

2012-212847

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari
To the Court of Appeals

RECEIVED

Appeal From Lancaster County OCT 29 2012
J.C. Buddy Nicholson, Jr., Circuit Court Judge

S.C. Supreme Court

THE STATE,

Petitioner,

vs.

PHILLIP MILLER,

Respondent.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Phillip Miller, Appellant.

Appeal From Lancaster County
J.C. "Buddy" Nicholson, Jr., Circuit Court Judge

Opinion No. 4977
Heard October 19, 2011 – Filed May 23, 2012

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Appellate Defender LaNelle Cantey DuRant, of
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Attorney General John W. McIntosh, Assistant
Deputy Attorney General Salley W. Elliott, Assistant
Attorney General William M. Blitch, Jr., all of
Columbia; and Solicitor Douglas A. Barfield, Jr., of
Lancaster, for Respondent.

court left the record open to give the parties a chance to subpoena the juror to testify. The juror was never called to testify. The court later denied Miller's motion in a written order.

II. Denial of Motion for New Trial

The trial court must grant a motion for a new trial based on a juror's failure to disclose information requested during voir dire "when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). A circuit court's ruling on a new trial motion will not be disturbed absent an abuse of discretion amounting to an error of law. State v. Sparkman, 358 S.C. 491, 495, 596 S.E.2d 375, 377 (2004).

A. Material Factor

The trial court based its decision solely on the second prong of Woods, ruling that the concealed information would not have supported a challenge for cause and would not have been a material factor in Miller's use of his peremptory challenges. The written order states in its entirety: "Defendant's motion for a new trial is denied. The issue raised in Defendant's motion is not a material factor, because there is no victim in the Defendant's case and there is no violent crime in the Defendant's case."¹

¹ The trial court's ruling that the information would not support a challenge for cause is implicit in its ruling denying the motion, as the information obviously would not support such a challenge, and the court would otherwise have been required to consider the intentional concealment prong of Woods. See State v. Lowery, 332 S.C. 261, 266, 503 S.E.2d 794, 797 (Ct. App. 1998) (explaining that a juror may be excused for cause "only if her opinions would prevent or substantially impair the performance of her duties as a juror in accordance with her oath and instructions." (citation and quotation marks omitted)).

The situation here is comparable to Woods because of the relationship between the juror and the solicitor's office. Standing alone, a juror's participation in a factually dissimilar trial might not be significant in trial counsel's decisions on peremptory strikes, particularly if the earlier trial occurred in another state or even a different county. Here, however, the information withheld has significance beyond the nature of the other case. The juror's participation in the ABWIK trial reveals a relationship between the juror and the solicitor's office prosecuting Miller. The mere existence of this relationship is significant. The fact that this relationship developed in the context of the juror's participation in the office's successful attempt to incarcerate a man who attacked her mother increases its significance.

We hold the information withheld by the juror would have been a material factor in the use of Miller's peremptory challenges in this case. The information also could not support a challenge for cause. Therefore, we reverse.

B. Intentional Concealment

The trial court made no factual determination on the first prong of the Woods test—whether the juror intentionally concealed the information. Because we believe this determination should be made by the trial court based on information that is not in the record before us, we remand the case to the trial court.

At the hearing before the trial court, the State argued the juror must provide an explanation before the court could decide if the concealment was intentional. The assistant solicitor stated:

I don't know how we can answer whether she understood it, didn't understand it, didn't hear it, thought you were referring to a case involving the same prosecutors and defense lawyers that are here. We don't have that information about her and . . . I'd argue it's probably fatal to the motion without having some testimony or explanation from her.

testimony. If I have to come to Lancaster to do that, I'll do that.

Solicitor: Yes, sir, I appreciate you giving us that opportunity.

Thus, the trial court apparently believed the question of intentional concealment should be decided objectively, and the juror's testimony was not necessary to either party's position. We disagree. In Woods, the supreme court defined intentional concealment as follows:

[I]ntentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.

345 S.C. at 588, 550 S.E.2d at 284. This definition suggests an objective component to the analysis, which is not dependent on the juror's testimony. However, we interpret Woods to support a subjective analysis, in addition to an objective one, in which the trial court considers the testimony of the juror if it is reasonably available.

The supreme court stated in Woods: "whether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis." 345 S.C. at 588, 550 S.E.2d at 284. Ordinarily, the juror's testimony is part of the basis of that determination. See Sparkman, 358 S.C. at 496-97, 596 S.E.2d at 377 (finding juror's failure to respond to *voir dire* question seeking to identify victims of "serious" crimes was reasonable, where juror testified he did not immediately recall that he had been assaulted forty years earlier and was not sure if the assault was a

juror's testimony was necessary, and Miller argued it was not. By interpreting Woods "contrary" to the State's argument, the trial court essentially ruled that it was not Miller's obligation to obtain the testimony of the juror. It is counterintuitive to penalize Miller for not disagreeing with the trial court on an issue as to which the court ruled in Miller's favor. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments.").

Moreover, our courts have not clearly indicated that the defendant has the burden of proving the juror's concealment of the information was intentional. In support of the position that the defendant does bear the burden, the dissent cites only State v. Bonneau, 276 S.C. 122, 276 S.E.2d 300 (1981), which does not involve a motion for a new trial based on a juror's intentional concealment of information during voir dire. Rather, as the Bonneau court stated, "[t]he sole question for determination of the court [was] whether the fact that an alternate juror was in the jury room briefly after the judge completed his charge denied the defendant a fair trial." 276 S.C. at 123, 276 S.E.2d at 300. In Woods, the supreme court did not expressly impose the burden of proof on the defendant as to this issue.³ Describing the two-prong test trial courts should use, the supreme court stated "a new trial is required only when the court finds" both of the prongs exist. 345 S.C. at 587, 550 S.E.2d at 284 (emphasis added). The supreme court then stated a trial court may infer the juror was not impartial "nothing to the contrary appearing." 345 S.C. at 587-88, 550 S.E.2d at 284 (emphasis added). Explaining its decision in State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998), the Woods court wrote "we stated that the first inquiry in the juror disqualification analysis is whether the juror intentionally concealed the information." 345 S.C. at 588, 550 S.E.2d at 284 (emphasis added). Finally, the Woods court stated "where a juror's response to *voir dire* amounts to an

³ In Woods, the supreme court affirmed this court's decision to reverse the trial court and grant a new trial. Significantly, this court also did not place the burden of proof on the defendant. State v. Woods, 338 S.C. 561, 564, 527 S.E.2d 128, 129-30 (Ct. App. 2000) (stating "the juror did not justify her failure to disclose particular information that was specifically sought by a *voir dire* question").

IV. Conclusion

We affirm the trial court's decision to admit the drugs into evidence. We reverse the court's ruling that the information the juror concealed would not have been a material factor in Miller's use of his peremptory challenges. We remand to the trial court for a determination as to whether the juror intentionally concealed the information.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

KONDUROS, J., concurs.

THOMAS, J. (concurring and dissenting): I agree with the majority's decision to uphold the admission of the drugs into evidence. I disagree, however, with the majority's decision to remand this matter to the circuit court for a determination as to whether the juror intentionally concealed that her mother had been the victim of a crime. Although I agree with the majority that the juror's failure to disclose that her mother had been the victim of a violent crime could have been a material factor in the defense's decision to use one of its peremptory challenges, I note the trial judge never ruled—nor was he requested to rule—as to whether this failure could have supported a challenge for cause. See State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001) (stating concealment of information by a juror is grounds for a new trial only when (1) the court finds the juror intentionally concealed the information and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the requesting party's peremptory challenges).

When a party argues on appeal that a new trial should have been granted because a juror failed to disclose information during the voir dire, the first question for the appellate court is whether the concealment was intentional. State v. Kelly, 331 S.C. 132, 146, 502 S.E.2d 99, 106-07 (1998). There are two prerequisites for intentional concealment. First, the voir dire question must be "reasonably comprehensible to the average juror." Woods, 345 S.C. at 588, 550 S.E.2d at 284. In addition, the party seeking a new trial must show "the subject of the inquiry is of such significance that the juror's

Defense Counsel: Thank you. So within 30 days you want an order with all this?

The Court: Do a short order and say it's under advisement and you all will have 30 days to file your memo. If you would like to take her testimony, let me know and I'll reconvene the hearing and we'll come to Lancaster and we'll get the clerk to subpoena her and bring her in to hear what she's got to say. If you want to do that. If you don't, that's fine. I'm not trying to tell you how to try your case. I'm just affording you the opportunity.

Defense Counsel: Thank you, Judge.⁴

The trial court left the record open after the motion hearing for counsel to take testimony from the juror on this issue. Neither the State nor the defense took advantage of this opportunity despite having nearly a year to do so. Under these circumstances, I would hold a remand is unnecessary. See State v. Cooper, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999) (noting in response to the appellant's argument that the trial court should have done something more to investigate a juror's alleged misconduct, "defense counsel never requested that the trial court do anything else").

Furthermore, nothing in the record or briefs indicates the defense requested the trial judge to find the subject of the inquiry was of such significance that the juror's failure to respond was unreasonable, and no foundation was laid for such a finding. Thus, the second prerequisite for intentional concealment was not met, and this failure alone is sufficient to

⁴ The record did not include an order prepared by either Miller or the State pursuant to these instructions; however, defense counsel's statements to the court suggest he understood he was responsible for drafting it. Whether or not such an order was prepared, the record includes a letter from defense counsel to the trial judge in which counsel states he sent a memorandum within thirty days after the hearing on Miller's new trial motion.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Lancaster County
Hon. J.C. Nicholson, Jr., Circuit Court Judge

The State,

Respondent.

v.

Phillip Glen Miller,

Appellant.

PETITION FOR REHEARING

On May 23, 2012, this Court Affirmed in Part, Reversed in Part, and Remanded Appellant's case for a determination of whether the juror intentionally concealed the information asked in voir dire. The Court's opinion reversed the trial judge's discretion in finding the information the juror concealed was not a material factor in the use of Appellant's peremptory challenges. The Court properly affirmed the trial court's ruling admitting the drugs into evidence. The majority of the Court misapprehended or overlooked the burden of proof for Appellant to establish his entitlement to a new trial. Further, this Court misapprehended or overlooked the applicable case law establishing Appellant's burden of proof and his failure to provide sufficient evidence from which the Court can rule. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing, find the trial court did not abuse its discretion in ruling the juror's failure to respond during voir dire did not necessitate a new trial, and affirm Appellant's conviction and sentence.

Burden of Proof/Intentional Concealment

The State submits the majority of this Court misapprehends or overlooks relevant case law regarding the burden of proof when a party moves for a new trial based on a juror's failure to disclose during voir dire. The case law of this State makes it clear the burden of proof is on the Appellant to demonstrate his entitlement to the new trial by demonstrating the facts and circumstances necessitating the new trial. Accordingly, when he fails to present sufficient evidence demonstrating his entitlement to the new trial, he has failed to meet his burden of proof and the trial court is correct in denying his motion for a new trial.

In State v. Woods, 345 S. C. 583, 550 S.E.2d 282 (2001), the South Carolina Supreme Court discussed the requirements to demonstrate entitlement to a new trial. In doing so, the Court specifically referenced the test articulated in Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986). The South Carolina Supreme Court in Thompson clearly established the burden of proof by stating: "A party seeking a new trial based upon the disqualification of a juror must show" The South Carolina Supreme Court makes it clear the party seeking the new trial, in this case Appellant, must show his entitlement to the new trial by providing the trial court sufficient evidence to make a determination regarding all of the factors necessary in Woods. The majority's holding that the burden of proof has not been established or is in question is clearly contrary to this holding in Thompson.

Further, numerous other cases from both appellate courts demonstrate the moving party has the burden of proof when asking for a new trial based on a juror's failure to disclose information or for other reasons which justify disqualification. See In re Vora, 354 S.C. 590, 582 S.E.2d 413 (2003) (finding movant has burden of proof when asking for a new trial because a juror should be disqualified); Gray v. Bryant, 298 S.C. 285, 379 S.E.2d 894 (1989) (same); State v. Johnson, 248

S.C. 153, 149 S.E.2d 348 (1966) (same); State v. Rayfield, 232 S.C. 230, 101 S.E.2d 505 (1958) (same); Morris v. Jensen, 309 S.C. 153, 420 S.E.2d 710 (Ct. App. 1992) (same). Accordingly, the question of the burden of proof is not one which is an open question, but rather has been clearly decided by numerous Courts finding the moving party has the burden of proof to demonstrate his entitlement to the new trial.¹

Even if this Court finds the overall burden is not clearly established, the Woods court, as the portions quoted by the majority demonstrates, placed the burden on the moving party to at a minimum establish intentional concealment and whether the information concealed would have supported a challenge for cause or would have been a material factor in the use of a peremptory challenge. Woods, 345 S.C. at 589, 550 S.E.2d at 285. Appellant has failed to establish intentional concealment and, as a result, the inquiry should be over.

Appellant failed to meet his burden of establishing the failure of the juror to respond was unreasonable or intentional. “[I]ntentional concealment occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror’s failure to respond is unreasonable.” Woods, 345 S.C. at 588, 550 S.E.2d at 284. “Necessarily, whether a juror’s failure to respond is intentional is a fact intensive determination which must be made on a case by case basis.” Woods, 345 S.C. at 588, 550 S.E.2d at 284 (2001).

Appellant should not be given a second bite at the apple to attempt to meet his burden when he had a full and fair hearing and failed to present sufficient evidence. It was his burden to provide

¹
The State has been unable to find any instance in which the party moving for a new trial based on any number of reasons from after-discovered evidence to juror misconduct does not have the burden of proof to establish grounds sufficient to justify the new trial.

sufficient evidence from which the decision could be made and he failed to do so. The State throughout the hearing argued her testimony was necessary for a finding the concealment was intentional and, without it, Appellant could not meet his burden. As the dissent appropriately notes, the trial court offered both Appellant and the State the opportunity to bring in the juror to elicit her testimony: "If you all want to take her testimony, let me know and we'll come over to Lancaster one day and see what she's got to say." (R.214).

Further, the trial court later acknowledged the burden was on Appellant and again offered assistance to bring the juror before the court if Appellant desired. After Appellant's counsel asked if the court wanted an order within 30 days, the court specifically addressed him stating:

Do a short order and say it's under advisement and you all will have 30 days to file your memo. **If you would like to take her testimony,** let me know and I'll reconvene the hearing and we'll come to Lancaster and we'll get the clerk to subpoena her and bring her in to hear what she's got to say. If you want to do that. If you don't, that's fine. **I'm not trying to tell you how to try your case. I'm just affording you that opportunity.** (R.214) (emphasis added).

Appellant's counsel responded: "Thank you, Judge." (R.215)

In the instant case, Appellant did not provide any testimony or affidavit from the juror explaining her failure to respond to the trial court's voir dire question. The Affidavit of William Frick indicates his belief she was the same person, but relies on a recollection of people and events from ten months prior and provides no further evidence Ms. Hinson was the daughter of the victim. All the prior cases addressing this issue involve a juror who subsequently testified to explain why they failed to respond. Without Ms. Hinson's testimony or an affidavit from her, it is impossible to know for certain if she is the same person whose mother was a victim of a crime, and therefore, Appellant failed to meet his burden to show she intentionally or unreasonably failed to answer.

Further, we do not have her explanation why she did not answer. The trial court has to consider all the facts in making its decision, but in this case, one significant fact is missing—Ms. Hinson's explanation for why she did not respond. The trial court must resolve the issue based purely on speculation as to whether the juror is one and the same as the person whose mother was attacked or whether there is any explanation why she failed to respond. Accordingly, the second prong of whether the concealment was unreasonable could not be established.

Additionally, as the majority points out and the dissent finds, the question of whether the concealment was intentional also contains an objective prong: whether the question presented to the jury on voir dire is reasonably comprehensible to the average juror. This question can and should be answered by the Court in this case and should be answered in the negative. There is no need to remand to the trial court for a determination which can be made based on the record before this Court. As stated in Woods: "Unintentional concealment . . . occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." Woods, 345 S.C. at 588, 550 S.E.2d at 284.

As the majority noted, the question asked was about three-fourths of the way through a very long series of questions with no apparent pauses to allow jurors to respond. Further, the specific question asked is ambiguous: "Is there any member of the jury panel who has been a victim of a crime in Lancaster County or member of your immediate family a victim of a crime please stand?" In determining whether it was readily understood it is instructive to see how the term immediate family has been applied in this State. The Legislature of this State has defined immediate family in numerous ways including in South Carolina Code section 2-17-10(7) (Supp. 2011) which provides immediate family means: a child; a spouse; or an individual claimed as a dependent for income tax

purposes. Sections 8-13-100, 8-13-1300, and 11-45-40 of the South Carolina Code provide the same definition or refer to section 2-17-10(7) for the definition of immediate family. However, Section 7-15-310 of the South Carolina Code defines the term immediate family to mean: "a person's spouse, parents, children, brothers, sisters, grandparents, grandchildren, and mothers-in-law, fathers-in-law, brothers-in-law, sisters-in-law, sons-in-law, and daughters-in-law." Section 8-11-177 of the South Carolina Code takes immediate family even farther defining it as "the spouse, great-grandparents, grandparents, parents, legal guardians, brothers, spouse of brothers, sisters, spouse of sisters, children, spouse of children, grandchildren, great-grandchildren of either the employee or the spouse."

Case law is also instructive. As the dissent notes, Barkley v. International Mutual Insurance Company defines immediate family as a restrictive definition and finds it includes only those persons living within the household, to the exclusion of those living outside the same house regardless of degree of consanguinity. Barkley v. Int'l Mut. Ins. Co., 227 S.C. 38, 42-43, 86 S.E.2d 602, 604 (1955) (finding a brother, not living in same household as his sister was not immediate family). Further, the South Carolina Supreme Court has stated: "The accepted definition of the word 'family,' as given by lexicographers, and approved in many cases, seems to be: 'The collective body of persons who live in one house, under one head or manager.'" Moyer v. Drummond, 10 S.E. 952, 952 (1890). As a result, it is certainly not unreasonable for the juror to decide her mother was not her immediate family because there is no indication appearing in the record the mother resided with the juror.

The Court's opinion includes a footnote indicating the State took the position that if a factual finding is required on the question of intentional concealment, the Court should remand for the trial court to make the finding. The State submits this Court can rule there is no evidence in the Record

providing the concealment is intentional because there is no evidence from the juror. The trial court cannot make factual findings any more than this Court can because the facts do not exist and Appellant had the burden to demonstrate them. The State specifically argued because there was no testimony by the juror this Court should rule Appellant failed to demonstrate intentional concealment. Further, the State argued the Court can rule on questions of law, which would include the question presented to the jury on voir dire is not reasonably comprehensible to the average juror. These would be rulings as a matter of law and not factual findings to be made by the trial court. Additionally, because the burden of proof is on Appellant, as the State argued below and during oral argument, the failure to present sufficient evidence will be fatal to his motion and should result in a ruling in favor of the State. Further, the State submits if the case is to be remanded, it is solely to be remanded for findings based on the record already created and presented because Appellant had the burden of proof and had a full opportunity to present any evidence including the testimony of the juror.

Appellant failed to present evidence necessary to meet his burden of proof, failed to establish the juror's failure to respond was intentional, and failed to provide a record indicating the basis for the juror's failure to respond. Appellant was offered the opportunity to present this evidence and chose not to avail himself of the opportunity. Additionally, the question on its face is not comprehensible to the average juror but is subject to interpretation depending on the definition of immediate family to be applied. Accordingly, Appellant failed to meet his burden to show the failure to answer was intentional and, therefore, the inquiry should have ended. See State v. Sparkman, 358 S.C. 491, 497, 596 S.E.2d 375, 378 (2004). Further, this Court's remand to consider whether the

juror intentionally concealed the information rewards Appellant's failure to present sufficient evidence to meet his burden at the initial hearing by granting him a second bite at the apple.²

The Court should grant the petition for rehearing, find the trial court did not abuse its discretion in denying the motion for a new trial because Appellant failed to provide sufficient evidence to meet his burden of proof that the concealment was intentional, and affirm Appellant's conviction and sentence.

Material Factor

In addition to proving the concealment was intentional, Appellant has to demonstrate the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. Woods, 345 S.C. at 587, 550 S.E.2d at 284.

[R]elief is required only when the court finds the concealed information would have supported a challenge for cause, or would have been a material factor in the use of the party's peremptory challenges. The inquiry must focus on the character of the concealed information, not on the mere fact that a concealment occurred.

Thompson, 288 S.C. at 15, 339 S.E.2d at 506.

Even assuming the Affidavit provides sufficient evidence from which the Court can conclude Ms. Hinson's failure to respond to the jury voir dire was unreasonable and her concealment intentional, the information that she was the daughter of a victim and testified at her mother's trial is not sufficient to warrant a finding of materiality. Further, the trial court correctly found the difference in the types of cases was significance in a finding of materiality where being the daughter

² It is entirely unclear from the Court's order whether on remand Appellant will be entitled to present additional evidence, including the testimony of the juror. If Appellant is entitled to present additional evidence, this further illustrates the reward provided by this Court's decision even though Appellant had opportunity to present the evidence at the initial hearing and failed to meet his burden of proof. The State submits no further evidence should be allowed to be presented and the trial court shall make the determination based on the burden of proof and the evidence already presented.

of a victim of a stabbing was not grounds for excuse for cause and was not material to the decision to use a peremptory strike in a drug possession and distribution case. As the trial court found, the fact a juror is the daughter of a victim of a violent crime is not likely to be a material factor in the use of a peremptory strike in a drug possession case in which there was no evidence of violence, weapons, or other logical connection to the trial involving her mother's attacker.

This Court finds the logical connection is the relationship with the solicitor's office and cites to Woods for support. In Woods, the juror spent three years as a victim's advocate working in the solicitor's office and failed to respond to two questions specifically related to her role as a victim's advocate with the solicitor's office. Woods, 345 S.C. at 589-590, 550 S.E.2d at 285. The questions she failed to answer were whether she had an association with any of the attorneys trying the case and whether she was a contributor to or supporter of any organization which has as its primary function the promotion of law enforcement or protection of victims' rights. Clearly her role as a victim's advocate for the solicitors office impacted both of those questions and would provide a material basis for supporting the use of a peremptory challenge.

The fact the juror was the daughter of a victim whose attacker was prosecuted by different attorneys in the solicitor's office does not rise to the same level of materiality as the concealed information in Woods. We know nothing of her feelings toward the solicitor's office. Her mother's attacker, according to the affidavit (R.219), was tried for ABWIK, but according to the docket report (R.227) he was convicted of ABHAN. She apparently testified for a total of 7 minutes including direct and cross-examination. (R.228). By not standing when asked if she was aware of any bias or prejudice, she indicated she had no reason to be biased in favor or against the defendant or the State. Without her testimony being provided, this Court cannot determine the nature of her relationship with the solicitor's office and cannot determine whether the failure to respond would

have been material. The relationship itself should not be sufficient, but instead it should be the nature of the relationship, as in Woods, that is significant. Accordingly, this Court should grant the Petition for Rehearing and find the trial court did not err in finding the information even if intentionally concealed was not material to the use of peremptory strikes in this case.

CONCLUSION

For all of the foregoing reasons, Respondent requests the panel grant the petition for rehearing, find the trial court did not abuse its discretion in denying Appellant's motion for a new trial because he failed to meet his clear burden of proof of establishing the concealment by the juror was intentional and would be material to his use of peremptory challenges, and affirm Appellant's conviction and sentence.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

June 21, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Lancaster County
Hon. J.C. Nicholson, Jr., Circuit Court Judge

The State,

Respondent,

v.

Phillip Glen Miller,

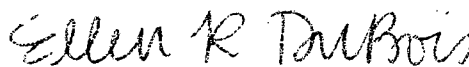
Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. DuRant, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 21st day of June, 2012.



ELLEN R. DuBOIS
Legal Assistant
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RECEIVED 20

The South Carolina Court of Appeals

JUL 27 2012 WS

ATTORNEY GENERAL
OFFICE

The State, Respondent,

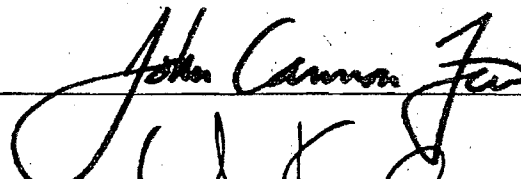
v.

Phillip Miller, Appellant.

Appellate Case No. 2009-114206

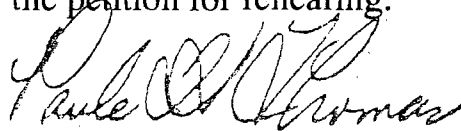
ORDER DENYING PETITION FOR REHEARING

After careful consideration of the petition 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, the petition for rehearing is denied.


C.J.

J.

I adhere to my dissent, but agree to deny the petition for rehearing.


J.

Columbia, South Carolina

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FILED

July 26, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari
To the Court of Appeals

RECEIVED

OCT 29 2012

Appeal From Lancaster County
J.C. Buddy Nicholson, Jr., Circuit Court Judge
S.C. Supreme Court

THE STATE,

Petitioner,

vs.

PHILLIP MILLER,

Respondent.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Appendix on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record,

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This 26th day of October, 2012.

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STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM LANCASTER COUNTY

J. C. Buddy Nicholson, Jr., Circuit Court Judge

ORIGINAL

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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

PHILLIP MILLER,

APPELLANT

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA

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J. C. Buddy Nicholson, Jr., Circuit Court Judge

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1 STATE OF SOUTH CAROLINA
2 COURT OF GENERAL SESSIONS
3 COUNTY OF LANCASTER
4 06-GS-29-0208

5
6 STATE OF SOUTH CAROLINA
7 VS.
8 PHILLIP GLEN MILLER

9
10 LANCASTER, SOUTH CAROLINA
11 APRIL 24-25, 2007
12 BEFORE THE HONORABLE J. C. NICHOLSON, JR.

13
14 APPEARANCES
15 FOR THE STATE: MIKE LIFSEY, CURTISHA MINGO
16 FOR THE DEFENDANT: MARK GRIER
17 REPORTED BY: MICHAEL C. WATKINS
18 OFFICIAL COURT REPORTER

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VOIR DIRE

1 MR. LIFSEY: This is State of South Carolina versus
2 Phillip Glen Miller, Your Honor. For the record, those are
3 indictments 2006-GS-29-208, 2006-GS-29-209 for the offenses
4 of possession with intent to distribute crack cocaine and
5 possession of marijuana.

6 THE COURT: Okay. Thank you, sir. Can I see the
7 solicitor and the attorney up here for just a second?

8 (A bench conference was held.)

9 THE COURT: The State has called the cases of State
10 versus Phillip Glen Miller on two indictments. And the
11 State alleges that the defendant on January 31, 2006 had a
12 sufficient quantity of cocaine for possession with intent
13 to distribute, and possessed -- simple possession of
14 marijuana. Now, these indictments are not evidence, it's
15 merely the means by which the defendant is brought before
16 the court for trial, and it's not evidence. And I read a
17 little bit to you what's in the indictment and then I'm
18 going to ask you some questions. The first thing I'm going
19 to do is call out a list of names, I'm going to ask you the
20 same question about each name. I'm going to ask you do you
21 know the individual, are you related by blood or marriage
22 or have you had any business or personal contact with the
23 individual whose name I called out. And when I say
24 marriages I'm talking about present marriages and past
25 marriages. If you are divorced from any of these folks let

VOIR DIRE

1 me know. I have had people who do not want to reveal the
2 fact that they were divorced from individual witnesses and
3 they weren't married so I'm talking about present and past
4 marriages when I call out the names. The first name is
5 Paul Harrison, he presently works for the Pageland Police
6 Department. Would you turn around and face the jury,
7 please, sir? Thank you, Officer Harrison. Is anybody
8 related by blood or marriage to Officer Paul Harrison?
9 Does anybody know Officer Paul Harrison either through
10 business, personal contacts or social contacts? If so,
11 please stand. Yes, ma'am, your name?

12 THE JUROR: Donna Parker.

13 THE COURT: Parker?

14 THE JUROR: Yes, sir.

15 THE COURT: Yes, ma'am, Ms. Parker, how do you know
16 Mr. Harrison?

17 THE JUROR: I guess it is personal and business. He
18 eats in my restaurant, too, but I know him that way.

19 THE COURT: You see him in your restaurant?

20 THE JUROR: Yes, sir.

21 THE COURT: How often do you see him?

22 THE JUROR: Well, once or twice a week. And I know
23 his wife.

24 THE COURT: How do you know his wife?

25 THE JUROR: We used to go to church together.

VOIR DIRE

1 THE COURT: You go to church together?

2 THE JUROR: We used to.

3 THE COURT: Y'all go to different churches now or you
4 don't go?

5 THE JUROR: We go to different churches now, yes.

6 THE COURT: How long ago was it that you went to the
7 same church? Six months ago, a year?

8 THE JUROR: Probably about a couple of years.

9 THE COURT: Have you seen her in the last two years?

10 THE JUROR: Uh-huh.

11 THE COURT: Where do you see her?

12 THE JUROR: Where I work.

13 THE COURT: Where you work. Coming in there to eat?
14 Where do you work?

15 THE JUROR: Pizza Inn.

16 THE COURT: Okay. Would that cause you any difficulty
17 in sitting on this jury assuming that Officer Harrison will
18 testify in this case?

19 THE JUROR: No.

20 THE COURT: Do you think you can be fair to both the
21 State and to the defendant?

22 THE JUROR: Yes.

23 THE COURT: Can you base your decision on the
24 testimony you hear in court today?

25 THE JUROR: Yes.

VOIR DIRE

1 THE COURT: Do you not think the fact that Officer
2 Harrison and his wife come into the Pizza Inn would
3 interfere with your ability to be fair in sitting on this
4 jury? Yes or no.

5 THE JUROR: No.

6 THE COURT: Okay. Sometimes when you shake your head
7 I can't see which way you're shaking it so if you would
8 just speak up and say yes or no, please. Thank you very
9 much, Ms. Parker. All right, the next name is Doug Vecchio
10 with the Lancaster Sheriff's Office. Thank you, Officer
11 Vecchio. Is anybody related by blood or marriage or does
12 anybody know officer Doug Vecchio? Does anybody have any
13 contact, personal or otherwise, with officer Vecchio,
14 please stand? Yes, ma'am, your name?

15 THE JUROR: Vicky Broom.

16 THE COURT: Yes, ma'am, Ms. Broom.

17 THE JUROR: I just know Doug casually, he's a friend
18 of my sister's and her husband.

19 THE COURT: Tell me how you casually know him. Where
20 do you see him?

21 THE JUROR: I have just seen him at their home before.

22 THE COURT: How often have you seen him?

23 THE JUROR: Five or six times.

24 THE COURT: Pardon?

25 THE JUROR: Five or six times.

VOIR DIRE

1 THE COURT: When is the last time you saw him?

2 THE JUROR: Probably eight or nine months ago.

3 THE COURT: Okay. Was it at a party or you just went
4 by to see him?

5 THE JUROR: He was at my sister's house.

6 THE COURT: You went by to see your sister?

7 THE JUROR: And her husband, yes.

8 THE COURT: Okay. And he was there?

9 THE JUROR: Yes.

10 THE COURT: Do you classify him as a personal friend
11 or acquaintance?

12 THE JUROR: Just an acquaintance.

13 THE COURT: Assuming he will testify in this case,
14 will that cause you any difficulty in sitting on a jury in
15 any manner whatsoever?

16 THE JUROR: No, sir.

17 THE COURT: Can you be fair to both the State and to
18 the defendant?

19 THE JUROR: Yes.

20 THE COURT: Can you base your decision on what you
21 hear in the courtroom?

22 THE JUROR: Yes.

23 THE COURT: That won't have any affect on you?

24 THE JUROR: No.

25 THE COURT: Thank you very much, Ms. Broom. All

VOIR DIRE

1 right. The next name is Jeff Hilton of the Lancaster
2 County Sheriff's Office. Is anybody related by blood or
3 marriage to officer Jeff Hilton or does anybody know Jeff
4 Hilton? Does anybody know him, is anybody related to him?
5 If so, please stand. The next name is Robin Vecchio with
6 the Lancaster Sheriff's Office. Does anybody know Robin
7 Vecchio? Is anybody related by blood or marriage to Robin
8 Vecchio? The next name is a Amy Stevens that works with
9 Sled. Does anybody know Amy Stevens or is anybody related
10 by blood or marriage to Amy Stevens? If so, please stand.
11 Next name is Jason Waldkirch from -- I think he's with
12 Sled. Does anybody know Jason Waldkirch? Is anybody
13 related -- and that is W-a-l-d-k-i-r-c-h. Does anybody
14 know him? The next name is Melvina Izzard. Is Melvina in
15 the courtroom? If you would, please stand. Mrs. Izzard is
16 standing to your left. Thank you, Ms. Izzard. Is anybody
17 related by blood or marriage to Melvina Izzard. Does
18 anybody know Melvina Izzard? If so, please stand. The
19 next name is Esther Knox. Mrs. Knox is standing to your
20 left. Thank you, Mrs. Knox. Is anybody related by blood
21 or marriage to Esther Knox? Does anybody know Esther Knox?
22 If so, please stand. The next name is Phillip Glen Miller.
23 Mr. Miller, if you would please stand and face the jury
24 please? Thank you, Mr. Miller. Is anybody related by
25 blood or marriage to Mr. Miller? Does anybody know

VOIR DIRE

1 Mr. Miller? If so please stand. I'm sorry, yes, sir?
2 What is your name?
3 THE JUROR: Willie Green.
4 THE CLERK: Page five, Your Honor, juror 65, he's
5 about six down. Willie Green.
6 THE COURT: Okay. Mr. Green, how do you know
7 Mr. Miller?
8 THE JUROR: My aunt is his aunt.
9 THE COURT: Your aunt is what?
10 THE JUROR: My aunt is his aunt.
11 THE COURT: How often do you see him?
12 THE JUROR: I don't see him too often.
13 THE COURT: Once a month, once a year or how often?
14 THE JUROR: One every six or seven months.
15 THE COURT: Where do you see him?
16 THE JUROR: What's that?
17 THE COURT: Where do you see him?
18 THE JUROR: Most of time riding and I speak to him.
19 THE COURT: Would that cause you any difficulty
20 sitting on this jury?
21 THE JUROR: What you say?
22 THE COURT: Would it cause you any problems sitting on
23 this jury?
24 THE JUROR: I don't reckon, I don't know.
25 THE COURT: You don't know? Will you come around up

VOIR DIRE

1 here, please, sir?

2 (A bench conference was held.)

3 THE COURT: Do any of you have an opinion about this
4 case or any similar cases involving crack cocaine or
5 marijuana? If you have formed an opinion about that
6 subject matter, please stand. Is there any member of the
7 jury panel that has heard anything about this case or heard
8 anybody talking about the case or anything in the paper
9 about the case other than what I have told you this
10 morning? If so, please stand. Is any member of the jury
11 panel aware of any bias or prejudice towards the defendant,
12 the State, or anyone else involved in this case? If so,
13 please stand. Is any member of the jury panel aware of any
14 bias or prejudice towards drug charges in general? If so,
15 please stand. Is any member of the jury panel a
16 contributor to any group which has its primary concern as
17 the promotion of law enforcement or victim's rights? These
18 would be MADD, SADD, CAVE or CADRE? If you're contributor
19 or member please stand, to any of those groups? Is there
20 any member of the jury panel where the solicitor in
21 Lancaster County has prosecuted yourself or any member of
22 your family? If so, please stand. Is there any member of
23 the jury panel who has been a victim of a crime in
24 Lancaster County or member of your immediate family a
25 victim of a crime please stand? Does any member of the

VOIR DIRE

1 jury panel know of any reason, personal or otherwise, why
2 they could not serve on this jury? All right. Solicitor,
3 would you stand and introduce yourself, please?

4 MR. LIFSEY: My name is Mike Lifsey, Assistant
5 Solicitor for the Sixth Circuit, and also Curtisha Mingo
6 who is an assistant solicitor in our office is going to sit
7 with me and may help some with this trial.

8 THE COURT: And Solicitor Doug Barfield is also seated
9 at the table. Is there any member of the jury panel who
10 has close personal friends or contacts with the solicitor
11 or anyone else in the solicitor's office? If so, please
12 stand. Mr. Grier, would you stand and introduce yourself
13 here?

14 MR. GRIER: I am Mark Grier, criminal defense
15 attorney, I have a private practice also, I am the public
16 defender.

17 THE COURT: Is there any member of the jury panel that
18 has been represented by Mr. Grier in the past or presently
19 being represented by Mr. Grier, or close personal friends
20 with Mr. Grier? If so, please stand. Yes, ma'am, your
21 name?

22 THE JUROR: Melanie Vaughn, 138.

23 THE COURT: All right, juror number 138 as Melanie
24 Moody, now known as Melanie Vaughn. You just recently got
25 married?

VOIR DIRE

1 THE JUROR: Yes, almost a year.

2 THE COURT: Well, congratulations.

3 THE JUROR: Thank you.

4 THE COURT: Yes, ma'am. How do you know Mr. Grier?

5 THE JUROR: His law firm has closed two real estate

6 dealings with me within the last year.

7 THE COURT: Did he personally do that?

8 THE JUROR: No.

9 THE COURT: Someone in his firm?

10 THE JUROR: Someone in his firm.

11 THE COURT: Do you know him?

12 THE JUROR: No.

13 THE COURT: You do not know him personally?

14 THE JUROR: No.

15 THE COURT: Would that create any difficulty for you

16 sitting on this jury?

17 THE JUROR: No.

18 THE COURT: You could be fair to both the State and to

19 the defendant?

20 THE JUROR: Yes.

21 THE COURT: You could base your decision on the

22 testimony that you hear in court?

23 THE JUROR: Yes, sir.

24 THE COURT: Thank you, Ms. Vaughn. Any further

25 questions from the State?

PRETRIAL MOTIONS

1 MR. LIFSEY: Nothing from the State, Judge.

2 THE COURT: Any further questions from the defense?

3 MR. GRIER: No, Your Honor.

4 THE COURT: Are you ready to strike?

5 MR. LIFSEY: Yes, sir.

6 THE COURT: Defendant ready to strike?

7 MR. GRIER: Ready to go, Your Honor.

8 THE COURT: Mr. Clerk give us a jury.

9 (At this time the jury panel was struck.)

10 MR. GRIER: Your Honor, I would just like to put
11 something on the record with regard to the jury. I would
12 not make a Batson motion, I would note that --

13 THE COURT: The first thing I was going to ask you, is
14 there any motions from the State as far as drawing a jury?

15 MR. LIFSEY: No, sir, Your Honor.

16 THE COURT: Anything from the defendant?

17 MR. GRIER: No, Your Honor. But I would like to put
18 something on the record, simply put as far as the ratio
19 issue the one black juror that was struck had a
20 pre-existing relationship with family and so I think
21 that any motion would be frivolous.

22 THE COURT: I think Mrs. Frazier, juror number 74,
23 knew the defendant and I talked to her at the bench with
24 the lawyers present and Mrs. Frazier said that Mr. Miller,
25 the defendant, had sold bait to his mother over the years

PRETRIAL MOTIONS

1 and that she knew him, and I have got to assume that's the
2 reason the State struck him; is that correct? Struck her.

3 MR. LIFSEY: That is correct. I struck her and that
4 was the only African-American juror I struck.

5 THE COURT: If you want to make your motion that's
6 fine.

7 THE JUROR: No, I think that would be frivolous, I
8 have no other motions.

9 THE COURT: You had something you wanted to take up
10 with regard to the chain of custody. Do you want to wait
11 until that comes up or do you want to take it up now and at
12 least make your argument and I will take it under
13 advisement until I hear the testimony? How do you want to
14 handle that? You tell me, Mr. Grier, how you want to
15 handle that.

16 MR. GRIER: In retrospect I think I would prefer to
17 take that up as it arises.

18 THE COURT: Now, during the trial if anybody wants to
19 make your objections, whatever legal objections. If you
20 want to argue the facts I will be happy to hear you at the
21 bench or I will be happy to send the jury out. The only
22 thing I'm saying is make your legal objection because I
23 don't want you making some closing argument on the facts.
24 Okay. If you want to argue the facts before I rule just
25 tell me, say, "Your Honor, may I argue the facts," that's

PRETRIAL MOTIONS

1 fine, you come up here to the bench and do it or I will
2 send the jury out, whichever comes first. I'm not trying
3 to cut you off, I'm just not going to allow mini-closing
4 arguments on a motion issue before the jury. Okay?

5 MR. LIFSEY: Yes, sir.

6 MR. GRIER: Yes, sir.

7 THE COURT: So if you want to excuse the jury when
8 this comes up, please let me know and I will be happy to do
9 that. What I'm saying to you, I don't mind sending the
10 jury out any time you two gentlemen want to send them out
11 and address whatever needs to be addressed is what I'm
12 trying to tell you.

13 MR. GRIER: Your Honor, one other pretrial issue, I
14 would ask that -- we could have a bar conference if
15 Mr. Lifsey wants to, but as far as -- he is indicating --
16 things that might be objectionable, he has indicated part
17 of his argument that I would find objectionable and I would
18 like to go ahead and put something on the record or have a
19 bar conference with you --

20 THE COURT: You're talking about his opening statement
21 or closing argument?

22 MR. GRIER: In his opening as I understand it, Your
23 Honor. Your Honor, he has indicated he would be arguing
24 that my client was under surveillance and I believe that
25 would be prejudicial. I would ask that he refrain from

PRETRIAL MOTIONS

1 making the argument that my client was under surveillance.
2 I could understand if facts arose that are related to this
3 case that resulted in him being under surveillance being
4 germane, otherwise I believe that arguing that he was under
5 surveillance would be prejudicial.

6 THE COURT: Well, tell me from your knowledge what is
7 going to -- the police officer is going to testify that
8 they had him under surveillance. Was this a buy?

9 MR. GRIER: No, Your Honor, no, this was not a buy.

10 THE COURT: Tell me a little more factual. I can
11 understand -- I think if a police officer is going to
12 testify he had him under surveillance and we stopped him
13 for whatever reason and he's going to make that opening
14 statement, that's fine. Number one, opening statement is
15 not a time to be arguing your case, it's simply a time to
16 go tell the jury on what you plan on proving. And if he
17 can prove that I don't have any objection -- I mean, I'm
18 going to rule against you so I need to sort of know
19 factually what we're talking about.

20 MR. GRIER: Yes, Your Honor. Basically this was a
21 situation where -- as I read the police report -- and I
22 haven't had a conversation with the officers -- but they
23 were observing a car wash and saw Mr. Miller ride through,
24 thought that was suspicious, started to follow him, there
25 was erratic driving and he was pulled and they found the

PRETRIAL MOTIONS

1 drugs in the vehicle.

2 THE COURT: So they stopped him for an alleged erratic
3 driving.

4 MR. GRIER: That's right, which would have been
5 certainly enough for a -- to get by any kind of protectable
6 stop argument under --

7 THE COURT: You object to him using the words
8 surveillance because it insinuates that they were actually
9 following and watching his movements and he just pulled
10 through a car wash and was driving erratically?

11 MR. GRIER: Correct.

12 THE COURT: Anything else?

13 MR. GRIER: Well, Your Honor, I think that's the
14 basis, yes.

15 THE COURT: Okay. Solicitor, let me hear from you.

16 MR. LIFSEY: Just so you understand the big picture,
17 and I am not going to illicit this in front of the jury,
18 this thing originates from an anonymous tip about
19 Mr. Miller selling drugs. Okay. Law enforcement gets that
20 information, they have that information. In fact, there's
21 a recording of that anonymous call. I'm not going to get
22 into the anonymous call but I want to give you the picture
23 of how we get here. This officer, Officer Harrison, sees
24 the defendant so he decide he's going to watch him a little
25 bit and see what happens.

PRETRIAL MOTIONS

1 THE COURT: He seizes?

2 MR. LIFSEY: Sees him driving.

3 THE COURT: Oh, he sees him driving. I thought you
4 said he seized the defendant. I was wondering how he
5 seizes the defendant.

6 MR. LIFSEY: Well, we will get to that in a minute.
7 He does see him driving and he begins watching him, in
8 fact, calls another officer, they call him and they see him
9 driving.

10 THE COURT: This is over what time frame?

11 MR. LIFSEY: Ten minutes maybe. And they watch him
12 drive into the car wash and you will hear -- and that's
13 suspicious to them and then they follow him a little more
14 and then they see erratic driving. What I intend to --

15 THE COURT: How is it suspicious to go into a car
16 wash?

17 MR. LIFSEY: Well, he didn't wash his car. He stops
18 at the car wash for just a -- a little bit after 10:00, he
19 stops, pulls in the car wash bay, stops, then pulls off.
20 And basically -- let me tell how I intend to articulate
21 this to the jury.

22 THE COURT: I want to know what you're going to tell
23 the jury.

24 MR. LIFSEY: I'm going to tell the jury the police
25 were conducting surveillance on Phillip Miller, they

PRETRIAL MOTIONS

1 observed him driving, they observed him drive into the car
2 wash, they observed whatever he did in the car wash, they
3 observed him leave the car wash. They see erratic driving,
4 they stop him and then from that point on.

5 THE COURT: I understand his objection. I'm going to
6 partially grant it. I am not going to let you use the word
7 surveillance, I think that has some awful bad connotations.
8 You can use they were watching him or they observed him or
9 whatever you want to say. In opening statement I am going
10 to restrict you from using the word surveillance.
11 Surveillance could mean video camera, all kinds of --

12 MR. LIFSEY: Can I say they were in --

13 THE COURT: -- connotations. So you can say they were
14 watching him or following him or whatever you want to say,
15 but just don't use the word surveillance.

16 MR. LIFSEY: Can I say they were investigating Phillip
17 Miller?

18 THE COURT: That's fine, I don't have any problem with
19 that.

20 MR. LIFSEY: That's what I am going to say then.

21 THE COURT: But I'm going to restrict you from using
22 that word, I think that indicates something other than what
23 was actually going on.

24 MR. GRIER: Your Honor, I think investigating is
25 equally prejudicial. I would submit --

PRETRIAL MOTIONS

1 THE COURT: That insinuates that they knew he was
2 doing bad things and insinuates -- why can't you just say
3 they were watching him, they saw him come through the car
4 wash?

5 MR. LIFSEY: I don't want to mislead the jury. This
6 is not a random patrol officer riding down the road who
7 sees somebody weaving.

8 THE COURT: How are you going to get around the
9 anonymous call?

10 MR. LIFSEY: All I'm going to say is --

11 THE COURT: But you insinuate they had some prior
12 knowledge to be following him and watching him or
13 surveillance or whatever you want to call it, how are you
14 going to justify it?

15 MR. LIFSEY: I disagree with the fact that it
16 insinuates that. They investigate people all of the time,
17 they look at people, they watch people. Otherwise you have
18 to -- Justice Toal puts it that the jury needs to get the
19 res justis of what is on here and -- I don't want to get
20 in -- I am not -- at this point I'm not trying to illicit
21 the testimony about the tip or call or say they got
22 information he was selling drugs, which is the information
23 they got. But I do think it ought to be fair for me to say
24 they were investigating Phillip Miller. If I leave it at
25 that I'm assuming Mr. Grier is not going to delve into what

PRETRIAL MOTIONS

1 the investigation is. I think that's a fair statement of
2 what happened and the truth.

3 MR. GRIER: I would submit that it would be fairer and
4 it would not be prejudicial to say that the car wash was
5 under surveillance. Certainly that's the implication I get
6 from -- the statement says there's drug activity at this
7 car wash, I think it would be a fair accurate and a
8 non-prejudicial statement.

9 THE COURT: But the car wash wasn't under
10 surveillance, Mr. Miller was and so -- just use the word
11 watching.

12 MR. LIFSEY: Okay. I'll say that then.

13 THE COURT: Use the word they were watching
14 Mr. Miller. Let's keep it at that as far as opening
15 statements. Now, closing arguments, that's a different
16 story, I'm just talking about opening statements. Some
17 attorneys want to argue their case and it's not the time to
18 be doing it.

19 MR. LIFSEY: But I intend to illicit then from the
20 officer, "Were you watching Phillip Miller on January 31st
21 of 2006?"

22 THE COURT: Certainly. I'm not putting any
23 restriction on the testimony you are going to illicit from
24 the officer, just in the opening statements. Do you
25 understand what I'm saying?

PRETRIAL MOTIONS

1 MR. LIFSEY: Just so I do understand what you're
2 saying but I want to make sure because I don't want to --
3 in my mind when I put Officer Harrison on the stand can I
4 ask him, "On January 31st were you investigating Phillip
5 Miller?" That would be my intention to ask that question
6 unless you say I can't ask that question.

7 MR. GRIER: Well, Your Honor, I believe that's
8 prejudicial and in essence it --

9 THE COURT: Everything he does is going to be
10 prejudicial to your client, that's his job.

11 MR. GRIER: I understand that.

12 THE COURT: That's not really a valid objection.

13 MR. GRIER: No, Your Honor. But it does raise the
14 suggestion in the mind of the jury that there was some
15 other behavior that's unrelated to the facts of this case
16 that caused him to be investigated or under surveillance.
17 I understand, his job is to be prejudicial to me.

18 THE COURT: From now on I will have to listen to
19 testimony and before you get to that point I will make the
20 decision. I just want to get the facts for the opening
21 statements. Okay?

22 MR. GRIER: Yes, sir.

23 THE COURT: We'll take a short break, I think some of
24 these folks need to go to the restroom and they have got to
25 come through the courtroom.

OPENING STATEMENTS

1 (A recess was taken.)

2 THE COURT: Anything before we bring the jury back in?

3 MR. GRIER: No, Your Honor, we are ready.

4 (The jury returned to the courtroom and were sworn.)

5 THE COURT: Solicitor?

6 MR. LIFSEY: Thank you, Your Honor. January 31st of
7 2006 a sheriff's deputy named Paul Harrison, that's him
8 right there, was watching a man named Phillip Miller about
9 a little before 10:00 in the evening. He will testify that
10 he saw Miller pull into a car wash and that he pulled into
11 the bay in the car wash where you wash your car and saw him
12 only stay there a brief period of time, not use the car
13 wash, not put anything in the trash, not doing anything
14 that you would expect somebody to do in a car wash, and
15 pull off. He will tell you that he began to follow him
16 after that some more. He enlisted the aide of another
17 Lancaster Sheriff's Officer, Bo Vecchio, that is
18 Mr. Vecchio right there, and they'll tell you they followed
19 him. They will tell you that at some point he began
20 weaving back and forth and they stopped the car and they
21 activate their blue lights, that's actually Vecchio's
22 lights that come on and he is the one that stops him.
23 They'll tell you that they come up to the car, that when
24 they talk to him they smell alcohol, they will tell you
25 that -- he tells them he didn't have any license. They get

OPENING STATEMENTS

1 him out of the car, he gives them consent to search and as
2 they get him out you will hear testimony that they see
3 marijuana in the car. Based on consent and the marijuana
4 they see, they search the car and they'll tell you they
5 look -- how they look in the glove compartment and they
6 find a good bit of quantity of crack cocaine. In fact, you
7 will ultimately hear testimony that it weighs out to
8 6.96 grams, or a little less than seven grams of crack
9 cocaine. You will hear testimony from the officers about
10 what that means. If you are not familiar with crack
11 cocaine they will tell you about crack and how it's used
12 and the fact that that is a significant quantity of crack
13 cocaine. And, in fact, the Judge is going to charge you at
14 the end of the case that the State of South Carolina
15 through our legislature and our law says that when anybody
16 possesses more than one gram of crack cocaine we can infer
17 possession with intent to distribute, in other words,
18 bumping something from a possession case to a possession
19 with intent to distribute. Keep in mind, you will hear
20 testimony that this was almost seven grams. So the State's
21 case, you'll see where it's coming, I want you to
22 understand what is coming, is that you will hear from two
23 police officers who were out there on the scene. And they
24 are the substantive witnesses, they are the witnesses that
25 will probably testify from our end the longest period of

OPENING STATEMENTS

1 time. You will hear from Officer Harrison who is now going
2 to tell you -- he is now with the City of Pageland, but was
3 at that time he was with the Lancaster Sheriff's
4 Department. You will hear from Officer Vecchio who is
5 still with the Lancaster Sheriff's Office. Now, in
6 addition to them you're going to hear a few other witnesses
7 that get us into analyzing the drugs and figuring out what
8 they are. You're going to hear from Officer Hilton, who is
9 basically in this case he works as someone who took the
10 evidence and takes it from one place to the other. In
11 other words, the officers don't keep the drugs with them
12 for months and months. This happened in January of '06,
13 they don't keep the drugs, they go to evidence and you will
14 hear from Officer Hilton and how he carries the evidence
15 around. There's two drugs in this case, there's marijuana
16 and crack cocaine. The way those are analyzed, the way
17 they are determined whether they were actually drugs is
18 actually different for each drug. In marijuana we have a
19 local police officer who is properly trained to analyze
20 those drugs, a lady named Robin Vecchio who works in the
21 sheriff's office analyzed the marijuana. So she was able
22 to -- she will testify that it was indeed marijuana and it
23 was illegal to have. You will also hear that for crack
24 cocaine what we have to do is -- we can't analyze that
25 locally, we have to take that to Sled where there's a

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1 laboratory where they analyze drugs. At Sled you are going
2 to hear from somebody named Amy Stevens who was basically
3 an evidence technician, she is somebody who checks in
4 evidence when the officer comes down and she takes it to
5 the chemist. The chemist is a man named Jason Waldkirch,
6 you will hear from Mr. Waldkirch and he will tell you how
7 he analyzed the drugs to determine what they are and what
8 he did to get an official weight and he will tell you it's
9 crack cocaine and about 6.96 grams. So Mr. Miller is
10 charged with two different crimes, possession with intent
11 to distribute crack cocaine based on possessing more than
12 one gram of crack cocaine, and he's charged with simple
13 possession of marijuana because the amount of marijuana was
14 just a small amount. We charged him with possession based
15 on what the Judge will tell you the law of possession is
16 and that is when you possess something and you have
17 dominion and control over the drugs or the premises in
18 which the drugs were found, in this case the car that he
19 was driving alone. So based on that you will hear, I
20 believe, six witnesses from the State. I don't think this
21 is going to be a lengthy days and days trial, but please be
22 aware that doesn't make it any less important. It's
23 important for the State and it's certainly important for
24 the defendant. We hope you will pay close attention and at
25 the very end of the case I will ask you to come back and

OPENING STATEMENTS

1 return a verdict of guilty. Thank you.

2 THE COURT: Mr. Grier?

3 MR. GRIER: May it please the Court? Solicitor?

4 Ladies and gentlemen of the jury, I am Mark Grier, I
5 represent Phillip Miller. The theme of this case is it is
6 not my car. You will hear proof that this car does not
7 belong to Phillip Miller. The solicitor will tell you and
8 I think he will stipulate to that, it is not my car.
9 Mr. Miller has a girlfriend, he has a child with this lady,
10 he works. And as Mr. Lifsey said, on the day that these
11 allegations arose Mr. Miller went to the car wash, didn't
12 get his car washed, drove through the car wash and he was
13 followed by the police and eventually he was stopped and
14 eventually they allege that they found cocaine in the glove
15 box of the vehicle, and found marijuana I believe in the
16 side pocket of the vehicle. Law enforcement, of course,
17 had numerous vehicles that were involved after the alleged
18 erratic driving occurred and there were some people descend
19 on Mr. Miller and the vehicle doesn't belong to him and
20 that's why we're here today. The State says that these are
21 his drugs and he says he knows nothing about these drugs,
22 that is up to you to decide whether you think these are his
23 drugs. The State and myself and my client have chosen you
24 out of a group of people. We excluded some people and we
25 chose some people based on what we know about you because

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1 we thought y'all would be up to the job. I know it's an
2 inconvenience for you to be up here today but trial by jury
3 is one of the benefits we get for living in this country
4 and it's a small sacrifice to pay to serve your country in
5 this manner. The system does not work without -- the
6 criminal justice system does not work without having jurors
7 to listen to the evidence and to decide the facts of the
8 case. You are the trier of facts, disputed facts. You are
9 going to decide what the facts are in this case. The Judge
10 is the giver of the law. He is going to tell you what the
11 law that you have got to follow is and you're going to go
12 into this room at some point I assume and you're going to
13 deliberate about this case and you're going to apply the
14 facts to the law and make a determination of what those
15 facts are and come up with a verdict that you all can agree
16 on what the outcome of this case should be. Now,
17 Mr. Miller is cloaked in the presumption of innocence. You
18 12 are the only people in the world that can remove the
19 cloak of presumption of innocence that surrounds
20 Mr. Miller. If you find the State has proven its case
21 beyond a reasonable doubt then you remove that cloak of
22 innocence from him. But there are several burdens of
23 proof, and I find when talking to jurors that it is one of
24 the more confusing things about jury duty is this burden of
25 proof issue. We have a burden of proof in a civil cases,

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1 this is a criminal case, but in a civil case the burden of
2 proof, if you imagine the bride of justice, the statute of
3 justice balancing the scales, in a civil case the person
4 that is bringing a lawsuit in a civil case, right, has to
5 merely tip those scaled in their favor to prevail in their
6 lawsuit, merely tipping the scales. The burden of proof
7 for somebody that is suing somebody is more likely than
8 not, merely tipping the scales in their favor. If the jury
9 believes one party over the other they prevail. That's not
10 what this case is about, it's a different burden of proof.
11 So I wanted to mention that that is something that I do
12 find in talking to jurors is confusing, it is incredibly
13 confusing. It's confusing to me until -- and I was trained
14 in the law. There's another burden of proof that's called
15 clear and convincing evidence that's a higher burden on the
16 part of the faction bringing the lawsuit, and simply put
17 that means that the evidence must be higher than merely the
18 preponderance of the evidence and higher than more likely
19 than not. That's not what this case is about. The burden
20 of proof on the State is beyond a reasonable doubt. Now,
21 what does beyond a reasonable doubt mean? The Judge will
22 give you the law, but I will tell you that in this state we
23 have a case called State vs. Manning where our appellate
24 court has said that a reasonable doubt is a doubt that
25 would cause one to hesitate to act. Simply put, if there's

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1 enough evidence -- that there's not enough evidence to
2 cause you to not hesitate, then you would find the
3 defendant not guilty. Another way to best put is simply
4 when looking at the scales of justice in a civil case they
5 must tip the scales. In a clear and convincing case they
6 must tip further, and in a criminal case they virtually
7 must be -- the weight of the evidence of the State must be
8 virtually to the ground. There can be virtually no
9 reasonable doubt. The scales are totally to the point
10 where you don't have any doubt in which you can assign no
11 reason. Now, why is it that way? Well, when our
12 forefathers drafted our constitution they had strong
13 spirits where freedom the way we know it and the way we
14 experience it in this country -- in drafting our
15 constitution they realized that they needed to draft it in
16 a way to protect freedom. Because if somebody said, "I saw
17 Mark Grier speeding on the way to court today," can I prove
18 my innocence? No, I probably couldn't prove my innocence.
19 If I had a witness, maybe that would help me if I were
20 being tried for speeding. I can't prove that I didn't do
21 what you say I did. The State has a lot of resources. I
22 don't know how many police officers are in this county.
23 The solicitor has numerous attorneys in this circuit. The
24 State has a lot of resources. Mr. Miller has little old
25 me, and, of course, my paralegal, Sherry Plyler. And it is

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1 us against the State and the State has a lot more resources
2 than we've got. The State gets to make opening statements
3 and the State gets to make closing statements and they get
4 to go first -- you get to hear them first and you get to
5 hear them last. There are a lot of reasons that freedom is
6 protected by imposing the burden of proof on the State of
7 beyond a reasonable doubt. In a civil case, all you can do
8 to somebody in a civil case is take away their money, so
9 the burden of proof that's required on the party bringing
10 that action is not what it is when you take away somebody's
11 freedom. So that's what I wanted to tell you about the
12 burden of proofs that will be applied in this case is proof
13 beyond a reasonable doubt is required. You don't walk into
14 this courtroom without anything, you bring your common
15 sense in this courtroom and you take into account what
16 people actually say about their perspective on the evidence
17 that you will hear today. And each of you has to come to
18 your own conclusion about whether or not the State met its
19 burden of proof beyond a reasonable doubt. And we know
20 that all of you will pay attention closely and that all of
21 you will take the law that the judge gives to you and apply
22 it to the facts in a conscientious manner just like anybody
23 that's accused of a crime in the State, the laws would be
24 applied to their case and that is what we ask you to do
25 today. And we believe that after you hear all of the

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1 evidence and the facts in this case we think you will find
2 that the State has not met its burden of proof beyond a
3 reasonable doubt and we think you will find the defendant
4 not guilty. We thank you very much.

5 THE COURT: Call your first witness.

6 MR. LIFSEY: We call Paul Harrison to the stand.

7 The witness, PAUL HARRISON, was first duly sworn and

8 Testified as follows, on:

9 DIRECT EXAMINATION

10 BY MR. LIFSEY:

11 Q State your name, please, sir.

12 A Paul Harrison.

13 Q Where are you employed, sir?

14 A I am a police officer in the city of Pageland, South
15 Carolina.

16 Q How long have you been with Pageland?

17 A Three months.

18 Q What did you do before that?

19 A I was with the Lancaster County Sheriff's Department.

20 Q And were you a Lancaster County Sheriff's deputy
21 officer back on January 31st of 2006?

22 A Yes, sir.

23 Q How long have you been a police officer altogether?

24 A Fifteen years.

25 Q What was your position on January 31st of 2006?

TESTIMONY OF PAUL HARRISON

1 A I was a narcotics supervisor on the Lancaster County
2 Drug Task Force.

3 MR. LIFSEY: Your Honor, I'm at the point I'm going
4 to -- may Mr. Grier and I approach?

5 THE COURT: Yes, sir.

6 (A bench conference was held.)

7 THE COURT: I'll let you put on a factual basis for
8 the argument at the appropriate time.

9 Q On January 31st of 2006, were you investigating
10 Phillip Miller?

11 A Yes, I was.

12 Q Do you see Mr. Miller in the courtroom?

13 A Yes, sir.

14 Q Is that him between Mr. Grier and Mr. Plyler?

15 A Yes, sir.

16 Q Specifically at about ten minutes to 10:00, would you
17 tell the jury what you saw and observed regarding
18 Mr. Miller?

19 A I observed Mr. Miller driving a blue Buick on the
20 bypass in Lancaster in front of Dunkin Donuts, pull into a
21 car wash --

22 Q Let me stop you just a minute. You say he was back
23 there a little before 10:00 at night, and you said you saw
24 him driving a car; is that right?

25 A Right.

TESTIMONY OF PAUL HARRISON

1 Q How did you know -- if you couldn't see through the
2 window at that point how did you know that was him?

3 A I recognized the car and it was a car I had seen him
4 in before and I thought immediately that's who that was.

5 Q Okay. So go ahead, tell me what you observed at that
6 point. So you see the car you believed to be Miller's
7 car?

8 A Right.

9 Q And then what do you do?

10 A When I get across the road from Dunkin Donuts I
11 observed the car pull into the car wash, waits about a
12 minute and he does not wash his car nor does he use the
13 vacuum cleaner or trash can, he pulls off, waits a minute
14 in the parking lot for traffic to go by and he pulls out
15 and heads south on the bypass.

16 Q This raised some concerns with you?

17 A Yes. There's no one else in the parking lot, he was
18 the only one there at nighttime.

19 Q What did you do at that point?

20 A I contacted Agent Vecchio when I first seen him pull
21 in and told him what I had observed.

22 Q And Agent Vecchio we will hear from in a minute, but
23 was he also a narcotics officer at that point?

24 A Yes.

25 Q Go ahead.

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1 A Once I contacted Agent Vecchio he was close in the
2 area, so when Phillip Miller pulled out on the bypass
3 Agent Vecchio was, like I said, he pulled up behind him
4 because I was crossing over and it would be a little hard
5 for me to get out in traffic.

6 Q So Vecchio is the closest vehicle to Miller's?

7 A Yes, sir. As soon as he pulls out Agent Vecchio is
8 right behind him.

9 Q What happened next?

10 A We decided to follow him to see where he was going
11 and what he was doing. We let him go probably about two
12 or three miles and turn right on Tanneyhill Road.

13 Q You haven't activated blue lights at this time.

14 A No.

15 Q Go ahead.

16 A At this point we were observing him. I might be a
17 half a mile back, it wasn't long, and Agent Vecchio calls
18 me and told me that he crossed the center line and that he
19 weaved back and forth. And I said, "Okay." At this time
20 he turns onto Pineview Drive and I caught up with them by
21 then and when we turned right onto Pineview Drive he went
22 to the other lane coming when he turned and stayed in the
23 other lane. At that point we decided to make a car stop
24 and investigate further why he was --

25 Q Did you make that call or --

TESTIMONY OF PAUL HARRISON

1 A Actually Agent Vecchio stated, "I'm going to pull him
2 over, he's kind of weaving."

3 Q All right. What happened then next?

4 A He pulled over -- turned on the blue lights, he
5 pulled over, and Agent Vecchio went to the driver's side
6 and talked to Mr. Miller, I went to the passenger side.

7 Q Were you in a position where you could hear the
8 conversation between Vecchio and Miller?

9 A Yes.

10 Q Relate what you heard.

11 A Okay. I remember hearing Agent Vecchio asking him
12 for his driver's license, he said he didn't have any and
13 Agent Vecchio asked him to step out of the car. While he
14 was doing that I was looking down in the passenger's side
15 of the car and where you close the door handle, I seen a
16 marijuana roach. And I had to tell Agent Vecchio, "I
17 found what appears to be a marijuana roach." And at that
18 time he was already placing him under arrest for no
19 driver's license.

20 Q Let me stop you just right there while we're talking
21 about it. You ultimately placed the marijuana in evidence
22 at some point?

23 A Yes, I did.

24 MR. LIFSEY: I'm going to have this marked for
25 identification purposes.

TESTIMONY OF PAUL HARRISON

1 Q Does that contain the marijuana that you found, the
2 marijuana roach?

3 A Yes, it does. This is the item that I tagged that
4 night.

5 Q You looked at that previously before we started this
6 trial at my request.

7 A Yes, sir, I did.

8 Q All right. You find the marijuana and obviously you
9 are arresting him for the no driver's license and having
10 the marijuana; is that correct?

11 A Yes, sir.

12 Q All right. What happens next?

13 A Agent Vecchio asked him whether he had any drugs in
14 the vehicle and he said no. Agent Vecchio asked, "Would
15 you mind if we searched," and that's the only thing he
16 asked, and he said no, that he does not mind. And at that
17 time we started searching.

18 Q Did you find anything of interest?

19 A I opened the passenger door and looked in that side
20 of the vehicle, I can't remember any specifics. Agent
21 Vecchio went into the back of the car and he came back
22 out -- I was in the passenger's side. When I got to the
23 glove box, when I opened it I seen a something that looked
24 the shape of a pill bottle that was wrapped in the duct
25 tape.

TESTIMONY OF PAUL HARRISON

1 Q Let me stop you for a second.

2 MR. LIFSEY: I'm going to have this marked as State's
3 Exhibit Number 2, Judge, for identification purposes at
4 this time.

5 Q I'm going to show you what's been marked for
6 identification as State's Exhibit 2. What specifically is
7 that?

8 A That's what I found.

9 Q Would you describe that to the jury?

10 A What I found was that pill bottle and it was wrapped
11 in duct tape. The inside was quite a few rocks of crack
12 cocaine, I can't remember specifically but I do know the
13 weight, but as far as the number of rocks I'm not sure.

14 Q First I guess let's do a mechanical of what you do.
15 What do you do with drugs, officer, when you find drugs?
16 How do you take them into evidence and how do you take
17 care of them and that sort of thing?

18 A We will take them to the evidence custodian. We
19 locked it up in a secure place at night or in a drawer.
20 The next day the evidence custodian would come in, we
21 would fill out the paperwork, turn this evidence in to him
22 on this day, and we drop it off then and we don't see the
23 drugs anymore until court. The evidence custodian
24 actually takes it to analysis, which in this case it
25 was to Sled, or the crack cocaine, it was to Sled, they

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1 analyze it, get it back to us in a sealed condition.

2 Q Okay. Who is the evidence custodian that you would
3 have given this crack to?

4 A Lieutenant Hilton.

5 Q And the night this happened was January 31st; is that
6 correct?

7 A Correct.

8 Q It was about 10:00 in the evening?

9 A Between 10:00 and 11:00 or so.

10 Q What hours does Hilton work usually?

11 A First shift, 8:00 until 5:00.

12 Q When you find drugs after-hours, what do you do with
13 them?

14 A We will secure them and I secured mine in my filing
15 cabinet where I have the only key to it. We do have a
16 drop box but in this case we had a few bags and I am
17 pretty sure it was full that night, or it was full, I
18 didn't want to drop it in there. It was actually a hole
19 cut through the door, it has got a lid on it and you drop
20 it in.

21 Q So this case you took the crack that you found and
22 you put it in your locked drawer; is that correct?

23 A That is correct.

24 Q Did anyone else have a key to that?

25 A No.

TESTIMONY OF PAUL HARRISON

1 Q How long did you keep it in that drawer?

2 A Until the next day when we came in.

3 Q What did you do the next day with it?

4 A Filled out all of the correct paperwork and turned it
5 over to the evidence tech.

6 Q I'm going to show you this item marked Exhibit 3.

7 I'm going to show you what's been marked for
8 identification as State's Exhibit 3. Would you tell the
9 jury what that is?

10 A This is a form B. What is basically when I first
11 seize the drugs the form B is the form you fill out. I
12 filled this form out and it basically says that I turned
13 this evidence that I've taken from Phillip Miller and it
14 tells you what it is, it is a bottle with white rocks in
15 it. I turned it over to Lieutenant Jeff Hilton, it has
16 got a date of February 1st of '06, and that's what this
17 is, this is the first part of the evidence sheet.

18 MR. LIFSEY: Your Honor, I would move this into
19 evidence as State's Exhibit 3.

20 MR. GRIER: I have no objection to its entry subject
21 to cross examination and further motions pertaining to it.

22 THE COURT: Exhibit 3 is admitted without objection.

23 (The form B was received as State's 3.)

24 Q Once the drugs leave your possession you're not
25 involved any further at that point in getting them

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1 analyzed or anything like that.

2 A No.

3 Q Let's talk a little bit about the crack cocaine. How
4 long have you been a police officer would you say?

5 A Fifteen years.

6 Q What kind of narcotics experience do you have?

7 A I started in 1997 in the drug task force, I stayed
8 working there for two years. Then in '05 I was promoted
9 to a lieutenant of the drug task force.

10 Q You have been to trainings or things that specialize
11 in narcotics and drugs?

12 A Yes, sir. I have been to quite a few schools around
13 the United States.

14 Q How often would you say you have dealt with crack
15 cocaine in your experience?

16 A Daily basis.

17 Q Well, for people who don't know anything about crack
18 cocaine, would you explain what it is and how it's used
19 just briefly so they'll understand?

20 A Okay. Crack cocaine is basically cocaine that is
21 made in a form where you can smoke it. You can't smoke
22 powder so you basically compound different things together
23 to make it where it actually will burn and where you can
24 smoke it where it gets straight to your lungs immediately.

25 Q So it makes -- basically the crack is solidified --

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1 the powdered cocaine is solidified into a rock like form;
2 is that correct?

3 A Correct.

4 Q And generally that's really -- the way that crack
5 cocaine is used and smoked; is that correct?

6 A Correct.

7 Q What is it usually used to smoke, how is it smoked?

8 A Cans. I have seen them use cans, they put the top of
9 it and put holes it in, or they can suck through the top
10 of it. The common thing is a pipe.

11 Q Is that what people commonly refer to as a crack
12 pipe?

13 A Yes.

14 Q Did you find any crack pipes in this car?

15 A No.

16 Q Did you find any cans or anything that would indicate
17 personal use of crack cocaine?

18 A No, sir.

19 Q All right. Crack as you said individually is smoked
20 usually in rocks; is that correct?

21 A Correct.

22 Q How much weight-wise is a rock of crack cocaine?

23 A All I can comment on is a \$20 rock, that would be
24 .25 grams, so four or five of them would make a gram.

25 Q And a gram of crack cocaine, you're talking about the

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1 potential for four or five rocks depending on how exactly
2 they are split up?

3 A Yes, sir.

4 Q And there's a case where you had almost if I did my
5 math seven grams -- almost seven grams of crack, that
6 would be somewhere between 28 and 35 rocks of crack
7 potentially?

8 A Possibly, yes.

9 Q I hate to do math in public as they say, but you get
10 four or five out of a gram?

11 A That would be fair to say.

12 Q How much do these rocks usually try to sell for?

13 A A gram, normally \$50.

14 Q \$50 for a gram?

15 A They could buy a gram, cut it up and actually make
16 money, make 60 bucks off of it or sometimes 80.

17 Q How much do you think almost seven grams of crack
18 would be worth?

19 A Say \$20 rocks -- well, actually if it's a gram that
20 would be \$300.

21 Q So I guess if you bought it wholesale you're talking
22 about \$300.

23 A Yeah.

24 Q And if you sold it retail more than that?

25 A Right.

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1 Q People that use crack cocaine in your experience as
2 an officer, do they usually keep large quantities of crack
3 cocaine around?

4 A No.

5 Q Why not?

6 A The addiction is so strong in my experience I have
7 seen them buy a \$20 rock, smoke it, find another \$20 then
8 come back an hour later or whenever they can and just
9 continue to smoke it all night long.

10 Q It's not like Sam's Club where you go buy a big bulk
11 of things, you don't see that in the crack business in
12 your experience?

13 A No.

14 Q All right. So you found this large quantity of crack
15 cocaine in Mr. Miller's car; is that correct?

16 A Correct.

17 Q You didn't find any indicia of use in the car? You
18 didn't find anything that would indicate he was using in
19 the car, did you?

20 A No.

21 Q You didn't find any pipes, any altered cans or
22 anything that would allow him to smoke crack cocaine?

23 A No, sir.

24 Q All right.

25 MR. LIFSEY: Just have one more moment, Judge.

TESTIMONY OF PAUL HARRISON

1 Q Did you find some money on the defendant?

2 A Yes. He did have some, I don't remember exactly how
3 much it is but --

4 MR. LIFSEY: I'm going to have this marked as State's
5 Exhibit Number 4 for identification, Judge, if I could.

6 THE COURT: Yes, sir.

7 MR. LIFSEY: While you're here I'm going to have this
8 marked as the next exhibit.

9 Q I'm going to show you what has been marked for
10 identification as State's Exhibit 4. Can you tell me what
11 that is, sir?

12 A It is an envelope. When we get money in we will
13 label it as for instance, twenty \$1 bills, nine \$5 bills.
14 That was a total of \$456.

15 Q Does that indicate the amount of money you took from
16 Mr. Miller?

17 A Yes, sir.

18 Q He had how much in cash?

19 A \$456.

20 MR. LIFSEY: I would move it into evidence, Your
21 Honor. This would be State's Exhibit Number 4.

22 THE COURT: Any objection?

23 MR. GRIER: No objection, Your Honor.

24 THE COURT: State's Exhibit Number 4 admitted without
25 objection.

TESTIMONY OF PAUL HARRISON

1 (The envelope with money was received as State's 4.)

2 Q I'm going to show you another item that has been
3 marked as State's Exhibit 5 and ask you to look at that
4 and tell me what that is.

5 A It's a cellphone that was taken from Mr. Miller on
6 the night in question.

7 MR. LIFSEY: Your Honor, I move this into evidence.

8 THE COURT: No objection?

9 MR. GRIER: I have no objection.

10 THE COURT: 5 admitted without objection.

11 (The cellphone was received as State's 5.)

12 Q So after you find the crack and the marijuana and
13 arrest Mr. Miller and find the money and cellphone you
14 basically turned the evidence over to Hilton to have it
15 analyzed; is that correct?

16 A The crack cocaine and the marijuana to be analyzed,
17 the other properties just seized.

18 Q Since then you haven't had any dealings in this case?

19 A No, sir.

20 MR. LIFSEY: Your Honor, I don't have any further
21 questions of this witness.

22 THE COURT: Cross examination?

23 MR. GRIER: Thank you, Your Honor.

24 CROSS EXAMINATION

25 BY MR. GRIER:

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1 Q Officer Harrison, I apologize, what is your rank now?

2 A It's PFC, Private First Class.

3 Q You were with the Lancaster Drug Task Force at the
4 time this happened; is that right?

5 A Yes.

6 Q And you testified I guess -- were you alone when you
7 were first watching Mr. Miller?

8 A When I first seen him I was traveling down the
9 bypass, I was by myself then.

10 Q Okay. And who were all of the officers involved in
11 this investigation?

12 A Me and Agent Vecchio.

13 Q Well, in the discovery it mentions Phillip Hall. Do
14 you recall what his participation in this --

15 A I think Officer Hall -- I don't think he done this
16 case, he may have been at the stop because we made a call
17 on the radio.

18 Q And Brian McClemore is listed as an officer involved.

19 A He was working that night.

20 Q He was working as well, but he wasn't with you?

21 A No.

22 Q You were solo in your vehicle working.

23 A Yes.

24 Q And was Vecchio on another assignment at the time?

25 A No, sir, he was in his vehicle.

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1 Q Okay. But he wasn't involved in any kind of
2 surveillance of the car wash or anything like that?

3 A No, not until I called him.

4 Q All right. So you called him and he is actually one
5 that gets behind Phillip Miller.

6 A Yes, sir.

7 Q And he is about half mile I believe you said ahead of
8 you or something like that, about that distance ahead of
9 you?

10 A No. That was what we were traveling down the bypass.
11 I was about that far behind both of them, because we were
12 following him trying not to let him know we were.

13 Q Are you in a marked vehicle?

14 A No, I was in an undercover vehicle.

15 Q Were there any marked vehicles involved in this
16 pursuit of Mr. Miller?

17 A No.

18 Q And there were no blue lights or no -- obviously if
19 you don't want him to know you were following him there
20 were no blue lights at that time?

21 A No.

22 Q How long did you follow him?

23 A I guess maybe about three miles.

24 Q I guess eventually a blue light did come on.

25 A Yes.

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1 Q And that was near Pineview and -- I believe you
2 testified that Vecchio said that he was driving
3 erratically?

4 A Yes.

5 Q And did you observe any erratic driving?

6 A I did when he turned onto Pineview Drive or Cain Mill
7 Road, it's a road that is about a 90-degree angle when you
8 turn off onto and kind of barrel onto it, when he did turn
9 on that road he was in both lanes.

10 Q Well, that road is unmarked, isn't it? There is no
11 center line.

12 A Yes, there's a line.

13 Q On the road that he was turning onto?

14 A Yeah.

15 Q Now, how far down Pineview -- and it's Cambridge, a
16 little street that's involved in this?

17 A He may have turned onto that road when he turned
18 on -- he turned onto a road, I can't remember the name.

19 Q Okay. And how long were you in pursuit of him,
20 approximately what distance?

21 A Pursuit?

22 Q Well, how long were you behind him -- in close
23 proximity behind him and Vecchio?

24 A Once Agent Vecchio called me on the radio, made radio
25 contact and said he was weaving I actually closed the

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1 distance at that time and I would say quarter of a mile
2 when I observed what I did.

3 Q You were about a quarter of a mile when you
4 observed --

5 A When I seen him turn onto Pineview Drive I did.

6 Q From the time he turned onto Pineview Drive -- and
7 approximate distance --

8 A I almost want to say immediately after he violated
9 that lane -- crossed the line, I want to say immediately
10 but he made the decision to make the stop.

11 Q All right. So from the time the lights went on how
12 long until Mr. Miller stopped?

13 A Right away.

14 Q What approximate distance when you say right away?
15 Maybe 100 yards or --

16 A 100 feet.

17 Q And where did you go as far as your vehicle? Did
18 Vecchio maintain --

19 A I was behind Agent Vecchio.

20 Q So Vecchio was behind the Buick?

21 A Right.

22 Q And you were behind Vecchio?

23 A Right.

24 Q Both of you were behind him. How long was it -- did
25 you call backup or do anything at that point?

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- 1 A I would call out a normal routine stop.
- 2 Q Is that after you stopped?
- 3 A Normally we do it as the blue lights are on, so you
- 4 have got -- you will have a few seconds before the car is
- 5 actually stopped and that's usually when we do it.
- 6 Q So once you stopped, what do you do when you get out
- 7 of the car? Do you do anything before you actually exit
- 8 your car after you stopped?
- 9 A No.
- 10 Q How long did it take you -- who was the first one to
- 11 Mr. Miller, the car that Mr. Miller was driving?
- 12 A Agent Vecchio on the driver's side.
- 13 Q How long -- you were watching Vecchio, I assume he
- 14 was right in front of you, right?
- 15 A Yeah.
- 16 Q So did it take five seconds or ten seconds? How long
- 17 did it take Vecchio to get to Mr. Miller?
- 18 A No more than five seconds approximately.
- 19 Q All right. Now, Vecchio was there first and you were
- 20 the one that really searched the car.
- 21 A Correct.
- 22 Q And you searched it after you got consent from
- 23 Mr. Miller to search the car.
- 24 A Correct.
- 25 Q Was he already arrested at the time and consented to

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1 the search?

2 A I'm quite sure he was.

3 Q Because it had been determined he didn't have a
4 license at that point?

5 A He may not have been in handcuffs but he had been --
6 I know I heard him ask him about the license and he said
7 he had said he didn't have a license or it had been
8 suspended and he was being questioned about that.

9 Q That questioning was taking place with Mr. Miller
10 still in the vehicle initially.

11 A At first when he said he didn't have a driver's
12 license Agent Vecchio asked him to step out of the
13 vehicle.

14 Q So Vecchio is talking to Miller. How far are they
15 from the vehicle?

16 A They are right beside it, I would say the back
17 driver's door.

18 Q And you step out to the driver's door which is open?

19 A No, I was on the passenger's side.

20 Q Oh, you were on the passenger's side. All right. So
21 where was -- I thought the marijuana was found in the
22 drivers side?

23 A The marijuana was found in the passenger's side in
24 the door.

25 Q Okay. The marijuana was found in the passenger's

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1 side of the door. So after you found the marijuana, what
2 did you do with the marijuana?

3 A Seized it.

4 Q I mean physically right there on the spot, what did
5 do you with that roach?

6 A Well, we had a plastic bag and so I placed it right
7 where it was.

8 Q Did you have those on you?

9 A I left it where it was, went back to the car and got
10 the bag.

11 Q You would have done that immediately, you saw the
12 marijuana --

13 A No. Probably I would have searched the vehicle and
14 then seized it after the vehicle had been searched.

15 Q All right. And \$456, do you think that's an
16 extraordinary amount of money for someone to have on them?

17 A Yeah, it's more than I have.

18 Q But is that -- did you determine that Mr. Miller was
19 working or not?

20 A I don't remember if we did or not.

21 Q Well, ordinarily a working person that cashes a check
22 might have that kind of money on them, would you agree
23 with me?

24 A Yes.

25 Q And you found a cellphone. The significance of a

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1 cellphone is that he had a cellphone, is that -- why was
2 the cellphone seized?

3 A For one thing in narcotics we use the cellphone to
4 get outgoing numbers and incoming numbers mainly in
5 addition to the fact that that's a tool used to make drug
6 transactions.

7 Q Just about everybody has got a cellphone now wouldn't
8 you say?

9 A Correct.

10 Q So you found the marijuana in the passenger's side
11 pocket, you found the cocaine in the glove box, you found
12 money on his person, would you not expect some of these
13 articles of drugs and paraphernalia to be kept in one
14 place together?

15 A You mean --

16 Q They were found in different places in the car and
17 he's charged with possession with intent to distribute.

18 A Right.

19 Q Is that not a bit unusual that those drug items were
20 found strung out in the car?

21 A No.

22 Q Now, did you weigh the cocaine?

23 A Probably initially we would weigh it usually.

24 Q How do you weigh that?

25 A Normally we would take it out of whichever container

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1 it's and put it on a digital scale and get an approximate
2 weight we would put on the charging papers and the report.
3 Usually differentiates some after it is analyzed, they
4 separate it and weigh just the pure drugs.

5 Q But when you weighed it what kind of weight did you
6 come up with?

7 A I thought it was close to 10 grams.

8 Q Turned out to be how much?

9 A Close to seven.

10 Q Close to seven grams. So your weighing process -- he
11 was charged initially with trafficking because it was over
12 10.

13 A Yes, sir.

14 Q But it turned out to be at least 30 percent less than
15 that?

16 A Yes, sir.

17 Q You took custody of all of the marijuana and this
18 bottle, correct?

19 A Yes, sir.

20 Q So when for our purposes did you seize those drugs?

21 A During that car stop the drugs were seized.

22 Q So that was on January 31st?

23 A Correct.

24 Q Of 2006?

25 A Yes.

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- 1 Q Well, you say you filled out the proper paperwork?
- 2 A Uh-huh.
- 3 Q Let's leave the car a minute and talk about that
- 4 since we are on that subject and you fill out the proper
- 5 paperwork. You do that in the office, you don't do that
- 6 on the scene.
- 7 A No, sir.
- 8 Q And you seized the drugs on January 31st.
- 9 A That's when I seized the drugs, yes, sir.
- 10 Q Well, what is this? What does it say about you
- 11 seizing drugs?
- 12 A You want me to read it?
- 13 Q Yeah, just read it.
- 14 A This is to certify that I, Lieutenant Harrison with
- 15 the Lancaster County Sheriff's Office on February 1st of
- 16 2006, I seized from Phillip Miller pursuant to a lawful
- 17 arrest at or near Pineview Drive and was held reliable --
- 18 Q It says it was seized on February 1st?
- 19 A Correct.
- 20 Q That's a sworn affidavit that the drugs were seized
- 21 on February 1st?
- 22 A Yes, sir.
- 23 Q And another question about this, the drugs were
- 24 seized on February 1st, correct, according to this?
- 25 A Well --

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1 Q This is not notarized. When was it notarized?

2 A It was notarized on the day before Agent Hilton takes
3 it to Columbia and it's analyzed by Sled.

4 Q Okay. So you don't have it notarized at the time
5 that you execute the paperwork?

6 A No, sir. I turn that in as evidence and the evidence
7 custodian, they get it notarized and --

8 Q They get it notarized?

9 A Yes, sir.

10 Q So you recall Robin notarizing this?

11 A No, sir. I take the evidence and turn it in and
12 that's how the process works.

13 Q Okay.

14 MR. GRIER: Your Honor, I have a matter of law that I
15 think needs to be taken up outside of the presence of the
16 jury.

17 THE COURT: All right. Ladies and gentlemen, it's
18 five minutes until 1:00. What we will do at this time is
19 break for lunch, don't discuss the case amongst yourselves
20 or with anyone else outside of the courtroom. I want you
21 to base your decision on what you hear inside of the
22 courtroom, not what someone tells you outside of the
23 courtroom. I want you to base your decision on the
24 evidence. It is 1:00, I want you to be back in your seats
25 at 2:30, have a nice lunch.

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1 (The jury left the courtroom.)

2 THE COURT: All right. I will hear from you.

3 MR. GRIER: Thank you, Your Honor. Your Honor,
4 Officer Harrison has testified as to when he seized the
5 drugs before the evidence that you've just --

6 THE COURT: Well, what number --

7 MR. GRIER: Well, Your Honor, apparently -- the only
8 one I see any proof of chain of evidence on is the crack, I
9 don't see anything about the marijuana.

10 THE COURT: All right. You're talking about State's
11 Exhibit Number 2; is that correct?

12 MR. GRIER: Yes, Your Honor.

13 THE COURT: All right. What is your motion?

14 MR. GRIER: Well, the motion is that he testified that
15 he in all of his testimony before the solicitor and
16 likewise with me that he seized the evidence on -- and the
17 incident occurred and the drugs came into his possession on
18 January 31st of 2006. He has executed -- or at least he
19 signed a notarized certificate of proof of chain of
20 physical custody or control stating that the drugs were
21 seized on February 1st, which is inconsistent with
22 testimony that he has rendered about when the evidence was
23 taken into his custody. Your Honor, that I believe would
24 render his form B rule six certificate of proof of physical
25 chain of custody or control defective and would be fatal to

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1 the chain of custody. But also, Your Honor, he has further
2 testified that he signed the certificate, dropped it and
3 that it was notarized outside of his presence and the
4 notary, of course in the State of South Carolina, has got a
5 sworn duty to witness.

6 THE COURT: Well, we haven't heard from Robin Vecchio
7 yet, she's on the witness list.

8 MR. GRIER: Mr. Harrison --

9 THE COURT: I understand he can verify that was his
10 signature when it was notarized, I assume the notary was
11 Robin Vecchio. You're saying he had to sign it in her
12 presence, is that what you're saying?

13 MR. GRIER: Well, the notary is swearing --

14 THE COURT: You mean you're notary has to confirm his
15 signature in front of under oath and that she notarized it
16 on March 14th of 2006?

17 MR. GRIER: Well, he has testified that he didn't know
18 or that he never saw it again, Your Honor, basically was
19 what his testimony was was that he didn't, and so
20 basically --

21 THE COURT: So basically you're saying that he
22 testified that the drugs were seized on January 31st and
23 the form B rule six I believe it was state certificate on
24 the brief said it was seized on February 1st and it was
25 turned over to Lieutenant Jeff Hilton on February 1st; is

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1 that correct?

2 MR. GRIER: That's correct, Your Honor.

3 THE COURT: Now, the state lab analysis says it was
4 sealed by Mr. Harrison on February 1st of 2006. And you're
5 asking me to suppress it?

6 MR. GRIER: I am, Your Honor. He says it was
7 seized -- the physical sworn or purportedly sworn affidavit
8 says it was seized on February 1st when this whole business
9 took place on another day other than February 1st and --

10 THE COURT: You're establishing chain of custody to
11 establish where the drugs went prior to testing. How does
12 that affect the chain of custody? You might be able to
13 weigh the sufficiency or the discrepancy of his testimony,
14 how he testified he took them from Mr. Miller on
15 January 6th and actually put on the form it was February
16 1st. How would that actually affect the chain of custody?
17 Because it says on State's Exhibit Number 3 that he turned
18 them on over to Lieutenant Hilton on February 1st of 2006
19 and he sealed them on February 1, 2006 and I assume some
20 other people are going to testify to establish a chain at
21 Sled. Whether it was seized on January 31st or
22 February 1st, how does that affect the chain itself?

23 MR. GRIER: Because, Your Honor, the affidavit of the
24 chain of custody he's sworn that he seized them on
25 February 1st so we know that they've been in his possession

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1 on January 31st. We have a time frame where there's no
2 evidence based on his sworn -- purportedly sworn document
3 where the paperwork does not account, which is mandatory,
4 required paperwork does not account for the chain of
5 custody of these drugs, Your Honor, it's not there. There
6 is certainly a period of custody missing there, Your Honor,
7 and that's why I believe it's relevant to the requirement
8 and --

9 THE COURT: Didn't he testify on the stand he got them
10 on January 31st, right? That's what he said on the witness
11 stand.

12 MR. LIFSEY: Yes, sir.

13 THE COURT: But the form says February 1st.

14 MR. GRIER: That's correct. And this paperwork, Your
15 Honor, I don't believe it is --

16 THE COURT: Well, there's a discrepancy on what's the
17 form B on whether he testified to it, there's a
18 discrepancy.

19 MR. GRIER: There's a discrepancy there, Your Honor,
20 which I would submit would be fatal to the chain of
21 custody.

22 MR. LIFSEY: I think that goes to admissibility -- as
23 to weight rather than admissibility. You're required as
24 near as practicable to establish a chain of custody and he
25 said he got it on January 31st, locked it in his drawer and

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1 that he's the only one that had a key for it, that he gave
2 it to Hilton on the 1st. Now, clearly he probably wrote
3 down when he was filling the form out on February 1st he
4 wrote down February 1st.

5 THE COURT: He very clearly put on the form it was
6 seized on February 1st.

7 MR. LIFSEY: And I clearly think that's an error, but
8 I don't think that goes to admissibility of the evidence
9 because his testimony was that it was at -- since the point
10 he got them out of the car they were in a secure facility.
11 He's testified to chain of custody, there's a piece of
12 paperwork where he put the wrong date on it, Mr. Grier is
13 free to argue that.

14 THE COURT: Did you ask him about the wrong date?

15 MR. LIFSEY: I didn't ask him about the wrong date.

16 THE COURT: You haven't clarified why it's wrong.

17 MR. LIFSEY: I intend to bring it up on redirect since
18 he brought it out.

19 THE COURT: Number one, I think until we establish the
20 chain, until we find out what the test results were you
21 haven't even offered it into evidence yet, I think your
22 motion is probably premature. So what I'm going to do is
23 take it under advisement, listen to the testimony when they
24 offer State's Exhibit Number 2 marked for identification
25 only, I think at that point in time I will have to rule on

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1 your motion.

2 MR. GRIER: Thank you, Your Honor.

3 THE COURT: Okay.

4 MR. GRIER: And I would like to be permitted to
5 continue cross examination of Officer Harrison.

6 THE COURT: We will do that after lunch.

7 (A lunch break was taken.)

8 THE COURT: Anything before we brings the jury back?

9 MR. GRIER: No, sir, Your Honor.

10 MR. LIFSEY: No, sir, Your Honor.

11 (At this time the jury returned to the courtroom.)

12 CONTINUED EXAMINATION

13 BY MR. GRIER:

14 Q Officer Harrison, do have you that form?

15 A Yes, I do.

16 Q Now, it has a statement in there I believe that
17 you -- it has a statement in there about when you took
18 possession of the drugs. When does that document say you
19 took possession of drugs from Phillip Miller?

20 A The document says it was February 1st of 2006.

21 Q When did the stop of Mr. Miller occur?

22 A January 31, close to midnight, on 2006.

23 Q And when did you take possession of the drugs?

24 A It would be that night, January 31st.

25 Q So it was not February 1st?

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- 1 A Not quite.
- 2 Q Who was the car that Mr. Miller was driving
- 3 registered to?
- 4 A A lady by the last name of Izzard, I believe, I don't
- 5 remember the first name.
- 6 Q So he didn't own the car?
- 7 A No.
- 8 Q And who else had access to the car, do you know?
- 9 A That night?
- 10 Q Well, just generally.
- 11 A The only one that night -- I don't know.
- 12 Q So you don't know who else had access to the car
- 13 possibly?
- 14 A No, sir.
- 15 Q And Mr. Miller consented to the search of the
- 16 vehicle?
- 17 A Correct.
- 18 Q And drugs were found in the vehicle?
- 19 A Yes.
- 20 Q And yet he consented to the search. Why would he
- 21 consent to the search if there were drugs in there? Do
- 22 you have an explanation for that?
- 23 A Why would he consent?
- 24 Q Yes.
- 25 A Are you asking my opinion on that?

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1 Q Yeah.

2 A My opinion is that the drugs were in a compartment up
3 in the dash, there's a hole that was up in there, my
4 opinion is that he didn't think the drugs would be found.
5 Well, actually when they stopped the car it fell out of
6 the hole actually up in the glove compartment where you
7 can put your hand up in there, it looked like a hidden
8 compartment that was made for concealing things.

9 Q Okay. Well, what were the results of the fingerprint
10 test on this bottle?

11 A As far as I know there wasn't a fingerprint test
12 done.

13 Q Why wasn't there a fingerprint test done on this?

14 A Probably because I picked it up right away when I
15 seen it, my fingerprints would have been on it.

16 Q Well, your fingerprints would have expected to have
17 been on it, right?

18 A Yes.

19 Q But you didn't check to see if Mr. Miller's
20 fingerprints would have been on it?

21 A No, sir.

22 Q Wouldn't that have been a lot more conclusive had you
23 done that?

24 A Well, I don't know about that.

25 Q Any evidence that he was trying to sell any drugs to

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1 anybody?

2 A That night, no.

3 Q No evidence that he -- well, no drugs were found on
4 his person.

5 A No, sir.

6 Q Did you search his home?

7 A No.

8 Q Did you search the home of the person the vehicle was
9 registered to, the address?

10 A No.

11 Q That was Pardue Street Apartments, wasn't it?

12 A I believe it was.

13 Q But you didn't follow-up with any search of anyone's
14 residence as a result of finding these drugs to see if
15 there were any other drugs?

16 A No.

17 Q Well, do you know much about Pardue Street
18 Apartments?

19 A Yes, sir.

20 Q There's a lot of drug cases made at Pardue Street
21 Apartments?

22 A In the past there were, but in the last few years it
23 has slowed down a lot.

24 Q Well, it has a history of having a lot of drug
25 transactions, doesn't it?

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- 1 A Correct.
- 2 Q And that's where the car was registered to?
- 3 A Yes.
- 4 Q Are you married?
- 5 A No.
- 6 Q Are you not married?
- 7 A No.
- 8 Q Got a girlfriend?
- 9 A Yes.
- 10 Q Has she got a car?
- 11 A Yeah.
- 12 Q Do you ever drive it?
- 13 A Sometimes.
- 14 Q What's in her glove box right now?
- 15 A Paperwork, cord to a cellphone, maybe some makeup.
- 16 Q You know what's in there?
- 17 A I know those items are.
- 18 Q Could there be other things in there that you don't
- 19 know about?
- 20 A Possibly.
- 21 MR. GRIER: Thank you, Officer. That's all of the
- 22 questions I have.
- 23 THE COURT: Redirect?
- 24 MR. LIFSEY: Briefly, Your Honor.
- 25 REDIRECT EXAMINATION

TESTIMONY OF PAUL HARRISON

1 BY MR. LIFSEY:

2 Q Officer Harrison, Mr. Grier asked you about the fact
3 that what has been marked as State's Exhibit 3 shows that
4 the drugs were taken on February 1st; is that correct?

5 A Correct.

6 Q And this traffic stop happened about 10:00 in the
7 evening, it began at 10:00.

8 A Yes, sir.

9 Q Well, when you arrest somebody without getting into
10 all of the details, is this a process that's over five or
11 ten minutes or it lengthy?

12 A It would be longer.

13 Q So I guess the important thing to ask is from the
14 moment you took possession of those drugs did they leave
15 your secure grasp at any point before Hilton gets them?

16 A No.

17 Q So in other words, you took them and you sealed them
18 up into your locked drawer until you could get them to
19 Officer Hilton; is that correct?

20 A That's right.

21 Q Mr. Grier asked you about the owner of the vehicle
22 that was in question that Mr. Miller was operating.

23 A Correct.

24 Q Have you seen Mr. Miller operate this car before?

25 A I have.

TESTIMONY OF PAUL HARRISON

1 Q Were you surprised to see him operating this car?

2 A No.

3 Q That night, was anybody else in that car besides him?

4 A He was the only one.

5 Q Did he have the dominion and control over that car?

6 A Yes, he did.

7 Q Mr. Grier asked you, do you remember him asking you

8 about a drug transaction at Pardue Street Apartments, do

9 you remember him asking you a question about that?

10 A Yes.

11 Q Based on your experience as an officer on Pardue

12 Street Apartments or anywhere else there might be drugs,

13 do people leave seven grams of crack laying around?

14 A No, they don't.

15 Q Is that a fairly valuable commodity?

16 A Yes.

17 MR. LIFSEY: I don't have any further questions of

18 this witness.

19 THE COURT: Recross?

20 MR. GRIER: No, Your Honor, thank you.

21 THE COURT: You may step down, thank you very much.

22 Call your next witness, please.

23 MR. LIFSEY: I call officer Doug Vecchio to the stand.

24 The witness, DOUGLAS VECCHIO, was first duly sworn and

25 Testified as follows, on:

TESTIMONY OF DOUGLAS VECCHIO

1 DIRECT EXAMINATION

2 BY MR. LIFSEY:

3 Q State your full name, sir.

4 A Douglas Michael Vecchio.

5 Q Mr. Vecchio, what do you do for a living, sir?

6 A I work for the sheriff's office in Lancaster County.

7 Q How long have you been a police officer?

8 A About 20 years.

9 Q Were you a police officer on January 31st of 2006?

10 A Yes, I was.

11 Q What were you doing that evening at close to 10:00 at
12 night?

13 A We were pretty much just riding and checking places.

14 I received a call from the radio from Officer Harrison who
15 was my boss, asked me if I was close to the car wash on
16 the bypass and I was.

17 Q What did he tell you?

18 A He told me he saw Phillip Miller pull into the car
19 wash and wanted me to watch him.

20 Q What happened next?

21 A When I got close he told me he was leaving the car
22 wash and was heading south on the bypass and I just
23 happened to go behind him.

24 Q What did you do? Did you follow him?

25 A Yeah, I followed him.

TESTIMONY OF DOUGLAS VECCHIO

1 Q Describe to the jury where you went and what
2 happened.

3 A We headed down the bypass and then hit the two lane
4 right there, followed him down there, and then he took a
5 right on Tanneyhill Road and I guess that's where I
6 started getting a little closer up on the tail a little
7 bit. I noticed he swerved a little bit and I called my
8 boss and told him he started swerving a little bit and so
9 he started -- I guess he told me to get closer. When he
10 turned onto Pineview he kind of went in the other lane and
11 then I made the decision just to go ahead and stop him. I
12 didn't know what was wrong with him and I just wanted to
13 check him out.

14 Q Did he stop once you -- you activated your blue
15 lights I assume; is that correct?

16 A Yes, sir.

17 Q What happened next?

18 A He pulled over, didn't have a problem, he pulled
19 right over. I think he turned over on one of the little
20 side roads right there, I think it was Cambridge Drive or
21 something like that.

22 Q What happened?

23 A I got out of the car, walked up to him, told him who
24 I was and why I stopped him. I asked him -- it was pretty
25 much a little conversation and asked him if he had a

TESTIMONY OF DOUGLAS VECCHIO

1 driver's license and he said that he didn't.

2 Q Okay.

3 A Smelled a little alcohol, we asked him to step
4 outside and we started talking to him a little bit.

5 Q What happened? Did he step outside?

6 A He did. He told me he didn't have a driver's license
7 so I told him at that point that he was under arrest. I
8 talked to him a little bit more and asked him if there was
9 anything in the car or anything like that and he said no.
10 I asked him if he minded if we searched it and he said
11 that's fine.

12 Q At some point did Officer Harrison tell you anything
13 that he had seen?

14 A Yeah. He -- pretty much what happened was my job was
15 to stay with Mr. Miller, we both can't be searching and
16 leaving somebody, you know, alone at that point. So he
17 told me what he had and I just stayed with Mr. Miller
18 pretty much the whole time.

19 Q Did he tell you he found the marijuana?

20 A Yeah, he told me that he found the marijuana.

21 Q So when he finds the marijuana, what, you take
22 custody of Miller, is that your job?

23 A Yeah.

24 Q Did you participate at any point with the search of
25 the vehicle itself or anything?

TESTIMONY OF DOUGLAS VECCHIO

1 A No, sir.

2 Q So you just basically watched Miller, kept him in a
3 safe --

4 A Correct. Because we have a -- we use undercover
5 cars, our cars don't have the cages and door locks and
6 everything and it's just our policy that somebody stays
7 with that person all of the time.

8 Q So you did that while he searched the car.

9 A Correct.

10 Q So you never actually were involved in the handling
11 of the drugs.

12 A No, sir.

13 Q Okay.

14 MR. LIFSEY: I don't have any further questions, Judge
15 for this witness.

16 THE COURT: Cross examination?

17 MR. GRIER: Thank you, Your Honor. May it please the
18 Court? Mr. Lifsey?

19 CROSS EXAMINATION

20 BY MR. GRIER:

21 Q Officer Vecchio, y'all were just checking all of the
22 plain areas, is that what you were doing?

23 A Pretty much, higher drug areas. Then we had a four
24 man team, we would split up, if he would get information
25 on one thing or I get information I'll check that, or if

TESTIMONY OF DOUGLAS VECCHIO

- 1 something calls up we will call each other.
- 2 Q Who was the four man team?
- 3 A Then it was myself, Paul Harrison, Ryan McClemore and
- 4 Steven Marshal.
- 5 Q Phillip Hall was not a part of that?
- 6 A No, he worked for the city police department.
- 7 Q Right, okay. So he wasn't involved?
- 8 A Beg your pardon?
- 9 Q I said he was not involved in this?
- 10 A You're talking about this incident?
- 11 Q Yeah.
- 12 A Back then he had county jurisdiction, he was serving
- 13 warrants, he would just be one of those if he heard
- 14 something on the radio you might need backup and he would
- 15 show up.
- 16 Q Okay. Do you know if he was involved in this at all?
- 17 A To be honest I don't remember.
- 18 Q Do you recognize this document?
- 19 A Yeah, I recognize it.
- 20 Q Who filled that out?
- 21 A It says Hall.
- 22 Q What is the name of that document?
- 23 A It was the initial report of seizure.
- 24 Q Who does it say were the officers?
- 25 A It was myself, Paul Harrison, Steven Marshal and

TESTIMONY OF DOUGLAS VECCHIO

1 Phillip Hall.

2 Q So somehow Phillip Hall was present; is that right?

3 A Right.

4 Q And you say you saw him take a wide turn, that was
5 off of Cane Mill onto Pineview?

6 A Right.

7 Q Did you activate your blue light right then?

8 A Well, when he turned I waited until he got back in
9 his lane before I activated the blue light.

10 Q Well, what is the distance from Cane Mill onto
11 Pineview would that have been approximately?

12 A I would guess maybe 100 feet or so.

13 Q And did he turn onto Cambridge.

14 A Yeah. When I activated my blue light he slowed down
15 and he turned over I guess to get off of the flow of
16 traffic, Pineview is a lot less traveled.

17 Q How far is Cambridge down there?

18 A I think -- when you turn I want to say it might be
19 the second road on the right so it's not far.

20 Q Couple hundred yards, or a few hundred yards at
21 least, though, isn't it?

22 A Maybe not that far. It's close.

23 Q Do you recall what Steven Marshal did at the scene?

24 A No.

25 Q You don't recall anything that Phillip Hall did at

TESTIMONY OF DOUGLAS VECCHIO

1 the scene?

2 A No.

3 Q You don't recall him being there?

4 A No.

5 Q Is your vehicle equipped with video?

6 A No, it's not.

7 Q Was Officer Harrison's vehicle?

8 A None of our investigator's cars have video in them.

9 Q Did you ever have your hands on the drugs?

10 A No.

11 Q Who physically took -- you seized the vehicle.

12 A We seized the vehicle.

13 Q Well, you, we --

14 A The sheriff's office seized it.

15 Q Who is responsible on the scene for the seizure of
16 that vehicle?

17 A That would be Paul Harrison's responsibility.

18 Q So how does that process of seizing a vehicle work?

19 A As far as --

20 Q You call a wrecker and have them tow it, I'm talking
21 about taking possession of that vehicle when you seize it?

22 A Usually we call the wreckers and what they do is they
23 take it out to the drug task force to analyze it. It's
24 like a big garage but it's all covered and secured and all
25 of that. We usually put it there until we get it back or

TESTIMONY OF DOUGLAS VECCHIO

1 whatever, it usually stays there until -- it keeps it out
2 of the weather and keeps anybody from breaking in.

3 Q Okay. That vehicle belongs to Melvina Izzard?

4 A Yeah, I think it did.

5 Q As far as you know her address is listed as Pardue
6 Street Apartments?

7 A I don't know what her address is.

8 Q Do you know anybody else that used that vehicle? Do
9 you know of any other use of anybody for the vehicle that
10 was seized in this case?

11 A Do I know of anybody else?

12 Q Have you ever seen anybody else driving that vehicle?

13 A No.

14 MR. GRIER: Thank you, Officer Vecchio.

15 MR. LIFSEY: Briefly on redirect if I may, Judge.

16 THE COURT: Yes, sir.

17 REDIRECT EXAMINATION

18 BY MR. LIFSEY:

19 Q Officer, Mr. Grier asked you about some questions
20 about the affidavit of the initial report and seizure
21 document; is that correct?

22 A Yes, sir.

23 Q I'm going to show you that one that he was asking you
24 about.

25 A Yes, sir.

TESTIMONY OF DOUGLAS VECCHIO

1 Q That form requires you to list all of the officers
2 that were present at the scene; is that correct?

3 A Yes. As far as I know, yes, sir.

4 Q That doesn't mean that all of them touched the drugs
5 or did anything out there, does it?

6 A No.

7 Q Is it unusual for multiple officers to respond to a
8 scene especially the guys that are on the drug unit work
9 cases?

10 A Sometimes they come five or ten minutes after the
11 initial stop, that's not unusual.

12 Q You were out there the entire time; is that right?

13 A Well, I was out there the entire time with
14 Mr. Miller.

15 Q That's correct.

16 A Yes, sir.

17 Q To the best of your knowledge did anybody involved in
18 this case touch the drugs after they were seized from
19 Miller besides Officer Harrison?

20 A No.

21 Q I also would direct you to the last page of the
22 seizure document that talks about other vehicles that
23 might be seized. What does it say on that line that
24 Officer Harrison filled out?

25 A It says this is the only vehicle that Miller was

TESTIMONY OF LEONARD JEFFREY HILTON

1 known to drive.

2 MR. LIFSEY: I don't have any further questions,
3 Judge.

4 THE COURT: Any recross?

5 MR. GRIER: No, thank you, Your Honor.

6 THE COURT: You may step down. Thank you. Call your
7 next witness.

8 MR. LIFSEY: I call Jeff Hilton to the stand.

9 The witness, LEONARD JEFFREY HILTON, was first duly
10 Sworn and testified as follows, on:

11 DIRECT EXAMINATION

12 BY MR. LIFSEY:

13 Q Would you state your full name, please?

14 A Leonard Jeffrey Hilton.

15 Q What do you do for a living, sir?

16 A I work with the Lancaster County Sheriff's Office as
17 a deputy sheriff.

18 Q Do you -- what all duties do you have at the
19 sheriff's office?

20 A Currently I am supervisor of evidence, training
21 officer. I am the coordinator of the SWAT team, K-9 units
22 and assist the administrator on the computer system.

23 Q Back on January 31st and February 1st of 2006, was
24 part of your job -- you say you were involved with
25 evidence; is that right?

TESTIMONY OF LEONARD JEFFREY HILTON

1 A Yes, sir.

2 Q Would you relate to the jury what your job is, what
3 kind of things you do and what did you at that time?

4 A During that time I was actually head of evidence.
5 What I would do is when officers would bring evidence to
6 the sheriff's office and turn it over to me, it's my
7 responsibility to log the evidence in and get it to the
8 appropriate place that we needed to store it until we go
9 to court and take evidence to Sled.

10 Q Okay. When you say transport the evidence to Sled,
11 and I'll talk about the crack in a minute, but the
12 marijuana, how do y'all handle the marijuana?

13 A We have an in-house technician that's been certified
14 by Sled to analyze marijuana and we analyze the marijuana
15 in-house.

16 Q Who is the in-house person that usually does it with
17 y'all?

18 A Currently that would be Robin Vecchio.

19 Q I'm going to show you an exhibit that's previously
20 been marked as State's Exhibit 1?

21 MR. LIFSEY: And I'll also have this marked as the
22 next exhibit, please.

23 Q What are these two things I just handed you?

24 A First one is a manila envelope that's used to store
25 evidence at the sheriff's office. And the second is what

TESTIMONY OF LEONARD JEFFREY HILTON

1 is called a chain of custody that's assigned a piece of
2 evidence that we have.

3 Q What does that chain of custody form tell you about
4 how you handled that marijuana?

5 A This particular piece of evidence that -- the manila
6 folder itself has a tag on it, and you look at the tag
7 that is on there and it has an item number. First of all
8 it has a case number that tells us that this evidence
9 actually belongs to this particular case. The second
10 number you will see on there is the item number which
11 identifies this item number as belonging to this
12 individual case. And this item number is specifically
13 this case in each piece of evidence that's generated at
14 the sheriff's office has its own individual item, so
15 there's no two identical item numbers at the sheriff's
16 office.

17 Q What, if anything, can you tell me about when you got
18 that item and what you did with it?

19 A Looking at the chain of custody when I received the
20 item I took it into the lab and it was placed into the lab
21 box, which is a box that we call the to-be-analyzed box.
22 We analyze the marijuana in-house itself, so any marijuana
23 we get we secure it inside of the lab until the marijuana
24 was analyzed.

25 Q Who did you get it from?

TESTIMONY OF LEONARD JEFFREY HILTON

1 A I got it from Paul Harrison.

2 Q Go ahead.

3 A Once I received the marijuana I secured it into the
4 box, took the necessary paperwork to Robin Vecchio, she
5 actually entered the information into the computer.

6 Q And she is ultimately the person who went ahead and
7 did the analysis; is that correct?

8 A Yes, sir, that's correct.

9 MR. LIFSEY: Your Honor, I want to move what has been
10 marked as State's Exhibit Number 6 into evidence.

11 THE COURT: Any objection?

12 MR. GRIER: No objection.

13 THE COURT: Six admitted without objection.

14 (The marijuana was received as State's 6.)

15 Q I'm going to hand you what's been marked as State's
16 Exhibit Number 2. What is that?

17 A This is what is commonly referred to as a BEST kit
18 that has been returned from Sled, the State Law
19 Enforcement Division.

20 Q All right. Now, what is a BEST kit, explain that.

21 A A BEST kit I think stands for Best Evidence Signed
22 for Testing. Any time we have any narcotics that needs to
23 go to Sled, what happens is the individual officer that
24 seized the items takes the narcotics or drugs, places them
25 inside of what we call the BEST kit envelope, which is

TESTIMONY OF LEONARD JEFFREY HILTON

1 actually inside this envelope. They will seal it, once
2 they seal it what they do is they seal it and put their
3 name in parenthesis right there. And that way if the seal
4 is broken we won't take it because the chain of custody
5 has been broken and it's not pure. So once I received it
6 from the individual officer who packaged it that's the
7 first thing I do is check the seal to make sure that the
8 seal is in tact. If the seal is in tact then I will take
9 this item from that officer. Once I take it then I make
10 sure that the proper paperwork has been filled out and
11 then I place that into the BEST kit envelope, and then
12 what we do is we actually have a box inside the lab that
13 we keep BEST kits in and when we get enough BEST kits we
14 will then make a trip to Columbia and transport those
15 items to Sled.

16 Q Did you, in fact, do that with that item? Did you
17 take it to Sled?

18 A Yes, sir, I did.

19 Q I'm going to hand you what has been marked for
20 identification as State's Exhibit Number 7. What is that?

21 A That's commonly referred to as our form C, which I
22 also call a substantive change of custody. When an
23 officer completes the BEST kit then they bring it to me,
24 this form is actually filled out showing the transfer of
25 the item from that individual officer to myself or whoever

TESTIMONY OF LEONARD JEFFREY HILTON

1 takes possession of it.

2 Q Okay. What does it show you ultimately do -- does it
3 show what you do with it once you get it?

4 A Yes, sir. If you look at the form C it shows that I
5 actually took possession of this individual BEST kit on
6 February 1st of 2006 from Lieutenant Paul Harrison. That
7 item -- the BEST kit was kept inside the bag at the
8 sheriff's office until March 15, 2006 at which time it was
9 transported to the State Law Enforcement Division,
10 normally called Sled where it was completed at intake
11 through Amy Stevens at Sled.

12 Q So in other words you took it to Columbia and gave it
13 to Sled, specifically gave it to a woman named Amy Stevens
14 at Sled; is that correct?

15 A Yes, sir, that's correct.

16 Q Is that what that document shows?

17 A Yes, it is.

18 MR. LIFSEY: I'll move this into evidence at this
19 time.

20 MR. GRIER: I have no objection.

21 THE COURT: Seven admitted without objection.

22 (The form was received as State's 7.)

23 Q All right. I'm also going to show you what has been
24 marked as State's Exhibit 8. Do you know what that is?

25 A This is the receipt from Sled showing that I

TESTIMONY OF LEONARD JEFFREY HILTON

1 delivered this Best kit to Sled and the name of the person
2 who took it from me.

3 Q I'm going to show you -- when does it show you
4 checked it in to sled, date and time?

5 A It shows March 15, 2006 at 11:31 a.m.

6 Q Who does it show you gave it to?

7 A Amy Stevens.

8 Q Then ultimately it's got some things -- and we will
9 hear from other folks about what they did at Sled -- does
10 it at some point indicate you got it back from Jason
11 Waldkirch, does it indicate when you got the item back?

12 A Yes, sir. On 7/27/2006 I received this item back
13 from Sled personally, went down there to take a load of
14 evidence and as we go down to drop the evidence off I
15 check to see if we have got any to be returned. On
16 July 26, 2006 at 14:04, which was 2:04 p.m. I took that
17 item back into possession and transported it back to the
18 sheriff's office.

19 MR. LIFSEY: Your Honor, I would offer State's Exhibit
20 Number 8.

21 THE COURT: Any objection?

22 MR. GRIER: No objection.

23 THE COURT: State's 8 admitted without objection.

24 (The form was received as State's 8.)

25 Q When you got it back from Sled in July, was this the

TESTIMONY OF LEONARD JEFFREY HILTON

1 condition that you got it back in?

2 A This was the condition that I got it back in, with
3 the exception of the white tag. It has got a back drop on
4 it that says LCS. What we do is when we get it back it
5 just makes it easier for us to document and place it
6 inside of the evidence room for quick retrieval if we need
7 it and request the evidence and the case number here
8 instead of trying to find the BEST kit number, it's just
9 easier to retrieve for us. This is the only additional
10 thing that I placed on this bag once I received it back
11 from Sled.

12 Q When you received it back from Sled, what did you do
13 with it at that point?

14 A It was placed inside the evidence vault and that's
15 where it stayed at until it got ready to come to court.

16 Q Has it been opened at all since you brought it back
17 from Sled?

18 A The best I can tell, no, sir.

19 Q What kind of -- did you work a regular first shift
20 back then?

21 A Yes, sir.

22 Q So it wouldn't have been -- when drugs are seized
23 after you're not working, would it have been anything
24 unusual for the officer just to lock it up until he could
25 get it to you the next day?

TESTIMONY OF LEONARD JEFFREY HILTON

1 A No, sir, that's common practice.

2 Q And apparently for some reason -- I'm going to hand
3 you what has already been introduced into evidence as
4 State's Exhibit Number 3. For some reason Robin Vecchio
5 didn't notarize that until some time in March. Is that
6 unusual in the way they do it out there?

7 A Yes, sir. What we usually do is once the BEST kit is
8 completed all of the paperwork goes inside of the BEST
9 kit, and the date of or the date that it was traveled to
10 Sled we will pull out the BEST kit, make sure the
11 paperwork is then filled out proper and then have it
12 notarized and then we transport it to Sled.

13 MR. LIFSEY: I don't think I have anymore questions.

14 THE COURT: Cross examination.

15 CROSS EXAMINATION

16 BY MR. GRIER:

17 Q Officer Hilton, on the form C, rule six you say that
18 the day that it is taken to Sled it's notarized?

19 A It's either the day of or the day before it is.

20 Q How does that process of getting it notarized, what
21 is that?

22 A Well, we just pull out the form, take a look at the
23 signatures on there to make sure that they're signatures
24 that we know. Most of these drug officers have been
25 working with us for ten or 15 years, we know their

TESTIMONY OF LEONARD JEFFREY HILTON

1 signatures. Sometimes we actually give them a call and
2 say, "Just want to make sure you signed these things," and
3 they will, they did and we notarize it.

4 Q So the officers don't actually appear in front of you
5 and attest to it -- you didn't notarize it, did you, your
6 own signature certainly.

7 A I didn't.

8 Q But you would on occasion, I guess, notarize someone
9 else's. You're a notary?

10 A Yes, sir.

11 Q So you might notarize someone else's signature,
12 another officer if you're not on that particular document
13 as either receiving it or something?

14 A Yes.

15 Q But as far as the process of notarizing those
16 documents, you don't actually have anybody appear in front
17 of you and have them -- it's common place that you'll just
18 look at those and say, "I recognize that," and notarize
19 it.

20 A Well, it depends. A lot of it depends. If it's
21 somebody that we know, like Paul Harrison has a signature
22 that is pretty distinctive, I have known Harrison for
23 going on 20 years now. So if he brought something to me
24 and laid it down and said, "I need it notarized," and
25 walked off, or if he calls me on the phone and says, "I

TESTIMONY OF LEONARD JEFFREY HILTON

1 left something in your box that I need notarized, would
2 you notarize it for me?" I would notarize it, yes, sir.

3 Q Well, what if he dropped it in the box and it just
4 appeared and you got the drugs and the form was in there
5 with it and you saw the signature on it, would that be
6 something that either you or Robin might notarize just
7 based on it's in there in the box with his signature on
8 it?

9 A Yes, sir. If I recognize the signature.

10 Q That's without him appearing and saying anything to
11 you about it, correct?

12 A Yes, sir.

13 Q Okay. Now, were you on the drug task force at one
14 time yourself?

15 A No, sir.

16 Q Well, have you field-weighed or have you weighed
17 drugs before in the line of your duties for any reason?

18 A No.

19 Q Never have?

20 A No.

21 Q Do you know anything about that? Have you been
22 trained in it?

23 A Not in the weight measuring of the drugs, no, sir.

24 Q Do you know how that process is done for the purposes
25 of determining the charge?

TESTIMONY OF LEONARD JEFFREY HILTON

1 A I have no idea.

2 Q All right. Robin Vecchio, what are her duties?

3 A Robin is actually the evidence technician and I am
4 her supervisor.

5 Q And she doesn't -- the only reason she takes custody
6 of -- and I understand from your testimony that she's
7 trained to test marijuana for the department in-house,
8 she's certified?

9 A Yes, sir. She's completed the required courses and
10 she's certified by the state to analyze marijuana.

11 Q And the only reason that she would be in the chain of
12 custody and would have her hands on it is for the purposes
13 of field testing the marijuana?

14 A No, sir. At this point she is actually the full
15 blown evidence technician so she took my old job. What
16 she does now is when somebody brings drugs or any evidence
17 to her she actually takes physical custody of any evidence
18 at the sheriff's office now, enters it into the computer
19 and places it where it needs to be placed.

20 Q All right. If would you revisit one thing for me, I
21 didn't quite understand. Do you physically -- you have a
22 drop box that you check from time to time?

23 A Yes, sir, we do.

24 Q And does that drug box get full sometimes to the
25 point where --

TESTIMONY OF LEONARD JEFFREY HILTON

1 A You're talking about the drug box?

2 Q Yes, excuse me. Did I say mailbox?

3 A It does.

4 Q If it's full is it just literally overflowing or can
5 you not put stuff in there? How does it -- what does it
6 mean to somebody trying to put drugs in there when it's
7 full?

8 A If it is full they just simply won't go in. It's the
9 drop box actually sits inside of a secured evidence room
10 and the evidence room is actually secured by an alarm. So
11 if anybody tries to go in without de-arming the alarm the
12 alarm it will go off. So when they get ready to drop any
13 evidence off -- some of the items won't fit through the
14 little door that we have, which is relatively small. BEST
15 kits usually fit through, but sometimes if it's full if I
16 put it in it won't drop all of the way in and pull it back
17 out.

18 Q How big is the opening?

19 A Slightly larger than an envelope, so a weapon or
20 anything wouldn't fit down in there.

21 Q Slightly larger than an envelope?

22 A Yes, sir.

23 Q Is this bottle larger than an envelope?

24 A It looks larger to me.

25 Q How would you put this into the drop box?

TESTIMONY OF AMY STEVENS

1 A It may not fit.

2 MR. GRIER: Thank you, Officer Hilton.

3 MR. LIFSEY: I have nothing further, Judge. State
4 calls Amy Stevens.

5 The witness, AMY STEVENS, was first duly sworn and

6 Testified as follows, on:

7 DIRECT EXAMINATION

8 BY MS. MINGO:

9 Q State your full name, please.

10 A Amy Stevens.

11 Q Where are you employed?

12 A I work with the South Carolina Law Enforcement
13 Division, also known as Sled.

14 Q How long have you been employed there?

15 A Since March 19th of 2006.

16 Q What is your job title?

17 A I am known as a forensic technician.

18 Q Can you kind of explain in laymen's terms what you
19 do?

20 A I work in the logging department of evidence and
21 control, and what I do is I log in the evidence that
22 outside agencies and inside agencies present to us.

23 Q Ms. Stevens, I'm going to show you what has been
24 marked as State's Exhibit Number 2. Can you identify what
25 that is?

TESTIMONY OF AMY STEVENS

1 A According to the lab number, yes, ma'am, I can.

2 Q What do you recognize it to be?

3 A The lab number is L063727, item number one.

4 Q Okay. Where did you -- who did you get the item
5 from?

6 A I received this item from Jeff Hilton of the
7 Lancaster County Sheriff's Office.

8 Q I'm going to show you what's been marked as State's
9 Exhibit Number 9. Do you recognize that?

10 A Yes, I do.

11 Q What is that?

12 A We call it a receipt that we give the officers that
13 submit the evidence.

14 Q So Mr. Hilton, he gave you State's Exhibit Number 2
15 and you gave him a copy of that receipt?

16 A Yes.

17 Q Okay. Now, did this container appear to have been
18 tampered with or altered in any way?

19 A Not to my knowledge, no, ma'am.

20 Q Okay. Now, did you transfer it to anybody? What did
21 do you it once he gave it to you?

22 A Once I logged it into our computer I then submitted
23 it into our drug intake storage, which is in our evidence
24 room in a locked cage.

25 Q It's in a locked cage?

TESTIMONY OF AMY STEVENS

1 A Uh-huh.

2 Q Do people have access to it?

3 A Myself and three other technicians have access to it
4 and that's it.

5 Q Did you tamper with the item at all while it was in
6 your custody?

7 A No, I did not.

8 MS. MINGO: Your Honor, at this time I move to
9 introduce State's Exhibit Number 9.

10 THE COURT: Any objection?

11 MR. GRIER: I don't have any objection.

12 THE COURT: State's Exhibit 9 admitted into evidence
13 without objection.

14 (The receipt was received as State's 9.)

15 MS. MINGO: Thank you, Ms. Stevens.

16 THE COURT: Cross examination?

17 MR. GRIER: Yes, Your Honor.

18 CROSS EXAMINATION

19 BY MR. GRIER:

20 Q Ms. Stevens, you said that you and three other
21 persons have access to that locked cage, is that what you
22 call it?

23 A Yes.

24 Q And you said you didn't tamper with it.

25 A No, sir.

TESTIMONY OF JASON WALDKIRCH

1 Q What about the other two people?

2 A I'm not sure, you would have to ask them.

3 Q You don't know anything about what they would have
4 done, do you?

5 A I'm sure they wouldn't have tampered with it.

6 Q You still don't know what they could have done, do
7 you?

8 A No, sir.

9 MR. GRIER: That's all.

10 THE COURT: Redirect?

11 MS. MINGO: No, sir, Your Honor.

12 The witness, JASON PETER WALDKIRCH, was first duly
13 Sworn and testified as follows, on:

14 DIRECT EXAMINATION

15 BY MR. LIFSEY:

16 Q State your full name, please.

17 A My name is Jason Peter Waldkirch.

18 Q What do you do for a living?

19 A I'm a scientist.

20 Q Where do you work today? Where are you employed now?

21 A I'm currently employed by Albemarle in Orangeburg,
22 South Carolina, sir.

23 Q Back in 2006 where did you work, sir?

24 A I worked at the South Carolina Law Enforcement
25 Division, commonly call Sled, sir.

TESTIMONY OF JASON WALDKIRCH

1 Q What was your job?

2 A I was a special agent forensic scientist in the drug
3 analysis lab.

4 Q What does that mean sort of in laymen's terms?

5 A That means as a scientist I was responsible for
6 analyzing submissions to our lab from the local police
7 agencies to determine if they contained any controlled
8 substances or not.

9 Q Tell me about your educational background, what kind
10 of background do you have?

11 A Sir, I have a BS Degree in Chemistry from the
12 University of Wisconsin. I have several years of graduate
13 school in chemistry at Penn State with no degree. I have
14 spent four years in the chemical industry as a practicing
15 organic chemist. I completed the South Carolina Criminal
16 Justice Academy basic law enforcement training. I
17 attended several drug training -- law enforcement drug
18 training exercises, and I've also completed the Sled
19 internal training program for forensic drug analysts.

20 Q And part of all of that training, I guess, goes to
21 being able and analyze and determine what are controlled
22 substances?

23 A Yes, sir.

24 Q Have you testified in court before?

25 A Yes, sir. I have testified in drug analysis twice

TESTIMONY OF JASON WALDKIRCH

1 before.

2 Q Have you had -- how many times have you analyzed
3 substances to determine -- approximately how many times to
4 determine whether or not there was drugs involved?

5 A I can't give you an exact number, but I'm going to
6 estimate, sir, that I have worked between 1,000 and 2,000
7 samples of the suspect evidence while I was at Sled.

8 Q Does Sled have any internal methods to sort of check
9 y'all's work and see how you are doing?

10 A Yes, sir. Once my training was complete every case I
11 worked for one year after that was 100 percent technically
12 reviewed. That means a senior more experienced drug
13 chemist went after me and checked all of my results, all
14 of my paperwork and made sure I was not making any errors
15 in my analysis. After that first year then I went to -- I
16 forget exactly what this was -- but I believe it was
17 10 percent technical review where 10 percent of my cases
18 were analyzed at random to make sure I was not making any
19 mistakes.

20 Q How long did you work for Sled?

21 A I worked at Sled for just under two and a half years,
22 sir.

23 Q And your leaving Sled, I guess -- did you leave Sled
24 to advance your career or what?

25 A I wanted -- my education is more in the research and

TESTIMONY OF JASON WALDKIRCH

1 development organic chemistry. The work I did at Sled was
2 the analytical chemistry and I wasn't excited about that.
3 The novelty wore off and I wanted to move back to
4 something that I had gone to school and to graduate school
5 for, which was more research and development.

6 MR. LIFSEY: Your Honor, I would move that he would be
7 qualified as an expert witness in the field of drug
8 analysis.

9 THE COURT: Any objection? Do you want to do any
10 cross examination of his qualifications?

11 MR. GRIER: Just a bit.

12 CROSS EXAMINATION

13 BY MR. GRIER:

14 Q Is it Walters?

15 A Waldkirch, sir.

16 Q When did you leave Sled?

17 A My last day was March 15th.

18 Q Of 2007?

19 A Yes, sir.

20 Q So you aren't particularly excited about that job,
21 you wanted to do something different?

22 A Yes, sir. I wanted to do something more with organic
23 chemistry.

24 Q So you were doing something at Sled you really didn't
25 want to be doing.

TESTIMONY OF JASON WALDKIRCH

1 A Well, I wouldn't put it that way, sir. It was just
2 this was a better opportunity for my career.

3 Q Well, did the fact that you really weren't doing what
4 was the best opportunity for you have any effect on --

5 MR. LIFSEY: Judge, I would object as to what basis
6 this has to do with whether he's qualified as an expert
7 witness or not.

8 THE COURT: I agree with you, this is cross
9 examination as to his qualifications. When you have the
10 opportunity for cross you can do that, but right now this
11 is on his qualifications as a chemist.

12 MR. GRIER: I'll wait until cross examination. Thank
13 you.

14 THE COURT: Do you have any objection to him being
15 qualified?

16 MR. GRIER: I do not.

17 THE COURT: The Court so finds. Please proceed,
18 Solicitor.

19 Q Explain what your job entailed in general terms
20 before we get to the specifics of this case, what you did
21 when drugs came in, how you got them. Just give us some
22 background, if you would.

23 A Sure. Typically when a drug case would come in the
24 local agency police officer would bring that to the drug
25 intake area that Ms. Stevens just spoke about briefly

TESTIMONY OF JASON WALDKIRCH

1 before, they would put it in their storage area. The case
2 would be assigned to me by my lieutenant or whoever was
3 assigned cases for that period. I would go down and pick
4 up the drug evidence, take it back upstairs, put it into
5 my custody in the computer system, and then store it in
6 our secured drug vault until it was time for me to work
7 that specific case. I would work that case, perform the
8 chemical and any instrumental analysis on it, then I would
9 get the data from the instrument, I would then proceed to
10 write up the report. And I would have -- the report would
11 be reviewed, if necessary, and then be sent out to the
12 agency. The drugs would be returned to the evidence
13 intake where they are returned to the agents the next time
14 they came to pick them up.

15 Q Were those sort of normal procedures followed in this
16 case?

17 A Yes, sir.

18 Q I'm going to hand you what has been marked for
19 identification as State's Exhibit 2. Do you recognize
20 what that is?

21 A I'm just making sure that the numbers match up and
22 that the evidence bag is still sealed. And yes, sir, I
23 recognize this.

24 Q Tell the jury what that is.

25 A This is the evidence from case L0603727.

TESTIMONY OF JASON WALDKIRCH

1 Q Okay. When did you get that and how did you get it?

2 And I will hand you what has been referred to as

3 Exhibit 8, I think you already have a copy of that.

4 A Yes, sir, I do.

5 Q Tell the jury where you got that.

6 A Exhibit 8, this page you just handed me, is the

7 internal chain of custody from the South Carolina law

8 Enforcement Division. This tracks where the drugs were at

9 any particular time while they were at Sled.

10 Q What does it indicate about those drugs that you are

11 holding in your lap up there?

12 A It tells when they came into Sled, where they were at

13 at any given time at Sled so we can track it if we need to

14 know who had the custody and who had the drugs at any

15 given time.

16 Q When does it indicate that Sled got those drugs?

17 A 3/15/06 at 11:31, that would be a.m. Amy Stevens in

18 evidence logging received them -- the drugs from -- it's

19 hard to read here -- from Jeff Hilton of the Lancaster

20 County Sheriff's Office.

21 Q What happened -- according to that sheet what

22 happened to the drugs next?

23 A Then about 40 minutes later at about 12:12 Amy put

24 them in the drug evidence intake storage, that is a large

25 secure area in the drug intake area where all of the

TESTIMONY OF JASON WALDKIRCH

1 evidence was stored and had a segregated evidence to store
2 the drug evidence.

3 Q How long -- or what happened to them next after they
4 were in that secure area?

5 A Well, then I came down and picked them up on
6 7/24/06 at 12:53 and took them upstairs in my custody to
7 my lab.

8 Q All right. Since there's been some discussion on
9 this, did you see any sign of tampering with the drugs at
10 any point by anyone at Sled or Ms. Stevens or anybody
11 else?

12 A No, sir. The bag is still sealed and except for this
13 white sticker on the side it's in substantially the same
14 condition that I last saw it. It is heat sealed and it
15 has my initials here and the date that I sealed it, so it
16 says JPW, and it says 7/24/06.

17 Q When you got it, did you inspect what you had to to
18 see if it looked like there had been any tampering of the
19 BEST kit when you got it and looked at it?

20 A Absolutely, that's part of our standard policy and
21 procedure.

22 Q Did you see any evidence that anybody at Sled had
23 tampered with it?

24 A No, sir. If I may. The evidence comes from the
25 locally agency in this sealed plastic bag I have inside

TESTIMONY OF JASON WALDKIRCH

1 here, it's plastic, it has these designs printed into the
2 bag so if someone were to tear or pull on it it would
3 become distended and it would be obvious that someone had
4 tried to do it. It is sealed at the top by this extremely
5 viscous sticky green adhesive, once that's sealed it
6 cannot be reopened without leaving very visible evidence
7 that somebody tried to tamper with it. It's our policy
8 and procedure at Sled -- or when I worked at Sled it was
9 our policy and procedure that if the bag had been tampered
10 with in any way we are not allowed to analyze it, I would
11 have to report that to my supervisor and return it to the
12 submitting agency unanalyzed.

13 Q Did you see any evidence of tampering of the bag?

14 A No, sir. There was no evidence of tampering.

15 Q So you get it untampered with. What do you do with
16 it at that point in time?

17 A From my notes and my recollection it seems this was
18 what we call a rush case. That means the submitting log
19 in and submitting agency called and needed the evidence
20 more rapidly than our normal course of business. So what
21 I did is after picking up the evidence I worked the case
22 right away.

23 Q When you say worked the case, would you explain what
24 you do and tell the jury what you do? What is involved?

25 A Once I open the case I examine the evidence to see

TESTIMONY OF JASON WALDKIRCH

1 what is actually in there.

2 Q You say you open it. So it's sealed as we just
3 discussed at length, you actually opened it; is that
4 right?

5 A That's correct, sir.

6 Q Go ahead.

7 A And by policy and procedure I don't try to open the
8 top at the part that's sealed, we cut at the bottom so we
9 can prove that the seal is still intact.

10 Q I see. Go ahead.

11 A As I was saying, I opened the bag, I examined the
12 evidence. In this case the inside of the BEST kit there
13 was an agency evidence bag from the submitting agency and
14 this was just a bag that the local agency puts the drugs
15 in so they don't fall out. Inside of that was a brown
16 plastic pill bottle like you would get at any pharmacy
17 when you pick up a prescription. It was wrapped however
18 in this silver gray duct tape type tape. I opened that,
19 inside there I found what looked to be a wet rock
20 substance.

21 Q You say wet. First of all physically it -- describe
22 that.

23 A What that means, sir, is that it was moist, it was
24 damp. It was not a liquid, it was a solid substance but
25 it had residual moisture on it.

TESTIMONY OF JASON WALDKIRCH

1 Q What did you do at that point with that?

2 A At that point -- if I may refer to my worksheet, sir.
3 The first step is to weigh the evidence to determine how
4 much there is.

5 Q Let me stop you just a minute, I'm glad you mentioned
6 weighing because there has been some discussion of
7 weights. How do you weigh something and how does that
8 compare to what law enforcement on the road might weigh
9 something?

10 A How I weighed it and how I would have weighed it in
11 this case and I did because it's my standard policy and
12 procedure to do this, is we have analytical balance. It's
13 a very high end device for weighing things accurately and
14 precisely. What we do is we take these little plastic
15 containers that all they exist to do is to hold stuff so
16 it doesn't roll all over the place. So I took that little
17 plastic container and the balance, then I zero the balance
18 so the computer inside of the balance automatically
19 subtracts the weight of that weighing mode, or little
20 container so that doesn't go into the weight. Then I put
21 the substance to be weighed, in this case the rock
22 substance, into that little weighing boat as we call them
23 and then let the balance come to equilibrium and then
24 record the date on that and the weight. Now, that's how
25 we do it at Sled. You were asking why I have a different

TESTIMONY OF JASON WALDKIRCH

1 number than the police?

2 Q Yes, that's the gist of what I was getting to.

3 A Well, first of all I don't know what kind of balance
4 they used at the local agency, our balances are very high
5 end analytical distributors. Two, DHEC, sends a
6 technician in twice a year to check our balances to
7 calibrate them and make sure they're working properly and
8 that they are reading true and correctly. They bring in
9 their own certified traceable weights, that means that
10 these weights are known to weigh what they weigh and they
11 test our balance and make sure our balances are accurately
12 reading. In addition every month I'm required to test our
13 balances to make sure that it's working properly and
14 giving a true accurate weight -- true accurate reading.

15 Q And obviously a policeman out on the side of the road
16 I guess does not have that degree of accuracy?

17 A I don't know what they have, but I have never heard
18 of any agency in the state having that level of
19 sophistication except for Sled.

20 Q Is it at all unusual for the weight of the drugs that
21 you weighed to not be the same as the weight the agency
22 weighs?

23 A That is actually very common, sir. Because I'm a
24 trained scientist, they're trained police officers. Are
25 they using their balance correctly? Their balance might

TESTIMONY OF JASON WALDKIRCH

1 be completely wrong. If they are not being calibrated and
2 check on a routine basis there's no weigh to tell if their
3 balance is giving a true, accurate and correct reading or
4 not.

5 Q So that's why we go with your weight; isn't that
6 right?

7 A Yes, sir.

8 Q Even when it's to the defendant's benefit as it was
9 in this case.

10 A Yes, sir.

11 Q So you weigh it. What do you do after you weigh it?

12 A Well, after I weigh it and record the weight then I
13 take a small sample of the substance to perform my
14 chemical and analytical tests on it.

15 Q Okay. What -- explain that.

16 A Sure. We have -- we perform two tests at Sled on a
17 controlled substance of this class. First is a simple
18 very quick inexpensive cheap screening test. We take a
19 small tiny bit of the substance, put it on a little
20 porcelain plate and add some chemicals to it and look to
21 see what color it changes. If it changes certain colors
22 that means it's possible to be a controlled substance, if
23 it doesn't change colors it's probably not. It's a quick
24 screening test and it is not really worth much other than
25 to help me judge what the next step is. I'm not allowed

TESTIMONY OF JASON WALDKIRCH

1 to report positive or negative reports based solely on a
2 screening test. I do the next step -- if I take the
3 information the screening test gives me and take it to the
4 next step, which is actually perform an instrumental test
5 on the substance.

6 Q Give us as best you can a brief version of what that
7 is, what is involved in that.

8 A Well, I take the substance, I dissolve it in a
9 solvent, I make it into a solution and then I take a
10 syringe, just like you see on TV, and I inject it into the
11 GC/MS, the gas chromatograph mass spectrometer.

12 Q All right. And I presume -- we're getting far field
13 for my limited expertise -- I presume when you do that
14 that tells you certain things based on the readings from
15 the GC/MS; is that correct?

16 A Yes. The data from the GC/MS spec. is the gold
17 standard in the forensic drug chemistry as well as gold
18 standard in many other fields of chemistry. It is a
19 solid, well known, well used instrumental method that is
20 recognized throughout the scientific community as the gold
21 standard.

22 Q And you did that in this case?

23 A Yes, sir, I did.

24 Q What did your results indicate?

25 A My results indicated that the substance -- the sample

TESTIMONY OF JASON WALDKIRCH

1 I injected into it was cocaine base crack.

2 Q Okay. And did you -- what was the official weight?

3 A The official weight I found was 6.96 grams, which is
4 the same as 107.40 grains.

5 Q So once again in laymen's terms, four one hundredths
6 of a gram short of being seven grams; is that correct?

7 A That is correct, sir.

8 Q Did you make those result into writing? Did you
9 reduce those into writing, your findings?

10 A Do you mean my report?

11 Q Yes.

12 A That information -- we are required to record that
13 information on our worksheet, that's just a worksheet for
14 our convenience. And I issued my formal report, which
15 includes those results, which you should have a copy of
16 that, sir.

17 Q I do.

18 MR. LIFSEY: In fact, if there's no objection, Your
19 Honor, I would move into evidence the copy that I have of
20 the drug analysis in this case.

21 MR. GRIER: I have a copy of it also, I don't have a
22 problem with it being a copy and I have no objection to it.

23 THE COURT: That would be Number 10?

24 MR. LIFSEY: Yes, sir.

25 (The drug report was received as State's 10.)

TESTIMONY OF JASON WALDKIRCH

1 Q So you find that there is indeed 6.96 grams of crack
2 cocaine and you write that -- put that in writing. What
3 do you do at that point? What do you do with the drugs?

4 A In this case I returned the drugs to the plastic pill
5 bottle. It's my usual procedure to put the drug
6 substances into a plastic bag but because it was wet I was
7 afraid if I put it in a plastic bag it would leak out, and
8 it appears that a little bit did leak out even though I
9 sealed it back in the bag. Then I put all of the
10 materials into these outer plastic bag here, sealed it up,
11 put my initials and the date on it to verify -- to make
12 sure that no one can tamper with it without me knowing
13 about it. Then I put it back into the drug vault and it
14 sat in our drug vault until --

15 Q This is a copy of State's Exhibit 8; is that correct?

16 A Yes. It stayed in the drug vault until 7/27/06 at
17 14:04, so that would be 2:04 in the afternoon. I took the
18 drugs down to the log-in area and handed them to Jeff
19 Hilton of the Lancaster County Sheriff's Office and he
20 signed for them.

21 Q Does this appear to be in the same condition that you
22 gave it back to Lieutenant Hilton?

23 A Actually it's slightly not. The sticker was not on
24 it and I mentioned it looks like a little bit of the drugs
25 leaked out. But other than that, yes, that is in the same

TESTIMONY OF JASON WALDKIRCH

1 condition.

2 MR. LIFSEY: Your Honor, I would move what's been
3 marked for identification as State's Exhibit 2, I would
4 move that into evidence.

5 THE COURT: Any objection?

6 MR. GRIER: Your Honor --

7 THE COURT: The earlier objection?

8 MR. GRIER: Well, I would like to take up another one
9 at this time.

10 THE COURT: All right. Ladies and gentlemen of the
11 jury, I need you to step out for a moment.

12 (The jury left the courtroom.)

13 THE COURT: Now, I understand the previous objection;
14 is that correct?

15 MR. GRIER: Yes, Your Honor, and I recognize that
16 now --

17 THE COURT: You have already allowed in the drug
18 analysis report.

19 MR. GRIER: I have allowed in the drug analysis report
20 in.

21 THE COURT: Without objection. Now, what does that do
22 to your prior objection?

23 MR. GRIER: Your Honor, my -- I recognize that that
24 objection -- everybody having testified now and certainly I
25 had some other motivation of making that objection at the

TESTIMONY OF JASON WALDKIRCH

1 time as well. But I would -- actually this would be a new
2 objection, I wouldn't continue that objection. But Ms --

3 THE COURT: What is your objection to the
4 admissibility of the drugs themselves? Because you have
5 already allowed the report in without objection.

6 MR. GRIER: Yes, Your Honor. And so I guess my
7 objection would be that Amy Stevens testified that there
8 were three people actually that had custody of the drugs,
9 Your Honor, while it was at Sled instead of just her.
10 Seemingly if there was -- she shared custody with two other
11 technicians, Your Honor. It was her testimony --

12 THE COURT: But she testified that she went -- there's
13 three other technicians that have access to the vault. She
14 went to the vault, got them, they were still sealed, took
15 them out, unsealed them -- excuse me, took them out of the
16 vault that the police officer put them in and put them into
17 a vault and there is three people that have access to the
18 vault, is that correct, Solicitor?

19 MR. LIFSEY: Yes, sir, that's my memory.

20 THE COURT: That's true in any evidence vault in the
21 whole state.

22 MR. GRIER: Yes, Your Honor.

23 THE COURT: So what is the legal objection?

24 MR. GRIER: Simply put that that gives access to --
25 that gives custody to three other people as opposed to just

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1 her and the chain of custody should reflect that everyone
2 had custody.

3 THE COURT: It's locked in the vault and they will
4 initial it when they take it out, right?

5 MR. GRIER: Yes, Your Honor.

6 THE COURT: Overruled . Do you have any other
7 objections?

8 MR. GRIER: No, Your Honor.

9 THE COURT: I am going to allow the number --

10 MR. LIFSEY: Well, it's actually Number 2 because I
11 had marked it for identification and not gotten it in.

12 THE COURT: Number 2 is in without objection. Number
13 1 is already in, right? That's the marijuana.

14 MR. LIFSEY: No, sir, that's not. I think to the best
15 of my knowledge one is the only one I have left that I
16 haven't actually introduced in.

17 THE COURT: All right. Number 2 is admitted with
18 objection. The rest of them accept for Number 1 is in
19 without objection.

20 (The crack cocaine was receive as State's 2.)

21 THE COURT: Anything else before we take a break?

22 MR. GRIER: That would be all, Your Honor. Thank you.

23 THE COURT: All right. Let's take about a ten minute
24 break.

25 (A recess was taken.)

TESTIMONY OF JASON WALDKIRCH

1 (The jury return to the courtroom.)

2 MR. LIFSEY: Your Honor, at this time we offer State's
3 Exhibit 2 into evidence.

4 THE COURT: At this time State's Exhibit 2 is admitted
5 into evidence over the defendant's objection.

6 MR. LIFSEY: Your Honor, I have no further questions
7 for this witness.

8 THE COURT: Cross examination?

9 MR. GRIER: I have no cross examination for this
10 witness.

11 THE COURT: How about we stop here for the day? What
12 time do you want to start back solicitor?

13 MR. LIFSEY: 9:30 is okay with me.

14 THE COURT: Madam forelady, ladies and gentlemen, we
15 will stop for this evening and ask you to be back in the
16 jury room at 9:30 and we will get started at that time and
17 get finished probably some time in the morning. Don't
18 discuss the case amongst yourselves or with anyone else. I
19 need you to make a decision on what you hear in the
20 courtroom, not what someone tells you outside of the
21 courtroom. Have a good evening and I will see you back in
22 the morning at 9:30.

23 (The jury left the courtroom.)

24 THE COURT: Anything from the State before we adjourn?

25 MR. LIFSEY: Nothing from the State.

TESTIMONY OF JASON WALDKIRCH

1 THE COURT: Defendant?

2 MR. GRIER: No, Your Honor.

3 THE COURT: Do you plan on offering any testimony?

4 MR. GRIER: Not from Mr. Miller. But I do intend on
5 calling two witnesses subject to seeing about some of their
6 history and impeachment issues.

7 THE COURT: But you are going to call some witnesses?

8 MR. GRIER: I am. They will be brief, I would say
9 direct not more than 20 minutes for each.

10 THE COURT: Okay. Mr. Miller, I want to ask you a
11 couple of questions. Okay. If you would, stand and raise
12 your right hand.

13 (The defendant was sworn at this time.)

14 THE COURT: I understand the State has one more
15 witness tomorrow and after they finish then you will have
16 an opportunity to put up testimony and I want to talk to
17 you a few minutes about your right to testify. Okay?

18 THE DEFENDANT: Okay.

19 THE COURT: Your attorney has told me you do not plan
20 on testifying and I want to explain a couple of things to
21 you. Okay?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Do you understand that you could not be
24 required to testify against yourself --

25 THE DEFENDANT: Yes, sir.

TESTIMONY OF JASON WALDKIRCH

1 THE COURT: -- under the 5th Amendment. And you also
2 understand if you decide to take the witness stand and
3 testify you have to ask questions. It's not like on
4 television, you take the 5th Amendment one question and
5 answer the next one, you either take the 5th Amendment and
6 don't testify or get on the witness stand and testify, do
7 you understand?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: If you decide to testify then you have to
10 answer all of the questions if it's allowed and there's no
11 objection under the Rules of Evidence, do you understand?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: I don't know if you have a prior criminal
14 history or not, but if you do some of that possibly could
15 be used against you and could qualify under the rules of
16 evidence, do you understand?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Do you understand that that's a personal
19 privilege that you have to testify or not to testify?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Or making the decision to testify, do you
22 understand?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Now, have you had ample opportunity to
25 talk to your attorney about whether you want to testify or

TESTIMONY OF JASON WALDKIRCH

1 not?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Have you understood the conversations that
4 you have had with your attorney?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: You understand if you do not testify then
7 I will instruct the jury that they could not use that
8 against you in any manner whatsoever, and the State could
9 not infer to your guilt because of your failure to testify,
10 do you understand?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: And as I said earlier, I have to make the
13 determination whether or not you freely and voluntarily and
14 intelligently make the decision not to testify, do you
15 understand?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Do you wish to consult with your attorney
18 about testifying or not testifying any further?

19 THE DEFENDANT: No, sir.

20 THE COURT: Would you like to talk to him?

21 THE DEFENDANT: No, sir.

22 THE COURT: Do you need to ask him anything else?

23 THE DEFENDANT: No, sir.

24 THE COURT: About your right to testify?

25 THE DEFENDANT: No, sir.

TESTIMONY OF JASON WALDKIRCH

1 THE COURT: Have you understood all of the
2 conversations that you have had with your attorney?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Have you understood what I have explained
5 to you here this afternoon?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Do you have any questions about what I
8 have explained to you?

9 THE DEFENDANT: No, sir.

10 THE COURT: Do you wish to testify?

11 THE DEFENDANT: No, sir.

12 THE COURT: Now, between now and tomorrow you are free
13 to change your mind if you so choose, do you understand?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: You are not locked into telling me no
16 today, you could still testify tomorrow if you so choose.
17 Okay?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: I'm not trying to take the position with
20 you whether you do or you do not, that's your decision and
21 only your decision, do you understand?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Thank you very much. We will adjourn
24 until 9:30 in the morning.

25 (Court adjourned for the evening and resumed on

TESTIMONY OF ROBIN VECCHIO

1 April 25, 2007 at 9:30 in the morning.)

2 THE COURT: Is the State ready to proceed?

3 MR. LIFSEY: Yes, sir.

4 THE COURT: Is the defendant ready to proceed?

5 MR. GRIER: Yes, sir.

6 THE COURT: Bring the jury in.

7 (The jury returned to the courtroom.)

8 THE COURT: Solicitor, if would you call your next
9 witness, please.

10 MR. LIFSEY: I call Robin Vecchio to the stand,
11 please.

12 The witness, ROBIN VECCHIO, was first duly sworn and
13 Testified as follows, on:

14 DIRECT EXAMINATION

15 BY MR. LIFSEY:

16 Q Would you state your full name, please?

17 A Robin Vecchio.

18 Q Ms. Vecchio, what do you do for a living?

19 A Marijuana analyzer and evidence tech. for Lancaster
20 Sheriff's Office.

21 Q How long have you worked for the sheriff's office?

22 A Almost seven years.

23 Q So your job now includes marijuana analysis?

24 A Right.

25 Q Would you explain a little bit to the jury what kind

TESTIMONY OF ROBIN VECCHIO

1 of training do you have to analyze the marijuana?

2 A You get certified through Sled, you take a two day
3 class. You are trained to analyze 100 samples and you
4 have to get them all right. Then they give you a written
5 test the next day to make sure you actually knew what you
6 were doing and I passed it.

7 Q So you got all of them right and you passed the Sled
8 certification to be a marijuana analyst?

9 A Right.

10 Q Have you testified in court before?

11 A Not in general sessions, I have in magistrate's
12 level.

13 Q And family court as well?

14 A Right.

15 Q And in those prior testimonies based on your training
16 have you offered opinions as to whether something is
17 marijuana or isn't?

18 A Yes, sir.

19 MR. LIFSEY: Your Honor, I would move she be qualified
20 as an expert witness in the field of marijuana analysis.

21 MR. GRIER: No objection, Your Honor.

22 THE COURT: The Court so finds.

23 Q Explain to the jury what you do to test whether
24 something is marijuana or not.

25 A You have to do a microscopic test and a chemical

TESTIMONY OF ROBIN VECCHIO

1 test. The microscopic test really is you look at
2 different grains, they call them hairs.

3 THE COURT: Can everybody on the jury hear what she's
4 saying? I can barely hear you.

5 THE WITNESS: I have strep throat, sorry.

6 THE COURT: I understand, speak up, please, ma'am.

7 A You have a microscopic test that you are looking for
8 three hairs is what we call them, you have to see all
9 three under a microscope.

10 Q I know you have strep throat, try as best -- do you
11 want some water?

12 A Please. You have to look at three fibers under a
13 microscope. Then you do a chemical test, you use three
14 different solutions and see how the marijuana reacts to
15 each solution. And as to the first one is a duchenoid
16 free agent, you just wet the marijuana with it, it doesn't
17 do anything, it just preps it. And then you put the
18 hydrochloric acid on it, and when you do that there's
19 supposed to be a color change. Depending on how old the
20 marijuana is or what they may have put on it, some of it
21 turns purple and you get all different colors, as long as
22 you get a color change that's what you are looking for.
23 And then with the third chloroform, when you do that it
24 makes an eye. It looks like you dropped a contact lense
25 in it, and if it does that then it is marijuana.

TESTIMONY OF ROBIN VECCHIO

1 Q So you basically do three different tests, and all
2 three of those have to come up positive for you to say
3 it's marijuana, right?

4 A Right.

5 Q I'm going to show you what's been marked as State's
6 Exhibit Number 1, which I believe you examined previously
7 at my request; is that right?

8 A Yes.

9 Q What is that?

10 A It's marijuana.

11 Q Well, okay. Where did you get that?

12 A It was turned in for this case number.

13 Q Okay. Where was that kept prior to you getting it?

14 A Usually they put it in a drop box or something and it
15 stays locked and secure, and then I get it out of there
16 and enter it into the system. After I do that then it is
17 in a marijuana analysis box, because 95 percent of the
18 marijuana that we get never goes to trial so we only
19 analyze what goes to trial.

20 Q All right. So you did perform the analysis on the
21 marijuana cigarette that was in here?

22 A Yes, sir.

23 Q What were your results as to that cigarette?

24 A It tested positive.

25 Q Positive for?

TESTIMONY OF ROBIN VECCHIO

1 A For marijuana.

2 Q All right.

3 A Sorry.

4 Q That's okay. And you performed all of the tests that
5 you described a few minutes ago, you did all of those
6 tests?

7 A Yes.

8 Q And it was positive for marijuana?

9 A Right.

10 Q After you did those tests, did you put it back in the
11 locked secure facility?

12 A Yes, sir, not the same box.

13 Q But a locked facility that only you and the evidence
14 folks have keys to?

15 A Yes, sir, there's two keys.

16 Q When did you last take it out or when did you see it
17 after that?

18 A I gave it to Doug yesterday.

19 Q You gave it to Doug Vecchio right here to bring it to
20 court?

21 A Yeah.

22 MR. LIFSEY: Your Honor, I move this be introduced
23 into evidence as State's Exhibit 1, and it be formally
24 moved into evidence.

25 THE COURT: Any objection?

TESTIMONY OF ROBIN VECCHIO

1 MR. GRIER: No objection.

2 THE COURT: State's Exhibit 1 would be admitted
3 without objection.

4 (The marijuana was received as State's 1.)

5 MR. LIFSEY: I don't have any further questions.

6 THE COURT: Any cross examination?

7 MR. GRIER: No cross examination.

8 THE COURT: Call your next witness.

9 MR. LIFSEY: Your Honor, the State rests at this time.

10 THE COURT: Madam forelady, I'm going to have to take
11 up some motions at this time, there may be a little bit of
12 a delay because they are waiting for a witness to get here
13 and hopefully they will be here in about ten minutes.

14 (The jury left the courtroom.)

15 THE COURT: Any motions?

16 MR. GRIER: Your Honor, I would make a motion for a
17 directed verdict based my motions. Simply as the 13 juror
18 I would ask the Court to find that the level of evidence
19 does not meet the standard required and that you take --
20 assume your role as the 13 juror to assure -- and the basis
21 for that I would suggest is there is -- certainly lack of
22 evidence can be evidence in the same way that physical
23 evidence is. There's a failure for law enforcement in this
24 case to investigate the facts of the case and the
25 circumstances in that no follow-up was done on the

TESTIMONY OF ROBIN VECCHIO

1 fingerprinting of the evidence as to the crack -- I'm not
2 going to make a motion as to the marijuana -- that
3 certainly there was evidence that my client consented to
4 the search and I would submit that that would suggest to a
5 reasonable juror that this, in fact, was not a substance
6 that the defendant had knowledge of. And, of course,
7 knowledge is paramount to a constructive possession case,
8 Your Honor. There's no evidence that he had any knowledge,
9 only an inference, which I understand is a difficulty that
10 I have in this case. But nonetheless, Your Honor, I would
11 make that motion for a directed verdict.

12 THE COURT: Taking that in the light most favorable to
13 the non-moving party that motion is denied. Any other
14 motions?

15 MR. GRIER: No, Your Honor.

16 (The jury returned to the courtroom.)

17 THE COURT: Mr. Grier, if would you call your first
18 witness, please.

19 MR. GRIER: Yes, Your Honor, I would recall Paul
20 Harrison.

21 The witness, PAUL HARRISON, remained under oath and
22 testified as follows, on:

23 DIRECT EXAMINATION

24 BY MR. GRIER:

25 Q Officer Harrison, you testified yesterday about

TESTIMONY OF PAUL HARRISON

1 finding the cocaine.

2 A Yes.

3 Q And you testified -- I believe I asked you, number
4 one, if Mr. Miller consented to the search.

5 A Right.

6 Q And you testified why you believed he consented to
7 the search.

8 A Yes.

9 Q And you testified that you believe there was a hidden
10 compartment in the glove box that he had cut out as I
11 understand it?

12 A What I was trying to explain I guess is something was
13 cut out or it was separated, the compartment was
14 separated.

15 Q Did you investigate the separation or the area where
16 you believe that he could hide something in the glove box?

17 A No.

18 Q Did you physically examine the separation that you
19 referred to?

20 A Will you explain?

21 Q Well, you said he cut something out or there was a
22 separation, I assume you mean between -- what kind of
23 separation would that be when you say separation?

24 A Where I believe that that bottle would have been
25 hidden.

TESTIMONY OF PAUL HARRISON

1 Q When you mean separation, what kind of a separation
2 are you referring to?

3 A A hole where the bottle would have been.

4 Q Did that appear to be something that was natural in
5 the glove box?

6 A I really can't remember exactly if it was something
7 made or something that had came lose or separated.

8 Q Okay.

9 MR. GRIER: Your Honor, I have a number of photographs
10 that I ask be marked as a Defendant's Exhibit.
11 Mr. Lifsey --

12 THE COURT: Do you have any objection?

13 MR. LIFSEY: Not for identification, I've looked at
14 them. He's not moving them into evidence yet, I don't
15 think.

16 THE COURT: Do you have any objection to them going
17 into evidence?

18 MR. LIFSEY: I think there needs to be a foundation
19 laid as to what they are, yes, sir, I would object to the
20 foundation.

21 MR. GRIER: And certainly I can do that.

22 Q You were involved in the stop, right, on January 31st
23 of 2006 of Phillip Miller.

24 A Yes.

25 Q Do you remember the vehicle he was driving?

TESTIMONY OF PAUL HARRISON

- 1 A A brown Buick is all I remember.
- 2 Q Do you recognize that vehicle?
- 3 A That's one that looks like the one I stopped.
- 4 Q Does it appear to be the same vehicle?
- 5 A It looks like it.
- 6 Q Does it look identical to it?
- 7 A I don't remember. I remember a brown Buick and a
- 8 gold grill on the front, but that's it.
- 9 Q And would you recognize that in relation to the car
- 10 the defendant was driving that day?
- 11 A That looks like the inside.
- 12 Q And do you recall what was in the glove box when you
- 13 searched it?
- 14 A Other than --
- 15 Q Well, were there other things in there?
- 16 A I don't recall.
- 17 Q Okay. Would you recognize anything in this
- 18 photograph?
- 19 A Nothing -- you mean do I recognize it from that
- 20 night?
- 21 Q Yeah.
- 22 A Not that I can recall.
- 23 Q Would the glove box have looked similar to that night
- 24 or do you recall?
- 25 A I don't recall as far as what contents were in there.

TESTIMONY OF PAUL HARRISON

1 Q You examined the glove box, however, and discovered
2 that there was some sort of separation or a hole in there.

3 A Yes.

4 Q Do you recognize anything in that photograph?

5 A I don't recognize it, but it appears to be a hole in
6 the glove box. It could have been like that, I don't
7 remember.

8 Q Does that appear to be something man-made or factory
9 or do you have an opinion on what the appearance of that
10 would be?

11 A To me it looks like it's factory but there's a piece
12 missing where it should be there.

13 Q And you also at the same intersection -- well, you
14 went to the intersection of Cain Mill Road and Pineview, I
15 believe?

16 A Correct.

17 Q And it's your understanding that that is where the
18 blue lights were activated and where the arrest was made.
19 And do you recognize this photograph?

20 A It looks like Pineview Drive.

21 Q Okay. And is there another road on that?

22 A Yeah, it appears to be Cain Mill Road.

23 Q That too is looking across Cain Mill Road down
24 Pineview?

25 A Right.

TESTIMONY OF PAUL HARRISON

1 Q Can you identify where Cambridge is in relation to
2 the houses or is there anything identifying -- anything in
3 that photograph that would suggest how far Cambridge is
4 down there?

5 A Yes. At the top of the road just about out of sight
6 there's a green sign, I'm pretty sure that would be
7 Cambridge Road to the right of it.

8 Q So it would be the second road to the right, do you
9 recall?

10 A Yes.

11 Q What would be your opinion of that approximate
12 distance?

13 A Not quite 100 feet, maybe 30 yards. Looking at the
14 photograph I would say 50 yards.

15 Q All right. And do you recognize this photograph?

16 A Well --

17 Q Do you see anything on the right-hand side of that
18 photograph that might help you identify the photograph?

19 A It looks like the photograph of a store -- yeah, that
20 looks like approximately Pineview Drive.

21 Q Does that appear to be the opposite direction of
22 Cambridge from Pineview Drive?

23 A Yes.

24 Q Does that appear that that is what that is a photo
25 of?

TESTIMONY OF PAUL HARRISON

1 A Yes.

2 MR. GRIER: Your Honor, I don't think I am going to be
3 able to get the proper foundation in for my first inquiry.
4 I would offer the two photographs of Pineview Drive from
5 one direction from Cain Mill Road and then from Cambridge
6 back towards Cain Mill Road.

7 THE COURT: Any objection?

8 MR. LIFSEY: I don't have any objection.

9 THE COURT: Defendant's 1 and 2 admitted without
10 objection.

11 (The photos were received as Defendant's 1 and 2.)

12 Q Do you know what the speed limit is on Cain Mill
13 Road? Do you happen to know?

14 A I don't know.

15 Q Do you know what the speed limit is on Pineview?

16 A I don't know.

17 Q Is it a residential area?

18 A Yes.

19 Q All right.

20 MR. GRIER: I have no further questions for Officer
21 Harrison.

22 THE COURT: Cross examination?

23 CROSS EXAMINATION

24 BY MR. LIFSEY:

25 Q Does the speed limit have anything to do with the

TESTIMONY OF MELVINA IZZARD

1 fact that there were 6.96 grams of crack in his car?

2 A No, it doesn't.

3 MR. LIFSEY: I don't have any further questions,
4 Judge.

5 THE COURT: Any redirect?

6 MR. GRIER: No, Your Honor.

7 THE COURT: You may step down. Thank you very much.

8 Call your next witness .

9 MR. GRIER: Thank you, Your Honor. Melvina Izzard.

10 The witness, MELVINA IZZARD, was first duly sworn and

11 Testified as follows, on:

12 DIRECT EXAMINATION

13 BY MR. LIFSEY:

14 Q Please state your name.

15 A Melvina Izzard.

16 Q What is your relationship with Phillip Miller?

17 A A friend.

18 Q Okay. You and Mr. Miller have a child together?

19 A Yes.

20 Q What's the child's name?

21 A Martavious.

22 Q Did you and Mr. Miller formerly have obviously a
23 romantic relationship?

24 A Yes, we did.

25 Q And how old is your child?

TESTIMONY OF MELVINA IZZARD

- 1 A Six.
- 2 Q Phillip is the dad?
- 3 A Yes.
- 4 Q How would you describe Phillip as the father?
- 5 A He's a good father.
- 6 Q Okay. Spend time with the child.
- 7 A Yes, take care of him.
- 8 Q All right. Now, in January of 2006, where were you
- 9 living?
- 10 A 2701 Pardue Street.
- 11 Q Still living there today?
- 12 A Yes.
- 13 Q Where was Mr. Miller living?
- 14 A In Fort Lawn.
- 15 Q Y'all weren't living together?
- 16 A No, sir.
- 17 Q Were y'all spending time together at that time?
- 18 A Yes.
- 19 Q So you live at Pardue Street Apartments?
- 20 A Yeah.
- 21 Q What is it like to live at Pardue Street Apartments?
- 22 A Well, for me it's okay.
- 23 Q Do you know anything about any drug activity at
- 24 Pardue Street Apartments?
- 25 A No.

TESTIMONY OF MELVINA IZZARD

- 1 Q Do you know anything about Mr. Miller's work history?
- 2 A He was working at west something roofing.
- 3 Q Okay. Is that some kind of what was he doing, do you
- 4 know?
- 5 A Roofing on a plant.
- 6 Q Okay. And do you know where the plant was at the
- 7 time in January of 2006?
- 8 A In Fort Lawn, I believe.
- 9 Q Do you know how long he had been working on that job?
- 10 A About six months.
- 11 Q Do you know anything about the kind of money he made?
- 12 A Good money.
- 13 Q Okay. Well, how often was he paid?
- 14 A Every week.
- 15 Q Okay. Do you know approximately how much he -- do
- 16 you know what kind of money he would bring home?
- 17 A Six or \$700 a week.
- 18 Q Now, did he put that money in a checking account?
- 19 A No, sir.
- 20 Q What would he do with his check?
- 21 A He would cash it.
- 22 Q Okay. And do you know when he would get paid?
- 23 A Fridays.
- 24 Q Would he help you out financially some?
- 25 A Yes, sir.

TESTIMONY OF MELVINA IZZARD

- 1 Q I want you to look at this photograph and tell me if
2 you recognize that photograph.
- 3 A Yes, I do.
- 4 Q What is that photograph?
- 5 A A brown Buick.
- 6 Q Is that a '79?
- 7 A Seventy-nine.
- 8 Q Okay. And do you know whether or not that's the --
9 anything about the vehicle in relation to Mr. Miller? Was
10 he arrested in that vehicle?
- 11 A Yes, sir.
- 12 Q And did you immediately get the vehicle back?
- 13 A No, sir.
- 14 Q When did you get the vehicle back?
- 15 A September of last year.
- 16 Q So that -- are you certain that that's the vehicle
17 that he was arrested in?
- 18 A Yes, I am.
- 19 Q All right. Now, I have another picture. Can you
20 tell me what that picture is about?
- 21 A The inside of the car.
- 22 Q So that's an interior photo of that same car?
- 23 A Yes, sir.
- 24 Q Do you know that for certain?
- 25 A Yes, sir.

TESTIMONY OF MELVINA IZZARD

- 1 Q Okay. And from what side of the vehicle is it?
- 2 A What what?
- 3 Q What side of the vehicle is it?
- 4 A The passenger's side.
- 5 Q Okay. And do you recognize this photograph?
- 6 A Yes, sir.
- 7 Q What is that a photograph of?
- 8 A The dash board.
- 9 Q The dash --
- 10 A Board or whatever.
- 11 Q All right. Now, are there contents in that dash?
- 12 A Yes, sir.
- 13 Q Were those contents in there when you got the vehicle
- 14 back in September?
- 15 A Yes, sir.
- 16 Q And have you really done anything with that vehicle
- 17 since September?
- 18 A No, sir.
- 19 Q Does the vehicle run now?
- 20 A No, sir.
- 21 Q Have you got a problem with it?
- 22 A Yes, sir.
- 23 Q What is the problem with it right now?
- 24 A Alternator is gone.
- 25 Q How long has it been sitting there?

TESTIMONY OF MELVINA IZZARD

- 1 A Every since September.
- 2 Q All right. Now, were those contents that were in the
3 dash in this picture removed?
- 4 A They were on the floor.
- 5 Q Can you describe that picture?
- 6 A Inside of the car.
- 7 Q And were the contents removed in that picture?
- 8 A Yes.
- 9 Q That's the dash of the brown '79 Buick that
10 Mr. Miller was arrested in on January 31st of 2006?
- 11 A Yes, sir.
- 12 Q This is another picture I want you to identify. Will
13 you identify that photo?
- 14 A The inside of the car.
- 15 Q From what angle was that photo taken?
- 16 A From the top.
- 17 Q Is it a photo of the bottom or the top?
- 18 A Of the top.
- 19 Q So this is a photo of the top of the glove box or
20 dash box?
- 21 A Yeah.
- 22 Q Are there some holes in there?
- 23 A Yeah. They've got one right here and a little one on
24 the side where you mash the button to open and pop the
25 trunk.

TESTIMONY OF MELVINA IZZARD

1 Q Okay. Now, do you know how those holes came to be in
2 there?

3 A Looks like they are supposed to be there, they were
4 made there.

5 Q As far as you know, did anybody that you know put
6 those holes in there?

7 A No, sir.

8 Q Do you think it came from the factory that way or
9 not?

10 A Yes, sir.

11 Q Okay. Did you investigate any of that yourself?

12 A No, sir.

13 Q Did you observe me do anything?

14 A Yes, sir.

15 Q What did you observe?

16 A You put a bottle in it.

17 Q What was -- do you know what I was attempting to do
18 when I did that?

19 A To see would it drop out.

20 Q Did you look in there after I attempted to do that?

21 A Yes.

22 Q What happened to the bottle?

23 A It disappeared.

24 Q Okay. Did you get that bottle back?

25 A No, sir.

TESTIMONY OF MELVINA IZZARD

1 Q When you say bottle, what kind of bottle was it?

2 A It was a pill bottle.

3 Q So you're going to have to go to a body shop and get
4 that out?

5 A Yes, sir.

6 Q Did you explore the hole?

7 A Yes, sir.

8 Q Did you find any place to put something where it
9 would be secure?

10 A No, sir.

11 Q Who does that car belong to?

12 A Me.

13 Q Who bought that car?

14 A I did.

15 Q And do you recall when you bought it?

16 A I don't remember.

17 Q Did you have a car when you bought that car?

18 A No, sir.

19 Q Now, who all uses that car?

20 A Family members, neighbors.

21 Q Do you use it?

22 A Yes, sir.

23 Q When you say family members and friends, what do they
24 use it for?

25 A When they have to go somewhere.

TESTIMONY OF MELVINA IZZARD

1 Q Okay. Do they have -- are these people that have
2 their own transportation or can you tell me about why they
3 have to use that car?

4 A They have their own transportation.

5 Q All right. Where is that car usually found?

6 A At my house.

7 Q And why -- do you give consent for people to use the
8 car?

9 A Sometimes.

10 Q Did you give consent for Mr. Miller to use the car?

11 A Yes.

12 Q And so why do you let people use your car?

13 A Because they are family and friends.

14 Q And can you tell me something about some of these
15 family members, anything about them?

16 A What do you mean?

17 Q Just tell me who are you talking about, just give me
18 some names.

19 A Nieces and nephews, sisters.

20 Q How many?

21 A About 12.

22 Q Okay. During this time, do you know exactly who had
23 been using the car over the week before? Can you tell me
24 who had been using the car the week before Mr. Miller was
25 arrested on this charge?

TESTIMONY OF MELVINA IZZARD

- 1 A My aunt, sister, his niece, that's it that I know of.
- 2 Q Do you know for certain those are the only people?
- 3 A That used it, yes.
- 4 Q Where had the car been? What places had the car been
- 5 that week that you know of?
- 6 A Grocery store, Wal-Mart and stuff.
- 7 Q Did you take it yourself?
- 8 A Yeah.
- 9 Q Do you go out on the weekends?
- 10 A Yeah.
- 11 Q Was it taken out the weekend before this happened?
- 12 A Yes.
- 13 Q Where was it taken?
- 14 A Casuals, a club.
- 15 Q How long was it there?
- 16 A About three or four hours.
- 17 Q How about when Phillip used the car, do you know if
- 18 any other people had used it while he had consent to use
- 19 the car?
- 20 A Yeah.
- 21 Q Other than people you have named?
- 22 A Yeah.
- 23 Q How common was that?
- 24 A Not too common.
- 25 Q Do you know the other people used it in the -- say

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1 the last few days or the week prior to this arrest?

2 A Only two peoples.

3 Q Who were they?

4 A Niece and aunt.

5 Q Did Mr. Miller know what they were using it for?

6 MR. LIFSEY: I object to that, that's calling for her
7 to say what Mr. Miller knew.

8 THE COURT: I sustain the objection.

9 Q Is there any problem with the locks on that car?

10 A Yes.

11 Q What is the problems with the locks on the car?

12 A It won't lock.

13 Q Will all of the doors not lock or --

14 A The driver's side door.

15 Q So you -- are you be able to lock it?

16 A Yes, sir.

17 Q Okay. Do you recognize all of these photographs?

18 A Yes, sir.

19 Q And they are all of the vehicle?

20 A Yes, sir.

21 MR. GRIER: Your Honor, I would offer as defense
22 exhibit.

23 MR. LIFSEY: I don't have any objection to these
24 pictures, Judge.

25 THE COURT: How many pictures are there? Mark them

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1 individually or --

2 MR. GRIER: Five. I think for clarity it would be
3 best to mark them individually, Your Honor.

4 THE COURT: Defendant's Exhibits 3 through 7 are
5 admitted.

6 (The photos were received as Defendant's 3-7.)

7 Q Ms. Izzard, are you familiar with the stretch of road
8 between Cain Mill Road and Pineview Drive down to
9 Cambridge, are you familiar with that?

10 A Yes.

11 Q How did you become familiar with that?

12 A Riding.

13 Q Have you actually been down there today at my
14 request?

15 A Yes, sir.

16 Q What did you do while you were down there?

17 A Made a right down the store.

18 Q So you made a right off of Cain Mill onto Pineview?

19 A Yes, sir.

20 Q And where did you go from there?

21 A Down to the second right and --

22 Q Is that Cambridge?

23 A I think it was.

24 Q Well, at any rate it was the second right on
25 Pineview?

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- 1 A Yes, sir.
- 2 Q All right. So you -- did you do anything special
- 3 when you did that? What did you do?
- 4 A Timed myself.
- 5 Q What did you time that as?
- 6 A Twenty seconds.
- 7 Q It took 20 seconds?
- 8 A Yes.
- 9 Q What speed were you doing?
- 10 A Thirty-five.
- 11 Q What was the speed limit there?
- 12 A Thirty-five.
- 13 Q What did you use to time the distance?
- 14 A My watch.
- 15 Q That watch that you have got right there on your hand
- 16 right there?
- 17 A Yes, sir.
- 18 Q It has got a second hand on it?
- 19 A Yes, sir.
- 20 Q That's what you used?
- 21 A Yes, sir.
- 22 Q Now, tell me exactly what you did. When did you
- 23 start timing it?
- 24 A From the stop sign until we got to the -- I don't
- 25 know the name of the street.

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1 Q It was the second road on the right?

2 A Yeah.

3 Q And that was the distance that you timed?

4 A Yeah.

5 Q Were you driving?

6 A No, sir.

7 Q Okay.

8 MR. GRIER: That's all I'm going to ask you. Thank
9 you, answer any questions that the solicitor might have for
10 you.

11 THE COURT: Cross examination.

12 CROSS EXAMINATION

13 BY MR. LIFSEY:

14 Q Ms. Izzard, you and the defendant have a child
15 together; is that right?

16 A Yes, sir.

17 Q And you say he supports that kid?

18 A Yes, sir.

19 Q You like him and everything, don't you?

20 A We are still friends.

21 Q Okay. And clearly, you know, if he got locked up he
22 ain't going to be paying child support anymore; isn't that
23 right?

24 A That's right.

25 Q You said you got the car -- you told Mr. Grier you

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1 got the car back in September of last year?

2 A Yes, sir.

3 Q Like seven months ago?

4 A Yes, sir.

5 Q So actually there's no way for the jury to know or
6 Mr. Grier or me to know if the car is the same as it was
7 seven months ago.

8 A Well, when I got it everything was on the floor.

9 Q Well, you're talking about what was inside the dash
10 and all?

11 A Yeah, it was on the floor.

12 Q But all of these people have been using the car you
13 testified; is that right?

14 A Ain't nobody used the car since I got it back.

15 Q I thought you told Mr. Grier you let people use it
16 all of the time.

17 A That was before I got it back.

18 Q But since impound you haven't let anybody use it.

19 A No.

20 Q How did you get it home?

21 A It ran enough for me to get it home.

22 Q So it ran all of the way home and then it just
23 stopped working then?

24 A No, it was working but I wouldn't drive it.

25 Q You weren't driving it?

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1 A No.

2 Q Why weren't you driving it?

3 A I have got my other car now.

4 Q Well, it would seem to me that that would be even
5 more reason, wouldn't it, to let other people borrow it if
6 you didn't need it?

7 A Nobody would borrow it because it wasn't running, the
8 alternator went out on it. That car has been sitting
9 there ever since I got it back.

10 Q I thought you just told me you stopped using it --
11 maybe I'm confused -- you stopped using it when you first
12 got it home because you got another car.

13 A No. I had already got my other car.

14 Q Okay. But you drove it home.

15 A Yeah. And that's where it has been parked ever
16 since.

17 Q When did you find out the alternator wasn't working?

18 A I was going out there and cranking it everyday.

19 Q And just the next day after you brought it home it
20 didn't start?

21 A No. But wasn't nobody driving it, it was just
22 sitting there and I kept getting the battery charged for
23 it and buying a new battery.

24 Q So all of these different people that you told
25 Mr. Grier about had been using it prior to it being

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- 1 impounded?
- 2 A Before that.
- 3 Q They used it before that, but they stopped using it
- 4 once you got it back from the police; is that correct?
- 5 A It ain't been running.
- 6 Q I think Mr. Grier, I remember, asked you specifically
- 7 who might have been using it right before Mr. Miller was
- 8 arrested while driving it. Do you remember him asking you
- 9 that?
- 10 A Yeah.
- 11 Q And ma'am, he said that -- I think you told him that
- 12 your sister drove it some.
- 13 A No, my sister-in-law.
- 14 Q Well, first of all, there's no question that he drove
- 15 it a lot, isn't that right, ma'am?
- 16 A Yeah.
- 17 Q So you drove it a lot and you're saying that
- 18 sometimes your sister-in-law drove it?
- 19 A Yes.
- 20 Q Was she a decent respectable person?
- 21 A Yeah.
- 22 Q Somebody you would trust with your vehicle?
- 23 A Yeah.
- 24 Q Not a crack dealer? I just have to ask.
- 25 A I don't know all of that.

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1 Q What about his niece, do you know if she's dealing
2 crack?

3 A I don't know.

4 Q How about Esther?

5 A I don't know about her either.

6 Q How about Angie Foster?

7 A I don't know about any of them.

8 Q How about him?

9 A I don't know what he do.

10 Q All right. Now, you mentioned -- well, let me ask
11 you this, you know what crack is?

12 A Yeah.

13 Q And it's valuable; isn't that right?

14 A Yeah.

15 Q And the more crack the more valuable it is; isn't
16 that right?

17 A Yeah, I guess.

18 Q Do you have any idea what seven grams of crack would
19 go for?

20 A Lord no.

21 Q You would agree that's at least a very expensive
22 valuable thing; isn't that right?

23 A Yeah, I guess.

24 Q You told Mr. Grier that sometimes your locks don't
25 work.

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1 A The lock on the driver's side don't.

2 Q So I guess that means somebody could come in and
3 steal something if they wanted to, right?

4 A Yeah.

5 Q Have you ever heard of anybody going into a car to
6 leave something valuable?

7 A Not really.

8 Q Okay.

9 MR. LIFSEY: I don't have any further questions,
10 Judge.

11 THE COURT: Redirect?

12 REDIRECT EXAMINATION

13 BY MR. GRIER:

14 Q The brown '79 Buick, has it had license tags on it
15 since you got it back from the sheriff's department?

16 A No.

17 Q So it hasn't been legal to drive since you got it
18 back?

19 A No.

20 MR. GRIER: Thank you.

21 MR. LIFSEY: May I just briefly?

22 RECROSS EXAMINATION

23 BY MR. LIFSEY:

24 Q Why didn't you mention the thing about the no license
25 tag when Mr. Grier talked to you the first time?

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1 A Because he didn't ask me.

2 MR. LIFSEY: All right. I don't have any further
3 questions.

4 THE COURT: You may step down. Thank you very much.
5 Any other witnesses?

6 MR. LIFSEY: Your Honor, that would be the defense's
7 case.

8 THE COURT: Any rebuttal or any reply testimony?

9 MR. LIFSEY: No, sir.

10 THE COURT: Ladies and gentlemen of the jury, I need
11 to hear some motions and please don't discuss the case
12 amongst yourselves at this time.

13 (The jury left the courtroom.)

14 THE COURT: Anything from the State?

15 MR. LIFSEY: Nothing from the State.

16 THE COURT: Anything else from the defendant?

17 MR. GRIER: No, Your Honor.

18 THE COURT: Okay. All right.

19 (A recess was taken.)

20 THE COURT: If you want to make a motion at the end of
21 the case I will be glad to hear your motion.

22 MR. GRIER: At the end of the defense case, Your
23 Honor, I would make another motion for a directed verdict.
24 Your Honor, again the motion would be as the 13 juror I
25 believe the Court has the power and the duty as it sees fit

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1 to determine that the evidence does not rise to the
2 standard of proof required by the State and I submit to you
3 in the present case you have already ruled after the
4 State's case, but however at the conclusion of the defense
5 case certainly evidence was presented that would suggest
6 that the testimony by the officer was not consistent with
7 what the exhibits, the photographs, would show, that it
8 appears -- he testified I believe it appeared that
9 Mr. Miller had cut out a place in the hiding place. I
10 believe that that was refuted by the evidence and that
11 would be another issue for the Court to weigh in
12 determining whether a directed verdict was justified. And
13 in addition the evidence of Ms. Izzard would certainly show
14 reasons that Mr. Miller was in possession of a substantial
15 amount of cash, that a lot of people that had access to
16 that vehicle, that the potential for that contraband being
17 the actual -- having been put there by someone else would
18 raise the level of evidence that the Court could if it
19 believes that the -- demonstrates and apply that additional
20 evidence and grant a directed verdict. Thank you, Your
21 Honor.

22 THE COURT: Thank you very much. Anything else for
23 the record?

24 MR. LIFSEY: Your Honor, I would just say in the
25 light -- viewed in the light most favorable to the State we

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1 have submitted enough to send it to the jury at this point.

2 These are factual issues that the jury can decide.

3 THE COURT: All right. I deny your motion. Anything
4 else?

5 MR. GRIER: No, Your Honor.

6 THE COURT: Ready for closing arguments?

7 MR. LIFSEY: Yes, Your Honor. Mr. Grier is going to
8 go first.

9 (The jury returned to the courtroom.)

10 THE COURT: Ready for closing arguments. Mr. Grier?

11 MR. GRIER: Ladies and gentlemen, this is the point of
12 the process where the attorneys make their closing
13 arguments, and the State gets to go last and I get to go
14 first in making my closing arguments. I would like to
15 thank you for the attention that you gave this case today.
16 It's very important to the administration of justice and
17 it's really important to my client that you have -- for
18 what you have done just to give the evidence and the
19 opportunity for both sides to present their evidence and
20 you give Mr. Miller his day in court and determine whether
21 or not, in fact, he is guilty of the crime he's charged
22 with. You know, and I think it's undisputed, that this
23 vehicle in which these drugs were found belonged to someone
24 other than Mr. Miller. While I think there's been credible
25 evidence submitted to you that you have heard for

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1 consideration that many people had access to this vehicle
2 in addition to Mr. Miller, had the opportunity to have put
3 these drugs and to pin these drugs in that vehicle as well.
4 You have heard the testimony of Officer Harrison, you have
5 heard the testimony of Officer Vecchio, you have heard the
6 testimony of a number of Sled witnesses that I'm not even
7 going to get into to help develop your decision today. But
8 certainly the evidence that I would want you to give a lot
9 of attention to in terms of your duty to determine whether
10 the State has proved their case beyond a reasonable doubt,
11 which is really what your responsibility as jurors is
12 today. Mr. Harrison testified certainly it's undisputed
13 that Mr. Miller consented to the search. I would submit to
14 you that having known -- had he had knowledge that there
15 were drugs in his car he wouldn't have agreed to consent to
16 the search. Officer Harrison testified that he believed
17 that there was a hiding place in that glove box that
18 Mr. Miller must have probably thought that the drugs
19 couldn't be found and that's why he consented to it. I
20 submit to you that you will get an opportunity to see these
21 photographs and you can see for yourself that this is an
22 apparent -- there's a hole in the dash in the glove box
23 most certainly, but it's an apparent factory hole. And
24 you've heard evidence, which I think is credible, from Ms.
25 Izzard that there's no secure place where drugs could be

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1 hidden in those holes without certainly a demonstration
2 would show that anything that was put in there would fall
3 into the cavity of the dash. And, in fact, there's a pill
4 bottle in the dash right now as you've heard testimony from
5 the demonstration of that, which I submit to you would
6 create a reasonable doubt and cause one to hesitate to act
7 over the issue of whether or not Mr. Miller would consent
8 to a search where he knew that there were drugs in his car.
9 You know from the evidence that Officer Harrison found the
10 marijuana roach in the passenger's side door of the
11 vehicle. Of course, Mr. Miller was on the driver's side
12 driving the car and so he certainly wasn't -- in relation
13 to the passenger's side door of the car he was not within
14 reach of that I would assume, and it appeared based on the
15 common knowledge of the way that cars are set up and so
16 that marijuana could have been placed there by anybody. We
17 know a lot of people had access to this vehicle. Officer
18 Harrison also testified that -- and if you will allow me --
19 that there was no evidence that Mr. Miller was attempting
20 to sell drugs. It was just simply a traffic stop, incident
21 to the traffic stop the car was searched and drugs were
22 found as a result of that search. No evidence that
23 Mr. Miller was making any attempt to sell any drugs to
24 anybody. Certainly I think we all on occasions go to
25 places that somebody is looking at might say it was

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1 suspicious. Well, we have got people that draw the
2 conclusion and somehow the inference was made that that was
3 suspicious. Well, certainly if it were a police officer
4 who is charged with the security of the public, they have a
5 duty to investigate anything that was suspicious and I'm
6 not criticizing that, I'm simply saying that in light of
7 our common law and what we do and how we make arrangements
8 to meet, I don't see that it really was suspicious activity
9 that suggests that he was doing anything wrong. Certainly
10 he was not doing anything wrong based on their testimony.
11 He was not attempting to sell and they did not show that he
12 was. You also heard Officer Harrison testify that he
13 couldn't be certain as to what was in his girlfriend's
14 glove box, and I think we could all say that we can't be
15 certain what's in someone else's car and things when other
16 people have access to it, and that would cause one to
17 hesitate to act when they think about whether or not
18 somebody is culpable of possession of drugs, and certainly
19 other people could likely have been responsible for drugs
20 being in the vehicle. We don't know what is in someone
21 else's vehicle, even if we're using that vehicle a lot we
22 don't know what is in there and certainly I believe that
23 creates a reasonable doubt as to the evidence presented by
24 the State. Mr. Miller had cash on him. We know he was
25 working, we know that he was making -- I believe Ms. Izzard

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1 testified -- I apologize to my client -- that he was
2 working and making some good money, that he was cashing his
3 check and it was normal for him to have a substantial
4 amount of cash on him. He wasn't using a checking account.
5 Some of us might like to do business that way, most
6 certainly a lot of folks do and I think Mr. Miller simply
7 is one of those folks and that would account to why he had
8 some \$456 if I remember correctly on this day when he was
9 arrested. You know, what is there is important, but what
10 is missing is also important. And I think in this case
11 that it was a critical piece of the missing evidence that
12 creates a reasonable doubt and it simply is this, Officer
13 Harrison testified that he did not fingerprint the bottle.
14 It could have been fingerprinted apparently, they just did
15 not do it. If it would have been fingerprinted I don't
16 think we would be having to decide whether or not
17 Mr. Miller was -- had knowledge and had had possession and
18 knew about the drugs that were located in that vehicle. I
19 think that was certainly a critical piece of evidence that
20 we should have had access to, you should have had access to
21 as a jury having to make that decision and it creates a
22 real reasonable doubt as to Mr. Miller's guilt. And when
23 there's an absence of evidence that might could be there
24 and the State has the burden of proof of presenting that
25 evidence to remove all reasonable doubt and failed to do so

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1 by giving you the tools that y'all need to do your job. I
2 think that the State failed to give you a tool that really
3 would have been most useful in this case and certainly that
4 creates a reasonable doubt. Now, Officer Vecchio testified
5 about he was the first one to get behind Mr. Miller and if
6 all of you are familiar with the layout of Lancaster, I
7 know some of you are spread out all over the county, but
8 certainly the testimony was this started on the bypass
9 right in the area I would say of not too far from
10 McDonald's and that it ended up culminating some miles
11 south of Lancaster, and Mr. Miller was followed for that
12 distance and he was followed by an officer and ultimately
13 that resulted in the officer activating his blue light at
14 the corner of Cain Mill Road and Pineview Drive or street,
15 road whatever it is, I'm not sure. And that the
16 testimony -- you should be able to see the pictures as well
17 and that will help you get some context for the distance
18 from the time the blue light is activated until the actual
19 stop was made. And you heard Ms. Izzard testify that she
20 timed it as doing the speed limit and it was about 20
21 seconds, that if you drove the speed limit to travel that
22 distance. But Officer Vecchio testified that it took maybe
23 five or ten seconds to get out of the vehicle and to get to
24 the side of Mr. Miller's car after the stop was made. And
25 so we can infer from that information, I think it's

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1 important, that Mr. Miller had at least about 30 seconds of
2 notice that he was being pulled by law enforcement, that he
3 didn't know before that, he had at least a minimum of 30
4 seconds. And, of course, you will get to see -- you will
5 get to see and hold all of this stuff in your hands and
6 look at it. But this is the bottle where the crack cocaine
7 was found and I would submit to you that in 30 seconds time
8 had Mr. Miller known that these drugs were in his glove box
9 he certainly had the time to get his hands on this bottle
10 and toss it. It's night, around 10:00 and dispose of that
11 crack, toss it out the window or do something else to it.
12 Had he had knowledge that that crack was in the car he had
13 time to get rid of it. I believe that creates a reasonable
14 doubt as to whether or not Mr. Miller knew that this crack
15 cocaine was in the vehicle. Ms. Izzard testified to you --
16 you know, Ms. Izzard had an opportunity to help Mr. Miller
17 more than this because she certainly is a -- credibility of
18 witnesses is important. I'm sure that Mr. Lifsey won't
19 agree with that, he may argue that to you as well. Ms.
20 Izzard had the opportunity to say that she lives in a drug
21 infested neighborhood and people were breaking in her cars
22 and that -- you know, that it seems likely to her that
23 someone may have stashed that in there or for whatever
24 reason. She didn't say that. She spoke truthfully and
25 said that she really thought as far as her experience in

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1 Pardue Street Apartments has been one where she hadn't had
2 any problems, she said she kept to herself and didn't get
3 involved in that stuff. She had the opportunity to say
4 that she had -- that that car was in possession of people
5 that she suspected of using drugs and that, you know, to
6 try and suggest that she had some knowledge that someone
7 else might have put those drugs in the car, she didn't say
8 that. She apparently doesn't really know where all that
9 car has been, but she didn't try to -- strain to suggest to
10 this jury that she had some knowledge that it was likely
11 that somebody else had put the drugs in there. So I submit
12 to you that her credibility about people having access to
13 the car and her not knowing about where that car had been
14 and what might have transpired in her car and who else --
15 who all may have had access to that car is credible because
16 she didn't try to spin things to cover the facts in the
17 light most favorable to Mr. Miller. Ladies and gentlemen
18 of the jury, the State has the burden of proof to prove
19 Mr. Miller is guilty beyond a reasonable doubt. Reasonable
20 doubt, I believe the Judge will instruct you, is a doubt
21 that will cause a reasonable person to hesitate to act. I
22 submit to you for the reasons based on the testimony and
23 the evidence that you have heard in this case that there
24 are quite a few reasons that one would hesitate to act in
25 this case. Mr. Miller chose not to testify in this case

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1 and that is certainly his constitutional right. These
2 police officers go to -- and also Sled agents, they go to
3 school where they're trained to testify in a courtroom.
4 Mr. Miller isn't trained, he has to rely I'll say on little
5 old me again to be his advocate and to present the evidence
6 in the light most favorable to him. He is presumed
7 innocent and the only way that cloak of innocence can be
8 removed is through your decision, and each of you
9 individually and intelligently make the decision after
10 consultation with your peers that, in fact, the State has
11 proven every element of their case beyond a reasonable
12 doubt. Certainly I would submit to you again that there
13 are all kinds of reasons that you might have a reasonable
14 doubt about the State's case and I would ask you to return
15 a verdict of not guilty today. Thank you again.

16 THE COURT: Mr. Lifsey?

17 MR. LIFSEY: Thank you. Please the Court, Judge?

18 THE COURT: Yes, sir.

19 MR. LIFSEY: Laying aside for a minute all of the
20 conspiracy theories and Sled agents tampering with evidence
21 and all of that, I would like to direct you back to the
22 only questions that matter in this case. There are two
23 questions that you as a jury have to answer. First of all,
24 did the State prove as to both the crack and the marijuana,
25 did we prove that Phillip Miller is guilty of possession of

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1 those drugs? And that's question one. And then question
2 two is as to the crack cocaine, is he also guilty, is he
3 guilty of possession with intent to distribute that crack
4 cocaine? I want to take those one at a time. First of all
5 as to the possession, the Judge is going to give you the
6 law in a few minutes, he's going to tell you what the law
7 is, he's going to read it to you. I think he's actually
8 going to give it to you in a written form so you can look
9 at it. And what that law will tell you is that there's two
10 kinds of possession, actual possession and constructive
11 possession, those are legal terms. But what we mean is
12 this, actual possession is something I have got in my
13 pocket, like keys, I have got actual possession of them.
14 Constructive possession means whether I have them on me or
15 not I have dominion and control, and I know those are the
16 legal kinds of words, dominion and control. That means I
17 have the ability to control either the drugs themselves or
18 the property where the drugs are found. That's very
19 important, the property where the drugs are found. It's
20 undisputed in this case that Phillip Miller had possession,
21 had dominion and control -- doesn't mean the owner, but he
22 was driving, he had the right to drive it around and to
23 operate it. He had dominion and control over the property,
24 the car, where the drugs were found and the Judge is going
25 to tell you that is constructive possession and

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1 constructive possession is possession and he's guilty. I
2 want to try to keep y'all focused on that and that's the
3 issue and the issue is he is and there's no dispute about
4 it. Now, Mr. Grier does bring out some other points that I
5 don't think matter but I want to talk to you about anyway,
6 other notions for how he somehow perhaps didn't know that
7 these drugs were in there. First of have all as to
8 consent. Mr. Grier says why did he consent to search the
9 vehicle? Well, if you remember the fact pattern, he had
10 already told the police he didn't have a license, he knew
11 he was going to be arrested for not having a license and
12 they were going to search his car anyway. Secondly, if I
13 remember the testimony correctly, about at the same time,
14 same moment as this consent he sees the officer apparently
15 see the marijuana so he is going to be arrested for the
16 marijuana, too. I don't understand why he should some how
17 be given credit for being arrested for no driver's license
18 knowing they were going to search his car anyway and then
19 say, "Search my car," like that is some kind of positive
20 for him. Secondly, Mr. Grier brings up these points about
21 maybe it's somebody else's crack. If it was a tenth of a
22 gram, if this was a \$20 rock or a crumb off of a \$20 rock
23 of crack cocaine, maybe there's some validity to this. But
24 you heard the officers' testimony and its undisputed, that
25 this is a large amount of crack cocaine. If you bought it

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1 by the gram -- a crack pipe I think he told you is a fifth
2 or a fourth of a gram, and if you bought it by the
3 quantity, okay, by the gram you're talking about I think he
4 said about \$300 worth of crack. If you buy it and retail
5 it, if you cut it up and sell it in rocks you're talking in
6 the neighborhood of \$500. Who leaves that around? That is
7 even worse than leaving cash in the car, \$500 of cash in
8 the car because it is an illegal substance anyway. And the
9 notions -- the reason we have juries and the reason we
10 don't have bench trials is we want people to use their
11 common sense. Does it make any sense to y'all that someone
12 would leave a very valuable illegal substance, and a lot of
13 it, just laying around in the car? It just doesn't make
14 any sense laying aside the fact that the officer told you
15 this is Phillip Miller's car, this is the car that Phillip
16 Miller drives around. I know Ms. Izzard said other people
17 used the car. Use your common sense in judging how
18 credible and how believable you think Ms. Izzard is,
19 comparing, of course, the fact that her ex-husband and
20 everybody is driving, they used to all drive it, you know,
21 you should keep that in -- use your credibility and
22 believability -- assess her credibility and believability,
23 please, in deciding what you want to do. Because what is
24 undisputed here is that Phillip Miller is driving a
25 vehicle, he has dominion and control over property where a

CLOSING ARGUMENTS

1 significant quantity of drugs are found and that's just not
2 disputed. I was trying to figure out what in the world we
3 were asking all of these questions about distance and speed
4 and I guess I finally found out, maybe I am not sharp
5 enough to follow what the argument was, I guess it was he
6 could have thrown out the drugs. If you remember the
7 testimony, there was night and Officer Vecchio doesn't turn
8 on his blue lights until right until he's right behind him.
9 It's not a case where he's half a mile down the road and
10 turns on the blue lights, he's right on him. Police
11 officers aren't stupid, they're trained to -- the notion
12 that someone might throw drugs out of the car is not
13 unheard of at all, and the officer watched to see if
14 anybody was throwing anything. He turned on the blue light
15 right behind him. So please, listen to what the Judge's
16 instruction is and listen to what he says about what
17 constructive possession means, and ask yourself if there's
18 any dispute that he was in possession of drugs as defined
19 by the Judge and the law, which is what you are supposed to
20 do anyway. So question one is no question. There's no
21 dispute that he was in constructive possession of the drugs
22 in this case. Now, that brings us as to question two, as
23 to the crack cocaine, and they charged him with possession
24 with intent to distribute. What evidence is there of an
25 attempt to distribute? Well, first of all there's the

CLOSING ARGUMENTS

1 quantity of cocaine. Another law the Judge will tell you
2 about is that the law says that if a person possesses more
3 than one gram of crack cocaine you may infer that he
4 intends to distribute that. In other words, our
5 legislature has said anybody that has got more than a gram
6 y'all can infer that's not for their own personal use and
7 you can infer that they are distributing. So first of all
8 we have the legislative presumption, the law and the legal
9 presumption that he intends to distribute based on a
10 quantity. Secondly as also to the quantity you have the
11 testimony of the officers. People who are addicted to
12 crack cocaine don't carry around that much crack. I don't
13 know how much any of y'all know about drugs in general or
14 crack cocaine in particular but I hope you heard from the
15 officers, crack cocaine among all the drugs, is a
16 particularly addictive item. People smoke it as soon as
17 they get it. People who are -- I don't want to be
18 insulting, but crack heads, personal crack users, they
19 don't buy in quantity. They buy a rock and then smoke it,
20 they might buy two rocks, then smoke it. They don't carry
21 around, based on the testimony by officers that was
22 undisputed, they don't carry around nearly seven grams of
23 crack cocaine, enough for 35 -- almost 35 crack rocks, that
24 is not behavior of a user. So that's evidence that you can
25 take as true. Furthermore there's no evidence of personal

CLOSING ARGUMENTS

1 use in the vehicle. If someone uses crack cocaine they
2 smoke it, they put it in a crack pipe and smoke it, or I
3 think they can also use an aluminum can, the officer made
4 reference to that. But there's none of that stuff in the
5 car indicating that the person in possession of that car
6 and possession of those drugs was not possessing them for
7 their own personal use or they would be using them. There
8 would be some evidence, there would be a crack pipe or
9 something and there wasn't. Please concentrate on those
10 questions and please don't concern yourself with whether or
11 not a Sled agent contaminated the evidence. I also wanted
12 to speak to the fingerprints too. But you heard the
13 officer testify, the officer went to the car and he opened
14 the car and he saw the marijuana and his hands are all over
15 the bottle. I wish the officer could have had on gloves, I
16 wished they would have been prepared, but officers are out
17 there on the road, they don't know what they're going to
18 come up against. What is not disputed is that Phillip
19 Miller possessed an automobile, he had dominion and control
20 over an automobile where the crack was found and you just
21 can't get around it. And so please look at the facts and
22 consider those questions. Question one, was he in
23 possession of the crack and marijuana? Of course he was
24 based on dominion and control over the property. Do we
25 have proof of intent to distribute? Of course we do based

CLOSING ARGUMENTS

1 on multiple reasons, based on quantity as defined by the
2 legislature, the amount of drugs as told to you by the
3 officer inconsistent with any individual use in their
4 experience. The fact that there is no pipes or any
5 evidence of any thing to do with use. So what you've got
6 is the answer to question one, is he in possession of both
7 drugs? Yes. And that finds him guilty of the marijuana.
8 And question two, did he possess with intent to distribute
9 the crack cocaine? Of course he did for reasons I laid out
10 for you and you should find him guilty of possession with
11 intent to distribute the cocaine. That is the truth. The
12 truth is what we look for. The word verdict comes from the
13 Latin words meaning true speaking. That's why we have you,
14 and your job is to go back there and find the truth and the
15 truth is that Phillip Miller possessed the marijuana and
16 the crack cocaine with intent to distribute the crack
17 cocaine. Thank you.

18 THE COURT: Madam Forelady, members of the jury, the
19 State of South Carolina charges the defendant, Phillip Glen
20 Miller, with one count of possession with intent to
21 distribute crack cocaine, and possession of crack cocaine
22 and possession of marijuana. I will give you a copy of
23 these instructions in written form and you can refer to the
24 instructions in your deliberations when you deliberate.
25 You must consider these instructions as a whole and not

JURY CHARGE

1 follow some but not others. Please return the instructions
2 back to us after you have reached a verdict. As to these
3 instructions, the defendant has pleaded not guilty which
4 places upon the State the burden to prove the defendant
5 guilty. A person charged with a criminal offense in South
6 Carolina is never required to prove himself innocent. I
7 charge you that it is a vital important rule of law and
8 evidence that the defendant in a criminal trial, no matter
9 how great or serious the offense with which he is charged,
10 is always to be presumed innocent until his guilt has been
11 proven beyond a reasonable doubt. This presumption of
12 innocence remains with the defendant at all times along
13 with his appearance at trial until you, the jury, find
14 based upon the facts presented reach a verdict of guilty
15 beyond a reasonable doubt, for it is the solemn duty of the
16 jury upon failure to find sufficient evidence beyond a
17 reasonable doubt to acquit him. The burden of proof is on
18 the State to establish by evidence to your satisfaction the
19 guilt beyond a reasonable doubt of this defendant. What is
20 reasonable doubt? A reasonable doubt is a kind of doubt
21 that would cause a reasonable person to hesitate to act.
22 If you have such a doubt as to the guilt of the defendant
23 he is entitled to a verdict of not guilty. A reasonable
24 doubt may arise from the evidence in the case or from a
25 lack of evidence in the case. You alone must make the

JURY CHARGE

1 determination of whether or not reasonable doubt exists as
2 to the guilt of the defendant. The term reasonable doubt
3 should be given the every day plain and ordinary meaning.
4 Proof beyond a reasonable doubt is proof that leaves you
5 firmly convinced of the defendant's guilt. There are very
6 few things in this world that we know with absolute
7 certainty. In criminal cases the law does not require
8 proof that overcomes every possible doubt, but if based on
9 your consideration of the evidence you are firmly convinced
10 that the defendant is guilty of the crime charged you must
11 find him guilty. On the other hand if you believe there's
12 a possibility that he's not guilty you should give him the
13 benefit of the doubt and find him not guilty. The evidence
14 by which you will decide what the facts consist of are the
15 sworn testimony of witnesses both on direct and cross
16 examination regardless of who calls the witness, the
17 exhibits that are received into evidence, any facts that
18 the lawyers have agreed and stipulated to. Certain things
19 are not evidence and you may not consider them in deciding
20 what the facts are. I will list them for you. These are
21 things you are not to consider in deciding what the facts
22 are. Arguments and statements by lawyers are not evidence
23 and lawyers are not witnesses. What they have said in
24 opening statements, closing arguments and at other times is
25 intended to help you but it is not evidence. If the facts

JURY CHARGE

1 as you remember them are different than what the lawyers
2 have stated them then go by your memory. Questions and
3 objection by lawyers are not evidence. Attorneys have a
4 duty to their clients to object when a particular question
5 is not proper under the rules of evidence. You should not
6 be influenced by the objection or how the Court rules on
7 the objection. If testimony has been excluded and stricken
8 and that you have been instructed to disregard is not
9 evidence and must not be considered. Anything you may have
10 seen or heard when court is not in session is not evidence.
11 You decide the case solely from the evidence you have seen
12 in the trial. The rules of evidence ordinarily would not
13 permit witnesses to testify as to their opinion or
14 conclusions. An exception, however, to this rule does
15 exist in those that we call expert witnesses. Expert
16 witnesses are witnesses who by education, experience have
17 become experts in some art, science, profession. These
18 witnesses may have stated their opinions as to relevant
19 material matters in which they are an expert. They also
20 may state the reasons for their opinion. You should
21 consider expert opinion received in evidence in this case
22 and give it such weight as you find it deserves. If you
23 should decide that the opinion of an expert witness is not
24 based upon sufficient education and experience, or if you
25 should conclude that the reasons given to support an

JURY CHARGE

1 opinion are not sound, or if you feel it's outweighed by
2 other evidence you may disregard the opinion entirely.
3 There are two types of evidence which have been presented
4 in the trial, direct evidence and circumstantial evidence.
5 Direct evidence is the testimony of a person who asserts
6 the claim and had actual knowledge of the facts such as eye
7 witnesses. Circumstantial evidence witness is proof of a
8 chain of facts and circumstances that indicated the
9 existence of a fact. The law makes absolutely no
10 distinction between the weight and value to give to either
11 direct or circumstantial evidence, nor is there a greater
12 degree of certainty required of circumstantial evidence
13 than of direct evidence. You should weigh all of the
14 evidence in the case that contests a factual issue. You
15 may have some direct evidence and some circumstantial
16 evidence when you contest a factual issue. You may have
17 some direct and some circumstantial evidence. To determine
18 the facts in this case you have to evaluate the
19 credibility, which means the believability of these
20 witnesses. Under our constitution and code of laws only
21 you, the jury, can make a finding of a factual distinction
22 in this case. I am not permitted to indicate to you how I
23 feel about the testimony or the evidence that has been
24 presented. Throughout this trial it has been my intention
25 to be fair and impartial to the parties involved. To

JURY CHARGE

1 determine the facts in the case you will have to determine
2 the credibility of the witnesses, which means the
3 believability of these witnesses. Some of the things you
4 may consider when deciding whether to believe a witness'
5 testimony in a particular matter would include what was the
6 manner and appearance of the witness who testified? Was he
7 or she straight forward in regards to the answer? Second,
8 was the testimony of the witness consistent or
9 inconsistent? How did the witness come to know the facts
10 that he or she testified to? Was this person present when
11 the incident or happened on the scene after it occurred?
12 Was there some reason the witness would want to give
13 testimony which would help or hurt one side or the other?
14 Was the witness biased or prejudiced? Was the witnesses'
15 testimony strengthened or weakened by other testimony or
16 evidence? You can believe as much or as little of these
17 witness' testimony as you think is proper. And you may
18 believe the testimony of a single witness against many or
19 just the opposite. Of course, you could determine the
20 proof by examination of the witnesses presented by each
21 side. Each side has the obligation to seek the truth
22 regardless of source. I charge you, ladies and gentlemen,
23 the fact that the defendant elects not to testify on his
24 own behalf cannot and must not be considered by you under
25 any circumstances or in any manner whatsoever. The

JURY CHARGE

1 decision of the defendant not to take the witness stand and
2 testify on his own behalf does not create any inference
3 against him, and I tell you now that you must not permit
4 the fact or weigh even the slightest degree against the
5 defendant. You should not let this fact enter into your
6 discussions or deliberations on the issues in this case.
7 The same constitution of laws which makes you the finders
8 of fact as I just explained also make me the sole
9 instructor of the law. You should accept statements of the
10 law as I give them to you. The attorneys are not the
11 instructors of the law, please base your decision on what
12 the law is and not what you think the law should be.
13 Possession with intent to distribute crack cocaine. The
14 defendant is charged with possession with intent to
15 distribute crack cocaine. The State must prove beyond a
16 reasonable doubt that the defendant possessed crack cocaine
17 with intent to distribute it. To prove possession the
18 State must prove beyond a reasonable doubt that the
19 defendant had both the power and the intent to control the
20 disposition and use of the crack cocaine. Possession may
21 be either actual or constructive. Actual possession means
22 that the crack cocaine was in the actual physical custody
23 of the defendant. Constructive possession means that the
24 defendant had dominion and control or the right to exercise
25 dominion and control over either the crack cocaine itself

JURY CHARGE

1 or the property in which the crack cocaine was found. Mere
2 presence at the scene where the drugs were found is not
3 enough to prove possession. Intent may be shown by acts
4 and conducts of the defendant in other circumstances in
5 which you may reasonably infer intent. In determining
6 whether the defendant had intent to distribute the crack
7 cocaine you may consider the circumstances surrounding the
8 defendant's alleged possession. You may consider the
9 amount of the substance alleged to have been in their
10 possession, the manner in which it was allegedly possessed,
11 the place where it was allegedly possessed and other
12 factors which you consider to be important. Possession of
13 one or more grams of crack cocaine creates an inference
14 that the defendant possessed the crack cocaine with the
15 intent to distribute it. This inference does not relieve
16 the State to prove beyond a reasonable doubt that the
17 defendant had the intent to distribute it. It is simply an
18 evidentiary fact which can be taken under consideration by
19 you along with the other evidence if you decide to do that.
20 Now, ladies and gentlemen, if you find the defendant was
21 not guilty beyond a reasonable doubt -- that he was guilty
22 of possession with intent to distribute crack cocaine but
23 was in possession of crack cocaine, you should give him the
24 benefit of the doubt and find him guilty of the lesser
25 offense of possession of crack cocaine. But, of course,

JURY CHARGE

1 you should not do this unless the evidence has been
2 established by the State beyond a reasonable doubt.
3 Possession of crack cocaine. The defendant is charged with
4 possession of crack cocaine. The State must prove beyond a
5 reasonable doubt that the defendant knowingly and
6 intentionally possessed crack cocaine. Knowingly means
7 with knowledge or conscious, not accidentally. Intentionally
8 means willful or intending the result which actually
9 occurred, not accidentally or involuntarily. Intent may be
10 shown by acts and conduct which caused the circumstances.
11 To prove possession the State must prove beyond a
12 reasonable doubt that the defendant had both the power and
13 intent to control the disposition and the use of the crack
14 cocaine. Possession may be actual or constructive. The
15 same definitions of actual and constructive possession
16 which I previously charged. The defendant is also charged
17 with possession of marijuana. The State must prove beyond
18 a reasonable doubt that the defendant knowingly and
19 intentionally possessed marijuana, the same definitions of
20 knowingly and intentionally as previously charged applies
21 in this charge. Intent may be shown by acts and conduct of
22 the defendant of the circumstances for which you may act
23 and you can infer intent. To prove possession the State
24 must prove beyond a reasonable doubt that the defendant had
25 both the power and the intent to control the disposition

JURY CHARGE

1 and use of the marijuana. Possession may be either actual
2 or constructive, the same definition as to actual and
3 constructive possession as I previously charged applies to
4 this crime. You have been selected as fair and impartial
5 jurors sworn to impartiality to try and determine the facts
6 in each case. If you have followed your oath to do so no
7 one would have the right to criticize your verdict and you
8 would have discharged your duty to decide this case from
9 the testimony heard from the sworn witnesses and the
10 evidence produced. I charge you to decide the outcome of
11 this issue without any bias or prejudice to any party. Do
12 not allow yourself to be governed by sympathy or prejudice
13 or passion or public opinion or other factors. Both the
14 State and the defendant have the right to expect that each
15 of you will carefully and impartially consider all of the
16 evidence in the case and you will follow the law as I have
17 charged and explained it to you. Nothing that I may have
18 said or done during the course of this trial has been in
19 any way to express or suggest to you that I have any
20 opinion as to the facts in weighing the credibility of the
21 witnesses. If my actions or words have seemed to so
22 indicate you are to disregard that because you are the only
23 ones that can have an opinion on the facts. Madam
24 Forelady, members of the jury, I have prepared three
25 verdict forms, one verdict form for each charge. The

JURY CHARGE

1 verdict has to be unanimous. And the first verdict form
2 which I have prepared has the caption of the case and the
3 number out beside it. And it says, "We, the jury, find the
4 defendant, Phillip Glen Miller, guilty of possession with
5 intent to distribute crack cocaine." Secondly, "We, the
6 jury, find the defendant, Phillip Glen Miller, not guilty
7 of possession with intent to distribute crack cocaine," a
8 place for the foreperson to sign and date it. The second
9 verdict form, "We, the jury, find the defendant, Phillip
10 Glen Miller, guilty of possession of crack cocaine."
11 Second, "We, the jury, find the defendant, Phillip Glen
12 Miller, not guilty of possession of crack cocaine." Third
13 "We, the jury, find the defendant, Phillip Glen Miller,
14 guilty of possession of marijuana. We, the jury, find the
15 defendant, Phillip Glen Miller, not guilty of possession of
16 marijuana." Madam Forelady, like I said earlier, the
17 verdict must be unanimous, all 12 of you have to agree.
18 Please respect each other's opinion, discuss the evidence,
19 discuss the testimony and you are to collectively reach a
20 unanimous decision. You can find the defendant guilty on
21 all three charges, or guilty of one of the charges or two
22 of the charges. But it is your decision on how you view
23 the facts. Madam Forelady, I'm going to ask you to retire
24 to your jury room, please do not being deliberations. I
25 have to take the charge up with the attorneys. I may have

JURY CHARGE

1 to add something or take something away and bring you back
2 very briefly, so don't begin your deliberations until the
3 bailiff has the verdict forms and the charge I just read to
4 you and all of the exhibits that have been presented into
5 evidence, so at that time you may start your deliberations.

6 Mrs. Robinson, if you'll wake up and keep your seat,
7 please, ma'am. Madam Forelady, if y'all will go to the
8 jury room.

9 (The jury left the courtroom.)

10 THE COURT: Any exceptions from the State?

11 MR. LIFSEY: No. That's a unique way to do the lesser
12 included but I don't have any objection to it as a separate
13 charge, I have no objection to it.

14 MR. GRIER: Your Honor, I have no objection to it
15 being done in separate charges, other than the instruction
16 that he could be found guilty of all three. I think the
17 proper instruction would have been if you find guilty of
18 possession with intent to distribute then the possession
19 would be discounted, or if you find not guilty of
20 possession with intent to distribute but find guilty of
21 possession then the possession with intent to distribute
22 would not apply. But if I understood the charge I believe
23 your instruction was that he could be found guilty of all
24 three and --

25 THE COURT: At the very end I did tell them that.

JURY CHARGE

1 MR. GRIER: Yes, sir.

2 THE COURT: And I'll bring them back out and correct
3 that.

4 MR. LIFSEY: I agree. However you want to do it is
5 fine. You could put it -- you could almost put one verdict
6 form on the crack and have guilty of possession with intent
7 to distribute, guilty of simple possession, not guilty.
8 But however -- that would be my thought as a way to do it
9 that is agreeable and logical, but ultimately it doesn't
10 really matter to me. He obviously can't be convicted of
11 both.

12 THE COURT: I will bring them back out and correct
13 that.

14 (The jury returned to the courtroom.)

15 THE COURT: Ladies and gentlemen, let me correct
16 something. I gave you a charge that you can find him
17 guilty of all three, that's incorrect. If you find him
18 guilty of possession with intent to distribute crack
19 cocaine then you cannot find him guilty of possession of
20 crack or simple possession of crack and I have changed the
21 verdict form to reflect that. You may go to the jury room
22 and begin your deliberations and the exhibits will be
23 brought to you very shortly along with the verdict forms.

24 (The jury left the courtroom and began deliberations.)

25 THE COURT: Madam Forelady, I understand you've

JURY VERDICT

1 reached a verdict; is that correct?

2 THE JUROR: Yes, we have.

3 THE COURT: Would you hand the verdict form to the
4 clerk, please, ma'am?

5 THE CLERK: Case 2006-GS-29-208, the State of South
6 Carolina vs. Phillip Glen Glen Miller, defendant, we, the
7 jury find the defendant, Phillip Glen Miller, guilty of
8 possession with intent to distribute crack cocaine. Signed
9 Melanie S. Vaughn, foreperson, dated April 25, 2007. Case
10 2006-GS-29-209, the State of South Carolina vs. Phillip
11 Glen Miller, defendant, we, the jury, find the defendant,
12 Phillip Glen Miller, not guilty of possession of marijuana,
13 signed Melanie S. Vaughn, foreperson, dated April 25, 2007.

14 THE COURT: Thank you very much. Mrs. Vaughn, I have
15 filled out on the back of the indictment those two verdicts
16 and I have written it in and dated it today, I'm going to
17 give it to the clerk, he's going to bring it over and if
18 you would sign your signature on the verdict form, please,
19 ma'am.

20 MR. LIFSEY: I'll give you his prior record when the
21 Court feels it's appropriate.

22 THE COURT: All right. Mr. Miller, do you want to
23 come around?

24 MR. GRIER: Your Honor, I would like to make a motion.

25 THE COURT: All right. Any motions you want to make

JURY VERDICT

1 if you want to make them now or make them after sentencing.

2 MR. GRIER: Well, Your Honor, it would be necessary
3 for me to make this motion right now, I would ask that the
4 jury be individually polled.

5 THE COURT: Would be polled? Okay, Mr. Clerk.

6 THE CLERK: Ms. Melanie Vaughn, is this your verdict
7 and is this still your verdict?

8 THE JUROR: Yes.

9 THE COURT: Samuel Seymoure, is this your verdict and
10 is this still your verdict?

11 THE JUROR: Yes.

12 THE COURT: Wanda Taylor, is this your verdict and is
13 this still your verdict?

14 THE JUROR: Yes.

15 THE CLERK: Mary Melton, is this your verdict and is
16 this still your verdict?

17 THE JUROR: Yes, sir.

18 THE CLERK: Robert Vaughn, Jr. is this your verdict
19 and is this still your verdict?

20 THE JUROR: Yes, it is.

21 THE CLERK: Claudia McIlwain, is this your verdict and
22 is this still your verdict?

23 THE JUROR: Yes.

24 THE CLERK: Jillian Hinson, is this your verdict and
25 is this still your verdict?

JURY VERDICT

1 THE JUROR: Yes, it is.

2 THE CLERK: Christopher Artis, is this your verdict
3 and is this still your verdict?

4 THE JUROR: Yes, sir.

5 THE CLERK: Joan Bowers, is this your verdict and is
6 this still your verdict?

7 THE JUROR: Yes, sir.

8 THE CLERK: David Simmons, is this your verdict and is
9 this still your verdict?

10 THE JUROR: Yes, sir.

11 THE CLERK: Larry Robinson, is this your verdict and
12 is this still your verdict?

13 THE JUROR: Yes, sir.

14 THE CLERK: Stephen Ballard, is this your verdict and
15 is this still your verdict?

16 THE JUROR: Yes, sir.

17 THE COURT: Let the record reflect all 12 jurors
18 affirmed the verdict. Any other motions?

19 MR. GRIER: Not at this time.

20 THE COURT: All right. Mr. Miller, do you want to
21 come around? Mr. Miller, how old are you?

22 THE DEFENDANT: Forty-three.

23 THE COURT: And what is your date of birth?

24 THE DEFENDANT: 3/13/64.

25 THE COURT: What is your social security number?

SENTENCING HEARING

1 THE DEFENDANT: 248-17-4327.

2 THE COURT: Solicitor, I will be glad to hear from
3 you. I would like to hear his prior criminal history.

4 MR. LIFSEY: Thank you. 1980 -- his criminal record
5 begins in 1980, malicious injury to property, received a
6 probationary sentence. 1982 assault and battery. 1982
7 disturbing the peace. 19 -- it looks like later in '82 the
8 prior probation for malicious injury was revoked. 1984
9 assault and battery. 1986 larceny and unlawful entry into
10 enclosed spaces. 1986 resisting arrest, he received --
11 appears to have received an active 18 month sentence at
12 that point. 1989 assaulting a police officer while
13 resisting arrest, he received seven months of active time
14 and then some probation to follow. 1993, criminal domestic
15 violence. 1993 a driving -- couple of driving under
16 suspension charges. 1994 another driving under suspension.
17 1995 an additional criminal domestic violence. 1996
18 another driving under suspension. 1998 he was charged with
19 distribution of crack cocaine and allowed -- apparently
20 allowed to plead guilty to the lesser charge of possession
21 of crack cocaine, that would be at least his first drug
22 offense, for that he went to court in February of 1999.
23 Later in 1999 he was arrested, or he did not plead on it
24 until 2001, and convicted apparently of possession with
25 intent to distribute it says crack but he may have pled to

SENTENCING HEARING

1 powdered cocaine.

2 THE COURT: That's his second drug offense.

3 MR. LIFSEY: That's at least his second -- at least
4 his second because he has an intervening marijuana in there
5 but I'm not going to count the simple possession of
6 marijuana, so that's at least two. 2000 -- and I think --
7 I will just go on -- 2001 simple assault and battery. 2005
8 he goes to court and apparently either pleads or is
9 convicted of another drug offense. It looks like he was
10 charged with manufactured possession of -- manufacture or
11 distribution of crack, he appears to have pled at that
12 point to possession with intent to distribute cocaine,
13 which would have been either.

14 THE COURT: That would have been at least three,
15 right?

16 MR. LIFSEY: Yes, sir, at least three not counting the
17 marijuana.

18 THE COURT: Okay. Four counting the marijuana.

19 MR. LIFSEY: Four counting the marijuana.

20 THE COURT: All right. Anything else from the
21 solicitor?

22 MR. LIFSEY: Well, nothing --

23 THE COURT: I believe it's 15 to 30.

24 MR. LIFSEY: He's in the range of 15 to 30, Judge. By
25 his prior record this is a right serious drug case and a

SENTENCING HEARING

1 right serious drug offender and we think it warrants a
2 right serious sentence.

3 THE COURT: I will be glad to hear from you,
4 Mr. Grier, or Mr. Miller, whatever you would like for me to
5 hear from him.

6 MR. GRIER: Your Honor, I would like to say a few
7 words, Mr. Miller can speak if he wants to. He's 43 years
8 old and I think you've learned a few things about him
9 through this trial. He has got a six year old child I met
10 last night, a young boy who was asking about his daddy.
11 And as the mother of that child has testified to you he has
12 been a good father to that child, Your Honor. And so
13 there's some -- he has been working construction for about
14 six months prior to the January date of this incident and
15 had been working and had maintained employment, Your Honor.
16 He has got brothers and sisters and his mother in town so
17 he has got substantial family and support. Your Honor,
18 this is obviously a serious charge, it's an 85 percent
19 charge.

20 THE COURT: 85. You said 95, it's 85.

21 MR. GRIER: If I said 95 I meant 85. He understands
22 that as well, Your Honor. And, of course, the minimum,
23 Your Honor, is 15 years, that's a substantial sentence. He
24 would be past his 50th birthday in serving that time, Your
25 Honor, it would be -- in serving that sentence it seems

SENTENCING HEARING

1 like a 15 year sentence would be appropriate under the
2 circumstances. He would certainly be out of circulation
3 which is kind of through the grape vine what law
4 enforcement has indicated they want and I think that would
5 be a very adequate sentence.

6 THE COURT: He's had three prior drug offenses, all
7 three of them charges him with trafficking on one and he --
8 apparently he pled to possession with intent to distribute.
9 What is it going to take to get his attention? He's had
10 three, and apparently he had a big break on all three of
11 those. Apparently he is either a slow-learner or very
12 hard-headed, one of the two.

13 MR. GRIER: Your Honor, 85 percent of 15 is something
14 in the neighborhood of 13 years and that would put him in
15 the 53 or 54 -- well, excuse me, in the 56 or 57 years of
16 age spending 13 years in prison, Your Honor. I think that
17 would send a very strong message, he's certainly never had
18 to serve that kind of time, not withstanding the fact that
19 he has had other offenses. It would be a very strong
20 message for him to spend 13 years, Your Honor, and I would
21 argue that would be adequate and would ask that you impose
22 the minimum for that reason. I think it would be very
23 strong considering his age. He's going to be pretty old
24 when he gets out on 85 percent of 15 right now, Your Honor.

25 THE COURT: Anything else?

SENTENCING HEARING

1 MR. GRIER: No, Your Honor.

2 THE COURT: Mr. Miller, anything you would like to
3 tell the Court before I pronounce sentence?

4 THE DEFENDANT: No, sir, not at this time.

5 THE COURT: Well, this is probably the only
6 opportunity you will have to say anything, when you say
7 nothing at this time. This is going to be your last
8 opportunity to say anything, I will be glad to hear
9 anything you want to tell me, you won't get another
10 opportunity.

11 THE DEFENDANT: Well, you know, I hate to put my
12 family through this.

13 THE COURT: What?

14 THE DEFENDANT: I hate to put my family through the
15 hard thing causing them pain, they are up here with me. I
16 just learned my lesson, you know, I shouldn't have been
17 doing it.

18 THE COURT: Okay. Anything else?

19 THE DEFENDANT: No, sir.

20 THE COURT: Anybody else you would like for me to hear
21 from, Mr. Grier? I would be glad to hear from any family
22 members.

23 MR. GRIER: Your Honor, I think they've indicated that
24 they're not emotionally equipped to respond right now.

25 THE COURT: Thank you very much. Anything else from

SENTENCING HEARING

1 the State?

2 MR. LIFSEY: Nothing from the State, Judge.

3 THE COURT: 06-GS-29-2008, possession with intent to
4 distribute crack cocaine, based on your prior criminal
5 history, Mr. Miller, I'm going to sentence you to the
6 department of corrections for a period of 20 years.

7 (The jury was dismissed from the courtroom.)

8 THE COURT: Anything you would like to make as far as
9 motions now? I will be happy to hear from you or you can
10 have ten days to file any other motions.

11 MR. GRIER: Yes, Your Honor. I think I would like to
12 do that, that will give me an opportunity to think about it
13 for awhile.

14 MR. LIFSEY: I don't have anything.

15 THE COURT: I'll give him ten days to file whatever
16 motions he wants to file.

17 (END OF THE TRIAL PROCEEDINGS.)

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1 I, the undersigned Michael C. Watkins, Official Court
2 Reporter for the Sixth Judicial Circuit of the State of
3 South Carolina, do hereby certify that the foregoing is a
4 true, accurate and complete transcript of record of the
5 proceedings had and evidence introduced in the trial of
6 the captioned case, relative to appeal, in the Court of
7 General Sessions for Lancaster County, South Carolina on
8 the 24th and 25th days of April, 2007.

9 I do further certify that I am neither of kin,
10 counsel, nor interest to any party hereto.

11

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July 6, 2009.

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Michael C. Watkins
Court Reporter

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STATE OF SOUTH CAROLINA)
) COURT OF GENERAL SESSIONS
COUNTY OF LANCASTER _) 2006-GS-29-0208

STATE OF SOUTH CAROLINA)
)
) vs. TRANSCRIPT OF RECORD
)
PHILLIP MILLER)

) DEFENDANT _)

January 29, 2008
Lexington, South Carolina

B E F O R E:

THE HONORABLE J. C. NICHOLSON, JR., JUDGE.

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

MICHAEL H. LIFSEY, ASSISTANT SOLICITOR
Attorney for the State

MARK GRIER, JR., PUBLIC DEFENDER
Attorney for the Defendant

CAROL M. THUEME, RPR
Official Court Reporter

I N D E X

(There were no witnesses produced.)

EXHIBITS

DEFENDANT'S

ID EVD

1-8

3

1 (WHEREUPON, Defendant's Exhibits Nos. 1-8 were
2 marked for identification only.)

3 MR. LIFSEY: Your Honor, the first matter -- my
4 name is Mike Lifsey. I'm with the Solicitor's office,
5 Sixth Circuit Solicitor's office, and the Lexington folks
6 have been nice enough to let us horn in here, and we
7 appreciate that.

8 Your Honor, we're here in regards to State
9 versus Phillip Glen Miller.

10 Mr. Miller is Indictment No. 2006-GS-29-208 in a
11 case that was tried to a jury in front of Your Honor on
12 April -- I think we started on the 24th and concluded on
13 April 25th, 2007..

14 Mr. Miller was represented by the public
15 defender, Mr. Mark Grier, who is here in the courtroom.
16 Mr. Miller was convicted of possession with intent to
17 distribute crack cocaine, third offense or greater.

18 Your Honor, you sentenced him to a sentence of
19 20 years and Mr. Grier has made a motion for a new trial,
20 and I will turn the matter over to him.

21 THE COURT: Made a motion for a new trial or
22 motion to reconsider the sentence or both?

23 MR. GRIER: Judge, motion for a new trial, 29
24 (a) and (b), and I've really not made a motion of record
25 for you to reconsider the sentence.

1 THE COURT: Okay. I'll be glad to hear you.

2 MR. GRIER: Judge, we've already pre-screened
3 the exhibits and marked them by agreement with the
4 Solicitor. And also I have copies of the cases that we'll
5 be arguing, Judge. That would be --

6 MR. LIFSEY: Let me just note for the record,
7 Judge, that Mr. Miller is here in the courtroom in the
8 jumpsuit, indicating he's in the Department of Corrections
9 in case you have any questions.

10 THE COURT: All right.

11 MR. GRIER: Judge, if I need to speak with him
12 he can call me over. I don't think it will be necessary.

13 THE COURT: Let me read your motion real quick.

14 MR. GRIER: Thank you, your Honor.

15 THE COURT: All right. If you would, Mr. Grier,
16 refresh my memory about the juror. It came up during the
17 trial, if I remember.

18 MR. GRIER: Actually, Your Honor, it came up
19 after the trial.

20 THE COURT: Was it after the trial? Did we talk
21 to the juror?

22 MR. GRIER: No, your Honor. My affidavit of
23 William Frick explains how that came to light.

24 THE COURT: Is the affidavit in here?

25 MR. GRIER: Yes, sir, it's Exhibit No. 5.

1 THE COURT: I believe he tried the case, didn't
2 he?

3 MR. GRIER: No, your Honor, I tried the case.
4 Mr. Frick had previously been an assistant solicitor.

5 THE COURT: That's right, Mr. Frick brought it
6 to our attention, right?

7 MR. GRIER: Yes, sir. That was after the jury
8 had been dismissed. In fact, I didn't learn about it
9 until after the jury had been dismissed. And Mr. Frick
10 didn't know anything about the voir dire process. He
11 wasn't present. He was summoned because my trial was
12 being concluded and he was next on the trial list.

13 If you want to read his affidavit, I think it
14 explains it, but if you'd like me to --

15 THE COURT: Let me find it.

16 MR. GRIER: I hope it's in there. The original
17 should be in there. It's Exhibit 5, Judge.

18 THE COURT: I see a copy of your motion, a copy
19 of the sentence sheet, the jury. I see a copy of the
20 indictment, the voir dire transcript. I see a copy of the
21 juror list. I don't see a copy -- I see the strike sheet.
22 I don't see an affidavit.

23 MR. GRIER: Your Honor, I have a copy of it.
24 Let's see if somehow it got buried.

25 Your Honor, it was stuck behind the sentencing

1 sheet.

2 THE COURT: Thank you, sir. I'll be glad to
3 hear from you.

4 MR. GRIER: Thank you, your Honor.

5 Judge, the transcript of the voir dire that is
6 also on page 15, the question that was posited by the
7 Court to the jury panel, page 15 at line nine: Is there
8 any member of the jury panel who's been a victim of a
9 crime in Lancaster County or a member of your family a
10 victim of a crime, please stand. And that question was
11 put forth by the Court, to which there was no response
12 from the juror.

13 And, of course, as you see in the affidavit,
14 after the trial and after the verdict, I learned that one
15 of the jurors, Ms. Jillian Hinson, was the daughter of a
16 victim in the Jimmy Wayne Estes case, which had been tried
17 the previous year. She testified on behalf -- it's
18 apparent and obvious that she was also -- that a member of
19 her family had been a victim in the case in Lancaster
20 County less than a year prior to this trial.

21 Judge, I think the Woods case -- the most recent
22 case, and there's been a lot of cases about that -- well,
23 excuse me.

24 THE COURT: You handed the cases up and then you
25 took them back.

1 MR. GRIER: Okay. I apologize.

2 Judge, also with regard to the transcript, the
3 transcript will also bear out the fact that during the
4 striking of the jurors, that three jurors had been struck
5 by the defense at the time that Ms. Hinson was seated;
6 that the defense still had two strikes left.

7 Judge, if you want me to walk you through that
8 process I can, but I don't think the State even disputes
9 that.

10 We had two jurors. And had we known that
11 Ms. Hinson was the daughter of someone that had been a
12 victim in a case less than a year old, we would have
13 certainly felt that that would have been a reason to
14 strike this juror. I do believe that we would have, had
15 we had that opportunity. Of course, we didn't have that
16 knowledge because the juror was not forthcoming.

17 Judge, the State versus Woods, in fact, also
18 involved possession with intent to distribute crack. The
19 case that, I believe, is the most on point.

20 The Smith case, of course, follows the Woods
21 test. And, you know, the question before the Court is,
22 well, of course the constitutional issue of a fair and
23 impartial trial, but the test in Woods is, you know, was
24 there intentional concealment on the part of the juror and
25 would the subject of the inquiry of the question asked by

1 the Court in voir dire, was it of such significance that
2 the juror's failure to respond is unreasonable.

3 The test is not even for this particular juror,
4 Judge. It's for the average juror with regard to this
5 question of whether there was intentional concealment.
6 And the second prong is whether both parts of the
7 intentional concealment prong had to be met and the
8 information concealed would have to support a challenge
9 for cause or it would have had to have been a material
10 factor in the party's preemptory challenges.

11 So working through, I think, the information
12 before the Court about the facts of this particular case,
13 the Woods case, of course, states: That intentional
14 concealment occurs when a question is reasonably
15 comprehensible to the average juror, not this particular
16 juror.

17 But certainly I've already read the question
18 that Your Honor posed to that jury. It's not ambiguous.
19 It's very straightforward. There's no ambiguity in that
20 question. And so it seems certainly plausible that it was
21 reasonably comprehensible to her. I don't think it could
22 have been any more comprehensible to her, in my opinion,
23 your Honor.

24 And, of course, it was not -- her prior
25 experience as to having a family member being a victim of

1 a crime was not far removed at that time, which is one of
2 the issues that could explain why a juror might not
3 respond forthcomingly about that, because they might not
4 remember, but that's not the case here, Judge. It was
5 simply ten months after the fact that she had been a
6 witness at a trial for her mother who had been stabbed in
7 the case of Jimmy Wayne Estes.

8 Your Honor, the inquiry is of such significance,
9 I believe, that, of course, Judge, these were the standard
10 voir dire questions of the Court. I don't think the Court
11 would have asked that questioned had it not been
12 significant.

13 And certainly for the defense, knowing people
14 that have had interaction with the Solicitor's office as
15 victims and, in fact, in the Woods case the juror that had
16 not been forthcoming in the Woods case had worked
17 part-time in the Solicitor's office and that's what she
18 had not disclosed, which is in a sense having worked with
19 the Solicitor's office in the prosecution of a case for
20 your mother, you know, I think would have predisposed her
21 to have some visceral distaste for the defense. It would
22 have been likely, at least from the defense perspective,
23 Judge.

24 And so we certainly believe that -- and, of
25 course, that question is designed to give the defense an

1 opportunity to look at the life experience of a juror and
2 determine whether they believe they're fair and impartial
3 and have an opportunity to weigh out intelligently whether
4 or not they're fair and impartial and to use a preemptory
5 strike if they believe that they are likely not to be
6 impartial, which I submit we would have used if we'd an
7 opportunity to weigh that issue, Judge, so I submit to you
8 that we meet both the prongs.

9 THE COURT: Did you use all your strikes, or do
10 you remember?

11 MR. GRIER: Ultimately we did use them all, yes.

12 THE COURT: And you had two left when she was
13 seated?

14 MR. GRIER: Yes, sir, we had two left when she
15 was seated.

16 The second prong of the test, Judge, of course,
17 is would the information concealed have supported the
18 challenge for cause or would it have been a material
19 factor in the use of the party's preemptory challenges.

20 Judge, I certainly think it would have supported
21 a challenge for cause, you know, the argument being that
22 the juror is not indifferent to the case in the sense that
23 she's a juror who recently challenged a person accused of
24 a crime. That certainly would have been something the
25 Court would have had to determine. I don't know how you

1 would have felt about that, but we would have taken the
2 position had we not had any preemptory challenges, that I
3 believe we would have challenged for cause on the basis
4 that we do not believe that she could be fair given her
5 experience as a witness for her mother in a case where her
6 mother had been stabbed and that that would make it
7 unlikely that she could be impartial. We would have
8 argued it, but --

9 THE COURT: That would depend on what she said
10 with additional questions being asked, and unfortunately
11 we didn't know the information and additional questions
12 weren't asked. Otherwise, it's pure speculation.

13 MR. GRIER: And it is, in fact, as the Woods
14 case points out, that under the circumstances of the woman
15 not disclosing that she'd worked in the Solicitor's
16 office, that that really was not relevant and they
17 couldn't have known and that they need not because the
18 defense did not have the opportunity to intelligently
19 weigh the material factor for the purposes of preemptory
20 strike.

21 And that's our position, Judge, is that
22 certainly, you know, we would not know what the Court
23 would do, but we believe that the fact that she had been
24 previously a witness and the daughter of a victim in a
25 case that was less than a year old would have supported

1 that challenge.

2 We most certainly believe that that would have
3 been a material fact in determining whether or not to
4 strike that juror, which is the "or" part of the test as
5 set forth in Woods, Judge. It's either would the
6 information concealed have supported the challenge or
7 would it have been a material factor in the use of a
8 party's preemptory strikes.

9 We certainly think it is a material factor. The
10 Court found in the Woods case that the failure to disclose
11 that the woman had been a part-time employee with the
12 Solicitor's office was a material factor and failing to
13 disclose that, it specifically states prevented the
14 opportunity for the defense to intelligently use its
15 preemptory strikes.

16 Judge, that's the essence of our argument. We
17 certainly don't have a transcript with regard to the Rule
18 29(a) issues to argue those, but simply for the record I
19 would ask that you -- and I don't know that it's
20 necessary, but I'd ask that you preserve the Rule 29(a)
21 portion with regard to failure to give a directed verdict
22 and failure with regard to the objections that we made.

23 THE COURT: Okay. Thank you very much.

24 MR. GRIER: Thank you, Judge.

25 THE COURT: Solicitor.

1 MR. LIFSEY: Your Honor, the first step in the
2 whole process of this analysis, I believe, is for you to
3 determine whether or not the juror's failure to answer was
4 intentional. And I don't know how you can do that without
5 the juror being present.

6 Obviously the defense has the burden of proof, I
7 believe, in asking for a new trial and you don't have the
8 juror present to say why she didn't answer.

9 And all these cases all involve cases where the
10 juror has given an explanation to the judge which the
11 judge either finds credible or not credible, and we don't
12 have that in this case.

13 THE COURT: Has anybody tried to talk to the
14 juror?

15 MR. LIFSEY: Well, I haven't because I'm
16 satisfied with the verdict.

17 THE COURT: I understand. Have you made any
18 effort to talk with her?

19 MR. GRIER: Judge, I have not. And I submit
20 that the test is not -- if you have any doubt about her
21 identity --

22 THE COURT: I'm sorry, what?

23 MR. GRIER: If you have any doubt about her
24 identity and whether or not she was the same person, then
25 the juror would be necessary. I think we've demonstrated

1 most certainly that she is the same person.

2 Then the test in Woods becomes, for intentional
3 concealment is, you know, was the question reasonably
4 comprehensible to the average juror. I submit that it
5 doesn't pertain to this particular juror.

6 THE COURT: You don't think you have to make
7 inquiry to this one particular juror as to the
8 circumstances as to why she did not reveal that
9 information as required?

10 MR. GRIER: Judge, I think if the Court found
11 that the question was ambiguous or there was some reason
12 that the Court -- that the question could be thought to be
13 ambiguous, then certainly I would think that the juror's
14 state of mind would be an issue. But when the issue is
15 simply, you know, if the question is comprehensible to the
16 average juror, then what's going on in her mind becomes
17 irrelevant to the issue of whether the question was
18 significant, and to the other remaining prongs of the
19 test, Judge, whether it would have supported the challenge
20 or whether it would have been a material factor in the use
21 of preemptory strikes. So I don't see really how it's
22 relevant.

23 THE COURT: Go ahead.

24 MR. LIFSEY: The only other thing that I would
25 add is, just to give you a flavor, the State versus Estes,

1 the trial in which the defense alleges Ms. Hinson was a
2 witness, and I don't know, I'm assuming they're correct,
3 that Mr. Frick's affidavit is correct, but just so you get
4 a flavor, that case was prosecuted by a prosecutor that no
5 longer worked for our office at the time of the trial. It
6 was defended by his predecessor, the public defender, who
7 also no longer works as the public defender in Lancaster
8 County, presided over by a different judge than yourself,
9 and her testimony, according to what I have, lasted a
10 grand total of five minutes.

11 So assuming that Ms. Hinson is the same
12 Ms. Hinson, and I'm not saying it's not because we don't
13 know, but we don't have her here to say that it's the same
14 her, but assuming it is, you know, I don't know that it's
15 entirely unreasonable for her not to have understood what
16 the question was.

17 Once again, like I say, I don't know how we can
18 answer whether she understood it, didn't understand it,
19 didn't hear it, thought you were referring to a case
20 involving the same prosecutors and defense lawyers that
21 are here. We don't have that information about her and I
22 think it's probably fatal, I'd argue it's probably fatal
23 to the motion without having some testimony or explanation
24 from her.

25 Now, if they couldn't find her, they made an

1 effort to submit an affidavit, if she had died, moved, was
2 unable to be found, you know, maybe that's a different
3 matter, but, you know, I don't have anything to believe
4 she's anywhere different than where she's always been. So
5 I guess my position is --

6 THE COURT: So your position is that basically
7 they should have at least have gotten an affidavit from
8 her, deposed her, or brought her in today to offer
9 testimony to carry the burden?

10 MR. LIFSEY: That's correct.

11 THE COURT: Well, the case says reasonably
12 comprehensible to the average juror and the subject of the
13 inquiry is of such significance that the juror's failure
14 to respond is unreasonable. So they sort of put it on the
15 reasonable man type of concept; i.e., a reasonable average
16 juror, not the individual subjected to state of mind of
17 the juror at the time they didn't reveal information is
18 the way I interpret the case, which is contrary to what
19 you're saying.

20 MR. LIFSEY: Well, and the case talks about the
21 reasonable man, but once again, the case doesn't have
22 testimony from the actual juror.

23 THE COURT: And the problem we've got now, it's
24 been almost a year. She's probably not going to remember
25 the trial nor the question even if I brought her in this

1 next week.

2 MR. LIFSEY: I guess what concerns me, I guess,
3 is we're relying on Mr. Frick's affidavit as to who she
4 is, what involvement she had with the Solicitor's office.

5 THE COURT: If I remember correctly, this came
6 up after the trial and you all brought it to my attention
7 and I think I said file your motion, if I remember right.

8 MR. GRIER: You did give us ten days.

9 THE COURT: And I talked to Mr. Frick in
10 chambers about it. And I think everybody was there when
11 we did that, if I remember correctly.

12 MR. LIFSEY: That may have been. I don't
13 remember. I honestly don't remember.

14 MR. GRIER: I do believe that's how it went
15 down, Judge. We realized it post-trial.

16 THE COURT: And I asked you to file your
17 motions.

18 MR. GRIER: Yes, sir. And, quite frankly, I
19 don't specifically remember that, you telling us based on
20 that information coming to you to file a motion. You said
21 to file your motions in ten days.

22 But, Judge, one more response to that.

23 Judge, they had the juror there and the Supreme
24 Court basically in this trial said that really wasn't
25 necessary, by actually saying that we're clarifying the

1 previous cases and the test is the average juror, so it's
2 in the Court's -- the average juror is subject to the
3 discretion of whether the Court believes the average juror
4 should have found it comprehensible or not, and that's our
5 position on it, Judge, which you've already stated that
6 you appreciate that argument.

7 THE COURT: Solicitor, how do you address the
8 part of the case where it says, and I'm referring to the
9 Woods case, that says: Information concealed would have
10 supported a challenge for cause or would have been a
11 material factor in the use of the party's preemptory
12 challenges?

13 And this other case, in this case she worked in
14 the Solicitor's office, which appears to me to be a little
15 more on the surface prejudicial than just having her
16 testify for five minutes in a prior criminal trial.

17 MR. LIFSEY: Well, I don't think it would
18 support challenge for cause.

19 THE COURT: I really question whether a
20 challenge would have been -- there's no way anybody knows
21 that without having talked to the juror. And that hasn't
22 been done, so we don't know if it would support a
23 challenge for cause.

24 But what about the preemptory challenge? As it
25 says, the material factor. I mean, how can you deny that

1 that would be a material factor in him exercising his
2 preemptory charges and at the time she was seated he had
3 two left?

4 MR. LIFSEY: Well, I mean, if the material
5 factor -- if the standard of it being a material factor is
6 the defense attorney says he was going to use it to
7 strike, then clearly Mr. Grier -- I mean, I wouldn't doubt
8 Mr. Grier when he said he would have used a strike, he
9 would have used a strike, so I don't question that. The
10 benefit, is there an objective standard to that? I mean,
11 if --

12 THE COURT: That's what I'm asking you. What
13 does that word mean, "material factor"?

14 Obviously he's going to stand there -- and I
15 don't mean to disparage him at all. Obviously today he's
16 going to say, I would have stricken her if I had known.
17 He probably would have. He'd have been justified in
18 striking her. Is that a material factor under this case?

19 MR. LIFSEY: Well, I don't know. All I know
20 about the prior case, and once again, I didn't work for
21 this Solicitor's office at the time the Estes case was
22 tried, but even though we don't have the victim to ask
23 what her involvement was, which I presumed he would have
24 done had she answered the question yes, my mother was the
25 victim of a crime and he might have asked her something

1 about it. I mean, she testified five minutes in a case,
2 and I don't know. I don't know what that amounts to. I
3 don't know what the answer to what a material factor is.
4 If it's a factor that someone would have considered, sure.
5 I mean, I think that's a factor both of us would have
6 considered. I mean, there are certain victims I'd strike,
7 believe me.

8 THE COURT: I think it would be a material
9 factor to both parties on whether you exercised your
10 strike or not.

11 MR. LIFSEY: Sure. Well, it's a factor. And
12 I'm not arguing. I just don't know what makes something a
13 material factor versus a factor in general.

14 THE COURT: Don't you think his argument sort of
15 turns on that issue?

16 MR. LIFSEY: I think that is -- yes, sir.

17 THE COURT: Well, how about getting me a
18 memorandum on that issue within the next 30 days?

19 MR. LIFSEY: Yes, sir.

20 THE COURT: Because I don't know what it means.
21 I can look it up in Webster. I don't know what it means.

22 MR. GRIER: The question being a material factor
23 in a preemptory strike, what we can find on that one?

24 THE COURT: What does it mean? I don't know.
25 But it appears to me that's the question we've got to

1 resolve, whether the fact that she failed to reveal the
2 fact that she testified in her mother's homicide case for
3 the State was a material factor in a preemptory challenge.

4 MR. GRIER: Well, there may be some dicta in
5 here, Judge.

6 THE COURT: Solicitor, I'm not opposed if you
7 think it's necessary to continuing the hearing, subpoena
8 this juror and taking her testimony at an appropriate
9 time. The problem I have is it's been now ten months and
10 she probably doesn't even remember the trial. I don't
11 know. I'm not opposed to doing that if you think that's
12 necessary.

13 MR. LIFSEY: Well, I think it's necessary if he
14 does that. I'm not trying to be smart about it, but I
15 think --

16 THE COURT: Your initial argument was that you
17 felt like there's no way I could make this decision
18 without knowing why she didn't do it and whether it was
19 intentional or not and you can't make the determination of
20 intention without having talked with her. So I'm offering
21 the opportunity to bring her in under oath and ask her the
22 question if you think that's necessary to your argument.

23 MR. LIFSEY: I think it's -- I'm not trying -- I
24 think it's necessary to his argument I guess is what I'm
25 saying.

1 THE COURT: Okay. Well, he doesn't think so.
2 You're the one that brought it up.

3 MR. LIFSEY: Yes, sir.

4 THE COURT: Why don't we do this. If you want
5 to do that, you think about it and let me know. We'll
6 reconvene the hearing, we'll issue a subpoena, and we'll
7 bring her in, put her under oath and take her testimony.
8 If I have to come to Lancaster to do that, I'll do that.

9 MR. LIFSEY: Yes, sir, I appreciate you giving
10 us that opportunity.

11 MR. GRIER: Judge, in conclusion, there is one
12 line in here that gives us a little bit of the test.

13 THE COURT: Where?

14 MR. GRIER: Judge, it's on page five in the
15 first paragraph in Woods again. The Smith case really
16 just follows Woods and that's why I gave it to you.

17 The last sentence of that paragraph: It is
18 reasonable to conclude that a juror's previous three-year
19 relationship as a victim's advocate with the prosecuting
20 Solicitor's office would be in a material fact in the use
21 of the defendant's preemptory challenges.

22 I don't know that it gives you any kind of a
23 test or anything, but they certainly found that to be a
24 material factor in that case. But you said you believe
25 that in your mind this does not weigh quite as heavily --

1 THE COURT: I really don't.

2 MR. GRIER: -- and certainly I understand that.

3 THE COURT: I'm not sure it's a material factor
4 as to any bias or prejudice she may exhibit based on --

5 MR. GRIER: Right. Well, but the issue is not
6 whether -- it's simply would I have used it had she said
7 yes, she was, and that really, the material factor is
8 really in the mind -- is what the judge believes is in the
9 mind of the defense or whoever is exercising the strike,
10 but we'll try to get you some more guidance on that.

11 THE COURT: That's all I'm asking you. If you
12 all want to take her testimony, let me know and we'll come
13 over to Lancaster one day and see what she's got to say.

14 MR. LIFSEY: Thank you, Judge.

15 MR. GRIER: Thank you. So within 30 days you
16 want an order with all this?

17 THE COURT: Do a short order and say it's under
18 advisement and you all will have 30 days to file your
19 memo. If you would like to take her testimony, let me
20 know and I'll reconvene the hearing and we'll come to
21 Lancaster and we'll get the clerk to subpoena her and
22 bring her in to hear what she's got to say. If you want
23 to do that. If you don't, that's fine. I'm not trying to
24 tell you how to try your case. I'm just affording you
25 that opportunity.

1 MR. GRIER: Thank you, Judge.

2 One other housekeeping matter, Judge. We do
3 have exhibits in here. Do I need to just carry those
4 back?

5 THE COURT: Yes, sir. You need to take those
6 back and give them to the clerk, if you would.

7 MR. GRIER: Yes, sir.

8 (The proceedings were concluded.)

9 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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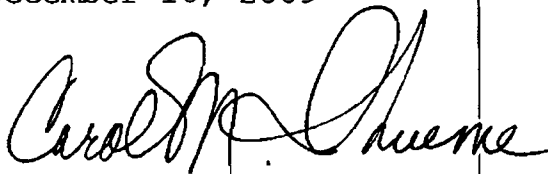
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1
2
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4 CERTIFICATE OF REPORTER5
6
7
8 STATE OF SOUTH CAROLINA)
9)
10 COUNTY OF LANCASTER)
11
1213
14 I, CAROL M. THUEME, RPR, Official Court Reporter for
15 the 11th Judicial Circuit of the State of South Carolina,
16 do hereby certify that the foregoing is a true, accurate
17 and complete Transcript of Record of the proceedings had
18 and evidence introduced in the trial of the captioned
19 case, relative to appeal, in the Court of General Sessions
20 for Lexington County, South Carolina, on the 29th day of
21 January, 2008.
2223
24 I do further certify that I am neither of kin,
25 counsel nor interest to any party hereto.

December 16, 2009

23
24
25
CAROL M. THUEME, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

FILED
IN THE COURT OF GENERAL SESSIONS
SIXTH JUDICIAL CIRCUIT

THE STATE OF SOUTH CAROLINA,

2007 MAY -4 A 11:57

MOTION FOR A NEW TRIAL
LANCASTER COUNTY, SC

VS.

PHILLIP MILLER,
DEFENDANT.

TO: Douglas Barfield, Solicitor:

YOU WILL PLEASE TAKE NOTICE that Mark Grier, Attorney of the Defendant hereby moves before the Honorable J. C. Nicholson, Jr., Presiding Judge in the above-captioned for a new trial. Defendant was convicted of Possession of Crack Cocaine with Intent to Distribute on April 25, 2007 and the Defendant was granted ten (10) days within which to file post-trial motions. Defendant's motion is based upon the grounds that:

1. The Court denied Motions for a Directed Verdict at the conclusion of the State's presentation of evidence and at the conclusion of the presentation of evidence by the Defense. Defendant contends that even in a light most favorable to the State, the evidence presented by the State was insufficient to submit to the jury and that the Court should have directed a verdict in favor of the Defendant and that said failure to direct a verdict in favor of the Defendant was error justifying the granting of a new trial.
2. The Court overruled objections made by the Defense which should have been sustained. Defendant contends that said failure to sustain the Defendant's objections was error justifying the granting of a new trial.
3. Subsequent to the conclusion of the trial the Defense learned that juror number 8, Jillian N. Hinson was the daughter of Robln Williams, the victim

**DEFENDANT'S
EXHIBIT**

#1
19-18

CERTIFIED TO BE A TRUE COPY

CERTIFIED TO BE A TRUE COPY

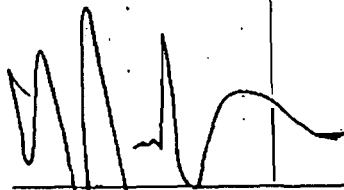
JEFF HAMMOND
CLERK OF COMMON PLEAS
AND GENERAL SESSIONS COURT
LANCASTER COUNTY, S.C.

JEFF HAMMOND
CLERK OF COMMON PLEAS
AND GENERAL SESSIONS COURT
LANCASTER COUNTY, S.C.

in the case of State vs. Jimmy Wayne Estes. The Defendant is informed and believes that the Court asked the question during voir dire "Has any member of this jury panel or any member of the immediate family of any member of this jury panel ever been a victim of crime?" and that said juror did not disclose this information. Defendant contends that the failure of said juror to disclose information requested by the Court during voir dire resulted in a tainted jury and prejudiced the Defendant such that a new trial should be granted.

WHEREFORE, based upon the foregoing, the Defendant requests that the Court grant a new trial in this matter.

May 3, 2007



Mark Grier
Attorney for the Defendant
105 West Dunlap Street
Post Office Box 2458
Lancaster, South Carolina 29721-2458
(803) 286-6275

millerP.mol@crim

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

IN THE COURT OF GENERAL SESSIONS
SIXTH JUDICIAL CIRCUIT

THE STATE OF SOUTH CAROLINA,

VS.

PHILLIP MILLER,
DEFENDANT.

AFFIDAVIT OF WILLIAM P. FRICK

Personally appeared before me the undersigned, who being duly sworn,
deposes and say that:

My name is William P. Frick and I am attorney associated with the law firm
of Koon & Cook, P.A. in the Winnsboro, SC office. I am under contract with
the Lancaster County Public Defender Corporation as a Public Defender.

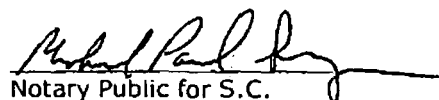
I previously worked as an Assistant Solicitor for the Sixth Judicial
Circuit and was one of the prosecutors in the trial of State vs. Jimmy Wayne
Estes for Assault and Battery With Intent To Kill which commenced on June
12, 2006 and concluded on June 15, 2006. Jillian Hinson was a witness for
the State in the trial. I participated in the interview of Jillian Hinson
prior to the trial and I believe I conducted the direct examination of Ms.
Hinson during the prosecution of the trial. I learned that Jillian Hinson
was the daughter of the victim in that case, Robin Williams, from my
interview with Ms. Hinson.

Mark Grier was the attorney for Phillip Miller in the above-captioned
matter which concluded on April 25, 2007. I was notified that the trial was
nearing conclusion that day and I traveled from Winnsboro to Lancaster to
fulfill my duties as Public Defender. I arrived in the Lancaster County
Courthouse immediately after the verdict had been read and before the jury
had been released. I immediately recognized Jillian Hinson seated as a juror
in that case. After the jury was released I mentioned to Mr. Grier that Ms.
Hinson had been a witness for the State in the prosecution of the man that
had stabbed Ms. Hinson's mother. Mr. Grier responded that he believed Ms.
Hinson had failed to disclose the fact that a member of her family had been
the victim of a crime when asked by the Court during voir dire.

I am absolutely certain that the Jillian Hinson who served as a juror in
the trial of State vs. Phillip Miller is the same person who testified on
behalf of the State in the prosecution the man who assaulted her mother in
the State vs. Jimmy Wayne Estes trial.


William P. Frick

Sworn to before me this 25 day
of January, 2008.


Notary Public for S.C.
My commission expires: 6/25/17

**DEFENDANT'S
EXHIBIT**

#5
1-27-08 

MARK GRIER
MARION H. GRIER, JR.
ATTORNEY AT LAW

103 SOUTH CATAWBA STREET
POST OFFICE BOX 2458

LANCASTER, SOUTH CAROLINA 29721-2456

TELEPHONE (803) 286-6275
FACSIMILE (803) 286-8111

February 28, 2008

via U.S. Mail and Facsimile (864)224-6320 (12 pages)

The Honorable J. C. Nicholson, Jr.
Circuit Court Judge
Post Office Box 8002
Anderson, South Carolina 29622-8002

Re: State vs. Phillip Miller

Dear Judge Nicholson:

Attached please find my memorandum and supporting documents in the above-captioned matter.

Sincerely,
Mark Grier



cc: Michael Lifsey, Assistant Solicitor

If all pages are not received or there is a problem with this transmission, please call (803)286-6275.

=====

This information contained in this facsimile message is Attorney Privileged and Confidential information intended only for the use of the individual or entity named as the recipient. If the reader is not the intended recipient, be hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the address above. Thank You.

MARK GRIER

MARION H. GRIER, JR.

ATTORNEY AT LAW

E-MAIL GRIERREALEST@COMPORIUM.NET

February 28, 2008

105 WEST DUNLAP STREET
POST OFFICE BOX 2458
LANCASTER, SC 29721-2458

TELEPHONE (803) 286-6275
REAL ESTATE (803) 285-7655
FACSIMILE (803) 286-8111

The Honorable J. C. Nicholson, Jr.
Circuit Court Judge
Post Office Box 8002
Anderson, South Carolina 29622-8002

Re: State vs. Phillip Miller /

Dear Judge Nicholson:

I am writing regarding the Defendant's Motion For A New Trial which was argued before you on January 29, 2008 in Lexington County. I am attaching a copy of the Motion with this letter. The issue before the Court was whether the failure of the juror Jillian N. Hinson to respond to the Court's voir dire question "Is there any member of the jury panel whose been a victim of a crime in Lancaster County or a member of your family a victim of a crime please stand." resulted in an impartial jury.

The juror had testified in support of her mother, Robin Williams, the victim in the trial of State v. Jimmy Wayne Estes, about ten (10) months prior to serving as a juror in the State v. Phillip Miller trial. Miller had two remaining peremptory strikes at the time the juror was seated and I argued that I was certain that I would have used a peremptory strike had I known the fact concealed by the juror. I argued that the facts before the Court met the test set forth in the case of Smith v. State requiring a new trial.

My understanding was that the Court agreed that the juror intentionally concealed the relevant information based on the language in Smith v. State "Intentional concealment occurs 'when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable.'" However, in weighing the second part of the Smith v. State test, "that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." I believe the Court did not feel that the information concealed would have supported a challenge for cause, however, the Court did appear to believe that the concealed information would have been a "material factor in the use of the party's peremptory challenges."

You asked Mr. Lifsey and I to write a memorandum sharing any research that we could find to assist the Court in ruling whether the juror's failure to respond to the Court's question would have been a "material factor" in the use of a peremptory strike by the Defendant and indicating whether we wished to offer additional evidence.

p2 grier>judge nicholson 2/28/08

I research "material factor" in the case law of South Carolina, North Carolina and Georgia. The term is widely used but sparingly defined. I found no guidance specific to what a "material factor" in the use of peremptory challenges might be. I would submit that the Supreme Court of South Carolina gives the most helpful insight into the application of the "material factor" issue as applied to peremptory challenges in the case of State v. Woods, 550 S.E.2d 282. (copy attached hereto) The Supreme Court granted a new trial where the juror concealed her three year relationship as a victims' advocate with the solicitor's office and that was found to be a material factor because "her concealment deprived respondent of information material to his intelligent use of peremptory challenges."

I submit that the Defendant is entitled to a new trial because, as in State v. Woods the information concealed by the juror in the instant case "deprived" the Defendant "of information material to his intelligent use of peremptory challenges." I look forward to your decision.

Thanking you, I am

Sincerely,
Mark Grier

A handwritten signature in black ink, appearing to be 'Mark Grier', with a long, sweeping horizontal stroke at the end.

cc: Michael Lifsey, Assistant Solicitor

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

) IN THE COURT OF GENERAL SESSIONS
) SIXTH JUDICIAL CIRCUIT

THE STATE OF SOUTH CAROLINA,

2007 MAY -4 A 11: 57

VS.

) MOTION FOR A NEW TRIAL
) LANCASTER COUNTY, SC

PHILLIP MILLER,
DEFENDANT.

TO: Douglas Barfield, Solicitor:

YOU WILL PLEASE TAKE NOTICE that Mark Grier, Attorney of the Defendant hereby moves before the Honorable J. C. Nicholson, Jr., Presiding Judge in the above-captioned for a new trial. Defendant was convicted of Possession of Crack Cocaine with Intent to Distribute on April 25, 2007 and the Defendant was granted ten (10) days within which to file post-trial motions. Defendant's motion is based upon the grounds that:

1. The Court denied Motions for a Directed Verdict at the conclusion of the State's presentation of evidence and at the conclusion of the presentation of evidence by the Defense. Defendant contends that even in a light most favorable to the State, the evidence presented by the State was insufficient to submit to the jury and that the Court should have directed a verdict in favor of the Defendant and that said failure to direct a verdict in favor of the Defendant was error justifying the granting of a new trial.
2. The Court overruled objections made by the Defense which should have been sustained. Defendant contends that said failure to sustain the Defendant's objections was error justifying the granting of a new trial.
3. Subsequent to the conclusion of the trial the Defense learned that juror number 8, Jillian N. Hinson was the daughter of Robin Williams, the victim

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JEFF HAMMOND
CLERK OF COMMON PLEAS
AND GENERAL SESSIONS COURT
LANCASTER COUNTY, S.C.

JEFF HAMMOND
CLERK OF COMMON PLEAS
AND GENERAL SESSIONS COURT
LANCASTER COUNTY, S.C.

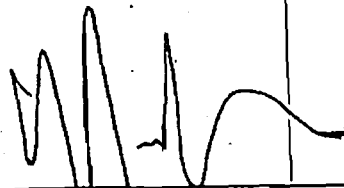
DEFENDANT'S
EXHIBIT

#1
10.10

in the case of State vs. Jimmy Wayne Estes. The Defendant is informed and believes that the Court asked the question during voir dire "Has any member of this jury panel or any member of the immediate family of any member of this jury panel ever been a victim of crime?" and that said juror did not disclose this information. Defendant contends that the failure of said juror to disclose information requested by the Court during voir dire resulted in a tainted jury and prejudiced the Defendant such that a new trial should be granted.

WHEREFORE, based upon the foregoing, the Defendant requests that the Court grant a new trial in this matter.

May 3, 2007



Mark Grier
Attorney for the Defendant
105 West Dunlap Street
Post Office Box 2458
Lancaster, South Carolina 29721-2458
(803) 286-6275

millierP.mot@crim

MARK GRIER

MARION H. GRIER, JR.

ATTORNEY AT LAW

E-MAIL: GRIERREALEST@COMPORIUM.NET

October 7, 2008

105 WEST DUNLAP STREET
POST OFFICE BOX 2458
LANCASTER, SC 29721-2458TELEPHONE (803) 286-6275
REAL ESTATE (803) 285-7655
FACSIMILE (803) 286-6111

The Honorable J. C. Nicholson, Jr.
Circuit Court Judge
Post Office Box 8002
Anderson, South Carolina 29622-8002

Re: State vs. Phillip Miller

Dear Judge Nicholson:

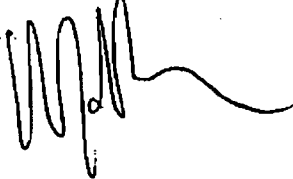
I am writing regarding the Defendant's Motion For A New Trial which was argued before you by myself and Assistant Solicitor Mike Lifsey on January 29, 2008 in Lexington County.

You asked that Mr. Lifsey and I write a memorandum sharing any research that we could find to assist the Court in ruling whether the juror's failure to respond to the Court's question would have been a "material factor" in the use of a peremptory strike by the Defendant and indicating whether we wished to offer additional evidence. I sent my memorandum dated February 28, 2008.

I am including copies of my memorandum and cover letter with this letter for your consideration and I request that you advise of your ruling at your earliest convenience.

Thanking you, I am

Sincerely,
Mark Grier



✓ cc: Michael Lifsey, Assistant Solicitor (letter only)
enclosures

STATE OF SOUTH CAROLINA

FILED
OFFICE OF CLERK
OF COURT

JUDGMENT IN A CRIMINAL CASE

COUNTY OF LANCASTER

2008 JAN 14 P 3:39 CASE NO: 2006-GS-29-0208

IN THE COURT OF LANCASTER

CLERK OF COURT
LANCASTER, SC

STATE VS. PHILLIP MILLER

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: Failure to Appear
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy: ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other:

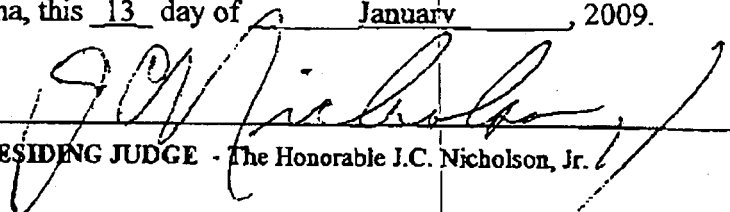
IT IS ORDERED AND ADJUDGED:

☐ See attached order;☐ Statement of Judgment by the Court:

Defendant's motion for a new trial is denied. The issue raised in Defendant's motion is not a material factor, because there is no victim in the Defendant's case and there is no violent crime in the Defendant's case.

Dated at Anderson, South Carolina, this 13 day of January, 2009.

Court Reporter:


 PRESIDING JUDGE - The Honorable J.C. Nicholson, Jr.

This judgment was entered on the 14th day of Jan, 2009, and a copy mailed first class this 14th day of Jan, 2009, to attorneys of record or to parties (when appearing pro se) as follows:

Michael Lifsey
Assistant Solicitor

Mark H. Grier, Jr.
105 West Dunlap Street
Post Office Box 2458
Lancaster, South Carolina 29721

CPFORM4M

GENERAL SESSIONS DOCKET REPORT FOR LANCASTER COUNTY

REPORT RUN DATE - 112599

INDICTMENT NUMBER: ²⁰⁰⁰996S29 - 125

DEFENDANT NAME: ESTES, JIMMY WAYNE

AKA:

ADDRESS:

CITY:

STATE: SC ZIP

SOCIAL SECURITY NUMBER

SEX: 1 MALE

RACE: 1 WHITE

DATE OF BIRTH

DRIVERS LICENSE STATE / NO.: SC / 999999999

MARITAL STATUS:

WARRANT OR TICKET NUMBER: 6238163 COUNTS: 01 OFFENSE CODE: 0014

NO WARRANT? 0

NAME OF OFFENSE: ASSAULT/ASSLT

RD ABAND

DATE OF ARREST: 111199 DATE RECD BY CLERK: 111899 SUMMARY JUDGE: 927

DISP DATE: ^{6/15/06}000000

DISP TYPE:

Terol / Guilty

DISP TYPE EXPLANATION:

JUDGE CODE/NAME: 121

COURT REPORTER:

CONVICTION: CTS: 00 OFFENSE: ¹³0000

SENTENCE: 10 yrs

CTB

DEFENSE ATTORNEY:

PROSECUTING ATTORNEY:

QB

DEFENDANT'S
EXHIBIT#8
1-29-08

JF

CERTIFIED TO BE A TRUE COPY
JEFF HAMMOND
CLERK OF COMMON PLEAS
AND GENERAL SESSIONS COURT
LANCASTER COUNTY, S.C.

The State
vs.

CERTIFIED TO BE A TRUE COPY

Jeff Hammond
CLERK OF COMMON PLEAS
AND GENERAL SESSIONS COURT
LANCASTER COUNTY, SC.

Date Trial Commences 6-12-06
Indictment for 00-C5-29-128

James Wayne Estes

Assault & Battery with
intent to kill

Jurors

Jurors Excused by Defendants

1. Owen McDaniel 95
2. Brandy Ruffett Cook 31
3. Patricia Jones 154
4. Jodi Pifer 81
5. Crystal Baker 149 / EXCUSED
6. Anna McKenachan 43
7. Jennifer Ellis 127
8. Bertha Blackmon 1
9. Yvonne Harris (Forelady)
10. John Snipes 19
11. Willie Blackmon 102
12. John Allen 51
13. Cynthia Hood 8

1. Stephen Williams 104
2. Kallea Bupen 42
3. John Efid 127
4. Christine Cook 130
- (Ad) Koryn Davis 78

Jurors Excused by State

1. Eddie Sheen 16
2. Germaine Richardson 128
3. Carl Higgins 65
4. Christopher Riedy 72

Witnesses for State

Witnesses for Defense

Opening: T. Holland 2:55-3:05

Ross Burton 3:05-3:20

Sgt. Davey Dwyer 3:20-3:33

3:33-5:36

3:36-3:40

3:40-3:42

Danny Williams 4:08-4:12

4:12-4:13

Julie Hinson 4:13-4:22

4:22-4:29

Jason Flynn 4:29-4:33

4:33-4:35

Jill Hinson 4:35-4:40

4:40-4:42

Angel Williams 4:42-4:45

4:45-4:46

Jerry Williams 10:10-10:14

10:14-10:16

Crystal Owens 10:16-10:24

10:24-10:30

Robert Williams 10:30-10:32

Robert Williams 10:32-10:50

10:50-11:15

11:15-11:17

(Hearings)

Drana Jackson 11:47-11:55

11:55-11:58

Capt. Andy Rollins 11:58-12:15

12:15-12:26

Lunch

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Lancaster
 STATE VS.
Phillip Glen Miller
 AKA: _____
 Race: Black Sex: Male Age: 43
 DOB: _____ SS#: _____
 Address: _____
 City, State, Zip: _____
 DL# _____ SID# _____

INDICTMENT/CASE#: 2006-GS-29-208
 AM#: 14-530772
 Date of Offense: 1/31/06
 S.C. Code §: 44-53-375(B)
 CDR Code #: 0450

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Possession with Intent to Distribute Crack Cocaine, 3d Offense or Over
 in violation of § 44-53-375(B) of the S.C. Code of Laws, bearing CDR Code # 3039

☐ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC ☐ §17-25-45
 w/minor 1st or Lewd Act)

The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (Defendant Initial)
 The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Jeff Hammond
Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which
 are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
 Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-23-15.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms: _____

☐ set by SCDPPPS

Recipient: _____

*Fine: \$ _____

§14-1-206 (Assessments 107.5%) \$ _____

§14-1-211(A)(1) (Conv. Surcharge) \$100 \$ _____

§14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

§56-5-2995 (DUI Assessment) \$12 \$ _____

§35.13 (Public Def/Prob) \$500 \$ _____

§73.3, 1B TP (Law Enforce. Funding) \$25 \$ _____

§33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

§50-21-114(BUI Breath Test Fee) \$50 \$ _____

§56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) \$ _____

TOTAL \$ _____

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP

Requires \$500 be paid to Clerk during probation.

Court Reporter: Mike WatkinsClerk of Court/Deputy Clerk: Jeff HammondPRESIDING JUDGE: Jeff HammondJudge Code: 11/12/07Sentence Date: 1/25/07

CERTIFIED TO BE A TRUE COPY

Jeff Hammond
 JEFF HAMMOND
 CLERK OF COMMON PLEAS
 AND GENERAL SESSIONS COURT
 LANCASTER COUNTY, S.C.

SCCA/217 (9/2006)

DEFENDANT'S
EXHIBIT#4
1-29-08

WITNESSES

Lt. P. Harrison - LCDTF #06-02287

bcc

DOCKET NO. 2006-GS-29-208

The State of South Carolina

County of Lancaster

COURT OF GENERAL SESSIONS

MARCH TERM 2006

ARREST WARRANT NUMBER/DOA

H530772 (DOA-02-01-06)

ACTION OF GRAND JURY

TRUE

Danny S. B...
Foreperson of Grand Jury
Date: MAR 2 2006

VERDICT

Guilty

4/25/07 *Melanie S. Vaughn*
Foreperson of Petit Jury
Date:

THE STATE
VS.

Phillip Glen Miller 209

Indictment for
PWIP gen 4/25/07
~~Trafficking in Cocaine Base~~
10 to 28 Grams

SC Code: § 44-53-375(C)(1)
CDR Code: 0450
Class: Felony, E

CERTIFIED TO BE A TRUE COPY
Jeff Hammond
JEFF HAMMOND
CLERK OF COMMON PLEAS
AND GENERAL SESSIONS COURT
LANCASTER COUNTY, S.C.

DEFENDANT'S
EXHIBIT
#2
1-27-08
OK

CERTIFIED TO BE A TRUE COPY
Jeff Hammond
JEFF HAMMOND
CLERK OF COMMON PLEAS
AND GENERAL SESSIONS COURT
LANCASTER COUNTY, S.C.

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)

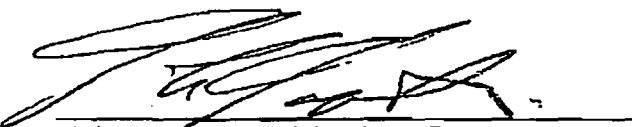
INDICTMENT

At a Court of General Sessions, convened on March 2, 2006, the Grand Jurors of Lancaster County present upon their oath:

PHILLIP GLEN MILLER
TRAFFICKING IN COCAINE BASE 10 TO 28 GRAMS

That Phillip Glen Miller did in Lancaster County on or about January 31, 2006, knowingly sell, manufacture, deliver, purchase, or bring into this state or provide financial assistance or otherwise aid, abet, attempt, or conspire to do the same or actually or constructively possess or knowingly attempt to actually or constructively possess ten grams or more but less than twenty-eight grams of cocaine base in violation of Section 44-53-375(c) (1) of the *Code of Laws of South Carolina*.

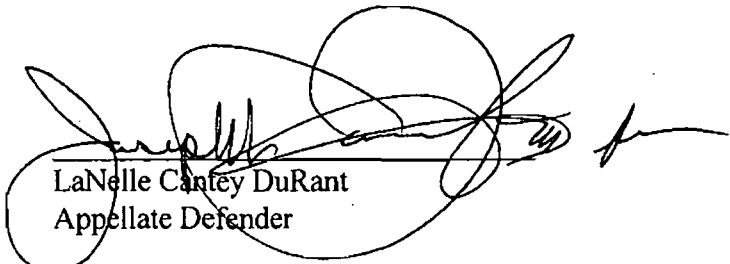
Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


John R. Justice, SOLICITOR

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."

September 27th, 2010



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ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

RECEIVED

OCT 29 2012

S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

PHILLIP MILLER,

APPELLANT

FINAL BRIEF OF APPELLANT.

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in denying appellant's motion for a new trial because the jury was tainted by having juror, Jillian Hinson, seated who did not disclose on *voir dire* that her mother was the victim of a violent crime, and Juror Hinson had testified for the state in that trial only ten months earlier?
2. Did the trial court err in admitting the drugs into evidence when the chain of custody was not complete because the three other evidence technicians who had access to the drugs which were locked in the evidence room at SLED were not included on the chain of custody which included only the name of Amy Stevens, the technician who received the drugs?

STATEMENT OF THE CASE

On March 2, 2006, the Lancaster County Grand Jury indicted Phillip Glen Miller on the charge of possession with intent to distribute (PWID) cocaine base 10 – 28 grams and simple possession of marijuana. On April 24 – 25, 2007, Miller proceeded to trial before the Honorable J.C. Nicholson, Jr., and a jury. The jury returned a verdict of guilty on the PWID cocaine base as indicted and a not guilty verdict on the possession of marijuana charge. Judge Nicholson sentenced Miller to twenty years on the PWID cocaine base third offense.

Miller's attorney filed a motion for a new trial on May 4, 2007. A hearing was held before Judge Nicholson on January 29, 2008. On January 13, 2009, Judge Nicholson filed an order denying the motion for the new trial. Miller's attorney filed a timely notice of appeal. This appeal follows.

ARGUMENT

I.

The trial court erred in denying appellant's motion for a new trial because the jury was tainted by having juror, Jillian Hinson, seated who did not disclose on *voir dire* that her mother was the victim of a violent crime, and Juror Hinson had testified for the state in that trial only ten months earlier.

The Lancaster County Drug Task Force of the Sheriff's Office was investigating Phillip Miller in January 2006. On January 31, 2006, Officer Paul Harrison saw a car that he had seen Miller driving before so he followed the car. The car pulled into a car wash but did not stop to wash, and then continued down the highway. Officer Harrison contacted another officer, Officer Doug Vecchio, and asked him to follow the car as Officer Harrison was turning around. R.33, ll.5 – 25; R.34, ll. 1 – 25; R.35, ll. 1 – 25; R.36, ll. 1 – 8.

Officer Vecchio notified Officer Harrison that the car was weaving back and forth across the center line. Then they decided to stop the car, and Miller was driving. Officer Vecchio asked for his driver's license, but Miller told him he did not have one. The officer had him step out of the car and arrested him for driving without a license. R.36, ll. 9 – 25; R.37, ll. 1 – 25.

Officer Harrison saw a marijuana roach on the passenger's side near the door handle, and he told Officer Vecchio. R.37, ll. 11 – 25. When asked, Miller consented for the officers to search the car. Officer Harrison found in the glove compartment a pill bottle with several rocks of 6.96 grams of crack cocaine according to the state's case. R.38, ll. 1 – 25; R.39, ll. 1 25; R.110, ll. 1 – 4. Miller was charged with PWID crack cocaine. Indictment 2006-GS-29-208.

Miller proceeded to trial, and the jury found him guilty of the PWID crack and not guilty of the possession of marijuana. R.182, ll. 3 – 13. Defense counsel filed a motion for a new trial on May 4, 2007 because Miller was denied a fair trial because the jury was tainted by juror Jillian Hinson not disclosing during *voir dire* that her mother was the victim of a stabbing and Ms. Hinson testified for the state in that trial . Memorandum February 28, 2008 Defendant's Exhibit 1.

A hearing was held before Judge Nicholson on January 29, 2008. Defense counsel presented an affidavit from William P. Frick, Esquire, where Attorney Frick explained that when he worked for the Sixth Judicial Solicitor's Office, he tried the case of State v. Jimmy Wayne Estes who was charged with assault and battery with intent to kill for stabbing Robin Williams. The trial was June 12 – 15, 2006. His affidavit explained that Jillian Hinson was the daughter of Robin Williams and had testified for the state in the trial. On April 25, 2007, Attorney Frick went to the Lancaster County Courthouse just as Miller's trial was ending. He recognized Jillian Hinson because he had interviewed her for the Estes trial when she testified. Attorney Frick told Attorney Grier about the Estes trial and Jillian Hinson's involvement that day after the jury had been dismissed. Attorney Grier remembered that Ms. Hinson had not disclosed that information during *Voir Dire* when the judge asked if anyone or a member of their family had been the victim of a violent crime. R. 194, ll. 1 – 25; R.195, ll. 1 – 25; R.196, ll. 1 – 25; R.197, ll. 1 – 25; Defendant's Exhibit 5.

Defense counsel argued that the issue was his constitutional right to a fair and impartial jury. He argued that, based on the trial transcript, he had two strikes left when Ms. Hinson was seated. He would have struck Ms. Hinson had he known that she was the

daughter of a victim who had been stabbed in a case just ten months earlier. R.7, ll.1 – 24.; R.8, ll. 24 – 25; R.9, ll. 1 – 7.

Counsel argued the case of State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001) which held that there were two prongs to be met concerning juror concealment. The first prong was if the concealment was intentional and if the failure to respond was unreasonable based on the significance of the question. The test, according to Woods was if the question was reasonably comprehensible to the average juror. The second prong to be met was if the information concealed would support a challenge for cause or would have to be a material factor in the party's peremptory challenges. R.198, ll. 17 – 25; R.199, ll. 1 – 10.

Counsel argued that the question asked during *voir dire* was straightforward and not ambiguous. The question asked by the judge was: "Is there any member of the jury panel who has been a victim of a crime in Lancaster County or member of your family immediate family a victim of a crime please stand?" R.202, ll. 22 – 25; R. 206, ll. 9 – 11. The Estes trial was only ten months earlier and involved ABIK, so there was not a problem with her not remembering. Defense counsel argued that because she testified for the state where her mother had been stabbed, he did not think she could be impartial. He said she would have been "predisposed to have some visceral distaste for the defense. R. 200, ll. 1- 25.

Counsel argued that the second prong was met because the information concealed would have supported a challenge for cause, and the information concealed was a material factor in his peremptory strikes. R.200, ll. 24 – 25; R.201, ll. 1 – 25; R.202, ll. 1 – 25; R.203, ll. 1 – 25.

The state argued that it was impossible to know if the concealment was intentional without having Ms. Hinson present to question her. R.202, ll. 1 – 21.

The judge said the question to resolve was whether the fact that she failed to reveal the fact that she testified in her mother's case for the state was a material factor in a peremptory challenge. R.211, ll. 24 – 25; R.212, ll. 1 – 3. The judge stated that defense counsel "would have been justified in striking her." R.210, ll. 17 – 18. The judge told the two attorneys to submit a memorandum to him within thirty days on what a "material factor" was because the argument "turned on that issue." R. 211, ll. 1 – 25.

On January 14, 2009, Judge Nicholson issued an order denying the motion for a new trial. He wrote:

Defendant's motion for a new trial is denied. The issue in Defendant's motion is not a material factor, because there is no victim in the defendant's case and there is no violent crime in the defendant's case.

Judge Nicholson's Order January 13, 2009.

All criminal defendants have the right to a trial by an impartial jury. U.S. Const. Amends. VI and XIV; S.C. Const. art I, Sec. 14. To protect both parties' right to an impartial jury, the trial judge must ask potential jurors whether they are aware of any bias or prejudice against a party. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998).

The Supreme Court wrote in State v. Woods, *supra*, that where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. The Court held that intentional concealment occurred when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. The Court held that unintentional nondisclosure exists

where, for example, the experience forgotten was insignificant or remote in time, or where the venireman reasonably misunderstands the question posed.

The juror in State v. Woods, *supra*, worked as a volunteer victims' advocate for three years in the solicitor's office which prosecuted the case. The juror did not respond to any questions asked during *voir dire*. The Court wrote that there was no question that she remembered the experience. The Court ruled that the juror's three year relationship with the solicitor's office would be a material factor in the use of a criminal defendant's peremptory challenges.

Jillian Hinson had had a relationship with a solicitor's office when she helped prosecute her mother's assailant by testifying at the trial. This fact would be a material factor in Miller's peremptory strikes. The *voir dire* questions help the defendant learn about the life experiences of each juror which help to shape their opinions about issues. The fact that she helped the state would create a probability that she held bias against the defendant. The fact that she did not disclose intentionally would raise a high probability that she was automatically biased. Testifying in the trial where her mother had been stabbed would be a significant event and not easily forgotten for the average juror.

The new trial should have been granted because the jury was tainted.

ARGUMENT

II.

The trial court erred in admitting the drugs into evidence when the chain of custody was not complete because the three other evidence technicians who had access to the drugs which were locked in the evidence room at SLED were not included on the chain of custody which included only the name of Amy Stevens, the technician who received the drugs.

During the state's presentation of the chain of custody of the crack cocaine, Amy Stevens, testified that she was a forensic technician with SLED, and did receive the crack cocaine for analysis from Jeff Hilton of the Lancaster County Sheriff's Office. She logged the drug information into the computer and then submitted the drugs into "our drug intake storage which is in our evidence room in a locked cage." R.93, ll. 3 – 25; R.94, ll. 1 – 25.

When asked if other people had access to the locked cage where the drugs were, she replied that she and three other technicians had access to it. R.95, ll. 1 – 4.

Following the testimony of Jason Waldkirch, who was a special agent forensic scientist in the drug analysis lab at SLED, defense counsel did not object to the drug analysis report being admitted, but counsel objected to an incomplete chain of custody. Counsel argued that Amy Stevens testified that three other technicians besides her had custody of the drugs while they were in her custody in the vault at SLED. Counsel argued that that gave three other people access to the drugs while they were supposedly locked up. Counsel said the chain of custody did not reflect the names of the other three people. The judge denied the objection. R.112, ll. 1 – 25; R.113, ll. 1 – 25; R.114, ll. 1 – 8.

Decisions regarding the admissibility of evidence and whether to grant or deny a mistrial are within the discretion of the trial court and will not be reversed on appeal absent

an abuse of discretion. State v. Sweet, 374 S.C. 1, 647 S.E.2d 202 (2007). An abuse of discretion occur when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. Id.

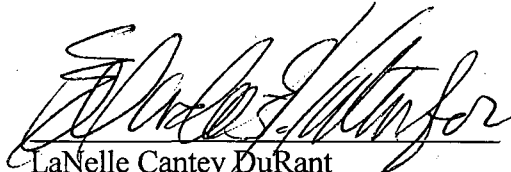
A party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable. State v. Sweet, supra. Where an analyzed substance that has passed through several hands, the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture. State v. Sweet, supra, citing Benton v. Pellum, 232 S.C. 26, 33, 100 S.E.2d 534 537 (1957).

The state should have presented additional testimony to make the chain of custody clear.

Conclusion

Based on the above, the conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'LaNelle Cantey DuRant', written over a horizontal line.

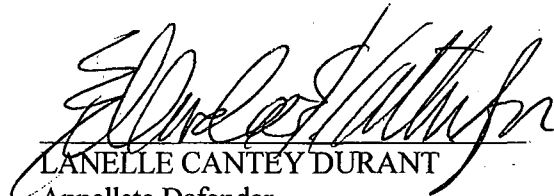
LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of October, 2010.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

OCT 29 2012

Appeal from Lancaster County

S.C. Supreme Court

J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

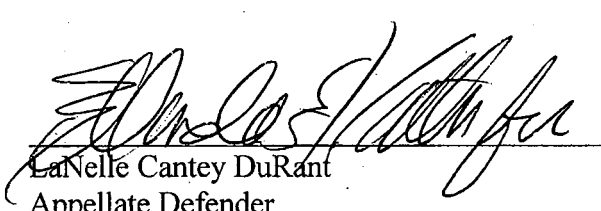
V.

PHILLIP MILLER,

APPELLANT

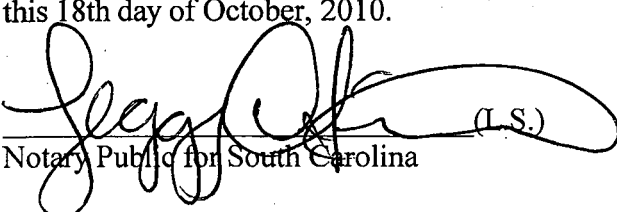
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William H. Blich, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 18th day of October, 2010.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of October, 2010.


Notary Public for South Carolina

My Commission Expires: December 4, 2017.

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

OCT 29 2012

S.C. Supreme Court

Appeal From Lancaster County
Hon. J.C. Nicholson, Jr., Circuit Court Judge

The State,

Respondent,

v.

Phillip Glen Miller,

Appellant.

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court properly denied Appellant's motion for a new trial because the juror's alleged failure to disclose did not taint the jury or prejudice Appellant.
- II. The trial court properly admitted the drugs into evidence because the chain of custody was established and because the SLED drug analysis report was previously admitted without objection.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

Officer Paul Harrison spotted Appellant's car turn into a car wash, sit for a minute, and then pull back into traffic. (T.34-35; R.34-35). Officer Harrison had Officer Douglas Vecchio follow Appellant's vehicle. (T.35-36; R.35-36). Officer Vecchio observed Appellant weaving into the other lane and decided to stop Appellant. (T.72; R.72). Once he pulled Appellant over, Officer Vecchio approached the vehicle's driver side door and Officer Harrison approached the passenger door. Officer Vecchio asked if Appellant had a driver's license. Appellant replied he did not have a license and was placed under arrest. (T.72-73; R.72-73).

Officer Vecchio asked if he could search the vehicle and Appellant gave his consent. Officer Harrison indicated he located a marijuana cigarette in the passenger door of the vehicle. (T.37; 73; R.37; 73). Officer Harrison continued searching the vehicle and, in the glove compartment, found a pill bottle containing several rocks of what appeared to be crack cocaine. (T.38-39; R.38-39). Officer Harrison never found a crack pipe or other indicia of personal use for the crack cocaine. (T.43; R.43).

Officer Leonard Hilton, head of evidence for the Lancaster County Sheriff's Office, received the drugs from Officer Harrison. (T.81-83; R.81-83). He placed the crack cocaine in a BEST evidence kit from SLED for transport to Columbia for analysis. (T.83-84; R.83-84). He turned the evidence over to Amy Stevens at SLED. (T.85; R.85). Amy Stevens received the evidence from Hilton and placed it in SLED's drug intake storage, part of their secure evidence room. (T.94; R.94).

Jason Waldkirch, a forensic scientist with SLED, retrieved the evidence from the secure drug room. (T.101-103; R.101-103). Agent Waldkirch determined the substance was cocaine base or crack cocaine. He indicated the official weight was 6.96 grams or 107.40 grains. (T.110; R.110). He placed the drugs back into the drug vault at SLED until Officer Hilton took the evidence back from SLED and placed it in the Lancaster County evidence vault until trial. (T.87; 111; R.87; 111).

Appellant was indicted for possession of marijuana and possession with intent to distribute (PWID) crack cocaine. The jury found him guilty of PWID crack cocaine and acquitted him of the marijuana charge. He was sentenced to twenty years in prison.

ARGUMENT

- I. The trial court properly denied Appellant's motion for a new trial because the juror's alleged failure to disclose did not taint the jury or prejudice Appellant.**

Appellant maintains the trial court erred in denying his motion for a new trial after it was learned a juror may have served as a witness in the trial of a defendant accused of stabbing the juror's mother. Even if the Court accepts the failure to respond was either intentional or unreasonable, Appellant has failed to demonstrate the information would have been a material factor in the use of his peremptory challenges.

A trial judge has the discretion to grant or deny a motion for a new trial, and his decision will not be reversed absent a clear abuse of discretion. State v. Johnson, 376 S.C. 8, 654 S.E.2d 835 (2007). Criminal defendants have the right to a trial by an impartial jury. U.S. Const. amends. VI and XIV; S.C. Const. art. I, § 14.

When a juror conceals information inquired into during voir dire, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges.

State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001) (citing Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986)).

During voir dire, the trial court asked: "Is there any member of the jury panel who has been a victim of a crime in Lancaster County or member of your immediate family a victim of a crime please stand?" There was no response to the question by any member of the jury panel. After the trial ended in Appellant's conviction, William P. Frick, submitted an

affidavit indicating he was involved in the Jimmy Wayne Estes trial for assault and battery with intent to kill. His affidavit provides:

Jillian Hinson was a witness for the State in the trial. I participated in the interview of Jillian Hinson prior to the trial and I believe I conducted the direct examination of Ms. Hinson during the prosecution of the trial. I learned that Jillian Hinson was the daughter of the victim in that case, Robin Williams, from my interview with Ms. Hinson.

(T. Affidavit of William Frick; R.219). His Affidavit continues: "I am absolutely certain that the Jillian Hinson who served as a juror in the trial of State vs. Phillip Miller is the same person who testified on behalf of the State in the prosecution [of] the man who assaulted her mother in the State vs. Jimmy Wayne Estes trial." (T. Affidavit; R.219).

Intentional or Unreasonable Concealment

The Supreme Court explained: "[I]ntentional concealment occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." Woods, 345 S.C. at 588, 550 S.E.2d at 284. The party seeking a new trial has the burden to prove the failure of the juror to respond was unreasonable or intentional. See Thompson, 288 S.C. at 14, 339 S.E.2d 505 at 506. "Necessarily, whether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis." Woods, 345 S.C. at 588, 550 S.E.2d at 284 (2001).

In the instant case, Appellant did not provide any testimony or affidavit from the juror explaining her failure to respond to the trial court's voir dire question. The Affidavit of William Frick indicates his belief she was the same person, but relies on a recollection of

people and events from ten months prior and provides no further evidence Ms. Hinson was the daughter of the victim. All the prior cases addressing this issue involve a juror who subsequently testified to explain why they failed to respond. Without Ms. Hinson's testimony or an affidavit from her, it is impossible to know for certain if she is the same person whose mother was a victim of a crime, and therefore, Appellant failed to meet his burden to show she intentionally or unreasonably failed to answer.

Further, we do not have her explanation why she did not answer. The trial court has to consider all the facts in making its decision, but in this case, one significant fact is missing—Ms. Hinson's explanation for why she did not respond. The trial court must resolve the issue based purely on speculation as to whether the juror is one and the same as the person whose mother was attacked or whether there is any explanation why she failed to respond. Accordingly, Appellant failed to meet his burden to show the failure to answer was intentional and, therefore, the inquiry should have ended. See State v. Sparkman, 358 S.C. 491, 497, 596 S.E.2d 375, 378 (2004).

Material Factor

In addition to proving the concealment was intentional, Appellant has to demonstrate the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. Woods, 345 S.C. at 587, 550 S.E.2d at 284.

[R]elief is required only when the court finds the concealed information would have supported a challenge for cause, or would have been a material factor in the use of the party's peremptory challenges. The inquiry must focus on the character of the concealed information, not on the mere fact that a concealment occurred.

Thompson, 288 S.C. at 15, 339 S.E.2d at 506.

Even assuming the Affidavit provides sufficient evidence from which the Court can conclude Ms. Hinson's failure to respond to the jury voir dire was unreasonable and her concealment intentional, the information that she was the daughter of a victim of a stabbing was not grounds for excuse for cause and was not material to the decision to use a peremptory strike in a drug possession and distribution case. As the trial court found, the fact a juror is the daughter of a victim of a violent crime is not likely to be a material factor in the use of a peremptory strike in a drug possession case in which there was no evidence of violence, weapons, or other logical connection to the trial involving her mother's attacker.

Accordingly, the trial court did not abuse its discretion in denying Appellant's motion for a new trial where the Appellant failed to meet his burden of proof establishing the concealment was intentional or that the information allegedly concealed was material to the use of his peremptory strikes.

- II. The trial court properly admitted the drugs into evidence because the chain of custody was established and because the SLED drug analysis report was previously admitted without objection.**

Appellant contends the trial court erred in admitting the crack cocaine into evidence because the State failed to properly establish a full chain of custody. The State, however, presented the testimony of every person who handled with the drugs and fully established the chain of custody. Further, any possible error is not preserved or merely harmless because Appellant allowed the report of the SLED forensic analyst into evidence prior to admitting the drugs.

PRESERVATION

This issue is not properly preserved for review on appeal. In order to preserve an evidentiary issue for review on appeal, a contemporaneous objection must be made when the testimony is offered. See State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court). If a party fails to properly object, the party is procedurally barred from raising the issue on appeal. State v. Johnson, 363 S.C. at 58-59, 609 S.E.2d at 523.

Counsel did not contemporaneously object when the results of the SLED lab testing were admitted. The State is required to establish the chain of custody prior to admitting evidence regarding the crack cocaine or the analysis of the substance. Once the forensic analyst testified without objection that the substance was 6.96 grams of crack cocaine, any subsequent objection would be untimely. In this case, Appellant waited until the State offered the actual drugs into evidence to object, instead of objecting when the analysis of

those drugs was admitted. (T.110; 112-113; R.110; 112-113). As a result, the objection was not timely and the issue is not preserved for review on appeal.

MERITS

The issue also fails on the merits. In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

In order to admit the drug evidence:

[A] party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable. Where an analyzed substance that has passed through several hands, the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture. Accordingly, if the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion by the trial court is shown in admitting the evidence absent proof of tampering, bad faith, or ill-motive.

State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205-206 (2007) (emphasis added) (citing Benton v. Pellum, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957); State v. Taylor, 360 S.C. 18, 25, 598 S.E.2d 735, 738 (Ct. App. 2004)).

"South Carolina law does not require testimony as to the exclusion of any possibility of tampering." State v. Rogers, 361 S.C. 178, 187, 603 S.E.2d 910, 915 (Ct. App. 2004).

The Courts of this State have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the evidence was not established at least as far as practicable. State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). When the identity of persons handling the specimen is established, evidence regarding its care goes only to the weight of the evidence and not its admissibility. Id.

In this case, all individuals who handled the evidence, acquired the evidence, or served as the custodian of the evidence testified at trial regarding their receipt of and handling of the drugs. The State is not required to present the testimony, or even identify, all persons who might have had access to the drug storage area. The State is required to establish a chain of custody of those who handled the evidence in question or took physical custody of the evidence in question.

Officer Hilton testified he headed Lancaster County's evidence room and took possession of the drugs in this case from Officer Harrison. (T.83; R.83). Officer Hilton testified he prepared the crack cocaine for transport to SLED by sealing it in a BEST evidence kit. (T.83-84; R.83-84). He transported the crack cocaine to Columbia and delivered it to Amy Stevens with SLED. (T.84-85; R.84-85). Agent Stevens took possession of the crack cocaine and secured it in the drug intake storage within SLED's locked evidence room. (T.93-94; R.93-94).

Agent Jason Waldkirch, the forensic analyst who tested the drugs, testified he retrieved the crack cocaine within the BEST evidence kit from the drug intake area of the evidence room. (T.102-103; R.102-103). He indicated there was no sign of tampering with the kit and the bag was still sealed. (T.103-104; R.103-104). Agent Waldkirch returned the

crack cocaine to the drug storage area, or "drug vault," where it remained until Officer Hilton took possession of the drugs and returned the evidence to Lancaster County. (T.87; 111; R.87; 111).

The State clearly established the chain of custody in this case. All persons who had "custody" of the drugs, who handled the drugs, or who had possession of the drugs testified at trial. The fact the State did not provide the testimony of other people who possibly had access to the location where the drugs were stored is not applicable to establishing the chain of custody. No evidence of tampering was provided and all persons who handled the drugs indicated they saw no evidence of tampering. Accordingly, the State established a complete chain of custody and the trial court properly admitted the crack cocaine into evidence.

HARMLESS ERROR

Even if the issue is preserved and has merit, any possible error is entirely harmless. As discussed above, Appellant did not object to the forensic analyst's testimony the substance was 6.96 grams of crack cocaine. The admission of the physical drugs, the only thing objected to by Appellant, would be cumulative to the testimony establishing the weight and type of drugs confiscated during the execution of the search warrant. See State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003) (admission of improper evidence is harmless where the evidence is merely cumulative to other evidence.); State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (any error in admission of evidence cumulative to other unobjected-to evidence is harmless). Therefore, any error would be entirely harmless due to Appellant's failure to object to the testimony of the forensic analyst.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

October 19, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Lancaster County
Hon. J.C. Nicholson, Jr., Circuit Court Judge

The State,

Respondent,

v.

Phillip Glen Miller,

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."

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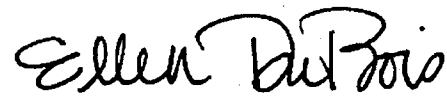
Appellant.

PROOF OF SERVICE

I, ELLEN DuBOIS, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. DuRant, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This 19th day of October, 2010.



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October 26, 2012

HAND-DELIVERED

The Honorable Daniel E. Shearouse
Clerk of Court, S. C. Supreme Court
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Columbia, S. C. 29211

RECEIVED

OCT 29 2012

S.C. Supreme Court

Re: State v. Phillip Miller

Dear Mr. Shearouse:

Enclosed please find two copies of the Appendix, along with Proof of Service, in the above-referenced case.

Thank you for your attention to this matter.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General

WMB/erd

Enclosures

cc: The Honorable Jenny A. Kitchings(one copy of Petition enclosed)
LaNelle C. DuRant, Esquire (two copies of Petition and Appendix enclosed)
Victim Services (one copy of Petition enclosed)