

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Anderson County

R. Lawton McIntosh, Circuit Court Judge

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S.C. Supreme Court

KEVIN WARE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000545

APPENDIX

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INDEX

INDEX.....	i
TRIAL TRANSCRIPT DATED JANUARY 5, 2009.....	1
APPLICATION FOR POST-CONVICTION RELIEF.....	223
AMENDED APPLICATION FOR POST-CONVICTION RELIEF	230
RETURN	237
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED SEPTEMBER 18, 2013	243
ORDER OF DISMISSAL	271
INDICTMENTS	281

STATE OF SOUTH CAROLINA)
) COURT OF GENERAL SESSIONS
COUNTY OF ANDERSON)

STATE OF SOUTH CAROLINA,)
)
 PLAINTIFF,)
 vs.) TRANSCRIPT OF RECORD
) 2007-GS-04-971 - 973
)
 KEVIN WARE,)
)
DEFENDANT.)

JANUARY 5, 2009
 ANDERSON, 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:

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 Attorney for the State

BRUCE A. BYRHOLDT, ESQ.
 Attorney for the Defendant

Donna Brady
 Official Court Reporter

INDEX OF WITNESSES

1		
2	KEVIN MARSEE IN CAMERA	
3	Direct By Mr. Bradley	32
4	Cross By Mr. Byrholdt	39
5	VIRGINIA GAIL RICHARDSON IN CAMERA	
6	Direct By Mr. Bradley	40
7	Cross By Mr. Byrholdt	44
8	KEVIN MARSEE	
9	Direct By Mr. Bradley	48
10	Cross By Mr. Byrholdt	52
11	EDWARD J. AMAN	
12	Direct By Mr. Bradley	57
13	Cross By Mr. Byrholdt	62
14	Redirect By Mr. Bradley	63
15	JODY CULBERTSON	
16	Direct By Mr. Bradley	64
17	Cross By Mr. Byrholdt	68
18	Redirect By Mr. Bradley	69
19	MIKE BASKIN IN CAMERA	
20	Direct By Mr. Byrholdt	72
21	Cross By Mr. Bradley	77
22	W. MICHAEL BASKIN	
23	Direct By Mr. Bradley	84
24	Cross By Mr. Byrholdt	92
25	ReDirect By Mr. Bradley	99

1	Recross By Mr. Byrholdt	.101
2	KEVIN WARREN	
3	Direct by Mr. Bradley	.103
4	Cross By Mr. Byrholdt	.105
5	FRANCES JOHNSON	
6	Direct By Mr. Bradley	.109
7	Cross By Mr. Byrholdt	.112
8	VIRGINIA G. RICHARDSON	
9	Direct By Mr. Bradley	.114
10	Cross By Mr. Byrholdt	.120
11	AMY STEPHENS	
12	Direct By Mr. Bradley	.129
13	Cross By Mr. Byrholdt	.132
14	NIKKI PERRY	
15	Direct By Mr. Bradley	.133
16	Cross By Mr. Byrholdt	.136
17	CARMEN TUCKER	
18	Direct By Mr. Bradley	.139
19	Cross By Mr. Byrholdt	.150
20		
21		
22		
23		
24		
25		

» > o < «

Closing Statement By Mr. Bradley 167

Closing Statement By Mr. Byrholdt 173

Jury Charge 178

STATE EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
1-2	Photos		87
3	Crack cocaine		150

COURT EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
1	Note from jury request testimony	190	
2	Note from jury (hung)	212	

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1 January 5, 2009

2 (Whereupon, court convened with all parties present,
3 when the following proceedings were had:)

4 THE COURT: All right, solicitor, if you'll call
5 your case.

6 MR. BRADLEY: Thank you, Your Honor. The state
7 calls the case of the State versus Kevin Ware,
8 indictments 2007-GS-04-971, 2007-GS-04-972, and
9 2007-GS-04-973. First, possession of crack cocaine with
10 intent to distribute; second, possession of crack cocaine
11 with intent to distribute within proximity of a park; and
12 third, conspiracy to distribute crack cocaine.

13 THE COURT: Thank you, sir.

14 Ladies and gentlemen of the jury panel, the state
15 has called the case of the State versus Kevin M. Ware,
16 charged with possession of crack cocaine with intent to
17 distribute, possession of crack cocaine with intent to
18 distribute within proximity of a park, and conspiracy to
19 distribute crack cocaine.

20 Ladies and gentlemen, these are indictments, not
21 evidence. There's no proof of innocence or guilt as to
22 the indictment, it's merely the mechanism by which the
23 person is brought before the court for trial. We're
24 going through basically the same process that you just
25 sat through when we drew the first jury.

1 The first thing I'm going to do is call out a list
2 of names. I'm going to ask you the same questions I
3 asked you when we drew the first jury. Are you related
4 by blood or marriage? Do you know the individual or have
5 you had any contact with the individual?

6 The first name is Kevin Marsee, Anderson City Police
7 Department. Is anybody related by blood or marriage to
8 Kevin Marsee, does anybody know Kevin Marsee or had any
9 contact with Kevin Marsee? If so, please stand.

10 (Prospective juror stands.)

11 THE COURT: Mr. Ebbeler, you know him through your
12 wife's employment?

13 PROSPECTIVE JUROR: Yes, sir. I don't know him
14 well, but I know of him.

15 THE COURT: Do you see him on a regular basis?

16 PROSPECTIVE JUROR: No, sir.

17 THE COURT: How often do you see him?

18 PROSPECTIVE JUROR: Once a month if I'm lucky.

19 THE COURT: Would that cause you any difficulty
20 sitting on the jury?

21 PROSPECTIVE JUROR: No, sir.

22 THE COURT: Can you be fair to both the state and
23 defendant?

24 PROSPECTIVE JUROR: Yes, sir.

25 THE COURT: Base your decision on the testimony you

Jury Selection

7

1 hear in the courtroom?

2 PROSPECTIVE JUROR: Yes, sir.

3 THE COURT: Thank you, Mr. Ebbeler, juror number 41.

4 The next name is Jody Culbertson, Anderson City
5 Police Department. Is anybody related by blood or
6 marriage? Does anybody know Jody Culbertson? If so,
7 please stand.

8 The next name is Kevin Warren, Anderson City Police
9 Department. Is anybody related by blood or marriage,
10 does anybody know Kevin Warren? If so, please stand.
11 Yes, sir, your name?

12 PROSPETIVE JUROR: Vance Rahn, juror number 129.

13 THE COURT: Yes, sir, Mr. Rahn? How do you know
14 him?

15 PROSPECTIVE JUROR: He lives in the same residential
16 area as I do.

17 THE COURT: How close?

18 PROSPECTIVE JUROR: Just in the same residential
19 area.

20 THE COURT: On the same street?

21 PROSPECTIVE JUROR: Yes.

22 THE COURT: Two houses down, next door?

23 PROSPECTIVE JUROR: Well, it's an older drive, so
24 maybe ten houses away, but it's across the way.

25 THE COURT: How often do you see him?

Jury Selection

8

1 PROSPECTIVE JUROR: Maybe once a month.

2 THE COURT: Do you see him in passing?

3 PROSPECTIVE JUROR: Yes.

4 THE COURT: Are you personal friends?

5 PROSPECTIVE JUROR: We're friendly, yes. I don't
6 know personal friends, but friends, yes. We talk to each
7 other. I know his wife and family.

8 THE COURT: You talk to him on a regular basis?

9 PROSPECTIVE JUROR: Not on a regular basis, just
10 coming and going.

11 THE COURT: How would that affect you sitting on
12 this jury?

13 PROSPECTIVE JUROR: It wouldn't.

14 THE COURT: Wouldn't cause you any difficulty at
15 all?

16 PROSPECTIVE JUROR: No, sir.

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

19 PROSPECTIVE JUROR: Yes, sir.

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

22 PROSPECTIVE JUROR: Yes, sir.

23 THE COURT: Thank you, Mr. Rahn.

24 The next name is Eddie Aman. Eddie Aman, Anderson
25 city police department. Is anybody related by blood or

Jury Selection

9

1 marriage or anybody know Eddie Aman?

2 The next name is Mike Bracone, Anderson City Police
3 Department. Is anybody related by blood or marriage or
4 does anybody know Mike Bracone? If so, please stand.

5 The next name is David Dean. Formerly with Anderson City
6 Police Department. Is anybody related by blood or
7 marriage to David Dean? Does anybody know David Dean?
8 If so, please stand.

9 The next name is Mike Baskin, formerly with Anderson
10 City Police Department. Does anybody know Mike Baskin or
11 is anybody related by blood or marriage to Mike Baskin?
12 If so, please stand.

13 The next name is Nikki Perry from SLED. Is anybody
14 related by blood or marriage to Nikki Perry? Does
15 anybody know Nikki Perry? If so, please stand.

16 The next name is Amy Stevens of SLED. Is anybody
17 related by blood or marriage to Amy Stevens or does
18 anybody know Amy Stevens? If so if so, please stand.

19 The next name is Carmen Tucker also of SLED. Does
20 anybody know Carmen Tucker? Is anybody related by blood
21 or marriage to Carmen Tucker? If so, please stand.

22 The next name is Virginia Gail Richardson. Anybody
23 related by blood or marriage to Virginia Gail Richardson.
24 Does anybody know Virginia Gail Richardson? If so,
25 please stand.

1 Has any member of the jury panel formed or expressed
2 an opinion about any issue or matter involved in this
3 case? If so, please stand.

4 Has anybody heard anything about this case other
5 than what I've told you or what you heard today in the
6 courtroom? If so, please stand. Is any member of the
7 jury panel aware of any bias or prejudice towards either
8 the state or the defendant in this case? If so, please
9 stand.

10 Does any member of the jury panel have a bias
11 towards drugs where they could not be a fair juror? If
12 so, please stand. Does any member of the jury panel know
13 of any reason, personal or otherwise, as to why they
14 could not serve on this jury? If so, please stand.

15 Now, the last -- Mr. Byrholdt and the solicitor were
16 present when we went through the first jury, I went
17 through a lot of other questions they were presented,
18 brought the jurors up to the bench. Does the state want
19 me to go through the same questions or did you hear
20 enough when we drew the first jury?

21 MR. BRADLEY: Heard enough, Your Honor, no need to
22 go through them.

23 MR. BYRHOLDT: I have all the jury information down,
24 Your Honor.

25 THE COURT: I'm going to incorporate all the

Jury Selection

11

1 questions I asked on the first jury during that process
2 when you were in the courtroom by referring to that
3 record, that they asked. The parties are waving the
4 asking of the second time; is that correct from the
5 state?

6 MR. BRADLEY: That is correct, Your Honor.

7 THE COURT: Mr. Byrholdt, is that correct?

8 MR. BYRHOLDT: That is correct, Your Honor.

9 THE COURT: Thank you very much. Is the state ready
10 to strike?

11 MR. BRADLEY: Yes, Your Honor, we are.

12 THE COURT: Defense ready to strike?

13 MR. BYRHOLDT: Need to introduce my client.

14 THE COURT: I'm sorry. Okay. Stand and introduce
15 yourself please. I'm sorry.

16 MR. BRADLEY: Good afternoon. My name is Matthew
17 Bradley, assistant solicitor here in Anderson County.
18 And sitting with me is Jen Biford, she's also an
19 assistant solicitor.

20 THE COURT: Is any member of the panel close
21 personal friends with Solicitor Bradley or anyone else in
22 the solicitor's office? If so, please stand.

23 (No response elicited.)

24 Mr. Byrholdt, if you'd stand and introduce yourself.

25 MR. BYRHOLDT: Please the Court? I'm Bruce

1 Byrholdt. I practice law across the street with the firm
2 of Chapman, Byrholdt and Yon. I represent Kevin. Thank
3 you.

4 THE COURT: Has anybody been represented by
5 Mr. Byrholdt, either presently or in the past, or close
6 personal friends of Mr. Byrholdt? If so, please stand.

7 Is anybody related by blood or marriage to Kevin
8 Ware, does anybody know Kevin Ware? If so, please stand.

9 All right. Any further questions?

10 MR. BRADLEY: Nothing further.

11 THE COURT: Anything further from the defendant?

12 MR. BYRHOLDT: No, your Honor.

13 THE COURT: Is the state ready -- excuse me, state
14 ready to strike?

15 MR. BRADLEY: Yes, Your Honor.

16 THE COURT: Defense ready?

17 MR. BYRHOLDT: Yes, Your Honor.

18 THE COURT: Madam clerk.

19 THE CLERK: Thank you, Your Honor.

20 Ladies and gentlemen, as I call your name if you'll
21 please come forward and present yourselves to the two
22 tables.

23 Number 72, Errol Hunter, number 72.

24 (Prospective juror 72, black male, steps forward.)

25 THE CLERK: Say you for the state?

Jury Selection

13

1 MR. BRADLEY: Please present the juror.

2 THE CLERK: Say you for the defendant?

3 MR. BYRHOLDT: Swear the juror.

4 THE CLERK: Have a seat, Mr. Hunter, in the jury
5 box.

6 Number 112, Pamela Motes, 112.

7 (Prospective juror 112, white female, steps
8 forward.)

9 THE CLERK: What say you for the state?

10 MR. BRADLEY: Please present the juror.

11 THE CLERK: What say you for the defendant?

12 MR. BYRHOLDT: Please swear the juror.

13 THE CLERK: Have a seat please, Ms. Motes, in the
14 jury box.

15 Number 155, Sharanda Thompson, 155.

16 (Prospective juror 155, white female, steps
17 forward.)

18 THE CLERK: What say you for the state?

19 MR. BRADLEY: Please excuse the juror.

20 THE CLERK: You may return to your seat, Ms.
21 Thompson.

22 Number 73, Shirley Irvin, number 73.

23 (Prospective juror 73, white female, steps forward.)

24 THE CLERK: What say you for the state?

25 MR. BRADLEY: Present the juror.

1 THE CLERK: What say you for the defendant?
2 MR. BYRHOLDT: Please excuse Ms. Irvin on this case.
3 THE CLERK: Thank you.
4 Number 132, Velories Reed, 132.
5 (Prospective juror 132, black female, steps
6 forward.)
7 THE CLERK: What say you for the state?
8 MR. BRADLEY: Please present the juror.
9 THE CLERK: What say you for the defendant?
10 MR. BYRHOLDT: Please swear the lady.
11 THE CLERK: Please have a seat in the jury box, Ms.
12 Reed.
13 Number 140, Timothy Sewell, number 140.
14 (Prospective juror 140, white male, steps forward.)
15 THE CLERK: What say you for the state?
16 MR. BRADLEY: Please excuse the juror.
17 THE CLERK: You're excused, thank you.
18 Number 54, Judith Frost, 54.
19 (Prospective juror 54, white female, steps forward.)
20 THE CLERK: What say you for the state?
21 MR. BRADLEY: Please present the juror.
22 THE CLERK: What say you for the defendant?
23 MR. BYRHOLDT: Please swear the juror.
24 THE CLERK: Please have a seat, Ms. Frost, in the
25 jury box.

Jury Selection

15

1 Juror number 10, Troy Blango, number 10.
2 (Prospective juror 10, black male, steps forward.)
3 THE CLERK: What say you for the state?
4 MR. BRADLEY: Please present the juror.
5 THE CLERK: What say you for the defendant?
6 MR. BYRHOLDT: Please swear the gentleman.
7 THE CLERK: Please have a seat in the jury box.
8 Number 75, Michael N. Junkins, 75.
9 (Prospective juror 75, white male, steps forward.)
10 THE CLERK: What say you for the state?
11 MR. BRADLEY: Please present the juror.
12 THE CLERK: What say you for the defendant?
13 MR. BYRHOLDT: Please excuse the juror.
14 THE CLERK: You may return to your seat. Thank you.
15 Juror number 76, Ronald Kay, 76.
16 (Prospective juror 76, white male, steps forward.)
17 THE CLERK: What say you for the state?
18 MR. BRADLEY: Please present the juror.
19 THE CLERK: What say you for the defendant?
20 MR. BYRHOLDT: Please excuse the juror from this
21 case.
22 THE CLERK: Thank you, you're excused.
23 Number 15, Timothy Bouchillon, 15.
24 (Prospective juror 15, white male, steps forward.)
25 THE CLERK: What say you for the state?

1 MR. BRADLEY: Please present the juror.
2 THE CLERK: What say you for the defendant?
3 MR. BYRHOLDT: Please excuse the juror.
4 THE CLERK: You're excused, thank you.
5 Juror number 130, Kevin Reardon, 130.
6 (Prospective juror 130, white male, steps forward.)
7 THE CLERK: What say you for the state?
8 MR. BRADLEY: Please present the juror.
9 THE CLERK: What say you for the defendant?
10 MR. BYRHOLDT: Please swear the gentleman.
11 THE CLERK: Please have a seat in the jury box, Mr.
12 Reardon.
13 Number 141, Charles Shealy, II, 141.
14 (Prospective juror 141, white male, steps forward.)
15 THE CLERK: What say you for the state?
16 MR. BRADLEY: Please present the juror.
17 THE CLERK: What say you for the defendant?
18 MR. BYRHOLDT: Please swear the juror.
19 THE CLERK: Please have a seat in the jury box, Mr.
20 Shealy.
21 Number 125, Rebecca Pickens, 125.
22 (Prospective juror 125, white female, steps
23 forward.)
24 THE CLERK: What say you for the state?
25 MR. BRADLEY: Please present the juror.

Jury Selection

17

1 THE CLERK: What say you for the defendant?
2 MR. BYRHOLDT: Please swear the juror.
3 THE CLERK: Have a seat in the jury box, please.
4 Number 29, Roger Cummings, number 29.
5 (Prospective juror 29, white male, steps forward.)
6 THE CLERK: What say you for the state?
7 MR. BRADLEY: Please present this juror.
8 THE CLERK: What say you for the defendant?
9 MR. BYRHOLDT: Please swear the gentleman.
10 THE CLERK: Please have a seat in the jury box.
11 Juror number 163, James White, 163.
12 (Prospective juror 163, white male, steps forward.)
13 THE CLERK: What say you for the state?
14 MR. BRADLEY: Please excuse this juror.
15 THE CLERK: You may return to your seat. Thank you.
16 Number 172, Christopher Wilson, 172.
17 (Prospective juror 172, white male, steps forward.)
18 THE CLERK: What say you for the state?
19 MR. BRADLEY: Please present this juror.
20 THE CLERK: What say you for the defendant?
21 MR. BYRHOLDT: Please swear the gentleman.
22 THE CLERK: Please have a seat in the jury box.
23 Number 157, John Tillie, number 157.
24 (Prospective juror 157, black male, steps forward.)
25 THE CLERK: What say you for the state?

1 MR. BRADLEY: Please present this juror.

2 THE CLERK: What say you for the defendant?

3 MR. BYRHOLDT: Please swear the gentleman.

4 THE CLERK: Please have a seat, Mr. Tillie, right

5 over there in the jury box. Thank you.

6 Number 34, Timothy Dickson, 34.

7 (Prospective juror 34, white male, steps forward.)

8 THE CLERK: What say you for the state?

9 MR. BRADLEY: Please present the juror.

10 THE CLERK: What say you for the defendant?

11 MR. BYRHOLDT: Please excuse Mr. Dickson from this
12 case.

13 THE CLERK: Thank you.

14 Number 120, James Pace, Jr. Number 120.

15 (Prospective juror 120, white male, steps forward.)

16 THE CLERK: What say you for the state?

17 MR. BRADLEY: Please present the juror.

18 THE CLERK: What say you for the defendant?

19 MR. BYRHOLDT: Please swear the gentleman.

20 THE CLERK: Please have a seat in the jury box, Mr.
21 Pace.

22 Number 97, Karleen Mattison, 97.

23 (Prospective juror 97, white female, steps forward.)

24 THE CLERK: What say you for the state?

25 MR. BRADLEY: Please present this juror.

Jury Selection

19

1 THE CLERK: What say you for the defendant?

2 MR. BYRHOLDT: Please excuse her from service on
3 this case.

4 THE CLERK: Thank you, Ms. Mattison.

5 Number 13, Pamela Boggs, number 13.

6 (Prospective juror 13, white female, steps forward.)

7 THE CLERK: What say you for the state?

8 MR. BRADLEY: Please present this juror.

9 THE CLERK: What say you for the defendant?

10 MR. BYRHOLDT: Please excuse the juror from this
11 case.

12 THE CLERK: Thank you, Ms. Boggs.

13 Juror number 8, Kay Barrett, number 8.

14 (Prospective juror 8, white female, steps forward.)

15 THE CLERK: What say you for the state?

16 MR. BRADLEY: Please present this juror.

17 THE CLERK: What say you for the defendant?

18 MR. BYRHOLDT: Please swear the lady.

19 THE CLERK: Ms. Barrett, if you'll have a seat on
20 that second row, you'll be our first alternate.

21 Juror number 85, Willie Lee, Jr. Number 85.

22 (Prospective juror 85, black male, steps forward.)

23 THE CLERK: What say you for the state?

24 MR. BRADLEY: Please present the juror.

25 THE CLERK: What say you for the defendant?

1 MR. BYRHOLDT: Swear the gentleman.

2 THE CLERK: Mr. Lee, if you'll have a seat on that
3 back row, you'll be our second alternate.

4 THE COURT: All right. Members of the jury, I'm
5 going to ask you to go to the jury room, elect a foreman
6 or forelady. Let me get you back in the courtroom after
7 that. You may elect anyone but Kay Barrett or Willie
8 Lee. If you'll follow the bailiff, he'll show you to the
9 jury room.

10 (Whereupon, the following proceedings were had
11 outside the presence of the jury:)

12 THE CLERK: Any motions from the state or the
13 defendant on drawing the jury?

14 MR. BRADLEY: None from the state.

15 MR. BYRHOLDT: No, Your Honor.

16 THE COURT: Other than what's already been made?
17 Thank you very much.

18 (Whereupon, the remaining venire is excused, after
19 which the following proceedings were had within the
20 presence of the jury:)

21 THE COURT: Mr. Foreman, members of the jury, we're
22 going to pass out a sheet with a number for you to call
23 in. We're going to have to try the murder case first. I
24 don't know how long it will take, two or two and a half
25 days. We may not start this trial until Wednesday

Jury Selection

21

1 afternoon or sometime Thursday. Something may happen
2 with the first case and we may be calling you back in
3 early. So on that sheet is a call-in number. It refers
4 to jury panel number two, there will be a message for
5 jury number two. The message may be call in tomorrow
6 night. Follow those instructions.

7 Right now my best guess is we probably won't start
8 this case until Thursday afternoon. That can change,
9 things happen. Okay. The instructions are to call in
10 after six. Instructions for the jury -- there will
11 probably be two instructions, one for the jury panel and
12 one for jury number two. Follow the instructions for
13 jury number two, not the jury panel. Okay.

14 (WHEREUPON, the jury is excused while another trial
15 is conducted before the court.)

16 Wednesday, January 7, 2009

17 (Whereupon, court reconvened with all parties
18 present, when the following proceedings were had
19 outside the presence of the jury:)

20 THE COURT: The foreman is juror number 120, number
21 20 on your strike sheet. I think you were gone. 120,
22 number 20 on your strike sheet, James C. Pace, Jr. is the
23 foreman. You all weren't in the courtroom when I got
24 that information. We haven't sworn the jury, right?

25 THE CLERK: That's correct, Your Honor.

1 MR. BYRHOLDT: The jury has not been sworn, Your
2 Honor.

3 THE COURT: All right. Is there anything before the
4 state before we bring the jury?

5 MR. BRADLEY: No, your Honor, unless you want to
6 hear that motion now.

7 THE COURT: No, I want to go ahead, let's get
8 opening statements in and then excuse the jury for the
9 evening. Then we'll hear your motions, start the
10 testimony tomorrow. Unless you all want to take some
11 testimony this afternoon, because I'm going to be sitting
12 here waiting for this first jury. That's up to you all.
13 Do you have any witnesses you can call?

14 MR. BRADLEY: Yes, Your Honor. We have several
15 here.

16 THE COURT: We can go ahead and make opening
17 statements and start the testimony if you want to. I'll
18 leave that up to you.

19 MR. BRADLEY: That's fine with me, Your Honor.

20 THE COURT: Mr. Byrholdt, is it okay with you?

21 MR. BYRHOLDT: Doesn't bother me, as long as the
22 jury -- I don't know how long you want to keep them. I'm
23 here for the night.

24 (The jury returns to open court when the following
25 proceedings were had:)

Opening Statement by Mr. Bradley

23

1 THE COURT: Mr. Barrett and Mr. Lee, the two
2 alternates, sit in those seats, and the foreman sit in
3 that seat.

4 Madam, Clerk, if you would swear the jury.

5 (Whereupon, the clerk administers the oath to a jury
6 of 12 and 2 alternates.)

7 THE COURT: Solicitor.

8 OPENING STATEMENT

9 BY MR. BRADLEY:

10 May it please the court? Mr. Byrholdt? Good
11 afternoon, ladies and gentlemen of the jury. I told you
12 the other day my name is Matt Bradley, prosecutor here in
13 Anderson County.

14 We are here today because on January 15, 2007, the
15 defendant, Kevin Ware, was found to be in possession of
16 2.4 grams of crack cocaine. On that day January 15th,
17 Anderson police officers executed a search warrant at
18 [REDACTED] Street here in Anderson city limits. As officers
19 entered the residence, they viewed the defendant, Kevin
20 Ware, inside the kitchen area of the house.

21 As officers Aman and Culbertson walked into the
22 kitchen, the defendant threw a baggy at officer Aman and
23 struck him in the chest, fell to the floor. Officer Aman
24 at that point detained the defendant, placed on the floor
25 on top of the baggy. As the scene cleared and forensic

1 officer -- the evidence officer came on to the scene, the
2 defendant was removed from the floor and the evidence
3 officer collected the baggy from underneath the
4 defendant.

5 That baggy was then tested. The baggy contained a
6 white, rock-like substance. That substance was tested
7 and it was found to be 2.4 grams --

8 MR. BYRHOLDT: I'm going to object. This is like
9 closing arguments, not opening statement. There is no
10 evidence before the jury at this point.

11 THE COURT: Solicitor, just tell the jury what facts
12 you plan on proving. Okay?

13 MR. BRADLEY: Yes, Your Honor.

14 THE COURT: Okay.

15 MR. BRADLEY: Thank you. These are the facts which
16 led to the arrest and charging -- the defendant was
17 arrested and charged with possession with intent to
18 distribute crack cocaine and possession with intent to
19 distribute within proximity of a park and conspiracy to
20 distribute crack cocaine.

21 South Carolina law defines those crimes, first,
22 possession with intent to distribute crack cocaine,
23 possession with intent to distribute crack cocaine within
24 proximity of a park -- it sounds very similar -- within a
25 half mile radius there was a public park; and conspiracy

Opening Statement by Mr. Bradley

25

1 to distribute crack cocaine, which is defined as a
2 combination of two or more persons for the accomplishment
3 of the unlawful objective, criminal objective, in this
4 case distributing crack cocaine.

5 As an assistant solicitor, it is my burden to prove
6 to you beyond a reasonable doubt that the defendant
7 committed these crimes. And I welcome that burden. A
8 reasonable doubt means that based upon all the evidence
9 presented to you, as a jury, you are firmly convinced of
10 a defendant's guilt.

11 The evidence you hear throughout the course of the
12 testimony comes from the Anderson City Police officers
13 who obtained a search warrant that day, who executed the
14 search warrant, found him to be in possession. You will
15 also hear evidence from the forensic chemist, who tested
16 the substance and did confirm it to be crack cocaine.
17 And you'll hear from Virginia Gail Richardson, the
18 occupier of the residence [REDACTED] street, who had called
19 the defendant earlier that day to come over and sell
20 crack cocaine to another individual.

21 I want to thank you for your patience and
22 attentiveness throughout the course of the trial.
23 Hearing all that evidence, and again, I submit to you at
24 the end of the trial, after hearing all the evidence,
25 you, the jury, will be firmly convinced of the

1 defendant's guilt and I'd ask you to find him guilty.

2 Thank you.

3 OPENING STATEMENT

4 BY MR. BYRHOLDT:

5 May it please the court? Ladies and gentlemen, my
6 name is Bruce Byrholdt. I practice law here in Anderson,
7 been here close to 30 years now.

8 I represent Kevin Ware, who is charged, and at this
9 point he's presumed innocent. And those are not hollow
10 words. Those are words our system of justice is based on
11 and that presumption of innocence stays with him
12 throughout this trial until the 12 of you who deliberate
13 find that the state has proven their case.

14 Because there's no burden of Kevin to prove his
15 innocence. That's hard to do. You can't prove something
16 that didn't happen.

17 The standard of proof in this case is proof beyond a
18 reasonable doubt. And the state must meet that burden
19 and they've got to prove that. Not through what Mr.
20 Bradley or I say, but from that witness stand and from
21 the evidence.

22 And when you hear a witness, just because they put
23 their hand on the bible and raise their hand doesn't mean
24 they're telling the truth. Use your common sense. Bring
25 your years of life experience and ask yourselves, are

Opening statement by Mr. Byrholdt

27

1 they telling the truth? Have they proven their case? Or
2 are they testifying because they have something to gain
3 by testifying? Or are they testifying because they've
4 already been promised something and have already received
5 something?

6 Because what you do, you use your experience to pass
7 on what's called credibility or believability of a
8 witness. Because the mere fact that you put your hand up
9 and swear to tell the truth, doesn't mean you're going to
10 do that. You use your experience. You observe the
11 witnesses. Are they consistent with what they've said
12 before or has their story changed? Did they have a
13 reason to testify in such a way? Is the evidence
14 trustworthy? Has the evidence been tampered with?

15 Those are all questions that I ask each of you to
16 ask yourselves as we're proceeding through this trial.
17 And I remind you at the outset Kevin does not have to
18 prove anything. The state must prove him guilty of each
19 and every element beyond a reasonable doubt.

20 And the judge will charge you the law. A reasonable
21 doubt is the kind of doubt that would cause an ordinary
22 person to hesitate. We believe at the conclusion of this
23 case there will be reasonable doubt based on bias, based
24 on prejudice, based on the untrustworthiness of this
25 evidence.

1 What I ask you to do is wait until you hear all of
2 the evidence and the judge gives you the law of the case
3 before you make a decision. Keep an open mind until you
4 hear everything. And at the conclusion, ask yourselves,
5 has the state proven their case beyond a reasonable
6 doubt? Or are the witnesses testimony biased or
7 prejudiced? Have they been promised something? Have
8 they been given something? Has the case been handled
9 properly?

10 I think at the conclusion of this case, you'll find
11 that there are reasonable doubts and all I'm asking you
12 to do is keep an open mind. I look forward to working
13 with you over the next couple of days. Hopefully, we
14 won't keep you here long.

15 My job is to make sure the state proves their case
16 beyond a reasonable doubt. If they don't, the judge is
17 going to charge that your duty is to acquit. It's not
18 what you think happened, it's not what might have
19 happened, it's what the state proves to each of you in
20 the next 48 hours.

21 On Kevin's behalf, I thank you. I know you'll pay
22 close attention. We chose to have you to hear this case.
23 That's why our system of justice is the greatest one in
24 the world, because a person charged is presumed innocent
25 and looks to his community to pass on whether the state

1 has proven their case.

2 We thank you.

3 THE COURT: Solicitor, if you'll call your first
4 witness.

5 MR. BRADLEY: Your Honor, the state calls Officer
6 Kevin Marsee.

7 THE COURT: Let me see the attorneys up here one
8 second.

9 (WHEREUPON, a bench conference was held in the
10 presence of the jury but outside the hearing of the
11 jury.)

12 THE COURT: Mr. Foreman, members of the jury. I'm
13 going to have to hear some motions before the state calls
14 this witness. I'm going to ask you to go to the jury
15 room. The reason I do that is during the course of the
16 trial I'm not permitted to comment on the facts. When
17 I'm hearing motions from the attorneys, occasionally I
18 need to comment on the facts or ask questions about the
19 facts and I do that out of your presence because I'm not
20 allowed under the law to comment on the facts. So, it's
21 not that I'm trying to hide anything, it's just that I
22 want to comply with the law as far as commenting on the
23 facts.

24 Plus I have to make a decision on whether it's
25 admissible. We have certain rules of evidence and rules

1 of court that we have to go by. These rules of evidence
2 are designed to give you, hopefully, the most trustworthy
3 testimony we can give and in making the decision on
4 whether it's admissible or not admissible that's what I
5 have to do. And that's the reason I ask you to go to the
6 jury room, due to no fault of the state or the defendant.
7 It's my doing for that purpose.

8 So, Mr. Foreman, if you'll go to the jury room.
9 I'll get you back just as soon as I hear the motions.

10 (The following proceedings were had outside the
11 presence of the jury:)

12 THE COURT: Solicitor, I understand you have some
13 Lyle information you want to go into; is that correct?

14 MR. BRADLEY: Yes, Your Honor.

15 THE COURT: All right. What I'm going to do is
16 listen to it in camera from this witness and then I'll
17 listen to your motion. But I just want to hear it, if
18 you'll get right to the point on what you want to go into
19 that you consider possibly to be Lyle and I'll rule on
20 your motions.

21 MR. BYRHOLDT: Your Honor, I'd move at this time to
22 sequester the witnesses.

23 THE COURT: Okay. Any objection to sequestering the
24 witnesses? Do you have any witnesses that need to be
25 sequestered, Mr. Byrholdt?

Opening statement by Mr. Byrholdt

31

1 MR. BYRHOLDT: The only possible witness is my
2 client.

3 THE COURT: All right. Who do you want to keep in
4 with you, solicitor.

5 MR. BRADLEY: Marsee is the leading officer. He's
6 fine.

7 THE COURT: All right. Everybody else step out in
8 the hall, please.

9 (Witnesses comply.)

10 THE COURT: Solicitor, does that cover all your
11 witnesses? I can't see who's sitting in the very back.

12 MR. BRADLEY: Yes, Your Honor.

13 THE COURT: All right. Please proceed.

14 MR. BRADLEY: Thank you, Your Honor. Call Kevin
15 Marsee.

16 KEVIN MARSEE, being first duly sworn,
17 testified as follows:

18 DIRECT EXAMINATION

19 BY MR. BRADLEY:

20 Q Officer -- Captain Marsee, what's your occupation?

21 A I'm a police captain with the City of Anderson police
22 department.

23 Q Were you working in that capacity on January 15,
24 2007?

25 A I was.

1 Q Did you come in contact with the defendant on that
2 day?

3 A Yes, I did.

4 Q What was the reason for that contact?

5 A I was conducting a narcotics investigation. This
6 investigation included a purchase of drugs and also
7 the execution of a search warrant.

8 Q And what was the basis for the search warrant?

9 A The basis for the search warrant was --

10 THE COURT: Solicitor, just get to the information
11 prior to January 15th you want to get into. I don't care
12 about all that.

13 MR. BRADLEY: The basis on the search warrant is
14 what he testifies --

15 THE COURT: Go ahead.

16 THE WITNESS: The basis for the search warrant was
17 the purchase of drugs from a residence at [REDACTED] Street
18 by a source of information. And also from information
19 that I received from this source who was reliable at the
20 time.

21 BY MR. BRADLEY:

22 Q And so based on that information that you received,
23 you obtained a search warrant and what did you learn
24 from the search warrant?

25 A I learned that there were individuals in the

1 residence, including the defendant, Mr. Ware. And
2 that Mr. Ware, upon the entry of those officers threw
3 a bag which contained what was later determined to be
4 crack cocaine at one officer.

5 MR. BYRHOLDT: Your Honor, that's the case we're
6 here about. That's not Lyle information. That's what
7 we're trying this case about.

8 THE COURT: Okay. Go ahead.

9 THE WITNESS: But he threw a bag of drugs at one of
10 the officers which was recovered and tested and
11 determined to be crack.

12 MR. BRADLEY: Your Honor, basically the search
13 warrants were prior drug transactions, it was the only
14 thing --

15 THE COURT: Let me see the affidavit on the search
16 warrant. Let me look at that. On the basis the search
17 warrant was issued by the magistrate. All you want to go
18 into is testimony that previously drugs had been
19 purchased at this residence?

20 MR. BRADLEY: From Mr. Ware.

21 THE COURT: From Mr. Ware. Okay.

22 MR. BYRHOLDT: That's not in the affidavit, Your
23 Honor.

24 THE COURT: Well, I'm going to see the affidavit.
25 Is that the extent what you're offering?

1 MR. BRADLEY: No, Your Honor. Ms. Richardson,
2 another witness, would also testify as to the prior
3 transactions.

4 THE COURT: Anything else you want to ask him?

5 MR. BRADLEY: That's all of this witness.

6 THE COURT: Officer Marsee, in your affidavit, it's
7 basically based upon a confidential informant, isn't it?
8 Is that correct?

9 THE WITNESS: Yes, sir.

10 MR. BYRHOLDT: Your Honor, the confidential
11 informant is not testifying in this trial. It would be
12 hearsay on hearsay.

13 THE COURT: I understand. Here is your affidavit.

14 MR. BRADLEY: Thank you, Your Honor.

15 THE COURT: Now, you got another witness that's
16 going to testify to what?

17 MR. BRADLEY: To the prior transactions that
18 occurred at her residence with Mr. Ware. She would call
19 Mr. Ware to come over to her residence to sell crack
20 cocaine to other individuals, Your Honor.

21 THE COURT: You have some cases you want me to look
22 at?

23 MR. BRADLEY: Yes, Your Honor.

24 THE COURT: I'm aware of one case where the purchase
25 was made the day before and the same purchase was made

1 the day after. The Supreme Court said that was not --

2 MR. BYRHOLDT: They reversed and sent it back for a
3 new trial.

4 THE COURT: Pardon?

5 MR. BYRHOLDT: They reversed and sent it back for a
6 new trial. I think it's page 817 through 819, it
7 discusses that Lyle is an exclusion, not an inclusion and
8 the risks involved.

9 THE COURT: How can -- from what you heard so far
10 and what you tell me, how do you get around the Tufour
11 case? It's a 19 -- excuse me, 2005 case.

12 MR. BRADLEY: Your Honor, I believe it's
13 distinguishable based on the fact that in that case the
14 defendant was strictly charged with trafficking. And
15 this case the defendant has been charged with conspiracy
16 as well. Trying to show common scheme and plan between
17 the two, the two individuals, Mr. Ware and
18 Ms. Richardson. I do have cases that --

19 THE COURT: So you think it should come in under
20 conspiracy, not the possession with intent to distribute,
21 is that what you're telling me?

22 MR. BRADLEY: Your Honor, I believe the case law
23 that I pulled is trying to get underneath the intent to
24 distribute as well as conspiracy. But based on that case
25 the distinguishability is between the conspiracy charge,

1 and he was only charged with trafficking in that case,
2 Your Honor, with intent.

3 THE COURT: Okay. Well, how do you still get around
4 the common scheme or plan? Even if it's conspiracy. I
5 mean the case says a common scheme or plan exception
6 requires more than mere commission of two similar crimes
7 by the same person. We're not even talking about similar
8 crimes here. He says he purchased the drugs previously.
9 He was aware of drugs being purchased previously. I
10 mean, he wasn't even the purchaser. In Tufour he was the
11 purchaser.

12 MR. BRADLEY: Yes, sir, Your Honor. Your Honor,
13 based upon the case law of State versus Geer, it's quite
14 similar where the defendant sold drugs from out of his
15 residence on two prior occasions and witnesses were able
16 to testify to that fact. He purchased drugs on two
17 separate occasions from the defendant. The Court did
18 allow that to come in, as it establishes intent regarding
19 the cocaine and possession at the time in question.

20 And State versus Moultrie, a person familiar with
21 Moultrie's method of operation providing evidence in
22 prior drug transactions, evidence applied common scheme
23 or plan along with Lyle. The witness testified about
24 Moultrie's normal mode of selling drugs, extraordinary
25 similarity is evidence that Boykin discovered on the

1 night of Moultrie's arrest. So those two cases, Your
2 Honor, I feel common scheme and plan and intent allow
3 Ms. Richardson's testimony and officer Marsee's testimony
4 of using a confidential informant to purchase drugs from
5 Mr. Ware.

6 THE COURT: Captain Marsee, have you purchased drugs
7 there?

8 THE WITNESS: Not personally, no, sir.

9 THE COURT: Have you purchased drugs from Mr. Ware?

10 THE WITNESS: No.

11 THE COURT: Then how do you know drugs had been
12 purchased from Mr. Ware at that residence other than
13 somebody telling you?

14 THE WITNESS: That's the only way.

15 THE COURT: Okay. All right. I'm not going to
16 allow that testimony that he knows drugs had been
17 purchased by Mr. Ware at that particular house. I'm
18 going to exclude it. I don't think it qualifies under
19 Tufour or Lyle exception, because conspiracy or intent to
20 distribute, especially the fact all he knows is somebody
21 told him that.

22 MR. BRADLEY: As I stated, Ms. Richardson also
23 testified as how she personally --

24 THE COURT: Well, if you want to put Mr. Richardson
25 up, I'll listen to Mr. Richardson. But you said this

1 man -- this is the witness that would go into prior bad
2 acts. If you want me to listen to Mr. Richardson, I'll
3 revisit the issue. Do you want to bring Mr. Richardson
4 in.

5 MR. BRADLEY: Yes.

6 MR. BYRHOLDT: Your Honor, can I ask a question of
7 Captain Marsee?

8 THE COURT: Yes, sir.

9 CROSS EXAMINATION

10 BY MR. BYRHOLDT:

11 Q In the affidavit you swore under oath to Judge
12 Mattison --

13 A Yes.

14 Q -- that you used a prior purchase to get the warrant,
15 correct?

16 A That is correct.

17 Q And you said the source -- "I was provided with
18 electronic device that recorded the transaction"?

19 A That is correct.

20 Q And you swore that under oath?

21 A Yes.

22 Q Wasn't the transmitter malfunctioning and it didn't
23 record anything?

24 A Once the buy was made it was later determined, either
25 through the download of the evidence or at the time

1 of the buy -- I don't know exactly when the
2 transmitter quit functioning, but it did quit
3 functioning. Yes.

4 Q So the affidavit to Judge Mattison that it was
5 recorded was not true, was it?

6 A No, it was not. I believed at that time that it did
7 in fact record.

8 Q But in fact it was not. So that's not true?

9 A No, it's not true. But that was my belief at the
10 time that it did record.

11 THE COURT: All right. Do you want to bring in Mr.
12 Richardson?

13 MR. BRADLEY: Yes, Your Honor.

14 THE COURT: You may step down. Thank you very much.
15 Ask Mr. Richardson to come in please.

16 MR. BYRHOLDT: It's Miss, Your Honor.

17 THE COURT: Miss?

18 MR. BYRHOLDT: Yes.

19 THE COURT: Okay, Miss Richardson.

20 VIRGINIA GAIL RICHARDSON, being first
21 duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. BRADLEY:

24 Q Ms. Richardson, where do you currently live?

25 A Now? Or when I was ---

- 1 Q Currently.
- 2 A Where I live at now, [REDACTED] Street.
- 3 Q Where did you live in January 2007?
- 4 A [REDACTED] Street.
- 5 Q And how long -- do you know the defendant?
- 6 A Yes, sir, I do.
- 7 Q How do you know the defendant?
- 8 A A friend brought him over to the house, Betty
- 9 Morrison. She's passed now. She had been down the
- 10 road and she come back up and another boy was in the
- 11 car that knowed her. And then he introduced him to
- 12 me.
- 13 Q Okay. How long ago was that?
- 14 A That's -- that was done been two years now, I guess
- 15 it's been about two and a half years, yes.
- 16 Q Prior to January 2007, how long was it?
- 17 A On January -- on the 17th.
- 18 Q January 17, 2007, how long prior to that?
- 19 A Yes, sir.
- 20 Q How long prior to January 15, 2007, had you known
- 21 this defendant?
- 22 A I'd been knowing him from six to nine months.
- 23 Q During that time frame what was your relationship
- 24 with the defendant?
- 25 A Well, they'd make phonecalls and he'd bring over the

1 drugs to a few people up and down that road, you
2 know. They'd come to the house and make phonecalls
3 and he'd bring drugs over to the house.

4 Q Who would make phonecalls? You would make
5 phonecalls?

6 A Yes, but they would make them too, use my phone to
7 call.

8 Q Did he ever call you?

9 A Yeah, he called me lots of times and asked me did we
10 need anything.

11 Q Need anything, what do you mean?

12 A Crack cocaine.

13 Q And what was -- what would your response be on those
14 cases?

15 A Lots of times I'd say "No." And then when Betty,
16 Shorty, or someone come down the road, would want to
17 get something, they'd make the phonecall and he'd
18 deliver it.

19 Q So you would have someone come to your house looking
20 for crack cocaine, what would be your practice,
21 relationship with the defendant?

22 A What now? I can't hear that.

23 Q I apologize. I'll rephrase the question. Whenever
24 someone would come to your house looking for crack
25 cocaine, who would you call?

1 A Kevin.

2 Q And would Kevin, would the defendant respond, would
3 he come over? Would he come to your house?

4 A Yeah. He'd come to my house and bring it, yes.

5 Q How many times in that six to nine months that you
6 knew the defendant prior to January 2007?

7 A Sometimes it might have been two or three times a day
8 and sometimes it was every other day. Sometimes it
9 went on for a week that we didn't call.

10 Q Okay. And on January 15, 2007, how many times did
11 you see the defendant?

12 A Greg Kay, he had come in and was wired up and I told
13 him, said, "Well, Greg" -- you know, he's brought
14 drugs there himself, I been knowing him about 15
15 years, used to go with my niece. Anyway, he said --
16 I said, "Well, Greg, you can get it down the road.
17 You know dealers, you bring stuff here, why can't you
18 go get it?"

19 He said, "No, I like Kevin's stuff." he said he got
20 some before. He said, "I prefer to get his."

21 And so, he said, "Well, you call him."

22 I said, "Well, I'll let you call him." So he called
23 him. And so Kevin wouldn't come for no hundred. And
24 so, anyway, Greg said to tell him -- "You call him
25 back and tell him to bring 200."

1 So that's when Kevin said he'd come over and bring
2 \$200 worth of crack cocaine.

3 MR. BRADLEY: That's all at this time, Your Honor.

4 THE COURT: Mr. Byrholdt, do you have any cross?

5 CROSS EXAMINATION

6 BY MR. BYRHOLDT:

7 Q He came there one time that day, right?

8 A Yeah, one time that day.

9 Q Nothing further. Thank you.

10 THE COURT: Anything else, solicitor, in reply?

11 MR. BRADLEY: Nothing further.

12 THE COURT: Miss Richardson, you may step down. If
13 you'll step back out in the hall, please, ma'am.

14 THE WITNESS: Okay. Thank you, sir.

15 THE COURT: Thank you, very much.

16 (Witness exits courtroom.)

17 THE COURT: Let me see your cases on conspiracy. Do
18 you have copies of them I can look at?

19 MR. BRADLEY: Specifically conspiracy, Your Honor?

20 THE COURT: Mr. Bradley, my question is on
21 conspiracy, that's a little different than Lyle.

22 MR. BYRHOLDT: Under the indictment in this case,
23 they only charged him with conspiring on one day.

24 THE COURT: On that day, all right.

25 MR. BYRHOLDT: They could have hit him for six

1 months.

2 THE COURT: They didn't conspire him with selling
3 over several months, just that one day?

4 MR. BYRHOLDT: With one day. Had they indicted him
5 for a six-month period, I wouldn't be sitting here.

6 MR. BRADLEY: That is true, he is only indicted for
7 that one day.

8 THE COURT: Anything you want me to look at on
9 conspiracy? Because if it's admissible law, it's got to
10 be a conspiracy issue. And I think it would have to be
11 the particular day unless it was an ongoing enterprise to
12 buy and sell drugs over a period of time.

13 MR. BRADLEY: Yes, Your Honor.

14 THE COURT: Apparently, it was just sort of
15 happenstance, it wasn't an on-going business relationship
16 in other words.

17 MR. BRADLEY: Your Honor, I have to look back
18 through, see exactly which one was the conspiracy.

19 THE COURT: You what? I can't hear you. You're
20 slurring your words and looking down.

21 MR. BRADLEY: Yes, sir. I apologize. I was looking
22 back through the cases, see exactly which one was the
23 conspiracy. I read so many off a while ago.

24 THE COURT: Do you have a copy of the case?

25 MR. BRADLEY: I'm trying to figure out which one it

1 was. I apologize.

2 MR. BYRHOLDT: Your Honor, additionally I'd move to
3 exclude it under 403, the prejudicial value clearly
4 outweighs the probative value. Especially we have an
5 indictment one particular day and the alleged
6 coconspirator testified one time. I mean, she disputes
7 what Marsee said. A prior statement that day with
8 Kevin --

9 THE COURT: Let me ask you -- just ask you this
10 question. Okay?

11 MR. BRADLEY: Yes, sir.

12 THE COURT: Earlier I asked you about the State
13 versus Tufour.

14 MR. BRADLEY: Yes, sir.

15 THE COURT: Read to you part of it.

16 MR. BRADLEY: Yes, sir.

17 THE COURT: Based on the officer's testimony, how is
18 her testimony, even though it is conspiracy, change that?
19 Now, if it was an ongoing business conspiracy to buy and
20 sell drugs over a time period, maybe, yes. But how does
21 that change Tufour as far as qualifications as prior bad
22 acts? Because apparently it's indicted for conspiracy on
23 January 15, '07, so it's got to come under Lyle, not the
24 conspiracy.

25 MR. BRADLEY: Yes, Your Honor.

1 THE COURT: I thought you were arguing earlier that
2 it should come in under conspiracy. And that sort of
3 took it out of the Lyle. I don't understand your
4 argument. I'm trying to understand your arguments before
5 I rule. Now, as far as Miss Richardson is concerned --

6 MR. BRADLEY: Yes, sir, your Honor. I -- based on
7 her testimony, Your Honor, I agree with the Court.

8 THE COURT: You what?

9 MR. BRADLEY: I agree with the Court. I'd withdraw
10 our motion for the court to hear the prior bad acts.

11 THE COURT: Okay.

12 MR. BRADLEY: That specific testimony.

13 THE COURT: That's fine. I want you to instruct her
14 before she gets on the witness stand in front of the
15 jury, the only thing we're going to talk about is what
16 occurred on January 15th.

17 MR. BRADLEY: Yes, sir.

18 THE COURT: Captain Marsee, don't go into your
19 knowledge prior to January 15th. Okay?

20 THE WITNESS: Yes, sir.

21 THE COURT: I don't have any problem about your
22 confidential informant verifying him, et cetera, et
23 cetera, et cetera. Okay. But as far as testifying that
24 you know drugs were bought at this house from Kevin Ware,
25 I don't want you going into that. Okay?

1 THE WITNESS: Yes, sir.

2 THE COURT: Do you understand?

3 THE WITNESS: Yes, sir.

4 THE COURT: Thank you, very much. All right.

5 Anything else before we bring the jury and call your
6 first witness?

7 MR. BRADLEY: No, your Honor.

8 THE COURT: Anything from the defendant?

9 MR. BYRHOLDT: Not from the defense, Your Honor.

10 THE COURT: Bring us the jury.

11 (Whereupon, the following proceedings were had
12 within the presence of the jury:)

13 KEVIN MARSEE, being first duly sworn,
14 testified as follows:

15 DIRECT EXAMINATION

16 BY MR. BRADLEY:

17 THE CLERK: State your full name, as well your last
18 name for the record, please.

19 THE WITNESS: Kevin Marsee, last name spelled
20 M-A-R-S-E-E.

21 Q Good afternoon, what's your occupation?

22 A I am a captain with the Anderson city police
23 department.

24 Q How long you been there?

25 A I been with the department almost 25 years now.

1 Q What are your duties as an officer at the police
2 department?

3 A My duties are, at present I'm the captain of special
4 operations. That position encompasses a warrant
5 division, a vice and narcotics unit, and a gang unit.

6 Q And were you working in that capacity on January 15,
7 2007?

8 A I was.

9 Q Okay. And on that date did you come into contact
10 with the defendant?

11 A Yes. That was the date.

12 Q What was the reason for that contact?

13 A I had a search warrant to search a residence located
14 at [REDACTED] Street, which is located in the City of
15 Anderson. And based on the fact I had a search
16 warrant and was conducting an investigation, I
17 instructed officers to initiate surveillance on the
18 location.

19 Q And when was that search warrant executed?

20 A The search warrant was obtained around 6:30 that
21 evening. And we began the operation at around
22 7:55 p.m. After that time I guess it was around
23 8:40 p.m. or so we executed the search warrant at
24 that residence.

25 Q And during that time you were doing surveillance,

1 what did you observe?

2 A Only overheard radio transmissions to the officers
3 who were assigned to me. There were messages
4 transmitted to me that an individual had arrived at
5 the residence that we were expecting to have drugs.

6 Q And what time -- you say, used the term "executed a
7 search warrant." what exactly does that mean?

8 A Executing a search warrant is -- a search warrant is
9 a piece of paper that is issued by a judge that
10 authorizes a law enforcement officer to search for
11 evidence of a crime or fruits of a crime at any
12 location that that evidence may be located.

13 Q Okay. And you testified earlier what time the search
14 warrant was executed. When the search warrant was
15 executed, what officers entered this residence?

16 A Two of the officers who entered in was two of the
17 individuals working for me at the time. And those
18 officers were Eddie Aman and Jody Culbertson, along
19 with myself, Mike Baskin, Mike Bracone. And I
20 believe that was it.

21 Q After they entered the residence what happened?

22 A Once I entered the residence, I was instructed by the
23 officers who initially made entry that there were
24 several individuals in the residence, one of them
25 being Mr. Ware. I was instructed that Mr. Ware was

1 in the kitchen area upon the --

2 MR. BYRHOLDT: Your Honor, that's going to be --
3 essentially it's hearsay. I mean, he's -- I'm going to
4 object. I mean he's --

5 THE COURT: I'll sustain the objection. Testify if
6 you saw Mr. Ware in the kitchen. Testify of your own
7 knowledge what you saw, what you did, what you observed
8 of your own knowledge. We passed the stage why you went
9 there.

10 THE WITNESS: All right. Mr. Ware was in the
11 kitchen area. I saw Mr. Ware and I saw a bag of crack
12 underneath where Mr. Ware was lying. I saw a struggle
13 with Mr. Ware during the time he was being arrested. And
14 I observed drug paraphernalia throughout the residence,
15 including crack pipes.

16 Q Anything else inside the residence?

17 A Yes, there were other individuals which included
18 Miss Virginia Gail Richardson, who was the person
19 renting the house or the apartment.

20 Q And after entry was made, what happened after that?
21 Was anyone charged with the crime?

22 A Based on the evidence that was obtained, Mr. Ware was
23 charged with possession with intent to distribute
24 crack cocaine, possession of crack cocaine with
25 intent to distribute within proximity of a park.

1 This was due to the fact that there's a park at the
2 end of C Street, within a half mile of that location.
3 And after a subsequent interview with
4 Miss Richardson, he was charged with conspiracy to
5 distribute crack cocaine. Well --

6 Q You took a statement from Ms. Richardson?

7 A Yeah, later that evening I did interview Ms.
8 Richardson and take a statement from her.

9 Q Going back to the park you said was located near the
10 residence, how far was it away from the residence?

11 A Right at the end of the street, no more than three or
12 four hundred yards.

13 Q Okay. Officer Marsee, that residence [REDACTED] Street
14 is in Anderson County; is that correct?

15 A In the city and county of Anderson. Yes, sir.

16 Q Thank you. No further questions at this time.

17 THE COURT: Cross examination?

18 CROSS EXAMINATION

19 BY MR. BYRHOLDT:

20 Q Do you have your case file with you?

21 A Yes, I do.

22 Q Do you have a case summary?

23 A I did two separate reports. I did a report known as
24 a drug track report and an incident report.

25 Q Is there anywhere in your report that says it was a

1 struggle?

2 A That's -- no, sir.

3 Q So that wasn't in your report? That would be
4 important to put down, wouldn't it, if there was a
5 struggle?

6 A No, sir. The defendant was arrested, that was
7 indicated in the report.

8 Q Do you guys take notes at the scene?

9 A Yes, sir.

10 Q How many people were in the house?

11 A There was --

12 Q Four or five?

13 A I believe five, yes.

14 Q And you conducted an interview with Ms. Richardson
15 later on?

16 A Yes, I did.

17 Q Did she identify anyone other than Mr. Ware as giving
18 her drugs?

19 A At that location? Yes. She admitted the fact that
20 she was involved with several individuals.

21 Q Were any of the people that she told you brought her
22 drugs at that location at the house that night?

23 A I'm sorry, sir?

24 Q Ms. Richardson identified people that brought her
25 drugs to that location?

- 1 A Yes, she did.
- 2 Q Were any of those people in the house the night of
- 3 the arrest of Ms. Richardson and Mr. Ware?
- 4 A Yes.
- 5 Q Was that person charged?
- 6 A Mr. Ware, yes.
- 7 Q Other than Mr. Ware?
- 8 A Oh, other than Mr. Ware?
- 9 Q Other than Mr. Ware and Ms. Richardson, did she
- 10 report any people bringing her drugs that were
- 11 present at that location that were not arrested?
- 12 A No. There was no one else who had brought drugs that
- 13 night.
- 14 Q That's not my question. My question was, did she
- 15 tell you the names of people that brought her drugs
- 16 to [REDACTED] Street?
- 17 A Yes.
- 18 Q That were present in that location --
- 19 A Yes.
- 20 Q -- in proximity to the crack pipes?
- 21 A Yes.
- 22 Q And they were not charged?
- 23 A They were not charged because they were not in
- 24 possession of drugs that night.
- 25 Q They were in the house, right?

- 1 A They were in the house but they were not in
2 possession of any drugs.
- 3 Q Were they charged with drug paraphernalia? They
4 weren't charged with anything, were they?
- 5 A Possession of drug paraphernalia isn't a charge that
6 we can make, only if you are responsible for the
7 location where you actually are can we make a charge
8 of drug paraphernalia.
- 9 Q The drugs that were seized, were they photographed?
- 10 A Yes, they were.
- 11 Q Who took those photographs?
- 12 A Our evidence officer, Mike Baskin.
- 13 Q Ms. Richardson was charged?
- 14 A Yes, she was.
- 15 Q She had already pled guilty. Are you aware of that?
- 16 A No, sir. I'm not.
- 17 Q Not aware of that. Would it surprise you she's pled
18 guilty?
- 19 A No, sir, not at all.
- 20 Q Do you know whether she was promised anything?
- 21 A She was not promised anything by me.
- 22 MR. BRADLEY: Objection.
- 23 THE COURT: What's your legal objection?
- 24 MR. BRADLEY: Not within his knowledge, Your Honor.
- 25 THE COURT: Pardon me?

1 MR. BRADLEY: Not within his knowledge of --

2 THE COURT: Overruled.

3 MR. BRADLEY: -- capacity as an officer.

4 BY MR. BYRHOLDT:

5 Q Do you know whether it would be proper,
6 hypothetically, if someone had two prior drug
7 offenses and was charged with conspiracy to possess
8 crack cocaine with intent to distribute, to get
9 probation for a third offense?

10 A It's difficult for me to give a legal conclusion to
11 that question. I mean, we as police officers do not
12 have control over what a person actually receives in
13 court. But whether it's proper or not, that calls
14 for a legal opinion that I don't --

15 Q You aware of any mandatory minimums for subsequent
16 drug offenses?

17 A There are mandatory minimums, but it depends on what
18 the person is indicted for.

19 Q Third offense possession with intent or conspiracy
20 to -- with intent to possess carries 15 to 30 years,
21 right, Captain Marsee?

22 A Yes. But if there are mandatory minimums, the judge
23 has no option but to give that to the person. If
24 there is an other indictment that is consistent with
25 the charge that they're indicted for a different

1 crime, we have no control over that.

2 Q You had nothing to do with anything that might have
3 happened?

4 A No, sir.

5 Q Thank you.

6 THE COURT: Redirect?

7 MR. BRADLEY: Nothing, Your Honor.

8 THE COURT: Thank you Mr. Marsee. You may step
9 down. Thank you, very much.

10 EDWARD J. AMAN, being first duly
11 sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. BRADLEY:

14 THE CLERK: If you'd please state your full name and
15 spell your last name for the record?

16 THE WITNESS: Edward Jackson Aman, A-M-A-N.

17 Q Good afternoon, officer. Could you tell the jury
18 what your occupation is?

19 A I'm a police officer with the City of Anderson police
20 department.

21 Q How long have you been there?

22 A I have broken time, which means I've been here twice.
23 I have eight years with the city, 13 years in law
24 enforcement.

25 Q As an officer, what are your duties?

- 1 A Right now my current duties pretty much revolve
2 around training most of the police officers defensive
3 tactics, firearms, report writing, things of that
4 nature. And also the SWAT team leader.
- 5 Q Also been your duty or other --
- 6 A I served in uniform patrol and narcotics as well.
- 7 Q In what capacity were you working on January of 2007?
- 8 A On this particular occasion I was serving as SWAT
9 team leader in execution of a search warrant.
- 10 Q Did you have reason to come in contact with the
11 defendant on that day?
- 12 A Yes, sir, I did.
- 13 Q What was that reason?
- 14 A We were executing a search warrant at a residence and
15 he was inside the residence.
- 16 Q What was the address of that residence?
- 17 A I believe.
- 18 Q Do you know who that address is listed?
- 19 A Richardson subject.
- 20 Q When did you make entry into the residence?
- 21 A To be honest with you, I don't remember the time
22 right off.
- 23 Q Were you with anyone or was it just you by yourself?
- 24 A No, sir. The SWAT team made entry into the
25 residence. Usually it's a six-man element. I'm not

1 sure how many entered that night. I was the fourth
2 man in the stack, so I was the fourth man to go
3 through the door.

4 Q When you made entry, can you tell us what you
5 observed?

6 A Yes, sir. I came in, we came in through the rear --
7 one of the rear entries of the dwelling and it enters
8 into like a mud room and a kitchen. And you have
9 basically, like in a kitchen, you always have the
10 countertops, you have cabinets, and you have kind of
11 a gap in between. As we come through, as I said,
12 there were actually three officers ahead of me. The
13 way we do what we do, first two guys actually
14 penetrating deeper into that residence, into what was
15 later determined to be the living room area. But as
16 I came in, my peripheral vision through that gap
17 there, I could see most of the kitchen, which ended
18 up being my area of responsibility. As I entered
19 through that doorway, I saw the defendant fling some
20 object into the air. The object actually struck me
21 in the chest. And went somewhere onto the floor.
22 And I actually had my weapon drawn on the defendant
23 and Ms. Richardson. They were both in that same
24 general vicinity.

25 Q What did you do next?

1 A I stayed there. I became the cover man. The contact
2 man, which was officer Culbertson, he was directly in
3 front of me in the stack. He actually took him to
4 the ground and cuffed him up, put handcuffs on him,
5 took him into custody. From there we pretty much
6 just waited for the evidence custodian to come around
7 and take names, take pictures, gather any evidence.

8 Q And so when you came into the room, you saw the
9 defendant and have something in his hand, threw it at
10 you, in your direction?

11 A I didn't see it in his hand necessarily. I saw his
12 arm making a type of flailing motion in my direction,
13 which drew my attention, because that's what we're
14 looking for, the hands. We're -- SWAT is always
15 looking for the hands because that's what can hurt
16 somebody, kind of trying to pick up on where their
17 hands are, what's around them. I see that motion and
18 I did see something in the air. And the thing,
19 whatever it was at that time, struck me in the chest
20 and landed on the ground.

21 Q And what happened to that officer later on?

22 A I believe Officer Culbertson, when he took the
23 defendant to the ground actually took him to the
24 ground on top of the object.

25 Q And after the defendant was removed from off the top

1 of the object, what happened to the object?

2 A The evidence officer came in and, observed to be kind
3 of consistent with what we know to be cocaine, crack
4 cocaine, they field tested it, field tested positive
5 for that. He took it into his control. We didn't
6 actually -- we try not to touch the evidence if we
7 know what it is.

8 Q All right.

9 THE COURT: Do you have any objection to them?

10 MR. BYRHOLDT: I do at this point.

11 THE COURT: Ladies and gentlemen of the jury, I got
12 another jury in the jury room deliberating on the first
13 trial. I'm trying to deal with some of those right now.

14 All right. Solicitor, please proceed.

15 MR. BRADLEY: Thank you, Your Honor. May I approach
16 the witness?

17 THE COURT: Yes, sir.

18 BY MR. BRADLEY:

19 Q Officer, showing you what's been marked for
20 identification purposes State's Exhibit 1 for
21 identification and State's Exhibit 2 for
22 identification. Take a look at those without
23 publishing them to the jury.

24 (Witness complies.)

25 Q Those items look familiar to you?

1 A Yes, sir.

2 Q Why do they look familiar to you?

3 A That's the item I believe struck me in the chest.

4 Q The night we're talking about, January 15?

5 A Yes, sir.

6 Q Okay. And where is the location of that picture?

7 A You can see the baseboard running by the trashcan
8 there. That's the counter I was talking about, as
9 you come into the kitchen. That's the kitchen floor,
10 it's on -- right there beside the trashcan.

11 Q When you came into the kitchen, did you see anyone
12 else in the kitchen besides the defendant?

13 A Ms. Richardson was in the kitchen as well.

14 Q Did you see Ms. Richardson's arm moving as the motion
15 described the defendant's arm moving?

16 A No, I did not.

17 Q Did you see any other objects coming at you from
18 anyone else other than the defendant's direction?

19 A No, sir, I did not.

20 Q Okay. Nothing further at this time.

21 CROSS EXAMINATION

22 BY MR. BYRHOLDT:

23 Q Lieutenant Aman, you didn't see anything in Mr.
24 Ware's hand, did you?

25 A No, sir.

1 Q And there are two people in the kitchen?

2 A Yes, sir.

3 Q I take it you say you were a SWAT leader?

4 A Yes, sir.

5 Q Focused primarily on the man that was there, was he
6 closest to you in proximity or were they about
7 together?

8 A They were about together. The proximity of this
9 particular room is not that large.

10 Q Can you tell this jury today where that object came
11 from? Whether it came from Ms. Richardson
12 originally, Mr. Ware, or from somebody else?

13 A You mean, definitively can I say?

14 Q Yeah.

15 A No, sir, I cannot.

16 Q Thank you, sir.

17 THE COURT: Any redirect?

18 REDIRECT EXAMINATION

19 BY MR. BRADLEY:

20 Q Officer, can you definitively say it did not come
21 from the defendant?

22 A No, sir. As I said, I saw his arm in that flowing
23 type motion, object struck me in the chest, went to
24 the floor. But I didn't take my eyes off either one
25 of the two subjects.

1 Q Again, they were the only two in the kitchen?

2 A They were the only two in the kitchen.

3 Q He was the only one moving his arm in your direction?

4 A Yes, sir.

5 Q And when he was taken down on the ground, you were
6 the closest to him?

7 A Right. But I still had to maintain visual contact on
8 her as well because when we do something like that,
9 taking all the people into custody, at least until we
10 make sure the scene is safe with the officers. So I
11 was kind of splitting my attention, but eyes on both
12 and right there in the same area.

13 Q Nothing else, Your Honor.

14 THE COURT: Recross?

15 MR. BYRHOLDT: No, your Honor.

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

17 (Witness steps down from the stand.)

18 THE COURT: Call your next witness.

19 MR. BRADLEY: State calls officer Jody Culbertson.

20 JODY CULBERTSON, being first duly

21 sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. BRADLEY:

24 Q If you'd please state your full name, spell your last
25 name for the record?

- 1 A Jody Culbertson, C-U-L-B-E-R-T-S-O-N.
- 2 Q Good afternoon, Mr. Culbertson. Tell us what your
- 3 occupation is.
- 4 A Narcotics investigator, City of Anderson police
- 5 department.
- 6 Q How long you been there?
- 7 A Four years.
- 8 Q That would have made you working there January 2007;
- 9 is that correct?
- 10 A That's correct.
- 11 Q What are some of your duties?
- 12 A As a narcotics investigator answer complaints inside
- 13 the city limits of drug -- citizens where they call
- 14 in drug complaints.
- 15 Q As part of your duties and capacity as an officer on
- 16 January 15, 2007, did you come in contact with the
- 17 defendant?
- 18 A Yes, I did.
- 19 Q What is the reason?
- 20 A I am assistant SWAT team leader, tasked with entry
- 21 that day at the residence.
- 22 Q What residence were you referring to?
- 23 A
- 24 Q
- 25 A yes, I'm sorry. In Anderson County.

1 Q And when you made entry into the residence, what did
2 you observe?

3 A As we made entry into the residence, there were two
4 of my operators in front of me. I was third in line
5 in front of the residence. My first two operators
6 behind the defendant who was standing deep in the
7 corner of the kitchen. As you go in there's a mud
8 room or a wash room. It hard -- right back it
9 empties into the kitchen area. There's a wall to the
10 left. The defendant was standing deep in the back
11 corner beside a female individual.

12 As we made entry, I actually was behind him as well,
13 saw him out of the corner of my eye, turned back to
14 him. At that time he was -- I observed him to throw
15 a item that hit the fourth man mind me, off his
16 chest. At that time I directly went to the
17 defendant, took him down to the ground.

18 Q And that fourth man behind you, who was that?

19 A Lieutenant Aman.

20 Q So when you came into the kitchen, you testified that
21 only you saw the defendant there. Who else was in
22 the kitchen?

23 A It was a female.

24 Q It was a female?

25 A Yes.

- 1 Q Do you know who that female was?
- 2 A I believe it was Ms. Richardson.
- 3 Q And did you see Ms. Richardson throw anything at the
- 4 officer?
- 5 A No. No.
- 6 Q After you took the defendant down, what happened?
- 7 What did you do?
- 8 A At that time I placed him in handcuffs, stood up
- 9 there with them. Once he was secured, I went over
- 10 and stood over the item he threw.
- 11 Q What happened to the item that he threw?
- 12 A The collection officer came and collected the item.
- 13 Q I believe there may be some pictures up on the
- 14 witness stand. If you could take a look at those
- 15 without showing them to the jury. Do you know what
- 16 those are?
- 17 A Yes. That's the item that he threw.
- 18 Q Okay. After the defendant was obtained, was anyone
- 19 else arrested?
- 20 A I don't recall.
- 21 Q Do you remember what the defendant is charged with?
- 22 A Possession with intent to distribute crack cocaine,
- 23 possession with intent to distribute within proximity
- 24 of a school or park.
- 25 Q Anything else you remember?

1 A Not that I recall, no.

2 Q Nothing further at this time.

3 THE COURT: Cross examination?

4 MR. BYRHOLDT: May it please the Court?

5 CROSS EXAMINATION

6 BY MR. BYRHOLDT:

7 Q Officer Culbertson, do you know where this package
8 came from?

9 A Yes, sir, from the defendant's hand.

10 Q Before that? Did he get it from Ms. Richardson? Do
11 you know that?

12 A No, sir. I have no recollection of that.

13 Q Whose house was that?

14 A As far as I know, hers. My job that day was to make
15 entry and secure the residence.

16 Q Who took Mr. Ware to the ground?

17 A I did.

18 Q Was this -- did he struggle with you or you just
19 doing that for safety purposes?

20 A Safety purposes.

21 Q He didn't fight you?

22 A No more than just being -- SWAT team coming in on
23 him.

24 Q So you mean there was no struggle, no fight between
25 Mr. Ware and the officers?

1 A No, sir. I was the only one that came. Lieutenant
2 Aman covered me, I took him to the ground. That's
3 our normal operating procedure.

4 Q Did you see anybody field test that package?

5 A No, sir. As my duty was, once the residence is
6 secure, I stood over it. After it's secured I went
7 to narcotics mode, I stood over that. But as our
8 normal procedure, we always field test.

9 Q Who took possession of it?

10 A I -- whoever the collection officer was that
11 particular day. I don't recall.

12 Q You didn't?

13 A No, sir. No, sir. I just -- only thing I did was
14 stood over the package or the item until it was
15 collected and as well, that is our standard operating
16 procedure.

17 Q You didn't see any field tests on the premises?

18 A I don't recall. No.

19 Q Thank you.

20 THE COURT: Any redirect?

21 MR. BRADLEY: Yes, your Honor.

22 REDIRECT EXAMINATION

23 BY MR. BRADLEY:

24 Q Was it your duty that night to do the field test?

25 A No.

1 Q When you came into the kitchen, you testified that
2 you only saw the defendant in possession of the item
3 he threw at officer Aman; is that correct?

4 A Yes, sir.

5 Q No one else?

6 A No, sir.

7 Q Okay. Nothing else, Your Honor.

8 THE COURT: Thank you very much. Any recross?

9 MR. BYRHOLDT: No, Your Honor.

10 THE COURT: You may step down. Thank you so very
11 much.

12 (Witness steps down from the stand.)

13 THE COURT: Call your next witness.

14 MR. BRADLEY: State calls officer Mike --
15 Investigator Mike Baskin.

16 THE COURT: All right. Mr. Foreman, we're going to
17 break for today. I believe on Monday I told you our
18 stopping point would be around 5 or 5:30. It's now 5:15.
19 Due to prior commitments we're not going to be able to
20 start the trial tomorrow until 1:30. So if you'll be
21 back in the jury room at 1:30 tomorrow. We'll continue
22 the trial at that time.

23 Please do not discuss the case amongst yourselves or
24 with anyone else. Once you make a decision, I want you
25 to make a decision on what you hear in the courtroom, not

1 what someone tells you, what you read in the paper or
2 watch on television. If there's anything in the paper or
3 on TV, please don't read it. See you tomorrow at 1:30.
4 Have a good evening. Follow the bailiff. I think you
5 already know where to come to.

6 (Whereupon, the following proceedings were had
7 outside the presence of the jury:)

8 THE COURT: All right. I understand there's a chain
9 of custody issue the defense would like to take up? The
10 way I understood it, Officer Culbertson said he stood
11 over the drug or over the packet that had been thrown.
12 Someone collected it. Briefly, what's the chain of
13 custody problem?

14 MR. BYRHOLDT: My concern is there may have been
15 contamination of evidence from the information the state
16 supplied me. There was evidence sent to SLED, my
17 understanding, other than SLED, Mike Baskin is the only
18 person involved in the handling of the evidence.

19 THE COURT: Do we have to take testimony to address
20 that in camera?

21 MR. BYRHOLDT: I think we would because if I'm
22 successful, the evidence is going to be suppressed and
23 the case is probably going to end.

24 THE COURT: I know, but can we agree on a
25 stipulation of the facts in dispute without sitting here

1 listening to testimony?

2 MR. BYRHOLDT: No. I think we have to have some
3 questions of Investigator Baskin, Your Honor.

4 THE COURT: Officer Baskin, come around and be
5 sworn.

6 Before we get started, I'm going to excuse the other
7 jury for the evening.

8 Madam clerk, if you'd swear him, I'll be back in
9 five minutes.

10 (Pause.)

11 THE COURT: Solicitor, do you know what area he's
12 talking about?

13 MR. BRADLEY: Not at all.

14 THE COURT: Do you want to let him ask questions,
15 you ask questions? Let you follow up?

16 MR. BRADLEY: This is the first I heard of it, Your
17 Honor.

18 THE COURT: I want to cut through to the facts, get
19 to the meat real quick. I'll let you follow up with any
20 questions after he finishes. Okay? Mr. Byrholdt.

21 MIKE BASKIN, being first duly sworn,
22 testified as follows:

23 DIRECT EXAMINATION

24 BY MR. BYRHOLDT:

25 Q In discovery I was provided a SLED report says

1 2.4 grams of crack cocaine and a best kit number and
2 then on your -- in the investigator notes the best
3 kit sent down two packs of drugs and some pills?

4 A No. No, sir. What was the ---

5 Q It's in the report listed as -- let me show you the
6 case jacket. It's got you securing this evidence in
7 best kit number B, as in boy, 177531. Would you
8 agree that's what's in the evidence list?

9 A That's what's on the evidence list, but that's not
10 the correct thing. I don't ---

11 Q And then there's a second best kit with the same
12 number on it?

13 A These drugs were never sent to SLED.

14 Q How did these drugs get out of the best evidence kit?
15 The best evidence kit, don't you seal the drugs?

16 A They are in a best evidence kit.

17 Q They're supposed to be in the best evidence kit with
18 that number on it?

19 A It's a different number altogether.

20 Q No, the number --

21 A I understand what this says, that's a typographical
22 error. That's not the number that they're under.

23 Q But that's what the state provided, saying there's
24 two sets of drugs sent to SLED under the same number.
25 That was my concern.

1 A The number that this other best kit is under is best
2 evidence, I believe 13017.

3 Q That's not what the report says --

4 A I understand, sir.

5 Q -- that was provided by Anderson Police Department?

6 A I understand that.

7 Q Can you look at the photographs that's been marked
8 for identification purposes. Did you take those
9 photographs, Officer Baskin?

10 A Yes, I did.

11 Q Who is the evidence custodian --

12 THE COURT: You need him --

13 BY MR. BYRHOLDT:

14 Q -- that's represented what's in your best evidence
15 kit in front of you.

16 A Yes.

17 Q And you're saying that that's the same materials?

18 A Yes, sir. They were put in this evidence bag and
19 then put in a best kit later.

20 Q What is this bag?

21 A This is the SLED lab number that was done by the SLED
22 analyst.

23 Q But what's the bag -- is that the bag that was
24 actually seized? Or do you know?

25 A I don't really know, that's what I would assume it

1 would be.

2 Q Was that material field tested at the scene?

3 A Yes, sir.

4 Q You tell me where in this report it says it was field

5 tested. The second page deals with that seizure.

6 A It doesn't say.

7 Q Okay. Is that just something that was left out?

8 Now, this is a typographical -- there's not any drugs

9 mixed together?

10 A No, sir. There's only one.

11 Q Was there another -- you saying there was a second

12 best evidence kit?

13 A Yes, sir, from the buy that was never sent to SLED.

14 Q Why wasn't it sent to SLED?

15 A Because he's not charged with it.

16 Q But it was listed in this report. You're saying

17 erroneous -- you didn't do this report, did you?

18 A That's the drug track report.

19 Q Who did that?

20 A The -- I guess whoever's case it is.

21 Q You did not do this?

22 A I may have transferred the evidence over to it, I'm

23 not sure.

24 Q That's my concern. You would agree it appears

25 there's two sets of drugs with the same evidence kit

1 number?

2 A Yes, sir. As I said, there's a typographical error
3 there. These drugs were collected at 1600 hours by
4 someone else and given to me. And they were in a
5 separate bag.

6 Q That's my problem. But the number says it's the same
7 bag?

8 A Yes, sir. I understand that. The best kit bag says
9 it is not the same bag. There's an evidence bag in
10 the best kit.

11 Q Right. But it's put in one bag. That's my concern.
12 From the report, it seems like there were two sets of
13 drugs put in the best evidence kit, number B, as in
14 boy, 177531.

15 A But as you can see, there are only one set of drugs
16 in this thing.

17 Q Unless somebody combined them, put them in that bag?

18 A No, sir. The other bag has got the drugs in them.

19 Q We don't know that because no best evidence kit in
20 this number report, other than the one.

21 MR. BYRHOLDT: That's my concern, Your Honor.

22 There's two sets of reports. One from an earlier seizure
23 he's not charged with. Here's one, one with best
24 evidence numbers. That's why they have the best evidence
25 kit so they're kept separately.

1 THE COURT: You have any more questions?

2 MR. BYRHOLDT: Not of Investigator Baskin. No, sir.

3 THE COURT: All right. Solicitor, you have any
4 questions? Do you want these reports for your questions?

5 MR. BRADLEY: We have the reports, Your Honor.

6 THE COURT: Do you have any questions?

7 MR. BRADLEY: Just a few, Your Honor.

8 CROSS EXAMINATION

9 BY MR. BRADLEY:

10 Q Investigator, the best kit that was collected the
11 night of January 15, 2007, it has a best kit, has a
12 number of B-177531; is that correct?

13 A Yes.

14 Q And does that match the best kit number on the SLED
15 report that was tested down at SLED?

16 A Investigation 177531.

17 Q Prior to that night, before the search warrant was
18 executed, were there any other drugs that were
19 collected by you in regard to the defendant?

20 A I did not collect them from the defendant. I checked
21 some drugs from another officer.

22 Q Okay. And that, where did those drugs come from?

23 A They came from a drug buy according to the -- to the
24 evidence bag.

25 Q And so they were not sent to SLED --

1 A No, sir, they were not.

2 Q -- to be tested?

3 A The only thing sent to SLED is in that bag right
4 there, that's correct. This right here.

5 Q Okay. So that I believe what Mr. Byrholdt is
6 referring to is another part of the narrative and
7 case summary, the same number is listed on the
8 controlled buy drugs; is that right?

9 A That's correct.

10 Q Okay. And your position for that, it was a
11 typographical error; is that correct?

12 A That's correct.

13 Q But the only thing that was sent, you were in
14 possession of both bags the entire time? They were
15 constantly under your custody, care, and control; is
16 that right?

17 A The -- once I received it, the first bag I received
18 from your office, then it was under my control. This
19 was all under my control from the time I collected
20 it.

21 Q And at any time did they get combined together?

22 A No.

23 Q Okay.

24 THE COURT: After all this confusion, tell me what
25 was sent to SLED. Under what best number and SLED

1 number.

2 THE WITNESS: The container number was 177531.

3 THE COURT: Wait a minute, 177531.

4 THE WITNESS: And had a number -- has number
5 L-07-1365.

6 THE COURT: All right. How do you know that's the
7 drugs that was removed from the floor of the house
8 where --

9 THE WITNESS: Because I put it in an evidence bag
10 with a date and time. And with the item number on it.

11 THE COURT: And then put it in a best kit? All
12 right. So your markings show that?

13 THE WITNESS: That is correct. That is correct.

14 THE COURT: You said you keep the best evidence kit?

15 THE WITNESS: Yes.

16 THE COURT: And that was sent to SLED?

17 THE WITNESS: Correct.

18 THE COURT: Now, how do you know that other number
19 wasn't sent?

20 THE WITNESS: Because I still have it.

21 THE COURT: So you still have the other number?

22 THE WITNESS: Yes.

23 THE COURT: All right. Do you have any questions
24 based on the questions the Court just asked?

25 MR. BYRHOLDT: Yes.

1 BY MR. BYRHOLDT:

2 Q But both of them are marked going into the best
3 evidence kit, correct?

4 A Both marked with the same number.

5 Q Right. One bag was sent to SLED. Like I said, the
6 problem is it appeared that they were combined. I
7 don't know if they were or not.

8 THE COURT: I understand. But he says the other one
9 is still in his possession, but the second bag was sent.
10 One bag had been sent, one bag hasn't been and it's still
11 in his possession.

12 MR. BYRHOLDT: The only thing that's been produced
13 to me, one under that evidence kit number, which showed
14 two things went.

15 THE COURT: I understand what you're saying, but I
16 think his testimony has clarified it. I'll be glad to
17 hear your argument.

18 MR. BYRHOLDT: I just think it appears there could
19 be contamination because it appears from the report that
20 two separate sets of drugs were placed in the same best
21 evidence kit based on the report.

22 THE COURT: I understand. But that's not his
23 testimony.

24 MR. BYRHOLDT: I agree, it's not his testimony.
25 It's what the report said.

1 THE COURT: We're not admitting it under his report.
2 We're admitting it under his testimony. Tell me where
3 this confusion under his testimony the, basis of your
4 motion to suppress, I assume that's your motion, right?
5 What's your motion? Let's back up. What's your motion?

6 MR. BYRHOLDT: To suppress. I'll renew that at this
7 time. They still have to put the chemist up.

8 THE COURT: I understand what your motion, to
9 suppress, right?

10 MR. BYRHOLDT: That the chain of custody is
11 incomplete because the report said two sets of reports
12 were sent in the same evidence bag, now saying it's a
13 clerical error. We don't know that. I've seen no other
14 drugs.

15 THE COURT: The way I understand his testimony, he
16 put a number on the bag that was collected at -- what's
17 the house number, [REDACTED] Street -- at that house, been
18 in his possession that was sent to SLED. He got that
19 back. The other bag never been sent, under his
20 possession. However, it does have the same number
21 177531. That's his testimony the way I understand it.
22 Do you understand it that way?

23 MR. BYRHOLDT: I do.

24 THE COURT: Do you understand it that way,
25 Solicitor?

1 MR. BRADLEY: Yes, sir, Your Honor.

2 THE COURT: As far as the motion concerning here,
3 we'll hear from SLED, My tendency is to rule against you.
4 But I will keep it under advisement until I hear from
5 SLED.

6 MR. BYRHOLDT: I understand.

7 THE COURT: SLED may come in and say they tested
8 two, I don't know.

9 MR. BYRHOLDT: Thank you.

10 THE COURT: Do you understand what I'm saying? It's
11 under advisement until I hear from SLED. He's explained
12 the conflict from his end. Now I guess SLED is going to,
13 have to see what they say. I'll take it under advisement
14 until we hear from SLED. Okay?

15 MR. BRADLEY: Yes, sir.

16 THE COURT: Anything else we need to deal with this
17 afternoon?

18 MR. BYRHOLDT: No, sir.

19 MR. BRADLEY: Just matter of bond for the defendant.

20 THE COURT: His bond is over. He appeared for
21 court. He goes to jail until tomorrow.

22 MR. BRADLEY: Just wanted to address it on the
23 record.

24 THE COURT: I don't know there's anything to
25 address. They're going to take him to jail.

1 MR. BYRHOLDT: I'd request ---

2 THE COURT: Denied.

3 MR. BYRHOLDT: Okay.

4 THE COURT: Goes to jail. Thank you so very much.
5 We'll start back tomorrow.

6 MR. BYRHOLDT: Can the state not discuss prior
7 testimony with their witnesses, about what people have
8 testified to? I think they can interview their
9 witnesses.

10 THE COURT: Yeah. Don't go out there and tell them
11 what everybody testified to. I don't have any problem
12 you prepping the witness.

13 (Whereupon, the proceedings are adjourned for the
14 evening recess.)

15 January 8, 2009

16 (Whereupon, court reconvened with all parties
17 present, when the following proceedings were had:)

18 THE COURT: Anything from the state before we bring
19 the jury?

20 MR. BRADLEY: No, Your Honor.

21 THE COURT: From the defendant?

22 MR. BYRHOLDT: No, Your Honor.

23 THE COURT: Talking yesterday about suppression,
24 refresh my memory.

25 MR. BYRHOLDT: I had investigator Baskin on the

1 stand. We finished all questions with him. We're ready
2 to go forward.

3 THE COURT: We're going to wait until we hear from
4 the SLED on the drugs, right?

5 MR. BYRHOLDT: Yes.

6 THE COURT: All right. Bring the jury in, please.

7 (The following proceedings were had within the
8 presence of the jury:)

9 THE COURT: Solicitor, call your next witness.

10 MR. BRADLEY: Thank you, your Honor. May it please
11 the Court? The state calls investigator Mike Baskin.

12 THE COURT: Ladies and gentlemen of the jury, the
13 reason we were waiting, the other jury reached a verdict.
14 We were dealing with that. That's the reason we were
15 running late. We got a verdict and I had to deal with
16 that before we start the trial. Sort of happened -- they
17 got the verdict at the same time as you all were coming
18 in.

19 W. MICHAEL BASKIN, being first duly
20 sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. BRADLEY:

23 THE CLERK: Please state your full name, spell your
24 last name for the record.

25 THE WITNESS: William Michael Baskin, B-A-S-K-I-N.

- 1 Q Good afternoon, tell us what your occupation is.
- 2 A I work for the solicitor's office.
- 3 Q In what capacity?
- 4 A Investigator.
- 5 Q How long have you been employed there?
- 6 A About 16 months.
- 7 Q What did you do before then?
- 8 A Worked for the Anderson City Police Department.
- 9 Q How long?
- 10 A A little over 30 years.
- 11 Q What titles did you hold there?
- 12 A I did crime scene and evidence there. I was a
- 13 sergeant.
- 14 Q And were you working in that capacity January, 2007?
- 15 A Yes, I was.
- 16 Q Did you have reason to respond to [REDACTED] Street,
- 17 Anderson, on that day?
- 18 A Yes, I did.
- 19 Q On January 15, 2007?
- 20 A Yes, I did.
- 21 Q What was the reason for responding there?
- 22 A I was there to collect evidence.
- 23 Q And what items did you collect?
- 24 A I collected drugs, crack pipe, cell phone.
- 25 Q And when you collected these items, when you

1 collected the drugs, did you do anything with them?

2 A I put them in an evidence bag.

3 Q Before that, did you do anything with them?

4 A The drugs I field tested.

5 Q What does field test mean?

6 A I have a -- have a presumptive test that you drop
7 part of the drugs into and break an ampule. It will
8 turn a certain color depending on the type of drug it
9 is.

10 Q What did it test?

11 A It tested for cocaine.

12 Q And, Investigator Baskin, showing you what's marked
13 State's Exhibit 3 for identification purposes, take a
14 look at that, tell me if you recognize that.

15 A Yes, sir. This is the drugs I collected that day.

16 Q Where did you collect them from?

17 A Kitchen floor.

18 Q Anything else about where you collected them from?

19 A They were underneath the defendant.

20 Q And besides collecting the item of evidence from the
21 residence that night, did you do anything else? Take
22 photographs?

23 A I'm sorry?

24 Q Did you do anything else at the scene that night?

25 A I took photographs, yes. Identified everyone in the

1 house.

2 Q What did you photograph?

3 A The drugs.

4 Q Anything else?

5 A Yes, I -- all the people that were in the house, and
6 another place in the bathroom where I collected a
7 crack pipe.

8 Q Okay. Investigator, showing you State's Exhibit 1
9 and 2 for identification purposes. Take a look at
10 those. Do you recognize them?

11 A Yes, sir. These are the drugs I collected.

12 Q Those the photographs you took as well?

13 A Yes.

14 Q Do those photographs accurately depict the scene from
15 that night?

16 A Yes, sir. After the defendant was taken off the
17 drugs.

18 Q Okay. And have they been edited or altered in any
19 way?

20 A No.

21 MR. BRADLEY: At this time, I'd like to move the
22 photos in evidence.

23 MR. BYRHOLDT: No objection.

24 THE COURT: What number is it, Mike?

25 MR. BRADLEY: One and two.

1 THE COURT: State's Exhibit 1 and 2 admitted without
2 objection.

3 (WHEREUPON, State's Exhibit No. 1-2 are admitted
4 into evidence.)

5 MR. BRADLEY: Thank you, Your Honor. Permission to
6 publish to the jury, Your Honor?

7 THE COURT: Yes, sir.

8 BY MR. BRADLEY:

9 Q Show you these on the overhead. Just describe to the
10 jury what they're seeing, please.

11 THE COURT: You need to step down?

12 (Witness steps down from the stand.)

13 A That's the baggy with the drugs in it there. This is
14 the kitchen. The defendant was on top of these
15 drugs.

16 THE COURT: Could I get him to speak up a little?

17 THE WITNESS: I said the defendant was on top of
18 these drugs. This is the baggy containing the drugs on
19 the kitchen floor.

20 Q And that was State's Exhibit No. 2. Show State's
21 Exhibit No. 1. If you could, explain this one as
22 well.

23 A Those are the same drugs.

24 Q That's the kitchen floor, that's the baggy they were
25 in?

1 A This is the baggy underneath the defendant.

2 MR. BRADLEY: Thank you. You may return to the
3 stand.

4 (Witness resumes stand.)

5 BY MR. BRADLEY:

6 Q After collecting the evidence and taking the
7 photographs that night, what did you do with the
8 evidence you collected?

9 A I took it and locked it up in the evidence room at
10 the city police department.

11 Q Regardless of the drugs, did you take it to have any
12 more testing done?

13 A Took it to SLED. Yes, sir.

14 Q What is SLED?

15 A SLED is the South Carolina Law Enforcement Division.

16 I took it to the log in there at the laboratory.

17 Q And what did they do at SLED?

18 A The log in and lab they analyze, they analyze drugs
19 they analyze DNA, all sorts of stuff.

20 Q And you personally took those drugs?

21 A Yes, sir. I personally took them.

22 Q What exactly did you take?

23 A I took the drugs -- well, I -- first, I put them in
24 an evidence bag at the scene. When I got back to the
25 police department, I put them in a best kit, which is

1 a container to take stuff to SLED with. It has a
2 chain of evidence on it. And I log it in. I logged
3 this into Amy Stevens and she took possession of it.

4 Q Is that the only thing you took?

5 A Yes. That was the only, as to this case, I took.

6 Q And mentioned that you took it to Amy Stevens and
7 logged it in?

8 A Yes.

9 Q What happened to the evidence while it was down there
10 at SLED?

11 A It was just logged in. I gave it to her and she took
12 possession of it.

13 Q Okay. Did this evidence come back into your
14 possession at any time after that?

15 A Yes, sir. I picked it up in April of that year.

16 Q April of that year. And who did you retrieve it
17 from?

18 A Carhonda Williams.

19 Q She's a SLED employee?

20 A Yes. She was in log in. She no longer works there.

21 Q What did she do when you arrived at SLED to pick it
22 up?

23 A I signed for it and she gave it to me.

24 Q What did you do after that?

25 A I brought it back to the Anderson Police Department

1 and locked it back up.

2 Q And after you took them back to the police department
3 were they constantly in your care and control while
4 you were working at the police department?

5 A Yes, sir.

6 Q And you mentioned that you left the police department
7 to come work for the solicitor's office a little
8 while ago. What did you do when you left the police
9 department with the evidence?

10 A It was still locked in place. Kevin Warren assumed
11 possession of the evidence then.

12 Q Kevin Warren is also with the police department?

13 A Yes, sir, evidence technician at the police
14 department now.

15 Q So it would be his duty to maintain custody and
16 control of that evidence?

17 A Yes, sir.

18 Q Investigator, if you could, walk us through the
19 process of when you collect the evidence and you put
20 it in the bag. What is the process of doing that?
21 How do you do that?

22 A I photograph it first, and then I -- depending on the
23 type of drug it is, I do a field analysis. The only
24 kind of drug I would not do a field analysis on would
25 be pills or marijuana. Then I put it in an evidence

1 bag. I put a case number on it, put the offense, the
2 person's name, the date and time collected, a
3 description of what I collected, you know, where I
4 collected it from. And then I bring it -- then, like
5 in this case with crack, I would bring it back to the
6 police department. Then I would fill out, as I said,
7 a best kit for taking it to the SLED laboratory.

8 Q Since it was in your possession, if it had been
9 edited or altered in any way, you would be able to
10 tell; is that correct?

11 A Yes. It's a sealed bag.

12 Q Has it been edited or altered any since it was in
13 your possession?

14 A Since the last time, no, sir.

15 Q Thank you. No further questions.

16 THE COURT: Cross examination?

17 MR. BYRHOLDT: May it please the Court?

18 CROSS EXAMINATION

19 BY MR. BYRHOLDT:

20 Q Investigator Baskin, you put it in a best evidence
21 kit to protect its integrity, correct?

22 A I put it in a best evidence bag to take it to SLED.

23 Q But also to preserve its integrity, right? So
24 someone doesn't add something or take something out?

25 A It's already in a sealed evidence bag.

1 Q And when you write down the number on your chain of
2 custody form, you do have chain of custody form,
3 right?

4 A Yes, sir. There's chain of custody forms with the
5 best kit. And I also keep a computerized
6 chain-of-evidence form.

7 Q Can you explain to this jury how two sets of evidence
8 could have the same best evidence kit number?

9 A Sir?

10 Q Can you explain to this jury whether it would be
11 possible for two separate quantities of drug to have
12 the same best evidence kit number?

13 A Two different drugs, the only way that could be
14 possible for a typographical error. In this
15 particular case, when I typed up the evidence in the
16 computer, I put the same lab number -- I mean, excuse
17 me, not lab number, container number for two
18 different sets of evidence.

19 Q So it's a clerical error?

20 A Yes, sir.

21 Q Do you do a Form B chain of custody?

22 A Yes, sir.

23 Q Do you have that with you today?

24 A No, sir. I don't. It may be in the case file.

25 Q Let me show you my copy. That's, again, for the

1 chain of custody, make sure it's all done correct?

2 A Correct.

3 Q Would it be possible to do a chain of custody and
4 swear that it was done on January 16th of 2007 when
5 the drugs weren't sent off until January 27, 2007?

6 Would that be another clerical error?

7 Is that your chain of custody form, sir?

8 A That's my original chain of custody form. Yes.

9 Q All right. On the bottom of it there's a notary
10 where it was sworn to, correct?

11 A That is my signature was sworn to, not the day that I
12 collected it. No, sir.

13 Q No, what's the day -- I mean, it's the day the form
14 was completed, correct?

15 A No. The day that I got my signature notarized I
16 didn't say -- I can't say I didn't complete the form
17 on the 16th. I don't remember.

18 Q You wouldn't have the form notarized before it was
19 completed, would you?

20 A No, sir.

21 Q What date was it notarized?

22 A My signature was notarized on the 16th of January.

23 Q And the form should have been completed before it was
24 notarized, correct?

25 A Correct.

1 Q What date was the evidence sent to SLED?

2 A It was sent 1/29.

3 Q Well, how could it be notarized January 16th when the
4 stuff wasn't sent out for eleven more days?

5 A I'm not following you.

6 Q Well, you sign it when the form is completed,
7 correct?

8 A My signature has to be notarized. Yes, sir.

9 Q Well, you wouldn't have it notarized before the form
10 was completed, would you?

11 A No, sir. The form was completed when I got it
12 notarized.

13 Q How could it be notarized on the 16th when the
14 evidence wasn't sent until 11 days later? Or did
15 somebody add stuff later?

16 A No. SLED will not notarize my signature. Therefore,
17 I have to have my signature notarized here. When I
18 take it to SLED, I put in the date and -- that I
19 turned it in to SLED. We don't put a name, but we
20 put the SLED for the law enforcement agency and for
21 the name.

22 Q So you're telling the jury you have your signature
23 and the form notarized before it's completed?

24 A I have my signature notarized before I take it to
25 SLED. Yes, sir. That's on every case.

1 Now, at one time we used to take stuff to SLED and
2 get them to notarize our signature but they will not
3 do it anymore. At least they wouldn't when I was
4 working. I don't know what that policy is now.

5 Q So it would be fair to say you entered information
6 after your signature was verified?

7 A Oh, yes, sir.

8 Q The form says you received it, placed it at SLED,
9 sworn before you some eleven days before it was sent?

10 A No, sir. That's not what it says.

11 Q Read the bottom of it, sir. What does this say?
12 Right here, the last paragraph.

13 A Sworn and subscribed this first of six -- January,
14 2007, Amy Sexton she works at the police department.
15 SLED will not notarize my signature. That's the
16 reason I have to have it done here.

17 Q Yeah, but you could have it done after you took the
18 drugs. Like let's assume you seized it on the 15th,
19 took it on the 27th, and you fill out the form and
20 say I delivered it and swear to it when you get back?

21 A These forms are turned in to SLED.

22 Q What I'm saying is you're swearing something was
23 done. Amy Sexton didn't know that was done, did she?

24 A She's not. My signature is what she's signing, not
25 what I've written there. My signature that I signed

1 it.

2 Q That's not what the form says, though is it? It says
3 sworn that you've done these things?

4 A Every best kit is done that way.

5 Q And every best kit has two sets of drugs in it,
6 clerical errors in it, mistakes?

7 A No, two sets of drugs in that best kit.

8 Q How many photographs did you take?

9 A Of the drugs?

10 Q How many photographs did you take at the scene?
11 We've only seen two.

12 A Five, six, seven, I believe. Maybe -- I take that
13 back, nine.

14 Q All right. How many -- nine?

15 A Yes, sir.

16 Q How many individuals, non-law enforcement, were in
17 that house?

18 A Five.

19 Q You took pictures of all five?

20 A Yes, sir.

21 Q Are they here today?

22 A Are all five of those people here?

23 Q Miss Richardson is here. Anyone else? Mr. Ware.

24 A I -- there's one other, there's one other lady here.

25 I think one of the ladies is dead. Mr. Ware is here.

1 Virginia Richardson is here. I'll have to look at
2 the other girl's name.

3 Q The reason we have a chain of custody is when the
4 drugs are handled, somebody is supposed to keep track
5 of them, correct?

6 A Correct.

7 Q And if that was not done, would that be a breach of
8 protocol, Mr. Baskin, in the handling of drugs?

9 A Yes, sir.

10 Q Because everybody -- every time somebody touches
11 them, somebody is supposed to sign off on the chain
12 of custody, correct?

13 A I'm sorry?

14 Q When you take them and hand them to someone else,
15 they sign for the drugs and have custody?

16 A They have custody, yes, sir.

17 Q When you get them back you sign for them?

18 A Yes, sir.

19 Q Everybody that has custody in the interim signs off
20 on them?

21 A Yes, would be handled at SLED.

22 Q Was the chain of custody maintained yesterday when
23 the drugs were put in with the court reporter here?

24 MR. BRADLEY: Objection, your Honor.

25 THE COURT: Overruled.

1 A The chain of custody?

2 Q Was it maintained? Did someone have possession of
3 the drugs without signing for them?

4 A The only person that took the drugs were the person
5 that relieved me of my duties.

6 Q Well, did anybody sign for them yesterday?

7 A No, they didn't sign for them. He brought them with
8 me and he was here in the courtroom and took them
9 from me in the courtroom.

10 Q Took them from the court reporter?

11 A Do you mean today? Yesterday?

12 Q Yesterday.

13 A I thought he took them from me.

14 Q Was that proper?

15 A I saw nothing wrong with it. No, sir.

16 Q Did he sign for them?

17 A No, sir.

18 Q Do we know who had them at all times yesterday?

19 A Do I know who had them at all times yesterday? No,
20 sir. Not after I gave them to him.

21 Q Nothing further. Thank you, sir.

22 THE COURT: Redirect?

23 MR. BRADLEY: Thank you, Your Honor.

24 DIRECT EXAMINATION

25

1 BY MR. BRADLEY:

2 Q Investigator Baskin, is it true that the drugs were
3 not ID'd for evidence until today?

4 A Correct.

5 Q Okay. They were never given to the court reporter
6 yesterday; is that correct?

7 A Not to my knowledge. No, sir.

8 Q Okay. Is it your duty, and in your capacity now as
9 investigator for the solicitor's office, to maintain
10 the custody and control of the drugs?

11 A No, sir, it's not.

12 Q And you testified earlier that's officer Warren's
13 duties, correct?

14 A Correct.

15 Q And he's the one that brought them to the courtroom
16 yesterday and today; is that correct?

17 A That's correct.

18 Q Okay. Going back to the night of January 15, 2007,
19 what was it you collected from the scene
20 specifically? What was in that baggy that you
21 collected from the scene specifically?

22 MR. BYRHOLDT: Asked and answered, Your Honor.
23 Object.

24 THE WITNESS: Crack cocaine.

25 THE COURT: Overruled. Go ahead.

1 Q Did you seal it in that bag when you collected?

2 A Yes, sir. I put it in the bag.

3 Q Is that the bag that you sealed it in?

4 A When I collected it, the bag that's in the best kit,
5 this bag right here.

6 Q And from the time that you collected it until the
7 time it went to SLED, did anyone else touch it?

8 A No, sir.

9 Q And during that time was anything done to it before
10 you took it to SLED?

11 A No, sir, other than put it in the best kit.

12 Q Was it still in the same sealed bag when you took it
13 to SLED?

14 A Yes, sir, it was.

15 Q And after it was tested, when you picked it up, was
16 it still in that sealed bag?

17 A It had been opened and analyzed, but it had been heat
18 sealed back and it's still heat sealed back.

19 Q Before you took it and after you picked it up, was
20 anything added or mixed with it?

21 A No, sir. No.

22 Q And, again, once you transfer custody of it to
23 Officer Warren, upon leaving the police department,
24 it's his duty to bring it to the courtroom and
25 maintain the custody, not your duty; is that correct?

1 A That's correct.

2 Q Nothing further, Your Honor.

3 THE COURT: Recross?

4 MR. BYRHOLDT: Yes, sir.

5 RECROSS EXAMINATION

6 BY MR. BYRHOLDT:

7 Q You said on the 15th you seized it from Mr. Ware. Is
8 that what you said?

9 A It was underneath Mr. Ware. He was picked up.

10 Q What does your form say it was seized from?

11 A Kevin Montreat Ware, Virginia Gail Richardson. They
12 were codefendants.

13 Q Well, you never mentioned Miss Richardson?

14 A I did.

15 Q Seized from her?

16 A The drugs weren't under Miss Richardson.

17 Q Why did you put her name?

18 A Because she was charged also with the drugs.

19 Q Okay. And you're saying it hasn't been altered, the
20 drugs?

21 A No.

22 Q When you left the city, did you do an inventory of
23 all the drugs that were there?

24 A No, sir, I did not.

25 Q Did you sign those drugs over to the officer that

1 replaced you?

2 A I signed nothing over to him.

3 Q How do we know what happened to those drugs?

4 A Because they're still in heat-sealed bag, untampered
5 with.

6 Q Well, you said it was opened at SLED and they
7 heat-sealed it back up, right?

8 A Yes, sir. They gave it to me just like it was.

9 Q Well, if you didn't sign it over to somebody, how do
10 we know somebody hasn't opened it back up and heat
11 sealed it back?

12 A Yes, we do. We could tell it.

13 Q Why wasn't it turned over to somebody, have them sign
14 for it?

15 A There are over 17,000 pieces of evidence, sir, and I
16 don't know how many --

17 Q It would take too much time?

18 A It would take years.

19 Q But it would protect people's rights, wouldn't it?
20 Nothing further.

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

22 Call your next witness.

23 MR. BRADLEY: Thank you.

24 May it please the Court. State calls Officer Kevin
25 Warren.

1 KEVIN WARREN, being first duly sworn,
2 testified as follows:

3 BY MR. BRADLEY:

4 THE CLERK: State your full name, as well as you
5 last name for the record, please, sir.

6 THE WITNESS: William Kevin Warren, W-A-R-R-E-N.

7 Q Good afternoon. Tell us what your occupation is.

8 A Police officer with Anderson City Police Department.

9 Q How long you been there?

10 A Fifteen years.

11 Q What title do you hold there?

12 A Corporal as evidence custodian.

13 Q Evidence custodian. When did you take over that
14 title?

15 A August of 2008.

16 Q And who had that title prior to you taking it over?

17 A Mike Baskin.

18 Q So when he left work there, you took over his duties
19 and all the evidence?

20 A That's correct. Correct, that year. It was August
21 of '07 that I took over, not '08.

22 Q And if you'd take a look at Exhibit No. 3. It's
23 right there. Tell me if you recognize that.

24 A Yes, sir, I do.

25 Q How do you recognize that?

1 A It has a label on it marked with the case number,
2 item number, and also the location where it was
3 stored in the evidence room.

4 Q And where did you receive this. Did you receive this
5 item?

6 A When I took over evidence as the evidence custodian,
7 this was already in the evidence room of the police
8 department.

9 Q Who had possession of it prior to you?

10 A Officer Mike Baskin.

11 Q Okay. Is it -- today is it the same condition as it
12 was when you took over that day from Mr. Baskin?

13 A Yes, sir. It's still in the sealed envelope that it
14 came from SLED in, the hot-sealed packet.

15 Q Those packets, are they tamper proof? Can somebody
16 tamper with it without it being recognized?

17 A I don't see how. It's hot sealed in their custody
18 and this is the way it's brought back from their
19 office to be put back in the evidence room. This one
20 doesn't appear to be tampered with from what can I
21 tell.

22 Q From the time you took it over from Mike Baskin when
23 he had that same job you had, evidence custodian, it
24 looks exactly the same from that time; is that
25 correct?

1 A That's correct.

2 Q And have you done anything with it except for
3 bringing it to court?

4 A No, sir.

5 Q And is that part of your duties, to transport the
6 evidence to trial when we have trials like this?

7 A That's correct.

8 Q Okay. Mr. Baskin --

9 MR. BRADLEY: May we approach, Your Honor?

10 THE COURT: Yes, sir.

11 (WHEREUPON, a bench conference was held in the
12 presence of the jury but outside the hearing of the
13 jury.)

14 MR. BRADLEY: Your Honor, the state has no further
15 questions of this witness at this time.

16 THE COURT: Cross examination?

17 MR. BYRHOLDT: May it please the Court?

18 CROSS EXAMINATION

19 BY MR. BYRHOLDT:

20 Q Officer Warren, when you're -- you're the evidence
21 custodian now?

22 A That's correct.

23 Q Is it proper procedure to use the same best evidence
24 kit number for two separate amounts of drugs?

25 A Clarify that. I don't understand the question.

1 Q Well, if you seize drugs, put them in a best kit,
2 it's got a number on it?

3 A Yes, sir.

4 Q Control number to preserve the integrity of the item
5 within?

6 A That's correct.

7 Q Would there be any reason to have the same best
8 evidence kit number for two distinct seizures of
9 drugs?

10 A Not to my knowledge.

11 Q Shouldn't happen, should it?

12 A No, sir.

13 Q Are you familiar with form B --

14 A Yes, sir.

15 Q -- chain of custody?

16 A Yes, sir.

17 Q Do you fill it out and have it notarized before it's
18 completed or do you complete it?

19 A Form B, whoever collects the evidence, fills out form
20 B, has it notarized, drops it in the evidence box or
21 wherever, or gives it to another officer. When I
22 receive it, I fill out form C and have it notarized.

23 Q But shouldn't form B be completed before it's
24 notarized?

25 A Anything going to SLED has to be notarized and

1 everything. If the form's not complete, to my
2 knowledge, they will not accept it there.

3 Q There's no way it should be notarized with a date
4 before it's sent off?

5 A You can notarize the form -- if you fill out form B
6 on the day you collect it, it should be notarized
7 that day. They notarize your signature when you sign
8 that form B.

9 Q And it should be done on the day it's seized?

10 A The day you sign it, they need to notarize that
11 signature is what I'm saying.

12 Q But why would you notarize something if you haven't
13 completed the project? Where the space is, I made
14 delivery such and such a date, and you're swearing
15 that that's what happened. How can you notarize
16 before it happens? What if it's never sent to SLED,
17 you've got a notarized form that would be empty or
18 you got a notarized form that said it was sent on the
19 29th or 7th whatever it is, and sworn to eleven days
20 earlier. How can you swear to something that hasn't
21 happened yet?

22 A Amy Sexton is saying that he signed this form on this
23 date validating his signature on this form.

24 Q That's not what the form says. The form says, "I
25 certify that I have done these things." That's what

1 the form says. That's not a good way to do it, is
2 it?

3 A This is the only form I've ever seen.

4 Q That doesn't make it right, though, does it?

5 A I'm just saying it could be errors. Yes, sir.

6 Q Definitely could be errors. When you took over the
7 evidence room, was there a chain of custody form
8 signed that you're now the custodian of all the
9 evidence?

10 A We signed over the keys, or Officer Baskin turned his
11 keys in to captain or lieutenant over the division.
12 Then they were reassigned. I had to sign for those
13 saying all this is in my custody at this date and
14 time I received the key.

15 Q How can you -- can you tell this jury how you knew
16 what was in there when you took over.

17 A Other than the evidence log, the computer -- in the
18 computer, all the evidence, I mean I didn't go
19 through each piece and verify.

20 Q Nobody has, have they?

21 A There are 18,000 pieces in the computer, roughly.

22 Q Thank you, Officer Warren.

23 THE COURT: Any redirect?

24 MR. BRADLEY: Nothing further, Your Honor.

25 THE COURT: Officer Warren, you may step down.

1 Thank you very much.

2 (Witness steps down from the stand.)

3 THE COURT: Officer Warren, would you wait in the
4 courtroom, please.

5 Call your next witness.

6 MR. BRADLEY: Yes, sir, your Honor. The state calls
7 officer Frances Johnson.

8 THE COURT: Officer who now?

9 MR. BRADLEY: Frances Johnson.

10 FRANCES JOHNSON, being first duly
11 sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. BYRHOLDT:

14 THE CLERK: If you would please state your full name
15 spell your last name for the record.

16 THE WITNESS: Miss Frances Johnson, J-O-H-N-S-O-N.

17 Q Officer Johnson, could you tell us where you're
18 employed?

19 A Anderson Police Department.

20 Q What position do you hold there?

21 A An evidence technician.

22 Q How long you been working there?

23 A At the police department, in total three years.

24 Q When did you become an evidence technician?

25 A I been doing it part time for approximately ten

1 months, full-time since December.

2 Q What are some of your duties as evidence technician?

3 A I collect evidence that has been turned in from
4 different officers. I record it, enter it into the
5 computer, just for basically safekeeping.

6 Q Do you work with Officer Warren of the Anderson
7 Police Department?

8 A I do.

9 Q Are you his assistant?

10 A Yes.

11 Q And some of your duties, you assist him, accompany
12 him to court when he comes to testify; is that
13 correct?

14 A I'm sorry.

15 Q Some of your duties assisting him, coming to court
16 when he comes to testify?

17 A Yes, you could say that.

18 Q Is that your reason for being here today?

19 A Yes. But mainly for training purposes.

20 Q And when you and he came over today, who had
21 possession of the evidence?

22 A Officer Warren.

23 Q And prior to us beginning the trial today, who came
24 into the courtroom with the evidence?

25 A Officer Warren.

1 Q And when we took a break a while ago, did you take
2 the evidence outside of the courtroom?

3 A No, sir, it wasn't at that time.

4 Q When did you come into possession of the evidence?

5 A Once we came in and he brought the evidence up here
6 to this young lady, she labeled it as evidence. And
7 then when Officer Warren walked away, the package was
8 still left laying there. I asked her if she was
9 finished with it at that time, and I took it and put
10 in the briefcase.

11 Q Did you do anything to alter it?

12 A No, sir. I did not.

13 Q What did you do with it after you put in the
14 briefcase?

15 A What did I do with the evidence after I put it in the
16 briefcase? That was the last time I handled it.

17 Q What did you do? Where did you take the briefcase?

18 A The briefcase remained on the seat. That's when
19 Officer Warren and I went outside, he took possession
20 of the briefcase at that time.

21 Q That was the only brief amount of time you were in
22 possession of the evidence?

23 A Yes.

24 Q When you placed it in the briefcase?

25 A Yes.

1 Q From then Officer Warren has been in possession of
2 the evidence?

3 A Yes, in the briefcase.

4 Q Just to make sure, the evidence we're speaking of is
5 exhibit No. 3, right there in front of you. Do you
6 recognize that?

7 A Yes. It appears to be the same.

8 Q Thank you. No further questions.

9 THE COURT: Cross examination.

10 CROSS EXAMINATION

11 BY MR. BYRHOLDT:

12 Q You're an evidence technician?

13 A Yes, sir.

14 Q Aren't you supposed to -- isn't the purpose of the
15 chain of custody to maintain the integrity of the
16 evidence?

17 A Yes.

18 Q You were not in the chain of custodian, correct, for
19 handling this evidence?

20 A No, not technically. No.

21 Q Why would you pick it up?

22 A Because, again, I'm here basically for training
23 purposes. And so when I was observing them recording
24 the evidence for court purposes or whatever, it was
25 left laying on the counter. That's why I asked her

1 if she was finished with it. Officer Warren and I
2 were about to walk away. It was just left lying
3 there. That's the reason I asked the question. When
4 she said she was finished with it. I took that to
5 mean the thing to do would be to secure it.

6 Q Why didn't you get officer Warren, if that's his job?

7 A Basically, we kind of work together with that. And
8 at that time he was speaking with, I think one of the
9 court staff or somebody over in another corner. And
10 the evidence was left unsecured.

11 Q It's not left unsecured, it's left with the court
12 reporter who maintains custody of it during a trial.

13 A Okay.

14 Q Did you know that?

15 A Well, again, when I asked her if she was finished
16 with it, she indicated she was finished. When I
17 picked it up, she didn't say any differently. So I
18 didn't realize I was doing anything to create a
19 problem.

20 Q Did you sign for the drugs if they were in your
21 custody?

22 A Today I did not. No, sir.

23 Q Have you ever, on these drugs, ever signed for them
24 having them in your custody?

25 A No, sir.

1 Q No further questions, Your Honor.

2 THE COURT: Redirect?

3 MR. BRADLEY: No redirect, Your Honor.

4 THE COURT: Miss Johnson, if you'll go have a seat
5 beside Officer Warren please, ma'am.

6 (Witness complies.)

7 THE COURT: Who is your next witness?

8 MR. BRADLEY: State calls Virginia Gail Richardson.

9 VIRGINIA G. RICHARDSON, being first
10 duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. BRADLEY:

13 THE CLERK: If you'll please state your full name,
14 spell your last name for the record.

15 THE WITNESS: Virginia Gail Richardson.

16 Q Ms. Richardson, where were you living in January of
17 2007?

18 A I was living at [REDACTED] Street.

19 Q Okay. I'd like for you to speak up so we can hear
20 you all the way back here. Okay?

21 A Okay.

22 Q Make sure everybody can hear you. Did anybody else
23 live there with you?

24 A Yes. My friend, Marie Pitts.

25 Q Is that residence [REDACTED] Street close to any parks

1 or ball fields?

2 A Yes, about a block and half from the ball park on C
3 Street.

4 Q That's called C Street Park; is that right?

5 A Yes, sir.

6 Q Do you know the defendant?

7 A Yes, sir. I know him. Yes, sir.

8 Q How long have you known him?

9 A About six months.

10 Q Six months from today or six months from January
11 2007?

12 A Six months from January the 15th.

13 Q Okay. And speaking of January 15, do you remember
14 seeing the defendant on that day?

15 A Yes, sir, I did.

16 Q And where did you see him?

17 A Well, I made a phone call for him to bring over
18 something for a guy.

19 Q To bring over, you said bring over something. What
20 did you ask for him to bring over?

21 A Drugs.

22 Q What type of drugs?

23 A It was crack cocaine.

24 Q And what was his reason for bringing that over?

25 A Greg Kay come there. He wanted me to make a phone

- 1 call for him to get him and bring it over to him.
- 2 Q So you called the defendant and he came over there
- 3 that night?
- 4 A Yes, sir.
- 5 Q And that was at your house?
- 6 A At my house.
- 7 Q And did he come over that night?
- 8 A Yes, he did.
- 9 Q What time of day or night was that?
- 10 A It was around 8:30, 9:00.
- 11 Q Okay. When he arrived at your house, what did he do?
- 12 A He come in the back door and Greg was there and I was
- 13 there. And so it was a little argument at first
- 14 because he approached him for to bring \$200 worth,
- 15 but when he got there, Kevin -- I mean Greg didn't
- 16 have but a hundred dollars.
- 17 Q And so what happened after that?
- 18 A Well, right after that, that's when he started
- 19 unwrapping the bag.
- 20 Q Sorry, when you say he, who are you talking about?
- 21 A The crack cocaine. The drugs.
- 22 Q But who was doing that?
- 23 A Kevin.
- 24 Q Okay. Continue. I'm sorry.
- 25 A Okay. And that's when it was a little argument

1 between them two. And right after that, that's when
2 the laws come in.

3 Q He was unwrapping the bag, you said?

4 A Right, when they come in my back door.

5 Q And you saw the drugs in the defendant's hands?

6 A Yes, I did.

7 Q Where did he have the drugs prior to having them in
8 his hands?

9 A Come out of his jacket, sweater pocket.

10 Q So he took it out of his pocket in his shirt?

11 A Yes.

12 Q I'm going to show you what's been marked State's
13 Exhibit 1 and 2. Take a look at those for me. Tell
14 me if you can recognize that.

15 A Yes, sir.

16 Q How do you recognize that?

17 A Because when they come in the back door, that's when
18 he slung it in the floor.

19 Q That's the bag of drugs --

20 A That's the only thing that was in my house, yes.

21 Q And when the officers came in that night, what did
22 you see the defendant do?

23 A He slung it towards the officer, towards the floor.

24 Q And did it hit any of the officers?

25 A No, I don't think it did. It hit the wall.

- 1 Q Okay. And it ended up in the floor. Is that what
2 you said?
- 3 A Yes, sir.
- 4 Q What happened after the defendant slung the drugs at
5 the officer. What happened after that?
- 6 A That's when they threw him down on the floor and
7 turned around and put me down on the floor.
- 8 Q Put you down on the floor as well?
- 9 A Yes, sir.
- 10 Q Were you arrested that night?
- 11 A Yes, sir. I was arrested that night, too.
- 12 Q Did you throw anything at the officers when they came
13 in?
- 14 A Did what, sir?
- 15 Q Did you throw anything at the officers?
- 16 A No, sir. No, sir. I had nothing on me.
- 17 Q Did anyone else throw anything on the officers when
18 they came in?
- 19 A No, sir.
- 20 Q To your knowledge, did anyone else in that house,
21 were they in possession of any drugs that night?
- 22 A That -- I can't hear all that good. What now?
- 23 Q I'm sorry. Did anyone else in the house besides the
24 defendant have possession of drugs that night?
- 25 A No, sir. No, sir.

1 Q And you said you were arrested. What crimes were you
2 charged with that night?

3 A I think I -- probably was after they searched the
4 house and everything, maybe 10:30 or 11:00 when they
5 got me to the city jail.

6 Q What were you charged with?

7 A At first they said it was going to be running a crack
8 house, something like that. And then that morning
9 that's when they brought me the warrant in on
10 conspiracy.

11 Q You been convicted of that crime?

12 A No, sir.

13 Q You haven't been convicted?

14 A Yeah, I've been convicted. Yeah, I'm doing
15 probation. I about got it over with.

16 Q And how did you -- how were you convicted of that
17 crime?

18 A I pled guilty.

19 Q Prior to pleading guilty, did anyone offer you
20 anything --

21 A No, sir.

22 Q -- for your testimony at this trial?

23 A No, sir.

24 Q Is it true you also have a few shoplifting
25 convictions on your record?

1 A Yes, I have had that. Yes.

2 Q Did you give a written statement to the police
3 officers in this case?

4 A I gave a statement that night when they arrested me.
5 Yes, sir.

6 Q The same night you were arrested?

7 A Yes, sir. The night I was arrested.

8 Q January 15, 2007?

9 A Yes, sir.

10 Q Was that written statement about your knowledge of
11 the defendant and what happened that night
12 January 15?

13 A Yes, sir, it was.

14 Q Does anything in your statement of that night differ
15 from how you're testifying to today?

16 A No, sir.

17 Q Is everything that you've told us today the truth?

18 A Yes, sir.

19 Q Nothing further.

20 THE COURT: Cross examination.

21 CROSS EXAMINATION

22 BY MR. BYRHOLDT:

23 Q Your record is a little worse than just shoplifting,
24 isn't it?

25 A Yes, I have a while back.

1 Q Breaking and entering.

2 A Sir?

3 MR. BRADLEY: Objection.

4 THE WITNESS: No, no.

5 MR. BRADLEY: May we approach, Your Honor?

6 THE COURT: Yes, sir.

7 (WHEREUPON, a bench conference was held in the
8 presence of the jury but outside the hearing of the
9 jury.)

10 THE COURT: Mr. Foreman, ladies and gentlemen of the
11 jury, it's 3:30. We're going to take a break at this
12 time. I need to hear some motions from the attorneys, so
13 please don't discuss the case. If anybody needs to
14 smoke, let the bailiffs know. They'll take you to the
15 smoke area. We'll take about a 15- or 20-minute break.
16 If you need anything, let the bailiffs know.

17 Ms. Richardson, keep your seat. Okay?

18 THE WITNESS: Okay.

19 (Whereupon, the following proceedings were had
20 outside the presence of the jury:)

21 THE COURT: All right. Let me hear you on the --
22 the way I understand it, the solicitor asked this witness
23 had she had a shoplifting charge. He asked her that
24 question.

25 MR. BRADLEY: I think that's --

1 THE COURT: I don't remember the exact wording.
2 What was your exact wording?

3 MR. BRADLEY: My exact wording, "Is it also true
4 that you have a few shoplifting convictions on your
5 record?"

6 MR. BYRHOLDT: And she has an eight-page record.

7 MR. BRADLEY: That's only in the --

8 MR. BYRHOLDT: But it misleads the jury. I think
9 that's what opens the door. I agree, I did not give him
10 advance notice because I didn't know they were going to
11 ask her that question.

12 THE COURT: What if they all had been within the ten
13 years, were you going to ask her about all of them?

14 MR. BRADLEY: As long as they carry over a period of
15 a year or a crime of moral turpitude, he could have.

16 THE COURT: I'm not asking you what he could do.
17 I'm asking you why, if you were bringing up the charges,
18 why did you limit just to the ten years, one within ten
19 years? Why don't you think he opened the door to her
20 entire criminal history? Because you insinuated to the
21 jury now her only criminal record she has is shoplifting,
22 which is not correct.

23 MR. BRADLEY: Your Honor, it was a tactic to have
24 the jury hear it before Mr. Byrholdt was going to impeach
25 her on it. I didn't want it to seem like we were hiding

1 anything as far as what's available to come in under the
2 rules of evidence. Mr. Byrholdt didn't give us ten days'
3 written notice. That's why I objected at the time I did,
4 Your Honor.

5 THE COURT: You still haven't answered my question.
6 My question is very simple to you. Why haven't you
7 opened the door to allow the defendant to go past the ten
8 years by asking the question, "Oh, by the way, don't you
9 have shoplifting, insinuating to the jury that's the only
10 criminal charge she had, whether it's been 10 years or 30
11 years. Why haven't you opened the door? That's my
12 question to you.

13 MR. BRADLEY: I don't think I've opened the door
14 because I haven't asked her, is that the only thing you
15 have on your record? I didn't ask her if that was the
16 only thing limited to her record. I asked her that
17 because, quite frankly, I knew Mr. Byrholdt was going to
18 impeach her on it. And it was a tactic to do in front of
19 the jury.

20 THE COURT: I'm not arguing about your tactics. I'm
21 just asking you, I don't understand why you didn't reach
22 some agreement beforehand. But to stand up and ask,
23 "Hey, is that your crime?" And that's not true. That's
24 not true.

25 The rule of evidence is designed for impeachment

1 purposes within the ten years. However, you can go past
2 the ten years if the Court allows you to do that. So my
3 question to you, why haven't you opened the door to allow
4 the defendant to go past the ten years? Normally, it's
5 the state trying to go past the ten years. That's where
6 the cases normally come up. Where you want to go past
7 ten years.

8 MR. BRADLEY: Yes, Your Honor. The state feels it
9 hasn't opened the door to it at all. Because, again, I
10 didn't limit it by saying, "Is that the only thing on
11 your record, other than this conspiracy, other than the
12 shoplifting?

13 THE COURT: Why didn't you ask the question is that
14 the only thing within ten years? Because that's the
15 facts and that's what you were bringing out.

16 MR. BRADLEY: Yes, Your Honor. The testimony I
17 elicited from the defendant was the truth, Your Honor.
18 As far as, is there a few shoplifting records on your
19 record.

20 THE COURT: I'm going to rule that you've opened the
21 door and the Court's going to allow her criminal record
22 prior to ten years to come into evidence based upon how
23 you asked the question and what you were trying to do and
24 the insinuation to the jury being that that's the only
25 thing she had on her criminal history. If you had

1 phrased it within ten years, that would be different. So
2 as far as your objection of him going past the ten years,
3 it's overruled. Okay?

4 Anything else while the jury is out before we take a
5 break?

6 MR. BYRHOLDT: No, Your Honor. And there are three
7 charges I'm going to talk about, one is the marijuana
8 charge, which is a crime of moral turpitude; a breaking
9 and entering, which is a crime of moral turpitude, the
10 other ones are within ten years. And my question --

11 THE COURT: Why don't you all talk real quick. You
12 show him what you're going into and see if he has any
13 objections. He's limited on what he can go into. Okay.

14 MR. BYRHOLDT: I also believe on the ten years he --
15 I think he's opened the door. There are more charges
16 than just, there are like three or four shoplifting,
17 there's stealing city property. He's asked her, you got
18 a few shopliftings and everything you testified today has
19 been the truth. I think that opens the door, also.

20 THE COURT: I've already ruled that. I need to know
21 what specifically are you going to ask her about. And I
22 think the state is entitled to know that.

23 What were you going to say?

24 MR. BYRHOLDT: A breaking and entering and a
25 marijuana, both crimes of moral turpitude. One deals

1 with theft, breaking and entering, and larceny.

2 THE COURT: What kind of marijuana?

3 MR. BYRHOLDT: Possession, simple.

4 THE WITNESS: Simple possession.

5 THE COURT: I don't think -- you got a case, is
6 there a case that says marijuana is a crime of --

7 MR. BYRHOLDT: Any narcotic conviction is a crime of
8 moral turpitude. I don't mean -- I don't mean that --

9 THE WITNESS: That's when I was 17 years --

10 THE COURT: Be quiet, ma'am.

11 MR. BYRHOLDT: And then there were four shopliftings
12 in the last ten years.

13 THE COURT: Those are the ones you're going into. I
14 understand your objection. I just wanted you to know
15 what he was going into and see if you had any objection
16 to any specific crime, any specific reason. The Court's
17 position is you opened the door. I want you to
18 understand that.

19 MR. BRADLEY: Okay.

20 THE COURT: Anything else?

21 MR. BRADLEY: Nothing further, Your Honor.

22 THE COURT: We'll take about a ten-minute break.
23 Ms. Richardson, please don't talk to anybody during the
24 trial, during the break. Just have a seat out there.

25 THE WITNESS: Okay. I'm sorry.

1 THE COURT: Thank you very much. We'll take about a
2 ten-minute break.

3 (Brief recess taken, after which the following
4 proceedings were had within the presence of the
5 jury:)

6 THE COURT: Continue cross, please, sir.

7 MR. BYRHOLDT: May it please the Court?

8 CROSS EXAMINATION

9 BY MR. BYRHOLDT:

10 Q Ms. Richardson, on January 15 of last year, how many
11 people were -- five people were in your house that
12 night?

13 A It was me and Marie and then Betty Morrison, the one
14 passed away, and just on Greg.

15 Q Greg?

16 A Greg Kay.

17 Q Greg was there to buy drugs?

18 A Yeah.

19 Q That's what you told the jury.

20 A Yes, sir. There was four people, me and her lived
21 there. And then it was Greg and Betty.

22 Q Were you using drugs that day?

23 A No, sir. No, sir.

24 Q You don't use drugs?

25 A No, sir. I have used drugs, but I wasn't using none

- 1 that day. I used them very seldom.
- 2 Q I'm sorry?
- 3 A I said I didn't use drugs that much.
- 4 Q Have you used drugs since that night?
- 5 A No, sir, I have not. I've went through treatment.
- 6 Q Well, now, I asked if you used drugs since
- 7 January 15th, and you said, "No."
- 8 A No, sir.
- 9 Q Well, you have, haven't you, because you're on
- 10 probation, correct?
- 11 A I'm on probation. Yes, sir.
- 12 Q Wasn't your probation revoked for failing a drug
- 13 test?
- 14 A For one drug test, but it wasn't the crack rock. It
- 15 was -- they had mixed up for morphine, and when they
- 16 gave me a shot, but it was Xanax.
- 17 Q You weren't given a probation violation for cocaine?
- 18 A I was violated one time.
- 19 Q You sure about that?
- 20 A Yes, sir, and I went back.
- 21 Q You have?
- 22 A That's what I'm saying.
- 23 Q I'm just trying to get the truth.
- 24 A Yes, sir.
- 25 Q Okay. You're not a drug dealer?

1 A No, I'm not no drug dealer. No, sir.

2 Q You weren't a drug dealer with Kevin Ware?

3 A No, sir. I was not no drug dealer with him.

4 Q Thank you, ma'am. No other questions.

5 A Okay.

6 THE COURT: Any redirect?

7 MR. BRADLEY: Nothing further, Your Honor.

8 THE COURT: You may step down, Ms. Richardson.

9 Thank you very much. Be careful stepping down.

10 (Witness steps down from the stand.)

11 THE COURT: Call your next witness.

12 MR. BRADLEY: State calls Amy Stevens of SLED.

13 MR. BYRHOLDT: She just a custodian? Go ahead. Amy
14 Stephens.

15 AMY STEPHENS, being first duly sworn,
16 testified as follows:

17 DIRECT EXAMINATION

18 BY MR. BRADLEY:

19 THE CLERK: If you'll please state your full name,
20 spell your last name for the record.

21 THE WITNESS: Amy Stevens, S-T-E-P-H-E-N-S.

22 Q Good afternoon. Can you tell us where you're
23 employed?

24 A Employed with the South Carolina Law Enforcement
25 Division, also known as SLED.

1 Q What's your position there?

2 A I'm a forensic technician in the evidence control
3 department.

4 Q How long have you worked there?

5 A I been employed with SLED since March of 2006.

6 Q What are your duties there?

7 A In the evidence control department we log in all the
8 evidence that comes in from the agencies throughout
9 the state of South Carolina, log into our computer
10 system, which assigns it a lab number. We then put
11 it into our evidence room under lock and key and
12 that's our duties.

13 Q Did you receive any items of evidence on January 29,
14 2007?

15 A Yes, sir, I did.

16 Q And did you mark the -- from where and what purpose
17 did you receive them?

18 A I received it from Mr. Baskin of the Anderson Police
19 Department. I logged it in, gave it lab number
20 L-071365, item No. 1.

21 Q And what did you do with that?

22 A I put into our drug intake storage, which is in our
23 evidence room.

24 Q I believe State's Exhibit 3 is still up there on the
25 witness stand. Will you take a look, see if you

1 recognize it?

2 A I remember the lab number, which is L-07961, item No.
3 1.

4 Q How long was it in your control, custody, and care?

5 A I logged it in at 9:34 a.m. And I put it in the drug
6 intake unit 10:02 a.m.

7 Q Is it in substantially the same condition now as it
8 was when you first received it?

9 A I received it in a best kit envelope. I'm not sure
10 what the analyst did when -- what he did with it, but
11 it's in the same type bag as when I received it.

12 Q Okay. And after you logged it in, you take and put
13 it -- and store it. What happens after that?

14 A It stays in storage until the analyst comes down,
15 gives us a list of lab numbers they'd like to
16 retrieve from the evidence room. In this case I
17 retrieved it on February 7, 2007, for forensic
18 scientist, Carmen Tucker.

19 Q After you retrieved it, what happened to it?

20 A I scanned it back into my custody and gave it to her,
21 which we all have bar codes and we scan it in our
22 custody in order to take custody of the evidence.

23 Q And Carmen Tucker, you said she was a forensic
24 analyst?

25 A Yes, in the drug ID department.

1 Q She's the one that did the testing on it; is that
2 correct?

3 A Correct.

4 Q And did you come back into contact with it
5 afterwards?

6 A No, sir.

7 Q Did she -- would the process be for another
8 technician to come put it back in custody with you?

9 A Yes, sir. After she analyzes it, they'll bring it
10 back down to evidence control for storage until we
11 return it to the returning agency.

12 Q And that's the standard procedure?

13 A Yes.

14 Q No further questions, Your Honor.

15 MR. BYRHOLDT: May it please the Court?

16 THE COURT: Yes, sir.

17 CROSS EXAMINATION

18 BY MR. BYRHOLDT:

19 Q Every time you handle it, you get your bar code?

20 A Correct.

21 Q And then when it goes to Carmen, her bar code comes
22 on; then it comes back to you, bar coded again?

23 A Well, actually the evidence only has one bar code.
24 Each person has a bar code for themselves.
25

Amy Stephens - Cross by Mr. Byrholdt

133

1 Q All right. Would it be proper procedure for a best
2 evidence number to be used for two distinct, the same
3 number to be used for two distinct pieces of
4 evidence?

5 A If it's all in the same bag. You talking about two
6 pieces of drugs? If it's all in the same best kit,
7 yes, it all gets the same lab number.

8 Q If a best number is used for two items, those items
9 were combined then and put in the best kit?

10 A I would assume so. Yes.

11 Q Nothing further. Thank you, ma'am.

12 MR. BRADLEY: No direct.

13 THE COURT: You may step down. Thank you very much.
14 May this witness be excused?

15 MR. BYRHOLDT: No objection.

16 THE COURT: Have a safe trip back to Columbia.

17 (Witness excused.)

18 MR. BRADLEY: State calls Nikki Perry, next witness.

19 NICHOLE R. PERRY, being first duly
20 sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. BRADLEY:

23 THE CLERK: If you would state your full name, spell
24 your last name for the record.

25 THE WITNESS: Nichole Renee Perry, P-E-R-R-Y.

1 Q Good afternoon, Miss Perry. Tell us where you're
2 employed.

3 A The South Carolina Law Enforcement Division.

4 Q What title do you hold there?

5 A I'm a forensic technician in the evidence control
6 department.

7 Q How long have you worked there?

8 A Approximately two and a half years.

9 Q And your duties there?

10 A I log in and package evidence brought in by agencies
11 across the state of South Carolina. We also have the
12 evidence room where we return evidence that has
13 already been analyzed to agencies.

14 Q As part of your duties -- is that the reason why
15 you're here testifying today?

16 A Yes, sir.

17 Q Did you come into contact with some evidence in this
18 matter?

19 A Yes, sir, I did.

20 Q Would you take a look at State's Exhibit No. 3,
21 that's already up there on the witness stand, see if
22 you recognize that.

23 A I do.

24 Q How do you recognize it?

25 A I recognize it by our yellow label. We give it a lab

1 number, L-070-1365.

2 Q Is this the evidence that came into your custody
3 while working at SLED?

4 A Yes, sir, it is.

5 Q What was the purpose of it coming into your custody?

6 A I received it. After analyzation -- I received
7 evidence into my custody from forensic scientist,
8 Carmen Tucker.

9 Q What did you do with it after that?

10 A I placed it on a shelf in our locked evidence room.

11 Q Is the evidence still in the same substantial
12 condition as it was when you received it in your
13 possession?

14 A Yes, sir, it is.

15 Q Did you come into contact with it any other time
16 after that?

17 A No, sir.

18 Q Was there anyone -- you were one of the last persons
19 to be in custody of it at SLED. Was there anyone
20 else in custody of it at SLED prior to it being
21 returned to the submitting agency?

22 A According to our chain of custody, Carhonda Williams
23 returned it to the agency.

24 Q What position does Miss Williams hold?

25 A Carhonda was a forensic technician in our evidence

1 control division as well.

2 Q The same position you hold as well?

3 A Yes, sir.

4 Q When did she come in possession of those items?

5 A On April 16, 2007.

6 Q For what reason did she come into possession of it?

7 A She returned it to Mike Baskin with the Anderson
8 Police Department.

9 Q And that would be a standard procedure for her to do
10 while she was working there?

11 A Yes, sir.

12 Q Is she still employed there at SLED?

13 A No, sir, she is not.

14 Q Okay. No further questions, Your Honor.

15 THE COURT: Cross examination.

16 MR. BYRHOLDT: May it please the Court?

17 CROSS EXAMINATION

18 BY MR. BYRHOLDT:

19 Q Was there a best evidence kit number associated with
20 Exhibit 3?

21 A According to this package it is.

22 Q What is that number?

23 A B177531.

24 Q Would it be proper to combine drugs from two separate
25 seizures in one best kit?

1 A I'm -- that's not really something that I -- I don't
2 seize drugs, so that's not something in my department
3 that I --

4 Q You would admit that if a best number is put on it,
5 on an item that matches B177531, then those items
6 would have been submitted to SLED in that envelope,
7 correct?

8 A Correct. Possible.

9 Q Let me show you something.

10 MR. BYRHOLDT: May I approach the witness, Your
11 Honor?

12 THE COURT: Yes, sir.

13 Q On 070-2472, there is a best kit listed that matches
14 that number, correct, B-177531?

15 A Matches that number. Yes.

16 Q That was some drugs that were collected at 1600 hours
17 on January 15th?

18 A According to your paper. Yes, sir.

19 Q According to the city police report?

20 A Okay.

21 Q Is this the same number B-177531 for some drugs that
22 were collected at 21:30 hours on the same day, with
23 the same best kit number?

24 A According to this report.

25 Q According to the report.

1 A That's what it appears.

2 Q All right. So does that mean that the drugs seized
3 at two different times were put in the same best kit
4 according to this report?

5 A Well, for me -- I believe you should probably ask the
6 officer that seized the drugs and placed it in this
7 pouch. All I do, receive this pouch from Carmen
8 Tucker that's already sealed. I don't even know
9 what's in there.

10 Q But what you claim to have there in Exhibit 3, is
11 what's in best pack B-177531 is what -- the same
12 number that's listed on that is listed in this
13 report?

14 A It's the same number that's listed on this best pouch
15 is the same number that's listed on that report.

16 MR. BYRHOLDT: Thank you, ma'am. I have nothing
17 further.

18 MR. BRADLEY: No redirect, Your Honor.

19 THE COURT: Thank you very much.

20 MR. BRADLEY: May this witness be excused?

21 THE COURT: Did you all come together? Witness may
22 be excused.

23 THE WITNESS: Thank you.

24 (Witness excused.)

25 THE COURT: Call your next witness.

1 MR. BRADLEY: Thank you, Your Honor. The state
2 calls Carmen Tucker.

3 CARMEN TUCKER, being first duly
4 sworn, testified as follows:

5 DIRECT EXAMINATION

6 BY MR. BRADLEY:

7 THE CLERK: Go right around there, have a seat in
8 the witness chair, please. If you'll state your full
9 name, spell your last name for the record.

10 THE WITNESS: Carmen Jeanine Tucker, T-U-C-K-E-R.

11 Q Good afternoon. Could you tell us what your
12 occupation is?

13 A I work at South Carolina Law Enforcement Division in
14 the forensic lab, the drug ID lab.

15 Q How long have you been employed there?

16 A Two years and seven months.

17 Q And what position do you hold there?

18 A I'm a drug analyst. I analyze any kind of compounds
19 that come into our department for -- to see if they
20 contain controlled substances.

21 Q Would that be considered your duties there at SLED?

22 A Yes, sir.

23 Q And what type of training is required to do such a
24 job?

25 A Well, my background in education got me in the door.

1 And then also I went through the academy for the law
2 part. And then we have extensive training, my
3 training was eight months of training with the other
4 drug analysts in the lab.

5 Q And as part of your duties, your job, have you had
6 occasion to chemically analyze substances to
7 determine whether the substance is or contains a
8 narcotic?

9 A Yes, I have.

10 Q Or a controlled substance?

11 A Yes.

12 Q And how many times have you done that?

13 A I'd say upwards, it's closing down on 2000, 2000 now.

14 Q And have you had occasion to chemically analyze
15 substances to determine whether the substance is or
16 contained crack cocaine?

17 A Yes, I have.

18 Q How many times?

19 A Well, that would be the same.

20 Q Same?

21 A Yeah, 2000.

22 Q And, again, a week how many analyses would you do?

23 A In a given week, would vary, anywhere between 20 and
24 30, 20 and 30 cases. Some of them would contain
25 multiple items.

1 Q As part of your job, have you ever testified to your
2 findings? You have testified as part of your duties
3 with your job?

4 A Oh, yes.

5 Q When you testified, were you qualified as an expert
6 in your field?

7 A Yes, I was.

8 Q How many times have you been qualified?

9 A I have been qualified four times.

10 MR. BRADLEY: At this time, Your Honor, I'd like to
11 move to have the witness declared an expert.

12 MR. BYRHOLDT: No objection.

13 THE COURT: Court so finds.

14 MR. BRADLEY: Thank you, Your Honor.

15 Q At this time like to show you State's Exhibit 3.
16 It's already up there on the witness stand. Take a
17 look at that, see if you recognize it.

18 A Yes, I do.

19 Q How do you recognize it?

20 A These are my initials on the writing where the date
21 is on there.

22 Q And when did you date it?

23 A This is dated February 14, 2007.

24 Q Why would you date it?

25 A That is the day it was processed.

1 Q By processed, what do you mean?

2 A That's the day I analyzed the evidence.

3 Q And what type of analysis did you do?

4 A The analysis performed on this evidence consists of a
5 preliminary test, which is a spot test that we run.

6 And then the conclusive test, which is the gas
7 chromatography mas spectroscopy, GC mas speck, a test
8 we use to analyze the compounds in the sample.

9 Q From where did you receive this Exhibit?

10 A The way it works at SLED is, I would go downstairs to
11 our log-in department, the first floor. I go in,
12 give a list of cases I need to pull for that day,
13 they pull the cases, place the cases under my name.
14 At that time I would take them upstairs.

15 Q While in your possession, were they constantly in
16 your care and control?

17 A Once we received, we have a vault that is locked
18 inside of our lab, part of our lab; and we lock the
19 evidence in the vault until such time as it's
20 processed.

21 Q Is the exhibit in essentially the same condition now
22 as it was the last time you saw it?

23 A Yes, it was.

24 Q How about when you first received it?

25 A No. When I first received it, this sealable bag in

1 here has a tamper-evident seal. All of the evidence
2 that you see here was inside this bag and that was
3 inside of a case jacket.

4 Q And what do you do to that bag.

5 A Basically what I do, I take this bag out. I check it
6 first for a seal tampering basically. If it's a
7 tamper evident seal, you can tell if someone tried to
8 pull it open due to the type of adhesive used. I
9 also check around the edges, make sure there are no
10 cuts or tears. Once that is done, I mark "Okay," let
11 me know it's okay, no tamperings, then I date and
12 initial.

13 I moved the evidence, which is in the evidence bag,
14 that is also labeled with the case number and sample
15 number and is initialed with my initials. I bring
16 the evidence out, which was in a plastic bag, which
17 is also labeled with the sample number and case
18 number and my initials. And then I begin processing
19 the evidence.

20 Q So when you received it, it was in that bag sealed
21 and it didn't appear to have been tampered with in
22 any way?

23 A That's correct.

24 Q So you had to open it to do your test on it?

25 A Yes, sir.

1 Q And a little while ago you went into some of the
2 tests that you performed: Based on those tests, what
3 was your conclusion on the evidence that you tested?

4 A Based on the test I performed, my conclusion was that
5 this rock substance cocaine-based crack 2.4 grams in
6 weight, 37.03 grains, and it is a schedule II
7 substance.

8 Q Is that your expert opinion?

9 A Yes, sir.

10 MR. BRADLEY: Your Honor, at this time I'd like to
11 move the drugs into evidence. Exhibit three?

12 THE COURT: Any objection?

13 MR. BYRHOLDT: Yes, sir. Need to take it up outside
14 the presence of the jury.

15 THE COURT: All right. Let me see the attorneys up
16 here just a second.

17 (WHEREUPON, a bench conference was held in the
18 presence of the jury but outside the hearing of the
19 jury.)

20 THE COURT: Mr. Foreman, members of the jury, I'm
21 going to ask you to go to the jury room. I need to hear
22 a motion at this time. The reason I'm going to ask you
23 to go to the jury room, I'm not permitted to comment on
24 the facts. When I make a decision on a motion or
25 evidence rules, I have to make a decision whether it's

1 admissible under the rules of evidence and rules of
2 court. I want to be free to comment on the facts. So I
3 have to ask you to go to the jury room so I'll be free to
4 comment on those facts out of your presence. That's the
5 reason I'm asking you to go.

6 So if you'll go to the jury room, please don't
7 discuss the case. I'll get you back as soon as I can.

8 (Whereupon, the following proceedings were had
9 outside the presence of the jury:)

10 THE COURT: What's the basis of your motion?

11 MR. BYRHOLDT: Rely on the case State versus
12 Chisholm, 584 S.E. 2d 401, South Carolina Court of
13 Appeals, 2003. A crack cocaine case. What we've got
14 here we've got one person missing from the chain of
15 custody. Miss Williams is not on the witness list, is no
16 longer employed at SLED. She's on the chain of custody.
17 She's not around.

18 But beyond that, we've got a problem with the
19 evidence that was submitted under best evidence number
20 B-177531, which is reflected in the Exhibit Number 3. In
21 the city police report, that best evidence number is
22 attributed to two different seizure times and amounts of
23 drugs. And I think that calls into question the
24 credibility of the chain of custody when you have the
25 same best evidence kit being used for a seizure that

1 allegedly took place unrelated to Mr. Ware earlier that
2 day; and a seizure arguably may be related to him later
3 on that day. And we've got one set of drugs being sent
4 under B-177531.

5 Plus we have the problem with the chain of custody
6 letter where they're swearing to something that's been
7 completed when it hasn't been. That would be my basis
8 for objecting to the evidence being admitted at this
9 time.

10 MR. BRADLEY: I don't really know with regard to
11 Miss Williams not being here to testify today. Refer to
12 the State versus Taylor, which a similar circumstance,
13 the former custodian worked at a place, was no longer
14 employed there, he was not there to testify. The next
15 person in line testified for him, completed the chain
16 because he was identified. Just because he wasn't there
17 to testify did not put the link in the chain as ruled by
18 State versus Taylor.

19 With the -- Officer Baskin testified to on the
20 numbers, the best evidence kit numbers, typographical
21 error is what's made -- on the report itself was a
22 typographical error that said the drugs from controlled
23 buy earlier in the day was the same drugs, the same kit
24 that was collected that night at the arrest of Mr. Ware.

25 I was asked and answered myself times, Mr. Byrholdt

1 and Mr. Baskin, he made clear just a typographical error.
2 What was taken to SLED, as Mr. Baskin referred to, and
3 what SLED employees referred to, what Mr. Baskin brought
4 down there. He says that's the only thing he took, what
5 he collected from Mr. Ware, right after his arrest, what
6 was beneath him. Because of typographical error,
7 Mr. Byrholdt relying on that, saying there's credibility
8 problem.

9 As far as the form, the standard procedures, Your
10 Honor, you already spoken to the officers about how they
11 would -- didn't notarize down at SLED. Therefore, they
12 notarize it beforehand. And you told them it's improper
13 procedure. But as far as chain of custody, I don't
14 believe it makes a link in the chain because standard
15 procedure, standard protocol they have, Your Honor. He
16 delivered it and testified to it, to that fact on many
17 occasions.

18 Mr. Byrholdt kept questioning him about it. His
19 testimony was that he took the evidence he collected that
20 night from underneath Mr. Ware, put it in a bag labeled
21 it with that number and took it to SLED within a couple
22 of days. He signed that form when he got back to the
23 police department that night and that -- and then later
24 on is when he placed it into SLED's custody. Therefore,
25 Your Honor, all those things that the testimony has

1 revealed, the state feels the chain of custody is
2 complete; and, therefore, the drugs should be allowed to
3 come in.

4 THE COURT: Okay. Anything briefly in rebuttal?

5 MR. BYRHOLDT: Just briefly, what Chisholm holds is
6 that chain of custody, the complete chain of evidence,
7 chain of possession must be established as far as
8 practical. A missing link in a chain creates an issue of
9 admissibility.

10 And we don't know if they even tried to get
11 Miss Williams here. I mean, the fact that she may not be
12 employed at SLED, I mean she may be working down the
13 street, I don't know. I mean, she's on my chain of
14 custody that was given to me and then she doesn't appear
15 as a witness.

16 More important than that, we have this problem with
17 two best evidence kit numbers. We've been shown no other
18 evidence.

19 THE COURT: Well, the testimony has been the
20 evidence itself that was seized from in the house where
21 the defendant was arrested, had the right number and the
22 right information on it. That was in the best --

23 MR. BYRHOLDT: But there is another problem, is
24 there's other evidence referenced in that same --

25 THE COURT: I understand. That other best kit is

1 not the evidence that was seized in this particular case,
2 according to the testimony from the officers. I
3 understand what you're saying.

4 MR. BYRHOLDT: Different interpretation.

5 THE COURT: Okay?

6 MR. BYRHOLDT: Yes, sir.

7 THE COURT: I don't think that alone arises to
8 suppression of the drugs. Okay. I think the fact that
9 Ms. Williams is not available, I think has been explained
10 by two custodians. I don't think that's a break in the
11 chain. Okay.

12 As far as the notarized statement where they
13 notarize the truthfulness of the statement, I know the
14 officers testified it notarizes the signature,
15 technically when you notarize something, a person is
16 swearing under oath, this is a true and accurate
17 statement, and you sign it and you notarize it.
18 Obviously, that's not a true and accurate statement, it
19 was a false affidavit, it was a false notary.

20 However, I don't think that rises to suppression. I
21 think that goes to weight and sufficiency of the evidence
22 and you'll just have to make that argument to the jury.
23 I don't think that arises to the suppression as far as the
24 chain is concerned.

25 MR. BYRHOLDT: Yes, sir.

1 THE COURT: Okay. So your motion to suppress is
2 denied. Anything else before we bring the jury --

3 MR. BRADLEY: Nothing further, Your Honor.

4 THE COURT: -- on this witness? All right, bring us
5 the jury, please.

6 (Whereupon, the following proceedings were had
7 within the presence of the jury:)

8 THE COURT: Solicitor.

9 MR. BRADLEY: Thank you, Your Honor. At this time
10 I'd like to move State's Exhibit 3 into evidence.

11 THE COURT: Over the defendant's objection. It's
12 admitted with objection. That's No. 3, right?

13 MR. BRADLEY: Yes, Your Honor.

14 THE COURT: State's Exhibit 3 admitted with
15 objection.

16 (WHEREUPON, State's Exhibit No. 3 is admitted into
17 evidence.)

18 MR. BRADLEY: I have nothing further for this
19 witness Your Honor.

20 THE COURT: Mr. Byrholdt.

21 MR. BYRHOLDT: May it please the court?

22 CROSS EXAMINATION

23 BY MR. BYRHOLDT:

24 Q Miss Tucker, would it be proper procedure in handling
25 evidence to seize drugs from two different incidents

1 and combine them in the same best evidence kit under
2 the same best evidence kit number?

3 A No, sir.

4 Q That would be improper, right?

5 A Yes, sir.

6 Q Because it would combine, it could change the type of
7 drug and the amount, correct?

8 A If the evidence is combined, it could contaminate.

9 Q It's what?

10 A If the two different evidence's are combined, they
11 could contaminate each other.

12 Q Could contaminate each other?.

13 A Right.

14 Q Would be bad police procedure?

15 A I would assume so. Yes.

16 Q No further questions. Thank you, Miss Tucker.

17 THE COURT: Any direct?

18 MR. BRADLEY: Nothing, Your Honor.

19 THE COURT: Miss Tucker, you may step down. Have a
20 safe trip back to Columbia.

21 (Witness excused.)

22 THE COURT: Call your next witness.

23 MR. BRADLEY: At this time the state rests, Your
24 Honor.

25 THE COURT: Let me see the attorneys up here again

1 real quick.

2 (WHEREUPON, a bench conference was held in the
3 presence of the jury but outside the hearing of the
4 jury.)

5 THE COURT: All right. Ladies and gentlemen of the
6 jury panel, I'm going to bring you back in the morning.
7 I would normally bring you back at 9:30; however, we have
8 the 2009 grand jury coming in, in the morning, an entire
9 jury panel from which we have to collect the jury for
10 this year. I'll go through a similar process we went
11 with through with you Monday. That will take probably
12 only an hour to an hour and a half, assuming everybody
13 gets here at 9:00.

14 So I'm going to ask you to be in the jury room at
15 10:30. Give me enough time to go through the grand jury
16 process. Ten-thirty. We'll resume the trial in the
17 morning.

18 Please don't discuss the case among yourselves or
19 with anyone else. I want you to make a decision on the
20 testimony you hear in the courtroom, not from your
21 friends, neighbors, husband, wife, who haven't heard
22 anything, not from anything you read in the paper or see
23 on TV. If anything is in the paper or on TV, please
24 don't read it, please don't watch it. Have a good
25 evening, I'll see you in the morning at 10:30.

1 (Whereupon, the jury is excused for the evening
2 recess.)

3 THE COURT: All right. Mr. Ware, stand and raise
4 your right hand.

5 KEVIN WARE, being first duly sworn,
6 testified as follows:

7 THE COURT: Mr. Ware, I'm going to talk to you a
8 little bit about your Fifth Amendment rights, which means
9 your right to remain silent. Do you understand?

10 THE DEFENDANT: Uh-huh.

11 THE COURT: I'm going to ask you some questions. If
12 you want to talk to your attorney during this process,
13 let me know. I'll let you stop and talk with your
14 attorney. If you have any questions you want to ask the
15 Court during this process, please tell me. I'll be glad
16 to listen to your question. Do you understand?

17 THE DEFENDANT: Yes.

18 THE COURT: All right. Under the Fifth Amendment of
19 the South Carolina Constitution as well as U.S.
20 Constitution no one can compel a defendant to be a
21 witness against themselves. In other words, no one can
22 compel you to testify or offer testimony at a criminal
23 trial. The law says that the state is responsible for
24 finding you guilty beyond a reasonable doubt. You do not
25 have the responsibility to find yourself innocent.

1 Do you understand? Yes or no?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Can you pull that microphone down so we
4 can hear you?

5 Do you understand that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. Do you understand that this
8 is a personal privilege, only you can waive that right to
9 testify?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Do you understand you have the right not
12 to testify but you also have the right to testify. Do
13 you understand?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Have you talked with your attorney prior
16 to today about testifying?

17 THE DEFENDANT: Yes. Yes, sir.

18 THE COURT: Have you understood the conversations
19 you have had with your attorney?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Do you need any further time to talk to
22 your attorney about your right to testify?

23 THE DEFENDANT: Yes. Yes, sir.

24 (Defendant confers with his attorney.)

25 MR. BYRHOLDT: Ready, Your Honor.

1 THE COURT: Do you need to talk to your attorney any
2 further about your right to testify?

3 THE DEFENDANT: No, sir.

4 THE COURT: Thank you --

5 THE DEFENDANT: No, sir.

6 THE COURT: -- sir. Do you understand your failure
7 to testify cannot be used against you by the state and I
8 will instruct the jury they cannot consider it in their
9 deliberations. Do you understand?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: If you elect to testify, you will assume
12 the role of a witness. When you take -- if you decide to
13 testify and you take the witness stand, you will have to
14 answer the questions as long as they're admissible under
15 the rules of law, rules of evidence. Do you understand?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: In other words, you can't say, "I don't
18 like that question, take the fifth, I like the next
19 question, I'm going to answer it." Do you understand?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: You either take the Fifth Amendment and
22 not testify or you take the witness stand and answer
23 questions. Do you understand?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Has anybody forced you, threatened you,

1 or coerced you --

2 THE DEFENDANT: No, sir.

3 THE COURT: -- to make you not testify?

4 THE DEFENDANT: No.

5 THE COURT: Anybody coerced you or threatened you to
6 make you testify?

7 THE DEFENDANT: No, sir.

8 THE COURT: Have you understood all the questions
9 that I have asked?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Do you have any questions you would like
12 to ask me about your Fifth Amendment rights to remain
13 silent or your right to testify?

14 THE DEFENDANT: No, sir.

15 THE COURT: Do you understand what I've explained to
16 you?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Do you wish to testify?

19 THE DEFENDANT: No, sir.

20 THE COURT: You do not need to discuss it any
21 further with your attorney; is that correct?

22 THE DEFENDANT: No, sir.

23 THE COURT: All right. Thank you very much.

24 Mr. Byrholdt, you have any questions you would like
25 to ask your client concerning his right to testify?

1 MR. BYRHOLDT: No, Your Honor -- Mr. Ware, I
2 explained to you if you chose to testify, either myself
3 or the state would ask you about your prior record,
4 including a drug offense that happened in 2000?

5 THE DEFENDANT: (Nods head up and down.)

6 MR. BYRHOLDT: You understand that could be used to
7 impeach your testimony?

8 THE DEFENDANT: Yes.

9 MR. BYRHOLDT: But the decision whether or not to
10 testify is one you're making alone, based on my advice?

11 THE DEFENDANT: Yes.

12 MR. BYRHOLDT: All the questions I have, Your Honor.

13 THE COURT: I understand the state does not have any
14 further witnesses. The state rests; is that correct?

15 MR. BRADLEY: That's correct, Your Honor.

16 THE COURT: Does the state have any motions?

17 MR. BRADLEY: Not at this time.

18 THE COURT: The defense have any motions?

19 MR. BYRHOLDT: Yes, sir.

20 THE COURT: I'll be glad to hear your motions.

21 MR. BYRHOLDT: I would move for a directed verdict
22 of acquittal on indictment number 2007-GS --

23 THE COURT: -- hang on just a second. Let me find
24 the indictments.

25 All right. Go ahead.

1 MR. BYRHOLDT: 973, conspiracy to distribute crack
2 cocaine indictment.

3 THE COURT: Conspiracy, okay.

4 MR. BYRHOLDT: To establish conspiracy, I would rely
5 on especially two cases. One is State vs. Mouzon,
6 M-O-U-Z-O-N, 485 S.E.2d 918. And they rely or discuss
7 probably the seminal case, State versus Gunn, G-U-N-N,
8 437 S.E.2d 75 Supreme Court case 1993. What they talk
9 about is a conspiracy, is a combination of or agreement
10 between two or more persons for the purpose of
11 accomplishing a criminal or unlawful object, or achieving
12 it by criminal or unlawful means an object that is
13 neither criminal nor unlawful. The gravamen of the
14 offense is the agreement or combination.

15 It goes on quoting Gunn to say what is required is a
16 shared single criminal objective, not just similar or
17 parallel objectives between similarly situated people.
18 It is not known -- for people who intend to distribute
19 drugs in a single area, occasionally or sporadically put
20 them in contact with each other. People within the same
21 industry and same locale can obviously occasionally be
22 expected to interact with each other without becoming
23 coconspirators.

24 In this case I asked Miss Richardson whether she was
25 a drug dealer and whether she was working for Mr. Ware.

Motions

159

1 The state's witness said, "No, sir, I'm not a drug dealer
2 and I'm not working for Mr. Ware or working with Mr.
3 Ware." That's the testimony that's in this record, Your
4 Honor.

5 THE COURT: On direct she did say she called him up,
6 told him to bring drugs. Had somebody there to --

7 MR. BYRHOLDT: She did say she made a phone call to
8 Kevin.

9 THE COURT: Right.

10 MR. BYRHOLDT: She did not identify this defendant
11 as the Kevin she called, Your Honor. That's not on the
12 record. That would be my basis. I don't have any
13 motions on the other two indictments, Your Honor.

14 THE COURT: Okay.

15 MR. BRADLEY: Your Honor, my argument would be --

16 THE COURT: Tell me where you've established
17 conspiracy.

18 MR. BRADLEY: Yes, sir.

19 THE COURT: A criminal enterprise carried on by two
20 or more parties.

21 MR. BRADLEY: As Ms. Richardson did testify she
22 called Mr. Ware that night for the exact purpose of
23 selling crack cocaine to another individual because he
24 was at her house and wanted to buy some and she knew
25 where she could -- who to call.

1 THE COURT: I thought the case Mr. Byrholdt just
2 quoted from, a single incident of drug buy is not
3 conspiracy. Isn't that what the case said? I haven't
4 read the case.

5 MR. BYRHOLDT: It said, "intended to act together
6 for their shared mutual benefit." There's been no
7 evidence of any benefit to Ms. Richardson in this case.

8 THE COURT: Share your case with Mr. Bradley, then
9 I'll look at it. In other words, Mr. Bradley, all you
10 have is the phone call, "Hey, I got somebody wants to buy
11 drugs, bring it over."

12 Then he comes over and the cops come in. That's all
13 you got. Is that conspiracy or not conspiracy?

14 MR. BRADLEY: I argue that's a combination between
15 her and Mr. Ware for the purpose of selling,
16 distributing, crack cocaine.

17 THE COURT: But then she testified on cross she
18 didn't have, sell drugs with him, didn't make any money
19 off him. Didn't have any business selling drugs with
20 him.

21 MR. BRADLEY: I believe what her answer was to
22 Mr. Byrholdt's question was she wasn't a drug dealer with
23 Mr. Ware. She said no when he asked if she was a drug
24 dealer with Mr. Ware, did not ask if she conspired with
25 Mr. Ware to distribute crack cocaine. I believe she

1 admitted she called the defendant the night in question
2 for the purpose of accomplishing a criminal objective,
3 that be distributing crack cocaine, and the defendant
4 arrived to carry out that purpose. She did testify, Your
5 Honor, that she pled guilty to the crime of conspiracy as
6 well.

7 THE COURT: That doesn't have anything to do with
8 this case.

9 MR. BRADLEY: I know, Your Honor, just saying she
10 admitted --

11 THE COURT: Then why you telling me that? That
12 don't have anything to do with this. She could have pled
13 guilty to jaywalking for all I care. What does that have
14 to do with whether this man committed conspiracy?

15 MR. BRADLEY: She admits to the fact what she was
16 doing that night, Your Honor. And here on the record as
17 well through her testimony.

18 THE COURT: Mr. Bradley, let me ask you two
19 questions. I'm reading from State versus Mouzon. Let me
20 find the cite S.E. 2d -- 485 S.E. 2d; page 922. The
21 focus is on the sufficiency of the evidence of an
22 agreement between the alleged conspirators and not on the
23 allege common object. It's the evidence of the
24 agreement.

25 And it goes to further, says, got to have a shared

1 single criminal objective. And it says, what is needed
2 is proof they intended to act together for their shared
3 mutual benefit within the scope of the conspiracy charge.
4 So my question, number one to you, what was the agreement
5 between the parties from the testimony that's been
6 offered?

7 I understand there was a phone call made and he
8 came, the cops came in, he threw the drugs at the cops.
9 What was the shared agreement between the parties based
10 on the testimony?

11 MR. BRADLEY: Ms. Richardson testified that Greg Kay
12 came to her residence, wanted to buy crack cocaine.
13 Therefore, she called the defendant to come over that
14 night, they were under the understanding that he would
15 come over and sell the crack cocaine to Mr. Kay.

16 THE COURT: What was the shared mutual benefit?
17 What's the testimony of the shared mutual benefit?

18 MR. BRADLEY: The testimony would be, Your Honor,
19 that she had an individual that was in her home wanting
20 to buy crack cocaine and she wanted -- this particular
21 person wanted to buy crack cocaine, therefore, she --

22 THE COURT: So what, how did she benefit? She got
23 happy because another person sold cocaine to a third
24 party? How did she benefit from it?

25 MR. BRADLEY: This particular instance she did not

Motions

163

1 receive any benefit from it --

2 THE COURT: That's the point.

3 MR. BRADLEY: Because the officers came in that
4 moment before the transaction occurred.

5 THE COURT: We have to base it on the testimony we
6 heard. What shared benefit did she receive?

7 MR. BRADLEY: At that time there was no chance for
8 her to receive a shared benefit because the officers came
9 in before the transaction ever was completed.

10 THE COURT: She testified, she was your witness, she
11 could have testified what benefit she shared with the
12 defendant. I don't think you can say, "Hey, the cops
13 came in and broke up the transaction, therefore, there
14 was no benefit."

15 She was on the stand, she could have said what the
16 conspiracy -- in the conspiracy what was going to be her
17 share of the benefit, couldn't you? You had her, she was
18 on cross.

19 MR. BRADLEY: Yes, sir, she could have.

20 THE COURT: Pardon?

21 MR. BRADLEY: She could have.

22 THE COURT: I mean, I don't know what the shared
23 benefit was. That's why I'm asking you. I haven't heard
24 it. Now, I know you've got to assume the defendant was
25 going to give her some money from the buy. That's the

1 assumption, but that's not the testimony.

2 MR. BRADLEY: Your Honor, I would just argue, again,
3 that she -- there was no mutual benefit this night
4 because the transaction was not completed.

5 THE COURT: She was what?

6 MR. BRADLEY: There was nothing achieved this night
7 because the transaction wasn't completed.

8 THE COURT: I understand. But she could have
9 testified as to the purpose of the conspiracy and the
10 sufficient -- what the agreement was and what they were
11 going to do and how she was going to have a benefit. I
12 mean, she could have testified to that.

13 MR. BRADLEY: In the past she received a cut. She
14 received a piece of the crack cocaine. But that would
15 have gotten into prior.

16 THE COURT: I don't doubt that. I'm not doubting
17 that's what was planned. But I got to go by what I've
18 heard in the courtroom.

19 MR. BRADLEY: Yes, Your Honor. And I asked her
20 about her previous benefit, Your Honor, from the
21 agreement.

22 THE COURT: You could have asked her about this
23 benefit, not the previous benefit. I'm going to grant
24 the directed verdict based upon the fact there's been no
25 testimony under Mouzon that there was any shared mutual

Motions

165

1 benefit to qualify for a criminal conspiracy.

2 As far as the other two, you didn't make a motion on
3 that.

4 MR. BYRHOLDT: No, sir. I did not make any motions
5 on the other two.

6 THE COURT: Do you think -- well, he's not offering
7 anything, so there won't be any rebuttal. You going to
8 be ready in the morning for closing arguments at 10:30?

9 MR. BRADLEY: Yes, sir.

10 MR. BYRHOLDT: Yes, sir.

11 THE COURT: We'll adjourn until 10:30 in the
12 morning. Thank you very much.

13 (WHEREUPON, the proceedings are adjourned for the
14 evening recess.)
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1 Friday, January 9, 2009

2 (WHEREUPON, Court reconvened with all parties
3 present, when the following proceedings were had
4 outside the presence of the jury:)

5 THE COURT: State ready for closing arguments?

6 MR. BRADLEY: Yes, Your Honor.

7 THE COURT: Defendant ready?

8 MR. BYRHOLDT: Yes, sir.

9 THE COURT: Anything before we bring the jury? Do
10 you want to go over the charge?

11 MR. BYRHOLDT: I'm familiar with your charge. Are
12 you going to charge simple possession?

13 THE COURT: I think the rules say we're supposed to
14 have a charge conference.

15 MR. BYRHOLDT: Your Honor, the state opens in full,
16 I get the last argument.

17 THE COURT: Yes, sir. You get the last argument.

18 (Bench conference held.)

19 THE COURT: I understand at the -- Donna, on the
20 record. We had an informal charge conference at the
21 bench, Mr. Byrholdt wants a charge on simple possession
22 which the Court is not going to charge. And he wants to
23 take exception to that after I complete the charge.
24 That's fine.

25 You all ready to bring the jury now?

1 MR. BRADLEY: Yes, Your Honor.

2 THE COURT: Bring us the jury, please.

3 (Whereupon, the jury returns to open court at 11:13
4 a.m., when the following proceedings were had within
5 the presence of the jury:)

6 THE COURT: Solicitor, closing arguments.

7 MR. BRADLEY: May it please the Court?

8 THE COURT: Yes, sir.

9 CLOSING STATEMENT

10 BY MR. BRADLEY:

11 Ladies and gentlemen of the jury, when this case
12 first started, I stood before you, told you as assistant
13 solicitor, my burden is to prove to you beyond a
14 reasonable doubt that the defendant committed the crimes
15 as charged. We welcome that burden, submit it to you.
16 Based upon the evidence submitted to you that burden has
17 been carried.

18 I'm about to talk to you a little bit about what
19 beyond a reasonable doubt means. It does not mean beyond
20 all doubt. There are very few things in life we know
21 with absolute certainty. The law does not require the
22 State to provide proof that overcomes every possible
23 doubt. A reasonable doubt is the kind of doubt that
24 would cause a reasonable person to hesitate to act.

25 Please don't confuse a hesitation to act with

1 carefully considering the evidence. The State asks that
2 you carefully consider the evidence when asked to
3 deliberate in a few minutes. Deliberation is not the
4 same as hesitation. Again, based upon the evidence
5 presented to you as a jury, if you are firmly convinced
6 of the defendant's guilt of the crime charged.

7 Now, again, what are those crimes charged and how
8 are they defined? You first have possession of crack
9 cocaine with intent to distribute, defined as possession
10 of crack cocaine with intent to distribute. Just as it
11 sounds. Then we have possession of crack cocaine with
12 intent to distribute within proximity of a park.
13 Again, possession of crack cocaine with intent to
14 distribute within half mile radius of a public park.

15 Now, focusing on the evidence and the facts
16 presented to you, go through that, show you how it meets
17 each element that I just read off.

18 First, starting with possession. Under South
19 Carolina law there are two types of possession, actual
20 and constructive. Actual possession is defined as when
21 the contraband or drugs are found in the actual physical
22 custody of the person charged with possession. That's
23 what we have here. The defendant was found to have the
24 drugs in his hand, in his actual physical custody on the
25 night of January 15, 2007. You heard Officer Culbertson

Closing Statement by Mr. Bradley

169

1 testify when he walked into the kitchen that night he saw
2 the baggy of drugs in the defendant's hand prior to him
3 throwing it the officer Aman. Officer Aman testified
4 when he walked into the kitchen that night, he saw the
5 defendant's arm moving in a throwing motion; and right
6 after that, something struck him in the chest, came from
7 the defendant's direction. Both of these officers
8 testified that they only saw the defendant, no one else,
9 throw something in their direction.

10 The defendant is the only one who had the drugs in
11 his hands that night, no one else. You also heard
12 testimony of Virginia Gail Richardson. She testified
13 that she also saw the defendant with possession of the
14 drugs in his hands prior to the officers entering the
15 kitchen that night. She said that he -- when he got to
16 her house that night he removed them from his sweatshirt
17 pockets, hold it in his, right before he entered the
18 kitchen. When he did enter the kitchen, she also saw him
19 throw the baggy of drugs in their direction.

20 Now, the State does not deny Miss Richardson is a
21 drug user. Not deny she's no saint. Please don't allow
22 that to prevent you possible can you say on the fact what
23 she testified to regarding the defendant being in
24 possession of the drugs and throwing the drugs in the
25 direction of the officers mirrors exactly what the

1 officers testified to.

2 Now, under possession we have the elements of crack
3 cocaine. You heard the forensic chemist Carmen Tucker
4 testify that in this bag there's 2.4 grams of crack
5 cocaine. She weighed it, she analyzed it, she tested it.
6 This is the bag that was submitted to her from officer
7 Mike Baskin of the police department here in Anderson
8 city. He testified that this bag is what he collected
9 that night from underneath the defendant. This bag and
10 this bag alone.

11 This is what the bag -- the drugs that are in this
12 bag are from in the baggy the defendant had in his hand
13 and threw it to the officers as they came into the
14 kitchen. Nothing was added, nothing was taken away.
15 That night he collected it, photographed it first,
16 collected it, field tested it. It tested positive for
17 cocaine. Sealed it in a bag. It was not tampered with.
18 It was not opened until it was taken to SLED and forensic
19 chemist opened it, tested it. It was then placed in this
20 bag, sent back to the Anderson City police department
21 where it remained until today.

22 So, from the defendant's hands that night on
23 January 15, 2007, to today in this courtroom -- this is
24 2.4 grams of crack cocaine. It came from the defendant's
25 possession.

Closing Statement by Mr. Bradley

171

1 Now, the next element after possession of crack,
2 intent to distribute. According to the law, the weight
3 alone of the crack cocaine allows you to infer the intent
4 of the defendant. Under South Carolina law possession by
5 the defendant of one or more grams of crack cocaine
6 allows you to infer the defendant possessed that crack
7 cocaine with intent to distribute. In this case the
8 defendant had 2.4 grams, well over the amount needed to
9 infer that he had the intent to distribute the crack
10 cocaine.

11 Not only do we have evidence of the weight itself of
12 the crack cocaine, you also heard testimony of Virginia
13 Gail Richardson, that she called him that night. Called
14 the defendant that night to come to her house sell that
15 crack cocaine to another individual. He arrived, he had
16 the crack cocaine in his hand. Before the transaction
17 could be completed, the officers came in. So he was
18 there that night with that necessary intent to distribute
19 the crack cocaine.

20 Finally, we have proximity to a park, the element of
21 proximity to a park. You heard testimony from officers
22 and Virginia Gail Richardson herself stating that her
23 residence, [REDACTED] Street in Anderson city, is just a few
24 blocks away from C Street Park here in Anderson city, a
25 public park. That distance is less than half of a mile.

1 So that element is met.

2 Ladies and gentlemen, the evidence is clear and it's
3 overwhelming. Don't allow yourself to be distracted by
4 anything other than the basic facts. Don't get
5 distracted from the basic facts, and how they proved all
6 the elements of the crimes. That's what's important.
7 All the elements of the crime have been met as I just
8 read them.

9 The defendant, Kevin Ware, was in possession of 2.4
10 grand larceny of crack cocaine. Because the law allows
11 you to infer his intent based on the weight and because
12 he was there that night to sell the crack to another
13 individual; and because he did all of this within half
14 mile of a public park, he is guilty of committing the
15 crimes possession with intent to distribute crack
16 cocaine, possession with intent to distribute crack
17 cocaine within proximity to a park.

18 I submit to you based upon the evidence the state
19 has offered evidence to prove to you firmly convince you
20 of the defendant's guilt and proven to you beyond a
21 reasonable doubt the defendant's guilty. When you go
22 back there to deliberate in a few moments focus on those
23 facts, basic facts. He had it in his hand. Weight
24 2.4 grams of crack cocaine. Intent to distribute. Don't
25 allow yourself to be distracted from anything else. Find

Closing Statement by Mr. Byrholdt

173

1 him guilty of committing those crimes.

2 Thank you very much.

3 CLOSING STATEMENT

4 BY MR. BYRHOLDT:

5 Mr. Foreman, ladies and gentlemen of the jury, I
6 want to thank you for the close attention you've paid
7 during this trial. On behalf of Kevin and his family, we
8 thank you for that. And when you go back to your
9 deliberation, each of the 12 that go back there, think
10 within yourself, has the state met the burden of proof?
11 That's the first question you should ask yourself.

12 Not what you think happened, as I told you in
13 opening, not what might have happened; but what you've
14 heard. And has this case been handled the way it should
15 have been handled? They've got a bag of drugs. And when
16 you go back in your jury room I want you to look at that
17 bag closely. And I want you to look at the photographs
18 that were taken that night. And see if the material in
19 the photographs looks like what's in this bag. I just
20 ask each of you to do that. Take your time when you're
21 back there, pass it around. You'll have that evidence
22 back with you.

23 This is 2.4 grams of what the chemist said is crack
24 cocaine in State's Exhibit Number 3. That came from best
25 pack number B-177531. What bothers me in this case is

1 when I asked the former evidence custody, you know, in
2 the record you put out you gave two different sets of
3 drugs in the same best pack. Now he wants to say it's a
4 clerical error. That's what he told you. But all the
5 reports that are there have the same number. We got one
6 set of drugs but from two different times. And were they
7 combined? That's for you to determine. I don't know.
8 You are the finders of the facts.

9 But let's assume for a minute that there was a
10 clerical error and they had a different sets of drugs.
11 Don't you think they would have brought that in and said,
12 "Look, here is the drugs that we had on that clerical
13 mistake." The state didn't do that to you. Apparently,
14 the state couldn't do that. It seems to me that somebody
15 made a mistake, combined two different seizures under the
16 same best pack number, which is B-177531, which is put on
17 this package. If they've done that, the evidence is
18 contaminated because they're trying to put on Mr. Ware
19 stuff that he's not even responsible for if that's what
20 happened.

21 I asked them about the chain of custody, that you
22 certify that all this is done and it's certified eleven
23 days before the stuff is even sent to SLED. How can you
24 certify something that hasn't happened? And their
25 argument was, well, they were just certifying my

Closing Statement by Mr. Byrholdt

175

1 signature.

2 When you swear before a notary that this certifies
3 that this has been completed, you can't do that. It's
4 just not being honest. And they said, "Well, people at
5 SLED won't sign it. They won't sign for it, don't give
6 it to them. That's easy. But when you say it's been
7 done and done correctly and there's a process you go
8 through, that's what they're supposed to do. And it was
9 not done in this case. Just wasn't done.

10 You know, the state told you up at the start of this
11 case, told you they had three charges against Mr. Ware.
12 Possession with intent to distribute, possession with
13 intent to distribute within proximity of a school, and
14 conspiracy.

15 As a matter of law the conspiracy case has been
16 thrown out. They told you they were going to prove to
17 you three charges at the start of this case. One is gone
18 already. And the standard is, have they proven their
19 case to you beyond a reasonable doubt?

20 Now, reasonable doubt can come from a lot of the
21 areas, it can come from the evidence itself. It can also
22 come from questions about how the evidence was handled.
23 It can come from evidence that wasn't put in. Ask
24 yourselves why they didn't bring that other evidence they
25 said was a clerical error. It would have been easy,

1 could have said, here is the evidence that was taken at
2 this point. It was not combined and here is the proof of
3 that. They didn't do that. If it was a mistake, how
4 come the record wasn't cleared up? The state puts these
5 records out and it's in there. Investigator Baskin said,
6 it's just a clerical error, the numbers are wrong. How
7 can the state try and punish somebody when they're saying
8 the numbers are wrong, it's just a clerical mistake. It
9 doesn't matter. It does matter. That's why we have
10 proof beyond a reasonable doubt. It's not, well, would
11 you suspect this or it might happen, it's proof beyond a
12 reasonable doubt. The highest standard we have in our
13 justice system.

14 They said somebody was there to buy drugs. That was
15 what the state told you. Mr. Greg Kay. Did you see
16 Mr. Greg Kay get on that witness stand and say he was
17 there to buy drugs from Mr. Ware? No. Said they had a
18 hundred dollars. Seen any marked money, any hundred
19 dollars put in evidence? No. Those are doubts that
20 cause a reasonable person to hesitate, have they proven
21 their case?

22 That's why I ask each of you, the first person, you
23 ask yourself, did the state prove their case beyond a
24 reasonable doubt or were errors and mistakes made?
25 Questions left unanswered. Evidence not submitted for

Closing Statement by Mr. Byrholdt

177

1 the 12 of you to review. If they had somebody in there
2 buying drugs, where is he? Why isn't he on the witness
3 stand? Why isn't the money there?

4 Ms. Richardson said she's not a drug dealer, not
5 working with Mr. Ware. I don't deal drugs, she's a drug
6 user. She ran a drug house. Where is she? She's a
7 witness for the State.

8 On behalf of Mr. Ware I thank you, each and every
9 one of you. For the most important service you can give
10 your community is jury service, other than serving in the
11 armed service during a time of conflict. It's not an
12 easy job. But we chose you 12 to uphold the oath you
13 took, which was to hold the state of South Carolina to
14 the highest burden out there, which is proving their case
15 beyond a reasonable doubt.

16 There are errors that were committed in this case.
17 There are mistakes done that just taint this evidence.
18 Look at the pictures and look at the drugs and see if
19 it's the same thing. We got one that looks like rocks
20 and one that looks like something else. That's for you
21 to determine.

22 We ask you to bring back a verdict of not guilty
23 because the state has failed to prove their case beyond a
24 reasonable doubt. They didn't put up Mr. Kay, didn't put
25 up the drugs to say that was another set of drugs. It

1 was just a mistake. Where are those drugs? And where is
2 that record that shows there's some other drugs out
3 there. We don't have that. It wasn't here.

4 On behalf of Kevin, we ask you to deliberate
5 adhering to the oath that you took. If you hold the
6 state to that high burden of proof, beyond a reasonable
7 doubt, you should bring back a verdict of not guilty on
8 both charges. The other charge the Court already took
9 care of. They told you they were going to prove all
10 three charges and they haven't.

11 I, on Kevin's behalf, we thank you. And I
12 appreciate the attention you've paid during this trial.

13 JURY CHARGE

14 THE COURT: Mr. Foreman, members of the jury, the
15 state of South Carolina charges the defendant Kevin M.
16 Ware with one count of possession of crack cocaine with
17 intent to distribute and one count of possession of crack
18 cocaine with intent to distribute within proximity of a
19 park.

20 I'm going to give you a copy of these instructions
21 in written form. During your deliberations you may refer
22 to the instructions to guide your decision making. You
23 must consider the instructions as a whole, not follow
24 some and ignore others. Please return the instructions,
25 Mr. Foreman, to the Court after you've reached a verdict.

Closing Statement by Mr. Byrholdt

179

1 I charge you further that the fact that a defendant
2 elects not to testify on his own behalf cannot and must
3 not be considered against him under any circumstances or
4 in any manner whatsoever. The decision of any defendant
5 not to take the witness stand to testify in his own
6 behalf does not create any inference against him. I tell
7 you now that you must not permit that fact to weigh in
8 even the slightest degree against such defendant. You
9 should not permit this fact to enter into your
10 discussions or deliberations of the issues in this case.

11 Now, as to these indictments, the defendant has
12 entered a plea of not guilty, which places upon the State
13 the burden of proving the defendant guilty. A person
14 charged with committing a criminal offense in South
15 Carolina is never required to prove himself innocent. I
16 charge you that it is a vital and important rule of
17 law of evidence that a defendant in a criminal trial, no
18 matter how great or serious may be the offense with which
19 he is charged, must always be presumed innocent until his
20 guilt has been proven beyond a reasonable doubt.

21 This presumption of innocence remains with the
22 defendant at all times, from the moment of his appearance
23 in this court, throughout the trial, until you, the jury,
24 have upon the testimony and evidence presented, reached a
25 verdict of guilty beyond a reasonable doubt. For it is

1 the solemn duty of the jury, if not clearly convinced of
2 his guilt beyond a reasonable doubt, to acquit the
3 defendant.

4 So the burden of proof is upon the state to
5 establish by evidence to your satisfaction, the guilt
6 beyond a reasonable doubt of this defendant.

7 Now, what is reasonable doubt? A reasonable doubt
8 is the kind of doubt that would cause a reasonable person
9 to hesitate to act. If you have such a doubt as to the
10 guilt of the defendant, he would be entitled to a verdict
11 of not guilty. A reasonable doubt may arise from the
12 evidence in the case or from the absence or lack of
13 evidence in the case. You, alone, must make a
14 determination whether or not reasonable doubt exists as
15 to the guilt of the defendant.

16 The term reasonable doubt should be given its
17 everyday, plain, ordinary meaning. Proof beyond a
18 reasonable doubt is proof which leaves you firmly
19 convinced of the defendant's guilt. There are very few
20 things in this world that we know with absolute
21 certainty. In criminal cases the law does not require
22 proof that overcomes every possible doubt. Based upon
23 your consideration of the evidence, if you are firmly
24 convinced of the defendant is guilty of the crime
25 charged, you must find him guilty.

Closing Statement by Mr. Byrholdt

181

1 On the other hand, if you are not firmly convinced
2 the defendant is guilty, you must give him the benefit of
3 the doubt and find him not guilty. The evidence from
4 which you're to decide the facts consist of the sworn
5 testimony of a witness, both on direct and cross
6 examination, regardless of who called the witness, the
7 exhibits that have been received in evidence, any facts
8 which the lawyers have agreed or stipulated.

9 Certain things are not evidence, you may not
10 consider them in deciding what the facts are. I will
11 list them for you. Arguments and statements by lawyers
12 are not evidence. The lawyers are not witnesses. What
13 they've said in their opening statements, closing
14 arguments, and at other times is intended to help you
15 interpret the evidence but is not evidence. If the facts
16 as you remember them differ from the way the lawyers have
17 stated them, your memory controls.

18 Questions and objections by lawyers are not
19 evidence. Attorneys have a duty to their clients to
20 object when they believe a question is improper under the
21 rules of evidence. You should not be influenced by the
22 objection or the Court's ruling on the objection.
23 Testimony that's been excluded as stricken, that you've
24 been instructed to disregard is not evidence and must not
25 be considered. Anything you may have seen on television

1 or read in the paper or heard from others when the Court
2 was not in session is not evidence. You're to decide the
3 case solely on the evidence received at trial.

4 Under the constitution and code of laws, only you,
5 the jury, can make the findings of fact in this case.
6 I'm not permitted to indicate to you how I may feel about
7 the testimony and evidence which has been presented.
8 Throughout this trial it's been my intention to be fair
9 and impartial towards each of the parties involved.

10 In determining the facts of this case you will have
11 to evaluate the credibility, which means the
12 believability, of each witness. And some of the things
13 you may consider as you decide whether or not to believe
14 a witness's testimony about a particular matter include:
15 First, what was the manner and appearance of the witness
16 who testified? Was she or he straightforward or
17 hesitant in answering? Second, was the testimony of a
18 witness consistent or inconsistent? How did the witness
19 come to know the facts that he or she testified to? Was
20 the person present during the incident or did he happen
21 on the scene after it occurred? Fourth, is there some
22 reason a witness would want to give testimony which would
23 help or hurt one side or the other? In other words, was
24 a witness biased or prejudiced? Was the testimony of a
25 witness strengthened or weakened by other testimony and

Closing Statement by Mr. Byrholdt

183

1 evidence?

2 You can believe as much or as little of each
3 witness's testimony as you think proper. You may believe
4 testimony of a single witness against that of many or
5 just the opposite. Of course, you do not determine the
6 truth by merely counting the number of witnesses
7 presented by each side. Throughout this process you have
8 but one objective, to seek the truth, regardless of its
9 source.

10 The same constitution and laws which designate and
11 make you the finders of fact as I just explained also
12 make me the sole instructor of the law. You should
13 accept statements of law as I give them to you. The
14 attorneys are not instructors of the law. Please base
15 your decision making on what the law is and not what you
16 think the law should be.

17 There are two types of evidence which are generally
18 presented during a trial, direct evidence and
19 circumstantial evidence. Direct evidence is the
20 testimony of a person who asserts or claims to have
21 actual knowledge of a fact, such as an eyewitness.
22 Circumstantial evidence is proof of a chain of facts and
23 circumstances indicating the existence of a fact.

24 The law makes absolutely no distinction between the
25 weight or value to be given to either direct or

1 circumstantial evidence, nor is a greater degree of
2 certainty required of circumstantial evidence than of
3 direct evidence. You should weigh all the evidence in
4 the case on a contested factual issue. You may have some
5 direct evidence and some circumstantial evidence. To
6 determine the facts in this case you will have to
7 evaluate the credibility, which means the believability
8 of each witness.

9 The defendant is charged with possession with intent
10 to distribute crack cocaine. The state must prove beyond
11 a reasonable doubt that the defendant possessed crack
12 cocaine with the intent to distribute it. To prove
13 possession, the state must prove beyond a reasonable
14 doubt that the defendant had both the power and the
15 intent to control the disposition or the use of the crack
16 cocaine.

17 Possession may be either actual or constructive.
18 Actual possession means that the crack cocaine was in the
19 actual physical custody of the defendant. Constructive
20 possession means the defendant had dominion and control.
21 The right to exercise dominion and control over either
22 the crack cocaine itself or the property on which the
23 crack cocaine was found.

24 Mere presence at the scene where the drugs was found
25 is not enough to prove possession. Actual knowledge of

Closing Statement by Mr. Byrholdt

185

1 the presence of the crack cocaine is strong evidence of
2 the defendant's intent to control its disposition or use.
3 The defendants knowledge and possession may be inferred
4 if the substance is found in property under the
5 defendant's control; however, this inference is simply an
6 evidentiary fact to be taken into consideration by you,
7 along with other evidence in the case, give it the weight
8 you decide it should have.

9 Two or more persons may have joint possession of a
10 drug. The state must also prove beyond a reasonable
11 doubt the defendant intended to distribute the crack
12 cocaine. Distribution means to deliver other than by
13 administering or dispensing a drug. Intent may be shown
14 by acts or conduct of defendant under circumstances which
15 you may naturally infer intent.

16 To determine whether the defendant had the intent to
17 distribute crack cocaine you may consider the
18 circumstances surrounding the defendant's alleged
19 possession; you may consider the amount of the substance,
20 the amount to have been possessed, the manner which it
21 was allegedly possessed; and the facts where it was
22 allegedly possessed, and other factors which you consider
23 to be important.

24 You must find the defendant did not intend to have
25 the crack cocaine solely for his own use. Possession of

1 more than -- one or more grams of crack cocaine creates
2 an inference that the defendant possessed the crack
3 cocaine with the intent to distribute it. This inference
4 does not relieve the state from proving beyond a
5 reasonable doubt the defendant had the intent to
6 distribute. This is simply an evidentiary fact to be
7 taken into consideration by you, along with the other
8 evidence in the case, to be given the weight you decide
9 it should have.

10 Possession of crack cocaine with intent to
11 distribute within proximity of a park. The defendant is
12 charged with possession of crack cocaine with intent to
13 distribute within proximity of a park. The state must
14 prove beyond a reasonable doubt that the defendant
15 unlawfully possessed with the intent to distribute crack
16 cocaine while in or within one-half mile of the grounds
17 of a public playground or park.

18 You've been selected as fair and impartial jurors,
19 sworn to impartiality to try and determine the facts of
20 this case. When you comply with your oath to do so, no
21 one will have the right to criticize your verdict. You
22 will have fully discharged your duty as jurors. You're
23 to decide this case according to the testimony as you
24 heard from the lips of sworn witnesses, along with other
25 evidence introduced.

Closing Statement by Mr. Byrholdt

187

1 I charge you as jurors you must decide the issues in
2 this proceeding without bias or prejudice to any party.
3 Do not allow yourself to be governed by sympathy, by
4 prejudice, by passion, by public opinion, or any other
5 arbitrary factor. Both the state and defendant have the
6 right to expect that each of you will carefully and
7 impartially consider all the evidence in the case.
8 Follow the law as I have explained it to you.

9 Nothing I may have said or done during the course of
10 this trial has been in any way intended to express or
11 suggest a view of the case or opinion of the facts, the
12 weight of the evidence, or credibility of the witnesses.
13 If any of my acts or words seem to so indicate disregard
14 such form your own opinion as to these matters.

15 Mr. Foreman, members of the jury, I have prepared
16 two verdict forms. Up at the top it has the State of
17 South Carolina versus Kevin M. Ware, the case number: We
18 the jury find the defendant, Kevin M. Ware, guilty of
19 possession of crack cocaine with the intent to distribute
20 within proximity of park. We, the jury, find the
21 defendant, Kevin M. Ware, not guilty of possession of
22 crack cocaine with intent to distribute within the
23 proximity of a park. There's a place for the foreman to
24 sign and date it.

25 I have the second verdict form, same caption, with a

1 different case number. We, the jury, find the defendant
2 Kevin M. Ware, guilty of possession of crack cocaine with
3 intent to distribute. We the jury find the defendant
4 Kevin M. Ware, not guilty of possession of crack cocaine
5 with intent to distribute. A place to sign and date it.

6 Ladies and gentlemen of the jury, your verdict has
7 to be unanimous. All 12 of you have to agree. I tell
8 you, it's a collective reasoning process on your part.
9 Respect each other's opinions, listen to each other's
10 opinions, discuss your opinions about the case and arrive
11 at a consensus of opinion that all 12 of you feel is
12 appropriate and proper. Review the evidence, discuss the
13 case amongst yourselves.

14 Mr. Foreman, I'm going to ask you to go to the jury
15 room. Don't begin your deliberations until the bailiff
16 brings the exhibits that have been admitted into
17 evidence, the charge, and the verdict form, and instructs
18 you to begin your deliberations. I have to take my
19 charge up with the attorneys. I may have to add
20 something or take something away. So I don't want you to
21 begin your deliberations until we bring all the items to
22 the jury room and instruct you to begin your
23 deliberations.

24 Mr. Foreman members of the jury if you would follow
25 the bailiff to the jury room please.

Closing Statement by Mr. Byrholdt

189

1 And the alternates please keep your seats. Two
2 alternates just keep your seats.

3 (Whereupon, the following proceedings were had
4 outside the presence of the jury:)

5 Any exceptions from the State?

6 MR. BRADLEY: Nothing.

7 THE COURT: From the defendant?

8 MR. BYRHOLDT: Yes, Your Honor, again I would renew
9 any request for lesser included charge of simple
10 possession even though amount raises inference I think
11 there was evidence in this record if the jury found the
12 evidence had been contaminated where they could find it
13 reduced down to less than a grandmother where it would be
14 simple possession.

15 THE COURT: That's denied. Anything else?

16 MR. BYRHOLDT: No, Your Honor. No, your Honor.

17 THE COURT: If the two parties would come forward,
18 make sure all the exhibits are present, put on the record
19 they're all present. And we'll deliver them to the jury
20 room to begin.

21 MR. BYRHOLDT: The defense, we've reviewed -- there
22 are three exhibits.

23 MR. BRADLEY: State's in agreement, your Honor.
24 Also reviewed the verdict forms, no objections to those.

25 (WHEREUPON, at 11:46 AM the jury retires to begin

1 its deliberations.)

2 (WHEREUPON, a note is received from the jury which

3 is marked as Court's Exhibit No. 1 for

4 identification.)

5 (Whereupon, the court reporter read back the

6 testimony to the jury in the jury room as follows:)

7 THE COURT REPORTER: This is the testimony of Mike

8 Baskin:

9 "Q Please state your full name, spell

10 your last name for the record.

11 "A William Michael Baskin, B-A-S-K-I-N.

12 "Q Good afternoon, tell us what your

13 occupation is.

14 "A I work for the solicitor's office.

15 "Q In what capacity?

16 "A Investigator.

17 "Q How long have you been employed there?

18 "A About 16 months.

19 "Q What did you do before then?

20 "A Worked for the Anderson City Police

21 Department.

22 "Q How long?

23 "A A little over 30 years.

24 "Q What titles did you hold there?

25 "A I did crime scene and evidence there.

1 I was a sergeant.

2 "Q And were you working in that capacity
3 January, 2007?

4 "A Yes, I was.

5 "Q Did you have reason to respond to
6 [REDACTED] Street, Anderson, on that day?

7 "A Yes, I did.

8 "Q On January 15, 2007?

9 "A Yes, I did.

10 "Q What was the reason for responding
11 there?

12 "A I was there to collect evidence.

13 "Q And what items did you collect?

14 "A I collected drugs, crack pipe, cell
15 phone.

16 "Q And when you collected these items,
17 when you collected the drugs, did you do
18 anything with them?

19 "A I put them in an evidence bag.

20 "Q Before that, did you do anything with
21 them?

22 "A The drugs I field tested.

23 "Q What does field test mean?

24 "A I have a -- have a presumptive test
25 that you drop part of the drugs into and break

1 an ampule. It will turn a certain color
2 depending on the type of drug it is.

3 "Q What did it test?

4 "A It tested for cocaine.

5 "Q And, Investigator Baskin, showing you
6 what's marked State's Exhibit 3 for
7 identification purposes, take a look at that,
8 tell me if you recognize that.

9 "A Yes, sir. This is the drugs I
10 collected that day.

11 "Q Where did you collect them from?

12 "A Kitchen floor.

13 "Q Anything else about where you
14 collected them from?

15 "A They were underneath the defendant.

16 "Q And besides collecting the item of
17 evidence from the residence that night, did you
18 do anything else? Take photographs?

19 "A I'm sorry?

20 "Q Did you do anything else at the scene
21 that night?

22 "A I took photographs, yes. Identified
23 everyone in the house.

24 "Q What did you photograph?

25 "A The drugs.

1 "Q Anything else?

2 "A Yes, I -- all the people that were in
3 the house, and another place in the bathroom
4 where I collected a crack pipe.

5 "Q Okay. Investigator, showing you
6 State's Exhibit 1 and 2 for identification
7 purposes. Take a look at those. Do you
8 recognize them?

9 "A Yes, sir. These are the drugs I
10 collected.

11 "Q Those the photographs you took as
12 well?

13 "A Yes.

14 "Q Do those photographs accurately depict
15 the scene from that night?

16 "A Yes, sir. After the defendant was
17 taken off the drugs.

18 "Q Okay. And have they been edited or
19 altered in any way?

20 "A No.

21 "MR. BRADLEY: At this time, I'd like to
22 move the photos in evidence.

23 "MR. BYRHOLDT: No objection.

24 "THE COURT: What number is it, Mike?

25 "MR. BRADLEY: One and two.

1 "THE COURT: State's Exhibit 1 and 2
2 admitted without objection.

3 "MR. BRADLEY: Thank you, Your Honor.
4 Permission to publish to the jury, Your Honor?

5 "THE COURT: Yes, sir.

6 "Q Show you these on the overhead. Just
7 describe to the jury what they're seeing,
8 please.

9 "THE COURT: You need to step down?

10 "A That's the baggy with the drugs in it
11 there. This is the kitchen. The defendant was
12 on top of these drugs.

13 "THE COURT: Could I get him to speak up a
14 little?

15 "A I said the defendant was on top of
16 these drugs. This is the baggy containing the
17 drugs on the kitchen floor.

18 "Q And that was State's Exhibit No. 2.
19 Show State's Exhibit No. 1. If you could,
20 explain this one as well.

21 "A Those are the same drugs.

22 "Q That's the kitchen floor, that's the
23 baggy they were in?

24 "A This is the baggy underneath the
25 defendant.

1 "Q Thank you. You may return to the
2 stand.

3 After collecting the evidence and taking the
4 photographs that night, what did you do with the
5 evidence you collected?

6 "A I took it and locked it up in the
7 evidence room at the city police department.

8 "Q Regardless of the drugs, did you take
9 it to have any more testing done?

10 "A Took it to SLED. Yes, sir.

11 "Q What is SLED?

12 "A SLED is the South Carolina Law
13 Enforcement Division. I took it to the log in
14 there at the laboratory.

15 "Q And what did they do at SLED?

16 "A The log in and lab they analyze, they
17 analyze drugs they analyze DNA, all sorts of
18 stuff.

19 "Q And you personally took those drugs?

20 "A Yes, sir. I personally took them.

21 "Q What exactly did you take?

22 "A I took the drugs -- well, I -- first,
23 I put them in an evidence bag at the scene.
24 When I got back to the police department, I put
25 them in a best kit, which is a container to take

1 stuff to SLED with. It has a chain of evidence
2 on it. And I log it in. I logged this into Amy
3 Stevens and she took possession of it.

4 "Q Is that the only thing you took?

5 "A Yes. That was the only, as to this
6 case, I took.

7 "Q And mentioned that you took it to Amy
8 Stevens and logged it in?

9 "A Yes.

10 "Q What happened to the evidence while it
11 was down there at SLED?

12 "A It was just logged in. I gave it to
13 her and she took possession of it.

14 "Q Okay. Did this evidence come back
15 into your possession at any time after that?

16 "A Yes, sir. I picked it up in April of
17 that year.

18 "Q April of that year. And who did you
19 retrieve it from?

20 "A Carhonda Williams.

21 "Q She's a SLED employee?

22 "A Yes. She was in log in. She no
23 longer works there.

24 "Q What did she do when you arrived at
25 SLED to pick it up?

Mike Baskin - Testimony Read

197

1 "A I signed for it and she gave it to me.

2 "Q What did you do after that?

3 "A I brought it back to the Anderson
4 Police Department and locked it back up.

5 "Q And after you took them back to the
6 police department were they constantly in your
7 care and control while you were working at the
8 police department?

9 "A Yes, sir.

10 "Q And you mentioned that you left the
11 police department to come work for the
12 solicitor's office a little while ago. What did
13 you do when you left the police department with
14 the evidence?

15 "A It was still locked in place. Kevin
16 Warren assumed possession of the evidence then.

17 "Q Kevin Warren is also with the police
18 department?

19 "A Yes, sir, evidence technician at the
20 police department now.

21 "Q So it would be his duty to maintain
22 custody and control of that evidence?

23 "A Yes, sir.

24 "Q Investigator, if you could, walk us
25 through the process of when you collect the

1 evidence and you put it in the bag. What is the
2 process of doing that? How do you do that?

3 "A I photograph it first, and then I --
4 depending on the type of drug it is, I do a
5 field analysis. The only kind of drug I would
6 not do a field analysis on would be pills or
7 marijuana. Then I put it in an evidence bag. I
8 put a case number on it, put the offense, the
9 person's name, the date and time collected, a
10 description of what I collected, you know, where
11 I collected it from. And then I bring it --
12 then, like in this case with crack, I would
13 bring it back to the police department. Then I
14 would fill out, as I said, a best kit for taking
15 it to the SLED laboratory.

16 "Q Since it was in your possession, if it
17 had been edited or altered in any way, you would
18 be able to tell; is that correct?

19 "A Yes. It's a sealed bag.

20 "Q Has it been edited or altered any
21 since it was in your possession?

22 "A Since the last time, no, sir.

23 "Q Thank you. No further questions.

24 "THE COURT: Cross examination?

25 "MR. BYRHOLDT: May it please the Court?

1 Investigator Baskin, you put it in a best
2 evidence kit to protect its integrity, correct?

3 "A I put it in a best evidence bag to
4 take it to SLED.

5 "Q But also to preserve its integrity,
6 right? So someone doesn't add something or take
7 something out?

8 "A It's already in a sealed evidence bag.

9 "Q And when you write down the number on
10 your chain of custody form, you do have chain of
11 custody form, right?

12 "A Yes, sir. There's chain of custody
13 forms with the best kit. And I also keep a
14 computerized chain-of-evidence form.

15 "Q Can you explain to this jury how two
16 sets of evidence could have the same best
17 evidence kit number?

18 "A Sir?

19 "Q Can you explain to this jury whether
20 it would be possible for two separate quantities
21 of drug to have the same best evidence kit
22 number?

23 "A Two different drugs, the only way that
24 could be possible for a typographical error. In
25 this particular case, when I typed up the

1 evidence in the computer, I put the same lab
2 number -- I mean, excuse me, not lab number,
3 container number for two different sets of
4 evidence.

5 "Q So it's a clerical error?

6 "A Yes, sir.

7 "Q Do you do a Form B chain of custody?

8 "A Yes, sir.

9 "Q Do you have that with you today?

10 "A No, sir. I don't. It may be in the
11 case file.

12 "Q Let me show you my copy. That's,
13 again, for the chain of custody, make sure it's
14 all done correct?

15 "A Correct.

16 "Q Would it be possible to do a chain of
17 custody and swear that it was done on
18 January 16th of 2007 when the drugs weren't sent
19 off until January 27, 2007? Would that be
20 another clerical error?
21 Is that your chain of custody form, sir?

22 "A That's my original chain of custody
23 form. Yes.

24 "Q All right. On the bottom of it
25 there's a notary where it was sworn to, correct?

Mike Baskin - Testimony Read

201

1 "A That is my signature was sworn to, not
2 the day that I collected it. No, sir.

3 "Q No, what's the day -- I mean, it's the
4 day the form was completed, correct?

5 "A No. The day that I got my signature
6 notarized I didn't say -- I can't say I didn't
7 complete the form on the 16th. I don't
8 remember.

9 "Q You wouldn't have the form notarized
10 before it was completed, would you?

11 "A No, sir.

12 "Q What date was it notarized?

13 "A My signature was notarized on the 16th
14 of January.

15 "Q And the form should have been
16 completed before it was notarized, correct?

17 "A Correct.

18 "Q What date was the evidence sent to
19 SLED?

20 "A It was sent 1/29.

21 "Q Well, how could it be notarized
22 January 16th when the stuff wasn't sent out for
23 eleven more days?

24 "A I'm not following you.

25 "Q Well, you sign it when the form is

1 completed, correct?

2 "A My signature has to be notarized.

3 Yes, sir.

4 "Q Well, you wouldn't have it notarized
5 before the form was completed, would you?

6 "A No, sir. The form was completed when
7 I got it notarized.

8 "Q How could it be notarized on the 16th
9 when the evidence wasn't sent until 11 days
10 later? Or did somebody add stuff later?

11 "A No. SLED will not notarize my
12 signature. Therefore, I have to have my
13 signature notarized here. When I take it to
14 SLED, I put in the date and -- that I turned it
15 in to SLED. We don't put a name, but we put the
16 SLED for the law enforcement agency and for the
17 name.

18 "Q So you're telling the jury you have
19 your signature and the form notarized before
20 it's completed?

21 "A I have my signature notarized before I
22 take it to SLED. Yes, sir. That's on every
23 case. Now, at one time we used to take stuff to
24 SLED and get them to notarize our signature but
25 they will not do it anymore. At least they

1 wouldn't when I was working. I don't know what
2 that policy is now.

3 "Q So it would be fair to say you entered
4 information after your signature was verified?

5 "A Oh, yes, sir.

6 "Q The form says you received it, placed
7 it at SLED, sworn before you some eleven days
8 before it was sent?

9 "A No, sir. That's not what it says.

10 "Q Read the bottom of it, sir. What does
11 this say? Right here, the last paragraph.

12 "A Sworn and subscribed this first of
13 six -- January, 2007, Amy Sexton she works at
14 the police department. SLED will not notarize
15 my signature. That's the reason I have to have
16 it done here.

17 "Q Yeah, but you could have it done after
18 you took the drugs. Like let's assume you
19 seized it on the 15th, took it on the 27th, and
20 you fill out the form and say I delivered it and
21 swear to it when you get back?

22 "A These forms are turned in to SLED.

23 "Q What I'm saying is you're swearing
24 something was done. Amy Sexton didn't know that
25 was done, did she?

1 "A She's not. My signature is what she's
2 signing, not what I've written there. My
3 signature that I signed it.

4 "Q That's not what the form says, though
5 is it? It says sworn that you've done these
6 things?

7 "A Every best kit is done that way.

8 "Q And every best kit has two sets of
9 drugs in it, clerical errors in it, mistakes?

10 "A No, two sets of drugs in that best
11 kit.

12 "Q How many photographs did you take?

13 "A Of the drugs?

14 "Q How many photographs did you take at
15 the scene? We've only seen two.

16 "A Five, six, seven, I believe. Maybe --
17 I take that back, nine.

18 "Q All right. How many -- nine?

19 "A Yes, sir.

20 "Q How many individuals, non-law
21 enforcement, were in that house?

22 "A Five.

23 "Q You took pictures of all five?

24 "A Yes, sir.

25 "Q Are they here today?

1 "A Are all five of those people here?

2 "Q Miss Richardson is here. Anyone else?

3 Mr. Ware.

4 "A I -- there's one other, there's one
5 other lady here. I think one of the ladies is
6 dead. Mr. Ware is here. Virginia Richardson is
7 here. I'll have to look at the other girl's
8 name.

9 "Q The reason we have a chain of custody
10 is when the drugs are handled, somebody is
11 supposed to keep track of them, correct?

12 "A Correct.

13 "Q And if that was not done, would that
14 be a breach of protocol, Mr. Baskin, in the
15 handling of drugs?

16 "A Yes, sir.

17 "Q Because everybody -- every time
18 somebody touches them, somebody is supposed to
19 sign off on the chain of custody, correct?

20 "A I'm sorry?

21 "Q When you take them and hand them to
22 someone else, they sign for the drugs and have
23 custody?

24 "A They have custody, yes, sir.

25 "Q When you get them back you sign for

1 them?

2 "A Yes, sir.

3 "Q Everybody that has custody in the
4 interim signs off on them?

5 "A Yes, would be handled at SLED.

6 "Q Was the chain of custody maintained
7 yesterday when the drugs were put in with the
8 court reporter here?"

9 THE COURT REPORTER: At that point there was an
10 objection.

11 "A The chain of custody?

12 "Q Was it maintained? Did someone have
13 possession of the drugs without signing for
14 them?

15 "A The only person that took the drugs
16 were the person that relieved me of my duties.

17 "Q Well, did anybody sign for them
18 yesterday?

19 "A No, they didn't sign for them. He
20 brought them with me and he was here in the
21 courtroom and took them from me in the
22 courtroom.

23 "Q Took them from the court reporter?

24 "A Do you mean today? Yesterday?

25 "Q Yesterday.

Mike Baskin - Testimony Read

207

1 "A I thought he took them from me.

2 "Q Was that proper?

3 "A I saw nothing wrong with it. No, sir.

4 "Q Did he sign for them?

5 "A No, sir.

6 "Q Do we know who had them at all times
7 yesterday?

8 "A Do I know who had them at all times
9 yesterday? No, sir. Not after I gave them to
10 him.

11 "Q Nothing further. Thank you, sir."

12 THE COURT REPORTER: Redirect Examination by Mr.
13 Bradley.

14 "Q Investigator Baskin, is it true that
15 the drugs were not ID'd for evidence until
16 today?

17 "A Correct.

18 "Q Okay. They were never given to the
19 court reporter yesterday; is that correct?

20 "A Not to my knowledge. No, sir.

21 "Q Okay. Is it your duty, and in your
22 capacity now as investigator for the solicitor's
23 office, to maintain the custody and control of
24 the drugs?

25 "A No, sir, it's not.

1 "Q And you testified earlier that's
2 officer Warren's duties, correct?

3 "A Correct.

4 "Q And he's the one that brought them to
5 the courtroom yesterday and today; is that
6 correct?

7 "A That's correct.

8 "Q Okay. Going back to the night of
9 January 15, 2007, what was it you collected from
10 the scene specifically? What was in that baggy
11 that you collected from the scene specifically?"
12 THE COURT REPORTER: And there was an objection.

13 "A Crack cocaine.

14 "THE COURT: Overruled. Go ahead.

15 "Q Did you seal it in that bag when you
16 collected?

17 "A Yes, sir. I put it in the bag.

18 "Q Is that the bag that you sealed it in?

19 "A When I collected it, the bag that's in
20 the best kit, this bag right here.

21 "Q And from the time that you collected
22 it until the time it went to SLED, did anyone
23 else touch it?

24 "A No, sir.

25 "Q And during that time was anything done

1 to it before you took it to SLED?

2 "A No, sir, other than put it in the best
3 kit.

4 "Q Was it still in the same sealed bag
5 when you took it to SLED?

6 "A Yes, sir, it was.

7 "Q And after it was tested, when you
8 picked it up, was it still in that sealed bag?

9 "A It had been opened and analyzed, but
10 it had been heat sealed back and it's still heat
11 sealed back.

12 "Q Before you took it and after you
13 picked it up, was anything added or mixed with
14 it?

15 "A No, sir. No.

16 "Q And, again, once you transfer custody
17 of it to Officer Warren, upon leaving the police
18 department, it's his duty to bring it to the
19 courtroom and maintain the custody, not your
20 duty; is that correct?

21 "A That's correct.

22 "Q Nothing further, Your Honor."

23 THE COURT REPORTER: Recross examination by Mr.
24 Byrholdt.

25 "Q You said on the 15th you seized it

1 from Mr. Ware. Is that what you said?

2 "A It was underneath Mr. Ware. He was
3 picked up.

4 "Q What does your form say it was seized
5 from?

6 "A Kevin Montreat Ware, Virginia Gail
7 Richardson. They were codefendants.

8 "Q Well, you never mentioned
9 Miss Richardson?

10 "A I did.

11 "Q Seized from her?

12 "A The drugs weren't under
13 Miss Richardson.

14 "Q Why did you put her name?

15 "A Because she was charged also with the
16 drugs.

17 "Q Okay. And you're saying it hasn't
18 been altered, the drugs?

19 "A No.

20 "Q When you left the city, did you do an
21 inventory of all the drugs that were there?

22 "A No, sir, I did not.

23 "Q Did you sign those drugs over to the
24 officer that replaced you?

25 "A I signed nothing over to him.

Mike Baskin - Testimony Read

211

1 "Q How do we know what happened to those
2 drugs?

3 "A Because they're still in heat-sealed
4 bag, untampered with.

5 "Q Well, you said it was opened at SLED
6 and they heat-sealed it back up, right?

7 "A Yes, sir. They gave it to me just
8 like it was.

9 "Q Well, if you didn't sign it over to
10 somebody, how do we know somebody hasn't opened
11 it back up and heat sealed it back?

12 "A Yes, we do. We could tell it.

13 "Q Why wasn't it turned over to somebody,
14 have them sign for it?

15 "A There are over 17,000 pieces of
16 evidence, sir, and I don't know how many --

17 "Q It would take too much time?

18 "A It would take years.

19 "Q But it would protect people's rights,
20 wouldn't it? Nothing further."

21 THE FOREMAN: Ma'am, that's enough.

22 THE COURT REPORTER: Is that all?

23 (Jurors respond affirmatively and the court reporter
24 exits at 3:50 p.m.)

25 (WHEREUPON, Court was again in session at 4:05 p.m.)

1 when the following proceedings were had:)

2 (WHEREUPON, Court's Exhibit No. 2 is marked for
3 identification.)

4 THE COURT: All right. Mr. Foreman ladies and
5 gentlemen of the jury, you sent a note stating you were
6 unable to agree on a verdict in this case.

7 As I instructed you earlier, the verdict of the jury
8 must be unanimous. When a matter is in dispute, it isn't
9 always easy for even two people to agree. So when 12
10 people must agree, it becomes even more difficult. In
11 most cases, absolute certainty cannot be reached or
12 expected. However, you have a duty to make every
13 reasonable effort to reach a unanimous verdict.

14 In doing this you should consult with one another,
15 express your own views and listen to opinions of your
16 fellow jurors. Tell each other how you feel and why you
17 feel that way. Discuss your differences with open minds.
18 Therefore, to some degree it can be said jury service is
19 a matter of give and take.

20 Although the verdict of the jury must be unanimous
21 every one of you has a right to your own opinion. The
22 verdict you agree to must be your own verdict result in
23 your own convictions and you should not give up your
24 firmly held beliefs merely to be in agreement with your
25 fellow jurors. The majority should consider the

Allen Charge

213

1 minority's opinion and the minority should consider the
2 majority's opinions. You should carefully reevaluate
3 your position, the reasonable, correctness, and
4 impartiality. You must lay aside all outside matters and
5 reexamine the question before you based on the law and
6 the evidence in this case.

7 If you do not agree on a verdict in this case, I
8 must declare a mistrial. In that case it does not mean
9 anyone wins. It just means that at some future time I
10 try this case some other jury sitting where you now sit.
11 The same participant will come, the same lawyers, ask
12 basically the same questions, and give basically the same
13 answers and we'll go through the whole process again.

14 You were selected in the same manner and same source
15 any future jury would be and there's no reason for me to
16 suppose that this case would ever be submitted to 12 more
17 intelligent, impartial, conscientious and competent
18 jurors than you; or that more clearer evidence will be
19 produced on one side or the other.

20 I, therefore, ask you to return to the deliberations
21 with the hope you can arrive at a verdict. Mr. Foreman,
22 members of the jury, go to the jury room.

23 (The jury retires to continue deliberations at
24 4:08 p.m.)

25 THE COURT: We'll stand at ease waiting on a jury

1 verdict.

2 MR. BRADLEY: Thank you, sir.

3 THE COURT: All right. Would you bring us the jury,
4 please.

5 (Whereupon, court was again in session at 5:20 p.m.
6 when the jury returns to open court to report its
7 verdict.)

8 THE COURT: Mr. Foreman, I understand you've reached
9 a verdict; is that correct?

10 THE FOREMAN: Yes, Your Honor.

11 THE COURT: Would you hand the verdict forms to the
12 bailiff please, sir.

13 (Foreman complies.)

14 THE COURT: Mr. Foreman, I have filled in the
15 verdict forms on the back of the indictment. I'm going
16 to give it to the clerk, have you to please sign it.
17 Then the clerk will publish the verdict.

18 THE CLERK: Indictment 2007-GS-04-971, the state of
19 South Carolina versus Kevin M. Ware. The verdict of the
20 jury, "We, the jury, find the defendant, Kevin M. Ware,
21 guilty of possession of crack cocaine, with intent to
22 distribute."

23 As to indictment 2007-GS-04-972, the State of South
24 Carolina versus Kevin M. Ware, the verdict of the jury,
25 "We, the jury, find the defendant, Kevin M. Ware, guilty

Verdict and Sentencing

215

1 of possession of crack cocaine with the intent to
2 distribute within proximity of a park."

3 Mr. Foreman, ladies and gentlemen of the jury, if
4 these were your verdicts, would you please indicate by
5 raising your right hand.

6 (No negative response elicited.)

7 THE CLERK: All hands raised, verdicts of the jury,
8 Your Honor.

9 THE COURT: Okay. Thank you very much.

10 All right. Mr. Foreman, ladies and gentlemen of the
11 jury, I want to thank you for your services this week.
12 The clerk has some letters for your employers if you need
13 it. If you'd go to the jury room. You're welcome to
14 stay through the sentencing process. If you want to
15 leave, that's up to you. Or you can go to the jury room,
16 she'll give you letters.

17 What remains is sentencing. You are welcome to stay
18 if you want to stay for the sentencing process. What's
19 the desire of the individual jurors? Did you want to
20 stay?

21 THE FOREMAN: I'd like to go. I'd like to go.

22 THE COURT: Well, fine. You're welcome to stay.
23 Mr. Ware, do you want to come around. You're welcome go
24 or stay, whichever you want to do.

25 (Jurors exit courtroom.)

1 THE COURT: All right. I think it's ten to 15 for
2 first; is that correct?

3 MR. BRADLEY: On the proximity to a park, 10 to 15.

4 THE COURT: Five to -- possession of crack cocaine
5 on the cocaine which is a second offense.

6 MR. BYRHOLDT: That's correct, Your Honor.

7 THE COURT: What's first offense?

8 MR. BRADLEY: He has a conviction from 2000, your
9 Honor, trafficking in crack cocaine.

10 THE COURT: Trafficking in crack cocaine, 2000?

11 MR. BRADLEY: Yes, sir. On indictment 2004-GS-04 H
12 the so.

13 THE COURT: What was his sentence at that time?

14 MR. BRADLEY: Five years.

15 THE COURT: So this will be the second. Do you
16 agree with that?

17 MR. BYRHOLDT: I would agree.

18 THE COURT: Any question whether he had
19 representation for enhancement?

20 MR. BYRHOLDT: There's not. I believe he was
21 represented by Mr. Tavernier.

22 MR. BRADLEY: Who is that signature? I'm not sure
23 who that -- but he did have.

24 MR. BYRHOLDT: Gordon Senerius.

25 THE COURT: At least he was represented for the

Verdict and Sentencing

217

1 purpose of enhancement, making it second.

2 MR. BYRHOLDT: That is true, Your Honor.

3 THE COURT: Glad to hear from the state as far as
4 sentencing should be concerned.

5 MR. BRADLEY: I just feel sentencing should be
6 commensurate with his prior record.

7 THE COURT: Anything else?

8 MR. BRADLEY: That's it.

9 MR. BYRHOLDT: Ask Mr. Ware speak first, Your Honor,
10 address the Court.

11 THE COURT: Glad to hear from any family members you
12 want me to hear. Happy to do that. Mr. Ware?

13 THE DEFENDANT: Yeah.

14 MS. GAINES: Carissa Nichole Gaines. Carissa
15 Nichole Gaines.

16 THE COURT: Yes, ma'am.

17 MS. GAINES: I just want to say --

18 THE COURT: What's your relationship to Mr. Ware?

19 MS. GAINES: That's my brother.

20 THE COURT: Your brother?

21 MS. GAINES: Yes, sir. I'm kind of nervous. I'm
22 sorry. We just think that, you know, some people do
23 deserve second chances.

24 THE COURT: Some people what?

25 THE WITNESS: Deserve second chances. Sir, we love

1 him. We really, really don't want him to go. We, you
2 know, we trying to just get ourselves together. Help him
3 get himself together. Just wish the Court have a little
4 mercy on him. Just try to work with him keep him home,
5 please.

6 MR. BYRHOLDT: Thank you.

7 THE COURT: Thank you very much.

8 Mr. Ware, glad to hear from you.

9 THE DEFENDANT: Sir, I have a drug problem. And
10 that was the reason for me a lot of things that I did do.
11 I apologize for that.

12 THE COURT: I understand you were probably selling
13 the drugs to feed your own habit, I would assume; is that
14 correct?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: One problem I have with that, even
17 though you may be an addict, you were actually selling;
18 and, unfortunately, I can't give you a suspended sentence
19 I guess legislature in their wisdom says couldn't get you
20 out. Like to give you suspended sentence, get out of
21 jail, get drug treatment. Legislature won't let you do
22 that. That's the law, unfortunately. Basically to give
23 you straight time so when you get back out, won't have
24 anything hanging over your head.

25 MR. BYRHOLDT: May it please the Court? The reason

Verdict and Sentencing

219

1 this case was tried, the sheriff's office did an
2 excellent job. The investigation in this case, had some
3 holes in it, problems with the forms, problem with the
4 evidence, which presented -- which gave Mr. Ware some
5 concern. He exercised his right's under the constitution
6 to have a trial. The jury deliberated more than five
7 hours on this case. And, with the questions they asked,
8 there were some concerns.

9 I would ask the Court to take -- I know the Court
10 has to impose a sentence. I would ask the Court to, as
11 part of that, also give him treatment, ATU. He has a
12 drug problem. He needs treatment. He's an excellent
13 young man we worked together on this case, met with his
14 girlfriend. And I think he, Kevin, is salvageable. He
15 needs to get clean, which he's been clean since he got
16 out. He spent a lot of time in jail. I would ask the
17 Court to give him credit for the time.

18 THE COURT: How long he been in jail, solicitor? Do
19 you know?

20 MR. BRADLEY: I believe it's little over 70, 70
21 days.

22 MR. BYRHOLDT: October 6th, 70 days.

23 THE COURT: Got out of jail this week or the week
24 before that?

25 MR. BYRHOLDT: No, Friday. Last Friday.

1 THE COURT: So you were in jail from October 6th
2 until I guess January the 2nd?

3 MR. BYRHOLDT: Yes.

4 THE COURT: Is that correct?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Well, actually might as well just count
7 it through today because he's been in jail since
8 consequence. How many days is it total?

9 THE CLERK: Your Honor, it's it a days from October
10 6 until today. Less than --

11 THE COURT: Less two days. I'll give him credit for
12 the two days. Does that sound correct, solicitor?

13 MR. BRADLEY: That's fine, your Honor.

14 THE COURT: Pardon?

15 MR. BRADLEY: Yes, Your Honor.

16 MR. BYRHOLDT: And I would ask the Court to give him
17 a sentence commensurate with his prior record which he
18 has, but also take into account that the questions the
19 jury had and the evidentiary problems we --

20 THE COURT: It's 85 percent crime, no question.
21 He's got to serve 85 percent. Do you understand that,
22 Mr. Ware?

23 THE DEFENDANT: Yes.

24 THE COURT: You won't be eligible in a third or
25 fourth, you have to do 85 percent. Do you understand?

Verdict and Sentencing

221

1 You will not be eligible for parole, do you understand?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: All right. Indictment number 791,
4 that's the possession with intent, second. Sentenced to
5 the State Department of Corrections a period of ten
6 years, credit for 92 days and run it concurrent with the
7 other indictment. Indictment 972, that's the proximity
8 of a park, that sentenced to the state department of
9 corrections a period of ten years, give you credit for it
10 approximate days, run that concurrent. Concurrent means
11 they run together. Do you understand? You'll serve
12 eight and a half years.

13 MR. BRADLEY: Thank you, your Honor.

14 THE COURT: Write on there ATU ordered. I forgot to
15 write it on there.

16 THE CLERK: Yes, Your Honor.

17 * * * * * END OF REQUESTED TRANSCRIPT OF RECORD * * * * *

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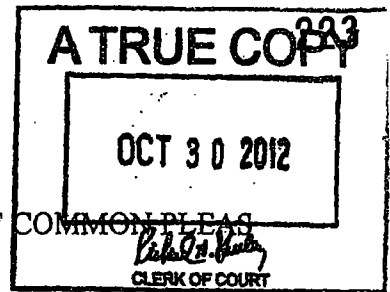
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1 CERTIFICATE OF REPORTER
2
34 STATE OF SOUTH CAROLINA)
5)
6 COUNTY OF ANDERSON)
78 I, Donna M. Brady, Official Court Reporter for the
9 Tenth Judicial Circuit of the State of South Carolina, do
10 hereby certify that the foregoing is a true, accurate and
11 complete Transcript of Record of the proceedings had and
12 evidence introduced in the trial of the captioned case,
13 relative to appeal, in the Court of General Sessions for
14 Anderson County, South Carolina, on the 5th through 9th
15 days of January, 2009.16 I do further certify that I am neither of kin,
17 counsel nor interest to any party hereto.
1819 June 2, 2009
2021
22 Donna M. Brady
23 Donna M. Brady
24 Circuit Court Reporter
25

FORM 5



STATE OF SOUTH CAROLINA

COUNTY OF Anderson

Kevin Ware SCDC # 269271
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

2012- CP - 04 - 03434

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention MacDougall corr. Inst, 1516 old Gillward Rd. 29472
2. Name and location of Court which imposed sentence Anderson county court
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) POSS. W/Intent to Distribute; I/No. 07-GS-04-971
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence
 - (a) PWID; January 2009; Ten (10) years, at 85%
 - (b) _____

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ANDERSON SC
2012 OCT 30 A 1031
COMMON PLEAS AND
GENERAL SESSIONS
Revised 3/2003

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty XXX _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. court of Appeals _____
- ii. S.C. Supreme court a petition for a writ of certiorari _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Court of Appeals denied _____
- ii. S.C. Supreme court denied _____
- iii. _____
- (c) the date of each such result:
- i. Court of Appeals denied on June 8, 2011 _____
- ii. S.C. Supreme court denied on September 20, 2012 _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective assistance of trial counsel
- (b) I would like to amended Application at later date.
- (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Ineffective assistance of trial counsel, by failing to
- (b) investigate the facts surrounding my arrest; counsel failed to
- (c) impeach the state's witness; counsel not prepared for trial.

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? YES
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. Direct Appeal; Columbia, S.C.
 - ii. Writ of certiorari; Columbia, S.C.
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. S.C. court of Appeals
 - ii. S.C. Supreme Court
 - iii. _____
 - iv. _____
- (c) the disposition thereof:
 - i. _____
 - ii. _____
 - iii. _____

- iv. _____
- (d) the date of each such disposition:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:
 - i. _____
 - ii. _____
 - iii. _____
- (b) the proceedings in which each ground was raised:
 - i. _____
 - ii. _____
 - iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) Ineffective Assistance of Counsel. This is a PCRA claim.
- (b) _____
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? N/A
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Trial Attorney: Bruce A. Byrholdt
- ii. Anderson, S.C.
- iii. Appellate Attorney: LaVelle C. Durant S.C. office of Appellate Columbia S.C.
- (b) the proceedings at which each such attorney represented you:
- i. See above
- ii. _____
- iii. _____
19. State clearly the relief you seek in filing this application:
- My conviction and sentenced reversed, and this case remanded for new trial
20. Are you now under sentence from any other court that you have not challenged?
- NO

STATE OF SOUTH CAROLINA)

County of Anderson)

VERIFICATION

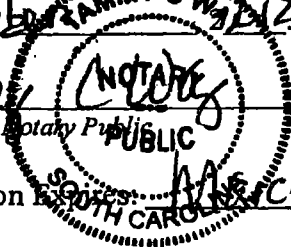
I, , being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Kevin Ware
Kevin Ware # 269271, Petitioner

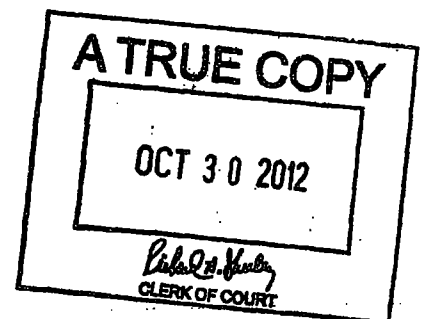
SWORN to and subscribed before me this 25th
day of October 2012

[Signature] (L.S.)
Notary Public

My Commission Expires March 9, 2014



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ANDERSON SC
2012 OCT 30 A 10:31
COMMON PLEAS AND
GENERAL SESSIONS



Revised 3/2003

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, , hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Kevin Ware

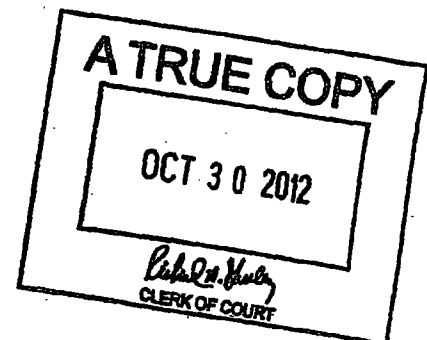
Kevin Ware Applicant #269271

SWORN or affirmed to and subscribed before me this

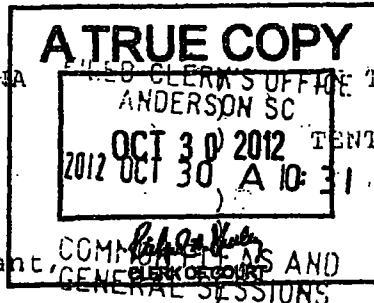
15th day of October, 2012.

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COMMON PLEAS AND
GENERAL SESSIONS



STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
Kevin Ware, #269271,



Applicant, COMM. CLERK AS AND
GENERAL SESSIONS

2012-CP-04-03434

vs.

AMENDED APPLICATION FOR
POST-CONVICTION RELIEF

State of South Carolina,

Respondents.

2007-65-04-972
C/A No. 2007-65-04-971

Under Rule 15(a), South Carolina Rules of Civil Procedure, and South Carolina Code §17-27-50, the Applicant, acting Pro Se, moves to amend the original pleadings filed with this court in the Applicant's initial post-conviction application.

The Applicant would respectfully show this court that Applicant's conviction, sentence, and custody are in violation of the Constitution and laws of the United States, and were obtained through violations of Applicant's Sixth and Fourteenth Amendment Rights to the effective assistance of counsel. These rights, made applicable to the states through the doctrine of incorporation, are fully outlined in Gideon v. Wainwright, 83 S.Ct. 792 (1963), and its progeny.

The Fourteenth Amendment Due Process Clause and the Sixth Amendment Right to Counsel Clause have been recognized as important elements to a criminal defendant's fundamental rights to a fair and impartial trial. See, e.g., Powell v. Alabama, 287 U.S. 45 (1932). Access to a reasonably competent attorney is necessary, in order for an accused, who has no knowledge of the law and the rules of evidence, to have "ample opportunity" to defend himself. Adams v. United States ex rel. McCann, 317 U.S. 269, 275 (1942).

It is through competent counsel that the accused secures all his other constitutional rights. Kimmelman v. Morrison, 477 U.S. 377 (1986). Thus, the right to counsel embodies much more than an attorney's physical presence. "[T]he right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.41 (1970). The right to counsel prevents the states from conducting trials at which persons who face incarceration must defend themselves, without adequate legal assistance. Cuyler v. Sullivan, 466 U.S. 335, 344 (1980).

In order for a defendant to obtain relief as a result of the ineffective assistance of counsel, the accused must show that his attorney did not render legal assistance within the range of competence of attorneys in criminal cases according to prevailing professional norms. Strickland v. Washington, 466 U.S. 668, 687-91 (1984). The accused must also show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. It is critical to note (because it is often misunderstood) that the Strickland prejudice test is not an outcome-determinative one. Rather, a "reasonable probability is a probability sufficient to undermine confidence in the outcome."

The South Carolina Supreme court has held that a defendant who enters a guilty plea on the advice of counsel may only attack the voluntary and intelligent nature of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have plead guilty, but would have insisted on going to trial. Jackson v. State, 340

S.C. 112, 531 S.E.2d 294, 296 (2000) (interpreting the Sixth Amendment to the United States Constitution)).

When a defendant pleads not guilty and elects to proceed to trial, as did the Applicant, our supreme Court has held that,

"The first part of the [Strickland] test requires that a defendant show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. The second part of the test requires that a defendant show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (See Strickland v. Washington, 466 U.S. at 694).

The Applicant was denied the effective assistance of counsel in violation of the Fourteenth Amendment Due Process Clause, and the Sixth Amendment Right to Counsel Clause, as promulgated in the tenets of Strickland v. Washington, 466 U.S. 671, 104 S.Ct. 2052 (1984), in the following critical respects.

- I. THE APPLICANT'S CONVICTION, SENTENCE, AND CUSTODY ARE IN VIOLATION OF THE CONSTITUTION AND LAWS OF THE UNITED STATES, AND WERE OBTAINED IN VIOLATION OF THE APPLICANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL, IN THAT COUNSEL FAILED TO CONDUCT AN ADEQUATE INVESTIGATION OF THE RELEVANT FACTS AND LAWS GOVERNING THE APPLICANT'S DEFENSE

The Sixth and Fourteenth Amendments impose on counsel a duty to conduct a reasonable investigation into the law and facts underlying a client's charged offense, because reasonably effective assistance must be based on professional decisions, and informed legal choices can be made only after an investigation of the options. "In other words, counsel has a duty to make reasonable investigations, or make a reasonable decision that makes particular

investigations unnecessary." Strickland v. Washington, 104 S.Ct. at 2060. The Supreme Court held further that,

"If there is only one plausible defense, the Court concluded, counsel must conduct a 'reasonably substantial investigation' into that line of defense, since there can be no strategic choice that renders such an investigation unnecessary. It must include 'an independent examination of the facts, circumstances, pleadings, and laws involved.'"

Strickland, at 2061 (Quoting Rummel v. Estelle, 590 F.2d 103, 104 (CA 1079)).

Counsel's failure to conduct a reasonably adequate investigation resulted in substantial prejudice to the Applicant's defense in the following particulars:

1. Counsel failed to investigate the laws and statutes governing a trial court's charge of a lesser included offense to the jury. Counsel's failure to use any case law in the lesser offense charge to the trial court in his request for a lesser charge to the jury prejudiced Applicant Ware. Counsel was ineffective in this matter, because he had previously and successfully been granted a direct verdict charge on conspiracy when he offered case law to the trial court to support his request on the conspiracy charge. The trial court relied on the case law from counsel to make its ruling. Constitutional Law 268 (11) Due process requires that a lesser included offense be charged when the evidence warrants it but only if the evidence would permit a jury rationally to find the defendant guilty of the lesser offense. U.S.C.A. Const. Amend. 14. United States v. Garcia-Duarte, 718 F2d 42, 47 (2d Cir. 1983). The trials of Garcia-Duarte and Applicant Ware parallel one another in several critical respects. First, both officers gave testimony which differed significantly from their written reports. The officer in Ware's trial, Baskin's written report stated clearly that two sets of drugs were placed in the same best kit bag with the same best kit number. However, in his oral testimony Officer Baskin alleged typographical error, which was never proven. SLED and Officer Baskin's successor, Officer Warren, substantiates Ware's

claim of contamination. Second, the officer in both Garcia-Duarte and Ware's case gave false statements regarding when the confiscated drugs were turned over to the chemist for analysis. A ten-day discrepancy existed in the Garcia-Duarte case and a thirteen day discrepancy exists in Ware's case. Further, any discrepancies as to dates within the chain or failure to comply with law enforcement policies, go to the weight or credibility of the evidence and not to its admissibility. State v. Carter, 344 S.C. 419, 544 S.E.2d 835 (2001). This would mean the jury could infer Officer Baskin's testimony was clearly open to dispute and a serious challenge to his credibility. Counsel's failure to offer any principles of law in his request for a lesser included offense to the trial court was extremely prejudicial to Ware. Counsel failed to investigate and familiarize himself with established case law, in which it is commonly held that if there is any evidence to support a charge of a lesser included offense, the trial court must grant the defendant's motion for such a charge. Counsel failed to argue to the trial court that State's evidence repeatedly demonstrated that the drugs discovered in Ms. Richardson's home was for personal use. There were five people in the home, and only 2.4 grams of crack cocaine. The police discovered crack pipes in proximity to the 2.4 grams of crack, as well as additional crack pipes in Ms. Richardson's living room. It was plainly evident that the crack discovered at Ms. Richardson's home was for personal use; not for sale. Consequently, counsel was ineffective in failing to investigate both the facts of Applicant's case, and the controlling laws and statutes. The trial court is required to charge a jury on a lesser-included offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed. Suber v. State, 371 S.C. 554, 640 S.E.2d 884 (2007) State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct.App.)

2. Counsel rendered ineffective assistance in that he failed to adequately investigate the criminal background of the State's witness, Ms. Richardson. Ms. Richardson testified, and the State

supported her testimony, that her prior criminal record consisted of minor theft offenses several years old. However, during cross examination it was brought out by the defense that Ms. Richardson's criminal history was extensive, serious, and of recent origin. Had counsel thoroughly investigated Ms. Richardson's criminal history prior to trial, he would have been prepared to fully impeach Ms. Richardson's testimony, and possibly prevent the State from calling Ms. Richardson as a witness. Furthermore, counsel was ineffective by not investigating the plea agreement of Ms. Richardson. Any understanding or agreement is relevant to a witness's credibility. This would unduly prejudice the defendant. And the jury is entitled to consider any agreement or understanding.

II. THE APPLICANT'S CONVICTION, SENTENCE, AND CUSTODY ARE IN VIOLATION OF THE CONSTITUTION AND LAWS OF THE UNITED STATES, AND WERE OBTAINED IN VIOLATION OF THE APPLICANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL, IN THAT COUNSEL FAILED TO PROTECT THE APPLICANT'S RIGHTS IN THE FOLLOWING PARTICULARS:

1. First, counsel failed to argue to the trial court the proper basis for a lesser offense charge to the jury, in that several witnesses gave testimony of drug paraphernalia was present, which supported the defense that the discovered drugs were for personal use, and not for resale. Second, by the credibility of Officer Baskin the jury could infer that any discrepancies in the chain or failure to comply with law enforcement policies go to the weight or credibility, and offer Ware the lesser offense charge;
2. Counsel failed to impeach the State's witness, Ms. Richardson, with her prior record, after winning approval from the trial court to do so;
3. Counsel failed to timely refund the Applicant's retainer fee, in order for the Applicant to retain substitute counsel, following counsel's release from the Applicant's case;
4. Counsel failed to object to the perjured testimony of Captain Kevin Marsee;

5. Counsel failed to object to the trial court's comments to the jury after five hours of deliberation that, if the jury failed to render a verdict, the State would be required to retry Applicant's case;

6. Counsel rendered ineffective assistance in that counsel failed to place on the witness stand those persons in Ms. Richardson's home at the time of Applicant's arrest, who would have supported the defense that the crack cocaine seized by the police was for personal use among those present, and not for sale;

WHEREFORE, having shown good and just cause, the Applicant respectfully moves this Court to vacate Applicant's sentence and conviction, and to order a new trial in Applicant's case.

Respectfully submitted,

Dated: 10-25-12

/s/ Kevin Ware
Kevin Ware, Applicant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	Case No. 2012-CP-04-3434
	)	
Kevin Ware,	)	
S.C.D.C. No. 269271,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed October 30, 2012, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. Applicant was indicted by the Anderson County Grand Jury at the March 2007 term of the Court of General Sessions for possession of crack cocaine with intent to distribute within proximity of a park (2007-GS-04-972) and possession of crack cocaine with intent to distribute (2007-GS-04-971). On January 9, 2009, the State called its case to trial. Applicant was represented by Bruce Byrholdt, Esq., and the State was represented by Matthew T. Bradley, Esq., of the Tenth Judicial Circuit Solicitor's Office. Applicant was found guilty as indicted. The Honorable J.C. Nicholson, Jr., sentenced Applicant to ten years imprisonment on both charges. The sentences were to be served concurrently.

A timely Notice of Appeal was filed on Applicant's behalf. LaNelle C. Durant, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of

Appeals affirmed Applicant's conviction and sentence in an unpublished opinion. State v. Kevin Ware, Op. No. 2011-UP-273 (S.C. Ct. App. filed June 8, 2011). A Petition for Writ of Certiorari with the South Carolina Supreme Court was filed on Applicant's behalf. The Supreme Court denied certiorari on September 20, 2012.

Attached herewith and incorporated herein by reference are the records of the Anderson County Clerk of Court regarding the subject conviction(s), the Applicant's records from the Department of Corrections, and transcript of the proceeding against Applicant. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel;
 - a. Failure to investigate the facts surrounding Applicant's arrest.
 - b. Failure to impeach the State's witness.
 - c. Failure to prepare for trial.
 - d. Failure to investigate the relevant facts and laws governing the Applicant's defense.
 - e. Failure to argue a lesser offense charge.
 - f. Failure to impeach the State's witness Ms. Richardson.
 - g. Failure to timely refund Applicant's retainer fee.
 - h. Failure to object to the perjured testimony of Captain Kevin Marsee.
 - i. Failure to object to the Court's comments to jury.
 - j. Failure to call witnesses from time of arrest.

III.

The Applicant's first claim is an allegation of ineffective assistance of trial counsel. The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at

625. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code '17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VI.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VII.

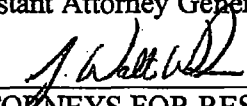
WHEREFORE, having made its Return, the Respondent requests that a hearing be held.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WALT WHITMIRE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

August 2nd, 2013

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

KEVIN WARE, # 269271

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent

IN THE COURT OF COMMON PLEAS
IN THE TENTH CIRCUIT

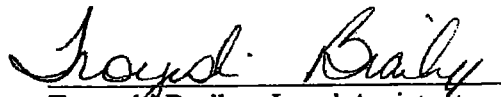
2012-CP-04-3434

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return and request for counsel in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Hugh W. Welborn, Esq.
P.O. Box 173
Anderson, SC 29622

DATED this 2ND day of August, 2013


 Troyesh Brailey, Legal Assistant
 For Respondent

State of South Carolina

County of Anderson

In the Court of Common Pleas

Kevin Ware,

Applicant,

-VS-

State of South Carolina,

Respondent.

2012-CP-04-03434

September 18, 2013

Transcript of Record

BEFORE:

The Honorable R. Lawton McIntosh, Judge

APPEARANCES:

Hugh Welborn, Esquire
Attorney for the Applicant

John W. Whitmire, Esquire
Assistant Attorney General
Attorney the State

Renee H. Tollison
Circuit Court Reporter

INDEX

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Kevin Ware				
Welborn	5			
Whitmire		14		
Bruce Byrholdt				
Welborn	22			
Whitmire		24		

<< -- >>

Opening Statements
Certificate of Reporter

PAGE
3
28

EXHIBITS

No	DESCRIPTION	ID	EV
	<i>No exhibits were presented during the hearing</i>		

1 September 18, 2013

2 (WHEREUPON, court convened with all parties present,
3 and the following proceedings were had commencing at
4 approximately 11:22 a.m.)

5 MR. WHITMIRE: May it please the Court, Your
6 Honor?

7 THE COURT: Yes, sir.

8 MR. WHITMIRE: The matter before this Court
9 currently is Kevin Ware v. State of South Carolina, 2012-
10 CP-04-3434. Mr. Ware was indicted for possession with
11 intent to distribute crack cocaine in the proximity of a
12 park and possession with intent to distribute crack
13 cocaine.

14 January 9, 2009, the State called this case for
15 trial. Mr. Ware was present and was represented by Bruce
16 Byrholdt. Mr. Ware was found guilty as indicted. Notice
17 of appeal was filed on his behalf. Lynelle Durant at the
18 Office of Appellate Defense perfected that appeal. The
19 Court of Appeals affirmed Mr. Ware's conviction and
20 sentence in an unpublished opinion filed June 8th, 2011.

21 Mr. Ware filed a timely notice -- a timely
22 application for post-conviction relief and is represented
23 by Hugh Welborn. In that application, Your Honor, Mr.

24 Ware alleges counsel was ineffective for failing to
25 investigate State witness Richardson's prior convictions

1 to fully impeach her.

2 THE COURT: Hold on. Slow down. For failing
3 to investigate -- I'm making notes. And what else?

4 MR. WHITMIRE: Deficient performance for
5 failing to ask for a lesser-included jury charge.
6 Failure to object to the Allen charge. Failure to object
7 to Captain Kevin Marcy's perjured testimony. And lastly,
8 Your Honor, failure to refund the Defendant's fee once
9 the trial was over.

10 THE COURT: That's denied.

11 MR. WHITMIRE: Yeah. I was going to move for
12 summary judgment on that. Also, I'm going to move for
13 summary judgment on failure to request a lesser-included
14 jury charge. I believe Mr. Byrholdt did do this at
15 trial.

16 THE COURT: Mr. Ware, I'm denying that because
17 that's not a ground. Let me just tell you, it's not --
18 that's not relief that I can grant in a post-conviction
19 relief action, so I'm denying that ground. That is the
20 failure to refund the monies. We're not going to go
21 there.

22 All right. Would you -- Mr. Welborn?

23 MR. WELBORN: I'm sorry. What's your question?

24 THE COURT: I was just telling Mr. Ware that
25 failure to refund monies is not relief available.

Kevin Ware - Direct Examination by Mr. Welborn

5

1 MR. WELBORN: I agree with that.

2 THE COURT: Okay.

3 MR. WELBORN: The only thing to add, Your
4 Honor, is ineffective assistance due to failure to call
5 witnesses.

6 THE COURT: Failure to call witnesses?

7 MR. WELBORN: Yes, sir.

8 THE COURT: Okay. Would you call your first
9 witness?

10 MR. WELBORN: If it please the Court, we'd call
11 Kevin Ware.

12 (WHEREUPON, the witness was duly sworn.)

13 THE COURT: Would you slide up next to that
14 microphone so we can hear you, please, sir. Thank you.

15 MR. WELBORN: May it please the Court?

16 THE COURT: Yes, sir.

17 KEVIN WARE,

18 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

19 DIRECT EXAMINATION

20 BY MR. WELBORN:

21 Q. Mr. Ware, you were before this Court a few years ago
22 and were represented by Mr. Byrholdt during your trial
23 concerning possession of crack cocaine, and you were

24 convicted of that charge; is that correct?

25 A. True.

1 Q. And you were given ten years on the two convictions
2 that you had, and they were to run concurrent; is that
3 correct?

4 A. True.

5 Q. And you're going to be eligible to get out of prison
6 April of this coming -- excuse me -- April of 2017; is
7 that correct?

8 A. True.

9 Q. Now, just so the record reflects this, do you
10 understand that if you get post-conviction relief, all
11 you get is a new trial?

12 A. Yes, sir.

13 Q. And do you understand that if you got a new trial
14 and got convicted, you could get a whole lot more time
15 than what you got on this particular charge this time?
16 Do you understand that?

17 A. Yes, sir.

18 THE COURT: Were there any charges dismissed?
19 Were there any charges nol prossed as a result of this?

20 MR. WHITMIRE: Your Honor, the conspiracy
21 charge he was indicted for was directed at the beginning
22 of the preliminary hearings. Apologies for failing to
23 mention that.

24 MR. WELBORN: There was a directed verdict on
25 conspiracy.

Kevin Ware - Direct Examination by Mr. Welborn

7

1 THE COURT: And it was granted? Okay. Go
2 ahead.

3 Q. All right. Knowing that, you want to go forward
4 today?

5 A. Yes, sir.

6 Q. All right. I'm going to ask you some questions.
7 And you've alleged that Mr. Byrholdt was ineffective in
8 that he failed to investigate the facts surrounding your
9 arrest. Can you be more specific and tell the Court what
10 you mean by that?

11 A. It was really the facts of the lesser-included
12 offense.

13 Q. And what offense was that?

14 A. Possession with intent.

15 Q. And how did he not investigate that?

16 A. He failed to present any laws, the facts of the
17 case.

18 Q. Can you be more specific?

19 A. Well, I mean, as far as he requested the lesser-
20 included offense, but he didn't do a thorough
21 investigation of the laws and facts surrounding the
22 lesser-included offense.

23 Q. The Court needs to know what did he not do.

24 A. He didn't show any principle laws or facts of the
25 case, material fact or principle of the law.

1 Q. He didn't show what, sir?

2 A. Any material facts or principles of the law.

3 Q. What should he have shown that he didn't show?

4 A. Well, as far as -- I mean, it's well settled that --
5 it's well settled that the laws to be charged are
6 determined by evidence presented at trial. And if any
7 evidence exists to support a charge, it should be given.
8 The trial court commits a reversible error if it fails to
9 give a requested charge on an issue raised by the
10 evidence. Counsel failed to ---

11 Q. Let me interrupt you, Mr. Ware. I appreciate you,
12 and the Court appreciates you quoting some law there.
13 But my question was fairly specific. What did Mr.
14 Byrholdt not do?

15 A. Well, I mean, he didn't bring up any issue as far as
16 the evidence being contaminated, as far as the false
17 affidavit of ---

18 Q. Well, let's talk about that. I'm sorry. I didn't
19 mean to interrupt you. Let's talk about that. When you
20 say that was contaminated, you're talking about when
21 there was evidence of two particular drugs going in the
22 same evidence kit. Is that what you're talking about?

23 A. Yes, sir.

24 Q. Well, now, he did bring that up and had extensive
25 arguments about that, didn't he?

Kevin Ware - Direct Examination by Mr. Welborn

9

1 A. He didn't bring it up in the request for the lesser-
2 included offense.

3 Q. Okay. All right. And the Court ruled on those ---

4 A. The admission of the evidence.

5 Q. Excuse me?

6 A. The Court ruled on the admission of the evidence.

7 Q. Okay.

8 A. The suppression.

9 Q. All right. You also alleged that Mr. Byrholdt
10 failed to impeach the State's witness. Can you be more
11 specific?

12 A. Well, this was after he had received -- the judge
13 gave him the leeway to impeach him on a past criminal
14 history, and he failed to do so.

15 Q. And what's her name that he failed to impeach?

16 A. What's her name?

17 Q. Yes. The witness that you wanted him to impeach?

18 A. Virginia Richardson.

19 Q. Okay. Now, you also said he failed to prepare for
20 trial. Tell me specifically what did he not do in
21 preparing for this trial?

22 A. All this was in the same issue of the lesser-
23 included offense. And as far as he failed to advise me
24 as far as the facts concerning the lesser-included
25 offense, for every possible lesser-included offense that

1 I could have received. As far as I had many
2 conversations with Mr. Byrholdt. And I told him that I
3 was only at this residence for personal use and not for
4 sale. And so he failed to even advise me of that, that
5 this was a defense that I could use.

6 Q. Besides that, anything else that he failed to do in
7 preparing for your trial?

8 A. Those were the only two issues as far as the lesser-
9 included offense.

10 Q. And what lesser-included offense was he supposed to
11 have prepared for you and he didn't? What's the name of
12 that?

13 A. Well, I mean, I said as far as he didn't advise me
14 as far as when I told him that I was only at the
15 residence for personal use of drugs. He didn't advise me
16 that this was a defense that I could use.

17 Q. Okay. You also said he failed to investigate the
18 relevant facts and laws governing your defense. Can you
19 be more specific? What did he not do?

20 A. That was only the lesser -- he failed to do lesser
21 of the lesser-included offense as far as the laws that I
22 just quoted.

23 Q. Okay. You said -- and I don't want to be too
24 excessive here -- he failed to argue a lesser offense
25 charge. Is that the same thing you said a moment ago?

Kevin Ware - Direct Examination by Mr. Welborn

11

1 A. Yes, sir.

2 Q. And you said he failed to impeach the State's
3 witness, Ms. Richardson. We talked about that a while
4 ago, didn't we?

5 A. Yes, sir.

6 Q. And you said he failed to object to the, you called
7 it, the perjured testimony of Captain Kevin Marcy. Can
8 you elaborate on that?

9 A. That was as far as -- it was the first buy of drugs
10 that they said that I was charged with. I mean, they
11 actually kicked it out. But I mean, I have no record of
12 that.

13 Q. Who kicked what out?

14 A. Judge Nicholson actually kicked the first buy that
15 he claimed to have of me out. But I mean, I had no
16 record of that.

17 THE COURT: You had no record?

18 THE WITNESS: No. No, sir. I mean, I tried to
19 get the transcript of that, I mean, but I couldn't get
20 it.

21 THE COURT: So there was a purchase that
22 evidence of that was suppressed or dismissed?

23 THE WITNESS: The judge kicked it out because

24 Marcy said that he had -- the probable cause was they had
25 me on a wire tape. He says it was underhanded. And it

1 was found out that Marcy lied about the wire tape. So
2 Judge Nicholson kicked that first buy out, said he didn't
3 want to hear anything about that. I mean, I couldn't get
4 a transcript of that.

5 THE COURT: Got you. Okay. Excuse me.

6 Q. Well, would you not agree in all candidness, Mr.
7 Ware, that if that charge was dismissed, then that was
8 what you wanted to have happen?

9 A. Yes, sir.

10 Q. Okay. All right. You said that Mr. Byrholdt failed
11 to object to the Court's comments to the jury. What
12 comments are you referring to?

13 A. Well, that was the comments after five hours after
14 the jury deliberated. He -- the judge told them that if
15 they didn't come back with a verdict that he would be
16 forced to call a mistrial.

17 Q. Okay. And you think that it's objectionable for a
18 judge to say that?

19 A. Well, I mean, I think he put pressure on the jury at
20 that point.

21 Q. Okay. Well, do you recall if the judge made a
22 different charge and told them to go back and discuss the
23 case some more? Do you recall that?

24 A. Yes. He charged them with the Allen charge.

25 Q. That's right.

Kevin Ware - Direct Examination by Mr. Welborn

13

1 A. Yeah.

2 Q. Okay. And you also allege that Mr. Byrholdt failed
3 to call witnesses on the time of the arrest. What
4 witnesses did he not call?

5 A. That would be me as far as the personal use. He
6 failed to put me on the stand. He advised me not to take
7 the stand. I mean, I could have testified as to my
8 personal use for my reason for being at the residence.

9 Q. Now, you made the ultimate decision though not to
10 testify; isn't that correct?

11 A. Under counsel's advise, yes, sir.

12 Q. Okay. Okay. But he didn't say I absolutely forbid
13 you to get on the stand, did he?

14 A. No, sir.

15 Q. What other witnesses did he not call to the stand
16 besides you?

17 A. I was the only one.

18 Q. Well, you've alleged witnesses in your application.
19 But the witnesses you referred to is you?

20 A. Yes, sir..

21 Q. Okay. Now, you understand if you take the stand
22 that any prior convictions can be brought out more than
23 likely?

24 A. I'm sorry. I didn't hear you.

25 Q. Did your lawyer tell you that if you take the stand

1 prior convictions concerning moral turpitude could be
2 brought out?

3 A. Yes, sir.

4 Q. Did you have some prior convictions?

5 A. Yes, sir.

6 Q. All right. Answer anything opposing counsel may
7 have.

8 MR. WHITMIRE: I beg the Court's indulgence.

9 THE COURT: Yes, sir.

10 CROSS-EXAMINATION

11 BY MR. WHITMIRE:

12 Q. Good afternoon, Mr. Ware. Did you and Mr. Byrholdt
13 discuss the confidential informant?

14 A. Yes, sir.

15 Q. Did he discuss the State's use of the confidential
16 informant with you?

17 A. Well, I mean, Mr. Byrholdt only found out who the
18 confidential informant, I mean, weeks before we went to
19 trial.

20 Q. And this was Ms. Richardson's home, wasn't it?

21 A. Yes, sir.

22 Q. My Byrholdt explained to you that you had no Fourth
23 Amendment protections in her home?

24 A. Yes, sir.

25 Q. And did Mr. Byrholdt review Ms. Richardson's

Kevin Ware - Cross-examination by Mr. Whitmire

15

1 statement with you prior to trial?

2 A. Yes, sir.

3 Q. And did Ms. Richardson, at trial, admit she called
4 you because a guy at her house wanted to buy some crack?

5 MR. WHITMIRE: That's page 115, Your Honor.

6 A. Yeah. I mean, she did allege that.

7 Q. And Ms. Richardson's testimony was that she wasn't
8 aware that this guy was a confidential informant; is that
9 correct?

10 A. I don't know if she actually did or not.

11 MR. WHITMIRE: Again, it's 115.

12 Q. And did Ms. Richardson testify you were unwrapping
13 the crack when the SWAT team executed the search warrant
14 and busted in her back door?

15 A. Could you say that again?

16 Q. Didn't Ms. Richardson testify that you were
17 unwrapping that crack when the SWAT team executed a
18 search warrant and busted in her back door?

19 A. Yes, she alleged that.

20 MR. WHITMIRE: 117.

21 Q. Do you remember what Ms. Richardson said you did
22 when those officers came in the residence?

23 A. The testimony from her was that I -- either she said
24 I threw it at the wall -- she alleged I threw it at the
25 wall or something like that.

1 Q. Did she say you threw that bag of crack at Officer
2 Oman?

3 A. No. She said the wall. I think the officer
4 testified, said I threw it -- Ms. Richardson testified,
5 said I threw it against the wall. And the officer
6 testified, said I threw it at his chest. That was two
7 different statements.

8 Q. Well, didn't all three officers testify that you
9 threw it at the officer in his direction?

10 A. No, sir. One officer said that he didn't know
11 exactly where I threw it. You know, he said the only
12 thing he saw was my hand moving in a throwing motion.

13 MR. WHITMIRE: That's correct, Your Honor.
14 Your Honor, that's page 49, 59 and 66 of the trial
15 transcript.

16 Q. But didn't Ms. Richardson testify she didn't witness
17 anyone else at the residence throwing a bag of crack,
18 throwing anything when those officers came in?

19 A. Yes, she alleged that.

20 Q. And you're claiming here today that Mr. Byrholdt
21 should have done more to impeach her credibility; is that
22 correct?

23 A. As far as her past crimes.

24 Q. Didn't she testify that she was guilty of running a
25 crack house during her direct examination?

Kevin Ware - Cross-examination by Mr. Whitmire

17

1 A. No. She said she was guilty of conspiracy.

2 MR. WHITMIRE: Page 119, Your Honor.

3 THE COURT: Yes, sir.

4 A. And she pled guilty to conspiracy because her
5 probation ---

6 Q. Do you recall Mr. Byrholdt impeached her
7 credibility?

8 A. Yes. Yes, he did a good job as far as that.

9 Q. So on 120 Mr. Byrholdt brings up Ms. Richardson
10 failed her blood test when she was on probation, directly
11 impeaching her credibility; is that correct?

12 A. Uh-huh (affirmative).

13 Q. Do you think Mr. Byrholdt exercised discretion not
14 bringing out all of her other convictions at that point
15 after getting those two things in?

16 A. I think it would have been relevant to the jury,
17 yes, sir.

18 Q. Did you stop Mr. Byrholdt and ask him to introduce
19 three or four other convictions she had at that point
20 during the trial? Whisper in his ear?

21 A. No, sir. I mean, I'm not a lawyer.

22 Q. But he reviewed her past history; is that correct?

23 A. No, sir.

24 Q. Nothing at all?

25 A. No.

1 Q. And did Mr. Byrholdt explain to you that your only
2 real defense was getting those drugs suppressed on a
3 defective chain of custody?

4 A. No, sir. Mr. Byrholdt told me that more than likely
5 that the drugs wouldn't be suppressed. He said the main
6 thing we probably would get would be a lesser-included
7 offense. So that's what we were actually shooting for, a
8 lesser-included offense.

9 Q. Didn't Mr. Byrholdt ask for that possession charge?

10 A. Huh?

11 Q. Didn't Mr. Byrholdt ask the judge for that
12 possession charge?

13 A. No, sir. I mean -- no, sir. He asked him for a
14 lesser-included offense, but he never quoted any facts in
15 the case.

16 Q. But you recall the judge saying that there was
17 absolutely no evidence to show that you were a user
18 using?

19 A. No, sir, I don't recall the judge saying that. I
20 mean, I never testified.

21 Q. Well, weren't you called over to that house by Ms.
22 Richardson to sell two hundred dollars worth of crack
23 cocaine to the confidential informant?

24 A. No, sir. I was called over to the house to actually
25 indulge in a sexual relationship with another female.

Kevin Ware - Cross-examination by Mr. Whitmire

19

1 Q. And selling crack was just something you were going
2 to do on the side then?

3 A. I was going to smoke some crack, yes, sir.

4 Q. But you reviewed Ms. Richardson's statements with
5 Mr. Byrholdt before trial? Did you?

6 A. No, sir.

7 Q. So Ms. Richardson was lying when she said that you
8 got upset with the confidential informant because he only
9 had a hundred dollars?

10 A. Yes, sir, she was lying.

11 Q. And you think Mr. Byrholdt did a good job of making
12 your suppression case to the jury for chain of custody?

13 A. The suppression case? I mean, I'm not arguing the
14 suppression. I mean, I'm here -- I'm arguing the lesser-
15 included offense.

16 Q. And he preserved all those objections; is that
17 correct?

18 A. As far as?

19 Q. The drugs coming in and different chain witnesses,
20 SLED, the local chemist.

21 A. Well, I mean, Ms. Williams, I think. I mean, she
22 wasn't there for the chain of custody.

23 Q. Didn't Mr. Byrholdt bring out to the jury that the
24 police had made some small technical errors throughout
25 this process?

1 A. Yes, as far as -- yeah, they had false affidavits

2 ...

3 Q. And didn't he almost win for you on that?

4 A. Like I said, Mr. Byrholdt said -- told me we

5 probably wouldn't get the drugs suppressed. He said we

6 were shooting for the lesser-included offense. And

7 that's exactly what happened. I mean, the judge denied

8 the suppression.

9 Q. And he made an argument to the judge; is that

10 correct?

11 A. As far as?

12 Q. The lesser-included offense and chain of custody.

13 A. He only requested it. He didn't use any facts or

14 principles of the law in the request to support that.

15 Q. Do you recall reviewing your right to testify with

16 the judge?

17 A. Yes, sir.

18 MR. WHITMIRE: On page 153, Your Honor.

19 Q. Didn't the judge give you additional time to talk to

20 Mr. Byrholdt?

21 A. Yes, sir.

22 Q. And you told the judge that you were not coerced,

23 that you were voluntarily waiving your right to testify;

24 is that correct?

25 A. Under counsel's advice, yes, sir.

Kevin Ware - Cross-examination by Mr. Whitmire

21

1 Q. And you have a prior drug -- you had a prior
2 conviction that was probably going to be in play; is that
3 correct?

4 A. Yes, sir.

5 Q. And didn't Mr. Byrholdt discuss all the positives
6 and negatives with you testifying?

7 A. Yes, sir.

8 Q. And you made that decision on your own; is that
9 correct?

10 A. Under counsel's advice, yes, sir.

11 Q. And you didn't tell the judge that you had any
12 concerns during that four- or five-page colloquy?

13 A. Any concerns as far as?

14 Q. About your right to testify?

15 A. No, sir.

16 MR. WHITMIRE: No further questions, Your
17 Honor.

18 THE COURT: Any redirect?

19 MR. WELBORN: No, Your Honor.

20 THE COURT: All right. Thank you, sir. You
21 may step down.

22 All right. Mr. Welborn, will you call your next
23 witness, please?

24 MR. WELBORN: I call Mr. Byrholdt.

25 (WHEREUPON, the witness was duly sworn.)

1 MR. WELBORN: May it please the Court?

2 THE COURT: Yes, sir.

3 BRUCE BYRHOLDT,

4 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

5 DIRECT EXAMINATION

6 BY MR. WELBORN:

7 Q. Mr. Byrholdt, isn't it a fact that you did not
8 research lesser-included offenses in this case?

9 A. No. I asked for a lesser-included. The only
10 lesser-included would have been, you know, simple
11 possession. The problem with that is we had more than a
12 gram of crack cocaine. There's a statutory presumption
13 anything above a gram is possession with intent to
14 distribute.

15 Q. And isn't it a fact you didn't investigate this case
16 or the law very thorough?

17 A. Well, I think I did a good job on this case. It was
18 a tough case. The problem we had is Mr. Ware had a prior
19 drug conviction. He wanted to testify that he was there
20 to get high. That would have been fine except for the
21 prior drug conviction. When you put the drugs and a
22 prior conviction on top, I didn't think we had any
23 chance. So we, you know, did the best we could and
24 argued it. I thought there was a good issue to go up on
25 appeal on the chain of custody because they had mixed a

Bruce Byrholdt - Direct Examination by Mr. Welborn

23

1 couple of bags of drugs together, and there was one of
2 the people missing from the chain. And I preserved those
3 issues, filed those appeals and sent that material down
4 to Appellate Defense.

5 Q. Isn't it a fact you didn't call Ms. Richardson who
6 was this person we talked about a moment ago? You didn't
7 call her to the stand and impeach her, did you?

8 A. She testified. I impeached her. When she said she
9 didn't use drugs, I thought the best thing to have was
10 that she had just recently had her probation revoked for
11 failing a drug test. She had a long record of
12 shopliftings, you know, misdemeanors. A lot of them were
13 very old. We argued about her prior record, and you
14 know, I was concerned if I opened the door, I might get
15 stuck with something I didn't want in there. And I
16 thought she had no credibility after she testified.

17 The thing that hurt Mr. Ware is the officer
18 testified that he was hit in the chest with a bag of
19 crack cocaine. They have photographs from the scene of
20 the bag of crack cocaine laying on the floor and Mr. Ware
21 and others that were there photographed at that time.
22 It's kind of hard to get around the fact when you have
23 witnesses saying that they saw -- either saw him throw
24 something and another officer saying he was hit in the
25 chest with a bag of crack cocaine that they had put in

1 evidence.

2 Q. Isn't it a fact that my client wanted to testify and
3 you wouldn't let him do that?

4 A. No. I told him he had an absolute right to testify.
5 But I told him that drug conviction was going to come in.
6 And if you're sitting in a jury and you hear somebody's
7 charged with selling drugs and got a prior conviction for
8 P.W.I.D. or trafficking, I don't think the jury's going
9 to have any sympathy at all.

10 And I think, you know, his best case was the fact
11 that the evidence was, in my opinion, mishandled. And
12 Ms. Richardson had no credibility. The confidential
13 informant did not testify at trial. They brought -- they
14 gave her the attempted sale.

15 And then, like I said, the jury stayed out a long
16 time. As far as that Allen charge goes, I hate that
17 charge. The courts are required by our Supreme Court to
18 at least make that charge before declaring a mistrial.

19 Q. Thank you. Answer anything opposing counsel may
20 have.

21 CROSS-EXAMINATION

22 BY MR. WHITMIRE:

23 Q. Just one question.

24 A. Yes, sir.

25 Q. Did you have a legal basis at all to question the

Bruce Byrholdt - Cross-examination by Mr. Whitmire

25

1 Allen charge or object to it?

2 A. None whatsoever.

3 Q. No further questions. Thank you, Mr. Byrholdt.

4 MR. WELBORN: Nothing further.

5 THE COURT: May he be excused?

6 MR. WELBORN: Yes, sir.

7 MR. WHITMIRE: Absolutely, Your Honor.

8 THE COURT: Thank you, sir.

9 THE WITNESS: Thank you, Your Honor.

10 THE COURT: All right. Any further witnesses?

11 MR. WELBORN: No, sir.

12 THE COURT: Any testimony from the State?

13 MR. WHITMIRE: The State rests. We'll be happy
14 to hear anything you'd like for me to say.

15 THE COURT: All right. Let me -- okay. As to
16 the failure to investigate, which I heard Mr. Ware say
17 repeatedly involved the lesser-included charge, the
18 record reflects that that was requested by Mr. Byrholdt.
19 There not being any evidence in the record to support
20 that charge, the judge, probably correctly, disallowed
21 it. But that would seem to me to be a matter of direct
22 appeal of law that the court should have charged the
23 lesser-included, but not on a P.C.R. because all the
24 lawyer can do is ask for it.

25 MR. WHITMIRE: Your Honor, it was a substantive

1 issue on appeal, whether in fact the chain of custody
2 could possibly warrant a lesser-included when there's no
3 evidence of it.

4 THE COURT: So I'm denying the motion on that
5 which would include his claim of failure to investigate
6 and failure to ask for lesser-included. The failure to
7 object to the Allen charge is manifestly without merit.
8 That is the law in this State, and I would suspect that
9 most defense lawyers don't want to hear it like Mr.
10 Byrholdt doesn't.

11 As to the captain's perjury, failure to challenge
12 the captain's perjured testimony, there's no evidence on
13 that in the hearing. And it's furthermore manifestly
14 without merit.

15 As to failure to call witnesses on his behalf, the
16 burden is always on the applicant, Mr. Ware. And it's
17 not enough for you just to say, you didn't call these
18 witnesses. You have to have them here or present some
19 testimony as to what they would have shown to show that
20 at the end of the day the likelihood of the result would
21 have been different. So without having any evidence to
22 that regard, that claim is denied as well.

23 And furthermore, the witnesses, as to being
24 yourself, the record shows at page 153 that you were read
25 and given the opportunity to exercise your rights under

1 the Fifth Amendment or to testify. That is a personal
2 decision as you were charged. You made that call. So
3 that claim that you were not called as a witness is just
4 manifestly without merit.

5 With that being said, I don't think there's any
6 other witness -- issues in this hearing that I haven't
7 addressed.

8 MR. WHITMIRE: None, Your Honor.

9 THE COURT: I'm going to deny the petition in
10 its total and ask that you draw me an order. Give it to
11 Mr. Welborn before you give it to me, okay?

12 MR. WHITMIRE: Thank you, Your Honor.

13 THE COURT: Thank you, Mr. Welborn, Mr.
14 Whitmire.

15 (WHEREUPON, the hearing ended at approximately 11:52
16 a.m.)

17 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

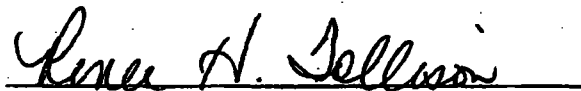
1 CERTIFICATE OF REPORTER

2 I, the undersigned Renee H. Tollison, Official Court
3 Reporter for the Tenth Judicial Circuit of the State of
4 South Carolina, do hereby certify that the foregoing is a
5 true, accurate, and complete transcript of record of all
6 the proceedings had and evidence introduced in the
7 trial/hearing of the captioned case, relative to appeal,
8 in the Circuit Court for Anderson County, South Carolina,
9 on the 18th day of September 2013.

10 This transcript may contain quoted material. Such
11 material is reproduced as read by the speaker.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.

14 April 30, 2014

15 
16 _____

17 Circuit Court Reporter

FILED - CLERK'S OFFICE
 STATE OF SOUTH CAROLINA ANDERSON) IN THE COURT OF COMMON PLEAS
) FOR THE TENTH JUDICIAL CIRCUIT
 COUNTY OF ANDERSON 2014 FEB 26 A 9:51

Kevin Ware,
 S.C.D.C. No. #269271

COMMON PLEAS AND
 GENERAL SESSIONS

) Case No. 2012-CP-04-3434

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

A TRUE COPY

FEB 26 2014

Richard X. Kiley
 CLERK OF COURT

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed October 30, 2012. Respondent made its Return. An evidentiary hearing into the matter was convened on September 18, 2013 at the Anderson County Courthouse. Applicant was present and was represented by Hugh W. Welborn, Esq. Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General. Applicant and trial counsel testified at the hearing.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. Applicant was indicted at the March 2007 term of the Court of General Sessions for Anderson County for possession of crack cocaine with intent to distribute within proximity of a park (2007-GS-04-972) and possession of crack cocaine with intent to distribute (2007-GS-04-971). He was represented by Bruce Byrholdt, Esquire. On January 9, 2009, Applicant pled guilty as indicted. He was sentenced by the Honorable J.C. Nicholson, Jr., to confinement for a period of ten (10) years of incarceration for possession of crack cocaine with intent to distribute within proximity of a park

(2007-GS-04-972) and ten (10) years of incarceration for possession of crack cocaine with intent to distribute (2007-GS-04-971), with all sentences running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The Applicant was represented by LaNelle Durant, Esquire on direct appeal. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Ware, Kevin M., Op. No. 2011-UP-273 (S.C. Ct. App. filed June 8, 2011). Applicant also filed a petition for writ of certiorari with the South Carolina Supreme Court. The Supreme Court denied certiorari on September 20, 2012. Applicant proceeded on the following allegations at his PCR hearing:

1. Ineffective Assistance of Counsel
 - a) failure to advise Applicant on his right to testify;
 - b) failure to investigate a defense of merely possession for personal use;
 - c) failure to properly cross-examine State witnesses;
 - d) failure to request a jury charge on possession of narcotics;
 - e) failure to object to trial judge's charge during deliberations.

SUMMARY OF TESTIMONY

Applicant testified counsel was ineffective for failing to investigate allegedly contaminated evidence. He elaborated that as a result of the inclusion of two different narcotics samples in a single evidence kit, counsel should have requested a charge on the lesser-included offense of possession. Applicant stated that counsel was deficient for not investigating material facts or principles of law. His version of the facts that led to his arrest and conviction was that he solely possessed the narcotics for personal use. He claimed counsel never advised him that was a viable defense. Applicant did testify that counsel reviewed the State's evidence and possible suppression defenses.

Applicant alleged counsel was ineffective for failing to conduct a proper cross-examination of Virginia Richardson. He contended counsel should not have held back in

impeaching Richardson with all of her prior convictions. Applicant surmised that this would have been relevant to the jury. Applicant alleged counsel was ineffective for failing to object to Captain Marsee's perjured testimony. He alluded to the trial judge suppressing a distribution charge that was not properly transcribed into the record.

Applicant alleged counsel was ineffective for failing to present witnesses on his behalf at trial. He testified counsel discussed the benefits and detriments of testifying on his own behalf with him. It is contention that counsel warned him that his prior convictions would come out of cross-examination. Applicant claimed that counsel's advice on the matter primarily influenced his decision not to testify. He now wishes he did testify and explain to the jury that the narcotics were for personal use.

Last, Applicant testified counsel was ineffective for not objecting to the trial judge's instruction to the jury when the deliberations stalled. He stated that five hours into deliberations, he felt like the trial judge's comments pressured the jury to return a guilty verdict.

At the PCR hearing, counsel testified to his course of conduct during the representation. Counsel believed he did a good job in the case. Counsel discussed Applicant's version of the facts with him. Counsel explained to Applicant version that he was "just a user" would be contradicted at trial by his past record. Counsel explained to him that it would not only hurt his credibility, but that it would further taint his image to the jury. Counsel was adamant that Applicant made the ultimate decision to not testify. He recalled the trial judge's colloquy on the matter. Counsel noted the one weakness in the State's case lied in evidence collection. Counsel formulated a motion to suppress on chain of custody and properly preserved his argument when trial denied his motion. Further, counsel formulated a trial strategy to diminish the weight of the evidence by exacerbating the minor mishandling from the evidence custodians. Furthermore, the

trial judge granted his motion to dismiss the conspiracy charge. Counsel found Richardson's testimony insignificant to the State's case in light of the numerous officers that witnessed Applicant throw the bag of narcotics at one of their comrades. His cross-examination was tempered with the fact that Richardson maintained no credibility. He was primarily concerned with opening the door to harmful testimony to his case. Counsel noted that he did request a lesser-included charge of possession but recognized the trial judge's ruling was correct. He stated that the possession charge was not applicable to the facts of the case. Last, counsel testified to the extended jury deliberations. He testified that the trial judge correctly charged Allen¹ at the appropriate juncture.

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

¹ Allen v. United States, 164 U.S. 492, 494, 17 S. Ct. 154, 41 L. Ed. 528 (1896)

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, supra. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As a matter of general impression, this Court finds counsel's representation here exemplary. He faced great odds at trial in light of the State's overwhelming evidence of Applicant's guilt, yet was able to turn a small defect that only went to the weight of the evidence into a near acquittal. This Court finds counsel's testimony credible and Applicant's testimony not credible. Counsel made appropriate and timely objections expected from a seasoned criminal defense lawyer.

A.

This Court finds Applicant failed to meet his burden to prove counsel was ineffective in the advising him on his right to testify. "An on-the-record waiver of a constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that right." Brown v. State, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994). "The same principles apply to the lack of a knowing and intelligent waiver of the defendant's right to testify at trial." Brown v. State, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994). "The Fifth Amendment provides that [n]o person ... shall be compelled in any criminal case to be a witness against himself. U.S. Const. Amend. V. The decision to testify or not is a perilous one. If a defendant

does not testify, he foregoes the opportunity to tell the jury his version of events. On the other hand, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions. Rule 609, SCRE. If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner during its deliberations. Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (internal quotations omitted). Here, this Court finds counsel adequately advised Applicant on his fundamental constitutional rights at issue. In addition, the trial judge entered a thorough colloquy on the matter where Applicant. Applicant knowingly, intelligently, and voluntarily made the ultimate decision not to testify.

This Court finds Applicant's contention that he was allegedly prejudice from counsel's advice here because had he testified, he would have been acquitted for PWID to be without merit. Applicant's testimony that he possessed the narcotics at the time of arrest solely for personal use was unpersuasive. The record shows he possessed a sufficient amount of narcotics necessitated to trigger the legal inference for PWID. Furthermore, he did not possess the narcotics paraphilia that is commonly associated with crack-cocaine consumption. Neither did a single witness testify that he was a mere user. In contrast, this Court agrees with counsel that the introduction of Applicant's prior convictions paints a much different picture. In addition this Court finds the allegation that counsel was ineffective for failing to investigate to support his claim that he was just a user where it is only supported by mere speculation. Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). Therefore, these allegations are denied and dismissed.

B.

This Court finds Applicant failed to meet his burden to prove counsel was ineffective for not impeaching Virginia Richardson on all of her admissible prior convictions during his cross-examination. "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). "The Confrontation Clause "guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." State v. Nance, 393 S.C. 289, 294, 712 S.E.2d 446, 449 (2011) (citing United States v. Owens, 484 U.S. 554, 559, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988)) (emphasis supplied). Here counsel articulated valid trial strategy to limit his cross-examination where the witnesses credulity was already in doubt. Virginia Richardson had testified on direct that she was arrested and subsequently convicted for "running a crack house." This Court finds counsel's explanation that an extended focus on cumulative prior convictions yielded diminished returns to Applicant's case at best. See Huggler v. State, 360 S.C. 627, 635, 602 S.E.2d 753, 757 (2004). "[The Court found it] prudent for counsel to limit cross-examination to the issues he thought were most important, without picking apart the witnesses' testimonies based on meaningless inconsistencies."). Instead the record shows counsel cross-examined Applicant on her inconsistent testimony concerning her drug use along and established a defense theory regarding her motive to testify against Applicant. Not only did counsel cross-examine Richardson on her beneficial plea deal, he also questioned a police officer on the matter. This Court finds counsel's strategy was deliberate and well executed. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for

employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.”). Any possible harm to Applicant here was speculative at best. See Drayton v. Evatt, 312 S.C. 4, 12, 430 S.E.2d 517, 522 (1993) (“[Counsel’s trial strategy on cross-examination] proves only that trial counsel was ineffective in the sense that all criminal defense lawyers whose clients are found guilty are ineffective. That any more argument or different contentions might possibly have altered this result would be sheer speculation.”). Last this Court finds Applicant’s allegation that counsel did not object to Captain Marsee’s alleged perjured testimony to be without merit and utterly unfounded. Therefore, these allegations are denied and dismissed.

C.

This Court finds Applicant’s allegation that counsel was ineffective for not objecting to the trial judge’s Allen charge to be without merit. This Court agrees with counsel that the charge was proper. “The typical judicial mechanism for encouraging an indecisive jury is the *Allen* charge, in which jurors are instructed on, among other things, their duties to approach the evidence with an open mind and consider the opinions of their fellow jurors.” State v. Robinson, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct.App.2004). “In South Carolina state courts, an *Allen* charge cannot be directed to the minority voters on the jury panel. Instead, an *Allen* charge should be even-handed, directing both the majority and the minority to consider the other’s views. A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. It is not coercion to charge every juror has a right to his own opinion and need not give up the opinion merely to reach a verdict. State v. Williams, 386 S.C. 503, 512, 690 S.E.2d 62, 66 (2010) (Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002)). Here, the trial judge’s charge was not directed towards a minority juror or even remotely coercive. See Tucker v. Catoe, 346 S.C. 483, 485, 552

S.E.2d 712, 713 (2001). Simply, a defense is under no duty to make an objection for the sake of making an objection. Therefore this allegation is denied and dismissed.

D.

Last this Court summarily dismisses Applicant's allegation that counsel was ineffective for not requesting a jury instruction to on the lesser-included offense of narcotics possession. Counsel requested the charge. See Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975), errors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings. Therefore, this allegation is denied and dismissed.

E.

Except as discussed above, this Court finds that the Applicant affirmatively abandoned the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BML, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

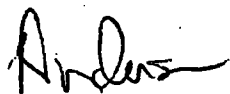
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 28 day of Feb, 2014.


R. LAWTON MCINTOSH
Presiding Judge
Tenth Judicial Circuit



South Carolina

FILED-CLERK'S OFFICE
ANDERSON SC
2014 FEB 26 A 9:51
JUDICIAL SESSIONS

WITNESSES
CULBERTSON - APD

DOCKET NO. 2007-GS-04-971

The State of South Carolina,

County of _____

COURT OF GENERAL SESSIONS

MAR 20 2007 TERM _____

MSM THE STATE

KEVIN M. WARE

1715781

ARREST WARRANT NO. _____

ACTION OF GRAND JURY

TRUE BILL

MAR 20 2007

Foreman of Grand Jury

[Signature]
Foreperson

VERDICT

Guilty

James Pace Jr.

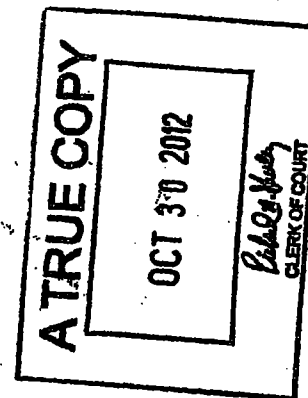
Foreman of Petit Jury

Date: 1/9/09

Indictment for

POSSESSION OF CRACK COCAINE
WITH INTENT TO DISTRIBUTE

44-53-0375 (B)(1) [3015]



[Stamp]

01/09/09 - cmp

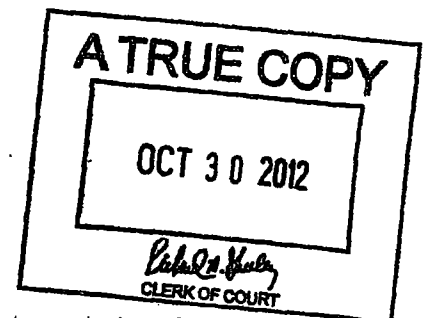
STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

INDICTMENT FOR
POSSESSION OF CRACK COCAINE
WITH INTENT TO DISTRIBUTE
44-53-0375(B)(1)[3015]

At a Court of General Sessions, convened on MAR 20 2007
the Grand Jurors of ANDERSON County present upon their oath:

POSSESSION OF CRACK COCAINE WITH INTENT TO DISTRIBUTE

THAT KEVIN M. WARE DID IN ANDERSON COUNTY ON OR ABOUT JANUARY 15, 2007
POSSESS WITH INTENT TO DISTRIBUTE A QUANTITY OF CRACK COCAINE, A CONTROLLED
SUBSTANCE UNDER PROVISIONS OF 44-53-110, *et seq.* Code of Laws of South Carolina (1976), AS
AMENDED; SUCH POSSESSION NOT HAVING BEEN AUTHORIZED BY LAW.



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


SOLICITOR

WITNESSES
CULBERTSON - APD

DOCKET NO. 2007-GS-04-972

The State of South Carolina,

County of _____

COURT OF GENERAL SESSIONS

MAR 20 2007 TERM _____

MSM THE STATE
KEVIN M. WARE

ARREST WARRANT NO. _____

ACTION OF GRAND JURY

TRUE BILL

MAR 20 2007

Foreman of Grand Jury _____

Foreperson _____

VERDICT

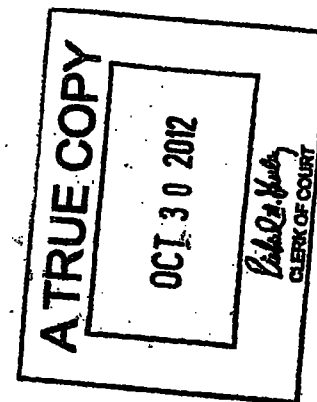
Guilty
James Ware Jr.

Foreman of Petit Jury _____

Date: 11/9/09

Indictment for

POSSESSION OF CRACK COCAINE
WITH INTENT TO DISTRIBUTE
WITHIN PROXIMITY OF A PARK
44-53-0445 (B)(2) [0108]



01/09/09-cmp

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

INDICTMENT FOR
POSSESSION OF CRACK COCAINE
WITH INTENT TO DISTRIBUTE WITHIN
PROXIMITY OF A PARK

44-53-0445(B)(2)[0108]

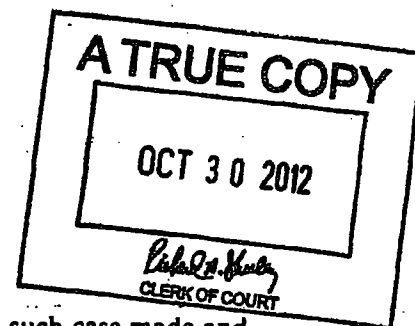
At a Court of General Sessions, convened on MAR 20 2007

the Grand Jurors of ANDERSON County present upon their oath:

POSSESSION OF CRACK COCAINE WITH INTENT TO DISTRIBUTE

WITHIN PROXIMITY OF A PARK

THAT KEVIN M. WARE DID IN ANDERSON COUNTY ON OR ABOUT JANUARY 15, 2007,
POSSESS WITH INTENT TO DISTRIBUTE A QUANTITY OF CRACK COCAINE, A CONTROLLED
SUBSTANCE UNDER PROVISIONS OF 44-53-110, et seq. Code of Laws of South Carolina (1976), AS
AMENDED, SUCH POSSESSION NOT HAVING BEEN AUTHORIZED BY LAW. THIS OFFENSE
OCCURRED WITHIN A ½ MILE RADIUS OF A PARK.



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


SOLICITOR