

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

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MAY 23 2011

The Honorable Benjamin H. Culbertson, Circuit Court Judge

S.C. Supreme Court

The State of South Carolina, ... Respondent,

v.

Ervin Gamble, ... Petitioner.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Benjamin H. Culbertson, Circuit Court Judge

The State of South Carolina, ... Respondent,

v.

Ervin Gamble, ... Appellant.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF GENERAL SESSIONS
COUNTY OF HORRY)

STATE OF SOUTH CAROLINA)

Original

-VS-

) 2008-GS-26-4184;
) and 2008-GS-26-4185

ERVIN C. GAMBLE, JR.,)

DEFENDANT.)

THE FOLLOWING PROCEEDINGS WERE HELD BEFORE THE HONORABLE
THE HONORABLE BENJAMIN H. CULBERTSON;
IN THE CIRCUIT COURT OF HORRY COUNTY, BEGINNING AT 9:54
AM ON THE 21ST DAY OF JULY, 2009, AT THE HORRY COUNTY
COURTHOUSE, 15TH JUDICIAL DISTRICT, HORRY COUNTY GENERAL
SESSIONS COURT, CONWAY, SOUTH CAROLINA.

REPORTED BY: H. EUGENE BUCKNER, CVR

ORIGINAL

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1 THE COURT:

2 All right.

3 Ladies and gentlemen of the jury
4 panel, welcome back. Uh -- I hope everyone had a good
5 evening.

6 Uh -- To state again, my name is
7 Judge Ben Culbertson, a resident judge for the 15th
8 Judicial Circuit. And I'm happy to be with you this week
9 for this term of general sessions court of which is
10 commonly referred to as criminal court.

11 We're getting ready to start the
12 first trial this week. And this is the case for which
13 you have been called back.

14 And out of this panel, here in the
15 courtroom, we will be selecting a jury for this first
16 case.

17 Now, I will be going over some
18 questions with you. These are called voir dire
19 questions.

20 In other words, you have already
21 been qualified to serve as jurors in General Sessions
22 Court for this term in Horry County.

23 However, I have some additional
24 questions to go over with you to determine whether or not
25 you are qualified to serve as jurors on this particular

1 case.

2 These questions also give the
3 attorneys some information that allows them -- or that --
4 uh -- assist them in their selection of jurors in this
5 case.

6 So the first thing we need to do
7 -- I don't know if they told you during your
8 qualifications, but when you do jury duty, you're
9 constantly taking oaths. And it's no different now.

10 At this time, I'll need everyone
11 to stand and raise your right hand so that the Clerk can
12 administer your oath for the voir dire questioning.

13 CLERK:

14 Judge --

15 Well, I can do it. That'll be
16 fine.

17 CLERK:

18 Okay.

19 WHEREUPON: The jury venire was
20 sworn in open court by The Court at 9:59 AM, July 21,
21 2009.

22 THE COURT:

23 Please be seated. Is there
24 anybody who did not respond by saying "I do?"

25 If so, please stand.

1 (No response.)

2 THE COURT:

3 All right.

4 Ladies and gentlemen, this case --

5 MS. VON HERRMANN:

6 Your Honor, may we approach just

7 one moment?

8 THE COURT:

9 Yes.

10 (WHEREUPON: Counsel for each party

11 conferred off the record briefly with The Court at the

12 bench.)

13 THE COURT:

14 All right.

15 Ladies and gentlemen, this is

16 Docket Number 2008-GS-26-4184; and Docket Number 2008-GS-

17 26-4185, State of South Carolina versus Evan -- Ervin C.

18 Gamble, Junior.

19 Mr. Gamble is charged with attempt

20 to distribute heroine and trafficking in heroine; these

21 incidences occurring on or about -- or alleged to have

22 occurred -- on about July the 16th, 2008, here in Horry

23 County South Carolina.

24 First of all:

25 Is there any member of the jury

1 panel related by blood or marriage, have a business
2 relationship, a social relationship, a personal
3 relationship, or any type of relationship with the
4 Defendant, Ervin C. Gamble, Junior?

5 If so, please stand.

6 (No response.)

7 THE COURT:

8 All right.

9 The following is a list of
10 possible witnesses involved in this case:

11 Chad Mullinix.

12 Joe Necessary.

13 Lisa Floyd.

14 Sharon Lilly.

15 And Dean Bishop.

16 Now, is there any member of the
17 jury panel related by blood or marriage, have a social
18 relationship, personal relationship, business
19 relationship, or any other type of relationship with any
20 of these potential witnesses?

21 If so, please stand.

22 (No response.)

23 THE COURT:

24 All right.

25 The attorney for the State in this

1 case is Heather von Herrmann. And the attorney for the
2 defendant is Mr. Russell Long.

3 Is there any member of the jury
4 panel related by blood or marriage, have a business
5 relationship, social relationship -- uh -- business
6 relationship or any other type of relationship with
7 either of these attorneys?

8 If so, please stand.

9 (No response.)

10 THE COURT:

11 Is there any member of the jury
12 panel ever been represented by either of these attorneys?

13 If so, please stand.

14 (No response.)

15 THE COURT:

16 Is there any member of the jury
17 panel ever been involved in any type of legal action in
18 which either of these attorneys represented the other
19 party?

20 If so, please stand.

21 (No response.)

22 THE COURT:

23 Is there any member of the jury
24 panel who either personally or has a family member
25 employed within the office of the 15th Circuit

1 Solicitor's Office or the law office of Russell Long?

2 If so, please stand.

3 WHEREUPON: A juror responded.

4 THE COURT:

5 Yes sir; your name and number?

6 JUROR:

7 Joshua Wall -- uh -- 436.

8 THE COURT:

9 All right.

10 Mr. Wall, who -- You work there;
11 or a family member works there?

12 JUROR:

13 Uh -- My mother-in-law is Beverly
14 Landrum --

15 THE COURT:

16 Your --

17 JUROR:

18 -- Assistant Solicitor.

19 THE COURT:

20 Your mother-in-law is Assistant
21 Solicitor?

22 JUROR:

23 Yes sir.

24 THE COURT:

25 All right.

1 All right, Mr. Wall; I'm going to
2 excuse you from presiding over this particular case;
3 okay.

4 JUROR:

5 Okay.

6 THE COURT:

7 Thank you.

8 No -- you need to -- You can wait
9 until the end. And then, when I excuse the jury, you can
10 go then.

11 Anybody else employed by the
12 Solicitor or Mr. Long's law office?

13 If so, please stand.

14 (No response.)

15 THE COURT:

16 Is there any member of the jury
17 panel who has formed or expressed an opinion about any
18 issue or matter involved in this case?

19 If so, please stand.

20 (No response.)

21 THE COURT:

22 Is there any member of the jury
23 panel who has heard anything, read anything, discussed
24 anything, or seen anything about this case?

25 If so, please stand.

1 (No response.)

2 THE COURT:

3 Is there any member of the jury
4 panel aware of any bias or prejudice towards either the
5 State of South Carolina or the Defendant in this case?

6 If so, please stand.

7 (No response.)

8 THE COURT:

9 Is there any member of the jury
10 panel who was a member of the grand jury that indicted
11 this case?

12 If so, please stand.

13 (No response.)

14 THE COURT:

15 Is there any member of the jury
16 panel who is a member of or a contributor to any group
17 which has as its primary concern the promotion of law
18 enforcement?

19 Some of these organizations are:

20 Mothers Against Drunk Driving.

21 Students Against Drunk Driving.

22 Citizens Against Violent Crimes.

23 Citizens Against Spousal Abuse.

24 Or any other such organization?

25 If so, please stand.

1 (No response.)

2 THE COURT:

3 Is there any member of the jury
4 panel who knows of any reason whatsoever as to why he or
5 she should not serve as a juror in this particular case,
6 with particular emphasis being placed on your ability to
7 be fair and impartial to both the State of South Carolina
8 and the Defendant in this case?

9 If so, please stand.

10 (No response.)

11 THE COURT:

12 Any additional questioning by the
13 State?

14 MS. VON. HERRMANN:

15 None, Your Honor.

16 THE COURT:

17 Any by the Defendant?

18 MR. LONG:

19 No sir, Your Honor.

20 THE COURT:

21 All right.

22 Before we proceed, I've left my
23 jury list in my office.

24 Let's take about a 5 minute break
25 and I'll be right back; okay.

1 MS. VON HERRMANN:

2 Okay. Thank you.

3 THE COURT:

4 All right; thank you.

5 (WHEREUPON: The court was
6 declared in recess at 10:02 AM, July 21, 2009.)

7 (WHEREUPON: The court was called
8 to order by the Bailiff at 10:10 AM, July 21, 2009; and
9 all pertinent parties, along with their counsel, were
10 back and present in the courtroom.)

11 BAILIFF:

12 Order in the court.

13 THE COURT:

14 That's all right. Keep your
15 seats.

16 Have we got everyone back?

17 BAILIFF:

18 Yes sir.

19 THE COURT:

20 All right.

21 Ladies and gentlemen, we're
22 getting ready to select the jury in this case.

23 Now we have put some things on the
24 record during -- or will put some things on the record as
25 a result of discussions.

1 Now -- uh -- based upon Mr. Wall's
2 -- uh -- answer to the voir dire questioning, I'm
3 excusing Mr. Wall, Juror Number 436 -- uh -- from serving
4 on this jury.

5 And likewise by consent of the
6 parties, Juror Number 239, Mr. -- is it Kinnard or
7 Kinnard?

8 JUROR:

9 Kinnard.

10 THE COURT:

11 Kinnard?

12 JUROR:

13 Yes sir.

14 THE COURT:

15 We're going to excuse him from
16 presiding on this particular jury.

17 Now what happens, ladies and
18 gentlemen, used to in the old -- uh -- before everything
19 was automated, your names would've been put in these
20 little cylinders and put into a big -- uh -- barrel; and
21 the barrel rolled around; and your names would've been
22 pulled out one at a time.

23 Well, we're automated now.

24 So everybody's name is fed into a
25 computer. And the computer spits your names out at

1 random.

2 And based upon that random -- uh
3 -- uh -- selection, your name is placed on a list. And
4 your name will be called out one at a time.

5 When your name is called, if you
6 would please come forward and stand here in front of the
7 attorneys.

8 Now usually in -- In civil cases,
9 your name is put on a list, and the attorneys just look
10 over the list and strike names.

11 But in criminal cases, it's a
12 little bit different.

13 When you name is called, you will
14 come forward. You'll stand in front of the attorneys.
15 You'll face the attorneys.

16 And the State's attorney will look
17 at you a little while, and then look over their notes a
18 little while.

19 And then they'll look back at you
20 a little while. And then they'll decide whether they
21 want you.

22 And then if they decide they want
23 you, then the defense attorney will look at you a little
24 while. And then he'll talk to his client a little while.

25 And then, he'll look back at his

1 notes a little while, and he'll decide if he wants you.

2 The State gets 5 strikes in this
3 case, and the Defendant gets 5 strikes in this case. And
4 that's how we select a jury.

5 We'll go forward until we select
6 12 jurors and 2 alternates.

7 And then, that will comprise the
8 jury -- uh -- in this case.

9 So if your name is not called, it
10 doesn't mean that you've been struck; it just means that
11 -- oh my goodness -- it just means that your name did not
12 make the list, because this is done at random, number
13 one.

14 Number 2:

15 If you are called and one of the
16 parties strikes you from presiding over this particular
17 case, don't take it as a per -- a personal insult to you.

18 It just means that:

19 For whatever reason, based upon
20 their research; based upon the facts of their case; based
21 upon -- uh -- whatever -- uh -- investigation they have
22 done; they just do not think that you would be -- uh -- a
23 good juror this particular case.

24 It doesn't mean that you wouldn't
25 be a good jury on another particular case.

1 But both parties have -- uh --
2 certain aspects that they're looking for in their jury
3 selection process, the whole focus being to select a fair
4 and impartial jury that can give both the State of South
5 Carolina and the Defendant a fair and impartial trial in
6 this case.

7 So, if you would please listen up.
8 And as your name is called, if you would please come
9 forward and stand in front -- uh -- of the attorneys and
10 face the attorneys. And we'll direct you further at that
11 time.

12 All right.

13 CLERK:

14 425, Mellisa Tryhall.

15 (WHEREUPON: The juror came
16 forward and turned and faced counsel table as
17 instructed.)

18 CLERK:

19 What say the State?

20 MS. VON HERRMANN:

21 Please present the juror.

22 CLERK:

23 Defense?

24 MR. LONG:

25 Swear Ms. Tryhall, please, Your

1 Honor.

2 CLERK:

3 Please be seated in the juror box.

4 JUROR:

5 Can I get my stuff?

6 CLERK:

7 Yeah.

8 THE COURT:

9 Oh, I'm sorry. I should have told
10 you:

11 When your name is called, if you
12 would bring with you anything you have; any pocketbooks,
13 umbrellas, coats, or whatever the case may be.

14 (WHEREUPON: This juror, having
15 been accepted by the parties, was seated as a juror in
16 this case.)

17 CLERK:

18 4, Conswella Mitchell.

19 (WHEREUPON: The juror came
20 forward and turned and faced counsel table as
21 instructed.)

22 CLERK:

23 What say the State?

24 MS. VON HERRMANN:

25 I'm sorry. What number was that?

1 We don't have a Number 4.

2 MR. LONG:

3 I don't have information on Number
4 4 either.

5 MS. VON HERRMANN:

6 Our list begins with the Number 5
7 in our jury card.

8 MR. LONG:

9 Actually, Ms. Mitchell is listed
10 alphabetically; Number 4; she is.

11 MS. VON HERRMANN:

12 Please excuse the juror in the
13 trial of this case.

14 CLERK:

15 Please be seated. You are excused
16 from this particular case.

17 (WHEREUPON: This jury panel
18 member, not being accepted by all parties, returned to
19 the panel and was not seated as a juror in this case.)

20 CLERK:

21 Juror 88, Maya Smith.

22 (WHEREUPON: The juror came
23 forward and turned and faced counsel table as
24 instructed.)

25 CLERK:

1 What say the State?

2 MS. VON HERRMANN:

3 Please excuse the juror from the
4 trial of this case.

5 CLERK:

6 Please be seated. You are excused
7 from this particular case.

8 (WHEREUPON: This jury panel
9 member, not being accepted by all parties, returned to
10 the panel and was not seated as a juror in this case.)

11 CLERK:

12 181, Shay -- Shelly Hale.

13 (WHEREUPON: The juror came
14 forward and turned and faced counsel table as
15 instructed.)

16 CLERK:

17 What say the State?

18 MS. VON HERRMANN:

19 Please present the juror for trial
20 of this case.

21 CLERK:

22 Defense?

23 MR. LONG:

24 Swear Ms. Hale, please, Your
25 Honor.

1 CLERK:

2 Please be seated in the juror box.

3 (WHEREUPON: This juror, having
4 been accepted by the parties, was seated as a juror in
5 this case.)

6 CLERK:

7 272, Michael Marinaccio.

8 (WHEREUPON: The juror came
9 forward and turned and faced counsel table as
10 instructed.)

11 THE COURT:

12 How do you pronounce your name?

13 JUROR:

14 Marinaccio.

15 THE COURT:

16 Marinaccio? Okay.

17 CLERK:

18 Sorry.

19 What say the State?

20 MS. VON HERRMANN:

21 Please present the juror for trial
22 of this case.
23 Defense?

24 Swear Mr. Marinaccio, please, Your
25 Honor.

1 CLERK:

2 Please be seated in the juror box.

3 (WHEREUPON: This juror, having
4 been accepted by the parties, was seated as a juror in
5 this case.)

6 CLERK:

7 448, Annette Whitcomb.

8 (WHEREUPON: The juror came
9 forward and turned and faced counsel table as
10 instructed.)

11 CLERK:

12 What say the State?

13 MS. VON HERRMANN:

14 Please present the juror in the
15 trial of this case.

16 CLERK:

17 Defense?

18 MR. LONG:

19 Swear Ms. Whitcomb, please, Your
20 Honor.

21 CLERK:

22 Please be seated in the juror box.

23 (WHEREUPON: This juror, having
24 been accepted by the parties, was seated as a juror in
25 this case.)

1 CLERK:

2 46, Mabel Brown.

3 (WHEREUPON: The juror came
4 forward and turned and faced counsel table as
5 instructed.)

6 CLERK:

7 What say the State?

8 MS. VON HERRMANN:

9 Please excuse the juror from trial
10 of this case.

11 CLERK:

12 Please be seated. You're excused
13 from this particular case.

14 (WHEREUPON: This jury panel
15 member, not being accepted by all parties, returned to
16 the panel and was not seated as a juror in this case.)

17 CLERK:

18 66, Michele Cartensen.

19 (WHEREUPON: The juror came
20 forward and turned and faced counsel table as
21 instructed.)

22 CLERK:

23 What say the State?

24 MS. VON HERRMANN:

25 Please present the juror in the

1 trial of this case.

2 CLERK:

3 Defense?

4 MR. LONG:

5 Swear Ms. Carstensen, please, Your
6 Honor.

7 CLERK:

8 Please be seated in the jury box.

9 (WHEREUPON: This juror, having
10 been accepted by the parties, was seated as a juror in
11 this case.)

12 CLERK:

13 253, Melodye Laveglia.

14 (WHEREUPON: The juror came
15 forward and turned and faced counsel table as
16 instructed.)

17 CLERK:

18 What say the State?

19 MS. VON HERRMANN:

20 Please present the juror.

21 CLERK:

22 Defense?

23 MR. LONG:

24 Swear her please, Your Honor.

25 CLERK:

1 Please be seated in the juror box.

2 (WHEREUPON: This juror, having
3 been accepted by the parties, was seated as a juror in
4 this case.)

5 CLERK:

6 412, Michael Sweatt.

7 (WHEREUPON: The juror came
8 forward and turned and faced counsel table as
9 instructed.)

10 CLERK:

11 What say the State?

12 MS. VON HERRMANN:

13 Please present the juror.

14 CLERK:

15 Defense?

16 MR. LONG:

17 Excuse Mr. Sweatt from the trial
18 of this case please, Your Honor.

19 CLERK:

20 Please be seated. You are excused
21 from this particular case.

22 (WHEREUPON: This jury panel
23 member, not being accepted by all parties, returned to
24 the panel and was not seated as a juror in this case.)

25 CLERK:

1 23, Tammy Bennett.

2 (WHEREUPON: The juror came
3 forward and turned and faced counsel table as
4 instructed.)

5 CLERK:

6 What say the State?

7 MS. VON HERRMANN:

8 Please present the juror.

9 CLERK:

10 Defense?

11 MR. LONG:

12 Swear Ms. Bennett, please, Your

13 Honor.

14 CLERK:

15 Please be seated in the juror box.

16 (WHEREUPON: This juror, having
17 been accepted by the parties, was seated as a juror in
18 this case.)

19 CLERK:

20 44, Jennifer Brown.

21 (WHEREUPON: The juror came
22 forward and turned and faced counsel table as
23 instructed.)

24 CLERK:

25 What say the State?

1 MS. VON HERRMANN:

2 Please present the juror.

3 CLERK:

4 Defense?

5 MR. LONG:

6 Your Honor, my paperwork indicates
7 that she has a relative in the Horry County Solicitor's
8 Office.

9 Is that incorrect?

10 JUROR:

11 Incorrect.

12 MR. LONG:

13 That is incorrect?

14 Swear Ms. Brown, please.

15 CLERK:

16 Please be seated in the juror box.

17 (Laughter.)

18 THE COURT:

19 Want to change your answer?

20 (Again, laughter.)

21 (WHEREUPON: This juror, having
22 been accepted by the parties, was seated as a juror in
23 this case.)

24 CLERK:

25 294, Wayne Minicozzi.

1 (WHEREUPON: The juror came
2 forward and turned and faced counsel table as
3 instructed.)

4 CLERK:

5 What say the State?

6 MS. VON HERRMANN:

7 Please present the juror.

8 CLERK:

9 Defense?

10 MR. LONG:

11 Excuse Mr. Minicozzi from the
12 trial of this case please, Your Honor.

13 CLERK:

14 Please be seated. You're excused
15 from this particular case.

16 (WHEREUPON: This jury panel
17 member, not being accepted by all parties, returned to
18 the panel and was not seated as a juror in this case.)

19 CLERK:

20 221, Susan Hunt.

21 (WHEREUPON: The juror came
22 forward and turned and faced counsel table as
23 instructed.)

24 CLERK:

25 What say the State?

1 MS. VON HERRMANN:

2 Please present the juror.

3 CLERK:

4 Defense?

5 MR. LONG:

6 Swear Ms. Hunt please, Your Honor.

7 CLERK:

8 Please be seated in the juror box.

9 (WHEREUPON: This juror, having
10 been accepted by the parties, was seated as a juror in
11 this case.)

12 CLERK:

13 285, Margaret Merle.

14 MR. LONG:

15 What was that number again?

16 CLERK:

17 285.

18 (WHEREUPON: The juror came
19 forward and turned and faced counsel table as
20 instructed.)

21 CLERK:

22 What say the State?

23 MS. VON HERRMANN:

24 Please excuse the juror in the
25 trial of this case.

1 CLERK:

2 Please be seated. You're excused
3 from this particular case.

4 (WHEREUPON: This jury panel
5 member, not being accepted by all parties, returned to
6 the panel and was not seated as a juror in this case.)

7 CLERK:

8 464, Teresa Woodberry.

9 (WHEREUPON: The juror came
10 forward and turned and faced counsel table as
11 instructed.)

12 CLERK:

13 What say the State?

14 MS. VON HERRMANN:

15 Please present the juror.

16 CLERK:

17 Defense?

18 MR. LONG:

19 Swear Ms. Woodberry please, Your
20 Honor.

21 CLERK:

22 Please be seated in the juror box.

23 (WHEREUPON: This juror, having
24 been accepted by the parties, was seated as a juror in
25 this case.)

1 CLERK:

2 188, Darren Hardwick.

3 (WHEREUPON: The juror came
4 forward and turned and faced counsel table as
5 instructed.)

6 CLERK:

7 What say the State?

8 MS. VON HERRMANN:

9 Please present the juror.

10 CLERK:

11 Defense?

12 MR. LONG:

13 Swear Mr. Hardwick.

14 CLERK:

15 Please be seated in the juror box.

16 (WHEREUPON: This juror, having
17 been accepted by the parties, was seated as a juror in
18 this case.)

19 CLERK:

20 127, Joyce Farris.

21 (WHEREUPON: The juror came
22 forward and turned and faced counsel table as
23 instructed.)

24 CLERK:

25 What say the State?

1 MS. VON HERRMANN:

2 Please present the juror.

3 CLERK:

4 Defense?

5 MR. LONG:

6 Swear Ms. Farris please, Your

7 Honor.

8 CLERK:

9 Please be seated in the juror box.

10 (WHEREUPON: This juror, having
11 been accepted by the parties, was seated as a juror in
12 this case.)

13 THE COURT:

14 All right. We'll swear 2
15 alternates. State gets one strike; the Defense gets two.

16 CLERK:

17 370, Abigail Schraeder.

18 (WHEREUPON: The juror came
19 forward and turned and faced counsel table as
20 instructed.)

21 CLERK:

22 What say the State?

23 MS. VON HERRMANN:

24 Please present the juror.

25 CLERK:

1 Defense?

2 MR. LONG:

3 Swear Ms. Schraeder, please.

4 CLERK:

5 Please be seated in the juror box.

6 (WHEREUPON: This juror, having
7 been accepted by the parties, was seated as an alternate
8 juror in this case.)

9 CLERK:

10 67, Dale Carter.

11 (WHEREUPON: The juror came
12 forward and turned and faced counsel table as
13 instructed.)

14 CLERK:

15 What say the State?

16 MS. VON HERRMANN:

17 Please excuse the juror.

18 CLERK:

19 Please be seated. You're excused
20 from this particular case.

21 (WHEREUPON: This jury panel
22 member, not being accepted by all parties, returned to
23 the panel and was not seated as an alternate juror in
24 this case.)

25 CLERK:

1 42, Jonathan Brooks.

2 (WHEREUPON: The juror came
3 forward and turned and faced counsel table as
4 instructed.)

5 CLERK:

6 What say the State?

7 MS. VON HERRMANN:

8 Please present the juror.

9 CLERK:

10 Defense?

11 MR. LONG:

12 Swear Mr. Brooks please, Your

13 Honor.

14 CLERK:

15 Please be seated in the juror box.

16 (WHEREUPON: This juror, having
17 been accepted by the parties, was seated as an alternate
18 juror in this case.)

19 WHEREUPON: At 10:26 AM, July 21,
20 2009, the jury selection was completed.

21 THE COURT:

22 All right.

23 Ladies and gentlemen, you will
24 comprise the jury in this first case.

25 I'm going to excuse you back to

1 the jury room at this particular time. And I'll bring
2 you back out in just a minute with some instructions on
3 this case.

4 But at this time, please follow
5 the Bailiff back to the jury room.

6 (WHEREUPON: The jury empanelled
7 in the case withdrew from the courtroom at 10:27 AM, July
8 21, 2009; and was no longer present during the following
9 proceedings.)

10 THE COURT:

11 Any challenges to the selection or
12 composition of the jury by the State?

13 MS. VON HERRMANN:

14 None from the State, Your Honor.

15 THE COURT:

16 Any by the Defendant?

17 DEFENSE:

18 May we approach Your Honor?

19 THE COURT:

20 Yes sir.

21 (WHEREUPON: A conference was held
22 at the bench by The Court and Counsel at 10:28 AM, July
23 22, 2009.)

24 THE COURT:

25 All right. Any challenges to the

1 selection or composition of the jury by the Defendant?

2 MR. LONG:

3 No sir, Your Honor.

4 THE COURT:

5 All right.

6 Those of you remaining in the jury
7 panel, we've got our jury for this particular case. And
8 so, your services will not be needed on this particular
9 case.

10 Uh -- Do they go back down to the
11 panel room, or call in, or what?

12 CLERK:

13 Uh -- They're having them call
14 back after 6.

15 THE COURT:

16 Okay.

17 All right; I am going to excuse
18 you for the remainder of today.

19 You should have been given a
20 number for the Clerk of Court. If you'll call back that
21 number after 6:00 PM today; and that'll give you
22 directions as far as -- uh -- when you need to return,
23 and if you need to return.

24 So make sure you call that number
25 after 6:00 PM today.

1 Now having said that, and I am
2 getting ready to excuse you. Even though you weren't
3 selected as a juror on this particular case, there are
4 other cases going on and you may be selected as jurors on
5 those cases.

6 However, if you are not selected
7 on a case this week, don't leave here thinking that you
8 have not fulfilled your duty as jurors.

9 The fact that you are here; the
10 fact that you are present; and the fact that you are
11 willing to serve; in and of itself facilitates the
12 judicial system, whether it be on the civil side or the
13 criminal side.

14 This is how the system works.

15 And without your presence, and
16 without your willingness to serve, we could not function
17 as a court.

18 So, the mere fact that you are
19 here; the fact that you were present; and the fact that
20 you are willing to serve; in and of itself brings about
21 the disposition of a number of cases.

22 Once parties start viewing jurors,
23 then they start re-evaluating their cases.

24 And -- uh -- not in this
25 particular case. It's going to go to trial.

1 But there are -- I can assure you
2 that there are a vast number of trials that have settled
3 -- uh -- or disposed -- been disposed of in some form or
4 fashion just simply because you were here and you were
5 willing to serve as jurors.

6 So, I thank you for your service;
7 not only personally, but on behalf of the citizens of
8 Horry County. Because it is an important function that
9 you serve by just being here.

10 Now having said that, I will
11 excuse you for the remainder of the day. And I'll direct
12 you to please call that number after 6:00 PM today.

13 Thank you very much.

14 WHEREUPON: The remaining jury
15 venire that wasn't chosen departed the courtroom at 10:32
16 AM, July 21, 2009.

17 THE COURT:

18 All right.

19 Lets go ahead and bring the jury
20 back in.

21 I'm just going to -- We're not
22 going to swear them in right now.

23 I'm going to go ahead and bring
24 them in; and then, just have them report back at 10:00
25 tomorrow for the trial of the case.

1 (WHEREUPON: The jury empanelled
2 in the case was escorted back into the courtroom at 10:32
3 AM, July 21, 2009; and was in fact present during the
4 following proceedings.)

5 THE COURT:

6 All right.

7 Ladies and gentlemen, welcome
8 back. You will be the jury that presides over this first
9 case.

10 And we've got some matters that we
11 need to take up, so we will not be starting this case
12 today.

13 We will be starting it tomorrow.
14 So, I'm getting ready to excuse you for the remainder of
15 the day.

16 And I'm going to ask that you be
17 back -- uh -- at -- uh -- well, I'm going to have you
18 back at 9:30 tomorrow morning; because there's some
19 things that I need for you to do -- uh -- before we get
20 started.

21 So, in just a minute, I'm going to
22 excuse you for the remainder of the day. And I ask that
23 you be back in the juryroom that you just left at 9:30
24 tomorrow morning.

25 Now, when you came back -- uh --

1 at 9:30 -- uh -- tomorrow morning, I'm going to ask you
2 to do one thing for me.

3 The first thing is:

4 To select a foreperson.

5 Now, the foreperson -- uh -- Many
6 judges select their own foreperson. I like to give the
7 jury the opportunity to select one -- uh -- on their own,
8 if they're able to do so.

9 If you cannot select a foreperson,
10 do not worry about it. I can appoint someone to serve as
11 foreperson of the jury.

12 Now, the foreperson has absolutely
13 no more influence, no more authority, and no more
14 importance than any other juror.

15 The foreperson is simply the
16 liaison between The Court and the jury.

17 If the jury has a need, the
18 foreperson let's the bailiff know.

19 If the jury has a question, the
20 foreperson let's the bailiff know.

21 And when the jury -- uh -- reaches
22 a decision, the foreperson -- uh -- will let The Court
23 know that they've reached a verdict in the case; and will
24 preside over the -- uh -- deliberations when it's time to
25 deliberate.

1 But other than a communication or
2 liaison responsibility, the foreperson has absolutely no
3 more authority, no more importance, or no more
4 responsibility than any other juror.

5 The only restriction is at this
6 point in time -- uh -- Ms. Schrader and Mr. Brooks; you
7 are alternate jurors. So you would not be allowed to
8 serve as the foreperson of this particular jury.

9 You are here -- uh -- as
10 alternates in the case -- uh -- something happens to one
11 of the other jurors.

12 And when you come back into the
13 courtroom, the foreperson will always sit at this front
14 seat -- uh -- closest to the jury.

15 The -- uh -- alternates -- Where
16 do you have the alternates sitting?

17 BAILIFF:

18 The 2 alternates will sit right
19 here.

20 THE COURT:

21 On the end?

22 BAILIFF:

23 Yeah.

24 THE COURT:

25 Okay. So the alternate --

1 BAILIFF:

2 And the foreperson will sit right
3 there.

4 THE COURT:

5 Okay.

6 The alternates sit on these 2
7 right seats; to my right, to your left.

8 BAILIFF:

9 Yes sir.

10 THE COURT:

11 And then, the foreperson will sit
12 in the second seat here on the front row closest -- uh --
13 to the witness.

14 The rest of you are a liberty to
15 sit in any seat you want.

16 You can sit in the same seat
17 throughout the trial the case; or you can alternate seats
18 throughout the trial of the case. However you want to is
19 fine.

20 Now, when we bring you back
21 tomorrow morning, I'll bring you in the courtroom. I
22 will go over some preliminary instructions with you at
23 that time.

24 However -- uh -- since you are
25 getting ready -- uh -- to leave for the remainder of the

1 day, I just want to -- uh -- caution you about a few --
2 few things.

3 Number one:

4 Do not discuss this case with
5 anyone, even among yourselves.

6 You don't know anything about the
7 case.

8 No evidence has been presented.

9 But please do not discuss the case
10 with anyone.

11 Particularly, do not talk to any
12 of the attorneys or any of the potential witnesses in
13 this case.

14 I know none of you will do
15 anything improper. But -- you know -- if you were on
16 trial and you saw one of the jurors speaking to a witness
17 for one or the other side, it might raise some suspicion
18 in your mind.

19 So, to avoid even the appearance
20 of any impropriety, I ask that you not speak with anyone,
21 particularly the attorneys or the potential witnesses in
22 this case.

23 Number two:

24 When you come into the courtroom,
25 if you would please turn off all of your cell phones,

1 communication devices, pagers, whatever the case may be.

2 I'll be giving you plenty of
3 opportunities to check your messages and to return calls.

4 But while you are in the
5 courtroom, it will require that we have your undivided
6 attention.

7 And I do not want you even be --
8 uh -- to even be interrupted by a silent -- uh -- alarm,
9 or anything of that nature on your phone.

10 So please turn off all pagers, all
11 cell phones, and things of that nature; or leave them out
12 of the courtroom altogether.

13 I ask that you be prompt when you
14 return.

15 Now having said that, that does
16 not mean that we will have you in the courtroom
17 performing the trial of the case exactly when I tell you
18 to be back.

19 We'll be tending to some court
20 businesses. But we cannot proceed with any function
21 unless all of the jurors are back and present.

22 And so, I ask that you be prompt
23 when you -- uh -- are directed to return.

24 Now, we know that emergencies
25 arise from time to time.

1 If you have an emergency, give us
2 a call.

3 We can -- may be able to assist
4 you with the emergency; or we'll certainly be able to
5 work around the emergency.

6 But for whatever reason, please do
7 not leave us in the dark, and not let us know where you
8 are or what's going on.

9 If you have -- If it's a
10 transportation problem, we can cure that easily. We can
11 send somebody to pick you up.

12 (Laughter.)

13 But, if you -- uh -- have -- uh --
14 any other type of an emergency, please give us a call and
15 let us know why you're not here.

16 Last, but certainly not least:

17 Please do not conduct any
18 independent investigations into this case.

19 Don't try to look in the
20 newspaper; go on the Internet; listen to any type of
21 news' reports or anything of that nature.

22 Your decision as jurors is to be
23 based exclusively on the testimony and evidence presented
24 during the trial of this case without any influence from
25 any outside source.

1 So please do not conduct any
2 independent investigations into the facts of this case.

3 Now at this time, I'm going to go
4 ahead and I'm going to excuse you for the remainder of
5 the day.

6 I ask that you be back in the jury
7 room at 9:30.

8 First thing, please select a
9 foreperson.

10 When you select a foreperson, just
11 write that foreperson's name on a list and give it to the
12 bailiff; and she'll present it to The Court.

13 But everyone has a good evening.

14 And I'll excuse you for the
15 remainder of the day.

16 Thank you very much.

17 (WHEREUPON: The jury empanelled
18 in the case withdrew from the courtroom at 10:40 AM, July
19 21, 2009; and was no longer present during the following
20 proceedings.)

21 THE COURT:

22 Anything else before we recess?

23 MS. VON HERRMANN:

24 Nothing from the State, Your
25 Honor.

1 MR. LONG:

2 Nothing from the Defendant.

3 THE COURT:

4 All right.

5 What time do y'all want to start
6 tomorrow morning with your motions?

7 MR. LONG:

8 9:00 o'clock?

9 THE COURT:

10 9:00 o'clock will be fine.

11 MS. VON HERRMANN:

12 Sounds good.

13 THE COURT:

14 Sounds good? All right.

15 We'll see y'all 9:00 o'clock
16 tomorrow morning.

17 MR. LONG:

18 Yes sir.

19 MS. VON HERRMANN:

20 Thank you, Judge.

21 THE COURT:

22 Thank you very much.

23 (WHEREUPON: The court was
24 declared in recess at 10:41 AM, July 21, 2009; and this
25 ended proceedings for this trial on July 21, 2009.)

1 (WHEREUPON: The court was called
2 to order by the Bailiff at 9:58 AM, July 22, 2009; and
3 all pertinent parties, along with their counsel, were
4 back and present in the courtroom.)

5 BAILIFF:

6 All Rise.

7 THE COURT:

8 All right. Thank you very much.
9 Please be seated.

10 REPORTER'S NOTE: SEVERAL EXHIBITS
11 WERE MARKED BY THE COURT REPORTER FOR IDENTIFICATION ONLY
12 PRIOR TO THE COURT BEING CALLED TO ORDER.

13 THE COURT:

14 All right.

15 We just received word from the
16 jury that they have selected Juror Number 44, Jennifer R.
17 Brown, as the foreperson.

18 All right.

19 Any preliminary matters before we
20 bring in the jury?

21 MS. VON HERRMANN:

22 Uh -- Your Honor, the only matter
23 that I have is that:

24 I would like to make a motion to
25 exclude the -- uh -- the reference to the CI.

1 This case is not -- We're not
2 going forward on the attempt to distribute case.

3 Uh -- The CI is immaterial to the
4 trafficking case.

5 The trafficking case is basically
6 -- uh -- that:

7 The Defendant drives up into the
8 driveway.

9 Uh -- He comes in there.

10 They arrest him -- uh -- based on
11 -- uh -- the -- the information that they had.

12 Uh -- And the CI, as you know Your
13 Honor, is deceased.

14 Uh -- I guess my -- my point is
15 this, that:

16 Uh -- If we start to talk about
17 the CI, then I think we're going to also have to start to
18 talk about the fact that he's deceased.

19 And I think that may place us in a
20 position -- uh -- where it is -- uh -- likely that we end
21 up with a mistrial.

22 THE COURT:

23 All right.

24 Let me hear from you, Mr. Long.

25 MR. LONG:

1 Your Honor, I don't anticipate or
2 expect that I'm going to bring up the CI.

3 Uh -- I know that they're trying
4 the trafficking case only.

5 Uh -- It's got to be the point
6 where they get to -- uh -- probable cause to make that
7 arrest -- uh -- that search of that vehicle.

8 Uh -- So I don't know how they --
9 Again, and I'm -- We mentioned this in chambers
10 yesterday.

11 I don't know how they get to that.
12 But that's -- that's not for me to
13 -- to determine.

14 That's -- I guess we'll wait and
15 see how they do it.

16 But I don't anticipate bringing up
17 the CI.

18 THE COURT:

19 All right.

20 Well, we'll just have to kind of
21 play it along.

22 I -- I'm not going to rule that it
23 cannot be brought up.

24 Certainly, y'all might open the
25 door. And I don't know how the case is going to be

1 presented.

2 Uh -- Uh -- But it is -- I will
3 sustain your objection -- or -- uh -- grant your motion
4 to the extent that:

5 I'm not going to allow the jury to
6 get confused because of an absence of a CI.

7 Uh -- But I kind of -- I hate to
8 do it as a pretrial -- granting the motion; because I
9 don't know how it's going to play out when we get to
10 trial.

11 MS. VON HERRMANN:

12 Yes, sir, Your Honor.

13 And I understand that it's -- that
14 it is a pretrial -- uh -- ruling; and that obviously, Mr.
15 Long has the right to object to at the time -- uh -- if
16 and when it's -- you know -- may come up or become
17 necessary.

18 THE COURT:

19 All right.

20 All right; now y'all are not going
21 forward -- Oh, excuse me.

22 Before we go further, this is the
23 note where the jury wrote -- jury wrote their foreperson,
24 Jennifer Brown; and gave it to the bailiff, who gave it
25 to us.

1 I'm going to go ahead and mark
2 that as Court's Exhibit 1.

3 It won't go back to the jury; but
4 it will be as Court's Exhibit 1, that shows who they
5 selected as a foreperson.

6 WHEREUPON: THE JURY'S NOTE
7 SHOWING THE FOREPERSON SELECTION WAS MARKED BY THE COURT
8 REPORTER AS COURT'S EXHIBIT NUMBER 1.

9 THE COURT:

10 All right.

11 Now, you're going forward on which
12 indictments in this case?

13 MS. VON HERRMANN:

14 Uh -- That's the traf -- I'll be
15 going forward on the trafficking in -- you know -- in 4
16 grams -- the 14 grams.

17 THE COURT:

18 All right.

19 So, this is Docket Number 2008-GS-
20 26-4185, the State versus Ervin C. Gamble, Junior. The
21 charge against Mr. Gamble is trafficking in heroin.

22 You are not going forward on the
23 attempt to distribute heroine, Docket Number 2008-GS-26-
24 4184.

25 Is that correct?

1 MS. VON HERRMANN:

2 That's correct.

3 THE COURT:

4 All right.

5 MR. LONG:

6 Your Honor, may I inquire as to
7 not going -- as to what not going forward means?

8 Does that mean that that -- uh --
9 indictment is now being nolle prossed?

10 MS. VON HERRMANN:

11 No. It does not mean it is being
12 nolle prossed.

13 It means at this time we elected
14 not to go forward on that particular case.

15 THE COURT:

16 So you're not trying him on that
17 charge at this time?

18 MS. VON HERRMANN:

19 Correct.

20 THE COURT:

21 Okay.

22 MR. LONG:

23 Well, I mean, that -- I would
24 assume, then, that they need to move to sever the two
25 counts. I believe it's counts of one indictment.

1 Is that correct?

2 THE COURT:

3 No, no.

4 MS. VON HERRMANN:

5 No. Two separate indictments.

6 THE COURT:

7 They've got two indictments; one
8 indictment on each count.

9 Now whether or not the facts and
10 circumstances are going to create a double jeopardy
11 problem, I don't know.

12 But I know that the Solicitor can
13 call whichever indictment they want to; and proceed at
14 their own risk; okay.

15 MR. LONG:

16 Okay.

17 THE COURT:

18 So that's -- They don't have to
19 call this indictment at this time; okay.

20 MS. VON HERRMANN:

21 Your Honor, the other matter that
22 I have for The Court, Your Honor, is that:

23 I do have a -- uh -- copy now.

24 This is somewhat preliminary, but I -- I don't imagine
25 that Mr. Long would have any objection to me doing this.

1 I am going to -- uh -- present to
2 The Court -- uh -- Mr. Gamble's prior conviction for
3 distribution of marijuana -- uh -- which took place in
4 2005.

5 This is an indictment -- uh -- for
6 a trafficking second offense.

7 And I have this certified copy
8 from Georgetown County -- uh -- where he was convicted.
9 And I would like to hand that up to The Court at this
10 time.

11 MR. LONG:

12 Without objection, Your Honor.

13 THE COURT:

14 All right.

15 So, we want to -- oh, okay.

16 MS. VON HERRMANN:

17 I guess we can just make that --

18 If we can just make that -- uh -- a Court's Exhibit --

19 THE COURT:

20 Court's Exhibit?

21 MS. VON HERRMANN:

22 -- perhaps would be the best way
23 to handle that.

24 MR. LONG:

25 No objection, Your Honor.

1 THE COURT:

2 All right.

3 So you are maintain -- You -- Are
4 you consenting and acknowledging that this would be a
5 second offense if convicted?

6 MR. LONG:

7 We are, yes.

8 THE COURT:

9 All right.

10 All right; so we have the -- uh --
11 sentencing sheet signed by Judge Steve John, dated May
12 23rd, 2005, with the indictment for distribution of
13 marijuana being Indictment Number 05-GS-22-548.

14 An arrest warrant for that charge;
15 arrest warrant H-387825.

16 Collectively, we'll put that as
17 Court's Exhibit Number 2.

18 WHEREUPON: THE AFORESAID
19 DOCUMENTS WERE MARKED BY THE COURT REPORTER AS COURT'S
20 EXHIBIT NUMBER.

21 THE COURT:

22 All right.

23 Anything else preliminary before
24 we bring in the jury?

25 MR. LONG:

1 Nothing from the State.

2 MR. LONG:

3 Nothing from the Defendant, Your
4 Honor.

5 THE COURT:

6 All right.

7 Let's go ahead and bring the jury
8 in, please.

9 MS. VON HERRMANN:

10 Your Honor, I guess I do need to
11 get on the record -- uh -- whether -- uh -- Mr. Long is
12 specifically waiving that suppression hearing?

13 We've discussed having that -- uh
14 -- previously.

15 And I guess if we -- if he's going
16 to do that, we need to do that on the record as well.

17 THE COURT:

18 Do you have a motion to suppress
19 at this time?

20 MR. LONG:

21 Your Honor, I don't have a motion
22 -- motion to suppress at this time.

23 THE COURT:

24 All right.

25 (WHEREUPON: The jury empanelled

1 in the case was escorted back into the courtroom at 10:08
2 AM, July 22, 2009; and was in fact present during the
3 following proceedings.)

4 THE COURT:

5 Ladies and gentlemen, welcome
6 back.

7 We are getting ready -- uh -- to
8 begin this first case, here in just a second.

9 This is a case of state versus
10 Ervin said Gamble Junior.

11 But before we -- uh -- get into
12 the specifics of that case, I want to go over some
13 preliminary matters with you.

14 I understand Ms. Jennifer Brown
15 has been selected as foreperson. And I appreciate you
16 serving in that capacity. If you would always occupy
17 that seat where you are sitting right now.

18 Uh -- Likewise at this time, we
19 have Ms. Schraeder and Mr. Brooks, who are our
20 alternates. If you would always occupy the seats -- uh
21 -- where you're sitting right now.

22 The rest of you are at liberty to
23 sit at which seat you like. You can -- uh -- As I said,
24 you can sit in different seats throughout the trial of
25 the case. You can sit in the same seat throughout the

1 trial of the case; or however you want to; or whatever
2 makes you feel more comfortable is acceptable -- uh -- as
3 you perform your duties.

4 First of all, I want to thank you
5 for being prompt today -- uh -- and for being willing to
6 serve as jurors in this case.

7 It is a very important and vital
8 roll that you serve.

9 But before we get started, I want
10 to introduce you to some court personnel so you'll know
11 who you're working with this week.

12 First:

13 From our Clerk of Court's office,
14 we've got Ms. Christina Barfield down here to my left.

15 She is from the Clerk of Court's
16 office. And she's responsible for all the administrative
17 matters that are involved in -- uh -- a trial; making
18 sure all the paperwork is -- uh -- filed -- uh --
19 properly; making sure notices are sent out to you as
20 jurors; making sure that you are notified when you need
21 to return.

22 And most importantly, she's one of
23 the ones that's responsible for sending out that big,
24 fat, paycheck to you at the end of the week when you
25 conclude your duties.

1 So, if you don't get your check,
2 remember the name: Christina Barfield. That's who you
3 want to call. And that's who you want to speak with.

4 Next, we have -- uh -- Mr. Gene
5 Buckner, my court reporter.

6 He is responsible for transcribing
7 everything that happens in court. If anybody wants to
8 know what happened in court this week, they can contact
9 Mr. Buckner; and he can provide them with a verbatim
10 transcript of what was said; when it was said; and who
11 said it; and what transpired. And we thank him for his
12 service.

13 Mr. Dana Sarvis is our Bailiff,
14 over here to my right and to your left. She is here to
15 take care of you.

16 If you have a need; if you have a
17 question; if you have an emergency; or whatever -- uh --
18 the case is, please contact Ms. Sarvis.

19 She is here to make sure you're
20 comfortable and to make sure you can perform your duties
21 -- uh -- properly.

22 Our Deputies are Mr. Brooks James,
23 and Mr. Ron Hemmingway, seated in the back and here to
24 the left.

25 They are here for the courtroom

1 security. There are here to make sure that you're safe;
2 that I'm safe; that the witnesses are safe; and that
3 everyone involved -- uh -- in this matter is safe. And
4 we certainly thank them for their service.

5 Now, as I stated earlier, we are
6 getting ready to begin the case of the State versus Ervin
7 C. Gamble, Junior.

8 Mr. Gamble has been charged with
9 trafficking in heroine.

10 The state will be -- uh --
11 presenting their case.

12 And I'll be going over some
13 preliminary instructions. But as I told you at the
14 outside -- uh -- at the beginning:

15 As jurors, one of the things
16 you're going to learn and you're going to get very good
17 at doing is taking oaths. And it's no different.

18 Before we start any trial, the
19 jury picked for that particular case must take an oath.

20 So if I could all of you to stand
21 and raise your right hand, while the Clerk of Court
22 administers the oath to you.

23 WHEREUPON: The jury empanelled in
24 this case was duly sworn in open court at 10:12 AM, July
25 22, 2009.

1 THE COURT:

2 All right.

3 Before we begin the trial, I want
4 to tell you that this trial is probably going to be
5 different from what you might expect.

6 Many people do not have a chance
7 to attend actual court sessions like you're doing now;
8 and may think, from watching television and the movies,
9 that trials are always full of high drama, intense
10 action, a lot of riveting circumstances, and things of
11 that nature.

12 And while these matters might be
13 true at times -- uh -- this trial is not for
14 entertainment.

15 It is a fundamental part of our
16 democracy; a search for the truth in an effort to make
17 sure that justice is done between the parties before The
18 Court.

19 And searching for the truth and
20 making sure that justice is done is often slow,
21 deliberate, and repetitive; the opposite of what you
22 might have seen on television or in the movies.

23 The attorneys appearing before you
24 are advocates for the parties they represent. But, first
25 and foremost, they are officers of the court.

1 They are sworn to uphold the
2 integrity and fairness of our judicial system; and to
3 help you search for the truth in this case.

4 You should expect them to be
5 professional, competent, and ethical, in the presentation
6 of their client's interest.

7 Now what I say now is intended to
8 serve as an introduction to the trial of the case.

9 These remarks are not a charge on
10 the law in this case. I will instruct you on the law
11 applicable to this case at the end of the trial before
12 you retire to begin your deliberations.

13 This is merely an explanation of
14 what the procedure -- uh -- is that we will follow during
15 the trial of this case; and to help you better understand
16 what's happening.

17 Now, the Defendant is charged by
18 an indictment -- this being the indictment -- which
19 charges the Defendant, Ervin C. Gamble, Junior, with
20 trafficking in heroine.

21 The indictment is simply the
22 charge by which the case is brought into court and is not
23 in any sense evidence of any allegations -- uh --
24 contained in it.

25 The Defendant has pled not guilty

1 to this indictment.

2 The State, therefore, has the
3 burden of proving each element of the indictment beyond a
4 reasonable doubt.

5 It will be your duty, ladies and
6 gentlemen, to decide whether the State has met that
7 burden of proof.

8 Your purpose as jurors is to find
9 and determine the facts.

10 You are the sole judge of the
11 facts.

12 If at anytime I make any comment
13 regarding the facts, you are to disregard my comments.

14 You are to determine the facts
15 from the testimony you hear and other evidence introduced
16 in court. And it is up to you to determine the
17 inferences which you feel may be properly drawn from that
18 evidence.

19 It is especially important that
20 you perform your duty of determining the facts diligently
21 and conscientiously. Because, ordinarily there is no way
22 to reverse a determination -- or an erroneous
23 determination of facts by a jury.

24 On the other hand and with equal
25 emphasis, the same law that makes you the judge of the

1 facts in this case, makes me the judge of the law in this
2 case.

3 You must accept and follow the law
4 as I give it to you, even though you may disagree with
5 it.

6 Just as I cannot tell you what the
7 facts of this case are, you cannot disagree with me as to
8 what the law in this case is.

9 Your job is to take the law as I
10 give it to you and apply it to the facts as you find
11 those facts to be from the testimony of witnesses and any
12 other evidence that is produced during the trial of this
13 case.

14 After doing that, you will render
15 your verdict, which is to be a true and just verdict
16 under the solemn oath that you just took.

17 Now until I advise you to begin
18 your deliberations, you must not discuss this case with
19 anyone, including your fellow jurors.

20 Do not discuss it with any
21 friends. Do not discuss it with any family members; or
22 anyone involved in this case.

23 After the case is submitted to
24 you, you must discuss it only in the jury room with your
25 fellow jurors.

1 The attorneys and parties in this
2 case have been advised that they are not to talk to you
3 at all.

4 So if you see anyone involved in
5 the case and they do not even say "Hello" to you or
6 anything of that nature, they are not being rude.
7 They're just following the instructions of The Court.

8 During the trial, we have just
9 received a new direction from the Supreme Court that
10 gives some guidelines as to what you can and cannot do in
11 this case.

12 Those basically say that:

13 You cannot use a computer.

14 You cannot use a cell phone.

15 You cannot twitter.

16 You cannot instant message.

17 You cannot contact anyone outside
18 of your fellow jurors during the trial of this case.

19 Do not contact anyone and let them
20 know what is going on.

21 When you are -- uh -- When you
22 take breaks for lunch; or we break for the evening; or
23 whatever the case may be; you will be allowed to use
24 computers. You will be allowed to use your cell phones.

25 But you are not contact anyone

1 about what's going -- transpiring in this trial.

2 There have been some problems with
3 jurors -- uh -- twittering newspapers; other people
4 during the course of the trial -- uh -- sending instant
5 messages, stating what's going on during the course of a
6 trial, and our Supreme Court has said:

7 That is a proper and you must
8 prohibit that from happening.

9 So you are not going to be allowed
10 to use your cell phone; or computer; or anything of that
11 nature during the course of the trial.

12 Likewise, when you are allowed to
13 use them, you're not use them to disclose anything that
14 is transpiring during the course of this trial.

15 Now until I advise you to begin
16 your deliberations, as I said, you cannot discuss this
17 case with anyone.

18 Now during the trial, do not
19 conduct any independent investigations.

20 Do not read any newspapers.

21 Do not look for anything on the
22 television.

23 You are to base your decision in
24 this case exclusively from the testimony presented from
25 the witness stand and from the evidence that is admitted

1 during the trial of this case.

2 And you are to render your
3 decision without any influence from any outside -- uh --
4 sources.

5 Now it is important that you keep
6 an open mind and not decide any issue in this case until
7 all of the evidence has been presented and the parties
8 have made their closing arguments and I've instructed you
9 to begin your deliberations.

10 It is your solemn responsibility
11 to determine the guilt or innocence of the Defendant.

12 And your verdict must be based
13 solely on the evidence as it is presented to you during
14 the trial of this case and on the law as I instruct you
15 at the close of the case.

16 In just a minute, the solicitor
17 will make what is called an opening statement, which the
18 Solicitor will explain to you the issues in this case; or
19 at least, what the Solicitor thinks the issues in this
20 case are.

21 The attorney for the Defendant may
22 also make an opening statement, although he's not
23 required to do so.

24 What the attorneys tell you during
25 their opening statements is not evidence in this case.

1 It is only their contention as to
2 what the issues -- or they perceive the issues to be.

3 The evidence in this case will be
4 presented to you by the testimony of sworn witnesses from
5 the witness stand and/or any other exhibits that I deem
6 to be admissible during the trial of this case.

7 Now we may break from time to time
8 when we have to take up legal matters. And I'll explain
9 to you at this point in time:

10 The reason we excuse the jury from
11 the jury room when we deal with legal matters, is because
12 you and you alone decide exclusively what the facts of
13 this case are.

14 However, when we decide legal
15 matters; whether it be a motion from the Defendant or a
16 motion from the State; it often requires the attorneys
17 and the judge to speak about factual issues.

18 Well, we don't want anything that
19 we say to influence you in your determination of what the
20 facts are. So that is why we excuse you from the
21 courtroom.

22 It's not that we're trying to hide
23 anything from you;. It is just that we are trying to
24 keep the jury from being influenced by anything we say
25 during the course of these motion hearings. And we don't

1 want you to be influenced. And we want you to base your
2 decision exclusively on the testimony and the evidence.

3 Now in determining what the true
4 facts are in this case, you must decide whether or not
5 the testimony of a witness is believable.

6 It'll be my responsibility to rule
7 as a matter of law as to whether certain testimony is
8 admissible at all, or not.

9 But once the testimony is admit --
10 admitted into evidence, whether or not you believe it, is
11 solely for you to determine.

12 In deciding whether to believe a
13 witness, you have the right to consider the interest of
14 the witness; the bias of any witness; the prejudice of
15 any witness; the opportunity for the witness to have seen
16 and heard the matters and things about which the witness
17 may testify; and the way the witness acts on the witness
18 stand.

19 You have the right to consider
20 anything that is in the record that will help you
21 evaluate the testimony of the witness.

22 That means that:

23 It is your duty to pay close
24 attention to these witnesses; to observe them; to listen
25 to them; to pay close attention to the attorneys; and to

1 The Court.

2 I ask you not to let your thoughts
3 wander; but give strict attention so the testimony in
4 this case, so at the end of all the testimony, after the
5 arguments of counsel and a charge on the law by The
6 Court, you can then be in a position to determine what
7 the true facts are in this case; and apply it to the law
8 as I give it to you.

9 As your added duty to -- uh -- The
10 foreperson has the added duty of presiding over the
11 deliberations when it's time to deliberate.

12 But I will let you know when you
13 are to begin your deliberations. And you are not to
14 begin your deliberations until you're instructed to do
15 so.

16 All right.

17 At this point in time before we
18 begin our opening remarks, are there any challenges to
19 opening instructions by the State?

20 MS. VON HERRMANN:

21 None from the State.

22 THE COURT:

23 Any from the Defendant?

24 MR. LONG:

25 No, Your Honor.

1 THE COURT:

2 All right.

3 Ms. von Herrmann, if you want to
4 make your opening statement?

5 MS. VON HERRMANN:

6 Thank you.

7 May it please The Court?

8 THE COURT:

9 Yes ma'am.

10 MS. VON HERRMANN:

11 Good morning ladies and gentlemen
12 of the jury. I appreciate you all being here.

13 The court talked to you for a few
14 minutes about what different people do in the courtroom.

15 Uh -- I'm an assistant solicitor.
16 I work for the Solicitor's office. And I represent the
17 State of South Carolina in criminal cases.

18 Uh -- So, it's my job to both try
19 criminal cases and also to dispose of criminal cases --
20 uh -- in other ways.

21 I work for -- uh -- your elected
22 official, who is Greg Hembree.

23 Uh -- The case that you are going
24 to hear today is a criminal case.

25 The Defendant in this case has

1 been charged with trafficking in heroine.

2 Uh -- Heroine is a -- is a
3 narcotic drug. And you will hear from different officers
4 about -- uh -- the various facts of this case.

5 Now there are no criminal cases
6 that are easy.

7 This is not an easy case for
8 anyone. But it is a straightforward case.

9 Uh -- The officers in this case
10 will tell you that they arrested this Defendant -- uh --
11 on another matter.

12 That when they arrested him, they
13 searched him. They found heroine in his pockets.

14 They were pulling him out of the
15 car as they arrested him.

16 They also found heroine in the
17 center console of that car.

18 Uh -- They found more than 4 grams
19 of heroin.

20 Heroine is a -- uh -- trafficking
21 in heroine is the type of case that really is based on
22 the amount of drugs that you have on you.

23 Uh -- If you have more than 4
24 grams of heroine in your possession, then you are guilty
25 of trafficking in heroine.

1 Again, I think this will be a
2 straightforward case.

3 I appreciate your attention. And
4 I'm confident that you will return a verdict of guilty
5 after hearing all the evidence.

6 Thank you.

7 THE COURT:

8 Mr. Long?

9 MR. LONG:

10 Thank Your Honor.

11 Madam Forelady; ladies and
12 gentlemen; you were introduced to me, and me to you,
13 yesterday.

14 Again I'm Russell Long.

15 I have the privilege and honor
16 today of representing Ervin Gamble -- uh -- today on
17 these particular charges.

18 The judge -- uh -- explaining what
19 everybody's role in the courtroom is here today in this
20 trial; and Ms. von Herrmann explaining to you what her
21 role is; my job is basically to sit on the other side of
22 the government.

23 And I find myself on the other
24 side of the United States of America; the State of South
25 Carolina; the City of Conway; the City of Myrtle Beach on

1 a daily basis; as the last line of defense between
2 government and citizens.

3 When the government makes an
4 allegation in this country, as opposed to in other places
5 such as Iran or Budapest; instead of just dragging off to
6 jail and sentencing to lifetime of hard labor in prison,
7 our Constitution and our government founded by great men
8 and great women -- uh -- was set up so that that:

9 Before that can happen, the
10 government, whichever government entity that is, must
11 come before a jury of your peers -- a jury of his peers,
12 which is exactly what the 14 of you are.

13 We chose -- Ms. von Herrmann and I
14 chose the 14 of you because we knew you would listen
15 carefully. And we knew you would give this case exactly
16 what it deserves, your full attention.

17 It's a big -- very, very important
18 day.

19 It's a very important day for the
20 State of South Carolina.

21 I can promise you:

22 It's the most important day of
23 that man's life.

24 We're asking you to -- and we know
25 you will -- treat it that way.

1 As a last line of defense between
2 citizens and the government, the Constitution and our
3 forefathers laid groundwork and laid rules that are very,
4 very, important.

5 In fact, they are essential.

6 I want you to, as we go into the
7 evidence in this case, keep these two things in mind:

8 And the judge is going to tell you
9 what the law is at the close of the case.

10 And I want you to listen very
11 carefully to what he tells you.

12 But he is going to tell you that:

13 First:

14 Every single person that sits in
15 that chair in a proceeding such as this is innocent.

16 That person is innocent.

17 Ervin Gamble is innocent.

18 As you look at him now, you must
19 by the law of the United States of America; by the law of
20 the State of South Carolina; you must look at him as
21 innocent.

22 He is innocent until, secondly:

23 The government -- the State of
24 South Carolina in this case -- proves to you beyond a
25 reasonable doubt that he's not.

1 They must prove to you beyond a
2 reasonable doubt by bringing you witnesses, exhibits,
3 recording devices; whatever it is that the government
4 uses in cases such as this; they must bring it all to
5 you.

6 And at the close of that case,
7 they have to ask you -- and we're going to ask you:

8 Did they in fact meet that burden?

9 And then, burden's a big word.

10 I think of a burden as a heavy
11 load.

12 I think of having to carry a big
13 old ton of bricks across a line; the line between
14 innocence and guilt.

15 That's what their job is in this
16 case.

17 And I would ask you to abide by
18 those extremely fundamental principles of law that make
19 us different than the rest of the world; that make us
20 proud to bear that flag.

21 I know that you will. That's why
22 we chose the 14 of you.

23 We want to thank you.

24 Ervin wants to thank you on the
25 front of this for your attention.

1 We can tell already that we're
2 going to get it. And we appreciate that.

3 At the close of the case, I'll
4 have a chance to speak to you again.

5 And -- uh -- I -- I agree with Ms.
6 von Herrmann. I think this is a pretty simple case.

7 I think it's a simple case that --
8 that has two sides of course. But, it's a simple case
9 nonetheless.

10 Was not going to confuse you.
11 We're not going to trick you.
12 And we should be able to get it
13 done today.

14 Thank you for your time.

15 THE COURT:

16 Ms. von Herrmann, you can call
17 your first witness.

18 MS. VON HERRMANN:

19 Thank Your Honor.

20 The State calls agent Chad
21 Mullinix to the witness stand.

22 WHEREUPON: CHAD MULLINIX WAS DULY
23 SWORN AND TESTIFIED UNDER OATH AS FOLLOWS:

24 CLERK:

25 Please state your name for The

1 Court and spell your last name.

2 WITNESS:

3 Chad Mullinix, M-u-l-l-i-n-i-x.

4 DIRECT EXAMINATION BY MS. VON HERRMANN:

5 Q. Agent Mullinix, how are you currently employed?

6 A. I'm -- uh -- currently employed with the Myrtle
7 Beach Police Department assigned to the 15th Circuit Drug
8 Task Force.

9 Q. And tell the jury if you will please, a little bit
10 about that -- uh -- multijurisdictional task.

11 A. Uh -- I work along with -- uh -- uh -- pretty much
12 every agency within the Horry and Georgetown County
13 areas.

14 Uh -- We work -- uh -- uh -- drug
15 cases -- predominantly drug cases -- uh -- in regards to
16 -- uh -- trafficking amounts -- uh -- of drugs.

17 Q. And what -- what is the goal, if you will, of the
18 DEU?

19 A. The goal is to -- uh -- to help the community get
20 the drugs off the street -- uh -- help citizens -- uh --
21 not safe -- the problems -- the demons that they may have
22 -- uh -- in regards to drugs; and get the people that are
23 -- uh -- selling those drugs -- uh -- in jail.

24 Q. And is it your job on a -- uh -- a daily basis --
25 basis -- to try to develop cases against is just people

1 that you feel are dealing drugs?

2 A. Yes; that is correct.

3 Q. And on July the -- I believe the -- looks to be the
4 17th of 2008 -- uh -- were you doing an investigation on
5 that day?

6 A. Uh -- The July -- July 16th?

7 Q. Yes.

8 A. Uh -- Yes ma'am. We were -- uh -- conducting a --
9 an investigation -- uh -- that day.

10 We were able to -- uh -- uh --
11 gain information of a person.

12 I -- We had the name of "Fats."

13 MR. LONG:

14 Your Honor, I would object at this
15 time on hearsay.

16 I'd like to take up a matter
17 outside the presence of the jury.

18 THE COURT:

19 All right.

20 All right, ladies and gentlemen of
21 the jury, as I stated to you earlier, we do have legal
22 matters that crop up from time to time.

23 I'll excuse you back to the
24 juryroom briefly while we deal with this legal matter.

25 Thank you very much.

1 (WHEREUPON: The jury empanelled
2 in the case withdrew from the courtroom at 10:30 AM, July
3 22, 2009; and was no longer present during the following
4 proceedings.)

5 THE COURT:

6 All right, Mr. Long, let me hear
7 from you.

8 MR. LONG:

9 Thank Your Honor.

10 I know it's awful quick for me to
11 be asking you to send the jury out; but I anticipated it.

12 Uh -- For this officer to take the
13 witness stand and say that they had gained information
14 about a certain individual named "Fats;" that information
15 was gained through hearsay.

16 Uh -- You know, I haven't asked
17 him where he got that information yet. But we know where
18 he got that information from.

19 He got that information from the
20 confidential informant in this case.

21 It is highly prejudicial if that
22 person is not going to be called as a witness -- and we
23 know that he's not -- for this witness to say that they
24 had gained information about someone, that's hearsay.

25 Uh -- That -- That is -- And it's

1 improper. And -- And -- I mean, we're starting the trial
2 out exactly where I thought we would. And -- uh -- And
3 that's wholly not fair to my client.

4 Uh -- You're talking about -- uh
5 -- a person who has just told the jury that the job is to
6 investigate drug dealers and that he had gained
7 information about a certain person named "Fats."

8 THE COURT:

9 All right.

10 Ms. von Herrmann?

11 MS. VON HERRMANN:

12 Your Honor, I -- I agree that he
13 gained that information through hearsay.

14 But what he's testifying, itself
15 -- uh -- is not hearsay.

16 I think what he's going to say is
17 that:

18 He is -- He did certain things as
19 a result of -- uh -- his investigation. And I don't -- I
20 don't think there's anything wrong with that.

21 THE COURT:

22 All right.

23 I think what I can do:

24 And I -- He's not really offering
25 it for the matter of -- truth of the matter asserted.

1 And I will instruct the jury that:

2 The purpose of this testimony, as
3 I understand it, is to explain why he did what he did.

4 And that:

5 They are not to take the hearsay
6 testimony as being truth -- that the -- what was stated
7 was true.

8 I think he can -- uh -- I think
9 the hearsay -- It's not really an exception, it's just
10 been deemed non-hearsay when you're not offering it for
11 the truth of the matter asserted; but you're offering it
12 to explain your actions, as to why you went to this
13 location; or why you went to this place.

14 MR. LONG:

15 But Your Honor, I think it is
16 being offered for the truth of the matter asserted.

17 Uh -- This is the -- This is why
18 -- This is -- The truth of the matter of why he was
19 investigating this person, is that:

20 He had a conversation with
21 someone.

22 That's hearsay.

23 Uh -- And it is being offered --

24 THE COURT:

25 It explains why he's investigating

1 it. But it's not proof of your client's guilty.

2 Because:

3 Whether or not the Statements were
4 made; whether or not they were true or untrue, is
5 irrelevant.

6 It just explains why he was
7 investigating your client.

8 I mean, they could say -- could
9 have called and said:

10 Uh -- Mr. Gamble just killed 15
11 people.

12 Well, that's not true; but it
13 certainly explains why he was going to investigate it.

14 And so they -- and I'll -- I'll --
15 I'll instruct the jury that they are not to take these
16 statements as being truthful; that they are only to
17 consider them to explain why the officer acted in the way
18 he did.

19 MR. LONG:

20 Thank Your Honor.

21 THE COURT:

22 All right.

23 Anything further?

24 MS. VON HERRMANN:

25 No sir, Your Honor.

1 THE COURT:

2 All right. Go ahead and bring
3 the jury back in.

4 (WHEREUPON: The jury empanelled
5 in the case was escorted back into the courtroom at 10:33
6 AM, July 22, 2009; and was in fact present during the
7 following proceedings.)

8 THE COURT:

9 All right.

10 Ladies and gentlemen, Officer
11 Mullinix is getting ready to testify as to some
12 information that he received.

13 And -- uh -- the defense attorney
14 -- uh -- made an objection based upon the hearsay
15 exclusion.

16 Ordinarily, a person cannot
17 testify as to what was told to them by someone else. Uh
18 -- You can only testify as to what you personally
19 observed; what you personally saw; what you personally
20 smelled; tasted; any personal observations.

21 However, one matter that has been
22 deemed not to be hearsay and is admissible, are
23 statements made -- uh -- even though they would
24 ordinarily be hearsay because they're spoken by someone
25 else -- they're not offered for the truth of the matter

1 asserted.

2 What I mean by that, is this:

3 The -- uh -- testimony that Mr.
4 Mullinix is giving regarding what was told to him by
5 someone else is not being -- uh -- given or used under
6 the assertion that that information was correct; or that
7 that information was right.

8 It is only being offered, and can
9 only be considered by you, to explain why Officer
10 Mullinix acted in the way he did.

11 So when he states that he was told
12 something by someone else, whether or not it is true not
13 true is not your consideration as much it is to determine
14 or to explain why Officer Mullinix acted in the way he
15 did.

16 So you cannot use it as proof of
17 the Defendant's guilt to the extent that you think the
18 truth -- the statement is true or the statement is false;
19 only to explain Officer Mullinix's actions; all right.

20 MS. VON HERRMANN:

21 Thank Your Honor.

22 THE COURT:

23 All right.

24 DIRECT EXAMINATION BY MS. VON HERRMANN CONTINUED:

25 Q. Officer -- uh -- Agent Mullinix, did you all have a

1 tactical plan you had developed with -- uh -- regard to
2 this particular Defendant?

3 A. Yes ma'am, we did. Uh -- Uh -- Myself, along with
4 other agents were in the area.

5 Uh -- Planned on -- uh -- speaking
6 with a person in regards to -- uh -- drugs.

7 Uh -- The drugs were to be -- uh
8 -- be delivered --

9 MR. LONG:

10 Your Honor, may we approach?

11 THE COURT:

12 Yes.

13 WHEREUPON: There was a brief
14 bench conference at 10:38 AM, July 22, 2009.

15 DIRECT EXAMINATION BY MS. VON HERRMANN CONTINUED:

16 Q. And as result of that tactical plan, were you at
17 some particular location?

18 A. Yes ma'am, we were.

19 Q. Where were you located?

20 A. Uh -- The exact address?

21 Q. Yes sir.

22 A. Uh -- 72 Offshore Drive in the Murrells inlet
23 section of Horry County.

24 Q. And -- uh -- what time of day was this?

25 A. Uh -- It was approximately -- uh -- 6:15.

1 Q. And at some point, did you make contact with this
2 Defendant, Ervin Gamble?

3 A. Yes ma'am; that is correct.

4 Q. And how did that happen?

5 A. Uh -- We con -- conducted a phone call -- uh --

6 MS. VON HERRMANN:

7 One moment.

8 WITNESS:

9 Uh -- Conducted a phone call -- uh
10 --

11 WHEREUPON: Ms. von Herrmann held
12 up her hand to halt the witness from speaking further.

13 DIRECT EXAMINATION BY MS. VON HERRMANN CONTINUED:

14 Q. I don't want you -- I don't want you to tell us what
15 you did.

16 I want you tell me if you happened
17 to come in contact with this Defendant?

18 A. Uh -- Yes ma'am. I apologize for -- uh --
19 misunderstanding.

20 Yes ma'am; we came in -- uh --
21 contact with -- uh -- Mr. Gamble.

22 He arrived at the location of 72
23 Offshore Drive.

24 At that time, he was arrested on a
25 separate charge.

1 Uh -- Upon -- uh -- being placed
2 under arrest, he was searched.

3 Uh -- Located on his person -- uh
4 -- was an amount of -- uh -- brown powdered substance
5 which subsequently field-tested for -- uh -- heroin.

6 Uh -- Located in his vehicle, in
7 the center console of the vehicle, was also -- uh --
8 additional amount of -- uh -- uh -- brown powdered
9 substance that field tested positive for heroin.

10 Q. Okay. What is a field test?

11 A. Uh -- It's a presumptive test -- uh -- that officers
12 -- uh -- do -- uh -- on the road -- uh -- that would give
13 us a -- uh -- a positive, so to speak.

14 Uh -- That test -- uh -- would
15 then go -- or the -- the drugs would then go to -- uh --
16 a testing site, which actually would be the Horry County
17 Police Department where they would do a more in depth
18 test.

19 Q. Right. Did you -- uh -- Did you take those drugs
20 off of Mr. Gamble?

21 A. Yes ma'am; that is correct.

22 Q. And what did you do with the drugs at that time?

23 A. Uh -- At that time , I took them into my possession.

24 Uh -- I placed them into the Horry
25 County -- uh -- Best Packet, which is provided to us by --

1 - uh -- uh -- the drug enforcement unit.

2 Uh -- And -- And then we later --
3 uh -- dropped that drug -- uh -- the drugs into the -- uh
4 -- Horry County Drug Drop.

5 WHEREUPON: THE BEST PACKET WAS
6 MARKED BY THE COURT REPORTER AS STATE'S EXHIBIT NUMBER 10
7 FOR IDENTIFICATION ONLY.

8 DIRECT EXAMINATION BY MS. VON HERRMANN CONTINUED:

9 Q. I'm going to show you what has been marked as
10 State's Exhibit 10 for ID.

11 And tell me if you can identify
12 that, please?

13 A. Yes ma'am. There's -- uh -- a brown powdered
14 substance -- uh -- heroine -- uh -- along with -- uh --
15 numerous bindles of -- uh -- heroine.

16 Those bindles are actually -- uh
17 -- what appears to be a -- a wax paper substance -- uh --
18 uh -- normally used for stamps -- uh -- uh -- that has
19 heroin in it -- a brown powder substance.

20 Q. Turn that -- uh -- item over, if you will please,
21 and tell me:

22 What is written there on the front
23 of that item?

24 A. Uh -- The Best Packet actually is the Best Number,
25 which is a monitoring number.

1 It also has my name; the date in
2 which it was sealed, along with my signature, in which --
3 uh -- was placed on there when dropping the drug in the
4 drop box.

5 Q. All right. And why do your -- your number on there
6 and your name on there?

7 A. Uh -- It's a monitoring procedure. Uh -- Uh -- It
8 shows that:

9 I was the person that actually
10 filled out the Best Packet itself; and also the person
11 that was filling in the document showing that if it is --
12 the seal is broken -- it shows that somebody else did it;
13 and that it was sealed by myself in my presence.

14 Q. Okay. During the time that you had those -- uh --
15 During the time that he was arrested and those drugs came
16 into your possession, did you change them or alter them
17 in any way?

18 A. No ma'am, I did not.

19 Q. Uh -- Did you tamper with them?

20 A. No ma'am; I did not.

21 Q. Change them as to form or substance?

22 A. No ma'am.

23 Q. And did anyone else handle those drugs other than
24 you?

25 A. No ma'am. I was the only person.

1 MS. VON HERRMANN:

2 All right.

3 Your Honor, I would move to have
4 Exhibit -- uh -- State's Exhibit 10 marked into evidence.

5 MR. LONG:

6 Your Honor, I would object to
7 that.

8 THE COURT:

9 Okay. You want to state an
10 objection on the record?

11 MR. LONG:

12 The foundation has not been laid.

13 Uh -- We don't know about -- He's
14 going to testify that after an arrest on a separate
15 charge, a search -- uh -- I don't know if there is a
16 basis for that arrest.

17 I don't know what the charge was.

18 I don't know if there was a
19 consent to search.

20 I know there wasn't a consent to
21 search.

22 And I don't believe that under the
23 Constitution as provided by 4th Amendment -- uh -- the
24 law of search and seizure -- that they have a right to
25 enter this into evidence at this time.

1 THE COURT:

2 Over objection, I'm going to go
3 ahead and admit State's Exhibit Number 10 into evidence
4 over Defendant's objection.

5 WHEREUPON: STATE'S EXHIBIT NUMBER
6 10, MARKED EARLIER FOR IDENTIFICATION ONLY, WAS ENTERED
7 INTO EVIDENCE OVER OBJECTION OF DEFENSE COUNSEL.

8 MS. VON HERRMANN:

9 Thank Your Honor.

10 DIRECT EXAMINATION BY MS. VON HERRMANN CONTINUED:

11 Q. And when you -- uh -- once you put these drugs into
12 this -- uh -- Best Bag, State's Exhibit 10, what did you
13 then do with them?

14 A. I placed them -- uh -- into the Horry County Police
15 Department Property and Evidence Drug Drop.

16 Q. And where is that located?

17 A. It's located in the -- uh -- M. L. Brown Building --
18 uh -- which is the Horry County Police Department.

19 Q. Okay. Uh -- One moment please. All right.

20 I'm going to show what has been
21 marked as State's Exhibit 1, and ask if you can identify
22 that for me?

23 A. Yes ma'am. This is a vehicle that -- uh -- Mr.
24 Gamble was driving at the time of his arrest.

25 Q. And -- uh -- is -- Was that picture taken on that --

1 that particular day?

2 A. Yes ma'am; that is correct.

3 Q. All right. So that is the vehicle -- uh -- that he
4 was removed from? Is that correct?

5 A. Yes ma'am; that is correct.

6 Q. All right. And that's a fair and accurate
7 representation?

8 A. Yes ma'am; it is.

9 MS. VON HERRMANN:

10 I would Move to have State's
11 Exhibit -- uh -- 1 marked into evidence.

12 MR. LONG:

13 I don't have any objection to the
14 photograph.

15 THE COURT:

16 All right. State's Exhibit
17 Number 1 admitted into evidence without objection.

18 WHEREUPON: STATE'S EXHIBIT NUMBER
19 1, EARLIER MARKED FOR IDENTIFICATION WAS ENTERED INTO
20 EVIDENCE WITHOUT OBJECTION.

21 DIRECT EXAMINATION BY MS. VON HERRMANN CONTINUED:

22 Q. And let me show you a picture of what's been marked
23 as State's Exhibit 2 for ID; and ask if you can identify
24 that for me?

25 A. Okay. Uh -- This is going to be the center console

1 of the vehicle in which Mr. Gamble was driving.

2 Uh -- Located in that center
3 console is -- uh -- numerous -- uh -- bags containing a
4 brown powder substance, along with -- uh -- some US
5 currency.

6 Q. Fair and accurate representation?

7 A. Yes ma'am, it is.

8 MS. VON HERRMANN:

9 I'd like to move this into
10 evidence as well.

11 MR. LONG:

12 No objection.

13 THE COURT:

14 State's Exhibit Number 2 admitted
15 into evidence without objection.

16 WHEREUPON: STATE'S EXHIBIT NUMBER
17 2 EARLIER MARKED FOR IDENTIFICATION WAS ENTERED INTO
18 EVIDENCE WITHOUT OBJECTION.

19 DIRECT EXAMINATION BY MS. VON HERRMANN CONTINUED:

20 Q. And, if you will, take a look at State's Exhibit 3
21 for ID and see if you can identify that?

22 A. Yes ma'am. It is a -- uh -- First Federal Envelope
23 with Mr. -- uh -- Gamble's name on it -- uh -- that was
24 located in the vehicle that he was driving upon arrest.

25 MS. VON HERRMANN:

1 All right.

2 And I would move that this be
3 admitted as well, Your Honor.

4 MR. LONG:

5 No objection.

6 THE COURT:

7 State's Exhibit Number 3 admitted
8 into evidence without objection.

9 WHEREUPON: STATE'S EXHIBIT NUMBER
10 3, EARLIER MARKED FOR IDENTIFICATION WAS ENTERED INTO
11 EVIDENCE WITHOUT OBJECTION.

12 DIRECT EXAMINATION BY MS. VON HERRMANN CONTINUED:

13 Q. And State's Exhibit Number 4; if you will identify
14 that for me as well, please.

15 A. Okay. Uh -- That would be the -- the driver's seat
16 of the vehicle in which Mr. Gamble was driving -- uh --
17 the date of his arrest.

18 Uh -- Located on the seat of that
19 vehicle is -- uh -- an amount of currency and a -- uh --
20 plastic baggie containing a brown substance that was
21 located on his person at the time of arrest.

22 MS. VON HERRMANN:

23 Okay. And I would move to have
24 this entered as well.

25 MR. LONG:

1 No objection.

2 THE COURT:

3 That's State's Exhibit Number --
4 you said that was 4?

5 MS. VON HERRMANN:

6 That was 4, Your Honor.

7 THE COURT:

8 All right. State's Exhibit
9 Number 4 admitted into evidence without objection.

10 WHEREUPON: STATE'S EXHIBIT NUMBER
11 4, EARLIER MARKED FOR IDENTIFICATION WAS ENTERED INTO
12 EVIDENCE WITHOUT OBJECTION.

13 MS. VON HERRMANN:

14 And I would ask to -- uh -- be
15 allowed to publish these photos at this time.

16 THE COURT:

17 Well, let's -- I mean, I want them
18 listening to the witnesses.

19 We can either do it when they go
20 back to deliberate. Or if you want to do it now, we can
21 wait for them to do it.

22 MS. VON HERRMANN:

23 I'll be happy to wait for them --

24 THE COURT:

25 Okay.

1 MS. VON HERRMANN:

2 -- if I can just hand -- hand them
3 around.

4 THE COURT:

5 That'll be good.

6 WHEREUPON: The State's Exhibits
7 so far entered were published to and reviewed by the jury
8 from 10:46 AM until 10:40 AM, July 22, 2009.

9 THE COURT:

10 All right; Ms. von Herrmann?

11 MS. VON HERRMANN:

12 Thank you.

13 DIRECT EXAMINATION BY MS. VON HERRMANN CONTINUED:

14 Q. Mr. Mullinix -- Agent Mullinix, at the time that --
15 uh -- this Defendant was placed under arrest, were there
16 any other individuals -- uh -- in the vehicle with him?

17 A. No ma'am, there was not.

18 Q. And -- uh -- did you determine -- uh -- where that
19 -- Was that vehicle subsequently towed?

20 A. Yes ma'am, it was.

21 Q. And -- uh -- when it was towed -- uh -- who did that
22 come back to?

23 A. It actually come back to a rental car company.

24 Q. All right. And -- uh -- were there other personal
25 belongings of Mr. Gamble's in that vehicle?

1 A. Uh -- Yes ma'am, there was.

2 Q. And what were they?

3 A. Uh -- There was a -- uh -- Apple iPhone that was
4 located in the vehicle.

5 Q. And did he -- uh -- tell you whether or not that
6 belonged to him?

7 A. Yes ma'am, he did.

8 MS. VON HERRMANN:

9 Uh -- I don't have any further
10 questions at this time.

11 Please answer any questions Mr.
12 Long may have.

13 WITNESS:

14 Yes ma'am.

15 MR. LONG:

16 I don't have any questions.

17 THE COURT:

18 All right. You may step down.

19 WITNESS:

20 Thank you, Your Honor.

21 THE COURT:

22 All right.

23 Ms. von Herrmann, you can call
24 your next witness.

25 MS. VON HERRMANN:

1 Yes sir. The State calls Sharon
2 Lilly.

3 MR. LONG:

4 Your Honor, I'll consent to the
5 chain. I think she's got all the chain-witnesses here.

6 THE COURT:

7 Is that going to be the chain?

8 MS. VON HERRMANN:

9 Yes sir.

10 MR. LONG:

11 It's already admitted into
12 evidence. I mean, so --

13 THE COURT:

14 Okay.

15 MS. VON HERRMANN:

16 Except that I -- I do -- uh --
17 have one issue that I believe I need to go over with --
18 uh -- with -- with -- uh -- Do I need to -- uh --
19 Obviously putting her up -- although, it --

20 THE COURT:

21 All right.

22 So the Defendant stipulates to the
23 chain of custody as to the contents of Plaintiff's (sic)
24 Exhibit Number 10?

25 MR. LONG:

1 Correct. We've been provided in
2 -- in pretrial discovery of a list of all the chain
3 witnesses.

4 I know that all the chain
5 witnesses are present in the courtroom.

6 It would be a waste of The Court
7 and the jury's time to go through each chain witness just
8 to show that they in fact touched the package.

9 THE COURT:

10 All right.

11 The chain of custody for
12 Plaintiff's (sic) Exhibit Number 10 is stipulated to by
13 the Defendant.

14 MS. VON HERRMANN:

15 Thank you.

16 And we'd call Lisa Floyd, please.

17 THE COURT:

18 All right.

19 WHEREUPON: LISA FLOYD WAS DULY
20 SWORN AND TESTIFIED UNDER OATH AS FOLLOWS:

21 CLERK:

22 Please be seated.

23 Please state your name for The
24 Court.

25 WITNESS:

1 Lisa Floyd; last name is spelled
2 F-l-o-y-d.

3 DIRECT CROSS-EXAMINATION BY MS. VON HERRMANN:

4 Q. Ms. Floyd, how are you currently employed?

5 A. I'm a Forensic Drug Analyst. I worked for the Horry
6 County Police Department.

7 Q. And -- uh -- tell the jury, if you will, of the
8 benefit of your educational background.

9 A. I've got a Bachelor of Science Degree in
10 Biochemistry from Clemson University; and approximately
11 24 hours toward a Masters Degree, also from Clemson
12 University in Biochemistry.

13 Q. And have you done some specific training with
14 regards to chemical analysis?

15 A. Yes. I underwent a 14-week training process with a
16 former SLED Chemist, who -- uh -- used the -- uh --
17 Spartanburg County Sheriff's Office Lab. And that was --
18 ended up training on all different types of drugs that
19 are -- uh -- that are sold and used in the United States.

20 Q. Are you certified by the State Law Enforcement
21 Davison to conduct these kinds of test on drugs?

22 A. Uh -- I'm certified through the Spartanburg County
23 Sheriff's Office, originally.

24 Q. And tell the jury, please, what type procedures,
25 just generally, that you use when you analyze drugs?

1 A. Uh -- I do presumptive analysis that are very
2 similar to what the officer explained was -- uh -- like a
3 field test kit.

4 Uh -- In my case, there is a
5 simple color test to give me an indication of what the
6 drug might be.

7 And then, I also do what is called
8 a confirmatory analysis, which is -- uh -- an in depth
9 look at exactly what that substance is.

10 Q. Have you been qualified previously as an expert in
11 court?

12 A. Yes, I have; 27 times previously.

13 Q. Let me show you -- uh --

14 MS. VON HERRMANN:

15 Your Honor, I would offer her up
16 as an expert -- an expert in chemical analysis at this
17 time.

18 MR. LONG:

19 We agree.

20 THE COURT:

21 All right.

22 Ladies and gentlemen of the jury,
23 ordinarily, as I told you earlier, a witness can only
24 testify as to what they personally observed; what they
25 saw; tasted; smelled; or whatever case may be.

1 However, there is an exception for
2 -- uh -- people who were deemed to be experts in a given
3 field.

4 Because of a person's education,
5 job experience, or whatever the case may be, they may
6 have certain knowledge in a certain field which allows
7 them to give an opinion; or render an opinion in that
8 field.

9 Now I'll instruct you on the
10 testimony of an expert witness later; but, basically, I
11 can let you know that:

12 An expert's testimony is to be
13 given the same weight and the same consideration and
14 judged under the same standards that you would judge any
15 witness.

16 You're not to give them any
17 additional credibility simply because they are an expert.
18 But you are to judge them just like you would any other
19 witness.

20 The only distinction between a lay
21 witness and an expert witness is:

22 An expert witness is authorized to
23 render an opinion.

24 So having said that, I do find
25 this witness to be an expert in the field of chemical

1 analysis.

2 MS. VON HERRMANN:

3 Thank Your Honor.

4 THE COURT:

5 Thank you.

6 DIRECT EXAMINATION BY MS. VON HERRMANN CONTINUED:

7 Q. I'm going to show you what's been marked as State's
8 Exhibit 10 into evidence; and ask you if you can tell the
9 jury please what that is?

10 A. Uh -- This is a package that I sealed after testing
11 drug evidence.

12 Uh -- It's labeled with the lab
13 number L080483.

14 Uh -- And it State's under where
15 the officer explained that it shows his date, his agency,
16 and his name and signature showing where he had sealed
17 it.

18 I have my initials: the letters
19 "OK" indicating that I had inspected the outer edge,
20 which you can see has like a blue design on it that
21 indicated that there was no evidence of tampering.

22 And my letters "OK" show that I
23 definitely looked at that to make sure that that package
24 had not been tampered with since that officer had sealed
25 it.

1 Uh -- It's also labeled with the
2 Agency's case number.

3 Then after testing, the evidence
4 is repackaged. Then I seal it in this outer clear -- uh
5 -- envelope and it's heat-sealed at the top with the lab
6 number, my initials, and the date that it was sealed
7 again.

8 Q. And -- uh -- are you confident that those drugs were
9 not tampered with between the time that -- uh -- they
10 were dropped in the drug box and the time that you
11 received them?

12 A. Yes, They appear to be in the exact same condition.

13 Q. And did you have an opportunity to test those drugs?

14 A. Yes, I did.

15 Q. And could you give the jury, please, your findings
16 with regard to those drugs?

17 A. Uh -- Yes. There were 4 items that were tested.

18 The first item was a powdery
19 brown-like substance in a sandwich baggie that was inside
20 some info-sealed plastic that was labeled "A. In right
21 front pocket."

22 The results of that analysis
23 showed that heroine and a substance called quinine were
24 found.

25 The weight of that Item 1 was 3.05

1 grams, which is 47.06 grains.

2 Uh -- Item 2 was a brown powder
3 substance that was found in each of 10 plain wax paper
4 bags that were folded and held with a brown rubber band.

5 They were inside a sandwich baggie
6 with Items 3 through 5, and inside info-sealed plastic
7 again that was labeled "B" in this case. "In car center
8 console with Item 6.

9 Item 2 was found to be heroine and
10 quinine. The weight was 0.59 grams, which is 9.10
11 grains.

12 Item 3 was a brown powder
13 substance in each of 10 plain wax paper bags that were
14 also looped together and held with a rubber band.

15 The results for Item 3 were that:

16 Heroine and quinine were found.
17 The weight was 0.53 grams, which is 8.17 grains.

18 Item 4 was a brown powder
19 substance in each of 10 wax paper bags that were folded
20 and held together with a rubber band.

21 Uh -- The results for Item 4 were:

22 Heroine and quinine were found.

23 And the weight was 0.59 grams, which is 9.10 grains.

24 Q. And so the total weight of the heroine that you
25 tested was 4.76 grams?

1 Is that correct?

2 A. I didn't actually make note of the total. But I can
3 do that now.

4 Q. Just add those together for me real quickly if you
5 don't mind?

6 A. 4.76 --

7 Q. Yes.

8 A. I think.

9 Q. And there was some additional -- uh -- bags as well?

10 Is that correct?

11 A. That's correct. Uh -- Items 5 and 6 on our report
12 -- uh -- there were more -- uh -- of those wax paper bag
13 packages that had a brown powdered substance in them that
14 were not analyzed at that time. And they're indicated on
15 the report with the results that says:

16 No analysis at this time.

17 Q. All right. So, why were those not analyzed?

18 A. Uh -- In order to expedite drug reports and to make
19 sure that we use county funds appropriately and -- uh --
20 and test only items that are necessary to be tested -- uh
21 -- we -- we try to do only those items that need to be
22 tested.

23 And in this case, when -- uh -- I
24 made a note on the back of my worksheet that
25 extrapolating the weight based on the average of what had

1 been tested so far, that -- uh -- the 11 untested packs
2 of 10 each, which is -- uh -- Items 5 and 6 -- 70 bags in
3 Item 5 and 40 in Item 6 -- which is the other 10 I
4 referred to -- that in the extrapolating the weight -- uh
5 -- the next level of trafficking is 14 grams; and that
6 those items would not meet or exceed that weight.

7 And at that point, we stopped
8 testing because you're just testing items and using
9 chemicals and time and resources that -- uh -- were
10 deemed to be unnecessary at that time.

11 Q. So the 4 grams was exceeded by your testing?

12 A. That's correct; yes.

13 Q. And so it was not necessary to -- necessary to test
14 any further because you had already reached that
15 threshold amount?

16 Is that correct?

17 A. That is correct.

18 MS. VON HERRMANN:

19 Thank you.

20 I don't have anything further.

21 THE COURT:

22 All right. Mr. Long?

23 MR. LONG:

24 Thank Your Honor.

25 CROSS-EXAMINATION BY MR. LONG:

1 Q. Agent Floyd, what's quinine?

2 A. Uh -- Quinine is used -- or has been used in the
3 past to treat malaria.

4 Uh -- It is found as a cutting
5 agent or adulterant in various drugs.

6 Q. It's a legal substance? Would it be legal for me to
7 possess quinine?

8 A. Uh -- With a prescription, yes.

9 Q. Well, is it necessary for me to have a prescription
10 to possess quinine?

11 A. Uh -- Over a certain -- uh -- level of it, yes.

12 Q. Okay. And you say it was -- it's used to treat
13 malaria?

14 A. Uh -- That was the typical treatment for malaria.

15 Q. Okay. Uh -- Did your -- Does your analysis
16 determine:

17 Of this 4.76 grams of brown
18 powdered substance; does your testing determine what
19 portion of that is quinine?

20 A. No, it does not.

21 Q. Do you have a test that you could have done to
22 determine what portion of that is quinine?

23 A. No. The laboratory is not set up to do any type of
24 purity analysis or a quantitative analysis.

25 Q. Is the SLED lab in Columbia set up to do that kind

1 of testing?

2 A. Uh -- For toxicology, their drug lab on a routine
3 basis does not provide purity levels; no.

4 Q. I understand they don't provide purity levels; but
5 are they set up?

6 Can they test to determine what
7 portion of the brown substance was quinine and what
8 portion was heroine?

9 A. I believe they can.

10 Q. Okay. And you would agree with me that the -- that
11 all of the 4.76 grams of brown powder substance -- all of
12 that --

13 MS. VON HERRMANN:

14 Objection, Your Honor.

15 I -- I've got a -- Can we just
16 approach for one moment?

17 THE COURT:

18 All right:

19 (WHEREUPON: Counsel for each party
20 conferred off the record with The Court at the bench at
21 11:02 AM.)

22 MR. LONG:

23 I don't have any other questions.

24 Thank you.

25 THE COURT:

1 All right.

2 Anything on redirect?

3 MS. VON HERRMANN:

4 Just a couple.

5 REDIRECT EXAMINATION BY MS. VON HERRMANN:

6 Q. What is quinine also used for?

7 A. Uh --

8 Q. In the drug trade?

9 A. Uh -- Just as a cutting agent or an -- an adulterant
10 in drugs to --

11 Q. Well, what does that mean?

12 A. -- as a filler.

13 Q. So, if someone has some heroine and they want to
14 increase the amount of heroine that they have, they will
15 use this cutting agent --

16 A. Uh --

17 Q. -- to make you go further? Is that correct?

18 A. That's correct.

19 MS. VON HERRMANN:

20 Thank you.

21 THE COURT:

22 All right. You may step down.

23 MR. LONG:

24 May I ask a question about --
25 pertaining to that question?

1 THE COURT:

2 All right. One -- All right.

3 Go ahead.

4 RECROSS-EXAMINATION BY MR. LONG:

5 Q. Her question about:

6 If they wanted to increase the
7 amount of heroine by adding quinine.

8 So if they had 2.76 grams of
9 heroine and they added 2 grams of quinine, that would
10 come up with your 4.76?

11 Is that a good example?

12 A. That's correct.

13 MR. LONG:

14 Okay; thank you.

15 THE COURT:

16 All right. You may step down.

17 All right; you can call your next
18 witness.

19 MS. VON HERRMANN:

20 Your Honor, the State rests.

21 THE COURT:

22 All right.

23 All right; ladies and gentlemen of
24 the jury, the State has presented its case; and therefore
25 under the procedures, we have certain legal matters that

1 we have to take up at this point in time.

2 So I'm going to excuse you back to
3 the jury room at this time; and we will be bringing you
4 back out shortly.

5 Thank you very much.

6 (WHEREUPON: The jury empanelled
7 in the case withdrew from the courtroom at 11:04 AM, July
8 22, 2009; and was no longer present during the following
9 proceedings.)

10 THE COURT:

11 All right; any motions?

12 MR. LONG:

13 Your Honor, I have a motion for a
14 directed verdict.

15 We've got a -- uh -- a case where
16 the only evidence provided to this Court -- to this jury
17 -- of the reason for the search was that my client was
18 arrested on a separate charge.

19 There's no indication in the
20 record of what that charge was.

21 There is no indication in the
22 record that it was a lawful arrest.

23 It's my understanding of the
24 status of the law in the 4th amendment search and seizure
25 law is that:

1 Search incident to a lawful arrest
2 -- uh -- would be allowed. But there has to be some
3 determination that it was a lawful arrest.

4 In fact, our position is:

5 It was an unlawful arrest.

6 The truth of the matter in this
7 case is:

8 They made an arrest for attempt to
9 distribute heroine.

10 Uh -- If -- If it -- If we were
11 allowed -- or if law enforcement were allowed to come
12 into court every time and say:

13 We made an arrest on another
14 matter; and then we searched and found this.

15 That's the way they would go about
16 doing their job.

17 Uh -- But we know that that's not
18 the case here.

19 We know that they made -- uh -- an
20 arrest for attempt to distribute, which we believe was an
21 unlawful arrest.

22 That unlawful arrest was based on
23 hearsay from an informant that's not here to testify
24 today.

25 There's got to be some finding in

1 the record, and some showing to this Court that they had
2 a right to search my client.

3 Just because they arrested him,
4 does not give them the right to search him or anything
5 else of his.

6 They have to show this Court that
7 it was a lawful arrest.

8 And there is no showing at all in
9 the record in this case.

10 And again Your Honor:

11 To the contrary, we believe it was
12 an unlawful arrest.

13 But it's not my job to prove that.
14 It's their job to show that he was lawfully detained; and
15 then searched thereafter.

16 And there's no -- nothing --
17 absolutely nothing in this record -- to show that he was
18 lawfully detained.

19 THE COURT:

20 All right.

21 All right; I noticed at the -- uh
22 -- at the outset that there was -- uh -- that you did
23 instruct that there was no -- uh -- motion to suppress.

24 Uh -- Let me hear from --

25 MR. HUMPHRIES:

1 If it please The Court?

2 THE COURT:

3 -- the State on that?

4 MR. LONG:

5 Your Honor, may I -- I mean, I
6 love Fran like a brother.

7 But I'm trying this case against
8 Heather von Herrmann.

9 Uh -- He hasn't even been involved
10 in this case at all.

11 I realize he's been popping in and
12 out; but if they -- if she -- if somebody's going to --
13 uh -- make -- have a response to my motion, I would hope
14 that it would be the lawyer that's trying the case.

15 THE COURT:

16 Okay. I'm going to allow him to
17 respond.

18 MR. HUMPHRIES:

19 Thank Your Honor.

20 THE COURT:

21 Go ahead

22 MR. HUMPHRIES:

23 The situation is this:

24 Issues regarding either unlawful
25 arrest or an illegal search are matters of law for The

1 Court and not for the jury.

2 In this case, the Defense did not
3 make an -- expressly did not make a motion to suppress,
4 either on the basis of illegal arrests or unlawful arrest
5 or illegal search.

6 The State takes the first position
7 that:

8 Not having done so, those matters
9 have been waived; because we're in front of the jury now.
10 They are matters of law.

11 They cannot be decided by the
12 jury.

13 They must be decided by this
14 Court, if at all.

15 Not having made that motion, then
16 the only issue for the jury in this case is whether or
17 not he had actual or constructive possession of the drugs
18 and what the weight of those drugs were based on the
19 charge; that being trafficking.

20 Having said that, and knowing that
21 is an onerous burden -- Well, it is an -- Let -- Let me
22 put it this way:

23 Knowing that that puts his client
24 in a very dangerous position at this stage, if it is --
25 is The Court's pleasure, the State would be more than

1 happy, in camera, to go into those issues, so The Court
2 can make that ruling at this time.

3 Uh -- It's been a very short case.
4 Obviously, it wouldn't take very
5 long to do it.

6 But our first position is:

7 Not having made it in front of The
8 Court prior to the -- the taking of the testimony, those
9 issues have been waived.

10 The only issue for the jury at
11 this time -- and -- and the standard at -- at the -- at
12 a motion for directed verdict is:

13 Whether there is any evidence to
14 support the charge.

15 And there is ample evidence.

16 So our first position is:

17 It's waived.

18 In the alternative, if The Court
19 wishes, we'll be glad to put it in camera, that
20 testimony, which we are prepared to do -- and were
21 prepared to do prior to call the case.

22 To -- To take the position that:

23 You can fail to make a suppression
24 motion; and then bring up a matter of law at directed
25 verdict, if that were truly a process that were approved

1 by this Court, it would happen in every case; because the
2 standard is completely different in terms of a pretrial
3 motion from a motion regarding suppression of evidence.

4 Because, in that motion, which The
5 Court can hear, you can elicit hearsay testimony in order
6 to establish probable cause.

7 Obviously, when you get in front
8 of the jury, the rules are different.

9 So to bind the State to prove
10 their probable cause in front of the jury -- and it's not
11 their decision to make -- without the benefit of those
12 relaxed rules, obviously wasn't contemplated by -- by
13 this Court, nor The Courts that we answer to.

14 So we have the first position:

15 It's waived.

16 The second position:

17 If The Court wishes, we'll be glad
18 to put it up at this time.

19 THE COURT:

20 Okay.

21 MR. LONG:

22 Your Honor, there's not a single
23 case, or a rule of criminal procedure, or a rule of
24 evidence in this State or any other that indicates that I
25 have to -- uh -- bring and argue a motion to suppress

1 evidence; and if I don't, then I cannot raise that at the
2 directed verdict stage.

3 In order to bring this case in
4 front of Your Honor -- and I've tried plenty of cases in
5 -- in -- in plenty of these courtroom -- example of:

6 A man -- uh -- A police officer
7 pulls up beside a car and see a passenger in a vehicle
8 drinking a beer.

9 Whether or not the police officer
10 had a right to arrest that man for open container of
11 alcohol and then, the search that was incident to that
12 arrest is an issue.

13 That's not necessarily an issue
14 for the jury. That's an issue for The Court.

15 This is an issue that -- you know
16 -- they had me in a bind. Actually --

17 THE COURT:

18 But, I mean, the critical point
19 is:

20 How did that issue come before The
21 Court.

22 They are not required to request
23 an in camera hearing to make sure that all of their
24 evidence is admissible.

25 MR. LONG:

1 They're required to get all of
2 their evidence in

3 They're required to admit all of
4 their evidence.

5 They are the ones with the
6 requirement to --

7 THE COURT:

8 But, if it's not a jury issue, you
9 can't do it in front of the jury.

10 MR. LONG:

11 Absolutely. If -- If -- If --
12 It's an issue in this trial.

13 If they make an arrest -- They
14 could just say:

15 We arrested him for something.

16 They don't say what they arrested
17 him for. That don't say -- and they -- and we don't have
18 -- we don't know if it was a lawful arrest or not.

19 We have no idea.

20 That does not get them to the
21 point where they can then go search him.

22 Uh -- The 4th amendment -- You're
23 stomping all over the 4th amendment if you allow them
24 just to search somebody because they say they arrested
25 him for something.

1 THE COURT:

2 So, it's your position that:

3 All evidence obtained pursuant to
4 a lawful arrest, the State has the burden of proving that
5 that evidence is admissible; rather than the Defendant
6 challenging its admissibility?

7 MR. LONG:

8 Absolutely.

9 If they -- If -- If it's a search
10 incident to arrest case, which is -- which is what
11 they've decided to go on.

12 If they'd tried the other case
13 along with this case, it wouldn't necessarily be a search
14 incident to arrest case.

15 But they decided --

16 THE COURT:

17 Well, tell me:

18 Where did they -- When did they --
19 How do they go about establishing that?

20 MR. LONG:

21 They called a trafficking in
22 heroine case --

23 THE COURT:

24 In front of the jury?

25 MR. LONG:

1 They did.

2 THE COURT:

3 No. What I'm saying is:

4 In this case -- and I think what
5 we know -- Everybody knows what we're talking about is:

6 They're not pursuing the
7 possession with intent to -- or -- What was the other
8 charge? Was it --

9 MS. VON HERRMANN:

10 Attempt --

11 MR. LONG:

12 Attempt to distribute.

13 THE COURT:

14 Attempt to distribute. They're
15 not pursuing that charge.

16 But you're saying:

17 It was incumbent upon them to
18 present testimony establishing probable cause for the
19 arrest of attempt to distribute cocaine?

20 MR. LONG:

21 Absolutely.

22 They've got to show --

23 THE COURT:

24 I mean, heroine.

25 MR. LONG:

1 -- the prior of fact -- They've
2 got to show the prior of fact in the case that they had a
3 right to search him.

4 THE COURT:

5 Well, how would that not unduly
6 prejudice your client?

7 I mean, he would be setting it up,
8 saying:

9 Look, if they're not pursuing this
10 charge, I don't want it mentioned to a jury that I was
11 arrested for attempt to distribute heroine; because
12 that's going to influence a jury on the trafficking
13 charge.

14 MR. LONG:

15 They're the ones with the burden.

16 I -- I -- I agree -- I --

17 THE COURT:

18 I understand your argument; but I
19 disagree with it.

20 I'm going to go ahead -- I'll deny
21 your motion for a directed verdict.

22 MR. LONG:

23 Okay.

24 Your Honor, furthermore -- uh --
25 the testimony early that they were -- uh -- based on

1 information, they decided to look at a man called Fats
2 and set up.

3 That -- all of that -- and I did
4 not move for a mistrial at that time -- that is based on
5 hearsay.

6 It's highly prejudicial to my
7 client.

8 And that is the basis for this
9 arrest that they made -- this unlawful arrest -- for
10 attempt to distribute.

11 My client didn't attempt to do
12 anything.

13 All he did was pull in the parking
14 lot.

15 He didn't break the law at all.

16 He didn't do anything in violation
17 of the law other than pull into parking lot.

18 He may have -- They -- Their
19 allegation -- and it's not in the record in this case;
20 but their allegation may have been that he talked about
21 doing something.

22 But talking about doing something
23 is not against the law.

24 The arrest in this case was for
25 attempt to distribute heroine.

1 Your Honor, based on that, it is
2 an unlawful arrest.

3 And I would hope that you would
4 see that that's an unlawful arrest and they don't have
5 the right to search him after that; and we would be
6 entitled to a directed verdict based on that.

7 THE COURT:

8 Okay. Your motion is noted for
9 the record.

10 It's denied.

11 MS. VON HERRMANN:

12 Thank Your Honor.

13 THE COURT:

14 All right; anything further?

15 MR. HUMPHRIES:

16 Nothing further from State, Your
17 Honor.

18 THE COURT:

19 All right.

20 Mr. Long, have you had ample
21 opportunity to discuss with your client his right to
22 testify or not testify in this case?

23 MR. LONG:

24 No sir.

25 THE COURT:

1 All right.

2 Do you want to -- uh -- How long
3 do we want -- I mean, do we want to --

4 MR. LONG:

5 About 5 minutes.

6 THE COURT:

7 Okay. Let's go ahead and take
8 about a 15 minute break -- uh -- so you can speak with
9 your client.

10 And -- uh -- what we're you doing
11 at this time Mr. Gamble is:

12 As the Defendant in this case, you
13 are entitled to certain constitutional rights; one of
14 those being your right to testify.

15 Now I want you to speak with your
16 attorney -- and he's going to advise you on those rights;
17 but so that we have a clear record, when we come back to
18 court, I'm going to ask you certain questions to make
19 sure you understand your right.

20 One of the critical questions I'm
21 going to ask you is whether not you wish to testify.

22 Now your attorney can advise you.
23 He can tell you the pitfalls, the advantages, whatever
24 the case may be.

25 But the decision on whether or not

1 to testify is exclusively up to you.

2 In other words:

3 If your attorney does not want you
4 to testify, you can still testify.

5 If your attorney wants you to
6 testify, you can still refuse to testify.

7 Because the decision is yours and
8 yours alone.

9 So we're going to take a break
10 now. Let's go ahead and take about a 15 minute break.

11 And certainly as we get closer to
12 the 15 minutes, Mr. Long, if it turns out you need
13 additional time, just send word back to me; and -- uh --
14 and we'll give you some additional time.

15 But let's go ahead and take a
16 break right now to give you an opportunity to speak with
17 your client.

18 MR. LONG:

19 Thank Your Honor.

20 THE COURT:

21 All right. We'll stand in
22 recess.

23 (WHEREUPON: The court was
24 declared in recess at 11:17 AM, July 22, 2009.)

25 (WHEREUPON: The court was called

1 to order by the Bailiff at 11:36 AM, July 22, 2009; and
2 all pertinent parties, along with their counsel, were
3 back and present in the courtroom.)

4 BAILIFF:

5 All Rise.

6 THE COURT:

7 Thank you very much. Please be
8 seated.

9 All right.

10 Mr. Long, have you had had ample
11 opportunity to discuss with your client his right to
12 testify or present a defense in this case?

13 MR. LONG:

14 I have, Your Honor.

15 THE COURT:

16 And does your client wish to
17 testify in this case?

18 MR. LONG:

19 No sir.

20 THE COURT:

21 All right.

22 All right; Mr. Gamble, if I could
23 please -- if you would please stand and raise your right
24 hand.

25 If you would please place him

1 under oath.

2 WHEREUPON: THE DEFENDANT, ERVIN
3 C. GAMBLE, JR., WAS DULY SWORN IN OPEN COURT BY THE CLERK
4 PRIOR TO VOIR DIRE BY THE COURT AND WAS QUESTIONED BY THE
5 COURT UNDER VOIR DIRE AS FOLLOWS:

6 VOIR DIRE EXAMINATION BY THE COURT:

7 Q. All right. You are Ervin C. Gamble, Junior?

8 A. Yes sir.

9 Q. All right. Mr. Gamble, at this time I'm going to
10 explain to you -- uh -- your rights as provided under the
11 Constitution regarding whether or not you -- uh -- can or
12 cannot -- or desire to testify in this case.

13 If you do not understand anything
14 I say, please let me know.

15 If you want me to explain anything
16 in more detail, please let me know.

17 Do you understand that so far?

18 A. Yes.

19 Q. All right. Now we've reached -- We have now
20 reached the stage of the trial where you may present your
21 defense.

22 You have the right to claim the
23 protections given to you by the Fifth Amendment to the
24 Constitution of the United States.

25 This amendment states in part,

1 that:

2 No person shall be compelled in
3 any criminal case to be a witness against himself.

4 This means that you cannot be
5 required to testify in this case.

6 You have the right to testify on
7 your own behalf. However, no one can make you testify.

8 This is a personal right; and no
9 one can waive the right except you.

10 If you decide to testify, you will
11 be subject to the same rules that govern other witnesses,
12 and you may be examined and cross-examined on any
13 relevant issue in this case.

14 In addition, if you have any
15 convictions involving dishonesty or false statement or
16 for crimes punishable by imprisonment for more than one
17 year, and if this Court determines that the probative
18 value in admitting that evidence outweighs its
19 prejudicial effect, the Solicitor will be able to
20 introduce your record to attack your credibility.

21 If you decide to testify, this
22 decision on your part must be freely, voluntarily, and
23 intelligently made with knowledge of the protections
24 given to you by the Fifth Amendment of the United States
25 Constitution, and the consequences of your decision to

1 testify.

2 If you decide not to testify, I
3 will instruct the jurors that they cannot give the fact
4 that you did not testify any consideration whatsoever;
5 and that there is to be absolutely no prejudice to you
6 because you did not testify.

7 It is left entirely up to you
8 whether or not you testify.

9 You may talk with your lawyer,
10 your family and friends, or anyone else; but the final
11 decision will be left entirely up to you.

12 Now do you understand what I've
13 explained to you?

14 A. Yes, Your Honor.

15 Q. Do you have any questions about what I've explained
16 to you?

17 A. No sir.

18 Q. Have you discussed this issue with your lawyer as to
19 whether or not you wish to testify?

20 A. Yes sir.

21 Q. Do you wish to talk to your lawyer anymore at this
22 time on this issue?

23 A. No sir.

24 Q. All right. And do you wish to testify in this
25 case?

1 A. No sir.

2 THE COURT:

3 All right. Thank you very much.

4 You may be seated.

5 All right, sir.

6 Uh -- Are y'all ready to proceed?

7 MR. LONG:

8 We're ready, Your Honor.

9 THE COURT:

10 All right. Will y'all be
11 presenting a defense? Any witnesses?

12 MR. LONG:

13 No, Your Honor.

14 THE COURT:

15 Okay.

16 Uh -- I'm wondering at this time
17 then; because I've -- I've got to draft some charges.

18 I'm wondering if we want to cut
19 the jury loose for lunch; or do you want to go ahead?

20 I know most attorneys want to make
21 their closing arguments and then have me charge the law.

22 If you want to go ahead and make
23 your closing arguments, and then we break for lunch and
24 allow me to draft some charges, we can do that.

25 Or, if you want to -- uh -- wait

1 and do it at the time of closing arguments -- I mean, at
2 the time I charge the law; whichever you prefer.

3 MS. VON HERRMANN:

4 Your Honor, I -- I'd prefer to
5 break and then, let us argue and you charge immediately
6 thereafter.

7 MR. LONG:

8 That's fine with me, Your Honor.

9 THE COURT:

10 All right.

11 All right; then we'll bring the
12 jury back in. I'll go ahead and cut them loose for lunch
13 and then -- uh -- what you think? Have them come back at
14 about one o'clock?

15 MS. VON HERRMANN:

16 Yes sir.

17 THE COURT:

18 Okay. That'll give them an hour
19 and 15 minutes to each lunch, come back; then, we can get
20 started then, okay?

21 All right. Go ahead and bring
22 the jury in.

23 (WHEREUPON: The jury empanelled
24 in the case was escorted back into the courtroom at 11:43
25 AM, July 22, 2009; and was in fact present during the

1 following proceedings.)

2 THE COURT:

3 All right.

4 Ladies and gentlemen, we've taken
5 care of the legal matters that we needed to -- to address
6 outside your presence.

7 However, before we proceed in this
8 trial, I think it's a good time -- it's a quarter till
9 12:00 -- I think we're going to go ahead and break for
10 lunch,

11 And so, I'm going to allow you go
12 to lunch at this time.

13 I ask that you return to the jury
14 room by one o'clock. That'll give -- Well, we'll say
15 1:15. That'll give you an hour and a half to each lunch
16 -- uh -- and then get back and be in the jury room -- uh
17 -- at 1:15.

18 Now, it's still too early to begin
19 deliberations.

20 Do not discuss the case, even
21 among yourselves.

22 Don't discuss it with anyone
23 outside of The Court.

24 Don't conduct any independent
25 investigations.

1 Don't go on the computer or
2 conduct any type of -- uh -- research or provide any
3 information to anyone as to what has transpired in court
4 thus far.

5 Hope everyone has a good lunch;
6 and we'll see you back in the juryroom at 1:15.

7 Thank you very much.

8 (WHEREUPON: The jury empanelled
9 in the case withdrew from the courtroom at 11:44 AM, July
10 22, 2009; and was no longer present during the following
11 proceedings.)

12 THE COURT:

13 All right.

14 Anything before we break for
15 lunch?

16 MR. LONG:

17 Nothing from on behalf of the
18 Defendant, Your Honor.

19 THE COURT:

20 Anything on behalf of the State?

21 MS. VON HERRMANN:

22 Nothing, Your Honor.

23 THE COURT:

24 All right.

25 We will break for lunch. Uh --

1 Please be back at 1:15.

2 If you have any proposed charges
3 or anything, just give them to me over lunch. I'll take
4 a look at them; okay.

5 MS. VON HERRMANN:

6 Yes, Your Honor.

7 MR. LONG:

8 Thank you, sir.

9 THE COURT:

10 Thank you very much.

11 (WHEREUPON: The court was
12 declared in recess at 11:45 AM, July 22, 2009.)

13 (WHEREUPON: The court was called
14 to order by the Bailiff at 1:35 PM, July 22, 2009; and
15 all pertinent parties, along with their counsel, were
16 back and present in the courtroom.)

17 BAILIFF:

18 All rise.

19 THE COURT:

20 Thank you very much. Please be
21 seated.

22 All right. I believe you had
23 another matter we wanted to take up first?

24 Is that correct?

25 MR. LONG:

1 I do, Your Honor.

2 WHEREUPON: A matter not related
3 to this particular case was taken up by The Court and Mr.
4 Long, beginning at 1:36 PM, July 22, 2009 and continuing
5 until 1:40 PM, July 22, 2009, at which time The Court
6 again turned its attention to this case as follows:

7 THE COURT:

8 All right.

9 Uh -- Before we bring the jury
10 back in, as I understand:

11 Since the Defense did not -- uh --
12 present any defense. that Mr. Long will have closing
13 arguments last; correct?

14 MS. VON HERRMANN:

15 That's correct, Your Honor.

16 And I was just looking through the
17 instructions and it came to my attention:

18 I -- I did not see an instruction
19 on actual and constructive possession. And I do think we
20 probably do need that.

21 THE COURT:

22 Okay.

23 MR. HUMPHRIES:

24 Defining those terms.

25 THE COURT:

1 All right.

2 Uh --

3 MR. HUMPHRIES:

4 I present believe there's one in
5 the Judge's Charge Book, if you can find --

6 THE COURT:

7 Well, there is. There is. And I
8 just -- I just didn't even think to put it in there.

9 If you want actual construct --
10 I'll -- I'll insert those -- uh -- instructions in there.

11 So we will add actual and
12 constructive possession to the jury instructions.

13 Any problem with that, Mr. Long?

14 MR. LONG:

15 No, Your Honor.

16 THE COURT:

17 All right.

18 Anything else?

19 MS. VON HERRMANN:

20 Yes, sir, Your Honor.

21 I just -- uh -- would like to ask
22 The Court to limit -- uh -- Mr. Long's argument with
23 regard to the issues of illegal search and -- uh -- and
24 illegal arrest.

25 I think those are matters that

1 we've discussed either up at the bench or -- uh -- in
2 camera.

3 And those are clearly matters that
4 are legal issues to be handled by The Court.

5 I think it's confusing to the jury
6 if those are interjected into his closing argument. And
7 I would ask that he would be -- uh -- limited in that
8 fashion.

9 I think -- uh -- Rule 402 and Rule
10 403 cover that.

11 THE COURT:

12 All right. Mr. Long?

13 MR. LONG:

14 Your Honor, I'm not going to get
15 into -- uh -- those issues per se. But I do hope that
16 Your Honor will let me -- uh -- at least ask the jury to
17 consider that they were not told why he was arrested or
18 what he was being arrested for.

19 THE COURT:

20 Why would that not just confuse
21 the jury?

22 What relevance does it have?

23 MR. LONG:

24 If -- uh --

25 THE COURT:

1 I mean, I've already ruled that it
2 was -- that the evidence was admissible.

3 The fact that they are not told
4 why he was arrested might confuse them into thinking:

5 Well, how can they charge him with
6 trafficking and try him on trafficking on heroine --
7 trafficking heroine, when he hasn't been arrested.

8 And the fact of the matter is:

9 He has been arrested for
10 trafficking heroine too.

11 MR. LONG:

12 I understand that. But I -- I
13 would like -- I mean, the -- the only evidence in -- in
14 the record was that:

15 They arrested him on another
16 matter.

17 THE COURT:

18 Right.

19 MR. LONG:

20 And then searched him incident to
21 that arrest and found heroine.

22 Uh -- I -- The only arguments that
23 I can make -- My whole closing argument is -- is more
24 about what they don't -- and did not present to the jury
25 than what they did.

1 And that's really all I have in --
2 as a closing argument.

3 THE COURT:

4 Yeah; I'm going to grant the
5 motion.

6 I'm not going to let you -- I'm
7 not going to let you state that.

8 I think that'll just confuse the
9 jury -- uh -- into thinking that he was never arrested.

10 I mean, if it had something that I
11 -- It's -- The point you're trying to make is only
12 important for two reasons:

13 Number one: To determine whether
14 or not they had probable cause to search the vehicle for
15 which -- when the heroine was found.

16 And the only other reason would be
17 to confuse the jury in this case; because it's -- really
18 has no bearing as to whether or not he possessed the
19 heroine.

20 I've already ruled that the
21 heroine comes in. Uh -- So I'm going to sustain the
22 objection on that.

23 MR. LONG:

24 Okay.

25 THE COURT:

1 All right.

2 All right; anything else before we
3 bring in the jury?

4 MS. VON HERRMANN:

5 Nothing, Your Honor.

6 MR. LONG:

7 Nothing on behalf of the
8 Defendant, Your Honor.

9 THE COURT:

10 All right. Go ahead and bring the
11 jury in.

12 (WHEREUPON: The jury empanelled
13 in the case was escorted back into the courtroom at 1:47
14 PM, July 22, 2009; and was in fact present during the
15 following proceedings.)

16 THE COURT:

17 All right.

18 Ladies and gentlemen, welcome
19 back. I hope everyone had a good lunch.

20 The State has closed its case.

21 The Defense -- uh -- will not be
22 calling any witnesses at this time. And I'll instruct
23 you on that little bit later.

24 But we have now reached the point
25 in time in a trial when the attorneys will make closing

1 arguments.

2 Now, you've received all of the
3 evidence and exhibits and heard all of the testimony
4 you're going to hear in this case. And that testimony
5 and evidence is upon -- is what you based your findings
6 of fact on.

7 The attorneys are entitled to give
8 closing arguments. But just like their opening
9 statements, these closing arguments are not evidence in
10 this case.

11 It is simply the attorneys'
12 account as to what they feel the evidence has shown in
13 this case.

14 You're to listen carefully to
15 their closing argument. However, if at any time either
16 of the attorneys make a statement regarding the facts of
17 this case during these closing arguments that differs
18 from what you find the facts in this case to be, you are
19 to disregard their statements, because this is not
20 evidence. It is just simply their opinion as to what has
21 been shown in this case.

22 All right; Ms. von Herrmann.
23 MS. VON HERRMANN:

24 Thank Your Honor.

25 Good afternoon. Thank you for

1 your attention during the trial of this case. We really
2 appreciate it.

3 As I mentioned to you before, this
4 case is pretty straightforward.

5 Uh -- We've got a case with two
6 witnesses. You have Officer Mullinix, who came up here
7 and testified to you:

8 That he works for the local drug
9 enforcement agency.

10 That they had arrested the
11 Defendant on this case on an unrelated charge.

12 That when they did, they -- uh --
13 placed him in handcuffs.

14 That they found a quantity of
15 heroine, approximately 3 grams, in his pocket; and found
16 additional heroine located in the vehicle that he was
17 driving.

18 Uh -- The law of trafficking
19 heroine is going to be given to you by the Judge.

20 He's going to talk to you and give
21 you the charge and explain all the elements of -- of
22 trafficking heroine.

23 But what I want you to focus in on
24 in that charge is that:

25 The track -- Is that:

1 The definition of trafficking in
2 heroine is this:

3 Possession of 4 grams or more of
4 heroine.

5 Possession of 4 grams or more of
6 heroine.

7 Now what does that mean?

8 What does possession mean?

9 There are two different ways that
10 you can possess something. And the Judge will instruct
11 you on this as well.

12 There's something called actual
13 possession. I am actually possessing this pin right now.
14 I have it in my hand; on my person. And that is actual
15 possession.

16 And constructive possession is
17 where:

18 You don't have it on your person;
19 but you can exercise dominion and control over it.

20 For example:

21 Uh -- I have this file located in
22 my book. Now while I did not have this in my hands while
23 I was speaking to you, I don't think there's any doubt in
24 anyone's mind that I have possession of that file, and
25 that that file belongs to me.

1 So the law doesn't differentiate
2 between having something on your person and having it in
3 an area where you can control it. So I have possession
4 of this file as equally as I have possession of the pin.

5 Why is an important?

6 It's important because the drugs
7 were separated; 3 grams in his pocket; 1.7 grams in his
8 car.

9 But he possessed both of those.

10 And when you combine the two,
11 you've got more than 4 grams of heroine.

12 So you've got possession and
13 you've got 4 grams of heroine.

14 When you got those two, you got a
15 trafficking.

16 That's all the State's required to
17 prove to you.

18 And I think that we've proved to
19 you between the testimony that Officer Mullinix put up
20 and the testimony of Lisa Floyd, forensic chemist.

21 But one of the issues that came
22 up, and that you may have a question about, legitimately,
23 is:

24 Mr. Long asked:

25 What portion of that -- uh --

1 heroine that you tested was quinine, and what portion of
2 it is heroine?

3 The law doesn't make a distinction
4 about that.

5 What the law says is that:

6 When they take that heroine in and
7 they test it, it is -- the weight that they take -- is
8 the weight -- the combined weight of heroine and whatever
9 it's mixed with.

10 Because what happens when people
11 deal drugs is this:

12 It starts somewhere in it's pure
13 form; maybe Mexico; maybe Columbia. Who knows? And it
14 travels from that location into the United States.

15 And the first guy who's got that
16 heroine, he wants to keep a little heroine for himself.
17 He wants to cut a portion off. And he wants to spread it
18 out.

19 So what does he do with it?

20 He takes it and he cuts it with
21 something.

22 Some people cut it with baking
23 powder. Some people cut it with baking soda. Some
24 people cut it with quinine.

25 There's all kinds of things that

1 you can cut it with.

2 And then it goes down to the next
3 person. And that guy cuts it with something else. And
4 it goes on down the line.

5 So very, very, rarely would you
6 have a situation where you had a hundred percent pure
7 heroine.

8 And again, that's not what the law
9 requires.

10 The law requires 4 grams of a
11 heroine and something else mixture.

12 And she testified to you that
13 that's what we have here in this case.

14 Uh -- With regard to that
15 possession again, let me -- let me go back to that.

16 We talked about these drugs and
17 they were admitted into evidence. But you really,
18 probably from where you're seated, did not get to see
19 this.

20 So what we have in this bag -- and
21 for obvious reasons, we can't take the drugs out of the
22 bag -- but you can sort of see in here that we've got the
23 3 grams of heroine here in the baggie -- in the larger
24 baggie.

25 Can everybody see that?

1 And then behind it (inaudible) --

2 COURT REPORTER:

3 I'm sorry, I didn't pick that up,
4 Heather; the last thing. You said something.

5 MS. VON HERRMANN:

6 I think I said -- I was trying to
7 shake it down. When I -- When you shake it down, you
8 can sort of see over to the side -- the area underneath
9 -- some little small stamp-sized bags. And those are the
10 little bags that Agent Mullinix was describing to you
11 earlier.

12 Those bags are the ones that she
13 also tested.

14 Remember she said she had 3 sets
15 of 10 bags that she tested. And she said that she found
16 25 nine; and one set of 10 bags; and .53 in another set
17 of 10 bags. And then there were another hundred and ten
18 bags that she didn't even test.

19 And the reason she didn't test
20 them was, because once you get over that four gram
21 threshold, you're there. And there's no reason to
22 continue to test the drugs.

23 But that's how it's packaged; in
24 those two -- two separate ways. And that's how it's was
25 found -- uh -- not been altered or anything during the

1 time that it was in the State's position or in Agent
2 Mullinix' possession.

3 You'll have these photographs back
4 in your jury room. You can take a look at that.

5 This is the vehicle that the
6 Defendant was driving when he was arrested.

7 And you can see here, the center
8 console. And it really is easier in this picture to see
9 how those small little baggies are packaged in there than
10 it is -- uh -- in the -- in the best kit.

11 So you'll have those to look at.

12 You're also going to have a
13 picture here of some -- it looks like a bank statement
14 with the Defendant's name on it. That was found in the
15 car.

16 And the reason that -- The reason
17 that I give you that information really, is just to let
18 you know -- uh -- that he was occupying that vehicle.

19 There wasn't someone else in that
20 vehicle that those drugs belonged to. That was his
21 rental car and that -- those were his drugs.

22 Uh -- One of the things that I'm
23 sure Mr. Long's going to spend a good deal of time
24 talking to you about is: reasonable doubt.

25 Reasonable doubt is a legal

1 concept. And in order to find someone guilty, you must
2 believe that they're guilty beyond a reasonable doubt.

3 What does that mean?

4 That is really kind of just
5 strange concept that is hard to define.

6 It doesn't mean beyond all doubt.

7 There are very few things in this
8 life that we can know with complete and absolute
9 certainty.

10 Uh -- And -- you know -- it may
11 turn -- tomorrow, it may -- it may snow here in Conway.

12 Uh -- But chances are that it's
13 not going to snow tomorrow in Conway.

14 You don't have to believe
15 something to an absolute certainty.

16 What you need to be, in order to
17 convict, is firmly convinced.

18 If you're firmly convinced that
19 this individual had 4 grams of cocaine (sic) in his
20 possession, then you have to find him guilty of
21 trafficking in cocaine (sic).

22 Thank you very much.

23 THE COURT:

24 Mr. Long.

25 MR. LONG:

1 Thank Your Honor.

2 Thank you, ladies and gentlemen.

3 You have listened very attentively. And this was a very
4 short trial; probably one of the shortest ones most of us
5 have ever been involved in.

6 I think I've heard a couple of
7 people say that; and it was -- uh -- for a trial -- uh --
8 with such a serious charge -- such a serious allegation.

9 It is been very brief.

10 I don't want you to think that
11 that means it's not important.

12 I think the 14 of you have a right
13 and an obligation to think in your heart and in your
14 mind:

15 What's going on here?

16 I think you have an obligation and
17 a right to wonder how this meeting took place?

18 I think you have a right and an
19 obligation to wonder:

20 If they had such a team of police
21 officers surrounding this area, why they did? And you
22 have a right to wonder why you only heard from one.

23 The State of South Carolina has a
24 job to do when they charge someone of any crime. That is
25 to put every single thing that they can within their

1 power and within their scope of what they do in front of
2 you.

3 They have a right to bring you a
4 videotape of an incident; of an arrest; of a search; if
5 they have that.

6 They have a right to videotape it.

7 They have a right to audio-tape
8 conversations between police; between witnesses; between
9 Defendants.

10 They have the ability to do that.

11 And they have the right to bring
12 that to you as part of what it is that they're going to
13 try and prove to you.

14 You have a right, and you have an
15 obligation, to sit and think:

16 All of these little individual
17 bags; could they have been fingerprinted?

18 Who last touched these things?

19 Did he ever touch them?

20 Did he ever have that kind of
21 control over these things?

22 And you have a right to question:

23 What's going on?

24 This was an extremely short trial
25 by design. I'm not sure why. But it was.

1 You have a right and an obligation
2 to realize that:

3 The only thing you presume by law
4 is:

5 He's innocent.

6 You cannot presume anything else
7 in this case.

8 The law doesn't let you do that.

9 You have to take that presumption,
10 which is a very strong standard of law, and you have to
11 decide:

12 If they've done enough?

13 If they've brought all of the
14 pieces of the puzzle that they could have brought to you.

15 And if that's enough to prove to
16 you beyond a reasonable doubt that he's guilty of this
17 crime.

18 I don't know what else there was
19 in this case that they could have brought you; because I
20 wasn't part of this investigation; part of this arrest;
21 part of this search.

22 I wanted to know what led up to it
23 to be honest with you.

24 I'm just as in the dark as you
25 are.

1 But I know I have a lot of
2 questions about:

3 What's going on here?

4 And I hope you do to.

5 I hope that you realize that:

6 To stake the rest of that man's
7 life, or a very large portion of it --

8 MS. VON HERRMANN:

9 Objection, Your Honor.

10 THE COURT:

11 Sustained. Go ahead.

12 MR. LONG:

13 To allow from tomorrow forward to
14 have this kind of impact on anyone's life, that you're
15 going to look at it very seriously. And you're going to
16 make certain that they've done everything they could have
17 done to prove to you beyond that reasonable doubt.

18 A reasonable doubt is a doubt that
19 you can give a reason for; if a reasonable person
20 hesitates to act.

21 If a reasonable person would
22 hesitate and say:

23 Wait a minute, maybe not.

24 That's a reasonable doubt.

25 If you have those questions in

1 your mind and in your heart, then he gets the benefit of
2 that.

3 We would ask that you give him
4 that today.

5 This is the most important day of
6 his life.

7 He has been accused of a serious
8 crime.

9 He is wondering:
10 What's going on here?
11 We want you to wonder:
12 What's happening?

13 What does all of this mean?

14 And remember:

15 Ervin Gamble is not on trial.

16 He's not.

17 The State of South Carolina is on
18 trial.

19 The State of South Carolina
20 accused him of something. And they have to prove it to
21 you.

22 So you look to them to make sure
23 they did everything they should have and could have done
24 in this case to prove their case.

25 Folks, we -- uh -- truly do

1 appreciate every ounce of energy that you've given to
2 this case. It is that important.

3 And we hope that you will go back
4 into the jury room when you discuss this matter between
5 yourselves; and we hope that you would realize that:

6 There are too many unanswered
7 questions and too many untied knots in this case for you
8 to convict man of trafficking in heroine.

9 Thank you.

10 THE COURT:

11 All right.

12 Ladies and gentlemen, all of the
13 testimony and evidence in this case has been presented to
14 you. And now is the time for me to charge on the law to
15 be applied in this case.

16 I remind you that during this
17 trial, you and I have certain duties to perform.

18 As the trial judge, it's my
19 responsibility to preside over the trial of this case. I
20 also have the duty to rule on the admissibility of
21 evidence offered during this trial.

22 You are to consider only the
23 competent evidence before you.

24 You are to consider only the
25 testimony which has been presented from the witness

1 stand, any exhibits which have been made a part of the
2 record in this case, and any stipulations agreed to by
3 the parties.

4 I have the additional duty to
5 charge you with the law applicable to this case.

6 As the presiding judge, I am the
7 sole judge of the law in this case. And it is your duty
8 as jurors to accept and apply the law as I now state it
9 to you.

10 If you have any ideas as to what
11 the law is or what the law ought to be, and your idea
12 differs from what I tell you the law is, then you must
13 abandon your idea as to what the law is or what the law
14 ought to be, because you are sworn to accept the law and
15 apply it exactly as I state it you.

16 In every case tried in this court
17 before a jury, the jury becomes the sole and exclusive
18 judge of the facts in a case.

19 The trial judge cannot intimate,
20 state, comment on, or make any statement to a trial jury
21 about the facts in a case.

22 Since you, the jury, are the sole
23 judge of the facts of this case, you are not to infer
24 from what I've said during the progress of this trial in
25 ruling upon the admissibility of evidence or otherwise,

1 or anything that I say to you now during the course of
2 these instructions to you, that I have an opinion about
3 the facts in this case.

4 The law does not allow me to have
5 an opinion about the facts in this case.

6 This is a matter solely for you,
7 the jury, to determine.

8 Now the indictment in this case
9 charges the Defendant, Ervin C. Gamble Jr., with
10 trafficking heroine.

11 I remind you that the fact that
12 the Defendant was arrested, charged, and indicted in this
13 case, is not evidence in this case; and cannot be
14 considered by you as evidence of the guilt in this case.

15 Nor does it create any presumption
16 or inference of guilt.

17 The indictment is simply the
18 formal, written instrument which contains the charge made
19 against the Defendant.

20 It is the formal document by which
21 this case is brought into this Court.

22 The Defendant pleads not guilty to
23 this indictment.

24 That plea puts the burden on the
25 State to prove the Defendant guilty.

1 A person charged with committing a
2 criminal offense in South Carolina is never required to
3 prove his innocence.

4 I charge you that:

5 It is an important rule of the law
6 that the Defendant in a criminal trial, no matter what
7 the seriousness of the charge may be, will always be
8 presumed to be innocent of the crime for which the
9 indictment was issued, unless guilt has been proven by
10 evidence satisfying you of that guilt beyond a reasonable
11 doubt.

12 This presumption of innocence does
13 not end when you begin your deliberations; but it
14 accompanies the Defendant throughout the trial, unless
15 and until you reach a verdict of guilty based upon
16 evidence satisfying you of that guilt beyond a reasonable
17 doubt.

18 The presumption of innocence is
19 like a robe of righteousness placed about the shoulders
20 of the Defendant which remains with the Defendant unless
21 and until it has been stripped from the Defendant by
22 evidence satisfying you of the Defendant's guilt beyond a
23 reasonable doubt.

24 The presumption of innocence is
25 not a mere legal theory. It is not just a legal phrase.

1 It is a substantial right to which
2 every Defendant is entitled, unless you, the jury, are
3 satisfied from the evidence of the Defendant's guilt
4 beyond a reasonable doubt.

5 Now, what is reasonable doubt in
6 the law?

7 A reasonable doubt is the kind of
8 doubt that would cause a reasonable person to hesitate to
9 act.

10 Proof beyond a reasonable doubt is
11 proof that leaves you firmly convinced of the Defendant's
12 guilt.

13 There are very few things in this
14 world that we can know with absolute certainty. And in
15 criminal cases, the law does not require proof that
16 overcomes every possible doubt.

17 If based on your consideration of
18 the evidence, you are firmly convinced that the Defendant
19 is guilty of the crime for which he has been charged, you
20 must find the Defendant guilty.

21 If on the other hand you think
22 there is a real possibility that the Defendant is not
23 guilty, you must give the Defendant the benefit of that
24 doubt and find him not guilty.

25 Necessarily, you must determine

1 the credibility of witnesses who have testified in this
2 case. Credibility simply means believability.

3 Your duty as jurors is to analyze
4 and to evaluate the evidence and determine which evidence
5 convinces you of its truth.

6 In determining the believability
7 of witnesses who have testified in this case:

8 You may believe one witness over
9 several witnesses; or several witnesses over one witness.

10 You may believe a part of the
11 testimony of a witness and reject the remaining part of
12 the testimony of the same witness.

13 You may believe the testimony of a
14 witness in its entirety; or reject the testimony of a
15 witness in its entirety.

16 You may consider whether any
17 witness has exhibited to you any interest, bias,
18 prejudice, or other motive in this case.

19 You may also consider the
20 appearance and manner of the witness while on the witness
21 stand.

22 In this case, you have heard
23 testimony from a witness known as an expert witness.
24 The rules of evidence ordinarily do not permit witnesses
25 to testify as to opinions or conclusions.

1 An exception to this rule exists
2 for witnesses we call: expert witnesses.

3 A witness, who by education or
4 experience has become expert in some art, science,
5 profession, or calling, may state an opinion as to the
6 relevant and material matter in which the witness claims
7 to be an expert; and may also state the reasons for the
8 opinion.

9 You should consider any expert
10 opinion received into evidence in this case, and like any
11 other evidence, give it the weight you think it deserves.

12 If you decide that the opinion of
13 an expert witness is not based on sufficient education
14 and experience; or if you conclude that reasons given in
15 support of the opinion are not sound; or that the opinion
16 is outweighed by other evidence, you may disregard the
17 opinion entirely.

18 An expert witnesses' testimony is
19 to be given no greater weight simply because the witness
20 is an expert.

21 Further, you are not required to
22 accept an expert's opinion, even though it is not
23 contradicted.

24 As jurors, it is your duty to
25 determine the effect, the value, the weight, and truth of

1 all of the evidence presented during the trial of this
2 case.

3 Now the fact that the Defendant
4 did not testify in this case is not a factor to be
5 considered by you in any way in your deliberations, and
6 in your consideration on the question of guilt or
7 innocence of the Defendant.

8 You must not consider the
9 Defendant's failure to testify in any manner whatsoever.

10 A Defendant has the constitutional
11 right to remain silent. And the assertion of this right
12 must not be considered by you in your deliberations.

13 I repeat:

14 Under your oath, you are to draw
15 no conclusion whatsoever from the fact that the Defendant
16 in this case did not testify.

17 The fact that the Defendant did
18 not testify should not even be discussed in the jury
19 room.

20 The burden of proof as I stated --
21 have stated to you -- is on the State.

22 The Defendant is not required to
23 prove his innocence.

24 Throughout the trial, the burden
25 of proof remains on the State to prove guilt beyond a

1 reasonable doubt.

2 Now, the Defendant is charged with
3 trafficking heroine.

4 To prove the Defendant guilty of
5 this crime, the State must prove beyond a reasonable
6 doubt that:

7 The Defendant knowingly sold,
8 manufactured, cultivated, delivered, purchased, brought
9 into this State, provided financial assistance, or
10 otherwise aided, abetted, attempted, or conspired to
11 sell, manufacture, cultivate, deliver, purchase, or bring
12 into this State, or was knowingly in actual or
13 constructive possession, or knowingly attempted to become
14 an actual or constructive possession of heroine.

15 The State must also prove beyond a
16 reasonable doubt that the amount of heroine, in its pure
17 form or any compound or mixture containing heroine, was 4
18 grams or more.

19 To prove possession, the State
20 must prove beyond a reasonable doubt that the Defendant
21 had both the power and the intent to control the
22 disposition or use of the heroine.

23 Possession may be either actual or
24 constructive.

25 Actual possession means that the

1 heroine was in the actual physical custody of the
2 Defendant.

3 Constructive possession means that
4 the Defendant had dominion and control, or the right to
5 exercise dominion or control over either the heroine
6 itself or the property in which the heroine was found.

7 Mere presence at the scene where
8 drugs were found is not enough to prove possession.

9 Actual knowledge of the presence
10 of the heroine is strong evidence of the Defendant's
11 intent to control it's disposition or use.

12 The Defendant's knowledge and
13 possession may be inferred when a substance is found on
14 property under the Defendant's control.

15 However, this inference is simply
16 an evidentiary fact to be taken into consideration by
17 you, along with the other evidence in the case, and to be
18 given the weight you decide it should have.

19 Now, there are two possible
20 verdicts which may be reached in this case.

21 No significance whatsoever should
22 be given to the order in which I state these verdicts to
23 you. I simply must state one possible verdict first, and
24 one possible verdict second.

25 The possible verdicts in this case

1 are:

2 One:

3 We, the jury, find the Defendant,
4 Ervin C. Gamble, Jr., guilty of trafficking in heroin.

5 Or:

6 We, the jury, find the Defendant,
7 Ervin C. Gamble, not guilty.

8 Ladies and gentlemen, you verdict
9 must be a unanimous one.

10 Ms. Brown, as foreperson, when the
11 jury agrees on the verdict, you'll sign your name under
12 the appropriate verdict on the verdict form.

13 You will have a verdict form here.

14 You'll sign your name under the
15 appropriate verdict; then you'll notify the bailiff that
16 the jury has reached a verdict. And we'll bring you back
17 into the courtroom at that time.

18 Now, I'll ask that at this time
19 that you return to the jury room; but please do not begin
20 your deliberations at this point in time.

21 I have to address matters of law
22 with the attorneys to see if they have any challenges or
23 additions to my instructions.

24 If they do, we'll bring you back
25 into court and I'll address those matters; if not, then

1 we'll send the exhibits back to the jury room with
2 instructions from the bailiff that you can begin your
3 deliberations.

4 At this time, I would -- uh --
5 send you back to the jury room; but please do not begin
6 your deliberations yet.

7 Thank you very much.

8 (WHEREUPON: The jury empanelled
9 in the case withdrew from the courtroom at 2:13 PM, July
10 22, 2009; and was no longer present during the following
11 proceedings.)

12 THE COURT:

13 Any exceptions to the jury charge
14 by the State?

15 MS. VON HERRMANN:

16 None, Your Honor.

17 THE COURT:

18 Any from the Defendant?

19 MR. LONG:

20 No, Your Honor.

21 THE COURT:

22 All right.

23 MS. VON HERRMANN:

24 Your Honor, I just would mention
25 -- and the only reason I do this is because this actually

1 happened in the last trial that I had and they forgot to
2 pull the alternates out there and --

3 THE COURT:

4 Yeah. I'm getting ready to do
5 that right now.

6 All right; if we'll go ahead and
7 take exhibits with the verdict form back to the jury.

8 I'll need to ask -- uh -- Ms.
9 Schraeder and Mr. Brooks if they will come out.

10 When you take these back, just
11 bring Ms. Schraeder and Mr. Brooks out; and I'll -- uh --
12 - I'll go ahead and excuse them.

13 MR. LONG:

14 Your Honor -- uh --

15 THE COURT:

16 Yeah. Excuse me.

17 MR. LONG:

18 Yes sir.

19 Uh -- Because we did not put up a
20 defense -- uh -- I would like for the record to reflect
21 that I renewed my motion for directed verdict at the
22 close of my case even though we didn't put a case up.

23 I'd just like for the record --

24 THE COURT:

25 All right.

1 MR. LONG:

2 -- to be clear on that; that had I
3 put up a case, I would've renewed my motion for directed
4 verdict based on the same grounds that I made a motion at
5 the close of the State's case.

6 THE COURT:

7 All right.

8 The motion is noted and I will
9 deny that motion.

10 Thank you very much.

11 All right; let's take the exhibits
12 and the verdict form back to the jury room. And -- uh --
13 please bring Ms. Schraeder and Mr. Brooks out.

14 Thank you.

15 MR. LONG:

16 Thank Your Honor.

17 THE COURT:

18 Thank you very much.

19 WHEREUPON: The alternate jurors
20 were brought back into court at 2:17 PM, July 22, 2009.

21 THE COURT:

22 Ms. Schraeder and Mr. Brooks, if
23 y'all want to come around please.

24 Uh -- As alternates, you have the
25 unfortunate duty of having been required to sit and

1 listen to all of the evidence and testimony, but then not
2 being allowed to deliberate.

3 Uh -- Your function was to serve
4 as alternates in the event some -- any of the 12 active
5 jurors needed -- uh -- replacing for whatever reason.

6 That does not appear to be the
7 case. And so therefore, under the law, you're not
8 allowed to deliberate or to render a verdict in this
9 case.

10 Having said that, I do want to
11 thank you for your service; because it is an important
12 service that you play here -- uh -- as alternates when
13 the needs -- because often the case, one of the 12 jurors
14 through illness, or a conflict, or whatever, have to be
15 excused and replaced with the alternate.

16 Uh -- You're free to go at this
17 time.

18 If you want to stay and see how
19 the trial concludes, you're welcome to stay with us. Uh
20 -- But your services in this case are not needed any
21 longer.

22 And they would need to --

23 CLERK:

24 9:30.

25 THE COURT:

1 -- come back at 9:30.

2 CLERK:

3 Yes sir.

4 THE COURT:

5 Okay.

6 Well, where do they come? Down to
7 the --

8 CLERK:

9 Down -- Downstairs to the jury
10 assembly room.

11 THE COURT:

12 All right.

13 So you are excused for the
14 remainder of the day; but you'll need to be back into the
15 assembly room tomorrow morning at 9:30.

16 As I said, you're welcome to stay
17 with us to find out what happens in this case, or you're
18 free to go at this time, whichever you prefer.

19 Thank you very much again for your
20 service.

21 JUROR:

22 Thank you.

23 WHEREUPON: The two alternates
24 exited the courtroom at a 2:18 PM, July 22, 2009.

25 THE COURT:

1 All right.

2 We'll stand in recess until we get
3 a verdict.

4 MS. VON HERRMANN:

5 Thank Your Honor.

6 THE COURT:

7 Thank you.

8 MR. LONG:

9 Yes sir. Thank you.

10 (WHEREUPON: The court was
11 declared in recess at 2:19 PM, July 22, 2009.)

12 (WHEREUPON: The court was called
13 to order by the Bailiff at 2:53 PM, July 22, 2009; and
14 all pertinent parties, along with their counsel, were
15 back and present in the courtroom.)

16 BAILIFF:

17 All Rise.

18 THE COURT:

19 Thank you very much. Please be
20 seated.

21 All right.

22 I received a note from the jury.

23 It just says:

24 Full transcript of Agent Mullinix.

25 And then, the signature, that

1 assume is Jennifer Brown's.

2 It looks like J-something or B-
3 something.

4 The only thing I know to do -- I'm
5 assuming they're requesting a transcript -- is to call
6 them in and tell him we don't have a transcript; but get
7 the court reporter to read back the testimony of Officer
8 Mullinix.

9 MS. VON HERRMANN:

10 If he's got a recording, that
11 means to play it back?

12 THE COURT:

13 Yeah, we could do that. Couldn't
14 we just playback the testimony?

15 COURT REPORTER:

16 Yes sir, Your Honor. But I'll
17 have to have a little bit of time and we'll have to go
18 off the record, because I'll be taking this out of here
19 and putting it through the computer and locating the
20 testimony and getting it ready.

21 Because, if you remember, in
22 between there, there's some things that have to be
23 extracted; because there was an objection --

24 THE COURT:

25 Right.

1 COURT REPORTER:

2 -- and they went out and came in.

3 So --

4 THE COURT:

5 How long do you think?

6 COURT REPORTER:

7 -- it'll take me probably about --

8 I'd say, maybe 20 minutes to get ready for them. I'll

9 need to bring some speakers in that'll amplify it.

10 So I'd say it shouldn't be any
11 more than 20 minutes. But -- you know -- it'll take me
12 probably that long.

13 THE COURT:

14 Okay.

15 MR. LONG:

16 Judge, does it -- does he have the
17 ability to -- uh -- read it back to them, and -- and
18 leave out the objection by you actually reading it to
19 them instead of playing the recording.

20 COURT REPORTER:

21 I have that ability; but it would
22 take a lot longer --

23 MR. LONG:

24 Okay.

25 COURT REPORTER:

1 -- because I would be listening;
2 talking; listening; talking; listening.

3 I've still got to locate it. I've
4 still got to separate it.

5 THE COURT:

6 Okay.

7 COURT REPORTER:

8 So it would be easier for me to go
9 ahead and separate it; and just play the two recordings
10 in open court.

11 THE COURT:

12 All right.

13 Uh -- Well, let's go ahead and
14 recess and let him get that set up so that he can play
15 back Agent Mullinix's testimony.

16 Uh --

17 MS. VON HERRMANN:

18 Your Honor, I don't -- I don't
19 know whether -- I was just trying to think if there was
20 -- you know -- if there was something specific that they
21 were inquiring about, then -- you know -- we might be
22 able to narrow it down.

23 I don't know whether --

24 THE COURT:

25 They just said:

1 Full transcript of Agent Mullinix.

2 MS. VON HERRMANN:

3 Yeah.

4 THE COURT:

5 So I imagine they want to hear his
6 whole testimony again.

7 MR. LONG:

8 And -- And you may want to let
9 them know we don't have a transcript; because one time we
10 had that question, and thought that I would just be able
11 to print off a transcript.

12 And when they heard that they
13 could hear it back the other way, they didn't want to do
14 it.

15 THE COURT:

16 Okay.

17 COURT REPORTER:

18 So, I mean, I don't know if that
19 would change their mind or not. Probably not; but --

20 MS. VON HERRMANN:

21 I don't agree; but, well, no.

22 THE COURT:

23 Well, let me -- What -- I've got
24 this question or request. I'm just going to write on
25 here:

1 Trans -- A transcript is not
2 available. However, we will playback the witness's
3 testimony for you. It'll take about 20 minutes to get
4 that prepared.

5 Send that back to them. And then
6 we'll -- uh -- bring them back out; okay.

7 Let me write this on here.

8 All right. On the response, I
9 just wrote:

10 A transcript is not available.
11 However, we can playback a recording of the witness's
12 testimony for you. It will take about 20 minutes to set
13 up the equipment. Thank you. Judge Culbertson.

14 MS. VON HERRMANN:

15 Yes sir, Your Honor.

16 THE COURT:

17 All right.

18 MR. LONG:

19 Yes, sir, Your Honor. We agree
20 with that.

21 THE COURT:

22 All right.

23 I'm going to mark this as Court's
24 Exhibit Number 3 and send that with them; okay.

25 MS. VON HERRMANN:

1 Yes sir. Thank you.

2 THE COURT:

3 Thank you.

4 MR. LONG:

5 Thank Your Honor.

6 WHEREUPON: THE AFOREMENTIONED
7 NOTE WAS MARKED BY THE COURT REPORTER AS COURT'S EXHIBIT
8 NUMBER 3 FOR THE RECORD.

9 DEPUTY BROOKS:

10 Now, do I need to wait on a
11 response from them for that --

12 THE COURT:

13 Just go ahead --

14 DEPUTY BROOKS:

15 -- or is that -- that is the
16 response?

17 THE COURT:

18 Just go ahead and give them that
19 and tell them that's the response and -- uh -- we'll be
20 back with them in about 20 minutes.

21 The note just speaks for itself.

22 WHEREUPON: The note, Court's
23 Exhibit 3, was sent back to the jury at 3:00 PM, July 22,
24 2009.

25 THE COURT:

1 All right.

2 And just let me know when you're
3 ready; all right.

4 COURT REPORTER:

5 Yes sir. And it may be a little
6 before that, but I --

7 THE COURT:

8 Well, that'll be fine. Take your
9 time.

10 All right. We'll stand in
11 recess.

12 (WHEREUPON: The court was
13 declared in recess at 3:02 PM, July 22, 2009.)

14 (WHEREUPON: The court was called
15 to order by the Bailiff at 3:15 PM, July 22, 2009; and
16 all pertinent parties, along with their counsel, were
17 back and present in the courtroom.)

18 (WHEREUPON: The court was called
19 to order by the Bailiff at 3:15 PM, July 22, 2009; and
20 all pertinent parties, along with their counsel, were
21 back and present in the courtroom.)

22 BAILIFF:

23 All rise.

24 THE COURT:

25 Thank you. Please be seated.

1 All right. Anything before we
2 bring the jury in?

3 MS. VON HERRMANN:

4 Nothing from the State.

5 MR. LONG:

6 No sir.

7 THE COURT:

8 All right. Bring the jury in.

9 (WHEREUPON: The jury empanelled
10 in the case was escorted back into the courtroom at 3:17
11 PM, July 22, 2009; and was in fact present during the
12 following proceedings.)

13 THE COURT:

14 All right.

15 Ladies and gentlemen, welcome
16 back.

17 I understand that -- uh -- the
18 jury had a request for the transcript of Officer
19 Mullinix's testimony.

20 Well, it takes time to prepare a
21 transcript. We don't have real time transcription yet --
22 uh -- in all the courts.

23 However -- And so we cannot
24 provide you with a transcript of his testimony. However,
25 we do have the capabilities of -- uh -- playing back an

1 audio recording of his testimony for you.

2 Now, we will playback that
3 testimony for you. Uh -- There will be no additions or
4 deletions from it. You will hear exactly what was
5 presented during the trial of the case.

6 If anyone has trouble hearing the
7 testimony, let me know by just raising your hand. Then
8 I'll stop the recording and -- uh -- make sure you're
9 able to hear it.

10 So please -- But I won't know that
11 you can't hear it unless you raise your hand.

12 So -- All right.

13 Let's go ahead and begin the
14 testimony.

15 WHEREUPON: At 3:18 PM, July 22,
16 2009, the playback of Agent Mullinix's testimony
17 originally was played back verbatim as follows:

18 QUESTION BY MS. VON HERRMANN:

19 Agent Mullinix, how are you currently employed?

20 ANSWER BY AGENT MULLINIX::

21 I'm -- uh -- currently employed with the Myrtle Beach
22 Police Department assigned to the 15th Circuit Drug Task
23 Force.

24 QUESTION BY MS. VON HERRMANN:

25 And tell the jury if you will please, a little bit about

1 that -- uh -- multijurisdictional task.

2 ANSWER BY AGENT MULLINIX::

3 Uh -- I work along with -- uh -- uh -- pretty much every
4 agency within the Horry and Georgetown County areas.

5 Uh -- We work -- uh -- uh -- drug
6 cases -- predominantly drug cases -- uh -- in regards to
7 -- uh -- trafficking amounts -- uh -- of drugs.

8 QUESTION BY MS. VON HERRMANN:

9 And what -- what is the goal, if you will, of the DEU?

10 ANSWER BY AGENT MULLINIX::

11 The goal is to -- uh -- to help the community get the
12 drugs off the street -- uh -- help citizens -- uh -- not
13 safe -- the problems -- the demons that they may have --
14 uh -- in regards to drugs; and get the people that are --
15 uh -- selling those drugs -- uh -- in jail.

16 QUESTION BY MS. VON HERRMANN:

17 And is it your job on a -- uh -- a daily basis -- basis -
18 - to try to develop cases against is just people that you
19 feel are dealing drugs?

20 ANSWER BY AGENT MULLINIX::

21 Yes; that is correct.

22 QUESTION BY MS. VON HERRMANN:

23 And on July the -- I believe the -- looks to be the 17th
24 of 2008 -- uh -- were you doing an investigation on that
25 day?

1 ANSWER BY AGENT MULLINIX::

2 Uh -- The July -- July 16th?

3 QUESTION BY MS. VON HERRMANN:

4 Yes.

5 ANSWER BY AGENT MULLINIX::

6 Uh -- Yes ma'am. We were -- uh -- conducting a -- an
7 investigation -- uh -- that day.

8 We were able to -- uh -- uh --
9 gain information of a person.

10 I -- We had the name of "Fats."

11 MR. LONG:

12 Your Honor, I would object at this
13 time on hearsay.

14 I'd like to take up a matter
15 outside the presence of the jury.

16 THE COURT:

17 All right.

18 All right, ladies and gentlemen of
19 the jury, as I stated to you earlier, we do have legal
20 matters that crop up from time to time.

21 I'll excuse you back to the
22 juryroom briefly while we deal with this legal matter.

23 Thank you very much.

24 WHEREUPON: The playback of this
25 portion of the testimony of Agent Mullinix's testimony

1 was concluded precisely at the point shown below at 3:20
2 PM, July 22, 2009.

3 THE COURT:

4 All right. Uh -- Fast forward
5 wherever the testimony resumes.

6 COURT REPORTER:

7 All right.

8 WHEREUPON: The playback of Agent
9 Mullinix's testimony originally heard by the jury resumed
10 and was played back verbatim at 3:21 PM, July 22, 2009,
11 as follows:

12 THE COURT:

13 All right.

14 Ladies and gentlemen, Officer
15 Mullinix is getting ready to testify as to some
16 information that he received.

17 And -- uh -- the defense attorney
18 -- uh -- made an objection based upon the hearsay
19 exclusion.

20 Ordinarily, a person cannot
21 testify as to what was told to them by someone else. Uh
22 -- You can only testify as to what you personally
23 observed; what you personally saw; what you personally
24 smelled; tasted; any personal observations.

25 However, one matter that has been

1 deemed not to be hearsay and is admissible, are
2 statements made -- uh -- even though they would
3 ordinarily be hearsay because they're spoken by someone
4 else -- they're not offered for the truth of the matter
5 asserted.

6 What I mean by that, is this:

7 The -- uh -- testimony that Mr.
8 Mullinix is giving regarding what was told to him by
9 someone else is not being -- uh -- given or used under
10 the assertion that that information was correct; or that
11 that information was right.

12 It is only being offered, and can
13 only be considered by you, to explain why Officer
14 Mullinix acted in the way he did.

15 So when he states that he was told
16 something by someone else, whether or not it is true not
17 true is not your consideration as much it is to determine
18 or to explain why Officer Mullinix acted in the way he
19 did.

20 So you cannot use it as proof of
21 the Defendant's guilt to the extent that you think the
22 truth -- the statement is true or the statement is false;
23 only to explain Officer Mullinix's actions; all right.

24 MS. VON HERRMANN:

25 Thank Your Honor.

1 THE COURT:

2 All right.

3 QUESTION BY MS. VON HERRMANN:

4 Officer -- uh -- Agent Mullinix, did you all have a
5 tactical plan you had developed with -- uh -- regard to
6 this particular Defendant?

7 ANSWER BY AGENT MULLINIX::

8 Yes ma'am, we did. Uh -- Uh -- Myself, along with other
9 agents were in the area.

10 Uh -- Planned on -- uh -- speaking
11 with a person in regards to -- uh -- drugs.

12 Uh -- The drugs were to be -- uh
13 -- be delivered --

14 MR. LONG:

15 Your Honor, may we approach?

16 THE COURT:

17 Yes.

18 QUESTION BY MS. VON HERRMANN:

19 And as result of that tactical plan, were you at some
20 particular location?

21 ANSWER BY AGENT MULLINIX::

22 Yes ma'am, we were.

23 QUESTION BY MS. VON HERRMANN:

24 Where were you located?

25 ANSWER BY AGENT MULLINIX::

1 Uh -- The exact address?

2 QUESTION BY MS. VON HERRMANN:

3 Yes sir.

4 ANSWER BY AGENT MULLINIX::

5 Uh -- 72 Offshore Drive in the Murrells inlet section of
6 Horry County.

7 QUESTION BY MS. VON HERRMANN:

8 And -- uh -- what time of day was this?

9 ANSWER BY AGENT MULLINIX::

10 Uh -- It was approximately -- uh -- 6:15.

11 QUESTION BY MS. VON HERRMANN:

12 And at some point, did you make contact with this
13 Defendant, Ervin Gamble?

14 ANSWER BY AGENT MULLINIX::

15 Yes ma'am; that is correct.

16 QUESTION BY MS. VON HERRMANN:

17 And how did that happen?

18 ANSWER BY AGENT MULLINIX::

19 Uh -- We con -- conducted a phone call -- uh --

20 MS. VON HERRMANN:

21 One moment.

22 AGENT MULLINIX:

23 Uh -- Conducted a phone call -- uh

24 --

25 QUESTION BY MS. VON HERRMANN:

1 I don't want you -- I don't want you to tell us what you
2 did.

3 I want you tell me if you happened
4 to come in contact with this Defendant?

5 ANSWER BY AGENT MULLINIX::

6 Uh -- Yes ma'am. I apologize for -- uh --
7 misunderstanding.

8 Yes ma'am; we came in -- uh --
9 contact with -- uh -- Mr. Gamble.

10 He arrived at the location of 72
11 Offshore Drive.

12 At that time, he was arrested on a
13 separate charge.

14 Uh -- Upon -- uh -- being placed
15 under arrest, he was searched.

16 Uh -- Located on his person -- uh
17 -- was an amount of -- uh -- brown powdered substance
18 which subsequently field-tested for -- uh -- heroin.

19 Uh -- Located in his vehicle, in
20 the center console of the vehicle, was also -- uh --
21 additional amount of -- uh -- uh -- brown powdered
22 substance that field tested positive for heroin.

23 QUESTION BY MS. VON HERRMANN:

24 Okay. What is a field test?

25 ANSWER BY AGENT MULLINIX::

1 Uh -- It's a presumptive test -- uh -- that officers --
2 uh -- do -- uh -- on the road -- uh -- that would give us
3 a -- uh -- a positive, so to speak.

4 Uh -- That test -- uh -- would
5 then go -- or the -- the drugs would then go to -- uh --
6 a testing site, which actually would be the Horry County
7 Police Department where they would do a more in depth
8 test.

9 QUESTION BY MS. VON HERRMANN:

10 Right. Did you -- uh -- Did you take those drugs off of
11 Mr. Gamble?

12 ANSWER BY AGENT MULLINIX::

13 Yes ma'am; that is correct.

14 QUESTION BY MS. VON HERRMANN:

15 And what did you do with the drugs at that time?

16 ANSWER BY AGENT MULLINIX::

17 Uh -- At that time , I took them into my possession.

18 Uh -- I placed them into the Horry
19 County -- uh -- Best Packet, which is provided to us by -
20 - uh -- uh -- the drug enforcement unit.

21 Uh -- And -- And then we later --
22 uh -- dropped that drug -- uh -- the drugs into the -- uh
23 -- Horry County Drug Drop.

24 QUESTION BY MS. VON HERRMANN:

25 I'm going to show you what has been marked as State's

1 Exhibit 10 for ID.

2 And tell me if you can identify
3 that, please?

4 ANSWER BY AGENT MULLINIX::

5 Yes ma'am. There's -- uh -- a brown powdered substance
6 -- uh -- heroine -- uh -- along with -- uh -- numerous
7 bindles of -- uh -- heroine.

8 Those bindles are actually -- uh
9 -- what appears to be a -- a wax paper substance -- uh --
10 uh -- normally used for stamps -- uh -- uh -- that has
11 heroin in it -- a brown powder substance.

12 QUESTION BY MS. VON HERRMANN:

13 Turn that -- uh -- item over, if you will please, and
14 tell me:

15 What is written there on the front
16 of that item?

17 ANSWER BY AGENT MULLINIX::

18 Uh -- The Best Packet actually is the Best Number, which
19 is a monitoring number.

20 It also has my name; the date in
21 which it was sealed, along with my signature, in which --
22 uh -- was placed on there when dropping the drug in the
23 drop box.

24 QUESTION BY MS. VON HERRMANN:

25 All right. And why do your -- your number on there and

1 your name on there?

2 ANSWER BY AGENT MULLINIX::

3 Uh -- It's a monitoring procedure. Uh -- Uh -- It shows
4 that:

5 I was the person that actually
6 filled out the Best Packet itself; and also the person
7 that was filling in the document showing that if it is --
8 the seal is broken -- it shows that somebody else did it;
9 and that it was sealed by myself in my presence.

10 QUESTION BY MS. VON HERRMANN:

11 Okay. During the time that you had those -- uh --
12 During the time that he was arrested and those drugs came
13 into your possession, did you change them or alter them
14 in any way?

15 ANSWER BY AGENT MULLINIX::

16 No ma'am, I did not.

17 QUESTION BY MS. VON HERRMANN:

18 Uh -- Did you tamper with them?

19 ANSWER BY AGENT MULLINIX::

20 No ma'am; I did not.

21 QUESTION BY MS. VON HERRMANN:

22 Change them as to form or substance?

23 ANSWER BY AGENT MULLINIX::

24 No ma'am.

25 QUESTION BY MS. VON HERRMANN:

1 And did anyone else handle those drugs other than you?

2 ANSWER BY AGENT MULLINIX::

3 No ma'am. I was the only person.

4 MS. VON HERRMANN:

5 All right.

6 Your Honor, I would move to have
7 Exhibit -- uh -- State's Exhibit 10 marked into evidence.

8 MR. LONG:

9 Your Honor, I would object to
10 that.

11 THE COURT:

12 Okay. You want to state an
13 objection on the record?

14 MR. LONG:

15 The foundation has not been laid.

16 Uh -- We don't know about -- He's
17 going to testify that after an arrest on a separate
18 charge, a search -- uh -- I don't know if there is a
19 basis for that arrest.

20 I don't know what the charge was.

21 I don't know if there was a
22 consent to search.

23 I know there wasn't a consent to
24 search.

25 And I don't believe that under the

1 Constitution as provided by 4th Amendment -- uh -- the
2 law of search and seizure -- that they have a right to
3 enter this into evidence at this time.

4 THE COURT:

5 Over objection, I'm going to go
6 ahead and admit State's Exhibit Number 10 into evidence
7 over Defendant's objection.

8 MS. VON HERRMANN:

9 Thank Your Honor.

10 QUESTION BY MS. VON HERRMANN:

11 And when you -- uh -- once you put these drugs into this
12 -- uh -- Best Bag, State's Exhibit 10, what did you then
13 do with them?

14 ANSWER BY AGENT MULLINIX::

15 I placed them -- uh -- into the Horry County Police
16 Department Property and Evidence Drug Drop.

17 QUESTION BY MS. VON HERRMANN:

18 And where is that located?

19 ANSWER BY AGENT MULLINIX::

20 It's located in the -- uh -- M. L. Brown Building -- uh --
21 - which is the Horry County Police Department.

22 QUESTION BY MS. VON HERRMANN:

23 Okay. Uh -- One moment please. All right.

24 I'm going to show what has been
25 marked as State's Exhibit 1, and ask if you can identify

1 that for me?

2 ANSWER BY AGENT MULLINIX::

3 Yes ma'am. This is a vehicle that -- uh -- Mr. Gamble
4 was driving at the time of his arrest.

5 QUESTION BY MS. VON HERRMANN:

6 And -- uh -- is -- Was that picture taken on that --that
7 particular day?

8 ANSWER BY AGENT MULLINIX::

9 Yes ma'am; that is correct.

10 QUESTION BY MS. VON HERRMANN:

11 All right. So that is the vehicle -- uh -- that he was
12 removed from? Is that correct?

13 ANSWER BY AGENT MULLINIX::

14 Yes ma'am; that is correct.

15 QUESTION BY MS. VON HERRMANN:

16 All right. And that's a fair and accurate
17 representation?

18 ANSWER BY AGENT MULLINIX::

19 Yes ma'am; it is.

20 MS. VON HERRMANN:

21 I would Move to have State's
22 Exhibit -- uh -- 1 marked into evidence.

23 MR. LONG:

24 I don't have any objection to the
25 photograph.

1 THE COURT:

2 All right. State's Exhibit
3 Number 1 admitted into evidence without objection.

4 QUESTION BY MS. VON HERRMANN:

5 And let me show you a picture of what's been marked as
6 State's Exhibit 2 for ID; and ask if you can identify
7 that for me?

8 ANSWER BY AGENT MULLINIX::

9 Okay. Uh -- This is going to be the center console of
10 the vehicle in which Mr. Gamble was driving.

11 Uh -- Located in that center
12 console is -- uh -- numerous -- uh -- bags containing a
13 brown powder substance, along with -- uh -- some US
14 currency.

15 QUESTION BY MS. VON HERRMANN:

16 Fair and accurate representation?

17 ANSWER BY AGENT MULLINIX::

18 Yes ma'am, it is.

19 MS. VON HERRMANN:

20 I'd like to move this into
21 evidence as well.

22 MR. LONG:

23 No objection.

24 THE COURT:

25 State's Exhibit Number 2 admitted

1 into evidence without objection.

2 QUESTION BY MS. VON HERRMANN:

3 And, if you will, take a look at State's Exhibit 3 for ID
4 and see if you can identify that?

5 ANSWER BY AGENT MULLINIX::

6 Yes ma'am. It is a -- uh -- First Federal Envelope with
7 Mr. -- uh -- Gamble's name on it -- uh -- that was
8 located in the vehicle that he was driving upon arrest.

9 MS. VON HERRMANN:

10 All right.

11 And I would move that this be
12 admitted as well, Your Honor.

13 MR. LONG:

14 No objection.

15 THE COURT:

16 State's Exhibit Number 3 admitted
17 into evidence without objection.

18 QUESTION BY MS. VON HERRMANN:

19 And State's Exhibit Number 4; if you will identify that
20 for me as well, please.

21 ANSWER BY AGENT MULLINIX::

22 Okay. Uh -- That would be the -- the driver's seat of
23 the vehicle in which Mr. Gamble was driving -- uh -- the
24 date of his arrest.

25 Uh -- Located on the seat of that

1 vehicle is -- uh -- an amount of currency and a -- uh --
2 plastic baggie containing a brown substance that was
3 located on his person at the time of arrest.

4 MS. VON HERRMANN:

5 Okay. And I would move to have
6 this entered as well.

7 MR. LONG:

8 No objection.

9 THE COURT:

10 That's State's Exhibit Number --
11 you said that was 4?

12 MS. VON HERRMANN:

13 That was 4, Your Honor.

14 THE COURT:

15 All right. State's Exhibit
16 Number 4 admitted into evidence without objection.

17 MS. VON HERRMANN:

18 And I would ask to -- uh -- be
19 allowed to publish these photos at this time.

20 THE COURT:

21 Well, let's -- I mean, I want them
22 listening to the witnesses.

23 We can either do it when they go
24 back to deliberate. Or if you want to do it now, we can
25 wait for them to do it.

1 MS. VON HERRMANN:

2 I'll be happy to wait for them --

3 THE COURT:

4 Okay.

5 MS. VON HERRMANN:

6 -- if I can just hand -- hand them
7 around.

8 THE COURT:

9 That'll be good.

10 All right; Ms. von Herrmann?

11 MS. VON HERRMANN:

12 Thank you.

13 QUESTION BY MS. VON HERRMANN:

14 Mr. Mullinix -- Agent Mullinix, at the time that -- uh --
15 this Defendant was placed under arrest, were there any
16 other individuals -- uh -- in the vehicle with him?

17 ANSWER BY AGENT MULLINIX::

18 No ma'am, there was not.

19 QUESTION BY MS. VON HERRMANN:

20 And -- uh -- did you determine -- uh -- where that --
21 Was that vehicle subsequently towed?

22 ANSWER BY AGENT MULLINIX::

23 Yes ma'am, it was.

24 QUESTION BY MS. VON HERRMANN:

25 And -- uh -- when it was towed -- uh -- who did that come

1 back to?

2 ANSWER BY AGENT MULLINIX::

3 It actually come back to a rental car company.

4 QUESTION BY MS. VON HERRMANN:

5 All right. And -- uh -- were there other personal
6 belongings of Mr. Gamble's in that vehicle?

7 ANSWER BY AGENT MULLINIX::

8 Uh -- Yes ma'am, there was.

9 QUESTION BY MS. VON HERRMANN:

10 And what were they?

11 ANSWER BY AGENT MULLINIX::

12 Uh -- There was a -- uh -- Apple iPhone that was located
13 in the vehicle.

14 QUESTION BY MS. VON HERRMANN:

15 And did he -- uh -- tell you whether or not that belonged
16 to him?

17 ANSWER BY AGENT MULLINIX::

18 Yes ma'am, he did.

19 MS. VON HERRMANN:

20 Uh -- I don't have any further
21 questions at this time.

22 Please answer any questions Mr.

23 Long may have.

24 AGENT MULLINIX:

25 Yes ma'am.

1 MR. LONG:

2 I don't have any questions.

3 WHEREUPON: The complete playback
4 of Agent Mullinix's testimony was concluded at 3:37 PM,
5 July 22, 2009.

6 THE COURT:

7 All right.

8 Ladies and gentlemen, that is the
9 testimony -- uh -- Officer Mullinix's -- uh -- testimony
10 in this case.

11 I'll excuse you back to the jury
12 room and you can resume your deliberations.

13 Thank you very much.

14 (WHEREUPON: The jury empanelled
15 in the case withdrew from the courtroom at 3:38 PM, July
16 22, 2009; and was no longer present during the following
17 proceedings.)

18 THE COURT:

19 All right.

20 We'll stand in recess. Thank you.

21
22 (WHEREUPON: The court was
23 declared in recess at 3:39 PM, July 22, 2009.)

24 WHEREUPON: The Court was informed
25 at 3:53 PM that the jury had a verdict.

1 (WHEREUPON: The court was called
2 to order by the Bailiff at 3:55 PM, July 22, 2009; and
3 all pertinent parties, along with their counsel, were
4 back and present in the courtroom.)

5 BAILIFF:

6 All Rise.

7 THE COURT:

8 Thank you very much. Please be
9 seated.

10 I understand the jury has reached
11 a verdict.

12 Is that correct?

13 DEPUTY BROOKS:

14 Yes sir.

15 THE COURT:

16 All right.

17 Anything before we bring in the
18 jury?

19 MS. VON HERRMANN:

20 Nothing from the State, Your
21 Honor.

22 MR. LONG:

23 No, Your Honor.

24 THE COURT:

25 All right.

1 Please bring jury in.

2 (WHEREUPON: The jury empanelled
3 in the case was escorted back into the courtroom at 3:57
4 PM, July 22, 2009; and was in fact present during the
5 following proceedings.)

6 THE COURT:

7 All right.

8 Madam Forelady, I understand the
9 just has reached a verdict. Is that correct?

10 FOREPERSON BROWN:

11 Yes, we have.

12 THE COURT:

13 All right. If you would please
14 get the verdict form to the bailiff -- uh -- excuse me --
15 to the Clerk.

16 All right.

17 I'll ask the clerk to please
18 publish the verdict.

19 CLERK:

20 State of South Carolina versus
21 Ervin C. Gamble, Jr., Indictment 2008-GS-26-4185:

22 We, the jury, find the Defendant
23 Ervin C. Gamble Jr., guilty of trafficking in heror -- in
24 heroine. Signed Jennifer Brown, Foreperson.

25 Ladies and gentlemen of the jury,

1 if this is your verdict, so signify by raising your right
2 hand.

3 WHEREUPON: All members of the
4 jury raised their right hand in response.

5 THE COURT:

6 All right.

7 Let the record reflect that all
8 jurors have raised their right hand.

9 Any polling of the jury by the
10 Defendant?

11 MR. LONG:

12 Please, Your Honor.

13 THE COURT:

14 All right.

15 If the Clerk would please poll the
16 jury?

17 CLERK:

18 When I call you names, please
19 stand. I'll ask you two questions. After you answer,
20 you can be seated.

21 44, Jennifer R. Brown?

22 WHEREUPON: The juror stood to be
23 polled..

24 CLERK:

25 Is this your verdict?

1 JUROR BROWN:

2 Yes.

3 CLERK:

4 Is it still your verdict?

5 JUROR BROWN:

6 Yes.

7 CLERK:

8 Thank you.

9 WHEREUPON: The juror resumed her
10 seat.

11 CLERK:

12 425, Mellisa Tryhall.

13 WHEREUPON: The juror stood to be
14 polled.

15 CLERK:

16 Is this your verdict?

17 JUROR TRYHALL:

18 Yes.

19 CLERK:

20 Is this still your verdict?

21 JUROR TRYHALL:

22 Yes.

23 CLERK:

24 Thank you.

25 WHEREUPON: The juror resumed her

1 seat.

2 CLERK:

3

4 181, Shelley Hale.

5 WHEREUPON: The juror stood to be

6 polled.

7 CLERK:

8

Is this your verdict?

9 JUROR HALE:

10

Yes.

11 CLERK:

12

Is this still your verdict?

13 JUROR HALE:

14

Yes.

15 CLERK:

16

Thank you.

17

WHEREUPON: The juror resumed her

18 seat.

19 CLERK:

20

272, Michael Marri -- Marri --

21

WHEREUPON: The juror stood to be

22 polled.

23 JUROR MARINACCIO:

24

Marrinaccio.

25 CLERK:

1 Thank you.

2 Is this your verdict?

3 JUROR MARINACCIO:

4 Yes, it was.

5 CLERK:

6 Is this still your verdict?

7 JUROR MARINACCIO:

8 Yes.

9 CLERK:

10 Thank you.

11 WHEREUPON: The juror resumed his

12 seat.

13 CLERK:

14 448, Annette Whitcomb.

15 WHEREUPON: The juror stood to be

16 polled.

17 CLERK:

18 Is this your verdict?

19 JUROR WHITCOMB:

20 Yes.

21 CLERK:

22 Is this still your verdict?

23 JUROR WHITCOMB:

24 Yes.

25 CLERK:

1 Thank you.

2 WHEREUPON: The juror resumed her
3 seat.

4 CLERK:

5 66 Michelle Carstensen.

6 WHEREUPON: The juror stood to be
7 polled.

8 CLERK:

9 Is this your verdict?

10 JUROR CARSTENSEN:

11 Yes.

12 CLERK:

13 Is this still your verdict?

14 JUROR CARSTENSEN:

15 Yes.

16 CLERK:

17 253, Melodye Laveglia.

18 WHEREUPON: The juror stood to be
19 polled.

20 CLERK:

21 Is this your verdict?

22 JUROR LAVEGLIA:

23 Yes.

24 CLERK:

25 Is this still your verdict?

1 JUROR LAVEGLIA:

2 Yes.

3 CLERK:

4 Thank you.

5 WHEREUPON: The juror resumed her
6 seat.

7 CLERK:

8 23, Tammy Bennett.

9 WHEREUPON: The juror stood to be
10 polled.

11 CLERK:

12 Is this your verdict?

13 JUROR BENNETT:

14 Yes.

15 CLERK:

16 Is this still your verdict?

17 JUROR BENNETT:

18 Yes.

19 CLERK:

20 Thank you.

21 WHEREUPON: The juror resumed her
22 seat.

23 CLERK:

24 221, Susan Hunt.

25 WHEREUPON: The juror stood to be

1 polled.

2 CLERK:

3 Is this your verdict?

4 JUROR HUNT:

5 Yes.

6 CLERK:

7 Is this still your verdict?

8 JUROR HUNT:

9 Yes.

10 CLERK:

11 Thank you.

12 WHEREUPON: The juror resumed her

13 seat.

14 CLERK:

15 464, Teresa Woodberry.

16 WHEREUPON: The juror stood to be

17 polled.

18 CLERK:

19 Is this your verdict?

20 JUROR WOODBERRY:

21 Yes.

22 CLERK:

23 Is this still your verdict?

24 JUROR WOODBERRY:

25 Yes.

1 CLERK:

2 Thank you.

3 WHEREUPON: The juror resumed her
4 seat.

5 CLERK:

6 188, Darren Hardwick.

7 WHEREUPON: The juror stood to be
8 polled.

9 CLERK:

10 Is this your verdict?

11 JUROR HARDWICK:

12 Yes, it is.

13 CLERK:

14 Is this still your verdict?

15 JUROR HARDWICK:

16 Yes.

17 CLERK:

18 Thank you.

19 WHEREUPON: The juror resumed his
20 seat.

21 CLERK:

22 127 Joyce Ferris.

23 WHEREUPON: The juror stood to be
24 polled.

25 CLERK:

1 Is this your verdict?

2 JUROR FERRIS:

3 Yes.

4 CLERK:

5 And is this still your verdict?

6 JUROR FERRIS:

7 Yes.

8 CLERK:

9 Thank you.

10 WHEREUPON: The juror resumed her
11 seat.

12 THE COURT:

13 All right.

14 Ladies and gentlemen of the jury,
15 that concludes your services in this case. And I thank
16 you for your service in this case.

17 Just as I told you from the
18 outset, we cannot function -- uh -- without the jury.

19 It is written in the Constitution.
20 And it is part of the required judicial process. And
21 this is how these matters are determined.

22 And I thank you -- uh -- not only
23 on behalf of myself and behalf of the parties here, but
24 for the State of South Carolina and the County of Horry
25 for your service in this case.

1 That will conclude your services
2 for today and in this case.

3 My understanding is that you are
4 to return to the jury panel area -- uh -- downstairs
5 tomorrow morning at 9:30; correct?

6 CLERK:

7 (Nods in the affirmative.)

8 THE COURT:

9 Is that 9:30?

10 CLERK:

11 Yes, Your Honor.

12 THE COURT:

13 All right; tomorrow morning at
14 9:30.

15 You're free to go for the
16 remainder of the day.

17 Thank you again.

18 Everyone else please remain seated
19 while the jury is excused.

20 (WHEREUPON: The jury empanelled
21 in the case withdrew from the courtroom at 4:01 PM, July
22 22, 2009; and was no longer present during the following
23 proceedings.)

24 THE COURT:

25 All right.

1 Any reason why we cannot proceed
2 to sentencing at that time?

3 MS. VON HERRMANN:

4 Your Honor, if I may just run to
5 the back and grab the sentencing sheet.

6 THE COURT:

7 All right. That'll be --

8 MR. LONG:

9 Before she does that, Your Honor,
10 I need to make a motion for a judgment notwithstanding
11 the verdict and request a new trial.

12 Your Honor, this --

13 THE COURT:

14 All right.

15 I'll go ahead and hear from you.

16 MR. LONG:

17 Thank Your Honor.

18 This is a -- uh -- This was a
19 search incident to arrest case.

20 There is a total lack of evidence
21 in this case for the basis of the arrest.

22 There's no evidence in the record
23 that the arrest was lawful or unlawful.

24 Uh -- If there's no evidence, and
25 we assume then -- or even there's a hint that the arrest

1 was unlawful -- then anything found subsequent to the
2 arrest is fruit of the poisonous tree and would not be --

3 COURT REPORTER:

4 I'm sorry; I didn't hear that,
5 Russell.

6 MR. LONG:

7 Fruit of the poisonous tree.

8 There's no evidence in the record
9 -- uh -- or even what Mr. Gamble was being arrested for;
10 just that he was arrested, and that a search subsequent
11 to that arrest brought about these drugs.

12 Uh -- There is no indicia of
13 probable cause; no indication of reasonable suspicion for
14 the arrest.

15 If you cannot find that there is
16 probable cause for the arrest -- uh -- then we believe
17 that it should be found that it did not exist. And
18 therefore, judgment should not be granted against my
19 client.

20 We would ask Your Honor that you
21 grant him a new trial based on that.

22 THE COURT:

23 All right.

24 The motion is noted.

25 I'm going to deny your motion and

1 let the verdict stand.

2 I likewise deny your motion for a
3 new trial.

4 MR. LONG:

5 Thank you, sir.

6 THE COURT:

7 Thank you very much.

8 MS. VON HERRMANN:

9 Thank Your Honor. And I -- I will
10 be right back.

11 WHEREUPON: Ms. von Herrmann left
12 the courtroom at 4:03 PM, July 22, 2009.

13 WHEREUPON: Ms. von Herrmann
14 returned to the courtroom at 4:05 PM, July 22, 2009.

15 THE COURT:

16 All right.

17 Mr. Long, any reason as to why we
18 can't impose sentence at this time?

19 MR. LONG:

20 No, Your Honor.

21 THE COURT:

22 All right.

23 In the case of State versus Ervin
24 C. Gamble Jr., Indictment Number 2008-GS-26-4185, on the
25 count of trafficking in heroine, 4 to 14 grams, second

1 offense, as I read the stature my hands are pretty much
2 tied. It's a mandatory sentence; non parolable offense;
3 cannot be suspended; not can probation be granted.

4 Therefore< pursuant to the
5 statute, the sentence of The Court as mandated by statute
6 is that:

7 You be confined to the State
8 Department of Corrections for 25 years and pay a fine of
9 \$100,000.

10 That's set out in law. And I
11 don't have any discretion over that.

12 All right.

13 Thank you very much.

14 All right.

15 We'll stand in recess until 9:30
16 tomorrow morning.

17 MR. LONG:

18 Thank Your Honor.

19 THE COURT:

20 Thank you very much.

21 MS. VON HERRMANN:

22 Thank you.

23 WHEREUPON: These judicial
24 proceedings were concluded at 4:08 PM, July 22, 2009.

25

CERTIFICATE

I, the undersigned, H. Eugene Buckner, CVR, Official Court Reporter at Large in and for the State of South Carolina, do hereby certify that the foregoing proceeding was taken on the 22nd day of July, 2009;

That the within judicial proceedings are, to the best of my ability, an accurate and verbatim transcription of the hearing;

I further certify that I am neither Counsel nor Solicitor to any of the parties in said suit, nor interested in the event of the cause.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 3rd day of September, 2009.

H. Eugene Buckner

H. EUGENE BUCKNER, CVR
OFFICIAL COURT REPORTER AT LARGE
15TH JUDICIAL DISTRICT
STATE OF SOUTH CAROLINA

WITNESSES

Chad Mullinex DEU - 15th Drug Enforcement Unit

DOCKET NO. 2008-GS-26-4105

The State of South Carolina

County of Horry

Heather Tolar

08H03070

COURT OF GENERAL SESSIONS

SEPTEMBER, 2008 TERM

REST WARRANT NUMBER

J320534

CDR: 0156 44-53-0370(e)(3)(a)2

DOA: 7/17/2008

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

OCT 30 2008

VERDICT

Foreperson of Petit Jury

Date:

Ervin C Gamble Jr
B/ M

Murrells Inlet, SC 29576
DOB:
SSN:

ATTORNEY:

Indictment for
TRAFFICKING HEROIN

J. Gregory Hembree, Solicitor

ORIGINAL

STATE OF SOUTH CAROLINA)

INDICTMENT

COUNTY OF HORRY)

At a Court of General Sessions, convened on SEPTEMBER 25, 2008, the Grand Jurors of Horry County present upon their oath:

ATTEMPT TO DISTRIBUTE HEROIN

CDR: 0185 44-53-0370(b)(1)

That Ervin C Gamble Jr did in Horry County on or about July 16, 2008, distribute, dispense or deliver, or did aid, abet, attempt or conspire to distribute, dispense, or deliver a quantity of Heroin, a Schedule I controlled substance under the provisions of Section 44-53-110, et. seq., S. C. Code of Laws, 1976, as amended, such possession not having been authorized by law, in violation of Section 44-53-0370(b)(1), S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


J. GREGORY HEMBREE
FIFTEENTH CIRCUIT SOLICITOR

CERTIFIED COPY

2009 DEC 31 AM 9:14

Melanie Augustine-Ward
CLERK OF COURT
HORRY COUNTY

WITNESSES

Chad Mullinex DEU - 15th Drug Enforcement Unit

DOCKET NO. 2008-GS-26- 7784

The State of South Carolina

County of Horry

Heather Tolar

08H03070

COURT OF GENERAL SESSIONS

SEPTEMBER, 2008 TERM

REST WARRANT NUMBER

J320533

CDR: 0185 44-53-0370(b)(1)

DOA: 7/17/2008

ACTION OF GRAND JURY

TRUE BILL

Jamie W. W. W.
Foreperson of Grand Jury OCT 30 2008

VERDICT

Foreperson of Petit Jury

Date:

vs.

Ervin C Gamble Jr

B/ M

Murrells Inlet. SC 29576

DOB:

SSN:

ATTORNEY:

Indictment for

ATTEMPT TO DISTRIBUTE HEROIN

J. Gregory Hembree, Solicitor

ORIGINAL

NP
08/04/09
225

WITNESSES

Chad Mullinex DEU - 15th Drug Enforcement Unit

DOCKET NO. 2008-GS-26- 4184

C
The State of South Carolina

County of Horry

Heather Tolar

08H03070

COURT OF GENERAL SESSIONS

SEPTEMBER, 2008 TERM

REST WARRANT NUMBER

J320533

CDR: 0185 44-53-0370(b)(1)

DOA: 7/17/2008

ACTION OF GRAND JURY

TRUE BILL

James W. Wubben
Foreperson of Grand Jury
Date: OCT 30 2008

VERDICT

Foreperson of Petit Jury

Date:

Ervin C Gamble Jr
R/ M

Murrells Inlet, SC 29576

DOB:

SSN:

ATTORNEY:

Indictment for

ATTEMPT TO DISTRIBUTE HEROIN

J. Gregory Hembree, Solicitor

ORIGINAL

NP
08/04/09

226

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

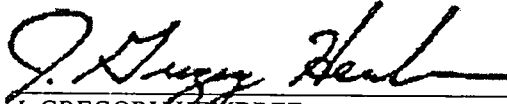
At a Court of General Sessions, convened on SEPTEMBER 25, 2008, the Grand Jurors of Horry County present upon their oath:

TRAFFICKING HEROIN

CDR: 0156 44-53-0370(e)(3)(a)2

That Ervin C Gamble Jr did in Horry County on or about July 16, 2008 sell, deliver, purchase, or bring into this state, or did aid, abet, attempt or conspire to sell, deliver, purchase or bring into this state, or was knowingly in actual or constructive possession of a quantity of Heroin in an amount of four grams or more but less than fourteen grams, same being a controlled substance all within the meaning of Section 44-53-110, et. seq., S. C. Code of Laws, 1976, as amended, in violation of Section 44-53-0370(e)(3), S. C. Code of Laws, 1976, as amended, for the crime of Trafficking.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


J. GREGORY HEMBREE
FIFTEENTH CIRCUIT SOLICITOR

CERTIFIED COPY

2009 DEC 31 AM 9:14

Melanie Augusta-Ward
CLERK OF COURT
HORRY COUNTY

WITNESSES

Chad Mullinex DEU - 15th Drug Enforcement Unit

DOCKET NO. 2008-GS-26-4785

The State of South Carolina

County of Horry

Heather Tolar

08H03070

COURT OF GENERAL SESSIONS

SEPTEMBER, 2008 TERM

REST WARRANT NUMBER

J320534

CDR: 0156 44-53-0370(e)(3)(a)2

DOA: 7/17/2008

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

OCT 30 2008

VERDICT

Foreperson of Petit Jury

Date:

Ervin C Gamble Jr
B/ M

Murrells Inlet, SC 29576
DOB:
SSN:

ATTORNEY:

Indictment for

TRAFFICKING HEROIN

J. Gregory Hembree, Solicitor

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Benjamin H. Culbertson, Circuit Court Judge

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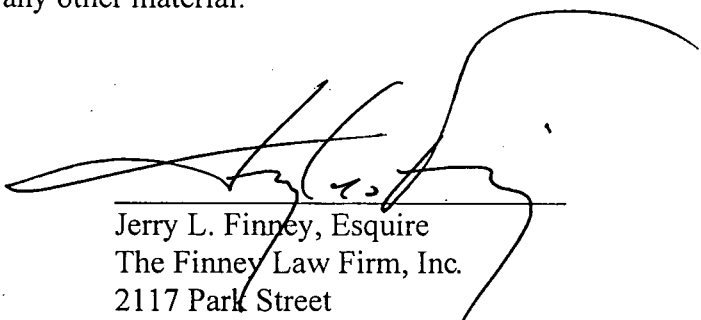
The State of South Carolina, ... Respondent,

v.

Ervin Gamble, ... Appellant.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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January 19, 2010

BLANK

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Case Number: 2009125406

The State of South Carolina, ... Respondent,

v.

Ervin Gamble, ... Appellant.

FINAL BRIEF OF THE APPELLANT

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February 5, 2010

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL JUDGE ERR IN ADMITTING THE STATE'S NARCOTICS EVIDENCE INTO EVIDENCE OVER THE APPELLANT'S OBJECTION THAT NO FOUNDATION HAD BEEN LAID FOR THAT EVIDENCE IN THAT THE BASIS FOR THE SEARCH DURING WHICH THE EVIDENCE WAS COLLECTED WAS NOT ESTABLISHED?
2. DID THE TRIAL JUDGE ERR IN DENYING THE APPELLANT'S MOTION FOR A DIRECTED VERDICT WHEN THE STATE FAILED TO ESTABLISH BASIS FOR THE SEARCH UNDERLYING THE SEIZURE OF ALL OF THE EVIDENCE PRESENTED AT THE TRIAL IN VIOLATION OF THE DEFENDANT'S 4th AMENDMENT RIGHTS?
3. DID THE TRIAL COURT ERR IN DENYING THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT IN THIS MATTER?
4. DID THE TRIAL JUDGE ERR IN DENYING THE APPELLANT'S MOTION FOR A NEW TRIAL IN THIS MATTER?

STATEMENT OF THE CASE

This is an appeal arising from the conviction of the Appellant, Mr. Ervin C. Gamble, Jr. that occurred at a trial before The Honorable Benjamin C. Culbertson occurring on July 22, 2009 in Horry County, South Carolina.

During the trial of this matter, the trial judge erroneously admitted the physical narcotics evidence, and all of the State's evidence, that was seized from the Appellant during a warrantless search conducted as a result of an unlawful arrest for which the arresting officer lacked probable cause. The trial judge also erroneously declined to grant the Appellant's motion for a directed verdict, motion for judgment notwithstanding the verdict in this matter and motion for a new trial.

Upon conviction, the Appellant was sentenced to twenty-five (25) years in the South Carolina Department of Corrections and this appeal followed.

FACTS

On July 16, 2008, the Appellant was arrested by Agent Chad Mullinax of the Myrtle Beach Police Department on two different occasions, albeit closely connected in time, and charged with two separate crimes. Agent Mullinax indicated that, on July 16, 2008, the Appellant's only action with regard to the Appellant's initial "arrest" was that the Appellant "arrived at the location of 72 Offshore Drive." (Transcript p. 88 lns 22-25)(R. p. 90, lines 22-23). Agent Mullinax went on to state that "[a]t that time, he was arrested on a separate charge... Upon...being placed under arrest, he was searched." (Transcript p. 89 lns 1-2)(R. p. 90, lines 24-25). There was no search warrant obtained at any time, and the warrantless search of the Appellant conducted subsequent to his initial "arrest" on this "separate charge" led to the seizure of physical narcotics evidence. As a result of this narcotics evidence the Appellant was arrested on the charge of Trafficking in Heroin. The evidence seized pursuant to the initial "arrest" was also the only evidence presented by the State of South Carolina against the Appellant during the trial of this matter on the charge of Trafficking in Heroin. There was absolutely no testimony whatsoever articulated on the record that would establish probable cause and legitimize the initial warrantless "arrest" of the Appellant on this prior "separate charge," which ultimately led to the seizure of all of the evidence that the State of South Carolina proffered against the Appellant at the trial of this matter.¹ As such, all of the evidence proffered by the prosecution against the Appellant in the trial of this matter was fruit of the poisonous tree obtained in violation of the Appellant's constitutional rights.

¹ It should be noted that the Appellant had no outstanding arrest warrants on the date in question and all of the testimony regarding the initial "separate charge," and the basis therefore, was presented by Agent Mullinax at the trial of this matter.

Accordingly, all of this evidence was inadmissible and the trial court's decision to allow this evidence into the record was clear error.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Preslar, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct.App. 2005). "A court's ruling on the admissibility of evidence will not be reversed by this Court absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant." State v. Hamilton, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct.App. 2001), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); *accord* Preslar, 364 S.C. at 472, 613 S.E.2d at 384; State v. McLeod, 362 S.C. 73, 79, 606 S.E.2d 215, 218-219 (Ct.App. 2004); State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct.App. 2000); State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct.App.1999); State v. Patterson, 337 S.C. 215, 228, 522 S.E.2d 845, 851 (Ct.App. 1999); *see* State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) ("The trial judge's decision to admit or exclude the evidence is reviewed on appeal under an abuse of discretion standard."); State v. Taylor, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998) ("[I]n order for this Court to reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown.").

"An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Irick, 344 S.C. 460, 463, 545 S.E.2d 282, 284 (2001) (citing Lee v. Suess, 318 S.C. 283, 285, 457 S.E.2d 344, 346 (1995)); *accord* State v. Sweet, 374 S.C. 1, 5, 647 S.E.2d 202, 204-205 (2007).

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004).

ARGUMENTS

I. THERE WAS NO PROBABLE CAUSE TO JUSTIFY THE INITIAL ARREST OF THE APPELLANT RENDERING THE SUBSEQUENT SEARCH OF HIS PERSON AND HIS VEHICLE INCIDENT TO THAT UNLAWFUL ARREST UNCONSTITUTIONAL; THEREFORE, IT WAS REVERSIBLE ERROR FOR THE TRIAL JUDGE TO ADMIT THE EVIDENCE OBTAINED AS A RESULT OF THIS ILLEGAL WARRANTLESS SEARCH AND SEIZURE THAT WAS CONDUCTED IN VIOLATION OF THE APPELLANT'S CONSTITUTIONAL RIGHTS.

Evidence seized in violation of the Fourth Amendment must be excluded from trial. State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* State v. Khingratsaiphon, 352 S.C. 62, 572 S.E.2d 456 (2002) *and* Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The failure of a trial court to exclude evidence seized in violation of the Fourth Amendment constitutes a clear abuse of the trial court's discretion and this failure also constitutes a clearly erroneous application of the law resulting in significant prejudice to the Appellant.

"Generally, a warrantless search is per se unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures." State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995). As such, "[t]he burden of establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches is upon **the prosecution**." State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995) *and* State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct.App. 1995)(emphasis added).

Further, "[t]urning to the question of probable cause, probable cause for a warrantless arrest generally exists 'where the facts and circumstances within the arresting officer's knowledge are sufficient for a reasonable person to believe that a crime has been or is being committed by the person to be arrested.'" State v. Moultrie, 316 S.C. 547, 552, 451 S.E.2d 34, 37 (Ct. App. 1994) *quoting* United States v. Miller, 925 F.2d 695, 698 (4th Cir.) *cert. denied*, 502 U.S. 833, 112 S.Ct. 111, 116 L.Ed.2d 80 (1991).

In the instant case, the only facts and circumstances within the knowledge of the arresting officer, Agent Chad Mullinax of the Myrtle Beach Police Department, that could have possibly supported the warrantless search of the Appellant are as follows.² Agent Mullinax testified that on July 16, 2008 he and other members of the 15th Circuit Drug Task Force "were -- uh -- conducting a -- an investigation -- uh -- that day. We were able to -- uh -- uh -- gain information of a person. I -- We had the name of 'Fats.'" (Transcript p. 81 lns. 8-12)(R. p. 82, lines 8-12). There was no other mention of the name "Fats" during the trial nor was there any connection or association of this nickname to any individual whatsoever, much less any connection or association of this nickname to the Appellant in any capacity. There was also no mention as to how the police obtained this nickname, what context the nickname was obtained in regard to, or any other information of any kind about this nickname. Put simply, there is absolutely nothing in the record other than the fact that the police somehow obtained a nickname for a person. Further, there was absolutely no link whatsoever between some person with the nickname of "Fats" to the Appellant. Any attempt at such would be pure speculation, which is impermissible.

² The following quoted material from Agent Mullinax's testimony is the entirety of the evidentiary record prior to the State's attempt to admit any physical evidence whatsoever.

Further, there was no additional testimony presented as to the source of this "information" or as to the legitimacy of any purported "information" provided to Agent Mullinax or obtained by Agent Mullinax. In fact, the record is devoid of any further testimony about any "information" known to law enforcement at this time.

Agent Mullinax next stated that he and the other agents had previously developed a "tactical plan" with regard to drugs in Horry County and that they "[p]lanned on -- uh -- speaking with *a person* in regards to -- uh -- drugs.... The drugs were to be -- uh -- be delivered." (Transcript p. 88 lns 5-8)(R. p. 89, lines 5-8)(emphasis added). There was no further testimony indicating whether or not the police actually spoke with anyone regarding drugs or with anyone with regard to anything else for that matter. There was no further explanation of the need or justification for any "tactical plan" nor was there any indication as to what the plan consisted of; who or what was the subject of the plan; or who or what the plan was supposed to accomplish. There was also no time frame for this "tactical plan" nor was there anything further about this matter presented at this trial.

Further, there was no indication as to the existence of or identity of the "person" that the agents had planned on speaking to. There is no indication as to what, if any, information was sought; as to what, if any, information was actually provided; or as to anything further with regard to any "person" or to any drugs whatsoever. There is certainly no connection whatsoever between this agent's testimony that the officers "planned on speaking with an individual" and the Appellant.

Agent Mullinax went on further to state that he and the other agents went to "72 Offshore Drive in the Murrell's Inlet section of Horry County..." at "approximately -- uh -- 6:15" on July 16, 2008. (Transcript p. 88 lns. 22-23, 25)(R. p. 89, lines 22-23, 25).

There was no information provided as to why the agents went to this particular location; where the address for this location came from; or what, if anything, was supposed to happen at this location. The agent testified solely that they went to 72 Offshore Drive in Murrell's Inlet as a result of their "tactical plan" with no other reason or justification whatsoever. There was no testimony in the record whatsoever to suggest that any criminal activity of any kind was happening, or that any criminal activity of any kind was about to happen, at this particular location. It would be impermissible to speculate otherwise.

While the agents were located at 72 Offshore Drive in Murrell's Inlet, Agent Mullinax testified that he came into contact with Mr. Gamble when Mr. Gamble "**arrived at the location of 72 Offshore Drive.**" (Transcript p. 89 lns. 22-3)(R. p. 90, lines 22-23)(emphasis added). There is no indication of any action taken by Mr. Gamble other than that he simply "**arrived**" at 72 Offshore Drive in Murrell's Inlet, South Carolina. Clearly, the simple act of "arriving" at 72 Offshore Drive in Murrell's Inlet is not - in and of itself - a crime. Nor is the simple act of arriving at this particular location, without any further information, evidence of the commission of or connection to any previous crime.

As such, the Appellant's sole action in this matter, his act of simply **arriving** at a location where law enforcement happened to be cannot form the probable cause that is required to support a lawful arrest pursuant to the protections of the United States Constitution. There is absolutely no mention of any connection of Mr. Gamble to anything that the agent had previously testified about and no such connection can legitimately be inferred in an attempt to justify the initial "arrest" in this matter. Put simply, there was absolutely no probable cause whatsoever to believe that Mr. Gamble

had committed, or was in the act of committing any crime whatsoever as is required before officer's can arrest an individual. *See, State v. Moultrie*, 316 S.C. 547, 551, 451 S.E.2d 34, 37 (Ct.App. 1994). Based upon the testimony presented during the trial of this matter, there was not even so much as reasonable suspicion to believe that any crime had been committed by anyone at all. As such, there was no legitimate justification for Agent Mullinax to arrest Mr. Gamble nor was there any legitimate basis to search his person or his vehicle incident to that arrest.

However, despite the complete and total lack of probable cause to believe that Mr. Gamble had been or was in the act of committing a crime, Mr. Gamble was in fact "arrested on a separate charge..." and "[u]pon... being placed under arrest, he was searched." (Transcript pp. 89-90 lns. 22-25, 1-2)(R. pp. 90-91, lines 24-25, 1-2). As such, the lack of probable cause renders the initial arrest of the Appellant and the resulting search and seizure unlawful, improper and in violation of the Appellant's 4th Amendment rights. Accordingly, it was clear error for the trial judge to admit the physical evidence seized as a result of the search incident to this unlawful arrest into evidence over the objection of defense counsel.

In addition, the fruits of a warrantless search that precedes a formal arrest cannot be used to justify the arrest. *State v. Moultrie*, 316 S.C. 547, 551, 451 S.E.2d 34, 37 (Ct.App. 1994) *citing* *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968). In this matter, the evidence seized from the Appellant preceding his arrest for Trafficking Heroin is not admissible to justify the Appellant's arrest for Trafficking in Heroin, which was the only offense pursued at the trial of this matter.

In the case at bar, Mr. Gamble's trial counsel objected to the State's attempt to admit the physical narcotics evidence that was seized during the warrantless search of the Appellant that was conducted incident to an arrest for which no probable cause existed.³ Defense counsel correctly argued that, prior to the attempted admission of the evidence into the record, no foundation for this evidence had been laid and that no basis for the initial arrest of Mr. Gamble had been articulated on the record, such that the Defendant's 4th Amendment Rights had been violated and all of the evidence seized would have been the proverbial fruit of the poisonous tree. (Transcript p. 93 Ins. 6-7, 12-25)(R. p. 94, lines 12-25). Over the objection of counsel and without any justification or explanation whatsoever, the trial court admitted the physical narcotics evidence into the record. The court indicated "[o]ver objection, I'm going to go ahead and admit State's Exhibit Number 10 [the physical narcotics evidence] into evidence over Defendant's objection." (Transcript p. 94 Ins. 2-4)(R. p. 95, lines 2-4). There was no further explanation whatsoever to support the admission of this evidence and the record simply does not contain any evidence of any probable cause to legitimize the initial arrest in this matter. Therefore the trial court's admission of this evidence, which was all fruit of the poisonous tree, was clear error and a complete abuse of his discretion that was detrimentally prejudicial to the Appellant.

"The burden of establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches is upon the prosecution." State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995) *and* State v. Bultron, 318

³ This evidence was State's Exhibit Number 10 that had previously been marked for identification purposes.

S.C. 323, 457 S.E.2d 616 (Ct.App. 1995). Failing to require the prosecution to produce any foundation for this evidence and failing to inquire as to the legitimacy of the arrest underlying this warrantless search was not only clear error, but it was also an abuse of discretion that was unquestionably prejudicial to the Appellant in this matter.

Upon defense counsel raising an objection as to glaring lack of foundation for the proffered evidence, it was incumbent on the trial court to determine whether a sufficient foundation for said evidence had been submitted. Prior to the attempted admission of the evidence at the trial, the arresting officer provided no foundation, probable cause, reasonable suspicion, or any justification of any kind whatsoever that would tend to support the legality or righteousness of the original "arrest." The officer failed to even acknowledge the nature of the charge that Mr. Gamble was initially arrested on. The only testimony presented to support the attempted admission of this evidence was that Mr. Gamble **arrived** at 72 Offshore Drive in Murrell's Inlet and was arrested on a separate charge and was later searched incident to that arrest. (Transcript pp. 89-90 lns. 22-25, 1-2)(R. pp. 90-91, lines 22-25, 1-2)(emphasis added). Arriving at a location, absent any additional information, simply does not and can not constitute a crime such that an individual can be arrested for it. Therefore, allowing this action to serve as the basis for an arrest justifying a warrantless search pursuant to that arrest was clear error committed by the trial court.

No further explanation or probable cause for this initial arrest exists, and all of the evidence collected from Mr. Gamble was seized pursuant to a search incident to this unsupported "arrest." The objection that was proffered by the Appellant clearly challenged the foundation for admitting the physical evidence. This objection articulated

the clear lack of basis or justification of any kind to support the underlying arrest. Further, the objection noted the potential significant 4th Amendment issues that the allowance of this evidence would cause. However, without any justification whatsoever, the trial judge admitted this evidence into the record. This constitutes clear error and amounts to an abuse of discretion by the trial judge that was significantly prejudicial to the Appellant in this matter. The proffered physical evidence, and all of the State's evidence presented in this matter, was illegally obtained during an unlawful search and seizure that was conducted in violation of the Appellant's 4th Amendment rights.

II. THE TRIAL JUDGE ERRED IN DENYING MR. GAMBLE'S MOTION FOR A DIRECTED VERDICT WHEN THE STATE FAILED TO ESTABLISH BASIS FOR THE SEARCH UNDERLYING THE COLLECTION OF THE ONLY PHYSICAL EVIDENCE PRESENTED AT THE TRIAL IN VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS.

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004), State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

At the close of the State of South Carolina's case in chief, counsel for the Defendant made a timely motion for a directed verdict. (Transcript p. 115 lns. 13-14)(R. p. 116, lines 13-14). The central focus of this directed verdict motion was the fact that the entirety of the evidence presented by the State of South Carolina against Mr. Gamble was fruit of the poisonous tree that had been seized during an illegal, improper and unjustifiable warrantless search of Mr. Gamble that was predicated on an illegal, improper and unjustifiable warrantless arrest that was in violation of Mr. Gamble's Constitutional 4th Amendment rights. (Transcript pp. 115-117)(R. pp. 116-118).

Defense counsel articulated that the prosecution had failed to establish probable cause to justify the arrest leading to the warrantless search, which the prosecution must do according to the South Carolina Supreme Court in *State v. Freiburger*, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006). In particular, the Appellant's trial defense counsel argued,

We've got...a case where the only evidence presented to this Court...to this jury...of the reason for the search was that my client was arrested on a separate charge. There is no indication in the record of what that charge was. There is no indication in the record that it was a lawful arrest. It's my understanding of the status of the law in the 4th amendment search and seizure law is that Search incident to a lawful arrest...would be allowed. But there has to be some determination that it was a lawful arrest. In fact, our position is: It was an unlawful arrest. The truth of the matter in this case is: They made an arrest for [a separate charge]...if law enforcement were allowed to come into court every time and say: We made an arrest on another matter; and they we searched and found this.... There's got to be some finding in the record and some showing to this Court that they had a right to search my client. Just because they arrested him, does not give them the right to search him or anything else of his. They have to show this Court that it was a lawful arrest. And there is no showing at all in the record in this case. And again Your Honor: To the contrary, we believe it was an unlawful arrest. (Transcript p. 115 lns 15-25, p. 116 lns 1-14, 25, p. 117 lns. 1-12) (R. p. 116, lines 15-25, p. 117 lines 1-14, p. 118 lines 1-12).

This argument is directly at the heart of this appeal because it was clearly the prosecution's burden to establish that the warrantless search leading to the seizure of all of the evidence presented at trial against the Defendant was obtained lawfully. *See*, Argument 1 above; *State v. Freiburger*, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* *State v. Dupree*, 319 S.C. 454, 462 S.E.2d 279 (1995) *and* *State v. Bultron*, 318 S.C. 323, 457 S.E.2d 616 (Ct.App. 1995).

In addition, in response to the motion for a directed verdict, the State of South Carolina acknowledged that the record was devoid of evidence that would establish the probable cause to support the initial arrest of the Appellant and, in fact, the prosecution

actually offered to supplement the record with in camera testimony after the directed verdict motion stating "if it is The Court's pleasure, the State would be more than happy, in camera, to go into those issues [the probable cause for the initial arrest], so The Court can make that ruling at this time. (Transcript pp. 119-20 lns 24-25, 1-2)(R. pp. 120-121, lines 24-25, 1-2). This is a clear and unequivocal acknowledgment that the State had completely failed to establish probable cause or the existence of circumstances constituting an exception to the general prohibition against warrantless searches as required by law. See, State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006). Therefore, it is clear that all of the evidence propounded by the prosecution as evidence of the offense charged was inadmissible as it is all fruit of the poisonous tree seized pursuant to a search incident to an unlawful arrest in violation of the Appellant's 4th Amendment rights. Therefore, the prosecution failed to produce any evidence of the offense charged and it was clear error and an abuse of discretion for the trial court to deny the directed verdict motion in this matter. See, State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004), State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Further, the denial of this directed verdict constitutes significant prejudice to the Appellant.

In additional response to the directed verdict motion, the prosecution attempted to advance the argument that, by failing to make a pre-trial motion to suppress the physical evidence, the defendant had completely waived his right to challenge the admissibility of this evidence. (Transcript p. 119 lns. 2-10)(R. p. 120, lines 2-10). This assertion is frighteningly inaccurate. There is absolutely no requirement whatsoever that a defendant must file a motion to suppress as a prerequisite for challenging the admissibility of evidence at trial. The decision of when and where to challenge the admissibility of

evidence, whether it be via pre-trial motion or at the time of the prosecution's attempt to admit the evidence, is a strategic trial decision. In fact, even when a defendant argues a pre-trial motion to suppress, the defendant must also make a contemporaneous objection to that evidence at trial in order to preserve the issue for appeal. *See, State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) (“[M]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.”).

However, in the case at bar, it is clear from the record that the trial judge may have simply misinterpreted the law as espoused in *Freiburger*, which imposes the burden of establishing “probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches” **upon the prosecution**. *State v. Freiburger*, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* *State v. Dupree*, 319 S.C. 454, 462 S.E.2d 279 (1995) *and* *State v. Bultron*, 318 S.C. 323, 457 S.E.2d 616 (Ct.App. 1995). The trial court questioned defense counsel asking, “So, it’s your position that: All evidence obtained pursuant to a lawful arrest, the State has the burden of proving that evidence is admissible; rather than the Defendant challenging its admissibility?” (Transcript p. 124 lns. 2-6)(R. p. 125, lines 2-6). The critical point at issue is that the trial court completely failed to determine the lawfulness of the underlying arrest that spawned the search and seizure of all of the prosecution’s evidence in this matter. The trial court failed to rule on the lawfulness of the underlying arrest and simply proceeded as if this arrest were *per se* lawful despite the glaring lack of probable cause to support this arrest.

This was clear error and constitutes an abuse of discretion that was significantly prejudicial to the constitutional rights of the Appellant.

As all of the evidence presented in this matter was fruit of the poisonous tree obtained in violation of the Appellant's constitutional rights, all such evidence is inadmissible against the Appellant in this matter. Therefore, it was clear error and an abuse of discretion for the trial judge to deny the motion for a directed verdict in that the State failed to produce any constitutionally valid evidence of the offense charged. Accordingly, this decision should be overturned and a directed verdict in favor of the Appellant should be granted.

III. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT IN THIS MATTER.

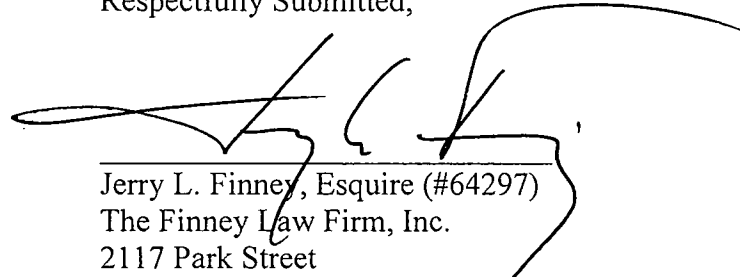
IV. THE TRIAL JUDGE ERRED IN DENYING THE APPELLANT'S MOTION FOR A NEW TRIAL IN THIS MATTER.

For the reasons articulated in Arguments 1 and 2 above, it was clear error for the trial court to deny the Appellant's motion for judgment notwithstanding the verdict and motion for a new trial in this matter. All of the evidence presented at the trial of this matter was obtained during an unconstitutional warrantless search and seizure of the Appellant in this matter. As such, all of the evidence presented at the trial should have been excluded by the trial judge meaning that the prosecution had failed to present any evidence supporting the offense charged. Denying the Appellant's motion for judgment notwithstanding the verdict and motion for a new trial in light of this was clear error by the trial judge. This clear error also caused significant prejudice to the Defendant.

CONCLUSION

The record in this matter is devoid of any testimony establishing probable cause or the existence of circumstances that would constitute an exception to the general prohibition against warrantless searches and seizures that would legitimize the initial arrest of the Appellant. Therefore, the trial court's admission of the physical narcotics evidence, which was clearly fruit of the poisonous tree obtained in violation of the Appellant's 4th Amendment rights, constitutes clear error and an abuse of discretion that was supremely prejudicial to the Appellant. In addition, the trial court's failure to grant a directed verdict in favor of the Appellant was a prejudicial abuse of discretion and constitutes clear error. Accordingly, the trial court's erroneous decisions should be overturned and the Appellant's conviction should be struck down.

Respectfully Submitted,



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February 5, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Case Number: 2009-125406

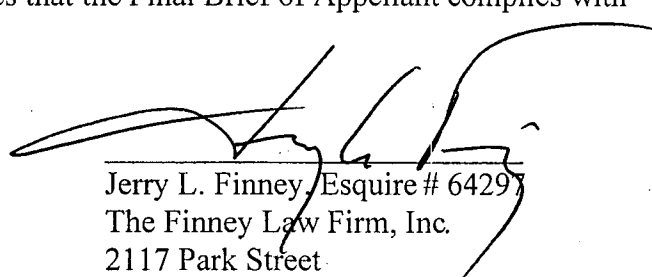
The State of South Carolina, ... Respondent,

v.

Ervin Gamble, ... Appellant.

CERTIFICATE OF COUNSEL

Counsel for Appellant hereby certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.



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IN THE COURT OF APPEALS

Appeal From Horry County
Hon. Benjamin H. Culbertson, Circuit Court Judge

The State,

Respondent.

v.

Ervin Gamble,

Appellant.

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court properly admitted the drug evidence obtained as a result of a valid search incident to a lawful arrest.
- II. The trial court properly denied Appellant's motion for a directed verdict.
- III. The trial court properly denied Appellant's motions for a judgment notwithstanding the verdict and a new trial. (Appellant's Issues III and IV).

STATEMENT OF THE CASE

The Horry County Grand Jury indicted Appellant on charges of attempted distribution of heroin and trafficking in heroin. On July 21-22, 2009, Appellant proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. The State elected to call only the trafficking in heroin charge for trial. The jury found Appellant guilty of trafficking in heroin and, because Appellant had a prior conviction for distribution of marijuana, the trial court sentenced him to twenty-five years in prison and a \$100,000 fine.

ARGUMENT

I. The trial court properly admitted the drug evidence obtained as a result of a valid search incident to a lawful arrest.

Appellant asserts the trial court improperly admitted the drug evidence seized during a search of Appellant after his arrest. Appellant contends there is no basis for the arrest appearing in the record, and there was insufficient evidence presented from which the court could properly conclude the search was incident to a lawful arrest. He maintains the drugs should be excluded based on the illegal search, and all evidence related to the drugs should have been excluded based on the fruit of the poisonous tree doctrine. The State, however, presented the facts and circumstances surrounding Appellant's arrest. The trial court had sufficient evidence from which it concluded the evidence was admissible as being the product of a valid search incident to a lawful arrest.

First, it is questionable whether the issue is properly preserved for review on appeal. Appellant never made a motion to suppress to the trial court. Agent Mullinix detailed the investigation, the stop of Appellant, the search of Appellant, and the finding of drugs that tested positive for heroin. Appellant never objected to this testimony or moved to suppress the discussion of the stop, search, or finding of drugs. As a result, he did not contemporaneously object when the evidence was first before the jury. In order to preserve an evidentiary issue for review on appeal, a contemporaneous objection must be made when the testimony is offered. See State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court). If a party fails to properly object, the party is procedurally barred from

raising the issue on appeal. Id. at 58-59, 609 S.E.2d at 523. Accordingly, the issue is not properly preserved for review on appeal.

Further, Appellant argues on appeal that much of the evidence should be excluded as fruit of the poisonous tree. Appellant, however, never moved before the trial court to suppress or exclude any evidence based on the fruit of the poisonous tree. Further, he never objected to the admission of the testimony of the drug analyst or her findings that the drugs in question constituted a heroin mixture in excess of four grams. As a result, any challenge to this testimony is not properly preserved for review on appeal.

On the merits, the trial court properly admitted the drug evidence. "In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." State v. Moore, 377 S.C. 299, 305, 659 S.E.2d 256, 259 (Ct. App. 2008) (quoting Wilson, 345 S.C. at 6, 545 S.E.2d at 829). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Evidence seized in violation of the Fourth Amendment must be excluded from trial. State v. Khingratsaiphon, 352 S.C. 62, 572 S.E.2d 456 (2002). Generally, a warrantless search is *per se* unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479,

482 (2007). "However, a warrantless search will withstand constitutional scrutiny where the search falls within one of several well recognized exceptions to the warrant requirement. One such exception is in cases of a search incident to arrest." State v. Freiburger, 366 S.C. 125, 132, 620 S.E.2d 737, 740 (2005) (citing *inter alia* State v. Ferrell, 274 S.C. 401, 409, 266 S.E.2d 869, 873 (1980) (in the case of a lawful custodial arrest, the full search of a person does not require a search warrant and is considered reasonable under the Fourth Amendment)). The burden of establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches is upon the prosecution. Id.; State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995) (burden is upon State to justify warrantless search).

The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest. Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested. State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006) (citing State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996) (finding probable cause for warrantless arrest for murder)). "Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer's disposal." Id. (citing *inter alia* Beck v. Ohio, 379 U.S. 89, 91 (1964) (a court must consider "whether, at the moment the arrest was made, the officers had probable cause to make it-whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy

information were sufficient to warrant a prudent man in believing that the [Appellant] had committed ... an offense.”)).

Prior to trial, counsel and the trial court engaged in a discussion regarding the charges against Appellant. Counsel for the State indicated the confidential informant in this case, from which law enforcement received information regarding Appellant, was deceased. As a result, the State chose not to proceed on the attempt to distribute heroin charge brought in addition to the trafficking in heroin charge for which Appellant was ultimately convicted. The State informed the judge law enforcement arrested Appellant at a specified location established as a result of the information from the confidential informant. (T.49-50; R.50-51). As a result, the trial court was clearly informed Appellant was initially arrested on the attempted distribution of heroin charge arising out of the contact with the confidential informant and subsequent investigation.

Further, at trial, the State presented further evidence establishing the validity of Appellant's arrest and the search incident to arrest. Agent Mullinix testified he was employed by the Myrtle Beach Police Department and a member of the Fifteenth Circuit Drug Task Force. He indicated he worked predominately on drug cases and distribution of drug cases. (T.80-81; R.81-82). He stated in July 2008 he was conducting an investigation regarding an individual named "Fats." (T.81; R.82).

As a result of the information, a tactical plan was developed specifically with regard to Appellant. Agent Mullinix testified other agents and himself were in the area and spoke with a person about having drugs delivered. (T.88; R.89). They selected a particular location and conducted a phone call. (T.88-89; R.89-90). Appellant was the only person

who arrived at the location and was arrested "on a separate charge." (T.89; 99; R.88; 100). After being placed under arrest, Appellant was searched and the officers located a brown powdered substance which field tested positive for heroin. Additional amounts of a brown powdered substance were found in the console of his vehicle. The additional substances also tested positive for heroin. (T.90; R.91).

The trial court had ample evidence from which it could conclude the drug evidence was seized as a result of a valid search incident to a lawful arrest. Appellant was initially arrested for "a separate charge," which the trial court knew was the attempted distribution of heroin. The fact the State did not proceed on the charge for which Appellant was arrested should have no impact on the validity of the search incident to arrest. See Freiburger, 366 S.C. at 133, 620 S.E.2d at 741 (fact that Freiburger was not ultimately arrested for crime which gave rise to search was not dispositive and does not vitiate the reasonableness of the underlying search incident to an arrest) (citing Devenpeck v. Alford, 543 U.S. 146 (2004)).

The State established the probable cause for the arrest for attempted distribution of heroin during which Appellant was searched.

Attempt crimes are generally ones of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime. Additionally, the State must prove that the defendant's specific intent was accompanied by some overt act, beyond mere preparation, in furtherance of the intent, and there must be an actual or present ability to complete the crime.

State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001). The State's evidence demonstrated Appellant had the specific intent to distribute heroin and proceeded to an agreed upon location which constituted the overt act. See e.g., State v. Reid, 383 S.C.

285, 298-299, 679 S.E.2d 194, 200-210 (Ct. App. 2009), *cert. pending* (finding appellant's arrival at a predetermined location was an overt act sufficient to support conviction for attempted criminal sexual conduct with a minor).

Agent Mullinix testified he was investigating information related to an individual and set up a drug delivery. The trial court knew Agent Mullinix received the information from a confidential informant who was deceased. Appellant was the only person who arrived at the predetermined location for the drug delivery and was properly arrested for attempted distribution of heroin. The fact some of the information was not presented to the jury is irrelevant because the determination of the admissibility of evidence is for the court and not the jury. See Gaster, 349 S.C. at 557, 564 S.E.2d at 93 ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."). The State showed Agent Mullinix had probable cause to arrest Appellant for the attempted distribution of heroin charge, and therefore, the arrest was a lawful, warrantless arrest. Additionally, a search incident to that arrest was valid in order to search for weapons or to prevent the destruction of evidence.¹ The trial court clearly had sufficient evidence from which it could find the search was incident to a lawful arrest, and as a result, properly admitted the drugs and evidence related to the drugs.

¹See Chimel v. California, 395 U.S. 752, 763 (1969) ("[A] warrantless search is permissible incident to a lawful arrest because of legitimate concerns for the safety of the officer and to prevent the destruction of evidence.").

II. The trial court properly denied Appellant's motion for a directed verdict.

Appellant contends the trial court erred in failing to grant his motion for a directed verdict. He relies entirely on his argument that the court improperly admitted the drug evidence to contend there was no evidence before the court supporting the decision to send the case to the jury. For the same reasons discussed above,² the drug evidence was properly admitted at trial and, therefore, clear evidence existed supporting the trial court's decision to deny Appellant's motion for a directed verdict.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. Id. When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Cherry, 361 S.C. 588, 593-593, 606 S.E.2d 475, 477-478 (2004). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." Id.

First, it was improper for Appellant to attempt to argue the suppression of the drug evidence as part of his motion for a directed verdict and the issue is not properly raised on

²The issue of the admissibility of the drug evidence was addressed fully in Issue I and will not be rehearsed in this Issue. The State believes the drug evidence was properly admitted by the trial court and should be considered in determining whether there was any direct or substantial circumstantial evidence supporting the trial court's decision to deny Appellant's motion for a directed verdict.

appeal. The trial court ruled on the admissibility of the drugs into evidence when Appellant objected. The only consideration for the trial court when deciding a motion for directed verdict is whether there exists any direct evidence or substantial circumstantial evidence tending to prove the guilt of the accused. Cherry, 361 S.C. at 593-593, 606 S.E.2d at 477-478. The trial court is not concerned with reconsidering the suppression of evidence previously ruled admissible or the suppression of evidence never objected to by Appellant. The same is true of this Court. Accordingly, Appellant's motion for a directed verdict, as raised, is improper and should not be considered by this Court on appeal.

Next, the issue also fails on the merits. Section 44-53-370 of the South Carolina Code (Supp. 2008) states:

(e) Any person . . . who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of:

(3) four grams or more of any morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin, as described in Section 44-53-190 or 44-53-210 , or four grams or more of any mixture containing any of these substances, is guilty of a felony which is known as "trafficking in illegal drugs" and, upon conviction, must be punished as follows if the quantity involved is:

(a) four grams or more, but less than fourteen grams:

....

2. for a second or subsequent offense, a mandatory term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of twenty-five thousand dollars;

S.C. Code Ann. §44-53-370(e)(3)(a)(2) (Supp. 2008). Accordingly, the State was required to show Appellant was knowingly in actual or constructive possession of between four and fourteen grams of heroin or a mixture containing heroin.

The testimony and evidence at trial clearly indicated Appellant was in possession of between four and fourteen grams of a mixture containing heroin. Agent Mullinix testified Appellant was searched when he arrived at the arranged location for the drug delivery. (T.88-89; R.89-90). Agent Mullinix testified he found a bag containing a brown powdered substance on Appellant's person which field tested positive for heroin. In addition bundles of a brown powdery substance were located in the console of Appellant's automobile as he was removed from the vehicle. This brown powdery substance also tested positive for heroin. (T.90-91; 94-97; R.91-92; 95-98). Further, Appellant was the lone occupant of the vehicle which was a rental car. Agent Mullinix found Appellant's personal belongings in the vehicle. (T.99-100; R.100-101).

Lisa Floyd, a forensic drug analyst for the Horry County Police Department, analyzed the brown powdered substance in four items. She indicated the substance included heroin and quinine, a substance used to cut or add volume to a heroin mixture. (T.107-108; R.108-109). She testified the total weight was 4.76 grams and that she did not test the remainder because it was clear it would not exceed 14 grams. (T.108-110; R.109-111).

Appellant makes the very specious argument that "the State of South Carolina acknowledged the record was devoid of evidence that would establish the probable cause to support the initial arrest of the Appellant." (App.Br.p.12). Appellant further contends the State's offer for the court to conduct a hearing into the admissibility instead of proceeding

on the motion for a directed verdict constitutes "a clear and unequivocal acknowledgement that the State had completely failed to establish probable cause or the existence of circumstances constituting an exception to the general prohibition against warrantless searches as required by law." (App.Br.p.12). These assertions by Appellant are, to borrow a phrase, "frighteningly inaccurate."

The State made it clear to the trial court it did not believe the directed verdict motion was a proper vessel for Appellant to re-litigate his arguments regarding the admissibility of evidence. Further, the State asserted Appellant waived his right to argue for suppression by allowing testimony to be taken in front of the jury related to the drugs and the seizure of the drugs. Additionally, the State reiterated the admissibility of evidence is a decision for the court and not something that has to be developed in front of the jury. Finally, the State offered to conduct an *in camera* hearing to address any issues regarding the admissibility of the evidence, even though it is clear, as far as the State was concerned, the trial court already decided the issue. (T.119-121; R.120-122).

Appellant's argument before the trial court went so far as to require the State to seek a determination on the admissibility of its evidence prior to its submission to the jury. He maintained he had no burden to even challenge the evidence at trial, but instead the State should have been required to prove its admissibility before the jury. (T.122-124; R. 123-125). This is clearly not the law of this State. Defendants are required to make

contemporaneous objections to evidence or move to suppress the admission of evidence in order to preserve an issue for review on appeal.³

Accordingly, the issue of the admissibility of drug evidence was not properly raised in the motion for a directed verdict; instead, the trial court should have been and clearly was concerned with whether there was evidence to support sending the charge to the jury. The State presented sufficient evidence Appellant was in actual possession of between four and fourteen grams of a mixture containing heroin. As a result, the trial court properly denied Appellant's motion for a directed verdict and submitted the case for the jury's consideration.

³ Further, this Court and the South Carolina Supreme Court have made it abundantly clear that rights, even Constitutional rights, may be waived by a defendant by failing to properly object. See State v. Byram, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997); State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996) (a constitutional argument is not preserved for appeal where appellant failed to argue the constitutional basis for his request at trial); State v. Gault, 375 S.C. 570, 574, 654 S.E.2d 98, 100 (Ct. App. 2007) (explaining that constitutional issues, like most others, must be raised to and ruled upon by the trial court to be preserved for appeal).

III. The trial court properly denied Appellant's motions for a judgment notwithstanding the verdict and a new trial. (Appellant's Issues III and IV).

Appellant contends, based on the same argument raised in Issues I and II, the trial court erred in denying his motions for judgment notwithstanding the verdict and a new trial. As discussed above, the evidence was properly admitted and there is more than sufficient evidence supporting the trial court's decision to submit the case to the jury. Further, the issues are argued in a conclusory manner with no supporting authority and are, therefore, abandoned. See State v. Howard, Op. No. 4579 (S.C.Ct.App. filed July 1, 2009) (Shearouse Adv.Sh. No. 30 at 132, 134-135) (finding "[a]n issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority"); State v. Tumbleston, 376 S.C. 90, 102, 654 S.E.2d 849, 855 (Ct. App. 2007) (finding issue abandoned when Appellant failed to argue or identify supporting authority on an issue in his brief on appeal).

Also, a motion for JNOV is a civil trial motion, and thus it is improper for a party to move for JNOV in a criminal trial. State v. Miller, 287 S.C. 280, 337 S.E.2d 883 (1985); State v. Dasher, 278 S.C. 395, 297 S.E.2d 414 (1982) (it was error of law for judge to direct verdict of not guilty in criminal case after jury had returned guilty verdict); State v. Taylor, 348 S.C. 152, 158, 558 S.E.2d 917, 919 (Ct. App. 2001)(ruling "a motion for a JNOV in a criminal case is not recognized in this state.").

Finally, the trial court properly denied the motion for a new trial. A trial judge has the discretion to grant or deny a motion for a new trial, and his decision will not be reversed

absent a clear abuse of discretion. See State v. Simmons, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983). In this case, ample evidence exists supporting the jury's verdict finding Appellant guilty of trafficking in illegal drugs—heroin—in excess of four grams but less than fourteen grams. The trial court properly denied Appellant's motion for a new trial based on the insufficiency of the evidence.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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January 25, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Horry County
Hon. Benjamin H. Culbertson, Circuit Court Judge

The State,

Respondent,

v.

Ervin Gamble,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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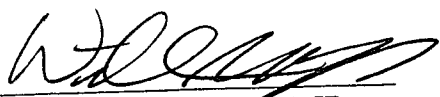
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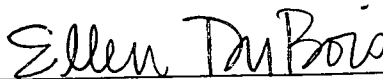
Appellant.

PROOF OF SERVICE

I, ELLEN DuBOIS, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Benjamin H. Culbertson, Circuit Court Judge

The State of South Carolina, ... Respondent,

v.

Ervin Gamble, ... Appellant.

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STATEMENT OF ISSUES ON APPEAL

- I. **DID THE TRIAL JUDGE ERR IN ADMITTING THE STATE'S NARCOTICS EVIDENCE INTO EVIDENCE OVER THE APPELLANT'S OBJECTION THAT NO FOUNDATION HAD BEEN LAID FOR THAT EVIDENCE IN THAT THE BASIS FOR THE SEARCH DURING WHICH THE EVIDENCE WAS COLLECTED WAS NOT ESTABLISHED?**
- II. **DID THE TRIAL JUDGE ERRED IN DENYING THE APPELLANT'S MOTION FOR A DIRECTED VERDICT WHEN THE STATE FAILED TO ESTABLISH BASIS FOR THE SEARCH UNDERLYING THE COLLECTION OF THE ONLY PHYSICAL EVIDENCE PRESENTED AT THE TRIAL IN VIOLATION OF THE APPELLANT'S CONSTITUTIONAL RIGHTS?**

FACTS

On July 16, 2008, the Appellant was arrested "on a separate charge" by Agent Chad Mullinax of the Myrtle Beach Police Department and searched incident to that arrest. Agent Mullinax indicated that, on July 16, 2008, the Appellant's **only** action with regard to the Appellant's "arrest" was that the Appellant "arrived at the location of 72 Offshore Drive." (Transcript p. 89 lns 22-23)(R. p. 90, lines 22-23). Agent Mullinax went on to state that "[a]t that time, he was arrested on a separate charge... Upon...being placed under arrest, he was searched." (Transcript p. 89-90 lns 24-25, 1-2)(R. pp. 90-91, lines 24-25, 1-2). There was no search warrant obtained at any time, and the warrantless search of the Appellant conducted subsequent to his initial "arrest" on this "separate charge" led to the seizure of the only physical narcotics evidence presented during the trial of this matter.

ARGUMENTS

- I. THERE WAS ABSOLUTELY NO PROBABLE CAUSE WHATSOEVER PRESENTED ON THE RECORD SUFFICIENT TO JUSTIFY THE INITIAL ARREST OF THE APPELLANT "ON A SEPARATE CHARGE" AND IT WAS REVERSIBLE ERROR FOR THE TRIAL JUDGE TO ADMIT ANY AND ALL EVIDENCE SEIZED PURSUANT TO THIS ARREST OVER THE STATED OBJECTION OF THE APPELLANT.**

To allow the admission of the physical evidence that was seized from the Appellant as a result of a search conducted pursuant to the Appellant's initial arrest "on a separate charge" in this matter to withstand constitutional scrutiny would result in a substantial evisceration of the 4th Amendment in the State of South Carolina. As such, the trial court's admission of this evidence over the stated objection of the Appellant's trial counsel was reversible error.

It is axiomatic that "[e]vidence seized in violation of the Fourth Amendment must be excluded from trial." State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006); State v. Khingratsaiphon, 352 SC 62, 572 S.E.2d 456 (2002). It is also clear that "a warrantless search is per se unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures." State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995). However, it is well-known that one exception to the warrant requirement is the "search incident to a 'lawful' arrest exception." *See* State v. Moore, 377 S.C. 299, 659 S.E.2d 356 (2008). It is noteworthy that case law identifies this exception as the search incident to a "lawful" arrest exception, and that the very name of the exception provides a clear directive that the arrest in question must be a "lawful" arrest in order for the exception to apply.

Further, "[t]he burden of establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches is upon the prosecution." State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995) *and* State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct.App. 1995). As such, in the case at bar, the State of South Carolina bore the affirmative burden of establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches. *Id.* Therefore, prior to the proper admission of any evidence that was seized as a result of the warrantless search in this matter (i.e. the physical narcotics evidence) the trial judge was constitutionally mandated to require the State of South Carolina to meet its burden of proof of establishing facts and circumstances constituting an exception to the warrant requirement. In failing to require the prosecution to meet its burden of proof in this matter, the trial judge committed reversible error.

Further, in overruling the Appellant's trial counsel's objection to the attempted admission of the evidence in question, the trial court failed to articulate any reasoning or basis for the decision whatsoever. The trial court simply indicated, "I'm going to go ahead and admit State's Exhibit Number 10 [the physical narcotics evidence] into evidence over Defendant's objection." (Transcript p. 94 lns. 2-4)(R. p. 95, lines 2-4). The record is silent as to any further explanation or reasoning from the trial judge. As such, it is clear from the record that the trial judge in this matter misapplied the law in that the trial judge clearly failed to acknowledge that the prosecution bore a burden of proof with regard to establishing an exception to the warrant requirement.

The trial court's misapplication of law is also evident from the trial court's question to the Appellant's trial counsel, "[s]o, it's your position that: All evidence obtained pursuant to a lawful arrest, the State has the burden of proving that evidence is admissible; rather than the Defendant challenging its admissibility?" (Transcript p. 124 lns. 2-6)(R. p. 125, lines 2-6). Clearly, this question suggests the idea of a predetermination of the lawfulness of an arrest rather than focusing on the actual issue raised by the Appellant's trial counsel, which was whether or not the State has met its burden of proof with regard to establishing an exception to the general prohibition against warrantless searches in this state (i.e. whether or not a proper foundation had been laid for the evidence).

The Respondent erroneously argues that the Appellant seeks a requirement that the State seek a determination on the admissibility of its evidence prior to its submission to the jury. (Respondent's Initial Brief p. 12)(Respondent's Final Brief p. 12). This is a mischaracterization of the Appellant's argument. In contrast, the Appellant's argument in this matter is simply that trial court did not impose, or even recognize the existence of, the burden of proof that lay clearly on the State of South Carolina to establish probable cause sufficient to legitimize the initial arrest of the Appellant prior to the trial court's decision to admit the evidence that had been seized incident to that arrest. *See State v. Freiburger*, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006); *State v. Dupree*, 319 S.C. 454, 462 S.E.2d 279 (1995); *State v. Bultron*, 318 S.C. 323, 457 S.E.2d 616 (Ct.App. 1995). In failing to require the prosecution to meet its burden of establishing probable cause sufficient to justify a warrantless search in this matter, the trial court committed

reversible error. Similarly, the trial court's failure to even acknowledge the existence of a burden on the prosecution also constitutes reversible error.

"Probable cause for a warrantless arrest generally exists 'where the facts and circumstances within the arresting officer's knowledge are sufficient for a reasonable person to believe that a crime has been or is being committed by the person to be arrested.'" State v. Moultrie, 316 S.C. 547, 552, 451 S.E.2d 34, 37 (Ct. App. 1994) *quoting* United States v. Miller, 925 F.2d 695, 698 (4th Cir.) *cert. denied*, 502 U.S. 833, 112 S.Ct. 111, 116 L.Ed.2d 80 (1991). As such, it was incumbent upon the trial court to compel the prosecution to establish probable cause sufficient to legitimize the initial arrest prior to the trial court's admission of any evidence seized pursuant to this arrest. The failure of the trial court to do so constitutes reversible error. In practical effect, the trial court removed the prosecution's burden of establishing probable cause, which is an erroneous removal of a right afforded to the Appellant by the 4th Amendment of the United States Constitution.

Accordingly, regardless of whether or not the trial court knew that the "separate charge" that the Appellant was arrested on was an attempted distribution charge, it was incumbent upon the trial judge in this matter to require the prosecution to have presented enough facts and circumstances on the record to lead a reasonable person to believe that this alleged crime, or any crime for that matter, had been or was in the process of being committed by the Appellant at the time of his initial arrest before the trial judge could properly admit any evidence seized incident to that arrest. *See* State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006); State v. Dupree, 319 S.C. 454, 462 S.E.2d

279 (1995); State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995). The trial court's failure to do so constitutes reversible error.

In actuality, the evidentiary record in this matter is devoid of any facts and circumstances that would be sufficient for **any** person, much less a **reasonable** person, to believe that any crime was in progress or that any crime had been committed at the time the Appellant was initially arrested and searched in this matter. Based upon the evidentiary record presented, it was reversible error for the trial judge to admit the physical narcotics evidence.

In response to the Appellant's argument that the record does not contain the requisite facts and circumstances supporting probable cause, the Respondent impermissibly relies upon facts and circumstances that are not a part of the evidentiary record to support the trial court's decision. In fact, the facts and circumstances relied upon by the Respondent come solely from articulations made by the prosecutor during the trial of this matter. The Respondent goes so far as to assert that the "fact that some of the information was not presented to the jury is irrelevant." (Respondent's Initial Brief p. 8)(Respondent's Final Brief p. 8). This is flatly wrong. All of the actual sworn witness testimony in the case at bar was presented before the jury. The only information not presented to the jury came in the form of legal arguments by the prosecution attorneys in this matter. However, it is axiomatic that arguments articulated by attorneys during a trial are not evidence and absolutely cannot for the basis for probable cause sufficient to legitimize an arrest. See McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."); Beaufort Realty Co., Inc. v. Beaufort

County, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001). In fact, as the trial judge correctly instructed the jury at the outset of this matter,

[w]hat the attorneys tell you during the opening statements is not evidence in this case. It is only their contention as to what the issues or they perceive the issues to be. The evidence in this case will be presented to you by the testimony of sworn witnesses from the witness stand and/or any other exhibits that I deem to be admissible during the trial of this case.

(Transcript pp. 69 lns. 24-5, 70 lns. 1-6)(R. pp. 70-71, lines 24-25, 1-6). This holds true for arguments made by attorneys during motions made during the case as well. *See*

McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933); Beaufort Realty Co., Inc. v. Beaufort County, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001).

Therefore, the Respondent's assertion that the "fact that some of the information was not presented to the jury is irrelevant" is woefully inaccurate given that all of the facts and information provided by the sworn witnesses was presented to the jury in this matter.

(Respondent's Initial Brief p. 8)(Respondent's Final Brief p. 8). As even the trial judge noted, probable cause sufficient to legitimize an arrest must come from sworn testimony on the record. For the trial court, or any court, to allow a prosecutor's articulation of the facts and circumstances to serve as the legal basis for probable cause sufficient to legitimize an arrest, absent a witness testifying to those facts and circumstances, would result in a catastrophic erosion of the 4th Amendment in this state. This simply cannot stand.

When reviewing the trivial nature of the actual "evidence" that was presented by the sworn prosecution witnesses in this matter, no reasonable person could possibly conclude that probable cause of any crime whatsoever was being committed or had been committed at the time that the Appellant was arrested in this matter. As such, it is clear

that the trial court erroneously failed to impose the constitutional burden of proof on the prosecution prior to the trial court's admission of the State's physical evidence. The only testimony presented on the record in this matter was that the police had the moniker "Fats", had developed some "tactical" plan, planned on speaking to "a" person, and were present at a location when the Appellant "arrived" at that location. Any connection of these separate pieces of the evidentiary puzzle requires significant conjecture and speculation, which is not permissible.

It is not clear from the record that the moniker "Fats" that the police were in possession of was even the name of a person. "Fats" could be the name of a person, a nickname, a place, a code, or anything in the realm of speculation. There is certainly no connection of this moniker whatsoever to the Appellant. As such, any connection of this moniker to anything in this matter could only come from complete conjecture.

In addition, there was nothing presented on the record as to what, if anything, the "tactical plan" that Officer Mullinax referred to entailed. There is no mention of what the specifics of the plan were, what the plan was designed to do, or anything else about the plan for that matter. To glean any probable cause from a police officer's indication that a "tactical plan" was in place with regard to the Appellant, or any particular person for that matter, requires complete guesswork. This is impermissible and results in an affront to the Appellant's constitutional rights. If a law enforcement officer were allowed to testify as to nothing more than that law enforcement had a "tactical plan" with regard to a particular individual such that the mere arrival of this particular individual at a location justified his arrest, the 4th Amendment would be substantially desecrated.

Furthermore, the record indicates that law enforcement "planned" on speaking with a person about a drug delivery. The record is silent as to whether or not law enforcement actually spoke with any persons or not. The record certainly does not contain any specific information regarding any alleged plans or details regarding any drug deliveries. In fact, the record is silent as to any information that may or may not have been received by law enforcement, detailed, first-hand, or otherwise. In order to assert that Officer Mullinax's statement that law enforcement "planned on speaking to a person" justifies the arrest of the Appellant requires assumptions that are impermissible under the laws of this state.

As to the location of the arrest, the Respondent argues this location was a "predetermined location for the drug delivery," such that the Appellant's mere arrival at this location, absent any other action, constitutes evidence of the crime of attempting to distribute heroin. (Respondent's Initial Brief p. 8)(Respondent's Final Brief p. 8). However, the record does not bear out this assertion as this argument is based upon total speculation. This argument requires the contemplation of facts and evidence that absolutely do not exist on the record. There was no information provided as to why the agents went to this particular location; where the address for this location came from; or what, if anything, was supposed to happen at this location.¹

While the Respondent has attempted to argue that information supposedly provided to law enforcement by another witnesses legitimizes this information, the record absolutely does not bear this argument out. The officer failed to articulate any specific information received from anyone, confidential informant or otherwise, and there is

¹ As noted above, the record indicates only that law enforcement "planned" on speaking to a person about drugs, not that law enforcement actually did speak with anyone about anything. (Transcript p. 88 ln 5)

certainly no evidence or testimony on the record to indicate that the location of the arrest was the “predetermined location for a drug delivery,” or the predetermined location for any illegal activity whatsoever. It bears reiterating that arguments made by attorneys cannot be considered evidence and cannot be considered when determining whether the state has met its burden of establishing probable cause. See McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933); Beaufort Realty Co., Inc. v. Beaufort County, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001). Accordingly, the Respondent’s reliance on arguments proffered by the prosecution attorney in this matter is misplaced. Furthermore, any reliance on such information by the trial court would also constitute reversible error.

The cases of *State v. Reid* and *State v. Moultrie* are illustrative cases wherein the facts and circumstances presented on the record in each of those cases supported the probable cause required to legitimize the arrests and searches conducted in each of those cases. When read against the complete lack of facts and circumstances supporting probable cause in the case at bar, the glaring factual distinction is apparent. In *Reid*, a case that was cited by the Respondent, a cybermolester, acting under the assumption that he was talking on the internet with a 14-year-old girl set up an illegal sexual rendezvous at a particular location. State v. Reid, 383 S.C. 285, 679 S.E.2d 194 (Ct. App. 2009). During these internet conversations, the cybermolester selected the location and even detailed the illicit actions that were to occur at this location. *Id.* Fortunately, in *Reid*, a law enforcement officer was posing as the 14-year-old girl in question and this officer testified to the exact nature of the conversation and as to the exact predetermination of the location of the arrest. *Id.* As such, the facts and circumstances regarding the

predetermination of the location as being the place selected for the elicited meeting was born out on the record and law enforcement testified as to the exact content of the explicit electronic communications of the cybermolester.² This is a completely different factual scenario from the situation presented in this matter in which there was absolutely no evidence presented on the record that Mr. Gamble's arrival at "72 Offshore Drive" when viewed in light of all of the other facts and circumstances articulated on the record in this matter could constitute conclusive evidence that a crime was being committed. Put simply, the facts and circumstances presented with regard to the probable cause to arrest Mr. Reid in *State v. Reid* are clearly not present in the case at bar.

Similarly, in *State v. Moultrie*, the officers testified as to the "detailed first hand information [the officers had received] about Moultrie's mode of operation during his drug transactions." 316 S.C. 547, 552, 451 S.E.2d 34, 37 (Ct. App. 1994).³ In addition, the officers testified as to their corroboration of this first-hand information by observing the scene upon arriving at this location and determining that the scene matched identically with the information that had been received. *Id.* Furthermore, the officers in *Moultrie* also testified as to personally viewing packages of marijuana at the feet of Mr. Moultrie at the time of the officers' arrival at the scene. *Id.* Contrast that factual scenario with the facts and circumstances present in the case at bar and it is apparent that the record in this matter simply does not bear out probable cause to justify the arrest of the Appellant. Having the moniker of "Fats," a tactical plan, a plan to speak with a person, and witnessing the Appellant arriving at 72 Offshore Drive is a far cry from receiving

² This argument is naturally predicated on the assumption that the facts and circumstances presented in *Reid* came from sworn witness testimony as opposed to being arguments made by the attorneys in the case.

³ This argument is also predicated on the assumption the information provided came from sworn witness testimony as opposed to arguments made by the prosecutors in the *Moultrie* case.

detailed first-hand information with regard to the mode of operation of an individuals suspected drug trafficking, corroborating this first-hand information at the scene, and personally witnessing drugs at the location in question. In the case at bar, the officer articulated no such detailed information, nor was there any mention of any corroboration.

Accordingly, in order for any court to determine that such exists in this case requires complete and total speculation, if not outright manufacturing of facts and circumstances to constitute probable cause. It is apparent that the record in this matter does not contain facts and circumstances from which a reasonable person could determine that a crime was being committed, or that a crime had been committed. Accordingly, the trial judge's admission of the physical evidence over the stated objection of defense counsel was reversible error.

Furthermore, there can be no dispute that the Appellant's trial counsel timely objected to the State's attempt to admit the physical narcotics evidence in this matter. Immediately upon the State's attempt to offer this evidence into the record, defense counsel stated, "Your Honor, I would object to that." (Transcript p. 93 lns. 6-7)(R. p. 94, lines 6-7). In response the trial judge requested that defense counsel state the nature of his objection on the record, which defense counsel did. (Transcript p. 93 lns. 9-25)(R. p. 94, lines 9-25). As such, it is clear that the Appellant's trial counsel timely objected to the admission of the evidence in question. Furthermore, the trial court clearly articulated, "I'm going to go ahead and admit State's Exhibit Number 10 [the physical narcotics evidence] into evidence over Defendant's objection." (Transcript p. 94 lns. 2-4)(R. p. 95, lines 2-4). As such, upon defense counsel raising an objection as to the proffered evidence, it was incumbent on the trial court to determine whether the record supported

the admission of this evidence. Failing to do so constitutes reversible error by the trial court in this matter.

If the trial court's admission of the evidence seized as a result of the search in this case is upheld, the 4th Amendment will be dealt a significant blow in this State.

Upholding the admission of evidence based upon the trifling facts and circumstances provided in this matter will completely dissolve the prosecution's burden of presenting sufficient probable cause that an exception to the warrant requirement exists as espoused in *State v. Freiburger*. 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006). Clearly this is not a desired result.

In the event that the trial court's decision is upheld on appeal, it is imminently foreseeable that law enforcement officers will completely change their tactics altogether as a direct result of this case. Law enforcement officers would now be able to stop an individual without any reason or justification whatsoever; charge the individual with a "crime;" search the individual pursuant to the arrest for this "crime;" dismiss the charges on the crime; and come in to court later to say "we had information of a person," "we planned speaking to a person about drugs," "we had a tactical plan with regard to this individual," and based solely upon this individual arriving at a location where we were waiting, absent anything else, the individual was arrested "on a separate matter" and was searched yielding additional evidence for which this individual now stands trial. Based upon the evidence presented in the record in this matter, the above scenario is imminently possible if not outright foreseeable. This cannot stand as it would completely dissolve the protections that the 4th Amendment to the United States Constitution provides to individuals in the State of South Carolina. The 4th Amendment of the United States

Constitution unequivocally requires the prosecution to articulate facts and circumstances on which a reasonable person would believe that a crime was being committed, or had been committed, to legitimize a warrantless search conducted pursuant to that arrest. The trial court in the case at bar failed to require the prosecution to articulate such facts and circumstances on the record in this matter, and this failure constitutes reversible error.

II. THE TRIAL JUDGE ERRED IN DENYING THE APPELLANT'S MOTION FOR A DIRECTED VERDICT WHEN THE STATE FAILED TO ESTABLISH BASIS FOR THE SEARCH UNDERLYING THE COLLECTION OF THE ONLY PHYSICAL EVIDENCE PRESENTED AT THE TRIAL IN VIOLATION OF THE APPELLANT'S CONSTITUTIONAL RIGHTS.

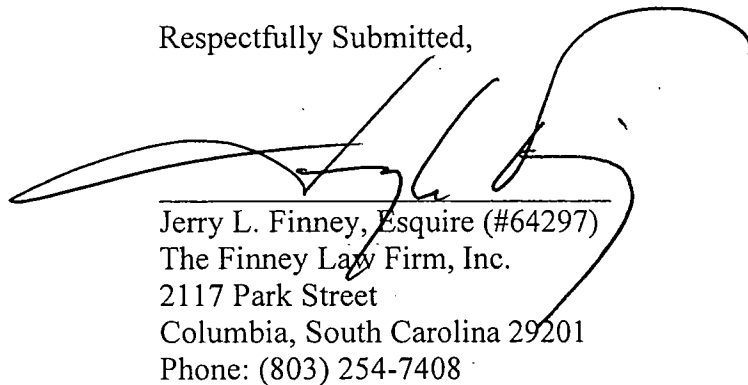
A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004), State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). In responding to the Appellant's arguments with regard to the Appellant's motion for a directed verdict, the Respondent completely mischaracterizes the facts that were presented on the record in this matter. The Respondent states "Agent Mullinax testified Appellant was searched when he arrived at the arranged location for the drug delivery" (Respondent's Initial Brief p. 11)(Respondent's Final Brief p. 11). This is factually inaccurate if not outright fabrication as even a casual reading of the record illustrates that the record is completely devoid of any mention of an pre-arrangement or predetermination of a location for anything, much less mention of pre-arrangement or pre-determination of the location for a drug delivery. Furthermore, all of the evidence presented in this matter came as fruits of a warrantless search and seizure for which the trial court erroneously failed to require the prosecution to articulate facts and circumstances comprising an exception to the

general prohibition against warrantless searches and seizures. As the trial court failed to require the State of South Carolina to establish its burden of proof, the search yielding all of the evidence in this matter was conducted in violation of the Appellant's 4th Amendment rights. See State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006); State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995); State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995). Therefore, the trial court's admission of this evidence constitutes reversible error.

CONCLUSION

For the foregoing reasons, the trial court's erroneous admission of evidence should be reversed and the Appellant's conviction in this matter should be stuck down and overturned.

Respectfully Submitted,



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February 5, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Benjamin H. Culbertson, Circuit Court Judge

~~Case No. 2009-12-7416~~

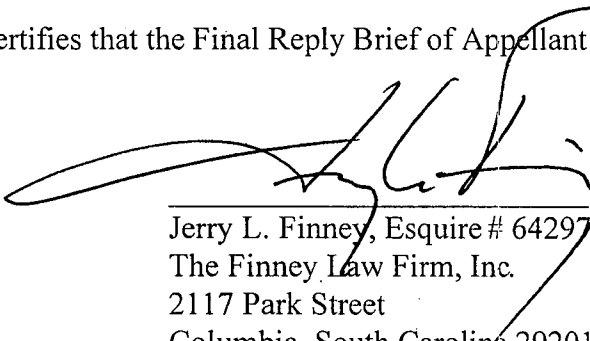
The State of South Carolina, ... Respondent,

v.

Ervin Gamble, ... Appellant.

CERTIFICATE OF COUNSEL

Counsel for Appellant hereby certifies that the Final Reply Brief of Appellant complies with Rule 211(b), SCACR.



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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Ervin Gamble, Appellant.

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Unpublished Opinion No. 2011-UP-095
Submitted January 4, 2011 – Filed March 10, 2011

AFFIRMED

Jerry L. Finney and Adam L. Whitsett, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William M. Blich, Jr., all of Columbia; and Solicitor J. Gregory Hembree, of Conway, for Respondent.

PER CURIAM: Ervin Gamble appeals his conviction of trafficking in heroin. We affirm [1] pursuant to Rule 220(b), SCACR, and the following:

1. We find no reversible error in the trial court's admission of evidence: State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997) (stating a general objection is insufficient to preserve an issue for appellate review); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (stating an objection must be made at the earliest opportunity to preserve an issue for appellate review).

2. We likewise find no reversible error in the trial court's denial of Gamble's motion for a directed verdict: State v. Green, 350 S.C. 580, 585, 567 S.E.2d 505, 508 (Ct. App.

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2002) (concluding the appropriate "vehicle for challenging the admissibility of evidence based on an alleged search and seizure violation is a motion to suppress").

3. We affirm the trial court's denial of Gamble's motion for judgment notwithstanding the verdict: State v. Follin, 352 S.C. 235, 258, 573 S.E.2d 812, 824 (Ct. App. 2002) (stating a motion for judgment notwithstanding the verdict is a civil trial motion and is improper in a criminal trial).

4. We affirm the trial court's denial of Gamble's motion for a new trial: State v. Tumbleston, 376 S.C. 90, 102, 654 S.E.2d 849, 855-56 (Ct. App. 2007) (finding an issue is deemed abandoned if the argument is raised in a brief, but not supported by authority).

AFFIRMED.

FEW, C.J., SHORT and WILLIAMS, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

APPEAL FROM HORRY COUNTY
Court of General Sessions

RECEIVED

The Honorable Benjamin H. Culbertson, Circuit Court Judge
MAR 25 2011

SC Court of Appeals

The State of South Carolina, ... Respondent,

v.

Ervin Gamble, ... Appellant.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Ervin Gamble respectfully petitions this Court for a rehearing of this appeal.

ARGUMENT

I. THE PER CURIAM DECISION IN THIS MATTER MISAPPLIES EXISTING SOUTH CAROLINA LAW IN AFFIRMING THE TRIAL JUDGE'S ERRONEOUS ADMISSION OF EVIDENCE AT THE TRIAL OF THIS MATTER AND A REHEARING IS NECESSARY

The *per curiam* decision of this Court finding no reversible error in the trial court's admission of evidence is a misapplication of South Carolina law and a rehearing of Petitioner's case is warranted. In support of its finding of no reversible error in the trial court's admission of evidence, this Court cites only two cases, *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760 (1997) and *State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991). There is no narrative or explanation provided in support of the Court's decision and there is no analysis of the arguments set forth by the Petitioner in this appeal.

In citing *Patterson*, this Court notes that a general objection is insufficient to preserve an issue for appellate review. *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997). This point is undisputed; however, *Patterson* has no application to the present case. It is undisputed that Petitioner's trial counsel did not make a motion *in limine* to suppress the physical evidence that Petitioner believes was illegally obtained in violation of the Petitioner's constitutional rights. However, Petitioner's trial counsel clearly objected to the State of South Carolina's first attempt to offer the disputed physical evidence into the record articulating the following objection:

[t]he foundation [for the proffered physical evidence] has not been laid.... We don't know about - - He's [the arresting officer] going to testify that after an arrest on a separate charged, a search... I don't know if there is a basis for that arrest. I don't know what the charge was. I don't know if there was a consent to search. And I don't believe that under the Constitution as provided by the 4th Amendment...the law of search and seizure - - that they have a right to enter this evidence at this time.

(R. p. 93).¹ While admittedly choppy, this objection clearly articulates a specific objection to the sufficiency of the foundation of the proffered evidence at the time it was proffered. Furthermore, this foundation argument is clearly grounded in a challenge to the constitutionality of the arrest upon which the prosecution based its sole justification for the warrantless search of the Petitioner that yielded the disputed evidence. It is undisputed that "[t]he burden of establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches is upon the prosecution." State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) *citing* State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995) *and* State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995).

The Petitioner's trial counsel specifically articulated a challenge to the proffered evidence indicating that counsel had heard no testimony whatsoever with regard to the probable cause for, or justification for, the underlying "arrest." (R. p. 93). Clearly, this objection invokes the issue of the prosecution's burden in this instance and sufficiently focuses on the precise nature of the Petitioner's challenge to the disputed evidence. This Court has previously held that an "objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge." McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct.

¹ The trial court admitted the disputed evidence over trial counsel's objection with no analysis or explanation whatsoever indicating, "[o]ver objection, I'm going to go ahead and admit State's Exhibit Number 10 [the physical narcotics evidence] into evidence over Defendant's objection." (R. p. 95).

App. 1996) *citing* Broom v. Southeastern Highway Contracting Co., 291 S.C. 93, 352 S.E.2d 302 (Ct. App. 1986). While the specific phrases “motion to suppress” and “probable cause” are not expressly articulated in trial counsel’s objection, it is abundantly clear from the objection that the Petitioner’s trial counsel sought to challenge the constitutionality of the search and seizure and the lack of probable cause justifying the underlying “arrest” that purportedly formed the foundation for the proffered evidence. (R. p. 93). Accordingly, this Court’s invocation of *Patterson*’s specific objection requirement to hold that no reversible error occurred is erroneous in light of the specific objection made by the Petitioner’s trial counsel. State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997); McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). Upon the Petitioner’s trial counsel’s specific objection, it became incumbent on the trial court to make a determination of the sufficiency of the foundation of the proffered evidence. The trial court’s failure to require a proper foundation for the proffered evidence constitutes clear error and amounts to an abuse of discretion in this matter. Accordingly, a rehearing for a detailed analysis of this issue is warranted.

Furthermore, in citing to the *Williams* case, this Court notes that an objection must be made at the earliest opportunity to preserve an issue for appellate review. State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991). This point that is also undisputed. However, the clear implication with this citation, particularly in light of Petitioner’s timely objection during the trial of this case, is that the Petitioner failed to preserve his right to challenge the disputed evidence by failing to make a pretrial motion

to suppress the evidence.² This holding is clearly erroneous because there is absolutely no requirement for a pretrial motion to suppress in South Carolina law. Contrarily, the South Carolina Supreme Court has articulated unequivocally that, “[w]e have no rule in this State requiring that a pretrial motion be made to suppress allegedly illegally obtained evidence.” State v. Goodstein, 278 S.C. 125, 128, 292 S.E.2d 791, 793 (1982).

In *Goodstein*, the trial judge ruled “that only the evidence before the magistrate at the pretrial suppression could be considered in determining the legality of the arrest and that the issue could not be again considered at the subsequent trial....” *Id.* The Supreme Court dispelled this belief as incorrect indicating, “[w]e do not think that the pretrial suppression hearing precluded the trial judge from considering the admissibility of evidence in question at the trial of this case.” *Id.* If a ruling on a pretrial suppression hearing does not preclude a trial judge from considering the admissibility of the same evidence at trial, then surely the failure to make such a pretrial motion cannot be properly used as the basis to preclude a challenge at the appellate level because pretrial motions are not final determinations of admissibility issues. Further, as a pretrial motion to suppress is not a final determination, a pretrial motion cannot be the “earliest opportunity to preserve an issue for appellate review” as required by *Williams*. State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991). This Court’s determination that the Petitioner’s challenge is not preserved on appeal because no pretrial motion to suppress was made is clearly erroneous.

² This implication is even more apparent when the citation from *Williams* is read in connection with this Court’s quotation from *State v. Green* later in this decision. The quoted language from *Green* reads “the appropriate vehicle for challenging the admissibility of evidence based on an alleged search and seizure violation is a motion to suppress.” State v. Green, 350 S.C. 580, 585, 567 S.E.2d 505, 508 (2002).

The pretrial motion or “*in limine*” issue was addressed by the South Carolina Supreme Court in *State v. Floyd*, 295 S.C. 518, 369 S.E.2d 842 (1988). In *Floyd*, the Supreme Court reviewed the history of *in limine* motions indicating,

[t]he purpose of a motion *in limine* is to prevent disclosure of potentially prejudicial matter to the jury. *Lagenour v. State*, 268 Ind. 441, 376 N.E.2d 475 (1978); *State v. Johnson*, 183 N.W.2d 194 (Iowa 1971); *see also Annot.*, 63 A.L.R.3d 311 (1975). A ruling on the motion is not the ultimate disposition on the admissibility of evidence. It remains subject to change based upon developments during trial. *See, e.g., Wiley v. State*, 516 So.2d 812 (Ala. Crim. App.1986), *rev'd on other grounds*, 516 So.2d 816 (Ala.1987); *Blackburn v. State*, 314 So.2d 634 (Fla. Dist. Ct. App.1975); *State v. Riggs*, 586 S.W.2d 447 (Mo. App.1979); *State v. Spahr*, 47 Ohio App.2d 221, 353 N.E.2d 624 (1976).

Id. at 520-21.

In *Floyd*, the South Carolina Supreme Court ultimately held as follows: “[w]e agree with the foregoing authorities that rulings *in limine* do not constitute final determinations on admissibility of evidence.” *Id.* The South Carolina Supreme Court went further send an unequivocal message to practitioners and jurists through *Floyd* stating, “[w]e caution the Bench and Bar that these pretrial motions are granted to prevent prejudicial matters from being revealed to the jury, but do not constitute final rulings on the admissibility of evidence.” *Id.* This exact language is also directly quoted by this Court in *State v. King*, 349 S.C. 142, 148-50, 561 S.E.2d 640, 643 (Ct. App. 2002).

Further, in *State v. Forrester*, the South Carolina Supreme Court further clarified that “making a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.” 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). Clearly, this Court’s ruling that Petitioner’s trial counsel’s failure to make a pre-trial motion to suppress evidence

waived the Petitioner's right to challenge this ruling on appeal is an erroneous application of existing South Carolina law that precluded an in depth analysis on the Petitioner's remaining arguments on appeal. As such, a rehearing on this appeal is warranted.

This Court's decision in *State v. Brown*, is also illustrative in this matter. 389 S.C. 473, 698 S.E.2d 811 (Ct. App. 2010). In *Brown*, this Court noted that "[d]uring trial, Brown moved to suppress the drugs on a violation of his Fourth Amendment rights. The trial court denied the motion to suppress, finding there was probable cause to stop the car, and Brown's arrest was lawful. The trial court held the search was proper because it was a search incident to a lawful arrest." State v. Brown, 389 S.C. 473, 479, 698 S.E.2d 811, 814 (Ct. App. 2010)(emphasis added). Clearly, this Court acknowledged the sufficiency of the trial objection because this Court raised no issue preservation concerns and ultimately reversed the trial court's decision finding that "the trial court erred in denying... [Brown's] motion to suppress the drugs in violation of... [Brown's] Fourth Amendment Rights" during Brown's trial. *Id.* at 480, 815. Furthermore, this Court went through a detailed analysis of the search incident to arrest exception to the warrant requirement that the Petitioner in this matter believes is warranted and determinative in this matter. *Id.* In this present case, as in the *Brown* case, there was not sufficient probable cause to support the arrest leading to the warrantless search yielding the disputed evidence. This Petitioner believes that the evidence was erroneously admitted by the trial court in this matter, and that a detailed analysis of this issue would result in a favorable outcome for this Petitioner, as in *Brown*. As such, this Petitioner respectfully requests a rehearing of this matter.

This Court further cites to *State v. Green* to support its decision to affirm the trial court in this matter. 350 S.C. 580, 567 S.E.2d 505 (2002). Because the facts of *Green* are distinguishable from the case at bar, the South Carolina Supreme Court's ruling in *Green* actually serves to bolster the Petitioner's position in regard to whether the Petitioner preserved his right to challenge the admission of the disputed evidence.

In *Green*, the appellant made no attempt whatsoever "at trial to suppress any evidence on constitutional grounds. Instead, Green attempted to raise the propriety of the police actions [for the first time] in a motion for directed verdict..." which was held to be improper. *Id.* at 585. The Supreme Court noted specifically

[a]t trial, Green did not move, either in limine or during an evidentiary hearing pursuant to *Blassingame*,² to suppress evidence.... Moreover, he failed to object at any time to its admissibility... including the cocaine, which was introduced without objection.

FN 2. See *State v. Blassingame*, 271 S.C.44, 47-48, 244 S.E.2d 528, 530 (1978) ("Whenever evidence is introduced that was allegedly obtained by conduct violative of the defendant's constitutional rights, the defendant is entitled to have the trial judge conduct an evidentiary hearing out of the presence of the jury *at this threshold point* to establish the circumstances under which it was seized.") (emphasis in original), *modified by State v. Patton*, 322 S.C. 408, 472 S.E.2d 245 (1996).

Id. at 585 & 589 n.2. Clearly, if a defendant is entitled to an evidentiary hearing during the trial and no pretrial motion to suppress is required under South Carolina law, this Court's determination that the Petitioner failed to preserve his right to challenge the admissibility of evidence in failing to argue a pretrial motion to suppress is a misapplication of South Carolina law and rehearing is warranted.

In this case, the Petitioner's trial counsel articulated a specific objection to the attempted introduction of the disputed evidence raising foundation arguments clearly grounded in a constitutional challenge of the search and seizure yielding the disputed

evidence. This objection was made at the time that the disputed evidence was proffered into evidence by the prosecution. Not only did the trial judge fail to conduct an evidentiary hearing as required in *Blassingame*, but the trial court also failed to articulate any basis for overruling trial court's objection to the admission of the evidence. State v. Blassingame, 271 S.C. 44, 47-48, 244 S.E.2d 528, 530 (1978); (R. p. 95).³ Similarly, this Court failed to address or analyze the trial court's erroneous admission of evidence and the Petitioner's challenge to the lack foundation for said evidence presented at the trial at the time that the evidence was admitted into the record. As such, a rehearing of this matter is warranted.

Should a reanalysis be conducted as is warranted in this matter, the Petitioner would argue again that the record in this matter is completely devoid of any sufficient evidence that could form a proper foundation for the disputed evidence. Accordingly, the trial court's allowance of this disputed evidence into the record over Petitioner's objection without any justification or analysis whatsoever should be reversed. In addition, this matter should be remanded for a new trial wherein the Petitioner would be afforded an opportunity to attack the foundation of the evidence proffered against him in this matter and to challenge the constitutionality of the "arrest" yielding the disputed evidence. The failure to conduct a detailed analysis of the Petitioner's appeal constitutes substantial prejudice to the Petitioner and rehearing is warranted.

³ It is worth noting once again that the prosecution went so far as offering to supplement the record with an actual foundation for the disputed evidence after the directed verdict motion was argued. (R. pp. 120-121). This can only be viewed as an acknowledgment by the prosecution that there was in fact no sufficient foundation for the disputed evidence at the time the evidence was admitted at the trial.

II. THE PETITIONER DID NOT ABANDON HIS CHALLENGE OF THE TRIAL COURT'S DENIAL OF THE PETITIONER'S MOTION FOR A NEW TRIAL AND A REHEARING ON THIS ISSUE IS WARRANTED.

Rather than analyzing the Petitioner's motion for new trial arguments, this Court deemed the argument abandoned solely on the contention that an argument must be "supported by authority" citing to *State v. Tumbleston*. 376 S.C. 90, 102, 654 S.E.2d 849, 855-56 (Ct. App. 2007). This assertion is incorrect as it acknowledges only one of *Tumbleston's* "either or" analysis. *Tumbleston* actually states that an issue is abandoned where an appellant fails to either argue **or** identify supporting authority in his brief. *State v. Tumbleston*, 376 S.C. 90, 102, 654 S.E.2d 849, 855-56 (Ct. App. 2007). The *Tumbleston* Court cited directly to *First Sav. Bank v. McLean* on this specific issue and *First Sav. Bank v. McLean* holds that "an issue is abandoned where the appellant fails to provide argument **or** supporting authority." 314 S.C. 361, 363 444 S.E.2d 513, 515 (1994) (emphasis added); *see also Fassett v. Evans*, 364 S.C. 42, 45, 610 S.E.2d 841, 844 (Ct. App. 2005); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 77, 557 S.E.2d 689, 690 (Ct. App. 2001). Clearly, the Petitioner provided arguments in support of his challenge to the trial court's denial of Petitioner's motion for new trial and the issue was not abandoned on appeal. Moreover, even if supporting authority is the standard, the Petitioner clearly cited to all of the arguments and supporting authority that the Petitioner made in Arguments 1 and 2 of the Petitioner's final brief submitted in this appeal. (Final Brief of Appellant p. 15). The reference and incorporation of these arguments and authority negated the need to simply reproduce the identical arguments multiple times in the same brief and should not constitute an abandonment of this argument. As such, a rehearing on the trial court's denial of the Petitioner's motion for a new trial is warranted.

CONCLUSION

Because the *per curiam* decision of this Court finding no reversible error in the trial court's admission of evidence is based upon a misapplication of existing South Carolina law, a rehearing of Petitioner's case is warranted. This court has held the Petitioner to an unrecognized, more onerous and unconstitutional standard of issue preservation in determining that the Petitioner failed to preserve his constitutional challenge to the foundation of the evidence proffered by failing to make a pretrial motion to suppress the disputed evidence. As this erroneous standard precluded analysis of the Petitioner's issues, the Petitioner would respectfully request a rehearing in this matter.

Furthermore, when analyzing the trial court's erroneous admission of evidence over the Petitioner's objection in light the glaring lack of foundation for this evidence, the trial court's admission of evidence should be reversed and this matter should be remanded back to stated court for a new trial.

Respectfully Submitted,

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signed by
Adam L. White
with express
permission and
consent.

Adam L. Whitsett, Esquire # 74888
The Finney Law Firm, Inc.
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Columbia, South Carolina 29201
Phone: (803) 254-7408

Attorneys for Appellant

March 25, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Benjamin H. Culbertson, Circuit Court Judge

The State of South Carolina, ... Respondent,

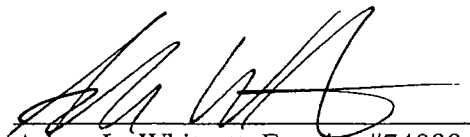
v.

Ervin Gamble, ... Appellant.

PROOF OF SERVICE

I, the undersigned, Adam L. Whitsett, Esquire of The Finney Law Firm, Inc, attorney for the Appellant, do hereby certify that I have served counsel of record with a copy of the **Petition for Rehearing** by causing a copy of the same to be placed in the United States Mail, first-class postage prepaid, addressed as follows, on March 25, 2011:

Assistant Attorney General William M. Blitch, Jr.
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549


Adam L. Whitsett, Esquire #74888
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March 25, 2011

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MAR 25 2011

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Benjamin H. Culbertson, Circuit Court Judge

The State of South Carolina, ... Respondent,

v.

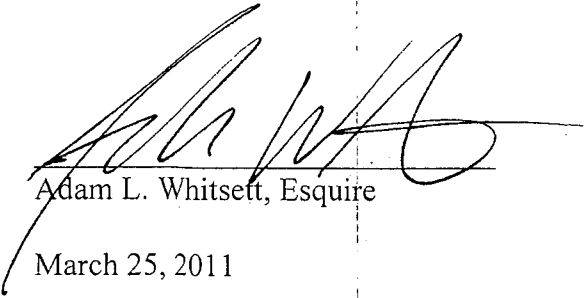
Ervin Gamble, ... Appellant.

PROOF OF SERVICE

I, the undersigned, Adam L. Whitsett, Esquire, of The Finney Law Firm, Inc, attorney for the Appellant, do hereby certify that I have mailed a copy of the Court of Appeals' decision along with the attached correspondence to the Appellant and the Appellant's mother by causing the same to be placed in the United States Mail, first-class postage prepaid, addressed as follows, on March 25, 2011:

MS. GAIL B. GAMBLE
1910 FRONT STREET
GEORGETOWN, SC 29440

MR. ERVIN C. GAMBLE, JR. - # 00336064
LEE CORRECTIONAL INSTITUTION
990 WISACKY HIGHWAY
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Adam L. Whitsett, Esquire

March 25, 2011

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The South Carolina Court of Appeals

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March 28, 2011

Assistant Attorney General William M. Blitch, Jr.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: The State v. Gamble, Ervin

Dear Counsel:

Appellant filed a Petition for Rehearing on March 25, 2011. The Court is requesting that opposing Counsel file a Return to this Petition for Rehearing.

The Return is due within ten (10) days from today. We will need an original and six (6) copies with proof of service on opposing counsel.

Sincerely,

A handwritten signature in black ink, appearing to read "Renee S. Johnson", is written over the typed name.

Renee S. Johnson
Administrative Specialist

VBA
TAG/rj

cc: Jerry L. Finney
Adam L. Whitsett

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Horry County
Hon. Benjamin H. Culbertson, Circuit Court Judge

The State,

Respondent,

v.

Ervin Gamble,

Appellant.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

By Opinion filed March 10, 2011, a panel of this Court affirmed Appellant's conviction and sentence. On March 25, 2011, Appellant filed a Petition for Rehearing, contending the Court erred in finding Appellant failed to properly preserve for review on appeal his issue related to the admission of narcotics and Appellant abandoned his argument the trial court erred in denying his motion for a new trial. By letter, this Court requested Respondent submit a response to Appellant's Petition for Rehearing.

Appellant fails to demonstrate anything this Court overlooked or misapprehended in reaching its decision in this case. The panel correctly affirmed the trial court's ruling.

I. Drug Evidence

This Court correctly determined Appellant failed to properly and timely preserve the issue related to the admission of drug evidence for review on appeal. Appellant is mistaken in his belief

this Court's ruling required him to make a motion in limine to suppress the evidence obtained as a result of Appellant's initial arrest and subsequent search. Instead, the Court's ruling correctly requires a contemporaneous objection at the first opportunity to contest the admission of the evidence, and this was not done by Appellant in this case.

First, Appellant's objection was clearly to the "foundation" of the admissibility of the evidence and not an argument to suppress based on the fruit of the poisonous tree as he maintained on appeal. See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (defendant may not argue one ground below and another on appeal); State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (party cannot argue one ground below and then argue different ground on appeal).

Next, this Court properly determined Appellant did not make a contemporaneous and timely objection. Agent Mullinix detailed the investigation, the stop of Appellant, the search of Appellant, and the finding of drugs that tested positive for heroin. Appellant never made a contemporaneous objection to any of this testimony nor moved to suppress any discussion of the stop, search, or finding of drugs. All of the evidence regarding the search and seizure of the drugs as well as the fact they tested positive for heroin was admitted without objection by Appellant. The only objection made was when the State subsequently sought to admit the physical drugs into evidence. As a result, Appellant did not contemporaneously object when the evidence was first before the jury. In order to preserve an evidentiary issue for review on appeal, a contemporaneous objection must be made when the testimony is offered. See State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court). If a party fails to properly object, the party is procedurally barred from raising the issue on appeal. Id. at 58-59, 609 S.E.2d at 523.

Nowhere in the Court's opinion is the requirement that Appellant move to suppress in a

motion in limine prior to being able to move to suppress at trial. The only requirement the Court imposes is the long standing requirement of a contemporaneous objection, which based on Appellant's arguments in this case, should have been made when Agent Mullinix first detailed the stop, search, and seizure before the jury.

To the extent the Court may consider the merits of the issue, the State submits the trial court properly admitted the evidence. The State relies on and incorporates by reference its arguments and citation set forth in its Final Brief of Respondent on Issue I.

II. New Trial

Appellant contends this Court erred in finding he abandoned his argument regarding a new trial. The issue was noted in the brief, but was argued solely in a conclusive manner and entirely without supporting authority. Accordingly, the Court properly deemed the issue abandoned, but not supported by authority. See State v. Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009) (finding "[a]n issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority"); State v. Tumbleston, 376 S.C. 90, 102, 654 S.E.2d 849, 855 (Ct. App. 2007) (finding issue abandoned when Appellant failed to argue or identify supporting authority on an issue in his brief on appeal); Glasscock, Inc. v. U.S. Fidelity & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (same).

If the Court determines it should consider the argument on the merits, the State relies on and incorporates by reference the entirety of its Final Brief of Respondent, especially as it relates to the admission of evidence and the evidence supporting the trial court's denial of a directed verdict and new trial.

Based on the foregoing, and the arguments more fully set forth in Respondent's Final Brief, Respondent submits Appellant's Petition for Rehearing should be denied.¹

Respectfully submitted,

ALAN WILSON
Attorney General

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Chief Deputy Attorney General

SALLEY W. ELLIOTT
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ATTORNEYS FOR RESPONDENT

April 7, 2011

¹ The State notes Appellant has not raised in his Petition for Rehearing any challenge to the Court's finding the trial court properly denied Appellant's motion for a directed verdict. This issue is abandoned by Appellant. The State craves reference to its brief for any discussion regarding the issue should it be necessary.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Horry County
Hon. Benjamin H. Culbertson, Circuit Court Judge

The State,

Respondent,

v.

Ervin Gamble,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I served the within Respondent's Return to Petition for Rehearing on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

Jerry L. Finney, Esquire
The Finney Law Firm, Inc.
2117 Park Street
Columbia, South Carolina 29201

I further certify that all parties required by Rule to be served have been served.

This 7th day of April, 2011.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Benjamin H. Culbertson, Circuit Court Judge

The State of South Carolina, ... Respondent,

v.

Ervin Gamble, ... Appellant.

REPLY TO RESPONDENT'S
RETURN TO PETITION FOR REHEARING

RECEIVED
APR 13 2011
SC Court of Appeals

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April 13, 2011

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Pursuant to Rule 221 and Rule 240 of the South Carolina Appellate Court Rules, Ervin Gamble hereby replies to Respondent's Return to Petition for Rehearing.

ARGUMENT

I. THE PER CURIAM DECISION IN THIS MATTER MISAPPLIES EXISTING SOUTH CAROLINA LAW IN AFFIRMING THE TRIAL JUDGE'S ERRONEOUS ADMISSION OF EVIDENCE AT THE TRIAL OF THIS MATTER AND A REHEARING IS NECESSARY

The *per curiam* decision of this Court finding no reversible error in the trial court's admission of evidence is a misapplication of existing South Carolina law in that this Court fails to address the core issue on appeal or to apply existing South Carolina law to that issue. This Court's decision appears to misapprehend the Petitioner's arguments in that the decision is completely devoid of any analysis whatsoever regarding the "foundation" argument that was properly set forth by Petitioner's trial counsel at the trial of this matter and argued on appeal in this matter. Accordingly, a rehearing of Petitioner's case is warranted. Furthermore, it is clear from the record that the trial court abused his discretion in allowing the disputed drug evidence into the evidentiary record without a proper or legally sufficient foundation. In addition, this abuse of discretion caused significant prejudice to the Petitioner, and, as such, the trial court's decision should properly be reversed.

Contrary to this Court's assertion that no specific objection was made at the trial of this matter, it is clear from the record that Petitioner's trial counsel did in fact articulate a specific objection to the glaring lack of foundation in support of the drug evidence that the State of South Carolina offered into evidence at the trial of this matter. (R. p. 93). "Foundation" is defined as "[t]he basis on which something is supported; esp.

evidence or testimony that establishes the admissibility of other evidence.” Black’s Law Dictionary 666 (7th ed. 1999). Prior to the admission of drug evidence, or any evidence, seized during a warrantless search of an individual, South Carolina law imposes the burden “of establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches...” on the prosecution. State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2006) citing State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995) and State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995). At the time that the State of South Carolina offered the disputed drug evidence into the evidentiary record, South Carolina law mandates that a proper foundation, evidence and testimony sufficient to satisfy the State’s burden of establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches, be established. *Id.*

In the case at bar, the sparse evidence and testimony that had actually been presented by the State at the time of the trial court’s admission of the disputed drug evidence could not possibly establish legally sufficient probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches. Recall that the evidence and testimony on the record at the time that the trial court admitted the disputed drug evidence into the evidentiary record indicated only that the Petitioner had “arrived” at 72 Offshore Drive in Murrell’s Inlet, South Carolina, was “arrested on a separate charge,” and searched incident to this “arrest.” (R. pp. 89-90). There was no evidence or testimony of any kind indicating the lawfulness of this “arrest” or the righteousness of the search for the disputed evidence. As such, the record was completely devoid of any evidence or testimony that could possibly form a legally

sufficient foundation for the disputed evidence at the time that the trial court erroneously admitted this evidence into the evidentiary record. Consequently, Petitioner's trial counsel raised a specific objection challenging the foundation, the sufficiency of the evidence and testimony purportedly establishing the admissibility, of the disputed drug evidence. (R. p. 93).

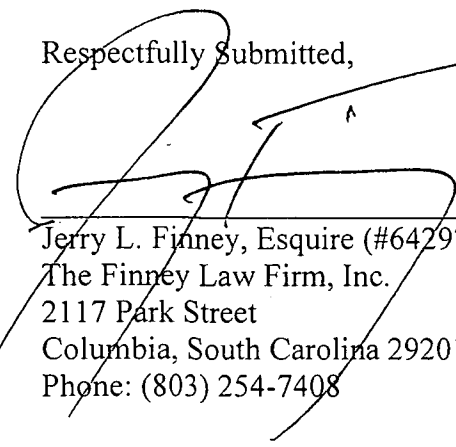
It is undisputed that this "foundation" argument was in fact made at the trial of this matter. *See* Respondent's Return to Petition for Rehearing. This specific objection was proffered at the earliest possible time, which was contemporaneous to the State's first attempt to submit the disputed evidence into the record without having previously established legally sufficient foundation. (R. p. 93). However, without analyzing or discussing any foundation evidence or testimony of any kind, the trial court denied Petitioner's trial counsel's objection without providing any justification or reasoning whatsoever. (R. p. 95). The trial court's failure to require sufficient foundational evidence and testimony as required by clearly established South Carolina law constitutes an abuse of discretion that substantially prejudiced the Petitioner in the trial of this matter necessitating reversal. In addition, this Court's failure to analyze or discuss this properly submitted foundational objection issue warrants rehearing of this issue.

The Petitioner further incorporates all arguments previous articulated by the Petitioner in the Final Brief of the Appellant, the Final Reply Brief of the Appellant and the Petition for Rehearing filed in this matter.

CONCLUSION

Because the *per curiam* decision of this Court finding no reversible error in the trial court's admission of evidence misapprehends the Petitioner's arguments on appeal, fails to address the core issue on appeal and fails to apply existing South Carolina law, a rehearing of Petitioner's appeal is warranted. When fully analyzing the trial court's erroneous admission of the disputed evidence over the Petitioner's trial counsel's specific objection to the glaring lack of foundation for this evidence, the trial court's admission of the disputed evidence is a clear abuse of discretion that is supremely prejudicial to the Petitioner. Accordingly, the trial court's decision should be reversed.

Respectfully Submitted,


Jerry L. Finney, Esquire (#64297)
The Finney Law Firm, Inc.
2117 Park Street
Columbia, South Carolina 29201
Phone: (803) 254-7408

signed by
Adam L. Whitsett
with express
permission and
consent

Adam L. Whitsett, Esquire # 74888
The Finney Law Firm, Inc.
2117 Park Street
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Phone: (803) 254-7408

Attorneys for Appellant

April 13, 2011

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Benjamin H. Culbertson, Circuit Court Judge

The State of South Carolina, ... Respondent,

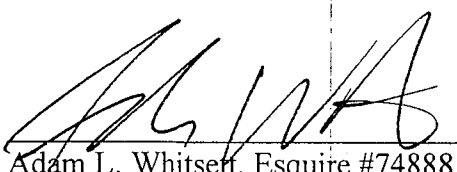
v.

Ervin Gamble, ... Appellant.

PROOF OF SERVICE

I, the undersigned, Adam L. Whitsett, Esquire of The Finney Law Firm, Inc, attorney for the Appellant, do hereby certify that I have served counsel of record with a copy of the **Reply to Respondent's Return to Petition for Rehearing** by causing a copy of the same to be placed in the United States Mail, first-class postage prepaid, addressed as follows, on April 13, 2011:

Assistant Attorney General William M. Blitch, Jr.
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549


Adam L. Whitsett, Esquire #74888
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APR 13 2011

SC Court of Appeals

April 13, 2011

324

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
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The Honorable Benjamin H. Culbertson, Circuit Court Judge

The State of South Carolina, ... Respondent,

v.

Ervin Gamble, ... Appellant.

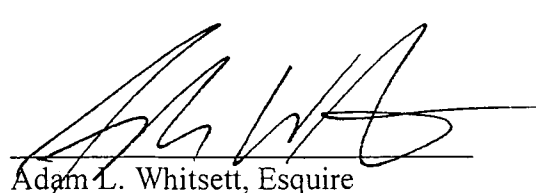
PROOF OF SERVICE

I, the undersigned, Jerry L. Finney, Esquire, of The Finney Law Firm, Inc, attorney for the Appellant, do hereby certify that I have mailed a copy of the Reply to Respondent's Return to Petition for Rehearing by causing the same to be placed in the United States Mail, first-class postage prepaid, addressed as follows, on April 13, 2011:

MS. GAIL B. GAMBLE
1910 FRONT STREET
GEORGETOWN, SC 29440

MR. ERVIN C. GAMBLE, JR. - # 00336064
LEE CORRECTIONAL INSTITUTION
990 WISACKY HIGHWAY
BISHOPVILLE, SC 29010

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APR 13 2011
SC Court of Appeals


Adam L. Whitsett, Esquire

April 13, 2011

325

The South Carolina Court of Appeals

The State,

Respondent,

v.

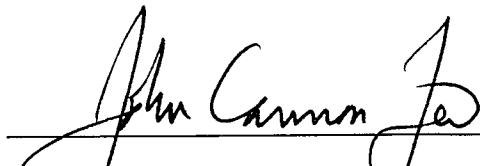
Ervin Gamble,

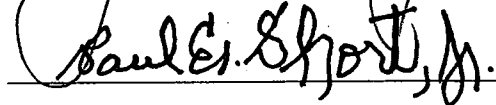
Appellant.

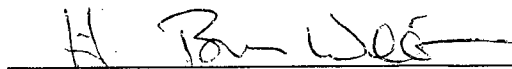
The Honorable Benjamin H. Culbertson
Horry County
Trial Court Case No.
2008-GS-26-4184; 2008-GS-26-4185

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.


C.J. Few


J. Short


J. Williams

Columbia, South Carolina

cc: Jerry L. Finney, Esquire
Adam L. Whitsett, Esquire
Attorney General Alan Wilson
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Salley W. Elliott
Assistant Deputy Attorney General William M. Blich, Jr.
J. Grégory Hembree, Esquire

FILED

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