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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. Supreme Court

Appeal from Greenville County

Letitia H. Verdin, Circuit Court Judge

KEVIN T. HARDY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000096

APPENDIX

WANDA H. CARTER
Deputy Chief Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

KAREN RATIGAN
Senior Assistant Deputy Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

COURT OF GENERAL SESSIONS

2005-GS-23-08183; 08184

ORIGINAL

STATE OF SOUTH CAROLINA)

PLAINTIFF)

vs.)

TRANSCRIPT OF RECORD

KEVIN TIJUAN HARDY)

DEFENDANT)

June 17, 2009

Greenville, South Carolina

B E F O R E:

THE HONORABLE EDWARD WELMAKER, Judge; and a jury.

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

JOYCE MONTS, ESQ.

Attorney for the State

SYMMES CULBERTSON, ESQ.

Attorney for the Defendant

APRIL HERRON

Official Court Reporter

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<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
1	Green Duffle Bag	84	85
2	Drugs	85	166
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1 THE COURT: All right, I understand the defense has a
2 motion to make. Is there more than one motion,
3 Mr. Culbertson?

4 MR. CULBERTSON: No, sir, not at this time. I
5 previously sent a copy of our motion to suppress to
6 Ms. Joyce Monts in the Solicitor's Office. I, then,
7 delivered a copy of that to your office, Your Honor, also.
8 So at this current time, that's the only motion we have
9 pending.

10 THE COURT: All right, be glad to hear from you,
11 Ms. Monts, in response.

12 MS. MONTS: Yes, Your Honor, may it please the Court.
13 I did read the motion and memorandum that Mr. Culbertson
14 did fax over to me and the State believes that the case
15 that the Defendant relies upon is the Pichardo case and
16 that that case states that without reasonable suspicion of
17 a serious crime, further detention goes beyond the scope
18 of the traffic stop. Well, our entire case is based upon
19 reasonable suspicion and the indicators that led up to
20 Trooper Owens obtaining reasonable suspicion. I don't
21 know if you want me to just argue it or I can put the
22 trooper up there to tell what he observed that led up to
23 his reasonable suspicion.

24 THE COURT: I think it would be beneficial to hear
25 the testimony, both for the Court and for Mr. Culbertson,

1 perhaps, to examine the witness. Do you have more than
2 one witness?

3 MS. MONTES: Not on this issue, Your Honor.

4 THE COURT: All right. I'll be glad for you to
5 present your evidence at this time.

6 MS. MONTES: Your Honor, may I -- we have one officer
7 as far as the reasonable suspicion, which led up to
8 allowing the drug dog to -- which ran around the car,
9 alerting on the car. Once the drug dog did that, we
10 believe it was probable cause, so we would have two to
11 show --

12 MR. CULBERTSON: And Your Honor, that's exactly what
13 my motion speaks about. When the drug dog got there, it
14 was beyond what the initial stop was for. The question of
15 my motion -- the question in Pichardo was not what the
16 drug dog may or may not have done, it goes to the legality
17 of that first stop. So that's what my motion is geared
18 towards.

19 THE COURT: All right. Let's hear that testimony and
20 we'll see what we've got then.

21 MS. MONTES: Your Honor, the State calls Dale Owens.

22 THE CLERK: Sir, if you'd, please, place your left
23 hand on the Bible.

24 DALE OWENS, after being duly sworn, testified as
25 follows:

1 THE CLERK: Please state your full name for the
2 record.

3 THE WITNESS: John Dale Owens.

4 DIRECT EXAMINATION

5 BY MS. MONTES:

6 Q Trooper, please tell the Court where you're employed.

7 A With the South Carolina Department of Public Safety
8 under the direction of the South Carolina Highway Patrol.

9 Q And how long have you worked there?

10 A For almost 16 -- or over 15 and a half years with
11 another two and a half years prior law enforcement prior
12 to that with another agency.

13 Q And describe your training, please, sir.

14 A Training, gone through the basic Criminal Justice
15 Academy back in 1991, '92, part of '91 and part of '92. I
16 then went through the basic Academy again with the highway
17 patrol with the Highway Patrol Academy, received probably
18 well over 1000 hours in advanced criminal patrol and
19 interdiction technique over the last 10 years. Instructor
20 with the National Highway Traffic Association in extending
21 traffic stops in criminal control. Also, an instructor
22 with the South Carolina Criminal Justice Academy in
23 specific skills with relations to advanced criminal
24 patrol. Also, an instructor nationally with NCEA,
25 National Criminal Enforcement Association, as well.

1 Q And --

2 A Well, over 1000 hours in advanced criminal control
3 and advanced interdiction skills.

4 Q And were you on duty on July 27th of 2005?

5 A Yes, ma'am, I was.

6 Q What were your duties on that night or that
7 afternoon, evening?

8 A I was a first line supervisor with the South Carolina
9 Highway Patrol under the ACE team. That evening, we were
10 on routine patrol, criminal patrol in Greenville County on
11 Interstate 85. Generally, our area of patrol on that day
12 or that week was between the 40-mile marker, which was
13 near the Greenville County line and the 48-mile marker,
14 which was Laurens Road. We saturated our efforts in the
15 area between the 40 and the 48 north and southbound. At
16 that time, we had myself and three other members of the
17 highway patrol working with the ACE team in this region.

18 Q And approximately, what time were you working and did
19 you observe the Defendant that evening?

20 A On the evening of July the 27th, 2005, we were
21 working a shift of 5:00 p.m. to 3:00 a.m. During that
22 evening, at approximately 8:12 in the afternoon or
23 evening, early evening, I observed the vehicle that the
24 Defendant was driving. The Defendant seated to my right
25 at the defense table in the greenish-brown suit or olive

1 suit, observed the vehicle that he was operating and
2 traveling below the posted speed limit in the center lane.

3 Q Why did that draw your attention?

4 A Because that's -- in Greenville County, the traffic
5 flow is generally above the posted speed limit, but this
6 was well below the posted speed limit and it was drawing
7 attention to him that he was impeding the traffic of other
8 cars and their flow of traffic.

9 Q What were the other cars having to do?

10 A Pass on the right and on the left. Also, during that
11 time, I observed a defective windshield, cracked
12 windshield that does go in the line sight of the Defendant
13 or the operator of the vehicle that he was operating,
14 which was him. He was the sole occupant in the vehicle.
15 While I was trying to catch up to this vehicle,
16 maneuvering through the traffic, I also observed him make
17 an improper lane change without giving proper signal. All
18 three of these are in violation of South Carolina Code of
19 Law.

20 Q And did you turn your blue lights on?

21 A Yes, ma'am, I did. I activated the blue light when I
22 positioned my patrol vehicle behind his vehicle and then
23 we pulled over to the right emergency shoulder just short
24 of Laurens Road, at that time.

25 Q Was this in Greenville County?

1 A Yes, ma'am.

2 Q What did you observe once you and the Defendant were
3 pulled over?

4 A Once we were pulled over, I exited my patrol car and
5 approached the subject vehicle on the passenger side.
6 When I walked up, I saw numerous things that I'm trained
7 to look for that are consistent with criminal activity.
8 And not just one thing, but it's the totality of the
9 circumstances. During that time of my initial approach,
10 things that I recall seeing were one bag on the rear seat,
11 one black male driver occupant, numerous air fresheners,
12 one cell phone, one map, one fast food bag. I also
13 noticed the driver's hand shaking and accelerated pulse or
14 heart rate. After reviewing the video tape, I also
15 noticed that the right turn signal was left on for the
16 remainder of the traffic stop.

17 Q Would you have noticed that at the time you pulled
18 him over?

19 A Potentially, I could have, but I really wasn't paying
20 attention to the turn signal. I was actually paying
21 attention to the driver and the other things inside the
22 car because of officer safety issues.

23 Q And describe where you learned what these indicators
24 mean.

25 MR. CULBERTSON: I object to that question, Your

1 Honor.

2 THE COURT: What's your objection?

3 MR. CULBERTSON: Unless she can give me some
4 understanding of what that question meant, I mean, what
5 these indicators mean -- I withdraw the objection.

6 THE COURT: All right.

7 BY MS. MONTS:

8 Q Describe your training and why you observed and
9 noticed those things.

10 A Through the numerous hours of advanced training in
11 criminal patrol and criminal interdiction, I've learned
12 these and many other indicators of criminal -- of
13 potential criminal activity. I also teach it as a part of
14 my education when I teach advanced criminal patrol as
15 well.

16 Q And what did you do once you -- did you approach the
17 car?

18 A Yes, ma'am, I did.

19 Q Where did you go and what did you observe?

20 A I approached on the passenger side and those are the
21 things I observed that I've just mentioned. It was the
22 one bag on the rear seat, one black male driver, numerous
23 air fresheners, a cell phone, a map, fast food bag, a
24 driver's hand shaking and accelerated pulse rate. And
25 also, like I stated as well, the right turn signal was

1 left on during the entire portion of the traffic stop
2 while the driver was in the car and as well as when the
3 driver was outside the vehicle.

4 Q And please continue, did you speak to the driver?

5 A Yes, I did. I went and identified myself to him,
6 stated that the reason for the traffic stop, stated what
7 my intentions were, which were to issue him a warning
8 citation for the moving infractions and the vehicle
9 equipment infractions. While I asked him for his driver's
10 license and registration, I then again noticed that his
11 hand was tremendously shaking even after I advised him
12 that I was writing him a warning for the citation. I
13 noticed that his heart was still accelerated and his
14 breathing was accelerated as well and deep breathing.

15 Q Did you ask the Defendant to exit the vehicle?

16 A Yes, ma'am, I did.

17 Q And what did you do at that point?

18 A I asked him to exit the vehicle. Me and him met at
19 the rear of his vehicle and at the front of my patrol
20 vehicle. Asked him to pat him down -- saw bulges in his
21 pants, I went ahead and patted him down. Felt a large
22 amount of money in his left front pocket, I believe it
23 was. It was in one of his front pockets. Didn't feel any
24 weapons or anything. Then we walked over to the passenger
25 side of my patrol vehicle, conducted -- then I began

1 writing a warning and talking briefly with the Defendant,
2 Mr. Hardy.

3 Q And what questions did you ask him and what were the
4 responses?

5 A I asked him -- well, just prior to that, he stated
6 that the car belonged to him, but that he hadn't
7 changed -- that he had just recently moved to Atlanta and
8 that he hadn't changed his address. And then when we were
9 at the back of the car, he stated that the car was in his
10 name. He had recently moved to Atlanta, Georgia, that he
11 had just gotten an apartment in Atlanta, Georgia, that he
12 did not have a job, but he was currently looking for one,
13 that he was presently going to Raleigh, North Carolina.
14 He stated his reason for going to Raleigh was to get a
15 criminal history so that he could get a job and then he
16 was going to return back to Georgia. You know, I
17 questioned several of these things.

18 Q And why is that?

19 A Well, I mean, criminal history, you can get a
20 criminal history in Georgia. I mean, you can get a
21 criminal history wherever you're at, really. It kind of
22 shocked me that you would drive over five hours just to
23 get a criminal history. Another thing that peaked my
24 interest that he had just moved to Atlanta and was paying
25 for an apartment, but didn't have a job. And also, he had

1 a large sum of money in his front pocket and still didn't
2 have a job. So those were things that were questions in
3 my mind. Could those truly have happened? Yes, those
4 could, but it's also stuff that's consistent with criminal
5 activity.

6 Q Did the location of the stop or the city the
7 Defendant was coming from alert you?

8 A Yes, ma'am, it did. Atlanta, Georgia is a source
9 city. It's the southeastern hub for narcotics in the
10 southeast.

11 Q What about I-85?

12 A I-85 is the major drug corridor from Atlanta to the
13 north, northeast.

14 Q Did you --

15 A And then he stated he was going for a couple of days
16 in Raleigh -- I'm sorry, stated several times during the
17 conversation that I could check his record. One thing
18 that, you know, we're trained in criminal patrol is the
19 overly cooperative, you know, extending their issues to
20 show or to prove that they're not guilty or that they're
21 cooperative. And it's through our training that an
22 innocent person has nothing to prove, it's the guilty
23 people that have something to prove.

24 Q Did you talk to the Defendant at all about anything
25 inside the vehicle?

1 A Yes, ma'am. I asked him if he had any luggage. When
2 I asked him if he had luggage in the car, there was a
3 hesitation and then he stated that he had luggage in the
4 car. The hesitation, which we're trained in deception,
5 the hesitation was showing some deception or concern with
6 the luggage that he was referring to.

7 Q Did the fact that the Defendant had moved, did that
8 prolong anything regarding checking the driver's license?

9 A Yeah, I mean, we always check -- when you have
10 information that's inconsistent with identification or
11 things provided from the Defendant or from the person on
12 the traffic stop, it's our general practice to check and
13 make sure that they are correct and that the statuses are
14 still clear.

15 Q And how did you have to do that with the change of
16 address?

17 A Well, we don't have computers in our car, so we have
18 to go through dispatch. We have to call it through
19 dispatch and then we have to wait for them to input it to
20 get the response and then call us back with that response.

21 Q And which address would you have given the dispatch?

22 A Well, I wouldn't have given the dispatch an address.
23 Actually, what I do is I give them the driver's license
24 number or identification number and then they come back
25 with an address. Or even, say, with the vehicle

1 registration, vehicle license number, you give them that
2 information and they come back with that information as
3 well. And they'll tell you the owner's name, their
4 address and whether the tag is still valid.

5 Q And what did you do at this point after you had
6 patted down the Defendant?

7 A After I patted down the Defendant, we had stepped
8 over to the passenger side of my patrol car, I began
9 writing a warning and talking with Mr. Hardy. During that
10 time that I was talking with Mr. Hardy, my suspicions
11 raised to a level enough that I knew I wanted to call for
12 an assistant with the traffic stop. When I called for
13 assistance, Trooper Gilbert answered up and advised that
14 he was in route. Like I said, he was within 10 miles of
15 my location. He proceeded in that direction. I went
16 ahead and continued with the traffic stop, asking
17 questions and finishing writing the warning, checking the
18 VIN number. Also, waiting on the reply from the
19 dispatcher from that information that I had given them to
20 confirm what I had or the information that I had or to
21 dispel the information that I had in regards to his
22 license status and vehicle registration status.

23 Q And where was the Defendant waiting during this time?

24 A He was standing with me on the passenger side.

25 Q And at what point did anybody arrive?

1 A It was shortly after that, I concluded with all my
2 background checks as far as the license vehicle
3 registration, concluded with the warning citation. I
4 explained those things to Mr. Hardy. After explaining
5 those things to Mr. Hardy, I immediately asked for consent
6 to search the vehicle and it was at that time or closely
7 after that time that Trooper Gilbert was on the scene.
8 When I asked for his consent, he began asking me questions
9 about the consent. I advised him that I was looking for a
10 yes or no answer, that he had the right to say yes, he had
11 the right to say no. He then replied no with his answer.

12 Q And where did -- did you leave him on the side of
13 the -- standing there or did you put him anywhere?

14 A No, I left him standing outside our patrol car.

15 Q And what happened when Trooper Gilbert arrived?

16 A I advised him that I needed him to run the drug
17 detection canine around the perimeter of the car.

18 Q And where was --

19 A For a drug sniff.

20 Q And where was the Defendant during this time?

21 A He was standing beside the patrol car with me.

22 Q Did any other troopers arrive?

23 A As to when they arrived, I'm not clear, but I know
24 Trooper Harrison came on the scene and I believe that was
25 it.

1 Q Do you recall how soon into the car stop you had
2 radioed for Trooper Gilbert to arrive?

3 A As to how to actually how much time, no, I do not.
4 It wasn't long into the stop. I mean, it was -- I don't
5 know exactly the amount of time.

6 Q Was it prior to you writing the ticket, if you
7 recall?

8 A I don't recall.

9 Q What did you observe -- what did you observe when --
10 after Trooper Gilbert got there, what did you observe him
11 do?

12 A He removed his canine partner from his patrol
13 vehicle. They then went and scanned the perimeter of Mr.
14 Hardy's vehicle. And during that time, he showed a
15 positive alert on the exterior of Mr. Hardy's vehicle and
16 then Trooper Gilbert allowed his canine partner inside the
17 vehicle. And then it was at that point when he let the
18 canine in the rear part of the vehicle that I observed his
19 canine partner aggressively scratching on a bag in the
20 trunk. Then Trooper Gilbert awarded his canine with a
21 tennis ball. And it's through my experiences with Trooper
22 Gilbert that when he awards the canine with his tennis
23 ball that he has given an alert and he has done his job.
24 Then you see, of course, Trooper Gilbert removes the
25 canine and then puts the canine back in his patrol

1 vehicle.

2 MS. MONTS: And, Your Honor, we do have the video
3 that shows how far into the stop that Trooper Owens calls
4 for Trooper Gilbert.

5 THE COURT: All right. I haven't heard anything
6 about the time frame of all this. What was the time frame
7 from the stop to Trooper Gilbert coming?

8 MS. MONTS: Your Honor, he was called approximately
9 three minutes into the stop and he --

10 MR. CULBERTSON: Your Honor, is she going to testify,
11 if she is, I want her on the witness stand.

12 THE COURT: Just ask the questions to the witness if
13 you would, Ms. Monts, as to when he arrived and when
14 Officer Gilbert arrived.

15 BY MS. MONTS:

16 Q Do you recall, if you do, approximately how long into
17 the stop that you called Trooper Gilbert and how long
18 until he arrived? If you don't, just --

19 A I don't know the actual time. If I was to guess, it
20 would have been less than ten minutes as far as when he
21 arrived. It would have been probably less than five into
22 the stop when I called him. But like I said, I don't know
23 the exact amount of time. If you're asking me to
24 estimate, I'm saying five and ten, five to call him, ten
25 for him to get there, if I'm estimating.

1 MS. MONTS: And, Your Honor, we can show you on the
2 video the exact times that those occurred.

3 THE COURT: All right. Any other questions of the
4 witness?

5 MS. MONTS: No, Your Honor.

6 THE COURT: You may cross-examine him.

7 MR. CULBERTSON: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MR. CULBERTSON:

10 Q Officer Owens, how are you doing today?

11 A Doing good, sir, how are you?

12 Q It's supposed to be your day off, isn't it?

13 A Well, we've changed it, today's my working day,
14 tomorrow's my day off.

15 Q Because of this?

16 A Yes, sir.

17 Q Congratulations. I want to be sure I understand a
18 couple of things from you.

19 A Okay.

20 Q You initially were working -- well, before I do that,
21 let me ask you this, I'm going to hand you -- I'm going to
22 ask you to give it back to me so I can refer to it, but
23 I'm going to ask you what's marked as South Carolina
24 Highway Patrol Aggressive Criminal Enforcement Team, the
25 ACE Team, is this your report that you filled out as a

1 result of this arrest?

2 A Yes, sir, it is.

3 Q Okay. That's what I've got and that's what I'm going
4 to be referring to.

5 MS. MONTS: Your Honor, can I see what he's referring
6 to?

7 MR. CULBERTSON: You sent it to me.

8 THE COURT: Let her see it again so that she'll know
9 what you're referring to.

10 MR. CULBERTSON: Yes, sir.

11 BY MR. CULBERTSON:

12 Q You've got a copy of all this, don't you, as far you
13 know? It's what you got sent to me?

14 A I say I've got a copy of it, but, like, lab results
15 and stuff, I don't have.

16 Q And that's not in what I've handed to you.

17 A Like I said, I didn't look at exactly what all you
18 had.

19 Q Well, take a look at it because what I'm going to ask
20 you is if that's a copy of the report that you provided to
21 the Solicitor's Office and that they, ultimately --

22 A Right, right.

23 Q -- provided to me through my discovery?

24 A That's fine.

25 Q Is that what that is?

1 A Yeah, all except like this crime lab report, mainly,
2 I don't know anything about that.

3 Q You don't know anything about that?

4 A No, I don't know anything about that.

5 Q And I'm not going to ask you about that right now,
6 I'm just going to ask you --

7 A That's fine. Like I said, I don't even know where
8 that report came from as far as those last three pages.

9 Q Let's not worry about those last three. Let's just
10 worry about what you did.

11 A Okay.

12 Q This is your report that you filled out as a result
13 of this traffic stop?

14 A Yes, sir.

15 Q And you've got a copy of it with you right now?

16 A Yes, sir, I do.

17 Q All right. On this piece of paper, it indicates that
18 you initiated a traffic stop on July the 27th of 2005; is
19 that correct?

20 A Yes, that's correct.

21 Q And it's about 20:12 or in layman's terms about 8:12
22 in the evening, 8:12 p.m?

23 A That's correct.

24 Q Is that correct? All right. And as I understand
25 your testimony and contained in your report are the

1 observations you made before the traffic stop and the
2 reasons that justify your traffic stop; is that correct?

3 A In the first paragraph, yes, sir.

4 Q Okay. And what you -- what I understood you to
5 testify to and what's contained in your report is that you
6 observed a car going two miles below the posted speed
7 limit?

8 A No, sir, actually, four miles.

9 Q Four miles?

10 A Fifty-six in a 60.

11 Q Well, that's what in your report, but what did you
12 write on the warning ticket?

13 A I don't have a copy of the warning ticket in front of
14 me.

15 Q Okay. Somewhere between two and four miles below the
16 speed limit is what you observed this car going?

17 A That's fine.

18 Q Is that fair? And because of that, you initiated the
19 traffic stop?

20 A Well, because of that and the defective windshield,
21 yes.

22 Q How did you notice the defective windshield if you're
23 behind the car and noticing it going too slow?

24 A Because, see, I monitor the traffic in my rear view
25 mirror and when I'm sitting on side ramps and stuff like

1 that, that's what I'm monitoring. And you can see the
2 defective windshield from the rear as well in many cases.

3 Q Where were you at the time you noticed the car being
4 driven by Mr. Hardy was going four miles below the speed
5 limit?

6 A Near the 46-mile marker.

7 Q Which way were you facing?

8 A I would have been facing north.

9 Q And Mr. Hardy was heading north?

10 A That's correct.

11 Q So was your attention drawn to his car before it got
12 to you or after it passed you?

13 A During and after.

14 Q Both before, during and after?

15 A Yes.

16 Q And at what point during that before, during, after
17 sequence did you notice the defective windshield?

18 A I really don't know, I just noticed that it was
19 defective. I don't know the exact time that I noticed it.

20 Q Fair enough. Did you write a warning ticket for
21 that?

22 A I don't know if I checked that block on there. I
23 know I made him aware of it.

24 Q Okay. It's not indicated anywhere in your report,
25 though, that he had a defective windshield, is it?

1 A Yes, sir.

2 Q Other than that first paragraph in your report, what
3 I meant was it is not indicated on the first page that
4 gives the reasons -- what you observed and all that other
5 stuff, it's not indicated on that page?

6 A Yes, sir, it is, impeding traffic and defective
7 windshield on the first page.

8 Q Thank you, sir. Okay. Sorry, I missed that. And
9 so -- but you did not write him -- you don't have a copy
10 of any sort of ticket you wrote him for the defective
11 windshield?

12 A Not with me, I do not. I don't have the packet that
13 you have. I don't have that in this, no, sir.

14 Q Okay. I thought you also mentioned something about
15 that was another reason you stopped him, also?

16 A Yes, sir, I stated -- well, it wasn't one of the
17 initial reasons I stopped him, it was a violation I
18 observed after I initially saw the two violations. I saw
19 another violation as I was accelerating up to catch and
20 that was the improper lane change, without giving proper
21 signal.

22 Q Can you describe that to me?

23 A Well, the law states that when you go to make a lane
24 change, a hundred feet prior to making that change or
25 movement, you must signal, give signal. And then it must

1 follow a hundred feet after you've made a completion of
2 that maneuver.

3 Q So my question is -- I want you to tell me what it is
4 Mr. Hardy didn't do that justified him being stopped or
5 not signaling proper lane change.

6 A I didn't stop him initially for not signaling. I
7 stopped him --

8 Q So he wasn't stopped for the lane change?

9 A No, I just stated that was another violation that I
10 observed during my encounter -- or prior to my encounter
11 with him.

12 Q All right. So a lane change violation is not the
13 reason for the stop?

14 A Not the initial reason, no, sir.

15 Q And the defective windshield and the too slow for
16 traffic --

17 A Impeding traffic, yes, sir.

18 Q That's the reason for the stop?

19 A Those are the initial reasons for the stop.

20 Q Okay, sir. How long did it take Mr. Hardy to pull
21 over after you activated your blue light?

22 A It wasn't a significant time. I really don't know.

23 Q Relatively normal amount of time for --

24 A I would say yes.

25 Q Nothing out of the ordinary about the amount of time

1 it took him to pull over and stop?

2 A No, sir.

3 Q He had done everything proper about pulling over and
4 stopping?

5 A As far as I can recall, yes.

6 Q As I understand it, you then walked up to Mr. Hardy,
7 who was in the driver's side of the car, and asked him for
8 his license and registration?

9 A I, actually, walked up, identified myself, told him
10 the reason for the traffic stop, told him what I was
11 actually going to do --

12 Q Okay.

13 A -- which was issue him a warning citation and then I
14 asked him for his license and vehicle information.

15 Q He provided all that to you?

16 A Yes, sir, he did.

17 Q And you checked all that out?

18 A During the traffic stop, yes, sir, I did.

19 Q And, ultimately, you wrote him a ticket for -- a
20 warning ticket for the cracked windshield and for the 58
21 in a 60-mile-an-hour zone.

22 A Impeding traffic, yes, sir.

23 Q Right, that's what you call it, that's what the
24 violation was, he was going too slow?

25 A Right.

1 Q And he was free to go at that point in time?

2 A At what point in time?

3 Q The point in time where you gave him those warning
4 tickets, he was free to go?

5 A No, sir, he was not.

6 Q Why not?

7 A Because I had developed reasonable suspicion that Mr.
8 Hardy was involved -- or potentially involved in criminal
9 activity.

10 Q Okay. Prior to giving him the warning tickets, had
11 you already patted Mr. Hardy down?

12 A Yes, I had.

13 Q And you found, I believe, \$400 in his pocket?

14 A I believe it was 500 something dollars. I don't have
15 that report in front of me, but if you look on his -- the
16 inmate form that states his wellness and wellbeing, it's
17 on that form.

18 Q Can you find that for me? Is that in this?

19 A I don't know if it's in this one or not. Let's see
20 here. \$574.55.

21 Q Okay. So he had \$574.55 on him. That was that bulge
22 you felt in his pocket that you got?

23 A That's correct.

24 Q Now, that bulge that you talked about, there was no
25 gun or knife or anything else, just the money?

1 A That's correct.

2 Q Okay. What I'm trying to figure out here, Officer
3 Owens, is you found some money in his pocket.

4 A Yes.

5 Q You had already written him warning tickets?

6 A Correct.

7 Q And you had already given all that back to Mr. Hardy?

8 A Correct.

9 Q He was free to leave at that point in time?

10 A Well, no, he should have felt free to leave because
11 of the consent that I asked. In order for consent to be
12 voluntarily -- and it's my opinion and many opinions of
13 many courts from what I've read, in order for it to be a
14 voluntary consent, he must have his items back. And
15 that's what I'm looking for, for him to feel like he's
16 free to leave so that the consent is voluntary.

17 Q Did he ever give you consent?

18 A No, sir, he did not?

19 Q So it doesn't matter whether it's voluntary or not
20 voluntary, he never gave you consent?

21 A No, he denied consent.

22 Q Okay. So what I'm trying to figure out then,
23 Officer, is at what point in time the reasons for this
24 initial stop dissipate?

25 A During the traffic stop itself. It was through that

1 whole totality of the circumstances during that traffic
2 stop is what made me ask for consent to search. It was
3 the totality of those circumstances. And there's probably
4 17, 18 or something indicators that I'm trained to detect
5 that the totality of those would --

6 Q Let me make it real simple and ask you this way, when
7 Mr. Hardy said no, you don't have consent, I'm not giving
8 you my consent to search the car, was he free to leave?

9 A No, sir, he was not.

10 Q Why not?

11 A Because I had developed reasonable suspicion through
12 my training and experience --

13 Q And that's what I want to hear about, what that
14 reasonable suspicion is.

15 A Okay. You want to hear the 17 indicators?

16 Q No, I want to hear what you found in this case
17 because I'm looking at your report here and there's some
18 listed here. I want to know which one of these you relied
19 upon to stop -- to continue to stop?

20 A It's the totality of all of them.

21 Q Okay.

22 A It's not just one indicator, sir, it's the totality
23 of all the circumstances through my training and
24 experience, which led me to believe that Mr. Hardy himself
25 was involved in a criminal activity. And it was through

1 that and also through Trooper Gilbert's running the
2 canine --

3 Q Before we get to the canine, let's talk about those
4 reasons you had to keep him there.

5 A Okay.

6 Q Tell me what reasons you had. If I understood it,
7 you noticed a bag on the backseat of the car?

8 A Well, first -- yes, there's one bag on the backseat
9 of the car --

10 Q What about a bag on the backseat of the car is
11 suspicious?

12 A Well, I know through my training and experience --

13 Q In this particular case --

14 A Sir, I can't go just with one particular case, I have
15 to rely on my training and experience that leads me to
16 believe that Mr. Hardy, the judge or you may even be
17 involved in criminal activity. I have to go on training
18 and experience to make me believe --

19 Q So I understand that, if you were to walk outside in
20 front of this courthouse and find a car with a bag sitting
21 on the backseat, that, to you, is reason enough to suspect
22 that criminal activity is taking place in that car?

23 A That alone, no, sir, it's not.

24 Q The next thing you mentioned was there was a black
25 male in the car. I assume that was Mr. Hardy?

1 A Yes, sir.

2 Q What about a black male in a car by himself gives you
3 reason to believe that criminal activity is taking place?

4 A That doesn't at all.

5 Q You also mentioned there were numerous air fresheners
6 in the car?

7 A Yes, sir?

8 Q What about air fresheners --

9 A Numerous air fresheners are, in many cases in
10 criminal activity, used to mask the odor of narcotics in
11 vehicles, especially when they're strategically placed or
12 when they're in numerous amounts. Just one air freshener
13 alone is enough. When you have numerous, it's overkill.

14 Q What else about Mr. Hardy's car gave you reason to
15 believe there was activity, criminal activity taking
16 place?

17 A Well, the cell phone. Cell phones are consistent in
18 business and criminal activity. If you don't have a job,
19 it makes me question as how do you pay for it.

20 Q Like this cell phone right here that I've got, a cell
21 phone like that?

22 A Yes, sir.

23 Q That's an indication of criminal activity?

24 A With the totality of the circumstances, yes.

25 Q That is an indication of criminal activity?

1 A Yes, sir, it is.

2 Q Okay. What else indicated there was criminal
3 activity?

4 A I noticed the one map --

5 Q The one map?

6 A The one map would make me concerned because --

7 Q Like a roadmap?

8 A Yes, sir.

9 Q Like you follow for directions?

10 A Yes, sir.

11 Q Like somebody who's going from Atlanta to Raleigh
12 might have with them to tell them how to get there?

13 A Well, that might be a concern, but if you're going to
14 your mom's house, I don't know why you would need a map.

15 Q But Mr. Hardy wasn't going to his mom's house, was
16 he? I indicated earlier he was going from Atlanta to
17 Raleigh --

18 A Well, he was going to Raleigh to get a criminal
19 history. If that's the area he grew up in --

20 Q My question is what about somebody having a roadmap
21 in the car to you indicates criminal activity?

22 A Yes, sir, it would indicate that to me if you're
23 going to an area you're familiar with.

24 Q So again, if you walk out the front of this
25 courthouse and find a car with a roadmap in it, that, to

1 you, indicates there's criminal activity afoot in that
2 car?

3 A Not with it alone, it does not.

4 Q What about with the bag on the backseat?

5 A Not with that alone, it does not.

6 Q What about with an air freshener hanging off the
7 rearview mirror?

8 A You're starting to build reason --

9 Q Those three things give you reason to believe
10 criminal activity --

11 A Not just those three things, but we've probably got
12 another 15 to go.

13 Q Well, let's go through them then. I want to know at
14 what point in time, observing these things, you decide
15 criminal activity was involved.

16 A Okay.

17 Q Go.

18 A Obviously, you've got fast food bags.

19 Q You've got a fast food bag in the car?

20 A Yes, sir.

21 Q So it's a criminal activity to eat any sort of fast
22 food in your car?

23 A No, sir. The totality --

24 Q What's the next thing on your list?

25 A Driver's hand shaking and accelerated heart and pulse

1 rate.

2 Q So being nervous in and of itself is enough for you
3 to think criminal activity is at play?

4 A Well, especially, when you've been told you're going
5 to be given a warning citation, yes, sir, it would be.

6 Q What else?

7 A Well, I-85 is a drug corridor.

8 Q So anybody going up and down 85 is automatically
9 suspicious or suspected of criminal activity?

10 A No, sir. It's with the totality of the
11 circumstances.

12 Q What's the next thing on your list?

13 A Well, he's coming from a drug source city.

14 Q So anybody that comes out of Atlanta headed north is
15 suspected of drug activity, criminal activity?

16 A With all the numerous indicators, yes, sir.

17 Q What else is next?

18 A Also, the signal that was left on, that's also
19 another thing that would indicate a level of nervousness
20 that your client was involved in.

21 Q When you said the signal was left on, the signal was
22 left on when he signaled -- after you had activated the
23 blue light and he was pulling off the lane, out of traffic
24 on the side of the road?

25 A That is correct.

1 Q So the fact that he left it on while on the shoulder
2 of the road --

3 A Yes, sir.

4 Q -- indicates to you that criminal activity was at
5 play?

6 A Well, it, actually, indicates his level of
7 nervousness --

8 Q Okay.

9 A -- because when your heart rate gets to approximately
10 130 beats per second -- I mean, per minute, you start to
11 lose visual focus --

12 Q Did you take his blood pressure that day?

13 A No, sir, I didn't.

14 Q So you don't really know what his heart rate was?

15 A No, but I can visually observe it in his neck.

16 Q So what was it?

17 A I don't know, it was accelerated.

18 Q You don't know what it was?

19 A It's much faster than it is right now.

20 Q You don't know what it was?

21 A No, sir, I don't.

22 Q Had it been fast enough and you had concerns about
23 his health, would you have called an ambulance or backup
24 or paramedic?

25 A Yes, sir, I would have.

1 Q But you didn't think it was sufficiently fast enough
2 to justify getting a paramedic there to check him out?

3 A He wasn't to the point of passing out, sir.

4 Q What's the next thing on your list to make you think
5 there was criminal activity?

6 A Well, that he didn't have a job and he was traveling
7 a long distance, that he had recently moved and he didn't
8 have any money -- or didn't have a job, but yet, he had
9 \$574 in his pocket. I don't even travel with \$574 in my
10 pocket.

11 Q So not having a job is reason to believe that
12 criminal activity is afoot?

13 A Well, potentially, yes, sir, with all these other
14 criminal indicators included, yes, sir.

15 Q I'm hearing a lot of potentially here, so I'm just
16 trying to figure out which one it was that made you
17 think --

18 A I've done told you, sir, it's the totality of all of
19 them. It's not just one of these.

20 Q What's the next thing on your list?

21 A Let me see here. When I asked him about illegal
22 narcotics in the car, he looked down and away, which would
23 be an indicator of deception.

24 Q So the manner in which he replied to you about where
25 he looked indicates criminal activity is afoot?

1 A No, it indicates he is deceptive in his answer, which
2 would mean he's potentially involved in criminal activity,
3 yes, sir.

4 Q What's next on your list?

5 A When I asked him about luggage in the car, he
6 hesitated, gave hesitation in answering his question about
7 if he had luggage in the car.

8 Q So slowness in his speech in response to your
9 question?

10 A And hesitation in an answer, yes, sir.

11 Q Was that the only answer he hesitated in?

12 A That's what I have noted, yes, sir.

13 Q It's the only one you recall today?

14 A Yes, sir, that's the only one I noted in my report as
15 well.

16 Q Anything else?

17 A He gave a disclaimer that his brother was in the
18 military. I didn't even ask him if his brother was in the
19 military.

20 Q Why do you think that's a disclaimer?

21 A Well, because a lot of people -- it's like I stated
22 earlier, people try to prove that they're innocent instead
23 of -- a guilty man is only going to prove that he's
24 innocent. An innocent man has nothing to prove.

25 Q All right. So y'all were just having a conversation

1 and he told you his brother was in the military?

2 A Yeah, I didn't even ask, I didn't even ask that
3 question.

4 Q What else is next? Let's say that's it.

5 A No, let's say one more. Let's say him failing to
6 provide accurate information on his driver's license could
7 be also a potential --

8 Q Oh, you mean the fact that he had moved residencies
9 and was living somewhere else than was indicated on the
10 driver's license?

11 A It was not indicated on the driver's license.

12 Q That's what I meant, the driver's license indicated
13 one thing. He told you he had recently moved and it had
14 not yet been changed on his driver's license. That, to
15 you, is a reason to believe criminal activity --

16 A It could be a potential, yes, sir?

17 Q Could be?

18 A Yes, sir.

19 Q Potentially?

20 A Yes, sir.

21 Q All that having been said and done, all that stuff
22 you being aware of and looking at --

23 A Yes, sir.

24 Q -- you wrote Mr. Hardy the warning tickets, you gave
25 him the warning tickets and you gave him back the cash

1 that was in his pocket?

2 A That's correct.

3 Q At that point in time, he was free to leave?

4 A After I explained the warning? I'm sorry.

5 Q My question was at that point in time, he was free to
6 leave?

7 A No, sir, he was not free to leave.

8 Q At what point in time during this stop was Mr. Hardy
9 ever free to leave?

10 A Never.

11 MR. CULBERTSON: No more questions.

12 THE COURT: Any redirect?

13 MS. MONTS: No, Your Honor.

14 THE COURT: Thank you, sir. You may step down.

15 MS. MONTS: Your Honor, that would be the State's
16 showing as far as the reasonable suspicion that prolonged
17 the stop in order to have the drug dog, which subsequently
18 was brought to the scene.

19 THE COURT: All right. Mr. Culbertson, be glad to
20 hear from you.

21 MR. CULBERTSON: Your Honor, I think it's fairly
22 clear from the officer's last statement that Mr. Hardy was
23 never free to leave after the initial traffic stop was
24 implemented. I think if you look at the case law I've
25 handed up to you in my motion, it's clear from Judge

1 Anderson's ruling in the Pichardo case, tracks almost word
2 for word what the situation is here. The car was stopped,
3 there was no justification, prolonged to search after the
4 initial traffic stop. That evidence should be suppressed.
5 Anything found after that point in time should be
6 suppressed. Exactly what this officer just said, Mr.
7 Hardy was never, never free to leave after he was stopped
8 for the traffic violations.

9 THE COURT: Yes, Ms. Monts.

10 MS. MONTS: May it please the Court, Your Honor. The
11 South Carolina Court of Appeals decided in Pichardo and
12 Rays and the Supreme Court denied on April 5th, 2007. In
13 that case, the Court held even if the underlying basis for
14 the initial traffic stop has concluded, it does not
15 automatically follow that any further detention for
16 questioning is unconstitutional. The Court further held
17 that lengthening the detention for further questioning
18 beyond the initial stop is permissible in two
19 circumstances. One being if the questioning -- if the
20 initial detention has become consensual, we are not
21 arguing that. We are arguing the second prong in that,
22 which is that the officer may detain the driver for
23 questioning unrelated to the initial stop if he has an
24 objectively, reasonable and articulable suspicion that
25 illegal activity has occurred or is occurring.

1 And, Your Honor, I will hand up the Branch case,
2 which, specifically, talks about there's approximately
3 four or five indicators or factors that are considered in
4 that case. And, Your Honor, our case is readily
5 distinguishable from the Pichardo case because that case
6 solely relied upon one factor, being nervousness. And as
7 the officer has specifically delineated, he had, at least,
8 18 factors. We certainly agree that nervousness alone
9 would not be enough for an officer to continue this, but
10 we had approximately 18 indicators.

11 And in Branch, it does quote the Sacaro case, which
12 states, A set of factors, each of which were individually
13 quote, Consistent with innocent travel could still, taken
14 together, produce a reasonable suspicion of criminal
15 activity. The Branch case also states that a police
16 officer's decision to stop and detain an individual is
17 evaluated objectively and is sufficient. If objective
18 evidence exist to down strike reasonable suspicion, the
19 stop is justified regardless of the officer's intentions.
20 Reasonable suspicion must -- a police officer must offer
21 specific and articulable facts that demonstrate, at least,
22 a minimal level of objective justification for the belief
23 that criminal activity is afoot. Judicial review of the
24 evidence must demonstrate reasonable suspicion, must be
25 common sensical focused on the evidence as a whole and

1 cognizant of both context and particular experience of
2 officers charged with the on-going task of law
3 enforcement, Your Honor.

4 And I can go through the 18 specific indicators that
5 Trooper Owens just went over, but it wasn't just
6 nervousness. There are, at least, 17 additional factors
7 that roused his suspicion up to the level of reasonable
8 suspicion. And that, as the other cases say, is much less
9 of a standard. It just allows them to have time to
10 continue their investigation. As the officer testified,
11 once he had developed this reasonable suspicion, which was
12 before he had even given the ticket to the Defendant, he
13 had already called several minutes into his stop to ask
14 for the drug dog handler to arrive. The drug dog handler
15 arrived shortly thereafter. There was no extreme
16 elongation. We are talking minutes here. And once the
17 drug dog handler got there, it was probable cause. But we
18 are down to the minimal standard of reasonable suspicion,
19 which 18 indicators completely meet that standard, Your
20 Honor.

21 And in the Branch case, the only indicators that they
22 had in that case were -- that the vehicle had previously
23 been pulled over for drugs, that the defendant's hands
24 were shaking, that there were air fresheners, that the car
25 was not registered to the defendant and, finally, that

1 another officer had known that defendant in the past as
2 being a drug dealer. So there were only five indicators
3 in that case.

4 Your Honor, one other thing I would like to cite is a
5 U. S. District Court case out of Kansas, but this case
6 specifically only list that there were four indicators
7 that were found to equal reasonable suspicion, that's the
8 Ferrari case. And that says reasonable and articulable
9 suspicion of criminal activity was found because of the
10 nervousness, number one, that there were air fresheners in
11 the van. Number two, that there was a one-term rental on
12 the car and that the vehicle had been rented by a third
13 party. There were only four indicators in that case.

14 THE COURT: What's your cite on the Branch case? Do
15 you have a copy?

16 MS. MONTS: Yes, Your Honor. And, Your Honor, case
17 law does not give a set amount of time that the officer,
18 once he has developed reasonable suspicion, has to
19 complete the stop. I believe in Branch, their example is
20 that they stated that 30 minutes where there time was
21 valid.

22 MR. CULBERTSON: And, Your Honor, I just wanted -- I
23 don't want to respond line for line for everything she
24 just said, but I would like to draw the Court's attention
25 to Pichardo case, which was cited in 2005. Specifically,

1 I would like the Court to look at paragraphs 28, 29, 37
2 and, I believe, 33. 33 and 37, Your Honor, of that
3 opinion. I think if you read those paragraphs, it speaks
4 specifically to the incident we have here.

5 MS. MONTS: And, your Honor, I have one more Court of
6 Appeals case from --

7 THE COURT: Excuse me, wait a minute.

8 28, 29 and what else?

9 MR. CULBERTSON: I said 28, 29, 33 and 37. I draw
10 the Court's attention to the entire order, to the entire
11 opinion, but, specifically, those paragraphs.

12 THE COURT: All right.

13 Yes, ma'am, I'm sorry to interrupt you.

14 MS. MONTS: I'm sorry, Your Honor. I'm handing you
15 State vs. Tindall. This was a 2008 Court of Appeals case,
16 which, again, list that approximately only five indicators
17 were enough to find reasonable suspicion in that stop.
18 And again, finally, Your Honor, that the State's position
19 is that it is the totality of the indicators. Each one or
20 several of them individually would not equal reasonable
21 suspicion, but having the amount and magnitude of
22 indicators that were found by this officer in this case
23 and his experience does equal totality of the situation as
24 stated in Sacaro and in Branch.

25 THE COURT: Yes, sir.

1 MR. CULBERTSON: And, your Honor, I don't mean to
2 belabor the point. We would agree that the officer
3 initially was justified in making the traffic stop. If
4 you read the case law, it's clear that while that stop may
5 be initially justifiable, to extend the search beyond an
6 initial stop means that there has to be a reason in the
7 officer's mind that justifies the continued detention.
8 The officer's final words from that stand were that there
9 was nothing that Mr. Hardy could have done that would ever
10 have given him the right to leave that scene freely and
11 voluntarily.

12 THE COURT: Doesn't that address the consensual --
13 the prong two rather than prong one?

14 MR. CULBERTSON: I think they kind of merge, though,
15 Your Honor. I agree with that, but I think there's a
16 merging of those issues there and you do have to draw a
17 distinction between the two. I think if you're talking
18 about totality of circumstances, you have to look at what
19 the officer's opinion and idea were at that time. He
20 never had any reasonable belief that criminal activity was
21 afoot, he was just suspicious that criminal activity was
22 afoot. That's not sufficient reason to continue the
23 search of the car.

24 THE COURT: All right. Well, I've had an opportunity
25 to read Pichardo and I've read Tindall already, haven't

1 read Branch, but the reasonable suspicion requires it to
2 be particularized and an objective basis for the extended
3 stop. And the cases both of you cite say that to make
4 that determination, you've got to consider the whole
5 picture, call it totality of circumstances or looking at
6 the whole picture.

7 Obviously, the State has the burden of articulating
8 facts that support a reasonable suspicion. I think the
9 facts in Pichardo are more distinguishable from this case
10 than those facts in Tindall. I've made notes of the
11 factors that the officer testified to. While some of
12 them, I think, have no basis whatsoever, I think some of
13 those he conceded. I think in light of all of the factors
14 listed in judging the totality as the courts have required
15 me to do, I believe that he has probably articulated a
16 reasonable suspicion to detain him there and I'll allow
17 the evidence.

18 And I'll deny your motion to suppress, Mr.
19 Culbertson.

20 MR. CULBERTSON: Yes, sir.

21 THE COURT: Let's take about a five-minute break and
22 then we'll be ready. Any other motions that we need to
23 take care of?

24 MR. CULBERTSON: Not from us, Your Honor.

25 MS. MONTS: Your Honor, we do have admission by the

1 Defendant that we -- Your Honor, we would not admit any
2 statement by the Defendant prior to him being --

3 THE COURT: All right.

4 MS. MONTS: I mean, excuse me, about admitting the
5 knowledge about the items.

6 THE COURT: Okay. So that won't be an issue about
7 Mr. Culbertson --

8 Just make sure your witnesses don't forget what
9 they've agreed not to talk about as far as any statement
10 about the drugs.

11 MS. MONTS: Your Honor, one other issue the State
12 had, we would ask that the age of this case, being that
13 it's from 2005, as far as belaboring the fact that it is
14 an old case, that it be brought out except for just in
15 general questioning with the witnesses as far as in
16 talking with the jury. I believe that both sides are
17 involved in this and I just would like to be put on the
18 record.

19 THE COURT: Going to be any --

20 MR. CULBERTSON: I'm not sure I understand what that
21 means.

22 THE COURT: I think she wants to make sure that the
23 jury doesn't hear a lot of comments about this is a four
24 year old case and it's all the State's fault it's been
25 dragging around that long. Are you going to say anything

1 like that?

2 MR. CULBERTSON: If it were up to me, it would be a
3 20 year old case, Your Honor.

4 MS. MONTS: Your Honor, the reason I was going to say
5 that is Mr. Culbertson had been unavailable quite a bit in
6 the past year or so.

7 THE COURT: I don't believe anybody needs to go
8 there.

9 MR. CULBERTSON: I didn't plan to, Your Honor.

10 THE COURT: Anything else? Let's take about a five
11 minute break and then we'll have our jury come in.

12 (WHEREUPON, a short break was taken.)

13 THE COURT: All right. Let's have our jury come in.

14 MS. MONTS: Your Honor, may we approach?

15 THE COURT: You may.

16 (WHEREUPON, a bench conference was held.)

17 (WHEREUPON, the jury came into open court at
18 approximately 3:20 p.m.)

19 THE COURT: Thank you for your patience with us,
20 ladies and gentlemen. Sometimes, I try to estimate when
21 we'll need your services and I don't do the best job at it
22 and I apologize for that. But we are now ready to proceed
23 with the trial of this case. I've had some other matters
24 that I had to take care of and finishing up the other
25 trial that we started. But be that as it may, we're now

1 ready to start this trial.

2 You've been selected, you saw the process yesterday.

3 And as I reminded you yesterday, the Defendant in this

4 case, he's been charged with these indictments on drug

5 offenses. And by pleading not guilty to these charges,

6 the burden is on the State to prove that guilt beyond a

7 reasonable doubt and that's what we'll be doing here in

8 just a little bit. You're going to be the fact finders.

9 You're going to be the judges of the facts. I'm referred

10 to as the Judge, I wear the black robe, but you're going

11 to be every bit as much judges as I because you're going

12 to be determining just what the facts are in this case.

13 You're here at a sacrifice, I'm well aware of that and

14 we're going to do all we can now that the case has started

15 to utilize your time in a wise manner.

16 This title I've given you as a judge, you may have

17 some apprehension about that. You may have never served

18 as a juror before, may have some concern about your

19 capability of being a juror, be a judge of the facts. But

20 let me assure you, ladies and gentlemen, you bring

21 everything that you need into this courtroom to be judges

22 of the facts because each of you have everyday experiences

23 that you've grown from in society and your home, school,

24 the work place and social activities. The good common

25 sense with which you've been blessed, also, you bring into

1 this courtroom. And that's what you're going to utilize
2 to be the fact finders and determine just what the facts
3 are. And you're going to do that by listening to the
4 witnesses who testify in this case to judge the demeanor
5 of those witnesses to determine the believability of who
6 you hear testify.

7 I am going to explain the law to you. This is not a
8 charge on the law in any way, but I'll do that at the end
9 of the case. And under the oath that you're going to take
10 in just a few minutes, you'll be agreeing that you're
11 going to accept the law and apply the law exactly as I
12 state it to you.

13 Part of my job, also, is to rule upon evidence that's
14 offered during the course of the trial. These attorneys
15 have been trained under the rules of procedure, the rules
16 of evidence. There may be objections made as the case
17 goes on, as questions are asked of witnesses. Frequently,
18 I can rule upon an objection in an easy manner by saying
19 overruled or sustained and they can ask the next question.
20 Sometimes, you may have already seen where the attorneys
21 will approach me up here as a conference and we can
22 whisper and maybe work out some legal matters that need to
23 be resolved. Sometimes, I have legal matters -- one of
24 the lawyers may say that they have a matter of law that we
25 need to address or I may decide that there's a point in

1 the trial that I need to rule on a matter of law and it
2 might necessitate you going back to your jury room while I
3 make that decision.

4 You're the judge of the facts and I'm the judge of
5 the law. And as the judge of the law, I want to do
6 everything within my power to make the very best decision
7 I can. And sometimes, in order to do that, I have to hear
8 matters that wouldn't be properly brought before a jury.
9 It might be testimony. It might be legal treatises. It
10 might be other evidence that would not be admissible. In
11 order for me to make that wise decision I hope I can, I
12 have to hear some things that would not be presented to
13 you. So if that happens in the course of the trial that
14 you have to go back to your jury room and then come back
15 in, I hope you'll understand that the purpose for that is
16 that I can hear everything I need to hear to rule upon the
17 law. You're going to hear everything you need to hear in
18 this case to rule upon the facts. There will be witnesses
19 who'll testify. There might be documents put into
20 evidence. There might be other tangible items put into
21 evidence. And you'll have that to assist you as you
22 decide what the facts are.

23 When you do start discussing the case and deciding
24 the facts, you'll be the sole judges of the facts, as I've
25 stated, and I'm not going to be back in the jury room with

1 you giving you my ideas about what the facts are. I'm a
2 Judge, I'm the judge of the law. You're a judge, you're
3 the judge of the facts. And that's solely up to you and
4 you alone to make that determination, not me.

5 Cases develop in stages. In a few moments, the
6 attorneys will have an opportunity to address you in
7 what's called an opening statement. What the attorneys
8 say to you in their opening statement is not evidence.
9 The evidence is really what the witnesses say. Even the
10 questions that are asked by the attorneys are not
11 evidence. Of course, they have to be framed that way so
12 there can be a response, evidentiary response from the one
13 who's testifying. But even though these opening
14 statements are not evidence, I urge you to listen
15 carefully as each of these attorneys address you.
16 Perhaps, they can give you some insights to help you as
17 you listen to the case, give you an overview of what you
18 can be alerted to as the case does develop.

19 After the opening statements, there will be testimony
20 presented. After all the testimony and evidence has been
21 put into evidence, then the attorneys will again have a
22 chance to address you in closing. And then is when I will
23 instruct you on the law.

24 Until you have heard all the evidence, until you've
25 heard my instruction on the law to you, you shouldn't be

1 discussing the case. I know that we sometimes have a
2 tendency to want to start speculating or analyzing what
3 we've heard so far and talk about it with each other while
4 you're taking breaks, talk about it with other people.
5 That would be improper for you to do, ladies and
6 gentlemen, because until all the evidence is in, you
7 should not be discussing the case in any way whatsoever.
8 And I'll give you further instructions on that as we end
9 the day.

10 We'll take periodic breaks. We'll normally go an
11 hour, hour and a half at a time, but if there's a time
12 that you feel you need a break and I haven't told you it's
13 time to take a break, please, let us know. You've had a
14 chance already to meet the bailiffs. They're here to
15 assist you in any way they can. They'll, certainly, get
16 my attention if you can't. Ms. Fryer and Mr. Fuller in
17 the back, they're, certainly, here to assist you in any
18 way they can.

19 The young lady sitting in front of me, directly in
20 front of me, Ms. April Herron, she's the court reporter.
21 She's going to take down everything that's said during the
22 course of this trial to make sure a record is maintained.
23 The young lady seated beside her is Ms. Mary Troup. She's
24 one of the clerks of court here that will assist
25 Mr. Wickenseimer with conducting things in the courtroom.

1 She will administer the oath to you in just a few moments.
2 She'll, certainly, be of assistance to you any way she
3 can. The young gentleman seated beside me to my far right
4 is Dane Sywinsky, he's a student in law school now. You
5 may see him coming and going. He's here just on
6 observation for the summer to try to watch what's going on
7 in the court. Directly to my right is Buckley Warden,
8 he's my law clerk, and he'll have many helps that he'll
9 provide to me as the case develops. You may see these
10 gentlemen going back to take care of matters in the
11 office. But any of these folks will be glad to help you
12 in any way they can.

13 I'm grateful to have an opportunity to work with you,
14 ladies and gentlemen. I'm honored to be working with you
15 because of the sacrifice you're making and I look forward
16 to the opportunity to serve as Judge with you.

17 At this time, in order to protect the record, I'll
18 ask the attorneys if there's any objections to the
19 statements made by the Court.

20 Any from the State?

21 MS. MONTS: No, Your Honor.

22 THE COURT: From the Defense?

23 MR. CULBERTSON: No, sir.

24 THE COURT: All right. Ms. Troup, if you will,
25 administer the oath to the jury, please.

1 THE CLERK: Please stand and raise your right hands.
2 For the oath, the proper response is I will.

3 (WHEREUPON, the jury was sworn.)

4 THE CLERK: Thank you, please be seated.

5 THE COURT: Solicitor, you may address the jury.

6 OPENING STATEMENT

7 MS. MONTS: May it please the Court, Your Honor.

8 Ladies and gentlemen of the jury, again, my name is
9 Joyce Monts, I work for the Thirteenth Circuit Solicitor's
10 Office. It's my job to prove to you that the Defendant is
11 guilty of the two crimes that he is currently charged
12 with. Those two crimes are trafficking in cocaine more
13 than 200 grams and trafficking -- excuse me, more than 400
14 grams, and trafficking in crack cocaine over 28 grams.

15 Now, trafficking, there's a lot of different ways to
16 define trafficking. The most simple way is you're just in
17 possession of a large amount of drugs. And the
18 legislature has statutes which say if you have this amount
19 of drugs, you are guilty of -- you can be charged with
20 trafficking.

21 In the case that you're going to hear, it occurred on
22 July 27th, 2005, approximately 8:12 in the evening when a
23 highway patrol pulled over the Defendant driving on I-85
24 here in Greenville County for a traffic violation.
25 Subsequent to his investigation, they called a drug dog

1 which alerted on the vehicle. After that, the car was
2 searched and inside -- the Defendant was the sole occupant
3 and owner of the vehicle. Inside that car in the trunk
4 was found a bag that did contain five packages of white
5 powder substance that was subsequently tested, came back
6 over 1200 grams, over a kilo of cocaine, and over 28
7 grams, 60.78 grams of crack cocaine. So there's two
8 separate charges, one for the cocaine and one for the
9 crack cocaine.

10 Now, the Defendant is cloaked in a rob of innocence
11 because no evidence has been yet presented to you so that
12 you can decide what really happened, was the Defendant
13 guilty of trafficking in crack cocaine and/or cocaine on
14 July 27th of 2005? Once the witnesses have testified from
15 the witness stand, once you have gotten physical evidence
16 introduced into evidence and once the Judge gives you
17 instructions at the end of trial, he will tell you and
18 tell you when you are allowed to go back and then talk
19 about the evidence that you hear. Evidence being
20 testimony and physical evidence that you can hold in your
21 hands. And the State believes that we will prove to you
22 beyond a reasonable doubt that the Defendant is guilty of
23 both of these charges. And that once the 12 people who
24 are back there deliberating come to a unanimous verdict on
25 each of these charges, that the verdict will be guilty on

1 both of these. Thank you, very much.

2 THE COURT: Mr. Culbertson, you may address the jury.

3 OPENING STATEMENT

4 MR. CULBERTSON: Thank you, Your Honor, may it please
5 the Court.

6 Ladies and gentlemen, my name is Sims Culbertson.
7 I'm an attorney here in Greenville. I've been practicing
8 law here for about longer than I care to remember. I have
9 the privilege today of representing Kevin Hardy, the
10 gentleman sitting beside me at the table over here.

11 He's been charged by these folks over here with
12 committing a crime. And what they say he did is that he
13 was driving a car -- they say he was driving a car and
14 contained inside the car was a whole bunch of cocaine.
15 And so much cocaine that they felt justified in bringing a
16 charge known as trafficking in cocaine against him.

17 Now, the Judge is going to instruct you at the end of
18 everything exactly what trafficking means and how a
19 trafficking charge differs from other drug charges. But
20 I'll tell you today right now that what it really means is
21 that there was a certain level, certain amount of drugs
22 and contraband in one spot. You need to ask yourself as
23 you listen to this case, who's responsible for that? Who
24 had control over that cocaine? Who's cocaine was it and
25 who did it belong to? And was Mr. Hardy, in fact, guilty

1 of trafficking in cocaine?

2 I submit to you by the time we're said and done with
3 all this, by the time we spend about a day or so up here
4 listening to all the witnesses and whatnot, it's my belief
5 that your verdict will be that Mr. Hardy is not guilty of
6 trafficking in cocaine. That they would not be able to
7 show you that he was, in fact, trafficking in cocaine. Or
8 for that matter, there's no real connection to the drugs
9 found in the car that he was in.

10 I ask you to keep an open mind. I ask you to listen
11 to all the witnesses, all the testimony and ask yourself
12 questions about who and what you're being told. At the
13 conclusion of that, you'll be asked to reach a verdict. I
14 hope, I believe the verdict is going to be not guilty.
15 Thank you.

16 THE COURT: Solicitor, you may call your first
17 witness.

18 MS. MONTS: Your Honor, the State calls Trooper Dale
19 Owens.

20 DALE OWENS, after being duly sworn, testified as
21 follows:

22 THE CLERK: Please state your full name for the
23 record.

24 THE WITNESS: John Dale Owens.

25 ///

DIRECT EXAMINATION

BY MS. MONTS:

Q Trooper, please tell the jury where you're employed and how long you've worked there.

A I'm employed with the South Carolina Department of Public Safety under the direction of the South Carolina Highway Patrol. And currently, have worked there for 15 and a half years with another additional two and a half years law enforcement with another agency.

Q And describe some of your training to have this job and while you've been in this job?

A Initially, with the first department I worked with in Columbia, I went through basic Academy, which is at the South Carolina Criminal Justice Academy. It was at that time eight weeks. Went through that, certified and began working with that department. After two and a half years of that role, I then applied for the highway patrol. After applying with the highway patrol and being accepted, I then went to the Highway Patrol's Academy, which was at that time 14 weeks, an additional 14 weeks. I went through there, successfully completed and then began working the road. Received many hours of instruction and training in many different areas, advanced accident reconstruction and all areas like that, including criminal patrol.

1 After five years of service on the regular road as a
2 trooper, I then was assigned to the aggressive criminal
3 enforcement unit. Since being with them in December of
4 '98, I have received well over 1000 hours additional
5 advanced credit hours in criminal patrol and interdiction
6 skills. I've also been certified as an instructor through
7 the National Highway Traffic Safety Association in
8 criminal patrol and extending traffic stops. I've also
9 been certified through the South Carolina Criminal Justice
10 Academy as an instructor of advanced criminal patrol.
11 Also, have taught in many states in the nation about
12 criminal patrol and criminal interdiction.

13 Q And what were your duties and your position on
14 July 27th of 2005?

15 A I was, actually, the first line supervisor over the
16 criminal interdiction unit in Greenville. I was assigned
17 to the upstate region. Supervised three other --
18 actually, at that time, two other men in my region on that
19 aggressive criminal enforcement unit on the evening of
20 July the 27th, 2005.

21 Q Describe what your duties were on that evening, where
22 were you and what were you doing?

23 A On that evening, that particular evening, we were
24 working 5 p.m. to 3 a.m, that was our shift that evening.
25 During that time, we were assigned to Greenville County on

1 the I-85 corridor. During our stretch of working that
2 interstate, we generally worked from the 40-mile marker of
3 the Greenville County line and the Anderson County line
4 back towards the 48-mile marker, which is the Laurens Road
5 exit.

6 Q And, approximately, 8:10, 8:12 that evening, where
7 were you and what did you observe?

8 A I was on the Northbound side of Interstate 85 near
9 the 46-mile marker, which would have been on or around
10 Augusta Road on 85 at Augusta Road.

11 Q Were you parked or were you moving?

12 A At that time I was stationery.

13 Q And describe what that means, is your engine on?

14 A Engine's running, sitting on the side of the road
15 monitoring traffic, looking for violations, various
16 violations.

17 Q And did you -- approximately, 8:12 that evening, did
18 you observe any violations?

19 A Yes, ma'am, I did.

20 Q What did you observe and what did you do?

21 A I observed the Defendant, which was driving a '91
22 Mazda, gray in color, two-door with a North Carolina tag.
23 The Defendant being the gentleman in the olive green shirt
24 or coat, suit. At that time, I observed him driving below
25 the posted speed limit. During that time, he was in the

1 center lane and that's what drew attention to me at that
2 time. Most of the people or the motoring public in
3 Greenville County on I-85 are traveling well above the
4 posted speed limit or, at least, 70 miles per hour in the
5 60 mile per hour zone. So the attention drew to me that
6 he was driving below 60 miles per hour in the center lane.
7 During that time, I also noticed that he had a defective
8 windshield, a cracked windshield that would obscure his
9 vision.

10 Q How could you see the windshield?

11 A Well, I mean, it's things we're trained to look for.
12 I mean, when we're looking at traffic, those are the
13 things we're looking for. We're not only just looking for
14 speeders. I know a lot of people think that's the main
15 violation that we're out there doing, but we're also
16 looking for equipment violations, improper lane change,
17 following too closely, all different types of violations,
18 equipment violations as well.

19 Q How far under the posted speed limit was the car
20 going?

21 A I noted on my warning ticket was 58 and I noted in my
22 report 56 miles an hour. So between 56 and 58, I'm not
23 sure which one is true and correct. I know it's one of
24 the two.

25 Q What did this action cause other traffic to do?

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1 A Well, they have to pass on the left and on the right.
2 And under state law, if you're riding slower than the rest
3 of the traffic, you're supposed to be in the right lane,
4 in the far right.

5 Q And, please, continue. At this point, are you in
6 Greenville County?

7 A Yes, ma'am. That's in Greenville County around the
8 46 mile marker, which is Augusta road. It was at that
9 time, I then proceeded onto the Interstate to initiate the
10 traffic stop. But prior to actually getting up behind
11 Mr. Hardy's vehicle, I observed another moving violation,
12 which was him changing lanes without giving proper signal
13 or without giving a signal. And I noted that in my report
14 as well that he didn't give a proper signal, but that was
15 not my initial reason for stopping him. The initial
16 reason was for impeding the traffic and the windshield
17 violation.

18 Q And describe what vehicle you are in?

19 A I was in an unmarked Crown Victoria, which was a
20 spare car at that time. I was having work done on my
21 patrol car at that time and I was in a spare car.

22 Q And, please, continue, what happened once you got out
23 and were moving on the Interstate?

24 A I positioned my vehicle behind him, activated my blue
25 light. This was around the -- between the 47, 48 mile

1 marker, just prior to Laurens Road, northbound. I
2 activated my blue light and called the traffic stop in and
3 then we pulled over to the right emergency shoulder. I
4 then exited my patrol vehicle, approached the passenger
5 vehicle -- or Mr. Hardy's vehicle on the passenger side.

6 Q How far was it from when you turned on your blue
7 light to when the Defendant pulled over?

8 A I don't know the exact amount of time, I didn't note
9 that it was obviously long or drawn out or anything like
10 that. I'd say in a consistent manner.

11 Q Was this location of the stop in Greenville County?

12 A Yes, it was.

13 Q And what -- did you observe how many people were in
14 the vehicle?

15 A That was just one sole occupant, which was Mr. Hardy,
16 he was in the vehicle by himself.

17 Q What did you notice about the car?

18 A During my approach -- during my approach of the
19 vehicle, our main focus is mostly to keep our eyes on the
20 violator himself for officer safety reasons. But also
21 during our approach we also look at other things in the
22 vehicle. We're looking for potential weapons, we're also
23 looking indicators of potential other acts of criminal
24 activity. And the number one thing means they're involved
25 in criminal activity is the totality of the circumstances,

1 things that we are trained to look for that are consistent
2 with criminal activity.

3 During that time, during my approach, I had observed
4 one bag on the rear seat. Like I stated earlier, I
5 observed one black male driver/occupant, that he was the
6 only occupant in the vehicle, numerous air fresheners, one
7 cell phone, one map, a fast food bag, the driver's hand
8 shaking and accelerated heart and pulse rate on the driver
9 as well. When I got up to the passenger window, I
10 contacted Mr. Hardy, I advised him who I was, I identified
11 myself, the department I worked for and the reason for the
12 traffic stop. Then it was at that time I also advised him
13 what I was going to do, my course of action.

14 Q Were you in uniform?

15 A Yes, ma'am, I was. Same uniform I'm wearing today.
16 Not the same, but.

17 Q Please continue, what was your operating procedure on
18 that evening?

19 A It was at that time that I advised him that I was
20 going to write him a warning citation for the moving
21 infraction and the defective windshield. After advising
22 him of that, I asked him for his driver's license and
23 registration. And there's a specific reason I do that, is
24 because I'm looking for his nervousness to either calm or
25 continue to be elevated. At that point I asked him for

1 his driver's license and registration after I told him I
2 was writing him the warning, his level of nervousness was
3 still elevated. He had accelerated heart rate and
4 accelerated breathing.

5 Q For those of us who have never gotten a warning, what
6 is the difference between a warning and a ticket?

7 A Well, a warning is, specifically, a warning. It
8 doesn't effect your license, your registration or your
9 insurance. It just states that I've stopped you, I've
10 made contact with you and I advised you of what your poor
11 driving habit was or what mistake in the law you had.
12 Whether it be defective equipment, whether you were doing
13 something illegal. And it warranted a warning. A
14 ticket -- or a citation or summons would be where there's
15 a penalty involved, such as a fine and maybe even points
16 against your license, in which, ultimately, effects your
17 wallet in more ways than one. Your wallet as far as
18 insurance and as far as a citation summons. And it could
19 even be jail time.

20 Q And when you were up at the front of the vehicle,
21 what did you notice about anything inside the vehicle?

22 A Well, those things were the things that I noticed,
23 the fast food bags, the one bag on the rear seat, the cell
24 phone, the numerous air fresheners, the map and the
25 accelerated breathing or the nervous tendencies.

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1 Q And have you called this vehicle in yet and have you
2 received a response yet from dispatch?

3 A During the initial part of the traffic stop or before
4 I exited my vehicle, I always call in the traffic stop,
5 nine times out of ten, unless there's radio traffic where
6 you can't call it in. You call it in and then you exit
7 your vehicle and you approach. And that's what happened
8 on this evening.

9 During my contact with Mr. Hardy, he stated that the
10 address on his driver's license wasn't correct, that he
11 had just recently moved to Atlanta, Georgia from Raleigh.
12 During that conversation, he stated that he wasn't
13 speeding, that -- that he was aware that he wasn't
14 speeding and I also advised him that I didn't stop him for
15 speeding.

16 Q And did you ever ask him out of the vehicle?

17 A Yes, ma'am. It was at that point after he handed me
18 his license and advised me that the address was incorrect
19 that I asked him out of his vehicle.

20 Q And have you yet found out who the car's registered
21 to?

22 A I believe he may have handed me his registration at
23 that time as well, so it would have been on there. But,
24 however, it was the incorrect -- it was the same address
25 that was on his license, that was on his registration.

1 Q What state was that?

2 A North Carolina, Washington, North Carolina.

3 Q And what did you notice, if anything, about the
4 Defendant when he got out of the vehicle?

5 A When he got out of the vehicle, it's our practice for
6 us to interact with them at the rear of his vehicle -- or
7 the violator's vehicle and the front of our vehicle on
8 camera. It was at that point that I saw bulges in his
9 pants and I asked to pat him down for my safety for
10 weapons. It was during my pat down that I felt a large
11 bulge in one of his pockets that was consistent with a
12 large sum of currency. That's what it felt like to me and
13 that's -- he allowed me to remove it, I removed it and
14 that's what it was. I didn't find any weapons or anything
15 like that.

16 So then we proceeded on to the passenger of my
17 vehicle to get out between the death tunnel, which is
18 between the two cars. We then stood on the passenger side
19 of my patrol vehicle where it's a safe area -- safer area
20 to conduct the business of the traffic stop. And it was
21 at that point I began writing the warning and just briefly
22 having a casual conversation with Mr. Hardy.

23 Q Had you called for backup at this point, if you
24 recall?

25 A There was a time when I did call for backup, as to

1 what time, actually, I called for it, I don't know. It
2 was minutes into the stop. I would say, if I estimated,
3 less than five minutes into the stop that I actually
4 called for an assistant.

5 Q And who did you speak to, is it someone you know?

6 A Trooper Gilbert, which was one of my subordinates at
7 that time, answered up and he was the closest to me or the
8 only one that was free at the time and he proceeded my
9 way.

10 Q Does Trooper Gilbert have any specialty?

11 A Yes, he's a canine handler and he has a canine
12 partner and he was assigned to the Aggressive Criminal
13 Enforcement unit as well.

14 Q Please continue, what do you do to continue your
15 procedure during a car stop?

16 A During the car stop, I went ahead and call dispatch
17 with Mr. Hardy's driver's license number and the tag
18 information. And asked them to confirm the information
19 that was given, to advise me of the address information
20 that was on it and also the status. Whether it was
21 suspended or valid or either any previous suspensions.
22 And then they take that information and they enter it in
23 the computer and then it takes time for them to get it and
24 then respond back to me.

25 So while I was waiting for that, I then began writing

1 the warning citation and talking with Mr. Hardy.

2 Q Did dispatch tell you that -- according to their
3 records who that car was registered to?

4 A Yes, ma'am, they did, later on into the traffic stop,
5 they did?

6 Q Who was that car registered to?

7 A It was registered to Mr. Hardy.

8 Q What -- please continue, what did you do after you
9 finished that part?

10 A Well, we talked and I wrote the warning during that
11 time. And while we were talking and writing, I was
12 asking, you know, questions and just briefly talking with
13 Mr. Hardy. And it was during that time, you know, during
14 that conversation he stated that the car was in his name,
15 that the address on his license was not correct, that he
16 had recently been to Atlanta, that he had been living down
17 there for just a little while. He had gotten an
18 apartment, he had just gotten it. He had moved from
19 Raleigh, North Carolina, that area. That he didn't have a
20 job right now, that he was looking for a job.

21 He stated that his current direction or travel that
22 he was going right now was that he was traveling to
23 Raleigh, North Carolina. And I had asked him, basically,
24 what was his purpose of his trip and he stated that he was
25 going to get a criminal history so that he could get a job

1 and that's why he was returning to Raleigh. I kind of
2 questioned that, that you were going to drive five hours
3 to get a criminal history when you can go to any local law
4 enforcement agency and get a criminal history, that he was
5 taking that trip and taking days to do that, all while he
6 didn't have a job and didn't have money. But yet, he had
7 570 something dollars in his pocket.

8 He stated he was going to stay there a couple days in
9 Raleigh. Stated several times during the conversation
10 that I could check his criminal record, which was odd to
11 me, why he wanted me to keep doing that. Being overly
12 cooperative is generally the way I put it. He stated he
13 had been in Atlanta since the first of July. Stated that
14 times were hard and that he hadn't gotten a job yet. So I
15 was wondering how he was being able to stay in Georgia
16 without having income was a question of mine. And that's
17 the way we think as criminal interdiction officers, is
18 well -- what's inconsistent there on his own with money.

19 He stated that he had never been in trouble before.
20 He stated that there were no weapons in the car. And when
21 he was giving me these answers, they were appearing to be
22 truthful, nondeceptive. He was looking me in the eye, you
23 know, not changing shift in his body weight, on his feet
24 and stuff like that. They appeared to be truthful
25 answers. But when I started asking questions -- I asked

1 him a question was there any illegal narcotics in the car,
2 he immediately looked down and away and answered my
3 question. Which to us trained in interdiction and
4 criminal patrol, in kinesics, that's what we're trained to
5 look for, the deception, and that's what was consistent
6 with Mr. Hardy when I asked him about illegal narcotics in
7 the car.

8 Then I asked him if he had any luggage in the car.
9 He hesitated with the answer and then gave me -- stated
10 yes, he had luggage in the car. It was after those
11 questions that he immediately brought up to me without me
12 asking that his brother was in the military. And without
13 asking that, it was odd to me. It was like he was giving
14 me information that he was a good person, that he doesn't
15 do stuff like this. And that's the things we look for in
16 criminal patrol. Not always is that the case, that
17 they're involved in criminal activity, but in many cases,
18 it is.

19 Q Did you subsequently tie the Defendant's driver's
20 license to him?

21 A Yes, ma'am, I did. After dispatch came and verified
22 that his license was valid and that it was clear that he
23 didn't have any problems at that time, yes, I did.

24 Q Was that through North Carolina or through Georgia?

25 A I believe I only checked that time -- I believe, to

1 the best of my recollection, I only checked North
2 Carolina. I didn't even check Georgia. Because he stated
3 he had only been there a short period of time, I didn't
4 even check Georgia.

5 Q And please continue, did you return the Defendant's
6 driver's license?

7 A Yes. After that period of time that I completed the
8 warning citation and the dispatch had given the
9 information back, I went ahead and returned his driver's
10 license, his registration and all of his paperwork. Then
11 I began to explain the warning citation to him, the
12 reason, just like I explained to him at the beginning of
13 the traffic stop. Then I explained the warning, how it
14 didn't effect him or anything like that again. And then
15 after I handed him the warning, I then immediately asked
16 him could I search his vehicle.

17 Q Was consent given?

18 A Well, initially, he started asking me questions.
19 After I asked for consent, he started asking me questions
20 about giving consent. Then I advised him he just needed
21 to say yes or no and that it was his right to say yes or
22 no. And it was after that he said no, he didn't want me
23 to search his vehicle.

24 Q Did Trooper Gilbert arrive?

25 A Yes, ma'am, he did.

1 Q And describe where he went when he arrived?

2 A Trooper Gilbert then came on the scene. I told him
3 that I needed him to use his canine partner to sniff the
4 perimeter of the car and do a free air sniff of the
5 perimeter of the car. It was then at that time Trooper
6 Gilbert exited -- went and removed his canine partner from
7 his patrol vehicle and then went to the front of
8 Mr. Hardy's vehicle and then began to work his dog around
9 the exterior portions of the car. Then it was shortly
10 after that, the dog alerted to the exterior of the car and
11 then went to the interior of the car and then,
12 subsequently, went into the trunk of the vehicle. And
13 once he was in the trunk of the vehicle, I visually
14 observed the dog heavily scratching on a bag in the trunk.
15 Then I observed Trooper Gilbert reward the dog with his
16 toy at that time, which is a tennis ball.

17 Q Were you and Mr. Hardy standing while the dog was
18 searching the vehicle?

19 A Mr. Hardy had his back to my patrol car and I was
20 facing Mr. Hardy slightly. It would have been between my
21 passenger front door and my passenger front tire, in that
22 area, on the passenger side of my patrol car.

23 Q If you recall, did any other officers arrive?

24 A Trooper Harrison arrived sometime after that. As to
25 his exact time of arrival, I really don't recall.

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1 Q What did you do once Trooper Gilbert completed
2 running his dog on the vehicle?

3 A After he completed running the dog on the vehicle,
4 Trooper Harrison stood with Mr. Hardy and then me and
5 Trooper Gilbert began doing a thorough search of parts of
6 the vehicle and the areas inside the vehicle.

7 Q And what did you observe inside the car or inside the
8 trunk?

9 A Inside the trunk, we observed a green duffle bag or
10 green overnight bag with what appeared to be men's
11 clothing, which appeared to be very close in size as to
12 what Mr. Hardy appeared to be at that time. Inside that
13 bag as well, we located five packages wrapped in gray duct
14 tape. Inside those packages was consistent -- white
15 powder material consistent through my training and
16 experience that was consistent with cocaine or narcotics.

17 Q Did you complete any tests on the substance?

18 A We did a field test on one of the packages, its
19 substance, and it came back positive for cocaine.

20 Q Did you talk to the Defendant after you found these
21 items?

22 A After we -- well, when we first found the packages
23 and through our training and experience, what I believed
24 to be narcotics, before I even opened them, we went ahead
25 and placed Mr. Hardy under arrest. Actually, David

1 Harrison, actually, placed Mr. Hardy in handcuffs. It was
2 at that time, we went ahead and Mirandized -- I went ahead
3 and Mirandized Mr. Hardy, reading his rights to him. I
4 read them to him and he understood them. And at that
5 point, he really didn't want to talk a whole lot. He
6 didn't claim knowledge or anything about what was in the
7 bag or the bag being his.

8 So I then went back and that's when I examined what
9 was in those packages and confirmed my suspicions that it
10 was narcotics. That, in fact, it was cocaine in one of
11 the packages that we tested. We didn't test each
12 individual package. And then we sealed them up for lab
13 analysis later.

14 Q Do you make any markings on these items when you take
15 control of them?

16 A I make markings on the bags. I don't make markings,
17 actually, on the individual package, no.

18 Q And where do you do that?

19 A Sometimes it's on the scene, sometimes it's at our
20 office, it just depends.

21 Q What markings do you put on there?

22 A Well, we put like -- depending on which county we're
23 in, each county does it different as to the process we use
24 for turning in evidence. In Greenville County, what we do
25 is we take it -- if it's like this time of night, the

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1 crime lab isn't open -- or the evidence facility isn't
2 open. And we take them to the Greenville County evidence
3 facility, so we have to take them to our office and we
4 store them in our office until the next time we're working
5 or the next time they're working and we take it to them.
6 We seal it in a bag and we put our name and initials and
7 the date and things like that on those packages.

8 Q Which items did you keep from the scene in your
9 control when you left the incident scene that night?

10 A We kept the green bag, all the items that were in the
11 green bag, the clothing, miscellaneous clothing items that
12 were in the green bag, and the narcotics. And also, the
13 original VHS tape of the stop from my patrol car as well.

14 Q Describe that. In this spare car, what was the video
15 recording capability?

16 A In the spare car -- the spare cars are essentially
17 cars that we've left in service in the fleet that,
18 basically, they're the worst cars we've got. And this
19 particular vehicle that we have works fairly well. Got
20 numerous miles, but it has operating capabilities. It has
21 a video camera that is activated when the patrol lights
22 are activated.

23 On this particular vehicle, the audio system does
24 not -- the hands-free audio system does not work properly
25 on this particular vehicle. You have in-car mic, but you

1 don't have an exterior mic that works properly. It didn't
2 have an exterior mic at that time for that vehicle.

3 Q Describe the difference between an interior and
4 exterior mic?

5 A Interior mic is a mic that's mounted permanently
6 inside the patrol vehicle. An exterior mic is a mic that
7 you carry on your body that's wireless that you carry
8 that's generally used -- nowadays, we have microphones
9 that are -- that have rechargeable batteries. In that
10 type vehicle, if it had one, it would have been one that
11 would have had -- you would have had to replace the nine
12 volts batteries in it.

13 Q And does the interior audio inside your car, does
14 that record the radio traffic that is going over the car
15 dispatch?

16 A Yeah, it records any noise that's being picked up
17 inside the vehicle, yes. I mean, it could be radio
18 traffic. It could be the AM/FM radio. It could be
19 noise -- the highway traffic. It could be even me
20 standing next to the door if the door's open. I mean, it
21 just depends on what it can hear.

22 Q Did you place -- you said that Trooper Harrison
23 placed the Defendant under arrest. Where was he placed
24 after he was put under arrest?

25 A Generally, what we do is we keep them outside the

1 vehicle at that time unless it's raining or we have
2 inclement weather or if it's very cold. Generally, we
3 keep them outside the vehicle in contact with the other
4 person unless we have two violators, and then we,
5 typically, separate them. Actually, as to what we did
6 that day, I can't actually recall exactly what was done.
7 More than likely, he was left outside the vehicle.

8 Q And is the person that was arrested that day at the
9 scene who was the driver of the vehicle that you found
10 illegal cocaine and crack in the trunk in the courtroom
11 today?

12 A Yes, he is, he's seated to the right of the defense
13 counsel -- or his left, the defense counsel's left, my
14 right.

15 Q And is -- what did you do with the green bag with the
16 clothing and the five bags of white powder substance?

17 A We placed them into evidence in our office. We
18 labeled it, we put a tag on it and then it's,
19 subsequently, later than transported to the centralized
20 evidence facility where they store it. They used to
21 didn't store it at the evidence facility, but now they do
22 store it. We normally stored that in our office in our
23 evidence, but now they store it all at centralized
24 evidence facility.

25 Q And where is the centralized evidence facility?

1 A That's in Columbia, South Carolina, down near the
2 State Fair grounds.

3 Q And what did you do with the five packages of
4 suspected narcotics in this case?

5 A Those are taken -- narcotics are taken or anything
6 that needs testing is taken to the Greenville Crime Lab --
7 or the evidence facility and then the crime lab or the
8 chemist comes and takes it from them. But we take it to
9 them to the evidence facility, which is located in the
10 basement of the sheriff's office, in the Greenville County
11 Sheriff's Office.

12 Q And describe where you go and what you do with these
13 items at the --

14 A We take them directly -- the arresting officer
15 generally takes it directly to the evidence facility,
16 which is in the basement of the sheriff's office. We then
17 turn it over to an evidence custodian there. We fill out
18 the proper paperwork that's involved with that and the
19 proper paperwork so that we can get a proper testing of
20 the material or whatever we have and then they take it
21 from us. And from that point forward, it's been my
22 experience, that a lab tech comes and gets it from them,
23 test it and then brings it back to them. And then it's
24 later picked up by our centralized evidence facility
25 personnel.

1 Q And is that a locked facility where the drugs are
2 left?

3 A Yes, ma'am.

4 Q And in this case, did you take those five bags back
5 to your office on this evening?

6 A No, ma'am.

7 Q Where did you take them -- I'm sorry, July 27th,
8 2005?

9 A On July 27th, 2005, I took them back to our facility
10 with the bags and everything and locked them in our
11 facility. And then --

12 Q And describe that locked facility.

13 A It's, basically, an old US Postal mailbox with a lock
14 on the front. You can drop it in the top and then it's
15 locked. At that time, I was the only one -- myself and
16 centralized evidence facility personnel were the only two
17 with a key to that faci -- to that lockbox.

18 Q And how long did the suspected narcotics stay at --

19 A Stayed till the 29th. And then on the 29th, we then
20 took it to the lab.

21 Q And where did you take it?

22 A No, I took it.

23 Q And where did you take it on the 29th?

24 A To the Greenville County lab.

25 Q And is that a locked facility?

1 A Yes, ma'am, it is.

2 Q And did you request that they be analyzed?

3 A Yes, I did.

4 Q And what did you do with the bag, the green bag and
5 the clothing that was in the Defendant's trunk that the
6 five packages --

7 A That stayed in our office and then it was
8 subsequently taken to the centralized evidence facility
9 when they mandated that it go to them.

10 Q So you're talking about -- you originally locked it
11 in your office --

12 A Right.

13 Q -- in the highway patrol's office in Greenville?

14 A In Greenville.

15 Q And then how does it get to the centralized facility
16 in Columbia?

17 A An evidence technician comes and gets it from us or
18 either sometimes, there's occasions where we take it to
19 them, but in most cases, at that time, they came to us and
20 picked up evidence and took it back.

21 Q And was the bag and the clothing subsequently taken
22 to the centralized facility in Columbia?

23 A Yes, ma'am, it was.

24 Q And have you seen it until now, have you seen it
25 between then and now?

1 A I haven't seen it since the day it was -- or I
2 haven't seen it since it was taken from our office until
3 just shortly before trial started.

4 Q And did you make markings on that bag containing the
5 clothing?

6 A Yes, we did.

7 (WHEREUPON, State's Exhibit No. 1 was marked for
8 identification only.)

9 BY MS. MONT'S:

10 Q Trooper, I'm going to hand you what's been marked for
11 identification State's Exhibit 1, can you please identify
12 this?

13 A Yes, ma'am, this is the green bag that was located in
14 the trunk of Mr. Hardy's vehicle, along with clothing and
15 some flip flops, shirts, some undergarments as well.

16 Q Did you make any markings on this bag -- well, on a
17 tag?

18 A Yes, ma'am, we tagged it with the -- my name, the
19 case number, the date of arrest and Mr. Hardy's name.

20 MS. MONT'S: Your Honor, we move State's Exhibit No. 1
21 marked for identification into evidence.

22 THE COURT: Any objection?

23 MR. CULBERTSON: No, sir.

24 THE COURT: Without objection, Exhibit 1 into
25 evidence.

1 MR. CULBERTSON: Your Honor, I'm assuming that in
2 addition to just the bag itself, they're also moving in
3 all the contents of the bag, also?

4 MS. MONTIS: Yes, Your Honor.

5 THE COURT: The bag and the contents are into
6 evidence without objection.

7 (WHEREUPON, State's Exhibit No. 1 was admitted
8 into evidence.)

9 MS. MONTIS: Your Honor, we'd have this marked for
10 identification.

11 THE COURT: You may have it marked for ID.

12 (WHEREUPON, State's Exhibit No. 2 was marked for
13 identification only.)

14 BY MS. MONTIS:

15 Q Trooper, I'm going to hand you what's been marked for
16 identification State's Exhibit No. 2. Can you please
17 identify what you can about this and open it up. Do you
18 need a knife?

19 A Please.

20 Q Can you please identify these items for the jury and
21 explain any markings?

22 A All right. That bag, that comes from evidence. That
23 has somebody's initials on it that are not mine. That
24 evidently -- that's after what they took out of here.
25 This is the bag that I sealed all these in --

1 MR. CULBERTSON: I have a chain of custody question,
2 then.

3 THE COURT: All right.

4 Ladies and gentlemen, let me ask you to go out to
5 your jury room just for a minute and we'll take care of
6 this legal matter. Don't discuss the case. We'll call
7 you back in just a few minutes.

8 (WHEREUPON, the jury left open court at
9 approximately 4:16 p.m.)

10 THE COURT: All right. What's your objection?

11 MR. CULBERTSON: Your Honor, I'm a little concerned
12 about great fanfare being made in the presence of the jury
13 and a bag being opened that the officer says he didn't
14 sign, he didn't know about. I have no idea who, what,
15 where it came from. Or for that matter, where it's been
16 since nobody's offered any sort of evidence yet as to the
17 chain of custody of any items seized from the car being
18 presented here today.

19 THE COURT: All right. Ms. Monts, you're going to
20 tie in it later?

21 MS. MONTS: Yes, Your Honor. We would need to have
22 the chemist here -- to go chronologically, we would have
23 the Trooper describe his markings on there and explain
24 what he does and then when we have the chemist come, he
25 would explain his markings on the items and what he has

1 done with these items.

2 MR. CULBERTSON: If they're going to tie it in later,
3 Your Honor, that's fine, but I'm going to object to them
4 being able to flash it around in front of the jury until
5 that time.

6 THE COURT: All right. I'll sustain the objection
7 then until -- is the chemist coming tomorrow?

8 MS. MONTS: Yes, Your Honor.

9 THE COURT: All right. Well, it's not been
10 identified as to what it is yet.

11 MR. CULBERTSON: Well, it's been marked for
12 identification.

13 THE COURT: Correct.

14 MR. CULBERTSON: It's not been moved into evidence
15 yet, but, I mean, it's sitting there. The jury can draw
16 whatever conclusions it wants. I'm assuming they believe,
17 since this is a drug case, that there are drugs in those
18 bags. It may or may not be, I don't know.

19 THE COURT: But they're not going to be evidence
20 until --

21 MR. CULBERTSON: And I object to it being paraded in
22 front of the jury until it is moved into evidence.

23 THE COURT: He's identifying the bags as what he got
24 out of the car?

25 MS. MONTS: Yes, Your Honor.

1 THE COURT: And what he did with it?

2 MS. MONTS: Yes, Your Honor, and that he has marked
3 on these items.

4 THE COURT: Well, Mr. Culbertson, tell me how you --
5 if we've got missing chains, how are the drugs ever going
6 to be shown to a jury until everybody's testified? In
7 other words, if the chemist comes, then you've got a chain
8 of custody problem, too.

9 MR. CULBERTSON: They're charged with the
10 responsibility of maintaining the chain. What I've
11 normally seen happen is folks come in and establish the
12 chain and then the drugs were moved into evidence.

13 THE COURT: Well, the drugs aren't being moved into
14 evidence now.

15 MR. CULBERTSON: I don't know what's in that bag.
16 All I know is the bags have been marked for
17 identification. I don't know that anybody can identify --
18 I don't know what these individual bags are, these five
19 bags here on the counter are. Or nor do I know where the
20 bag they came out of came from because they don't have a
21 chain on the bag they came out of.

22 THE COURT: As I understand the testimony, Solicitor,
23 the offer of this witness is that these are bags that he
24 carried to somewhere and he identified them as coming out
25 of the car, is that --

1 MS. MONTIS: Yes, Your Honor.

2 THE COURT: That's what his testimony now is going to
3 be?

4 MR. CULBERTSON: And my understanding, Your Honor, I
5 hate to interrupt, is that this officer said he was
6 presented a brown paper bag -- his testimony, as I recall
7 it, was this bag right here, that he didn't know whose
8 signature or name or anything appeared on this brown paper
9 bag. After he said that, these other five smaller
10 cellophane bags were removed from this larger brown paper
11 bag. So my objection goes to this brown paper bag, there
12 being no chain established yet on this brown paper bag
13 that, apparently, contained those smaller bags. And then,
14 ultimately, I'm going to get to these bags because I don't
15 know that anybody has established the chain on those bags,
16 the five cellophane bags.

17 THE COURT: All right, Solicitor, you got the chain?

18 MS. MONTIS: Yes, Your Honor. We're trying to go in
19 chronological order rather than reverse chronological
20 order.

21 THE COURT: Okay.

22 MR. CULBERTSON: And that's fine, but he's already
23 testified he didn't know anything about the signatures and
24 the markings on that brown paper bag, so I don't know how
25 they're going to get past that brown paper bag to get to

1 those five bags.

2 THE COURT: Well, we'll see what they do on that.
3 And if we have to call him back up for identification,
4 we'll do that. But this might be a good time -- since the
5 video needs to be -- I don't know how much more you've got
6 of this witness, but, obviously, we're not going to be
7 able to conclude him today because of the video being
8 offered. And y'all need to go over that together to see
9 if there's any redactions on it. This might be a good
10 time to send the jury home, give y'all an opportunity now
11 to look over the video and then we'll start back tomorrow.

12 I'll sustain the objection that's made. He can
13 certainly look at the evidence outside of the presence of
14 the jury and he can identify what's in that bag. And then
15 he can go back in that bag, I'll allow him to do that, but
16 not to show it before the jury until such time as the
17 chain has been established for it.

18 MS. MONTES: And, Your Honor, so he would just hold
19 them outside the view --

20 THE COURT: He would look in the bag and say I know
21 what's in here and these are the bags. And then if we
22 have to call him back, you can call him back, I'll allow
23 you to do that after the chain has been established based
24 upon his objection.

25 MS. MONTES: Yes, Your Honor.

1 THE COURT: Rather than -- this might be the best
2 time to just go on and tell the jury that we've got some
3 matters to take care of and then you can start there
4 tomorrow with him identifying them outside their presence.
5 You can leave them right there. I'm about to dismiss the
6 jury and then we'll get into the video.

7 Let's bring the jury in.

8 MS. MONTS: Your Honor, I apologize, am I going to
9 ask anymore questions?

10 THE COURT: No, not right now.

11 (WHEREUPON, the jury came into open court at
12 approximately 4:24 p.m.)

13 THE COURT: Ladies and gentlemen, we got a late start
14 today and we still have some legal matters to cover. I
15 could leave you back in your jury room and we could
16 resolve them in 45 minutes and then we could do a little
17 more testimony today but I don't want to keep you waiting
18 while we go over this. I told you in advance there will
19 be some legal matters I have to take care of out of your
20 presence. I'm going to let you go early today. We're
21 going to start back at 9:00 in the morning. We're going
22 to work on and get some of these other matters resolved.
23 If you will be back in your jury room tomorrow at 9:00,
24 we'll be ready to start with the testimony at that time.

25 Let me remind you again not to discuss the case with

1 anyone. I'm confident you'll have curious inquiry from
2 family and friends wanting to know what you heard and how
3 it's going and what's it all about, tell me what you
4 understood so far, let me give you my ideas about that.
5 That would be improper. Let me remind you, you will have
6 opportunities to share your experiences with your loved
7 ones and your friends when this case is done with,
8 probably tomorrow sometime, but if you can refrain from
9 that -- or you need to refrain from that because of the
10 commitment you've made. You've promised the State of
11 South Carolina and you've promised this Defendant that
12 you're going to be fair and impartial and you're going to
13 make a decision on this case based on what happens in this
14 courtroom, the testimony you hear, the evidence that's
15 presented, the law that I give you and that alone. So
16 with that in mind, let me remind you once more to not
17 discuss the case.

18 I don't want to tempt you, but I need to emphasize
19 this, too. With the curious nature that many of us have,
20 we want to do our own independent research and we want to
21 go back and check something on the internet or look up
22 some words that we heard, that would be improper, too.
23 Everything that needs to be presented to you for you to
24 make a good sound decision will be presented by these
25 attorneys and you don't need any other source of

1 information.

2 I wouldn't suspect that while you're gone tonight
3 that anyone would want to contact you or give you
4 information or ask you questions about this case,
5 obviously, that would be improper. If anyone were to do
6 that, please explain to that person you can't talk about
7 the case and you're a juror. If they were to persist,
8 please, excuse yourself as soon as you can. If you get
9 the name of that individual, please report it to me and
10 I'll take care of that. I'm confident nothing like that
11 will happen, but I want you to be alerted to the
12 importance of your staying overly fair about this case.

13 When we come back tomorrow, I'm going to appoint
14 Ms. Sweeney as the foreman of the jury, foreperson. She
15 will occupy that seat and the alternate, of course, will
16 always occupy that seat. The alternate is every bit as
17 part of the trial as anyone else. We have an alternate in
18 case something were to happen to one of the first twelve
19 who were selected. There might be an emergency in your
20 home, there might an illness. I certainly hope not, but
21 the alternate is here to fill in in case that were to
22 happen so we wouldn't have to start the trial all over
23 again. So she'll occupy that seat. The foreperson will
24 occupy the seat on the front row, the one closest to the
25 witness stand.

1 What the foreperson does is -- sometimes there might
2 be need for communication with the Court. While you're
3 back in your jury room, if some of you have a question to
4 ask, an inquiry to make of the bailiffs or the Court or
5 anyone else, the foreperson would be the one that would
6 write out that need that you have as jurors, sign her name
7 to it and give it to the bailiffs. They'll get it to the
8 appropriate person and we try to take care of that. Sort
9 of the liaison with the Court. Sometimes, evidence might
10 be presented in the course of the trial. The attorneys
11 might want to hand it to the jury, they'll give it to the
12 foreperson, she can pass it around to everyone else.
13 Ultimately, the foreperson is going to be the one who will
14 facilitate the discussions. When this case is over and
15 done and you've heard all the evidence and I've given you
16 my legal instruction, then the foreperson will make sure
17 everyone has their say and gets input from everyone as you
18 deliberate to decide what the facts are in the case. So
19 the foreperson will be the presiding officer, so to speak,
20 to make sure that everything functions smoothly. She'll
21 occupy that seat on the front row, the one closest to the
22 witness stand, the alternate, the seat that she now has.
23 The rest of you, as you come and go, you can sit in the
24 same seats, you may want to sit in different seats, but
25 that's perfectly all right.

1 Have a good evening, ladies and gentlemen, and I'll
2 see you back at 9:00 in the morning. You are dismissed at
3 this time.

4 (WHEREUPON, the jury left open court at
5 approximately 4:32 p.m.)

6 THE COURT: All right. So we have clarity here, the
7 exhibits in the bag will not be shown to the jury while
8 they're marked for ID only. And will be identified and
9 then when the chain is in, then they're ready to be
10 offered into evidence, they can be admitted. I hope
11 everybody understands that.

12 Now, we can give an opportunity -- y'all can
13 certainly use the courtroom here to look over the
14 videotape. If you want to do it in your office, so that
15 can be seen. How long is the videotape?

16 MS. MONTIS: Fifty minutes, Your Honor.

17 THE COURT: Fifty?

18 MS. MONTIS: Yes, sir.

19 Mr. Culbertson, do you have capability on your
20 computer to look at it?

21 THE COURT: Why don't we just let Mr. Culbertson,
22 with his client -- if you don't mind, I don't believe we
23 need anyone else.

24 You can return to your seat, Officer Owens.

25 He doesn't need to be here, I don't suppose, either.

1 We're off the record. We're just using this room.

2 Is the bondsman here?

3 MR. CULBERTSON: The bondsman is not present in the
4 courtroom, although I've spoken with him earlier today.

5 THE COURT: If the bondsman is here and prepared to
6 state on the record that he is responsible for his
7 presence here and is going to continue on the bond -- as
8 you well know, the bond is now over. There is no bond.
9 So I'll be glad to listen to him if he wants to,
10 otherwise, we'll have to take him into custody.

11 The Court will be at ease now and y'all can look over
12 the video and decide which redactions you need.

13 MS. MONTS: Your Honor, I just --

14 Trooper Owens, listen to the Judge's answer, please.

15 May Trooper Owens discuss the five packages inside
16 the bag as long as he doesn't show them?

17 THE COURT: We're just not showing them now. If you
18 need to call him back, you can to say those are the
19 packages.

20 (WHEREUPON, the proceedings were concluded for
21 the day to be reconvened on June 17, 2009.)

22

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24

25

1 Wednesday, June 17, 2009

2 THE COURT: Have you had a chance to review the video
3 with any particular objections on the video for time and
4 place, I'll be glad to hear those.

5 MS. MONTS: Your Honor, I'm fine with putting the
6 whole videotape in.

7 MR.. CULBERTSON: Your Honor, yesterday, there was a
8 request by the State to delete the audio portion of the
9 video. I've consented to them deleting that audio portion
10 of the video.

11 THE COURT: I thought there was no audio on the
12 video.

13 MR. CULBERTSON: Well, there's sporadic audio,
14 there's no -- apparently, one of the microphones was not
15 working, so there's some sporadic conversation that's
16 actually on the video. My concern is that only portions
17 of that conversation get heard, so I just as soon --

18 THE COURT: So it's going to be muted to everything,
19 whatever noises might be, everything is going to be
20 silence, is that right now?

21 MS. MONTS: Well, Your Honor, I never made a motion
22 for the audio to be kept out. Yesterday, what I was
23 talking about was the discussion about meeting with the
24 DEA, you know, that part being kept out. But after
25 listening to it yesterday, I decided I didn't need that --

1 what it is, there's a microphone on the officer that -- in
2 this case, there wasn't one. The only microphone is
3 inside the car, so if you hear anything inside the car or
4 anyone standing near it with the door open, so there are
5 recordings there, including the Defendant being
6 Mirandized. So you do hear parts of that. Mr. Culbertson
7 is right, you know, as in most of my tapes, unfortunately,
8 some things go in and out. But there is sound and there
9 is anything that is heard from inside the car recorded,
10 just what's taking place outside the car is not recorded.

11 THE COURT: Did y'all talk yesterday about whether
12 that was coming in or not? Obviously, the State hasn't
13 made a motion.

14 MR. CULBERTSON: We did not have a chance to talk
15 yesterday about whether --

16 THE COURT: Y'all want to talk a minute and see what
17 you want to leave in on sound and what you want to leave
18 off?

19 (WHEREUPON, an off-the-record discussion was had
20 between the attorneys.)

21 (WHEREUPON, State's Exhibit No. 3 was marked for
22 identification only.)

23 MR. CULBERTSON: Apparently, their position now is
24 just go ahead and put the whole thing in.

25 THE COURT: Your position is?

1 MR. CULBERTSON: I don't know that I have any
2 objection -- I don't know that there's any sort of legal
3 objection for them not being able to put it in.

4 THE COURT: All right. We'll take care of that at
5 the time. Again, so that everybody knows the items that
6 are marked for identification purposes only can be
7 examined by the witness, but not shown to the jury until
8 they are into evidence. Once they're admitted into
9 evidence, then they can be shown to the jury.

10 Anything else we need to take care of?

11 MS. MONTS: No, Your Honor.

12 MR. CULBERTSON: No, sir.

13 THE COURT: All right. Let's have our jury come in.

14 MS. MONTS: Your Honor, does the witness need to go
15 to the stand or wait?

16 THE COURT: I'll just call you around and I'll tell
17 you then you're still under oath. We'll let the jury get
18 in first.

19 (WHEREUPON, the jury came into open court at
20 approximately 9:20 a.m.)

21 THE COURT: Madam Forelady, ladies and gentlemen of
22 the jury, we're now ready to proceed with the trial of the
23 case.

24 Officer Owens, you may resume the witness seat. I
25 will remind you you're still under oath.

1 All right. Ms. Monts, you may continue your
2 examination of the witness.

3 BY MS. MONTS:

4 Q Trooper Owens, yesterday we were discussing what's
5 been marked for identification State's Exhibit 2. Can
6 you, please, describe what these items are and what your
7 relationship is with them, what do you know about them?

8 A This brown paper bag contains another brown paper bag
9 that has my initials on it, the date, 7/29/05. And it has
10 a lab case number that's assigned by the Greenville County
11 Lab. That bag contained -- was the bag that I had placed
12 the evidence into on the 29th to turn into the evidence
13 lab for analysis. And then there's other, several other
14 packages containing the packaging materials and the --
15 what appears to be the narcotics that was contained in
16 those packages. Those packages containing an off-white
17 substance, tan-like in color and also the packaging
18 material that packaged those materials when I discovered
19 them. Which is a gray duct tape material, which is gray
20 duct taped, and then several other plastic cellophane like
21 packaging material. Without taking them out of there, I
22 can't tell you exactly how many packages are there in.

23 Q Holding it down, please, tell us.

24 A Okay. There's one package that has a gray duct tape
25 inside that also has a brown tar or grease-type substance

1 in it, which is consistently used in packaging of
2 narcotics for reasons of disguising the odor, in one of
3 the packages. There's another package with gray duct tape
4 and a white powdered substance as well. There's another
5 package, this being the third package, with a gray duct
6 tape packaging material. Also, a white powdered
7 substance. Then also, another powdered substance that
8 even looks like it may be rock-like in form. And then
9 there's another fourth package with another gray duct tape
10 package that also has a form of grease or black type of
11 material inside of it. And then it has what appears to be
12 three additional bags of white powdered substance.

13 There's the brown paper bag with my initials on it
14 with the evidence tape. It also has another set of
15 initials on it. Actually, two other sets of initials on
16 it, a date, and another date, case number and my initials.
17 Then there's a fifth package with a white -- with three
18 separate bags of white powdered substance and a gray duct
19 tape packaging material as well that also has some black
20 tar-like or grease-like substance combined in the
21 packaging material as well.

22 Q And are these the substances that you took custody of
23 on July 27th, 2005 from the Defendant's truck?

24 A Yes, ma'am.

25 Q Where did you place those?

1 A Securely in evidence.

2 Q And we've got several evidence locker rooms, so which
3 one are you talking about right now?

4 A Initially on the 27th, we placed them in our
5 evidence, which is just our office in a locked box. Then
6 on the 29th, they're transported from our office by me to
7 the crime lab or the evidence facility at the Greenville
8 Sheriff's Office. At a time when they're opened, they
9 take them into possession at that time in a locked
10 facility. Then later on, they're taken from that facility
11 to an unknown location of my knowing where they test these
12 substances for various different narcotics tests. And
13 then they're brought back to that location, put back into
14 the evidence at the Greenville lab. And then later picked
15 up by one of our centralized evidence facility technicians
16 and then transported to Columbia and then stored in a
17 locked facility in Columbia.

18 Q And going back to the car stop, did you give the
19 Defendant's warnings for his traffic violations?

20 A Yes, ma'am, I did. Yes, ma'am.

21 Q Was that on one warning piece of paper or two?

22 A It was one warning citation and it had -- if I'm not
23 mistaken, it had two blocks checked or marked, one for the
24 impeding traffic and one for the defective windshield.

25 Q And when -- once Trooper Gilbert arrived at the scene

1 with his canine, were you with -- standing with the
2 Defendant?

3 A Yes, I was.

4 Q And were you speaking with him?

5 A Yes, ma'am, I was.

6 Q And what, if anything, did he say to you when the
7 canine was at the car?

8 A During -- when Trooper Gilbert went to execute the
9 sniffer, went to remove the dog from the -- from his
10 parole vehicle, the Defendant said to me, Well, the dog
11 can search the interior of the car, but not the trunk.

12 Q Did he say anything about the exterior?

13 A I believe he said the exterior and the passenger
14 area.

15 Q And did you have a response?

16 A I don't know that I responded to that.

17 Q And did you provide a video from your car to our
18 office.

19 A Yes, ma'am, I did.

20 Q Was that a copy of the video?

21 A Yes, ma'am, it was.

22 Q What is the video recording tape or device in your
23 vehicle?

24 A It's a VHS.

25 Q I'm going to hand you what's been marked for

1 identification State's Exhibit 3, can you please tell the
2 jury what this is?

3 A It appears to be a DVD with a -- I assume that's a
4 case number on top of it, the video that was viewed
5 yesterday, which is also a copy of the video that was
6 taken from my in-car camera.

7 MS. MONTS: Your Honor, we move State's Exhibit 3
8 into evidence.

9 MR. CULBERTSON: Your Honor, I object to that at this
10 time.

11 THE COURT: What's your obligation?

12 MR. CULBERTSON: Your Honor, the first time I saw
13 that was yesterday afternoon after we finished trial.
14 I've previously filed discovery request. It was never
15 provided to me until yesterday afternoon.

16 THE COURT: All right.

17 Ladies and gentlemen, I need you to go out just for a
18 moment and we'll take care of this legal matter. Don't
19 discuss the case at this time.

20 (WHEREUPON, the jury left open court at
21 approximately 9:24 a.m.)

22 THE COURT: All right. Mr. Culbertson, any reason we
23 couldn't bring that up before the jury came in? We were
24 just talking about the tape before the jury came in so
25 that we could resolve this earlier.

1 MR. CULBERTSON: No real excuse, Your Honor.

2 THE COURT: I'll be glad to hear from you.

3 MR. CULBERTSON: Well, just that, I mean, it was
4 never provided to me before.

5 THE COURT: All right.

6 MR. CULBERTSON: I think they have an affirmative
7 obligation to comply with discovery request. In the
8 middle of trial is not a time to respond to my discovery
9 request.

10 THE COURT: All right.

11 Solicitor, be glad to hear from you about that.

12 MS. MONTS: Your Honor, the Defendant was provided
13 discovery letter with enclosed written material on
14 November 28th of 2005. In that letter, it does say
15 contact our office regarding a mutually convenient time
16 for you to view evidence which may be contained in
17 property and evidence. We will allow you to inspect
18 evidence that may be utilized at trial.

19 Back then, in '05, what we did was either the defense
20 attorney provided us with a blank tape and we made them a
21 copy or they could come to our office and view it.
22 Neither of those occurred in this case. Currently, what
23 we do is put tapes on the computer. This one, in fact,
24 was put on a computer sometime in May of this year when we
25 updated old cases to get those also on the computer. And

1 Mr. Culbertson has had access from his office on a
2 computer to do this since sometime in May, Your Honor.

3 Again, the Defendant and the defense attorney viewed
4 the tape yesterday, but he's had four years he could have
5 contacted us to come to view it in our office or provided
6 us with a tape. As of last month, he could have just sat
7 in his office and looked on the computer and viewed it.
8 But he has had an opportunity now, and his client, to view
9 the tape.

10 THE COURT: Did you receive the letter,
11 Mr. Culbertson?

12 MR. CULBERTSON: If I don't know it exist, I don't
13 know to go look for it. If they don't tell me there's a
14 tape, I don't know there's tape worth going to look at.
15 They just told me they complied with their discovery and I
16 could come and view the stuff.

17 THE COURT: Did you get the letter?

18 MR. CULBERTSON: Yes, sir.

19 THE COURT: Okay.

20 MR. CULBERTSON: But if they don't tell me what they
21 have, I don't know to go to get a copy of the tape or make
22 a copy of whatever they've got or go view it. If I don't
23 know they've got it -- it doesn't do me any good, if I
24 don't know they've got it, to go do something. If they
25 don't tell me we've got a tape that you might want to look

1 at, then the obligation's mine if they inform me they have
2 a tape. But if I don't know they there's a tape of the
3 event, I don't know to go look at it.

4 THE COURT: Yes, ma'am.

5 MS. MONTS: Your Honor, page three of the incident
6 report, which Mr. Culbertson utilized yesterday in the
7 hearing, list the evidence that we have. It says five
8 packages of white powdered substance, green luggage bag
9 with clothing, numerous air fresheners and the in-car
10 video tape from Owens patrol car.

11 MR. CULBERTSON: And parenthetically it says no
12 audio. Now, they're telling me it's an audio. They don't
13 get to have it both ways. They can't say there's a tape
14 or not a tape or audio, not an audio.

15 THE COURT: All right. What on the video do you
16 object to and find that's prejudice? Is it just the
17 principle that you say you didn't have it or is it the
18 fact that there's damaging evidence on the video?

19 MR. CULBERTSON: Well, that's a separate issue. But
20 my objection right now is I was not provided a copy or the
21 opportunity to view that until we were in the middle of
22 trial, so a Rule 5 violation complaint right now.

23 THE COURT: When did you last talk to the Solicitor
24 before yesterday about this case?

25 MR. CULBERTSON: One day last week, Your Honor. I

1 don't remember exactly, Thursday to Friday. No, I'm
2 sorry, it had to have been Tuesday of last week. I was
3 out town from Wednesday on, so it had to have been Tuesday
4 of last week.

5 THE COURT: Did you go the solicitor's office or did
6 you talk over the phone?

7 MR. CULBERTSON: Talked over the phone. And, Your
8 Honor, we may -- Ms. Monts and I may have seen each other
9 here at the courthouse on other topics and there may have
10 been some conversation about this case and trial but
11 nothing about any kind of tape or anything like that. I
12 mean, I'm not trying to put words in her mouth or accuse
13 her of anything, but we did not discuss viewing evidence
14 when we last spoke in person last week.

15 THE COURT: Yes, ma'am?

16 MS. MONTS: Again, Your Honor, I was just going to
17 say that the defense Bar was sent out letters about how to
18 go online and view our tapes online in their own offices,
19 which would save everybody time and effort. And
20 Mr. Culbertson had the opportunity to do that.

21 THE COURT: All right. Mr. Culbertson, let's go to
22 the next issue as to the prejudicial effect in the tape.
23 What items in the tape do you object to if we overcome the
24 Rule 5 problems?

25 MR. CULBERTSON: Your Honor, there is a -- on the --

1 well, here's my objection to the tape, I don't think I've
2 got an objection to the tape itself, the visual aspect, I
3 mean, I don't think I have an objection to make about
4 that. But there is an audio portion of the tape in which
5 a conversation takes place between the officer and my
6 client. Portions of that conversation fade in and out.
7 There are portions of that conversation which are very;
8 for lack of a better word, hear wrong, you can't
9 understand what's being said, what's being talked about.
10 I don't know that there was any prior warning, whether it
11 be the Miranda warning or any other sort of warning, that
12 the conversation was being recorded and what his rights
13 were, prior to that conversation being recorded. So I
14 have an objection about that.

15 There's also a conversation concerning, as I
16 understand it, a meeting with DEA officers. I think that
17 in and of itself is prejudicial to my client. I'm asking
18 for that entire portion of the conversation be struck.
19 And my thing is if you're going to strike a portion of it,
20 you've got to strike the whole thing.

21 THE COURT: When you say strike a portion of it,
22 you're talking about the audio or a portion --

23 MR. CULBERTSON: If a portion of the audio is struck,
24 then the --

25 THE COURT: Then the whole tape has to be struck?

1 MR. CULBERTSON: Then the whole audio portion has to
2 be struck.

3 THE COURT: All right.

4 Solicitor, what about the audio portion?

5 MS. MONTS: Your Honor, we would prefer that it's in,
6 but we, certainly, understand that that would be a way to
7 resolve this is to keep the audio out.

8 MR. CULBERTSON: Do I take that to be a consent by
9 the solicitor's office to redact the entire audio portion?

10 THE COURT: I think you understood what she said,
11 Mr. Culbertson.

12 MR. CULBERTSON: Yes, sir.

13 THE COURT: Mr. Culbertson, as I understand Rule 5,
14 it says, you know, upon request the State will permit you
15 to inspect the matters. I think based upon what the
16 Solicitor has said and the letter received, I think,
17 certainly, the spirit of that rule has been complied with.
18 You had an opportunity to review the tape yesterday
19 afternoon as much as you wanted to. If you need more time
20 to review the tape today, I'll give you that time, but I'm
21 going to allow the tape in. We'll redact all the --
22 rather mute the sound, none of the sound will be played.
23 I think that there's pieces of sound and then others not.
24 That can certainly confuse the jury with hearing portions
25 of dialogue and not hearing other portions.

1 But I'll certainly give you every opportunity, even
2 now, and we'll let the jury stay out if you feel like you
3 need to go over it again. I think you and your client
4 both had an opportunity to review yesterday. If you feel
5 like you need to review it more, I'll certainly allow that
6 to help in your cross-examination or whatever you may
7 need, but I believe the spirit of the rule has been
8 complied with and I'll overrule your objection as to the
9 tape.

10 MR. CULBERTSON: Thank you, sir. I don't know need
11 any more time right now, Your Honor.

12 THE COURT: All right. So we won't play any of the
13 audio. The tape will be admissible into evidence over
14 objection.

15 All right. Let's have our jury come back, please.

16 (WHEREUPON, the jury came into open court at
17 approximately 9:43 a.m.)

18 THE COURT: Thank you, very much, ladies and
19 gentlemen.

20 Exhibit 3, over objection, is admitted into evidence.

21 You may proceed, Solicitor.

22 MS. MONTIS: Your Honor, we ask to publish the video
23 at this time.

24 THE COURT: You may do so.
25

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

3 (WHEREUPON, State's Exhibit No. 3, the video
4 was played.)

5 MS. MONTS: Your Honor, can we fast-forward to where
6 we see something other than this on the screen?

7 MR. CULBERTSON: Absolutely not.

8 THE COURT: All right. There's an objection. We'll
9 play it in its entirety.

10 MR. CULBERTSON: Your Honor, can I be heard on that
11 issue or wait until the end of the tape?

12 THE COURT: We'll wait. I'll grant your motion.

13 MR. CULBERTSON: Your Honor, I object to them
14 manipulating the tape while it's playing. I made a
15 notation -- I'm making an objection, I ask that the tape
16 be stopped at this point.

17 THE COURT: All right. Stop the tape.

18 (WHEREUPON, the tape was stopped.)

19 THE COURT: All right. What's your objection?

20 MR. CULBERTSON: Your Honor, I made a notation when
21 this first issue got raised about speeding the tape along,
22 there was 12 -- the marker down here indicated 12.00. I
23 believe about 45 seconds has passed now and it now reads
24 23.01.

25 My objection after inquiring the solicitor's office

1 if they had speeded the tape up was that they had speeded
2 the tape up.

3 THE COURT: All right. Your objection is noted.

4 Go back 45 seconds and play it --

5 MR. CULBERTSON: No --

6 THE COURT: You want it played in its entirety?

7 MR. CULBERTSON: I want to go back to the 12.00
8 point, which is some -- by the indication now, some 13
9 minutes ago. I mean, if they're speeding the tape up, I
10 have an objection. The solicitor -- I'd like to take this
11 up outside the presence of the jury.

12 THE COURT: All right. Ladies and gentlemen, if
13 you'll retire to your jury room, we'll take care of this
14 issue and call you back as soon as we can. Please don't
15 discuss the case.

16 (WHEREUPON, the jury left open court at
17 approximately 9:50 a.m.)

18 THE COURT: Yes, sir.

19 MR. CULBERTSON: Your Honor, there have been numerous
20 conversations about playing this tape. As I understand
21 it, you instructed everyone in this courtroom to play this
22 type in its entirety, but for the audio portion. There
23 was a point in time where the solicitor's office requested
24 to speed the tape up. I objected to that and, as I
25 understood it, you sustained by objection about speeding

1 the tape up. Then shortly thereafter, I noticed the tape
2 was, in fact, speeded up.

3 THE COURT: What --

4 MR. CULBERTSON: My objection right now is I make a
5 motion for prosecutorial misconduct at this point in time
6 because of their manipulating the evidence that's now in
7 this Court's jurisdiction.

8 THE COURT: All right. So the tape's been speeded
9 up, is that correct?

10 MS. MONTS: Yes, Your Honor. When I --

11 MR. CULBERTSON: And -- I apologize.

12 MS. MONTS: When there was minutes of delay with
13 nothing but looking at the car, I asked, Your Honor, I
14 said, if the defense does not object, we can speed it up
15 to where something happens besides just looking at the
16 same picture. I thought the defense said no objection and
17 I thought you said go ahead. So if that's not what
18 happened --

19 THE COURT: I think the way you worded it -- I can't
20 remember how way you worded it, Mr. Culbertson.

21 MR. CULBERTSON: I said absolutely not.

22 THE COURT: And I think the interpretation was
23 absolutely not, I have no objection, I presume?

24 MS. MONTS: Yes, Your Honor.

25 THE COURT: But you want -- what's the purpose of the

1 jury seeing --

2 MR. CULBERTSON: Before we get to that issue, my
3 issue now is prosecutorial misconduct --

4 THE COURT: I deny your motion. I deny your motion
5 because I believe -- I had some -- the way you said it,
6 absolutely not, and they said -- I wasn't quite sure of
7 whether you meant absolutely not, I have no objection or
8 absolutely not, I do not want them to do it.

9 MR. CULBERTSON: I want the whole tape played.

10 THE COURT: All right. What's the purpose for the
11 jury? In other words --

12 MR. CULBERTSON: Because I'm, ultimately, going to
13 get back to my motion for suppression. And I think when,
14 Your Honor, actually sees how long this gentleman sits on
15 the side of the road with nothing being done, no other
16 indication of criminal activity taking place, it may very
17 well change this Court's mind on the appropriateness of
18 this stop and the legality --

19 THE COURT: And the tape is 50 minutes or so?

20 MR. CULBERTSON: Yes, sir, I believe it is.

21 THE COURT: Okay.

22 MR. CULBERTSON: And I think that speaks directly to
23 my motion made yesterday to suppress this evidence.
24 Because I think it speaks specifically to the illegal
25 activity by the police when they stopped this car. I

1 agree they had a right to stop the car, but if it takes
2 them an hour to decide there's some other criminal
3 activity afoot that justifies further search of the car,
4 that goes to the point of my motion.

5 THE COURT: All right, sir.

6 MR. CULBERTSON: And I want this Court to have an
7 opportunity to review it. I want this jury to see just
8 how long it was.

9 THE COURT: What would be the purpose of the jury
10 seeing how long it was? In other words, for your motion
11 to suppress that I have decided and I'll certainly revisit
12 it if that's what you want, but how does the jury benefit
13 from seeing the entire matter without it being
14 fast-forwarded? How does that help the jury factually to
15 determine this matter?

16 MR. CULBERTSON: I don't know, but I don't think I
17 need to disclose what my trial strategy is at this point
18 either.

19 THE COURT: Well, if you can -- if you can convince
20 me that the jury needs to see it that way, I'll be glad to
21 play it that way, but I don't want your client to be
22 jeopardized by a jury watching something that they feel
23 like they don't need to see, a still car there for -- if
24 you feel that they need to see that for the presentation
25 of your case to the juror, I'll allow it. But I'll be

1 glad over my lunch hour to watch it at regular pace,
2 minute by minute, second by second and I'll certainly
3 allow you to be heard again on your motion to suppress.

4 MR. CULBERTSON: Yes, sir. It's not evidence. I'm
5 not going to be trying to control the other side's
6 evidence in this matter. I'm just asking if they have
7 evidence they want to present, that all the evidence is
8 presented. If it takes an hour, it takes a day, it takes
9 a week, then do that, but don't nitpick out of it and pick
10 what parts you want.

11 THE COURT: So your objection is that it should not
12 be fast-forwarded at all and the jury needs to see it all
13 for you to be able to adequately present your case to the
14 jury?

15 MR. CULBERTSON: If they brought it in here and
16 wanted to show it to everybody, then let's show everybody.

17 THE COURT: Well, again, I'm not asking you that.
18 I'm asking you do you believe that you have to -- the jury
19 needs to see it in regular action for you to be able to
20 present your case to the jury?

21 MR. CULBERTSON: I think the jury needs to be aware
22 of just how long this gentleman, Mr. Hardy, sat there on
23 the side of the road.

24 THE COURT: You said it was at 12?

25 MR. CULBERTSON: Well, actually, probably started

1 before that, but when I first made a notation about the
2 time frame, it was about the 12.00 mark.

3 THE COURT: Okay.

4 MR. CULBERTSON: Which, I assume, is about the 12
5 minute mark. I don't know how that timer actually recites
6 time.

7 THE COURT: Can you get it back to that?

8 MS. MONTS: 12.01, is that correct?

9 MR. CULBERTSON: I think that's right. I mean, my
10 note -- yeah, about that time, 12.00.

11 MS. MONTS: That's 12.01.

12 THE COURT: All right. All right, anything else now
13 before the jury comes back on the tape? We're going to
14 play the tape straight through regular speed. I'm going
15 to watch it now and if I need to watch it again, I'll do
16 that, too. Have been watching it.

17 All right. Have the jury come back.

18 MR. CULBERTSON: Judge --

19 THE COURT: Wait a minute. Just a second.

20 MR. CULBERTSON: Just to be clear about this, Your
21 Honor, my motion for suppression started yesterday, it's
22 an on-going suppression motion. It tracks throughout the
23 entire trial. And I think this evidence that we're
24 viewing now may be somewhat lengthy and I don't think that
25 I had a chance to start watching it yesterday, but I draw

1 your attention to the amount of time it takes from the
2 time of the initial stop to the time anything is
3 discovered in Mr. Hardy's car. And that goes directly to
4 my issue I raised yesterday.

5 THE COURT: Well, I did not watch it yesterday while
6 you were watching it with your client and the solicitor,
7 but I have watched it today and I'll continue to watch it
8 and watch it again if I need to.

9 MR. CULBERTSON: All right. Thank you, sir.

10 THE COURT: All right. Let's have our jury come
11 back.

12 (WHEREUPON, the jury came into open court at
13 approximately 10:05 a.m.)

14 THE COURT: All right. Thank you, very much, ladies
15 and gentlemen. We're now ready to proceed.

16 You may continue to play the video.

17 (WHEREUPON, State's Exhibit No. 3, the
18 video, was continued to be played.)

19 MS. MONTS: Your Honor, do I have permission to stop
20 and start it?

21 THE COURT: We'll do that to get it operating.

22 Ladies and gentlemen, if you'll go back to your jury
23 room while we work with this technical matter. We'll call
24 you back in just a few minutes. Don't discuss the case.

25 You can take a short break and we'll see if the

1 technicians can get it going again.

2 (WHEREUPON, the jury left open court at
3 approximately 10:47 a.m.)

4 THE COURT: All right. We'll take about a ten-minute
5 break.

6 (WHEREUPON, a short break was taken.)

7 THE COURT: Yes, ma'am, Solicitor.

8 MS. MONTS: Your Honor, what we did, we tried to fix
9 the original disk and it turned out it had a scratch in it
10 and the software techs could not fix it, so we ran another
11 DVD. What I propose is we run that, the new DVD, from the
12 43 minute mark on. I believe the first video showed until
13 about 43, about 45 seconds and just introduce it as
14 another exhibit. The Trooper is prepared to say that is a
15 copy of the same video.

16 THE COURT: All right. Any objection?

17 MR. CULBERTSON: No, sir.

18 THE COURT: Okay.

19 Let's tell our jury --

20 Are we ready to show it now when the jury gets back?

21 MS. MONTS: Yes, sir, we'll put it back at 43.

22 THE COURT: Let's have the jury come in.

23 MS. MONTS: Your Honor, should I introduce this in
24 front of the jury as the second DVD?

25 THE COURT: You're going to introduce it as an

1 exhibit, also?

2 MS. MONTS: Yes, sir.

3 THE COURT: The other's one already in evidence?

4 MS. MONTS: Yes, Your Honor.

5 THE COURT: I'll explain to them it was scratched and
6 redone. And that one can be Exhibit 4.

7 And, I guess, the same objection, Mr. Culbertson +-

8 MR. CULBERTSON: Yes, sir.

9 THE COURT: -- as you had before, so we'll just mark
10 that as Exhibit 4. And if they need to see it during the
11 deliberations, we'll be sure to use 4 to show instead of
12 3.

13 MS. MONTS: Yes, Your Honor.

14 (WHEREUPON, State's Exhibit No. 4 was marked for
15 identification and received into evidence.)

16 (WHEREUPON, the jury came into open court at
17 approximately 12:10 p.m.)

18 THE COURT: Thank you, ladies and gentlemen. I
19 understand that there was a scratch on that particular
20 DVD. It's been corrected now and we're ready to proceed
21 in the same place that we stopped earlier.

22 You can proceed with publishing it to the jury.

23 (WHEREUPON, the State's Exhibit No. 4, new DVD,
24 was continued to be played.)

25 THE COURT: Continue your examination of the witness.

1 BY MS. MONTS:

2 Q Trooper, on the -- during the search when you and
3 Trooper Gilbert were looking in the trunk, if you recall,
4 do you recall at what point you observed what you believed
5 to be the narcotics?

6 A On the video, it was around 25 minutes.

7 Q And what did you do once you found what you believed
8 to be the narcotics?

9 A I signaled to my partner -- or one of my partners
10 that's standing with me, I give a silent signal for him to
11 go ahead and place the Defendant in handcuffs. And that
12 signal, generally, with my unit, is scratching the badge,
13 indiscreetly scratching the badge.

14 Q And --

15 A And on this video, you see me do it several times
16 because the officer that was standing with the Defendant,
17 actually, had his back to me and he wasn't paying me -- he
18 was paying the Defendant more attention than he was me.
19 And that's for obvious reasons, officer safety issues.

20 Q And approximately when after the stop did you call
21 for Trooper Gilbert to arrive?

22 A Approximately three minutes into the traffic stop.

23 Q And how long, if you recall, did it take for him to
24 get there to assist you?

25 A It was around -- well, you see him on the video, I

1 think it's around 23 minutes, but it could have been just
2 before that.

3 Q And we talked about there being air fresheners in the
4 car, did you collect those?

5 A Actually, you see on the video Trooper Gilbert
6 collecting them and putting them in the bag.

7 MS. MONTS: Thank you. I have no further questions.

8 THE COURT: You may cross-examine the witness.

9 CROSS-EXAMINATION

10 BY MR. CULBERTSON:

11 Q Officer, as I recall your testimony, you stopped the
12 car that my client was driving because he was going too
13 slow?

14 A He was driving in the middle lane less than the
15 posted speed limit, yes.

16 Q So he was driving too slow?

17 A Well, too slow and impeding traffic in the middle
18 lane, yes, sir.

19 Q And because you observed a cracked windshield on his
20 car?

21 A That's correct.

22 Q You would agree with me you can't really tell by this
23 video if the windshield is cracked or not?

24 A No, sir, the resolution is not that great.

25 Q You said -- I'm sorry, you okay?

1 A Uh-huh.

2 Q You said once you stopped him, you walked up to the
3 car -- and I saw clear on the video, but you said that
4 when you -- as I understood it, when you started talking
5 to him, you noticed that -- your suspicion, for lack of a
6 better word, was heightened because there were air
7 fresheners in the car; is that correct?

8 A That and numerous --

9 Q All right, we're going to get there.

10 A Yeah.

11 Q But would you agree the air freshener was one of the
12 triggering factors that caused you to be more suspicious?

13 A The air fresheners, yeah, numerous.

14 Q And it was a black male driving alone?

15 A That didn't really raise my suspicion, I mean, that's
16 --

17 Q Well, you testified to that and you made a note of it
18 in your report?

19 A No, I just noted in the report that it was one black
20 male driver in the vehicle.

21 Q Okay. That there was a bag, I'm assuming you mean by
22 that, like a suitcase or a luggage bag sitting in the
23 back seat?

24 A Probably a small overnight bag or something like
25 that?

1 Q We don't ever see you get that out of the car,
2 though, do we?

3 A No, sir.

4 Q And there's three, four, five other bags you get out
5 of the car, but we never see that bag that heightened your
6 suspicion come out of the car?

7 A No, sir.

8 Q He appeared nervous, his breathing was deep, he had
9 money in his pockets; is that correct?

10 A Yes, sir, 574 dollars and some odd change.

11 Q All right. Let's be clear how about that money in
12 his pocket. It's clear from this video, you saw his money
13 and you gave it back to him?

14 A Correct.

15 Q All right. So I'm curious as to what aspect of that
16 heightened your suspicion about criminal activity?

17 A When he stated that he didn't have a job and that he
18 was carrying a large sum of money in his pocket and he
19 wasn't working --

20 Q But, obviously, you didn't think it was suspicious
21 enough not to give it back to him?

22 A Well, sir, I hadn't gotten to the point where I had
23 determined that he was definitely involved in criminal
24 activity at that point.

25 Q All right, sir. Ultimately, you write him a ticket,

1 a warning ticket for driving too slow?

2 A Driving too slow and a defective windshield.

3 Q And a cracked windshield?

4 A Yes, sir.

5 Q So you wrote him two warning tickets?

6 A No, sir, they're both checked on the same warning
7 ticket.

8 Q Okay. I got you. You gave that to him, gave him his
9 money back, gave him his driver's license back, gave him
10 everything back, he was free to leave?

11 A At the point when I gave him his stuff back, it's
12 speculation as to whether he felt free to leave, but no, I
13 wasn't going to let him leave.

14 Q My question to you, Officer, was when you gave him
15 all that stuff back, he was free to leave?

16 A You'd have to ask him his speculation.

17 Q No, I'm asking you?

18 A I wasn't going to let him leave.

19 Q Why?

20 A Because it was my duty to the citizens of the State
21 of South Carolina and the citizens of the United States to
22 do my job. When I suspect a person's involved in criminal
23 activity, it's my job to follow out the investigation and
24 make sure they're not involved in criminal activity, sir.

25 Q What had he done illegal?

1 A Sir?

2 Q At that point in time, what had he done illegal?

3 A Well, he was hauling drugs in his car, sir.

4 Q No, sir, at the time you gave him everything back --

5 A Sir, he was involved in criminal activity. He had
6 drugs in his car.

7 Q Sir, the truth of the matter is you had no reason
8 after you gave him all that stuff back to continue to
9 detain him on the side of the road for some hour?

10 A Sir, it was 25 minutes when drugs were found in his
11 car --

12 Q So you detained him --

13 A I had --

14 Q -- on the side of the road --

15 A If you'd let me finish answering the question, sir.

16 THE COURT: Wait a minute.

17 MR. CULBERTSON: I apologize.

18 THE COURT: The court reporter can only get one
19 person at a time, so let him answer, then you ask
20 questions and neither one interrupt the other.

21 MR. CULBERTSON: Yes, sir, I apologize.

22 THE WITNESS: Through the complete business of the
23 traffic stop or during the traffic stop, through my
24 training and experience, there was numerous indicators
25 through the totality of the circumstances that led me to

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1 believe that this Defendant was involved in criminal
2 activity. It's through my training and experience and
3 training of other law enforcement officers that I train, I
4 felt this Defendant was involved in criminal activity.
5 Therefore, it prolonged me in detaining him to find out
6 that, in fact, if he truly was involved in criminal
7 activity. And within 25 minutes of the traffic stop, you
8 see drugs that are actually seized from the Defendant in
9 his vehicle. So yes, I did detain your client a
10 reasonable amount of time, 25 minutes, and, in fact, saw
11 that your client was, actually, involved in criminal
12 activity.

13 BY MR. CULBERTSON:

14 Q All right. My question, Officer, was at what point
15 in time after you gave him back his driver's license,
16 after you had written him the warning ticket and after you
17 had given him back the money in his pocket, at what point
18 in time when you've already decided he was free to leave

19 --

20 A Sir, I never said he was free to leave.

21 Q So at no point in time was he ever free to leave?

22 A No, sir, he was not.

23 Q From the moment you pulled him over on the side of
24 the road for going too slow and for the cracked
25 windshield, was he ever free to leave?

1 A No, sir, he was not.

2 Q It then takes some 25 minutes or so, rough guess, for
3 other officers to show up?

4 A No, sir, it was 23 minutes, I believe.

5 Q Okay. 23 minutes, all right, for other officers to
6 show up?

7 A Correct.

8 Q And y'all began to search his car?

9 A No, sir, actually, 23 minutes is when Trooper Gilbert
10 arrives. Your client had refused full consent of
11 searching the vehicle. Trooper Gilbert removed his canine
12 partner, the canine partner then did a free air sniff of
13 the perimeter of the car, the dog alerted on the vehicle,
14 then we searched your client's car.

15 Q Okay. After you took items out of my client's car, I
16 think it was two days before -- you took custody of them
17 and placed them one place on the 27th and then two days
18 later, you took them somewhere else; is that correct?

19 A That's correct.

20 Q And then some time after that, they got transferred
21 to yet a third location?

22 A Maybe three or four locations, I'm not sure.

23 Q Okay. All right. And that's all standard operating
24 procedure?

25 A That's correct.

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1 Q All right. From the side of the road this videotape
2 shows, where did y'all go?

3 A I believe we went to the detention center, if I'm not
4 mistaken.

5 Q Straightaway to the detention center?

6 A I believe so, yes, sir.

7 Q Did you ever stop by DEA headquarters?

8 A I can't recall if we did or not. We could have. If
9 your client wanted to cooperate within an investigation
10 through the federal system, we could have, but I don't
11 recall that.

12 Q You don't recall going to DEA headquarters and having
13 a conversation with them there about this stop?

14 A No, sir, I do not.

15 Q You don't recall being told by DEA officers they had
16 no interest in the legality of this stop?

17 A I don't recall they did. If they had an interest, we
18 would have went Federal with it.

19 Q Or if they had believed that this was an illegal stop
20 and search, they would have told you no, we don't want to
21 mess with this?

22 A That was never told to me.

23 Q You don't recall that sitting here today?

24 A Sir, that was never told to me.

25 Q Okay. Okay. Did you find any guns in my client's

1 car?

2 A No, sir, I did not.

3 Q Other than the 500 so dollars that you found in his
4 pocket that you gave back to him, did you find any other
5 large sums of money in his car?

6 A No, sir, I did not.

7 Q Did you find any items that identified the contents
8 of that bag as belonging to my client?

9 A There's no names or anything directly linking those
10 to your client.

11 Q Okay. And the bag that you found in the back seat of
12 his car, did you ever look in that bag?

13 A I'm sure we looked in it, yes, sir.

14 Q Were there items in that bag that identified my
15 client?

16 A Not that I recall.

17 Q All right.

18 MR. CULBERTSON: Thank you, sir.

19 THE COURT: Any redirect?

20 MS. MONTS: No, Your Honor.

21 THE COURT: All right. Thank you, Officer Owens, you
22 may step down.

23 You may call your next witness.

24 MS. MONTS: Your Honor, the State calls Donnie
25 Gilbert.

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1 THE CLERK: Sir, please, place your left hand on the
2 Bible and raise your right hand.

3 DONNIE GILBERT, after being duly sworn,
4 testified as follows:

5 THE CLERK: Please be seated. Please state your full
6 name for the record.

7 THE WITNESS: Donnie Leland Gilbert.

8 DIRECT EXAMINATION

9 BY MS. MONTS:

10 Q Trooper, please tell the jury where you're employed
11 and how long you've worked there.

12 A I'm employed by the South Carolina Highway Patrol
13 under the direction of the Aggressive Criminal Enforcement
14 Team. I have been employed by the South Carolina Highway
15 Patrol since July of 1999.

16 Q And please describe your training in the field of law
17 enforcement and any specific areas.

18 A The basic -- the first training period that I went
19 through was six months -- I'm sorry, five months worth of
20 training at the Criminal Justice Academy for the South
21 Carolina Highway Patrol. I had no prior police experience
22 before then. That, basically, consisted of -- it was 20
23 weeks. You went through all the phases of basic law,
24 basic highway patrol training towards working accidents,
25 towards working any collisions that involved deaths,

1 towards anything that could happen as far as enforcing the
2 laws of the State of South Carolina. After the 20 weeks
3 is up, you go for maybe one to two days a year for backup
4 training.

5 After that, I was stationed in Richland County when I
6 graduated the patrol, stayed there for five and a half
7 years. August of 2004 is when I joined the Aggressive
8 Criminal Enforcement Team. From August 2004 until now,
9 I'm still employed with the Aggressive Criminal
10 Enforcement Team as a canine handler.

11 Once I joined the Aggressive Criminal Enforcement
12 Team, some of the training and procedures that we took
13 then to be a canine officer, there is a 10-day training
14 period with the canine and the canine coordinator. The
15 canine coordinator would be the person -- that is Corporal
16 Mark Howard. He is in charge of all the canines for the
17 South Carolina Highway Patrol that are assigned in this
18 state. A 10-day training course period with him that
19 would cover canine procedures, canine case law, the manual
20 of operations for canines. It would cover finding hides
21 hidden by the canine coordinator in vehicles and in
22 buildings, including blanks, including hides that had
23 nothing there.

24 The other training that we do is two days a month. I
25 will travel to Columbia to further my canine training. At

1 that time to do basically the same thing. Which the
2 canine coordinator takes drugs that are checked out of the
3 central evidence facility in Columbia from cases that have
4 been disposed of and he will take those drugs and he will
5 hide those in vehicles and also buildings, including
6 blanks, including vehicles and buildings that don't have a
7 hide in there. And we go through and our canines are
8 required to alert and indicate to the presence of the
9 source of the illegal narcotics, the odor.

10 Q And describe the training that your dog has received.

11 A Canine Ajax was trained before I was paired with him
12 in August 2004. Corporal Mark Howard was the trooper that
13 purchased the dog and then trained him for the purposes
14 being used for the South Carolina Highway Patrol.

15 Q Can you describe the length of training that the dogs
16 go through?

17 A No, ma'am. As far as the length and how many days it
18 takes for Corporal Howard to train them, no. For me, when
19 I joined canine Ajax, it was a 10-day training period.

20 Q Describe any certifications that you have and that
21 the dog has in narcotics.

22 A Together, we are paired and certified once a year.
23 We are certified by an unbiased official that is sponsored
24 by Drug Beat. Drug Beat is -- it's actually -- you can go
25 to the web address, which is www.drugbeat.com and you can

1 see the procedures and the policies that we follow. The
2 guidelines are listed on there as well. There is an
3 unbiased official that is not employed by the South
4 Carolina Highway Patrol nor the Department of Public
5 Safety. He controls all the environments and the training
6 environments and we go through him. That includes that
7 instructor basically taking drugs, hiding those in
8 vehicles and buildings. And my canine is required to
9 alert and indicate to the presence of the odor of illegal
10 narcotics in those spots. At that point in time, we
11 either pass or fail as a team.

12 Q What is that certification called?

13 A It's drugbeat.com. It's the people that sponsor him.
14 It's who he works for.

15 Q And what types of drugs are you and Ajax certified
16 on?

17 A He's certified on five, marijuana, meth, cocaine,
18 heroin and crack.

19 Q And when you go back for your recertification, what
20 drugs are you recertified on?

21 A The same ones, those five.

22 Q And what type of dog is Ajax?

23 A Ajax is a Dutch shepherd, who is now nine years --
24 eight years old.

25 Q And describe your procedure, what do you do to ask

1 your dog to search a vehicle or a home or whatever?

2 A What I was taught to do in the 10-day training period
3 by the canine coordinator and through training for the
4 last five years with the canine, you develop a rapport
5 with him just like you would any other partner, a child or
6 just like a rapport that I've developed with Lance
7 Corporal Owens through -- since March of 2005, I had
8 worked directly under his command and I developed a
9 rapport with him.

10 It's the same process that you would go through with
11 a dog. You, basically -- what I was taught to do is when
12 you get to the front of a vehicle, you, basically, hold
13 the leash in the left hand, you cast with the right hand
14 and go counterclockwise around the vehicle. If he shows
15 any interest towards the smell or odor or illegal
16 narcotics, he will alert to that.

17 Q Describe what an alert is.

18 A An alert is a change of body posture and breathing
19 pattern.

20 Q Can the average person notice this?

21 A If you're not trained to look for it, you may miss
22 it, especially with Ajax, he is very subtle at times.

23 Q And describe what the change in body posture and the
24 other thing is?

25 A You're talking about the alert?

1 Q Yes.

2 A It's just, basically -- a change of body posture
3 could be Ajax putting his ears up, his tail goes up and he
4 stops in his tracks. And it's just like -- let's use this
5 analogy here, if I were walking Ajax around a vehicle and
6 he stops, walks back towards a spot and goes okay, wait a
7 minute, wait a minute, whoa, whoa, whoa, we passed it.
8 Let's go back over here, let me smell this again. And
9 he's, basically, saying, Daddy, you took me too far,
10 Daddy. Hold on. Let me pull you back over here towards
11 this door right here where the smell is. And then what he
12 will do is he will -- basically, what Ajax does is stop.
13 He stops at that point and says I'm not going any further
14 because I smell what I think to be the odor of illegal
15 narcotics, which I'm training detect.

16 And at that point in time, as a handler, you know
17 what he's doing. And after the four and five years of
18 experience that I've had with him, you recognize this.
19 It's just one of those things that you, basically, develop
20 a rapport with him about.

21 Q Does Ajax live with you?

22 A Yes.

23 Q Do you feed him?

24 A Yes. I am the caretaker for him 24 hours a day.

25 Q And how long have you had him living with you and in

1 your care 24 hours a day?

2 A Since August of 2004.

3 Q And describe do air currents effect a smell in a car
4 search at all?

5 A It could. An uncontrolled environment, you know,
6 there's --

7 Q What is an uncontrolled environment?

8 A An uncontrolled environment is, basically, just like
9 a traffic stop where we do not control the environment!
10 We don't control the wind, the rain, the snow, the sleet,
11 whatever the case is as far as how hot, how cold, the wind
12 direction --

13 Q Does vehicle traffic effect that?

14 A It could, yes, ma'am. The vehicle traffic going by
15 could actually take the odor of that illegal narcotic and
16 push it to the front of the vehicle. It could take it and
17 push it to any part of that vehicle that air can pass
18 through. You can also evaluate on residual odor. A
19 canine can detect residual odor. And what that means is
20 that object or that odor that he is trained to detect,
21 it's not there anymore, but the odor is.

22 To make sense out of that, the best way that I can --
23 the best analogy I've come up with is let's say that
24 you're eating lunch one day and you have a piece of
25 chicken and you have a biscuit. And you stick -- you have

1 some left over, so you stick both of them in a Tupperware
2 container and put it in the refrigerator. You go back the
3 next day, you eat the piece of chicken, you leave the
4 biscuit. You go back the next day, you open that
5 container up to eat the biscuit, you still smell the
6 chicken, right?

7 So it's the same process of the odor of illegal
8 narcotics. The source of that odor is not there anymore,
9 but yet, the odor is. So -- it's just like somebody
10 smoking a cigarette in a car, too. If anybody has kids
11 that smoke or if you smoke and somebody that doesn't smoke
12 gets in that car, they go, sniff, you smoke cigarettes in
13 there.

14 Q Okay. And let's go to the date in question, July
15 27th, 2005, were you on duty that evening?

16 A Yes, ma'am, I was.

17 Q Where were you located approximately 8:00, 8:15 that
18 evening?

19 A In Greenville County.

20 Q And did you respond to a backup call from Trooper
21 Owens on that day?

22 A Yes, ma'am, I did.

23 Q Do you recall what it was that you heard that caused
24 you to go to his location?

25 A We didn't have the sound here. I believe he may have

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1 called for any available unit and -- or he may have called
2 for me personally.

3 Q And once you got a call, what is your procedure, what
4 did you do in this case?

5 A Whatever I'm doing at the time, I could be backing
6 another officer up, I could be on a stop of my own,
7 there's a number of places that I could have been, but I
8 responded in the most timely fashion possible.

9 Q What did you recall observing when you got to this
10 location on I-85 where Trooper Owens was, did you see any
11 vehicles parked?

12 A Yes.

13 Q What did you see?

14 A I don't remember the make or the color of the vehicle
15 that was on the tape, but it was the same tape that we
16 just watched.

17 Q And was Trooper Owens' car there?

18 A Yes, ma'am.

19 Q And describe what -- where did you park and what did
20 you do?

21 A Most of the time in these situations, I'll either
22 park behind or somewhat beside Lance Corporal Owens'
23 vehicle just for the simple fact of -- to stay out of the
24 flow of traffic. If somebody were to hit my vehicle in
25 the rear, I have to think about I have a dog in the car,

1 too, so I don't want him to get damaged or hurt, killed,
2 anything like that, so I kind of park -- my favoritism is
3 I kind of park to the side of the other vehicle. Not all
4 the way, but somewhat to allow if there's any other
5 officers to come, they can park directly behind Lance
6 Corporal Owens' vehicle.

7 At that point in time, Lance Corporal Owens could
8 have basically explained to me the situation. A lot of
9 times that's what happens. On this instance here, we
10 don't have the volume, so I don't know for sure if he
11 advised me whether this was a refusal, whether it was a
12 consent search or anything of that nature. That is
13 details that, to me, I don't want to know at the time.

14 Q And what did you do and what did Ajax do once you
15 arrived?

16 A I was in the process of getting Ajax to perform a
17 free air canine scan. And if you'll watch the video and
18 I'll point that out to you if you didn't see it, on the
19 way to go to the right front of the vehicle, just passing
20 the vehicle, canine Ajax stops and goes, he sticks his
21 nose to the door and, evidently --

22 MR. CULBERTSON: Your Honor, I'm going to object to
23 this.

24 THE COURT: What's your objection?

25 MR. CULBERTSON: The video is in evidence, it speaks

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1 for itself. This is additional, this is cumulative, it
2 speaks for itself.

3 THE COURT: I'll overrule your objection. I'll allow
4 him to testify as to what he observed at the time at the
5 traffic stop.

6 BY MS. MONTS:

7 Q Please continue, what did you observe your dog do and
8 what did you do?

9 A In the process of taking him up to the right front
10 fender, canine Ajax basically stopped as we got to the
11 passenger door where the window was down. Obviously,
12 because Corporal Owens at the time was talking to the
13 Defendant through that window. The window was down.
14 Canine Ajax walks by it -- not by it, but gets to that
15 point and then sticks his head up in the air. If you'll
16 notice that his body posture changes just a little bit.
17 He kind of sticks his nose to the door and goes, you know.
18 I keep walking, but he doesn't keep walking with me.

19 Q What do you hear him doing with his nose?

20 A You can actually hear -- the only way to explain it
21 is to say that a dog's nose pops when they breathe
22 rapidly. And the reason being is a dog's nose is wet,
23 stays wet, especially in the wintertime. When they get to
24 breathing rapidly through their nose, you can actually
25 here it pop because of the fluid that's in there.

1 And the way that we learn this, to listen for it, is
2 the canine coordinator during training will take you and
3 put you in a dark room with no lights whatsoever. And it
4 may be a small room, it may be a big room. It's usually
5 small to keep us from hurting ourself. He turns all the
6 lights out and he puts a hide in there and makes you
7 search the room based on what you hear the dog doing. And
8 that's how we basically learn to come to listen to that.

9 Q Please continue, what did you observe your dog doing
10 at the side of the car?

11 A He tried to jump in the passenger's window. And, to
12 me, that is a very strong alert to the odor of illegal
13 narcotics. He's trying to tell me, hey, daddy, I'm going
14 to the source of the odor. I smell it, but I can't
15 pinpoint it right now where we're at because that's my
16 job, I have to pinpoint the area. It's just like hand
17 grenades and horseshoes, you don't reward them for getting
18 close, you reward them for actually pinpointing the source
19 of that odor. And in this instance, he did that
20 perfectly. He --

21 Q What in your law enforcement experience and training
22 does that mean once he has alerted?

23 A Once he has alerted, that is an action he takes when
24 he first encounters the odor of the illegal narcotic he's
25 trained to detect. That's the alert, that's what he does.

1 And that's what you see on the video. He is jumping
2 through that window, sticks his feet up there and tries to
3 get in because he's trying to pin -- at that point, he's
4 trying to pinpoint the source of the odor. He can't get
5 to the source by being on the outside of the car.

6 Q And then what do you do?

7 A I open the door for him to let him in at that point
8 because at that point, it's an alert. The State of South
9 Carolina has allowed us and it's actually a Federal law, a
10 canine alert at that point, that canine has the ability to
11 search the rest of the vehicle once he's performed a scan
12 of the outside. And in this case, I couldn't even get him
13 to the right front bumper to start the scan because he had
14 already alerted to the passenger window before we even
15 started.

16 Q Describe how the trunk and the interior of the
17 vehicle, how the air currents are.

18 A A lot of times with traffic going by, the wind
19 current will go through the seals of the trunk and it will
20 push the odor through the back seat. It will push the
21 odor through any of the cracks that that car has. It may
22 push the odor through the rear wheel wells, the black
23 pieces that go over the wheels, any cracks in that. That
24 odor is coming out all those cracks where the air can
25 actually fit or go through.

1 Q Please continue, what did you do once you opened the
2 car door.

3 A When I opened the car door, what I saw on the tape
4 was canine Ajax went straight to the back seat. And I
5 also noticed that once he went straight to the back seat,
6 he put his nose in the crease of the back seat, where the
7 bottom meets the back. And he also at that point took his
8 head and raised up to the rear deck where the speakers
9 would be, where it would meet the back window. And I have
10 found in my training and experience with that dog that
11 when he does that, he's trying to get to the back seat.
12 He sticks his nose in the crease and then he goes up the
13 back seat and takes his nose and goes across the back, the
14 speaker board back there, he's trying to get into the
15 trunk.

16 Q What did you do once you observed this action by the
17 dog?

18 A I basically took him out by the leash. I don't know
19 if I had to get the keys out of the ignition or if there
20 was a trunk release in the car, but from that point, we
21 opened the trunk. I had to move a couple of bags or maybe
22 one, I think what I saw on the tape was just one bag, to
23 allow him to fit in the trunk because Ajax is a little
24 skittish when it comes to tight places. If he can't fit
25 in there, he's not like a cat, he's not going to squeeze

1 in there. He's just stubborn like that. So in order to
2 allow him to fit into the trunk, I took one of the bags
3 and moved it over to the left, as you saw. And that made
4 a spot for him to fit.

5 Once he jumped into the trunk, you can't see it on
6 the tape, but what I can see is him indicating on one of
7 the bags, which is --

8 Q Describe what that is.

9 A An indication is a trained response that he does when
10 he pinpoints the source of the illegal odor he's trained
11 to detect. It's a scratch, bite, something of that
12 nature.

13 Q And what bag, if you recall, did you notice him doing
14 this on?

15 A It was that bag sitting right there.

16 Q Are you --

17 A I'm sorry, it's the bag sitting in front of the jury,
18 the green bag with the black handles.

19 Q State's Exhibit 1?

20 A Yes, ma'am.

21 Q Where was Trooper Owens while you were searching the
22 trunk with Ajax?

23 A I would assume, to the best of my memory, he was back
24 with the Defendant.

25 Q And what did you do once you observed Ajax alert --

1 excuse me, indicate on that bag in the trunk?

2 A If you'll notice on the tape, I take the tennis ball
3 out of my left pocket and I go around my back and put it
4 in my right hand and throw it down there to him. Ajax --
5 a dog expects -- that is his reward, that's his toy,
6 that's his reason for being, that's his joy. That's what
7 brings him the most joy in the world is that tennis ball.
8 And how I can explain that, I don't know how you get
9 enjoyment out of a tennis ball other than he just loves to
10 chew on it. But that's his reward, that's what he lives
11 for, that's what he loves to do. And he knows that he
12 only gets that reward when he does what he's trained to
13 do, so as you'll notice, I took it around my back and took
14 it in my right hand and rewarded him for doing the job
15 he's supposed to do.

16 Q And what did you do once that was over, what do you
17 do with Ajax?

18 A I secured him in my vehicle. And on the tape, myself
19 and Corporal Owens went up and searched the vehicle.
20 Usually, in that situation, Corporal Owens will approach
21 me and say, you know, did Ajax pay particular attention to
22 one spot over the other or what did he do or, you know,
23 things of that nature. And I will explain to him that --
24 basically in this situation what my words would have been
25 to him is he indicated on one of the bags in the trunk,

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1 let's check here.

2 Q Did you take custody of any of the items that were
3 taken from the car or trunk that day?

4 A No. As far as evidence wise, no. Now, as you see on
5 the tape, I may have taken them out of the trunk or out of
6 a bag and placed on the hood or put them back in the bag,
7 but, ultimately, Corporal Owens was the caretaker of that.

8 MS. MONT'S: Thank you. I have no further questions.

9 THE COURT: Yes, ma'am.

10 You may cross-examine the witness.

11 MR. CULBERTSON: No questions, Your Honor.

12 THE COURT: All right. Thank you, sir. You may step
13 down, Officer Gilbert.

14 THE WITNESS: Thank you, Your Honor.

15 THE COURT: You may call your next witness.

16 MS. MONT'S: Your Honor, the State calls Sergeant
17 Rivers.

18 MENDELL RIVERS, after being duly sworn,
19 testified as follows:

20 THE CLERK: Thank you. Please be seated. Please
21 state your full name for the record.

22 THE WITNESS: Mendell Christopher Rivers.

23 DIRECT EXAMINATION

24 BY MS. MONT'S:

25 Q Sergeant Rivers, please tell the jury where you're

1 employed and how long you've worked there.

2 A I'm employed with the South Carolina Highway Patrol
3 Department of Public Safety. I've been employed with them
4 for close to 18 years.

5 Q And what are your duties with the highway patrol?

6 A My current duties are I work as a supervisor at the
7 central evidence facility in Columbia.

8 Q And just give us a street address for that.

9 A South Grove, 1620 South Grove in Columbia, South
10 Carolina.

11 Q And can you describe, as far as Greenville County,
12 what are your duties regarding evidence -- from items
13 seized here in Greenville County?

14 A My relationship to those things would be that we
15 actually come and we pick up evidence that has been seized
16 by any Department of Public Safety officer. And we
17 transport that evidence down to our facility down in
18 Columbia for permanent storage until we receive further
19 notice as to what to do with that particular evidence.

20 Q And describe this storage area in Columbia, is it a
21 secure area and who has access to it?

22 A It is a secure warehouse and the only ones who have
23 access to that warehouse are the CEF unit, which consists
24 of approximately four to five officers that are employed
25 with the Department of Public Safety. The only access

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1 that is available is through Scantron ID and those
2 items -- or those people that are employed by that
3 particular unit have the only access to that location.
4 There are several security measures that are taken as well
5 as security cameras that are throughout the warehouse
6 where any of the evidence is stored as well as in the
7 areas that are accessible to those particular areas.
8 There are approximately four secured areas in which to get
9 to where we keep all the evidence that is stored at our
10 facility.

11 Q And in this case that we're talking about today, did
12 you pick up any evidence and take it from Greenville to
13 Columbia back in July or any time in 2005?

14 A The evidence and -- of today?

15 Q Yes, sir.

16 A I did not pick up that evidence myself. It was
17 picked up by a CEF technician who is not currently -- no
18 longer employed with the Department of Public Safety.

19 Q Is that A. J. Spence?

20 A Yes.

21 Q Where he is now?

22 A I am not sure.

23 Q Why did he leave the highway patrol?

24 A He retired.

25 Q And when he brought that down to Columbia, where

1 would the State's Exhibit 1 into evidence and State's
2 Exhibit 2 -- if you can just identify State's Exhibit 2
3 for me, please, I believe, for identification.

4 A A brown paper bag with contents inside, with several
5 cellophane bags inside of it.

6 Q And did you -- I'm going to go in reverse order. Did
7 you bring State's Exhibit 1, this green bag with its
8 contents and what's been marked for identification as
9 State's Exhibit 2, did you bring those to Greenville
10 yesterday?

11 A Yes, ma'am.

12 Q And where did you retrieve them from to bring them
13 here?

14 A I retrieved them from our warehouse in Columbia at
15 the CEF warehouse.

16 Q What is the CEF?

17 A CEF is the Central Evidence Facility.

18 Q And when Trooper Spence brought it from Greenville
19 down to Columbia, where would he have put it?

20 A He would have stored it at the Central Evidence
21 Facility in the secured area of the warehouse.

22 MR. CULBERTSON: Your Honor, I'm going to have to
23 object to that. What he might have done and what he
24 should have done is one thing. If he can tell me exactly
25 what he did do, that's permissible.

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1 THE COURT: Okay. I'll sustain your objection.

2 MR. CULBERTSON: Thank you.

3 BY MS. MONT'S:

4 Q Trooper, I'm going to hand you two boxes. Can you
5 please identify these for the jury and any paperwork
6 attached to them?

7 A This smaller box is the box that contained evidence
8 of this bag here, that was inside --

9 Q That would be --

10 A State Exhibit 2 was inside this box. And also all
11 the paperwork that's associated with it that we received,
12 along with it, a chain of custody, the South Carolina
13 Department of Public Safety chain of custody. And
14 evidence destruction form that gives all the information
15 related to this particular case such as the case number,
16 the officer's number, name and the violator's -- the
17 subject/violator name and the description of the evidence
18 itself as well as the chain of custody as to who had
19 possession of this -- these items at any particular time
20 and its movement.

21 Q And do you recognize the signatures of the trooper on
22 this form?

23 A Yes, ma'am.

24 Q And who is that?

25 A My name, M. C. Rivers.

1 MS. MONT'S: Your Honor, we'd move this form into
2 evidence at this time.

3 THE COURT: Any objection?

4 MR. CULBERTSON: I'm -- just for clarification, is
5 she just moving the form into evidence?

6 THE COURT: That's what she asked for.

7 MR. CULBERTSON: I have no objection to that.

8 THE COURT: Without objection, then that will be
9 marked as State's Exhibit 5. State's Exhibit 5 into
10 evidence.

11 (WHEREUPON, State's Exhibit No. 5 was marked for
12 identification and received into evidence.)

13 BY MS. MONT'S:

14 Q Sergeant, is Trooper Spence's signature also on this
15 form?

16 A Yes, ma'am.

17 Q And what date is that?

18 A It is August 18th of 2005.

19 Q And where does that say this item was taken?

20 A His name first appears as receiving from the
21 Greenville SO on 8/18 of '05 at approximately 10:30. And
22 also from safe location being CEF on the same date, 8/18
23 of '05.

24 Q And where is that, CEF, where is that located?

25 A The CEF would be Central Evidence Facility of 1620

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1 Shock Road, Columbia.

2 Q I'm going to hand you the larger box with
3 documentation, can you please identify this box and the
4 documentation?

5 A This box also contains a chain of custody belonging
6 to the South Carolina Department of Public Safety of
7 evidence as well. It has the case number on it that
8 matches the case number here with all the identifying
9 information on it with the description of it being shown
10 as a green bag, comma, miscellaneous clothing.

11 Q Is your signature on this document?

12 A Yes, ma'am.

13 MS. MONT'S: Your Honor, I'd move this document into
14 evidence at this time.

15 THE COURT: Any objection?

16 MR. CULBERTSON: No, sir.

17 THE COURT: Without objection, State's Exhibit No. 6
18 is into evidence.

19 (WHEREUPON, State's Exhibit No. 6 was marked for
20 identification and received into evidence.)

21 BY MS. MONT'S:

22 Q Have you, Trooper, been to the Greenville property
23 and evidence room to retrieve any evidence since you've
24 been in this position?

25 A Yes, ma'am.

1 Q Can you describe the procedures there?

2 A The procedures would be I'd usually call them in
3 advance and ask if they do have any evidence that needs to
4 be picked up for the upstate ACE Team. At that point,
5 they will advise me yes or no. If so, I will proceed down
6 to the Greenville County Detention Center, which is
7 located right down the street here, I believe, on McGee
8 Street.

9 At that time, I will go into their facility, which is
10 a secured location as well. They usually have someone
11 come and meet me to escort me in to their facility. Once
12 I arrive at that point of their location within the
13 detention center, they will then go ahead and get whatever
14 items that I am actually picking up to take into our
15 possession to actually transport down to our centralized
16 evidence facility in Columbia. I will sign a chain of
17 custody or an evidence transfer from them that would
18 actually transfer the possession from them to myself. I
19 will, at that point, take custody of it, put it in my
20 vehicle, which is a secured vehicle, and transport it down
21 to Columbia to the central evidence facility.

22 Q And the forms that you've identified there as the
23 chain of custody property and evidence forms, are those
24 the standard forms that are used by the Department of
25 Public Safety?

1 A Yes, ma'am.

2 MS. MONTS: Thank you. No further questions.

3 THE COURT: Any cross-examination?

4 MR. CULBERTSON: No, sir.

5 THE COURT: Thank you, Officer Rivers, you may step
6 down.

7 Madam Forelady, ladies and gentlemen, I understand
8 your lunch is here. We'll take about an hour and 10
9 minute break to give the other folks an opportunity to get
10 a bite to eat. You can maybe stretch your legs.

11 Don't discuss the case, again, I remind you about
12 that as you're out and about. Have a good lunch. We'll
13 be back at 2:15 and be ready to proceed with the trial at
14 that time.

15 (WHEREUPON, the jury left open court at
16 approximately 1:08 p.m.)

17 THE COURT: All right. We'll be at ease until 2:15.

18 MR. CULBERTSON: Your Honor, just to be clear about
19 this, I have an on-going suppression motion. I object to
20 all this stuff coming in through my suppression motion. I
21 know you've ruled on that already.

22 THE COURT: All what stuff coming in now, the drugs?

23 MR. CULBERTSON: The drugs -- the evidence found from
24 my client's car, anything found from my client's car. I
25 wanted to be sure that my suppression motion, not only did

1 we do beforehand, but rather than get up at the end of
2 everybody's testimony, Detective Owens' testimony and
3 everybody else, I just want to be sure that I'm clear on
4 the record as to having voiced my objection at each and
5 every stage.

6 THE COURT: Yes, sir, your objection is noted. I
7 understand that the -- I don't remember -- again, I know
8 that you're objecting to the drugs suppression. I know
9 the last two exhibits were without objection, the forms.

10 MR. CULBERTSON: The forms, I don't object to, but I
11 have an overall objection to --

12 THE COURT: The DVDs were objected to because of the
13 stop. And I can't remember about the bag. Obviously,
14 Exhibit 2 is being objected to, but, yes, sir, that's not
15 into evidence yet, No. 2, I understand; is that correct?

16 MR. CULBERTSON: That's correct.

17 THE COURT: That is only marked, am I correct?

18 COURT REPORTER: Correct.

19 THE COURT: All right.

20 MR. CULBERTSON: Thank you, sir.

21 THE COURT: Be back at 2:15 ready to go.

22 (WHEREUPON, a lunch break was taken.)

23 THE COURT: All right. Anything we need to discuss
24 out of the jury's presence before we start back?

25 MS. MONTS: Nothing from the State, Your Honor.

1 MR. CULBERTSON: No, sir.

2 THE COURT: All right. From a planning standpoint,
3 do you expect to finish with your witnesses this
4 afternoon?

5 MS. MONTS: Yes, Your Honor. We have two very short
6 witnesses, I expect.

7 THE COURT: Let's have our jury come in.

8 (WHEREUPON, the jury came into open court at
9 approximately 2:25 p.m.)

10 THE COURT: You may call your next witness.

11 MS. MONTS: Your Honor, the State calls Kara Bennick.

12 KARA BENNICK, after being duly sworn, testified
13 as follows:

14 THE CLERK: Thank you. Be seated. Please state your
15 full name for the record.

16 THE WITNESS: Kara Bennick.

17 DIRECT EXAMINATION

18 BY MS. MONTS:

19 Q Ms. Bennick, please tell the jury where you're
20 employed and how long you've worked there?

21 A Greenville County Department of Public Safety and
22 I've been employed by them for 11 years.

23 Q And what are your current duties there?

24 A I'm the supervisor over the property and evidence
25 room.

1 Q And can you describe what those duties entail?

2 A In addition to administrative duties, I also take in
3 and accept evidence from the officers.

4 Q And can you describe where you work and the security?

5 A Yeah. Evidence is a very high level of security. We
6 have only four people that can access evidence at any
7 given time. Everything is brought to the counter and
8 accompanied by reports. We verify that everything is
9 present and accounted for and then it is placed in secured
10 areas while it goes out to testing or stored or whatever
11 is going to happen with it.

12 Q And describe the procedure when an officer brings
13 evidence to the property and evidence room.

14 A Okay. He will bring it to the counter and we will
15 verify all his information on his reports and stuff and we
16 will sign for custody of that at the counter.

17 Q And can he also get that back immediately or what
18 happens to those, to the items?

19 A No, if he was to take it back immediately, he would
20 have to resign for the evidence to leave our custody back
21 into his custody.

22 Q And please describe the procedure when drugs are
23 brought and a request for analysis is done, what happens?

24 A We take those drugs in, we, again, verify the
25 reports. We sign for everything. We take them and we put

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1 them in a secured storage -- temporary storage location
2 awaiting processing by the lab.

3 Q And where is the lab and how do they get the drugs
4 from you?

5 A The lab is just down the hall from us and they come
6 to the counter. We bring the drugs from the secured
7 location up to the counter, they sign for them from our
8 custody to their custody and take them back to the lab
9 with them.

10 Q And how many employees are under you in the property
11 and evidence department?

12 A There's four total.

13 Q And do you know Renee Pruitt and Eddie Hucks?

14 A Yes.

15 Q Please tell us their relationship to you.

16 A They are both -- they are both employees of mine.
17 Eddie is no longer in the evidence room, but was at the
18 time of this case.

19 MS. MONT'S: Your Honor, I'd ask this be marked for
20 identification purposes.

21 MR. CULBERTSON: No objection, Your Honor.

22 THE COURT: Without objection, mark Exhibit 7.

23 (WHEREUPON, State's Exhibit No. 7 was marked for
24 identification only.)

25 ///

1 BY MS. MONTES:

2 Q Ms. Bennick, I'm handing you what's been marked for
3 identification State's Exhibit 7. Can you please identify
4 this form?

5 A Yes, this is a property and evidence report that
6 would accompany the evidence.

7 Q And please describe what information this form
8 contains.

9 A The officer fills out the case number, the case type,
10 the date and time that he has brought the evidence to us.
11 On this particular form, it has a suspect's name and the
12 location where the property was originally impounded at,
13 and then it has a description of the property.

14 Q And can you identify the signatures of your
15 employee's on there?

16 A I can. You want me to go through them?

17 Q Yes, please.

18 A Okay. There's Renee Pruitt, she accepted custody of
19 the evidence on 7/29/05 at 16:15. And there's also Eddie
20 Hucks, who received it back from the lab on August 9th,
21 2005 at 16:30.

22 Q And who from the lab checked that out in between
23 those dates?

24 A Sean Collins on August 1st, 2005, at 13:46.

25 Q And do you recognize any other signatures on the

1 form?

2 A I do. Officer Spence came and picked it up from our
3 custody on August 18th, 2005, at 10:30.

4 Q And where was he employed?

5 A He was State Transport Police. He was their property
6 officer who did all their pick ups.

7 MS. MONT'S: Your Honor, we would move Exhibit 7 into
8 evidence at this time.

9 THE COURT: Without objection, it's in evidence.

10 (WHEREUPON, State's Exhibit No. 7 was admitted
11 into evidence.)

12 BY MS. MONT'S:

13 Q And again, can you describe the items that was --
14 that this property and evidence form is regarding?

15 A Yes, it's labeled item No. 1, the quantity is five
16 and it says duct taped bundles containing a white powder
17 substance.

18 Q And when property and evidence checks items in, how
19 do they package them or mark them or do they do either of
20 those?

21 A It would depend on how the officer brought it to us.
22 If he already has the package, we'll leave it in his
23 packaging and we'll sign for it as sealed. If he does not
24 have a package, we will help him package it. We will seal
25 it up and sign for it.

1 Q Ms. Bennick, I'm going to hand you what's been marked
2 for identification State's Exhibit 2, and if you'll just
3 hold it down below and see if you know of any markings on
4 there?

5 A Okay. On the bags -- on this bag right here is our
6 label that came from Greenville property and evidence.
7 And on the bags in here that are resealed by the lab, you
8 can see Sean Collins' signature and dates, indicating they
9 came from our lab.

10 MS. MONTS: Thank you. No further questions.

11 THE COURT: Cross-examination?

12 MR. CULBERTSON: No questions, your Honor.

13 THE COURT: All right. Thank you, Ms. Bennick, you
14 may step down.

15 MS. MONTS: Your Honor, we ask that Ms. Bennick be
16 excused.

17 MR. CULBERTSON: No objection.

18 THE COURT: Without objection, this witness may be
19 excused.

20 MS. MONTS: Your Honor, I ask this report be marked
21 for identification.

22 (WHEREUPON, State's Exhibit No. 8 was marked for
23 identification only.)

24 THE COURT: Exhibit 8 is marked for identification.
25 You may call your next witness.

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1 MS. MONTIS: Your Honor, the State calls Sean Collins.

2 SEAN COLLINS, after being duly sworn, testified
3 as follows:

4 THE CLERK: Thank you, please be seated. Please
5 state your name for the record.

6 THE WITNESS: Sean Franklin Collins.

7 DIRECT EXAMINATION

8 BY MS. MONTIS:

9 Q Mr. Collins, please tell the jury where you're
10 employed and how long you've worked there.

11 A I'm employed by the Greenville County Laboratory.
12 I'm currently the laboratory director and I've been
13 employed there for just under 18 years.

14 Q And can you describe the extent of your education?

15 A I have a Bachelor of Science degree in chemistry from
16 Clemson University. I've attend the Drug Enforcement
17 Administrations Forensic Chemist seminar. I've completed
18 several instrumental schools for the tools I use in the
19 laboratory. And I've testified as an expert witness in
20 the area of drug identification 151 times.

21 MS. MONTIS: Your Honor, the State would offer
22 Mr. Collins as an expert in the field of chemical drug
23 analysis.

24 THE COURT: Any objection?

25 MR. CULBERTSON: No objection.

1 THE COURT: Without objection, this witness will be
2 accepted or ruled as an expert in the field of chemical
3 analysis.

4 BY MS. MONTES:

5 Q Mr. Collins, can you please describe for the jury how
6 it is you get a substance to analysis?

7 A All the evidence for testing is stored in the
8 property and evidence section just down the hallway from
9 the laboratory. On a routine basis, as we need to get a
10 case to be worked, we'll go down to the property and
11 evidence room, request what's waiting and they'll bring
12 the items that are requested for testing to the counter.
13 And we'll decide what we need to get or if we're looking
14 for a specific case, take it, sign for custody, then
15 return to the laboratory with it.

16 Q When you sign for custody is that on a property and
17 evidence form?

18 A Yes, ma'am, it is.

19 Q And if you would, please, take a look at State's
20 Exhibit 7, do you see -- can you identify your signature?

21 A Yes, ma'am, I can.

22 Q What does that information tell us from the form?

23 A It shows that I've signed for the custody of the
24 evidence for laboratory analysis on August 1st, 2005, at
25 13:46 hours.

1 Q And where do you take it and when did you return it?

2 A I took it down to the laboratory, while it wasn't
3 being tested, it was secured in my locker. And it was
4 returned to the property and evidence section on August
5 9th, 2005 at 16:30 hours.

6 Q And Mr. Collins, if you would, please take a look at
7 State's Exhibit 2, if you'll hold it down here, and can
8 you please identify any of the bags, any markings or
9 anything that you wrote on?

10 A Yes, ma'am. My initials and the date are on the
11 outer bags themselves and my initials and item numbers are
12 on the bags inside them.

13 Q Did you complete an analysis on these items?

14 A Yes, ma'am, I did.

15 Q And are these items that you checked out of the
16 property and evidence room and analyzed and then returned?

17 A Yes, ma'am.

18 MS. MONTIS: Your Honor, we would move State's Exhibit
19 2 into evidence at this time.

20 THE WITNESS: Any objection?

21 MR. CULBERTSON: No, sir.

22 THE COURT: Exhibit 2 is into evidence.

23 (WHEREUPON, State's Exhibit No. 2 was admitted
24 into evidence.)

25 ///

1 BY MS. MONTS:

2 Q Mr. Collins, would you please hold up State's Exhibit
3 2 so the jury can see?

4 A (The witness complied.)

5 Q When you analyze these substances, do you produce a
6 report?

7 A Yes, ma'am, I do.

8 Q I'm going to hand you what's been marked for
9 identification State's Exhibit 8, can you please identify
10 this for the jury?

11 A This is the original report for this case.

12 Q Is your signature on that?

13 A Yes, ma'am, it is.

14 Q Is the case number on that?

15 A Yes, ma'am, it is.

16 MS. MONTS: Your Honor, we move State's Exhibit 8
17 into evidence at this time.

18 MR. CULBERTSON: No objection.

19 THE COURT: Without objection, Exhibit 8 is into
20 evidence.

21 (WHEREUPON, State's Exhibit No. 8 was admitted
22 into evidence.)

23 BY MS. MONTS:

24 Q Mr. Collins, will you please show the items that are
25 inside Exhibit 2 and explain which items on your report

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1 each one is, please?

2 A Yes, ma'am. My report broke this out into five
3 different items. I labeled them items 1A through 1E.
4 This is the 1A sample item. 1B is in this bag. This
5 contains items 1C, 1D and the items labeled as 1E.

6 Q Can you describe the manner in which these substances
7 would have been when you originally checked them out of
8 property and evidence?

9 A Yes, ma'am. In this particular case, the wrapping of
10 duct tape, these items were inside it. It had to be cut
11 open to get to the powder substance or the rock substance.
12 And the same with the other items as well, they were
13 sealed within the duct taped pouch and had to be opened
14 and resealed.

15 Q Do you do the resealing?

16 A Yes, ma'am, I do.

17 Q Can you please publish the results on your report
18 from each of those items?

19 A Yes, ma'am. Item 1A was found to be cocaine with a
20 weight of 498.76 grams. Item 1B contained three bags,
21 which were found to contain cocaine with a total weight of
22 370.30 grams. Item 1C was also three bags of powder
23 substance found to be cocaine with the weight of 244.58
24 grams. Item 1D contained cocaine with a weight of 123.57
25 grams. Item E was two bags of a rock substance, which was

1 found to be crack cocaine, also known as cocaine base,
2 with a weight of 60.70 grams.

3 Q Can you describe the difference between crack
4 cocaine, slash, cocaine base and cocaine?

5 A Yes, ma'am. Cocaine is the powder form of the drug,
6 it's also in a salt form, without getting too technical.
7 Cocaine is used to make crack cocaine or cocaine base.
8 It's just a process to refine it, get it in a different
9 form more suitable for consumption.

10 Q And what's another term for 1,000 grams?

11 A A kilogram is 1,000 grams. The first four items
12 found to be cocaine were a combined weight of 1,237.21
13 grams or 1.237 kilograms.

14 MS. MONT'S: Thank you. I have no more questions.

15 THE COURT: You may cross-examine the witness.

16 MR. CULBERTSON: Yes, sir, just a minute.

17 CROSS-EXAMINATION

18 BY MR. CULBERTSON:

19 Q Mr. Collins, let me -- just for my information, I
20 guess for everybody else's, chemically speaking, what's
21 the difference between what you identified as cocaine and
22 what you identified as crack cocaine?

23 A Chemically, cocaine is cocaine hydrochloride. Crack
24 is cocaine with the hydrochloride removed from it.

25 Q So crack is cocaine certain substances taken out?

1 A Yes, a portion of it removed.

2 Q Is that a fair way to say --

3 A Yes, sir. I like to explain to people, if you
4 consider cocaine as a tree branch, crack would be a two by
5 four. They're both wood, one's been processed with a few
6 things removed.

7 Q And the processing actually removes part of the
8 chemical compound of cocaine to make it crack or is
9 something added to the cocaine to make it crack? I'm
10 confused about that.

11 A Cocaine is cocaine, hydrochloride in salt form. If
12 you remove the hydrochloride and leave just the cocaine
13 base, that is crack.

14 Q Okay. So just for me, crack is just -- is the same
15 thing as cocaine with certain chemical properties removed?

16 A Yes, sir.

17 Q All right. And that's why it's in two separate bags?

18 A Yes, sir.

19 Q Is Mr. Hardy's name on any of those bags?

20 A Not that I'm aware of.

21 Q Are his fingerprints on any of those bags?

22 A I didn't check it for fingerprints.

23 Q Is there any sort of identification that identifies
24 those as items that belong to Mr. Hardy?

25 A No, sir.

1 MR. CULBERTSON: Okay. Thank you, sir.

2 THE COURT: Any redirect?

3 MS. MONTS: No, Your Honor.

4 THE COURT: All right. Thank you, sir. You may step
5 down.

6 MS. MONTS: Your Honor, we ask that Mr. Collins be
7 excused.

8 MR. CULBERTSON: No objection.

9 THE COURT: Without objection, he may be excused.
10 You may call your next witness.

11 MS. MONTS: Your Honor, that is the State's case.

12 THE COURT: Madam Forelady, ladies and gentlemen of
13 the jury, I have some legal matters I need to take care of
14 outside of your presence. I'll ask you to go back to your
15 jury room just briefly. We'll call you back in a few
16 minutes and be ready to proceed with the trial. Don't
17 discuss this case while you're out.

18 (WHEREUPON, the jury left open court at
19 approximately 2:43 p.m.)

20 THE COURT: All right. Any legal matters we need to
21 take care of?

22 And then we need to settle the record so that I can
23 have an opportunity, Mr. Culbertson, to talk to your
24 client about his right to testify. Anything we need to
25 take care of before that?

1 MR. CULBERTSON: I don't know if the State has
2 anything?

3 THE COURT: Anything from the State? Any matters
4 that we need to take care of?

5 MS. MONTS: Just regarding the Defendant testifying.

6 THE COURT: Okay. Well, is there a record on the
7 Defendant?

8 MS. MONTS: He has no record, Your Honor.

9 THE COURT: Okay. No record, okay, so we won't have
10 any impeachable evidence there.

11 All right. Mr. Culbertson, be glad to hear from you.

12 MR. CULBERTSON: Thank you, Your Honor. At this
13 time, I'd like to make a motion for directed verdict.

14 THE COURT: Okay.

15 MR. CULBERTSON: Actually, I have a couple motions,
16 but that would be my first one, Your Honor. And then I
17 would -- just so you know, I would renew my initial
18 suppression motion at this time.

19 THE COURT: All right. As far as the directed
20 verdict, of course, I'm required by law to always view the
21 evidence in the light most favorable to the nonmoving
22 party. And if there's any direct evidence or any
23 circumstantial evidence that could fairly lead to the --
24 logically to the guilt, then I must submit it to the jury.
25 And I find that there is sufficient evidence in this case

1 to submit it to the jury.

2 As far as your motion to suppress --

3 MR. CULBERTSON: May I be heard just briefly?

4 THE COURT: I'm be glad to hear from you on that.

5 MR. CULBERTSON: Your Honor, I'll just submit, at
6 least, one case to you during our motion to suppress and
7 numerous other cases cited in our motion to suppress. I
8 think you now have had an opportunity to not only hear the
9 testimony of Officer Collins, but also view the videotape
10 of -- excuse me, Officer Owens, to view the videotape of
11 the stop and subsequent arrest pursuant to that stop. I
12 think if you'll look at both of those and if you consider
13 specifically Officer Owens' testimony earlier today where
14 he said at no point in time was Mr. Hardy ever free to
15 leave brings the question of the legality of the stop and,
16 therefore, the legality of any search that flowed from
17 that stop.

18 It was fine for Mr. Hardy to have been stopped for
19 the traffic violations. But once it began to escalate
20 beyond just a routine traffic stop for purpose of getting
21 a warning ticket, then it bears in mind and bears this
22 Court to ask the question why. And in my mind, there's no
23 justification to extending that stop beyond writing a
24 ticket.

25 And if you look specifically at and look at Officer

1 Owens' testimony that says at no point in time was he ever
2 free to leave once I stopped him, then it draws into
3 question the whole legality of any search that followed
4 from that initial stop. I think when the Court looks at
5 that, especially in light of the Pichardo ruling, there's
6 no doubt that that evidence that flowed from that search
7 should be suppressed in this case.

8 THE COURT: All right. Thank you, sir.

9 Ms. Monts, be glad to hear from you.

10 MS. MONTS: Your Honor, it's the State's position
11 that the reason that the Trooper testified the way he did
12 is because, as he testified additionally, he had developed
13 reasonable suspicion shortly after the car stop. And
14 that, in fact, testified about approximately 18 indicators
15 that led up to his reasonable suspicion. So it was not a
16 detention for no reason, it was a detention because it was
17 reasonable suspicion of criminal activity taking place.
18 And his -- he was then allowed to do a further
19 investigation, which included him calling for his canine
20 dog to come and search the exterior of the car, which
21 subsequently led to probable cause to search the car. But
22 based on the 18 indicators that the Trooper testified
23 about, we certainly believe there was reasonable suspicion
24 to detain him for further investigation of criminal
25 activity.

1 THE COURT: Well, I've again read the three cases
2 that have been presented to me, two of which I had read
3 earlier, did read the Branch case that the State gave me
4 yesterday during my lunch hour. Again, I believe the
5 Pichardo cases -- and certainly I have high respect for
6 Justice Anderson's knowledge of the law and what he wrote
7 about and the head notes that you mentioned,
8 Mr. Culbertson, are certainly pertinent. But I believe
9 that the Tindall case -- I read Pichardo as being where it
10 was a consent. I know that he talks about that there
11 was -- almost goes on after reviewing that and then moves
12 on to if it is a reasonable suspicion that all they had
13 there was the nervousness and explained that a person who
14 couldn't speak English would likely be nervous.

15 But the thrust of that case, to me, goes to the
16 consensual encounter more so than -- and then in the
17 Tindall case, it seems like the State there was relying
18 upon that. But the Court of Appeals says we don't even
19 need to get there because there's enough of the reasonable
20 suspicion factors to not even have to rule on that.
21 Branch gives good insight and has some very articulate
22 language that offer -- discussing the very things that the
23 Court must rely on to view this. Talks about the holistic
24 approach and common sense that has to be utilized.

25 I think officers who make stops are always working on

1 a continuum. And I did not take the testimony of Officer
2 Owens to say that he could not leave to only apply to the
3 fact that I thought he was a drug dealer. As I reviewed
4 the evidence and as I remember it, he was, basically,
5 saying that he couldn't leave because I was writing him a
6 ticket in doing those things. And then as that process
7 was working, the observations were coming into play and
8 then there was another reason that I would not allow him
9 to leave. I think allowing him to leave, really, is the
10 thrust of whether it was a consensual encounter or not
11 involving the other factor.

12 I believe the matters he articulated -- I think the
13 Solicitor talks about 18 things. I'm not sure I counted
14 that many and some of those I counted I personally find to
15 not be pertinent factors for reliance. But I think
16 they're -- certainly in light of the case law, I think
17 they are factors that are sufficient to warrant a denial
18 of your motion. And so I overrule Mr. Culbertson.

19 Any other motions that we need to talk about? And
20 then I certainly need to talk to your client about his
21 right to testify in this case? Anything else we need to
22 address?

23 MR. CULBERTSON: Not from us, Your Honor.

24 THE COURT: All right. If you would come forward
25 with your client for a moment up here.

1 MS. MONTES: Your Honor, there's one thing regarding
2 the Defendant testifying.

3 THE COURT: Okay.

4 MS. MONTES: I did out of an abundance of caution want
5 to mention in fairness to the Defendant that although we
6 did not in our case in chief bring up the fact that the
7 Defendant admitted to Trooper Owens that he knew that
8 there was a kilo of cocaine in the trunk of the vehicle,
9 that if the opportunity arises and that we would need to
10 do so, I would intend to put up Trooper Owens in reply and
11 bring that fact out.

12 MR. CULBERTSON: I object to that entire colloquy
13 that just took place.

14 THE COURT: What's your objection?

15 MR. CULBERTSON: Other than trying to influence the
16 Court improperly about the character of my client, that
17 served no useful purpose.

18 THE COURT: Well, let me talk to your client first
19 and then we'll address that matter. He needs to make an
20 intelligent decision as to whether or not to testify,
21 that's the main thing I want him to know.

22 If you would, raise your right hand, please, sir.

23 KEVIN HARDY, after being duly sworn, testified
24 as follows:

25 ///

KEVIN HARDY-EXAMINATION BY THE COURT

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EXAMINATION

BY THE COURT:

Q Mr. Hardy, we've reached the time in the trial where I need to explain to you certain rights that you have. I'm confident that you've had an opportunity to talk to your attorney about these rights that you enjoy, but I need to be satisfied in my own mind that you understand the opportunities that you have to put up a defense and to testify in your own behalf. So I need to explain these to you. If at any time, you feel that you don't understand something I'm saying, please, stop me, raise your hand or whatever you need to do. I want to make sure what I'm saying to you is understood by you.

The Constitution of the United States and our State Constitution, for that matter, specifies that no person can be compelled in any criminal case to be a witness against himself. This means you can't be required to testify in this case. You have a right to testify on your own behalf, but nobody can make you testify. That is a personal right that you enjoy as any other citizen and nobody but you can waive this right. It's yours to decide whether or not you want to testify.

If you decide to testify, you would be subject to the same rules that every other witness is subject to. You can be examined and cross-examined on any relevant issue

1 that might be present in the case. The State has
2 indicated that they have no evidence of any prior record.
3 But if they did, if you had prior a record for which you
4 could have been imprisoned for more than a year or you've
5 made false statements or crimes of that nature, then if I
6 determine the probative value of admitting those crimes
7 would outweigh its prejudicial effect, then the State
8 would be allowed to attack your credibility on that.

9 Now, if you decide to testify, that decision has to
10 be made on your part voluntarily and freely and
11 intelligently with the knowledge of the protections that
12 you have under the Constitution of our state and of the
13 United States. You may choose not to testify. If you
14 choose not to testify, I'll instruct the jury that they
15 can't give the fact that you chose not to testify any
16 consideration whatsoever. I'll tell them they can't even
17 talk about that in the jury room. It would be no
18 prejudice whatsoever brought to you about testifying or
19 choosing not to testify. Whether you testify or you don't
20 testify is a personal decision that you'll have to make.
21 You can obviously talk to family, friends, anyone else,
22 your lawyer. But ultimately that's going to have to be a
23 decision that you make and you, alone, make. Do you
24 understand what I've explained so far?

25 A Yes, sir.

KEVIN HARDY-EXAMINATION BY THE COURT

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1 Q Do you have any questions of me?

2 A No, sir, no questions.

3 Q Have you discussed this matter with your attorney
4 about testifying or not testifying?

5 A Yes.

6 THE COURT: All right. We'll take a short break and
7 you can have additional time to talk with him. And then,
8 of course, we'll be ready for you to put up a defense if
9 you'd like to. You may return to your seat.

10 All right. Then, Mr. Culbertson, we'll talk about
11 the impeachable statement that, obviously, when we take a
12 break, you'll need to discuss that. I'll rule on that now
13 so that your -- I want your client --

14 Anything else from the State that you would have for
15 impeachable purposes other than you say you want to bring
16 up the statement that --

17 MS. MONTS: That's all, Your Honor.

18 THE COURT: All right. You opposed to that?

19 MR. CULBERTSON: I'm opposed to them bringing that
20 issue up to, Your Honor, prior to my client even getting
21 close to the witness stand. I thought it was an improper
22 action. I think it has a chilling effect on my client's
23 decision. And I think it was offered to chill my client's
24 decision as to whether or not to testify and to improperly
25 influence this Court's opinion about my client before he

1 even gets on the stand.

2 THE COURT: Well, I don't know what you're seeking
3 from that, that you're objecting to it, but I think it was
4 a necessary -- I don't know how I would rule on that yet,
5 I haven't heard everything I need to. But your client
6 needs to make an intelligent decision. I sure wouldn't
7 want him to decide to testify and then they spring that on
8 him by coming out. So I don't oppose the fact that the
9 Solicitor brought that up. And, believe me, it's not
10 having any effect on me as far as your client. But I
11 think your client is entitled to have a full knowledge of
12 what might be the risks that he has in testifying. I
13 wouldn't want them to spring a prior record that they
14 didn't tell him about or tell him about through you, so I
15 disagree with you on the objection. I don't know what the
16 motive was, but I personally think it's important for your
17 client to know fully so that he can make that intelligent
18 decision whether or not to testify.

19 So having gone past that now, is there an objection
20 to the State cross-examining him on the statement that he
21 made if he were to testify?

22 MR. CULBERTSON: I think they can cross-examine him
23 about anything they want to cross-examine him about.

24 THE COURT: Do we need a Jackson V. Denno hearing on
25 this as far as the statement? Were his rights read then?

1 MS. MONTES: No, Your Honor, and that's why we did not
2 bring it up then. But I do have case law that says even
3 an unconstitutional obtained statement can be used against
4 the Defendant in cross-examination. I have several cases
5 on that.

6 THE COURT: Was this the result of an inquiry or
7 question, interrogation or was it merely a statement made
8 by the Defendant?

9 MS. MONTES: Your Honor, it was after Miranda was
10 given and it was a statement he gave. There was a
11 conversation going on, it was not recorded and it was not
12 written. The officer put it in his report so the defense
13 attorney has knowledge that the officer did put in his
14 report after he was Mirandized. And it was after the
15 videotape cuts off, so it's not on the videotape. It's
16 just a statement the Defendant made just saying that he
17 had approximately one kilo of cocaine.

18 MR. CULBERTSON: And again, Your Honor, I hate to
19 keep belaboring this point, but --

20 THE COURT: That's what you're here for, I'm not
21 begrudging that. You belabor it as long as you need to.

22 MR. CULBERTSON: But my objection was to them even
23 bringing this issue up to, Your Honor, at this point in
24 time. For them to go on and on and on about what he said
25 and what we took out of what it means is an end run around

1 my objection.

2 THE COURT: Well, maybe we're not understanding each
3 other right. I want your client to be fully informed.
4 You say you believe they can cross-examine him on that, I
5 just want to make sure that the statement passes
6 Constitutional muster. And according to -- see, the
7 problem that I have as the Judge, I haven't seen the
8 incident report and all those things that you have seen,
9 but, believe me, what the Solicitor has said to me in no
10 way impairs my thoughts about your client in any way
11 whatsoever. I want him to know what he faces if he
12 decides to take the witness stand. That's the primary
13 purpose of this dialogue that we're having right now.

14 MR. CULBERTSON: Yes, sir, I understand that. I
15 appreciate, Your Honor's, attitude approach towards that,
16 I truly do. But my objection is for them to say well, we
17 plan on offering this stuff and here's what we plan on
18 offering has a chilling effect on my client. And, in my
19 mind, potentially, has a prejudicial effect on this
20 Court's decision how about to respond with anything in the
21 future that happens with my client whether or not he takes
22 the witness stand.

23 THE COURT: Well, I'll overrule that objection and --

24 MR. CULBERTSON: And I apologize, Your Honor. I
25 don't want them to have the opportunity to say well,

1 here's what we're going to talk about, here's what we can
2 prove, here's what we think we can do, here's what's out
3 there and never be able to get to that stuff. I mean,
4 that's why we have rules of evidence. There's a timely,
5 orderly progression of evidence that's supposed to be
6 presented in this courtroom. Then publicizing it before
7 we ever get to that point thortates the rules of evidence.
8 And I object to that procedure.

9 THE COURT: All right, sir.

10 MS. MONTS: Your Honor, I do have several cases I can
11 cite. I have one copy. I need to make a copy to give to
12 the defense attorney about the unconstitutional statement
13 still being able to be cross-examined.

14 THE COURT: It is an unconstitutional statement?

15 MS. MONTS: I am --

16 THE COURT: It was after Miranda and it was a
17 spontaneous statement, is that what I'm hearing?

18 MS. MONTS: Yes, Your Honor. Yes, Your Honor.

19 THE COURT: Well, I'll be glad to take the cases and
20 you can certainly give whatever cases you need to to
21 Mr. Culbertson.

22 Let's take a short break.

23 Do you have -- again, I think yesterday we had a side
24 bar and you said that the most your defense, if you put
25 one up, would be 45 minutes?

1 MR. CULBERTSON: Yes, sir.

2 THE COURT: You still think that would be the case?

3 MR. CULBERTSON: Yes, sir.

4 THE COURT: We might can get this to the jury this
5 afternoon, then? Any reason we couldn't?

6 MR. CULBERTSON: Not that I know of, Your Honor.

7 THE COURT: Any requests for charge? I know we're
8 not at that stage yet, but if you have anything that you
9 feel like is extraordinary. I think the standard charge
10 will be there, but I'll be glad to -- my law clerk will be
11 glad to have anything that you've got on that.

12 MS. MONTS: And, Your Honor, it doesn't have to be
13 brought up now, I just want to note the fact that the law
14 has changed since 2005 and currently. I assume you're
15 going to read the current law which states cocaine base.
16 Under section 44-53-375, back in 2005, under the
17 indictment, it used the term crack cocaine. And I didn't
18 know if you wanted to address that with the jury at all.
19 The chemist did testify that crack cocaine and cocaine
20 base were the same thing. The lab report and the
21 indictment will both say crack cocaine. The instruction,
22 I assume, you will be giving will say cocaine base. I
23 thought there may need to be a jury charge saying that
24 cocaine base is crack cocaine. And I believe that's in
25 the statute -- definition statute as well.

1 THE COURT: The indictment says crack cocaine, my
2 charge will say crack cocaine.

3 Is that a problem to you?

4 MS. MONTS: No, sir, I think the current -- the
5 current statute, I believe, says cocaine base.

6 THE COURT: Well, my charge will be crack cocaine.

7 MS. MONTS: Thank you, sir.

8 THE COURT: All right. Let's take a short break. If
9 you need more time, let me know if you need to talk with
10 your client more, Mr. Culbertson.

11 MR. CULBERTSON: Thank you, sir, I appreciate that.
12 I've messed this up twice now and I just want to be sure I
13 write down the correct time you want us back here.

14 THE COURT: How about whenever you're ready, but no
15 later than 20 after? Does that give you enough time?

16 MR. CULBERTSON: Yes, sir.

17 THE COURT: If you need more -- I want your client to
18 be comfortable with where we are now.

19 MR. CULBERTSON: Yes, sir. Thank you, Your Honor.

20 (WHEREUPON, a short break was taken.)

21 THE COURT: When the jury comes back, I'll just let
22 you rest on the record in front of the jury. You can say
23 the defense rest, then I'll tell them it's time for
24 closing statements.

25 I've got a verdict form here I'd like for y'all to

1 look at and make sure it's in the right order and
2 everything is spelled right.

3 All right. Verdict form is in order.

4 All right. Let's have our jury come in.

5 (WHEREUPON, the jury came into open court at
6 approximately 3:30 p.m.)

7 THE COURT: Thank you, very much, ladies and
8 gentlemen.

9 Mr. Culbertson, you may present your case.

10 MR. CULBERTSON: Your Honor, we rest.

11 THE COURT: All right. Ladies and gentlemen, you've
12 heard all the evidence now. The State has rested, so has
13 the defense. The next stage, of course, as I told
14 yesterday will be an opportunity for the attorneys to make
15 closing statements to you. This is not evidence. The
16 evidence is in. But as I told you in their opening
17 statements, I urge you to listen carefully to these
18 attorneys address you. They can, perhaps, give you some
19 insights that will assist you as you begin your
20 deliberations in a few minutes. After they've had an
21 opportunity to address you, I'll instruct you on the law.

22 Solicitor.

23 CLOSING STATEMENT

24 MS. MONTS: May it please the Court.

25 Ladies and gentlemen of the jury, I'm going to tell

1 you a little bit about trafficking cocaine and trafficking
2 crack cocaine because I'm sure you want to know what that
3 means. And I told you a little bit in the opening what
4 that means. If anything I say differs from what His Honor
5 tells you when he is giving you the jury instructions,
6 well, listen to him because he is the finder of the law.
7 He is the judge of the law, whereas you, the 12 people
8 that are back there deliberating, are the finders of the
9 facts. You are the judges of the facts. The judges of
10 what happened on July the 27th of 2005. And whether or
11 not the State has met its burden of beyond a reasonable
12 doubt and proven that the Defendant, Mr. Hardy, is guilty
13 of the two charges.

14 Now, the two charges are separate. There's a
15 trafficking cocaine and a trafficking crack cocaine. And
16 the reason is because when these five separate bags were
17 found inside this green duffle bag along with the men's
18 clothing in the Defendant's trunk at the car stop, most of
19 the cocaine -- excuse me, most of the white powder -- and
20 again, you will have these items in the back that you can
21 look at and they are heat sealed, so they cannot be
22 opened. Most of this cocaine -- or white powder came back
23 as regular cocaine. 60.70 grams of it came back as crack
24 cocaine. And you will have the lab sheet that Sean
25 Collins, the chemist, filled out to tell you what these

1 separate bags weighed and what the analysis was, whether
2 it was cocaine or crack cocaine. And the bag that was
3 labeled 1E by Mr. Collins was the crack cocaine, 60.70
4 grams. And the total of the other four bags was over 1200
5 grams of cocaine. 1200 grams, as Mr. Collins told you, is
6 over a kilo, over a kilogram of cocaine.

7 Now, trafficking -- and I'm going to abbreviate
8 because I'm not very neat and I don't have a lot of room.
9 Trafficking means several different things. As I
10 mentioned in opening, the most simple way is just to be in
11 possession. And His Honor will read to you the statute.
12 And the statute includes not only possessing the illegal
13 substance, but also, providing financial assistance or
14 delivering or bringing into the State or knowingly selling
15 it or manufacturing it or aiding, abetting, attempting or
16 conspiring to sell, manufacture, deliver or bring into the
17 State or was knowingly in actual or constructive
18 possession. So we're going to go with the -- or with in
19 constructive or actual possession on both of our charges
20 of crack cocaine. So trafficking is being in possession
21 of a large amount. We have crack cocaine or it's usually
22 just abbreviated crack or we have cocaine. I believe
23 Mr. Collins said cocaine hydrochloride. It still has the
24 hydrochloride in it.

25 The Defendant is charged with trafficking crack

1 cocaine more than 28 grams. He is charged with
2 trafficking cocaine more than 400 grams.. That means he is
3 in possession, that the substances are crack or cocaine,
4 the lab report shows you that, that he had 60.70 grams of
5 crack. And then he had more than 1200 grams of cocaine.
6 That the Defendant was in Greenville County, that the
7 Defendant is the person whose identity was known. His
8 identity was known because he was arrested right then at
9 the scene. It's not something like a burglary where you
10 have to get fingerprints and try to find the person. In
11 this case, the person was arrested right then, right when
12 the crime was committed. So we know his identity, he was
13 arrested immediately, that was Kevin Hardy, who is the
14 Defendant in this trial. And that it occurred on the date
15 in question, July 27th of 2005. So we have the date, we
16 have the Defendant's identity and we have that it occurred
17 in Greenville County. We have that it was cocaine. We
18 have that it was crack. We have that it was more than 400
19 grams of cocaine. We have that it was more than 28 grams
20 of crack. So the only thing left to talk about is what is
21 possession.

22 And let me go back, you might think it's weird, why
23 is it 28 grams here and 400 grams here. The statute --
24 and I don't know if His Honor will talk about all the
25 different levels of the cocaine trafficking statutes or

1 the crack cocaine trafficking statutes, but there are
2 several different levels. There's more than 28 grams,
3 then it jumps up to 100, 200 and 400. So those are the
4 four different statutes that can be gone under. In our
5 case, we went over 28 with the crack and over 400 with the
6 cocaine.

7 Now, what is possession? Possession means to be --
8 there's constructive and actual. Actual is like this pen
9 in my hand. I am actually in possession of this pen.
10 Constructive possession is something maybe that's down in
11 my car or something I have at home. It's mine, I'm in
12 possession of it. It's not on me, but I'm in possession
13 of it because I have knowledge of it and I have the right
14 to control it. Knowledge and right to control.

15 Ladies and gentlemen, in our case, on July 27th,
16 2005, the Defendant was in possession of the cocaine and
17 crack cocaine that was in the duffle bag with the clothing
18 in his trunk. Just because it wasn't a pen in his hand
19 doesn't mean he wasn't in possession of it. He was -- the
20 knowledge that he -- the knowledge and the right to
21 control it.

22 And how do we know that? A lot of things are proved
23 by circumstantial evidence. His Honor, I expect, will
24 talk to you about the difference between direct evidence
25 and circumstantial evidence. Direct evidence would be I

1 am proven to be in possession of this pen because you are
2 sitting there looking at me being in possession of this
3 pen. Circumstantial evidence would be if, say it was
4 raining outside -- it was raining when you came in,
5 somebody comes in, they are soaking in rain. They have an
6 umbrella, they are shaking it. They are saying it's
7 raining outside. You aren't seeing right at that moment
8 that it's raining, but you have all these other pieces of
9 evidence that show you. You knew it was raining earlier.
10 The person is wet, the person has a wet umbrella and the
11 person is telling you that it's raining. So there are
12 other sources of evidence besides you having your eyeball
13 on the evidence.

14 Now, how do we know -- what ways can we prove the
15 circumstantial evidence in this case? In our case, what
16 facts do we know? And facts that you know can add up to
17 equal more facts. That's why when you were chosen, one of
18 the main reasons was your backgrounds, your experiences,
19 your education and, most importantly, your common sense.
20 That's what jurors need to use is their common sense to
21 decide what really happened, what was really going on.

22 So in order to be in possession, what do we know
23 about these drugs. Who was in possession of these drugs?
24 What do we know? We know the drugs are in a green bag.
25 We know the green bag is in the trunk of a car. We know

1 that the car belongs to the Defendant. We know that the
2 car is registered in his name, to the Defendant. I'm
3 sorry, that's a little abbreviation for defendant. We
4 know that the Defendant is the driver of the car. We know
5 that the Defendant has the keys to the car. We know that
6 he is the only one in the car. There was nobody else.

7 What else do we know? We know that he came from
8 Atlanta. He had been in sole, complete control of his car
9 for, at least -- and I'm guessing, for, at least, two
10 hours. And he's supposedly going towards Raleigh, North
11 Carolina, so he's going to be in sole control of that car
12 for some more time. And that's only if he then
13 relinquishes his control of that car to someone else.
14 Because right now, for, at least, the last two hours, we
15 can add up these pieces of circumstantial evidence to lead
16 to the conclusion that the Defendant is in control of that
17 car and of anything inside that car.

18 What else do we know about this case? We know
19 that -- from hearing the officer talk, he talked with the
20 Defendant, that the Defendant was unemployed, that he had
21 \$574 on him. We know that he was taking a trip from
22 Atlanta to the Raleigh area. What do we know about taking
23 a trip? We know that you have to pay for gas. What else
24 do we know? We know that in -- when he gets to Greenville
25 County, he is pulled over for a traffic violation. When

1 he's pulled over for the traffic violation, the trooper
2 has him exit the vehicle. You saw the tape. Anything
3 that I say that differs from what you remember or the 12
4 of you back there deliberating remember it, remember it
5 the way you remember because you are the judges of the
6 facts.

7 The trooper pulls him over, gets him out, has him sit
8 in his car while he's writing the warning ticket. He does
9 write him the warning ticket and checks the impeding
10 traffic and the broken windshield, cracked windshield. So
11 he's involved in a traffic violation, he's being pulled
12 over. While he's writing his ticket -- in fact, the
13 trooper said only approximately three minutes after he
14 stopped the car, he calls for backup, who is the drug dog,
15 Trooper Gilbert and his drug dog, Ajax. So only three
16 minutes into the stop, he's called for backup. He is
17 gaining reasonable suspicion of illegal activity and he is
18 then entitled to further investigate a crime.

19 Before he has finished writing the warning ticket,
20 during the initial stop, he has talked to the Defendant
21 and gained some more information about him. And
22 approximately 20 to 23 minutes after the stop -- and
23 that's from when the car stops. The car stops, the
24 trooper's video is running from then. It's from the
25 trooper getting out, walking up to the car, walking up to

1 the Defendant, talking to the driver, getting the driver
2 out, having him come back, talking to him about where he
3 lives, what his address is, getting dispatch to run his
4 driver's license, all of that is taking place during this
5 time. So by the time Trooper Gilbert and Ajax arrive and
6 within a minute of Ajax getting to the Defendant's
7 vehicle, he alerts on the car. Which then gives the
8 troopers probable cause to search for illegal substances,
9 which Ajax is trained and certified to detect.

10 The troopers then search the vehicle and they go
11 where Ajax alerted on the green bag that's, specifically,
12 in the trunk. Remember, the alert was on the outside of
13 the car because the smell was somewhere floating through
14 the car. When the dog gets in the trunk, he immediately
15 indicates, as Trooper Gilbert told you, on the bag. And
16 inside the bag -- and on the video, you saw the clothes
17 that the Defendant -- I mean, that the troopers pulled
18 out, along with the five bags that, at that time, were
19 duct taped, the silver duct tape, to make them small. And
20 as you saw on the video, they're smaller when they're duct
21 taped and everything is condensed like that. The chemist
22 opens that up and analyzes the substance inside.

23 The State must meet its burden beyond a reasonable
24 doubt. We must prove to you that the Defendant is guilty
25 of the crimes charged. Now, in this case, he's charged

1 with two separate crimes, trafficking of crack cocaine and
2 trafficking with the cocaine. There are two separate
3 indictments. Those two can be decided separately. But in
4 this case, all the drugs were in the same duffle bag.

5 The burden beyond a reasonable doubt does not mean
6 beyond all doubt. You will not hear His Honor when he's
7 instructing you on the law say that the State must meet
8 beyond all doubt. You can't have any doubt. You will not
9 hear him say that. Because there is nothing in this world
10 that can be proven to a 100 percent certainty. But the
11 State has met its burden and has proven that the Defendant
12 was in control of that car, that he was in possession of
13 anything in that car and what was in the trunk.

14 And looking at the big picture, we can -- here's the
15 Defendant, he's in Greenville County. He's in his car.
16 He's not at home. He's several hours away from his home.
17 Who is in control of that car in Greenville County? Is --
18 whose in control? Is anybody else in Greenville County on
19 July 27, 2005 in control of that car? Ladies and
20 gentlemen, I wasn't in control of that car. My family
21 wasn't in control of that car. Nobody in my office was in
22 control of that. No citizen or person in Greenville
23 County at that time was in control of that car. Who was
24 the only person in control of that car and the items
25 inside it? Mr. Hardy.

1 Now, the State's job, as I mentioned, is to prove to
2 you that the elements of the crime have been met. That it
3 occurred in this county, that it was the Defendant, that
4 it occurred on the date of incident, that the substances
5 were crack and cocaine and that the Defendant was in
6 possession of those. We have met that burden.

7 Now, the defense will have the last argument. They
8 will have the last chance to talk to you. And I'm going
9 to just guess that they're probably going to go off on
10 some other tangent. But ladies and gentlemen, what the
11 State must prove to you is whether the Defendant is guilty
12 of the elements of the crime. Talking about the stop is
13 irrelevant, talking about the color of the car is
14 irrelevant. If -- you may have heard the story about a
15 puddle of water and after a rain, there's grit and dirt in
16 the bottom. And if you drop something in there and the
17 swirls turn, you can't see what's in the bottom. It's the
18 defense's job to make the swirls in the water so that you
19 are no longer looking at the actual crime, that you are
20 looking at other things. Because, ladies and gentlemen,
21 in this case, the evidence is there. You've got one
22 person in his car, hours away from home with a kilo, over
23 a kilo of cocaine in a bag of clothes in the trunk.

24 The State has met its burden beyond a reasonable
25 doubt. Not beyond all doubt, but beyond a reasonable

1 doubt that the Defendant is guilty of these two charges.
2 And we believe that when the 12 of you who are back there
3 deliberating go back and render your truthful verdict that
4 you swore to uphold, that that truthful verdict on both of
5 these charges is guilty. Thank you.

6 THE COURT: Mr. Culbertson, you may address the jury.

7 CLOSING STATEMENT

8 MR. CULBERTSON: Thank you, sir.

9 I don't care how you dress it up, a pig's still a
10 pig, a cow's still a cow and a duck's still a duck. It's
11 obvious -- I mean, we all sat here for longer than we
12 really cared to and watched the videotape and saw what was
13 on that videotape. I'm going to talk to you a little bit
14 about what you don't see on that videotape.

15 You see a gentleman, my client, Mr. Hardy, being
16 pulled over for what, by all accounts, was a relatively
17 minor traffic offense. He was going too slow on 85, two,
18 three, four miles, whatever too slow. That gave this
19 officer an opportunity to pull him over. A black male, by
20 himself, driving a car up 85. Gave him reason to pull him
21 over.

22 When he pulled him over, he says I'm just going to
23 write you a warning ticket. And he takes an hour to write
24 him a warning ticket. And during that time, several other
25 officers show up. You can look at the tape again, if you

1 care to, and see this dog walk around the car. When he,
2 ultimately, gets there, the dog -- I'm not sure what he
3 does, but eventually gets inside the car and the then
4 officers open up the trunk of car. And if you'll look
5 closely at the tape, what you'll see is a picking up of
6 this bag or a bag that looks like that, and put it back.
7 And look around in the interior of the car some more and
8 pick up some other bags inside the car. And then they
9 come back here and open it up and they start searching
10 through this bag and maybe some of the other bags. And
11 then they search through it again. And when they search
12 through it a second time, they start pulling out what
13 appeared to me to be aluminum foil wrapped, duct tape
14 wrapped, I don't know what the wrapping was, but some sort
15 of packages. It didn't look like these. And they got all
16 giddy and happy about that and started high fiving one
17 another. That's fine. They then charge Mr. Hardy with
18 possession and control and trafficking and all this stuff.

19 Well, before we get there, let's really ask ourselves
20 a couple of questions. They've had all this stuff for
21 five or so years now. At no point in time did they
22 present to you any evidence that says this is Mr. Hardy's
23 bag. His initials aren't on here. His name's not on
24 here. No identifying marks at all. None of those items
25 are in little clear plastic bags today. No driver's

1 license, no ID card, and there are no fingerprints.
2 There's nothing that they can say directly proves this is
3 his stuff, because they don't have it because it doesn't
4 exist.

5 Mr. Hardy, at the time, some five years ago when all
6 this happened, was about 25 years of age. He had been in
7 Atlanta, was coming back, as you heard, was going back
8 home outside the Raleigh area in North Carolina. He gets
9 stopped. What happened in Atlanta, none of us know. What
10 happened coming back, none of us know. Nobody knows.
11 Nobody knows whose bag this is, nobody knows whose drugs
12 this is, nobody can draw any clear connection between this
13 stuff and Mr. Hardy.

14 Now, the officer will tell you my suspicion got
15 heightened because a black male driving by himself coming
16 up 85. And my suspicion was heightened because there was
17 an air freshener on the rear-view mirror and there was a
18 bag on the back seat, a single bag by itself on the back
19 seat. Where is that bag? Is there anything in that bag
20 that says a certain person, has any identifying markers or
21 cards or names or anything on that bag? Well, we don't
22 know because they chose not to present it to you. I
23 submit to you that was probably Mr. Hardy's travel bag,
24 probably his luggage that had his belongings in it. But
25 they didn't want to tell you about stuff they could prove,

1 but they want you to guess and hypothesize about who this
2 belongs to. You'll have to make up your own decisions
3 about that.

4 As I looked at this tape, it appeared to me that
5 there are three or four other bags that got moved around
6 inside that trunk. And it also appeared to me the dog
7 never once directly identified as anything being in this
8 bag. I don't know. But they, for some reason, after
9 stopping him for an hour start looking through this bag
10 that's in his car with no identifying marks on it. And
11 they would have you believe that all this stuff belongs to
12 him.

13 Look at what's not found in the car. Again, look at
14 the fact there's no direct identifying markers tying
15 Mr. Hardy to this bag. There is no gun, no firearms in
16 the car, which I submit to you would be commonplace for
17 major drug dealers. There's no large amount of cash or
18 currency found in the car, which I submit to you would be
19 commonplace for major drug dealers. There was some cash
20 found on Mr. Hardy by this officer that he takes out of
21 his front pocket and then he hands back to him and says no
22 big deal, no problem there.

23 It doesn't add up. It doesn't add up why a 25 year
24 old who has never been arrested before nor since should be
25 involved in this sort of activity. It's an attempt by the

(1 State to point a finger at a gentleman whose got no
2 history of any wrongdoing to claim he's responsible for
3 all this. I don't know how any of this stuff got in his
4 car. He probably doesn't know how any of this stuff got
5 in his car. You surely don't know how any of this stuff
6 got in his car. And to make the leap of faith that
7 they're asking for is inconceivable. Yeah, it was found
8 in the trunk of his car. We don't know how it got there.
9 We don't know who owns it. And we don't know what the
10 connection of any of this stuff is to Mr. Hardy.

(11 I submit to you they have not met their burden of
12 proof. They have not proven to you through fingerprints,
13 through hair fibers, through anything else that ties this
14 stuff directly to Mr. Hardy. I submit to you that they've
15 not met their burden of proof. You have one alternative.
16 And alternative is to find this gentleman, Kevin Hardy,
17 who's never been in trouble before or since, not guilty of
18 these offenses. Thank you.

19 JURY CHARGE

(20 THE COURT: Madam Forelady and ladies and gentlemen
21 of the jury, it is now my opportunity to instruct you on
22 the law. Let me remind you, when you were qualified to
23 serve as jurors, I told you we have indictments here, we
24 have two separate indictments. These indictments aren't
25 evidence. They're no consideration by you whatsoever of

1 any inference of guilt. They're merely the papers by
2 which the Defendant is brought before this Court for
3 action to be taken by the Court and by a jury of his
4 peers, such as you.

5 The fact that there are two indictments in this case,
6 obviously, they charge separate and distinct offenses.
7 You can decide -- you should decide each indictment
8 separately on the evidence and the law applicable to each
9 of those uninfluenced by your decision on the other. In
10 other words, the defendant in any case can be acquitted on
11 any or all of the offenses or be found guilty on any or
12 all the offenses. You will be asked to write a separate
13 verdict form of guilty or not guilty on each of
14 indictments.

15 I indicated to you that by entering a plea of not
16 guilty, as the Defendant has done, that places the burden
17 on the State to prove a defendant guilty. A person
18 charged with committing a criminal offense in South
19 Carolina is never required to prove himself innocent.
20 That's an important rule of law, ladies and gentlemen,
21 that in a criminal case, no matter how serious the charge
22 may be, a defendant will always be presumed to be innocent
23 for the crime for which the indictment was issued unless
24 guilt has been proven by evidence that satisfies you of
25 that guilt beyond a reasonable doubt.

1 Presumption of innocence doesn't end when you begin
2 your deliberations, but it accompanies the Defendant
3 throughout the trial until you've reached a verdict of
4 guilt based on evidence satisfying you of that guilt
5 beyond a reasonable doubt. Presumption of innocence is
6 like a robe of righteousness. It's placed about the
7 shoulders of a defendant and remains with that defendant
8 until it's been stripped for him by evidence satisfying
9 you of the defendant's guilt beyond a reasonable doubt.
10 Presumption of innocence is not a mere legal theory. It's
11 not a legal phrase that's used. It's a substantial right
12 to which every defendant is entitled unless you, the jury,
13 are satisfied from the evidence of defendant's guilt
14 beyond a reasonable doubt.

15 Now, you may ask what is a reasonable doubt in the
16 law? Reasonable doubt is the kind of doubt that would
17 cause a reasonable person to hesitate to act. The State
18 having the burden of proof beyond a reasonable doubt might
19 be different from some of you having served in juries on
20 other cases in other courts. Perhaps you were in a civil
21 trial and were told that it was only necessary to prove a
22 fact by what was called the preponderance of the evidence
23 or what was known as the greater weight of the evidence.
24 In criminal cases, however, the State's proof is more
25 powerful than that, it must be proof beyond a reasonable

1 doubt. That would be proof that would leave you firmly
2 convinced of the Defendant's guilt.

3 Now, there are very few things in this world that we
4 know with absolute certainty. And in criminal cases the
5 law doesn't require proof that overcomes every possible
6 doubt. If, based upon your consideration of the evidence,
7 you are firmly convinced of the Defendant's guilt of the
8 crimes charged, then you must find the Defendant guilty.
9 If, on the other hand, you think there's a real
10 possibility that the Defendant is not guilty, then you
11 must give him the benefit of the doubt and find him not
12 guilty.

13 Let me remind you that during the course of the
14 trial, you and I have had certain duties to perform. And
15 as the trial judge, it has been my responsibility to
16 preside over the trial. My duty has been to rule on the
17 admissibility of evidence that's offered during the trial.
18 You're to only consider the competent evidence before you
19 in the case. If any evidence was -- an objection made and
20 sustained, then, of course, you should disregard any of
21 that evidence. You should consider the testimony that's
22 been presented from the witness stand, the exhibits that
23 have been made a part of the record.

24 My job, also, is to instruct you on the law of the
25 case. I'm the sole judge of the law, as I've stated to

1 you earlier, it's your duty as jurors to accept that law
2 and apply the law exactly as I state it to you. You may
3 already have an idea about what the law is in a case such
4 as this or you may have an idea about what you think the
5 law ought to be in a case like this. And if either of
6 those ideas are in conflict with what I now tell you the
7 law is, then you must disregard those notions that you
8 have because you swore to accept the law and apply the law
9 exactly as I state it to you.

10 Every case that's tried in this courtroom before a
11 jury. The jury becomes the sole, exclusive judges of the
12 facts in the case. A trial Judge can't intimate or state
13 or comment on or make any reference whatsoever about the
14 facts in the case. Since you, the jury, are the sole fact
15 finders, you're not to infer from anything I've said
16 during the course of the trial, any rulings I've made on
17 the admissibility of evidence or otherwise, anything I say
18 to you now in the course of this instruction to you that I
19 have an opinion about the facts of the case. I do not
20 have an opinion. The Constitution in South Carolina,
21 specifically, prevents me from having an opinion about the
22 facts of the case. That's totally and exclusively up to
23 you and you alone. It's your duty to determine the effect
24 and the value, the weight and the truth of the evidence
25 presented during the trial.

1 There's two types of evidence which, generally, are
2 presented. There's direct evidence and there's
3 circumstantial evidence. Direct evidence is the testimony
4 of a person who claims to have actual knowledge of a fact,
5 such as an eyewitness. It would be evidence which
6 immediately establishes the main fact to be proved.
7 Circumstantial evidence is proof of a chain of facts and
8 circumstances that would indicate the existence of a fact.
9 It's evidence which immediately establishes collateral
10 facts from which the main fact may be inferred. In other
11 words, it's based on inference and not on personal
12 knowledge or observation.

13 Now, the law makes absolutely no distinction between
14 the weight or the value to be given either direct evidence
15 or circumstantial evidence. Nor is a greater degree of
16 certainty required of circumstantial evidence than of
17 direct evidence. You should weigh all the evidence in the
18 case. And after weighing that evidence, if you're not
19 convinced of the guilt of the Defendant beyond a
20 reasonable doubt, then you must find the Defendant not
21 guilty.

22 Of necessity, ladies and gentlemen, you must
23 determine the credibility of witnesses who have testified
24 in the case. Credibility simply means believability.
25 It's your duty as jurors to analyze and evaluate the

1 evidence and determine which evidence convinces you of its
2 truth. In determining believability of witnesses who've
3 testified, you can believe one witness over several
4 witnesses or several witnesses over one witness. You can
5 believe a part of the testimony of a witness and reject
6 the remaining part of the testimony of that very same
7 witness. In your discretion, you can believe the
8 testimony of a witness in its entirety. You can reject
9 the testimony of a witness in its entirety. You can
10 consider whether a witness has exhibited to you any
11 interest or bias or prejudice or other motive in the case.
12 You can consider the appearance of the witness while on
13 the witness stand, the demeanor of that witness. It's up
14 to you, and you alone, to determine the credibility of the
15 witnesses who testified in this case.

16 Now, normally, the rules of evidence would not permit
17 witnesses to give opinions or conclusions. There was an
18 exception to this rule, however, in our rules of evidence
19 and that's what we call expert witnesses. And a witness
20 who, by education or experience, has become an expert in
21 some art or science or profession or calling may state an
22 opinion as to relevant and material matters in which that
23 witness claims to be an expert. He may also state the
24 reasons for that opinion. You should consider an expert's
25 opinion received in evidence in this case and, like other

1 evidence, give it the weight that you think it deserves.
2 If you decide the opinion of an expert is not based on
3 sufficient education or experience or you conclude the
4 reasons given in support of that opinion are not sound or
5 that the opinion is outweighed by other evidence, you may
6 disregard the opinion entirely. An expert witness'
7 testimony is to be given no greater weight than that of
8 any other witness simply because that witness is an
9 expert. Furthermore, you're not required to accept an
10 expert's opinion even though it may be uncontradicted.

11 In order to establish criminal liability, criminal
12 intent is required and it must be proven by the State
13 beyond a reasonable doubt. Criminal intent is always a
14 matter that must be determined by a jury from the
15 circumstances surrounding the situation. There is no way
16 to prove intent to a mathematical certainty. Obviously,
17 there's no way that medical science can dissect a person's
18 brain and determine what a person had in mind. So the law
19 says criminal intent may be inferred from the
20 circumstances shown to have existed. It's not necessary
21 to establish intent by direct and positive evidence but it
22 may be established by inference in the same way as other
23 facts taken into consideration the acts of all the parties
24 and all the facts and circumstances of the case. Criminal
25 intent is a mental state, it's a conscious wrongdoing.

1 It's up to you to determine what the Defendant intended to
2 do based upon the circumstances shown to have existed.

3 I instruct you, ladies and gentlemen, and emphasize
4 to you the fact that the Defendant did not testify is not
5 a factor to be considered by you in any way in your
6 deliberations and in your consideration of the question of
7 guilt or innocence of the Defendant. Must not be
8 considered by you in any manner whatsoever. A defendant
9 has a Constitutional right to remain silent and the
10 assertion of this right must not be considered by you in
11 your deliberations. I repeat, under your oath, you are to
12 draw no conclusion whatsoever from the fact that the
13 Defendant in this case did not testify. The fact that the
14 Defendant did not testify should not even be discussed by
15 you in the jury room. The burden of proof, as I've stated
16 to you, is on the State. The Defendant's not required to
17 prove his innocence. The burden of proof remains on the
18 State to prove guilt beyond a reasonable doubt.

19 In this case, the Defendant is charged with
20 trafficking in cocaine, also, an indictment for
21 trafficking in crack. The State must prove beyond a
22 reasonable doubt that the Defendant knowingly sold or
23 manufactured, cultivated, delivered, purchased or brought
24 into the State or provided financial assistance or
25 otherwise aided and abetted, attempted or conspired to

1 sell and manufacture, cultivate, deliver, purchase or
2 bring into this State or was knowingly in actual and
3 constructive possession or knowingly attempted to become
4 in actual or constructive possession of the cocaine or the
5 crack.

6 As far as the cocaine charge, the State must prove
7 beyond a reasonable doubt that the amount of the cocaine
8 or any mixture of the -- containing the cocaine was 400
9 grams or more. As far as the other charge of the crack,
10 the State must also prove beyond a reasonable doubt that
11 the amount of the crack cocaine was 28 grams or more.

12 To prove possession, the State must prove beyond a
13 reasonable doubt that the Defendant had both the power and
14 the incident to control the disposition or use of the
15 drug. Possession may be either actual or constructive.
16 Actual possession means that the particular drug, be it
17 cocaine or crack, was in the actual physical custody of
18 the Defendant. Constructive possession means that the
19 Defendant had dominion and control or the right to
20 exercise dominion or control over either the drug itself
21 or the property upon which the drug was found.

22 Mere presence at the scene where the drugs were found
23 is not enough to prove possession. Actual knowledge of
24 the presence of the drug is strong evidence of the
25 Defendant's intent to control its disposition or use. The

1 Defendant's knowledge and -- possession may be inferred
2 when a substance is found on the property under that
3 Defendant's control. However, this inference is simply an
4 evidentiary fact to be take into consideration by you
5 along with all the other evidence in the case and to be
6 given the weight that you decide it should have. Two or
7 more persons may have joint custody of the drug. To
8 deliver a drug means to actually, constructively or
9 attempt to transfer the drug.

10 Now, Madam Forelady, I've prepared a verdict for you.
11 There's two charges, as I've stated. There's one verdict
12 form, it has two different offenses, trafficking of the
13 crack cocaine and trafficking of the cocaine. You,
14 obviously, need to make a decision as to whether or not
15 the State has met its burden of proof. If you find that
16 it has, then, of course, your verdict would be guilty. If
17 you find the State has not met its burden, your verdict,
18 of course, would be not guilty. And that would apply to
19 each of the two charges separately. They are separate and
20 distinct charges.

21 When you have reached a verdict, then, of course,
22 Madam Forelady, you would check the appropriate block on
23 each of the charges, sign your name as foreperson, date
24 it, let the bailiffs know by the appropriate sign and
25 we'll receive your verdict back here in the courtroom.

1 All 12 of you must agree on a verdict. Your verdict can't
2 be based upon sympathy or passion or prejudice or emotion
3 or any other consideration that's not in evidence in the
4 case.

5 Obviously, you're free to ask me any questions
6 concerning the law in the case, but remember, it's
7 impermissible for me to answer any questions that you may
8 have regarding the facts of the case. That's your duty as
9 the sole fact finders.

10 At this time, I'm going to ask you to return to your
11 jury room. Don't start your discussions just yet, there's
12 one final matter of law I need to take care of with the
13 attorneys. After that, I will give you instructions to
14 begin your deliberations. You may retire back to your
15 jury room.

16 (WHEREUPON, the jury left open court at
17 approximately 4:13 p.m.)

18 THE COURT: Exception to the charge from the State?

19 MS. MONTS: No, Your Honor.

20 THE COURT: From the defense?

21 MR. CULBERTSON: Yes, sir. I would object to the
22 definition of constructive possession that you gave to the
23 jury. And I would also ask for an additional charge on
24 simple possession.

25 THE COURT: Okay. I think the charge was appropriate

1 under the law. I don't believe simple possession would --
2 based upon the facts that I've heard in this case, I don't
3 believe that that would be an appropriate lesser included
4 offense. I would deny your motion on both of those.

5 MR. CULBERTSON: Yes, sir.

6 THE COURT: If you would, make sure all the exhibits
7 are in order and I have the verdict form here to carry
8 back with that.

9 MR. CULBERTSON: Could I ask, also, Your Honor, I, at
10 least, made one reference to it in my closing, I think the
11 State did, also. But I know the CD's themselves of the
12 stop are in evidence, I'm just curious as to whether the
13 jury has a mechanism about which to watch these CD's in
14 the jury room?

15 THE COURT: There's not anything in the jury room.
16 If they ask to review it in any way we can certainly, with
17 your consent, we can send something back or we can bring
18 them back out here to review it, either way. If and when
19 they ask to review it, we'll --

20 MR. CULBERTSON: I think a simple instruction at this
21 stage that if they want to look at the tape, for whatever
22 reason, we can bring them back.

23 THE COURT: Or if you and the Solicitor can agree and
24 we can get a machine back there, they can look at it their
25 way. Y'all talk about that. If they ask to see it, we'll

1 certainly accommodate them. We'll make sure they get to
2 see it, either there or up here.

3 MR. CULBERTSON: Yes, sir.

4 SOLICITOR'S INVESTIGATOR: Your Honor, it's not on a
5 type of media that would play like a DVD player would
6 play, which is the kind of thing they would be able to
7 roll in there. It's on a media that I have to play on the
8 computer that can be projected. If you want to plug up a
9 computer back there, but it would be most efficient if
10 they just came in.

11 THE COURT: We'll bring them back out here if we need
12 to.

13 All right. When all the --

14 I need -- when you get all the evidence back, just
15 make sure the alternate comes out here.

16 (WHEREUPON, the alternate returns to the
17 courtroom.)

18 (WHEREUPON, the jury began deliberating at
19 approximately 4:20 p.m.)

20 THE COURT: Okay. Now, you have survived. You're
21 welcome to stay with us, we'd love to have you. You're
22 free to go if you need to, also. And as far as tomorrow,
23 I think we've got a panel coming in, but you won't be a
24 part of it because we didn't know whether you'd be free.
25 So I think you probably ought to call back tomorrow night

1 just to see --

2 ALTERNATE JUROR: Tomorrow after six?

3 THE COURT: After six. I think you're probably going
4 to be free for the week, I suspect. I don't know that
5 we'll start one Friday.

6 Thank you, very much for serving. We appreciate it.

7 ALTERNATE JUROR: Thank you.

8 THE COURT: As I say, you're welcome to stay, but
9 you're welcome to leave, too.

10 ALTERNATE JUROR: Thank you. I've got a daughter to
11 get.

12 (WHEREUPON, the alternate was excused.)

13 (WHEREUPON, court was in recess awaiting a
14 verdict.)

15 THE COURT: I understand we have a verdict. Anything
16 we need to take care of before the jury returns to the
17 courtroom?

18 MS. MONTS: No, sir, Your Honor.

19 MR. CULBERTSON: No, sir.

20 THE COURT: All right. Have our jury come in,
21 please.

22 (WHEREUPON, the jury came into open court at
23 approximately 4:50 p.m.)

24 THE COURT: Madam Forelady, I understand the jury has
25 reached a verdict, is that correct?

1 MADAM FORELADY: Yes, we have, Your Honor.

2 THE COURT: Is it a unanimous verdict?

3 MADAM FORELADY: Yes, it is, Your Honor.

4 THE COURT: If you would, please, hand the verdict
5 form to the bailiff.

6 All right. Madam Clerk, you may publish the verdict.

7 THE CLERK: Your Honor, this is case 2005-GS-23-8184
8 and 8183, the State of South Carolina vs. Kevin Tawan
9 Hardy. We, the jury, unanimously find the Defendant,
10 Kevin Tawan Hardy, as to the charge of trafficking crack
11 cocaine more than 28 grams, the verdict is guilty. As to
12 the charge of trafficking cocaine more than 400 grams, the
13 verdict is guilty. This is signed by Inez Sweeney, your
14 Forelady.

15 Ladies and gentlemen of the jury, if you agree this
16 is a verdict you reached in your deliberation room, would
17 you please raise your right hand.

18 All right. Thank you.

19 THE COURT: Is there anything we need to take care of
20 with the jury before they're discharged in this case?
21 Anything from the State?

22 MS. MONTS: No, Your Honor.

23 THE COURT: From the defense?

24 MR. CULBERTSON: No, Your Honor.

25 THE COURT: Thank you, very much, ladies and

1 gentlemen, for serving with us on this case. I appreciate
2 the opportunity I had, it's been an honor to serve with
3 you. You've been a very conscientious group and I
4 appreciate that. It's been a treat to get to work with
5 you.

6 I'd like to be able to tell you that you're
7 discharged for the week, but I don't know that yet. We
8 have another panel of jurors coming in tomorrow. I'm
9 confident you won't need to be here tomorrow, but I need
10 you to call back tomorrow night after six. I don't know
11 if we might need to start a trial, short trial, on Friday,
12 either civil court or here. So we'll just need for you to
13 call back tomorrow night after six o'clock.

14 Thank you for serving on this case. You're dismissed
15 for the day.

16 I do need the Forelady, if you would, to meet the
17 clerk outside. There's one more paper that I need to get
18 you to sign.

19 Otherwise, you're dismissed at this time. Thank you
20 very much, ladies and gentlemen. Have a good evening.

21 (WHEREUPON, the jury left open court and was
22 dismissed at approximately 4:55 p.m.)

23 THE COURT: Anything we need to take care of before
24 sentence is imposed in this case? Anything from the
25 State?

1 MS. MONTS: No, Your Honor.

2 THE COURT: Anything from the defense?

3 MR. CULBERTSON: No, Your Honor. Although I would
4 request that my client, before you impose sentence, be
5 allowed to stay on an appeal bond. I've talked to him
6 about this. I think there are sufficient grounds to
7 justify an appeal that may, ultimately, result in a
8 reversal. So I'm asking you to allow him the opportunity
9 to remain out on appeal bond pending that process.

10 THE COURT: I believe that to be beyond my
11 jurisdiction.

12 MR. CULBERTSON: I think you can leave him on an
13 appeal bond.

14 THE COURT: If I remember the law right, any sentence
15 over ten years, I believe the Court of Appeals has that
16 jurisdiction. I may be wrong. We can check the law
17 later, but I think, if I'm not mistaken, the Court of
18 Appeals has decision to make on appeal bond rather than I.
19 If you find I'm in error, you, certainly, can let me know
20 tomorrow, I'll be around. I don't think we need to find
21 that out tonight. But I think the statute says anything
22 over ten years, the Court of Appeals has jurisdiction over
23 that. I miss it sometimes, I might be wrong.

24 MR. CULBERTSON: I miss time frames, I might have
25 missed that myself, Your Honor.

1 THE COURT: Okay. If you would come forward with
2 your client.

3 All right. Mr. Culbertson, be glad to hear from you
4 and be glad to hear from your client if he would like to
5 address the Court himself.

6 MR. CULBERTSON: Thank you, Your Honor. What I'd
7 like to tell you, if you don't already know, I think I've
8 tried to bring some of this out during the course of this
9 trial. But that is my client, Mr. Hardy, is currently 31
10 years of age. At the time of this offense, he was 25, I
11 think just turned 26 years of age. He is single. He has
12 no children, though he's engaged to this young woman who
13 has a prior child from a different relationship. He's
14 attempting to try to raise that child and be committed to
15 a woman. One day plans to still marry. He is from North
16 Carolina and, actually, has a job in Greenville, North
17 Carolina. He works, as I understand it, with Charter
18 Communications up there in Greenville. He's been doing
19 that for a number of years now.

20 Your Honor, I think it's important to point out,
21 know you don't have a great deal of discretion on your
22 sentencing on this charge, but he had no record prior to
23 this offense and since that time. Some five years now has
24 elapsed since this incident arrest. He has no charges
25 pending nor has he ever been arrested since that time

1 either, Your Honor. I think what you have is a young man,
2 who, back then, was young and stupid and desperate and
3 made a bad decision. Unfortunately, he's going to have to
4 pay for that decision. I just ask, Your Honor, to give
5 him as much credit and as much deference as you can.

6 THE COURT: All right. Thank you.

7 Mr. Hardy, anything you want to tell me, sir?

8 MR. HARDY: My faith in God and mercy in the Court,
9 you know. I made a mistake.

10 THE COURT: How far did you go in school, sir?

11 MR. HARDY: I got like a year left to get my BS in
12 biology.

13 THE COURT: What college?

14 MR. HARDY: I went to Barber Scotia College in
15 Concord, North Carolina. Right outside of Charlotte.

16 THE COURT: Did you grow up in Greenville, North
17 Carolina?

18 MR. HARDY: Washington River.

19 THE COURT: Is that in the Greenville area?

20 MR. HARDY: Yes, sir.

21 THE COURT: Eastern North Carolina?

22 MR. HARDY: Yes, sir.

23 THE COURT: How much time has been served on this
24 case, Solicitor?

25 MS. MONTS: Twenty-three days, Your Honor.

1 THE COURT: There's no prior record, I gather?

2 MS. MONTS: No, Your Honor.

3 MR. CULBERTSON: No, Your Honor.

4 THE COURT: Anything the State wants to say?

5 MS. MONTS: Nothing further from the State, Your
6 Honro.

7 THE COURT: Be glad to hear from Officer Owens if
8 there's anything --

9 TROOPER OWENS: No, sir. I truly believe that Mr.
10 Hardy made a mistake and it probably was a dire, desperate
11 need, probably not having a job or something of that sort.
12 I had no problems with Mr. Hardy on that evening. He was
13 more than cooperative other than, you know, he got caught
14 up in doing something he probably made a poor choice in
15 making a decision. And whatever mercy you can give to
16 him, I have no problems in feeling that as well.

17 THE COURT: Thank you, sir.

18 MR. HARDY: Appreciate it.

19 THE COURT: Well, everyone knows that minimum on one
20 is seven years and on the other is 25 years, so doesn't
21 leave much room for mercy, Mr. Hardy, unfortunately.

22 You did understand that from your attorney, that it
23 was a 25 year minimum sentence on the offense of
24 trafficking in cocaine?

25 MR. HARDY: I just really found that out today. I'm

1 not a violent person and I don't cause no problem. I made
2 a mistake, Your Honor.

3 THE COURT: I wish I had more leeway. I don't
4 have -- I've got a five year window of time for which I
5 can impose a sentence.

6 The CDR codes are right on this, I just want to make
7 sure before it gets down that we've got all that right.

8 MS. MONTS: Yes, sir.

9 THE COURT: Mr. Hardy, it makes it difficult,
10 assumingly, a fine young man who's got a good head on his
11 shoulders and had a good opportunity to make a positive
12 impact in our world, but I have to impose a sentence. I'm
13 required by law to impose a sentence for the crime that's
14 been committed. Case 2005-GS-23-8183, the sentence is the
15 Defendant be committed to the State Department of
16 Corrections for a period of time of 25 years. Case
17 2005-8184, the sentence is seven years to be concurrent.
18 That previously imposed, be given credit for his time
19 served.

20 I wish you the very best, Mr. hardy.

21 MR. HARDY: Can I hug my brother before I leave,
22 please?

23 THE COURT: No, sir. I'll try to make arrangements
24 for that for you, okay, you go on back to the cell now.

25 MS. MONTS: Thank you, Your Honor.

1 THE COURT: All right. Thank you,, very much. We'll
2 be at ease until 9:00 o'clock in the morning.

3 MR. CULBERTSON: Thank you, Your Honor.

4 (WHEREUPON, the proceedings were concluded.)
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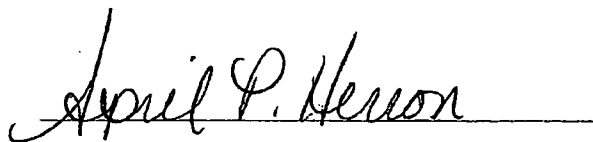
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Greenville County, South Carolina, on the 16th & 17th day of June, 2009.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

February 10, 2010



APRIL P. HERRON, Court Reporter

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)KEVIN T. HARDY, 335620)

Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2013-CP-23- 01426

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention LEE CI, 990 WISACKY HWY., BISHOPVILLE, SC 29610
2. Name and location of Court which imposed sentence G-VILLE GEN SESS COURT
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) TRAFFICKING CRACK COCAINE x2 OFFENSE
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) JUNE 17, 2009, 25 and 7 CONCURRENT,
 - (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty XXXX
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
~~YES~~
~~YES~~
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. SC COURT OF APPEALS
- ii. SC SUPREME COURT
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. SEE UP-OP NO. 2012-UP-315, FILED 5/23/2012 AFFIRMED
- ii. PENDING FROM REHEARING REQUEST
- iii. _____
- (c) the date of each such result:
- i. MAY 29, 2012
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. SEE OPINION AS CITED AFFIRMED CONVICTIONS
- ii. PENDING IN SC SUPREME COURT
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: SEE ATTACHMENT STATING GROUNDS/ISSUES

- (a) _____
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10): **SEE ATTACHMENT STATING GROUNDS/ISSUES, etc.**
- (a) _____
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? _____
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? **8dii** _____
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof: **8dii EXPLAINED**
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed: **7/8**
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (c) the disposition thereof: **7/8**
- i. _____
- ii. _____
- iii. _____

- iv. _____
- (d) the date of each such disposition: N/A
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition: N/A
- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
NO

15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented: N/A
 - i. _____
 - ii. _____
 - iii. _____
 - (b) the proceedings in which each ground was raised: N/A
 - i. _____
 - ii. _____
 - iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) MUST FOLLOW THE PROPER EXHAUSTION DOCTRINE, etc.
 - (b) _____
 - (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? xxx
- (b) your trial, if any? xxx
- (c) your sentencing? xxx
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? xxx
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. SYMMES CULBERTSON, ESQ.
 - ii. LANELLE C. DURANT, ESQ.
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. TRIAL, Symmes Culbertson, Esq.
 - ii. APPEAL, Lanelle C. Durant, Esq. Appellate Dept.
 - iii. _____

19. State clearly the relief you seek in filing this application:

VACATE SENTENCE WITH PREJUDICE AND DISMISS CHARGES

20. Are you now under sentence from any other court that you have not challenged?

NO

PCR ADDENDUM 1.

10-a: APPLICANT WAS DEINED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE 6th AND 14th AMENDMENT OF THE U.S. CONST. AND BY ART. I, §§ 3 AND 14 OF THE S.C. CONST. DURING ALL PHASES OF THE CRIMINAL CASE, etc.

11-a: TRIAL COUNSEL AND APPELLATE COUNSEL PERFORMANCE DURING THE TRIAL AND APPEAL WAS UNREASONABLE AND PREJUDICE AGAINST APPLICANT ACCORDINGLY TO, SEE STRICKLAND V. WASHINGTON, 466 U.S. 688 (1984); COUNSEL'S ACTIONS AND NON-ACTIONS ARE THE FOLLOWING AND NOT LIMITED TO AS STATED:

THE FOLLOWING OMISSIONS:

A: TRIAL COUNSEL FAILED TO PRETRIAL THE CHEMICAL ANALYSIS REPORT LISTING THE AMOUNT OF DRUGS AS THIS WAS A CRUCIAL STAGE OF THE APPLICANT'S CASE TO CHALLENGE THE ACCURACY OF THE DRUGS CONFISCATED ALLEGED;

B: TRIAL COUNSEL FAILED TO INVESTIGATE THE OFFICER WHO DID THE PRELIMINARY ARREST AND INVESTIGATION OF THE CASE/INCIDENT DUE TO THE QUESTIONABLE RACE ISSUES ARRIVED FROM THE OFFICER ARRESTING THE APPLICANT AND DOING THE TRAFFIC STOP IN THE CASE MATTER;

C: TRIAL COUNSEL FAILED TO PLACE OBJECTIONS TO THE TRIAL RECORD IN REGARDS TO THE OFFICER USING APPLICANT'S RACE AS A FACTOR AS HIM STOPPING THE APPLICANT;

D: TRIAL COUNSEL FAILED TO FILED PRETRIAL MOTIONS IN HAVING THE COURT TO EVALUATE THE OFFICER'S AFFIDAVITS AND POLICE REPORTS THAT WERE FALSIFIED BY THE OFFICER TO OBTAIN A ARREST WARRANT AND INDICTMENT AGAINST THE APPLICANT, THE TRIAL COUNSEL NEVER CHALLENGED THE STATEMENTS THAT THE OFFICER GAVE TO GRAND JURY;

F: APPELLATE COUNSEL FAILED TO FILE FOR A REHEARING AND PETITION FOR A CERTIORARI TO THE APPELLATE COURTS AS SHOULD HAVE BY THE TIMELY NOTICES GIVEN BY THE APPELLATE COURT RULES, THE APPLICANT IS ENTITLED TO HAVE HIS CASE PROPERLY EXHAUSTED BY EVERY AVAILABLE REMEDY TO HIM IN HIS CASE AND THE APPEAL ATTORNEY DID NOT ASSIST HIM ON DOING SO AS SHE SHOULD HAVE;

E: APPELLATE COUNSEL FAILED TO BRIEF EVERY PROPERLY PRESERVED ISSUE OF THE TRIAL RECORD AND SUBMIT TO THEM TO THE APPELLATE COURT FOR THE APPELLATE REVIEWS, AND UNDER THE WELL SETTLED LAWS BY OUR SC SUPREME COURT, SEE AT: GILCHRIST V. STATE, SUPRA. AND SEE: SOUTHERLAND V. STATE, SUPRA., etc.;

G: APPLICANT IS ENTITLED TO THE BENEFITS OF THE NEW LAWS PASS IN 2009-10, BY THE SC LEGISLATORS OMNIBUS CRIME REDUCTION AND SENTENCING REFORM ACT., THE APPLICANT IS ENTITLED TO AL BENEFITS OF THIS NEW LAWS DUE TO THE SAVING CLAUSE OF THIS PARTICULAR LAW, AS IT STATES THE FORCE OF THIS LAW EFFECTS ALL APPEALS EXISTING AS OF THE EFFECTIVE DATE OF THIS ACT AND FOR THE ENFORCEMENT OF THE RIGHTS UNDER THE REPEAL OR AMENDED LAWS.

APPLICANT'S PCR IS SUBJECT TO THE AMENDING RULES, etc., RULE 71.1(a), SCRA. TO BE DONE BY THE CASE COUNSEL POTENTIALLY APPOINTED, etc.

STATE OF SOUTH CAROLINA)

VERIFICATION

County of LEE)

KEVIN T. HARDY, 335620

I, , being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.



KEVIN T. HARDY, 335620

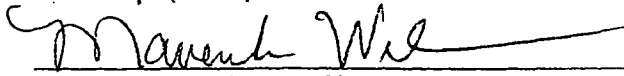
LEE CI

990 WISACKY HWY.

BISHOPVILLE, S.C. 29010

APPLICANT

SWORN to and subscribed before me this 1
day of March, 2013

 (L.S.)
Notary Public

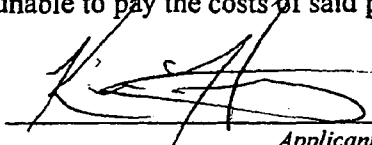
My Commission Expires: 3/8/2020

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

KEVIN T. HARDY, 335620

I, , hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.



Applicant

SWORN or affirmed to and subscribed before me this
1 day of March, 2013.



Notary Public

KEVIN T. HARDY, 335620
LEE CT
990 WISACKY HWY.
BISHOPVILLE, S.C. 29010

My Commission Expires: 3/8/2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2013-CP-23-1426
COUNTY OF GREENVILLE	)	
	)	
Kevin T. Hardy,	)	
S.C.D.C. No. 335620,	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed March 12, 2013, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Applicant was indicted at the October 2005 term of the Greenville County Grand Jury for trafficking cocaine, 400 or more grams (2005-GS-23-8183) and trafficking cocaine, more than 28 grams (2005-GS-23-8184). Symmes Culbertson, Esquire represented the Applicant.

After the State took the case to trial, the Applicant was found guilty. On June 17, 2009, the Honorable G. Edward Welmaker sentenced the Applicant to concurrent terms of twenty-five years for trafficking cocaine, 400 or more grams and seven years for trafficking cocaine, 28-100 grams.

A notice of appeal was filed at the South Carolina Court of Appeals. LaNelle C. DuRant, Esquire perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Hardy, Op. No. 2012-UP-315 (S.C. Ct. App. filed May 23, 2012). The

Remittitur was sent on June 12, 2012.

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

In his application for post-conviction relief the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. "Trial counsel failed to pretrial the chemical analysis report listing the amount of drugs as this was a crucial stage of the Applicant's case to challenge the accuracy of the drugs confiscated alleged."
 - b. Failure to investigate the officer based on his use of race as one factor related to reasonable suspicion.
 - c. Failure to object based on racial factors used in determining reasonable suspicion.
 - d. Failure to file pretrial motions in order to evaluate affidavits and police reports as well as failure to challenge the officer's statements to the Grand Jury.
2. Ineffective assistance of appellate counsel.
 - a. Failure to file for rehearing or petition for writ of certiorari.
 - b. Failure to brief every properly preserved issue.
3. Applicant claims he is entitled to benefits from the passage of the Omnibus Crime Reduction and Sentencing Reform Act.

III.

The Respondent asserts the Applicant's allegations that his trial attorney was ineffective are without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v.

Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305

S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985). In analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009); Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (noting courts apply the Strickland test to determine if appellate counsel was deficient for failing to raise an issue and whether the defendant was prejudiced from the failure to raise the issue). Appellate counsel, however, is not required to raise every non-frivolous claim, but instead may select among them in order to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000).

The Respondent contends the Applicant's appellate attorney rendered effective assistance of counsel. However, this ground for relief may raise factual issues that are not conclusively refuted by the record. The Respondent requests an evidentiary hearing on this allegation.

V.

The Court should summarily dismiss Applicant's third allegation because it failed to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160 (2003). An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;

4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy.... S.C. Code Ann. § 17-27-20 (1976).

Even if the facts alleged by the Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. The Respondent therefore moves for summary dismissal of this allegation pursuant to S.C. Code Ann. § 17-27-70(c) (2003).

VI.

The Respondent denies each allegation not expressly admitted, qualified or explained.

VII.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

Respectfully submitted,

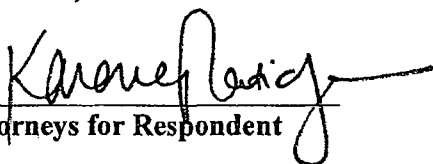
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

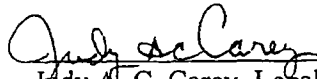
Oct. 23, 2013

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
	)	
	)	2013-CP-23-1426
	)	
KEVIN T. HARDY, 335620	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Kevin T. Hardy, 335620
Lee Correctional Institution
990 Wisacky Highway
Bishopville SC 29010

DATED this 23rd day of October, 2013.


 Jody A. C. Carey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	Case No(s) : 2013CP2301426
	)	
Kevin Hardy,	)	
	)	
Applicant,	)	
	)	
-VS-	)	TRANSCRIPT OF RECORD
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

October 22, 2014
Greenville, South Carolina

B E F O R E:

HONORABLE LETITIA H. VERDIN, Judge.

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

KAREN RATIGAN, Esquire
Attorney for the State

BRIAN JOHNSON, Esquire
Attorney for the Applicant

Teresa B. Johnson
Certified Verbatim Reporter
P.O. Box 2812
Greenville, S.C. 29602

Records are
taken and
produced via



Speech CAT 7™

I N D E XDIRECT CROSS REDIRECT RECROSS

Kevin Hardy

by Mr. Johnson 6

Symmes Culbertson

by Ms. Ratigan 31

by Mr. Johnson 35

Certificate of Reporter 43

EXHIBITS PAGE

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
APPLICANT EXHIBITS			
A-1	Registration	12	12

RESPONDENT EXHIBITS

(No exhibits offered.)

COURT EXHIBITS

(No exhibits offered.)

Remarks

4

P R O C E E D I N G S

(WHEREUPON, the proceedings begin on the 22nd day of October, 2014 at approximately 10:06 a.m.)

MS. RATIGAN: May it please the court, this is the case of Kevin Hardy versus the State of South Carolina. The docket number is 2013-CP-23-1426. Mr. Hardy was indicted for Trafficking Cocaine in excess of 400 grams and Trafficking Cocaine more than 28 grams. He was represented on these charges by Mr. Culbertson.

The case went to trial before Judge Welmaker in June 2009. At which point, Mr. Hardy was found guilty. On June 17, 2009, Judge Welmaker sentenced him to concurrent terms of 25 years for Trafficking Cocaine 400 or more grams and seven years for Trafficking 28 to 100.

THE COURT: All right.

MS. RATIGAN: He didn't file an appeal. The Court of Appeals affirmed his conviction and sentences in May of 2012 and the State is ready to proceed.

MR. JOHNSON: Thank you, Your Honor. If it may please the court, I would like to at this time -- I may be able to shed light on

1 issues that you might hear before you today
2 based upon my client. I think first my client
3 will claim that counsel in this matter was
4 ineffective because he did not challenge the
5 probable cause for the initial stop. He is
6 also going to allege that counsel was
7 ineffective because he didn't know that the
8 video of the stop did not have audio until the
9 day of the trial.

10 He is going to state that counsel was
11 ineffective because he did not properly
12 preserve a racial profiling argument and that
13 is in reference to his appeals court case,
14 Judge. Also he is going to allege that he was
15 ineffective because he previously spoke with
16 the DEA but there was no investigation made.
17 We don't have any proof of that here but he
18 still wants to provide testimony on the matter.

19 **THE COURT:** Okay. All right. You ready
20 to proceed?

21 **MR. JOHNSON:** Yes, ma'am, Your Honor. I'm
22 going to call Kevin Hardy.

23 **KEVIN HARDY**

24 having first been duly sworn, testifies as follows:

25 **THE CLERK:** Thank you. Please state your

1 name for the record.

2 THE WITNESS: My name is Kevin Hardy.

3 THE CLERK: Thank you. You may be seated.

4 MR. JOHNSON: Thank you, Your Honor.

5 DIRECT EXAMINATION

6 BY MR. JOHNSON:

7 Q Kevin, let me know when you are situated.

8 A I want to make sure. I am not a lawyer,
9 but I have been doing my research. Let me get my
10 stuff together. I am ready, sir.

11 Q All right. Kevin, do you know why we are
12 here today?

13 A Yes, sir.

14 Q Please portray that to the court.

15 A We are here today to show how my trial
16 counsel was ineffective.

17 Q Now, you did an application for
18 postconviction relief, is that correct?

19 A Yes, sir.

20 Q And as you just stated, in that
21 application, you allege that your attorney was
22 ineffective for trial?

23 A Yes, sir.

24 Q Who was your attorney for trial?

25 A Symmes Culbertson.

1 Q Okay. What were the charges?

2 A Trafficking cocaine and trafficking crack
3 cocaine.

4 Q All right. You said this wasn't a plea,
5 this was a trial, correct?

6 A This was a trial.

7 Q All right. Let's go over the ways that you
8 believe trial counsel was ineffective.

9 A Okay.

10 Q Please tell the court about your first
11 ground as far as ineffective assistance.

12 A All right. My first ground that I actually
13 put in for was actually for my trial counsel was
14 ineffective because he did not investigate properly
15 to the best of his ability. If he had investigated
16 properly, he would have also seen that there was no
17 audio on the tape from the traffic stop itself. I've
18 been out on bail four years.

19 Q Let me slow you down. What tape are you
20 talking about? What tape?

21 A The tape from the car, the state trooper
22 from when he pulled me over.

23 Q And was this tape played at trial?

24 A This tape was played at trial.

25 Q You stated that the tape played at trial

1 had no audio?

2 **A** It had no audio. The only audio that he
3 said was on the tape was from the inside of the car.
4 I was on the side of the road 55 minutes with no
5 audio.

6 **Q** There was a 55-minute tape?

7 **A** Yes, sir.

8 **Q** And the tape did not have any audio?

9 **A** No audio. The only audio they had was
10 probably like a minute from the inside of the car.
11 You can't really hear him questioning me but you can
12 hear me telling him no, sir. There was no audio for
13 55 minutes straight.

14 **Q** Now you stated that your trial counsel
15 didn't know about this?

16 **A** He said he didn't know about this on my
17 transcript. It is in the transcript. He said that
18 was his first time seeing the tape.

19 **Q** You believe that prejudiced you how? What
20 would the tape had shown if it had audio? Or what
21 would you have done if you had known it did not have
22 audio?

23 **A** First of all, if it had audio, you could
24 hear, from the bogus police report from the get-go,
25 all of the stuff that he is saying, stuff that he is

1 saying like you can just run my record, my brother's
2 in the military, the disclaimer, things that is on
3 the police report here. I would read the whole thing
4 but it would take up a lot of time. It is a bunch of
5 bull.

6 In order for me to give these responses
7 that he just said I just come out and give you a
8 statement, you have to ask me some type of question.
9 What he was doing was kept asking me the same
10 question for me to get an attitude so he could have
11 reasonable suspicion to search me.

12 First of all, he pulled me over for doing
13 58 in a 60. My lawyer was trying to argue reasonable
14 suspicion but he never argued to the court and made
15 the court put on record.

16 Q Let me slow you down. We will get to that.

17 A Okay.

18 Q Continue to talk about what the tape would
19 have shown. If you had known that the audio was
20 there, what would it have shown? Or if the audio was
21 in there, what would you have done? How would that
22 have changed your analysis of the case?

23 A If you would hear the officer and the way
24 that he was questioning me, it would have shown that
25 from the get-go he did not stop me for a warning

1 ticket. He stopped me just to search me for some type
2 of contraband in my car. It is hard to defend myself
3 when I can't, when you can't hear the officer
4 talking. If the officer is in court, versus me,
5 you're going to believe the officer because he swear
6 to uphold and tell the truth and support the citizens
7 of South Carolina.

8 Q If you had known that there was no audio,
9 how would that have particularly changed your
10 analysis of the case or is that something you would
11 have preferred to discuss with your attorney?

12 A If they had audio, if you could see how
13 long I sat on the highway for a warning ticket for 55
14 minutes, you would have known when the dispatch
15 cleared my information, you would have seen when he
16 returned my belongings back. After the dispatcher
17 cleared everything, he gave me my belongings. I
18 asked if everything is done. He said yes, everything
19 is done. Then he said sir, excuse me, do you mind if
20 I search your vehicle. I told him no, sir, you can't
21 search my vehicle.

22 First of all, 58 in a 60 is something I
23 never heard of. You asked me had I been drinking in
24 the car. I step out of the car. You asked me again
25 before you run my license. You pat me down. I

1 should have had an insurance card. I told him I got
2 my license and my registration. He kept asking me
3 had I been to jail. I said sir, you got my
4 information. I never did a day in jail. I don't
5 know what you are looking for but you have all that I
6 could give you to show my innocence. Therefore, I
7 told him no, sir, you can't search my vehicle.

8 So then, he takes the latch off of the
9 Taser gun and pull it out. He said wait right here
10 until the dog gets here. Now, he got in his police
11 report that he returned me my belongings and then he
12 asked me for consent to search my vehicle. I told
13 him no. Why didn't I leave? From the trial, he said
14 I was never free to leave from the moment he stop me.
15 Therefore, he sees me off the side of the highway
16 from the get-go. I have proof right here. I would
17 like to show the judge. I have this paper.

18 Q If you would like for me to make it an
19 exhibit, I can.

20 A Yes, sir. I'm sorry. Show her that on my
21 registration, it had my insurance company and my
22 policy number printed plain as day on my
23 registration. There is no need, there is no reason
24 for me to have to give you an insurance card.

25 Q Hold on a second, Kevin.

1 **A** I'm sorry.

2 **MR. JOHNSON:** Your Honor, I would like to
3 have this marked and entered into evidence.

4 **THE COURT:** Any objection?

5 **MS. RATIGAN:** No objection.

6 **THE COURT:** All right. It will be so
7 entered as de -- as --

8 **MR. JOHNSON:** Applicant's Exhibit 1.

9 **THE COURT:** Yeah.

10 **MR. JOHNSON:** Yes, ma'am.

11 **(WHEREUPON, Applicant's Exhibit 1 is marked for**
12 **identification and admitted into the record.)**

13 **BY MR. JOHNSON:**

14 **Q** If you want to tell the judge what she is
15 looking at.

16 **A** Okay, Your Honor, as you see, you have the
17 registration right there on the right-hand side.
18 There is a registration from North Carolina. He kept
19 asking me where is your insurance card. I said I
20 don't have an insurance card. I have my license and
21 I have my registration.

22 What he was actually doing, he kept asking
23 me the same questions. He kept asking me had I been
24 drinking and this and that. First of all, I don't
25 drink and I don't use drugs, first of all, so I'm not

1 intoxicated. I told him no. I offered to blow on
2 his machine. He said no, don't worry about it.
3 Don't worry about it.

4 After the dispatcher called back and says
5 everything is valid, he tries to go -- he says I need
6 to check the VIN number. What is the purpose of you
7 checking the VIN number after the dispatcher has
8 cleared my tag and my driver's license? Therefore,
9 you are killing time for the man with the dog to get
10 there. In reality, I have not even broke the law.
11 What US law or South Carolina traffic have I broke
12 for driving 58 in a 60?

13 Q Let's go ahead and get into that. Okay?

14 A Yes, sir.

15 Q Since we seem to be going there. I believe
16 you also stated that you don't believe he had
17 probable cause to stop you.

18 A No, he didn't have probable cause.

19 Q So start from the beginning.

20 A The reason for the stop was not to search
21 me. His initial encounter, the reason for the stop
22 was for driving 58 in a 60 mile-per-hour zone. My
23 lawyer failed to make the court rule on what US
24 traffic law or South Carolina traffic law I broke for
25 driving 58 in a 60 mile-per-hour zone with a minimum

1 of 45?

2 Q Are you stating that your lawyer didn't
3 make a motion on probable cause?

4 A For the probable cause of the stop itself.

5 Q What did he make a motion on?

6 A Reasonable suspicion to search me. He
7 didn't ever make -- he never made the court rule on
8 what the probable cause -- why did you stop me for
9 driving 58 in a 60. If a state trooper were to stop
10 anyone in this courtroom, they write you a real
11 citation for driving 58 in a 60, if you go to
12 magistrate court, the judge is going to laugh at
13 them. The speed limit is 60. The minimum is 45.

14 I'm just trying to -- you can't put the
15 carriage before the horse. The horse comes before
16 the carriage. If the traffic stop itself was, if you
17 lack probable cause to stop me from the jump, you
18 don't have probable cause to even stop me. So
19 everything else was fruit from the poisonous tree.

20 Q You think you were prejudiced by your
21 counsel not challenging the probable cause to the
22 stop?

23 A Probable cause to the stop. He also was
24 ineffective because if I am a lawyer and you come to
25 me and tell me I want to retain you because I got

1 pulled over for trafficking drugs, how did you get
2 pulled over for trafficking drugs. I want to see the
3 tape. By him not seeing the tape, if he would have
4 saw the tape, he would've known there was no audio on
5 the tape. Therefore, he would have to look for other
6 alternatives to prove my innocence also.

7 I told him from the side of the highway,
8 the officer took me to the federal district
9 attorney's office. I'm not from South Carolina, but
10 I never will forget where I went at. He took me to
11 Pellingham Road, Pelham Road or Pellingham, something
12 like that. It got car lots on the left-hand side.
13 It got a brick building on the right-hand side. He
14 took me around the back up a flight of long black
15 iron steps. It was a burgundy Camaro with tinted
16 windows. I never forgot it.

17 Made me put my head against the wall. He
18 opened the door. Dude let him in. He open another
19 door and stick me in this white room with the light
20 at the top. So he came out. He came to ask me, Mr.
21 Hardy, do you know why you are here. I said no, sir.
22 He said you are here for trafficking drugs. I said I
23 ain't never. They are not my drugs, first of all. I
24 didn't know no drugs were in my car.

25 He came to me. He said your only record,

1 you have a did a day in jail for a speeding ticket
2 and you got these drugs. It doesn't equal. He said
3 you want to help yourself, you can tell me. I said
4 yeah, I want to help myself. He said go ahead and
5 help yourself and tell me where you were taking these
6 drugs.

7 I said you can help not being smart with
8 me. I'm going to tell you like I told the officer on
9 the side of the highway because he asked me the same
10 thing. I told him you can help me call my daddy and
11 get my lawyer down that. Besides that, put me in my
12 jumpsuit because we don't have nothing to talk about.
13 He said okay.

14 Officer, what did you stop him for. The
15 man picked up the warning ticket from which the
16 officer gave me. He said what did you stop him for,
17 58 in a 60, you can't be serious. He said he was
18 driving 58. He said that is not probable cause. Why
19 did you stop him?

20 My question is I'm telling you he illegally
21 searched me. I don't want to get ahead of myself.
22 After I left the federal district attorney, they gave
23 it back to the state. When I got to the county, he
24 made me take all of my things out of my pocket and
25 put it in my property bag. When I made bail 28 days

1 later, I put my one ticket in the pocket of my wallet
2 and my registration where my money go. Because I
3 don't keep my money with my wallet just in case I
4 lose my wallet, I got my money. If I got my money --
5 if I lose my money, I got my bank card. If I make
6 bail, my warning ticket is gone but my registration
7 is there.

8 So now you tampering with evidence. What
9 is the reason for you taking my warning ticket when
10 you already wrote in your police report that you
11 wrote me up for driving 58 in a 60. Therefore, to
12 me, he has been trying to build a case from nothing.
13 He was trying to build reasonable suspicion. He was
14 trying to claim all of these factors for reasonable
15 suspicion when it is nothing.

16 I got my papers out of my glove
17 compartment. He said I had -- he picked the roadmap
18 out of all of the papers from out of my passenger's
19 seat. One roadmap, a fast food bag and he said the
20 driver's hands was shaking at an accelerated pulse.
21 It's not a person in America that does not -- it's
22 kind of fishy when an officer pulls them over. But if
23 those were leading factors that you are trying to say
24 that I was trafficking drugs, everybody in the state
25 will need to be doing time. That's not right.

1 Q Now, you just talked about reasonable
2 suspicion.

3 A Yes, sir.

4 Q There was a number of factors that he
5 communicated to the court to support that, correct?

6 A Yes, sir.

7 Q Now after your trial, you had an appeal?

8 A Yes, sir.

9 Q There was a decision turned out in your
10 appeal and they affirmed the decision of the trial
11 court, is that correct?

12 A Yes, sir.

13 Q Was there an issue brought up in the appeal
14 that wasn't able to be covered on the basis of the
15 trial? Can you communicate that to the court?

16 A After I caught my time, there was a case of
17 State versus Tindall. Welmaker said -- Judge
18 Welmaker, he said that my case is more like State
19 versus -- more relatable to State versus Tindall than
20 Ricardo Reyes. After I caught my time, the Court of
21 Appeals overturned State versus Tindall. They said
22 there is no way from the factors. Basically, the same
23 type of factors that were in the Tindall case were in
24 my case. The officer couldn't determine that there
25 was contraband in the car without the illegal search

1 and seizure of the individual. So the case that they
2 used to convict me to affirm my conviction got
3 overturned after I caught my time.

4 Q Okay. Was there also an issue in your
5 actual appeals decision that wasn't actually
6 addressed regarding racial profiling?

7 A You are right. Therefore the officer also
8 stated during trial that he teaches classes to
9 upcoming officers. It is in my transcript. He
10 teaches officers, upcoming officers them classes to
11 look for those tactics. Out-of-state tags, black
12 males with out-of-state tags. Therefore, what you
13 actually doing is you're actually teaching your
14 officers to profile. I don't want to say racial
15 profile because then I would try to make it look like
16 a racist. That is not what I'm trying to do.

17 You're actually profiling a group of
18 individuals from a certain ethnic group that more
19 than likely you might consider they are more than
20 likely to commit a crime. Therefore, if you want to
21 call it racial profiling, I will say that's racial
22 profiling. I'm not going to sit here and say you are
23 a racist, but that is what you are doing. You are
24 targeting certain individuals. That is what he did.
25 From the get-go in the transcript, he also said I was

1 never free to leave. Why was I never free to leave?

2 I don't understand. Why was I never free to leave?

3 Q Now with regards to your appeals decision

4 ---

5 A Yes, sir.

6 Q --- you are familiar with it, correct?

7 A Yes, sir.

8 Q Specifically, did they say that Hardy's
9 trial counsel questioned the officer concerning
10 consideration of a black male driver alone as a
11 factor to support reasonable suspicion. They never
12 argued to the trial court that the state had the same
13 questionable factors. Is that consistent?

14 A Yes, sir. That's also an issue. My direct
15 appeal, they cannot make a ruling or do anything with
16 it because my trial lawyer was ineffective because he
17 never properly preserved the issue in the trial. He
18 didn't even raise that particular issue. So they are
19 saying he didn't object, he did not place the proper
20 objections or anything so they could not rule on it.

21 Q With regards to the video and with regards
22 to racial profiling and in regards to the probable
23 cause argument, those issues have been resolved in
24 your favor, would the drugs have been -- in your
25 opinion, would the drugs have been suppressed?

1 A The drugs would have definitely been
2 suppressed. You can't even justify right now in this
3 present time, you can't even justify the reason for
4 pulling me over for driving 58 in a 60, in a 60 mile-
5 per-hour zone with a minimum of 45 in the center
6 lane. He doesn't tell you that he boxed me in and
7 followed me for half a mile.

8 Q You have a copy of the report with you?
9 The officer's report?

10 A Yes, sir. I have got a copy of the police
11 report right here.

12 Q Can you communicate to the court where he
13 stated that's why he pulled you over?

14 A It says that on 7/27/2005, possibly at
15 20:12 hours, Corporal Owens was on patrol in
16 Greenville county on Interstate 85 near the 46 mile
17 marker. While Owens was monitoring traffic from the
18 right emergency shoulder near the 46 mile marker, 46
19 mile marker, he observed a silver Mazda traveling
20 below the speed limit in the center lane impeding
21 traffic and operating with a defective windshield.

22 Let me stop you right there. How can you
23 see a defective windshield from the side of the
24 highway in a center lane with traffic everywhere? In
25 North Carolina, you have to have inspection stickers.

1 In 2005, you had to have inspection stickers or you
2 can't operate your vehicle. From the beginning of
3 your windshield where your windshield starts from
4 close to your hood is tented. A rock hit my window.
5 There was a little crack by the tent. There is no
6 way possible I could have gotten an inspection
7 sticker if that crack in my windshield would have
8 been defective to where it would impair my vision.

9 Q Was there any testimony elicited regarding
10 the issue?

11 A No, there was no testimony. The reason --
12 let me finish reading. I don't want to get ahead of
13 myself. Like I said, I'm not a lawyer. I'm going to
14 try to do whatever I can. Owens measured the vehicle
15 speed with a radar at 56 miles per hour in a 60 mile-
16 per-hour zone. As Officer Owens accelerated behind
17 the subject's vehicle, he observed the vehicle also
18 make a lane change without giving signal.

19 Once he positioned his patrol car behind,
20 he activated the blue lights. And shortly after the
21 subject vehicle pulled over to the right emergency
22 shoulder and the vehicle came to a stop, Owens
23 observed one occupant and North Carolina license
24 plates on the rear of the vehicle. Therefore, it
25 doesn't tell you that he followed me. He got beside

1 me. He followed me from the side of the highway. He
2 came through traffic. He got beside me. He seen my
3 tags. He got beside me and was pacing me.

4 My thing is this also, this is a traffic
5 stop. The officers have cars that have mic systems
6 for my protection and their protection. Why would
7 you even have a patrol car on the highway without the
8 proper equipment? If you don't have an audio system,
9 you are telling me that you pulled me going 56 in a
10 60. On your warning ticket, you said 58 in a 60.
11 When we asked you at trial, you said 58 or 56, it is
12 the same. No, it is not the same.

13 Q The arguments that you are making are
14 arguments that you preferred that your attorney made
15 with regards to probable cause?

16 A Exactly. Probable cause of the stop.

17 Q Mr. Hardy, is there anything else that you
18 would like for me to communicate to the court with
19 regards to ineffectiveness or otherwise with regard
20 to your application for postconviction relief?

21 A Yes, sir. I also have here I admitted some
22 issues because this is my first time ever coming to
23 prison. I did three years of college, got a year
24 left. I take my life very, very serious. I goes to
25 the law library and I do my research. Like I said, I

1 am not a lawyer but I would be a fool not to try to
2 help myself. I also pulled this case up right here.
3 It is call State versus Moore, State versus Moore.
4 The Court of Appeals just overturned this case on
5 July 17, 2013.

6 Q Do you have a citation?

7 A Say it again?

8 Q Do you have a citation for State versus
9 Moore?

10 A A citation?

11 Q You know what that is?

12 A I'm sorry about that. Yes, sir, I do.

13 Yes, sir. It is appellate case Number 2011-191327.

14 Q How do you feel that this applies in that
15 case applies to your case?

16 A If you were to take this police report that
17 he wrote up and wrote for me -- by the way, the State
18 versus Moore is dealing with the same state trooper
19 with the same dog handler. If you were to take this,
20 read this case and read my case, he basically writes
21 everything up -- he writes everything up the same.
22 He pull you over for something bogus and then he
23 starts a fishing expedition to try to build up a
24 case. Even if you find drugs, he tried to validate
25 his reason for stopping you, it is illegal. The

1 Court of Appeals, in this case here, he got way more
2 factors than me. He got alcohol on his breath. He is
3 speeding. They pull him over. He gave consent to
4 search the vehicle. He got drugs in the trunk. He
5 got a pistol in the same bag. He got more money in
6 the bag.

7 The Court of Appeals just reversed this
8 case. He said the same type of factors that he is
9 using in my case that he tried to do in this case
10 which actually has more factors, the Court of Appeals
11 say there is no way possibly that you can determine
12 that an individual having contraband in the car from
13 a traffic stop when the fact that you're using is
14 bogus. Therefore, I amend the issues.

15 The issues from the State versus Moore case
16 also amended to my case. The trial counsel failed to
17 cross-examine the officer about the fact of the
18 crimes. The officer did not have any reasonable
19 suspicion of a crime being committed after he gave
20 the applicant a traffic ticket, parentheses, warning
21 citation. It deprived the applicant of his right to
22 confront his accuser. There is no way the officer
23 could have determined that the applicant had
24 contraband in his car just by conducting a traffic
25 stop.

1 I also said that trial counsel failed to
2 place proper objections on the record when the
3 solicitor used the arresting officer's background to
4 prejudice against the applicant. As the trial
5 counsel failed to challenge the officer's expertise
6 as a traffic officer, the trial counsel allowed the
7 solicitor to bolster the officer's credibility.

8 I am trying to show you how the officer is
9 lying. He falsified a warning ticket, wrote up a
10 bogus police report and then he got drugs. When, in
11 fact, you didn't have probable cause to even stop me
12 from the get-go. That is just a fact. That is the
13 law. I have to break a law. In order for me to get
14 pulled over, I have to break a law. So if I broke no
15 law, how can the drugs come to light when you just
16 illegally pulled me over. You seized me. You
17 actually said I was never free to leave from the get-
18 go.

19 Q Not to stop you. But I believe you
20 expressed -- I believe you previously expressed your
21 thoughts to the probable cause. We will move on.

22 A Okay.

23 Q Is there anything else that you would like
24 to portray to the court that you think the court
25 should consider in your application as far as

1 ineffectiveness or have you covered your ground?

2 **A** Give me a second. Let me make sure I look
3 over everything here. Also in my motion for
4 discovery, I never seen a Rule 6 or papers from the
5 SLED department.

6 **Q** You are talking about chain of custody?

7 **A** Chain of custody papers. Rule 6. It is
8 not even included in my motion for discovery. I
9 don't know anything about no drugs. So how are you
10 going to try to convict me of a crime when you
11 haven't even sent it off to the lab and they got the
12 proper paperwork?

13 **Q** Are you saying that your attorney should
14 have challenged that issue?

15 **A** He should have challenged the issue also.
16 Trial counsel failed the chemical analysis report
17 listing the amount of drugs. That was a critical
18 stage of the applicant's case to challenge the
19 accuracy of the drugs confiscated. Okay. Also I
20 have here my appellate counsel also -- on the other
21 hand, my appellate counsel, after the court affirmed
22 my decision, I have 15 days to put a petition for
23 rehearing in. My appellate counsel never put a
24 petition for rehearing in.

25 It was five days past before I received the

1 letter. At the time, I am a Lee County Correctional
2 Institution. The institution was on lockdown because
3 they took one of the officers hostage on super max.
4 They shut the whole institution that we can get no
5 mail coming in no mail going out. My thing is, how
6 can I put a petition for rehearing in when I don't
7 even know that my decision had even been denied and
8 everything else.

9 Q So your grievance here is against your
10 appellate counsel, is that correct?

11 A This grievance right here is against the
12 appellate counsel.

13 Q Who is your appellate counsel?

14 A DuRant.

15 Q Do you think that if the petition had been
16 filed, the case could have been decided in your
17 favor?

18 A It should have been decided in my favor.
19 My case is more like Tindall's. Tindall had more
20 factors in that case than in my case. The Supreme
21 Court said that the fact is that they are using his
22 lack of probable cause, lack of reasonable suspicion.
23 The actual case that they used to convict me got
24 overturned.

25 Q Kevin, is there anything else you would

1 like to present to the court?

2 A I think I have covered everything actually.
3 From the applicant denied -- I was denied the right
4 to effective assistance of counsel guaranteed by my
5 14th Amendment of the U.S. Constitution and Article
6 1, 3 and 14 of the South Carolina Constitution. If
7 my lawyer would have investigated properly, if he
8 would've made the court rule on and preserve my
9 issues and make the court rule on what particular
10 traffic -- what traffic law was broke driving 58 in a
11 60, if you would've put in the proper pretrial
12 motions and did an investigation properly and
13 subpoena the federal district attorney so even in
14 trial when he asked me, which was in my transcript,
15 he asked me four times did you take them to the
16 federal district attorney's office. No, I did not.
17 Did you take them to the DEA headquarters? No, sir,
18 I didn't. He asked four times. The man said the
19 last time he asked he said no because if it did, we
20 would've went federal. That is a lie.

21 If you would have subpoenaed the federal
22 district attorney, you could have called your witness
23 to the stand and you will see that the officer was
24 lying the whole time. From the looks of this paper
25 here -- I was going to obtain Tricia Blanchette, you

1 know, I was going to obtain her. She already
2 fighting against the same state trooper and dog
3 handler on the State versus (Inaudible.) I heard,
4 she said they had him under investigation. He's not
5 a state trooper. Now he works for the Spartanburg
6 sheriff department. I don't, you know, something
7 ain't right.

8 Q Okay, Kevin. Kevin, please answer any
9 questions that the Attorney General may have.

10 A Yes, sir. Yes, sir.

11 MS. RATIGAN: I have no questions for Mr.
12 Hardy, judge.

13 THE COURT: All right. You can step down.

14 THE WITNESS: Yes, ma'am.

15 THE COURT: Mr. Johnson, anything -- any
16 other witnesses?

17 MR. JOHNSON: No, that concludes the
18 applicant's case, Judge.

19 THE COURT: All right. Thank you.

20 MR. JOHNSON: Thank you.

21 MS. RATIGAN: Your Honor, we will call Mr.
22 Culbertson.

23 SYMMES CULBERTSON

24 having first been duly sworn, testifies as follows:

25 THE CLERK: Thank you. Please state your

1 full name for the record.

2 THE WITNESS: Symmes Culbertson.

3 THE CLERK: Thank you. You may be seated.

4 DIRECT EXAMINATION

5 BY MS. RATIGAN:

6 Q Mr. Culbertson, do you recall representing
7 Mr. Hardy on these charges?

8 A Yes, I did.

9 Q Did you file a discovery motion?

10 A Yes, I did.

11 Q Did you receive, to the best of your
12 knowledge, those materials from the state?

13 A I did. One of the issues at trial was the
14 timing in which I received those documents. But as
15 far as I know, I received everything the state had.

16 Q Okay. What was the basis for the troopers
17 traffic stop of your client? Do you recall?

18 A I personally don't know the basis of that
19 trooper's stop. What he testified to was there were
20 traffic violations. As I recall, Mr. Hardy was
21 initially stopped with driving too slow.

22 Q And was there also something about a
23 cracked windshield and a failed signal?

24 A There was some testimony about a cracked
25 windshield. It might have been improper signaling or

1 something like that.

2 Q Did you see any basis to challenge the
3 actual stop of the vehicle?

4 A Not on those grounds, no, ma'am.

5 Q Did you explain to Mr. Hardy why you did
6 not feel there was a basis to challenge the probable
7 cause?

8 A I thought I had.

9 Q Regarding discovery, the transcript
10 indicates that you were not provided the video until
11 the actual trial, do you recall that?

12 A Yes, ma'am.

13 Q And that is something that you argue to the
14 judge?

15 A Yes, ma'am.

16 Q The issue about the video not having any
17 audio, is that something you also brought up to the
18 judge?

19 A I did. But as I recall, there were
20 portions of the tape where you could hear some
21 conversation. There were other portions where you
22 could not hear some conversation. After
23 conversations with Joyce Monts, the assistant
24 solicitor prosecuting the case, and the judge, there
25 was decision to if we were going to play the tape,

1 play the audio on the tape, either play all of it or
2 play none of it. As I recall, there was something on
3 the tape about Mr. Hardy being involved with some DEA
4 investigations or something like that.

5 There may have been the decision -- I'm
6 trying to recall back now. I apologize. I think
7 there was discussion about DEA investigation and the
8 decision being made at trial not to play the audio
9 portion of the tape because of the reference to the
10 ongoing DEA investigation.

11 Q Again, since you did not get the Cape until
12 trial, that is something that you could not have
13 known beforehand?

14 A That's correct.

15 Q Okay. Do you recall whether Mr. Hardy told
16 you he ever talked to the US attorney or the DEA in
17 this case?

18 A I actually don't recall. I believe he may
19 have mentioned that. But I have no clear memory of
20 that today.

21 Q If he had told you he had spoken to the US
22 attorney or the DEA, what would you have done at that
23 point?

24 A If he told me he had spoken to either the
25 US attorney or the DEA, I would have inquired of him,

1 Mr. Hardy, exactly who or what he talked to and then
2 tried to make contact with the DEA agent or the US
3 attorney and have conversation about what they had
4 talked to Mr. Hardy about.

5 Q Okay. But you don't have any recollection
6 of having talked to anyone?

7 A No, ma'am.

8 Q Mr. Hardy had argued today that you should
9 have brought up the issue of racial profiling. Is
10 that something you considered at the time?

11 A You know, sitting here today, it is my
12 personal opinion Mr. Hardy was stopped for driving
13 while black. That was not an issue that got raised
14 at trial.

15 Q Why did you decide to get on that at the
16 trial?

17 A I don't think there was any clear-cut
18 evidence at trial that that actually transpired or
19 took place. While that might have been my personal
20 feeling, there was no evidence to support that other
21 than the testimony of the officer as to why he
22 stopped him.

23 Q Okay. As part of your discovery, did you
24 receive the Rule 6 chain documents?

25 A Yes, I did.

1 Q Okay. Would you, in your general practice, -
2 provide a copy of discovery to your client or is that
3 something you just reviewed with them?

4 A I initially review with my clients when it
5 comes in. As a general practice, I try not to give
6 copies of discovery to my clients. I just think that
7 is a bad idea. But if my client desires to have a
8 copy of it, I will provide it to them.

9 MS. RATIGAN: That's all I have, Your
10 Honor.

11 THE COURT: All right. Mr. Johnson?

12 MR. JOHNSON: Thank you, Your Honor.
13 Briefly.

14 **CROSS-EXAMINATION**

15 **BY MR. JOHNSON:**

16 Q With regards to the audio tape, I believe
17 you recall that you did -- you attempted to prevent
18 that evidence from coming into the trial?

19 A Initially tried to prevent the entire stop
20 -- the entire evidence stop from coming into trial.
21 I think part -- one of my trial decisions was that
22 there was an audio portion of the videotape that was
23 inflammatory towards Mr. -- towards my client, Mr.
24 Hardy. I believe it was a trial decision to exclude
25 the audio portion of the tape.

1 Q So it is your recollection that the court
2 decided not to play the audio but otherwise they will
3 make the rest of the tape admissible to the court?

4 A That's correct.

5 Q Now, I believe the argument that you tried
6 to exclude, I believe the whole thing had to do with
7 the fact that it was only provided to you recently
8 and basically was a discovery violation?

9 A That's correct.

10 Q Now, I believe that the solicitor at the
11 time actually argued that they seemed to notice that
12 there might have been some items that you would be
13 able to get. That was their argument. The court
14 accepted the argument as far as overruling your
15 objection, is that correct?

16 A That's correct.

17 Q Now, you stated that you believe that he
18 was basically pulled over for driving while black?

19 A I did say that.

20 Q Now, I believe you also testified that you
21 didn't believe that you could prove it basically. I
22 don't think you thought you could prove it or make
23 that argument?

24 A I don't know how you actually prove
25 something like that. I think it is a difficult thing

1 to prove that somebody got racially profiled and
2 pulled over. I think there was certainly some
3 indications that transpired in this case. There was,
4 in my opinion, no concrete evidence to show that. I
5 tried to show just that in my pretrial motions, in my
6 argument to the court about some of the evidence
7 coming in and the justification for the reason Mr.
8 Hardy was stopped.

9 The allegation on Mr. Hardy's behalf to the
10 court, the reason he was stopped was because he was
11 black, I don't -- that is a difficult argument to
12 make that the only reason he was stopped was because
13 he was black. I tried to point out to the judge the
14 stated reasons for his stop were somewhat
15 questionable.

16 Q I believe you did an actual brief on a
17 reasonable suspicion, is that correct?

18 A Yes.

19 Q You actually stated that you believed they
20 did not have probable cause but you didn't
21 necessarily believe you could prove it so you didn't
22 pursue that issue officially so the record was
23 preserved.

24 A I don't know -- I'm not sure that I
25 understood your question.

1 Q I guess what I am asking is you didn't feel
2 strong enough about the probable cause to actually
3 make a motion on the basis of probable cause?

4 A Apparently not.

5 Q Do you recall how much time it was between
6 when Mr. Hardy was arrested and when you went to
7 trial?

8 A I believe it was about four years.
9 Somewhere between four and five years between the
10 date of his arrest and the date of trial. I believe
11 he was arrested in 2005. I think we went to trial in
12 2009.

13 Q Would you agree that if you and Mr. Hardy
14 had known about the existence of the video and you
15 had gone over it together, then that may have
16 affected your analysis with regards to how you would
17 have addressed the case?

18 A I don't know. I don't know.

19 MR. JOHNSON: Your Honor, I have no further
20 questions at this time.

21 THE COURT: All right, Ms. Ratigan?

22 MS. RATIGAN: I have no redirect for Mr.
23 Culbertson. We would rest at this time.

24 THE COURT: All right. Mr. Culbertson,
25 you can step down.

1 **MS. RATIGAN:** The state would waive any
2 closing argument, Your Honor.

3 **THE COURT:** All right. Mr. Johnson,
4 anything else?

5 **MR. JOHNSON:** Judge, I believe Mr. Hardy
6 wants to say something briefly. I will be very
7 brief.

8 **THE COURT:** All right.

9 **MR. JOHNSON:** He was referring to several
10 cases. One was the State versus Tindall case.
11 That was the case the court relied upon that was
12 later overturned. That is one of his main
13 causes for concern. He also brought up --

14 **THE COURT:** Of course, he does realize
15 that in the Court of Appeals case about him, the
16 court distinguished his case from Tindall.

17 **MR. JOHNSON:** From Tindall.

18 **THE COURT:** But okay. I'm sorry. Go ahead.

19 **MR. JOHNSON:** Then there was also the
20 appeals court case involving the same officer.
21 It looks like Judge Couch originally disagreed
22 that counsel have been ineffective or involving
23 the same circumstances. I believe that was
24 later overturned. I do think you would like you
25 to consider that as well. As far as the

1 probable cause argument, he thinks in the brief
2 that counsel submitted that he actually brings
3 it up, but does not go so far as to actually
4 make a motion on the basis. He believes that
5 prejudiced him because it wasn't able to be
6 heard by the Court of Appeals.

7 With regards to the audio, Judge,
8 apparently my client feels he was prejudiced by
9 that because he wasn't even aware that the audio
10 existed. He wasn't aware of what was on the
11 audio. He contends -- he testified that
12 obviously if there was audio, it will be
13 consistent with what he said. Things that are
14 consistent with what he said that he believes
15 reasonable suspicion wouldn't have been found
16 and that would've changed the analysis. Judge,
17 that is the argument to the court.

18 **THE COURT:** All right. Mr. Hardy, I will
19 hear from you very briefly.

20 **MR. HARDY:** Yes, ma'am. The issues that I
21 brought before the court today, like I said, me,
22 as a man personally and an individual with
23 common sense, can look at this case and see, to
24 me, that the actions of the officer was
25 inappropriate. All of the issues that I brought

1 before the court today dealing with the
2 ineffective counsel and stuff like that
3 prejudiced me. I don't feel like to get a right
4 to a fair trial with a traffic stop with no
5 audio for 55 minutes on the side of the highway
6 for a warning ticket, on the side of the highway
7 for 55 minutes for a warning ticket for a law
8 that I didn't break. So my thing is if the
9 individual was to come in here and you were to
10 be the trial judge and come in here and argue
11 the case for individual to come in here for a
12 traffic stop for driving 58 in a 60, that is
13 unheard of.

14 **THE COURT:** All right. All right, thank
15 you, sir.

16 **MR. HARDY:** Yes, ma'am. Yes, ma'am. Yes,
17 ma'am.

18 **THE COURT:** That's okay.

19 **MR. HARDY:** I appreciate it. I don't
20 know. I did everything. I did my research. I
21 brought all of the documents that I could bring
22 and presented to the court, ma'am.

23 **THE COURT:** I understand and I wrote down
24 all of the case law that you gave me, the cases
25 that you mentioned. I'm going to read those.

Closing Remarks

42

1 And I have not yet read the trial transcript.
2 I'm going to do that as well. After I do those
3 things and only after I do those things am I
4 going to rule on this case. I'm going to take
5 it under advisement today.

6 **MR. HARDY:** Yes, ma'am.

7 **THE COURT:** Good luck to you.

8 **MR. JOHNSON:** Thank you, Judge.

9 **MR. HARDY:** Yes, ma'am.

10

11 **(WHEREUPON, the proceedings conclude at**
12 **approximately 10:52 a.m.)**

13

14

15

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18

CERTIFICATE

43

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

I, the undersigned, Teresa B. Johnson, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville, South Carolina, on this 29th day of April, 2015.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

Teresa B. Johnson

Official Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS	
	)		
COUNTY OF GREENVILLE	)	C.A. No. 2013-CP-23-1426	
	)		
Kevin T. Hardy, S.C.D.C. No. 335620,	)		
Applicant,	)		
	)	ORDER OF DISMISSAL	
v.	)		
	)		
State of South Carolina,	)		
Respondent.	)		
	)		

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 DEC 19 PM 4:35

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed March 12, 2013. The Respondent made its return on October 23, 2014. A hearing into the matter was held on October 22, 2014 before Judge Letitia H. Verdin at the Greenville County Courthouse. The Applicant was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Symmes Culbertson, Esquire. The Court had before it the transcript of the trial; the Greenville County Clerk of Court records, including the arrest warrant, indictment and sentencing sheet; the briefs and Order from the Applicant's direct appeal to the South Carolina Court of Appeals; the Applicant's South Carolina Department of Corrections Records; the PCR Application; the Applicant's Amendment to his PCR Application; and the Return.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the October 2005 term of the Greenville County Grand Jury for trafficking cocaine, 400 or

more grams (2005-GS-23-8183) and trafficking cocaine, more than 28 grams (2005-GS-23-8184). He was represented by Symmes Culbertson, Esquire, at trial. After the State called the case to trial, the Applicant was found guilty. On June 17, 2009, the Honorable Edward Welmaker sentenced him to twenty five (25) years.

A Notice of Appeal was timely filed in the South Carolina Court of Appeals. LaNelle C. DuRant, Esquire, perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Hardy, Op. No. 2012-UP-315 (S.C. Ct. App. May 23, 2012). The Remittitur was sent on June 12, 2012.

ALLEGATIONS

In his Application for PCR, the Applicant argues that he received ineffective assistance of counsel at both the trial and appellate levels. He additionally alleges that he is entitled to benefits from the passage of the Omnibus Crime Reduction and Sentencing Reform Act.

Regarding the ineffective assistance of counsel trial claim, the Applicant particularly alleges the following:

- a. Trial counsel "failed to pretrial the chemical analysis report listing the amount of drugs as this was a crucial stage of the Applicant's case to challenge the accuracy of the drugs confiscated alleged;"
- b. Trial counsel failed to investigate the officer based on his use of race as one factor relating to his identification of reasonable suspicion;
- c. Trial counsel failed to object to the evidence discovered during the traffic stop based on the officer's mention of race;
- d. Trial counsel failed to file pretrial motions to challenge affidavits, police reports, and the officer's statements to the Grand Jury.

Regarding the ineffective assistance of appellate counsel claim, the Applicant particularly alleges the following:

- a. Appellate counsel failed to file for a rehearing or petition for a writ of certiorari;
- b. Appellate counsel failed to brief every properly preserved issue for appeal.



FINDINGS OF FACT AND CONCLUSIONS OF LAW

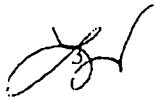
This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2014).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 686 (1984); Porter v. State, 368 S.C. 378, 629 S.E.2d 353, 356 (2006). Regarding the first prong, the Applicant must in essence show that counsel's advice was not “within the range of competence demanded of attorneys in criminal cases.” Hill v. Lockhart, 474 U.S. 52, 56 (1985). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). A reasonable probability is “a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 686).



Furthermore, the decisions and advice of trial counsel should be assessed for reasonableness under all the circumstances, with heavy deference given to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). There is a strong presumption that adequate assistance of counsel was rendered, and that reasonable care was exercised at trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007).

A defendant is also constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). In analyzing a claim of ineffective assistance of appellate counsel, courts apply the Strickland test just as they would when analyzing a claim of ineffective assistance of trial counsel. See Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009); Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Appellate counsel, however, is not required to raise every non-frivolous claim, but instead may select among them in order to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. 259, 288 (2000).

a. Trial counsel's failure to challenge the chemical analysis report.

The Applicant claims that trial counsel was ineffective because he did not challenge the chemical analysis report detailing the substances discovered in his vehicle. Particularly, the Applicant appears to take issue with the report's conclusion as to the weight of the substances tested. However, the Applicant presented no evidence on this subject prior to or during his PCR hearing. Since no error with the report has been shown, the Applicant's trial counsel had no basis upon which to challenge it.

Therefore, in the absence of any evidence demonstrating that the chemical analysis report was incorrect, this Court finds that the Applicant has failed to meet his burden of proving that counsel was ineffective in this regard.



b. Trial counsel's failure to object or further investigate the officer's inclusion of racial information in his account of the traffic stop.

The Applicant argues that trial counsel was ineffective for not further investigating or challenging the arresting officer's potential racial bias. During his PCR hearing, the Applicant testified that he believed that he was initially pulled over while driving on I-85 "because [he] was black." The Applicant's trial counsel also stated it was his belief that the initial traffic stop only occurred because of the Applicant's race. The Applicant argues that the officer improperly considered his race as a factor when concluding that reasonable suspicion existed to detain him.

The arresting officer initiated a traffic stop because the Applicant was impeding traffic on the interstate and for driving with a cracked windshield. (Trial Tr. 8.) As he approached the Applicant in his car, the officer made several observations relating to the contents and occupants of the vehicle. (Trial Tr. 9.) One of these observations was that the driver, the vehicle's sole occupant, was a black male. (Id.) The Officer also noticed that the Applicant's heart rate was visibly accelerated and that his hands were shaking. (Id.) The officer testified that he developed his suspicion of criminal activity because the Applicant did not appear to calm after being told he was only receiving a warning. (Trial Tr. 11.) Rather, the Applicant's hands continued to shake, he continued to exhibit an elevated heart rate, and he began to breathe heavily. (Id.)

The Applicant's trial counsel questioned the officer concerning his consideration of "a black male, driving alone" as a factor he used to support reasonable suspicion. (Trial Tr. 30-31.) In response to these questions, the officer indicated that this observation was not the foundations for his suspicion. (Trial Tr. 31.) Rather, the officer's suspicion was formed as a result of the Applicant's continued nervous behavior as the traffic stop continued. (Trial Tr. 30-36.) The officer's suspicion grew as he discovered a large amount of cash on the Applicant's person,



noted irregularities in the Applicant's story, and observed the Applicant's body language when answering a question about the presence of illegal narcotics. (Trial Tr. 36-37.)

The Applicant has failed to meet his burden of proving that trial counsel was ineffective for not further pursuing this issue. The Applicant's trial counsel conducted a thorough cross examination of the arresting officer in this case. A substantial amount of this cross examination was devoted to attacking the officer's identification of reasonable suspicion during the early stages of the traffic stop. The Court of Appeals stated that the officer referenced the Applicant's race only when discussing his initial observations at the stop. The officer's subsequent testimony makes clear that the Applicant's race was not included as one of the factors to support reasonable suspicion to extend the stop. Therefore, the Applicant's trial counsel² was not effective for not continuing to pursue the matter.

c. Trial counsel's inability to file pretrial motions to challenge police reports, affidavits, and the officer's statements presented to the Grand Jury.

The Applicant asserts that trial counsel was ineffective because he did not move to exclude certain pieces of evidence from presentation to the Grand Jury. However, the Applicant's attorney had no part in the presentation of evidence to the Grand Jury, and could not have been able to object to such a presentation. This argument provides no basis for an ineffective assistance claim.

d. Appellate counsel's failure to file for rehearing or petition for a writ of certiorari.

The Applicant asserts that appellate counsel was ineffective for failing to request a rehearing or to petition for a writ of certiorari. However, it appears that the decision of the Court of Appeals has been directly appealed to the South Carolina Supreme Court and that such a



hearing request is currently pending. In light of these direct appeals, the Applicant has not demonstrated that any further petition for certiorari should have or could have been filed.

e. Appellate counsel's failure to brief every issue preserved for appeal.

The Applicant asserts that appellate counsel was ineffective because she did not brief and argue every issue that was preserved for review. In the case at bar, appellate counsel raised two issues on appeal: the scope of the initial traffic stop and the use of the Applicant's race in the officer's evaluation of reasonable suspicion. Both issues were briefed and argued on appeal.

As discussed above, appellate counsel is not required to raise every meritorious claim in order to render effective assistance. Rather, appellate counsel may select those arguments which he or she believes to be most likely to generate a favorable outcome on appeal. Smith v. Robbins, 529 U.S. 259, 285–86 (1999). Such strategic decisions are entitled to substantial deference by reviewing courts. Id. This Court finds that appellate counsel rendered reasonably effective assistance in selecting the arguments she believed were most likely to generate a favorable outcome for her client.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test—that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed wither errors or omissions in his representation of the Applicant. This Court also finds that the Applicant has failed to prove the second prong of Strickland—that he was prejudiced by trial counsel's performance.

Omnibus Crime Reduction and Sentencing Reform Act

The Applicant asserts that he is entitled to benefits from the passage of the Omnibus Crime Reduction and Sentencing Reform Act. However, this argument does not fall within any



of the six grounds for relief set forth in the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160 (2003). Additionally, the Applicant has not presented any evidence indicating what particular relief might be afforded by this change in the law.

This Court finds that there is no statutory basis for the granting of post-conviction relief on this ground. Additionally, even if a ground for relief did exist, the Applicant has presented no evidence demonstrating that he is entitled to such relief. Therefore, the Applicant's final ground for PCR is dismissed, and the Applicant is not entitled to PCR on this basis.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

Based on all the foregoing, this Court finds that the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by Counsel's representation at trial or on direct appeal. Furthermore, the relief requested under the Omnibus Crime Reduction and Sentencing Reform Act is not proper in a PCR action, and will not be granted today. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.



IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 8 day of ^{Dec} November, 2014.



Letitia H. Verdin
Circuit Court Judge
Thirteenth Judicial Circuit



WITNESSES

OWENS *Dickerson*

SCHP

7/27/2005

DOCKET NO. 2005-GS-23-
JLK

008183

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

OCTOBER TERM 2005

6-17-09

GUilty THE STATE
VS.

KEVIN TJUAN HARDY

ARREST WARRANT NUMBER

1795364

ACTION OF GRAND JURY

TRUE BILL
H. Daniel Pickens

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Guilty

Indictment for

0281

TRAFFICKING COCAINE

VIOLATION § 44-53-0370

One D. J. Pickens
Foreperson of Petit Jury

6-17-09
Date:

107

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
TRAFFICKING COCAINE

At a Court of General Sessions, convened on OCTOBER 18, 2005 the Grand Jurors of Greenville County present upon their oath:

That KEVIN TIJUAN HARDY did in Greenville County, on or about the 27th day of July, 2005, knowingly sell, manufacture, deliver or bring into the State of South Carolina, or did knowingly provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver or bring into the State or was knowingly in actual or constructive possession of more than 400 grams of Cocaine. This is in violation of §44-53-370 of the South Carolina 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.

Jay K. Monto
SOLICITOR

WITNESSES

OWENS *Dickerson*

SCHP

7/27/2005

DOCKET NO. 2005-GS-23- ^{JLK} 008184

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

OCTOBER TERM 2005

6-17-05

THE STATE

VS.

GUILTY

KEVIN TIJUAN HARDY

ARREST WARRANT NUMBER

DIRECT INDICTMENT

DOB: 10/13/1978

SSN: 243-37-0201

B/M

ACTION OF GRAND JURY

TRUE BILL

K. Dickerson
FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

0392

Indictment for

TRAFFICKING CRACK COCAINE

VIOLATION § 44-53-0375

Guilty

Wm. Dickerson
Foreperson of Petit Jury

6-17-05
Date:

208

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
TRAFFICKING CRACK COCAINE

At a Court of General Sessions, convened on OCTOBER 18, 2005 the Grand Jurors of Greenville County present upon their oath:

That KEVIN TIJUAN HARDY did in Greenville County, on or about the 27th day of July, 2005, knowingly sell, manufacture, deliver or bring into the State of South Carolina or did knowingly provide financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver or bring into the State or was knowingly in actual or constructive possession of more than 28 grams of crack cocaine. This is in violation of §44-53-375 of the South Carolina 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.

Jay K. Monto
SOLICITOR