

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Abbeville County

R. Lawton McIntosh, Circuit Court Judge

2009-CP-01-00105

RECEIVED

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S.C. Supreme Court

MARSHALL MILLER, #249557,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

Appellate Case No. 2013-001076

APPENDIX

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JIMMY MADDEN - DIRECT

1 A Chip.

2 Q Okay. Anything unusual going on at that
3 time?

4 A No. He was working on a car..

5 Q How long did you stay there?

6 A That night I stayed there about probably an
7 hour, hour and a half.

8 Q All right. Any unusual odor or anything
9 there while you were there?

10 A No, sir, other than the shop.

11 Q Excuse me?

12 A Other than a shop.

13 Q Okay. Did you have occasion to come by there
14 the next day, the 24th, the day Marshall Miller was
15 arrested?

16 A Yes, sir.

17 Q Tell us about that.

18 A The guy that works for me up there, the one
19 that drives the wrecker, he called me, I was at my
20 daughter's babysitting and he told me something was
21 going on down there and I told him, I said, "Well,
22 can you all handle it?" He said, "No, we can't
23 handle it," said, "You need to come by, come down
24 here." So I went down there and I walked up and I
25 asked the officers, I said, "What's going on," and

JIMMY MADDEN - DIRECT

1 they told me they was looking for Marshall Miller.

2 Q All right. Did you know Marshall Miller?

3 A I had seen him one time down at Billy's.

4 Q That was it?

5 A Uh-huh (affirmative).

6 Q Go ahead.

7 A And I just asked him, you know, what they was
8 doing there. He said they was hunting Marshall
9 Miller, that he was there and he had run.

10 Q Uh-huh.

11 A And Chip was sitting there and he was the
12 only one over there at the shop at that time, Chip
13 was.

14 Q Uh-huh.

15 A And so I asked Chip where Billy was, he said
16 he's over at the house, so I just hung around there
17 to see what was going on.

18 Q Where did you go to hang around?

19 A I stayed right there at the shop.

20 Q Did you later go across the street?

21 A I went across the street later and then come
22 back.

23 Q And when you say you went across the street,
24 whose house was that?

25 A That's my brother's house.

JIMMY MADDEN - DIRECT

1 Q All right. And nextdoor to Billy?

2 A Uh-huh (affirmative)

3 Q All right. Did the police actually request
4 your assistance?

5 A They wanted me to open my brother's house up,
6 asked me did I have a key, they was looking for his
7 daughter.

8 Q Uh-huh.

9 A And I told them I had a key, so I told them,
10 I said, "I will run to the house and get it," but
11 the key that I had wouldn't open the door.

12 Q Okay. How long were you there that day?

13 A Well, like I say, after he, I know he had
14 called me, I come straight down there and I stayed
15 the rest of the afternoon; you know, until they was
16 gone.

17 Q Was there some difficulty moving the trailer?

18 A Yes.

19 Q What was that problem?

20 A They had the wrong receiver in the truck they
21 was going to pull it with and I had to go back to
22 the house and get a two inch receiver so he could
23 pull it, two and five-sixteenths, excuse me.

24 Q What happened when you came back with that,
25 basically a ball for a trailer?

JIMMY MADDEN - DIRECT

1 A Yes, sir.

2 Q And how was this connected to the truck?

3 A He had to slide that receiver out, slide the
4 other one in, put a pin in it.

5 Q Okay. As you came back to the trailer with
6 that receiver did you notice anything about the
7 trailer?

8 A I parked in my mother-in-law's yard and
9 walked --

10 Q That's nextdoor neighbor?

11 A Nextdoor.

12 Q How far away is that?

13 A Just stepping distance, probably not to
14 farther from than from here back to that wall.

15 Q Okay.

16 A As I was walking down through there I
17 happened to notice something on top of the trailer.

18 Q Uh-huh.

19 A So, when I got down there they said that they
20 going to move that trailer. I said, "What you
21 going to do with that that's up on top of the
22 trailer?" They said, "What's up there?" I said,
23 "I don't know, there is something up there." So
24 they climbed up there and got it off.

25 Q Was that the, does this look like what they

JIMMY MADDEN - DIRECT

1 found on top of the trailer, State's Exhibit 39?

2 A Yes, sir.

3 Q Okay. Did you go in the garage that day?

4 A Yes, sir.

5 Q All right. And walk through it?

6 A Yes, sir.

7 Q Did you notice anything unusual in it?

8 A No, sir.

9 Q Did you notice any unusual odors or anything?

10 A No, sir.

11 Q When you would go by the garage during the
12 week or on weekends would you knock on the door
13 before you went in?

14 A No, sir.

15 Q How would you get in?

16 A Like I say, just slide the doors back and if
17 Billy had those doors locked and he was working I
18 would always go around to the back and go in.

19 Q Did you have a key to the garage?

20 A No, sir, not at that time. He had a
21 different lock on there.

22 Q But the back door was usually unlocked?

23 A Yes, sir. There never was a door locked if
24 he was there, if I wanted to get in.

25 Q Did you ever have any trouble getting in when

JIMMY MADDEN - DIRECT

1 he was there?

2 A No, sir.

3 MR. WISE: Thank you. Answer any questions
4 the State may have.

5 THE COURT: Cross-examination, Mr. Hood?

6 MR. HOOD: Thank you, Your Honor.

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JIMMY MADDEN - CROSS

1 CROSS EXAMINATION

2 QUESTIONS BY MR. HOOD:

3 Q Mr. Madden, we have never met before, have
4 we?

5 A No, sir.

6 Q Have you met anybody at the State's table
7 before?

8 A I have seen that lady that's sitting there.

9 Q Special Agent Sonnefeld?

10 A I have seen her but never met her.

11 Q She was there that day, wasn't she?

12 A Right.

13 Q Let me get this straight. Billy Moore,
14 essentially he's your nephew, right?

15 A Yes, sir.

16 Q And you have known him since he was a little
17 kid, isn't that right?

18 A Right.

19 Q And you love Billy Moore like the nephew he
20 is, don't you?

21 A Yes, sir.

22 Q He's family?

23 A Yes, sir.

24 Q And you take care of your family, don't you?

25 A I try to.

JIMMY MADDEN - CROSS

1 Q You provide for your family?

2 A Yes, sir.

3 Q You make sure that everybody is taken care
4 of, is that right?

5 A Yes, sir.

6 Q As you should?

7 A Right.

8 Q Let me ask you a question. This defense
9 Exhibit Number 1 right here, can everyone see?
10 Now, you said, and you correct me if I'm wrong,
11 okay, that is essentially where your house is, is
12 that right?

13 A That's what it looks like.

14 Q And it's somewhere in that area?

15 A Yes, sir.

16 Q It may not be on that map but that's
17 essentially where it is, is that right?

18 A Yes.

19 Q The shop is right down in here?

20 A Yes.

21 Q Is that right?

22 A Yes.

23 Q Who owns all this land around here?

24 A I own this over here.

25 Q Do you own all this land?

JIMMY MADDEN - CROSS

1 A I own eighty something acres right there.

2 Q And does anybody live in this area right here
3 where the shop is except for members of your family
4 or your extended family?

5 A No, sir.

6 Q And tell me who all lives in this area, if
7 you could name every person that lives right down
8 in this area?

9 A This house beside my house is empty, it's a
10 two story house, it belongs to Mr. Hicks. I live
11 in this house.

12 Q The gentleman you just mentioned, he doesn't
13 live there?

14 A No, sir, but he does go by there, he checks
15 on his cows and stuff, he lives right up the road
16 there in another house.

17 Across the road right here in this area,
18 that's what I was looking at, that is where they
19 used to pile some gravel, that's the reason I
20 noticed this, and my brother lives in a trailer
21 right here, and Billy lived right beside him in a
22 trailer.

23 Q Where is the shop?

24 A The shop is across the road.

25 Q You felt comfortable enough just to walk in

JIMMY MADDEN - CROSS

1 there whenever you wanted to, it was your shop, you
2 owned it?

3 A Right.

4 Q Is that right?

5 A Yes, sir.

6 Q You felt comfortable, you knew Billy well
7 enough, you were close enough friends and family
8 just to walk in there?

9 A Right.

10 Q It wasn't an issue?

11 A No, sir.

12 Q Just like if you go over to your sister's
13 house or your mother's house, you just walk in you
14 don't knock on the door, is that right?

15 A Uh-huh (affirmative)

16 Q You said you went over there about every
17 night, is that your testimony?

18 A Yes, sir.

19 Q And how late would you stay over there?

20 A Just different times. Sometimes I might not
21 stay but twenty minutes, sometimes I might stay an
22 hour or two.

23 Q Did you ever stay past midnight?

24 A Well, like I say, we run a wrecker service
25 and I have come back through there 1:00 o'clock in

JIMMY MADDEN - CROSS

1 the morning, 2:00 o'clock in the morning, what not.

2 Q Do you stop in and say hi to Billy?

3 A Stop in to see what they were doing.

4 Q Kind of check up on them?

5 A Yes.

6 Q Making sure everything was okay?

7 A Yes.

8 Q Being a normal family man, your family is
9 important to you?

10 A Yes.

11 Q That night in question, what I want to talk
12 about is the night before all this stuff happened,
13 I think according to your testimony you left about
14 10:00 o'clock, is that right?

15 A Yes.

16 Q You said you stayed about an hour, hour and a
17 half, you got there about 8:30, probably 10:00 is a
18 fair estimate?

19 A Right.

20 Q So, what happened there between 10:00 p.m.
21 and when you got there the next day, I mean, do you
22 know?

23 A Nothing but they was looking for Marshall
24 Miller.

25 Q I mean from 10:00 at night when you left,

JIMMY MADDEN - CROSS

1 until this next day when, I think you said you have
2 a worker that called you and said, "Hey, something
3 is going on down here, you need to get down here"?

4 A Right.

5 Q What happened between then and when your
6 worker called you?

7 A If I'm not there I can't tell you but I do
8 look out the window occasionally.

9 Q What?

10 A Look out the window.

11 Q Can you see that shop?

12 A I can see that shop.

13 Q I'm not good with distances. Can you see
14 that shop?

15 A I can see the shop.

16 Q Were the lights on?

17 A Yes, sir.

18 Q Were they likely to stay up all night long
19 and work on go-carts?

20 A Yes, sir.

21 A Would they stay up all night long and work on
22 go-carts?

23 Q A lot of nights? Two nights a week?

24 A The thing of it is, the reason he would do
25 that --

JIMMY MADDEN - CROSS

1 Q I will let you explain in just a second, just
2 tell me, give me an approximation.

3 A Oh, yes, sometimes three, four nights a week.

4 Q And if you know why he would do it, you go
5 ahead and tell us.

6 A You see, we try to work on cars during the
7 day to pay bills, you know, you got to have an
8 income.

9 Q That's exactly right.

10 A When you got customers coming in all during
11 the day sometimes you can't get nothing done,
12 that's what happens to me, and I have to work late
13 at night because if you don't make any money you
14 can't pay your bills.

15 Q Do you sometimes work all night long?

16 A When I was younger I did. Now I'm not able
17 to.

18 Q And why aren't you able to?

19 A Just getting older. I'm 55 and got to go to
20 sleep, 8:00 o'clock, what not, I'm tired, I got to
21 go to bed.

22 Q You're a mechanic, working with your hands,
23 working on cars, working on go-carts, I mean,
24 you're not sitting behind a desk pushing paper, is
25 it?

JIMMY MADDEN - CROSS

- 1 A No, sir.
- 2 Q It's physical labor?
- 3 A Yes, sir.
- 4 Q You're in there, your hands are dirty, you've
5 got tools all over the place, you are operating big
6 machines, I mean?
- 7 A Uh-huh (affirmative)
- 8 Q You can't, it's not for somebody that's used
9 to sitting behind a desk all day, is it?
- 10 A No, sir.
- 11 Q It's physical labor?
- 12 A Yes, sir.
- 13 Q Tiring, isn't it?
- 14 A Sure is.
- 15 Q Do you remember where you said earlier, you
16 testified, Mr. Wise asked you about this, "When you
17 came over there, 8:30 to 10:00, do you remember
18 what vehicles were there?" It's okay if you don't,
19 I'm curious.
- 20 A I believe the red Pontiac Grand Am was there.
21 Billy's vehicle was the only other vehicle there,
22 that I can remember.
- 23 Q You said earlier you had met Marshall before,
24 is that right?
- 25 A Yes.

JIMMY MADDEN - CROSS

1 Q Where did you meet him at?

2 A Well, I had seen him there and I also seen
3 him over at another boy's garage.

4 Q Do you know where that was?

5 A It was in Hodges.

6 Q Do you that what his name was?

7 A George Jones.

8 Q And how close is Hodges to where you live?

9 A About five minutes.

10 Q Not too far?

11 A No.

12 MR. HOOD: Beg the Court's indulgence, Your
13 Honor.

14 THE COURT: Take your time.

15 Q Mr. Madden, have you been a mechanic all your
16 life?

17 A Just about. I have worked in textiles, too.

18 Q Have you ever been involved in the
19 manufacturing of methamphetamine?

20 A No, sir. I hate drugs.

21 Q Do you know what it takes to go into making
22 methamphetamine?

23 A I don't know anything about it.

24 Q You haven't been here all week during the
25 trial, this week, last week, is that right?

JIMMY MADDEN - CROSS

1 A Uh-huh (affirmative)

2 Q So, you're not sure what has been testified
3 to?

4 A No, sir.

5 Q Sitting in the same exact seat you have?

6 A Right.

7 Q So, even if you saw the things associated
8 with methamphetamine manufacturing, would you know
9 what they were?

10 A No, sir.

11 Q Would you know when you're looking at Sudafed
12 pills that that goes into making meth?

13 A I would know that was Sudafed pills, that's
14 about it.

15 Q You would make the assumption it's for a
16 common cold?

17 A Right.

18 MR. HOOD: No further questions, Your Honor.

19 THE COURT: Mr. Varner?
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JIMMY MADDEN - CROSS

CROSS EXAMINATION

QUESTIONS BY MR. VARNER:

Q All right, Mr. Madden, since you have worked in a shop all your life, you know basically what's going to be in a shop?

A Yes, sir.

Q Did you at any point in time see anything in Billy's shop that struck a cord to you as being weird or didn't belong there or why was it there?

A No, sir.

Q Anything there whatsoever that was out of the ordinary or made you kind of perk up or pay attention?

A Not that I can think of.

Q Okay. This question about 10:00 o'clock at night until 10:00 o'clock the next morning, you weren't there, so therefore you didn't know what was going on, right?

A No, sir.

Q Well, do you know what SLED agents were there so they would, quote, quote, know what was going on?

A No, sir.

Q So, if you weren't there to see it happen, then, or you don't have it on video, you don't know

JIMMY MADDEN - CROSS

1 whether it happened or not, then, do you?

2 A No, sir.

3 MR. HOOD: Objection, Your Honor.

4 THE COURT: Grounds?

5 MR. HOOD: The form of the question, Your
6 Honor, he can't speculate as to what he would know
7 and what he wouldn't know.

8 MR. VARNER: Your Honor, that's a direct
9 response to the question he asked.

10 THE COURT: It's overruled.

11 MR. HOOD: Thank you, Your Honor.

12 BY MR. VARNER:

13 Q You were talking about taking care of your
14 family, and by that, you mean more than just your
15 wife or your children, that means your whole
16 family, your extended family?

17 A Yes, sir.

18 Q Part of taking care of your family is making
19 sure that they all do the right thing, isn't it?

20 A Yes, sir.

21 Q Part of it is teaching them to tell the
22 truth?

23 A Yes, sir.

24 Q Part of it is keeping an eye on them to make
25 sure they don't get in trouble or don't make

JIMMY MADDEN - CROSS

1 mistakes with their lives?

2 A Yes, sir.

3 Q And you did that?

4 A Right.

5 Q And at any point in time have you seen at
6 that shop anything going on that concerned you, as
7 being part of that family?

8 A No, sir.

9 Q All right, sir. You have lived in this area
10 all your life, correct?

11 A Yes.

12 Q I'm not asking you how well you know these
13 people -- well, as a matter of fact I will. You
14 have just seen Marshall Miller, correct?

15 A Yes, sir.

16 Q Did you know who Tina Stevenson was?

17 A No, sir.

18 Q How about Julie Prince, have you ever heard
19 of her?

20 A I towed a car for her.

21 Q Okay. And Martha Ellis?

22 A Never heard of her.

23 Q David Cumming?

24 A No, sir.

25 Q Tony Howard?

JIMMY MADDEN - CROSS

- 1 A No, sir.
- 2 Q Sandra Jo Hughes?
- 3 A No, sir.
- 4 Q Jason Davis?
- 5 A No, sir.
- 6 Q Ernest Covan, you said you have known him?
- 7 A I know him.
- 8 Q About all his life?
- 9 A Yes.
- 10 Q Bonnie Saylors?
- 11 A No, sir.
- 12 Q Ashley Bannister?
- 13 A No, sir.
- 14 Q Scottie Prince?
- 15 A No, sir.
- 16 Q Tonya Lee Michelle Madden?
- 17 A That's my niece.
- 18 Q That's your brother's daughter, correct?
- 19 A Yes, sir.
- 20 Q Were you aware and did you know she had had a
- 21 drug problem?
- 22 A Yes, sir. I had to pay her out a couple
- 23 times.
- 24 Q Okay. And you also knew she was working as a
- 25 stripper?

JIMMY MADDEN - CROSS

1 A No, sir, I didn't know that.

2 Q You didn't know that, okay. Do you know
3 whether or not she was ever dating or seeing
4 Marshall Miller at anytime?

5 A No, sir.

6 Q Okay. But you're aware Michelle was having
7 problems with her life?

8 A Yes.

9 Q All right. Sammy McNeil?

10 A Never heard of him.

11 Q Tracy Davis?

12 A No, sir.

13 Q Jeff Horne?

14 A I know Jeff, I have worked with Jeff at one
15 time.

16 Q How about Jeff Frye?

17 A No, sir.

18 Q How about Ray Powell or Little Ray?

19 A No, sir.

20 MR. VARNER: That's all the questions I have.

21 THE COURT: Anything on redirect?

22 MR. WISE: Nothing on redirect.

23 THE COURT: Thank you. Come down, please,
24 sir.

25 (Witness excused).

JIMMY MADDEN - CROSS

1 THE COURT: Any objection to this witness
2 being excused?

3 MR. WISE: No, sir. Of course he can remain
4 in the courtroom.

5 MR. HOOD: No objection, Your Honor.

6 MR. VARNER: No objection.

7 MR. WISE: Wayne Hughes.

8 THE COURT: Mr. Witness, you may stay with us
9 if you wish, or leave the building if you wish.

10 The name you called is what?

11 MR. WISE: Wayne Hughes.

12 THE COURT: Mr. Hughes.
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WAYNE HUGHES - DIRECT

1 WAYNE HUGHES,
2 after being first duly sworn testified as follows:

3 THE CLERK: Have a seat and state your full
4 name for the record.

5 THE WITNESS: Wayne Hughes.

6 THE CLERK: State your name, Mr. Hughes.

7 THE WITNESS: Wayne Hughes.

8 DIRECT EXAMINATION

9 QUESTIONS BY MR. WISE:

10 Q Mr. Hughes, where do you live?

11 A Greenwood.

12 Q Are you married?

13 A Yes, sir.

14 Q Do you have a daughter named --

15 A I have two daughters, one Christy and one
16 Stacy.

17 Q All right. And you have a daughter married
18 to Billy Moore?

19 A Right, my youngest daughter Christy.

20 Q How long have they been married?

21 A I think they have probably been married
22 around eight or nine years.

23 Q Okay. Did you have occasion to be out on
24 Morgan Road at Billy Moore's shop on the 24th of
25 September?

WAYNE HUGHES - DIRECT

- 1 A Right. My daughter called me and told me
2 there was a lot of law enforcement there and asked
3 me if I would come over there, and I did.
- 4 Q Okay. Any particular reason, outside of
5 being her father, that being her father, she would
6 call you?
- 7 A I'm also in law enforcement. I'm a sergeant
8 with the Greenwood Police Department.
- 9 Q You're on disability?
- 10 A I'm out on medical leave, yes.
- 11 Q How long have you been out on medical leave?
- 12 A It will be two years in February.
- 13 Q Okay. What time did you get there?
- 14 A Approximately 1:30, 2:00 o'clock, somewhere
15 in that area.
- 16 Q Okay. And did you go over to the garage?
- 17 A Not at first I didn't, I did later on.
- 18 Q When you first got there what did you do?
- 19 A There is a little gravel lot across the
20 street from the garage, we pulled over there and
21 parked and I sat there in a vehicle.
- 22 Q I believe you see Jimmy Madden over there?
- 23 A Right.
- 24 Q When did you walk over to the garage?
- 25 A I walked over and spoke with Officer

WAYNE HUGHES - DIRECT

1 McAllister and also with Officer Gunter.

2 Q Did you walk through the garage?

3 A Yes, sir, I did.

4 Q Did anybody stop you?

5 A No.

6 Q All right. When you walked through the
7 garage did you know what they were there for?

8 A I knew after McAllister had told me.

9 Q And he told you it involved Marshall Miller?

10 A Right, and that there was several of them
11 involved.

12 Q Did he tell you what kind of charges were
13 pending against them?

14 A At that time they didn't.

15 Q Did they tell you it was drug or not drug
16 charges?

17 A They said there was drug charges.

18 Q But not what kind of drugs?

19 A No.

20 Q Okay. Now, in your training with the police
21 department have you been to the police academy?

22 A Yes, I have.

23 Q When you did have the occasion to go to the
24 police academy did you go to any drug schools?

25 A Yes, I have.

WAYNE HUGHES - DIRECT

1 Q Did you have occasion to learn anything about
2 methamphetamine laboratories at that time?

3 A Yes, I did.

4 Q As to what they smell like and so forth?

5 A Right.

6 Q And how did you learn what they smell like?

7 A It was explained to us that it was like a
8 real strong ammonia type smell.

9 Q Okay. When you went through that garage on
10 the 24th of September did you see anything related
11 to a methamphetamine lab?

12 A No, I did not.

13 Q You didn't go by that garage that much?

14 A I hadn't in the last year or so.

15 Q You basically had been home on disability?

16 A Right.

17 Q Did you see them find the kit on top of the
18 garage, on top of the trailer?

19 A Yes, I did.

20 Q And was it something similar to State's
21 Exhibit 39?

22 A Right, it looked like a shaving kit, yes.

23 Q But it says Medport?

24 A I didn't see that on it.

25 Q In your training as a police officer, if this

WAYNE HUGHES - DIRECT

1 had been a site of a meth lab, what would have been
2 the correct procedure?

3 A As far as what, as far as processing?

4 Q As far as access to the building?

5 A It should have been closed off.

6 Q And why is that?

7 A Well, it would be considered a crime scene,
8 anybody that entered the crime scene would have
9 contaminated it.

10 Q And were the police stopping anybody from
11 walking through the garage?

12 A Not that I saw.

13 MR. WISE: Thank you very much. Answer any
14 questions the government may have.

15 THE COURT: Cross-examination, Mr. Crout?

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WAYNE HUGHES - CROSS

CROSS EXAMINATION

QUESTIONS BY MR. CROUT:

Q Now, Mr. Hughes, and correct me, what is your rank?

A I'm a sergeant.

Q Sergeant, okay. Sergeant Hughes, you and I have never met before, correct?

A No.

Q When you came to the shop that day were you in a patrol vehicle or were you in a private vehicle?

A Private.

Q And were you wearing a uniform, or civilian clothes?

A Civilian clothes.

Q And how did you identify yourself as being a sergeant with the, was it with the Greenwood Police Department?

A Police department. I didn't have to.

Q In other words, you identified yourself by sight, they knew who you were?

A They knew me, right. I started law enforcement with McAllister.

Q So, you identified yourself through visual presentation?

WAYNE HUGHES - CROSS

1 A That's right.

2 Q And had the dispatcher sent you to that
3 location?

4 A No.

5 Q Who sent you to that location?

6 A My daughter called me and asked me to come up
7 there.

8 Q And why did she ask you to come? Did she
9 tell you why she asked you to come up there?

10 A She just said there was a lot of police
11 officers up there and she didn't really know what
12 was going on, she come home for lunch, and when she
13 came home for lunch that's what she found.

14 Q And other than going there, did you make any
15 kind of inquiry as to what, did you get on your
16 speaker and radio in and try to find out?

17 A No.

18 Q You just went straight there?

19 A Right.

20 Q And you had indicated that -- your daughter,
21 does she work for the Greenwood Police Department?

22 A No, she works for Clendenin Lumber Company.

23 Q She works for a lumber company?

24 A Uh-huh (affirmative)

25 Q And I believe you had testified that the shop

WAYNE HUGHES - CROSS

1 was a possible crime scene?

2 A I didn't know what it was.

3 Q You didn't know what it was?

4 A No.

5 Q Have you made any substantive determination
6 of what it is?

7 A I haven't been back there since. Well, I
8 went up there the other day.

9 Q Why did you go up there the other day?

10 A I went up there and met with Billy's attorney
11 Mr. Wise.

12 Q Now, is it usual for a family member to
13 dispatch you to a location?

14 A I think any daughter would call their dad if
15 they were upset about something or didn't know what
16 was going on.

17 Q I understand. That was not my question.

18 A I wasn't called there as a law enforcement
19 officer.

20 Q I want to go back to that question again. I
21 would agree and I think you would agree anytime a
22 family member was concerned, especially a child,
23 they would call their parent to express their
24 concern. I'm not arguing about that. My question
25 is, is it usual for a family member to dispatch you

WAYNE HUGHES - CROSS

1 to a crime scene?

2 A No.

3 Q And you said you didn't go there as a law
4 enforcement official?

5 A No, I did not.

6 Q But you used your connections as a law
7 enforcement officer getting access to the scene?

8 A I didn't see a problem with anybody having
9 access to the scene.

10 Q Anybody should have been allowed to come and
11 go?

12 A There was probably fifteen or twenty people
13 walking in and out and around that place.

14 Q Those ten or fifteen or twenty people, were
15 they just concerned citizens?

16 A I don't know what they were, most of them
17 were in civilian clothes.

18 Q Most of them were in civilian clothes?

19 A Yes.

20 Q You are aware that oftentimes SLED wears
21 civilian clothes?

22 A Absolutely, but the SLED agents were dressed
23 in SLED uniforms.

24 Q All right. Now, what did you, when you got
25 there and ascertained what was going on, what did

WAYNE HUGHES - CROSS

1 you do then?

2 A I didn't do anything. I went back and sat
3 back down on the tailgate of the vehicle across the
4 street.

5 Q Did you get in touch with your daughter and
6 say, "Don't worry about it, this is all right"?

7 A I talked with her, she sat over there with
8 me.

9 Q Okay. So, in other words, when you got
10 finished you went to your daughter and you
11 explained to her what was going on?

12 A I didn't tell her what was going on because
13 when I first got there I didn't know.

14 Q Okay. Did you ever at any point allay her
15 fears about what was going on?

16 A No.

17 Q You never allayed her fears?

18 A As far as -- what do you mean.

19 Q Well, did you ever tell her, "Thanks for the
20 call, I went up there and I checked it out, this is
21 what is going on, here is your information that you
22 are asking about"?

23 A The only thing I told her is whenever
24 McAllister, he walked over and he told me what was
25 happening, then I relayed that to her.

WAYNE HUGHES - CROSS

1 Q That basically is what she was calling you
2 about, right?

3 A She just called me because she was scared,
4 didn't know what was going on at their house.

5 Q I understand, but what I'm saying is, she was
6 scared, you went and investigated or you went and
7 at least investigated for her and you told her what
8 you found out, right?

9 A Right.

10 Q Okay. And you did that so she wouldn't be
11 scared anymore, right?

12 A Well, to try to comfort her, yes.

13 Q Comfort her, calm her down, because you were
14 responding as her father?

15 A That's correct.

16 Q Now, did you write up a report of this
17 incident?

18 A No, I did not.

19 Q Did you make any notes about this incident at
20 all?

21 A No, I did not.

22 Q And other than the conversation you said you
23 had with Ronnie McAllister, did you have any
24 conversations with anybody else?

25 A One of the SLED agents asked me if I would

WAYNE HUGHES - CROSS

1 talk to Billy.

2 Q Talk to Billy Moore?

3 A Right.

4 Q Do you know Billy Moore?

5 A Sure. He's my son-in-law.

6 Q And did you talk to Billy Moore?

7 A Yes, I did.

8 Q And did you make a report of that interview?

9 A No. It wasn't an interview.

10 Q What did he want you to talk to him about?

11 A To see if I could get him to talk to them,
12 and that is what I told him when I went to the car.

13 Q Okay. And did you make a report of his
14 response?

15 A No, I did not. I was not there on an
16 official capacity.

17 Q So, you weren't talking to him as a sergeant
18 in the Greenwood Police Department, you were just
19 talking to him as --

20 A As his father-in-law.

21 Q As a father-in-law?

22 A Uh-huh (affirmative)

23 Q And did you give him any advice one way or
24 the other?

25 A Yes, I did.

WAYNE HUGHES - CROSS

1 Q What advice was that?

2 A I told him if he was involved in it, to tell
3 them the truth and to do whatever he had to do but
4 be truthful about it, you know, if they needed,
5 whatever they needed, let them have it because if
6 he was involved in it he needed to be truthful
7 about it, and he told me he was not.

8 Q Would you agree, then, that if you had
9 responded to that scene in a law enforcement
10 capacity you would have written a report, correct?

11 A That's right.

12 Q And if you would have responded to that
13 scene, if you had spoken to Billy Moore in a law
14 enforcement capacity you would have probably made a
15 note of that contact?

16 A That's right.

17 Q You would have wrote down, "Spoke with Billy
18 Moore," something to that extent?

19 A Absolutely.

20 Q And you weren't a regular at that shop, were
21 you?

22 A I hadn't been for awhile because I have had
23 several surgeries and I have been pretty much down
24 for the last two years.

25 Q Well, let me ask you this. Did you do any,

WAYNE HUGHES - CROSS

1 did you have any participation in go-cart racing or
2 any of that activity?

3 A No. I have been there and watch him build
4 them, you know, in the past and I have went to some
5 of the races with him.

6 Q But I guess, I guess what I'm just trying to
7 ask, and please clarify for us, I just want to know
8 how involved you were in the repair part of the
9 shop?

10 A I wasn't.

11 Q You weren't involved in that?

12 A No.

13 Q And do you remember who from Greenwood was at
14 the scene?

15 A I remember seeing Ronnie McAllister and I saw
16 Doug Gunter and I'm trying to think of what the
17 other fellow's name is that was working the dogs, I
18 can't remember his name.

19 Q Now, in your training, if you were working a
20 crime scene and an individual unrelated with law
21 enforcement came up and said, you know, an
22 individual unrelated with law enforcement came up
23 and said, "My daughter called and wants to know
24 what is going on," and came up to this crime scene,
25 would you allow them to do that?

WAYNE HUGHES - CROSS

1 A Let me clarify one thing.

2 Q Okay, please do.

3 A I am a crime scene person, investigator for
4 Greenwood.

5 Q Okay.

6 A I am, I work all the major crimes, or did up
7 until a few years ago.

8 Q Okay.

9 A Anytime I approached a crime scene I didn't
10 let law enforcement on my crime scene.

11 Q All right.

12 A The crime scene was sealed, a log, and an
13 officer was set up at the entrance to the crime
14 scene, anybody that entered it, his name went on
15 that log and they were subpoenaed to court. I
16 didn't let anybody contaminate my crime scene.

17 Q All right. So, you wouldn't let a concerned
18 citizen in, much less another officer?

19 A Not if I thought it was a crime scene.

20 Q All right. So, then, are we safe to say that
21 you responded to this incident location as a
22 concerned citizen but you gained access as a result
23 of your connections with law enforcement?

24 A I couldn't say that, no. You would have to
25 ask them why they let me in.

WAYNE HUGHES - CROSS

1 Q But suffice it to say they were aware you
2 were with law enforcement?

3 A Oh, I'm sure, I know they were, yes.

4 MR. CROUT: No further questions.

5 THE COURT: Mr. Varner?
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WAYNE HUGHES - CROSS

1 CROSS EXAMINATION

2 QUESTIONS BY MR. VARNER:

3 Q Sergeant, how long have you been in law
4 enforcement?

5 A I have been back with Greenwood for fourteen
6 years, I was with them prior, I was with Greenwood
7 County Sheriff's Department prior, and I was also
8 with Oakland County Sheriff's Department in
9 Michigan.

10 Q So, how many years total?

11 A It's twenty-five.

12 Q Twenty-five or better years of law
13 enforcement?

14 A Yes, sir.

15 Q They keep talking about a crime scene. That
16 is your cup of tea, that's your specialty, correct?

17 A That's correct.

18 Q All right. They keep calling this a crime
19 scene. Was there anything there that indicated to
20 you it was in fact a crime scene?

21 A Not that I saw.

22 Q Okay. So, other than them calling it a crime
23 scene, was it called or referred to as a crime
24 scene then or indicated as such?

25 A No.

WAYNE HUGHES - CROSS

1 Q In fact, were you in fact told, "What we're
2 doing is we're looking for Marshall Miller, we
3 heard or thought he might be over here," that's
4 what they were doing, isn't it?

5 A That's correct.

6 Q Okay. And your daughter's father-in-law, Mr.
7 Madden, he's not in law enforcement, is he?

8 A No.

9 Q Was he over there, too?

10 A Yes, he was.

11 Q Okay. Well, now, he couldn't have used any
12 connections as a law enforcement officer to get in
13 there, then, he just flat walked in, didn't he?

14 A Yes, he did.

15 Q So, calling this a crime scene at best was an
16 afterthought?

17 A Evidently so.

18 Q Let me ask this. The prosecutor has asked
19 you about responding to a relative. If a relative
20 was involved in a crime would you even respond?

21 A MR. CROUT: Objection, Your Honor,
22 mischaracterization of the question. I asked him
23 if he was dispatched by a relative.

24 Q Okay. If you were responding to a dispatch
25 to a crime involving a relative would you be the

WAYNE HUGHES - CROSS

1 one that did that investigation or would you call
2 in an outside agency or somebody else?

3 MR. CROUT: Objection once again,
4 mischaracterization.

5 THE COURT: It's overruled.

6 Q That means you can answer the question, sir.

7 A I know but would you repeat it.

8 Q Okay. To help you, I will just put it in
9 plain language. If your son-in-law or your
10 daughter had been involved in a crime would you be
11 the one investigating it, or would you call
12 somebody else?

13 A It wouldn't be up to me, it would already be
14 dispatched to somebody else.

15 Q If you received allegations of activity,
16 criminal activity in your own department in
17 Greenwood, would Greenwood investigate that or
18 would they call in SLED to investigate it?

19 A They would call in SLED.

20 Q And is that standard procedure when one
21 agency has accusations or questions, they call in
22 an independent agency to do the investigation?

23 A That's correct.

24 Q And that's the way it always is in law
25 enforcement?

WAYNE HUGHES - CROSS

1 A Yes, sir.

2 Q That's the quote, quote, golden rule, isn't
3 it?

4 A Yes, sir.

5 Q You don't investigate your own because it
6 doesn't smell right?

7 A That's correct.

8 Q And if you failed to investigate, you have
9 got a duty to report that allegation to an
10 appropriate investigating agency, don't you?

11 A Yes, you do.

12 Q And if you had received a report, regardless
13 of the source, that one of your fellow officers or
14 an officer in another agency had been involved in
15 something that was inappropriate, would you just
16 put that in the file and leave it alone or would
17 you have reported it to an appropriate agency?

18 A I would have reported it.

19 Q And you're talking about all the people,
20 roughly how many law enforcement related people
21 were there?

22 A I couldn't tell you.

23 Q Best guess, were there more than ten, more
24 than fifteen?

25 A Probably more than ten.

WAYNE HUGHES - CROSS

1 Q Okay. How long, about what time was it when
2 you got there?

3 A It was somewhere around 1:30 or somewhere in
4 early afternoon.

5 Q And did they tell you how long they had been
6 there?

7 A No.

8 Q How long did they stay there?

9 A I'm not absolutely sure.

10 Q How long were you there? You say you got
11 there around 1:00, give or take. How long were you
12 there before they found this green bag that's
13 referred to as Exhibit 39?

14 A They found that.

15 Q How long were you there before then?

16 A It was right when they were leaving.

17 Q Right when they were leaving?

18 A Yes.

19 Q How long were you there, if you got there at
20 1:00, how long was it before the bag was found, a
21 half an hour, an hour?

22 A Around 4:00 o'clock.

23 Q So, about three hours later?

24 A Right.

25 Q Do you agree with all that law enforcement

WAYNE HUGHES - CROSS

1 there, at least three hours, in this, quote, quote,
2 that at the crime scene it was Mr. Madden, who is
3 not even a police officer, that found this?

4 A That can happen.

5 Q Well, that did happen here, didn't it?

6 A Yes.

7 MR. VARNER: That's all the questions I have.

8 THE COURT: Anything on redirect?

9 MR. WISE: Nothing on redirect.

10 THE COURT: Thank you, sir. Come down.

11 (Witness excused).

12 THE COURT: Any objection to this witness
13 being excused, Mr. Wise?

14 MR. WISE: No, sir.

15 THE COURT: From the State?

16 MR. CROUT: None from the State, Your Honor.

17 MR. VARNER: None, Your Honor.

18 THE COURT: Mr. Witness, you may stay with us
19 or you may leave the building if you wish.

20 Madam Forelady and ladies and gentlemen of
21 the jury, we'll take a short recess at this time.
22 Please do not discuss the case by, between and
23 among yourselves and retire to the jury room.
24 Everyone else remain seated.

25 (The jury was excused from the courtroom).

1 THE COURT: Anything from the State before we
2 close the record momentarily?

3 MR. HOOD: No, sir, Your Honor.

4 THE COURT: From the defendant Miller?

5 MR. VARNER: Nothing, Your Honor.

6 THE COURT: Defendant Moore?

7 MR. WISE: Just one thing for planning
8 purposes, Your Honor. My next witness is not going
9 to be that long, we will probably run, after the
10 break, until 12:30 or a little after 12:30. Then I
11 do plan on calling Mr. Moore and I'm sure he would
12 run until 1:30. I just wondered if it would be
13 more appropriate to break for lunch after my next
14 witness.

15 THE COURT: We shall.

16 MR. WISE: All right, just so, that way we
17 won't be running real late for lunch.

18 THE COURT: Plan on doing that.

19 MR. WISE: Thank you.

20 THE COURT: We will close the record, then,
21 until we come back into session momentarily.

22 (Recessed at 12:07 p.m.).

23 (Reconvened at 12:17 p.m.).

24 THE COURT: The record is open in indictment
25 2002-GS-47-32, the State of South Carolina versus

1 Marshall Miller and others. The defendants in this
2 trial are Marshall Miller and Billy Moore.

3 Is there anything from any quarter for the
4 record before the jurors are shown in?

5 MR. HOOD: No, sir, Your Honor.

6 MR. VARNER: Nothing, Your Honor.

7 MR. WISE: Nothing, Your Honor.

8 THE COURT: Thank you. Mr. Busby, show the
9 jurors in, please.

10 (The jury returned to the courtroom).

11 THE COURT: All the jurors are present, with
12 the forelady and the alternates properly seated.
13 Madam witness, come on up to your right please,
14 come all the way around. Place your left hand on
15 the Bible and raise your right hand. The clerk
16 will administer the oath.

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CHRISTY MOORE - DIRECT

1 CHRISTY HUGHES MOORE,
2 after being first duly sworn testified as follows:
3 THE CLERK: Have a seat and state your full
4 name for the record.

5 THE WITNESS: My name is Christy Hughes
6 Moore.

7 THE COURT: What's your first name?

8 THE WITNESS: Christy.

9 DIRECT EXAMINATION

10 QUESTIONS BY MR. WISE:

11 Q Do people call you Chris?

12 A Yes, sir.

13 Q Okay. Chris, where do you live?

14 A 709 Morgan Road, Hodges.

15 Q And you're married to Billy Moore?

16 A Yes, sir.

17 Q You all have been married how long?

18 A About ten years.

19 Q All right. Do you all have any children?

20 A We have two stepchildren.

21 Q All right. And whose children are those?

22 A Billy's.

23 Q All right. And how old are they?

24 A Sixteen and fourteen.

25 Q And did they live with you all for a good

CHRISTY MOORE - DIRECT

1 while?

2 A Yes, sir.

3 Q Up until when?

4 A Up until September 24th.

5 Q Of?

6 A Year before last, when this happened.

7 Q 2002?

8 A Yes, sir.

9 Q All right. Where are you employed?

10 A At Clendenin Lumber Company.

11 Q How long have you been working there?

12 A Eight years.

13 Q What do you do with them?

14 A I work in the computer room on the production
15 line.

16 Q I believe Billy worked there for awhile, too?

17 A Yes, sir.

18 Q And did he leave Clendenin Lumber Company and
19 open up a garage?

20 A Yes, sir.

21 Q Where is that garage located?

22 A Across the street from my home.

23 Q What kind of mechanic work does he do in that
24 garage?

25 A He worked on cars, and go-carts on the side.

CHRISTY MOORE - DIRECT

1 Q All right. Did he get into go-cart racing?

2 A Yes.

3 Q Big time?

4 A Yes, sir.

5 Q Who would he go racing with?

6 A With my stepson and Chip.

7 Q How long have you known Chip?

8 A Probably about three years now, three or four
9 years.

10 Q Okay. How often was Chip around there?

11 A Every day.

12 Q All right. What would he do over at Billy's
13 shop?

14 A He would help Billy out, he spent a lot of
15 time with Tyler working on go-carts and we go to
16 the races, he helped out a lot.

17 Q Would he come over and help out at your
18 house, too?

19 A Yes.

20 Q And doing what things there?

21 A He would feed my animals for me, I have a lot
22 of animals, he would help feed them, haul the trash
23 off, anything you would ask him to do.

24 Q Did you help him out with things?

25 A I did.

CHRISTY MOORE - DIRECT

1 Q What did you do?

2 A I would clean his apartment for him and I
3 cooked for him a lot.

4 Q And what about paying bills and stuff?

5 A I would help him with his bills.

6 Q And how long has that been going on?

7 A Not long after I met him, really.

8 Q A number of years?

9 A He's just like a member of the family.

10 Q Okay. Now, how much time did Billy spend
11 over at the garage working?

12 A A lot.

13 Q What time do you go to work in the morning?

14 A Sometimes at 6:00 and sometimes at 7:00.

15 Q Did you ever go over to the garage and check
16 on him, talk to him, see him?

17 A If he was there I went over there every
18 morning, if he was there.

19 Q Okay. What about in the evenings or during
20 the day on weekends?

21 A Uh-huh, I would go go over there every day at
22 my lunch break, I went over there every day when I
23 come home from work and during the evening.

24 Q Did you call him before you went over?

25 A No.

CHRISTY MOORE - DIRECT

1 Q A week or ten days before the September 24th,
2 I believe, was your father in the hospital?

3 A Yes, sir.

4 Q And were you down at the hospital checking on
5 him?

6 A Yes, sir.

7 Q What time did you come home from there?

8 A It would be between 10:00 and 12:00 at night.

9 Q And would you occasionally drop by the garage
10 then?

11 A Every night if Billy was there I would let
12 him know I was at home.

13 Q Excuse me?

14 A Every night if Billy was over there, if he
15 wasn't at the house he would be at the shop.

16 Q You would stop by and check on him before you
17 went home?

18 A Yes, sir.

19 Q Did you ever meet Marshall Miller?

20 A No, sir.

21 Q Did you ever see him, even?

22 A I saw him three times.

23 Q Were you ever formally introduced to him?

24 A No, sir.

25 Q About when did you see that truck that he

CHRISTY MOORE - DIRECT

1 drove first over to Billy's garage, in relation to
2 September 24th?

3 A Probably about nine days before that is when
4 the car had showed up over there, they come the
5 next day to check on his car, I saw the truck.

6 Q The times that you went over to the garage
7 did you ever smell anything that was out of the
8 ordinary?

9 A No.

10 Q At anytime when you were at your house did
11 you ever smell anything that was out of the
12 ordinary?

13 A No, sir.

14 Q And how far is your house from this garage?

15 A Not very far at all, it's quite visible.

16 Q It's what?

17 A You can see it plain, I mean, it's just right
18 across the street, it's not far at all.

19 Q Walking distance?

20 A Yes, sir.

21 Q Now, what other relatives live around you?

22 A Billy's Grandmother, his aunt.

23 Q Where does she live?

24 A Right across the street.

25 Q Okay.

CHRISTY MOORE - DIRECT

1 A His aunt and uncle live nextdoor to the shop.

2 Q Uh-huh.

3 A And then a cousin lives nextdoor, well, it's
4 Billy's uncle's brother that actually lives
5 nextdoor to us.

6 Q Billy has another relative that lives
7 nextdoor, I believe, where the Maddens live?

8 A Yes, sir.

9 Q Who is that?

10 A His ex-stepmother.

11 Q What is the relationship between Billy and
12 his ex-stepmother?

13 A Not very good.

14 Q On 10/24 what time did you come home that
15 day?

16 A I came home at 11:30 for lunch.

17 Q Is that normal?

18 A Yes, sir.

19 Q And did you see anything when you got home?

20 A The police were at the Maddens' house
21 nextdoor.

22 Q All right. And where was Billy?

23 A He was in the back yard on the four-wheeler.

24 Q Did you see him?

25 A Yes, sir.

CHRISTY MOORE - DIRECT

1 Q In the back yard of your house?

2 A Yes, sir, at my house.

3 Q Across the street from the garage?

4 A Yes, sir.

5 Q And what did you and Billy do when you got
6 home?

7 A I walked out and talked to him, he told me
8 that the police were looking for Michelle, and he
9 come inside and had lunch with me.

10 Q All right. How long did you all spend having
11 lunch?

12 A Until about a quarter after 12:00.

13 Q Is that a normal routine?

14 A Yes, sir.

15 Q And what happened then?

16 A I started to leave to go back to work and
17 Billy started back across the the street, that is
18 when I saw the police there, I stopped and asked
19 what was going on.

20 Q And did they let you leave?

21 A No.

22 Q So, what did you do then?

23 A I parked my car across the street in front of
24 the Maddens' home and talked with the police to
25 find out what was going on, that is when they told

CHRISTY MOORE - DIRECT

1 me they were looking for Marshall Miller.

2 Q And when did you call your father?

3 A Right after that.

4 Q Did he come out there?

5 A Yes, sir.

6 Q Did you ever go over to the garage that day?

7 A Yes, sir.

8 Q Did you go in it?

9 A Yes, sir.

10 Q Did you notice anything unusual in it?

11 A No, sir.

12 Q Anything you hadn't seen before?

13 A A lot of police.

14 Q All right. Did you notice any unusual odor
15 or anything about it?

16 A No, sir.

17 Q Now, you knew -- do you know Jeff Horne?

18 A I've met him before but I don't really
19 actually know him.

20 Q And of course Marshall, you say you have
21 never been formally introduced to him?

22 A I have never even spoke with him.

23 Q During the time that you were over there did
24 the police ever block access to the garage where
25 people couldn't go in and out?

CHRISTY MOORE - DIRECT

1 A No, sir.

2 MR. WISE: Thank you. Answer any questions
3 the government may have.

4 THE COURT: Mr. Hood, cross-examination.

5 MR. HOOD: Thank you, Your Honor.
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CHRISTY MOORE - CROSS

1 CROSS EXAMINATION.

2 QUESTIONS BY MR. HOOD:

3 Q Mrs. Moore?

4 A Yes, sir.

5 Q Have we ever met before?

6 A No, sir.

7 Q Do you know who I am?

8 A No, sir.

9 Q I missed the beginning of your testimony, I'm
10 sorry, how long have you and Billy been married?

11 A Almost ten years.

12 Q You said something about children, I
13 apologize, do you all have children?

14 A Two stepchildren, Billy's children.

15 Q Are they Billy's children from a first wife?

16 A Yes, sir.

17 Q Do they live with you all?

18 A They did at the time, yes, sir.

19 Q And when did they stop living with you?

20 A When this happened in September.

21 Q And where did they go live at that time?

22 A With their mother.

23 Q Did you have a good relationship with these
24 children?

25 A Yes, sir.

CHRISTY MOORE - CROSS

1 Q How long had you known the children? I don't
2 even know how old they are, how old are they?

3 A My son is sixteen and my daughter is
4 fourteen.

5 Q And how long had you known them?

6 A Going on eleven years now.

7 Q You considered them --

8 A They're mine.

9 Q -- your own children, is that right?

10 A Yes, sir.

11 Q You have a very -- I'm assuming you have a
12 very tight bond with them?

13 A Yes, I do.

14 Q And to say that you love Billy Moore is an
15 understatement?

16 A Right.

17 Q Is that right?

18 A I love my husband very much.

19 Q And you care about your husband?

20 A Yes, I do.

21 Q You would come home, fix him lunch and take
22 care of him?

23 A Yes, sir.

24 Q You would stop by the trailer and say, "Hey,
25 I'm home, everything is okay"?

CHRISTY MOORE - CROSS

1 A Yes, sir.

2 Q You all had a loving relationship?

3 A Yes, sir.

4 Q You cared about each other, didn't you?

5 A Uh-huh (affirmative)

6 Q Do you know what it takes to manufacture
7 methamphetamine?

8 A I have no idea.

9 Q Do you have any clue of what ingredients goes
10 into making meth?

11 A No, sir.

12 Q You said, do you remember the line of
13 questioning from Mr. Wise about there was nothing
14 unusual in the garage. You went in there that day;
15 right?

16 A Yes, sir.

17 Q How often would you go over to the garage?

18 A Several times a day.

19 Q And how often, how many hours a day was Billy
20 working?

21 A He worked a lot of hours a day.

22 Q Ten hours, twelve hours?

23 A Probably.

24 Q Did he ever work all night long?

25 A Yes, sir.

CHRISTY MOORE - CROSS

1 Q How many times a week would he work all night
2 long?

3 A Maybe two or three times a week, maybe.

4 Q I mean, when would he sleep?

5 A During the day, a lot of times like at lunch
6 time when I would come home he was getting up then.

7 Q So, he didn't have to work on the cars during
8 the day?

9 A He would or Chip would.

10 Q So, they had to work on go-carts all night
11 and cars during the day, or what, do you know?

12 A If he had a job that he needed to get
13 finished and it was just him, Chip helped him out.

14 Q How did he have the ability to stay up all
15 night long?

16 A He would sleep, he would come in in the
17 morning and sleep.

18 Q So, if he had time to sleep in the mornings,
19 then why wouldn't he work on the cars in the
20 morning and sleep at night?

21 A If he had stayed up late at night working on
22 a car to get it finished the next day.

23 Q On average how many nights a week would he
24 spend all night in that shop?

25 A Maybe two or three.

CHRISTY MOORE - CROSS

1 Q For how long, how many months?

2 A I'm not really sure.

3 Q As long as you have known him to have the
4 shop?

5 A Probably.

6 Q If he's working so hard over at the shop,
7 what's he doing riding a four-wheeler around when
8 you come home for lunch that day?

9 A He was dragging a harrow. We have been
10 trying to get grass to grow.

11 Q I'm sorry, I missed the first part?

12 A We had planted grass and he had a drag harrow
13 behind the four-wheeler out there, he was trying to
14 get grass to grow out there in the back.

15 Q What else would he do on the four-wheelers?

16 A He just rode them deer hunting, they would
17 take them deer hunting, stuff like that.

18 Q Were you in the shop the night before they
19 all got arrested?

20 A Yes, sir.

21 Q How long were you there?

22 A Maybe 45 minutes to an hour.

23 Q Were you there at 4:00 o'clock in the
24 morning?

25 A No, sir.

CHRISTY MOORE - CROSS

1 Q What time were you there the night before
2 they got arrested, that's what I'm referring to?

3 A It would probably have been around 10:00 or
4 11:00 when I came back from the hospital.

5 Q Who was there then?

6 A Ernest Covan and my husband and Chip and
7 Marshall Miller.

8 Q And what cars were there?

9 A The red car was there that my husband was
10 working on, and his black truck was there, Marshall
11 Miller's black truck and Chip's truck.

12 Q And what happened all throughout that night
13 until you went to work the next morning?

14 A I have no idea, I went home and went to
15 sleep.

16 Q And what was your work schedule again, I
17 missed that part of your testimony, I'm sorry?

18 A From 7:00 until 4:00 or after.

19 Q What do you do once you get home at night?

20 A Then? I would come home every day, I would
21 stop by the shop every day when I come in, then I
22 would go home.

23 Q Did you have a hobby or something you did at
24 your house?

25 A I have a lot of animals.

CHRISTY MOORE - CROSS

1 Q Did you spend every single waking moment you
2 were at home over at that shop with your husband?

3 A No, sir.

4 Q Is it a fair statement he spent a whole lot
5 of time over there, most of which you weren't even
6 there?

7 A He spent a lot of time there.

8 Q I mean, he spent a lot of time over there?

9 A Yes.

10 Q We can agree on that, right?

11 A Yes.

12 Q He's a hard worker?

13 A He really is.

14 Q There is lots of time he was over at that
15 shop and you don't know what in the world he was
16 doing, is that right?

17 A Right.

18 Q And you said, do you remember that whole line
19 of questioning you didn't see anything unusual in
20 the garage?

21 A Yes, sir.

22 Q Did you see this in the garage, State's
23 Exhibit Number 21?

24 A No, sir.

25 Q Would you consider this to be unusual?

CHRISTY MOORE - CROSS

1 A Yes, sir.

2 Q Let me ask you this, Mrs. Moore. Prior to
3 September 24th, 2002, you had met Marshall Miller,
4 is that what you testified to?

5 A I have not met him.

6 Q You have seen him?

7 A I've seen him.

8 Q Who told you who he was?

9 A My husband did.

10 Q And were you just inquisitive about who is
11 over there, what's going on?

12 A Uh-huh (affirmative)

13 Q Just normal?

14 A Yes, sir.

15 Q Husband and wife type of questions, is that
16 right?

17 A Yes, sir.

18 Q Did you have any idea that SLED had an
19 ongoing investigation into Marshall Miller at all?

20 A No, sir.

21 Q Did you have any idea that they had an
22 ongoing investigation into Ernest Covan?

23 A No, sir.

24 MR. HOOD: That's all I have, Your Honor,
25 thank you.

CHRISTY MOORE - CROSS

1 THE COURT: Mr. Varner?

2 CROSS EXAMINATION

3 QUESTIONS BY MR. VARNER:

4 Q Did you see any SLED agents out there
5 watching the shop so SLED would know what was going
6 on there?

7 A No, sir.

8 Q All right. Talking about your relationship
9 with your husband, you described it as a loving,
10 close relationship?

11 A Yes, sir.

12 Q And in a loving, close relationship there is
13 a lot of hugging, kissing and sleep in the same
14 bed?

15 A Yes, sir.

16 Q Do you wash his clothes also?

17 A I do.

18 Q Okay. Well, have you ever smelled anything
19 unusual?

20 A No, sir.

21 Q Okay. Well, where do you do the laundry? Is
22 it like in a little room there?

23 A Yes.

24 A Uh-huh (affirmative)

25 Q Are the clothes thrown in there?

CHRISTY MOORE - CROSS

1 A No, they are in a laundry basket in the
2 bathroom.

3 Q When you take them into that room have you
4 ever smelled an ammonia smell?

5 A No, sir.

6 Q On any of his clothes?

7 A No, sir.

8 Q When he lays next to you in the bed at night
9 have you ever smelled an ammonia smell on his hair
10 or clothes?

11 A No, sir.

12 Q On anything, when he comes in at night?

13 A No, sir.

14 Q Have you smelled anything on him other than a
15 guy who works at a mechanic shop or body shop, so
16 to speak?

17 A No, sir.

18 Q Okay. And wives generally speaking pay
19 attention to those things, don't they?

20 A I do.

21 Q All right. Your estimate, how many police
22 officers were over there that day during the course
23 of the time they were there, your best guess?

24 A Thirty to forty, maybe more.

25 Q A lot?

CHRISTY MOORE - CROSS

1 A A lot.

2 MR. VARNER: That's all the questions I have.

3 THE COURT: Mr. Wise?

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CHRISTY MOORE - REDIRECT

1 REDIRECT EXAMINATION

2 QUESTIONS BY MR. WISE:

3 Q Just one question. On the morning of the
4 24th did you go by the garage?

5 A I did.

6 Q And about what time?

7 A It would have probably been about a quarter
8 until 7:00.

9 Q And why do you know the time?

10 A I had to be at work at 7:00 o'clock.

11 MR. WISE: Okay, thank you.

12 THE COURT: Anything on recross?

13 MR. HOOD: No, sir, Your Honor.

14 THE COURT: Mr. Varner?

15 MR. VARNER: Nothing further, Your Honor.

16 THE COURT: Thank you very much. Come down,
17 please.

18 (Witness excused).

19 THE COURT: Ladies and gentlemen, Madam
20 Forelady of the jury, we will take a recess at this
21 time. The Court has another matter not involving
22 this case to take up at 2:15. It's expected, it's
23 expected that that will take about twenty minutes,
24 so we will recess until 2:40 so that we will be
25 sure, it's a conference call, the Court does not

1 know how many people are going to be on the
2 conference call and we don't want you to
3 unnecessarily come back before that's over, so
4 we're going to recess now and allow you to come
5 back at 2:40.

6 Now, please do not discuss the case by,
7 between and among yourselves nor with any other
8 person. Do not allow anyone to discuss the case
9 with you. If anyone were to attempt to discuss the
10 case with you please tell that person or persons
11 that you are a juror and you are not permitted to
12 discuss the case with them. If any person or
13 persons persist in discussing the case after you
14 make them aware that you're a juror that would be
15 improper, wrong and illegal and you should report
16 that, you should first try to find out who those
17 people are, that person is, as the case may be, and
18 you should report that to one of the bailiffs or
19 the court clerk as soon as you return, without
20 telling anyone else about the event. The Court
21 will see to it that matter is investigated and
22 dealt with.

23 If there were to be any media coverage such
24 as newspaper, television or radio of this trial you
25 will immediately disabuse yourself of it and ignore

1 it completely once you realize it involves this
2 trial, as you are to decide the facts of this case
3 based solely and only upon the evidence that's
4 presented during the course of the trial in front
5 of you in this courtroom.

6 You will be excused now to return at 2:40.
7 Everybody else remain seated, the jurors are
8 excused.

9 (The jury was excused from the courtroom).

10 THE COURT: Is there anything for the record
11 from the State?

12 MR. HOOD: Your Honor, I just want to kind
13 of, for planning purposes, I don't know how many
14 more witnesses he's going to call. I know he says
15 one. Can we plan on arguing and charging this
16 afternoon? I just need to know for my own personal
17 sake.

18 MR. WISE: It would seem to me, with the
19 Court's schedule, we're going to be close to 4:00
20 o'clock finishing up with the last witness, given
21 roughly an hour and ten or fifteen minutes with
22 him.

23 MR. HOOD: At this time, I know we talked
24 about this last night, Your Honor, in chambers, at
25 this time, without Mr. Moore testifying, I mean,

1 since he hasn't testified yet, the State does not
2 intend on calling any reply witnesses. We're not
3 going to give up that right until we hear Mr.
4 Moore's testimony but at this time we do not intend
5 on calling any further or any reply witnesses. I
6 just need to know for my preparation purposes if
7 we're going to close this afternoon.

8 MR. WISE: It looks like we will be coming
9 back Friday anyway. I was thinking if we actually
10 start argument after 4:00, it would be, I don't
11 know, 5:30 to 6:00.

12 THE COURT: Well, if we get close to 4:00
13 o'clock, then we will delay argument and charge
14 until in the morning. If we complete within, say
15 by 3:00 or 3:30, be prepared to go to the jury this
16 afternoon and the Court will break after the final
17 arguments and charge in the morning and the jurors
18 will commence deliberations. So, it just depends
19 on when we get through with all of the evidence in
20 the case, as to what we may do.

21 Now, if you want to agree, if everybody wants
22 to agree that you will argue in the morning and
23 that all of the evidence will be completed today,
24 the Court will accept your better judgment about
25 the matter.

1 MR. WISE: That suits me. I don't like to
2 break up the argument and charge.

3 THE COURT: How says the State?

4 MR. HOOD: That's fine, Your Honor.

5 THE COURT: All right, then we'll complete
6 all the evidence today and recess and then we will
7 argue and charge in the morning. That is the
8 agreement of everybody. No one feels prejudiced?

9 All right, we're in recess until 2:40 in this
10 matter.

11 (Recessed at 12:59 p.m.).

12 (Reconvened at 2:51 p.m.).

13 THE COURT: The record will open. This is
14 the State of South Crolina versus Marshall Miller
15 and others in indictment number 2002-GS-47-32,
16 Marshall Miller and Billy Moore are the defendants
17 on trial during this case.

18 Is there anything from any quarter before the
19 jurors come in, please?

20 MR. HOOD: Nothing, Your Honor.

21 MR. VARNER: Nothing, Your Honor.

22 MR. WISE: Nothing, Your Honor.

23 THE COURT: Show the jurors in, Mr. Busby,
24 please.

25 (The jury returned to the courtroom).

1 MR. HOOD: Your Honor, may we approach?

2 THE COURT: Yes, sir.

3 (Unrecorded bench conference).

4 THE COURT: Madam Forelady, ladies and
5 gentlemen, you all do not discuss the case, return
6 to the jury room for just a moment. You won't be
7 in there long enough to talk to each other. Do not
8 discuss the case. Return to the jury room.

9 (The jury was excused from the courtroom).

10 THE COURT: Mr. Moore, if you would please
11 stand, sir.

12 Mr. Moore, you are advised that you have a
13 right not to testify, that is an absolute
14 constitutional right that's guaranteed to you by
15 the Constitution of this state and of the United
16 States. If you were to elect not to testify the
17 Court would tell the jurors that they could not
18 hold against you the fact that you remained silent,
19 because you have that right. The Court would tell
20 the jurors that they could not hold that against
21 you nor could they even discuss it at anytime even
22 when they were deliberating whether you were guilty
23 or innocent of the charge for which you are
24 accused.

25 You also have the right to testify, whichever

1 you wish to do, you may do, but keep in mind that
2 if you elect to remain silent, which is your
3 absolute constitutional right, the jurors would be
4 told that they cannot hold that against you in any
5 way at anytime. You also have the right to
6 testify.

7 Now, have you had a chance to talk with your
8 attorney about that?

9 BILLY MOORE: Yes, Your Honor.

10 THE COURT: And what do you elect to do?

11 BILLY MOORE: Testify.

12 THE COURT: Very well, thank you. Be seated.
13 Show the jury in.

14 (The jury returned to the courtroom).

15 THE COURT: Ladies and gentlemen, thank you
16 for your patience.

17 The record will show that all the jurors are
18 present, with the forelady and the alternates
19 properly seated. The matters lies with the
20 defendant Moore.

21 MR. WISE: Call Billy Moore.

22 THE COURT: Come up, sir.
23
24
25

BILLY MOORE - DIRECT

1 BILLY WAYNE MOORE,
2 after being first duly sworn testified as follows:

3 THE CLERK: Be seated and state your name for
4 the record.

5 THE WITNESS: Billy Wayne Moore.

6 THE COURT: You may examine.

7 DIRECT EXAMINATION

8 QUESTIONS BY MR. WISE:

9 Q Billy where do you live?

10 A 709 Morgan Road.

11 Q How long have you been living there?

12 A Approximately seven years there.

13 Q And who owns that land?

14 A I do.

15 Q And how did you obtain that land?

16 A Through inheritance.

17 Q Who did you inherit that from?

18 A My father.

19 Q When did he die?

20 A Approximately four years ago.

21 Q All right. And when did you move the mobile
22 home in there?

23 A Approximately seven years ago.

24 Q Now, you're married to Christy Moore?

25 A Yes.

BILLY MOORE - DIRECT

- 1 Q How far did you go in school?
- 2 A Ninth grade.
- 3 Q And did you complete the ninth grade?
- 4 A No, sir.
- 5 Q Where did you, what did you do after school?
- 6 A Joined the military.
- 7 Q And what branch of the service?
- 8 A The armed forces, Army.
- 9 Q Where did you go for basic training?
- 10 A Fort Lenoard Wood, Missouri.
- 11 Q How old were you when you went?
- 12 A Seventeen.
- 13 Q How long did you serve in the military?
- 14 A Until I was twenty-one.
- 15 Q All right. You got out of the military, came
- 16 back to South Carolina?
- 17 A Yes, sir.
- 18 Q What did you do then?
- 19 A Went to work for Shoney's in Greenwood,
- 20 kitchen manager.
- 21 Q How long did you work there?
- 22 A About six years.
- 23 Q And after that?
- 24 A Went to work for Clendenin Lumber Company.
- 25 Q And how long did you work there?

BILLY MOORE - DIRECT

- 1 A Six years.
- 2 Q And when did you leave Clendenin Lumber
- 3 Company?
- 4 A Three and a half years ago, four years ago,
- 5 somewhere like that.
- 6 Q And what did you do after that?
- 7 A Opened my own garage.
- 8 Q Are you married?
- 9 A Yes, sir.
- 10 Q How long have you been married?
- 11 A Approximately ten years.
- 12 Q And you have got two children by a former
- 13 marriage?
- 14 A Yes, sir.
- 15 Q And how old are they?
- 16 A Seventeen and fourteen, I mean sixteen and
- 17 fourteen, I'm sorry.
- 18 Q And when did you get custody of them?
- 19 A Six and a half, seven years ago.
- 20 Q And have you raised them since then?
- 21 A Yes, sir.
- 22 Q As a result of these charges what happened to
- 23 the custody of the children?
- 24 A Their mother gained temporary custody.
- 25 Q Okay. Now tell us, if you would, when you

BILLY MOORE - DIRECT

1 first met Marshall Miller.

2 A About eight to nine days previous to
3 September 24th Chip came and said that he had met a
4 fellow at the lake that had had a crate motor put
5 in a vehicle and it wasn't running.

6 Q A crate motor, meaning it was a new motor off
7 a crate?

8 A Yes. He could not get it running, and seeing
9 it was a crate motor, there had to be some kind of
10 problem in the way it was installed, I said yes, I
11 would go out and look at it. I went out, I got the
12 car running good enough to bring it to the shop
13 where I had proper tools and equipment to work on
14 the car.

15 Q All right.

16 A And fixed it for him.

17 Q Is that the first time you met him?

18 A Yes, sir.

19 Q Did he come by your shop?

20 A He came not the day -- he brung the car the
21 day that I got it running, and it was approximately
22 three days later before I seen him again.

23 Q Did you have anything in your shop that
24 attracted his attention?

25 A He was interested in the go-carts. I had

BILLY MOORE - DIRECT

1 nine in the shop.

2 Q How many go-carts did you have in the shop?

3 A Nine.

4 Q Were all of them yours?

5 A No, sir.

6 Q What were most of them?

7 A Three of them was mine and the rest of them
8 was on consignment to be sold.

9 Q All right. And what was his interest in
10 go-carts?

11 A Of trying to drive one and own one.

12 Q And did you have discussions with him about
13 going racing?

14 A Yes, sir, we did. Not on that occasion but
15 the next time he came to the shop.

16 Q All right. And how did that conversation go?

17 A I told him that if he was interested, which
18 he seemed to be, that the weekend coming he could
19 drive one of mine and then if he was interested he
20 could talk more about purchasing one.

21 Q Did you discuss with him about transporting
22 the go-carts to the racetrack?

23 A No, sir, not at that time.

24 Q All right.

25 A When he came to pay me for the car on, I

BILLY MOORE - DIRECT

1 think it was Thursday before.

2 Q Uh-huh.

3 A Then I asked, I asked him about, could he haul
4 one because I had no way of taking that many
5 go-carts to the track.

6 Q Uh-huh.

7 A And I knowed he had a truck, I asked him
8 could he carry one, he said, well, he had a trailer
9 that would house them all.

10 Q And before that day had you seen the trailer?

11 A No, sir.

12 Q All right. So, what did you do then?

13 A That Saturday morning he come with the
14 trailer and had a few odds and ends in it, we
15 loaded it.

16 Q What was your impression of the trailer when
17 he showed up?

18 A That was the way to go.

19 Q Why is that?

20 A Well, when it's anywhere from 95 to a hundred
21 outside, I have never been nowhere but by the doors
22 at the race track that cool air was blowing out,
23 let alone be in there myself, and it had
24 air-conditioning, it was just like a shop on
25 wheels.

BILLY MOORE - DIRECT

1 Q Did he have some stuff in the trailer?

2 A He had a few items in the trailer.

3 Q All right. And what did you do with those?

4 A We unloaded them off into my shop right at
5 the door.

6 Q I believe he had some, he had something you
7 took precaution when you unloaded it?

8 A There was several firearms in cases and
9 several cases of ammunition.

10 Q Uh-huh.

11 A And I have kids in and out of the shop, I
12 told him that the ammo needed to be put in a
13 cabinet and locked.

14 Q Uh-huh.

15 A He agreed. We put the ammo in the cabinets
16 under the refrigerator as you walk in the door and
17 he got a lock out of his truck and locked it.

18 Q You did what?

19 A He got a lock out of his truck and locked it..

20 Q Okay. Did you have the lock?

21 A No.

22 Q Did you have a key to it?

23 A No.

24 Q All right. Tell us, then, what happened
25 after that, what did you all do then?

BILLY MOORE - DIRECT

- 1 A As in?
- 2 Q Later that day.
- 3 A We started loading my stuff on the trailer.
- 4 Q All right. Did you go racing?
- 5 A Yes, sir.
- 6 Q When you got back was he interested in
- 7 racing?
- 8 A He told me to go ahead and figure out what a
- 9 brand new go-cart would cost him.
- 10 Q Uh-huh And would you make a commission off
- 11 that go-cart if you ordered one for him?
- 12 A Real good commission. If I didn't think he
- 13 was really interested in buying one I wouldn't have
- 14 let him rode one of mine.
- 15 Q Okay. When you get back from the race what
- 16 do you do for a day or so?
- 17 A Clean them up.
- 18 Q All right. Does that take a while?
- 19 A Yes, sir.
- 20 Q When he came back did he leave his trailer at
- 21 your place?
- 22 A Yes, he did.
- 23 Q Was he there on the 23rd of September of
- 24 2002?
- 25 A That afternoon he was there for about an

BILLY MOORE - DIRECT

1 hour, he came back in later that night, probably
2 between 9:00 and 10:00 o'clock.

3 Q All right. What was he there for that time?

4 A He asked me could he install a radio in his
5 truck.

6 Q What kind of radio was it, do you remember?

7 A Sony CD player.

8 Q Okay. Was it a new one or what?

9 A Yes, sir, he took it out of the box.

10 Q Okay. Did it have instructions with it?

11 A Yes, sir.

12 Q And who was installing that?

13 A He was.

14 Q What were you doing?

15 A I was working on a motor in the engine room.

16 Q And was Ernest Covan there?

17 A Yes, sir, he was.

18 Q And what was Ernest doing there?

19 A He had two pieces of weedeater he was working
20 on.

21 Q Had he also looked at anything you owned
22 about buying it?

23 A A mini bike.

24 Q Did your uncle come by that evening?

25 A Yes, he did.

BILLY MOORE - DIRECT

1 Q And stayed about how long?

2 A Approximately an hour, hour and a half, maybe
3 two hours.

4 Q Is it unusual for him to just drop in?

5 A No, he come by several times a day.

6 Q And he owned the building?

7 A Yes, sir, and the land, too.

8 Q Did he charge you any rent for it?

9 A No, sir.

10 Q All right. You all were there how long, how
11 long did you all spend working on the stuff in the
12 garage?

13 A Then?

14 Q On the 23rd, into the 24th?

15 A Pretty much all night.

16 Q All right. What time did you leave?

17 A About 6:30, a quarter to 7:00.

18 Q Up until the time you left at 6:30, a quarter
19 until 7:00, had Marshall Miller ever shown you any
20 drugs?

21 A No, sir.

22 Q Had you seen any?

23 A No, sir.

24 Q All right. Did he tell you what he did for a
25 living?

BILLY MOORE - DIRECT

1 A He said he was, he worked shutdown as an
2 electrical technician.

3 Q Do you know people who do that?

4 A Yes, sir.

5 Q And what kind of money do those people make?

6 A Very good money.

7 Q All right. Did you see any, did Marshall
8 Miller show you any money?

9 A Only when he paid me.

10 Q And about how much would you estimate he had
11 when he showed you his money then?

12 A Approximately, before he paid me,
13 eight-hundred, a thousand dollars or so.

14 Q Was it in a roll?

15 A No, sir, just a couple hundreds and then some
16 twenties, I assume, and he paid me in a hundred and
17 two twenties and a five.

18 Q Okay. So, you left at 6:30 the next morning?

19 A Yes.

20 Q Where did you go?

21 A Home.

22 Q And what did you do when you got home?

23 A I took a shower and then went out and started
24 dragging where I'm trying to grow grass in the
25 back.

BILLY MOORE - DIRECT

1 Q And how long did you spend doing that?

2 A By the time I got out there and up until
3 about, I would say between 10:00 and 11:00.

4 Q Okay. And did you notice something when you
5 were out there?

6 A Yes, I did.

7 Q And what was that?

8 A The law officers.

9 Q All right. Where were they?

10 A Coming around both sides of Michelle Madden's
11 trailer.

12 Q Coming where?

13 A Around both sides of Michelle Madden's
14 trailer.

15 Q All right. And Michelle Madden lives where?

16 A Nextdoor.

17 Q All right. And what did you do when you saw
18 them out there? First of all did you know they
19 were law enforcement officers when you first saw
20 them?

21 A Yes, I did.

22 Q How did you know that?

23 A They was wearing black uniforms with SLED
24 wrote on them.

25 Q Okay. What did you do when you saw them?

BILLY MOORE - DIRECT

1 A I approached them and asked them could I help
2 them.

3 Q All right. I hand you this picture and ask
4 you if you can identify that?

5 A The back of Michelle's trailer.

6 Q Who is in that picture?

7 A That's me.

8 Q And that's the approximate location of what?

9 A About where I met them.

10 Q Okay.

11 MR. VARNER: No objection, Your Honor.

12 THE COURT: How says the State?

13 MR. CROUT: No objection from the State, Your
14 Honor.

15 THE COURT: To be marked as Defendant Moore's
16 Exhibit Number 2.

17 (Defendant Moore Exhibit Number 2 was
18 marked and received in evidence).

19 QUESTIONS BY MR. WISE:

20 Q I hand you this other picture and ask you
21 what that shows?

22 A That would be the approximate area looking
23 back toward my house.

24 Q Is that your trailer in that picture?

25 A Yes, sir.

BILLY MOORE - DIRECT

1 MR. VARNER: No objection.

2 THE COURT: Marked and becomes part of the
3 evidence in the case.

4 MR. HOOD: No objection, Your Honor.
5 (Defendant Moore Exhibit Number 3 was
6 marked and received ine vidence).

7 BY MR. WISE:

8 Q What did you do when you went up to -- first,
9 what agent did you go talk to?

10 A Miss Sonnefeld.

11 Q And what did you ask her?

12 A Could I help them.

13 Q And what did she respond?

14 A That they was looking for Michelle Madden.

15 Q All right. And what did you tell them?

16 A That they missed her by about an hour.

17 Q Did you all have any other conversation?

18 A Yes, sir. She asked me who the truck and
19 trailer across the street belonged to.

20 Q What did you tell her?

21 A Mr. Miller.

22 Q And did she ask you anything else after that?

23 A Could she go talk to him.

24 Q What did you tell her?

25 A She could, I didn't have no problem with it.

BILLY MOORE - DIRECT

1 Q Did you introduce yourself to her?

2 A Yes, sir. She asked me who I was.

3 Q All right. And after that conversation what
4 did she do?

5 A They went across the street.

6 Q What did you do?

7 A Went back to dragging until my wife came home
8 for lunch.

9 Q And when your wife came home for lunch what
10 did you do?

11 A She wanted to know what all was going on and
12 I told her what knowledge I had at that time, they
13 was looking for Michelle and asked me about the
14 truck and trailer across the street, we went and
15 had lunch.

16 Q How long did you all spend having lunch?

17 A Thirty, forty-five minutes.

18 Q What happened after lunch?

19 A She went to go back to work and there was
20 more cars come in across the street, so I went
21 across to see exactly what was going on.

22 Q Okay. And did you talk to Connie across the
23 street?

24 A Yes, I did.

25 Q And what were you all discussing across the

BILLY MOORE - DIRECT

1 street?

2 A That they was looking for Marshall and
3 Marshall had fled, they was waiting on a helicopter
4 and crime dogs.

5 Q All right. And what were you doing, what did
6 you start doing?

7 A I went into the office, started doing,
8 working on a block that I was working on, then a
9 little while later Miss Sonnefeld again came and we
10 was discussing what items was mine at the tailgate
11 of that trailer and what items of mine was on the
12 trailer.

13 Q So, you had some items on the trailer?

14 A Yes, sir.

15 Q And why were they on his trailer?

16 A Just because we never had unloaded everything
17 from Saturday racing.

18 Q And how long did you spend there talking with
19 her about whose items were whose?

20 A I would say fifteen, thirty minutes.

21 Q All right. And after that then what happened
22 in relation to you?

23 A Then a Greenwood officer, Ronnie McAllister,
24 came up and asked me would I sign a search warrant
25 for the shop.

BILLY MOORE - DIRECT

1 Q Okay.

2 A And to my best knowledge I had signed one
3 previously for the State.

4 Q Had the officers been in your shop?

5 A For a good two hours, hour and a half.

6 Q Something like that?

7 A Uh-huh (affirmative)

8 Q And what did you tell him?

9 A That I had already gave consent to search the
10 shop.

11 Q Uh-huh.

12 A He said, "No, this is for Greenwood County."

13 Q Okay.

14 A So I signed one for him.

15 Q Did you have any problem doing that?

16 A No, sir.

17 Q All right. What happened after you signed
18 that?

19 A Doug Gunter walked from in the other room and
20 had a red --

21 Q When you say the other room, you have to
22 describe a little bit for the jury.

23 A I was in the front part of the office, he
24 walked on back in the office, he come out with a
25 red bag and had a needle and some spoons and told

BILLY MOORE - DIRECT

1 me I was under arrest.

2 Q Is this the red bag, this red bag here?

3 A That's it.

4 Q Which is State's 23. Prior to Doug Gunter
5 bringing this out had you ever seen that?

6 A No.

7 Q Okay.

8 A I told him at that time I didn't.

9 Q And did they also show you this bag that's
10 been marked State's Exhibit 21?

11 A No.

12 Q Did you see that one that day?

13 A No.

14 Q The only one you saw was this Sudafed bag?

15 A Yes.

16 Q And at that point they arrested you?

17 A Yes.

18 Q Now, did you stay there or did you --

19 A They immediately put me in a Greenwood County
20 Sheriff's car and took me to Greenwood County.

21 Q Now, did they also search the locked cabinet?

22 A I don't know, I wasn't in there.

23 Q You weren't in there?

24 A No, sir.

25 Q Well, when you got back what was the

BILLY MOORE - DIRECT

1 condition of the locked cabinet?

2 A The lock had been cut off.

3 Q Okay. I hand you these two pictures and ask
4 if you can identify those?

5 A That's the lock that was cut off and laying
6 on the floor.

7 MR. VARNER: No objection, Your Honor.

8 MR. CROUT: None from the State.

9 THE COURT: To be marked and become part of
10 the evidence in the case. We will mark them as one
11 exhibit or two?

12 MR. WISE: Make them two.

13 THE COURT: Each will be given a number.

14 (Defendant Moore Exhibits 4 and 5 were
15 marked and received in evidence).

16 BY MR. WISE:

17 Q Were the guns you placed in the shop still
18 there when you got back?

19 A No, sir.

20 Q What about the bullets?

21 A No, sir.

22 Q They weren't there either? All right. Now,
23 where does your uncle live in relation to your
24 shop?

25 A About 300 yards.

BILLY MOORE - DIRECT

1 Q Let me ask you if you can identify this
2 picture?

3 A That's his house.

4 Q Where was that picture taken from?

5 A Standing in front of my shop.

6 MR. WISE: I would like to move to introduce
7 this picture.

8 THE COURT: What says the State?

9 MR. CROUT: No objection from the State.

10 MR. VARNER: No objection.

11 THE COURT: To be marked and become part of
12 the evidence in the case.

13 (Defendant Moore Exhibit Number 6 was
14 marked and received in evidence).

15 BY MR. WISE:

16 Q Now, Mr. Moore, if you can, point out who
17 lives around you and where you live in that
18 picture.

19 A My trailer would be approximately right here.

20 Q Is your trailer shown on that aerial
21 photograph?

22 A No, sir. This photograph was done before it
23 was put there.

24 Q Okay. All right, let's start, let's start
25 with the line about right here and go on this side

BILLY MOORE - DIRECT

1 of the road as to who lives where, and then this
2 side of the road.

3 A In this opening right here there is a trailer
4 now, it's the son of the Medlins who live right
5 here.

6 Q All right.

7 A This is Mr. and Mrs. Medlin and their
8 daughter.

9 Q All right.

10 A This would be my grandmother.

11 Q All right. Now, that's your grandmother on
12 which side of the family?

13 A My daddy's.

14 Q Your father's side?

15 A Uh-huh (affirmative)

16 Q Okay.

17 A This would be the shop.

18 Q Uh-huh.

19 A And this would be Jim's house.

20 Q Who lives on the other side of the road?

21 A This would be my ex-stepmother right here.

22 Q All right.

23 A The Maddens.

24 Q Uh-huh.

25 A Myself, and Mrs. Higgins.

BILLY MOORE - DIRECT

1 Q All right. And how well do you get along
2 with your ex-mother-in-law, ex-stepmother?

3 A We don't.

4 Q Did you all have a dispute over the estate?

5 A Yes, sir.

6 Q Okay. Do you know Tommy Stewart?

7 A About two months before the arrest.

8 Q You met him sometime that summer?

9 A Yes, sir.

10 Q All right. How did you meet him?

11 A A guy I went to school with and did some work
12 on his vehicle brought him to the shop, he wanted
13 to get some work done on an MR1.

14 Q What is an MR1?

15 A That's a car.

16 Q And how many times do you think you have seen
17 him in two or three months?

18 A Approximately maybe four.

19 Q Did you ever sell him any methamphetamine?

20 A No.

21 Q Did you ever watch Marshall Miller make any
22 methamphetamine?

23 A No, sir.

24 Q Did you ever help him make any
25 methamphetamine?

BILLY MOORE - DIRECT

1 A No.

2 Q Did you ever sell any for him?

3 A No, sir.

4 Q I believe the day of this incident the police
5 sat down and talked to you?

6 A Yes, sir.

7 Q And asked you about how long you had known
8 Marshall Miller and so forth?

9 A Off and on different interviews, different
10 ones, yes, sir.

11 Q Did you give them a full statement?

12 A Yes, sir.

13 Q All right. Now, I believe Marshall came by
14 and got you to sign a statement?

15 A He had me sign a document.

16 Q A document, okay. Did you know what it was?

17 A Insurance form, he said.

18 Q How well do you read and write?

19 A I don't.

20 Q All right. Can you make out a few words?

21 A Something I have seen numerous times.

22 Q When he got you to sign this document did you
23 make any effort to read it?

24 A No, sir. I didn't go against what he said.

25 Q Is it unusual for people to ask you to sign

BILLY MOORE - DIRECT

1 things for insurance?

2 A No, quite frequently.

3 Q Okay. Why is that?

4 A So they can turn it in on their insurance.

5 Q Now, in the time you have had the shop over
6 there, do you work nights?

7 A Night and days.

8 Q Why is that?

9 A Only one person, somebody's got to do it.

10 Q All right. How often does your wife come by
11 and visit the shop?

12 A All spare moments she can between the time
13 she comes home and in between supper and asks me if
14 I want something to eat and brings me something to
15 eat.

16 Q What about your uncle, does he come in?

17 A Every day.

18 Q All right. Is it unusual for any other
19 people to drop by?

20 A I have customers that came by night and day,
21 second shift workers came by at certain times and
22 first shift workers came by a certain time.

23 Q Now, you met Chip how long ago, James
24 Heatherly?

25 A About three years ago.

BILLY MOORE - DIRECT

1 Q How did you meet him?

2 A Through a mutual friend.

3 Q And how did he come to get involved in
4 helping you out?

5 A He was interested in all the go-carts and
6 once he started fooling with them a little bit,
7 Chip never left.

8 Q And before he was helping you what was he
9 doing?

10 A Sitting in an apartment.

11 Q Does he get paid for this?

12 A No. He's on disability.

13 Q Do you feed him on occasions?

14 A I fed him and also built him a go-cart to
15 ride.

16 Q He started go-cart riding with you?

17 A Yes, sir.

18 Q All right. And how old was your son when you
19 were going go-cart riding?

20 A How old was he?

21 Q Yes.

22 A He started out, when we started out he was
23 thirteen years old.

24 Q Did he enjoy it?

25 A Yes, sir, he loves it.

BILLY MOORE - DIRECT

1 Q Did you get reasonably good at it?

2 A With hard work, I did.

3 Q And the last year you were actively go-cart
4 racing did you win any awards or anything?

5 A Out of the nine --

6 Q You and Chip and your son?

7 A Out of the nine trophies that are given, we
8 took four of them.

9 Q And what were those?

10 A Second place in heavy, second place in
11 medium, third place in light, and third place in
12 heavy.

13 Q Billy, on the 24th of September when the
14 police were by your house did you cooperate with
15 them?

16 A Yes, sir.

17 Q Give them permission to search your garage?

18 A Yes, sir.

19 Q Did they ask to come search your house or
20 anything?

21 A I think they went over and looked around, I'm
22 not really sure, I didn't go with them.

23 Q Did you try to do anything to stop then?

24 A No, sir.

25 Q When you first saw the police were in

BILLY MOORE - DIRECT

1 Michelle Madden's yard did you, did you volunteer
2 to go see them?

3 A Yes, sir.

4 Q All right. Did you tell them any lies?

5 A No, sir.

6 Q Cooperate with them?

7 A Yes, sir.

8 Q Did you ever -- you're indicted with nineteen
9 other people, all right. Do you know Marshall
10 Miller?

11 A Yes, sir.

12 Q Known him about how long by September 24th?

13 A Approximately eight to nine days.

14 Q Do you know Tina Stevenson?

15 A No, sir.

16 Q Do you know Julie Prince?

17 A Yes, sir.

18 Q How did you know her?

19 A I went to school with her.

20 Q And how long ago was that?

21 A Back in grammar school twenty some years ago.

22 Q Did you have any dealings with her?

23 A No, sir.

24 Q Martha Ellis?

25 A No.

BILLY MOORE - DIRECT

1 Q You didn't know her?

2 A No.

3 Q David Cumming?

4 A No.

5 Q Tony Howard?

6 A No, sir.

7 Q Sandra Jo Hughes?

8 A That was Julie's mother.

9 Q All right. And did you have any dealings
10 with her?

11 A No, sir.

12 Q All right. Had you even seen her in the last
13 six months before September 24th?

14 A Only in the grocery store or something of
15 that nature.

16 Q Did you ever associate with her socially?

17 A No, sir.

18 Q Jason Davis?

19 A I know of him but I do not know him.

20 Q Ernest Covan?

21 A Yes, sir.

22 Q And how long have you known Ernest?

23 A All my life.

24 Q Bonnie Saylor?

25 A No.

BILLY MOORE - DIRECT

- 1 Q Ashley Bannister?
- 2 A No, sir.
- 3 Q Scottie Prince?
- 4 A No, sir.
- 5 Q Tonya Michelle Madden?
- 6 A Yes, sir.
- 7 Q And how long have you known her?
- 8 A All my life.
- 9 Q All of her life?
- 10 A All her life.
- 11 Q She's how much younger than you?
- 12 A I would say about ten, twelve years.
- 13 Q Sammy McNeil?
- 14 A No, sir.
- 15 Q Tracy Davis?
- 16 A She was there when I went to get the car.
- 17 Q Is that the only time you ever met her?
- 18 A Yes, sir.
- 19 Q Ray Powell?
- 20 A No, sir.
- 21 Q Jeff Frye?
- 22 A No, sir.
- 23 Q And Jeff Horne?
- 24 A I went to school with Jeff.
- 25 Q All right. And how much did you see Jeff in

BILLY MOORE - DIRECT

1 the six or eight months before September 24th?

2 A Maybe three or four.

3 Q All right. Did you ever conspire with any of
4 these people to manufacture, sell, give away
5 methamphetamine?

6 A No, sir.

7 MR. WISE: Thank you. Answer any questions
8 the government may have.

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BILLY MOORE - CROSS

1 CROSS EXAMINATION

2 QUESTIONS BY MR. CROUT:

3 Q Mr. Moore, I believe you indicated in your
4 testimony you don't read too well, is that right?

5 A That's correct.

6 Q Now, your first grade teacher, did she ever
7 tell you that you had any reading problems?

8 A Yes. She held me back a year.

9 Q She held you back a year?

10 A Yes, sir.

11 Q You went to the second grade. What about
12 your second grade teacher, did she hold you back?

13 A I was in special resource classes the entire
14 time I was in school.

15 Q Now, did you go to, after the second grade,
16 when you went into the third grade did you just
17 stay at that same level in your resource class?

18 A Yes, the entire time I was in school.

19 Q So, your reading never changed from the
20 second grade until the ninth grade?

21 A Pretty much stayed the same. I can read as
22 well now as I could then.

23 Q So, you read at second grade level?

24 A I'm not sure exactly what a second grade
25 level is but if I seen a word numerous times I know

BILLY MOORE - CROSS

1 what it is, but to read a sentence, no, sir.

2 Q All right. So, what about Chip, Mr.

3 Heatherly, does he help you with your reading?

4 A Yes, sir.

5 Q He will read like instructions, mechanical
6 instructions and things like that?

7 A Mechanical instructions. Clinton's manual,
8 Haines manual are all pictures. Anything pictures
9 I can do.

10 Q You deal with the pictures?

11 A Yes.

12 Q Now, as far as your other knowledge, has most
13 of that been just taught to you by somebody else?

14 A Between the military and hands-on is how I'm
15 a mechanic.

16 Q All right. And when you left the military
17 what rank were you?

18 A I was a PFC.

19 Q PFC? I guess you were in there three years?

20 A I was two years active and then two years
21 National Guard.

22 Q Okay. But you were able to do all that at
23 that reading level, correct?

24 A Yes.

25 Q Did the Army ever give you any assistance

BILLY MOORE - CROSS

1 with your reading?

2 A No, sir.

3 Q All right. Now, I am curious. Did Marshall,
4 did you introduce Chip to Marshall Miller, or did
5 he introduce, or did Chip introduce Marshall Miller
6 to you?

7 A Chip introduced Marshall to me.

8 Q And the first time you all met where did you
9 all meet?

10 A At the lake house.

11 Q At the lake house?

12 A Uh-huh (affirmative)

13 Q Okay. And what date was that, exactly?

14 A I'm not sure. It was eight or nine days
15 before September 24th.

16 Q So, do you want to say maybe like September
17 16th or 17th?

18 A Yes, sir.

19 Q Okay. And how long did you all meet then?

20 A I talked with Marshall maybe fifteen, twenty
21 minutes.

22 Q About fifteen or twenty minutes?

23 A Uh-huh (affirmative). I was there for about
24 three hours.

25 Q Okay. So, I guess you talked to him first

BILLY MOORE - CROSS

1 for about fifteen or twenty minute, then started --

2 A He asked me about the car and I told him
3 about the car. He left and I went on working on
4 the car.

5 Q He just left you there?

6 A Yes, sir.

7 Q And was Chip with you?

8 A Chip was there and Chip went to the store and
9 came back.

10 Q Okay. The second time you all met, where did
11 you all meet then?

12 A He came to my shop to check on his car.

13 Q How did you get the car? I'm assuming that's
14 the same car, that red car, correct?

15 A The Grand Am?

16 Q Yes, the Grand Am?

17 A Uh-huh (affirmative)

18 Q It was red, right?

19 A Red.

20 Q Okay. How did you get the car from his house
21 to your shop?

22 A That's what I spent three hours doing, after
23 I got all the mechanical parts of it to where it
24 would run Marshall drove it to my shop.

25 Q He drove it, you didn't have to tow it or

BILLY MOORE - CROSS

1 anything?

2 A No, sir.

3 Q And, so, what day did he come to the shop to
4 check on the car from that first time?

5 A Chip took him home that day and approximately
6 three days later is when he came back to check on
7 it.

8 Q Okay. So, we're up to about the 19th or 20th
9 now, right?

10 A 17th, yes, sir.

11 Q And on that date how long did you meet with
12 him and talk to him?

13 A I was busy, I talked to him probably ten or
14 fifteen minutes at the time that he got there, he
15 was there probably thirty, forty-five minutes, and
16 waiting on me to come back to talk to him again.

17 Q So, you talked to him ten or fifteen minutes,
18 you wait for about thirty or forty-five?

19 A I was with another customer.

20 Q You were with another customer, he comes
21 back, and how long did you talk to him that time,
22 the second time?

23 A He asked me questions about go-carts,
24 questions on his automobile, I would say about
25 thirty minutes.

BILLY MOORE - CROSS

1 Q And then he left, he paid you and left?

2 A Yes, sir.

3 Q All right. Now, you said that was probably
4 on the 19th or 20th. Was that the meeting where
5 you said "Hey, you can drive one of my go-carts
6 this weekend"?

7 A He had briefly talked about it, briefly
8 talked about it then but he also asked me about
9 working on another red car which was a Grand Prix,
10 if I'm not mistaken.

11 Q So, you didn't spend the whole thirty minutes
12 talking about go-carts?

13 A No.

14 Q You spent some of that on his Grand Prix?

15 A Uh-huh (affirmative)

16 Q All right. And then some of that talking
17 about go-carts?

18 A Him and Chip talked more about the go-carts
19 than what I had time to talk to him about.

20 Q Because you were busy?

21 A Yes.

22 Q Okay. Now, is that where you offered to let
23 him drive one of your go-carts at the races that
24 weekend?

25 A When he come back to pick up the Grand Prix.

BILLY MOORE - CROSS

1 Q Okay.

2 A We talked probably thirty, forty-five
3 minutes, maybe an hour then on the go-carts
4 subject.

5 Q That would have been actually the third time
6 you met him, correct?

7 A Right.

8 Q Okay. Now, what date was that?

9 A That was the Friday before the 24th.

10 Q That's a Friday before the 24th?

11 A Yes, sir.

12 Q All right. So, that was approximately, then,
13 maybe the 22nd, two days after your second meeting,
14 21st, 22nd?

15 A After the meeting of the 19th, that would
16 have been the 22nd or so.

17 Q All right. And at that meeting when he came
18 to pick up the Grand Prix you confirmed from your
19 thirty minutes conversation that he could race one
20 of your go-carts, right?

21 A We talked about it. I have one for all
22 serious inquiries I would do that for.

23 Q Is it just kind of like a test model?

24 A Exactly.

25 Q So, at your third meeting he, though,

BILLY MOORE - CROSS

1 confirmed, "I will drive one," right?

2 A Exactly.

3 Q And you say, "Hey, bring your truck because
4 if you're going to drive it you got to take it out
5 there yourself"

6 A I had no way of hauling that many.

7 Q Okay. When you say that many, you were just
8 going to let him drive one, right?

9 A But my son still was going to race and Chip,
10 sometimes I did, sometimes I didn't, it depends on
11 how many customers I had or what I had going on. I
12 also built engines for many different people. When
13 it got to the racetrack I attended to all them. I
14 had very little time to race, myself.

15 Q What I'm saying, what I'm getting at here is
16 that that go-cart that you usually leave or that
17 you have for customers, you let them use it to race
18 on the weekends but they generally have got to get
19 it to the track themselves?

20 A If they don't, then one of ours stay home,
21 Chip's would stay home most of the time and we
22 would carry it ourselves.

23 Q Okay. But then Marshall told you, "Hey, I've
24 got a big old trailer, we can take all our stuff,
25 your children's stuff, my stuff, everybody's

BILLY MOORE - CROSS

1 stuff"?

2 A The entire shop.

3 Q All right. Now, if Marshall doesn't let you
4 use his trailer how do you get, how do you get the
5 other go-carts to the races?

6 A We carry them, I have a trailer that can haul
7 two go-carts.

8 Q Okay.

9 A And in the back of the truck I can haul three
10 go-carts if necessary but I can't carry as much
11 equipment then.

12 Q Okay. So, on the, I guess the third meeting
13 is where you all come to the agreement of using his
14 trailer and then the fourth meeting I guess is when
15 you all actually go to the races, right?

16 A That Saturday.

17 Q That Saturday night is the races?

18 A Yes.

19 Q What date was that?

20 A Tuesday would have been the 24th, it would
21 have been Monday would have been the 23rd. The
22 22nd.

23 Q It's Saturday night, right?

24 A Uh-huh (affirmative)

25 Q September 22nd?

BILLY MOORE - CROSS

1 A Okay, Sunday would have been the 23rd, 24th,
2 no, it would have been the 21st.

3 Q Okay. The 21st is when you actually went and
4 raced?

5 A Yes, sir.

6 Q Okay. On your fourth meeting he has got all
7 your go-carts in his trailer, your children, all
8 your children's go-carts. Now, did he ride by
9 himself or did you ride with him?

10 A Me and my son rode with him.

11 Q You and your son rode with him, all right.
12 That's your fourth meeting. Then you come back
13 from that race and you're cleaning up?

14 A No, sir, we didn't start cleaning up that
15 night.

16 Q You didn't start, you're tired that night,
17 you come back, all you're trying to do is get
18 everything in the garage?

19 A Exactly.

20 Q All right.

21 A We didn't even get it in the garage, we left
22 it in the trailer.

23 Q You just left it in the trailer, all right.
24 He leaves?

25 A Yes, sir.

BILLY MOORE - CROSS

1 Q Okay. Then he comes back on the 23rd?

2 A No, sir. It would have been the 24th --
3 well, the 23rd, the night previous.

4 Q Right, he comes back the night before?

5 A Yes.

6 Q Have you all started cleaning up by then?

7 A We're basically about done.

8 Q About done, so he didn't really help in the
9 clean-up part?

10 A No, sir.

11 Q Okay. And he hangs around there all night
12 from the 23rd to the 24th?

13 A He was installing a radio in his truck.

14 Q But he's there, he's working?

15 A He come in about 10:00 o'clock and started
16 putting a radio in his truck.

17 Q Okay. So, he's in your shop installing a
18 radio in the truck on you all's, is that you all's
19 fifth or sixth meeting, I guess the fourth meeting
20 is when you went to the go-cart races and the fifth
21 time you see him is on the 23rd, that's your fifth
22 meeting?

23 A That's right.

24 Q So, you had had basically five individual
25 meetings with Marshall Miller?

BILLY MOORE - CROSS

1 A Yes, sir.

2 Q All right. Now, those pictures that you were
3 showing, that you identified, who took those
4 pictures?

5 A Mr. Wise.

6 Q He took those pictures?

7 A Yes.

8 Q When did he take those pictures?

9 A A couple weeks ago.

10 Q And that lock was still on the floor there a
11 couple weeks ago?

12 A Yes, sir. I have never moved back into the
13 shop.

14 Q You just hadn't gone back?

15 A We have been fenced in and I never have moved
16 back in.

17 Q All right. Now, do you remember the
18 statement that Mr. Wise referred to, that you had
19 given to Agent Sonnefeld, do you remember that?

20 A I remember talking with her.

21 Q All right. And do you remember her showing
22 you what you had written?

23 A As in what I had written?

24 Q Excuse me, showing you what she wrote about
25 what you told her?

BILLY MOORE - CROSS

1 A To my best knowledge.

2 Q Now, let me ask a question because you might
3 be a little confused. I'm not talking about your
4 ability to read it and understand it. What I'm
5 saying, do you remember her just showing it to you
6 and saying, "I wrote down what you told me"?

7 A She was writing the entire time I was talking
8 to her.

9 Q She was writing the entire time, but when she
10 got finished did she say, "Okay, Mr. Moore, here is
11 what I wrote"?

12 A I can't say that.

13 Q You can't say that?

14 A No, sir.

15 Q Now let me ask you this. Well, if you signed
16 it you could identify your signature, is that
17 correct?

18 A Yes, sir.

19 Q And maybe this will refresh your memory?

20 A Yes, sir.

21 Q Just take a look at it. Is this your
22 statement right here, excuse me, your signature
23 right here?

24 A That appears to be my signature.

25 Q All right. What is this date right here?

BILLY MOORE - CROSS

1 A That would be 9/24/02.

2 Q All right.

3 Q Now, there is one address up here, shop
4 address, 708 Morgan Road, Hodges. Is that your
5 shop address?

6 A I really don't know the shop address.

7 Q Sir?

8 A I really don't know the shop address.

9 Q But it's on Morgan Road?

10 A Yes, sir.

11 Q And it is in Hodges?

12 A Yes, sir.

13 Q Now, what about your residence address, is it
14 709 Morgan Road?

15 A Yes, sir.

16 Q And that's in Hodges as well?

17 A Yes, sir.

18 Q All right. Now, do you remember telling her
19 that on September 17th a man brought a Pontiac
20 Grand Am to your shop for you to work on, do you
21 remember telling her that?

22 A I told her he brought the Pontiac Grand Prix,
23 a Grand Am and Grand Prix both.

24 Q All right. But do you remember telling her
25 that he brought a Grand Am to your shop?

BILLY MOORE - CROSS

1 A I don't remember telling her exactly a Grand
2 Am because I know the difference between a Grand Am
3 and Grand Prix.

4 Q I understand, but what I'm saying is, as to
5 that vehicle, did you tell her that you met
6 Marshall Miller at the lake or did you tell her
7 that he brought the vehicle to your shop?

8 A I can't say exactly.

9 Q You don't know exactly what you told her?

10 A I know if I would have told her it would have
11 been a Grand Am, not a Grand Prix.

12 Q All right. What about do you remember
13 telling her that Mr. Miller had actually asked you
14 to hold on to his trailer because he had to get it
15 out of his shop at Cokesbury? Do you remember
16 telling her that?

17 A No, sir.

18 Q You never told her that?

19 A I'm not going to say I didn't but I know
20 better than that.

21 Q When you say you know better than that, you
22 know that that statement is not correct now?

23 A That is not a statement that I have made.

24 Q Okay. Now, when you gave that statement to
25 her do you recall telling her that you can't read?

BILLY MOORE - CROSS

1 A I know I can't.

2 Q I know, but did you tell her, "I can't read"?

3 A I don't recall her asking me.

4 Q Well, when you signed the bottom of this what
5 did you think you were signing?

6 A Whatever she was writing.

7 Q And what do you think she was writing?

8 A What I was telling her.

9 Q Thank you. Now, there's been some discussion
10 about this statement that you signed for Marshall
11 Miller, and in that statement -- now, you can
12 count, right?

13 A Can I count?

14 Q Yes.

15 A Oh, yes.

16 Q Okay. And like words like years, you can
17 spell years?

18 A I know what it looks like.

19 Q You know what the word looks like?

20 A Yes.

21 Q Give us a shot at it.

22 A It would be y-a-e-r.

23 Q Y-a-e-r, but I'm saying more than one.

24 A More than one what?

25 Q Year.

BILLY MOORE - CROSS

1 A If it's in a number I know the number.

2 Q I know, I understand, and I understand you're
3 attempting to spell year but what I'm saying is
4 spell years, more than one year.

5 A Y-a-e-r, it would be with S.

6 Q Okay. That's all right, I just wanted you to
7 add the S. I don't think anybody is going to argue
8 with you that you misspelled it a little bit but
9 you got it close.

10 All right. On this statement here did you
11 have any idea what this number two was related to?

12 A The two wasn't on there.

13 Q That two wasn't on there?

14 A No, sir.

15 Q What about up here, was your name on there?

16 A That's my name.

17 Q All right. How often do you have to sign
18 documents like this?

19 A Quite frequently, a couple times a week
20 probably.

21 Q Are they like this or are they insurance
22 documents?

23 A Different types of papers.

24 Q But you have to sign your name?

25 A Some is wrecker bills, different times.

BILLY MOORE - CROSS

1 Q And who reads those to you so you will know
2 what you're signing?

3 A If Chip's not there my wife does.

4 Q Who read this to you, Chip or your wife?

5 A Nobody read that, there was nobody in the
6 presence of me and Marshall at the time.

7 Q I'm curious, then. So, Chip or your wife
8 reads stuff if they're there?

9 A If they are not there --

10 Q Then you just sign it?

11 A I basically take it for what the person says.

12 Q All right. What did he tell you this was?

13 A An insurance form.

14 Q He told you it was an insurance form?

15 A Yes.

16 Q Do you know what happens if you sign false
17 information on an insurance form?

18 A Well, I'm sure it's against the law of some
19 sort.

20 Q But you didn't think to try to determine
21 whether or not what was in here was true or not?

22 A I have signed so many, I didn't question the
23 man.

24 Q All right. How many other documents would
25 you say you have signed without knowing what the

BILLY MOORE - CROSS

1 contents are?

2 A I can't give you a number. I'm going to say
3 more than five.

4 Q You have signed more than five?

5 A Less than ten, maybe.

6 Q More than five, less than ten?

7 A Yes.

8 Q Are those related to your go-cart business or
9 just life in general?

10 A Life in general.

11 Q Were you concerned about what car this
12 insurance work was for, the Grand Am or the Grand
13 Prix?

14 A No, sir, I didn't question it.

15 Q You didn't question it?

16 A No.

17 Q What about the Camaro, you weren't concerned
18 if it was for the Camaro?

19 A What Camaro?

20 Q Didn't he own a Camaro?

21 A Not to my knowledge.

22 Q What about a black truck?

23 A Yes, sir.

24 Q But you never did any work on a black truck?

25 A No, sir.

BILLY MOORE - CROSS

1 Q All right. What about Jeff Horne, how well
2 do you know Jeff Horne?

3 A I know of him, I went to school with him. As
4 well as anybody I went to school with, I reckon.

5 Q Did you ever go over to his house?

6 A No, sir.

7 Q Now, do you remember your father-in-law
8 talking to you on the day that the arrest occurred
9 at your shop?

10 A Yes, sir.

11 Q And is he aware that you can't read?

12 A Yes, sir.

13 Q And what did he tell you to tell the police
14 officers?

15 A Whatever I know.

16 Q Now, as for as the batteries that were in the
17 fire at your shop, you have been taught it's not a
18 good idea to burn batteries in a fire, correct?

19 A No, I hadn't been taught that.

20 Q You hadn't been taught that?

21 A No.

22 Q Do you even know that?

23 A I didn't until you said something about it
24 earlier.

25 Q Earlier?

BILLY MOORE - CROSS

1 A If I could read I could have told you that
2 maybe, but ain't nobody told me.

3 Q Nobody has ever told you that's a bad idea?

4 A No, sir.

5 Q Who told you it was a good idea?

6 A Why would you say somebody told me it was a
7 good idea?

8 Q I'm not asking, I'm just saying who told you
9 it was a good idea?

10 A Nobody.

11 Q You can just say, "Nobody told me, I thought
12 it up myself."

13 A Nobody told me.

14 Q You just thought that up yourself?

15 A It was considered garbage and I have always
16 burned garbage.

17 Q All right. So, when you met with Agent
18 Sonnefeld you had indicated to her Marshall Miller
19 actually wanted you to use his trailer to take to
20 the go-cart races, right?

21 A Yes.

22 Q You told her that, and you told her that you
23 didn't, you didn't tell her it was a Grand Prix,
24 you told her it was, you didn't tell her it was a
25 Grand Am, you told her it was a Grand Prix?

BILLY MOORE - CROSS

1 A If I told her anything about him bringing a
2 car it was a Grand Prix, not a Gran Am.

3 Q And you never told her, "I can't read"?

4 A No, sir.

5 Q What exactly did you do in the Army?

6 A I was a 63501, which is a light mechanic.

7 Q Where did you do your AIT?

8 A Fort Leonard Wood, Missouri.

9 Q You did your basic there, too?

10 A Yes, sir.

11 Q And what type of vehicles did you work on?

12 A Anything from a Jeep to a deuce and a half.

13 Q And for the benefit of some of the folks of
14 the jury, I know what it is but can you tell the
15 jury what a deuce and a half is?

16 A That would be the heavy equipment trucks.

17 Q And did you ever drive it, outside of having
18 to drive them to repair them, did you ever drive
19 these vehicles?

20 A No, sir.

21 Q And outside of doing mechanical work, have
22 you ever done any other type of work?

23 A Mechanical work at the sawmill and I have
24 cooked.

25 Q And you indicated you do know Ernest Covan.

BILLY MOORE - CROSS

1 correct?

2 A Yes, sir.

3 Q How did you meet Ernest Covan?

4 A He lived right up off the main road, 25, all
5 my life.

6 Q And was he friends with Marshall Miller?

7 A I have learned that he is, was.

8 Q How did you learn, just through this case?

9 A Yes, sir.

10 Q Were Marshall and Ernest Covan ever at the
11 shop together?

12 A Only the night before.

13 Q Only on the night before they got arrested?

14 A Yes.

15 Q And did they appear to be friends, to you?

16 A Yes, sir.

17 Q So, that's really when you realized they knew
18 each other?

19 A Exactly.

20 MR. CROUT: Mr. Moore, that's about it.

21 Thank you.

22 THE WITNESS: Thank you.

23 THE COURT: Mr. Varner?

24

25

BILLY MOORE - CROSS

CROSS EXAMINATION

QUESTIONS BY MR. VARNER:

Q Mr. Moore, you were arrested and charged with all these drugs that were at your shop that morning, is that correct?

A Yes, sir.

Q And were those charges subsequently dropped?

A No, sir.

Q Are those charges still pending, then?

A Yes, sir.

Q Okay. And it's just kind of a common sense question, you agree you would stay up sometimes two, maybe three nights of the week working?

A Not without sleep at all.

Q Okay.

A But very little sleep.

Q I was going to ask you, how do you do that, how do you stay up all night?

A I've been trained ever since I was in the military, I can do it on very little sleep. I'm not saying three days with no sleep.

Q Okay. Well, that's what I was going to ask you. If you do go a night without sleep, when do you try to catch up and how much sleep do you have to have?

BILLY MOORE - CROSS

1 A I can go on to work with three to four hours.

2 Q Do you catch up like the next morning or
3 catnaps here and there?

4 A If I'm caught up around the shop I sleep a
5 day, a day and a half at times.

6 Q What, now, I'm sorry?

7 A If I was caught up at the shop I sleep a day,
8 day and a half at times.

9 Q Okay. And do you sometimes take catnaps at
10 work?

11 A I would go home if I got extremely tired at
12 any given time I got ready and take a nap.

13 Q Okay.

14 MR. VARNER: That's all the questions I have.

15 MR. WISE: Just one question on redirect.

16

17

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BILLY MOORE - REDIRECT

REDIRECT EXAMINATION

QUESTIONS BY MR. WISE:

Q Mr. Moore, how many cars did Marshall Miller bring to your shop?

A Two.

Q And what were they?

A A Grand Am and a Grand Prix.

Q All right. But on two different occasions?

A Yes, sir.

Q Do you remember which one he brought first?

A When we went over to his place we brought the Grand Am back.

Q All right. Then how many days later did you get the other one?

A Three to four days.

Q One other question. This Saran wrap, what do you use it for?

A Wrap go-cart tires.

Q And the scales?

A To weigh engine parts.

Q How long have you had those scales?

A A long time. More than four years.

MR. WISE: Okay, thank you. That's all I have.

THE COURT: Anything on recross examination?

1 MR. CROUT: Nothing from the State, Your
2 Honor.

3 THE COURT: Mr. Varner?

4 MR. VARNER: Nothing further, Your Honor.

5 THE COURT: Thank you. Come down, please,
6 sir.

7 (Witness excused).

8 MR. WISE: The defense rests, Your Honor.

9 THE COURT: That's the case in chief for
10 defendant Moore.

11 Will there be reply, or do you want some time
12 to consider?

13 MR. HOOD: Nothing from the State, Your
14 Honor.

15 THE COURT: Very well. Ladies and gentlemen,
16 that completes all the evidence in the case. You
17 have heard all the evidence in the case and at this
18 hour we will not attempt to argue and charge
19 because that would allow you to commence
20 deliberation at somewhere around 6:30 to 7:00
21 o'clock, so we won't do that. We will do that in
22 the morning.

23 Do not discuss the case by, between or among
24 yourselves. Do not discuss the case with anybody,
25 do not allow anyone to discuss the case with you.

1 If anyone attempts to do so please advise that
2 person that you are a juror and it is not proper
3 for you to discuss the case with them and you may
4 not do it. If any person or persons persist in
5 discussing the case after you make them aware that
6 you're a juror that would be improper, wrong and
7 illegal and you should report that. You should
8 first try to find out who those people are, that
9 person is, as the case may be, and you should
10 report that to one of the bailiffs or the court
11 clerk as soon as you return, without telling anyone
12 else about the event. The Court will see to it
13 that matter is investigated and dealt with.

14 If there were to be any media coverage such
15 as newspaper, television or radio of this trial you
16 will immediately disabuse yourself of it and ignore
17 it completely once you realize it involves this
18 trial, as you are to decide the facts of this case
19 based solely and only upon the evidence that's
20 presented during the course of the trial in front
21 of you in this courtroom.

22 We do have an unrelated matter at 10:00
23 o'clock which we expect will take about fifteen
24 minutes. It will be at 10:00 o'clock so if you
25 come, you will go to the room outside. That room

1 will be available, Madam Clerk?

2 THE CLERK: Yes, sir.

3 THE COURT: If you come before 10:00 or
4 before 10:15 go to the room outside. We're going
5 to ask you to be back at 10:15. We expect this
6 matter to be real short, a short hearing at 10:00,
7 but it could last twenty minutes, but we expect to
8 be through with it by 10:15, we will get started,
9 we think, at 10:15.

10 So, the jurors are excused to return at 10:15
11 and if we are not ready for you at 10:15 just
12 retire to that room out there and we will call you
13 in as soon as possible, and probably we will be
14 ready for you at that time.

15 So, the jurors are excused until 10:15 a.m.
16 in the morning. Thank you very much.

17 (The jury was excused from the courtroom).

18 THE COURT: Is there anything for the record
19 from the State?

20 MR. HOOD: I'm just curious as to what time
21 you want to take up requested charge, Your Honor?

22 THE COURT: I would like to take it up now.

23 MR. HOOD: Yes, sir.

24 THE COURT: But it will be informal, an
25 informal discussion, you don't have to formally

1 talk about that.

2 Is there anything for the record?

3 MR. HOOD: No, sir.

4 THE COURT: Anything for the record from the
5 defendant Miller?

6 MR. VARNER: Nothing, Your Honor.

7 THE COURT: Defendant Moore?

8 MR. WISE: Yes, Your Honor. I would like to
9 at this time renew my motion for directed verdict
10 on the grounds that taking the evidence in a light
11 most favorable to the State, in addition to the
12 grounds stated at the end of the State's evidence,
13 the additional ground of there has been no showing
14 of a conspiracy among all of these individuals. At
15 the most, if there is anything to go to a jury, it
16 does not involve one conspiracy, but I think
17 involves two or more conspiracies, and that under
18 the law of South Carolina is in variance to the
19 indictment and therefore the indictment, the
20 directed verdict should be granted.

21 MR. HOOD: Your Honor, the State stands on
22 its previous argument concerning this issue.

23 THE COURT: The motion is denied. Anything
24 further?

25 MR. WISE: Nothing further.

1 THE COURT: Thank you. We are in recess
2 until 10:15 or as soon as the prior unrelated
3 matter is dispensed with, which should be at or
4 about 10:15. So, we're in recess until then.

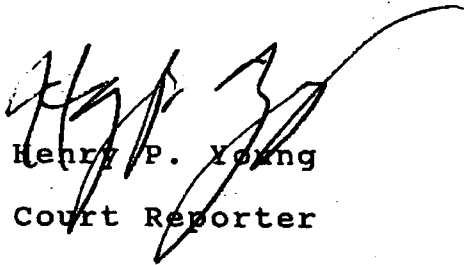
5 (Recessed at 3:59 p.m.).
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I, the undersigned Henry P. Young, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case in the Circuit Court for Abbeville County, South Carolina, on the 29th day of January, 2004.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

January 8, 2005


Henry P. Young
Court Reporter

STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS
CASE NO. 2002-GS-47-32

COUNTY OF ABBEVILLE

STATE OF SOUTH CAROLINA,)

-vs-)

MARSHALL MILLER and)
BILLY MOORE,)

Defendants.)

B E F O R E:

HONORABLE WYATT T. SAUNDERS, JR.

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

JOHN K. CROUT, Esquire
ROBERT E. HOOD, Esquire
Attorneys for the State

KIM R. VARNER, Esquire
Attorney for the Defendant Marshall Miller

C. RAUCH WISE, Esquire
Attorney for the Defendant Billy Moore

Henry P. Young
Court Reporter

VOLUME VIII of VIII

JANUARY 30, 2004

1 (Reconvened at 11:49 a.m.).

2 THE COURT: The record is open, we're in
3 session in the State of South Carolina versus
4 Marshall Miller and others, indictment
5 2002-GS-47-32. The defendants on trial are
6 Marshall Miller and Billy Moore. We have completed
7 all of the evidence in the case and we're prepared
8 now for closing arguments.

9 We may have to take a luncheon break at some
10 time because we had some business earlier in an
11 unrelated case that took more time than was
12 expected and we did have another charge conference
13 that took more time than expected. It's now ten of
14 12:00 and we have agreed the State will open on the
15 law, then the defendant Miller will close, the
16 defendant Moore will close and the State will
17 close.

18 That being the circumstance, the anticipated
19 time involved may bring us to at or about 1:30
20 before the State is about to close. I don't know
21 what to do about that. It may be that we just have
22 to plow ahead, so to speak, until all parties have
23 closed and summed up, thereupon we will try to have
24 something to eat for the jurors and the Court will
25 charge after they have an opportunity to eat.

1 Now, it would not be the Court's intention to
2 allow them to leave during the arguments and charge
3 but they would stay in the jury room. How do you
4 feel about that?

5 MR. WISE: Your Honor, I have some problems
6 with having a jury hearing my argument after 1:30
7 and not having had lunch.

8 THE COURT: Well, it's almost 12:00 o'clock.
9 Do you want to just let them go on to lunch now?

10 MR. WISE: That may be more appropriate.

11 MR. HOOD: No, sir.

12 MR. WISE: We could come back at 1:00 o'clock
13 and go straight forward, no stopping.

14 MR. HOOD: That puts us at 4:00 o'clock, 4:30
15 before the jury even gets the case.

16 MR. WISE: It's going to be that anyway.

17 MR. VARNER: If we break for lunch now or
18 break for lunch then, it's not going to change when
19 it gets to the jury. I'm inclined to agree with
20 that. I would tell the Court, I don't want to
21 block myself in, but my closing may run an hour to
22 an hour and a half.

23 THE COURT: Well, the Court would prefer to
24 do it without interruption if it's possible.

25 MR. VARNER: I don't want to interrupt,

1 either, Your Honor.

2 THE COURT: They may not be ready for lunch,
3 we're not ready for lunch, but we will go ahead and
4 take a lunch period, we will come back at 1:00
5 o'clock and we're going to drive this thing right
6 on through.

7 MR. VARNER: That's fine, thank you, Your
8 Honor.

9 THE COURT: Mr. Hood, that is with all due
10 respect to you, sir.

11 MR. HOOD: Yes, sir, Your Honor.

12 THE COURT: Ask the jury out, Mr. Busby. The
13 record remains open. There may be a break allowed
14 everybody at certain times.

15 MR. HOOD: I will need a break before I start
16 my last argument, Your Honor.

17 THE COURT: Okay.

18 (The jury returned to the courtroom).

19 THE COURT: All the jurors are present, with
20 the forelady and the alternates properly seated.

21 Ladies and gentlemen, we had a matter that
22 was scheduled for 9:45 but we didn't get started at
23 9:45 because there was some conference time, there
24 were conferences held before that by both sides in
25 that unrelated case, there were complications

1 presented that kept us from going forward at the
2 appointed hour and we didn't hear that case until
3 very much, very much later. Then after that was
4 ended at probably about 10:30 or a quarter until
5 11:00 we had a conference with the attorneys in the
6 case in which you are involved concerning other
7 matters, and that took an additional period of
8 time, so we have now decided on the sequence of
9 events that will follow.

10 The State will open on the law, the defendant
11 Miller will argue to you, the defendant Moore will
12 argue to you. This means their attorney, Mr.
13 Varner will present the argument for Mr. Miller,
14 Mr. Wise will present the argument for Mr. Moore,
15 and then the State will come up and sum up in
16 closing, then the Court will charge you.

17 Now, that all is going to take a good little
18 while so we have discussed here before you came in
19 what we should do and if we were to get started it
20 would be sort of a broken up effort to get it to
21 you, so we have decided that you may want to go on
22 to lunch now. This is an hour early for lunch but
23 otherwise you're going to hear one argument, then
24 you're going to go to lunch and be locked up at
25 lunch, you're going to have lunch in the jury room

1 and then come back and hear additional argument.

2 Now, we do intend to take breaks during the
3 argument, we're not going to make you sit here for
4 any undue length of time. You have already done
5 that, you have worked hard and the Court extends
6 its thanks and deep appreciation for that, but the
7 better part of discretion seems to be to go ahead
8 and have an early lunch, come back and let you hear
9 an uninterrupted presentation of the summations or
10 final arguments of the parties and the charge of
11 the Court with reasonable breaks in between these
12 times so that nobody will be uncomfortable, then
13 you will have, you will receive the signal at that
14 time, which is all the evidence and the verdict
15 form for your use, Madam Forelady, in coming to a
16 verdict.

17 That seems to be the best thing to do. So,
18 do not discuss the case by, between and among
19 yourselves nor with any other person, do not allow
20 anyone to discuss the case with you. If anyone
21 attempts to discuss the case with you tell that
22 person or persons that you are a juror and you are
23 not permitted to discuss the case with them. If
24 they were to persist after you alert them that you
25 are a juror use every reasonable means available to

1 you to obtain the identity of such person or
2 persons and report it to one of the bailiffs or to
3 the court clerk as soon as you return to the
4 courtroom, without sharing that information with
5 anyone, and the Court will investigate and deal
6 with that situation immediately.

7 If there were to be any media coverage of the
8 trial such as newspaper, television or radio, as
9 soon as you realize what you're seeing, hearing or
10 reading has to do with this trial please
11 immediately disabuse yourself of such because you
12 must decide this case only and exclusively upon the
13 evidence that has been presented. The evidence is
14 closed, so you have heard all the evidence, all the
15 evidence has been presented during the course of
16 this trial.

17 Now, in order for us to give this case to you
18 fairly early, is an hour sufficient, or better
19 said, is an hour insufficient for any one of you?

20 Okay. We'll be back at 1:00 o'clock. Be
21 back in the jury room at 1:00 o'clock. The jurors
22 are excused, to be back at 1:00 o'clock, and Miss
23 Jenson, if you would stay just a minute, please.
24 Everybody else is excused.

25 (The jury was excused from the courtroom).

1 THE COURT: Miss Jenson, if you will stand up
2 just a minute, please. This is juror number 75,
3 Jessica Jenson. Miss Jenson called in on yesterday
4 and reported that she didn't feel good and the
5 Court was concerned that such a report may cause a
6 difficulty with one or more of the parties involved
7 in this case, and much to the happiness of the
8 Court Miss Jenson was able to come. Miss Jenson,
9 given that situation on yesterday, do you feel
10 confident that you will be able to go forward today
11 and participate?

12 JUROR: Yes, I feel better today.

13 THE COURT: You feel better today? Thank
14 you. I wanted to be sure about that. Thank you
15 very much for sharing that. Don't share with
16 anyone what we talked about, it's nobody's
17 business, but the attorneys wanted to be certain
18 that you felt well and that you could continue,
19 because once we commence deliberations,
20 deliberations will continue until a verdict is
21 reached, so I wanted to be sure you felt okay.

22 JUROR: Yesterday was the day I didn't feel
23 good.

24 THE COURT: Well, you look like you feel
25 better today. Okay, thank you very much. You are

1 excused until 1:00 o'clock.

2 JUROR: Okay, thank you.

3 THE COURT: Thank you, ma'am.

4 (Juror excused from the courtroom).

5 THE COURT: Is there anything for the record
6 from any quarter before we break until 1:00
7 o'clock? It is now 11:59.

8 MR. HOOD: Nothing, Your Honor.

9 MR. VARNER: Nothing, Your Honor.

10 MR. WISE: Nothing, Your Honor.

11 THE COURT: We are in recess until 1:00
12 o'clock.

13 (Recessed at 11:59 a.m.).

14 (Reconvened at 1:05 p.m.).

15 THE COURT: The court is reconvening after a
16 luncheon recess in indictment 2002-GS-47-32, the
17 State of South Carolina versus Marshall Miller and
18 others. In this matter Marshall Miller and Billy
19 Moore are before the Court for trial. The evidence
20 has been completed and we are now prepared to go
21 forward with final arguments by all parties.

22 Is there anything for the record from any
23 quarter?

24 MR. HOOD: No, sir, Your Honor.

25 THE COURT: Hearing none, then --

1 MR. WISE: One thing. This is a perfunctory
2 motion, I realize that the rules allow the
3 government to open on the law only. I would
4 request that the government be required to open
5 fully on the law and the facts just as in a civil
6 case, because I think it's really a denial of due
7 process to allow the government to just open on the
8 law and then reply fully to what we say. I realize
9 that the rules of this state are a little
10 different, but I would like to make that motion.

11 THE COURT: Do you wish to respond, Mr. Hood?

12 MR. HOOD: No, sir.

13 THE COURT: Mr. Crout?

14 MR. CROUT: No, sir.

15 THE COURT: All right. Show the jury in,
16 please. The Court previously conversed with the
17 parties in chambers and agreed that the State would
18 open on the law, that the defendant Miller would
19 then sum up, the defendant Moore would then sum up
20 and the State would sum up completely.

21 (The jury returned to the courtroom).

22 THE COURT: All the jurors are present, with
23 the forelady and the alternates properly seated.
24 The matter is with the State for final argument on
25 the law.

1 MR. HOOD: May it please the Court, Your
2 Honor.

3 THE COURT: Mr. Hood.

4 MR. HOOD: Good afternoon, Madam Forelady,
5 ladies and gentlemen of the jury. We have reached
6 that point of the trial for what is known as
7 closing arguments. That's where the lawyers get to
8 come before you and basically give you their
9 version of the facts, how they see the case, what
10 they think they have shown, what they think someone
11 hasn't shown. I'm going to kind of give you an
12 outline for how that's going to happen. I can't
13 stand being in a room and not knowing what's going
14 to come next and I realize you have been like that
15 for awhile now, so let me give you an outline.

16 I'm going to argue on what we call the law.
17 I'm going to give you a brief outline of what some
18 of the law is in this case and I'm not going to be
19 up here for no more than fifteen minutes or so, and
20 then I'm going to sit down and then Mr. Miller's
21 attorney is going to come up and give his final
22 argument, then Mr. Moore's attorney is going to
23 come up and give his final argument, then I will
24 come before you one more time, one more time to
25 make the State's final closing argument, and the

1 reason we do that is the State holds the burden of
2 proof.

3 I was introduced to you a few weeks ago,
4 well, two weeks ago now, my name is Robert Hood and
5 I work for the Attorney General's office, and I
6 realize that it's been some time, this is my first
7 opportunity to address you as a jury, and let me
8 take this opportunity to genuinely thank you for
9 your service. I know when you started not last
10 Tuesday but the Tuesday before you thought, "Oh,
11 you know, it can't be this is going to go into
12 Saturday," and here we are on the Friday after.
13 Your service, your attentiveness is genuinely
14 appreciated on behalf of the State and the
15 individuals here that represent the State and the
16 people of South Carolina. You have all been paying
17 attention, we haven't had any problems with anybody
18 sleeping or dozing off throughout the trial, and
19 that is really appreciated by all parties involved.

20 Let's go through some of the duties and the
21 responsibilities of the parties in this room. The
22 State's job, the prosecutors, it's our job to be
23 ministers of justice, it's our job to ensure that
24 justice is done and that the evidence is brought
25 before you so you can make a determination. It's

1 the defense attorneys' jobs, Mr. Wise and Mr.
2 Varner, to zealously represent their clients, to do
3 everything they can do to represent their clients
4 in the best way possible, and they have done that.
5 It's His Honor's job to administer the law, and
6 when all is said and done and after I give my final
7 argument Judge Saunders is going to tell you what
8 the law is. He's going to explain it to you and
9 then you will have an opportunity to go back there
10 and determine a verdict. And as you have seen
11 throughout the entire trial Judge Saunders has made
12 rulings on motions one way or the other, sometimes
13 in front of you, because he controls the law and he
14 is the sole finder and the sole determiner of the
15 law.

16 And that leaves you. What is your
17 responsibility? You all, ladies and gentlemen, are
18 the finders of the facts. You will determine the
19 facts in this case. No one else can determine what
20 the facts are in this case because you and you
21 alone determine the facts and you and you alone
22 judge the credibility or believability of every
23 single witness who sat right there in that chair
24 and testified.

25 The only burden that the law places on you is

1 that you reach a verdict. There is only two things
2 that you can base that verdict on, the law as Judge
3 Saunders gives it to you, and the evidence that
4 came from that witness stand and the evidence that
5 was presented before you, and the evidence will be
6 back there in that jury room with you. You can't
7 base your decision on innuendo or speculation.
8 Remember, what the attorneys say in their questions
9 is not evidence. The evidence is in the answers
10 that come from the mouths of the witnesses.

11 What are the defendants charged with? Two
12 defendants, Marshall Miller and Billy Moore. What
13 are they charged with? They are charged with the
14 exact same thing, they are charged in the exact
15 same indictment, and that indictment says that
16 between November, 1999, and March of 2003 they
17 conspired to traffic methamphetamine. That begs
18 the question what is a statute, what is the law?

19 Ladies and gentlemen, trafficking
20 methamphetamine over 100 grams is simply this. A
21 person who knowingly conspires to sell,
22 manufacture, deliver, purchase or bring into this
23 state more than 100 grams of methamphetamine, which
24 is also known as crank. I think you have heard it
25 called multiple things in the past two weeks, but

1 it's methamphetamine or crank. It's all the same
2 thing.

3 That begs the question, what does this word
4 right here mean? We all know what a sale is, what
5 to sell is, we all know what manufacturing is, we
6 all know what delivering is, we all know what
7 purchasing is and we all understand what bringing
8 it into this state is.

9 What does the word conspire mean, conspiracy.
10 Conspiracy is simply this, and everybody is going
11 to talk about this and everybody is going to try to
12 confuse you about this. They are going to try to
13 lead you down one road or lead you down another
14 road, but when you hear the word conspiracy think
15 to yourself the word agreement, when two or more
16 people agree to commit an unlawful objective you
17 have a conspiracy.

18 Now, when you go out to buy a car and you go
19 out to the local Ford dealer or the local Chevrolet
20 dealer you probably enter into a contract, they
21 probably make you sign your name all over the
22 place. If you have ever purchased a house you
23 probably had to fill out a whole bunch of documents
24 and sign your name. If you have ever rented an
25 apartment you have probably had to sign a rental

1 agreement with somebody. Those are all contracts,
2 those are all agreements.

3 Well, unfortunately, ladies and gentlemen,
4 criminals don't make agreements and they don't
5 write things down and they don't have to because
6 the law recognizes that that agreement can be
7 tacit. What is tacit? That is just a big legal
8 word that means unspoken or silent. The fact of
9 the matter is, ladies and gentlemen, we all agree
10 on things all the time without ever saying do you
11 agree to manufacture methamphetamine with me, do
12 you agree to sell methamphetamine for me? You
13 don't have to come outloud and say it.

14 A prime example, I'm engaged and sometimes I
15 go over to my fiance's house and we're there
16 cooking dinner and there is a door that leads out
17 into her back yard. Well, right next to that door
18 is a trash can. Sometimes when I go over there it
19 has a lid on it so the animals won't get in it, the
20 lid's up, the bag is in there and it's tied. Now,
21 she doesn't have to look at me and say, "Robert,
22 take out the trash." She doesn't have to say,
23 "Robert, are you going to take out the trash?" She
24 doesn't have to sign this piece of paper that says,
25 "You'll take out the trash." It's understood the

1 reason that lid's up and the bag is tied. It's
2 because you know who's supposed to take out the
3 trash, me. We didn't agree on it, we didn't put it
4 in writing, but there was a tacit understanding
5 between us that I should be taking out the trash.

6 Now, I have never been a juror, let me give
7 you that warning right now, so I don't know what
8 goes on back there in that room but I have noticed
9 something. There is three people out of all
10 fourteen of you that have assigned seats. That's
11 Madam Forelady and the two alternates. But I have
12 noticed something over the past two weeks. You all
13 sit in the same seats. Now, I don't know what went
14 on back there in that room but my guess is you all
15 didn't make a seating chart and you didn't say,
16 "Hey, that's my seat, don't sit in there anymore, I
17 like to sit in that seat," but you all come out and
18 sit in the same seat. Maybe you didn't. I'm
19 assuming that you didn't, you all just come out and
20 sit in the same seat, because why? Because you all
21 agreed on it. You didn't have to say anything to
22 each other, you all just go to the same seat over
23 and over again. A tacit agreement.

24 The second thing, all these parties in this
25 conspiracy, they don't have to know each other.

1 The law doesn't require that all nineteen people
2 charged in that indictment know each other. The
3 law just requires that two or more people reach an
4 agreement.

5 A very important point, and this isn't the
6 law according to Robert Hood, this is the law of
7 this state, decided by higher courts, the Supreme
8 Court and the Court of Appeals, once the parties
9 agree to accomplish a criminal objective the crime
10 of conspiracy is complete even though no further
11 act has been committed. They call it an overt act,
12 overt act in legal terms. That means you agree to
13 do something, then you commit an act in furtherance
14 of that agreement. That is not required. The only
15 thing that is required is an agreement. If you
16 determine that there is an agreement, then there is
17 a conspiracy and the defendants are guilty. They
18 don't ever have to manufacture meth, they don't
19 ever have to sell it, they don't ever have to
20 deliver it, they don't ever have to bring it into
21 the state, they don't ever have to purchase it.
22 They just have to agree to do those things.

23 Now, have I shown you that, has the State
24 shown you that this week? Yes, but it's not
25 required.

1 Another important legal point. The reason I
2 do this, ladies and gentlemen, is because it's
3 easier for me to visualize things than just to hear
4 somebody talk about it. The agreement, it need not
5 be formal or expressed. It can be a tacit mutual
6 understanding to knowingly and intentionally engage
7 in criminal activity whether as a means or an end
8 of the agreement.

9 You understand, you understand what a tacit
10 agreement is, you don't have to write it down, you
11 know what that means.

12 A very important legal point, if the State
13 can prove a conspirator only has a slight
14 connection to the conspiracy, this connection is
15 sufficient to convict the conspirator of knowing
16 participation in the conspiracy. And what is that
17 word right there, slight, only has a slight
18 connection to the conspiracy. Keep that in the
19 back of your mind. I'm going to talk about that
20 later, a slight connection.

21 The law further states, and I realize some of
22 these words, they all get mixed up in my mind
23 sometimes, too, the uncorroborated testimony, you
24 all know what corroboration is, the uncorroborated
25 testimony of a co-conspirator is sufficient to

1 connect someone to a conspiracy. Think about it in
2 the back of your mind.

3 Why do we have conspiracy law? What is the
4 purpose of having a conspiracy? Why has this state
5 said that it's bad to have a conspiracy? Because
6 of this. If you just have one person doing it they
7 can't do that much, one person can't do as much as
8 two, as three, as four, as five, all the way up to
9 nineteen. Think of it this way. If you have a
10 garden and you have little kids around your house
11 you may tell them, "Little Jimmy, don't go play in
12 the garden because I don't want you to mess up the
13 vegetables that are growing in there" They have to
14 go through their growing process and they have to
15 be watered but if little Jimmy goes out there and
16 plays in the garden he may mess up some of the
17 vegetables.

18 Well, what if little Jimmy and eighteen of
19 his friends get out there and play in the garden,
20 how much more damage is that going to do, because
21 the policy reasons behind having a conspiracy law
22 is to punish the group, punish people for entering
23 into a common criminal plan. Two heads are better
24 than one and nineteen people manufacturing,
25 distributing and helping someone in a meth

1 conspiracy are more powerful and can do more damage
2 than one person alone.

3 The burden of proof. You're going to hear a
4 lot about the burden of proof. We hold the burden
5 of proof, the people sitting at this table right
6 here hold the burden of proof and as a career
7 prosecutor I can tell you we welcome that burden of
8 proof. It is the highest legal standard in this
9 country and it should be. That's one of the things
10 that makes this country unique, and you may have
11 read in a book proof beyond reasonable doubt, you
12 may have seen in a movie proof beyond a reasonable
13 doubt, and you may think in your mind, "I know what
14 reasonable doubt is," but the law has defined
15 reasonable doubt, and it's not proof beyond any
16 doubt, it's not proof beyond a shadow of a doubt,
17 it's not proof beyond all doubt. It's proof beyond
18 a reasonable doubt.

19 The fact of the matter is if you go back
20 there in that room and you determine that, "The
21 State has firmly convinced me of Billy Moore's
22 guilt," you must find him guilty, and, "If the
23 State has firmly convinced me that of Marshall
24 Miller's guilt," you must find him guilty. It's
25 not an unattainable standard, ladies and gentlemen,

1 otherwise no one would ever get convicted if it was
2 an unattainable standard. If you are firmly
3 convinced, if you are firmly convinced of the
4 defendants' guilt you must find them guilty.

5 And how have we done this? We have done this
6 through direct and circumstantial evidence. Let's
7 take the two apart, let's take them separately.
8 Direct evidence. What is direct evidence? Direct
9 evidence is what you see, what you hear, what you
10 taste, what you smell, what you can observe
11 yourself with your senses, "I saw Marshall Miller
12 manufacturing methamphetamine, I purchased four
13 ounces a week for a year from Marshall Miller, I
14 smelled the same smell I smelled at Cokesbury, at
15 Billy Moore's shop two weeks before they were
16 arrested." What you hear, what you see, what you
17 smell, remember the defendant's tasted of ether
18 there, senses, what you saw, what you heard, what
19 you smelled.

20 Circumstantial evidence is this. It's
21 putting a chain of events together to reach a
22 conclusion. Now, what's the most important thing
23 about this? The most important thing about it is
24 this. You hear people say all the time, "Oh, they
25 just have a circumstantial evidence case, they just

1 have circumstantial evidence, they don't have any
2 direct evidence." Under the law, and the judge
3 will instruct you, direct evidence and
4 circumstantial evidence are equal. They are equal,
5 no greater weight is given to either one.

6 What is circumstantial evidence? Putting a
7 chain of events together to reach a conclusion.
8 This is the only way I know how to explain it. If
9 you go home tonight, and you have to forgive me
10 because of the weather disaster we just went
11 through, if you go home tonight and the local
12 weatherman says, "It's going to snow tonight, there
13 is an 80 percent chance for snow tonight," you look
14 outside your bedroom window before you go to bed
15 and there is no snow anywhere on the ground, and
16 you wake up the next morning, getting ready to go
17 to work, getting ready to go to school, getting
18 ready to take care of your family, and there is
19 snow all over the ground you can make the
20 conclusion that it snowed. "He said it was going
21 to snow, I didn't see any snow, there is snow all
22 over the ground." You can make the reasonable
23 conclusion, by putting all those things together,
24 that sometime during the middle of the night from
25 the time you went to bed until the time you woke up

1 it snowed.

2 Now, is it possible that one of your
3 neighbors brought a snow blower over and blew snow
4 all over your neighborhood? Sure. Is it
5 reasonable?

6 Credibility of witnesses. You and you alone
7 judge the credibility and the believability of
8 every single witness that took that witness stand.
9 Ladies and gentlemen, you've been preparing for
10 this every day of your life. You know when someone
11 is lying to you, you know when someone is telling
12 you the truth. You know when that co-worker who
13 said, "Oh, I'm sick, I can't come to work today,"
14 isn't telling the truth. You know when you told
15 little Jimmy to go take out the trash and he said,
16 "Oh, yes, I did it," but you know it wasn't done.

17 How do you judge the credibility, how do you
18 judge the believability? Here are some factors.
19 These aren't an exclusive list. Picture that
20 person on the witness stand. Was that person
21 hesitant, were they hesitant to answer questions?

22 Were they forthright?

23 What was their demeanor on the witness stand?

24 How do they look, how do they act?

25 Did they have a bias? Did they have a reason

1 to lie? Did they have a prejudice? Do they have
2 some reason to be prejudiced against somebody in
3 the room?

4 Most importantly is what they told you
5 corroborated, is it corroborated by other witnesses
6 that you heard from?

7 One of the last legal points I'm going to hit
8 on, ladies and gentlemen, is criminal intent. The
9 State in every single criminal case must prove
10 criminal intent. What that means is, what is the
11 person thinking? And it's impossible to open up
12 Marshall Miller's mind on the day he was arrested
13 and dissect it and say, "This is what he was
14 thinking on that day." It's impossible to open up
15 Billy Moore's mind on the day he was arrested and
16 say, "This is what he was thinking that day."

17 How do we prove criminal intent? We prove it
18 through their actions and we prove it through their
19 words and we prove it through the circumstances
20 surrounding their individual situations. That's
21 how we prove criminal intent.

22 I forgot something very important just a few
23 moments ago, I tend to do that, please forgive me.
24 When I was talking about a conspiracy I forgot a
25 very important part. If you determine that someone

1 is in a conspiracy, once you place them in the
2 conspiracy that person is responsible for each and
3 every action of every other co-conspirator. It
4 doesn't matter if they never sold drugs, it doesn't
5 matter if they never manufactured drugs, it doesn't
6 matter if they never washed a Mason jar or popped
7 pills or purchased pills or bought anhydrous
8 ammonia or burned things to cover up the smell. If
9 they are in the conspiracy, if you find they are in
10 the conspiracy they're responsible for each and
11 every action of every single other co-conspirator.
12 That's not the law according to Robert, that's the
13 law.

14 Set aside the issue of punishment. You have
15 no decision making ability as far as punishment.
16 Judge Saunders will administer punishment if you
17 find them guilty. Don't even let that come into
18 your consideration. Your question is are they
19 guilty, are they not guilty, did the State prove
20 its case beyond a reasonable doubt, or did they
21 not, "Am I firmly convinced of their guilt?"
22 Punishment should not come into your thought
23 process in any way, shape or form because that's
24 not your job, that's His Honor's job.

25 Let me leave you with this, ladies and

1 gentlemen. There are no college classes on how to
2 be a juror, I can't go to Erskine, you can't go to
3 Lander, you can't go to Clemson and say, "I want to
4 take a class on how to be a good juror, sign me
5 up." But I submit to you that you have been
6 preparing for these two weeks every single day of
7 your life. Why? Because you have the God given
8 common sense, and all I ask is that you use that
9 common sense, use that common sense to see through
10 all the confusion, all the distractions, and look
11 at what the truth is. Use your common sense.

12 The last thing I ask of you is this. Keep an
13 open mind. Don't make up your decision until Mr.
14 Varner has argued, until Mr. Wise has argued, until
15 I have argued again or until the judge has given
16 you instructions on the law. Keep an open mind and
17 give us one more opportunity. I know you have been
18 here two weeks, I know it's been long, I know it's
19 Friday afternoon, but give us one more opportunity
20 to come before you and prove our case to you, to
21 make our points.

22 Thank you.

23 THE COURT: Mr. Varner, the jury is with you,
24 sir.

25 MR. VARNER: May it please the Court.

1 THE COURT: Mr. Varner.

2 MR. VARNER: Madam Forelady, ladies and
3 gentlemen of the jury, I will re-introduce myself,
4 I'm Kim Varner, I'm an attorney from Greenville.
5 I'm going to ask, as you go through this case, when
6 you listen to what's been referred to as argument,
7 everybody I know wants to tell you how you're
8 supposed to think. If I try to do that, disregard
9 it. Nobody has the right to tell you how to think.

10 But that's the one thing you are asked to do
11 as jurors, is to come in here and actually think
12 about what went on, not about well, how do you
13 feel, what do you believe? It's kind of like,
14 returning, returning to the beginning, in the
15 opening statements, we're not out on the street,
16 we're not out on the sidewalk going well, what do
17 you think, what do you think has happened, do you
18 believe this? Because when you come into a
19 courtroom it's a different standard, a different
20 set of rules.

21 And I agree with what Mr. Hood said, use your
22 common sense, but that common sense is to ask the
23 tough questions. I refer to it as the little lady
24 in the Wendy's commercial, it's the jurors' job to
25 say, "Where is the proof, don't give me opinions,

1 don't give me conjecture, don't give me
2 speculation, give me the proof, give me the best
3 proof available," because he says that they gladly
4 accept the responsibility of being prosecutors, of
5 having that burden of proof. Well, what goes with
6 that is the requirement to present the best proof
7 available to the jury, and that's what we're
8 talking about here, because I will ask you to think
9 one way, which is this, to think independently.
10 It's very easy to be a rubber stamp, everybody else
11 thinks this way, I'll go along. The police think
12 this way, well, we'll rubber stamp it." That
13 doesn't require any thought. You have actually got
14 to sit and think about not what you were told, but
15 what you heard and what was proven to you.

16 You know, when we started off with this case
17 Mr. Hood got up here and he told you that he was a
18 minister of justice, I'm a defense lawyer, Mr. Wise
19 over here is a defense lawyer. Ladies and
20 gentlemen, I'll tell you this. It's his opinion,
21 he's entitled to that, but I submit to you you
22 folks are the ministers of justice, you're the ones
23 who decide what the facts are, because our system
24 is set up that way. It's called an adversarial
25 system. Kind of like two football teams, one is

1 not empowered with some glorious power and a
2 righteousness. One team is there to win, the other
3 team is there to win, and that's not a bad thing.

4 The prosecution has a function, to get a
5 conviction, period. It's not to seek justice.
6 It's what people want you to believe, from the
7 prosecution. But that's not a bad thing, it was
8 set up, when the writers of our constitution set
9 this thing up they didn't give one set of people a
10 white hat and another set of people a black hat,
11 they're the good guys and the bad guys, they set it
12 up as an adversarial system, and the State is to
13 present evidence in such a manner that it is most
14 likely to get a conviction, and the defense is to
15 ask the questions, to point out the questions of
16 what they didn't do, and that's not a bad thing,
17 because ultimately who decides what is true? The
18 judge told you at the beginning that you folks do,
19 because what a prosecutor says is argument, what I
20 say is argument, but what you say at the conclusion
21 of this case is called a verdict, it means to speak
22 the truth.

23 Now, what is it you are looking at the truth
24 of? Number one, really there is only one thing at
25 trial here, because the judge will tell you,

1 despite what all these, quote, quote, what they
2 purport to be the law, the bottom line is the judge
3 will give you what the law is in this case, not the
4 prosecutors, not anyone else, he will give you the
5 law, and you are to take it as he gives it to you.
6 But the judge is going to tell you that a
7 defendant, any of us, the people of the State who
8 Mr. Wise and I represent, when people of the State
9 are charged with a crime they are presumed to be
10 innocent, they don't have to testify, they don't
11 even have to come to their trial, so if you're
12 testing the truthfulness of something, the system
13 is set up in such a way that a defendant is
14 presumed to be innocent and doesn't have to produce
15 evidence, you don't have to prove your innocence.
16 Then, what is it you're testing, what is it you're
17 looking for the truth of? You're looking for the
18 truthfulness of the State's allegations. In other
19 words, has the State proven their case on each and
20 every element beyond any reasonable doubt. And I
21 ask you, part of what I bring out is
22 contradictions, things that don't fit in your
23 common senses.

24 One of the things Mr. Hood said was each
25 person is responsible for the acts of the others.

1 Well, that was one of the things that was brought
2 up in this case. I agree with that principle, I
3 firmly believe that people should be fed from the
4 same spoon. I don't think you should be treated
5 any different than any of the others. You treat
6 everybody the same, but is that what you saw here?
7 If each, if they practice what they preach, if each
8 person in this, quote, quote, alleged conspiracy is
9 just as responsible as everybody else, then why
10 aren't they all fed from the same spoon? They kept
11 telling you, oh, there's been no promises, there's
12 been no promises, these people are truthful and
13 honest people.

14 They weren't truthful enough to tell you, I
15 will tell you how truthful they are, "I will tell
16 you, I will tell a lie to save my own neck."
17 That's the truth you heard. That's part of what
18 was brought out.

19 I'm going to read you something, and it's
20 something from the 1200's, the way justice, as it
21 was referred to, used to be done. And this is from
22 the 13th Century, "We must now speak of those
23 indicted by popular rumor. From rumor suspicion
24 arises, and from rumor and suspicion a strong
25 presumption which must stand until the man

1 indicted has purged himself of such suspicion."

2 Think about that for a minute. It's awfully
3 familiar with what has gone on here for the last
4 two weeks. You had a lot of rumors, they all got
5 in here and they all told the same story, wants to
6 talk about a conspiracy. Well, there was a
7 conspiracy all right, they all happened to say the
8 same thing. If you heard Marshall Miller's name
9 once, you must have heard it 5,000 times.

10 Did they believe what they say? Apparently
11 Marshall told them how to live, breathe, what to
12 wear. Apparently meth was pouring out of the
13 spigot for Marshall. Isn't it odd, not one single
14 drug purchase, and they tried over and over again.
15 Is that consistent with what all those people told
16 you, or does that go back to the 13th Century
17 thinking? "People are indicted by popular rumor,
18 and from rumor comes suspicion, and when the two of
19 those come together you have a strong presumption
20 until the man who is indicted has purged himself of
21 that."

22 They put the burden to prove his truth or
23 innocence, kind of the same as the Salem witch
24 trials but, you know, the framers of our
25 constitution, they read the political writings of

1 centuries past, they understood how people are, and
2 unfortunately not all parts of people are good.
3 There is a bad side to people, unfortunately. Part
4 of it is people are quick to condemn, and the
5 framers of our constitution understood that,
6 particularly with what we call a mob mentality,
7 they are quick to condemn, that is why we had
8 lynchings, people would gather at the town square
9 to lynch somebody they thought was guilty. A very
10 scary thing, very frightening.

11 The framers of our constitution understood
12 that it's hard, it's a really tough thing to be
13 brave, and being brave doesn't mean you run
14 downstairs when a window is cracked at 3:00 o'clock
15 in the morning and confront somebody, that's
16 stupid, but being brave is kind of like what you
17 teach your children. There might be nine good
18 buddies of theirs smoking a joint, one kid says, "I
19 don't need that, it's not good for me." That's the
20 kind of bravery I'm taking about. They wanted to
21 instill bravery in people, goodness in people, they
22 wanted people to have a forum and a way in which
23 they could stand up and say, "I don't agree with
24 that, despite what everybody wants me to do,
25 despite what rumor and suspicion and what may be

1 popular, I'll stand up to that." That's being
2 brave. So, they set up a system of government and,
3 you know, everybody has wanted to criticize it, it
4 is kind of like Winston Churchill said many years
5 ago, the system we have set up may not be the best
6 in the world but find me a better one.

7 The judge told you at the very beginning
8 serving on a jury is the most important thing that
9 a citizen can do absent actual service in military
10 conflict during a time of war, because this is your
11 one opportunity to in fact be brave, to stand up
12 and say, "Despite what everybody else may want to
13 do, despite what the government tells me I've got
14 to do, I'm going to do what I know to be the right
15 thing under the circumstances," and you have that
16 power, probably to a certain extent probably the
17 most power any of us will ever get, it's a powerful
18 thing, it's a great privilege and it's something
19 that is very, very unique to this country.

20 I join along with the Solicitor in telling
21 you, the government and Mr. Wise sitting there,
22 too, and the defendant, we very much appreciate you
23 taking time out of your life to be here on
24 Saturday, to take time away from your family,
25 because this is your opportunity to participate.

1 But you know, when it was set up, set up in that
2 way, I know there is people will tell you all day
3 long the government is way out of whack, it's lost
4 its purpose, and that's been going on almost since
5 the government was started.

6 You are here in Abbeville, a county that's
7 rich in history and tradition, you have a gentleman
8 out there who was, has a plaque here in Abbeville,
9 John C. Calhoun, because he was part of the next
10 generation after the framers and what he argued is
11 the same argument that's going on here today, is
12 how much power, how much power do you give the
13 government without putting checks on it? Because
14 part of what he argued was if you have a government
15 that's run by the majority of people, what that is,
16 that's just a government of the most powerful, it's
17 tyranny, it's frightening, you not only have to put
18 checks on it, you have to put checks on the checks,
19 and that's exactly what you folks are. You are the
20 check on the government and how far they can go and
21 can't go and what they do and do not do with a
22 citizen, and that is where you step in.

23 I told you at the beginning of this case
24 nobody was going to get up and tell you that
25 Marshall Miller was a Boy Scout, that he was a nice

1 guy, good guy. I told you at the very beginning
2 you were going to get to see the seamy side of
3 life, and what a cast. You have seen it. I'm not
4 going to argue with you that Marshall Miller didn't
5 use drugs, I'm not going to argue with you that he
6 didn't cook crystal meth, but the question is, was
7 there a conspiracy? That's what the argument is.

8 And I told you at the beginning that if
9 somebody is killed, if you shoot somebody, just
10 because the government wants to call it murder,
11 each of you have every right in the world to come
12 before a jury and say, "Wait a minute, yes, I did
13 shoot somebody, yes, I may have cooked crystal
14 meth, or yes, I may have used drugs or shot up
15 drugs, I'm not saying that's right, but you can
16 charge somebody with those crimes. But you want to
17 call it murder? I've got a right to say it was an
18 accident. I've got a right to say it was self
19 defense, I've got a right to say it's voluntary
20 manslaughter or involuntary manslaughter or second
21 degree murder."

22 The government is not the one who has the
23 right to tell you it's murder, take it or leave it,
24 and that's what the conspiracy charge is about,
25 because if you look at the way the government set

1 it up here, "You guys have a conspiracy as to where
2 you sit, only for a good purpose, you twice have
3 created synergy, and you did it without even
4 talking, you just did it."

5 Well, under that scenario everything is an
6 agreement. You know, we all walked in that front
7 door today. We didn't agree to walk in that front
8 door. I walked in that front door because I parked
9 in the front, it was the most convenient thing for
10 me to do. It didn't matter to me whether you came
11 in the front door, you, or you, but we all came in
12 the front door since we all did the same thing.
13 Did we had some kind of mental telepathy going on,
14 some kind of agreement to come in that front door?
15 That's not what a conspiracy is, and that's what
16 we've been here about.

17 Now, I ask as you go through this, what the,
18 quote, quote, ministers of justice have done, they
19 want, as they want to present themselves, but ask
20 yourself did the system that was set up by SLED or
21 the Attorney General's office, was it a system
22 designed to give you the truth, or was it a system
23 that guaranteed that what they got was compliance?
24 What I mean by that is, by that, was the system
25 they set up, did it get the people to barking like

1 dogs and they got a bunch of barking in the right
2 way, or was it designed to give you the truth? You
3 know, Saddam Husein can tell you, "Everybody here
4 loves me," and he could have murdered a hundred
5 thousand people in front of the TV cameras and they
6 would have told you how much they loved Saddam
7 Husein. Compliance he would get, but would that be
8 the truth? Would it be really the truth? Did they
9 really love the man?

10 These people who got up here, that is when he
11 was talking about credibility, they have a lot to
12 gain or lose not by telling the truth, but by
13 complying with what the State wanted. Compliance
14 and truth have nothing to do with each other.
15 Saddam Husein is the perfect example of that. He
16 didn't give people the truth but he got them to
17 bark like a dog and to say what he wanted, and if
18 they didn't they went to jail or they got killed.

19 Well, the State's situation here, they
20 certainly weren't going to kill anybody, but if you
21 didn't give them compliance what would your name
22 be? Your name might be Billy Moore and your name
23 might be Marshall Miller, you would be sitting over
24 here, you dirty rotten scumbags, but if you comply
25 you're a minister of justice here to give the jury

1 the truth, because these are the people that they
2 asked you to rely on.

3 And I ask you to go back to what Chester
4 Bragg, the main agent who testified and worked on
5 this case, just listen to what Chester Bragg said,
6 because I asked him several things, "But would you
7 depend on these people," and I referred to them as
8 prostitutes, drug addicts, drunks, junkies,
9 thieves, crooks, strippers, whatever they were,
10 "would you Chester Bragg rely on those people for
11 the truth?" And do you know what he said? "No."

12 Now, isn't it ironic Chester Bragg himself
13 wouldn't rely on those people for the truth, and
14 Mr. Hood is going to get up here and tell you to
15 rely on them for the truth? We go back to feeding
16 everybody from the same spoon. Practice what you
17 preach.

18 Chester Bragg said something else very
19 important, I submit to you. "You don't know the
20 truth if you don't do the investigation." And I
21 asked him a whole series of questions about all
22 these things that went on, no investigation, none.
23 We've got books and books and books. I submit to
24 you what went on here, you had a bunch of junkies
25 and all they did was compare their stories and if

1 they all sounded the same there's the truth.

2 Now, back to a question I asked, if you
3 repeat something often enough it somehow or another
4 becomes the truth?

5 Ladies and gentlemen, you have a right to
6 demand how it's to be done here in Abbeville County
7 and to say don't give me what ten junkies said that
8 you don't even trust yourself, if there is evidence
9 out there do the investigation, if you are told
10 there is anhydrous ammonia tanks on somebody's
11 property go look. If you were told one person in
12 this quote, quote, conspiracy had an in with a SLED
13 officer and he had even seen the stuff on the
14 computer check it out.

15 Mr. Brag told you they can go into computers,
16 they have the facilities, he could have verified
17 that. It doesn't matter what everybody thinks, it
18 doesn't matter what everybody believes, it doesn't
19 matter what everybody tells you, it's there. The
20 computer printout would be there from five years
21 ago, two weeks ago or whatever, they have the
22 technology to do it, to find out.

23 What is the truth here, where is the
24 investigation, why wasn't that done, and you have
25 got every right to say, "I have a reasonable doubt,

1 not necessarily from the evidence, but from the
2 lack of evidence."

3 You were told also from the testimony that
4 came out that this Ray Powell had somebody on the
5 inside in Abbeville County who was telling him
6 stuff. "Did you check it out?" "No." "Did you
7 turn it in to an agency to check it out?" "No."

8 I submit to you, why? Because they don't
9 want their deciples of the ministers of justice to
10 look any worse they then already do, because you
11 really might find out the truth here. The
12 ministers of justice deliberately selected what
13 evidence they wanted you to hear and what they
14 didn't want you to hear, and you are going to hear
15 that's our right, we've got the right to decide who
16 we do and do not put up on the witness stand. By
17 all means that is their right but don't confuse the
18 word right with the moral concept of being
19 righteous. Two totally separate things.

20 When they say, "That is our right," that's
21 another way of saying, "It was legal for us to do
22 that." That's right, it is legal for them to do
23 that, to pick and choose who they do or do not want
24 you to hear. That is legal. In other words,
25 that's their right but when you look at is it right

1 morally, that is your right to question that, to
2 ask, "Why was I selectively given stuff, why was I
3 not told the full story, why do you have a system
4 that set up compliance rather than seeking the
5 truth, why didn't you investigate?"

6 And I submit to you as you go through this
7 case, if what the State says is true and is proven
8 beyond any reasonable doubt, there is three
9 problems. Number one, there were no drug
10 purchases, period. Now, we saw the one with, I may
11 have her name wrong, Julie or Tina, whatever, the
12 young girl who said she got her drugs from her
13 mother, but you saw not one, but two purchases
14 where you could hear what was going on, what was
15 being said. Now, they sent at least five different
16 people to go buy drugs from Marshall, they know how
17 to do that, they have all gone to school for that,
18 they search them, they wire them up, they have
19 videos. Well, he explained why one of them didn't
20 go down, Marshall wouldn't talk to him. Why? Was
21 it because he wasn't the big bad drug dealer that
22 everybody reported him to be, or was it because he
23 had a little inside information? Maybe there was
24 that leak there, maybe Ray Powell did have all
25 this. They were sure told that, and there is

1 certainly some indications of that, because one of
2 the things Marshall Miller was doing, he was going
3 out and getting affidavits back in August, all
4 these statements, and there is a whole satchel full
5 of them, never seen him do drugs, never seen him
6 with large sums of money.

7 That is just not something you do, you want
8 to use your common sense, that is just not
9 something you do on a Saturday afternoon. That's
10 not something your average drug dealer does either.
11 They don't run around and say, "Here, I'm selling
12 you a quarter gram," or whatever it is, "of crystal
13 meth, now here, sign this statement saying you have
14 never seen me do this before." You want to use
15 common sense?

16 In August he knew it was coming down. As a
17 matter of fact, I think that was the testimony, he
18 thought his time was running out. I wonder how
19 Marshall Miller knew the secret investigation of
20 the Grand Jury is getting ready to unfold? We'll
21 never know. Nobody bothered to investigate.
22 Nobody cared except for one thing. Everybody
23 pinned it on Marshall. Where are those drug
24 purchases?

25 And not only that, in those videos, if they

1 did have somebody wired, what was it Marshall said
2 to them? Guess what? If he had said in there,
3 "Hey, whoa, wait, you guys are ganging up on me,
4 you're playing me for a patsy, you're playing me
5 for a dummy." What if the tapes don't even exist.
6 You don't know. You don't know. And I'm not
7 asking you to guess but I'm asking you to ask that
8 tough question, "Why wasn't that given to me or why
9 wasn't that explained to me?" You are entitled to
10 do that, not to guess, but you're entitled to ask
11 those questions. And what would that have told
12 you? It kind of would depend on what he would say
13 or didn't say, what the extent of his involvement
14 was.

15 So, I submit to you you have three things
16 going on, no drug purchase, no investigation and
17 there is no trust. Those three things scream
18 throughout this entire case.

19 When we go through, one of those
20 co-conspirators, I kept asking them, "What were you
21 thinking, what were you feeling when you were
22 talking to these agents?" They basically said, "I
23 was scared." That's the method you're getting
24 compliance with, when people are scared you get
25 them to do what you want them to do. What did they

1 focus on? All they wanted to hear about was
2 Marshall Miller. But they were quick to point out,
3 "But we weren't promised anything," except for I
4 think Michelle Madden, she said, "Well, I called
5 them myself, tried to get some help." "Help with
6 what?" "The trouble I was in."

7 Part of the truth did come out at that stage
8 of the game. As you went through with each one of
9 them you picked up real quick Marshall Miller, what
10 about Marshall? Well, you learned in this trial
11 Marshall came here in approximately November of
12 '99. He did know, I believe, Mott Ellis, he did
13 know a couple of other people. Most everybody else
14 have been here all their lives. What came out in
15 Marshall's statement is what I heard people
16 referring to as, at one point he was referred to as
17 the little guy, but what did you hear other than
18 Marshall was kind of the new guy? He wasn't part
19 of the neighborhood crew, he wasn't part of, "I
20 live nextdoor to him," or, "I went to grammar
21 school with him." He was the new guy that came in.
22 And you hear repeatedly, "Well, why did you sign
23 those statements?" And it was, "Well, you kind of
24 signed them because Marshall was just that kind of
25 guy, he is that pushy guy, it's better to sign it

1 than to question him."

2 Wait a minute. That is a denial of
3 individual responsibility but yet that's the one
4 thing the State keeps preaching, you're responsible
5 for what you do. And I ask you, how do they come
6 to you and have their cake and eat it, too, because
7 if you are responsible for what you do, if you
8 signed a statement it's not good enough to say,
9 "Well, I didn't read it," or, "Somebody else told
10 me it was the easiest thing to do." If you sign a
11 statement saying something is true, then you're
12 responsible for signing it. But, you know, nobody
13 wanted to hear, "I signed it because I told a lie
14 for Marshall, I lied for him," because, you see, if
15 it came out that they would tell a lie, well, if
16 they would tell a lie on the side of the road to
17 make Marshall happy, if their life was on the line
18 what do you think they would do then? Because they
19 didn't have nagging, gnawing Marshall in front of
20 them, they had something more precious than money
21 to be offered, their lives.

22 You had one little girl, she said she had
23 three charges against her, ten years each, plus a
24 mandatory minimum sentence of twenty-five years
25 hanging over her head, and the example I gave her,

1 "If you were looking at, if you gave me \$50 and I
2 gave you back a dollar and eighty cents do you
3 think you did a good deal," because she was
4 planning on getting out, I think in November, she
5 was going to do eighteen months. The question was
6 asked if you gave a witness \$25,000 would you
7 believe their testimony? Well, they got a lot more
8 than \$25,000. That's even if your life is almost
9 worthless, to give you back 48 years of your life,
10 "But I wouldn't do anything to help them." That's
11 what credibility is about. It's tainted from the
12 very beginning.

13 I want to tell you, as you go through
14 Marshall's statement, you're going to be able to
15 take it back there with you and you may see this
16 drawing that the State has, it's all these people's
17 names and they all point to Marshall, and the
18 question, that was Marshall's meth, Marshall's
19 meth. If Ray Powell was cooking it or Mott Ellis
20 was cooking it, or all those other people they said
21 were cooking it, why is it Marshall's? And
22 Michelle Madden was asked, "Were you out selling
23 dope for Marshall?" She messed up. She said, "I
24 was selling it for me." We'll go to conspiracy on
25 that in just a little bit.

1 But if you go through Marshall's statement,
2 and I submit to you of all the statements that were
3 quote, quote, given, number one, a lot of these
4 people went through debriefing, but I asked the
5 question, "Who besides Marshall not only went
6 through twelve hours of debriefing but gave you a
7 thirty some page statement, gave you any kind of
8 statement," and the answer was nobody but Marshall.
9 He was the only one who not only gave the twelve to
10 fifteen hours of debriefing, he sat down and wrote
11 a thirty something page detailed summary of what
12 was going on.

13 So, what was his motivation for lying? Was
14 he offered or was the State going to recommend
15 eighteen months or were they going to offer, "Well,
16 we'll not call this over a hundred grams, we'll
17 call this ten to twenty-eight grams, not only do
18 you not have to do the twenty-five years, we'll
19 recommend three years and you only have to do about
20 a third of that, you can do eighteen months."

21 Everybody else that gave an oral statement
22 got recommendations --

23 MR. HOOD: Your Honor, I'm going to object to
24 this line of statement Mr. Varner is making based
25 on the rule about plea agreements before the jury.

1 THE COURT: Mr. Varner, avoid this type
2 argument.

3 MR. VARNER: I'll try to stay within the
4 bounds.

5 THE COURT: Yes, sir.

6 MR. VARNER: Ask yourself about the
7 credibility. What did Marshall Miller have to gain
8 or lose with his statement, compared to other
9 people? What did he gain by his statement, what
10 would taint his statement? What could it possibly
11 be? He goes through and he tells you about people
12 who got him started. You got this rightuous speech
13 about, "We were climbing the ladder." Apparently
14 when they got to Marshall they decided they wanted
15 to quit. When they talked to Marshall, Marshall
16 told them about other people, Jason S. or J-Bird.
17 He tells in there roughly when they dealt together,
18 told them stuff he bought, where he bought his
19 anhydrous. No investigation. He tells you about
20 all these other people. As a matter of fact, one
21 of the things he says in there was, "I felt like I
22 was working for Ray Powell," the one he also said
23 had connections with SLED and the one he also, said
24 that Ray had connections with Abbeville and was
25 getting help and getting inside information, and I

1 submit to you there was evidence in this trial to
2 support that. No investigation, zero.

3 But now Ray Powell apparently is one of the
4 deciples of the ministers of justice. He started
5 talking about all the things these people had,
6 assets list, this was stuff people had bought.
7 Well, feed everybody from the same spoon. What did
8 Jason do for a living to buy all these thing? What
9 did Ray do for a living to have all this stuff?
10 When I say Ray, I'm talking about Ray Powell,
11 Little Ray. "People that has helped me cook and
12 know how to cook," listed twenty people, of which
13 five of them were indicted.

14 And, you know, Marshall, this bad, mean, evil
15 person, the new guy on the block, and there is no
16 dispute about this because, number one, it wasn't
17 even investigated but every time you see the word
18 Marshall, when you see that circle of all the
19 people around, all the arrows pointing at Marshall,
20 substitute the word patsy, sucker, because there
21 was a conspiracy here, the conspiracy was let's all
22 blame it on Marshall, he's the one that doesn't
23 have the connections here, he's the one who doesn't
24 know, you know, they are all in it up to their
25 neck, bottom line, I submit to you, but what does

1 this mean, evil Marshall do, this drug lord? Well,
2 he bought one of them a Toyota, he did buy a
3 Trans-Am and Z71, he pays for Tina's bond, Tina's
4 lawyers, Martha's bond, Martha's lawyer, Darlene's
5 fine, Jeff Horne's bond, he pays for a dead girl's
6 funeral. It certainly wasn't to buy her silence.

7 Why would this evil, mean drug lord who
8 controlled these people pay for somebody's funeral?
9 He was also giving them dope, fronting it, loaning
10 it, and it came out how much money these people
11 owed him. You know what, it was a golden
12 opportunity to, number one, get rid of their
13 competitor, and number two, get all the stuff for
14 free, don't have to pay it back now because he's
15 not going to be here.

16 And you go through Jason's bond, bought Paul
17 a camper, Julie's kids' Christmas, Lisa's kids'
18 Christmas. Then Ronnie Suttles. Is that
19 consistent with the big time drug lord, or was that
20 consistent with a patsy, the one that was so easy
21 to dump on, the little guy, because we sure don't
22 want Ray Powell being in the top of this, not Ray,
23 he's twice as big as Marshall. Of course he just
24 happened to let it slip out, he spoke about
25 Marshall in the past tense.

1 Marshall, she brought out, gave information
2 on another drug ring, gambling operations and, you
3 know, he's the guy to dump on real quick and real
4 easy. He doesn't have those inside connections
5 with SLED, he doesn't have those inside connections
6 with the local police department, he doesn't have a
7 support group here around him. Let's all dump it
8 on Marshall. He's going to be the fall guy because
9 somebody's going to fall the longest and the
10 hardest, the guy who gave everything away.

11 And you know, this big drug lord who made
12 hundreds of thousands of dollars, these are the
13 mansions he lived in, this apartment complex, I
14 think there is his shop, trailer, a place on 252.
15 This guy who was doing kilos of crystal meth,
16 making hundreds of thousands of dollars, gone, he
17 gave it away, if he, quote, quote, made it, but
18 he's a dangerous person.

19 Folks, I know it's been two weeks, it hasn't
20 been that long, I'm not going to go through all the
21 evidence, you heard all the testimony about Jeff,
22 excuse me, Gene Saylor, him being a cook, the
23 stuff was at his place, tons of examples of it, the
24 thing about Ray playing Marshall for the patsy
25 again, getting him to go over and collect a drug

1 debt, he found out later he was sucker punched, he
2 was actually doing a breaking and entering with
3 Ray. Nobody checked up on that.

4 On stealing stuff, the camper, whatever it
5 was, people owed him drug money, they went and
6 stole it, or the camper, I think. Didn't even
7 check to see. Marshall told them about Ray
8 stealing all this stuff from H. D. Payne, nobody
9 even made a phone call.

10 Speaking of making phone calls. You know,
11 they gave you Marshall Miller's B. J.'s Buying Club
12 thing, you know, you got this testimony of all
13 these batteries that he bought. There is twelve of
14 you. You're not dumb. Everybody in this courtroom
15 knew what the inference was, those were batteries
16 bought to make crystal meth, lithium batteries, and
17 I submit to you that's exactly the purpose of it,
18 let you go home thinking he bought all those
19 lithium batteries.

20 Who brought out to you they weren't? I
21 asked, the judge required him to come back, being I
22 wanted to know if those were lithium batteries or
23 alkaline batteries. They came back as alkaline
24 batteries. Why be selective, why didn't they tell
25 you the whole story? You ask yourself that. "Why

1 was I told part of it?"

2 Talk about this investigation, who knows how
3 many officers were out there at Billy Moore's
4 place, five, ten, you heard anything from ten to
5 forty, and that was a meth lab and they were doing
6 this investigation, but number one, they kept
7 calling it a crime scene until a gentleman got up
8 here, the sergeant, who said that was his cup of
9 tea, that was his specialty, he does crime scenes.
10 People don't come up on crime scenes. That was not
11 a crime scene.

12 And all this searching and everything, but
13 you know what, they were about ten seconds away
14 from the drugs riding down the road sitting on top
15 of the trailer. The gentleman, and I think it was
16 Billy Moore's stepfather, I think, said he was
17 walking across the street and said what's that on
18 top of the trailer right as they were about to pull
19 off. I submit to you there is problems with the
20 whole situation there, to call this, quote, quote,
21 a great conspiracy.

22 And the fingerprints thing, you are going to
23 see all the stuff here. The stuff here in the box,
24 and what I'm referring to is the ziplock, the big
25 bag with all the Mason jars in it, that Gene

1 Saylors came up with, that had all this stuff in
2 the box, the coffee grinder, rubber gloves, all
3 kind of stuff, and every bit of it was dusted for
4 fingerprints, not one single fingerprint of
5 Marshall Miller or, for that matter, Mr. Moore or
6 anybody else involved in this, none they could
7 identify.

8 You know, we can go through each and every
9 single article. There is no dispute, I'm not going
10 to argue with you that Marshall, he wasn't studying
11 for his Boy Scout badge, but by the same token is
12 he part of this conspiracy, because what the Court
13 is going to tell you is a conspiracy is, partly as
14 the State said, it is an agreement and there also
15 has to be the intent to agree to achieve a
16 particular objective.

17 Well, Martha Ellis got up here and when she
18 first got arrested she gave a statement saying that
19 Marshall Miller gave her all that dope and she
20 said, "I said it because that's what Brandon Scott
21 wanted me to say." I understood that, so to speak,
22 so she blamed it all on Marshall.

23 Then later she gave a statement to SLED in
24 which she said, "Well, what I said before wasn't
25 quite true." Well, no, it wasn't, it was a lie.

1 "I really got that dope from Ray Powell."

2 Well, ask yourself this. What was Martha
3 afraid of to begin with? Was it Ray, or was it not
4 giving compliance to the State? But somewhere in
5 the middle she said, "Well, it did come from Ray,"
6 but yet when she got up here on the witness stand,
7 "Well, I lied that time, too, it really did come
8 from, it was really Marshall's dope."

9 And you know what, you're being told even
10 though the SLED agents themselves don't trust it,
11 you're being told you trust this in the most
12 important of someone's affairs in deciding whether
13 someone gets a criminal record, if you are going to
14 convict somebody of a crime, you rely on them.

15 Of course you don't have to rely on that.
16 You can look at all this other stuff, these baggies
17 that somehow didn't become baggies, but they are
18 evidence, clearly, the same as words, evidence of
19 these things, that Marshall Miller was engaged in a
20 criminal activity, no ifs, ands or buts. The
21 question is the conspiracy. Was there, number one,
22 an agreement, and number two, was there an intent
23 to enter into an agreement, to work together?

24 One of the questions I asked, I tried to make
25 a point of this with Michelle and several other

1 people, they did this for themselves, they sold
2 dope, they kept the money, they did it for
3 themselves, they were keeping the profits. They
4 did it to have a good time, as strange and as
5 demented as that may be, they did it to have fun.
6 It's an improper and illegal way to have fun, they
7 did it for themselves. I submit to you there was
8 no common goal.

9 One of the questions I asked, I said these
10 people are busy shooting up dope, one guy said, "I
11 don't know what time it was." Days were
12 unimportant, weeks weren't important, months
13 weren't important, they couldn't even keep their
14 years straight, but they have a conspiracy? I
15 specifically submit to you, I specifically asked
16 the question, I said, "You were so messed up you
17 didn't know your left foot from your right foot,"
18 and he agreed with that. And he said, "That's
19 right."

20 So, these people who were so messed up,
21 they're shooting drugs and they're addicts, they're
22 junkies, use your common sense on that, what is an
23 addict? It's a person who can't give it up, they
24 can't resist it, they can't get away from stuff, if
25 they've got it they are going to do it. According

1 to the State's proof, the State's evidence, it sure
2 was plentiful, they did it all the time. They
3 didn't know their left foot from their right foot.

4 Is Marshall guilty of manufacturing crystal
5 meth, probably so. Is he guilty of distributing
6 it, probably so. That doesn't mean that he's
7 guilty of a conspiracy to do that. You've got a
8 bunch of bumblehead junkies who at times, yes, they
9 were together. But you know, the State alleged
10 that all these people together, in their indictment
11 it names all the people and other people, not or
12 other people, and other people whose names are both
13 known and unknown to the State Grand Jury did in
14 Abbeville County, it goes on, and it says they
15 conspired to sell, manufacture, deliver or
16 purchase, in other words, the State has alleged in
17 their indictment that all of these people together
18 conspired as per the indictment to do this illegal
19 activity. And you can find that Marshall Miller
20 and Ernest Covan and Ray Powell, for that matter,
21 and possibly Tracy, did at some point in time enter
22 into a conspiracy if you believe they had the
23 intent to enter into an agreement and did in fact
24 have an agreement, but a conspiracy among those
25 four or five is not sufficient, I submit to you, to

1 support a verdict of guilty because the State has
2 alleged it is a conspiracy among them all to do it,
3 there is an agreement, spoken or unspoken, to do it
4 and there is an intent to have that agreement with
5 all of them.

6 And even if you find there were several
7 conspiracies, people who were working together,
8 unless there is a common goal among those, he is
9 not guilty. He may be guilty of other crimes but
10 not of the conspiracy.

11 Ladies and gentlemen, just looking through my
12 notes, I'm not going to try to go through all the
13 inconsistencies, you know, as you go through it.
14 The last part, the State was talking about
15 circumstantial evidence, which there is some
16 alleged circumstantial evidence against both Mr.
17 Miller and against Mr. Moore over there, but the
18 judge is going to tell you that circumstantial
19 evidence, use the words the judge gave you, must
20 exclude any other logical or reasonable explanation
21 to the exclusion of other explanations, and an
22 example he gave was you wake up the next morning
23 and there is snow on the ground. Well, it's
24 logical it did snow that night. But one of the
25 things they tell you was these people were telling

1 the truth and yet Tony Stewart somehow or another,
2 he knows all about this, he's one of the people on
3 the circle pointing to Marshall, he knows all about
4 it, but he got up here and told you about how they
5 cooked it and how they used the Coleman stove.

6 I submit to you it was ludicrous, he didn't
7 have a clue about what cooking crystal meth meant.
8 There is no cooking done. It's a chemical
9 reaction, that came through loud and clear, with
10 the lithium and the anhydrous ammonia, you don't
11 dare get it near a flame because it will blow sky
12 high but yet Tony Stewart, part of the truth of the
13 State's case, was sitting there telling you, "Oh,
14 yes, they used a Coleman stove and cooked this,"
15 making it up as he went.

16 And that is one of the people that the State
17 chose to present to you. And, you know, one of the
18 other odd things, they had a witness who gave a
19 statement, who said he saw, his statement was he
20 saw Marshall Miller put that green bag with all the
21 stuff, as a matter of fact, out of seventy
22 something exhibits, it's about thirty of those
23 exhibits, he saw Marshall Miller reach up and throw
24 that up on the roof. They had a way of linking
25 Marshall Miller to that with a witness. His name

1 was Chip. The State didn't call him as a witness.
2 You've got a right to ask why, because Mr. Moore
3 could have done the same thing that I did, which is
4 say, "I rest my case," and been done with it.

5 I submit to you it's a real simple and easy
6 answer. They knew very well, because they talked
7 to Mr. Chip Heatherly, he might tell you what
8 happened and he had nothing to gain or lose by his
9 testimony, he wasn't indicted or anything. One of
10 the things he was going to tell you was Billy Moore
11 wasn't involved. Nobody wanted you to hear that.
12 A minister of justice? A minister of justice would
13 have presented that to you, the defendant did
14 instead.

15 And I asked one of the things about
16 Marshall's statement, because the Solicitor, the
17 government brought out, "Well, not everything
18 Marshall told you was true, was it?" "No, it
19 wasn't." So I got up and I said such as? And he
20 said, "Well, he said Tracy wasn't involved."

21 Out of fifteen hours of debriefing and thirty
22 something pages of writing that's the only, quote
23 quote, lie they found? And the thing that came out
24 was, Michelle Powell, Ray's wife, according to
25 Ray's own statement, was there for fifty something

1 cooks and the State determined she wasn't involved,
2 or somebody did. That's the whole problem here.

3 I'll get back to a couple things. There is
4 no trust because of the people involved, there is
5 no purchases, and there is no investigation, and
6 you don't know the truth if you don't investigate.
7 It came out, that is their open words, and I submit
8 to you what you have here is a situation in which
9 it was almost, I don't know if you folks have been
10 fishing before but it's almost like reaching into
11 the basket of crickets and you just reach in and
12 pick out a cricket and that's the one that gets put
13 on the hook. There is no reason to it, there is no
14 rhyme to it, it's purely the will of the person
15 reaching, and as people who live here you folks
16 make the decision as to how it's going to be done
17 in your community.

18 The problem is we're not talking about
19 crickets. We're talking about people's lives, how
20 some can just be arbitrarily not on the hook and
21 others like Marshall Miller get put on the hook,
22 not feeding everybody from the same spoon, fishing
23 for the cricket, so to speak, because I submit to
24 you the real center of this is Ray Powell, I think
25 the evidence will show you, and there is no reason

1 to doubt it.

2 In terms of Marshall's statement, there were
3 ways to check it out but they didn't want you to
4 hear that because it didn't fit into all the
5 statements they had already locked everybody into
6 that Ray or whoever got them all together to say,
7 "Hey, guys, this is going to go on Marshall,
8 Marshall knows it, he's trying to get a jump on us,
9 he's trying to get statements but we're going to
10 dump it on him. These people have already given
11 statements, they can't switch their story now.
12 They've got to stick with what they've got."

13 You folks decide. I'm not asking you to look
14 at whether or not Marshall Miller is innocent. He
15 is certainly by no means that, neither were any of
16 the people here, but has the State proven each and
17 every element of a conspiracy, a knowing and
18 intended agreement to carry out an illegal purpose,
19 an illegal enterprise, or a bunch of junkies
20 getting high, helping one another wherever they
21 could and how they could but with no real stated
22 aim or purpose? That is not a conspiracy, I submit
23 to you, and you know what.

24 All of us see what we want to see, just human
25 nature. You can look at gray hair, you can see old

1 age, you can see decay, the effects of the years on
2 people's lives, or you can see maturity,
3 experience, it depends on how you look at it. But
4 that's your province, that's solely within your
5 province. And even to a certain extent we can all
6 argue it's black and white.

7 That's black and white, it's a picture.
8 When you go back in your room you can discuss
9 what's in that picture. I submit to you you're
10 going to be surprised. It is how two people can
11 look at the same thing, because a lot of them are
12 going to see a man's face, you can see his
13 shoulder, there is his neck, his chin, his mouth,
14 there is his two lips, and his nose and his eyes
15 and eyebrow. And some of you are going to say
16 huh-uh, look at it that way, that's the word liar,
17 l-i-a-r.

18 Look at their testimony the same way. They
19 are going to tell you it's the truth. I'm going to
20 ask you to look at it closely, use your common
21 sense and see what it tells you.

22 I thank you very much for your time. It's
23 been tough for all of you, it's not a fun spot to
24 be in over here, not a fun spot to be there, but
25 take your job seriously, think independently and be

1 brave enough to say, "This is not the way we want
2 it done, if you're going to prove somebody guilty,
3 use the best evidence, don't get a bunch of junkies
4 and don't let them all tell the same story without
5 checking out who knows who and why would they have
6 told it and just let them compare stories. If it's
7 told often enough and loud enough it becomes true,
8 that's not the way it works."

9 Thank you.

10 THE COURT: Madam Forelady, ladies and
11 gentlemen of the jury, we will take a short recess
12 now for a comfort stop for all of you that need it.
13 Do not discuss the case by, between and among
14 yourselves. You have not heard the entire case.
15 Retire to the jury room, please.

16 (The jury was excused from the courtroom).

17 THE COURT: We're in brief recess.

18 (Recessed at 2:49 p.m.).

19 (Reconvened at 3:22 p.m.).

20 THE COURT: All right. Is the State ready?

21 MR. HOOD: Yes, sir, Your Honor.

22 THE COURT: For Mr. Miller?

23 MR. VARNER: Yes, sir.

24 THE COURT: Mr. Wise?

25 MR. WISE: Yes, sir.

1 THE COURT: Show the jury in, please.

2 (The jury returned to the courtroom).

3 THE COURT: All the jurors are present, with
4 the forelady and alternates properly seated. Mr.
5 Wise, you're recognized, sir.

6 MR. WISE: If it please the Court.

7 THE COURT: Mr. Wise.

8 MR. WISE: The good news for you is I
9 represent Billy Moore, I will not be as lengthy as
10 everyone else.

11 Just as the State discussed with you the law
12 in this case, I too will discuss in the first part
13 of my discussion with you, I hate to call it an
14 argument, it just sounds too competitive and you
15 all didn't get to argue back, so I call it
16 discussion. In my discussion I'm going to talk
17 about the law, too, what they have to prove and so
18 forth. In the second half we will discuss the
19 facts of the case, a few facts in the case as they
20 relate to Billy Moore.

21 If you go in the jury room and you say to
22 yourselves or among yourselves, "You know, Billy
23 Moore is probably guilty of this conspiracy, he
24 probably did it, he probably agreed with Marshall
25 Miller to traffic in drugs," what should your

1 verdict be? Your verdict should be not guilty
2 because in this criminal court we don't talk about
3 what probably happened, what could have happened,
4 what might have happened or what possibly happened
5 out there in this conspiracy. When we talk about
6 proof beyond a reasonable doubt it's the highest
7 standard known to man short of an absolute
8 certainty. It's a thing we brag most, as the
9 prosecuting attorney said, the thing we brag most
10 about when we talk about our criminal justice
11 system, that that's the proof we have. So, we're
12 not talking about probability or possibilities when
13 we talk about the proof in this case, and against
14 that standard you have to weigh all the evidence in
15 this case, all of it.

16 Also His Honor will charge you the law of
17 circumstantial evidence. If proven to the, to the
18 standard necessary, circumstantial evidence is
19 reliable, and for a simple reason. It has to
20 exclude every other reasonable hypothesis except
21 the guilt of the accused. You actually have to go
22 out and actively seek, His Honor will charge you,
23 another alternative explanation other than guilt,
24 and if there is another alternative explanation
25 other than guilt then the circumstantial evidence

1 isn't sufficient enough to convict and you must
2 acquit.

3 Now, the prosecuting attorney gave the
4 illustration of the snow and all that, that's fine,
5 but there is a little illustration I like to use
6 that shows, I think, very effectively what
7 circumstantial and direct evidence is. And the
8 case against Billy Moore, when I get to the facts,
9 is 100 percent circumstantial evidence, there is no
10 direct evidence of his being involved in this
11 conspiracy. Let's say for some reason the
12 Legislature in its infinite wisdom passed a law
13 that made it it illegal to break a pencil. If I
14 were to stand in front of you and break a pencil
15 your seeing that happen would be direct evidence,
16 you could go to court, you could testify, testify
17 you saw it happen. That is direct evidence of the
18 act.

19 Now, I take a pencil and put it behind my
20 back, you all didn't see me break it, no one did.
21 If I pull out two pieces, did I break it? Well,
22 that's the only reasonable explanation. No one
23 came up behind me and broke it, you heard the snap,
24 although you didn't see it, and therefore you can
25 logically assume that I broke the pencil, although

1 there was no direct evidence to that effect.

2 But if I take another pencil and actually
3 leave the courtroom and come back in with two
4 pieces of a pencil, can you say beyond any and all
5 reasonable doubt that I broke the pencil? Is that
6 the only reasonable explanation of what happened?
7 Or can you really even say it's the same pencil?
8 That, under those circumstances, the last example,
9 you could not convict on circumstantial evidence
10 because there is a myriad of explanations of what
11 happened out of your presence, and that's the
12 standard by which you have to view circumstantial
13 evidence.

14 Now, let's go with some things the government
15 says. Let's take one of their charts, it's not
16 evidence in this case, and they say on this nice
17 chart they have, if the State can prove conspiracy,
18 a conspirator, a conspirator has a slight
19 connection to the conspiracy, the word is slight,
20 the word is not weak, the word is not something
21 that's not proven beyond a reasonable doubt, it is
22 slight, but it is still something the government is
23 required to prove beyond any and all reasonable
24 doubt. A slight connection to the conspiracy, also
25 agreement. So, merely because they use the word

1 slight certainly does not mean the word weak.

2 That's not what slight means.

3 They also tell you that there can be a tacit
4 agreement. Well, I think they have misused tacit.
5 Tacit means basically an implied agreement and you
6 can have some people operating together and have an
7 implied agreement. If you want to know really, you
8 know, sometimes the word tacit is thrown around too
9 loosely, if you went into a lawyer's office and
10 said, "I want to sue somebody for breach of
11 contract," and they said, "Fine, what kind of
12 agreement did you have?" And you said, "I had a
13 tacit agreement," the lawyer is going to laugh you
14 out of the office. So, that is not what tacit
15 means, it doesn't mean weak, it doesn't mean weak
16 agreement, because the truth is beyond a reasonable
17 doubt. If there is a tacit or implied agreement it
18 still has to be a strong implied agreement, not a
19 slight agreement.

20 Now, with that, let's go through some of the
21 testimony in this case. This conspiracy
22 investigation started with Brandon Scott here in
23 Abbeville County sometime in 2000, he took some
24 statements from some people and historically went
25 back into the year 1999. Brandon Scott was the

1 first investigating officer in this case.

2 What did Brandon Scott do in this? First of
3 all, when he found suspicious people that he
4 thought were involved in the conspiracy he sat down
5 and did surveillance, he sat down and went to the
6 person's house, noting who was there, what kind of
7 car they were driving, typical surveillance. He
8 did that for a good part of the year 2001. I asked
9 him, "Did you ever come up with the name of Billy
10 Moore?" "No." Didn't know him. He had been
11 working on this investigation for who knows how
12 long before the arrests came down, did not know
13 Billy Moore. The man who had been heading the
14 investigation up.

15 Then we have Connie Sonnefeld who comes in,
16 and I asked her, "When is the first time you saw
17 Billy Moore?" "Out back behind Michelle Madden's
18 trailer." "What did he do?" She's wearing stuff
19 that lets him know she's SLED. Does he run? No,
20 he comes up to her and says, "Can I help you?" And
21 she says, "Who are you?" He says, "I'm Billy
22 Moore." She doesn't say, "You're under arrest."
23 She says she didn't know him. She had been working
24 on this case for a year, didn't know him.

25 He said, "Can I help you?" She said, "I'm

1 looking for Michelle Madden." He said, "You missed
2 her." She said, "Whose car is that across the
3 street?" He said, "A guy named Marshall Miller."
4 She said, "Can we go talk to him?" He said sure.
5 Did he go call Marshall Miller and tell him to run,
6 anything like that? No. He went and ate lunch,
7 hung around, stayed there. The woman who
8 investigated this case from the beginning didn't
9 know him, didn't know him. Those were the first
10 basically two witnesses for the State in this case.
11 No connection with Billy Moore.

12 There were only two witnesses really had
13 anything to say about Billy Moore. The first one
14 was the guy from Greenwood, Tommy Stewart. You all
15 remember Tommy Stewart, the guy that thinks you
16 cook meth with a Coleman stove. Well, you know,
17 he's the only one that testified that you cook meth
18 with a Coleman stove because everybody else knows
19 you don't do that, you don't do that.

20 What else about Tommy Stewart that was
21 interesting? I thought the most interesting thing
22 was when he was asked on cross-examination about
23 all the meth he was buying from Marshall Miller. I
24 asked him, "How long did you buy it from him?"
25 "Oh, on up into October." "Really?" "Yes."

1 Well, then Mr. Varner pointed out that's
2 interesting, he asked him, "What jail did you go to
3 to buy it from," because Marshall Miller was in
4 jail from the 24th of September, "What jail did you
5 go to?" "Well, it wasn't October, it was earlier,"
6 he backed it up.

7 And then he said, "I made a controlled buy
8 from Billy Moore." Okay, fine, where is it?/ You
9 can decide this case upon the proof or lack
10 thereof. Where is it? And besides, look at this,
11 I mean, just think about this logically for a
12 moment, keep your common sense, because this
13 conversation had to go down this way or somebody's
14 lying, and when I get through I think you will
15 realize it didn't go down this way.

16 Poor Tommy gets caught with some
17 methamphetamine. Ronnie McAllister comes to him
18 who knows when and says, "If you help us out we'll
19 see about getting rid of these charges." And what
20 does Tommy Stewart say? He told Ronnie McAllister,
21 "Oh, great," he said, "Look, I know this big meth
22 cook in Cokesbury, he manufactures meth, I know, I
23 have been up there, I know he manufactures it, he's
24 a big meth dealer, I also know Billy Moore."
25 Ronnie McAllister says, "Great, let's go get Billy

1 Moore."

2 I'm sorry, did it happen that way? If it
3 happened that way something is really wrong with
4 drug enforcement. Why didn't it happen that way?
5 Because somebody is not telling the truth. And
6 that is Tommy Stewart's testimony. That's it.

7 Now, in his opening comments the prosecuting
8 attorney said the factors by which you determine
9 whether or not someone is telling you the truth, if
10 you apply those to Tommy Stewart, I love them, all
11 right, was he hesitant to answer? Well, a little
12 bit. Was he forthright? Well, he was forthright
13 in changing back and forth.

14 How about his demeanor? Did he have a bias,
15 the fact they had charges dropped against him, did
16 that influence his testimony? Was he corroborated
17 by other witnesses, even when he claimed other
18 evidence was available, and the answer is no. He
19 didn't do it. He made a controlled buy, you all
20 saw earlier in this case what a controlled buy is,
21 we didn't see it. All right.

22 Another witness, Michelle Madden. What can
23 we say about Michelle Madden? She was listed on
24 this indictment. Where was she? Yes, Tonya Lee
25 Michelle Madden, about three-fourths of the way

1 down, the longest name on the indictment, she's
2 listed on this indictment. She sits down and talks
3 to Connie Sonnefeld before this indictment came
4 down against her, did not know, Connie Sonnefeld
5 didn't tell her, "The information I'm getting from
6 you is going to put you away for twenty-five years,
7 no parole," didn't tell her that. They get an
8 indictment on her and she gets a lawyer, she goes
9 to a lawyer and, as she testified, a lawyer told
10 her what any lawyer would tell her, "You're in a
11 world of hurt, you're looking at twenty-five years
12 mandatory, no parole if you're convicted on this."
13 That's what the lawyer, that is what she said the
14 lawyer told her, it's the truth. Then the lawyer
15 says, "But if you can help them out, if you can
16 help them out we can probably get that reduced down
17 a little bit."

18 Well, she went and decided to help them out
19 and got her sentence reduced down to three years,
20 of which she will be serving eleven and a half
21 months according to my calculation. That's about a
22 nineteen year gain for her.

23 All right? And what did she get? She goes
24 to see them after she's arrested, when she has to
25 cooperate, and they start asking her a logical

1 question, considering Marshall Miller, "What do you
2 know about the shop across the street?" Well, it
3 doesn't take a rocket scientist to realize, "Hey,
4 I've got to cooperate to get a deal, they want to
5 know something about the shop across the street,
6 therefore if I tell them something about the shop
7 across the street I'm helping."

8 None of this is recorded, so we don't have
9 the pleasure of knowing how the conversation really
10 went or how her thought process was, but basically
11 that's what it was, logic will tell you that.
12 Whereupon she then says, "Yes, there is something
13 suspicious about that shop across the street, you
14 know, one night I was at home just sitting on my
15 porch and, you know, all of a sudden I smelled the
16 same stuff I smelled up at Cokesbury, it smelled
17 like ether and, you know, it seemed to be in the
18 neighborhood and I saw Marshall Miller's truck down
19 the road and, you know, I thought you all should
20 know that."

21 All right. But then let's look at what the
22 facts really truly are. All right. Michelle
23 Madden, an addict, she admitted it, she said on the
24 stand, "Yes, I was addicted to this. I was
25 addicted." She was so addicted that even after her

1 arrest on a charge that could get her twenty-five
2 years in jail if she's convicted she continues to
3 use, and that's a pretty serious addiction. It
4 would seem that most people when you are arrested
5 and looking at that, that would be a real wake-up
6 call where, "Huh-uh, I'm out of here, I don't care
7 what I have to do, I don't use, I'm out of here,
8 I'm through with it."

9 But not her. Her addiction was that bad. So
10 she basically testifies to the drugs and she has
11 the drugs and has her bond revoked many months
12 later. Why do I tell you that? I tell you that
13 for this reason. It defies logic again to think
14 that Michelle Madden, who would trade sex for
15 drugs, could sit on her porch, smell
16 methamphetamine being made, see Marshall Miller's
17 truck across the road and not go over there. That
18 defies logic, it defies what we have been taught
19 about addicts, it defies what common sense would
20 tell you. All the things methamphetamine does to
21 you, it does not make you paranoid to cross a road,
22 that's for sure, a hundred yards or less away.
23 Look at the map, I'll point it out to you.
24 Remember the testimony, Michelle Madden's place is
25 right here, the shop is right there. She wouldn't

1 even cross the road, knowing that Marshall Miller
2 was over there, according to her testimony, and she
3 could get probably free meth. But she's an addict.

4 Now, that defies logic and that's it, that's
5 her testimony against Billy Moore. End of
6 discussion about all the, quote, damaging testimony
7 against Billy Moore, that's it, those two. And the
8 State has to convince you beyond any and all
9 reasonable doubt they're telling the truth.

10 Now, it was interesting, and I took the
11 quote, I got the quote myself, that if you want to
12 know how to decide this case decide it the way
13 Chester Bragg would decide it. I would suggest
14 that. Chester Bragg was asked on
15 cross-examination, "Would you base the most
16 important decision of your life based upon what
17 these people told you?" His answer was, "I
18 wouldn't, no."

19 Then how can the State ask you to base the
20 most important decision in Billy Moore's life upon
21 those two witnesses? How can they? One they have
22 given nineteen years of freedom to in exchange for
23 her testimony, and the other one couldn't keep his
24 story straight and they didn't bother to come in
25 with corroboration of his alleged version of

1 anything. "I wouldn't, no." Well, you shouldn't
2 either.

3 Now, look at this map again. Intersting
4 enough, we talked about, you know, what things mean
5 in this case. Well, we'll skip that for a minute.
6 Billy Moore testified that people living here,
7 people living here, his grandmother here, his uncle
8 down here, a relative he doesn't get along with
9 here, the Maddens here, he's there and another
10 house down there, everybody close by, and that's
11 where they claim, they say we're going to go make
12 meth?

13 Well, first of all SLED didn't believe meth
14 was being made at that garage. If SLED had
15 believed meth was being made at that garage would
16 you have seen a yellow stripe around it, as
17 Sergeant Hughes testified to, would you have seen a
18 yellow strip around it, would you have seen people
19 coming in? Checking people who came in and out?
20 It would have been restricted access before you
21 could ever say meth if that was the crime scene.
22 They didn't believe it was a crime scene, very
23 simple, very simple.

24 Now, you know, the old saying beauty is in
25 the eye of the beholder, sometimes the evidence is

1 in the eye of the beholder. What do you see when
2 you see something? And what did Ronnie McAllister
3 see when he saw three boxes of Glad wrap in the
4 garage? He saw drugs, he saw drug containers, he
5 saw means of wrapping the drugs up to be sold and
6 he said we've got baggies. Well, they're not
7 baggies but he said, "We've got baggies, we have
8 proof here positive that Billy Moore is dealing
9 drugs."

10 Well, what did he forget to ask? He forgot
11 to ask Billy what he used them for. Billy
12 testified, "We heat go-cart wheels in them and wrap
13 them up, we use them all the time." Two
14 explanations, one reasonable, one isn't. The law
15 requires you to adopt that explanation.

16 Then what does Ronnie McAllister find?
17 "Ah-hah, scales. We know what this is for, you
18 weigh it out, you put it in the baggies, we've got
19 a big drug operation going here. This is drug
20 scales, this is what it is."

21 What is the explanation? You weigh parts for
22 go-carts to make sure you get the lightest one to
23 put in there. Innocent explanation, the law
24 requires you to accept it.

25 And they come in and say, "Ah-hah, this was

1 found in the garage, this is Billy Moore's, we know
2 it is, it was found in the garage." One, Billy
3 wasn't there, hadn't been there for hours, is the
4 first problem. A lot of people in and out of
5 there, that's the second problem. The third
6 problem is would you, we have a Medport bag that
7 was found on top of the trailer with a bunch of
8 identification belonging to Marshall Miller in it,
9 and what do we have here, "Oh, I'll be, a Medport
10 bag." Doesn't it make sense they belong to the
11 same person? Innocent explanation, you're required
12 to follow it, find it.

13 And then they say this Sudafed bag. Never,
14 the other Medport bag and Sudefed bag, nothing was
15 ever done to even try to find a fingerprint on
16 them. Billy Moore said, "This wasn't mine, wasn't
17 in there." Innocent explanation, you're required
18 to follow it.

19 You know, one of the most confusing things
20 about this trial. Proof positive that things are
21 in the eyes of the beholder, not necessarily, you
22 know, what someone calls it. We went through a day
23 of this trial with people pointing at charts and
24 Mr. Varner brought us a pointer, the Judge called
25 it a pointer, everybody calls it a pointer, where

1 is the pointer, somebody grab it. It's not a
2 pointer, it's a radio antenna. It's a radio
3 antenna, that's what it is, it's an electric radio
4 antenna that we used in here as a pointer, it's not
5 a pointer. Again, in the eyes of the beholder.

6 Now, His Honor will charge you the defendant
7 is not required to call any witnesses. Billy Moore
8 chose to, he chose to get on the stand and tell you
9 his story, tell you about himself, about what goes
10 on out there. "How long have you known Marshall
11 Miller?" There isn't a scintilla of evidence in
12 this case, not a scintilla of evidence that Billy
13 Moore had known Marshall longer than nine days,
14 nine days. There is not a scintilla of evidence
15 that Billy Moore had sold drugs, scintilla of
16 credible evidence he had sold drugs to Marshall
17 Miller or even knew he had them. It's simply not
18 there.

19 Wayne Hughes you saw testify, former police,
20 or police officer on disability, he's out there, he
21 gets Billy aside and says, "Look," as any police
22 officer would and probably any family member would,
23 "Look, tell them the truth, if you're involved in
24 this let them know now," and Billy said from the
25 beginning, "I'm not involved."

1 Jimmy Madden, they want to say this is a meth
2 lab here, and Jimmy Madden who lives down here
3 comes in and out of there unannounced on a regular
4 basis. His wife is in and out of there unannounced
5 on a regular basis. Other people in and out of
6 there on a regular basis. His grandmother lives no
7 farther than this courtroom from that building, and
8 they want to say that's where they make this
9 noxious smelling stuff on a regular basis?

10 There were some ten co-defendants named in
11 this indictment who testified, ten. Seven of those
12 when asked said, "I don't know Billy Moore, I have
13 never seen him, I don't know who you're talking
14 about." Michelle Madden, who dated Marshall
15 Miller, if you want to call it that, who got, went
16 off with Marshall Miller for drugs for many months,
17 even said Marshall Miller never mentioned Billy
18 Moore. Never mentioned him.

19 So, where is Billy Moore in this conspiracy,
20 where is he? Where is it that he has agreed with
21 Tina Stevenson, of whom he did not know and did not
22 know him, Martha Ellis who he did not know and did
23 not know him, David Cumming, Tony Howard, Sandra Jo
24 Hughes, Jason Davis, Ernest Covan, Bonnie Saylor,
25 where is any proof that he worked with these people

1 in a conspiracy? Where is the proof that he knew
2 these people, and granted the government doesn't
3 have to prove he knew them but he has to know that
4 the conspiracy existed and some people were part of
5 it before you have this agreement to violate the
6 law. Where is it? In the old Wendy's commercial,
7 where is the beef? You cannot convict someone of a
8 serious felony like this on speculation, conjecture
9 and surmise, nor can you convict someone by
10 building an inference upon an inference. That is
11 not sufficient either.

12 You know, when the Titanic sunk there was
13 some people that got off that boat successfully but
14 the problem was they were close by the boat as it
15 started to go down and when a giant boat like that
16 goes down it creates a suction, and those who were
17 nearby, who should have been saved, should have
18 been, you know, should have lived, died because
19 they were sucked down with it. If the best the
20 government can show in this case is that Billy
21 Moore was close, that's not sufficient to convict
22 him of trafficking methamphetamine more than 100
23 grams. That's not sufficient.

24 You've got to, in order to convict in this
25 case you've got to find that Billy Moore had an

1 agreement, you've got to find proof beyond a
2 reasonable doubt that he had an agreement, not
3 slight proof, proof beyond a reasonable doubt that
4 he had an agreement with these individuals and the
5 agreement consisted of trafficking more than 100
6 grams of methamphetamine, and it's not there.
7 The State hasn't given the proof, the State hasn't
8 produced it. The State of South Carolina, in order
9 to survive, is a free state, certainly does not
10 need the conviction of Billy Moore on this evidence
11 in order to continue to exist. Hold the State to
12 their burden, hold the State to their standard.

13 You know, you don't have a choice in this
14 case, either guilty or not guilty, but I wish there
15 were a way you would have a choice of writing down
16 innocent on it.

17 Billy Moore took the stand, he was
18 cross-examined by the State and, you know, it's
19 amazing that when a case has been investigated from
20 sometime in the year 2000, Billy Moore has been
21 indicted since sometime in March of 2002, 2003,
22 excuse me, some nine months ago, they can come in
23 here after all, with all the resources the State
24 has and the only thing they can find to ask Billy
25 Moore on cross-examination is, "How many times did

1 you meet Marshall Miller?" If he were involved in
2 this conspiracy, if they had any evidence he was
3 involved in this conspiracy they would have had a
4 whole lot more questions than how many times did
5 you meet Marshall Miller? And that's all they had
6 and that's it, with all their resources, all their
7 SLED agents and all the means at their disposal,
8 that's the best they could come up with.

9 The proper verdict in this case should be
10 innocent, unfortunately the Court only gives you
11 the choice of not guilty.

12 Thank you.

13 THE COURT: Mr. Hood, the jury is with you.

14 MR. HOOD: Your Honor, I would ask for about
15 five minutes, literally five minutes to get set up,
16 if the Court is so inclined.

17 THE COURT: Yes, sir, you're entitled to it.
18 Madam Forelady and ladies and gentlemen of the
19 jury, we will take a short recess. Please to not
20 discuss the case by, between and among yourselves
21 and retire to the jury room.

22 (The jury was excused from the courtroom).

23 THE COURT: We'll have a short recess.

24 MR. HOOD: Thank you, Your Honor.

25 (Recessed at 3:56 p.m.).

1 (Reconvneed at 4:11 p.m.)

2 THE COURT: The record is open in indictment
3 2002-GS-47-32, the State of South Carolina versus
4 Marshall Miller and others, wherein Marshall Miller
5 and Billy Moore are the defendants in this trial.
6 All parties have argued except for the final
7 summation of the State, which will commence when
8 the jurors are shown in.

9 Show the jury in, please.

10 (The jury returned to the courtroom).

11 THE COURT: All the jurors are present, with
12 the alternates and the foreperson properly seated.
13 The jury is with you, Mr. Hood.

14 MR. HOOD: May it please the Court, Your
15 Honor.

16 THE COURT: Mr. Hood.

17 MR. HOOD: Mr. Varner, Mr. Wise, ladies and
18 gentlemen, Madam Forelady.

19 I can do no better justice for you this
20 afternoon than to take this case out of the massive
21 and large amount of detail that you have seen last
22 week and this week and all the arguments you have
23 heard, and give you a simple outline of what this
24 case is about, a very bold and a very simple
25 outline of what this case is about.

1 The fact of the matter is that each of those
2 nineteen defendants played an indispensable and
3 reciprocal part in this conspiracy. They each had
4 a role, they each had a part and they each had a
5 responsibility. The pattern of crime here is the
6 crime, the crime is the pattern of crime, the
7 kingpin of which holds them all together to supply,
8 manufacture and distribute drugs. The kingpin is
9 Marshall Miller. It is not necessary in our laws,
10 in our society, for men to agree on everything in
11 order for them, in order for them to agree on
12 enough to put them in a conspiracy.

13 Let me start with what things that under the
14 State's position are not contested.

15 Number one, over a hundred grams of
16 methamphetamine is not an issue. Let me explain
17 that to you, let me explain why it's not an issue.
18 Because I don't have to put 100 grams on all
19 nineteen people, I don't have to put a hundred
20 grams on Marshall Miller and I don't have to put a
21 hundred grams on Billy Moore. I only have to put a
22 hundred grams on the conspiracy as a whole. It's
23 not required that I put Marshall Miller having a
24 hundred grams in his possession or Billy Moore
25 having a hundred grams. Remember, the crime is

1 what? The crime is the agreement. A hundred grams
2 is not an issue. If you believe the testimony of
3 Ray Powell, that he got four ounces a week for a
4 year, that's over 5,000 grams, that's fifty kilos
5 of methamphetamine.

6 The second thing, and I almost don't even
7 want to say this, because you may be mad at me, but
8 we could have tried this case with one lay witness,
9 just one, and that was Ernest Covan, because he
10 said he got a pound of methamphetamine from
11 Marshall Miller, he bought his anhydrous ammonia
12 for him, and who was with him on the day he got
13 arrested? Marshall Miller, indicted. Billy Moore,
14 indicted. Jeff Horne, indicted. Ernest Covan,
15 indicted. And they were all doing meth at whose
16 shop? Billy Moore's shop. One witness.

17 Now, did we do that? No. Did you hear a lot
18 more than that? Yes. Why? Because I didn't want
19 to base our whole case on one witness, and the
20 reason we could have based our case on one witness
21 is because there is two types of cases, and in this
22 case they are essentially intertwined. It's called
23 a historical case. That is when you interview
24 somebody, you debrief somebody and they tell you,
25 "This is what I have done, this is how long I have

1 done it, this is how much I bought, this is where
2 it happened, this is who I got it from, this is how
3 I paid for it." That's a historical case. You
4 build it from witness on top of witness on top of
5 witness on top of witness, and you didn't hear from
6 one lay witness, you heard from twelve lay
7 witnesses.

8 The second type of case is an evidentiary
9 case, wherein -- well, there is evidence in this
10 case, too. You will have it back there in the room
11 with you. There is almost two ounces of
12 methamphetamine in this case. Pills, syringes,
13 pictures, receipts, scales, receipts from C. C.
14 Dickson, there is plenty of evidence in this case.
15 But this case isn't about one or the other, it's
16 about a combination of both.

17 The next thing that is a given, that there
18 has been a lot of talk about this week and I'm here
19 to set the record straight, the Attorney General's
20 office, the State of South Carolina doesn't indict
21 anyone. I am not responsible, nor is the Attorney
22 General Henry McMaster, for indicting anyone. SLED
23 does not indict anyone. Who determines who gets
24 indicted and who doesn't is up to a group of people
25 just like you. They are the members of the

1 Statewide Grand Jury and they hear evidence every
2 month in Columbia and those folks decide whether or
3 not the Gene Saylor and Tommy Stewarts of the
4 world and the Ray Powells of the world get
5 indicted. I don't decide that, the grand jurors
6 decide who gets indicted. Very important. All
7 this talk about, "Well, he wasn't indicted and he
8 wasn't indicted. Well, why didn't you indict him?"
9 The Grand Jury decides who gets indicted, just like
10 you decide who you find guilty and who you find not
11 guilty. They have the same power as you do,
12 they're just on a different level in the criminal
13 justice process.

14 The last thing I want to tell you about is
15 this thing called mere presence. You're going to
16 hear the judge tell you in his charge on the law
17 that being merely present is not enough. Well,
18 ladies and gentlemen, there is a fine example of
19 mere presence in this case. Let me tell you who
20 was just merely present. Remember the defense's
21 first witness, James Heatherly, Chip Heatherly,
22 remember, he had a beard and he would be over there
23 helping Billy Moore and helping feed the chickens
24 and, you know, all that stuff. He was merely
25 present, ladies and gentlemen. Marshall Miller and

1 Billy Moore just weren't merely present. They were
2 actively involved.

3 What have we shown you through law
4 enforcement? Let's start with this. All this
5 evidence, you're going to have it all back there in
6 the room. When they can get the evidence they do
7 it. And why was this seized, you ask yourself.
8 And why was this seized, you ask yourself. I tell
9 you why it was seized, because when they go in
10 there to seize stuff they have a responsibility to
11 seize every single thing they can possibly think is
12 involved in a crime in any way, shape or form,
13 because if they hadn't seized it, you know who
14 would be yelling about it? They have a duty to
15 seize that stuff and you should be glad that they
16 do, because you don't know, all you know is it was
17 used to weigh engine parts. You don't know it
18 wasn't used to weigh drugs.

19 The second thing, when law enforcement has an
20 opportunity to interview witnesses they do so.
21 You've got to remember this, folks. These people
22 that we got all these interviews from, they weren't
23 interviewed all at the same time. They weren't
24 placed in a big room and said okay, everybody tell
25 me what you know. They were interviewed

1 independent of each other. They don't know what
2 everybody else is saying. Think about that. You
3 don't interview twelve people at one time, you
4 interview one person, and they don't know what all
5 the other people are saying. And when you
6 interview them they have to give up their
7 constitutional rights, rights that all of you and I
8 and the defendants have. They have to give that up
9 and say, "I'm willing to incriminate myself," and
10 you heard it over and over and over again, no
11 one promised them anything. It wasn't, "If you
12 tell me something I'll give you seven years. If
13 you tell me something I'll give you ten, if you
14 tell me something I'll give you three." It's,
15 "Cooperate, cooperate fully and if I find out
16 you're lying to me it's going to be worse."

17 Michelle Madden, you heard her testimony, the
18 little twenty year old female. They didn't ask her
19 about that smell. She told them. Why? Because
20 she agreed to cooperate. She had been told, "You
21 better tell us everything, because it's only going
22 to be worse on you if you don't."

23 Fingerprints. We all entered into a
24 stipulation. When you see all this stuff back here
25 you are going to see all this black fingerprint

1 dust all over it, coffee grinder, rock salt, and
2 the reason we did that is so I could save the time
3 of calling two expert witnesses, but remember the
4 stipulation? It says that there were fingerprints
5 found but none of them matched Marshall Miller or
6 Billy Moore, and do you remember the second half of
7 the stipulation? Just because you touch something
8 doesn't mean you leave a fingerprint. This isn't
9 CSI. All that stuff on CSI, my family says to me
10 all the time, "Why don't you have that? Don't you
11 have that?" This is real, it's not TV. Just
12 because you touch something doesn't mean you leave
13 a fingerprint, and who knows how many people
14 touched all this stuff over and over and over
15 again.

16 When law enforcement can make a controlled
17 buy they do. Remember that long video on the first
18 day? I thought the thing was never going to end.
19 I said, "Somebody please fast forward through that.
20 If I have to sit here and watch that thing any
21 longer I'm going to go crazy." But remember, and
22 why did we show you that, why did we show you that?
23 Because if we can do it we do it. You don't think
24 I want to have a controlled buy off of every single
25 person named in the indictment? Yes. Is that

1 possible? No. Where did Marshall Miller do his
2 drug deals? Where did he do them? Whether it was
3 Shamrock, 252, Waterloo or Cokesbury, where did he
4 do them? In the bedroom, in secret, never in front
5 of other people, because he didn't want anybody to
6 know what was going on.

7 What have the witnesses shown you? Ladies
8 and gentlemen, we brought before you a cast of
9 characters, twelve individuals, and those twelve
10 individuals were very interesting people, to say
11 the least. But what's important about them is
12 this. They admitted what they did, they admitted,
13 "I'm involved, I take responsibility for what I
14 did." But I'm about to say something that's very
15 important, you are going to hear me say it again.
16 If I could have my Sunday School teacher as a
17 witness I would. Unfortunately my Sunday School
18 teacher doesn't get involved in methamphetamine
19 conspiracies.

20 Remember that whole line of questioning,
21 "You're a junkie, you're a junkie?" They are all
22 junkies, no one disagrees, but who else is going to
23 know how the inner workings of a meth conspiracy
24 works except for a bunch of junkies, who else is
25 going to hang out with them, who else am I supposed

1 to use? I can't send a normal law abiding citizen
2 in there because, guess what, they're not going to
3 sell to them because they're not a junkie. I don't
4 like these people either, they're not my favorite
5 people, I wouldn't go out and eat dinner with them,
6 they're all in prison.

7 But what you've got to ask yourself is this.
8 Are they telling the truth? Because it takes one
9 to know one, and the only people that are going to
10 know what's going on in that methamphetamine
11 conspiracy are the junkies, because it takes one to
12 know one. You may not like some of the deals those
13 people got, you may think they didn't get enough
14 time, they got too little time, they got too much
15 of a deal, that's fine if you don't like some of
16 their deals. If you don't like the plea deals some
17 of those people got that is your right but do not
18 reward Marshall Miller because you don't like their
19 plea deals, and do not reward Billy Moore because
20 you don't like their plea deals. If you don't like
21 their plea deals blame me, you want to blame
22 somebody because somebody got three years or
23 somebody got seven years or somebody got ten years,
24 you can blame me all day long but don't reward
25 Marshall Miller and Billy Moore because you don't

1 like their plea deals. You can blame me.

2 What have the witnesses told you? You heard
3 from a number of witnesses and it was all last week
4 and I realize that and you are just going to have
5 to bear with me because I'm going to go through
6 them. If I say something different from what you
7 remember it, you take it from what you remember,
8 from the way you remember it, but I'm going to go
9 through them. But before I do I want to explain a
10 very important principle to you. This is
11 fundamental conspiracy right here, this is
12 fundamental conspiracy. If you remember nothing,
13 if you remember nothing else of what I say,
14 remember this. It doesn't matter if you have the
15 busiest role or the smallest role, the question is
16 do you have a role, because if you have a role, if
17 you have a part, you're guilty.

18 And I had this great analogy. A defense
19 attorney I heard one time get up and talk about
20 fishing and throwing the small fish back. Well,
21 I've got another great one today. Remember Mr.
22 Varner saying the crickets in the bucket and they
23 just pick whatever cricket they want to pick out
24 and that's who gets in trouble, whoever they want
25 to pick out of the bucket. That's not the

1 question. The question is not did you get picked
2 out of the bucket, the question is, and use your
3 common sense, are you a cricket and are you in the
4 bucket, because if you're in the bucket and you're
5 a cricket you're guilty.

6 Remember his opening statement about Nurnburg
7 and the war conspiracy trials, they were punishing
8 the leaders, they were after the leaders. Well, in
9 my opinion Marshall Miller is a five star general.
10 But that's not the point. It's not were you a
11 leader, it's not were you a general, were you a
12 colonel, were you a captain, a lieutenant, a master
13 sergeant, a sergeant or a private, you know what
14 I'm going to say, it's not what was your rank, it's
15 were you a soldier, did you fight in the battle?
16 You may have been sitting behind a desk doing the
17 paperwork to send somebody to battle, you may have
18 been flying a plane or driving a tank or shooting a
19 gun, or you may be the general sitting there on his
20 white horse looking to see what's going on, but the
21 question is were you a soldier and did you fight in
22 the battle, because if you did you're guilty just
23 as much as everybody else because they don't even
24 have to know each other.

25 Remember Mr. Crout's opening statement about

1 his brother and them going to buy that car? He
2 thought the cars were made right there at the
3 dealership but they are not. The wheels are made
4 somewhere, the tires are made somewhere, the
5 steering wheel is made somewhere, the windshield is
6 made somewhere, the motor is made somewhere, they
7 don't all know each other but they all come to a
8 conclusion, a logical legal object, a vehicle. All
9 these people don't know each other, they don't have
10 to know each other, but it's the conclusion,
11 trafficking methamphetamine, did they agree to do
12 it, that's what's the most important thing.

13 And remember Mr. Varner's closing argument?
14 He said Marshall Miller may have been in a
15 conspiracy with Tracy Davis, Ernest Covan and Ray
16 Powell. Stop, that's enough. Remember, he doesn't
17 have to know all nineteen people, he doesn't have
18 to agree with all nineteen people, he's only got to
19 agree with two, and if he agrees with one other
20 person he's in it and he's guilty, just like Billy
21 Moore, and let's go through these witnesses, this
22 is what you have to think for yourself. When you
23 look at these witnesses, when you see them sit up
24 here in their South Carolina Department of
25 Corrections uniform or Greenwood County jumpsuits,

1 here is what you have to think for yourself.

2 When they first gave a statement were they
3 promised anything? No.

4 Did they plead guilty and admit what they
5 did? Yes.

6 Did they come in here and tell you the same
7 story? Yes.

8 Was their testimony corroborated? Did other
9 people say the same same exact things? Yes.

10 Let's get this issue of dates out of the way.
11 You heard them, ladies and gentlemen, when you are
12 on this stuff you don't know what day of the week
13 it is, you stay up all night long, you stay up two
14 or three days at a time, you don't work, you don't
15 have a job, you're on meth, you don't know what day
16 of the week it is, you don't know what month it is,
17 they are all confused on dates. Do you not
18 remember the attorneys getting confused on dates,
19 too? Probably the only date anybody of this entire
20 case agrees on is that they all got arrested on
21 September 24th, 2002. No one is clear on dates.

22 Let's start with Ernest Covan, he was the
23 first witness out of the box. What does Ernest
24 Covan give you? "I got a pound of methamphetamine
25 from Marshall Miller over a three year period." He

1 bought anhydrous ammonia for Marshall Miller. Is
2 that corroborated? Yes. We got a receipt with his
3 name on it and he came in here and admitted it.
4 Who also admitted it, who also admitted this?
5 Marshall Miller.

6 He was with Marshall Miller, Billy Moore and
7 Jeff Horne the night before they all got arrested,
8 and what did he tell you? They all did
9 methamphetamine together, they all shot it up, they
10 had, they had some of Marshall Miller's
11 methamphetamine and they all stood there in the
12 shop about 3:00 or 4:00 in the morning and shot up
13 methamphetamine. Is that corroborated? What do
14 you think this is for? Whose shop was this found
15 in? Billy Moore's. What do you think this is for?
16 Do you think they just carry these things around
17 for fun? No. You heard how they shoot it up, they
18 use a spoon and needle. Whose shop was this in,
19 whose office is this in? Billy Moore.

20 What does that corroborate? Ernest Covan.
21 They all shot up meth that morning. Let me say
22 this. Now, if you're not working second or third
23 shift, who in the world stays up all night to put a
24 radio in a car? Does that appeal to your
25 conscience, people just stay up all night, put a

1 radio in a car when you don't have a job or
2 anything to do the next day? No. You don't do
3 that unless you're on methamphetamine, because it
4 keeps you awake, it keeps you pumped up, gives you
5 energy to go fix whatever needs to be fixed and
6 clean your entire house.

7 Ernest Covan, in prison. Remember Mr.
8 Varner, he said in his opening statement we gave
9 them the the sun, the moon and the stars? That's
10 what these people got to come in here and testify.
11 Well, guess what, they are looking at the same sun,
12 they are looking at the same moon, they are looking
13 at the same stars. The difference is all of us are
14 out here and they are all in prison. So, how much
15 of a deal did they get? They are all wearing brown
16 uniforms in the Department of Corrections, with a
17 serious felony on their records.

18 The next State's witness, Julie Prince, the
19 one that made all the buys. What did she tell you?
20 This is where all their stories start to come
21 together. Remember Ernest, they had a trailer on
22 252, they had a place at Waterloo, they had a place
23 at Cokesbury, Shamrock Apartments, 252, Cokesbury,
24 Waterloo, Ray Powell's house, every witness, went
25 from place to place to place, the man moved because

1 he knew the law was on him, he couldn't stay in one
2 place too long because if he did he would get
3 caught. He moved from place to place to place to
4 place, moved his cook site here to Ray Powell's
5 house, and you know what Billy Moore's shop is,
6 that is just the next place to move to.

7 All the witnesses go from place to place to
8 place to place, and where do they go to do their
9 deals? They go in the bathroom, excuse me, go in
10 his bedroom and he's got it there. Julie Prince,
11 she probably bought from him a hundred times,
12 two-hundred times, every day they are over there,
13 they are taking his methamphetamine from him and
14 distributing it in Abbeville County, Greenwood
15 County, Laurens County, all the counties in this
16 area, they're getting rid of it, they're moving it,
17 they're making their money.

18 Jason Davis, her boyfriend. Now, you think
19 why didn't I call Jason Davis? Jason Davis said,
20 "I bought half grams to a gram from him." That's
21 not a lot of dope, why would I call him? Remember
22 what Jason Davis told you? Marshall cut him off
23 because he wasn't buying enough, because Marshall
24 had moved on to bigger and better things. But you
25 remember that day in the Shamrock Apartments, Jason

1 Davis goes by to get his hit before he goes to
2 work. He's got his syringe, let me see if I can
3 find one in here without poking myself, these, he's
4 pulling it back and shooting it up and he says it
5 looks a little funny, and what does Marshall Miller
6 say, "Go ahead and try it." So, he shoots it up.
7 What does he say right after that? "I made it."

8 Bonnie Saylors, she goes from place to place
9 to place, she's buying meth continually, she knows
10 Julie Prince, she knows, they all know each other,
11 they all know what's going on, they all know who
12 their source is.

13 David Cumming, he testified he got over ten
14 ounces of Marshall Miller's methamphetamine either
15 from Marshall or Ray Powell. You see, it doesn't
16 matter who it comes from because its all the same
17 meth. Ray had to get it from Marshall to give it
18 to somebody else, it's step after step after step,
19 and these are the big people, we haven't even
20 gotten into all the people on the very bottom that
21 aren't buying virtually anything, that are out on
22 the streets. Ten ounces, there is twenty-eight
23 grams in an ounce. I'm not good at math but what
24 does that come out to be in a three year period,
25 and where did he meet Marshall Miller, at the

1 Little General in Honea Path, and who introduced
2 him, Sandra Jo Hughes, who is also indicted, and
3 how does she introduce him, she introduces him as
4 her source.

5 Tina Stevenson. I don't think Tina Stevenson
6 even likes me. Do you remember her sitting up
7 here, I would ask her a question and she would look
8 at me like, "I'm going to come out of that chair
9 and beat you up." I mean, I don't think the woman
10 even likes me, and you remember Mr. Varner going
11 off on her, "You're a junkie, aren't you?" Yes,
12 she's a junkie, they're all junkies, it takes one
13 to know one, and she said she probably had fifty
14 customers, and remember those five distributions he
15 went into that got dismissed, and do you remember
16 the question I asked her, where did all that meth
17 come from? Marshall Miller.

18 And why is that important? Because every
19 single criminal act you have seen in this case,
20 whether it's a distribution, whether it's
21 possession, whether it's making it, whether it's
22 delivering it, it's all part of the conspiracy,
23 that's what you've got to understand, all these
24 actions are just furtherances of the conspiracy,
25 it's just overt act after overt act, it's just

1 evidence of an agreement, evidence of the agreement
2 between these people.

3 Sammy McNeil, Tina Stevenson and husband,
4 everybody in the world was coming over to their
5 house to buy methamphetamines. He has been out
6 there with Marshall. Why did I put Sammy McNeil
7 up? He didn't buy a lot from him. Why did I put
8 him up? Where does he go, think back, where does
9 Sammy McNeil go? He goes to Anderson to work on
10 some kind of room for Marshall, and what does he
11 smell, the same smell he smelled before, Marshall
12 Miller cooking meth.

13 They all said, everybody that has ever
14 smelled it being made said, "I can't describe it,
15 that's how bad it smells, that's how it's just in
16 your face, knock you down smell." Why did I call
17 Sammy McNeil up? Because he saw Marshall doing it,
18 direct evidence, in Anderson next to his sister's
19 house. And I will explain to you why that's
20 important in just a little while.

21 But remember, they all say he's cooking at
22 252, he's cooking at Cokesbury, he's cooking at
23 Waterloo, he's cooking at Ray Powell's house, and
24 you see these people follow him from place to place
25 to place to place to place, and they were beginning

1 to follow him where? Billy Moore's shop. I will
2 get to that in just a minute. You see, they are
3 like little pack rats, they go from one place,
4 well, Marshall moved there, you heard them, "I got
5 to get that dope, it's the best dope I've ever had,
6 you don't even have to do that much of it to get
7 this great sensation." They had to have it because
8 he controlled them.

9 Remember how much money is in his confession,
10 he spent \$114,000, and you want to call him a
11 patsy? He controlled those people with his meth
12 and he controlled those people with his money,
13 because he had to have them, he had to have
14 somebody to put it on the street, he had to have
15 somebody to buy it and he had to have somewhere to
16 make it. And you heard the witnesses' testimony,
17 they would go buy pills for him, they would go buy
18 coffee filters for him, they would go buy rock salt
19 for him, over and over again, pills, they would go
20 buy batteries for him, he himself purchased 96,000
21 pills from B. J.'s Wholesale Club, the records are
22 in evidence. I'm not good at math but my
23 calculations were 96,000 pills in one year. What
24 do you think he was doing? You know what he was
25 doing. He had to have them to make it.

1 Where were we? Mott Ellis, remember Miss
2 Ellis, she came in here, I know she wasn't in SCDC
3 uniform, but she had entered into a plea agreement
4 with the State and she agrees to plead guilty to
5 this crime, and what did she tell you? She got
6 ounce after ounce after ounce from Marshall. She
7 saw him cooking it, she bought from him, she knew
8 Ray Powell, she knew David Cumming.

9 One important fact that people just seem to
10 forget, the night before they got arrested where
11 did she go? You remember, you'll have it back
12 there, when Brandon Scott arrested Mott Ellis she
13 had drugs on her, okay? Those drugs are right here
14 and they are right here. She was trying to eat
15 them. Methamphetamine, positive, there is the
16 report in there, you can read how much meth it was.
17 She was trying to eat them. What did she tell you?
18 Where did she get those drugs? She got them from
19 Marshall Miller the night before they got arrested.
20 Where did she say she got them? Billy Moore's
21 shop. Marshall Miller gave her these drugs at
22 Billy Moore's shop. Corroboration.

23 Ray Powell, Little Ray. Everybody has been
24 up here harping on Ray Powell, Ray Powell this and
25 Ray Powell that. Let's do some math. Ray Powell

1 told you among other things that he received four
2 ounces to six ounces, we will take the lower of the
3 two, give them the benefit of the doubt, for an
4 entire year, 52 weeks in a year, we can all agree
5 on that. Minimum four ounces a week, that's 208
6 ounces. Excuse my handwriting, be glad you're not
7 my secretary, she can't read it either, 208 ounces,
8 and you remember the chart we used, how many grams
9 are in an ounce? Our scientific chart here says
10 28.35.

11 Well, I'm not great with decimals, so I'm
12 just going to say 28, again giving the benefit of
13 the doubt, times 28, and I must admit I did this
14 with a calculator beforehand. That's 5,824 grams,
15 also known as five kilos, almost six, also known as
16 thirteen pounds of methamphetamine. That's how
17 much he received from how many people? One person.
18 And who did he get it from? You know who he got it
19 from, Marshall Miller, because he was over at Ray
20 Powell's house cooking, they were making meth at
21 Ray Powell's house every week for a year, and Ray,
22 remember so much of what Ray said, what did he
23 describe to you, the cooking process, remember him?

24 You want to talk about someone that's not
25 hesitant to talk, he answered every question like

1 that. What did he tell you? They take anhydrous
2 ammonia, they take anhydrous ammonia, they take
3 lithium strips from batteries. What kind of
4 batteries did Marshall use? What did he say? Blue
5 and silver. They pop off the top and take the
6 coils out. They take pills and they take starter
7 fluid.

8 Now, you may say, "Robert, you don't have any
9 starter fluid." Attention to detail. When you get
10 back in that room look at State's Exhibit Number
11 66. We can all agree Marshall Miller was arrested
12 on September 24th, 2002, on September the 19th of
13 2002 in what state? Hartwell, Georgia. He
14 purchased, let me see if I can find it on here, six
15 cans of starter fluid. What do you think they were
16 doing at Billy Moore's shop?

17 Ray Powell. He told you how they made it.
18 And remember how much detail? Ray had seen it, Ray
19 had done it, he admitted it. He's already pled
20 guilty, he admitted his involvement. And he would
21 take the Mason jars, remember all the Mason jars we
22 have from Georgia, and they used the coffee
23 filters, remember the coffee filters, you've got to
24 have the coffee filters to make the meth. They
25 poured it, this whole process, poured it in this

1 whole process and bring it back. Do you remember
2 Ray, he said they would bring it back. Do you know
3 who else said they would bring it back? Who used
4 that term? Corroboration of Ray Powell, right
5 here, in whose confession, Marshall Miller's.

6 What else would Ray tell you about the
7 process? Sometimes he wouldn't do it all in the
8 same place, sometimes he would do part of it one
9 place and then do another part of it later. What's
10 probably the most important thing that Ray told
11 you? They would always burn the stuff because it
12 smelled so bad that you had to burn it to cover up
13 the smell or someone might know what's going on.
14 Remember that? He said, "We would always be
15 burning something, we would be burning a tire, we
16 would be burning trash, once it was all over we
17 would burn all the stuff we had just used," because
18 they had to cover up the smell, the secret.

19 Do you know why they call it a clandestine
20 lab? Because it's secret, because they don't want
21 anybody to know what's going on. But where do they
22 do it? Ray Powell, that man did it right next to
23 his house. Remember the shop in Cokesbury, right
24 next to the house. Remember the house in Waterloo,
25 right next to the house. Remember the trailer on

1 252, right next to the house. Remember Mr. Crout's
2 question, "So, you can be smart enough to make it
3 and dumb enough to do it near your house?"

4 What's the purpose of the methamphetamine
5 expert? And remember this, none of our witnesses
6 were in here while anybody testified, they were all
7 sequestered, just like Mr. Moore's witnesses, they
8 were sequestered, sometimes that happens in trials,
9 that's normal. Remember the meth expert? He told
10 you how it was made. Ray Powell came in and told
11 you the same exact things. Whose testimony here is
12 corroborated?

13 Michelle Madden, 21, 22 year old stripper
14 with a little kid. That woman's life is ruined.
15 It wasn't in too good a shape before she met
16 Marshall Miller but it was ruined that day in that
17 hotel when she said, "Teach me how to shoot it up,"
18 and he pulled her a line out of a spoon in a
19 syringe and stuck it in her arm. Her life was
20 ruined. It wasn't that great to begin with but she
21 was ruined that day and she would get from Marshall
22 over and over and over again, methamphetamine after
23 methamphetamine. And Michelle Madden, she was so
24 nervous she couldn't see straight, she would laugh
25 she was so nervous, just because she didn't know

1 what else to do.

2 Do you want to talk about direct evidence?
3 What did she smell two weeks before they all got
4 arrested? What had she smelled at Cokesbury?
5 Miller cooking, she smelled him cooking, "I will
6 never forget that smell, it was the worst smell I
7 ever smelled." What did she smell two weeks before
8 they got arrested, sitting on her daddy's front
9 porch? The same exact smell. And why didn't she
10 go over there? You got to get your dates straight.
11 She had cooperated before that. If she went over
12 there and SLED found out about it, it would be
13 worse than when she failed her drug test. She
14 knew, "I've already cooperated, I can't go over
15 there. If I go over there and they find me it's
16 going to be worse than it already is." And who
17 called who? She called them. She told you, "No,
18 they didn't ask me about that, I told them about
19 it," that's what she told you, "I told them."

20 All this stuff down in Georgia. Gene
21 Saylors, everybody likes to pick on Gene Saylors,
22 the man who admittedly had been involved in a
23 methamphetamine business and had decided to get his
24 life straight and get out of it, and what did he do
25 when he got that stuff from Marshall Miller? He

1 called the cops. He took them to it in Georgia.
2 And, "No, I didn't sit down and be debriefed."
3 Do you know why he didn't? Because he, just like
4 every single person involved in this case and every
5 single person in this room, has a constitutional
6 right to remain silent and he didn't want to talk,
7 and guess what, they can't make him talk. They
8 have to voluntarily want to talk. But he took them
9 to it, and is it just a coincidence that all this
10 stuff and the stuff that goes into making meth,
11 coffee grinder, what did Ray Powell say, he would
12 grind up his ephedrine in the coffee grinder, and
13 what did you find in the coffee grinder, you will
14 have it back there, it's evidence in this case,
15 what came out of that coffee grinder, ephedrine.
16 Corroboration? You tell me. Do you think they
17 just made this story up? Do you think they all got
18 together in one room and said, "Let's put it on the
19 patsy, let's put it on Marshall?" All his money
20 came from an inheritance? I mean, does that sit
21 with your common sense?

22 Gene Saylors, all that stuff in Georgia,
23 you'll have it back there, you can look at it, you
24 can see it, you know what it was all used for, and
25 how do you know Gene Saylors is telling you the

1 truth? Because, remember, "You don't know that was
2 Marshall's trailer in that thing, that RV storage
3 place in Georgia, you don't know that that was his
4 trailer, you can't prove that that was his
5 trailer." Up there trying to test Gene Saylor's.
6 Look what they found in whose truck? Remember in
7 the beginning they wouldn't even admit that was his
8 truck. In Marshall Miller's truck, one rental
9 agreement for the Hartwell mini-warehouse. The
10 name of Kathy Crump, and we all know who Kathy
11 Crump is, paid August 28th, 2002. Is it just a
12 coincidence that's in Marshall Miller's truck? Do
13 you have a habit of leaving documents that you
14 signed in other people's vehicles? Gene Saylor's.

15 Let's talk about this B. G.'s Wholesale Club
16 stuff. I looked at the time frame. The time frame
17 is September the 10th of 2001 to September the 1st
18 of 2002, a year, 96,000 pills, 96,000 pills. You
19 can add, I didn't have the time to do the money,
20 how much money that cost. Where do you think he
21 was getting his money? It must, oh, it must be
22 from his inheritance, I forgot.

23 Remember Mr. Varner's closing argument about
24 how did Marshall know, remember that whole thing
25 about somebody's got an in with somebody else and

1 all that confusion? You want to know how Marshall
2 knew he was on to him? Attention to detail.
3 State's Exhibit Number 69 has two phone numbers on
4 it, you will have it, and it has Frank O'Neil.
5 Frank O'Neil is the lieutenant over SLED narcotics.
6 And who testified about this? Mott Ellis, because
7 she said Frank O'Neil came to see her and told her,
8 "You need to cooperate now or the next time you see
9 me I'm going to have a warrant," and she didn't
10 cooperate, she had the right not to cooperate, and
11 who did Mott Ellis tell you she gave this to? And
12 where was it found? Marshall Miller, and it was
13 found in Marshall Miller's possession. He knew
14 SLED was on to him, he had to move his cook site,
15 "Only God knows who had told on me so far."

16 And you've got to remember this. State Grand
17 Jury investigations are secret. No one knows
18 what's going on until they're indicted because
19 Grand Jury proceedings are secret, just like
20 federal Grand Jury proceedings are secret.

21 I know I have been up here for almost an
22 hour. Bear with me, this is a very important case,
23 it's a very important day for the defendant Miller
24 and for defendant Moore. I have one more area to
25 talk to you about. Let's talk about the day of the

1 arrest, September 24th, 2002, at Billy Moore's
2 shop.

3 Who's there? Ernest Covan, indicted.
4 Marshall Miller, indicted. The night before, Jeff
5 Horne, indicted. Billy Moore, indicted. What did
6 Ernest Covan tell you? They had done meth that
7 morning, they had done Marshall's meth. Is it just
8 coincidence he's hanging out at a shop with three
9 other people that were indicted along with him in a
10 methamphetamine conspiracy? Does it make sense to
11 you that they just stay up all night for no
12 particular reason to work on a radio, two to three
13 nights a week, does that appeal to your common
14 sense? It may appeal to your common sense if you
15 work third shift but if you own your own business
16 do you stay up all night and work unless you've got
17 something to help you?

18 Tommy Stewart. Remember the guy in the
19 orange jump suit, Mr. Varner called him Tony
20 Stewart. Well, Tony Stewart is a NASCAR driver,
21 his name is Tommy Stewart. And, you know, I
22 thought about Tommy Stewart and I thought about him
23 a lot. I don't like Tommy Stewart, I mean, as far
24 as, he's in prison, he's in jail for a reason but
25 the thing about Tommy Stewart is this. Tommy

1 Stewart was never interviewed, Tommy Stewart was
2 never debriefed, Tommy Stewart wasn't approached
3 until a few weeks before trial because we had
4 learned he made a controlled purchase off of Billy
5 Moore. But remember what I told you. Grand Jury
6 investigations are secret, so Tommy Stewart, the
7 the only people that have access to the discovery
8 are, remember all those volumes they talk about,
9 there are fifteen in this case --

10 MR. VARNER: I object to him going outside
11 the record.

12 MR. HOOD: That's the law, Your Honor.

13 THE COURT: Objection is overruled.

14 MR. HOOD: I'll keep it --

15 THE COURT: Continue.

16 MR. HOOD: Yes, sir, thank you. Tommy
17 Stewart, the only people that are allowed to have
18 discovery, that's what we give them, are the
19 defendants and the attorneys, the SLED agents and
20 us. So, Tommy Stewart would have no idea what's
21 going on and what's not going on. Is it just a
22 coincidence that Tommy Stewart came in here and
23 told you he knows Jeff Horne, indicted? He's been
24 to Jeff Horne and Sandra Jo Hughes' house, both
25 indicted, and purchased methamphetamine there while

1 Billy Moore was there doing the same thing. Is it
2 just a coincidence that he said him and Jeff Horne
3 had been to Cokesbury? How would he know where
4 Cokesbury was, how would he know to say Cokesbury
5 if it wasn't true? Him and Jeff Horne had been to
6 Cokesbury, they had seen Marshall Miller do some
7 form of the cooking process, he doesn't know what
8 the cooking process is because he's not that
9 involved. And what did he tell you? He bought, he
10 had been buying meth from Jeff Horne and Marshall
11 Miller and it was the same meth because Marshall's
12 meth had a distinctive taste, how many people told
13 you that it had a distinctive ether taste, and that
14 he had purchased the same methamphetamine with the
15 same taste and the same sensation from who? Billy
16 Moore at Billy Moore's shop on Morgan Road.

17 And what else did he tell you? And this was
18 one line out of all the thirty something witnesses
19 you heard from could have passed right by you.
20 Listen very closely. He told you, "Jeff Horne,"
21 who was indicted, "told me that Marshall and Billy
22 were cooking behind Billy's shop." How is that
23 corroborated? How am I going to corroborate that?

24 Number one, Michelle Madden. They never
25 counted on Michelle Madden sitting across the

1 street smelling it.

2 Number two, this. Can you see how this has
3 kind of disappeared? You see, you didn't hear
4 anybody else using this, the burn, in their closing
5 argument. Do you want to know why? Because
6 physical evidence doesn't lie. You can't get
7 around physical evidence, just like a rape kit,
8 they can't get around DNA. You heard what these
9 things are. Uncontradicted testimony that these
10 are lithium strips from lithium batteries. You can
11 go through this mess, ephedrine blister packs,
12 twenty feet from whose shop, Billy Moore's shop.
13 If it fits in your common sense that people go out
14 and burn lithium strips from batteries, then find
15 Billy Moore not guilty, but what is this a bag of?
16 This is a bag of corroboration, it corobborates
17 Tommy Stewart, it corobborates Michelle Madden.

18 What else didn't they count on? They didn't
19 count on Jeff Horne running his mouth to Billy
20 Moore, I mean to Tommy Stewart. They didn't count
21 on him running his mouth about Marshall and Billy
22 back there cooking meth. Tommy Stewart came in
23 here and incriminated himself for nothing, because
24 he came in here and did the right thing and told
25 them what was going on. In essence, you would have

1 to believe that Ernest Covan using meth, Mott Ellis
2 getting meth from Marshall the night before at
3 Billy Moore's shop, Michelle Madden smelling meth
4 being cooked a couple weeks before they got
5 arrested, and the burn and all the physical
6 evidence and Jeff Horne who says they were cooking,
7 and the anhydrous tanks in his little mobile
8 methamphetamine lab, is all that just a
9 coincidence? Is that just a coincidence? Is all
10 that stuff at Billy Moore's shop or does it make
11 more sense that Marshall was just moving his cook
12 site one more time because he knows the law is on
13 him?

14 I mean, if you are running a legitimate
15 business do you let somebody bring this into your
16 shop, do you let somebody bring this into your
17 shop, do you let somebody bring almost two ounces
18 of methamphetamine into your shop, do you let
19 somebody pull up with an anhydrous ammonia tank in
20 the back of a truck? No. That's ludicrous.

21 And this whole thing, Billy Moore's
22 testimony, look at the pictures of Billy Moore
23 here, in Defendant's Exhibits, that is, these are
24 great, that shows where it is, I guess Mr. Moore
25 shaved for court today. Does that apply to your

1 common sense, all of that stuff, all those people,
2 that Billy Moore didn't know what was going on?

3 And I'm sure his family is a very loving
4 family, ladies and gentlemen, but they have no clue
5 what goes into making methamphetamine, they don't
6 know the first thing about it, and they all love
7 him, they all care about him, they don't want to
8 lose a son, they don't want to lose a son-in-law,
9 they don't want to lose a husband, they don't want
10 to lose a nephew, they don't want to lose a best
11 friend that does everything for him. You want to
12 talk about bias and prejudice, let's talk about
13 them. Who has a real bias and prejudice? The fact
14 of the matter is the man was at the shop all the
15 time and they don't know what was going on at that
16 shop, remember the one witness I asked, said, "You
17 were over there until about 10:00 o'clock, isn't
18 that right?" "Yes, I was." "You didn't come over
19 until midday the next day, is that right?" "That's
20 right." "Well, what happened all night?" "I don't
21 know." Because they weren't there.

22 And this whole can't read thing, I don't even
23 know what to do with that. Does it make sense to
24 you that he can't read and you can be in the Army?
25 You've got to take a test, if you have been through

1 high school you know you have to take an advanced
2 test, if you have ever been in the military you
3 know it's book after book after book after
4 instruction after instruction but, you see, he had
5 to come up with something to say because he sure
6 couldn't admit to signing this statement for
7 Marshall, because it was an insurance document.
8 Does that look like an insurance document? And he
9 had to come up with something to say, because the
10 day of the crime he told Connie Sonnefeld, "I have
11 just known Marshall a little bit." This whole
12 thing about going racing and storing the stuff on
13 the trailer, none of that came out on the day of
14 the arrest, none of that was anywhere to be found.
15 He's got to come up with something to say why he's
16 giving contradictory statements. I guess people
17 just sign their names to things and don't even look
18 at it. There is some things I sign my name to but
19 have never looked at but I can tell you this, if I
20 had a bunch of SLED agents at my shop and they were
21 inside of it and the ringleader of a meth
22 conspiracy was in there and I was giving them a
23 statement I know I would know what was in that
24 statement before I signed it. It just doesn't add
25 up.

1 The story just doesn't add up. Think about
2 it, use your common sense. Everything is there,
3 the anhydrous tanks, the pills, the batteries, the
4 starter fluid and, I don't know which one of these
5 bags it's in, the meth, the spoons, the syringes,
6 the pipes, the baggies, bag after bag after bag,
7 and the burn. Can't get around the burn, can you?
8 Because what it should tell you, the person who was
9 merely present, I don't burn batteries, I would
10 never burn a battery. They can't get around that,
11 can they, they can't get around those lithium
12 batteries in there.

13 And what is the greatest corroboration tool
14 of all? I know it's tiring to listen to that
15 statement being read, but what does he tell you?
16 "I can give you something on every single person."
17 All this stuff about other people committing
18 crimes, you know all that stuff Mr. Varner made
19 such a big deal about, all this stuff about other
20 people committing crimes and doing all these
21 things, if he wanted to tell them who Jason S. was,
22 guess what, he could have but he didn't because he
23 wanted something in return. All that stuff on all
24 those people, that's what's not corroborated in
25 this case. That is what is not corroborated in

1 this case. All that trash he talked, when he's
2 trying to save his soul he'll say anything on
3 anybody.

4 Ladies and gentlemen, let me hit a couple
5 more items. Pay attention to the details back in
6 the room. This is a book out of Marshall's truck
7 and you can read it. "I have never seen Marshall
8 Miller with any dope whatsoever and I have never
9 seen Marshall with a large sum of cash either." He
10 wrote it up, he had it printed out, they didn't.

11 You want a home detention system, call ADT,
12 if you want to know if the law is coming put up
13 some cameras and put a monitor in the bedroom where
14 you do your drug deals.

15 Let me finish with this. When I saw this map
16 I got excited. Do you want to know why I got
17 excited? I was mad at myself first because I
18 hadn't gone to get it. But after that I calmed
19 down. You look at this map when you get back in
20 there. What a better place to cook meth? In the
21 middle of nowhere. Surrounded by who? Who lives
22 in all these houses? Who owns all this land? Your
23 family. Just like Marshall cooked around his, Ray
24 cooked around his, and they were going to cook
25 around Billy's, because why? Who's not going to

1 tell on you? Your family. What a better place to
2 cook meth than right there with all those woods
3 surrounding you.

4 Ladies and gentlemen, the purpose of a
5 conspiracy is not to punish one man for another
6 man's crime, the purpose of a conspiracy is to
7 punish someone for entering into a crime, agreeing
8 to commit a crime. We're not punishing one man for
9 another man's actions. We seek to convict people
10 that agree to commit crimes. When I first started
11 doing these cases I said, "You all have got to be
12 crazy, I've got virtually no dope to hold up and
13 all I've got is a bunch of people in prison," and I
14 had this seasoned prosecutor who looked at me and
15 said, "Robert, listen, you understand the game of
16 baseball, don't you?" I said, "Sure, I love
17 baseball."

18 Think of a conspiracy like a baseball game.
19 It doesn't matter if you're the starting pitcher,
20 the starting shortstop, or the relief pitcher or a
21 pinch runner, a pinch hitter, if you play one
22 inning or play or the entire game, it don't matter
23 if you started it or if you played on the very last
24 pitch of the entire game, if you played in the game
25 you're responsible for what happens, and if you

1 play in the conspiracy you're responsible.

2 Marshall Miller had to have his ear and
3 runner, he had to have the person to pop the pills,
4 he had to have the person to buy the anhydrous, he
5 had to have the person to move the meth, he had to
6 have the person to distribute to, he had to have
7 the Mason jar washer, and he had to have the person
8 to give him a place to manufacture, he had to have
9 it, because without it all the conspiracy doesn't
10 work.

11 I have never been on a jury, I think with my
12 current occupation I probably never will be, most
13 defense attorneys would relish in the idea of
14 striking me from a jury. And it's got to be
15 frustrating, you have been here two weeks, it's
16 Friday night, you wish you were home, you wish you
17 were with your family, you wish to God, "Let me be
18 anywhere but this courthouse," and you can't say a
19 word, you can't ask Michelle Madden a question, you
20 can't ask Billy Moore a question, you can't ask the
21 attorneys a question. "Well, why are you doing
22 this, what about this?" You can't say anything,
23 you're silenced and it's got to be frustrating, it
24 would be frustrating for me.

25 But the fact of the matter is this. You have

1 the most powerful voice in this courtroom. You
2 haven't been able to ask a question but you have
3 the most powerful voice in this courtroom because
4 with one word you can hold those two men
5 responsible, you can hold them accountable, you can
6 administer justice in this case with one word. You
7 can hold Billy Moore and Marshall Miller
8 accountable for what they did, for the crime they
9 agreed to commit, and you know what that word is,
10 guilty.

11 Thank you.

12 THE COURT: Madam Forelady, ladies and
13 gentlemen of the jury, we will take a short recess
14 at this time. The charge will be the next thing,
15 it will be about as lengthy as the last argument,
16 so I want everybody to be comfortable. Do not
17 discuss the case because you haven't heard it all
18 because you haven't heard the law. Do not discuss
19 the case by, between and among yourselves. Take a
20 short recess and prepare to hear the charge from
21 the Court.

22 Go to the jury room, please.

23 (The jury was excused from the courtroom).

24 THE COURT: We stand in recess.

25 (Recessed at 5:16 p.m.).

1 (Reconvened at 5:31 p.m.).

2 THE COURT: The record will open, please.

3 This is State of South Carolina versus Marshall
4 Miller and others, indictment number 2002-GS-47-32,
5 wherein Marshall Miller and Billy Moore are the
6 persons at this trial, are the defendants on trial.

7 It is now time for the Court to charge the
8 jury. Show the jury in, please, Mr. Busby.

9 (The jury returned to the courtroom).

10 THE COURT: All the jurors are present, with
11 the alternates and the forelady properly seated.

12 Madam Forelady and ladies and gentlemen of
13 the jury, the State of South Carolina in this
14 indictment charges the defendants Marshall Miller
15 and Billy Moore with the crime of conspiracy to
16 traffic in methamphetamine. Methamphetamine is
17 also known as crank. It is referred to in our laws
18 as crank because methamphetamine is a
19 pharmaceutical term and crank is a street term, and
20 it is referred to as crank and methamphetamine and
21 they are the same thing. You should know that.

22 Now, the indictment charges both Marshall
23 Miller and Billy Moore and other persons who are
24 known and unknown and other persons who are charged
25 in the indictment in Abbeville, Greenwood and

1 Anderson Counties during the time extending from on
2 or about November, 1999, until the 11th of March,
3 2003, with conspiring to sell, manufacture,
4 deliver, purchase or bring into this state more
5 than 100 grams of methamphetamine, also known as
6 crank, a controlled substance under the laws of
7 this state, such conduct not having been authorized
8 by law and such activity occurring or having
9 significance in one or more counties of this state
10 and therefore the State Grand Jury has brought the
11 indictment or the bill of indictment before this
12 Court.

13 This indictment is not evidence and it should
14 not be considered to be evidence under any
15 circumstance at anytime. It is a charging paper.
16 It's not evidence, it doesn't mean anything other
17 than it being the vehicle by which the matter comes
18 before the Court for you to determine the facts of
19 the case, whether the defendants are guilty or
20 innocent of the charges of trafficking in
21 methamphetamine, more than 100 grams of
22 methamphetamine, also known as crank.

23 You should distinctly understand that the
24 allegations by the State contained in this
25 indictment are no way at all at anytime to be

1 considered to be evidence. The only evidence in
2 this case is the testimony from the lips of these
3 witnesses sworn to tell the truth, the exhibits
4 that have been introduced and the stipulation that
5 was read to you, that you will recall, it concerned
6 fingerprints.

7 Now, to this indictment both of these
8 defendants, Marshall Miller and Billy Moore, come
9 before the Court and before you and plead not
10 guilty, which places upon the State the burden of
11 proving them or either of them to be guilty. A
12 person or any persons charged with committing a
13 criminal offense in South Carolina is never
14 required to prove himself or herself to be
15 innocent.

16 It is a vital and important rule of law that
17 a defendant or defendants in a criminal trial, no
18 matter how serious the offense may be with which
19 the person is charged, or not serious, as the case
20 may be, must always be presumed innocent until the
21 guilt of the defendant or defendants has been
22 proved beyond a reasonable doubt. This presumption
23 of innocence remains with the defendants or
24 defendant, as the case may be, at all times
25 throughout the trial and is only removed when and

1 if the State has proved beyond a reasonable doubt
2 the guilt of the defendant or the defendants.

3 It is your solemn and sworn duty, ladies and
4 gentlemen, as members of the jury that if you are
5 not clearly convinced of the guilt of the
6 defendants or the defendant, as the case may be,
7 beyond any reasonable doubt to the contrary, to
8 find the defendants or the defendant not guilty.

9 It has been the intention of the Court to be
10 absolutely fair and impartial both to the State of
11 South Carolina and to the defendant Marshall Miller
12 and defendant Billy Moore, and if you have drawn
13 any inference from any ruling, any deed or any word
14 or statement that the Court may have made during
15 the term of this trial you must immediately
16 disabuse yourself of it because it was not
17 intentional. The Court has meant to be fair and
18 impartial to all parties.

19 So, the burden of proof is upon the State to
20 establish by evidence to your satisfaction the
21 guilt of one or both of the defendants here on
22 trial, and the Court will not attempt to define for
23 you what is meant by a reasonable doubt in your
24 mind. This is up to you. A reasonable doubt is
25 simply a doubt that you find to be reasonable. A

1 reasonable doubt can arise from the evidence
2 presented or it can arise from the lack of evidence
3 presented.

4 If the State has presented evidence that has
5 removed all reasonable doubt from your minds as to
6 one or both of the defendants' guilt, then you
7 should find one or both of the defendants to be
8 guilty. However, if you are left with a reasonable
9 doubt in your mind as to the guilt of one or both
10 of the defendants, then it's your duty to find them
11 to be not guilty.

12 Madam Forelady and ladies and gentlemen of
13 the jury, under our Constitution you and you alone
14 are the finders of the facts. The Court has no
15 right to pass upon the facts, express any opinion
16 as to the facts or make any suggestion as to what
17 the Court may think the facts are or are not. The
18 Court may not suggest in any way what the Court
19 thinks about the guilt or the innocence of the
20 defendants or either of them. You should form no
21 opinion in that regard from anything the Court may
22 have said or any ruling the Court may have made.

23 You are also the judges and the sole judges
24 of the credibility, which means the believability,
25 of the witnesses who testified before you under

1 oath in this case. In passing upon the credibility
2 or the believability of witnesses the Court
3 suggests to you some things that you may or you may
4 not consider. These are some suggestions that you
5 may take into consideration as you deliberate the
6 credibility or the believability of the witnesses
7 who have testified in this trial.

8 You may consider the demeanor or the manner
9 that a witness has when he or she testifies before
10 you, you may consider whether the witness was
11 hesitant or was forthright in delivering his or her
12 testimony, you may consider whether the witness had
13 a reason to be biased or prejudiced for or against
14 the State or for or against either of the
15 defendants, you may consider whether a witness'
16 testimony was contradicted by other testimony of
17 the same witness or testimony from another witness,
18 and you may consider whether the witness' testimony
19 was supported by other evidence in the case.

20 Another suggestion for you to consider is the
21 witness' opportunity for observation and to have
22 the knowledge that was claimed to have been had by
23 the witnesses and witness who may have testified.

24 Ladies and gentlemen, you may have heard some
25 information about some criminal charge that may

1 have been brought in some other court at some other
2 time, and you are warned and cautioned that that is
3 not evidence in this case and it should not be
4 considered evidence in this case in any way. You
5 are charged with a duty and responsibility to
6 decide the facts of this case and you are not
7 concerned with any other charges that may or may
8 not be pending against any defendant. You are
9 concerned only with this charge.

10 Now, concerning the believability or the
11 credibility of witnesses, you don't do this by
12 counting the number of witnesses that either side
13 may have called or not called. It's up to you to
14 decide the credibility of the witnesses, or stated
15 in another way, the believability of the statements
16 that they did make under oath and before you.

17 You may believe a small portion of a witness'
18 testimony, you may believe all of a witness'
19 testimony, you may believe some of one witness'
20 testimony and some of another, or none of a
21 witness' testimony and all of another. So, it's in
22 any way that you can put it together to go about
23 the business of finding the truth that you should
24 make your business.

25 You may believe one witness against any, many

1 other witnesses or many witnesses against one
2 witness. All of these things you will consider,
3 bearing in mind that you should give the defendants
4 and both of them the benefit of every reasonable
5 doubt.

6 During the course of this trial, Madam
7 Forelady and ladies and gentlemen of the jury, you
8 have heard some testimony from one or more
9 witnesses who have been found to be experts in
10 certain fields of learning. In considering the
11 opinion of an expert witness that has been admitted
12 in this case you should first consider the factual
13 evidence. An expert may, however, base his or her
14 opinion upon factual evidence presented at the
15 trial, but an expert may also base his or her
16 opinion on facts and data which are not in
17 evidence. You may consider the expert's opinion if
18 you find that the testimony is based on facts that
19 are reasonably relied on by experts in that field.
20 You must consider expert testimony in the same
21 manner as you do any other testimony and give it
22 such weight as you believe it may be entitled to be
23 given when considered with all of the other
24 evidence in the case. Such testimony by an expert
25 is given for the purpose of helping you to

1 understand the evidence and not for the purpose of
2 controlling your judgment.

3 The value of expert testimony does not depend
4 upon the skill and knowledge professed to be had by
5 the expert but, rather, upon the skill and
6 knowledge which he or she actually possesses.
7 It's for you to judge whether he or she actually
8 has such knowledge. In this regard you may
9 consider the training of the person, the
10 experience, the ability to communicate his or her
11 ideas, the logic of his or her opinions, the
12 factual support for such opinions, and all other
13 factors just as you would judge and weigh the
14 testimony of any other witness or witnesses.

15 The value and effect of expert testimony is a
16 matter solely to be estimated by you the jury. No
17 mere opinion of an expert can be accepted as in and
18 of itself truthful or reliable but must be weighed
19 by you and convince your judgments beyond a
20 reasonable doubt with the same force and effect as
21 any other fact proved in the case before you can
22 rely upon such expert testimony as a basis for
23 conviction.

24 You may have heard the testimony of expert
25 witnesses who have knowledge, special knowledge,

1 special skill, experience, training and education
2 in a particular field and who have given their
3 opinion as experts. In determining the weight to
4 be given to these opinions you should consider the
5 qualifications and the credibility of the experts
6 or expert and the reasons given for such opinions.
7 You are not bound by the opinions and you should
8 give them such weight, if any, to which you deem
9 they are entitled.

10 Ladies and gentlemen, there are two types of
11 evidence which are presented during any trial or
12 generally presented during any trial, direct
13 evidence and circumstantial evidence. Direct
14 evidence is direct knowledge, such as testimony of
15 an eyewitness, a person who saw or heard a thing
16 occur.

17 Circumstantial evidence is a proof of a chain
18 of facts and circumstances indicating the existence
19 of a fact because of the chain of circumstances and
20 the facts that have been shown to have existed.
21 The law makes absolutely no distinction between the
22 weight or value to be given to either direct or
23 circumstantial evidence, nor is any greater degree
24 of certainty required of circumstantial evidence
25 than is required of direct evidence. There have

1 been some efforts by the attorneys to explain to
2 you circumstantial evidence. The Court will make a
3 meager effort to do so.

4 Some time ago I was sitting in chambers and
5 there are three electric wires running from a
6 telephone pole to the building. Gazing out the
7 window I saw a bird, and the electric wires are
8 very close to the window, I saw a bird fly by. But
9 the bird went outside of my vision just as it was
10 flapping its wings in a manner of coming to a stop,
11 and the middle wire began to shake. Moments later
12 the middle wire was still and a few moments later
13 the middle wire shook suddenly and the bird flew by
14 again. By that, I was able to conclude that the
15 bird lit upon the wire, although I did not see it
16 happen. That's an example of circumstantial
17 evidence. Hopefully that, together with other
18 examples, will help you understand circumstantial
19 evidence, and remember that direct evidence and
20 circumstantial evidence are given equal weight and
21 the Court makes no distinction between them.

22 Where it is undertaken by the prosecution in
23 a criminal case to prove the guilt of an accused
24 person by circumstantial evidence, not only must
25 the circumstances be proven beyond a reasonable

1 doubt, but they must point conclusively, that is,
2 to a moral certainty to the guilt of the accused.
3 They must wholly and in every particular be
4 perfectly consistent with each other and they must
5 further be absolutely inconsistent with any other
6 reasonable hypothesis than the guilt of the
7 accused.

8 Corroborating evidence is any evidence which
9 tends to strengthen, add to, add weight to or
10 believability to any other evidence or that which
11 makes more certain any other evidence which
12 previously or was later introduced during the
13 trial, and the jury can give such corroborating
14 evidence such weight as the jury feels it deserves.

15 You, Madam Forelady and ladies and gentlemen
16 of the jury, should weigh all of the evidence and
17 if you are not convinced of the guilt of the
18 defendants or either of them beyond a reasonable
19 doubt you must find the defendants or either of
20 them to be not guilty.

21 The evidence from which you are to decide the
22 facts of this case consists of the sworn testimony
23 of witnesses who testified before you, the exhibits
24 that have been introduced and any facts that the
25 lawyers have agreed upon or have stipulated. In

1 reaching your verdict you may consider only the
2 evidence that constitutes proper evidence, that is,
3 testimony, exhibits and stipulations. Certain
4 things are not evidence and you may not consider
5 them to be evidence in deciding the facts of the
6 case.

7 These things are not evidence: The arguments
8 and statements by the lawyers. The lawyers are not
9 witnesses. What they have said in their opening
10 statements, closing arguments, questioning of the
11 witnesses and other times is intended to help you
12 interpret the evidence but it is not evidence. If
13 the facts as you remember them differ from the way
14 the lawyers have stated them your memory controls.

15 Also not evidence is the questions and
16 objections that the lawyers may have introduced or
17 stated during the course of the trial. Attorneys
18 have a duty to their client to object when they
19 believe a question may be improper under our rules
20 of evidence or a procedure may be improper. You
21 should not be influenced by any objection or by the
22 Court's ruling upon any objection.

23 Also not evidence is any testimony that may
24 have been stricken or excluded or that you have
25 been instructed to disregard. In addition, if

1 testimony or exhibits have been received for a
2 limited purpose, if any have been, you must follow
3 the limiting instructions that were given to you.

4 Anything that you may have seen or heard when
5 the Court was not in session is not evidence and
6 you are to decide this case solely upon the
7 evidence that's been received during the course of
8 this trial.

9 The same Constitution that makes you and you
10 alone to be the finders of the facts makes the
11 Court and only the Court to be the instructor of
12 the law. You must accept as correct the law that
13 the Court charges to you and apply the law to the
14 evidence as you find it to be and reach your
15 verdict. You must put aside any preconceptions
16 that you may have had as to what the law may have
17 been before you came here some time ago and accept
18 the law as it is being instructed to you. For the
19 purposes of your duty and responsibilities as
20 jurors in this trial you should not be concerned
21 with what the law might be, ought to be, may be or
22 could be, but what the law is as it is being
23 instructed to you.

24 Now, the defendants, as you know, have been
25 charged with the crime of trafficking in more than

1 100 grams of methamphetamine, also known as crank.
2 The State must prove beyond a reasonable doubt that
3 the defendants or either of them knowingly sold,
4 manufactured, delivered, purchased or brought into
5 this state, provided financial assistance or
6 otherwise aided, abetted, attempted or conspired to
7 sell, manufacture, deliver, purchase or bring into
8 this state or was knowingly in actual or
9 constructive possession or knowingly attempted to
10 become in actual constructive possession of more
11 than 100 grams of methamphetamine, also known as
12 crank, in conspiracy with one or more other
13 persons. This charge is one of conspiracy and that
14 will be more clearly identified and explained to
15 you later.

16 Constructive possession and proof of
17 constructive possession is this. A person can be
18 convicted of constructive possession of
19 methamphetamine, also known as crank, upon proof of
20 either, of actual possession but also constructive
21 possession. Proof of constructive possession,
22 along with the knowledge of the presence of the
23 methamphetamine or crank is sufficient to support a
24 conviction for the possession of the
25 methamphetamine or crank.

1 To prove constructive possession the State
2 must show that the defendants or either of them had
3 dominion and control or the right to exercise
4 dominion and control by and through a conspiracy
5 over more than 100 grams of methamphetamine, also
6 known as crank. Constructive possession may be
7 established through either direct or circumstantial
8 evidence and possession may be shared. Possession
9 requires more than mere presence.

10 Again, the defendants are charged with a
11 conspiracy or with conspiring to traffic in more
12 than 100 grams of methamphetamine, which is also
13 known as crank. Therefore the Court must explain
14 to you and define for you the law of conspiracy.
15 The crime of conspiracy and conspiracy itself is
16 nothing more than an illegal agreement. Conspiracy
17 or a conspiracy is the agreement to commit a crime
18 and the intent to carry out the agreement. In
19 other words, if two or more people have agreed to
20 commit a criminal act with the intent to accomplish
21 that goal, then they have conspired together to
22 accomplish that goal. However, the crime is the
23 agreement itself, coupled with the intent to carry
24 through and carry out the agreement. And when one
25 person agrees with another to do an illegal act

1 with the intent to carry out the agreement, those
2 are guilty, or those persons are guilty of
3 committing the crime of conspiracy.

4 We're dealing with one kind of conspiracy.
5 Conspiracy is the agreement to do an unlawful act
6 by lawful means or to do a lawful act by unlawful
7 means. In this case we're dealing with one kind of
8 conspiracy and that is, if you were to find any
9 exists, and you may not, or you may, depending upon
10 your view of the evidence, then we're dealing with
11 only one kind in this case, and that is an
12 agreement to do an unlawful act. The intent to
13 carry it out, even if it's not carried out, is
14 sufficient. The agreement is the essence of the
15 conspiracy.

16 It's not necessary for the people who are
17 engaged in a conspiracy to actually meet, have a
18 formal agreement, draw it up, expressly state it or
19 contract with each other. The agreement may be
20 tacit, meaning that it may be unspoken, implied or
21 deduced from the facts or the acts of the parties
22 as you may find them to be. Nor is it necessary
23 for the State to try all of the conspirators
24 together before the same jury, nor is it necessary
25 for the State to indict all of the participants in

1 any conspiracy together in the same indictment.

2 In order for there to be a crime it is
3 necessary that the participants or co-conspirators
4 come to some mutual understanding, tacit, that
5 means unspoken, implied or deduced from the facts
6 as you may find them to be, it is necessary that
7 the co-conspirators come to some mutual
8 understanding, tacit or otherwise, to accomplish a
9 common and unlawful end.

10 In other words, the evidence in the case need
11 not show that the alleged members of the conspiracy
12 actually had an expressed agreement, although they
13 could have had, but they don't have to. This does
14 not have to be shown by the State, and they don't
15 have to be, it doesn't have to be shown that they
16 directly stated between themselves the details of
17 any agreement and the object of the agreement or
18 that they determined the precise means by which the
19 object or purpose was to be accomplished. So, they
20 could have all had one common goal, all have worked
21 towards that end without knowing the full details
22 of what the other conspirators were doing.

23 However, before a person can be guilty of the
24 crime of conspiracy it must be proven to your
25 satisfaction and beyond a reasonable doubt that the

1 conspiracy was formed as alleged in the indictment
2 and that the defendants or either of them was an
3 active party in it.

4 Only you may decide the facts of this case,
5 only you may determine whether or not a conspiracy
6 existed, and if so, whether or not the defendants
7 or either of them was involved in it.

8 Under this indictment, which is not evidence,
9 the agreement alone constitutes the offense of
10 conspiracy. Therefore, before any defendant may be
11 convicted of the offense it must appear from the
12 evidence and beyond a reasonable doubt that the
13 conspiracy existed and the defendants or either of
14 them was a knowing party to the conspiracy.

15 Again, a tacit, unspoken or implied mutual
16 agreement or understanding which results in the
17 unlawful and intentional adoption of a common goal
18 by two or more persons is sufficient under the law
19 to constitute the crime of conspiracy, provided
20 that the common purpose to do so, to do an unlawful
21 act, provided that the common purpose of the
22 understanding is to do an unlawful act.

23 The understanding or the agreement, if any
24 you may find to be, as to the means or way to
25 accomplish the unlawful goal or act or as an end

1 result of the accomplishment of such unlawful goal
2 or act is the conspiracy, if you should find it to
3 exist.

4 A defendant in an alleged conspiracy must
5 have had an intent to advance the common goal of
6 the agreement. If the persons involved are not
7 acting in concert but are instead acting separately
8 and individually, then you may rightfully conclude
9 that they are not involved in a conspiracy. On the
10 other hand, if two or more persons pursue the same
11 unlawful goal, one doing one act and one performing
12 another act to accomplish the unlawful goal, then
13 you may consider such to be evidence if you so find
14 that they are engaged in a conspiracy to achieve
15 that unlawful goal.

16 Cooperation between two or more persons to
17 accomplish an unlawful goal in some form or some
18 manner must be shown and this cooperation must be,
19 may be shown by circumstantial evidence.
20 Cooperation means that there was an intentional
21 participation in a transaction or transactions or
22 acts or act which furthered or furthers the goal of
23 the alleged conspiracy, and the participation must
24 have been done with a view toward and the purpose
25 of furthering the common design and fulfilling the

1 agreement.

2 If a person in any manner encourages, advises
3 or helps to assist in a transaction or scheme which
4 helps to advance the goal or design of the
5 conspiracy and if that person understands that the
6 transaction itself is unlawful, then that person is
7 a co-conspirator.

8 Again, in order to become a party to a
9 conspiracy a person must join with someone else to
10 achieve the object of the conspiracy by the means
11 and in the way that has been agreed upon. There is
12 no conspiracy when one individual acts by and for
13 himself alone. A common intention, design or goal
14 shared by two or more persons to commit an unlawful
15 act is the essence of the crime of conspiracy.

16 So, if the evidence presented by the State as
17 to the defendants or either of them satisfies you
18 beyond a reasonable doubt that the conspiracy as
19 alleged did in fact exist and you find that the
20 defendants or either of them were or was a party to
21 such conspiracy, if you should find such did exist,
22 then you may find both or either of them to be
23 guilty as charged.

24 If, on the other hand, the evidence presented
25 by the State fails to satisfy you beyond a

1 reasonable doubt that the conspiracy as alleged did
2 exist, or if you find that the defendants or either
3 of them was not a party to any conspiracy as
4 alleged, then you will find the defendants or
5 either of them to be not guilty.

6 Now, there are some things that you must know
7 and the Court must instruct you concerning,
8 regarding the law of conspiracy in addition to what
9 you have already heard.

10 First, an alleged member of a conspiracy is
11 responsible for every criminal act done by every
12 other member of the conspiracy during its existence
13 and while the person remains in the conspiracy.

14 A conspiracy is a kind of partnership so that
15 under the law each member is an agent or a partner
16 of every other member and each member is bound and
17 responsible for the acts and statements of every
18 other member made in pursuance of their unlawful
19 scheme or agreement.

20 A person is considered by the law to remain
21 in a conspiracy until that person does some
22 affirmative act to withdraw from the conspiracy.
23 In addition, if a person joins a conspiracy
24 understanding the unlawful character and nature of
25 the agreement, then that person may be convicted of

1 the crime of conspiracy even though that person had
2 not participated earlier on in the conspiracy and
3 even if the person played only a minor role in the
4 conspiracy. Further, a person may be a member of a
5 conspiracy without having full knowledge of all of
6 the details and all of the other names and
7 identities of all of the other alleged
8 co-conspirators.

9 Thus, if the State has proved to your
10 satisfaction beyond a reasonable doubt from the
11 evidence that's been presented in this case that a
12 conspiracy as alleged did in fact exist and that
13 the defendants or either of them entered into such
14 conspiracy, then the statements and acts knowingly
15 made and done during such conspiracy by the
16 defendants or either of them in furtherance of the
17 object and aims of the conspiracy to accomplish an
18 unlawful goal, if any you should find, then such
19 statements and acts knowingly made and done by the
20 defendants or either of them may be considered by
21 you as evidence against the defendants or either of
22 them even though either one of them or both of them
23 may not have been present to hear any statements or
24 see any acts that may have occurred during the
25 existence of the conspiracy.

1 If both or either of them did any effort to
2 accomplish the unlawful goal pursuant to the
3 conspiracy you may find both or either of them to
4 be guilty. However, if the State has failed to
5 prove to your satisfaction beyond a reasonable
6 doubt that a conspiracy did in fact exist as
7 alleged by the State, or that if it did exist and
8 the State has failed to prove to your satisfaction
9 beyond a reasonable doubt that the defendants or
10 neither of them was part of any implied unspoken or
11 expressed agreement to be a party to such
12 conspiracy, you may find either or both of them to
13 be not guilty.

14 The State must also prove to your
15 satisfaction beyond a reasonable doubt that the
16 amount of methamphetamine, also known as crank,
17 involved in this conspiracy was 100 grams or more.

18 Two defendants are named in this indictment
19 You are to consider each case seperately and write
20 a verdict differently in each case. You may find
21 both defendants not guilty, one of the defendants
22 guilty and the other not guilty, or both guilty.
23 You are to consider each one separately and
24 determine whether or not the State of South
25 Carolina has proven a defendant guilty of the

1 conspiracy beyond a reasonable doubt.

2 The State is not required to place upon the
3 stand every witness who has any knowledge of the
4 material facts connected with the crime charged or
5 whose name is endorsed upon the indictment.

6 There is no constitutional right to be
7 arrested. The police are not required to guess at
8 their peril the precise moment at which they have
9 probable cause to arrest a suspect in a crime. Law
10 enforcement officers are under no constitutional
11 duty to halt a criminal investigation at the moment
12 that they have minimum evidence to establish
13 probable cause or a quantum or scintilla of
14 evidence which may fall short of the amount
15 necessary to support a criminal conviction.

16 If you were to find the defendants guilty,
17 and if you were to do that it must be by proof
18 beyond a reasonable doubt, it will then be the
19 Court's responsibility to decide what punishment
20 should be imposed. In considering the evidence and
21 arguments you should not concern yourselves with
22 the punishment involved. It should not enter into
23 your consideration or discussions at any time. You
24 are to determine the facts, which will be reflected
25 in your verdict.

1 It is well within the discretion of the
2 prosecution to offer plea agreements to defendants
3 in a case and to allow co-defendants to plead
4 guilty to lesser offenses, and those co-defendants
5 may testify but in this and every case the
6 credibility of each witness is something that you
7 and you alone are to decide.

8 As the Court has stated to you previously,
9 co-defendants have testified. Co-defendants are
10 also called accomplices, and the testimony of an
11 accomplice to the crime may be sufficient in and of
12 itself to convict a defendant of the crime charged.
13 In other words, the testimony of an accomplice does
14 not have to be corroborated in any way and you may
15 convict a defendant based solely upon such
16 testimony if such testimony or evidence convinces
17 you beyond a reasonable doubt of the guilt of the
18 defendants or either of them.

19 As always, the weight to be given to the
20 testimony of any witness is for the jury and for
21 the jury alone to decide, and if uncorroborated
22 evidence satisfies you of a defendant's guilt
23 beyond a reasonable doubt, then you may find the
24 defendants or either of them to be guilty.

25 You are instructed now and it is emphasized

1 to you the fact that a defendant may be absent from
2 the trial and does not testify in his own behalf in
3 a criminal trial is not a factor to be considered
4 by you in any way in your deliberations. You must
5 not consider the fact that a defendant has chosen
6 not to appear and not to testify when you determine
7 the guilt or the innocence of a defendant. It must
8 not be considered by you in any manner whatsoever
9 either against or for the defendant. A defendant
10 has the absolute constitutional right to remain
11 absent and to remain silent. The assertion of that
12 constitutional right cannot and must not be
13 considered by you in your deliberations. Under
14 your oath, then, Madam Forelady and ladies and
15 gentlemen of the jury, you are to reach no
16 inference and draw no conclusion whatsoever from
17 the fact that a defendant in this case did not
18 appear and did not testify. The fact that the
19 defendant did not appear or offer a defense should
20 not even be discussed in your jury room.

21 The burden of proof, as has been stated to
22 you, is upon the State. It is not the burden of
23 any accused to prove his innocence. The burden of
24 proof remains upon the State to prove the guilt of
25 the defendant beyond every reasonable doubt.

1 Again, it's emphasized to you that the fact that
2 the defendant did not appear at the trial or
3 testify is not a fact to be considered by you in
4 determining the guilt or the innocence of the
5 defendant or in any other aspect of your
6 deliberations.

7 While the Court generally determines the
8 admissibility of evidence, you are instructed that
9 as regard to any alleged statement or statements
10 made by any defendant, that you the members of the
11 jury make the ultimate determination of whether or
12 not the defendant made such statement, and if he
13 did make such statement, whether the statement was
14 made by the defendant voluntarily and of his own
15 free will and accord, and finally, just what
16 weight, if any, should be given to any alleged
17 statement.

18 You must first determine if the alleged
19 statement was a product of an essentially free and
20 unconstrained choice by its maker. You must
21 determine that it was, and the burden is upon the
22 State to prove this fact, as all other facts beyond
23 a reasonable doubt, and then you may give the
24 statement such further consideration as you and you
25 alone deem proper. If you determine the alleged

1 statement was not the free and voluntary will and
2 expression of the defendant who made such statement
3 or statements, then you should not consider the
4 statement or statements at all.

5 In determining whether a defendant's will was
6 overcome in obtaining a statement or statements you
7 should consider both the characteristics of the
8 accused as you have learned them during the course
9 of the trial and the details of the interrogation
10 which is referred to in the law as the totality of
11 the circumstances. Some of the factors you must
12 consider are the age of the accused, his education
13 or his lack thereof, his mental ability or his
14 capacity to think, his IQ or intelligence, his
15 background and environment, the advice he may have
16 had or the lack of advice he may have had, and the
17 warnings to the accused of his constitutional
18 rights, including but not limited to the procedural
19 safeguards known as the Miranda warnings concerning
20 the right to remain silent, that a statement could
21 be used against him in a court of law, the right to
22 have a lawyer present, if an indigent person, that
23 is a person without money, that if he could not
24 afford a lawyer, then a lawyer would be appointed
25 to represent him without any cost and that he could

1 stop making the statement at anytime.

2 Other factors to consider are the place and
3 the length of the detention and the nature of the
4 questioning. Also you will consider whether the
5 statement was spontaneous or voluntary or was made
6 by the defendant and not in response to a question
7 by a law enforcement officer when Miranda warnings
8 are not required. If the defendant were
9 represented by an attorney and made a statement
10 after he had been told that he did not have to say
11 anything, as such, the Miranda warnings, then he
12 was free to make any such statement.

13 Another factor to be considered by you is
14 whether the defendant initiating the statement or
15 the making of the statement was given his Miranda
16 warnings before he made the statement and freely
17 and voluntarily made such statement without his
18 attorney being present if he had any attorney.

19 You the jury must carefully scrutinize all
20 the surrounding circumstances about and concerning
21 such statement or statements before you give any
22 weight to any alleged statement or statements. You
23 must be satisfied beyond a reasonable doubt that
24 the statement was made by the accused person
25 uninfluenced by promise of reward, threats of

1 injury or diminution of his rights.

2 You are instructed that the mere presence of
3 a person at the scene of a crime is not sufficient
4 to support, is not sufficient evidence to support a
5 conviction of a crime. A defendant cannot be found
6 guilty on any charge solely because he was merely
7 present at the scene of a crime. To be found
8 guilty of the commission of a crime a person must
9 personally commit the crime or be present at the
10 scene and intentionally take a role in commission
11 of the crime.

12 Criminal intent is a necessary element of
13 each crime and must be proved by the State beyond a
14 reasonable doubt. Criminal intent is always a
15 matter that must be determined by the jury from the
16 circumstances surrounding the situation. There is
17 no way to prove intent to a mathematical certainty.
18 There is no way that medical science can dissect a
19 person's brain and determine what he then and there
20 had in mind of doing or not doing. So, the law
21 says that criminal intent may be inferred from the
22 circumstances shown to have been existing at the
23 time in question. This is how the jury makes a
24 determination of whether or not the elements
25 requiring intent was present.

1 Criminal intent is a state of mind which
2 operates jointly with an act in the commission of a
3 crime. Criminal intent is a mental state, a
4 conscious wrongdoing, so it is up to you the jury
5 to determine what these defendants or either of
6 them intended to do based upon the circumstances
7 shown to have been in existence at anytime as
8 alleged during the conspiracy, if any you should
9 find.

10 The Court instructs you that the State must
11 prove criminal intent beyond a reasonable doubt
12 just as the State must prove every element beyond a
13 reasonable doubt, as was previously explained to
14 you.

15 It is not necessary to establish intent by
16 direct or positive evidence, but intent may be
17 established by inference in the same way as any
18 other fact, by taking into consideration the acts
19 of the parties and all of the facts and
20 circumstances of the case. While the State may
21 prove motive, it is not necessary that the State
22 prove motive. However, the State must prove
23 intent.

24 You have been selected as fair and impartial
25 jurors and have been sworn to impartially try and

1 determine the facts of this case, and when you
2 comply with your oath to do that, then no one will
3 have any right to criticize your verdict and you
4 will have fully discharged your duty as jurors.

5 If any of you have made any notes during the
6 course of the trial you will disregard and
7 completely destroy any such notes and do not share
8 them or the fact that you made notes with any of
9 your colleagues. If you did, it would make you a
10 better juror because it means that you have paid
11 close attention and listened and recorded some of
12 the things that you have seen or heard during the
13 course of the trial, but your actual notes may
14 cause you to be given greater weight than one of
15 your fellow jurors, and all of you are entitled to
16 equal weight, so completely and absolutely destroy
17 such notes and don't tell your fellow jurors that
18 you have even made them. All of you are entitled
19 to equal recollection of the evidence.

20 Now, we have prepared a verdict form for you,
21 ladies and gentlemen, and Madam Forelady, and in
22 this case it is rather simple. In some cases it's
23 somewhat complicated but this one is one page and
24 rather simple. It is known you can't read it from
25 there, and all of you will have a chance to see it

1 but we will go over it so the record is clear. The
2 first part of it is of no consequence to you. It
3 simply says the name of the case, where it's being
4 tried, the number of the case and name of the
5 defendants and the words verdict form. It says, as
6 to conspiracy to traffic in more than 100 grams of
7 methamphetamine, also known as crank, colon, we the
8 jury find the defendant Marshall Miller, and there
9 is two places there, guilty and not guilty.

10 Now, you are to make nothing whatsoever of
11 the order in which your choices come. It could
12 just as easily be not guilty and guilty. The Court
13 means nothing by putting them in the order that
14 your choices are listed.

15 And then next is as to, we the jury find the
16 defendant Billy Moore guilty or not guilty, and all
17 of this is as it relates to the conspiracy to
18 traffic in more than 100 grams of methamphetamine,
19 also known as crank.

20 Hopefully, not being able to read it from
21 that distance, you understand it. You will use
22 this verdict form and when all have agreed you will
23 sign your name as foreperson, and it's dated the
24 30th of January.

25 Now, it's 6:24, 6:23, we're going to order

1 something for you to eat because it's going to take
2 you a while to go through the evidence, and you may
3 deliberate as long as you wish. You can deliberate
4 on into the evening, or you may cease deliberations
5 later in the evening, return home and come back
6 tomorrow and continue. So, the fact that the 30th
7 of January is down there, Madam Forelady and ladies
8 and gentlemen of the jury, doesn't mean that you
9 cannot come back tomorrow and continue your
10 deliberations. You are free to do that.

11 Your verdict must be a unanimous one, which
12 means every one of you must agree upon it. Madam
13 Forelady, when the jury agrees upon a verdict you
14 will fill in the verdict and, as we explained to
15 you, by signing your name as foreperson.

16 Now, the court must consult with the
17 attorneys to see if the Court has left out
18 something, which is possible, or has misstated
19 something, and if the Court needs to give you
20 additional instructions we will ask you back out
21 and accomplish that. If not, the bailiff will
22 appear at your door with the verdict form and the
23 exhibits and that will be your signal to begin your
24 deliberations.

25 Now, before that happens your clerk will come

1 in, if there are no objections, and take your
2 orders for your meal. It's been some time and you
3 will order and she will order something for you to
4 eat.

5 When you do reach a verdict, Madam Forelady
6 and ladies and gentlemen, somebody will knock on
7 the door, the bailiff will obtain the information
8 that you have or have not reached your verdict or
9 you have a question or whatever the circumstances
10 may be, and if you have reached a verdict we will
11 assemble here and receive your verdict.

12 Now, the alternates will accompany the jurors
13 into the jury room at this time but we may ask you
14 out momentarily.

15 Do not discuss the case by, between and among
16 yourselves and retire to the jury room.

17 Thank you very much.

18 (The jury was excused from the courtroom
19 at 6:25 p.m.).

20 THE COURT: Are there exceptions or requests
21 for additional charge from the State?

22 MR. HOOD: Nothing, Your Honor.

23 THE COURT: Are there exceptions or requests
24 for additional charge from the defendant Miller?

25 MR. VARNER: Yes, Your Honor. In regard to

1 your, in the beginning in your credibility charge
2 you advised the jury do not consider charges in
3 another court, or words to that effect. And that
4 was in the midst of the credibility charge. One of
5 the key issues that we had brought up affecting the
6 credibility of the witnesses were the other charges
7 and/or convictions. Jurors, I don't think,
8 understand the difference between using the word
9 charge or conviction, and I would request that the
10 jury be advised that, as a cure, or as an addition,
11 that prior convictions and/or dismissed charges are
12 proper for the jury to consider in determining the
13 credibility of a witness, because the way it was
14 phrased and the way I heard it, it was you're not
15 to consider other charges in other courts. That
16 was something we kept bringing up, was prior
17 convictions, and the jury is not going to know the
18 difference between a conviction and a charge, and I
19 would submit a statement to the effect that prior
20 convictions and/or dismissed charges are proper for
21 the jury to consider in determining the credibility
22 of a witness.

23 THE COURT: Thank you, Mr. Varner. Anything
24 further?

25 MR. VARNER: Nothing further, Your Honor.

1 THE COURT: Mr. Wise?

2 MR. WISE: Yes, Your Honor.

3 THE COURT: Any exceptions to the charge or
4 requests for additional charges?

5 MR. WISE: One. I take exception to your
6 charge, trafficking more than 100 grams, and the
7 charge on constructive possession. I don't think
8 it's relevant to this case because it's a pure
9 conspiracy. I object to the charge.

10 THE COURT: Wait a minute, you object to
11 trafficking in more than 100 grams? I thought --

12 MR. WISE: You charged them basically
13 trafficking, and charged the law of possession,
14 constructive possession. They are not charged with
15 trafficking more than 100 grams, they are charged
16 with conspiracy to traffic.

17 THE COURT: All right. That's a fine
18 distinction. The Court will not return to that
19 because constructive possession and possession is
20 part of the conspiracy to traffic.

21 MR. HOOD: It is all the same statute.

22 THE COURT: Or could be, depending upon the
23 view of the jury.

24 MR. WISE: Anyway, I've got a problem with it
25 because, the reason is this, if you charge

1 trafficking more than 100 grams, then there is a
2 lesser included you are required to give, that you
3 are not required to give them under -- I'm not sure
4 what case it was.

5 MR. HOOD: Gosnell.

6 MR. WISE: The Gosnell case, you're not
7 required to give them, that's the reason.

8 Secondly, I object to the portion about no
9 constitutional right to be arrested, which was
10 basically the State's requested charge number four,
11 and I object to the portion, as we discussed
12 earlier, where the co-defendant's testimony does
13 not need to be corroborated. And I would like to
14 introduce to the Court exhibits, my requested
15 charge one, two, and three, I don't think they were
16 given, particularly the second sentence of
17 requested charge number one, which said it is
18 sufficient to show that each defendant knew or had
19 reason to know the scope of the conspiracy and that
20 each defendant had reason to believe that their own
21 benefits were dependent upon the success of the
22 entire venture.

23 Excuse me. Not two. Numbers one and three.
24 One and three basically say that the mere fact that
25 they know each other or engage in similar

1 activities is not sufficient to sustain a
2 conviction. I would --

3 THE COURT: I have them.

4 MR. WISE: I was going to mark them as
5 court's exhibits for the record.

6 THE COURT: Let me look at them. These will
7 be marked Court's Exhibits 2, 3 and 4 pursuant to
8 Mr. Wise's request.

9 (Court's Exhibits 2, 3 and 4 were marked).

10 THE COURT: Anything further, Mr. Wise?

11 MR. WISE: One other thing, Your Honor. I
12 object to the illustration about the bird, because
13 another bird could have landed on that wire other
14 than the one you saw. That's it.

15 THE COURT: Mr. Hood, Mr. Crout, either of
16 you wish to be heard concerning either of the
17 requests of either defendants?

18 MR. CROUT: Your Honor, I'm not sure, was Mr.
19 Wise simply preserving for the record the same
20 issues he made this morning in our charge
21 conference? I'm not sure of the context that he's
22 raising it.

23 MR. WISE: Pretty much. I thought that was
24 going to be included somewhere in the Judge's
25 charge, and I didn't hear anything that sounded

1 like my three in the Judge's charge, the same one I
2 presented earlier.

3 MR. CROUT: My understanding was we went over
4 number three and decided to leave three out because
5 it was already included in another part of the
6 original charge, so I'm not going to respond if
7 he's bringing it up for the purposes of preserving
8 it for the record.

9 MR. WISE: I'm bringing it up because I don't
10 think it was included in the Court's other charge.

11 MR. CROUT: Your Honor, I would then respond
12 that it was included.

13 THE COURT: Well, the Court feels it was
14 included. The Court feels that the jurors are
15 clear that the charge is trafficking by conspiracy
16 in more than 100 grams of methamphetamine, also
17 known as crank, and they are not charged with
18 simple possession but that possession or
19 constructive possession may be part of a finding or
20 a ground for a conviction for conspiracy to traffic
21 in methamphetamine. Now, the Court certainly feels
22 that possession or constructive possession may be a
23 part of a conspiracy to traffic in an illegal
24 substance.

25 Now, the Court also denies your objection to

1 recharge the jury on the charge, or the charge, or
2 recharge the jury on the constitutional right not
3 to be arrested. The Court feels that is a correct
4 charge.

5 The Court also feels that a co-defendant's
6 testimony may be sufficient by and of itself to
7 allow the jury to find that the State has sustained
8 the burden of proof required of it beyond a
9 reasonable doubt and find the defendants or either
10 of them guilty of trafficking by conspiracy in
11 methamphetamine exceeding 100 grams or more. And
12 so far as the bird, that was another attempt to
13 illustrate circumstantial evidence. Mr. Hood did
14 so, I believe you did so.

15 MR. WISE: I did so, yes, sir.

16 THE COURT: By your pencil trick, and the
17 Court did so by an actual observation, the
18 observation that it had to be the same bird that
19 landed upon the wire, it could not be any other
20 circumstance that would give rise to those facts,
21 therefore your objection is denied.

22 The Court also, returning to you, Mr. Varner,
23 and your objection, reminds you that the bias and
24 prejudice charge was given and it was the intention
25 of the Court to remind the jury that although the

1 defendant Moore may have been charged with a crime
2 other than that with which he stands accused, it
3 would be improper for this jury to consider that in
4 any way in its inquiry as to his guilt or innocence
5 of this crime. That was the reason that statement
6 was made to this jury, it was to protect Mr. Moore?

7 MR. VARNER: Your Honor, I understood that
8 but the way you said it was not if a defendant, you
9 said if a witness, and you stated to the jury, you
10 told them explicitly they are not to consider
11 charges in another court.

12 THE COURT: I don't recall saying -- it was
13 my recollection that it was with regard to a
14 defendant.

15 MR. VARNER: I think that I was able to pick
16 up later on what you said, it was directed to a
17 defendant, but I don't think a non lawyer picked up
18 on that, I mean, when a jury hears from a judge you
19 are not to consider prior charges, that was one of
20 the things I harped on, these people's prior
21 charges and dismissed charges, and they were flat
22 told not to consider that, they are not to consider
23 that, and I think despite what the Court's intent
24 may have been, I think the way the jury would have
25 taken it basically negated probably 60 percent of

1 my case, and I think that it needs to be explicit
2 to the jury that they can consider it. I don't
3 think that takes away from Mr. Moore and what the
4 Court's intentions were, but I think it would clear
5 up any potential misunderstanding the jury may
6 have, is that they can consider, of witnesses, as
7 opposed to a defendant, you can distinguish however
8 you want, but prior convictions or dismissed
9 charges are proper for a jury to consider in
10 weighing the credibility or believability of a
11 witness, their motivation.

12 THE COURT: Mr. Wise, you're still on your
13 feet. Do you want to talk about that?

14 MR. WISE: No, I'm not going to talk about
15 that. I have one other statement.

16 THE COURT: How says the State, Mr. Crout?

17 MR. CROUT: I think it was clear when you
18 were talking to them about other charges you meant
19 in their deliberations about this case, and I think
20 it was quite clear that when you talk about
21 witnesses you included the fact that they could
22 include other charges or dismissal of charges as to
23 their testimony. I was not confused at all about
24 the fact that what you were trying to tell them and
25 what the instructions tells them is that when they

1 go back and deliberate they need to determine if
2 these individuals did what they are accused of
3 doing in this instance, they are not supposed to
4 make a determination about whether or not they did
5 other things, and I believe that is the purpose of
6 that instruction and it seemed quite clear to me.

7 MR. VARNER: Your Honor, if he wasn't
8 confused, he just stated it in a confused manner.
9 He said the jury can consider the charges in this
10 case. That's the whole point, no, they can't. You
11 told them they couldn't, and if he's clear on it,
12 he stated it wrong, which tells me even he
13 misunderstood it, let alone people who are not
14 lawyers.

15 THE COURT: Well, the record will speak for
16 itself but the Court clearly understood, clearly
17 understood Mr. Crout and his recapitulation of what
18 the Court said, meant and implied to this jury.
19 Now, the Court did tell them that they could
20 consider whether a witness had a reason to be
21 biased or prejudiced, and gave them every reason to
22 consider any, or every right or avenue to consider
23 anything that would influence a witness' testimony.

24 The Court further told the jurors that it was
25 will within the discretion of the prosecution to

1 offer plea agreements to defendants in a case and
2 to allow co-defendants to plead guilty to lesser
3 offenses and those co-defendants may testify, "But
4 in this and every case the credibility of each
5 witness is something that you and you alone
6 decide."

7 Now, the only reason the Court mentioned any
8 other criminal charges was because it came out in
9 this case through some measure that Mr. Moore had
10 been charged with a sale of methamphetamine and it
11 was the intention of the Court to make clear to the
12 jury that they are not to consider that in any way
13 in this case. It is believed that the jury got the
14 message.

15 MR. VARNER: Note my exception.

16 THE COURT: Thank you very much for your
17 observation and request for additional charges or
18 exemptions.

19 MR. WISE: I was just going to state for the
20 record I join in Mr. Varner's objection --

21 THE COURT: Why don't you state it yourself.

22 MR. WISE: I have nothing further to add to
23 it.

24 THE COURT: Then why you are speaking?

25 MR. WISE: Just for the record I say I joined

1 in and then I have a question.

2 THE COURT: What are you joining in?

3 MR. WISE: His objection.

4 THE COURT: Well, what is his objection?

5 MR. WISE: The objection to the charge about
6 the statement that was made, the only objection he
7 made.

8 THE COURT: Do you want me to get the jury
9 out and tell them not to consider that your client
10 had been charged with a crime?

11 MR. WISE: No, I don't --

12 THE COURT: Do you want to do that, Mr. Wise?

13 MR. WISE: I don't want to do that. I think
14 that -- I know I don't.

15 THE COURT: Well, is that what you're asking
16 for?

17 MR. WISE: No, that is not what I'm asking
18 for.

19 THE COURT: Are you joining in his objection?

20 MR. WISE: Correct, but I don't think --

21 THE COURT: How am I going to correct it
22 unless I get them out and tell them that?

23 MR. WISE: That wasn't his suggestion on how
24 to cure it.

25 MR. VARNER: Your Honor, my point was the

1 jury doesn't know the difference between a charge
2 and a conviction. If you had said you cannot
3 consider charges in another court and explain to
4 the jury, "However, you can consider convictions or
5 dismissed charges in regard to credibility of
6 witnesses," my problem was I don't think a jury
7 knows the difference between a charge and
8 conviction because you hear all the time you are
9 charged with a crime on the street and in the
10 jurors' terms you are charged with a crime, you're
11 convicted of a crime, it's one and the same. To a
12 judge, to lawyers, there is a world of difference
13 but not to jurors, and that was the meat of my
14 objection, is to explain to the jury, and I think
15 what your charge literally said was correct, that
16 they can't consider a charge in another court, but
17 because of the nature of this case I think the jury
18 needed to know that you don't consider charges but
19 prior convictions or dismissed charges are proper
20 to consider in determining the credibility of the
21 witnesses, that was the crux of my objection, the
22 jury doesn't know the difference between a charge
23 and conviction. I may know it and everyone else
24 sitting in here right now may know it but these
25 people back here don't know the difference and

1 neither will a jury.

2 THE COURT: Thank you, Mr. Varner. Thank
3 you, Mr. Wise. Does the State wish to be heard?

4 MR. HOOD: No, sir, Your Honor.

5 THE COURT: The request is denied. The Court
6 feels that the charge in its totality is clear to
7 the jury, as clear to the jury as it can be, as it
8 can be made clear.

9 Anything further?

10 MR. HOOD: No, sir.

11 THE COURT: All right. Now, we will ask the
12 two alternates out. That is, let me give you their
13 names, please. That's Miss Copelan and Mr.
14 Hawthorne, miss Copelan and Mr. Hawthorne, and as
15 soon as that happens you will please marshal your
16 evidence and agree upon it, all three parties.

17 (The Alternate jurors returned to the
18 courtroom).

19 THE COURT: You all remain standing there,
20 please. Miss Copelan, juror number 30, and Mr.
21 Hawthorne, juror number 59, the Court has to excuse
22 you at this time. It is with regret that the Court
23 has to excuse you because you have paid close
24 attention, the Court has noticed as you are sitting
25 closer to the Court than any other jurors, the

1 Court has noticed that you all have listened,
2 looked and paid close attention, and it is with the
3 deepest regret that you have to be excused but with
4 the greatest of appreciation from the Court, from
5 all of the parties involved, from the county and
6 from the state and from the nation, for your
7 service as alternate jurors in this case. If any
8 untoward event were to have occurred, illness,
9 accident, death in a family, something of that
10 nature, you would have been called upon to
11 discharge the duties of a regular juror. In a case
12 of this length, this complexity, we need
13 alternates, as you certainly know.

14 And, Madam Clerk, do you have their checks
15 for them?

16 THE CLERK: No, sir.

17 THE COURT: Will they be mailed?

18 THE CLERK: What we will do, I will turn it
19 over to the finance office and they prepare the
20 checks with the excuses and I will get them in the
21 mail just as quick as possible.

22 THE COURT: So, you will be receiving a large
23 check. Thank you both very much. You are excused.

24 (Alternate jurors excused from the
25 courtroom).

1 THE COURT: The parties will please begin to
2 marshal evidence, together with the court reporter,
3 and before the evidence is shown in, together with
4 the verdict form, each party will be required to
5 speak to the record that you are satisfied that all
6 the evidence is here. The record is closed.

7 (Brief recess).

8 THE COURT: The record will open. Indictment
9 2002-GS-47-32, the State versus Marshall Miller and
10 others, wherein Marshall Miller and Billy Moore are
11 the defendants in this trial.

12 The Court understands the exhibits have been
13 examined by all three parties, the State, Mr.
14 Miller's attorney Mr. Varner, Mr. Moore's attorney
15 Mr. Wise, and the court reporter and all agree that
16 all exhibits are here. Is that a correct
17 statement?

18 MR. HOOD: Yes, sir, Your Honor, as far as
19 the State goes.

20 MR. VARNER: Yes, sir Your Honor, on behalf
21 of Miller.

22 THE COURT: Mr. Varner, did Mr. Wise concur,
23 as far as you know, or can you speak --

24 MR. VARNER: Your Honor, I can't speak for
25 Mr. Wise. I can't even speak well for myself.

1 MR. WISE: No objection. We checked
2 everything.

3 THE COURT: Very well. And you're satisfied,
4 Mr. Court Reporter?

5 The record is closed.

6 (Recessed at 6:17 p.m.).

7 (Court Exhibit Number 5 was marked).

8 (Reconvened at 8:40 p.m.).

9 THE COURT: The record is open, state of
10 South Carolina versus Marshall Miller and others,
11 wherein Marshall Miller and Billy Moore are the
12 defendants at trial in indictment 2002-GS-47-32.

13 The Court understands that the jurors have
14 reached a verdict. Is there any remark or question
15 by anybody before the jurors come in?

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

17 MR. VARNER: None, Your Honor.

18 MR. WISE: None, Your Honor.

19 THE COURT: Are you ready, Madam Clerk?

20 THE CLERK: Yes, sir.

21 THE COURT: All right, show the jury in, Mr.
22 Busby, please.

23 (The jury returned to the courtroom
24 at 8:43 p.m.).

25 THE COURT: All the jurors are present, with

1 the forelady properly seated. Madam Clerk, will
2 you inquire?

3 THE CLERK: Members of the jury, do you have
4 a verdict?

5 JUROR: Yes, sir.

6 THE COURT: Pass it up.

7 The verdict is in order. It may be
8 published.

9 THE CLERK: State of South Carolina, County
10 of Abbeville, case number 2002-GS-47-32, the State
11 versus Marshall Miller and Billy Moore. As to
12 conspiracy to traffic in more than a hundred grams
13 of methamphetamine, also known as crank, we the
14 jury find the defendant Marshall Miller guilty.

15 We the jury find the defendant Billy Moore
16 not guilty.

17 January 30, 2004, and signed by the foreman.

18 THE COURT: Mr. Bailiff, we inadvertently put
19 2003. Here, take this pencil and ask Madam
20 Forelady to change that to a four. The Court
21 apologizes.

22 Are there any exceptions or objections to the
23 verdict, or requests of the Court regarding the
24 verdict, from the State?

25 MR. HOOD: No, sir.

1 THE COURT: From the defendant Miller?

2 MR. VARNER: Your Honor, poll the jury,
3 please.

4 THE COURT: The jury will be polled. Just a
5 moment. Anything from the defendant Moore?

6 MR. WISE: No, Your Honor.

7 THE COURT: The jury will be polled as to the
8 defendant Miller.

9 THE CLERK: As I call your name, if you will
10 stand and raise your right hand.

11 Juror Mary Hawkins. Is this your verdict and
12 is it still your verdict?

13 JUROR: Yes.

14 THE COURT: Okay.

15 THE CLERK: Juror number two, Jessica Jenson,
16 stand and raise your right hand. Is this your
17 verdict and is it still your verdict?

18 JUROR: Yes.

19 THE CLERK: Juror Kenneth Mullins, if you
20 will stand. Is this your verdict and is it still
21 your verdict?

22 JUROR: Yes.

23 THE CLERK: Thank you. Marilyn Rayford. Is
24 this your verdict and is it still your verdict?

25 JUROR: Yes.

1 THE CLERK: Juror Jimmy Ellis. Is this your
2 verdict and is it still your verdict?

3 JUROR: Yes.

4 THE CLERK: Antonio Crawford. Is this your
5 verdict and is it still your verdict?

6 JUROR: Yes.

7 THE CLERK: J. S. Hall. Is this your verdict
8 and is it still your verdict?

9 JUROR: Yes.

10 THE CLERK: Christine Bryant. Is this your
11 verdict and is it still your verdict?

12 JUROR: Yes.

13 THE CLERK: Howard Cook. Is this your
14 verdict and is it still your verdict?

15 JUROR: Yes.

16 THE CLERK: Brent Bowers. Is this your
17 verdict and is it still your verdict?

18 JUROR: Yes.

19 THE CLERK: Delores Peterson. Is this your
20 verdict and is it still your verdict?

21 JUROR: Yes.

22 THE CLERK: Burt Brantley. Is this your
23 verdict and is it still your verdict?

24 JUROR: Yes.

25 THE COURT: Thank you, Madam Clerk.

1 Any further requests regarding the jury, from
2 any quarter?

3 MR. HOOD: No, sir, Your Honor.

4 MR. VARNER: None, Your Honor.

5 MR. WISE: None, Your Honor.

6 THE COURT: Thank you, and ladies and
7 gentlemen, Madam Forelady of the jury, thank you
8 all for your service. It is hoped that this
9 experience has not been an unduely harsh punishment
10 because of the weather and the length of the trial
11 but on the other hand it's hoped that you have
12 benefited in some way from sitting on a trial jury,
13 an experience that you may never have again as long
14 as you live. Few people ever sit on a trial jury
15 in their life in a case that lasts more than a day
16 or two, if they ever do at all, so you have had the
17 opportunity to sit on a case that is more than a
18 simple case, a complicated case in some regards and
19 a lengthy case. And the Court extends deep
20 gratitude to you on behalf of the State of South
21 Carolina, the county of Abbeville and the United
22 States of America for your service and
23 participation in the judicial system of our
24 country. The Court also thanks you on behalf of
25 all the court employees and staff and all the

1 parties involved in this trial.

2 You are excused, your duties are finished.
3 Thank you very much. You may leave the building.

4 (The jury was excused from the courtroom).

5 THE COURT: Go on the record. Mr. Wise, does
6 your client have a bond for bail?

7 MR. WISE: Didn't he post ten percent?

8 THE CLERK: Yes.

9 MR. WISE: It goes back to his Aunt Patsy.

10 THE COURT: All right. The person posting
11 the bond for bail may apply for return of it and,
12 Mr. Wise, if you will assist in that --

13 MR. WISE: No problem.

14 THE COURT: -- it will be done.

15 MR. WISE: No problem. And the State
16 indicated they have no objection to my client
17 getting his scales and the Glad wrap back.

18 THE COURT: Any objection?

19 MR. HOOD: No, sir.

20 THE COURT: All right. It may be the better
21 part of wisdom to withhold those things at the
22 present time because they may be needed if Mr.
23 Miller is located.

24 MR. WISE: Well, I was saying, seeing if Mr.
25 Varner would waive any problem with that on the

1 record because I don't think they were significant
2 to the case as far as his client is concerned.

3 MR. VARNER: Your Honor, I'll waive it
4 because I don't think that had any bearing on Mr.
5 Miller's case.

6 THE COURT: The Court is not certain, Mr.
7 Varner, in all due respect to you, counsel can
8 waive the presentment of evidence, in the event of,
9 upon sentencing, if Mr. Miller were to appeal and
10 there were to be a reversal. That's a concern.
11 And it's not to work a hardship upon this man Mr.
12 Moore but it's in evidence and Mr. Miller is not
13 here, so it cannot be finalized and we can't tell
14 him right now.

15 MR. WISE: Let me do some research on it,
16 then.

17 THE COURT: If you will do that, that will be
18 appreciated but at this point they will be held
19 with the other evidence at this point. We'll talk
20 about it further at your request, Mr. Wise.

21 Anything further, Mr. Wise?

22 MR. WISE: No, sir.

23 THE COURT: You're excused. Anything
24 further, Mr. Varner?

25 MR. VARNER: Briefly, Your Honor. Move for a

1 new trial in regard to the purported confession
2 being allowed in, Your Honor. I think it was
3 highly prejudicial and inappropriate, and also in
4 regard to the jury trial, and other motions and
5 objections made during the trial.

6 THE COURT: Does the State wish to be heard?

7 MR. HOOD: No, sir.

8 THE COURT: The motion is denied.

9 MR. VARNER: Thank you, Your Honor.

10 THE COURT: All right, Mr. Varner, you all
11 sign where indicated. One of you all come up and
12 sign this sentence sheet for the State. Just
13 strike through Solicitor and put AAG.

14 Anything further?

15 MR. HOOD: No, sir.

16 THE COURT: The record will show that the
17 sentence sheet in case number 2002-GS-47-32 as to
18 defendant Marshall Miller, convicted of conspiracy
19 to traffic more than 100 grams of methamphetamine
20 pursuant to Section 44-53-375(C)(3) has been
21 imposed. It will not be pronounced at this time
22 and it will be sealed until such time as Mr. Miller
23 can be brought before the Court and the sentence
24 read.

25 Is there anything further?

1 MR. HOOD: No, sir.

2 THE COURT: The record is closed and the
3 trial is concluded.

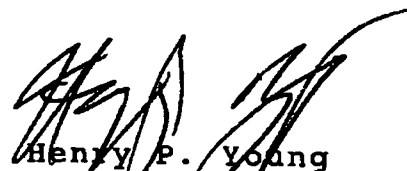
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I, the undersigned Henry P. Young, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case in the Circuit Court for Abbeville County, South Carolina, on the 30th day of January, 2004.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

January 8, 2005


Henry P. Young
Court Reporter

STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS
2002-GS-47-032

COUNTY OF ABBEVILLE

STATE OF SOUTH CAROLINA,)

-VS-)

MARSHALL MILLER,)

Defendant.)

August 24, 2004

B E F O R E:

HONORABLE WYATT T. SAUNDERS

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

ROBERT E. HOOD, Esquire
Attorney for the State

KIM R. VARNER, Esquire
Attorney for the Defendant

Henry P. Young
Court Reporter

1 P-R-O-C-E-E-D-I-N-G-S

2 (Convened at 10:22 a.m.).

3 MR. HOOD: May it please the Court?

4 THE COURT: Mr. Hood.

5 MR. HOOD: The State calls Marshall Miller.

6 THE COURT: This is indictment 2002-GS-47-32,
7 State of South Carolina versus Marshall Miller and
8 others. The defendant Miller is before the Court
9 with his attorney Mr. Varner of the Greenville Bar.
10 Mr. Varner, as you may or may not be aware, on the
11 30th of January, this year, in this case the Court
12 sealed the sentence.

13 MR. VARNER: I'm aware, Your Honor.

14 THE COURT: All right. Mr. Miller, this was
15 sealed on that day, the record will indicate that
16 that sealed sentence is being opened at this time
17 in open court.

18 Are there any remarks or comments from the
19 State, Mr. Hood?

20 MR. HOOD: No, sir, Your Honor.

21 THE COURT: From the defendant, Mr. Varner?

22 MR. VARNER: Not at this time, Your Honor.

23 THE COURT: In indictment 2002-GS-47-32, on
24 the, looks like it was the 30th day of January,
25 2004, Mr. Miller was convicted of conspiracy to

1 traffic more than 100 grams of methamphetamine.
2 It's the order, sentence and adjudication of the
3 Court he be confined to the State Department of
4 Corrections for a term of 25 years.

5 Anything further, Mr. Varner?

6 MR. VARNER: Your Honor, we would ask, I
7 don't recall whether or not motions were made at
8 the conclusion of the trial but for purposes of
9 protecting the record --

10 THE COURT: The record is open to you, sir.

11 MR. VARNER: -- we would ask for a new trial.
12 Additionally, and the grounds are in regards to the
13 confession that was entered into evidence, I think
14 the Court ruled indirectly that had Mr. Marshall
15 Miller been there possibly he could have
16 enlightened the Court as to what promises or
17 inducements were made and I believe that that
18 improperly put the burden on the defendant when the
19 burden should have been on the State all the way
20 through. I think there was clear evidence that Mr.
21 Miller did rely on certain inducements and
22 promises, whether correctly presented or
23 incorrectly presented, and therefore that the
24 confession was not freely and voluntarily entered
25 into and we respectfully request, for that reason

1 and other reasons enumerated at the trial, request
2 that a new trial be granted, Your Honor.

3 THE COURT: Thank you, Mr. Varner. Mr. Hood?

4 MR. HOOD: Nothing, Your Honor.

5 THE COURT: Motion is denied, respectfully.

6 Anything further?

7 MR. VARNER: Nothing further, Your Honor.

8 MR. HOOD: No, sir, Your Honor.

9 THE COURT: This matter is closed. Thank
10 you.

11 MR. VARNER: Thank you, sir.

12 MR. HOOD: Thank you, Your Honor.

13 (Hearing concluded at 10:31 a.m.).

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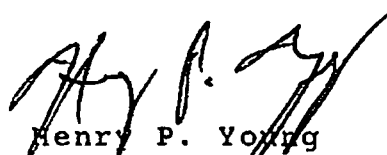
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I, the undersigned Henry P. Young, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case in the Circuit Court for for Abbeville County, South Carolina, on the 24th day of August, 2004.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

May 28, 2004


Henry P. Young
Court Reporter



The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
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November 10, 2008

REMITTITUR

The Honorable Lisa Dunbar
State Grand Jury
PO Box 11508
Columbia, SC 29211

Re: The State v. Miller, Marshall
2002-GS-47-00032

Dear Ms. Dunbar:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Sincerely,

A handwritten signature in dark ink, appearing to read "Renee S. Johnson".

Renee S. Johnson
Administrative Specialist

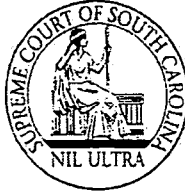
VCA/tj

cc: Deputy Chief Attorney for Capital Appeals Robert M. Dudek
Assistant Attorney General, State Grand Jury, DeWayne Pearson
Jerry W. Peace, Esquire

RECEIVED

NOV 14 2008

STATE OF SOUTH CAROLINA
COURT OF APPEALS



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 7, 2008

Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Miller, Marshall
2002-GS-47-00032

Dear Counsel:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

“Petition for Writ of
Certiorari Denied.

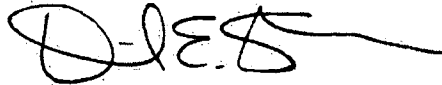
s/ Jean H. Toal C.J.
For the Court

November 7, 2008.”

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
Page Two
November 7, 2008

Very truly yours,

A handwritten signature in black ink, consisting of the letters 'DES' in a stylized, cursive font, followed by a long horizontal line extending to the right.

CLERK

DES/dmh

cc: ✓ Assistant Attorney General T. DeWayne Pearson
The Honorable Jerry W. Peace
The Honorable Emily Yeargin McMahan
The Honorable Kenneth A. Richstad

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Abbeville County
Court of General Sessions

Honorable Wyatt T. Saunders, Jr., Circuit Court Judge

Opinion No. 4307 (S.C. Ct. App. Filed 10/19/2007)

2002-GS-47-00032.

THE STATE,

RESPONDENT,

vs.

MARSHALL MILLER,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

HENRY D. MCMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

T. DEWAYNE PEARSON
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211-1549
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ATTORNEYS FOR RESPONDENT

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ISSUE PRESENTED

1.

Whether the Court of Appeals erred by holding that petitioner's statements were properly admitted into evidence where the State maintained that the statements were collected without any direct or implied promises by the State.

2.

Whether the Court of Appeals erred by holding that the State did not offer the petitioner a plea offer of a sentencing recommendation of eight (8) to twelve (12) years.

STATEMENT OF THE CASE

On September 10th 2002, the State Grand Jury indicted Marshall Miller and 14 other individuals for conspiracy to traffic more than 100 grams of methamphetamine from on or about November 19, 1999 until the present.

Miller's case was called for jury trial on January 20, 2004, before the Honorable Wyatt T. Saunders, Jr. and a jury. Kim R. Varner represented Miller. R. 1. Miller absconded and was tried in his absence. At the conclusion of the trial on January 30, 2004, Miller was found guilty. R. 1435, ll. 9-16.

On August 24, 2004, Miller was sentenced to twenty-five years imprisonment. R. 1441, ll. 2-4. Defense counsel moved for a new trial on the basis of Miller's statements to law enforcement being allowed into evidence. R. 1441, l. 11 – 1442, l. 2. That motion was denied.

Miller filed his Final Brief of Appellant on March 12, 2007. After oral argument, the South Carolina Court of Appeals affirmed Miller's conviction and sentence. State v. Miller, 652 S.E.2d 444 (2007). Miller thereafter submitted a Petition for Rehearing and Amended Petition for Rehearing. The South Carolina Court of Appeals denied rehearing by order dated January 17, 2008. The Petition for Writ of Certiorari was submitted by Miller on April 21, 2008. The State's Return to the Petition for Writ of Certiorari follows.

STATEMENT OF THE FACTS

On September 10th 2002, the State Grand Jury indicted Miller along with 14 other individuals for conspiracy to traffic in more than 100 grams of methamphetamine from on or about November 19, 1999 until the present. The State Law Enforcement Division (SLED) arrested Miller on September 24, 2002. Following his arrest, SLED agents Bragg and Sonnefield interviewed Miller concerning his knowledge of the conspiracy on three separate occasions, February 13, 2003, February 25, 2003 and March 4, 2003. R. 27, ll. 6-18. During these interviews, Miller provided information implicating himself and others within the conspiracy to traffic methamphetamines as well as other illegal activities.

On April 29, 2003, Assistant Attorney General Jennifer Evans sent a written plea offer to Miller, through his attorney Kim Varner. That offer indicated that the State would recommend a fifteen-year sentence for Miller in return for his guilty plea. This offer was made after consideration of Miller's cooperation in the investigation. R. 41, l. 10 – 42, l. 11.

Miller failed to appear for the beginning of his trial on January 20, 2004. Defense counsel requested that the court hold a hearing pursuant to Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774 (1964), to determine the voluntariness of the Miller's statements to law enforcement should the State seek to introduce the statements as evidence. R. 8, l. 18 – 9, l. 9. Alternatively, defense counsel sought to enforce a different plea agreement counsel claimed to have reached with the State. At the Denno hearing on Miller's statements and the purported plea agreement, attorney Kim Varner indicated to the court that he needed to testify as a witness. R. 94, ll. 24-25.

Varner was sworn and testified that Miller retained him shortly after his arrest. R. 96, ll. 9-10. Varner testified that he had numerous conversations with SLED Agent Frank O'Neil and Assistant Attorney General Jennifer Evans concerning any potential cooperation or compliance his client might have. R. 96, l. 11 – 97, l. 21. Varner further testified as of the morning February 13, 2002, he did not have a firm plea offer. R. 100, ll. 2-5. Varner then testified that he spoke with Assistant Attorney General Evans on the way to a meeting with his client on February 13, 2002. Varner testified that he asked whether she could recommend a sentence in a range under ten years and she replied that she could not. Varner then testified as follows:

She came back with, "We can do something in the eight to twelve range," and I said, "I know what that translates into that translates into twelve," and she kind of laughed and said, "Well, in all probability it's going to be twelve," but a statement to the effect, and I think I made this statement, "Well, if he could deliver Osama Bin Laden or something like that, something phenomenal, is it possible to get under that range?" And she, I believe, took that statement in jest, which is the way it was intended, and she said, "If he delivers something phenomenal, sure, we're looking in the eight to twelve range."

R. 101, ll. 13-25.

Varner further testified that he spoke with Miller prior to the beginning of the first interview on February 13, 2002. Varner then testified that he wanted to advise Miller in front of the SLED agents while he "went over what I call the ground rules. I wanted them present for this so there would not be a misunderstanding." R. 102, ll. 20-25. "I explained to Mr. Miller in front of the agents that he did not have to make a statement, that this was his choice, and I reiterated to him that we had a deal of eight to twelve years. His response was, 'You got a deal for twelve years, I'll never get the eight, I'll

never get ten, I'm going to get twelve.' And I said, plan on the twelve." R. 102, l. 25 – 103, l. 7.

Varner testified that he and Miller went to Laurens County for a hearing after receiving the State's written plea offer for a recommendation of fifteen (15) years. Varner testified that he thought Assistant Attorney General Evans had misrepresented herself. He said that he told Evans that fifteen is not in the eight to twelve range. He said that Evans responded by stating that fifteen is in the eight to twelve range. R. 104, ll. 8-12. Varner then testified that he was having a problem with Miller and his family. Varner testified that he said he had told Miller twelve, "they were counting on twelve, and that, you know, the family was hoping for eight but Marshall understood an eight to twelve, he was going to get twelve and that he was not going to accept fifteen, fifteen was not in the range." R. 105, ll. 5-14.

Varner testified that that "[t]here is no question whatsoever I very clearly indicated to Mr. Miller that he had a plea agreement of eight to twelve, there is no question in my mind that that's what he relied on to his detriment and that he gave up his constitutional right to remain silent based on that, and there is no question in my mind, after doing this for 25 years, I don't go in and make people blind promises, I had an eight to twelve agreement." R. 105, l. 20 – 106, l. 3. Varner admitted on cross-examination that he never sent a written confirmation to the State of his understanding of the details of any plea agreement. R.109, ll. 20 - 25. Varner further admitted on cross that the sole basis of his motion concerning the voluntariness of Miller's statement was the reliance on the eight-to-twelve-year plea deal. R. 109, ll. 6-11.

SLED agent Frank O'Neil testified that he was involved in the arrest of Miller. R. 25, ll. 8-21. Agent O'Neil also testified that he told Miller that "all he could do by cooperating was help himself." R. 29, ll. 21 -22. Agent O'Neil also testified that he did not refer to a particular time or to a sentence that Miller could possibly receive. R. 29, ll. 23-24.

Assistant Attorney General Jennifer Evans then testified at the hearing. Evans testified that after Miller was arrested, the State indicated that they would like Miller to cooperate with the investigation. R. 39, ll. 9-17. Evans then testified that plea offers for state grand jury cases were not made verbally. The only plea offers made were formal written plea offers. Evans testified that those offers were made only with the expectation of full cooperation, full debriefing, cooperation throughout the investigation, and then at that point there is nothing promised except for the fact that the cooperation will be taken into account. She testified that she did not discuss sentencing because she did not know at that point what they (defendants) know or whether they are going to be fully honest. R. 40, ll. 9-25. Evans testified that she informed defense counsel that the State would consider Miller's cooperation and that the official plea offer would come after a full debriefing and would be sent in letter form. R. 49, l. 22 – 50, l. 7. Evans denied making any plea offer to Miller other than the fifteen-year offer that was enumerated in the formal written plea offer. Evans specifically denied making a plea offer for a range of eight to twelve years. R. 51, l. 5.

Evans then testified that she had a conversation with Varner after sending the formal plea offer of fifteen years to Miller. She testified that Varner repeatedly asked her about the eight to twelve year range that Miller wanted in return for his cooperation,

however she denied ever making an offer on those terms. Specifically, Evans testified, "I have never made an eight to twelve year offer to you at all." R. 52, ll. 16 – 18. Varner then asked Evans if she recalled making a statement that fifteen is in the eight to twelve range. Evans responded by testifying as follows:

"I didn't, no, I did not say that. But I can explain what I did say. You said, 'My client was hoping to get about twelve years,' and I said, Well fifteen years is close to what he was hoping for. But it was clearly at all times something that your client wanted and never anything that we offered by the State."

R. 54, ll. 8-14.

SLED Agent Chester Bragg then testified for the State. He acknowledged he was involved in the investigation of Miller. R.60, ll. 8-20. Agent Bragg testified that he was present for three interviews with Miller, including the interview of February 13, 2002. Agent Bragg testified that Varner did ask to speak privately with Miller before that interview. He further testified that he remembered re-entering the interview room while Varner went over the ground rules and the risks with Miller. Agent Bragg did not recall any sentencing range being spoken of at that time. R. 77, ll. 17-18.

SLED Agent Constance Sonnefield then testified. Sonnefield testified that the only promise she made to Miller was that his cooperation would be taken into consideration. R. 84, ll. 8-10. Sonnefield said that she remembered Varner telling them prior to Miller's interview that he had been speaking with Assistant Attorney General Evans. She also remembered Varner stating that he wanted everyone in the room so that everyone understands the ground rules. R. 93, ll. 1-15. Agent Sonnefield did not remember any sentencing range being discussed at that time. The only plea arrangement

she remembered being discussed was that Miller's cooperation would be taken into consideration. R. 94, ll. 4-10.

After the close of testimony, Varner moved that the State should either be forced to fulfill the plea agreement of eight to twelve years, or in the alternative, should not be allowed to enter the defendant's statements to law enforcement into evidence. R. 120, ll. 1-22. Varner argued that Miller detrimentally relied on his belief that the State offered a sentencing range of eight to twelve years and thus waived his right to remain silent. Varner argued that his waiver was made in consideration for a promise and therefore cannot be considered to be freely and voluntarily tendered if the State was not fulfilling the promise. Varner argued that as a result of this reliance, the statements made by Miller to law enforcement were not voluntary and therefore inadmissible.

The trial court then denied both motions, stating as follows:

"The evidence preponderating toward Mr. Miller's misunderstanding based upon an inadvertent representation by his attorney, if any, in fact was made within the attorney-client relationship or upon his own misunderstanding, of his own misunderstanding of any representations by the State. Argument having been made in the range of eight to ten years was within the attorney-client relationship as testified to by Mr. Varner, and related by the attorney to the defendant and that has not been testified to by the defendant. The Court may not and will not invade the attorney-client relationship and the confidentiality thereof and cause that to preponderate in favor of the defendant when he is not here to state what he understood there to be in existence which caused him to make any such statement and to allow himself to be cross-examined concerning his understanding of any offer was made before him or causing him to say what he did say.

Now this judge is also aware of the policy and procedures followed in such matters as we now are considering, and the Court fully and completely embraces the testimony of Agent, excuse me, of Assistant Attorney General Jennifer Evans with regard to there is no plea agreement offered to any defendant until after that defendant has been debriefed, and the offer in this matter was written and forwarded to the defendant Miller and contained a fifteen year offer. The Court finds that that is credible

evidence in the matter and accepts it as such and preponderates in favor of the State and preponderates in favor of the voluntariness of the statement.

The court cannot conclude that the statements to Agents Bragg and Sonnefeld were not freely and voluntarily given after Mr. Miller was afforded all the case law in such cases made and provided, or that the handwritten statement was not freely and voluntarily given.

The court denies the motion to enforce any plea agreement in the eight to twelve year range and the Court will permit the introduction of the statements, both written and oral, of Mr. Miller.”

R. 120, l. 23 – 122, l. 18.

During the trial, SLED Agent Chester Bragg was called by the State to render testimony. Varner renewed his original objections concerning the admissibility of the statements given by Miller. Agent Bragg then testified that he interviewed Miller on three separate occasions. The initial meeting was in Laurens County and lasted approximately two hours. The second and third meetings were between four and five hours. R. 1046, ll. 1-7. During these interviews, Miller confessed his involvement “in the methamphetamine business.” R. 994, ll. 11-13. Miller provided law enforcement with a written statement confessing to making and distributing methamphetamines as well as implicating many other individuals he had contact with in the manufacture and distribution of methamphetamines.

In addition to the information concerning his and his co-conspirators involvement in the methamphetamine conspiracy, Miller’s statement also alluded to information he had concerning other methamphetamine distributors, illegal gambling operations, theft rings, insurance and prescription fraud, a conspiracy to murder a law enforcement officer and a possible police misconduct.

The jury found Miller guilty of conspiracy to traffic in more than a hundred grams of methamphetamine. Varner then moved for a new trial on the basis of the judge's admission of Miller's statements into evidence. R. 1436, 1. 25 – 1437, 1. 5. That motion was denied. Miller was sentenced to twenty-five years imprisonment on August 24, 2004. During sentencing, defense counsel moved for a new trial on the same grounds that Miller's statements were given in return for promises of leniency. R 1440 - 1442. That motion was denied.

COURT OF APPEALS

The Court of Appeals noted that the trial court did not err in admitting Miller's oral and written statements at trial, because they were knowingly, intelligently, and voluntarily made. The court further held that, "the evidentiary record does **NOT** contain an enforceable plea agreement." State v. Miller, 652 S.E.2d 444, 455 (2007). Specifically, the Court of Appeals held that "Miller's statements were made in the 'hope' of leniency rather than as a consequence of a 'promise'."

ARGUMENT

1.

THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S ADMISSION OF THE MILLER'S STATEMENTS TO LAW ENFORCEMENT BECAUSE THERE WERE NO DIRECT OR IMPLIED PROMISES BY THE STATE.

The State did not make a direct or implied promise to Miller. It is true that a confession may not be extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of improper influence. State v. Rochester, 301 S.C. 196, 391 S.E.2d 244, 246 (1990) *citing* Hutto v. Ross, 429 U.S. 28, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976). However, an attempt to create a firm commitment out of plea negotiations has no merit. State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982).

The ruling of the Court of Appeals concerning the admissibility of Miller's statements should not be overturned. The trial judge's determination of whether a statement was knowingly, intelligently, and voluntarily made, requires an examination of the totality of the circumstances surrounding the waiver. State v. Rochester, 301 S.C. 196, 391 S.E.2d 244, 247 (1990) *citing* State v. Doby, 273 S.C. 704, 258 S.E.2d 896 (1979). On appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show and abuse of discretion. State v. Rochester, 301 S.C. 196, 391 S.E.2d 244, 247 (1990) *citing* State v. Livingston, 223 S.C. 1, 73 S.E.2d 850 (1952). Furthermore, on review, the court is limited to determining whether the trial judge abused his discretion. The court does not re-evaluate the facts based on its own view of the preponderance of

the evidence but simply determines whether the trial judge's ruling is supported by any evidence. State v. Compton, 366 S.C. 671, 677, 623 S.E.2d 661, 664 (2005) *citing* State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001).

In this case, the trial judge was in the best position to examine the totality of the circumstances. The trial judge had the opportunity to listen to the testimony of all witnesses. The trial judge had the ability to observe the demeanor and personally weigh the credibility of each witness called before him in the Denno hearing. After hearing all the testimony and weighing the credibility of the witnesses, the trial judge made a factual determination that, "The court cannot conclude that the statements to Agents Bragg and Sonnefeld were not freely and voluntarily given after Mr. Miller was afforded all of his rights, warnings and safeguards pursuant to the case law in such cases made and provided, or that the handwritten statement was not freely and voluntarily given." R. 122, ll. 8-14. Considering the totality of the circumstances, including Miller's assertions concerning the alleged offer of eight to twelve years, the trial judge made a factual determination using his discretion that the statements were freely and voluntarily given.

The trial judge expressly found that there was no plea offer of an eight to twelve year recommendation. The judge expressed that he was aware of the policy and procedure followed in plea negotiations involving the State Grand Jury. He stated that he completely embraces the testimony of Assistant Attorney General Evans with regard to there is no plea agreement offered to any defendant until after that defendant has been debriefed and the offer in the matter was written and forwarded to the defendant Miller and contained a fifteen year offer. R. 121, l. 19 – 122, l. 3. By doing so, the trial judge rejected the testimony of Varner that there was such an agreement.

On appeal, Miller contends that his statements to law enforcement were given in reliance upon a promise of leniency. Miller also contends that absent that promise, the statements would not have been given. However, the record does not substantiate this argument. Miller was not present to testify during the Denno hearing. Three officers and Assistant Attorney General Evans denied any promise of leniency. Although the officers and Evans told Miller it was in his best interest to cooperate, no one made any direct or implied promise of leniency. Moreover, without any testimony from Miller himself, the record has no indication of his understanding of exactly how his cooperation would affect any possible leniency he might receive.

There is nothing in the record that would indicate the State made a promise of leniency to the defendant. It is clear through the testimony of the State's witnesses that the only indication the State made concerning a possible sentence was that Petitioner's cooperation would be taken into account when it became time for the State to decide whether it was going to make a plea offer. In ruling on the admissibility of Miller's statements, the trial judge had the opportunity in the Denno hearing to listen to the testimony, assess the demeanor and credibility of all witnesses, and weight the evidence accordingly. The trial judge analyzed the voluntariness of Miller's statements in compliance with the due process requirements. Luculently, the admission of Miller's statements at trial was not an abuse of discretion. See State v. Miller, 652 S.E.2d 444 (2007). The hope for leniency and a promise of leniency are not interchangeable. It is clear that by cooperating in the investigation, Miller hoped to receive leniency, however, there is nothing in the record to support the proposition that leniency was promised to him.

Miller bases his appeal on the conversation between Evans and Varner of February 13, 2002. That conversation cannot be construed as a firm offer of an eight to twelve year sentencing recommendation by the State because Miller had not yet cooperated. It is clear from the record that Miller and his attorney were informed that no offer would be made until Miller cooperated and the State had the opportunity to assess the level of Miller's cooperation. The State made it clear that any plea offer would only be made after Miller had been debriefed and had cooperated fully with the investigation. During the time period Miller bases his argument upon, he had neither fully cooperated nor had he been fully debriefed. Therefore, he cannot now rely on the contention that he relied upon the preliminary negotiations made on his behalf by his attorney. The discussion with Miller's attorney was the State forthrightly telling counsel the best he could do for his client should his client wish to cooperate. The decision to cooperate under these parameters was left solely to Miller and his lawyer.

There is nothing in the record to indicate that the State advanced the idea of an eight to twelve year sentence to Miller. All the testimony in the record, including that of Miller's attorney, indicate that Miller and his counsel generated this range of sentencing and presented it to the State. The statements offered by Varner indicate a plea negotiation, not a plea agreement nor a promise by the State.

Finally, the testimony presented by Miller's attorney indicates that any negotiation made by the State was predicated with a reservation. Notably, Varner testified that Evans maintained that, "If he [Miller] delivers something phenomenal, sure, we're looking in the eight to twelve range." While the record does indicate that the

defendant cooperated with the investigation, there is nothing to indicate that Miller delivered anything phenomenal.

The statements given by Miller were not induced by a promise of leniency, but rather by his hope for leniency. Miller and his attorney were informed that a plea offer would not be made until Miller had fully cooperated with the investigation and as such, there was no promise for leniency, either expressed or implied, by the conversation between Assistant Attorney General Evans and defense counsel Varner. An attempt to create a firm commitment out of plea negotiations has no merit. The holding of the Court of Appeals should be affirmed.

THE COURT OF APPEALS PROPERLY RULED THERE WAS NOT AN OFFER OF AN EIGHT TO TWELVE YEAR SENTENCING RANGE FROM THE STATE TO MILLER.

The eight to twelve year sentencing range sought by Miller was not binding upon the State because there was never a plea agreement entered into for that range. Miller relies heavily upon Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495 (1971) and it's South Carolina progeny, Sprouse v. State, 355 S.C. 335, 585 S.E.2d 278 (2003), State v. Thompson, 278 S.C. 1, 392 S.E.2d 581 (1982) and State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994); in his assertion that state prosecutors are obligated to fulfill the promises they make to defendants when those promises serve as inducements to defendants to plead guilty. Those cases are distinguishable from this case. The trial judge found that there was no plea agreement for an 8-12 year sentence. Absent a valid plea agreement, the analysis stops. There was no agreement for the trial judge to enforce.

Further, this case does not trigger the analysis of Santobello as Miller exercised his right to a jury trial and never pled guilty. The cases cited by Miller all involve appeals of guilty pleas whereby the Appellant pled guilty to something different than he agreed. In this case, Miller failed to appear at the date specified for his trial. Therefore, he expressly refused any plea offer that was outstanding at the time and exercised his constitutional right to a jury trial. Although Miller had the absolute right not to attend his trial, by doing so, he expressly rejected any plea offer from the State.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the ruling of the Court of Appeals be affirmed.

Respectfully submitted,

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May 19, 2008

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Abbeville County

Wyatt T. Saunders, Jr., Circuit Court Judge

Opinion No. 4307 (S.C. Ct. App. filed 10/19/2007)

2002-GS-47-00032.

THE STATE,

RESPONDENT,

V.

MARSHALL MILLER,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 17, 2008.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred by holding petitioner's statements were properly admitted into evidence where those substantial statements were given to law enforcement as a result of promises of leniency for his cooperation, particularly where even the state's evidence showed petitioner was tendering those statements with the understanding of a plea bargain that would have substantially reduced his sentencing exposure?

2.

Whether the Court of Appeals erred by holding that a plea agreement did not exist where petitioner's attorney testified under oath that the state offered a recommended sentence of eight to twelve years in return for petitioner's cooperation, that petitioner accepted that offer, and where petitioner relied to his detriment on that plea agreement by giving a plethora of information about the methamphetamine conspiracy to the state, since this was fundamentally unfair and contrary to the public policy of encouraging cooperation and guilty pleas?

STATEMENT OF FACTS

Procedural history

Petitioner was indicted by the statewide grand jury on September 10, 2002 for trafficking methamphetamine (conspiracy) along with Tina Stevenson, Julie Prince, Martha Ellis, David Cummings, Tony Howard, Sandra Jo Hughes, Jason Davis, Ernest Covan, Bonnie Saylor, Ashley Bannister, Scotty Prince, Tonya Lee Michelle Madden, Samuel McNeill and Tracy Davis. The alleged time period of the meth conspiracy extended "from on or about November 19, 1999 until the present." It alleged the principals conspired "to sell, manufacture, deliver, purchase, or bring into the state, more than one hundred grams of methamphetamine." R. 1444.

The case of petitioner and co-defendant Billy Moore came on for trial on January 20, 2004 before the Honorable Wyatt T. Saunders, Jr. Kim R. Varner represented petitioner. Rauch Wise represent co-defendant Moore. R 1. Petitioner was tried in his absence.

At the conclusion of the trial on January 30, 2004 petitioner was found guilty, and co-defendant Moore was acquitted. R. 1435, ll. 9 -16.

On August 24, 2004, petitioner was sentenced to twenty-five years imprisonment. R. 1440, l. 23 – 1441, l. 4. Defense counsel repeated his motion for a new trial on the basis of petitioner's confessions being allowed into evidence where there "was clear evidence that Mr. Miller did rely on certain inducements and promises" when he gave his statements to law enforcement. That motion was again denied. R. 1441, l. 11 – 1442, l. 7.

The Court of Appeals affirmed petitioner's conviction in State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (2007). App. 1-19. This petition for a writ of certiorari follows the denial of rehearing. App. 29.

Introduction

Petitioner went the extra mile in cooperating with the state by supplying them information about the meth conspiracy during three separate meetings held in motel rooms, and he also provided law enforcement an extremely detailed written statement "naming names." In return he was to receive the sentence negotiated between the Assistant Attorney General and petitioner's attorney. While law enforcement officials widely acknowledged petitioner's extensive cooperation, the legal powers for the state refused to honor their promises, and petitioner was sentenced to twenty-five years imprisonment. While the state ultimately disputed exactly what petitioner was promised in return for in his enormous cooperation, only in a world of legal fiction can it seriously be disputed that he was promised leniency in sentencing in return for his detailed statements.

Relevant facts

Prior to trial defense counsel told the judge that if the state intended to attempt to use petitioner's statements against him that a Jackson v. Denno, 378 U.S. 368 (1964), hearing would be required. Counsel also was moving to enforce the plea. R. 8, l. 18 – 9, l. 10. Assistant Attorney General Hood said such a hearing would necessitate Jennifer Evans, who was the prosecutor at the time of the plea negotiations, testifying. Defense counsel Varner would later testify under oath – as a witness -- that petitioner accepted a plea offer from Evans for a sentence of between eight and twelve years in return for his statements and his cooperation. Petitioner accepted that offer, Varner testified, and cooperated and gave statements. R. 8, l. 18 – 9, l. 10. Defense counsel argued petitioner should get "the benefit of the bargain, but the state can't win both ways. Not only do not give the deal, but they get to use all the information." R. 11, l. 19 – 12, l. 7.

A hearing on petitioner's statements and the plea agreement was held on January 21, 2004, prior to trial. SLED agent Frank O'Neil testified he was involved in the arrest of petitioner on September 24, 2002. R. 25, ll. 8 – 21. O'Neil told petitioner he could help himself by cooperating. R. 29, l. 18 - 30, l. 4. O'Neil later spoke with defense counsel Varner, petitioner's retained counsel. Varner told O'Neil "about Marshall Miller's willingness to cooperate. His attorney indicated that he was willing to cooperate fully by giving us information concerning his involvement and others in the conspiracy." R. 26, ll. 16 – 22.

As a result of his conversation with Varner, O'Neil contacted special agent Chester Bragg and agent Sonnefield to arrange a time for them to interview petitioner. O'Neil testified that both agents interviewed petitioner three times: February 13, 2003, February 25, 2003, and March 4, 2003. R. 27 ll. 12 – 18. As will be seen infra those interviews lasted for several hours on each occasion. In addition, petitioner gave the agents about a thirty page written statement implicating many other individuals in the conspiracy, and promising more specific information he could provide to law enforcement. See State's Exhibit 71, Petitioner's Written Statement; R. 998, l. 21 – 1031, l. 11. As will also be seen infra defense counsel Varner testified he told petitioner to expect to receive a twelve year sentence from the state's recommendation of eight to twelve years. However, Varner said petitioner was persistent in attempting to show the state he deserved *less than twelve years* in that eight to twelve range *by fully cooperating*. In fact, as will also be seen infra, the state told Judge Floyd at petitioner's bond reduction hearing that petitioner had "fully cooperated."

On cross-examination, O'Neil acknowledged petitioner had the "jailhouse lawyer type mentality," meaning petitioner understood that those who cooperate with the state are rewarded, and those who falsely maintain their innocence pay the price. R. 30, ll. 8 – 10. O'Neil admitted that he talked to Varner on several occasions following his conversation with petitioner. R. 30, ll. 18 –

20. They had their first meeting with O'Neil and the assistant attorney general in Varner's office in Greenville. R. 31, ll. 7 – 12.

During this meeting they discussed in general term the perimeters or possibilities of what petitioner could expect for his cooperation. R. 31, ll. 13 – 19. O'Neil acknowledged that he remembered being told petitioner could name other people involved in the drug conspiracy, but he stated he did not remember being told petitioner could also provide information about an illegal gambling operation and stolen guns. R. 31, l. 20 – 32, l. 10.

Assistant Attorney General Jennifer Evans then testified. Evans admitted after petitioner was arrested “we did indicate that we would like Mr. Marshall Miller to cooperate with our investigation.” R. 39, ll. 9 – 17. Evans said she never interviewed petitioner herself. R. 39, l. 22 – 40, l. 3. Evans maintained that the only plea agreements the Attorney General's office entered into were “formal written plea offers.” R. 40, ll. 4 – 16. Evans also claimed that in general there is “nothing promised except for the fact that we will take that cooperation into account. R. 40, ll. 9 – 25. Evans said she at one point she sent a plea offer letter to Varner wherein it was stated that the state would recommend a fifteen year sentence for petitioner in return for his guilty plea. R. 41, l. 10 – 42, l. 11. That letter was dated April 29, 2003, about seven weeks after the third interview with petitioner, and after he also gave his written confession which provided the state a plethora of information about the conspiracy and illegal activity. See Written Statement. R. 1446; R. 43, l. 2 – 3.

Evans admitted that Varner talked to her about a recommendation of eight to twelve years. However, Evans maintained: “*our offer has always been fifteen years.*” R. 44, ll. 10 – 23; R. 45, ll. 5 – 8. (emphasis added). On cross-examination by Varner, Evans acknowledged she knew Varner had been talking “back and forth” with Agent O'Neil about the information petitioner could

provide. R. 46, ll. 8 – 16. Evans also said the only promise during the interview process and otherwise was that if petitioner fully cooperated “we would take that into account in giving a plea offer.” She again repeated that she remembered that eight to twelve range being raised, but she added, “I don’t like to talk about numbers.” R. 50, ll. 8 – 24. Evans maintained: “I have never made an eight to twelve year offer to you [counsel Varner] at all.” R. 52, ll. 9 – 18.

Evans denied that she later told defense counsel Kim Varner after making the eight to twelve year offer: “Kim fifteen is in the twelve, eight to twelve [year] range.” Evans testified that Varner told her petitioner was hoping to get twelve years, and she said she told Varner, “Well, fifteen years is close to what he was hoping for.” R. 54, ll. 5 – 16.¹

Evans admitted she remembered problems arose between Varner and petitioner because of “the argument of the eight to twelve versus him accepting fifteen.” R. 57, ll. 15 – 18. Evans denied that she remembered being told by Varner that he had advised petitioner he would need to get another attorney to file a motion to enforce the plea agreement because Varner was now a potential witness. Evans said she only remembered being told by Varner that he asked petitioner’s mother “to hire to another attorney on the forfeiture matter.” R. 58, ll. 3 – 12.

SLED Agent Chester Bragg testified next for the state. He acknowledged he was involved in this operation -- “Crankdown.” R. 60, ll. 8 – 13. Bragg testified his first meeting with petitioner and Agent Sonnefield was at the Laurens County Police Department. R. 61, l. 15 – 62, l. 2. Bragg remembered that Varner was present but that Varner left before petitioner began giving his first

¹ Evans insinuated petitioner should not live up to the plea agreement by refusing to take a polygraph. However she then admitted petitioner was told by a doctor that he could not take a polygraph, and the polygraph examiner refused to give the polygraph. R. 52, l. 25 – 55, l. 3. Evans also said petitioner maintained that Tracy Davis was not involved in the conspiracy, and she later admitted her involvement. R. 55, ll. 4 – 18.

statement. R. 62, ll. 3 – 10. Braggs said petitioner was given his Miranda warnings, and the initial interview lasted “approximately a couple of hours.” R. 63, ll. 8 – 10.

For the second interview, Bragg said they had petitioner picked up at the Abbeville City jail and taken to a motel in Greenwood. Petitioner apparently did not want to be seen with law enforcement for safety reasons. R. 64, l. 24 – 65, l. 3; R. 70, ll. 2 – 8. Braggs said petitioner was driven to the back of the motel so that he would not be seen. Bragg remembered petitioner sat in a chair in the motel room while he gave his statements during the second and third interviews in the Greenwood motel: “He could have sat on the bed if he wanted.” R. 66, ll. 3 – 24.

Braggs said before or during either the second or third interview, “I can’t remember exactly” petitioner gave him his written statement that he had written while in the jail. R. 67, ll. 10 – 18. State’s Exhibit 71, R. 1446. Bragg remembered that before the third interview petitioner was again picked up from the Abbeville jail and taken to the Greenwood motel. Bragg acknowledged that these interviews took place with the understanding and support of Varner. R. 68, ll. 17 – 21. Bragg admitted that Varner understood that during their discussions that Bragg would not be the person making the plea offer. R. 72, ll. 3 – 14.

Bragg also acknowledged that it appeared to him petitioner trusted him, Bragg. R. 72, ll. 15 – 19. Bragg said that petitioner wanted to get out on bond because he wanted to be wired so he “could deliver several other crank cooks.” R. 73, ll. 17 – 21. Bragg drove petitioner to Columbia after the third interview for a bond reduction hearing. R. 70, l. 14 – 71, l. 8. During the bond hearing, Bragg admitted that he told Judge Floyd that: “Marshall had fully cooperated, he had given useful and full information.” R. 74, ll. 6 – 21.

As to the first interview in Laurens, Bragg said he did remember seeing Varner talking in the parking lot with Assistant Attorney General Jennifer Evans before that interview on February

13, 2003. R. 75, ll. 3 – 12. Bragg acknowledged he did remember Varner asked to talk privately to petitioner before that interview. R. 76, ll. 4 – 20. As will be seen infra, Varner testified that he spoke on his cell phone with Evans while driving to the first interview in Laurens.

SLED Agent Constance Sonnefield then testified. R. 82, ll. 1 – 9. Sonnefield maintained that the only promise she gave petitioner was that his cooperation “would be taken into consideration.” R. 84, ll. 8 – 10. Sonnefield said that her role was arranging the motel rooms and other matters, and that Bragg did the interviewing of petitioner, and Bragg also took possession of petitioner’s written statement. R. 83, l. 15 – 90, l. 19. Sonnefield said she remembered Varner being about five minutes late to the first interview, and she remembered him apologizing and stating he had been outside in the parking lot talking to Assistant Attorney General Jennifer Evans. R. 92, l. 16 – 93, l. 5.

Sonnefield also recalled that Agent Bragg offered to leave after Varner and petitioner talked in private. However, Varner said: “No, I want you here so everybody understands the ground rules . . .” R. 93, ll. 10 – 19. As to the exact negotiated range of the sentence, Sonnefield also maintained: “I don’t remember numbers [the eight to twelve range]. I remembered that if you cooperated it would be taken into consideration.” R. 93, l. 24 – 94, l. 13.

Varner then told the judge he needed to testify “as a witness.” R. 94, l. 23 – 95, l. 1. Varner then testified under oath that he was retained by petitioner shortly after petitioner’s arrest. Varner said that he had numerous conversations with Assistant Attorney General Jennifer Evans and Special Agent Frank O’Neil about petitioner getting a bond and his potential cooperation with the state. R. 96, ll. 5 – 17. Varner testified that he told both Evans and O’Neil that petitioner had information about a murder for hire of a police officer in the Ware Shoals area, “about several arsons cases, about a potential underground bunker of many stolen weapons . . . and that he could

name numerous other individual in the conspiracy and that he was willing to be wired and make buys." R. 96, l. 5 – 97, l. 21.

Varner further testified that Evans told him "this was not solely her decision. The term I use is that they had to roundtable it." R. 97, ll. 10 – 25. Varner remembered that as of February 13, 2003 "Jennifer Evans, the Attorney General, and I had not firmed anything up." R. 100, ll. 2 – 5. Varner added that petitioner was "very jailhouse smart" and he wanted to make petitioner was aware that they did not have a deal at that point. R. 100, ll. 2 – 13.

Varner said that on his way to the police station for the first meeting he talked with Evans on his cell phone and he indicated to her that petitioner wanted a sentence of less than five years. "Her response to that was she felt that was ludicrous." R. 100, ll. 14 – 25. Varner said he told Evans he fully understood five years was impossible but that he nonetheless had an obligation to pass on his client's request. R. 100, l. 22 – 101, l. 4.

Varner said Evans told him at that point she "could not make a commitment." Varner remembered telling Evans: "I've been doing this for twenty-five years, Mr. Miller is in jail twice, he's not going to talk based on a hope, a promise and a kiss, and I asked her could she give me a sentence in the range under ten years. She said no, she couldn't." Varner then testified as follows:

She came back with, "We can do something *in the eight to twelve range*," and I said, "I know what that translates into, that translates *into twelve*," and she kind of laughed and said, "Well, in all probability it's going to be twelve," but a statement to the effect, and I think I made this statement, "Well, if he could deliver Osama Bin Laden or something like that, something phenomenal, is it possible to get under that range? And she, I believe, took that statement in jest, which is the way it was intended, and she said, "If he delivers something phenomenal, sure, we're looking in the eight to twelve range."

At that time she told me, she said, because I asked her, I said, "Look I don't want to put Marshall in a bad situation, I don't want to put

myself in a bad situation, I'm in the car on the way." At that time she told me, she said, "Kim, you can check with any of the lawyers I have dealt with before, I do what I say I'm going to do, provided Marshall does what he's going to do."

R. 101, l. 13 – 102, l. 8. (emphasis added).

Varner testified he talked to petitioner in private for about five minutes before the proposed first interview. He then pronounced that he wanted the two SLED agents present while he "went over what I call the ground rules." "I wanted them present for this so there would not be a misunderstanding." R. 102, ll. 20 – 25. "I explained to Mr. Miller in front of the agents that he did not have to make a statement, that this was his choice, and I reiterated to him that we had a deal of eight to twelve years." R. 102, l. 20 – 103, l. 4. Varner said petitioner responded: "You got a deal for twelve years, I'll never get the eight, I'll never get ten, I'm going to get twelve, and I said, 'Plan on the twelve.'" R. 103, ll. 1 – 7.

Varner said based on this petitioner relied "on getting a twelve year sentence. He not only cooperated, he gave written statements, he fully cooperated and offered to do even more, to go outside and tell them of other criminal activity." Varner then referenced a newspaper article where petitioner gave information on a big gambling operation in Georgia. Varner added that at least four other people were brought into the conspiracy as a result of petitioner's information. R. 102, ll. 1 – 17.

Regarding the subsequent fifteen year plea offer petitioner was given, Varner said he told Evans: "Jennifer, fifteen years is not in the eight to twelve range, that's what we agreed to." Varner testified Evans responded: "Kim, fifteen is in the eight to twelve range." R. 104, ll. 1 – 12. Varner also testified that when he countered that fifteen years was not in the eight to twelve range, Evans

responded: "Well, fifteen is in the eight to twelve [year] range the way I look at it." R. 104, ll. 13 – 25.

Because of all this Varner said he had to talk to petitioner for "an extended period of time," and he then told Assistant Attorney General Evans and Hood that "I was having a conflict with my client and with his family. It was a mess. I said the family was told I told him twelve, they were counting on twelve, and that, you know, [the] family was hoping for eight but Marshall understood an eight to twelve, he was going to get twelve, and that he was not going to accept fifteen, fifteen was not in the range. And I advised her that he said he was going to get another attorney, not to fire me, but get another attorney to bring an action to enforce the plea agreement." R. 105, ll. 4 – 14.

Varner then testified he was told that there would be another guilty plea date "if he wants to do it at that point in time or if he changes his mind and wants to plead, that's fine. That's where it was left." However, Varner added, "[t]here is no question whatsoever I very clearly indicated to Mr. Miller that he had a plea agreement of eight to twelve, there is no question in my mind that that's what he relied on to his detriment and that he gave up his constitutional right to remain silent based on that, and there is no question in my mind, after doing this for 25 years, I don't go in and make people blind promises, I had an eight to twelve agreement." R. 105, l. 15 – 106, l. 3; R. 109, ll. 4 – 10.

On cross-examination Varner was asked why he did not send a letter verifying the agreement. Varner answered, "You know, when you trust someone's integrity and someone vouches for it . . . you know what, I made a terrible mistake by trusting somebody." R. 109, ll. 20 – 25. Varner elaborated: "Some three months later I got a plea offer that was totally contrary [fifteen year] to what we had discussed. R. 110, ll. 1 – 4.

As for attempting to enforce the plea agreement earlier, Varner said the problem was that he was a potential witness, and he remembered another lawyer did contact him about representing petitioner but Varner said he did not know if petitioner was able to come up with the retainer fee for that lawyer. Varner testified he therefore ultimately had to make the motion to enforce the plea agreement himself. R. 110, ll. 10 -22. Varner said that petitioner "detrimentally relied on the eight to twelve year representation of the deal." R. 111, ll. 6 - 11.

After the testimony was closed, Varner argued that petitioner detrimentally relied on the state's offered sentencing range and waived his right to remain silent. Varner said petitioner was "very much a jailhouse lawyer" and he thought they had an eight to twelve deal. R. 112, l. 3 - 114, l. 2. Varner said he represented to petitioner, and the agents verified, "that petitioner had a promise." R. 114, l. 3 - 115, l. 8.

Varner argued that petitioner's statements were given in consideration for a promise, and his statements therefore cannot be considered to be freely and voluntarily tendered. Varner repeated that the promise was relayed to petitioner through his attorney and the Attorney General's office who "in fact had the authority to enter into the agreement, that takes away the voluntariness of it . . ." Varner argued the statements should be suppressed. R. 115, ll. 1 - 24.

The Assistant Attorney General then argued the plea offer was fifteen years. R. 116, ll. 2 - 22. Varner responded that the state wanted the best of all worlds: "They don't want to go through with an agreement but they want to get the fruits of the agreement, and it's one or the other." R. 120, ll. 7 - 13. Varner argued the state should either be forced to fulfill the plea agreement or that it could not use petitioner's statements given in return for a promise of leniency against him during a trial. R. 120, ll. 1 - 22.

The judge then denied the motion to enforce “any plea agreement in the eight to twelve year range and the court will permit the introduction of the statements, both written and oral, [by] Mr. Miller.” R. 120, l. 23 – 122, l. 18.

The trial

At the conclusion of the trial, during his closing statement, Varner told the jury that what they had just witnessed was the state’s witnesses making petitioner the fall guy: “When you see that circle of all the people around, all the arrows pointing at Marshall, substitute the word patsy, sucker, because there was a conspiracy here, the conspiracy was let’s all blame it on Marshall, he’s the one that doesn’t have the connections here, he’s the one that doesn’t know [people], you know, they are all in it up to their neck, bottom line . . .” R. 1319, ll. 18-25.

Towards the very end of the state’s case, the attorneys discussed the limits and the manner of SLED agent Chester Bragg’s testimony about what petitioner told him. The attorneys discussed redacting petitioner’s written statement, and the Assistant Attorney General stated he wanted it all “squared away” on what Bragg “is or is not to say.” Defense counsel Varner said he was renewing his original objections but that he had a separate objection regarding Bragg’s use of his notes during his testimony that he hoped could be worked out during the break. The judge responded that Varner’s objections regarding the statements had been ruled upon, and Varner said that that he just wanted to be sure the judge to understand that his original objections stood. R. 875, l. 9 – 877, l. 5.

Again, prior to Bragg’s testimony, Varner brought up the limits and the manner of Bragg’s testimony. The attorneys and the judge discussed his testimony. The judge ruled that Bragg’s notes could not be introduced as an exhibit, but that he could use them to refresh his memory. Varner would be allowed to inquire about Bragg using his notes. The judge noted that Bragg’s testimony from his notes would be “an oral confession to the officer . . . he can say what the defendant told

him.” Varner then agreed they had now covered the “Jackson v. Denno matter concerning his handwritten notes.” The Assistant Attorney General added that he did not think Varner was challenging the statement “outside of the purported promise or promise was believed . . .” Varner responded, “I have nothing additional to say than what I have already said before in your previous ruling . . .” Varner assured the state he was not going to argue in addition that petitioner was drugged or tortured. R. 949, l. 21 – 954, l. 25.

Bragg then testified he was present when petitioner was arrested on September 24, 2002. R. 957, ll. 5 – 14. Bragg recalled that SLED agents seized “some vehicles there on the property,” and he noted that there was a trailer on the property where petitioner was arrested. R. 967, ll. 5 – 24. Bragg said that some powder and some syringes and some pills were also seized. R. 961, ll. 2 – 22. The defense stipulated that some of the evidence seized came back as methamphetamine. R. 964, ll. 18 – 21.

Bragg testified that he subsequently interviewed petitioner. The first time was in February at the Laurens City Police Department. Agent Sonnefield was with him. R. 992, ll. 12 – 21. The interview lasted a couple of hours. R. 992, ll. 22 – 23. The second and third interviews occurred in a motel in Greenwood. R. 993, l. 2 – 994, l. 5.

Bragg testified that petitioner confessed to him that he was “in the methamphetamine business.” R. 994, ll. 11 – 19. Bragg recalled petitioner telling him that Jason and Ray Powell were some of the people who made methamphetamine with him. R. 995, ll. 1 – 3. Bragg said petitioner admitted he was a meth maker and that he also sold meth. R. 996, ll. 3 – 9.

The state also introduced a copy of petitioner’s written statement that he gave to Bragg. R. 996, l. 14 – 1031, l. 11. In this statement petitioner described how he began using meth. R. 998, l.

18 – 1000, l. 5. Petitioner told law enforcement that “Tammy and Rick” made “killer dope,” and petitioner’s inquired if there was a continuous supply. R. 1000, ll. 2 – 9.

Petitioner described how he met David Meadows who was a meth cook. R. 1001, l. 14 – 1002, l. 9. He also described how law enforcement in Greenville found a meth lab but couldn’t prove “it was Jason’s and David’s lab.” R. 1002, ll. 5 – 11. Petitioner said Jason at one point threatened to kill him if he told anything about cooking meth “so I started helping him cook.” Petitioner said they would cook about two times a week and spent the rest of the week getting supplies. R. 1003, ll. 18 – 25.

Petitioner wrote about how David Meadows was paranoid about Jason. Petitioner said they then started using a woman named Lisa’s shed for about six to eight months where he cooked meth with Jason. They then moved to Jason’s trailer. R. 1004, ll. 5 – 20. Petitioner and Ray Powell later became partners. R. 1004, ll. 24 – 25. Petitioner also described selling Ray Powell meth. R. 1005, l. 4 – 1006, l. 9. Jason, Ray and petitioner worked together and petitioner said Ray was scared because Jason always carried a gun. R. 1006, l. 22 – 1008, l. 11.

Petitioner then wrote to Bragg about various “cook sites” in Abbeville County, Greenwood County, Laurens County, and Georgia. R. 1009, l. 2 – 1010, l. 9. Petitioner described how at one point two pitchers blew up on him and he got burned and Rick Wren had to finish the cooking. “Me and Ernest and Ray cooked at Jeff Frye’s pasture behind his trailer [after that]. R. 1010, ll. 14 – 24. In his voluminous statement petitioner also implicated Jeff Horne and Sandra Hughes, Steve Hodges and Tammy Stewart. R. 1013, ll. 2 – 22. Petitioner implicated several other people during his statement. R. 1019, l. 2 – 1028, l. 17. Petitioner statement ended as follows:

Things I will give you, Ray Powell, partner and cook. Jason S. and Preacher, major cook. Will Vinson and McMaw, Mexican connection, Denise Haggan, Frank Provan, major cook twenty years.

Marvin, major cook twenty years. Conspiracy to commit murder on police officer. A.J. Welch, Ware Shoals Police Chief, dirty. Brandon Scott possible. Poker house in Georgia. Two insurance fraud, workman's comp claims. Will give everything I know about people information on arson in Due West antique shop, MeMaw. Give the information on David Cumming's arson. List of cooks and cook sites I know of. A theft ring in Georgia and South Carolina. Deputy Sheriff Abbeville leaks information to Ray. Prescription fraud, list of doctors they go to. Names of two OC dealers, big dealers. Save you a trial. I want a bond and any condition you want to put on it so I can finish my, so I can finish my trailer, plus I want to start my time at Clinton City or Anderson City for safety reasons. I will do, someone will do for me. Plus be fair about the time I get. If I deliver all of this I should get very little time."

R. 1030, l. 13 – 1031, l. 11.

Petitioner also told Bragg in his written statement about people who had lied to the police in their statements which were provided to him during discovery. R. 1031, l. 22 – 1032, l. 13.

On cross-examination Braggs said the initial meeting in Laurens with petitioner was approximately two hours long. The final two meetings were about four to five hours long. R. 1046, ll. 1 – 7. Bragg admitted that petitioner cooperated and gave him the thirty page written statement, and he acknowledged he could not recall anyone else cooperating in the investigation to that extent. R. 1047, l. 22 – 1048, l. 8.

Following petitioner's conviction defense counsel Varner moved for a new trial on the basis of the judge allowing petitioner's statements into evidence. R. 1436, l. 15 – 1438, l. 5. That motion was denied. R. 1437, l. 8. Similarly at sentencing defense counsel moved for a new trial on the same grounds that petitioner's statements were given in return for promises of leniency, and that a new trial therefore should be granted. R. 1441 - 1442.

Court of Appeals

The Court of Appeals noted Varner's testimony, and wrote that petitioner did not testify. The Court of Appeals found "[A]ttorney General Evens denied *any promise of leniency* in exchange for Miller's statements. Although the officers and Evans told Miller it was in his best interests to cooperate, no one made any direct or implied promise of leniency. As a result, Miller's statements were made in the 'hope' of leniency rather than as a consequence of a 'promise.' State v. Miller, 375 S.C. 370, 387, 652 S.E.2d 444, 453 (2007). App. 15.

ARGUMENT

1.

Defense counsel correctly argued petitioner's statements to law enforcement were clearly given in reliance upon the promises of leniency. The Court of Appeals erred by holding these statements to petitioner were admissible against petitioner where they clearly were given in reliance on a plea agreement -- be it eight to fifteen years or just fifteen years.

An inculpatory statement may not be contracted "by any direct or implied promises, however slight [or] by the exertion of improper influence." State v. Rochester, 301 S.C. 196, 391 S.E.2d 244, 246 (1990), *citing* Hutto v. Ross, 429 U.S. 28, 30 (1976). See, also, State v. Osborne, 301 S.C. 363, 392 S.E.2d 178 (1990) (threat that charges could be brought if information was withheld made the confession inadmissible in the same manner as a promise of leniency made the statement that followed the promise inadmissible).

Here, defense counsel Varner and Assistant Attorney General Evans disagreed over the *details of the exact* plea offer. Assistant Attorney General Evans maintained that the only offer to petitioner was fifteen years, and that she sent a letter dated April 29, 2003 with that offer. R. 41, l. 10 – 42, l. 11. Varner strenuously maintained that Evans offered petitioner a recommended sentence in the range of eight to twelve years when he pled guilty. Varner testified he told petitioner to count on the sentence being twelve years, and nothing in the lower range. Varner also said Evans told him at one point that fifteen years was essentially in the eight to twelve year range. The dispute over whether the offer was fifteen years or eight to twelve years does not have to be resolved – either way petitioner gave his statement in return for a promise of leniency. The holding of the Court of Appeals that petitioner essentially did not give the state the plethora of information in this case as a consequence of a promise of leniency is even refuted by Evans' own testimony above.

It is clear through Varner's testimony, and any fair reading of petitioner's statements that he nonetheless was attempting to get a "downward departure" within that eight to twelve year range. Further, Judge Floyd was told at a hearing to reduce petitioner's bond that petitioner had "fully cooperated," and he met with law enforcement on three separate occasions apparently for about ten total hours. Petitioner also gave a long written statement to the police implicating others and offering to help even further. See State's Exhibit 71. R. 1446.

Petitioner's statements were unquestionably given in return for a promise of leniency where he was facing a twenty-five year sentence. Further, it should be clear beyond any dispute that petitioner's statements were inextricably entwined with the state's promises of leniency. See State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987). When examining the totality of the circumstances, as required, petitioner's statement cannot be separated from the promises of leniency, and Varner's vehement testimony, and any fair reading of this record leads to that conclusion. The state even told Judge Floyd at a bond reduction hearing -- which agent Bragg drove petitioner to -- that petitioner had "fully cooperated." See State v. Doby, 273 S.C. 704, 258 S.E.2d 896 (1979).

Again, this is not a case where there was either a plea agreement or not a plea agreement. See State v. Compton, 366 S.C. 671, 623 S.E.2d 661 (Ct.App. 2005). It is undisputed that petitioner's statements were given in return for a promise of leniency -- be that eight to twelve years or fifteen years.

Defense counsel Varner correctly argued the state could not have it both ways, they could not disregard the fact that the statements were given where a guilty plea - - even by the state's evidence - - was envisioned, and then use petitioner's statement against him at trial. That was fundamentally unfair, contrary to public policy, and was not allowed in South Carolina even before

the rules of evidence. See State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986). (Now also Rule 410, SCORE).

When a guilty plea is not consummated or it is later withdrawn, statements given to obtain that leniency cannot be used against the defendant at trial. Defense counsel was correct that the state could not have it both ways where petitioner relied to his detriment on the promise of leniency in the plea offer.

As the Court noted in State v. Mathis it is in the public interest to encourage the settlement of criminal cases, and this policy favors not prejudicing a defendant who cooperated and gave statements, but later, for whatever reason, the guilty plea never resulted. See State v. Wright, 103 Ariz. 52, 436 Pac.2d 601 (1968). It is undisputed petitioner's statements were given in return for a promise of leniency and that a plea offer was extended to petitioner based on his cooperation. The Court of Appeals erred by holding otherwise, and certiorari should be granted.

The Court of Appeals erred by ruling there was not an offer of an eight to twelve year sentence in the plea offer from Assistant Attorney General Evans to defense counsel Varner, which petitioner accepted.

The Court of Appeals held that: "Discussions between Evans and Varner about a range of potential sentences prior to Miller's debriefing were plea negotiations and cannot be construed as an 'offer.' Nothing in the testimony indicates Evans ever intended to agree to an eight-to-twelve-year plea." State v. Miller, 375 S.C. 370, 390, 652 S.E.2d 444, 454 (2007). App. 18. However, as seen, Varner vehemently maintained under oath that Evans offered a sentencing recommendation of eight to twelve years at petitioner's guilty plea if he cooperated and gave the police statements and information. As seen, the state told Judge Floyd at the bond reconsideration hearing that petitioner "fully cooperated." Varner also testified that Evans later told him that "fifteen was close to twelve" – apparently meaning petitioner did not have any real complaint.

Varner also testified that he communicated the eight to twelve year plea offer to petitioner, that petitioner was a "jailhouse lawyer," and that petitioner would not have given the police statements without the certainty of this deal. Varner testified he talked to petitioner in private for about five minutes before the proposed first interview. He then pronounced that he wanted the two SLED agents present while he "went over what I call the ground rules." "I wanted them present for this so there would not be a misunderstanding." R. 102, ll. 20 – 25.

"I explained to Mr. Miller in front of the agents that he did not have to make a statement, that this was his choice, and I reiterated to him that *we had a deal of eight to twelve years.*" R. 102, l. 20 – 103, l. 4. Varner said petitioner responded: "*You got a deal for twelve years, I'll never get the eight, I'll never get ten, I'm going to get twelve, and I said, 'Plan on the twelve.'*" R. 103, ll. 1 –

7. (emphasis added). See Sprouse v. State, 355 S.C. 335, 585 S.E.2d 278 (2003); State v. Thompson, 278 S.C. 1, 392 S.E.2d 581 (1982); State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994).

Varner said based on this petitioner relied “on getting a twelve year sentence. He not only cooperated, he gave written statements, he fully cooperated and offered to do even more, to go outside and tell them of other criminal activity.” Varner then referenced a newspaper article where petitioner gave information on a big gambling operation in Georgia. Varner added that at least four other people were brought into the conspiracy as a result of petitioner’s information. R. 102, ll. 1 – 17.

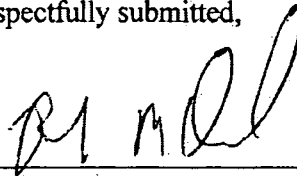
The Court of Appeals acknowledged in its opinion that a “defendant who provides beneficial information to law enforcement can be said to have detrimentally relied . . . [and] the fact an agreement was oral does not prevent possible enforcement.” Citing Custodio v. State, 373 S.C. 4, 11, 644 S.E.2d 36, 39 (2007). This Court also noted that South Carolina has recognized the principles set forth in Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495 (1971) on public policy demanding the enforcement of an accepted plea bargain. State v. Miller, 375 S.C. 370, 652 S.E.2d 444, 454 (2007).

However, the Court then cited State v. Whipple, 324 S.C. 43, 49, 476 S.E.2d 683, 687 (1996) for the proposition “that a defendant may not attempt to create a firm commitment out of plea negotiations.” State v. Miller, 375 S.C. 370, 652 S.E.2d 444, 454 (2007). However, as petitioner argued on rehearing Whipple was clearly a capital case involving the “hope” of a sentence, and not a plethora of information given in return for an express promise as was the situation here. Whipple is clearly distinguishable, and this is not and was not a hope of consideration case. App. 26-27.

CONCLUSION

Based on the foregoing argument, a writ of certiorari should be granted in order to allow full briefing on these two issues.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR PETITIONER.

This 21st day of April, 2008

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Abbeville County
Wyatt T. Saunders, Jr., Circuit Court Judge

Opinion No. 4307 (S.C. Ct. App. filed 10/19/2007)
2002-GS-47-00032.

THE STATE,

RESPONDENT,

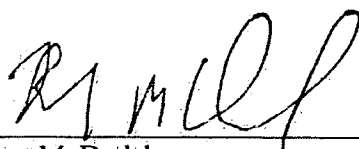
V.

MARSHALL MILLER,

PETITIONER

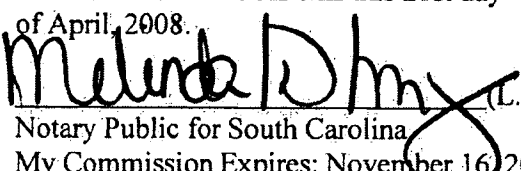
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on DeWayne Pearson, Esquire, and the S.C. Court of Appeals this 21st day of April, 2008.



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of April, 2008.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: November 16, 2008

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Abbeville County

Honorable Wyatt T. Saunders, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

MARSHALL MILLER,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err by admitting Appellant's statements to law enforcement into evidence?
2. Did the trial judge err by refusing to enforce a plea agreement of eight to twelve years?

STATEMENT OF THE CASE

On September 10th 2002, the Statewide Grand Jury indicted Appellant and 14 other individuals for conspiracy to traffic more than 100 grams of methamphetamine from on or about November 19, 1999 until the present.

The case of Appellant and co-defendant Billy Moore was called for trial on January 20, 2004, before the Honorable Wyatt T. Saunders, Jr. and a jury. Kim R. Varner represented Appellant. R. 1. Appellant was tried in his absence. At the conclusion of the trial on January 30, 2004, Appellant was found guilty and co-defendant Moore was acquitted. R. 1435, ll. 9-16.

On August 24, 2004, Appellant was sentenced to twenty-five years imprisonment. R. 1441, ll. 2-4. Defense counsel moved for a new trial on the basis of Appellant's statements to law enforcement being allowed into evidence. R. 1441, l. 11 – 1442, l. 2. That motion was denied. This appeal follows.

STATEMENT OF THE FACTS

On September 10th 2002, the Statewide Grand Jury indicted Appellant along with 14 other individuals for conspiracy to traffic in more than 100 grams of methamphetamine from on or about November 19, 1999 until the present. The State Law Enforcement Division (SLED) arrested Appellant on September 24, 2002. Following his arrest, SLED agents Bragg and Sonnefield interviewed Appellant concerning his knowledge of the conspiracy on three separate occasions, February 13, 2003, February 25, 2003 and March 4, 2003. R. 27, ll. 6-18. During these interviews, Appellant provided information implicating himself and others within the conspiracy to traffic methamphetamines as well as other illegal activities.

On April 29, 2003, Assistant Attorney General Jennifer Evans sent a written plea offer to Appellant, through his attorney Kim Varner. That offer indicated that the State would recommend a fifteen-year sentence for Appellant in return for his guilty plea. This offer was made after consideration of the Appellant's cooperation in the investigation. R. 41, l. 10 – 42, l. 11.

Appellant failed to appear at his trial on January 20, 2004. Prior to the start of Appellant's trial, defense counsel requested that the court hold a hearing pursuant to Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774 (1964), hearing to determine the voluntariness of the Appellant's statements to law enforcement should the State seek to introduce the statements as evidence. R. 8, l. 18 – 9, l. 9. Alternatively, defense counsel also sought to enforce a different plea agreement Appellant claimed to have reached with the State. At the hearing on Appellant's statements and the purported plea agreement,

Appellant's attorney Kim Varner indicated to the court that he needed to testify as a witness. R. 94, ll. 24-25.

Varner was sworn and testified that Appellant retained him shortly after his arrest. R. 96, ll. 9-10. Varner testified that he had numerous conversations with SLED Agent Frank O'Neil and Assistant Attorney General Jennifer Evans concerning any potential cooperation or compliance his client might have. R. 96, l. 11 – 97, l. 21. Varner further testified as of the morning February 13, 2002, he did not have a firm plea offer. R. 100, ll. 2-5. Varner then testified that he spoke with Assistant Attorney General Evans on the way to a meeting with his client on February 13, 2002. Varner testified that he asked whether she could recommend a sentence in a range under ten years and she replied that she could not. Varner then testified as follows:

She came back with, "We can do something in the eight to twelve range," and I said, "I know what that translates into that translates into twelve," and she kind of laughed and said, "Well, in all probability it's going to be twelve," but a statement to the effect, and I think I made this statement, "Well, if he could deliver Osama Bin Laden or something like that, something phenomenal, is it possible to get under that range?" And she, I believe, took that statement in jest, which is the way it was intended, and she said, "If he delivers something phenomenal, sure, we're looking in the eight to twelve range."

R. 101, ll. 13-25.

Varner further testified that he spoke with Appellant prior to the beginning of the first interview on February 13, 2002. He then testified that he wanted to advise Appellant in front of the SLED agents while he "went over what I call the ground rules. I wanted them present for this so there would not be a misunderstanding." R. 102, ll. 20-25. "I explained to Mr. Miller in front of the agents that he did not have to make a statement, that this was his choice, and I reiterated to him that we had a deal of eight to twelve

years. His response was, 'You got a deal for twelve years, I'll never get the eight, I'll never get ten, I'm going to get twelve.' And I said, plan on the twelve." R. 102, l. 25 – 103, l. 7.

Varner testified that he and Appellant went to Laurens County for a plea date after receiving the State's written fifteen-year offer. He testified that he thought Assistant Attorney General Evans had misrepresented herself. He said that he told Evans that fifteen is not in the eight to twelve range. He said that Evans responded by stating that fifteen is in the eight to twelve range. R. 104, ll. 8-12. Varner then testified that he was having a problem with Appellant and his family. Varner testified that he said he had told Appellant twelve, "they were counting on twelve, and that, you know, the family was hoping for eight but Marshall understood an eight to twelve, he was going to get twelve and that he was not going to accept fifteen, fifteen was not in the range." R. 105, ll. 5-14.

Varner testified that that "[t]here is no question whatsoever I very clearly indicated to Mr. Miller that he had a plea agreement of eight to twelve, there is no question in my mind that that's what he relied on to his detriment and that he gave up his constitutional right to remain silent based on that, and there is no question in my mind, after doing this for 25 years, I don't go in and make people blind promises, I had an eight to twelve agreement." R. 105, l. 20 – 106, l. 3. Varner admitted on cross-examination that he never sent a written confirmation to the State of his understanding of the details of any plea agreement. R. 109, ll. 20 - 25. Varner further admitted on cross that the sole basis of his motion concerning the voluntariness of Appellant's statement was the reliance on the eight-to-twelve-year plea deal. R. 109, ll. 6-11.

SLED agent Frank O'Neil testified that he was involved in the arrest of Appellant. R. 25, ll. 8-21. Agent O'Neil also testified that he told Appellant that "all he could do by cooperating was help himself." R. 29, ll. 21 -22. Agent O'Neil also testified that he did not refer to a particular time or to a sentence that Appellant could possibly receive. R. 29, ll. 23-24.

Assistant Attorney General Jennifer Evans then testified at the hearing. Evans testified that after Appellant was arrested, the State indicated that they would like Appellant to cooperate with the investigation. R. 39, ll. 9-17. Evans then testified that the only plea offers made were formal written plea offers. Evans testified that those offers were made only with the expectation of full cooperation, full debriefing, cooperation throughout the investigation, and then at that point there is nothing promised except for the fact that the cooperation will be taken into account. She testified that she did not discuss sentencing because she did not know at that point what they (suspects) know and if they are going to be fully honest. R. 40, ll. 9-25. Evans testified that she informed defense counsel that the State would consider Appellant's cooperation and that the official plea offer would come after a full debriefing and would be sent in letter form. R. 49, l. 22 – 50, l. 7. Evans denied making any plea offer to Appellant other than the fifteen-year offer that was enumerated in the formal written plea offer. Evans specifically denied making a plea offer for a range of eight to twelve years. R. 51, l. 5.

Evans then testified that she had a conversation with Varner after sending the formal plea offer of fifteen years to Appellant. She testified that Varner repeatedly asked her about the eight to twelve year range that Appellant wanted in return for his cooperation, however she denied ever making an offer on those terms. Specifically,

Evans testified, "I have never made an eight to twelve year offer to you at all." R. 52, ll.

16 – 18. Varner then asked Evans if she recalled making a statement that fifteen is in the eight to twelve range. Evans responded by testifying as follows:

"I didn't, no, I did not say that. But I can explain what I did say. You said, 'My client was hoping to get about twelve years,' and I said, Well fifteen years is close to what he was hoping for. But it was clearly at all times something that your client wanted and never anything that we offered by the State."

R. 54, ll. 8-14.

SLED Agent Chester Bragg then testified for the State. He acknowledged he was involved in the investigation of Appellant. R.60, ll. 8-20. Agent Bragg testified that he was present for three interviews with Appellant, including the interview of February 13, 2002. Agent Bragg testified that Varner did ask to speak privately with Appellant before that interview. He further testified that he remembered re-entering the interview room while Varner went over the ground rules and the risks with Appellant. Agent Bragg did not recall any sentencing range being spoken of at that time. R. 77, ll. 17-18.

SLED Agent Constance Sonnefield then testified. Sonnefield testified that the only promise she made to the Appellant was that his cooperation would be taken into consideration. R. 84, ll. 8-10. Sonnefield said that she remembered Varner telling them prior to Appellants interview that he had been speaking with Assistant Attorney General Evans. She also remembered Varner stating that he wanted everyone in the room so that everyone understands the ground rules. R. 93, ll. 1-15. Agent Sonnefield did not remember any sentencing range being discussed at that time. The only plea arrangement she remembered being discussed was that Appellant's cooperation would be taken into consideration. R. 94, ll. 4-10.

After the close of testimony, Varner moved that the State should either be forced to fulfill the plea agreement of eight to twelve years, or in the alternative, should not be allowed to enter the defendant's statements to law enforcement into evidence. R. 120, 11. 1-22. Varner argued that Appellant detrimentally relied on his belief that the State offered a sentencing range of eight to twelve years and thus waived his right to remain silent. Varner argued that his waiver was made in consideration for a promise and therefore cannot be considered to be freely and voluntarily tendered if the State was not fulfilling the promise. Varner argued that as a result of this reliance, the statements made by Appellant to law enforcement were not voluntary and therefore inadmissible.

The court then denied both motions, stating as follows:

"The evidence preponderating toward Mr. Miller's misunderstanding based upon an inadvertent representation by his attorney, if any, in fact was made within the attorney-client relationship or upon his own misunderstanding, of his own misunderstanding of any representations by the State. Argument having been made in the range of eight to ten years was within the attorney-client relationship as testified to by Mr. Varner, and related by the attorney to the defendant and that has not been testified to by the defendant. The Court may not and will not invade the attorney-client relationship and the confidentiality thereof and cause that to preponderate in favor of the defendant when he is not here to state what he understood there to be in existence which caused him to make any such statement and to allow himself to be cross-examined concerning his understanding of any offer was made before him or causing him to say what he did say.

Now this judge is also aware of the policy and procedures followed in such matters as we now are considering, and the Court fully and completely embraces the testimony of Agent, excuse me, of Assistant Attorney General Jennifer Evans with regard to there is no plea agreement offered to any defendant until after that defendant has been debriefed, and the offer in this matter was written and forwarded to the defendant Miller and contained a fifteen year offer. The Court finds that that is credible evidence in the matter and accepts it as such and preponderates in favor of the State and preponderates in favor of the voluntariness of the statement.

The court cannot conclude that the statements to Agents Bragg and Sonnefeld were not freely and voluntarily given after Mr. Miller was afforded all the case law in such cases made and provided, or that the handwritten statement was not freely and voluntarily given.

The court denies the motion to enforce any plea agreement in the eight to twelve year range and the Court will permit the introduction of the statements, both written and oral, of Mr. Miller."

R. 120, l. 23 – 122, l. 18.

During the trial, SLED Agent Chester Bragg was called by the State to render testimony. Varner renewed his original objections concerning the admissibility of the statements given by Appellant. Agent Bragg then testified that he interviewed Appellant on three separate occasions. The initial meeting was in Laurens County and lasted approximately two hours. The second and third meetings were between four and five hours. R. 1046, ll. 1-7. During these interviews, Appellant confessed his involvement "in the methamphetamine business." R. 994, ll. 11-13. Appellant provided law enforcement with a written statement confessing to making and distributing methamphetamines as well as implicating many other individuals he had contact with in the manufacture and distribution of methamphetamines.

In addition to the information concerning his and his co-conspirators involvement in the methamphetamine conspiracy, Appellant's statement also alluded to information he had concerning other methamphetamine distributors, illegal gambling operations, theft rings, insurance and prescription fraud, a conspiracy to murder a law enforcement officer and a possible dirty police chief.

Court found Appellant guilty of conspiracy to traffic in more than a hundred grams of methamphetamine at the close of the trial. Varner then moved for a new trial on the basis of the judge's admission of Appellant's statements into evidence. R. 1436, l. 25

– 1437, l. 5. That motion was denied. The defendant was sentenced to twenty-five years imprisonment on August 24, 2004. During sentencing, defense counsel moved for a new trial on the same grounds that Appellant's statements were given in return for promises of leniency. R 1440 - 1442. That motion was denied. This appeal follows.

ARGUMENT

1.

THE RULING OF THE TRIAL JUDGE SHOULD NOT BE OVERTURNED AS THERE HAS BEEN NO SHOWING OF AN ABUSE OF DISCRETION.

The ruling of the trial judge concerning the admissibility of Appellant's statements should not be overturned. The trial judge's determination of whether a statement was knowingly, intelligently, and voluntarily made, requires an examination of the totality of the circumstances surrounding the waiver. State v. Rochester, 301 S.C. 196, 391 S.E.2d 244, 247 (1990) *citing* State v. Doby, 273 S.C. 704, 258 S.E.2d 896 (1979). On appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show and abuse of discretion. State v. Rochester, 301 S.C. 196, 391 S.E.2d 244, 247 (1990) *citing* State v. Livingston, 223 S.C. 1, 73 SE.2d 850 (1952). Furthermore, on review, the court is limited to determining whether the trial judge abused his discretion. The court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. State v. Compton, 366 S.C. 671, 677, 623 S.E.2d 661, 664 (2005) *citing* State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001).

In this case, the trial judge was in the best position to examine the totality of the circumstances. The trial judge had the opportunity to listen to the testimony of all witnesses. The trial judge had the ability to observe the demeanor and personally weigh the credibility of each witness called before him in the Denno hearing. After hearing all the testimony and weighing the credibility of the witnesses, the trial judge made a factual

determination that, "The court cannot conclude that the statements to Agents Bragg and Sonnefeld were not freely and voluntarily given after Mr. Miller was afforded all of his rights, warnings and safeguards pursuant to the case law in such cases made and provided, or that the handwritten statement was not freely and voluntarily given." R. 122, ll. 8-14. Considering the totality of the circumstances, including Appellant's assertions concerning the alleged offer of eight to twelve years, the trial judge made a factual determination using his discretion that the statements were freely and voluntarily given.

The trial judge expressly found that there was no plea offer of 8-12 years. The judge expressed that he was aware of the policy and procedure followed in plea negotiations involving the State Grand Jury. He further found that he "completely embraces" the testimony of Assistant Attorney General Evans with regard to there is no plea agreement offered to any defendant until after that defendant has been debriefed and the offer in the matter was written and forwarded to the defendant Miller and contained a fifteen year offer. R. 121, l. 19 – 122, l. 3. By doing so, the trial judge rejected the testimony of Varner that there was such an agreement.

There is evidence in the record to support the trial judge's ruling. There is nothing in the record to indicate that the trial judge's ruling was manifestly erroneous or that he abused his discretion by this finding. Therefore, the trial judge's decision concerning the admissibility of Appellant's statements should not be disturbed. Appellant should not be granted a new trial.

2.

THE TRIAL JUDGE CORRECTLY ADMITTED APPELLANT'S STATEMENTS TO LAW ENFORCEMENT BECAUSE THERE WERE NO DIRECT OR IMPLIED PROMISES NOR WAS THERE THE EXERTION OF IMPROPER INFLUENCE BY THE STATE.

The State never made a direct or implied promise to Appellant. It is true that a confession may not be extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of improper influence. State v. Rochester, 301 S.C. 196, 391 S.E.2d 244, 246 (1990) *citing* Hutto v. Ross, 429 U.S. 28, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976). However, an attempt to create a firm commitment out of plea negotiations has no merit. State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982).

Appellant contends that his statements to law enforcement were given in reliance upon a promise of leniency. Appellant also contends that absent that promise, the statements would not have been given. However, there is nothing in the record that would indicate the State made a promise of leniency to the defendant. It is clear through the testimony of the State's witnesses that the only indication the State made concerning a possible sentence was that Appellant's cooperation would be taken into account when it became time for the State to decide whether it was going to make a plea offer. The hope for leniency and a promise of leniency are not interchangeable. It is clear that by cooperating in the investigation, Appellant hoped to receive leniency, however, there is nothing in the record to support the proposition that leniency was promised to him.

The record indicates that the only offer made to Appellant was the written offer of fifteen years. The State acknowledged a conversation with the defense attorney whereby Appellant sought an agreement for a reduced sentence. The testimony of defense counsel

Varner was as follows: "She [Assistant Attorney General Evans] came back with, "We can do something in the eight to twelve range," and I said, "I know what that translates into that translates into twelve," and she kind of laughed and said, "Well, in all probability it's going to be twelve," but a statement to the effect, and I think I made this statement, "Well, if he could deliver Osama Bin Laden or something like that, something phenomenal, is it possible to get under that range?" And she, I believe, took that statement in jest, which is the way it was intended, and she said, "If he delivers something phenomenal, sure, we're looking in the eight to twelve range." R. 101, ll. 13-25.

This is the conversation upon which Appellant bases his argument. The conversation cannot be construed as a concrete offer of an 8-12 year sentence by the State before Appellant had begun to cooperate. This discussion with Appellant's attorney was the State forthrightly telling counsel the best he could do for his client should his client wish to cooperate. The decision to cooperate under these parameters was left solely to Appellant and his lawyer. The impact of a ruling contrary to the trial judges ruling would be to necessitate the State making plea offers before knowing the level of involvement or cooperation from defendants.

It is clear from the record that Appellant and his attorney were informed that no offer would be made until Appellant cooperated and the State had the opportunity to assess the level of Appellant's cooperation. There is nothing in the record to indicate that the State advanced the idea of an eight to twelve year sentence to the Appellant. All the testimony in the record indicates that Appellant and his counsel generated this range of

sentencing and presented it to the State. The statements offered by Varner indicate a plea negotiation, not a plea agreement nor a promise by the State.

Finally, the testimony presented by Appellant indicates that any negotiation made by the State was predicated with a reservation. Notably, Varner testified that Evans maintained that, "If he [Appellant] delivers something phenomenal, sure, we're looking in the eight to twelve range." While the record does indicate that the defendant cooperated with the investigation, there is nothing to indicate that Appellant delivered anything phenomenal.

There was no promise for leniency, either expressed or implied by the conversation between Assistant Attorney General Evans and defense counsel Varner. Appellant and his attorney were informed that a plea offer would not be made until Appellant had fully cooperated with the investigation. An attempt to create a firm commitment out of plea negotiations has no merit. Therefore there was no direct or implied promise of leniency made to Appellant. Appellant should not be granted a new trial.

3.

THE TRIAL JUDGE CORRECTLY ADMITTED APPELLANT'S STATEMENTS TO LAW ENFORCEMENT BECAUSE APPELLANT RECEIVED LENIENCY BY WAY OF THE FIFTEEN-YEAR PLEA OFFER.

Appellant received the leniency he attempted to bargain for from the fifteen-year plea offer extended by the State. The State made a plea offer of fifteen years after taking into account Appellant's cooperation with the investigation, thereby giving Appellant leniency from the twenty-five year sentence he was facing. A statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise. State v. Rochester, 301 S.C. 196, 391 S.E.2d 244, 246 (1990) *citing* State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987).

Appellant contends in his brief that Appellant gave his statements to law enforcement in return for the plea offer. Appellant further maintains that whether that plea offer was eight to twelve years or fifteen years does not matter in the analysis for the purposes of this issue because his statements were inextricably entwined with the State's promise of leniency. Appellant's statements were not inextricably entwined with the State's promise of leniency because the State never made a promise of leniency as maintained in issue two.

It is clear from the testimony that Appellant hoped to receive leniency for his cooperation in the investigation. And while the State never made a promise or an offer to Appellant until after Appellant made his statements to law enforcement, the State did in fact extend leniency to Appellant. It is clear that the

fifteen-year offer extended to Appellant was a significantly shorter period of time than twenty-five years he faced if convicted, thereby giving him the benefit of the bargain he sought.

The statements given by Appellant were not induced by a promise of leniency, but rather by his hope for leniency. Therefore they are not so connected with the inducement as to be a consequence of the promise. Furthermore, Appellant received leniency he attempted to bargain for from the fifteen-year plea offer extended by the State. Appellant should not be granted a new trial.

4.

THE TRIAL JUDGE CORRECTLY RULED THAT AN EIGHT TO TWELVE YEAR SENTENCING RANGE WAS NOT BINDING UPON THE STATE.

The eight to twelve year sentencing range sought by appellant was not binding upon the State because there was never a plea agreement entered into for that range. Appellant relies heavily upon Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495 (1971) and it's South Carolina progeny, Sprouse v. State, 355 S.C. 335, 585 S.E.2d 278 (2003), State v. Thompson, 278 S.C. 1, 392 S.E.2d 581 (1982) and State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994); in his assertion that state prosecutors are obligated to fulfill the promises they make to defendants when those promises serve as inducements to defendants to plead guilty. Those cases are distinguishable from this case as Appellant never pled guilty.

As outlined in argument one and two, the trial judge found that there was no plea agreement for an 8-12 year sentence. Absent a plea agreement, there was nothing for the trial judge to enforce. The State never offered a sentencing range of 8-12 and thus it was never accepted.

Further, this case does not trigger the analysis of Santobello as Appellant exercised his right to a jury trial and never pled guilty. The cases cited by Appellant all involve appeals of guilty pleas whereby the Appellant pled guilty to something different than he agreed. In this case, Appellant failed to appear at the date specified for his trial. Therefore, he refused any plea offer that was outstanding at the time and exercised his constitutional right to a jury trial. Although Appellant had the absolute right not to attend his trial, by doing so, he expressly rejected any plea offer from the State.

The court did not err by refusing to enforce any alleged plea agreement because Appellant never entered into one instead exercising his right to a jury trial. This case should not be remanded for enforcement of a plea agreement.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

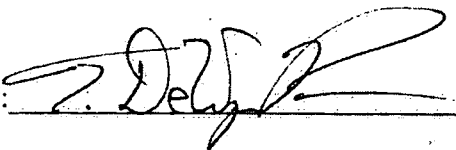
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BY: 

ATTORNEYS FOR RESPONDENT

April 9, 2007

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Abbeville County

Honorable Wyatt T. Saunders, Jr., Circuit Court Judge

THE STATE,

Respondent,

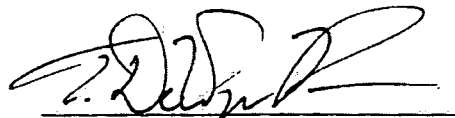
vs.

MARSHALL MILLER,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b),
SCACR.



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April 9, 2007

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Abbeville County

Honorable Wyatt T. Saunders, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

MARSHALL MILLER,

Appellant.

PROOF OF SERVICE

I, T. DeWayne Pearson, Counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert M. Dudek, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.



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April 5, 2007

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

MAR 12 2007

Appeal from Abbeville County
SC Court of Appeals

Wyatt T. Saunders, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARSHALL MILLER,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by admitting appellant's statements into evidence where those statements were given to law enforcement as a result of promises of leniency for his cooperation, particularly where even the state's evidence showed appellant was offered a plea bargain that would have substantially reduced his sentence in consideration for his statements and cooperation?

2.

Whether the court erred by refusing to enforce the plea agreement where appellant's attorney testified under oath that the state offered a recommended sentence of eight to twelve years in return for appellant's cooperation, that appellant accepted that offer, and where appellant relied to his detriment on that plea agreement by giving a plethora of information about the meth conspiracy to the state?

3

STATEMENT OF THE CASE

Appellant was indicted by the statewide grand jury on September 10, 2002 for trafficking methamphetamine (conspiracy) along with Tina Stevenson, Julie Prince, Martha Ellis, David Cummings, Tony Howard, Sandra Jo Hughes, Jason Davis, Ernest Covan, Bonnie Saylor, Ashley Bannister, Scotty Prince, Tonya Lee Michelle Madden, Samuel McNeill and Tracy Davis. The alleged time period of the meth conspiracy extended "from on or about November 19, 1999 until the present." It alleged the principals conspired "to sell, manufacture, deliver, purchase, or bring into the state, more than one hundred grams of methamphetamine." R. 1444.

The case of appellant and co-defendant Billy Moore came on for trial on January 20, 2004 before the Honorable Wyatt T. Saunders, Jr. Kim R. Varner represented appellant. Rauch Wise represent co-defendant Moore. R 1. Appellant was tried in his absence.

At the conclusion of the trial on January 30, 2004 appellant was found guilty, and co-defendant Moore was acquitted. R. 1435, ll. 9 -16.

On August 24, 2004, appellant was sentenced to twenty-five years imprisonment. R. 1440, l. 23 – 1441, l. 4. Defense counsel repeated his motion for a new trial on the basis of appellant's confessions being allowed into evidence where there "was clear evidence that Mr. Miller did rely on certain inducements and promises" when he gave his statements to law enforcement. That motion was again denied. R. 1441, l. 11 – 1442, l. 7.

This appeal follows.

STATEMENT OF FACTS

Prior to trial defense counsel told the judge that if the state intended to attempt to use appellant's statements against him that a Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964), hearing would be required. Counsel also was moving to enforce the plea. R. 8, l. 18 – 9, l. 10.

Assistant Attorney General Hood said such a hearing would necessitate Jennifer Evans, who was the prosecutor at the time of the plea negotiations, testifying. Defense counsel Varner would later testify under oath – as a witness -- that appellant accepted a plea offer from Evans for a sentence of between eight and twelve years in return for appellant's statements and his cooperation. Appellant accepted that offer, Varner testified, and cooperated and gave statements. R. 8, l. 18 – 9, l. 10.

Defense counsel argued that the Jackson v. Denno hearing needed to be held before opening statements so that both sides knew where they stood. Defense counsel told the judge appellant gave his statements in return for promises, and appellant relied on those promises. Defense counsel argued appellant should get "the benefit of the bargain, but the state can't win both ways. Not only do not give the deal, but they get to use all the information." R. 11, l. 19 – 12, l. 7.

The hearing on appellant's statements and the plea agreement was held on January 21, 2004, prior to trial. SLED agent Frank O'Neil testified he was involved in the arrest of appellant on September 24, 2002. R. 25, ll. 8 – 21. O'Neil told appellant he could help himself by cooperating. R. 29, l. 18 - 30, l. 4. O'Neil later spoke with defense counsel Varner, appellant's retained counsel. Varner told O'Neil "about Marshall Miller's willingness to cooperate. His attorney indicated that he was willing to cooperate fully by

giving us information concerning his involvement and others in the conspiracy.” R. 26, ll. 16 – 22.

As a result of his conversation with Varner, O’Neil contacted special agent Chester Bragg and agent Sonnefield to arrange a time for them to interview appellant. O’Neil testified that both agents interviewed appellant three times: February 13, 2003, February 25, 2003, and March 4, 2003. R. 27 ll. 12 – 18.

As will be seen infra those interviews lasted for several hours on each occasion. In addition, appellant gave the agents about a thirty page written statement implicating many other individuals in the conspiracy, and promising more specific information he could provide to law enforcement. See State’s Exhibit 71, Appellant’s Written Statement; R. 998, l. 21 – 1031, l. 11. As² will also be seen infra defense counsel Varner testified he told appellant to expect to receive a twelve year sentence from the state’s recommendation of eight to twelve years. However, Varner said appellant was persistent in attempting to show the state he deserved less than twelve years in that eight to twelve range by fully cooperating. In fact, as will also be seen infra, the state told Judge Floyd at appellant’s bond reduction hearing that appellant had “fully cooperated.”

On cross-examination, O’Neil acknowledged appellant had the “jailhouse lawyer type mentality,” meaning appellant understood that those who cooperate with the state are rewarded, and those who falsely maintain their innocence pay the price. R. 30, ll. 8 – 10.

O’Neil admitted that he talked to Varner on several occasions following his conversation with appellant. R. 30, ll. 18 – 20. They had their first meeting with O’Neil and the assistant attorney general in Varner’s office in Greenville. R. 31, ll. 7 – 12.

During this meeting they discussed in general term the perimeter or possibilities of what appellant could expect for his cooperation. R. 31, ll. 13 – 19. O'Neil acknowledged that he remembered being told appellant could name other people involved in the drug conspiracy, but he stated he did not remember being told appellant could also provide information about an illegal gambling operation and stolen guns. R. 31, l. 20 – 32, l. 10.

Assistant Attorney General Jennifer Evans then testified. Evans admitted after appellant was arrested “we did indicate that we would like Mr. Marshall Miller to cooperate with our investigation.” R. 39, ll. 9 – 17. Evans said she never interviewed appellant herself. R. 39, l. 22 – 40, l. 3.

Evans maintained that the only plea agreements the attorney general's office entered into were “formal written plea offers.” R. 40, ll. 4 – 16. Evans also claimed that in general there is “nothing promised except for the fact that we will take that cooperation into account. Mr. Miller was indicted for a twenty-five offense . . .” R. 40, ll. 9 – 25. As seen, appellant was sentenced to twenty-five years imprisonment.

Evans said she at one point she sent a plea offer letter to Varner wherein it was stated that the state would recommend a fifteen year sentence for appellant in return for his guilty plea. R. 41, l. 10 – 42, l. 11. That letter was dated April 29, 2003, about seven weeks after the third interview with appellant, and after he also gave his written confession which provided the state a plethora of information about the conspiracy and illegal activity. See Written Statement. R. 1446; R. 43, l. 2 – 3.

Evans admitted that Varner talked to her about a recommendation of eight to twelve years. However Evans maintained: “our offer has always been fifteen years.” R. 44, ll. 10 – 23; R. 45, ll. 5 – 8.

On cross-examination Evans admitted she knew Varner had been talking "back and forth" with Agent O'Neil about the information appellant could provide. R. 46, ll. 8 – 16. Evans told Varner during his cross-examination: "I told you the official plea offer would come after a full debriefing and we would send it out in letter form as we do in all our cases." R. 49, l. 14 – 50, l. 7.

Evans also said the only promise during the interview process and otherwise was that if appellant fully cooperated "we would take that into account in giving a plea offer." She again repeated that she remembered that eight to twelve range being raised, but she added, "I don't like to talk about numbers." R. 50, ll. 8 – 24. Evans maintained: "I have never made an eight to twelve year offer to you [counsel Varner] at all." R. 52, ll. 9 – 18.

Evans denied that she later told defense counsel after making the eight to twelve year offer: "Kim [Varner] fifteen is in the twelve, eight to twelve [year] range." Evans testified that Varner told her appellant was hoping to get twelve years, and she said she told Varner, "Well, fifteen years is close to what he was hoping for." R. 54, ll. 5 – 16.¹

Evans admitted she remembered problems arose between Varner and appellant because of "the argument of the eight to twelve versus him accepting fifteen." R. 57, ll. 15 – 18. Evans denied that she remembered being told by Varner that he had advised appellant he would need to get another attorney to file a motion to enforce the plea agreement because Varner was now a potential witness. Evans said she only remembered being told by Varner

¹ Evans insinuated appellant should not live up to the plea agreement by refusing to take a polygraph. However she then admitted appellant was told by a doctor that he could not take a polygraph, and the polygraph examiner refused to give the polygraph. R. 52, l. 25 – 55, l. 3. Evans also said appellant maintained that Tracy Davis was not involved in the conspiracy, and she later admitted her involvement. R. 55, ll. 4 – 18.

that he asked appellant's mother "to hire to another attorney on the forfeiture matter." R. 58, ll. 3 – 12.

SLED Agent Chester Bragg testified next for the state. He acknowledged he was involved in this operation -- "crankdown." R. 60, ll. 8 – 13. Bragg testified his first meeting with appellant and Agent Sonnefield was at the Laurens County Police Department. R. 61, l. 15 – 62, l. 2. Bragg remembered that Varner was present but that Varner left before appellant began giving his first statement. R. 62, ll. 3 – 10. Braggs said appellant was given his Miranda warnings, and the initial interview lasted "approximately a couple of hours." R. 63, ll. 8 – 10.

For the second interview, Bragg said they had appellant picked up from the Abbeville City jail and taken to a motel in Greenwood. Appellant apparently did not want to be seen with law enforcement for safety reasons. R. 64, l. 24 – 65, l. 3; R. 70, ll. 2 – 8. Braggs said appellant was driven to the back of the motel so that he would not be seen. Bragg remembered appellant sat in a chair in the motel room while he gave his statements during the second and third interviews in the Greenwood motel: "He could have sat on the bed if he wanted." R. 66, ll. 3 – 24.

Braggs said before or during either the second or third interview, "I can't remember exactly" appellant gave him his written statement that he had written while in the jail. R. 67, ll. 10 – 18. State's Exhibit 71, R. 1446.

Bragg remembered that before the third interview appellant was again picked up from the Abbeville jail and taken to the Greenwood motel. Bragg acknowledged that these interviews took place with the understanding and support of Varner. R. 68, ll. 17 – 21.

Bragg acknowledged that Varner understood that during their discussions that Bragg would not be the person making the plea offer. R. 72, ll. 3 – 14.

Bragg also admitted that it appeared to him appellant trusted him. R. 72, ll. 15 – 19. Bragg said that appellant wanted to get out on bond because he wanted to be wired so he “could deliver several other crank cooks.” R. 73, ll. 17 – 21. Bragg drove appellant to Columbia after the third interview for a bond reduction hearing. R. 70, l. 14 – 71, l. 8.

During the bond hearing, Bragg admitted that he told Judge Floyd that: “Marshall had fully cooperated, he had given useful and full information.” R. 74, ll. 6 – 21.

As to the first interview in Laurens, Bragg said he did remember seeing Varner talking in the parking lot with Assistant Attorney General Jennifer Evans before that interview on February 13, 2003. R. 75, ll. 3 – 12.

Bragg acknowledged he remembered Varner asked to talk privately to appellant before that interview. R. 76, ll. 4 – 20. As will be seen infra, Varner testified that he spoke on his cell phone with Evans while driving to the first interview in Laurens. The following took place between Bragg and Varner:

Q. And whether I [Varner] misunderstood it or whether it was correct or not, do you recall me telling Marshall Miller, “Marshall, I just got off the phone with Jennifer. If you testify or you give cooperation,” that, “you are in an eight to twelve range and expect the twelve, you’re in an eight to twelve range, you don’t have to do this, this is your choice, freely and voluntarily entering into this, this is going to be your decision if you will take that range,” whether I misunderstood my statement with Jennifer or whether that was correct or even if that was a lie, do you recall me making the statement to Marshall to that effect?

A. I do not recall any numbers being mentioned at all.

R. 77, ll. 4 – 18.

SLED Agent Constance Sonnefield then testified. R. 82, ll. 1 – 9. Sonnefield maintained that the only promise she gave appellant was that his cooperation “would be taken into consideration.” R. 84, ll. 8 – 10. Sonnefield said that her role was arranging the motel rooms and other matters, and that Bragg did the interviewing of appellant, and Bragg also took possession of appellant’s written statement. R. 83, l. 15 – 90, l. 19.

Sonnefield said she remembered Varner being about five minutes late to the first interview, and she remembered him apologizing and stating he had been outside in the parking lot talking to Assistant Attorney General Jennifer Evans. R. 92, l. 16 – 93, l. 5.

Sonnefield also recalled that Agent Bragg offered to leave after Varner and appellant talked in private. However, Varner said: “No, I want you here so everybody understands the ground rules . . .” R. 93, ll. 10 – 19. Sonnefield also maintained “I don’t remember numbers [the eight to twelve range]. I remembered that if you cooperated it would be taken into consideration.” R. 93, l. 24 – 94, l. 13.

Varner then told the judge he needed to testify “as a witness.” R. 94, l. 23 – 95, l. 1. Varner then testified under oath that he was retained by appellant shortly after appellant’s arrest. Varner said that he had numerous conversations with Assistant Attorney General Jennifer Evans and Special Agent Frank O’Neil about appellant getting a bond and his potential cooperation with the state. R. 96, ll. 5 – 17.

Varner testified that he told both Evans and O’Neil that appellant had information about a murder for hire of a police officer in the Ware Shoals area, “about several arsons cases, about a potential underground bunker of many stolen weapons . . . and that he could

name numerous other individual in the conspiracy and that he was willing to be wired and make buys." R. 96, l. 5 – 97, l. 21.

Varner further testified that Evans told him "this was not solely her decision. The term I use is that they had to roundtable it." R. 97, ll. 10 – 25. Varner remembered that as of February 13, 2003 "Jennifer Evans, the Attorney General, and I had not firmed anything up." R. 100, ll. 2 – 5. Varner added that appellant was "very jailhouse smart" and he wanted to make appellant was aware that they did not have a deal at that point. R. 100, ll. 2 – 13.

Varner said that on his way to the police station for the first meeting he talked with Evans on his cell phone and he indicated to her that appellant wanted a sentence of less than five years. "Her response to that was she felt that was ludicrous." R. 100, ll. 14 – 25. Varner said he told Evans he fully understood five years was impossible but that he nonetheless had an obligation to pass on his client's request. R. 100, l. 22 – 101, l. 4.

Varner said Evans told him at that point she "could not make a commitment." Varner remembered telling Evans: "I've been doing this for twenty-five years, Mr. Miller is in jail twice, he's not going to talk based on a hope, a promise and a kiss, and I asked her could she give me a sentence in the range under ten years. She said no, she couldn't." Varner then testified as follows:

She came back with, "We can do something *in the eight to twelve range*," and I said, "I know what that translates into, that translates *into twelve*," and she kind of laughed and said, "Well, in all probability it's going to be twelve," but a statement to the effect, and I think I made this statement, "Well, if he could deliver Osama Bin Laden or something like that, something phenomenal, is it possible to get under that range? And she, I believe, took that statement in jest, which is the way it was intended, and she said, "If he delivers

something phenomenal, sure, we're looking in the eight to twelve range."

"At that time she told me, she said, because I asked her, I said, "Look I don't want to put Marshall in a bad situation, I don't want to put myself in a bad situation, I'm in the car on the way." At that time she told me, she said, "Kim, you can check with any of the lawyers I have dealt with before, I do what I say I'm going to do, provided Marshall does what he's going to do."

R. 101, l. 13 – 102, l. 8. (emphasis added).

Varner testified he talked to appellant in private for about five minutes before the proposed first interview. He then pronounced that he wanted the two SLED agents present while he "went over what I call the ground rules." "I wanted them present for this so there would not be a misunderstanding." R. 102, ll. 20 – 25. "I explained to Mr. Miller in front of the agents that he did not have to make a statement, that this was his choice, and I reiterated to him that we had a deal of eight to twelve years." R. 102, l. 20 – 103, l. 4. Varner said appellant responded: "You got a deal for twelve years, I'll never get the eight, I'll never get ten, I'm going to get twelve, and I said, 'Plan on the twelve.'" R. 103, ll. 1 – 7.

Varner said based on this appellant relied "on getting a twelve year sentence. He not only cooperated, he gave written statements, he fully cooperated and offered to do even more, to go outside and tell them of other criminal activity." Varner then referenced a newspaper article where appellant gave information on a big gambling operation in Georgia. Varner added that at least four other people were brought into the conspiracy as a result of appellant's information. R. 102, ll. 1 – 17.

Regarding the subsequent fifteen year plea offer appellant was given, Varner said he told Evans: "Jennifer, fifteen years is not in the eight to twelve range, that's what we agreed

to.” Varner testified Evans responded: “Kim, fifteen is in the eight to twelve range.” R. 104, ll. 1 – 12. Varner also testified that when he countered that fifteen years was not in the eight to twelve range, Evans responded: “well, fifteen is in the eight to twelve [year] range the way I look at it.” R. 104, ll. 13 – 25.

Because of all this Varner said he had to talk to appellant for “an extended period of time,” and he then told Assistant Attorney General Evans and Hood that “I was having a conflict with my client and with his family. It was a mess. I said the family was told I told him twelve, they were counting on twelve, and that, you know, family was hoping for eight but Marshall understood an eight to twelve, he was going to get twelve, and that he was not going to accept fifteen, fifteen was not in the range. And I advised her that he said he was going to get another attorney, not to fire me, but get another attorney to bring an action to enforce the plea agreement.” R. 105, ll. 4 – 14.

Varner then testified he was told that there would be another guilty plea date “if he wants to do it at that point in time or if he changes his mind and wants to plead, that’s fine. That’s where it was left.” However, Varner added, “[t]here is no question whatsoever I very clearly indicated to Mr. Miller that he had a plea agreement of eight to twelve, there is no question in my mind that that’s what he relied on to his detriment and that he gave up his constitutional right to remain silent based on that, and there is no question in my mind, after doing this for 25 years, I don’t go in and make people blind promises, I had an eight to twelve agreement.” R. 105, l. 15 – 106, l. 3; R. 109, ll. 4 – 10.

On cross-examination Varner was asked why he did not send a letter verifying the agreement. Varner answered, “You know, when you trust someone’s integrity and someone vouches for it . . . you know what, I made a terrible mistake by trusting somebody.” R. 109,

ll. 20 – 25. Varner elaborated: “Some three months later I got a plea offer that was totally contrary [fifteen year] to what we had discussed. R. 110, ll. 1 – 4.

As for attempting to enforce the plea agreement earlier, Varner said the problem was that he was a potential witness, and he remembered another lawyer did contact him about representing appellant but Varner said he did not know if appellant was able to come up with the retainer fee for that lawyer. Varner testified he therefore ultimately had to make the motion to enforce the plea agreement himself. R. 110, ll. 10 -22. Varner said that appellant “detrimentally relied on the eight to twelve year representation of the deal.” R. 111, ll. 6 – 11.

After the testimony was closed, Varner argued that appellant detrimentally relied on the state’s offered sentencing range and waived his right to remain silent. Varner said appellant was “very much a jailhouse lawyer” and he thought they had an eight to twelve deal. R. 112, l. 3 – 114, l. 2. Varner said he represented to appellant, and the agents verified, “that appellant had a promise.” R. 114, l. 3 – 115, l. 8.

Varner argued that appellant’s statements were given in consideration for a promise, and his statements therefore cannot be considered to be freely and voluntarily tendered. Varner repeated that the promise was relayed to appellant through his attorney and the attorney general’s office who “in fact had the authority to enter into the agreement, that takes away the voluntariness of it . . .” Varner argued the statements should be suppressed. R. 115, ll. 1 – 24.

The Assistant Attorney General then argued the plea offer was fifteen years. R. 116, ll. 2 – 22. Varner responded that the state wanted the best of all worlds: “They don’t want to go through with an agreement but they want to get the fruits of the agreement, and it’s

one or the other.” R. 120, ll. 7 – 13. Varner argued the state should either be forced to fulfill the plea agreement or that it could not use appellant’s statements given in return for a promise leniency against him during a trial. R. 120, ll. 1 – 22.

The judge then denied the motion to enforce “any plea agreement in the eight to twelve year range and the court will permit the introduction of the statements, both written and oral, Mr. Miller.” R. 120, l. 23 – 122, l. 18.

The trial

At the conclusion of the trial, during his closing statement, Varner told the jury that what they had just witnessed was the state’s witnesses making appellant the fall guy: “When you see that circle of all the people around, all the arrows pointing at Marshall, substitute the word patsy, sucker, because there was a conspiracy here, the conspiracy was let’s all blame it on Marshall, he’s the one that doesn’t have the connections here, he’s the one that doesn’t know [people], you know, they are all in it up to their neck, bottom line . . .” R. 1319, ll. 18-25.

Towards the very end of the state’s case, the attorneys discussed the limits and the manner of SLED agent Chester Bragg’s testimony about what appellant told him. The attorneys discussed redacting appellant’s written statement, and the assistant attorney general stated he wanted it all “squared away” on what Bragg “is or is not to say.” Defense counsel Varner said he was renewing his original objections but that he had a separate objection regarding Bragg’s use of his notes during his testimony that he hoped could be worked out during the break. The judge responded that Varner’s objections regarding the statements had been ruled upon, and Varner said that that he just wanted to be sure the judge to understand that his original objections stood. R. 875, l. 9 – 877, l. 5.

Again, prior to Bragg's testimony, Varner brought up the limits and the manner of Bragg's testimony. The attorneys and the judge discussed his testimony. The judge ruled that Bragg's notes could not be introduced as an exhibit, but that he could use them to refresh his memory. Varner would be allowed to inquire about Bragg using his notes. The judge noted that Bragg's testimony from his notes would be "an oral confession to the officer . . . he can say what the defendant told him." Varner then agreed they had now covered the "Jackson v. Denno" matter concerning his handwritten notes." The Assistant Attorney General added that he did not think Varner was challenging the statement "outside of the purported promise or promise was believed . . ." Varner responded, "I have nothing additional to say than what I have already said before in your previous ruling . . ." Varner assured the state he was not going to argue in addition that appellant was drugged or tortured. R. 949, l. 21 – 954, l. 25.

Bragg then testified he was present when appellant was arrested on September 24, 2002. R. 957, ll. 5 – 14. Bragg recalled that SLED agents seized "some vehicles there on the property," and he noted that there was a trailer on the property where appellant was arrested. R. 967, ll. 5 – 24. Bragg said that some powder and some syringes and some pills were also seized. R. 961, ll. 2 – 22. The defense stipulated that some of the evidence seized came back as methamphetamine. R. 964, ll. 18 – 21.

Bragg testified that he subsequently interviewed appellant. The first time was in February at the Laurens City Police Department. Agent Sonnefield was with him. R. 992, ll. 12 – 21. The interview lasted a couple of hours. R. 992, ll. 22 – 23. The second and third interviews occurred in a motel in Greenwood. R. 993, l. 2 – 994, l. 5.

Bragg testified that appellant confessed to him that he was "in the methamphetamine business." R. 994, ll. 11 – 19. Bragg recalled appellant telling him that Jason and Ray Powell were some of the people who made methamphetamine with him. R. 995, ll. 1 – 3. Bragg said appellant admitted he was a meth maker and that he also sold meth. R. 996, ll. 3 – 9.

The state also introduced a copy of appellant's written statement that he gave to Bragg. R. 996, l. 14 – 1031, l. 11. In this statement appellant described how he began using meth. R. 998, l. 18 – 1000, l. 5. Appellant told law enforcement that "Tammy and Rick" made "killer dope," and appellant's inquired if there was a continuous supply. R. 1000, ll. 2 – 9.

Appellant described how he met David Meadows who was a meth cook. R. 1001, l. 14 – 1002, l. 9. He also described how law enforcement in Greenville found a meth lab but couldn't prove "it was Jason's and David's lab." R. 1002, ll. 5 – 11. Appellant said Jason at one point threatened to kill him if he told anything about cooking meth "so I started helping him cook." Appellant said they would cook about two times a week and spent the rest of the week getting supplies. R. 1003, ll. 18 – 25.

Appellant wrote about how David Meadows was paranoid about Jason. Appellant said they then started using a woman named Lisa's shed for about six to eight months where he cooked meth with Jason. They then moved to Jason's trailer. R. 1004, ll. 5 – 20. Appellant and Ray Powell later became partners. R. 1004, ll. 24 – 25. Appellant also described selling Ray Powell meth. R. 1005, l. 4 – 1006, l. 9. Jason, Ray and appellant worked together and appellant said Ray was scared because Jason always carried a gun. R. 1006, l. 22 – 1008, l. 11.

Appellant then wrote to Bragg about various "cook sites" in Abbeville County, Greenwood County, Laurens County, and Georgia. R. 1009, l. 2 - 1010, l. 9. Appellant described how at one point two pitchers blew up on him and he got burned and Rick Wren had to finish the cooking. "Me and Ernest and Ray cooked at Jeff Frye's pasture behind his trailer [after that]. R. 1010, ll. 14 - 24. In his voluminous statement appellant also implicated Jeff Horne and Sandra Hughes, Steve Hodges and Tammy Stewart. R. 1013, ll. 2 - 22. Appellant implicated several other people during his statement. R. 1019, l. 2 - 1028, l. 17. Appellant statement ended as follows:

Things I will give you, Ray Powell, partner and cook. Jason S. and Preacher, major cook. Will Vinson and McMaw, Mexican connection, Denise Haggen, Frank Provan, major cook twenty years. Marvin, major cook twenty years. Conspiracy to commit murder on police officer. A.J. Welch, Ware Shoals Police Chief, dirty. Brandon Scott possible. Poker house in Georgia. Two insurance fraud, workman's comp claims. Will give everything I know about people information on arson in Due West antique shop, McMaw. Give the information on David Cumming's arson. List of cooks and cook sites I know of. A theft ring in Georgia and South Carolina. Deputy Sheriff Abbeville leaks information to Ray. Prescription fraud, list of doctors they go to. Names of two OC dealers, big dealers. Save you a trial. I want a bond and any condition you want to put on it so I can finish my, so I can finish my trailer, plus I want to start my time at Clinton City or Anderson City for safety reasons. I will do, someone will do for me. Plus be fair about the time I get. If I deliver all of this I should get very little time."

R. 1030, l. 13 - 1031, l. 11.

Appellant also told Bragg in his written statement about people who had lied to the police in their statements which were provided to him during discovery. R. 1031, l. 22 - 1032, l. 13.

On cross-examination Braggs said the initial meeting in Laurens with appellant was approximately two hours long. The final two meetings were about four to five hours. R. 1046, ll. 1 – 7. Bragg admitted that appellant cooperated and gave him the thirty page written statement, and he acknowledged he could not recall anyone else cooperating in the investigation to that extent. R. 1047, l. 22 – 1048, l. 8.

Following appellant's conviction defense counsel Varner moved for a new trial on the basis of the judge allowing appellant's statements into evidence. R. 1436, l. 15 – 1438, l. 5. That motion was denied. R. 1437, l. 8.

Similarly at sentencing defense counsel moved for a new trial on the same grounds that appellant's statements were given in return for promises of leniency, and that a new trial therefore should be granted. R. 1441 - 1442.

ARGUMENT

I.

Defense counsel correctly argued appellant's statements to law enforcement were clearly given in reliance upon the promises of leniency. As such, these statements were not admissible against appellant.

An inculpatory statement may not be contracted "by any direct or implied promises, however slight [or] by the exertion of improper influence." State v. Rochester, 301 S.C 196, 391 S.E.2d 244, 246 (1990), *citing* Hutto v. Ross, 429 U.S. 28, 30, 97 S.Ct. 202, 203 (1976). See, also, State v. Osborne, 301 S.C. 363, 392 S.E.2d 178 (1990) (threat that charges could be brought if information was withheld made the confession inadmissible in the same manner as a promise of leniency made the statement that followed the promise inadmissible).

Here, defense counsel Varner and Assistant Attorney General Evans disagreed over the plea offer. Varner strenuously maintained that Evans offered appellant a recommended sentence in the range of eight to twelve years when he pled guilty. Varner testified he told appellant to count on the sentence being twelve years, and nothing in the lower range.

It is clear through Varner's testimony, and any fair reading of appellant's statements that he nonetheless was attempting to get a "downward departure" within that eight to twelve year range. Further, Judge Floyd was told at a hearing to reduce appellant's bond that appellant had "fully cooperated," and he met with law enforcement on three separate occasions apparently for about ten total hours. Appellant also gave a long written statement to the police implicating others and offering to help even further. See State's Exhibit 71. R. 1446.

Assistant Attorney General Evans maintained that the only offer to appellant was fifteen years. However, she acknowledged discussions with Varner about the eight to twelve year range. Varner testified that Evans told him "fifteen was close to twelve" and within the range that was agreed on.

What is absolutely clear in this case is that appellant gave his statements to the police in return for the plea offer. Whether that plea offer was eight to twelve years – as appellant strongly maintains it was in issue two – or fifteen years does not really matter in the final analysis for purposes of this issue. Appellant's statements were unquestionably given in return for a promise of leniency where he was facing a twenty-five year sentence.

Further, it should be clear beyond any dispute that appellant's statements were inextricably entwined with the state's promises of leniency. See State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987). When examining the totality of the circumstances, as required, appellant's statement cannot not be separated from the promises of leniency, and Varner's vehement testimony, and any fair reading of this record leads to that conclusion. The state even told Judge Floyd at a bond reduction hearing -- which agent Bragg drove appellant to - - that appellant had "fully cooperated." See State v. Doby, 273 S.C. 704, 258 S.E.2d 896 (1979).

Again, this is not a case where there was either a plea agreement or not a plea agreement. See State v. Compton, 366 S.C. 671, 623 S.E.2d 661 (Ct.App. 2005). It is undisputed that appellant's statements were given in return for a promise of leniency – be that eight to twelve years or fifteen years.

Defense counsel Varner correctly argued the state could not have it both ways, they could not disregard the fact that the statements were given where a guilty plea - - even by

the state's evidence - - was envisioned, and then use appellant's statement against him at trial. That was fundamentally unfair, contrary to public policy; and was not allowed in South Carolina even before the rules of evidence. See State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986).

When a guilty plea is not consummated or it is later withdrawn, statements given to obtain that leniency cannot be used against the defendant at trial. Defense counsel was correct that the state could not have it both ways where appellant relied to his detriment on the promise of leniency in the plea offer.

As the Court noted in State v. Mathis it is in the public interest to encourage the settlement of criminal cases, and this policy favors not prejudicing a defendant who cooperated and gave statements, but later, for whatever reason, the guilty plea never resulted. See State v. Wright, 103 Ariz. 52, 436 Pac.2d 601 (1968). It is undisputed appellant's statements were given in return for a promise of leniency and that a plea offer was extended to appellant based on his cooperation. The judge erred by admitting appellant's statements against him under these circumstances. Appellant should be granted a new trial.

The judge erred by ruling the promise of a eight to twelve year sentence in the plea offer from assistant attorney general Evans to defense counsel Varner, which appellant accepted, was not binding upon the state.

As seen, Varner vehemently maintained under oath that Evans offered a sentencing recommendation of eight to twelve years at appellant's guilty plea if he cooperated and gave the police statements and information. As seen, the state told Judge Floyd at the bond reconsideration hearing that appellant "fully cooperated." Varner also testified that Evans later told him that "fifteen was close to twelve" – apparently meaning appellant did not have any real complaint.

Varner also testified that he communicated the eight to twelve year plea offer to appellant, that appellant was a "jailhouse lawyer," and that appellant would not have given the police statements without the certainty of this deal.

In Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495 (1971), the United States Supreme Court held that state prosecutors are obligated to fulfill the promises they make to defendants when those promises serve as inducements to defendants to plead guilty. Our Supreme Court has followed the principles of fundamental fairness that solicitors cannot breach even an oral -- as here -- plea agreement. See Sprouse v. State, 355 S.C. 335, 585 S.E.2d 278 (2003); State v. Thompson, 278 S.C. 1, 392 S.E.2d 581 (1982); State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994).

Varner is an officer of the court. He also testified, as a matter of necessity, as a witness that the eight to twelve year offer was made to him to him by assistant attorney general Evans. Varner conveyed the offer to appellant, appellant accepted it, and appellant

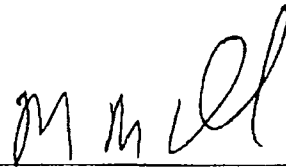
gave his statements in reliance upon the eight to twelve year plea offer. The assistant attorney general was handling many cases and surely dealing with many different lawyers during operation crankdown. Varner conversely had only one client, appellant, and Varner vehemently maintained; and he testified under oath that this eight to twelve year plea offer was made and accepted.

The court erred under the very unusual circumstances of this case by refusing to enforce the plea agreement. His case should be remanded for enforcement of that plea agreement.

CONCLUSION

By reason of the foregoing arguments appellant's conviction should be reversed and this case remanded to the Abbeville County Court of General Sessions for a new trial. In the alternative appellant's case should be remanded for enforcement of the plea offer that was accepted by appellant.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR APPELLANT.

March 12, 2007

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

March 12, 2007

A handwritten signature in black ink, appearing to read 'M. Dudek', written over a horizontal line.

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Deputy Chief Attorney for Capital Appeals

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Abbeville County
Wyatt T. Saunders, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

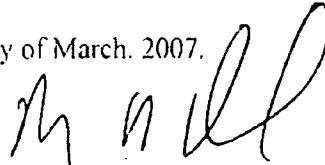
V.

MARSHALL MILLER,

APPELLANT

CERTIFICATE OF SERVICE

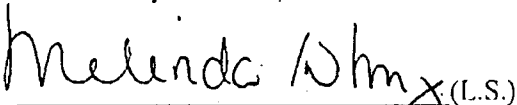
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Dwayne Pearson, Assistant Attorney General, Office of the Attorney General, State Grand Jury, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201 Esquire, this 12th day of March, 2007.



Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 12th day of March, 2007.



(L.S.)

Notary Public for South Carolina
My Commission Expires: November 16, 2008

STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE

IN THE ☒ COURT OF COMMON PLEAS
☐ FAMILY COURT

MARSHALL MILLER #249557

☒ Plaintiff

v.

STATE OF SOUTH CAROLINA

☐ Defendant

check box above indicating submitting party

CASE NO.

09-CP-01-105

**MOTION INFORMATION FORM
AND COVER SHEET**

name, S.C. Bar no. and address of plaintiff's attorney telephone: fax: e-mail: other:		name, S.C. Bar no. and address of defendant's attorney telephone: fax: e-mail: other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: _____		Court Reporter Needed: YES / NO	
Estimated Time Needed: _____			
SECTION II: Motion Type			
☐ Written motion attached ☐ Form Motion -- I hereby move for relief or action by the court as set forth in the attached proposed order.			
_____ Signature of Attorney for Plaintiff / Defendant		_____ Date submitted	
SECTION III: Motion Fee			
☐ PAID - AMOUNT: _____ ☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☒ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE CODE: Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ (print name)		DATE FILED <u>4-20-09</u>	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

SCCA/233 (1/2003)

FORM 5

STATE OF SOUTH CAROLINA)

County of ABBEVILLE)

IN THE COURT OF COMMON PLEAS

MARSHALL MILLER #249557)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

09-CF-01-105

APPLICATION FOR

POST-CONVICTION RELIEF

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 the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institution
P.O. Box 205 EA-41, Ridgville, SC. 29472
2. Name and location of Court which imposed sentence Abbeville County
Court of General Sessions
3. Name(s) of co-defendant(s) (if any) Due to the fact there are (18)
eighteen co-defendants it's impossible to list them all.
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2002-GS-47-032 conspiracy to traffick methamphetamine

- (b) _____
(c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
(a) August 24, 2004 (sealed sentence was opened (25years))
(b) _____
(c) _____
6. Check whether a finding of guilty was made:
(a) after a plea of guilty not guilty
(b) after a plea of not guilty jury trial
(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. South Carolina Court of Appeals
ii. South Carolina Supreme Court
iii. _____
(b) the result in each such Court to which you appealed:
i. affirmed conviction and sentence
ii. affirmed conviction and sentence
iii. _____
(c) the date of each such result:
i. October 19, 2007
ii. November 13, 2008
iii. _____
(d) if known, citations of any written opinion or orders entered pursuant to such results:
i. Op.No.4307
ii. no written order CERT. DENIED
iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
(a) N/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 counsel
- (b) Denial of 5th, 6th and 14th Amendment rights
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) see attached memorandum of law in support
- (b) see attached memorandum of law in support
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (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. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

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. N/A

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. N/A

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) first filing of PCR
 - (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? no
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. Kim Varner, Esquire
Greenville, Bar
 - ii. Robert Dudek, Esquire
Columbia, Bar
 - iii. _____
 - (b) the proceedings at which each such attorney represented you:
 - i. jury trial and sentencing
 - ii. direct appeal and writ of cert.
 - iii. _____

19. State clearly the relief you seek in filing this application:
vacate sentence and conviction and remand for new trial or
in the alternative, specific sentence performance.

20. Are you now under sentence from any other court that you have not challenged?

yes

Revised 3/2003

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Dorchester)

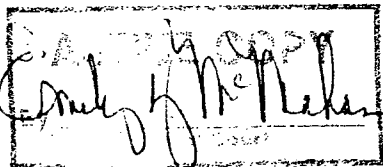
I, Marshall Miller, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Marshall Miller

SWORN to and subscribed before me this 16
day of April, 07.

[Signature] (L.S.)
Notary Public

My Commission Expires: 8/20/2016



CLERK OF COURT
CLERK OF COURT
CLERK OF COURT

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Marshall Miller, 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.

Marshall Miller
Applicant

SWORN or affirmed to and subscribed before me this
16 day of April, 07.

[Signature]
Notary Public

My Commission Expires: 8/20/2016

[Signature]
Clerk of Court

FILED
STATE OF SOUTH CAROLINA
COUNTY OF Aiken
2007 APR 20 AM 9 21
EMILY MCMAHAN
CLERK OF COURT

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF ABBEVILLE

INDICT.NO. 2002-GS-47-032

MARSHALL MILLER #249557.....PETITIONER,

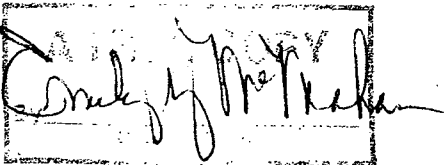
-VS-

STATE OF SOUTH CAROLINA, and

ATTORNEY GENERAL, HENRY McMASTER.....RESPONDENT,

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
APR 20 AM 9 22
EMILY McMAHAR
CLERK OF COURT

MEMORANDUM OF LAW IN SUPPORT OF
APPLICATION FOR POST-CONVICTION RELIEF
BROUGHT PURSUANT TO: S.C. CODE ANN:
§17-27-20 THROUGH §17-27-160



Respectfully Submitted,

1s/ Marshall Miller
Marshall Miller #249557

Submitted this 16th day of April, 2009

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STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE

) IN THE COURT OF COMMON PLEAS
)

MARSHALL MILLER #249557

) INDICT.NO. 2002-GS-47-032

PETITIONER,

)

-V-

) MEMORANDUM OF LAW IN SUPPORT OF

STATE OF SOUTH CAROLINA, and

) APPLICATION FOR POST-CONVICTION

ATT.GEN. HENRY McMASTER

) RELIEF BROUGHT PURSUANT TO: S.C.

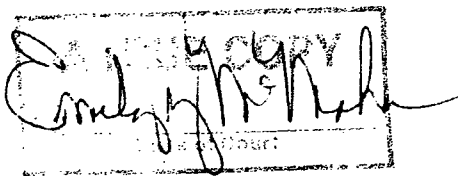
RESPONDENT,

) CODE ANN. §17-27-20 THROUGH

§17-27-160

COMES NOW, Marshall Miller, pro-se, seeking relief in this Honorable Court claiming that his Constitutional rights were violated in a number of ways, including, but not limited to his Sixth Amendment right to the effective assistance of counsel, as well as his right to a fair trial, that is protected under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Petitioner presents this Application for Post Conviction Relief and Memorandum of Law in Support pursuant to S.C. Code Ann. §17-27-20 through §17-27-160. The issues included herein along with Petitioner's statement of facts will show unto this Court that Petitioner is entitled to the requested relief.



Respectfully Submitted,

/s/ Marshall Miller
Marshall Miller #249557

ISSUE (A) WAS COUNSEL INEFFECTIVE FOR CONCEDED PETITIONER'S
GUILT DURING TRIAL?

FACTS

During the trial of Petitioner he was represented by retained counsel; who made the following statements to the jury in opening argument; as follows:

"I don't think anybody is going to get up here and tell you that Marshall Miller was boy-scout. He wasn't out trying out for his merit badge. I submit to you that you won't hear that what he was doing was appropriate or good or part of the, quote, close quotes, synergy, or that even some of his activities were legal. They were illegal and nobody is going to argue that. [Tr.p.253, L.18-25, Tr.p.254, L.1].

"But there are other things that could happen in which you have got to say, particularly in a drug case, Yes, I did drugs, or yes I might have sold drugs. [Tr.p.254, L.4-8].

Counsel then further argues to the jury during closing as follows:

I submit to you, but what does this mean, evil Marshall do, this drug lord. He bought one of them a Toyota, he did buy a Trans-Am and a 2-71, he pay's for Tina's bond, Tina's lawyers, Martha's bond, Martha's lawyers, Darlene's fine, Jeff Horne's bond, he pays for a dead girls funeral. It certainly wasn't to buy her silence. [Tr.p.1689, L.25, Tr.p.1690, L.1-6].

Why would this evil mean drug lord who controlled these people pay for somebody's funeral? He was also giving them dope, fronting it loaning it, and it came out how much money these people owed him. [Tr.p.1690, L.7-11].

And you go through Jason's bond, bought Paul a camper, Julie's kids' christmas, Lisa's kids' christmas. Then Ronnie Suttles. Is that consistent with the big time drug lord [Tr.p.1690, L.16-19].

And you know, this big drug lord who made hundreds of thousands of dollars, these are the mansions he lived in, this apartment complex, I think there is his shop, trailer, a place on 252. This guy who was doing kilos of crystal meth, making hundreds of thousands of dollars, gone, he gave it away, if he quote, quote, made it, but he's a dangerous person. [Tr.p.1691, L.11-18].

You can look at all this other stuff, these baggies that somehow didn't become baggies, but they are evidence, clearly, the same as words, evidence of these things, that Marshall Miller was engaged in criminal activity, no ifs, ands or buts. The question is there a conspiracy. [Tr.p.1695, L.16-21].

According to the State's proof, the State's evidence, it sure was plentiful. [Tr.p.1696, L.25, Tr.p.1697, L.1-2].

And you can find that Marshall Miller and Earnest Covan and Ray Powell, for that matter, and possibly Tracy, did at some point in time enter into a conspiracy if you believe they had the intent to enter into an agreement and did in fact have an agreement, but a conspiracy among those four or five is not sufficient. [Tr.p.1697, L.19-25].

And even if you find there were several conspiracies, people working together, unless there is a common goal among those, he is not guilty. He may be guilty of other crimes, but not the conspiracy. [Tr.p.1698, L.6-10].

I'm not asking you to look at whether or not Marshall Miller is innocent, He is certainly by no means that. [Tr.p.1702, L.13-15]

DISCUSSION

Petitioner contends that he was denied his right to the effective assistance of counsel when counsel conceded in his argument to the jury that there was no reasonable doubt regarding one of the factual issues in dispute...Petitioner's guilt or innocence.

The adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate. Anders v. California 87 S.Ct. 1396 (1967).

The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing.

When a true adversarial criminal trial has been conducted even if the defense counsel may have made demonstrable errors, the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. U.S. Cronic 466 U.S. at 656-57, 104 S.Ct. at 2045-46.

Petitioner contends that a criminal defendant is also protected from unfairness in the criminal process by the due process requirement that "his guilt" be proven beyond a reasonable doubt.

The United States Supreme Court has explicitly held: "The Due Process Clause protects the accused against conviction except

upon proof beyond a reasonable doubt of every fact and element to constitute the crime with which he is charged. In re Winship 90 S.Ct. 1068 (1970). The Supreme Court has also stated that Due Process commands that no man shall lose his liberty unless the government has borne the burden of producing evidence and convincing the fact finder of his guilt. Spencer v. Randall 78 S.Ct. 1332 (1958). When a defense attorney concedes that there is no reasonable doubt concerning a factual issue in dispute, the Government has not been held to it's burden of persuading the jury that the defendant is guilty.

The Supreme Court recognized in Cronic that there are circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Cronic 104 S.Ct. at 2046. The Court identified the complete denial of counsel or the deprivation of effective representation at a critical stage of an accused's trial as justifying the presumption of prejudice. *Id* at 104 S.Ct. 2047.

The Strickland test, requiring a showing of prejudice caused by counsel's ineffectiveness, is applicable (1) in cases where the record reflects that an attorney's errors or omissions occurred during an attempt to present a defense, or (2) that he or she engaged in an unsuccessful maneuver that was intended to assist the defendant in obtaining a favorable ruling. (quoting United States v. Swanson 943 F.2d 1070 (1991) at 1073.

Petitioner contends that counsel's conduct clearly caused a complete breakdown in the adversarial system of justice in this

case that compels this Court to apply the Cronic exception to the Strickland requirement of a showing that the outcome of the trial would have been different without Counsel's errors or omissions. See Cronic (supra) at 2047. Counsel's concession in his argument to the jury that Petitioner was "no a nice guy and that his actions were illegal", does not demonstrate mere negligence in the presentation of Petitioner's case or a strategy to gain a favorable result that misfired. Instead, Counsel's statement "substantially lessened" the State's burden of proof of persuading the Jury that Petitioner was guilty. Just the fact that Counsel said "they were illegal and nobody is going to argue that" tainted the integrity of the trial. The Supreme Court instructed in Cronic that "if counsel entirely fails to subject the prosecution's case to a meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversarial process presumptively unreliable". Cronic (supra) at 2047.

In the instant case, Counsel's actions and inactions were not merely an attempt to champion Petitioner's cause. The concession that there was no doubt that Petitioner was involved in illegal activities and drug sales was a clear abandonment of the defense of Petitioner at a very critical stage of the criminal proceeding. In Herring v. New York 95 S.Ct. 2550 (1975), The United States Supreme Court recognized the importance of the opening and closing argument to a criminal defendant. The Court found that a New York law which allowed every judge in a non-jury

criminal trial deny counsel any opportunity to make closing argument deprived the accused of his constitutional right to the assistance of counsel. Is at 95 S.Ct. 2556.

A lawyer who informs the jury that it is his/her view of the evidence that there is "no reasonable doubt" regarding one of the factual issues in dispute, has utterly failed to subject the prosecution's case to a meaningful adversarial testing. Cronic at 2047.

The Tenth Circuit has also recognized that "an attorney who adopts and acts upon a belief that his client should be convicted fails to function in any meaningful sense as the government's adversary. Osborne v. Shillinger 861 F.2d 612 (quoting Cronic at 2051). Counsel's statement conveyed to the jury that his belief was that Petitioner is guilty and the jury could easily hang a guilty verdict on the hook and not feel bad about it. The actions of counsel made it impossible for the jury to return a not guilty verdict. This argument by Counsel not only fails to uphold the responsibility of defense counsel, but it is also wrong from another standpoint. As there are many cases that uphold the admonitions by the trial courts that defense counsel is not to inform the jury of his/her opinion of the guilt or innocence of the defendant.

Custmarily, this is when defense counsel asserts, in effect, I believe this man is innocent because otherwise I would not be here defending him. This is universally held to an improper argument. United State v. Young 105 S.Ct. 1038 (1984)(defense

counsel, like the prosecutor must refrain from interjecting personal beliefs into the presentation of his/her case. United States v. Swafford 766 F.2d 426.

Counsel certainly was not obligated nor ethically authorized to tell the jury what he did, and completely deny Petitioner his Sixth Amendment Right to the effective assistance of trial counsel, as well as his Fourteenth Amendment right to a fair trial that is protected by the Due Process Clause. Petitioner argues this issue under that standard set forth U.S. v. Cronin 104 S.Ct. 2039 to 2051. Therefore, no prejudice has to be specified, yet the prejudice incurred is readily apparent by Counsel's opening and closing argument which denied Petitioner a fair trial and the right to the effective assistance of trial counsel.

Wherefore, for the aforementioned violations of Petitioner's rights, this Petitioner will forever pray that this Court will grant the requested relief of a new trial.

ISSUE (B) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE
HIGHLY PREJUDICIAL "OPINION TESTIMONY" OF A STATE'S WITNESS WHO
HAD NOT BEEN QUALIFIED AS AN EXPERT BY THE TRIAL COURT?

FACTS

The State's entire case against Petitioner was circumstantial, for the only evidence presented against Petitioner was that of other alleged co-defendants.

The State's theory of the case was that Petitioner was "conspiring" to traffick methamphetamine through-out a multi-county drug ring.

During the trial of Petitioner, Agent Constance Sonnefeld gave the following testimony without objection from trial counsel, as follows:

This is a five gallon, I believe a five gallon gas container containing some chemicals. There is a bag that contains more chemicals. And this red bottle right here. Right here, you can see a little better down here, but right here there is a coffee bean grinder that had some residue in it. [Tr.p.305, L.19-25].

And this is a box of salt and this was a plastic container that had some chemicals in it. [Tr.p.306, L.10-12].

We just identified it as what I thought it was. [Tr.p.306, L.21].

DISCUSSION

Petitioner contends that the State's "chemical residue" evidence presented by a non-expert witness amounted to evidence

that was inadmissible due to it's unreliability.

Petitioner further contends that Counsel should have objected to this testimony by a State's witness who had not been qualified by the trial Court as an Expert Witness. Petitioner contends that the testimony given by Agent Sonnefeld was deliberately placed before the Jury to invoke personal prejudice against Petitioner, and for counsel's failure to object or at least cross-examine Sonnefeld as to her qualifications to give such testimony. This testimony was allowed to be heard by the jury as to prove the truth of the matter asserted.

Furthermore, personal opinion or belief of a non-qualified expert witness jeopardized the integrity of the entire trial process. This is doubly true when the testimony is prejudicial, like the testimony in the instant case.

The introduction of the assumed chemical and residue evidence test constituted a pivotal point in the trial of Petitioner, in that it had the potential to reasonably establish in the Juror's minds that this was in fact "methamphetamine chemical residue". Which would raise the inference in the Juror's minds that damaging evidence existed against Petitioner.

While a Court reviewing Counsel's conduct in an ineffective assistance of counsel claim, it's not to judge actions in hind sight. Strickland v. Washington 104 S.Ct. 2065. It's clear that at the time this evidence was being introduced it would in fact be prejudicial to Petitioner's case.

Trial Counsel however, failed to make any contemporaneous

objections to either the qualifications of the witness or the reliability of the testimony by a non-expert witness.

The evidence was merely circumstantial in Petitioner's case and while a timely objection may not have excluded the damaging testimony. The lack of any objection clearly prejudice Petitioner, especially in light of the fact that this testimony was solicited by a lay-witness in violation of South Carolina Rules of Evidence (701)(c).

Additionally the failure of Counsel to object, later foreclosed Petitioner from raising the issue of the opinion testimony on appeal.

Petitioner submits that he was denied the effective assistance of trial counsel at trial, by the deficient performance of Counsel when Counsel failed to object to the highly prejudicial testimony of a non-witness who's testimony was unreliable and surely mis-lead the Jury into reaching their verdict against Petitioner.

In South Carolina, opinion testimony by a lay-witness, is governed by South Carolina Rules of Evidence (701) which states: "If the witness is not testifying as an expert, the witness' testimony in the form of opinion or inference is limited to those opinions and inferences which:

- (A) Are rationally based on the perception of the witness;
- (B) Are helpful to a clear understanding of the witness' testimony or the determination of fact in issue;
- (C) Do not require special knowledge, skill, or training.

Petitioner contends that Counsel should have objected on the grounds that the testimony violated Section (C) of the South Carolina Rules of Evidence.

For, South Carolina specifically drafted Section (C) "to emphasize that a lay person may not give Expert opinions".

In 1993, The United States Supreme Court held that: "the trial judge must ensure that any and all scientific testimony or evidence admitted in, be not only relevant, but reliable". Daubert v. Merrell Dow Pharmaceuticals 113 S.Ct. 2786, also see Taylor v. State 889 P.2d 319, where the court said "the reliability refers to trust worthiness of evidence. In a case involving scientific evidence, evidentiary reliability will be based upon scientific validity".

This standard applies to "novel scientific techniques" and "well established propositions". Daubert (supra) at 2796.

In short, Daubert (supra) requires that any Expert testimony pertaining to scientific knowledge which the witness in the instant case did not have. This unchallenged testimony so infected the trial with unfairness as to result a denial of due-process. Donnelly v. Dechristforo 94 S.Ct. 1868.

Petitioner contends that he was denied the effective assistance of trial counsel as guaranteed by the Sixth Amendment, as well as he was denied right to fair trial that is protected under the Fourteenth Amendment's Due Process Clause.

The prejudice incurred can easily been seen for if Counsel

would have at least objected and preserved this issue for appellate review there is a reasonable probability that not only the out come of the trial might have been different, but Petitioner's appeal would have been different as well. Petitioner contends that he was denied the effective assistance of counsel when counsel failed to make a contemporaneous objection at a critical stage of the proceeding that unduly prejudiced Petitioner.

For the aforementioned violation of Petitioner's rights, Petitioner will forever pray that this Court will grant the requested relief of a new trial.

ISSUE (C) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE
HIGHLY PREJUDICIAL "OPINION TESTIMONY" OF A STATE'S WITNESS WHO
HAD NOT BEEN QUALIFIED AS AN EXPERT BY THE TRIAL COURT?

FACTS

During trial, the State called Ronnie McCallister as a witness. McCallister testified that he was employed by the Greenwood County Sheriffs Department..[Tr.p. 429, L.9]..during McCallister's testimony the following was recorded:

Sled was contacted, and analysis was
conducted by Sled and it was deemed to be
anhydrous ammonia contained in the tank.
[Tr.p.445, L.20-23].

This is the black cheverolette pickup
truck that contained the anhydrous
ammonia tank I described earlier.
[Tr.p.449, L.7-8].

This bag contained a number of pills,
ephedrine based pills such as Sudefed and
other antihistamines and cold tablets
[Tr.p.450, L.15-17].

This is another photograph, a little more
descriptive of that same container. You
can see the pills, the red pills, some of
them are red and some of them are white.
[Tr.p.450, .19-22].

Directly behind the shop area on the
ground there was some charred remains
obviously a fire. Upon close inspection
of that you could tell that batteries had
been burned, some medicine containers,
ephedrine based medicine containers had
been burned. [Tr.p.458, L.20-25].

VARNER: Objection, Your Honor, to his qualifications as to how a fire burns, unless he's in forensics or is qualified on that. [Tr.p.459, L.5-7].

DISCUSSION

Petitioner contends that Counsel was ineffective for failing to properly object to the highly prejudicial opinion testimony of Ronnie McCallister.

Petitioner's contentions are that the testimony given by McCallister was purposely placed before the Jury in an attempt to allude the Jury into believing that Petitioner had a "meth lab" at Billy Moore's residence. This was all the more damaging since Petitioner was being tried for "conspiracy" and not "manufacturing" methamphetamine. Furthermore, personal opinion, or belief of a non-qualified expert witness jeopardized the entire trial process.

The introduction of this testimony constituted a multi-pivotal point in Petitioner's trial, for this assumed evidence coupled with Agent Sonnefeld's testimony served as self-serving testimony in an attempt to "bolster" the credibility of the State's case. Which would surely have raised the inference in the Jury's minds that damaging evidence existed against Petitioner. While a Court reviewing Counsel's conduct in an ineffective assistance of counsel claim is not to judge the action in hindsight. Strickland 104 S.Ct. 2065. It is also clear that at the time this evidence was being introduced that it would be very prejudicial to Petitioner's case. It cannot be contested that Counsel was unfamiliar with this aspect of trial procedure, for Counsel had just objected to this witness' testimony regarding the witness' qualifications as to "how fire burns"; yet

Counsel did [not object] to McCallister testifying to the alleged pills, ephedrine based medicines, and the alleged analysis conducted by SLED on the alleged anhydrous ammonia tank. As was seen (supra) McCallister was allowed to tell the jury that SLED did in fact conduct an analysis on the alleged anhydrous tank, yet as will be seen (infra), the only witness who was qualified as an Expert by the Court gave the following testimony as recorded:

Quincy Ford-Qualified Expert for SLED:
Well, we're not allowed to bring the anhydrous ammonia tank to SLED, therefore we will not even perform an analysis on that tank [Tr.p.606, L.13-15].

Petitioner contends that the testimony of McCallister's personal opinion and belief jeopardized the integrity of the trial.

The evidence in the entire case was merely circumstantial and consisting mainly on the testimony of alleged co-defendant's who's credibilities were clearly in question. The testimony given by McCallister was not only "incorrect", it also violated the South Carolina Rules of Evidence 701 (C).

In South Carolina, opinion testimony by a lay-witness is governed by South Carolina's Rules of Evidence 701 which states: "If the witness is not testifying as an expert, the witness' testimony in the form of opinion or inference is limited to those opinions and inferences which: (A) are rationally based on the perception of the witness; (B) are helpful to a clear

understanding of the witness' testimony or the determination of fact in issue; (3) do not require special knowledge, skill, or training. Petitioner contends that Counsel should have objected on the grounds that the testimony violated Section (C) of the South Carolina Rules of Evidence.

For, South Carolina specifically drafted Section (C) to emphasize that a lay person may not give expert opinions. In the instant case this can clearly be seen because McCallister testified that the anhydrous ammonia tank had been taken to SLED for analysis and it was deemed by SLED to be anhydrous. Yet in reviewing the Testimony of Quincy Ford, qualified expert testified that "we're not allowed to bring the anhydrous ammonia tank to SLED, therefore we will even perform an analysis on that tank" [Tr.p.606, L.13-15].

So in all reality, McCallister's testimony was more than unqualified it was a blatant lie to the Jury.

In 1993, the United States Supreme Court held that: "the trial judge must ensure that any and all scientific testimony or evidence admitted in, be not only relevant, but reliable". Daubert v. Merrell Dow Pharmaceuticals 113 S.Ct. 2789; also see Taylor v. State 889 P.2d 319, where the court said: "the reliability refers to trust worthiness of evidence. In a case involving scientific evidence, evidentiary reliability will be based upon validity".

This standard applies both to "novel scientific techniques

and well established propositions". Daubert (supra) at 2796. In short Daubert (supra) requires that any expert testimony pertaining to "scientific knowledge", which the witness in this case surely did not have.

This unchallenged testimony so infected the trial with unfairness as to result in a denial of due process. Donnelly v. Dechristforo 94 S.Ct. 1868. Petitioner contends that he was denied the effective assistance of trial counsel as guaranteed by the Sixth Amendment and as a result of Counsel's failure's Petitioner rights to a fair trial was also violated.

For the aforementioned reasons, Petitioner will forever pray that this Court will grant the requested relief of a new trial.

ISSUE (D) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE
ERRONEOUS REASONABLE DOUBT INSTRUCTION?

FACTS

During the Court's instructions to the Jury the following reasonable doubt instruction was recorded:

So the burden of proof is upon the State to establish by evidence to your satisfaction the guilt of one or both of the defendants here on trial, and the Court will not attempt to define for you what is meant by reasonable doubt in your mind. This is up to you. A reasonable doubt is simply a doubt for which you find to be reasonable. A...[Tr.p.1771, L.19-25]...reasonable doubt can arise from the evidence presented or it can arise from the lack of evidence presented.

Where it is undertaken by the prosecution in a criminal case to prove the guilt of an accused person by circumstantial evidence, not only must the circumstances be proven beyond a reasonable...[Tr.p.1778, L.22-25]...doubt, but they must point conclusively, that is, to moral certainty to the guilt of the accused. They must wholly and in every particular be perfectly consistent with each other and they must further be absolutely inconsistent with any other reasonable hypothesis than the guilt of the accused. [Tr.p.1-7].

DISCUSSION

Petitioner contends that he was denied the effective assistance of trial counsel when counsel failed to object to the erroneous reasonable doubt instruction given by the trial Court.

The Due Process Clause of the Fourteenth Amendment

"safeguards" against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. Taylor v. Kentucky 436 U.S. 478, 98 S.Ct. 1930, 1935 (1978). An instruction is defective if a reasonable juror could interpret it to allow a finding of proof below that required by the Due Process Clause. Cage v. Louisiana 111 S.Ct. 328, 112 L.Ed.2d 339 (1990).

Such an instruction could "mislead" the jury into finding no reasonable doubt when in fact there was some. Holland v. United States 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954).

The United States Supreme Court has disapproved a standard of moral rather than evidentiary certainty in determining an accused's guilt or innocence. Cage v. Louisiana 111 S.Ct. at 330. Such a charge as given in the instant case is a misleading charge in that it allowed the jury to base a finding of guilt upon subjective feeling rather than upon an evaluation of the evidence. See United States v. Drake 673 F.2d 15 (1st Cir.).

The use of a "moral certainty" standard rises to the level of a constitutional violation when it is combined with other terms in the Judge's charge which "suggests a higher degree of doubt than is required for acquittal under the reasonable doubt standard. Cage v. Louisiana 111 S.Ct. at 329-330.

A reviewing court can only engage in pure speculation--it's view of what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant guilty." In Sullivan v. Louisiana 113 S.Ct. 2078 the Court held that the

erroneous reasonable doubt instruction violates due process under Cage (supra), and amounts to a structural error, and thus cannot be considered harmless error regardless of how overwhelming the evidence of guilt. Id at Sullivan (supra) at 2082-2083.

In the instant case with this regard, a trial in which a deficient reasonable-doubt instruction in itself infected the trial with unfairness, as in the end no judge can possibly know for certain what factors led to the jury's verdict. Cf. Pope v. Illinois 481 U.S. 497, 503, n.6, 107 S.Ct. 1918, 1922. In the instant case the reasonable doubt instruction given turns the State's burden of proof on it's head by requiring the jury to find "a reasonable explanation" of evidence consistent with Petitioner's guilt before it can find him guilty. This charge clearly suggests a higher degree of doubt than that required for acquittal. Rather than conveying to the jury the principle that the State must affirmatively establish Petitioner's guilt by probative evidence beyond a reasonable doubt, this charge could have misled the jury into focussing exclusively on "Petitioner's explanation" of evidence to determine the existence of reasonable doubt. This was all the more damaging considering the fact that Petitioner's exercised his right to not be present at the trial. Petitioner contends that he was denied his constitutionally guaranteed right to the effective assistance of trial counsel when counsel failed to object to the erroneous reasonable doubt jury instruction.

For the aforementioned reasons, Petitioner will forever pray that this Court will grant the requested relief of a new trial.

ISSUE (E) WAS COUNSEL INEFFECTIVE FOR FAILING MOTION IN LIMINE CHALLENGING THE ADMISSIBILITY OF THE ALLEGED EVIDENCE RETRIEVED FROM THE STATE OF GEORGIA, DUE TO IMPROPER CHAIN OF CUSTODY OF THE ALLEGED EVIDENCE, AS WELL AS THE UNRELIABILITY OF THE EVIDENCE?

ISSUE (F) WAS APPELLATE COUNSEL INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF JURISDICTION CONCERNING THE ALLEGED EVIDENCE THAT WAS INTRODUCED AT TRIAL DUE TO IT'S UNRELIABILITY AND JURISDICTION AND CHAIN OF CUSTODY?

To save the Court's time, Petitioner will address these issues together since the facts of one encompass the other.

FACTS

During Petitioner's trial, the State called Gene Saylor as a witness and the following colloquy was recorded:

Q. Did he ever ask you during that time period to store some items for him or hide some items for him?? You described what he asked you to do with those items.

A. He said more or less, "I need to hide them, I need to leave them here for a few days and I'll call you when I need them. [Tr.p.537, L.16-22].

Q. All right. Could you describe the items that he left with you?

A. It was a yellow and black bag, a zip, you know, duffle bag, I guess, and a red

five gallon jug, and I don't know what you call the plastic containers, whatever, storage cases, I guess you call them, I don't know. [Tr.p.538, L.22-25, P.539, L.1-3].

Q. What was in the plastic container?

A. In the black container?

Q. Yes, Sir.

A. It was full of jars.

Q. What kind of jars?

A. Mason jars, yes sir.

Q. What about the trailer, did he leave that with you?

A. Yes, sir. He was having problems in Carolina, I guess he just said he needed to leave it there for a few days, which was out of the question as far as I was concerned, but it was there I think maybe two days.

Q. When you say leave it there, you mean leave it at your house?

A. Right in my yard. [Tr.p.539, L.4-19].

Saylors has testified that Petitioner has allegedly left the items in question in the State of Georgia. The following was further recorded:

Q. And prior to your testifying I showed you some photographs to see if you could identify those photographs, too?

A. Right.

Q. After he left those items with you what did you do with them?

A. Well, when he left I immediately left with them.

Q. Where did you take them?

A. It might have been maybe a mile, two miles from my house, which is right off the road maybe thirty-yards. [Tr.p.540, L.6-19].

Q. The property where you took the other items that you described, who owns that property?

A. I have no idea. I just, they wasn't going to be in my possession, I have no idea who owned them. I mean it's just like a mile or two of woods from my house, that's just all field or whatever.

Q. Well, these items that he left, why didn't you want them in your possession?

A. That I can't answer, I don't know.

Q. You don't know why you didn't want them in your possession?

A. I know why I didn't want them.

Q. You just tell us why you didn't want them.

A. I mean, I basically knowed that those items was and I felt like I knowed that was in that jug and I knowed it didn't need to be in my yard, no longer than it took him to leave, that's as long as I wanted it in my yard.

Q. I realized you didn't test what was in that jug. [Tr.p.541, L.4-25].

A. No sir.

Q. You didn't sniff anything out of that jug?

A. No, sir.

Q. You might not have even held it up or shaken it or anything, I understand

that, but just from your experience and experience alone, what did you think was in that jug?

A. Well, it wasn't water, so you know it wasn't gas, so --

Q. Eventually did you contact somebody in law enforcement regarding those items?

A. Yes, sir.

Q. And who did you contact?

A. I can't even think of his name now.

Q. Do you know what police department, could you just tell us what police department?

A. Abbeville, yes.

Q. That's all right.

A. I hadn't seen him for a good while.

Q. After you indicated to the Abbeville Police Department that you had those items did you have the opportunity to meet Agent Sonnefeld?

A. Yes. [Tr.p.543, L.12-25]

Q. And did she meet you shortly after you made that report to the Abbeville Police Department?

A. I think it was, yes, sir, the next day, I believe it was.

Q. And did you take Agent Sonnefeld and another individual to that site?

A. Yes, sir.

Q. And you showed them where those items were located?

A. Yes, sir. [Tr.p.544, L.1-10].

Gene Saylor has acknowledged that [he moved], "tampered" with the alleged evidence in question. He further has testified that he [didn't call Georgia Authorities], but rather he contacted Agent Sonnefeled in the State of South Carolina, who inreturn [did not] contact Georgia Authorities but rather traveled "across the Georgia-South Carolina State Line" and brought the alleged evidence in question.....[back into] South Carolina without any chain of custody or authority of law. Surely not only the jurisdiction of the items comes into question, but admissibility, reliability and chain of custody as well.

Especially since the alleged evidence in question was placed before the jury to prove the truth of the matter asserted.

DISCUSSION

The Constitutionality of evidence seized in a criminal case can be challenged in a suppression hearing. Jackson v. Denno 378 U.S. 368 (1964), State v. Gamble 247 S.C. 214, 146 S.E.2d 709 (1966), overruled on other grounds, State v. Torrence 305 S.C. 45, 406 S.E.2d 315 (1991). Similar hearings are required when the legality of the seizure of evidence or the person or the identification of the criminal defendant is challenged. However bare allegation of a constitutional violation is insufficient to require a suppression hearing. State v. Patton 322 S.C. 408, 472 S.E.2d 245 (1996).

In the instant case, Counsel should have motioned the Court in limine to challenge the admissibility of the evidence as well as the chain of custody of the evidence. In State v. Blassingame 271 S.C. 44, 47-48, 244 S.E.2d 528, 530 (1978), this Court pronounced a bright line test for when a Fourth Amendment suppression hearing must be held. Whenever evidence is introduced that was allegedly obtained by conduct violative of the defendant's constitutional rights, the defendant is entitled to an evidentiary hearing out of the presence of the jury at this threshold point to establish the circumstances under which it was seized. Jackson v. Denno 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Although Jackson dealt with the admissibility of a confession its rational is equally applicable to the present case. (emphasis added).

Under Blassingame (supra), a defendant need not articulate specific grounds as to why a suppression hearing is necessary; he need only make a broad, general motion. Such as in the instant case. It cannot be contested that Gene Saylor's credibility would be an issue in concern due to his prior drug use and conviction for selling methamphetamine. See [Tr.p.533, L.8-12]. Furthermore, it is even more interesting that South Carolina SLED Agent Connie Sonnefeld "crossed the South Carolina-Georgia State Line" and illegally retrieved the alleged evidence from the State of Georgia [without] the assistance of Georgia Authorities, thus would also bring into question the "fruit of the poisonous tree doctrine".

Clearly not only does the reliability and jurisdiction of the illegally obtained evidence come into play, but also the taint imposed by Gene Saylor [moving] the alleged evidence as well.

In the instant case Counsel did object to the relationship to anything within the jurisdiction of the charges before the Court concerning the alleged evidence and Counsel also candidly pointed out to the Court that these articles did in fact come out of the State of Georgia, but Counsel failed to challenge the chain of custody of the evidence in question. The question is whether or not Agent Sonnefeld had the proper authorization to cross the Georgia State line and "bring evidence back across" the South Carolina State Line, thus clearly violating chain of custody as well as jurisdiction and rendering the evidence tainted as well as unreliable.

The question now also becomes whether or not the evidence was in fact reliable since Gene Saylor was the "ONLY" one in contact with the articles that have yet to be linked to Petitioner by clear and convincing evidence. Counsel was ineffective for failing to motion in limine to suppress the illegally obtained evidence, as well as Counsel's ineffectiveness for failing to challenge the chain of custody.

Petitioner further contends that he was denied his constitutionally guaranteed right to the effective assistance of Appellate Counsel as well when counsel failed to raise this issue on appellate review.

A defendant is constitutionally entitled to the effective

assistance of Appellate Counsel. Evitts v. Lucy 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)(to be effective appellate counsel must give assistance of such quality to make the appellate procedure fair). Thrift v. State 302 S.C. 535, 397 S.E.2d 523 (1990)(appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record).

In deciding a claim of ineffective assistance of counsel, the focus is on the fundamental fairness of the proceeding whose result is being challenged. Strickland v. Washington 466 U.S. 668, 685, 696, 104 S.Ct. 2052, 2063, 2069. First, the burden of proof is on the petitioner to show that counsel's performance was deficient as measured by the standard of reasonableness under professional norms.

Second, the petitioner must prove that he was prejudiced by such a deficient performance to the extent that but for counsel's errors the result may have been different.

Just as a transcript may by rule or custom be a prerequisite to appellate review, the services of a lawyer will for every virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits. See Griffin v. Illinois 351 U.S. at 20, 76 S.Ct. at 591. Therefore the right to appellate counsel is limited to the first appeal. See Ross v. Moffitt 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

Nonetheless, if a State has created appellate courts as "an integral part of the...system for finally adjudicating the guilt or innocence of a defendant. Griffin v. Illinois (surpa) at 18, 76 S.Ct. at 590, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clause of the Constitution.

In Evitts v. Lucy 105 S.Ct. 830, the United States Supreme Court held: The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. Id at 833-843. In short, the promise of Douglas v. California 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) that a criminal defendant has a right to counsel on appeal -- like -- the promise of Gideon v. Wainwright 372 U.S. 335, 344, 83 S.Ct. 792, 796, that a criminal defendant has the right to counsel at trial would be a futile gesture unless it comprehended the right to the effective assistance of appellate counsel as well.

In the instant case, Appellate Counsel was surely aware of this meritorious issue of jurisdiction and failed to raise the issue on appeal. Furthermore, Trial Counsel was ineffective as well for failing to challenge the chain of custody and the admissibility of the illegally obtained evidence as well.

For the foregoing violations of Petitioner's rights, Petitioner will forever pray that this Court will grant the requested relief of a new trial.

ISSUE (G) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S INSTRUCTIONS TO THE JURY THAT IMPERMISSIBLY COMMENTED ON THE FACTS OF THE CASE AND THUS IN DOING SO PREMATURELY DIRECTED A VERDICT FOR THE STATE?

FACTS

During the Trial Court's instructions to the jury the following was recorded:

As the Court has stated to you previously, co-defendants have testified. Co-defendants are also called accomplices, and the testimony of an accomplice to a crime may be sufficient and of itself to convict a defendant of the crime charged. In other words, the testimony of an accomplice does not have to be corroborated in any way and you may convict a defendant based solely upon such testimony, if such testimony or evidence convinces you beyond a reasonable doubt of the guilt of the defendants or either of them. As always, the weight to be given to the testimony of a witness is for the jury and for the jury alone to decide, and if uncorroborated evidence satisfies you of the defendant's guilt beyond a reasonable doubt, then you may find the defendant's or either of them guilty.

Petitioner contends that he was denied his constitutionally guaranteed right to the effective assistance of trial counsel when counsel failed to object to the trial court's instructions that impermissibly commented on the facts of the case as well as the evidence. When read as a whole these instruction, in effect created an impermissible judicial comment on the facts of the case.

DISCUSSION

Judicial comments on the facts is prohibited in South Carolina. See (S.C. Constitution Art.5, Sec.17)(" A trial judge may not instruct the jury regarding what weight should be given certain evidence or even that certain is or is not entitled to consideration from them. As the South Carolina Supreme Court said in State v. Hartley 414 S.E.2d 182, at 183:

"A judge may not charge in respect to matters of fact, but shall declare the law, State v. Bagwell 23 S.E.2d 244 (1942)(a judge cannot express in his charge, or intimate any opinion as to the weight or the sufficiency of testimony without violating the prohibition of the Constitution as to charging upon the facts). 75A Am.Jur.2d Trial §1203, at 693 (1991)(The trial court may not instruct the jury what weight should be given [to the evidence], or even that any particular evidence is or is not entitled to receive weight or consideration from them). State v. Edwards 120 S.E. 490 (1923)(wherein our Supreme Court held the absence of motive is a mere circumstance to be considered by the jury and rejected an instruction that the absence of motive may raise a reasonable doubt as to the defendant's guilt because it was a charge on the facts).

In the instant case, the Court simple told the Jury that they could believe the testimony of the State's witness and no further evidence was needed to conviction Petitioner. This charge coming directly after the State's closing argument only reiterated the facts as put forth by the Prosecution, to the point that the

Trial Court's instruction could have been interpreted as a judicial endorsement of the Prosecution's argument.

Petitioner further argues that his due process rights to a fair trial were violated by the comments of the trial court. For through the doctrine of substantive due process, all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. Whitney v. California 47 S.Ct. 641 (1927).

The threshold question in the instance is whether the comments by the trial court were sufficiently conscience-shocking as to implicate substantive due process protections. Petitioner contends that they were, because the Trial Court acted intentionally for the purpose that only served the Prosecution. Here the issue asserted is one protected by the due process clause, when it's violation by the Court served a compelling interest, which amounted to abuse of power sufficient to shock the judicial conscience. County of Sacramento 118 S.Ct. at 1717-18.

Petitioner contends that the direct comments by the trial court were a direct violation of his rights to a fair trial, and that the only purpose served by this, was to direct a verdict for the State. Counsel was ineffective for failing to object, and ask the court for curative instruction. Here Counsel's failure to preserve this meritorious issue for appeal fell below the objective standard of reasonableness and amounted to a deficient performance. As there is a reasonable probability that but for

this deficiency the results of the trial as well as the appeal could possibly have been different.

For the aforementioned violations of Petitioner's rights, Petitioner will forever pray that this Court will grant the requested relief of a new trial.

ISSUE (H) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO DEFICIENCIES IN THE INDICTMENT PRIOR TO TRIAL AS MANDATED BY S.C.CODE OF LAW ANN. §17-19-90?

ISSUE (I) WAS COUNSEL INEFFECTIVE FOR FAILING TO MOTION THE COURT FOR A BILL OF PARTICULARS BASED ON THE VAGUENESS OF THE INDICTMENT?

To save the Court's time, Petitioner will address these issues together since the facts of one encompass the other.

FACTS

The indictment in the instant case purports to charge Petitioner as follows:

SUPERSEDING INDICTMENT Filed March 14, 2003

The State moves this Court pursuant to S.C. Code Ann. §14-7-1750 (Law Co-op.1976), to order and direct that the Superseding Indictment returned by the State Grand Jury on March 11, 2003, charging, MARSHALL MILLER, TINA STEVENSON, JULIE PRINCE, MARTHA ELLIS, DAVID CUMMINGS, TONY HOWARD, SANDRA JO HUGHES, JASON DAVIS, ERNEST COVAN, BONNIE SAYLORS, ASHLEY BANNISTER, SCOTTY PRINCE, TONYA LEE MICHELLE MADDEN, SAMUEL MCNEILL, TRACY DAVIS, RAY POWELL, JEFF PRYE, BILLY MOORE, and JEFF HORNE, with violations of S.C. Code Ann. §44-53-375(C)(Law Co-op.1976), be kept secret until further order of this Court. No person shall disclose the finding of the Superseding Indictment or any warrant or summons issued pursuant thereto, except when necessary for the issuance and execution of the warrant or summons.

Petitioner contends that Counsel should have objected to the indictment prior to trial as mandated by S.C. Code of Law §17-19-90, and in failing to do so Counsel rendered ineffective assistance of counsel, that is protected under the Sixth Amendment right to the effective assistance of trial counsel. Furthermore, Counsel's failure to object allowed Petitioner to be brought to trial contrary to the mandates of the Constitution Art. 1, §11 "No man shall be held for an infamous crime unless upon a proper indictment.

DISCUSSION

An indictment sufficiently charges a particular offense when "it apprises the defendant of the elements of the offense intended to be charged and informs the defendant of the circumstances he must be prepared to defend. Locke v. State 341 S.C. 54, 56, 533 S.E.2d 324, 325 (2000), citing Granger v. State 333 S.C. 2, 507 S.E.2d 322 (1998).

An indictment must (1) enumerate [all the elements] of the charged offense, regardless of whether it is a statutory offense, and (2) recite the factual circumstances under which the offense occurred. See S.C. Code Ann. 17-19-20, State v. Evans 322 S.C. 78, 478 SE.2d 97 (overruled on other grounds).

The South Carolina Supreme Court has instructed to apply "the indictment sufficiency test[...].with a practical eye", to the content of the indictment. State v. Adams 277 S.C. 115, 125, 283 S.E.2d 582, 587 ,overruled on other grounds State v. Torrence 305 S.C. 45, 406 S.E.2d 315 (1991).

To charge a crime an indictment must contain the elements of the offense charged, fairly inform the defendant of what charge against which he must defend and enable him to plead an acquittal or conviction in bar of future prosecutions for same offense. U.S. v. Hamer 10 Fed.Appx. 205 cert. denied 122 S.Ct. 1805.

Every ingredient of the crime must be charged in the indictment, general references to provisions of the statute is insufficient. U.S. v. Wicks 187 F.3d 429 appeal from denial of PCR relief dismissed 14 Fed.Appx. 294.

A defendant is entitled to know the exact charge they must face. U.S. v. Benntte 36 F.R.D. 103. The better practice is to set forth the elements of the crime in the indictment rather than just referring to the statutory section alleged to have been violated. State v. Owens 522 S.E.2d 745, 346 S.C. 637.

The constitutional provisions provide further support of Petitioner's view, because of requirements for a proper accusation at common-law and because of the common-law understanding that a proper jury trial requires a proper accusation. "The idea of a jury trial, as it has always been known where common-law prevails, includes an allegation, as part of the machinery of the trial. An accusation which lacks any particular fact which law makes essential to punish is...no accusation within the requirements of common-law, and it is no accusation in reason. See 1 Bishop, Criminal Procedure §87 at 55..."a notice and indictment requirements ensures that before..."persons held for crimes...shall be convicted, there shall

be an allegation against them of every element of the crime which the law makes essential to the punishment to be inflicted.

The United States Supreme Court held in Hamlin v. U.S. 94 S.Ct. 2887, 2907-08 that "Our prior cases indicate that an indictment is sufficient if it, first contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. Hamlin (supra) , also see Hagner v. U.S. 285 U.S. 427, 52 S.Ct. 417, 76 L.Ed. 861 (1932), U.S. v. Debrow 74 S.Ct. 113 (1953).

It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as "those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to punish. U.S. v. Carll 105 U.S. 611, 612, 26 L.Ed 1135 (1882).

In the instant case it cannot be contested that the indictment contains NO ELEMENTS AT ALL. In the instant case Counsel should have at a minimum motioned the Court for a Bill of Particulars. The purpose of the Bill of Particulars is to inform the defendant more specifically of the charge made against him, it is not to furnish a defendant with the government's evidence in advance of the trial. U.S. v. Hall 39 F.R.D. 26, and while a Bill of Particulars is not part of the practice in South Carolina, but the accused may move to quash the indictment

because it furnishes insufficient information. State v. Wells 161 S.E. 177, 162 S.C. 509. The decision to grant or deny a motion for a Bill of Particulars lies within the sound discretion of the trial court and may be challenged only for abuse of discretion. U.S. v. McDougall 790 F.2d 1135. In the instant case though Counsel did nothing other than turn a blind eye to the insufficient indictment and proceed with merely a trial ritual.

Petitioner contends that he was denied his Constitutionally guaranteed right to the effective assistance of trial counsel when counsel failed to object to the indictment prior to trial as mandate by South Carolina Law Code §17-19-90, or at least motion the Court for a Bill of Particulars. When looking at the indictment it is clearly insufficient and when comparing the indictment to the Trial Court's charge on the law, the Court's charge is no less than a "SHOT-GUN BLAST" at the world, as the Court's charge simply charges the entire statute without reference to any specific allegation or element. Petitioner was surely prejudiced thereby this deficiency.

For the aforementioned violations of Petitioner's rights, this Petitioner will forever pray that this Court will grant the requested relief of a new trial.

CONCLUSION

Petitioner prays that from the citations of authorities in support, that this Honorable Court will find that he (petitioner) was denied the effective assistance of trial counsel during trial; and that this Honorable Court will grant the requested relief of a new trial.

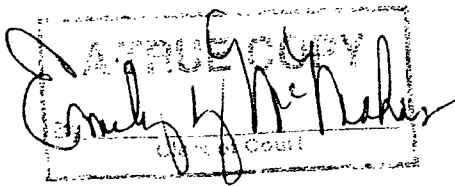
For the requested relief stated herein, Petitioner will forever pray.

Respectfully Submitted,

181 Marshall Miller

Marshall Miller #249557

Submitted this 16th day of April, 2009



FILED
STATE OF SOUTH CAROLINA
CLERK OF COURT
EMILY Y. KOHANAN
CLERK OF COURT
2009 APR 20 PM 9 23

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ABBEVILLE)

EMILY Y. MCMAHAN
CLERK OF COURT

2002 APR 20 PM 9 22

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE

MARSHALL MILLER #249557) INDICT.NO. 2002-GS-47-032

PETITIONER)

-V-

) MOTION TO ADDRESS ALL ISSUES

STATE OF SOUTH CAROLINA; and) PRESENTED, BROUGHT PURSUANT TO:

ATT.GEN. HENRY McMASTER) S.C.CODE ANN. §17-27-80

RESPONDENT,)

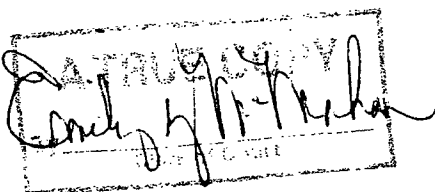
COMES NOW, Marshall Miller, pro-se, herein after Petitioner who respectfully moves this Honorable Court to direct the Attorney General's Office to address all issues presented pursuant to S.C. Code Ann. §17-27-80, as directed by the South Carolina Supreme Court in Pruitt v. State 423 S.E.2d 127. That each and every issues presented be addressed at any PCR hearing that is held according to Bryson v. State 493 S.E.2d 500 (1997).

Petitioner further asks that each and every issue raised herein be addressed by the Court at any hearing that is held and that this Court will direct that [all] issues be addressed in any Order issued by this Court. For the requested Petitioner will forever pray.

Respectfully Submitted,

/s/ Marshall Miller

Marshall Miller #249557



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ABBEVILLE)

MARSHALL MILLER #249557) INDICT.NO. 2002-GS-47-032

PETITIONER,)

-V-)

STATE OF SOUTH CAROLINA; and)

ATT.GEN. HENRY McMASTER)

RESPONDENT,)

CERTIFICATE OF SERVICE

I, Marshall Miller, do hereby swear under the penalty of perjury that I have mailed the Original and (1) one copy of the enclosed Application for Post Conviction Relief and Memorandum of Law in Support to the Abbeville Clerk of Court, P.O. Box 99, Abbeville, SC. 29260. This was done by way of the U.S. Mail here at Lieber Correctional Institution in Ridgeville, SC. 29472.

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 16 DAY OF April, 2009

Myrtle Block
NOTARY PUBLIC

MY COMM. EXPIRES 8/20/2016

KINDEST REGARDS,

/s/ Marshall Miller

Marshall Miller #249557

Carolyn McMiller

STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE

Marshall Miller, # 249557,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT
Case No: 2009-CP-01-105

RETURN

The Respondent, making its Return to the application for Post-Conviction Relief filed April 20, 2009, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court of the State Grand Jury. On September 10, 2002, the Applicant was indicted by the State Grand Jury of South Carolina for Trafficking Methamphetamine (Conspiracy)(2002-GS-47-32). Kim R. Varner, Esquire, represented him. The Applicant proceeded to trial¹ on January 20, 2004 and was convicted by the jury as indicted on January 30, 2004. The Applicant's sealed sentence was opened on August 24, 2004 at which time the Honorable Wyatt T. Saunders, Jr., sentenced him to confinement for a period of twenty-five (25) years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence on October 19, 2007. State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (2007). The Court of Appeals then denied the Applicant's Petition for Rehearing on January 17, 2008. The Applicant subsequently filed a

¹ The Applicant was tried in absentia.

Petition for Writ of Certiorari to the South Carolina Supreme Court on April 21, 2008. The Supreme Court denied the petition on November 7, 2008, and the Remittitur was issued on November 10, 2008.

Attached herewith and incorporated herein by reference are the records of the County Clerk of Court for the State Grand Jury of South Carolina regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the Appellate Court records. The Respondent reserves the right to amend this Return upon the receipt of any relevant materials.

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;
2. Ineffective Assistance of Appellate Counsel; and
3. "Denial of 5th, 6th, and 14th Amendment rights."

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 Applicant further contends he received ineffective assistance of appellate counsel. The Respondent contends this allegation is also without merit. Respondent contends that the Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the

effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999).

To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate 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. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

The Applicant's third allegation claims infringement of his rights under certain amendments to the United States Constitution. The Applicant's claims regarding various deprivations of his constitutional rights are all presented within the context of his allegations that he received ineffective assistance of both trial and appellate counsel. Therefore, the Respondent submits that these claims regarding violations of the Applicant's constitutional rights, that are presented within the context of ineffective assistance, should be analyzed accordingly, under Strickland, *supra*.

The Respondent further submits that any allegations regarding violations of the Applicant's constitutional rights should be summarily dismissed for failure to set forth with any specificity, other than ineffective assistance of counsel, the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must "...specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50 (2003). In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Accordingly, the Respondent would submit that any claims in support of this allegation presented outside the context of ineffective assistance, should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act.

VI.

The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of trial counsel and ineffective assistance of appellate 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.

VII.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VIII.

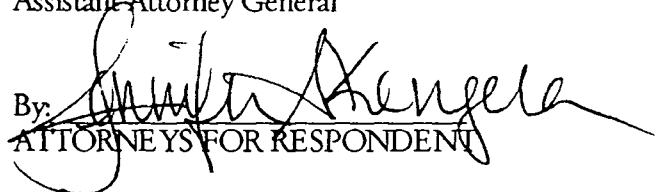
WHEREFORE, having made its Return, the Respondent requests that a hearing be held.

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

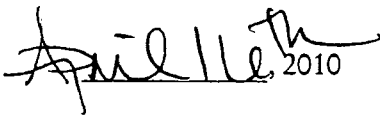
SALLEY W. ELLIOTT
Assistant Deputy Attorney General

JENNIFER A. KINZELER
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

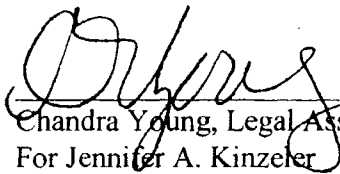
 April 16th 2010

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ABBEVILLE	)	
	)	
	)	2009-CP-01-105
	)	
MARSHALL MILLER, #249557	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Jon Eric Newlon, Esquire
1629 Hwy 72 Bypass, NE
Greenwood, SC 29649-1606

DATED this 19th day of April, 2010.


 Chandra Young, Legal Assistant
 For Jennifer A. Kinzeler

STATE OF SOUTH CAROLINA)

COUNTY OF ABBEVILLE)

Marshall Miller)

Plaintiff,)

vs.)

State of South Carolina)

Defendant.)

IN THE COURT OF COMMON PLEAS
8TH JUDICIAL CIRCUIT

CASE NO.: 09-CP-01-105

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

John DeVore Compton, III, Bar No. 13102

Address:

212 Grace Street

Greenwood, SC 29649

Phone: (864) 942-0518 Fax (864) 942-0815

E-mail: _____ Other: _____

Defendant's Attorney:

J. Rutledge Johnson, Bar No. _____

Address:

PO Box 11549

Columbia, SC 29202

Phone: (803) 734-3737 Fax (803) 734-4113

E-mail: _____ Other: _____

☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Discovery

Estimated Time Needed: 15 minutes

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

[Signature]
Signature of Attorney for ☐ Plaintiff / ☐ Defendant

3/12/12
Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT: \$ _____

☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☒ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☒ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA)
COUNTY OF ABBEVILLE)

IN THE COURT OF COMMON PLEAS

Marshall Miller,)
Plaintiff,)
vs.)
State of South Carolina,)
Defendant.)

MOTION FOR DISCOVERY

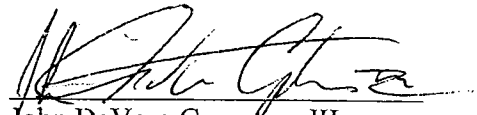
09-CP-01-105

COMES NOW Marshall Miller, applicant in the above captioned matter, by and through his counsel of record who on the 10th day after service hereof, or as soon thereafter as this matter may be heard, will move before the Presiding Judge of the Court of Common Pleas of the Eighth Judicial Circuit, Abbeville County, for the right to use the Discovery Rules under the South Carolina Rules of Civil Procedure in the above captioned matter.

For the purposes of this Motion, your applicant is informed, believes and alleges that he cannot obtain a complete and thorough hearing of the issues raised in his application for Post-Conviction Relief without the use of the Rules of Civil Procedure, and that the interest of justice will be served if he is granted this right.

WHEREFORE, your applicant prays for an Order of this Court granting the use of the Rules of Civil Procedure to pursue discovery in the above captioned matter.

Respectfully Submitted.



John DeVore Compton, III
Compton Law Firm, P.A.
212 Grace Street
Greenwood, SC 29649
(864) 942-0518
Attorney for Applicant

Greenwood, South Carolina
March 12, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF ABBEVILLE)

IN THE COURT OF COMMON PLEAS

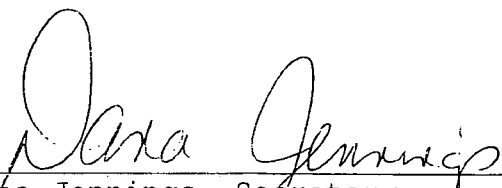
Marshall Miller,)
Plaintiff,)
vs.)
State of South Carolina,)
Defendant.)

CERTIFICATE OF SERVICE

09-CP-01-105

I, Dana Jennings, Secretary for Compton Law Firm, P.A., do hereby certify that on the 12th day of March, 2012, I served a copy of the Motion for Discovery along with a Certificate of Service in the above captioned matter via hand-delivery and by depositing a copy thereof in the United States Mail at Greenwood, South Carolina, with the proper postage affixed, directed to Defendant's attorney of record, J. Rutledge Johnson, Esquire, at his address as follows:

J. Rutledge Johnson, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29202


Dana Jennings, Secretary
Compton Law Firm, P.A.
212 Grace Street
Greenwood, SC 29646
Telephone: (864) 942-0518

Greenwood, South Carolina
March 12, 2012

STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Marshall Miller, # 249557,

2009-CP-01-0105

Applicant,

State of South Carolina,

Respondent.

REPLY TO MOTION FOR DISCOVERY

TRUE COPY
FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2012 APR 18 AM 9 07
EMILY Y MCMAHON
CLERK OF COURT

This matter comes before the Court by way of the Applicant's Motion For Discovery. The Applicant has requested the use of the Rules of Civil Procedure in this case.

The Respondent submits the following:

1. Generally, the Uniform Post-Conviction Procedure Act does not allow for discovery in a noncapital post-conviction relief case without good cause and order of the circuit court permitting discovery requests. S.C. Code Ann. § 17-27-150(A) states:

A party in a noncapital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for the effective utilization of discovery procedures, counsel may be appointed by the judge for an applicant who qualifies for appointment pursuant to Section 17-27-60 or similar applicable provisions of law.

The conviction being challenged by the Applicant in this action arises from a noncapital offense. Additionally, the Respondent has provided all of the relevant documents in its possession as follows: PCR application, return, the trial transcript, Clerk of Court's records, and SCDC records.

2. The Applicant has failed to specify what he is seeking in the discovery process. It would be impossible for the Respondent to respond without any guidelines as to what the Applicant seeks.

The Respondent asks this Court to order the Applicant to specify his discovery requests and to limit discovery as many State Grand Jury documents are confidential. However, should the Court wish to convene a hearing on the matter, a hearing may be scheduled at the next available term of PCR court.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General

BY:


ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

Apr 17, 2012.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

THE COURT OF GENERAL SESSIONS
FOR THE 5th JUDICIAL CIRCUIT
Case No.: 2002-GS-47-32

OCT 26 2012

State of South Carolina,)
vs.)
Marshall Miller, #249557,)
Defendant.)

JAMES R. PARKS
CLERK, STATE GRAND JURY

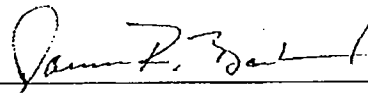
PROTECTIVE ORDER

This matter having been brought to the attention of the Court upon motion of the Attorney General and the Court having been fully advised of this matter, pursuant to South Carolina Code §§14-7-1700 and 14-7-1720, including the fact that Defendant Marshall Miller was tried *in absentia* in Indictment Number 2002-GS-4732 to Trafficking Methamphetamine (Conspiracy). Defendant filed an application for post conviction relief on or about April 20, 2009.

IT IS HEREBY ORDERED that the Attorney General is protected as part of the post-conviction relief, if he discloses the State Grand Jury discovery materials in the investigation entitled "Crank Down" to Defendant's post-conviction relief attorney, John D. Compton, III, Esquire. This protection is being authorized pursuant to South Carolina Code §14-7-1720(a) for the purpose of allowing the Attorney General to "comply with constitutional, statutory, or other legal requirements or to further justice." This is made for the purposes of litigating the post-conviction relief matter and Discovery is limited for that purpose and not authorized for any other purpose.

IT IS FURTHER ORDERED that any prior Protective Order issued in this case remains effective with respect to all State Grand Jury testimony. Interviews of witnesses and any other documents developed during the grand jury investigation of this matter that are not otherwise disclosed pursuant to this Order during the Defendant's post conviction relief matter.

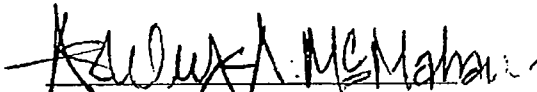
IT IS SO ORDERED.



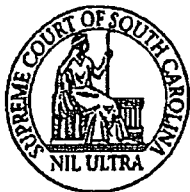
James R. Barber, III
Presiding Judge, State Grand Jury
General Sessions, 5th Judicial Circuit

Oct. 26th, 2012

I SO MOVE:



Ashley A. McMahan
Assistant Attorney General



The Supreme Court of South Carolina

JEAN HOEFER TOAL
CHIEF JUSTICE

POST OFFICE DRAWER 12458
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE (803) 734-1584
FAX (803) 734-1167
E-MAIL: jtoal@scjd.state.sc.us

MEMORANDUM

TO: Circuit Court Judges

FROM: Chief Justice Jean H. Toal

RE: Statewide Grand Jury Transcripts

DATE: June 20, 2002

It has come to my attention that copies of transcripts prepared for the Office of the Attorney General of statewide grand jury proceedings have been ordered to be made for defense counsel as part of discovery. Please note that the Office of Attorney General has a contract with a private transcription service to provide transcripts only to that office. Copies of transcripts requested by the defense are to be obtained through the private transcription service at the rate provided by Rule 607 (h) (1), SCACR. Thank you for your cooperation in this matter.

cc: Robert Bogan, Esquire
Statewide Grand Jury

RECEIVED
JUN 26 2002
STATE GRAND
JURY
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