, Your Honor, thank you very

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TIFFANY SMITH - DIRECT BY MS. BASS

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1 much.

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

3 MS. BASS: Tiffany Smith, Your Honor.

4 TIFFANY SMITH, HAVING BEEN SWORN,

5 TESTIFIED AS FOLLOWS:

6 CLERK: If you'll state your full name and spell your
7 last name.

8 MS. SMITH: And spell it?

9 CLERK: Yes, ma'am.

10 MS. SMITH: Tiffany Smith, S-M-I-T-H.

11 DIRECT EXAMINATION OF TIFFANY SMITH BY MS. BASS:

12 Q: Good morning, Ms. Smith, I'm Julia Bass, I have some
13 questions for you. If you have trouble hearing me, let me
14 know and you need to make sure that -- the Judge will let you
15 know if you're not close enough, okay, but all the jurors need
16 to hear what you have to say. Okay?

17 A: Okay.

18 THE COURT: I want to make sure she speaks into the
19 microphone so that these jurors in the far corner can hear her
20 too.

21 If at any time you have some difficulty, please let me
22 know.

23 You may proceed.

24 MS. BASS: Thank you, Your Honor.

25 BY MS. BASS:

State v. Alex Robinson (November 9, 2011)
TIFFANY SMITH - DIRECT BY MS. BASS

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- 1 Q: And if I talk too fast or you don't understand the
2 question let me know. Okay?
- 3 You're not related by blood or marriage to me, Mr.
4 Hilliard, Mr. Richardson; is that correct?
- 5 A: Correct.
- 6 Q: And in this particular case, has anyone threatened you,
7 promised you anything to get you to testify?
- 8 A: No.
- 9 Q: Were you served with a subpoena?
- 10 A: Yes.
- 11 Q: By Mr. Hilliard?
- 12 A: Uh-huh (affirmative response).
- 13 Q: Yes or no?
- 14 A: Yes.
- 15 Q: Okay, you can't say uh-huh.
- 16 A: Okay, sorry.
- 17 Q: The court reporter is taking down what you say so --
18 okay? How old are you?
- 19 A: Twenty-three.
- 20 Q: Okay. And where do you live, what part of the county?
- 21 A: Conway.
- 22 THE COURT: Talk into the microphone for me, please.
- 23 Q: Okay. Did you --
- 24 A: Conway.
- 25 Q: And where do you currently work?

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TIFFANY SMITH - DIRECT BY MS. BASS

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- 1 A: At Pizza Hut in Myrtle Beach.
- 2 Q: Okay. And are you married or single?
- 3 A: Single.
- 4 Q: Do you have any children?
- 5 A: No.
- 6 Q: Okay. And have you ever been married?
- 7 A: No.
- 8 Q: Okay. I'm gonna draw your attention back to September --
- 9 the month of September of 2008. Okay?
- 10 A: Okay.
- 11 Q: Do you remember that month?
- 12 A: Yes.
- 13 Q: Okay. I'm gonna draw your attention specifically to
- 14 September 25th of 2008. Who were you dating back on September
- 15 the 25th of 2008?
- 16 A: Kenneth Durant.
- 17 Q: Okay. Are you currently dating him?
- 18 A: No.
- 19 Q: How long has it been since y'all have broken up?
- 20 A: Like six months after.
- 21 Q: Okay. So, that would be the early part of '09?
- 22 A: Yeah. Well, it was like right before -- probably
- 23 February of '09.
- 24 Q: Okay. February of 2009 you broke up with him?
- 25 A: Uh-huh (affirmative response).

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- 1 Q: Yes or no?
- 2 A: Yes.
- 3 Q: Okay. And have you dated him, gotten back together,
4 spent any time with him since February of 2009?
- 5 A: No.
- 6 Q: Have you ever dated my client Alex Robinson?
- 7 A: No.
- 8 Q: Are you close personal friends with Alex Robinson?
- 9 A: No.
- 10 Q: Have you even been close personal friends with Alex
11 Robinson?
- 12 A: No, other than being my boyfriend's brother, no.
- 13 Q: Okay. And Gil Yakoel or Gil Yakoel, are you close
14 personal friends with her?
- 15 A: No.
- 16 Q: Okay. Did you spend any time with these people -- these
17 people being the ones that I've named before '08?
- 18 A: Huh-uh (negative response).
- 19 Q: Yes or no?
- 20 A: No.
- 21 Q: Okay. And where were you living in August of 2008?
- 22 A: Conway, at 1915 Highway 548.
- 23 Q: And who were you living with?
- 24 A: My grandmother.
- 25 Q: Okay. On your mom's side or your daddy's side?

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TIFFANY SMITH - DIRECT BY MS. BASS

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- 1 A: Dad's.
- 2 Q: Your paternal grandmother?
- 3 A: Uh-huh (affirmative response).
- 4 Q: Yes or no?
- 5 A: Yes.
- 6 Q: Okay. And who were -- where you working at the time back
7 in August?
- 8 A: Dollar Tree in Conway.
- 9 Q: And where is Dollar Tree -- where was that located?
- 10 A: Conway.
- 11 Q: And were you working at Dollar Tree in -- September 25th
12 of '08?
- 13 A: Not September -- it was early September is when I quit.
- 14 Q: Okay. You quit or you got laid off?
- 15 A: Well, laid off.
- 16 Q: Okay. And after you got laid off, what kind of income
17 did you have in September?
- 18 A: Unemployment.
- 19 Q: Unemployment check?
- 20 A: Uh-huh (affirmative response).
- 21 Q: Yes or no?
- 22 A: Yes.
- 23 Q: Okay. And other than receiving unemployment checks in
24 September of '08 what other forms of income or who other --
25 I'm sorry, what other forms of income did you have?

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- 1 A: Well, that was really enough but my grandmother if I
2 needed help she, you know, helped me cause I'd help her.
3 Q: Okay. So, your grandmother that you'd been living with
4 ---
5 A: Uh-huh (affirmative response), yes.
6 Q: --- would also give you money?
7 A: Yes.
8 Q: Did you parents give you any money?
9 A: Sometimes if I needed it.
10 Q: Okay. Do your parents live in Horry County?
11 A: No, in Georgia.
12 Q: Okay. And September 25th of '08, what is the first thing
13 you remember happening that day?
14 A: Getting throwed in the floor.
15 Q: Okay. What do you mean getting throwed in the floor?
16 A: And arrested.
17 Q: Okay.
18 THE COURT: You're not talking into the microphone for
19 me, I wish you would, please.
20 A: I remember getting arrested.
21 Q: Okay. And who arrested you on September 25th of '08?
22 A: I don't know their names but ---
23 Q: Do you see them present in the courtroom?
24 A: No.
25 Q: Okay. And when you were arrested, where were you on the

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- 1 morning of September 25th of '08?
- 2 A: Asleep in the bed.
- 3 Q: Okay. And how old were you then?
- 4 A: Twenty.
- 5 Q: Twenty years old?
- 6 A: Uh-huh (affirmative response), twenty-one, maybe.
- 7 Q: Okay. Had you graduated from high school?
- 8 A: Huh-uh (negative response).
- 9 Q: Okay. And how far did you go in school?
- 10 A: Eleventh grade.
- 11 Q: Okay. And where were -- what was the location of the
- 12 house where you were arrested on September 25th of '08?
- 13 A: In the back bedroom, the master bedroom.
- 14 Q: Okay. And what was the location of the house -- I
- 15 apologize, what address? Was it in Conway, was it in South
- 16 Carolina, where were you?
- 17 A: Conway.
- 18 Q: Okay. Do you remember the physical address of the place
- 19 where you were?
- 20 A: Stoneybrook, I'm not sure of the number.
- 21 Q: Okay. And you were living on [REDACTED]; is that
- 22 correct?
- 23 A: Uh-huh (affirmative response), yes.
- 24 Q: And what kind of home were you living in?
- 25 A: It was a mobile home.

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TIFFANY SMITH - DIRECT BY MS. BASS

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- 1 Q: Okay. And who were your roommates on September 25th of
2 2008, at [REDACTED] in Conway?
- 3 A: Gil and Kenneth.
- 4 Q: And Kenneth would be Kenneth Durant?
- 5 A: Uh-huh (affirmative response).
- 6 Q: Yes or no?
- 7 A: Yes.
- 8 Q: And Kenneth would be Kenneth Levon Durant?
- 9 A: Yes.
- 10 Q: Any other people living there at the time, spending the
11 night?
- 12 A: Well, unless, you know, somebody didn't want to drive
13 home but other than living there it was Gil, Kenneth and me.
- 14 Q: Okay. During the month of -- well, when exactly did you
15 move in? Do you remember what timeframe?
- 16 A: In July, maybe the end of June, July, somewhere around
17 that time.
- 18 Q: Okay. Of '08?
- 19 A: Yes.
- 20 Q: From -- in the month of July, August, September, up until
21 the time you were arrested, did you ever -- did Alex Robinson
22 ever live there as a roommate?
- 23 A: No.
- 24 Q: Okay. Did he ever spend the night there?
- 25 A: No.

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- 1 Q: Okay. And the things I'm gonna ask you from here on out,
2 if you don't understand or you don't know the answer just say
3 so. Okay?
- 4 A: Okay.
- 5 Q: What type of relationship -- what kind of dating
6 arrangement did you observe, you personally observe between
7 Alex Robinson and Gil Yakoel or Yakoel?
- 8 A: That he just was trying to help her because she was
9 pregnant but it wasn't really a boyfriend/girlfriend type
10 relationship.
- 11 Q: Okay.
- 12 A: I've never seen them hugged up or -- yeah.
- 13 Q: Hugged up, you mean like actually hugging?
- 14 A: Yeah.
- 15 Q: Is that what you mean by hugged up? Yes or no?
- 16 A: Yes.
- 17 Q: Okay. The night of September 25th of '08, Alex Robinson
18 did not spend the night there, correct?
- 19 A: Correct.
- 20 Q: The night of the 24th, he did not spend the night there?
- 21 A: Correct.
- 22 Q: Did you -- and I'm only talking about you -- did you ever
23 see Alex Robinson spend the night at that house on [REDACTED]
24 [REDACTED] in Conway, South Carolina during the month
25 of July, August or September?

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1 A: No.

2 Q: Okay. After you were arrested did you go back to the
3 house on Stoneybrook Road, where you were arrested?

4 A: Yes.

5 Q: How long did you live there after you were arrested on
6 September 25th of '08?

7 A: Till around February, around that time.

8 Q: Till around February of '09?

9 A: Uh-huh (affirmative response).

10 Q: What did you notice about the condition of the mobile
11 home where you and Gil and Kenneth were living after you got
12 out of jail?

13 A: It was -- everything was everywhere.

14 Q: What do you mean everything was everywhere? Tell the
15 jury what you mean.

16 A: Like it was trashed where the police had went through the
17 house.

18 Q: Okay.

19 A: When I ---

20 Q: Did anyone come back and repair the door that you know of
21 after you got out of jail?

22 A: No.

23 Q: When you got out of jail and you returned the home, were
24 any of your things missing?

25 A: Yes.

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1 Q: Okay. Had there been a break-in while y'all were in
2 jail?

3 A: Yes.

4 Q: Okay. So, I'm gonna make sure we're clear, we're not
5 blaming the police for stuff that was taken after the police
6 left and after y'all were arrested, the house was broken into?

7 A: Yes.

8 Q: Okay. During the month of September, do you remember
9 other break-ins, hearing about other break-ins in the
10 Stoneybrook area?

11 A: Yes.

12 Q: Tell the jury how many break-ins there were that you
13 remember or remember being told about from the neighbors over
14 there in September of '08?

15 A: One.

16 Q: One. Okay. How many during the month of August did you
17 remember?

18 A: I don't remember.

19 Q: Okay. Do you remember any from the month of July?

20 A: No.

21 Q: Okay. Did you pay rent at the house?

22 A: Yes.

23 Q: And how much rent -- who would you pay rent to?

24 A: To Kenneth.

25 Q: And how much rent would you pay?

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- 1 A: Probably like -- I'd give maybe half of my check.
- 2 Q: Half of your unemployment?
- 3 A: Yes.
- 4 Q: To Kenneth Levon Durant?
- 5 A: Yes.
- 6 Q: Okay. And did you ever see him paying the rent over
- 7 there at [REDACTED] or did you ever go with him when he went
- 8 to pay the rent?
- 9 A: Yes.
- 10 Q: Okay. Who was in the car when you went to pay the rent?
- 11 A: Me and him.
- 12 Q: Okay. Him being Kenneth Levon Durant?
- 13 A: Yes.
- 14 Q: And where did y'all go when you went to pay the rent?
- 15 A: We'd get a money order and send it through the mail.
- 16 Q: Okay. And who -- do you remember who y'all were paying
- 17 rent to?
- 18 A: Peterkin (spelled phonetically), I think his name was.
- 19 Q: A Mr. Peterkin?
- 20 A: Yes.
- 21 Q: Did you ever go physically pay it where like you went
- 22 into a store you went to somebody's house to pay the rent?
- 23 A: No.
- 24 Q: Okay. You always mailed it?
- 25 A: Yes.

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1 Q: Okay. While Gil Yakoel was there or Gil Yakoel was
2 there, did -- what kind of duties, what kind of
3 responsibilities did she have around the house? Did she do
4 any cooking?

5 A: No.

6 Q: Did she clean up?

7 A: No.

8 Q: Did she pay rent?

9 A: No.

10 Q: Okay. Do you recall if she was working anywhere at the
11 time?

12 A: She wasn't working.

13 Q: Okay. You don't remember her working anywhere ---

14 A: No.

15 Q: --- during that timeframe? Okay. Do you know whose
16 house, do you know who -- did you ever see any paperwork with
17 Kenneth's name on it where he was paying the rent?

18 A: No.

19 Q: Okay. Did you ever see a lease for over there?

20 A: No.

21 Q: Okay. When you left your grandmother's house in Conway,
22 did you change your address with the Department of Motor
23 Vehicles?

24 A: No.

25 Q: When you left [REDACTED] in 2009, did you change your

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- 1 address with the Department of Motor Vehicles?
- 2 A: No.
- 3 Q: Okay. Where is your address? Is it your grandmother's
- 4 house, your parents' house?
- 5 A: On my ID?
- 6 Q: Yes.
- 7 A: It's at my uncle's house, the 4175 Primrose Lane.
- 8 Q: It's been at your uncle's house?
- 9 A: It's been that every since I've had a South Carolina
- 10 license.
- 11 Q: Does your uncle live with your grandma?
- 12 A: No.
- 13 Q: Okay. So, you list your address on your driver's license
- 14 as being your uncle's house?
- 15 A: Yes.
- 16 Q: Do you stay there from time to time?
- 17 A: Well, now I stay there.
- 18 Q: Okay. But you never changed your address from your
- 19 grandmother's to [REDACTED] you just kept your address the
- 20 whole time?
- 21 A: Yes.
- 22 Q: At your uncle's?
- 23 A: Yes.
- 24 Q: Okay. Did you ever receive anyone else's mail other than
- 25 your own at [REDACTED]?

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- 1 A: It -- well, it would be different mail coming. I just
2 put it up.
- 3 Q: Okay. What do you mean you put it up? Where would you
4 put it?
- 5 A: In the drawer.
- 6 Q: What drawer?
- 7 A: The ones by the -- in the kitchen?
- 8 Q: Okay. I'm going to show you some pictures, please. And
9 I'll ask you some questions based on the numbers, okay. Can
10 you tell us, tell the jury, please, who's in Number Thirty-
11 three if you know? Can you identify those two people?
- 12 A: That is Gil and Kelly.
- 13 Q: Gil Yakoel?
- 14 A: Yes.
- 15 Q: What's Kelly's last name?
- 16 A: Not sure.
- 17 Q: Do you know where she worked or who she ---
- 18 A: No.
- 19 Q: Do you know who she was at the party with? Or what was
20 going on at that time?
- 21 A: Um...
- 22 Q: If you don't know that's okay.
- 23 A: At this time, I'm not sure but I know that she was there
24 and I'm not sure what we was doing.
- 25 Q: Okay. That's all right. Did you ever -- when this get-

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- 1 together was going on, were you there?
- 2 A: Yes.
- 3 Q: Okay. When you were there, how did y'all prevent people
- 4 from going in the different bedrooms or were people free to go
- 5 throughout the house?
- 6 A: We didn't.
- 7 Q: We didn't do what?
- 8 A: I mean, I wasn't paying attention, I'm not sure who went
- 9 where?
- 10 Q: Okay. Did -- were people free to go in and out of your
- 11 bedroom?
- 12 A: No.
- 13 Q: Okay. Why not?
- 14 A: Because it was right there where I could see it.
- 15 Q: Okay. Were people free to go in and out of the restroom,
- 16 the kitchen?
- 17 A: Yes, because the restroom that everyone used was down
- 18 that hallway, so ---
- 19 Q: Okay.
- 20 A: --- it was kind of hard to pay attention.
- 21 Q: Were they free to go in and out of the room Gil was
- 22 staying in?
- 23 A: I'm not sure.
- 24 Q: That's okay. If you don't know, just say so. Okay. I'm
- 25 gonna show you what's been marked as Number Thirty-four, tell

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- 1 the jury who those people are?
- 2 A: I can't really see this one but that's Alex.
- 3 Q: Okay. And can you tell who the individual is next to
- 4 him?
- 5 A: Not really.
- 6 Q: Okay. That's all right.
- 7 A: It's kind of dark.
- 8 MR. RICHARDSON: What number is that, Ms. Bass?
- 9 MS. BASS: That is Thirty-four.
- 10 BY MS. BASS:
- 11 Q: And who is the person if you know in Number Thirty-five?
- 12 A: That's Gil.
- 13 Q: Gil Yakoel?
- 14 A: Uh-huh (affirmative response).
- 15 Q: Okay. And who is this person in Number Thirty-eight or
- 16 who are the people in Thirty-eight?
- 17 A: That's me and that's Michela.
- 18 Q: Okay. Michela Ashley Torrence?
- 19 A: Yes.
- 20 Q: Okay. Thank you. And this is Number Twelve, whose book
- 21 bag does that belong to?
- 22 A: I don't know.
- 23 Q: Okay. You don't recognize the book bag?
- 24 A: Huh-uh (negative response).
- 25 Q: That's no?

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- 1 A: Yes, that's no.
- 2 Q: Okay. And identify, please, Number Eleven.
- 3 A: That's Kenneth Durant.
- 4 Q: Okay. And that was your boyfriend at the time?
- 5 A: Yes.
- 6 Q: You've broken up with him?
- 7 A: Yes.
- 8 Q: Hadn't talked to him in how long?
- 9 A: It's been about three years now or '09, the beginning of
- 10 '09.
- 11 Q: So, it's been about three years since you talked to him?
- 12 A: Yes.
- 13 Q: Okay. And you were not here yesterday for any of the
- 14 testimony, correct?
- 15 A: No.
- 16 Q: Okay. You were out of state yesterday?
- 17 A: Yes.
- 18 Q: Okay. And can you identify the women in Number Thirty-
- 19 nine, please?
- 20 A: I know that's Kelly but I'm not sure who that is in the
- 21 background.
- 22 Q: Okay. And have you -- I know you've not ever seen the
- 23 picture but -- I mean, the chart but Number Six, can you tell
- 24 the jury what that is and what it contained?
- 25 A: The drawer of mail.

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- 1 Q: Okay. And who all's mail would you throw in there?
- 2 A: If it wasn't for me or him, I'd -- me or Kenneth, I'd
- 3 just throw it in the drawer.
- 4 Q: Okay. And did you ever put anyone's mail in there other
- 5 than Alex Robinson?
- 6 A: Yes.
- 7 Q: Okay. Did you ever put any mail in there for a female?
- 8 A: Yes. It was -- sometimes it would be mail from people I
- 9 didn't even know so I'd just put it in there.
- 10 Q: Okay. In that drawer there were more people's mail that
- 11 just Alex Robinson?
- 12 A: Yes.
- 13 Q: Did you put any of your mail in there?
- 14 A: No.
- 15 Q: Did you put any of Kenneth's mail in there?
- 16 A: No.
- 17 Q: Okay. And I'm gonna show you what's been marked as
- 18 Number Twenty and ask you is that your bedroom, is that Ms.
- 19 Michela's bedroom, whose bedroom is that? Well, what part of
- 20 the house is that, can you tell?
- 21 A: That's the room Gil was sleeping in.
- 22 Q: Okay. That's the room where Gil was sleeping?
- 23 A: Yes.
- 24 Q: Okay. And when the police left that day, did they take
- 25 any of your clothes on September 25th of '08?

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TIFFANY SMITH - DIRECT BY MS. BASS

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- 1 A: My clothes?
- 2 Q: Yeah.
- 3 A: No.
- 4 Q: Did you see them take any of Gil's clothes or Kenneth's
- 5 clothes?
- 6 A: No.
- 7 Q: Okay. You said that Alex Robinson never spent the night
- 8 over at that house; is that correct?
- 9 A: Correct.
- 10 Q: In July, August or September of '08; is that correct?
- 11 A: Correct.
- 12 Q: Did Alex Robinson ever come over and help you do laundry?
- 13 A: No.
- 14 Q: Did Alex Robinson ever pick up the dry cleaning for you?
- 15 A: No.
- 16 Q: Did he ever come over and wash dishes with you?
- 17 A: No.
- 18 Q: Okay. Did you ever see Alex Robinson bring clothes over
- 19 to the house?
- 20 A: No.
- 21 Q: Okay. Did Gil walk around nude or did she have clothes
- 22 at the ---
- 23 A: She had her clothes.
- 24 Q: Okay. And in the bedroom where Gil was staying, whose
- 25 clothes were in there that you know of if you know?

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- 1 A: Other than hers, I'm not sure because, you know, it was
2 just her clothes and guy clothes, so I don't know whose they
3 were but I know she had hers there too.
- 4 Q: Okay. She had her clothes there too. And she was
5 pregnant at the time?
- 6 A: Yes.
- 7 Q: Okay. Did you ever see her wear big jeans?
- 8 A: No.
- 9 Q: Okay. Did you ever see her wear what's called boyfriend
10 jeans?
- 11 A: No.
- 12 Q: Okay. Did you ever -- you never saw anybody wear those
13 jeans that I showed you; is that correct?
- 14 A: Correct.
- 15 Q: Okay. Do you know a person by the name of Shek or Roland
16 Robinson?
- 17 A: Yes.
- 18 Q: Did Roland Robinson ever stay at that house during the
19 months of July, August or September of '08, if you know?
- 20 A: Yes. Off and on like -- not continuously but I would see
21 him there and he would stay.
- 22 Q: What is his race?
- 23 A: He's black.
- 24 Q: Okay. And how was his hair?
- 25 A: He has dreads.

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TIFFANY SMITH - DIRECT BY MS. BASS

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- 1 Q: All right. Dreadlocks.
- 2 A: Uh-huh (affirmative response).
- 3 Q: Is his hair longer or shorter than mine?
- 4 A: Shorter.
- 5 Q: Okay. And is he taller or shorter than I am?
- 6 A: I don't know.
- 7 Q: Okay. Was he a big guy or little guy?
- 8 A: Average.
- 9 Q: Okay. Did anyone ask you if it was okay for Gil Yakoel
- 10 to stay there since she wasn't paying rent and you were?
- 11 A: No.
- 12 Q: Okay.
- 13 A: I mean, I didn't see a problem because she was pregnant
- 14 you know so...
- 15 Q: Okay. And at any time prior to September 25th of '08
- 16 when they -- the police executed that search warrant, had she
- 17 ever moved out?
- 18 A: No.
- 19 MS. BASS: Your Honor, if you'll give me just a minute.
- 20 I may be finished.
- 21 THE COURT: You may proceed.
- 22 MS. BASS: Thank you, Your Honor.
- 23 BY MS. BASS:
- 24 Q: When Roland spent the night, Roland Robinson, did he
- 25 sleep in the bed with Gil?

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TIFFANY SMITH - DIRECT BY MS. BASS

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- 1 A: No.
- 2 Q: Did he sleep in the room with Gil?
- 3 A: No.
- 4 Q: Where did he sleep?
- 5 A: If she was there, he would sleep in the living room.
- 6 Q: Where would he sleep, floor, couch, futon?
- 7 A: I don't really remember all that.
- 8 Q: Okay. Did Gil ever have any girls spend the night over
- 9 during the months of July, August, September?
- 10 A: Well, the girls that I knew too, the -- but no, her
- 11 friends didn't really spend the night.
- 12 Q: Okay. Did any of your friends spend the night over there
- 13 during the month of July, August or September?
- 14 A: Yes. I had one friend spend the night.
- 15 Q: What was her name?
- 16 A: Kendra.
- 17 Q: Okay. What's Kendra's last name?
- 18 A: Wilson.
- 19 Q: And when I say spend the night, did you have any -- did
- 20 any of Gil's, your friends, Kenneth's friends come over ---
- 21 MR. RICHARDSON: Your Honor, I've been letting the
- 22 leading going on but there's a lot leading questions. I would
- 23 just ask to please stop.
- 24 Q: Did anyone stay past midnight?
- 25 A: Sometimes.

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TIFFANY SMITH - DIRECT BY MS. BASS

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- 1 Q: But not spend the night?
- 2 A: Right.
- 3 Q: Can you remember who any of those people were, what their
4 names are?
- 5 A: I don't really remember exact time who it was that spent
6 the night but I know like if we were up hanging out that
7 people would stay if it was really late and then leave.
- 8 Q: Prior to the search warrant, did you ever see any drugs
9 in the house?
- 10 A: No.
- 11 Q: Did you sell any drugs?
- 12 A: No.
- 13 Q: Did you see anyone sell any drugs during the months you
14 lived there?
- 15 A: No.
- 16 Q: When the police broke in on September 25th, that morning,
17 where were you, who were you in the room with?
- 18 A: I was asleep in the bed with Kenneth Durant.
- 19 Q: And what time as best you can remember was it in the
20 morning?
- 21 A: It was early in the morning, probably about 8:00, 7:30, I
22 don't really remember what time but I know it was early.
- 23 Q: Okay. And was there anyone anywhere in the bathroom, the
24 kitchen, living room, anything like that?
- 25 A: Like ---

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TIFFANY SMITH - DIRECT BY MS. BASS

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- 1 Q: Any other people in ---
- 2 A: Oh, no. Gil because she was asleep in the back room.
- 3 Q: Okay. And was anyone in the bed with Gil?
- 4 A: No.
- 5 Q: Anyone spend the night with her?
- 6 A: Huh-uh (negative response).
- 7 Q: Who did you see in that room other than Gil Yakoel in the
- 8 days prior to the search warrant. Name every person you saw
- 9 in that bedroom?
- 10 A: Roland Robinson, her, and me other than going back there
- 11 and talking with them but that's it.
- 12 Q: Okay. And you were charged in this case; is that
- 13 correct?
- 14 A: Correct.
- 15 Q: Tell the jury what you were charged with?
- 16 A: Manufacture and distribution.
- 17 Q: Manufacture and distribution of what?
- 18 A: Cocaine.
- 19 Q: Okay. And did you plead guilty to the charge?
- 20 A: They dropped it to criminal conspiracy.
- 21 Q: And you pled to the criminal conspiracy?
- 22 A: Yes.
- 23 Q: Okay. What did the police tell you about who would be
- 24 charged per what room, what did the police tell you on
- 25 September 25th of '08? What did Donald Kent [sic] from Horry

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TIFFANY SMITH - DIRECT BY MS. BASS

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1 PD tell you?

2 A: Well, I just remember there was like, was there anything
3 in here and he said whatever is found in each room is what
4 you'll be charged with.

5 Q: Okay. And you were charged and Kenneth was charged for
6 what was in your room?

7 A: Right.

8 Q: And Kenneth later signed an affidavit saying you had no
9 knowledge of the drugs; is that correct?

10 A: Correct.

11 Q: And you saw a copy of that?

12 A: Correct.

13 Q: Okay. Had you ever seen Kenneth's gun before that day?

14 A: No.

15 Q: Okay. Did you -- just a couple -- I'm not gonna ask you
16 about all these pictures, I'm just gonna ---

17 MR. RICHARDSON: Your Honor, for the record, the -- if
18 the Defense wants to move these photographs in that were
19 previously identified by Ms. Yakoel, I have no objection to
20 those moving into evidence instead of going through them.
21 Okay?

22 THE COURT: You need to index those pictures, so you can
23 see them faster.

24 MR. RICHARDSON: Your Honor, I have no objection to these
25 pictures being moved into evidence.

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TIFFANY SMITH - DIRECT BY MS. BASS

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1 THE COURT: Without objection. Move them in and let's
2 move on, please.

3 MS. BASS: Okay.

4 MR. RICHARDSON: You may just want to call them out for
5 the record.

6 MS. BASS: That's what I'm gonna do.

7 THE COURT: Sir?

8 MR. RICHARDSON: She may just want to call the numbers
9 out for the record without having to go through the
10 identification process.

11 MS. BASS: Number Two, Number Three ---

12 THE COURT: You have no objection to all of them, do you?

13 MS. BASS: Number Four.

14 MR. RICHARDSON: None of them, Your Honor. She just
15 needs to put them on the record what numbers they are. These
16 were -- these were discussed previously but the numbers ---

17 MS. BASS: Five, Six, Seven, Eight, Nine, Ten, Twelve,
18 Eleven, Thirteen, Fourteen, Fifteen, Sixteen, Seventeen,
19 Eighteen, Twenty-one, Twenty-two, Twenty-three, Twenty-four,
20 Fifty-eight.

21 And Your Honor, I think I only have about three questions
22 and I'm not gonna touch the rest of these pictures. We move
23 these into evidence, Your Honor, and I'm only gonna ask her
24 about these.

25 THE COURT: Just -- you handle it the way you think is

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TIFFANY SMITH - DIRECT BY MS. BASS

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1 appropriately, Ms. Bass.

2 MS. BASS: Yes, sir. I only have three more.

3 DEFENDANT'S EXHIBITS TWO THROUGH EIGHTEEN

4 TWENTY-ONE THROUGH TWENTY-FOUR AND FIFTY EIGHT

5 ADMITTED INTO EVIDENCE.

6 BY MS. BASS:

7 Q: Okay. Could you please identify the lady in Number Six,
8 if you know?

9 A: Lacy.

10 Q: Lacy. And where is Lacy sitting this particular time?

11 A: In the living room.

12 Q: Of what house?

13 A: [REDACTED].

14 Q: Okay. And this Number Five, who is this lady?

15 A: Kelly.

16 Q: And you don't know Kelly's last name?

17 A: Not sure.

18 Q: Do you know where she worked or where she lives?

19 A: No.

20 Q: Okay. And in Number Five, whose bedroom is she standing
21 in?

22 A: Not sure.

23 Q: Okay. But was it [REDACTED]

24 A: Not sure.

25 Q: And this picture, these items here, do you recall who

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TIFFANY SMITH - CROSS BY MR. RICHARDSON

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1 those belong to?

2 A: No.

3 Q: Okay. Just one moment, Your Honor. No further
4 questions, thank you so much.

5 THE COURT: You may cross examine.

6 MR. RICHARDSON: Thank you, Your Honor, if I may. I want
7 to look at one of those photographs real quick.

8 CROSS EXAMINATION OF TIFFANY SMITH BY MR. RICHARDSON:

9 Q: I'm gonna move all these out the way.

10 Good morning, Ms. Smith.

11 A: Good morning.

12 Q: Ms. Smith, actually you got charged with possession with
13 intent to distribute cocaine that day, correct?

14 A: Correct.

15 Q: In September of 2008?

16 A: Correct.

17 Q: That charge is actually dismissed, correct?

18 A: Yes.

19 Q: You pled to a different charge from a different date; is
20 that correct?

21 A: Well, they were put together, I think, both of them.

22 Q: In March 2009, you pled to criminal conspiracy, I'm
23 sorry, in October of 2009 you plead to criminal conspiracy,
24 correct?

25 A: Correct.

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TIFFANY SMITH - CROSS BY MR. RICHARDSON

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1 Q: And that was from an incident in March 2009?

2 A: Correct.

3 Q: So, separate charge?

4 A: But I think they were both ran together.

5 Q: But not -- that criminal conspiracy did not deal with
6 [REDACTED], right, didn't take place at [REDACTED]?

7 A: I thought it did because I had both of my charges listed
8 when they offered me probation.

9 THE COURT: You're gonna have to talk a little louder in
10 that microphone. I'm afraid they can't hear you back there.
11 Please lean forward and talk into the microphone.

12 Q: So the only time you were arrested was in September of
13 2008?

14 A: No, I was arrested March the 5th.

15 Q: Okay. And that's what you pled criminal conspiracy on,
16 correct?

17 A: Yeah, well, they ran both charges together, so I pled
18 criminal conspiracy to both.

19 Q: Okay. Now, you told Ms. Bass that Gil was not working
20 when she was staying at [REDACTED], correct?

21 A: Correct.

22 Q: Were you there 24/7?

23 A: Most of the time, yeah.

24 Q: Most of the time? Were you using any drugs at that
25 point?

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TIFFANY SMITH - CROSS BY MR. RICHARDSON

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- 1 A: No.
- 2 Q: And you were there most of the time, you weren't aware of
3 any drug dealing?
- 4 A: Correct.
- 5 Q: You weren't aware that Mr. Durant was dealing drugs?
- 6 A: No, I wasn't.
- 7 Q: You weren't aware that he had the handgun?
- 8 A: No.
- 9 Q: You told Ms. Bass that you never updated your address on
10 your license, correct?
- 11 A: Correct.
- 12 Q: It's still in your uncle's address?
- 13 A: Yes.
- 14 Q: At the time you were at [REDACTED] it was in your
15 uncle's address?
- 16 A: Yes.
- 17 Q: You told Ms. Bass nobody else was living there during
18 July, August or September.
- 19 A: Correct.
- 20 Q: Okay. So, Roland Robinson wasn't living there?
- 21 A: From time to time but he wasn't there every day.
- 22 Q: He didn't have his stuff there?
- 23 A: I don't know what he had there. I wasn't back there.
- 24 Q: Well, you're there 24/7, did he come in with suitcases?
- 25 A: No, I've never seen him come in with suitcases.

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TIFFANY SMITH - CROSS BY MR. RICHARDSON

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- 1 Q: Did he come in with a box of clothes?
- 2 A: I don't know what was in there before I came. He was
3 there before I moved in, I know that.
- 4 Q: And the picture with Mr. Robinson sitting on the couch,
5 you couldn't identify who that other person was, correct?
- 6 A: I couldn't tell on him.
- 7 Q: Couldn't tell who it was. What kind of car did Mr.
8 Durant have?
- 9 A: A Cadillac.
- 10 Q: Cadillac. Did he have a motorcycle?
- 11 A: I think he used to; I'm not sure if before me he had it
12 but at the time I was with him, no.
- 13 Q: Didn't have a motorcycle at that time?
- 14 A: No.
- 15 Q: But he did have a Cadillac?
- 16 A: Yes.
- 17 Q: And Alex Robinson did go over to [REDACTED], correct?
- 18 A: I've seen him come over, yeah.
- 19 Q: No doubt he was there before?
- 20 A: Not living there, no.
- 21 Q: And Mr. Durant, you're aware that he's a brother of Mr.
22 Robinson, correct?
- 23 A: Yes.
- 24 Q: And Mr. Durant wrote an affidavit trying to clear you of
25 charges, correct?

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- 1 A: Correct.
- 2 Q: Were you aware when Mr. Robinson got arrested on these
3 charges?
- 4 A: No, I wasn't aware until after -- like awhile when I got
5 out.
- 6 Q: After you got out?
- 7 A: Uh-huh (affirmative response).
- 8 Q: A couple of weeks after you got out, a couple of months,
9 when?
- 10 A: Well, whenever I got out, his brother told me what
11 happened.
- 12 Q: Oh, so Mr. Durant knew -- when did you get out? How long
13 were you in jail?
- 14 A: About two weeks, maybe. September 25th, I got out
15 October 13th, I think.
- 16 Q: So, when you got out October 13th, Mr. Durant knew his
17 brother was locked up?
- 18 A: Yes.
- 19 Q: On trafficking charges?
- 20 A: Yes.
- 21 Q: And he told you this?
- 22 A: How would he not know, it's his brother.
- 23 Q: Exactly. And he wrote an affidavit just for you,
24 correct?
- 25 A: Yes.

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TIFFANY SMITH - REDIRECT BY MS. BASS

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1 Q: Thank you, no further questions.

2 MS. BASS: Your Honor, just a couple.

3 THE COURT: Ms. Bass, direct your recross only on those
4 issues that were initially brought up on cross examination.

5 MS. BASS: Yes, sir.

6 THE COURT: Thank you, ma'am.

7 REDIRECT EXAMINATION OF TIFFANY SMITH BY MS. BASS:

8 Q: When you were arrested on March 5th of '09, who were you
9 two co-defendants?

10 A: Gil and Kenneth.

11 Q: On March 5th of '09?

12 A: Darlene Ford and Antwan Bryant.

13 Q: Darlene Ford and Antwan Bryant.

14 A: Correct.

15 MS. BASS: No further questions, Your Honor; thank you.

16 THE COURT: You may come down. Thank you.

17 MS. BASS: Your Honor, we'd ask that she be relieved from
18 her subpoena.

19 THE COURT: She is relieved.

20 MS. BASS: Thank you so much.

21 (REPORTER'S NOTE: Witness leaves the witness stand.)

22 THE COURT: Call your next witness, please.

23 MS. BASS: Just one moment, Your Honor.

24 Your Honor, Defense rests.

25 THE COURT: All right. Was there anything in reply?

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MOTIONS

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1 MR. ROBINSON: Yes, sir.

2 THE COURT: I accept that decision and I will charge the
3 jury accordingly. All right.

4 MS. BASS: Thank you, Your Honor.

5 THE COURT: You may be seated. Now, any motions on
6 behalf of the State?

7 MR. RICHARDSON: None, Your Honor.

8 THE COURT: On behalf of the Defense?

9 MR. HILLIARD: Judge, in regard to the testimony which
10 was previously offered regarding the chase, we would again
11 move to exclude that testimony. As you will recall, the
12 police officer who testified -- the video, you recall, the
13 video was a video of him going to the scene and then there was
14 something where there was a wreck and somebody jumped out and
15 ran away but he did not recollect the car tag, he did not
16 recollect the car make or model and in that regard, we would
17 move at this time that never having been tied together to
18 excuse that testimony.

19 THE COURT: No, sir. I think given the totality of all
20 the testimony involved, that was for the jury to consider
21 whether or not the Defendant was involved. There's sufficient
22 testimony if believed by the jury.

23 MR. HILLIARD: Yes, sir, and ---

24 THE COURT: So I would respectfully deny that motion.

25 MR. HILLIARD: And also, Judge ---

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MOTIONS

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1 THE COURT: Of course, we've already heard it; we've
2 heard that motion before.

3 MR. HILLIARD: Except for they could've tied it together
4 in some form or fashion connected to the car, they never did
5 but in any event, it is more prejudicial than probative. I
6 understand your ruling and ---

7 THE COURT: Well, they saw a picture of the car. They
8 could identify it by the pictures themselves of a black
9 automobile. But that's already in evidence so I'm not sure
10 what your motion is.

11 MR. HILLIARD: All right, sir. Well, in -- my motion,
12 Judge, at this point is it was -- I understand that it was in
13 evidence, we asked that it not be placed into evidence and it
14 was my understanding, perhaps incorrect, that they would tie
15 it together in some form or fashion connected to the case.

16 THE COURT: Well, I think it's in evidence and -- yes,
17 sir; do you want to respond to that?

18 MR. RICHARDSON: Your Honor, I can tie it together. The
19 officer that took the failure to stop video said he didn't
20 recall the make and model but then Sergeant Donald said he saw
21 the video, he chased the car from J. Reuben Long, that was the
22 same car in the video.

23 THE COURT: That was my ---

24 MR. RICHARDSON: That ties it together.

25 THE COURT: No, it's going in to the jury. It's in

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MOTIONS

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1 evidence; I've admitted it. I understand what your position
2 is. Do you have any other positions?

3 MR. HILLIARD: The other motions that we would make, Your
4 Honor, are to dismiss the case. We renew our previous motions
5 as to the exclusions of other evidence. I understand Your
6 Honor's ruling and we are renewing our motions for the purpose
7 of the record.

8 THE COURT: Considering your motion in favorable light to
9 the nonmoving party, the evidence if believed shows the
10 following if believed, that being for the jury. First, that
11 this Defendant resided at that location. Secondly, the
12 evidence shows if believed that the drugs were found in his
13 bedroom occupied by him and his girlfriend. Thirdly, the
14 evidence shows if believed that the quantity of cocaine in
15 question was found in his britches. And lastly, the evidence
16 if believed by the chemist shows that quantity was within the
17 amount as alleged in the indictment. All of which is for the
18 jury to determine as finders of the facts and your motion
19 therefore is most respectfully denied.

20 MR. HILLIARD: Thank you, Your Honor.

21 THE COURT: All right. Let's take a short break and in
22 accordance with agreement of counsel, I'm going to charge the
23 jury prior to argument.

24 Anything further from the State?

25 MR. RICHARDSON: Your Honor, the only charge I would see

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CHARGE OF THE COURT

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1 THE COURT: I do.

2 MR. HILLIARD: All right, sir. And in that regard, it
3 has the address on the face of the indictment is the address
4 of the event where the search warrant was. Our position is
5 that's not where our client lives. The prosecution put that
6 address on the fact of the indictment, we didn't have any
7 choice about that. We would object to that part of it going
8 to the jury. Certainly, the body of the indictment is the
9 body of the indictment. As to the face of the indictment, we
10 would object.

11 THE COURT: I'm gonna have the Madame Clerk white that
12 part out.

13 MR. RICHARDSON: Without objection.

14 THE COURT: Madam Clerk, let's white that out.

15 MR. HILLIARD: Thank you, Judge.

16 THE COURT: And I'll let you observe it before I send it
17 in.

18 MR. HILLIARD: Thank you, Judge.

19 (RECESS.)

20 *****OFF THE RECORD*****

21 (On the Record.)

22 THE COURT: Bring in the jury please.

23 (REPORTER'S NOTE: The jury returns to the courtroom.)

24 THE COURT: Madame Foreman, ladies and gentlemen, as you
25 now know, I have ordered lunch for you today such that we can

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CHARGE OF THE COURT

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1 proceed with the process. This will be the last case this
2 week for your consideration. As a result of that, I know
3 you're anxious to conclude the deeds and get home; so I've
4 ordered lunch for you to save an hour, hour and a half of your
5 time.

6 Ordinarily in the trial of a case, at this stage, we have
7 summation by distinguished counsel and then I charge the law.
8 I've been on the bench twenty-seven years and jurors have told
9 me during that period of time, Judge, I wish you would've told
10 us what the law was even before I heard their arguments, I
11 believe I could've followed their position better had I known
12 what the law was. And that makes absolute sense to me. And
13 so for the last few years, I charge the law ahead of time as I
14 do now by and with the consent of counsel of the State and of
15 the Defendant's.

16 Now, I charge you and will charge you at a later moment,
17 this Defendant in this case as is his absolute right elected
18 not to testify. Our constitution provides for that, that is
19 your right, that is my right, that is his right. There is
20 absolutely no adverse inference to be derived from the fact
21 that this Defendant did not testify. The fact that he did not
22 testify cannot even enter into your deliberations in the jury
23 room. He has that constitutional right of no adverse
24 inference against him for exercising that right. Madame
25 Foreman, I instruct you that you must not permit that question

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CHARGE OF THE COURT

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1 to even enter into your discussions in the jury room. He has
2 that absolute right.

3 Now, this indictment charges this Defendant Alex Lorenzo
4 Robinson with trafficking in the amount of cocaine in the
5 amount of 100 grams or more but less than 200 grams. Your
6 elected legislature met and passed a statute that says an
7 individual who possesses that quantity of cocaine, actual or
8 constructive is guilty of trafficking in cocaine. To this
9 charge, this Defendant specifically pleads not guilty thereby
10 placing the burden of proof upon the State of South Carolina
11 of proving him guilty if they can to your satisfaction by
12 evidence beyond a reasonable doubt.

13 I told you at the beginning of this process and I
14 emphasize again to you, this defendant and all defendants in
15 South Carolina are brought to trial upon an indictment such as
16 I hold in my hand. This indictment simply contains the
17 allegations as against this defendant, not proof but
18 allegations only and the State would prove them beyond a
19 reasonable doubt. To these allegations and they are
20 allegations only, this defendant specifically pleads not
21 guilty. Allegations in this complaint is absolutely no
22 evidence whatsoever. Evidence if any comes from this witness
23 stand under oath and from such other matters that may have
24 been introduced in the trial of this case by evidence. And
25 Madame Foreman, as to those matters that I have permitted in

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CHARGE OF THE COURT

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1 evidence, they will be with you in the jury room. I have
2 jokingly said that we've used these pictures to the extent we
3 bout wore them out but they will be with you in the jury room.

4 Now, this defendant, as I continue to emphasize to you,
5 has pled not guilty to this indictment and to the allegations
6 it contains and that plea puts the burden of proof upon the
7 State of South Carolina to prove him guilty if they can to
8 your satisfaction beyond a reasonable doubt.

9 I charge you that a person charged with committing a
10 criminal offense in South Carolina is never ever required to
11 prove himself innocent. I charge you that it's an important
12 rule of law that the defendant in a criminal trial, no matter
13 how serious the charge may be will always be presumed innocent
14 of the crime for which the indictment was issued unless his
15 guilt has been proven by evidence satisfying you of that guilt
16 beyond a reasonable doubt. This presumption of innocence does
17 not end when you begin your deliberations but it accompanies
18 the defendant throughout the trial until you have reached a
19 verdict of guilt based on the evidence satisfying you of that
20 guilt beyond a reasonable doubt.

21 It has been said by many scholars that the presumption of
22 innocence is like a robe of righteousness placed about the
23 shoulders of any defendant which remains with the defendant
24 until it has been stripped from the defendant by evidence
25 satisfying you of the defendant's guilt beyond a reasonable

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1 doubt.

2 This presumption of innocence is not merely legal theory,
3 it is not just a legal phrase, but it is a substantial right
4 to which this defendant and every defendant is entitled to
5 unless you the jury are satisfied from the evidence of the
6 defendant's guilt beyond a reasonable doubt.

7 Let's discuss for a moment the term reasonable doubt.
8 What is reasonable doubt in the law? A reasonable doubt is
9 the kind of doubt that would cause a reasonable person to
10 hesitate to act.

11 The State has the burden of proving the defendant guilty
12 beyond a reasonable doubt and some of you may have served as
13 jurors in civil cases where you were told that it is only
14 necessary to prove that a fact is more likely true than not or
15 by the greater weight of evidence. In criminal cases, the
16 State's proof must be more powerful than that. It must be, as
17 I continue to say to you, beyond a reasonable doubt.

18 Now, Madame Foreman and ladies and gentlemen, proof
19 beyond a reasonable doubt is proof that leaves you firmly
20 convinced of the defendant's guilt. There are very few things
21 in this world that we know with absolute certainty and in
22 criminal cases the law does not require proof that overcomes
23 every possible doubt. If, based on your consideration of the
24 evidence, you are firmly convinced that the defendant is
25 guilty of the crime charged, you must find that defendant

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1 guilty. If on the other hand, you think there is a real
2 possibility that the defendant is not guilty, you must give
3 him the benefit of that doubt and find him not guilty.

4 Now, I remind you that during the trial of this case, you
5 and I have certain duties to perform. As the Trial Judge, it
6 is my responsibility to preside over the trial of this case
7 and I also have the duty to rule on the admissibility of the
8 evidence offered during the trial of this case. You are to
9 consider, Madame Foreman and ladies and gentlemen, only the
10 competent evidence before you. You must disregard any
11 testimony that I may have struck from the trial of this case.
12 You are to base your verdict on the law and evidence heard in
13 this case and from no other source.

14 I have the additional duty to charge you the law
15 applicable to this case. As the presiding judge, I am the
16 sole judges of the law in this case. It may be that you or I
17 might disagree with what the law is or ought to be but for the
18 purposes of this case under your oath you are required to
19 accept the law as I give it you remembering at all times as
20 finders of the facts, you take the facts as you twelve
21 determine they are beyond a reasonable doubt and apply those
22 facts to the law of this case and thereafter reach a verdict
23 or either not guilty or guilty. And in that regard, Madame
24 Foreman, I will have for you an appropriate verdict form.

25 Now I want to emphasis to you as I have previously said

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1 to you, you and you alone are the sole and only judges of the
2 facts in this case. I am not permitted to have a factual
3 opinion about any issue and I certainly have none. I tell you
4 that if any ruling, mannerism, just -- judgment of mine might
5 tend to indicate to any of you how I feel about any factual
6 situation between these litigants, please disregard that. I
7 am not entitled to a factual opinion and I absolutely have
8 none. You twelve and you alone in this wide world are the
9 sole and only finders of the facts with regards to the issues
10 in this case.

11 Now, ladies and gentlemen, there are two types of
12 evidence which are generally presented during a trial, direct
13 evidence and circumstantial evidence. Direct evidence is the
14 testimony of a person who claims to have actual knowledge of
15 the facts such as an eye witness. It is evidence which
16 immediately establishes the main fact to the proved.

17 Circumstantial evidence is proof of a chain of facts and
18 circumstances indicating the existence of a fact. It is
19 evidence which immediately establishes collateral facts from
20 which the main fact may be inferred. Circumstantial evidence
21 is based on inferences and not on personal knowledge or
22 observation.

23 I tell you Madame Foreman and ladies and gentlemen, the
24 law makes absolutely no distinction between the weight or
25 value to be given to either direct or circumstantial evidence.

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1 Nor is a greater degree of certainty required of
2 circumstantial evidence than direct evidence. You should weigh
3 all of the evidence in the case. After weighing all of the
4 evidence, if you are not convinced of the guilt of the
5 defendant beyond a reasonable doubt, you must find the
6 defendant not guilty.

7 Necessarily, you must determine the credibility of the
8 witnesses who have testified in this case. Credibility simply
9 means believability. It is your duty as jurors to analyze and
10 to evaluate the evidence and determining which evidence
11 convinces you of its truth.

12 In determining the believability of witnesses who have
13 testified in this case, as I indicated earlier, you may
14 believe one witness against that of many or the other way
15 around. Obviously you do not determine the truth or falsity
16 of a matter by counting the witnesses who may have testified
17 on one side or the other. In other words, you may accept
18 totally or reject totally or accept in part and reject the
19 other in your discretion if you choose as the sole and only
20 finders of the facts in this case.

21 As I told you earlier, we use different means of
22 determining whether or not a witness is telling us the truth
23 or a false. Sometimes we in our experiences in life we
24 observe the demeanor of a witness. As an example, we always
25 ask ourselves how did they come to know about the facts they

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1 are telling us. Sometimes we ask ourselves, hey, is there
2 some reason wants me to believe one thing or another. You
3 have other methods using common sense that you've observed
4 during your life's experiences. The point I make to you is
5 that you and you alone judge every witness's credibility and
6 believability.

7 Now, I designated a witness as an expert witness and
8 qualified her as an expert. Let me talk about that a moment.
9 The rules of evidence ordinarily do not permit witnesses to
10 testify to opinions or conclusions. An exception to this rule
11 exists for witnesses we call experts. A witness who, by
12 education and experience, has become an expert in some area or
13 some art, science or profession or calling may state an
14 opinion relevant and material to the matter in which the
15 plaintiff claims to have been an expert and they give their
16 reasons for that opinion.

17 You should consider an experts opinion received in
18 evidence in this case and like any other evidence give it the
19 weight you think it deserves. If you decide the opinion of an
20 expert witness is not based on sufficient education experience
21 or if you conclude that the reasons given in support of the
22 opinion are not sound that the opinion is outweighed by other
23 evidence, you may if you choose disregard such evidence.

24 An expert witness, ladies and gentlemen, is to be given
25 no greater weight than that of other witnesses simply because

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1 the witness is an expert. You are not required to accept an
2 expert's opinion if you do not conclude it was proper under
3 the circumstances.

4 With regards to a witness with a prior record, I charge
5 you as follows: A person who has a past criminal record is
6 competent to testify during a trial. The past record does not
7 affect the ability of that witness to testify. The past
8 record may only be considered by you if at all in determining
9 the witness's believability or credibility. Remember, you are
10 the sole judges of the facts in this case and to the
11 believability of any and all witnesses.

12 I instruct you at the beginning and I do so again as
13 follows. I instruct you and emphasize that the fact that the
14 Defendant did not testify is not a factor to be considered by
15 you in any way in your deliberations and in your consideration
16 of the question of the guilt or the innocence of the
17 Defendant. It must not be considered by you in any manner
18 whatsoever as I told you before, this defendant and all
19 defendants has the absolutely constitutional right to remain
20 silent and the assertion of this right must not be considered
21 by you in your deliberations in any way whatsoever.

22 In this case, Madame Forman, ladies and gentlemen, there
23 are allegations of spoliation or destruction of evidence. The
24 State not only has the burden of proof of guilt but it also
25 has the burden of producing evidence which could establish the

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1 innocence of the defendant. When evidence is lost or
2 destroyed by a party, you may if you choose infer the evidence
3 which was lost or destroyed by that party would have been
4 adverse to that party. If you find first that the evidence
5 was spoiled or destroyed and if you further find that the
6 evidence could have established the innocence of the
7 defendant, you may then consider these facts in deciding
8 whether or not the State has met its burden.

9 As I told you earlier and I'll tell you again, the
10 defendant is charged with trafficking in cocaine in the amount
11 of 100 grams or more but less than 200 grams. The State must
12 prove beyond a reasonable that the Defendant knowingly had in
13 his possession this quantity of cocaine and they must prove it
14 beyond a reasonable doubt. I use the word in his possession
15 either actual or constructive and I will define those terms
16 for you. The State must also prove beyond a reasonable doubt
17 that the amount of the cocaine or any mixture thereof
18 contained cocaine was 100 grams or more but less than 200
19 grams.

20 There are certain elements that the State must prove
21 beyond a reasonable doubt before the defendant can be
22 convicted and found guilty. Each of these elements must be
23 found by you, the jury, beyond a reasonable doubt. First, it
24 must be found that the defendant did possess a quantity of
25 cocaine at the time and place as alleged in the indictment.

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1 Possession requires that a person be in the actual or
2 constructive possession of the controlled substance with
3 actual knowledge of its presence. Actual possession of a
4 controlled substance is this: When the controlled substance
5 is found in the actual physical custody of the person charged
6 with the indictment. Constructive possession of a controlled
7 substance exists when the person although not in actual
8 physical possession of the controlled substance exercises
9 dominion and control over the controlled substance or has the
10 right to exercise dominion and control over the controlled
11 substance. A person, ladies and gentlemen, has possession of
12 a controlled substance within the meaning of the law when he
13 has the power and intent to control its deposition or use.

14 It must be shown that the defendant had possession of the
15 controlled substance, actual or constructive, and that the
16 defendant knew he had the controlled substance in his
17 possession, actual or constructive. Knowledge of the presence
18 of the controlled substance by the defendant is essential.

19 The defendant's knowledge and possession may be inferred
20 if the substance was found on the premises or property under
21 his control. You, as the jury, are free to accept or reject
22 this permissive inference of knowledge and possession
23 depending upon your view of the evidence.

24 Secondly, you must find that the substance was cocaine
25 and you must find that beyond a reasonable doubt. I charge you

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1 that cocaine is a controlled substance.

2 Third, you must find that the quantity of the controlled
3 substance was 100 grams or more but less than 200 grams and
4 with all of the issues that the State must prove, that issue
5 must be proven beyond a reasonable doubt.

6 Now, ladies and gentlemen, you have been selected as
7 fair, impartial jurors, sworn to impartially try and determine
8 the facts of this case and when you comply with your oath to
9 do so then no one will have a right to criticize your verdict
10 and you would have fully discharged your duty as jurors. You
11 should not be influenced by opinions or expressions of
12 opinions if any which you may've heard on the outside but you,
13 ladies and gentlemen, are to decide this case according to the
14 testimony that you have heard from the lips of the sworn
15 witnesses along with any other evidence in the case that I
16 have introduced for your consideration.

17 Now, Madame Foreman, I have prepared for you a verdict
18 form. There's no significance by the way in which I list
19 them, I could've just as easily turned them around the other
20 way. There are two verdict forms and each one of them of
21 course must be found by you unanimously, could not be found by
22 a majority, obviously not a minority. It must be found by the
23 -- The first says, we the jury unanimously find the Defendant
24 Alex Lorenzo Robinson guilty of trafficking in cocaine of 100
25 grams or more but less than 200 grams; or we the jury

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1 unanimously find the Defendant Alex Lorenzo Robinson not
2 guilty. Whatever your verdict is, it would be unanimous, you
3 would sign your name on the line indicated and date it, let
4 the bailiff know and we will accept it here.

5 I'll let you go to the jury room just a moment and I'll
6 be -- I'm going to send in also the indictment itself which as
7 you understand is not evidence. I've sent this form in just
8 to help you as a guideline but once you've reached a verdict,
9 please return to the back of the indictment and under verdict,
10 write whatever your verdict was, please sign your name.

11 I'll let you go to the jury room just a minute. I'll be
12 calling you back for final summation of counsel. Thank you.
13 (REPORTER'S NOTE: The jury retires to the jury room.)

14 THE COURT: Outside the presence of the jury, any
15 exceptions or additions to the charge?

16 MR. RICHARDSON: No, sir, Your Honor.

17 THE COURT: What says the Defendant?

18 MR. HILLIARD: None, Your Honor.

19 THE COURT: All right. You want to take a very short
20 break and ---

21 MR. HILLIARD: Before we begin, that would be
22 appreciated, Judge. Thank you.

23 THE COURT: Let me ask you this: Will there be one or
24 two arguments by the State?

25 MR. RICHARDSON: Just one, Your Honor, I'll go last.

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1 THE COURT: Does that suit y'all?

2 MR. HILLIARD: I'd rather go last but that's my only
3 choice.

4 THE COURT: Okay, that's -- well, they'll be -- you will
5 start first as the law requires and they'll have the
6 completion.

7 MR. HILLIARD: Yes, sir.

8 THE COURT: Which one will argue?

9 MR. HILLIARD: Me, Judge.

10 MS. BASS: I lost that battle, too, Your Honor.

11 THE COURT: That's fine.

12 MR. HILLIARD: Thank you, Judge.

13 THE COURT: All right. Thank you. Let's take a short
14 break and get started again, please.

15 MR. RICHARDSON: Thank you, Judge.

16 (RECESS.)

17 *****OFF THE RECORD*****

18 (On the Record.)

19 THE COURT: Bring the jury in.

20 (REPORTER'S NOTE: The jury returns to the courtroom.)

21 THE COURT: Madame Foreman, under our rules,
22 distinguished counsel for the Defense would proceed first
23 followed by the Solicitor. And we'll have lunch by then and
24 we begin deliberations.

25 All right, sir. You may proceed, sir.

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1 CLOSING ARGUMENT BY MR. HILLIARD:

2 MR. HILLIARD: Thank you, Judge.

3 Ladies and gentlemen, I don't mind telling you that as I
4 stand before you at this point in the trial that I am very,
5 very afraid. The reason for that is that there's real
6 possibility that me standing here right now and talking to you
7 for the next -- it's only really gonna be a few minutes -- is
8 going to have a substantial impact on Alex Robinson's life.
9 He has Ms. Bass and myself as his attorneys and to some degree
10 he's stuck with us and that -- if I have done anything that is
11 offensive to you or is -- makes you feel bad in some way or if
12 Ms. Bass, as nice as she is, has done something that has
13 offended you or you think we've done something wrong, please
14 hold that against me or her and when you go home, as the Judge
15 said, and speak with your spouse or significant other, you can
16 say well those lawyers did this or that and I thought it was
17 bad but don't hold it against Alex Robinson because we're his
18 lawyers and we are here to speak on his behalf.

19 One of the things that the Judge said in his charge that
20 I'd like to talk about at the outset, when he was talking
21 about reasonable doubt is -- and I want you to think about
22 this while I'm talking -- a real possibility that he is not
23 guilty, a real possibility that he is not guilty. When the
24 Solicitor in the beginning was talking with you in the very,
25 very beginning of this case, when we first sort of got to know

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1 each other, he was talking about he was down with his son, I
2 believe it was and they were connecting the dots and it was
3 Sponge Bob and he compared his job to that. And as we go
4 through this conversation, I want you think about that. I
5 would submit to you as we get through this that the dots are
6 not connected.

7 Remember that, as the Judge told you, Alex Robinson is
8 presumed to be innocent. That means as he sits right now, he
9 is innocent, he is innocent. It is the responsibility of the
10 State if they bring us all into court to show proof. It is
11 their job to show proof, to investigate and bring forth
12 evidence that will have the opportunity to show you beyond a
13 reasonable doubt that in fact Alex Robinson, a living,
14 breathing human being is in fact guilty of what?

15 Now, here we are today and have been for several days
16 talking about a whole lot of stuff but when the Judge got to
17 the part of where -- what's in the indictment, all right, and
18 that is what are your choices? He has either proved by
19 government's evidence guilty or he is not proved by the
20 government's evidence guilty beyond a reasonable doubt of
21 what? What is it that they say that he did? What is it that
22 you can find him guilty of?

23 State's Exhibit Number Twenty-nine, and you'll have this
24 back in the jury room with you, State's Exhibit Number Twenty-
25 nine has in it a number of things. I'm going to ask you to

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1 remember that Alex Robinson is not charged with having these
2 three blue pills, these three blue pills right here that were
3 identified as street name Ecstasy. Ecstasy, you will recall
4 what Gil Yakoel was originally charged with trafficking at
5 another time. He was not charged with having those pills and
6 he's not charged with this block brick thing here, either,
7 he's charged with having this powder, that's all that he is
8 charged with; that's your choices either guilty or not guilty
9 of possessing that powder, the State with the burden of proof.
10 So, here we are in the trial. So, what does guilty mean?
11 I know when the Judge goes through that and he talks about
12 either guilty or not guilty and he talks about possession,
13 because that's what the trafficking thing is. The trafficking
14 thing is possession of a certain amount of an illegal
15 substance that the legislature has decided warrants a name all
16 its own and that is trafficking. Possession, what does
17 possession mean? One of the things that the Judge said about
18 possession -- and I ask you to remember this because it's, it
19 is confusing. If you -- if I owned a house and Ms. Bass is
20 living in that house and in Ms. Bass' bedroom she has this, I
21 have actual right to go in my house and I have actual right,
22 perhaps, to go in that bedroom. The house belongs to me, it's
23 a bedroom and I have a right under some renter agreement or
24 some sort of thing to go in the house and see what's in there,
25 that does not mean that I am in possession -- just because I

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1 have the right to go in the house and the right to go in the
2 closet doesn't mean that I have possession of what's in there.
3 Possession under the law requires as the Judge said in the
4 very beginning of his charge, knowingly, knowingly. So, the
5 requirement is that it be proved to you beyond a reasonable
6 doubt to the satisfaction of each and every one of you that in
7 fact Alex Robinson knew, knew that this powder was in that
8 closet. If there is a real possibility that this powder was
9 in that closet and he didn't know it, he's not guilty, that's
10 what the Judge said. If there is a real possibility this
11 powder was in the closet and he didn't know it then he is not
12 guilty. Okay?

13 Now, so the government, the State, perhaps doing the best
14 they can under the circumstances, what do they do? Well, they
15 are connecting the dots. What else did the Judge say? What
16 else did the Judge say? At the time and place as alleged in
17 the indictment, that's another requirement that they have to
18 meet. That is he had to know it was in the closet and he had
19 to know it was in the closet at the time and place as alleged
20 in the indictment. So, they have the responsibility under the
21 evidence as they connect the dots to show that he knew that it
22 was in the closet at the time that they say, on the occasion
23 that they say in the indictment that it was there. That's
24 another part of their burden.

25 So, back to what they're doing, Alex Robinson wasn't

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1 there. They pick -- they got a search warrant, right?
2 There's a search warrant. They got a search warrant. The
3 State, the police, they select when they -- and the talked
4 about that some in the testimony, they selected the time that
5 they wanted to execute this search warrant. They selected the
6 day and the time that they wanted to go and hit this house and
7 spread out and do the things that they talked about, knock in
8 the door and go inside and scatter out and do that. They
9 selected the date and the time when they went there. Alex
10 Robinson was not there. He wasn't there. They picked the
11 time, they picked the day; he wasn't there, right. So, we got
12 that part. Now, the police officer says we're gonna charge
13 who's in the room with what's in the room. That's what the
14 police man says. All right. So, you've got two people in the
15 front room and one person in the back room, Gil is the person
16 in the back room. She's already been charged with trafficking
17 drugs on one occasion and now she's trafficking drugs on a
18 second occasion. What in the world is she gonna do? What's
19 she gonna do? She's gonna do what it was that she did and
20 we'll talk more about that later.

21 But you know, when we think about the case and the
22 responsibility of the police, what did they bring you? I
23 mean, they started off in the case and they didn't -- they
24 didn't take much. You know, if you're trying to prove
25 something as serious as trafficking in cocaine, if that's what

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1 you're trying to prove, you're trying to show that somebody is
2 actually engaged in trafficking cocaine, don't you collect up
3 the stuff that's there? I mean, what did they bring you?
4 They brought you this thing. What is this; something that's
5 in the middle room that you can look out the window with.
6 Well, hello, folks, there's a guy in the front room with a
7 gun. Where's the gun? They didn't bring the gun; they gave
8 the gun to somebody at some point in conjunction with a rule
9 that they have about guns, right. So, they didn't bring you
10 the gun but there's a guy in the front room with a gun, right,
11 and he's got a TV to see who's coming. Does that make sense?
12 Sure.

13 What else? Well, the guy in the front room, he's got
14 some little bags of cocaine. They guy in the front room,
15 right? What does that -- you know, that doesn't mean anything
16 about Alex, right? You know, beyond a reasonable doubt, a
17 reasonable possibility he's not guilty, real possibility he's
18 not guilty just because there's this. What?

19 What else do they have? Well, what else do they have?
20 They got some stuff they threw away, they threw it away. And
21 what did they tell you about what they threw away? They don't
22 know what it is. How can -- you know, here's the thing,
23 right, the burden of proof is on the government. The
24 presumption of innocence is on the Defense. They go to a house
25 where they say is his house. They gather up the stuff that

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1 they say proves it's his house and they throw it away, right?
2 But we don't know what's there, you don't know what's there.
3 There is no way anybody on earth is ever gonna know what that
4 was. Maybe that would've been helpful but we don't have the
5 burden; they have the burden. They threw away the evidence.
6 They don't even know what they threw away. They don't know
7 what they threw away.

8 Well, and some stuff they gave away, right, some stuff
9 they gave away. They gave it back to whoever came for it.
10 If, you know, return to owner, they don't know what they gave
11 away back to the owner. Some stuff was destroyed on purpose,
12 some stuff was destroyed by accident and some stuff was given
13 back to whoever it was that it belonged to and what they want
14 you to convict Alex Robinson on is some pictures, a bag of
15 dope, and a BB&T account deposit slip from January the 7th of
16 2008. That's all you've got.

17 If you don't know the answer to the question he's not
18 guilty, this is not an opportunity for you to speculate, to
19 think about it, to investigate, to try to figure it out. If
20 you don't know the answer to the question, ladies and
21 gentlemen, then he is in fact not guilty. They have failed --
22 and they can fail by not preserving the evidence, they can
23 fail by not collecting the evidence. What about that? What
24 about that? You know, there's a photograph -- you're gonna
25 have these with you in the back. You're gonna have these in

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1 the back and that's State's Exhibit Number Twenty and, you
2 know, the police officer testified that in his view that those
3 were man jeans that he pulled down out of the top of the
4 closet and the that the dope fell out when the jeans fell out
5 and I believe that Gil -- and let me say this before I even
6 get any further. When I start talking about what the evidence
7 is, there is -- there are twelve of you that will be
8 discussing this and there's only one of me. I might remember
9 the evidence differently than you remember the evidence. It
10 may be something that I say and you think to yourself, well,
11 that's not what that person said; that person said something
12 else. I will pledge to you that I am not trying to mislead
13 you. If I am mistaken, I am mistaken and I will apologize for
14 that. If -- whatever the evidence is is what you guys it is,
15 not what I say it is and that's true for me and of course the
16 prosecutor. But I recollect that at some point in time Ms.
17 Yakoel said that she felt like the jeans in State's Twenty
18 were Alex Robinson's jeans. Now, if you look at Nineteen and
19 Twenty, and I will submit that if you look at them carefully,
20 that those may not even be the same pair of jeans, those may
21 not even be the same pair of jeans if you look at these -- if
22 you look at these photographs carefully. Of course, had the
23 police collected the jeans, there is a possibility as was
24 indicated that we could test the jeans, we could see who had
25 been wearing the jeans, we could see who the jeans were.

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1 Perhaps we could look at it and at least see what size the
2 jeans were to see if they would fit or not. You know, if we
3 had these jeans, we could do something with them, make a
4 legitimate and reasonable determination about the credibility
5 of Gil I've-got-a-deal Yakoel. But we don't have the jeans so
6 we can't do anything with them and you are forced to make a
7 decision without that piece of evidence which I would submit
8 to you would have been very beneficial, helpful. They didn't
9 collect the jeans.

10 I acknowledge that I am embarrassed to get to this part
11 of my conversation but I will, I will say it and live with it.
12 I don't want Alex to date my daughter. He does not have a
13 lifestyle that is consistent with what I would like for my
14 family. He is a young African-American male. I've come to
15 know him and I like him but I don't want him to date my
16 daughter. Now, when we were picking jurors the truth is I was
17 hoping that we would have some African-Americans on the jury
18 but as it is, we don't. I don't mean by that to suggest that
19 there is any prejudice in any form or fashion on any member of
20 the jury. I will only ask that you remember -- you know, this
21 is -- it's tough to be on a jury, it's hard to do what the law
22 requires, to sit here and to judge a case based only on the
23 evidence and to put aside anything that you might otherwise
24 think. The thing that I will ask you to remember and to keep
25 in your mind is that Alex Robinson is not on trial for his

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CLOSING ARGUMENT BY MR. HILLIARD

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1 lifestyle. He is not on trial for his -- the things that he
2 does. You know, one of the things that Ms. Yakoel said, she
3 said he's a good dope dealer. Right? That's what she said,
4 she said he's a good dope dealer. She didn't like anything
5 about him but she said the only thing he was that good at was
6 being a good dope dealer but she also said that she didn't
7 know anything about dope dealing and that sort of thing. But
8 remember this, remember this, that's not what he's on trial
9 for. Without regard to whether you think that's true or false
10 or anything else, remember what the Judge said, remember what
11 the Judge said, knowingly had actual or constructive
12 possession of this right here at the time and place as alleged
13 in the indictment. That's it. That is all he's on trial for,
14 that is it, that's your decision, that's all.

15 What else is it that could've happened and didn't in this
16 case? Now, we know for a fact, the people in the front
17 bedroom pled guilty to something, right? There is a
18 photograph, State's Exhibit Number Thirteen, they put it into
19 evidence, that's the little bags of dope that the front
20 bedroom fellow pled guilty to, right? And then we got State's
21 Exhibit Number Twenty-five, that is the powder that we're on
22 trial about today. Whose powder is that? Whose powder is
23 that?

24 The chemist that they sent this to over at the Horry
25 County Police Department said that there is a way to tell if

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CLOSING ARGUMENT BY MR. HILLIARD

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1 those two things came from the same -- but these little
2 baggies with the cocaine in these little baggies came from the
3 same bag as the big bag. What about that? What would that
4 mean to you? Would that mean that the guy in the first case
5 was the possessor of the big bag as well? That he kept his
6 little bags for sale in a spot different than he kept the big
7 bag? It would, I submit to you make sense.

8 Why the police said to the people when they came in the
9 house, well, whatever room you're in, that's the dope. What
10 the heck is that? Whatever room you're in that's the dope
11 you've got. Does that mean that if you were in the front
12 bedroom, that you can't have the dope in the back bedroom? It
13 sort of means that, right, if you're in the front bedroom you
14 can't have the dope that's in the back bedroom but what about
15 if you're not even there? What about that? You're not even
16 there. I guess that doesn't matter.

17 They made a deal, they made a deal with Gil. But before
18 I get into that let me just point out a couple of things,
19 other things that they didn't do in connection with
20 opportunities that they had to show you whose drugs those
21 really are. Fingerprints, fingerprints, and a police officer
22 said -- I wrote it down somewhere but I'm not very good with
23 taking notes. The police officer said when the Solicitor said
24 -- when the Solicitor asked him, well, did you -- how often do
25 you take fingerprints on bags of dope? I submit to you that

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CLOSING ARGUMENT BY MR. HILLIARD

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1 the Solicitor expected him to say never but he didn't, he said
2 we seldom take fingerprints off of bags of dope. And then he
3 said because most of the time you can't get a fingerprint off
4 a bag of dope. Well, hey, sometime -- most of the time you
5 can't, that also necessarily means sometimes you can. So
6 there is a great deal of controversy in this case about who
7 that sack of dope belongs to. So, if they wanted to convict a
8 person that wasn't even at the house, shouldn't they have
9 looked for some fingerprints on the bag of dope or something,
10 some fingerprints on the door to the closet or some
11 fingerprints on something, on something? Not a single
12 fingerprint taken in this case. There's no DNA; they didn't
13 do any DNA testing on anything in this case, nothing, no
14 serology, no trace evidence, they didn't look at any hairs,
15 they didn't look at anything. All they did, all they did in
16 connection with that, they went to the room, they arrested the
17 girl, they got a warrant for him and that was the end of the
18 case except for throwing away some of the evidence. They
19 didn't collect anything, nothing.

20 Ladies and gentlemen, don't be fooled by the girl with
21 deal. Now, she presented, she came into court with her family
22 and her lawyer and she walked up there and she said I don't
23 have a deal, I don't know what's gonna happen. But she also
24 said that she didn't intend to go to jail and she knew about
25 that sort of thing because she had been to jail. Her other

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CLOSING ARGUMENT BY MR. HILLIARD

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1 case had been dismissed.

2 When you think about her -- when you think about her
3 testimony and I'm -- I may be hitting things that you guys
4 already thought about or maybe I even say some things that you
5 disagree with and if I do that I am truly sorry. But the --
6 when she's up there, she presents as a young, single mom in
7 dire straits who has to take her clothes off to buy food for
8 her child, that's what she -- and she's a bit weepy about it.
9 Alex provided her with a [REDACTED], a place to live,
10 [REDACTED], his brother allowed her to stay at
11 [REDACTED], she stayed his mom. She testified that that car,
12 the car, remember the car, he gave her that car to drive so
13 she could get around to doctors' appointments. He paid her
14 rent. He bought her manicures. Her bond on the charge, he
15 paid half of the bond in the beginning. The child support,
16 child support, he pays child support as she said through the
17 Clerk of Court right downstairs. She said, oh, but he's late
18 but she hadn't been down there to check regarding that. He's
19 had nothing to do with her according to her after the second
20 arrest, after his arrest for this charge. He's had nothing to
21 do with her since the arrest.

22 When she went through the pictures, she said that he
23 controlled what she did. When you look at those pictures and
24 you have then in the jury room, look and see if you don't
25 think she's having a good time. She was enjoying her time.

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CLOSING ARGUMENT BY MR. HILLIARD

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1 She was enjoying what she was doing. She was making choices.
2 No question, she was young and at the same time, she was
3 making choices and she is responsible for those choices that
4 she was making.

5 One of the photographs, you heard testimony to the effect
6 that there was another -- there was another individual who
7 lived at the house whose name was Robinson who came there,
8 stayed there, had been there on some occasions, testimony to
9 the effect that he had left his prison ID there. Perhaps it
10 was mistaken identity. He's been identified in State's
11 Exhibit Number Thirty-four as Roland Robinson, the picture is
12 not very good admittedly but the guy in the white shirt was
13 identified to you as Roland Robinson who stayed at the house.

14 I forgot to talk about this when we were talking about
15 what they had and destroyed and whatnot but look at -- and
16 nobody said a word about this that I remember but look at
17 State's Exhibit Number Seventeen. There's a computer sitting
18 on top of that, right. Look at that, that's a computer. What
19 the heck is on that computer, what's on that hard drive,
20 what's on that -- where did that go? Did anybody get it? Did
21 they take it anywhere? Did they do anything with it? Does it
22 prove anything one way or the other? I don't know. You don't
23 know. I don't know if anybody knows but there is it. They
24 had it at some point or at least had the opportunity to have
25 it and they didn't take it but they want you to convict Alex

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CLOSING ARGUMENT BY MR. HILLIARD

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1 Robinson anyway.

2 Marijuana, that's about the lifestyle, that's not about
3 the case. Ecstasy, that's about Gil, maybe. Look at this, I
4 mean, evidence -- again evidence, a photograph of a drawer
5 with envelopes. Let's convict this guy for trafficking in
6 cocaine by taking a photograph of a drawer of envelopes. Is
7 that -- I mean, is that right? How about fair? What about
8 fair; is that fair? And look at this, Seven and Eight; come
9 on, really? It's 2011 and that's what you got. To change a
10 young man's life forever and that's what you've got. Is that
11 fair? Isn't there just something about the law that ought to
12 be fair? Sandwich bags, sandwich bags, all right, a junk
13 drawer, photograph of Alex being happy, a photograph of Gil
14 pregnant, happy, liquor bottle behind her -- I don't know if
15 that means anything or not ---

16 THE COURT: Counsel, I remind you, sir, you've now been
17 talking forty minutes.

18 MR. HILLIARD: Thank you, Judge. I'm almost done. I
19 appreciate that. I didn't realize it'd been that long.

20 THE COURT: I didn't think you did.

21 MR. HILLIARD: The one thing that there is that is
22 consistent in this case, when the people got arrested, when
23 the police and the drugs were there, Alex Robinson wasn't
24 there. He was never good enough for his girlfriend at the
25 time, she belittled him, she said he never was good at working

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1 at anything, he just wasn't good enough. She doesn't intend
2 to go to jail. She was in the room, she was there with the
3 drugs, she's got the deal. Alex Robinson nowhere near there
4 and -- I -- Judge, I'm sorry, I didn't -- and I won't take a
5 long time with this but, you know what, he didn't have
6 anything to do with it but in any event you saw it and I
7 reckon I ought to talk about it, I almost forgot. How about
8 the big -- here comes the policeman riding fast down the road,
9 zoom-zoom-zoom, nobody in front of him, he's just going fast
10 from point A to point B, car wreck, people run into the
11 soybean field and get arrested. How about a so what for that,
12 right? I mean, what does the Judge tell you? Judge tells you
13 at the time and place alleged in the indictment with knowledge
14 of its possession, the cocaine, a real possibility he's not
15 guilty. Policeman driving fast down the road, car wreck,
16 that's got nothing to do with this ladies and gentlemen, not a
17 thing in the world, not a thing in the world.

18 The bag of coke, they didn't send it to SLED, there's no
19 way to prove that it's not Kenneth's coke, the coke that was
20 in the front room. There's no way for us to prove that. If
21 we had that analysis, could we show that it was Kenneth's?

22 There's one telling thing and I'll sit down and shut up
23 and I -- let me say I thank you very much. If I've talked too
24 long, I apologize but certainly recognize that when I sit down
25 I am done. I can't say anything else, I can't do anything

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CLOSING ARGUMENT BY MR. RICHARDSON

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1 else, this thing is over for me and for Alex. The Solicitor
2 is gonna stand up and he will have an opportunity to say
3 within the bounds of the rules, whatever it is that he wants
4 to and I can't reply to any of it. So as you listen to him,
5 I'll ask each of you to think about what it is that I might've
6 said if I had had the opportunity to stand back up. I can't
7 stand back up; this is it. I thank you all, each of you for
8 being with us. I know this has been an enormous imposition on
9 you and I know that it's a terrible responsibility to have a
10 man's life in your hands. But there's a telling thing about
11 this that nobody has really talked much about. If Alex
12 Robinson was the one living in the house and if this is his
13 house and if the electricity is in his name, this is his deal,
14 then why isn't he the one living in the master bedroom. How
15 come?

16 I'll leave it with that. Thank you very much.

17 THE COURT: Thank you, counsel.

18 MR. HILLIARD: Thank you, Your Honor.

19 THE COURT: You may have your closing argument.

20 MR. RICHARDSON: Yes, sir. I just waiting till Mr.
21 Hilliard sits down if that's all right, Judge?

22 CLOSING ARGUMENT BY MR. RICHARDSON:

23 MR. RICHARDSON: Don't want your sandwiches to get cold
24 so I'm gonna try and be quick.

25 Folks, the picture is complete. Every one of those dots

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1 I told you about has connected up and the picture is complete
2 and what has been painted is a picture of man guilty of man
3 trafficking in cocaine greater than 100 grams, less than 200
4 grams. Those dots that composed of the evidence you heard
5 here in court, the credible testimony you got from the stand,
6 the actual physical evidence that was entered, monitors,
7 cameras, the dope, the deposit slip taken out of the
8 Defendant's pocket after he ran from police listing his
9 address at [REDACTED]. Folks, the Defense doesn't
10 want you to look at the evidence, they're trying to confuse
11 you with strippers, who was stripping when, where. Some
12 mystery man, Roland Robinson that only Mr. Durant could
13 identify in a picture, I think the Defense identified he went
14 by the name of Shek and Ms. Yakoel said she knew Shek and Ms.
15 Smith said she knew Shek but they looked at the picture and
16 said I don't know who that is, mystery man, Roland Robinson.
17 They don't want you to look at was collected. They want to
18 worry you about DNA that wasn't collected and the fingerprints
19 that weren't collected because if you look -- they want you to
20 be distracted from what was taken because they know the
21 evidence that was collected all links back to the Defendant.
22 All those dots connect and they make a big flashing arrow
23 pointing directly back at the Defendant saying he's guilty.

24 The Judge told you about the law just a little while ago
25 and I'm not gonna rehash everything but he talked to you about

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1 direct and circumstantial evidence and, folks, that's what we
2 have putting the Defendant in the house, circumstantial
3 evidence. It's a chain of facts, those dots that lead you
4 down the path to show you that was his house, his drug house,
5 where he exercised dominion and control, his girlfriend in
6 there. That was his dope in his pants in his closet with his
7 car outside.

8 The Judge talked to you about the law on trafficking
9 cocaine, possession, constructive possession, the Defendant
10 wasn't there but the dope was in his pants in his closet. The
11 Judge talked to you about reasonable doubt and that's always a
12 magic term that you hear on TV and it seems to be such a high
13 burden we just can't read it. But that's simply not it,
14 folks. The Judge told you to prove the Defendant guilty
15 beyond a reasonable doubt, I have to give you evidence that
16 leaves you firmly convinced of his guilt. And we do that by
17 putting in the relevant, competent and admissible evidence and
18 testimony. That's my job. I'm not here -- my job is not to
19 mislead you, take you down rabbit trails that get you lost and
20 dead end, throw up smoke screens and hope you can't find your
21 way back to the truth, to a just verdict. And if you follow
22 that competent, relevant and admissible evidence, that leaves
23 you to the right answer, the Defendant is guilty. It leaves
24 you firmly convinced of his guilt.

25 So, let's examine the evidence found at the house.

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CLOSING ARGUMENT BY MR. RICHARDSON

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1 First, electric bill in the Defendant's name. The Defendant's
2 brother in the house. Well, there's mail in the house
3 addressed to the Defendant. Sorry I got it misspelled there.
4 And it's to [REDACTED]. Folks, that's important that
5 there is mail addressed to Alex Robinson found at [REDACTED]
6 [REDACTED] but it's addressed to [REDACTED] I
7 guess the mail carrier picked up that mail at [REDACTED]
8 Road and brought it over to [REDACTED]k because it had to get
9 there somehow. It's the Defendant's mail, he brought it over.
10 [REDACTED], the same address Mr. Durant said he
11 used for his mailing address even though he lives out at
12 Carolina Forest. He told me that when he said he lied about
13 his address on -- whenever he signed in with the officer but
14 mail to Dunn Shortcut Road that got over from Dunn Shortcut
15 Road in the Defendant's name to the mobile home.
16 You've got pictures of the Defendant in the house.
17 You've seen the pictures from the party. So, you've got
18 pictures of him at the house, at the house. You've got his
19 girlfriend four to five months pregnant at the time. She's in
20 the back bedroom with male clothing. You've got a car in his
21 name and once he and Mr. Hilliard that, oh, well, the address
22 on that car, the mailing address for that car is [REDACTED]
23 [REDACTED] Yeah, that's his mailing address. He doesn't
24 want bills coming to his dope house, no, no. He doesn't want
25 a postman coming by there. Send my mail to Daddy's house,

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CLOSING ARGUMENT BY MR. RICHARDSON

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1 I'll go by and pick it up, I'll take care of it at my dope
2 house. Folks, we know that's his car because a few days
3 later, he runs in that car. Folks, that's the evidence we
4 found there.

5 Prior to the search warrant -- and the officers didn't
6 serve the search warrant on the Defendant, they served it on
7 the property. And they went in and they found evidence that
8 he controlled that house. No, he didn't have the master
9 bedroom. Ms. Yakoel told you that they had just recently
10 moved in because they were a little bit dispossessed with the
11 prior property from her arrest. He tried to move in her into
12 his momma's house, Ms. Robinson didn't like that too much,
13 kicked her out so moved her into the business place for a
14 little while. He'd stay, come and go, kept his clothes there.
15 Those male clothes they pulled down, the dope fell out.
16 Folks, the bill was in his name, his brother was there, he let
17 his brother stay there, his mail was there from Dunn Shortcut.
18 He had pictures of himself in the house, we have pictures of
19 his actually partying in the house, the same month. His
20 pregnant girlfriend is in the house, four to five months
21 pregnant. Are they having a rocky relationship, no doubt.
22 Pregnancy does strange things to a relationship anyway
23 especially when you're dating a drug dealer with \$4,000 worth
24 of cocaine. \$4,000 to \$4,500 worth of cocaine found in his
25 clothes in the bedroom, his car is right outside in his name

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CLOSING ARGUMENT BY MR. RICHARDSON

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1 and he's caught driving it a few days later.

2 And I almost forgot, folks, Mr. Hilliard talked about
3 this monitor and the camera. Mr. Durant said he didn't have a
4 monitor in his bedroom. The camera was in the back bedroom,
5 the one that faces [REDACTED] The monitor is in the
6 living room, there's good reason for that. When the kingpin,
7 the Defendant over there is sitting in that bedroom, he can
8 see the road, clear as day. If you got a bunch of dope, you
9 want to be able to see who is coming up the walk. If you had
10 the Hope Diamond in your bedroom, you'd want to see who was
11 coming in that bedroom. So, he's got a camera in there for
12 when he's out of the bedroom. He's not gonna be back in his
13 brother's bedroom, in the master bedroom, he's gonna be
14 sitting in the living room watching that big screen TV,
15 playing video games, that's why the monitor is out in the
16 living room. There's no monitor in Mr. Durant's room because
17 he's a small-time drug dealer, seven little bags of cocaine,
18 a pistol in a book bag. And Mr. Hilliard wants to say, oh,
19 you're gonna keep your main supply in a different room that
20 what you're gonna deal. Really? Seven little grams of
21 cocaine but you're gonna keep the 109 grams in a room with a
22 nineteen-year-old pregnant girl where you can't control who
23 comes in and out while you're sleeping, brilliant business
24 plan.

25 Folks, the evidence starts stacking up against him and

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CLOSING ARGUMENT BY MR. RICHARDSON

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1 the Defense does not want you to look at that. They want to
2 talk about DNA, fingerprints and what wasn't done. You've got
3 the pictures, you look at the mail. I wish we had it, I wish
4 we didn't have to talk about spoliation; there's none. The
5 mail would not help the defendant whatsoever. It clearly
6 states that it was mail in the name of Alex Robinson that was
7 collected. We took pictures of other people, his ex-wife, her
8 mail. I wish we had it. I wish you could look through each
9 one and see what address appears on each one. See his name on
10 each one. You can see a couple of them or they're
11 photographed.

12 The Judge talked to you about credibility of witnesses.
13 How do you know what to believe. He's gonna tell you you can
14 believe one witness over many or vice versa. But one, you're
15 gonna use your common sense. How does it sound to you? How
16 do they act when they're up here on the witness stand? How
17 nervous do they appear? How confident do they appear? What
18 have they got to gain? What enemies do they have to punish or
19 friends to reward? What they say, is it corroborated by
20 evidence.

21 Well, let's look at Mr. Durant. Mr. Durant tells you he
22 lied to police when they came to serve an eviction notice and
23 identified himself as his brother. Told you he lied when he
24 told -- either he lied when he said he lives at Carolina
25 Forest or he lied on a document some months later whenever he

APP'X 500

State v. Alex Robinson (November 9, 2011)
CLOSING ARGUMENT BY MR. RICHARDSON

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1 says, no, I live at [REDACTED], the same address
2 as his brother uses.

3 He talks to you about, I think its Roland Robinson. He
4 says there's a prison card for Roland Robinson at the place.
5 Where is Roland Robinson's mail? It wasn't found there.
6 Where's that prison card? The officers did a thorough search;
7 no prison card was found. Folks, there's no Roland Robinson.
8 Nobody else can identify him. There's a guy that's there
9 partying September 5th, 2008 but it's not Roland.

10 Mr. Durant tells you he's got a car. And at first when I
11 said, well, where was it that day? Oh, it's my dad's. Oh,
12 no, no, no, it was parked behind the house. I don't know
13 which one it was. The officers didn't -- didn't say anything
14 about finding another car at that address. Maybe that's what
15 Mr. Robinson was in whenever he left the night before.

16 Mr. Durant, he took his fall on what he had, this guy, he
17 was a small-time drug dealer. He wants to tell you that he
18 let Gil live there. You doggone right he let Gil live there
19 because the kingpin over there, with the power still in his
20 name, the big time dope dealer, told him he was gonna let Gil
21 live there at least for a little while, he'd come and go as he
22 please.

23 Ms. Smith, folks, I don't know how sure she is of
24 anything. She says Alex didn't live there but she says she's
25 not sure how people came and went. She's confused as to what

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CLOSING ARGUMENT BY MR. RICHARDSON

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1 charge she pled on. Criminal conspiracy, she just doesn't
2 know from what date. She says Gil wasn't working. Mr. Durant
3 said she was. You can throw them out, folks.

4 Let's talk about Gil. Make no doubt about it, she's made
5 mistakes. When you start dating Alex Robinson at the ripe age
6 of fifteen/sixteen, he's got fast money, it's fun but it'll
7 lead you down the wrong path and sure enough, she went there.
8 He put her up, moved her around. Seventeen, she moved in with
9 him, a man almost ten years older than her she told us. Who's
10 got the control in that relationship? She got charged.

11 Mr. Hilliard wants to talk about trafficking in Ecstasy
12 she got charged with in August. Agent Hardee told you it was
13 BZP. Told you that to his understanding, it wasn't a
14 scheduled drug. Tests Ecstasy but it's BZP but in 2008, it
15 wasn't scheduled, wasn't against the law in South Carolina.
16 Folks, I can only prosecute things that are against the law in
17 South Carolina. So, naturally, those charges were dismissed.

18 But let's talk about the proffer, she's still got charges
19 pending. She's been charged from this arrest and has not been
20 promised one thing, one thing other than her testimony won't
21 be used against her. I don't need her testimony against her.
22 She was found in the room.

23 Folks, Ms. Yakoel told you about her relationship. She
24 told you about the people she hung around with. She told you
25 who controlled it. She told you why she was in that bedroom.

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CLOSING ARGUMENT BY MR. RICHARDSON

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1 Is what she said corroborated? Yeah, we know she lived at
2 [REDACTED], when know when she left. Do we know when she
3 moved in [REDACTED] Yeah, because we got a birthday party
4 September 5th, 2008, that's her best friend, she knows that
5 date, while she's pregnant. Mr. Durant wants to tell you
6 she's stripping during that time. Look at the picture, folks,
7 Ms. Yakoel is not stripping at that time. She told you later
8 on, yeah, she went to dancing because the defendant wasn't
9 paying child support, not at that point. She was able to quit
10 after a while because he didn't start paying a little bit.
11 She told you she got married, thankfully. She's twenty-two
12 now. But she tells you it was a rocky relationship. She'd
13 been with him for four years or so at that point when she's
14 nineteen, three to four years. She's under his spell but
15 she's trying to break loose. She's already been to jail one
16 time for him. And so she decides to leave the night before.
17 That afternoon goes to her mom's, packs up her stuff. And the
18 Defendant calls her, come on back, baby, baby, oh baby, baby,
19 I'll be good, baby, baby, I won't go out no more, baby, baby,
20 I won't go to the strip clubs, I won't leave you at home, you
21 won't need that car anymore because I'll drive with you. I
22 guess he lied to her because she gets back to the house, all
23 Mr. Lovey-Dovey says, good to see you, hops in the shower and
24 leaves. Leaves her there with the dope up in the closet. She
25 tells you about the next morning.

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CLOSING ARGUMENT BY MR. RICHARDSON

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1 Folks, you'll have the pictures back there with you.
2 There's a picture of Gil that was taken in a blanket that
3 morning. I believe it's a defense exhibit. Look at the
4 girl's face, she's shocked. She's shocked that Alex's dope
5 was up there. She knew he was a dealer. She liked that
6 lifestyle, she liked having the cash. But only now, when she
7 hits twenty-two that she realized how wrong she was. She told
8 you about the arrest and how when she is arrested. She gets
9 out to the jail, the Defendant is not arrested. She leaves
10 her car keys to that Hyundai at the house; who goes back and
11 gets those car keys? Who is caught in the car just five days
12 later? He's got access to the house because that is his drug
13 house. But she tells you she talks to him before he's
14 arrested on the phone. I'm so scared. I can't go to prison,
15 I'm pregnant. What's the Defendant tell her, you've gonna
16 have to -- you're gonna have to take the charge on this one.
17 I ain't going either; I ain't gonna go to prison. He knows
18 he's got charges. He knows he's got charges. His brother
19 knows there's coming. His brother won't write an affidavit
20 for him but the Defendant knows he's got charges and so when
21 he winds up at the jail, last ditch effort, he's gonna do one
22 thing for the mother of his child, he's gonna help post half
23 the bond. Where does he get the cash? But he sees Detective
24 Donald and peels out of there and he runs and he runs because
25 he knows it was his dope house that got hit. It was his dope

APP'X 504

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALEX ROBINSON,

APPELLANT

RECORD ON APPEAL

DAYNE C. PHILLIPS
Appellate Defender

CARMEN V. GANJEHSANI
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**THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT.
STATE'S EXHIBIT #5 (PHOTO), #6 (PHOTO), #7 (PHOTO), #8 (PHOTO), #9 (PHOTO)
AND #10 (DASH CAM VIDEO)**

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CLOSING ARGUMENT BY MR. RICHARDSON

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1 that got found in his pants in his bedroom with his pregnant
2 girlfriend. And the car he's in right now is the same one
3 that was there, he's got to run.

4 Folks, connect the dots. The bill was in his name; his
5 brother was there; the pictures were there; his girlfriend was
6 there, pregnant; the car was there; he runs from police; the
7 bedroom with clothes that would fit him where the dope was
8 found; his picture is there; his mail is there delivered from
9 another address. It's an arrow and it points directly at the
10 defendant, folks, because he's guilty, guilty of trafficking
11 cocaine 100 to 200 grams. Thank you.

12 THE COURT: Thank you, Mr. Richardson, counsel for the
13 State and thank you counsel for the Defense.

14 Ladies and gentlemen, you've heard the final arguments,
15 I've given you the charge of the case, you found -- you've
16 heard all of the evidence and the case will be with you for
17 your deliberation. When you go to the jury room, your lunch
18 will be there. I'll leave it to you, Madame Foreman to decide
19 whether you want to negotiate during lunch or have your lunch
20 and then wait but that will be your decision. Now
21 unfortunately, our rules do not provide for the alternate to
22 go with you but I'll have to keep the alternate in case
23 something happens. Everybody looks well and healthy and I'll
24 think you'll be that way but I've had things happen so I've
25 got to keep the alternate separate from you.

State v. Alex Robinson (November 9, 2011)
CLOSING ARGUMENT BY MR. RICHARDSON

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1 Madame Alternate, anytime the jury has a question though,
2 I'll bring you back to keep you fully informed so that if
3 necessary you'll be able to take the place of a regular juror.

4 I've explained the jury forms to you, Madame Foreman,
5 there will be pencil and paper provided in the jury room and
6 if any of you have any questions about the law, please write
7 that down, let the Bailiff know and I'll call you out and be
8 glad to charge you as to that issue. Remember now, I cannot
9 tell you what the facts are. You and you alone decide that
10 issue. I remember a case I was trying in Darlington, South
11 Carolina when a young lady was charged with arson, having been
12 alleged she burned down a mobile home. Jury came out and said
13 did she smoke. Well, I knew she smoked, I saw her outside the
14 room smoking but that question was never asked and never
15 answered on the record. Consequently, I told the jury that
16 that issue was not discussed on the record. I tell you that
17 to say that whatever the evidence is not based on -- I mean,
18 your judgment is not to be based on speculation but it be
19 based on the law and evidence heard in this courtroom.

20 You may now retire and have your lunch. And I'll leave it
21 to you to decide when you want to begin your deliberation.

22 Alternate remain in the courtroom, please.

23 (REPORTER'S NOTE: The jury retires to the jury room.)

24 THE COURT: Counsel, escort the alternate to the
25 appropriate place and have lunch provided for her.

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State v. Alex Robinson (November 9, 2011)
CLOSING ARGUMENT BY MR. RICHARDSON

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1 DEPUTY: Yes, sir, Your Honor.

2 THE COURT: Thank you.

3 All right. Come forward, let's agree what's ---

4 MR. HILLIARD: Judge, before we do that and after the
5 alternate get out ---

6 THE COURT: Pardon me?

7 MR. HILLIARD: I say before we do that and after the
8 alternate steps outside and I -- is she out -- okay. I am
9 uncertain what occurred but at the conclusion of the
10 prosecutor's argument, there was some -- and I make no
11 allegations or whatever you might call it but there was
12 something, noise, something from over here on the right-hand
13 side where those school kids are and one of the jurors looked
14 over there and smiled. I don't know what that was. Perhaps
15 it was nothing.

16 THE COURT: I didn't see or hear or anything, did you,
17 Josh? I certainly didn't see or hear or anything.

18 MR. HILLIARD: The folks that are -- there are people who
19 are here that we can call as witnesses ---

20 THE COURT: No, sir, I'm not gonna do that. The jury
21 fully understands that that they are to base on the law and
22 evidence heard in this courtroom and I saw nothing improper by
23 any -- did anybody have any comments that they made? What
24 comment -- come forward.

25 MR. HILLIARD: Stand up.

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State v. Alex Robinson (November 9, 2011)
CLOSING ARGUMENT BY MR. RICHARDSON

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1 MS. HILLIARD: They were clapping ---
2 THE COURT: Come forward. What's your name?
3 MS. HILLIARD: My name is Bonnie Hilliard.
4 THE COURT: And what did you say or do if anything?
5 MS. HILLIARD: I didn't do anything. They were clapping.
6 I was ---
7 THE COURT: Do what?
8 MS. HILLIARD: They were clapping as Brad finished. The
9 students were clapping and then the juror in the second seat
10 looked over at them smiled.
11 MR. HILLIARD: It was the third juror from the right-hand
12 side on the ---
13 MR. RICHARDSON: I assume they were clapping because they
14 were glad lunchtime was here.
15 MS. BASS: Please.
16 THE COURT: I ---
17 MR. RICHARDSON: They asked earlier how long the argument
18 was gonna be and I told them ---
19 THE COURT: Ms. Hickman, did your class clap for any
20 reason.
21 MS. HICKMAN: I truly did not notice anyone clapping but
22 ---
23 THE COURT: Ma'am?
24 MS. HICKMAN: I did not notice anyone clapping but these
25 kids are really ---

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State v. Alex Robinson (November 9, 2011)
CLOSING ARGUMENT BY MR. RICHARDSON

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1 THE COURT: I did not notice it either and don't think
2 that it influenced the jury in any way. I -- let's let the
3 jury understand they are to base the law and evidence in this
4 case.

5 MR. HILLIARD: Judge, I would request -- respectfully
6 request a curative instruction to the jury to the effect that
7 anything that was exhibited in the courtroom should not be
8 considered by them. I heard it. There's no question in my
9 mind what happened. I'm not trying to embarrass anybody. I'm
10 not trying to cause any trouble but it happened.

11 MS. HICKMAN: There may've been a noise. I really did
12 not notice -- I'm so sorry.

13 THE COURT: They jury is having lunch. I don't see a --
14 to do that would bring them back after lunch would just
15 disrupt the whole proceeding. I've been observing very
16 carefully and I didn't observe any clapping which would tend
17 to influence the jury.

18 MR. HILLIARD: All right, sir. Well, I would like to
19 make a proffer of the witnesses that I have here to testify
20 regarding that and I will say that ---

21 THE COURT: Which witnesses you got to testify?

22 MR. HILLIARD: I'll call Bonnie. Bonnie.

23 MS. HICKMAN: This student said that she did ---

24 THE COURT: Come forward, please. If you know anything
25 about the case, I want to know about it and want to know why

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State v. Alex Robinson (November 9, 2011)
CLOSING ARGUMENT BY MR. RICHARDSON

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1 you did it.

2 What's your name?

3 MS. ALSTON: Aliyah. I did like this (indicating) by
4 accident. I wasn't clapping.

5 THE COURT: What?

6 MS. ALSTON: I did like this by accident but I wasn't
7 clapping.

8 THE COURT: You were not clapping?

9 MS. ALSTON: No.

10 THE COURT: Is this what you heard -- or who heard her?

11 All right. Who else did you hear clapping? Let me ask
12 you this, what is your involvement in this case in any way.
13 Who are you?

14 MR. HILLIARD: This is my wife, Judge, she is here with
15 me.

16 MS. HILLIARD: I've been working on this case since ---

17 THE COURT: You tell me who you heard clapping?

18 MS. HILLIARD: The kids over here were clapping ---

19 THE COURT: Pardon?

20 MS. HILLIARD: The kids were clapping over here.

21 THE COURT: They say they were not. Ms. Hickman, their
22 teacher, says they were not.

23 Bring the jury in and I'll tell them -- they'll have to
24 interrupt their lunch.

25 Bring the jury in.

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CLOSING ARGUMENT BY MR. RICHARDSON

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1 THE COURT: Ms. Hickman, come forward, please.

2 Bring the jury back and let them interrupt their lunch.

3 MR. HILLIARD: Well, let's do one of the other, Judge.

4 (REPORTER'S NOTE: Brief bench conference with Ms. Hickman.)

5 Judge, if we could have -- I understand that you're
6 having a conversation with the teacher and ---

7 THE COURT: You may come forward and join it.

8 MR. HILLIARD: We need it on the record, Judge.

9 THE COURT: You're making an ado about nothing and it's
10 your wife that's doing it.

11 MR. HILLIARD: Let's go with this, Judge.

12 THE COURT: No, come forward. On the record, let's come
13 forward. Bring the jury in.

14 MR. HILLIARD: Judge, you can't bring the jury in while
15 we're trying to ---

16 THE COURT: I can do what I please; it's my court.

17 MR. HILLIARD: No question about that, Judge.

18 THE COURT: Okay, I didn't think there was. It may not
19 be necessary if the jury didn't hear anything or wasn't
20 necessary.

21 Bring the jury in, please.

22 (REPORTER'S NOTE: The jury returns to the courtroom.)

23 THE COURT: Ladies and gentlemen, at the conclusion of
24 the State's argument, there is some assertion that maybe one
25 of these young students clapped. That young student is

State v. Alex Robinson (November 9, 2011)
CLOSING ARGUMENT BY MR. RICHARDSON

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1 denying that, said she clapped not for the case but for her
2 own purposes. However, and I think one -- as the noise was
3 heard, one juror turned to the left which is fine. I say
4 again to you, if that occurred, which I don't think it did, I
5 didn't hear it, my law clerk didn't hear it -- if it occurred
6 I tell you that you must disregard that. You're to base your
7 law and evidence under the law in this case. We have with us
8 some young students, law students from a school who are
9 interested in the law and have given us their time to be here
10 and I think them for that. But if somebody made some gesture
11 back there and you saw it, please disregard it. Does anybody
12 want to tell me they are influenced by anything they may've
13 heard back from the students? Anybody?

14 (REPORTER'S NOTE: No response from jury.)

15 THE COURT: I think not. Go back and enjoy your lunch.

16 (REPORTER'S NOTE: The jury retires to the jury room.)

17 THE COURT: All right, counsel. Do you have any
18 witnesses you want to call under oath?

19 MR. HILLIARD: Yes, sir.

20 THE COURT: Which one? And the record -- the record is
21 going to reflect that your wife is the one that made this
22 accusation.

23 MR. HILLIARD: No, sir, Judge, the record -- well, the
24 record ---

25 THE COURT: She said she did, didn't she?

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CLOSING ARGUMENT BY MR. RICHARDSON

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1 MR. HILLIARD: I made the accusation.

2 THE COURT: No, you identified her as your wife who said
3 it occurred. Don't change on me, now.

4 MR. HILLIARD: Judge, I'll -- I am asking ---

5 THE COURT: I am telling you that this accusation comes
6 from an assertion by your wife based on your conduct --
7 content. Now, if you've got a witness that you want to call,
8 call her.

9 MR. HILLIARD: The first thing I want to do, Judge, is
10 object to the Court's remarks to the jury. I believe that the
11 Court's remarks to the jury ---

12 THE COURT: What remark are you objecting to?

13 MR. HILLIARD: I'm objecting to the remark to the jury
14 that said that you did not believe that the event occurred. I
15 believe that that interjected the Court into the ---

16 THE COURT: No, sir. I did not hear it and I would lie
17 to the jury if I told them I did. I just said I did not hear
18 it and I'm satisfied with that. Now, what else have you got?

19 MR. HILLIARD: Well, Judge, the jury was brought out with
20 this poor student who is standing here in front of the group
21 and in the middle of the room and with the teacher before the
22 Court and at the point in time that Your Honor was making the
23 remarks commending the students for being here and ---

24 THE COURT: What -- well, you've been wasting my time for
25 two days, outside the presence of the jury, what witness do

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1 you wish to call to assert your position that this jury was
2 influenced by one young student putting their hands together.
3 If you got a witness call them and let's get on with it.

4 MR. HILLIARD: I call me, John Hilliard.

5 THE COURT: I'm not gonna accept you, you're ---

6 MR. HILLIARD: I'll call them, Your Honor. I'll call all
7 of them.

8 THE COURT: Pardon me?

9 MS. BASS: I'll call all of them and we'll move Mr.
10 Hilliard out of it. Let me just call all of them or let's
11 have every person raise their hand, my motion is ---

12 THE COURT: I'll ask them for you.

13 MS. BASS: Your Honor, I ---

14 THE COURT: I'm not gonna waste my time calling every
15 witness.

16 MS. BASS: Okay. Well, I move at this time on behalf of
17 Alex Robinson to ---

18 THE COURT: Pardon?

19 MS. BASS: I would move at this time on behalf of Alex
20 Robinson that I just be allowed to put the names of every
21 person on the record that said they heard clapping ---

22 THE COURT: Just wait a minute and let me hear ---

23 MS. BASS: --- to preserve the record ---

24 THE COURT: No, wait -- I can do it. How many of you
25 back there heard somebody clap? Please raise your hand. All

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MOTIONS

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1 right. I want you two to come forward.

2 MR. HILLIARD: There's four, Judge.

3 THE COURT: All right. Four come forward.

4 Say what you got to say.

5 You understand now whether they clapped or not, the issue
6 is whether they were influenced or not. I have instructed the
7 jury about that.

8 Did you clap? What's your name?

9 MR. FILLMORE: Quan Fillmore

10 THE COURT: Talk a little louder.

11 MR. FILLMORE: Quan Fillmore.

12 THE COURT: Did you clap?

13 MR. FILLMORE: No, sir.

14 THE COURT: Sir?

15 MR. FILLMORE: No, sir.

16 THE COURT: Why are you standing here?

17 MS. BASS: Cause he heard clapping.

18 THE COURT: You heard it? Who did you hear clap?

19 MR. FILLMORE: It was her -- it was like -- she just did
20 like that (indicating).

21 THE COURT: Pardon me?

22 MR. FILLMORE: She just did like that.

23 THE COURT: Can you hear what he said? You gonna have to
24 talk louder.

25 COURT REPORTER: That's a microphone right there.

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State v. Alex Robinson (November 9, 2011)
MOTIONS

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1 MR. FILLMORE: I said, it wasn't really a clap, it was
2 just like that (indicating) because she was thinking it was
3 over and we could leave.

4 THE COURT: It was not a clap?

5 MR. FILLMORE: No, it was just (indicating) that.

6 THE COURT: Is that what you did? Who did that?

7 Who was the girl that put their hands together and why?

8 MS. ALSTON: (Raising hand) because I was ready to go.

9 THE COURT: Okay. Who else heard a ---

10 MS. BASS: Your Honor, what's her name and the correct
11 spelling, please.

12 MS. ALSTON: A-L-I-Y-A-H.

13 MS. BASS: A-L ---

14 MS. ALSTON: --- I-Y-A-H.

15 MS. BASS: Aliyah, what's your last name?

16 MS. ALSTON: Alston.

17 MS. BASS: A-U-S-T ---

18 MS. ALSTON: A-L-S-T-O-N.

19 MS. BASS: A-L-S-T-O-N.

20 MS. BASS: And this young man, what's his name? Correct
21 spelling, please, sir.

22 MR. FILLMORE: Q-U-A-N.

23 MS. BASS: Quan.

24 MR. FILLMORE: Q-U-A-N.

25 THE COURT: Wait a minute, now. You are beginning to

State v. Alex Robinson (November 9, 2011)
MOTIONS

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1 badger guests of my courtroom and I am not going to permit it.

2 MS. BASS: Your Honor, I object to that.

3 THE COURT: Wait a minute. You be quiet please. Don't

4 -- let me talk a moment. I'm not going to let you badger

5 guests of my courtroom. Now, these young people -- did the

6 rest of you hear any clapping or any noise?

7 MS. PICKETT: I did hear it.

8 THE COURT: Tell me what you heard?

9 MS. PICKETT: I heard her clapping but I'm not sure if
10 she was clapping because of what the man said or ---

11 THE COURT: Wait a minute. Come forward.

12 COURT REPORTER: Name please.

13 MS. PICKETT: My name is Diamond Pickett.

14 THE COURT: Yes.

15 MS. PICKETT: And yes, I did hear her clapping. I'm not
16 sure if she was clapping because of what the man said or if
17 she was clapping because she was ready to go but she did clap.

18 THE COURT: That's fine. And who is the one that
19 clapped?

20 MS. PICKETT: Aliyah.

21 MS. ALSTON: Me.

22 THE COURT: Okay. Anybody else clap?

23 MS. HICKMAN: No, sir.

24 MR. HILLIARD: Judge, I recognize ---

25 THE COURT: No. I'm gonna end this for you right now.

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MOTIONS

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1 If I'm wrong, I'll let the appellate court say it. This jury
2 has told me -- I've told them not to be influenced by that,
3 they have not. I'm not going to let you badger these young
4 folks, not gonna do it. Stand aside. You can say what you
5 want to but you asked me to give a curative instruction to the
6 jury. At your request, I broke lunch and did that. Now, you
7 want to badger these young folks and I'm not gonna permit it.
8 If I'm wrong, say so. The jury has told me by words that they
9 were not influenced by this young girl putting her hands
10 together. Now, Madame -- Ms. Hickman, you were back there.

11 MS. HICKMAN: Yes, sir.

12 THE COURT: I want you to say for the record what -- tell
13 what you heard. You were right there in the middle of them.

14 MS. HICKMAN: I was sitting in front of these ---

15 THE COURT: Talk a little louder so she can hear you.

16 MR. RICHARDSON: Here you go.

17 MS. HICKMAN: I was sitting in front of these children
18 and I -- when he was finished speaking I heard a noise and I'm
19 used to, as a teacher just being attuned to noises because I
20 cautioned the kids when we come in here to be very quiet. And
21 so immediately I turned around to see and I really didn't see
22 what the noise was, I just heard a noise. And I just said,
23 shh, be quiet, and that was all that I heard or seen.

24 THE COURT: Now, you want to question her on what she
25 heard, I'll be -- permit that. Not both of you now, the rules

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1 requires one, I'll permit either one of you.

2 MS. BASS: All I wanted to know was the correct spelling
3 of Quan's name and the ---

4 THE COURT: Again, you're harassing. I didn't ask you
5 that. I asked you to cross examine her on her witness -- on
6 her statement.

7 MS. BASS: Ma'am, could you please identify what are the
8 names of the students and so I could spell their names, that's
9 all. Correct spelling, that's all.

10 MS. HICKMAN: I have given it to this lady here also.
11 This is Quan Fillmore.

12 MS. BASS: Okay. Thank you.

13 MS. HICKMAN: Aliyah Alston.

14 MS. BASS: I've got that one, thank you.

15 MS. HICKMAN: Diamond Pickett.

16 MS. BASS: Diamond Pickett.

17 MS. HICKMAN: Taquilla Bellamy and Sha'Mara Henderson.

18 THE COURT: In the meantime, bring my jury back out.

19 Bring them back out. Bring the jury back out.

20 DEPUTY: Yes, sir, Your Honor.

21 (REPORTER'S NOTE: The jury returns to the courtroom.)

22 DEPUTY: Waiting on the alternate, Your Honor.

23 THE COURT: Bring the alternate in too.

24 DEPUTY: All right.

25 THE COURT: We need to wait on the alternate. Any time I

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1 discuss any issue with you, I need to have that alternate
2 present.

3 Ladies and gentlemen, at the conclusion of the State's
4 case, there was apparently some noise or clapping or whatever
5 it was in the background. Now many of you happened to hear
6 whatever it was? Please raise your hand. Somebody turned.
7 Okay. Did that influence any of you in any way with regards
8 to your judgment as finders of the facts in this case?
9 (REPORTER'S NOTE: Jury unanimously indicates in the
10 negative.)

11 THE COURT: If any of you were influenced by whatever
12 occurred back there, raise your hand and I'll excuse you from
13 the trial of this case.

14 (REPORTER'S NOTE: No response from jury.)

15 THE COURT: Now you're all under oath. And you are
16 saying to me that you heard some type of disturbance back
17 there, is that right, some of you, but all of you under oath
18 are saying to me that that would not influence whatever
19 decision you make as finders of the facts in this case. Is
20 that what I hear?

21 (REPORTER'S NOTE: Jury unanimously indicates affirmatively.)

22 THE COURT: Then you -- I'm not gonna interrupt your
23 lunch again. Go ahead. Thank you.

24 (REPORTER'S NOTE: The jury retires to the jury room.)

25 THE COURT: All right. Anything further?

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1 MR. HILLIARD: Judge, if I could point out for the
2 purpose of the record that I counted as an officer of the
3 Court at least eight jurors that raised their hand and said
4 that they had heard what we had previously described. The
5 reason -- you know, I don't take any pleasure in this. I'm
6 not -- this is uncomfortable for me, okay ---

7 THE COURT: You're not making -- let me interrupt that,
8 whether they did or did not, each of these jurors have told me
9 under oath that they heard some noise of some kind back there
10 and I've told them that I would recuse any one of them who was
11 affected by it. I'm comfortable with that statement.

12 I am uncomfortable with you and your wife embarrassing
13 the guests of this Court in such a manner. It is totally
14 improper. It did not occur in the manner that you say. If it
15 occurred at all it was very slight and I don't think it was
16 proper for you to embarrass these young folks in that way and
17 that's all I'm gonna say about it other than to say I've
18 discussed with the jurors, none of them were affected by it,
19 all of them were under oath saying that they will base their
20 verdict on the law in this case and I'm comfortable with it.
21 We are in recess for lunch. Thank you.

22 MR. RICHARDSON: Thank you, Your Honor.

23 MR. HILLIARD: We move for mistrial, Judge.

24 THE COURT: I reject that.

25 MR. HILLIARD: Thank you, Judge.

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1 THE COURT: I think you had a fair trial and it's up the
2 jury. I'm not going to mistrial based on what your wife said
3 she heard. Nobody else heard it.

4 MR. HILLIARD: I ---

5 THE COURT: Wait a minute. You don't understand. I've
6 told you I'm through with this. Now, you fool with me and I'm
7 gonna deal with you in a harsh way. We are in recess. I deny
8 your motion for a mistrial and think it's absurd on the face
9 of it.

10 MR. RICHARDSON: We need to go through ---

11 THE COURT: You want to be heard?

12 MR. RICHARDSON: No, sir, Your Honor. We just need to go
13 through the exhibits so they can go back to the jury.

14 THE COURT: All right. Thank you.

15 Ms. Hickman, I express to you, and again I want to be on
16 the record, my -- Ms. Hickman, I express to you on the record
17 my appreciation for your group's presence here.

18 MS. HICKMAN: Thank you.

19 THE COURT: Conclude absolutely that their conduct was
20 not improper under the circumstances, apologize for the
21 inconvenience of this and thank you again for being here.

22 MS. HICKMAN: Thank you, sir.

23 (REPORTER'S NOTE: Exhibits reviewed and approved by counsel
24 for State and Defense before being submitted to jury.)

25 (REPORTER'S NOTE: Deliberation begins at 2:00 p.m.)

APP'X 526

State v. Alex Robinson (November 9, 2011)
QUESTION OF THE JURY

576

1 *****OFF THE RECORD*****

2 (On the Record.)

3 THE COURT: Bring the jury in, please.

4 I am -- let the record reflect that I have received a
5 communication which has now made a part of the record, have
6 shown it to the State and to the Defendant, this provides as
7 follows: Law of possession. Obviously, they want the law of
8 possession which I am prepared.

9 COURT'S EXHIBIT NUMBER FOUR

10 MARKED FOR IDENTIFICATION

11 (REPORTER'S NOTE: The jury returns to the courtroom.)

12 THE COURT: Good afternoon. I trust that you got your
13 lunch down though you were interrupted so much. Sometimes
14 these things occur and I hope you understand.

15 You've done exactly as I asked you to do and that was if
16 anybody has any further questions about the law, please let me
17 know. I have received a communication wherein your
18 distinguished jury, Madame Foreman, desires a further
19 instruction with regard to the law of possession. The
20 statutory laws of South Carolina regarding cocaine mandate
21 that if a person is in possession, actually or constructively,
22 of a quantity of cocaine of more than 100 and less than 200,
23 they are guilty of trafficking in cocaine. Now, let me
24 describe for you the various elements and define for you
25 possession. There are certain elements of this offense which

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State v. Alex Robinson (November 9, 2011)
QUESTION OF THE JURY

577

1 the State must prove beyond a reasonable doubt. Before the
2 Defendant can be convicted and found guilty, each of these
3 three elements must be found by you the jury beyond a
4 reasonable doubt and should you fail to find beyond a
5 reasonable doubt that all of these elements exist, your
6 verdict must be for the Defendant. First, the jury must find
7 beyond a reasonable doubt that this Defendant did possess a
8 quantity of a controlled substance at the time and place and
9 in the manner alleged in the indictment. Possession requires
10 that a person be in the actual or constructive possession of
11 the controlled substance with actual knowledge of its
12 presence. Possession of a controlled substance exists when
13 the controlled substance is found in the actual physical
14 custody of the person charged with possession and constructive
15 possession of a controlled substance exists when a person
16 although not in actual physical possession of the controlled
17 substance exercises dominion and control over the controlled
18 substance or has the right to exercise dominion and control
19 over the controlled substance. A person has possession of a
20 controlled substance within the meaning of the law when he has
21 the power and intent to control its disposition or use. It
22 must be shown that the Defendant had possession of the
23 controlled substance actual or constructive and that the
24 Defendant knew he had the controlled substance in his
25 possession, actual or constructive. Knowledge of the presence

State v. Alex Robinson (November 9, 2011)
QUESTION OF THE JURY

578

1 of the controlled substance by the defendant is essential.
2 The defendant's knowledge and possession may be inferred if
3 the substance was found on the premises or property under the
4 defendant's control. You, as the jury, are free to accept or
5 reject this permissive inference of knowledge and possession
6 depending upon your view of the evidence. The second
7 condition you must find beyond a reasonable doubt is that the
8 substance was cocaine, which I charge you is a controlled
9 substance. And the third thing that you must find beyond a
10 reasonable doubt is that the quantity of the controlled
11 substance was 100 grams or more but less than 200. That is
12 the charge with possession, actual or constructive.

13 You may now return to your deliberations. Thank you.

14 (REPORTER'S NOTE: The jury retires to the jury room.)

15 THE COURT: Gentlemen, I have this instruction that I
16 absolutely read. If you desire me to, I'll be glad to send it
17 in. What say the State?

18 MR. RICHARDSON: I have no objection, Your Honor.

19 MR. HILLIARD: Judge, we would ask that the instruction
20 not be sent to the jury and we would further ask that they be
21 instructed that in order for there to be possession,
22 constructive possession, that the Defendant must have
23 knowledge ---

24 THE COURT: I said that.

25 MR. HILLIARD: Yes, sir, but after that it was said that

State v. Alex Robinson (November 9, 2011)
VERDICT OF THE JURY

579

1 knowledge of the existence of the controlled substance could
2 be inferred by the right to control the property. I would
3 submit to the Court that that gives them the opportunity ---

4 THE COURT: This is the same sentence -- same that I gave
5 at the initial conference and there was no objection to it.
6 I'm gonna leave it like it is.

7 MR. HILLIARD: All right. Thank you, Your Honor.

8 THE COURT: All right. Thank you.

9 MR. RICHARDSON: Thank you, Your Honor.

10 At ease, Your Honor?

11 THE COURT: Sir?

12 MR. RICHARDSON: We're at ease?

13 THE COURT: Yeah, but don't go so far that -- the jury
14 may have another ---

15 MR. RICHARDSON: Yes, sir. I was just downstairs in my
16 office.

17 THE COURT: Yeah, we are at ease, that's fine.

18 MR. HILLIARD: Thank you, Your Honor.

19 THE COURT: All right.

20 *****OFF THE RECORD*****

21 (On the Record.)

22 THE COURT: Thank you, be seated. Ladies and gentlemen,
23 I have received a communication from the jury that they have
24 reached a unanimous verdict in this case. I have absolutely
25 no idea as to what the verdict is. However, whatever the

APP'X 530

State v. Alex Robinson (November 9, 2011)
VERDICT OF THE JURY

580

1 verdict is, it will impact on various folks within the sound
2 of my voice. I want everybody to know that I will permit no
3 outburst, no statement of any kind, no noise. If any of that
4 occurs, I'm gonna find somebody in contempt of court and deal
5 with it in a most serious manner. This is a most solemn
6 moment whether the verdict is not guilty or guilty and must be
7 treated as such and I assume that y'all will do that. I
8 certainly hope so.

9 Bring the jury in.

10 (REPORTER'S NOTE: The jury returns to the courtroom.
11 3:52 p.m.)

12 THE COURT: Bring the foreman in, please. Is the
13 foreman in?

14 Madame Foreman, have you and your distinguished jury
15 reached a unanimous verdict?

16 MADAME FOREPERSON: Yes, we have.

17 THE COURT: If this be the unanimous verdict of all
18 twelve, please signify by raising your right hand.

19 The jury has so signified. Please accept the verdict and
20 hand it to me.

21 And where is the indictment, did they bring it? What
22 happened to the indictment.

23 MADAME FOREPERSON: It's still in the room.

24 THE COURT: Please get it. Have the Bailiff ---

25 DEPUTY: She did, Your Honor.

State v. Alex Robinson (November 9, 2011)
VERDICT OF THE JURY

581

1 THE COURT: Okay. Madame Foreman, you will recall that
2 in addition to this form verdict to assist you, I also sent in
3 the indictment. On the back of that indictment is the word
4 verdict. I'm gonna ask that you put on the back of the
5 indictment under the word verdict the exact thing that you
6 found here for me.

7 Give that to the -- show her the word verdict on the back
8 and hand her this indictment please. Madame Clerk, hand her
9 this.

10 Using the same language on this document, please put it
11 on that and sign your name.

12 Now, may I see the back of the indictment? Please put --
13 hand them back. Put the quantities involved.

14 I thank you for this. This is an exact conformity with
15 your findings of fact.

16 Please read the verdict.

17 CLERK: Yes, sir.

18 THE COURT: You can read it off the other statement.
19 They're the same thing so read it either way you want to.

20 CLERK: Yes, sir. Indictment Number 2009-GS-26-3445,
21 State of South Carolina, County of Horry versus Alex Lorenzo
22 Robinson, we the jury unanimously find the Defendant Alex
23 Lorenzo Robinson guilty of trafficking cocaine in the amount
24 or 100 grams or more but less than 200 grams. Signed by
25 foreperson Janice Galbraith, dated November 9th, 2011.

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State v. Alex Robinson (November 9, 2011)
VERDICT OF THE JURY

582

1 THE COURT: Show both forms first to the State and then
2 to the Defendant so there will be no question about it.

3 Is there any question by the Defense about the form or
4 the verdict?

5 MR. HILLIARD: No question about the form or the verdict,
6 Your Honor.

7 MR. RICHARDSON: No, sir, Your Honor.

8 THE COURT: Anything else required before I discharge
9 this distinguished jury?

10 MR. HILLIARD: We'd ask that they be polled, Your Honor.

11 THE COURT: Sir?

12 MR. HILLIARD: We would ask that they be polled, Your
13 Honor.

14 THE COURT: Poll the jury. You're entitled to that.

15 CLERK: When I call your juror number if you will please
16 stand. Juror Number 35, is this your verdict?

17 JUROR 35: Yes.

18 CLERK: Is it still your verdict?

19 JUROR 35: Yes.

20 THE COURT: Thank you.

21 319, is this your verdict?

22 JUROR 319: Yes.

23 CLERK: Is it still your verdict?

24 JUROR 319: Yes.

25 CLERK: Thank you.

State v. Alex Robinson (November 9, 2011)
VERDICT OF THE JURY

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1 214, is this your verdict?
2 JUROR 214: Yes.
3 CLERK: Is this still your verdict?
4 JUROR 214: Yes.
5 CLERK: Thank you.
6 296, is this your verdict?
7 JUROR 296: Yes.
8 CLERK: Is this still your verdict?
9 JUROR 296: Yes.
10 CLERK: Thank you.
11 60, is this your verdict?
12 JUROR 60: Yes.
13 CLERK: Is this still your verdict?
14 JUROR 60: Yes.
15 CLERK: Thank you.
16 362, is this your verdict?
17 JUROR 362: Yes.
18 CLERK: Is this till your verdict?
19 JUROR 362: Yes.
20 CLERK: Thank you.
21 79, is this your verdict?
22 JUROR 79: Yes.
23 CLERK: Is this still your verdict?
24 JUROR 79: Yes.
25 CLERK: Thank you.

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State v. Alex Robinson (November 9, 2011)
VERDICT OF THE JURY

584

1 126, is this your verdict?
2 JUROR 126: Yes.
3 CLERK: Is this still your verdict?
4 JUROR 126: Yes.
5 CLERK: Thank you.
6 104, is this your verdict?
7 JUROR 104: Yes.
8 CLERK: Is this still your verdict?
9 JUROR 104: Yes.
10 CLERK: Thank you.
11 123, is this your verdict?
12 JUROR 123: Yes.
13 CLERK: Is this still your verdict?
14 JUROR 123: Yes.
15 CLERK: Thank you.
16 92, is this your verdict?
17 JUROR 92: Yes.
18 CLERK: Is this still your verdict?
19 JUROR 92: Yes.
20 CLERK: Thank you.
21 95, is this your verdict?
22 JUROR 95: Yes.
23 CLERK: Is this still your verdict?
24 JUROR 95: Yes.
25 CLERK: Thank you.

State v. Alex Robinson (November 9, 2011)
MOTIONS

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1 THE COURT: The jury has been polled. Anything further
2 before I discharge the jury?

3 MR. HILLIARD: Nothing further, Your Honor.

4 THE COURT: Madame Foreman, ladies and gentlemen, none of
5 you asked to come to court this week and none of you certainly
6 asked to be in this trial. But as citizens of Horry County
7 and the State of South Carolina, you have come forth and have
8 done your duty as jurors. I have nothing to say with regards
9 to the verdict except that the evidence if believed and
10 obviously it was, would certainly justify your verdict in this
11 case. As finders of the facts, it was your decision to make
12 and you've made it unanimously and we thank you for your
13 services.

14 This will end your services for the week. We had one
15 other case to try and it has been resolved. I'm told that
16 there's no civil cases. Is that right down there to be tried?

17 CLERK: Yes, sir.

18 THE COURT: I'm not gonna send my jury back down there
19 anyway.

20 You are now discharged with my thanks and gratitude.
21 Thank you so much.

22 (REPORTER'S NOTE: Jury is dismissed and leaves courtroom.)

23 THE COURT: Have the Defendant come forward for
24 sentencing and then I'll hear any motions.

25 MR. HILLIARD: We'll hear the motions before the

State v. Alex Robinson (November 9, 2011)
MOTIONS

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1 sentencing, Your Honor?

2 THE COURT: I will -- whatever you prefer.

3 MR. HILLIARD: Thank you, Your Honor. Judge we would
4 renew our motion for mistrial in connection to the case. I
5 recognize that the Court has ruled on the motion but at the
6 same time we believe that -- and I recognize that the Court
7 has asked the jurors whether or not they were influenced by
8 the occurrences in the court and they have indicated in the
9 negative. However, I would submit to the Court that it is
10 under the circumstances impossible for them not to have been
11 influenced by that and we would ask you to mistry the case on
12 the basis of that.

13 THE COURT: You know, that's interesting. Your folks
14 apparently heard a lot of noise up here. My court reporter
15 heard nothing. I heard nothing. And my law clerk heard one
16 solid sound but you would say there was a big applause back
17 there and that just did not occur. Under any circumstances, I
18 called the jury back out twice and asked them were they
19 influenced by it in any way and they said no. I even said if
20 anybody was influenced in any way I would discharge them from
21 this jury and so I -- we are fully protected on the record.
22 These young students were high school or college students and
23 certainly were not disruptive in any way and if you or anybody
24 else said they were you are in error, period. That motion is
25 respectfully denied.

State v. Alex Robinson (November 9, 2011)
MOTIONS

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1 MR. HILLIARD: Thank you, Your Honor.

2 THE COURT: Okay.

3 MR. HILLIARD: We further, Your Honor, renew our motion
4 made at the conclusion of the State's case and at the
5 conclusion of our case for a directive verdict of not guilty.
6 We would submit to the Court that the evidence even taken in a
7 light most favorable to the State is insufficient to go to the
8 jury and allow them to convict Mr. Robinson of trafficking in
9 cocaine. We believe it is insufficient.

10 THE COURT: I understand your position but as I said
11 before the evidence was overwhelming that he lived at this
12 place. The evidence was overwhelming that the drugs as found
13 were in his bedroom. Evidence was overwhelming that it was
14 more than 100 and less than 200, that's undisputed. And it
15 was found in his britches and I could very well see how a jury
16 could've found him guilty of possession actual or
17 constructive. The evidence was just overwhelming if believed
18 and so I would respectfully say to you, sir, that that was a
19 question for the jury based on the totality of the evidence
20 and they have found this guilty verdict which I think under
21 the testimony if believed is proper.

22 MR. HILLIARD: Thank you, Your Honor.

23 THE COURT: So, I would respectfully deny that motion.
24 You wish to be heard on that issue?

25 MR. RICHARDSON: No, sir, Your Honor.

State v. Alex Robinson (November 9, 2011)
MOTIONS

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1 THE COURT: All right. Anything further?

2 MR. HILLIARD: Thank you, Your Honor. Judge, we would
3 again renew our motion for the search warrant to be quashed
4 and would ask that Your Honor recuse yourself from hearing
5 this case based on the fact that the search warrant was signed
6 by Your Honor thus making you the determiner of whether or not
7 there was sufficient information to go forward on the search
8 warrant. We renew that motion.

9 THE COURT: Well, your -- the record will reflect that
10 you made such a motion.

11 MR. HILLIARD: Yes, sir.

12 THE COURT: And the record will reflect that I denied it.

13 MR. HILLIARD: Yes, sir.

14 THE COURT: It's a two-pronged issue, one separate from
15 the other. And the first issue was, was the affiant's
16 affidavit on the face of it sufficient for a search warrant.

17 MR. HILLIARD: Yes, sir.

18 THE COURT: I concluded that it was. The second issue
19 was raised in court on the record was whether or not that the
20 affiant gave true and correct statements and I could make that
21 determination separately from being the judge who issued the
22 search warrant and I did. I see absolutely no conflict in
23 that position. So, that's respectfully denied.

24 MR. HILLIARD: Thank you, Your Honor. And once again we
25 renew our motion to dismiss the case based on the destruction

State v. Alex Robinson (November 9, 2011)
MOTIONS

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1 of evidence, we would submit to the Court is favorable to our
2 client.

3 THE COURT: Well, the record will reflect that at your
4 suggestion I charged the jury with the appropriate spoilage
5 charge. I do conclude that the evidence that they destroyed
6 was relatively insignificant, saw no probative value one way
7 or the other but do not believe that it impacted on the
8 fairness of the trial but you are protected on that issue.

9 MR. HILLIARD: Thank you, Your Honor.

10 THE COURT: Anything further? Ms. Bass, I'll be glad now
11 to hear you since he's sat down.

12 MR. HILLIARD: That's all we have, Your Honor. Thank you
13 very much.

14 THE COURT: I will say this for both of you, the case was
15 very vigorously tried. Thank you so much. We are now -- no,
16 bring the Defendant forward.

17 MR. RICHARDSON: Your Honor, for the record, I assume the
18 motion for new trial was during the mistrial motion?

19 MR. HILLIARD: Motion for new trial is denied as well,
20 Your Honor?

21 THE COURT: Yes, sir.

22 MR. HILLIARD: Thank you, Your Honor.

23 THE COURT: There is ample evidence sufficient for the
24 jury's consideration to arrive at the verdict that they did.
25 And on those other issues, you are protected on the record.

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State v. Alex Robinson (November 9, 2011)
MOTIONS

590

1 MR. HILLIARD: Thank you, Your Honor.

2 THE COURT: All right, sir. What's the prior record of
3 this Defendant if any? Come forward.

4 MR. RICHARDSON: One second, Your Honor. Court's
5 indulgence.

6 Your Honor, he is ---

7 THE COURT: Talk to me. You're talking down to the ---

8 MR. RICHARDSON: Yes, sir, Your Honor. He has a
9 probation -- he got put on probation in 2004, February of 2004
10 for receiving stolen goods, 1,000 to \$5,000. That's his prior
11 record, Your Honor.

12 THE COURT: All right, sir.

13 Counsel, anything you want to be heard on?

14 MR. HILLIARD: Yes, sir, Judge. You have seen and heard
15 the evidence in connection with this case. My client has been
16 convicted, I understand that. I have come to know him
17 personally over the period of time that I have represented him
18 and I can tell you as an officer of the court that I have
19 found him to be a respectful individual who has been polite,
20 prompt, he has come and spoken with me on any number of
21 occasions and I can tell you also as an officer of the court,
22 Your Honor, that his child support is current. That was one
23 of the things that I checked on prior to this trial commencing
24 on Monday, last week because it was of interest to me and he
25 is paying child support. I recognize that he won't be paying

APP'X 541

State v. Alex Robinson (November 9, 2011)
SENTENCE OF THE COURT

591

1 child support but he has regularly paid child support through
2 the Clerk of Court for Horry County. He had been working in
3 the recording business up until this point in time and I
4 understand that he faces the maximum sentence in court and I
5 told him to anticipate if we were unsuccessful that he would
6 likely get the maximum sentence.

7 THE COURT: I have no discretion in the matter.

8 MR. HILLIARD: All right, sir.

9 THE COURT: The sentence is imposed by legislature.

10 SENTENCE OF THE COURT:

11 THE COURT: The evidence in this case, if believed and
12 the jury apparently believed it was that there was a
13 significant drug activity on these premises and that was the
14 basis of the search warrant and the search warrant appeared to
15 be true. There is testimony unfortunately for him that that
16 significant quantity found in his bedroom where his girlfriend
17 was and was found in jeans identified as his, that was for the
18 jury to consider and that was substantial testimony in this
19 case as against him. As I said before and I'll say again to
20 you and to him, the case was very vigorously tried by both of
21 you and submitted to the jury under the charge to which there
22 was no exceptions or additions. The jury deliberated at
23 length and fairly I thought and reached a verdict that they
24 did of guilty in the quantity of 100 -- more than 100 and less
25 than 200. The statute as made and provided requires that

APP'X 542

State v. Alex Robinson (November 9, 2011)
SENTENCE OF THE COURT

592

1 somebody convicted of trafficking in cocaine in this amount
2 must be sentenced to twenty-five years. Our legislature
3 regards as a very serious matter the trafficking in cocaine
4 and that's their judgment. In accordance with my duty as an
5 officer of the court it be the sentence of this judge that he
6 be confined in the state penitentiary for a period of twenty-
7 five years and pay a fine of \$50,000. Thank you so much.

8 MR. HILLIARD: Thank you, Your Honor.

9 (ADJOURNED)

10 *****END OF TRANSCRIPT OF RECORD*****
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APP'X 543

DOCKET NO. 2009-GS-26-03445

The State of South Carolina
County of Horry

Scott Graustein 08H04220

COURT OF GENERAL SESSIONS

SEPTEMBER, 2009 TERM

THE STATE

vs.

Alex Lorenzo Robinson
B/ M
1251 Stoneybrook Drive
Conway, SC 29827-3007
DOB:
SSN:

ATTORNEY: Williams, Brana J.

Indictment for

TRAFFICKING COCAINE (100-200 GRAMS)

J. Gregory Hembree, Solicitor

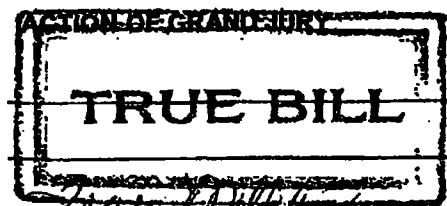
ORIGINAL

WITNESSES

Kent Donald Horry County Police Department

REST WARRANT NUMBER

J321135
CDR: 0280 44-53-0370(e)(2)(c)
DOA: 10/1/2008



Foreperson of Grand Jury
ate: SEP 2 4 2009

RDICT

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on AUGUST 27, 2009, the Grand Jurors of Horry County present upon their oath:

TRAFFICKING COCAINE
(100 GRAMS OR MORE, BUT LESS THAN 200 GRAMS)

(CDR: 0280 44-53-370(e)(2)(c))

That **Alex Lorenzo Robinson** did in Horry County on or about September 25, 2008, knowingly, sell, deliver, purchase or bring in to this State, or aid, abet, attempt or conspire to sell, deliver, purchase or bring into this State, or was in actual or constructive possession, or attempted to become in actual or constructive possession of a quantity of Cocaine in an amount of 100 grams or more, but less than 200 grams, the same being a controlled substance, a within the meaning of Section 44-53-370, et. seq., S. C. Code of Laws, 1976, as amended, such possession not having been authorized by law, and being in violation of Section 44-53-370(e)(2)(c), S. C. Code of Laws, 1976, as amended, for the crime of trafficking.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


J. GREGORY HEMBREE
FIFTEENTH CIRCUIT SOLICITOR

APP'X 545

WITNESSES

Kent Donald Horry County Police Department

The State of South Carolina

County of Horry

Scott Graustein

08H04220

COURT OF GENERAL SESSIONS

SEPTEMBER, 2009 TERM

REST WARRANT NUMBER

J612710

CDR: 0065 58-05-0750(B)(1)

DOA: 10/1/2008

THE STATE

vs.

Alex Lorenzo Robinson

B/ M

1251 Stoneybrook Drive

Conway, SC 29527-3007

DOB:

SSN:

ATTORNEY: Williams, Brana J.

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

SEP 24 2009

RDICT

Indictment for

FAILURE TO STOP FOR BLUE LIGHT

J. Gregory Hembree, Solicitor

ORIGINAL

Foreperson of Petit Jury

Date:

APP'X 546

STATE OF SOUTH CAROLINA)
COUNTY OF Horry)

INDICTMENT

At a Court of General Sessions, convened on AUGUST 27, 2009, the Grand Jurors of Horry County present upon their oath:

FAILURE TO STOP FOR BLUE LIGHT/SIREN

CDR: 0065 56-05-0750(B)(1)

That **Alex Lorenzo Robinson** did in Horry County on or about September 30, 2008, while operating a motor vehicle on a road, street, or highway of the State of South Carolina, did refuse and fail to stop his/her motor vehicle when signaled to do so by a law enforcement vehicle, by means of a siren and/or flashing light, in violation of Section 56-05-0750(B)(1), S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


J. GREGORY AMBREE
FIFTEENTH CIRCUIT SOLICITOR

APP'X 547

WITNESSES

Kent Donald Horry County Police Department

The State of South Carolina

County of Horry

Scott Graustein

08F104220

COURT OF GENERAL SESSIONS

SEPTEMBER, 2009 TERM

ARREST WARRANT NUMBER

J321135

CDR: 0280 44-53-0370(e)(2)(c)

DOA: 10/1/2008

THE STATE

vs.

Alex Lorenzo Robinson
B/ M

Conway, SC 29527-3007
DOB:
SSN:

ATTORNEY: Williams, Brana J.

Indictment for

TRAFFICKING COCAINE (100-200 GRAMS)

J. Gregory Hembree, Solicitor

ORIGINAL

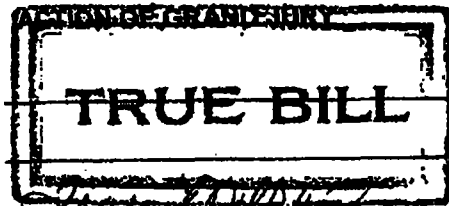
CERTIFIED COPY

2011 NOV 17 AM 11:26

CLERK OF COURT
HORRY COUNTY

Release not required

APP'X 548



Foreperson of Grand Jury
Date: SEP 24 2009

VERDICT

Guilty 11/9/11

James J. Hembree

100-200 Grams

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on AUGUST 27, 2009, the Grand Jurors of Horry County present upon their oath:

TRAFFICKING COCAINE
(100 GRAMS OR MORE, BUT LESS THAN 200 GRAMS)

(CDR: 0280 44-53-370(e)(2)(c))

That Alex Lorenzo Robinson did in Horry County on or about September 25, 2008, knowingly, sell, deliver, purchase or bring in to this State, or aid, abet, attempt or conspire to sell, deliver, purchase or bring into this State, or was in actual or constructive possession, or attempted to become in actual or constructive possession of a quantity of Cocaine in an amount of 100 grams or more, but less than 200 grams, the same being a controlled substance, a within the meaning of Section 44-53-370, et. seq., S. C. Code of Laws, 1976, as amended, such possession not having been authorized by law, and being in violation of Section 44-53-370(e)(2)(c), S. C. Code of Laws, 1976, as amended, for the crime of trafficking.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


J. GREGORY MCBREE
FIFTEENTH CIRCUIT SOLICITOR

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542

NOV-15-2011 16:49 From: Horry Clerk Court 8439156081

To: 95271400

P.1/4

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Horry
STATE VS.Alex Lorenzo Robinson

AKA:

Race: BLACK Sex: M Age: 29DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED]City, State, Zip: [REDACTED]DL#: [REDACTED] SID#: [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Drugs / Trafficking in cocaine. 100 g or more, but less than 200 gINDICTMENT/CASE#: 2009GS2603445A/W#: J321135Date of Offense: 9/25/2008S.C. Code §: 44-53-0370(e)(2)(c)CDR Code #: 0280

SENTENCE SHEET

☒ CONVICTED OF orin violation of § 44-53-0370(e)(2)(c) of the S.C. Code of Laws, bearing CDR Code # 0280
☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-15The charge is: ☒ As Indicted, ☐ Lesser Included Offense. ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation. ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: Richardson, Bradley C. SCB68305

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed 1 yearand/or to pay a fine of \$ \$50,000; provided that upon the service of 0 days/months/years and/or paymentof \$ 0; plus costs and assessments as applicable*; the balance is suspended probation for 0

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

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

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

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ 0 plus 20% fee: \$ 0Payment Terms: 0☐ Set by SCDPPPS 0Recipient: 0*Fine: \$50,000.00

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$5,375.00§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$100.00§ 56-5-2995 (DUI Assessment) \$12 \$§ 56-1-286 (DUI Breath Test) \$25 \$Proviso 47.9 (Public Def/Prob) \$500 \$§ 14-1-212 (Law Enforce. Funding) \$25 \$25.00§ 14-1-213 (Drug Court Surcharge) \$150 \$100.00§ 50-21-114 (BUI Breath Test Fee) \$50 \$§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$Proviso 90.5 (SCCJA Surcharge) \$5 \$3% to County (if paid in installments) \$2,119.40TOTAL \$107,099.40PTUP 0 days/hours Public Service EmploymentObtain GED ☐Attend Voc. Rehab. or Job Corp. 0May serve W/E beginning 0Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fines may be pd. in equal, consecutive weekly/monthly pmts. of \$ 25.00 beginning 12/09/2036\$ 0 paid to Public Defender FundOther: 0☐ Appointed PD or appointed other 0
§ 47.12 requires \$500 be paid to 0 during probation.

Clerk of Court/ Deputy Clerk

Court Reporter

Presiding Judge 0
Judge Code: 2041Sentence's Date: November 9, 2011

APP'X 550

STATE OF SOUTH CAROLINA

ORIGINAL

HORRY COUNTY
SOUTH CAROLINA

SEARCH WARRANT

September 17, 2008

Detective
Kent Donald

APP'X 551

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

SEARCH WARRANT

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR
OF THE MUNICIPALITY OF *HORRY COUNTY, SOUTH CAROLINA*.

It appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

**DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED**

From Hwy. 501, turn right onto Brown Dr. and travel approximately .3 miles to Stoneybrook Dr. Bear left onto Stoneybrook Dr. and travel approximately .1 mile to 1251 Stoneybrook Dr. #54, which is the 6th house on the right side of the street. The residence is described as a white single-wide with green shutters, with a wooden set of steps and porch leading to the front door which also has a glass storm door. The rear door has no steps leading to it. The house sits perpendicular to the road. There is a green in color plastic mailbox with the numbers "1251" on it in front of the residence.

Now, therefore, you are hereby authorized to search the subject premises for the property described below, and to seize such property if found:

DESCRIPTION OF PROPERTY

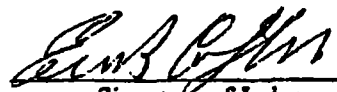
Specifically cocaine, heroin, crack cocaine, marijuana, and any other illegal controlled and controlled substances. Items used to facilitate the distribution of controlled substances such as scales, baggies, vials, containers, etc., firearms, ledgers, books and papers. Any paraphernalia used to facilitate the use of any controlled substances such as pipes, bong, spoons, straws, hypodermics, and etc. that would show that the occupants of the residence are involved with the possession, personal use/or sale of controlled substances. Any currency, monies, or merchandise related to the sale of cocaine or any other illegal controlled substances. Items of personal property that may establish ownership and control of areas searched. Any outhouses, garages, sheds or vehicles, storage units located on the property.

This Search Warrant shall not be valid for more than ten days from the date of issuance. A written inventory of all property seized pursuant to this Search Warrant shall be made to, within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such search if practicable, and, if not, to such person as soon thereafter as practicable; in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to a prominent place on such premises.

Horry County, South Carolina

Sept 17, 2008

 (L.S.)
Signature of Judge

APP'X 552

Form Approved by
S.C. Attorney General
Section 17-13-160
March 13, 1978

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

AFFIDAVIT

Personally appear before me, one Detective Kent Donald who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

Specifically cocaine, heroin, crack cocaine, marijuana, and any other illegal controlled and controlled substances. Items used to facilitate the distribution of controlled substances such as scales, baggies, vials, containers, etc., firearms, ledgers, books and papers. Any paraphernalia used to facilitate the use of any controlled substances such as pipes, bong, spoons, straws, hypodermics, and etc. that would show that the occupants of the residence are involved with the possession, personal use/or sale of controlled substances. Any currency, monies, or merchandise related to the sale of cocaine or any other illegal controlled substances. Items of personal property that may establish ownership and control of areas searched. Any outhouses, garages, sheds or vehicles, storage units located on the property.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED

From Hwy. 501, turn right onto Brown Dr. and travel approximately .3 miles to Stoneybrook Dr. Bear left onto Stoneybrook Dr. and travel approximately .1 mile to 1251 Stoneybrook Dr. #54, which is the 6th house on the right side of the street. The residence is described as a white single-wide with green shutters, with a wooden set of steps and porch leading to the front door which also has a glass storm door. The rear door has no steps leading to it. The house sits perpendicular to the road. There is a green in color plastic mailbox with the numbers "1251" on it in front of the residence.

REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

I am a police officer, certified in South Carolina. I have been employed by the Horry County Police Department for 10 years with 7 years as a Detective. I have received training in the following: Drug Investigator Level I and Level II 80 hours, and Narcotics Commanders Course 40 hours. I have been involved in other search warrants relating to the seizure of illegal narcotics. I am authorized to make searches and seizures. A confidential and reliable informant working for the Horry County Police Department purchased a quantity of off white powder substance represented as being cocaine and field-testing positive for cocaine attributes from the occupants of the house identified as 1251 Stoneybrook Dr in Conway, SC. That the informant has been able to make recent continuous purchases of illegal drugs from this residence leads to the affiant's belief that there is the possibility there may be more illegal drugs located at this residence.

APP'X 553

Form Approved by
S.C. Attorney General
Section 17-13-160
March 13, 1978

Sworn to and Subscribed before me
This 17 day of Sept, 2008
[Signature] (L.S.)
Signature of Judge

[Signature]
AFFIANT
Address 2516 S. Main St
Columbia, SC 29526
Phone 1 243 915 2048

APP'X 554

Form Approved by
S.C. Attorney General
Section 17-13-160
March 15, 1978

RETURN

I received the attached Search Warrant on, 9-17-08, and have executed it as follows:

On, 9-25-08 at 0740 hours.

I searched (residence) described in the warrant and

I left a copy of the warrant at the with
Kenneth Durant

Name of person searched or "at the place of search" with
Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

Hi-point C9 semi P1278306 w/ magazine w/ 8.9mm rounds, box containing
4 rounds of Federal Premium, bag of off white compressed powder, bag
of off white rock like substance, bag w/ three blue circular tablets, bag
w/ two bags w/ green leafy substance, two surveillance cameras w/ monitor
JVC compact VHS recorder w/ blue carry case, digital scale, box open
of clear sandwich bags, black box w/ marijuana, long silver box w/ marijuana
long medicine bottle w/ prescription order issued to Tiffany Smith, DG
Aspirin bottle w/ 5 assorted prescription tablets, Sony Ericsson phone, Texa
memory card, Kingston 1GB memory card, SC driver's license, Jan and wife
certificate issued to Gil Yakob, 31A-05 US currency, marijuana, ashtray,
sketch ashtray, digital picture frame, multi-colored glass pipe w/ barrel
marijuana residue, marijuana rocks, money ashtray box, Remington 12 gauge
shotgun shells, various paperwork on the name of Alex Robinson, wallet
bottle w/ hidden compartment, Kenneth Durant SC driver's license

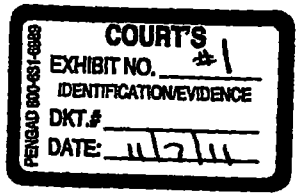
I swear that this Inventory is true and detailed account of all the property taken by me on
the warrant in the presence of Ashley Hardie, Danny Furr, Derrick And, Van
Sizall, Craig Hutchinson.

SWORN to before me this 14
Day of October 2008

[Signature] (L.S.)
Signature of Judge

[Signature]
(Signature of Officer Executing Warrant)

APP'X 555



State v. Heath, 370 S.C. 326, 635 S.E.2D 18 (S.C. 2006)

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635 S.E.2D 18 (S.C. 2006)

370 S.C. 326

The STATE, Respondent,

v.

Ted Lee HEATH, Appellant.

No. 26200.

Supreme Court of South Carolina.

August 14, 2006

Heard April 6, 2006.

James W. Boyd, of Boyd & Jordan, of Rock Hill, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia, and Solicitor Thomas E. Pope, of York, for Respondent.

TOAL, Chief Justice.

A jury found Ted Lee Heath (Appellant) guilty of trafficking in crack cocaine. This appealed followed. We reverse and hold that Appellant was entitled to a directed verdict because the State failed to present evidence that Appellant was in constructive possession of crack cocaine.

Factual / Procedural Background

Appellant, who was twenty-two years old at the time of the arrest, lived in a house with his mother and a young child. Appellant's mother owned the house.

The police obtained a warrant to search for crack in and around the house. When the police arrived at the house to execute the warrant, Appellant and his brother were outside in front of the house. Appellant appeared to have just finished washing his car in front of the house. Appellant remained by

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the car in front of the house as the officers approached.

Upon the police officers' arrival, Appellant's brother immediately ran into the house and locked himself in the bathroom. After Appellant's brother was restrained, the police discovered crack cocaine and approximately two thousand, five hundred dollars in cash. In addition, the officers discovered scales and a small crack rock in the house. Further, officers discovered numerous plastic baggies; allegedly the type used by crack dealers.

Additionally, and at the center of this appeal, a police dog discovered a car-washing mitt in a recycling bin near the back door of the house containing 43.48 grams of crack cocaine.

A jury convicted Appellant of trafficking crack cocaine and Appellant was sentenced to 25 years imprisonment. We certified this case from the court of appeals pursuant to Rule 204(b), SCACR. Accordingly, the issue before this Court is:

Did the trial court err in failing to direct a verdict in favor of Appellant because of the State's failure to establish an essential element of the crime?

Law / Analysis

A defendant is entitled to a directed verdict when the State fails to present evidence of the offense charged. *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). In determining whether the trial court erred in denying a motion for directed verdict, we must view the evidence in the light most favorable to the State. *State v. Ballenger*, 322 S.C. 196, 198, 470 S.E.2d 851, 853 (1996).

The State alleges that Appellant violated South Carolina Code section 44-53-375(C). The Code provides that a "person ... who is knowingly in actual or constructive possession of ten grams or more of ... crack cocaine ... is guilty of" trafficking in crack cocaine. The record reflects that the police found 43.48 grams of crack cocaine at Appellant's residence. The State does not dispute that Appellant was not in actual possession of the crack. Accordingly, the issue presented is whether the State proved that Appellant was knowingly in constructive possession of crack.

Mere presence is insufficient to prove constructive possession. *State v. Tabor*, 260 S.C. 355, 364, 196 S.E.2d 111, 113 (1973). In order to prove constructive possession, the "State must show a defendant had dominion and control, or the *right to exercise dominion and control* over the [illegal substance]." *State v. Halyard*, 274 S.C. 397, 400, 264 S.E.2d 841, 842 (1980) (emphasis added). Further, the State may establish constructive possession by either circumstantial or direct evidence. *Id.* The defendant's knowledge and possession may be inferred if the substance was found on premises under his control. *State v. Adams*, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987) (emphasis added).

In the present case, the police discovered crack in a car-washing mitt in a recycling bin outside near the back door of the house. The State presented no direct or circumstantial evidence linking Appellant to the 43.48 grams of crack. As a result, the question becomes whether Appellant had dominion and control over the property where the crack was found.

APP'X 557

We hold that the State failed to present evidence that Appellant could exercise dominion and control over the area where the crack was found. Appellant lived in the home where the crack was found. However, the home is owned by Appellant's mother. As a result, it is arguable that Appellant merely had a right to access the area where the crack was found, not actual dominion and control of the property.

Conclusion

Accordingly, we reverse Appellant's conviction because the State failed to establish an essential element of the crime charged.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (S.C. 2002)

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563 S.E.2d 315 (S.C. 2002)

349 S.C. 326

The STATE, Respondent,

v.

Jamie MIZZELL and Jimmy Allen "Tootie" Mizzell, Petitioners.

No. 25456.

Supreme Court of South Carolina

April 29, 2002.

Heard March 20, 2002.

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Chief Attorney Daniel T. Stacey, of South Carolina Office of Appellate Defense; and Robert Edward Lominack, of Law Offices of David I. Bruck, of Columbia, for petitioners.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Harold M. Coombs, Jr., of Columbia; and Solicitor Randolph Murdaugh, III, of Hampton, for respondent.

BURNETT, Justice.

Brothers Jamie Mizzell ("Jamie") and Jimmy "Tootie" Mizzell ("Tootie") (collectively, "petitioners") were charged with first degree burglary, grand larceny, and possession of a firearm during the commission of a violent crime. At trial, a jury convicted petitioners of second degree burglary and grand larceny. The Court of Appeals affirmed. See *State v. Mizzell*, 341 S.C. 529, 535 S.E.2d 134 (Ct.App.2000). We granted certiorari to review the Court of Appeals' decision. We reverse.

FACTS

APP'X 559

On September 24, 1996, Howard Woods' ("Woods") home was burglarized. Woods stated he left his home in the afternoon, returning later to find the front door kicked in and numerous guns missing. Woods testified knowing petitioners from a hunting club.

Investigator Fowler ("Fowler"), the lead investigator, testified that upon reaching Woods' home, he found the door opened. He

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discovered no fingerprints or any other physical evidence to further the investigation. After receiving a tip, Fowler went to the home of Thomas Harley ("Harley") and recovered nine of Woods' rifles. Harley admitted buying rifles from petitioners. Harley testified a man and woman were in the truck with petitioners when he bought the rifles.

The State's key witness, Donald Steele ("Steele"), testified he and his wife accompanied petitioners to Woods' home. Steele drove a small pick-up truck to the home. After arriving, Steele claimed petitioners kicked in the door and entered. Steele testified petitioners exited the home carrying guns. Steele further testified to witnessing petitioners sell several of the guns to a man, presumably referring to Harley.

On cross-examination, Steele admitted the State charged him with the same crimes as petitioners. The trial court excluded evidence of the possible sentence Steele faced but permitted petitioners to examine Steele about the sentence in general terms.

ANALYSIS/DISCUSSION

Petitioners argue the trial court erred in violating their rights under the Sixth Amendment's Confrontation Clause ^[1] by limiting the cross-examination of Steele. Specifically, petitioners assert the trial court should have permitted defense counsel to elicit from Steele the possible punishment he could receive if he were convicted of the charged crimes. We agree.

"The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." *State v. Graham*, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) (quoting *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986)). The Sixth Amendment is applicable to the states through the Fourteenth Amendment. ^[2] See *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

A defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *State v. Brown*, 303 S.C. 169, 399 S.E.2d 593 (1991). "On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness." *State v. Brewington*, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) (quoting 98 C.J.S. *Witnesses* § 560a (1957)); see Rule 608 (c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.").

A criminal defendant may show a violation of the Confrontation Clause "by showing that he was prohibited

from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674, 684 (1986). The trial judge retains discretion to impose reasonable limits on the scope of cross-examination. *State v. Sherard*, 303 S.C. 172, 399 S.E.2d 595 (1991); accord *Delaware v. Van Arsdall*, *supra*. Before a trial judge may limit a criminal defendant's right to engage in cross-examination to show bias on the part of the witness, the record must clearly show the cross-examination is inappropriate. *State v. Graham*, *supra*. If the defendant establishes he was unfairly prejudiced by the limitation, it is reversible error. *State v. Brown*, *supra*.

The trial judge prohibited questioning Steele about a specific possible sentence because the charges against Steele and petitioners were the same. "The purpose of preventing disclosure of the potential sentence facing the defendant is that such evidence is irrelevant to the jury and could possibly prejudice the State's right to a fair trial." *Illinois v. Brewer*, 245 Ill.App.3d 890, 185 Ill.Dec. 917, 615 N.E.2d 787, 790 (1993). We implicitly recognized this interest in *State v. Brown*, *supra*.

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The jury is, generally, not entitled to learn the possible sentence of a defendant because the sentence is irrelevant to finding guilt or innocence. However, other constitutional concerns, such as the Confrontation Clause, limit the applicability of this rule in circumstances where the defendant's right to effectively cross-examine a co-conspirator witness of possible bias outweighs the need to exclude the evidence.

In *State v. Brown*, *supra*, we held the trial court erred in excluding evidence of a witness' possible punishment because it would allow the jury to learn of Brown's own potential sentence, if convicted.

The witness admitted, on direct examination, she testified in exchange for being charged with only one count of conspiracy for which she could face a maximum sentence of seven and one-half years. On cross-examination, the trial judge precluded the defense from asking the witness the maximum punishment she faced if found guilty of trafficking in cocaine, the crime initially charged against her.

We found Brown was unfairly prejudiced because the witness "was permitted to avoid a mandatory prison term of more than three times the duration she would face on her plea to conspiracy [was] critical evidence of potential bias that appellant should have been permitted to present to the jury." *Id.*, 303 S.C. at 171, 399 S.E.2d at 594. Moreover, the witness provided the only evidence to link Brown to the cocaine trafficking. *Id.*, 303 S.C. at 171-72, 399 S.E.2d at 594.

Because of the error of law and the unfair prejudice to Brown, we held the denial of meaningful cross-examination outweighed the State's interest in excluding the evidence. *Id.*, 303 S.C. at 172, 399 S.E.2d at 594.

The case *sub judice* is distinctive because the co-conspirator witness was charged with the same crimes as petitioners but had neither agreed to a plea bargain nor pled guilty. Petitioners assert the State should not be allowed to rely on this distinction to exclude this testimony because the absence of the agreement, if anything, suggests the witness will testify more favorably to the State's position. Petitioners argue Steele would reasonably have felt the quality of his cooperation would determine the degree of benefit he would later receive. See *Boone v. Paderick*, 541 F.2d 447, 451 (4th Cir. 1976) ("[A] promise to recommend leniency (without assurance of it) may be interpreted by the promisee as

contingent upon the quality of the evidence produced; the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor."). We agree.

Generally, a judge may prevent the introduction of evidence which informs the jury of the possible sentence defendants may receive if convicted because it is either irrelevant or substantially prejudicial. See *Illinois v. Brewer, supra*; *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991) (construing Rule 403, SCRE, to allow a judge to exclude relevant evidence if the danger of unfair prejudice substantially outweighs its probative value); Rule 402, SCRE ("Evidence which is not relevant is not admissible.").

The fact the witness has yet to reach a plea bargain or been found guilty should not prevent the admission of such evidence. The lack of a negotiated plea, if anything, creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency. Accordingly, we conclude the Court of Appeals erred in holding the trial judge properly excluded testimony concerning Steele's potential sentence if convicted of the same crimes as petitioners.

Our inquiry does not end upon finding the trial court committed an error in limiting the cross-examination of Steele. "A violation of the defendant's Sixth Amendment right to confront the witness is not *per se* reversible error" if the "error was harmless beyond a reasonable doubt." *Graham*, 314 S.C. at 385, 444 S.E.2d at 527. Whether an error is harmless depends on the particular facts of each case and upon a host of factors including:

the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case.

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Van Arsdall, 475 U.S. at 684, 106 S.Ct. at 1438, 89 L.Ed.2d at 686; see *State v. Clark*, 315 S.C. 478, 445 S.E.2d 633 (1994) (applying *Van Arsdall* factors); see also *State v. Graham, supra*, (the *Van Arsdall* factors are not exhaustive).

"Harmless beyond a reasonable doubt" means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt. *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). In determining whether an error is harmless, "the reviewing court must review the entire record to determine what effect the error had on the verdict." *Clark*, 315 S.C. 478, 484, 445 S.E.2d 633, 636 (Toal, J. dissenting); see, e.g., *Arnold v. State, supra*.

Considering the *Van Arsdall* factors, we note much of Steele's testimony was either cumulative or corroborated by other witnesses. Both Woods and Fowler testified the front door to the home had been kicked in or tampered with to gain entry. Harley testified he bought rifles from petitioners and observed a male and female (presumably Steele and his wife) in the truck.

Critically, however, Steele was the only witness to testify as an eyewitness to petitioners' burglary of the home. The lack of physical evidence placing petitioners at the scene enhanced the importance of Steele's testimony. As in *Brown*, the co-conspirator witness is the only link placing petitioners at the scene of the crime.

The State contends any error is harmless because the trial judge permitted petitioners to cross-examine Steele about any plea agreement and to question the veracity of his testimony. Additionally, the State asserts the trial court's error did not prejudice the outcome of the trial because Steele was allowed to testify, if convicted, he could go to jail for a "long time."

Steele's general admission he "could get a long sentence for these crimes," denies petitioners' Confrontation Clause rights under the Sixth Amendment. A "long sentence" may have different meanings to different jurors.

We believe the defendant's Sixth Amendment right to effective cross-examination in this case outweighs the right of the State to shield the jury from knowledge of the possible sentence for a defendant who faces the same charges as a witness against him. A witness admitting he is subject to a "long sentence" is quite different from a witness admitting he could be sentenced to a maximum of life in prison, the sentence faced by Steele if convicted of first degree burglary.
^[3] See S.C.Code Ann. § 16-11-311(B) (Supp. 2001).

In *State v. Sherard*, *supra*, two juvenile co-conspirators implicated Sherard in a robbery-murder scheme. In exchange for their testimony, the two were allowed to plead guilty as accessories in family court. Sherard was waived up to general sessions court on charges of murder and attempted armed robbery.

On cross-examination one of the co-conspirators admitted his charges of murder and attempted armed robbery were reduced in exchange for his testimony. He further testified that if he were found guilty of murder in general sessions court, he would face a mandatory life sentence. However, the trial judge prevented Sherard from asking the second co-conspirator witness the penalty he could have suffered if convicted of the original charges. The trial judge did allow the witness to testify he knew the reduced charges would result in much less severe penalties.

We found Sherard suffered no prejudice from the trial court's decision. Critically, we distinguished our decision from *Brown* where "no evidence was presented to the jury regarding the sentence the witness avoided in pleading guilty and testifying for the State." *Id.*, 303 S.C. at 175, 399 S.E.2d at 596. While we found the trial court afforded the defense ample opportunity to demonstrate the bias of the witnesses, we found it critical that "during cross-examination of [the first co-conspirator witness], the jury was made fully aware that a charge of murder carries a mandatory life sentence." *Id.* In the present case, the jury only knew Steele was subject

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to the vagaries of a "long" prison term, whatever that may mean.

Because Steele was the only witness to directly link petitioners to the burglary, we cannot say the trial court's error was harmless beyond a reasonable doubt. See *Arnold v. State*. Accordingly, we find the trial court committed prejudicial error in limiting petitioners cross-examination into Steele's possible sentence.

CONCLUSION

For the aforementioned reasons we REVERSE the court below.

TOAL, C.J., MOORE and WALLER, JJ., concur.

PLEICONES, J., concurring in result.

Notes:

[1] U.S. Const.Amend. VI.

[2] U.S. Const.Amend. XIV.

[3] A "[b]urglary in the first degree is a felony punishable by life imprisonment. For purposes of this section, "life" means until death. The court, in its discretion, may sentence the defendant to a term of not less than fifteen years." S.C.Code Ann. § 16-11-311(B) (Supp.2001).

State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (S.C. 2000)

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536 S.E.2d 675 (S.C. 2000)

342 S.C. 121

The STATE, Petitioner,

v.

Lorenzo Labelle JONES and Melvin Patrick Riles, Respondents.

No. 25188.

Supreme Court of South Carolina

Aug. 21, 2000.

Heard June 8, 2000.

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[Copyrighted Material Omitted]

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Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., of Columbia, and Solicitor E.L. Clements, III, of Florence, for petitioner.

Frederick A. Hoefer, II, and Kevin M. Barth of Harwell, Ballenger, Barth & Hoefer, L.L.P., for respondents.

PLEICONES, Justice:

We granted certiorari to review the Court of Appeals' holding in *State v. Jones*, 331 S.C. 228, 500 S.E.2d

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499 (Ct.App.1998) that probable cause did not exist to issue a search warrant when the affidavit contained a false statement. We affirm.

ISSUE

Did the Court of Appeals err in holding that a magistrate did not have a substantial basis for finding probable cause to issue a search warrant even when an affiant substituted truthful oral information for false information he had intentionally included in the affidavit?

FACTS

The Drug Unit of the Florence Police Department received a tip from a confidential informant that cocaine had been stored at a particular home in Florence and that a shipment would be arriving that weekend. The informant described the van that would be used to transport the drugs, and told the officers that the van would pull behind the house, to prevent it from being seen from the road.

The Drug Unit set up surveillance of the house. After the arrival of the van, an officer took an affidavit for a search warrant to a magistrate. The affidavit stated:

Over the past three weeks an agent of the Florence Combined Drug Unit has observed a quantity of cocaine being stored on the premises. That agent has been responsible for the seizure of illicit drugs and the arrest of illicit drug violators in the past. Information given by this agent has been corroborated by surveillance agents pertaining to this case. (emphasis added).

The affiant, a police officer, verbally advised the magistrate that he had intentionally used the term "agent" instead of "informant" in the affidavit in order to protect the identity of his informant. The affiant truthfully repeated the information his informant had given him and also told the magistrate about the surveillance by police agents.

The magistrate found that probable cause existed to search the house and signed the warrant. Cocaine and other incriminating evidence were found in the house, and Lorenzo Labelle Jones and Melvin Patrick Riles (Defendants) were arrested.

Defendants moved during the trial to suppress the evidence obtained as a result of the search warrant, arguing that the informant was falsely identified as an "agent" in the affidavit. In an evidentiary hearing, the magistrate testified that even after the verbal information provided by the affiant, he was under the impression that the "agent/informant" was a police officer. And he would possibly have asked more questions had he known that such was not the case. The trial court denied Defendants' motion, holding that the magistrate had a substantial basis to find probable cause.

Defendants were convicted of trafficking cocaine, and sentenced to imprisonment of thirty years.

In *State v. Jones*, 331 S.C. 228, 500 S.E.2d 499 (Ct.App.1998), the Court of Appeals reversed

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the trial court and remanded for a new trial. The Court of Appeals held that the evidence should be suppressed because the false affidavit circumvented the affidavit requirement of S.C.Code Ann. § 17-13-140 (1985) and *State v. McKnight*, 291 S.C. 110, 352 S.E.2d 471 (1987). The Court of Appeals then denied the State's petition for rehearing.

We granted certiorari, and now affirm.

DISCUSSION

When reviewing a magistrate's decision to issue a search warrant, we must consider the totality of the circumstances. See *State v. Missouri*, 337 S.C. 548, 524 S.E.2d 394 (1999)(citing *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). Although great deference must be given to a magistrate's conclusions, ^[1] a magistrate may only issue a search warrant upon a finding of probable cause. See *State v. Bellamy*, 336 S.C. 140, 519 S.E.2d 347 (1999).

A defendant has the right to challenge misstatements in a search warrant affidavit. See *Franks v. Delaware*, ^[2] 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) ; *State v. Sachs*, 264 S.C. 541, 216 S.E.2d 501 (1975). A defendant is entitled to an evidentiary hearing if the following criteria are met: (1) the defendant's attack is more than conclusory and is supported by more than a mere desire to cross-examine; (2) the defendant makes allegations of deliberate falsehood or of reckless disregard for the truth which are accompanied by an offer of proof; and, (3) the affiant has made the allegedly false or reckless statement. Further, if the foregoing criteria have been met, and the remaining content is insufficient to find probable cause after the allegedly false or reckless material has been set aside, the defendant is entitled to his hearing, under the Fourth and Fourteenth Amendments. *Franks*, 438 U.S. at 171, 98 S.Ct. at 2684, 57 L.Ed.2d at 677.

In this case, the affidavit contained false information, i.e., the identification of the informant as an "agent." The affiant admitted to the magistrate that he had intentionally used the term "agent" to mislead Defendants. While the officer attempted to correct this false statement with truthful oral information, the testimony of the magistrate indicates that the officer did not, in fact, correct the magistrate's misunderstanding. The magistrate's assumption that the informant was an undercover police officer was not altered, and the magistrate relied upon the false statement when making his probable cause determination. This is made clear from the magistrate's testimony that he "possibility" [sic] would have questioned the affiant more extensively had he known the informant was not a police officer. Setting aside the first three mentions of "agent" in the affidavit means that only the corroborating evidence of the police "agents" ' surveillance of the residence would remain. This evidence alone is insufficient to establish probable cause. Under a *Franks* analysis, probable cause did not exist under the Fourth Amendment of the United States Constitution.

The General Assembly has imposed stricter requirements than federal law for issuing a search warrant. Both the Fourth Amendment of the United States Constitution and Article I, § 10 of the South Carolina Constitution require an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued. U.S. Const. amend. IV; S.C. Const. art. I, § 10. Additionally, the South Carolina Code mandates that a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record...." S.C.Code Ann. § 17-13-140 (1985). Oral testimony may also be used in this state to supplement search warrant affidavits which are facially

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insufficient to establish probable cause. See *State v. Weston*, 329 S.C. 287, 494 S.E.2d 801 (1997). However, "sworn oral testimony, standing alone, does not satisfy the statute." *State v. McKnight*, 291 S.C. 110, 352 S.E.2d 471 (1987).

The Court of Appeals characterized the false affidavit as the equivalent of not having an affidavit at all, and held that § 17-13-140 had been violated since *McKnight* requires a written affidavit. This conclusion is logical, because if an affidavit is not truthful, then the magistrate must depend totally on information provided orally by the affiant in order to determine if probable cause exists.

The Court of Appeals also correctly concluded, that because of utilization of the false term in the affidavit, the veracity of the informant was not established under the "totality of the circumstances" test. Under the "totality of the circumstances" test, a reviewing court considers all circumstances, including the status, the basis of knowledge, and the veracity of the informant, when determining whether or not probable cause existed to issue a search warrant. See *State v. Bellamy*, 336 S.C. 140, 519 S.E.2d 347 (1999) and *State v. Driggers*, 322 S.C. 506, 473 S.E.2d 57 (1996) (nonconfidential informants and eyewitnesses have more credibility than confidential informants).

In this instance, the magistrate erroneously believed the confidential informant to have been a police officer, and indicated his view that in these circumstances, a police officer would be more credible than a confidential informant. Therefore, we agree with the Court of Appeals that the magistrate did not have sufficient information about the informant's veracity to determine whether or not there was probable cause.

We agree with the Court of Appeals' holding that oral information may only be used by an affiant to supplement or to amend incorrect information in an affidavit which was not knowingly, intentionally, or recklessly supplied by the affiant. See *State v. Sachs*, 264 S.C. 541, 216 S.E.2d 501 (1975) and *State v. Workman*, 272 S.C. 146, 249 S.E.2d 779 (1978) (search warrant can be validly amended prior to execution by sworn oral communication to the issuing magistrate).

CONCLUSION

Based on the foregoing discussion, the opinion of the Court of Appeals is **AFFIRMED**.

TOAL, C.J., MOORE, WALLER and BURNETT, JJ., concur.

Notes:

[1] See *State v. Weston*, 329 S.C. 287, 494 S.E.2d 801 (1997).

[2] The State claims that the issue of whether or not the term "agent" in the search warrant affidavit is a false statement under a

Franks analysis has not been preserved for review. However, the solicitor told the trial judge that the "controlling authority" in Defendants' pre-trial motion for suppression was *Franks*. The Defendants' attorney agreed, and the evidentiary hearing proceeded on that premise.

State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (S.C. 1999)

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524 S.E.2d 394 (S.C. 1999)

337 S.C. 548

The STATE, Petitioner,

v.

Victor Wyatt MISSOURI, Respondent.

No. 25031.

Supreme Court of South Carolina

Dec. 6, 1999.

Heard June 9, 1999.

Attorney General Charles M. Condon, Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Robert M. Atrial of Greenville, for petitioner.

Chief Attorney Daniel T. Stacey, of South Carolina Office of Appellate Defense, of Columbia, for respondent.

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TOAL, Justice:

In this criminal case, this Court granted certiorari to review the Court of Appeals' unpublished opinion in *State v. Missouri*, 97-UP-448 (Ct.App.1997). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

During January and February 1995, Greenville detectives were investigating a crack cocaine ring with the help of a confidential informant. On February 3, 1995, the police obtained a search warrant to search the

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home of Laura and Curtis Sibert a/k/a "Hot Sauce" for cocaine. The lead detective, Eric Cureton, submitted an affidavit in support of the search warrant. The affidavit states, in part:

Your affiant [Eric Cureton] states that on January 25, 1995 he received information from investigator Sam C. Cureton of the Greenville County Sheriff's Office pertaining to Victor Wyatt Missouri. The information that was relayed to your affiant that Missouri was involved in the manufacture and distribution of crack cocaine. The following is a chronological chain of events leading to your affiants [sic] belief that Victor Wyatt Missouri, and others not yet identified, are manufacturing and distributing crack cocaine....

The confidential source of information, who from here forward will be referred to as CSI, stated that for the past two months he has purchased a total of two kilograms of cocaine from Victor Missouri. He would receive this in half kilo quantities every two weeks.

On January 31, 1995 CSI stated that he had talked with Missouri and another subject who is only known as "Hot Sauce." During this conversation Missouri and "Hot Sauce" stated that they were going to Atlanta, Georgia on February 1, 1995 and obtain four kilos of powder cocaine. This cocaine would then be delivered to Greenville, South Carolina and cooked into crack cocaine. On February 1, 1995 this same CSI went by "Hot Sauce's" apartment at 400 Summit Drive apartment 5-D, Summit Place Apartments. During a conversation with "Hot Sauce" CSI was told that he had not been able to leave for the trip to Atlanta, that they had some things to get together beforehand. During this same conversation CSI told "Hot Sauce" that he wanted to purchase from him a half of a kilo. "Hot Sauce" told CSI that it would cost him around \$13,000.00 for the half kilo. CSI told "Hot Sauce" to call him when he left for Atlanta.

On February 2, 1995 at 4:00 in the afternoon, CSI went to Missouri's residence at 126 Sycamore Drive in the City of Greenville, South Carolina. At the residence was Missouri and "Hot Sauce." "Hot Sauce" told CSI that he was leaving for Atlanta around 4:30 and would return around midnight that same night. "Hot Sauce" told CSI that he would page him as soon as he got back in town.

On February 3, 1995, at 4:00 in the morning, Missouri called CSI and told him that "Hot Sauce" was back and they needed somewhere to cook the crack. He said he couldn't cook it at his (Missouri) house because he had relatives there. CSI told him he would give him an answer later and he ultimately told him no. Around 9:00 this same morning CSI paged "Hot Sauce" via his digital pager. "Hot Sauce" returned the call and told CSI they were still trying to get it together. At 10:15 another page was made to "Hot Sauce" with the same results. At 2:00 in the afternoon the CSI drove to "Hot Sauce's" apartment at 400 Summit Drive and went in to inquire about his portion of the cocaine. Your affiant wired the CSI with a body transmitter that would enable your affiant to monitor the conversations he had while inside this apartment. Your affiant, while monitoring the audio transmitter, heard a male voice, whom CSI later stated was "Hot Sauce", question CSI about the phone that had been used earlier trying to set the transaction up. This male appeared to be somewhat reserved about talking with CSI about the cocaine. CSI told your affiant that "Hot Sauce" did appear to be nervous about the deal they were trying to make. **"Hot Sauce" told CSI that he had the crack but he would call him when it was right.**

While officers of the Vice and Narcotics Bureau were surveilling 400 Summit Drive,

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Apartment 5-D on February 3, 1995, it was determined that Missouri, "Hot Sauce" and others who have not been identified, were in the apartment. Around 5:00 a black male and black female left the apartment in a white dodge van.... The van then traveled to Parkersway Foods at Worley Road and Rutherford Road. The female again went inside. After the female left Detective Sergeant T.D. Christy interviewed the clerk and he stated that the black female had purchased 5 boxes of Arm & Hammer baking soda. The van then traveled back to apartment 5-D and the female took a grocery bag into the apartment. She returned to the van and they left again. The surveillance on the van was terminated at this time.

Your affiant, through training, experience and working with other experienced investigators, believes that Victor Wyatt Missouri, "Hot Sauce" and others yet unknown are manufacturing crack cocaine inside of apartment 5-D Summit Place Apartments, 400 Summit Drive in the City of Greenville, South Carolina.

When the police executed the search warrant, officers found Missouri in the kitchen standing over a sink, facing a set of triple beam scales. Inside the sink was a quantity of cooked, crack cocaine. Missouri was arrested for trafficking in crack cocaine. At his trial, Missouri moved to suppress the evidence obtained in the search. Missouri argued the affidavit supporting the search warrant contained false information and further omitted critical, exculpatory information. The trial court denied the motion to suppress. In an unpublished opinion, the Court of Appeals reversed the trial court, holding that the omitted information was necessary for the magistrate's finding of probable cause. See *State v. Missouri*, 97-UP-448 (Ct.App.1997). Judge Hearn dissented in a separate opinion. This Court granted certiorari to address the following issue:

Did the Court of Appeals err in applying the test articulated by *Franks v. Delaware* ^[1] for considering a challenge to the veracity of a search warrant affidavit?

LAW/ANALYSIS

The State argues that the Court of Appeals improperly applied the *Franks* test in deciding whether the magistrate had probable cause to issue the search warrant. We disagree.

At the suppression hearing, Officer Cureton testified that the following sentence in the warrant affidavit was in fact a false statement: " 'Hot Sauce' told CSI that he had the crack but he would call him when it was right." Officer Cureton stated that Curtis Sibert a/k/a "Hot Sauce" never told his informant there was crack in Hot Sauce's apartment. Further on cross-examination, Officer Cureton testified that his informant had gone into Hot Sauce's house at about 3:00 p.m. on February 3, and the informant was told that Missouri had the "stuff," but it was not there. The informant then left the residence and returned at about 4:00 p.m. after Missouri had returned to the house. A "wire" had been placed on the informant's body to enable the police to listen to the conversations. After the informant left Hot Sauce's house, he approached Officer Cureton and told him, "It's not there. It's not there." In addition, Hot Sauce had earlier told the informant that he did not want to cook the cocaine at his house because his wife was trying to go straight. This information was not provided to the magistrate in the supporting affidavit. The trial judge concluded that even with this information, the magistrate would have had a substantial basis upon which to find probable cause for issuing the warrant.

In *Franks v. Delaware*, the United States Supreme Court held that the Fourth and Fourteenth Amendments gave a defendant the right in certain circumstances to challenge the veracity of a warrant affidavit

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after the warrant had been issued and executed. ^[2] To summarize, the Court provided the following two-part test:

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(1) To mandate an evidentiary hearing, the challengers' attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof; and

(2) If these requirements are met, and if, when material that is subject of the alleged falsity or recklessness disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.

Franks, 438 U.S. at 171-72, 98 S.Ct. at 2684, 57 L.Ed.2d at 682.

Franks addressed an act of commission in which false information had been included in the warrant affidavit. However, the *Franks* test also applies to acts of omission in which exculpatory material is left out of the affidavit. See, e.g., *United States v. Colkley*, 899 F.2d 297 (4th Cir. 1990); *United States v. Vazquez*, 605 F.2d 1269 (2d Cir. 1979). To be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge. ^[3] There will be no *Franks* violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause. See *Colkley*, *supra*.

The instant case involves both an act of commission and an act of omission by Officer Cureton in drafting the warrant affidavit. We find that Officer Cureton at least acted recklessly in making the false statement and in omitting the exculpatory information. He testified unequivocally that the statement was false, and his informant had, in fact, made a statement to the contrary. Thus, the primary issue before this Court is whether excluding the false information and inserting the exculpatory statement, there remains a substantial basis upon which the magistrate could have found probable cause to issue the warrant. In doing so, this Court must apply the "totality of the circumstances" test of *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). See *Colkley*, *supra*.

The supporting affidavit begins with the allegation that Victor Missouri and others "are manufacturing and distributing crack cocaine." The affidavit then discusses a series of chronological events which are intended to support this prefatory allegation. The affidavit's description of the informant's contact with the suspects on the day the search warrant was obtained culminates with the false statement that Hot Sauce told the informant he had the crack but would call him when it was right. If our task were simply to consider the affidavit without this statement, we would likely find a substantial basis for probable cause. The absence of the false statement makes the location of the drugs less certain, but this uncertainty is negated by the other events recounted in detail in the affidavit.

However, under *Franks*, our inquiry does not end here. We must also consider the effect of adding the informant's statement, "It's not there," as well as the information that Hot Sauce did not intend to cook the cocaine at his apartment. In doing so, we hold that the affidavit would not support a finding of probable cause to

search Hot Sauce's apartment.

We begin with the presumption that the Fourth Amendment does not require an affiant

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to include all potentially exculpatory evidence in the affidavit. See *Colkley, supra*. A presumption to the contrary "would perforce result in perniciously prolix affidavits that would distract police officers from more important duties and render the magistrate's determination of probable cause unnecessarily burdensome." *Colkley*, 899 F.2d at 303. However, in the instant case, the omitted information goes to the very heart of the affidavit's purpose, which is to establish probable cause to search Hot Sauce's apartment for crack cocaine. Instead of simply creating some uncertainty in the affidavit, the inclusion of the omitted information creates an affirmative hurdle which the remaining portions of the affidavit must overcome. These other portions reveal that the suspects had arranged to sell a quantity of crack cocaine to the confidential informant. The suspects purchased cocaine in Atlanta and transported it to Greenville for this purpose. The affidavit further reveals that the suspects purchased baking soda and brought it back to Hot Sauce's apartment. Baking soda is known to be a common cutting and drying agent when converting powdered cocaine into crack cocaine. Standing alone, these facts are not conclusive as to the presence of crack cocaine in Hot Sauce's apartment, but they make it a fair probability. Yet, when the omitted information is inserted, the probable presence of the crack cocaine in the apartment is defeated. This, in turn, erodes the basis upon which a magistrate could find probable cause to search Hot Sauce's apartment. The remaining portions of the affidavit fail to rehabilitate this basis. [4]

We realize this case presents a close call on the probable cause determination. However, the combination of the police officer's deliberate falsehood and his omission of critical facts pollute the affidavit to the extent that a magistrate could not have found that probable cause existed to issue the search warrant. There is no doubt that the officer intended to mislead the magistrate in obtaining the search warrant. We realize that police officers routinely leave out facts they believe are immaterial to the probable cause determination. Yet, when an omission is combined with an affirmative falsehood, it reveals that the affiant not only believed the omitted information was critical, but that a statement in the affidavit to the contrary was necessary for establishing probable cause. We recognize that under *Franks* our role is not to punish dishonest police officers but, rather, to ensure that a substantial basis exists to find probable cause. That said, the depth of the prevarication perpetrated by the officer in this case undermines any remaining legitimacy the affidavit might possess. Under these circumstances, this Court is required by the Constitution to invalidate the search warrant where the facts create such a close call on the probable cause determination.

CONCLUSION

Based on the foregoing, we AFFIRM the Court of Appeals.

MOORE, J., concurs.

FINNEY, C.J., concurs in result only.

BURNETT and WALLER, JJ., dissenting in a separate opinion.

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I respectfully dissent. Although Officer Cureton's conduct is reprehensible, the issue is whether probable cause existed in spite of the investigator's inclusion of a false statement and omission of exculpatory information from the supporting affidavit. ^[1] In my

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opinion, probable cause remained in spite of the officer's misrepresentations. ^[2]

In *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527, 548 (1983), the United States Supreme Court adopted the "totality of the circumstances" test for probable cause determinations:

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

See *State v. Bellamy*, 336 S.C. 140, 519 S.E.2d 347 (1999).

"In dealing with probable cause ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *State v. Dupree*, 319 S.C. 454, 458, 462 S.E.2d 279, 282 (1995), quoting *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879, 1890 (1949).

Here, Officer Cureton included the following false statement in his affidavit: " 'Hot Sauce' told [the informant] that he had the crack but he would call him when it was right." The majority concludes that, disregarding this false statement, there still existed a substantial basis from which to find probable cause. I agree.

In addition, Officer Cureton failed to inform the magistrate of certain exculpatory information. First, he did not tell the magistrate that when the informant first returned from Hot Sauce's apartment on February 3, the informant stated he was told respondent had the "stuff," but it was not there. Furthermore, the investigator failed to tell the magistrate respondent subsequently entered Hot Sauce's apartment. As a result, while wearing a wire, the informant again entered Hot Sauce's apartment and, upon return, stated, "It's not there. It's not there." Finally, the investigator did not advise the magistrate Hot Sauce had earlier told the informant he did not want to cook the cocaine at his apartment because his wife was trying to "go straight." The majority concludes if Officer Cureton had included the omitted information in the supporting affidavit, probable cause to search Hot Sauce's apartment would not have existed. I disagree with this conclusion.

Considering the totality of the circumstances as reflected in the supporting affidavit, minus the false statement, and with the addition of the exculpatory information, there remains a substantial basis from which to find probable cause. The totality of the circumstances indicate Hot Sauce and respondent planned to go to Atlanta and obtain cocaine which they would then cook into crack cocaine in Greenville. The informant wanted to purchase cocaine in the same quantity as he had purchased it from respondent every two weeks for the past two months.

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Three days later, respondent called the informant and said Hot Sauce had returned and they were looking for a location to cook the cocaine. The informant paged Hot Sauce twice the same morning. Hot Sauce returned the pages and told the informant he was continuing to look for a location to cook the cocaine. In the afternoon, the informant entered Hot Sauce's apartment. Hot Sauce suddenly appeared nervous and unwilling to discuss the drug buy. Hot Sauce indicated respondent, who was not present, had the cocaine and stated he did not want to cook the cocaine at his apartment because his wife was trying to "go straight."

After the informant left, respondent arrived at Hot Sauce's apartment. Two other individuals left Hot Sauce's apartment, purchased

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large quantities of baking soda, which is known to be used to process powder cocaine into crack cocaine, and returned to Hot Sauce's apartment with the baking soda. [3]

These circumstances provide a fair probability that contraband or other evidence of a crime could be found at Hot Sauce's apartment at the time the search warrant was issued. Even assuming the informant unequivocally knew the drugs were not present in Hot Sauce's apartment, i.e., either because Hot Sauce had become suspicious and, hence, told the informant the drugs were not there or because respondent did not enter the apartment after the informant left, there was still probable cause to believe evidence of a crime could be found in the apartment. A warrant need not be based on the probability of discovering an illegal item on the premise to be searched. [4] Although common household items like baking soda are not incriminating, the purchase of a large quantity of baking soda by individuals associated with a recent drug purchase and looking for a location to cook cocaine is evidence of a crime. While officers may ultimately choose to wait until contraband is on the premise before obtaining a search warrant, knowledge the illegal substance is not on the premises does not automatically negate a finding of probable cause.

In my opinion, the trial judge properly ruled the evidence seized as a result of the search warrant should not be suppressed. *State v. Asbury*, 328 S.C. 187, 493 S.E.2d 349 (1997) (In criminal cases, appellate courts are bound by fact findings in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law). I would reverse the decision of the Court of Appeals.

WALLER, J., concurs.

Notes:

[1] 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 687 (1978).

[2] In *State v. Sachs*, 264 S.C. 541, 216 S.E.2d 501 (1975), this Court also addressed whether a defendant could attack the veracity of facts supporting a search warrant when the warrant was valid on its face. Noting that the United States Supreme Court had not yet

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squarely addressed this issue, this Court answered the question in the affirmative, providing the following limited test: "Did the officer, or other government official, in such capacity, intentionally, recklessly, or in bad faith recite facts he knew or should have known to be erroneous, without correcting the error by additional affidavit or affirmation, to obtain the issuance of a warrant?" *Sachs*, 264 S.C. at 555, 216 S.E.2d at 509. The Court further provided the following caveat: "However, even if the officer was delict, so long as probable cause was established by affidavit or affirmation without the aid of the erroneous fact, the warrant satisfies the constitutional demands." *Id.*

[3] See Edward Gregory Mascolo, *Controverting An Informant's Factual Basis for a Search Warrant: Franks v. Delaware Revisited and Rejected Under Connecticut Law*, 15 Q.L.R. 65 (1995).

[4] The cases cited in Judge Hearn's dissent are inapposite to the instant case because they do not involve the reckless or intentional omission of material facts. Rather, these cases deal with the constitutionality of including in the search warrant affidavit reconnaissance information gathered from thermal imaging machines. In addressing this issue, the cases found that even without the thermal imaging information, there was sufficient information in the affidavits to support a finding of probable cause. See *United States v. Cusumano*, 83 F.3d 1247 (10th Cir. 1996); *United States v. Robinson*, 62 F.3d 1325 (11th Cir. 1995); *United States v. Ishmael*, 48 F.3d 850 (5th Cir. 1995).

[1] See *Franks v. Delaware*, 438 U.S. 154, 171-72, 98 S.Ct. 2674, 2684, 57 L.Ed.2d 667, 682 (1978) (1) where defendant establishes deliberate falsehood or reckless disregard for the truth and those allegations are accompanied by offer of proof and 2) if these requirements are met, and if, when material that is subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required).

[2] In my opinion, respondent did not have standing to challenge the sufficiency of the search warrant as he had no expectation of privacy in his co-defendant's apartment. *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980).

[3] I note Officer Cureton's testimony indicates the informant entered Hot Sauce's apartment twice on the afternoon of February 3, 1995, while the supporting affidavit states the informant entered the apartment only once. However, the important portion of the testimony and affidavit, that the informant last informed Officer Cureton the drugs were not in Hot Sauce's apartment, is contained in both.

[4] *Illinois v. Gates*, *supra* (probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place"); see *United States v. Gil*, 58 F.3d 1414, 1418 (9th Cir. 1995) ("observations of conduct consistent with drug trafficking, even though apparently innocuous, can give rise to probable cause"); *United States v. Moody*, 977 F.2d 1425 (11th Cir. 1992) (warrant authorizing search for envelopes, pieces of cardboard, paperclips, and string was unobjectionable for alleged crimes involving homemade bombs).

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460 S.E.2d 573 (S.C. 1995)

319 S.C. 312

The STATE, Respondent,

v.

Kenneth SINGLETON, Appellant.

No. 24292.

Supreme Court of South Carolina.

August 7, 1995

Heard May 2, 1995.

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[319 S.C. 314] Fred Henderson Moore & Herman L. Moore, both of Moore & Moore, Charleston, and South Carolina Office of Appellate Defense, Columbia, for appellant.

Atty.-Gen. T. Travis Medlock, Chief Deputy Atty. Gen. Donald J. Zelenka, Sr. Asst. Atty. Gen. Harold M. Coombs, Columbia, and Sol. David P. Schwacke, North Charleston, for respondent.

BURNETT, Justice:

Kenneth Singleton appeals his conviction for driving a moped while under the influence of alcohol and/or drugs (DUI). We affirm.

FACTS

Singleton was arrested and charged with driving a moped while under the influence of alcohol and/or drugs. While Singleton was being booked into the detention facility, the booking officer found cigarette rolling papers and green plant material in Singleton's pockets and gave them to the arresting officer who deposited the evidence in a heat-sealed bag and locked the bag in an evidence cabinet. An evidence custodian later removed the bag from the cabinet to analyze the

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substance. It tested positive for marijuana and was subsequently destroyed pursuant to Circuit Court Order.

In the course of Singleton's trial, the trial judge charged the jury that a moped is a vehicle as

contemplated by S.C. Code Ann. § 56-5-2930 (1991), thus making it illegal to drive a moped while under the influence of alcohol and/or drugs. After deliberating for thirty minutes, the jury advised the trial judge that they were unable to reach a verdict. The judge delivered an Allen [1] jury instruction and encouraged the jurors to take more time to deliberate, to re-examine their

[319 S.C. 315] views, and to avoid a mistrial by reaching a unanimous verdict. The jury deliberated further and convicted Singleton.

At the request of Singleton's counsel, the jury was polled. During polling, one of the jurors answered as follows:

[CLERK]: [Juror], was this your verdict?

[JUROR]: Yes.

[CLERK]: Is it still your verdict?

[JUROR]: No.

[THE COURT]: What did he say?

[CLERK]: He said no.

[THE COURT]: Go back in your jury room to continue your deliberations. I'm told this was a unanimous verdict. Is this your verdict?

[JUROR]: It is now.

[THE COURT]: And it's still your verdict?

[DEFENSE COUNSEL]: Your Honor, I think ...

[THE COURT]: Wait a minute now. I'm asking you--I think you misunderstood. The verdict of the jury as announced to me is guilty. Is that your verdict too?

[JUROR]: Yes.

[THE COURT]: And is it still your verdict?

[JUROR]: Yes.

[THE COURT]: Proceed to poll the jury. Go ahead.

The verdict stood after the polling.

ISSUES

I. Did the trial judge err in charging that a moped is a vehicle under the DUI statute?

II. Did the trial judge abuse his discretion during the supplemental instruction and jury polling?

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III. Was the chain-of-custody of the marijuana established?

DISCUSSION

I. Is a Moped a Vehicle?

Singleton was convicted under the DUI statute, which makes it unlawful for any person to drive any vehicle while under the influence of alcohol and/or drugs. ~~S.C.Code Ann. § 56-5-2930 (1991). The provisions of Chapter 5 of Title 56 govern the operation of mopeds on the public highways~~

[319 S.C. 316] and streets. S.C.Code Ann. § 56-5-50 (Supp.1994). Accordingly, we conclude the General Assembly intended the DUI statute to embrace the driving of a moped and the trial judge did not err in charging that a moped is a vehicle as contemplated by the DUI statute.

Singleton relies upon statutes involving vehicle registration, licensing of drivers, and liability insurance in contending that a moped is not a motor vehicle. We conclude that, although exempted from registration, licensing, and insurance requirements, mopeds are within the purview of the DUI statute.

II. Did the Trial Judge Abuse His Discretion?

Singleton contends the trial judge made inappropriate comments in the Allen instruction and intimidated a juror during polling. We disagree.

The trial judge has a duty to urge the jury to reach a verdict but he may not coerce them. *State v. Lynn*, 277 S.C. 222, 284 S.E.2d 786 (1981); *State v. Pulley*, 216 S.C. 552, 59 S.E.2d 155 (1950). It is not coercion when a trial judge instructs the jury that failure to reach a verdict will require a

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new trial at additional expense, [2] or states that every juror has a right to his own opinion and need not give it up merely for the purpose of reaching agreement. [3] Moreover, the trial judge must be satisfied that the verdict is unanimous. If it is made known to the court when it is time to render the verdict that any juror does not assent to it, the verdict cannot be received and the jury should retire to their room until they have agreed. *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981).

We conclude that Singleton failed to establish that the judge's comments during the supplemental instruction were coercive. Further, the manner of polling was appropriate to ensure that the juror did not misunderstand the verdict and to confirm that the verdict was unanimous. See *State v. Roper*, 274 S.C. 14, 260 S.E.2d 705 (1979) (the manner of polling is within the court's discretion). Accordingly, since Singleton was not

prejudiced by either the supplemental instruction or the manner of polling, there was no abuse of discretion by the trial judge.

[319 S.C. 317] III. Was the Chain-of-Custody of the Marijuana Established?

The party offering evidence must trace possession of the substance and what was done with it from the time it was taken until final analysis. *State v. Cribb*, 310 S.C. 518, 426 S.E.2d 306 (1992); accord, *Raino v. Goodyear Tire and Rubber*, 309 S.C. 255, 422 S.E.2d 98 (1992); *State v. Sarvis*, 265 S.C. 144, 217 S.E.2d 38 (1975). In addition, if the evidence possesses exculpatory value that is apparent before its destruction, its disposal constitutes a denial of due process. *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); *State v. Jackson*, 302 S.C. 313, 396 S.E.2d 101 (1990).

Here, the record establishes the chain-of-custody of the marijuana from the time it was taken from Singleton until its final analysis, and Singleton failed to establish that the destroyed evidence was exculpatory. We further conclude that the officers were acting in good faith and in accord with normal procedures when destroying the marijuana after analysis. See *Arizona v. Youngblood*, supra (bad faith on part of police must be established in order for the destruction of potentially useful evidence to constitute a denial of due process); *California v. Trombetta*, supra (no due process violation when normal practice is to discard evidence after analysis). Accordingly, Singleton was not prejudiced by the destruction of the evidence.

AFFIRMED.

FINNEY, C.J., and TOAL, MOORE and WALLER, JJ., concur.

Notes:

[1] *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

[2] *State v. Ayers*, 284 S.C. 266, 325 S.E.2d 579 (Ct.App.1985).

[3] *State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct.App.1985).

State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (S.C.App. 2010)

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702 S.E.2d 395 (S.C.App. 2010)

390 S.C. 502

The STATE, Respondent,

v.

Waltroric U. MOSES, Appellant.

No. 4758.

Court of Appeals of South Carolina.

November 5, 2010

Heard Sept. 15, 2010.

Rehearing Denied Dec. 20, 2010.

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[Copyrighted Material Omitted]

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[Copyrighted Material Omitted]

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Appellate Defender M. Celia Robinson, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Julie M. Thames, all of Columbia; Robert Mills Ariail, of Greenville, for Respondent.

PIEPER, J.

[390 S.C. 508] Waltronic U. Moses appeals his conviction for assault and battery of a high and aggravated nature (ABHAN) and sentence pursuant to the Youthful Offender Act. On appeal, Moses argues the trial court erred in: (1) ruling his statement was voluntarily made; (2) refusing to dismiss the charges due to the State's destruction of and failure to disclose videotaped evidence; (3) refusing to grant the motion to quash the indictments; and (4) admitting statements by a witness under Rule 613, SCRE, as prior inconsistent statements. We affirm.

FACTS/PROCEDURAL HISTORY

On September 28, 2006, Moses, a special education student at Hillcrest High School, was involved in a physical altercation with a school police officer. The altercation took place during a lunch period when Moses went to the cafeteria to wish a cafeteria worker happy birthday. Moses walked towards a lunch line being monitored by a biology teacher, Brian Carl. As Moses approached, Carl told him not to cut in line. Moses did not respond and Carl followed him, indicating that Moses had to go to the end of the line. Moses continued to ignore Carl and proceeded through the lunch line. After tugging on Moses' backpack, Carl repeated for a third time that Moses could not cut in line. Refusing to cooperate, Moses told Carl not to touch him and that he better get away from him. Consequently, in accordance with school procedure, Carl took Moses' identification badge from his backpack and asked Officer Morris Madden, the school resource officer, to handle the situation with Moses.

Thereafter, Moses walked behind Carl to the administrator's table to retrieve his badge. When Moses walked back **[390 S.C. 509]** toward the lunch line, Carl turned around and put his hand on Moses' shoulder. Moses responded by raising his hand up and stating, "don't f__ing touch me." When Madden saw Moses raise his hand, Madden stood up, grabbed Moses by the hand, and told him to sit down at the administrator's table. Instead of sitting down, Moses "pushed" his chair toward Madden and told Madden to get off of him. Moses then pushed Madden. Moses started to walk away and Madden caught up with him and attempted to place him under arrest. When Madden attempted to grab Moses and arrest him, Moses turned around, shoved Madden with both hands, and told him, "get the f--k away."

After Moses pushed Madden a second time, Madden attempted to push Moses to the ground in order to gain control of him. However, Madden was unable to keep Moses

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down. Once Moses was able to stand up, he grabbed Madden around his waist and pushed him backwards. Madden used his arms to come underneath Moses' grip and then punched him. Moses then punched Madden in the left temple area of his head, knocking off his glasses. As a result, Madden suffered multiple facial fractures.

Moses immediately ran out of the cafeteria and exited the building while Madden and Officer Matthew Smith followed him. Smith asked Moses to stop. Moses finally stopped and told Smith to keep Madden away from him. Smith placed Moses into custody and transported him to the Simpsonville Police Department. At the police department, Smith

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took Moses into the squad room where he removed Moses' handcuffs. Smith read Moses his rights verbatim from the "Waiver of Rights" form and asked Moses if he understood his *Miranda* ^[1] rights. Moses replied that he understood his rights and signed the waiver. Smith then took Moses' written statement by writing down everything Moses said.

Moses was indicted for ABHAN, malicious injury to personal property, and disturbing schools. The case proceeded to trial in Greenville County on October 29, 2007. Following jury selection, the court denied the defense's pretrial motions [390 S.C. 510] relating to a *Brady* ^[2] violation involving production of the school's surveillance tapes, the voluntariness of Moses' statement, and the alleged irregularity of grand jury proceedings. At trial, the court also overruled two evidentiary objections by defense counsel on the basis of hearsay and relevance.

The trial court granted a directed verdict on the indictment for malicious injury to personal property, finding no evidence of intent. The jury found Moses guilty of ABHAN, but not guilty of disturbing schools. The court sentenced Moses to incarceration for a period not to exceed six years, which is the maximum sentence for ABHAN under the Youthful Offender Act. This appeal followed.

ISSUES ON APPEAL

- (1) Did the trial court err in ruling that Moses' custodial statement was admissible as voluntarily made?
- (2) Did the trial court err in refusing to dismiss the charges against Moses as the result of the State's alleged destruction of and failure to preserve or disclose videotaped evidence?
- (3) Did the trial court err in refusing to grant the motion to quash the indictments?
- (4) Did the trial court err in admitting as substantive evidence prior statements made by a defense witness under the theory that the statements were admissible as prior inconsistent statements under Rule 613, SCRE, and did the court err in denying the motion to strike when the State's witness referenced Moses' prior bad act of assaulting a teacher?

STANDARD OF REVIEW

In criminal cases, the appellate court only reviews errors of law and is bound by the trial court's factual findings unless the findings are clearly erroneous. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220(2006). "On appeal, the trial judge's ruling as to the voluntariness of the confession will not be disturbed unless so erroneous as to constitute an abuse of [390 S.C. 511] discretion." *State v. Myers*, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). Likewise, rulings on the admission of evidence are within the trial court's discretion and will not be reversed absent an abuse of discretion. *State v. Stokes*, 381 S.C. 390, 398, 673 S.E.2d 434, 438 (2009).

LAW/ANALYSIS

Moses first argues the trial court erred in failing to suppress Moses' custodial statement on the ground the statement was not knowingly or voluntarily given. Moses argues that under the totality of the circumstances, the statement, taken from a learning-disabled student, unaccompanied by his

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parents, was improperly admitted into evidence. However, because defense counsel failed to make a contemporaneous objection, this issue is not preserved for our review. "[M]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced." *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840(2001). Notwithstanding, if the court makes a ruling on the admission of evidence *immediately prior* to the evidence at issue being introduced at trial, then the aggrieved party need not renew the original objection. *Id.* (emphasis added). Here, Moses does not meet the exception to the rule because the evidence was not immediately introduced following the court's ruling at the pretrial hearing. Thus, it was necessary for defense counsel to renew her objection to the introduction of Moses' custodial statement in order to preserve the issue for appellate review.

Moreover, the record supports the trial court's ruling that Moses' statement was freely, knowingly, and voluntarily made. In *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the United States Supreme Court indicated "that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." 378 U.S. at 376, 84 S.Ct. 1774. Accordingly, a defendant has the right to object to the use of the confession and to have a fair hearing and a reliable [390 S.C. 512] determination on the issue of voluntariness. *Id.* at 376-77, 84 S.Ct. 1774. In order to introduce into evidence a confession arising from custodial interrogation,^[3] the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). *State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct.App.2009); *State v. Miller*, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct.App.2007).^[4]

"The main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel." *Berghuis v. Thompson*, __ U.S. __, __, 130 S.Ct. 2250, 2261, 176 L.Ed.2d 1098 (2010). Both of these *Miranda* rights protect the privilege against compulsory self-incrimination. *Id.* at 2260. The United States Supreme Court has now recognized there is no principled reason to adopt differing standards for determining when an accused has "invoked" the right to remain silent or "invoked" the right to counsel. *See id.* As such, a suspect must "invoke" these rights "unambiguously." *See id.* "A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that avoid[s] difficulties of pro of and ... provide[s] guidance to officers on how to proceed in the face of ambiguity." *Id.* (internal quotation marks and citation omitted). Otherwise, "[i]f an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong.'" *Id.* (quoting *Davis v. United States*, 512 U.S. 452, 461, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994)). Suppression under these circumstances would place a "significant burden on society's interest in prosecuting criminal activity." *Id.*

Here, Moses did not unambiguously "invoke" his right to remain silent or his right to counsel. Additionally, Moses [390 S.C. 513] has not challenged on appeal his right to counsel; thus, we need only consider whether Moses "waived" his right to remain silent due to his assertion that his statement was not freely and voluntarily given. *See Berghuis*, 130 S.Ct. at 2260 ("Even absent the accused's invocation of the right to remain silent, the accused's statement during a custodial interrogation

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is inadmissible at trial unless the prosecution can establish that the accused in fact knowingly and voluntarily

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waived [*Miranda*] rights when making the statement.") (internal quotation marks and citation omitted). The Supreme Court has indicated two dimensions to this waiver inquiry: (1) the waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception" and (2) the waiver must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)). As both the United States Supreme Court and our state supreme court have indicated, the prosecution need not show that a waiver of *Miranda* was express. *Berghuis*, 130 S.Ct. at 2261; *State v. Kennedy*, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998) ("An express waiver is unnecessary to support a finding that the defendant has waived the right to remain silent or the right to counsel guaranteed by *Miranda*." (citing *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979))). An implicit waiver is sufficient. *Id.* Regardless of whether the waiver is express or implied, the waiver must be given freely, knowingly, and voluntarily. Accordingly, we must assess Moses' waiver under this standard.

In South Carolina, the test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overcome by the totality of the circumstances surrounding the confession. See *Goodwin*, 384 S.C. at 601, 683 S.E.2d at 507 (citing *Dickerson v. United States*, 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000)). Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations [390 S.C. 514]; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep. See, e.g., *Withrow v. Williams*, 507 U.S. 680, 693-94, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) (length of interrogation, location, continuity, and defendant's maturity, physical condition, education, and mental health); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (noting the following factors as relevant: age, education, advice of constitutional rights, length of detention, repeated and prolonged nature of questioning, and use of physical punishment such as deprivation of food or sleep); *Goodwin*, 384 S.C. at 601, 683 S.E.2d at 507 (police coercion, length of interrogation, its location, continuity, and defendant's maturity, education, physical condition, and mental health); *Simmons*, 384 S.C. at 163-64, 682 S.E.2d at 28-29 (awareness of constitutional rights, coercion, hunger, promise of leniency); *State v. Dye*, 384 S.C. 42, 47-48, 681 S.E.2d 23, 26-27 (Ct.App.2009) (defendant's awareness of rights, coercion, environment, education); *State v. Parker*, 381 S.C. 68, 85-93, 671 S.E.2d 619, 627-32 (Ct.App.2008) (age, education, physical and mental state of defendant, misrepresentations of evidence by police, coercion, effect of juvenile's request for parent and advice of parent); *Miller*, 375 S.C. at 384-86, 652 S.E.2d at 451-52 (direct or implied promise of leniency). This list of factors is not an exclusive list. See *Withrow*, 507 U.S. at 693-94, 113 S.Ct. 1745. Moreover, no single factor is dispositive and each case requires careful scrutiny of all surrounding circumstances. *Schneckloth*, 412 U.S. at 226-27, 93 S.Ct. 2041; *State v. Pittman*, 373 S.C. 527, 566, 647 S.E.2d 144, 164 (2007).

Here, Smith testified during the hearing that only he and Moses were present during his interview, although he acknowledged that several officers walked in and out of the room. The record does not indicate Moses was threatened by Smith. Rather, Smith, aware that Moses was seventeen years old and enrolled in special education classes, took the time to write Moses' statement himself after reading each line of the "Waiver of

Rights" form to Moses, who then signed the form. [390 S.C. 515] Additionally, Moses testified on two separate occasions that he understood his *Miranda* rights. He further testified that Smith did not tell him what to say during his

statement. The record does not indicate that Moses was detained for an extended period of time. Finally, although Moses could only read and write at a third grade level, he was able to earn an occupational diploma. Although the trial court failed to specifically mention his mother's alleged request to be present during questioning, we find that factor standing alone is not dispositive. Ultimately, upon review of the totality of the circumstances in this case, the record supports the trial court's conclusion that Moses' statement was freely, knowingly, and voluntarily made, regardless of his age, learning disability, and separation from his mother. Thus, we find no abuse of discretion by the trial court.

Next, Moses argues the trial court erred in refusing to dismiss the charges due to the failure of the State to preserve or disclose videotaped evidence from the incident in the cafeteria which would have been helpful to Moses in identifying student witnesses. Because of his expulsion, Moses was not allowed to go back to the school to look for student witnesses who were in the cafeteria at the time of the incident. If he had been presented with the entire surveillance recording, defense counsel asserts he may have been able to locate, interview, and present favorable testimony from student witnesses.

The State's duty to disclose evidence favorable to the defendant is addressed by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). "The suppression by the [State] of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. In South Carolina, an individual asserting a *Brady* violation must demonstrate that the evidence: (1) was favorable to the accused; (2) was in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching.^[5] *Riddle v. Ozmint*, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006); [390 S.C. 516] *State v. Carlson*, 363 S.C. 586, 609, 611 S.E.2d 283, 295 (Ct.App.2005). The court in *Riddle* recognized the United States Supreme Court's emphasis on the prosecutor's responsibility for fair play. *Riddle*, 369 S.C. at 46, 631 S.E.2d at 74. In describing this responsibility, the court stated:

The prudent prosecutor will resolve doubtful questions in favor of disclosure. This is as it should be. Such disclosures will serve to justify trust in the prosecutor as the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done. And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.

Id. (internal quotation marks and citation omitted). As such, it is imperative for prosecutors to abide by this rule as " [o]ur judicial system relies upon the integrity of the participants." *Id.* Whether the prosecutor's failure to reveal evidence pursuant to *Brady* is due to negligence or an intentional act is irrelevant because a court may find a *Brady* violation regardless of the good or bad faith of the prosecutor. *Gibson v. State*, 334 S.C. 515, 528, 514 S.E.2d 320, 327 (1999). Because *Brady* is founded upon a sense of fairness and justice, the focus in a *Brady* analysis should not be on the misconduct of the prosecutor, but rather on the fairness of the procedure. *Id.* As noted in *Brady*, " [t]he principle ... is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.

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Society wins not only when the guilty are convicted but when criminal trials are fair[.]" *Id.* (quoting *Brady*, 373 U.S. at 87, 83 S.Ct. 1194). "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Id.* (quoting *United States v. Agurs*, 427 U.S. 97, 110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)).

Generally, "[t]here are three categories of *Brady* violations: (1) cases involving nondisclosed evidence or perjured [390 S.C. 517] testimony about which the prosecutor knew or should have known; (2) cases in which the defendant specifically requested the nondisclosed evidence; and (3) cases in which the defendant made no request or only a general request for *Brady* material." *Carlson*, 363 S.C. at 609, 611 S.E.2d at 295. Evidence considered favorable to the defendant includes both exculpatory and impeachment evidence and extends to evidence that is not in the actual possession of the prosecution, but also to evidence known by others acting on the government's behalf, including the police. *Kennerly*, 331 S.C. at 452-53, 503 S.E.2d at 220. Moreover, "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); accord *Kyles v. Whitley*, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); see also *Riddle*, 369 S.C. at 45, 631 S.E.2d at 73 ("The question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial 'resulting in a verdict worthy of confidence.'" (quoting *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555)); *State v. Hill*, 368 S.C. 649, 661, 630 S.E.2d 274, 280-81(2006) (stating evidence is material if the cumulative effect of the suppressed evidence results in a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different); *Fradella v. Town of Mount Pleasant*, 325 S.C. 469, 479, 482 S.E.2d 53, 58 (Ct.App.1997) ("A defendant shows a *Brady* violation by demonstrating that 'favorable evidence could [have been presented] to put the whole case in such a different light as to undermine confidence in the verdict.'"). Evidence is not considered "material" if the defense discovers the information in time to adequately use it at trial. *Kennerly*, 331 S.C. at 453, 503 S.E.2d at 220; *Sheppard v. State*, 357 S.C. 646, 660, 594 S.E.2d 462, 470 (2004) (finding no *Brady* violation when defense counsel was given witness's statements in time for cross-examination, and, thus, there was not a reasonable probability the outcome of the trial would have been different had the statements been disclosed prior to trial).^[6]

[390 S.C. 518] While *Brady* imposes a duty on the State to *disclose* material evidence favorable to the defendant, the State has the additional duty, albeit not an absolute duty, to *preserve* evidence that is favorable to the defendant. Although under *Brady* the good or bad faith of the State is irrelevant when the State fails to disclose material, exculpatory evidence, the United States Supreme Court has clarified that a different analysis is required when the State fails to preserve evidence that *might* have exonerated the defendant. In *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), the Court explained the reason for this difference:

We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful

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evidence does not constitute a denial of due process of law.

488 U.S. at 58, 109 S.Ct. 333.

South Carolina has adopted the duty to preserve analysis of *Arizona v. Youngblood* in its jurisprudence. While recognizing that the State does not possess an absolute duty to preserve potentially useful evidence, our state supreme

court has held that a defendant must demonstrate either that the State destroyed evidence in bad faith, or the state destroyed evidence that possessed an exculpatory value that is apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means. *State v. Mabe*, 306 S.C. 355, 358-59, 412 S.E.2d 386, 388 (1991); see also *State v. Cheeseboro*, 346 S.C. 526, 538, 552 S.E.2d 300, 307 (2001) (finding "[t]he State does not have an absolute duty to preserve potentially useful evidence that [390 S.C. 519] might exonerate a defendant.") (emphasis added); *State v. Singleton*, 319 S.C. 312, 317, 460 S.E.2d 573, 576 (1995) (" [i]f the evidence possesses exculpatory value that is apparent before its destruction, its disposal constitutes a denial of due process." (citing *Youngblood*, 488 U.S. at 56 n. 3, 109 S.Ct. 333)).

In this case, defense counsel failed to establish a due process violation resulting from the intentional destruction of, or failure to preserve, relevant evidence. The record fails to establish bad faith on Smith's part. The State argued to the trial court during pretrial motions that the surveillance system in place at Hillcrest High School was very antiquated and only captured still images, not live video. As the State further explained, a live video could not be obtained from the surveillance system because it is a delayed still image process. Instead, if not yet automatically deleted, delayed pictures could be obtained, such as the one produced by Smith to defense counsel. Further, the solicitor indicated to the trial court that she had given a hard copy of the picture and a copy of the disk to defense counsel; this statement was not contested at the time made. The State also invited the defense expert to Hillcrest High School to examine the surveillance system. Thus, based on the information provided, the record supports the trial court's finding that the State did not destroy any evidence in bad faith.^[7]

Furthermore, the testimony of record fails to establish the exculpatory value of this evidence. The defense asserts the tape " would most likely" have allowed it to identify witnesses who *may reasonably* have presented favorable evidence or evidence which could have lead the defense to impeachment evidence. Standing alone, this assertion is insufficient. Moreover, Moses failed to show that he could not obtain other evidence of comparable value by other means; in fact, the State provided defense counsel with a high school yearbook to help Moses in identifying other witnesses who were present in the cafeteria. See, e.g., *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir.1990) (finding no *Brady* violation when exculpatory [390 S.C. 520] information was not only available to the defendant, but also available in a source where a reasonable defendant would have looked); see also *Cheeseboro*, 346 S.C. at 538-39, 552 S.E.2d at 307 (" To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means."); *Mabe*, 306 S.C. at 358-59, 412 S.E.2d at 388 (" A defendant must demonstrate either that the state destroyed evidence in bad faith, or that the state destroyed evidence that possessed an exculpatory value that is apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means."). Accordingly, we find no reversible error in the trial court's denial of Moses' motion to dismiss the case based on the alleged destruction of relevant evidence.

Moses next asserts on appeal that the trial court erred in refusing to grant the

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motion to quash the indictments on the ground the grand jury process followed in this case violated due process and constitutional guarantees. Moses asserts that the Greenville County Grand Jury returned over four hundred indictments on the day the indictments against him were returned; thus, he argues that the devotion of only two minutes per indictment constituted evidence that the grand jury proceedings were not regular. We disagree.

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"A grand jury is not a prosecutor's plaything and the awesome power of the State should not be abused but should be used deliberately, not in haste." *State v. Capps*, 276 S.C. 59, 61, 275 S.E.2d 872, 873 (1981). Grand jury proceedings are presumed to be regular unless clear evidence indicates otherwise. *State v. Thompson*, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (Ct.App.1991). Any speculation regarding "potential" abuse of grand jury proceedings cannot suffice as evidence of "actual" abuse in order to quash an indictment. *Id.* at 502, 409 S.E.2d at 424.

In *State v. Duncan*, 274 S.C. 379, 264 S.E.2d 421 (1980), the court dealt with a strikingly similar issue. The defendant appealed his conviction for murder and argued, among several other grounds, that the trial court erred in failing to quash his [390 S.C. 521] indictment. 274 S.C. at 380, 264 S.E.2d at 422. At trial, Duncan's motion to quash the indictment was based entirely on the number of indictments returned by the grand jury on the day his indictment was returned, arguing it was impossible for the grand jury to have had enough time to weigh the evidence presented against him. *Id.* at 380-81, 264 S.E.2d at 422. The supreme court affirmed the trial court's decision to deny the motion, holding that the Fifth Amendment only requires the indictment to be returned by an unbiased jury and to be valid on its face. *Id.* at 381, 264 S.E.2d at 422. Moreover, the court stated the time spent deliberating a matter does not control the effectiveness of the indictment. *Id.*

Similar to the argument made in *Duncan*, Moses' argument is based on the number of indictments returned on a single day. Here, Moses asserts that all three indictments should be quashed because the grand jury processed 418 indictments on the day it returned his indictments. At trial, Moses argued that based on the number of indictments returned that day, the grand jury would have processed one indictment every 2.3 minutes, not allowing much time and consideration for the volume of evidence presented in this case. Although the court in *Duncan* never mentioned the number of indictments returned that day, the court stated, "[t]he length of time spent deliberating a matter, even if it could be established, does not control the effectiveness of the deliberation." *Id.* at 381, 264 S.E.2d at 422. Furthermore, this evidence is not clear evidence of any *actual* abuse justifying the quashing of the indictments but rather, it is tantamount to mere speculation regarding *potential* abuse. See *Thompson*, 305 S.C. at 502, 409 S.E.2d at 424. In addition, the average time suggested herein by Moses discounts the equal possibility that the grand jury spent more time on some cases and less on others. Accordingly, without direct evidence, which we acknowledge is difficult to provide due to the secretive nature of the grand jury proceedings, Moses failed to demonstrate irregular grand juror proceedings. Thus, we find no reversible error in the trial court's denial of the motion to quash the indictments.

Turning to the next issue on appeal, Moses argues the trial court erred in admitting statements made by Amy Gahagan, Moses' teacher, as prior inconsistent statements under [390 S.C. 522] Rule 613, SCRE. He argues that no foundation was made for the introduction of the statements and, further, that the court erred in denying the defense motion to strike when the State's witness referenced Moses' assault of a teacher. We disagree.

According to Rule 613, SCRE:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made

the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Rule 613(b), SCRE. "A prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination." *State v. Stokes*, 381 S.C. 390, 398-99, 673 S.E.2d 434, 438 (2009). Unlike the federal rule, the South Carolina rule requires that a proper foundation must be laid before admitting a prior inconsistent statement. *State v. McLeod*, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct.App.2004). Thus, "[i]t is mandatory that a witness be permitted to admit, deny, or explain a prior inconsistent statement." *Id.*

The trial court did not err in allowing Coach Robert Searfoss to testify regarding Gahagan's prior inconsistent statement. "Generally, where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement." *State v. Blalock*, 357 S.C. 74, 80, 591 S.E.2d 632, 636 (Ct.App.2003); *see also State v. Carmack*, 388 S.C. 190, 201-02, 694 S.E.2d 224, 230 (Ct.App.2010) (holding witness did not unequivocally admit making a prior inconsistent statement; therefore, the trial court did not abuse its discretion in allowing extrinsic evidence of the statement). This wide latitude extends to a witness indicating an inability to recall or to remember a previous statement:

If the witness neither directly admit[s] nor den[ies] the act or declaration, as when he merely says that he does not **[390 S.C. 523]** recollect, or, as it seems, gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had done or said by answering that he did not remember.

Blalock, 357 S.C. at 80, 591 S.E.2d at 636 (quoting *State v. Sullivan*, 43 S.C. 205, 211, 21 S.E. 4, 7 (1895)). Here, the proper foundation was laid for the admission of Gahagan's inconsistent statement. Gahagan's testimony was not an unequivocal admission. She merely stated she could not remember having asked Searfoss in the fall of 2006 to take Moses into his classroom. Gahagan was advised by the State of the substance of the statement she made to Searfoss, the time and place it was allegedly made, the person to whom it was made, and she was given the opportunity to explain or deny the statement. *See* Rule 613(b), SCRE. Moreover, the State even rephrased the question to Gahagan to allow her a sufficient opportunity to explain or deny the statement. We find no abuse of discretion by the trial court.

Moses also argues the trial court improperly denied the defense motion to strike Searfoss's testimony regarding Moses' prior assault in Laurens County. During his testimony, Searfoss stated, "Mrs. Gahagan told me that Walt could be confrontational at times. And one of the reasons he was at Hillcrest now is because he assaulted a teacher at Laurens High School...." Defense counsel objected to the statement on the ground of relevance and moved to strike the statement. The trial court instructed the jury as follows: "[t]he comment about Laurens [referring to the assault on a teacher] is not admissible. You should disregard that." The court further instructed the jury that the previous statement regarding what Gahagan told Searfoss should only be used to evaluate the credibility of Gahagan. According to the court's statement to the jury to disregard the testimony regarding the Laurens County incident, the trial court in effect granted the motion to strike. We do not think the semantics of the court's ruling prejudiced Moses or affected the outcome of the trial. Instead, the defendant's procedural objective of the motion to strike achieved the remedy of the court directing the jury to disregard the testimony:

The general rule is indisputably established that, when in the course of a trial incompetent statements of witnesses **[390 S.C. 524]** are brought in either from accident, or when they might be reasonably, though erroneously,

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thought by counsel to be competent, the only remedy that the court can afford is to grant a motion to strike out and instruct the jury to disregard the testimony. The injury resulting from the jury having heard the incompetent statement is regrettable, but the trial cannot be stopped because of such accidents and mistakes liable to occur in every trial.

Keller v. Pearce-Young-Angel Co., 253 S.C. 395, 399, 171 S.E.2d 352, 354 (1969). Thus, we find no prejudicial, reversible error as to this issue. [8]

CONCLUSION

Based on the foregoing, the trial court's decision is

AFFIRMED.

WILLIAMS and KONDUROS, JJ., concur.

Notes:

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[2] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[3] Custodial interrogation is not in dispute herein.

[4] Once introduced, the State must prove to the jury (or fact finder) beyond a reasonable doubt that the statement was freely, knowingly, and voluntarily made. *State v. Simmons*, 384 S.C. 145, 162, 682 S.E.2d 19, 28 (Ct.App.2009); *Goodwin*, 384 S.C. at 602, 683 S.E.2d at 507.

[5] Likewise, under Rule 5, SCRCrimP, defendants, upon request, are entitled to disclosure of their statements, criminal records, and any documents or tangible objects material to the preparation of their defense or intended for use by the prosecution. Rule 5(a)(1), SCRCrimP. For purposes of Rule 5, "material" is used in the same context as it is in a *Brady* analysis. *State v. Kennerly*, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct.App.1998). Once there is a Rule 5 violation, a court will only reverse "where the defendant suffered prejudice as a result of the violation." *Id.* 331 S.C. at 453-54, 503 S.E.2d at 220.

[6] Although this case involved a trial, the *Brady* standard is also applicable to guilty plea cases. See *Gibson*, 334 S.C. at 525, 514 S.E.2d at 325 (adopting essentially the same standard that is applied in the context of a trial: "A *Brady* violation is material when there is a reasonable probability that, but for the government's failure to disclose *Brady* evidence, the defendant would have refused to plead guilty and gone to trial.").

[7] Although defense counsel suggested that others had mentioned the "alleged" video, the defense never proffered that testimony for the

record.

[8] Moses further asserts the trial court erred in allowing the State to offer general evidence of Moses' bad character on the ground the defense opened the door to the evidence by presenting positive evidence of Moses' work habits, his disability, and the fact he had passed a drug test. While this argument appears in Moses' brief, we note it is not mentioned in the issues on appeal. " Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR. Moreover, the argument advanced in the brief makes no reference to any supporting authority. See *State v. Howard*, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct.App.2009) (" An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."). Accordingly, we need not reach the merits of this argument.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with 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."

May 29th, 2013



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALEX ROBINSON,

APPELLANT

APPELLATE CASE NO. 2011-203769

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err by failing to quash the search warrant and suppress the evidence found during the execution of the search warrant when the sworn affidavit was stale as well as contained false and unreliable information, thereby misleading the trial court into issuing the search warrant?
- II. Did the trial court err in refusing to reveal the identity of the confidential informant when it was essential to a fair determination of Appellant's case?
- III. Did the trial court err in refusing to recuse himself, upon motion by Appellant, when the trial court's impartiality might be questioned by ruling on the validity of a search warrant he previously issued?
- IV. Did the trial court err in refusing to grant a new trial where the cumulative effect of the errors were so prejudicial as to deprive Appellant of a fair trial?

STATEMENT OF THE CASE

On August 27, 2009, Appellant Alex Robinson was indicted by the Horry County Grand Jury for trafficking between one-hundred and two-hundred grams of cocaine and failing to stop for a blue light.

On November 7, 2011, Appellant proceeded to trial before the Honorable Edward B. Cottingham and a jury. R. 1. Appellant was represented by John Hilliard and Julia Bass, and the State was represented by Assistant Solicitor Brad Richardson. Pre-trial, the trial court granted defense counsel's motion to sever the charges, and the State proceeded to trial on the trafficking cocaine charge. R. 3, l. 24 – 19, l. 21.

On November 9, 2011, the jury found Appellant guilty of trafficking between one-hundred and two-hundred grams of cocaine. R. 524, ll. 20-25. The trial court sentenced Appellant to twenty-five years imprisonment pursuant to S.C. Code Ann. § 44-53-370(e)(2)(c) (2008). R. 534, l. 10 – 535, l. 8.

ARGUMENT

- I. The trial court erred by failing to quash the search warrant and suppress the evidence found during the execution of the search warrant because the sworn affidavit was stale as well as contained false and unreliable information, thereby misleading the trial court into issuing the search warrant.

Relevant Facts

Pre-trial, defense counsel challenged the sufficiency of the search warrant that was previously issued by the trial court and moved to suppress the evidence found during the execution of the search warrant on September 25, 2008. R. 11, ll. 4-11; R. 30, ll. 6-10. The probable cause section of the search warrant affidavit provides:

A confidential and reliable informant working for the Horry County Police Department purchased a quantity of off white powder substance represented as being cocaine and field-testing positive for cocaine attributes from the occupants of the house identified as [redacted] Stoneybrook Dr in Conway, SC. That the informant has been able to make recent continuous purchases of illegal drugs from this residence

R. 27, ll. 19-25; State's Exhibit # 1 (Search Warrant). Defense counsel argued that, under the totality of the circumstances, the search warrant affidavit and the supplemental oral testimony failed to establish sufficient information to support the trial court's finding of probable cause where: (1) the affiant knew information in the affidavit was false (e.g., the CI did not actually observe the alleged drug transaction); (2) there was no evidence presented to the trial court to verify the reliability of the confidential informant (CI); and (3) the prior alleged observations by the CI were made without listing a single date of when the alleged drug transactions occurred. R. 11, l. 24 – 30, l. 13; R. 47, l. 2 – 57, l. 19.

Contrary to the information contained in the search warrant affidavit, Officer Kent Donald of the Horry County Police Department admitted that the CI *never* purchased

cocaine from the occupants of the residence at Stoneybrook Drive. R. 23, l. 22 – 39, l. 2. Specifically, Officer Donald stated that the CI gave Christopher Oliver the “police buy money” and that on three separate occasions the CI stayed in the car while Oliver allegedly purchased cocaine from individuals inside the Stoneybrook residence. R. 24, l. 14 – 29, l. 25. Officer Donald also revealed that the alleged drug transactions occurred on the following dates: August 15, 2008; August 22, 2008; and September 12, 2008. R. 25, ll. 3-24. Officer Donald further noted that the Return for the search warrant was not signed within the ten day requirement. R. 32, ll. 6-20.

On cross-examination, Officer Donald admitted that, although he prepared and signed the sworn search warrant affidavit, he did *not* inform Judge Cottingham that the CI *never* entered the Stoneybrook residence, or that the CI was *not* the person who allegedly purchased the cocaine from the Stoneybrook residence. R. 37, l. 11 – 40, l. 10. Officer Donald also admitted that he failed to provide Judge Cottingham with any information establishing the reliability of CI as well as the dates for when the alleged drug transactions occurred. R. 40, ll. 11-22; R. 44, l. 24 – 45, l. 2. Officer Donald further noted that he *never* “patted down” Oliver—as required—for drugs prior to the alleged drug transactions. R. 45, l. 3 – 46, l. 8.

After defense counsel listed numerous cases in support of the motion to quash the search warrant and suppression of the evidence,¹ the trial court rejected defense counsel’s argument that the State failed to prove the reliability of the CI and stated: “I’ll be glad for you [defense counsel] to put your cases on the record but I’m not gonna [sic] sit here and have a review of all the cases that I’ve read for the last twenty-seven years.” R. 47, l. 2 – 50,

¹ Court’s Exhibit #1 (Case law submitted by the Defendant).

l. 22. The trial court also gave a further explanation of his ruling:

I'm familiar generally with the cases that you [defense counsel] cited but I respectfully disagree with your position. This affidavit in my opinion then and now is complete and in accordance with the law regarding search warrants. This affiant to the best of his knowledge told the truth. Now, he [Officer Donald] may have told it not exactly as you would have it but he said I'm basing it on reliable information that I received that drugs have been sold from this place on several occasions.

R. 52, ll. 5-12. In response, defense counsel argued, "Your Honor, we would move on three grounds, number one, that there [was] patently on the face of this search warrant incorrect information provided to Your Honor." R. 52, ll. 21-23.

The trial court ruled, "Respectfully rejected. It's not patently information wrong [sic]. *I dealt with that twice now and I'm not gonna [sic] go there again.*" R. 52, l. 24 - 53, l. 1 (emphasis added). Defense counsel also argued that "the information [in the search warrant affidavit was] stale" because "[Officer Donald] did not put any dates in [affidavit]" to prove that the search warrant was issued within the seventy-two hour requirement. R. 53, ll. 2-5. The trial court maintained, "*I don't think the dates were necessary . . . I reject that.*" R. 53, ll. 6-7 (emphasis added). Defense counsel further argued that a police report indicated at least one of the drug transactions occurred at an address other than the address listed in the search warrant affidavit. R. 53, ll. 8-10. The trial court replied:

Now, what he [Officer Donald] may or may not have said in some prior report doesn't concern me. I'm concerned with the truth and accuracy of what he said on this occasion and he said Stoneybrook. . . . As the issuing judge, I'm concerned with what he said today or in that instance.

R. 53, ll. 11-25. The trial court then noted, "My concern, [defense counsel], is whether or not this affiant to the best of his knowledge was telling me the truth on that day. He says he

got this from a reliable and confidential informant." R. 55, ll. 10-13.

The trial court ruled, "I conclude that [the search warrant affidavit] contains sufficient information for me to issue a bench warrant, I mean, a search warrant, which I did. And I respectfully deny your motion to quash the indictment [search warrant]." R. 55, ll. 16-19. To further support his ruling, the trial court stated, "I think it's sufficient for me to conclude that the affidavit of this affiant was sufficient and the totality of the information provided is sufficient for the search warrant. *Now, I don't need any more on this question.*" R. 57, ll. 2-6 (emphasis added).

The cases cited in support of defense counsel's motion to suppress were later entered into evidence as Court's Exhibit #1. R. 83, l. 1 – 84, l. 17. After the close of the State's case, defense counsel noted, "I did not object to the introduction of the powder cocaine into evidence, what I intended and what I meant by that was I did not object to the chain of custody aspect of it. I preserve and reserve my previous objections." R. 359, ll. 8-12. In response, the trial court stated, "*No, you are protected on the record as to that issue clearly and I understood that it was subject to that objection in fairness to you.*" R. 359, ll. 20-22 (emphasis added). After the jury found Appellant guilty of trafficking cocaine, defense counsel renewed the motion to quash the search warrant and suppression of the evidence found during the execution of that search warrant. R. 531, ll. 2-8. The trial court denied the motion. R. 531, ll. 9-23.

Discussion

A. The affiant knew the information in the search warrant affidavit was false.

In this case, the trial court was misled by the information contained in the search warrant affidavit because the affiant, Officer Donald, knew the information was false. R. 23,

l. 22 – 39, l. 2; State's Exhibit # 1 (Search Warrant); *See United States v. Leon*, 468 U.S. 897, 923 (1984) (citing *Franks v. Delaware*, 438 U.S. 154 (1978) (noting that suppression remains an appropriate remedy if the magistrate issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth)); *Accord United States v. Colkley*, 299 F.2d 297 (4th Cir. 1990); *State v. Missouri*, 337 S.C. 548, 524 S.E.2d 394 (1999).

The Fourth Amendment of the United States Constitution guarantees "[t]he right of the people to be secure . . . [from] unreasonable searches and seizures." U.S. Const. amend. IV. Notably, the South Carolina General Assembly "has imposed stricter requirements than federal law for issuing a search warrant. Both the Fourth Amendment of the United States Constitution and Article I, § 10 of the South Carolina Constitution require an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued." *State v. Jones*, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000); U.S. Const. amend. IV. The South Carolina Code mandates that a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record" S.C. Code Ann. § 17-13-140 (1985).

"The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. *State v. Philpot*, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995). A magistrate may issue a search warrant only upon a finding of probable cause. *State v. Bellamy*, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued." *State v. Dupree*, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003). Evidence obtained in

violation of the Fourth Amendment is inadmissible in both state and federal court. *See State v. Forrester*, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001).

In terms of a circuit court's review of a magistrate's finding of probable cause, "[t]he duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." *State v. Baccus*, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). In determining whether a substantial basis exists, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched. *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 & n. 6 (1978). "This determination requires the magistrate to make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying the information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. King*, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002).

Oral testimony may also be used in this state to supplement search warrant affidavits which are facially insufficient to establish probable cause. *See State v. Weston*, 329 S.C. 287, 494 S.E.2d 801 (1997); *see also State v. Sachs*, 364 S.C. 541, 216 S.E.2d 501 (1975). However, "[i]n reviewing the validity of a warrant, an appellate court may consider only information brought to the magistrate's attention." *State v. Thompson*, 363 S.C. 192, 200, 609 S.E.2d 556, 560 (Ct. App. 2005).

In this case, Officer Donald admitted on cross-examination that, although he prepared and signed the sworn search warrant affidavit, he *never* told Judge Cottingham that the CI did *not* enter the Stoneybrook residence, or that the CI was *not* the person who

allegedly purchased the cocaine from the Stoneybrook residence. R. 37, l. 11 – 40, l. 10.

Yet, the probable cause section of the search warrant affidavit provides:

A confidential and reliable informant working for the Horry County Police Department purchased a quantity of off white powder substance represented as being cocaine and field-testing positive for cocaine attributes from the occupants of the house identified as [redacted] Stoneybrook Dr in Conway, SC. That the informant has been able to make recent continuous purchases of illegal drugs from this residence

R. 27, ll. 19-25; State's Exhibit # 1 (Search Warrant). Accordingly, the trial court erred by not suppressing the evidence obtained during the execution of the search warrant because the trial court was misled by information in the sworn affidavit that the affiant knew was false. R. 55, ll. 16-19; R. 57, ll. 2-6; *See Leon*, 468 U.S. at 923 (citing *Franks*, 438 U.S. 154 (noting that suppression remains an appropriate remedy if the magistrate issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth)); *see also Forrester*, 343 S.C. at 643, 541 S.E.2d at 840.

B. The State failed to establish the reliability of the confidential informant.

When a confidential informant is involved, it is necessary to examine the reliability and credibility of the informant for determining the existence of probable cause. *See Illinois v. Gates*, 462 U.S.-213, 230-235 (1983). In determining whether the information relied upon by law enforcement is reliable, no one factor is necessary or sufficient to establish probable cause. *Id.* Instead, probable cause arises from the totality of the circumstances, and “[a] deficiency in one [factor] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.” *Id.* As previously noted by our Supreme Court:

The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, *including the "veracity" and "basis of knowledge" of persons supplying hearsay information*, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

State v. Weston, 329 S.C. 287, 290-91, 494 S.E.2d 801, 802-03 (1997) (quoting *Gates*, 462 U.S. 213).

In *United States v. Ross*, 456 U.S. 798, 800-801 (1982), the United States Supreme Court found that probable cause existed where a confidential informant, who had *proved to be reliable previously*, provided specific detailed information and officers *observed corroborating evidence*. Specifically, the informant gave a detailed description of the drug dealer, the drug dealer's nickname, the specific address where the drug sales took place, the fact that the informant just witnessed a buy, and a statement by the dealer to the informant that the trunk of the car contained additional drugs. The officers were also able to confirm that a car matching the description provided by the informant was at the address given, the car was registered to an individual who used the alias provided by the informant, and the person seen driving the car matched the description provided by the informant.

In *State v. Peters*, 271 S.C. 498, 500-502, 248 S.E.2d 475, 476-477 (1978), our Supreme Court determined that probable cause existed to search a car where a confidential informant, who had *provided reliable information previously*, told police that a yellow Grand Prix automobile with a white top and a South Carolina license tag with the digits "308" would leave Folly Beach soon with a quantity of marijuana and officers observed a car fitting the description leaving the beach and recognized the driver and passenger as having been involved in illicit drug use previously. *Id.*

In this case, the trial court erroneously found the CI reliable for two reasons. First, the State presented absolutely no evidence to establish the CI's reliability (e.g., whether the CI had previously provided reliable information to law enforcement regarding illegal activity). Second, the trial court committed reversible error by refusing to reveal the CI's identity, so that defense counsel could cross-examine the CI about the alleged drug transactions. R. 47, l. 2 – 50, l. 22. The trial court stated: "I'll be glad for you [defense counsel] to put your cases on the record but I'm not gonna [sic] sit here and have a review of all the cases that I've read for the last twenty-seven years." R. 47, l. 2 – 50, l. 22. The trial court also gave an explanation of his ruling:

I'm familiar generally with the cases that you [defense counsel] cited but I respectfully disagree with your position. This affidavit in my opinion then and now is complete and in accordance with the law regarding search warrants. *This affiant to the best of his knowledge told the truth.* Now, he [Officer Donald] may have told it not exactly as you would have it but he said *I'm basing it on reliable information that I received that drugs have been sold from this place on several occasions.*

R. 52, ll. 5-12 (emphasis added). Therefore, the reliability of the CI was *never* established because the trial court could not make a "common sense decision whether, given all the circumstances set forth in the affidavit before him, *including the "veracity" and "basis of knowledge" of persons supplying hearsay information*, [that] there [was] a fair probability that contraband or evidence of a crime will be found [at the address listed in the search warrant]." *Weston*, 329 S.C. at 290-91, 494 S.E.2d at 802-03 (quoting *Gates*, 462 U.S. 213).

C. The search warrant affidavit failed to list the dates of the alleged drug transactions.

In this case, defense counsel also argued that "the information [alleged in the search warrant affidavit was] stale" because "[Officer Donald] did not put any dates in [affidavit]"

to prove that the search warrant was issued within the seventy-two hour requirement. R. 53, ll. 2-5. The trial court erroneously held, "*I don't think the dates were necessary . . . I reject that.*" R. 53, ll. 6-7 (emphasis added).

At the suppression hearing, Officer Donald revealed that the alleged drug transactions occurred on the following dates: August 15, 2008; August 22, 2008; and September 12, 2008. R. 25, ll. 3-24. Officer Donald further noted that the Return for the search warrant was not signed within the ten day requirement. R. 32, ll. 6-20. The search warrant was issued by the trial court on September 17, 2008, and executed by law enforcement on September 25, 2008. *See* State's Exhibit # 1 (Search Warrant).

Based on those dates, the trial court should have found the evidence alleged in the search warrant affidavit stale and insufficient to establish probable cause. *See United States v. Doyle*, 650 F.3d 460, 471 (4th Cir. 2011) ("A valid search warrant may issue only upon allegations of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause *at that time.*") (emphasis in original); *see also United States v. McCall*, 740 F.2d 1331, 1336 (4th Cir. 1984) ("[E]vidence seized pursuant to a warrant supported by 'stale' probable cause is not admissible in a criminal trial to establish a defendant's guilt."); *United States v. Laylor*, 996 F.2d 1578, 1582 (4th Cir. 1993) (finding "a time frame should have been disclosed. This court has already cautioned the police about the need to specify time periods in warrant applications.").

D. The search warrant affidavit was not sufficient to support a finding of probable cause by the trial court.

The totality of the circumstances test is used to evaluate whether the information offered in an affidavit is a sufficient basis for probable cause. *See State v. Johnson*, 302 S.C. 243, 247, 395 S.E.2d 167, 169 (1990); *see also Missouri*, 337 S.C. 548, 524 S.E.2d 394

(citation omitted) (noting when reviewing a magistrate's decision to issue a search warrant, an appellate court must consider the totality of the circumstances); *Baccus*, 367 S.C. at 50, 625 S.E.2d at 221 (“[t]he duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed.”).

In this case, defense counsel properly argued that, under the totality of the circumstances, the search warrant affidavit and the supplemental oral testimony failed to establish sufficient information to support the trial court’s finding of probable cause where: (1) the affiant knew information in the affidavit was false (e.g., the CI did not actually observe the alleged drug transaction); (2) there was no evidence presented to the trial court to verify the reliability of the confidential informant (CI); and (3) the prior alleged observations by the CI were made without listing a single date of when the alleged drug transactions occurred. R. 11, l. 24 – 30, l. 13; R. 47, l. 2 – 57, l. 19.

The good faith exception to the exclusionary under the Fourth Amendment does not apply here because Officer Donald knowingly tainted the search warrant affidavit with false information. See *Weston*, 329 S.C. at 292-93, 494 S.E.2d at 804 (explaining the three situations where deference to a magistrate’s finding of probable cause is not warranted under *Leon*, 468 U.S. 897). Additionally, without further investigation, the stale and knowingly false information provided in the search warrant affidavit was insufficient to establish a fair probability that drugs would be found at the residence listed in the affidavit. See *State v. Gentile*, 373 S.C. 506, 515-516, 646 S.E.2d 171, 175-176 (Ct. App. 2008) (finding additional investigation into residence was required to establish probable cause because the search warrant affidavit was not sufficient to support a finding of probable cause when the police found marijuana on a visitor who had just left Gentile’s residence).

“Under a *Franks* analysis, probable cause did not exist under the Fourth Amendment of the United States Constitution[.]” *Jones*, 342 S.C. at 127, 536 S.E.2d at 678. Accordingly, Appellant was prejudiced by the trial court’s failure to quash the search warrant and suppress the evidence obtained as tainted fruit. *See Mapp v. Ohio*, 367 U.S. 643 (1961); *see also Philpot*, 317 S.C. at 461, 454 S.E.2d at 907.

II. The trial court erred in refusing to reveal the identity of the confidential informant because it was essential to a fair determination of Appellant's case.

Relevant Facts

Pre-trial, defense counsel cited *State v. Diamond*, 280 S.C. 296, 299, 312 S.E.2d 550, 551 (1984) and requested, "Judge, we need the confidential informant in order to have the hearing." R. 17, l. 20 – 19, l. 17. The trial court ruled, "Not gonna [sic] require the CI to be here." R. 19, l. 18 – 20, l. 8. In support of his ruling, the trial court provided the following explanation:

We're not gonna [sic] have a prot[ected] hearing on that issue; I'm gonna [sic] have a limited hearing with his [Officer Kent Donald's] testimony. It's clear to me that you [defense counsel] knew this case was [coming up] for trial and I conclude you're deliberately trying to delay it and I'm not gonna [sic] permit you to do it

R. 20, ll. 11-15.

During Officer Donald's testimony at the suppression hearing, defense counsel moved again under *State v. Diamond* "for the CI's name because the CI would be a witness that we [defense counsel] would *need to call in our defense*." R. 37, ll. 1-3 (emphasis added); U.S. Const. amend. VI. The trial court noted, "*I'll rule on that if I conclude it's necessary. I don't think at this point it complies with State v. Diamond because the CI was not a part of this deal but go ahead.*" R. 37, ll. 4-7 (emphasis added). Defense counsel subsequently argued, "[W]e have absolutely no choice under State versus Diamond but to ask that the CI be produced so she can be cross examined." R. 54, ll. 2-5. The trial court ruled, "No, ma'am. I'm not gonna [sic] do that either. Diamond doesn't go that far. I'm concerned with the truth or falsity of what this witness said to me on that occasion." R. 54, ll. 6-8.

Furthermore, the trial court admitted, "[T]he CI was not a participant in this particular case; search warrant." R. 54, ll. 11-13. Defense counsel argued, "That's our point, Your Honor. What you just said is exactly what I've been saying. That's the whole point, the CI did not participate . . . That's why we're asking for suppression." R. 54, ll. 14-18. The trial court maintained, "You're not entitled to it. You want to be heard on that, [Assistant Solicitor]? . . . you [the State] don't allege that the CI was there at the time of the search warrant, do you?" R. 54, ll. 19-22. Defense counsel interjected, "That's why I want to question her [the CI]." R. 54, ll. 23-24. The trial court replied:

My concern, [defense counsel], is whether or not this affiant to the best of his knowledge was telling me the truth on that day. He [Officer Donald] says he got this from a reliable and confidential informant. *Now, if you think that I'm gonna [sic] let you call every reliable and confidential informant on the truth and accuracy of his statement, you're mistaken. I conclude that this statement is true.*

R. 55, ll. 10-19 (emphasis added).

The trial court found that "Diamond is totally different" and did not apply to this case. R. 56, l. 4 - 57, l. 6. Defense counsel further argued, "If you'll please make a note of the record because at this point, I don't see how Mr. Robinson [Appellant] can get a fair trial if I [defense counsel] can't cross-examine a person [the CI] that's accusing him of something when he wasn't even there." R. 57, ll. 7-11. The trial ultimately ruled:

No, he's not accusing - - he's not accusing him at this time. He was only used [sic] a confidential informant, that's a different issue. *I've ruled on it and you can take it up with the appellate court. If I'm wrong, they can tell me so. All of us judges have examined State v. Diamond ten thousand times and it's not applicable to the issues in this case and I say that most respectfully.*

R. 57, ll. 12-18 (emphasis added).

Discussion

The United States Supreme Court has held, "Where the disclosure of an informer's identity . . . is *relevant and helpful* to the defense of an accused, or is *essential to a fair determination* of a case, the privilege must give way." *Roviaro v. United States*, 353 U.S. 53 (1957) (emphasis added). Our Supreme Court has held, "Public policy considerations for nondisclosure of an informant's identity are absent where the informant openly participates in the criminal transaction." *State v. Diamond*, 280 S.C. 296, 299, 312 S.E.2d 550, 551 (1984); *See McLawhorn v. North Carolina*, 484 F.2d 1 (4th Cir. 1973) (finding disclosure is required where an informant is an actual participant, particularly where he sets up the criminal transaction); *see also State v. Blyther*, 287 S.C. 31, 33, 336 S.E.2d 151, 152-53 (Ct. App. 1985) (finding "where . . . the informant is either a *material witness* to the crime or directly participates in it, disclosure may be required, particularly where, in a drug related crime, he is the *only witness to the transaction other than the buyer and the defendant*") (internal citation omitted) (emphasis added).

In this case, contrary to the information contained in the search warrant affidavit, Officer Kent Donald of the Horry County Police Department admitted that the CI *never* purchased cocaine from the occupants of the residence at Stoneybrook Drive. R. 23, l. 22 – 39, l. 2. Specifically, Officer Donald stated that the CI gave Christopher Oliver the "police buy money" and that on three separate occasions the CI stayed in the car while Oliver allegedly purchased cocaine from individuals inside the Stoneybrook residence. R. 24, l. 14 – 29, l. 25. Therefore, the trial court erred in refusing to reveal the identity of the confidential informant because it was essential to a fair determination of Appellant's case. *See Roviaro*, 353 U.S. 53; *see also McLawhorn*, 484 F.2d 1 (finding disclosure is required

where an informant is an actual participant, particularly where he sets up the criminal transaction); *Diamond*, 280 S.C. at 299, 312 S.E.2d at 551.

III. The trial court erred in refusing to recuse himself, upon motion by Appellant, when the trial court's impartiality might be questioned by ruling on the validity of a search warrant he previously issued.

Relevant Facts

Pre-trial, defense counsel argued, "[O]ur threshold problem with [the search warrant] is if we have the issuing judge making a determination about the sufficiency of the warrant[.]" R. 13, ll. 12-14. The trial court maintained that defense counsel should have raised this issue with a different judge, and defense counsel replied, "[T]he reason I didn't do it is I don't get to pick when the case gets called for trial[.]" R. 13, l. 24 – 23, l. 1. The trial court stated, "I'm not going to delay this trial with a jury waiting on a bunch of motions that you [defense counsel] could've heard last week on this issue." R. 15, ll. 1-6.

Defense counsel recalled, "I couldn't believe that he [the solicitor] was actually gonna [sic] call the case in front of you because . . . it never occurred to me in a million years that a judge who signed the search warrant could make a determination as to the validity of the search warrant." R. 16, ll. 3-17. The trial court then noted that he believed defense counsel was trying to delay the trial and denied defense counsel's motion. R. 16, l. 20 – 26, l. 7. In response, defense counsel stated, "Well, the motion you're denying is to recuse yourself from consideration of the search warrant" and the trial court replied, "Which I decline to do." R. 17, ll. 9-11.

The trial court ruled, "I conclude that I can certainly be impartial on a truth or falsity matter even though I was the issuing judge with regards to the search warrant. The issues are totally different. And I respectfully deny your motion. I decline to recuse myself" R. 21 ll. 3-11. After the jury found Appellant guilty of trafficking cocaine, defense counsel renewed the motion to recuse the trial court from determining the validity of the search

warrant, and the trial court denied the motion. R. 531, ll. 2-23.

Discussion

Rule 501, SCACR, Code of Judicial Conduct, Canon 3(E)(1) provides that “[a] judge should disqualify himself or herself in a proceeding in which the judge’s impartiality might be reasonably be questioned” In *Brent v. State*, 929 So.2d 952 (Miss. Ct. App. 2005), the Mississippi Court of Appeals held, “The trial judge committed manifest error in failing to recuse himself, despite his subjective pronouncements that he held no bias against [the defendant]” when that same trial judge “issued the search warrant that lead to [the defendant’s] arrest, and ultimately to the subsequent indictment that brought [the defendant] before [the trial judge.]”); *Cf. Floyd v. State*, 303 S.C. 298, 299 400 S.E.2d 145, 146 (1991) (granting a new PCR hearing because the judge who presided over his PCR hearing also presided over the trial from which PCR was sought and finding “a per se rule of recusal . . . will eliminate even the suggestion of partiality”).

The *Brent* Court found that Canon 3(E)(1) of the Code of Judicial Conduct disqualifies judges “in proceeds in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or as otherwise provided by law[.]” *Brent*, 929 So.2d at 954. The *Brent* Court also found that Canon 3(E)(a) provides for disqualification “where a judge has personal knowledge of ‘disputed evidentiary facts concerning the proceedings.’ *Id.* Ultimately, the *Brent* Court held, “The problem created by this scenario is patently obvious. Not only *might* a reasonable person harbor doubts about the impartiality of the judge in this situation, we find that any reasonable person *should* have such doubts.” *Id.* at 955.

Here, Defense counsel argued prior to trial, “[O]ur threshold problem with [the search warrant] is if we have the issuing judge making a determination about the sufficiency of the warrant[.]” R. 13, ll. 12-14. The trial court subsequently ruled, “I conclude that I can certainly be impartial on a truth or falsity matter even though I was the issuing judge with regards to the search warrant. The issues are totally different. And I respectfully deny your motion. I decline to recuse myself” R. 21, ll. 3-11.

The same rationale applied in *Floyd v. State* can be applied in this case. Thus, the trial court erred in refusing to recuse himself, upon motion by Appellant, when the trial court’s impartiality might be questioned by ruling on the validity of a search warrant he previously issued. See *Brent*, 929 So.2d 952; Canon 2, CJC, Rule 501, SCACR (providing “a judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities”); Canon 3(E)(1), CJC, Rule 501, SCACR (providing “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned”).

IV. The trial court erred in refusing to grant a new trial because the cumulative effect of the errors were so prejudicial as to deprive Appellant of a fair trial.

In *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999), our Supreme Court held that an appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine. Specifically, the errors must adversely affect a defendant's right to a fair trial to qualify for reversal. *Id.* Yet, the Court has "stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Id.* (quoting *State v. Mitchell*, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998)).

Even if this Court finds that the three previous errors do not require reversal, the cumulative effect of those errors in light of the Court's improper comments and rulings were so prejudicial as to deprive Appellant of a fair trial. See *Johnson*, 334 S.C. at 93, 512 S.E.2d at 803. For example: (1) the trial court permitted testimony and allowed the State to enter the videotape from the failure to stop for a blue light charge into evidence, despite that the charge was severed from this case; (2) the trial court denied defense counsel's motion for a mistrial during defense counsel's opening statement; (3) the trial court denied defense counsel's motion for a mistrial based on the trial court's comments regarding the courtroom disturbance; and (4) the trial court denied defense counsel's motion to dismiss based on the admitted destruction of evidence by the State. R. 7, l. 8 - 19, l. 21; 58, l. 21 - 97, l. 25; 110, l. 13 - 114, l. 2; 121, ll. 7-24; 123, ll. 9-13; 178, l. 8 - 179, l. 25; 456, l. 9 - 458, l. 19; 503, l. 4 - 532, l. 24; State's Exhibit #10 (Dash Cam Video). Accordingly, the trial court erred in refusing to grant a new trial because the cumulative effect of the errors were so prejudicial as to deprive Appellant of a fair trial. R. 531, l. 2 - 532, l. 21; See *Johnson*, 334 S.C. at 93, 512 S.E.2d at 803.

CONCLUSION

For the foregoing reasons, Appellant Alex Robinson respectfully requests that this Court reverse his conviction and sentence and remand this case to the Horry County Court of General Sessions for a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of June, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 18th, 2013



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APP'X 620

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Edward B. Cottingham, Circuit Court Judge
Appellate Case No. 2011-203769

THE STATE,

Respondent,

vs.

ALEX LORENZO ROBINSON,

Appellant.

FINAL BRIEF OF RESPONDENT

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APP'X 621

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STATEMENT OF ISSUES ON APPEAL

I.

The trial judge properly declined to quash the search warrant and suppress the evidence discovered during the search of the targeted residence because the search warrant affidavit established a reliable probable cause basis to believe narcotics would be discovered at the targeted residence at the time of the search while containing no false, inaccurate, or misleading information. Furthermore, even if the trial judge erred in finding the search warrant affidavit sufficiently established a probable cause basis for the search, the trial judge properly declined to suppress the evidence discovered in the search because the search warrant was obtained in good faith and was not so lacking in indicia of probable cause that belief in and reliance on its validity was unreasonable.

II.

The trial judge properly declined to require the disclosure of the confidential informant's identity because that information was not relevant or necessary towards Appellant's ability to defend his case, and Appellant failed to articulate any meaningful or compelling reason as to why the disclosure of the confidential informant's identity was necessary or required under the circumstances

III.

The trial judge properly declined to recuse himself on the sole basis that he had previously issued a search warrant in Appellant's case because the issuance of the search warrant in an earlier proceeding did not constitute evidence of bias or partiality on the part of the trial judge and no other evidence was presented to suggest the trial judge could not be fair and impartial to Appellant.

IV.

Any issue regarding the applicability of the cumulative error doctrine was not preserved for appellate review and abandoned because Appellant did not raise any issue in regards to cumulative error during trial and, instead, raised the issue for the first time on appeal in a conclusory and unsupported manner. Regardless, Appellant's trial was not rendered unfair as a result of any errors, cumulative or otherwise, and none of the errors identified by Appellant as rendering his trial unfair actually constituted an error.

STATEMENT OF THE CASE

In September of 2008, Appellant Alex Lorenzo Robinson was arrested after attempting to flee from law enforcement officers conducting a narcotics investigation. In August of 2009, the Horry County grand jury indicted Appellant for one count of trafficking in cocaine in an amount between 100 and 200 grams and one count of failure to stop for a blue light. On November 9, 2011, a jury trial was commenced in the Horry County court of general sessions with the Honorable Edward B. Cottingham, circuit court judge, presiding. Following a pre-trial ruling, the trial proceeded forward only on the trafficking in cocaine charge. At the conclusion of trial, the jury convicted Appellant of trafficking in cocaine in an amount between 100 and 200 grams. Following the verdict, the trial judge sentenced Appellant to a twenty-five year term of imprisonment and a \$50,000 fine. Subsequently, Appellant filed a timely notice of appeal.

STATEMENT OF FACTS

In August of 2008, officers with the Horry County Police Department began a narcotics investigation targeting a residence in Conway, South Carolina, after a confidential informant indicated she knew someone who could arrange narcotics purchases from that residence. (R. pp. 23-24). As part of the investigation, Sergeant Kent Donald met with the confidential informant prior to the arranged drug transactions, and the confidential informant bought cocaine from the targeted residence on three separate occasions. (R. pp. 24-27). During the transactions, the confidential informant met with an individual named Christopher Oliver, the informant drove Oliver to the targeted residence and parked nearby, Oliver went into the residence while the informant watched Oliver go inside from the car, and Oliver returned from the residence shortly thereafter with cocaine. (R. pp. 25-26). As the investigation into the residence continued, Sergeant Donald began to suspect Appellant Alex Lorenzo Robinson was connected to the narcotics activity after discovering Appellant paid the electricity bills for the targeted residence. (R. p. 127; p. 329; p. 333).

Based on the confidential informant's successful narcotics purchases, Sergeant Donald sought a search warrant for the targeted residence and prepared an accompanying sworn affidavit. (R. pp. 27-28; pp. 543-547). In the search warrant affidavit, Sergeant Donald stated:

I am a police officer, certified in South Carolina. I have been employed by the Horry County Police Department for 10 years with 7 years as a Detective. I have received training in the following: Drug Investigator Level I and Level II 80 hours, and Narcotics Commanders Course 40 hours. I have been involved in other search warrants relating to the seizure of illegal narcotics. I am authorized to make searches and seizures. A confidential and reliable informant working for the Horry County Police Department purchased a quantity of off white powder substance represented as being cocaine and field-testing positive for

cocaine attributes from the occupants of the house identified as [the address of the targeted residence] in Conway, SC. That the informant has been able to make recent continuous purchases of illegal drugs from this residence leads to the affiant's belief that there is the possibility there may be more illegal drugs located at this residence.

(R. pp. 28-29; pp. 543-547). The search warrant was issued by the Honorable Edward B. Cottingham, circuit court judge, on September 17, 2008. (R. pp. 543-547).

Thereafter, on the morning of September 25, 2008, law enforcement officers went to the targeted residence to execute the search warrant. (R. pp. 126-128). The officers knocked on the door, announced their presence, and then forced entry after receiving no response from inside. (R. pp. 129-130). After the officers entered the residence, Sergeant Donald headed to the bedroom on the left side of the home. (R. pp. 130-131). Inside, he located Kenneth Durant, Appellant's half-brother, and Tiffany Smith, Durant's girlfriend. (R. p. 133; p. 364; p. 373). The officer then secured the room, conducted a search, and discovered a book bag containing seven small bags of cocaine, a loaded nine-millimeter handgun, and a scale. (R. pp. 133-134). Meanwhile, Detective Ashley Hardee entered the bedroom on the right side of the house. (R. p. 303). Inside, he encountered Gil Yakoel, Appellant's pregnant girlfriend. (R. p. 156; pp. 233-234; pp. 304-305). After securing the room, Detective Ashley conducted a search and located men's clothing in the bedroom closet. (R. p. 306). Upon removing some of the clothing, a bag containing 109.35 grams of cocaine fell out of a pair of men's jeans. (R. p. 149; pp. 306-308; p. 350). Additionally, three Ecstasy pills, several bags of green plant material, a photograph of Appellant, and paperwork addressed to Appellant were discovered in the bedroom. (R. p. 147; p. 152; p. 351). As officers continued searching the residence, they additionally discovered a surveillance system with a monitor providing a view of the street outside, numerous letters addressed to Appellant, shotgun shells, a digital scale,

baking soda, and plastic bags. (R. pp. 137-138; pp. 141-142). A vehicle registered to Appellant was also discovered parked outside of the residence. (R. p. 152).

Following the discovery of the narcotics in the targeted residence, Sergeant Donald sought and obtained a warrant for Appellant's arrest based on the evidence connecting him to the home. (R. p. 162). Thereafter, Sergeant Donald learned Appellant was at a detention center on September 30, 2008, attempting to obtain the release of Yakoel, who had been arrested along with Durant and Smith after the search resulted in the discovery of the drugs. (R. p. 161; p. 163). In response, Sergeant Donald travelled to the detention center to arrest Appellant. (R. p. 163). When he arrived, he saw Appellant sitting in the detention center parking lot inside of the vehicle the officer had earlier seen parked outside of the targeted residence when he executed the search warrant. (R. pp. 165-167). Appellant looked in Sergeant Donald's direction and then immediately began driving away. (R. pp. 165-166). Sergeant Donald followed Appellant and activated his blue lights to initiate a traffic stop. (R. p. 169). However, Appellant did not stop and, instead, quickly accelerated and began fleeing from the officer. (R. p. 169). Appellant continued to flee at a high rate of speed until he hit a law enforcement device that punctured his tires. (R. pp. 170-171). Appellant then crashed his vehicle, and Appellant and a passenger in his vehicle immediately fled into a nearby soybean field on foot. (R. pp. 119-120; p. 171). In response, Corporal Scott Calderwood chased them into the field and quickly caught and arrested them. (R. p. 120; p. 171). After Appellant was arrested, Sergeant Donald searched Appellant and discovered a bank deposit slip with Appellant's name and the address of the targeted residence on it inside of Appellant's wallet. (R. p. 171; pp. 173-175).

Subsequently, Appellant was indicted for trafficking in cocaine in an amount between 100 and 200 grams and failure to stop for a blue light, and he proceeded to trial before Judge Cottingham. (R. p. 2; pp. 536-539). At the outset of trial, defense counsel moved for the solicitor to be required to select which of the indicted offenses to proceed forward on, and the trial judge granted that request. (R. pp. 3-4; p. 9). However, the trial judge ruled the testimony regarding Appellant's arrest would be admissible during trial, and defense counsel agreed the testimony would come in. (R. pp. 9-10).

Defense counsel then asserted the search warrant was defective because the information contained in the search warrant affidavit was allegedly false. (R. pp. 10-13). In response, the solicitor noted the affidavit was truthful because the confidential informant went to the targeted residence and had the cocaine brought to the car from the residence. (R. pp. 12-13). Following the exchange, the trial judge initially ruled the search warrant and affidavit were proper. (R. p. 13).

Defense counsel next sought the trial judge's recusal while contending it was allegedly improper for the trial judge to rule on the propriety of the search warrant because he personally issued it. (R. p. 13). Following Appellant's recusal request, the trial judge noted the issue was not raised in a timely fashion despite the fact that defense counsel was aware for several weeks that the trial judge would be presiding over Appellant's trial and had an opportunity to bring the issue before another judge. (R. pp. 13-14). In response, defense counsel asserted he did not raise the issue in a timely manner because he "couldn't believe" the solicitor called the case before the trial judge even though he admittedly had notice the solicitor intended to do so. (R. p. 16). After considering the matter, the trial judge declined to recuse himself from consideration of

the propriety of the search warrant. (R. p. 17). However, the trial judge agreed to conduct a pre-trial hearing on the warrant issue. (R. p. 18).

Prior to the hearing, defense counsel reasserted his claim that the information contained in the search warrant affidavit was false while acknowledging the alleged falsity was dependent on the context in which the statements were viewed. (R. p. 19). Defense counsel further contended he needed the confidential informant present to testify in regards to the validity of the search warrant without identifying a specific reason as to why the informant's presence was necessary. (R. p. 19). The trial judge declined that request. (R. pp. 19-20).

Thereafter, after further considering the search warrant issue, the trial judge stated he believed the search warrant was proper, affirmatively indicated he could be fair and impartial in regards to the search warrant despite the fact that he was the issuing judge, and reaffirmed his decision not to recuse himself. (R. p. 21). In support of his decision not to recuse himself, the trial judge noted the issue regarding the allegations of false statements in the search warrant affidavit was a distinct issue from the validity of the issuance of the search warrant itself. (R. p. 21). The trial judge further reaffirmed his decision to sever the charges while also reaffirming his decision to permit testimony regarding Appellant's flight. (R. p. 21).

Subsequently, a hearing was conducted on the search warrant issue, and Sergeant Donald testified about his investigation and the preparation of the search warrant affidavit. (R. p. 24; p. 28). During his testimony, the officer stated the confidential informant informed him that she purchased drugs from the targeted residence on three occasions, watched Oliver enter the residence on each occasion, and was in the vehicle when Oliver returned from the residence with the cocaine. (R. pp. 24-26). He further

indicated he did not believe he left anything out of the search warrant affidavit and did not attempt to mislead the trial judge through the information included in the affidavit. (R. p. 32). On cross-examination, Sergeant Donald acknowledged the confidential informant never went to the door of the targeted residence, never entered the residence, and never met with Appellant. (R. p. 35; pp. 37-39). However, those allegations were not contained in the search warrant affidavit. (R. pp. 28-29; pp. 543-547).

Following Sergeant Donald's testimony, the trial judge asked defense counsel to specifically identify which allegations contained in the affidavit were false. (R. p. 46). In response, defense counsel first moved for the warrant to be suppressed based on an alleged lack of information regarding the informant's reliability. (R. p. 47). Defense counsel then asserted the affidavit was false because it stated the confidential informant purchased the cocaine. (R. pp. 50-51). In reply, the solicitor asserted the reliability of the confidential informant was established by the successful narcotics purchases and the confidential informant's statements about purchasing the cocaine were accurate and truthful. (R. pp. 51-52). After considering the arguments of counsel, the trial judge ruled the search warrant affidavit was valid and truthful when considered in the proper context. (R. p. 52). Following the ruling, defense counsel moved for the search warrant to be quashed as stale, and the trial judge denied the motion. (R. p. 53). Defense counsel then renewed the request for the confidential informant to be produced to testify on the search warrant issue, and the trial judge again denied the request, noting the confidential informant was not a participant in regards to the narcotics for which Appellant was on trial. (R. p. 54). Thereafter, the trial judge reaffirmed his ruling that the search warrant affidavit was free of false statements and contained sufficient information to justify the issuance of the warrant. (R. p. 55).

Following the trial judge's ruling, defense counsel asserted that some evidence had been improperly destroyed, and the trial judge conducted a hearing on that issue. (R. pp. 58-59; pp. 64-65). During the hearing, Sergeant Donald testified that mail listing Appellant's name along with an address different from the address of the targeted residence was collected when the search warrant was executed at the targeted residence. (R. p. 65; pp. 68-72). Following the officer's testimony, the solicitor asserted some paperwork was unintentionally destroyed and noted a jury charge on spoliation of evidence would be appropriate. (R. p. 73; p. 79). In response, defense counsel asserted the case should be dismissed because he claimed there may have been more letters destroyed that he was unable to review. (R. pp. 78-79). The trial judge then continued the hearing on the spoliation of evidence issue, and Lori Rabon, the property and evidence supervisor for the Horry County Police Department, offered testimony in regards to the destruction of the letters recovered from the targeted residence. (R. p. 85). During her testimony, Rabon stated some paperwork with Appellant's name on it was mistakenly destroyed in response to the resolution of one of Appellant's codefendants' cases. (R. pp. 85-86). She further noted drug paraphernalia was destroyed pursuant to departmental policy and other items taken during the execution of the search warrant were returned to their owners. (R. pp. 87-88). On cross-examination, defense counsel asked Rabon about a gun, and she indicated she was unaware of a gun being entered into evidence in Appellant's case. (R. p. 95). Following Rabon's testimony, defense counsel asserted a gun was found, was destroyed, and was exculpatory in some way. (R. p. 96). Thereafter, the trial judge ruled defense counsel would be permitted to cross-examine the witnesses in regards to the firearm if he desired to do so but found none of the destroyed

evidence was destroyed as the result of misconduct while also finding the destruction of the evidence did not result in any meaningful prejudice to Appellant. (R. p. 96).

Following the ruling, defense counsel argued the video recording and evidence related to Appellant's flight prior to his arrest should not be admitted during trial. (R. p. 101; p. 105). In response, the trial judge indicated he would rule upon the admissibility of the video recording during trial but noted testimony and evidence related to Appellant's arrest would be admissible. (R. p. 101; pp. 103-104).

The solicitor and defense counsel then presented their opening statements to the jury. (R. pp. 106-114). During defense counsel's opening statement, defense counsel asserted to the jury that the solicitor did not mention anything in regards to destroyed evidence in his opening statement. (R. p. 112). In response to those remarks, the trial judge interrupted, stating: "In fairness to [the solicitor], that's an unfair comment because I specially asked him to keep his comments short and I'm asking you do the same." (R. p. 112). Defense counsel then requested a bench conference and asked for a mistrial based on the trial judge's interruption and remarks. (R. p. 112; pp. 178-179). At a later point during trial, the trial judge denied the mistrial motion and noted he interrupted the opening statement to stop defense counsel from improperly commenting on the solicitor's case. (R. p. 179). Thereafter, the trial judge issued a curative instruction to the jury, stating:

Ladies and gentlemen, in our procedure, we have an opening statement wherein counsel for the State and the Defense gives you a short statement as to what their position is regarding the presentation of the State's case and of the Defense. At the conclusion of all the testimony, our rules require a lengthy summation if desired so that the attorneys for the State and the Defense can go into a lengthy explanation as to what they say the evidence thinks. On yesterday, counsel for the Defense was getting ready to elicit what the State had not shown to you in his opening statement. At that time I stopped her used unfortunately the word unfair which was not a

responsible comment by me and I asked that you ignore this. My intent was and is to say to that attorney that the proper way to go into that issue was at summation and not in opening statement after all of the evidence had been presented. So, I would not ever suggest to you that that attorney was being unfair. It was not my intention to use that word. My intention was just to call to her attention to go into that issue if she thought necessary at summation rather than in opening statement. So, please accept this curative statement as a statement by me that I certainly didn't mean to infer in any way that she was unfair. Thank you.

(R. p. 191).

As the trial proceeded, Corporal Calderwood testified about his apprehension of Appellant after Appellant ran into the soybean field following his attempt to flee from Sergeant Donald. (R. pp. 115-120). During his testimony, a video recording from Corporal Calderwood's vehicle was played for the jury over Appellant's objection. (R. p. 121; p. 123).

Additionally, Sergeant Donald testified about his search of the targeted residence, his discovery of narcotics and mail addressed to Appellant in the residence, his attempt to arrest Appellant, and Appellant's attempted flight. (R. pp. 127-128; pp. 133-134; p. 138; p. 147; p. 149; p. 163; p. 169; p. 171). He further stated he conducted a post-arrest search of Appellant and discovered a bank deposit slip in Appellant's wallet with Appellant's name and the address of the targeted residence listed on it. (R. pp. 173-175). At that time, defense counsel objected based on his "previous argument," and the objection was overruled. (R. p. 173).

In addition to Sergeant Donald's testimony, Yakoel testified Appellant lived with her at the targeted residence in August and September of 2008, paid all of the bills for the residence, also paid the bills for another apartment he was renting at the same time, and kept his clothes at the residence. (R. pp. 233-239; p. 242; p. 249). However, she noted Appellant was not present at the residence when law enforcement officers executed the

search warrant. (R. p. 239). She further testified Appellant was a successful drug dealer and indicated the drugs discovered in the bedroom she shared with Appellant did not belong to her and fell out of a pair of pants that belonged to Appellant. (R. pp. 260-261; pp. 264-265; p. 267; pp. 295-296).

Furthermore, Detective Hardee testified about his discovery of the narcotics in the bedroom where he encountered Yakoel. (R. pp. 298-299; pp. 306-307). The detective noted he discovered a plastic bag containing over one hundred grams of cocaine after it fell out of a pair of men's jeans stored in the bedroom closet. (R. p. 306; pp. 308-309). He further testified Appellant was not present at the time of the search. (R. p. 319).

Thereafter, during the defense's case, Rabon testified about the destruction of the paperwork with Appellant's name on it. (R. pp. 409-410; p. 412). In addition to Rabon's testimony, Sergeant Donald confirmed some of the documents taken during the search did not have Appellant's name on them while noting numerous documents did have Appellant's name on them. (R. pp. 417-418).

Subsequently, at the close of the evidentiary phase of trial, defense counsel again moved to exclude any testimony related to Appellant's flight from law enforcement, and the motion was denied. (R. p. 456). The trial judge then instructed the jury on the applicable law. (R. pp. 459-472). As part of the jury charge, the trial judge instructed:

[T]here are allegations of spoliation or destruction of evidence. The State not only has the burden of proof of guilt but it also has the burden of producing evidence which could establish the innocence of the defendant. When evidence is lost or destroyed by a party, you may if you choose infer the evidence which was lost or destroyed by that party would have been adverse to that party. If you find first that the evidence was spoiled or destroyed and if you further find that the evidence could have established the innocence of the defendant, you may then consider these facts in deciding whether or not the State has met its burden.

(R. pp. 469-470). Defense counsel and the solicitor then presented their closing arguments to the jury, and the jury retired from the courtroom. (R. pp. 474-502).

After the jury left the courtroom, defense counsel asserted someone made a noise at the end of the solicitor's closing argument, and the trial judge responded that he did not hear anything. (R. p. 503). Following the trial judge's response, defense counsel's wife, who was present in the courtroom, asserted "they" were clapping and insisted one of the jurors looked in the direction of a group of students who had entered the courtroom earlier that morning. (R. pp. 419-421; p. 504). Following that assertion, defense counsel requested a curative instruction indicating the jury should not consider anything exhibited in the courtroom. (R. p. 505). Thereafter, one of the students acknowledged she accidentally and unintentionally made a noise but indicated she was not clapping. (R. p. 506). However, defense counsel's wife responded by again asserting "kids were clapping." (R. p. 506). In response, the trial judge had the jurors return to the courtroom and instructed them to disregard anything they may have heard while noting he did not hear anything and did not think anything occurred. (R. pp. 507-508). He further asked the jurors if any of them were influenced by anything they may have heard, and no jurors responded in the affirmative. (R. p. 508). The jury then again retired. (R. p. 509).

After the jury once again retired, defense counsel objected to the trial judge's remark that he did not believe the event occurred. (R. p. 509). In response, the trial judge inquired if any of the students heard clapping, and several students indicated they heard something. (R. pp. 510-511). Of the students who responded, one indicated he heard a noise but it was not clapping, another indicated she heard a girl put her hands together, and another indicated he heard clapping but was not sure what the motivation for it was. (R. pp. 511-513). Following the statements of the students, the trial judge had

the jurors again return to the courtroom. (R. p. 515). The trial judge then instructed the jurors that noise or clapping had occurred, asked them if they heard it, and further asked if it influenced them in regards to their roles as jurors. (R. p. 516). All of the jurors unanimously indicated the noise did not influence them, and the jury again retired. (R. p. 516). After the jury left the courtroom, defense counsel moved for a mistrial based on the noise, and the trial judge denied the motion. (R. p. 517).

At the conclusion of trial, the jury convicted Appellant of trafficking in cocaine in an amount between 100 and 200 grams. (R. p. 524). Following the verdict, defense counsel renewed the motion for a mistrial, arguing it was "impossible" for the jury not to have been impacted by the noise in the courtroom, and the trial judge denied the motion after noting the jurors twice confirmed they had not been influenced by any noise they may have heard or did hear. (R. p. 529). Defense counsel then renewed the motions for the warrant to be quashed and the charges to be dismissed based on the destruction of the evidence, and the trial judge denied the motions. (R. pp. 531-532). Thereafter, the trial judge sentenced Appellant to a twenty-five year term of imprisonment and a \$50,000 fine. (R. p. 535).

ARGUMENT

I.

The trial judge properly declined to quash the search warrant and suppress the evidence discovered during the search of the targeted residence because the search warrant affidavit established a reliable probable cause basis to believe narcotics would be discovered at the targeted residence at the time of the search while containing no false, inaccurate, or misleading information. Furthermore, even if the trial judge erred in finding the search warrant affidavit sufficiently established a probable cause basis for the search, the trial judge properly declined to suppress the evidence discovered in the search because the search warrant was obtained in good faith and was not so lacking in indicia of probable cause that belief in and reliance on its validity was unreasonable.

Appellant alleges the trial judge erred in refusing to quash the search warrant and in denying the motion to suppress the evidence recovered during the search of the targeted residence. In support of that contention, Appellant maintains the search warrant affidavit was stale and contained false and unreliable information. Contrary to Appellant's contentions, the search warrant affidavit contained sufficient reliable information to establish a probable cause basis to believe narcotics would be found at the targeted residence at the time of the search. Furthermore, the law enforcement officer who prepared the search warrant affidavit did not knowingly include false information in the affidavit or act with a reckless disregard for the truth in an effort to mislead the issuing judge, and the information contained in the search warrant affidavit was not false, inaccurate, or untruthful in any way. However, even if the search warrant was improperly issued due to some deficiency in the search warrant affidavit, suppression of the evidence recovered in the search of the targeted residence was not warranted because the warrant was obtained in good faith and was not so lacking in indicia of probable cause that the law enforcement officer's belief in its validity was unreasonable. Accordingly, the trial judge properly declined to quash the search warrant and correctly

denied Appellant's motion to suppress the evidence discovered during the search of the targeted residence. Appellant's conviction should be affirmed.

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The reviewing court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). When reviewing a decision to issue a search warrant, the reviewing court should decide whether the issuing judge had a substantial basis for concluding probable cause existed. State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003). Applying the same standard as the issuing judge, the court should base its determination on the totality of circumstances. State v. Keith, 356 S.C. 219, 223, 588 S.E.2d 145, 147 (Ct. App. 2003). The issuing judge's probable cause determination should be afforded great deference on appeal. State v. Rutledge, 373 S.C. 312, 316, 644 S.E.2d 789, 791 (Ct. App. 2007).

In order to justify the issuance of a search warrant, the affiant must present a sworn affidavit establishing the grounds for the warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). A search warrant affidavit must contain sufficient underlying facts upon which an issuing judge can base a probable cause determination. State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990). The facts contained in the affidavit must be so closely related to the time of the issuance of the warrant to justify a finding of probable cause at that time. State v. Winborne, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979).

A search warrant may only be issued upon a finding of probable cause. Bellamy, 336 S.C. at 143, 519 S.E.2d at 348. In State v. Williams, 262 S.C. 186, 189, 203 S.E.2d

436, 437-438 (1974), the South Carolina Supreme Court explained probable cause as it relates to the issuance of a search warrant:

In order to justify the issuance of a search warrant, probable cause must be shown, but the term 'probable cause' does not import absolute certainty. In determining whether there is sufficient evidence to sustain a finding of probable cause, each case stands on its own facts. The evidence need not be sufficient to support a conviction, or a verdict of guilty, or to establish guilt beyond a reasonable doubt; nor need the proof be positive, it being enough if it is such as to induce in the mind of the issuing officer an honest belief that the facts set forth exist, or as would lead a man of prudence to believe that the offense has been committed.

(citing State v. Bennett, 256 S.C. 234, 182 S.E.2d 291 (1971)).

In deciding whether to issue a search warrant, the issuing judge must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). Critically, in making a probable cause determination, "[issuing judges] are concerned with probabilities and not certainties." State v. Sullivan, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976).

Consideration should be given to the fact that search warrant affidavits are typically prepared by non-lawyers in the haste of criminal investigations, and they must be viewed in a common sense and realistic fashion. State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995). "Searches based on warrants will be given judicial deference to the extent that an otherwise marginal search may be justified if it meets a realistic standard of probable cause." Id. "Suppression is appropriate in only a few situations, including when an affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" State v. Weston, 329 S.C.

287, 293, 494 S.E.2d 801, 804 (1997) (quoting United States v. Leon, 468 U.S. 897, 923 (1984)).

In the case sub judice, the trial judge correctly found the search warrant was properly issued because the information contained in the search warrant affidavit was sufficient to establish a reliable probable cause basis to believe narcotics would be found in the targeted residence at the time of the search. Accordingly, the trial judge properly denied the motion to quash the search warrant and properly declined to suppress the evidence recovered during the search of the targeted residence.

In challenging the propriety of the search warrant, Appellant initially contends the trial judge should have quashed the search warrant because Sergeant Donald allegedly knowingly included false information in the search warrant affidavit. Specifically, Appellant maintains the statements in the affidavit indicating the confidential informant purchased cocaine from the occupants of the targeted residence were knowingly false in light of the fact that Sergeant Donald allegedly knew the confidential informant did not actually observe a drug transaction. To the contrary, when viewed in the proper manner, none of the statements contained in the search warrant affidavit were false or misleading. Critically, contrary to Appellant's interpretation of the search warrant affidavit, the affidavit did not contain any language indicating the confidential informant actually entered the targeted residence. Cf. Rutledge, 373 S.C. at 319, 644 S.E.2d at 792 ("Rutledge . . . contends the affidavit improperly implied that the officers recovered the marijuana, seeds, and stalks from the residence itself. . . . Nowhere does the affidavit say it was found in the house."). Instead, when viewed in the proper context, the information contained in the affidavit only indicated the confidential informant purchased and obtained drugs from the targeted residence, which is exactly what occurred through

the informant's act of going to the residence, giving money to Oliver, watching Oliver enter the residence, and watching Oliver return from that same residence with cocaine. See State v. Thomas, 275 S.C. 274, 276, 269 S.E.2d 768, 769 (1980) (holding that courts should consider a "common-sense reading of the entire affidavit" in determining whether probable cause exists); see also United States v. Colkley, 899 F.2d 297, 300 (4th Cir. 1990) ("An affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation."). Thus, by going to the residence and receiving cocaine that was brought out of the residence, the confidential informant purchased cocaine from the occupants of the residence just as described in the search warrant affidavit, and, significantly, that information fully established a probable cause basis to believe narcotics would be discovered in the targeted residence irrespective of whether the confidential informant ever went inside. See United States v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988) ("[T]he nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence."); Dupree, 354 S.C. at 691, 583 S.E.2d at 445 (instructing evidence of a drug transaction supports an inference that more drugs will be found at the same location); see also United States v. Cioni, 649 F.3d 276, 286 (4th Cir. 2011) ("[E]ven if the additional facts cited by Cioni were included in the affidavits, the probable cause calculus would nonetheless have remained unchanged. Under these circumstances, Franks is inapplicable."); Colkley, 899 F.2d at 298 ("We hold that the Johnson affidavit was not tainted by the affiant's failure to include within it all potentially exculpatory information. Johnson's incriminating statements were properly admitted because Johnson made no showing that the affiant intended to mislead the magistrate by

omitting information, and because the warrant with the omitted information would in any event have been supported by probable cause[.]”).

As Appellant acknowledged during trial, his contentions that the allegations in the affidavit were false were “a matter of the way you look at it.” (R. p. 19). However, officers preparing search warrant affidavits are not required to prepare the affidavits with unerring technical precision, and search warrant affidavits are not to be viewed in an overly-technical manner. See Arnold, 319 S.C. at 260, 460 S.E.2d at 405 (“Affidavits are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and should therefore be viewed in a common sense and realistic fashion.”). Therefore, Appellant’s interpretation of the information contained in the search warrant affidavit, which was based on an overly-technical reading of the affidavit in an effort to find an interpretation that would support his contentions that the affidavit’s information was false, was not proper under the circumstances and did not establish Sergeant Donald knowingly and intentionally included false information in the search warrant affidavit or acted with a reckless disregard for the truth in an effort to mislead the issuing judge. See United States v. Ventresca, 380 U.S. 102, 108 (1965) (“[W]here these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.”); see also Colkley, 899 F.2d at 301 (“Franks protects against omissions that are *designed to mislead*, or that are made in *reckless disregard of whether*

they would mislead, the [issuing judge].” (italics in original)). As a result, the trial judge properly declined to quash the search warrant based on an alleged Franks violation.¹ See State v. Missouri, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999) (“There will be no Franks violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause.”); Rutledge, 373 S.C. at 319, 644 S.E.2d at 792 (finding no Franks violation occurred where nothing in the search warrant affidavit demonstrated a reckless disregard for the truth).

Next, Appellant contends the trial judge erred in refusing to quash the search warrant because the search warrant affidavit allegedly failed to contain sufficient information to establish the reliability of the confidential informant. To the contrary, the search warrant affidavit contained sufficient information to establish the reliability of the confidential informant through the information regarding the informant’s successful narcotics purchases from the targeted residence on multiple occasions. See Dupree, 354 S.C. at 691, 593 S.E.2d at 445 (“The controlled buy was evidence of the credibility and trustworthiness of the informant.”). Critically, the statements in the affidavit indicated the informant successfully purchased what was purported to be cocaine from the residence in a recent and continuous manner and the substance purchased from the residence tested positive for cocaine upon analysis. Thus, through her successful purchases of narcotics from the residence, the confidential informant’s reliability was established, and there was probable cause to believe more cocaine would be found in a

¹ In Franks v. Delaware, 438 U.S. 154, 156 (1978), the United States Supreme Court held: “[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant’s request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit’s false material set to one side, the affidavit’s remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.”

search of the residence. See Gates, 462 U.S. at 233 (“[A] deficiency in [veracity or basis of knowledge] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.”); see also Bellamy, 336 S.C. at 145, 519 S.E.2d at 349 (finding a search warrant sufficiently established the confidential informant’s reliability where, “[a]lthough the affidavit is weak on the element of the reliability of the informant, this deficiency is compensated for by the strong showing of specificity, first-hand observation, and partial corroboration”).

In arguing the search warrant did not sufficiently establish the confidential informant’s reliability, Appellant also contends the trial judge erred by failing to require the disclosure of the informant’s identity so she could be called to testify during the pre-trial hearing on the search warrant issue. However, as the United States Supreme Court has recognized, criminal defendants have no constitutional right to confront or question confidential informants during pre-trial hearings in regards to the sufficiency of search warrants. See McCray v. Illinois, 386 U.S. 300, 312-313 (1967) (holding criminal defendants are not constitutionally entitled to the disclosure of a confidential informant’s identity for the purposes of a preliminary hearing on the issue of whether probable cause existed to support an arrest or a search). Furthermore, any testimony beyond what was presented to the trial judge at the time he issued the search warrant was irrelevant towards a subsequent analysis as to the sufficiency of that warrant. See Arnold, 319 S.C. at 259, 460 S.E.2d at 405 (“A search warrant may issue only upon a finding of probable cause, and in passing on the validity of the warrant, a reviewing court **may consider only information brought to the [issuing judge]’s attention.**” (emphasis added)). Accordingly, the trial judge committed no error in declining to require disclosure of the confidential informant’s identity for the purposes of the pre-trial hearing on the propriety

of the search warrant, and such information was irrelevant as to whether or not the search warrant affidavit contained sufficient information to establish the informant's reliability. See State v. Burney, 294 S.C. 61, 62-63, 362 S.E.2d 635, 636 (1987) ("The confidential informant's role in this case was limited to supplying the police with information regarding Burney's possession of narcotics. Although he did participate in the controlled buy in 1985, the transaction here served only to aid in establishing the informant's reliability. The informant did not participate in the drug bust of January 17, 1986, or in any other transaction involving the possessory offenses for which Burney was tried and convicted. . . . Disclosure of the informant's identity was not required.").

Finally, Appellant contends the trial judge should have found the search warrant was stale based on the fact that it allegedly did not contain sufficient information to establish a probable cause basis to believe narcotics would be found in the targeted residence at the time the search warrant was issued. To the contrary, although the search warrant affidavit did not contain specific information regarding the dates of the drug transactions in which the confidential informant participated, the affidavit still contained sufficient information to establish a probable cause basis to believe narcotics would be found in the targeted residence at the time of the search based on the nature of the criminal activity alleged in the affidavit. See United States v. Johnson, 461 F.2d 285, 287 (10th Cir. 1972) ("[T]he vitality of probable cause cannot be quantified by simply counting the number of days between the occurrence of the facts relied upon and the issuance of the affidavit."). Critically, Sergeant Donald included information in the search warrant affidavit establishing the confidential informant had purchased drugs at the residence both recently and, most importantly, continuously. Through that information, the trial judge was made aware that narcotics had been sold from the

targeted residence recently and that the sale of narcotics from the residence was a continuous, ongoing enterprise. See State v. Thompson, 363 S.C. 192, 207, 609 S.E.2d 556, 564 (Ct. App. 1992) ("Given the continuous nature of the alleged drug activity, we find the record supports the trial court[']s finding that it was reasonable for the magistrate to conclude that Thompson would be found in possession of illegal substances. Although isolated sales of narcotics unquestionably occur, it is generally recognized that 'narcotics conspiracies are the very paradigm of the continuing enterprises for which the courts have relaxed the temporal requirements of non-staleness.' " (citation omitted)).

Furthermore, based on the information regarding the recentness of the transactions, the search warrant affidavit clearly conveyed to the trial judge that the transactions had not occurred so long ago that the probable cause basis to believe drugs would be located at the residence had been diminished. Cf. Winborne, 273 S.C. at 64, 254 S.E.2d at 298 ("It gives no indication of how long ago the drugs were seen. It could have been many years ago."). Under those circumstances, the search warrant affidavit sufficiently established probable cause to believe drugs would be located at the targeted residence at the time of the search based on the continuous and recent nature of the drug activity connected to the residence, and the trial judge properly declined to suppress the evidence due to the alleged staleness of the information contained in the affidavit. See United States v. Farmer, 370 F.3d 435, 439 (4th Cir. 2004) (finding the ongoing nature of the alleged criminal operation rendered the recentness of the information contained in the search warrant affidavit less crucial and suggested probable cause would not be diminished solely by the passage of time); see also United State v. McCall, 740 F.2d 1331, 1336 (4th Cir. 1984) ("In some circumstances, the very nature of the evidence sought may suggest that probable cause is not diminished solely by the passage of time."); see, e.g., United

States v. Uhrich, 228 F. App'x 248, 254 (4th Cir. 2007) (finding a search warrant was not stale where the allegations in the search warrant affidavit detailed criminal conduct that was protracted and continuous in nature and not a mere isolated violation of law).

However, even if the search warrant affidavit in Appellant's case did not sufficiently establish the confidential informant's reliability or the timeliness of the information justifying the search, the trial judge properly declined to suppress the evidence discovered as a result of the search because Sergeant Donald acted in good faith in obtaining the search warrant and acted in objectively reasonable reliance on the issuing judge's probable cause determination in conducting the search. See Leon, 468 U.S. at 922 ("[T]he marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."). Critically, Sergeant Donald complied with the statutory warrant requirements in obtaining the search warrant and included information in the search warrant affidavit establishing the confidential informant had purchased narcotics from the targeted residence on multiple occasions both recently and continuously. Under those circumstances, even if the issuing judge erred in determining the search warrant affidavit was sufficient to establish probable cause, the affidavit was not so lacking in indicia of probable cause that it was entirely unreasonable for Sergeant Donald to rely on the warrant after it was issued. See Weston, 494 S.C. at 293, 494 S.E.2d at 804 (recognizing that application of the good-faith exception is not prohibited simply because a search warrant was deficient in some respect); see also Leon, 468 U.S. at 918-921 ("[S]uppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule. . . . Penalizing the officer for the [issuing

judge]'s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.”); Anderson, 851 F.2d at 729-730 (finding the good-faith exception applied even though the search warrant affidavit did not contain any information regarding the date of the crime or the date that Anderson offered to sell a weapon to the informants). Accordingly, as Sergeant Donald did not act unreasonably in relying on the search warrant, the trial judge properly declined to suppress the evidence discovered in the search of the targeted residence. See Segura v. United States, 468 U.S. 796, 806 (1984) (“By its terms, the Fourth Amendment forbids only ‘unreasonable’ searches and seizures.”).

In conclusion, the trial judge properly determined the affidavit contained sufficient information to establish a reliable probable cause basis to believe narcotics would be discovered in the targeted residence at the time of the search. See Gates, 462 U.S. at 238 (“The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.”); Texas v. Brown, 460 U.S. 730, 741 (1983) (instructing probable cause is a flexible, common-sense standard); see also Dupree, 354 S.C. at 691, 593 S.E.2d at 445 (“The magistrate had ample probable cause to issue the warrant. Given all the circumstances set forth in the affidavit, there was a ‘fair probability’ that crack cocaine would be found in the mobile home.”). However, even if the search warrant should not have been issued due to some deficiency in regards to the search warrant affidavit, the trial judge properly declined to suppress the evidence recovered during the search because the affidavit was not so lacking in indicia of probable cause as to render

Sergeant Donald's reliance upon the search warrant entirely unreasonable. See Leon, 468 U.S. at 926 ("We have now reexamined the purposes of the exclusionary rule and the propriety of its application in cases where officers have relied on a subsequently invalidated search warrant. Our conclusion is that the rule's purposes will **only rarely be served by applying it in such circumstances**. . . . [S]uppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." (emphasis added)); see also Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]").

Accordingly, the trial judge properly denied Appellant's motion to quash the search warrant and declined to suppress the evidence recovered in the search of the targeted residence. Appellant's conviction should be affirmed.

II.

The trial judge properly declined to require the disclosure of the confidential informant's identity because that information was not relevant or necessary towards Appellant's ability to defend his case, and Appellant failed to articulate any meaningful or compelling reason as to why the disclosure of the confidential informant's identity was necessary or required under the circumstances.

Appellant asserts the trial judge committed reversible error by refusing to require the disclosure of the identity of the confidential informant. In support of that contention, Appellant appears to contend the confidential informant's testimony was somehow necessary in regards to Appellant's challenge to the validity of the search warrant. To the contrary, the trial judge properly exercised his discretion in declining to require the disclosure of the confidential informant's identity because the informant was only peripherally connected to Appellant's case through her provision of the information to Sergeant Donald that ultimately led to the issuance of a search warrant for the targeted residence. Significantly, the confidential informant was not connected in any way to the narcotics that resulted in Appellant's trafficking charge, and, thus, the identity of the confidential informant was not necessary or essential in regards to the preparation of Appellant's defense against that charge. Under those circumstances, the trial judge did not abuse his discretion in refusing to require disclosure of the confidential informant's identity, and Appellant failed to provide a valid or compelling reason justifying the disclosure of that information. Appellant's conviction should be affirmed.

"Generally, the State may not be compelled to disclose the names of its confidential informants." State v. Bultron, 318 S.C. 323, 330, 457 S.E.2d 616, 620 (Ct. App. 1995). "The purpose of the privilege [against disclosure] is the furtherance and protection of the public interest in effective law enforcement." Roviaro v. United States, 353 U.S. 53, 59 (1957). "The privilege recognizes the obligation of citizens to

communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform their obligation.” Id.

However, the privilege against disclosure is limited to the extent necessary to ensure fundamental fairness for all parties to a case. Id. at 60. “Where the disclosure of an informant’s identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.” Id. at 60-61. Significantly though, there is “no fixed rule with respect to disclosure[.]” Id. at 62. Instead, the public’s interest in perpetuating the flow of vital information to law enforcement officials must be balanced against the criminal defendant’s right to prepare his defense. Bultron, 318 S.C. at 330, 457 S.E.2d at 620. Therefore, whether disclosure is required necessarily depends on the particular circumstances of each individual case. Roviaro, 353 U.S. at 62.

Typically, “[a]n informant’s identity need not be disclosed where either the informant possesses only a peripheral knowledge of the crime or is a mere tipster who supplies a lead to law enforcement authorities.” State v. Blyther, 287 S.C. 31, 33, 336 S.E.2d 151, 152 (Ct. App. 1985) (citations omitted). “Where, however, the informant either is a material witness to the crime or directly participates in it, disclosure may be required, particularly where, in a drug related case, he is the only witness to the transaction other than the buyer and the defendant.” Id. (citations omitted); see State v. Diamond, 280 S.C. 296, 299, 312 S.E.2d 550, 551 (1984) (“Public policy considerations for nondisclosure of an informant’s identity are absent where the informant openly participates in the criminal transaction.”). However, “[e]ven if the informant is an active participant in the criminal act and/or a material witness, the court may still sustain an invocation of the nondisclosure privilege if other factors and circumstances warrant doing

so.” Bultron, 318 S.C. at 330, 457 S.E.2d at 620; see State v. Riggins, 262 S.C. 466, 468, 205 S.E.2d 376, 377 (1974) (holding the trial judge properly declined to provide the name of a confidential informant who was present when Riggins sold marijuana to an undercover officer); see also McLawhorn v. North Carolina, 484 F.2d 1, 5 (4th Cir. 1973) (“[O]ne of the factors tending to show that the prosecution is not entitled to withhold from the accused information as to the identity of an informant is the qualification of the informant to testify directly concerning the very transaction constituting the crime. On the other hand, the privilege of nondisclosure ordinarily applies where the informant is neither a participant in the offense, nor helps set up its commission, but is a mere tipster who only supplies a lead to law investigating and enforcement officers. This appears to be the generally accepted rule where the informant merely provides a lead or tip that furnishes probable cause for a search and seizure. Ordinarily, knowledge of the identity of a tipster would not be essential in preparing the defense of the accused and the public interest in protecting such informants should weigh heavily in favor of nondisclosure.” (citations and footnote omitted)).

In seeking the disclosure of the identity of a confidential informant, “the burden is upon the accused to show facts and circumstances giving rise to an exception to the privilege against disclosure[.]” State v. Batson, 261 S.C. 128, 134, 198 S.E.2d 517, 520 (1973). “[T]he onus is on the defendant to ‘come forward with something more than speculation as to the usefulness of such disclosure.’ ” United States v. Blevins, 960 F.2d 1252, 1259 (4th Cir. 1992) (citations omitted). In deciding whether to require the disclosure of a confidential informant’s identity, the trial judge has “considerable discretion” on the matter. Batson, 261 S.C. at 134-135, 198 S.E.2d at 520. On appeal, a trial judge’s decision not to require disclosure of an informant’s identity will not be

reversed unless the defendant can demonstrate that disclosure was required and prejudice resulted from the lack of disclosure. Id. at 135, 198 S.E.2d at 520

In the case at bar, the trial judge properly declined to require the disclosure of the confidential informant's identity because the disclosure of that information was not relevant, significant, or essential to any aspect of Appellant's defense. That is true because the confidential informant in Appellant's case merely provided information regarding drug transactions for which Appellant was **not** criminally charged, and the information provided by the confidential informant was solely used to obtain a search warrant as opposed to being used to prove Appellant's guilt or to obtain a warrant for Appellant's arrest in connection to the drug transactions in which the confidential informant actually participated. See United States v. Gray, 47 F.3d 1359, 1365 (4th Cir. 1995) ("In delineating the significance of this involvement, we have held that the government is privileged to withhold the identity of the informant when the informant was a "mere tipster," . . . or was used only for obtaining a search warrant, . . . but that failing to disclose the informant's identity more likely amounts to error when the informant was an active participant in the events leading to the arrest of the accused[.]") (emphasis added)); see also United States v. Ray, 61 F. App'x 37, 55 (4th Cir. 2003) ("Because the confidential informant was used solely to obtain a search warrant and not at trial, the government had no duty to disclose the identity."). Critically, Appellant was **not** indicted for any offense related to the transactions in which the confidential informant participated but, instead, was charged with trafficking in cocaine based solely on the discovery of narcotics during the search of the targeted residence. Cf. Bultron, 318 S.C. at 331, 457 S.E.2d at 621 (finding disclosure of the identity of a confidential informant was not required where "[t]he State presented evidence Appellants were in

constructive possession of the narcotics independent of the information offered by the informant"). Importantly, the confidential informant was not involved with and was not connected to the narcotics discovered in the search of the targeted residence in any way. Cf. Roviato, 353 U.S. at 64 (finding the prosecutor was required to reveal the identity of an informant in "a case where the Government's informer **was the sole participant, other than the accused, in the transaction charged**" (emphasis added)); McLawhorn, 484 F.2d at 6 ("The facts in the case at bar clearly indicate that the informant **was a participant in the incident which resulted in the arrest and conviction of [McLawhorn]**." (emphasis added)); Diamond, 280 S.C. at 298, 312 S.E.2d at 551 ("The informant was clearly **a participant in the transaction**, not a mere 'tipster' or witness or, as the trial judge ruled, a 'conduit.' " (emphasis added)). Accordingly, under those circumstances, there was no compelling reason requiring disclosure of the identity of the confidential informant in Appellant's case, and the informant's identity was not essential to any aspect of Appellant's defense.

As his sole basis for arguing that the confidential informant's identity should have been disclosed, Appellant contends the confidential informant's presence was somehow needed at trial because Sergeant Donald admitted that the confidential informant never purchased cocaine from the occupants of the targeted residence. Notwithstanding the fact that Sergeant Donald did not testify that the confidential informant did not purchase cocaine from the targeted residence, such a contention would not establish why the confidential informant's presence was required at trial even if it was accurate. In regards to the sufficiency of the search warrant prepared by Sergeant Donald, the officer's testimony was the only testimony needed for the trial judge to be able to properly decide that issue, and the confidential informant's testimony was wholly irrelevant towards the

trial judge's determination of the propriety of the warrant. See Rugendorf v. United States, 376 U.S. 528, 534 (1964) ("[A] careful examination of the whole record shows **that he requested the informers' names only in his attack on the affidavit supporting the search warrant.** Having failed to develop the criteria of Roviario necessitating disclosure on the merits, we cannot say on this record that the name of the informant was necessary to his defense. All petitioner's demands for identification of the informants were made during the hearings on the motion to suppress and were related to that motion. **Never did petitioner's counsel indicate how the informants' testimony could help establish petitioner's innocence.**" (emphasis added and footnote omitted)).

Furthermore, nothing was presented suggesting there was any reason to believe the confidential informant's testimony would have differed in any meaningful way from the testimony of Sergeant Donald, and Appellant has not identified any compelling reason to entertain such speculation. As a result, Appellant failed to articulate a valid reason for the identity of the confidential informant to be disclosed. See State v. Shupper, 263 S.C. 53, 57, 207 S.E.2d 799, 800 (1974) (finding no error in the refusal to require disclosure of the confidential informant's identity where "the defendant made no showing whatever that his lot may have been improved by the informer's testimony").

The confidential informant who provided the information to Sergeant Donald about the targeted residence did not supply drugs to the residence, did not personally interact with Appellant at the residence, did not accuse Appellant of committing any offense, did not participate in the search of the residence, and was not present when the narcotics for which Appellant was criminally charged were discovered by the law enforcement officers executing the search warrant. Instead, the confidential informant's role in Appellant's case was limited solely to providing the information that ultimately

led to the discovery of cocaine wholly unconnected to the informant by establishing the probable cause basis that justified the issuance of the search warrant for the targeted residence. See Gray, 47 F.3d at 1365 (noting the government is not required to disclose the identity of a confidential informant when that informant was used solely towards obtaining a search warrant). As a result, the confidential informant's testimony was irrelevant to any material issue in dispute in Appellant's trial. See State v. Boutilier, 12 A.3d 44, 49 (Me. 2011) ("A review of the record reveals that Boutilier has not presented adequate evidence to support his allegation that the confidential informant's statement served to enhance the charges against him or that the informant would have information relevant to the case at trial. Since the State specified that it relied only on the evidence found in the search of Boutilier's property in bringing the charges against him and did not plan to call the informant at trial, Boutilier failed to meet his burden of demonstrating that the informant may possess relevant knowledge that could assist in his defense at trial."). Because the confidential informant's testimony was not necessary towards establishing Appellant's guilt or innocence or towards aiding in the preparation of Appellant's defense, there was no compelling reason justifying or mandating the disclosure of the confidential informant's identity. Therefore, the trial judge did not abuse his broad discretion in declining to do so, and Appellant failed to articulate any meaningful reason either at trial or on appeal that would justify a conclusion to the contrary. See Batson, 261 S.C. at 134-135, 198 S.E.2d at 520 ("It is also generally recognized that the trial court has considerable discretion as to ordering, or refusing to require, disclosure and that in the event of refusal, the burden is upon the accused to show prejudice resulting therefrom."). Appellant's conviction should be affirmed.

III.

The trial judge properly declined to recuse himself on the sole basis that he had previously issued a search warrant in Appellant's case because the issuance of the search warrant in an earlier proceeding did not constitute evidence of bias or partiality on the part of the trial judge and no other evidence was presented to suggest the trial judge could not be fair and impartial to Appellant.

Appellant contends the trial judge erred in declining to recuse himself from presiding over the trial. In support of that contention, Appellant maintains the trial judge was required to recuse himself because his impartiality allegedly could reasonably be questioned in light of the fact he issued the search warrant he was called to rule upon during Appellant's trial. To the contrary, the fact that the trial judge had earlier issued a search warrant in Appellant's case did not prohibit the trial judge from ruling on the validity of that warrant in the adversarial setting of Appellant's trial and did not constitute evidence of judicial bias, prejudice, or partiality. Furthermore, no other evidence of the trial judge's prejudice or bias against Appellant was presented during trial. Thus, in the absence of any evidence establishing bias on the part of the trial judge, the trial judge was not disqualified from presiding over Appellant's trial, and the trial judge had a duty not to recuse himself under those circumstances. Accordingly, the trial judge properly denied Appellant's request for recusal. Appellant's conviction should be affirmed.

Every defendant has a right to a fair trial presided over by a fair and impartial judge. State v. Langford, 400 S.C. 421, 437, 735 S.E.2d 471, 479 (2012). "Pursuant to Canon 3(E)(1)(a) of Rule 501, SCACR, a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." State v. Jackson, 353 S.C. 625, 627, 578 S.E.2d 744, 745 (Ct. App. 2003). However, when there is no valid reason for disqualification, a trial judge has a duty to preside over the case. Simpson v. Simpson, 377 S.C. 519, 525-526, 660 S.E.2d 274, 278 (Ct. App. 2008).

Judges are presumed to be unbiased, and that presumption is “more than a pious hope.” Langford, 400 S.C. at 438, 735 S.E.2d at 480 (citation and internal quotation marks omitted). “It is not enough for a party seeking disqualification to simply allege bias or prejudice.” Jackson, 353 S.C. at 627, 578 S.E.2d at 745. Instead, the burden is upon the party seeking recusal to show some evidence of that bias or prejudice. Id. Furthermore, “[t]he alleged bias or prejudice must stem from an extra-judicial source and result in a decision based on information other than what the judge learned from his or her participation in the case as a judge.” Id.; see United States v. Grinnell Corp., 384 U.S. 563, 583 (1966) (“The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.”). Standing alone, judicial rulings **almost never** constitute a valid ground for recusal. Liteky v. United States, 510 U.S. 540, 555 (1994).

Decisions regarding recusal rest in the sound discretion of the trial judge. Ness v. Eckerd Corp., 350 S.C. 399, 404, 566 S.E.2d 193, 196 (Ct. App. 2002). A trial judge should exercise sound discretion in determining whether his partiality might reasonably be questioned. State v. Howard, 384 S.C. 212, 218, 682 S.E.2d 42, 45 (Ct. App. 2009). In reviewing a trial judge’s decision not to recuse himself on appeal, an appellate court will not reverse a judge’s failure to disqualify himself absent evidence of judicial bias or prejudice. Jackson, 353 S.C. at 627, 578 S.E.2d at 745.

In Appellant’s case, the trial judge properly declined to recuse himself from presiding over Appellant’s trial. Initially, the trial judge’s earlier involvement in the issuance of the search warrant did not constitute evidence of bias or prejudice and did not result in the trial judge learning any information from an extra-judicial source. See

Grinnell Corp., 384 U.S. at 583 ("The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."); see also Howard, 384 S.C. at 218, 682 S.E.2d at 54 ("[T]he alleged bias must be personal, as distinguished from judicial, in nature." (citation and internal quotation marks omitted)). Furthermore, no evidence of any kind was presented during trial suggesting the trial judge could not be fair and impartial to Appellant simply because he issued the search warrant, and the mere fact that the trial judge ruled upon the validity of the search warrant in a pre-trial, non-adversarial hearing neither established the trial judge was personally biased against Appellant nor prevented the trial judge from reconsidering his earlier ruling in light of the evidence and arguments Appellant presented in the adversarial setting of the trial.² See Liteky, 510 U.S. at 555 ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion."); see also Withrow v. Larkin, 421 U.S. 35, 56-57 (1975) ("Judges repeatedly issue arrest warrants on the basis that there is probable cause to believe that a crime has been committed and that the person named in the warrant has committed it. Judges also preside at preliminary hearings where they must decide whether the evidence is sufficient to hold a defendant for trial. Neither of these pretrial involvements has been thought to raise any constitutional barrier against the judge's presiding over the criminal trial and, if the trial is without a jury, against making the necessary determination of guilt or innocence. Nor has it been thought that a judge is disqualified from presiding over injunction proceedings because he has initially assessed the facts in issuing or denying a temporary restraining order or a preliminary injunction. .

² Notably, the trial judge's decision not to recuse himself also did not prevent or hinder appellate review of the trial judge's rulings on the validity of the search warrant. See Liteky, 510 U.S. at 555 ("Almost invariably, [judicial rulings] are proper grounds for appeal, not for recusal.").

.. We should also remember that it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around.”). In fact, the trial judge specifically assured the parties he could be fair and impartial in ruling on the issues that arose during trial. Accordingly, in the absence of any legitimate evidence of bias or prejudice, the trial judge did not abuse his discretion in declining to recuse himself in Appellant’s case.

In arguing the trial judge erred in failing to recuse himself, Appellant does not contend there is any actual evidence of bias or prejudice on the part of the trial judge and has not identified any specific evidence of bias or prejudice. Instead, relying solely on the trial judge’s earlier issuance of the search warrant, Appellant speculatively contends the trial judge’s impartiality might be questioned based on the fact that the trial judge issued a judicial ruling on the warrant prior to trial.³ Contrary to Appellant’s contentions, the fact that the trial judge issued the search warrant did not establish any bias or prejudice against Appellant, and such a contention should not be entertained or condoned.⁴ See Langford, 400 S.C. at 439, 735 S.E.2d at 480 (“The contention that a

³ Notably, the search warrant was issued for a specific address and not a person, and Appellant’s name was not mentioned in the search warrant affidavit. (R. pp. 543-547).

⁴ In arguing a trial judge should be disqualified from ruling on the validity of a search warrant that the trial judge personally issued, Appellant primarily relies upon the decision of the Mississippi Court of Appeals in Brent v. State, 929 So. 2d 952 (Miss. Ct. App. 2006). In that case, the trial judge presiding over Brent’s trial issued the search warrant at issue in Brent’s case and had previously prosecuted Brent while serving as an assistant district attorney. Id. at 955. After considering the circumstances of Brent’s case, the Mississippi Court of Appeals concluded the trial judge’s partiality might and should reasonably be questioned under those circumstances and, as a result, reversed the trial judge’s decision not to recuse himself. Id. at 955. Significantly though, unlike the analysis applied by the Missouri Court of Appeals, parties seeking recusal in South Carolina must present actual evidence of bias or prejudice and cannot simply rely on the possibility of partiality when seeking the disqualification of a trial judge. See Jackson, 353 S.C. at 627, 578 S.E.2d at 745 (“It is not enough for a party seeking disqualification to simply allege bias or prejudice.”). Furthermore, numerous other appellate courts have reached a starkly different conclusion than the Mississippi Court of Appeals, with the overwhelming majority of courts that have considered the issue determining the issuance of a search warrant does not automatically prevent the issuing judge from considering the validity of the warrant in a subsequent proceeding. See Heard v. State, 574 So. 2d 873, 875 (Ala. Crim. App. 1990) (“[A]bsent a showing of prejudice, an issuing magistrate may

judge was biased *solely* because he ruled against a defendant is untenable and insulting towards the court, and it would set a dangerous precedent were we to sanction it.” (italics in original)). Demonstrating the erroneous nature of such an assumption, courts in South Carolina have historically and consistently recognized judges are capable of reconsidering the judicial determinations they have previously made without being rendered impartial by virtue of making those determinations. See State v. Floyd, 295 S.C. 518, 520, 369 S.E.2d 842, 843 (1988) (“A ruling on the motion is not the ultimate disposition on the admissibility of evidence. It remains subject to change based upon developments during trial.”); see also Rule 221, SCACR (outlining the procedure for petitioning an appellate court for rehearing following the issuance of the court’s decision). However, assuming Appellant was somehow correct on the potential for bias

properly serve as the trial judge on the same cause.”); Holloway v. State, 293 Ark. 438, 441, 738 S.W.2d 796, 798 (Ark. 1987) (holding a trial judge who issued a search warrant is not required to recuse himself from subsequently determining the propriety of that warrant during trial); Heidt v. State, 292 Ga. 343, 347-348, 736 S.E.2d 384, 389-390 (Ga. 2013) (finding no error in the denial of a motion to recuse the trial judge on the basis that he had previously issued two search warrants and several orders in Heidt’s case because “the involvement of the trial judge with the issuance of search warrants and orders for records was directly related to Heidt’s case and was not ‘extra-judicial’ ”); People v. Antoine, 335 Ill. App. 3d 562, 573, 781 N.E.2d 444, 454 (Ill. App. Ct. 2002) (“That [the trial judge] presided over the warrant proceedings and issued the search warrant is not sufficient alone to establish prejudice.”); Bussell v. Commonwealth, 882 S.W.2d 111, 112 (Ky. 1994) (“The second allegation in the recusal motion was that the trial judge had ruled on an ex parte motion for a search warrant. This claim is without merit. Recusal is appropriate only when the information is obtained from an extrajudicial source.”); State v. Poole, 472 N.W.2d 195, 197 (Minn. Ct. App. 1991) (holding a trial judge who issues a search warrant is not automatically precluded from subsequently considering the validity of the warrant); State v. Pointer, 135 N.J. Super 472, 480, 343 A.2d 762, 766 (N.J. Super. Ct. App. Div. 1975) (finding no merit to the contention that a judge who issued a warrant was required to disqualify himself from considering a subsequent motion to suppress); People v. McCann, 85 N.Y.2d 951, 952-953 (N.Y. 1995) (holding a trial judge was not required to recuse himself from ruling on the validity of a search warrant that he issued, finding there is no basis to conclude a trial judge reviewing a search warrant under those circumstances would give the issue anything less than fair and impartial consideration, and further noting a trial judge’s decision in regards to a warrant he issued is nonetheless subject to appellate review); State v. Monserrate, 125 N.C. App. 22, 32-33, 479 S.E.2d 494, 501 (N.C. Ct. App. 1997) (holding a trial judge who issued a search warrant is not automatically required to recuse himself from subsequently ruling on the validity of the search warrant); Kemp v. State, 846 S.W.2d 289, 306 (Tex. Crim. App. 1992) (“The mere fact that a trial judge issued a defendant’s search or arrest warrant, alone, does not establish bias against the defendant in a subsequent criminal proceeding[.]”); State v. Chamberlain, 161 Wash. 2d 30, 37, 162 P.3d 389, 392 (Wash. 2007) (finding no error in the trial judge’s decision to decline to recuse himself in a case where he issued the search warrant that was subsequently challenged during trial and stating “[e]vidence of a judge’s actual or potential bias must be shown before an appearance of fairness claim will succeed”).

that could result from a trial judge reviewing a search warrant he issued, the mere possibility the trial judge's earlier decision to issue the warrant might raise a question regarding the trial judge's partiality is not sufficient to disqualify the trial judge from presiding over the trial without some actual evidence of prejudice or bias. See Langford, 400 S.C. at 438, 735 S.E.2d at 480 (recognizing "[t]he right to a judge who is free from the mere *appearance* of partiality is not part of due process at all" (italics and brackets in original and citation and internal quotations marks omitted)). As a result, since Appellant has not identified any specific evidence of the trial judge's bias or prejudice against him aside from the trial judge's earlier judicial ruling on the search warrant, the trial judge had an affirmative duty to decline to recuse himself and preside over Appellant's trial. See Simpson, 377 S.C. at 525-526, 660 S.E.2d at 278 ("When disqualification is not required, the South Carolina Code of Judicial Conduct holds, 'A judge *shall* hear and decide matters assigned to the judge . . . ' " (italics in original and citation omitted)).

Appellant has failed to meet his burden of establishing evidence of bias or prejudice on the part of the trial judge, and no evidence was presented suggesting the trial judge could not be fair and impartial in Appellant's case. See Jackson, 353 S.C. at 627, 578 S.E.2d at 745 ("The party must show some evidence of that bias or prejudice."). The fact that the trial judge issued a search warrant in Appellant's case did not establish the trial judge was biased or prejudiced against Appellant and, thus, did not disqualify the trial judge from ruling on the validity of the search warrant. Accordingly, as there is a total lack of evidence of bias, the trial judge did not abuse his discretion in declining to recuse himself from further participation in Appellant's trial. See id. ("If there is no evidence of judicial bias or prejudice, a judge's failure to disqualify himself will not be reversed on appeal."). Appellant's conviction should be affirmed.

IV.

Any issue regarding the applicability of the cumulative error doctrine was not preserved for appellate review and abandoned because Appellant did not raise any issue in regards to cumulative error during trial and, instead, raised the issue for the first time on appeal in a conclusory and unsupported manner. Regardless, Appellant's trial was not rendered unfair as a result of any errors, cumulative or otherwise, and none of the errors identified by Appellant as rendering his trial unfair actually constituted an error.

Appellant asserts the trial judge erred by not granting a new trial based on the cumulative effect that a number of alleged errors had on the fairness of the trial. Without presenting any specific argument to establish any actual errors occurred, Appellant maintains several alleged errors collectively deprived him of a fair trial. Initially, any issue regarding the applicability of the cumulative error doctrine was not properly preserved for appellate review because that issue was not raised to or ruled upon by the trial judge. Additionally, even if the issue was somehow preserved for review, Appellant abandoned the issue on appeal by merely raising a conclusory and unsupported argument on the issue. Furthermore, regardless of any concerns regarding issue preservation and abandonment, the cumulative error doctrine was not applicable to Appellant's case because none of the alleged errors identified by Appellant as collectively depriving him of a fair trial actually constituted an error. As Appellant's trial was not rendered unfair by any alleged error, cumulative or otherwise, the trial judge did not err by not granting Appellant a new trial following the jury's verdict. Appellant's conviction should be affirmed.

A. Issue Preservation and Abandonment

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v.

Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). “If a party fails to properly object, the party is procedurally barred from raising the issue on appeal.” State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). The appellate court will not consider any issues or arguments that were not presented to or passed upon by the trial judge, and an appellant is limited on appeal solely to the grounds raised during trial. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970); see State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (“Appellant is limited to the grounds raised at trial.”); see also State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) (“[A] party cannot argue one theory at trial and a different theory on appeal.”). “Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and **arguments**.” 1’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000) (emphasis added).

Likewise, “conclusory statements unaccompanied by argument and citation to authority are insufficient to preserve an issue for appellate review.” State v. Crocker, 366 S.C. 394, 399, n. 1, 621 S.E.2d 890, 893 (Ct. App. 2005). “An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.” Howard, 384 S.C. at 217, 682 S.E.2d at 45. Appellate courts will not consider arguments or issues raised on appeal in a conclusory or

unsupported manner. Savannah Bank, N.A. v. Stalliard, 400 S.C. 246, 252, n. 3, 734 S.E.2d 161, 164 (2012).

In the case sub judice, Appellant failed to preserve any issue in regards to the cumulative effect of the errors he contended occurred during trial because Appellant did not raise any issue regarding cumulative error to the trial judge and never contended to the trial judge that the alleged errors taken together adversely impacted his constitutional right to a fair trial. See Patterson, 324 S.C. at 19, 482 S.E.2d at 767 (“Appellant is limited to the grounds raised at trial.”); see also In re Care and Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) (“Constitutional issues, like most others, must be raised to and ruled upon by the trial court to be preserved for appellate review.”). Because Appellant did not raise an argument regarding the cumulative effect of the alleged errors to the trial judge, Appellant is precluded from raising such an argument for the first time on appeal. See West v. Morehead, 396 S.C. 1, 14, 720 S.E.2d 495, 502 (Ct. App. 2011) (“Appellants make arguments and cite authorities in their briefs that were not presented to the trial court. These arguments are not preserved.”); see also State v. Senter, 396 S.C. 547, 555, 722 S.E.2d 233, 237 (Ct. App. 2011) (“Because Senter failed to raise this argument to the trial court, it is not preserved for our review.”).

However, even assuming the issue regarding cumulative error was somehow preserved during trial despite the fact Appellant did not raise the issue to the trial judge, Appellant abandoned the issue on appeal by merely raising a conclusory argument in support of his appellate contentions. Significantly, on appeal, Appellant contends several specified errors taken together cumulatively deprived him of his constitutional right to a fair trial. However, aside from merely identifying four errors that allegedly occurred during trial, Appellant has not presented any argument or supporting authority to

establish the alleged errors constituted actual errors. In light of the conclusory and unsupported manner in which the issue has been raised on appeal, any issue regarding the cumulative effect of the alleged errors has been abandoned and, thus, cannot properly be considered on appeal. See State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010) (holding a conclusory, unsupported argument was abandoned on appeal); see also State v. Attardo, 263 S.C. 546, 551, n. 1, 211 S.E.2d 868, 869 (1975) (“ ‘The burden of proof is on the appellant to convince this Court that the lower court was in error.’ ” (citation omitted)). Accordingly, for the foregoing reasons, Appellant failed to meet his burden of establishing his trial was rendered unfair by the cumulative effect of errors he claims occurred during trial. See State v. Huggins, 336 S.C. 200, 205, 519 S.E.2d 574, 577 (1999) (“It is well-settled that issues may not be raised for the first time on appeal.”). Appellant’s conviction should be affirmed.

B. Propriety of the Trial Judge’s Allegedly-Erroneous Rulings

Pursuant to the cumulative error doctrine, a criminal defendant may be entitled to reversal if he can demonstrate that errors occurred during trial and those errors taken together adversely affected his right to a fair trial. State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). However, an argument based on the cumulative error doctrine necessarily must fail if the defendant cannot meet his burden of establishing any errors actually occurred. State v. Kornahrens, 290 S.C. 281, 290, 350 S.E.2d 180, 186 (1986). Furthermore and significantly, a criminal defendant is only constitutionally entitled to a fair trial and not a perfect one. State v. McEachern, 399 S.C. 125, 149, 731 S.E.2d 604, 616 (Ct. App. 2012); see State v. Black, 400 S.C. 10, 29, 732 S.E.2d 880, 891 (2012) (“[A] defendant is entitled to a fair trial, not a perfect one.”).

In the case at bar, notwithstanding the fact that the issue regarding the cumulative error doctrine was not preserved for appellate review and has been abandoned on appeal, Appellant failed to establish his trial was rendered unfair as a result of the cumulative effect of the errors he identified in a conclusory fashion on appeal. Critically, the reason why those errors could not have rendered Appellant's trial unfair is that none of the errors Appellant identified as collectively warranting reversal actually constituted an error.

Turning to the errors identified by Appellant, Appellant first contends the trial judge erred in admitting testimony and evidence related to the failure to stop for a blue light charge because that charge was severed from Appellant's trial for trafficking in cocaine. However, despite the fact the trial judge did not permit the solicitor to submit the failure to stop for a blue light charge to the jury, the evidence related to Appellant's flight and substantial efforts to evade arrest was directly related to the trafficking offense for which he was on trial because the circumstances surrounding Appellant's flight supported an inference that he knew law enforcement officers were seeking to arrest him for the trafficking offense as he was unquestionably aware officers had seized the narcotics stored inside of his home. See State v. Pagan, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006) ("It is sufficient that circumstances justify an inference that the defendant's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose."); State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011) ("[A]ny guilty act or conduct on the part of the accused is admissible as some evidence of consciousness of guilt."); State v. Walker, 366 S.C. 643, 655, 623 S.E.2d 122, 128 (Ct. App. 2005) ("It is sufficient that circumstances justify an inference that the accused's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for

that purpose.”); State v. Crawford, 362 S.C. 627, 635, 608 S.E.2d 886, 890 (Ct. App. 2005) (“Flight, when unexplained, is admissible as indicating consciousness of guilt, for it is not to be supposed that one who is innocent and conscious of that fact would flee.”). Accordingly, the trial judge did not abuse his broad discretion by admitting testimony related to Appellant’s flight immediately before his arrest for the trafficking offense. See State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) (“A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.”).

Additionally, Appellant contends the trial judge erred in denying his motion for a mistrial based on the trial judge’s interruption of defense counsel’s opening statement. Initially, the trial judge properly exercised his discretion to interrupt defense counsel’s opening statement because defense counsel improperly referred to the solicitor’s case in an argumentative manner during the opening remarks, which was not consistent with the purpose of an opening statement. See State v. Brown, 277 S.C. 203, 204-205, 284 S.E.2d 777, 778 (1981) (“An opening statement serves to inform the jury of the general nature of the action and the defenses involved in a case so they will be better prepared to understand the evidence presented. . . . [T]he scope of an opening statement is within the discretion of the trial judge[.]” (citations omitted)). However, even assuming the trial judge somehow abused his discretion by interrupting defense counsel’s opening statement, the trial judge nonetheless issued a curative instruction to the jury in regards to the interruption, and Appellant raised no objection to the sufficiency of that curative instruction. See State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) (“No issue is preserved for appellate review if the objecting party accepts the judge’s ruling and does not contemporaneously make an additional objection to the sufficiency of the

curative charge or move for a mistrial.”). Accordingly, the trial judge did not abuse his discretion in regards to defense counsel’s opening statement, and any possible error that could have occurred was cured by the trial judge’s curative remarks to the jury. See State v. Brown, 389 S.C. 84, 95, 697 S.E.2d 622, 628 (Ct. App. 2010) (“A curative instruction is usually deemed to cure an alleged error.”).

Next, Appellant contends the trial judge erred in declining to grant a mistrial in light of his comments to the jury following a courtroom disturbance. Contrary to Appellant’s contentions, the trial judge properly responded to a disturbance in the courtroom by taking steps to determine the nature of disturbance and taking steps to determine if any jurors were impacted by it. See State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007) (“The conduct of a criminal trial is left largely to the sound discretion of the trial judge.”); see also State v. Heath, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958) (“Necessarily the conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had.”). After discussing the matter with individuals in the courtroom and with the jury, the trial judge determined a mistrial was not warranted after all of the jurors indicated they were unaffected by anything that occurred in the courtroom, and the noise that was reported did not and could not have resulted in any actual articulable prejudice to Appellant. See State v. Grovenstein, 335 S.C. 347, 351, 517 S.E.2d 216, 218 (1999) (“We have consistently required defendants to demonstrate prejudice due to improper jury influences.”); State v. Aldret, 333 S.C. 307, 313, 509 S.E.2d 881, 814 (1999) (“[T]he trial court has broad discretion in assessing allegations of juror misconduct.”); State v. Kelly, 331 S.C. 132, 141, 502 S.E.2d 99, 104 (1998) (“The trial judge is in the best position to determine the credibility of the jurors; therefore, [the appellate court] should grant him broad deference

on this issue.”). Therefore, based on the jurors’ assurances that any disturbance they may have occurred did not impact their abilities to remain fair and impartial in Appellant’s case, the trial judge properly declined to grant a mistrial based on the disturbance or his remarks to the jury on the matter. See State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) (“The granting of a motion for mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way.”).

Finally, Appellant contends the trial judge erred in dismissing the trafficking charge in light of the fact that evidence was admittedly destroyed by the State prior to trial. However, although the State mistakenly destroyed a number of documents taken during the search of the targeted residence, there was no evidence suggesting that the State destroyed the evidence in bad faith or that the evidence possessed apparent exculpatory value, and comparable evidence was introduced during trial through the presentation of testimony and evidence establishing letters addressed to other individuals and to Appellant at an address different from the targeted residence were found in the search of that residence. See Arizona v. Youngblood, 488 U.S. 51, 57 (1988) (“[W]e think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.”); California v. Trombetta, 467 U.S. 479, 488 (1984) (“The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish ‘materiality’ in the constitutional sense.”); State v. Cheeseboro, 346 S.C. 526, 538, 552 S.E.2d 300, 307 (2001) (“The State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant.”);

see also Baker v. McCollan, 443 U.S. 137, 146 (1979) (instructing law enforcement officers are not required to perform entirely error-free investigations); State v. Bland, 399 S.C. 220, 226, 730 S.E.2d 909, 912 (Ct. App. 2012) (“[O]ur holding that Bland failed to demonstrate that the lineup had exculpatory value is sufficient to uphold his convictions[.]”). Furthermore, the trial judge greatly minimized any potential for prejudice to Appellant by instructing the jury on the adverse inference to the State that could be drawn from the destruction of the evidence. See, e.g., Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) (“A jury is presumed to follow instructions.”). Accordingly, the destruction of the letters collected from the targeted residence did not entitle Appellant to dismissal of his charges or render his trial fundamentally unfair.

Thus, in raising the applicability of the cumulative error doctrine on appeal, Appellant failed to identify any actual errors in support of his contention that his trial was rendered unfair as a result of the cumulative effect of the trial errors taken together. For that reason, Appellant failed to establish he was entitled to relief pursuant to the cumulative error doctrine. See Johnson, 334 S.C. at 93, 512 S.E.2d at 803 (“[A party raising an issue pursuant to the cumulative error doctrine] must demonstrate more than error in order to qualify for reversal on this ground. Instead, the errors must adversely affect his right to a fair trial.”); see also Kornahrens, 290 S.C. at 290, 350 S.E.2d at 186 (“[Kornahrens] asserts the trial judge should have granted a new trial because of the cumulative effect of the asserted trial errors. Since we have found no errors, this issue is without merit.”). Appellant’s conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

BY:

A large, stylized handwritten signature in black ink, appearing to read 'M. Farthing', is written over a horizontal line.

Mark R. Farthing

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ATTORNEYS FOR RESPONDENT

May 30, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Edward B. Cottingham, Circuit Court Judge
Appellate Case No. 2011-203769

THE STATE,

Respondent,

vs.

ALEX LORENZO ROBINSON,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

ALAN WILSON
Attorney General

MARK R. FARTHING
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BY:



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ATTORNEYS FOR RESPONDENT

May 30, 2013

APP'X 678

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Alex Robinson, Appellant.

Appellate Case No. 2011-203769

Appeal From Horry County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 5224
Heard January 8, 2014 – Filed April 23, 2014

REVERSED

Dayne C. Phillips, of Lexington, and Appellate Defender
Carmen Vaughn Ganjehehnsani, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Mark Reynolds Farthing, both of
Columbia, for Respondent.

FEW, C.J.: Alex Robinson appeals his conviction for trafficking cocaine, arguing the trial court erred in refusing to suppress evidence seized pursuant to a search warrant. We find the search warrant invalid because the affidavit supporting it gave the issuing judge no information as to the confidential informant's reliability. We reverse.

APP'X 679

I. Facts and Procedural History

In August 2008, a confidential informant told Sergeant Kent Donald of the Horry County Police Department's narcotics and vice section she could purchase drugs from Robinson's residence. Sergeant Donald and a federal law enforcement agent met with the informant on August 15 to set up the first buy. The informant told the officers that to make the purchase, "she would go meet the other person that was going to supply them with the cocaine." The "other person" was Christopher Oliver. Sergeant Donald testified he "debriefed" the informant after the buy. Describing what the informant told him, Sergeant Donald testified, "When [the informant] got there, . . . Mr. Oliver told her to drop him off away from the residence because the occupants of the house did not want any undue suspicion on their house. So, [the informant] was told to park down the road[,] and [Oliver] would walk to the residence."

Sergeant Donald also testified that on August 22 and September 12, he "met with the confidential informant to search -- wired,¹ I gave her \$600 of police buy money. She went and picked Mr. Oliver up[,] and they went again to [Robinson's residence]." While Oliver was inside Robinson's residence, the informant "sat in the car the whole time" and listened to music.

On September 17, Sergeant Donald prepared an affidavit in which he swore the informant—not Oliver—purchased cocaine from Robinson's residence. Sergeant Donald stated,

A confidential and reliable informant working for the Horry County Police Department purchased a quantity of off white powder substance represented as being cocaine and field-testing positive for cocaine attributes from the occupants of the house identified as 1251 Stoneybrook Dr. in Conway, SC. That the informant has been able to make recent continuous purchases of illegal drugs from this residence leads to the affiant's belief that there is the possibility there may be more illegal drugs located at this residence.

¹ Sergeant Donald later described the "wire" as an audio listening device, which recorded the informant—but not the drug sale—while she sat in her car listening to music and waiting on Oliver to buy the drugs.

Sergeant Donald presented the affidavit to a circuit court judge because "this case had the possibility of going federal," and on September 17 the judge signed a warrant authorizing the search of Robinson's residence. When officers executed the warrant on September 25, they discovered a large plastic bag containing 109.35 grams of cocaine, seven small bags of cocaine, marijuana, ecstasy pills, a scale, video surveillance equipment, and various items connecting Robinson to the residence, such as his mail and photographs of him.

Robinson was indicted for trafficking cocaine, and the State called the case for trial before the same circuit judge who signed the search warrant. The trial court denied his motion to suppress the evidence seized pursuant to the warrant. The jury found him guilty, and the court sentenced him to twenty-five years in prison.

II. The Validity of the Warrant

We address two of Robinson's arguments that the trial court erred by not granting his motion to suppress. First, he argues Sergeant Donald misled the judge who issued the search warrant by knowingly omitting the facts and circumstances of Oliver's involvement in the drug transactions. Second, he argues the warrant is invalid because Sergeant Donald did not present the issuing judge with any information regarding the confidential informant's reliability.

We agree Sergeant Donald omitted key information necessary for the issuing judge to determine whether probable cause existed. We disagree, however, that the omission of the information requires suppression. Regarding Sergeant Donald's failure to provide the issuing judge information about the informant's reliability, we find this failure left no substantial basis on which the judge could determine the existence of probable cause, and thus we order suppression.

A. The Omission of Key Information from the Affidavit

The trial court agreed with the State that the affidavit was accurate despite the omission of Oliver's involvement. The court stated, "This affidavit has -- there's no false statement in this affidavit." We hold the trial court's finding is clearly erroneous. *See State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012) ("In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous.").

Sergeant Donald's affidavit states the "informant . . . purchased . . . cocaine . . . from the occupants of the house," and "the informant has been able to make . . .

purchases of . . . drugs from this residence." During the suppression hearing, however, he testified, "I was working a confidential informant who stated that she knew someone that could purchase some drugs." Describing the individual buys, he testified the informant "would go meet the other person that was going to supply them with the cocaine." Sergeant Donald's affidavit implies, if not expressly states, the informant personally entered the house and purchased cocaine. In actuality, however, assuming what the informant told Sergeant Donald was true, Oliver was the one who purchased cocaine from the occupants of the house while the informant was "park[ed] down the road" listening to music. Sergeant Donald's testimony at the suppression hearing conclusively demonstrates his statements in the affidavit are false.

The State argues Sergeant Donald's statements are true because Oliver was the informant's agent, and through Oliver the informant purchased the drugs. Even if the State is correct that the informant was a purchaser under the law of agency, that is a determination the issuing judge must make—not the officer. *See United States v. Watson*, 703 F.3d 684, 695 n.13 (4th Cir. 2013) ("[T]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." (citations omitted)); *State v. Gentile*, 373 S.C. 506, 513, 646 S.E.2d 171, 174 (Ct. App. 2007) ("The affidavit must contain sufficient underlying facts and information upon which *the magistrate may make a determination* of probable cause." (emphasis added and citation omitted)). Thus, the officer should have disclosed that the informant purchased cocaine through a purported agent, and should have described the circumstances he believed gave rise to the agency relationship. Because the affidavit represented that the informant was the purchaser, but did not disclose the facts related to agency, the affidavit is false even under the State's agency theory.

Therefore, the trial court's finding that the affidavit contained no false statement is clearly erroneous. Although there is plenty of evidence relating to the trial court's finding, all of this evidence negates—none supports—the trial court's conclusion. *See Brown*, 401 S.C. at 87, 736 S.E.2d at 265 (stating "[in] a Fourth Amendment search and seizure case, an appellate court must affirm the trial court's ruling if there is any evidence to support it").

Under *Franks v. Delaware*, however, the court may not order suppression simply because the officer made a false statement in, or omitted key facts from, an

affidavit supporting a search warrant. 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667, 672 (1978) (establishing the two-prong test for challenging the veracity of a search warrant affidavit). The defendant must also demonstrate "those false statements or omissions were material, *i.e.*, rendered the affidavit unable to 'support a probable cause finding.'" *United States v. McKenzie-Gude*, 671 F.3d 452, 462 (4th Cir. 2011) (quoting *United States v. Allen*, 631 F.3d 164, 171 (4th Cir. 2011)). We find Sergeant Donald's false statement in the affidavit does not require suppression because the existence of probable cause depended on the accuracy of what the informant told Sergeant Donald. In other words, including in the affidavit the correct information about Oliver's involvement would not have changed the fact that probable cause existed, *if* the informant was telling the truth.

B. The Reliability of the Confidential Informant

We find, however, that Sergeant Donald's failure to include in his affidavit any evidence of the informant's reliability renders the warrant invalid. In making a probable cause determination,

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, *including the "veracity" and "basis of knowledge" of persons supplying hearsay information*, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 496 (2009) (emphasis added) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)).

The only information in the affidavit about the events and circumstances at Robinson's residence, and thus the only information provided to the issuing judge regarding the existence of probable cause, came from the informant. As the issuing judge observed during the suppression hearing, "There were drugs there *if* the allegations [in the affidavit] are true." Thus, the existence of probable cause in this case depended entirely on the informant's hearsay statements to Sergeant Donald—whether the informant told the truth—particularly as to (1) whether there were any drugs purchased at all and (2) whether the drugs were purchased from Robinson's residence. Concerning these key points, if the informant gave Sergeant

Donald incorrect information, there would be no probable cause to search Robinson's residence. Therefore, we find it was necessary that Sergeant Donald demonstrate the informant's reliability to the issuing judge. *See State v. Martin*, 347 S.C. 522, 527, 556 S.E.2d 706, 709 (Ct. App. 2001) ("A warrant based solely on information provided by a confidential informant must contain information supporting the credibility of the informant and the basis of his knowledge." (quoting *State v. 192 Coin-Operated Video Game Machs.*, 338 S.C. 176, 192, 525 S.E.2d 872, 881 (2000))); *State v. Adolphe*, 314 S.C. 89, 92, 441 S.E.2d 832, 833 (Ct. App. 1994) ("The task of a magistrate when determining whether to issue a warrant . . . includes consideration of the veracity of the person supplying the information and the basis of his or her knowledge." (internal citations omitted)).

III. Suppression

The State argues against suppressing the evidence because it contends the warrant was obtained in good faith and was not so lacking in indicia of probable cause that the law enforcement officers' belief in its validity was unreasonable, and thus should be upheld under *United States v. Leon*, 468 U.S. 897, 919-20, 104 S. Ct. 3405, 3419, 82 L. Ed. 2d 677, 696-97 (1984). In *Leon*, the Supreme Court established a good faith exception to the exclusionary rule, holding "that when an officer acting in objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope, a reviewing court should not order a suppression of the evidence based on a lack of probable cause." *State v. Weston*, 329 S.C. 287, 292, 494 S.E.2d 801, 803-04 (1997) (summarizing *Leon*). The *Leon* Court listed three situations in which the good faith exception cannot apply, one of which is reviewing courts will not defer to a warrant based on an affidavit "that does not provide the magistrate with a substantial basis for determining the existence of probable cause." 468 U.S. at 914-15, 104 S. Ct. at 3416, 82 L. Ed. 2d at 693.

In *State v. Johnson*, 302 S.C. 243, 248, 395 S.E.2d 167, 170 (1990), our supreme court ruled "*Leon* specifically precludes the application of the good faith exception" in a situation indistinguishable from ours. In *Johnson*, "the informant told South Carolina Law Enforcement agents that he had seen a large quantity of cocaine, cash and a gun in Johnson's home" "within the past seventy-two (72) hours." 302 S.C. at 245, 395 S.E.2d at 168. This information, if accurate, would have provided a substantial basis on which the issuing judge could find the existence of probable cause. However, the affidavit "d[id] not set forth any information as to the reliability of the informant." 302 S.C. at 247, 395 S.E.2d at 169. The supreme court stated:

Without any information concerning the reliability of the informant, the inferences from the facts which lead to the complaint will be drawn not by a neutral and detached magistrate, as the Constitution requires, but instead, by a police officer engaged in the often competitive enterprise of ferreting out crime, or, as in this case, by an unidentified informant.

302 S.C. at 248, 395 S.E.2d at 169 (internal quotation marks omitted).

After concluding "the affidavit . . . did not provide the magistrate with sufficient information concerning the informant's reliability upon which he could base a probable cause determination," the court considered whether the good faith exception applied. 302 S.C. at 248-49, 395 S.E.2d at 169-70. Quoting *Leon*, 468 U.S. at 915, 104 S. Ct. at 3416, 82 L. Ed. 2d at 693, our court found the good faith exception inapplicable:

[R]eviewing courts will not defer to a warrant based on an affidavit that does not provide the magistrate with a substantial basis for determining the existence of probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.

302 S.C. at 248-49, 395 S.E.2d at 170 (internal quotation marks omitted).

As in *Johnson*,² Sergeant Donald's affidavit gave the issuing judge no information to assess the reliability of the information on which probable cause could exist. Without such information, the issuing judge was forced to guess whether the

² In *Johnson*, the court was unable to determine if the officer supplemented the affidavit with testimony before the issuing judge. See 302 S.C. at 249, 395 S.E.2d at 170 (stating "it is not clear from this record whether oral testimony concerning the reliability of the informant was given to the magistrate"). The court remanded for a determination of whether any such supplementation provided the judge with information as to the reliability of the informant. *Id.* Such a remand is unnecessary in this case, however, because Sergeant Donald testified at the suppression hearing he did not supplement his affidavit.

events described in the affidavit actually occurred. Under these circumstances, we cannot defer to the warrant because the affidavit "does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.'" *Johnson*, 302 S.C. at 248, 395 S.E.2d at 170 (quoting *Leon*, 468 U.S. at 914-15, 104 S. Ct. at 3416, 82 L. Ed. 2d at 693). We find that given the lack of any basis on which the issuing judge could find the information in the affidavit reliable, the "affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Weston*, 329 S.C. at 293, 494 S.E.2d at 804 (quoting *Leon*, 468 U.S. at 923, 104 S. Ct. at 3421, 82 L. Ed. 2d at 699); *see also id.* (cautioning "*Johnson* should not be read as prohibiting application of the good-faith exception every time an affidavit fails to satisfy the technical requirements of *Gates*").

Consequently, *Leon*, *Weston*, and *Johnson* require us to find the good faith exception inapplicable to Robinson's case. We hold the evidence must be suppressed. *See State v. Robinson*, 335 S.C. 620, 632 n.3, 518 S.E.2d 269, 276 n.3 (Ct. App. 1999) (stating "the good faith exception is inapplicable in cases where the affidavit fails to provide the magistrate with a substantial basis for probable cause"); *Adolphe*, 314 S.C. at 93, 441 S.E.2d at 834 (finding the good faith exception was inapplicable because "the affidavit did not contain any information regarding the reliability of the informant").

IV. Remaining Issues

Robinson raises additional issues on appeal, including the argument that the judge should have recused himself because a judge should not hear a motion to suppress evidence seized pursuant to a warrant that judge signed. *Compare Floyd v. State*, 303 S.C. 298, 299, 400 S.E.2d 145, 146 (1991) (adopting "a *per se* rule of recusal" when the same judge who presided over a criminal trial is asked to preside over a post-conviction relief proceeding for the same defendant), *with State v. Watkins*, 406 S.C. 360, 363-64, 752 S.E.2d 261, 262 (2013) (holding a judge is not automatically disqualified from presiding over a retrial after granting post-conviction relief). Because we find the search warrant was invalid and the evidence must be suppressed, we need not resolve these issues. *See State v. Hepburn*, 406 S.C. 416, 429 n.14, 753 S.E.2d 402, 408 n.14 (2013) (declining to address remaining issues because the court's determination of a prior issue was dispositive).

V. Conclusion

We find the search warrant was invalid because Sergeant Donald gave the issuing judge no information regarding the informant's reliability. Without such information, the affidavit did not provide the issuing judge a substantial basis for a finding of probable cause, the good faith exception does not apply, and the evidence must be suppressed.

REVERSED.

PIEPER and KONDUROS, JJ., concur.

APP'X 687

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

Appeal from Horry County
Edward B. Cottingham, Circuit Court Judge

MAY 08 2014

SC Court of Appeals

Opinion No. 5224 (S.C. Ct. App. filed April 23, 2014)

THE STATE,

RESPONDENT,

V.

ALEX ROBINSON,

APPELLANT.

APPELLATE CASE NO. 2011-203769

PETITION FOR REHEARING

Appellant Alex Robinson is in agreement on the whole with this Court's Opinion issued on April 23, 2004 which reversed Appellant's conviction where the search warrant was invalid because the affidavit supporting it gave the issuing judge no information as to the confidential informant's reliability.

Because Appellant, however, anticipates that the State will likely file a timely Petition for Rehearing and subsequently seek review from the South Carolina Supreme Court, Appellant seeks to preserve for review this Court's additional holding that suppression was not required based on the false statements contained in the affidavit supporting the search warrant. Therefore, Appellant files this Petition for Rehearing

APP'X 688

pursuant to Rule 221(a), SCACR based upon the following points overlooked or misapprehended by the Court:

This Court agreed that Sergeant Donald's statements in the affidavit supporting the search warrant that the informant purchased cocaine from the occupants of the house and that informant has been able to make purchases of drugs from this residence were false and held that the trial court's finding that the affidavit contained no false statement was "clearly erroneous."

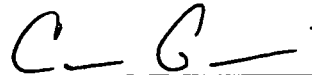
This Court, however, found that Sergeant Donald's false statements in the affidavit did not require suppression because probable cause still existed. Appellant disagrees with this analysis and asserts that when these false statements are set aside, there is no remaining content in the warrant affidavit to support a finding of probable cause. The entirety of the probable cause section of the affidavit is false and there is no residual sufficient content to support a finding of probable cause. See State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000); State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999).

Therefore, the search warrant is invalid both because the affidavit supporting it consists entirely of false statements and because the affidavit gave the issuing judge no information as to the confidential informant's reliability and both of these reasons warrant suppression of the evidence seized pursuant to the search warrant.

CONCLUSION

For the reasons set forth herein, Appellant Alex Robinson respectfully requests that only the portion of the Opinion of the Court of Appeals holding that the false statements in the search warrant affidavit did not also warrant suppression be modified to reflect that such false statements in the affidavit did warrant suppression. Appellant requests that the remaining portions of the Opinion be upheld.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

This 8th day of May, 2014.

APP'X 690

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MAY 19 2014

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Edward B. Cottingham, Circuit Court Judge
Appellate Case No. 2011-203769

THE STATE,

Respondent,

vs.

ALEX LORENZO ROBINSON,

Appellant.

RESPONDENT'S PETITION FOR REHEARING

On April 23, 2014, this Court issued a published opinion in which it reversed Appellant Alex Lorenzo Robinson's conviction for trafficking in cocaine. State v. Robinson, Op. No. 5224 (S.C. Ct. App. filed April 23, 2014). In the opinion, this Court found that the trial judge committed a clear error in determining that the search warrant affidavit did not contain any false information. Additionally, this Court concluded that the search warrant issued in Robinson's case was invalid because the affiant failed to include any evidence in the supporting affidavit regarding the reliability of a confidential informant working with the Horry County Sheriff's Office. Furthermore, this Court found that suppression of the evidence was warranted after determining that the good faith exception articulated in United States v. Leon, 468 U.S. 897 (1984), was not applicable to Robinson's case. Pursuant to Rule 221(a), SCACR, Respondent ("the State") respectfully submits that this Court misapprehended or overlooked several critical

1
APP'X 691

points – particularly in respect to the applicability of the good faith exception – and petitions this Court for rehearing as a result.

Absence of Any False Information in the Warrant Affidavit

In its opinion, this Court found that the trial judge clearly erred in finding that the search warrant affidavit did not contain any false information. In reaching that conclusion, this Court held that Sergeant Donald's affidavit, at a minimum, implied that the informant personally entered the residence and purchased cocaine, which this Court found was "conclusively demonstrated" to be false in light of Sergeant Donald's trial testimony regarding the details of the narcotics transactions. However, contrary to this Court's conclusion, the testimony and evidence presented during trial – when viewed in the proper context – established that Sergeant Donald did not include any false information in the warrant affidavit.

In South Carolina, an affiant seeking to obtain a search warrant must present a sworn affidavit to a judge presenting grounds sufficient to establish probable cause in order to justify the issuance of the warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348-349 (1999); see S.C. Code Ann. § 17-13-140 ("A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant."); see also Illinois v. Gates, 462 U.S. 213, 238 (1983) (identifying probable cause as "a fair probability that contraband or evidence of a crime will be found"). In deciding whether to issue a search warrant, the issuing judge must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238. Importantly though, the issuing judge – and a court

subsequently reviewing the issuing judge's decision – must view the warrant affidavit in a common sense and realistic fashion and give consideration to the fact that such affidavits are typically prepared by non-lawyers in the haste of criminal investigations. State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995).

In the case sub judice, the trial judge properly determined that the warrant affidavit did not contain any false information because none of the statements included in the affidavit were intentionally false or misleading.¹ Critically, contrary to this Court's interpretation of the warrant affidavit, the affidavit did not contain any language indicating – or even implying – that the confidential informant actually entered the targeted residence. Cf. Rutledge, 373 S.C. at 319, 644 S.E.2d at 792 (“Rutledge . . . contends the affidavit improperly implied that the officers recovered the marijuana, seeds, and stalks from the residence itself. . . . Nowhere does the affidavit say it was found in the house.”). Instead, when viewed in the proper context, the information contained in the affidavit only indicated that the confidential informant purchased and obtained drugs from the targeted residence, and that is exactly what actually occurred. Specifically, the testimony and evidence presented during trial established that the confidential information went to the targeted residence accompanied by her contact with the agreed-upon purpose of buying cocaine, gave money to the contact for the cocaine, specifically watched as the contact took the money into the residence, and continued to watch as the contact returned

¹ Under the Fourth and Fourteenth Amendment of the United States Constitution, a defendant has a right “to challenge misstatements in a search warrant affidavit.” State v. Jones, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000). In Franks v. Delaware, 438 U.S. 154, 171-172 (1978), the United States Supreme Court identified the process for raising such a challenge. Pursuant to the process identified in Franks, a defendant is constitutionally entitled to a hearing on the validity of a search warrant affidavit if “the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit” and “if the allegedly false statement is necessary to the finding of probable cause[.]” Id. at 155-156. If such a showing is made, the defendant is entitled to a hearing where he must prove his allegations of falsity or a reckless disregard for the truth by a preponderance of the evidence. Id. at 156. Assuming that the allegations are proven during the hearing and the search warrant affidavit's remaining content is insufficient to establish probable cause, the search warrant is void, and the trial judge should suppress the evidence discovered during the search “to the same extent as if probable cause was lacking on the face of the affidavit.” Id.

from the residence with the cocaine. See State v. Thomas, 275 S.C. 274, 276, 269 S.E.2d 768, 769 (1980) (holding that courts should consider a “common-sense reading of the entire affidavit” in determining whether probable cause exists). Thus, by going to the residence, sending money inside for cocaine, and receiving cocaine that was brought out of the residence in exchange for the money, the confidential informant purchased cocaine from the occupants of the residence just as described in the search warrant affidavit, and, significantly, that information fully established a probable cause basis to believe narcotics would be discovered in the targeted residence irrespective of whether the confidential informant ever personally went inside. See United States v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988) (“[T]he nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence.”); State v. Dupree, 354 S.C. 676, 691, 583 S.E.2d 437, 445 (Ct. App. 2003) (instructing that evidence of a drug transaction supports an inference that more drugs will be found at the same location); see also United States v. Cioni, 649 F.3d 276, 286 (4th Cir. 2011) (“[E]ven if the additional facts cited by Cioni were included in the affidavits, the probable cause calculus would nonetheless have remained unchanged. Under these circumstances, Franks is inapplicable.”); United States v. Colkley, 899 F.2d 297, 298 (4th Cir. 1990) (“We hold that the Johnson affidavit was not tainted by the affiant’s failure to include within it all potentially exculpatory information. Johnson’s incriminating statements were properly admitted because Johnson made no showing that the affiant intended to mislead the magistrate by omitting information, and because the warrant with the omitted information would in any event have been supported by probable cause[.]”).

Notably, although this Court failed to reference or discuss it in its opinion, defense counsel for Robinson readily conceded during trial that Robinson’s argument that the

information included in the warrant affidavit was false was “a matter of the way you look at it.” (R. p. 19). Despite that concession, this Court concluded that the statements in the warrant affidavit could only be interpreted as an implication or direct expression that the informant personally entered the residence and purchased cocaine. Critically though, when the question of whether information in a warrant affidavit is intentionally false or misleading rests on the “matter of the way you look at it,” the inclusion of information that could potentially be interpreted in a way to suggest that it is false or misleading is not sufficient to establish that false or misleading information actually was included in the warrant affidavit, particularly when considering that an officer preparing a search warrant affidavit is not required to prepare the affidavit with unerring technical precision or include every detail of an investigation in the affidavit. See Arnold, 319 S.C. at 260, 460 S.E.2d at 405 (“Affidavits are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and should therefore be viewed in a common sense and realistic fashion.”); see also Colkley, 899 F.2d at 300 (“An affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation.”).

Significantly, the best possible evidence establishing that Sergeant Donald did not knowingly and intentionally include false or misleading information in the warrant affidavit was that he would have had no reason to do so since doing so would not have impacted the probable cause basis for the issuance of the warrant. See Missouri, 337 S.C. 548, 554, 524 S.E.2d 394, 398 (1999) (“To be entitled to a Franks hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge.”) Just as this Court specifically determined, the inclusion of all of the details about the narcotics

transactions – including those about the involvement of the confidential informant’s contact – would not have changed the fact that probable cause existed for a search of the residence assuming that the confidential informant was telling the truth. Under such circumstances, Sergeant Donald’s failure to include every detail of the transactions did not establish that the information he did include in the warrant affidavit was designed to be intentionally false or misleading. As a result, the trial judge correctly found that the warrant affidavit did not contain any false information. See Rutledge, 373 S.C. at 319, 644 S.E.2d at 792 (finding no Franks violation occurred where nothing in the search warrant affidavit demonstrated a reckless disregard for the truth); see also Colkley, 899 F.2d at 301 (“Franks protects against omissions that are *designed to mislead*, or that are made in *reckless disregard of whether they would mislead*, the [issuing judge].” (italics in original)). Therefore, this Court’s should grant the State’s petition for rehearing, rehear and reconsider the matter, issue a new opinion holding that the trial judge correctly concluded that the search warrant affidavit did not contain any false information, and ultimately affirm Robinson’s conviction.

Sufficiency of the Information in the Warrant Affidavit to Establish Reliability

In its opinion, this Court concluded that the trial judge erred in issuing the search warrant because the search warrant affidavit allegedly contained no information whatsoever in regard to the reliability of the confidential informant who provided the information about the targeted residence to the officers. In reaching that conclusion, this Court determined that “[t]he only information in the affidavit about the events and circumstances at Robinson’s residence . . . came from the informant” but that there was no information about the informant’s reliability. However, contrary to this Court’s conclusion, the information contained in the warrant affidavit

was sufficient to establish that the informant was reliable and that there was a probable cause basis for a search of the targeted residence.

Before issuing a search warrant, an issuing judge is required to make a "a practical, common-sense decision" that there is a fair probability that contraband or evidence of a crime will be found in a particular place based on all of the circumstances set forth in the warrant affidavit. Gates, 462 U.S. at 268. In making such a decision in a case where an affiant relied upon information supplied by a confidential informant, the informant's veracity, reliability, and basis of knowledge are highly relevant towards a determination the value of the informant's information. Id. However, those elements related to the informant are not "entirely separate and independent requirements to be rigidly exacted in every case" and, instead, "should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place." Id. at 230.

In the case at bar, the trial judge properly determined that the warrant affidavit established a probable cause basis to believe drugs would be located in the targeted residence because there was sufficient information included in the search warrant affidavit to establish that the confidential informant who participated in the controlled narcotics buys from the residence was reliable. Specifically, the confidential informant's reliability was established in the warrant affidavit through the inclusion of the information regarding the informant's successful narcotics purchases from the targeted residence on multiple occasions. See Dupree, 354 S.C. at 691, 593 S.E.2d at 445 ("The controlled buy was evidence of the credibility and trustworthiness of the informant."). Critically, the statements in the affidavit indicated that the informant was working for the Horry County Police Department, successfully purchased what was purported to be

cocaine from the residence in a recent and continuous manner, and that the purchased cocaine was confirmed to be cocaine through field-testing.² Cf. State v. Viard, 276 S.C. 147, 150-151, 276 S.E.2d 531, 532 (1981) ("Affiant alleged his informant had been at the residence, saw drugs there within the past 72 hours, and purchased drugs during a controlled buy which field tested positive for depressants. We conclude the affidavit contained sufficient underlying facts and information upon which the magistrate made her independent determination of probable cause."). Thus, the information in the warrant affidavit made it clear to the issuing judge that the confidential informant had participated in successful control drug buys from the targeted residence and that officers of the Horry County Sheriff's Office working with the informant corroborated the information provided by her by working with her and field-testing the cocaine that she purchased from the targeted residence. See Gates, 462 U.S. at 241 ("Our decisions applying the totality-of-the-circumstances analysis . . . have consistently recognized the value of corroboration of details of an informant's tip by independent police work."). As a result, the affiant sufficiently established the confidential informant's reliability in the warrant affidavit, and there was probable cause to believe more cocaine would be found in a search of the residence. See id. at 233 ("[A] deficiency in [veracity or basis of knowledge] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability."); see also Bellamy, 336 S.C. at 145, 519 S.E.2d at 349 (finding that a search warrant sufficiently established the confidential informant's reliability where, "[a]lthough the affidavit is weak on the element of the reliability of the informant, this deficiency is compensated for by the strong showing of specificity, first-hand observation, and

² The inclusion of that information in the warrant affidavit rendered the affidavit in Robinson's case far different from the affidavit in State v. Johnson, 302 S.C. 243, 248, 395 S.E.2d 167, 169 (1990), which contained no information of any kind from which the issuing judge could determine if the confidential informant was reliable. Critically, in Johnson, the warrant affidavit merely stated that a confidential informant had seen a quantity of cocaine in Johnson's home within the past seventy-two hours. Id. at 245, 395 S.E.2d at 168.

partial corroboration”); see, e.g., Viard, 276 S.C. at 149-150, 276 S.E.2d at 532 (“Affidavits must be judged on the facts presented and not on the precise wording used.”). Therefore, this Court’s should grant the State’s petition for rehearing, rehear and reconsider the matter, issue a new opinion holding that the trial judge correctly concluded that the search warrant affidavit contained sufficient information to establish the reliability of the information provided by the confidential informant and a probable cause basis for the search of the targeted residence, and ultimately affirm Robinson’s conviction.

Applicability of the Good Faith Exception

In its opinion, this Court held that the trial judge should have suppressed the evidence discovered during the search because the good faith exception articulated by the United States Supreme Court in United States v. Leon, 468 U.S. 897 (1984), was allegedly not applicable to Robinson’s case due to the fact that the warrant affidavit allegedly lacked any basis for determining if the information included in it was reliable. However, contrary to this Court’s determination, the good faith exception was applicable under the facts and circumstances of Robinson’s case because the warrant affidavit was not “ ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable[,]’ ” which was the proper standard identified by the Supreme Court in Leon for determining if the good faith exception was applicable. Id. at 924 (citation omitted).

Turning to the Supreme Court’s decision in Leon, officers in that case received information from an informant of unknown reliability about drug activity occurring at a particular residence and initiated a narcotics investigation as a result. Id. at 901. During their investigation, they observed cars registered to individuals with criminal records come to and leave from the residence and saw individuals enter the residence and leave a short time later with

small paper sacks. Id. They also located a small quantity of marijuana at an airport in the belongings of two individuals connected to the targeted residence when those individuals returned from a trip to Miami. Id. at 902. Thereafter, a narcotics investigator prepared a search warrant affidavit recounting those details, obtained a search warrant, searched a variety of locations connected to Leon and his accomplices, and discovered large quantities of cocaine and other evidence. Id. Subsequently, during trial, Leon and his accomplices sought the suppression of the evidence discovered during the searches, and the district court judge granted the suppression motion after finding that the warrant affidavit contained insufficient information to establish probable cause. Id. at 903. Following that ruling, the State appealed, and the Ninth Circuit Court of Appeals affirmed the district court judge's decision. Id. at 904-905. The State then filed a petition for a writ of certiorari in the Supreme Court, and the Supreme Court granted that petition to address the issue of whether the exclusionary rule should be applied to evidence "obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." Id. at 900.

After considering the issue, the Supreme Court determined that the exclusionary rule should only "rarely" be applied to cases where officers reasonably relied upon subsequently-invalidated search warrants. Id. at 926. Specifically, the Supreme Court concluded that suppression of the evidence based on a subsequently-invalidated search warrant was only appropriate in four limited situations: (1) where the affiant misled the issuing judge by including false or misleading information in the warrant affidavit; (2) where the issuing judge wholly abandoned his neutral and detached judicial role; (3) where the warrant affidavit was " 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable[;]' " and (4) when a warrant was so facially deficient in some technical respect that

the officer executing the search warrant could not reasonably have presumed it to be valid. Id. at 923 (citation omitted). Thereafter, the Supreme Court reversed the district court judge's decision in Leon's case despite the fact that the warrant affidavit had been found not to contain sufficient information to establish probable cause after concluding that "the officers' reliance on the magistrate's determination of probable cause was objection reasonable" under the circumstances. Id. at 926.

Just as in Leon, the good faith exception was applicable in Robinson's case even assuming that the trial judge erred in finding that the search warrant affidavit was sufficient to establish a probable cause basis for the search. That is true because the warrant affidavit prepared in Robinson's case was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable[.]" which is what is necessary for an officer's reliance on a search warrant to be objectively unreasonable. Id. at 924. Specifically, the information in Sergeant Donald's warrant affidavit was not "bare bones." Instead, the warrant affidavit contained statements establishing the grounds for why the officer believed drugs would be located at the targeted residence, statements regarding the ongoing and continuous nature of the drug activity occurring at the targeted residence, and at least some information regarding the reliability of the confidential informant through the statements about the informant's work with the Horry County Sheriff's Office in conducting the successful narcotics buys that yielded the cocaine. Cf. id. at 926 (finding that an officer's reliance on a search warrant was not objectively unreasonable despite the fact that the warrant affidavit did not contain sufficient information to establish probable cause where the warrant was supported by more than a "bare bones" affidavit). As a result, the officer's reliance on the search warrant was not objectively unreasonable, the officer acted in good faith in executing the search warrant, and

the trial judge properly declined to suppress the evidence discovered during the search of the targeted residence. See id. at 922 (“[T]he marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial cost of exclusion.”).

In reaching a contrary conclusion, this Court found that the good faith exception was not applicable after concluding that the warrant affidavit did not contain a substantial basis for determining the existence of probable cause and that the warrant affidavit was so lacking in indicia of probable cause as to render official belief in its existence unreasonable. To the extent that this Court’s decision was based on a finding of an absence of a substantial basis for finding probable cause, that is **not** the appropriate standard for determining if the good faith exception is applicable and, instead, is the standard for determining whether a warrant affidavit establishes probable cause. United States v. Bynum, 293 F.3d 192, 195 (4th Cir. 2002); see also Gates, 462 U.S. at 239 (“An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause[.]”). Critically, in United States v. Bynum, the Fourth Circuit Court of Appeals explained:

“Substantial basis” provides the measure for determination of whether probable cause exists in the first instance. If a lack of a substantial basis also prevented application of the Leon objective good faith exception, **the exception would be devoid of substance**. In fact, Leon states that the third circumstance prevents a finding of objective good faith only when an officer’s affidavit is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” This is a less demanding showing than the “substantial basis” threshold required to prove the existence of probable cause in the first place.

Bynum, 293 F.3d at 195 (citations omitted and emphasis added). Accordingly, this Court applied an incorrect standard in determining if the good faith exception was applicable to Robinson’s case. See State v. Weston, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997) (“Johnson should not be read as prohibiting the applicability of the good-faith exception every time an

affidavit fails to satisfy the technical requirements of Gates. Suppression is appropriate in only a few situations, including when an affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " (citation omitted)). Moreover, to the extent that this Court found the warrant affidavit to be so lack in indicia of probable cause, this Court's finding was incorrect in light of the information in the affidavit regarding the confidential informant's work with the Horry County Sheriff's Office, the confidential informant's successful purchases of cocaine from the targeted residence on multiple occasions, and the results of the field-testing of the purchased cocaine. Compare Viard, 276 S.C. at 150-151, 276 S.E.2d at 532 ("Affiant alleged his informant had been at the residence, saw drugs there within the past 72 hours, and purchased drugs during a controlled buy which field tested positive for depressants. We conclude the affidavit contained sufficient underlying facts and information upon which the magistrate made her independent determination of probable cause."); with Johnson, 302 S.C. at 245, 395 S.E.2d at 168 (finding that a search warrant affidavit did not contain a substantial basis for determining the existence of probable cause where it merely stated "that a confidential informant had seen a quantity of cocaine in Johnson's home within the past seventy-two (72) hours"). For those reasons, this Court should grant the State's petition for rehearing, rehear and reconsider the matter, issue a new opinion holding that the good faith exception was applicable to Robinson's case, and ultimately affirm Robinson's conviction. See Leon, 468 U.S. at 918-921 ("[S]uppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule. . . . Penalizing the officer for the [issuing judge]'s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."); see, e.g., United States v. Anderson, 851 F.2d 727, 729-730 (4th Cir. 1988)

(finding the good-faith exception applied even though the search warrant affidavit did not contain any information regarding the date of the crime or the date that Anderson offered to sell a weapon to the informants).

Conclusion

Based on the foregoing reasons coupled with the arguments raised in the Final Brief of Respondent and during oral argument, the State respectfully requests that the panel reconsider and rehear this matter, vacate its previous opinion, and affirm Robinson's conviction and sentence after finding that the trial judge correctly concluded that no false information was included in the warrant affidavit, that the trial judge correctly determined the search warrant affidavit contained sufficient information to establish the reliability of the information provided by the confidential informant and a probable cause basis for the search of the targeted residence, and that the good faith exception was applicable to Robinson's case.

Respectfully submitted,

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May 19, 2014

The South Carolina Court of Appeals

The State, Respondent,

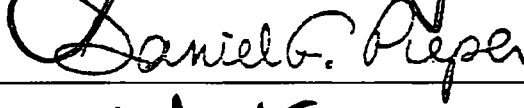
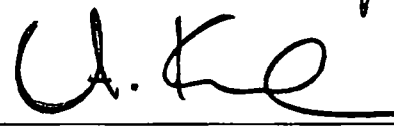
v.

Alex Robinson, Appellant.

Appellate Case No. 2011-203769

ORDER

After careful consideration of both the Respondent's and the Appellant's petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, both petitions for rehearing are denied.

	C.J.
	J.
	J.

Columbia, South Carolina

cc: Alan McCrory Wilson, Esquire
Mark Reynolds Farthing, Esquire
Dayne C. Phillips, Esquire
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