

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Anderson County

J. Cordell Maddox, Jr., Circuit Court Judge

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S.C. Supreme Court

CARIUS LOMAX,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000040

APPENDIX

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STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF ANDERSON) 10TH JUDICIAL CIRCUIT

THE STATE) TRANSCRIPT OF RECORD
-VS-) 08-GS-04-1615
CARIUS KENTA LOMAX,) 08-GS-04-1617
DEFENDANT.)

FEBRUARY 2, 2009

APRIL 7, 2009

ANDERSON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE J. C. BUDDY NICHOLSON, JUDGE; AND A
JURY.

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

RAME CAMPBELL, ASSISTANT SOLICITOR
ATTORNEY FOR THE STATE

KURT TAVERNIER, ESQUIRE
ATTORNEY FOR THE DEFENDANT

SHARON L. VIZER-HANKS
CIRCUIT COURT REPORTER

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(SW) - DENOTES STATE'S WITNESS

(DW) - DENOTES DEFENSE WITNESS

(IC) - DENOTES IN CAMERA

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ALL STATE'S EXHIBITS WERE PREMARKED FOR IDENTIFICATION.

1 Monday, February 2, 2009

2 THE COURT: Solicitor, if you'll call your case,
3 please.

4 MR. CAMPBELL: Please the Court. Your Honor, the
5 State is ready in indictment number 2008-1615, The State vs.
6 Carius Lomax for trafficking in cocaine; and 2008-1617, The
7 State vs. Carius Lomax for possession with intent to
8 distribute a controlled substance. Mr. Lomax is represented
9 by Mr. Tavernier.

10 THE COURT: Thank you. Ladies and gentlemen of the
11 jury panel, the State has called The State vs. Carius Lomax,
12 and the document that he was reading or referring to is an
13 indictment. It's merely the means by which the defendant is
14 brought before the Court for trial. It's not evidence and you
15 are not to consider it as evidence. It's just the
16 administrative process by which the defendant is brought
17 before the Court for trial.

18 Now, I'm going to ask you some questions, and the
19 first thing I'm going to do is call out a list of names. I'm
20 going to ask you the same question about each name. I'm going
21 to ask if you're related by blood or marriage, do you know the
22 individual, have you had any contact with the individual whose
23 names that I call.

24 If the individual is in the courtroom when I call
25 the name out, please stand and face the jury.

1 The first name is Brandon Dunn of the Anderson
2 Police Department.

3 Would you face the jury, please.

4 Thank you, Officer Dunn. I appreciate it. You may
5 have a seat.

6 Is anybody related by blood or marriage to Brandon
7 Dunn or does anybody know Brandon Dunn or had any contact with
8 Brandon Dunn? If so, please stand.

9 (There was no response.)

10 THE COURT: The next name is Russell McClellan of
11 the Anderson Police Department.

12 Thank you, Officer McClellan.

13 Is anybody related by blood or marriage to Russell
14 McClellan, or does anybody know Russell McClellan, or had any
15 contact with Russell McClellan? If so, please stand.

16 The next name is Kevin --

17 POTENTIAL JUROR: I'm standing up.

18 THE COURT: Yes, ma'am, your name?

19 POTENTIAL JUROR: I don't know if he's related to my
20 ex-husband or not. Does that matter?

21 THE COURT: He is related?

22 POTENTIAL JUROR: I don't know for sure if he's
23 related to my ex-husband.

24 THE COURT: Well, if you don't know who does?

25 POTENTIAL JUROR: Well, he might know.

1 THE COURT: Pardon?

2 POTENTIAL JUROR: He might now.

3 THE COURT: Who is your ex-husband?

4 POTENTIAL JUROR: Tommy Mobley.

5 OFFICER MCCLELLAN: Yes.

6 THE COURT: You're related to Tommy Mobley?

7 OFFICER MCCLELLAN: Yes, Your Honor.

8 THE COURT: What's the relationship?

9 OFFICER MCCLELLAN: He is my cousin.

10 THE COURT: Your first cousin?

11 OFFICER MCCLELLAN: Yes, Your Honor.

12 THE COURT: First cousin. He's your first cousin.

13 Your ex-husband's first cousin.

14 POTENTIAL JUROR: Right.

15 THE COURT: All right. Have you had any contact
16 with Officer McClellan yourself in recent years?

17 POTENTIAL JUROR: No, not in recent years.

18 THE COURT: How long have you been divorced from
19 your ex-husband?

20 POTENTIAL JUROR: Three years.

21 THE COURT: Three years. When you were married to
22 your husband did you ever see Officer McClellan?

23 POTENTIAL JUROR: Yes, at a family reunion, I think
24 one time.

25 THE COURT: How often would you see him?

1 POTENTIAL JUROR: Once or twice total.

2 THE COURT: Once or twice total per year or what?

3 POTENTIAL JUROR: No, total in my whole life.

4 THE COURT: So you don't have a -- other than just
5 being your husband's first cousin, you don't really have a
6 personal relationship with him?

7 POTENTIAL JUROR: No, none.

8 THE COURT: Assuming he's going to testify in this
9 case would it cause you any difficulty in sitting on the jury?

10 POTENTIAL JUROR: I don't think so.

11 THE COURT: Can you be fair to both the State and
12 the defendant?

13 POTENTIAL JUROR: Yes.

14 THE COURT: Can you base your decision on the
15 testimony you hear in the courtroom?

16 POTENTIAL JUROR: Yes.

17 THE COURT: What was your jury number again?

18 POTENTIAL JUROR: 117.

19 THE COURT: 117. Thank you, Ms. Scott.

20 All right. The next name is Kevin Warren. He is
21 standing in the back. If you'll look to your right in the
22 back of the courtroom.

23 Thank you, Mr. Warren.

24 Is anybody related by blood or marriage to Kevin
25 Warren? Does anybody know Kevin Warren? Has anybody had any

1 contact with Kevin Warren? If so, please stand.

2 Yes, ma'am, your name?

3 POTENTIAL JUROR: Martha Thrasher.

4 THE COURT: Do you know your number?

5 MS. THRASHER: Pardon?

6 THE COURT: Do you know your number?

7 MS. THRASHER: 134.

8 THE COURT: Yes, ma'am, Ms. Thrasher, how do you
9 know Mr. Warren?

10 MS. THRASHER: I knew Kevin in school, and he used
11 to play little league. My husband coached.

12 THE COURT: Well, look at the size of him now. That
13 was a while back, wasn't it?

14 MS. THRASHER: I know.

15 THE COURT: How long ago was that?

16 MS. THRASHER: It's been years.

17 THE COURT: Years?

18 MS. THRASHER: Yes, sir.

19 THE COURT: Have you seen him since then?

20 MS. THRASHER: I may see him occasionally in town or
21 something but nothing to visit or anything, just say hi or
22 something.

23 THE COURT: Would that cause you any difficulty on
24 sitting on this jury?

25 MS. THRASHER: No, sir.

1 THE COURT: Can you be fair to both the State and
2 the defendant?

3 MS. THRASHER: Yes, sir.

4 THE COURT: Can you base your decision on the
5 testimony you hear in the courtroom?

6 MS. THRASHER: Yes, sir.

7 THE COURT: All right. Thank you, Ms. Thrasher.

8 The next name is Joel McKee, Anderson Police
9 Department. Is anybody related by blood or marriage to Joel
10 McKee, or does anybody know Joel McKee, or had any contact
11 with Joel McKee? If so please stand.

12 (There was no response.)

13 THE COURT: The next name is Carmen Tucker of SLED,
14 South Carolina Law Enforcement Division in Columbia. Does
15 anybody know Carmen Tucker? Is anybody related by blood or
16 marriage to Carmen Tucker? If so, please stand.

17 (There was no response.)

18 THE COURT: The next name is Bobby Geer. Is anybody
19 related by blood or marriage to Bobby Geer?

20 (There was no response.)

21 THE COURT: Does anybody know Bobby Geer, or have
22 any contact with Bobby Geer? If so, please stand.

23 (There was no response.)

24 THE COURT: The defendant, Carius Lomax, was here
25 this morning, ladies and gentlemen, and according to his

1 attorney he's left to get a witness and is supposed to be
2 back, and I hope he'll be back shortly but we're going to go
3 ahead and proceed with drawing of the jury.

4 Is anybody related by blood or marriage to Carius
5 Lomax? Does anybody know Carius Lomax or had any contact with
6 Mr. Lomax? If so, please stand.

7 (There was no response.)

8 THE COURT: Solicitor, if you'd stand and introduce
9 yourself, please.

10 MR. CAMPBELL: Thank you, Your Honor. My name is
11 Rame Campbell. I'm an assistant solicitor here for Solicitor
12 Adams here in Anderson County, and I'll be the prosecutor
13 handling this case.

14 THE COURT: Does anybody have any close personal
15 relationship or close personal friends with anyone in the
16 Solicitor's Office here in Anderson County? If so, please
17 stand.

18 (There was no response.)

19 THE COURT: Mr. Tavernier?

20 MR. TAVERNIER: Thank you, Your Honor.

21 THE COURT: Wait a minute. I got 2 people standing.
22 Excuse me.

23 POTENTIAL JUROR: Juror number 85, Renea Mahaffey.

24 THE COURT: Number 85. Yes, ma'am, Ms. Mahaffey.

25 MS. MAHAFFEY: I used to work with Chrissy Theos

1 Adams in Charleston County when I was a court reporter for the
2 9th Circuit.

3 THE COURT: Okay. How long have you been here in
4 Anderson?

5 MS. MAHAFFEY: Since '96.

6 THE COURT: Since '96. Have you seen her since
7 you've been here?

8 MS. MAHAFFEY: Just on TV.

9 THE COURT: Pardon?

10 MS. MAHAFFEY: Just on TV.

11 THE COURT: Just on TV.

12 MS. MAHAFFEY: Yes, sir.

13 THE COURT: So she was practicing law in Charleston?

14 MS. MAHAFFEY: Yes, sir.

15 THE COURT: And you would see her in court?

16 MS. MAHAFFEY: Yes, sir.

17 THE COURT: Did you have a personal relationship
18 with her?

19 MS. MAHAFFEY: A friendship.

20 THE COURT: A friendship. Would that cause you any
21 difficulty in sitting on this jury?

22 MS. MAHAFFEY: No, sir.

23 THE COURT: Can you set that aside and be fair to
24 both the State and the defendant?

25 MS. MAHAFFEY: Yes, sir.

1 THE COURT: Can you base your decision on the
2 testimony you hear in the courtroom?

3 MS. MAHAFFEY: Yes, sir.

4 THE COURT: Thank you, Ms. Mahaffey.

5 MS. MAHAFFEY: Thank you.

6 MR. CROMER: Your Honor, I'm juror number 35, and
7 I'm an attorney and I know both the attorneys on the case
8 professionally.

9 THE COURT: That comes from practicing law; is that
10 correct, Ms. Cromer?

11 MS. CROMER: Yes, Your Honor.

12 THE COURT: Would that cause you any difficulty in
13 sitting on this jury?

14 MS. CROMER: No.

15 THE COURT: Can you be fair to both the State and
16 the defendant?

17 MS. CROMER: Yes.

18 THE COURT: Can you base your decision on testimony
19 you hear in the courtroom?

20 MS. CROMER: Absolutely.

21 THE COURT: Thank you, Ms. Cromer.

22 Mr. Tavernier, your turn.

23 MR. TAVERNIER: Thank you, Your Honor. My name is
24 Kurt Tavernier. I'm an attorney and I practice here in
25 Anderson County.

1 THE COURT: Has anybody been represented by Mr. Kurt
2 Tavernier either presently or in the past? Is anybody close
3 friends with Mr. Tavernier? If so, please stand.

4 (There was no response.)

5 THE COURT: Has any member of the jury panel formed
6 or expressed an opinion about any issue in this type of case?
7 If so, please stand.

8 (There was no response.)

9 THE COURT: Is any member of the jury panel biased
10 or prejudiced to the extent towards drugs where they could not
11 be a fair juror? If so, please stand.

12 (There was no response.)

13 THE COURT: Is any member of the jury panel aware of
14 any bias or prejudice towards either the State or the
15 defendant in this case? If so, please stand.

16 (There was no response.)

17 THE COURT: Is there any member of the jury panel
18 who is a member or contributor to any group which has its
19 primary concern the promotion of law enforcement or victims'
20 rights such as MADD, SADD, CAVE, or CADRE? If you contribute
21 money or if you are a member, please stand.

22 Yes, ma'am, your name?

23 POTENTIAL JUROR: Lisa Skelly, juror 122.

24 THE CLERK OF COURT: Number 122, Ms. Skelly.

25 THE COURT: Yes, ma'am, Ms. Skelly.

1 MS. SKELLY: I contribute to MADD because my father
2 was killed by a drunk driver 14 years ago.

3 THE COURT: Would you come around, please, ma'am.
4 The attorneys can join me up here.

5 (WHEREUPON, the following side-bar took place.)

6 THE COURT: I can barely hear you. Your father?

7 MS. SKELLY: My father was killed by a drunk driver
8 14 years ago.

9 THE COURT: Fourteen years ago. Okay. And you've
10 been a member of MADD ever since?

11 MS. SKELLY: Uh-huh.

12 THE COURT: How active has your involvement been
13 with MADD?

14 MS. SKELLY: Just donations and raising money.

15 THE COURT: Donations and raising money?

16 MS. SKELLY: I do speak on their behalf.

17 THE COURT: You do what?

18 MS. SKELLY: I do speak on their behalf.

19 THE COURT: You do? What type of organizations do
20 you speak at?

21 MS. SKELLY: Usually churches and schools.

22 THE COURT: How would that affect you in this case
23 since it's drug related? It's not alcohol, but it's still
24 drug related. It's not a driving offense but it's drug
25 related. How would that affect you on this jury?

1 MS. SKELLY: I can't really say. I don't know.

2 THE COURT: Well, if you don't know nobody does.

3 MS. SKELLY: Well, I know I take -- it's difficult
4 even still.

5 THE COURT: I understand, and I'm sorry about your
6 father. I'm sorry about that loss. It's something you'll
7 probably never get over and I think it's good that you're a
8 member but my concern is we all have our prejudices and we all
9 have our likes and dislikes. So I'm trying to determine if
10 that's going to affect you on how you would view the evidence
11 or against the defendant or for the defendant. That's what
12 I'm trying to determine. And if you do that's fine. That's
13 normal. We all got our prejudice. I got mine, you got yours,
14 we all do. That's what I'm trying to find out.

15 MS. SKELLY: I'd have to say that I am.

16 THE COURT: You'd have to say you were because of
17 the drugs?

18 MS. SKELLY: I think it would.

19 THE COURT: All right. What I'm going to do is I'm
20 going to excuse you for service on this particular jury, okay?
21 Not all of them but just this one.

22 MS. SKELLY: I understand.

23 THE COURT: Okay. Thank you very much.

24 (WHEREUPON, the side-bar was concluded.)

25 THE COURT: Does any member of the jury panel know

1 of any reason personal or otherwise as to why they cannot
2 serve on this jury? If so, please stand.

3 (There was no response.)

4 THE COURT: Is there any member of the jury panel or
5 member of their family or close personal friend has been
6 prosecuted in a criminal case in Anderson County? If so,
7 please stand.

8 POTENTIAL JUROR: I will stand up again. I'm juror
9 117. My brother works for Anderson County Sheriff's
10 Department. So he testifies in lots of their cases. I don't
11 know if that makes any difference or not.

12 THE COURT: Your brother?

13 MS. SCOTT: Yes.

14 THE COURT: Okay. You want to come around.

15 And while she's coming around let me ask another
16 question. Is there any member of the jury panel or member of
17 your immediate family been a victim of a crime? If so, please
18 stand.

19 The attorneys can join me up here.

20 (WHEREUPON, the following side-bar occurred.)

21 THE COURT: Yes, ma'am, Ms. Scott. How long has
22 your brother worked for the sheriff's department?

23 MS. SCOTT: A long time.

24 THE COURT: A long time.

25 MS. SCOTT: He's been back -- well, he's been back

1 up here 3 or 4 years. He works in forensics.

2 THE COURT: He works in forensics here?

3 MS. SCOTT: Chris Scott.

4 MR. CAMPBELL: That's your brother?

5 MS. SCOTT: Yeah.

6 MR. CAMPBELL: I wouldn't hold that against you.

7 I'm sorry.

8 [LAUGHTER]

9 MR. CAMPBELL: He testifies quite a lot.

10 THE COURT: Where was he working before he came back
11 to Anderson?

12 MS. SCOTT: I think he worked in Columbia.

13 THE COURT: Columbia. In forensics in Columbia?

14 MS. SCOTT: Yes.

15 THE COURT: And he moved back up here?

16 MS. SCOTT: Yes.

17 THE COURT: How would that affect you sitting on
18 this jury?

19 MS. SCOTT: I don't think it will.

20 THE COURT: Why not?

21 MS. SCOTT: Because I don't -- he never really tells
22 me, you know, what's going on.

23 THE COURT: You never had any discussion with him?

24 MS. SCOTT: Not really, no.

25 THE COURT: No really. You don't think it would

1 have an effect on you?

2 MS. SCOTT: I don't think so.

3 THE COURT: You think you can be fair?

4 MS. SCOTT: I think I can.

5 THE COURT: Tavernier, you got any questions?

6 MR. TAVERNIER: No. If she grew up with him she
7 knows a lot.

8 MR. CAMPBELL: He's lieutenant over our forensic
9 unit over out at the sheriff's department.

10 MR. TAVERNIER: She's fine.

11 THE COURT: Thank you.

12 (WHEREUPON, the side-bar was concluded.)

13 THE COURT: Ms. Cromer, you want to come around.

14 (WHEREUPON, the following side-bar was reported.)

15 THE COURT: What is your number?

16 MS. CROMER: Number 35. I had my motorcycle stolen.
17 I was a crime victim.

18 THE COURT: You were a crime victim?

19 MS. CROMER: I was.

20 THE COURT: Did anybody get prosecuted?

21 MS. CROMER: Yeah, I prosecuted the crime.

22 THE COURT: Did they get caught?

23 MS. CROMER: No, they never found it.

24 THE COURT: They never found it. Did you get your
25 bike back?

1 MS. CROMER: No.

2 THE COURT: Would that cause you any problems
3 sitting on this jury?

4 MS. CROMER: No.

5 THE COURT: You think you will be okay?

6 MS. CROMER: I'll be fine.

7 THE COURT: You all got any questions of Ms. Cromer?

8 MR. CAMPBELL: Did you used to do contract work for
9 the solicitor's office?

10 MS. CROMER: Yes.

11 THE COURT: Oh, you did?

12 MS. CROMER: I used to.

13 THE COURT: You used to.

14 MS. CROMER: And for the public defender's office.

15 THE COURT: You've done contract for both of them?

16 MS. CROMER: Uh-huh.

17 THE COURT: You want to serve or do you want to go?
18 I'll excuse you.

19 MS. CROMER: No, I'll serve. I'll be glad to serve.

20 THE COURT: I'm going to excuse you since you've
21 done contract work for both of them. Go make some money.

22 MS. CROMER: All right.

23 (WHEREUPON, the side-bar was concluded.)

24 THE COURT: Any further questions from the State?

25 MR. CAMPBELL: Nothing from the State, Your Honor.

1 THE COURT: Anything from the defendant?

2 MR. TAVERNIER: None, Your Honor.

3 THE COURT: All right. Madam Clerk, whenever you're
4 ready.

5 THE CLERK OF COURT: Yes, Your Honor.

6 THE COURT: Let me see the lawyers up here real
7 quick.

8 (WHEREUPON, a bench conference was had.)

9 THE CLERK OF COURT: Ladies and gentlemen of the
10 jury, if I call your name if you'll please come forward.
11 Bring any personal belongs that you have with you, bring them
12 as you come up. Stand right here in this area. We'll tell
13 you whether -- you'll present yourself to the State's table
14 and to the defense table, then we'll tell you whether to have
15 a seat in the jury box or to return to your seat. Thank you.

16 Number 69, Harriet Henderson.

17 (A white female came forward.)

18 THE CLERK OF COURT: What say you for the State?

19 MR. CAMPBELL: Present Ms. Henderson.

20 THE CLERK OF COURT: Say you for the defendant?

21 MR. TAVERNIER: Please excuse Ms. Henderson from
22 this case.

23 THE CLERK OF COURT: You may return to your seat.

24 Thank you, Ms. Henderson.

25 Juror 112, Lisa Queen. Number 112.

1 (A white female came forward.)

2 THE CLERK OF COURT: What say you for the State?

3 MR. CAMPBELL: Present Ms. Queen.

4 THE CLERK OF COURT: Say you for the defendant?

5 MR. TAVERNIER: Seat Ms. Queen, please.

6 THE CLERK OF COURT: If you'll have a seat in the

7 jury box, please, Ms. Queen.

8 Number 117, Kimberly Scott. Number 117.

9 (A white female came forward.)

10 THE CLERK OF COURT: What say you for the State?

11 MR. CAMPBELL: Present Ms. Scott.

12 THE CLERK OF COURT: Say you for the defendant?

13 MR. TAVERNIER: Please excuse Ms. Scott from this

14 case.

15 THE CLERK OF COURT: You may return to your seat.

16 Thank you, Ms. Scott.

17 Juror number 55, Thomas Geist. Number 55.

18 (A white male came forward.)

19 THE CLERK OF COURT: What say you for the State?

20 MR. CAMPBELL: Present Mr. Geist.

21 THE CLERK OF COURT: Say you for the defendant?

22 MR. TAVERNIER: Seat Mr. Geist, please.

23 THE CLERK OF COURT: If you'll have a seat, please,

24 sir, in the jury box right there.

25 Number 138, Daniel Waldsmith, Sr. Number 138.

1 (A white male came forward.)

2 THE CLERK OF COURT: What say you for the State?

3 MR. CAMPBELL: Present Mr. Waldsmith.

4 THE CLERK OF COURT: Say you for the defendant?

5 MR. TAVERNIER: Seat Mr. Waldsmith, please.

6 THE CLERK OF COURT: If you'll have a seat, please,
7 sir, right up there in the jury box.

8 Number 83, Michael Lewis. Number 83.

9 (A white male came forward.)

10 THE CLERK OF COURT: What say you for the State?

11 MR. CAMPBELL: Present Mr. Lewis.

12 THE CLERK OF COURT: Say you for the defendant?

13 MR. TAVERNIER: Seat Mr. Lewis, please.

14 THE CLERK OF COURT: Mr. Lewis, if you'll have a
15 seat right over there in the jury box.

16 Juror number 25, Melissa Cashman. Number 25.

17 (A white female came forward.)

18 THE CLERK OF COURT: What say you for the State?

19 MR. CAMPBELL: Present Ms. Cashman.

20 THE CLERK OF COURT: Say you for the defendant?

21 MR. TAVERNIER: Seat Ms. Cashman, please.

22 THE CLERK OF COURT: Have a seat in the jury box,
23 please, ma'am.

24 Juror number 134, Martha Thrasher. Number 134.

25 (A white female came forward.)

1 THE CLERK OF COURT: Say you for the State?

2 MR. CAMPBELL: Present Ms. Thrasher?

3 THE CLERK OF COURT: Say you for the defendant?

4 MR. TAVERNIER: Please excuse Ms. Thrasher from this
5 case.

6 THE CLERK OF COURT: Thank you, Ms. Thrasher.

7 Juror number 10, Kristi Black. Number 10.

8 (A white female came forward.)

9 THE CLERK OF COURT: What say you for the State?

10 MR. CAMPBELL: Present Ms. Black.

11 THE CLERK OF COURT: Say you for the defendant?

12 MR. TAVERNIER: Seat Ms. Black, please.

13 THE CLERK OF COURT: If you'll have a seat in the
14 jury box, please, ma'am.

15 Number 72, Chad Hopkins. Number 72.

16 (A white male came forward.)

17 THE CLERK OF COURT: What say you for the State?

18 MR. CAMPBELL: Present Mr. Hopkins.

19 THE CLERK OF COURT: Say you for the defendant?

20 MR. TAVERNIER: Seat Mr. Hopkins, please.

21 THE CLERK OF COURT: Have a seat in the jury box,
22 please.

23 Number 71, Douglas Holden. Number 71.

24 (A white male came forward.)

25 THE CLERK OF COURT: What say you for the State?

1 MR. CAMPBELL: Present Mr. Holden.

2 THE CLERK OF COURT: Say you for the defendant?

3 MR. TAVERNIER: Seat Mr. Holden, please.

4 THE CLERK OF COURT: Have a seat in the jury box,
5 please, sir.

6 Number 103, Joe Noblitt, III. Number 103.

7 (A white male came forward.)

8 THE CLERK OF COURT: What say you for the State?

9 MR. CAMPBELL: Present Mr. Noblitt.

10 THE CLERK OF COURT: Say you for the defendant?

11 MR. TAVERNIER: Seat Mr. Noblitt, please.

12 THE CLERK OF COURT: Have a seat in the jury box,
13 please.

14 Juror number 98, Roger Mudd. Number 98.

15 (A white male forward.)

16 THE CLERK OF COURT: What say you for the State?

17 MR. CAMPBELL: Present Mr. Mudd.

18 THE CLERK OF COURT: Say you for the defendant?

19 MR. TAVERNIER: Seat Mr. Mudd, please.

20 THE CLERK OF COURT: Have a seat, please, Mr. Mudd,
21 in the jury box.

22 Number 61, Brenda Hall. Juror number 61.

23 (A white female came forward.)

24 THE CLERK OF COURT: What say you for the State?

25 MR. CAMPBELL: Present Ms. Hall.

1 THE CLERK OF COURT: Say you for the defendant?

2 MR. TAVERNIER: Seat Ms. Hall, please.

3 THE CLERK OF COURT: Have a seat, please, ma'am, in
4 the jury box.

5 Juror number 11, Alberta Bobo. Number 11.

6 (A black female came forward.)

7 THE CLERK OF COURT: What say you for the State?

8 MR. CAMPBELL: Present Ms. Bobo.

9 THE CLERK OF COURT: What say you for the defendant?

10 MR. TAVERNIER: Seat Ms. Bobo, please.

11 THE CLERK OF COURT: Have a seat in the jury box,
12 please, ma'am.

13 THE COURT: All right. Ladies and gentlemen of the
14 jury, what I'm going to ask you to do is go to the jury room
15 and elect either a foreman or a forelady. After you've done
16 that write the name down. Let the bailiff know you've done it
17 and I'll get the bailiff in the courtroom very shortly
18 thereafter. If you'll follow the bailiff he'll show you where
19 to go.

20 (WHEREUPON, the jury leaves the courtroom at
21 approximately 12:10 p.m.)

22 THE COURT: All right. Any motions from the State
23 as far as drawing the jury?

24 MR. CAMPBELL: None from the State, Your Honor.

25 THE COURT: Any from the defendant?

1 MR. TAVERNIER: None, Your Honor.

2 THE COURT: All right. Thank you very much.

3 All right. Ladies and gentlemen of the jury panel,
4 what I'm going to ask you to do is I got to tend to something
5 that's going to take me about 5 minutes. If you'll go step
6 out in the hall the bailiff will let you back in in about 5
7 minutes, please. Everybody step out in the hall.

8 (WHEREUPON, the jury venire leaves the courtroom.)

9 THE COURT: What time you all want to start
10 testimony this afternoon? It's 10 minutes after 12:00.

11 MR. TAVERNIER: Whenever you want to crank it up,
12 Judge.

13 THE COURT: Why don't we plan on 2:30.

14 Would you bring the jury in, please, sir.

15 For the record, Kristi Black is the forelady on the
16 jury, which is juror number 10.

17 (WHEREUPON, the jury enters the courtroom at
18 approximately 12:18 p.m.)

19 THE COURT: Ms. Black, if you would sit in that
20 chair during the trial, I'd appreciate it. Where everybody
21 else sits, it doesn't matter.

22 Now, we're not going to start the testimony until
23 2:30 this afternoon. We're getting ready to draw another
24 jury. So if you'll be back in the jury room at 2:30 we'll get
25 started at that time.

1 When you come to the courthouse come straight to the
2 jury room. If you'll go with the bailiff he'll show you where
3 to come at 2:30. I'll see you at 2:30.

4 (WHEREUPON, the jury leaves the courtroom at
5 approximately 12:20 p.m., and the trial of this case was
6 recessed for lunch.)

7 (WHEREUPON, State's Exhibit Numbers 1 through 14
8 were premarked for identification only.)

9 THE COURT: All right. We got all the jurors?

10 THE BAILIFF: Yes, sir.

11 THE COURT: All right. Anything from the State
12 before we bring in the jury? Is the State ready to proceed?

13 MR. CAMPBELL: Yes, sir. Let me put a few
14 housekeeping matters on the record. Mr. Lomax was notified of
15 this case today, and I want to make a court's exhibit where we
16 mailed to his bonding agency and to him at his address at [REDACTED]
17 [REDACTED] Street, to his address of [REDACTED] Avenue in
18 Anderson, and also to [REDACTED] in Anderson.

19 Notice for trial was mailed on January 22nd, 2009.
20 We did get a card back from the Buena Vista saying the address
21 was vacant. The reason why it was mailed to 3 different
22 addresses is that he currently has 4 different cases pending
23 against him. From 9-5-07 he has 2 counts of AWIK. From April
24 1st, 2008 he has a CDV 2nd offense; April 28th, '08, these
25 charges here we're on today; and June 9th, 2008 he also has a

1 failure to stop for blue light case.

2 The case history on this, the incident date was
3 April 28th, 2008. It was indicted by the Anderson County
4 Grand Jury on July 22nd, 2008. He showed up for roll call on
5 October 14th, 2008, November 6th, 2008, and January 13th,
6 2009. He did come to our office this morning. So he did
7 receive notice about the trial.

8 It was my understanding he also talked to
9 Mr. Tavernier about the case. I had his name called. He did
10 not show back up this morning. Jerry Greensburg, the bailiff
11 here, called his name at the courthouse steps at 10:50 this
12 morning, and then Buck, the bailiff, just called his name 3
13 times downstairs around 2:40 and had no response to that.

14 I'm also going to hand up a copy of his bond form
15 and make it a court exhibit stating that if he did not show he
16 would be tried in his absence, and in this it is stated that
17 he did not sign this, he refused to sign and it was signed by
18 Ken Mattison, the Anderson City Magistrate Judge. And I'm
19 going to make these part of a court exhibit, Your Honor.

20 THE COURT: Okay. That's fine.

21 (WHEREUPON, Court Exhibit Numbers 1 through 3 were
22 marked and made a part of the record.)

23 THE COURT: All right. Mr. Tavernier, you've been
24 appointed. You've been working with him for how long now?

25 MR. TAVERNIER: Your Honor, the file was opened

1 while he was initially incarcerated. The file was closed
2 because once he bonded out he failed to notify the public
3 defender's office. That file has been closed, remain closed
4 until this morning when you appointed me.

5 I have had contact with Mr. Lomax on at least two
6 occasions of which I'm aware when Catherine Huey with the
7 solicitor's office directed him to me at prior roll calls. He
8 was informed by both myself and Kendra Gurley, my investigator
9 out of the public defender's office, to make an appointment to
10 see me about these charges and to get ready for trial. He has
11 never made that appointment. Quite frankly, when he showed up
12 this morning I didn't even recognize him. I told him he was
13 first up for trial.

14 He was notified by my office, I think within the
15 past two weeks on three different occasions that he was coming
16 up for trial, that I would sit with him but I would not
17 represent him in any capacity because of his failure or
18 refusal to cooperate in preparation for what I would consider
19 to be possibly any legitimate defenses he might have.

20 As a consequence when he showed up this morning he
21 indicated to me that he, in fact, did have a defense, he did
22 have a witness by the name of Bobby Geer, who was going to
23 claim responsibility for the drugs that were located in the
24 vehicle. He was informed to contact Mr. Geer and be back here
25 because he was first up for trial.

1 THE COURT: What time was this?

2 MR. TAVERNIER: I would venture to say, Your Honor,
3 probably between 9 and 9:15.

4 THE COURT: All right. Have you seen him since
5 then?

6 MR. TAVERNIER: I have not seen him. I have had
7 Ms. Gurley call him twice and leave a message on his voicemail
8 that he is required to be back in court immediately. We have
9 not had any response.

10 Your Honor, as far as things are concerned, in
11 preparation of the case I was provided discovery by
12 Mr. Campbell January 26th. I have gone through the file. I
13 have at least prepared as best I can for trial without any aid
14 of Mr. Lomax. And because on earlier discussions today what I
15 perceive as best I can do, I reviewed the chain of custody,
16 I've reviewed and interviewed the officers. I believe I'm
17 prepared for trial at least from my perspective without the
18 aid of Mr. Lomax.

19 That having been said, Your Honor, I believe it's
20 only prudent to cover my backside and request a continuance
21 until such time as I have had an opportunity to at least
22 consult with Mr. Lomax regarding the facts surrounding this
23 situation.

24 THE COURT: Well, did you tell him that he was going
25 to be tried in his absence if he didn't show?

1 MR. TAVERNIER: I told him he was first up for
2 trial, Your Honor, and that he needed to be back here and
3 ready to go, and that if he did not provide me a defense he
4 would be defending himself. If he did provide me a witness
5 and assist me then I might be in a position to represent him
6 at that point.

7 THE COURT: Yes, sir?

8 MR. CAMPBELL: Just one further thing on the
9 discovery matters. On August 5th, 2008 Ms. Huey did send
10 Mr. Tavernier a copy of the initial case file from the city
11 police department. That was before they did close his file
12 out.

13 THE COURT: Well, other than on the bond has he had
14 any type of notice that if he didn't show he'd be tried in his
15 absence, from the State?

16 MR. CAMPBELL: Just on his bond papers themselves
17 and also the bond cards themselves says for trial, that we
18 send out to him, and I'll hand it up for the Court, to show it
19 states in big letters for trial. And as a result, he received
20 notice of it and did show up at our office this morning asking
21 where he needed to go, and they told him fourth floor.

22 THE COURT: Okay. And you were under the impression
23 he would be returning, Mr. Tavernier?

24 MR. TAVERNIER: Your Honor, for the first time I
25 felt pretty good about what my options might be at trial

1 today, and I told him if he had that individual. I believe
2 Mr. Lomax and his wife were here and they departed. I told
3 them to get back here. And I thought if that were to -- if
4 Mr. Geer were to say what he told me -- or what Mr. Lomax
5 advised me that Mr. Geer was going to testify to that chances
6 were, I felt, pretty decent in his regard that Mr. Geer is
7 going to fall on the sword and accept responsibility, at least
8 he had a fighting chance for the jury, and at which point he
9 said I'll be back.

10 THE COURT: Okay. All right. I find proper notice
11 has been given to the defendant for trial today, proper notice
12 has been given that if he wasn't present he'd be tried in his
13 absence, and your motion to continue is denied.

14 Anything else from the State or the defendant?

15 MR. CAMPBELL: No, Your Honor.

16 THE COURT: Anything else from the defendant?

17 MR. TAVERNIER: I do, Your Honor. I've got a couple
18 motions in limine, if you're ready.

19 THE COURT: All right. Go ahead.

20 MR. TAVERNIER: Your Honor, first, officers
21 stopped -- there was probable cause for stopping. The
22 defendant was -- they were responding to a call or BOLO that
23 was placed out by dispatch responding to an individual at a
24 gun call, and would like to have any reference that any gun
25 may have been involved or involving this defendant be excluded

1 or totally eliminated from any testimony other than the fact
2 that they were responding and they saw the vehicle.

3 THE COURT: Specific to what?

4 MR. TAVERNIER: Pardon?

5 THE COURT: Have you heard the tape? Have you heard
6 the 911 -- not the 911 tape but the tape? What was
7 specifically said about a gun; do you know?

8 MR. TAVERNIER: That a black male had left an area
9 driving a small blue vehicle, and that a gun had been involved
10 in an altercation. Mr. Lomax was not that individual. He did
11 match the description. He was driving a small blue vehicle,
12 but I think what initially drew Officer Dunn's attention to
13 him was at an intersection -- he's prepared to testify
14 Mr. Lomax almost struck his patrol vehicle, and that's when he
15 started pursuing the vehicle.

16 THE COURT: And that's the reason he stopped him?

17 MR. TAVERNIER: Yes, sir.

18 THE COURT: All right. Let me hear from the State
19 about the gun.

20 MR. CAMPBELL: Your Honor, the only thing we're
21 going into on what he's talking about is that a call did come
22 out for a man with a gun. They did respond to the area in
23 regards to that with a description of a black male driving a
24 small blue car. They did see the car in close proximity to
25 the area that was dispatched to. They are going into that

1 just for the basis of why they were in the area, also for the
2 fact that when Mr. Lomax got out of the car he started
3 walking.

4 The officer drew his gun and asked him to stop and
5 get on the ground due to the nature of the call because he
6 didn't know what he was getting into. I'm going to tell them,
7 if you allow me to, I'm just going to tell the jury that he
8 was not involved with this gun. No gun was found in the
9 vehicle.

10 But I do have to go into the fact that's the reason
11 why they were in the area and how the stop or the
12 confrontation began was based upon that traffic call, that
13 call from dispatch to begin with.

14 So we are going into the fact on the gun just
15 briefly to explain why they were in the area and why they
16 detained him initially, until they figured out what was going
17 on, but after that he wasn't --

18 THE COURT: Did they stop him because of suspicion
19 of the gun or because they liked to hit him at the
20 intersection? What was the reason for the stop?

21 MR. CAMPBELL: Well, that also drew their attention.

22 THE COURT: Pardon?

23 MR. CAMPBELL: The street where he was responding
24 to, Dickens Avenue, was close to this intersection and it just
25 so happened he come around the corner and almost hit him, and

1 that, of course, drew his attention, plus the fact it was a
2 black male driving the small blue vehicle.

3 THE COURT: If that's the reason he stopped him why
4 do you think you have to go into the gun, other than just
5 prejudice the jury?

6 MR. CAMPBELL: Well, he detained him initially to
7 find out what was going on. He didn't know what he was
8 getting into.

9 THE COURT: Well, you can detain him for just do a
10 Terry frisk, or the automobile. He can detain him for that
11 reason, if he stopped them.

12 MR. CAMPBELL: Well, that he can, but he didn't know
13 who he was talking to, and plus the guy lied to him again by
14 giving a false name. So he didn't know what he was getting
15 into at this point in time.

16 THE COURT: I'm going to grant his motion to
17 eliminate testimony about the gun. Does everybody understand?
18 We're not going to talk about the gun. I don't mind you
19 talking about him running you off the road or whatever he did
20 and what happened after that point, okay? I don't think the
21 gun has anything to do with giving you a valid reason to stop
22 him and search the car, or whatever transpired, okay?

23 Any other motions?

24 MR. TAVERNIER: One other, Your Honor. There was
25 alcohol located in the vehicle, beer and alcohol. Mr. Lomax

1 was not charged with that. Mr. Geer accepted responsibility
2 for that at the location, and any reference to the beer or
3 alcohol, we'd ask that officers refrain from bringing that up
4 since we were not charged with that offense with the open
5 container.

6 THE COURT: What's your position on the beer and
7 alcohol, Solicitor?

8 MR. CAMPBELL: We weren't going into it because he
9 wasn't charged with it.

10 THE COURT: He said he wasn't going into it.

11 MR. TAVERNIER: Okay. And then I think he was also
12 driving under suspension.

13 MR. CAMPBELL: He was driving under suspension and
14 charged in city court for driving under suspension. So that
15 we are going into.

16 THE COURT: Your motion on that is denied.

17 Anything else? Does he have a prior control
18 history?

19 MR. TAVERNIER: He does, Your Honor.

20 THE COURT: Have you all agreed on that? Well, he's
21 not here to testify so I guess that's a moot issue, isn't it,
22 unless he shows up here shortly?

23 MR. TAVERNIER: I don't think we'll be going into
24 that at all. There was a co-defendant who I anticipate using
25 as part of a defense. He does, in fact, have a criminal

1 record to which I will direct the jury's attention.

2 THE COURT: You got a witness to direct it?

3 MR. CAMPBELL: I don't think he can go into it at
4 this point in time. In fact, they don't have a witness here
5 to go into it.

6 THE COURT: Okay. All right. Anything else before
7 we bring the jury in?

8 MR. CAMPBELL: No, Your Honor.

9 THE COURT: Will you bring us the jury, please, sir.

10 (WHEREUPON, the jury enters the courtroom at
11 approximately 2:58 p.m.)

12 THE COURT: Clerk, if you'll swear the jury, please.

13 (WHEREUPON, the jury was given their oath.)

14 THE COURT: Madam Forelady, ladies and gentlemen of
15 the jury, Mr. Lomax is not here, and in order to proceed in
16 his absence the Court has to find that there's sufficient
17 evidence that he had notice of the trial and if he was not
18 present he would be tried in his absence. The Court has so
19 found. However, under the laws of this State a defendant may
20 be tried in his absence but this fact may not be considered
21 against him in any manner whatsoever.

22 A defendant shall be tried precisely if he were
23 present in court pleading not guilty placing the burden upon
24 the State to prove his guilt beyond a reasonable doubt. I
25 wanted to explain that to you before we got started.

1 Solicitor?

2 MR. CAMPBELL: Please the Court.

3 Mr. Tavernier.

4 Ladies and gentlemen of the jury, this case is
5 basically about being at the wrong place at the wrong time.
6 On April 28th, 2008 Officer Brandon Dunn, seated right here,
7 was responding to a call going towards Dickens Avenue, and a
8 description to be on the look out for a black male driving a
9 small blue vehicle.

10 Well, it just so happens as he was getting near
11 Dickens Avenue a vehicle matching this description came around
12 and almost hit his car. So he immediately pulled around and
13 eventually stopped him a couple blocks away.

14 A black male got out of the car of the driver's
15 seat, and there was two individuals in it. The passenger
16 stayed where he was but the driver got out. And Mr. Dunn
17 asked him. Officer Dunn, he said, Stay where you are.

18 But he kept trying to walk off. And then it was
19 dark, and the fact he didn't know what was going on, the guy
20 wasn't listening to him, you know, he drew his weapon and
21 ordered him on the ground.

22 So he eventually, he goes up and talks to him. The
23 guy gives him a name and he eventually finds out that it was a
24 false name. And as a result, they run through and find out
25 that his license was suspended and he couldn't drive that

1 vehicle.

2 Well, they searched the car after the fact since he
3 was being placed under arrest, and low and behold they find 19
4 pills that we are going to show and prove to you was
5 hydrocodon wrapped in a napkin, and also some what we're going
6 to prove to you is crack cocaine.

7 Now, that's what he's been charged with, possession
8 of a controlled substance, possession with intent to
9 distribute the pills, and also trafficking in cocaine more
10 than 10 grams. And the State has the burden of proving this
11 to you beyond a reasonable doubt.

12 Now, you're going to hear testimony from officers,
13 you're going to hear testimony from a chemist who's going to
14 explain what she found when she analyzed these substances.
15 And later, after you've heard everything and the information
16 that's come from the stand, you're going to be asked to go
17 back into the jury room and deliberate on whether or not he is
18 guilty or not of these charges.

19 And when you hear the terms reasonable doubt, we are
20 supposed to prove this to you beyond a reasonable doubt, what
21 does that mean? You know, the legal term is basically to
22 cause a reasonable person to hesitate to act. That's just
23 legal jargon.

24 The way I look at it is this; if you think he did it
25 you find him guilty, if you think he didn't do it you find him

1 not guilty. That's plain and simple, because when you come in
2 here and you've been chosen for this jury you don't leave your
3 common sense and your world experienced outside the courtroom
4 door.

5 I mean, you all are all smart, you work, you got
6 families. You know, you've been around. You can take what
7 you learned and know from the facts and come up with a
8 verdict. And at the end of this trial I'm going to ask you to
9 render a verdict and ask you to render a verdict that speaks
10 the truth; and I thank you for your time and effort.

11 THE COURT: Mr. Tavernier?

12 MR. TAVERNIER: Thank you. May it please the Court.

13 Ladies and gentlemen of the jury, I don't normally
14 take issue with things that Mr. Campbell says but keep in mind
15 his definition of beyond a reasonable doubt and his
16 interpretation about if you think he did it he's guilty, if
17 you don't think he did it he's not guilty is wrong.

18 The State has the burden to prove beyond a
19 reasonable doubt whether an individual committed the act in
20 which he was charged. It is not a mere preponderance, it is
21 not a mere scintilla of evidence, it is not the greater weight
22 of the evidence, it's not what is more likely than not to have
23 occurred. It is beyond a reasonable doubt.

24 And you, as the triers of fact, have that burden to
25 make a determination from the facts as you will hear them from

1 the witness stand, from the people who will testify today what
2 occurred on that evening, and then you will take those facts
3 and you will apply them to the law as His Honor will charge
4 you.

5 Now, I have the privilege of being appointed to
6 represent Mr. Lomax. And as His Honor will charge you his
7 absence does not in any way indicate his guilt because he
8 doesn't have any obligation whatsoever to prove his innocence.
9 The total burden absolutely sets squarely on these individuals
10 sitting at this table. And if you hold that against Mr. Lomax
11 then you are breaching your duty as a juror because as he sits
12 he is absolutely clean when he walks into this courtroom, and
13 until such time as the State proves its burden then and only
14 then can you determine that he's guilty.

15 I ask that you pay attention to the evidence that's
16 presented, and at that time you'll be asked to take your
17 deliberations back in the jury room. Apply it keenly to the
18 law as His Honor will charge you, and then we will ask that
19 you come back with a verdict that speaks to truth, and that
20 would be a verdict of not guilty. Thank you.

21 THE COURT: Solicitor, if you'll call your first
22 witness, please.

23 MR. CAMPBELL: Your Honor, the State calls Officer
24 Brandon Dunn to the stand.

25 BRANDON ANTHONY DUNN, after having been duly

BRANDON DUNN - DIRECT BY MR. CAMPBELL

1 sworn, testified as follows:

2 THE CLERK OF COURT: If you will state your full
3 name and spell your last name for the record, please, Officer.

4 THE WITNESS: My name is Brandon Anthony Dunn,
5 D-u-n-n.

6 DIRECT EXAMINATION

7 BY MR. CAMPBELL:

8 Q. Officer Dunn, where are you employed?

9 A. Anderson City Police Department.

10 Q. And how long have you been in law enforcement?

11 A. About 3 years.

12 Q. Now, were you employed at Anderson City Police
13 Department on April 28th, 2008?

14 A. Yes, I was.

15 Q. Now, do you recall that day?

16 A. I do.

17 Q. What shift were you on that day?

18 A. I was on Charlie shift, which is our third shift,
19 night patrol.

20 Q. And what hours do you all typically work?

21 A. We work from 8 at night until 8 in the morning.

22 Q. Now, during your shift did you have an occasion to
23 be dispatched or were you sent to Dickens Avenue?

24 A. Yes, I was.

25 Q. And did you go to Dickens Avenue?

BRANDON DUNN - DIRECT BY MR. CAMPBELL

1 A. I did.

2 Q. And about approximately what time was this?

3 A. Approximately 8 -- right at 8:30 in the evening.

4 Q. And was it dark outside, dusk, was it still light?

5 A. It was dark. It was completely dark outside.

6 Q. Now, when you were going, you were in a patrol car?

7 A. I was.

8 Q. Is it a marked patrol car?

9 A. It is.

10 Q. Has the bar lights and all identifications of
11 Anderson City Police Department on it?

12 A. It does.

13 Q. And how were you dressed?

14 A. Just as I am right now.

15 Q. You were in full dressed uniform?

16 A. Yes, sir.

17 Q. Now, while you were in route to Dickens Avenue what
18 were you -- did you have a description or something you were
19 looking for?

20 A. I did. We were advised by dispatchers to be on the
21 lookout for a black male driving a small blue vehicle leaving
22 the area of Dickens Avenue.

23 Q. And did you eventually come upon a vehicle and
24 individual matching this description?

25 A. Yes, I did.

BRANDON DUNN - DIRECT BY MR. CAMPBELL

1 Q. And exactly where or what was your location?

2 A. I was actually on Orr Street, right there at North
3 Street at the four-way stop sign heading towards Dickens
4 Avenue.

5 Q. And how close to Dickens Avenue is this?

6 A. Like within a quarter mile.

7 Q. And what first drew your attention to this vehicle?

8 A. It was a blue vehicle, what we was looking after; a
9 black male; and the vehicle actually turned onto Orr Street
10 where I was sitting and almost struck the front end of my
11 patrol vehicle.

12 Q. And were you able to get identification or look to
13 see who was the person driving it?

14 A. Yes, I was.

15 Q. Okay. And did this person acknowledge that he saw
16 you?

17 A. He did. After he almost struck the front of my
18 vehicle he moved his car progressively into his lane and kind
19 of threw his hand up like I'm sorry.

20 Q. So you knew that he saw you at that point in time?

21 A. Yes.

22 Q. And as a result, what if anything did you do next?

23 A. At that time I did turn my patrol vehicle around and
24 pursued after him to make the vehicle stop.

25 Q. Did you turn your blue lights on?

BRANDON DUNN - DIRECT BY MR. CAMPBELL

1 A. Yes, I did.

2 Q. And how far did you have to go?

3 A. Two blocks, maybe.

4 Q. And did he eventually stop?

5 A. He did. He pulled into a residence on Orr Street.

6 Q. Now, where this stop was located, is that within the
7 City Limits of Anderson?

8 A. It is.

9 Q. Which is in Anderson County?

10 A. That's correct.

11 Q. Now, did you have anybody else riding with you at
12 that point in time?

13 A. I did not. I was by myself.

14 Q. And can you tell the ladies and gentlemen of the
15 jury what happened next.

16 A. I made the vehicle stop, Mr. Lomax's vehicle in the
17 driveway, I believe [REDACTED] East Orr Street. As I pulled up
18 behind his vehicle Mr. Lomax exited the vehicle. He opened
19 the door and exited the vehicle. I stepped out of my vehicle
20 and instructed him to get back in the car and shut the door.
21 At that time Mr. Lomax in a very quick pace proceeded away
22 from his vehicle with hands in front of him.

23 It was very dark outside and because I didn't know
24 what was going on or what his intentions were I did unholster
25 the weapon and order him to the ground. And at that time I

BRANDON DUNN - DIRECT BY MR. CAMPBELL

1 did proceed towards him detaining him in handcuffs for my
2 safety until I could figure out what was going on.

3 Q. Now, did he have anybody riding with him?

4 A. He did. There was a passenger in the vehicle.

5 Q. And when you pulled up on this car did you see a lot
6 of excessive movement inside the car going on before he got
7 out of the car?

8 A. No, sir, not at all.

9 Q. Now, after you had him detained -- and that was the
10 reason why, just you're trying to find out what was going on?

11 A. That's correct.

12 Q. Did eventually other officers show up for backup?

13 A. That is correct.

14 Q. In fact, Officer Russell McClellan showed up; is
15 that right.

16 A. That is true.

17 Q. Now, did you ask him his name?

18 A. I did.

19 Q. And what name did this guy give you?

20 A. He gave me the name of Demetrius Jamal Lomax.

21 Q. And did you learn while you were on the scene that
22 that name was not correct?

23 A. That is correct.

24 Q. And what did you ask him then?

25 A. I asked him was his name indeed Carius Kenta Lomax,

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1 and at that time he admitted that he had lied and given me a
2 wrong name, that his name was, in fact, Carius Kenta Lomax.

3 Q. And did you have his name run through your dispatch?

4 A. I did. I ran his name and date of birth that he
5 gave through our dispatch to try to locate a driver's license
6 and verify that he wasn't wanted for anything else.

7 Q. And did anything come back on his license?

8 A. Yes. It came back that his license was suspended.

9 Q. Now, after this did you also run the tag on this
10 vehicle?

11 A. Yes, I did.

12 Q. And were you able to get back and determine or learn
13 who the registered owner of this vehicle was?

14 A. I did. After we ran the tag we discovered that the
15 registered owner was actually Carius's wife.

16 Q. And do you recall her name?

17 A. Not right off the top of my head I do not.

18 Q. And did his wife eventually show up at the scene?

19 A. She did show up at the scene after Mr. Lomax was
20 eventually taken into custody, and she wanted her vehicle
21 back.

22 Q. Now, let me ask you this. Do you have a camera in
23 your car?

24 A. No, I do not, or I did not at that time.

25 Q. And how long was it from the time that the car

BRANDON DUNN - DIRECT BY MR. CAMPBELL

1 almost hit you when you first observed this blue car to the
2 time that he was stopped? What was the time frame?

3 A. Thirty to 45 seconds.

4 Q. Officer Dunn, I'm going to hand you what's been
5 marked for identification as State's Exhibit 1, 2, 3 and 4.
6 Can you first please look at these.

7 A. (The witness complied).

8 Q. Now, do these 4 pictures here, do they fairly and
9 accurately represent what you saw on the night of April 28th,
10 2008?

11 A. That is correct.

12 Q. And have they been altered, changed or manipulated
13 any shape, way or form, to your knowledge?

14 A. No, sir.

15 MR. CAMPBELL: Your Honor, may the witness step off
16 the stand, please?

17 THE COURT: Yes, sir.

18 (WHEREUPON, the witness stepped down from the
19 witness stand.)

20 BY MR. CAMPBELL:

21 Q. Officer Dunn, I'm going to take a look up at the big
22 screen. If you can please explain, is this where you
23 officially saw -- or the car stopped?

24 A. That is correct, in the driveway of the residence.

25 Q. And this here, is this residence, this house showing

BRANDON DUNN - DIRECT BY MR. CAMPBELL

1 private property, is that [REDACTED] East Orr Street?

2 A. That is correct.

3 Q. Here in Anderson?

4 A. Yes.

5 Q. In fact, this is a picture of -- you all took a
6 picture of the house number?

7 A. Yes.

8 Q. And Exhibit 3, is that the car you saw?

9 A. That is.

10 Q. And this is just another view of it; is that right?

11 A. Yes.

12 Q. All right. If you'll please take the stand.

13 A. (The witness complied).

14 MR. CAMPBELL: Your Honor, at this time I move
15 State's Exhibit 1, 2, 3 and 4 into evidence.

16 THE COURT: Any objection?

17 MR. TAVERNIER: No objection.

18 THE COURT: State's 1, 2, 3 and 4 admitted without
19 objection.

20 (WHEREUPON, State's Exhibit Numbers 1 through 4,
21 photographs, were admitted into evidence.)

22 MR. CAMPBELL: Officer Dunn, that's all the
23 questions I have at this time. Please answer any questions
24 Mr. Tavernier might have.

25 THE COURT: Cross-examination.

BRANDON DUNN - CROSS BY MR. TAVERNIER

1 CROSS-EXAMINATION

2 BY MR. TAVERNIER:

3 Q. Officer Dunn, Mr. Lomax was in the wrong place at
4 the wrong time, wasn't he?

5 A. He was.

6 Q. He wasn't the individual you were looking for?

7 A. No, sir, he was not.

8 Q. When you had the opportunity to detain him and he
9 was placed on the ground were you the lone officer at this
10 time?

11 A. I was, at that time.

12 Q. Okay. From the time he exited the vehicle to the
13 time you placed cuffs on him approximately how long did it
14 take?15 A. Approximately five seconds from the time he exited
16 the vehicle to the time I had him on the ground and had the
17 cuffs on him.

18 Q. That quick?

19 A. Yes.

20 Q. Once you placed cuffs on him what did you do with
21 him?22 A. At that time, once I placed the handcuffs on
23 Mr. Lomax, I was awaiting other backup before I made any other
24 movements. So I had my eyes and my attention diverted to
25 Mr. Lomax and the other occupant in the vehicle.

BRANDON DUNN - CROSS BY MR. TAVERNIER

1 Q. In your incident report it states that he got out of
2 the vehicle and began to walk off with his hands in front of
3 him?

4 A. Yes.

5 Q. All right. And all this occurred within five
6 seconds?

7 A. Yes. It was very quick.

8 Q. And you didn't have any other responsibilities. You
9 didn't search the vehicle? That was Officer McClellan,
10 correct?

11 A. That's correct. I was dealing with Mr. Lomax as to
12 his identity.

13 Q. So all your attention was focussed on Mr. Lomax,
14 correct?

15 A. Yes.

16 MR. TAVERNIER: No more questions. Thank you.

17 THE COURT: Any recross?

18 MR. CAMPBELL: No.

19 THE COURT: You may step down. Thank you very much.
20 Call your next witness.

21 MR. CAMPBELL: Your Honor, the State calls Officer
22 Russell McClellan.

23 JONATHAN RUSSELL MCCLELLAN, after having been
24 duly sworn, testified as follows:

25 THE CLERK OF COURT: If you will state your full

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1 name and spell your last name for the record, please.

2 THE WITNESS: Jonathan Russell McClellan,
3 M-c-C-l-e-l-l-a-n.

4 DIRECT EXAMINATION

5 BY MR. CAMPBELL:

6 Q. Officer McClellan, you are employed with the
7 Anderson City Police Department?

8 A. Yes, sir.

9 Q. And were you employed back in the same position you
10 are back on May 20th, 2008?

11 A. Yes, I was.

12 Q. And how long have you been in law enforcement?

13 A. Ten years.

14 Q. Has that all been with the city?

15 A. No, sir. I worked for the Anderson County Sheriff's
16 Office, and I've been with the City for about a year.

17 Q. Now, on April 28th, 2008 did you respond to a call
18 or to a traffic stop that Officer Dunn had conducted?

19 A. I did.

20 Q. And do you recall exactly where that was located?

21 A. It was right at the corner of Orr right before you
22 got to Old Williamston Road at [REDACTED]

23 Q. And you were in a marked patrol car?

24 A. Yes, sir.

25 Q. Had the bar lights and all the identifications

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1. marking you were a police officer?

2 A. Yes, sir.

3 Q. And you were dressed like you are today, right?

4 A. Just like I am today.

5 Q. And how long did it take you after you heard the
6 call that he had made the stop did you arrive?

7 A. Approximately a minute.

8 Q. So you were in route to Dickens Avenue, also?

9 A. Yes, sir. When they gave the BOLO out of the
10 vehicle I also went in route.

11 Q. And when you say BOLO, that means be on the lookout?

12 A. Be on the look out for.

13 Q. And when you arrived what did you observe?

14 A. Officer Dunn was putting Mr. Lomax in the back of
15 his patrol vehicle when I arrived. He stated that he had give
16 him the wrong name, and he had learned that during the time
17 while I was coming in route. When Officer Fikes pulled up he
18 also identified Mr. Lomax.

19 Q. And so you played no part in the arrest of
20 Mr. Lomax; is that right?

21 A. No, sir.

22 Q. Now, after he was arrested what, if anything, did
23 you do?

24 A. Did a vehicle inventory of the vehicle, due to some
25 narcotics agents saying that there possibly may be some --

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1 Q. All right. Let's not get into that just yet. Now,
2 you were going to search the vehicle; is that right?

3 A. That's correct, field inventory, search the vehicle.

4 Q. And what is the purpose of doing that?

5 A. To look for any illegal narcotics or people's
6 possessions that they say get stolen that don't get stolen
7 while it's at the shop.

8 Q. So after the arrest had taken place you conducted
9 this; is that right?

10 A. That's correct.

11 Q. And you saw the exhibits that were just placed up
12 here on the screen?

13 A. Yes, sir.

14 Q. Is that how it looked on April 28th, 2008?

15 A. Yes, sir.

16 Q. And that's the blue car that you were fixing to
17 search?

18 A. Yes, sir.

19 Q. After Mr. Lomax's arrest?

20 A. That's correct.

21 Q. Now, where did you first start your search?

22 A. Usually start it up front. I usually work -- being
23 in law enforcement, I usually work from the driver's side
24 around the vehicle in the passenger compartment. I started my
25 search by opening up the sunglasses little holder, and when I

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1 opened that up I noticed a paper towel. It's kind of wrapped
2 kind of tight, kind of twisted. I pulled that down out of
3 there and looked at it and noticed that it had the hydrocodone
4 pills that was later identified as hydrocodone.

5 Q. Officer McClellan, I'm going to show you what's been
6 marked for identification as State's Exhibits 5, 6, 7, 8 and
7 9. Could you please take a look at those.

8 [PAUSE]

9 And what do these pictures depict?

10 A. It shows the sunglasses holder with the napkin in it
11 containing the pills, and then when we took it down out of the
12 holder we spread it out and photographed the pills also laying
13 on the seat.

14 Q. Can you see that, the screen?

15 A. Yes, sir.

16 Q. Now, I'm going to show you what's been identified as
17 State's Exhibit 5. Can you please tell the ladies and
18 gentlemen of the jury what this photo depicts.

19 A. That's actually the paper towel wrapped up tight in
20 the sunglasses holder.

21 Q. Okay. And is number 6 just an alternate view of it?

22 A. It's just the opposite side of the photo, yes, sir.

23 Q. I show you 8. And that's where you took it out and
24 just put it on the seat?

25 A. That's the way it was wrapped up before we unraveled

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1 it.

2 Q. And that's the paper towel. Okay.

3 I guess showing State's Exhibit Number 9, that's
4 just showing the pills right there?

5 A. Yes, sir.

6 Q. And I guess a better picture, State's Exhibit 7?

7 A. Yes.

8 Q. Is that showing the pills inside the napkin as you
9 found them; isn't that right?

10 A. After it was unrolled, yes, sir.

11 MR. CAMPBELL: Your Honor, at this time I'd like to
12 move State's Exhibit 5 through 9 into evidence.

13 MR. TAVERNIER: No objection, Your Honor.

14 THE COURT: Nine through 5, you said?

15 MR. CAMPBELL: Yes, sir, 5 through 9.

16 THE COURT: Five through 9, admitted without
17 objection.

18 (WHEREUPON, State's Exhibit Numbers 5 through 9,
19 photographs, were admitted into evidence.)

20 BY MR. CAMPBELL:

21 Q. Now, Officer McClellan, after you removed these
22 pills from the sunglass console what, if anything, did you do
23 with them?

24 A. They was taken and placed in a bag for evidence and
25 later on placed in a best evidence kit.

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1 Q. Now, did you maintain sole custody and possession of
2 these pills once you removed them from the sunglass holder?

3 A. Yes, sir. Due to me finding them, I did.

4 Q. Now, I'm going to show you what's been marked for
5 identification as State's Exhibit Number 13. If you can
6 please look at it, sir, and tell me what this is.

7 A. That's the paper towel, and these are the pills that
8 was located in the vehicle.

9 Q. And if you'll flip it over. Is that the best kit
10 that you initially put them in?

11 A. Yes, sir.

12 Q. In fact, how do you know that's the one you put it
13 in?

14 A. Because it has my signature.

15 Q. And that's your handwriting right there?

16 A. And that's my handwriting, and it also has a control
17 number.

18 Q. And you log it in under that control number; is that
19 correct?

20 A. Yes, sir.

21 Q. Now, did you stop your search just at the sunglass
22 holder?

23 A. No, sir. After locating that I continued my search.
24 During my years in law enforcement I've known people to hide
25 narcotics and in many unusual places. So I continued my

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1 search at which time I popped a small side panel which would
2 be down by the driver's right knee.

3 When I popped that panel I noticed a plastic baggie
4 containing what appeared to be a white rock-like substance
5 that's prevalently known to be crack cocaine.

6 Q. Now, I want to show you what's been marked for
7 identification as State's Exhibit Number 10, 11 and 12. Can
8 you please take a look at those first, sir.

9 [PAUSE]

10 In the first 2 photographs do they depict where you
11 found what you suspected to be crack cocaine to be located?

12 A. Yes, sir.

13 Q. I'll show you first State's Exhibit Number 10.
14 Officer McClellan --

15 Your Honor, may I have the witness step off the
16 stand, please?

17 THE COURT: Yes, sir.

18 (WHEREUPON, the witness stepped off the witness
19 stand.)

20 BY MR. CAMPBELL:

21 Q. If you will please just kind of orient the ladies
22 and gentlemen of the jury what you are talking about and where
23 you found what you are looking for.

24 A. Okay. As I started the search of my vehicle I come
25 down. A lot of users like to throw crack cocaine, we call

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1 them chips or rocks, in the floorboard because that's what
2 they do look like. So I always like to start in here and look
3 in this area. As I come around, I noticed this panel. It's
4 not easily popped off but it does have a couple of spring
5 clips on the back. When I got to there I just popped it off
6 here, and that right there is the baggie of crack cocaine.

7 Q. And State's Exhibit Number 11 is a close-up view of
8 it?

9 A. Yes, sir.

10 Q. And that's showing the panel as it's been pulled
11 out?

12 A. That's how it was popped out. Once I noticed it I
13 just left it where it was to be photographed.

14 Q. And right here, these are just little holes where
15 this panel clips into that; is that right?

16 A. That's correct.

17 Q. Does it take a decent amount of force to pull this
18 panel off?

19 A. Yes, sir. You have to pop it. The clips, they just
20 hold it on but, yes, sir, it does take a little force to take
21 it off.

22 Q. In fact, I think -- is this right next to the gas
23 pedal?

24 A. Yes, sir. Right there near the gas pedal
25 (indicated).

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1 Q. So this is right next to the driver's foot?

2 A. Yes, sir.

3 Q. Now, to confirm that this was what you suspected to
4 be crack cocaine did you conduct what they call a field test?

5 A. I did.

6 Q. You can get back on the stand.

7 A. (The witness complied).

8 Q. And what exactly -- can you just tell the ladies and
9 gentlemen of the jury quickly, briefly what a field test is, a
10 field test kit.

11 A. It's called a nit kit. They make several different
12 brands, but it's two bases. And as the two chemicals join if
13 it is the substance that you are looking for it will turn a
14 color, usually indicated on the package as being blue or
15 purple usually for crack cocaine or cocaine.

16 Q. And you conducted one in this case; is that right?

17 A. Yes, sir, I did.

18 Q. So you opened the little bag and you took a little
19 bit and poured it in, and then see if it had a reaction?

20 A. That's correct.

21 Q. And this is State's Exhibit Number 12. Is that
22 showing what the reaction was?

23 A. Yes. There's a blue chip about halfway up, and the
24 blue chips at the bottom are actually the cocaine.

25 Q. Okay. And this did show a reaction for crack

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1 cocaine -- or cocaine? Excuse me.

2 A. That is correct.

3 MR. CAMPBELL: Your Honor, at this time I move
4 State's Exhibit Number 10, 11 and 12 into evidence.

5 THE COURT: Any objection?

6 MR. TAVERNIER: No objection, Your Honor.

7 THE COURT: Admitted without objection.

8 (WHEREUPON, State's Exhibit Numbers 10, 11 and 12,
9 Photographs, were admitted into evidence.)

10 BY MR. CAMPBELL:

11 Q. Now, I'm going to show you what's been marked for
12 identification State's Exhibit 14. If you could please take a
13 look at that and identify what that is.

14 A. That's the baggie from the stop and the chips of
15 crack cocaine.

16 Q. And that's the baggie. You opened that baggie prior
17 to testing; is that right?

18 A. That's correct.

19 Q. And was this item -- did you have it -- did you
20 remove it prior to photographing it or handling it?

21 A. I didn't hear the question.

22 Q. Prior to you removing this from the car did you have
23 it photographed?

24 A. Yes. It was photographed and the photographs is
25 there.

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1 Q. And this photograph here, this is prior to you
2 taking a sample; is that right?

3 A. That is correct.

4 Q. So before you removed it you took a photograph of
5 exactly where it was in the car?

6 A. That's correct.

7 Q. Now, when you took it out of the car did you
8 maintain sole possession and custody --

9 A. I did.

10 Q. -- of this little baggie?

11 A. I did.

12 Q. And what did you do with it?

13 A. I placed it into a paper bag as collected evidence
14 on the side of the road. Once I got to the hall I got a best
15 kit that we have there that we have to seal for SLED. I
16 entered all the information on it, placed the evidence back
17 into the best kit and placed it in the evidence drop box.

18 Q. In fact, your name, your handwriting, signature is
19 on there; is that right?

20 A. That's correct.

21 Q. And once you seal this up can you get into it?

22 A. You can get into it but it's tamper proof. It has a
23 tamper proof piece up here that shows if you do mess with it.

24 Q. And after you retrieved these items from the vehicle
25 what do you do with them?

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1 A. After I retrieve them from the vehicle --

2 Q. And put them in the bags.

3 A. -- I have them photographed, then I place them in
4 that paper bag where I then transport them directly back to
5 the police department where I enter them into this
6 (indicated).

7 Q. And after you put them into the best kit bag there
8 what do you do with them? That's what I was getting at.

9 A. Oh. They are then in turn taken down the hallway
10 and placed in the evidence locker. There's a drop box, a drug
11 drop box.

12 Q. And can anybody get into this? I mean, can any
13 officers get into it, the drop box?

14 A. No, sir, only the evidence technicians, that I know
15 of.

16 Q. All right. Now, did you complete your search of the
17 car after this?

18 A. I did.

19 Q. Did you find any, like, prescription pill bottles or
20 anything like that in the car?

21 A. No, I did not.

22 Q. Showing he had any valid prescription for this?

23 A. I did not.

24 Q. Or for the pills?

25 Now, you mentioned at times in your experience in a

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1 lot of users you will find bits and pieces on the floorboard
2 of the car?

3 A. That's correct.

4 Q. Does this, in your experience, seem to show this guy
5 is a user?

6 A. No, sir.

7 Q. Is it typical for a user to hide stuff up behind
8 hidden panels?

9 A. Not a user.

10 Q. And as a result of what you found he was charged
11 with trafficking in crack cocaine, more than 10 grams, and
12 possession with intent to distribute, possession of a
13 controlled substance, being the hydrocodone pills; is that
14 right?

15 A. That is correct.

16 Q. Now, he had a passenger in the car; is that right?

17 A. He did.

18 Q. And was the passenger charged with either of these
19 narcotics?

20 A. No, sir, he wasn't.

21 Q. And what was the reason why he was charged?

22 A. Due to the location and the vehicle being
23 Mr. Lomax's wife's, and due to the location of where the dope
24 was found, and he was in sole possession of the vehicle, also.

25 Q. Now, since you went through the entire car was it

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1 possible that this passenger could have placed the crack
2 cocaine in that panel while they were driving?

3 A. I would say yes but it would probably be rather
4 hard.

5 Q. And you looked at the car; is that right?

6 A. I did.

7 Q. And was there a panel just like the one you saw in
8 State's Exhibit 10, is there one on the passenger side, also?

9 A. It has an opposite panel, yes, sir.

10 Q. So if it had been the passenger's dope, in your
11 opinion, it would have been easier for him to place it on his
12 side than try to reach around and place it on the driver's
13 side?

14 A. Yes, sir. I would have put it on my side if it
15 would have been me.

16 Q. In fact, this panel here is right next to the gas
17 pedal where the driver's foot would be?

18 A. Yes, sir.

19 Q. So it would be kind of dangerous to try to rip that
20 off while you're driving down the road?

21 A. I would say so.

22 Q. Okay. I guess what I'm getting at, did you have any
23 reason to charge the passenger with these two narcotics?

24 A. No, sir.

25 MR. CAMPBELL: Officer McClellan, I have no further

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1 questions. Please answer any questions Mr. Tavernier might
2 have.

3 THE COURT: Cross-examination.

4 MR. TAVERNIER: Thank you, Your Honor. May it
5 please the Court.

6 CROSS-EXAMINATION

7 BY MR. TAVERNIER:

8 Q. Officer McClellan, when you do your examination of a
9 vehicle do you put on plastic gloves?

10 A. Normally, yes, sir.

11 Q. Did you in this instance?

12 A. No, sir.

13 Q. Okay. When you started your checking of the vehicle
14 and you went to the sunglass holder, you had to pull that
15 down, didn't you?

16 A. Yes, sir.

17 Q. That was accessible to the passenger of the vehicle,
18 wasn't it?

19 A. Yes, sir.

20 Q. To eliminate the passenger as a potential suspect
21 could you not have had forensics come out and dust that
22 sunglass holder to determine whether there were any prints on
23 that sunglass holder to determine who might have put those
24 drugs up there?

25 A. Yes, sir, we could have had it dusted.

1 Q. But you didn't do it, did you?

2 A. Well, due to the area, everybody touches that in the
3 vehicle.

4 Q. Everybody touches it?

5 A. Yeah, his wife, him.

6 Q. Okay. So you're making an assumption that the drugs
7 that are found in the sunglass holder are Mr. Lomax's when
8 it's very equally accessible by Mr. Geer, correct?

9 A. Yes, sir.

10 Q. And one way that you possibly could have determined
11 or eliminated Mr. Geer as a potential suspect or owner of
12 those drugs would have been to test that holder for
13 fingerprints where he might have had to grab it to pull it
14 down, right?

15 A. Yes, sir.

16 Q. But you didn't do it?

17 A. No, sir.

18 Q. Okay. So arguably the only fingerprints that had it
19 been checked would have been maybe Mr. Lomax, maybe his wife,
20 and yours would have been found in that location, right?

21 A. That's correct.

22 Q. So we don't know whether Mr. Geer's fingerprints
23 were up there, do we?

24 A. No, sir.

25 Q. And you can't tell by the packaging because the

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1 paper towel doesn't reflect any fingerprints, and you didn't
2 check that either, did you?

3 A. No, sir.

4 Q. Now, let's go to the little compartment that's down
5 on the side board of the console. It doesn't take much to pop
6 those off, does it?

7 A. It takes a little bit to pop it off.

8 Q. Okay. But an individual could do it --

9 A. Oh, yeah --

10 Q. -- very easily? I mean, you've already
11 acknowledged --

12 A. It don't take 50 pounds of pressure, no, sir.

13 Q. Okay. So based on your experience, to which you've
14 already testified to, as a narc's officer, if an individual
15 were to dispose of his drugs and he were the passenger in a
16 vehicle and wanted to eliminate himself as a suspect he'd put
17 them over on the driver's side, wouldn't he?

18 A. Throw them in the back of the car or somewhere, yes,
19 sir.

20 Q. He'd get rid of them somehow to the driver's side,
21 correct?

22 A. Driver's side, his side, back seat.

23 Q. And if he is familiar with the vehicle and he has
24 the time because Officer Dunn is distracted by Mr. Lomax's
25 actions he could have reached over, popped that, threw the

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1 drugs in there and closed it, right?

2 A. He could.

3 Q. Okay. Did you check that panel for fingerprints?

4 A. No, sir.

5 Q. All right. So you could have checked that for
6 fingerprints and determined whether Mr. Lomax's fingerprints
7 were there or Mr. Geer's, correct?

8 A. That's correct.

9 Q. Or even for that reason his wife, Mr. Lomax's wife,
10 correct?

11 A. Correct.

12 Q. And so as a practical matter the only fingerprints
13 that would have possibly been there could have been Mr. Lomax,
14 Mrs. Lomax, Mr. Geer, or yours, correct?

15 A. That's correct.

16 Q. But you didn't do that?

17 A. No, sir.

18 Q. Okay. Now, we have the baggie in which the drugs
19 were found, right?

20 A. Yes, sir.

21 Q. That baggie is of a texture and substance that will
22 retain fingerprints, correct?

23 A. It will.

24 Q. But you didn't check that either, did you?

25 A. No, sir.

JONATHAN RUSSELL MCCLELLAN - CROSS BY MR. TAVERNIER

1 Q. So it's safe to say you assume because of the
2 location as you testified to that the drugs were automatically
3 Mr. Lomax's?

4 A. I can't call forensics out. I have to get that
5 approved through my lieutenant so --

6 Q. You can't call forensics out but you can make an
7 assumption as to who owns the drugs when you have the burden
8 to investigate completely and make a determination that these
9 drugs are his, correct?

10 A. Correct.

11 Q. And that was your call. You determined by your own
12 without calling your lieutenant that you were not going to
13 call forensics, that you are assuming the drugs are
14 Mr. Lomax's, and that Mr. Geer had nothing to do with it so
15 therefore he wasn't charged?

16 A. Yes, sir.

17 Q. And so you want the jury here to make a
18 determination based on your assumption that Mr. Lomax is
19 guilty, plain and simple, because of an incomplete
20 investigation, correct?

21 A. Yes, sir.

22 Q. Mr. Geer isn't unfamiliar with drugs, is he?

23 A. I've never had any dealing with him, sir.

24 Q. Did you have an opportunity to check his background?

25 A. No, sir.

JONATHAN RUSSELL MCCLELLAN - REDIRECT BY MR. CAMPBELL

1 Q. Would it surprise you --

2 MR. CAMPBELL: Objection, Your Honor.

3 THE COURT: I'll sustain the objection.

4 MR. TAVERNIER: That's all I have. Thank you.

5 THE COURT: Redirect?

6 MR. CAMPBELL: Yes, Your Honor.

7 REDIRECT EXAMINATION

8 BY MR. CAMPBELL:

9 Q. Officer McClellan, your experience, is it likely
10 that the passenger, Mr. Geer, as Mr. Tavernier has pointed
11 out, could have or would have put the drugs there while they
12 were driving down the road?

13 A. No, sir.

14 Q. Common sense tells you that, doesn't it?

15 A. That's correct.

16 Q. Because there's a panel just like it on the other
17 side where he could have easily placed it?

18 A. Yes, sir.

19 Q. Now, this was not an incomplete investigation, was
20 it?

21 A. Not in my opinion, sir.

22 Q. There wasn't anything else you could have done; is
23 that right?

24 A. Not at that time.

25 Q. Did you feel there was a need to fingerprint this

1 little baggie in this case?

2 A. No, sir.

3 Q. And why was that?

4 A. And a lot of times in cases like that you don't get
5 anything off of them to begin with?

6 Q. And typically do you all call forensics out for a
7 case such as this?

8 A. No, sir.

9 Q. And based upon all the other factors that you
10 observed and witnessed was it your opinion that the drugs were
11 properly charged to Mr. Lomax?

12 A. Yes, sir, they was.

13 MR. CAMPBELL: I have no further questions.

14 THE COURT: You may step down.

15 MR. TAVERNIER: Your Honor, I've got a couple in
16 response.

17 THE COURT: We're not going to do any recross.
18 Please step down.

19 Call your next witness.

20 It's in the Court's discretion.

21 MR. TAVERNIER: I understand, Your Honor, but he
22 went into some additional -- may I be heard?

23 THE COURT: Well, you should have objected it wasn't
24 in reply. We're not going to do any recross.

25 Call your next witness.

WILLIAM KEVIN WARREN - DIRECT BY MR. CAMPBELL

1 MR. CAMPBELL: Your Honor, the State call's Kevin
2 Warren to the stand.

3 WILLIAM KEVIN WARREN, after having been duly
4 sworn, testified as follows:

5 THE CLERK OF COURT: If you'll state your full name
6 and spell your last name for the record, please.

7 THE WITNESS: William Kevin Warren, W-a-r-r-e-n.

8 DIRECT EXAMINATION

9 BY MR. CAMPBELL:

10 Q. Where are you currently employed?

11 A. Anderson City Police Department.

12 Q. In what capacity or position are you employed in?

13 A. Evidence custodian.

14 Q. And how long have you been in that position?

15 A. Since August of '07.

16 Q. And how long have you been in law enforcement?

17 A. Sixteen years.

18 Q. Has all that been with the city?

19 A. That's correct.

20 Q. Now, can you please tell the ladies and gentlemen of
21 the jury, explain to them what your job as evidence custodian
22 is.

23 A. My daily routine is to -- officers drop evidence
24 during the nightshift or when I'm not present. I come in in
25 the mornings, unlock the boxes, take it down to the evidence

WILLIAM KEVIN WARREN - DIRECT BY MR. CAMPBELL

1 room, enter it into the computer system and put it on a shelf
2 for court purposes.

3 Q. Now, is part of your job to see that evidence is
4 secured?

5 A. That's correct.

6 Q. Now, this drop box, can you tell the ladies and
7 gentlemen of the jury what exactly when we refer to a drug
8 drop box, what are we talking about?

9 A. Every department can have different ones. Ours is
10 similar to a postal-type box. It only has one door that
11 swings that they drop it in that way nobody else can get --
12 you can't reach your arm or anything, and it also has a bar
13 going across which has a lock that only myself and the other
14 evidence custodian has keys to.

15 Q. And is this like one of those bank -- when you go
16 drop your deposit slip in or --

17 A. That's correct.

18 Q. It opens one way. You drop it in, it goes in, you
19 can't get to it?

20 A. You cannot. It only has a pocket, then it drops
21 when you close it.

22 Q. And what is the purpose -- why do you all -- why do
23 you take such precautions?

24 A. Being with so many officers and so many people at
25 the hall you don't want anybody to have access where the

WILLIAM KEVIN WARREN - DIRECT BY MR. CAMPBELL

1 evidence could get missing or damaged or manipulated in any
2 way.

3 Q. And on -- I guess it would have been April 29th,
4 2008, when you came in to work did you have an occasion to
5 retrieve what has been marked at State's Exhibit 13 and 14?

6 MR. TAVERNIER: Your Honor, if I may. I'm very
7 familiar with the chain of custody. I have reviewed it, and
8 I'm going to stipulate to the chain of custody and to the
9 examination by Ms. Tucker as to the drugs, and they are what
10 they are, and to the weight.

11 MR. CAMPBELL: I'm going to go a little bit into it,
12 Your Honor.

13 THE COURT: Okay. All right.

14 BY MR CAMPBELL:

15 Q. If you'll please look at those.

16 A. (The witness complied).

17 Q. And is that what you retrieved out of the drop box
18 on April 29th, 2008?

19 A. That is correct.

20 Q. And it was sealed just like that, on the inner bag?

21 A. The inner bag was also in a brown envelope in the
22 best kit, also.

23 Q. And it hadn't been opened or tampered with, to your
24 knowledge, when you opened it -- or when you retrieved it?

25 A. The seal on top was sealed with the tamper proof.

WILLIAM KEVIN WARREN - DIRECT BY MR. CAMPBELL

1 It hadn't been manipulated in any way.

2 Q. And as a result of this did you take this to SLED
3 itself?

4 A. I did.

5 Q. Yourself, you took it to SLED?

6 A. I took it to SLED on, I believe May 6th.

7 Q. And you had no further contact with it until it was
8 brought back to your office?

9 A. That's correct.

10 Q. And you've maintained complete care, custody and
11 control of these items since then?

12 A. That's correct.

13 Q. And, in fact, until you brought them to court today?

14 A. That's correct.

15 MR. CAMPBELL: I have no further questions.

16 THE COURT: I assume with the stipulation you don't
17 have any cross; is that correct?

18 MR. TAVERNIER: No cross, Your Honor. We'll
19 stipulate.

20 THE COURT: All right. You may step down. Thank
21 you very much. Be careful stepping down.

22 Call your next witness.

23 MR. CAMPBELL: Your Honor, the State calls Carmen
24 Tucker to the stand.

25 CARMEN TUCKER, after having been duly sworn,

CARMEN TUCKER - DIRECT BY MR. CAMPBELL

1 testified as follows:

2 THE COURT: Mr. Tavernier, I assume you will agree
3 if Ms. Tucker has qualifications as a chemist to test cocaine;
4 is that correct?

5 MR. TAVERNIER: Absolutely, Your Honor.

6 THE COURT: All right. The Court finds her as an
7 expert chemist sufficient to test cocaine.

8 Solicitor, please proceed.

9 DIRECT EXAMINATION

10 BY MR. CAMPBELL:

11 Q. Ms. Tucker, if you'll please state your name for the
12 record.

13 A. Carmen Tucker, T-u-c-k-e-r.

14 Q. And you are currently employed be SLED?

15 A. Yes, I am.

16 Q. And you're employed as a chemist at SLED?

17 A. That's correct.

18 Q. And you have been qualified before as a forensic
19 chemist in drug analysis?

20 A. Yes, sir, 5 times.

21 Q. Now, I'm going to show you what's been marked for
22 identification as State's Exhibit 13 and 14. If you will
23 please take a look at those.

24 [PAUSE]

25 Did you have an opportunity to look at them?

CARMEN TUCKER - DIRECT BY MR. CAMPBELL

1 A. Yes, I did.

2 Q. And can you please -- when you retrieved these -- or
3 when you received them were they in that bag, the inner bag?

4 A. The inner bag, yes.

5 Q. And when you receive them what, if anything, do you
6 do with them once you receive the bag?

7 A. After we pick up the bags from log-in and they are
8 placed into our custody in the system, and physically, we
9 check -- whenever we take them, either we're going to work
10 them that day or we're going to lock them in our vault, we
11 have a vault inside of our lab that's also locked and no one
12 else can get in outside of our lab, we take this tamper
13 evident best bag and we basically check it when we're
14 beginning to process the evidence. We check the tamper
15 evidence seal, and we check all around the bag for any cuts or
16 any other type of tampering. That's the first thing we do.

17 Q. And had either of these items been tampered with or
18 altered or cut on?

19 A. No, they have not.

20 Q. As a result, you'll test it at that point in time?

21 A. That's correct.

22 Q. If it had been messed with or changed you would have
23 sent it back to the agency, the submitting agency?

24 A. Absolutely. We don't touch it if it's open.

25 Q. Okay. Please carry on. Now, after you retrieved

CARMEN TUCKER - DIRECT BY MR. CAMPBELL

1 these items did you open them up and test them?

2 A. Yes, I do, and I always cut at the bottom of the bag
3 away from the tamper evidence seal.

4 Q. And in this case, looking at -- is that State's
5 Exhibit 13?

6 A. This one is 13.

7 Q. Take a look at State's Exhibit 13. Is that how you
8 received it with the napkin and the pills in there?

9 A. Yes. The pills were wrapped up in the napkin.

10 Q. And did you make a determination of what exactly
11 these pills were?

12 A. Yes, I did.

13 Q. And what, if anything, did you learn?

14 A. These are hydrocodone acetaminophen tablets.

15 Q. Is that a controlled substance?

16 A. Yes, it is. It's a schedule 3.

17 Q. And when we say controlled substance, does that mean
18 you have to have a doctor's prescription to get this drug?

19 A. For a schedule 3, absolutely.

20 Q. And how did you identify what these are?

21 A. With pharmaceutical preparations once we've viewed
22 them -- every pill is viewed front and back on the sides to
23 make sure there has been no tampering, liquids dripped on it,
24 things like that.

25 Once we determine there's been no tampering we use

CARMEN TUCKER - DIRECT BY MR. CAMPBELL

1 several sources to look up the shape, color, markings, scoring
2 or nonscoring of the tablet and match it to one of our
3 sources, and I have 2 sources for this. One was the picture.

4 Q. In fact, what does the markings on that say?

5 A. This says on one side Watson 540, and on the other
6 side it's a half score.

7 Q. And when you compared it it came out to be, when you
8 look at the pharmaceutical manuals, hydrocodone?

9 A. Hydrocodone and acetaminophen.

10 Q. Now, the next item, number 14, State's Exhibit 14.

11 A. Yes.

12 Q. Okay. Same thing. You received it, hadn't been
13 tampered with and you tested it; is that right?

14 A. That's correct.

15 Q. And what type of test did you conduct on that?

16 A. For this sample basically it was inside the tamper
17 evident bag, inside this plastic bag here. Once I removed it
18 all from the plastic bag the sample is weighed first. And
19 then we take a sample and we test with spot test reagents, and
20 we're looking for a ballpark of the compound. And then we
21 take a sample and we run it on an instrument, which basically
22 is a confirmatory test.

23 Q. And let me step back on number 13. How many pills
24 were in there?

25 A. There are 19 tablets.

CARMEN TUCKER - DIRECT BY MR. CAMPBELL

1 Q. Now, you said you weighed State's Exhibit 14. What
2 was the actual weight of that?

3 A. The actual weight of the sample, again, I said it's
4 not weighed with the bag. It's weighed just the sample
5 itself.

6 Q. Just the drug.

7 A. Just the drug, 10.23 grams.

8 Q. Ten point --

9 A. Point 23 grams.

10 Q. And just not a long explanation, but what kind of
11 process do you go through when you test it, the test you
12 actually go through?

13 A. For this type of substance, once we get through the
14 preliminary test, which is a spot test reagent, we can either
15 use gas chromatography mass spectrometry or we can use fourier
16 transform infrared spectroscopy, and you can use either one as
17 a confirmatory test for this type of substance.

18 Q. And that's what you conducted on these?

19 A. This sample I conducted the infrared spectroscopy.

20 Q. And what did it determine?

21 A. Basically, the way the infrared spectroscopy works
22 is you take the sample itself. You don't have to put it in a
23 solution. You just put it on the diamond plate and you
24 basically compress it, and you hit it with the infrared light.
25 Basically what's happening in this procedure is if you think

CARMEN TUCKER - DIRECT BY MR. CAMPBELL

1 about a water molecule, a water molecule is an oxygen and two
2 hydrogens, and those hydrogens are bonded to that oxygen.

3 Whenever you hit it with that infrared light it's
4 going to cause those bonds to stretch, to bend, to wag to
5 different things. This instrument measures that, and it will
6 change depending on if you took an oxygen off and put a carbon
7 on there -- sorry. If you took a hydrogen off and put a
8 carbon on that oxygen there would be a different type of
9 stretching. It measures differently, and that's what we use
10 to identify.

11 And to go a little further, you get an actual
12 fingerprint of the compound similar to fingerprints in DNA.

13 Q. And basically you compare it to charts and will tell
14 you what --

15 A. Right. We have an in-house library of confirmed
16 substances that we've compared this to.

17 Q. And this one, you determine it to be, I believe
18 cocaine base?

19 A. Cocaine base, crack.

20 Q. Which is commonly known as crack cocaine?

21 A. That's correct.

22 MR. CAMPBELL: Your Honor, at this time, I'd move
23 State's Exhibit 13 and 14 into evidence.

24 THE COURT: Any objection?

25 MR. TAVERNIER: No objection.

CARMEN TUCKER - DIRECT BY MR. CAMPBELL

1 THE COURT: Thirteen and 14, admitted without
2 objection.

3 (WHEREUPON, State's Exhibit Numbers 13 and 14 were
4 admitted into evidence.)

5 BY MR. CAMPBELL:

6 Q. And just for showing State's Exhibit Number 13,
7 these are the pills that you analyzed?

8 A. Yes, sir.

9 Q. What exactly is hydrocodone? What type of --

10 A. Hydrocodone is an analgesic. It's a pain reliever.

11 Q. And then State's Exhibit 14, and when you said you
12 weighed this, this little baggie right here, you didn't weigh
13 it with that little baggie?

14 A. No, I did not.

15 Q. The only thing you weighed was actually this
16 substance right here which you determined to be a cocaine base
17 known as crack cocaine?

18 A. That's correct.

19 MR. CAMPBELL: Your Honor, I have no further
20 questions of this witness.

21 THE COURT: Cross-examination?

22 MR. TAVERNIER: No.

23 THE COURT: Okay, Ms. Tucker. Thank you so much.
24 Have a safe trip going back to Columbia.

25 MS. TUCKER: Thank you, sir.

1 THE COURT: Thank you very much.

2 Solicitor, you want to call your next witness.

3 MR. CAMPBELL: Your Honor, that is the State's case.

4 THE COURT: Okay. Mr. Tavernier, do you have any
5 witnesses?

6 MR. TAVERNIER: None, Your Honor.

7 THE COURT: Okay. Thank you very much.

8 All right. Madam Forelady, ladies and gentlemen of
9 the jury, we're going to take a short break at this time,
10 about 10 minutes. If you need anything let the bailiff know.

11 Do we have any smokers? Raise your hand if you got
12 a smoker. If you need to take a smoke break let them know.
13 They'll take you outside to smoke.

14 All right. Don't discuss the case amongst
15 yourselves. I want you to hear all the testimony, all the
16 closing arguments and the charge before you start deliberating
17 on the case, Madam Forelady, so please don't discuss case
18 amongst yourselves. I'll see you in about 10 minutes.

19 (WHEREUPON, the jury leaves the courtroom at
20 approximately 3:58 p.m.)

21 THE COURT: All right. We'll talk about a 10-minute
22 break.

23 (WHEREUPON, a brief recess was taken.)

24 THE COURT: Lawyers, come up here for just a second.

25 (WHEREUPON, a bench conference was had.)

1 THE COURT: Will you bring us the jury, please.

2 (WHEREUPON, the jury enters the courtroom at
3 approximately 4:22 p.m.)

4 THE COURT: Solicitor?

5 MR. CAMPBELL: Please the Court?

6 THE COURT: I'll recognize your motions at the end
7 of the State's case, and they are denied.

8 MR. TAVERNIER: Thank you.

9 MR. CAMPBELL: Thank you, Your Honor. May it please
10 the Court.

11 Ladies and gentlemen of the jury, as I told you at
12 the beginning there would come a time when you all get a
13 chance to deliberate and you all have to render a verdict in
14 this case, and as I stated in my opening, Mr. Lomax was at the
15 wrong place at the wrong time, happened to fit the description
16 of a car and individual that these officers were looking for.

17 Now, a lot of police work happens to be by luck.
18 Catching bad guys is always not, you know, Cojak. A lot of
19 times just happened to luck into things, such as Officer Dunn
20 did, and that's a lot of what police work, a lot of what goes
21 on, and that's what happened in this case.

22 Officer Dunn had no idea at that point in time that
23 Mr. Lomax was toting around pills and crack cocaine. He had
24 no earthly idea. What his whole perception was, was I got the
25 individual getting out of the car, wanting to get out of

1 there, then the man lies to me.

2 This dope right here is the reason why Mr. Lomax
3 gave a false name and was trying to get out of that car. I
4 mean, why else if he just had a license suspended would you
5 just lie and give a false name? You know you're going to get
6 checked. So what else are you hiding? And that's what this
7 comes down to.

8 Mr. Lomax knew this was in the car and he was trying
9 to separate himself from that car. And why do we say
10 Mr. Lomax is the one that should be charged and is guilty of
11 possessing these? It's like this. This car, he has complete
12 control over it. What they call dominion and control. It's
13 his car, registered in his wife's name. And as Officer Dunn
14 stated, she showed up at the scene, further giving credence to
15 what he's saying that he belongs, that he has direct ties to
16 this vehicle.

17 Second of all, why give a false name? Why would you
18 lie for just a simple suspension of your driver's license,
19 unless you're trying to cover up or hide something else. In
20 fact, it wasn't until he learned on the scene that that wasn't
21 his name and he fessed up.

22 And why does the State make such a big deal about
23 10.23 grams of crack cocaine? It's because have you all ever
24 baked cookies, you know, with your children, or make them?
25 You know, or you come in -- you know, I have a two and a half

1 year old. She loves cookies. And when she eats one, crumbs
2 get everywhere. And you know that crumb came from a larger
3 cookie, and that larger cookie came from a larger batch, and
4 that's the same thing in the drug world. This little bit
5 right here, which is traffic of weight 10.23 grams, came from
6 something larger.

7 These pills, why would he have these in just a
8 napkin, unless he intended to get rid of them somehow? I
9 mean, he's a rolling drugstore. This isn't here for personal
10 consumption, and that brings me back to what the State has to
11 prove. We don't have to prove that he is selling. It's not
12 in the elements of this offense.

13 Trafficking, we have to prove that it is crack
14 cocaine, it is a controlled substance and that it's more than
15 10 grams. Same thing with the pills, except it's hydrocodone.
16 And as the officer stated, there was no prescription pills --
17 or bottle in the car.

18 Now, how do you prove this? You know, it comes down
19 to possession. There's two types of possession. There's
20 actual and constructive. Actual is you have it on you, in
21 your pocket, you know.

22 Constructive is that you have control over it, and
23 the legal term is dominion and control. But, you know,
24 another way to look at it is everybody I'm assuming has a
25 checking account or had one in the past. You have a

1 checkbook. And that checkbook you have control over, whether
2 it's on your person and it's actual -- if you got it in your
3 coat pocket, you know, it's actual possession.

4 But you also have constructive possession. If you
5 leave your checkbook in your car, you leave it at home it's
6 still yours and you're still responsible for it. That is the
7 constructive possession. In this case, he has the car. The
8 car is his. It's in his wife's name. Why else would it be
9 hidden in the driver's side, unless he was the one that put it
10 there?

11 You know, when you take a look at this -- and
12 Mr. Tavernier was trying to argue that well, it was an
13 incomplete investigation and that it's really the passenger.
14 Ladies and gentlemen, when you look right here you see the gas
15 pedal and where this panel is right here. And as Officer Dunn
16 stated, in the 30 to 45 seconds it took him to stop from the
17 time this car almost hit him until the time it pulled in to
18 [REDACTED] East Orr Street was 30 to 45 seconds.

19 A passenger -- you can see how small. It's a small
20 compact car. There is no way he could have reached over and
21 popped this without hitting his leg and causing either a wreck
22 or him the swerve or anything like that to get to this. And
23 as the officer stated, it took some force to pop it off, and
24 you can see by these little clips you're going to have to push
25 it straight in to pop it back in.

1 But what the kicker is, is that if it was, in fact,
2 Mr. Geer's dope Mr. Geer had the same type of panel on his
3 side where he could have put it if it was actually his. As
4 the officer stated, Officer McClellan, that hey, typically
5 when we find dope, if somebody has it on them, they get rid of
6 it. They throw it in the back seat, they throw it under the
7 floorboard under the seat. They are not going to keep it on
8 them.

9 Ladies and gentlemen, this is hidden, and this isn't
10 accessible while they're driving. He may not have put it
11 there while he was driving down the road, and I seriously
12 doubt he did because he probably would have wrecked, but that
13 had been there because he knew that. And he also had put
14 those pills up there. And like I say, wrong place at the
15 wrong time, but he got checked, those are his pills.

16 You know, you can try to argue fingerprint this and
17 fingerprint that. As the officer testified that, you know,
18 rarely you get fingerprints, rarely does it show anything.
19 And that right there is why he gave a false name. That is
20 right there why he tried to get away from that car and
21 separate himself.

22 You know, as I told you when you came in here that
23 you all have had experiences that -- work, you have family,
24 raise children. You know, when you come into this courtroom
25 you just don't leave all that at the door, and you can piece

1 two and two together, and that's what your job is here when
2 you are rendering a verdict.

3 And like I stated before, our job is to prove to you
4 beyond a reasonable doubt, and the State feels that we have
5 proved to you beyond a reasonable doubt that, in fact, on
6 April 28th, 2008 Mr. Lomax possessed this crack cocaine, 10.23
7 grams, as well as 19 pills of hydrocodone, a painkiller.

8 And when you go back in that jury room to
9 deliberate, you know, think about Mr. Tavernier is, of course,
10 going to raise alternate theories and try to cloud and confuse
11 the issue, but when it comes right down to it you can see the
12 truth, and that's all we ask you to do is render a verdict
13 that speaks the truth, and in this case that verdict is
14 guilty. And I thank you all for your time and patience.

15 THE COURT: Mr. Tavernier?

16 MR. TAVERNIER: Thank you, Your Honor. May it
17 please the Court.

18 Mr. Campbell.

19 Ladies and gentlemen of the jury, the State is
20 asking you to base a conviction on an assumption. This is not
21 CSI as you see on TV where they are going to go to the
22 extremes but our judicial system demands, requires that law
23 enforcement not only investigate a crime to make the case
24 against a certain suspect but they also have an obligation,
25 and they have an obligation to complete an investigation to

1 make a determination what is the most plausible explanation,
2 and if there is evidence available then they should find them.

3 I do not want my family, I don't believe you would
4 want your families, nor does Mr. Lomax, should they be
5 subjected to an incomplete investigation. All forensics had
6 to do was come out and check for fingerprints. And it's not
7 what is most likely, what is most plausible, what is most
8 feasible that we're dealing with.

9 The State has the burden and that burden is beyond a
10 reasonable doubt, the highest degree of burden that the
11 judicial system requires, and they require that in law
12 enforcement. And if you were charged with a crime would you
13 want a thorough investigation or would you want one based on
14 assumption, based on proximity?

15 By Officer Dunn's own testimony he was preoccupied
16 with Mr. Lomax. Mr. Geer had access to the vehicle. Officer
17 McClellan testified that if you have drugs and you are
18 experienced in the use of narcotics, or whatever, you're going
19 to get rid of them. And had they been on the passenger side
20 he stated most likely Mr. Geer would have been charged.

21 If you are streetwise draw upon your own common
22 sense. Where are you going to place the drugs? And if you
23 are familiar with the vehicle, if you are familiar with what's
24 been done in that type of activity you know where stuff can be
25 stored. Fifteen minutes is all it would have taken to have a

1 unit respond, dust that vehicle for fingerprints and we
2 wouldn't have any question whatsoever whether Mr. Geer's
3 fingerprints are on that panel or up on the sunglass holder.

4 We don't know, but we don't have the burden.
5 Mr. Lomax doesn't have any burden. It's the State, and these
6 individuals right here have to prove beyond a reasonable
7 doubt. They are the ones who have to prove the case.

8 Now, think about it. If it were a relative of yours
9 or if it were one of you do you want a case based on
10 assumptions, conjecture, speculation or would you have wanted
11 them to take that extra step and verify hey, my fingerprints
12 aren't on that panel, my fingerprints aren't on that sunglass
13 case, my fingerprints are not on this baggie?

14 That could have been done, and it wasn't. Our
15 judicial system demands it. We need thorough investigations.
16 And all I'm going to ask you to do is send a message to law
17 enforcement that if they are going to investigate a crime at
18 least be thorough because they have a responsibility not only
19 to prove the case against an individual but to eliminate
20 individuals as suspects, and when they don't do that then they
21 fall short. And it would have been very easy to call out
22 forensics and have that checked, but they didn't do it.

23 Mr. Lomax isn't here. He doesn't have any burden
24 whatever. He doesn't have to be here. He didn't have to
25 testify, he didn't have to present any evidence. That's why I

1 get last argument.

2 What do you want your law enforcement officials to
3 do? Do you want them to do a thorough job and make it what we
4 would call a slam dunk so there is no question, or do you want
5 to leave it up to speculation and conjecture based on more
6 likely than not because of proximity of where they are found?
7 That ladies and gentlemen is reasonable doubt, and as His
8 Honor will charge you if you determine, any one of you, that
9 there is reasonable doubt then by your oath you must find the
10 defendant not guilty. Thank you.

11 THE COURT: Madam Forelady and members of the jury,
12 the State of South Carolina charges the defendant, Carius
13 Kenta Lomax, with one count of trafficking crack cocaine, one
14 count of possession hydrocodone with intent to distribute.

15 I will give you a copy of these instructions in
16 written form, and during your deliberations you may refer to
17 these instructions to guide your decision making. You must
18 consider these instructions as a whole and not follow some and
19 ignore others.

20 Madam Forelady, whenever you finish or reach a
21 verdict I will ask you to return the charge.

22 Now, to these indictments, the defendant has entered
23 a plea of not guilty, which places upon the State a burden of
24 proving the defendant guilty. A person charged with
25 committing a criminal offense in South Carolina is never

1 required to prove himself innocent.

2 I charge you it's a vital important rule of the law
3 of evidence that a defendant in a criminal case no matter how
4 great or serious may be the offense with which he is charged
5 must always be presumed innocent until his guilt has been
6 proven beyond a reasonable doubt.

7 His presumption of innocence remains with the
8 defendant at all time, from the moment of his appearance in
9 this court throughout the trial until you, the jury, have upon
10 the testimony and evidence presented reached a verdict of
11 guilty beyond a reasonable doubt.

12 For it is the solemn duty of the jury if not clearly
13 convinced of his guilt beyond a reasonable doubt to acquit the
14 defendant. So the burden is upon the State to establish by
15 evidence to your satisfaction the guilt beyond a reasonable
16 doubt of this defendant.

17 Now, what is a reasonable doubt? A reasonable doubt
18 is the kind of doubt that would cause a reasonable person to
19 hesitate to act. If you have such a doubt as to the guilt of
20 the defendant he would be entitled to a verdict of not guilty.

21 Reasonable doubt may arise from the evidence which
22 is in the case or from the absence or lack of evidence in the
23 case. You alone must make the determination of whether or not
24 reasonable doubt exists as to the guilt of the defendant.

25 The term reasonable doubt should be given its

1 everyday plain and ordinary meaning. Proof beyond a
2 reasonable doubt is proof that leaves you firmly convinced of
3 the defendant's guilt.

4 There are very few things in this world that we know
5 with absolute certainty, and in criminal cases the law does
6 not require proof that overcomes every possible doubt. If
7 based on your consideration of the evidence you are firmly
8 convinced the defendant is guilty of the crime charged you
9 must find him guilty.

10 On the other hand, if you are not firmly convinced
11 the defendant is guilty you must find him -- give him the
12 benefit of the doubt and find him not guilty.

13 The evidence from which you are to decide what the
14 facts consist of, the sworn testimony of the witnesses both on
15 direct and cross-examination, regardless of who called the
16 witness, the exhibits that have been received into evidence
17 and any facts to which the lawyers have agreed or stipulated.

18 Certain things are not evidence. You may not
19 consider them in deciding what the facts are. I will list
20 them for you. Arguments and statements by lawyers are not
21 evidence. The lawyers are not witnesses. What they've said
22 in opening statement, closing arguments and at other times is
23 indicated to help you interpret the evidence but is not
24 evidence. If the facts as you remember them differ from the
25 way the lawyers have stated them your memory controls.

1 Questions and objections by lawyers are not
2 evidence. Attorneys have a duty to their clients to object
3 when they believe a question is improper under the rules of
4 evidence. You should not be influenced by the objection or by
5 the Court's ruling on the objection.

6 Testimony that's been excluded or stricken or you've
7 been instructed to disregard is not evidence and must not be
8 considered. Anything you may have seen, television, read in
9 the paper or heard from others when court is not in session is
10 not evidence. You are to decide the case solely on the
11 evidence received at trial.

12 Under the constitution and code of laws only you,
13 the jury, can make the findings of fact. I'm not permitted to
14 indicate to you how I may feel about the testimony and
15 evidence which has been presented. Throughout this trial it's
16 been my intention to be fair and impartial toward each of the
17 parties involved.

18 To determine the facts in this case you have to
19 evaluate the credibility, which means the believability of
20 each witnesses. Some of things you may consider as you decide
21 whether or not to believe a witness testimony about a
22 particular matter include was the manner and appearance of the
23 witness who testified, was he or she straightforward or
24 hesitant in answering; was the testimony of the witness
25 consistent or inconsistent; how did the witness come to know

1 the facts that he or she testified to; was the witness present
2 during the incident or did he happen on the scene after it
3 occurred; is there some reason a witness would want to give
4 testimony which would help or hurt one side or the other, in
5 other words, was the witness bias or prejudice; was the
6 testimony strengthened or weakened by other testimony of
7 evidence.

8 You can believe as much or as little of each
9 witness's testimony as you think proper. You may believe the
10 testimony of a single witness against that of many or just the
11 opposite. Of course, you do not determine the truth by merely
12 counting the number of witnesses presented by each side.
13 Throughout the process you have but one objective, to seek the
14 truth regardless its source.

15 The same constitution and laws which designate and
16 make you the finders of the fact, as I just explained, also
17 make me the sole instructor of the law. You should accept
18 statements of law as I give them to you. The attorneys are
19 not the instructor of the law. Please base your decision
20 making on what the law is and not what you think the law
21 should be.

22 There are two types of evidence which are generally
23 presented during trial; circumstantial evidence and direct
24 evidence. Direct evidence is testimony of a person who
25 asserts or claims to have actual knowledge of a fact such as

1 an eyewitness. Circumstantial evidence is proof of a chain of
2 facts and circumstances indicating the existence of a fact.

3 The law makes absolutely no distinction between the
4 weigh or value to be given to either direct or circumstantial
5 evidence nor is a greater degree of certainty required of
6 circumstantial evidence than of direct evidence. You should
7 weigh all the evidence in the case.

8 On a contested factual issue you may have some
9 direct evidence and some circumstantial evidence. To
10 determine the facts in the case you'll have to evaluate the
11 credibility, which means the believability of each witness.

12 Under the laws of this State a defendant may be
13 tried in his absence but this fact may not be considered
14 against him in any manner whatsoever. The defendant shall be
15 tried precisely if he were present in the court pleading not
16 guilty.

17 Trafficking in crack cocaine, 10 to 28 grams. The
18 defendant is charged with trafficking in crack cocaine. The
19 State must prove beyond a reasonable doubt that the defendant
20 knowingly sold, manufactured, cultivated, delivered,
21 purchased, brought into this State, provided financial
22 assistance; otherwise aided, abetted, attempted or conspired
23 to sell, manufacture, cultivate, deliver, purchase or bring
24 into this State; was knowingly in actual constructive
25 possession; knowingly or attempted to become in actual

1 constructive possession of 10 grams or more but less than 28
2 grams of crack cocaine.

3 Crack cocaine means an alkaloid cocaine of
4 free-based form of cocaine which is the inproduct of a
5 chemical alteration whereby the cocaine in salt form is
6 converted to a form suitable for smoking.

7 To provide trafficking in crack cocaine the State
8 must show that the defendant had actual constructive
9 possession of 10 grams or more of crack cocaine, that he knew
10 he had such possession. The State must prove each of these
11 elements beyond a reasonable doubt.

12 Under the South Carolina law any person who is
13 knowingly in actual constructive possession of 10 grams or
14 more of crack cocaine shall be guilty of trafficking in crack
15 cocaine. Therefore, you cannot find the defendant guilty of
16 trafficking in crack cocaine unless you find there were 10
17 grams or more of crack cocaine.

18 Trafficking is defined as engaged in a commercial
19 activity to buy and sell regularly. Trafficking inputs the
20 carrying on or the engaging in a business. The word traffic
21 has a popular meaning, it's change or passing of goods or
22 commodities of goods for money.

23 Actual possession means that the crack cocaine was
24 in the actual physical custody of the defendant.

25 Constructive possession means that the defendant had

1 dominion and control or the right to exercise dominion or
2 control over either the crack cocaine itself or the property
3 in which the crack cocaine was found. In other words,
4 possession of an object or premises give rise to an inference
5 that the person charged has both the power and intent to
6 control the use and disposition of the object.

7 Mere presence of a person in an area when an object
8 is found is not enough in and of itself to give rise to
9 necessary inference.

10 Constructive control may be established by
11 circumstantial evidence as well as direct evidence. The
12 defendant's knowledge and possession of a controlled substance
13 may be inferred if the substance found on the premises is
14 under his control. You as jurors are free to accept or reject
15 this inference of knowledge and possession depending upon you,
16 as finders of the fact, view the testimony and evidence.

17 Possession of hydrocodone with intent to distribute.
18 The defendant is charged with possession with intent to
19 distribute hydrocodone. The State must prove beyond a
20 reasonable doubt that the defendant possessed hydrocodone with
21 the intent to distribute.

22 To prove possession the State must prove beyond a
23 reasonable doubt that defendant had the power and the intent
24 to control the disposition or use of the hydrocodone.

25 Possession may be actual or constructive. The

1 definition of actual or constructive is the same for this
2 charge as to the previous trafficking in crack cocaine charge.
3 Two or more persons may have joint possession of a drug.

4 The State must also prove beyond a reasonable doubt
5 that the defendant intended to distribute the hydrocodone.
6 Distribute means to deliver other than by administering or
7 dispensing a drug. Intent may be shown by acts and conduct of
8 the defendant and other circumstances in which you may
9 naturally and reasonably infer intent.

10 To determine whether the defendant had the intent to
11 distribute the hydrocodone you may consider the circumstances
12 surrounding the defendant's alleged possession; you may
13 consider the amount of the substance alleged to have been
14 possessed; the manner in which it was allegedly possessed; the
15 place where it was allegedly possessed, and other factors
16 which you consider to be important. You must find that the
17 defendant did not intend to have the drugs solely for his own
18 use.

19 Now, you've been selected as fair and impartial
20 jurors sworn to impartiality try and determine the facts in
21 this case. When you comply with your oath to do so then no
22 one will have the right to criticize your verdict and you will
23 have fully discharged your duty as jurors.

24 You are to decide this case according to the
25 testimony you've heard from the lips of the sworn witnesses

1 along with other evidence introduced.

2 I charge you as jurors you must decide the issue in
3 this proceeding without bias and without prejudice to any
4 party. You cannot allow yourself to be governed by sympathy,
5 by prejudice, by passion, by public opinion or any other
6 arbitrary factor.

7 Both the State and the defendant have a right to
8 expect that each of you will carefully and impartially
9 consider all the evidence in the case and you will follow the
10 law as I explain it to you.

11 Nothing I may have said or done during the course of
12 this trial has been in any way intended to express or suggest
13 a view of the case or an opinion as to the facts, the weight
14 of the evidence or credibility of witnesses. If any of my
15 actions or words have seemed to so indicate you disregard such
16 and form your own opinion as to those matters.

17 Madam Forelady, I have prepared two verdict forms as
18 to the State of South Carolina vs. Lomax. The number of the
19 case, County of Anderson, State of South Carolina, we, the
20 jury, unanimously find the defendant, Carius Kenta Lomax,
21 guilty of trafficking cocaine. We, the jury, unanimously find
22 the defendant, Carius Kenta Lomax, not guilty of trafficking
23 crack cocaine, a place for the foreperson to sign and date it.

24 I have a second verdict form with the case number.
25 We, the jury, unanimously find that the defendant, Carius

1 Kenta Lomax, guilty of possession of hydrocodone with intent
2 to distribute. We, the jury, unanimously find the defendant,
3 Carius Kenta Lomax, not guilty of possession of hydrocodone
4 with intent to distribute, a place for the foreperson to sign.

5 Madam Forelady, members of the jury, your verdict
6 has to be unanimous. All 12 of you have to agree. I will
7 tell you it's a collective reasoning process, for you to
8 elicit each other's opinions, discuss the facts, look at the
9 evidence and arise at a just verdict.

10 Madam Forelady, I'm going to ask you to go to the
11 jury room. However, before you begin your deliberations wait
12 until the bailiff brings the evidence, the verdict form and
13 the charge book and instructs you to begin your deliberations.
14 But before you go, just sit tight for just a second.

15 Let me see the attorneys up here.

16 (WHEREUPON, a bench conference was had.)

17 THE COURT: All right. Madam Forelady, members of
18 the jury, if you'll follow the bailiff to the jury room, and
19 hopefully he'll be with you very shortly with the evidence and
20 the verdict form and the charge book. Thank you very much.

21 (WHEREUPON, the jury leaves the courtroom at
22 approximately 4:53 p.m.)

23 THE COURT: Any exception from the State on the
24 charge?

25 MR. CAMPBELL: None from the State.

1 THE COURT: Any exception from the defendant on the
2 charge?

3 MR. TAVERNIER: None.

4 THE COURT: All right. Would you all come forward
5 and put on the record all the exhibits are present.

6 If you'll give this to the jury and give them all
7 the exhibits and tell them to begin their deliberations,
8 please.

9 MR. CAMPBELL: All the exhibits are in place.

10 THE COURT: All of them present?

11 MR. CAMPBELL: Yes, sir.

12 MR. TAVERNIER: Yes, sir.

13 THE COURT: Sit tight. We'll see what the jury is
14 going to do.

15 (WHEREUPON, the jury was instructed to begin their
16 deliberations at approximately 4:54 p.m., and court was in
17 recess while awaiting a verdict.)

18 (WHEREUPON, court reconvened at approximately 5:25
19 p.m.)

20 THE COURT: Anything from the State before we bring
21 the jury?

22 MR. CAMPBELL: No, Your Honor.

23 THE COURT: How about from the defendant?

24 MR. TAVERNIER: No, Your Honor.

25 THE COURT: Bring us the jury, please, sir.

1 (WHEREUPON, the jury enters the courtroom at
2 approximately 5:26 p.m.)

3 THE COURT: Madam Forelady, I understand you've
4 reached a verdict; is that correct?

5 THE FORELADY: Yes, sir.

6 THE COURT: Would you hand the verdict form to the
7 bailiff, please, ma'am.

8 (WHEREUPON, the verdict form was handed to the
9 Court.)

10 THE COURT: Madam Forelady, I have written your
11 verdict on the back of the indictment, and it has a place for
12 you to sign. I've dated it today, February 2nd, '09. I'm
13 going to give it to the clerk and ask you to please sign it,
14 please, ma'am.

15 [PAUSE]

16 THE COURT: Thank you, ma'am.

17 If you'll publish the verdict, please.

18 THE CLERK OF COURT: Indictment 2008-GS-04-1615, the
19 State of South Carolina vs. Carius Kenta Lomax. The verdict
20 of the jury, we, the jury, unanimously find the defendant,
21 Carius Kenta Lomax, guilty of trafficking crack cocaine.

22 As to indictment 2008-GS-04-1617, the State of South
23 Carolina vs. Carius Kenta Lomax. The verdict of the jury, we
24 the jury, unanimously find the defendant, Carius Kenta Lomax,
25 guilty of possession of hydrocodone with intent to distribute.

1 Madam Forelady, ladies and gentlemen of the jury, if
2 these are your verdicts would you please indicate by raising
3 your hand.

4 All hands are raised, the verdicts of jury, Your
5 Honor.

6 THE COURT: All right. Thank you very much.
7 Any motions from the State concerning the jury?

8 MR. CAMPBELL: No, Your Honor.

9 THE COURT: From the defendant?

10 MR. TAVERNIER: None, Your Honor.

11 THE COURT: All right. Ladies and gentlemen of the
12 jury, I want to thank you for your service this afternoon. If
13 you'll be back in the courtroom tomorrow at 2:30, we'll
14 hopefully draw a jury at that time. We're going to need you
15 12. We've got another jury coming in in the morning and we're
16 going to draw another jury for tomorrow afternoon.

17 The only thing left is I will have to sentence the
18 defendant. And what happens is I sentence him and seal it,
19 and it's put in a sealed envelope and I issue a bench warrant
20 for his arrest. Wherever we find him or wherever he is
21 arrested he'll be brought before the Court and the sentence
22 will be read to him and he'll serve it at that time. So I'll
23 see you all tomorrow at 2:30 in this courtroom.

24 (WHEREUPON, the jury leaves the courtroom at
25 approximately 5:30 p.m.)

1 THE COURT: Two things I would like to clear up for
2 the record, purpose of the record. The first thing was you
3 were going to ask about -- what's the passenger's name?

4 MR. CAMPBELL: Bobby Geer.

5 THE COURT: Bobby Geer. On cross-examination, based
6 upon what had been covered in pretrial, you were going to ask
7 Mr. Geer about his criminal record, and before that got out
8 the solicitor objected and I sustained that objection. I just
9 want to put on the record what I was sustaining because you
10 actually never got the sentence out; is that correct,
11 Mr. Tavernier?

12 MR. TAVERNIER: Yes. I was going to go into that he
13 had some type of criminal history, which would have indicated
14 he had some involvement with drugs.

15 THE COURT: And he objected, and I sustained it
16 before he actually got the question out. I apologize to you.
17 I should have at least listened to the question before I
18 sustained it but I thought I knew where you were going.

19 MR. TAVERNIER: Not a problem, Judge.

20 THE COURT: And I also put on the record that your
21 standing motions at the end of the State's case were heard and
22 granted -- well, they weren't heard but I acknowledged them
23 and I denied them. Do you have any motions at this time?

24 MR. TAVERNIER: None. I think it was a fair trial,
25 Judge.

1 THE COURT: All right. I need a sentence sheet.

2 MR. CAMPBELL: I have his rap sheet I'll read into
3 the record.

4 THE COURT: Thank you. I'll be glad to hear you
5 concerning anything you like to tell me concerning sentencing,
6 Mr. Tavernier.

7 All right. This is a trafficking second. What's
8 the first drug offense?

9 MR. CAMPBELL: Your Honor, I'll put in and make a
10 Court exhibit, I have a certified conviction on his previous
11 one. I'll just go ahead and put for the Court's record his
12 rap sheet. He has a conviction for a criminal sexual conduct
13 in the first degree while he was a juvenile, he did DJJ;
14 Prowling; he has a possession of crack cocaine in '99, which
15 is the certified conviction I'm going to make an exhibit.
16 I'll make that a Court exhibit, Your Honor.

17 (WHEREUPON, Court's Exhibit Number 4, a Sentencing
18 Sheet, was marked and made a part of the record.)

19 MR. CAMPBELL: He has giving false information in
20 '04, another giving false information, hindering an officer,
21 criminal domestic violence first offence, malicious injury to
22 property, trespassing; '07 driving under suspension; '08 he
23 had a DUS third, and he also had a sex offender registry
24 violation conviction.

25 THE COURT: You've got this as a second. What was

1 the first drug offense?

2 MR. CAMPBELL: The first drug offense was possession
3 of crack cocaine in indictment number 99-GS-04-434.

4 THE COURT: When was that?

5 MR. CAMPBELL: This was April 30th, 1999.

6 THE COURT: Was he represented?

7 MR. CAMPBELL: Fletcher Johnson.

8 THE COURT: Fletcher Johnson?

9 MR. CAMPBELL: Yes, sir. It was in general
10 sessions. I've got a plea sheet.

11 THE COURT: I just want to make sure he was
12 represented so you could use it for enhancement.

13 MR. CAMPBELL: Right. He has some possession of
14 marijuana convictions, but I don't use those to enhance.

15 THE COURT: It would be hard to use those to
16 enhance.

17 MR. CAMPBELL: Yeah. I use them when we got an
18 attorney present.

19 THE COURT: Be glad to hear you on anything.
20 Anything you want to tell me on sentencing, from the State?

21 MR. CAMPBELL: No, sir. You've heard the case, you
22 heard the facts, you heard his record. He has three pending
23 cases currently with us. This is just one of the four cases
24 we had pending.

25 THE COURT: What cocaine, crack cocaine, or what?

1 MR. CAMPBELL: The other two, he has two counts of
2 assault with intent to kill where he's alleged to have shot a
3 shotgun into a car where actually his mother was in. He has a
4 criminal domestic violence second offense pending, who is
5 actually with his wife who is the owner of this car, and he
6 has a failure to stop for a blue light charge, too.

7 THE COURT: Okay. Be glad to hear you.

8 MR. TAVERNIER: Your Honor, it's kind of difficult
9 for me to say anything because I've had very limited contact.

10 THE COURT: Well, I want to give you that
11 opportunity if there's something you would like to say.

12 MR. TAVERNIER: I understand. I've just -- I've had
13 very limited contact so I really don't know what I could say
14 one way or the other.

15 THE COURT: Okay.

16 (WHEREUPON, the sentence was sealed, and the trial
17 of this case was concluded.)

18 Tuesday, April 7, 2009

19 THE COURT: This is State vs. Carius Lomax that we
20 tried it when?

21 MR. CAMPBELL: February 2nd.

22 THE COURT: February 2nd, 2009.

23 MR. CAMPBELL: Yes, sir.

24 THE COURT: A bench warrant was issued that day.
25 When did they pick him up?

1 MR. CAMPBELL: A couple weeks ago, I think. I don't
2 have the exact date.

3 THE COURT: The jury found Carius Kenta Lomax -- are
4 you Carius Kenta Lomax?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Raise your right hand.

7 CARIUS KENTA LOMAX, after having been duly
8 sworn, testified as follows:

9 THE COURT: The jury on February the 2nd, 2009 found
10 you guilty of possession of hydrocodone with intent to
11 distribute, found you guilty of trafficking in crack cocaine,
12 and a sealed sentence was given to you at that time since you
13 were tried in your absence. And on February the 2nd, '09 you
14 were sentenced to the State Department of Corrections for a
15 period of 20 years for the trafficking; and on indictment
16 1617, manufacturing, you were sentenced to the State
17 Department of Corrections for a period of 5 years, and those
18 will run consecutive.

19 THE DEFENDANT: Can I say something?

20 THE COURT: So that means you received 25 years.

21 Now, I'll be glad to hear any motions if you're
22 going to make any motions. I've read the sentence to him.

23 (WHEREUPON, an off-the-record conversation took
24 place between the defendant and his counsel, Mr. Tavernier.)

25 THE COURT: Intent to distribute is what it was,

1 okay?

2 THE DEFENDANT: Sir?

3 THE COURT: Intent to distribute. Now, go ahead.

4 THE DEFENDANT: Yes, sir. I mean, where did the
5 manufacturing come from, because I didn't have no
6 manufacturing charge?

7 THE COURT: It was intent to distribute the
8 hydrocodone, is what it was, okay? And then the trafficking.

9 (WHEREUPON, an off-the-record conversation took
10 place between the defendant and his counsel, Mr. Tavernier.)

11 THE COURT: Do you have any motions? He's been
12 sentenced. Do you have any motions?

13 MR. TAVERNIER: Your Honor, at this time I would
14 move for a reconsideration and a reduction in the sentence. I
15 would ask that you consider a sentence more in keeping with --
16 if he had appeared, Your Honor, and he didn't have to appear.
17 If he had appeared prob -- I know I would have considered and
18 requested the Court to consider something in the neighborhood
19 between a 10 to 12 year sentence and to run them both
20 concurrent on the charges. That, based on my experiences,
21 would be more in keeping with what he is charged and more in
22 keeping with typically what sentence would be.

23 I'm not going to say or discuss what we had been
24 offered because he was well aware of that and made the
25 decision not to show. And as the Court is aware he was

1 informed of the consequences, and all I can say is he made a
2 decision not come back that day but I don't want him to be --
3 and I hesitate to use the word punished or -- that's the wrong
4 word but I can't think of a better word, to suffer the
5 consequences for his failure to appear, Your Honor. He had
6 the right not to show.

7 THE COURT: Well, that has something to do with
8 sentencing, if the man won't show up for Court when he's
9 supposed to after he's had notice, you know, and he fails to
10 do it. So yes, that enters into the sentencing process,
11 whether you want to call it punishment or not I'm not going to
12 argue with you about it.

13 MR. TAVERNIER: I understand.

14 THE COURT: But I'll be glad to hear you as if --
15 sir, do you want to run your mouth or do you want to listen?

16 THE DEFENDANT: Okay. I'll listen first.

17 THE COURT: I'll be glad to listen to you at the
18 appropriate time.

19 THE DEFENDANT: All right.

20 THE COURT: Okay, but put your hand down, all right.

21 I've already sentenced you to 27 years. Your
22 attorney has made a motion to reduce that. So if you'll just
23 sit there, behave yourself I'll give you an opportunity to
24 speak, okay?

25 All right. Let me go to the State first and I'll be

1 glad to hear you as to reduction in sentence. I mean, I
2 thought all criminals sentenced is punished so I don't have
3 any problem with you using that word, okay.

4 What's his criminal record?

5 MR. CAMPBELL: Your Honor, the criminal record is
6 pretty extensive. He had a criminal sexual conduct first
7 degree with a minor. That was a juvenile. He had a prowling.
8 He has a possession of crack cocaine. He was convicted back
9 in '99, the malicious injury to personal property, criminal
10 domestic violence conviction, prowling. He has a marijuana
11 conviction, simple possession, false information conviction.
12 He has a sexual offender registry conviction, giving false
13 information, hindering an officer, another criminal domestic
14 violence, trespassing, DUS, DUS third or greater.

15 Your Honor, he has been in and out of the court
16 system. He currently, actually, besides this case, himself,
17 Ms. Huey has three different cases on him, assault and battery
18 with intent to kill, possession of a weapon, a failure to stop
19 for a blue light, a DUS, and another criminal domestic
20 violence second offense pending, or may have been dismissed as
21 a result of this trial here. He is definitely a danger and
22 threat to our community.

23 THE COURT: Have they been dismissed?

24 MS. HUEY: Yes, sir. They were dismissed as a
25 result of the conviction of this case.

1 THE COURT: Tell me how you found him.

2 MR. CAMPBELL: He was picked up on a bench warrant.

3 At the trial, after the trial was over with you issued a bench
4 warrant. He was picked up a couple weeks ago, I believe. I
5 don't know the exact date.

6 THE COURT: Did they find him here locally or was he
7 arrested on something else?

8 MR. CAMPBELL: He was found locally, is my
9 understanding. They were actively looking for him. And, you
10 no know, he's definitely a danger to our community. He was
11 here that morning for trial and then chose to leave once he
12 saw we were going forward with it. I think Ms. Huey --

13 THE COURT: Was he here for the jury drawing?

14 MR. CAMPBELL: No, sir. He came to our office, was
15 seen in the courthouse. I think Mr. Tavernier actually spoke
16 to him then he left when he realized we were actually going
17 forward with the case. This was one of four pending cases we
18 had against him at the time. And, you know, State's position
19 is --

20 THE COURT: Well, refresh my memory a little bit on
21 the trafficking. I mean, what did he have as far as the sale?

22 MR. CAMPBELL: He was stopped in a car and he got
23 out of the car, and it was, I believe 10 something grams of
24 crack was found in the little --- on the center console of a
25 hidden compartment, and there was like 19 pills of hydrocodone

1 was also found.

2 THE COURT: Did they find anything else, baggies or
3 scales?

4 MR. CAMPBELL: That was it right there.

5 THE COURT: Nothing else to indicate he was actually
6 selling the items?

7 MR. CAMPBELL: Well, he wasn't selling at the time,
8 Your Honor, right, but nothing --

9 THE COURT: I understand, but did you find any
10 scales or any packages or any --

11 MR. CAMPBELL: Not in the car. It was a car stop.

12 THE COURT: Okay. It was a car stop.

13 All right. I'll be glad to hear you.

14 MR. TAVERNIER: Thank you, Your Honor. And, Your
15 Honor, I've had a relationship with you in the court and I
16 don't mean to use the word punishment, I just -- you don't
17 punish somebody as a matter of the sentencing.

18 But the drugs were found in a compartment under a --
19 in the center console on the driver's side there was a
20 removable panel along the floorboard.

21 THE COURT: That's right. You were trying to show
22 that somebody had to remove it, and was there a passenger in
23 the car?

24 MR. TAVERNIER: There was a passenger in the
25 vehicle.

1 THE COURT: And I think your argument at trial was
2 that he had maybe removed the panel.

3 MR. TAVERNIER: Correct.

4 THE COURT: And he was arguing there was no way the
5 panel could have been moved on the driver's side while the car
6 was in motion; is that correct?

7 MR. CAMPBELL: That's correct, and the fact that his
8 car was his wife's. I mean, it was registered in her name.

9 THE COURT: I was trying to remember the facts of
10 the case, is what I was trying to do. Okay.

11 MR. CAMPBELL: He was the driver and the car was
12 registered in his wife's name.

13 THE COURT: Right. Okay. I'm with you. They were
14 hiding behind a panel by the gas pedal in the car.

15 MR. TAVERNIER: Correct. And there was a
16 considerable period of time, from the officer's testimony,
17 between when Mr. Lomax was removed from the vehicle and then
18 when they subsequently did the search and he was --

19 THE COURT: Was there a dog involved?

20 MR. TAVERNIER: Sir?

21 THE COURT: Was there a dog involved in this?

22 MR. CAMPBELL: No, sir. A search incident to
23 arrest.

24 MR. TAVERNIER: No. They had taken Mr. Lomax out of
25 the car and he was placed -- he was put on the ground, and

1 there was a single officer for a considerable period of time
2 and his attention was diverted from the vehicle. And my
3 argument was that there was a passenger in the vehicle who has
4 a substantial amount of time in which he could have replaced
5 that panel because it wasn't totally in place upon the search,
6 and he could have placed the drugs in there while the
7 officer's attention was diverted handling Mr. Lomax, and
8 obviously the jury didn't buy that argument.

9 But other than that there was no other indication in
10 the vehicle, as you've already mentioned, no scales, baggies
11 or other paraphernalia to indicate that he was active in the
12 sale. It was only the weight that was driven. It was just
13 barely over the threshold for the trafficking.

14 And in that regard, Your Honor, and I understand
15 based on his record but we would request a reduction in
16 sentence to, I would say somewhere between -- and I'm going to
17 open it up for the Court, somewhere between the 10 and 15 year
18 mark because he's going to serve 85 percent of whatever he
19 does get, and ask that you run -- and I'm going to beg your
20 mercies a little bit more to run them concurrent rather than
21 consecutive so he gets the benefit of that rather than having
22 him max out both sentences.

23 THE COURT: Okay. Thank you very much.

24 All right, Mr. Lomax, I'll be glad to hear anything
25 you would like to tell me.

1 THE DEFENDANT: I just -- I mean, I don't have
2 anything to say.

3 THE COURT: Pardon?

4 THE DEFENDANT: I'll just keep my mouth shut.

5 THE COURT: Well, let me say this to you. This is
6 the only opportunity you're going to have to talk. Now, you
7 had your hand up and I told you to be quite and put your hand
8 down. So I'll be glad to hear anything you want to tell me.

9 THE DEFENDANT: Okay. Well, I came --

10 THE COURT: I'm not asking you to be quite. Now
11 I'm asking you to talk.

12 THE DEFENDANT: Well, I came to court that morning
13 and I had talked to Mr. Tavernier, and I told him that the
14 passenger was going to admit to the drugs being his and he
15 told me that I can leave to go find him. So I left to go find
16 him. It took me a period of time looking for him, trying to
17 find him. And when me and my wife got back to court all this
18 was already taken care of. So they have already did it. And
19 I was just going to find the person who was the passenger who
20 was in the passenger seat of the car, and he said he was going
21 to admit to the drugs being his.

22 THE COURT: Well, did you find the passenger?

23 THE DEFENDANT: I never did get to find him that
24 day.

25 THE COURT: You never found him?

1 THE DEFENDANT: But I done found him now.

2 THE COURT: Oh, you found him now?

3 THE DEFENDANT: Yeah.

4 THE COURT: Did you bring him into your attorney's
5 office and he give a statement to the attorney?

6 THE DEFENDANT: But I didn't know I was going to
7 court or nothing today.

8 THE COURT: Did you bring him into your attorney's
9 office and give statement?

10 THE DEFENDANT: No. My wife is supposed to be
11 picking him up to do that.

12 THE COURT: Oh, okay.

13 THE DEFENDANT: Yeah.

14 THE COURT: All right. Anything else you want to
15 tell me?

16 THE DEFENDANT: No, sir.

17 MR. TAVERNIER: Your Honor, for the record, I do not
18 want to misinform or mislead the Court in any way. Mr. Lomax
19 is correct. I told him to go find his witness, but I also
20 told him we were going to be picking a jury --

21 THE COURT: To come back?

22 MR. TAVERNIER: He needed to be back.

23 THE COURT: I understand.

24 MR. TAVERNIER: And I don't want the Court to be
25 misled.

1 THE COURT: I understand. All right.

2 Mr. Tavernier, as far as the sentence is concerned, what I
3 will do is I'll run the sentences concurrent. I'll change it
4 from consecutive to concurrent.

5 Cathy, do I have to do an amended sentencing sheet
6 or what do I have to do, scratch on this?

7 THE CLERK OF COURT: I believe that would be best,
8 Your Honor, if you don't mind.

9 THE COURT: Well, just change the 20 on the
10 trafficking and 5 on the other and run them concurrent instead
11 of consecutive, and I will modify it to that extent.

12 Anything else?

13 MR. CAMPBELL: No, Your Honor.

14 THE COURT: All right. I've changed the sentence to
15 concurrent, which means it runs together, Mr. Lomax. I wish
16 you the best of luck.

17 THE DEFENDANT: I appreciate it.

18 THE COURT: Thank you very much.

19 MR. TAVERNIER: Your Honor, can you inform him he
20 has a right to appeal within 10 days.

21 THE COURT: Yeah.

22 MR. TAVERNIER: I want to make sure that's on the
23 record, okay.

24 THE DEFENDANT: So if he come into your office and
25 write that statement would that help?

1 MR. TAVERNIER: Within 10 days we have the right to
2 ask for a motion to reconsider.

3 THE DEFENDANT: Okay.

4 MR. TAVERNIER: But that needs to be done very
5 quickly.

6 THE DEFENDANT: So I have to do this?

7 MR. TAVERNIER: You'll have to get your wife to get
8 that witness if he's available.

9 THE DEFENDANT: Yeah.

10 MR. TAVERNIER: Then we'll have to file a motion to
11 determine whether that's newly discovered evidence and that
12 entitles you to a new trial, all right? Those are issues that
13 we'll have to discuss later.

14 THE DEFENDANT: Okay.

15 THE COURT: You understand what he's telling you?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Okay. Thank you very much.

18 (WHEREUPON, the hearing was concluded.)

19

20

21

22

23

24

25

C E R T I F I C A T E

I, Sharon L. Vizer-Hanks, Official Court Reporter
for the 10th 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
the evidence introduced in the hearing of the captioned case
in Circuit Court on the 2nd day of February 2009 and the 7th
day of April 2009.

I do further certify that I am neither of kin,
counsel nor have an interest to any party hereto.

September 14, 2009

A handwritten signature in cursive script, reading "Sharon L. Vizer-Hanks".

SHARON L. VIZER-HANKS

CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA)

County of Anderson)Carivs Ihenia Lomas # 262668)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS)

A TRUE COPY 125

MAR - 5 2012

R. L. H. H. H.
CLERK OF COURT

APPLICATION FOR

POST-CONVICTION RELIEF

2012 - CP - 04 - 00650

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 Court of General Sessions, Anderson County, SC
3. Name(s) of co-defendant(s) (if any) Bobby Green
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2008 GS 04 1617 -> PSID Carib(b) 2008 GS 04 1615 -> Trafficking crackCOMMON PLEAS AND
GENERAL SESSIONS

2012 MAR - 5 A 10:56

FILED - CLERK'S OFFICE
ANDERSON SC

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) April 7, 2009 5 ~~20~~ years concurrent
- (b) April 7, 2009 20 years
- (c) _____
6. Check whether a finding of guilty was made:
- (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. Appeal was denied
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. Filed June 14, 2011
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Unpublished Opinion No. 2011-UP-242
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) My attorney failed to subpoena the witness, Told me to find him, tried in absence
 (b) My attorney was not prepared, he did not even realize he was defending me the day of
 (c) Judge failed to grant a continuance which did not allow me a fair trial.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) I was held in absence after my attorney told me to leave the courthouse to find
 (b) My attorney was not even aware of who he was representing
 (c) Even after hearing how unprepared my attorney and I was, judge failed to grant

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? _____
 (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. _____
 ii. _____
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. _____
 ii. _____
 iii. _____
 iv. _____

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

I had an attorney appeal my case to the SC court of Appeals, but do not know the specific grounds for appeal.

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) _____
 (b) _____
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Hurt Tavernier
 (b) your trial, if any? Hurt Tavernier
 (c) your sentencing? Hurt Tavernier
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Wheeler ~~Hutchins~~ Huggins
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
Hunter C. Blain, Sarah Gans Draddy.

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. Hurt Tavernier, 110 E. Benson St. Anderson, SC 29624
 ii. Wheeler Huggins
 iii. Hunter C. Blain and Sarah Gans Draddy - 2315 N. Main St., Ste 117, Anderson, SC 29621
 (b) the proceedings at which each such attorney represented you:
 i. Public Defender who represented me at trial
 ii. Appeal to the SC Court of Appeals
 iii. PCR application and PCR

19. State clearly the relief you seek in filing this application:

A New Trial

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

County of Anderson)

VERIFICATION

I, Carius Lomax, 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.

Carius Lomax

SWORN to and subscribed before me this 21st day of February, 2012.

[Signature] (L.S.)
Notary Public

My Commission Expires: 3-31-2021

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ANDERSON SC
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COMMON PLEAS AND
GENERAL SESSIONS

A TRUE COPY

MAR -5 2012

Revised 3/2003

[Signature]
CLERK OF COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2012-CP-04-0650
COUNTY OF ANDERSON	)	
	)	
Carius Kenton Lomax,	)	
S.C.D.C. No. 262660,	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed March 05, 2012, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Anderson County Clerk of Court's orders of commitment. The Applicant was indicted at the July 2008 term of the Anderson County Grand Jury for trafficking in ice, crack, or crack less than 28 grams (2008-GS-04-1615) and possession with intent to distribute of a schedule III narcotic (2008-GS-04-1617). Kurt Tavernier, Esquire represented the Applicant.

The State took the case to trial, and on February 2, 2009 the Applicant was found guilty. The Honorable J.C. Nicholson, Jr. sentenced the Applicant to thirty (20) years imprisonment for trafficking and twenty (5) years imprisonment for PWID of a schedule III narcotic, sentences to run concurrently.

A notice of appeal was filed at the South Carolina Court of Appeals. M. Celia Robinson, Esquire perfected the appeal. The Court of Appeals affirmed the Applicant's conviction and sentence. State v. Carius Lomax, Op. No. 2011-UP-292 (S.C. Ct. App. filed June 14, 2011).

Attached herewith and incorporated herein by reference are the records of the Anderson County Clerk of Court regarding the subject convictions and the Applicant's records from the South Carolina Department of Corrections. The appellate records and trial transcript will be forwarded upon receipt.

II.

In his application for post-conviction relief the Applicant alleges he is being held in custody unlawfully for the following reason:

1. Ineffective assistance of counsel.
 - a. "My attorney failed to subpoena key witness. Told me to find him, tried in absentia while my attorney was not prepared, he did not even realize he was defending me... (unintelligible)."
 - b. "Judge failed to grant a continuance which did not allow me a fair trial."
 - c. "I was tried in absentia after my attorney told me to leave the courthouse... (unintelligible)."
 - d. "My attorney was not even aware of who he was representing."
 - e. "Even after hearing how unprepared my attorney and I was, judge failed to grant a continuance."

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a criminal defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441,

442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Respondent denies each allegation not expressly admitted, qualified or explained.

V.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

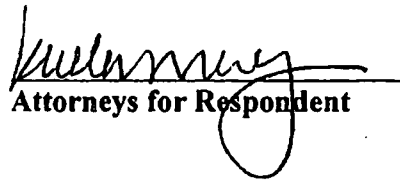
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

KAELOM MAY
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:



Attorneys for Respondent

8/2, 2012

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	)	
	)	
	)	2012-CP-04-0650
	)	
CARIUS KENTON LOMAX, #262660	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Hunter C. Blouin, Esquire
2315 N. Main Street, Suite 117
Anderson, SC 29621

DATED this 3rd day of August, 2012


 Angela Bennett, Legal Assistant
 For Respondent

State of South Carolina

County of Anderson

In the Court of Common Pleas

Carius Lomax,

Applicant,

-VS-

State of South Carolina,

Respondent.

2012-CP-04-650

February 27, 2013

Transcript of Record

BEFORE:

The Honorable J. Cordell Maddox, Judge

APPEARANCES:

Sarah G. Drawdy, Esquire
Attorney for the Applicant.

John W. Whitmire, Esquire
Attorney for the State

Renee H. Tollison
Circuit Court Reporter

INDEX

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Carius Lomax				
Drawdy	5		30	
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Whitmire	32		53	
Drawdy		43		
Kendra Gurley				
Whitmire	54			
Drawdy		56		

<< -- >>

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Opening Statements	3
Certificate of Reporter	60

EXHIBITS

No	DESCRIPTION	ID	EV
	<i>No exhibits were presented during the hearing</i>		

1 (WHEREUPON, court convened with all parties present
2 and the following proceedings were had commencing at
3 approximately 10:41 a.m.)

4 MR. WHITMIRE: Your Honor, one procedural
5 matter before I call the case.

6 THE COURT: Okay.

7 MR. WHITMIRE: It reads, "sentenced to thirty
8 years imprisonment in trafficking and twenty years in
9 prison for PWID." It should read, "twenty" and then,
10 "five." Just a typo.

11 THE COURT: Okay.

12 Any objection to amending the return?

13 MS. DRAWDY: No, none, Your Honor. And I
14 believe I've spoken with the State about -- it's really a
15 clarification or amendment on my client's application.

16 THE COURT: Sure.

17 MS. DRAWDY: He argues that Mr. Tavernier was
18 not prepared. One of the correlaries out of there is
19 discovery. It's our position that discovery was not
20 filed with the State in this case.

21 THE COURT: Okay.

22 Any objection to that issue?

23 MR. WHITMIRE: Oh, no.

24 THE COURT: Okay. All right. We can start.

25 MR. WHITMIRE: May it please the Court. The

1 State calls Carius Kenton Lomax v. State of South
2 Carolina, 2012-CP-04-650. Mr. Lomax is incarcerated in
3 the South Carolina Department of Corrections pursuant to
4 an order from the Anderson County Clerk of Court. Mr.
5 Lomax was indicted at the July 2008 term of the Anderson
6 County Grand Jury for trafficking crack cocaine and
7 possession with intent to distribute a schedule III
8 narcotic. Mr. Tavernier represented Mr. Lomax at this
9 trial in absentia.

10 The State called its case on February 2nd, 2009.
11 Applicant was found guilty. The Honorable Judge
12 Nicholson sentenced the Applicant to twenty years
13 imprisonment for trafficking, five years imprisonment for
14 PWID a schedule III narcotic, sentences to run
15 concurrently.

16 Mr. Lomax filed his appeal, South Carolina Court of
17 Appeals. Mr. Robinson, as required, perfected this
18 appeal. The South Carolina Court of Appeals affirmed
19 this conviction on June 14th, 2011. Mr. Lomax filed his
20 application for post-conviction relief on March 5th,
21 2012. Respondent filed its return August 8th -- August
22 2nd, 2012.

23 Applicant is present and is represented by Ms. Sarah
24 Drawdy. At this time I turn matters over to the
25 Applicant.

Carius Lomax - Direct Examination by Ms. Drawdy

5

1 THE COURT: Okay.

2 Yes, ma'am?

3 MS. DRAWDY: Thank you, Your Honor. May it
4 please the Court. I call Carius Lomax.

5 THE COURT: All right.

6 Mr. Lomax, come around and be sworn, please.

7 **CARIUS LOMAX,**

8 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

9 DIRECT EXAMINATION

10 BY MS. DRAWDY:

11 Q. Mr. Lomax ---

12 THE COURT: Hold on a second. Let me pull this
13 closer to you here. There you go.

14 Q. And just make sure you speak up because she's
15 recording everything.

16 Mr. Lomax, when you were arrested on these charges
17 originally, did you apply to the Public Defender's
18 Office?

19 A. Yeah. They came to the County, and I had talked to
20 Kendra.

21 Q. But you actually applied for ---

22 A. For the public defender.

23 Q. --- a public defender?

24 A. Yes, ma'am.

25 Q. Okay. And you were incarcerated on these charges at

Carius Lomax - Direct Examination by Ms. Drawdy

6

1 the Anderson County Detention Center for how long before
2 you were able to bond out?

3 A. Probably about two months.

4 Q. All right. And over the course of those two months,
5 did anyone come from the Public Defender's Office to meet
6 with you?

7 A. Yes. Kendra.

8 Q. And by Kendra, you mean Kendra Gurley over here?

9 A. Kendra Gurley.

10 Q. All right. And did you know -- is Kendra Gurley an
11 attorney?

12 A. No.

13 Q. Okay.

14 A. I thought she was an investigator.

15 Q. All right. An investigator with the PD's Office.
16 Did you know who the attorney was who had been appointed
17 to your case?

18 A. Kurt Tavernier.

19 Q. All right. Did Mr. Tavernier come out to the jail
20 to meet with you?

21 A. No, ma'am.

22 Q. Okay. At any time over the course of your
23 representation by the PD's Office, did you meet with Mr.
24 Tavernier at the PD's Office?

25 A. No, ma'am. It was in the court.

- 1 Q. So you did meet with him in court?
- 2 A. In court.
- 3 Q. Okay. Can you tell the Court about those meetings
- 4 with Mr. Tavernier in court?
- 5 A. Yeah. He was asking -- he was basically trying to
- 6 get me to take a ten-year plea.
- 7 Q. Well, first let me ask you this. How many times did
- 8 you meet with Mr. Tavernier?
- 9 A. A total of twice.
- 10 Q. Twice?
- 11 A. Twice, yeah.
- 12 Q. Was that here in this courtroom?
- 13 A. It was in this courtroom.
- 14 Q. Why were you in this courtroom?
- 15 A. He was trying to get me to take a ten-year plea.
- 16 Q. What brought you to court?
- 17 A. Oh.
- 18 Q. Did Mr. Tavernier call you, or ---
- 19 A. Yeah, the card. The card came in the mail.
- 20 Q. A card came in the mail?
- 21 A. Yeah.
- 22 Q. So was it a roll call?
- 23 A. Roll call.
- 24 Q. Okay. So you came here and you met Mr. Tavernier.
- 25 And during those meetings with Mr. Tavernier, what did

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1 you discuss?

2 A. We was talking about getting me to take the ten
3 years, and I was telling him that I would have to talk to
4 my family because that was something big -- that was
5 something hard to swallow before what I was charged with.

6 Q. Now, those two times you met with Mr. Tavernier here
7 in this room, did you review discovery with him?

8 A. Nothing.

9 Q. Did you go over possible defenses with him?

10 A. Nothing.

11 Q. Did you go over your constitutional rights if you
12 decided to take a plea or not?

13 A. Nothing. He was basically -- he was basically on
14 the Solicitor's side. He was trying to get me to take --
15 he was basically going for what they was saying. And I
16 said, "Well, you're not playing defense." I mean,
17 "You're not playing defense; you're playing offense.
18 It's like you're not even for me." You know what I'm
19 saying? "Because you ain't ..." He wasn't telling me
20 nothing.

21 Q. Were you able to discuss possible witnesses with
22 him?

23 A. Yeah. I told him that I had a witness by the of
24 Bobby Geer who I was using. But when I came to court, he
25 told me that he forgot to subpoena Bobby Geer.

- 1 Q. All right. Well, let's hang on. Those two times
2 you met with Mr. Kurt Tavernier in this room, were you
3 able to discuss witnesses with him on those occasions?
4 A. Yeah, we talked.
- 5 Q. Okay. And is that this Mr. Bobby Geer referenced?
6 A. Yeah.
- 7 Q. And Bobby Geer -- who was Bobby Geer?
8 A. My co-defendant.
- 9 Q. Okay. And this was a car stop; correct?
10 A. Yes, ma'am.
- 11 Q. And he was also in the car?
12 A. Yes, ma'am.
- 13 Q. So you left those two times. And then did you come
14 back again on or about February 2nd, 2009, to court?
15 A. Yeah, for trial because after the first meeting --
16 after the first and the second one -- the first one was
17 for a plea of ten. The second one was telling him I
18 wasn't taking that. So Christina -- Christie -- what's
19 her name? Christie Adams? Chrissy Adams?
20 Q. Chrissy Adams.
- 21 A. Yeah. She told me that she was going to go ahead
22 and send -- "Okay, well, we're going to trial then." And
23 I was like, "All right." You know what I'm saying?
- 24 Q. Well, let me ask you this. Those two times you met
25 with Mr. Tavernier here, were you excused?

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1 A. Yes, ma'am.

2 Q. Free to leave?

3 A. (No verbal response)

4 Q. So this third time, February 2nd, on or about, I
5 think it was, 2009, you were talking with Mr. Tavernier;
6 correct?

7 A. Yes, ma'am.

8 Q. Tell us about that. You showed up to court into the
9 building.

10 A. Yes.

11 Q. What happened when you got into the building?

12 A. Okay. Well, first of all, he didn't even know who I
13 was. He was like -- he was telling -- I guess it was
14 some other guy with him. He was saying that he don't
15 even know who he was representing. And my wife was like,
16 "Okay." She was like, "How can he say that he don't know
17 you when we just came -- we know him?" You know what I'm
18 saying? "So you might want to go up there and talk to
19 him." So I walked up there. I say, "Kurt." I say, "I'm
20 Carius Lomax." I say, "We just got finished talking
21 about the ten-year plea, and I told you that I wasn't
22 going to take it." So he say -- he call me to the
23 conference room which was in the back.

24 Q. All right. Let's talk about this. So when you
25 turned down a ten-year plea offer, did you and Mr.

1 Tavernier go somewhere alone?

2 A. No. He was just -- the ten-year plea was right in
3 here.

4 Q. All right. And then what happened?

5 A. And he was -- he was just like -- he was basically
6 -- Christina -- Christie was talking -- Christie Adams
7 was talking to him, and he was basically like, "Well,
8 Christie, he's not taking the ten." You know what I'm
9 saying? He was basically like -- basically, he's telling
10 me, "Go ahead and take the ten and get 'er done." And I
11 was like, "Ten and get 'er done?" I'm like, "Man, you --
12 we not going over nothing. We just ..."

13 Q. So after that discussion, what happened?

14 A. You know what I'm saying? When I didn't take the
15 ten-year plea, he was just like, "Well ..." That's when
16 she say we was going to trial. So they excused me from
17 the courtroom, and I went home.

18 Q. How did that take place? You're in the courtroom.
19 What, if anything, did you and Mr. Tavernier discuss?

20 A. Yeah, we -- when we went on the like the second
21 visit or third visit, he -- we went to the conference
22 room. And I say, "Where's the witness I was telling you
23 about?" And he was like, "Oh." He was like, "I totally
24 forgot." You know what I'm saying? And I was like,
25 "Well, you know I need that witness." You know what I'm

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1 saying? And he was like, "Well ..." Like, "Do you think
2 you can find him?"

3 Q. Now, is this the day of the trial?

4 A. Yeah, day of trial.

5 Q. "Do you think you can find him?" And what did you
6 say?

7 A. And I say, "You know, I know a couple spots where he
8 might be at. I can go check." You know what I'm saying?
9 And he was like, "Well, you can take care of this and
10 I'll take care of that." You know what I'm saying? And
11 then I guess -- see, I'm not knowing what's going on
12 because when he -- when I left, I did -- I went and I
13 called my aunt. As a matter of fact, I went to my aunt's
14 house, and I called my home boy. And I was like, "Well,
15 I'm waiting on ..." I say, "They gave me some more time.
16 I got to wait on another trial card to come in the mail."
17 So I had -- I really went home and went to sleep because
18 I was tired. I stayed up all night. And I was trying to
19 spend as much time as I can with my wife. And I really
20 -- I went home and went to sleep.

21 Q. So who told you you could leave the courthouse that
22 day?

23 A. Kurt.

24 Q. Okay. And did Kurt Tavernier tell you, "If you
25 don't show up, you will be tried in your absence"?

1 A. I mean, when he told me to go find the witness, I
2 left right after then, and I came in here and I got my
3 wife. And I was like, "Come on, let's go." And she was
4 like, "You ready?" And I was like, "Yeah." So we went
5 out, went there, got on the elevator, went downstairs and
6 I left. And -- yeah. And later on, that's when I was
7 finding out that -- I didn't know what took place in my
8 trial because I was tried in my absence.

9 Q. Right. You left. When you left, did you have any
10 further contact with Mr. Tavernier?

11 A. None.

12 Q. Did Mr. Tavernier tell you you needed to be back at
13 two o'clock?

14 A. I didn't hear him say it.

15 Q. Okay. When you left that day and you went home, did
16 you -- what did you do?

17 A. I just went home and went to sleep. I mean, because
18 I was tired because I'm under the impression that I'm
19 just going to be waiting on another trial card because
20 based on the fact that we're not ready. He's saying that
21 we wasn't ready and that the Solicitor wasn't ready.
22 They wasn't ready to proceed.

23 Q. Did Mr. Tavernier tell you he was not ready with
24 your defense?

25 A. Yeah. He say we wasn't ready to go, you know. I'm

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1 not -- he's telling me he's not prepared and they're not
2 prepared.

3 Q. Now, let me ask you at any time did you leave town
4 or ---

5 A. No.

6 Q. So you were always in town?

7 A. I was in town.

8 Q. How did you find out you'd been tried in your
9 absence?

10 A. My bondsman contacted me.

11 Q. And your bondsman contacted you, you learned from
12 him ---

13 A. Her.

14 Q. --- her you were tried in your absence. Did you
15 leave town after that?

16 A. Nuh-uh (negative).

17 Q. And so you were -- were you picked up by law
18 enforcement?

19 A. Law enforcement.

20 Q. And then subsequently sentenced?

21 A. Yeah.

22 Q. So every time you got a card for roll call, is it
23 your testimony you appeared?

24 A. I appeared, yeah.

25 Q. When you got this card that said on the bond form,

1 "trial," did you appear that day?

2 A. I appeared.

3 Q. Did you -- whenever you left the roll call
4 appearances and you left that day, were you excused by
5 someone?

6 A. I was excused.

7 Q. Okay. And tell the Court, what was your
8 understanding when Mr. Tavernier told you you could go?

9 A. Find a witness, have the witness back in court on
10 the next trial appearance, and we come up with a defense
11 because we wasn't prepared. That's -- I mean, that's
12 what he said. We wasn't prepared, and they wasn't
13 prepared.

14 Q. And let's just briefly talk about that preparedness.
15 Had Mr. Tavernier ever sat down and gone over with you
16 some documents in his file?

17 A. He didn't go over nothing. See, he had the paper in
18 front of him. And he told me -- he said, "We got a ..."
19 He say, "It was a gun call. That's all they got." You
20 know what I'm saying? And then he -- that's when we
21 started talking about this witness. And it went from
22 that to being excused, me leaving.

23 The bailiff, the guy who be at the door right there,
24 he told me -- he wasn't even going to let me in the room
25 because he told me I wasn't even on the docket to go to

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1 trial that day. You know what I'm saying? So I took it
2 upon myself to go to the Solicitor's Office and double
3 check because I wasn't fixing to leave and just get
4 anything happen to me. But ---

5 Q. So your testimony is you showed up that day?

6 A. Yeah.

7 Q. The bailiff told you you weren't on the docket. You
8 double checked with the Solicitor's Office.

9 A. Double checked with the Solicitor's Office.

10 Q. Did they tell you to go upstairs?

11 A. Yeah. She told me that I -- this is what she said.
12 She said that -- I don't even remember her name. And I
13 hate that I didn't even ask her her name because I was
14 trying to find out all that. But she told me -- she said
15 that I was not on the docket for trial. I was supposed
16 to appear in court for roll call next month for failure
17 to stop for a blue light. She say she don't know why I'm
18 here, why I got the card or none of that.

19 Q. But nevertheless, you went upstairs?

20 A. And that's when I went back -- she say -- she told
21 me to wait on Christina. She say, "Well, go upstairs and
22 wait on Christina to come and y'all just," you know, "you
23 tell her what you told me." You know what I'm saying?
24 And I was telling her that the bailiff -- it was a guy
25 with a burgundy suit on at the door.

- 1 Q. But you were here?
- 2 A. I was here, yeah.
- 3 Q. And the only reason you left was because Mr.
- 4 Tavernier ---
- 5 A. He excused me. Yeah, he excused me.
- 6 Q. Now, to your knowledge, did Mr. Tavernier have an
- 7 investigator with him that day?
- 8 A. He -- I mean, I don't recall seeing Kendra, I mean,
- 9 because she look different now. You know what I'm
- 10 saying? Like she was -- you know, I ain't -- it ain't
- 11 nothing like I'm mad at her or nothing like that. It was
- 12 Kurt Tavernier and another guy. That's who it -- that's
- 13 who he was with.
- 14 Q. Okay. Now, I need to ask -- you said there was a
- 15 witness that Mr. Tavernier failed to subpoena?
- 16 A. Uh-huh (affirmative).
- 17 Q. Do you believe that this witness, had he been at
- 18 trial, do you believe it would have or could have
- 19 resulted in a different outcome in your case?
- 20 A. Yes, ma'am.
- 21 Q. To your knowledge, did Mr. Tavernier tell you he'd
- 22 ever talked to this witness?
- 23 A. He ain't never -- he never did talk to them. But
- 24 see, I'm thinking -- I'm thinking like if Kurt would have
- 25 just waited for the judge to come in and went through it

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1 properly asking him for the continuance and everything,
2 it might would have been a whole different outcome
3 because the judge would have made a decision on, "We not
4 going to continue this; we're going to go ahead and try
5 it today," or, "We're going to go ahead and vacate this
6 due to the lack of evidence," or things like that. But
7 he basically took it upon his self to relieve me knowing
8 certain things that he needs to go through as a lawyer
9 himself, waiting to see what the judge have to say about
10 this. By him telling me to leave and asking for a
11 continuance and then the judge denying it, he put me in
12 jeopardy.

13 Q. And let me ask you, did you have a phone, your own
14 phone, that day ---

15 A. No. My wife had a phone.

16 Q. --- that ---

17 A. Yeah, my wife had a phone.

18 Q. She had a -- did you ever receive a phone call from
19 Mr. Tavernier saying you needed to get back here for
20 trial?

21 A. No, ma'am, because she would have told me because we
22 was together. She had the phone on. He could have had
23 -- he could have had -- now, he could have had a
24 different number or whatever, but I'm thinking that Kurt
25 had the right number. But he didn't call that number.

1 Q. Did Mr. Tavernier have your address?

2 A. Yeah, he had my grandfather's address, you know.

3 Q. So could he have sent an investigator to let you
4 know you were up for trial?

5 A. Yeah. See, when I got the trial card, I knew, you
6 know. So I wasn't planning on leaving. I came. I was
7 actually in the courtroom, you know. So he -- like I
8 just feel like Kurt should have waited for that judge to
9 come. Because if he had of waited for the judge to come
10 relieve me, the judge could have made a decision on not
11 granting a continuance, or we're going to go ahead and go
12 through with this or going over the evidence and
13 everything and seeing that they lacked evidence so he
14 could have vacated. Anything could have happened that
15 day than me getting sentenced in my absence, being tried
16 and convicted and given twenty-seven years. Yeah.

17 Q. Do you know if the PD's Office ever requested
18 discovery on your behalf?

19 A. He -- I ain't never seen no discovery.

20 Q. Okay. Now, you filed this application, and you said
21 in your application that Mr. Tavernier failed to subpoena
22 the witness. We discussed that. That Mr. Tavernier was
23 not prepared. We discussed that. And the judge failed
24 to grant a continuance. Is there anything else? And we
25 discussed the discovery issue. Is there anything else

Carius Lomax - Cross-examination by Mr. Whitmire

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1 that we have not -- that you'd like to mention?

2 A. I think -- because everything -- yeah. No, ma'am.

3 Q. Okay. Thank you.

4 A. All right.

5 Q. I have no more questions. Please answer any

6 questions the State may have.

7 THE COURT: All right. Yes, sir?

8 CROSS-EXAMINATION

9 BY MR. WHITMIRE:

10 Q. Good morning, Mr. Lomax.

11 A. Good morning.

12 Q. Do you recall when Mr. Tavernier was appointed on

13 your case?

14 A. I don't recall the exact date because I was

15 incarcerated.

16 Q. And did you provide your contact information to the

17 PD's Office?

18 A. Yes, ma'am. I mean, yes, sir. I'm sorry about

19 that.

20 Q. And you recall the charge in your case?

21 A. Yeah. Trafficking in crack cocaine, more than ten,

22 less than twenty-eight, and possession of Lortabs.

23 Q. And I heard you testify that Mr. Tavernier never met

24 with you prior or tried to contact you?

25 A. Yeah, me and Kurt was meeting in this court. We was

1 meeting in court. Like they'd send me a card to come,
2 and I come in and basically plea arrangements or whatever
3 you call it.

4 Q. But you knew the trafficking charge carried some
5 potential serious fines?

6 A. Yeah. He told me, yeah. Yeah.

7 Q. You knew you had a conviction for a P.W.I.D. before?

8 A. Yeah.

9 Q. Okay. So between May 2008 and February 2009, did
10 you ever get worried that your attorney had never spoken
11 with you according to what you're saying today?

12 A. I mean, as soon as I got out on the bond, when I had
13 got out on bond, the cards was coming in, you know, to
14 come up here. And when I came up here, that's when we
15 would discuss and everything. Basically he already had
16 the ten already out without basically going over nothing
17 with me. He was just, you know, basically on the
18 foundation of take this -- he was very confident that I
19 was going to take the ten.

20 Q. Did you ever contact the Public Defender's Office
21 with these concerns?

22 A. No, sir.

23 Q. For that whole year you had between your arrest and
24 trial?

25 A. No, sir.

Carius Lomax - Cross-examination by Mr. Whitmire

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1 Q. You know where the Public Defender's Office is
2 located?

3 A. Yes, sir.

4 MR. WHITMIRE: Brief indulgence, Your Honor.

5 THE COURT: Yes, sir.

6 Q. Do you recall the bail processing form you filled
7 out?

8 A. Yes, sir. It was for a hundred thousand.

9 MR. WHITMIRE: Your Honor, I'm referring to
10 page 135 of the transcript.

11 Q. Do you recall the conditions of that bond you
12 signed?

13 A. It was surety.

14 Q. And didn't that bond require you to appear at the
15 June 13th, 2009, term of General Sessions?

16 A. Yeah.

17 Q. And right under that, didn't that bond require you
18 to come to any other term of court until ---

19 A. Yeah, I mean, the judge ---

20 Q. --- your case was disposed of?

21 A. Yeah. Ken Mattison, he told me that, you know --

22 going through the conditions, telling me I had to be

23 there. So when I got the cards, I made sure I showed up

24 because it was very important I showed up for trial.

25 Q. And do you recall it listing an address and contact

- 1 information on that bond form?
- 2 A. Yeah. [REDACTED] East Orr.
- 3 Q. You listed [REDACTED] Salem Street.
- 4 A. [REDACTED] Salem Street?
- 5 Q. Did you live at that residence that entire year
- 6 before you were tried?
- 7 A. Yeah. [REDACTED] Salem Street is where my grandmother once
- 8 lived, but that must have been an address that was
- 9 already on file.
- 10 Q. But didn't the bond require you to promptly notify
- 11 the court if you were to change addresses?
- 12 A. I mean ...
- 13 Q. Do you remember?
- 14 A. I'm not really -- I don't specialize in knowing
- 15 about like -- I forgot, I mean, whatever because I don't
- 16 know. That's not something that I just study on a
- 17 regular ---
- 18 Q. That's okay.
- 19 A. Okay.
- 20 Q. No big deal. And the last question about the bond.
- 21 Do you recall that bond form warning you that you would
- 22 be tried in your absence if you did not show up at trial?
- 23 A. Yes, sir.
- 24 Q. So you were on notice that if the Solicitor called
- 25 the case, you would be tried in your absence?

Carius Lomax - Cross-examination by Mr. Whitmire

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1 A. Yeah.

2 Q. Thank you.

3 MR. WHITMIRE: Brief indulgence, Your Honor.

4 THE COURT: Sure.

5 Q. Going back to the weeks or months leading up to
6 trial, you made no contact with the Public Defender's
7 Office concerning Mr. Tavernier not speaking with you?

8 A. Uh-huh (affirmative).

9 Q. But you received notice that you were on the trial
10 docket a few weeks before your February 22nd -- February
11 2nd, 2009, trial; is that correct?

12 A. Yeah.

13 Q. Did you meet with Mr. Tavernier the morning of the
14 trial?

15 A. Yeah, we met.

16 Q. And why didn't you return to court that afternoon to
17 go before the judge?

18 A. Because when -- like I say, when Kurt first came in,
19 he didn't even know who I was. He was basically saying
20 he didn't even know who he was representing. And prior
21 to that, we already had done discussed plea arrangements,
22 and I talked to Christina because she was telling me that
23 she was going to -- I was going to -- she was taking it
24 to trial. And ---

25 Q. You were on notice that you were first up on the

- 1 trial docket?
- 2 A. Yes, sir.
- 3 Q. And your bond form did tell you that you'd be tried
- 4 in your absence?
- 5 A. Yeah, it had it on there.
- 6 Q. So are you upset with Mr. Tavernier at this point?
- 7 A. I mean, Mr. -- I mean, like I don't hold grudges
- 8 like that. I'm just feeling like when he stated that he
- 9 didn't know who I was, I'm like, "I just can't -- we just
- 10 talked about the ten-year plea." And they relieved me to
- 11 go home to talk to my family about it. And I went home
- 12 and discussed it.
- 13 Q. Did you consider appearing in front of -- I'm sorry
- 14 -- before Judge Nicholson that afternoon and asking to
- 15 have Mr. Tavernier relieved?
- 16 A. Relieved as my counsel?
- 17 Q. Having another attorney appointed.
- 18 A. Oh, no, uh-uh (negative), because, I mean, I haven't
- 19 hired an attorney. I didn't have the money to hire an
- 20 attorney, so I was going to go forth with Mr. Tavernier.
- 21 Q. And you said that morning when you came to court you
- 22 spoke with the bailiff. Do you recall the bailiff's name
- 23 you spoke with?
- 24 A. I'm not familiar with the people in court.
- 25 Q. So you have no correspondence with anyone you spoke

Carius Lomax - Cross-examination by Mr. Whitmire

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1 with that day?

2 A. Yeah. I just -- I remember him standing at the
3 door, and it was like before they started up the
4 microphones and everything in here. You know, I was here
5 that early. And he was asking people their names before
6 he let them in the courtroom. So when he got to me, he
7 asked me what my name. I said, "Carius Lomas." And he
8 told me I was not on the docket for trial. He say, "Who
9 told you that you was supposed to be here for trial?"
10 And I say, "I got a card in the mail." He said, "Well,
11 we don't have you on the docket for trial."

12 Q. Okay. But prior to trial, you did go over the
13 State's evidence with Mr. Tavernier, didn't you?

14 A. I mean, he ---

15 Q. You discussed it?

16 A. We talked about the charge of ten grams and all of
17 that and saying that, "Take ten and get 'er done."

18 That's -- I mean, that's what Kurt -- that's what he told
19 me, you know.

20 Q. Did you ever offer any defenses?

21 A. You mean such as?

22 Q. Such as, "It wasn't mine," or, "This is not real
23 crack." Did you tell him anything?

24 A. I mean, I did tell Kurt -- I told him -- I say -- I
25 say, "Kurt, I have a witness that's claiming these

- 1 drugs." That's what I told him.
- 2 Q. You never produced information for this witness?
- 3 A. I told him the name Bobby Geer. He's my co-
- 4 defendant. He was involved with this traffic stop.
- 5 Q. But Mr. Geer was charged with possession of alcohol;
- 6 he wasn't charged with ---
- 7 A. Yeah, yeah, yeah.
- 8 Q. So you had information that Mr. Geer would have
- 9 accepted responsibility for these charges?
- 10 A. Yeah. But see, when I left to find him, I wasn't
- 11 under the impression of coming back because, see, later
- 12 on reading my trial transcript, he stated that he told me
- 13 to come right back. And I didn't hear that, so I went
- 14 home ---
- 15 Q. Returning to Mr. Geer.
- 16 A. Okay.
- 17 Q. I do apologize. Sorry. Returning to Mr. Geer, you
- 18 were under the impression that Mr. Geer would accept
- 19 responsibility on these charges, the twenty-year
- 20 potential trafficking charge?
- 21 A. Yes, sir.
- 22 Q. But when you were arrested and he was in the car
- 23 with you, did he tell the police that, "Those are my
- 24 drugs," then?
- 25 A. No, sir. But I must state this too. I also told

Carius Lomax - Cross-examination by Mr. Whitmire

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1 Mr. Geer never mind because -- never mind on doing that
2 because the simple fact of I couldn't just have him
3 accept responsibility for something and me knowing that
4 it wasn't his. So ...

5 Q. So whose were they?

6 A. Huh? I don't even know if they got no drugs. I
7 ain't even seen no drugs. I don't even know the -- I
8 don't even know if Christina or the Solicitor have any
9 drugs. I ain't seen nothing, you know. So that's why I
10 ain't really speak on that because I ain't seen nothing.

11 Q. Mr. Lomax, you've had some time to prepare for this
12 PCR. Is Mr. Geer here today to testify?

13 A. No. I don't see him.

14 Q. Now, have you had a chance to read your trial
15 transcript since you were convicted?

16 A. Yes, sir. I mean, I read it, but I mean, I wasn't
17 coming here to state no case law and all that. I'm just
18 basically going over what happened that day.

19 Q. Okay. Just telling your side of the story?

20 A. Yeah, just that.

21 Q. No specific law. I won't do that either. But just
22 to tell your side of the story. Is there anything you
23 would have done differently, advised Mr. Tavernier
24 differently at trial?

25 A. I mean, I feel like Kurt should have just really --

1 he should have waited for the judge, you know, because I
2 mean, the judge plays a specific role here too. You
3 know, he could have -- all he had to do was just wait and
4 -- it's about like bond hearings. When you go to a bond
5 hearing, you have to go through a judge. You know what
6 I'm saying? So if he had of just waited for the judge to
7 come, it would have been a whole lot different because
8 the judge could have made decisions that he couldn't
9 make.

10 Q. And you were driving your wife's car when you were
11 arrested; is that correct?

12 A. Yes, sir.

13 Q. And the crack cocaine and the Hydrocodone pills were
14 discovered near the driver's side of the vehicle; is that
15 correct?

16 A. He found the Hydrocodone pills up in the little sun
17 visor.

18 Q. The sun visor?

19 A. Yes, sir.

20 Q. Still on the left side. And you never challenged
21 the narcotics?

22 A. Because I was tried in my absence, I didn't have a
23 chance to do nothing.

24 Q. But you had a full year, didn't you, by the time --
25 between the time you were arrested and your trial?

Carius Lomax - Redirect Examination by Ms. Drawdy

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1 A. I don't -- was it a full year?

2 Q. Well, I'm asking ...

3 A. It probably was, yeah.

4 MR. WHITMIRE: No further questions, Your
5 Honor.

6 THE COURT: Anything on redirect?

7 MS. DRAWDY: Briefly.

8 REDIRECT EXAMINATION

9 BY MS. DRAWDY:

10 Q. The State talked about when you -- about these roll
11 calls. I'm referring to page 29 of the transcript. You
12 showed up every time you got a card, didn't you?

13 A. Yeah, I showed up.

14 Q. October 14th, 2008, November 6th, 2008, January
15 13th, 2009, and the morning of the trial, February 2nd;
16 correct?

17 A. Correct.

18 Q. You showed up. And your attorney told you to go; is
19 that correct?

20 A. Yes.

21 Q. All right. The witnesses. You talked about this
22 other witness. And the State asked you if you'd actually
23 -- I mean, Mr. Tavernier showed you some documents. Did
24 he ever discuss the fingerprints or the lack of
25 fingerprints in this case on the drugs?

- 1 A. Uh-uh (negative).
- 2 Q. Did he ever discuss with you where this car had been
3 since it belonged to your wife? Someone else may have
4 had access to it and driven it?
- 5 A. Nothing.
- 6 Q. All right. Did he ask you about what you knew about
7 this passenger in the car, if he had a record?
- 8 A. Yeah. See, me and Kurt, we didn't go -- basically,
9 Kurt was on the foundation that he -- like he was
10 concrete like solid like he knew he was going to get me
11 to take the ten years.
- 12 Q. You and Mr. Tavernier never discussed how long you'd
13 been in the car?
- 14 A. We didn't discuss ---
- 15 Q. You'd just gotten in it that day?
- 16 A. We didn't discuss nothing, nothing at all.
- 17 Q. Didn't talk about where the drugs were found in the
18 car and the sunglass visor and in the pocket on the side,
19 on the driver's side, if -- you were actually found on
20 the outside of the vehicle; correct?
- 21 A. Yeah.
- 22 Q. So he never talked about if someone else could have
23 stuffed those things in there?
- 24 A. Stuck the drugs in there, uh-uh (negative).
- 25 Q. And then when you talked about this witness for

Kurt Tavernier - Direct Examination by Mr. Whitmire

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1 trial, do you have subpoena power?

2 A. I don't have subpoena power.

3 Q. I mean, Bobby Geer and you, have you all -- if you'd
4 asked him to come to trial, could you have forced him to
5 come?

6 A. I couldn't have forced him to come.

7 Q. Okay. If Mr. Tavernier had subpoenaed him, he would
8 have been able to force him to come; right?

9 A. Yeah.

10 Q. I have no more questions. Thank you.

11 THE COURT: Thank you, sir. You can step down.
12 Appreciate it.

13 THE WITNESS: Thank you, sir.

14 THE COURT: Okay. Any other witnesses?

15 MS. DRAWDY: None, Your Honor.

16 THE COURT: All right.

17 For the State?

18 MR. WHITMIRE: May it please the Court, Your
19 Honor. The State calls Mr. Tavernier to the stand.

20 **KURT TAVERNIER,**

21 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

22 DIRECT EXAMINATION

23 BY MR. WHITMIRE:

24 Q. Mr. Tavernier, how long have you been practicing
25 criminal law?

- 1 A. Since 1989.
- 2 Q. You were appointed to represent Mr. Lomax?
- 3 A. I was.
- 4 Q. And how did Mr. Lomax -- how did you come to be
- 5 appointed on Mr. Lomax's case?
- 6 A. He was initially appointed Jennifer Johnson on an
- 7 assault and battery with intent to kill charge. While he
- 8 was out on bond on that charge, he incurred the
- 9 trafficking charge. I do all -- virtually all the drug
- 10 charges for that are appointed to the Public Defender's
- 11 Office by contract. And after obtaining the trafficking
- 12 charge, because it carried a higher sentence than the
- 13 ABWIK, I was given Mr. Lomax's case sometime in 2008.
- 14 Q. What efforts did you and your investigator make to
- 15 contact Mr. Lomax?
- 16 A. He was initially contacted at the jail and
- 17 interviewed. Then a file is opened. According to the
- 18 notes, the arrest date was 6/19/08, and he received a
- 19 charge for trafficking, and he received a possession with
- 20 intent to distribute the controlled substance. Our file
- 21 was opened on June 25th of '08 when discovery was
- 22 requested from the Solicitor's Office.
- 23 Q. Did you have the opportunity to review this
- 24 discovery with Mr. Lomax during the early stages of your
- 25 representation?

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1 A. No, I did not. Mr. Lomax never came to the office.
2 He had an initial appointment that was set up, I believe,
3 in September of '08. And Kendra Gurley can confirm that.
4 I don't know that I have that particular date here. But
5 he was set up to come in, and he never showed. According
6 to my notes, we had an additional contact on November 7th
7 of '08. And according to the notes that Kendra wrote in
8 the file, "Defendant is to make an appointment with K.T.
9 to discuss plea in January, ten years." He never made an
10 appointment. And I'm not a babysitter, so I'm not going
11 to track him down. If he has no interest in preparation
12 for his case, I'll do what I have to do to prepare. I
13 review the case file, talk to the officers and review the
14 chain of evidence and go from there.

15 Q. You still filed for discovery; correct?

16 A. According to the notes, discovery was requested June
17 25th of '08. And if you'll bear with me, I have a letter
18 -- two packets. One packet is sent -- well, two packets
19 were both addressed to me August 5th of '08.

20 Q. And in this investigation, did you have an
21 opportunity to review the SLED analysis?

22 A. Yes, I did. I had the lab report, reviewed the
23 chain of discovery. Turned out that it was approximately
24 a little over ten grams -- 10.23 grams of crack cocaine.

25 Q. And what investigation or research did you do

1 regarding any potential Fourth Amendment violation, if
2 you can recall?

3 A. Basically, what I do I review the incident report,
4 then I talk to the officer. And Russell McClellon was
5 the officer, initial reporting officer, on this case.
6 And I went and I gave him a call. Since I do primarily
7 drugs, I know most of these guys fairly well. I can call
8 them up and discuss what goes on and what happened. And
9 they're pretty forthright. And I called Russell, got --
10 figured out what happened, found out what wasn't
11 necessarily in the incident report, and made a
12 determination based on my discussions with him, what was
13 in any incident report what kind of case they had.

14 Q. So you don't recall any particular issues regarding
15 search incident to arrest?

16 A. Particularly to this case, the stop was based on a
17 call that had been received by the police department
18 where some type of altercation had occurred between a
19 black male and another individual, and a gun was
20 involved. The individual was apparently supposed to have
21 fled the area in a small blue vehicle. Mr. Lomax was in,
22 I believe, his wife's car which was a small blue Versa,
23 if I recall correctly. And I reviewed some of the file,
24 not all of it. And he was stopped when he made a turn
25 onto, I think it was, Dickson or Dickenson Avenue and he

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1 came close to striking a patrol vehicle that was in the
2 area.

3 Q. And that was an additional basis upon which Officer
4 McClellon made the stop?

5 A. And he was arrested for driving under a suspended
6 license? Or was he arrested ---

7 A. Subsequently, he was -- that was one of the charges,
8 yes.

9 Q. And did Mr. Lomax's passenger make any statements?

10 A. According to what Officer McClellon told me, there
11 were open containers and alcohol in the vehicle. Mr.
12 Geer took responsibility for the alcohol in the vehicle,
13 but neither party took responsibility for the drugs that
14 were found.

15 Q. And at this stage of your investigation, do you have
16 any reason to believe Mr. Geer would have been a
17 beneficial witness at trial?

18 A. It was never mentioned at any time prior to that,
19 and so when Mr. Lomax said the day of trial he had a
20 witness who was going to -- that Mr. Geer was going to
21 claim responsibility for the drugs, I said, "Well, then
22 you'd better go find him."

23 Q. What potential detriments were involved with calling
24 Mr. Geer -- subpoenaing him to come to trial?

25 A. Well, subpoenaing -- number one is if he claimed he

1 didn't have any ownership of the drugs. And if he said
2 that under oath on the stand, then everything pointed to
3 Mr. Lomax. But there was nothing to indicated in
4 anything that I had reviewed to verify or corroborate
5 that Mr. Geer in any way was going to take responsibility
6 for a trafficking charge.

7 Q. Prior to you closing Mr. Lomax's file, were you able
8 to form a defense strategy for a probable trial or
9 possible trial?

10 A. His file may have been technically closed -- but I
11 had -- you know, I had basically prepared. I was
12 informed, I think, sometime in either December or early
13 January that his case was going to be on the trial
14 docket. And as far as I can tell, his file was still
15 open as late as November of '08 because I think we tried
16 this in February in '09. But his file technically was
17 still open because there's no notes in it pertaining to
18 him -- and I'm assuming that would have been at a roll
19 call appearance. And quite frankly, just to respond when
20 he indicates that I didn't recognize him, I didn't. I
21 had seen him probably for maybe five minutes at a roll
22 call on one or two occasions prior to that. He had never
23 showed up at the office to discuss anything. So did I
24 recognize him? Not a chance. I've got about a hundred
25 and fifty different clients, and I can't recognize them

1 all.

2 Q. But were you able to formulate a defense strategy?

3 A. Oh, I did. There were two things that I was
4 pointing to. Number one was if the drugs were placed by
5 the passenger, there was a significant period of time
6 while Mr. Lomax was -- there was a period when Mr. Lomax
7 exited the vehicle. And he was told by the officer to
8 stay in the vehicle, but he nevertheless got out of the
9 vehicle and started walking toward the officers. And at
10 that time, Officer McClellon said he was somewhat
11 distracted. And then Officer Fikes arrived. So there
12 was a period of time when the passenger was alone in the
13 vehicle. And basically the defense I had formulated at
14 that point was that if the drugs were on the passenger,
15 he had the time to plant them in the -- behind the piece
16 of trim next to the console where they were located.

17 Q. And just generally, can you explain your procedures
18 when dealing with a client who is delinquent in his
19 representations of his case?

20 A. There are -- there have been, I'm going to say,
21 probably four occasions where defendants have failed or
22 refused to cooperate in preparation and don't show up as
23 Mr. Lomax did. And at that time, I will inform the court
24 that they -- that I'm not prepared to go to trial, that
25 I'm not prepared based on their lack of cooperation. And

1 the court has -- and I'd move to be relieved. And
2 usually -- I think on at least three occasions I've been
3 asked to sit with a defendant while he represents
4 himself. And they either go to trial or they
5 subsequently -- the court has granted a continuance.

6 Q. And did you file that motion for a continuance at
7 the beginning of the trial?

8 A. Yes, I did. I think if you'll check the transcript
9 -- when I reviewed page 31, I did request a continuance.

10 Q. Just a few more questions before I ask you a handful
11 of questions about trial. Were you able to contact Mr.
12 Lomax when his case was placed on the trial docket?

13 A. Kendra is probably -- Kendra Gurley is probably in a
14 better position pertaining to the contact. But we have
15 -- according to her notes, there were letters sent to
16 him. The bondsman was notified. I think that was Ms.
17 Fields. We had one -- we had 376-2212 as a number, 260-
18 9494 which was a grandfather number that we were given.
19 367-7251, I think was his mother's number that we were
20 given. 964-9088, I believe, is an aunt. And 964-1663
21 who is Tracy. Those numbers were given. They were all
22 called, according to our notes. Kendra has some
23 additional notes on ---

24 Q. That's okay.

25 A. --- contacts. So that was the extent of what we --

1 that I have in the file as far as I can tell.

2 Q. Do you recall your interactions, communications with
3 Mr. Lomax on the day this case was called to trial?

4 A. We had -- he was notified that we were first up for
5 trial on that date. I did meet with him briefly. He's
6 correct. I didn't recognize him. We met and went out
7 the left door over here. We discussed what was going to
8 happen. He indicated at that time that his co -- and I'm
9 not sure if Mr. Geer was his co-defendant. But Mr. Geer
10 was ready to take responsibility. And I said, "Well, if
11 you have a way to get him, you'd better go get him. You
12 need to be back at 2:15. We're going to resume trial --
13 or start trial. And regardless of what happens, you need
14 to be back because ..." Did I release him and tell him
15 he could go? Yes. But I also told him he needed to be
16 back by 2:15 because trial was going to start at 2:30
17 from what we were informed. So yes, I did release him.

18 His memory regarding me talking to Chrissy, I don't
19 -- Rame Campbell was the assistant solicitor who handled
20 this case. I had very little contact with Chrissy Adams,
21 the Solicitor, pertaining to these -- to any of my cases.
22 And Ken -- I'm sorry. But Kendra was present at the time
23 I had that conversation because she was also the one who
24 was trying to track him down in the meantime.

25 Q. Did you warn Mr. Lomax that he would be tried in his

1 absence?

2 A. I did. I told him, "We're going to trial at 2:15 --
3 2:30. You need to be back."

4 Q. In that trial, do you recall the obstacles in the
5 State's evidence? What is your theory of the case?

6 A. There were a couple of things that it was not too
7 difficult for Officer McClellon to remove that side panel
8 on the trim -- along the console. And that it would have
9 been possible. And I think he acknowledged it, according
10 to my notes, trial notes, that it would have been
11 possible for the passenger to have reached over and
12 placed the drugs there.

13 There were no fingerprints located on the drugs.
14 There wasn't a whole lot I could do about the pills that
15 were located in the -- I think it was a sunglass case.
16 But basically, that was the -- I think, according to my
17 notes, that was about the extent of what we had because
18 it was a little bit difficult to overcome the fact that
19 it was in fact his wife's car that he was driving.

20 Q. Considering that, did you attempt to engage in plea
21 negotiations with the State?

22 A. I always do. When I get a case in, I evaluate it,
23 assess basically what I think the State can prove, if
24 there are any readily apparent issues that come forward.
25 And then I'll determine what the appropriateness is for

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1 making a motion and make that decision and try -- you
2 know I'll assess it. I'm an ex-cop. I worked vice and
3 narcotics when I was a cop. I know considerably what
4 goes on, and I have primarily dealt in drugs for my
5 entire career. And I've got a pretty good grasp on what
6 kind of case is going to be presented. Based of my
7 assessment, the minimum that I think Mr. Lomax was facing
8 in this case was ten years.

9 Q. Did you advise Mr. Lomax to take that offer?
10 Consider it?

11 A. I told him seriously I think probably the one or two
12 times we would have met during a roll call that based on
13 my assessment of the evidence, that was probably as good
14 a deal as I was going to get. If they weren't going to
15 come off of the trafficking to reduce it below a
16 trafficking third offense, we weren't going to have a
17 whole lot of luck.

18 Q. One final question. Did you try the best case you
19 possibly could considering the circumstances?

20 A. Under the circumstances, I thought I had about as
21 fair a chance as anybody on what we had going at the
22 time, what we were able to do.

23 MR. WHITMIRE: No more questions, Your Honor.

24 Thank you, Mr. Tavernier.

25 THE COURT: Yes, ma'am?

1 MS. DRAWDY: Thank you, Your Honor. May it
2 please the Court.

3 CROSS-EXAMINATION

4 BY MS. DRAWDY:

5 Q. Mr. Tavernier, February 2nd, 2009, there were jurors
6 here because there was a jury pool, I guess, that
7 morning?

8 A. Yes.

9 Q. Maybe a bunch of defendants, attorneys, both sides,
10 prosecutors and defense attorneys? Busy?

11 A. To the best I recall, yes.

12 Q. Would you concede that there were -- Mr. -- my
13 client, Mr. Lomax, testified you told him, "Go get him.
14 Go find your witness." And he also testified he was
15 under the impression he would just be roll-called in
16 again. And you admit he showed on all his roll calls;
17 correct? To your knowledge, remembering ---

18 A. To the best of my knowledge, once I started -- once
19 I got appointed in June of '08, to the best of my
20 knowledge. He had pending charges before. But there was
21 no bench warrant, so I'm assuming he showed up.

22 Q. He always showed up, and he showed up that morning,
23 February the 2nd, 2009?

24 A. He did.

25 Q. Okay. And I just want to draw your attention to the

1 transcript pages 32 and 33. And at the end of this, I'm
2 going to ask you if it would be fair to say that there
3 could have been a miscommunication in light of how busy
4 it was that morning. On pages 32 of the transcript --
5 really it begins actually on page 31 where the Court
6 asked him, "Well, did you," meaning Mr. Tavernier, "tell
7 him he was going to be tried in his absence if he didn't
8 show?" "Did you tell him he would be tried in his
9 absence?" And your response at that time was, quote, "I
10 told him he was first up for trial, Your Honor, and that
11 he needed to be back here ready to go and that if he did
12 not provide a defense he would be defending himself. He
13 did not -- if he did provide me a witness and assist me,
14 then I might be in a position to represent him at that
15 point." Where in that paragraph did you tell him he
16 would be tried in his absence if he did not return?
17 A. You're talking about my response to the judge?
18 Q. Yes. Lines 1 through 6.
19 A. I don't know that I directly answered that he would
20 be tried in his absence ---
21 Q. And then let's ---
22 A. --- in that question.
23 Q. All right. And then I'll ask again. The Court
24 inquired one more time lower on that same page. It's
25 line 22. "And you, Mr. Tavernier, were under the

1 impression he would be returning?" And your answer then
2 was, "Your Honor, for the ..." Instead of saying, "Yes,
3 I told him he would be TIA-ed if he did not," your answer
4 was, "For the first time, I felt pretty good about what
5 my options would be at trial today. And I told him if he
6 had that individual, I believe Mr. Lomax and his wife
7 were here and departed. I told them to get back here,
8 and I told him that I thought that were to -- if Mr. Geer
9 were to say what he told me or what Mr. Lomax advised me
10 Mr. Geer was going to testify to, that chances were I
11 felt pretty decent in his regard. That if Mr. Geer was
12 going to fall on the sword and accept responsibility, at
13 least he had a fighting chance with the jury at which
14 point he said, 'I'll be back.'" Anywhere in there about,
15 "You'll be tried in your absence if you do not return"?
16 A. Well, I believe in my response to the question, the
17 judge asked, "Were you under the impression he would be
18 returning?"
19 Q. Right. So you were?
20 A. I was.
21 Q. Anywhere in here about, "And I told him he would be
22 TIA-ed, Your Honor"?
23 A. Not in that response, no.
24 Q. Anywhere in there in either of those paragraphs do
25 you tell the court you told him to be back here at 2:15

1 or 2:30 like you tell this Court today?

2 A. I don't know if it's in this particular area or
3 somewhere -- no. The only thing that I can point to, Ms.
4 Drawdy, is on page 30 in conversation with the court that
5 as a consequence -- I'm talking line 20. "As a
6 consequence, when he showed up this morning, he indicated
7 to me that he in fact did have a defense. He had a
8 witness by the name of Bobby Geer, and he was informed to
9 contact Mr. Geer and be back here because he was first up
10 for trial."

11 Q. So you told the court there, "Be back here because
12 we're first up for trial"? Your earlier testimony about
13 the 2:15/2:30, is it possible that when you and my client
14 were having that conversation out here in the corridors
15 of the courtroom, in the midst of being up for trial you
16 said, "Go get your witness," and "get back here," perhaps
17 that communication hadn't been totally understood by my
18 client? He knew to go and try and get the witness?

19 A. Is it possible he didn't understand?

20 Q. Yes.

21 A. Or fully grasp? Anything is possible, Ms. Drawdy.
22 But you know, like I said, Ms. Gurley was with me, and
23 she was a witness to that conversation. And she's
24 prepared to testify today too that he was told to be back
25 in the afternoon. And I specifically remember 2:15

1 because we were supposed to be in court at 2:30.

2 Q. Now, this was a trafficking charge carrying twenty-
3 five years. Would it have not been more prudent to have
4 sent your investigator, Ms. Gurley, who was there to go
5 ahead and get this witness or to at least to accompany
6 maybe Mr. Lomax to get the witness?

7 A. I couldn't -- we were going to pick a jury that
8 morning. She's with me in court all the time.

9 Q. But it wasn't important to have the defendant there
10 to pick a jury?

11 A. At that particular point in time, based on what he
12 said, he thought he could locate the witness, I told him
13 it was more important for him to go get the witness if he
14 had a defense than anything else. As far as picking the
15 jury, I've probably picked a hundred of them, and it
16 wasn't going to change a whole lot.

17 Q. But you still needed Ms. Gurley?

18 A. At that particular point, I wasn't going to send her
19 on a wild goose chase. He hadn't produced him in a year,
20 so ...

21 Q. Okay. And in your experience, do you think that Mr.
22 Geer would have come along with my client or would have
23 been better able to come along under subpoena by your
24 office?

25 A. He probably would have been better served coming

1 along with the subpoena. But based on my conversations
2 with Officer McClellon, it did not appear to me, nor was
3 I inclined to think that based on what Mr. Lomax was
4 telling me that Mr. Geer was going to accept
5 responsibility for a trafficking charge which carried
6 mandatory minimums.

7 Q. So we discussed the TIA. About the discovery
8 yourself, do you have somewhere in your file where your
9 office requested discovery?

10 A. There -- all I can show you right here is that when
11 the file is opened, discovery request is sent on December
12 -- or this one was June 6th -- no, excuse me -- June 25th
13 of '08. All right. And I have approximately a little
14 over thirty-five, thirty days later letters from
15 Catherine Huey sending me the vast majority of the -- the
16 incident report, criminal record, drug report.

17 Q. So you have a response, but you just have a notation
18 when the office allegedly sent the request for it?

19 A. I have one that's sent on the initial ABWIK charge.
20 I cannot put my hands -- in a quick review, I cannot put
21 my hands on that formal letter other than it's the custom
22 of the office to do that, Ms. Drawdy.

23 Q. Okay. And with my client, I think we've heard
24 testimony that he met you here in the courtroom at
25 earlier roll calls. But you were never able to sit down

1 with him and go through discovery, i.e. the drug chain,
2 SLED analysis, fingerprints or lack thereof, or the
3 passenger in the vehicle, his record and did he have one
4 or not. Were you able to go over any of those things?

5 A. Mr. Lomax never showed up at any appointment for the
6 office, nor did he make any -- even after the November
7 note in the file that he was to make an appointment to
8 come by the office to go over things, there was no
9 subsequent office meeting.

10 Q. And so he never showed up, so your office closed
11 this file, correct, around November 2009? I mean, 2008?
12 I think that's what you testified on direct.

13 A. It may have been closed. I think if he didn't show
14 up for any subsequent appointment, probably would have.
15 But the last notation that I have pertaining to regarding
16 appointments is November 7th, Ms. Drawdy, of that year.

17 Q. All right. So it was closed around November, and
18 then you were appointed to represent Mr. Lomax the day of
19 that trial; is that correct? That's what the transcript
20 says, that you had been appointed -- I'll direct you to
21 the transcript page 30, line 3, "That file had been
22 closed. It remained closed until this morning when you
23 appointed me."

24 A. Technically, yes, we were appointed to represent
25 him. And as far as the court and everybody was

1 concerned, I would have represented him until such time
2 as the file was closed. And then since it was closed, we
3 would have considered my responsibility over. But as I
4 think I might have said earlier, Mr. Campbell, Rame --
5 here you go. I have the letter requesting discovery
6 dated June 25th.

7 Q. For these charges?

8 A. For these charges.

9 Q. Thank you. When you were reappointed that morning,
10 if you will, did you feel or did you actually argue to
11 the court that you were not prepared, you had not -- in
12 terms of being prepared as best you could, but you really
13 wanted to discuss the facts of the case with my client;
14 is that true?

15 A. Yeah, I think I conveyed to the court that as far as
16 my preparation for the trial, I had done as much as I
17 could do without his cooperation. I think I conveyed
18 that to the court and said -- because I had interviewed
19 the officers, gone over the evidence, gone over the chain
20 of custody on the drug analysis, and everything appeared
21 to be in order. I had my motions in limine prepared, was
22 prepared to address whatever legal issues I needed to
23 address. The only thing I didn't have was, number one,
24 Mr. Lomax or his defendant -- excuse me -- his witness
25 that he claimed would take responsibility for the drugs.

1 Q. Now, and just to be clear, you did no investigation
2 on your own of the passenger, i.e. witness; correct?

3 A. Other than talking to Officer McClellon and
4 reviewing what his background was -- what Mr. Geer's
5 background was, proceeding after him to formally
6 investigate whether he was going to take responsibility.
7 Let's put it this way. With as much as I've done in
8 drugs, I've only had probably -- I can count two or three
9 occasions where a boyfriend/girlfriend would accept
10 responsibility if they had lesser charges and that kind
11 of thing. But knowing this had a mandatory minimum of
12 jail time and a violent crime, my -- I was a little
13 skeptical as far as Mr. Geer taking responsibility and
14 going to jail for Mr. Lomax.

15 Q. Just wrapping it up, you talked about the defenses
16 that you offered that the State went into with you. Do
17 you -- you had no idea though because you hadn't been
18 able to discuss with my client how long he had been in
19 the car; correct? The car belonged to his wife?

20 A. Like I said, Ms. Drawdy, he never came in, and I
21 prepared as best I could without his cooperation.

22 MS. DRAWDY: Beg the Court's indulgence one
23 moment, Your Honor.

24 THE COURT: Okay.

25 Q. One last thing. My client, he had testified on

1 direct that he had checked with the bailiff. Do you
2 recall whether or not he was actually on a docket that
3 week, or was he one that, "Let's try it because
4 everything else has fallen through the cracks"? Was he
5 actually on a docket?

6 A. To the best of my recollection from the letters I
7 received from Mr. Campbell in January indicated that we
8 were actually first up on the trial docket.

9 Q. You don't have a copy of that or a published docket
10 that says, "Carius Lomas, number one for trial"?

11 A. I very seldom rely on those because those things
12 fall apart. I could be number ten on the docket and be
13 first up when it comes up on Monday. But based on my
14 conversations with Rame and the letters he had given me,
15 the last card I had dated January 26th, the last
16 correspondence, they both reference, "The case is on the
17 trial docket the week of February 22nd, the trial of this
18 case, with Catherine Huey. I've enclosed an additional
19 copy of the case file even though she provided discovery
20 back in August of 2008. If you have any questions,
21 please call." I forwarded to Mr. Lomax.

22 Q. Or did you just receive the card?

23 A. No. As far as I can recall, I think Ms. Gurley can
24 probably respond better on that. On the notes that she
25 has for her contacts, he was sent notice that he was

1 first up for trial, and Ms. Mary Davis, the bondsman, was
2 also notified that he was going to be first up for trial.

3 MS. DRAWDY: Beg the Court's indulgence for a
4 moment.

5 THE COURT: All right.

6 MS. DRAWDY: I have no further questions.
7 Thank you, Mr. Tavernier.

8 THE COURT: All right. Anything else?

9 REDIRECT EXAMINATION

10 BY MR. WHITMIRE:

11 Q. Generally, do you release clients prior to a pending
12 hearing, tell them to go out and find somebody?

13 A. In this case, I told Mr. Lomax if he had his
14 witness, and it was critical that he needed to go get
15 that witness and bring him back.

16 Q. Is that the only reason to ask Mr. Lomax to find a
17 witness?

18 A. That was the only reason because he had just at that
19 point come up. That's the only reason. I don't release
20 guys from roll call when we have a general roll call
21 unless it's with consent.

22 Q. No further questions.

23 THE COURT: Okay. You can step down.

24 MS. DRAWDY: I don't know if he is under
25 subpoena or not, but we're fine with him being excused in

Kendra Gurley - Direct Examination by Mr. Whitmire

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1 Mr. Tavernier needs to get to some other place.

2 THE COURT: Okay. That's fine.

3 MR. TAVERNIER: I think I'm already past that.

4 THE COURT: Well, blame me. Sorry. Everybody
5 else does.

6 Okay. Anything else?

7 MR. WHITMIRE: The State has one final witness,
8 Ms. Kendra Gurley.

9 **KENDRA GURLEY,**

10 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

11 DIRECT EXAMINATION

12 BY MR. WHITMIRE:

13 Q. Ms. Gurley, what is your job title?

14 A. Paralegal at the Public Defender's Office.

15 Q. How long have you been a paralegal?

16 A. I've actually been a paralegal for quite some time,
17 but I've been with the Public Defender's office for seven
18 years.

19 Q. And typically, how do you aid the attorneys in the
20 office with their investigations?

21 A. I aid them as far as helping interview the clients
22 and prepare documents for them, being assistants with
23 them in court.

24 Q. Do you recall Mr. Tavernier's representation of Mr.
25 Lomax?

1 A. Yes, sir.

2 Q. And what role did you play?

3 A. I basically had interviewed Mr. Lomax. And I have
4 actually spoken to Mr. Lomax on different occasions
5 regarding his case.

6 Q. Would you make efforts to contact Mr. Lomax when he
7 would not schedule appointments?

8 A. Yes, sir. He had one appointment on September the
9 17th that he failed to show for. On that same date, I
10 had checked that no additional appointments had been
11 scheduled. He failed to reschedule that appointment. On
12 January the 26th, '09, I left a message with Ms. Lomax
13 that his case was scheduled for trial the week of
14 February the 2nd. And then on February the 2nd, numerous
15 phone calls were made by his bondsman and I trying to
16 locate him for trial when he didn't show back up.

17 Q. And do you recall the morning of his trial? You
18 were with Mr. Tavernier?

19 A. Yes, sir.

20 Q. Could you briefly describe that morning for the
21 Court?

22 A.. We were basically here for jury pool/jury selection
23 and qualification. And Mr. Lomax was here. And Kurt
24 told him to go get the witness and bring him back, be
25 here by 2:15.

Kendra Gurley - Cross-examination by Mr. Whitmire

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1 Q. Did Mr. Tavernier recall that?

2 A. I mean, he generally does. Now, I didn't make a
3 note that he totally said he was going to be tried in his
4 absence, but I just know that he told him to be there at
5 2:15, that they were beginning at 2:15.

6 Q. No further questions.

7 THE COURT: All right. Yes, ma'am?

8 CROSS-EXAMINATION

9 BY MS. DRAWDY:

10 Q. Were you privy to their conversations?

11 A. Excuse me?

12 Q. Were you privy to Mr. Tavernier ---

13 A. Was I present?

14 Q. Yes. Privy, present, the same. Were you right
15 there when you heard it?

16 A. Generally I am right there.

17 Q. Were you a participant because you were maybe taking
18 some notes?

19 A. Yes.

20 Q. Okay. Was there a discussion about Mr. Tavernier
21 not recognizing my client?

22 A. I don't recall. I mean ...

23 Q. Was there a discussion about Mr. Tavernier not being
24 prepared because he hadn't met with my client?

25 A. There may have been some discussion to that effect,

1 but basically stating that he couldn't be prepared
2 because the client had not contacted or come in and
3 cooperated by keeping his scheduled appointments or
4 making appointments.

5 Q. So was there also discussions about Mr. Tavernier
6 trying to get this continued?

7 A. Yeah, I do think there was discussions, that he
8 attempted to do that. And that was denied.

9 Q. It was denied, but that morning when this discussion
10 is going around, it had not been denied at that point?

11 A. Right.

12 Q. So is it fair and reasonable to say that when my
13 client left to go look for this witness, the impression
14 y'all left was y'all were getting or seeking a
15 continuance?

16 A. No. He was specifically told to be back at 2:15.
17 That they were beginning the trial at 2:30, so he needed
18 to be back at 2:15.

19 Q. Where a continuance would be sought?

20 A. I don't recall if that particular wording was said,
21 but he was told to be back at 2:15 for the trial to
22 start.

23 Q. But you do recall some discussions about seeking a
24 continuance?

25 A. There were discussions about a continuance.

1 Q. Okay.

2 MS. DRAWDY: Beg the Court's indulgence for one
3 moment, Your Honor.

4 THE COURT: Sure.

5 Q. And was there a time when Mr. Tavernier spoke with
6 my client without you present?

7 A. Where?

8 Q. In the meeting room perhaps out there.

9 A. I mean, you know, usually I'm with him. Generally
10 anytime he's meeting with a client, that's formality. So
11 if that happened, I can't say that it -- I wasn't there,
12 you know.

13 Q. And your background, you're an investigator with the
14 PD's office. Are you SLED trained?

15 A. No, ma'am.

16 Q. Okay. So are you or someone with your experience in
17 your line of work with the PD's office, do you go out and
18 interview witnesses?

19 A. Not on a regular basis. Generally, our clients will
20 gather their witnesses and then we will contact them or
21 have them come into the office or this and that.

22 Q. So Mr. Tavernier never suggested Mr. Lomax give Ms.
23 Gurley Bobby Geer's contact information for her to get
24 him here and you stay put at the trial?

25 A. No. I mean, I think he was going to find him.

1 Q. Thank you. No more questions, Ms. Gurley.

2 THE COURT: Anything else from the State?

3 MR. WHITMIRE: Nothing further, Your Honor.

4 THE COURT: Thank you. If she's under
5 subpoena, we'll release her too.

6 MS. DRAWDY: Yes.

7 THE COURT: Anything else?

8 MR. WHITMIRE: Nothing further, Your Honor.

9 THE COURT: All right. Anything in reply?

10 MS. DRAWDY: No, Your Honor. Thank you.

11 THE COURT: Okay. I'll review the file. I got
12 it this morning. I appreciate y'all waiting. And I'll
13 take it under advisement. I'll let you know something in
14 four days. By Monday.

15 (WHEREUPON, the hearing ended at approximately 11:57
16 a.m.)

17 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

1 CERTIFICATE OF REPORTER

2 I, the undersigned Renee H. Tollison, Official Court
3 Reporter for the Tenth Judicial Circuit of the State of
4 South Carolina, do hereby certify that the foregoing is a
5 true, accurate, and complete transcript of record of all
6 the proceedings had and evidence introduced in the
7 trial/hearing of the captioned case, relative to appeal,
8 in the Circuit Court for Anderson County, South Carolina,
9 on the 27th day of February 2013.

10 This transcript may contain quoted material. Such
11 material is reproduced as read by the speaker.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.

14 March 19, 2015

15

16 S/ *Renee H. Tollison*

17 Circuit Court Reporter

FILED-CLERK'S OFFICE
 STATE OF SOUTH CAROLINA ANDERSON SC IN THE COURT OF COMMON PLEAS
) FOR THE TENTH JUDICIAL CIRCUIT
)
 COUNTY OF ANDERSON : 2014 JAN 31) A 10: 26

Case No. 2012-CP-04-0650

Carius Kenton Lomax,
 S.C.D.C. No. 262660,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

This matter comes to the Court by way of an Application for Post-Conviction Relief filed March 5, 2012. The Respondent filed its Return on August 2, 2012. An evidentiary hearing into the matter was scheduled on February 26, 2013 at the Anderson County Courthouse. Applicant was present and was represented by Sarah Ganss Drawdy, Esq., and Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General. Applicant and his trial attorney, Kurt Tavernier, Esq., testified at the PCR hearing.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted at the July 2008 term of the Anderson County Grand Jury for trafficking, less than 28 grams (2008-GS-04-1615) and possession with the intent to distribute (2008-GS-04-1617). Applicant was represented by Kurt Tavernier, Esq. On February 2, 2009, the State called its case to trial before the Honorable J.C. Nicholson. Applicant was tried in his absence and was found guilty as indicted. On April 7, 2009, his sentence unsealed. The sentences were amended to reflect concurrent

service. Applicant was sentenced to twenty years imprisonment for trafficking and five-years imprisonment on the possession charge.

A timely notice of appeal was filed on Applicant's behalf. Celia Robinson, Esq., of the Office of Appellate Defense, perfected the appeal pursuant to Anders v. California.¹ The South Carolina Court of Appeals affirmed his conviction and sentence. State v. Lomax, Op. No. 2011-UP-292 (S.C. Ct. App. filed June 14, 2011).

Applicant proceeded on the following allegations at his PCR hearing:

1. Ineffective Assistance of Counsel:
 - a) failure to investigate the State's evidence and file for discovery;
 - b) failure to subpoena Bobby Geer as a trial witness;
 - c) failure to make an untimely motion for continuance;

SUMMARY OF TESTIMONY

At the PCR hearing, Applicant alleged counsel was ineffective for failing to file a motion for discovery. Applicant stated that he did not know if counsel had requested discovery in his case. Applicant also alleged counsel was ineffective for failing to prepare for trial. Applicant stated that he never reviewed the State's evidence with him nor did counsel recognize him on the day of trial. Thus Applicant claimed he never discussed his version of the facts that led to his arrest. Applicant stated he met counsel at roll call and on the morning of the trial. Applicant stated he did not make efforts to contact the counsel or the public defender's office prior to his trial. Applicant stated counsel should have presented beneficial fingerprint evidence at trial.

Second, Applicant alleged counsel was ineffective for not presenting Bobby Geer as a defense witness at trial. Applicant stated counsel told him that he "forgot to subpoena" Geer, who was identified as Applicant's passenger during the traffic stop that led to the arrest. Applicant stated Geer would have testified on his behalf. Geer was only charged with possession

¹ Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

of alcohol while Applicant was charged for the narcotics. Applicant stated Geer would have told the jury the narcotics belonged to him, thereby absolving Applicant of culpability. Applicant elaborated he instructed Geer not to disclose his guilt during the arrest. Applicant stated that one reason he did not return to Court on February 2, 2009 was because he was upset counsel did not recognize him.

Applicant alleged counsel was ineffective for instructing him to locate Geer without advising him on the status of the trial. Applicant stated he was present for every court appearance while on bond. Applicant understood the conditions of his bond, one of which required him to appear at the June term of General Sessions and thereafter until his charges were disposed of. Applicant also understood he would be tried in his absence if he did not show up to trial. Applicant stated he left the Courthouse on February 2, 2009 with instructions from counsel to locate and ensure Geer would be available for the next court appearance. Applicant stated counsel did not explain to him that he had to return that afternoon. It was his impression that his case was premature for trial because both the solicitor and counsel were not prepared to the move forward. Applicant stated an undisclosed bailiff told him his case was not on the trial docket for that first February term of General Sessions. Thus, Applicant stated he immediately went home to nap and was shocked to subsequently learn he was tried and convicted in his absence. Applicant stated he never received a phone call from counsel that the case was moving forward without him present.

Third, Applicant alleged counsel was ineffective for failing to move for continuance in a timely matter. Applicant speculated that if the motion had been made in his presence, then he would have been on notice that his case was moving forward that day.

At the PCR hearing, counsel testified to his course of conduct regarding his representation in this matter. Counsel had practiced law for twenty years at the time of trial subsequent to his career as a narcotics police officer. Counsel explained the scope of his practice extended to handling drug cases for the Public Defender's Office. Applicant was in custody when counsel was appointed to the case in 2008. Counsel first met with Petitioner in June of 2008. Counsel filed for and received two packets of discovery materials in August, which included the incident reports, SLED lab results, and chain of custody documentation. Counsel investigated the materials and interviewed the arresting officer. Counsel summarized his impression of the State's case as follows: Applicant was driving a vehicle registered to his spouse when he entered a roadway and nearly struck a patrol car; a traffic stop resulted in the Applicant's arrest for driving under suspension; the police discovered prescription opiates and crack cocaine housed separately within the vehicle; the passenger, Geer, who was arrested on a minor unrelated offense, did not claim possession of the narcotics. Counsel scheduled an appointment with Applicant in September to discuss developments in the case. Applicant failed to show and never contacted counsel afterwards to reschedule. Counsel also made efforts to contact Applicant in November that proved unfruitful. Again, Applicant did not show after he was noticed for the second scheduled appointment.

Counsel developed a theory of defense absent Applicant's assistance on the element of possession. The strategy included eliciting testimony that Geer had the opportunity to move the narcotics while Applicant was outside the vehicle speaking with the police. Counsel noted the police were unable to get fingerprint lifts from the relevant compartments in the vehicle. Counsel investigated Geer's background and noted that Geer had a negligible relationship to Applicant. Geer's charges were disposed of prior to trial where he received the statutory minimum sentence

for his separate offense. Counsel did not interview Geer because he believed Geer would have been an adverse witness.

On January 26, 2009, Solicitor Rame Cambell noticed counsel that Applicant's case would be first up on the February trial docket. Applicant was also notified of the trial date. On the morning of trial, counsel discussed trial procedure with Applicant. During the conversation, Applicant told counsel Geer would take responsibility for the narcotics. Counsel stated that he had no basis to believe testimony from Geer would help the defense until the day of trial when Applicant told him Geer would confess on the stand. Counsel made a contemporaneous decision to direct Applicant to locate Geer within a specified window of time. Counsel told Applicant that, "he needed to be get Geer" because "the trial will start at 2:30." Counsel's investigator, Kendra Gurley, remained with him at the Courthouse to pick a jury. Counsel only made the decision to send Applicant to locate Geer because the issue came up "at the last minute." Counsel stated Applicant left the Courthouse when the venire panel arrived. When Applicant did not show that afternoon, calls were placed to his cell phone, his grandmother's phone, his mother's phone, and his aunt's phone. Counsel reiterated that he was clear with Applicant that he must return to the Courthouse that afternoon. Counsel stated he tried the best case he could for Applicant under the circumstances.

At the PCR hearing, Kendra Gurley testified to her involvement in Applicant's case. Gurley worked as a paralegal for the Public Defender's office. Gurley stated Applicant missed his two scheduled appointments with counsel in 2008 and did not make an effort reschedule. Gurley left a voice message on Applicant's cell phone on January 26, 2009 to notify him his case was set for trial on February 2, 2009. She was present with counsel and Applicant on the morning of trial. Gurley stated she witnessed counsel tell Applicant to leave and return with Geer

before 2:30 that afternoon. When Applicant failed to show, Gurley made numerous phone calls to locate Applicant.

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, *supra*. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court's records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and exhibits from the prior proceedings, and, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds counsel and Gurley's testimonies to be credible and Applicant's testimony not credible. This Court finds it was manifestly clear Applicant understood his trial had commenced when he knowingly decided to voluntarily abandon his defense. See State v. Patterson, 367 S.C. 219, 230, 625 S.E.2d 239, 244 (Ct. App. 2006) ("[A] defendant may be presumed to waive or forfeit the right to be present by misbehaving in the courtroom or by voluntarily remaining away from trial."). Even Applicant's testimony on the matter was inconsistent. In comparison, counsel and Gurley fully detailed their interactions on February 2, 2009. This Court finds counsel exercised reasonable discretion in sending Applicant to locate Geer as a result of circumstances created by Applicant. This Court finds counsel's reputation and experience in representing clients facing narcotics charges to be high regarded and was apparent in the manner counsel made strategic decisions in investigating, preparing, and presenting Applicant's defense. This Court finds that although Applicant presented no credible evidence that showed he suffered any prejudice from counsel's representation, any possible detriment was borne from Applicant's conduct and actions. The duty to communicate, conduct a reasonable investigation, and prepare are predicated and judged upon a defendant's conduct. Because Applicant was released on bond, he has responsibility to attend

scheduled appointments, ensure his contact information was accurate, and aid counsel in the representation. This Court finds Applicant's failures on the above mentioned were unequivocal. See Strickland, 466 U.S. at 681, 104 S. Ct. at 2061 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.").

A.

This Court finds Applicant's allegation that counsel was ineffective for failing to investigate the State's evidence is without merit. "Moreover, while the scope of a reasonable investigation depends upon a number of issues, "at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (emphasis supplied). This Court finds counsel's testimony on the matter credible and convincing. Counsel adequately investigated incident reports and the lab reports obtained by his discovery motion for a possible suppression defense. Addressing Applicant's more enunciated allegation that counsel was ineffective for failing to investigate possible fingerprint evidence, this Court finds it to be without merit. First, this Court finds counsel's trial strategy here valid. Counsel made a reasonable decision to elicit testimony from State witnesses at trial that the absence of fingerprint lifts on the vehicle's relevant compartments showed the possibility that Geer planted the narcotics could not be disproved. See Strickland, 466 U.S. at 681, 104 S. Ct. at 2061 ("Those strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based.") Second, Applicant failed to present credible evidence to show what beneficial impact the purported investigation would have had in his defense. Thus, the allegations rest on mere speculation. See Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) ("Failure to conduct an independent investigation does not

constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." Therefore, these allegations are denied and dismissed.

B.

This Court finds Applicant's allegation that counsel was ineffective for failing to subpoena Geer to testify on Applicant's behalf at trial is without merit. This Court finds counsel's testimony credible and convincing. "So long as a defendant's attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient." Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011). This Court finds counsel had a valid and strategic reason for not producing Geer as a witness at trial. Counsel interviewed the arresting officers as to Geer's involvement and criminal history. Geer was charged with a misdemeanor unrelated to narcotics use or transactions. Counsel determined Geer did not have familial or substantial personal connection to the Applicant that could have indicated he would have been willing to forgo his own interests. Thus, this Court finds counsel's reasoning valid to stray from involving Geer in Applicant's case where the substantial detriment of calling him as a witness outweighed any foreseeable benefit. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) Applicant waited until the morning of his trial to convey his knowledge of Geer's alleged intention to exculpate Applicant. See Strickland v. Washington, 466 U.S. at 681, 104 S. Ct. at 2061 ("[C]ounsel's investigatory decisions must be assessed in light of the information known at the time of the decisions.").

Regardless, Applicant failed to produce testimony from Geer on the matter. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) ([A]pplicant's allegations, alone, will not support a finding of prejudice when applicant claims counsel was ineffective for failing to investigate

witnesses; instead, applicant must show the results of an investigation would have resulted in a different outcome at trial). Therefore, this allegation is denied and dismissed.

C.

Last, this Court summarily dismisses Applicant's allegation that counsel was ineffective for failing to move for a continuance at an earlier juncture in the trial. Applicant contends he would never have been tried in absentia had counsel made the motion before he left to find Geer. This Court finds counsel's testimony credible and Applicant's testimony not credible. This Court finds a defense attorney is under no duty to make strategic decisions in anticipation that a defendant might decide to ignore a directive and condition of bond to the detriment of the presentation of his defense. Regardless, this Court finds counsel could not have foreseen that Applicant would not return and flee. Despite Applicant's hubris in neglecting to meet and discuss his case with counsel, he did however testify he attended his prior court appearances. See Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993) (This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.). Therefore, this allegation is denied and dismissed.

D.

Except as discussed above, this Court finds that the Applicant affirmatively abandoned the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's

failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

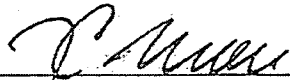
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 30 day of January, 2014.

FILED - CLERK'S OFFICE
ANDERSON, SC
2014 JAN 31 A 10:26
GENERAL PLEAS AND
CRIMINAL SESSIONS


J. CORDELL MADDOX, Jr.
Presiding Judge
Tenth Judicial Circuit

Anderson, South Carolina

FILED-CLERK'S OFFICE
ANDERSON SC
2014 JAN 31 A 10:26
ANDERSON PLEAS AND
GENERAL SESSIONS

DOCKET NO. 2008GS04-1615

The State of South Carolina

County of Anderson

COURT OF GENERAL SESSIONS

JUL 22 2008

Term

THE STATE

vs.

Carius Lomax

COMMITMENT

Blind Sealed 8/2/09

W/V released 4-7-09/MAR 24/07/09-camp

CTH

Indictment for

Drugs / Trafficking in ice, crack, or crack - 10 g
or more, but less than 28 g

SC Code: 44-53-0375(C)(1)(c)
CDR Code: 0452

WITNESSES

DUNN B, APD

ARREST WARRANT NUMBER

1718055

ACTION OF GRAND JURY

TRUE BILL

JUL 22 2008

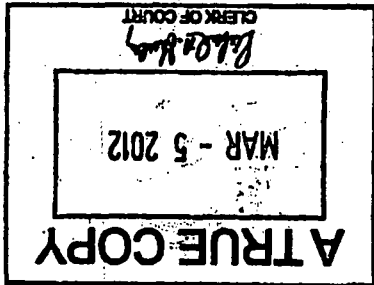
Foreperson of Grand Jury
Date: Foreperson

VERDICT

Guilty

Justicia Black

Foreperson of Petit Jury
Date: 2/2/09



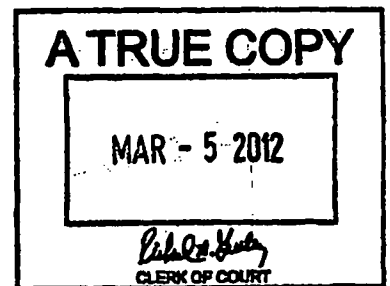
STATE OF SOUTH CAROLINA)
COUNTY OF Anderson)

INDICTMENT

At a Court of General Sessions, convened on JUL 22 2008, the Grand Jurors of Anderson County present upon their oath:

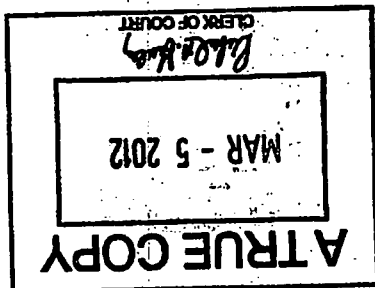
Drugs / Trafficking in ice, crank, or crack - 10 g or more, but less than 28 g

That the Defendant, **Carius Lomax**, on or about **April 28, 2008**, in Anderson County, South Carolina, did knowingly sell, manufacture, deliver, purchase, or bring into this State, or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive possession of more than ten (10) grams but less than twenty-eight (28) grams of Crack Cocaine, a schedule II controlled substance, as defined and otherwise limited in Sections 44-53-110, 44-53-210(b)(4), 44-53-210(d)(1), or 44-53-210(d)(2), all in violation of Section 44-53-375, 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.

Catherine J. Huey
ASSISTANT SOLICITOR



DOCKET NO. 2008GS04-1611

The State of South Carolina

County of Anderson

COURT OF GENERAL SESSIONS

JUL 22 2008

Term

THE STATE

vs.

Carius Lomax

COMMITMENT

04/07/09-comp

CTH

Indictment for

Drugs / Manuf., poss. of other sub. in Sch. I, II,
III or flunitrazepam or analogue, w.l.t.d.SC Code: 44-53-0370(b)(2)
CDR Code: 0187

WITNESSES

DUNN B. APD

ARREST WARRANT NUMBER

I718057

RETURN TO GRAND JURY
TRUE BILL

JUL 22 2008

Foreperson of Grand Jury

Date:

VERDICT

Guilty

Justice A. Bach

Foreperson of Petit Jury

Date:

2/2/09

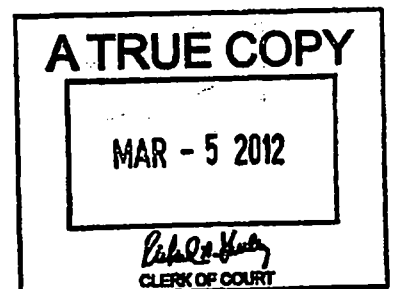
STATE OF SOUTH CAROLINA)
)
 COUNTY OF Anderson)

INDICTMENT

At a Court of General Sessions, convened on: JUL 22 2008, the Grand Jurors of
 Anderson County present upon their oath:

**Drugs / Manuf., poss. of other sub. in Sch. I, II, III or flunitrazepam or
 analogue, w.i.t.d. - 1st offense**

THAT CARIUS KENTA LOMAX DID IN ANDERSON COUNTY OR ABOUT APRIL 28, 2008 HAVE IN
 HIS POSSESSION WITH INTENT TO DISTRIBUTE A QUANTITY OF HYDROCODONE, A SCHEDULE
 III CONTROLLED SUBSTANCE UNDER PROVISIONS OF 44-53-110, *et seq. Code of Laws of South
 Carolina* (1976), AS AMENDED, SUCH POSSESSION NOT HAVING BEEN AUTHORIZED BY LAW.



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

Catherine D. Huey
 ASSISTANT SOLICITOR