

Volume II of II

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Diane Schafer Goodstein, Circuit Court Judge

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SC SUPREME COURT

VONDELL SANDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212070

APPENDIX

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1 WHICH THE COURT REDUCED FROM TWO HUNDRED THOUSAND, SO
2 HE WAS ABLE TO PROVIDE TEN PER CENT SURETY, SEVEN
3 THOUSAND FIVE HUNDRED DOLLARS, YOUR HONOR. SO, THE
4 TOTAL ON THOSE TWO BONDS, I BELIEVE, IS FOURTEEN
5 THOUSAND THREE HUNDRED DOLLARS THAT HE'S BEEN ABLE TO
6 PAY IN FUNDS. SO, BESIDES THE COURSE OF CONDUCT, YOUR
7 HONOR, ABOUT THE COMMUNICATIONS, I BELIEVE MY CLIENT IS
8 NO LONGER INDIGENT. BECAUSE, YOUR HONOR, ABOUT THE CASE
9 LOAD THAT OUR OFFICE HAS, WE'RE ABOVE THE AMERICAN BAR
10 ASSOCIATION STANDARDS, BOTH FOR FAMILY COURT AND GENERAL
11 SESSIONS COURT, AND BECAUSE WE CURRENTLY ONLY HAVE FOUR
12 ACTIVE ATTORNEYS IN THE PUBLIC DEFENDER'S OFFICE, I
13 WOULD ASK, YOUR HONOR, AT THIS POINT TO BE RELIEVED OF
14 REPRESENTING MR. SANDERS, AS HE HAS DEMONSTRATED THAT
15 HE HAS THE FINANCIAL RESOURCES TO HIRE A PRIVATE
16 ATTORNEY, OR ALTERNATELY, TO REPRESENT HIMSELF, SINCE
17 HE'S BEEN ABLE TO PAY FOURTEEN THOUSAND DOLLARS IN BOND
18 MONEY SINCE OCTOBER. I DON'T BELIEVE MR. COLLINS HAS
19 A SUBSTANTIVE BASIS TO OPPOSE THIS MOTION FOR RELIEF,
20 YOUR HONOR.

21 THE COURT: LET'S FIND OUT.

22 MR. KRAMER: YES, SIR.

23 THE COURT: WHAT'S YOUR SITUATION,
24 MR. SANDERS?

25 DEFENDANT SANDERS: I NEVER STATED

1 AT ANY TIME THAT I WANTED TO REPRESENT MYSELF. HE MADE
2 THE SUGGESTION THAT I SHOULD REPRESENT MYSELF, BECAUSE
3 I ALWAYS WOULD ASK HIM ABOUT THE EVIDENCE PERTAINING TO
4 MY CASE, BUT I NEVER WAS ABLE TO GET NONE OF THE
5 EVIDENCE I REQUESTED.

6 THE COURT: FROM YOUR LAWYER OR FROM
7 THE POLICE?

8 DEFENDANT SANDERS: THE SOLICITOR'S
9 OFFICE.

10 THE COURT: WELL, YOU, YOU'VE BEEN
11 ASKING THE SOLICITOR'S OFFICE FOR YOUR EVIDENCE?

12 DEFENDANT SANDERS: ALSO MY
13 ATTORNEY.

14 THE COURT: ALRIGHT. LET'S GET BACK
15 TO THE PART ABOUT BEING INDIGENT. HOW HAVE YOU HAD THE
16 WHEREWITHAL TO -- HAVE YOU SPENT THIRTEEN THOUSAND IN
17 BOND MONEY?

18 DEFENDANT SANDERS: NONE OF THIS
19 MONEY WAS MY MONEY, IT WAS INCOME TAX MONEY AND ---

20 THE COURT: SOMEBODY ELSE'S INCOME
21 TAX MONEY?

22 DEFENDANT SANDERS: YES, SIR.

23 THE COURT: YOU BORROWED IT FROM
24 SOMEBODY ELSE?

25 DEFENDANT SANDERS: NO, THEY LOANED

1 IT, I GUESS, TO GET ME OUT.

2 THE COURT: WELL, THEY LOANED IT,
3 BUT YOU BORROWED IT, RIGHT?

4 DEFENDANT SANDERS: YEAH. OKAY,
5 YEAH.

6 THE COURT: IT WASN'T YOUR MONEY?

7 DEFENDANT SANDERS: NO. HUH UH.

8 THE COURT: AND YOU OWE THEM THE
9 MONEY BACK?

10 DEFENDANT SANDERS: YES, SIR.

11 THE COURT: WHAT KIND OF WORK DO YOU
12 DO?

13 DEFENDANT SANDERS: MECHANICAL WORK.

14 THE COURT: WHAT KIND OF INCOME DO
15 YOU HAVE?

16 DEFENDANT SANDERS: WELL, I JUST
17 STARTED TO WORK, I JUST GOT A JOB LAST WEEK.

18 THE COURT: AND YOU APPLIED FOR THE
19 PUBLIC DEFENDER IN THE CLERK'S OFFICE?

20 DEFENDANT SANDERS: YES, SIR.

21 THE COURT: AND THEY APPOINTED A
22 PUBLIC DEFENDER?

23 DEFENDANT SANDERS: YES, SIR.

24 THE COURT: DID YOU ANSWER THE
25 QUESTIONS ON THE QUESTIONNAIRE TRUTHFULLY?

1 DEFENDANT SANDERS: YES, SIR.

2 THE COURT: DO YOU WANT TO REPRESENT
3 YOURSELF OR WANT TO HIRE A LAWYER?

4 DEFENDANT SANDERS: NO, SIR.

5 THE COURT: ALRIGHT. I DENY YOUR
6 MOTION, MR. KRAMER, IT APPEARS THAT THIS IS NOT HIS
7 MONEY HE'S SPENDING. HE'S BORROWED THIS MONEY FROM
8 OTHER SOURCES TO PAY THE BOND MONEY AND ---

9 LET ME MAKE A SUGGESTION HERE,
10 THOUGH, IF I MAY, MR. SANDERS. IT'S HARD, -- YOU KNOW,
11 IT'S BEEN SAID, AND IT'S KIND OF AN OLD ADAGE AMONG
12 LAWYERS AND THE LEGAL PROFESSION, THAT HE WHO REPRESENTS
13 HIMSELF HAS A FOOL FOR A CLIENT. AND WHEN YOU GO TO TRY
14 TO REPRESENT YOURSELF BY TRYING TO FIND OUT WHAT
15 EVIDENCE THEY HAVE AGAINST YOU, AND YOU'RE WRITING THE
16 SOLICITOR'S OFFICE AND THAT SORT OF THING, THE BEST
17 THING YOU CAN DO IN REPRESENTING YOURSELF, OR EXCUSE ME,
18 IN ALLOWING THE ATTORNEY TO REPRESENT YOU, WHICH IS WHAT
19 YOU SAY YOU WANT HIM TO DO, IS TO FOLLOW HIS ADVICE.
20 THAT NEVER CEASES TO AMAZE ME WHY PEOPLE WILL HAVE A
21 LAWYER AND THEN NOT DO WHAT THEY ADVISE THEM TO DO, OR
22 EVEN WORSE, PEOPLE WHO LAY OUT THOUSANDS OF DOLLARS AND
23 HIRE LAWYERS, AND THEN DON'T DO WHAT THEY ADVISE THEM
24 TO DO. I DON'T UNDERSTAND IT. BUT YOU WILL BE WELL
25 ADVISED TO, IF YOUR LAWYER SAYS QUIT WRITING THE

1 SOLICITOR'S OFFICE, I'LL SHOW YOU WHAT EVIDENCE THEY
2 HAVE AGAINST YOU, THIS IS WHAT THEY HAVE, A, B, C. NOW,
3 THERE'S SOME THINGS PERHAPS THAT THEY CAN'T SHOW YOU
4 BECAUSE IT'S ONLY SHOWED THEM ON A CONFIDENTIAL BASIS.
5 FOR INSTANCE, I'LL GIVE YOU AN EXAMPLE, THAT SOUNDS KIND
6 OF TRICKY, LIKE, YOU KNOW, IT'S A CONSPIRACY AGAINST ME.
7 WELL, IT'S NOT. SOMETIMES THE SOLICITOR'S OFFICE USES
8 WHAT'S KNOWN AS CONFIDENTIAL INFORMANTS, UNDERCOVER
9 WORK, PEOPLE THAT ARE, THAT DON'T LOOK LIKE POLICEMEN,
10 AND THEY'RE NOT POLICEMEN, BUT THEY GO OUT TO MAKE A
11 CASE FOR THEM. AND THE POLICE DON'T WANT THE IDENTITY
12 OF THEIR CONFIDENTIAL INFORMANT EXPOSED. IF YOUR, IF
13 THEY HAVE A VIDEO TAPE, -- LET'S SAY YOU'RE CHARGED --
14 I DON'T EVEN KNOW WHAT YOU'RE CHARGE WITH, BUT LET'S
15 SAY YOU'RE CHARGED WITH DRUGS, SALE OF DRUGS OR
16 SOMETHING, AND THEY HAVE A VIDEO TAPE OF YOU SELLING THE
17 DRUGS, THE COURT MAY MAKE THE PROSECUTOR SHOW YOUR
18 LAWYER WHAT THEY HAVE, SHOW HIM THAT VIDEO TAPE, WITH
19 INSTRUCTIONS TO THE LAWYER THAT HE'S NOT TO DIVULGE THE
20 IDENTITY OF THE CONFIDENTIAL INFORMANT. BUT SUFFICE IT
21 TO SAY, THAT'S HIS CLIENT, AND HE'S BUYING, OR SELLING
22 DRUGS TO THIS CONFIDENTIAL INFORMANT. HE'S AN OFFICER
23 OF THE COURT. WE HAVE -- WELL, LET'S PUT IT THIS WAY,
24 HE WOULD BE MAKING A MONUMENTAL MISTAKE TO LIE TO THE
25 COURT, TO TELL THE COURT, I'M NOT GOING TO DIVULGE

1 INFORMATION OF THAT CI, AND THEN TELL YOU WHO IT WAS.
2 THEY AIN'T GOING TO SHOW THAT TAPE TO YOU BECAUSE YOU
3 AIN'T GOT NOTHING TO LOSE BY LYING, AND YOU CAN DISCLOSE
4 THE IDENTITY OF THE CONFIDENTIAL INFORMANT, AND MAYBE
5 GET THAT CONFIDENTIAL INFORMANT IN A JAM. I MEAN, HIS
6 SAFETY MAY BE AT ISSUE IF YOU TELL EVERYBODY IN THE
7 NEIGHBORHOOD THAT THIS GUY IS WORKING FOR THE POLICE.
8 SO, WE DON'T WANT YOU TO KNOW THAT, BECAUSE YOU HAVE NO
9 ALLEGIANCE TO THE COURT. YOUR LAWYER DOES.

10 HE ALSO HAS AN ALLEGIANCE TO YOU,
11 TO REPRESENT YOU ZEALOUSLY, TO DO THE BEST JOB UNDER THE
12 LAW THAT HE CAN, AND HE AIN'T GOING TO TELL YOU THEY'VE
13 GOT A CONFIDENTIAL INFORMANT SELLING YOU DRUGS AND
14 THEY'VE GOT YOU ON TAPE UNLESS THEY HAVE. HE AIN'T
15 GOING TO LIE TO YOU, THAT WOULD BE ANOTHER MONUMENTAL
16 MISTAKE HE WOULD MAKE, AND PERHAPS SOMETHING FOR WHICH
17 HE COULD EVEN BE DISBARRED.

18 SO, THOSE, THAT'S JUST ONE EXAMPLE
19 OF SOMETHING THAT HE MAY NOT BE ABLE TO TELL YOU ABOUT,
20 BUT EVERYTHING THAT HE IS ABLE TO TELL YOU ABOUT AND
21 SHOW YOU, HE'LL BE GLAD TO DO THAT, I FEEL SURE. BUT
22 YOU NEED TO FOLLOW HIS INSTRUCTIONS, YOU BE THE CLIENT
23 AND LET HIM BE THE LAWYER. YOU CAN'T WORK WHEN THERE'S
24 TWO LAWYERS REPRESENTING YOU, AND ONE OF THEM IS YOU.
25 THAT JUST DON'T, IT'S HARD TO WORK THAT WAY. ALRIGHT?

1 DEFENDANT SANDERS: ALRIGHT.

2 THE COURT: VERY WELL.

3 MR. KRAMER: YOUR HONOR, I WOULD
4 LIKE TO NOTE THAT THE STATE HAD PROVIDED AN OFFER OF TEN
5 YEARS, WHICH EXPIRED, I BELIEVE, ON FEBRUARY TWENTY-
6 SEVENTH IN THIS CASE, SO THERE IS A TRIAL PENDING ON THE
7 WEEK OF THE NINTH OF MARCH, I BELIEVE. ALSO, AS I SAID
8 BEFORE TO THE COURT, MR. SANDERS WILL NOT LISTEN TO MY
9 ADVICE, HE CONTINUES TO WRITE LETTERS TO BOTH THE
10 SOLICITOR AND ---

11 THE COURT: YOU TOLD ME ABOUT THAT.

12 MR. KRAMER: YES, SIR, HE SAID HE
13 WOULD NOT STOP, AS MY WITNESS SAID, HE WOULD NOT STOP,
14 HE INDICATED HE WOULD NOT STOP WRITING THE LETTERS. SO,
15 YOUR HONOR, WHAT I'M SAYING IS, BY WRITING THESE LETTERS
16 I HAVE NO IDEA WHAT'S IN THEM, SO I BELIEVE HE'S
17 VIOLATING ATTORNEY-CLIENT PRIVILEGE, BECAUSE I DO NOT
18 KNOW WHAT'S IN THE LETTERS.

19 THE COURT: NO, SIR, HE CAN'T BE
20 VIOLATING THE ATTORNEY-CLIENT PRIVILEGE ---

21 MR. KRAMER: YES, SIR.

22 THE COURT: --- BECAUSE IT'S HIS
23 PRIVILEGE.

24 MR. KRAMER: YES, SIR, I BELIEVE
25 THAT, YOUR HONOR, BUT I CANNOT ADEQUATELY REPRESENT

1 SOMEONE WHO WILL NOT FOLLOW MY ADVICE OR LISTEN TO WHAT,
2 THE DISCOVERY I'VE PROVIDED TO HIM, YOUR HONOR, WHICH
3 I HAVE FULLY PROVIDED HIM, ---

4 THE COURT: ALRIGHT. THANK YOU, SIR.

5 MR. KRAMER: --- JUST FOR THE
6 RECORD. THANK YOU, YOUR HONOR.

7 THE COURT: ALRIGHT. YOU HEARD,
8 WHAT YOUR LAWYER WANTS YOU TO DO IS STOP WRITING THE
9 SOLICITOR'S OFFICE.

10 DEFENDANT SANDERS: YES, SIR. I
11 ONLY WROTE ONCE.

12 THE COURT: THANK YOU, SIR.

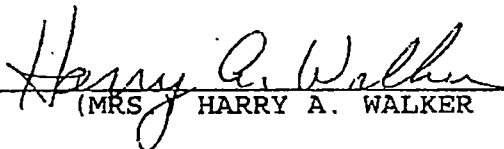
13 MR. KRAMER: THANK YOU, YOUR HONOR.

CERTIFICATE

I, THE UNDERSIGNED, MRS. HARRY A. WALKER, OF ROWESVILLE, SOUTH CAROLINA, OFFICIAL COURT REPORTER FOR THE FIRST 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 CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE COURT OF GENERAL SESSIONS FOR ORANGEBURG COUNTY, SOUTH CAROLINA, ON THE FIRST DAY OF MARCH, 2004.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

DATE: MARCH 16, 2004


(MRS. HARRY A. WALKER)

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG .

COURT OF GENERAL SESSIONS
FIRST JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA

CASE NO.

versus

)
)
) TRANSCRIPT OF RECORD

VONDELL SANDERS,

)
) DATE:

DEFENDANT

)
) MARCH 9, 2004
)

BEFORE:

HONORABLE J. BREELAND, PRESIDING JUDGE

APPEARANCES:

KENT COLLINS, ESQUIRE

ANGELA AVINGER, ESQUIRE

ASSISTANT SOLICITORS

FOR THE STATE

SAM KRAMER, ESQUIRE

PUBLIC DEFENDER

FOR THE DEFENDANT

HARRY A. WALKER (MRS.)
COURT REPORTER, FIRST JUDICIAL CIRCUIT
POST OFFICE BOX 127
ROWESVILLE, SOUTH CAROLINA 29133

1 DATE:

2 MARCH 9, 2004

3 THE COURT: YES, SIR.

4 MR. KRAMER: GOOD AFTERNOON, YOUR
5 HONOR.

6 THE COURT: GOOD AFTERNOON.

7 MR. KRAMER: FOR THE COURT REPORTER,
8 THIS IS IN THE MATTER OF THE STATE VERSUS VONDELL
9 SANDERS, V-O-N-D-E-L-L S-A-N-D-E-R-S.

10 THE COURT: YES, SIR.

11 MR. KRAMER: YOUR HONOR, I WANT TO
12 GO ON THE RECORD AND MAKE THE MOTION HERE, FOR
13 ADDITIONAL INFORMATION UNDER THE CASE OF STATE VERSUS
14 DIAMOND, WHICH IS TWO EIGHTY SOUTH CAROLINA TWO NINETY-
15 SIX. AND ALSO, I WANT TO REFERENCE CHIEF JUSTICE TOAL'S
16 RECENT MEMO REQUIRING SOLICITORS TO DISCLOSE DISCOVERY
17 EVIDENCE IN A PROMPT MANNER.

18 IN THIS CASE, YOUR HONOR, THE STATE
19 HAS NOT PRODUCED THE FOLLOWING DISCOVERY, WHICH I HAVE
20 REQUESTED ON NUMEROUS TIMES, I'VE MET INFORMALLY WITH
21 MR. COLLINS, HAD DISCUSSIONS WITH HIM. THERE'S A
22 MARIJUANA ANALYSIS THAT SUPPOSEDLY WAS DONE ON DRUGS
23 THAT WERE SEIZED, ALLEGEDLY. I HAVE NOT BEEN PROVIDED
24 A COPY OF THE TAPE. I'VE BEEN ALLOWED TO LISTEN TO IT
25 ONLY, MY CLIENT HAS NOT HAD THE OPPORTUNITY TO LISTEN

1 TO THIS TAPE THAT WAS MADE WITH A CONFIDENTIAL
2 INFORMANT. I'VE NOT BEEN PROVIDED A DRUG ANALYSIS OF
3 THE CRACK COCAINE THAT THE CONFIDENTIAL INFORMANT
4 PURCHASED, DESPITE REPEATED REQUESTS. I'VE BEEN NOT
5 PROVIDED CERTIFIED COPIES OF THE PRERECORDED MONEY. I'VE
6 BEEN PROVIDED WITH A RAP SHEET WHICH IS BLANKED OUT,
7 YOUR HONOR.

8 THE COURT: EXCUSE ME. CERTIFIED
9 COPIES OF MONEY?

10 MR. KRAMER: OF THE PRERECORDED
11 MONEY, YOUR HONOR, COPIES OF THE MONEY THAT IS SHOWN
12 THAT WAS AN INTEGRAL PART OF THE EVIDENCE IN THE CASE,
13 I'VE NOT BEEN PROVIDED THE CERTIFIED COPIES THAT SHOW
14 WHERE THIS MONEY IS CERTIFIED TO BE THE SAME MONEY THAT
15 WAS USED IN THE CASE. I'VE BEEN PROVIDED A RAP SHEET
16 WHICH IS BLANKED OUT WHICH DOES NOT SHOW WHO THE C.I.
17 IS, CONFIDENTIAL INFORMANT. IN THIS CASE, YOUR HONOR,
18 THE C.I. IS THE ONLY WITNESS AND IS MATERIAL, IS A
19 MATERIAL PART OF THE CASE. AND YOUR HONOR, SINCE THE
20 STATE HAS NOT PRODUCED THIS EVIDENCE IN A TIMELY MANNER,
21 I WOULD REQUEST, YOUR HONOR, THAT IT BE SUPPRESSED AND
22 NOT BE ALLOWED TO BE USED IN THE TRIAL, YOUR HONOR. MY
23 CLIENT, MR. VONDELL SANDERS, WHO STANDS NEXT TO ME, WE
24 WOULD REQUEST, YOUR HONOR, THAT WE BE ALLOWED TO LISTEN
25 TO THAT TAPE IN CAMERA, IN THE COURT'S CHAMBERS, OR THAT

1 I BE PROVIDED A COPY OF THE TAPE SO I CAN HAVE MY
2 CLIENT'S INPUT TO PREPARE FOR THE TRIAL, WHICH I'M NOT
3 ABLE TO DO BECAUSE I CAN'T REVIEW THE EVIDENCE WITH MY
4 CLIENT TO GO AHEAD, IN WHICH CASE HE MAY DECIDE HE WANTS
5 A TRIAL, HE MAY NOT DECIDE HE WANTS A TRIAL. BUT I
6 DON'T HAVE THE EVIDENCE, YOUR HONOR, TO REVIEW WITH HIM.
7 SO, I'M HAMPERED IN MY ATTEMPT TO GO AHEAD AND ZEALOUSLY
8 REPRESENT MY CLIENT BECAUSE THE EVIDENCE IS NOT
9 AVAILABLE. AND I UNDERSTAND, YOUR HONOR, THAT THERE MAY
10 BE AN INSTANCE WHERE THE STATE FEELS THAT THEY DO NOT
11 HAVE TO DISCLOSE THIS INFORMATION, YOUR HONOR. HOWEVER,
12 UNDER STATE VERSUS JENKINS, THREE TWENTY-TWO, SOUTH
13 CAROLINA, THREE SIXTY, A VERY SIMILAR CASE TO THIS ONE,
14 YOUR HONOR, THE COURT OF APPEALS HELD THAT BECAUSE THE
15 STATE DID NOT REVEAL WHO THE CONFIDENTIAL INFORMANT WAS
16 TO THE DEFENDANT, THAT THE CONFIDENTIAL INFORMANT WAS
17 NOT AVAILABLE FOR THE CLIENT TO CONFRONT THAT
18 CONFIDENTIAL INFORMANT, FOR HIS LAWYER TO CROSS-EXAMINE
19 HIM, AND THE COURT STATED THAT, "WE UNDERSTAND THE TRIAL
20 JUDGE'S REASONING, SINCE HE HAD ALREADY UPHELD THE
21 VALIDITY OF THE SEARCH WARRANT. HOWEVER, THE
22 CIRCUMSTANCES UNDER WHICH POLICE SENT SOMEONE INTO THE
23 DEFENDANT'S BUSINESS TO MAKE A DRUG PURCHASE WERE
24 CLEARLY RELEVANT TO WHATEVER CLAIM OR DEFENSE THAT I
25 COULD PROFFER TO THE COURT." AND, YOUR HONOR, WHAT I'M

1 SAYING HERE IS ---

2 THE COURT: WHAT WERE THE FACTS TO
3 THAT CASE?

4 MR. KRAMER: WHAT'S THAT, YOUR
5 HONOR?

6 THE COURT: WHAT WERE THE FACTS OF
7 THE JENKINS CASE?

8 MR. KRAMER: YOUR HONOR, THE
9 CONFIDENTIAL INFORMANT PURCHASED CRACK COCAINE FROM THE
10 DEFENDANT IN A BUSINESS OWNED BY THE DEFENDANT AND HER
11 HUSBAND. BASED ON THIS SALE THE LAW ENFORCEMENT
12 OFFICERS OBTAINED A SEARCH WARRANT FOR THE BUSINESS.
13 AS A RESULT THE OFFICERS FOUND A QUANTITY OF CRACK
14 COCAINE IN THE DEFENDANT'S APRON, THE DEFENDANT WAS
15 CHARGED WITH PWID, CRACK COCAINE. AT A PRETRIAL
16 SUPPRESSION HEARING IN WHICH THE SEARCH WAS DEEMED
17 ALLOWED, THE STATE MOVED TO BAR ANY REFERENCE TO THE
18 CONFIDENTIAL INFORMANT. THE DEFENDANT ARGUED THE
19 CONFIDENTIAL INFORMANT WAS A LYNCH PIN DEFENSE MAKING
20 THE CONFIDENTIAL INFORMANT PLANTED THE CRACK COCAINE IN
21 THE DEFENDANT'S APRON, AND THE TRIAL COURT GRANTED THE
22 STATE'S MOTION, THE DEFENDANT WAS CONVICTED. THE COURT
23 OF APPEALS REVERSED AND REMANDED FOR A NEW TRIAL.

24 THE COURT: ALRIGHT, NOW, SLOW UP
25 AND LET ME SEE WHAT YOU SAID.

1 MR. KRAMER: YES, SIR.

2 THE COURT: YOU SAID THAT, START AT
3 LYNCH PIN AND GO SLOWER.

4 MR. KRAMER: YES, SIR. THE
5 DEFENDANT ARGUED THAT THE CONFIDENTIAL INFORMANT WAS A
6 LYNCH PIN OF THE DEFENSE.

7 THE COURT: ALRIGHT.

8 MR. KRAMER: CLAIMING THE CI PLANTED
9 THE CRACK COCAINE IN DEFENDANT'S APRON. THE TRIAL COURT
10 GRANTED THE STATE'S MOTION AND THE DEFENDANT WAS
11 CONVICTED. THE COURT OF APPEALS REVERSED AND REMANDED
12 FOR A NEW TRIAL.

13 THE COURT: ALRIGHT.

14 MR. KRAMER: NOW, YOUR HONOR, IN
15 THIS CASE ALSO, YOUR HONOR, BASED ON ALL THE EVIDENCE
16 THAT I HAVE LOOKED AT SO FAR, THE STATE HAS NOT
17 DEMONSTRATED, IN THE INFORMATION THEY HAVE GIVEN ME,
18 THAT THE CI IS RELIABLE OR HAS VERACITY. TO NOT REVEAL
19 WHO THE CI IS TO ME WILL DENY MY CLIENT, YOUR HONOR, THE
20 RIGHT TO CROSS-EXAMINE AND CONFRONT THE WITNESS. AND
21 SO, BECAUSE THIS INFORMATION HAS NOT BEEN TIMELY
22 PROVIDED ME, YOUR HONOR, BOTH UNDER STATE V. DIAMOND AND
23 UNDER ONGOING RULE FIVE BRADY DISCOVERY, I MAKE THE
24 MOTION, YOUR HONOR, AT THIS TIME THAT THAT EVIDENCE BE
25 SUPPRESSED.

1 THE COURT: OVERRULED. BUT LET ME
2 ASK YOU, ---

3 MR. KRAMER: YES, SIR, YOUR HONOR.

4 THE COURT: ---LET ME ASK YOU, HOW
5 DO YOU FIGURE YOU WON'T HAVE AN OPPORTUNITY TO CONFRONT
6 THE WITNESS? HE'LL BE ON THE STAND IN THE TRIAL.

7 MR. KRAMER: BECAUSE, YOUR HONOR,
8 THE STATE HAS NOT GIVEN ME ADEQUATE TIME TO MEET WITH
9 THE CONFIDENTIAL INFORMANT, YOUR HONOR, I HAVE NOT HAD
10 TIME TO SEE THE CONFIDENTIAL INFORMANT WITH MY
11 INVESTIGATOR, TO MEET WITH HIM, TO REVIEW WHATEVER
12 EVIDENCE COULD BE PROVIDED, YOUR HONOR, AND THAT'S TO
13 THE STATE'S BENEFIT.

14 THE COURT: DO YOU THINK YOU HAVE
15 AN OPPORTUNITY AND A RIGHT TO MEET WITH THE CONFIDENTIAL
16 INFORMANT?

17 MR. KRAMER: I, I, YES, SIR, I
18 BELIEVE I DO HAVE A RIGHT TO MEET WITH THE CONFIDENTIAL
19 INFORMANT, YOUR HONOR, ---

20 THE COURT: UNDER WHAT CASE?

21 MR. KRAMER: --- PRIOR TO THE CASE.

22 THE COURT: UNDER WHAT CASE THAT
23 GIVES YOU A RIGHT TO MEET WITH HIM AND TALK TO HIM?

24 MR. KRAMER: WELL, YOUR HONOR,
25 UNDER, I WOULD BELIEVE THAT WOULD BE UNDER BOTH STATE

8

1 V. JENKINS, AND I BELIEVE THAT WOULD BE ALSO UNDER STATE
2 V. DIAMOND, YOUR HONOR.

3 THE COURT: THEY'RE JUST TAKING
4 ABOUT IDENTITY, THEY'RE NOT TALKING ABOUT A TET-A-TET
5 OR ANYTHING WITH THE ---

6 MR. KRAMER: WELL, THERE'S A
7 TIMELINESS FACTOR IN HERE, YOUR HONOR, IN THAT WE CANNOT
8 ADEQUATELY PREPARE IF WE DON'T HAVE THE TIME. THE TIME
9 TO PRODUCE THE CONFIDENTIAL INFORMANT IS NOT ON THE DAY
10 OF THE TRIAL -- TO GIVE THE DEFENSE ADEQUATE TIME TO
11 PREPARE. YOUR HONOR, UNDER RULE SIX O ONE OF THE SOUTH
12 CAROLINA COURT OF APPEALS, I HAVE BEEN IN FAMILY COURT
13 TODAY, I'VE GOT THREE CASES PENDING, I'M GOING BACK
14 ACROSS THE HALL INTO THAT COURT, I'VE BEEN THERE ALL DAY
15 AS THE COURT HAS OBSERVED ME MEETING WITH FAMILY COURT
16 DEFENDANTS. SO, YOUR HONOR, AS FAR AS BEING COMPETENT
17 TO PROCEED TO TRIAL WITHIN THIS SHORT PERIOD OF TIME,
18 THAT MAY BE AN ISSUE, YOUR HONOR, BECAUSE OF THE TIMING
19 WITH BEING IN FAMILY COURT AND BEING IN THIS COURT.

20 THE COURT: IF YOU'RE ENTITLED TO
21 THE INFORMATION.

22 MR. KRAMER: YES, SIR, AND I BELIEVE
23 WE ARE ENTITLED, YOUR HONOR, UNDER DIAMOND AND UNDER
24 JENKINS FOR THAT INFORMATION, TO MEET WITH THAT CI, TO
25 HAVE A RAP SHEET OF THE CI THAT'S NOT BLACKED OUT, YOUR

1 HONOR, WHERE I CAN'T READ SOME OF THE INFORMATION, TO
2 HAVE A RAP SHEETS THAT'S COMPLETE, THAT DOESN'T LOOK
3 LIKE PAGES ARE MISSING IN IT, YOUR HONOR. AND FOR ALL
4 THAT INFORMATION, YOUR HONOR, AGAIN I WOULD ASK THE
5 COURT TO RECONSIDER ITS DENIAL OF THE SUPPRESSION
6 MOTION.

7 THE COURT: WELL, I THINK THERE ARE
8 OTHER WAYS TO, TO SOLVE YOUR PROBLEM, PERHAPS, WITHOUT
9 SUPPRESSING THE EVIDENCE. FOR INSTANCE, A CONTINUANCE
10 MAY BE IN ORDER, BUT TO SUPPRESS THE EVIDENCE, I MEAN,
11 THAT'S KIND OF A -- IF, IN FACT, YOU ARE RIGHT, AND IF,
12 IN FACT, YOU HAVE A RIGHT TO IT, AND IF, IN FACT, THEY
13 HADN'T PROVIDED IT AND THE ONLY EVIDENCE AGAINST HIM IS
14 THE CONFIDENTIAL RELIABLE, OR EXCUSE ME, THE
15 CONFIDENTIAL INFORMANT'S TESTIMONY, TO SUPPRESS HIS
16 TESTIMONY WOULD BE TO END THE CASE.

17 MR. KRAMER: YOUR HONOR, ---

18 THE COURT: NOW, YOU THINK YOU HAVE
19 A RIGHT TO HAVE THE CASE ENDED?

20 MR. KRAMER: YOUR HONOR, THIS IS AN
21 OLD CASE, WE HAVE REPEATEDLY ASKED FOR THIS INFORMATION,
22 THIS IS NOT NEW.

23 THE COURT: WELL, LET'S FIND OUT WHY
24 IT HASN'T BEEN GIVEN, WHAT'S ---

25 MR. KRAMER: YES, YOUR HONOR.

10.

1 THE COURT: WHAT'S THE SCORE, MR.
2 COLLINS?

3 SOLICITOR COLLINS: YOUR HONOR, AS
4 FAR AS THE ISSUE GOES AS TO THE MARIJUANA ISSUE, YOUR
5 HONOR, WE'LL PROVIDE HIM A COPY OF THAT ANALYSIS HERE,
6 WE JUST GOT IT TODAY HERE IN COURT.

7 SAM, THERE'S THE COPY OF THE
8 ANALYSIS FOR THE MARIJUANA.

9 AS TO THE CRACK, THE ANALYSIS OF THE
10 CRACK, I THINK HE IS SPEAKING OF THE CRACK ANALYSIS OF
11 THE ORIGINAL BUY. THAT IS AN UNCHARGED DEFENSE, YOUR
12 HONOR.. THE CONFIDENTIAL INFORMANT WENT INTO THE
13 DEFENDANT'S HOME, PURCHASED A QUANTITY OF CRACK COCAINE
14 FROM HIM. UPON COMING OUT THE CRACK WAS RETRIEVED FROM
15 LAW ENFORCEMENT OFFICIALS. THEY THEN, THE LAW
16 ENFORCEMENT OFFICIALS THEN WENT TO THE MAGISTRATE,
17 OBTAINED A SEARCH WARRANT, WENT BACK TO HIS HOME AND
18 EXECUTED THE SEARCH WARRANT, YOUR HONOR. UPON THE
19 EXECUTION OF THE SEARCH WARRANT A SUM OF CRACK COCAINE
20 AND A SUM OF MARIJUANA WAS FOUND ON, IN HIS HOME. AND
21 UPON, AND THAT'S WHAT HE'S CHARGED HERE TODAY FOR, HE'S
22 CHARGED WITH POSSESSION WITH INTENT TO DISTRIBUTE CRACK
23 COCAINE, HE'S CHARGED WITH POSSESSION WITH INTENT TO
24 DISTRIBUTE MARIJUANA, AS WELL AS TWO ACCOMPANYING CLOSE
25 PROXIMITY CHARGES, YOUR HONOR. HE'S NOT CHARGED WITH

1 THE DISTRIBUTION. AND SO, AS A RESULT THEREOF WE DON'T
2 FEEL AS IF HE'S ENTITLED TO THAT ANALYSIS. AND ANOTHER
3 THING, WE DON'T HAVE THE ANALYSIS BACK FROM SLED YET,
4 YOUR HONOR.

5 AS TO THE PRERECORDED, AS TO THE
6 MONEY, HE'S NOT, THAT REALLY WON'T BE AN ISSUE, EITHER,
7 AT THIS PARTICULAR TRIAL, THAT WOULD ONLY PERHAPS BECOME
8 AN ISSUE IF HE'S CHARGED WITH THE DISTRIBUTION. AND I
9 DON'T KNOW ABOUT CERTIFIED COPIES THAT WE CAN REALLY
10 GIVE HIM THAT. COPIES OF THE MONEY SHOULD HAVE BEEN IN
11 THE INITIAL DISCLOSURE THAT WE SENT HIM.

12 THE BLANKED, AND THE BLANKED OUT RAP
13 SHEET, YOUR HONOR, WE DID THAT PURSUANT TO YOUR
14 INSTRUCTIONS. AND AS FAR AS THE CI AS A WITNESS, THE
15 ONLY, THE CI WILL NOT BE A WITNESS IN THIS TRIAL. HE
16 PERHAPS WOULD BE AT A SUPPRESSION HEARING. OTHER THAN
17 THAT, I MEAN, HE WON'T BE A WITNESS AT THIS PARTICULAR
18 TRIAL. I MEAN, HE'S ONLY CHARGED WITH POSSESSION WITH
19 INTENT TO DISTRIBUTE, HE'S NOT CHARGED WITH THE
20 DISTRIBUTION CHARGE. AND AS A RESULT OF THAT I REALLY
21 DON'T THINK WE HAVE AN OBLIGATION TO DIVULGE HIS ---

22 THE COURT: WHAT DO YOU SAY TO THAT,
23 MR. KRAMER?

24 MR. KRAMER: YOUR HONOR, I THINK THE
25 STATE IS ASKING THE COURT TO MAKE A LEAP OF FAITH HERE

12

1 TO BELIEVE THAT AN UNTESTED DRUG FOR WHICH THERE IS NO
2 ANALYSIS, IT COULD HAVE BEEN FLOUR, IT COULD HAVE BEEN
3 SUGAR, IT COULD HAVE BEEN A CONFECTIONERY FROM PIGGLY
4 WIGGLY DOWN ON RUSSELL STREET. THERE'S NO ANALYSIS,
5 THAT'S THE BASIS OF THEIR SEARCH WARRANT. THEY CAN'T,
6 THEY DON'T WANT TO PRODUCE THE CONFIDENTIAL INFORMANT,
7 THEY DON'T WANT TO PRODUCE THE PRERECORDED MONEY, AND
8 THEN THEY'RE TELLING ME, YOUR HONOR, THAT THEY DON'T
9 HAVE TO PRODUCE THE DRUG ANALYSIS. NOW, YOUR HONOR,
10 THAT'S ---

11 THE COURT: ON THE DRUGS THAT YOU
12 HAD IN THE HOUSE, OR THE SUBSTANCES YOU HAD IN THE
13 HOUSE?

14 MR. KRAMER: NO, YOUR HONOR, THIS
15 IS THE BASIS THAT THEY WENT IN ON, ON THE SEARCH
16 WARRANT. AND WHAT THEY'RE TELLING ME TODAY, YOUR HONOR,
17 FOR THE FIRST TIME, IS, THE CI IS NOT GOING TO BE A
18 WITNESS, THEY'RE NOT GOING TO MAKE THE MONEY AN ISSUE,
19 AND THAT I DON'T NEED A DRUG ANALYSIS THAT A SEARCH
20 WARRANT IS BASED ON. SO, HOW DO WE KNOW, YOUR HONOR,
21 THAT THAT WAS, IN FACT, A REAL DRUG IN THERE, YOUR
22 HONOR? THAT'S ONE OF THE ELEMENTS ---

23 THE COURT: YOU DON'T HAVE TO, DO
24 YOU?

25 MR. KRAMER: THAT'S WHAT ---

1 THE COURT: ALL YOU HAVE TO KNOW IS
2 THAT SOMEBODY APPEARED BEFORE A MAGISTRATE AND GAVE HIM
3 PROBABLE CAUSE, NOT ABSOLUTE PROOF, BUT PROBABLE CAUSE
4 THAT THERE WERE DRUGS IN THE PLACE. AND THAT'S BASED
5 ON WHETHER OR NOT, I ASSUME THE LAW ENFORCEMENT OFFICER
6 WENT TO HIM AND SAID, WE WERE PROVIDED THIS INFORMATION
7 BY A CONFIDENTIAL, RELIABLE INFORMANT, THAT HAS PROVED
8 CONFIDENTIAL, OR PROVED RELIABLE IN THE PAST, HE'S MADE
9 BUYS BEFORE FOR US, OR PREVIOUSLY, AND THIS IS WHAT HE
10 FOUND. AND BASED ON WHAT HE'S FOUND WE THINK WE WOULD
11 LIKE TO SEARCH THE FELLOW'S RESIDENCE. AND IT SATISFIED
12 THE JUDGE. NOW, I DON'T KNOW THAT YOU HAVE TO KNOW
13 WHETHER, IN FACT, IT WAS REALLY DRUGS OR NOT.

14 MR. KRAMER: YOUR HONOR, THERE --

15
16 THE COURT: THE JUDGE DIDN'T HAVE
17 TO KNOW.

18 MR. KRAMER: THERE IS NO INDICIA OF
19 RELIABILITY OR VERACITY FOR THAT CONFIDENTIAL INFORMANT
20 IN THAT UNDERLYING AFFIDAVIT THAT SUPPORTS THAT SEARCH
21 WARRANT. IT DOESN'T SAY, I'VE USED THIS CONFIDENTIAL
22 INFORMANT IN THE PAST FIVE TIMES OR TEN TIMES AND
23 THEY'VE BEEN RELIABLE, IT'S NOT IN THERE, YOUR HONOR.

24 THE COURT: WHAT DOES IT SAY?

25 MR. KRAMER: IT JUST SAYS, YOU KNOW,

14

1 A CONFIDENTIAL INFORMANT PROVIDED THIS INFORMATION. IT
2 DOESN'T INDICATE THE VERACITY OR THE RELIABILITY OF THAT
3 INFORMANT OR HOW MANY TIMES HE HAD BEEN USED. IT TALKS
4 ABOUT HOW MANY TIMES THE OFFICER, THE OFFICER, WHO IS
5 NOT A MATERIAL PART OF THE TRANSACTION, HAS BEEN
6 INVOLVED IN NUMEROUS DRUG ARRESTS, OR HOW MANY YEARS
7 HE'S HAD OF COMMISSIONED LAW ENFORCEMENT SERVICE. IT
8 DOES NOT ADDRESS THOSE AREAS, YOUR HONOR, OF RELIABILITY
9 AND VERACITY.

10 THE COURT: WHAT DO YOU SAY TO THE
11 USE OF THE CONFIDENTIAL RELIABLE INFORMANT, THEY HAVING
12 A RIGHT TO KNOW THAT WITH REGARD TO THE SEARCH WARRANT?

13 SOLICITOR AVINGER: YOUR HONOR, I
14 THINK IT'S ALWAYS GOOD TO BE INCLUDED IN THE SEARCH
15 WARRANT. THE DETECTIVE IS PRESENT TODAY, AND I'M NOT
16 REALLY SURE EXACTLY, IS MR. KRAMER'S, THE GIST OF IT,
17 FROM WHAT I'M GETTING, IS THAT BASICALLY THIS IS A
18 SUPPRESSION HEARING FOR THE SEARCH WARRANT, IS THAT
19 BASICALLY WHERE WE ARE?

20 MR. KRAMER: NO, YOUR HONOR, WE WERE
21 GOING TO DO THE SUPPRESSION HEARING FOR THE SEARCH
22 WARRANT AS A PRETRIAL MOTION ONCE THE JURY WAS SWORN.
23 THAT'S WHAT MRS. AVINGER TOLD ME THE OTHER -- OR I
24 BELIEVE THAT WAS YESTERDAY, YOUR HONOR, AND I HAD NO
25 KNOWLEDGE OF THAT, THAT THAT WAS GOING TO BE DONE AFTER

1 THE JURY WAS SWORN, IN A PRETRIAL MOTION. SHE INFORMED
2 ME OF IT YESTERDAY, I DIDN'T EVEN KNOW HOW SHE FOUND
3 THAT INFORMATION OUT.

4 SOLICITOR AVINGER: WELL, THAT WAS
5 MY UNDERSTANDING, TOO, UNTIL I, -- I MISSED A MEETING
6 THIS MORNING BETWEEN YOU AND ---

7 THE COURT: WELL, IS THERE SOMETHING
8 WRONG WITH DOING IT THAT WAY?

9 SOLICITOR AVINGER: I DON'T BELIEVE
10 SO, YOUR HONOR.

11 MR. KRAMER: WELL, YOUR HONOR, AS
12 FAR AS -- I DON'T KNOW IF THERE'S BEEN ANY EX PARTE
13 COMMUNICATIONS OR NOT WITH THE COURT REGARDING MY CASE,
14 BUT I'VE ONLY DEALT PRIMARILY ON THE CASE, YOUR HONOR,
15 WITH MR. COLLINS DIRECTLY, I HAVEN'T DEALT WITH ANYBODY
16 ELSE IN THE SOLICITOR'S OFFICE BUT MR. COLLINS, AS FAR
17 AS THE STATUS AND SCHEDULING OF MY CASE, OR WHAT
18 INFORMATION UNDER DISCOVERY RULE FIVE IS TO BE PROVIDED.
19 SO, I DON'T KNOW IF THAT'S, IF, IF, YOU KNOW, THAT'S AN
20 ISSUE FOR THE COURT TO LOOK AT ALSO.

21 SOLICITOR AVINGER: YOUR HONOR,
22 WE'RE PREPARED, AT WHATEVER POINT TO HAVE ---

23 THE COURT: THE QUESTION -- EXCUSE
24 ME, THE QUESTION I HAVE, IS THERE SOME OBJECTION TO
25 HAVING IT, A SUPPRESSION HEARING?

16

1 MR. KRAMER: NO, YOUR HONOR, I WOULD
2 LIKE TO DO THE SUPPRESSION HEARING. THIS IS, THIS WAS
3 MY MOTION, YOUR HONOR, UNDER STATE V. DIAMOND TODAY, TO
4 REVEAL CERTAIN INFORMATION.

5 THE COURT: ALRIGHT.

6 MR. KRAMER: AS FAR AS THE
7 SUPPRESSION HEARING UNDER THE SEARCH WARRANT, YOUR
8 HONOR, I UNDERSTOOD FROM MRS. AVINGER THAT WAS TO BE
9 TAKEN TOMORROW IF THE TRIAL WAS TO PROCEED TOMORROW,
10 AFTER A JURY HAD BEEN SWORN, AS A PRETRIAL MOTION. AND
11 I, AND THAT IS A SEPARATE PROCEEDING. MY UNDERSTANDING
12 WAS, FROM THIS, YOUR HONOR, WHICH IS A MOTION UNDER
13 STATE VERSUS DIAMOND.

14 THE COURT: TO DISCLOSE, TO GIVE YOU
15 A COPY OF THE TAPE.

16 MR. KRAMER: YES, YOUR HONOR.

17 THE COURT: THIS IS THE AUDIO TAPE.

18 MR. KRAMER: YES, YOUR HONOR.

19 THE COURT: THAT YOU HEARD BUT YOUR
20 DEFENDANT HAS NOT HEARD?

21 MR. KRAMER: HE HAS NOT HAD THE
22 OPPORTUNITY TO HEAR IT, YOUR HONOR. WE'RE WILLING TO
23 LISTEN TO IT IN CHAMBERS, IN CAMERA, OR WE CAN LISTEN
24 TO IT IN THE PUBLIC DEFENDER'S OFFICE, BUT I DON'T HAVE
25 A COPY OF IT TO LISTEN TO IT.

1 THE COURT: IS THERE SOME RELUCTANCE
2 TO LETTING HIM HEAR THE TAPE?

3 SOLICITOR AVINGER: WELL, NUMBER
4 ONE, WE DON'T MAKE COPIES OF TAPES, WE MAKE TAPES
5 AVAILABLE.

6 THE COURT: WELL, CAN YOU LOAN HIM
7 THAT ONE?

8 SOLICITOR AVINGER: DO YOU WANT HIM
9 TO HEAR THAT, CAN YOU ---

10 SOLICITOR COLLINS: THAT'S ALRIGHT
11 WITH ME.

12 SOLICITOR AVINGER: YOUR HONOR, ONCE
13 AGAIN, IT HAS THE CI'S VOICE ON IT, WHICH IS, IS JUST
14 AS IDENTIFYING AS HIS NAME.

15 THE COURT: IF IT HAD HIS
16 FINGERPRINT, DO YOU THINK THEY COULD TELL WHO IT WAS?

17 SOLICITOR AVINGER: NOT HIS
18 FINGERPRINT, YOUR HONOR, BUT HIS VOICE, I THINK THEY
19 COULD. WHAT I DON'T UNDERSTAND IS, IF WE'RE HERE JUST
20 ON A DIAMOND ISSUE, DIAMOND ISSUE ONLY, NOT TALKING
21 ABOUT THE VALIDITY OF THE SEARCH WARRANT, UNDER DIAMOND
22 I DON'T THINK HE'S ENTITLED TO THIS CI, BECAUSE THIS CI
23 ---

24 THE COURT: WELL, WE'RE TALKING
25 ABOUT THE TAPE RIGHT THIS MINUTE, I'M TALKING ABOUT THE

1 TAPE.

2 SOLICITOR AVINGER: AND THE TAPE,
3 IT'S THE SAME THING.

4 SOLICITOR COLLINS: YOUR HONOR, I
5 MEAN, IF HE'S TALKING ---

6 THE COURT: NO, I DON'T THINK GIVING
7 SOMEBODY A VOICE TAPE IS GIVING THEM THEIR, HIS
8 IDENTITY.

9 SOLICITOR COLLINS: WELL, YOUR
10 HONOR, HE'S GOT THE WRONG MOTION, THEN. IF HE'S MAKING
11 A DIAMOND MOTION, THAT'S A CONFIDENTIAL INFORMANT ISSUE.

12 THE COURT: WELL, LET'S NOT CALL IT
13 A DIAMOND MOTION, LET'S CALL HIS MOTION A MOTION TO GET
14 THE TAPE.

15 MR. KRAMER: MOTION FOR FURTHER
16 DISCOVERY, YOUR HONOR, UNDER DIAMOND.

17 THE COURT: FURTHER DISCOVERY, THAT
18 SOUNDS GOOD, MOTION FOR FURTHER DISCOVERY.

19 MR. KRAMER: BUT YOUR HONOR, I DON'T
20 UNDERSTAND WHOSE CASE THIS IS, IS IT MRS. AVINGER'S
21 CASE, OR IS IT SOLICITOR COLLINS' CASE?

22 THE COURT: WHAT DIFFERENCE DOES IT
23 MAKE, IT'S THE STATE'S CASE.

24 MR. KRAMER: I UNDERSTAND THAT, YOUR
25 HONOR.

1 THE COURT: THEY'RE DOUBLE TEAMING
2 YOU.

3 MR. KRAMER: I DON'T MIND THAT, YOUR
4 HONOR, I JUST DIDN'T KNOW WHOSE CASE IT WAS.

5 THE COURT: WELL, ---

6 MR. KRAMER: AND THAT GOES BACK TO
7 THE EX PARTE ISSUE, YOUR HONOR.

8 THE COURT: WELL, WHAT IS THE EX
9 PARTE ISSUE? LET'S TALK ABOUT THAT. WHAT IS THE EX
10 PARTE ISSUE?

11 MR. KRAMER: WELL, YOUR HONOR, TO
12 ME IT MEANS COMMUNICATIONS WITH THE COURT WITHOUT
13 OPPOSING COUNSEL BEING PRESENT THAT AFFECT THE ELEMENTS
14 OF THE CASE OR THAT AFFECT THE STATUS OF THE CASE, OR
15 THAT AFFECT WHICH WAY A CASE MAY BE TRIED, OR ELEMENTS
16 OF EVIDENCE ---

17 THE COURT: YOU CAN'T HAVE AN EX
18 PARTE COMMUNICATION WITH THE COURT ABOUT PROCEDURAL
19 MATTERS?

20 MR. KRAMER: NOT JUST PROCEDURAL
21 MATTERS, IT COULD BE SUBSTANTIVE MATTERS, YOUR HONOR,
22 EXACTLY WHAT THE SUBSTANCE THAT I'M ASKING FOR TODAY,
23 I'M ASKING FOR THE COURT TO HAVE THE STATE REVEAL TO ME
24 SUBSTANTIVE MATTERS THAT AFFECT MY CLIENT'S RIGHT TO
25 CONFRONT THE WITNESSES, TO REVIEW THE EVIDENCE WITH ME,

20

1 YOUR HONOR, TO HEAR THIS TAPE, TO HAVE ME MEET WITH THE
2 CI, TO LOOK AT THE ANALYSIS, WHICH AGAIN, THE COURT
3 NOTED, MR. COLLINS JUST PROVIDED ME ON THE MARIJUANA,
4 I STILL DON'T HAVE THE CRACK COCAINE ANALYSIS, TO LOOK
5 AT CERTIFIED COPIES OF THE PRERECORDED MONEY, YOUR
6 HONOR. THAT'S WHAT I'M ASKING THE COURT TO DO, TO GIVE
7 ME ---

8 THE COURT: FURTHER DISCOVERY.

9 MR. KRAMER: FURTHER SUBSTANTIVE
10 DISCOVERY, YOUR HONOR, THAT I DON'T HAVE.

11 THE COURT: FURTHER SUBSTANTIVE
12 DISCOVERY AND TO REVEAL THE IDENTITY OF THE WITNESSES, -
13 --

14 MR. KRAMER: CONFIDENTIAL INFORMANT,
15 YES, SIR.

16 THE COURT: --- I.E., THE
17 CONFIDENTIAL RELIABLE -- OR THE CONFIDENTIAL INFORMANT -
18 --

19 MR. KRAMER: YES, SIR, YOUR HONOR.

20 THE COURT: --- UNDER DIAMOND.

21 MR. KRAMER: YES, SIR.

22 THE COURT: DIAMOND, AS I UNDERSTAND
23 IT, RELATES ONLY TO CONFIDENTIAL INFORMANTS.

24 MR. KRAMER: THAT IS CORRECT, YOUR
25 HONOR.

1 THE COURT: AND IT SAYS THAT YOU
2 DON'T HAVE A RIGHT TO HAVE THE, HAVE THE NAME OR THE
3 IDENTITY OF INFORMANTS OR SNITCHES, BUT YOU DO SOMEBODY
4 THAT'S AN INTEGRAL PART OF YOUR DEFENSE.

5 MR. KRAMER: A MATERIAL PART OF THE
6 TRANSACTION, YOUR HONOR.

7 THE COURT: OF THE TRANSACTION.

8 MR. KRAMER: YES, SIR. AND UNDER
9 RULE ---

10 THE COURT: IN THIS TRANSACTION THAT
11 YOU'RE BEING TRIED FOR IS POSSESSION WITH INTENT TO
12 DISTRIBUTE.

13 MR. KRAMER: YES, SIR.

14 THE COURT: YOU'RE NOT BEING TRIED
15 WITH A SALE.

16 MR. KRAMER: THAT'S CORRECT, YOUR
17 HONOR.

18 THE COURT: AND HE'S NOT EVEN GOING
19 TO BE A WITNESS.

20 MR. KRAMER: YOUR HONOR, THE OTHER
21 THING IS, UNDER RULE FIVE, BRADY, UNDER THAT ONGOING
22 DISCOVERY, THAT'S THE OTHER PRONG, YOUR HONOR, BESIDES
23 DIAMOND, TO REVEAL THIS INFORMATION TO ME.

24 THE COURT: BRADY, YOU'RE ENTITLED
25 TO EXCULPATORY EVIDENCE.

22

1 MR. KRAMER: EXACTLY, YOUR HONOR,
2 AND I HAVE NOT BEEN PROVIDED ALL THE EXCULPATORY
3 EVIDENCE THAT MAY ---

4 THE COURT: YOU MAY NOT BE UNDER
5 BRADY ---

6 MR. KRAMER: THAT MAY BE ---

7 THE COURT: --- WE AIN'T GOT TO THAT
8 YET, ---

9 MR. KRAMER: YES, SIR.

10 THE COURT: --- I'M TALKING ABOUT
11 DIAMOND.

12 MR. KRAMER: YES, SIR, I'VE GOT IT,
13 YOUR HONOR.

14 THE COURT: ALRIGHT, SIR. WELL,
15 DIAMOND, I DON'T THINK YOU'RE ENTITLED TO THE IDENTITY
16 OF THE CI IF YOU'RE NOT BEING CHARGED WITH THE SALE.
17 YOU MIGHT STIR UP SOMETHING IN A SUPPRESSION HEARING.
18 IT WAS MY INTENTION TO HAVE THE SUPPRESSION HEARING, YOU
19 KNOW, AT THE TRIAL. THAT'S WHERE I'VE ALWAYS HAD
20 SUPPRESSION HEARINGS BEFORE. BUT, AND THAT'S WHY I
21 ASKED YOU, IS THERE SOMETHING WRONG WITH DOING IT THEN?
22 IS IT SOMETHING YOU OBJECT TO BY DOING IT THEN?

23 MR. KRAMER: YOUR HONOR, AS I SAID
24 BEFORE TO THE COURT EARLIER, I HAVEN'T HAD ADEQUATE TIME
25 TO PREPARE UNDER RULE SIX O ONE AND SOUTH CAROLINA COURT

1 OF APPEALS AS FAR AS BEING, WHAT COURT I'M IN RIGHT NOW.
2 AS FAR AS BEING IN FAMILY COURT, OR AS FAR AS BEING OVER
3 IN GENERAL SESSIONS COURT, YOUR HONOR. AS I TOLD THE
4 FAMILY COURT JUDGE, JUDGE MACKLAND, THAT I WOULD BE OVER
5 HERE DOING A MOTION, AND WOULD SHE HOLD OFF ON THE THREE
6 CASES THAT I HAVE PENDING IN FAMILY COURT, FOR THIS BIT
7 OF INFORMATION, YOUR HONOR. I ALSO BELIEVE THAT UNDER
8 STATE VERSUS DIAMOND, MY READING OF IT, YOUR HONOR, IS,
9 WHEN THE CONFIDENTIAL INFORMANT IS THE ONLY WITNESS TO
10 THE DRUG TRANSACTION, IN THIS CASE THAT CONFIDENTIAL
11 INFORMANT IS, IN FACT, THE ONLY WITNESS, YOUR HONOR.

12 THE COURT: THAT'S RIGHT, IN THE
13 DRUG TRANSACTION, ---

14 MR. KRAMER: THERE IS NO OTHER
15 WITNESS.

16 THE COURT: --- BUT WE'RE NOT TRYING
17 THE DRUG TRANSACTION CASE.

18 MR. KRAMER: I UNDERSTAND, YOUR
19 HONOR, BUT WHAT I'M TRYING TO SAY, IN THEIR, IN THE
20 INFORMATION THAT THEY'RE TELLING ME TODAY, WHICH I'VE
21 JUST FOUND OUT, YOUR HONOR, IS, IF THEY DON'T USE THE
22 CI, AND THEY DON'T GIVE ME THE DRUG ANALYSIS, AND
23 THEY'RE NOT GOING TO USE THE MONEY, THAT'S THE BASIS FOR
24 THEIR SEARCH WARRANT, THAT'S THE BASIS FOR THE
25 POSSESSION WITH INTENT TO DISTRIBUTE CHARGES, YOUR

24

1 HONOR. AND NOW THEY'RE TELLING ME THAT THAT, ALL THAT
2 INFORMATION IS NOT GOING TO BE USED OR AVAILABLE AT
3 TRIAL, AND THEY DON'T HAVE TO GIVE IT TO ME. SO, I'M
4 SUPPOSED TO DEFEND MY CLIENT WITH THE RAP SHEET THAT'S
5 BLANKED OUT THAT I'VE GOT.

6 THE COURT: THE RAP SHEET, OF
7 COURSE, IS NOT BLANKED OUT, THE NAME ---

8 MR. KRAMER: YES, SIR.

9 THE COURT: --- OF THE PERSON WHO
10 IS THE POSSESSOR OF THAT RAP SHEET.

11 MR. KRAMER: YES, SIR.

12 THE COURT: OR WHOSE RAP SHEET IT
13 IS, BECAUSE THAT WOULD REVEAL THE IDENTIFY OF THE CI.
14 THAT'S THE RAP SHEET OF THE CI. THE WHOLE IDEA IS TO
15 PROTECT THE CONFIDENTIAL INFORMANTS WHOSE LIVES MAY BE
16 IN JEOPARDY IF WE DIVULGE THAT. THEN YOU PLEAD GUILTY,
17 HIS IDENTITY IS DIVULGED, AND HE'S ON THE STREET WITH
18 A TARGET ON HIS BACK. YOU KNOW, I THINK THE PUBLIC,
19 NOTWITHSTANDING THE CI, HAS A RIGHT TO HAVE HIS HEALTH
20 PROTECTED UNLESS IT INFRINGES ON YOUR ABILITY TO
21 REPRESENT YOUR CLIENT. NOW, YOU'RE NOT REPRESENTING
22 YOUR CLIENT FOR A SALE, YOU'RE REPRESENTING HIM FOR
23 HAVING DRUGS.

24 MR. KRAMER: I UNDERSTAND THAT, YOUR
25 HONOR.

1 THE COURT: THE REASON THEY FOUND
2 THE DRUGS IS BECAUSE OF A SEARCH WARRANT. NOW, THE TIME
3 TO TEST, I THOUGHT, AND I'VE ASKED THREE OR FOUR TIMES
4 AND I HAVEN'T GOTTEN AN ANSWER YET, I'VE GOTTEN THAT I
5 HAVE TO BE IN FAMILY COURT, BUT I DON'T UNDERSTAND THAT
6 TO BE THE ANSWER, DO YOU HAVE AN OBJECTION TO HAVING THE
7 SUPPRESSION HEARING AT THE TRIAL?

8 MR. KRAMER: YOUR HONOR, AS FAR AS
9 TO SUPPRESS, TO, TO CHALLENGE THE VALIDITY OF THE SEARCH
10 WARRANT, NO, YOUR HONOR, I DO NOT HAVE THAT. WHAT I'M
11 ASKING TODAY IS ADDITIONAL DISCOVERY UNDER BOTH BRADY
12 AND DIAMOND. THE STATE HAS NOT DEMONSTRATED IN THE
13 INFORMATION OF THE ---

14 THE COURT: WELL, LET'S STOP RIGHT
15 THERE, ---

16 MR. KRAMER: ALRIGHT, YOUR HONOR.

17 THE COURT: --- AND BREAK IT DOWN.

18 OKAY. WHAT DOES DIAMOND TALK ABOUT?

19 MR. KRAMER: DIAMOND TALKS ABOUT
20 REVEALING THE CONFIDENTIAL INFORMANT, YOUR HONOR, IT'S
21 AN ---

22 | THE COURT: ALRIGHT, SIR.

23 MR. KRAMER: --- INTEGRAL PART OF
24 THE CASE.

25 | THE COURT: AND I TOLD YOU THAT.

26

1 SINCE HE'S NOT TESTIFYING, I DON'T THINK THAT'S
2 DISCOVERABLE FOR PURPOSES OF THIS TRIAL, AND THAT
3 TRANSACTION, IF YOU WILL, OF FINDING DRUGS IN HIS
4 RESIDENCE, OR FINDING WHATEVER THEY CLAIM IS DRUGS IN
5 HIS RESIDENCE.

6 MR. KRAMER: RIGHT.

7 THE COURT: NOW, SHOULD YOU HAVE THE
8 TAPE? I THINK YOU SHOULD, BECAUSE I DON'T THINK THAT
9 WOULD REVEAL HIS IDENTITY. I THINK YOU OUGHT TO BE ABLE
10 TO HEAR IT. I'D LIKE TO KNOW WHAT HEARING IT, HOW THAT
11 WOULD HELP YOUR CLIENT, BEFORE I RULE ON IT.

12 MR. KRAMER: WELL, YOUR HONOR, FOR
13 EXAMPLE, IF THE TAPE QUALITY IS VERY POOR, IF YOU CAN'T
14 UNDERSTAND WHAT OCCURRED, THAT MAY LIMIT THE VALUE OF
15 THE EVIDENCE, YOUR HONOR, THAT MAY GIVE MY CLIENT AN
16 INDICATION, WHICH I CAN ADVISE HIM ON, OF THE STRENGTH
17 OF THE CASE THE STATE IS PRESENTING AGAINST HIM.

18 THE COURT: ALRIGHT. NOW, YOU'VE
19 HEARD IT.

20 MR. KRAMER: I HAVE HEARD THE TAPE,
21 ALONG WITH MR. COLLINS, YOUR HONOR, IN MR. COLLINS'
22 OFFICE.

23 SOLICITOR COLLINS: YOUR HONOR, THE
24 PROBLEM IS, THAT TAPE IS NOT, HAS NOTHING TO DO WITH HOW
25 MUCH EVIDENCE I HAVE AGAINST HIM ON THE POSSESSION WITH

1 INTENT TO DISTRIBUTE CHARGES. THAT WOULD BE, IF I
2 DECIDED TO INDICT HIM FOR DISTRIBUTION AS WELL AS AN
3 ADDITIONAL CLOSE PROXIMITY. THEN, OF COURSE, THE TAPE,
4 HE WOULD DEFINITELY, MAYBE HE WOULD BE INCLINED TO, I
5 WOULD HAVE TO LET HIM LISTEN TO IT. HOWEVER, UNDER THESE
6 CIRCUMSTANCES ---

7 THE COURT: WHAT IS, DO YOU INTEND
8 TO INTRODUCE THE TAPE?

9 SOLICITOR COLLINS: NO, SIR, I
10 DON'T, I DON'T INTEND TO INTRODUCE IT.

11 THE COURT: THAT'S NOT GOING TO BE
12 IN EVIDENCE.

13 NOW, LET'S GO BACK TO THE NEXT ONE.
14 THE TAPE WE'VE TALKED ABOUT. LET'S TALK ABOUT CERTIFIED
15 COPIES OF MONEY AT A BUY.

16 MR. KRAMER: YES, SIR. THERE WAS
17 AN INDICATION THAT THERE WERE, I BELIEVE, PRERECORDED
18 MONEY WAS USED, AND DISCOVERY PROVIDED TO ME DOES NOT
19 CONTAIN INFORMATION THAT SHOWS THAT THE COPIES OF THE
20 MONEY THAT IS PICTURED IS A CERTIFIED COPY OF THE ACTUAL
21 MONEY THAT WAS USED. AS FAR AS, THAT'S AN INTEGRAL PART
22 OF THE CASE, THE PRERECORDED MONEY, ALONG, YOUR HONOR,
23 WITH THE CI, ALONG WITH THE TAPE, THAT'S THEIR
24 INFORMATION THEY'RE SAYING THEY'RE NOT GOING TO USE NOW
25 DURING THE TRIAL.

28

1 THE COURT: ALRIGHT. THAT WOULD GO
2 TO THE VALIDITY OF THE SEARCH WARRANT, WOULD IT NOT?

3 MR. KRAMER: YOU'RE, THAT'S CORRECT,
4 YOUR HONOR, AND THE STATE HAS NOT DEMONSTRATED HERE THAT
5 THE CI IS RELIABLE.

6 THE COURT: THEY DON'T HAVE TO IF
7 YOU'RE GOING TO DO A SUPPRESSION HEARING AT THE TRIAL.

8 MR. KRAMER: I UNDERSTAND THAT, YOUR
9 HONOR.

10 THE COURT: NOW, LET'S TALK ABOUT
11 NO IDENTITY ON THE RAP SHEET. YOUR OBJECTION IS, YOU
12 DON'T KNOW WHO HAS THE CONVICTIONS.

13 MR. KRAMER: I DON'T, YOUR HONOR.
14 I CAN'T TELL BY THE QUALITY OF THE RAP SHEET PROVIDED -
15 --

16 THE COURT: IT'S THE QUALITY AND NOT
17 THE FACT THAT THE NAME IS OBLITERATED.

18 MR. KRAMER: IT'S ALSO BESIDES THE
19 FACT THAT IT'S BLACKED OUT, YOUR HONOR. I CAN'T TELL ON
20 SOME OF THE CONVICTIONS, IT'S NOT THE ORIGINAL COPY
21 WHERE I CAN LOOK AND SEE WHETHER THERE'S A PAGE MISSING,
22 OR WHETHER IT'S COMPLETE, OR WHETHER THINGS HAVE RUN
23 OFF THE EDGE. IT'S OBVIOUSLY PRINTED BY A COMPUTER, AND
24 NOT RUN OFF OF A, SOME KIND OF XEROX MACHINE, SO I CAN'T
25 TELL ---

1 THE COURT: CAN YOU MAKE A BETTER
2 COPY FOR HIM?

3 MR. KRAMER: --- WHERE THE PAGE
4 BREAKS ARE.

5 SOLICITOR AVINGER: YOUR HONOR, HE
6 COULD SIT DOWN WITH US AND WE COULD GO THROUGH IT,
7 CONVICTION BY CONVICTION. WE'D BE HAPPY TO DO THAT.

8 THE COURT: THERE YOU GO.

9 MR. KRAMER: WELL, YOUR HONOR, NOT
10 TO MISUNDERSTAND WHAT THE STATE IS PROFFERING HERE, WHAT
11 I REQUESTED THAT RAP SHEET FOR IS SO I CAN REVIEW IT
12 MYSELF AND ALSO REVIEW IT WITH MY CLIENT. IT'S
13 EVIDENCE, YOU KNOW, THAT HE'S ENTITLED TO SEE, YOUR
14 HONOR, AS PART OF THE TRIAL AGAINST HIM.

15 THE COURT: ALRIGHT, SIR. WELL, WHY
16 DON'T YOU DO THIS, WHY DON'T YOU SIT DOWN WITH THE STATE
17 AND GO OVER THOSE CONVICTIONS ONE BY ONE, AND MAKE NOTES
18 OF WHAT YOU THINK HE HAS A RIGHT TO SEE, IF YOU SAY HE
19 CAN'T READ WHAT'S BEEN GIVEN. THAT WAY HE'LL KNOW
20 EXACTLY WHAT IT SAYS, WHAT THEY THINK IT SAYS, AND WHAT
21 YOU THINK IT SAYS.

22 NOW, THE DRUG ANALYSIS OF CRACK
23 COCAINE. HE AIN'T GOT A PRAYER IN HELLO CENTRAL WITHOUT
24 A DRUG ANALYSIS OF CRACK COCAINE, AND YOU HAVEN'T BEEN
25 PROVIDED THAT?

30

1 MR. KRAMER: I HAVE NOT BEEN
2 PROVIDED THE ANALYSIS, YOUR HONOR. I WAS PROVIDED THE
3 ANALYSIS OF THE DRUGS THAT WERE SEIZED AS PART OF THE
4 SEARCH WARRANT. I WAS NOT PROVIDED AN ANALYSIS OF THE
5 INITIAL BUY OF THE DRUGS, WHICH MR. COLLINS INDICATED
6 HAS NOT COME BACK YET FROM SLED.

7 THE COURT: THEN THEY COULDN'T GIVE
8 IT TO YOU.

9 SOLICITOR COLLINS: WELL, YOUR
10 HONOR, HE ---

11 MR. KRAMER: I JUST FOUND THAT OUT
12 TODAY, YOUR HONOR.

13 SOLICITOR COLLINS: AND HE'S NOT
14 ENTITLED TO THAT, YOUR HONOR.

15 THE COURT: NO, I DON'T THINK HE IS,
16 EITHER.

17 SOLICITOR COLLINS: IT'S AN
18 UNCHARGED OFFENSE.

19 MR. KRAMER: HE'S TOLD ME TWO
20 DIFFERENT THINGS, YOUR HONOR, HE'S TOLD ME, I'M NOT
21 ENTITLED TO IT, ---

22 THE COURT: WELL, LET ME TELL YOU
23 WHAT I'M TELLING YOU ---

24 MR. KRAMER: YES, SIR.

25 THE COURT: --- I'M TELLING YOU THAT

1 YOU'RE ENTITLED TO A DRUG ANALYSIS OF ANY DRUGS HE'S
2 BEING PROSECUTED ON. YOU HAVE A RIGHT TO KNOW IF THAT
3 IS, IN FACT -- WELL, I DON'T KNOW WHAT THEY GOT, WAS IT
4 MARIJUANA, WAS IT ---

5 MR. KRAMER: CRACK COCAINE, YOUR
6 HONOR.

7 SOLICITOR COLLINS: BOTH, YOUR
8 HONOR.

9 THE COURT: YOU'VE GOT A RIGHT TO
10 HAVE THAT. AND IF THEY CAN'T PROVE THAT IT WAS, IN
11 FACT, CRACK COCAINE, THEY AIN'T GOING TO GET A
12 CONVICTION. DO YOU HAVE THAT ANALYSIS?

13 SOLICITOR AVINGER: YES, SIR.

14 THE COURT: HAVE YOU GIVEN IT TO
15 HIM?

16 SOLICITOR COLLINS: YES, SIR.

17 THE COURT: YOU HAVE IT.

18 MR. KRAMER: NO, YOUR HONOR. LET
19 ME BRING IT TO THE COURT'S ATTENTION. THEY HAVE
20 PROVIDED ME, TO CLARIFY, THE ANALYSIS OF DRUGS THAT WERE
21 SEIZED, YOUR HONOR, FROM THE SEARCH WARRANT, WHICH I
22 BELIEVE ---

23 THE COURT: AND THAT'S WHAT HE'S
24 BEING TRIED FOR.

25 MR. KRAMER: YES, SIR, YOUR HONOR.

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1 THEY HAVE NOT PROVIDED ME THE DRUG ANALYSIS WHICH THE
2 SEARCH WARRANT IS BASED ON. BECAUSE MR. COLLINS SAID,
3 FINE, IF I PROVIDE IT TO YOU I MAY WANT TO, YOU KNOW,
4 CHARGE HIM WITH THAT FURTHER OFFENSE, AND I SAID, MY
5 CLIENT DOESN'T CARE, IF YOU WANT TO CHARGE HIM WITH
6 ANOTHER OFFENSE, WE WOULD LIKE TO SEE THE ANALYSIS. AND
7 THAT WAS AS RECENTLY AS YESTERDAY, YOUR HONOR, THE NINTH
8 OF MARCH, THAT I HAD THAT DISCUSSION, TO SEE IF MY
9 CLIENT AGAIN WAS WANTING TO PROCEED TO TRIAL OR BE OPEN
10 TO ACCEPT AN OFFER FROM THE STATE AGAIN. AND I REALIZE,
11 YOUR HONOR, AS I TOLD MY CLIENT, IF HE WANTS TO PLEAD
12 GUILTY IT WOULD BE WHATEVER THE COURT WOULD DETERMINE.
13 HE UNDERSTAND THAT THE OFFER HAS EXPIRED AT THIS POINT,
14 BUT IT'S MY DUTY ALSO, YOUR HONOR, WHILE I CONTINUE TO
15 DEFEND MY CLIENT TO ALSO KEEP NEGOTIATIONS OPEN WITH THE
16 STATE IN CASE MY CLIENT HAS A LAST MINUTE CHANGE OF
17 MIND.

18 THE COURT: OKAY. I MEAN, I DON'T
19 KNOW WHAT THE POINT IS.

20 MR. KRAMER: YES, SIR, YOUR HONOR,
21 BUT THE ISSUE HERE, YOUR HONOR, IS, NO, I HAVE NOT BEEN
22 PROVIDED THE DRUG ANALYSIS OF THE DRUGS THAT THE CI
23 BOUGHT FOR THE SEARCH WARRANT TO BE BASED ON.

24 THE COURT: THAT FORMS THE BASIS OF
25 THE SEARCH WARRANT.

1 MR. KRAMER: EXACTLY.

2 THE COURT: ALRIGHT, YOU HAVEN'T
3 BEEN PROVIDED THAT?

4 MR. KRAMER: YES, SIR.

5 THE COURT: THEY CAN'T GIVE IT TO
6 YOU BECAUSE THEY SAY THEY DON'T HAVE IT. AND I DON'T
7 THINK YOU'RE ENTITLED TO IT NOW. IF IT COMES TO TRIAL
8 AND AT A SUPPRESSION HEARING, AND THEY CAN'T GIVE YOU
9 THAT, MAYBE YOU'VE GOT SOMETHING TO TALK ABOUT ---

10 MR. KRAMER: YES, SIR, YOUR HONOR.

11 THE COURT: --- BUT FOR THE TRIAL
12 OF THIS CASE, ON THESE CHARGES, I DON'T THINK YOU NEED
13 THAT INFORMATION NOW. NEITHER DO I THINK YOU NEED THE
14 TAPE, IF THAT'S NOT GOING TO BE AN ISSUE AGAINST YOU IN
15 THE TRIAL OF THIS CASE. THE DRUG ANALYSIS ON THE CRACK
16 THAT WAS FOUND IN THE HOUSE, OR WHAT THEY CLAIM WAS
17 FOUND IN THE HOUSE, YOU HAVE A RIGHT TO THAT, AND YOU'VE
18 BEEN GIVEN THAT. WAS ANY OTHER DRUGS FOUND IN THE
19 HOUSE?

20 SOLICITOR COLLINS: NONE, YOUR
21 HONOR, JUST MARIJUANA AND CRACK, YOUR HONOR.

22 THE COURT: WAS HE PROVIDED WITH THE
23 MARIJUANA ANALYSIS?

24 SOLICITOR COLLINS: YES, SIR, YOUR
25 HONOR.

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1 MR. KRAMER: JUST NOW, YOUR HONOR..

2 THE COURT: ALRIGHT. DO YOU NEED
3 SOME TIME TO DIGEST THAT?

4 MR. KRAMER: I HAVEN'T HAD TIME TO
5 DIGEST IT, YES, YOUR HONOR, THAT'S WHY I SAID, --

6 THE COURT: HOW MUCH TIME DO YOU
7 NEED?

8 MR. KRAMER: --- I'M INTENDING ON
9 GOING BACK TO FAMILY COURT AS SOON AS I FINISH HERE.

10 THE COURT: ALRIGHT, SIR, WELL, HOW
11 MUCH TIME DO YOU NEED, WHEN DO THEY PLAN ON TRYING THIS
12 CASE?

13 MR. KRAMER: I'M NOT SURE, YOUR
14 HONOR, MR. COLLINS INDICATED HE MAY BE READY TO PROCEED
15 ON WEDNESDAY, I BELIEVE THE ELEVENTH OF MARCH OF TWO
16 THOUSAND AND FOUR, BUT I'M NOT SURE, YOUR HONOR, I
17 REALLY, I DON'T KNOW IF HE WANTS TO PROCEED ON WEDNESDAY
18 OR NOT. BUT I WOULD LIKE TO, YOU KNOW, THE COURT TO
19 UNDERSTAND THAT IF I'M TO PROCEED ON WEDNESDAY, THEN I
20 WOULD NEED THE TAPE FOR THE PRETRIAL SUPPRESSION MOTION
21 OF THE SEARCH WARRANT, I WOULD NEED THE DRUG ANALYSIS
22 FOR THAT PRETRIAL SUPPRESSION MOTION, YOUR HONOR, AND
23 I WOULD LIKE TO HAVE THE IDENTITY OF THE CI FOR THAT
24 SEARCH WARRANT ISSUED, YOUR HONOR, FOR THAT SUPPRESSION
25 MOTION, BECAUSE I THINK THOSE ARE ALL THREE PRONGS THAT

1 THAT SEARCH WARRANT RESTS ON. AND THE PROBLEM HERE IS
2 TIMELINESS, YOUR HONOR. IF THEY WANT TO PUT THE DEFENSE
3 TO THE TEST HERE, YOUR HONOR, YOU CAN PROVIDE IT TO ME
4 TOMORROW MORNING, BUT I DON'T THINK THAT GIVES ME
5 ADEQUATE TIME TO PREPARE, REVIEW WITH MY CLIENT, LOOK
6 AT WHATEVER POSSIBLE DEFENSES WE MAY OFFER, YOUR HONOR.

7 THE COURT: YES, MA'AM -- YES, SIR?

8 SOLICITOR AVINGER: YOUR HONOR, IN
9 A SUPPRESSION HEARING OF A SEARCH WARRANT, IT'S THE
10 DEFENSE'S MOTION AND HE HAS TO PROVIDE AN OFFER OF PROOF
11 AS TO WHAT AREAS HE'S ATTACKING. I MEAN, WE'LL BE READY
12 FOR ANY MOTION TO SUPPRESS THE SEARCH WARRANT. AND, IN
13 FACT, AS OF THIS MINUTE, IT MAY CHANGE, BASICALLY, SOME
14 THINGS THAT HAVE COME OUT SINCE THIS HEARING, BUT PRIOR
15 TO THIS HEARING OUR INTENTION WAS IN THE SUPPRESSION
16 HEARING ON THE SEARCH WARRANT, ONLY TO HAVE THE AFFIANT
17 TESTIFY, WHICH IS THE CASE OFFICER, THE NARCOTICS
18 DETECTIVE. THAT WOULD HAVE BEEN THE ONLY WITNESS WE
19 WOULD CALL IN SUPPORT OF THE VALIDITY OF THE SEARCH
20 WARRANT. BECAUSE IT'S MY UNDERSTANDING THAT MR. KRAMER
21 HAS TO PROVIDE AN OFFER OF PROOF, AND HAS TO MAKE
22 SPECIFIC ATTACKS AGAINST THE SEARCH WARRANT, WHICH,
23 WHICH, FRANKLY, WE DON'T THINK HE'S GOING TO BE ABLE TO
24 DO.

25 MR. KRAMER: YOUR HONOR, I RESERVE

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1 MY RIGHT, IF THE COURT WILL ALLOW ME, TO ADDRESS THAT
2 ISSUE AT THE APPROPRIATE TIME, BUT I WILL OFFER SPECIFIC
3 ATTACKS ON ELEMENTS OF THE SEARCH WARRANT, AS FAR AS
4 INDICIA OF RELIABILITY, AS FAR AS VERACITY, AS FAR AS
5 TIMELINESS.

6 THE COURT: WHEN DO YOU INTEND TO
7 TRY THIS CASE?

8 SOLICITOR AVINGER: YOUR HONOR, WE
9 HAD INTENTIONS OF TRYING IT TOMORROW. UM, ---

10 THE COURT: BUT WHAT?

11 SOLICITOR AVINGER: I NEED TO
12 RETHINK WHETHER -- WE WERE NOT GOING TO CALL THE CI AT
13 ALL. NOW, IT'S FOUR O'CLOCK, I NEED TO SEE IF WE CAN
14 FIND THE CI TO PROVIDE MORE ADDITIONAL TESTIMONY ON THE
15 SEARCH WARRANT ISSUE.

16 THE COURT: MY SUGGESTION IS -- OF
17 COURSE, YOU CAN CALL YOUR CASES WHENEVER YOU WANT TO.
18 I CAN'T ---

19 SOLICITOR AVINGER: YES, SIR.

20 THE COURT: --- I CAN'T CALL YOUR
21 CASES FOR YOU. BUT IF YOU DON'T KNOW WHERE YOUR CI IS,
22 YOU THINK HE MAY HAVE TO BE HERE FOR PURPOSES OF A
23 SUPPRESSION HEARING, ---

24 SOLICITOR AVINGER: RIGHT.

25 THE COURT: --- IF IT WERE ME I'D

1 KNOW WHETHER OR I COULD GET HIM OR NOT BEFORE I CAME TO
2 TRIAL.

3 SOLICITOR AVINGER: YES, SIR.

4 THE COURT: MAYBE IT WOULD BE A GOOD
5 IDEA TO CONTINUE THE TRIAL FOR A WHILE.

6 SOLICITOR AVINGER: YES, SIR, I -
7 - WE'LL WILL MAKE THAT DECISION AFTER WE HEAR FROM HIM.

8 THE COURT: I UNDERSTOOD THIS WAS
9 GOING TO BE A MOTION FOR CONTINUANCE AND A MOTION FOR
10 THESE OTHER THINGS WHEN YOU TALKED TO ME EX PARTE
11 EARLIER.

12 MR. KRAMER: YES, SIR, YOUR HONOR.
13 YES, SIR, I UNDERSTAND MRS. AVINGER HAS ALSO DONE THAT,
14 SINCE SHE RELAYED INFORMATION TO ME, YOUR HONOR, ABOUT
15 THE CASE. SO, ---

16 THE COURT: ABOUT PROCEDURAL
17 MATTERS, THE SAME AS YOU DID.

18 MR. KRAMER: PROCEDURAL OR
19 SUBSTANTIVE, I DON'T KNOW, YOUR HONOR.

20 THE COURT: WELL, I'M TELLING YOU.

21 MR. KRAMER: THANK YOU, YOUR HONOR.

22 THE COURT: YOU'RE WELCOME.

23 MR. KRAMER: AS FAR AS THE MOTION
24 FOR CONTINUANCE, YOUR HONOR, I WOULD ENTERTAIN THAT
25 MOTION AT THE SAME TIME, YOUR HONOR. IF THERE IS TO BE

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1 A CONTINUANCE, THAT IT BE CONTINUED TO NEXT TERM OF
2 COURT, YOUR HONOR.

3 THE COURT: I'LL ENTERTAIN THE
4 MOTION IF YOU MAKE IT.

5 MR. KRAMER: YES, SIR, I'M OFFERING
6 THAT MOTION, YOUR HONOR.

7 THE COURT: YOU'RE MAKING THAT
8 MOTION?

9 MR. KRAMER: YES, SIR, REQUEST IT
10 FOR ---

11 THE COURT: FOR A CONTINUANCE?

12 MR. KRAMER: FORMALLY, YOUR HONOR,
13 I OFFER THE COURT A MOTION FOR CONTINUANCE, BASED ON THE
14 FACT, YOUR HONOR, THAT THE STATE HAS NOT PROVIDED ME
15 TIMELY DISCOVERY WHICH I'M NOW FINDING OUT PIECE BY
16 PIECE DURING THIS HEARING, YOUR HONOR.

17 THE COURT: WELL, WITHOUT DECIDING
18 THAT THEY HAVE NOT PROVIDED YOU WITH ANYTHING THEY
19 SHOULD HAVE, I'M NOT MAKING THAT FINDING, BUT I'M GOING
20 TO GRANT YOU A CONTINUANCE UNTIL THE NEXT TERM OF COURT,
21 AND I'LL TAKE THESE MATTERS UNDER ADVISEMENT THAT YOU'VE
22 RAISED AND WHETHER OR NOT YOU HAVE A RIGHT TO ANY OF
23 THIS INFORMATION PRIOR TO A SUPPRESSION HEARING, THAT
24 I ASSUME YOU'RE GOING TO MAKE.

25 MR. KRAMER: I WILL, YOUR HONOR.

1 THE COURT: AND I'D LIKE FOR BOTH
2 OF YOU, BOTH THE STATE AND THE DEFENSE TO SUBMIT TO ME
3 PROPOSED ORDERS ON THE MATTER.

4 MR. KRAMER: YES, SIR, YOUR HONOR.

5 THE COURT: AND THEN I'D LIKE TO SEE
6 BOTH OF YOU IN CHAMBERS, IF I MAY, ALL THREE OF YOU IN
7 CHAMBERS.

8 MR. KRAMER: YES, SIR. THANK YOU,
9 YOUR HONOR.

10 THE COURT: THANK YOU.

11 SOLICITOR COLLINS: THANK YOU, YOUR
12 HONOR.

13 SOLICITOR AVINGER: THANK YOU.

14 THE COURT: ANYTHING FURTHER?

15 SOLICITOR AVINGER: NO, SIR, YOUR
16 HONOR.

17 MR. KRAMER: NOTHING, YOUR HONOR,
18 THANK YOU, SIR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County.

John L. Breeden, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

VONDELL SANDERS,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

ELEANOR DUFFY CLEARY
Assistant Appellate Defender

South Carolina Office
of Appellate Defense
1205 Pendleton Street, Room 306
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(803) 734-1330

ATTORNEY FOR APPELLANT

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TABLE OF AUTHORITIES**CASES**

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<u>State v. Torrence</u> , 305 S.C. 45, 406 S.E.2d 315 (1991)	6

STATEMENT OF ISSUE ON APPEAL

Did the trial court err by failing to charge the jury that appellant's confession could not be considered by the jury unless it found beyond reasonable doubt that the statement was given freely and voluntarily under the totality of the circumstances?

STATEMENT OF THE CASE

Appellant Vondell Sanders was indicted by the Orangeburg County grand jury in December 2003 for possession with intent to distribute (PWID) crack cocaine, possession with intent to distribute (PWID) crack cocaine within proximity of a school, possession with intent to distribute marijuana (PWID), and possession with intent to distribute (PWID) marijuana within proximity of a school. ROA pp. 554-557. ROA p. 7, lines 6-17.

Appellant was tried before the Honorable John L. Breeden, Jr., and a jury on April 20, 2004. Kent Collins represented the state and Sam Kramer represented appellant. ROA p. 1. The jury found appellant guilty of the charges relating to crack cocaine and not guilty of the charges relating to marijuana. ROA pp. 482-483.

Judge Brogdon sentenced appellant to eighteen years in prison for PWID (third offense) and fifteen years in prison for PWID in proximity of a school. ROA pp. 552-553.

This appeal follows.

ARGUMENT

The trial court erred by failing to charge the jury that appellant's confession could not be considered by the jury unless it found beyond reasonable doubt that the statement was given freely and voluntarily under the totality of the circumstances.

Appellant was arrested at a trailer after the police executed a search warrant and found crack cocaine and marijuana. The state sought to introduce testimony that appellant admitted the drugs were his after they read him his Miranda, *infra*, rights. ROA pp. 69-71; p. 73, lines 3-10. During the Jackson v. Denno¹ hearing, appellant testified that the police officers did not read him his rights and that he did not make a statement. ROA p. 97, lines 6-10; p. 98, lines 2-4. Counsel sought to suppress evidence of the statement on the grounds that Miranda rights were not given and that appellant was under the influence of alcohol, which precluded a knowing, intelligent, and voluntary waiver. ROA p. 125-126.

The judge ruled that the statement was admissible finding that appellant made the statement freely and voluntarily. ROA p. 129, lines 7-9. The police testified to the jury that appellant made the statement that the drugs were his. ROA p. 184, lines 17-22. However, the jury was never instructed regarding the statement.

Prior to any questioning, a person "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." A person "may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612 (1966).

Once the trial court determines that the statement is voluntary and admits it into evidence, he must instruct the jury that no confession may be considered by it unless found beyond reasonable doubt to have been given freely and voluntarily under the totality of the circumstances. State v. Adams, 277 S.C. 115, 123, 283 S.E.2d 582, 586 (1981), *overruled on other grounds*, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Cooper, 291 S.C. 332, 337, 353 S.E.2d 441, 443 (S.C. 1986), *overruled on other grounds*, State v. Torrence, 406 S.E.2d 315 (S.C. 1991).

Here, the judge erred by instructing the jury and appellant's convictions should be vacated.

¹ Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964) (Judge must hold hearing on the question of voluntariness of the confession.)

CONCLUSION

Based on the foregoing, appellant's convictions should be vacated.

Respectfully submitted,



Eleanor Duffy Cleary
Assistant Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of July, 2005.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

John L. Breeden, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

VONDELL SANDERS,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Vondell Sanders states:

1. She is Assistant Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge John L. Breeden, Jr., which was held on April 22, 2004, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Vondell Sanders.

Respectfully submitted,



Eleanor Duffy Cleary
Assistant Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of July, 2005.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

July 14, 2005



Eleanor Duffy Cleary
1205 Pendleton Street, Room 306
Columbia, SC 29201
803) 734-1330
Attorney for Appellant

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County

John L. Breeden, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

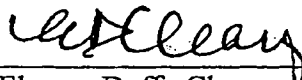
V.

VONDELL SANDERS,

APPELLANT

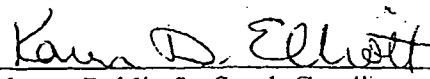
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, this 14th day of July, 2005. A copy of the brief and record on appeal have also been served on Vondell Sanders, #241308 at Lieber Correctional Institution this 14th day of July, 2005.


Eleanor Duffy Cleary
Assistant Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of July, 2005.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: March 13, 2007

FORM 5

STATE OF SOUTH CAROLINA)

County of ORANGEBURG)

IN THE COURT OF COMMON PLEAS

06 CP38-585

Vondell Sanders #241308)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS BE READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Inst. P.O. Box 205,
Ridgeville, SC 29472-0205

2. Name and location of Court which imposed sentence ORANGEBURG County Court
of General Sessions.

3. Name(s) of co-defendant(s) (if any) _____

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2003-GS-38-2371-PWID Crack Cocaine

- (b) 2003-GS-38-2372- PWID Crack Cocaine W/I
- (c) Close Proximity of School or Park.

5. The date upon which sentence was imposed and the terms of the sentence:

- (a) 4-22-04 - PWID Crack Cocaine - 19 Years
- (b) 4-22-04 - PWID Crack Cocaine W/I Close Proximity of
- (c) or Park - 15 Years Concurrent.

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty _____
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES _____

8. If you answered Ayes@ to (7), list:

(a) the name of each Court to which you appealed:

- i. COURT OF APPEALS
- ii. _____
- iii. _____

(b) the result in each such Court to which you appealed:

- i. APPEAL DISMISSED
- ii. _____
- iii. _____

(c) the date of each such result:

- i. MARCH 22, 2006
- ii. _____
- iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. N/A
- ii. N/A
- iii. N/A

9. If you answered Ano@ to (7), state your reasons for not so appealing:

- (a) N/A

(b) N/A(c) N/A

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) SEE ATTACHMENT - A

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) SEE ATTACHMENT - 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? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/Aii. N/Aiii. N/A

iv. _____

(b) the name and location of the Court in which each was filed:

i. N/Aii. N/Aiii. N/A

iv. N/A

(c) the disposition thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(d) the date of each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

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?

YES

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

Did Trial Court err by failing to charge that Appellant's alleged statement could not be considered by the juror unless it found beyond reasonable doubt that statement was freely and voluntarily made under the totality of the circumstances.

(b) the proceedings in which each ground was raised:

APPEALS COURT

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) Because this is my first opportunity to do so.
 (b) _____
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? NO
 (b) your trial, if any? YES
 (c) your sentencing? YES
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

18. If you answered Ayes@ to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:
 i. Sam Kramer - Peggy Hines- Orangeburg Public Defenders
Eleanor Duffy Cleary- 1205 Pendleton St. Room 306,
Columbia, SC 29201
 ii. _____
 iii. _____

(b) the proceedings at which each such attorney represented you:
 i. Sam Kramer - Peggy Hines- Trial Counsel.
Eleanor Duffy Cleary- Appellate Counsel.
 ii. _____
 iii. _____

19. State clearly the relief you seek in filing this application:

SENTENCE VACATED

20. Are you now under sentence from any other court that you have not challenged?

NO

Revised 3/2003

STATE OF SOUTH CAROLINA)

VERIFICATION

County of ORANGEBURG)

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ORAN
2006 MAY 22
10:51

I, Vondell Sanders # 241308, 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.

Vondell Sanders
Vondell Sanders # 241308

SWORN to and subscribed before me this 19
day of May, 2006.

[Signature] (L.S.)
Notary Public

My Commission Expires: 4/24/2016

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Vondell Sanders # 241308, 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.

Vadell Sanders
Applicant

SWORN or affirmed to and subscribed before me this

19 day of May, 2006.

[Signature]
Notary Public

My Commission Expires: 4/24/2016

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1. Whether Appellate counsel was ineffective for failing to raise issue of trial Judge refusing to require the State to disclose the identity of an informant who was clearly a participant in the "alleged" drug transaction, an not mere tipster or conduit. This State's witness would have been helpful to the defense on the validity of the search warrant obtain on 10-17-03. See, State v. Burns, 364 S.E.2d 465 (S.C. 1988). See, State v. Diamond, 312 S.E.2d 550 (1984). See, State v. Robbins, 525 U.S. 259, 288, 120 S.Ct. 746, 145 L.E.2d 756 (2000).

2. Whether the trial Judge denial of the motion to suppress said statement, all wrongfully obtained, denied Appellant Equal Protection under Miranda v. Arizona, supra, and Article 1§3; Article 1§12 of the S.C. Const., and the Fifth and Fourteenth Amendment of the U.S. Const. See State v. Atchinson, 268 S.C. 588, 235 S.E.2d 294 (1977).

3. Whether the trial Judge erred in admitting contested statement without finding of facts resolving the conflicting voir dire testimony. See, State v. Jones, 396 S.E.2d 309.

4. Whether Appellate trial counsel was ineffective for failing to object to hearsay testimony that was in violation of my Due Process and Equal Protection of the law as guaranteed by the confrontation clause under Article 1§3; Article 1§14 of the S.C. Const.; and S.C. Code Ann. § 17-23-60, and the Sixth and Fourteenth Amendment of the U.S. Const.

5. Whether Appellate trial counsel was ineffective for failing to object to trial Judge's instructions that permaturly directs the verdict for the State. See, Crim. Law Rev. 769.

6. Whether Appellate trial counsel was ineffective for failing to object to Solicitor's closing arguments that was voching for State witness credibility. See, State v. Shuler, 545 S.E.2d 805. See, Crim. Law Rev. 636(1), 1163(2)

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C.I. (unincorporated)
unincorporated

7. Whether Appellate trial counsel was ineffective for failing to object to the trial Judge dismissing the Alternate juror without just cause before an unanimous verdict was rendered. See, S.C. Code § 14-7-210. See, SCRC. Rule 47.B. *incorporated*

8. Whether Appellate trial counsel was ineffective for failing to inquire into what happened to the missing juror. *incorporated*

9. Whether Appellate trial counsel was ineffective for failing to object to the jury verdict being less than unanimous, an failure to request for a miss trial or an acquittall. See, S.C. Rules of Crim. P. Rule 14.A,C. See, S.C. Rules of Court, Rule 48. See, Fed. P. 23(b).

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS

06-CP-38-585

Vondell Sanders, #241308,)

Applicant,)

v.)

RETURN

State of South Carolina,)

Respondent.)

The Respondent, making its Return to the application for Post-Conviction Relief filed May 22, 2006, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. The Applicant was indicted at the December 2003 term of the Orangeburg County Grand Jury for Possession with Intent to Distribute Schedule I, II, III Drugs (03-GS-38-2369); Possession with Intent to Distribute Marijuana within Proximity of a School or Park (03-GS-38-2370); Possession with Intent to Distribute Crack Cocaine (03-GS-38-2371); and Possession with Intent to Distribute Crack Cocaine within Proximity of a School or Park (03-GS-38-2372). He was represented by Sam Kramer, Esquire and Peggy Hinds, Esquire. On April 20, 2004, the Applicant underwent trial by jury pursuant to which he was found guilty of Possession with Intent to Distribute Crack Cocaine, Third Offense (03-GS-38-2371) and Possession with Intent to Distribute Crack Cocaine within Proximity of a School or Park (03-GS-38-2372). He was sentenced by the Honorable

John L. Breeden, Jr. to confinement for concurrent periods of nineteen (19) years for Possession with Intent to Distribute Crack Cocaine, Third Offense (03-GS38-2371) and fifteen (15) years for Possession with Intent to Distribute Crack Cocaine within Proximity of a School or Park (03-GS-38-2372).

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Eleanor Duffy Cleary, Esquire represented the Applicant on appeal. Pursuant to Anders v. California, 386 U.S. 738 (1967), the South Carolina Court of Appeals dismissed Applicant's appeal. State v. Sanders, Op. No. 2006-UP-171 (S.C. Ct. App. filed March 22, 2006). The remittitur was issued on April 7, 2006.

Attached herewith and incorporated herein by reference are the records of the Orangeburg County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the transcript of the Applicant's trial, the opinion of the Court of Appeals denying the Applicant's direct appeal, and the remittitur. Any of the above not so attached will be forwarded upon receipt.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of appellate counsel;
 - a. "Appellate counsel was ineffective for failing to raise the issue of trial judge refusing to require the State to disclose the identity of an informant who was clearly a tipster or conduit. This State's witness would have been helpful to the defense on the validity of the search warrant obtain (sic) on 10-17-03."
2. Ineffective assistance of trial counsel;
 - a. "Whether appellate trial counsel was ineffective

for failing to object to hearsay testimony that was in violation of my Due Process and Equal Protection of the law as guaranteed by the confrontation clause."

b. "Whether appellate trial counsel was ineffective for failing to object to trial judge's instructions that permaturly (sic) directs the verdict for the State."

c. "Whether appellate trial counsel was ineffective for failing to object to Solicitor's closing arguments that was (sic) vouching for State witness credibility."

d. "Whether appellate trial counsel was ineffective for failing to object to the trial judge dismissing the alternate juror without just cause before an (sic) unanimous verdict was rendered."

e. "Whether appellate trial counsel was ineffective for failing to inquire into what happened to the missing juror."

f. "Whether appellate trial counsel was ineffective for failing to object to the jury verdict being less than unanimous, an (sic) failure to request for a miss (sic) trial or an acquittall (sic)."

3. Trial court errors;

a. "Trial judge (sic) denial of the motion to suppress said statement, all wrongfully obtained denied Appellant Equal Protection under Miranda v. Arizona, supra, and Article 1, Section 3; Article 1, Section 12 of the S.C. Const., and the Fifth and Fourteenth Amendment of the U.S. Const."

b. "Trial judge erred in admitting contested statement without finding of facts resolving the conflicting voir dire testimony."

III.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State,

302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, Id. at 537; Gilchrist v. State, Op. No. 25973, 2005 WL 949285 (S.C. Sup. Ct. filed April 25, 2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

The Respondent contends that 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. Sharper, Id.

IV.

The Respondent interprets each of the Applicant's second allegations to be claims that he received ineffective assistance of trial counsel. The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of

competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Butler, 286 S.C. at 441, 334 S.E.2d at 813. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, 466 U.S. at 668. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

The Applicant's allegations regarding trial court errors are direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, the Court should summarily dismiss this allegation.

VI.

The State therefore requests that this Court convene an evidentiary hearing on the issue of ineffective assistance of counsel. As to all other allegations, the State moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VII.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VIII.

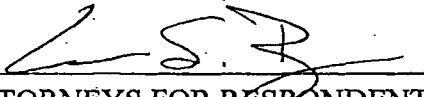
WHEREFORE, having made its Return, the State requests that a hearing be held.

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

LANCE S. BOOZER
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

2/16, 2007

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG) FIRST JUDICIAL CIRCUIT
2006-CP-38-0585

VONDELL SANDERS,

PLAINTIFF,

VS.

STATE OF SOUTH CAROLINA,

DEFENDANT.

TRANSCRIPT OF RECORD

SEPTEMBER 7, 2010
ST. GEORGE, SOUTH CAROLINA

B E F O R E:

THE HONORABLE DIANE S. GOODSTEIN, JUDGE

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

MATHIAS CHAPLIN, ESQ.
ATTORNEY FOR THE STATE

MARY WILLIAMS, ESQ.
ATTORNEYS FOR THE DEFENDANT

BONNIE H. KELLY
CIRCUIT COURT REPORTER

I N D E X

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EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVID</u>
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- NO EXHIBITS -

1 MS. WILLIAMS: Your Honor, if it please the Court,
2 this is Mr. Vondell Sanders, 2006-CP-38-0585; and you had
3 seen this case last term of court. I believe Clarissa
4 Warren Joyner had previously been appointed; relieved her.
5 At that time, Mr. Sanders wished to proceed *pro se*. He
6 then informed us through a letter that he would like an
7 attorney, and Mr. Mathias Chaplin was appointed.

8 And Mr. Sanders -- just as a recap, he was charged
9 with possession with intent to distribute marijuana, a
10 third offense; possession with intent to distribute
11 marijuana within proximity of a school or park. He was
12 acquitted of those two charges.

13 He was also charged with possession with intent to
14 distribute crack cocaine, that was a third offense; and a
15 possession with intent to distribute crack cocaine within
16 proximity of a school. He received 19 years and 15 years
17 concurrent on those two charges, following a jury trial.

18 He was represented by Sam Kramer and Peggy Hinds. As
19 you may know, Mr. Kramer is in Afghanistan at this time. I
20 do believe that Ms. Hinds can provide us the information
21 that we need. And so, we're gonna make an effort to go
22 ahead and get this matter resolved.

23 And I'll let Mr. Chaplin tell us a little bit more
24 about the allegations.

25 THE COURT: Very well. Yes, sir, Mr. Chaplin.

1 MR. CHAPLIN: Good morning. Thank you very much, Your
2 Honor.

3 THE COURT: Yes.

4 MR. CHAPLIN: My name's Mathias Chaplin, and I've been
5 appointed to represent Mr. Vondell Sanders in this PCR
6 hearing. As the State pointed out, Mr. Sanders was
7 originally representing himself *pro se*; however, he had
8 requested an attorney.

9 I spent -- I went to visit him in the Department of
10 Corrections, and we spent a good bit of time going over
11 everything. I have gone over the possible exposure that he
12 would face: Should he receive a new trial, if the
13 sentences were ran [sic] consecutive, it could be up to 60
14 years; if concurrent, it would probably be around 30.

15 And I then sat down with him to make sure that all of
16 the issues that he wanted to bring forth to this Court
17 today had been consolidated, and that him and I were on the
18 same page. And I feel like we've done that.

19 And the issues, Your Honor, that we'd like to go
20 forward with would be an issue regarding a lesser included
21 charge to the jury, a hearsay concern, and a juror issue.
22 In all of these, we're representing that this suggests
23 ineffective assistance of counsel.

24 THE COURT: Okay. If you'll call your first witness.

25 MR. CHAPLIN: Yes. At this time, we'd call Vondell

DIRECT EXAMINATION BY MR. CHAPLIN - VONDELL SANDERS

6

1 Sanders, please.

2 THE COURT: All right, sir. Come on, Mr. Sanders.

3 (The applicant comes forward.)

4 WHEREUPON Vondell Sanders, having
5 been first duly sworn, testifies as follows:

6 THE COURT: Very well. If you'd please be seated, and
7 state your full name for the record.

8 THE WITNESS: My full name is Vondell Sanders.

9 THE COURT: Very well. S-a-n-d-e-r-s.

10 THE WITNESS: Yes, ma'am.

11 THE COURT: And Vondell is V-o-n-d-e-l-l.

12 THE WITNESS: Yes, ma'am.

13 THE COURT: Thank you, Mr. Sanders.

14 (To Mr. Chaplin) Your witness.

15 DIRECT EXAMINATION BY MR. CHAPLIN:

16 Q Good morning, Mr. Sanders.

17 A Good morning.

18 Q Mr. Sanders, are you comfortable?

19 A Yes, sir.

20 Q Okay. All right. I'm going to be asking you some
21 questions regarding your PCR that you filed -- application.
22 Do you remember filing this application for post-conviction
23 relief on May of 2006?

24 A Yes, sir.

25 Q And do you also recall amending this application June

1 of 2010?

2 A Yes, sir.

3 Q All right. Would you also recall that you and I met
4 at the Department of Corrections on August 29th of this
5 year?

6 A Yes, sir.

7 Q Okay. Then we also met again this morning, prior to
8 this hearing, here at the courthouse.

9 A Yes, sir.

10 Q Okay. During that meeting on August 29th, would you
11 say that we prepared and -- for this hearing?

12 A Yes, sir.

13 Q And were you provided all the documents that I
14 received from the State pertaining to this matter?

15 A Yes, sir.

16 Q Now, earlier you were going to represent yourself pro
17 se and we discussed that matter; did we not?

18 A Yes, sir.

19 Q And at the conclusion of our discussion, you decided
20 that you would like me to assist you in this matter; is
21 that correct?

22 A Yes, sir.

23 Q Okay. Now, the outcome that you're desiring in this
24 matter is what?

25 A A new trial.

DIRECT EXAMINATION BY MR. CHAPLIN - VONDELL SANDERS

8

1 Q Okay. Now, we did also discuss the fact that the
2 exposure that you would opening yourself to had -- should
3 you want to -- should you receive a new trial, could
4 possibly be 60 years if ran consecutive, 30 years if
5 concurrent.

6 A Yes, sir.

7 Q Okay. All right. Now, let's get into the -- is there
8 anything, as far as introductions, that I have omitted that
9 you would like to point out?

10 A No, sir.

11 Q Okay. Then I'll go ahead and start with the issues
12 that we would like this Court to consider.

13 It's my understanding that the first concern that you
14 have would be the fact that the jury was not charged with
15 the lesser included offense of possession.

16 A Yes, sir.

17 Q Would you please expound.

18 A My first issue is: Was counsel ineffective for not
19 requesting a jury charge of less [sic] included offense of
20 possession with intent to distribute to possession. *State*
21 *vs. Dreher*, 340 SC 2d, 784; and *Brightman vs. State*, 520 SC
22 2d; and South Carolina Code at SC 44-53-375 (b), the
23 statute that provide a permissible inference that the jury
24 have a option to except or reject the permissible
25 inference.

DIRECT EXAMINATION BY MR. CHAPLIN - VONDELL SANDERS

9

1 And for counsel not requesting that less included
2 offense charge, that prejudiced me, because the jury did
3 not have the -- the -- the option to request or reject in -
4 -

5 THE COURT: In other words, if the lesser included
6 offense isn't charged, how they gonna find you guilty of
7 the lesser included offense?

8 THE WITNESS: Yes. Yes, ma'am.

9 THE COURT: Okay. I understand.

10 THE WITNESS: And the outcome of the trial could have
11 been different, had he request that less [sic] included
12 offense; because I could have been found guilty of the
13 lesser included offense rather than the greater offense.

14 THE COURT: I understand. I gotcha. Go ahead.

15 DIRECT EXAMINATION BY MR. CHAPLIN (CONTINUES):

16 Q Before we proceed with exhibits, would you like to say
17 anything else regarding your -- this particular matter?

18 A No, sir.

19 Q All right. Now, Mr. Sanders, you were present at your
20 trial; is that correct?

21 A Yes, sir.

22 Q And were you present during the charging phase, when
23 the judge charged the jury prior to them deliberating?

24 A Yes, sir.

25 Q Okay. And do you recall at any time your attorney

DIRECT EXAMINATION BY MR. CHAPLIN - VONDELL SANDERS

10

1 asking that the lesser included offense of possession be
2 charged to the jury?

3 A No, sir.

4 Q In fact, do you recall that when the judge asked for
5 any concerns from your attorney regarding the charges, your
6 attorney stated he had no objections; is that correct?

7 A Yes, sir.

8 Q And we're referring to Mr. Kramer; is that true?

9 A Yes, sir.

10 Q Okay.

11 MR. CHAPLIN: Your Honor, may I approach the witness?

12 THE COURT: Of course.

13 MR. CHAPLIN: I'm handing him page 481 -- I'm sorry --
14 page 481 of the transcript of this matter.

15 (Hands document to the witness.)

16 Q And I'd like to call your attention, Mr. Sanders, to
17 line 23.

18 A Yes, sir.

19 Q Would you please read the statement your attorney made
20 regarding the charges.

21 A (As read) "The defense has no objections to the
22 current charges, Your Honor."

23 Q Thank you. And it's your position, that had the
24 charge of possession been given to the jury, that they
25 would have had the option of considering possession as well

DIRECT EXAMINATION BY MR. CHAPLIN - VONDELL SANDERS 11

1 as possession with intent during the deliberation phase.

2 A Yes, sir.

3 Q And because they were not given that option, that you
4 were prejudiced.

5 A Yes, sir.

6 Q Now, Mr. Sanders, you've had a lot of time since 2006
7 to think about this. Before I move to the other issue, and
8 for the Court's -- for the information to the Court, it's
9 three issues total that we're gonna present -- do you have
10 anything else that you want to share with the Court
11 regarding your concerns with your attorney's not objecting
12 that -- or not insisting that the judge charge the jury
13 with the lesser included offense of possession?

14 A No, sir.

15 Q Okay. All right. And as a result, you believe that
16 your attorney was ineffective by not doing that.

17 A Yes, sir.

18 Q And that that mistake was detrimental to the outcome
19 of your case.

20 A Yes, sir.

21 Q All right. At this time, Mr. Sanders, let's move to
22 issue No. 2. And I think issue No. 2 in this matter has to
23 do with failure of your attorney to object to a hearsay
24 statement; is that correct?

25 A Yes, sir.

DIRECT EXAMINATION BY MR. CHAPLIN - VONDELL SANDERS

12

1 Q Okay. Could you please expound.

2 A Trial -- trial counsel -- trial counsel elicit hearsay
3 testimony from the State witness, and I was unable to
4 cross-examine the witness. And --

5 THE COURT: Who was it? Which witness? Do you
6 remember?

7 THE WITNESS: It was confidential informant.

8 MR. CHAPLIN: Excuse me, Mr. Sanders. Your Honor, I'd
9 like to bring the Court's attention to page 214 of the
10 transcript.

11 THE COURT: Wonderful.

12 MR. CHAPLIN: I have a separate copy.

13 THE COURT: Oh, bless your heart. You keep that.

14 MR. CHAPLIN: Okay.

15 THE COURT: Okay. I'm at 214.

16 MR. CHAPLIN: Yes, ma'am. And Your Honor, just for
17 the record, we would like to have these introduced as
18 exhibits.

19 THE COURT: It's already part of the record.

20 MR. CHAPLIN: Okay. I just wanted to make sure.

21 THE COURT: Sure. Transcript is already part of the
22 record.

23 MR. CHAPLIN: Okay.

24 THE COURT: But you would highlight page 214.

25 MR. CHAPLIN: Page 214, and I would also like to

1 highlight page 481.

2 THE COURT: Okay.

3 MR. CHAPLIN: That would have been regarding the first
4 issue. And the second issue would have been page 214 for
5 issue No. 2.

6 THE COURT: Got it.

7 MR. CHAPLIN: Okay. Now --

8 THE COURT: Okay. Yes.

9 MR. CHAPLIN: Please proceed, Mr. Sanders. You were
10 expounding on this particular issue regarding the -- the
11 failure of your attorney to object to a hearsay statement.
12 A Yes, sir. My attorney failed to object to a hearsay
13 testimony from a State witness that I was unable to cross-
14 examine. On the transcript, page 199, line 8, the
15 arresting officer was asked (as read): "Before you had
16 went in with the search warrant, did you determine if this
17 was Vondell Sanders's home?"

18 We -- his answer was (as read): "We got information
19 that Vondell Sanders lived there, which come from a
20 confidential informant."

21 THE COURT: Uh-huh.

22 A And with the statement that he had made, that
23 prejudiced me, because I was unable to cross-examine the
24 witness that he was speaking of.

25 THE COURT: I understand. What you're saying is that,

DIRECT EXAMINATION BY MR. CHAPLIN - VONDELL SANDERS

14

1 that the response is actually non-responsive to what is
2 being asked.

3 But your point is that the point that -- that Mr.
4 Kramer received a non-responsive answer which was hearsay,
5 he should have objected and moved to have it stricken.

6 THE WITNESS: Yes, ma'am.

7 THE COURT: I understand.

8 THE WITNESS: And he -- he also reiterated the same
9 question on page 214.

10 THE COURT: Uh-huh. Okay.

11 THE WITNESS: Line 7. He said the confidential
12 informant advised that he stayed there.

13 THE COURT: Exactly.

14 THE WITNESS: And that prejudiced me, because I was
15 unable to cross-examine ---

16 THE COURT: Cross-examine the confidential informant.

17 THE WITNESS: Yes, ma'am.

18 THE COURT: Okay.

19 DIRECT EXAMINATION BY MR. CHAPLIN (CONTINUES):

20 Q Now, Mr. Sanders, when we talked about this, I asked
21 you how do you feel -- that this particular statement and
22 your attorney's failure to object or have it stricken, how
23 do you think -- what impact do you think that had on the
24 outcome of your case?

25 A It could have caused the jury to portray me as having

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1 something to do with the drugs that was in the house, or
2 what was going on in the house.

3 Q So, just the mention that there was a confidential
4 informant, which wasn't responsive to the question, would
5 have painted you -- placed you in a very bad light.

6 A Yes, sir.

7 Q And it would have caused possibly the jury to
8 speculate as to well, what's -- you know, what was the
9 purpose of the CI and were you being watched; was there a
10 big investigation or whatever. And a lot of this stuff was
11 not even privy to the jury; is that correct?

12 A Yes, sir. They could have speculated anything.

13 Q And -- and so, you believe that had your attorney
14 objected to that statement, which is in violation of Rules
15 801 and 803 of the South Carolina Rules of Evidence, and
16 also I think, Rule 401, as pertains to relevant information
17 -- 403, rather -- that might be excluded if it's extremely
18 prejudicial, you think that this statement violated those
19 rules; is that correct?

20 A Yes, sir.

21 Q Okay. And as a result, you believe that your attorney
22 was ineffective in failing to object and have stricken from
23 the record the statements on page 214 of the transcript and
24 also page ---

25 A 199.

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16

1 THE COURT: 214.

2 Q 214 and then what?

3 A 199.

4 Q Okay. And tell me the line on page 199.

5 A Line 18 through 21.

6 MR. CHAPLIN: Okay. So, we'd like to highlight that
7 for the record, too, Your Honor.

8 Q Is there anything else that you would like to bring to
9 the Court's attention regarding this issue?

10 A No, sir. That's it.

11 Q Okay.

12 THE COURT: Okay. Got it. And the third one is ...

13 MR. CHAPLIN: The third issue, Your Honor, has to do
14 with the fact that there appears to have been, during
15 deliberation or at some point, a juror missing; that we did
16 not have a unanimous verdict. And Your Honor, I -- I kind
17 of thought that you would react that way.

18 THE COURT: Yes.

19 MR. CHAPLIN: So, what I'd like to do is first, call
20 the Court's attention to the portions of the transcript
21 that support what Mr. Sanders and I would like to point
22 out. And then I'll let Mr. Sanders elaborate further.

23 THE COURT: Sure.

24 MR. CHAPLIN: Beg the Court's indulgence.

25 THE COURT: All right. Is it -- does it occur in the

1 polling of the --

2 MR. CHAPLIN: Ma'am?

3 THE COURT: Does it --

4 MS. WILLIAMS: I believe it's at page 485, if I
5 remember right.

6 MR. CHAPLIN: May I approach the witness, Your Honor?

7 THE COURT: Of course.

8 MR. CHAPLIN: Okay.

9 (Mr. Chaplin hands documents to the witness.)

10 MR. CHAPLIN: Here are the three portions of the
11 transcript that I'd like you to use to refresh your memory
12 in case that you'd forgotten. But I just want to make
13 sure.

14 Okay. Your Honor --

15 THE COURT: All right.

16 MR. CHAPLIN: The issue, Your Honor, has to do with a
17 juror by the name of "Praleaux." I'd like to call the
18 Court's attention to page 47 of the transcript.

19 THE COURT: Could you spell that, "Praleaux."

20 MR. CHAPLIN: P-r- -- Ms. -- M - s. -- P-r-a-l-e-a-u-
21 x.

22 THE COURT: Praleaux.

23 MR. CHAPLIN: Yes.

24 THE COURT: All right. Now, I'm first going to page
25 40 something?

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1 MR. CHAPLIN: 47.

2 THE WITNESS: 47.

3 THE COURT: 40 what?

4 THE WITNESS: 47.

5 MR. CHAPLIN: And I would say 47 and 48, Your Honor.

6 THE WITNESS: Uh-huh. Yes.

7 MR. CHAPLIN: Down at the bottom.

8 THE COURT: (As read) "Juror No. 152, Willie" -- this
9 says "Willie Praleaux."

10 MR. CHAPLIN: Yes.

11 THE COURT: Juror 152, Ms. Praleaux.

12 MR. CHAPLIN: (As read) "What says the State?"

13 THE COURT: Uh-huh.

14 MR. CHAPLIN: The solicitor then says, "Please sit,
15 Ms. Praleaux." And Mr. Sanders's attorney, Mr. Kramer,
16 also says, "Please sit Ms. Praleaux."

17 All right. So, at that point, Your Honor, it's our
18 understanding that we have Ms. Praleaux on the jury.

19 Your Honor, then I would ask the Court to go to page
20 497 and 498 of the transcript.

21 Mr. Sanders, I'm going to give you a chance to --

22 THE WITNESS: Okay.

23 MR. CHAPLIN: I just want to get the record
24 established.

25 THE COURT: Okay.

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1 MR. CHAPLIN: Your Honor, on the far right-hand side,
2 where it says "except," I would like to point out that on
3 page 498, Juror 152, Willie Praveaux, was accepted to be a
4 juror in this trial. Okay.

5 Then Your Honor, I would call the Court's attention to
6 page 483 of this transcript.

7 THE COURT: Yes.

8 MR. CHAPLIN: Okay. Your Honor --

9 THE COURT: Yes.

10 MR. CHAPLIN: -- what occurs at this time is that at
11 the bottom of page 483, the Court asks, "Would you have us
12 poll the jury?"

13 THE COURT: Yes.

14 MR. CHAPLIN: And I think the State and Defense ask
15 that the jury be polled.

16 Then we go to the next page, and then each juror is
17 polled.

18 THE COURT: Yes.

19 MR. CHAPLIN: At the completion of that, Your Honor,
20 there are 10 people that have responded that that is their
21 verdict.

22 Then on line 7 of page 485, Your Honor --

23 THE COURT: Uh-huh. Yes.

24 MR. CHAPLIN: The Court then asks for -- "Mr.
25 Praveaux, was this your verdict, and is it still you

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20

1 verdict?"

2 The bailiff then replies, "We don't have a Praveaux."

3 So, then the Court says, "Who has not been polled?"

4 And then Juror 11, Emma Perkins, pipes in and says,
5 "Yes, that is her verdict."

6 And the part that's troubling, Your Honor, is that
7 then the Court then says, after Ms. Perkins acknowledges
8 that that's her verdict, says, "Yeah. That was the person
9 who didn't show."

10 THE COURT: Okay. Then the alternate -- let me just
11 look real quick.

12 MR. CHAPLIN: Had already been dismissed prior to
13 deliberations.

14 THE COURT: Well, who -- I'm just trying to ---

15 MR. CHAPLIN: Oh, go ahead. Yes, ma'am.

16 THE COURT: A Ms. Lilly Bamberg was the alternate.

17 MR. CHAPLIN: Yes, ma'am.

18 THE WITNESS: Yes, ma'am.

19 THE COURT: All right. And Lilly Bamberg -- this is
20 the shortest way for me.

21 MR. CHAPLIN: Yes.

22 THE COURT: Lilly Bamberg is not polled in the polling
23 process.

24 MR. CHAPLIN: She ---

25 THE WITNESS: She was excused right before the

1 deliberation.

2 MR. CHAPLIN: And in fact, in the transcript, Your
3 Honor, the judge does thank her for her services, and
4 allows her to leave prior to deliberation.

5 THE COURT: Okay.

6 MR. CHAPLIN: Now, Your Honor, I have also contacted
7 the court reporter in this matter, Ms. Walker, and I spoke
8 with her on the -- on the -- excuse me -- I don't want to
9 misspeak -- on the second of September, and I called her at
10 her home.

11 And she indicated that she keeps records for five
12 years; this is beyond that time. She wouldn't have any
13 records, nor does she recall anything that odd or peculiar,
14 like a missing juror occurring at that time.

15 But I'm not trying to testify for her. I'm just
16 trying to tell the Court what I learned when I called her.
17 So ...

18 THE COURT: And I think that as accurate, after five
19 years, I do not believe that court reporters, under our
20 rules, have an obligation to -- to maintain transcripts and
21 recordings. You know, they must -- court reporters, too,
22 they got -- it's got to come to an end at some point.

23 MR. CHAPLIN: Yes.

24 THE COURT: I think five years is -- is the cut off
25 time.

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1 MR. CHAPLIN: Your Honor, then I also spoke with the
2 Clerk of Court in Orangeburg, their office, to see if there
3 might be ---

4 THE COURT: Sure.

5 MR. CHAPLIN: --- any exhibits or anything like that,
6 that would shed some light on this particular matter. We
7 were unsuccessful in that event as well.

8 So, Your Honor, I'm going to let Mr. Sanders speak to
9 this issue for a second. But basically what we're saying
10 is that the transcript only shows 11 responses. It also
11 suggests that the 12th juror, Mr. or Ms. Praleaux -- I
12 think it started off as "Miss," and ended up as "Mr.
13 Praveaux," or something like that -- that we don't have any
14 type of way to believe that that person deliberated to
15 render the particular verdict that my client received.

16 My client did not consent to a verdict of 11 people.
17 My client was not made aware of this issue, and it also
18 appears that it might have been -- gone unnoticed by the
19 Court during this time. Because I think that -- my
20 experience is that court reporters would have written
21 something down had it been examined or explored further.

22 THE COURT: So, just so I am clear --

23 MR. CHAPLIN: Yes, ma'am.

24 THE COURT: -- obviously if this was a verdict of 11
25 people rather than 12, that is -- that is an issue for

1 direct appeal, right?

2 MR. CHAPLIN: (No audible response.)

3 THE COURT: So, the concern is, in that this is a PCR,
4 is that there was no objection ---

5 MR. CHAPLIN: That's ---

6 THE COURT: --- made ---

7 MR. CHAPLIN: Yes.

8 THE COURT: --- to a verdict of 11 people ---

9 MR. CHAPLIN: That is correct, Your Honor.

10 THE WITNESS: That's correct.

11 THE COURT: --- rather than for 12. That would be the
12 objection ---

13 MR. CHAPLIN: That's the ---

14 THE COURT: --- because I gather this was not a topic
15 on direct appeal, right?

16 THE WITNESS: No, ma'am.

17 MR. CHAPLIN: It was not.

18 THE WITNESS: It wasn't.

19 THE COURT: So -- so the concern -- just to be sure
20 that we are articulating -- everybody on the same ---

21 MR. CHAPLIN: Yes..

22 THE COURT: --- page --

23 MR. CHAPLIN: Thank you.

24 THE COURT: -- the concern is that there were -- there
25 failed to be an objection made by trial counsel to a

DIRECT EXAMINATION BY MR. CHAPLIN - VONDELL SANDERS

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1 verdict of 11 folk --

2 MR. CHAPLIN: Yes.

3 THE WITNESS: Yes, ma'am.

4 THE COURT: -- therefore preserving the issue for
5 appeal.

6 MR. CHAPLIN: Yes.

7 THE COURT: Yes?

8 THE WITNESS: Yes, ma'am.

9 THE COURT: Got it.

10 MR. CHAPLIN: And I think that's the response that Mr.
11 Sanders received from Appellate Defense with regards to why
12 that issue might not have been raised in a direct appeal,
13 it's that it hadn't been raised ---

14 THE COURT: Sure.

15 MR. CHAPLIN: --- nor preserved.

16 THE COURT: Got it.

17 DIRECT EXAMINATION BY MR. CHAPLIN (CONTINUES):

18 Q Mr. Sanders, again, you've had a lot of time to
19 prepare for this, and for one point, you were even going to
20 represent yourself. And I just do not want you to leave
21 here without having your day in court.

22 A Yes, sir.

23 Q Now, we've said a lot, and I think the judge just
24 summarized this issue very well. But what else would you
25 like to add to that?

1 THE WITNESS: My question is to the Court, was trial
2 counsel ineffective for failing to object to the jury poll
3 being less than a unanimous --

4 THE COURT: Uh-huh.

5 THE WITNESS: -- which violated -- which violated --

6 MR. CHAPLIN: Take your time.

7 THE WITNESS: -- my constitutional right --

8 THE COURT: To have 12 people.

9 THE WITNESS: Yes, ma'am.

10 THE COURT: Yes, sir. I got it. I got it, and I
11 understand the issue fully. Uh-huh.

12 THE WITNESS: Okay.

13 THE COURT: I got it. And I think Mr. Chaplin wants
14 to be sure that -- that now you have addressed all of the
15 issues that you believe appropriate in your PCR.

16 THE WITNESS: Yes, ma'am.

17 THE COURT: Now, let me tell you what I'm worried
18 about: I heard -- I heard all of that and I paid
19 attention. But that chair just clicked. That chair should
20 not have just clicked.

21 THE WITNESS: It went down.

22 THE COURT: And I am worried -- I don't -- I do not
23 want that chair to fall with you in it and hurt you.
24 Here's what I want you to do for me -- here comes the
25 Jewish mama -- I want you to ease up out of that chair.

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1 Let's get you another chair, Mr. Sanders, because that
2 shouldn't happen. And you wouldn't be able to brace
3 yourself with all the jewelry you got on today.

4 So, I don't know what's up with this chair, but let's
5 put you in another chair.

6 THE WITNESS: It just went down. It just went down.

7 THE COURT: What do you think, Major? Go get -- that
8 shouldn't have happened.

9 MR. CHAPLIN: To be on the safe side. Is the chair
10 moveable?

11 COURT SECURITY: I don't think the chair's moveable.

12 (Brief pause to secure the witnesses seating.)

13 MR. CHAPLIN: Okay. Your Honor, I think we're about
14 ready to rap up this phase of the testimony.

15 DIRECT EXAMINATION BY MR. CHAPLIN (CONTINUES):

16 Q Mr. Sanders, did you provide the Court with everything
17 that you wanted to say regarding all three issues that we
18 raised today?

19 A Yes, sir.

20 Q Okay. So, we raised an issue regarding not -- your
21 trial counsel being ineffective for not charging the jury
22 with a lesser included offense -- or not objecting to the
23 fact that the jury was not ---

24 THE COURT: Charged with the lesser included offense,
25 right?

1 Q --- charged with lesser included offense.

2 A Yes, sir.

3 THE COURT: Got it.

4 Q You also state today that you believe your trial
5 counsel was ineffective for not objecting and asking to
6 have the record stricken for a hearsay statement, regarding
7 the confidential informant during your trial.

8 A Yes, sir.

9 Q And finally, you believe that your trial counsel was
10 ineffective for not objecting to the fact that it appears
11 that only 11 jurors deliberated in this case, and your
12 trial counsel failed to object to that verdict and preserve
13 this -- that issue for appeal.

14 A Yes, sir.

15 Q Okay. Is there -- are there any other issues that you
16 would like to bring before this Court today regarding your
17 application for post-conviction relief?

18 A No, sir, that's it.

19 Q All right.

20 THE COURT: All right. Cross-examination.

21 (Brief pause.)

22 CROSS-EXAMINATION BY MS. WILLIAMS:

23 Q Now, Mr. Sanders, did you assist in the preparation of
24 your defense in this case?

25 A Yes, ma'am.

CROSS-EXAMINATION BY MS. WILLIAMS - VONDELL SANDERS

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1 Q And did you meet with Ms. Hinds and Mr. Kramer?

2 A Yes, ma'am.

3 Q Can you tell me a little bit about those meetings, how
4 often did you all meet?

5 A I had to go to roll call and after I had went to roll
6 call, every day after that I would meet with either Mr.
7 Kramer or Ms. Hinds. I think I had met with Ms. Hinds
8 about three or four times before I had went to trial.

9 Q Did you meet with Mr. Kramer probably more or less
10 than that?

11 A More.

12 Q Okay. And had you discussed with Mr. Kramer the
13 defense that you would present?

14 A Yes, ma'am.

15 Q And what did that defense consist of primarily?

16 A That the drugs was not mine; that I didn't have
17 anything to do with it. I didn't know the drugs was in the
18 house.

19 Q And y'all have got testimony from your sister and
20 girlfriend' is that accurate?

21 A Yes, ma'am.

22 Q Okay. And were those two individuals arrested during
23 the trial?

24 A Yes, ma'am.

25 Q And did y'all discuss search warrant issues, things

RE-DIRECT EXAMINATION BY MR. CHAPLIN - VONDELL SANDERS 29

1 like that, beforehand as well?

2 A Yes, ma'am.

3 Q Now, what did you do when the jury polling occurred?

4 A I was getting ready to ask my attorney to -- what
5 about the other jury. He was like, "Don't worry about it.
6 I'm going to do a direct appeal."

7 Q Okay. And did you ask him where this person was? Do
8 you remember when the person went missing?

9 A No, ma'am.

10 Q So, you didn't count the jurors at any point; you
11 don't remember --

12 A No, ma'am.

13 Q -- difference that morning versus the day before?

14 A No. The only thing I remember is when he excused the
15 alternate juror.

16 Q Okay.

17 A But I didn't remember any other juror being missing or
18 -- or anything like that.

19 Q Okay. All right. Thank you.

20 THE COURT: Redirect.

21 REDIRECT EXAMINATION BY MR. CHAPLIN:

22 Q Mr. Sanders --

23 A Yes, sir.

24 Q -- I think you stated that you did mention the issue
25 with regard to the missing juror to your attorney?

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1 A Yes, sir.

2 Q At what point did you do that?

3 A Right after the jury poll.

4 Q And the response you received was ...

5 A He was going to do a direct appeal.

6 Q However, when you did your direct appeal, what
7 happened?

8 A The issue was not brought up. The attorney -- she had
9 told me being that he did not object, I would have to raise
10 that on a PCR.

11 Q As ineffective assistance?

12 A Yes, sir.

13 Q And do you believe that your attorney's failure to
14 object to there not being a 12-panel jury, do you believe
15 that that was ineffective assistance of counsel?

16 A Yes, sir.

17 Q Okay. All right.

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

19 THE COURT: Thank you. Is there any re-cross?

20 MS. WILLIAMS: Nothing further. Thank you.

21 THE COURT: Okay. Now -- now you gotta ease up out of
22 that chair and collect all the other stuff. And there's
23 some water there for you, too, Mr. Sanders, if you want
24 that. We'll take that for you. You got enough. You want
25 -- you want that water? Take it over to counsel table.

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1 There you go. All right.

2 Okay. Call your next witness, please.

3 MR. CHAPLIN: Thank you. We have no further
4 witnesses, Your Honor.

5 THE COURT: Very well. All right. Yes, ma'am.

6 MS. WILLIAMS: We're going to call Ms. Hinds.

7 THE COURT: All right, Ms. Hinds. Come along, please,
8 ma'am, and be sworn.

9 WHEREUPON Peggy Hinds, having been
10 first duly sworn, testifies as follows:

11 THE COURT: State your full name for the record and
12 spell your last name.

13 THE WITNESS: Margaret Elizabeth Hinds, H-i-n-d-s.

14 THE COURT: Grab that microphone. I'll let you sing
15 "My Way."

16 THE WITNESS: You wouldn't -- you wouldn't want me
17 singing.

18 DIRECT EXAMINATION BY MS. WILLIAMS:

19 Q Ms. Hinds, can you tell me where you're currently
20 employed, and just a little bit about your legal
21 experience.

22 A First Circuit Public Defender's Office; I work out of
23 the Orangeburg office as the deputy. I've been doing that
24 for almost 14 years.

25 Q And is it that capacity that you came to represent Mr.

1 Sanders?

2 A I was an assistant public defender at the time, yes.

3 Q Okay. And you tried this case, was it with Sam
4 Kramer?

5 A It was actually Sam's case, but I tried it with him
6 and was second chair.

7 Q So, were you privy to the investigation preparation
8 that was going on during this case?

9 A Yes, ma'am. I think Sam probably had a number of
10 meetings, as Mr. Sanders said, before I got involved with
11 it. But I think he was absolutely accurate. I think I met
12 with him five times after I got brought in, and I was privy
13 to all of Sam's previous investigation and so forth.

14 Q Was there an investigator in this case, do you recall?

15 A I believe we used Marion Brothers.

16 Q Okay. And y'all had prepared some extensive pre-trial
17 motions. And had you also prepared some defense witnesses?

18 A Yes, ma'am.

19 Q Okay. And you tell me just basically what the defense
20 theory of the case.

21 A Basically, Mr. Sanders vehemently denied that the
22 drugs were his. Basically that the drugs belonged to --
23 the marijuana belonged to Silvia Wright, and that the crack
24 cocaine belonged to -- I believe it was Sharon Sanders.

25 Q And that was his sister and a girlfriend; is that

1 correct?

2 A Yes, ma'am.

3 Q Okay. And did you call those individuals as witnesses

4 ---

5 A Yes, we did.

6 Q --- in defense?

7 A And we had spoken to them ahead of time.

8 Q All right. I'm going to go a little bit -- just to
9 cut to the chase, for lack of a better word, you -- did you
10 take notes during the trial?

11 A I took 26 pages of notes from the pre-trial motions
12 through to when the jury came back.

13 Q Okay. And it looks like April 22, 2004, was the last
14 day of trial. Do you have anything in your notes regarding
15 a juror being absent that day?

16 A Absolutely not. The last of it was what the verdict
17 was, that we polled the jury, and that Sam made the
18 appropriate post-trial motions. And then of course the
19 sentence.

20 Q All right. And it looks like the jury went out around
21 -- I think it was 4:45 in the afternoon. Did you all
22 dismiss the alternate sometime before that, that afternoon?

23 A When the jury went back to deliberate, I believe
24 that's when the -- the alternate was dismissed.

25 Q Okay. And would you have let the alternate go if

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1 there had been someone missing that morning?

2 A Absolutely not.

3 Q Okay. So, do you have any recollection as to why this
4 transcript doesn't reflect a response from Juror Praleaux?

5 A No. I am absolutely perplexed. It would have been so
6 huge for a juror to be missing, particularly after we had
7 just let the alternate leave. I can't imagine. This would
8 have stuck out in my mind.

9 I know this was a long time ago, but that would have
10 been one I remembered forever. I can't imagine that
11 neither Sam nor I nor Judge Breeden, nor even the
12 solicitors. They would have wanted to make sure that their
13 -- their verdict was gonna stand.

14 Surely it would have been discussed or there should
15 have been something on the record. To -- to my
16 recollection, there was not a juror missing. I can't
17 explain the transcript.

18 Q All right. Beg your indulgence for just one moment.

19 THE COURT: Okay.

20 Q All right. Now, did you all consider requesting
21 lesser included offenses?

22 A Yes, we did.

23 Q And can you tell me what the -- what you decided about
24 that?

25 A Specifically asked for the lesser included of

1 possession. We also asked for mere presence. The judge wa
2 not willing to give us either of those charges.

3 Q And was that on the record, or in chambers? Do you
4 have any recollection?

5 A I -- from my -- it doesn't state in my notes. Because
6 I didn't see it in the transcript, I imagine it was in
7 chambers. But I -- my notes do reflect that he
8 specifically denied.

9 In addition to that, there was testimony that it was
10 5.6 grams, I think a little over 5.6. So, it wasn't a
11 close case. It wasn't like it was just a little bit over a
12 gram.

13 In addition to that, his defense being that they
14 weren't his drugs at all, I don't believe the judge felt
15 that we were entitled to -- to the simple possession.

16 Q And you may or may not recall if there was some
17 concern about a hearsay about whether he lived in the
18 trailer or not; whether other people who said that he lived
19 there or had stayed the night there.

20 A I believe there were. I think there was a witness who
21 was testifying about the cops coming to the wrong trailer.
22 But to kind of cut to the chase on that, my notes reflect
23 that Sam had made a motion to try to suppress the drugs by
24 specifically stating that the search warrant was no good
25 based on the reliability of the CI. And the judge

CROSS-EXAMINATION BY MR. CHAPLIN - PEGGY HINDS

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1 ultimately decided that the search warrant was good, and
2 that the -- it was up to the jury whether or not the CI was
3 reliable.

4 Q And had there been a plea offer in this case prior to
5 trial?

6 A There'd actually been two. I think the initial
7 written plea offer was for 12 years. During the course of
8 our interactions before he actually went to trial, the
9 offer had actually gone down to 10.

10 Q All right.

11 MS. WILLIAMS: I believe that's all the questions I
12 have for Ms. Hinds. Thank you.

13 THE COURT: Cross-examination.

14 MR. CHAPLIN: Thank you.

15 THE COURT: Yes.

16 CROSS-EXAMINATION BY MR. CHAPLIN:

17 Q Ms. Hinds, you stated that you were the deputy -- you
18 were the -- an Assistant Public Defender at that time?

19 A Yes, sir.

20 Q And you sat second chair.

21 A Yes, sir.

22 Q Let's just talk about the juror issue, start with
23 that:

24 A Yes, sir.

25 Q You state that you would have -- that would have stuck

1 out like a sore thumb.

2 A Absolutely. I mean, that's -- that's such a huge,
3 unusual occurrence, if we had been missing a juror. And we
4 certainly never would have agreed to a verdict of only 11
5 jurors; especially not with the exposure that Mr. Sanders
6 was looking at.

7 Q And I'm glad you pointed that out, because Mr. Sanders
8 received 19 years for this verdict, which appears to not
9 have been a unanimous verdict. And he's today asking that
10 he receive a new trial.

11 It would have stuck out like a sore thumb had the
12 issue been raised. But it wasn't raised, was it?

13 A I don't -- all I can tell you is I don't believe it
14 happened. I -- I don't believe we were missing a juror.

15 Q And you're saying that because ...

16 A Because the -- I would have noticed, the judge would
17 have noticed, Mr. Kramer would have noticed. We never
18 would have allowed that not to be addressed.

19 Q Well --

20 A That is certainly a very unusual circumstance. As a
21 defense attorney, we would never allow a jury of only 11
22 people to -- to stand.

23 Q Now, you indicated that you took, like, 26 pages of
24 notes.

25 A I did.

CROSS-EXAMINATION BY MR. CHAPLIN - PEGGY HINDS

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1 Q Do you have anything in your notes regarding the
2 polling of the jury?

3 A Only that we polled.

4 Q That you polled.

5 A Uh-huh.

6 Q Now ---

7 A Had a juror been missing, I think I would have noted
8 it by there.

9 Q So, do you have any way that you could explain what
10 the Court said about "yeah, that was the person who didn't
11 show"?

12 A No. And I ---

13 Q Did someone get sick or did someone --

14 A Well, and that's also -- I don't understand, because
15 they asked who -- is there any member of the jury panel
16 who's not been polled, they say, "Emma Perkins, was this
17 your verdict, is your verdict still?" She answers "yes."

18 And then the next statement is, "Yes. That was the
19 person who didn't show."

20 Q Well, in fact, they polled the jury, and the only
21 called 11 names. And one person didn't answer. And then
22 they said, "Did we omit anyone?"

23 Did that set of a red flag to you that maybe there was
24 something wrong?

25 A No, sir.

1 Q And that's when Ms. Perkins said -- who I would
2 imagine would have been sitting right there in the panel,
3 said, "Oh, yeah. I didn't get called."

4 And then she was questioned and polled, and she said,
5 yeah, that's my verdict.

6 A That happens routinely, though, when they're -- when
7 they're going through to -- that's exactly why the Court
8 asks is there anybody who hasn't been polled.

9 Q Okay. But routinely, when I -- my experience has been
10 that no one answers, that everybody did get polled.
11 However -- so, then again, I'm just gonna -- I -- and I
12 know I've asked this before, but I -- it's just so
13 important.

14 Then the Court responds on page 485 (as read): "Yeah.
15 That was the person who didn't show." And that's what I've
16 been really trying to figure out, why was that statement
17 made? Can you help us with that?

18 A I would love to be able to help you. No, I can't.

19 Q Let me ask you a different question, because I know
20 we're all human here: Is it possible that only 11 people
21 deliberated?

22 A I suppose anything's possible.

23 Q And if only 11 people deliberated, then that wouldn't
24 have been a fair verdict, would it?

25 MS. WILLIAMS: Your Honor, I think that asks her to

CROSS-EXAMINATION BY MR. CHAPLIN -- PEGGY HINDS

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1 comment on the ultimate issue, which is up for the Court's
2 decision.

3 MR. CHAPLIN: I just asked her opinion as second chair
4 in a trial.

5 THE COURT: Obviously, if there's a verdict of 11
6 people instead of 12 people, that's a problem.

7 MR. CHAPLIN: Yes.

8 THE COURT: Okay.

9 MR. CHAPLIN: Beg the Court's indulgence.

10 THE COURT: Yes, sir.

11 (Mr. Chaplin confers briefly with the applicant.)

12 Q So -- and -- and I guess, also, from the transcript,
13 no one raised an objection, neither you nor Mr. Kramer,
14 regarding this matter, because it went unnoticed.

15 A There was no objection made. I -- I won't go so far
16 as to say it went unnoticed.

17 Q Okay. So, no objection was made.

18 A That's correct.

19 Q Okay. Therefore, that -- that issue was not
20 preserved.

21 A Yes, sir.

22 Q Okay. Now, let's move onto the next issue, the lesser
23 included offenses. I think your testimony was that in
24 chambers, you asked the judge to charge the jury with
25 certain offenses that were not charged. Would you please

1 repeat your --

2 A We asked for simple possession. We also asked for a
3 mere presence charge.

4 Q And you believe that that might have been in chambers?

5 A Yes, sir.

6 Q Okay. When you came back on the record, was that
7 denial of your motion preserved?

8 A Apparently not.

9 Q Okay. When we talk about the confidential informant,
10 there had been a lot of discussion prior to this trial with
11 regards to how matters pertaining to that CI were going to
12 be handled; is that correct?

13 A That's correct.

14 Q And I think the issues regarding the CI were
15 pertaining to whether or not that person's testimony was
16 reliable for the search warrant, correct?

17 A Correct.

18 Q Okay. Did you all talk about whether or not the fact
19 that there was a confidential informant would be shared
20 with the jury?

21 A I'm not sure I understand your question.

22 Q Was there any discussion with regards to the
23 confidential informant being present at the trial to -- as
24 a witness?

25 A No.

CROSS-EXAMINATION BY MR. CHAPLIN - PEGGY HINDS

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1 Q Okay. And in fact, it was determined that that person
2 would not be present, correct?

3 A That's correct.

4 Q And I think as far as that person's identity, you
5 asked to have that shared, and that motion was denied as
6 well.

7 A That's correct.

8 Q And I think you said something, too, with regards to
9 prior to -- prior to Lynn Shire mentioning the fact that
10 there was a confidential informant, that there had been
11 reference to a CI prior to that in the trial?

12 A In the pre-trial, sure.

13 Q But I'm saying in the trial, had a CI -- had a
14 confidential informant been mentioned prior to that?

15 A I -- I don't know. I mean, I -- I don't recall. I'd
16 have to read the transcript to give you an accurate answer.
17 You -- you've got the transcript.

18 Q Actually, I'm just going back to you were saying
19 something about there was a witness that was saying the
20 confident went to the wrong house originally?

21 A Yes.

22 Q But she didn't say anything about a confidential
23 informant, did she?

24 A No.

25 Q Okay.

1 A No.

2 Q Did you or Mr. Kramer talk about making an objection
3 to the mentioning of a confidential informant when it was
4 mentioned by Mr. Shire on page 214?

5 A I can't recall. I believe Mr. Kramer had talked about
6 it with the judge, and I think, because of his rulings
7 during the pre-trials, that it was determined it wasn't
8 going to go anywhere.

9 Q I see. But as far as the records concern, no
10 objection was made at that time; is that ---

11 A No. That's correct.

12 Q --- correct? So, therefore, that matter was not
13 preserved.

14 A That's correct.

15 MR. CHAPLIN: Beg the Court's indulgence.

16 THE COURT: Okay.

17 (Mr. Chaplin confers briefly with the applicant.)

18 MR. CHAPLIN: No further questions for Ms. Hinds,
19 Judge.

20 THE COURT: Very well. All right.

21 MS. HINDS: I'll go ahead?

22 THE COURT: You -- do you redirect?

23 MS. WILLIAMS: No, ma'am. I don't.

24 THE COURT: I have a few questions.

25 DIRECT EXAMINATION BY THE COURT:

DIRECT EXAMINATION BY THE COURT - PEGGY HINDS

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1 Q Do you have a transcript? Because I'm going to hand
2 you the transcript, because I need you to look at
3 something.

4 A Okay.

5 Q Look -- look with me at page -- well, I moved -- I
6 moved it. I'm looking at the polling.

7 MS. WILLIAMS: 485.

8 THE COURT: All right.

9 THE COURT REPORTER: 45?

10 MS. WILLIAMS: 485, sorry.

11 Q You with me?

12 A Uh-huh.

13 Q Because I -- I'm not quite sure what's going on,
14 because the colloquy ought be between only the Court, the
15 Clerk, and the juror, right?

16 A Yes, ma'am.

17 Q Okay. And the whole -- this whole problem with
18 Praveaux has nothing to do with the Clerk, has nothing to
19 do with the Court, and has nothing to do with the juror.
20 It says "bailiff."

21 A Yes, ma'am.

22 Q And if -- and then the next line is (as read): "Who
23 has not been polled?"

24 Well, the Clerk is going on and saying, "Emma
25 Perkins." Clerk hasn't even finished --

1 A Yes, ma'am.

2 Q -- going through the 12. I -- and it just seems to me
3 that this whole -- it looks a little unusual, and of
4 course, we know Ms. Harry Dot, she's the only court
5 reporter that takes things down --

6 A Shorthand.

7 Q -- by shorthand.

8 A Yes, ma'am.

9 Q And her recording, she records in a -- in a fairly
10 unique fashion.

11 A Yes, ma'am.

12 Q And so, it's -- because there should have been a
13 response (as read): "Clerk: Mr. Praveaux, was that your
14 verdict and is it still your verdict?"

15 And I understand this "Mr.", but -- and then there
16 should have been a response. Then we got something from
17 the bailiff --

18 A Yes, ma'am.

19 Q -- which is highly unusual. Because it wouldn't be --
20 it would not be an appropriate role in the proceedings for
21 the bailiff to determine who is and who is not a juror.

22 A Yes, ma'am.

23 Q I mean --

24 A I --

25 Q So, that's -- I mean, now that is unusual. And then

1 for the Court at that point, prior to the Clerk completing
2 a polling, to say who hadn't been polled, is unusual,
3 because there's not been a colloquy between the Court and
4 Ms. Perkins, where it looks like Ms. Perkins raised her
5 hand and said, "Your Honor, I hadn't" -- looks like the
6 Clerk wasn't finished.

7 So, this whole colloquy, the -- the bailiff being
8 stuck in there just looks real odd, in terms of the
9 structure of the --

10 A It -- it does to me, too, but I can't explain it.

11 Q Okay. All right.

12 THE COURT: Does that prompt questions from either of
13 you? It's just a mystery, I think.

14 MR. CHAPLIN: Your Honor --

15 THE COURT: Yeah.

16 MR. CHAPLIN: -- my -- my thought, when I read this
17 for the first time and when I went over it with Mr.
18 Sanders, was that I agree. For a bailiff to be part of
19 this dialogue is highly unusual. I can't --

20 THE COURT: It's not, in any way, because I -- you
21 know, I couldn't survive in court without my bailiffs. So,
22 I'm not demeaning the role of our little bailiffs. God
23 knows, I'm not doing that.

24 But it would be unusual for the bailiffs in Orangeburg
25 or the bailiffs here to inject themselves in the polling of

1 the jury. That would be just very, very unusual.

2 MS. WILLIAMS: I have also -- one thing that kind of
3 stood out to me was that it says "we don't have a
4 Praveaux," with a "v," and the juror's name was "Praleaux."
5 There's -- could be something with saying a name wrong. I
6 don't know if that was possible.

7 There was a juror missing also, that -- in the very
8 beginning of jury selection.

9 THE COURT: Is that "Miller"?

10 MS. WILLIAMS: There was somebody, Keller, I think ---

11 THE COURT: Keller.

12 MS. WILLIAMS: --- who didn't show ---

13 THE COURT: Henry.

14 MS. WILLIAMS: --- who didn't show. So, I don't know
15 what the conversation was, but --

16 THE COURT: And good for you for trying to find the
17 recording. That was the -- that was the perfect solution.

18 MS. WILLIAMS: I looked for it, too.

19 THE COURT: It really was. I'll bet you both did.

20 Absolutely. Thank you both for doing that. Yeah.

21 MR. CHAPLIN: Well, Your Honor, if -- if I could just
22 say, too, that I guess what we're saying is that when they
23 polled the jury --

24 THE COURT: Yes.

25 MR. CHAPLIN: -- we didn't get a "Praleaux" or

1 "Praveaux." We didn't get a response --

2 THE COURT: Right.

3 MR. CHAPLIN: -- from that person.

4 THE COURT: You don't know that. The trans -- here's
5 the issue, the transcript doesn't -- the transcript fails
6 to reflect that. So, here's the question -- and you're
7 gonna make a note, because I don't know the answer to it.

8 Here's where we are: We have a transcript in this
9 case. We have a transcript that has been certified by our
10 court reporter, a very esteemed court reporter, without
11 question, that we have all relied on for -- for quite some
12 time, who is precise.

13 So, the question then is: On it's face, it appears
14 irregular; however, it is what it is. There are memories
15 that, by testimony, where the attorneys are quite
16 satisfied, that would be so highly unusual, it couldn't --
17 it would not have been missed by the Clerk, the Court, the
18 Solicitor, lawyers. However, we have the transcript that
19 does otherwise, that don't tell me what rules, tell me what
20 governs. I don't know the answer to that. I don't know
21 the answer to that.

22 So, I know that with the proposed orders that I'm
23 going to ask you for, that that's -- that is the issue that
24 I'm looking for your brilliance.

25 Because we have the discrepancy, we have an internal

1 discrepancy in the transcript itself, and we have a
2 discrepancy with the transcript in the testimony both ways.
3 You have Mr. Sanders who says, "It makes perfect sense. I
4 remember it happening. I remember trying to serve my own
5 needs in preserving this error. I knew it was an error.
6 I'm trying to -- I can count. I'm counting. I'm worried.
7 I'm trying to preserve this record."

8 We have a counselor who says so highly unusual, highly
9 unusual, would have been noticed both by counsel, co-
10 counsel, solicitor, clerk, and judge.

11 It's -- and we have a transcript that is consistent
12 with Mr. Sanders' testimony.

13 Is it a finding that the Court must make, or because
14 it is a certified transcript, it is something else? I
15 don't know the answer to that, but I know I got me some
16 brilliant minds, and I'm going to look for proposed orders
17 on that issue.

18 The other ones are very clear, you know. And I will
19 be contemplating them, certainly. This one, I really do
20 need some -- I need some good research. This is an unusual
21 -- I've never had -- I've never this issue.

22 I know what to do when we don't have -- when we don't
23 have the transcript. But when we have one, you know, it's
24 different.

25 MS. WILLIAMS: And I'll just tell you, this is not

1 offered to be testimonial in any way, because Mr. Kramer is
2 not here. But I had spoken to him about this when he was
3 here in June. This case was called, and he echoed what Ms.
4 Hinds said. I don't know what he would say if asked did
5 the applicant ask you to do this, you know, if his memory
6 would change at all. It is my recollection that he echoed
7 Ms. Hinds sentiments. I do have an e-mail address where I
8 could possibly try to procure some type of typed or written
9 answer to that question, if you're interested in it. But -
10 -

11 THE COURT: No. I wouldn't do that. I wouldn't do
12 that to --

13 MS. WILLIAMS: Okay.

14 THE COURT: -- to counsel, because then -- then we'd
15 waltz into other constitutional issues, because it would be
16 -- thwart the ability to cross-examine. We won't do that.

17 I mean, the issue is what the issue is.

18 MS. WILLIAMS: Uh-huh.

19 THE COURT: So, I'm satisfied with it, unless of
20 course -- unless of course, the two of you talked, and Mr.
21 Chaplin, you believe it is so essential that we need to
22 park the case until we can get a -- y'all can take a
23 telephone deposition of Mr. Kramer.

24 I'm going to leave it to y'all to think about, talk
25 about that. You may decide for whatever reason you want to

1 do that. If you want to do that, I'm not going to thwart
2 you from -- from -- from doing that. But if you don't want
3 it, we'll go forward. Am I making sense?

4 MR. CHAPLIN: Yes, you are, Your Honor.

5 THE COURT: Okay. Y'all just chat about, see what
6 y'all want to do. Okay.

7 And if Mr. Sanders wants to do that, we'll do that.
8 Does that make sense what I'm saying, Mr. Sanders?

9 APPLICANT: Yes, ma'am.

10 THE COURT: I just want -- I just -- listen, you --
11 you are very, very vigilant about your schedule, very
12 patient, but you're being vigilant, too.

13 I want you to have a dialogue with your lawyer. You
14 have -- have a role in that decision making process. Okay.

15 APPLICANT: Yes, ma'am.

16 THE COURT: Yes. Wonderful.

17 MR. CHAPLIN: Your Honor --

18 MS. WILLIAMS: Thank you.

19 THE COURT: Obviously, y'all leaving it with me. Do
20 this for me, though, if you will, if y'all will get me a
21 letter, or if y'all want to get together and do a joint e-
22 mail and who's the scribe, as long as both of you know
23 what's being "scribbled," and send me -- you can e-mail Ryan
24 Miller, my law clerk -- gosh, I still like how that rings -
25 - and -- but if you want it to come to me, do not e-mail

1 it. I will not see it if it's an e-mail. Ryan will.

2 Okay.

3 MR. CHAPLIN: Your Honor, do we have a time frame with
4 regards to ---

5 THE COURT: Can I ask you this? What -- tell me what
6 you need. First of all, to make the decision about
7 deposing Mr. Kramer, because if we do that, then you can't
8 -- then you don't know what it's going to be.

9 MR. CHAPLIN: That's true.

10 THE COURT: It's going to be up to the United States
11 government.

12 MR. CHAPLIN: Yes.

13 THE COURT: I would say that -- I'd like to have your
14 proposed orders in 30 days, unless -- unless you all want
15 to depose Mr. Kramer; and then y'all just got to keep me
16 posted. And then what you'll do is you'll depose him,
17 you'll submit his written deposition to me, I will read it.
18 And then 30 days after y'all submit his deposition, I'll
19 look for proposed orders. That make sense?

20 MR. CHAPLIN: No, it does, Your Honor.

21 THE COURT: Okay.

22 MR. CHAPLIN: And then may I -- may I be so bold as to
23 suggest that the Solicitor's Office or maybe the Attorney
24 General's Office ---

25 THE COURT: Yeah.

1 MR. CHAPLIN: -- would -- would pay for a deposition
2 on whatever the case might be.

3 THE COURT: Yes, ma'am -- sir. Yes. That's perfectly
4 fine.

5 MR. CHAPLIN: Okay.

6 THE COURT: And she's wonderfully cooperative, but
7 y'all got to first decide that.

8 MS. WILLIAMS: I need an order telling us we --

9 THE COURT: Not a problem. I will be delighted to
10 give you one of those. But again, y'all got to decide. If
11 you want it, submit me an order; I will sign it, Hugh Ryan
12 will scream at me.

13 MR. CHAPLIN: Yes.

14 THE COURT: It doesn't matter. I'm used to that.

15 And then you'll take the -- the deposition. I will --
16 I will look for your proposed order time to begin once
17 y'all have submitted it.

18 MS. WILLIAMS: And I'll just let you know, he's in
19 Afghanistan for one to two years.

20 THE COURT: I know -- well, that's why you've got to
21 do it by deposition. You gotta -- you've gotta do it by
22 telephone deposition. You just simply have to, or Skype it
23 or something. Y'all might Skype it, submit it somehow.

24 But in any event, y'all are looking at me -- do y'all
25 think I'm like a computer -- y'all think I'm ---

1 MR. CHAPLIN: I was -- I was ---

2 THE COURT: I am so excited. I am technologically
3 challenged. But -- but there are some means, particularly
4 with regards to service folks, that they got some
5 additional way to communicate. I'll leave that to you
6 guys.

7 And y'all -- now -- and finally, if -- if you're
8 coming up on your 30 days and something happens, and you
9 need a little bit of time additional, if you'll get with
10 each other and agree, and shoot it over to Mr. Miller --
11 don't give it to me, but shoot it to him, that would be
12 fine. I don't care, as long as y'all are -- as long as
13 y'all are on top of it, communicating, and then put it in
14 the schedule. Okay. Yes? Yes?

15 MR. CHAPLIN: Thank you very much, Your Honor.

16

17 --- END OF TRANSCRIPT OF RECORD ---

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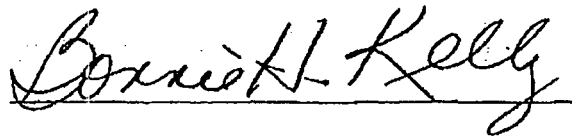
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1 CERTIFICATE

2
3 I, THE UNDERSIGNED BONNIE H. KELLY, OFFICIAL
4 COURT REPORTER FOR THE FIRST JUDICIAL CIRCUIT OF THE
5 STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE
6 FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT
7 OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE
8 INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE,
9 RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR
10 ORANGEBURG COUNTY, SOUTH CAROLINA, ON THE 31ST DAY OF
11 MAY, 2007.

12 I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
13 COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

14
15 
16

17 BONNIE H. KELLY,
18 COURT REPORTER
19

20 COLUMBIA, SOUTH CAROLINA

21 SEPTEMBER 7, 2011

State of South Carolina) In the Court of General Sessions
) First Judicial Circuit
 County of Orangeburg) 2006-CP-38-00585

Vondell Sanders,)

Applicant,)

VS.)

Transcript of Record

State of South Carolina,)

Defendant.)

September 21, 2011

St. George, South Carolina

B E F O R E:

The Honorable Diane S. Goodstein, Judge

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

Robert Corney, Esquire
 Attorney for the defendant

Mathias Chaplin, Esquire
 Attorney for the applicant

Bonnie H. Kelly
 Circuit Court Reporter

I N D E X

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E X H I B I T S

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<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVID</u>
C-1	Affidavit document		4

1 (Marked Court's Exhibit No. 1, affidavit document.)

2 THE COURT: All right. Now, we have -- as I
3 understand it, the affidavit of Mr. Kramer has been filed,
4 yes, with -- without objection?

5 MR. CHAPLIN: Without objection, Your Honor.

6 THE COURT: Very well. Listening to you.

7 MR. CORNEY: Yes, ma'am. May it please the Court?

8 THE COURT: Yes.

9 MR. CORNEY: Your Honor, this is Vondell Sanders.
10 It's case number 2006-CP-38-0585. Mr. Sanders was true
11 bill indicted in December 2003 by the Orange [sic] County
12 Grand Jury for possession with intent to distribute crack,
13 possession with intent to distribute marijuana, possession
14 with intent to distribute marijuana within proximity of a
15 school or park, and possession with intent to distribute
16 crack in the proximity of a school or park.

17 Mr. Sanders proceeded to jury trial on April 20, 2004,
18 before Judge Breeden. And at that trial he was represented
19 by Mr. Sam Kramer and Peggy Hinds. He was convicted of
20 possession with intent to distribute crack and possession
21 with intent to distribute crack within proximity, but
22 acquitted of the marijuana charges. He was sentenced to 19
23 years for possession with intent to distribute crack as a
24 third offense, and 15 years on the proximity charge to --
25 and his sentences were to run concurrently.

1 Mr. Sanders filed a PCR application -- a timely PCR
2 application, and a hearing was held back in September of
3 2010 before Your Honor, as you may remember. And Mr.
4 Sanders raised three issues at that hearing: One dealing
5 with the jury charge involving a lesser included offense of
6 possession that wasn't -- that wasn't requested by counsel;
7 the second one was dealing with a hearsay objection that
8 wasn't made; and the third was an issue with only 11 jurors
9 responding when they were being polled, which I'm sure you
10 remember.

11 And we're here today only on the issue of the missing
12 juror. We left the record open last time with Mary
13 Williams -- I mean, from her office left the record open
14 with you to do some further investigation into that eleven
15 juror issue. And I think we've got a foreperson and the
16 supposed missing juror here today to testify. So I think
17 we're ready to go forward if you are.

18 THE COURT: Very well. Anything you need to add?

19 MR. CHAPLIN: Please proceed, Your Honor.

20 THE COURT: Very well. Thank you so much. All right.

21 MR. CORNEY: The State will just start by calling
22 Chris Furtick, please.

23 THE COURT REPORTER: Last name again. I'm sorry.

24 MR. CORNEY: Furtick, F-u-r-t-i-c-k.

25 (To the witness) is that right?

DIRECT EXAMINATION BY MR. CORNEY - CHRISTOPHER FURTICK 6

1 THE WITNESS: Yes, sir.

2 COURT CLERK: Please raise your right hand; state your
3 full name for the record.

4 THE VICTIM: Christopher Bruce Furtick.

5 CHRISTOPHER FURTICK, having been
6 first duly sworn, testifies as follows:

7 THE VICTIM: (To the Court) Hey.

8 THE COURT: Good afternoon. All right.

9 DIRECT EXAMINATION BY MR. CORNEY:

10 Q Mr. Furtick, I'm just gonna get real -- real quick to
11 the point here. Do you remember -- recall being on a jury
12 for a case back in of April 2004?

13 A Yes, sir.

14 Q Okay. And was that the case of *Vondell Sanders*?

15 A Yes, sir.

16 Q Okay. Were you present each day during that trial?

17 A Yes, sir. I believe I was.

18 Q Okay. Do you remember if it lasted more than one day
19 or not?

20 A Yes, sir, it did.

21 Q It did. Okay. And without telling me anything about
22 what you may have discussed or thought, did you deliberate
23 as a jury with ---

24 A Yes, sir.

25 Q --- with -- and do you recall if there were 12 members

DIRECT EXAMINATION BY MR. CORNEY - CHRISTOPHER FURTICK 7

1 of that jury?

2 A I don't remember.

3 Q Don't remember?

4 A No.

5 Q Do you remember if you as a jury rendered a verdict in
6 that case?

7 A Yes, sir.

8 Q And you were the jury foreperson in that case, right?

9 A Uh-huh. Yes, sir.

10 Q Do you recall what the verdict was, whether it was
11 guilty? not guilty?

12 A Well, yeah. I mean, it was a guilty verdict, I don't
13 remember precisely, you know, what -- what it may have
14 been.

15 Q Do you recall if the verdict was read in open court by
16 the judge?

17 A I don't remember.

18 Q Okay. Do you remember being approached by an
19 investigator back in December 2010?

20 A Yes, sir.

21 Q Okay. And -- and that was -- that was Investigator
22 Elizabeth Cook; do you remember?

23 A I know it was a woman. I don't remember her name.
24 Yes, sir.

25 Q Okay. But she -- she asked you some of these similar

DIRECT EXAMINATION BY MR. CORNEY - CHRISTOPHER FURTICK 8

1 questions, right?

2 A Yes, sir.

3 Q And at the time, you kind of -- you gave these similar
4 answers, right, you didn't remember a whole lot?

5 A That's right.

6 Q Okay. Do you recall at any point any jurors leaving
7 the courtroom or -- or leaving in -- in transport to the
8 jury room?

9 A No, sir, I don't recall.

10 Q So from -- from what you can -- what you can remember,
11 you have no reason to believe that -- that there were only
12 11 jurors in the room during deliberations?

13 A I don't remember. I mean, I ---

14 Q Don't remember either way?

15 A --- it's been so long ago.

16 Q Okay.

17 MR. CORNEY: I believe that's all I have unless Mr. -
18 - Mr. Chaplin wants to supplement that.

19 THE WITNESS: Okay.

20 MR. CHAPLIN: Yes. Very briefly.

21 CROSS-EXAMINATION BY MR. CHAPLIN:

22 Q Good afternoon, Mr. Furtick. So it's your testimony
23 that you do not remember whether or not there were 12
24 people deliberating regarding this verdict?

25 A That's right. I don't -- I -- I don't remember, no,

CROSS-EXAMINATION BY MR. CHAPLIN - CHRISTOPHER FURTICK 9

1 sir.

2 MR. CHAPLIN: Nothing further.

3 MR. CORNEY: That -- that's all, Your Honor.

4 THE COURT: Thank you so much for being here today.

5 THE WITNESS: Thank you.

6 THE COURT: Is this witness free to leave?

7 MR. CORNEY: Yes, ma'am.

8 THE COURT: Any objection?

9 MR. CHAPLIN: No objection, Your Honor.

10 THE COURT: Mr. Wilson?

11 MR. WILSON: Yes, ma'am.

12 THE COURT: Never, ever have you ever been so quiet
13 during a proceeding. I scarcely know what to say.

14 MR. WILSON: Well, Your Honor, it's a first. First
15 for everything.

16 THE COURT: Thank you so kindly for being so
17 cooperative ---

18 MR. WILSON: Thank you, Your Honor.

19 THE COURT: --- both of you. Really appreciate so
20 very much.

21 MR. CORNEY: At this time, Your Honor, we'd like to
22 call Ms. Willie Mae Prioleau. I believe I'm pronouncing
23 that correct.

24 THE COURT: Okay. Is -- is it "Prioleau" or "Prelo"
25 [phonetic]?

DIRECT EXAMINATION BY MR. CORNEY - WILLIE MAE PRIOLEAU 10

1 MR. CORNEY: Prioleau.

2 THE COURT: Prioleau.

3 MR. CORNEY: I'm sure I'll find out in a minute if I'm
4 pronouncing it incorrectly, Your Honor.

5 THE COURT: Sure.

6 (To witness as she approaches) Hi. Come on forward,
7 please.

8 COURT CLERK: Please raise your right hand, state your
9 full name for the record.

10 THE WITNESS: My name is Willie Mae Prioleau.

11 COURT CLERK: Could you spell your name for me please?

12 THE WITNESS: W-i-l-l-i-e, Willie; Mae, M-a-e;
13 Prioleau, P-r-i-o-l-e-a-u.

14 WILLIE MAE PRIOLEAU, having been
15 first duly sworn, translates as follows:

16 THE COURT: Now, you can be seated, Ms. Prioleau.
17 Thank you.

18 DIRECT EXAMINATION BY MR. CORNEY:

19 Q Ms. Prioleau, thank you for being here with us today.
20 I know it's not your first choice of where you want to be,
21 but we'll try to make it pretty -- pretty quick.

22 Ms. Prioleau, do you recall being a juror in the case
23 in front of Judge Breeden back in April 2004?

24 A Yes.

25 Q And do you ---

DIRECT EXAMINATION BY MR. CORNEY - WILLIE MAE PRIOLEAU 11

1 A First time being on a jury, yes.

2 Q Okay. Do you recall being present at -- at the
3 hearing each day?

4 A I been twice, but I was, you know, dismissed for my
5 age.

6 Q You were dismissed from this jury for your age or did
7 you sit on ---

8 A 2004?

9 Q Yes, ma'am.

10 A Yeah.

11 Q For Vondell Sanders, was that the case?

12 A Yes.

13 Q Okay. So you didn't sit in on the jury during this
14 case?

15 A Once.

16 Q Okay. Do you remember -- you remember sitting in the
17 jury box and -- and testimony being given while you were
18 there?

19 A Okay.

20 Q All right. And do you remember the -- the judge
21 instructing you as a group with your jury members to go
22 back into the room and -- and do deliberations?

23 A Yes.

24 Q Okay. And you went back there and deliberated with
25 the jury?

DIRECT EXAMINATION BY MR. CORNEY - WILLIE MAE PRIOLEAU 12

1 A Yes.

2 Q Okay. And without telling us what you talked about
3 back there or what -- what anybody said, you were -- you
4 were present for the deliberations while they decided
5 whether or not he was guilty? Or were -- were you present
6 during that time?

7 A Back in the room or out in front?

8 Q Out in the room with the jury as they talked about
9 whether they thought Mr. Sanders was ---

10 A Whether he was ---

11 Q --- guilty or not.

12 A --- guilty or not?

13 Q Yes, ma'am.

14 A Yes, we did.

15 Q You were there. Okay. And do you -- were you there
16 when they -- when the jury came to a decision? And you
17 don't have to tell us how they did that or -- or what they
18 came to. But were you there when -- as part of the jury
19 when they decided?

20 A Well, part of them say he was guilty, and part of them
21 say he wasn't.

22 Q Okay. But you were there for that, right?

23 A I was there for that.

24 Q Okay. And did you come back out with the jury and --
25 and let the judge read what your -- the jury's decision had

CROSS-EXAMINATION BY MR. CHAPLIN - WILLIE MAE PRIOLEAU 13

1 been?

2 A Yes.

3 Q Okay. Do you remember the -- the judge coming around
4 and asking each juror one by one if that was your verdict?

5 Do you remember him doing that in the end?

6 A Was he guilty or not?

7 Q Yes, ma'am. Do you remember him coming around and
8 asking y'all ---

9 A I think I do.

10 Q Okay.

11 A Yes.

12 Q Okay.

13 MR. CORNEY: I think that's all I have. I'll see if
14 Mr. Chaplin has anything he wants to consult supplement
15 that with.

16 THE COURT: Yes, Mr. Chaplin.

17 MR. CHAPLIN: Yes. Thank you very much.

18 THE COURT: Yes.

19 CROSS-EXAMINATION BY MR. CHAPLIN:

20 Q Good afternoon, Ms. Prioleau.

21 A Hi.

22 Q Do you remember talking to me on the phone a couple of
23 times?

24 A Right.

25 Q All right. Great. Ms. Prioleau, you put something

CROSS-EXAMINATION BY MR. CHAPLIN - WILLIE MAE PRIOLEAU 14

1 out there that I have to follow up on. You indicated that
2 you were dismissed from a jury because of your age. Can
3 you please expound? What were you referring to?

4 A I don't remember, but I know, you know, when they
5 asked -- you know, I've been to all the trials, you know,
6 for guilty or not guilty or whatever. But then I didn't
7 have anyone to keep my two-year-old granddaughter. so I
8 went to the judge and I asked him, you know -- so he told
9 me I was excused.

10 Q Okay. Well -- and I think it was your testimony that
11 you said that -- and I'm gonna repeat your words: "Part --
12 part of them say he was guilty, the other part said he
13 wasn't."

14 A Right.

15 Q Now, I think the question was asked of you, were you
16 in the courtroom when the jury was polled. Let me explain
17 that.

18 Polling is when each person is asked whether or not
19 that is their verdict. Do you recall being asked that
20 question?

21 A Yes. I think I did.

22 Q Beg your pardon?

23 A I think I did. Yes.

24 Q What makes you think you did?

25 A Because when we was back in the room, you know, I told

DIRECT EXAMINATION BY THE COURT - WILLIE MAE PRIOLEAU 15

1 them that I was not guilty, you know. And I told them I
2 was not guilty. Some said he was guilty, and two said he
3 wasn't. So, I was one say I wasn't guilty. Not guilty.

4 Q So your vote was not guilty?

5 A Right.

6 MR. CHAPLIN: Okay. No further questions.

7 THE COURT: Hold on one second for me ---

8 THE WITNESS: Oh.

9 THE COURT: --- please ma'am.

10 THE VICTIM: Okay.

11 DIRECT EXAMINATION BY THE COURT:

12 Q Well, now I'm confused. I -- I got -- can I ask you
13 just a couple of questions?

14 A Yes, ma'am.

15 Q How -- how many times in your young life have you
16 showed up for jury duty?

17 A For jury duty?

18 Q Yes, ma'am.

19 A None.

20 Q None? We know you went one time, because you was on
21 the jury, right?

22 A Yeah, here. Yes.

23 Q Yeah. Up -- up in Orangeburg?

24 A Yes, ma'am.

25 Q Okay. You went to Orangeburg for jury duty?

DIRECT EXAMINATION BY THE COURT - WILLIE MAE PRIOLEAU 16

1 A Yes.

2 Q Have you been one time or have you been more than one
3 time for jury duty?

4 A For jury duty like going to jury duty?

5 Q Just when you show up and you sit out in the courtroom
6 and they might need you and they might not need you.

7 A Just that one time.

8 Q Just that one time.

9 A Right.

10 Q Okay. And so you showed up and there was a judge
11 there by the name of Judge Breeden, who's a big guy. He's
12 from -- probably talked being from Horry County.

13 A Uh-huh.

14 Q From Myrtle Beach. Do you remember him? He's a big
15 guy.

16 A Yes, he was a big ---

17 Q Okay. Big guy.

18 A The judge you talking about, right?

19 Q Very -- yes. Kind of jovial fellow.

20 A Yeah.

21 Q Remember him?

22 A Yes, ma'am.

23 Q Okay.

24 A I think so.

25 Q Okay.

DIRECT EXAMINATION BY THE COURT - WILLIE MAE PRIOLEAU 17

1 A I can't remember his name, but I know he was a big
2 guy.

3 Q And -- and that's typical. Most people can't remember
4 ---

5 A Okay.

6 Q --- you know, can't remember -- especially so long
7 ago.

8 A Uh-huh.

9 Q And then you went and you sat out in the audience --
10 sat -- obviously it's up in Orangeburg, right? You from
11 Orangeburg County, right?

12 A Yes, ma'am.

13 Q Okay. Or at least you were in Orangeburg County in
14 2004?

15 A Yes, ma'am.

16 Q Okay. You still living there?

17 A I'm still there now.

18 Q You still live on ---

19 A But I've been away since I was 18 and I moved back.

20 Q To Orangeburg?

21 A Yes, ma'am.

22 Q When did you move back?

23 A Moved back on 6th day -- 2000.

24 Q Oh, wonderful. Okay.

25 A Yes, ma'am.

DIRECT EXAMINATION BY THE COURT - WILLIE MAE PRIOLEAU 18

1 Q So you were there about four years and -- and --

2 A They called me for jury duty.

3 Q -- then you got called up for jury duty.

4 A That was my first time on jury duty.

5 Q I got it.

6 A Uh-huh.

7 Q So you went out into the courtroom with a whole bunch
8 of people, right?

9 A Yes, ma'am.

10 Q Remember that?

11 A Uh-huh.

12 Q Okay. And -- and Judge Breeden asked you a bunch of
13 questions, you know, what's your name, you know, have you -
14 - he would have asked you can you read, write, speak and
15 understand the English language --

16 A Uh-huh.

17 Q -- and are you from Orangeburg County; stuff like
18 that.

19 A Yes, ma'am.

20 Q Okay. And you answered -- you -- you listened to
21 those questions.

22 A Yes, ma'am.

23 Q Okay. And then they -- they said we got a case to
24 try, yes?

25 A (No audible response.)

DIRECT EXAMINATION BY THE COURT - WILLIE MAE PRIOLEAU 19

1 Q And then solicitor stood -- stood up and said we got -
2 - we have a case that needs to be tried. Do you remember
3 that?

4 A No, ma'am. I don't ---

5 Q You don't remember that specifically?

6 A I don't remember that, no.

7 Q But in any event, they moved on and they -- do you
8 remember them picking the jury?

9 A Yes, ma'am.

10 Q You remember that part?

11 A Uh-huh.

12 Q Okay. And then you went -- and it's on that side
13 (indicates) of the courtroom up in Orangeburg. But you
14 went and took a seat like -- like over in here in the jury
15 box. You remember that?

16 A Right. Uh-huh.

17 Q Okay. Now, when judge -- when you didn't have
18 somebody to care for your -- for your -- was it your
19 granddaughter?

20 A Yes, ma'am.

21 Q When you didn't have anybody to -- to take care of
22 your granddaughter, tell me when did that happen? When was
23 that? Was that before the trial or after the trial?

24 A After.

25 Q It was after the trial?

DIRECT EXAMINATION BY THE COURT - WILLIE MAE PRIOLEAU 20

1 A Yes, ma'am.

2 Q Okay. Because -- were they gonna keep -- they had
3 more work to do or something after that trial, and you
4 said, "Judge Breeden, I need to go because my child -- my
5 grandchild doesn't have anybody to look after him"?

6 A I can't remember at that time.

7 Q Uh-huh.

8 A I can't remember.

9 Q You can't remember at that time?

10 A No, ma'am.

11 Q Okay. But -- but you stayed for the whole trial.

12 A I think it was a trial, yes. When he was -- like I
13 say, he was guilty, yes.

14 Q Yes, yes.

15 A Yes, ma'am.

16 Q In other words, usually what happens is you come in
17 the morning usually about nine o'clock, 9:30.

18 A Right.

19 Q And then you sit and you listen to the evidence, you
20 listen to witnesses be called. Do you remember that?

21 A (No audible response.)

22 Q People are called and they'll come testify ---

23 A Yes, ma'am.

24 Q --- what they saw ---

25 A Yes, ma'am.

DIRECT EXAMINATION BY THE COURT - WILLIE MAE PRIOLEAU 21

1 Q --- what, you know ---

2 A Yes, ma'am.

3 Q --- what they did, what they saw.

4 A Yes, ma'am.

5 Q And then you take a -- and you took, like -- you took
6 a lunch break, right?

7 A Yes, ma'am.

8 Q And then you come back after lunch and the same sort
9 of happens again.

10 A Uh-huh. Uh-huh.

11 Q They -- the people call witnesses who come to testify
12 what they saw and what they did --

13 A That's right.

14 Q -- etcetera. Remember that?

15 A After we come back after lunch, you know, we went back
16 in the jury room.

17 Q That's right. Exactly.

18 A Uh-huh.

19 Q And then you -- when the judge called for you, you
20 came back out into the courtroom, right?

21 A Yes, ma'am.

22 Q And then you heard more -- more witnesses or whatever.

23 A Uh-huh.

24 Q Okay. And then there came a time -- there came a time
25 when it was time for the jury to go back into that jury

DIRECT EXAMINATION BY THE COURT - WILLIE MAE PRIOLEAU 22

1 room where you had been, and talk about the case, right?

2 Remember that?

3 A Yes, ma'am.

4 Q Okay. And -- and at that point, the jury was supposed
5 to decide was Mr. -- and -- and -- was Mr. Sanders guilty
6 or not guilty.

7 And he was charged with a number of different crimes.
8 Do you remember that? It wasn't just one crime, it was
9 more than one crime.

10 A More than one?

11 Q Well, he was charged with more than one crime.

12 A No. I think it was just one ---

13 Q You remember ---

14 A --- that I can remember.

15 Q You just remember one? All right.

16 A Yes, ma'am.

17 Q Okay. Whatever. And then -- and then y'all talked
18 about it in your jury room, and I'm not asking you about
19 that, because I can't ask you about that. I ---

20 A Uh-huh.

21 Q That's to the jury -- that's -- that's what the jury
22 does. I'm not asking you about that.

23 A Okay.

24 Q Okay. And so then the jury -- did the jury, like,
25 reach a decision?

DIRECT EXAMINATION BY THE COURT - WILLIE MAE PRIOLEAU 23

1 A (No audible response.)

2 Q Said, "We've reached a verdict," and knock on the
3 door. Do you remember that?

4 A You're talking about us or ...

5 Q Yeah. Uh-huh. The jury.

6 A The jury?

7 Q Uh-huh.

8 A Knock on the door?

9 Q No. Well, it would have been the foreman, I guess,
10 that would have knocked on the door, the presiding juror.

11 But do you remember the time when the jury reached a
12 verdict? Do you know what that means, "reached a verdict"?
13 You know what I'm saying? When they made their decision.

14 A Oh. Yes, ma'am, they did. Yeah.

15 Q Remember the jury made their decision.

16 A Yes.

17 Q Okay.

18 A Uh-huh.

19 Q And you remember that.

20 A I think so, yes.

21 Q Okay. All right. And -- and then they said, well --
22 and then the -- then the jury came back out to the
23 courtroom once they reached their decision.

24 A Uh-huh.

25 Q Remember that?

DIRECT EXAMINATION BY THE COURT - WILLIE MAE PRIOLEAU 24

1 A Uh-huh.

2 Q And took their seat in the jury box, right?

3 A Right.

4 Q Okay. And -- and then the judge said -- or I guess
5 maybe the clerk said what the decision of the jury was. Do
6 you remember that?

7 A (No audible response.)

8 Q Let me tell you what I do. Let me tell you the way it
9 happens here and see if that helps you. What happens is
10 when my juries are finished -- it's called "deliberating" -
11 - when they finish talking about a case --

12 A Uh-huh.

13 Q -- and they reach their decision, right? The
14 presiding juror writes that down for the whole jury, right?

15 A Right.

16 Q And they -- typically they got to decide if a person
17 is guilty or not guilty, but everybody has to agree. And
18 they can't -- you know, they can't -- the deliberations
19 continue until they make a decision, everybody's agreed.
20 Do you remember that process?

21 A I remember that.

22 Q Okay.

23 A Yes, ma'am.

24 Q Okay.

25 A I remember.

DIRECT EXAMINATION BY THE COURT - WILLIE MAE PRIOLEAU 25

1 Q And then once they make a decision, everybody agrees
2 to the decision, then the -- the presiding juror, some
3 people call them the "foreman" of the jury ---

4 A Uh-huh.

5 Q --- on behalf of the jury, they write that down on a
6 piece of paper. Okay? Or they circle something, whatever.

7 A Uh-huh.

8 Q And then the whole jury comes back out in the
9 courtroom. Do you remember that?

10 A Yes, ma'am.

11 Q Okay. And then usually, usually the person who's the
12 foreman and he's sitting right there (indicates.) That's
13 Mr. Taylor right there.

14 A Uh-huh.

15 Q And they usually sitting right there on the front
16 seat. That person will hand the paper, with the verdict
17 written on it, hand it to the judge.

18 A Uh-huh.

19 Q Judge looks at it. Judge says -- decides if it's what
20 -- you know, if they've reached a decision. And then
21 sometimes the judge will read it, but sometimes the judge
22 will pass it to the Clerk of Court. And the Clerk of Court
23 would just read what was the jury's verdict, what did the
24 jury decide.

25 A Uh-huh.

DIRECT EXAMINATION BY THE COURT - WILLIE MAE PRIOLEAU 26

1 Q Do you remember any of that?

2 A I can't remember all that.

3 Q That's okay.

4 A No.

5 Q Well, that's all right.

6 A No, ma'am.

7 Q That's okay. And then the judge will do something
8 like this, and the judge will say to the jury, "Ladies and
9 gentlemen, was that your verdict back in the jury room, and
10 is that your verdict in the courtroom. And if so, raise
11 your right hand." Do you remember anything like that?

12 A Uh-huh.

13 Q You remember that?

14 A Uh-huh.

15 Q That's a "yes"?

16 A No. I did have to I put up my hand ---

17 Q Okay.

18 A --- and I tell him, "Not guilty."

19 Q You said "not guilty"?

20 A Uh-huh.

21 Q Okay. And when did you say that?

22 A When we come out in the courtroom.

23 Q Okay. Okay. When you came out into the courtroom,
24 you said "not guilty."

25 Okay. And then what happened next?

DIRECT EXAMINATION BY THE COURT - WILLIE MAE PRIOLEAU 27

1 A I can't remember. And I don't know whether they ask
2 me why or what. I can't remember. But I know I had the
3 not guilty.

4 Q Okay.

5 A Yes, ma'am.

6 Q Was that -- was that in the jury room or was that out
7 in the courtroom?

8 A Out here. Out here in the courtroom.

9 Q Out here in the court ---

10 A I think it was out here in the courtroom.

11 Q Out -- but in -- but not here in the courtroom?

12 A No. Like, you know --

13 Q Up at Orangeburg.

14 A Yes, ma'am.

15 Q All right. Okay.

16 A In the courtroom.

17 Q And do you remember if you went home after that or if
18 you went back into the jury room? Do you remember?

19 A I can't remember. But I don't think we back in the
20 jury room. I don't think so.

21 Q Okay. Okay.

22 A It was four years ago. I don't think so.

23 Q Okay. Okay. All right. You just don't remember.

24 A No, ma'am.

25 Q Okay. All right. And you said that you said, "not

DIRECT EXAMINATION BY THE COURT - WILLIE MAE PRIOLEAU 28

1 guilty." Can you tell me a little bit about that? When
2 did you say that? Who -- you know, did somebody ask you
3 and you said it? Do you remember that?

4 A No. We were there back, you know, when you were
5 making the decision, they made you hold a hand up. I said
6 not guilty. A few more said not guilty.

7 Q Yes.

8 A I can't remember the name or whatever.

9 Q That's okay. You don't have to.

10 A But I know I said not guilty.

11 Q Uh-huh.

12 A And I think I said not guilty when we come out in the
13 courtroom, I think. But I know I did say it in the back
14 when we were deciding.

15 Q Okay.

16 A Yeah.

17 Q Okay. Okay. And you think maybe you said that in --
18 in -- when you came out here.

19 A Uh-huh. Yes, ma'am.

20 Q Okay. Why do you think you said it then too?

21 A Like I guess -- I think someone asked the question. I
22 don't know who it was.

23 Q Uh-huh. Yeah.

24 A You know, I -- the person that asked it.

25 Q Uh-huh.

DIRECT EXAMINATION BY THE COURT - WILLIE MAE PRIOLEAU 29

1 A I can't remember who it was.

2 Q Uh-huh. You -- you think it was a man that asked you
3 the question or a woman?

4 A I can't remember.

5 Q Okay. Because you said "he," so I thought maybe you
6 remembered who asked the question.

7 A No, I can't.

8 Q Okay. And then -- and -- and I want you to think real
9 hard for me. If you don't remember, don't you worry about
10 it. But if you can remember, that would -- you know, I
11 just need to know whatever you do remember. I don't want
12 you to -- you know, I don't want you struggling too hard,
13 but I ---

14 A Uh-huh.

15 Q --- I do need to know everything that remember. Once
16 you did that, once you said not guilty, what happened next?

17 I need you to think a minute, and take your time and
18 think.

19 A When I said not guilty to the jury, we come out; they
20 came out.

21 Q You came out.

22 A We come out and sit.

23 Q And you sat. And then what happened; do you remember?

24 A And they was asking for the verdict and all that, you
25 know?

DIRECT EXAMINATION BY THE COURT - WILLIE MAE PRIOLEAU 30

1 Q Yeah.

2 A I really can't remember nothing else.

3 MR. CHAPLIN: I beg your pardon, Your Honor. Could
4 she please speak up?

5 THE COURT: She said she doesn't really -- okay. She

6 ---

7 A I really don't remember what happened ---

8 THE COURT: She doesn't remember.

9 A --- after the day, you know.

10 Q Uh-huh.

11 A But I know I told the jury "not guilty." And I think
12 when I come outside -- I'm not quite sure -- but they asked
13 about the juror and I think I said "not guilty," you know.

14 Q Okay. Okay. You think that's what you said.

15 A Yes, ma'am.

16 Q Okay. All right. And do you remember anything else
17 about that day?

18 A No, ma'am. I think after the -- after that, the case
19 and everything, I think we -- I went home, I think.

20 Q Okay.

21 A Uh-huh.

22 Q Okay. Now, let me just ask you this question: And I
23 don't mean to pry, but after that trial, have you had any
24 health problems?

25 A Health?

DIRECT EXAMINATION BY THE COURT - WILLIE MAE PRIOLEAU 31

1 Q Health problem? Any particular health problem?

2 You've been pretty healthy since ---

3 A Yes, ma'am.

4 Q --- since this trial? Well, you look healthy. You
5 look wonderful.

6 A I thank God.

7 Q "Thank God" is right, isn't it? Yes. Wonderful.

8 THE COURT: All right. Does that prompt any questions
9 from the Attorney General?

10 MR. CORNEY: No, Your Honor. And I appreciate it. I
11 think you ---

12 THE COURT: Very well.

13 MR. CORNEY: --- expounded a little better than I did.

14 MR. CHAPLIN: No. I -- I appreciate it, Your Honor.
15 Thank you very much, Ms. Prioleau.

16 THE COURT: You are so wonderful to have come here.

17 THE WITNESS: Thank you.

18 THE COURT: I thank you so much.

19 THE WITNESS: You're welcome.

20 THE COURT: Are you still -- and you're still living
21 in Orangeburg County?

22 THE WITNESS: Yes, ma'am.

23 THE COURT: Well, I look forward to seeing you up in
24 Orangeburg County.

25 THE VICTIM: Okay.

1 THE COURT: Thank you kindly.

2 THE WITNESS: All right.

3 THE COURT: Yes, ma'am.

4 THE WITNESS: Now?

5 THE COURT: You're free to go when you are ready.

6 THE WITNESS: Okay.

7 THE COURT: Thank you so much.

8 THE WITNESS: You're welcome.

9 (The witness exits the stand.)

10 THE COURT: Yes, sir?

11 MR. CORNEY: I believe that's all we have as far as
12 testimony, Your Honor. I think Mr. Chaplin wanted to try
13 to do a quick review of ---

14 THE COURT: Sure.

15 MR. CHAPLIN: Okay.

16 MR. CORNEY: --- from the last one.

17 THE COURT: Sure.

18 MR. CORNEY: I'll -- I'll let him go ahead and do that
19 first.

20 MR. CHAPLIN: Thank you. Your Honor, I made some
21 notes here, because what I want to say I want to try to be
22 brief as possible. But I need to make sure I cover all the
23 points.

24 First and foremost, everyone knows I represent Vondell
25 Sanders. And the bottom line is Mr. Sanders wants a new

1 trial. And he's basing that on several things, but most
2 importantly the overarching concern is ineffective
3 assistance of counsel. All right?

4 Mr. Sanders went to trial in -- April 20th of 2004,
5 and was sentenced to 19 years. Ever since 2005, Mr.
6 Sanders has been writing letters concerned about the fact
7 that there wasn't a unanimous verdict in this particular
8 matter. I'm glad that we're finally getting that matter
9 heard, and hopefully resolved with the conclusion of this
10 hearing.

11 He received a sentence of 19 years for PWID crack, and
12 15 years concurrent for PWID proximity. And he's asking to
13 tell this Court several things: First of all, I've gone
14 over the exposures and some of the concerns that someone
15 might have facing a new trial. And I covered that on the
16 record at the last PCR hearing that we had. And I think
17 Mr. Sanders is well aware of that.

18 (To the applicant) And if you would just indicate that
19 you do remember that conversation.

20 APPLICANT: Yes, I remember.

21 MR. CHAPLIN: Okay. And that was Vondell Sanders
22 saying, yes, he does remember.

23 All right. Mr. Sanders belief is that his counsel was
24 deficient, and he believes that that deficiency greatly
25 prejudiced him. And he believes that counsel conduct

1 during his trial so undermined the proper functioning of
2 the adversarial process, that the trial results cannot and
3 should not be relied upon.

4 Now, counsels' performance in this matter was
5 deficient. And I think Mr. Corney summarized it, but I'd
6 like to just give a little more depth. First of all,
7 failing -- the counsel failed to object to the jury verdict
8 being less than unanimous. And that failure to request a
9 mistrial, as required by Rules of Procedure 14 A, B, & C,
10 was not done.

11 Furthermore, when the jury was polled, there were only
12 11 responses to the guilty verdict that appeared on the
13 transcript.

14 Now, an objection at that time, Your Honor, should
15 have been made regardless. And I know that we brought in a
16 lot of different parole evidence to try to sort this thing
17 out or whatever the matter might be. But somebody should
18 have been listening and somebody should have made an
19 objection to preserve that issue for Mr. Sanders, that
20 there were only 11 people that responded. And our position
21 is that that objection was not made.

22 And I would just like to support that by saying that,
23 Your Honor, the transcript is the transcript. And that's
24 the background -- the backbone of our entire appellant
25 system. I mean, all appeals talk about the fact that if

1 it's not in the transcript, if it wasn't preserved, it
2 can't be ruled upon.

3 Now, that's the same yardstick that Mr. Sanders
4 initial appeal was measured by. Certain things weren't
5 raised, they couldn't be argued. And we're asking that the
6 same yardstick be applied here. It's not in the
7 transcript, the transcript is the record; and therefore,
8 we've only got 11 responses.

9 I think that to rule otherwise, Your Honor, would be
10 setting a very dangerous precedent. I think basically
11 we're saying that the transcript may not be accurate. And
12 I think that in all other procedures, we do rely upon the
13 transcript as gospel.

14 THE COURT: Let me ask you this question.

15 MR. CHAPLIN: Yes.

16 THE COURT: Who wasn't there?

17 MR. CHAPLIN: Well, Your Honor, based on the
18 transcript we have -- I can tell you who was there. And I
19 can tell you there were only 11 people.

20 THE COURT: Well, who wasn't there?

21 MR. CHAPLIN: Well, when they swore the jury in, there
22 was a Willie Mae Prioleau that was seated. And when they
23 did the actual polling, Willie Mae Prioleau did not give
24 her response.

25 THE COURT: Well, she said she was there.

1 MR. CHAPLIN: Well, there's no response.

2 THE COURT: Okay.

3 MR. CHAPLIN: Your Honor, the second issue is:
4 Counsel failed to object on the record when the Court
5 failed to charge the jury with the lesser included offense
6 of possession.

7 Beg the Court's indulgence.

8 THE COURT: Okay.

9 MR. CHAPLIN: And I'm passing up *State v. Heywood*.
10 And I'm referring to a case by the name of *State v. Drafts*.
11 It's on the third page of that, Your Honor ---

12 THE COURT REPORTER: "Draft"?

13 MR. CHAPLIN: Yes.

14 THE COURT REPORTER: D-r-a ---

15 MR. CHAPLIN: Drafts.

16 THE COURT REPORTER: --- D-r-a-f-t?

17 MR. CHAPLIN: D-r-a-f-t-s. That's my Charleston
18 accent coming out.

19 THE COURT: That's how -- that's how come you can say
20 "Prioleau" better than anybody else.

21 MR. CHAPLIN: Oh, yeah. Yeah.

22 And it -- it says here (as read): "A trial judge must
23 charge a lesser included offense, if there is any evidence
24 from which it can be inferred, that the defendant committed
25 the lesser included of the crime charged."

1 And Your Honor, there was ample testimony on the
2 record at this trial that someone else owned the marijuana
3 and someone else owned the crack. Therefore, there is a
4 strong likelihood that if Mr. Sanders, being a resident of
5 that home, could be charged with constructive possession.
6 Therefore, we believe that that lesser included charge of
7 constructive possession should have been -- rather
8 possession, should have been made to the jury. They should
9 have had that option to consider.

10 And counsels stated in the record that they did ask
11 for that instruction in chambers. But then, when they came
12 out to speak on the record, they failed to put it on the
13 record.

14 So we believe that -- not only do I think, but even
15 trial counsel believe that that should have been a charge
16 given to the jury, and it was not. And we believe that
17 their failure to do that would rise to the occasion of
18 ineffective assistance.

19 And then finally, Your Honor, trial counsel failed to
20 object to a statement made by Officer Lynn Shear as to
21 hearsay. And I'm not gonna belabor the point, because we
22 went over that real well last time. But basically Mr.
23 Shear took the stand and he mentioned the fact that their -
24 - what --- the confidential informant said, "blah, blah,
25 blah."

1 So we believe that that was extremely prejudicial.
2 There was exhaustive conversation with regards to the fact
3 that the State was not gonna disclose the identity of that
4 confidential informant, and basically that was just not --
5 that was just, like, not even gonna be mentioned.

6 Mr. Sanders was not allowed to know the identity of
7 that. Furthermore, Mr. Sanders was not allowed to cross-
8 examine him. His trial counsel was not allowed to cross-
9 examine that -- that confidential informant.

10 So that matter should have been stricken. But at
11 the least it -- a hearsay objection should have been
12 raised, because they were sitting there and the officer
13 testified as to what the confidential informant said.

14 So we believe that maybe an objection under
15 prejudicial -- the prejudicial value of that should have
16 been raised, it should have been stricken, and also that
17 it should not have been -- an objection should have been
18 made when he made that statement.

19 So in conclusion, Your Honor, I'd say but for
20 counsels' deficient performance, there is a reasonable
21 probability that the outcome of this trial would have been
22 different. An objection to a verdict that is not unanimous
23 would have preserved this important issue. Had it been
24 preserved, the appellate court would have ruled on this
25 matter.

1 It is reasonable to think that Mr. Sanders could
2 possibly be home right now if that matter had been
3 reserved. I don't know. However, that does suggest a very
4 different outcome than what we got.

5 There also appears that there had been evidence to
6 suggest a charge of possession. That was not a charge
7 given to the jury. And even though Attorney Hinds stated
8 that she did ask for that charge, it wasn't preserved on
9 the record.

10 Again, Your Honor, had that charge been given, it's
11 reasonable -- reasonable to think that possibly the jury
12 would have selected that charge instead of convicting Mr.
13 Sanders on the other. Therefore, had the lesser included
14 charge been given, we believe that the outcome of that
15 matter would have definitely been different.

16 And then finally, Your Honor, an objection to the
17 statement about what the confidential informant told them -
18 - told the officer, should not have been made. The State
19 goes to great lengths, as I said early, to protect the
20 confidential informant. Yet the State then takes the stand
21 and then talks about the confidential informant. You can't
22 have it both ways.

23 Now, Mr. Sanders here did not get an opportunity to
24 know who that was, he didn't get an opportunity to cross-
25 examine him. And there was suggestions that the

1 confidential informant may not have been reliable. That
2 should have -- could have been brought up as well, but it
3 wasn't.

4 The mentioning of the confidential informant's
5 statement, with no chance to cross-examine this witness,
6 was an injustice to Mr. Sanders. Clearly counsels' fail --
7 failure to object created a reasonable probability the
8 outcome of this would have -- matter would have been
9 different.

10 So therefore, Your Honor, I've attempted to preserve
11 three very important matters on the record, with supporting
12 documentation and case law. And I would just beg the
13 Court's indulgence one second to ---

14 THE COURT: Sure.

15 MR. CHAPLIN: --- make sure my client is satisfied
16 with what I've ---

17 THE COURT: Absolutely. Absolutely.

18 (Mr. Chaplin confers with the applicant.)

19 APPLICANT: Yes, sir. I'm satisfied.

20 MR. CHAPLIN: Okay. All right.

21 THE COURT: Thank you.

22 MR. CHAPLIN: Thank you.

23 THE COURT: Yes, sir?

24 MR. CORNEY: Just very briefly, Your Honor.

25 THE COURT: Sure.

1 MR. CORNEY: And I think this has been hashed out the
2 first time around in the PCR transcript they -- that I gave
3 you this morning from the first time around.

4 But just a -- just a -- for a brief summary, as far as
5 the jury charge for the lesser included offense of
6 possession, Peggy Hinds, at the first PCR, testified that
7 she did request that in chambers. The judge denied it.

8 And in -- in addition to that, as far as preserving it
9 for appeal on the -- on the record, Peggy Hinds said that
10 her and Shawn -- or Sam Kramer, the two attorneys, had met
11 with him four times each, at least, where he was an active
12 participant in creating his defense for trial. And his
13 defense was, "These drugs aren't mine."

14 So she didn't think that that simple possession charge
15 was gonna be effective whatsoever based on the defense
16 they'd put up that these drugs aren't mine. So that was
17 kind of a trial strategy at that point for her to not
18 request that outside of -- you know, on the record, even
19 though she did request it in chambers just to -- just to be
20 safe with that.

21 And as far as the missing juror, I think there's just
22 far too much evidence to -- to the contrary to -- to
23 believe that this is actually a missing juror issue as
24 opposed to scrivener's error in the transcript. Miss Harry
25 Dot Walker said -- has said -- and Mr. Chaplin said this in

1 the first PCR, it's in that transcript -- even said that
2 she said she didn't remember anything peculiar about this
3 trial or the jury or any missing jurors. Peggy Hinds said
4 that she was sure that, had there been a missing juror,
5 someone would have said something.

6 Have -- have the affidavit from Sam Kramer passed up.
7 He said he definitely doesn't remember anything odd, and if
8 he did, he surely would have objected to it. Surely the
9 solicitor would have said something to keep his verdict,
10 you know, that he had just -- he had just gotten good.

11 And then on top of that, if you look at the trial
12 transcript, just before Judge Breeden turns the case over
13 to the jury, he, on the record, even discusses that -- that
14 it has to be unanimous, all 12 -- with all 12 jurors. And
15 even goes through this kind of colloquy with the Court and
16 with the jury saying, "You know, I've had a case come back
17 once before where we only had 11 jurors decide and one that
18 held out. We can't have that."

19 And so just before he turns the case over to the jury,
20 he's clearly -- has this in mind, we need 12 jurors.

21 Additionally, just before he lets the alternate go, he
22 says something about, you know, "You were here in the event
23 in case something happened to one of the jurors. And thank
24 goodness that hasn't happened."

25 Surely he's not looking at a jury box with 11 jurors

1 in it, and turning to -- to the alternate saying you're
2 excused, because we have 12 here. This -- these are all
3 things that were in his mind at the time.

4 They step -- the jury stepped back to the -- to the
5 jury room for jury charge objections. And that was when
6 the alternate was excused. Deliberations started directly
7 after that, and the jury only deliberated for one hour
8 without any questions or breaks, at which time a juror
9 could have left.

10 So I think that there's just far too much evidence
11 that goes to point that this is a scrivener's error.
12 There's a -- I think there's even a bailiff that -- that --
13 that's on the -- in the transcript speaking at one point
14 during jury polling. Obviously it -- to me it seems there
15 were a lot of people speaking at one point. And -- and
16 unfortunately Ms. Harry Dot Walker couldn't get it all down
17 and -- and missed that last response from Ms. Prioleau on
18 record.

19 So the State would contend that -- that -- that all
20 three of these allegations are without merit and his
21 application should be denied.

22 THE COURT: Thank you very much. How about the
23 hearsay objection?

24 MR. CORNEY: Well, as far as the hearsay objection, it
25 was something -- and Peggy Hinds talked about this the

1 first time around in the PCR -- talking about that -- that
2 Mr. Kramer had tried to suppress the drugs based on a bad
3 search warrant because of the unreliability of a -- of the
4 confidential informant. And the judge ruled that, you
5 know, that was a jury question. Reliability of
6 confidential informants is something that they didn't raise
7 again after the judge had said, you know, we're gonna leave
8 that up to the jury. I'm not gonna -- I'm not gonna rule
9 on whether this confidential informant's statements are
10 reliable or not; which was what their contention is, is
11 that these were unreliable statements that were brought in
12 without the ability to cross-examine the confidential
13 informant.

14 So that would be our stance on it, that -- that they
15 did bring that up and that's not what was trial strategy
16 after that.

17 THE COURT REPORTER: I'm sorry? Say that one more
18 time.

19 MR. CORNEY: It was a trial strategy from that point
20 on after they had -- had raised ---

21 THE COURT: But there's a difference between a motion
22 to suppress and -- and this hearsay statement of a
23 confidential informant coming in during the course of the
24 trial, though, right?

25 MR. CORNEY: Yes, Your Honor. I mean, clearly there's

1 a difference there in that -- and -- and I don't know,
2 based on the transcript from the first PCR, if that was
3 something Peggy Hinds touched on. We don't have her here
4 today. Just we both kind of thought that she had given her
5 two cents, and we weren't gonna rehash those issues. So --

6 -

7 THE COURT: Sure.

8 MR. CORNEY: --- we kind of ---

9 THE COURT: Okay.

10 MR. CORNEY: --- whatever's in the record is ---

11 THE COURT: The recorded reference to the -- to the
12 transcript.

13 MR. CORNEY: Yes, ma'am.

14 THE COURT: All right. Wonderful.

15 MR. CORNEY: I don't want to stomp on Mary Williams'
16 toes after she's already done the first part.

17 THE COURT: I'm with you. I'm with you.

18 MR. CORNEY: Thank you very much.

19 THE COURT: Now, both of you have the transcript in
20 the first trial?

21 MR. CHAPLIN: Yes.

22 MR. CORNEY: Yes, Your Honor.

23 THE COURT: From the -- from the underlying trial and
24 from the first PCR --

25 MR. CHAPLIN: Yes, Your Honor.

1 MR. CORNEY: Yes, ma'am.

2 THE COURT: --- hearing? I'm gonna want proposed
3 orders from both of you, I know.

4 MR. CHAPLIN: That's not a problem.

5 THE COURT: And you just tell me, y'all -- both of you
6 are so very, very busy. Y'all just get together and let me
7 know, just y'all -- meet and confer right there, and tell
8 me how long you need. Is 30 days long enough? Do you want
9 45? Do you need 60? Just tell me so I'll know when to
10 expect it.

11 MR. CHAPLIN: Your Honor, before we confer, could I
12 just make two last points?

13 THE COURT: Sure.

14 MR. CHAPLIN: Okay.

15 THE COURT: Of course.

16 MR. CHAPLIN: The other thing that I need to say is
17 that we also need to reconcile what we just heard today.
18 Willie Mae Prioleau said that she gave a verdict of not
19 guilty. All right?

20 So our issue is that the verdict was not unanimous.

21 THE COURT: Well, then that means she's there. You've
22 got -- you know what I'm saying?

23 Here's what concerns me about where you are. You
24 know, the position up until this moment --

25 MR. CHAPLIN: Uh-huh.

1 THE COURT: -- up until today has been that there were
2 11 folk.

3 MR. CHAPLIN: And we still say that the -- I'm sorry.
4 I didn't mean to cut you off.

5 THE COURT: You -- you didn't cut me off. We -- we
6 are having a discussion about that. I mean, either she's
7 there or she's not.

8 MR. CHAPLIN: Well, I don't -- her testimony is that
9 in the room, or whenever point or whatever, she indicated
10 that she voted not guilty.

11 Now, I don't know what happened out here, except the
12 transcript said that only 11 people were polled. So we
13 came here today without her testimony pointing out that
14 there were only 11 responses; therefore, there's something
15 wrong with that.

16 And then she gets on the stand and she even further
17 says that -- that her -- her verdict back there, or
18 something like that, was not guilty.

19 So that's just a new issue that I need to put out
20 there.

21 MR. CORNEY: And obviously we're gonna -- we're -- we
22 would object to that amendment at this point in time. And
23 when they -- like you said, the issue was: Were there 11
24 jurors or were there not? It wasn't the validity of the --
25 of the actual guilty or not guilty verdict that was

1 rendered at that point.

2 And so I feel like that's a -- at this point that's
3 adding allegation that wasn't brought in this PCR
4 application.

5 MR. CHAPLIN: Your Honor, Mr. Sanders did not have an
6 opportunity to raise that allegation until she gave her
7 testimony, which he did today. And I think it's timely.

8 THE COURT: And y'all are gonna -- y'all are gonna put
9 that in your order. That it --

10 MR. CHAPLIN: I see.

11 THE COURT: You're gonna argue that it is timely;
12 you're gonna order that it's not timely.

13 MR. CHAPLIN: Okay.

14 THE COURT: And then you're going to, you know, put
15 that in your decision as well.

16 In other words, rather than have you do a memorandum
17 and then potentially another order, just put it in -- put
18 that argument in your order, because it's gonna have to be
19 there anyway, right?

20 MR. CHAPLIN: Yes, ma'am.

21 THE COURT: So no need in doing it twice.

22 MR. CHAPLIN: I just wanted to --

23 THE COURT: I -- I -- genius that you are, I figured
24 you'd --

25 MR. CHAPLIN: Oh, no, I'm not a genius. But I'm ---

1 THE COURT: --- I figured you'd -- I figured I was ---

2 MR. CHAPLIN: --- just trying.

3 (The Court and Mr. Chaplin talking simultaneously.)

4 THE COURT: --- gonna get -- before you got out of
5 here.

6 MR. CHAPLIN: Okay. All right.

7 THE COURT: Yes.

8 MR. CHAPLIN: Okay.

9 THE COURT: I'm well -- I'm well aware that -- of that
10 -- that that would be your position. I truly am. I -- I
11 got that.

12 MR. CHAPLIN: Okay. So, I'll confer --

13 (Whereupon, Mr. Corney and Mr. Chaplin confer.)

14 MR. CHAPLIN: Your Honor, to err on the side of making
15 sure we make the deadline, we'd like to say 45 days.

16 THE COURT: That is fine with me. Now, listen to me
17 gentlemen. If you all are reaching 45 days and all those
18 things that you don't know right at this moment are gonna
19 happen in your world, if y'all need a little -- just a few
20 more days, if y'all get together and agree and shoot me an
21 e-mail, I just want to -- I just need to know how y'all are
22 doing. If you need a little bit more time, I'm -- I -- I
23 know how busy lawyers are. You just let me know just so we
24 can just sort of know when to expect.

25 MR. CHAPLIN: Yes.

1 THE COURT: All right. Yes? Yes?

2 MR. CHAPLIN: Yes. Thank you, Your Honor.

3 THE COURT: Fantastic.

4 MR. CORNEY: Thank you, Your Honor.

5 THE COURT: Thank you. Thank you all so much. Thank
6 you for your flexibility too.

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8 --- END OF TRANSCRIPT OF RECORD ---

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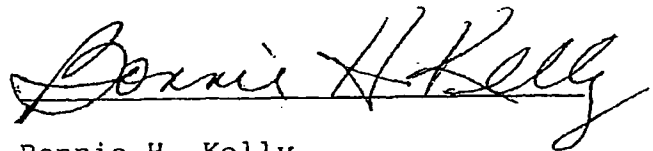
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CERTIFICATE

I, the undersigned Bonnie H. Kelly, official court reporter for the First 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 hearing of the captioned cause, relative to appeal, in the Circuit Court for Orangeburg County, South Carolina, on the 21st of September, 2011.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.



Bonnie H. Kelly,

Court Reporter

Columbia, South Carolina

December 21, 2011

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STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Vondell Sanders, # 241308,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
2012 MAR 27 PM 4:15) FOR THE FIRST JUDICIAL CIRCUIT

) FILED 100 RECORDS
) VINCE L. BLAIR) 2006-CP-38-0585
) CLERK OF COURT
) COURT HOUSE
) 1000 N. GOV. ST.
) COLUMBIA, SC 29201

ORDER OF DISMISSAL

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 22, 2006, and amended June. The Respondent made its Return on February 16, 2007. An evidentiary hearing into the matter was convened on September 7, 2010, at the Dorchester County Courthouse. The Applicant was present at the hearing and was represented by Mathias Chaplin, Esquire. The Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying was Applicant's trial counsel, Peggy Hinds, Esquire. Applicant's additional trial attorney, Sam Kramer, Esquire, was unable to attend the September 2010 hearing due to an extended job-related trip overseas. At the close of the hearing, this Court granted Applicant additional time to further investigate his claims regarding the transcript's reflection of only eleven jurors answering during jury polling.

With the help of a private investigator, Applicant was able to locate both the jury foreman from trial as well as the alleged missing juror. The investigator issued a report detailing her findings on January 7, 2011, stating she could not draw any firm conclusions regarding whether

the alleged missing juror was or was not present during jury polling. With this information in hand, this Court reconvened a hearing on September 21, 2011, at which Applicant was present with counsel, Mr. Chaplin. The Respondent was represented by Rob Corney of the South Carolina Attorney General's Office. Also present and testifying at the hearing were the jury foreman, Chris Furtick, and the alleged missing juror Willie Mae Prioleau.

At both hearings, this Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Orangeburg County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. The Applicant was true bill indicted at the December 2003 term of the Orangeburg County Grand Jury for Possession with Intent to Distribute Cocaine Base, Possession with Intent to Distribute Cocaine Base Within Proximity of a School or Park, Possession with Intent to Distribute Marijuana, and Possession with Intent to Distribute Marijuana within Proximity of a School or Park (2003-GS-38-2369/2370/2371/2372). Applicant was represented by Peggy Hinds, Esquire, and Sam Kramer, Esquire, on the charges. On April 20, 2004, the Applicant proceeded to jury trial before the Honorable John L. Breeden, Jr., where he was convicted of Possession with Intent to Distribute Cocaine Base, Third Offense and Possession with Intent to Distribute Cocaine Base within Proximity of a School or Park. Judge Breeden sentenced Applicant to nineteen (19) years imprisonment for PWID and fifteen (15) years imprisonment for the proximity charge, sentences to run concurrently.

A timely Notice of Appeal was filed and an Anders brief was submitted on Applicant's behalf by appellate counsel, Eleanor Duffy Cleary, Esquire. The South Carolina Court of

Appeals dismissed the appeal in March 2006, and issued the Remittitur on April 7, 2006. State v. Sanders, Op. No. 2006-UP-171 (S.C. Ct. App. filed March 22, 2006).

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. "Whether appellate trial counsel was ineffective for failing to object to hearsay testimony that was in violation of my Due Process and Equal Protection of the law as guaranteed by the confrontation clause."
 - b. "Ineffective for failing to object to trial judge's instructions that prematurely directs the verdict to the state."
 - c. "Ineffective for failing to object to solicitor's closing arguments that was vouching for State witness credibility."
 - d. "Ineffective for failing to object to the trial judge dismissing the alternate juror without just cause before a unanimous verdict was rendered."
 - e. "Ineffective for failing to inquire into what happened to the missing juror."
 - f. "Ineffective for failing to object to the jury verdict being less than unanimous, a failure to request for a mistrial or an acquittal."
2. Ineffective assistance of appellate counsel.
 - a. "Ineffective for failing to raise the issue of trial judge refusing to require the State to disclose the identity of an informant who was clearly a tipster or conduit. This State's witness would have been helpful to the defense on the validity of the search warrant obtain on 10-17-03."
3. Trial court error.
 - a. "Trial judge denial of the motion to suppress said statement all wrongfully obtained denied Appellant Equal Protection under Miranda v. Arizona and Article 1, Section 3; Article 1, Section 12 of the S.C. Const., and the Fifth and Fourteenth Amendment of the U.S. Const."

- b. "Trial judge erred in admitting contested statement without finding facts resolving the conflicting *viore dire* testimony."

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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCF; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this

prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117; 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Failure to Request Jury Charge to Lesser Included Possession

The first allegation raised by Applicant at the September 2010 hearing was counsel was ineffective for failing to request a jury charge on the lesser included offense of possession.

Applicant testified he believed counsels' failure to request the lesser included offense rendered their representation ineffective as the jury was never able to determine whether he was guilty of the lesser rather than greater charge. Applicant went on to say he did not recall either attorney making such a request at any point during the course of the trial. On cross-examination, Applicant testified he had assisted his attorneys in the preparation of his defense to be used at trial, which was developed on the theory that the drugs found were not his, nor did he have any knowledge of them being in the house at the time of his arrest.

Counsel testified at the hearing as well, stating that the main defense theory developed was based on Applicant's adamant stance that the drugs did not belong to him, but rather his girlfriend and sister. Counsel went on to say, based on Applicant's statements, she did in fact make an in-chambers request that Judge Breeden charge the jury with the lesser included offenses of possession and mere presence, both of which he denied. Counsel went on to say that

based on Applicant's defense theory that the drugs were not his nor did he have knowledge of them, a jury charge on possession would have been inconsistent and likely ineffective. Counsel finished by articulating that due to the weight of the drugs recovered, a possession jury charge was unlikely to be given by the court regardless of the defense theory.

Based on a thorough review of the record, in conjunction with the testimony presented at the PCR hearing, I find Applicant has failed to carry his burden in proving counsel was ineffective in this regard. First, Applicant has failed to prove counsel's performance was unreasonable or otherwise deficient in this regard. Counsel plainly testified she did in fact request such a jury charge in-chambers, which was promptly denied by the trial judge. Additionally, a jury charge to possession would have been wholly inconsistent with the defense theory Applicant readily admits he participated in preparing for trial. Therefore, even assuming *arguendo*, counsel had not requested such a charge, her performance was not unreasonable under the circumstances. Further, Applicant has failed to prove he suffered prejudice as a result of the request to charge not being made in open-court and preserved in the trial record. I find Applicant's contention that he was prejudiced as the outcome at trial would have been different had the jury been charged with possession to be without merit. Under S.C. Code § 44-53-375(B), possession of one or more grams of cocaine base is prima facie evidence of possession with intent to distribute. According to counsel's testimony, there was over five and a half (5.6) grams of crack collected by police upon their search of Applicant's home. Therefore, if the jury had concluded Applicant was in possession of the crack, then the weight was such as to make him guilty of possession with intent to distribute and not simple possession. This weight disparity, along with Applicant's inconsistent defense theory presented at trial, convinces this Court that

such a jury charge would not have made a difference in the outcome at trial. I find Applicant has failed to prove both deficiency and resulting prejudice, and therefore this allegation is denied.

Failure to Object to Hearsay Testimony of Confidential Informant

Applicant second allegation of trial counsel's ineffectiveness stems from counsel's failure to object to what Applicant alleges is hearsay testimony regarding statements made by an undisclosed confidential informant. Specifically, Applicant alleged counsel failed to object to a statement made by Detective Lyn Shirer on re-cross examination at trial in which Shirer stated he knew the trailer on which he was executing a search warrant on was Applicant's because "the confidential informant had advised[him] [Applicant] stayed [at that trailer]". Applicant testified at the PCR that because the confidential informant was not at present at trial and therefore unable to be cross-examined, the statement was impermissible hearsay. Applicant contended counsel's failure to object to Shirer's non-responsive answer which was hearsay prejudiced his case as the statement portrayed Applicant as "having something to do with the drugs that was in the house" in front of the jury.

Counsel stated she did recall some testimony about the execution of the search warrant on Applicant's home, and stated a motion to suppress the drugs was made to the court on the basis that the search warrant was invalid as a result of the confidential informant's unreliability. Counsel said Judge Breeden ultimately ruled that the search warrant was valid and left the confidential informant's reliability to be determined by the jury. Counsel went on to testify Applicant's lead counsel, Kramer, had discussed with the judge the state's ability to mention to confidential informant during trial despite his/her absence, and ultimately determined the objections to those statements "weren't going anywhere". Based on that belief, they decided not to pose a hearsay objection to Shirer's recollection of the confidential informant's statement.

I find Applicant has failed to prove counsel was ineffective in this regard. Counsel readily admitted, and the transcript confirms, there was no objection made to the statements by Detective Shirer regarding the information received from the confidential informant. However, the decision not to object to such was an informed, strategic decision made by counsel after bringing the matter to the court's attention in pre-trial motions and being overruled. *See Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992)(*Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.*) Further, I find Applicant has failed to show prejudice resulting from this failure, such that had the objection been made and sustained, there is a reasonable likelihood that the outcome of the trial would have been different. The information obtained from the confidential informant regarding which trailer belonged to Applicant would only have been relevant in attempting to challenge the validity of the warrant and to suppress the evidence found as a result thereof. Such a motion was presented by counsel in a pre-trial motion and denied by the trial judge, leaving the issue as a credibility finding for the jury. Further, the hearsay statements from Detective Shirer were merely cumulative to the testimony presented by Applicant's girlfriend (Sylvia Wright) and sister (Sharon Sanders) at trial. Therefore, the information from the confidential informant recited by Detective Shirer on re-cross examination in no way prejudiced Applicant such that had it been kept out as hearsay, the result of the trial likely would have been different. Applicant has failed to prove both deficiency and resulting prejudice in this regard.

Missing Twelfth Juror

The final allegation set forth by Applicant in this application is that counsel was ineffective in failing to object or otherwise move for a mistrial based on the jury returning a verdict with which only eleven (11) jury members agreed during the polling process.

September 7, 2010, PCR Hearing

As testified to by Applicant at the PCR hearing and confirmed by the trial transcript, at the close of the case and after deliberations, the jury returned its verdict convicting Applicant of Possession with Intent to Distribute Cocaine Base and Possession with Intent to Distribute Cocaine Base Within Proximity of a School or Park, but acquitting Applicant of the two Marijuana charges. Upon the reading of the verdicts, counsel requested the jury be polled at which time the trial judge undertook polling of the jury. When the trial judge turned to poll Juror "Proveaux", the transcript reflects no such juror answered, where after Judge Breeden said "that was the person who didn't show". Directly thereafter, Judge Breeden concluded the polling process saying, "all of the jurors have been polled and all of them indicate it was their verdict and it is still their verdict". Applicant's counsel, the solicitor, the judge, nor any other party in the courtroom made any further mention of a "missing" juror according to the trial transcript, but the transcript clearly identifies only eleven (11) jurors responding to the polling questions of the trial judge. Applicant went on to testify at the PCR that, although he did not remember counting the jurors or recall "any other juror being missing", he mentioned the missing juror to counsel after the polling process, at which point counsel told Applicant he would file a direct appeal on that issue.

Co-Counsel Peggy Hinds, Esquire, testified at the September 2010 PCR hearing as to the alleged missing juror issue as well. Counsel stated she "absolutely [did] not" have anything in

her notes regarding a juror being absent on the final day of trial and stated she absolutely would not have let the alternate juror be dismissed had there been only eleven jurors entering deliberations. Counsel went on to say: "it would have been so huge for a juror to be missing, particularly after we let the alternate leave. I can't imagine. This would have stuck out in my mind." She continued, saying:

"I can't imagine that neither Sam [Kramer, lead counsel] nor I nor Judge Breedon nor even the solicitors [didn't bring the missing juror to the court's attention]...Surely it would have been discussed or there should have been something on the record. To my recollection, there was not a juror missing. I can't explain the transcript."

Counsel went on to testify that she and Kramer "certainly never would have agreed to a verdict of only 11 jurors, especially...with the exposure that [Applicant] was looking at" and reiterated "[she][didn't] believe [they] were missing a juror" during the course of the trial, deliberations or jury polling. Counsel finished by stating, "had a juror been missing, I think I would have noted it". A sworn affidavit was submitted to this Court and supplemented as part of the PCR record in this matter, in which lead counsel Sam Kramer, Esquire, concurred with the testimony presented by Peggy Hinds regarding the alleged missing juror. In the affidavit, Kramer states he believes twelve (12) jurors were present during the entirety of the trial and deliberations, and goes on to say he has no recollection of ever discussing a missing juror with Applicant either during jury polling or thereafter.

September 21, 2011 Re-Convened PCR Hearing

At the September 21, 2011, reconvened PCR hearing, this Court heard testimony of the gentleman serving as the jury foreman at Applicant's 2004 trial, Chris Furtick (hereinafter

“Furtick”), as well as the alleged missing juror, Willie Mae Prioleau (hereinafter “Prioleau”). This Court had the opportunity to examine both witnesses and closely pass upon their credibility and weigh their testimony accordingly.

Juror Chris Furtick

Furtick testified he did recall serving as the jury foreman on Applicant’s trial and that he was present each day during that trial. (Tr. p. 6, lns 10 – 17; p. 7, lns 8 - 9.)¹ Furtick went on to say he did recall entering jury deliberations after a multiday trial, but was unable to recall whether all twelve (12) members of the jury were present during the trial and/or deliberations. (Tr. p. 6, ln 21 – p. 7, ln 4.)

Juror Willie Mae Prioleau

Prioleau was also present and testified at the September 2011 PCR hearing as to her involvement in Applicant’s trial. Prioleau started by saying she did recall being a juror in a case before Judge Breeden in April of 2004, and it had been her first time ever serving on a jury. (Tr. p. 10, ln 22 – p. 11, ln 1.) She went on to say she remembered sitting in the jury box and being instructed by the judge to go into the jury room to start deliberations as well, at which time she did enter deliberations with the jury members. (Tr. p. 11, ln 20 – p 12, ln 1.) Prioleau testified she remembered talking about whether Applicant was guilty of the charges or not, and stated “part of them say he was guilty, and part of them say he wasn’t.” (Tr. p. 12, lns 8 – 21.) She went on to say that upon reaching their verdict, she thought she remembered entering the courtroom at which time the trial judge polled the jury on the verdict. (Tr. p. 13, lns 3 – 11; p. 14, lns 15 – 23.) On cross-examination, Prioleau recalled “when we was back in the room...I told then that I was not guilty...Some said he was guilty, and two said he wasn’t...I was one say I wasn’t guilty.” (Tr. p. 14, ln 25 – p. 15, ln3.)

¹ All transcript references herein represent cites from the September 21, 2011, hearing transcript.

Upon completing of cross-examination, this Court undertook an examination of the witness in order to clarify several vague or inconsistent areas in her testimony. During this colloquy, Prioleau stated she recalled coming to Orangeburg for her first jury duty ever, and remembered Judge Breeden as a "big...kind of jovial fellow." (Tr. p. 15, ln 20 – p. 16m ln 19.) She went on to say she remembered the jury selection process and remembered being picked to serve as a juror. (Tr. p. 19, lns 1 – 16.) Prioleau then stated she spoke with Judge Breeden after Applicant's trial finished to ask to be excused to take care of her granddaughter, at which time the judge told her she was free to leave. (Tr. p. 19, ln 17 – p. 20, ln 1; p. 14, lns 4 – 9.) Prioleau again remarked that she thought she was present for the entire trial, saying "like I say, he was guilty". (Tr. p. 20, lns 11 – 13.) Prioleau stated she remembered the jury deliberation process agreeing with the Court when it stated "the deliberations continue until they make a decision, everybody's agreed." (Tr. p. 24, lns 18 – 25.) When asked about the jury polling process, Prioleau stated she couldn't remember the entire process, but did remember entering the courtroom at which time she "did have to put up [her] hand and tell [the judge] not guilty." (Tr. p. 26, lns 1 – 22.) Prioleau repeated several times thereafter that she really didn't remember what happened after coming out of the jury room, but thought she may have told the judge "not guilty" when asked for her verdict. (Tr. p. 28, lns 4 – 19; p. 30, lns 2 – 15). Prioleau stated that during jury deliberations "a few more [jurors] said not guilty" along with her when casting their votes. (Tr. p. 28, ln 6).

Based on a thorough review of the transcript and the testimony presented at both PCR hearings, along with the supplemental documents made part of the record, I find Applicant has failed to sufficiently establish counsel was ineffective in failing to object to a verdict rendered by a less than a unanimous, twelve (12) member jury. First, I find Applicant has failed to establish

counsel's performance was deficient in failing to pose such an objection as the testimony before this Court reflects there was no missing juror as alleged by Applicant. The credible testimony of both trial attorneys for Applicant, coupled with the testimony of Willie Mae Prioleau, have firmly convinced this Court that any issue with the transcript regarding a missing juror is a mere scrivener's errors. The trial transcript in this matter does not provide a complete and accurate reflection of the actual number or nature of the responses given to Judge Breeden during jury polling. Prioleau, having never served on a jury before or after this trial, was able to recall all pertinent portions of the complex, multiday criminal proceeding, including jury deliberations and the polling process. Prioleau's vague remarks about being excused from the jury by Judge Breeden were developed further during this Court's examination, at which time Prioleau recalled she was excused only after Applicant's trial had concluded. Nothing in Prioleau's testimony tends to lead this Court to believe she was absent from any portion of the trial, deliberations, reading of the verdict or subsequent jury polling. Additionally, this Court is inclined to agree with counsel's credible testimony in that, had a juror been missing during any portion of the trial, one of the many actors involved in the matter (defense counsel, solicitor, bailiff, trial judge, court reporter, etc.) would have brought such an obvious defect to the court's attention, and would have some recollection to provide this Court with as well. (*"Absent evidence to the contrary, the regularity and legality of proceedings in general sessions court is presumed."* Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (S.C. 1995) *citing* Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (S.C. 1986).) While ambiguity in the transcript may provide some diminutive grounds from which one could begin to question this presumption, the testimony presented before this Court affirmatively verifies the legality and regularity of the proceedings against Applicant.

Additionally, during the jury charges Judge Breeden specifically stressed the importance of a twelve member jury rendering a unanimous verdict, stating:

"I remind you again that these verdicts have to be...the unanimous verdicts of all twelve jurors. [That] may sound redundant to you, the unanimous verdict of all twelve jurors. It's not...[W]hen I say the unanimous [verdict] of all twelve jurors that's what I mean."

Judge Breeden went on to excuse the alternate juror, saying she had served in the event that something happened to one of the twelve jurors but "thank goodness that ha[d] not happened." After one (1) hour of deliberations, the jury returned their verdicts. Undoubtedly the judge's underscored remarks about the importance of a unanimous, twelve juror decision were still fresh in the minds of the parties involved. It is simply impractical to believe those same parties then allowed an eleven member jury to return a less than unanimous verdict. Based on a thorough review of the record along with the testimony presented at the PCR hearing, this Court concludes there was no valid objection to be made by counsel regarding a missing juror as such was not the case, and therefore counsel's performance was not deficient in this regard.

At the close of the PCR, Applicant attempted to amend his allegations based on the testimony presented at the hearing to allege ineffectiveness on counsel's part in failing to object to a less than unanimous verdict rendered by the jury. Specifically, Applicant contended that through Prioleau's testimony at the hearing, it was shown the guilty verdict was less than unanimous as Prioleau testified she voted "not guilty". Respondent objected to the amendment of the application as untimely and improper to be brought forth for the first time at the close of all testimony. This Court agrees with Respondent's objection and finds this late amendment would improperly prejudice Respondent under Rule 15(b), S.C. Rules of Civil Procedure. Although a party may amend pleadings to conform to the evidence at any time under the Rule, the decision to allow lies in the sound discretion of the court and should not be allowed where such an

amendment would prejudice the opposing party in maintaining its action or defense. Here, Respondent would be improperly prejudiced by allowing such an amendment because a hearing was previously convened before this Court on the matter at which time key testimony was received from Applicant's trial counsel, Peggy Hinds. Counsel for Applicant and Respondent agreed not to subpoena Hinds to this later hearing to render additional testimony as the parties concurred she had exhausted her testimony on all relevant issues. Because of this agreement, Hinds was neither subpoenaed nor present at the September 2011 hearing, and Respondent was unable to rebut Applicant's amended allegation through the testimony of Hinds. Further, co-counsel, Sam Kramer, was unable to attend either hearing before this Court, but submitted an affidavit in lieu of live testimony. Kramer's affidavit affirmatively rebuts Applicant's "missing juror" allegation, but fails to address Kramer's recollections regarding the unanimity of the verdict as that was not a point of contention before this Court at the time the affidavit was executed. Therefore, to allow Applicant to amend his allegations without affording Respondent the opportunity to rebut such allegations would unfairly prejudice Respondent's defense. Accordingly, I find this amendment must be denied and dismissed as improperly made at this late juncture.

However, assuming *arguendo* that such an amendment was allowed, I also find Applicant failed to sufficiently carry his burden in proving the counsel was ineffective in failing to object to a less than unanimous verdict. Prioleau plainly testified this was her first and only time serving as a juror, and undoubtedly demonstrated through her testimony that she is wholly unfamiliar with the judicial process and functioning of the court system. This lack of understanding, coupled with the passage of considerable time, made Prioleau's testimony vague and convoluted at times. Prioleau stated several times throughout the hearing that she had said "not guilty" when

asked to cast her vote as to Applicant's guilt. These comments, on their face could tend to lead one to believe the verdict was less than unanimous when considered in a vacuum; however, it is critical to the analysis to recognize that Applicant was in fact acquitted by the jury of two of the four charges presented at trial. Prioleau's testimony referencing "a few other jurors" who also voted "not guilty" leads this Court to believe Prioleau's comments about casting a "not guilty" vote are in reference to one of the two charges upon which Applicant was ultimately found not guilty. In fact, Prioleau also stated at one point that she voted Applicant was guilty, only furthering this Court's findings. (Tr. p. 20, lns 11 – 13). Applicant went on to openly admit several times that she did not really remember what happened when the jury entered the courtroom to present the verdicts, and was unable to conclusively testify as to what her response during jury polling was. (Tr. p. 28, lns 4 – 19). It is important to note there is nothing in the transcript to suggest Prioleau told the trial judge she believed Applicant was not guilty during jury polling as Prioleau had equivocally testified. (Tr. p. 26, lns 1 – 22; p. 28, lns 4 – 19; p. 30, lns 2 – 15; *compare with* Tr. p. 20, lns 11 – 13 (*"like I say, he was guilty."*)). Further, Prioleau's statement was that she raised her hand when asked for her verdict at which time she told the judge "not guilty". According to the trial transcript, the responses given by the jurors during polling were in the form of either "yes" or "no"; Prioleau's testimony suggesting that she responded "not guilty" when asked by the judge during polling is yet another indicator of the clouded nature of her recollections. Further, I find it improbable that no actor involved in the matter spoke up when Prioleau raised her hand and gave an answer of "not guilty" rather than "yes", a response which would be easily distinguishable from the eleven other jurors' responses. In sum, Prioleau's unfamiliarity with the judicial process and fading memory of the trial have limited her ability to testify to the exact details of her voting and responses to jury polling, and

have firmly convinced this Court that the verdicts reached by the jury were in fact unanimous. Applicant has failed to overcome the presumption of regularity in the proceeding based on the testimony provided at the hearing, and has further failed to prove counsel was ineffective in failing to pose an objection to the verdict as there was no valid objection to be made.

As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise the remaining allegations set forth in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the

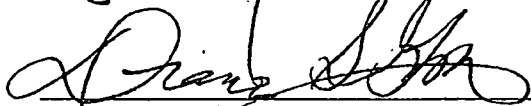
appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this

8 day of March, 2012



Diane S. Goodstein
Presiding Judge
First Judicial Circuit



, South Carolina.

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

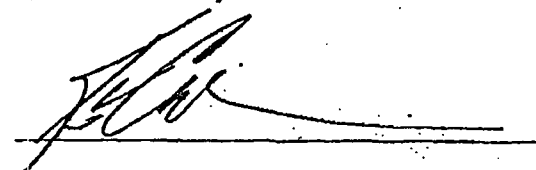
INDICTMENT
2003GS38-2371

At a Court of General Sessions, convened on December 08, 2003 the Grand
Jurors of Orangeburg County present upon their oath:

POSSESSION WITH INTENT TO DISTRIBUTE CRACK COCAINE

That Vondell Sanders, did in Orangeburg County, on or about October 17, 2003,
knowingly and intentionally possess with intent to distribute a quantity of Crack Cocaine,
a Schedule II controlled substance and as a result violated Section 44-53-375(b)(1),
Code of Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such
case made and provided.


Kent Collins SOLICITOR

701

WITNESSES

554

DETECTIVE LIN SHIRER

Arresting Agency:
Orangeburg Co. Sheriff Dept.

ARREST WARRANT NUMBER

G633801

Arrested: Oct 19, 2003

ACTION OF GRAND JURY

[Signature]
Foreperson of Grand Jury
Date: December 11, 2003

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. G6338-2371

The State of South Carolina

County of

ORANGEBURG

COURT OF GENERAL SESSIONS

December 08, 2003 TERM

THE STATE
vs.

Vondell Sanders

Indictment for

POSSESSION WITH INTENT TO
DISTRIBUTE CRACK COCAINE

SC Code: 44-53-375(B)(1)
CDR Code: 0112
Class: FEL-D

After being fully advised as to my legal rights,
hereby waive presentment to the Grand Jury.

Defendant

I
hereby appear in my own proper person and
plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

ATTEST: TRUE COPY

[Signature]
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

03 DEC 11 PM 4:28
INNOVATION
773214 71 VOLT
COURT FOR ALCOHOL

03 DEC 11 PM 4:28

ATTEST: TRUE COPY

[Signature]
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

WITNESSES

DETECTIVE LIN SHIRER

Arresting Agency:
Orangeburg Co. Sheriff Dept.

ARREST WARRANT NUMBER

G633802

Arrested: Oct 19, 2003

ACTION OF GRAND JURY

For person of Grand Jury
Date: December 11, 2003

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2003GS30-2012

The State of South Carolina

County of

ORANGEBURG

COURT OF GENERAL SESSIONS

December 08, 2003 TERM

THE STATE
vs.

Vondell Sanders

Indictment for

PWID CRACK COCAINE WITHIN
PROXIMITY OF SCHOOL OR PARK

SC Code: 44-53-0445
CDR Code: 0108
Class: FEL-EXM

hereby waive presentment to the Grand Jury.

Defendant

hereby appear in my own proper person and
plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

ATTEST: TRUE COPY

Lisa W. Magli
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

553

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Orangeburg
STATE VS.
Vandell Sanders
CA: _____
Race: M Sex: M Age: _____
DOB: _____ SS#: _____
Address: _____
City, State, Zip _____
_____ SID# _____

INDICTMENT/CASE#: 2003 -GS- 34 - 2372
AW#: 91033802
Date of Offense: Oct 17, 2003
S.C. Code §: 44-53-445(A)
CDR Code #: 0 1 1 0 1 8
☐ CASE RESTORED
SENTENCE
☐ PLEA ☒ TRIAL

disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
to: POWID CRACK Cocaine w/in close prox (10-15)
violation of § 44-53-445(A) of the S.C. Code of Laws, bearing CDR Code # 0 1 1 0 1 8
☐ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
TEST: _____

Solicitor _____ Defendant _____ Attorney for Defendant _____

HEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____ provided that upon the service of _____ days/months/years and/or payment
plus costs and assessments as applicable, the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation,
which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
Department of Corrections.

SPECIAL CONDITIONS:

RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: \$ _____ plus 20% fee: \$ _____
Payment Terms: _____
Set by SCDPPPS _____

PTUP _____ days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning _____
Substance Abuse Counseling _____
Random Drug/Alcohol Testing _____
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____
\$ _____ paid to Public Defender Fund
Other: _____

Recipient: _____
Fine: \$ _____
4-1-206 (Assessments 107.5%) \$ _____
4-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00
4-1-211(A)(2) (DUI Surcharge) \$100 \$ 100.00
6-5-2995 (DUI Assessment) \$12 \$ _____
§5.13 (Public Def/Prob) \$500 \$ _____
3.3, 1B TP (Law Enforce. Funding) \$25 \$ 55.00
3.7, 1B TP (Drug Court Surcharge) \$100 \$ _____
0-21-114 (BUI Breath Test Fee) \$50 \$ _____
6-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____
to County (if paid in installments) \$ 10.75
TOTAL \$ 231.75

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

Clerk of Court Deputy Clerk _____
Court Reporter: Herry Dot Walker
ATTEST: True Oose
Judge Code: _____
Sentence Date: 11-22-03
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

INDICTMENT
2003GS38-2372

At a Court of General Sessions, convened on December 08, 2003 the Grand Jurors of Orangeburg County present upon their oath:

PWID CRACK COCAINE WITHIN PROXIMITY OF SCHOOL OR PARK

That Vondell Sanders, did in Orangeburg County, on or about October 17, 2003, knowingly and intentionally possess with intent to distribute a quantity of Crack Cocaine, a Schedule II controlled substance, within a one-half mile radius of the grounds of Rivelon Elementary School, and as a result violated Section 44-53-445, Code of Laws of South Carolina, 1976, as amended.

03 DEC 11 PM 3:45
FILED FOR CLERK
LISA W. MIZELL
CLERK OF COURT
ORANGEBURG COUNTY

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


Kept Collins SOLICITOR

WITNESSES

DETECTIVE LIN SHIRER

Arresting Agency:
Orangeburg Co. Sheriff Dept.

ARREST WARRANT NUMBER

G633799
Arrested: Oct 19, 2003

ACTION OF GRAND JURY

[Signature]
Foreperson of Grand Jury
Date: December 11, 2003

VERDICT

Foreperson of Petit Jury

DOCKET NO. 2003GS38-2369

The State of South Carolina

County of.

ORANGEBURG

COURT OF GENERAL SESSIONS

December 08, 2003 TERM

THE STATE
vs.

Vondell Sanders

Indictment for

POSSESSION WITH INTENT TO
DISTRIBUTE SCHEDULE I, II, III-DRUG

SC Code: 44-53-370
CDR Code: 0186
Class: FEL-F

After being fully advised as to my legal rights, I
hereby waive presentment to the Grand Jury.

Defendant

I
hereby appear in my own proper person and
plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

WITNESSES

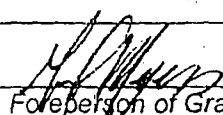
DETECTIVE LI N SHIRER

Arresting Agency:
Orangeburg Co. Sheriff Dept.

ARREST WARRANT NUMBER

G633800
Arrested: Oct 19, 2003

ACTION OF GRAND JURY


Foreperson of Grand Jury
Date: December 11, 2003

VERDICT

206 Foreperson of Petit Jury
Date:

DOCKET NO. 2003GS38-2370

The State of South Carolina

County of

ORANGEBURG

COURT OF GENERAL SESSIONS

December 08, 2003 TERM

THE STATE
vs.

Vondell Sanders

Indictment for

PWID MARIJUANA WITHIN PROXIMITY
OF A SCHOOL OR PARK

SC Code: 44-53-445
CDR Code: 0107
Class: FEL-F

After being fully advised as to my legal rights, I
hereby waive presentment to the Grand Jury.

Defendant

I
hereby appear in my own proper person and
plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.