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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Cherokee County

Roger L. Couch, Circuit Court Judge

DUSTON LENIER ROGERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002626

APPENDIX

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF CHEROKEE) IN THE COURT OF GENERAL SESSIONS
3
4 The State,)
5 -vs-) TRANSCRIPT OF RECORD
6 Dustin Lenier Rogers,) 2006-GS-11-964;965
7 Defendant.) April 3 and 4, 2007
8) Gaffney, South Carolina
9

10 B E F O R E:

11 HONORABLE J. DERHAM COLE, JUDGE; and a jury
12

13 A P P E A R A N C E S:

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15 Attorney for the State

16 EDWARD A. LAMB, ESQUIRE
17 Attorney for the Defendant
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19
20
21 Linda D. Moffitt
22 Circuit Court Reporter
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24
25

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1		<u>EXHIBITS</u>		
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
3	S-1	Crack cocaine		92
4	S-2	Gun		55
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6	S-4	Bullets		55
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Jury qualification

1 (Proceedings April 3, 2007)

2 THE COURT: Good afternoon, ladies and gentlemen of
3 the jury panel.

4 We are ready to begin with jury selection in the next
5 case that's going to require some of your participation.

6 And the title of this case is the State vs. Dustin Lenier
7 Rogers.

8 The defendant has been charged with two separate and
9 distinct offenses, although they are alleged to have arisen
10 out of one particular event which the state alleges
11 occurred back on September the 6th of 2006.

12 There are two indictments, two separate charges, but,
13 as I say, they arise out of one particular event that
14 occurred on that day.

15 The state alleges by way of each of these indictments
16 that the defendant, Dustin Lenier Rogers, did here in
17 Cherokee County possess a quantity of crack cocaine and at
18 the time he possessed it he intended to distribute it; and
19 they also allege that at the same time he also had in his
20 possession a handgun, he not being entitled under the law
21 to possess the handgun under the circumstances that existed
22 on that date.

23 Now, as to those indictments and as to the charges the
24 defendant has entered a plea of not guilty. And as you are
25 aware, a plea of not guilty places upon the state the

Jury qualification

1 burden of proving the allegations that they have set forth
2 in each of these indictments; and therefore the burden is
3 upon the state to establish the defendant's guilt beyond a
4 reasonable doubt before any such of a verdict could be
5 returned.

6 So we are going to be selecting, again, 13 of you to
7 participate. You will consider the evidence, decide the
8 facts, apply the law and arrive at a fair and just
9 decision.

10 Now, again, I'm going to ask you some questions before
11 we begin with jury selection in order to determine whether
12 or not there is any reason why any one of you jurors should
13 not be selected to participate in the trial of this
14 particular case. And so, again, as these questions are
15 asked if you need to respond to them, I'll ask that you
16 please stand. And I will address those matters with you
17 individually.

18 Again, the defendant, Dustin Lenier Rogers.

19 Mr. Rogers, if you will, please, stand and face the jury
20 panel so that they may see who you are.

21 (Whereupon, the defendant stood.)

22 THE COURT: You've got to turn and face them.

23 All right. That's Mr. Rogers.

24 Thank you. Be seated.

25 Seated with Mr. Rogers at the defense table is Ed

Jury qualification

1 Lamb, his lawyer. He will be assisting him in the trial of
2 this case.

3 (Whereupon, Mr. Lamb stood.)

4 THE COURT: Presenting the case on behalf of the state
5 is Alex Stalvey seated at the prosecution's table. He is
6 an assistant solicitor for the 7th Judicial Circuit.

7 (Whereupon, Mr. Stalvey stood.)

8 THE COURT: Potential witnesses on behalf of the state
9 would include --

10 MR. STALVEY: May I approach Your Honor?

11 THE COURT: -- Christie Poole with the Cherokee County
12 Sheriff's Department; Jimmy Henson with the Cherokee County
13 Sheriff's Department; Kukila Stanley with the state law
14 enforcement division.

15 Any other witnesses on behalf of the state?

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

17 THE COURT: The defendant?

18 MR. LAMB: No, Your Honor.

19 THE COURT: All right. Those are the potential
20 witnesses. I've told you who the defendant is, I've told
21 you who the potential witnesses are and identified the
22 lawyers for you.

23 Does any juror know anybody who has just been
24 introduced to you? If so, please stand.

25 All right. Tell me, please, ma'am, if you will, who

Jury qualification

1 you are, your juror number and which person you know.

2 JUROR NO. 54: Kawaide Wilson, Juror No. 54. I know
3 of Mr. Rogers and I'm an acquaintance to some of his family
4 members.

5 THE COURT: All right. Is there anything about that
6 fact or that connection that would in any way impair your
7 ability to be fair and impartial to both sides in this
8 case?

9 JUROR NO. 54: No, sir.

10 THE COURT: Have you heard anything about this case at
11 all?

12 JUROR NO. 54: No, sir.

13 THE COURT: Okay. Thank you. You may be seated.
14 Yes, sir.

15 JUROR NO. 86: Richard Thomas, No. 86. I know
16 Christie Poole. I worked on a vehicle for her.

17 THE COURT: Okay. Would that fact in any way impair
18 your ability to be fair in this case?

19 JUROR NO. 86: No, sir.

20 THE COURT: Thank you. Be seated.

21 Has anybody heard anything about the circumstances
22 that might relate to this particular case by any chance?

23 (No response.)

24 THE COURT: Is there anything about the nature of the
25 case, that is what the defendant is accused of having done,

Jury qualification

1 is there anything about the nature of the case itself that
2 would prevent any juror from being able to be fair and
3 impartial if you were called upon to decide the case? If
4 so, please stand.

5 (No response.)

6 THE COURT: Does any juror know of any reason
7 whatsoever why you could not be fair and impartial if you
8 were called upon to decide this case?

9 All right. You are Mr. Johnson. And your juror
10 number was what?

11 JUROR NO. 104: 104.

12 THE COURT: 104. And you do have a reason why you
13 think you could not be fair and impartial to one side or
14 the other?

15 JUROR NO. 104: Yes, sir.

16 THE COURT: All right. Thank you. You may be seated.
17 You will be excused from service in this case.

18 Any other questions requested by the state?

19 MR. STALVEY: No, sir, Your Honor.

20 THE COURT: By the defendant?

21 MR. LAMB: None from the defendant, Your Honor.

22 THE COURT: All right. As your names are called
23 please come forward. You'll be instructed if you are to be
24 seated or excused. If either asks that you be excused, you
25 can go back where you are now. If both agree to have you

Motion

1 seated, you'll have a seat in the jury box to your right.

2 (Whereupon, a jury was impanelled.)

3 THE COURT: All right. Those who have been selected,
4 I'm going to ask you to please go with a bailiff to a jury
5 room. I will bring you back shortly to begin with the
6 trial of the case.

7 (The following takes place outside the presence of the
8 jury.)

9 THE COURT: All right. Any matters to be addressed
10 regarding jury selection by the state?

11 MR. STALVEY: None from the state, Your Honor.

12 THE COURT: From the defendant?

13 MR. LAMB: None from the defendant.

14 (Whereupon, the remaining members of the jury venire
15 were excused.)

16 THE COURT: All right. Mr. Lamb, you have got a
17 motion to suppress any evidence seized as a result of a
18 search conducted by the police that yielded drugs or
19 evidence to be submitted in the trial of this case.

20 MR. LAMB: Yes, Your Honor.

21 THE COURT: All right. And, Mr. Stalvey, do you want
22 to call your witnesses to establish probable cause for the
23 search?

24 MR. STALVEY: Yes, sir.

25 Your Honor, the state would call Christie Poole to the

Christie Poole (In-camera)
Direct examination by Mr. Stalvey

1 stand.

2 CHRISTIE POOLE, having been
3 first duly sworn, testified as follows:

4 DIRECT EXAMINATION BY MR. STALVEY

5 Q Investigator Poole, could you please identify yourself
6 for the record?

7 A Christie Poole.

8 Q Where are you currently employed?

9 A Cherokee Metro Narcotics Unit.

10 Q And where were you employed on September the 6th of
11 2006?

12 A Cherokee Metro Narcotics Unit.

13 Q And did you receive some information on that day
14 regarding the defendant, Dustin Rogers?

15 A I received some on a vehicle in which he was in.

16 Q Okay. Could you describe to the Court what kind of
17 information you received?

18 A I received information that a subject by the name of
19 Billy Rogers and his vehicle with the other occupants in it
20 would be traveling in the vicinity of Granard Street.

21 At that point in time myself and two other officers
22 went to that area and located the vehicle with the subject,
23 Billy Rogers, in it, the defendant, and another subject.

24 Q And what did you do after you located that vehicle?

25 A I spoke with Billy Rogers who owns the vehicle. It's

Christie Poole (In-camera)
Direct examination by Mr. Stalvey

1 registered to someone else but he is the -- he has the car
2 all the time. And advised him that I had received
3 information that he had narcotics in the vehicle.

4 At that time he told us to search, and then he told us
5 not to search, and then he told us we could search. I
6 advised him we were going to get the K-9 officer out there
7 if need be or whatever. He told us there was nothing in
8 the vehicle, to search the vehicle, so we asked the
9 occupants to step out of the car.

10 When Mr. Rogers, Dustin Rogers, stepped out of the
11 vehicle there was a handgun visible in his back pocket as
12 he -- he had an object in his hand that he laid on the back
13 of the car when I went to handcuff him from the gun. It
14 was a glassine bag containing yellowish-white rock-like
15 substance.

16 Q And could you -- first, so we are absolutely clear,
17 who gave you consent to search that vehicle?

18 A The owner of the vehicle, Mr. Dustin, not Dustin
19 Rogers, Billy Rogers.

20 Q Billy Rogers. And is Billy Rogers in the courtroom
21 today?

22 A I don't see him.

23 Q Is he sitting over there at that table?

24 A He is not.

25 Q Okay. When you -- let's go back to when you asked if

Christie Poole (In-camera)
Direct examination by Mr. Stalvey

1 you could search the vehicle.

2 A Yes, sir.

3 Q What response was given to you?

4 A He told us at first to search the vehicle, then he
5 told us we couldn't search the vehicle, and then he told us
6 to search the vehicle, I mean.

7 Q And-but after he told you the first time that he
8 didn't want you to search the vehicle, what transpired
9 between you and Billy Rogers?

10 A I just advised them to keep their seats, we were going
11 to get a K-9 unit up there to go around the vehicle.

12 I advised him I already had enough to stop the
13 vehicle, I mean to search the vehicle, but I would get a
14 dog up there. And he said just search the vehicle, there's
15 nothing in the vehicle, search the car.

16 Q Okay. And did you ask all of the occupants of the
17 vehicle to get out of the car?

18 A We did.

19 Q Okay. And I know you've already gone through it once,
20 but tell the Court what happened after you asked all the
21 occupants to get out of the vehicle.

22 A As Dustin Rogers stepped out of the vehicle I was
23 going to do a pat-down for weapons. As he turned around
24 there was no need. There was a gun sticking in his back
25 pocket.

Christie Poole (In-camera)
Cross-examination by Mr. Lamb

1 At that point in time I advised him to get his hands
2 on top of the car. I removed the weapon from his back
3 pocket. When I reached up to handcuff him he laid a
4 glassine bag containing a yellowish-white rock like
5 substance on the top of the car. He was handcuffed and
6 escorted to the police car and transported.

7 Q And what did you place him under arrest for?

8 A I placed him under arrest for unlawful possession of a
9 firearm and possession of crack -- or possession with
10 intent to distribute crack cocaine.

11 Q Please answer any questions Mr. Lamb might have for
12 you.

13 CROSS-EXAMINATION

14 BY MR. LAMB

15 Q Christie, what time of the day did you receive this
16 call?

17 A Give me just a second. It was 11:40 at night.

18 Q 11:40 at night?

19 A Yes, sir.

20 Q And when did you execute -- when did y'all go out and
21 look for the car then? All of this happen at night?

22 A Yes, sir.

23 Q All right. So what did the C. R. I. tell you?

24 A He stated that Billy Rogers would be in his vehicle
25 and they would be traveling in that area and they were --

Christie Poole (In-camera)
Cross-examination by Mr. Lamb

- 1 there was narcotics in the vehicle.
- 2 Q How do you know there was narcotics in the vehicle?
- 3 A How did my informant know that?
- 4 Q Yes.
- 5 A He had seen the narcotics.
- 6 Q How did he see it?
- 7 A I didn't ask him that. I'm assuming he was in the
- 8 vehicle at some point in time, or with them.
- 9 Q Has he given you information that proved to be true
- 10 before?
- 11 A Yes, sir.
- 12 Q How many times?
- 13 A Several.
- 14 Q Is he under payment from you?
- 15 A Under payment?
- 16 Q Yeah. Were you paying him to be a confidential
- 17 reliable informant?
- 18 A I have in the past, yes.
- 19 Q You have in the past.
- 20 A Yes.
- 21 Q So he calls you up with another tip and tells you to
- 22 look for this car with -- how many people did he say was in
- 23 it? Have you got that down anywhere?
- 24 A He didn't say how many people exactly were in the car.
- 25 Q He didn't say one-person, two-person, or three people.

Christie Poole (In-camera)
Cross-examination by Mr. Lamb

- 1 A He did not.
- 2 Q And how did he identify the car?
- 3 A He identified the car as the snake car which belonged
4 to Billy D. Rogers.
- 5 Q Billy D. Rogers.
- 6 A Green in color.
- 7 Q So was Billy D. Rogers the one he said he bought the
8 stuff from?
- 9 A He didn't say he bought anything.
- 10 Q He didn't say he bought anything.
- 11 A He did not.
- 12 Q Okay. And then you got your gang, got your troops
13 together and everything else with that kind of information,
14 correct?
- 15 A Yes.
- 16 Q All right. And you went out and found the vehicle.
- 17 A Yes, sir.
- 18 Q What did the vehicle do wrong so you could stop it?
- 19 A I stopped the vehicle because I had information there
20 was narcotics in the vehicle.
- 21 Q There was information that they had narcotics in the
22 vehicle.
- 23 A Yes, sir.
- 24 Q In other words, you didn't even try and ascertain that
25 the taillight was out or the car drove wrong or anything

Christie Poole (In-camera)
Cross-examination by Mr. Lamb

1 else. You just went on what this guy told you on a
2 telephone.

3 A I felt no need to do all that because it was a
4 confidential reliable informant that had provided the
5 information.

6 Q Confidential reliable informant.

7 A Uh-huh.

8 Q And that's the basis for the reason you stopped the
9 car.

10 A Yes, sir.

11 Q Not on anything the car did, not on Billy's driving or
12 anything else.

13 A Billy was not driving. But, no, sir. I stopped it
14 because I had information there was narcotics in the
15 vehicle.

16 Q And who was driving?

17 A Another gentleman was driving the vehicle. I do not
18 remember his name.

19 Q What was his -- you don't remember his name?

20 A I do not. He was not arrested for anything.

21 Q And where was Billy?

22 A He was in the front passenger seat of the vehicle.

23 Q And where was Dustin?

24 A He was behind the driver in the back seat of the
25 vehicle.

Christie Poole (In-camera)
Cross-examination by Mr. Lamb

1 Q Okay. And you, of course, asked the driver of the
2 vehicle to get out first, correct?

3 A The driver got out before your client got out.

4 Q Well, you know, I know it. My client was in the rear,
5 correct?

6 A Yes.

7 Q And he got out of the vehicle. Did you search him?

8 A We patted him down for weapons. Yes, we did.

9 Q And the gentleman was still sitting in the car?

10 A Yes, he was.

11 Q All right. And then you told who to get out?

12 A There was another officer on the other side of the
13 vehicle that I believe got Mr. -- the other Mr. Rogers out
14 at the same time.

15 Q All right. The owner of the car?

16 A Yeah.

17 Q Owner of the car out of the car at the time.

18 A Yes.

19 Q And he was patted down and everything else. And
20 you're still patting down the guy you've got and talking
21 with him, correct?

22 A The other, the driver, was referred to a city officer
23 or highway patrol -- I don't remember which one -- to
24 perform some field sobriety tests because he had the odor
25 of alcohol on him.

Christie Poole (In-camera)
Cross-examination by Mr. Lamb

- 1 Q An odor of alcohol. Well, was he arrested for driving
2 under the influence?
- 3 A He was not. He passed all of his field sobriety tests
4 fine.
- 5 Q And did the other officer -- did you have to wait for
6 him to get there?
- 7 A No, sir. The other officers pulled up when we called
8 out we were on a traffic stop. I assume they were in the
9 area.
- 10 Q All right. So then after he got out of the car and
11 you checked the other guy down, when did you get around to
12 my guy?
- 13 A When did I get around?
- 14 Q Yeah.
- 15 A I asked him to step out of the vehicle after the
16 driver was taken out of the vehicle.
- 17 Q So you got the driver out and you got -- he was on the
18 passenger side, wasn't he?
- 19 A Who?
- 20 Q My client.
- 21 A No, he was not. He was behind the driver.
- 22 Q He was behind the driver. And you asked him to get
23 out.
- 24 A Yes, I did.
- 25 Q And he got out of the car, correct?

Christie Poole (In-camera)
Cross-examination by Mr. Lamb

1 A He did.

2 Q Well, what -- you say that when he got out of the car
3 you could see a gun?

4 A When he got out of the car and turned towards the car
5 for me to pat him down for weapons I could see a gun in his
6 back pocket, yes, sir.

7 Q You mean if I've got on a pair of jeans and everything
8 else and I've got a gun sticking in my back pocket, that's
9 what you saw?

10 A Yeah, yes, sir. He had a gun sticking in his back
11 pocket.

12 Q He didn't have his shirttail out?

13 A I don't remember his shirttail. I remember seeing a
14 gun.

15 Q You don't remember his shirttail out?

16 A I don't remember.

17 Q And you don't remember it covering up his whole back
18 pocket?

19 A It didn't cover up his back pocket because I seen a
20 gun in this back pocket.

21 Q You seen a gun in his back pocket.

22 A Yes, sir.

23 Q Was that the only gun you found?

24 A Yes, sir.

25 Q So you -- did you arrest him immediately for the gun?

Christie Poole (In-camera)
Cross-examination by Mr. Lamb

- 1 A He was arrested for the gun and the crack at the same
2 time. He had the crack in his hand.
- 3 Q Had the crack in his hand.
- 4 A Yes, sir.
- 5 Q In a small bag?
- 6 A Yes.
- 7 Q And how much crack was it?
- 8 A I don't have the SLED report back. I've got
9 approximately 9.5 grams. That's bag and all.
- 10 Q SLED says it's 8.1 grams. Would that be correct?
- 11 A That -- it could be. I mean, I haven't seen the SLED
12 report.
- 13 Q You haven't even seen the SLED report?
- 14 A No, sir, I have not.
- 15 Q But you didn't have any reason to get my client out
16 and search him, did you?
- 17 A I had a reason to get your client outside to search
18 the vehicle, yes, sir. I can't search the vehicle with
19 people in it.
- 20 Q But you searched him immediately.
- 21 A No. I was going to pat him down for weapons and I
22 seen a gun immediately.
- 23 Q Saw a gun immediately.
- 24 A Yes, sir.
- 25 Q And you arrested him immediately.

Christie Poole (In-camera)
Cross-examination by Mr. Lamb

1 A He was arrested, yes, sir. He was placed in a police
2 car under arrest.

3 Q Did you place him under arrest or what?

4 A I'm pretty sure I told him he was under arrest, yes,
5 sir. I mean, as far as who walked him to the car or
6 whatever, I don't recall that. I'm pretty sure I'm the one
7 who told him he was under arrest.

8 Q Did anybody get excited about when you saw he had a
9 gun?

10 A What do you mean, get excited?

11 Q Well, I mean, you see a gun, you get excited, don't
12 you?

13 A I told him to put his hands on top of the car and not
14 to move them. That's as excited as I got.

15 Q And he did.

16 A He did.

17 Q And you were pointing a gun at him.

18 A No. I didn't have a gun out.

19 Q You didn't have a gun out or anything else.

20 A No, sir; no, sir.

21 Q Now, this confidential reliable informant that you
22 have --

23 A Yes, sir.

24 Q -- he didn't tell you to go to a place or anything
25 else where they had drugs or anything, correct?

Christie Poole (In-camera)
Cross-examination by Mr. Lamb

- 1 A He told me that the vehicle, the occupants in the
2 vehicle, had narcotics.
- 3 Q What did he say exactly, do you remember? Did you
4 write it down?
- 5 A No, sir.
- 6 Q Have you got a record of the call?
- 7 A No, sir. The vehicle was where it was said it was
8 going to be at.
- 9 Q So you don't have anything to prove that you got the
10 car.
- 11 A I arrested two people.
- 12 Q You arrested two people. Well, my point is that
13 that's not like going out and observing them at a house and
14 then seeing them doing suspicious activity in a car and
15 then getting them and stopping them, is it?
- 16 A No, sir.
- 17 Q You were going exactly on your informant.
- 18 A I was going on my informant, sir.
- 19 Q You didn't write down anything about or anything at
20 all that he said or anything that he did or that he called
21 in even.
- 22 A I have it in my notes that I got the information from
23 an informant.
- 24 Q You don't even know who it was, do you?
- 25 A Do I know who it was?

Christie Poole (In-camera)
Cross-examination by Mr. Lamb

- 1 Q Yes, ma'am.
- 2 A Yes, sir, I do.
- 3 Q You know who it was?
- 4 A Do I know who my informant is?
- 5 Q Yes.
- 6 A Yes, sir, I do.
- 7 Q I'm not asking you for his name.
- 8 A I know exactly who it is.
- 9 Q So you don't keep notes on when he called you and how
- 10 he called you and things he tells you about them, or you
- 11 just go out and act on everything he does?
- 12 A I don't understand. Are you asking me do I dictate
- 13 notes every time he calls me?
- 14 Q Yes, ma'am.
- 15 A No, I do not.
- 16 Q You don't dictate any notes at all. Has he ever been
- 17 wrong?
- 18 A No, sir.
- 19 Q He's never been wrong. How many times has he been
- 20 right? You couldn't tell because you didn't write it down,
- 21 did you?
- 22 A No, sir.
- 23 Q Did you say you were going to get the drug dogs out?
- 24 A I advised him, yes, I could call a drug dog out there.
- 25 Q Did you call any drug dogs out there?

Christie Poole (In-camera)
Cross-examination by Mr. Lamb

- 1 A I did not.
- 2 Q Did you say you could get the drug dogs out there and
3 didn't call then? Correct?
- 4 A Repeat that one more time.
- 5 Q You said if you don't let me search your car I'm going
6 to get the drug dogs out.
- 7 A I asked for consent to search the vehicle and he told
8 us to search the vehicle. Then he told us not to search
9 the vehicle. And I told him that I was just going to call
10 a K-9 out there.
- 11 Q All right. And you didn't call them out.
- 12 A No, because he said search the car, there's nothing in
13 it.
- 14 Q But you didn't -- you just said he said search the car
15 and then he said don't search it.
- 16 A He did. And then he said search the car.
- 17 Q That's four times he responded to your question,
18 right?
- 19 A Search, don't search, search.
- 20 Q Okay. Do you know why he changed his mind?
- 21 A No.
- 22 Q You obviously were never in fear of your life,
23 correct?
- 24 A Was I in fear of my life? No, sir, I was not in fear
25 of my life.

Christie Poole (In-camera)
Redirect examination by Mr. Stalvey

1 MR. LAMB: I believe that's all, Your Honor.

2 MR. STALVEY: Brief redirect, Your Honor.

3 REDIRECT EXAMINATION

4 BY MR. STALVEY

5 Q Investigator Poole, just so we are clear, this
6 informant, had this informant ever provided you with any
7 information?

8 A Yes, sir.

9 Q What kind of -- any information relating to crimes
10 involving narcotics?

11 A Yes, sir.

12 Q Did that information ever lead you to make an arrest?

13 A Yes, sir.

14 Q How about a conviction?

15 A Yes, sir.

16 Q Would you consider this informant a reliable
17 informant?

18 A Yes, sir.

19 Q And did you when you got the call that night have any
20 reason to doubt that the information given to you by that
21 informant was reliable this time?

22 A To that one, no, sir.

23 Q So there hadn't been anything that happened in between
24 that would make you think that this information was not
25 reliable.

Christie Poole (In-camera)
Redirect examination by Mr. Stalvey

1 A No, sir.

2 Q Did this information turn out to be reliable?

3 A Yes, sir.

4 Q And how did that turn out to be reliable?

5 A Because I went to the location where, the area where,
6 he told me the vehicle would be with one of the subjects
7 involved.

8 The vehicle was there with that subject in the
9 vehicle. The vehicle was stopped. There was narcotics
10 removed from the occupants or the vehicle.

11 Q Okay. When this defendant, Mr. Rogers, got out of the
12 vehicle, you say you saw a pistol in his back pocket.

13 A Yes.

14 Q Now, would you consider a defendant that you have
15 information who was involved in narcotics to be --

16 MR. LAMB: Your Honor, I object to the defendant.

17 She hasn't even said the defendant was involved in
18 narcotics or anything else. She didn't even know he was
19 there.

20 THE COURT: Well, I'm not sure I understand what the
21 question was.

22 Ask the question, and then I will address whether or
23 not it ought to be -- your objection ought to be sustained
24 or overruled.

25 Q On September the 6th of 2006 when this defendant got

Christie Poole (In-camera)
Redirect examination by Mr. Stalvey

1 out of the vehicle and you saw a pistol, would you consider
2 that a problem for your safety?

3 A Yes, it's a problem for my safety, I mean.

4 THE COURT: I'm going to overrule your objection.

5 A I mean --

6 Q Go ahead and explain.

7 A He was in between me and the vehicle, and I was behind
8 him. And his hands were nowhere near this pistol. And
9 when I advised him to put his hands on top of the car, he
10 did exactly what I said.

11 He never reached for the pistol. He never offered to
12 try to get away from me or anything. He put his hands on
13 top of the vehicle.

14 At no point in time did he threaten my life or
15 anything. I wasn't scared, because I do this every day. I
16 mean, he done exactly what I said, get your hands on top of
17 the car, I see the gun. He put his hands on top of the car
18 for me.

19 Q That's what I -- but, I mean, somebody with a pistol
20 does pose a threat to the officer's safety.

21 A It does pose a threat to officer safety.

22 Q Thank you.

23 MR. STALVEY: I have no other, no other questions at
24 this time.

25

Christie Poole (In-camera)
Recross-examination by Mr. Lamb

1 RECROSS-EXAMINATION

2 BY MR. LAMB

3 Q But on your confidential reliable informant, you don't
4 have any notes or anything else you can show us here today
5 that you received a call at such and such a time to do
6 this.

7 A The only, the only thing on my confidential reliable
8 informant in this file is the fact that I put it in my case
9 earlier I received information from him.

10 MR. LAMB: That's all.

11 THE COURT: Step down.

12 Any other witnesses?

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

14 THE COURT: Does the defense wish to present any
15 testimony or other evidence?

16 MR. LAMB: No, Your Honor.

17 THE COURT: All right. Anything y'all need to tell me
18 about it that might enlighten me as to what my decision
19 ought to be, or do you think I can do it on my own?

20 MR. STALVEY: It's the defendant's motion, Your Honor.

21 THE COURT: Well, I know. But do you want to be heard
22 or not?

23 MR. STALVEY: I'll be happy to respond to anything
24 that the defense has to put up. I can make a brief --

25 THE COURT: I'm not asking for it. I'm just trying to

Motion

1 give y'all an opportunity to if you want to. I think I
2 understand it.

3 Mr. Lamb, do you need to be heard?

4 MR. LAMB: No, Your Honor. I will just cite some
5 cases, State vs. Banda, which was a recent case.

6 THE COURT: For the proposition of what?

7 MR. LAMB: For the proposition that the police
8 officers have to have a reason for stopping a car.

9 THE COURT: All right.

10 MR. LAMB: And that if they've got the reason they can
11 do so.

12 In this particular case it had a tag from Atlanta on
13 the car, so they could stop the vehicle. And then you
14 can -- you get into the proposition of asking the
15 passengers to get out of the vehicle, which you can do that
16 also. And then you get into the proposition does the
17 officer have a reason to pat them down or not pat them down
18 as far as that's concerned.

19 It's our position that this officer, number one, was
20 not after my client. He was after the one in the front
21 seat. He got out. He may or may not have told them to
22 search the vehicle. I don't know. The other guy where he
23 went, what he did, I don't know.

24 Then my client then got out of the vehicle. It is at
25 this point the officer said she saw a gun on my client.

Motion

1 Now, certainly if she saw a gun on my client, then that
2 would give them reason to pat him down. But it's our
3 proposition that there was no gun to be seen on my client.

4 THE COURT: Okay.

5 MR. STALVEY: Your Honor, the state's position would
6 be supported by Adams vs. Williams, Supreme Court case of
7 the United States, that held a traffic stop can be made on
8 an informant's information if it is reliable. It does
9 distinguish that a traffic stop cannot be made if it is an
10 anonymous tip.

11 Your Honor, I think the testimony clearly shows that
12 this informant's information had been reliable before and
13 that in this case it was reliable again.

14 Your Honor, when she got to the car between -- in
15 addition to the information that she already had, she got
16 consent to search the car.

17 To go back, it would be the state's position that this
18 defendant doesn't have standing to challenge probable cause
19 to search the car because this wasn't the defendant's car.
20 And the state's position would be that the testimony from
21 Investigator Poole clearly shows that. However --

22 THE COURT: Well, let me clear that for you, I think.

23 He might not have standing to contest a consensual
24 search of the vehicle, but he would have standing to
25 contest an illegal search of the vehicle.

Motion

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

2 The state would just reiterate its position that the
3 stop of the vehicle was not -- or the search of the vehicle
4 was not -- the stop of the vehicle was not improper; the
5 search of the vehicle was not illegal; that Investigator
6 Poole did have reasonable or probable cause to search that
7 vehicle based on the totality of the circumstances.

8 She had information from a confidential reliable
9 informant that had proved true before. When she got to the
10 car she asked for a consent to search and did say, "I will
11 have the dog out here to search." She got consent to
12 search and when she did --

13 THE COURT: Well, let me ask you about that.

14 If you don't have a voluntary consent and you tell
15 somebody that you are going to get a dog out there to do
16 it, and so they do then consent, can that be a voluntary
17 consent?

18 MR. STALVEY: Your Honor, we believe it could be, yes,
19 sir.

20 THE COURT: Well, how so?

21 MR. STALVEY: Well, in this case.

22 THE COURT: In other words, if you've got probable
23 cause or you had consent, what do you need a dog for, to
24 establish probable cause?

25 MR. STALVEY: She didn't need a dog.

Motion

1 THE COURT: That's my point. So why do you threaten
2 to bring a dog out if you already have probable cause
3 unless you're trying to coerce the defendant into giving a
4 consent, or not the defendant but the driver into giving
5 the consent?

6 MR. STALVEY: Your Honor --

7 THE COURT: Not coerce but coax him into consent.

8 MR. STALVEY: Yes, sir, Your Honor. I understand.
9 However I think the testimony goes to show that she did
10 receive consent. Then she did mention the dog. I will
11 concede that to Your Honor. But she had received consent
12 before.

13 THE COURT: She testified to it.

14 MR. STALVEY: She had information before that she
15 could search the vehicle and --

16 THE COURT: That's why you don't need another one. If
17 you've got probable cause, you don't have to multiply your
18 probable cause times two.

19 MR. STALVEY: Yes, sir, Your Honor. I understand.

20 THE COURT: Okay.

21 MR. STALVEY: Thank you, Your Honor.

22 THE COURT: Do you want to reply to anything?

23 MR. LAMB: No, sir, Your Honor.

24 THE COURT: All right. Well, here's the way I
25 understand the testimony.

Motion

1 Investigator Poole received information from a person
2 that she knew the identity of, that she had dealt with
3 before, who had provided information in the past which had
4 proven to be reliable and had led to arrests and
5 convictions of other persons for narcotics violations.

6 She received this information at 11:40 p.m. one
7 evening. And then shortly thereafter the information that
8 was provided proved to be accurate, that is that a
9 particularly described vehicle having a specific and
10 particular occupant would be operating that vehicle at a
11 particular location within a short period of time after the
12 call was received.

13 In order to corroborate that information Investigator
14 Poole went to the location where she saw the vehicle which
15 contained that particular individual as well as others.
16 She stopped the vehicle based upon that information that
17 she had received.

18 Pursuant to that stop there is, according to her
19 testimony there was, a kind of vacillation about whether or
20 not Billy Rogers, the owner of the vehicle, was going to
21 consent to a search.

22 While there might be a reasonable argument or a
23 reasonable discussion over whether or not there was a valid
24 consent since there was a vacillation and there was at
25 least the threat of the use of a narcotics dog, which

Motion

1 resulted again in the consent, I don't think I need to
2 reach that point simply because in this case where an
3 officer receives information from a person who has been
4 used previously and has provided reliable information and
5 they provide additional information about a person in a
6 vehicle at a specific location that is corroborated by the
7 officer and the reliable informant indicates to the officer
8 that there would be narcotics in the vehicle and his basis
9 of knowledge or her basis of knowledge was that he or she
10 had seen those narcotics in the vehicle, that is sufficient
11 information to authorize the officer to stop the vehicle in
12 order to conduct that investigation.

13 Once the vehicle is stopped it is reasonable for
14 occupants of the vehicle to be removed not only for the
15 protection of the officer but also for the purpose of
16 facilitating the search of the vehicle.

17 So the officer would have a right to take those
18 persons in reasonable control or supervision in order to
19 allow her to be able to conduct a search of the vehicle.

20 The undisputed testimony today is that when the
21 defendant, Dustin Rogers, was removed from the vehicle a
22 pistol was seen in his pocket in plain view. It was not
23 the result of any search. It was a plain-view observation
24 of a pistol in a pocket.

25 It's a violation of the law to have a pistol in your

Motion

1 pocket in a vehicle unless perhaps you have a permit to
2 carry the vehicle (sic), which has not been shown here
3 today. So she had a right at that point to place the
4 defendant under arrest for unlawful possession of a pistol,
5 which she apparently did. And pursuant to that arrest or
6 during the course of that seizure of the defendant he
7 produced the bag which contained the drugs which are the
8 subject of this particular prosecution.

9 So I do find there was probable cause to make a stop
10 of the vehicle. I do find that the seizure of the drugs
11 from the defendant was valid pursuant to a search incident
12 to a lawful arrest; and therefore any motion to suppress
13 the fruits of that search is denied.

14 All right. Are y'all ready to go forward?

15 MR. STALVEY: Your Honor, may we approach?

16 THE COURT: Yes, sir.

17 (Bench conference held off the record.)

18 THE COURT: All right. We are going to take ten
19 minutes.

20 (Whereupon, a recess was taken.)

21 THE COURT: All right. Are we ready for the jury now?

22 MR. STALVEY: Yes, sir, Your Honor. Thank you.

23 THE COURT: All right. Bring them in. Ask
24 Ms. Lipscomb to take the foreperson's seat.

25 (The following takes place in the presence of the

1 jury.)

2 THE COURT: All right. Where is Mr. Coggins?

3 Mr. Coggins, you are in the alternate's seat. And you
4 can take that seat.

5 There are two seats that are what we call designated,
6 I guess. One is the foreperson's seat; the other is the
7 alternate's seat. They will always occupy those seats.
8 Everybody else can sit wherever you want to. If you like
9 where you are, you can stay there, but we don't want you to
10 get in any kind of argument about the seating. But you
11 just talk about it and stay where you want to or have
12 another one if you don't like it. But the foreperson
13 always sits there, the alternate always sits there.

14 Ms. Lipscomb, I'm going to ask you to serve as the
15 foreperson of this jury. Because you served as a juror
16 before, you understand what the foreperson does. But the
17 foreperson serves as a spokesperson.

18 So if during the trial something needs to be brought
19 to my attention, you let the bailiff know. He'll let me
20 know, and I'll address it if any juror has any difficulty,
21 problem or question. Tell the forelady and she'll relay
22 that information to me.

23 Secondly, you'll be asked to preside over jury
24 deliberations when the time comes. When you go back into
25 the jury room at the trial's conclusion you're going to

1 preside over that deliberation process just to ensure that
2 it's carried out in some orderly information.

3 And, thirdly, you'll be asked to actually write the
4 verdict or the decision of the jury. You'll do that on a
5 form I'll provide you at the trial's conclusion on which
6 you will indicate the jury's unanimous decision.

7 Now, the foreperson has those duties that I have just
8 indicated. But that doesn't mean that she is any more
9 important than any of you other jurors, because the
10 decision of the jury is the unanimous consensus opinion of
11 all 12 jurors, and so all of you are going to have an equal
12 say and an equal vote in what the ultimate decision will be
13 in the case.

14 Someone simply has to be delegated those
15 responsibilities that I have just indicated, and I have
16 delegated those to Ms. Lipscomb in appointing her as the
17 foreperson. But, as I say, all of you are equally
18 important so far as the ultimate decisions in this case are
19 concerned, because the verdict has to be unanimous. All of
20 you must be in agreement.

21 Now, Mr. Coggins, you've been selected as an alternate
22 juror. And your function is to take the place of one of
23 the original 12 jurors in the event that one of these
24 original 12 cannot continue to serve for some reason. And
25 if one becomes ill or is called away and cannot continue to

Jury sworn

1 serve as a juror, then you would take that person's place.
2 And in that event you would be the 12th juror.

3 If however when the time comes for jury deliberations
4 the original 12 are able to perform that service, then your
5 service ends and you don't participate any further, because
6 during that deliberation process no more than 12 jurors may
7 participate.

8 But it is important that you pay just as careful
9 attention as we ask of all of the jurors because it does
10 occur from time to time for one reason or another one of
11 these jurors may be called away. In that event you become
12 the 12th.

13 So we of course do appreciate your participation as an
14 alternate juror just as we appreciate the participation of
15 all of you jurors who have been selected for the purpose of
16 deciding the verdict in this particular case.

17 You may swear the panel.

18 (Whereupon, the jury was duly sworn.)

19 THE COURT: Now, ladies and gentlemen, as you know,
20 you have been selected to decide the verdicts in the case
21 of the State vs. Dustin Lenier Rogers.

22 As I told you, he has got two separate indictments.
23 There are two separate charges. They do however arise out
24 of one particular event that the state alleges occurred
25 back on September the 6th of last year.

1 They allege on that date that he did possess some
2 quantity of crack cocaine and that at the time he possessed
3 it he intended to distribute it. And they also allege that
4 at the same time he did also have in his possession a
5 pistol or a handgun, he not being authorized to have it at
6 that place and time.

7 Now, as you also know, as to those charges or those
8 indictments he has entered a plea of not guilty. And, as I
9 told you, that plea of not guilty places upon the state
10 because they brought the charges the burden of proving the
11 allegations they have set forth in each of those
12 indictments, the burden of proving each of the essential
13 elements that constitute the crimes of possession with
14 intent to distribute and unlawful possession of a pistol;
15 and therefore the burden is upon the state to establish the
16 defendant's guilt to the satisfaction of you 12 jurors
17 beyond a reasonable doubt before any verdict of guilty
18 could be returned as to any charge or even any lesser
19 included offense.

20 When a person is accused of a crime under the law they
21 are always presumed to be innocent. That presumption of
22 innocence remains with any defendant, as it does with this
23 defendant, from the time that he is placed under arrest and
24 throughout the course of the criminal process and even
25 throughout the course of the actual trial.

1 That presumption of innocence will be with Mr. Rogers
2 even when you go back into the jury room to begin with your
3 deliberations in this case. And that presumption of
4 innocence will be with him in that jury room, and it will
5 be with him forever unless you 12 jurors determine that
6 he's no longer entitled to that presumption of innocence.

7 That is after you consider the evidence in the case,
8 you decide the facts and you then apply the law, if you 12
9 jurors unanimously determine that his guilt has been proven
10 as to some crime beyond a reasonable doubt, then he would
11 no longer be entitled to that presumption of innocence.
12 But it's only if, unless and until you are satisfied that
13 he has been proven guilty of some crime that he would no
14 longer be entitled to that presumption of innocence.

15 Now, the way the trial is going to proceed is in a
16 moment the lawyers are going to address you in opening
17 statements.

18 There are two occasions in the trial where lawyers can
19 address the jury, and that is at the beginning of the trial
20 before any evidence is introduced and then again at the
21 conclusion of the trial after all of the evidence has been
22 received.

23 Now, keep in mind what I just said. It's before the
24 evidence is received and after the evidence has been
25 concluded.

1 So what the lawyers tell you in those statements is
2 not evidence. The evidence comes in between those opening
3 and closing statements. So you can't consider the lawyers'
4 statements as being any evidence upon which you will base
5 your determination of fact and ultimately your decision.

6 And of course that's because the lawyers aren't
7 witnesses to anything. They're not going to be telling you
8 anything they know about this case that they have learned
9 from their own personal experience or their own personal
10 knowledge about the facts.

11 That's what witnesses do. The witnesses come to court
12 and testify. The lawyers aren't witnesses about this case.
13 They're not going to take the witness stand and they're not
14 going to testify under oath. They're not going to be
15 subjected to direct and cross-examination as each witness
16 will be.

17 So what they tell is not evidence in the case, but you
18 should listen to what they have to say because the
19 statements do serve a purpose.

20 Now, the opening statements will serve to provide you
21 with a basic understanding as to what the case is about
22 from the perspective of both the state and the defendant so
23 that you will have some context in which to place the
24 evidence that we will be receiving shortly thereafter.

25 After those are concluded we begin with the reception

1 of evidence. The state, as you know, has the burden of
2 proof, so they'll go forward first with their presentation
3 of evidence.

4 After the state has concluded the defendant has the
5 same opportunity to present testimony and other evidence
6 should he wish to.

7 But a defendant in a criminal case does not have to
8 testify, does not have to call any witnesses, does not have
9 to produce any evidence. And that's because the burden is
10 never upon a person accused of a crime to prove that they
11 are not guilty or to prove that they are innocent, because
12 in many circumstances that would not even be possible.

13 And so when you make an accusation against another the
14 burden is upon the accuser to establish those accusations
15 beyond a reasonable doubt. And the burden is not on a
16 person who is accused to prove their innocence because that
17 might not be possible.

18 But, as I say, a defendant is always afforded an
19 opportunity to testify or present evidence if they wish to.
20 They are simply not under the obligation to.

21 And if a defendant chooses not to testify or present
22 evidence, you can't consider that fact in any way. You
23 can't hold that against them. You can't allow that to
24 influence your decision or to enter into your
25 deliberations.

1 You've got to base your decision as to whether or not
2 his guilt has been proven beyond a reasonable doubt based
3 upon the evidence presented in the case, and you can't
4 permit the fact that a defendant does not offer evidence to
5 weigh in the slightest degree against the defendant
6 because, as I say, he doesn't have any burden of proof in
7 the case.

8 After all of that evidence has been received the
9 lawyers will again address you in closing statements.
10 Those closing statements provide the lawyers an opportunity
11 to discuss with you the evidence that you've seen and
12 heard. And through that discussion they each will have the
13 opportunity to try to persuade you or to convince you that
14 that evidence does or does not support a particular
15 decision.

16 And after all of that -- after all of that is
17 concluded I will then instruct you in detail and fully on
18 the law that's applicable in a -- these particular types of
19 cases. And then you'll be asked to go back and begin
20 deliberations.

21 And through that process you 12 jurors are simply
22 going to be called upon through the exercise of good
23 judgment and common sense to evaluate witnesses' testimony,
24 to determine what the most credible evidence is.

25 From that evidence you will decide what you believe,

1 if anything, occurred back on September the 6th of 2006 as
2 it relates to these allegations.

3 Once you decide the facts, you'll then apply the law,
4 and you'll determine whether or not the defendant has been
5 proven guilty beyond a reasonable doubt of any crime the
6 state claims he committed.

7 Now, all that we ask for you to do is to pay careful
8 attention throughout the course of the trial. Give every
9 witness the same degree of attention as they testify.

10 Sometimes you have to assess and evaluate the
11 credibility of witnesses, especially if there's a conflict
12 in testimony and it's a conflict on facts that are material
13 to your making a decision. And so that's one of your
14 duties and one of your prerogatives, is you get to decide
15 the credibility of witnesses.

16 And you can believe everything they testify to; you
17 may believe none of it. You can believe some portion of a
18 witness' testimony and disbelieve some other portion. But
19 it's important you give every witness the same degree of
20 attention as they testify so that when you got back to
21 begin deliberating you'll be in a proper position to be
22 able to fairly evaluate and assess the credibility of a
23 witness' testimony in light of not only that witness'
24 testimony but in light of all of the testimony and all of
25 the evidence received during the case.

Opening statements

1 It's also important that you keep an open mind
2 throughout the course of the trial. And by that I simply
3 mean that you are not under any circumstances to begin
4 making up your minds or formulating your opinions as to
5 what you think the ultimate decision ought to be until all
6 of the evidence has been received, until I have instructed
7 you on the law that is applicable and until you are then
8 asked to go back into the jury room and begin your
9 deliberations in the case. That is the process that has
10 been designed for you 12 jurors to arrive at a fair and
11 just decision, not just in this case but in any case.

12 So I do want to thank you in advance for your
13 participation as well as your careful attention. I would
14 ask that you please give the lawyers your attention now as
15 they give you their opening statements.

16 Mr. Stalvey.

17 MR. STALVEY: May it please the Court, Your Honor.

18 THE COURT: Yes, sir.

19 MR. STALVEY: Ladies and gentlemen, as the judge just
20 told you, your role in this case is to judge the facts.
21 The facts of this case are that on September the 6th of
22 2006 Investigator Christie Poole of the Cherokee County
23 Sheriff's Office got some information that a car would be
24 traveling in a specific neighborhood in Gaffney.

25 The occupants of that car according to the information

Opening statements

1 that Christie Poole had were in possession of narcotics.
2 So Christie Poole acted on that information and made the
3 traffic stop. And in this vehicle the defendant sat in the
4 back seat.

5 For her own safety she asked all of the people that
6 were in that car to step out. When this defendant, Dustin
7 Rogers, stepped out of the vehicle he turned his back to
8 Investigator Poole and she saw a pistol stuck in his back
9 pocket.

10 She immediately ordered him to put his hands on the
11 top of the car, which he complied. He did what she told
12 him. When he put his hands on the top of that car, in his
13 left hand was a plastic bag, and in that plastic bag was
14 eight grams of crack cocaine.

15 He was placed under arrest. He was charged with
16 possession with intent to distribute crack cocaine and
17 unlawful possession of a pistol.

18 Now, ladies and gentlemen, this case is about as
19 straightforward as anything I've ever seen before. He had
20 the drugs in his hands. He had the pistol in his back
21 pocket.

22 The facts of the case are clear. All you have to do
23 in order to find him guilty of these two charges are to use
24 your common sense and good judgment and listen carefully to
25 the testimony you'll hear from this witness stand right

Opening statements

1 here. That testimony will be he was in possession of those
2 drugs. He had them in his hand.

3 In order to find him guilty of possession with intent
4 to distribute crack cocaine you just have to find first
5 that he was in possession of the drugs. That testimony,
6 those facts are clear. In his hands.

7 The second part of possession with intent to
8 distribute is the intent to distribute. And, ladies and
9 gentlemen, there are several factors that you may consider
10 when determining that this defendant intended to distribute
11 those drugs.

12 However the legislature of this state has made that
13 job easy for you as jurors. The legislature of this state
14 has said and has put in the law that if somebody is in
15 possession of one gram of crack or more you may infer that
16 he intended to distribute that crack cocaine.

17 The facts of this case are clear. And you'll hear
18 from a chemist from the state law enforcement division that
19 will tell you this defendant was in possession of
20 eight grams of crack cocaine, eight times the amount you
21 are allowed to infer to determine that he intended on
22 distributing those drugs.

23 Ladies and gentlemen, he was also found with in my
24 opinion a large amount of cash, about \$450, and he was
25 found to be in possession of a pistol. Drugs, eight grams,

Opening statements

1 eight times the amount you are allowed to infer; pistol;
2 cash. I want you to consider those things when trying to
3 determine if he intended to distribute those drugs.

4 The second thing he's charged with today, the second
5 decision y'all have to make, was was he in possession of a
6 pistol unlawfully.

7 Once again, the facts are clear. He had a pistol in
8 his back pocket. The law of this state says it's illegal
9 for you to possess a pistol unless -- and there are several
10 things that put you in that exception to have a pistol.

11 One is a concealed weapon's permit, but there are
12 certain things about that; another, if you are a law
13 enforcement officer; another, if you're hunting; among many
14 others. None of those exceptions apply to this defendant.
15 So those two things we ask as the state -- you to determine
16 his guilt on.

17 The facts will be clear. We just ask you to use your
18 common sense, use your good judgment. And at the
19 conclusion of this case it will be clear this defendant,
20 Dustin Rogers, is guilty of possession with intent to
21 distribute crack cocaine and guilty of unlawful possession
22 of a pistol. Thank you.

23 MR. LAMB: May it please the Court.

24 THE COURT: Mr. Lamb.

25 MR. LAMB: Good afternoon, everybody. My name is Ed

Opening statements

1 Lamb and I practice law with Cox, Lamb and Seeley out of
2 Spartanburg.

3 I agree that this is a simple case. It's a simple
4 case because of the facts and circumstances herein. I ask
5 you to listen to the facts very closely to determine if
6 they are there.

7 Now, the law the solicitor didn't bother to tell you,
8 but the law also says that if you don't think that he
9 intended to distribute the crack cocaine, then you could
10 also find him guilty of possession, merely possession, of
11 drugs, possession of the drug itself.

12 So that's one other element that we have to add to
13 this case. That is the only element that we are contesting
14 as far as this case is concerned.

15 The amount of cocaine that he had was not that much.
16 It was in a small bag. It was a small amount and
17 everything else. And we take the position that he was in
18 possession of it for his own use.

19 You'll hear from the witnesses and be able to
20 ascertain who is telling the truth, who is not and then
21 reach a verdict which speaks the truth.

22 I ask you to listen to the evidence, place yourself in
23 the facts and circumstances and reach a verdict which
24 speaks the truth. And that's all I ask for you to do here
25 today. Thank you.

Christie Poole
Direct examination by Mr. Stalvey

1 MR. STALVEY: May it please the Court, Your Honor.

2 THE COURT: Yes, sir.

3 MR. STALVEY: The state would call Christie Poole to
4 the stand.

5 CHRISTIE POOLE, having been
6 first duly sworn, testified as follows:

7 DIRECT EXAMINATION BY MR. STALVEY

8 Q Investigator Poole, would you please identify yourself
9 for the benefit of the court reporter?

10 A My name is Christie Poole and I'm a special agent with
11 the Cherokee Metro Narcotics Unit.

12 Q And were you a special agent with the Cherokee County
13 Narcotics Unit on September the 6th of 2006?

14 A Yes.

15 Q And could you please explain to the jury what your
16 duties were as part of that unit?

17 A We -- my duties are to pretty much try to locate drug
18 users and drug sellers, to try to seize narcotics from the
19 streets and arrest those who are using or selling those
20 drugs.

21 Q Okay. And those were your duties on September 6th of
22 2006.

23 A Yes, sir.

24 Q And did you come into contact with the defendant,
25 Dustin Rogers, on that day?

Christie Poole
Direct examination by Mr. Stalvey

1 A Yes, sir.

2 Q And if you could, explain to this jury how you came
3 into contact with Mr. Rogers.

4 A I had received information that a green Chevrolet
5 vehicle with snakes on it, which is actually the car
6 they -- a different subject would be traveling in a certain
7 location, and that the occupants of the vehicle would have
8 narcotics.

9 Q And what location was that?

10 A Around Granard Street, in that area, Granard Street
11 and Buford street.

12 Q Is that in Cherokee County?

13 A It is.

14 Q Okay. And what did you do when you received that
15 information?

16 A Myself and two other officers went to that area and
17 began looking for the vehicle.

18 Q And did you find the vehicle?

19 A We did.

20 Q And what happened when you found the vehicle?

21 A We executed a traffic stop on the vehicle.

22 Q And tell this jury what you did when you executed the
23 traffic stop.

24 A I advised the subject who was the owner of the
25 vehicle -- he was a front-seat passenger in the vehicle --

Christie Poole
Direct examination by Mr. Stalvey

1 that I had information that there was narcotics in the
2 vehicle.

3 Q And what happened after that?

4 A Do you want a play by play?

5 Q Play by play.

6 A At that time the subject told, gave us consent to
7 search his vehicle. And then he advised us that we could
8 not search his vehicle. I advised him finally we had dogs
9 that we could bring out. The subject said there's nothing
10 in the vehicle, search the vehicle.

11 Q And what happened? What did you do when he told you
12 you could search the vehicle?

13 A We take everyone out of the vehicle so that we can
14 search the vehicles, because it's hard to search the
15 vehicle with someone sitting in it.

16 The people were removed from the vehicle. The front
17 two people were removed. There's officers on one side of
18 the vehicle and officers on the other side of the vehicle.
19 They were removed, patted down for weapons, so forth and so
20 on, until we got to Mr. Rogers.

21 Q Okay. Where was he seated in the vehicle?

22 A He was sitting behind the driver in the back seat.

23 Q And what happened when you asked him to get out of the
24 car?

25 A Mr. Rogers stepped out of the vehicle. And we always

Christie Poole
Direct examination by Mr. Stalvey

1 have them turn away from us so that we don't face any
2 resistance as far as face to face.

3 As he stepped out of the vehicle and as he turned away
4 from me, there was a pistol in his back pocket. At that
5 point in time I advised him -- we say gun. I said gun.
6 And then I advised him to put his hands on top of the
7 vehicle.

8 Q Why do you say gun?

9 A So that every officer around there knows that there's
10 a gun other than the ones we have on someone.

11 Q And where exactly did you see the pistol on this
12 defendant?

13 A It was in his back pocket, pants pocket.

14 Q Okay.

15 MR. STALVEY: May I approach the witness, Your Honor?

16 THE COURT: Yes, sir.

17 Q Investigator Poole, I'm going to show you what's
18 marked as State's 2, 3 and 4. If you could, tell me what
19 these items are.

20 A No. 2 is the pistol that was removed from Mr. Rogers'
21 pocket. Exhibit 3 is the magazine which holds the
22 ammunition for the gun which was removed from the gun. And
23 these are the bullets that were in the magazine that was in
24 the gun.

25 Q Okay.

Christie Poole
Direct examination by Mr. Stalvey

1 A I believe there is ten of them.

2 Q And those are the items that you recovered from the
3 defendant on September the 6th of 2006.

4 A Yes, sir.

5 Q Okay. That was the pistol that was in his back
6 pocket.

7 A Yes, sir.

8 MR. STALVEY: Your Honor, at this time the state would
9 move to enter what's marked as 2, 3 and 4 as evidence in
10 the case.

11 THE COURT: Any objection?

12 MR. LAMB: No objection.

13 THE COURT: They are admitted.

14 (Gun marked State's Exhibit No. 2; magazine marked
15 State's Exhibit No. 3; bullets marked State's Exhibit No.
16 4.)

17 Q Investigator Poole, what happened after you saw him
18 put his -- if you could, go back and tell us what happened
19 when you, when you saw the gun in the defendant's back
20 pocket.

21 A He was advised to put his hands on top of the vehicle.
22 At that time he did.

23 Q Okay.

24 A As he put his hands on the top of the vehicle he, he
25 had something in his left hand. When I reached up to cuff

Christie Poole
Direct examination by Mr. Stalvey

1 him, he dropped it on the car. It was the -- it was a
2 glassine bag and we -- that had crack in it, or
3 yellowish-white rock-like substance.

4 MR. STALVEY: And may I approach the witness, Your
5 Honor?

6 THE COURT: Yes, sir.

7 MR. LAMB: Let me see it. I haven't seen that. No
8 objection.

9 Q Investigator Poole, I would like for you to take a
10 look at what's marked as State's Exhibit 1 for
11 identification purposes only. Can you tell this jury
12 what's in that bag?

13 A What's in this bag is actually another bag in which
14 the items that Mr. Rogers had in his hand was placed into
15 to send off to SLED.

16 There's a glassine bag on one side and then another
17 glassine bag which contains yellowish-white rock-like
18 substance or crack cocaine.

19 MR. LAMB: Objection to crack cocaine unless she can
20 testify or knows its crack.

21 THE COURT: All right. Well, I sustain the objection.

22 Q Investigator Poole --

23 THE COURT: Is that what you believe to be an illegal
24 substance?

25 THE WITNESS: It is.

Christie Poole
Direct examination by Mr. Stalvey

1 THE COURT: Okay.

2 Q Investigator Poole, did you recover anything else from
3 the defendant besides the pistol and those drugs or the
4 package which you believed to be crack cocaine?

5 A Yes, sir.

6 Q What did you -- what else did you recover?

7 A We also recovered \$453 in cash and a glassine baggie
8 containing green plant-like material.

9 Q Investigator Poole, what did you do with the baggie of
10 yellowish rock-like substance after you recovered it from
11 this defendant?

12 A What we call is we call it BEST bag-it-up. We put it
13 in a sealed envelope or a sealed -- this bag right here,
14 the inner bag. We place it in that bag with a chain of
15 custody paperwork. And it is sent to the South Carolina
16 Law Enforcement Division for analysis.

17 What we do is we bag it up. There is a secure place
18 at the sheriff's office where it is. It's called a drop
19 box. And then the evidence custodian delivers it to SLED.

20 Q Okay. How do you know that that packaging contains
21 the substance you took off the defendant that day? Is
22 there any identifying marks or anything on that bag to help
23 you know that?

24 A My signature is on it.

25 Q What does that signature tell you?

Christie Poole
Direct examination by Mr. Stalvey

1 A That signature says printed name of person sealing the
2 envelope and signature of person sealing the envelope.

3 That means that I signed the envelope the day I sealed it
4 into that bag.

5 Q Okay. And did you alter or change the substance
6 before you put it in that bag?

7 A No, sir.

8 Q And after you put it in that bag, is there any way
9 that that substance could have been altered or tampered
10 with?

11 A No, sir. There's a -- when you seal the bag there's a
12 green kinda, I call it sticky goo. If you try to reopen
13 the bag or whatever it distorts it. You just can't reopen
14 the bag without it being known you opened the bag.

15 Q And from what you can tell by looking at that bag has
16 it been ripped or opened or anything?

17 A Not to my knowledge.

18 Q Investigator Poole, I'm going to ask you some
19 questions about the pistol that you recovered off this
20 defendant.

21 Are you familiar with the unlawful possession of a
22 pistol statue in this state?

23 A Not verbatim, but, yes, sir, I mean.

24 Q Do you know if he was -- had any reason to be in
25 possession of that pistol, legally to be in possession of

Christie Poole
Cross-examination by Mr. Lamb

1 it?

2 A No, sir.

3 Q Was he a law enforcement officer?

4 A No, sir.

5 Q Was he on his way to go hunting or fishing or anything
6 like that?

7 A There was no fishing tackle or hunting equipment in
8 the vehicle.

9 Q Was he a law enforcement officer?

10 A No, sir.

11 Q Is there any other exception to that unlawful carrying
12 of a pistol charge that would apply to this defendant?

13 A Not to my knowledge.

14 Q Okay. And that's why you arrested him for it?

15 A Yes, sir.

16 Q Please answer any questions Mr. Lamb may have for you.

17 MR. LAMB: May it please the Court.

18 THE COURT: Yes, sir.

19 CROSS-EXAMINATION

20 BY MR. LAMB

21 Q Christie, on the date in question, what time did you
22 receive your call?

23 A Around 11:40.

24 Q 11:40?

25 A A little bit before.

Christie Poole
Cross-examination by Mr. Lamb

- 1 Q Okay. And 11:40 at night?
- 2 A Yes, sir.
- 3 Q And what did you then do?
- 4 A Myself and two other officers went to the area in
- 5 which the vehicle was said to be traveling.
- 6 Q The vehicle was said to be traveling.
- 7 A Yes, sir.
- 8 Q Well, you know, was the vehicle in motion when you saw
- 9 it, or what?
- 10 A Yes, sir.
- 11 Q Okay. And was it moving around?
- 12 A It was driving down the road.
- 13 Q Well, you know, okay. It was driving down the road.
- 14 And what reason did y'all stop it for?
- 15 A Because we had information that the -- there was
- 16 illegal narcotics in the vehicle.
- 17 Q All right. And you then stopped the vehicle and
- 18 you -- the owner, Billy D. Rogers, is that correct, he was
- 19 sitting in the front?
- 20 A He was.
- 21 Q And the driver was who?
- 22 A I don't remember his name. He was not arrested.
- 23 Q You don't remember his name.
- 24 A I do not.
- 25 Q All right. And who all was there?

Christie Poole
Cross-examination by Mr. Lamb

- 1 A Who all as far as?
- 2 Q Witnesses as to what happened.
- 3 A Special Agent Jerry Smith was there; Special Agent
- 4 Richard Burgess was there. There were some other city
- 5 officers that were there.
- 6 Q That's at least four others, yeah.
- 7 A There were other officers there. I don't remember all
- 8 of their names.
- 9 Q Four others. And did they observe what you observed
- 10 and everything else?
- 11 A What do you mean?
- 12 Q Did they see what you saw?
- 13 MR. STALVEY: Objection, Your Honor. That would be
- 14 hearsay. How can she testify as to what other people saw?
- 15 THE COURT: Well, you can ask her were they in a
- 16 position to be able to observe. How about that?
- 17 MR. LAMB: Yeah.
- 18 Q Were they in a position to be able to observe
- 19 everything you saw?
- 20 A I don't believe that all of them were, I mean.
- 21 Q But some of them were.
- 22 A I believe that Richard Burgess may have been standing
- 23 behind me when I had Mr. Rogers step out of the vehicle.
- 24 Q And you said gun.
- 25 A Yeah.

Christie Poole
Cross-examination by Mr. Lamb

1 Q That's the first time you've said anything about gun.

2 A Well.

3 Q You didn't say it in your previous testimony, did you?

4 A It's a word we say, I mean.

5 Q Did you forget that or was that for the benefit of the
6 jury?

7 A I wasn't asked if I said anything else during my
8 previous testimony.

9 Q You were asked everything about your previous
10 testimony though, weren't you?

11 MR. STALVEY: Your Honor, object. She did testify
12 that she said gun in her earlier testimony when I was doing
13 the direct examination. So I'm not sure what --

14 MR. LAMB: I'm talking about the other examination we
15 had.

16 THE COURT: All right. Well, I am going to overrule
17 your objection at the present.

18 Q And this is a gun that you saw.

19 A Yes, sir.

20 Q Had it been fired?

21 A Had it been fired?

22 Q Yeah.

23 A I don't know.

24 Q You don't know. Can it be fired?

25 A Can it be fired?

Christie Poole
Cross-examination by Mr. Lamb

- 1 Q Yeah.
- 2 A I don't know.
- 3 Q So you don't know whether this gun is a weapon or not.
- 4 A It is a weapon. It is a pistol.
- 5 Q It's a pistol.
- 6 A It is.
- 7 Q But you don't know whether it could be fired.
- 8 A Are you asking me have I took the gun out and fired
- 9 it?
- 10 Q Yes, ma'am.
- 11 A I have not.
- 12 Q All right. Now, you said that you saw that in his
- 13 pocket.
- 14 A I did.
- 15 Q Was it sticking out?
- 16 A It was in his pocket, down in his pocket.
- 17 Q Down in his pocket.
- 18 A Uh-huh.
- 19 Q Back pocket?
- 20 A His back pocket.
- 21 Q Okay. And you said when he turned around you could
- 22 see it.
- 23 A Yes.
- 24 Q Is that how it was sticking out?
- 25 A I didn't say it was sticking out. I said it was down

Christie Poole
Cross-examination by Mr. Lamb

1 in his pocket.

2 Q Down in his pocket. So you couldn't actually see the
3 gun?

4 A Yes, I could see the gun.

5 Q How did you see it, the outline of it, or what?

6 A No. I seen the gun. He was standing in front of me.
7 He had on baggy pants with big baggy pockets and the gun
8 was right there in his pocket. The gun was heavy pushing
9 the pocket out. I seen the gun.

10 Q But was it sticking out anywhere like this?

11 A No, sir.

12 Q So it was completely in his pocket.

13 A It was in his pocket.

14 Q And you saw the gun.

15 A I saw the gun, yes, sir.

16 Q Are you -- you saw the outline.

17 A I saw the gun.

18 Q You saw the gun.

19 A The gun.

20 Q How did you see the gun if it was in his baggy pocket?

21 A Because the gun weighs and his pockets are big, and
22 the gun had the pocket pushed out and it had the pocket
23 held on, and I seen the gun.

24 Q Oh, you could look. Now you can look down in the
25 pocket and see the gun.

Christie Poole
Cross-examination by Mr. Lamb

- 1 A He is standing right in front of me. I could see the
- 2 gun.
- 3 Q He was standing right in front of you with his hands
- 4 up like that.
- 5 A He didn't have his hands up like that at first until I
- 6 told him to put his hands on the car.
- 7 Q So he cooperated with you fully, didn't he?
- 8 A He put his hands on his vehicle, yes.
- 9 Q He cooperated with you fully, didn't he?
- 10 A He did.
- 11 Q All right. And this package has not been opened.
- 12 A The knowledge, where I sealed the package, has not
- 13 been opened. I'm sure that SLED did open it to test it.
- 14 Q Well, where?
- 15 A I don't know.
- 16 Q You could see it, couldn't you?
- 17 A Well, I don't have -- I haven't opened that plastic
- 18 outline to see where they opened it.
- 19 Q Oh, so actually outside of it is not the package.
- 20 A The bag inside is the bag that --
- 21 Q The bag inside is the bag. Okay. And this is not a
- 22 lot of crack cocaine, is it?
- 23 A Yes, sir, it is.
- 24 Q Beg your pardon?
- 25 A Yes, sir, it is; yes, sir, it is.

Christie Poole
Cross-examination by Mr. Lamb

1 Q That's not a lot of crack cocaine and you couldn't
2 even sell it --

3 A Yes, sir, it is.

4 MR. STALVEY: Objection, Your Honor. She's answered
5 the question.

6 THE COURT: Sustained.

7 Q Did you arrest anybody else at the scene?

8 A We did.

9 Q Who?

10 A Billy D. Rogers.

11 Q Okay. And the other guy you let go?

12 A The driver was released, yes, sir.

13 Q Yes. The driver, was he the guy that called you and
14 told you?

15 A No, sir.

16 Q He is not your confidential reliable informant.

17 A No, sir, he is not.

18 Q And how are you going to sell that crack cocaine right
19 here? How are you going to sell it? Are you going to
20 crack it up? Are you going to crack it open or what? How
21 do you do it?

22 A What are you asking me, how do they sell crack
23 cocaine?

24 Q No. How are you going to sell that crack cocaine
25 right there?

Christie Poole
Cross-examination by Mr. Lamb

- 1 A Probably --
- 2 Q Could you hit it with a hammer?
- 3 A I don't know how they would break it up but probably
- 4 into \$10 or \$20 or \$30 rocks -- rocks.
- 5 Q You couldn't break it up, could you?
- 6 A Yes, sir, you could.
- 7 Q You could break that up.
- 8 A Yes, sir.
- 9 Q And you said how many other officers were at the
- 10 scene?
- 11 A There was two other narcotics officers, and some city
- 12 officers had came up. I'm not sure of their names or how
- 13 many.
- 14 Q And who did you get the \$453 cash off of?
- 15 A Mr. Rogers.
- 16 Q Where?
- 17 A Where?
- 18 Q Yeah. Where?
- 19 A Out of his pocket.
- 20 Q Which pocket?
- 21 A I don't remember exactly which pocket.
- 22 Q You don't remember which pocket. Was it in his
- 23 wallet?
- 24 A I don't remember.
- 25 Q You don't remember. Have you got the \$453 here today?

Christie Poole
Redirect examination by Mr. Stalvey

1 A It's been turned over to the -- I'm sorry.

2 Q Have you got the \$453 today?

3 A No, sir.

4 MR. LAMB: That's all, Your Honor.

5 MR. STALVEY: Brief redirect, Your Honor.

6 THE COURT: Yes, sir.

7 REDIRECT EXAMINATION

8 BY MR. STALVEY

9 Q Investigator Poole --

10 A Yes, sir.

11 Q -- how long have you been working in narcotics here in
12 Cherokee County?

13 MR. LAMB: Objection. Not subject to
14 cross-examination at this point.

15 THE COURT: Well, I think that's a lead-in. Let me
16 hear what the next question is, and then I will address
17 your objection.

18 Q Did you answer the question?

19 A Do you want me to answer the question?

20 THE COURT: Yes.

21 A I've been a narcotics officer for, on and off for,
22 probably about six or seven years.

23 Q And approximately how many times have you recovered
24 drugs off of suspects?

25 MR. LAMB: Objection.

Christie Poole
Redirect examination by Mr. Stalvey

1 THE COURT: Overruled presently.

2 A Presently hundreds.

3 Q And on September the 6th you recovered this substance
4 off of the defendant, correct?

5 A Yes, sir.

6 Q Did y'all do any like -- did y'all weigh it out there
7 at the scene, the substance?

8 A When we got back to the office it was weighed.

9 Q And do you remember how much it weighed?

10 A I put approximately nine something grams. That's bag
11 and all. That's approximate because I'm not a chemist
12 or --

13 Q Okay. And based on your experience, how much is that
14 crack cocaine worth on the street?

15 A About \$800.

16 Q \$800?

17 A Yeah.

18 Q And based on your experience, how much crack do users
19 usually carry around with them?

20 MR. LAMB: I am going to object to that question.

21 This is not proper for cross-examination. He could have
22 brought this up in his direct testimony, Your Honor. I
23 asked no questions about users or anything else.

24 THE COURT: Well, let me see y'all just a minute.

25 (Bench conference held off the record in the presence

Jimmy Dale Henson
Direct examination by Mr. Stalvey

1 of the jury but out of the hearing of the jury.)

2 THE COURT: All right. Ask your next question.

3 Q Investigator Poole, based on the quantity that you
4 weighed and your experience as a narcotics officer, was
5 this amount consistent with a user or a dealer?

6 MR. LAMB: Objection.

7 THE COURT: Sustained.

8 Q Investigator Poole, let me go back to that pistol.
9 Mr. Lamb asked you if it was a toy. Is there any doubt in
10 your mind that that is a real pistol, or is it a toy?

11 A It's a real pistol.

12 MR. STALVEY: No further questions at this time.

13 THE COURT: Thank you. You may step down.

14 MR. STALVEY: Your Honor, the state would call Jimmy
15 Henson to the stand.

16 JIMMY DALE HENSON, having been
17 first duly sworn, testified as follows:

18 DIRECT EXAMINATION BY MR. STALVEY

19 Q Mr. Henson, could you please give your full name for
20 the record?

21 A Jimmy Dale Henson.

22 Q And who are you currently employed by?

23 A Cherokee County Sheriff's Office.

24 Q And what's your title there?

25 A Crime scene investigator, slash, evidence custodian.

Jimmy Dale Henson
Direct examination by Mr. Stalvey

1 Q So I'm going to call you Investigator Henson if that's
2 okay. Is that proper?

3 A Yes, sir.

4 Q Okay. Investigator Henson, were you -- what was your
5 title on September the 6th of 2006?

6 A Crime scene investigator/evidence custodian.

7 Q And what -- can you describe to the jury what you did
8 as an evidence custodian?

9 A As evidence custodian we have -- it's a slot in the
10 hall in the sheriff's department. It's like a mail drop.
11 You can drop something in. It falls to the floor in a
12 box, but you can't get it back out. And as evidence
13 custodian every now and then I'll go in there and see
14 what's in the box, log it in on our computer and put it on
15 a shelf or either put it in a box that it needs to be
16 delivered to SLED.

17 Q And, Investigator Henson, did you come into contact
18 with any evidence associated with the case we're here on
19 today?

20 A Yes, I did.

21 MR. STALVEY: And may I approach the witness, Your
22 Honor?

23 THE COURT: Yes, sir.

24 Q And, Investigator, if you could look at what's marked
25 as State's Exhibit 1 for identification purposes only, can

Jimmy Dale Henson
Direct examination by Mr. Stalvey

1 you tell me if that's the evidence that you received in
2 relation to this case against Mr. Rogers?

3 A It is.

4 Q Okay. And how can you tell that?

5 A Each one of these bags is -- Investigator Poole
6 addressed these BEST bag kits that we get. It has an
7 identification number on it. Every one of the numbers are
8 different.

9 When I take this out of my drop box I'll log this
10 number down on a chain-of-custody form that I took it out
11 of this box at this date and this time, and I sign that I
12 did it.

13 Q And what do you do when you take it out of the box?
14 What do you do after you do that?

15 A When I take it out of the box I'll first off make sure
16 that it's sealed, and I'll put the date at the top of the
17 bag and put my initials on it that the bag was sealed when
18 I received it.

19 Then I log it into our computer system by this BEST
20 bag number and by the case number of the sheriff's
21 department. And then I'll fill out this form that I
22 received it. And then it's dropped into a box to be
23 delivered to SLED.

24 Q And was that bag sealed when you saw it?

25 A Yes, sir, it was.

Jimmy Dale Henson
Cross-examination by Mr. Lamb

1 Q And could you tell if it had been tampered with in any
2 way?

3 A It was not tampered with.

4 Q And how are you sure it was not tampered with?

5 A Because I put my initials on it. The bag was sealed
6 when I got it.

7 Q And did you -- you say it's put somewhere to be taken
8 to SLED. Who does that?

9 A I do.

10 Q You take it down to SLED. Where would that be
11 located?

12 A In Columbia.

13 Q And you take it down there with you to Columbia?

14 A Yes, sir, I do.

15 Q And how do you make sure that nothing happens to it on
16 that trip?

17 A It's in my personal custody the whole time.

18 Q And is it -- and was this tag tampered with or altered
19 with from that trip from your evidence office to SLED?

20 A No, it was not.

21 Q Please answer any questions Mr. Lamb may have now for
22 you.

23 CROSS-EXAMINATION

24 BY MR. LAMB

25 Q When did you take it down to SLED?

Jimmy Dale Henson
Cross-examination by Mr. Lamb

- 1 A On December the 29th of 2006 I made delivery to SLED.
2 Q Okay. Did you drop it in the evidence box down there?
3 A No, sir. I handed it over to an evidence custodian
4 down there, and they signed for it.
5 Q What did they sign?
6 A It's not really -- I get it off the computer. It's a
7 SLED laboratory forensic services request.
8 Q May I see it, please?
9 A There is the technician that I gave it to.
10 Q All right. Then how does it get back here?
11 A I usually pick it up when I go down and take evidence
12 down there. If they're through testing evidence, I'll pick
13 it up and bring it back up.
14 Q Where is that form?
15 A Where I brought it back?
16 Q Yes, sir.
17 A I failed to get it. It's in my office.
18 Q Failed to get it?
19 A Yeah.
20 Q In other words, you don't have the complete chain of
21 custody.
22 A Yeah, I've got the complete chain of custody.
23 Q Well, where is it?
24 THE WITNESS: If you'll give me five minutes I'll
25 bring it up here, Your Honor.

Jimmy Dale Henson
Cross-examination by Mr. Lamb

- 1 THE COURT: Just answer the question unless you want
- 2 to see the document.
- 3 A The complete chain of custody is I take it to SLED. I
- 4 turn it over to an evidence technician. I've got the piece
- 5 of paper for that.
- 6 When I pick it up I've got another piece of paper in
- 7 the evidence vault that says I picked it up this certain
- 8 day. And I bring it back up here and file it back into our
- 9 evidence vault.
- 10 Q And then when it's checked back out again for trial,
- 11 you got to do that again, right?
- 12 A Yes, sir.
- 13 Q Have you got that in your file at your office?
- 14 A It would be in the office, yes, sir.
- 15 Q Be in the office. And how long have you known that we
- 16 were going to have this trial today?
- 17 A I learned about it at about 2:15 today.
- 18 Q 2:15.
- 19 A Yes, sir.
- 20 Q So you do not have the evidence, the complete chain of
- 21 custody?
- 22 A The complete chain of custody is never out of my
- 23 custody until it's at SLED when I turn it over to them.
- 24 Q You do not --
- 25 A And then it's in my custody. I tell you I picked it

Jimmy Dale Henson
Redirect examination by Mr. Stalvey

1 up and I took it down there.

2 Q You do not have the evidence showing that. You're
3 just saying it, correct?

4 A I'm saying that, yes, sir.

5 MR. LAMB: That's all, Your Honor.

6 MR. STALVEY: Brief redirect.

7 THE COURT: Yes, sir.

8 REDIRECT EXAMINATION

9 BY MR. STALVEY

10 Q Investigator Henson, you took an oath before you sat
11 on that witness stand, did you not?

12 A Yes, sir, I did.

13 MR. LAMB: Your Honor, I am going to object to the
14 solicitor's questioning of his witnesses. You know, he's
15 just asking questions that's not proper on cross.

16 THE COURT: Well, that's just, again, that's sort of a
17 lead-in thing. Let me hear the question, the real
18 question, first. And then I'll address any objection you
19 might have.

20 Q Was that evidence in your custody from the time you
21 picked it up from SLED until today?

22 A Yes, it was.

23 Q Was that evidence altered or tampered with?

24 A No, it was not.

25 Q Is that your sworn testimony today?

Jimmy Dale Henson
Recross-examination by Mr. Lamb

1 A That's my sworn testimony.

2 MR. STALVEY: Thank you, Your Honor.

3 RECROSS-EXAMINATION

4 BY MR. LAMB

5 Q But you don't have the documents necessary to
6 substantiate your testimony, do you, sir?

7 A I do not have the other piece of paper with me.

8 Q Thank you.

9 MR. STALVEY: Your Honor, the state has no further
10 questions at this time.

11 THE COURT: Okay. You may step down.

12 Is that all you've got for today?

13 MR. STALVEY: Yes, sir, Your Honor.

14 THE COURT: There's just one other witness?

15 MR. STALVEY: As of now, Your Honor.

16 THE COURT: Okay.

17 MR. STALVEY: The state may recall a witness, Your
18 Honor.

19 THE COURT: Sir?

20 MR. STALVEY: The state may recall a witness.

21 THE COURT: Okay. Probably there is one additional
22 witness. That witness is coming from Columbia, so that
23 witness is not here this afternoon. We will begin with
24 that witness first thing in the morning at 9:30. So we're
25 going to recess for the afternoon.

1 Let me caution you that during the overnight recess --
2 you might have a spouse or a child or a friend or somebody
3 that knows you've got jury duty and they want to know what
4 you're doing. Well, you can't tell them. You just tell
5 them you are involved in the case. You're not permitted to
6 discuss it in any fashion whatsoever. And you can't
7 discuss it with any person whatsoever.

8 Now, after you reach a decision, that is after you
9 come to a verdict, you can talk about it all you want to or
10 as little as you want to. But before you reach a decision
11 you're not permitted to discuss the case with anybody.

12 That includes with your fellow jurors. You can't
13 discuss it among yourselves until you've been instructed to
14 begin deliberations. And of course that won't begin until
15 all the evidence has been received and I've instructed you
16 on the law and instructed you to begin. So during the
17 overnight recess do not discuss the case with anybody.

18 Also, you can't conduct your own research or do your
19 own investigation into any issue. Should some arise during
20 the trial and you have a question about something, you
21 can't go supplement your -- the evidence or information by
22 conducting research or doing your own investigation.

23 You have to base your verdict upon what you see and
24 hear in the courtroom during the trial, and you can't
25 permit yourselves to consider any outside or extraneous

1 information.

2 So during the overnight recess, no discussions with
3 any person. Don't let them attempt to discuss it with you,
4 and don't conduct any research or do any investigation.

5 Do have a good evening however. And please report
6 back to your jury room at 9:30 in the morning, 9:30 in the
7 morning.

8 When you come back you'll be reporting to the side
9 door across the street from the back of the church. Come
10 in that door and someone will let you in and bring you
11 upstairs to the jury room. Have a good afternoon.

12 (The following takes place outside the presence of the
13 jury.)

14 THE COURT: I'm just curious. Was there a Rule 6 form
15 completed in this case?

16 MR. STALVEY: Yes, sir, Your Honor.

17 THE COURT: And did you object to Rule 6 being used
18 and warn the witnesses here?

19 MR. LAMB: Yes, sir.

20 THE COURT: Okay. All right. Anything we need to
21 address before we recess?

22 THE OFFICER: Your Honor, is the defendant in custody?

23 THE COURT: Is he in custody? He is not in custody.
24 You didn't bring him over here.

25 THE OFFICER: No, sir.

1 THE COURT: Who is on his bond?

2 MR. LAMB: Steen.

3 THE COURT: Well, he'll have to go into custody since
4 Mr. Steen is not here. Once the case is called and he's
5 here, the bondsman's obligation is up. So he will have to
6 be in custody overnight.

7 MR. LAMB: Can she get Mr. Steen to come over here?
8 She's willing to.

9 THE COURT: Well, how long is it going to take? I'm
10 not just going to sit around here and wait on Mr. Steen.
11 He could have been here at lunchtime, I mean, you know.

12 UNIDENTIFIED PERSON: I can call him and get him here.

13 THE COURT: From Spartanburg?

14 UNIDENTIFIED PERSON: No. He's in Gaffney, in the
15 office right here in Gaffney.

16 THE COURT: Oh, okay. Well, if he can be here in a
17 few minutes I'll wait for him. I hope you don't have a
18 telephone in that pocketbook.

19 UNIDENTIFIED PERSON: No. It's out in the car.

20 THE COURT: All right. Any other matters we need to
21 address?

22 MR. STALVEY: None from the state, Your Honor.

23 THE COURT: We will be at ease. We'll wait for
24 Mr. Steen to show up if he is coming.

25 (Whereupon, a recess was taken.)

1 THE COURT: All right. Mr. Lamb, you've got Mr. Steen
2 here.

3 MR. LAMB: I do, Your Honor.

4 THE COURT: You are John W. Steen.

5 THE BONDSMAN: Yes, sir, Judge Cole.

6 THE COURT: Mr. Steen, you signed the bond for
7 Mr. Rogers when he was released from custody on these
8 charges of possession with intent to distribute crack
9 cocaine and unlawful possession of a pistol.

10 THE BONDSMAN: Yes, I did.

11 THE COURT: The case has been called for trial. Of
12 course he is in here. We are in the trial of the case
13 right now.

14 And of course the reason I required you to be present,
15 Mr. Lamb and the defendant had requested that he be
16 permitted to remain on bond. While the trial is in
17 progress, and I don't allow that unless, under most
18 circumstances unless, the bondsman is willing to continue
19 that obligation and says so in court.

20 Do you wish to continue the obligation?

21 THE BONDSMAN: Yes, sir. It's all right.

22 THE COURT: So you understand if he doesn't show up in
23 the morning you owe us \$32,500.

24 THE BONDSMAN: Yes, sir.

25 THE COURT: You just bring the check over here in the

1 morning.

2 THE BONDSMAN: You going to give me 30 days, ain't
3 you, Judge?

4 MR. LAMB: I'll bring it to you, Your Honor.

5 THE COURT: You will?

6 MR. LAMB: Half of it.

7 THE COURT: Mr. Lamb says he will bring it.

8 Mr. Rogers, do you understand you have got an
9 obligation to be here in the morning for the continuation
10 of this trial? But whether or not you show up, this trial
11 is going on. And so you have an obligation to be here
12 under the conditions of bond just like Mr. Steen has an
13 obligation to see that you are here.

14 And so you need to be here. And of course we are
15 starting back at 9:30. So you have to be here at least by
16 9:30. And Mr. Lamb may need you before that. But if you
17 are not here at 9:30 we are going to issue a bench warrant
18 for you.

19 We are going to estreat the bond and we are going to
20 continue with the trial of this case. So you are going to
21 keep track of him.

22 THE BONDSMAN: You want him here by 9:00 o'clock in
23 the morning?

24 THE COURT: I need him by 9:30 when we start.
25 Mr. Lamb may need him here earlier than that.

1 The defendant shall remain on bond, understanding
2 Mr. Steen has agreed to continue the obligation.

3 Court is in recess until 9:30 in the morning.

4 END OF PROCEEDINGS APRIL 3, 2007

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Kukila Stanley
Direct examination by Mr. Stalvey

1 (Proceedings April 4, 2007)

2 (The following takes place outside the presence of the
3 jury.)

4 THE COURT: Are y'all ready for the jury?

5 MR. STALVEY: Yes, Your Honor. My SLED agent is just
6 out in the hall. Can I go grab her?

7 THE COURT: Sure.

8 MR. STALVEY: The state is ready, Your Honor.

9 THE COURT: Okay. Bring the jury in, please.

10 (The following takes place in the presence of the
11 jury.)

12 THE COURT: Good morning, ladies and gentlemen.

13 As you know, when we recessed yesterday the state had
14 begun with their presentation of evidence. So we are going
15 to continue with that presentation this morning.

16 Mr. Stalvey.

17 MR. STALVEY: Thank you, Your Honor. The state would
18 call Kukila Stanley.

19 KUKILA STANLEY, having been
20 first duly sworn, testified as follows:

21 DIRECT EXAMINATION BY MR. STALVEY

22 Q Ms. Stanley, could you please give your full name and
23 address for the court reporter, please?

24 A My name is Kukila Nicole Stanley. My address is [REDACTED]
25 [REDACTED], Columbia, South Carolina 29210.

Kukila Stanley
Direct examination by Mr. Stalvey

- 1 Q And what is your current occupation?
- 2 A I am a drug analyst with SLED.
- 3 Q And how long have you done that?
- 4 A I have done that for one year and eight months.
- 5 Q And could you tell this jury what SLED is, please?
- 6 A SLED is the South Carolina Law Enforcement Division.
- 7 Q And how long have you been employed by SLED?
- 8 A I have been employed by SLED one year and eight
- 9 months.
- 10 Q Okay. Thank you. What position do you hold at SLED?
- 11 A I'm a drug analyst.
- 12 Q And how long have you -- have you held that position
- 13 the entire time you've been there?
- 14 A Yes.
- 15 Q And what are your duties as a drug analyst?
- 16 A My duties as a drug analyst is to analyze anything
- 17 that has been submitted to see if it's a controlled
- 18 substance.
- 19 Q And do you have to have any training in order to do
- 20 that?
- 21 A Yes.
- 22 Q If you could, describe briefly your training that you
- 23 received in order to analyze those drugs.
- 24 A I received training with the South Carolina Criminal
- 25 Justice Academy for legal training. I also have completed

Kukila Stanley
Direct examination by Mr. Stalvey

1 the competency and proficiency testing that we have to do
2 in order to be classified as an analyst with SLED.

3 Q And in the year or over a year that you've worked at
4 SLED have you had occasion to chemically analyze substances
5 to determine whether the substance is or contains a
6 narcotic or narcotic drug?

7 A Yes.

8 Q How many times?

9 A Over 500 times.

10 Q Okay. And have you ever had an occasion to chemically
11 analyze a substance that contained crack cocaine?

12 A Yes.

13 Q How many times have you had to do that?

14 A At least 500.

15 Q And about how many of these chemical analyses do you
16 make a week?

17 A I do at least 20 to 25 a week.

18 Q And is it a regular part of your duties?

19 A Yes.

20 Q And have you ever had occasion to be qualified as an
21 expert in the courts of this state?

22 A Yes.

23 Q How many times?

24 A One.

25 Q Have you ever testified in a court in this state?

Kukila Stanley
Direct examination by Mr. Stalvey

1 A Yes.

2 Q How many times?

3 A One.

4 MR. STALVEY: Your Honor, at this time I would move
5 that Agent Kukila Stanley be qualified as an expert in the
6 field of chemistry and the analysis of narcotics.

7 THE COURT: Any objection to the witness'
8 qualifications?

9 MR. LAMB: Your Honor, I am not sure the witness is
10 qualified.

11 She has only been in one trial previously. She has
12 only been involved, I assume, in one court case and
13 everything else. And therefore I would object to the
14 witness' qualifications.

15 THE COURT: All right. Overrule your objection. She
16 is qualified.

17 MR. STALVEY: May I approach the witness, Your Honor?

18 THE COURT: Yes.

19 Q Ms. Stanley, I am knowing to show you what's marked as
20 State's 1 first. Could you take a look at that? Do you
21 have an opinion of what that substance is?

22 A Just looking at it I wouldn't give an opinion about
23 it. I could use my report to tell you what it is.

24 MR. STALVEY: May I approach the witness, Your Honor?

25 THE COURT: Yes.

Kukila Stanley
Direct examination by Mr. Stalvey

1 Q Show you what's marked as State's Exhibit 5. Does
2 that report help you?

3 A Yes.

4 Q What is that report?

5 A According to the report it's cocaine based crack,
6 found 8.07 grams, 124.53 grains. And it is a schedule two
7 drug.

8 Q Okay. When did you make that determination?

9 A According to the report it's dated January 18th of
10 2007.

11 Q Okay. And when -- is that when you received that
12 exhibit?

13 A Can I refer to my notes to tell you when I received
14 it?

15 Q Yes, ma'am.

16 A I received the exhibit on January 3rd of 2007.

17 Q And who did you receive it from?

18 A I received it from Tammy Bannister.

19 Q Okay. And who is Tammy Bannister?

20 A She is an evidence forensics technician at SLED.

21 Q Okay. And if you could, describe to this jury what
22 happens when Tammy Bannister receives substances like the
23 one that's right there.

24 MR. LAMB: Your Honor, I am going to have to object to
25 how Tammy Bannister receives substances. Tammy Bannister

Kukila Stanley
Direct examination by Mr. Stalvey

1 needs to be here to testify as to how she receives
2 substances, who she got it from and why and be able to show
3 that.

4 THE COURT: All right. Well, she can't testify to
5 what somebody else did, because she doesn't know unless she
6 was there. But she can testify as to what the procedure is
7 at SLED if she knows it for the handling of these types of
8 substances.

9 MR. STALVEY: Thank you, Your Honor.

10 Q You just testified that Tammy Bannister is the
11 evidence custodian at SLED.

12 A Correct.

13 Q And could you describe to this jury what the duties of
14 the evidence custodian are?

15 A They are the person that receives the drugs from the
16 person that brings it in from the particular agency.

17 Q And what happens? Was there a protocol as far as
18 keeping that evidence secure?

19 A They are to keep it in a bag in the drug in-take bin.

20 Q And when you receive the evidence from the custodian,
21 is there any way that you can tell if it's been tampered
22 with or altered?

23 A Yes.

24 Q How is that?

25 A When I receive the evidence, I receive it in an

Kukila Stanley
Direct examination by Mr. Stalvey

1 envelope.

2 THE COURT: Excuse me just a minute. Let me ask you
3 to back up from that microphone just a little bit. You're
4 distorting it.

5 THE WITNESS: Sorry.

6 A When I receive the evidence, I receive it in an
7 envelope like so. And in the envelope there is a BEST kit
8 which you'll see on the inside right here. And the BEST
9 kit is sealed, and the way that I can tell whether or not
10 it's been tampered with, if this green area right here has
11 been removed from the actual bag, it shows that it's been
12 tampered with. It wasn't.

13 So to indicate that it wasn't I would label it
14 according to the lab number and put my initials here and
15 indicate that the seal was intact when I received the
16 evidence.

17 Q And was the seal intact when you received the
18 evidence?

19 A Yes.

20 Q And what did you do when you received the evidence?

21 A When I received the evidence, as I said, I would label
22 it, initial it, and I would proceed to open it.

23 I would take the evidence out of the bag, weigh it, do
24 a conformity, I'm sorry, a presumptive test, which is a
25 color test. With the color test it gives me an idea as to

Kukila Stanley
Direct examination by Mr. Stalvey

1 what the substance is. In this case -- I'm sorry. In this
2 case when I did the analysis, according to my notes it gave
3 me an idea that it was cocaine based crack.

4 I then went on to do a presumptive test on an
5 instrument called the F. T. I. R. and got the results of
6 cocaine based crack found.

7 Q Okay. And did you weigh that evidence?

8 A Yes, I did.

9 Q And what kind of test did you use in order to weigh
10 it?

11 A I used an electronic balance.

12 Q Okay. And what were the results? What were the
13 results of that test?

14 A When I weighed it it weighed out to be 8.07 grams.

15 Q And after your test and your analysis, do you have an
16 opinion as to what that substance is?

17 A Based on the results that I received, yes.

18 Q And what is that?

19 A Cocaine based crack found.

20 Q And based on the test and analysis you did in order to
21 weigh that substance, do you have an opinion of how much it
22 weighed?

23 A Yes.

24 Q And what is that?

25 A Based on the weight that I found it's 8.07 grams.

Kukila Stanley
Cross-examination by Mr. Lamb

1 Q And you've already testified that that exhibit that
2 you have, not State's 1 but I believe State's 5, is your
3 report.

4 A Correct.

5 MR. STALVEY: Your Honor, at this time the state moves
6 to enter State's 1 and State's 5 as evidence in this case.

7 THE COURT: 1 is the substance found as in the report?

8 MR. STALVEY: Yes, sir, Your Honor.

9 THE COURT: Mr. Lamb.

10 MR. LAMB: The same objection I had previously, Your
11 Honor. They have not established the chain of custody and
12 do not have Tammy Bannister here. We don't know who Tommy
13 Bannister got the thing from. And therefore I would object
14 on those grounds.

15 THE COURT: All right. Overrule the objection. Each
16 of those items are admitted.

17 (Crack cocaine marked State's Exhibit No. 1; report
18 marked State's Exhibit No. 5.)

19 MR. STALVEY: Thank you, Your Honor.

20 Q Answer any questions Mr. Lamb has.

21 CROSS-EXAMINATION

22 BY MR. LAMB

23 Q And your name is Kukila Stanley?

24 A Yes.

25 Q All right. And did you graduate from college?

Kukila Stanley
Cross-examination by Mr. Lamb

- 1 A Yes.
- 2 Q Which college did you go to?
- 3 A University of South Carolina.
- 4 Q Gamecock fan, huh?
- 5 A Yes.
- 6 Q And you went to -- after that you got other training?
- 7 A Yes.
- 8 Q What other training did you have?
- 9 A I received training through SLED to become proficient
- 10 to be an analyst, chemical analyst.
- 11 Q Proficient to become a chemical analyst, which means
- 12 that when you got out of college with all the knowledge and
- 13 everything else you weren't proficient.
- 14 A I had to receive training in order to do the job.
- 15 Q And you said that you -- your job as a chemical
- 16 analyst, you analyzed 500 chemicals -- 225 per week -- 500
- 17 per year?
- 18 A At least 500 during the course of time that I have
- 19 been there, 20 to 25 a week.
- 20 Q And with that many chemicals that you've analyzed,
- 21 you've only testified in court one time.
- 22 A Yes.
- 23 Q And this is your second time in testifying in court.
- 24 A Yes.
- 25 Q Okay. And when the drugs come in -- where did these

Kukila Stanley
Cross-examination by Mr. Lamb

- 1 drugs come from?
- 2 A I don't know.
- 3 Q You don't know where they came from?
- 4 MR. STALVEY: Your Honor, I'm going to object. She
- 5 just answered his question.
- 6 THE COURT: Overruled.
- 7 Q You don't know where they came from?
- 8 A No.
- 9 Q Okay. So they could have -- as far as the 25 you had
- 10 on a particular day that you did this and everything else,
- 11 they could have been from anywhere, correct?
- 12 A Correct.
- 13 Q So without the person Tammy Bannister to testify what
- 14 procedure she followed, we don't know where the drugs came
- 15 from, correct?
- 16 A I don't know. I personally received it from Tammy.
- 17 Q You personally received it from Tammy.
- 18 A Yes.
- 19 Q Okay. In other words, she brought the package to you
- 20 or packages to you.
- 21 A No. I went and picked the package up from her.
- 22 Q Okay. And it was one of how many you were doing on
- 23 that day?
- 24 A I don't recall.
- 25 Q Okay. But you do, what, 25 a day, 20 or 25?

Kukila Stanley
Cross-examination by Mr. Lamb

- 1 A A week.
- 2 Q A week. Okay. Now, when you see crack cocaine come
3 in and look at it and everything else, is this how it
4 normally looks?
- 5 A When I receive crack cocaine coming in, it comes into
6 this BEST pack. How it looks, it varies from time to time.
- 7 Q Okay. Would it be more or less in a bag?
- 8 A It just depends.
- 9 Q Well, of the 500 cases you've done, you know, what's
10 the average weight that you got out of it?
- 11 A I can only judge it based on a case-by-case situation.
- 12 Q Well, you certainly have some opinion as to how many
13 based on the 25 per week, don't you?
- 14 A I can only judge it on a case-by-case situation.
- 15 Q Well, on a case-by-case situation, last week for
16 example, did you do any?
- 17 A Yes.
- 18 Q What was one of them that you remember?
- 19 A I don't recall.
- 20 Q You don't recall any of them?
- 21 MR. STALVEY: Objection, Your Honor. Mr. Lamb is
22 asking her about what she did last week. That has no
23 relevance to this case.
- 24 THE COURT: Overruled.
- 25 A I don't recall.

Kukila Stanley
Cross-examination by Mr. Lamb

1 Q You don't recall any of them. You don't recall. And
2 of the 500 cases you make per year, 20 to 25 per week, do
3 you remember any of them?

4 A If I were to see them before me, yes, I would be able
5 to recall it.

6 Q Well, I mean, the numbers don't just jump out at you
7 sometimes they're so large?

8 A No.

9 Q They don't do that, huh?

10 A No.

11 Q At the time that you performed the analysis on this
12 particular one, how long had you been with SLED?

13 A May I refer to my report?

14 Q Sure, yes, ma'am, if you've got notes or anything
15 else.

16 A At the time of the analysis I had been with SLED one
17 year, six months.

18 Q One year and six months.

19 A Yes.

20 MR. LAMB: I believe that's all I have, Your Honor.

21 THE COURT: Okay.

22 MR. STALVEY: No redirect, Your Honor.

23 THE COURT: Thank you. You may step down.

24 MR. STALVEY: Your Honor, may this witness be excused?

25 THE COURT: She may.

Motion

1 (Whereupon, the witness was excused.)

2 MR. STALVEY: Your Honor, that concludes the state's
3 case.

4 THE COURT: All right. Ladies and gentlemen, that's
5 all of the testimony or evidence to be by the state, at
6 least in their case in chief.

7 Before we go any further I have got some legal matters
8 to address with the lawyers. So I'm going to ask you to
9 please go to your jury room. Do not yet discuss the case.
10 I'll bring you back in a few minutes to continue.

11 (The following takes place outside the presence of the
12 jury.)

13 THE COURT: All right. Motions or other matters to
14 address?

15 MR. LAMB: Your Honor, we make a motion that these
16 current charges against this particular defendant be
17 dismissed due to the lack of a chain of custody involved in
18 the case.

19 Number one, she cannot, could not testify who had it
20 prior to her other than Tammy Bannister, was the protocol
21 and everything else.

22 In the trial of a case, as you know, we need to have
23 step by step who handled it, who took it, who took it where
24 and everything else. That is why we have the forms that
25 you have to sign and everything else and that is why the

Motion

1 forms have to be filled out and done in a proper manner.

2 We also have a break in the chain of custody and
3 receiving it back from them in that he did not testify that
4 he -- did not have with him the chain of custody when he
5 testified and everything else.

6 Now, I can understand having it in his office and
7 wanting to go get it and everything else, but the Court is
8 here. The Court is trying the case and has tried on the
9 basis of what they've heard. And the Court has not seen
10 and the defense has not seen any evidence that ties him to
11 the case in chief, Your Honor.

12 THE COURT: All right. Mr. Stalvey, do you want to
13 respond to that argument?

14 MR. STALVEY: Thank you, Your Honor.

15 It would be the state's position that Your Honor has
16 seen all the evidence and has heard the testimony, and
17 today Your Honor admitted the evidence or admitted the
18 state's exhibits as evidence in this case.

19 Your Honor, the question of admissibility rests with
20 the Court. And the state's position would be that Your
21 Honor made a sound decision in admitting the evidence and
22 it should stay in evidence.

23 THE COURT: Okay. Well, as I understand those forms,
24 Rule 6 forms are used for two purposes, probably, well, I
25 know number one is for use at trial if individuals are not

Motion

1 going to testify if a defendant objects to the use of the
2 Rule 6 forms. Then the witnesses have to testify and
3 establish a proper chain. So then the forms are
4 unnecessary.

5 So SLED may also require the use of those forms
6 pursuant to their protocol. I am not certain of that. It
7 might be a SLED regulation. But that's the purpose of the
8 forms. And so if the witnesses come and testify, the forms
9 are unnecessary. So I can't grant your motion based upon
10 that ground, Mr. Lamb.

11 The fact that Ms. Bannister did not testify is not a
12 factor that would result in the state failing to establish
13 a chain of custody, because the testimony reflects that
14 Ms. Poole when she took possession of the substance which
15 has been testified to as crack cocaine, she placed it into
16 a BEST evidence bag, which is an evidentiary procedure used
17 to protect the integrity of the sample or the substance.

18 And it's in a bag that is tamper-evident, that is if
19 someone tears it open you can tell it. If you cut it open,
20 you can see it. If they try to open it in some fashion,
21 you know it. And so she placed it in a BEST evidence bag.

22 It was received at SLED. The chemist testified that
23 when she took the package in order to analyze the substance
24 that the package was still intact. It had not been
25 tampered with. The substance was still -- its integrity

Motion

1 was still intact; and that after she tested it she sealed
2 it in another bag with everything in it.

3 Mr. Henson testified that he took it down there and he
4 picked it up and brought it back and it has been in his
5 possession until it came to court for the purpose of this
6 trial.

7 So in my view I think the chain of custody has been
8 established. So under the law every person who may have
9 handled the evidence does not have to come and testify so
10 long as it is established that the integrity of the
11 evidence is established. And in this case, because it's
12 placed into a tampered-evident container, that's the
13 purpose of them doing so.

14 You could theoretically pass it around at the
15 Carolina-Clemson football game and you still wouldn't need
16 but two people to come and testify, the one who sealed it
17 and the one that brought it to court or the one that tested
18 it.

19 So based upon that having been established, I deny
20 your motion to dismiss based upon the failure of the state
21 to establish a proper chain.

22 Any other motions from the defense?

23 MR. LAMB: No, Your Honor.

24 THE COURT: All right. Is the defendant going to
25 testify?

1 MR. LAMB: Your Honor, the defendant tells me that he
2 is not -- will not testify at this particular time.

3 THE COURT: Well, it's the only time that he's going
4 to get.

5 MR. LAMB: Yes, sir, Your Honor.

6 THE COURT: Okay. Any other witnesses you're going to
7 call?

8 MR. LAMB: No, Your Honor.

9 THE COURT: All right. Mr. Rogers, you are the
10 defendant in this case, and now the time has come where you
11 have an opportunity to present evidence if you want to.

12 When you are charged with a crime you have a
13 constitutional right to remain silent. That is nobody can
14 make you testify. You don't have to make any statements.
15 You don't have to answer any questions as they relate to
16 these charges, because you do have that right to remain
17 silent.

18 At the same time, if you do wish to testify in the
19 trial of this case and provide this jury with any
20 additional evidence, now is the only opportunity that you
21 will have to do so.

22 So if you do want to tell the jury anything, you have
23 to do it now. In other words, you can't wait until after
24 the jury has reached a verdict and if it doesn't go to suit
25 you, you can't say, well, I changed my mind, I want to tell

1 the jury I didn't do it or I don't know anything about it
2 or I'm not guilty or whatever you might want to say.

3 It'll be too late then. So if you want to provide
4 them with any testimony, now is the time for you to do it.

5 Have you and -- and if you do testify, do you
6 understand you will have to answer not only Mr. Lamb's
7 questions but you'll have to answer the solicitor's
8 questions even if the answers might tend to prove you
9 guilty?

10 Ordinarily you have a right not to incriminate
11 yourself, but when you take the witness stand and testify
12 you have to answer all relevant questions even if they do
13 tend to prove your guilt.

14 If you don't testify I'm going to tell the jury they
15 can't hold that against you, they can't consider that in
16 any way. I already have told them that at the beginning.
17 I'm going to tell them that again if you don't testify,
18 that they can't hold that against you, they can't consider
19 it, they can't even talk about it in the jury room.

20 Now, have you and Mr. Lamb had a sufficient
21 opportunity to discuss the advantages and disadvantages of
22 your testifying and of your not testifying?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: And do you appreciate what those
25 advantages and disadvantages are?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: And having had those discussions, have you
3 had time to reflect upon your decision as to whether or not
4 you will testify?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: And have you reached a decision?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: And what is that decision?

9 THE DEFENDANT: I will not testify.

10 THE COURT: You will not testify?

11 THE DEFENDANT: No, sir.

12 THE COURT: And is that a decision that you reached of
13 your own free will and accord?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Did anybody force you into it?

16 THE DEFENDANT: No, sir.

17 THE COURT: Anybody pressure you into it?

18 THE DEFENDANT: No, sir.

19 THE COURT: Did anybody suggest that in their opinion
20 that's the decision that you ought to make?

21 THE DEFENDANT: No, sir.

22 THE COURT: So you just made that decision on your own
23 after discussing it with your lawyer and anybody else you
24 wanted to talk to about it.

25 THE WITNESS: Yes, sir.

1 THE COURT: And you're satisfied with that decision?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Okay. Thank you. Be seated.

4 All right. Any requests for instructions by the
5 state?

6 MR. STALVEY: None from the solicitor, Your Honor.

7 THE COURT: From the defendant?

8 MR. LAMB: Your Honor, I assume that you're going to
9 charge possession with intent to distribute.

10 I would also request a charge of possession by itself
11 involved therein.

12 I would also request that Your Honor charge in
13 connection with the inference and everything else, that you
14 not charge an inference or anything else as far as that's
15 concerned.

16 THE COURT: You mean you don't want me to charge the
17 law in the case?

18 MR. LAMB: The law in the case as I understand it,
19 Your Honor, is that you can -- permissive inference does
20 not relieve the state from actually proving beyond a
21 reasonable doubt the element of intent to distribute.

22 THE COURT: Well, that's absolutely a fact. But the
23 statute provides under 44-53-375, Subsection (b)(3), it
24 says possession of one or more grams -- no, that's the
25 wrong one.

1 Possession of one or more grams of cocaine based is
2 prima facie evidence of a violation of this subsection,
3 which has always as I understand it been interpreted not to
4 be prima facie evidence in the sense for the jury's
5 benefit.

6 But the statute provides that a jury is permitted to
7 infer the individual charge of possession intending to
8 distribute if the state proves there was -- that he did
9 possess more than one gram.

10 Clearly, I'm going to charge the jury that it's
11 permissible for them to infer from possession of more than
12 one gram that the defendant intended to distribute the
13 substance but that that is an inference only. They must
14 determine what inferences are reasonable to make; and that
15 if they do choose to make such an inference, they have to
16 be convinced of that fact beyond a reasonable doubt.

17 MR. LAMB: That's fine. Your Honor, that would cover
18 it and everything else. I just wanted to be sure that you
19 got into that, and I figured you would, but I had to say
20 that.

21 THE COURT: I will. All right. Any others?

22 MR. LAMB: We specifically request, Your Honor, too
23 you charge possession as far as an alternate sentence in
24 this case.

25 THE COURT: I will. Are you talking about simple

1 possession of crack cocaine?

2 MR. LAMB: Yes.

3 THE COURT: I will. The state does not object to
4 that?

5 MR. STALVEY: No objection from the state, Your Honor.

6 MR. LAMB: That covers it, Your Honor.

7 THE COURT: All right. Are y'all ready to conclude or
8 do you need just a few minutes?

9 MR. STALVEY: The state is ready to proceed.

10 MR. LAMB: The defense is ready.

11 THE COURT: Okay. Bring the jury back.

12 (The following takes place in the presence of the
13 jury.)

14 THE COURT: All right. The state has rested.

15 Mr. Lamb, do you wish to present any additional
16 evidence in the case?

17 MR. LAMB: I do not, Your Honor.

18 THE COURT: All right. Ladies and gentlemen, that is
19 all of the evidence to be received.

20 What remains to be done are the lawyers' final
21 summations, after which I will instruct you on the law, and
22 then you will begin deliberating.

23 So please give the lawyers your attention now as they
24 give you their final summations.

25 Mr. Stalvey.

Closing arguments

1 MR. STALVEY: Thank you, Your Honor. May it please
2 the Court.

3 THE COURT: Yes, sir.

4 MR. STALVEY: Ladies and gentlemen, I first want to
5 thank you for your careful attention that you paid during
6 this case. I know you paid close attention to all of the
7 witnesses that the state has put up, and I hope all of the
8 testimony was as clear as I promised you it would be at the
9 beginning of this case.

10 Ladies and gentlemen, there is only one dispute in
11 this case, and Mr. Lamb referred to it in his opening
12 argument. It is whether this defendant intended to
13 distribute that crack cocaine. There is no question and
14 there is no dispute that he was in possession of it.

15 As far as the gun charge, there is no question and
16 there is no dispute that he was in possession of that gun.

17 Those are not decisions that you will have to make
18 today, but I do bring those up to point out something about
19 this case that I'm sure you all noticed during the
20 testimony.

21 Even though there is no question that this defendant
22 possessed drugs from an admission from that defense table,
23 you heard a lot of questions about the credibility of the
24 drugs, were they drugs or not, despite the admission that
25 he was caught with drugs.

Closing arguments

1 MR. LAMB: Your Honor, I don't like to object this
2 early or anything else, but I don't remember having
3 admitted anything as far as this court is concerned. And
4 he is arguing something that is not as far as this matter
5 in evidence.

6 THE COURT: Well, let me see y'all just a minute.

7 (Bench conference held off the record in the presence
8 of the jury but out of the hearing of the jury.)

9 THE COURT: All right. You may continue.

10 MR. STALVEY: Thank you, Your Honor.

11 THE COURT: Let me say, let me just tell the jury
12 this.

13 The lawyers, you understand, they're expressing
14 opinions about the evidence and that sort of thing. As
15 I've already told you, what they say is not evidence in the
16 case. And notwithstanding how hard or easy a decision
17 might be based upon what has been presented, the state
18 always has the burden of proof of proving any charge
19 they've brought against the defendant. They always have
20 the burden of proof.

21 Okay. Mr. Stalvey.

22 MR. STALVEY: Thank you, Your Honor.

23 Ladies and gentlemen, to go back to what I was saying,
24 and the state -- and I totally agree with what the Court
25 just told you. It's our job to prove to you that the

Closing arguments

1 defendant committed the crimes that he's charged with
2 today.

3 And, ladies and gentlemen, I submit to you that that
4 proof is there. I submit to you that you heard from
5 Investigator Poole who told you when she pulled the car
6 over this defendant was in that car, was in possession of a
7 baggie that had a substance in it. She couldn't tell you
8 what that substance was.

9 She also told you he had a pistol in his back pocket.
10 We later called up Jimmy Henson, who the point of his
11 testimony was just to tell you where those drugs were and
12 tell you how he took care of them. And I think it was
13 clear he took care of them.

14 He didn't have a form with them yesterday. I
15 apologize for that. That's my fault. I should have told
16 him to bring all of his paperwork. So don't hold that
17 against Jimmy Henson. He's a fine officer, and that's my
18 fault. I should have told him to bring that paperwork.

19 But I submit to you there should be no doubt in your
20 mind that what he told you was the truth. He had that
21 evidence with him. It was not tampered with. It was taken
22 care of. It was not altered in any way. And when he took
23 it to SLED and got it back from SLED nothing happened to
24 it. That was his testimony. And I submit to you he was
25 telling you the truth yesterday. And I think that's not

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1 hard for you to believe.

2 Ladies and gentlemen, the SLED agent that you heard
3 from this morning, the purpose of her testimony was to tell
4 you what that substance was that this defendant had in his
5 hand that day.

6 I think that was clear. She told you it was crack
7 cocaine. Another reason that she was here to testify was
8 to tell you how much it weighed. And she testified that it
9 was eight grams.

10 So I think the testimony, the evidence that you will
11 have that you will be able to take back with you in the
12 jury room and look at shows that he was in possession of
13 the gun unlawfully and he was in possession of the crack
14 cocaine.

15 Now, I just said, I just told you, about the weight.
16 Ms. Stanley testified that it was eight grams. And that's
17 where I want to start off by telling you eight grams of
18 crack cocaine is eight times the amount that you may infer
19 that this defendant, Dustin Rogers, was distributing crack
20 cocaine that day. That is in the law of this state. It's
21 an inference.

22 You still get to make up your mind. You're not forced
23 to make up your mind that he was distributing based on that
24 weight, but you may infer that. And the legislature of
25 this state has said that and has put it in the books of the

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1 laws of this state. You may infer that eight grams -- it's
2 actually one gram. And like I told you before, he had
3 eight times the amount you may infer.

4 I also would point you to the fact that he had \$400 in
5 cash, \$800 in crack cocaine and a loaded pistol with him
6 while he was riding around Gaffney.

7 I don't think it is too far for you to put those
8 things together and conclude that he intended to distribute
9 those drugs. That's not too far of a jump for you to make.
10 And I trust that you will make that decision, you will come
11 to that conclusion. And I trust you will find this
12 defendant guilty of possession with intent to distribute
13 crack cocaine as well as guilty of unlawful possession of a
14 pistol. Thank you.

15 MR. LAMB: May it please the Court.

16 THE COURT: Mr. Lamb.

17 MR. LAMB: I would ask you to imagine what happened on
18 the night when this took place. I do so for the benefit of
19 explaining the circumstances and everything else.

20 Christie Poole purportedly got a call from a C. R. I.
21 And the C. R. I. told her that the car owned by the one boy
22 would be in the area; and that she got her troops together
23 and jumped in the car and went out looking for this car on
24 the basis of what the C. R. I. said.

25 Now, she saw the car out there, and the car was

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1 stopped. It wasn't doing anything wrong, but it was
2 stopped anyway. And she, they got the driver out of the
3 car, who we never know who he was because she couldn't
4 remember him and couldn't identify him or anything else.

5 Now, is it reasonable to say that at an arrest like
6 this occurring you don't know who one of the people was
7 that you got out and was interviewing as far as the case is
8 concerned? But that's what happened. She said that there
9 were three of them there and there were four other officers
10 that were on the scene shortly thereafter.

11 Now, she got, they got the guy out of the car on the
12 passenger side, and who was the owner of the car, and he
13 was really who they were looking for. And then they got my
14 client out of the car.

15 Now, this is where we get into who do you believe or
16 who you don't believe, or as the judge said, use your
17 common sense as far as jurors are concerned as to how it
18 happened and where it happened and what happened.

19 She would have you believe that she got my client out
20 of the car and as he turned to put his hands on top of the
21 car she saw a gun. And I don't remember the sequence. And
22 you, ladies and gentlemen of the jury, remember the
23 evidence the way you've heard it and everything else. It's
24 not what I say and it's not what the solicitor says. It's
25 the way you hear the evidence. But she puts his hands on

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1 the car, and she saw the gun and said gun.

2 Now, if they could stop the car the way they did,
3 okay, and if it happened that way, then she then would be
4 able to say she could see the gun in his pocket.

5 Now, these are, these are pants pockets here, and it's
6 too large for the gun. But certainly he didn't have on
7 these kind of pants that I've got on. He had on a pair of
8 pants. And the gun would have been hidden from her. And I
9 asked her about that. She said, no, I could look down in
10 the pocket and see the gun.

11 The boys nowadays wear their shirttails out and they
12 come down to here, okay, come down to here. And if he had
13 on a shirttail like that she couldn't see the gun. She
14 couldn't have seen the gun as far as that's concerned.

15 But, be that as it may, she found the gun somehow,
16 pat-down or anything else. Whether they've got a right to
17 a pat-down or anything else, that's another question. The
18 courts will have to consider that. But, you know, she
19 found the gun on him. And in addition to what -- she said
20 she saw him put something up on the car when he reached up
21 to do that and it was the crack cocaine.

22 Now, he's charged with possession of crack cocaine
23 with intent to distribute. What that means is that the
24 crack cocaine, he was going to sell it to somebody else.
25 The amount of the crack cocaine is right there. How he was

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1 going to sell that little bit of crack cocaine is beyond
2 me. It's for you to figure out, I guess. My whole point
3 of possession of intent to sell the crack cocaine is that
4 that amount of crack cocaine is a very little bit of
5 cocaine.

6 Now, what do you have to show that he was going to
7 intend to distribute it? Well, you've got the state's
8 inference, which you can -- you don't have to listen to or
9 anything else that they said; and that the inference is if
10 you've got more than one point on you, the inference
11 arises.

12 Well, you know, I take issue with the state's way of
13 calculating how many times he had over. He said eight
14 times the amount. I think it's seven times if you subtract
15 one from it. What does it matter; what does it matter?

16 Okay. Was that an amount of cocaine he was going to
17 sell to somebody? Was that an amount of cocaine he was
18 going to give to somebody for a profit, or was that
19 something he bought for his own personal consumption? Now,
20 the state would have us believe he was going to sell the
21 bag of cocaine and everything else. But what other
22 evidence do they have of going and selling?

23 They've got the gun. Now, I don't know what they
24 would have done had they not had a gun, but they've got the
25 gun.

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1 They've got a large amount of cash. Well, you know,
2 the law says a large amount of cash. Is \$450 a large
3 amount of cash? That's for you to decide. It's the weight
4 of things that you have to decide as far as that's
5 concerned.

6 And they've got a small amount of evidence. I think
7 .08 is a small amount. I think it's seven times what
8 you're supposed to have, but it is up to you, ladies and
9 gentlemen.

10 MR. STALVEY: Objection, Your Honor. Arguing outside
11 the facts. It is eight grams, not .08.

12 THE COURT: Overruled.

13 MR. LAMB: Whatever it is. You can do the math.
14 Okay. I'm not going to argue. Whatever it is, you do the
15 math as far as this is concerned.

16 But what -- that's the three things they have to show
17 he was going to distribute this cocaine. And number one
18 they don't have is have they got any baggies that he was
19 going to sell it with?

20 They searched the car, pulled the car apart and
21 everything else. Little bags they put it in and say, hey,
22 here, Joe, is your ounce and everything else. Do they have
23 anything to crack the cocaine up and say here is your
24 amount and everything else? I don't know how you buy this
25 stuff. Okay. I don't know how you buy it or sell it or

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1 anything else. But they found no evidence of that in the
2 car.

3 Did he have any scales to weigh the evidence? There
4 was no evidence of that. There's no testimony of that.
5 There is nothing to say, hey, you had a set of scales in
6 the car with you and you were going to use it to sell this
7 and therefore you are guilty of possession with intent to
8 distribute.

9 Did he find the notebook saying list of names and
10 everything in it? We don't have that. We don't know
11 anything about that. There are nothing, there was nothing
12 in the car that they got or nothing that they got off my
13 client that indicates that he was going to sell that
14 cocaine.

15 Now, this young man's life is going to be ruined by
16 this if he's found guilty of trafficking in cocaine because
17 trafficking carries a serious offense. I'll just tell you.
18 Possession is a serious offense, yes, serious offense, yes.
19 But he could live with that. So I ask you to look at the
20 evidence and see what it is that they claim that he had.

21 Now, he wanted to say that we admitted everything and
22 what were you doing here and everything. We didn't admit
23 it. Okay. We didn't admit it. I would never admit
24 anything before a jury as far as a case is concerned and
25 everything else because I never know where a case is going.

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1 I didn't know that the guy was going to come in and say,
2 well, I don't have the form with me or anything else
3 and-but I know I saw it and everything else. I saw it and
4 was the one that saw it and everything else.

5 You know, I never know when a person is going to
6 testify that, well, I don't know where it came from, I
7 don't know who gave it to me or anything else but it's what
8 I got and that's what she's testified to.

9 The reason that you never admit anything like that as
10 far as that's concerned, you don't ever know what the state
11 is not going to come up with or do come up with.

12 Now, another point that bothers me, and maybe it
13 doesn't bother you or anything else, but another point that
14 bothers me is that there were four, six -- six potential
15 witnesses of this crime and how it went down and what went
16 down and everything else, and who said what and everything
17 else. Have you heard a word from anybody else testify?

18 You heard Christie testify, but have you heard anybody
19 else to testify to anything that she did, said or anything
20 else is true or not true? Six other people who are at the
21 actual scene and saw the arrest, and they are not here to
22 testify. That's, that bothers me a little bit. Okay. But
23 it's a point to consider in figuring out your jury verdict
24 and everything else.

25 Now, granted, if you believe everything the state has

Jury charge

1 said, then you can find him guilty of possession with
2 intent to distribute crack cocaine. If you have a little
3 bit of doubt about something or anything else, you are
4 entitled to that doubt and can stick to it as far as the
5 case is concerned. If you believe a little bit of doubt or
6 something else, he could be guilty, may be guilty, might be
7 guilty, that's not sufficient.

8 He has got to be guilty beyond a reasonable doubt. So
9 if you have got any question in your mind, you're supposed
10 to resolve it in favor of the defendant. And you could
11 find him guilty of possession of cocaine because he was.
12 Okay. He had the cocaine on him at the particular time.
13 He had the gun on him at the particular time, but my whole
14 point in the scenario is how did it get there and how did
15 they find what they found?

16 Ladies and gentlemen of the jury, you have been very
17 supportive in this case. You have listened very carefully.
18 And I would just ask you to consider the case and reach a
19 verdict that speaks the truth. Thank you.

20 THE COURT: Madam forelady and ladies and gentlemen of
21 the jury, you have now heard and seen all of the evidence,
22 as well as the final summations of the lawyers. And so now
23 I'm going to instruct you on the law that's applicable in
24 the case, and then you'll be asked to go back and begin
25 with your deliberations. And through that process you will

Jury charge

1 examine the evidence, decide the facts, apply the law and
2 arrive at a fair and just decision.

3 It is your exclusive duty to determine what the facts
4 are, and you do that through your own common sense
5 examination and evaluation of all of the testimony and the
6 other evidence received during the trial of this case.

7 You 12 jurors alone will decide what weight, value and
8 effect to give to any particular testimony or other
9 evidence in the case. Your sole objective of course is to
10 simply reach the truth in the matter, and by doing that you
11 will have fulfilled your obligations as jurors, and that is
12 to simply give both the state and the defendant a fair and
13 impartial trial.

14 The same law that provides that you are the judges of
15 the facts also provides that I am the judge of the law, and
16 that simply means nobody is going to tell you how to arrive
17 at your determination of fact in this case.

18 You do that, as I have already told you, by the
19 exercise of good judgment and common sense conscientiously
20 applied to the testimony and the evidence in the case.

21 You must however under your oath as a juror accept the
22 law as I provide it to you as being the law that is
23 applicable in this particular case, and so you are not to
24 concern yourself with what you thought the law was before
25 you came to serve as a juror this week or what you think

Jury charge

1 the law ought to be. You must simply accept the law as I
2 provide it to you as being the law that is applicable in
3 this particular case. And then you take that law and you
4 apply it to the facts as you 12 jurors determine those
5 facts to be based upon your examination of the evidence in
6 the case.

7 Now, as you know, in this case the state has charged
8 the defendant with two separate and distinct criminal
9 offenses. Each of those offenses, as I told you, are
10 alleged to have arisen out of one particular event or
11 occurrence that the state alleges occurred back on
12 September the 6th of 2006 here in Cherokee County.

13 There are two separate indictments. One indictment
14 charges the defendant with possession with intent to
15 distribute crack cocaine; the other indictment charges the
16 defendant with the unlawful possession of a pistol.

17 You are going to have both of these indictments back
18 in the jury room, Madam Forelady, because it's going to be
19 on the back of each of these indictments that you will
20 indicate the jury's unanimous decision as it relates to
21 your verdict as to that particular charge.

22 But, now, while the indictments are in the jury room,
23 as I've already told you, I believe, they're not proof of
24 anything. They're not evidence of anything. The reason
25 they'll be there, they'll serve as the verdict form. And

Jury charge

1 the indictments serve no other purpose so far as you jurors
2 are concerned. They simply will serve as the verdict form.

3 But as to the accusations made by the state and as to
4 the charges set forth in each of those indictments the
5 defendant has entered a plea of not guilty. And, as I told
6 you, that plea of not guilty has therefore placed upon the
7 state the burden of proving the allegations that they have
8 set forth in each of those indictments, the burden of
9 proving each of the essential elements that constitutes the
10 crimes that are alleged in each of those indictments; and
11 therefore the burden is upon the state to establish the
12 defendant's guilt as to any charge beyond a reasonable
13 doubt.

14 The burden is never upon a defendant or a person
15 accused of a crime to prove that they are not guilty or to
16 prove that they are innocent, because in many cases that
17 might not even be possible. The burden is always upon the
18 state because they bring the charge to establish a person's
19 guilt beyond a reasonable doubt.

20 It is a vital, important and cardinal rule of law that
21 every defendant in a criminal trial, and it doesn't matter
22 how serious the offense might be, any person accused of a
23 crime is always presumed to be innocent of that charge.
24 And that presumption of innocence remains with any
25 defendant, as it does with this defendant, from the time

Jury charge

1 that he is placed under arrest and throughout the course of
2 the criminal process and even throughout the course of the
3 actual trial in the case.

4 As I told you, that presumption of innocence will be
5 with this defendant even when you go back to the jury room
6 to begin with your deliberations in this case. And that
7 presumption of innocence will be with him in that jury
8 room, and it will remain with him forever unless you 12
9 jurors determine that he's no longer entitled to that
10 presumption of innocence.

11 That is after you've carefully considered the
12 evidence, and from that evidence you've decided the facts,
13 and after deciding the facts you have applied the law, if
14 you determine that his guilt as to some charge has been
15 proven beyond a reasonable doubt, then under those
16 circumstances he would no longer be entitled to that
17 presumption of innocence. But it's only if, unless and
18 until the state satisfies you of his guilt beyond a
19 reasonable doubt that the presumption of innocence would no
20 longer be applicable.

21 Now, while the state does have the burden of proving
22 the defendant's guilt beyond a reasonable doubt, that
23 doesn't mean that they have to prove his guilt beyond all
24 doubt or beyond any possible doubt. But it does require
25 the state to prove his guilt beyond a reasonable doubt.

Jury charge

1 The term reasonable doubt should be given its plain
2 and ordinary meaning. A reasonable doubt is the kind of
3 doubt that would cause a reasonable person to hesitate to
4 act upon the information provided.

5 And a defendant in a criminal trial is entitled to any
6 reasonable doubt that arises from the evidence or lack of
7 evidence in a case. And if, upon any factual issue
8 essential to a finding of a verdict of guilty, you have
9 some reasonable doubt as to how that issue should be
10 resolved, you are under an obligation to always resolve
11 that reasonable doubt in favor of the defendant.

12 Therefore if upon your consideration of the whole case
13 you have a reasonable doubt as to his guilt, you must
14 resolve that doubt in his favor and return a verdict of not
15 guilty.

16 And, at the same time, after you've considered the
17 evidence in the case and applied the law, if you have no
18 reasonable doubt as to his guilt as to a particular charge,
19 then of course it would be your corresponding duty to
20 convict the defendant or to find him guilty of any crime
21 you have been satisfied beyond a reasonable doubt that he
22 has committed.

23 Now, in applying the principle of reasonable doubt, as
24 I've stated, you have to always resolve a reasonable doubt
25 in favor of the defendant.

Jury charge

1 Now, in a case where you are permitted to consider
2 greater and lesser offenses, as you will in this particular
3 case, because with respect to the indictment for possession
4 with intent to distribute crack cocaine, an indictment for
5 possession with intent to distribute necessarily includes
6 the lesser offense of possession of crack cocaine. The
7 only difference between the two is the additional element
8 of an intent to distribute with respect to the charge of
9 possession with intent to distribute crack cocaine.

10 But, in any event, you are going to be able to
11 consider the greater and the lesser. And in applying the
12 principle of reasonable doubt, if you have a reasonable
13 doubt as to whether a person has been proven to be guilty
14 of a greater offense or a lesser offense, you must resolve
15 that reasonable doubt in his favor and only find him guilty
16 of the lesser offense. However of course you can only find
17 the defendant guilty of the lesser offense if you are
18 satisfied beyond a reasonable doubt that he has been proven
19 to have been guilty of that offense.

20 Now, because you are the sole judges of the facts in
21 this case you are therefore necessarily the sole judges of
22 the credibility, and that is the believability of each
23 witness that has testified during the trial. And you 12
24 jurors alone will decide what weight, value and effect to
25 give to any particular testimony or other evidence in the

Jury charge

1 case. Again, your sole objective is to simply reach the
2 truth in the matter.

3 But as you evaluate witnesses' testimony there are
4 some factors which you should consider in making your
5 assessment as to the credibility of that testimony. And
6 those include what was the demeanor of the witness, that is
7 how did the witness appear to you when the witness
8 testified from that witness stand. Did the witness appear
9 to you to be telling the truth and to have knowledge of the
10 facts to which that witness has testified?

11 You may also consider whether or not the testimony of
12 a witness was consistent, or was it inconsistent with that
13 witness' own testimony or with other testimony or other
14 evidence in the case?

15 You may also take into consideration how the witness
16 came to know the facts to which that witness has testified.
17 That is what was that particular witness' opportunity and
18 ability to perceive the existence of those facts to which
19 that witness has testified by having previously used his or
20 her senses, and then what is their ability to be able to
21 come into court and to accurately recollect to you as to
22 what they have previously seen or heard.

23 You may also consider any bias or prejudice or
24 interest that a witness might have in the outcome of the
25 case. And by that I simply mean do you find some reason

Jury charge

1 that a particular witness would come into court and would
2 testify one way or another to help or to hurt one side or
3 the other.

4 You may consider any interest that a witness might
5 have in the outcome if you determine that a witness does
6 have such an interest and you further find that that
7 interest would bear upon that particular witness'
8 credibility.

9 You may also consider whether or not the testimony of
10 a witness is strengthened, or is it weakened by other
11 testimony or other evidence in the case.

12 Now, during the course of this trial you heard
13 testimony from a witness that was qualified as an expert in
14 a particular field.

15 The fact that the Court qualifies a person as an
16 expert should not be taken by you as any indication by me
17 as to how I think you ought to accept the testimony or
18 opinions of that particular witness.

19 Ordinary laypersons are not permitted to testify in an
20 opinion form. Now, they can come to court and they can
21 testify as to what they have previously seen or heard or
22 experienced or perceived, but they're not allowed to
23 testify in an opinion form. But where a person does have
24 special education or training or experience or skill with
25 respect to a particular field, then those persons may be

Jury charge

1 qualified by the Court as an expert in that particular
2 field. Where the witness is qualified as an expert, then
3 the witness is permitted to testify in an opinion form
4 about some fact in issue.

5 Now, you have to judge the credibility of expert
6 witnesses just as you do any other witness. And if you
7 determine that an expert does not possess sufficient
8 education or training or experience or skill or knowledge
9 or did not take the proper consideration of the facts that
10 relate to this particular case into account when providing
11 testimony or an opinion, then you can reject that expert's
12 testimony and that expert's opinion in its entirety; or you
13 may choose to believe some portion of it and reject some
14 other portion of it.

15 Simply put, you must judge the credibility and the
16 believability of an expert witness just as you do any other
17 witness in the case. And it is for you jurors to determine
18 what evidence to accept and what evidence to reject,
19 whether or not it's from an expert or a layperson.

20 And because you are the judges of the facts and
21 because you judge the credibility of each witness, you are
22 permitted to believe as much or as little of what a witness
23 has testified to as you deem is appropriate. And so,
24 again, you can believe everything they say, you can believe
25 none of it. You may believe one portion of a witness'

Jury charge

1 testimony and reject some other portion of that same
2 witness' testimony.

3 In a given case you could believe one witness as
4 opposed to many, or many as opposed to one. But whatever
5 your good judgment and common sense tells you is the most
6 believable testimony and evidence is what you should
7 accept. And you should reject any testimony or other
8 evidence that you find not to be credible or believable.
9 And, again, your sole objective is to simply reach the
10 truth in the matter. And by doing that you will have
11 fulfilled your obligations as jurors in this case.

12 Now, while there are various forms of evidence such as
13 testimony, photographs, documents, charts and other types
14 of physical exhibits, there are really only two types of
15 evidence.

16 Either one or both of those types of evidence may be
17 proved used to prove any fact in issue. They may be used
18 independently or in combination. But the two types of
19 evidence are direct evidence and circumstantial evidence.

20 Now, direct evidence is the testimony of a person who
21 testifies from actual knowledge of the fact to which they
22 testify. In other words, it's testimony by a person who
23 has perceived the existence of some fact by means of his or
24 her senses, and then they come into court and testify as to
25 what they have previously experienced and perceived.

Jury charge

1 Circumstantial evidence, on the other hand, is the
2 proof of some other fact or set of facts which taken either
3 singly or collectively may prove the existence of a fact in
4 consequence, or excuse me, may prove a fact in question as
5 a necessary consequence through an inference.

6 An inference is simply a deduction of fact which may
7 logically and reasonably be drawn from the proof of some
8 other fact or set of facts. In other words, it's not a
9 fact which is proven by the direct testimony of a witness
10 based upon that witness' personal perception, but it is a
11 conclusion which might reasonably be drawn from the proof
12 of other facts taken together.

13 So, in other words, you may infer that a particular
14 event occurred or that a particular fact exists based upon
15 the proof of sufficient factual circumstances which would
16 reasonably warrant your arriving at such a conclusion.
17 However whatever conclusion you reach based upon any
18 inferences, you must be satisfied of that conclusion beyond
19 a reasonable doubt.

20 Now, the law makes absolutely no distinction between
21 the weight or the value to be given to either direct
22 evidence or circumstantial evidence, nor is a greater
23 degree of certainty required of circumstantial evidence as
24 opposed to direct evidence. Whatever type of evidence used
25 to prove any fact in issue, you should consider all of the

Jury charge

1 evidence presented during the case. And after carefully
2 considering all of that evidence in your minds if you are
3 not convinced of the guilt of the defendant as to some
4 crime beyond a reasonable doubt, then you must resolve that
5 doubt in his favor and return a verdict of not guilty.

6 Now, we have two indictments, we have got two charges.
7 The indictments aren't evidence, but you know they're going
8 to be the verdict form.

9 I'm going to instruct you on both. I'm just going to
10 begin with possession with intent to distribute crack
11 cocaine because that's the first in numerical sequence.
12 But you can consider the charges when you go back to
13 deliberate in any fashion that you wish to or whatever
14 order you wish to.

15 But Indictment 2006-964 charges the defendant with
16 possession with intent to distribute crack cocaine. That
17 indictment alleges that on September the 6th of 2006 Dustin
18 Lenier Rogers did in Cherokee County manufacture,
19 distribute, dispense, deliver, purchase or aid, abet
20 attempt, or conspire to manufacture, distribute, dispense,
21 deliver or purchase, or possess with the intent to
22 manufacture, distribute, dispense, deliver or purchase a
23 controlled substance. They allege that substance to be
24 crack cocaine, a schedule two controlled substance under
25 the law of this state.

Jury charge

1 That's what the state has alleged. And what they are
2 contending the defendant did that would be in violation of
3 those facts set forth is that he did possess some quantity
4 of crack cocaine, at the time he possessed it he did intend
5 to distribute it.

6 Section 44-53-375 of the Code of Laws of South
7 Carolina, the code section that the defendant is alleged to
8 have violated in that respect, and it does provide that it
9 should be unlawful for any person to possess with intent to
10 distribute or deliver crack cocaine.

11 Now, as I told you, the offense of possession with
12 intent to distribute crack cocaine necessarily includes the
13 lesser offense of possession of crack cocaine; therefore
14 I'm first going to instruct you on the law as it relates to
15 the crime of possession of crack cocaine, and then I'll
16 tell you about the additional element of an intent to
17 distribute.

18 Now, in order for a person to be guilty of a crime of
19 possession the state has to prove beyond a reasonable doubt
20 that the person did possess the substance that they claim
21 he did possess.

22 Now, in this case they're claiming possession of crack
23 cocaine. They're also claiming possession of a pistol. So
24 the law as it relates to possession that I am going to
25 instruct you applies to both the crack cocaine as well as

Jury charge

1 to the pistol. In other words, they have to prove
2 possession under both of those indictments.

3 Now, the two ways you can prove possession of a
4 substance or an item, it may be through -- he may be proven
5 guilty of possession by actual possession or by
6 constructive possession.

7 Now, constructive possession of a substance or an item
8 occurs when a person does not have actual physical custody
9 of the substance or item but the person has a right to
10 exercise dominion and intent to exercise dominion and
11 control over that substance or that item.

12 Actual possession of a substance or an item occurs
13 when that substance or that item is found to be in the
14 actual physical custody or control of the person charged
15 with possession. But in order to be found guilty of a
16 charge of possession of an item or substance, not only does
17 it have to be proven that you possessed that item or that
18 substance but that you had to have knowledge of that item
19 being in your possession.

20 Now, the elements of possession, as well as knowledge
21 and intent, may be proven by either direct evidence or
22 circumstantial evidence or a combination of both types of
23 evidence.

24 You are permitted to infer the act of possession, as
25 well as the element of knowledge and intent, from evidence

Jury charge

1 of acts or declarations or conduct of the person charged
2 with possession, as well as any other circumstances
3 established by the evidence in the case from which you
4 might reasonably infer the elements and the act of
5 possession.

6 Now, in order for the defendant to be found guilty of
7 possession with intent to distribute or to deliver crack
8 cocaine it would be necessary that the state prove to your
9 satisfaction beyond a reasonable doubt that the defendant
10 not only possessed, that is had in his physical custody, a
11 quantity of crack cocaine as I've explained that to you,
12 but in addition he must have possessed it and intended to
13 distribute it or to deliver it.

14 Intent is the state of a person's mind which operates
15 jointly with an act in the commission of a criminal
16 offense. Intent is the state of a person's mind which
17 directs his actions towards a specific object or goal.

18 In this case the state must prove that the defendant
19 intended to distribute or to dispense or to deliver crack
20 cocaine. To distribute or to deliver means to actually or
21 constructively transfer or attempt to transfer or have an
22 intention to transfer a controlled substance from one
23 person to another, whether or not it was in exchange for
24 money or any other valuable consideration.

25 Further you are instructed that under Section

Jury charge

1 44-53-375, Subsection (b) (3), that law provides that you
2 are permitted to infer an intent to distribute or an intent
3 to deliver based upon proof of possession of more than one
4 gram of crack cocaine.

5 Now, any time you're permitted to make an inference,
6 an inference, as I've stated, is simply a deduction of fact
7 that may logically and reasonably be drawn from the proof
8 of some other fact or set of facts. But the fact that the
9 law does permit you to make such an inference, the law does
10 not require you to make such an inference. You may make
11 that inference if you find it to be reasonable under the
12 facts and evidence in this particular case, but you must be
13 convinced of that fact beyond a reasonable doubt.

14 And of course the state has to prove that the
15 substance that they allege the defendant possessed was, in
16 fact, with respect to the drug charge, was, in fact,
17 cocaine based. And cocaine base is defined in the law as
18 an alkaloidal cocaine or freebase form of cocaine which is
19 the end product of a chemical alteration whereby the
20 cocaine in salt form is converted to a form suitable for
21 smoking. And cocaine base is commonly referred to as rock
22 or crack cocaine.

23 Now, in this case also the defendant is charged in a
24 separate indictment with unlawfully possessing a pistol.
25 They allege on the same date and time as they allege he

Jury charge

1 possessed the crack cocaine that he also had in his
2 possession a handgun and that he was not entitled to
3 possession of that pistol.

4 They allege that was in violation of 16-23-20, and
5 16-23-20 provides that it should be unlawful for any person
6 to carry about his or her person any handgun, whether
7 concealed or not, except where it is permitted by law. And
8 there are certain exceptions that are set forth in the
9 statute. None of those exceptions are applicable under the
10 facts and evidence in this particular case.

11 Now, as I have previously told you at the beginning of
12 this trial, in a trial where a defendant does not take the
13 witness stand or testify during the trial of the case,
14 that's not a factor that you may consider in any way during
15 your deliberations or in your determination as to whether
16 or not his guilt has been proven beyond a reasonable doubt.

17 You may not allow that fact to weigh in the slightest
18 degree against a defendant where a defendant does not
19 testify, because, as I've stated, the burden is always upon
20 the state in bringing a charge against another to establish
21 that person's guilt beyond a reasonable doubt, and the
22 burden is never upon a defendant to prove that he is not
23 guilty or to prove that he is innocent because in some
24 cases that would not even be possible.

25 So you may not draw any inference, you may not reach

Jury charge

1 any conclusion from the fact that a defendant does not
2 testify during the trial of the case, nor may you consider
3 that fact in any way whatsoever in your deliberations or in
4 your determination as to whether or not he has been proven
5 guilty, nor may you even discuss that fact while you are
6 engaged in those deliberations.

7 Now, Madam Forelady and ladies and gentlemen of the
8 jury, I am not concerned with what your decisions are, but,
9 as I told you previously, your verdict has to be unanimous.
10 All of you have to be in agreement before any verdict may
11 be returned to the Court.

12 Now, in this case, Madam Forelady and ladies and
13 gentlemen, you're going to have three choices or three
14 options so far as the verdict form is concerned.

15 With respect to the indictment charging the defendant
16 with violation of the drug act, possession with intent to
17 distribute crack cocaine, if the state has proven to your
18 satisfaction beyond a reasonable doubt each of the
19 essential elements constituting the crime of possession
20 with intent to distribute crack cocaine as I've explained
21 those to you, and you're convinced of that beyond a
22 reasonable doubt, then in that event the verdict form would
23 be guilty. One word, guilty.

24 Madam forelady, you would indicate it on the back of
25 the indictment. You'll see in lower -- I am going to fold

Jury charge

1 it before we send it back. But you'll see on the back of
2 the indictment, you'll see the word verdict. It's beneath
3 that word that you're going to indicate the jury's
4 unanimous decision. Sign your name as the foreperson and
5 place the appropriate date on it.

6 Now, with respect to that indictment, as I told you,
7 you also are permitted to consider the lesser included
8 offense of possession of crack cocaine.

9 So if the state has failed to establish an essential
10 element as to possession with intent to distribute but the
11 state has proven to your satisfaction beyond a reasonable
12 doubt each of the elements necessary to a finding of a
13 verdict of guilty of the charge, of the lesser included
14 offense of possession of crack cocaine, then you could find
15 the defendant guilty of possession of crack cocaine.

16 If that's your decision, Madam Forelady, you're going
17 to need to write that out. So in that event the verdict
18 form would be guilty of possession only, or guilty of
19 possession of crack cocaine. But whatever it is, you have
20 to write that out so that we will know it's not possession
21 with intent to distribute, it's only possession.

22 And if the state has failed to prove beyond a
23 reasonable doubt an essential element of either of those
24 crimes or both of those crimes and failed to prove him
25 guilty of either, then of course your verdict in that

Jury charge

1 instance would be not guilty. And you would indicate that
2 verdict form in the space provided.

3 So, again, with respect to the indictment charging
4 violation of the drug act, you have got three verdict
5 forms. They are guilty, meaning guilty of the charge in
6 the indictment, or guilty of possession of crack cocaine,
7 or guilty of possession only if you prefer. That just
8 means he has only been proven guilty of possession. Or the
9 third option, not guilty.

10 Now, with respect to the unlawful possession of a
11 pistol, you have two -- two options. And they are guilty
12 or not guilty.

13 Again, whatever the decision is, it has to be
14 unanimous. All of you must be in agreement.

15 When you have deliberated the case and made those
16 decisions, Madam Forelady, indicate them on the verdict
17 form, sign your name, place the date and notify the bailiff
18 that you have reached a decision. And we will bring you
19 back to receive those verdicts.

20 Now, during deliberations every now and then a jury
21 might have a question about the facts or might want to know
22 was there something else we can get, do you have this or do
23 you have that or do you have some other witness or do you
24 have another document, that sort of thing.

25 Now that you are going back to deliberate no -- even

Jury charge

1 if there is additional evidence somewhere, you can't get
2 it. No additional evidence can be received once a jury
3 goes back to deliberate.

4 So if you think you're looking for something else or
5 want something else or would like to have something else or
6 wonder if something exists, it wouldn't matter. You can't
7 have it. No more evidence can be submitted now that you're
8 going back to deliberate.

9 If you have a question about the testimony that was
10 received and you think that question can be answered by
11 having testimony replayed, I can always bring you back to
12 have testimony reheard in whole or in part if you need it.

13 So if you want to have testimony replayed, I don't
14 have a transcript. I can't send a transcript back. But if
15 you want to hear a witness' testimony in whole or in part,
16 let the bailiff know. I'll bring you back to accomplish
17 that.

18 If at any time you have a question about the law
19 that's applicable and you need an additional explanation,
20 you need a clarification or some further enlightenment on
21 the law that's applicable, I can always answer those
22 questions.

23 So if you have a question about the law, write it on a
24 piece of paper, give it to the bailiff. He'll provide it
25 to me, and I will bring you back to respond to it. If at

Jury charge

1 any time you have a question, write it down and give it to
2 the bailiff, and he will give it to me.

3 I don't know if we have any smokers on the jury. If
4 we do, you can smoke, but you can't smoke in the jury room.
5 You have to go outside to smoke. But if anybody is absent
6 from the jury room for an authorized purpose the
7 deliberations have to stop. They may only resume when all
8 12 jurors are present so that all may participate.

9 Now, I also don't have any idea how long your
10 deliberations are going to take to conclude your
11 obligations in the case, but I will tell you that if you
12 get to a point during deliberations that you think it's
13 appropriate to order lunch, it usually takes about an hour
14 or so to have it ordered, prepared and brought to the jury
15 room for your benefit.

16 Of course it's not lunchtime now. But you may get to
17 a point where you, knowing it's going to take an hour, you
18 want to order lunch. So if that should occur, let the
19 bailiff know. We'll make those arrangements for you.

20 I think that covers everything. I'm going to ask you
21 to go back with the bailiff to a jury room.

22 Mr. Coggins, I'll ask you to stay with me.

23 Do not however begin deliberating. I've got some
24 matters to address with the lawyers. If I don't need to
25 bring you back, don't need to provide you any additional

Jury charge

1 information, I will send word by the bailiff that you can
2 begin deliberating. And in that event he'll bring to the
3 jury room all of the exhibits which have been introduced.

4 And to you, Madam Forelady, he will also bring these
5 verdict forms.

6 So please retire but don't begin deliberating until I
7 send you word.

8 (Whereupon, the jury retired to deliberate at
9 11:00 a.m.)

10 (Whereupon, the alternate juror was excused.)

11 THE COURT: Are there any exceptions taken to the
12 instruction or requests for additions to the instruction by
13 the state?

14 MR. STALVEY: None from the state, Your Honor.

15 THE COURT: By the defendant?

16 MR. LAMB: None from the defendant, Your Honor.

17 THE COURT: And the number of exhibits are five. Let
18 me ask y'all to verify them before they go back, please.

19 MR. STALVEY: Your Honor, we have got the gun, the
20 magazine and then the ammunition.

21 THE COURT: Ray is going to secure that gun.

22 (Pause.)

23 THE COURT: Okay. Send the exhibits and the verdict
24 forms back and tell them to notify us when they have
25 concluded.

Verdict

1 (Whereupon, the exhibits and the verdict form were
2 submitted to the jury at 11:05 a.m.)

3 (Whereupon, a recess was taken.)

4 THE COURT: I am told the jury has reached a decision
5 in Mr. Rogers' case. Are we ready to bring them back?
6 Okay. Bring them back.

7 (Whereupon, the jury returned to the courtroom at
8 12:21 p.m.)

9 THE COURT: Madam Forelady, have you and your fellow
10 jurors reached a unanimous decision as to each of the
11 separate indictments?

12 THE FORELADY: Yes, we have.

13 THE COURT: Have you indicated those decisions on the
14 back of the indictment as requested?

15 THE FORELADY: Yes, I have.

16 THE COURT: Did you sign your name as the foreperson?

17 THE FORELADY: Yes, I did on one of them. I forgot to
18 do the other. I'm sorry.

19 THE COURT: Do you have a pen?

20 (Pause.)

21 THE COURT: And put the date on there too if you
22 didn't.

23 (Pause.)

24 THE COURT: All right. If you will, please hand those
25 verdict forms up by way of the bailiff.

Verdict

1 All right. You may publish the verdicts.

2 THE CLERK: Indictment 06-GS-11-965, the State of
3 South Carolina vs. Dustin Lenier Rogers, indictment for
4 unlawful possession of a pistol, the verdict is guilty,
5 signed by the forelady, Stacy Lipscomb.

6 Indictment 2006-GS-11-964, the State of South Carolina
7 vs. Dustin Lenier Rogers, indictment for possession with
8 intent to distribute crack cocaine, the verdict is guilty,
9 signed by foreperson, Stacy Lipscomb.

10 Ladies and gentlemen of the jury, if this is the
11 verdict of you all, please indicate by raising your right
12 hands.

13 (Whereupon, all jurors responded in the affirmative.)

14 THE CLERK: Thank you.

15 THE COURT: Any other matters to be addressed with the
16 jury present by the state?

17 MR. STALVEY: None from the state, Your Honor.

18 THE COURT: From the defendant?

19 MR. LAMB: None, Your Honor.

20 (Whereupon, the trial jury was excused.)

21 THE COURT: All right. With regard to the Rogers
22 matter, is there any matters we need to address before the
23 imposition of sentence?

24 MR. STALVEY: None from the state, Your Honor.

25 MR. LAMB: None, Your Honor.

Sentence

1 THE COURT: Okay. Mr. Rogers, come around, please.

2 MR. STALVEY: May I approach, Your Honor?

3 THE COURT: Yes, sir.

4 All right. Mr. Rogers is on probation now?

5 PROBATION AGENT: Yes, sir.

6 THE COURT: Tell me about that, please.

7 PROBATION AGENT: Yes, Your Honor. May it please the
8 Court.

9 THE COURT: You served a citation?

10 PROBATION AGENT: Yes, sir. He was sentenced, sir,
11 February the 7th of 2005 on two offenses, the first
12 possession of crack first offense. He was given a Y O. A.
13 sentence not to exceed two years and placed on probation
14 for three years with shock recommended. He was to obtain
15 his G. E. D.

16 And on the second offense, also possession of crack
17 first offense, given the same exact sentence, a Y. O. A.
18 not to exceed two years with shock recommended and placed
19 on probation for three years.

20 THE COURT: I assume he did the shock. He got out, 90
21 days?

22 PROBATION AGENT: I think they suspended the shock and
23 if he ever did get revoked, then the shock would be
24 recommended.

25 THE COURT: So he was just placed on probation.

Sentence

1 PROBATION AGENT: Yes, sir.

2 THE COURT: Anything else?

3 PROBATION AGENT: We've had one administrative hearing
4 on him in the past.

5 On May the 5th of 2006 he was charged with failing to
6 make truthful reports in that he had reported he had
7 attended adult education when, in fact, he had failed to
8 attend classes, and failed to provide a urine sample, and
9 agent -- failing to follow the advice and instructions of
10 the agent.

11 Our hearing officer at that time placed him on
12 intensive supervision with home detention not to exceed six
13 months, electronic monitoring for 90 days, complete 100
14 hours of public service and attend adult education as
15 instructed. That's it.

16 THE COURT: All right. Mr. Lamb.

17 MR. LAMB: Your Honor, you've heard the case in the
18 matter and everything else.

19 I would just like to say that he is 23 years of age.
20 He lives at home with his father and his mother. He works
21 with his mom. His mom runs what?

22 THE DEFENDANT: A consignment shop.

23 MR. LAMB: A consignment shop and everything else.

24 His mom and dad are here in the courtroom and have
25 been with him throughout. She's been looking after him and

Sentence

1 everything else. But a mother can only do so much, Your
2 Honor.

3 Anything you want to tell the Court?

4 ANGELA ROGERS: I had --

5 THE COURT: Let me ask you to come up here next to
6 Mr. Lamb and state your name for the benefit of the record.

7 ANGELA ROGERS: My name is Angela Rogers.

8 THE COURT: Okay.

9 ANGELA ROGERS: Dustin -- I had been having to go out
10 and find other jobs, because after he get off from my job
11 it's like 5:00 o'clock. And I moved back to Greenville.
12 So we're back here by 6:30. And it just gives him a lot of
13 time. And I don't want all of that time on his hands. So
14 I was having him to go out and look for other jobs at the
15 present.

16 And everybody wanted a report. So, you know, when he
17 came up with the report, they wouldn't offer him a job. So
18 I was in the process of getting his own business started.

19 I was going to -- he is very good with cars and fixing
20 cars. A lot of friend guys of his asked him to work on his
21 cars and design designs on their cars.

22 So I was in the process of getting his own business
23 started as far as opening up like a detail shop for him to
24 start working on cars, something for him to do to keep him
25 occupied when he leaves me, because after 5:00, you know,

Sentence

1 we're closed down unless he has a delivery, him and his
2 friends.

3 I applied to his friends that works with him, because
4 he don't have license, and one of them has to drive. So
5 after 5:00 we close. And then when we come from Greenville
6 it's like 6:00 o'clock. And so I'm trying to do everything
7 I can to keep him away from, you know, bad influences. And
8 so I had applied for him to own his own detail shop.

9 THE COURT: Okay. Anything else any of you would like
10 to say?

11 THE DEFENDANT'S FATHER: Not at this time. I don't
12 have nothing to say. Only I would ask you to go easy on
13 him because he is not going to buy again.

14 THE COURT: Well, I realize that, but unfortunately
15 the legislature has set forth the penalties for these
16 offenses. There are minimum sentences that have to be
17 imposed. There is no discretion in the Court. Of course
18 that's why, you know -- I don't know why these kids don't
19 understand you can't be messing with this stuff.

20 He has already been before the Court before and he was
21 given a break and apparently he didn't accept it, didn't
22 take advantage of it, wasn't interested in doing it or just
23 refused to comply with the law and just going to be
24 stubborn like a lot of kids are. But, unfortunately, he's
25 going to learn a very hard lesson today as a result of his

Sentence

1 stubbornness.

2 Anything else, Mr. Lamb?

3 MR. LAMB: No, Your Honor.

4 THE COURT: Mr. Rogers, anything you want to tell me?

5 THE DEFENDANT: No, sir.

6 THE COURT: All right. On Indictment 2006-964, that's
7 the indictment for possession with intent to distribute
8 crack cocaine, it being a third offense under the statute,
9 the Sentence of the Court is you, Dustin Lenier Rogers, be
10 confined to the South Carolina Department of Corrections
11 for a period of 15 years.

12 MR. LAMB: Your Honor, that's his third?

13 THE COURT: Yes, sir.

14 MR. LAMB: I didn't think he had ever been convicted
15 of possession of crack cocaine with intent to distribute.

16 PROBATION AGENT: These are possession of crack first
17 offense.

18 MR. LAMB: First offense.

19 THE COURT: There is two of them, isn't there?

20 PROBATION AGENT: Yes, sir.

21 THE COURT: This makes three.

22 MR. LAMB: But it's not intent to distribute. It's
23 just simple possession of crack.

24 THE COURT: You talking about the priors?

25 MR. LAMB: Yes, sir.

Sentence

1 THE COURT: That's the reason I say the legislature
2 has made this a very serious offense. If you've been
3 convicted of simple possession of marijuana twice and you
4 get convicted of possession with intent to distribute crack
5 cocaine, it's 15 years minimum and 30 years maximum.

6 MR. LAMB: Okay.

7 THE COURT: I don't see where I have any choice in
8 that.

9 With respect to the indictment for unlawful possession
10 of pistol, Sentence of the Court is you, Dustin Lenier
11 Rogers, be confined to the South Carolina Department of
12 Corrections for a period of one year concurrent with any
13 other sentence.

14 Now, Mr. Rogers, you have a right to appeal the
15 verdict of the jury and the Sentence of the Court. You
16 must file any notice of your intent to appeal within ten
17 days of today's date. Good luck to you.

18 PROBATION AGENT: And the probation, Your Honor.

19 THE COURT: Oh, I'm sorry. Wait a minute.

20 Mr. Rogers, come back.

21 With regard to the probation matter, I do find he
22 wilfully failed to comply with the conditions of probation.
23 Revoke those in full. Run those concurrent with any other
24 sentence.

25 END OF REQUESTED TRANSCRIPT OF RECORD

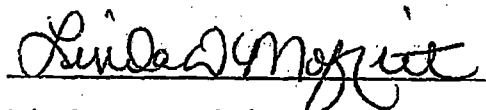
Certificate

CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh 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 cause, relative to appeal, in the Court of General Sessions for Cherokee County, South Carolina, on the 3rd and 4th days of April 2007.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

September 15, 2007



Linda D. Moffitt
Circuit Court Reporter

79W 151

FORM 5

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF Cherokee FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C. **012CP-110770**
Full name and prison number (if any) of Applicant,)
DUSTON Lenier Rogers 2012 OCT 26 AM 10 43
v.)
BRANDY W. MCBEE APPLICATION FOR
State of South Carolina) 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 McCormick Correctional Institution
2. Name and location of Court which imposed sentence Cherokee County
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) NO 06-65-11-964
 - (b) NO 06-65-11-965
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) April 4, 2007, 15 yrs PWID, 1 year poss. of pistol concurrent
 - (b) _____

012CP-110770

6. Check whether a finding of guilty was made:
(c) _____

(a) after a plea of guilty _____

(b) after a plea of not guilty ✓

(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. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Affirmed

ii. _____

iii. _____

(c) the date of each such result:

i. March 10th 2009

ii. _____

iii. _____

(d) If known, citations of any written opinion or orders entered pursuant to such results:

i. N/A

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) The Effective Assistance of Counsel

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

A Newly discovered evidence of Turner's Misconduct and Ineffective Assistance of Attorney

in violation of B.C. Const Art 19.14 and U.S. Const 6th, 14th, 17th, 18th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st, 52nd, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th, 71st, 72nd, 73rd, 74th, 75th, 76th, 77th, 78th, 79th, 80th, 81st, 82nd, 83rd, 84th, 85th, 86th, 87th, 88th, 89th, 90th, 91st, 92nd, 93rd, 94th, 95th, 96th, 97th, 98th, 99th, 100th

Requires vacation of conviction and sentence.

012CP-110770

- (a) _____
 (b) _____
 (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) *Denial of Due Process and fundamental fairness*
 (b) *Newly and after discovered evidence*
 (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? *SC Court of Appeals*
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
 (d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. *direct appeal*

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. *S.C. Court of Appeals, Columbia, S.C.*

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. *affirmed*

ii. _____

iii. _____

BRANDY W. MOBEE

2012 OCT 26 AM 10 43

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 CLERK OF COURT
 QUINCY COUNTY, S.C.

012CP-110770

iv. _____

(d) the date of each such disposition:

i. March 10, 2009

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. State vs. Rogers 2009 UP 136

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?

N/A

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Newly discovered evidence

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

FILED IN OFFICE OF
CLERK OF COURT
JEROME COUNTY, S.C.
2012 OCT 26 PM 10 43
BRANDY W. MOBEE

012CP-10770

- (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? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
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. Edward A Lamb 276 Magnolia St, Spartanburg, SC 29301
- ii. Lanette Durant, 1330 Lady Street, Suite 401, Columbia, SC 29201-3332
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Trial
- ii. Appeal
- iii. _____
19. State clearly the relief you seek in filing this application:
Vacation of illegal conviction and sentence
20. Are you now under sentence from any other court that you have not challenged?
No

FILED IN OFFICE OF
CLERK OF COURT
SPARTANBURG COUNTY, S.C.
2012 OCT 26 AM 10 43
BRANDY W. JOBBEE

012CP-110770

STATE OF SOUTH CAROLINA)

County of Cherokee)
Dustin L. ROGERS)

VERIFICATION

I, _____, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Dustin L. Rogers
Dustin L. Rogers

SWORN to and subscribed before me this 24
day of October, 2012

J. Frankler (L.S.)
Notary Public

My Commission Expires: 12-16-2019

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2012 OCT 26 PM 10 43
BRANDY W. MCBEE

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE

Duston Lenier Rogers, #279924,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2012-CP-11-0770

RETURN AND MOTION TO DISMISS

In response to the post-conviction relief application filed October 26, 2012, the Respondent would show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. The Applicant was indicted at the November 2006 term of the Cherokee County Grand Jury for one (1) count of Possession With Intent to Distribute Crack Cocaine (06-GS-11-0964) and one (1) count of Unlawful Possession of a Pistol (06-GS-11-0965). The Applicant was represented by Edward Lamb, Esquire. On April 4, 2007, the Applicant proceeded to trial and was found guilty as indicted. He was sentenced by the Honorable J. Derham Cole to confinement for a period of fifteen (15) years for Possession With Intent to Distribute Crack Cocaine – 3rd (06-11-0964), and one (1) year for Unlawful Possession of a Pistol (06-GS-11-0965), each sentence to be served concurrently.

A timely Notice of Appeal was filed on behalf of the Applicant by LaNelle C. Durant, Esquire, of the South Carolina Office of Appellate Defense. The South Carolina Court of Appeals dismissed the case by written order filed March 10, 2009. State v. Rogers, 2009-UP-136

(S.C. C.t. App. filed March 10, 2009). The case was returned to the lower court by Remittitur dated March 26, 2009.

2009-CP-11-0819

The Applicant subsequently filed his first application for post-conviction relief (PCR) on August 24, 2009. The State filed its Return on or about February 19, 2010. An evidentiary hearing was convened on May 24, 2010, at which the Applicant was present and represented by Stanley T. Case, Esquire. The Applicant raised the following issues in his first PCR:

1. Ineffective assistance of counsel, in that
 - a. Counsel failed to object to the sentencing enhancement.

The Honorable J. Mark Hayes, II denied and dismissed Applicant's application with prejudice by written Order dated July 28, 2010. A timely Petition for Writ of Certiorari was submitted to the South Carolina Supreme Court. The appeal was then transferred to the South Carolina Court of Appeals. The South Carolina Court of Appeals denied the Petition by written Order dated March 7, 2013. The Remittitur was sent down on March 25, 2013.

II.

In his *second* and current application for post-conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

- | |
|---|
| <p>10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:</p> <p><i>a) Newly discovered evidence of Juror Misconduct and Impartial Jury in violation of B.C. Const Art 1914 and U.S. Const 6th 14th 51 ^{Revised 3/2003} Amend Rights</i></p> <p><i>b) Evidence of material facts not previously presented and heard that requires vacation of conviction and sentence.</i></p> |
|---|

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) *Denial of Due Process and fundamental fairness*
- (b) *Newly and after discovered evidence*
- (c) _____

For the purpose of this Return, the Respondent incorporates the Clerk of Court records and the South Carolina Department of Corrections' records and the prior PCR records by reference. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

The Court should dismiss the current Application because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (2003) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." [Emphasis in original]. Id., 305 S.C. at 450, 409 S.E.2d at 394. If the Applicant could have raised these allegations in a previous application,

then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, Id.

The Applicant could have raised the new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications. Accordingly, Respondent moves for a dismissal of the application because it is successive.

IV.

The Respondent submits that this Application for Post-Conviction Relief should also be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10, et. seq. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offenses he challenges in this Application on April 4, 2007. The remittitur from Applicant's direct appeal was issued on March 26, 2009. The Applicant was therefore required to file his application before March 26, 2010. This Application was filed on October 25, 2012, well over two (2) years after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (2003) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the

pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Respondent requests that this Court dismiss the application for post-conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

VI.

Applicant alleges newly discovered evidence of juror misconduct.¹ However, Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based as Applicant has not provided any facts whatsoever to support this allegation. The Uniform Post-Conviction Procedure Act requires that the Applicant must "specifically set forth the grounds upon which the application is based." Section 17-27-50 of the Code of Laws of South Carolina (1976). In an application for post-conviction relief, it is incumbent upon 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). Further, Applicant's allegations fail to meet any of the requirements of Rule 8(a) of the South Carolina Rules of Civil Procedure, which provides that a pleading must contain: : "(1) a short and plain statement of the *facts* showing that the pleader is entitled to relief. . ." (emphasis added).

¹ See McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013) which held an issue of fact exists and a hearing is therefore required where an allegation would establish an exception to either the statute of limitations or the prohibition against successive applications when those allegations are not conclusively refuted by the record. The court also held the traditional five part test governing newly discovered evidence in PCR actions is not applicable to allegations of juror misconduct. The court enunciated a new test for when the grant of a new trial is warranted on the basis of juror misconduct: "if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges."

This allegation is so vague that it is impossible for the State to respond, as Applicant has failed to set forth any facts whatsoever which would entitle him to relief.² Since Applicant has failed to make even a prima facie showing, Respondent submits that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedure Act and for failing to comply with Rule 12(b)(6), SCRCP.

VI.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VII.

WHEREFORE, having made its Return, Respondent moves to summarily dismiss the application because it is successive, was filed after the statute of limitations had expired, and fails to state, with specificity, a claim upon which relief can be granted.

(signatures on following page)

² Respondent has filed a Motion for More Definite Statement in an attempt to fully comprehend Applicant's allegations.

Respectfully submitted,

ALAN M. WILSON
Attorney General

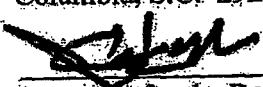
JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Staff Attorney

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for the Respondents

April 30, 2014 Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Duston Lenier Rogers,

2012-CP-11-0770

Applicant,

v.

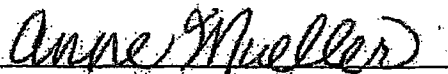
CERTIFICATE OF SERVICE

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 Respondent's Return and Motion to Dismiss in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Ms. Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
P.O. Box 1015
Rock Hill, SC 29730


Anne A. Mueller
Legal Assistant for the Respondent

DATED this 30th day of April, 2014.

1 STATE OF SOUTH CAROLINA } COURT OF COMMON PLEAS NONJURY
2 COUNTY OF CHEROKEE }

3
4 DUSTON LENIER ROGERS,)
5 APPLICANT,)
6 VS.)
7 STATE OF SOUTH CAROLINA,)
8 RESPONDENT.)

TRANSCRIPT
OF
RECORD
2012-CP-11-770

9
10 September 17th, 2014
11 Spartanburg, South Carolina
12
13

14 B E F O R E:
15 THE HONORABLE ROGER L. COUCH, Judge.
16

17 A P P E A R A N C E S:
18 LEAH B. MOODY
19 ESQ.
Attorney for the Applicant
20 J. CLAYTON MITCHELL
21 ASSISTANT ATTORNEY GENERAL
Attorney for the State
22
23

24 PAMELA E. GREEN
25 Circuit Court Reporter
Seventh Judicial Circuit

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I N D E X O F W I T N E S S E S

(There were no exhibits marked or testimony taken
during this hearing.)

P R O C E E D I N G S

1
2
3 THE COURT: All right. The State may call the next
4 case.

5 MR. MITCHELL: Your Honor, the next case is Dustin
6 Lenier Rogers versus the State of South Carolina. Case
7 Number 2012-CP-11-770.

8 Applicant was indicted at the November 2006 term of the
9 Cherokee County Grand Jury for one count of possession with
10 intent to distribute crack cocaine, one count of unlawful
11 possession of a pistol. Applicant was represented by Edward
12 Lamb, and on April 4th, 2007, applicant proceeded to trial
13 and was found guilty as indicted. The Honorable Judge Cole
14 sentenced him to confinement for a period of 15 years for
15 possession with intent to distribute crack cocaine and for
16 one year for unlawful possession of a pistol and that's to
17 be served consecutively.

18 A notice of appeal was filed in his behalf. The South
19 Carolina Court of Appeals dismissed that case by written
20 order on March 10th, 2009, and remittitur was issued
21 March 26th, 2009.

22 The applicant then filed his first PCR application on
23 August 24th, 2009. A hearing, a hearing was held on May
24 24th, 2010, where he raised different issues of ineffective
25 assistance of counsel. The Honorable J. Mark Hayes denied

1 and dismissed that application by order dated July 28th,
2 2010. He appealed that decision to the South Carolina
3 Supreme Court, which was then transferred to the South
4 Carolina Court of Appeals. The Court of Appeals denied that
5 petition by order dated March 7th, 2013.

6 The applicant is filed a second PCR in this case on
7 October 26th, 2012. We filed -- well, in that application
8 he raised allegations of juror misconduct as newly
9 discovered evidence in his trial, in his original trial.
10 So, what he said exactly in the application, and I quote,
11 "newly discovered evidence of juror misconduct and impartial
12 jury."

13 So, we filed a motion for more definite statement to
14 see what those allegations were concerning more specific,
15 and then we haven't heard -- we never heard anything back.
16 He had an attorney appointed before we filed that motion,
17 which is Ms. Moody who's here today, and then we filed a
18 motion to dismiss the PCR application on May 2nd, 2014.

19 We're here today on our motion to dismiss the case as
20 he's failed to state, with specificity, these allegations of
21 juror misconduct, and, Your Honor, I point you to our motion
22 to dismiss, but, you know, we're -- we are conscious of the
23 allegations of juror misconduct as a --

24 THE COURT: Uh-huh. (Affirmative).

25 MR. MITCHELL: -- recent case, McCoy v. State, which

1 I'm sure you are familiar with, it came out of Spartanburg
2 County, where, where the Supreme -- South Carolina Supreme
3 Court issued an opinion and changed the test for an
4 allegation of juror misconduct. It's not under the
5 traditional five part test of newly discovered evidence.

6 They created a -- it's a little bit more protective of
7 those allegations cause it's of the seriousness of how any
8 kind of juror misconduct could taint a proceeding.

9 THE COURT: All right.

10 MR. MITCHELL: So -- and what they came up with is a
11 new test. So, we're here today to see what the allegations
12 are and to see---

13 THE COURT: As of yet you've not heard, with any
14 specificity, what the allegations are?

15 MR. MITCHELL: You know, it's out -- we're worried that
16 you can't just say oh, juror misconduct, and then you get an
17 evidentiary hearing every time you say that. So, we just
18 need something more from him specifically on what those
19 allegations are.

20 THE COURT: Well, let's hear what Moody -- Ms. Moody
21 has to say about this.

22 MS. MOODY: Thank you, Your Honor.

23 May it please the Court?

24 THE COURT: Yes, ma'am.

25 MS. MOODY: I'm aware of State v. McCoy -- McCoy v.

1 State in which the, the Court came down with the new test,
2 and I sent a letter to my client on June 3rd, 2014, to try
3 to explain to him what we needed.

4 THE COURT: Uh-huh. (Affirmative).

5 MS. MOODY: When we were able to talk to him -- I think
6 that there was a misunderstanding as to what specifically he
7 needed to say because, when talking to him, he just alludes
8 to juror misconduct. I did give him, in the letter, the
9 test that the Court articulated that it was -- the juror
10 intentionally concealed the information and the information
11 concealed would have supported a challenge for cause or
12 would have been a material fact in the use of his
13 peremptory, peremptory challenges.

14 Based on that -- he's had his mother contact me. The
15 way he found out the information, and he's able to testify
16 to this today, Your Honor, is that his mother, in speaking
17 with his mother, the information came from the pastor. I
18 would need to be able to issue a subpoena to have the pastor
19 come forth and testify as to what the misconduct was.

20 THE COURT: Well, again, I'm gonna ask you though we
21 need to know specifically what's being -- for the State to
22 be prepared, they're gonna have to know something about
23 what's being alleged.

24 MS. MOODY: Yes, sir.

25 THE COURT: Okay. Can you help us?

1 MS. MOODY: I still haven't been able to ascertain
2 that.

3 THE COURT: Okay. So right now you, you need to talk
4 to other people who have brought this to your client's
5 attention?

6 MS. MOODY: Yes, sir, I would prefer to speak to the
7 minister specifically.

8 THE COURT: Well, here's, here's what I'm gonna do.
9 I'm gonna continue the case for 30 days. I'm gonna direct
10 that, during the 30 days, you file an amended application
11 specifically stating what juror, juror misconduct your
12 client is alleging. Should they fail to do that, then I
13 will entertain a motion to dismiss the case.

14 MS. MOODY: Thank you, Your Honor.

15 THE COURT: So you have 30 days to talk to these folks,
16 get your application filed with specific allegations so the
17 State's in a position to respond.

18 All right.

19 MR. MITCHELL: Thank you.

20 THE COURT: Thank you.

21 I'll ask the State to prepare an order to that effect.

22

23

24 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

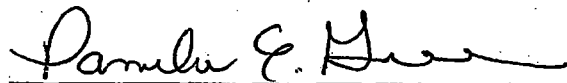
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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Cherokee County, South Carolina, on the 17th day of September, 2014.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

December 16th, 2014



PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

COUNTY OF CHEROKEE)

Duston Lenier Rogers, #279924,)

2012-CP-11-0770

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2014 NOV 26 AM 10 55
BRANDY W. MCBEE

This matter comes before this Court by way of an application for post-conviction relief filed October 26, 2012. An evidentiary hearing on the State's Motion to Dismiss was scheduled for September 17, 2014, at the Spartanburg County Courthouse. The Applicant was present and represented by Leah B. Moody, Esquire. J. Clayton Mitchell represented the Office of the Attorney General.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. The Applicant was indicted at the November 2006 term of the Cherokee County Grand Jury for one (1) count of Possession with Intent to Distribute Crack Cocaine (06-GS-11-0964) and one (1) count of Unlawful Possession of a Pistol (06-GS-11-0965). The Applicant was represented by Edward Lamb, Esquire. On April 4, 2007, the Applicant proceeded to trial and was found guilty as indicted. He was sentenced by the Honorable J. Derham Cole to confinement for a period of fifteen (15) years for Possession With Intent to Distribute Crack Cocaine - 3rd (06-11-0964), and one (1) year for Unlawful Possession of a Pistol (06-GS-11-0965), each sentence to be served concurrently.

A timely Notice of Appeal was filed on behalf of the Applicant by LaNelle C. Durant, Esquire of the South Carolina Office of Appellate Defense. The South Carolina Court of Appeals dismissed the case by written order filed March 10, 2009. State v. Rogers, 2009-UP-136 (S.C. C.t. App. filed March 10, 2009). The case was returned to the lower court by Remittitur dated March 26, 2009.

2009-CP-11-0819

The Applicant subsequently filed his first application for post conviction relief (PCR) on August 24, 2009. The State filed its Return on or about February 19, 2010. An evidentiary hearing was convened on May 24, 2010, at which the Applicant was present and represented by Stanley T. Case, Esquire. The Applicant raised the following issues in his first PCR:

1. Ineffective assistance of counsel, in that
 - a. Counsel failed to object to the sentencing enhancement.

The Honorable J. Mark Hayes, II denied and dismissed Applicant's application with prejudice by written Order dated July 28, 2010. A timely Petition for Writ of Certiorari was submitted to the South Carolina Supreme Court. The appeal was then transferred to the South Carolina Court of Appeals. The South Carolina Court of Appeals denied the Petition by Written Order dated March 7, 2013. The Remittitur was sent down on March 25, 2013.

ALLEGATIONS

In his *second* and current application for post-conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Newly and after discovered evidence
 - i. "Newly discovered evidence of Juror Misconduct and Impartial Jury"
 - ii. "Evidence of material facts not previously presented and heard that requires vacation of conviction and sentence."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the arguments presented at the PCR hearing. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Successive

The Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to the previous application for post-conviction relief. S.C. Code Ann. § 17-27-90 (2003) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the current allegations could have been raised in the proceedings based on Applicant's prior application for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. Applicant has failed to establish sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief; therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State,

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P 3

420 S.E.2d 834 (1992).

Statute of Limitations

This Court further finds that this Application for post-conviction relief should also be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10, et. seq. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offenses he challenges in this Application on April 4, 2007. The Remittitur was returned on March 26, 2009. The Applicant was therefore required to file his application before March 26, 2010. This Application was filed on October 25, 2012; well over two (2) years after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (2003) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, this Court summarily dismisses the application for post-conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

Newly Discovered Evidence – Juror Misconduct

Furthermore, this Court finds that Applicant's claims of newly discovered evidence in the

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P 4*

form of juror misconduct must be dismissed, as Applicant has failed to set forth any specific allegations of the nature of the evidence. The Uniform Post-Conviction Procedure Act requires that the Applicant must "specifically set forth the grounds upon which the application is based." Section 17-27-50 of the Code of Laws of South Carolina (1976). In an application for post-conviction relief, it is incumbent upon 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). At the scheduled hearing on the State's motion to dismiss, September 17, 2014, this Court provided Applicant with a period of thirty days in which to amend his application and provide specific grounds on which his allegations were based. As of this time, the Applicant has failed to provide any specific grounds.

Applicant's allegations fail to meet any of the requirements of Rule 8(a) of the South Carolina Rules of Civil Procedure, which provide that a pleading which sets forth a claim must contain: "(1) a short and plain statement of the *facts* showing that the pleader is entitled to relief. . . ." (emphasis added). Applicant has not set forth any facts that would entitle him to relief and has failed to make the minimum prima facie showing. This Court fully appreciates the seriousness of this allegation, especially in light of McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013), but Applicant has not sufficiently pled a claim showing that he is entitled to relief. Therefore, this Court finds that this allegation must be dismissed pursuant to the Uniform Post-Conviction Procedure Act and for failing to state a claim pursuant to Rule 12(b)(6), SCRPC.

CONCLUSION

IT IS THEREFORE ORDERED that, for the reasons set forth above, the Application for PCR is hereby denied and dismissed with prejudice.

This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 21st day of November, 2014.



Roger L. Couch
Presiding Judge

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2014 NOV 26 AM 10 55
BRANDY W. MCBEE

WITNESSES

[Signature]

ARREST WARRANT NUMBER

H854795

ACTION OF GRAND JURY
TRUE BILL

[Signature]
Foreperson of Grand Jury
Date: 11/16/06

VERDICT

Guilty

[Signature]
Foreperson of Petit Jury
Date: 4/4/07

DOCKET NO. 06-GS-11- 965

The State of South Carolina

County of Cherokee

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

NOV 16 2006

TERM

THE STATE
vs.

Dustin Lenier Rogers

Indictment for
UNLAWFUL POSSESSION OF PISTOL

SC Code: 16-23-20

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF CHEROKEE)

INDICTMENT

At a Court of General Sessions, convened on

NOV 16 2006

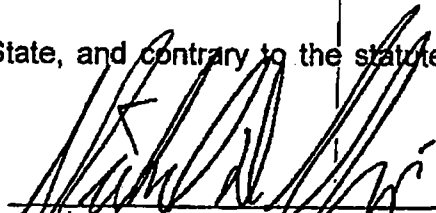
the

Grand Jurors of Cherokee County present upon their oath:

UNLAWFUL POSSESSION OF A PISTOL

That Dustin Lenier Rogers did in Cherokee County on or about September 6, 2006, did have in his possession a handgun, he not being entitled to the possession of the pistol, in violation of §16-23-20 of the Code of Laws of South Carolina, (1976, as amended).

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


ASSISTANT SOLICITOR

WITNESSES

[Signature]

ARREST WARRANT NUMBER

H854794

ACTION OF GRAND JURY
TRUE BILL

Foreperson of Grand Jury
Date: *11/16/06*

VERDICT

GUILTY

Foreperson of Petit Jury
Date: *4/4/07*

DOCKET NO. 06-GS-11- *964*

The State of South Carolina

County of Cherokee

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

NOV 16 2006

TERM

THE STATE
vs.

Dustin Lenier Rogers

Indictment for

POSSESSION WITH INTENT TO
DISTRIBUTE CRACK COCAINE

SC Code: 44-53-375

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within Indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF CHEROKEE)

INDICTMENT

At a Court of General Sessions, convened on NOV 16 2006, the
Grand Jurors of Cherokee County present upon their oath:

POSSESSION WITH INTENT TO DISTRIBUTE CRACK COCAINE

That Dustin Lenier Rogers did in Cherokee County on or about September 6, 2006, manufacture, distribute, dispense, deliver, purchase or aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with the intent to manufacture, distribute, dispense, deliver or purchase a controlled substance, to wit: a quantity of Crack Cocaine, a schedule II controlled substance under provisions of §44-53-110, in violation of §44-53-375 CODE OF LAWS OF SOUTH CAROLINA, (1976), as amended, such possession not having been authorized by law.

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

Assistant Solicitor

