

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Williamsburg County

Steven H. John, Circuit Court Judge

RECEIVED

JUL 22 2016

SC SUPREME COURT

DAVID VICE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002398

APPENDIX

KATHRINE H. HUDGINS
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JULIE COLEMAN
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
TRIAL TRANSCRIPT (dated November 5-6, 2012).....	1
INDICTMENTS AND SENTENCING SHEETS.....	267
POST-CONVICTION RELIEF APPLICATION.....	272
RETURN	280
POST-CONVICTION RELIEF HEARING TRANSCRIPT (dated July 15, 2015).....	285
PLANTIFF'S EXHIBIT NO. 1 (Discovery Motion).....	348
PLANTIFF'S EXHIBIT NO. 2 (Affidavit).....	349
ORDER OF DISMISSAL	351

STATE OF SOUTH CAROLINA	)	COURT OF GENERAL SESSIONS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF WILLIAMSBURG	)	CASE NO. 2012-GS-45-50
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	TRANSCRIPT OF RECORD
	)	
DAVID R. VICE,	)	
	)	
Defendant.	)	

November 5-6, 2012
Kingstree, South Carolina

B E F O R E:

THE HONORABLE CLIFTON NEWMAN, Judge; and a jury

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

KIMBERLY BARR, Solicitor
Attorney for the Plaintiff

MATTHEW SWILLEY, Esquire
Attorney for the Defendant

KRYSTAL J. SMITH
Court Reporter

1	<u>I N D E X</u>	
2	<u>WITNESS/DESCRIPTION</u>	<u>PAGE NUMBER</u>
3	Jury Voir Dire.....	8
4	Jury Selection.....	10
5	Batson Motions.....	18
6	Ruling on Batson Motions.....	27
7	Motion to Suppress.....	32
8	Deputy Loy Hayes	
9	Direct Examination by Ms. Barr.....	33
10	Direct Examination by the Court.....	38
11	Cross Examination by Mr. Swilley.....	38
12	Ruling on Motion to Suppress.....	49
13	Motion to Sequester and Ruling.....	53
14	Jury Sworn.....	57
15	Opening Statements	
16	Ms. Barr.....	59
17	Mr. Swilley.....	63
18	Lt. Sherrod Timmons	
19	Direct Examination by Ms. Barr.....	66
20	Cross Examination by Mr. Swilley.....	77
21	Deputy Loy Hayes	
22	Direct Examination by Ms. Barr.....	78
23	Motion for Mistrial and Ruling.....	80
24	Renewed Motion for Mistrial.....	87
25	Continued Direct Examination by Ms. Barr.....	87

	WITNESS/DESCRIPTION	PAGE NUMBER
1		
2	Cross Examination by Mr. Swilley.....	107
3	Redirect Examination by Ms. Barr.....	113
4	Lt. Jeffrey Scott	
5	Direct Examination by Ms. Barr.....	117
6	Cross Examination by Mr. Swilley.....	137
7	SLED Agent Lynn Black	
8	Direct Examination by Ms. Barr.....	138
9	Cross Examination by Mr. Swilley.....	150
10	Redirect Examination by Ms. Barr.....	152
11	Sgt. Robert Shearer	
12	Direct Examination by Ms. Barr.....	153
13	Cross Examination by Mr. Swilley.....	173
14	State Rests.....	176
15	Questioning of Jury Foreman.....	176
16	Motion for Directed Verdict.....	182
17	Ruling on Directed Verdict.....	183
18	Questioning of Defendant re: Testifying.....	184
19	Defense Rests.....	187
20	Charge Conference.....	187
21	Alternate Juror Seated.....	202
22	Closing Arguments	
23	Ms. Barr.....	203
24	Mr. Swilley.....	214
25	Charge on the Law.....	221

1	WITNESS/DESCRIPTION	PAGE NUMBER
2	Jury Questions.....	235
3	Verdict.....	239
4	Jury Polled.....	240
5	Post-trial Motions and Ruling.....	242
6	Sentencing Hearing.....	247
7	Sentence of the Court.....	264
8	Court Reporter Certification.....	266
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1	<u>E X H I B I T S (STATE)</u>			
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
3	1	(none)		
4	2	(none)		
5	3	DVD of Dash Cam Video	95	96
6		(NOT TRANSCRIBED)		
7	4	(none)		
8	5	Green and Yellow Gym Bag	69	94
9	5A	Sealed Bag of Cocaine	71	159
10	5B	Six Bags of Marijuana	72	161
11	5C	Box of Glad Plastic Bags	74	163
12	5D	Red Scale	100	101
13	5E	Plastic Jewelry Bags	102	103
14	5F	Dollar Bill	126	171
15	5G	Plastic Bags of Plant Material	128	
16	5H	Red Plastic Bag w/Cell Phone	163	163
17	6	Color Photo	172	172

18 E X H I B I T S (COURT)

19 1 Driving Record of Defendant 35

20

21

22

23

24

25

1 NOVEMBER 5, 2012

2 (WHEREAS this matter was scheduled for a trial, the
3 defendant appeared along with his counsel of record. The
4 proceedings began at 11:31 a.m.)

5 THE COURT: Madam Solicitor?

6 MS. BARR: Your Honor, good morning.

7 THE COURT: Good morning.

8 MS. BARR: May it please the Court. At this time, the
9 State calls Indictment Number 2012-GS-45-50. It's the State
10 versus David R. Vice. Your Honor, this is an indictment for
11 trafficking in more than 28 grams of cocaine, possession with
12 intent to distribute marijuana, and failure to stop for a blue
13 light and siren. Mr. Vice is represented by attorney Matthew
14 Swilley and the State is ready for trial.

15 THE COURT: All right, ladies and gentlemen, the State
16 has called to trial the case of the State versus David Romonte
17 Vice. This case comes into court -- this case comes into
18 court as a result of an indictment returned by the Grand Jury
19 of Williamsburg County charging Mr. Vice with the offenses of
20 -- is the trial on the charges in the -- all charges in the
21 indictment?

22 MS. BARR: That's correct, Your Honor.

23 THE COURT: That being the indictment is: count one,
24 failure to stop for a blue light; count two, possession with
25 intent to distribute marijuana; and count three, trafficking

1 more than 28 grams but less than 100 grams of cocaine, on
2 about December 19th, 2011.

3 Mr. Vice has pled not guilty to these charges. He is
4 presumed to be not guilty of these charges. He cannot be
5 found guilty of these charges unless the State presents
6 evidence which convinces a jury of his guilt beyond a
7 reasonable doubt and that is the purpose of a trial to
8 determine whether the State can meet that burden of proof.

9 The State is represented through the Third Circuit
10 Solicitor's Office and Assistant Solicitor Kimberly Barr. Ms.
11 Barr, if you would, introduce yourself and anyone else you
12 would like to introduce.

13 MS. BARR: Thank you, Your Honor. Good morning, ladies
14 and gentlemen. My name is Kimberly Barr. As the judge
15 indicated, I'm an assistant solicitor here in Williamsburg
16 County. I also practice law with the Law Offices of Ronnie
17 Saab. Of course, I work for Mr. Saab. There is another
18 lawyer at our office; her name is Helen McFadden. Seated at
19 the table with me is Investigator Deborah Collins with the
20 Sheriff's Office and also our office manager, Ms. Linda
21 Williams.

22 THE COURT: All right. Ladies and gentlemen, the
23 defendant is in court as well, represented by counsel, Mr.
24 Swilley. If you'll introduce yourself, as well as anyone else
25 you would like to and Mr. Vice as well.

1 MR. SWILLEY: Thank you, Your Honor. My name is Matt
2 Swilley. I practice law in Myrtle Beach with Bobby Frederick
3 with the Frederick Law Office. This here is my client, David
4 Vice. He is from Kingstree.

5 THE COURT: All right. If anyone on the jury panel is a
6 friend, a relative or associate of Ms. Barr, Mr. Swilley, Mr.
7 Vice, or if you know any of them, please stand.

8 (Whereupon, no one stands.)

9 THE COURT: If you -- this incident or these incidents
10 alleged in the indictment are alleged to have occurred on or
11 about December 19th, 2011, in what area of the county, Ms.
12 Barr?

13 MS. BARR: In the Holywoods community, Your Honor.

14 THE COURT: In the Holywoods area of Williamsburg County.
15 If any member of the jury panel is -- has heard anything about
16 this case or think you know anything about this case, if so,
17 please stand.

18 (Whereupon, no one stands.)

19 THE COURT: The following people may testify in this case
20 and if you're here, we'd like for you to stand: Deputy Loy
21 Hayes of the Sheriff's Office standing back there, Corporal
22 Johnny Jenkins of the Sheriff's Office, Sergeant Robert
23 Shearer of the Sheriff's Office, Sheriff Michael Johnson,
24 former Lieutenant Jeffrey Scott from the Sheriff's Office,
25 Agent Lynn Black of SLED, Deputy Chief Dudley Musier of the

1 Sheriff's Office, Investigator Shannon Coker of the Sheriff's
2 Office, and Lieutenant Sherrod Timmons of the Sheriff's
3 Office. If you know any of them or if you're a friend, a
4 relative, or associate of any of them, please stand.

5 (Whereupon, members of the jury panel stand.)

6 THE COURT: Yes, sir?

7 POTENTIAL JUROR: I went to school with Lieutenant Coker,
8 but I don't think that will affect me.

9 THE COURT: All right. What is your name, please?

10 POTENTIAL JUROR: Bart Grayson.

11 THE COURT: Mr. Grayson, thank you, Mr. Grayson. Yes,
12 sir, you are?

13 POTENTIAL JUROR: O'Neal Matthews.

14 THE COURT: Mr. Matthews.

15 POTENTIAL JUROR: I know the sheriff and I play ball with
16 him, softball with him.

17 THE COURT: You play ball with Sheriff Michael Johnson
18 and you know him. Would that affect your ability to be a fair
19 and impartial juror?

20 POTENTIAL JUROR: No.

21 THE COURT: All right, thank you. Anyone else? Yes,
22 ma'am?

23 POTENTIAL JUROR: Shannon Coker married my cousin.

24 THE COURT: All right and your name is?

25 POTENTIAL JUROR: Amanda Miller.

1 THE COURT: Ms. Amanda Miller and would that fact affect
2 your ability to be a fair and impartial juror?

3 POTENTIAL JUROR: No, sir.

4 THE COURT: All right, thank you. Others?

5 (Whereupon, no one responds.)

6 THE COURT: If you know of any reason why you cannot give
7 the State and the defendant a fair and impartial trial, if you
8 know of any reason whatsoever why you should not be selected
9 to be a juror on this case, please stand. Please let me know
10 at this time.

11 (Whereupon, no one stands.)

12 THE COURT: No one is standing. Any additional questions
13 that the State or the defense would like for me to ask?

14 MS. BARR: None on behalf of the State, Your Honor.

15 MR. SWILLEY: Not from the defense, Your Honor.

16 THE COURT: All right, ladies and gentlemen, the -- give
17 the clerk your attention and we will proceed with the jury
18 selection and they can stand in place, Madame Clerk.

19 THE CLERK: Thank you. Members of the petit jury, as I
20 call your name and your number, will you please stand where
21 you are and await further instructions? Juror Number 8,
22 Janice Barr.

23 (Whereupon, a black female stands.)

24 MS. BARR: Please present the juror.

25 MR. SWILLEY: Please swear Ms. Barr.

1 THE COURT: Please come forward and have a seat in the
2 petit jury box. Please come forward. Juror Number 150,
3 Christopher Ray.

4 (Whereupon, a white male stands.)

5 MS. BARR: Please present the juror.

6 MR. SWILLEY: Please excuse Mr. Ray from the trial of
7 this case.

8 THE CLERK: You are excused. You may remain where you
9 are. Juror Number 92, Sherhonda Julius.

10 (Whereupon, a black female stands.)

11 MS. BARR: Please present the juror.

12 MR. SWILLEY: Please swear Ms. Julius.

13 THE CLERK: Please come forward, Ms. Julius, and have a
14 seat in the petit jury box. Juror Number 37, David Crews.

15 (Whereupon, a white male stands.)

16 MS. BARR: Please present the juror.

17 MR. SWILLEY: Please excuse Mr. Crews from the trial of
18 this case.

19 THE CLERK: Juror Number 97, William Lewis.

20 (Whereupon, a white male stands.)

21 MS. BARR: Please present the juror.

22 MR. SWILLEY: Please excuse Mr. Lewis from the trial of
23 this case.

24 THE CLERK: Juror Number -- excuse me -- 153, Scott
25 Richardson.

1 (Whereupon, a white male stands.)

2 MS. BARR: Please present the juror.

3 MR. SWILLEY: Please swear Mr. Richardson.

4 THE CLERK: Please come forward and have a seat in the
5 petit jury box. Juror Number 72, Bartley Grayson.

6 (Whereupon, a white male stands.)

7 MS. BARR: Please present the juror.

8 MR. SWILLEY: Please excuse Mr. Grayson from the trial of
9 this case.

10 THE CLERK: You're excused. Juror Number 16, Ashley
11 Brown.

12 (Whereupon, a black female stands.)

13 MS. BARR: Please excuse Ms. Brown from the trial of just
14 this case.

15 THE CLERK: Okay. Juror Number 102, Gerald Matthews.

16 (Whereupon, a white male stands.)

17 MS. BARR: Please present the juror.

18 MR. SWILLEY: Please excuse Mr. Matthews from the trial
19 of this case.

20 THE CLERK: Juror Number 144, Cherry Porchea.

21 (Whereupon, a black female stands.)

22 MS. BARR: Please present the juror.

23 MR. SWILLEY: Please swear Ms. Porchea.

24 THE CLERK: Please come forward and have a seat in the
25 petit jury box. Juror Number 98, Joe Linder.

1 (Whereupon, a black male stands.)

2 MS. BARR: Please present the juror.

3 MR. SWILLEY: Please swear Mr. Linder.

4 THE CLERK: Please come forward and have a seat in the
5 petit jury box. Number 197, Simon Wilson.

6 (Whereupon, a black male stands.)

7 MS. BARR: Please excuse Mr. Wilson from the trial of
8 just this case.

9 THE CLERK: Juror Number 117, Gene McKnight.

10 (Whereupon, a black male stands.)

11 MS. BARR: Please present the juror.

12 MR. SWILLEY: I have no further strikes.

13 THE CLERK: You had five.

14 THE COURT: Strikes are five and five.

15 THE CLERK: Please -- please come forward, Mr. McKnight,
16 and have a seat in the petit jury box. Number 104, O'Neal
17 Matthews.

18 (Whereupon, a black male stands.)

19 MS. BARR: Please present the juror.

20 THE CLERK: Please come forward and have a seat in the
21 petit ---

22 THE COURT: You need to ask the defense ---

23 THE CLERK: Oh, I'm sorry.

24 THE COURT: --- whether there's any challenge for cause.

25 THE CLERK: Okay.

1 MR. SWILLEY: No, ma'am, no challenge for cause.

2 THE CLERK: Please come forward and have a seat in the
3 petit jury box. Juror Number 63, Tynisha Gamble.

4 (Whereupon, a black female stands.)

5 MS. BARR: Please present the juror.

6 THE CLERK: Defense, any challenges for cause?

7 MR. SWILLEY: No, ma'am.

8 THE CLERK: Please come forward and have a seat in the
9 petit jury box. Number 23, Mary Burgess.

10 (Whereupon, a black female stands.)

11 MS. BARR: Please excuse the juror for the trial of just
12 this case.

13 THE CLERK: Okay. Juror Number 51, Frankie Fisher.

14 (Whereupon, a white male stands.)

15 MS. BARR: Please present the juror.

16 THE CLERK: What says defense?

17 MR. SWILLEY: No cause.

18 THE CLERK: Please come forward and have a seat in the
19 petit jury box. Juror Number 107, Roderick McBride.

20 (Whereupon, a black male stands.)

21 MS. BARR: Please excuse this juror from the trial of
22 just this case.

23 THE CLERK: Juror Number 186, Clementine Weaver.

24 (Whereupon, a black female stands.)

25 MS. BARR: I'm sorry, ma'am. What was the juror's

1 number?

2 THE CLERK: 186.

3 MS. BARR: Thank you. Please present the juror.

4 MR. SWILLEY: No cause.

5 THE CLERK: Please come forward and have a seat in the
6 petit jury box. Juror Number 115, Carlia McFadden.

7 (Whereupon, a black female stands.)

8 MS. BARR: Please present the juror.

9 THE CLERK: Please come forward and have a seat in the
10 petit jury box.

11 MR. SWILLEY: No -- no cause, Madame Clerk.

12 THE CLERK: Oh, I'm sorry. Number 183, Joseph Varner.

13 (Whereupon, a black male stands.)

14 MS. BARR: Please excuse the juror from the trial of just
15 this case.

16 THE CLERK: Juror Number 194, Sandy Williams

17 (Whereupon, a black female stands.)

18 MS. BARR: Present Ms. Williams.

19 MR. SWILLEY: No cause.

20 THE CLERK: Please come forward and have a seat in the
21 petit jury box.

22 THE COURT: We'll select two alternates.

23 THE CLERK: 121, Amanda Miller.

24 (Whereupon, a white female stands.)

25 MS. BARR: Please present Ms. Miller.

1 MR. SWILLEY: Please excuse Ms. Miller from the trial of
2 this case.

3 THE CLERK: Juror Number 188, Robinette Whitaker.
4 (Whereupon, a black female stands.)

5 MS. BARR: Please present the juror.

6 MR. SWILLEY: Please swear Ms. Whitaker.

7 THE CLERK: Please come forward. Juror Number 65,
8 Christopher George.

9 (Whereupon, a black male stands.)

10 MS. BARR: Please excuse the juror from the trial of just
11 this case.

12 THE CLERK: Juror Number 81, Dantrell Harrison.
13 (Whereupon, a black male stands.)

14 MS. BARR: Please present Mr. Harrison.

15 MR. SWILLEY: Please swear Mr. Harrison.

16 THE CLERK: Please come forward and have a seat in the
17 petit jury box.

18 THE COURT: Are there any matters of law regarding the
19 jury selection?

20 MS. BARR: Yes, sir. Judge, there's one matter of law I
21 have to state.

22 THE COURT: All right. Ladies and gentlemen, we'll have
23 you all go into this jury room and while you're there please
24 do not discuss this case in any way whatsoever. Please go in
25 this jury room right here. Please do not discuss this case in

1 any way whatsoever.

2 (Whereupon, the jury exits the courtroom at 11:51 a.m.)

3 THE COURT: Are there other people in the auditorium
4 there?

5 THE CLERK: There are a few defendants in there.

6 THE COURT: Are there people in there?

7 THE CLERK: No jurors.

8 THE COURT: I understand that.

9 THE CLERK: The defendants.

10 THE COURT: I said people. Are there people in there?

11 THE CLERK: There are a few. In the auditorium? Janna
12 Mae?

13 THE BAILIFF: I didn't hear you.

14 THE CLERK: Check the auditorium.

15 THE COURT: We're going to have the folks who are in the
16 auditorium to -- to come out of the auditorium and go
17 someplace else, maybe take a 15 minute break or so. We're
18 going to have this jury -- the remaining jury panel go into
19 the auditorium. So have the folks in the auditorium to leave
20 for about 15 minutes or so.

21 THE BAILIFF: All right.

22 THE COURT: All right, ladies and gentlemen, those of you
23 who were not selected in -- in the jury, if you all would, go
24 back into the auditorium there for a little bit and we'll have
25 you come back as soon as we can. It won't be that long.

1 Please do not discuss this matter while you are in there.

2 (Whereupon, the jury panel exits the courtroom at 11:53
3 a.m.)

4 THE COURT: Ms. Barr?

5 MS. BARR: Your Honor, we would move at this time
6 pursuant to *Batson v. Kentucky* and we would ask that the
7 defense provide race and gender neutral reasons for exercising
8 the strikes that the defense exercised. My notes reflect that
9 the defense struck five jurors, all Caucasian jurors: Juror
10 Number 150, white male, Juror Number 37, white male, Juror
11 Number 97, white male, Juror Number 72, a white male, Juror
12 Number 102, a white male, and the alternate juror 121, a white
13 female.

14 Your Honor, the State does not challenge Juror Number 121
15 and the State does not challenge Juror Number 72, as both of
16 them indicated some affiliation or kinship with one of the
17 witnesses in the case. However, we would assert to the Court
18 and ask that the record reflect the defendant is a black male,
19 but all of the jurors struck by the defense are white males
20 and, Judge, we believe that those categories of jurors are a
21 racially -- racially cognitive group of people and we believe
22 that the defendant should be called upon to explain why they
23 struck those particular jurors.

24 THE COURT: All right. The State has asserted and the
25 record establishes that the members of a racially gender --

1 gender cognitive class of jurors have been struck by the
2 defense and the burden therefore is on the defense to state a
3 race neutral reason for making those strikes and -- and, Mr.
4 Swilley, you have the floor.

5 MR. SWILLEY: Thank you, Your Honor, and for the record I
6 also make the same motion against the State, but I -- I guess
7 we can get to that at the appropriate time.

8 Your Honor, Christopher J. Ray was Juror Number 150. I
9 struck him due to the fact that he worked at Nucor Steel.
10 From my experience, people that I know from there tend to be
11 more conservative, more of a law and order type. Your Honor,
12 also his wife is a nurse and I think that might have affected
13 -- that might affect his judgment adjudicating a case in which
14 there were drugs involved. His wife I think would have
15 significant time spent treating people that were drug addicts.

16 I believe the State also cited Juror Crews. That is
17 David Crews. That is Number 37. Your Honor, he -- his
18 occupation -- he works at International Paper as a foreman. I
19 felt that though in his employment as a foreman he would have
20 experience in dealing with people under him that may fail drug
21 tests, may be using drugs when they come in, and his -- he
22 would have some sort of prejudice against a case in which
23 narcotics are alleged to be involved as well.

24 The third juror that the State noticed was Mr. Lewis, a
25 William D. Lewis. He is a teacher in Hemingway. Your Honor,

1 as a -- as a teacher, I think it -- I inferred that Mr. Lewis
2 had a love for young people. Drug addiction and drug sales is
3 considered to be a plague amongst the youth in our state and I
4 thought that he would not make a good juror and would have a
5 hard time being fair and impartial against someone who is
6 accused of trafficking narcotics.

7 I think the fourth and final juror that the State noticed
8 was a Mr. Matthews. I believe that is Juror Number 102,
9 Gerald W. Matthews. Your Honor, he did note that he was
10 retired. This was probably one of the more older jurors in
11 the panel. I noticed that his demeanor -- he looked very
12 stern and stoic and I don't think that he -- he didn't look to
13 me like he wanted to be here. It didn't look like he was
14 going to give our side a fair shake and that's why I decided
15 to strike him.

16 THE COURT: Ms. Barr?

17 MS. BARR: I beg the Court's indulgence.

18 (Whereupon, there is a brief pause in the proceedings.)

19 MS. BARR: Your Honor, we would assert to the Court that
20 those reasons advanced by counsel for striking those
21 particular jurors are merely protectoral.

22 Judge, we would submit that Juror Number 8, Janice Barr,
23 she's a black female and she works as a medical office
24 assistant at Black River Healthcare and, Judge, we would
25 simply assert that if there was a concern about someone being

1 in the health field and that having some concern as to whether
2 or not they would be a fair juror, then they could have
3 exercised a strike as it relates to Mrs. Barr, who was
4 actually the first juror seated, if my -- if my notes are
5 correct.

6 And, Judge, whenever I hear the words that they had a
7 certain look about them or they appeared to be stern, I
8 contrast that in relation to all of the strikes that were
9 exercised and every single one of them was exercised against a
10 white individual. The strikes that was exercised by the
11 defense on the jury, the actually seated jurors, were all
12 white males and, Judge, I think if you look at it in total and
13 in context that we would just simply say that those strikes
14 were -- were in violation of *Batson v. Kentucky* and we'd ask
15 that the Court excuse that juror and have us to reseal the
16 jury.

17 Judge, I think there was one more. Your Honor, there was
18 also a strike that the defense exercised indicating that they
19 -- he was concerned that one of the jurors was a teacher.
20 Judge, I would submit to the Court again that the reason
21 advanced was protectoral. When you look at Juror Number 188,
22 she was the first alternate juror seated. Again, an African
23 American female and she's an instructor at the elementary
24 school.

25 So, Judge, when you look in total as to all of the jurors

1 who were striked [verbatim] and the reasons advanced as far as
2 their employment, but you had similarly situated jurors of the
3 same race as the defendant. We would just simply submit that
4 this was a violation of *Batson*.

5 THE COURT: Yes, sir, Mr. Swilley?

6 MR. SWILLEY: Your Honor, I would just note that Ms.
7 Barr, the first juror seated, as well as Robinette Whitaker,
8 the first alternate, those are both administrative assistants.
9 I don't think that they would have -- I don't think that Ms.
10 Barr had a lot of interaction with patients based upon her job
11 description, Your Honor, as well as Ms. Whitaker. It seemed
12 that she is an instructional assistant and I don't think
13 that's indicative of any kind of interaction with the children
14 based upon what I heard.

15 Your Honor, the burden is upon the State to prove that
16 those reasons are merely protectoral. I don't -- I don't
17 think they've met that burden.

18 THE COURT: Of course, what you think doesn't matter, but

19 ---

20 MR. SWILLEY: I understand, Your Honor.

21 THE COURT: --- what I think is what controls it, but go
22 ahead. Aside from that, any -- any other argument?

23 MR. SWILLEY: No, sir.

24 THE COURT: Any response, Ms. Barr?

25 MS. BARR: No further response on the alternate, Judge.

1 THE COURT: Jury selection is one of the more difficult
2 -- difficult tasks the judge has in evaluating whether jurors
3 are being discriminated against and *Batson* violated or whether
4 or not the defendant, whoever the person doing the striking,
5 may satisfy the race neutral criteria.

6 In this circuit, we've had two cases reversed within the
7 past few years where the judge has decided that the defendants
8 violated *Batson* in the jury strikes. The first was the triple
9 murder case involving the Edwards, where Judge King said the
10 defense violated *Batson* and ordered a re-striking and they
11 were convicted and then granted a new trial.

12 Then the -- most recently, a decision that came out
13 October 17th of this year where a defendant was convicted in
14 Lee County. Judge King was presiding, the State v. Jerry
15 McMillan. He was convicted on two counts of murder, sentenced
16 to life without parole, and Judge King ruled that they
17 violated *Batson* and the Court of Appeals in that case reversed
18 their -- this person's conviction as well and the Court went
19 on to talk about the law regarding strikes that -- stating
20 that the proponent's reason for striking a juror does not have
21 to be clear, reasonably specific, or legitimate. The reason
22 need only be race neutral and that the opponent of a strike
23 must show the -- that the race or gender neutral explanation
24 was mere pretext, which is generally established by showing
25 the party did not strike a similarly situated member of

1 another race or gender.

2 So in this case, the defense says that -- that he struck
3 Mr. Ray because his wife was a nurse and that she's probably
4 treated a lot of addictions and all and that for that reason
5 he might be partial with a person charged with dealing with
6 drugs and to counter that, Ms. Barr says that he -- the first
7 juror, Ms. Barr, Janice A. Barr, works as a -- in the
8 healthcare field. She says she's a medical director or ---

9 MS. BARR: Medical office assistant at Black River
10 Healthcare Group.

11 THE COURT: A medical office assistant at Black River
12 Healthcare and her juror information sheet says that she has
13 an associate's degree in medical office assistant. Mr.
14 Swilley says, well, that doesn't equate to being a nurse, that
15 it sounds like she's more like an office assistant or someone
16 dealing with more of an administrative type of situation
17 rather than treatment and that he saw those two things
18 differently.

19 I find that that is a race neutral reason and who knows
20 whether the underlying pretext is to try to get rid of as many
21 white jurors as possible, but as far as the *Batson* -- the
22 criteria is concerned, he has given a race neutral reason on
23 that. As the case says, it does not have to make sense, it
24 doesn't have to be plausible, it just simply that it has to be
25 race neutral and given the history of cases being reversed

1 based on judges making the call of *Batson* seemingly being
2 expanded to include a wider latitude than it did originally, I
3 find that this is a race neutral reason.

4 The second one at issue is Mr. William D. Lewis. That's
5 Juror Number 97, a teacher in Hemingway. Mr. Swilley says,
6 well, he probably has dealt with a lot of instances where drug
7 sales have plagued the area youths and so he's probably seen
8 the devastating effect of that on children and he thinks that
9 that is a -- he's not -- shouldn't be -- is he the one? The
10 one you questioned, Ms. Barr?

11 MS. BARR: He was, Judge.

12 THE COURT: All right.

13 MS. BARR: Number 97.

14 THE COURT: 97 and that he allowed on the jury which one?
15 The first alternate, Ms. Robinette?

16 MS. BARR: Yes, sir.

17 THE COURT: Her ---

18 MS. BARR: 188.

19 THE COURT: 188. Let's see, the first strike by the
20 defense was Amanda Miller, who knew Shannon Coker,
21 Investigator Coker. The second person, Juror Number 188, it
22 says alternate. No, 188 is on the jury.

23 THE CLERK: She's alternate number one.

24 THE COURT: Okay. So the claim is that he did not strike
25 her and that means that he has -- according to the State that

1 he failed to strike a similarly situated member in another
2 race and the juror information sheet on -- on Ms. Whitaker
3 says that she is an instructional -- instructional assistant.
4 Her formal education is graduated, some college, and that her
5 present or former employer is Dr. Jennifer Gardner.

6 And the defense makes a similar argument to the -- to the
7 first strike, that is that this juror appears to him to be
8 someone who is in an assistant capacity without having direct
9 impact as far as a teacher, a nurse. I find that that is a
10 race neutral explanation as well and uphold that strike.

11 The third juror struck was 102, a retired person, where
12 the defense says that he had a stern and stoic demeanor and he
13 seemed like he didn't want to be here. Of course, that is
14 very, very difficult to -- to gauge when you're talking about
15 Batson. I know that there are instances where one prosecutor
16 who struck a black guy said that the defendant was shucking
17 and jiving and so therefore that was his basis for striking
18 the person and the Court said you can't -- you can't strike
19 anyone based on that. I think some other instances where the
20 State or defense said the person seemed to be a redneck, the
21 State said we just can't categorize people like that as a
22 basis for -- for Batson.

23 I think Mr. Swilley threw in enough -- enough other
24 reasons saying he was retired, appeared not to want to be
25 here, he was stoic, and didn't seem to be engaging and kind of

1 lack of interest in the process. I think -- whether or not
2 that's true, I don't know, but the -- and I view all of that
3 with some degree of skepticism, particularly considering the
4 -- that he has found these faults in all the folks that he
5 struck.

6 But given the most recent edict of the Court saying that
7 a proponent's reason for striking a juror does not have to be
8 clear, reasonably specific or legitimate, the reason need only
9 be race neutral, it's almost as if *Batson* doesn't exist
10 anymore when you start reading some of these cases. So I
11 think he's passed the test by -- by the slimmest of margin,
12 but nevertheless, he's passed the test and I will not set
13 aside the jury.

14 MS. BARR: Thank you, Your Honor.

15 THE COURT: Not according to *Batson*.

16 MR. SWILLEY: I'll withdraw my motion, Your Honor.

17 THE COURT: All right. Well, let's first bring the crowd
18 in from the auditorium so I can cut them loose. Is there one
19 I did not address, Ms. Barr? 72?

20 MS. BARR: I didn't challenge that one, Judge.

21 THE COURT: You did not challenge that one?

22 MS. BARR: Yes, sir.

23 THE COURT: You're not challenging the other two?

24 MS. BARR: 72 or 121, I did not.

25 THE COURT: Mr. Crews? Okay, well ---

1 MS. BARR: It should be on there, Judge.

2 THE COURT: Regarding the foreperson, who he says that,
3 you know, he probably encounters a lot of folks who fail drug
4 tests, I find that's race neutral. Thank you.

5 (Whereupon, there is a pause in the proceedings as the
6 jury panel enters the courtroom.)

7 THE COURT: All right, ladies and gentlemen, I guess we
8 have our juror -- jury in place. That means we cannot use you
9 all and that means you all are through for the day. Thank you
10 very much. If you all would, call back after six p.m. to find
11 out when you'll need to come back. Certainly, I think that
12 the -- when's the best time to give them this hourly space of
13 time for voting in the morning? Like start late, Ms.
14 Williams? The polls open at seven and we don't start until
15 ten.

16 THE CLERK: Yes, sir.

17 THE COURT: That gives folks plenty of time; doesn't --
18 won't it?

19 THE CLERK: I don't think so.

20 THE COURT: That's not enough time?

21 THE CLERK: I don't think so.

22 THE COURT: Eleven?

23 THE COURT: I'd say eleven.

24 THE COURT: Because we're not going to be here Wednesday
25 morning so, you know, we've got to squeeze as much in as we

1 can.

2 THE CLERK: Eleven, Kimberly?

3 MS. BARR: Whenever y'all think is best.

4 THE CLERK: I'd say eleven.

5 THE COURT: Of course, if they -- because you also -- it
6 doesn't close until seven so we can leave early if that helps,
7 too.

8 THE CLERK: Well, yeah.

9 THE COURT: I think I'd rather start early and then ---

10 THE CLERK: Then leave early.

11 THE COURT: --- leave early, but we -- I mean as far as a
12 new jury, I don't think we'd bring -- we won't call them to
13 come in. We'll just start at -- I don't know.

14 THE CLERK: We'll call them in the afternoon.

15 THE COURT: Yeah. Well, ladies and gentlemen, I need you
16 all to call back after six because we have this jury and we
17 don't know how long this case will be going obviously, but
18 we'll give you all the time to come back tomorrow if you need
19 to come back tomorrow and I -- and, you know, I'm committed to
20 being someplace else Wednesday morning so we know we won't be
21 here Wednesday morning. So I don't think this week is going
22 to be too burdensome on you all, but thanks for coming and
23 please call back after six p.m. to find out what time you'll
24 need to be here tomorrow. Thank you very much.

25 (Whereupon, the jury panel exits the courtroom at 12:17

1 p.m.)

2 THE COURT: All right, as far as pressing on with the
3 jury panel we have here, are there any other matters before we
4 get running?

5 MR. SWILLEY: Your Honor, I have a motion to suppress.

6 THE COURT: All right, a motion to suppress. All right.

7 MR. SWILLEY: I have a written brief. May I approach?

8 THE COURT: Yes, sir. Do you have one for my law clerk
9 or do we need to share it?

10 MR. SWILLEY: I only printed out three. I apologize. I
11 should have known better.

12 THE COURT: Now, a hearing on this motion should take how
13 long, Ms. Barr? I'm trying to figure out with the jury.

14 MS. BARR: You're talking about my motion? Judge, I'm
15 not sure how long the motion will take, but we'd love to be
16 able to have them come back at maybe two or two thirty.

17 THE COURT: All right. Do we have any other matters that
18 we also need to deal with?

19 MS. BARR: Yes, sir. Judge, we had the bond hearing
20 scheduled on that murder case for Mr. Wallace, we've got a
21 motion that Ms. Gay would like to have heard and then this
22 motion.

23 THE COURT: All right.

24 MS. BARR: I think the victims are out there on that
25 Wallace case.

1 THE COURT: Okay. So we'll -- well, let's bring the jury
2 out so I can cut them loose and then we can have access.

3 (Whereupon, there is a pause in the proceedings until the
4 jury enters the courtroom at 12:21 p.m.)

5 THE COURT: All right, ladies and gentlemen, thank you
6 very much. You all will be the jury on this case. We have
7 some matters that we need to talk about outside your presence
8 and then we have some other matters in other cases we need to
9 talk about as well and then we need to take lunch ourselves.
10 So all that considered, we're going to let you all go until
11 two thirty.

12 If you all will leave, when you leave -- when you come
13 back, don't ever come in here. Try not to be around anyone
14 involved with the case itself and please be back in the jury
15 room at two thirty, two thirty. You all can find something to
16 do in Kingstree I imagine for the next couple of hours
17 including getting lunch. So we'll see you all back at two
18 thirty.

19 (Whereupon, the jury exits the courtroom at 12:23 p.m.)

20 THE COURT: All right, let's just be at ease for just a
21 moment.

22 (Whereupon, there is a break in the proceedings from
23 12:24 p.m. until 12:27 p.m.)

24 THE COURT: All right. Are we ready for a suppression
25 hearing?

1 MS. BARR: The State is ready, Your Honor.

2 THE COURT: All right.

3 MR. SWILLEY: The defense is ready, Your Honor.

4 THE COURT: All right. Any opening comments about it?

5 MS. BARR: Judge, I don't -- I don't have any.

6 THE COURT: All right. Yes, sir?

7 MR. SWILLEY: Your Honor, just this is based upon

8 doctrine of fruit of the poisonous tree. Your Honor, based on
9 the evidence that I've seen, Mr. Vice was halted in a car on
10 December 19th, 2011, by Deputy Loy Hayes of Williamsburg who
11 pulled in front of him and the incident report cites that Mr.
12 Vice -- it does say he was known to be driving under
13 suspension and it also said that he came around the curve on
14 Red Road left of center. Your Honor, he was -- so I think
15 there are two claims, that he was driving under suspension and
16 that he drove his automobile left of center.

17 Your Honor, I've watched the video several times and I'd
18 like the Court just to view that part when it's -- when it's
19 ready. It appears that Mr. Vice stayed on the right side of
20 the double yellow line. Also, I don't believe that based on
21 the evidence that I've seen that there was a driver's license
22 that was ran through anything that would indicate that Mr.
23 Vice was in fact driving under suspension at the time. He was
24 at the time, but there was no -- there was nothing to suggest
25 that based on the materials provided me in discovery other

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 than the fact that he had done this once before.

2 Your Honor, I think that's a stop without any kind of
3 reasonable suspicion of a criminal activity or probable cause
4 and thus after he was stopped, he drove around and it's
5 alleged that Mr. Vice threw the -- a bag of narcotics out of
6 the window and I just move to suppress that based upon that
7 that evidence was -- was obtained by the State and it was
8 perpetuated by a -- an unlawful stop without reasonable
9 suspicion. That's -- that's the basis, Your Honor.

10 THE COURT: All right. Ms. Barr, call your first
11 witness.

12 MS. BARR: We'd call Deputy Loy Hayes.

13 THE CLERK: Do you solemnly swear to tell the truth, the
14 whole truth, and nothing but the truth, so help you God?

15 THE WITNESS: Yes, I do.

16 DEPUTY LOY HAYES, being first duly
17 sworn, testifies as follows:

18 DIRECT EXAMINATION

19 BY MS. BARR:

20 Q: Sir, state your full name for the record?

21 A: Deputy Loy Hayes.

22 Q: And you're employed with the Williamsburg County
23 Sheriff's Office?

24 A: Yes, I am.

25 Q: Now, Deputy Hayes, you were working back on December the

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 19th of 2011?

2 A: Yes, I was.

3 Q: And on that date, you saw the defendant, David Vice?

4 A: Yes, I did.

5 Q: Now, prior to December 19th of 2011, were you familiar
6 with Mr. Vice?

7 A: Yes, I was.

8 Q: In what way were you familiar with him?

9 A: I was familiar that he was known to drive under
10 suspension and I think we had had several warrants on him
11 prior to this incident ---

12 Q: All right.

13 A: --- that I was familiar with.

14 Q: All right. Now, sir, other than the charges that emanate
15 from the December 19th, 2011, arrest, does the Williamsburg
16 County Sheriff's Office have charges on Mr. Vice that pre-date
17 December of 2011?

18 A: Yes, they do.

19 Q: All right and this was from a traffic stop that happened
20 back in April ---

21 A: April.

22 Q: --- of that year?

23 A: Yes, ma'am, it was.

24 Q: All right.

25 MS. BARR: I'd like to have this marked as a Court's

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 exhibit.

2 (Whereupon, the driving record of the defendant is marked
3 as Court's Exhibit Number 1.)

4 Q: All right. Tell the Court, if you will, what caused you
5 to stop the defendant, David Vice, back on December 19th of
6 last year?

7 A: I was patrolling the area of Red Road. We -- around that
8 time, we had had several incidents in that area so that's why
9 I was patrolling the area.

10 Q: Yes, sir.

11 A: I noticed a gray in color car coming around the curve.

12 Q: Okay.

13 A: It appeared to me that it went left of center.

14 Q: Okay.

15 A: I was familiar with the car. I knowed Mr. Vice drove
16 that car.

17 Q: Had you seen him driving that car before December 19th,
18 2011?

19 A: I'm -- I can't -- I can't recall.

20 Q: Okay.

21 A: I can't say for sure, but I was familiar with the
22 description of the car that he drove.

23 Q: Okay.

24 A: And I seen -- I seen him come around the curve there. He
25 was also -- I was also familiar for him to run from the

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 police.

2 Q: Okay.

3 A: So I come -- I kind of cut across the road there, cut the
4 blue lights on. He come up. He went to drive around me. I
5 told him to stop and he continued to go. That's when a chase
6 pursued.

7 Q: All right. Now, sir, at some point in time you observed
8 something come from the vehicle?

9 A: Yes, I did.

10 Q: All right and were you able to determine later what that
11 was that was -- that came from the vehicle?

12 A: Yes, I was.

13 Q: Okay and is that the marijuana and the cocaine that's the
14 subject of this case?

15 A: Yes, it was.

16 Q: All right. I'm going to hand you what's been marked as
17 Court's Exhibit Number 1. Can you tell the judge what that
18 is?

19 A: This is a driving record from the DMV.

20 Q: Okay. Driving record for which customer?

21 A: For David Vice.

22 Q: All right and, sir, calling your attention to page 2 of
23 that driving record, can you tell us whether or not the
24 defendant, David Vice, had an active driver's license
25 suspension as of December 19th, 2011?

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

- 1 A: He did.
- 2 Q: All right and what was that suspension for?
- 3 A: For driving under the influence.
- 4 Q: Okay and for what particular date was he charged with
- 5 driving under the influence?
- 6 A: 4/29/2011.
- 7 Q: All right. All right. Did he also have another
- 8 suspension for driving under suspension at the time?
- 9 A: Yes. Yes, he did.
- 10 Q: All right and what was the cause date for the driving
- 11 under suspension that resulted in his license being revoked?
- 12 A: The driving under suspension.
- 13 Q: For what particular day? What date?
- 14 A: For 8/4/2010.
- 15 Q: Okay. All right and we've got a suspension for DUI and a
- 16 suspension for DUS. Did he have another driver's license
- 17 suspension ---
- 18 A: Yeah.
- 19 Q: --- at that time?
- 20 A: For controlled substance violation which was 8/4/2010 as
- 21 well.
- 22 Q: All right and when did the suspension begin for the
- 23 controlled substance violation?
- 24 A: It began 8/6/2011.
- 25 Q: And when did it end?

CROSS EXAMINATION OF DEPUTY LOY HAYES BY MR. SWILLEY

1 A: February the 6th of 2012.

2 Q: All right and so at the time that you performed a traffic
3 stop or attempted to perform a traffic stop I should say, he
4 had a driver's license suspension for a controlled substance
5 violation?

6 A: Yes, he did.

7 Q: All right. All right, sir, I believe that that's all the
8 questions that I have. Please answer any questions that the
9 judge or opposing counsel may have for you.

10 DIRECT EXAMINATION BY THE COURT

11 THE COURT: You said you were having some trouble in the
12 area or some problems in the area. Is that what you said?

13 THE WITNESS: Yes, sir.

14 THE COURT: What kind of problems?

15 THE WITNESS: We had a call where a house was shot up in
16 the area. I think we've had a couple of break-ins and
17 larcenies right there in that area.

18 THE COURT: All right.

19 THE WITNESS: Just -- just general problems.

20 THE COURT: All right. You may go ahead, Mr. Swilley.

21 MR. SWILLEY: Thank you, Your Honor.

22 CROSS EXAMINATION

23 BY MR. SWILLEY:

24 Q: Deputy Hayes, you said that to Ms. Barr that Mr. Vice was
25 known to drive under suspension; did I hear you say that?

CROSS EXAMINATION OF DEPUTY LOY HAYES BY MR. SWILLEY

- 1 A: Yes.
- 2 Q: Okay, but before you put your car in front of him, you
3 didn't run a -- run his license; did you?
- 4 A: No, not at that time.
- 5 Q: Okay and you also said he was known to have warrants on
6 him. Did he have any active warrants on him at the time?
- 7 A: I don't know. I don't think he had any. He didn't have
8 any at the time.
- 9 Q: So there was no reason for you to think that he had any
10 active warrants on him; correct?
- 11 A: No. No. I said he -- he was known to have warrants in
12 the past.
- 13 Q: Okay and you said he did have charges that pre-dated this
14 incident; correct?
- 15 A: Yes.
- 16 Q: And he'd already been served with those charges; correct?
- 17 A: Yes.
- 18 Q: And he'd already bonded out of jail; correct?
- 19 A: Right.
- 20 Q: Let me ask you, Deputy Hayes, what was the first -- on
21 Red Road, you know, you're coming towards that road coming
22 into Kingstree. I'm sorry. But you said that -- about what
23 time did you recognize that it was David Vice in that car?
- 24 A: What do you mean about what time?
- 25 Q: Well, about how -- how close was it from your car to his

CROSS EXAMINATION OF DEPUTY LOY HAYES BY MR. SWILLEY

1 car did you recognize that it was Mr. Vice?

2 A: He was -- he was up on me about when I recognized it was
3 actually him.

4 Q: Can you give me a number distance? Feet?

5 A: Maybe thirty -- forty feet.

6 Q: Okay and tell me about approximately where on that curve
7 did you see him drive over the double yellow?

8 A: When -- when he come around the curve. I mean he was in
9 kind of in the middle lane when he come around the curve.

10 Q: Was he ---

11 A: As he come around the curve, I'm headed towards the curve
12 and I see him come around the curve and he was in the middle
13 of the road when he come around the curve.

14 Q: When you say middle of the road, can you give me a -- a
15 -- can you get a little bit more specific about that?

16 A: He was -- he was not in his -- he was across the other --
17 into the other lane of traffic.

18 Q: Okay and you said that you were familiar with the car
19 that he was driving?

20 A: Yeah.

21 Q: Okay and -- but you had never seen him driving that. You
22 weren't sure if you'd ever seen him driving that car before?

23 A: No. I'm not sure if I did.

24 Q: Okay.

25 MR. SWILLEY: I beg the Court's indulgence. Your Honor,

1 I have no further questions for Deputy Hayes.

2 THE COURT: All right. Ms. Barr, anything else?

3 MS. BARR: Judge, that's all the questions that I would
4 have.

5 THE COURT: All right. You may step down.

6 (Whereupon, the witness leaves the stand at 12:40 p.m.)

7 THE COURT: Next witness?

8 MS. BARR: Judge, that would be the State's presentation
9 of witnesses.

10 THE COURT: All right. By the defense, witnesses?

11 MR. SWILLEY: I beg the Court's indulgence for a moment.
12 Your Honor, I don't -- I don't wish to proffer any testimony,
13 but I would ask that the Court view the -- the videotape from
14 the dash cam video camera before making a ruling if we could.

15 THE COURT: All right. I'd be happy to.

16 (Whereupon, there is a pause in the proceedings as the
17 video is made ready to play. The dash cam video is then
18 played in the courtroom. NOT TRANSCRIBED HEREIN. The
19 video, later marked as Plaintiff's Exhibit Number 3, runs
20 for approximately 6 minutes.)

21 MR. SWILLEY: Your Honor, do you want me to stop it now?

22 THE COURT: I don't know. I mean ---

23 MR. SWILLEY: That -- that's all the pertinent part for
24 the most part.

25 (Whereupon, the videotape is stopped.)

1 THE COURT: All right. Yes, sir, Mr. Swilley?

2 MR. SWILLEY: Your Honor, I'd just -- I wanted the Court
3 to see that so the Court could see that he didn't cross over
4 the center line. I mean I've watched that tape fifteen to
5 twenty times in the past couple of days and I can't find out
6 -- I can't see ---

7 THE COURT: He said when he came around the curve, he was
8 across the center line.

9 MR. SWILLEY: That's what I'm talking ---

10 THE COURT: There at the beginning.

11 MR. SWILLEY: Yes, sir. That's what I'm talking about.
12 I couldn't see where that -- where that took place.

13 THE COURT: And that they knew him to be under --
14 reasonably believed him to be under suspension and to be
15 engaged in violating the law by driving under suspension at
16 the time that he observed him driving.

17 MR. SWILLEY: I understand that, Your Honor, but I think
18 that Deputy Hayes testified that he had been known to drive
19 under suspension. He didn't run a -- run a driving history on
20 him. I mean that was just purely -- based purely on
21 conjecture and speculation. I don't -- I don't think that
22 provides a basis for a reasonable suspicion. The fact that
23 he's done something in the past so he's doing it now, I just
24 don't think that meets that threshold. Your Honor, I know
25 it's not important what I think, but I think that it just

1 doesn't get there.

2 THE COURT: Okay. I'm not discounting what you're think.
3 I'm not, but in the context of the other argument in the other
4 case in which you thought wasn't -- wasn't determinative. I
5 mean what I think is determinative, but obviously what you
6 think is important to you and to your client and can influence
7 me as to what I should think based on what you might argue as
8 to what you think.

9 MR. SWILLEY: Yes, sir, but the fact that he had done --
10 done a prior act on a prior occasion I don't think bears any
11 -- bears any evidence or bears any indication that he is doing
12 that on this particular occasion. If Deputy Hayes had ran his
13 driving history through the radio and found out that he --
14 that he was, then that would, of course, be probable cause,
15 but it didn't happen. He's just basing ---

16 THE COURT: But the test is to test probable cause or to
17 test the articulable suspicion ---

18 MR. SWILLEY: Your Honor, it's ---

19 THE COURT: --- that a person is engaged in criminal
20 activity?

21 MR. SWILLEY: It's a reasonable articulable suspicion
22 somebody is engaged in criminal activity, but, Your Honor, at
23 the time that Deputy Hayes whips his car in front of him and
24 stops him, I just don't think he has that. He has no reason
25 -- no reasonable articulable reason. Your Honor, there's just

1 nothing indicative that he's driving under suspension other
2 than the fact that he's done it before and I don't think
3 that's a reasonable suspicion and the tape reveals that he
4 doesn't cross the center line at any point preceding to Deputy
5 Hayes pulling his car in front of him. That -- that's what I
6 saw. So I don't -- I don't -- I think that any drugs
7 recovered from this situation would be fruit of the poisonous
8 tree.

9 THE COURT: All right.

10 MR. SWILLEY: And that would be -- I mean it was -- any
11 and all drug evidence obtained is perpetuated by the unlawful
12 stop. Just the mere fact that he had -- that there were past
13 instances where he drove under suspension does not -- it
14 doesn't lead to a reasonable articulable suspicion that he was
15 driving under suspension at the time and I don't -- I didn't
16 hear any other facts that would yield an objective
17 manifestation of any kind of criminal activity.

18 THE COURT: All right. Ms. Barr?

19 MS. BARR: Your Honor, and maybe it's because I'm the
20 prosecutor and he's the defense lawyer, but to me it seemed
21 clear that when the defendant drove around the curve, to me
22 appeared that he was over the center line and he ---

23 THE COURT: Can you show me what you're talking about?

24 MS. BARR: Sir?

25 THE COURT: Can you show me what you're talking about?

1 MS. BARR: Yes, sir. If I can get somebody to fast
2 forward it to the beginning?

3 MR. TYLER BROWN: I will.

4 MS. BARR: Or rewind it to the beginning I should say.
5 (Whereupon, the video is reset to the beginning and
6 played again briefly and then stopped.)

7 MS. BARR: Judge, it appears to me here that the vehicle
8 is over the center line and, Judge, it would be great if they
9 were closer and you could catch it, but obviously we have to
10 use the evidence that we have and I think that to the extent
11 that I view it one way and Mr. Swilley views it another way
12 that it's a question of fact for the jury to determine. But
13 in my view here, if the line goes straight there, then it
14 views to -- it appears to me that he's over the center line.

15 (Whereupon, the video is played further and then
16 stopped.)

17 MS. BARR: But, Judge, even if you didn't have a
18 violation of the traffic laws, you have an officer who had
19 reasonable suspicion that the defendant was driving under
20 suspension. The Williamsburg County Sheriff's Office, which
21 is the same agency that made this arrest, had just previously
22 arrested the defendant about eight months ago in April. He
23 was charged with offenses that in and of themselves resulted
24 in a driver's license suspension and, Judge, the officer is
25 permitted to use his experience and his knowledge of the

1 defendant in meeting the standard of whether or not there is
2 reasonable suspicion to initiate the traffic stop.

3 What makes it even more problematic for -- I think for
4 the defense is that the defendant's actions once he was told
5 to stop it just raised the level of suspicion even more. If
6 the only thing the defendant were guilty of is simply driving
7 left of center, then common sense and experience would tell us
8 that an individual would just simply stop and it was -- in
9 looking at that videotape again and realizing how long they
10 actually pursued him, I think that that makes -- gives rise to
11 even more, not necessarily at this point reasonable suspicion,
12 but actually probable cause.

13 But, Judge, clearly the courts have provided that an
14 officer is permitted to use his experience, his knowledge, and
15 the defendant's subterfuge, which according to *State v. Yates*
16 provides that reasonable inference that something is located
17 -- this is actually a warrantless search issue, but something
18 was located in his room that he did not want the police to
19 discover. So when you have a defendant who acts unreasonable
20 given the circumstances, that certainly may give rise to a
21 reasonable suspicion that would warrant a traffic stop.

22 And, Your Honor, clearly if the traffic stop is -- is
23 permissible, then the evidence of the drugs are admissible
24 and, Judge, I would also ask the Court to consider Court's
25 Exhibit Number 1, which is the defendant's driving record

1 which clearly establishes that on the date that this incident
2 occurred he was under an active suspension for an offense that
3 went back to August of 2010 and that suspension was still in
4 effect at the time this traffic stop occurred.

5 THE COURT: All right. Any reply?

6 MR. SWILLEY: Your Honor, I'd just like to reiterate to
7 the Court that Deputy Hayes testified that he didn't have his
8 -- this driving record or anything similar to that at the time
9 he actually stopped the defendant's car and, Your Honor, based
10 upon his experience and knowledge, I know that an officer can
11 use that to factor into whether or not there's a reasonable
12 suspicion, but the mere fact that it just -- that it happened
13 -- it's happened once before is not -- is not a reasonable
14 articulable suspicion for this particular time.

15 Judge, I just -- it's just -- it's just not there and the
16 fruit of the poisonous tree doctrine provides that the
17 evidence has to be excluded if it had not come to light but
18 for the illegal actions of law enforcement and the evidence
19 has been obtained by the exploitation of the illegality. It's
20 just -- it's just -- based on what I've seen, it's just not
21 there, Your Honor, and that's -- that's all I have.

22 THE COURT: All right.

23 MS. BARR: Judge, if I also may?

24 THE COURT: Yes.

25 MS. BARR: Just as an aside, Your Honor, I believe that

1 the defendant was convicted in the Magistrate's Court of the
2 offenses -- the magistrate level offenses that result from
3 this particular incident. I believe he was charged with
4 driving left of center and also driving under suspension and,
5 Your Honor, if that is in fact the case that he was convicted,
6 we would take the position that he is precluded from arguing
7 the reasonableness of the stop or the probable cause for the
8 stop.

9 THE COURT: All right. Well, I'll take a -- just take a
10 look over it and some matters and ponder this over lunch. So
11 we'll -- the matter has been called for trial. What's the
12 situation with the defendant and bond?

13 MS. BARR: Your Honor, he is under a -- I was getting
14 ready to say a \$20,000 bond and Freedom Bail Bonds posted it,
15 but that was actually from the incident that happened back in
16 April. But he's out on bond.

17 THE COURT: Well, the case has been called for trial.
18 The bond is up. What -- what's the status?

19 MS. BARR: We would take that position, Your Honor.

20 MR. SWILLEY: Your Honor, Mr. Vice is from here in
21 Kingstree. He's not going anywhere. He's actually appeared
22 at the courthouse whenever I've summoned him. I respectfully
23 request the Court let him remain out on bond for the duration
24 of the trial or at least for today before we get started.
25 He's not a flight risk. He's a lifetime resident of here.

1 THE COURT: He has no bond. The case is -- once the
2 trial starts, there is no bond unless the bonding company
3 commits to being on the bond throughout the trial.

4 MR. SWILLEY: Okay. Would -- would the Court be inclined
5 to let him remain free if I get verification from the bonding
6 company?

7 THE COURT: After you've gotten verification.

8 MR. SWILLEY: Yes, sir.

9 THE COURT: But not before. So he's in custody pending
10 that and we'll -- we're going to break for lunch on this case.
11 On this case. We'll take up some other matters.

12 (Whereupon, there is a break in the proceedings from 1:06
13 p.m. until 2:57 p.m.)

14 THE COURT: Wherein a motion for summary judgment is
15 filed, the State has the burden of proof by a preponderance --
16 not summary judgment, but a motion for suppression. A motion
17 for suppression has been filed. The State has the burden of
18 proof by a preponderance of the evidence that the -- that
19 there was proper search and seizure.

20 In this case, I find that the law enforcement had a
21 reasonable basis to stop the defendant, that there was a
22 reasonable -- articulable reasonable suspicion or facts and
23 testimony of articulated basis to have a reasonable suspicion
24 that the defendant was engaged in criminal activity based on
25 the officer's knowledge of the defendant driving under

1 suspension -- driving the car under suspension.

2 The officer gave testimony that he reasonably believed
3 that the -- or he believed that the defendant's driver's
4 license had been suspended based on previous -- previous
5 arrests of the defendant and whereas there are a number of
6 cases that say that past experience -- in fact one having
7 committed a criminal offense in and of itself does not give a
8 reasonable basis to believe that the person is engaged in
9 criminal conduct or unlawful activity. I think the rule is
10 different and should be different with regard to the driving
11 offense and a reasonable basis to stop one to -- to
12 investigate whether or not the defendant was in fact driving
13 under suspension at the time.

14 With regard to the -- the defendant driving left of
15 center while coming around the curve, the only testimony we
16 have in the record is the testimony of the officer that --
17 that that was his observation. I cannot tell one way or the
18 other based on the video whether the defendant was actually
19 driving left of center or not coming around the curve. There
20 has been no testimony to contradict the officer's testimony at
21 that point.

22 I do not support the State's contention that the
23 defendant's ultimate conviction for the driving offense waived
24 his right to -- to assert his -- a constitutional rights
25 violation of this trial. A violation of constitutional rights

1 can be asserted at any time.

2 But whether or not the officer had a reasonable basis to
3 stop the defendant, it appears to me based on the video that
4 the defendant clearly gave officers probable cause to pursue
5 him when he decided to turn his car around and attempt to
6 elude the officers, driving at a high rate of speed. I think
7 the law is relatively -- is clear in this state that the --
8 driving is a privilege on the roads of South Carolina and you
9 do not have the right to decide that a police officer has no
10 legitimate basis to stop you when the officer attempts to stop
11 you while driving the car -- driving a car. I believe a
12 person who drives a car consents in effect to being stopped
13 and certainly once stopped, the constitutional rights can be
14 raised, but there is no constitutional right to ignore or
15 attempt to elude a police officer.

16 The case of *Illinois v. Wardlow* says an additional factor
17 to consider in determining whether reasonable suspicion exists
18 is the officer's experience and intuition and that this all
19 must be based on common sense judgments and inferences about
20 human behavior. Nevertheless, a wealth of experience will not
21 overcome a complete absence of articulable facts. And that --
22 that ruling has been supported in South Carolina in a number
23 of cases where there is no reasonable basis or no articulable
24 facts to justify a stop.

25 In this case, I find that whether or not the officer had

1 a reasonable basis to stop the defendant, any subsequent acts
2 by the defendant would not constitute any fruit of the
3 poisonous tree that can be raised by the defendant because
4 there is no right to seek to avoid being stopped by the police
5 or to break the law in driving at a high rate of speed,
6 running stop signs, driving left of center, driving recklessly
7 in an effort to avoid and not stop for the blue light.

8 And based on all of that and the totality of the
9 circumstances that exist in this case, the motion to suppress
10 is denied. Are y'all ready for the jury?

11 MS. BARR: The State is ready.

12 MR. SWILLEY: Your Honor, I just ask that my motion be
13 made a Court's exhibit and that the State's witnesses be
14 sequestered.

15 THE COURT: That your motion be made -- you filed a
16 motion I presume or plan to file it?

17 MR. SWILLEY: Actually, it has been filed, Your Honor.
18 It has been filed.

19 THE COURT: If you filed it with the clerk, it would be
20 in the file.

21 MR. SWILLEY: Okay.

22 THE COURT: The video is a Court's exhibit for the
23 purposes of this hearing. I assume it will be used during the
24 course of the trial as well.

25 MS. BARR: That's correct, Judge. I was -- I was looking

1 for it. I just wanted to make sure I marked it.

2 THE COURT: Is there any objection to the admission of
3 the -- well, we'll deal with that during the course of the
4 trial I assume. You have that and the second Court's exhibit,
5 the driving record. All right. Yes, sir?

6 MR. SWILLEY: And, Your Honor, I move to have the State's
7 witnesses sequestered.

8 THE COURT: The witnesses sequestered. What says the
9 defense about that?

10 MR. SWILLEY: The defense?

11 THE COURT: What says the State about that?

12 MS. BARR: Judge, I don't -- we would object to the
13 witnesses being sequestered. This is a situation where we
14 don't expect that testimony of the witnesses will overlap.
15 We've got the officer who initiated the traffic stop. We've
16 got one SLED individual who will testify about the analysis on
17 the cocaine and we've got Lieutenant Jeffrey Scott, who used
18 to be with the Sheriff's Office, but he analyzed the marijuana
19 in the case, and we have Lieutenant Timmons here to testify
20 about chain of custody and that sort of thing. So I don't
21 think based on the type of case that we have and the number of
22 witnesses that we'll have that a sequestration motion is
23 necessary or -- or even appropriate.

24 THE COURT: All right. Any -- anything in response?

25 MR. SWILLEY: Your Honor, I just think that credibility

1 is going to play a big factor in this trial of the witnesses
2 and I just wanted to ensure that my client isn't unduly
3 prejudiced, that all the witnesses remain unbiased and -- and
4 not have their testimony influenced by what they hear. And a
5 motion to sequester is within the sound discretion of the
6 trial court, Your Honor. It's -- it's pretty much completely
7 up to you so I just respectfully request that you grant the
8 motion.

9 THE COURT: I deny the motion to sequester. I don't see
10 any need or any benefit or any likelihood based on what has
11 been said. You have officers who apparently had different
12 roles in the process and no fact witnesses and no officers who
13 -- who are likely to benefit from the testimony of the others
14 in such a way as to deprive the defendant the right to a fair
15 trial. So I deny the motion. What else?

16 MR. SWILLEY: Your Honor, just when the time comes when
17 Ms. Barr attempts to enter the video, there is some -- there
18 are some things said on the video that I do think would be
19 prejudicial to my client. We can take that matter up when it
20 -- when the time comes.

21 THE COURT: Like what?

22 MR. SWILLEY: Your Honor, at about ten seconds after 19
23 minutes, 19:10, there is some -- there are some words by the
24 deputies indicating that my client had a pistol on him. He
25 didn't have a pistol, but they're -- they're alleging that and

1 they say something along the lines of make sure you check him
2 for a pistol, he's always got a pistol. And then there's --
3 there's some discussion about another incident involving some
4 -- some type of violence that happened before that that Mr.
5 Vice isn't implicated in, but I do think that it could be
6 prejudicial. That's at about 22 minutes and 20 seconds, Your
7 Honor.

8 THE COURT: Is there any objection to redacting those two
9 things and turning the tape down when we get to those things?

10 MS. BARR: No objection, Judge.

11 THE COURT: All right. So that's -- that's not a
12 problem.

13 MR. SWILLEY: So, Your Honor, I just ask that at 19
14 minutes the sound just be cut off of the video. I think it's
15 only 24 minutes long.

16 THE COURT: All right.

17 MR. SWILLEY: Okay.

18 THE COURT: Are you going to cut it off at 19 minutes
19 itself?

20 MS. BARR: Judge, the plan was to simply stop it after
21 he's put in handcuffs.

22 THE COURT: Which is?

23 MS. BARR: Which is probably in five or ten minutes in.

24 THE COURT: All right. She said she doesn't plan to play
25 it up to 19 minutes.

1 MR. SWILLEY: Well, Your Honor, I just -- I feel like
2 just the only thing that's prejudicial towards my client is
3 what's said after -- after 19 minutes. I just ---

4 THE COURT: She says she's going to stop it before 19
5 minutes.

6 MR. SWILLEY: I understand that, but I'd like the jury to
7 see the entire video just -- just so they can get a good idea
8 what happens. I mean I guess this isn't really a ripe issue
9 right now, but ---

10 MS. BARR: And, Judge, once I seek to move it into
11 evidence, provided that motion is granted, then it will be an
12 exhibit and so if counsel wishes to play it in his cross
13 examination, then he's free to do that.

14 THE COURT: Okay. Well, of course, you can't dictate to
15 the State how to present the State's own evidence. You can
16 present whatever evidence you want including the balance of
17 the tape and turn it down whenever you want to as you might
18 want to.

19 MR. SWILLEY: I understand.

20 THE COURT: All right. Anything else?

21 MS. BARR: Nothing from the State, Your Honor.

22 MR. SWILLEY: Not from the defense, Your Honor.

23 THE COURT: All right. Let's bring that jury in and see
24 what happens.

25 (Whereupon, the jury enters the courtroom at 3:10 p.m.)

1 THE COURT: All right. Welcome back, ladies and
2 gentlemen. If you all will, stand at this time to be sworn.

3 THE CLERK: Please stand and raise your right hands. You
4 shall well and truly try and a true deliverance make between
5 the State of South Carolina and the prisoner at the bar and a
6 true verdict give according to the evidence, so help you God.
7 Please be seated.

8 THE COURT: All right, ladies and gentlemen, welcome
9 back. You have now been selected and sworn and taken an oath
10 to well and duly try this case and render a true verdict
11 according to the law and according to the evidence, so help
12 you God, and as long as you fulfill that oath, then you will
13 have performed your duty -- your jury service and complied
14 with the oath that you have just taken before God.

15 Now, the defendant in this case, Mr. Vice, has been
16 indicted as I indicated earlier and charged with failure to
17 stop for a blue light, possession with intent to distribute
18 marijuana, and trafficking in cocaine. He has pled not guilty
19 and is presumed to be not guilty and cannot be found guilty
20 unless the State convinces you that he is guilty and the State
21 must present evidence which convinces each and every juror of
22 guilt beyond a reasonable doubt and should the State fail to
23 do that, then you must find the defendant not guilty. You
24 must also evaluate each and every charge in the indictment
25 independent of the other charges in the indictment.

1 Now, out of all the other folks who showed up this
2 morning, out of all the other people who live here in
3 Williamsburg County, out of all the other people who live in
4 South Carolina, in fact out of all the other people who live
5 here in the United States of America, only the 12 of you who
6 will deliberate can decide the facts of this case. Only the
7 12 of you who will deliberate can decide whether the defendant
8 is guilty or not guilty.

9 Now, just as only you can decide the facts of this case,
10 as the presiding judge I am the sole judge of the law of this
11 case and you must accept as correct the law as I state it to
12 you at this time during the trial and in much greater detail
13 at the end of the trial.

14 Now, you are to determine the facts of this case from the
15 evidence that is presented during the course of the trial.
16 The evidence generally consists of testimony which will come
17 from this witness stand together with any exhibits that are
18 introduced during the course of the trial. You take the
19 evidence and from the evidence you turn -- you determine the
20 facts of this matter and after determining the facts, then you
21 apply the law as I give it to you and reach your verdict.

22 Now, in order for you to determine the facts of this case
23 and apply the law of this case to the facts, it is essential
24 that you pay attention and that you give this matter your
25 undivided attention, that you cast out from your mind all your

1 other concerns and focus on this case because this is an
2 important matter for the State of South Carolina and for the
3 defendant. I will do all that I can to keep things moving, to
4 make sure that you are not worn out, tired, having to sit for
5 too long, and that we don't waste any time dealing with this
6 case.

7 In just a moment, you will hear an opening statement by
8 the State, Ms. Barr. After she gives her opening, then the
9 defense will have an opportunity to do the same thing. Then
10 we will begin with the testimony from the witnesses. Ms.
11 Barr?

12 MS. BARR: Thank you, Your Honor, may it please the
13 Court.

14 THE COURT: Yes, ma'am.

15 OPENING STATEMENTS

16 MS. BARR: Mr. Swilley, Deputy Hayes, ladies and
17 gentlemen of the jury, good afternoon.

18 (Whereupon, the jurors reply: Good afternoon.)

19 MS. BARR: Let me say -- let me begin by thanking you all
20 for being here this afternoon and when I say that, I mean that
21 very earnestly and very sincerely, understanding that you all
22 didn't have a choice. I imagine that there are probably about
23 50 other places that you would rather be than sitting in a
24 jury room in a courtroom deliberating the trial of a criminal
25 case, but I want to echo the Court's sentiments when the judge

1 says that you all are the most important people to the State
2 of South Carolina and to Mr. David Vice this week because
3 you're the person who hopefully decides this case and will
4 hopefully render justice when you do.

5 Now, more than simply being here, obviously we make you
6 be here, but we want you and we encourage you to pay very
7 close attention to this case. The defendant is charged with
8 three offenses here. He's charged with, as the judge
9 indicated, failure to stop for a blue light and siren,
10 possession with intent to distribute marijuana, and
11 trafficking in cocaine.

12 These charges come from a traffic stop that happened back
13 on December the 19th of last year. The initial stop was
14 attempted on Red Road in Kingstree. I don't know if you all
15 are familiar with -- with that location, but essentially the
16 evidence in this case is going to show that on that particular
17 day, Deputy Hayes with the Williamsburg County Sheriff's
18 Department observed the defendant commit a traffic violation.
19 So he did as all deputies do and all law enforcement do, turn
20 on the blue light and sirens and try to initiate a traffic
21 stop.

22 Well, folks, you're going to hear that this traffic stop
23 didn't go according to plan. Not only are you going to hear
24 evidence of that, you're going to see evidence of that because
25 as luck would have it, Deputy Hayes had a video camera in his

1 patrol car and you're going to see how he pursued the
2 defendant, who refused to stop even though, again, the blue
3 lights were activated and the siren was activated. And this
4 chase continued for a good little bit of distance and other
5 law enforcement vehicles got involved and ultimately they were
6 able to bring the defendant to a stop.

7 Now, what the evidence is also going to show is that
8 during that chase, the defendant dropped a quantity of drugs
9 and, folks, it wasn't a small quantity. It wasn't what some
10 people would call a blunt of marijuana. It was packs and
11 packs of marijuana. It was packs and packs of cocaine. And
12 you'll have the people who analyzed those drugs to come before
13 you and testify as to what they are and we certainly believe
14 they're all going to tell you it was marijuana and it was
15 cocaine.

16 Now, I told you a little bit about the failure to stop
17 for a blue light and siren. I'll tell you a little bit about
18 the trafficking cocaine and the possession with intent to
19 distribute marijuana. In our laws, a person is charged with
20 possession with intent to distribute a drug if -- based on a
21 couple of things that you all can consider, if the amount of
22 the drugs is such that it will cause a reasonable person to
23 say, you know, this doesn't look like something that's used
24 for personal use. This looks like something a person is going
25 to sell or based on the packaging. You're allowed to consider

1 those things, whether or not based on those two factors the
2 defendant intended to distribute or sell the marijuana.

3 Now, he's also charged with trafficking in cocaine and
4 what we expect that the evidence is going to show is that on
5 that date the amount of cocaine that was in the defendant's
6 possession was about 52 grams of cocaine. You all probably
7 have no idea what that means, but that's a whole lot of dope.

8 After the analysts who have tested the drugs will come in
9 and testify as to their findings, that will be the State's
10 case and so we don't expect that this trial will take very
11 long. As a matter of fact, we expect that we'll conclude the
12 trial by tomorrow. But I want you all to remember that it may
13 not be a long case. It may not be a long case. I know some
14 of you hear about cases that drag on for weeks and months at a
15 time. This is not going to be that kind of case, but it is an
16 important case and so for that reason I ask you not only to
17 give us your time, but to please give us your undivided
18 attention and at the conclusion of the case I'm going to ask
19 you to give us justice and I submit to you and I will submit
20 to you that justice will come in the form of a guilty verdict.
21 Thank you all again.

22 THE COURT: Mr. Swilley?

23 MR. SWILLEY: Thank you, Your Honor, if it please the
24 Court.

25 THE COURT: Yes, sir.

1 MR. SWILLEY: Ms. Barr?

2 MS. BARR: Yes, sir.

3 MR. SWILLEY: Good afternoon, ladies and gentlemen. My
4 name is Matthew Swilley. I practice law in Myrtle Beach, as I
5 said earlier, and this is my client, David Vice. Ladies and
6 gentlemen, the State is not going to prove Mr. Vice guilty
7 beyond a reasonable doubt. The reason for that is there is a
8 reasonable doubt in this case. At the conclusion of all the
9 State's evidence and testimony, you will have questions that
10 are left unanswered. For that reason, you have to render a
11 verdict not guilty.

12 Ladies and gentlemen, what happened on December 19th of
13 last year was that David was on his way home in the middle of
14 the day driving his girlfriend's car, a Chevy Caprice Classic,
15 great car, and all of a sudden for no apparent reason an
16 officer pulls his car right in front of David's in the middle
17 of Red Road. David gets scared. He never had that happen to
18 him before and he drove away out of fear.

19 Along the way, David -- he ran away. The officer caught
20 up to him and he pulled his car over. They pulled him out of
21 the car, a gun pointed at his head. More police showed up. A
22 bag was thrown onto the hood of the car that contained cocaine
23 and marijuana. David was put in the back of the car. He was
24 handcuffed and had his money taken from him. He had to sign
25 over his money on the spot. He was taken to jail.

1 Ladies and gentlemen, as Ms. Barr stated, my client is
2 presumed innocent, okay, just like everybody else in America
3 when they're on trial. It's up to the State to prove him
4 guilty and if you have any reasonable doubt, any questions
5 that are unanswered that are reasonable, you have to render a
6 verdict not guilty.

7 At the conclusion of the State's case, you'll have
8 questions that are unanswered. You'll have the feeling that
9 something is just not quite right. I don't feel comfortable
10 doing this. I don't want to convict him because I'm not
11 firmly convinced enough to convict.

12 See, in a criminal case, there's three prevailing
13 principles that you need to be aware of. Number one is the
14 defendant is presumed not guilty, innocent like I said. The
15 burden is on the State. David doesn't have to prove anything.
16 We don't have to prove anything. He doesn't -- he doesn't
17 have to do -- he doesn't have to take the stand. He doesn't
18 have to have me do anything if he doesn't want me to.

19 The burden is on the State and the third and most
20 important is the burden is beyond a reasonable doubt. It's
21 not more likely than not. It's not pretty sure, but beyond a
22 reasonable doubt. That's a very high standard. The reason
23 why that's a high standard is because to take somebody's
24 freedom in America here, you've got to show up. The
25 government has got to put up. The government has got to

1 convince 12 people that somebody did something wrong and
2 they're not going to meet -- they're not going to meet that
3 burden in this case, ladies and gentlemen, because of
4 questions that are unanswered. You will not be firmly
5 convinced and thus you'll have to render a verdict of not
6 guilty.

7 Now, one thing that I did agree with Ms. Barr about was
8 your job this week is very, very important. Unless you ever
9 get elected to a -- to an office like in the state or in the
10 -- in the federal congress, this is the most power you're ever
11 going to have. You have the power. You have the power over a
12 man's freedom, over a man's life, and I'm asking you to use
13 that very, very wisely.

14 I know you might not want to be here, but the fact of the
15 matter is this week is very important. So at the end of the
16 day, to serve justice upon David Vice would be to render a
17 verdict of not guilty. Thank you very much.

18 THE COURT: Ms. Barr?

19 MS. BARR: Your Honor, the State would call Lieutenant
20 Sherrod Timmons.

21 THE CLERK: Do you solemnly swear the evidence and
22 testimony you will give this Court and jury will be the truth,
23 the whole truth, and nothing but the truth, so help you God?

24 THE WITNESS: I do.

25 MS. BARR: May it please the Court.

DIRECT EXAMINATION OF LT. SHERROD TIMMONS BY MS. BARR

1 THE COURT: Yes.

2 LIEUTENANT SHERROD TIMMONS, being
3 first duly sworn, testifies as follows:

4 DIRECT EXAMINATION

5 BY MS. BARR:

6 Q: Lieutenant Timmons, state your full name for the record.

7 A: Louie Timmons.

8 Q: All right and tell us where you're employed?

9 A: Williamsburg Sheriff's Office.

10 Q: And how long have you been there?

11 A: Fifteen years.

12 Q: Fifteen years and what do you do for the Sheriff's
13 Office?

14 A: Currently at this time I'm over the housing of the
15 evidence and training.

16 Q: Okay. Now, you are a certified police officer?

17 A: I am.

18 Q: And you've been in law enforcement for fifteen years?

19 A: I have.

20 Q: Okay. All right and how long have you been the evidence
21 custodian?

22 A: Just a little over a month.

23 Q: Okay. Now, what department within the Sheriff's Office
24 did you work prior to being head of the evidence vault?

25 A: I was the patrol lieutenant.

DIRECT EXAMINATION OF LT. SHERROD TIMMONS BY MS. BARR

1 Q: Okay. All right and give us an idea of what your
2 responsibilities would be as the evidence custodian?

3 A: As officers make cases, there's evidence. Once they
4 collect it, they bring it to me. I sign it into the evidence
5 vault. It stays there until trial unless there's things that
6 need to be tested. A lot of things go to SLED to be tested
7 and some can be tested in-house.

8 Q: Okay. All right. Now, you have a big green and yellow
9 bag there with you; is that correct?

10 A: Yes, ma'am.

11 Q: And at my request, did you take from the evidence vault
12 in this case that yellow and green bag?

13 A: I did.

14 Q: All right and has that bag -- except for its trip to
15 Columbia to SLED, has it remained within the custody and
16 control of Williamsburg County Sheriff's Office?

17 A: It has.

18 Q: All right and other than the SLED analysts, other than
19 Lieutenant Jeffrey Scott and yourself, has anybody else dealt
20 with that bag?

21 A: Prior to it being signed into the evidence, it was
22 recovered. So there was people that recovered it and then
23 they transferred custody to the evidence vault.

24 Q: Recovered it from the scene you mean?

25 A: The scene, yes.

DIRECT EXAMINATION OF LT. SHERROD TIMMONS BY MS. BARR

1 Q: I got you. All right. Once it was logged into the
2 Sheriff's Office into the evidence vault, other than SLED
3 looking at it ---

4 A: It's been -- it's been nowhere.

5 Q: All right. All right. Let me, if I can, have you step
6 down and let's mark the bag as an exhibit.

7 (Whereupon, the green and yellow gym bag is marked as
8 State's Exhibit Number 5.)

9 Q: All right. Let me get you to stay right here for just a
10 second for me. Now, whose name appears on that evidence bag?

11 A: Sergeant Shearer was the first -- first person that
12 received it. Deputy Hayes.

13 Q: This fellow here?

14 A: Yes.

15 Q: All right.

16 A: And Lieutenant Scott.

17 Q: Jeffrey Scott?

18 A: Jeffrey Scott.

19 Q: Okay.

20 A: And myself.

21 Q: All right. Now, this was recovered by Sergeant Robert
22 Shearer on what date?

23 A: 12/19/2011.

24 Q: And whose case? How were you able to determine that this
25 evidence is related to the case against Mr. David Vice?

DIRECT EXAMINATION OF LT. SHERROD TIMMONS BY MS. BARR

1 A: It has the case number, description of evidence, type of
2 offense, and the deputy's signature that signed it into the
3 evidence.

4 Q: All right. Let me ---

5 MS. BARR: Judge, we would move State's Exhibit Number 5
6 in at this time.

7 MR. SWILLEY: Your Honor, I don't -- I don't think the
8 chain of custody has been established through just one
9 witness.

10 THE COURT: All right. What are you seeking to
11 introduce, Ms. Barr?

12 MS. BARR: The -- the bag and I'll have the contents
13 later marked separately as exhibits, but right now I'm just
14 seeking to have the bag.

15 THE COURT: All right. Anything ---

16 MS. BARR: And I -- I'm sorry, Judge.

17 THE COURT: Anything further?

18 MR. SWILLEY: Your Honor, I don't think she's laid the
19 foundation for the actual bag to be put into evidence through
20 this witness.

21 THE COURT: All right. Ms. Barr?

22 MS. BARR: Judge, I'll be able to with other witnesses.
23 That's fine.

24 THE COURT: All right. It's admitted for identification
25 purposes ---

DIRECT EXAMINATION OF LT. SHERROD TIMMONS BY MS. BARR

1 MS. BARR: All right.

2 THE COURT: --- at this time.

3 Q: Now, let me get you to stand right there for me. If you
4 would, put the bag on the top. All right. If you could, open
5 the bag for me, but do not remove the contents.

6 (Whereupon, the witness complies by unzipping the bag
7 identified as State's Exhibit Number 5.)

8 Q: All right. Now, sir, when the bag was logged into
9 evidence with the Williamsburg County Sheriff's Office, were
10 there any items contained within that bag?

11 A: Yes, all the items that's in it at this time.

12 Q: Okay. All right and let me get some stickers. The items
13 that are contained within that bag, were any of them analyzed
14 by SLED?

15 A: Yes. There's one BEST kit.

16 Q: All right. Now, let me make sure you turn around so they
17 can hear you. When you say a BEST kit, tell me what that is?

18 A: It's an evidence kit that SLED provides to the local law
19 enforcement ---

20 Q: Yes, sir.

21 A: --- to package certain types of drugs in to be analyzed.

22 Q: All right. Would you mind handing me the specific item
23 that was labeled as with a BEST kit?

24 (Whereupon, the witness complies.)

25 Q: Okay. All right and is there anything that is particular

DIRECT EXAMINATION OF LT. SHERROD TIMMONS BY MS. BARR

1 about this exhibit that will tell you whether or not it's been
2 tampered with?

3 A: Yes. The bag ---

4 Q: Tell us about that?

5 A: The bag has been sealed by SLED and when they seal it,
6 they initial it across the actual line where it's heat sealed.

7 Q: Okay.

8 MS. BARR: We'd like to have this marked as State's
9 Exhibit 5A.

10 MR. SWILLEY: Your Honor, again, she's marking it. I
11 don't know whether she's marking the bag or whether it's the
12 contents into evidence or not. I don't think the foundation
13 has been laid or chain of custody been established for the
14 contents.

15 THE COURT: It will be marked for identification
16 purposes.

17 MS. BARR: It is.

18 Q: All right. Now -- now, all right. All right. Now, tell
19 me what the other -- is it three bags that are in there?

20 A: There's several different bags.

21 Q: Okay.

22 A: Inside.

23 Q: All right. Pull out the bags that contain green, leafy
24 substance.

25 (Whereupon, the witness complies.)

DIRECT EXAMINATION OF LT. SHERROD TIMMONS BY MS. BARR

1 Q: Any other bags containing a green, leafy substance?

2 A: Yes.

3 Q: All right. All right. So I am holding -- is it six
4 bags? You count them and you tell me if I'm right.

5 A: One second. Let me make sure that's all of them. Yes,
6 ma'am, six.

7 MS. BARR: I'll have these marked for identification
8 purposes only.

9 (Whereupon, the six bags of marijuana are marked for
10 identification as State's Exhibit Number 5B.)

11 Q: Lieutenant Timmons, is there any markings that are
12 contained within what's been marked for identification
13 purposes as State's Exhibit Number 5B that would tell us
14 whether or not these substances have been analyzed? And you
15 can take them one at a time.

16 A: It has the date and Officer Jeff Scott's initials. He
17 generally does that when he tests.

18 Q: Okay. Your voice is going down. Make sure you keep your
19 voice up. Say it again now?

20 A: It has the date of testing. It says 2/17/12 and it's got
21 JSS on it.

22 Q: Now, who is JSS?

23 A: Jeff Scott.

24 Q: All right and ---

25 A: Jeffrey Scott.

DIRECT EXAMINATION OF LT. SHERROD TIMMONS BY MS. BARR

- 1 Q: In February of this year, where was Jeff Scott employed?
- 2 A: The Sheriff's Office.
- 3 Q: And what were his responsibilities then?
- 4 A: Evidence custodian.
- 5 Q: Was he -- and if you know, fine, and if you don't, that's
- 6 fine, too. Was he ever certified to analyze marijuana?
- 7 A: He was.
- 8 Q: All right. Now, I'm going to give you the second part of
- 9 State's Exhibit 5B and tell me just is there anything
- 10 contained within that exhibit that would tell you whether or
- 11 not it's been analyzed?
- 12 A: The same thing. It has the case number, 2/17/2012 marked
- 13 on it.
- 14 Q: All right and tell us about this third packaging, please,
- 15 sir? Same question.
- 16 A: It has the case number and the date, 2/17/12, with the
- 17 initials JSS written on it.
- 18 Q: And what about the remainder of these? The others?
- 19 A: All of them. This one's not marked.
- 20 Q: Okay. Is that the smaller of the six?
- 21 A: Yes.
- 22 Q: Okay.
- 23 A: The other two are marked with the same date, 2/17/12,
- 24 with JSS and the case number written on it.
- 25 Q: Okay. All right. Now, is there anything else that is

DIRECT EXAMINATION OF LT. SHERROD TIMMONS BY MS. BARR

1 contained within the Court's -- the State's Exhibit Number 5
2 that's of any evidentiary value? Well, let me ask you this.

3 MS. BARR: I'll have this marked as C, 5C.

4 (Whereupon, a box of Glad plastic bags is marked for
5 identification as State's Exhibit Number 5C.)

6 Q: I'm going to hand you what's been marked for
7 identification purposes as State's Exhibit Number 5C and ask
8 you if you recognize that?

9 A: Yes. It's a bag of Glad fold top sandwich bags.

10 Q: Okay.

11 A: A box of them.

12 Q: All right. Now, let me ask you this, Lieutenant Timmons.
13 Prior to being assigned as the evidence custodian, did you
14 ever -- you mentioned you worked on patrol. Did you ever have
15 any occasions to be involved with the arrest of folks for
16 possession of narcotics or selling narcotics?

17 A: I did.

18 Q: All right. Now, does this packaging -- does it have any
19 value to you in terms of -- of -- as it relates to these
20 drugs?

21 MS. SWILLEY: Objection.

22 THE COURT: Yes, sir?

23 MR. SWILLEY: I think that's -- that question calls for
24 speculation.

25 THE COURT: All right. I missed the question. What was

DIRECT EXAMINATION OF LT. SHERROD TIMMONS BY MS. BARR

1 it?

2 MS. BARR: I asked, sir, have you -- did you ever have
3 occasion as a patrol officer to arrest people or be involved
4 in the investigation of people for possession or selling of
5 narcotics and I believe he ---

6 WITNESS: Yes.

7 MS. BARR: And the next question: do these bags have any
8 value to you as far as it relates to possession of drugs?

9 THE COURT: And the objection is?

10 MR. SWILLEY: Your Honor, I think that calls for
11 speculation.

12 THE COURT: As to whether they have value to this officer
13 in relation to drugs?

14 MR. SWILLEY: In relation to this case. That's correct.

15 THE COURT: I overrule the objection as it relates to
16 speculation.

17 MR. SWILLEY: Your Honor, I think relevant -- relevance
18 is also important. I don't think he has any information as to
19 this case. I mean he's talking about other cases.

20 THE COURT: Now, I sustained the objection as it relates
21 to relevance.

22 MR. SWILLEY: Thank you.

23 Q: How many bags does this particular exhibit indicate that
24 it contains?

25 A: 180.

DIRECT EXAMINATION OF LT. SHERROD TIMMONS BY MS. BARR

1 Q: All right and have you ever had occasion during your
2 experience as a patrol officer to arrest an individual charged
3 with selling drugs or intending to sell drugs?

4 A: Yes.

5 Q: All right and in terms of someone charged with selling
6 drugs or intending to sell drugs, in your experience are they
7 packaged a certain way?

8 A: Yes, they are.

9 Q: All right. Can you tell us about that based on your
10 experience?

11 A: They're packaged in sandwich bags such as those. They're
12 packaged in Ziploc bags. It depends.

13 Q: Okay. All right. Is there anything else that's
14 contained within that particular bag?

15 (Whereupon, there is a pause in the questioning as the
16 witness looks in the bag.)

17 Q: What I'll have you do, Lieutenant Timmons, is let me let
18 you put all those things back in there for me.

19 (Whereupon, the witness complies.)

20 Q: While you're doing that, let me just ask you a quick
21 question. Were you present on the scene when Mr. Vice was
22 arrested?

23 A: No, I was not.

24 Q: After those items were tested by SLED and Lieutenant
25 Jeffrey Scott, have they been within the sole custody, control

CROSS EXAMINATION OF LT. SHERROD TIMMONS BY MR. SWILLEY

1 and possession of the Williamsburg County Sheriff's Office?

2 A: They have.

3 Q: All right. I believe that's all the questions that I
4 have for you, Mr. Timmons. Please answer any questions that
5 defense counsel may have.

6 THE COURT: Yes, sir.

7 MR. SWILLEY: Thank you, Your Honor.

8 CROSS EXAMINATION

9 BY MR. SWILLEY:

10 Q: Lieutenant Timmons, did you have anything whatsoever to
11 do with this particular case?

12 A: No, I did not.

13 Q: All right.

14 MR. SWILLEY: Thank you. Nothing further.

15 THE COURT: Anything further?

16 MS. BARR: Not from this witness, Judge.

17 (Whereupon, the witness leaves the stand at 3:39 p.m.)

18 THE COURT: All right. Next witness?

19 MS. BARR: We'd call Deputy Loy Hayes.

20 THE COURT: Deputy Hayes.

21 THE CLERK: Place your left hand on -- do you solemnly
22 swear that the evidence and testimony you will give this Court
23 and jury will be the truth, the whole truth, and nothing but
24 the truth, so help you God?

25 THE WITNESS: Yes, I do.

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 DEPUTY LOY HAYES, being first duly
2 sworn, testifies as follows:

3 DIRECT EXAMINATION

4 BY MS. BARR:

5 Q: Deputy Hayes, state your name for me?

6 A: Deputy Loy Hayes.

7 Q: All right and tell the ladies and gentlemen of the jury
8 where you work?

9 A: The Williamsburg County Sheriff's Department.

10 Q: All right and how long have you worked at the Sheriff's
11 Office?

12 A: Five years.

13 Q: All right and tell them what you do?

14 A: We do anything where we respond to domestic calls, we do
15 traffic, run traffic for traffic violations, just, you know,
16 your normal law enforcement duties.

17 Q: Okay. Now, sir, you were working back on December 19th of
18 2011?

19 A: Yes, I was.

20 Q: All right and you were working patrol that day?

21 A: Yes, ma'am.

22 Q: All right. Now, on that day, of course, you saw the
23 defendant, David Vice?

24 A: Yes.

25 Q: And did you know the defendant prior to that day?

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 A: I was familiar with him, yes.

2 Q: All right. Tell the jurors how the traffic stop or the
3 attempted traffic stop was initiated and why?

4 A: We had had some prior complaints in the area of Red Road.

5 MR. SWILLEY: Objection, Your Honor.

6 THE COURT: All right. Basis of the objection?

7 MR. SWILLEY: Your Honor, I don't think that's -- that
8 particular subject matter is relevant, Your Honor.

9 THE COURT: What he was doing that day?

10 MR. SWILLEY: Or the other -- the incidents for which he
11 -- the answer to the question that he was just asked.

12 THE COURT: All right. Restate the question, please.

13 MS. BARR: Yes, sir.

14 Q: Tell us the circumstances surrounding your encounter with
15 David Vice on December 19th of last year?

16 THE COURT: All right.

17 A: Again, I was patrolling ---

18 MS. BARR: Wait, wait.

19 THE COURT: Just a moment. And you object to ---

20 MR. SWILLEY: That -- that wasn't the particular question
21 that I -- that I was objecting to.

22 THE COURT: Okay. Do you object to this question?

23 MR. SWILLEY: No.

24 THE COURT: All right.

25 Q: You may continue.

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 A: Okay. Again, I was -- I was patrolling Red Road area and
2 I noticed a gray in color Chevy known to be driven by a David
3 Vice and he was also known to be driving under suspension.

4 MR. SWILLEY: Objection.

5 THE COURT: Objection is overruled.

6 Q: You may continue.

7 A: I noticed that as he come around a curve I noticed the
8 vehicle crossed over the center line.

9 Q: Okay.

10 A: Which was left of center. Considering knowing that -- of
11 who the suspect was and knowing he was known to run from law
12 enforcement ---

13 MR. SWILLEY: Objection, Your Honor. Your Honor, I'd
14 make a motion for a mistrial at this juncture.

15 THE COURT: Ladies and gentlemen, I'm going to have you
16 go step to the jury room. Please do not discuss the case.

17 (Whereupon, the jury exits the courtroom at 3:43 p.m.)

18 THE COURT: Yes, sir?

19 MR. SWILLEY: Your Honor, based upon what I just heard I
20 believe Deputy Hayes testified that Mr. Vice was known to run
21 from law enforcement. Your Honor, that's an introduction of
22 prior bad acts. I think that the jury now is going to be
23 prejudiced against my client. The fact that he's put into the
24 record the fact that Mr. Vice has had prior incidents with
25 police indicates that he's had prior charges not in relation

1 to this -- to this case and I would move -- I would move the
2 Court grant a mistrial in this case.

3 THE COURT: All right. Ms. Barr, what do you say about
4 that?

5 MS. BARR: Judge, I would say that when counsel got up in
6 opening statement and said that the defendant was pulled over
7 for no apparent reason, he simply got scared and had never had
8 that happen to him before, which is clearly not in fact the
9 case. I mean I think that the officer's testimony in that
10 regard, one, it formed the basis of one of the reasons why he
11 initiated -- one of the many reasons why he initiated the
12 traffic stop, and also it would rebut the statement that
13 counsel made that that had never happened before.

14 And, Judge, even if the Court would determine that that
15 particular testimony is irrelevant, we don't believe that it
16 rises to the level of warranting a mistrial and we submit that
17 if it's not appropriate and not relevant that a curative
18 instruction would suffice.

19 THE COURT: All right. Yes, sir?

20 MR. SWILLEY: Your Honor, just for the record, in my
21 opening I was referring to the fact that Mr. Vice never had an
22 officer pull in front of him in that manner, but that's -- I
23 guess that's not really relevant. But the -- the officer just
24 testified about prior bad acts of the defendant. The jury
25 heard it. I don't think you can erase that from their mind.

1 It's very prejudicial and I think it does rise to the level of
2 a mis -- of warranting a mistrial.

3 THE COURT: All right.

4 (Whereupon, there is a brief pause in the proceedings.)

5 THE COURT: All right.

6 MS. BARR: And, Judge, we would also argue under *State v.*
7 *Council*, 515 S.E.2d 508. It's a 1999 case where the appellate
8 court determined that vague references to the defendant's
9 prior record where there is no attempt by the State to
10 introduce evidence of a conviction of other crimes did not
11 warrant a mistrial.

12 THE COURT: Well, you know the case of *State v.*
13 *Laterrance Dunlap*. In that case, the defendant was charged
14 with distribution of crack cocaine and the question was
15 whether or not the counsel had opened the door to evidence
16 rebutting the defendant's contention that the defendant was
17 merely an addict -- an addict and thus evidence of defendant's
18 prior drug record was admissible and that case joined the
19 opening statements of defense counsel acknowledged that
20 petitioner had been in trouble with the law from time to time
21 from the time he was 15 years old and a young man addicted to
22 drugs and we could convict him right now because he was a
23 young man when he was hooked on crack and had a problem with
24 it. He never sold it; he used it. And the question then
25 became whether or not that opened the door for this evidence

1 being admitted as his prior drug record.

2 That case is not directly on point, not on all squares,
3 except that in the pre-trial hearing in this case the State
4 admitted as a Court's exhibit the defendant's prior driving
5 record -- can I see that Court's exhibit again, please? --
6 which I reviewed and it showed two DUI suspensions and one DUS
7 suspensions -- one DUS suspension. There appears to be a
8 controlled substance violation on 8/6/2011, which would have
9 been a few months prior to this. A driving under suspension
10 in 2010 and controlled substance violation 8/4/2010. There
11 appears to be one from 2005. So the question is whether or
12 not the -- of course, a number of failure to pay traffic
13 ticket violations appear.

14 Whether or not the officer has a right to explain why he
15 did what he did and whether or not that's appropriate evidence
16 to rebut counsel's assertion in opening statement that -- that
17 the defendant was driving casually down the road and was
18 driving his girlfriend's car when all of a sudden the officer
19 blocked the road in front of him, that he was shocked and
20 scared and never had that happen to him before. I think on
21 balance that the -- that the evidence is proffered to explain
22 why the officer did what he did on that day, particularly in
23 regard to explaining why he stopped him, that is that he knew
24 him.

25 There was no stipulation in this case that he -- or some

1 dispute. It appears based on arguments before whether the
2 officer knew or had reason to believe that the defendant was
3 driving under suspension, he testified that he knew that he
4 was under suspension so that would have given him probable
5 cause to stop him which is an issue in the case.

6 The question is whether or not his reputation of running
7 from the police whether or not that improperly then brings in
8 some prior bad acts and whether or not those prior bad acts
9 which -- which -- which might not amount to any allegation of
10 any criminal violation or specific criminal violation, but
11 behavioral violation, whether or not all of that would deprive
12 the defendant's right to a fair trial.

13 Anything -- any -- anything else you all want to say on
14 that with regard to that?

15 MR. SWILLEY: Your Honor, just in my opinion that the
16 fact that a person is alleged to have run from law enforcement
17 it's axiomatic that you think that there is a -- that a
18 reasonable person would think that there is a reason for that,
19 that there was another crime involved. I mean you don't --
20 police just don't chase people and ---

21 THE COURT: He's explaining why he blocked the road.

22 MR. SWILLEY: I understand, but there was no reason to
23 talk about any kind of prior bad act, any kind of prior flight
24 on behalf of Mr. Vice. I think it was unduly prejudicial.

25 THE COURT: All right. Ms. Barr?

1 MS. BARR: Judge, I think when -- when counsel got up and
2 made the comment that the defendant was scared because he'd
3 never had that happen to him before -- and I don't think the
4 officer did it intentionally. I just think he was explaining
5 what he was doing that day. But I think it's proper testimony
6 in light of the opening statement that was made.

7 THE COURT: Okay.

8 MS. BARR: Because he doesn't want -- he doesn't want the
9 prosecution to make the defendant to appear that he's just
10 this -- this criminal, but at the same time I don't think it's
11 fair to represent to the -- to the jury that he's just this --
12 this innocent person and had never gotten in any trouble with
13 the law, which is the impression that he gave to the jury, and
14 so if we -- we're going to balance that, I think we need to --
15 to balance in -- in all respects. But certainly, Judge, we
16 don't think that a mistrial is warranted based on that lone
17 isolated reference to the defendant having run from the police
18 before.

19 THE COURT: Just a moment.

20 MS. BARR: And, Judge, I don't know whether or not -- I
21 don't have his driving record. Can I?

22 THE COURT: What did you say?

23 MS. BARR: I was -- may I see his driving record, Your
24 Honor? Thank you, Judge. Judge, that's all we would add.

25 THE COURT: All right. You know, quite often during a

1 trial you have the lawyers get up and tell the jury various
2 things as if they're testifying and then -- and then there's
3 no testimony later given because the defendant has a right to
4 remain silent and the jury is only left with the impressions
5 of what the lawyer had stated and though I generally tell the
6 jury to -- that what the lawyers say is not -- not evidence.

7 I think on balance I'm going to sustain the objection and
8 give a curative instruction and deny the motion for a mistrial
9 even though it's a very thin line as to whether or not the
10 testimony was appropriate or not.

11 MS. BARR: Thank you, Your Honor.

12 THE COURT: Let's bring -- let's take a two minute
13 stretch and then we'll bring them back in.

14 (Whereupon, there is a break in the proceedings from 3:57
15 p.m. until 3:59 p.m.)

16 THE COURT: All right. Let's bring the jury and press
17 on.

18 (Whereupon, the jury enters the courtroom at 4:00 p.m.)

19 MS. BARR: May it please the Court.

20 THE COURT: Ladies and gentlemen, I -- I sustained the
21 objection to the last portion of the testimony given by the
22 officer and you are to disregard that testimony. In fact,
23 we'll have you disregard the entire question and response to
24 the last -- the last question and response and have the State
25 restate.

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 MS. SWILLEY: Your Honor, I just renew my previous motion
2 to protect the record.

3 THE COURT: All right.

4 CONTINUED DIRECT EXAMINATION

5 BY MS. BARR:

6 Q: Deputy Hayes, you indicated that you observed the
7 defendant driving a vehicle?

8 A: Yes.

9 Q: Okay. All right. Now, was he approaching you or was he
10 in front of you or how did that work?

11 A: Approaching me.

12 Q: Okay. All right and tell us about the -- just so we can
13 pick up where we left off, about the traffic violation that
14 you observed?

15 A: When he come around the curve, I noticed he was driving
16 left of center or driving basically in the middle of the road.

17 Q: Okay. All right and after he came around the curve,
18 what, if anything, did you do to try to initiate a traffic
19 stop on his vehicle?

20 A: Well, I activated my blue lights and in this particular
21 incident I kind of pulled sideways in the road there to ---

22 Q: Okay.

23 A: --- to stop him.

24 Q: Okay. All right and what happened next?

25 A: He went to go around me and I yelled for him to stop and

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 he proceeded to go around me and then accelerated.

2 Q: All right. Now, when you told him to stop, I'm assuming
3 you were at that point face to face, eye to eye with him?

4 A: Basically, yes.

5 Q: Okay and when we talk about the individual who was
6 driving that car, we're talking about the defendant, David
7 Vice?

8 A: Yes.

9 Q: All right and tell us what happened after he proceeded to
10 go around you?

11 A: I turned around. I still had my -- my blue lights on. I
12 proceeded to go after him and then I activated my siren.

13 Q: Okay.

14 A: The subject was still -- he wouldn't stop ---

15 Q: Okay.

16 A: --- or pull over.

17 Q: Now, was his -- did he maintain a normal speed or did his
18 speed increase or decrease in any manner?

19 A: It increased.

20 Q: Okay. All right. What -- how long did the chase last?

21 A: Several minutes, a few miles.

22 Q: Okay. Now, were you ever close enough behind him whereby
23 he could have seen your blue lights or heard your sirens?

24 A: Yes.

25 MR. SWILLEY: Objection. Calls for speculation.

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 THE COURT: Restate the question, please.

2 MS. BARR: Yes, sir.

3 Q: Was there ever a point in time that you were close enough
4 behind Mr. Vice where he could have either, one, seen your
5 blue lights or, two, heard your sirens?

6 A: Yes.

7 THE COURT: He's answered the question; hasn't he?

8 MS. BARR: He -- he did. Mr. Swilley had an objection.

9 THE COURT: The objection is overruled.

10 Q: Now, sir, were you -- do you know -- do you have any
11 reason to believe that Mr. Vice had any problems seeing or
12 hearing?

13 A: No, he didn't.

14 Q: All right. Now, did other law enforcement vehicles
15 participate at all in the pursuit?

16 A: Yes.

17 Q: Okay. How many miles to you think you went?

18 A: Four -- four to five miles maybe.

19 Q: All right and what time of day was this?

20 A: This was around noon, twelve o'clock.

21 Q: Okay and the point where you initially tried to initiate
22 a traffic stop and ultimately where the vehicles ended up, was
23 that area within Williamsburg County?

24 A: Yes, it was.

25 Q: And what other law enforcement officers were available or

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 assisted you during that -- during that time?

2 A: Sergeant Shearer.

3 Q: Robert Shearer?

4 A: Robert Shearer with the Sheriff's Office.

5 Q: Yes, sir.

6 A: Let's see. There was Corporal Jenkins, Johnny Jenkins

7 ---

8 Q: Okay.

9 A: --- with the Sheriff's Office.

10 Q: Okay.

11 A: We had Sheriff Johnson ---

12 Q: Okay.

13 A: --- of Williamsburg County and our chief deputy, Dudley
14 Mesier, and I think there was some city units that called and
15 come out and assisted.

16 Q: All right. Now, at the point in time when it is
17 appropriate, I may ask you to identify those officers if they
18 are on the videotape.

19 A: Okay.

20 Q: Now, aside from the defendant not stopping when you
21 activated your blue lights and siren, did anything else
22 unusual occur from the time you initiated the chase until the
23 time he ultimately came to a stop?

24 A: I observed him throw a bag out of the vehicle.

25 Q: Okay and can you describe the bag for us?

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 A: It was a green and yellow ---

2 Q: Okay.

3 A: --- bag.

4 Q: I'm going to hand you what's been marked for
5 identification purposes as State's Exhibit Number 5, which
6 includes 5A, B, and C. Do you recognize that particular
7 exhibit?

8 A: Yes, I do.

9 Q: And tell the ladies and gentlemen of the jury how it is
10 that you recognize this exhibit?

11 A: That's the bag David Vice threw out the window out of his
12 vehicle.

13 Q: All right and when he threw it out, was this at a point
14 where you were still engaged in the chase?

15 A: Yes, we were.

16 Q: All right. When he threw it out, what area of town were
17 you all in at that time?

18 A: It's called the Holywoods area.

19 Q: Okay. Were there any other individuals around?

20 A: There was.

21 Q: Okay. How -- what, if anything, did they do? The other
22 individuals I mean.

23 A: Well, when the bag was throwed out, they started running
24 towards the bag.

25 Q: Okay.

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 A: And the officer behind me stopped and retrieved the bag.

2 Q: Now, which officer did that?

3 A: Sergeant Shearer.

4 Q: Robert Shearer?

5 A: Yes.

6 Q: All right and when he retrieved the bag, did he ever
7 bring it to you?

8 A: He did.

9 Q: Okay and when did he do that? When did he bring it to
10 you?

11 A: Immediately. It just -- it was right after we got him
12 stopped and he was able to retrieve the bag and then just come
13 to where I'm at.

14 Q: Okay. Now, the bag that Officer Shearer brought to you,
15 that was the same bag that you saw being thrown out the
16 window?

17 A: Yes, it was.

18 Q: And is that the same bag that's been identified as
19 State's Exhibit Number 5?

20 A: It is.

21 Q: All right and where was this bag taken once Deputy
22 Shearer brought it to you?

23 A: It was taken to the Sheriff's Office.

24 Q: Okay. By whom?

25 A: By me.

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 Q: Okay and you took it to the Sheriff's Office and you gave
2 it to who?

3 A: After we logged it in and it was given to Jeff Scott.

4 Q: Logged it into the evidence room?

5 A: Evidence.

6 Q: All right. Now, while you were at the scene, did you
7 have an opportunity to look inside the bag?

8 A: I did.

9 Q: All right and I'll have you do that while you're on the
10 witness stand and tell me if the items that you observed
11 inside this bag on that day are the same items that are
12 contained within that bag today? Do you need any napkins or
13 anything? We're running out of gloves, but I'll give you a
14 napkin if you need it.

15 A: Well, I mean it's all bagged up.

16 Q: Okay.

17 A: It appears to be all there.

18 Q: Okay. Is there anything that's in that bag now that was
19 not in that bag on December 19th of last year?

20 A: Maybe just a little evidence thing.

21 Q: Okay.

22 A: Okay. That's just -- it was just packaged different, but
23 it's showing where it was I guess tested, yeah. No, okay,
24 that's the whole thing there that was in it.

25 Q: All right.

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 A: But everything else I believe.

2 Q: Okay. All right.

3 MS. BARR: Now, Judge, we would move State's Exhibit
4 Number 5, inclusive of 5A, 5B, and 5C, into evidence at this
5 time.

6 MR. SWILLEY: Your Honor, as to the green and yellow bag,
7 I would have no objection, but to -- to its contents, I don't
8 think the chain of custody has been established. There's been
9 no analysis -- no analyst has testified. So to the bag no
10 objections, to everything inside of it I would object on those
11 grounds.

12 THE COURT: Well ---

13 MS. BARR: And, Judge ---

14 THE COURT: Yes?

15 MS. BARR: Judge, we would submit that I think a chain of
16 custody has been established. Now, as to what those
17 particular contents are, of course, we'll have witnesses to
18 testify to that, but clearly the bag and the contents that are
19 contained within the bag, the chain of custody has been
20 established as to those items.

21 THE COURT: All right. The bag is admitted only at this
22 time.

23 (Whereupon, State's Exhibit Number 5, the green and
24 yellow gym bag, is admitted into evidence.)

25 Q: Now, Deputy Hayes, you had a camera inside your patrol

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

- 1 car; is that correct?
- 2 A: Yes, it is.
- 3 Q: And did you have a marked vehicle or did you have one of
- 4 those under -- under ---
- 5 A: Marked.
- 6 Q: I call them undercover vehicles.
- 7 A: It was marked.
- 8 Q: Okay. All right. Blue lights and sirens were working
- 9 appropriately?
- 10 A: Yes, ma'am.
- 11 Q: All right. Now, you reported the pursuit on that date?
- 12 A: Yes, I did.
- 13 Q: All right. I'm going to show you what's been marked for
- 14 identification purposes as State's Exhibit Number 3 and tell
- 15 me if you recognize this particular exhibit?
- 16 A: Yes.
- 17 Q: All right and tell the ladies and gentlemen of the jury
- 18 how it is that you recognize it?
- 19 A: It is the CD that was made.
- 20 Q: Okay. From the ---
- 21 A: From the dash cam.
- 22 Q: Okay. Involving Mr. Vice?
- 23 A: Yes.
- 24 Q: All right.
- 25 MS. BARR: Judge, we would move State's Exhibit Number 3

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 in at this time.

2 MR. SWILLEY: No objection.

3 THE COURT: It's admitted without objection.

4 (Whereupon, State's Exhibit Number 3, the DVD containing
5 the dash cam video, is admitted into evidence.)

6 MS. BARR: And we would request permission to publish.

7 THE COURT: You may.

8 Q: Deputy Hayes, let me get you to step down for just a
9 moment to help me with the projector?

10 (Whereupon, there is a pause in the proceedings as the
11 video is readied for playing.)

12 Q: All right, Deputy Hayes, what I'll do is I'll simply play
13 the -- the videotape, but I won't ask you any questions until
14 after the ---

15 A: Yeah.

16 Q: --- playing concludes. Okay?

17 A: Okay.

18 (Whereupon, the dash cam video is played in the
19 courtroom. NOT TRANSCRIBED HEREIN.)

20 Q: Just point when you can identify the defendant's vehicle
21 for us?

22 (Whereupon, the witness complies, indicating. The
23 videotape continues to play for a few minutes and is then
24 stopped.)

25 Q: Deputy Hayes, let me pause it for just a moment. I'm

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 going to go back just a little bit way -- a little bit. Were
2 you able to see the point in time wherein the defendant
3 discarded the green and yellow bag we talked about?

4 A: Yes.

5 Q: Okay. All right. I'm going to rewind it just a wee bit
6 and can you make sure to point that part out ---

7 A: Okay.

8 Q: --- to the jury ---

9 A: Yes.

10 Q: --- when it's replayed? Thank you, sir.

11 (Whereupon, the videotape resumes playing and the witness
12 complies, indicating. The tape is then stopped.)

13 A: All right. If you notice, he's holding it out the window
14 right here.

15 (Whereupon, the videotape resumes playing briefly and is
16 then stopped again.)

17 A: And that's where he throws it and it landed. It hits
18 here.

19 Q: All right.

20 (Whereupon, the videotape resumes playing briefly and is
21 then stopped.)

22 Q: Another quick question. The point where you indicated
23 that he threw the bag, was there another individual ---

24 A: There was.

25 Q: --- near that bag?

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 A: There was. There was an officer behind me.

2 (Whereupon, the videotape resumes playing briefly and is
3 then stopped.)

4 Q: Do you have any idea what that part was that flew off the
5 vehicle?

6 A: No, I don't.

7 (Whereupon, the videotape resumes playing and continues
8 playing through the next question and answer.)

9 Q: Whose vehicle is that?

10 A: That's Sheriff Michael Johnson.

11 (Whereupon, the witness makes a statement which is not
12 heard over the sound of the videotape. The tape is then
13 stopped.)

14 Q: I'm sorry, sir. Say that again, please?

15 A: That was actually -- that was a taser. That was not a
16 gun that I had pointed at him. That was a taser out, not a --
17 not a gun.

18 Q: All right. So you did not point a ---

19 A: No, I did not point ---

20 Q: --- gun at his head?

21 A: No, I did not.

22 (Whereupon, the videotape resumes playing briefly and is
23 then stopped.)

24 Q: And if you will, identify these individuals in that
25 screen?

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 A: This is me, Deputy Hayes. This is our sheriff, Michael
2 Johnson. This is Corporal Johnny Jenkins.

3 Q: Yes, sir.

4 A: And Investigator Alex Wood.

5 Q: Alex?

6 A: I'm sorry, Alex.

7 Q: Edwards?

8 A: Yes.

9 Q: Yes, sir. I think it is.

10 (Whereupon, the videotape resumes playing briefly and is
11 then stopped at the point in time on the tape when the
12 defendant is handcuffed.)

13 Q: All right and the individual who was taken out of the
14 driver's seat was who?

15 A: David Vice.

16 Q: All right. You want to hand me that stuff?

17 (Whereupon, the witness returns to the witness stand.)

18 Q: Sir, when you opened that bag after Sergeant Robert
19 Shearer brought it back to you, what was -- what was in the
20 bag?

21 A: There was a large quantity of green leafy-like substance
22 believed to be marijuana.

23 Q: Okay.

24 A: And there was several bags of white powder believed to be
25 cocaine. There was a red scale. There was ---

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

- 1 Q: A red scale?
- 2 A: Yes, ma'am.
- 3 Q: Is that contained within the bag now?
- 4 A: Yes, it is.
- 5 Q: All right. Can you please take that out for me?
- 6 A: There was sandwich bags, little small what they call -- I
- 7 guess they call it jewelry bags.
- 8 Q: Okay.
- 9 A: There's a -- there's the scale.
- 10 Q: All right. Hold -- hold on for a second. Now, I'm going
- 11 to hand you what's been marked for identification purposes as
- 12 State's Exhibit Number 5D. Is this the scale that you talked
- 13 about?
- 14 A: Yes.
- 15 Q: All right and is that the first time you've ever seen
- 16 something like that?
- 17 A: No, ma'am, it's not.
- 18 Q: Okay. In what other context have you seen a scale that
- 19 resembles that?
- 20 A: In other incidents.
- 21 Q: Okay. Other -- what type of other --
- 22 A: For drug arrests, other drug arrests.
- 23 Q: All right and do you know what that is used for?
- 24 A: It's for weighing drugs.
- 25 Q: For weighing drugs?

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 A: Yeah, whether it be cocaine or marijuana or crack,
2 whatever it may be.

3 Q: All right.

4 MS. BARR: Judge, we would move State's Exhibit Number 5D
5 in at this time.

6 THE COURT: Any objection?

7 MR. SWILLEY: Your Honor, I just object as to -- under
8 relevance. There's no -- there's no -- nothing in the record
9 that would suggest that that was used in conjunction with
10 anything the defendant is charged with.

11 THE COURT: All right. It's admitted over objection.

12 MS. BARR: All right.

13 (Whereupon, State's Exhibit Number 5D, the red scale, is
14 admitted into evidence.)

15 Q: Okay. You indicated that you saw a -- bags of green
16 leafy substance that you believed to be marijuana?

17 A: Right.

18 Q: You saw a white powdery substance that you believed to be
19 cocaine?

20 A: Right.

21 Q: You saw baggies?

22 A: Yes.

23 Q: And you saw a scale?

24 A: Right.

25 Q: All right and you said something about jewelry bags.

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 Tell me what you were talking about?

2 A: Well, they're called -- I think that's what they're
3 originally called.

4 Q: Okay.

5 A: I call them dope bags and that's what most people ---

6 MR. SWILLEY: Objection, Your Honor. I -- I'd move to
7 strike.

8 THE COURT: To strike what?

9 MR. SWILLEY: What he -- he just said in reference to his
10 term for those particular bags.

11 THE COURT: All right. Ms. Barr?

12 MS. BARR: Judge, he -- I asked him about the what he
13 called jewelry bags or what some people would call jewelry
14 bags and I just asked him to explain it what he meant by it.

15 THE COURT: I overrule the objection.

16 MS. BARR: All right.

17 Q: Now, can you -- do you see those still within there?

18 A: Yes.

19 Q: All right. Can you pull those out for me, please?

20 (Whereupon, the witness complies.)

21 A: They're actually -- they're small bags in a bag. That
22 would be one bag.

23 Q: All right.

24 MS. BARR: Let me have this as 5E. Thank you.

25 (Whereupon, the bag of jewelry bags is marked for

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 identification as State's Exhibit Number 5E.)

2 MS. BARR: Judge, we would move 5E into evidence. We'd
3 move to admit State's Exhibit 5E.

4 MR. SWILLEY: Again, Your Honor, I'd object under the
5 fact that's irrelevant to the -- to the allegations against
6 the defendant.

7 THE COURT: May I see the exhibit?

8 MS. BARR: And, Judge, if I may ask one more question to
9 lay a proper foundation?

10 THE COURT: All right.

11 Q: Sir, the -- what's been marked as State's Exhibit Number
12 5E, you indicated that you call them dope bags. Why do you
13 call them that?

14 A: Because that's what they package marijuana, cocaine,
15 crack in. Most of the time when we catch people with
16 narcotics, they are usually in those bags.

17 Q: In those type bags?

18 A: Those type bags.

19 MS. BARR: Judge, we would renew the motion to admit
20 State's 5E.

21 THE COURT: I admit the exhibit over objection.

22 (Whereupon, State's Exhibit Number 5E, the bag of jewelry
23 bags, is admitted into evidence.)

24 MS. BARR: Well, we'll leave them out. We'll leave them
25 out here. All right.

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 Q: The defendant -- you may -- you can have a seat, sir. Do
2 you want me to put that bag down there? Are you good?

3 A: Yeah. You can put it down there.

4 Q: The defendant was arrested and taken down to the
5 Williamsburg County Detention Center?

6 A: Yes, he was.

7 Q: All right and he was charged with resisting arrest?

8 MR. SWILLEY: Objection, Your Honor. She's -- she's
9 leading the witness.

10 THE COURT: All right. Don't lead the witness.

11 Q: What was the defendant charged with?

12 A: He was charged with possession with intent -- with the
13 intent to distribute marijuana, trafficking in cocaine,
14 failure to stop for a blue light, and ---

15 THE COURT: Ms. Barr, and those -- you're asking in
16 relation to what he's on trial for now?

17 MS. BARR: Yes, sir.

18 THE COURT: All right.

19 MS. BARR: Yes, sir.

20 Q: All right. That's all I have for him.

21 MS. BARR: Now, Judge, I have one follow-up question.
22 May counsel and I approach?

23 THE COURT: Yes. Ladies and gentlemen, let's stand up
24 and get a little -- a little stretch in.

25 (Whereupon, a bench conference is held off the record.)

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 Q: Deputy Hayes, just a couple of follow-up questions and
2 then I'll be done. In addition to the charges that you
3 brought against him for the drugs and obviously the failure to
4 stop for a blue light, was he also charged with driving under
5 suspension?

6 A: Yes, he was.

7 Q: All right and the initial traffic violation that you
8 observed, did you charge him in connection with that traffic
9 violation as well?

10 A: Yes, I did.

11 Q: Do you know what the disposition or the outcome ---

12 MR. SWILLEY: Objection.

13 Q: --- of those charges were?

14 THE COURT: All right.

15 MR. SWILLEY: Objection, Your Honor. That's -- that's
16 irrelevant.

17 THE COURT: The objection is sustained.

18 Q: In addition to all of the items that we see in State's
19 Exhibit Number 5, was there any money confiscated from the
20 defendant at that time?

21 A: Yes, there was.

22 Q: And where was the money taken from and what was the
23 amount of the money?

24 A: \$282 was in Mr. Vice's front pocket.

25 Q: Okay.

DIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 A: And \$3,195 was in his back pocket.

2 Q: Okay.

3 A: And that was seized.

4 Q: So that was about roughly \$3,400 in cash?

5 A: Yes, ma'am.

6 Q: Okay. All right and is it normal or standard protocol
7 from the Sheriff's Office to seize money taken when arrests
8 for drugs are made?

9 A: Yes, it is.

10 Q: All right and what do you all do with the money after
11 it's been seized from a defendant?

12 A: Normally, as patrol deputies we normally just log it in
13 our evidence and turn it in in our evidence.

14 Q: Okay.

15 A: And they take over from there.

16 Q: Okay and that would be Lieutenant Jeff Scott?

17 A: It was at the time, yes.

18 Q: Okay. Do you know where the money is now?

19 A: No, I do not.

20 Q: Do we need to ask Jeff Scott that question?

21 A: Yes, you do.

22 Q: Okay. Fair enough. Sir, I believe that is all the
23 questions I have for you. If you will, please answer any
24 questions that opposing counsel or the Court may have.

25 THE COURT: Mr. Swilley?

CROSS EXAMINATION OF DEPUTY LOY HAYES BY MR. SWILLEY

CROSS EXAMINATION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BY MR. SWILLEY:

Q: Deputy Hayes, why were you driving so slowly initially before you encountered Mr. Vice?

A: I was patrolling the area.

Q: Okay. About how fast were you going?

A: I wasn't going that fast. I had just turned off of a side road there.

Q: Okay.

A: So I wasn't going that fast.

Q: Okay. What side road had you turned off of?

A:

Q: Okay. What were you doing down ? Just patrolling?

A: Patrolling.

Q: Okay. When you -- when you first encountered the -- the gray car, can you -- can you tell me about what point you saw it -- you think you saw it cross the center line?

A: As it come around the curve, it appeared to me it was across the center line.

Q: And about how far away from you was that car at that point?

A: I really can't say. I -- I can't -- I don't know how far away it was. I can't say.

Q: You can't give me an estimate?

A: I'd be scared to.

CROSS EXAMINATION OF DEPUTY LOY HAYES BY MR. SWILLEY

1 Q: Okay. So when you saw Mr. Vice approach, you whipped
2 your car in front of him; right? To block the other lane;
3 correct?

4 A: The roadway, yes.

5 Q: Yeah, okay. Now, is that -- is that the way you usually
6 pull people over?

7 A: No, it's not.

8 Q: Okay. That's not standard procedure?

9 A: It's not the way we normally do it.

10 Q: Okay. How -- how is -- how do you normally do it?

11 A: Normally, I turn around on them and get behind them and
12 activate my blue light.

13 Q: Okay and for what reason is it done that way usually?

14 A: Well, he was known to run from law enforcement.

15 Q: That's not what I asked you. I said why is it ---

16 A: Yes, it is what you asked me.

17 Q: Why -- why did you -- so you -- so you put yourself in
18 danger? You swerved into the other lane?

19 A: I didn't swerve into the other lane. I pulled into the
20 center of the road because I know Mr. David ---

21 Q: All right. That's enough. And you didn't -- you didn't
22 run his license to see if it was suspended at that time; did
23 you?

24 A: No.

25 Q: Okay.

CROSS EXAMINATION OF DEPUTY LOY HAYES BY MR. SWILLEY

1 A: Not before that.

2 Q: Okay. Now, what -- what's your department's policy on
3 police pursuits? Do you -- I mean is there certain guidelines
4 that you follow?

5 A: We have -- I mean we -- we pursue them until our --
6 unless our supervisor cancels or unless we see that it's too
7 dangerous to pursue.

8 Q: And what would dictate that it's too dangerous to pursue?

9 A: Well, in this situation I didn't find where it was too
10 dangerous to pursue. I mean he wasn't driving ---

11 Q: But ordinarily what -- what would dictate that?

12 A: If he was driving recklessly and there's a lot of traffic
13 on the road, if we're near a school, something to that nature.

14 Q: Okay and for any offense? For any -- for any traffic
15 offense?

16 A: It's up to -- it's officer's discretion.

17 Q: Okay and your supervisor is the one that will tell you to
18 terminate the pursuit?

19 A: Unless we feel that we're -- unless we feel ourselves
20 that we're in danger.

21 Q: Okay and when the car finally pulled over, you pointed
22 out to Ms. Barr you had the taser out; right?

23 A: Yes.

24 Q: Okay and you're running towards him with a taser?

25 A: Yes.

CROSS EXAMINATION OF DEPUTY LOY HAYES BY MR. SWILLEY

1 Q: Okay and was it the sheriff that pushed you out of the
2 way?

3 A: Yes.

4 Q: Okay. Why did he do that?

5 A: You'll have to ask him that.

6 Q: Okay. Did -- he didn't tell you why?

7 A: No.

8 Q: Okay and you were the one that actually took -- took the
9 money off from Mr. Vice; correct?

10 A: Yes.

11 Q: All right. You found it when y'all searched him and took
12 it out of his pocket?

13 A: Right.

14 Q: All right and did you count all that money on the camera?

15 A: I don't think so.

16 Q: Okay. Any reason for that?

17 A: No.

18 Q: Okay and you said you were on _____ and is that
19 the street Mr. Vice -- before you encountered Mr. Vice. Is
20 that the street Mr. Vice lives on?

21 A: I believe so.

22 Q: Or at the time?

23 A: At the time, yes.

24 Q: Okay. When you said that you saw the bag get thrown out
25 and you said you saw other individuals in the area run towards

CROSS EXAMINATION OF DEPUTY LOY HAYES BY MR. SWILLEY

- 1 it?
- 2 A: Yes, I did.
- 3 Q: Okay and who were those individuals?
- 4 A: I have no idea.
- 5 Q: Okay. You didn't try to do any investigation or find out
- 6 later?
- 7 A: Uh-uh.
- 8 Q: Okay. Any reason for that?
- 9 A: No.
- 10 Q: Okay. Based upon your knowledge of the situation, any
- 11 other deputy try to find out who any of those other
- 12 individuals were?
- 13 A: No.
- 14 Q: Okay and do you know of any reason for that?
- 15 A: For what? What reason?
- 16 Q: For that nobody had followed up on that.
- 17 A: I mean they was just running towards the bag. I mean
- 18 they didn't have anything to do with the case.
- 19 Q: Okay. Now, did you do any investigation as far -- or I
- 20 won't say investigation. Did you do any -- anything else in
- 21 relation to the bag when it was brought to the scene where you
- 22 had Mr. Vice pull over? Did you -- did you try to lift any
- 23 prints off any of the bags inside of it?
- 24 A: You can't lift prints off of that type of material.
- 25 Q: You can't or you don't?

CROSS EXAMINATION OF DEPUTY LOY HAYES BY MR. SWILLEY

1 A: You can't.

2 Q: Okay. Did you do any DNA swabs on any of the ---

3 A: No, I didn't.

4 Q: --- things inside? Okay. So there's nothing -- no
5 forensic evidence that links to anybody; correct?

6 A: No.

7 Q: Okay. All right. Now, when you took the money off of
8 him, can you be more specific about what -- what you did with
9 that money right after you took it. Did you put it in an
10 envelope or anything like that?

11 A: Yes, I did.

12 Q: Okay and then where did you take it?

13 A: To the Sheriff's Office.

14 Q: Okay and who did you give it to?

15 A: Jeff Scott.

16 Q: Okay and you haven't seen it since then; right?

17 A: No, sir.

18 Q: Okay.

19 MR. SWILLEY: I beg the Court's indulgence.

20 Q: Were you able to see anybody in the passenger seat with
21 Mr. Vice when you initially approached him?

22 A: No.

23 MR. SWILLEY: I beg the Court's indulgence.

24 Q: Mr. Hayes, had you ever -- had you ever met Mr. Vice
25 before?

REDIRECT EXAMINATION OF DEPUTY LOY HAYES BY MS. BARR

1 A: No, I had not.

2 Q: Okay. Not before that day?

3 A: No.

4 Q: Okay.

5 MR. SWILLEY: Nothing further.

6 THE COURT: Redirect?

7 MS. BARR: Just a couple questions, Your Honor, if I may.

8 REDIRECT EXAMINATION

9 BY MS. BARR:

10 Q: Deputy Hayes, the individuals that you saw approach the
11 bag as you were in pursuit of Mr. Vice, do you know whether or
12 not they stuck around after he was ultimately arrested and
13 taken into custody?

14 A: No. I don't think so.

15 Q: At that point, if the only thing they did was to walk up
16 to the bag, had they committed a crime at that point in your
17 views?

18 A: No.

19 Q: Okay. Could you have arrested them if that's all they
20 did was walk to the bag?

21 A: No.

22 Q: Okay.

23 MS. BARR: That's all the questions that I have.

24 THE COURT: Anything further?

25 MR. SWILLEY: No recross, Your Honor.

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

2 (Whereupon, the witness leaves the stand at 4:40 p.m.)

3 MS. BARR: Judge, may counsel and I approach the bench?

4 THE COURT: Yes.

5 (Whereupon, a bench conference is held off the record.)

6 THE COURT: All right, ladies and gentlemen, we're going
7 to quit for the day. We're going to start back at ten thirty
8 tomorrow morning. Hopefully, it will give you all an
9 opportunity to vote before you come tomorrow, but we'll start
10 at ten thirty. We need you here at ten thirty. When you come
11 back tomorrow -- Mr. McKnight, Gene McKnight?

12 JUROR MCKNIGHT: Yes, sir?

13 THE COURT: I'm going to appoint you to serve as the
14 foreperson of the jury and you'll take the seat in the front
15 here where Ms. Anderson -- Ms. Barr -- Anderson-Barr -- Ms.
16 Barr is sitting now and your responsibility as the foreperson
17 will be to serve as the spokesperson for the jury, to preside
18 over the jury deliberations, and to complete the verdict form
19 representing the unanimous verdict of the jury at the end of
20 the case.

21 I want to caution you all and remind you once again that
22 when you sit on a jury, you're supposed to listen to the whole
23 case and listen to the law and listen to the lawyers and then
24 discuss the case and discuss the case only with the people on
25 the jury. So it serves no useful purpose for you to go home

1 and decide you're going to discuss it with someone who is not
2 on the jury.

3 In addition to it serving no useful purpose, it would be
4 a violation of your oath as jurors because the way the system
5 works is that everyone on a jury listens to the same thing and
6 then they discuss what they have seen and heard and so what
7 someone who has not seen and heard it might add to it is of no
8 benefit and violates your oath of office. After the case is
9 over, you can talk to anyone you want to, but while the case
10 is going on, you're to talk to no one but your fellow jurors
11 and that is after you've heard the whole case.

12 So with that, we'll see you all tomorrow morning at ten
13 thirty. So have a good evening and we'll reconvene tomorrow
14 at what time?

15 JURORS: Ten thirty.

16 THE COURT: All right. Everybody's got it. All right.
17 We'll see you then.

18 (Whereupon, the jury exits the courtroom at 4:41 p.m.)

19 THE COURT: All right. Do you have -- is there anything
20 else on this case?

21 MS. BARR: Judge, I can't think of anything else except I
22 don't know whether or not Mr. Swilley was able to get in touch
23 with the bondsman.

24 MR. SWILLEY: Your Honor, I don't -- I know that people
25 on behalf of Mr. Vice contacted the bondsman. I don't think

1 they had any luck in getting in contact with the actual
2 bondsman.

3 THE COURT: Okay. The bond is up when the case is
4 called. There's no responsibility of the bondsman. Their job
5 is to deliver the person to court for trial or at least make
6 sure they come, but after the case starts there is no bond.
7 So he's in custody.

8 (Whereupon, the proceedings end for the day at 4:45 p.m.)

9 NOVEMBER 6, 2012

10 (Whereupon, the proceedings resume at 10:43 a.m. with the
11 defendant and all counsel present.)

12 THE COURT: Here we are once again.

13 THE CLERK: Good morning.

14 THE COURT: All right. Thank you. Be seated. Are you
15 ready?

16 MS. BARR: The State is ready, Your Honor.

17 THE COURT: All right. Are you ready?

18 MR. SWILLEY: Yes, sir.

19 THE COURT: All right. Let's bring them on.

20 (Whereupon, the jury enters the courtroom at 10:44 a.m.)

21 THE COURT: All right. Good morning.

22 THE JURY: Good morning.

23 THE COURT: The jury is back. Ms. Barr, your next
24 witness?

25 MS. BARR: At this time, the State calls Jeffrey Scott to

DIRECT EXAMINATION OF LT. JEFFREY SCOTT BY MS. BARR

1 the stand.

2 THE COURT: Okay. Mr. Scott.

3 THE CLERK: Let me find my Bible. Okay. Do you solemnly
4 swear that the evidence and testimony you will give this Court
5 and jury will be the truth, the whole truth, and nothing but
6 the truth, so help you God?

7 THE WITNESS: I do.

8 THE CLERK: Okay. Have a seat.

9 LIEUTENANT JEFFREY SCOTT, being first
10 duly sworn, testifies as follows:

11 DIRECT EXAMINATION

12 BY MS. BARR:

13 Q: Sir, let me get you to state your full name for the
14 record?

15 A: Jeffrey Scott.

16 Q: And, Mr. Scott, tell the ladies and gentlemen of the jury
17 where you work now?

18 A: I am an associate professor at Horry Georgetown Technical
19 College in the Criminal Justice Department.

20 Q: Okay and how long have you been there?

21 A: As an adjunct, since 2009, but I currently came on full-
22 time as of August of this year.

23 Q: All right and where did you work before then, Mr. Scott?

24 A: With the Williamsburg County Sheriff's Office.

25 Q: Okay and what did you do for the Sheriff's Office?

DIRECT EXAMINATION OF LT. JEFFREY SCOTT BY MS. BARR

1 A: At the time, I was a crime scene investigator, evidence
2 technician, and a training officer.

3 Q: Okay and how long had you been employed with the
4 Sheriff's Office?

5 A: With the Sheriff's Office, twelve -- thirteen years.

6 Q: Okay and you were a certified police officer?

7 A: Yes.

8 Q: All right and tell us a little bit about your educational
9 background and what your responsibilities would have been with
10 the Sheriff's Office as a crime scene tech and evidence
11 custodian?

12 A: I have an associate's degree of science in criminal
13 justice, I have a bachelor's degree of liberal arts, and I
14 have a master's degree in criminal justice, a master's degree
15 of science.

16 Q: Okay. What would have been your day to day
17 responsibilities with a -- with the Sheriff's Office when you
18 worked as a crime scene technician and as an evidence
19 custodian?

20 A: Basically, what I would do is as far as -- as far as the
21 evidence custodian as cases came in, whether it be ones that I
22 processed or others that deputies brought in, we would collect
23 evidence, package it, store it, or send it to SLED for
24 analysis. As a crime scene investigator, I would go out to
25 scenes -- it could be major cases or minor cases -- and

DIRECT EXAMINATION OF LT. JEFFREY SCOTT BY MS. BARR

1 analyze, photograph, collect, process scenes for evidence that
2 could be brought back, stored, do a further processing, or
3 sent to such labs as SLED for analyzation.

4 Q: Okay. Now, in terms of evidence that's taken off to
5 SLED, we're talking about the South Carolina Law Enforcement
6 Division?

7 A: That is correct.

8 Q: In terms of those items and items in general being
9 analyzed, have you been certified to analyze certain types of
10 illegal drugs in South Carolina?

11 A: That is correct.

12 Q: All right. Tell us about your training and your
13 experience to become certified and what particular type of
14 narcotic you've been certified to test?

15 A: I'm certified to test and analyze marijuana.

16 Q: Okay.

17 A: We have to go through a specific training criteria at
18 SLED.

19 Q: Yes, sir.

20 A: We go up there where we have to be tested on knowledge of
21 marijuana analysis or the plants and certain things such as
22 chemicals and microscopic examinations. We have to pass with
23 a certain percentage in the written category and then we have
24 to do analyzation on the plant material.

25 Q: Okay.

DIRECT EXAMINATION OF LT. JEFFREY SCOTT BY MS. BARR

1 A: And have to pass it with a certain percentage category.

2 Q: All right and how long have you been certified by SLED to
3 analyze marijuana?

4 A: Well, right now my current certification goes through
5 2014.

6 Q: Okay. All right. Do you remember when you first became
7 certified?

8 A: Back in 2000 -- I would say '03 or '04.

9 Q: Okay.

10 A: It's been a while.

11 Q: All right and your certification was valid in -- after --
12 certainly during the time that you analyzed the -- the drugs
13 associated with this case?

14 A: That is correct. My current certification is from 2011
15 to 2014.

16 Q: Okay. All right. Now, so -- or kind of educate us a
17 little bit and tell us how -- well, before we do that, let me
18 -- let me ask you this question. Have you had occasion as a
19 police officer to testify in court regarding your analysis of
20 marijuana in the past?

21 A: Yes, I have.

22 Q: All right and have you been certified or qualified by the
23 Court to be an expert witness in that area?

24 A: Yes, I have.

25 Q: All right.

DIRECT EXAMINATION OF LT. JEFFREY SCOTT BY MS. BARR

1 MS. BARR: Judge, at this time we would tender Mr. Scott
2 as an expert in the field of marijuana ID and analysis.

3 MR. SWILLEY: No objection to that, Your Honor.

4 THE COURT: He is so admitted and, ladies and gentlemen,
5 when a person is qualified as an expert in a field, they can
6 offer opinions whereas others cannot.

7 MS. BARR: Thank you, Your Honor.

8 Q: Now, sir, as part of your duties as an evidence custodian
9 and as part of being certified to test what we believe to be
10 marijuana, you had occasion to become involved in the
11 investigation of this particular case, David ---

12 A: Yes, I did.

13 Q: --- Vice?

14 A: Yes, I did.

15 Q: Okay. Tell me what were your duties as it relates to
16 this case?

17 A: Basically, the collection of the evidence once the -- the
18 deputies brought it in.

19 Q: Okay.

20 A: And then the further analyzation of the plant materials.

21 Q: All right and when we talk about evidence that the
22 deputies brought in, who would have brought in evidence to you
23 on this case?

24 A: Deputy Hayes.

25 Q: All right and I'm going to hand you what's previously

DIRECT EXAMINATION OF LT. JEFFREY SCOTT BY MS. BARR

1 been admitted as State's Exhibit Number 5, this yellow and
2 green gym bag. Was this one of the items that was brought to
3 you by Deputy Hayes?

4 A: Yes, that's correct.

5 Q: All right and tell me what all was contained within that
6 particular exhibit as it was brought into you by Mr. Hayes and
7 how did you log it into evidence?

8 A: Basically, it was the gym bag itself.

9 Q: Yes, sir.

10 A: There was 14 bags, you know, plastic bags of plant
11 material.

12 Q: Okay.

13 A: And it had a dollar bill that had some plant material in
14 it.

15 Q: Okay.

16 A: And there was a few other items such as baggies and -- in
17 another bag.

18 Q: Okay. All right. Now, what type of measures do you
19 implement as the evidence custodian to maintain the chain of
20 custody of items that are brought to you and also to make sure
21 that nobody tampers with them?

22 A: Once it's turned over to me, I have complete control of
23 the storage of it so ---

24 Q: Okay.

25 A: --- nobody else gets the information -- the material back

DIRECT EXAMINATION OF LT. JEFFREY SCOTT BY MS. BARR

1 out. I do the analysis. It stays in storage.

2 Q: Okay.

3 A: So it doesn't go anywhere else. As far as anything else
4 that might have to go to SLED, I would be the one that
5 transports it to SLED for their analysis.

6 Q: Okay. Now, after you left your duties with the Sheriff's
7 Office in August of this year, do you know who succeeded you
8 ---

9 A: I do.

10 Q: --- in that role as evidence custodian?

11 A: That would be Lieutenant Timmons.

12 Q: Lieutenant Sherrod Timmons?

13 A: That's correct.

14 Q: All right. Now, I'm going to hand you what's been marked
15 for identification purposes as -- I think it's State's 5A.

16 I'm sorry, 5B. Do you recognize these items?

17 A: This one and this one.

18 Q: Tell us how it is that you recognize those particular
19 items?

20 A: It has my name and the case number and the date on it.

21 Q: All right. These are all a part of State's Exhibit 5B.

22 A: Okay. Yes.

23 Q: All right. Now, I'm going to pick up where I left off a
24 couple of seconds ago. Tell me how you go about identifying a
25 substance that you believe is marijuana and confirming that it

DIRECT EXAMINATION OF LT. JEFFREY SCOTT BY MS. BARR

1 is, in fact, marijuana or excluding the possibility that it's
2 marijuana?

3 A: We -- what we have to do is we do what we call a
4 microscopic test.

5 Q: Okay. Tell -- what is that?

6 A: Basically, we take the sample of the plant material ---

7 Q: Okay.

8 A: --- each piece ---

9 Q: Okay.

10 A: --- and look at it under a microscope and we're looking
11 for specific characteristics of the plant material.

12 Q: Okay.

13 A: Specifically, types of hairs that are found on the plant
14 material.

15 Q: Okay.

16 A: We're looking for such things as systolic hairs,
17 unicellular hairs, and multicellular hairs.

18 Q: All right and that's called the microscopic test?

19 A: That -- that is correct.

20 Q: All right and based upon your experience and your
21 training what, if anything, did the microscopic test of those
22 particular items indicate to you?

23 A: They were positive. They indicated that all three hairs
24 were present on the material.

25 Q: Okay. All right and tell us about the second test that

DIRECT EXAMINATION OF LT. JEFFREY SCOTT BY MS. BARR

1 you performed?

2 A: The second test is the chemical test.

3 Q: All right.

4 A: And it's called the Duquenois-Levine test.

5 Q: Okay.

6 A: And it's a chemical process that is a two-fold process.

7 Basically, we take the sample of the material and test it with
8 chemicals of solution A, which would be for looking for the
9 specifics of marijuana.

10 Q: Okay.

11 A: That would test for marijuana. Then we would add another
12 chemical, which is chloroform, to look for a highly specific
13 -- for THC, which is the Levine part.

14 Q: Okay.

15 A: So one looks for marijuana, which is -- which is
16 marijuana is present ---

17 Q: Okay.

18 A: --- and then one is highly specific for the Levine.

19 Q: All right. Now, tell us what, if anything, did your
20 chemical test of those particular items reveal to you?

21 A: The chemical test came back positive ---

22 Q: Okay.

23 A: --- for marijuana, as well as highly specific for the
24 presence of THC.

25 Q: All right. Now, we have individual bags that are marked.

DIRECT EXAMINATION OF LT. JEFFREY SCOTT BY MS. BARR

1 We're going to have this as 5F. Thank you.

2 (Whereupon, a plastic bag containing a dollar bill is
3 marked for identification as State's Exhibit Number 5F.)

4 Q: All right, sir, I'm going to hand you what's been marked
5 for identification purposes as State's Exhibit Number 5F.

6 Tell me if you recognize that?

7 A: Yes.

8 Q: All right. How is it that you recognize it?

9 A: My initials, the case number, and the date is on it.

10 Q: Okay and what is it?

11 A: It's a dollar bill.

12 Q: Okay.

13 A: It's part of this case.

14 Q: All right and did that have any significance to you in
15 connection with this case?

16 A: Yes. That is correct.

17 Q: All right. Tell us about that, please, sir?

18 A: This one was part of the case in which the dollar bill
19 was recovered from the subject.

20 Q: Okay and was there anything that was contained on that
21 particular dollar bill that had any significance to your part
22 of the investigation?

23 A: That was the -- the marijuana was contained in the dollar
24 bill.

25 Q: Okay. All right.

DIRECT EXAMINATION OF LT. JEFFREY SCOTT BY MS. BARR

1 MS. BARR: Judge, we would move State's Exhibit Number 5F
2 in at this time.

3 MR. SWILLEY: Your Honor, I don't think the chain of
4 custody has been established as far as practicable. I don't
5 think this -- this witness has testified as to who had it
6 precedent to whom he had it from.

7 THE COURT: All right. Ms. Barr?

8 MS. BARR: Your Honor, I believe the testimony by Deputy
9 Hayes was that he brought the packet -- the gym bag into the
10 evidence custodian, who was at that time Lieutenant Scott.
11 Lieutenant Scott just testified that he maintained custody and
12 control of that particular exhibit until he left. We've
13 already had Lieutenant Sherrod Timmons to testify that he has
14 taken over his responsibilities from Lieutenant Scott and the
15 witness has also testified that he performed the analysis on
16 those particular items. So I believe the chain of custody has
17 properly been -- properly been established.

18 THE COURT: All right. Mr. Swilley?

19 MR. SWILLEY: Your Honor, I don't think there's been any
20 testimony as to who had the material precedent to Deputy
21 Hayes, whether through Deputy Hayes or any other witness. So
22 I don't -- based upon my view of the evidence presented thus
23 far, I don't think the chain of custody has been established
24 as far as practicable.

25 THE COURT: Ms. Barr?

DIRECT EXAMINATION OF LT. JEFFREY SCOTT BY MS. BARR

1 MS. BARR: Judge, I would just add that I recollect that
2 Deputy Hayes testified that Sergeant Robert Shearer was the
3 one who brought the bag to him and he took it to the -- to the
4 evidence custodian at the time.

5 THE COURT: Have we -- have we heard from him?

6 MS. BARR: Not yet, Your Honor.

7 THE COURT: All right. The objection is sustained.

8 Q: All right, sir, tell us what has been identified as
9 State's Exhibit Number 5 -- is it 5G? Tell us what that is?

10 A: These are the bags that the material was contained in.

11 Q: Okay and you said the material was contained in. What
12 materials are you specifically talking about?

13 A: Which would have been the green plant material, the
14 marijuana.

15 Q: Okay.

16 A: It's the original bags.

17 Q: All right and in terms of the particular items that
18 relate to what you tested for marijuana, how many total items
19 were there that you tested?

20 A: Fourteen bags plus one dollar bill.

21 Q: Okay and the results of all of those fourteen tests
22 revealed what?

23 A: That they were positive for both microscopically and
24 chemically for marijuana.

25 Q: All right.

DIRECT EXAMINATION OF LT. JEFFREY SCOTT BY MS. BARR

1 A: Seed one.

2 Q: Okay. Now, there was some testimony on yesterday
3 regarding money that was confiscated in this case. Could you
4 tell us whether or not you had any involvement with actually
5 taking money in the case?

6 A: That is correct.

7 Q: All right. Tell us about that, please?

8 A: As part of the case when it's turned over, if there is
9 any monies turned over, the deputies will fill out a money
10 sheet ---

11 Q: Okay.

12 A: --- actually indicating all, like the denominations, how
13 many there are in quantity, and then they would write down
14 total and then I would come back and look at it. I would
15 recount it and make sure that their total was correct ---

16 Q: Okay.

17 A: --- and then it gets deposited into our holding account.

18 Q: And did you do that on this case?

19 A: Yes.

20 Q: All right. I'm going to hand you this particular
21 exhibit. I'm not going to make it a Court's exhibit, but did
22 you -- at -- did -- you took money in connection with this
23 case from whom?

24 A: It was submitted by Loy Hayes.

25 Q: Okay.

DIRECT EXAMINATION OF LT. JEFFREY SCOTT BY MS. BARR

1 MR. SWILLEY: Your Honor, I -- I haven't seen this --
2 this particular piece of paper.

3 (Whereupon, the paper is provided to counsel for the
4 defendant for review.)

5 MR. SWILLEY: Your Honor, that -- that hasn't been
6 provided to me during discovery. I -- I just move the Court
7 that the Court not allow this to be discussed or in testimony
8 ---

9 THE COURT: All right.

10 MR. SWILLEY: --- or entered into evidence.

11 THE COURT: Ms. Barr?

12 MS. BARR: Judge, I don't believe that it's required
13 under Rule 5, but it's just simply a document stating that he
14 -- the amount of money that he got from Deputy Loy Hayes and I
15 -- and that's all that's in the incident report which was
16 provided to counsel.

17 THE COURT: All right. I'm going to have the jury go to
18 the jury room for a moment. Please do not discuss the case.

19 (Whereupon, the jury exits the courtroom at 11:01 a.m.)

20 THE COURT: All right. Tell me about it again, Ms. Barr?

21 MS. BARR: Yes, sir, Judge, and I'll -- I'll hand it to
22 the Court. It's simply a property form indicating that
23 approximately \$3,400 was turned over to the witness from
24 Deputy Loy Hayes and it has the defendant's name on it and all
25 of that information is contained within the incident report

DIRECT EXAMINATION OF LT. JEFFREY SCOTT BY MS. BARR

1 that was provided not only to current counsel, but previous
2 counsel as well.

3 THE COURT: You said the information was contained in the
4 ---

5 MS. BARR: Incident report.

6 THE COURT: --- incident report?

7 MS. BARR: Yes, sir, in terms of the dollar amount that
8 was taken off of the defendant.

9 THE COURT: And the objection again is?

10 MR. SWILLEY: Your Honor, I can't speak for Mr. Kent, but
11 that wasn't provided to me during -- pursuant to Rule 5. I
12 think the State is trying to use this in its case in chief so
13 I'll just move that testimony and that piece of paper be
14 excluded.

15 THE COURT: And this is discoverable on what -- on what
16 basis?

17 MR. SWILLEY: Your Honor, I think that the State is
18 attempting to use it in its case in chief against the
19 defendant. I believe Rule 5 mandates that anything to be used
20 against the defendant in -- in its case in chief has to be
21 given to counsel as well and the rule is reciprocal for
22 defense counsel as well.

23 THE COURT: Okay.

24 MS. BARR: Judge, the last sentence on the incident
25 report says Mr. Vice's money total of \$3,477 was seized. Mr.

DIRECT EXAMINATION OF LT. JEFFREY SCOTT BY MS. BARR

1 Vice signed a consent order of forfeiture of -- of the money
2 and that simply is, if you would, a chain of custody just
3 establishing that the \$3,400 was taken from Deputy Hayes and
4 given to Lieutenant Scott. So I'm kind of at a loss as to how
5 the defense can maintain that it wasn't provided in discovery.
6 We're not seeking to have the document itself admitted into
7 evidence. We're just seeking to have the witness testify that
8 he received that evidence.

9 THE COURT: Well, is the objection to the document?

10 MR. SWILLEY: Or just -- just any -- any testimony
11 proffered in reference to it and the document.

12 THE COURT: Okay. According to the solicitor, she's not
13 offering the document. I overrule the objection regarding the
14 testimony since it was provided in the incident report. All
15 right. You can bring the jury back.

16 THE BAILIFF: Your Honor, may I approach the bench?

17 THE COURT: Yes, sir.

18 (Whereupon, the jury enters the courtroom at 11:05 a.m.
19 While waiting for the jury, the bailiff has a bench
20 conference with the judge.)

21 THE COURT: The objection is overruled.

22 CONTINUED DIRECT EXAMINATION

23 BY MS. BARR:

24 Q: Mr. Scott, I'm going to hand you again this exhibit and
25 as it relates to money, did you take any or did you have

DIRECT EXAMINATION OF LT. JEFFREY SCOTT BY MS. BARR

1 Deputy Hayes to turn over any money to you in connection with
2 this case?

3 A: That is correct.

4 Q: All right and tell us what your process is when a -- an
5 investigator or a deputy brings you money related to a
6 particular case?

7 A: What they do is they fill out this form. It gives case
8 number, date, who it's going to come from, and what they do is
9 they break down the currency into denominations.

10 Q: Okay.

11 A: And then they total it up, currency and coin.

12 Q: Okay.

13 A: And once they sign off on it that they have counted it,
14 I'll come back behind them and verify that the count is
15 correct.

16 Q: Okay.

17 A: I'll recount the -- the entire lump sum and make sure
18 it's correct and then we deposit it into our drug seizure
19 account until a case is referred or disposed of.

20 Q: Okay. So the money would have been deposited and
21 remained with the Sheriff's Office?

22 A: That -- that is correct.

23 Q: And I'm sorry ---

24 A: In their drug seizure account.

25 Q: Okay and the total amount of money that was seized in

DIRECT EXAMINATION OF LT. JEFFREY SCOTT BY MS. BARR

1 this case?

2 A: \$3,477.50.

3 Q: Okay. All right. Now, I'm going to hand you what's been

4 marked for identification purposes as State's Exhibit Number

5 5A. Tell us if you recognize that particular exhibit?

6 A: Yes. That is correct.

7 Q: Okay. How is it that you recognize it?

8 A: It has the information where Deputy Hayes sealed it ---

9 Q: Okay.

10 A: --- on the front. It also has the matching case number

11 to the information as far as the incident report.

12 Q: Okay.

13 A: And it has a B number, which indicates the bag and the B

14 number is all the same.

15 Q: Okay. All right. Now, when you received that particular

16 item in from Deputy Hayes, what did you do with it?

17 A: These are put into what they call BEST -- BEST kits or

18 BEST evidence kits.

19 Q: Okay.

20 A: It comes in a package like this. It basically has

21 paperwork indicating who it came from and everything is turned

22 over and it is kept in storage in the evidence room until it

23 is time to take it to SLED ---

24 Q: Okay.

25 A: --- for it to be analyzed.

DIRECT EXAMINATION OF LT. JEFFREY SCOTT BY MS. BARR

1 Q: All right. When it goes to SLED for analysis, who is the
2 individual who would take it to SLED?

3 A: At that time, I was the one that was taking it to SLED.

4 Q: And you would take it to SLED's office where?

5 A: In Columbia.

6 Q: All right and once the item has been analyzed by SLED,
7 what happens to it from that point?

8 A: Once it's been analyzed, it is returned back to their
9 evidence storing -- storage area ---

10 Q: Yes, sir.

11 A: --- inside the building.

12 Q: Okay.

13 A: We will come back up there as if we were to take more
14 evidence up there for a case, we would go up there and we
15 would tell them we're ready, we can take back. So they would
16 get the evidence that's ready to be brought back and they
17 would sign it over to us. We would bring it back and then we
18 would put it back in storage until cases come available for
19 trial.

20 Q: All right. So you're the individual who would have taken
21 that to SLED and then also who would have picked it up and
22 brought it back to the Sheriff's Office?

23 A: That's correct.

24 Q: And it would have remained where up until the trial?

25 A: Into the evidence room.

DIRECT EXAMINATION OF LT. JEFFREY SCOTT BY MS. BARR

1 Q: Okay.

2 A: Until trial.

3 Q: Now, during the particular period in time that we're
4 talking about, who would have had access to the evidence room
5 while you were working there and you were the evidence
6 custodian?

7 A: I was the only one that would have had access at that
8 time.

9 Q: Okay. All right and does anything that's contained
10 within State's Exhibit 5A suggest to you that it's been
11 tampered with at all?

12 A: It doesn't look like it.

13 Q: Okay.

14 A: It's all sealed. It looks like it has the initials of
15 whoever sealed it.

16 Q: Okay.

17 A: And the material was still inside.

18 Q: Okay. All right.

19 MS. BARR: I beg the Court's indulgence, Your Honor.

20 (Whereupon, there is a pause in the proceedings.)

21 MS. BARR: All right, sir, I believe that's all the
22 questions that I have. Please answer any questions that Mr.
23 Swilley or -- or the Court may have for you.

24 THE COURT: Mr. Swilley?

25 MR. SWILLEY: Thank you, Your Honor.

CROSS EXAMINATION OF LT. JEFFREY SCOTT BY MR. SWILLEY

CROSS EXAMINATION

1
2 BY MR. SWILLEY:

3 Q: Mr. Scott, you -- just to clarify, your duties were just
4 to analyze the substance and to tell what it is; correct?

5 A: That is correct.

6 Q: Did -- did you do any -- any tests -- any forensic tests
7 that would determine anybody who ever possessed or came into
8 contact with that material?

9 A: No.

10 Q: Okay.

11 A: It's just for -- just for the materials.

12 Q: Okay and you were never at the scene or -- or your duty
13 in relation to this particular case, that's -- that's all you
14 did; correct? You never went out to the scene or anything of
15 that nature?

16 A: No. I didn't go out to the scene.

17 Q: Okay. Thank you, Mr. Scott. I have nothing further.

18 THE COURT: Anything further?

19 MS. BARR: I don't have any redirect for him. Thank you.

20 THE COURT: Thank you, Officer Scott. You may step down.

21 THE WITNESS: All right. Thank you. Do you want this
22 right here?

23 MS. BARR: I guess we can put it back in the bag. Leave
24 that out for me, please, sir. Put the other stuff in the bag.
25 You got it?

DIRECT EXAMINATION OF AGENT LYNN BLACK BY MS. BARR

1 THE WITNESS: Yeah.

2 MS. BARR: And Mr. Scott, if you would, just put that on
3 the floor right there, that would be great. Thank you.

4 THE WITNESS: All right.

5 (Whereupon, the witness leaves the stand at 11:11 a.m.)

6 MS. BARR: Your Honor, at this time we would call Ms.

7 Lynn Black.

8 THE COURT: Ms. Black.

9 THE CLERK: Do you solemnly swear that the evidence and
10 testimony you will give this Court and the jury will be the
11 truth, the whole truth, and nothing but the truth, so help you
12 God?

13 THE WITNESS: I do.

14 MS. BARR: May it please the Court.

15 THE COURT: Yes.

16 AGENT LYNN BLACK, being first duly
17 sworn, testifies as follows:

18 DIRECT EXAMINATION

19 BY MS. BARR:

20 Q: Good morning, Ms. Black. How are you doing?

21 A: Good morning. Just fine.

22 Q: Great. State your full name for the record and tell the
23 ladies and gentlemen of the jury where you work and what you
24 do?

25 A: My name is Lynn Black.

DIRECT EXAMINATION OF AGENT LYNN BLACK BY MS. BARR

1 Q: Yes.

2 A: I work for the South Carolina Law Enforcement Division,
3 commonly known as SLED, in the drug analysis department in the
4 forensic services laboratory.

5 Q: All right. You were subpoenaed to testify in this case?

6 A: Yes, ma'am.

7 Q: All right and tell us what it is that you do for SLED and
8 give us a little information about your background?

9 A: My duties include receiving and analyzing of substances
10 brought in by law enforcement personnel and then I analyze
11 them to determine if they're controlled substances or not. My
12 educational background is I have a bachelor of science degree
13 in chemistry from Kentucky Wesleyan College, a certificate of
14 medical technology from the University of Louisville, and a
15 master of science in forensic science from Marshall
16 University. Prior to my job with SLED, I worked for eight
17 years at the Georgia Bureau of Investigation crime lab as a
18 drug chemist as well and I've been with SLED for approximately
19 four years.

20 Q: Okay. Now, Ms. Black, you've I imagine had an
21 opportunity to testify in state courts within South Carolina
22 since you've been with SLED?

23 A: Yes, I have.

24 Q: All right and have you previously been qualified as an
25 expert witness?

DIRECT EXAMINATION OF AGENT LYNN BLACK BY MS. BARR

1 A: Yes, I have.

2 Q: In what area?

3 A: In drug analysis.

4 Q: All right.

5 MS. BARR: Your Honor, at this time we would tender Ms.
6 Black as the field in -- as an expert in the field of drug
7 analysis.

8 MR. SWILLEY: No objection to that, Your Honor.

9 THE COURT: She is so qualified.

10 Q: Ms. Black, the State Law Enforcement Division received
11 evidence in connection with the case against the defendant,
12 David Vice?

13 A: Yes, ma'am.

14 Q: All right and tell me what was received into evidence and
15 what happened once it was received into evidence by SLED?

16 A: Just the general way evidence comes into SLED?

17 Q: Yes, yes, ma'am.

18 A: Basically what happens is the law enforcement
19 representative will bring evidence in to SLED and they come
20 into the forensic services building and we have a log-in
21 department where there are some folks in there who will take
22 the evidence and they will also have -- usually there's
23 paperwork that's associated with it and they use that
24 paperwork to enter the evidence into our computer system and
25 then they will generate a unique crime lab case number for

DIRECT EXAMINATION OF AGENT LYNN BLACK BY MS. BARR

1 that piece of evidence and also a bar code sticker that has
2 that unique crime lab case number on it which they will affix
3 to that particular piece of evidence.

4 They -- that is then used to scan that evidence so that
5 we -- that's our internal tracking, our internal chain of
6 custody, so wherever that piece of evidence goes in the -- at
7 SLED, it is bar coded so that, you know, that we will know
8 where the evidence is at all times.

9 Once they affix that label to the evidence, they will bar
10 code it to themselves and then bar code it to the vault, which
11 is where they keep all the evidence until wherever it's --
12 whatever department it's supposed to go to, that person comes
13 down. In my case, I would come down to the log-in department
14 and they would scan that piece of evidence to me. I also have
15 a bar code so then it would show that evidence is in my
16 custody and I take it up to my department where I will either
17 go ahead and start my analysis or I will place it in the drug
18 vault until I'm ready to start my analysis. So that's
19 basically how evidence comes in to me.

20 Q: All right. In terms of maintaining the integrity and the
21 security of evidence that comes in from law enforcement agents
22 throughout the state, what measures do SLED -- does SLED take
23 in connection with those concerns?

24 A: For drug evidence, we actually provide the evidence bags
25 for them to -- for agencies to submit their evidence in. It's

DIRECT EXAMINATION OF AGENT LYNN BLACK BY MS. BARR

1 a tamper-proof bag and I believe other disciplines they have
2 other ways that they require evidence to be brought in. It
3 has to be sealed, you know, in some sort of tamper evident
4 tape or -- or some sort of tamper evident bag as well.

5 Q: All right. Now, if I can, Ms. Black, I'm going to get
6 you to step off the witness stand for me.

7 (Whereupon, the witness complies.)

8 Q: I'm going to hand to you now what's been marked for
9 identification purposes as State's Exhibit Number 5A. I'm
10 going to ask you to tell me if you recognize that particular
11 exhibit?

12 A: I do.

13 Q: All right and tell the jury how it is that you recognize
14 it?

15 A: I recognize it by the unique crime lab case number, the
16 bar code right here, this sticker, and also my initials are on
17 the bottom seal. The date and my initials are on all the bags
18 that are inside there as well.

19 Q: All right and let me get you to step over here for just a
20 moment. You talked about the BEST kit?

21 A: Mm-hmm.

22 Q: Now -- and you indicated that those kits are sent out
23 from SLED to the various agency -- law enforcement agencies
24 throughout ---

25 A: Correct.

DIRECT EXAMINATION OF AGENT LYNN BLACK BY MS. BARR.

1 Q: --- the state and show us, if you will, the -- the BEST
2 kit that's contained within the pouch?

3 A: Yes. This -- this outer pouch is what I place the BEST
4 kit and all the evidence into. This inner bag that has other
5 writing and stuff on it, that's actually the BEST kit bag.
6 What -- what we give them out -- give out to law enforcement
7 personnel is actually a manila envelope that has this bag in
8 it and all the paperwork that the law enforcement personnel
9 need to fill out in order to submit the evidence.

10 So when I get it, I open up that bag and then when I'm
11 finished with my analysis, I put it into this outer bag with
12 all this K-pack. I think that's just because that's what
13 whoever we buy it from call it, but we seal it up into this.
14 But the actual BEST kit bag is this inner one that has the
15 writing. It's also got its own unique bar code as well and
16 that's how the law enforcement agencies can track it as well.

17 Q: All right. Now, when you would have received that
18 particular exhibit, can you tell us whether or not there were
19 any concerns about the way that it was packaged that would
20 suggest to you that it had been tampered with in any way?

21 A: No. It was sealed when I received it and had no evidence
22 of being tampered with.

23 Q: Okay. Tell us about your analysis from SLED once you got
24 that particular exhibit?

25 A: Once I -- this particular one?

DIRECT EXAMINATION OF AGENT LYNN BLACK BY MS. BARR

1 Q: Yes, ma'am.

2 A: Once I received this, I opened up the bag, cut it open
3 with some scissors, and removed the items that were inside.
4 There are four bags on the inside and I don't know if y'all
5 can tell, but there's -- there's a little difference in color
6 between some of them and these are kind of off-white and
7 there's two in here that are white. So I separated them out
8 by color first of all.

9 Q: Okay.

10 A: And then I began, you know, my analysis. Generally, what
11 I do is I will weigh the substances and I will take a net
12 weight, which means I'll take them -- the substance out of the
13 bag and put it on the scale and get the weight of it. I don't
14 weigh the bags with it.

15 And then in this particular case, I believe I had to
16 weigh these two and combine them because they were similar in
17 texture and color and they ended up being the same substance
18 as well. And then I combined these two as well -- these two
19 substances as well.

20 Q: All right. All right. Tell us what your -- or tell us
21 about the process of determining what that substance is and
22 what ultimately your analysis of it was?

23 A: Basically, any evidence that I get -- (coughs) excuse me
24 -- especially if it's powder evidence then I'm going to do two
25 tests. I'm going to do a preliminary test, which generally is

DIRECT EXAMINATION OF AGENT LYNN BLACK BY MS. BARR

1 a color test or also called a chemical test and I'm just
2 looking for a color change. It's not going to tell me exactly
3 what it is, but it will kind of give me a direction to go. It
4 gives me kind of a class of substances that it might be and in
5 this particular case, I did do two color tests, one on each
6 bag.

7 And then from there I went to my next test, which was an
8 instrumental test or actually also called a confirmatory test.
9 This one I did it on an instrument called a gas chromatograph
10 mass spectrometer, GCMS for short. It's -- it's a mouth full.

11 Q: Okay.

12 A: And it's basically just two -- kind of two instruments
13 put together and what it does will just separate the
14 substances out to their components and then I'm able to
15 identify it further and based on both of those tests, the
16 chemical test and then the instrumental test, I can make a
17 positive identification of the substance.

18 Q: Okay and tell me what did you determine the items
19 contained within State's Exhibit 5A to be?

20 A: My item 1.1 ended up being positive for cocaine.

21 Q: Okay. All right. Now, this -- you mentioned something
22 that was kind of curious to me. You indicated that some of
23 the substances that are contained within the bag are sort of
24 an off-white color ---

25 A: Yes.

DIRECT EXAMINATION OF AGENT LYNN BLACK BY MS. BARR

1 Q: --- and one appears to be a pure white color.

2 A: Correct.

3 Q: Was there a difference in those two items?

4 A: Yes.

5 Q: Okay. Tell us about that?

6 A: The -- the two bags that are off-white, those are the two
7 that were positive for cocaine.

8 Q: Okay.

9 A: The other two were negative for controlled substances.

10 Q: Okay. Tell us what a controlled substance is?

11 A: A controlled substance is a -- a substance that is
12 regulated by the government. In our particular case, you
13 know, it's drugs and -- and other -- for this case, all of
14 this they're referring to drugs, but controlled substances can
15 be things that are regulated. Well, let me back up. They can
16 be things like prescription drugs.

17 Those are controlled substances, but these -- there is
18 also higher degrees of controlled substances. The way the --
19 the federal government and the state government put them
20 together is they'll put them in different classes or actually
21 they call them schedules and we have Schedule I all the way to
22 IV.

23 Q: Okay.

24 A: I think IV. Well, V for the federals and I think just
25 here in the state is IV, but the higher the number, the -- the

DIRECT EXAMINATION OF AGENT LYNN BLACK BY MS. BARR

1 lesser -- the lesser degree of addiction possibilities.

2 Q: Okay.

3 A: So Class I is a very high possibility of addiction and
4 actually -- excuse me, Schedule I is a higher possibility of
5 addiction and it currently does not have any medicinal value.

6 Q: What would be an example of a Schedule I controlled
7 substance?

8 A: That would be LSD, psilocin, heroin.

9 Q: Okay.

10 A: Cocaine is a -- is a Schedule II so it has some medicinal
11 value. It is used in I think some surgeries and stuff so it,
12 you know, does have a current use, but it does have very high
13 addiction possibilities and that's why they -- they classify
14 it as a Schedule II and then they go on down and you have III,
15 IV and, like I said, V for federal cases and some federal
16 regulations.

17 Q: Okay and in terms of your analysis for the portion of
18 that particular exhibit that you determined to be cocaine,
19 what was the weight connected with just what you determined to
20 be cocaine?

21 A: I'd have to refer to my report.

22 Q: Please.

23 A: I don't have it ---

24 Q: Please do.

25 A: --- in memory.

DIRECT EXAMINATION OF AGENT LYNN BLACK BY MS. BARR

1 Q: Yes, ma'am.

2 A: The total net weight was 52.8 grams of the two plastic
3 bags.

4 Q: 52.8 grams of cocaine?

5 A: Correct.

6 Q: All right and let me ask you in terms of how this
7 particular exhibit looks now versus when it left your
8 possession at SLED, do you notice any changes to it?

9 A: No. It's -- it's in the same condition as I saw it.
10 It's still sealed.

11 Q: Okay. All right. You can take a seat. Thank you,
12 ma'am.

13 (Whereupon, the witness returns to the witness stand.)

14 MS. BARR: Judge, we would move State's Exhibit Number 5A
15 in at this time.

16 MR. SWILLEY: Your Honor, I would object under the -- for
17 the previous reasons as to the last witness. I don't think
18 that the chain of custody has been established as far as
19 practicable.

20 THE COURT: All right. Ms. Barr?

21 MS. BARR: Judge, we'll just continue with -- with this
22 witness.

23 THE COURT: Are you withdrawing the request or do you
24 want me to rule?

25 MS. BARR: I'm sorry, Judge?

DIRECT EXAMINATION OF AGENT LYNN BLACK BY MS. BARR

1 THE COURT: Do you withdraw the request ---

2 MS. BARR: Yes.

3 THE COURT: --- or do you want me to rule?

4 MS. BARR: Judge, I withdraw the request.

5 THE COURT: All right.

6 MS. BARR: All right.

7 Q: All righty. Other than analyzing that particular item of
8 evidence, did you have any other involvement with this case?

9 A: No, ma'am, I did not.

10 Q: Now, you mentioned something about the pure white
11 substance that's contained in 5A. You said that it was -- I
12 think your analysis revealed it was not a controlled
13 substance?

14 A: That's correct.

15 Q: All right. Do you -- would you have any way or do you
16 know what that particular substance is?

17 A: No, I do not know. My analysis did not reveal what that
18 was.

19 Q: Okay. You just know that it's not a -- an illegal drug
20 of any sort or any type of drug?

21 A: Correct. Correct.

22 Q: Okay. Okay. All right, ma'am, that's all the questions
23 that I have. Thank you so much. Please answer any questions
24 that defense counsel or the Court may have for you.

25 A: Okay.

CROSS EXAMINATION OF AGENT LYNN BLACK BY MR. SWILLEY

CROSS EXAMINATION

1
2 BY MR. SWILLEY:

3 Q: Good morning, Ms. Black.

4 A: Good morning.

5 Q: You testified to Solicitor Barr about the types of tests
6 you do to determine what the substance is; correct?

7 A: Yes.

8 Q: Do you perform any tests that determine who or what could
9 have come into contact with a particular substance?

10 A: No, sir, I do not.

11 Q: Okay and that's not what y'all do at SLED; correct?

12 A: The only ---

13 Q: For drugs?

14 A: For drugs in the drug department, we do not test for
15 that. No, sir.

16 Q: Okay and you testified that the -- the BEST kit came with
17 you said four bags; correct?

18 A: Correct.

19 Q: Okay and they were all in the same BEST kit; correct?

20 A: That's correct.

21 Q: And you said two of the bags you did a test on and it was
22 no controlled substance?

23 A: That's correct.

24 Q: And these are the same tests you did on -- on the other
25 two?

CROSS EXAMINATION OF AGENT LYNN BLACK BY MR. SWILLEY

- 1 A: That's correct.
- 2 Q: Okay and so that was -- that was item 1.1 and 1.2 in your
3 -- in your analysis; correct?
- 4 A: That's correct.
- 5 Q: Okay. Was it just -- was it just random when you chose
6 to test two and then the other two or did you have any kind of
7 rhyme or reason to that? The two you chose to select and then
8 the other two?
- 9 A: The colors.
- 10 Q: Same color?
- 11 A: Yeah. I distinguished them -- excuse me -- distinguished
12 them by colors. One -- the two bags looked like they were
13 off-white and two bags looked like they were more, you know,
14 whiter color and then -- but I tested all four bags.
- 15 Q: Okay and as to the bag that you said did test positive
16 for cocaine, the net weight was the entire -- the entire
17 material; correct?
- 18 A: Correct. The two -- the two bags -- well, the substance
19 in the two bags net weight, you know, without the bags, and
20 then total together.
- 21 Q: Okay and when you say the net weight, are you referring
22 to the entire substance or just the part -- the part that is
23 cocaine in that particular bag?
- 24 A: The entire substance.
- 25 Q: Okay. So it's -- it's feasible that there's other

REDIRECT EXAMINATION OF AGENT LYNN BLACK BY MS. BARR

1 substances mixed in with what tested positive for cocaine;
2 correct?

3 A: Correct.

4 Q: Okay. So you would agree there's no really way to test
5 the actual cocaine with the other substances in a particular
6 bag; correct?

7 A: There is a way, but we do not do quanti -- quantitation
8 at SLED.

9 Q: All right. Thank you, Ms. Black.

10 THE COURT: Anything further?

11 REDIRECT EXAMINATION

12 BY MR. BARR:

13 Q: Ms. Black, I just wanted to make sure I understood your
14 testimony on cross examination. You tested all four baggies
15 contained within this particular exhibit?

16 A: That's correct.

17 Q: Okay. I just wanted to make sure I was clear. All
18 right. Thank you.

19 MS. BARR: That's all the questions I have.

20 THE COURT: Anything else?

21 MR. SWILLEY: Nothing from the defense, Your Honor.

22 THE COURT: All right. Thank you, ma'am.

23 (Whereupon, the witness leaves the stand at 11:29 a.m.)

24 MS. BARR: Judge, we'd ask that the witness be excused.

25 THE COURT: The witness is excused.

DIRECT EXAMINATION OF SERGEANT ROBERT SHEARER BY MS. BARR

1 THE WITNESS: Thank you, Your Honor.

2 THE COURT: All right.

3 MS. BARR: We'd call Sergeant Robert Shearer.

4 THE CLERK: Do you solemnly swear that the evidence and
5 testimony you will give this Court and jury will be the truth,
6 the whole truth, and nothing but the truth, so help you God?

7 THE WITNESS: So help me God.

8 SERGEANT ROBERT SHEARER, being first
9 duly sworn, testifies as follows:

10 DIRECT EXAMINATION

11 BY MR. BARR:

12 Q: Sergeant Shearer.

13 A: Good morning, Ms. Barr.

14 Q: How are you doing?

15 A: I'm -- I'm okay.

16 Q: You had a long night last night?

17 A: Yes, ma'am.

18 Q: Okay. All right. Duty calls?

19 A: Yes, ma'am.

20 Q: Okay. I'll -- we'll go ahead and -- and be very quick
21 with you. State your full name for me?

22 A: It's Robert Glen Shearer II.

23 Q: All right and tell me where you work?

24 A: I work for the Williamsburg County Sheriff's Office.

25 Q: And -- and how long have you worked at the Sheriff's

DIRECT EXAMINATION OF SERGEANT ROBERT SHEARER BY MS. BARR

1 Office?

2 A: Since 2004, eight years this month.

3 Q: All right and tell us what you do?

4 A: I'm the shift supervisor on -- Deputy Hayes was on my
5 shift at the time. I -- I'm responsible for taking calls on
6 the radio, backing all the officers up. Anytime we got a bad
7 or violent call, I usually take primary on that call.
8 Discipline with the deputies and all that on my shift and
9 everything else.

10 Q: All right. Did you work last night?

11 A: I did and I work tonight also.

12 Q: Okay. What time did you get off this morning?

13 A: At six thirty.

14 Q: Oh, goodness. Okay. All right. You were involved in
15 this case in -- with David Vice back on December the 19th of
16 2011?

17 MR. SWILLEY: Objection, Your Honor. She's leading the
18 witness.

19 THE COURT: Objection is overruled.

20 A: I was involved with the case on Case Number 12995 back in
21 December.

22 Q: Okay and what was your involvement in the case?

23 A: I was the supervisor so I was monitoring the radio when
24 Deputy Hayes initiated a chase in progress on Red Road.

25 Q: Okay.

DIRECT EXAMINATION OF SERGEANT ROBERT SHEARER BY MS. BARR

1 A: I actually got -- I was either the second or the third
2 vehicle on -- in the chase when they actually turned onto
3 Highway 377.

4 Q: Okay.

5 A: It was my responsibility to monitor the radio, monitor
6 different things like traffic congestion, weather conditions,
7 stuff like that to know if the risk was worth the reward. A
8 lot of times as a supervisor, if a chase gets too dangerous, I
9 have to make them what we call 10-22, the chase disregard,
10 which is stop the chase depending on the violation and what's
11 going on. I monitored the radio. I actually got behind them
12 when they were turning onto I think it's called Holywoods Road
13 off of 377 when they made the left turn.

14 Q: Yes, sir.

15 A: And I actually seen Mr. Vice holding a bag out the window
16 that when he dropped, I retrieved.

17 Q: All right. Speaking of that bag, I'm going to hand you
18 what's been admitted as State's Exhibit Number 5.

19 A: It's a green and white bag that looks like a -- I call it
20 a Green Bay Packers bag, but -- I mean it's a green and yellow
21 bag.

22 Q: Okay. Is this the item that you're talking about?

23 A: It is.

24 Q: All right and you indicated that you saw the defendant
25 throw that from the vehicle?

DIRECT EXAMINATION OF SERGEANT ROBERT SHEARER BY MS. BARR

1 A: I did. He held it out the window with his left hand
2 while he was driving when he made that left onto Holywoods
3 Road. There was about four or five people standing at the
4 intersection. I think that's Holywoods Road and McAllister.
5 It's the first -- when you make a left on Holywoods Road, it's
6 the first intersection. When he got to that intersection, he
7 threw it out on the road and all five of those subjects run
8 towards the bag.

9 So I was the second or third vehicle. I think I was the
10 third vehicle, but I was either the second or third vehicle.
11 I knew the first vehicle was going to continue to chase Mr.
12 Vice so I pulled right up to that bag before the subjects
13 could get to it, jumped out my car, grabbed the bag, threw it
14 in the passenger seat. I opened the bag real quick to make
15 sure there was nothing in there that could hurt me ---

16 Q: Okay.

17 A: --- while I was continuing in the car pursuit in case
18 there was an accident or anything like that and when I say
19 that, I'm talking about like weapons that aren't on safety,
20 anything like that.

21 Q: Okay.

22 A: I opened it and I seen there was a large quantity of
23 narcotics. I relayed that information on the radio so
24 deputies would know to continue the pursuit because now we had
25 a felony and then I went to where the chase ended, which I

DIRECT EXAMINATION OF SERGEANT ROBERT SHEARER BY MS. BARR

1 believe was on -- it -- it was on Red Road.

2 Q: Okay. Now, at the time of this ---

3 A: At the intersection of Red Road and Sand Ridge Road is
4 where the chase ended.

5 Q: Okay. At the time of this particular incident, did --
6 was your vehicle equipped with a camera?

7 A: It was not.

8 Q: It was not? Okay. All right. Now, once the chase
9 ended, did you then at that point join Deputy Hayes?

10 A: I went straight to where the chase had ended at the
11 intersection of Sand Ridge and Red Road and proceeded to give
12 the evidence to Deputy Hayes.

13 Q: All right. Now, you indicated that when you initially
14 put the bag into your vehicle, you had to check to make sure
15 there was nothing in there that could harm you?

16 A: Correct.

17 Q: All right. You -- you said you observed ---

18 A: I unzipped it. I observed the narcotics. I looked in
19 there to make sure there wasn't anything that would hurt me.
20 I zipped it back up. It stayed on my passenger seat. I went
21 straight to where the chase had ended. By this time, they
22 already had Mr. Vice in custody and I handed it directly to
23 Deputy Hayes, who was the initiating officer.

24 Q: All right. I'm going to hand you what's been marked for
25 identification purposes as State's Exhibit Number 5A. Do you

DIRECT EXAMINATION OF SERGEANT ROBERT SHEARER BY MS. BARR

1 recognize anything that's contained within that particular
2 exhibit?

3 A: Correct, the cocaine that's in the bag.

4 Q: And you said the cocaine that was in the bag?

5 A: In this bag right here.

6 Q: And you observed it in there that day?

7 A: Correct.

8 Q: All right.

9 MS. BARR: Judge, we ---

10 A: Along with sandwich bags and large bags of marijuana and
11 medium sized bags of marijuana.

12 Q: All right.

13 MS. BARR: Your Honor, we would move State's Exhibit
14 Number 5 in -- 5A in at this time.

15 THE COURT: All right. Anything from the defense?

16 MR. SWILLEY: Your Honor, I -- I object. I don't think
17 the chain of custody has been established. I don't think
18 since from Deputy Hayes until -- until it was taken to the --
19 another member of the Sheriff's Office. I don't think that's
20 been attested to.

21 THE COURT: All right. Ms. Barr?

22 MS. BARR: Judge, the witness has testified that he
23 picked it up off of the ground, he took it to Deputy Hayes.
24 Deputy Hayes has previously testified that he took it to the
25 Sheriff's Office. Deputy Hayes testified that he gave it to

DIRECT EXAMINATION OF SERGEANT ROBERT SHEARER BY MS. BARR

1 Lieutenant Scott, who has also testified that he maintained
2 custody and control of it and, Your Honor, we would submit
3 that we've established the chain since the time the bag was on
4 the ground until it got here today.

5 THE COURT: All right. Mr. Swilley?

6 MR. SWILLEY: Your Honor, I believe the video showed a
7 couple individuals handle the bag and I don't think that's
8 been attested to as well based upon my recollection. I don't
9 think those individuals have been named. There were several
10 individuals there that ---

11 THE COURT: I'll overrule the objection and admit --
12 admit the item into evidence.

13 (Whereupon, State's Exhibit Number 5A, the bag of
14 cocaine, is admitted into evidence.)

15 MS. BARR: Your Honor, permission to publish?

16 THE COURT: You may.

17 (Whereupon, State's Exhibit Number 5A is published to the
18 jury.)

19 Q: All right. You indicated that there was cocaine and also
20 marijuana?

21 A: Marijuana, a scale, and I think there was a cell phone in
22 there.

23 Q: Okay. All right. Now, I know you've been up all day so
24 I'm going to ---

25 A: And a bag of sandwich bags.

DIRECT EXAMINATION OF SERGEANT ROBERT SHEARER BY MS. BARR

1 Q: That's okay. That's okay. I'm going to help you out
2 here. I'm going to hand you what's been collectively marked
3 as State's Exhibit Number 5A. I think we've got a total of
4 six bags that are marked as 5A and ask you, sir -- 5B, I'm
5 sorry -- if you recognize these particular exhibits?

6 A: I do.

7 Q: Tell us how you recognize them?

8 A: From being in that bag.

9 Q: All right and these were in the bag the day that you took
10 it off of ---

11 A: The intersection of Holywoods Road and I think that's
12 McAllister Road.

13 Q: All right and in terms of the items that are contained
14 within the gym bag, did you remove anything or take anything
15 out or ---

16 A: No, ma'am.

17 Q: --- put anything in?

18 A: I didn't.

19 Q: All right.

20 A: I did put my hand in there to look around, like I said,
21 to make sure there weren't no weapons or anything in there
22 that could hurt me or one of my fellow officers ---

23 Q: Okay.

24 A: --- in case I got in a wreck or something because, you
25 know, chases are at high speeds and everything else, but that

DIRECT EXAMINATION OF SERGEANT ROBERT SHEARER BY MS. BARR

1 was it.

2 Q: Okay. All right.

3 MS. BARR: Your Honor, we would move State's Exhibit
4 Number 5B into evidence at this time.

5 THE COURT: Mr. Swilley?

6 MR. SWILLEY: Same objection, Your Honor.

7 THE COURT: All right. It's admitted over objection.
8 All of them are admitted over objection.

9 (Whereupon, State's Exhibit Number 5B, six bags of
10 marijuana, is admitted into evidence.)

11 Q: In terms of the -- the package of these drugs, the
12 marijuana, then did you all weigh them at all?

13 A: I'm not sure if Deputy Hayes did when he got back to the
14 office or not.

15 Q: Okay. All right.

16 A: It's protocol that we normally do.

17 Q: All right. All right. I'm going to hand you what's been
18 I believe admitted as State's Exhibit 5E. Were these
19 contained within the ---

20 A: They were.

21 Q: --- gym bag as well?

22 A: They were.

23 Q: All right. You mentioned you saw a scale?

24 A: I did.

25 Q: I'm going to hand you I believe what's been admitted as

DIRECT EXAMINATION OF SERGEANT ROBERT SHEARER BY MS. BARR

1 State's 5D.

2 A: Correct.

3 Q: Is that the scale that you referenced?

4 A: Yes, ma'am.

5 Q: All right. I'm going to hand you State's 5C and those
6 are the Ziploc bags that you talked about or Glad bags you
7 talked about?

8 A: Sandwich bags.

9 Q: Sandwich bags. Okay. Did you observe -- I'm holding ---

10 MS. BARR: If Your Honor will let the record reflect, I'm
11 holding a red plastic bag.

12 Q: Did you observe that contained within the gym bag as
13 well?

14 A: I did.

15 Q: All right. Now, you mentioned something about a cell
16 phone?

17 A: Correct.

18 Q: All right. Is ---

19 A: That's the cell phone.

20 Q: --- this the cell phone that you saw in that particular
21 bag?

22 A: Correct.

23 Q: All right.

24 MS. BARR: Can I get a sticker for this, please, ma'am?

25 SH. Thank you.

DIRECT EXAMINATION OF SERGEANT ROBERT SHEARER BY MS. BARR

1 (Whereupon, the cell phone in the red plastic bag is
2 marked for identification as State's Exhibit Number 5H.)

3 MS. BARR: Your Honor, we would move State's Exhibit
4 Number 5H in, which is the cell phone.

5 MR. SWILLEY: Your Honor, I would -- I would object under
6 relevance.

7 THE COURT: Objection is overruled. Admitted over
8 objection.

9 MS. BARR: Thank you, Your Honor.

10 (Whereupon, State's Exhibit Number 5H, the cell phone in
11 the red plastic bag, is admitted into evidence.)

12 Q: And, Sergeant Shearer, I don't think that I've moved to
13 admit 5C in, but the sandwich bags, you have identified them
14 as being in the gym bag?

15 A: Correct.

16 MS. BARR: Your Honor, we would move State's Exhibit
17 Number 5C in at this time.

18 THE COURT: Defense?

19 MR. SWILLEY: Your Honor, I would object under relevance
20 as far as in relation to the substance.

21 THE COURT: It's admitted over -- it's admitted over
22 objection.

23 (Whereupon, State's Exhibit Number 5C, the box of Glad
24 sandwich bags, is admitted into evidence.)

25 Q: I'm pulling a silver item from the red plastic bag that

DIRECT EXAMINATION OF SERGEANT ROBERT SHEARER BY MS. BARR

1 was in the gym bag. Can you tell us what that particular item
2 is?

3 A: I believe it's a cigar, but I'm not totally sure.

4 Q: All right. If I were to give it to you to hold and look
5 at it, would that refresh your memory at all?

6 A: It's a Dutchmaster cigar.

7 Q: Okay. Now, you've been with the Sheriff's Department
8 tell me again how long?

9 A: For eight years.

10 Q: All right. Have you been involved in investigating
11 narcotic activity before this date?

12 A: Correct and in Summerton for four years before that.

13 Q: Okay. All right and have you ever seen cigars in
14 connection with drug cases in your previous experience?

15 A: I have. They take the tobacco half of it out, mix it
16 with marijuana, and then smoke ---

17 MR. SWILLEY: Objection, Your Honor. I -- I haven't been
18 -- nothing in reference to that has been in any of the
19 materials provided to me and I don't see how a cigar is
20 relevant in any kind of illegal activity and if it is, I think
21 it would be overly cumulative.

22 THE COURT: All right. Ms. Barr?

23 MS. BARR: Your Honor, all of the physical evidence is
24 certainly available for inspection by counsel and I believe
25 that the witness has just testified in his experience that

DIRECT EXAMINATION OF SERGEANT ROBERT SHEARER BY MS. BARR

1 oftentimes he'll see individuals who use narcotics will also
2 use the tobacco from cigars and so I believe that based on his
3 testimony this item of evidence is relevant.

4 THE COURT: Anything further?

5 MR. SWILLEY: Not -- nothing further, Your Honor. That's
6 just -- that was my reason.

7 THE COURT: Objection is sustained.

8 A: Can I finish my answer?

9 Q: No.

10 A: Okay.

11 Q: The judge has sustained the objection.

12 A: Oh, I'm sorry.

13 Q: So what I'm going to do is I'm going to put all of this
14 back in the -- now, once you took this item, you -- when I say
15 this item, I mean State's Number 5. You indicated that you
16 gave it to Deputy Hayes?

17 A: Correct, on the scene.

18 Q: All right and do you recall putting the bag on the hood
19 of the vehicle?

20 A: Hood of the car.

21 Q: Hood of the car?

22 A: Correct. I haven't seen the -- I heard you or him
23 mention video or whatever. I haven't seen the video, but I
24 did put it on the hood of his vehicle.

25 Q: Okay. All right.

DIRECT EXAMINATION OF SERGEANT ROBERT SHEARER BY MS. BARR

1 MS. BARR: Judge, we would move to publish a portion of
2 State's Number 3.

3 THE COURT: It's in evidence.

4 MR. SWILLEY: Your Honor, I'd object to publication. I
5 think it's already been published to the jury and frozen in
6 certain frames. I just -- I think it would be cumulative, you
7 know, under Rule 403.

8 THE COURT: All right. The objection is overruled.

9 (Whereupon, there is a pause in the proceedings as the
10 videotape is prepared for playing.)

11 Q: Sergeant Shearer, can I get you to step over here?

12 A: Correct. I mean yes, ma'am.

13 Q: You can stand on this side for me, please. I don't want
14 you to block ---

15 A: I got you.

16 Q: Yes, sir. And, sir, if you will, don't testify, but just
17 point to the part of the video where you see the defendant
18 throw the bag through the window.

19 A: Okay.

20 (Whereupon, there is a pause in the questioning as the
21 videotape is played.)

22 A: That's me talking on the radio.

23 Q: Okay.

24 A: As Deputy Hayes continues to chase, he's giving out his
25 location at all times. He's ---

DIRECT EXAMINATION OF SERGEANT ROBERT SHEARER BY MS. BARR

1 MR. SWILLEY: Your Honor, I would object to that. He's
2 not responding to ---
3 A: --- trying to ---
4 MR. SWILLEY: --- any questions. He's just talking.
5 THE COURT: All right. Objection sustained.
6 MR. SWILLEY: I move to strike that as well, Your Honor.
7 THE COURT: It's struck.
8 (Whereupon, the video continues playing.)
9 A: All right. I'm behind him now.
10 MR. SWILLEY: Your Honor, I -- I'd object to that as
11 well.
12 THE COURT: Objection is overruled.
13 A: I was the first brown car. There's the bag hanging out
14 the window. There's where he throws the bag and I stop
15 directly behind him and pick it up.
16 Q: All right. What I'll do is I'll stop it and fast forward
17 it ---
18 (Whereupon, the video stops.)
19 Q: --- to the point where Mr. Vice is placed in cuffs.
20 (Whereupon, the video is fast forwarded and played
21 again.)
22 Q: Do you recognize that fellow right there?
23 A: Corporal Jenkins is standing right there.
24 Q: All right.
25 A: He was on my shift, too, at the time.

DIRECT EXAMINATION OF SERGEANT ROBERT SHEARER BY MS. BARR

1 Q: All right.

2 A: At this time, I'm already on the scene. That's why I'm
3 calling for a weapon.

4 Q: All right. So that's your voice we can hear in the
5 background?

6 A: Correct.

7 Q: All right.

8 A: That's the bag, me throwing it down there. That's the
9 sheriff. Well, that's the chief and the sheriff.

10 (Whereupon, the video is stopped.)

11 Q: Okay, this is Deputy Hayes?

12 A: That's Deputy Hayes. That's the sheriff. You all need
13 to vote for today and that's the chief right over there.

14 (Whereupon, the video is played.)

15 Q: Is that the sheriff or is that Dudley Mesier? The chief?

16 A: I get them mixed up. That's the chief right there and
17 that's the sheriff right there.

18 Q: You're right there?

19 A: When I -- when I stopped to get the drugs ---

20 (Whereupon, the video is stopped.)

21 A: --- Sheriff Michael Johnson, Deputy Investigator Edwards,
22 and Chief Dudley were actually coming down Thurgood Marshall
23 and they got behind the chase and took over as the second
24 vehicle to take my place.

25 Q: All right and this particular item here is what?

DIRECT EXAMINATION OF SERGEANT ROBERT SHEARER BY MS. BARR

1 A: That's the green and yellow -- I call it a Green Bay
2 Packers bag, but I think it says Spring Valley or something
3 high school on it.

4 Q: All right.

5 A: And that's me putting it on the hood and Deputy Hayes has
6 already taken money from Mr. Vice. I think he had money in
7 his left and right pocket. I can't testify to that because I
8 wasn't there at the time, but that's the money he's taken
9 [verbatim] off Mr. Vice in his hand and that's the bag of
10 narcotics right there.

11 (Whereupon, the video is played.)

12 Q: Okay.

13 A: And that's me telling him about the chain of custody and
14 everything he needs to do for me to take it directly to him.

15 Q: All right.

16 (Whereupon, the video is stopped.)

17 Q: And this is you here?

18 A: That's me.

19 Q: Beside the sheriff?

20 A: That's me plus about twenty pounds.

21 Q: Okay.

22 (Whereupon, the video is played briefly, but the sound is
23 turned off.)

24 A: I believe Deputy Hayes -- oh, I mean never mind. I
25 didn't mean to testify.

DIRECT EXAMINATION OF SERGEANT ROBERT SHEARER BY MS. BARR

1 (Whereupon, there is a pause in the questioning as the
2 video continues to play.)

3 A: I'm going back and forth at this time filling out record
4 logs, bringing him evidence bags and everything he needs for
5 ---

6 Q: All right.

7 A: --- evidence.

8 Q: Now, what -- what -- tell me what that is that Deputy
9 Hayes is holding?

10 A: He's counting the currency. You see he's talking to Mr.
11 Vice in front of the camera.

12 Q: All right. I'm going to pause it for just a moment. All
13 right. That particular bag the deputy -- the white -- I say
14 bag -- the envelope that Deputy Hayes is holding ---

15 A: That was an evidence bag that I brought him so he could
16 go ahead and put the money in it and seal it.

17 Q: All right. I'm going to hand you what's been marked for
18 identification purposes as State's Exhibit Number 5F. Do you
19 recognize that?

20 A: Yes, I do. This is the type of bag I brought Deputy
21 Hayes to seize the money in. I'm sure it's the exact one
22 because it's wrote on.

23 Q: All right.

24 MS. BARR: Your Honor, we would move State's Exhibit
25 Number 5F in at this time.

DIRECT EXAMINATION OF SERGEANT ROBERT SHEARER BY MS. BARR

1 MR. SWILLEY: Same objection as previous, Your Honor.

2 THE COURT: All right. It's admitted over objection.

3 (Whereupon, State's Exhibit Number 5F, the dollar bill,
4 is admitted into evidence. The videotape is resumed
5 playing.)

6 Q: All right. I think I'll stop it here.

7 A: All right.

8 Q: You can take your seat.

9 A: All right.

10 Q: Thank you, sir.

11 A: Thank you.

12 (Whereupon, the video is stopped and the witness returns
13 to the witness stand.)

14 Q: Sergeant Shearer, the defendant, David Vice, was charged
15 with trafficking cocaine, failure to stop for a blue light,
16 and possession with intent to distribute ---

17 A: Marijuana.

18 Q: --- marijuana. What, if anything, about the evidence
19 that you collected from that bag would indicate to you or lead
20 you to believe that he was possessing with the intent to
21 distribute marijuana?

22 A: The totality of the circumstances, the amount of
23 marijuana, the amount of cocaine, the sandwich bags, the
24 baggies normally used to sell narcotics, the scale.

25 Q: Okay.

DIRECT EXAMINATION OF SERGEANT ROBERT SHEARER BY MS. BARR

1 A: The list goes on and on.

2 (Whereupon, a color photo is marked for identification as
3 State's Exhibit Number 6.)

4 Q: All right. Now, I'm going to hand you what's been marked
5 for identification purposes as State's Exhibit Number 6. Do
6 you recognize that, sir?

7 A: Correct.

8 Q: All right. What is that?

9 A: The marijuana, the cocaine, the scale, the cigar, the
10 sandwich bags, and the cell phone and I believe the money
11 seized from Mr. Vice.

12 Q: All right.

13 MS. BARR: Judge, we would move State's Exhibit Number 6
14 in at this time.

15 MR. SWILLEY: Your Honor, that -- that picture wasn't
16 provided me until today during trial. I just move to exclude
17 that photograph due to failure to comply with Rule 5.

18 THE COURT: All right. Admitted over objection.

19 (Whereupon, State's Exhibit Number 6, a color photograph
20 of the evidence in the case, is admitted into evidence.)

21 MS. BARR: Your Honor, permission to publish?

22 THE COURT: Yes.

23 MS. BARR: Thank you, Sergeant Shearer. Go home and get
24 you some sleep. That's all the questions that I have.

25 THE COURT: Cross examination?

CROSS EXAMINATION OF SERGEANT ROBERT SHEARER BY MR. SWILLEY

1 THE WITNESS: Thank you, Ms. Barr.

2 CROSS EXAMINATION

3 BY MR. SWILLEY:

4 Q: Mr. Shearer, you said that you were the second or the
5 third vehicle behind ---

6 A: What was your ---

7 Q: I'm not done asking the question.

8 A: No. I was asking you what your name was so I could
9 answer your question respectfully.

10 Q: My name is Matt Swilley. You said you were either --
11 either the second or the third vehicle behind Sergeant ---

12 A: Correct, Mr. Swilley.

13 Q: All right. Who was in the other one besides Deputy
14 Hayes?

15 A: Corporal Jenkins.

16 Q: Corporal Jenkins? Okay and when you stopped to -- when
17 you stopped your vehicle during the pursuit, did Corporal
18 Jenkins follow?

19 A: He continued in the pursuit, correct.

20 Q: Okay. So you were the only one that stopped; right?

21 A: Correct.

22 Q: And your car was not equipped with a dash camera?

23 A: It was not.

24 Q: And was Corporal Jenkins'?

25 A: It was not.

CROSS EXAMINATION OF SERGEANT ROBERT SHEARER BY MR. SWILLEY

- 1 Q: Okay.
- 2 A: We both got new vehicles right after that.
- 3 Q: I understand. How far away were you from Deputy Hayes
- 4 and Deputy Jenkins?
- 5 A: I was right on Deputy Hayes' bumper or the patrol car in
- 6 front of me.
- 7 Q: Okay. So when you stopped your vehicle, you said there
- 8 were four or five people standing at the intersection?
- 9 A: It might have been more than that.
- 10 Q: Can you give me an approximation?
- 11 A: Five to ten.
- 12 Q: Okay. So it's five to ten?
- 13 A: Standing on the corner, correct.
- 14 Q: Okay. Did you speak or ever make contact with any of the
- 15 people?
- 16 A: I did not. I got the bag and threw it in the car and
- 17 went to Deputy Hayes there.
- 18 Q: Okay and subsequent to Mr. Vice's arrest, did you make
- 19 contact with them?
- 20 A: We rode back around there and stuff, but we didn't see
- 21 anybody.
- 22 Q: You didn't interview anybody?
- 23 A: No.
- 24 Q: Okay and was Deputy Coker anywhere during the pursuit?
- 25 A: I think he was involved somewhere in the pursuit. I'm

CROSS EXAMINATION OF SERGEANT ROBERT SHEARER BY MR. SWILLEY

1 not sure. We have so many.

2 Q: Okay and when the what you refer to as the Packers bag
3 was recovered, did you perform any kind of forensic analysis
4 on the actual bags?

5 A: I did not.

6 Q: Okay.

7 A: I did not.

8 Q: Okay. Based upon your knowledge, did anyone else?

9 A: I -- I -- I signed it directly over to Deputy Hayes. I'm
10 sure SLED did. I'm sure Lieutenant Scott probably did.
11 Everybody else, but that was beyond me. Like I said, I wasn't
12 primary officer.

13 Q: Okay. So you didn't. No one else to your knowledge
14 lifted any prints off the bags?

15 A: Not to my knowledge.

16 Q: Okay and no DNA swabs as well; right?

17 A: Negative.

18 Q: Okay. Thank you, Deputy Sheriff.

19 A: Thank you.

20 MS. BARR: I don't have any redirect, Judge.

21 THE COURT: All right. Thank you. You may step down.

22 THE WITNESS: Can I be dismissed?

23 THE COURT: Yes, sir.

24 THE WITNESS: Thank you.

25 (Whereupon, the witness leaves the stand at 11:59 a.m.)

1 MS. BARR: Your Honor, at this time the State would rest.

2 THE COURT: All right, ladies and gentlemen, that is the
3 State's evidence. I ask that you go to the jury room, but
4 please do not discuss the case and when you go to the jury
5 room, Mr. Foreman, if you would, stay right there while the
6 others go to the jury room. Please go to the jury room.
7 Please do not -- do not discuss this case.

8 (Whereupon, the jury exits the courtroom at 11:59 a.m.
9 and the jury foreman, Mr. McKnight, remains in the jury
10 box.)

11 THE COURT: Mr. McKnight, when the bailiff came up and he
12 relayed to me that you indicated that you are -- that you are
13 related you think to the lady seated next to the defendant's
14 female acquaintance?

15 JUROR MCKNIGHT: Yes, sir.

16 THE COURT: All right and next to -- next to the lady --
17 what is your name, ma'am, in the -- are you Ms. Vice?

18 MS. VICE: Yes, sir.

19 THE COURT: Jane Vice?

20 MS. VICE: Yes, sir.

21 THE COURT: All right and so you are -- what relation are
22 you to Ms. Vice?

23 JUROR MCKNIGHT: Well, relative, you know. I don't know,
24 you know.

25 THE COURT: All right. You don't know the extent of the

1 relationship?

2 JUROR MCKNIGHT: No.

3 THE COURT: And, Ms. Vice, you're the mother of the
4 defendant?

5 MS. VICE: Yes, sir.

6 THE COURT: So that would make you related to the
7 defendant as well?

8 JUROR MCKNIGHT: Yes, sir.

9 THE COURT: All right.

10 JUROR MCKNIGHT: Yes, sir.

11 THE COURT: And is that the reason you brought it to --
12 well, tell me why you decided to bring that to my attention.

13 JUROR MCKNIGHT: Well, I just -- you know, I don't know,
14 you know, just what to do so I just wanted to let you know
15 this, let the Court know this.

16 THE COURT: All right.

17 JUROR MCKNIGHT: I didn't know the young man on
18 yesterday.

19 THE COURT: All right.

20 JUROR MCKNIGHT: And when I saw her sitting there, that's
21 the reason why I brought it to your attention.

22 THE COURT: Okay and I certainly appreciate that and you
23 are -- I see you have some gray hair. Now, about how old are
24 you now?

25 JUROR MCKNIGHT: Sixty-one, sir.

1 THE COURT: Sixty-one. Well, sir, I'll catch up with you
2 tomorrow so we're -- we're right there together.

3 JUROR MCKNIGHT: I worked out of town for the past 31
4 years so that's the -- you know, I -- that's the reason why I
5 don't know the young man, Judge.

6 THE COURT: All right, but during your years you've known
7 that Ms. Vice to be a relative and you've -- you all have
8 known each other to be kin to each other?

9 JUROR MCKNIGHT: Yes, sir. Yes, sir.

10 THE COURT: All right. All right. Any questions that
11 the State or the defense would like to -- for me to pose to
12 the witness -- to the -- not the witness, but the juror?

13 MR. SWILLEY: Your Honor, I just -- I'm curious as to
14 whether he feels that he could be fair and impartial to both
15 sides. That's all I really am concerned with.

16 THE COURT: Mr. McKnight, do you think the fact that you
17 are related to the defendant that that would affect your
18 ability to sit as a juror in this case?

19 JUROR MCKNIGHT: No, sir. No, sir.

20 THE COURT: And do you think that it would affect your
21 ability to be a fair and impartial juror?

22 JUROR MCKNIGHT: No, sir.

23 THE COURT: All right. Anything else the State or the
24 defense would like for me to ask?

25 MR. SWILLEY: Not from the defense, Your Honor.

1 MS. BARR: Not from the State, Your Honor.

2 THE COURT: All right. Let's see now. Mr. McKnight,
3 we're going to have you to come this way and up there by that
4 left door there by where Jack McRae is standing. If you
5 would, just stand right outside that door for a couple minutes
6 -- a couple moments I should say.

7 (Whereupon, the juror complies.)

8 THE COURT: All right. Ms. Barr?

9 MS. BARR: Your Honor, I'm trying to figure out the
10 juror's juror number. I think it's 117.

11 THE COURT: It's Number 117.

12 MS. BARR: Your Honor, I'd ask that the juror be excused
13 and that the Court seat the first ---

14 THE COURT: Okay.

15 MS. BARR: --- alternate. Your Honor, I'm not sure where
16 the juror fell in terms of the number of strikes that I had
17 used, but certainly if I had any inclination that he was
18 related to the defendant, I would have used one of my
19 peremptory challenges to not seat him. I commend the juror's
20 earnestness in bringing his relationship to the defendant to
21 the Court's attention, but clearly I would not want someone on
22 this jury who is related to the defendant.

23 THE COURT: All right. Mr. Swilley?

24 MR. SWILLEY: Your Honor, based on my recollection, Mr.
25 McKnight was selected -- he was the sixth juror to be seated.

1 He did state that he thought that he was related to the
2 defendant's mother, but didn't know whether he was related to
3 the -- to the defendant and couldn't really ---

4 THE COURT: If he's related to the mother, he's related
5 to the defendant. I don't think that's an issue.

6 MR. SWILLEY: Well, I mean I guess by blood or marriage,
7 I don't know. He didn't really specify. I just -- I don't
8 think he was ---

9 THE COURT: Well, through blood or marriage, if he had --
10 if he's related to the defendant's mother, he's related to the
11 defendant through whatever other -- whatever interpretation
12 you make of it. She -- if he's related to the mother, he's
13 related to the child, but go ahead.

14 MR. SWILLEY: I would -- I would just -- Your Honor, I
15 just didn't think it was -- it was -- this would be enough to
16 warrant Mr. McKnight being taken off the jury. He just -- he
17 just wasn't real specific. So I just request the Court leave
18 him on there.

19 THE COURT: Let's see. Both the State and the defense
20 used all five strikes. Mr. McKnight was the -- at the time
21 Mr. McKnight was seated, the State had three more strikes
22 because he was the sixth juror seated. I'm going to ask him a
23 couple more questions to try to determine how close kin he
24 might be. Ms. Vice, do you know?

25 MS. VICE: Yes, sir. His dad is my mother's two first --

1 his dad is my mother's two first cousins.

2 THE COURT: His dad and your mom?

3 MS. VICE: Yes, sir.

4 THE COURT: Are first cousins?

5 MS. VICE: Yes, sir.

6 THE COURT: He would be your second cousin and he would
7 be David's third cousin.

8 MS. VICE: Yes, sir.

9 THE COURT: All right and what's the -- what's the rule
10 on that degree of consanguinity to make a juror disqualified
11 to serve? I don't have my computer with me.

12 (Whereupon, there is a pause in the proceedings for
13 several minutes while the appropriate code is
14 researched.)

15 THE COURT: All right. We're going to proceed with the
16 trial. I'll -- I'll ponder the issue over a period of time.
17 Unfortunately, our computers are down and that's our primary
18 means of research. We're going to have Mr. McFadden [sic.]
19 stay on the jury for the time being.

20 MS. VICE: McKnight.

21 THE COURT: Mr. McKnight to stay on the jury for the time
22 being and I'll still think about it and I'll tell him not to
23 discuss anything with any of the jurors as far as
24 relationships. All right.

25 (Whereupon, Juror McKnight enters the courtroom at 12:13

1 p.m.)

2 THE COURT: Mr. -- Mr. McKnight, I want you to go back to
3 the jury room, but do not discuss with any of the jurors --
4 have you mentioned anything to them about being related to
5 anyone?

6 MR. MCKNIGHT: No, sir.

7 THE COURT: All right. If you -- if you will, do not
8 discuss any of that with any juror.

9 MR. MCKNIGHT: Yes, sir.

10 THE COURT: I'm going to have you go back with the jury.
11 Thank you, sir.

12 (Whereupon, the juror exits the courtroom at 12:13 p.m.)

13 THE COURT: All right. The State has rested. Anything
14 by the defense?

15 MR. SWILLEY: Yes, Your Honor. I'd make a motion for a
16 directed verdict. Under Rule 19, the State has to establish
17 competent evidence that all the elements of the indictments
18 along with whether or not they occurred in the county or the
19 venue of the county and jurisdiction as well as the date and,
20 Your Honor, also the defendant has to be identified.
21 Throughout the course of the trial, Your Honor, I don't
22 believe there was a single witness that identified Mr. Vice at
23 all.

24 THE COURT: The last witness said that when he was
25 apprehended, they counted the money out in front of him.

1 MR. SWILLEY: What I was referring to is identify Mr.
2 Vice here in court. I don't think there was an in-court
3 identification at all.

4 THE COURT: An in-court identification?

5 MR. SWILLEY: That's correct, Your Honor.

6 THE COURT: All right. Ms. Barr?

7 MS. BARR: Judge, my recollection of the testimony of
8 Deputy Hayes was that he knew the defendant, David Vice, and
9 when I asked him who the driver of the vehicle was and who was
10 placed in handcuffs, my recollection is that he stated the
11 defendant, David Vice, and I think he may have -- obviously
12 the record may not reflect this, but he may have pointed to
13 the defendant and I'm not sure if there's a legitimate
14 question as to whether or not the defendant on trial is
15 actually David Vice. Judge, I would submit that that's --
16 that's not an issue.

17 THE COURT: All right. I deny the motion. I think the
18 record is sufficiently -- has sufficiently established -- to
19 survive this motion has sufficiently established the
20 apprehension of the defendant, Mr. Vice, as being the
21 perpetrator of the offenses for which he is on trial. All
22 right. Anything else?

23 MR. SWILLEY: Not from the defense, Your Honor.

24 THE COURT: All right.

25 MR. SWILLEY: We're not going to put up a case.

1 THE COURT: All right. Mr. Vice, if you will, come
2 around here. I want to discuss with you your right to testify
3 or not testify.

4 (Whereupon, the defendant complies.)

5 THE COURT: If he will be sworn, please.

6 THE CLERK: Raise your hand. Do you solemnly swear to
7 tell the truth, the whole truth, and nothing but the truth, so
8 help you God?

9 THE DEFENDANT: Yes, ma'am.

10 THE COURT: Mr. Vice, if you would, face me. We have
11 reached the stage of the trial where the -- where you have the
12 right to present your defense. Now, you have -- under the
13 Constitution of the United States, you have a right to claim
14 the protections of the -- under the Fifth Amendment which says
15 that no person shall be required to be a witness against
16 himself. That means that you cannot be required to testify in
17 this case. But you do have the right to testify if you would
18 like to testify, but no one can make you testify. Whether or
19 not you testify is a personal right and no one can waive those
20 rights but you.

21 Now, if you decide that you do not wish to testify, I
22 will -- I will inform the jury that you have a constitutional
23 right to remain silent and the fact that you have exercised
24 that right cannot be held against you in any way and that they
25 are to make no inferences from the fact that you did not

1 testify and the fact that you did not testify should not even
2 be discussed in the jury room.

3 If you decide to testify, then you would be subject to
4 being examined and cross examined on any relevant issue in
5 this case. In addition, if you have any criminal convictions
6 involving crimes of dishonesty or crimes punishable by more
7 than one year imprisonment and I determine that the probative
8 value of admitting that evidence outweighs any prejudicial
9 effect on you, the solicitor in that instance would be able to
10 introduce your record to -- your criminal record to attack
11 your credibility or to attempt to impeach you with your
12 record.

13 Now, you have the right to discuss whether or not you
14 should testify with your family, your friends, your lawyer, or
15 anyone else you would like to discuss it with, but in the end
16 whether or not you testify is up to you. Do you understand
17 what I've explained to you?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: All right and have you discussed with your
20 lawyer whether or not you should testify?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Do you need to talk with him about that
23 anymore?

24 THE DEFENDANT: No, sir.

25 THE COURT: Have you made up your decision -- your mind

1 as to whether or not you're going to testify?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Are you going to testify?

4 THE DEFENDANT: No, sir.

5 THE COURT: All right. Okay. Thank you, sir. All
6 right. Well, we'll have the jury come out and rest -- and
7 then the defense will rest in the presence of the jury. Now,
8 scheduling-wise we're at twelve twenty. We just got here.
9 We've been here almost two hours. How do you all want to work
10 it? Do you want to press on with argue and deliberation and
11 have Ms. Williams find them something to eat or -- or do you
12 all want to break for lunch?

13 MS. BARR: Judge, I'd love to be able to break for lunch
14 if Your Honor will.

15 MR. SWILLEY: I concur with that, Your Honor.

16 THE COURT: All right.

17 MS. BARR: We've got agreement.

18 THE COURT: Okay. All right. Well, we'll break until
19 one thirty for lunch and we'll come back and argue and charge
20 at that time. I'm going to let the jury go and then see if
21 you all have any -- any requests to charge before -- before we
22 -- so let's bring in the jury.

23 (Whereupon, the jury enters the courtroom at 12:21 p.m.)

24 THE COURT: All right, ladies and gentlemen, the State
25 has rested. It's now the defense's turn. Mr. Swilley?

1 MR. SWILLEY: Your Honor, the defense would rest at this
2 juncture.

3 THE COURT: All right, ladies and gentlemen, the defense
4 has rested as well and that means that you have heard all the
5 testimony in this case and you have received all the evidence
6 in this case. The next thing will be closing arguments, but
7 before we do that we're going to break for lunch. We're going
8 to break until one thirty. So we'll give you all a chance to
9 go and find something to eat and we'll do the same thing and
10 we need to have you back at one thirty. Please do not discuss
11 the case. We'll see you at one thirty.

12 (Whereupon, the jury exits the courtroom at 12:23 p.m.)

13 THE COURT: All righty. Any requested charges?

14 MS. BARR: Judge, as far as the State is concerned, I
15 think the standard ones that Your Honor charges along with the
16 law would be -- law related to the specific charges, the
17 specific offenses. I don't -- I can't think of any special
18 instructions that we would want.

19 THE COURT: Yes, sir?

20 MR. SWILLEY: Your Honor, I request the Court charge on
21 the lesser included offenses of possession with intent to
22 distribute cocaine, possession of cocaine, and possession of
23 marijuana.

24 THE COURT: Possession -- simple possession of marijuana,
25 possession with intent to distribute cocaine, and simple

1 possession of cocaine.

2 MR. SWILLEY: Or possession of cocaine, yes, Your Honor.

3 THE COURT: Also post -- it is not called simple
4 possession.

5 MR. SWILLEY: Yes, sir.

6 THE COURT: Possession. All right. What do you say
7 about it, Ms. Barr?

8 MS. BARR: Your Honor, I would say that there is no
9 evidence in this case that the defendant could be guilty of a
10 lesser included offense of possession of marijuana or
11 possession of cocaine. The evidence as related to the cocaine
12 charge is there were 52 grams of cocaine.

13 As far as trafficking is concerned, the first tier of
14 trafficking, the State has to prove that the defendant
15 possessed more than 10 but less than 28 grams of cocaine. The
16 second tier for trafficking, the State -- which is the one
17 that we have today says that the State has to prove that the
18 defendant trafficked in more than 28 grams but less than 100
19 grams of cocaine and, Your Honor, there is certainly no
20 evidence before this Court to suggest that the defendant could
21 be guilty of possession of cocaine as opposed to trafficking
22 cocaine.

23 THE COURT: Mr. Bryant, would you hand me Title 44,
24 please?

25 (Whereupon, the bailiff complies.)

1 THE COURT: Go ahead.

2 MS. BARR: Considering the weight. Judge, also we would
3 ask the Court -- and I don't know how well you were able to
4 see the drugs in this case from your distance, but clearly
5 based on the weight of the marijuana, the amount of the drugs,
6 and the money that was seized, as well as the presence of the
7 baggies and the digital scales, this would not lend itself to
8 a conclusion that the defendant simply ---

9 THE COURT: Your last name is McBride?

10 THE BAILIFF: Yeah.

11 THE COURT: Excuse me, McBride, not Bryant. I'm thinking
12 of Election Day. You used to cut grass for ---

13 THE BAILIFF: Mr. Bryant.

14 THE COURT: Bryant, yeah. Okay. Go ahead.

15 MS. BARR: There is no evidence in the record to suggest
16 that the defendant could be guilty of possession of marijuana
17 as opposed to possession with intent to distribute. I think
18 for the possession of marijuana it has to be under 28 grams
19 and I think given what we know about the amount of marijuana
20 that was taken, as well as the money, the baggies, and the
21 digital scales, that there's no evidence that the defendant
22 had the marijuana for his personal use. And so we would
23 submit to the Court that there's no evidence in the record to
24 warrant a charge of simple possession of marijuana or
25 possession of cocaine.

1 THE COURT: All right.

2 MR. SWILLEY: Your Honor, by my recollection I think when
3 the analyst, Ms. Black, was on the stand, she did testify that
4 she tested two bags and found 52.8 grams, but did say that it
5 was inconclusive as to how much cocaine was actually in there
6 along with any other substance, just that there was that
7 substance in that particular bag that tested positive for
8 cocaine, but she couldn't say how much of that was actual
9 cocaine versus what it could have been cut with or anything
10 else. I think that's competent evidence for a jury to find
11 that there is -- for the -- for the lesser includeds to be
12 charged.

13 THE COURT: But she couldn't determine what now?

14 MR. SWILLEY: She -- she stated that she tested it, but
15 how much -- the fact that -- there wasn't -- there was no way
16 for her to tell it was pure cocaine or it was -- there was
17 other substances mixed in that she -- there was -- there were
18 tests that could establish that, but that she didn't run those
19 tests is what she testified to.

20 THE COURT: How is that -- how is that relevant? I mean
21 the statute provides -- does the statute say it has to be
22 pure?

23 MR. SWILLEY: No, no, sir, but it does -- it does say
24 that it has to possess actual cocaine, not other substances
25 for which -- which it was cut with. Your Honor, I think

1 that's competent evidence to find that the ---

2 THE COURT: What -- what part of the statute says that?

3 MR. SWILLEY: Well, it just says trafficking cocaine.

4 MS. BARR: Your Honor, 44-53-392 states that, not
5 withstanding any other provision of this article, the weight
6 of any controlled substance referenced in this article is the
7 weight of that substance in pure form or in combined or
8 mixture thereof.

9 THE COURT: 44-53-392?

10 MS. BARR: 392, Your Honor.

11 THE COURT: Okay. How about that part of the statute?

12 MR. SWILLEY: Well, Your Honor, I guess that could be up
13 for interpretation, but ---

14 THE COURT: Okay. Up for interpretation?

15 MR. SWILLEY: But as to the possession of marijuana, Your
16 Honor, you know, there's -- there's evidence that the jury
17 could come to the conclusion that it was for personal use and
18 not with -- not with an intent to distribute. So I would just
19 request that the Court also charge the lesser included of
20 that.

21 THE COURT: Well, what's the impact of her testimony that
22 the cocaine may also have some medicinal purposes? Was that
23 -- was that ---

24 MR. SWILLEY: I don't -- I don't recall her saying that
25 -- testifying that.

1 THE COURT: She said there was Schedule I, which are hard
2 core with no medicinal purposes, and Schedule II, which
3 includes cocaine and -- and something about it -- studies have
4 shown that it has some medicinal purposes. Doctors use it in
5 the operating room or she said something to that effect. You
6 didn't -- you don't recall hearing her say that?

7 MR. SWILLEY: I did hear her mention about schedules and
8 how they could have some medicinal effect versus no medicinal
9 effect.

10 THE COURT: Medicinal because with regard to cocaine she
11 said something about doctors have used it in operating
12 proceedings and maybe it's Novocaine or I don't know what -- I
13 don't know. She didn't thoroughly elaborate on that. I'm
14 just asking you whether -- whether that lends any weight to
15 your argument or takes away from your argument or -- or not a
16 part of your argument.

17 MR. SWILLEY: Your Honor, that's -- that's really not --
18 wasn't part of our argument.

19 THE COURT: Okay.

20 MS. BARR: Judge, on that issue regarding the Court's
21 question about the analyst's testimony for a Schedule II
22 controlled substance, I was looking at Section 44-53-200 and
23 it indicates that if -- to be included as a Schedule II
24 substance, the statute provides that it has to (a) have a high
25 potential for abuse, (b) it has a currently accepted medical

1 use in the treatment in the United States or currently
2 accepted medical use with severe restrictions, and (c) abuse
3 may lead to severe psychic or physical dependence, and I think
4 that's kind of what she was talking about in terms of there
5 are acceptable medical uses. I don't know that she went on to
6 say that it's severely restricted, but that's kind of I think
7 what the Court was -- was asking about.

8 THE COURT: She said -- she said it can lead to
9 dependency or addiction.

10 MS. BARR: Yes, sir.

11 THE COURT: All right. Basically, Mr. Swilley is arguing
12 -- the gist of his argument -- my -- my reaction to it at
13 least is that in every drug case the defense is entitled to a
14 -- a possession charge. If I were to accept that argument,
15 then I -- if you have -- how many -- how much marijuana is
16 this?

17 MR. SWILLEY: I don't think -- I don't think an actual
18 weight was attested -- was testified to.

19 THE COURT: Did we have a -- did anyone testify as to the
20 actual weight, Ms. Barr?

21 MS. BARR: Judge, I don't think they did.

22 THE COURT: All right. So if you have -- because clearly
23 you have a lot of marijuana so the -- and the cocaine weight
24 is in the level of trafficking and their -- the defense has
25 not presented any evidence. So the question is whether or not

1 in any -- in any case without any testimony to say this is my
2 -- for my personal use or I plan -- you know, I smoke an ounce
3 of marijuana per day and I plan to smoke this over the next
4 ---

5 MS. BARR: Three years.

6 THE COURT: --- three years or six months or whatever,
7 whether or not you just automatically get a charge on
8 possession. Now, I know you -- your argument is, well, no, we
9 get it on the possession in this case as opposed to every case
10 based on -- tell me those factors again in this case. Why are
11 you entitled to a charge on possession?

12 MR. SWILLEY: Your Honor, I just cited that the analyst
13 testified that she couldn't tell exactly how much was in a
14 particular pile and along with the marijuana there was no
15 evidence of an actual weight, as -- as well as the element
16 with an intent to distribute has to be proven beyond a
17 reasonable doubt.

18 THE COURT: All right. All right. Well, I'll -- we'll
19 think over lunch and then you'll -- you'll prepare your
20 argument both ways, all right, if I charge it or if I don't.

21 MR. SWILLEY: Yes, sir.

22 THE COURT: Okay. We'll -- we'll wait until after lunch
23 and then I'll -- I'll say whether or not I'll charge that, Mr.
24 Swilley. You know, wherever a lesser included can be charged,
25 I always give the defendant the benefit of the doubt and

1 charge a lesser included because my experience is that jurors
2 don't pay any attention to that and they charge -- and they --
3 they don't pay any attention to it in the sense that just
4 because the judge says you can find someone guilty of
5 something, it doesn't result in the jury finding them guilty
6 of it if the evidence is clearly to the contrary.

7 So -- so I -- I generally have no problem with charging
8 lesser includeds or anything that -- where the defendant is
9 given the benefit of the doubt, but the law is that there must
10 be some evidence in the record of something in order for there
11 to be a charge related to it. I -- I have to search high and
12 low to see how that could be possible in this case.

13 MR. SWILLEY: Your Honor, I just -- I would just add that
14 there was a cigar I believe introduced into evidence that was
15 used to smoke ---

16 THE COURT: No. You objected to that and I sustained the
17 objection; didn't I?

18 MS. BARR: You did, Your Honor.

19 THE COURT: We don't have that. You objected to that
20 cigar.

21 MR. SWILLEY: Okay.

22 MS. BARR: Judge, would you consider charging 44-53-392
23 about the weight of controlled substance?

24 THE COURT: 44-392. What does that say?

25 MS. BARR: That's -- that's the one that talks about the

1 weight of a controlled substance, whether it's in its pure
2 form or if it's in a mixture. Given counsel's questions to
3 the SLED analyst on cross examination.

4 THE COURT: The definition is: or any mixture containing
5 cocaine. That's in the standard definition of what is
6 cocaine. All right. Anything else?

7 MR. SWILLEY: No, Your Honor.

8 THE COURT: All right.

9 MS. BARR: Nothing from the State, Judge.

10 THE COURT: All right. We have Mr. Brown swarming
11 around. Is there anything that he needs, pleas or anything
12 before we -- of course, we're going to start back at one
13 thirty so ---

14 MS. BARR: Yes, sir.

15 THE COURT: Maybe we'll just take a lunch and be back at
16 one thirty.

17 MS. BARR: Do that, Judge.

18 THE COURT: All right. That's what we'll do. One
19 thirty.

20 (Whereupon, there is a break in the proceedings from
21 12:36 p.m. until 1:52 p.m.)

22 THE COURT: All right. First, with regard to the
23 charges, I'm going to charge the lesser -- I'm going to charge
24 simple possession of marijuana since the State did not
25 introduce any evidence as to weight.

1 The State introduced evidence as to weight as to
2 trafficking and the only evidence in the case is the
3 possession of the weight as indicated through the testimony of
4 the witnesses and pursuant to the case of *The State v.*
5 *Raffaldt*, R-A-F-F-A-L-D-T, it is the amount of cocaine rather
6 than the criminal act which triggers the trafficking statute
7 and distinguishes trafficking from distribution and simple
8 possession.

9 If the amount of cocaine or any mixture containing
10 cocaine is 10 grams or more, the trafficking statute is -- is
11 applied and in this instance, the statute that -- that applies
12 is the amount of 28 grams or more. So I'm not going to charge
13 anything other than trafficking as to that offense. There was
14 28 grams or more, but less than 100 grams.

15 Also, regarding the juror who is the second cousin of the
16 -- second cousin once removed from the defendant, I'm going to
17 exclude that juror. I think that the purpose of having
18 alternate jurors is for -- is for this exact purpose, that is
19 that if during the course of the trial it might appear that
20 jurors provide answers differently as to relationships and all
21 than they would during the voir dire, it's within the
22 discretion of the Court to utilize alternate jurors. The
23 juror was unaware of his relationship with -- to the
24 defendant, but based on that relationship, I find that he
25 should be taken off the jury and if you will bring him now, I

1 will exclude him. Mr. McKnight.

2 THE BAILIFF: Just him?

3 THE COURT: Just Mr. McKnight, George McKnight, if he'll
4 come out.

5 (Whereupon, Juror McKnight enters the courtroom.)

6 THE COURT: All right. Mr. McKnight, I understand from
7 talking to -- to Ms. Vice, the defendant's mother, that her
8 mother and your father ---

9 JUROR MCKNIGHT: Yes, sir.

10 THE COURT: Is that what you said?

11 MS. VICE: Your Honor, I said his father, but he and my
12 mother was two first cousins.

13 THE COURT: Right.

14 MS. VICE: I thought I said his father, but he -- the
15 defendant [sic.] McKnight and my mother, they are two first
16 cousins.

17 THE COURT: First cousins?

18 MS. VICE: Yes, sir.

19 THE COURT: The defendant [sic.] McKnight and your mother
20 are two first cousins?

21 MS. VICE: Yes, sir.

22 THE COURT: So that would place you in a fairly close
23 relationship ---

24 JUROR MCKNIGHT: Yes, sir.

25 THE COURT: --- to the defendant and to -- and more

1 importantly to his family.

2 JUROR MCKNIGHT: Yes, sir.

3 THE COURT: And it's unfair to put you in that position
4 of sitting on a jury and making a determination of guilt or
5 innocence of a close relative of that nature or to that extent
6 and in addition to that, we're -- if that information is known
7 to the State during jury selection, chances are they would
8 have decided to put someone on the jury other than the
9 relative of the defendant and you were the sixth juror
10 selected and at that time the State had only used two of their
11 five jury strikes and chances are even though they liked you
12 as a juror that had they known you were related to the
13 defendant, they would not have put you on the jury.

14 So rather than put you in that position and the State in
15 that position and all of us in that position, we'll just use
16 one of those alternates that we have. So we're going to --
17 we're going to cut you loose and let you go, but thanks.

18 JUROR MCKNIGHT: Yes, sir.

19 THE COURT: Now, we don't plan to pick any more juries
20 this week. I don't know -- unless you all have an instant
21 case of two -- no more than two hours to do tomorrow. We have
22 to do those plus guilty pleas and other things.

23 MS. BARR: I don't think we'll need any other jurors.

24 THE COURT: I know Mr. Brown is chomping at the bits.

25 MR. TYLER BROWN: I did have a case I'm ready to go on,

1 but I don't want to -- I know that everybody has obligations.
2 I'm not going to push it.

3 THE COURT: Yeah.

4 MR. TYLER BROWN: I'll wait until January.

5 THE COURT: Okay. So you won't have to come back.

6 You're -- you're free to -- we've let all the other jurors go
7 including this crew after they get through with this case. So
8 I want to thank you very much and you can go.

9 JUROR MCKNIGHT: Thank you.

10 THE COURT: All right and I'll explain everything. I'll
11 pick me a new foreperson and I'll explain everything to the
12 jurors.

13 JUROR MCKNIGHT: Yes, sir.

14 THE COURT: All right.

15 JUROR MCKNIGHT: Do I go this way?

16 THE COURT: Yeah. You can go that way. Give the clerk
17 your badge there. All right. Thank you, sir, Mr. McKnight.

18 JUROR MCKNIGHT: Yes, sir. Yes, sir.

19 (Whereupon, the juror leaves the courtroom.)

20 THE COURT: Now, per the rules, the -- in civil court you
21 pick the next person up, but in criminal court the proper way
22 to do it is by lot. So you have out of two, one should be
23 randomly selected to be the next alternate to be seated on the
24 jury. Any objection to the court reporter picking one --
25 picking it out? Before you pull it out, hold up, Madam Court

1 Reporter.

2 THE CLERK: Wait a minute. Just a minute.

3 MS. BARR: No objection on behalf of the State.

4 MR. SWILLEY: No objection, Your Honor.

5 THE COURT: All right. Let's see who we have then.

6 (Whereupon, a slip of paper is drawn from two slips of
7 paper in a cup containing the names of the two alternate
8 jurors.)

9 THE CLERK: It's Juror Number 81, Dantrell Harrison.

10 THE COURT: All right. Dantrell Harrison then will
11 become our alternate and we'll name Mr. Joe L. Linder to be
12 the foreperson of the jury. All right. With all that, are
13 you all ready to proceed with closing arguments?

14 MS. BARR: Judge, the State is ready. I would just ask
15 one question. Your Honor, you're going to charge possession,
16 actual and constructive?

17 THE COURT: Yes.

18 MS. BARR: Okay. That's all. The State is ready, Your
19 Honor.

20 MR. SWILLEY: The defense is ready, Your Honor.

21 THE COURT: I'm not going to charge weight since there's
22 no evidence of weight or -- or any inferences based on the
23 weight. They can infer based on everything else, but they
24 can't -- or whatever if they decide to -- or decide based on
25 anything else, but it's -- they can use their common sense,

1 but they cannot -- there's no inference charge based on
2 weight.

3 Well, all right. Well, let's bring them on.

4 (Whereupon, the jury enters the courtroom at 2:00 p.m.)

5 THE COURT: All right. Welcome back, ladies and
6 gentlemen. We have -- we have some changes in the make-up of
7 the jury. Mr. McKnight is no longer a member of the jury and
8 Ms. Dantrell Harrison or Mister -- who is Dantrell? Mister,
9 I'm sorry. Mr. Dantrell Harrison, you'll become the twelfth
10 juror. Ms. ---

11 THE CLERK: Whitaker.

12 THE COURT: --- Whitaker, you'll remain an alternate at
13 this point and, Mr. Linder, you get the seat to serve as the
14 foreperson of the jury. I'm going to appoint you to serve as
15 the foreperson. If you will, take that seat and, Mr. Dantrell
16 Harrison, if you will, take -- well, you can stay right there
17 if you wish. That's fine. I just want to let you know.

18 All right, ladies and gentlemen, you've heard the
19 evidence. You've heard the testimony. It's now time for
20 closing arguments. What the lawyers tell you is not evidence.
21 Evidence consists of testimony from the witness stand and from
22 exhibits that are introduced, but certainly the arguments are
23 important and I invite you to give them your attention at this
24 time. Ms. Barr?

25 MS. BARR: Thank you, Your Honor. May it please the

1 Court.

2 THE COURT: Ms. Barr will open. Mr. Swilley will close.

3 MS. BARR: Thank you, Your Honor.

4 CLOSING ARGUMENTS

5 MS. BARR: Mr. Swilley, Deputy Hayes, Mr. Foreman, ladies
6 and gentlemen of the jury, good afternoon.

7 (Whereupon, the members of the jury reply: Good
8 afternoon.)

9 MS. BARR: I made a promise to you all earlier that we
10 would try to conclude the case by lunchtime on today and I'm
11 relieved that I was able to -- to keep that promise. I think
12 that it is interesting and appropriate that you all are here
13 to decide this case on Election Day because I think that it
14 actually says a lot about our system of government and how it
15 works and I don't think that there was probably a better day
16 that I could pick to make the arguments to you that I'm going
17 to make.

18 I started off this case by telling you about the three
19 charges. I'm going to try to briefly explain to you what I
20 believe the judge is going to tell you about the law in the
21 case. I'm going to talk about the facts and then I'll have a
22 seat and Mr. Swilley will follow me.

23 The way that our court rules work and I actually don't
24 like this part about it, but in these type cases the State
25 goes first in closing argument and then the defense lawyer

1 will have an opportunity to stand before you and tell you his
2 version of the case and I always kind of like to be the last
3 person to make an argument to the jury because the rule of
4 thumb is people remember what they hear last. But the rules
5 permit the defense lawyer to go first so I'm sure -- or to go
6 last so I'm sure that he's sitting there writing down as I
7 speak all the reasons why you should disregard everything that
8 I say.

9 But in any event, let's start about the charges. You all
10 have heard the evidence in the case. You've listened to
11 witnesses. You've seen videotapes. You've seen the drugs
12 that are involved in this case. So you know all about the
13 case. It's not complicated.

14 The defendant is charged with three offenses, the first
15 being failure to stop for a blue light and sirens. That law
16 can be found in Section 15 -- 56-5-750 of the South Carolina
17 Code of Laws and essentially that law says that it's illegal
18 -- unlawful for a person to fail to stop when signaled by a
19 law enforcement vehicle by means of flashing blue lights or
20 sirens.

21 That's the law and, folks, when you all heard the
22 testimony of Deputy Hayes and Sergeant Shearer and you saw the
23 videotape, it is clear and it's apparent that the defendant is
24 guilty for failure to stop for a blue light. It's not just
25 what you heard from the officers; you actually had the benefit

1 of being able to see that crime being committed firsthand.

2 The second charge that is before you is possession with
3 intent to distribute marijuana. Now, the law as it relates to
4 the two drug charges requires that the State prove three
5 things: essentially, one, that the defendant was in possession
6 of the drugs; two, that he knew he was in possession of the
7 drugs; and three, as it relates to the marijuana charge that
8 he possessed it with the intent to distribute.

9 Ms. Barr, what do you mean he possessed it with the
10 intent to distribute? What does that mean? Well, when
11 somebody possesses something with the intent to distribute,
12 distribute just simply means they have an intent to pass it
13 from one person to another, whether you're selling it or
14 whether you're giving it away, whatever you're doing. You
15 don't have the intent to just keep it for yourself; you have
16 the intent to give it to another person.

17 As it relates to the cocaine charge, the defendant is
18 charged with trafficking in cocaine. That's under Section 44-
19 53-370 and what I think the judge will tell you about the
20 trafficking cocaine is that if an individual has possession of
21 more than 28 grams of cocaine, but less than 100 grams of
22 cocaine, then that person is guilty of trafficking in cocaine.

23 Now, what's the evidence before you that the defendant is
24 guilty of trafficking in cocaine? You heard the analyst's
25 testimony, the young lady who came from SLED, and she talked

1 about the weight that's associated with the cocaine that she
2 analyzed and that weight was 52 grams.

3 Now, one of the things that I believe was sort of
4 interesting about her testimony, Mr. Swilley asked her on
5 cross examination, well, how do you know that that was all
6 pure cocaine as opposed to some mixture. Well, the law
7 actually has an answer for that. Under the law, it doesn't
8 matter whether it's pure cocaine, whether it's some
9 combination of cocaine or something else, or it's a mixture of
10 something else. If it's 52 grams of cocaine, whether it's in
11 its purest form or in a mixture, it's considered cocaine.

12 (Whereupon, counsel retrieves State's Exhibit Number 5A,
13 the bag of cocaine, from inside State's Exhibit Number
14 5.)

15 And the interesting thing about that is when the analyst
16 talked about there being two different types of substances
17 that were contained within that bag, one was pure white and
18 one -- two were pure white and two were sort of an off-white
19 color and you can actually see that and there is a distinct
20 difference in the colors of those particular items.

21 What I would suggest to you, just kind of based on common
22 sense -- I mean we all heard just how these type things are
23 manufactured. Oftentimes, you hear about cocaine being mixed
24 with baking soda or something along those lines to make it
25 last longer. So there's no controlled substance detected

1 within this pure white form and we would suggest to you that
2 it's reasonable to infer that that pure white substance that
3 was not a controlled substance was probably some form of
4 baking soda or baking powder.

5 What I would suggest to you that the defense is going to
6 argue is something that's called a lesser included offense.
7 We don't have in South Carolina different degrees of murder.
8 Sometimes you may hear on TV that somebody is charged with
9 murder in the first degree or murder in the second degree and
10 sometimes you may hear that maybe murder in the second degree
11 is a lesser included offense of murder in the first degree.

12 What I suspect the defense may argue is that, well, the
13 defendant is not guilty of anything and if he's guilty of
14 something, then, you know, perhaps he's only guilty of simple
15 possession of marijuana and, folks, when you have to determine
16 whether or not an individual is guilty of a crime, you have to
17 obviously listen to the evidence and listen to the law, but
18 you all have the benefit of being able to take your good old-
19 fashioned common sense back there with you. You don't have to
20 leave that at the door. You can take it right there back with
21 you in that jury room when you deliberate.

22 (Whereupon, counsel retrieves State's Exhibit Number 5B,
23 the six bags of marijuana, from inside State's Exhibit
24 Number 5.)

25 And when you take your good old-fashioned common sense

1 back there with you and you take the law that the judge will
2 give to you and you take the evidence, you have to ask
3 yourself a question. Is this really a situation where I
4 believe that somebody had this amount of marijuana for their
5 own personal use such that it's really a lesser included
6 offense of simple possession of marijuana?

7 Do we really believe that this person did not -- and when
8 I say this person, I mean the defendant, David Vice, did not
9 have an intent to sell marijuana and sell cocaine based on all
10 that we know? I suppose it's possible somebody could have
11 this for their own personal use. I suppose if they were on a
12 suicide mission, perhaps it's possible.

13 But, folks, for you to buy that story that I suspect the
14 defense is going to tell you, it really is going to have you
15 suspend all your notions of reason to buy that story and it's
16 not just this amount of marijuana, this amount of marijuana,
17 this amount of marijuana, this amount of marijuana.

18 (Whereupon, counsel retrieves State's Exhibit Number 5C,
19 the box of Glad plastic baggies, from inside State's
20 Exhibit Number 5.)

21 Ms. Barr, how else do we know he's trying to sell it?
22 Well, one really good indication, these baggies. It makes it
23 a whole lot easier when you're trying to sell dope if you put
24 it in these little small baggies. Now, folks, this wasn't
25 little Halloween candy that he had in this bag and he was

1 putting it in little baggies to send to the kids. This is the
2 real deal.

3 (Whereupon, counsel retrieves State's Exhibit Number 5D,
4 the red scales, from inside of State's Exhibit Number 5.)

5 Now, if that's enough evidence for you, how about the
6 scales? Why would these scales be found with all this dope?
7 Because he wants to make sure that he is giving away what he's
8 selling and he's getting his money's worth. That's why you
9 have these.

10 (Whereupon, counsel retrieves State's Exhibit Number 5E,
11 the jewelry bags, from inside State's Exhibit Number 5.)

12 And on top of that, you heard the officer testify and
13 I've actually never seen them in a plastic bag before, but
14 testify about these little baggies. I don't know if you've
15 all heard street terminology about a dime bag of weed or
16 whatever, but I would suggest to you that this is what that's
17 used for.

18 And if we have any other concerns as to whether or not he
19 had already sold some that day, then all you have to do is
20 look at State's Exhibit Number 6. Folks, on the day David
21 Vice was arrested, he had over \$3,400 in cash in his pockets.
22 Now, I don't know many folks that make that kind of money in a
23 month let alone have it in a -- in a day. So it was
24 profitable for him.

25 One of the things that I just could not understand, you

1 all saw the videotape where he's driving and all of a sudden
2 he throws the bag out. I remember that part. He wasn't
3 counting on that to be on videotape. He was not aware that
4 Officer Hayes had a video camera in his car because what I
5 expect that he thought was that, well, listen, all right, they
6 put the blue lights on me. I'm caught. Now, I've got to
7 lessen what I'm facing so I've got to get the drugs off me.

8 I did not understand though for the life of me how it was
9 that this person happened to slow his car down long enough to
10 throw the drugs outside the car and somebody just happened to
11 walk up to where the drugs were. I mean how would that person
12 even know that he was going to do that and most people if
13 you're seeing a police chase with an individual running from
14 the cops and three and four patrol cars behind him with blue
15 lights and sirens, they're going to stay out of that. They're
16 not going to come into it and I could not understand why --
17 you know, how did that person even know to be there at that
18 time and when I saw the cell phone in that bag, the first
19 thing that occurred to me, well, he had to get the drugs off
20 of him because, quite frankly, if he was able to get the drugs
21 and the officers never got it, the only thing he was looking
22 at was failure to stop for a blue light. That's it. That's
23 it.

24 I suspect and I would submit to you that that cell phone
25 is in that bag for a reason. I suspect that during the entire

1 time when he's running from the police he managed to make a
2 phone call and he told somebody. Because, you know, this
3 stuff has some money value. This evidence is valuable. You
4 don't just throw that out the window. I suspect that he
5 called somebody and said, listen, the police are chasing me.
6 I need you to come pick up the stuff.

7 And it became even more clear to me because if you watch
8 that tape -- and you'll be permitted to if you want to to
9 watch it again -- but if you watch that tape, it appears -- I
10 remember seeing a Cadillac vehicle on -- in one slice of the
11 videotape and it appeared that the defendant had come across
12 that vehicle on two occasions, almost as if he had circled
13 around in the block right before he discarded the drugs. I
14 don't think that that was simply by coincidence. I would
15 submit to you that it's not.

16 Mr. Swilley said in his opening statement that the State
17 will not be able to convince you of the defendant's guilt
18 beyond a reasonable doubt. What I think is probably what you
19 will hear is that they'll argue to you that we have not
20 established the defendant's guilt, that there are no
21 fingerprints, no DNA, so therefore the defendant must be not
22 guilty.

23 Folks, the law requires that the State prove a case
24 beyond a -- a reasonable doubt, not an unreasonable one. See,
25 the defense don't want you to believe your own lying eyes.

1 They want you to believe what they want you to believe. I
2 always get a little nervous in this part of the trial because
3 sometimes, you know, I think as a prosecutor that I have a
4 good case or a so-so case or a bad case as a prosecutor and I
5 always worry because jurors who are members of our community,
6 they sit in, they listen to a case, and they feel like, oh, I
7 have to judge this person. I don't feel comfortable judging
8 this person and they worry about, well, what if. What if I
9 find this person guilty?

10 First of all, let me tell you that in your deliberations
11 you're not judging an individual. You're not judging a man.
12 You're judging the conduct of that man, the defendant's
13 conduct, not him, not him, and I would ask you all to remember
14 that David Vice made a decision to be named the defendant in
15 the State of South Carolina versus David Vice. He made a
16 choice. Mr. Vice has no one to blame for the position that he
17 sits in right now other than himself.

18 When you are in the trade of dealing and selling dope --
19 I'm not talking about somebody who is a casual user or
20 somebody who may smoke a blunt every once in a blue moon or
21 whatever. When you make a decision that you are going to sell
22 drugs for a living, you have made a benefit versus risk
23 analysis. The benefits, you know, if I get away with this, I
24 get a whole bunch of money, maybe thousands of dollars. I can
25 put all kind of sub-woofers in my car. I don't have to work a

1 nine to five like the average person. I'm going to make easy
2 money. Those are the benefits.

3 When you weigh the risk, gosh, if I get caught, I might
4 get arrested. He had that balancing scale and you know what?
5 He made the decision that the benefits outweigh the risk.

6 So I would caution you. I would implore you not to view
7 this case with an eye toward sympathy, but to view this case
8 with an eye toward justice. When I look at that tape, I look
9 at and I think about all the decisions that David Vice made
10 back on December the 19th of 2011. He made a decision to run.
11 He almost got away, almost. I was wondering what kind of
12 vehicle Deputy Hayes had because he caught up to him and you
13 could almost feel the speed of his vehicle. I mean he was
14 flooring it and he caught up to him. He made a decision not
15 to stop, he made a decision to toss the drugs, and he made a
16 decision to keep on going. Well, you make those decisions,
17 that's fine, but you have accepted the consequences of those
18 decisions.

19 Folks, on this Election Day, we would ask that you hold
20 the defendant accountable for the decisions that he made.
21 Don't buy into the smoke screen or the red herrings that I
22 suspect that the defendant's attorney will throw at you. You
23 know, DNA and fingerprints, those are wonderful forensic tools
24 -- I'll concede that point -- and those kinds of things are
25 crucial when you don't have a suspect, when you don't have

1 eyewitness testimony, when you don't have video. Those things
2 are absolutely crucial, but when you have a videotape that you
3 all have personally had the opportunity to view that shows the
4 defendant throwing away the drugs -- the drugs, I would submit
5 to you that the State has established guilt beyond a
6 reasonable doubt. Yes, it's true you can believe what you
7 see.

8 On this Election Day, I ask that you render justice in
9 this case. I ask that you do what the law has asked you to do
10 and that is to do justice and honor the oath that you've taken
11 to listen to the evidence and apply the law and render a
12 verdict. Folks, the only just verdict in this case, the only
13 true verdict in this case is a verdict of guilty against the
14 defendant on each and every count of the indictment. We ask
15 you all, we implore you all to do just that. Thank you all so
16 much for your time. Thank you more importantly for your
17 attention.

18 THE COURT: Mr. Swilley?

19 MR. SWILLEY: Thank you, Your Honor, if it please the
20 Court. Ms. Barr. Good afternoon, ladies and gentlemen.

21 (Whereupon, the jurors reply: Good afternoon.)

22 MS. BARR: Let me get this out of your way.

23 (Whereupon, there is a pause in the proceedings as the
24 evidence is returned to the bag marked as State's Exhibit
25 Number 5.)

1 MR. SWILLEY: Ladies and gentlemen, you have a choice to
2 make. You probably made a choice this morning, like Ms. Barr
3 talked about, when you went to the polls. You have a choice
4 to make this afternoon. Ladies and gentlemen, it's up to you
5 to make the right choice, okay, the right choice. Now, who
6 decides what is the right choice? Y'all do.

7 If you remember during my opening statement I told you
8 there were going to be some questions that are left
9 unanswered, questions that are left unanswered that aren't
10 going to leave you comfortable with doing what the State wants
11 you to do, what the government wants you to do, which is in
12 this case convict my client of the crimes for which he is
13 charged.

14 Ladies and gentlemen, it's important in a case like this
15 that you see all the questions that are going to be left
16 unanswered. First and foremost, at the beginning, you know,
17 you heard from -- you heard from three factual witnesses from
18 Williamsburg County, the county that you all live in. They
19 gave their version of the story and I'm going to show you a
20 piece of the video that's in evidence and I want to ask you --
21 now that that video is in evidence, when you go back in the
22 jury room to decide the right decision, I'm going to ask that
23 you watch it and I want you to ask yourself is what was said
24 during trial does it match up with what you see on the video.
25 Okay?

1 When Deputy Hayes said that he was out patrolling the
2 area over in the Holywoods community, just patrolling it and
3 he just happened to run into Mr. Vice, okay, during the video
4 while he's driving about 20 miles an hour and he's just turned
5 off Mr. Vice's street, does that make sense? Does that add
6 up? The fact that he was on his street patrolling the area
7 and he says he sees Mr. Vice, the car, recognizes him, and
8 then says later on that he had never seen it before. He whips
9 his car in front of him because he says he was driving left of
10 center. Now, let me show you real quick. Thank you for
11 bearing with me for one second.

12 (Whereupon, a portion of the video marked as State's
13 Exhibit Number 3 is played in the courtroom.)

14 MR. SWILLEY: The question you have to ask yourself from
15 that jury room is did he drive left of center and if not --
16 and you just saw that he didn't -- what else do you not
17 believe? It's up to you.

18 But, ladies and gentlemen, there's a very important thing
19 called credibility that you all have to gauge. Credibility,
20 believability. Okay? If one thing proves not to be true,
21 what else is not true? All right.

22 Now, later on, after the chase ensued, you see a bag fly
23 out the window, okay, and you know people ran up to it, but
24 nobody was interviewed. Nobody around that area was
25 interviewed. Law enforcement was very adamant in saying that

1 he rushed the bag before anybody touched it, but they left out
2 any and all names of anybody else who was around and no other
3 reports except for the one Deputy Hayes came out with even
4 though there were several other deputies involved.

5 When you get to the point where Mr. Vice is, they were --
6 they were very adamant in throwing the bag on top of the car
7 in front of the camera showing all the drugs, counting the
8 money out they had taken out of Mr. Vice in front of the
9 camera, but somehow not counting up all the money he had in
10 his back pocket, the thousands of dollars.

11 Well, why did they do that? I don't know, but what it
12 creates is a series of things and questions that have been
13 left unanswered. Questions that had Mr. Vice really been
14 guilty of the things for which he was accused would have been
15 answered.

16 Ladies and gentlemen, I'm going to stress again you watch
17 that tape and try to recall the things that you've heard and
18 you've got to make a decision. Am I okay with this? Am I
19 going to do what the government is asking me to do? Am I
20 going to give it my stamp of approval? Do I like this? Am I
21 going to sign off and say okay?

22 Because, ladies and gentlemen, at the end of the day you
23 guys live in Williamsburg County. I go back to the beach.
24 This is your county. You have to decide what you want to do,
25 what's right for your county, whether or not you give this the

1 okay, the thumbs up, or you're going to give it the thumbs
2 down and say no, you haven't been completely truthful with me.
3 So you know what? I'm not going to do what you ask me to do.
4 You know what? That's not right. Answer the questions. Be
5 truthful with me, a citizen of this county, and answer the
6 questions that I have.

7 Now, if you go into your favorite restaurant and you
8 order your favorite -- your favorite soup -- let's just say
9 you like soup and you get soup and the waiter brings it over
10 and you start eating soup. Somehow the soup doesn't taste
11 right. I don't like it. I don't like it today. Something is
12 wrong with this soup. Are you going to keep eating that soup?
13 Are you going to keep eating until it's empty or are you going
14 to call the waiter back over and say there's something wrong
15 with this soup, please take it back? Fix it. That's what
16 you're going to do and that's what you have to do today.

17 The right decision is to say you know what? I don't like
18 what you did. I don't like the way you did it and I'm not
19 going to approve of it and that's final and that's your
20 decision. It doesn't reach the point of beyond a reasonable
21 doubt, the evidence that you saw, because he's not guilty.

22 You know, Ms. Barr came out in her closing and said, you
23 know, you have to -- Mr. Vice is responsible for his conduct.
24 You know what else? Everybody else is responsible for their
25 conduct, too. Proper -- proper measures could have been taken

1 to assure that these unanswered questions were answered had
2 they wanted to. Something just doesn't taste right. There's
3 something wrong with this soup.

4 If you recall, during my opening statement, there's three
5 things -- there's three hard line principles mandated by our
6 constitution that exist in a criminal case. Number one, the
7 defendant is presumed innocent. Mr. Vice sits over there and
8 he's innocent. The State has to -- has the burden of proof.
9 The burden is on them to prove whatever they want to prove.
10 Third, the burden lies at beyond a reasonable doubt and that's
11 the most important. Not more likely than not, but beyond a
12 reasonable doubt.

13 The judge -- our judge here is going to charge you all on
14 what a reasonable doubt is. You can't equate any kind of
15 number to it, but you can say it's a doubt that would cause a
16 reasonable person to hesitate. I don't know how helpful that
17 is, but I'll tell you beyond a reasonable doubt would be if
18 tonight when you go home to Kingstree, Greeleyville, wherever
19 you live, and you lay your head on a pillow and you can go to
20 sleep and be happy with doing what the government wanted you
21 to do and fall asleep easily. Because if you don't, if you're
22 laying there -- if you lay there awake and you think, well, he
23 acted like -- he said he was on patrol, but he acted like he
24 was looking for him on the video. He never interviewed
25 anybody else. I never heard from anybody else other than law

1 enforcement.

2 There's no fingerprints on any of that bag, which there
3 had to have been if David Vice would have ever touched it.
4 There was no DNA that was taken off anything, which there
5 would have been had David Vice ever touched it. What about
6 that money? There's questions that need to be answered.

7 I know you've been here paying very good attention all
8 day and I -- I think that everybody is very appreciative, but
9 to be honest it's not over. You have to make the right
10 decision. Let me tell you something. The right decision
11 might not be the most popular decision, but it's still the
12 right decision. If it was the most popular decision, it
13 wouldn't be the right decision. It would be the easiest
14 decision. But it's up to you all to decide what you're going
15 to tolerate, what you want, what you're okay with in your
16 county.

17 Now, this is the most powerful -- this is the most power
18 you're ever going to have, especially today because you did
19 something this morning to exercise your power, your choice
20 over what the government does and right now you have the same
21 thing, but it's not just who's going to -- who's going to get
22 that job in Washington, D.C. It's who's going to get their
23 freedom kept or taken away and there's not a whole lot more
24 power you could have. So the choice is yours. Are you going
25 to make the right decision?

1 Ladies and gentlemen, if there's been anything that I've
2 done or said that's -- that you found offensive or obnoxious,
3 let me go ahead and apologize right now, but that's -- if
4 that's the case, put that on me. Don't take that out on my
5 client. It's my fault. I'll take the blame. Let me
6 apologize for what happened. Thank you for listening so
7 patiently.

8 THE COURT: Ladies and gentlemen, let's stand for just a
9 moment and stretch.

10 (Whereupon, the jurors comply.)

11 THE COURT: All right. Mr. Foreman and members of the
12 jury, you've heard the testimony, the evidence, and the
13 arguments of the State and the defendant. I will now explain
14 to you the law that applies to this case.

15 Under the Constitution and laws of South Carolina, you
16 are the finders of the facts in this case. I do not have the
17 right to pass upon the facts or to even express any opinion
18 that I might have as to them because this is a matter solely
19 for you the jury to determine. As jurors then, it is your
20 duty to determine the effect, the value, the weight, and the
21 truth of the evidence presented during this trial.

22 You are also the judges, the sole judges of the
23 credibility, that is the believability, of the witnesses who
24 have testified and of the evidence which has been presented
25 during this trial. In passing upon credibility, you may take

1 into consideration many things, such as the demeanor or the
2 manner of testifying, whether the witness had reason to be
3 biased or prejudiced, or whether a witness's testimony was
4 contradicted on the one hand or supported and corroborated on
5 the other hand.

6 All these things you will consider, bearing in mind that
7 you should give the defendant the benefit of any reasonable
8 doubt. It becomes your duty as jurors to analyze and to
9 evaluate the evidence and determine that evidence which
10 convinces you of its truth.

11 Now, as the trial judge, it is my responsibility to
12 preside over the trial of this case and to rule upon the
13 admissibility of the evidence offered during the trial. You
14 are to consider only the testimony which has been presented
15 from this witness stand, together with any exhibits which have
16 been made a part of the record.

17 I have the additional duty to charge you the law
18 applicable to this case and, as the presiding judge, I am the
19 sole judge of the law of this case. It is your duty as jurors
20 to accept as correct the law which I apply -- which I state to
21 you and apply the law to the facts as you find them and then
22 reach your verdict. And finally, I charge you in this regard,
23 that you should not be concerned with what you think the law
24 ought to be, but rather what I charge you the law is.

25 Now, the fact that the defendant was arrested and charged

1 and indicted is not evidence in this case and cannot be
2 considered by you as evidence of guilt in this case, nor does
3 it create any presumption or inference of guilt. The
4 indictment is simply the formal written instrument which
5 contains the charges made against the defendant. An
6 indictment is a formal document by which a case is brought
7 into court.

8 The indictment in this case alleges three different
9 offenses against the defendant. The charges are failure to
10 stop for a blue light, possession with intent to distribute
11 marijuana, and trafficking more than 28 grams but less than
12 100 grams of cocaine.

13 The charges are separate and distinct offenses. You must
14 decide each charge separately on the evidence and the law
15 applicable to it uninfluenced by your decision as to any other
16 charge. The defendant may be convicted or acquitted on any or
17 all of the charges the defense is charged and you will be
18 asked to write on the -- the verdict form a separate verdict
19 of guilty or not guilty for each charge.

20 The defendant has pled not guilty to the charges in the
21 indictment and that plea places the burden on the State to
22 prove the defendant guilty. A person charged with committing
23 a criminal offense in South Carolina is never required to
24 prove himself innocent and I charge you that it is an
25 important rule of the law that the defendant in a criminal

1 trial, no matter what the seriousness of the charges may be,
2 will always be presumed to be not guilty of the crimes for
3 which the indictment was issued unless guilt has been proven
4 by evidence satisfying you of that guilt beyond a reasonable
5 doubt.

6 The presumption of innocence does not end when you begin
7 your deliberations, but it accompanies the defendant
8 throughout the trial until you reach a verdict of guilt based
9 on evidence satisfying you of that guilt beyond a reasonable
10 doubt. The presumption of innocence is like a robe of
11 righteousness placed about the shoulders of the defendant
12 which remains with the defendant until it has been stripped
13 from the defendant by evidence satisfying you of the
14 defendant's guilt beyond a reasonable doubt.

15 Now, the presumption of innocence is not a mere legal
16 theory. It's not just a legal phrase. It is a substantial
17 right to which every defendant is entitled unless you, the
18 jury, are satisfied from the evidence of the defendant's guilt
19 beyond a reasonable doubt.

20 The State must prove the defendant guilty beyond a
21 reasonable doubt. So what is a reasonable doubt in the law?
22 A reasonable doubt is a doubt which makes an honest, sincere,
23 conscientious juror in search of the truth to hesitate to act.
24 Proof beyond a reasonable doubt must therefore be proof of
25 such a convincing character that a reasonable person would not

1 hesitate to rely and act upon it in the most important of his
2 or her own affairs.

3 Proof beyond a reasonable doubt can also be described as
4 proof that leaves you firmly convinced of the defendant's
5 guilt. Now, there are very few things in this world that we
6 know with absolute certainty and in criminal cases the law
7 does not require that proof overcomes every possible doubt.

8 If based on your consideration of the evidence you are
9 firmly convinced that the defendant is guilty, then you must
10 find him guilty. If on the other hand you think that there is
11 a real possibility that he is not guilty, you must then give
12 him the benefit of the doubt and find him not guilty.

13 Now, I instruct you and emphasize that the fact that the
14 defendant did not testify is not a factor to be considered by
15 you in any way in your deliberations and in your consideration
16 of the question of guilt or innocence of the defendant. It
17 must not be considered by you in any manner whatsoever. A
18 defendant has the constitutional right to remain silent and
19 the assertion of this right must not be considered by you in
20 your deliberations.

21 I repeat, under your oath, you are to draw no conclusions
22 whatsoever from the fact that the defendant in this case did
23 not testify. The fact that the defendant did not testify
24 should not even be discussed in the jury room. The burden of
25 proof, as I stated to you, is on the State. The defendant is

1 not required to prove his innocence. The burden of proof
2 remains on the State to prove guilt beyond a reasonable doubt.

3 The defendant is charged with failing to stop for a blue
4 light. In order to prove this crime, the State must prove
5 beyond a reasonable doubt that the defendant was driving a
6 motor vehicle, that the defendant was driving the motor
7 vehicle on a road, street or highway of this state, that the
8 defendant was signaled to stop by a law enforcement vehicle by
9 a means -- by means of a siren or flashing light, and that the
10 defendant did not stop.

11 In determining whether or not there are mitigating
12 circumstances which would justify the defendant's failure to
13 stop for the blue light, you may consider actual road
14 conditions, actual road conditions, other conditions such as
15 lighting and weather, officer, driver and/or passenger safety,
16 and any other circumstances you believe to reasonably mitigate
17 the alleged violation. An official signal requiring a --
18 requiring a motorist -- motorist to stop may be a siren or
19 flashing lights, but both are not required.

20 An attempt to increase the speed of a vehicle or in some
21 other manner avoid the pursuing law enforcement vehicle when
22 signaled by a siren or flashing light may be considered as
23 evidence of failure to stop for a blue light. However, it is
24 merely an evidentiary fact to be taken into consideration by
25 you along with all the other evidence in the case and to be

1 given the weight that you decide it should receive.

2 The defendant is charged with possession with intent to
3 distribute marijuana. The State must prove beyond a
4 reasonable doubt that the defendant possessed marijuana with
5 the intent to distribute it. To prove possession, the State
6 must prove beyond a reasonable doubt that the defendant had
7 both the power and the intent to control the disposition or
8 use of the marijuana.

9 Possession may be either actual or constructive. Actual
10 possession means that the defendant was in the actual physical
11 custody. It means that the marijuana was in the actual
12 physical custody of the defendant. Constructive possession
13 means that the defendant had dominion and control or the right
14 to exercise dominion or control over either the marijuana
15 itself or the property on which the marijuana was found.

16 Mere presence at the scene where the drugs were found is
17 not enough to prove possession. Actual knowledge of the
18 presence of the marijuana is strong evidence of the
19 defendant's intent to control its disposition or use. The
20 defendant's knowledge and possession may be inferred when a
21 substance is found on the property under which the defendant
22 -- found on the property under the defendant's control.

23 However, this inference is simply an evidentiary fact to be
24 taken into consideration by you along with the other evidence
25 in this case and to be given the weight you decide it should

1 have.

2 Distribute means to deliver rather than administering or
3 dispensing a -- or dispensing a drug. Intent may be shown by
4 acts and conduct of the defendant and other circumstances from
5 which you may naturally and reasonably infer intent.

6 In determining whether the defendant had the intent to
7 distribute the marijuana, you may consider the circumstances
8 surrounding the defendant's alleged possession. You may
9 consider the amount of the substance alleged to have been
10 possessed, the manner in which it was allegedly possessed, the
11 place where it was allegedly possessed, and other factors
12 which you consider to be important. You must find that the
13 defendant did not intend to have the marijuana solely for his
14 own use.

15 If you find that the State has failed to prove beyond a
16 reasonable doubt that the defendant is guilty of possession
17 with intent to distribute marijuana, you may consider whether
18 the State has proved beyond a reasonable doubt that the
19 defendant is guilty of simple possession of marijuana. Simple
20 possession does not require an intent to distribute the
21 marijuana.

22 The defendant is charged with trafficking in cocaine.
23 The State must prove beyond a reasonable doubt that the
24 defendant was knowingly in actual or constructive possession
25 of cocaine. The State must also prove beyond a reasonable

1 doubt that the amount of the cocaine or any mixture containing
2 cocaine was 28 grams or more, but less than 100 grams.

3 Knowingly means with knowledge, consciousness, not
4 accidentally. Intentionally means willfully, intending the
5 result which actually occurs, not accidentally or involuntary.
6 Actual possession means that the cocaine was in the actual
7 physical custody of the defendant. Constructive possession
8 means that the defendant had dominion and control or the right
9 to exercise dominion or control over either the cocaine itself
10 or the property on which the cocaine was located.

11 Now, Mr. Foreman and members of the jury, I'm required to
12 charge you the law as I have done through these instructions
13 now being given to help guide you to a just and lawful
14 verdict. Whether some of these instructions will apply will
15 depend upon what you find to be the facts. The fact that I
16 have instructed you on various subjects on this case must not
17 be taken as indicating an opinion of this Court as to what you
18 should find to be the facts or what your verdict should be.

19 In conclusion, you've been selected by both the State and
20 the defendant to be fair and impartial jurors. It is your
21 duty then in your joint deliberations to determine the truth
22 in this case, giving the defendant the benefit of every
23 reasonable doubt on each and every charge and from the facts
24 which you determine to be true, you take and apply the law
25 which I have just given you and thus arrive at a verdict which

1 speaks the truth in this case.

2 I've told you the standards you have to apply to the
3 charge of failure to stop for a blue light, possession with
4 intent to distribute marijuana, and trafficking in cocaine 28
5 grams or more, but less than 100 grams. I will give you a
6 copy of these instructions in written form. During your
7 deliberations, you may refer to the instructions to guide your
8 decision making. You must consider the instructions as a
9 whole and not follow some and ignore others.

10 You've heard the evidence and now you've heard the law.
11 Whatever your verdict as to the respective charges, Mr.
12 Foreman, you will indicate it on the verdict form by writing
13 guilty or not guilty as it relates to each particular charge.

14 For failure to stop for a blue light, guilty or not
15 guilty. Possession with intent to distribute marijuana,
16 guilty of possession with intent to distribute marijuana or
17 guilty of simple possession of marijuana or not guilty. And
18 trafficking in cocaine more than 28 grams, but less than 100
19 grams, either guilty or not guilty.

20 Now, certainly there's -- there is no significance in
21 which -- in the order in which I stated the possible verdicts.
22 Simply one must be stated before the other and, Mr. Foreman,
23 you will check the appropriate box representing the verdict of
24 the jury as to each charge. You will then sign and date the
25 verdict form.

1 Remember that all -- although the foreperson is the only
2 juror who writes the verdict, it is not his alone. The
3 verdict has to be a unanimous verdict and, Mr. Foreperson, Mr.
4 Foreman, you're not authorized to write the verdict until all
5 of you have agreed as to what the verdict should be.

6 Now, ladies and gentlemen, I'm going to send you to your
7 jury room, all of you except our remaining alternate, but do
8 not begin to discuss the case until you have received a copy
9 of this jury charge, the exhibits, and the verdict form. Once
10 you receive these things, that would be your signal to begin
11 your deliberations.

12 Once you begin your deliberations, you will deliberate
13 until you have reached a verdict and at which time you will
14 knock on the door, advise the bailiffs, and we will bring you
15 out to receive your verdict and, Mr. Foreperson, it will be
16 your responsibility to preside over the jury deliberations. I
17 ask that all of you now return to the jury room except for Ms.
18 Whitaker and we will send those things in so that you can
19 begin your deliberations.

20 (Whereupon, the jury exits the courtroom at 2:55 p.m.)

21 THE COURT: And, Ms. Whitaker, I'll get with you in just
22 a moment. If you could, stay right there. Any additions or
23 exceptions to the jury charge?

24 MS. BARR: No, Your Honor.

25 MR. SWILLEY: Your Honor, just to protect the record on

1 appeal, I would -- I would just -- I have an objection to
2 where you mentioned -- you used the term inferred for property
3 under which the defendant controls as far as possession. Your
4 Honor, I just -- just for the record on appeal, I just object
5 and say that's a comment on the facts, as well as comments
6 about a verdict that speaks the truth. I think that would
7 undermine the objective of the jury to determine if there's
8 proof beyond a reasonable doubt.

9 THE COURT: I guess you're leaning on that most recent
10 opinion that ---

11 MR. SWILLEY: I am.

12 THE COURT: --- came out and commented on Judge Russo's
13 colloquy with everyone, but I don't think that -- I don't
14 think it reaches to every word a judge says. That -- I follow
15 a script pretty closely.

16 MR. SWILLEY: Yes, sir.

17 THE COURT: That's what I followed in this case. All
18 right. If you all will, review the matters to be submitted to
19 the jury.

20 (Whereupon, counsel examines the exhibits to be sent back
21 to the jury and confirms the admitted exhibits.)

22 MR. SWILLEY: Your Honor, do you want us to take a TV
23 back in there as well? Is there a television back there? Is
24 there one that they could use?

25 MS. BARR: Well ---

1 THE COURT: There's no -- there's no TV in evidence.

2 (Whereupon, there is a pause in the proceedings.)

3 THE COURT: Mrs. Whitaker, we pick our extra jurors
4 because something often might happen to one juror and
5 sometimes two. As you can see, we lost one of our jurors in
6 the case after we discovered he was related to some of the
7 parties in the case.

8 So fortunately we had two alternates and the way that the
9 alternates are selected, we put the two names in a hat and
10 just reach in and grab one and as it turned out, the other
11 guy's name was pulled instead of yours. So we can't --
12 couldn't use you to be an alternate, but we certainly thank
13 you for your good work in this case.

14 This is the only case that we're -- only trial we're
15 going to do this week so you are free to go with thanks.
16 Madame Clerk, do you have anything to tell her?

17 THE CLERK: Yes. Ms. Whitaker, I'd like to thank you for
18 your service again on behalf of the Clerk's Office. I'll be
19 in office until December 31st.

20 THE JUROR: Okay.

21 THE CLERK: So if I can assist you, please call me by
22 then.

23 THE JUROR: I sure will.

24 THE CLERK: Okay.

25 THE JUROR: Thank you.

1 THE COURT: Ms. Whitaker, I advise -- state to all jurors
2 to not discuss the case until -- until -- until I give you the
3 case. Of course, they're still waiting to begin to talk about
4 the case now. Certainly, after you're off jury duty you can
5 talk to anyone you might want to about the case, but I would
6 just ask that you wait until you hear there is a verdict
7 before you make any comments and certainly no one has any
8 right to bother you about anything regarding the case anyway.
9 All right. Good luck to you.

10 THE JUROR: Thank you. You have a good day.

11 (Whereupon, the alternate juror exits the courtroom.)

12 THE COURT: All right. All the exhibits are accounted
13 for?

14 MS. BARR: Yes, sir.

15 THE COURT: Now, with respect -- and the lawyers do it in
16 practically every case despite my instructions and court rules
17 that I circulate and that is that if you -- if you introduce
18 video materials into evidence, you either have to have some
19 stipulation as to how they're going to be -- what they're
20 going to be played on to submit to take back to the jury and
21 all of that should be done during the course of the trial, not
22 mentioned for the first time after the jury is -- they are
23 ready for deliberations.

24 So either you work out during the trial through some
25 stipulation as to how items introduced in evidence will be

1 viewed by the jury through some stipulation or get some court
2 ruling or otherwise the -- those -- the exhibit itself goes
3 in, but you didn't put any TVs and VCRs and other things in
4 evidence.

5 So if requested, then the jury will be brought out and it
6 showed and played on whatever you want played in open court.
7 But I know of no other means of resolving this other than
8 arranging it to send things back to the jury room to play
9 exhibits on.

10 All right. All right. Here are the instructions and the
11 verdict form and then the exhibits and they can have that.
12 All right. All right.

13 (Whereupon, the evidence and verdict form are delivered
14 to the jury room at 3:03 p.m. and the deliberations
15 begin. There is a break in the proceedings until 4:00
16 p.m.)

17 MR. SWILLEY: Your Honor, as to the note, did it say they
18 wanted to see the whole thing or just the video?

19 THE COURT: It says may we see the video please.

20 MR. SWILLEY: Your Honor, all -- I don't have a problem
21 with them seeing the whole video as long as the sound it cut
22 off at 19 minutes. That's -- the whole thing is fine with me.

23 THE COURT: All right. Well, we're going to take a three
24 minute break and then we're going to play the video and, Ms.
25 Barr, you need to cut it off at 19 -- or cut the sound down at

1 19 on it I guess.

2 MS. BARR: I went ahead and muted it, Judge.

3 THE COURT: Okay and you muted it at 19?

4 MS. BARR: I muted it from the start unless you want to
5 hear ---

6 THE COURT: No. They want to know whether or not there
7 -- they want to -- they want to see it. They want to hear it
8 as well up to 19 minutes.

9 (Whereupon, there is a pause in the proceedings as the
10 video is prepared for viewing.)

11 THE COURT: All right. You can bring them on.

12 (Whereupon, the jury enters the courtroom at 4:04 p.m.)

13 THE COURT: All right, Mr. Foreman and members of the
14 jury, you said you wanted to see the video. We will play the
15 video. Now, ladies and gentlemen, listen. You can only
16 discuss it in the jury room. So don't talk about this here.

17 (Whereupon, State's Exhibit Number 3, the dash cam video,
18 is played in open court. NOT TRANSCRIBED HEREIN.)

19 THE COURT: Is that sufficient? Mr. Foreman, is that
20 sufficient?

21 THE JURY FOREMAN: Yes, sir. Can I ask one question?

22 THE COURT: You can write your questions down if you need
23 to pose any. All right. Thank you. If you all will, go back
24 to the jury room. Thank you very much.

25 (Whereupon, the jury exits the courtroom at 4:15 p.m.)

1 THE COURT: All right.

2 (Whereupon, there is a break in the proceedings from 4:16
3 p.m. until 4:21 p.m.)

4 THE COURT: And you can bring the jury in. The question
5 is was the blue light on at the start of the chase. That's
6 the jury's question. Hold them just for a second, Mr.
7 Frazier. Hold them just for a moment, just for a second.

8 I usually confer with the lawyers before I bring the jury
9 in. The question: was the blue light on from the beginning
10 from the start of the chase? That's the jury question. What
11 do you say? What says the State?

12 MS. BARR: Your Honor, I think that's obviously a
13 question of fact and what I've seen you do when similar
14 questions are asked in other trials is explain to the jury
15 that they're the finders of fact and they'd have to I guess
16 answer that question during the course of their deliberations.

17 MR. SWILLEY: I'd be in concurrence with that, Your
18 Honor. I think any -- any answer to that would be a comment
19 on the facts.

20 THE COURT: All right. Let's bring them out.

21 (Whereupon, the jury enters the courtroom at 4:23 p.m.)

22 THE COURT: All right, Mr. Foreman, members of the jury,
23 you sent out a question. Was the blue light on at the begin
24 -- on at the beginning from the start of the chase?

25 Now, I'm not a member of the jury; I'm the judge. You

1 all are on the jury. As I stated to you at the beginning of
2 the trial and at the end of the trial, your job is to listen
3 to the facts and listen to the evidence and then to deliberate
4 and decide the case based on the evidence presented during the
5 course of the trial. The witnesses have testified.

6 They're -- it's improper for me to comment upon the fact
7 -- facts that were expressed and any opinion that I might have
8 as to them because it is solely a matter for you, the jury, to
9 determine based on the facts presented during the trial. You
10 can't ask me questions as to who said what and who testified
11 to what and so forth and so on. Your role as a juror is to
12 listen, to pay attention during the trial, then to deliberate
13 after you have heard it -- heard the testimony, the evidence,
14 and the law. So with that, I ask that you go back and
15 continue your deliberations.

16 (Whereupon, the jury exits the courtroom at 4:25 p.m.)

17 THE COURT: Any additional exceptions to the charge by
18 the State?

19 MS. BARR: No, sir, Your Honor.

20 MR. SWILLEY: Not from the defense, Your Honor.

21 THE COURT: All right. We're back at ease and we'll
22 continue on with the last person if he can be found.

23 (Whereupon, there is a break in the proceedings until
24 4:30 p.m. at which time the jury indicates that a verdict
25 has been reached.)

VERDICT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: All right. I understand that there -- the jury has a verdict so you can bring them out.

(Whereupon, the jury enters the courtroom at 4:30 p.m.)

THE COURT: Mr. Foreman, if you would, stand only. Mr. Foreman only. Okay.

THE CLERK: Mr. Foreman, have you reached a verdict?

THE JURY FOREMAN: Yes.

THE CLERK: Is it unanimous?

THE JURY FOREMAN: Yes.

THE CLERK: Please hand it to the bailiff.

THE JURY FOREMAN: All right.

THE CLERK: Please hand it to me.

(Whereupon, the Clerk passes the verdict form to the Court for review.)

THE COURT: All right. The defendant will stand. You may be seated, Mr. Foreman. Madam Clerk, you may publish the verdict.

THE CLERK: State versus David Romonte Vice. We, the jury, by unanimous consent as to the offense of failure to stop for blue light ---

THE COURT: To the charge of?

THE CLERK: As ---

THE COURT: That's what the offense. I'm sorry.

THE CLERK: As to the offense of failure to stop for a

1 blue light, we, the jury, find the defendant guilty.

2 As to the offense of possession of marijuana, we, the
3 jury, find the defendant guilty of possession with intent to
4 distribute marijuana.

5 As to the offense of trafficking more than 28 grams, but
6 less than 100 grams of cocaine, we find the defendant guilty.

7 If these are your verdicts, so say you all and please let
8 it be known by raising your right hands.

9 (Whereupon, all jurors raise their right hand.)

10 THE CLERK: Thank you.

11 THE COURT: Any additional polling requested?

12 MR. SWILLEY: I request to poll the jury, Your Honor.

13 THE COURT: All right. If you will, poll the jurors
14 individually, Madam Clerk.

15 THE CLERK: Okay. Janice Barr.

16 THE COURT: Madam Clerk, the -- the verdict form that
17 says as to the offense of marijuana, the offense charge was
18 possession with intent to distribute marijuana so, if you
19 will, have the jury respond reading it as to the offense of
20 possession with intent to distribute marijuana instead of the
21 offense of possession of marijuana.

22 THE CLERK: With intent.

23 THE COURT: Possession with intent to distribute
24 marijuana. You can read it from the indictment if you want
25 to.

1 THE CLERK: Let me see if I can. Ms. Barr, as to the
2 offense of failure to stop for a blue light and with the
3 offense of possession with intent to distribute marijuana and
4 as to the offense of trafficking more than 28 grams but less
5 than 100 grams of cocaine, were those your verdicts and are
6 those still your verdicts?

7 JUROR BARR: Yes.

8 THE CLERK: Sherhonda Julius, were those your verdicts
9 and are those still your verdicts?

10 JUROR JULIUS: Yes.

11 THE CLERK: Scott Richardson, were those your verdicts
12 and are those still your verdicts?

13 JUROR RICHARDSON: Yes.

14 THE CLERK: Cherry Porchea, were those your verdicts and
15 are those still your verdicts?

16 JUROR PORCHEA: Yes.

17 THE CLERK: Joe Linder, were those your verdicts and are
18 those still your verdicts?

19 JUROR LINDER: Yes.

20 THE CLERK: O'Neal Matthews, were those your verdicts and
21 are those still your verdicts?

22 JUROR MATTHEWS: Yes.

23 THE CLERK: Tynisha Gamble, were those your verdicts and
24 are those still your verdicts?

25 JUROR GAMBLE: Yes.

1 THE CLERK: Frankie Fisher, were those your verdicts and
2 are those still your verdicts?

3 JUROR FISHER: Yes.

4 THE CLERK: Clementine Weaver Franklin, were those your
5 verdicts and are those still your verdicts?

6 JUROR FRANKLIN: Yes.

7 THE CLERK: Carlia McFadden, were those your verdicts and
8 are those still your verdicts?

9 JUROR MCFADDEN: Yes.

10 THE CLERK: Sandy Williams, were those your verdicts and
11 are those still your verdicts?

12 JUROR WILLIAMS: Yes.

13 THE CLERK: Dantrell Harrison, were those your verdicts
14 and are those still your verdicts?

15 JUROR HARRISON: Yes.

16 THE CLERK: That completes the polling.

17 THE COURT: All right. The jury has been polled and the
18 verdict is a unanimous verdict of each and every juror. Mr.
19 Swilley, are there any post-trial motions?

20 MR. SWILLEY: Yes, Your Honor, but you may -- you may
21 want to hear these outside of the presence of the jury. I
22 don't know if you want to dismiss them before that.

23 THE COURT: I'll retain the jury. The jury can hear --
24 be here to hear those motions.

25 MR. SWILLEY: Your Honor, I just make a motion for a new

1 trial pursuant to several of the objections I had, the
2 instance of testimony to prior bad acts, as well as the not
3 having a witness identify the defendant in court. I would
4 just make a motion for a new trial as to that.

5 THE COURT: All right. Ms. Barr?

6 MS. BARR: Your Honor, as it relates to evidence of prior
7 bad acts, I believe that that was excluded during a pre-trial
8 motion and I don't believe any evidence of any prior bad acts
9 actually came before this jury and, Judge, we would submit
10 that the witnesses have properly identified the defendant,
11 David Vice, as the individual who threw the bag from the
12 vehicle back on December 19th of last year and, Judge, we would
13 respectfully request that the motion for a new trial be
14 denied.

15 THE COURT: He's referring to prior bad acts with the
16 officer saying that he blocked the road because he -- he knew
17 that he would run or he's been known to run. I think that's
18 what he said.

19 MR. SWILLEY: That's correct, Your Honor.

20 MS. BARR: And -- and, Your Honor, to the extent that the
21 Court may have held that that was improper, Your Honor, you
22 gave a curative instruction for the -- for the jury to
23 disregard that portion of the witness's testimony and we would
24 submit that that was sufficient.

25 THE COURT: All right. I think that both during the --

1 the defense counsel's opening statement as well as the defense
2 counselor's questioning of the witness, the -- the responses
3 were solicited to the extent that the officer has a right to
4 explain why -- why he did what he did and he elected to block
5 the road to prevent Mr. Vice from getting by.

6 Of course, when that testimony was given during the
7 trial, out of an abundance of caution I sustained the
8 objection and gave a curative instruction having the jury
9 disregard that testimony. I think that that fairly -- fairly
10 addressed that issue in addition to that to the extent that
11 that might have been something that should not have been
12 introduced, the evidence is otherwise overwhelming that the --
13 the defendant is guilty.

14 Of course, the proof is in the pudding and despite the
15 officer's best efforts, he didn't stop anyway. He whipped it
16 around and went back another direction. So the officer
17 demonstrated some wisdom in doing what he did, particularly in
18 light of Mr. Vice's actions subsequent thereto.

19 So I respectfully deny the motion. Anything else before
20 sentencing?

21 MR. SWILLEY: By way of mitigation, Your Honor?

22 THE COURT: No, before we proceed to sentencing.

23 MR. SWILLEY: There is not.

24 THE COURT: All right. Ladies and gentlemen, your job is
25 done. Thank you very much. Now, whenever a jury finds a

1 person guilty, then it becomes my duty to impose a sentence.
2 Obviously, these offenses are quite serious charges -- quite
3 serious crimes and based on the magnitude of the drugs
4 involved in this case, quite -- quite a serious offense.

5 You don't have any other role in this, but I invite you
6 to stay for sentencing if you'd like to. If you want to
7 leave, you can as well.

8 We're not going to have any more jury trials this week.
9 I have a CLE conference tomorrow and one on Friday so we're
10 going to do some more guilty pleas here today and sometime
11 tomorrow, but we started court last Monday and this is our
12 second week so we'll be working on to try to do as much as we
13 can in between going home and watching the election results
14 and going to a CLE tomorrow, doing some work tomorrow, trying
15 to get with Mr. Linder and all to celebrate our birthday
16 tomorrow, th. And then -- so we have a lot to do in
17 the next couple days, but thank you all.

18 THE JUROR: It's my birthday also.

19 THE COURT: Tomorrow? Oh, wow. This is a ---

20 THE CLERK:

21 THE COURT: Okay. Well, I knew it was going to be a
22 great jury. All these th babies. All right. Well,
23 thank you all very much. We're going to proceed to sentencing
24 at this time.

25 THE CLERK: To those of you who work ---

1 THE COURT: Also, I think Madam Clerk has a certificate
2 for your job, related certificates to tell them you were in
3 court.

4 THE CLERK: Yes. I'd like to thank you for your
5 services. To those of you who work, if you need a certificate
6 for your employer, Mr. Frazier has them, the court bailiff.

7 THE COURT: And Ms. Williams is wrapping up.

8 THE CLERK: Yes.

9 THE COURT: Twenty-eight years as your Clerk of Court and
10 thirty-nine years as ---

11 THE CLERK: In the office.

12 THE COURT: Thirty-nine years in a month?

13 THE CLERK: Yes, almost in office.

14 THE COURT: In the Clerk of Court's office. She came out
15 of Tomlinson High School and went straight into the Clerk's
16 Office after a little stay in New York.

17 THE CLERK: Yes.

18 THE COURT: She's been here most of her life serving the
19 citizens of Williamsburg County. She ran unopposed
20 practically every time she ran and she did an excellent job
21 for all the citizens. She kept all the books and records and
22 deeds and everything straight for all these many years. Let's
23 give her a round of applause.

24 (Whereupon, applause.)

25 THE CLERK: Thank you so much.

1 THE COURT: Madam Clerk, these moments are so precious,
2 as you well know.

3 THE CLERK: Yes, they are and I cherish each one of them.
4 It's a bittersweet moment, but I solicit your blessings.

5 (Whereupon, the jury is released at 4:39 p.m. All jurors
6 remain in the courtroom.)

7 SENTENCING HEARING

8 THE COURT: All right, very good. Ms. Barr?

9 MS. BARR: Your Honor, I'll hand you the sentencing
10 sheets.

11 THE COURT: Prior record?

12 MS. BARR: Your Honor, the defendant was convicted in
13 2003 for simple possession of marijuana. In 2004, he was
14 convicted of assault and battery of a high and aggravated
15 nature. He was sentenced to 7 years. He was convicted in
16 2005 of unlawful carrying of a pistol where he also -- he
17 received a one year sentence.

18 It looks like he picked up another possession of
19 marijuana charge and that was what it looks like may have
20 violated his probation on the aggravated assault charge. Your
21 Honor, in addition, Mr. Vice had several DUI and driving under
22 suspension offenses which resulted in his driver's license
23 being suspended -- it looks like consistently since 2005.

24 Judge, he has a pending charge with our county for
25 possession with intent to distribute cocaine, unlawful

1 carrying of a pistol, resisting arrest, and failure to stop
2 for a blue light. That incident actually happened in April of
3 2011, so about eight months before his arrest in this case,
4 and during one of the pre-trial motions when Deputy Hayes
5 talked about him being -- the defendant being known to run
6 from law enforcement, it was related to that prior charge of
7 failure to stop for a blue light and siren and resisting
8 arrest. But, Judge, that's essentially the extent of his
9 record.

10 THE COURT: All right. Mr. Swilley?

11 MR. SWILLEY: Your Honor, I'm not -- just -- before I
12 begin mitigation, just in response to Ms. Barr, I don't see --
13 based upon my understanding, I don't think Mr. Vice has ever
14 been on probation. I don't see a conviction for possession of
15 marijuana, just for the unlawful carrying of a pistol.

16 THE COURT: You say he's never been on probation?

17 MR. SWILLEY: Not -- not -- not to my understanding.

18 THE COURT: All right. We have Mr. Smith and is that Mr.
19 Wilson back there?

20 MR. SMITH: Yes, sir.

21 MR. WILSON: Yes, sir.

22 THE COURT: Head man? They'll -- they'll -- they'll
23 confirm all of that.

24 MR. SWILLEY: Okay. Just as to his convictions, all I'm
25 seeing is an ABHAN in '04 and the carrying of a pistol. Your

1 Honor, David came into my office -- excuse me.

2 THE COURT: I'm listening to you.

3 MR. SWILLEY: David came into my office on Friday, last
4 Friday. I had never met him before. He hired me and then, of
5 course, I had to be in court on Monday. So I haven't gotten
6 to know him as well as I'd like, as well as I try to get to
7 know some of my other clients.

8 Your Honor, he just -- he's very concerned about his
9 family. He has three small children. He has a child, J. ,
10 who is six, T. , who is four, and K. , who is seven
11 months. They all live with him. He also -- he supports them
12 all. He lives with his fiancée, Latoya Cooper.

13 He's just -- in my interactions with him, he's been very
14 polite. He's been very courteous. He's been very mild-
15 mannered. We haven't shared a terse word. He's maintained a
16 very, very friendly demeanor.

17 Your Honor, I would just ask that you not punish him for
18 exercising his right to a trial. Of course, that's one of his
19 constitutional rights and -- and try to sentence him with --
20 with a sense of mercy and leniency. He's only 27 years old.
21 He has a lot of life ahead of him. I'm sure he's very
22 apologetic for his actions. There wasn't a lot of time in
23 this matter to discuss any kind of alternative route other
24 than a trial. So I just ask the Court to keep that in mind as
25 well.

1 He's a lifetime resident of Kingstree. He graduated from
2 Wil Lou Gray School. His past employment has been plant work,
3 manual labor. He's worked in restaurants. He doesn't have
4 any kind of formal education subsequent to high school, which
5 I think explains some of the activity he's been involved in
6 since he was -- since he was young.

7 Judge, just in summation, I don't think David is a
8 malicious person or an angry person. He's just made some
9 serious mistakes and I just ask the Court to give him some
10 mercy.

11 THE COURT: All right. Anyone else want to say anything
12 on his behalf?

13 MR. SWILLEY: Your Honor, I believe his father wishes to
14 address the Court.

15 THE COURT: All right. Yes, sir?

16 MR. VICE: Right here? Okay. I am David's father.

17 THE COURT: What's your name?

18 MR. VICE: David.

19 THE COURT: David?

20 MR. VICE: I am David R. Vice, Jr.

21 THE COURT: All right.

22 MR. VICE: And my father was named David. He's the third
23 and back I think maybe about a year or two ago, I had an
24 arrest. I had an accident, automobile.

25 THE COURT: All right.

1 MR. VICE: I hit a car in the back and I would like to
2 maybe have the record straight because I don't ever remember
3 him having a DUI, but I was charged with a DUI when I had the
4 accident.

5 THE COURT: All right. I think those DUIs were -- they
6 weren't last year. What years were they, Ms. Barr?

7 MS. BARR: There was a DUI from -- I'm showing a
8 conviction in July of 2011.

9 THE COURT: The other driving offenses, maybe they were
10 DUSSs.

11 MR. VICE: 2011?

12 MS. BARR: Your Honor, according to the South Carolina
13 Department of Motor Vehicles driving record for David Romonte
14 Vice III, he was convicted of driving under the influence on
15 June 28th of 2011 and it related to the date of offense as
16 April 29th, 2011, which would have been the same date that he
17 had the prior drug charge with -- with the county.

18 THE COURT: The other driving offenses ---

19 MS. BARR: He ---

20 THE COURT: --- were what years?

21 MS. BARR: He had a driving under suspension cause date
22 of August the 4th, 2010. He was convicted on February 7th of
23 2012. I'm sorry. That's when that suspension started. He
24 was arrested for driving under suspension August 4, 2010. He
25 was convicted September 16th, 2010. He had a controlled

1 substance violation at the same time, August 4, 2010, and a re

2 ---

3 THE COURT: That wasn't you; was it?

4 MR. VICE: No.

5 THE COURT: Okay.

6 MS. BARR: He was convicted ---

7 MR. VICE: No, sir.

8 MS. BARR: He was convicted at the same time for the
9 controlled substance violation.

10 THE COURT: And he had other offenses in 2005, 2006, and
11 thereabouts?

12 MS. BARR: Yes, sir. He had another controlled substance
13 violation on August 29th of 2005 and another controlled
14 substance violation on January 3rd, 2003.

15 THE COURT: None of those are yours?

16 MR. VICE: (No audible response.)

17 THE COURT: All right. Okay. Mr. Vice, what else do you
18 want to tell me on behalf of your son?

19 MR. VICE: Well, I can understand the charges against him
20 and I'd like for the Court to go as lightly as possible
21 because -- simply because he's young. He's made a mistake.

22 THE COURT: All right. Thank you, sir.

23 MR. VICE: Thank you.

24 THE COURT: All right. Mr. Vice, anything you'd like to
25 say?

1 THE DEFENDANT: Um ---

2 THE COURT: By the way, if you all would, come around and
3 stand in front of me here.

4 (Whereupon, the defendant and his counsel comply.)

5 THE COURT: While you're thinking, Mr. Wilson or Keels or
6 Smith ---

7 MR. WILSON: Never on probation before, Judge.

8 THE COURT: Never on probation, okay.

9 THE DEFENDANT: I'd just like to say I have kids, you
10 know, and whatever this county or community feel that I did
11 wrong or whatever that nobody else did or nothing -- I mean
12 just take it as lenient and light as possible. I got kids.
13 That's all I got to say. I ain't got nothing to say.

14 (Whereupon, the defendant turns and walks away from the
15 bench.)

16 THE COURT: Where are you going? Stand right there.

17 THE DEFENDANT: I ain't got nothing to say.

18 THE COURT: You may not have anything to say, but I have
19 a lot to say. Where are you going?

20 THE DEFENDANT: Prison.

21 THE COURT: You're about to go someplace. You turned
22 your back as if you were walking away. It's an interesting
23 comment you made that whatever this community says that you
24 did that other people didn't do. I think that's the gist. Is
25 that the gist of what you got from that, Mr. Swilley?

1 MR. SWILLEY: I -- I believe that's what I heard.

2 THE COURT: And I guess I can take it from that that
3 because other people are involved in drugs, maybe they're drug
4 dealers or drug traffickers or drug users or otherwise
5 involved in drugs, that you should not be punished. Is that
6 what you are saying?

7 THE DEFENDANT: No, sir. I mean if I did anything wrong
8 to this community or county, I apologize for it. That what I
9 say all right and that's it. That's all. I ain't -- I could
10 say I don't want to go to prison because I don't need to
11 because I got kids, but I mean it all done. It don't matter
12 now I mean.

13 THE COURT: Well, you know, the -- the last excuse that I
14 accept when I sentence people is the excuse that because I
15 have kids and it's probably for the reason for the length of
16 time that I have been here involved in court in Kingstree, you
17 know, I've seen generations of people. I've seen the
18 grandfather to the son to the grandson and in most instances
19 the people who I see here, the thing that I see them teaching
20 their children are to follow in their footsteps and those same
21 children of people end up coming before me.

22 I don't accept the notion that, well, I have three
23 children, four children, five children and so therefore I
24 shouldn't be punished. Because those children, they see what
25 you do. They learn from the parents and they try to follow

1 their parents' footsteps, be it a drug dealer or otherwise.

2 Go ahead, sir.

3 THE DEFENDANT: Well, I don't mean just that I have three
4 children. I mean, well, I have three children that I love,
5 that I care for, that I should be there for that no one else
6 is going to be there for them like I will. You know, I don't
7 do wrong things around my children. That's all I got to say,
8 sir.

9 THE COURT: Now, your mother was here a little earlier.
10 She decided to leave?

11 THE DEFENDANT: Maybe so, sir.

12 THE COURT: Do you know where she went to?

13 THE DEFENDANT: I didn't get to speak with her. They was
14 all over me. I mean I couldn't look at nobody because they
15 kept on me.

16 THE COURT: Mr. Vice, you're going to say something?

17 MR. VICE: She had to go back to work.

18 THE COURT: She had to go back to work?

19 MR. VICE: Yes, sir.

20 THE COURT: Well, you're facing a lot. Failure to stop
21 for a blue light carries a minimum of 90 days, a maximum of
22 three years. Possession with intent to distribute marijuana
23 carries up to five years in prison and the big one is
24 trafficking in cocaine. Trafficking in cocaine carries a
25 minimum of seven years, a maximum of 25 years in prison and a

1 fine of \$50,000.

2 Whatever sentence you receive cannot be suspended and
3 that's the time that you have to do. So I'll hear anything
4 else anyone else wants to say about that.

5 MS. BARR: Judge, if I just may say, Mr. Swilley
6 indicated that he was just retained I believe not last Friday,
7 but the Friday before last. Is that correct?

8 MR. SWILLEY: Yes, ma'am.

9 MS. BARR: And Mr. Vice had had the services of attorney
10 Shaun Kent on the April 2011 case since December of last year
11 and he had Mr. Kent representing him on this particular case
12 in January of -- of this year and, Judge, I -- you probably
13 couldn't see the tape because while it was playing the
14 television set was facing the jury, but one of the things that
15 just -- kind of just ---

16 THE COURT: That's why I have in my rules of court that
17 the counsel is to submit a copy of all exhibits to the Court
18 so that I can follow what's being presented to the jury, but I
19 -- I viewed it prior during the pre-trial hearing. But go
20 ahead.

21 MS. BARR: Judge, one of the things that just kind of
22 concerned me -- I mean we prosecute -- I prosecute failure to
23 stop for a blue light cases all the time and I don't think it
24 was until I saw the video in this case when I really kind of
25 appreciated the danger that's posed not just to a defendant or

1 to law enforcement, but to people who have absolutely no
2 connection with the case.

3 In this videotape, you see children walking, pedestrians
4 walking, vehicles. To their credit, the drivers of those
5 vehicles are pulling over trying to get out of the way and we
6 know that those type situations where somebody is running from
7 the police when they have drugs in their -- their vehicle can
8 -- can go south really bad and it can end up being a very
9 tragic situation. I'm just grateful that nobody was hurt
10 during all this.

11 THE COURT: I've heard -- I've heard many cases where
12 people running from the police crash into innocent people,
13 paralyze them, kill them. Of course, we had the case here
14 with the trooper some years ago. Back in Jack McCrea's
15 heyday, Jack -- when the trooper was following this guy down
16 in toward Hemingway, was it -- was that trooper -- was his
17 name Perry?

18 THE CLERK: Mm-hmm, it was Perry.

19 THE COURT: Was it Perry?

20 THE CLERK: Mm-hmm.

21 THE COURT: Yeah, Trooper Perry chased this guy trying to
22 get him to stop and lost control of his patrol car and killed
23 him -- was killed and then here comes the same defendant
24 sympathetic claiming, you know, asking for mercy and all and
25 through his reckless driving he's killed -- he's caused the

1 death of a trooper.

2 Of course, he wasn't driving the trooper's car, but the
3 trooper was trying to stop him just like these troopers were
4 trying to stop you on that day, those deputies were, and it --
5 it is a -- it is one of the most serious offenses. Fortunate
6 for you, you didn't hit someone and -- and end up facing life
7 or death based on -- through no good fault of your own and no
8 good driving of your own. Of course, you're lucky you didn't
9 kill yourself as well and we've seen a lot of that happen.

10 But more significant than anything else is this
11 trafficking in cocaine and all of this marijuana which wasn't
12 weighed, but it -- it wasn't weighed, but it looked about
13 several pounds I'm sure.

14 MS. BARR: It was 800 -- over -- a little over 800 grams.

15 THE COURT: All right. So ---

16 MS. BARR: Almost two pounds.

17 THE COURT: Almost two pounds and then all of this
18 cocaine. I imagine that was to supply all the drug users or
19 dealers or whatever if you're packaging and plan to traffic it
20 and so we -- and I see all of those people, too. They end up
21 in the orange jumpsuits because they're hooked on it, stealing
22 from people, stealing from family, friends, stores, all kinds
23 of things they do to try to get it.

24 So when we -- when the laws are reserved -- the toughest
25 laws are reserved for the drug dealers. Mr. Vice, that would

1 be you because that's your role in the process. You know,
2 this wasn't -- you aren't a user. You're a trafficker.
3 You're one of the big boys. I mean the statute even includes
4 a person who brings it into the state through whatever means
5 or who finances it, all of those things, and -- and all of
6 that includes trafficking and that's exactly what you were
7 doing on that day.

8 And fortunately for Williamsburg County, for those same
9 citizens you were talking about, fortunately you were caught
10 because someone else would be suffering the consequences if
11 you weren't caught, if you had distributed everything that you
12 had to distribute, and so now the day of reckoning is here for
13 you and what more can you say, what more can anyone do.
14 You've made your choices as Ms. Barr stated in her closing and
15 no one else put you in that spot but yourself. Those are
16 choices that you made. You decided that that's the life you
17 want to live. Obviously, an intelligent young man from a good
18 family.

19 You know, the difficulty I have in being a judge here is
20 I end up knowing your people and I know your mother from -- we
21 had her on jury duty when some years ago. She was one of our
22 good jurors, a fine lady, but nevertheless I have a job to do
23 and I have to disregard all of that. So anything else you
24 would like to say before sentencing, Mr. Vice?

25 THE DEFENDANT: Well, one more thing. I didn't have any

1 intentions to hit any kids or any citizens or any pedestrians
2 and I didn't hit any.

3 THE COURT: I understand. No, that would be murder if
4 you did.

5 THE DEFENDANT: I didn't.

6 THE COURT: I mean recklessness is a -- is the element.

7 THE DEFENDANT: Yes, sir. I know. I didn't.

8 THE COURT: Yeah.

9 THE DEFENDANT: I didn't.

10 THE COURT: You know, you passed Ms. Williams' house
11 there on the Red Road. What if she was -- decided to come out
12 of her ---

13 THE DEFENDANT: No, but I didn't -- I didn't pass her
14 house, sir. I stopped. When they arrested me, I mean I
15 stopped. I didn't -- I didn't like -- I stopped, like they
16 didn't have to keep chasing me. As you can see when the tape
17 stopped, it wasn't no like where they had to block me off or
18 stop me. I hit the brakes and stopped and got out of the car.
19 No one -- you know, I stopped.

20 THE COURT: All right. I'll give you that. You did.
21 You didn't -- of course, they didn't have to shoot out your
22 tire or they were going to stop you one way or the other.
23 They had a plan for you. You weren't getting away. You had
24 the high sheriff and you even had Dudley Mesier behind you.
25 You know he wasn't going to let you get away, among others.

1 You know, he used to patrol this territory for years himself
2 on the highway patrol. He wasn't going to let you get away,
3 nor were the other officers. You had Jenkins there in
4 pursuit, too. They weren't going to let you get away. Go
5 ahead.

6 THE DEFENDANT: That's it, sir. I just ask for the
7 lenientest [verbatim] sentence as possible. That's it.

8 THE COURT: I mean what's the point of leniency though?
9 That's the thing. That's -- I'm not here to just issue out
10 candy and Baby Ruths. I'm here to enforce the law and to
11 protect the citizens of this community. Yes, ma'am? Is this
12 the girlfriend? Ms. Cooper?

13 MS. COOPER: Yes. I'm Latonya Cooper. I'm his fiancée.

14 THE COURT: Fiancée? When are y'all getting married or
15 plan to get married?

16 MS. COOPER: Well, I guess the plan is off now.

17 THE COURT: Well, when were the plans?

18 MS. COOPER: Didn't have any at the moment. We were just

19 ---

20 THE COURT: Okay. I mean when people use the word
21 fiancée, it usually means you've proposed and got a date.

22 Otherwise ---

23 MS. COOPER: No date was set yet.

24 THE COURT: All right. Okay. Go ahead.

25 MS. COOPER: I just wanted to say that I understand the

1 severity of the charges and everything, you know, put upon
2 him, but we do have kids and to my knowledge this is his first
3 offense for this. I don't know exactly what is going on with
4 everything placed before him because I've never known him to
5 do anything like that. If he did, he hide it pretty well. So
6 I don't know exactly ---

7 THE COURT: Well, you didn't know, but apparently all the
8 law enforcement knew.

9 MS. COOPER: Yeah and I know a lot of law enforcements to
10 be very unjust and dirty also.

11 THE COURT: All right.

12 MS. COOPER: So I mean you have to take all that into
13 considation.

14 THE COURT: And if they -- if they -- if they're charged,
15 then they -- they'll have their day in court, too.

16 MS. COOPER: Absolutely.

17 THE COURT: But today is his day. It's not none of
18 theirs regardless.

19 MS. COOPER: I know today is his day and I'm just begging
20 and pleading that you be as lenient as possible with him. We
21 have a little baby that just was born. She's seven months and
22 I really just want -- but she's still -- she loves him to
23 death, sometimes don't even go to sleep until he's home.

24 THE COURT: Yeah.

25 MS. COOPER: And I need him there, too, also.

1 THE COURT: I understand, but he can't -- you know, he's
2 facing a mandatory minimum sentence. He won't be home for a
3 long time and those are the choices that he made. No one else
4 made those choices, but him.

5 MS. COOPER: I understand those are choices that he made.
6 We all make mistakes in life.

7 THE COURT: I understand.

8 MS. COOPER: That doesn't mean, you know, something can
9 be put forth so serious to where he has to get maybe, you
10 know, a long time away from someone he loves a lot.

11 THE COURT: He's facing seven to twenty-five on that one
12 charge, five years on another, and three years on another.

13 MS. COOPER: I understand now, but I beg please that you
14 just be as lenient as possible with him please.

15 THE COURT: All right, Ms. Cooper, thank you. I
16 understand.

17 MS. COOPER: Thank you.

18 THE COURT: All right. Anything else, Mr. Vice? Mr.
19 Swilley?

20 MR. SWILLEY: Nothing else, Your Honor. I just -- just
21 reiterate to the Court what I've already said. Please don't
22 punish him for exercising his ---

23 THE COURT: All right. I just want to say for the record
24 though you haven't been on the case a long time, you've been
25 an excellent -- you did an excellent job and you fought

1 vigorously for him. You raised a lot of issues that many
2 lawyers miss and you've challenged the State at every turn.
3 You didn't let -- you kept your eyes open. My clerk even
4 passed me a note as to how on the ball you were during the
5 trial. So you've done a good job of representing him as best
6 as you could.

7 MR. SWILLEY: Thank you, Your Honor.

8 SENTENCE OF THE COURT

9 THE COURT: Mr. Vice, on the charge of failure to stop
10 for a blue light, the sentence is three years.

11 On the offense of possession with intent to distribute
12 marijuana, the sentence is five years.

13 On the offense of trafficking in cocaine, the sentence is
14 ten years.

15 All sentences are to run concurrent. You're given credit
16 for time served. I wish you the best. Hopefully, your life
17 can go upwards from here.

18 THE DEFENDANT: One more question.

19 THE COURT: Yes, sir.

20 THE DEFENDANT: I can get a hug from my family before
21 they cuff me?

22 THE COURT: Yes. Let him get a hug. Let him get one hug
23 for Christmas, New Year's, Thanksgiving.

24 (Whereupon, the defendant makes a statement in a low
25 voice as he walks away from deputies in the courtroom.)

1 FEMALE DEPUTY: First of all, we're in charge.

2 MALE DEPUTY: Okay, fella, come here. Turn around.

3 THE DEFENDANT: I didn't say anything.

4 MALE DEPUTY: Put your hands behind your back.

5 THE DEFENDANT: I said the judge gave me permission to
6 get a hug. You keep talking under your breath ---

7 FEMALE DEPUTY: Yeah, but you have to listen to what the
8 officers say they're going to let you do. You can't do what
9 you ---

10 THE DEFENDANT: I didn't say anything wrong.

11 FEMALE DEPUTY: --- want to do.

12 MALE DEPUTY: You don't do what you want to do in here.

13 THE DEFENDANT: I just said I wanted a hug. I didn't --
14 I didn't say anything. I just said the judge ---

15 THE COURT: All right. Well, you get no hug. You've --
16 you've blown that opportunity, Mr. Vice.

17 In addition, the statute requires a -- before he leaves
18 out ----

19 FEMALE DEPUTY: Hold up.

20 THE COURT: Before he leaves, the statute also mandates a
21 fine of \$50,000. So on the trafficking, it's ten years and
22 pay a fine of \$50,000. All right, ladies and gentlemen, thank
23 you all very much.

24 (Whereupon, the proceedings end at 5:06 p.m.)

25 --- END REQUESTED TRANSCRIPT ---

1 STATE OF SOUTH CAROLINA)
2) CERTIFICATE
3 COUNTY OF FLORENCE)
4

5 I, the undersigned, Krystal J. Smith, Official Court
6 Reporter for the Twelfth Judicial Circuit of the State of
7 South Carolina, do hereby certify that the foregoing is a
8 true, accurate, and complete Transcript of Record of all the
9 proceedings had and evidence introduced in the hearing of the
10 above captioned case, relative to appeal, in the Court of
11 General Sessions for Williamsburg County, South Carolina, on
12 the 5th and 6th days of November, 2012.

13 I do further certify that I am neither of kin, counsel,
14 nor interest to any party hereto.

15
16 Krystal J. Smith

17 Court Reporter

18
19 Florence, South Carolina
20 February 26, 2013
21
22
23
24
25

WITNESSES

Loy Hayes
Williamsburg County Sheriff

ARREST WARRANT NUMBER

M888755 M888759 M888759

**ACTION OF GRAND JURY
TRUE BILL**

Date: 3-1-12

Michael Jones
Foreperson of Grand Jury
Date: 3-1-12

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2012-GS-45-0050

**The State of South Carolina
County of WILLIAMSBURG**

COURT OF GENERAL SESSIONS

MARCH TERM 2012

THE STATE

vs.

DAVID ROMONTE VICE

Indictment for

**Failure to Stop for a Blue Light, Possession
with Intent to Distribute Marijuana, and
Trafficking in cocaine, 28 g or more, but less
than 100 g**

Ernest A. Finney III

ERNEST A. FINNEY, III, SOLICITOR

FILED

12 FEB 30 AM 11:56

**CAROLYN F. WILLIAMS
CLERK OF COURT
KINGSTREE, S.C.**

STATE OF SOUTH CAROLINA)
)
 COUNTY OF WILLIAMSBURG)

A CERTIFIED TRUE COPY
Sharon W. Staggers
 SHARON W. STAGGERS
 CLERK OF COURT
 WILLIAMSBURG COUNTY
 INDICTMENT FOR
 Failure to Stop for a Blue Light, Possession with
 Intent to Distribute Marijuana, and Trafficking in
 cocaine, 28 g or more, but less than 100 g

At a Court of General Sessions, convened on March 1, 2012 the Grand Jurors of WILLIAMSBURG County present upon their oath:

COUNT ONE - FAILURE TO STOP FOR A BLUE LIGHT

That in Williamsburg County, South Carolina, on or about December 19, 2011, the Defendant, David Romonte Vice, while driving a motor vehicle on a road, street, or highway of the State, did fail to stop for a law enforcement vehicle after being signaled by a flashing light or a siren to do so; all in violation of Section 56-5-750, Code of Laws of South Carolina (1976), as amended.

COUNT TWO - POSSESSION WITH INTENT TO DISTRIBUTE MARIJUANA

That David Romonte Vice did in Williamsburg County on or about December 19, 2011, possess with intent to distribute, dispense or deliver, or did aid, abet, attempt or conspire to distribute, dispense or deliver a quantity of Marijuana, a controlled substance under the provisions of Section 44-53-110, et seq., Code of Laws of South Carolina, 1976, as amended, such distribution not having been authorized by law, and being in violation of Section 44-53-370, S. C. Code of Laws, 1976, as amended.

COUNT THREE - TRAFFICKING MORE THAN 28 GRAMS, BUT LESS THAN 100 GRAMS OF COCAINE

That David Romonte Vice did in Williamsburg County on or about December 19, 2011, unlawfully and knowingly sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did possess or attempt to possess more than 28 grams but less than 100 grams of Cocaine, a controlled substance under the provisions of Section 44-53-110, et seq., Code of Laws of South Carolina, 1976, as amended, being in violation of Section 44-53-370, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Solicitor

CAROLYN F. WILLIAMS
 CLERK OF COURT
 KINGSTREE, S.C.
 12 FEB 30 AM 11:56

Edward A. Fin...

FILED

FTSBL.DOT

SCCA/217 (03/2011)

11/12/12 2012-GS-45-CSS (count 3)
§ 24-13-40 to be calculated and applied

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Williamsburg

VS.

David Romonte Vice

AKA:

Race: 2 Sex: M Age: 21

DOB: SS#:

Address:

City, State, Zip:

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Possession with Intent to Distribute Marijuana ☒ CONVICTED OF or ☐ PLEADSin violation of § 44-53 of the S.C. Code of Laws, bearing CDR Code #☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: Kimberly V Barr 8443

Barr, Kimberly V

SC Bar#

Defendant

Matt Swilley

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 5 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 of \$ _____; 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: 11/6/12☒ 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.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)		\$ -
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$ -
§ 56-5-2995 (DUI Assessment)	\$12	\$ -
§ 56-1-286 (DUI Breath Test)	\$25	\$ -
Proviso 47.9 (Public Def/Prob)	\$500	\$ -
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$ 150.00
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$ -
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$ -
Proviso 90.5 (SCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)		\$ 8.40
TOTAL		\$ 288.40

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2012-GS-45-0050

A/W#: M686759

Date of Offense: 12/19/2011

S.C. Code § : 44-53-0370(b)(2)

CDR Code #: 0186

SENTENCE SHEET

Presiding Judge

Judge Code:

Sentence Date:

A CERTIFIED TRUE COPY

CAROLYN F. WILLIAMS

CLERK OF COURT

WILLIAMSBURG COUNTY

☐ Appointed PD or appointed other counsel § 47.12 requires \$500 be paid to Clerk during probation.

Nov 6, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Williamsburg
 STATE VS.
David Romonte Vice

AKA:

Race: 2 Sex: M Age: -DOB: - SS#: -

Address:

City, State, Zip:

DL#: - SID#: -*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Trafficking in Cocaine (More than 28 but less than 100 grams)in violation of § 44-53-370(e)(2) of the S.C. Code of Laws, bearing CDR Code # 2359
☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTORNEY

Samuel D. Barr
Barr, Kimberly V8443
SC Bar#

Defendant

Matt Swilley
Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed - yearsand/or to pay a fine of \$ 50,000.00; provided that upon the service of - days/months/years and/or payment of \$ -; 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: 11/10/12 2012-GS-45-0080 (count 2)☒ 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.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ - plus 20% fee: \$ -

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)		\$ 50,000.00
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 53,750.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$ 100.00
§ 56-5-2995 (DUI Assessment)	\$12	\$ -
§ 56-1-286 (DUI Breath Test)	\$25	\$ -
Proviso 47.9 (Public Def/Prob)	\$500	\$ -
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$ 150.00
§ 50-21-114(BUI Breath Test Fee)	\$50	\$ -
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$ -
Proviso 90.5 (SCCA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)		\$ 3120.90
TOTAL		\$107,150.90

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

INDICTMENT/CASE#: 2012-GS-45-0050A/W#: M686756Date of Offense: 12/19/2011S.C. Code § : 44-53-0370(e)(2)(b)1CDR Code #: 2359

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

SPECIAL CONDITIONS:

PTUP

- days/hours Public Service EmploymentObtain 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:

A CERTIFIED TRUE COPY

CAROLYN F. WILLIAMS

CLERK OF COURT

☐ Appointed PD or appointed other counsel
 § 47.12 requires \$500 be paid to Clerk during probation.

Presiding Judge

Judge Code:

Sentence Date:

2127Nov. 10, 2012

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF WILLIAMSBURG)

DAVID R. VICE #00314663)

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

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2014-CP-45

14 CP45 485

APPLICATION

POST-CONVICTION RELIEF

SHARON L. STAGGERS
CLERK OF COURT
KINGSTREE, S.C.

2014 SEP 17 AM 11:14

FILED

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention TURBEVILLE CORRECTIONAL INSTITUTION
2. Name and location of Court which imposed sentence WILLIAMSBURG COUNTY
GENERAL SESSIONS COURT, KINGSTREE, SOUTH CAROLINA
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2012-GS-45-50 FAILURE TO STOP FOR A BLUE LIGHT
 - (b) 2012-GS-45-50 TRAFFICKING IN COCAINE, 28G OR MORE, BUT LESS
THAN 100 G- 1ST OFFENSE
 - (c) 2012-GS-45-50 MANUF., POSS. OF OTHER SUB. IN SCH. I, II, III OR
FLUNITRAZEPAM OR ANALOGUE, W.I.T.D.- 1ST OFFENSE

Revised 3/2003

SCANNED
9/17/14

5. The date upon which sentence was imposed and the terms of the sentence:
- (a) NOVEMBER 6, 2012- 3years; Concurrent; Credit Time Served
 - (b) NOVEMBER 6, 2012- 10years & fine \$50,000; Concurrent; Credit Time Served
 - (c) NOVEMBER 6, 2012- 5years; Concurrent; Credit Time Served
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
 - (b) after a plea of not guilty X
 - (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
 - i. SOUTH CAROLINA COURT OF APPEALS
 - ii. _____
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. SOUTH CAROLINA COURT OF APPEALS DENIED APPEAL
 - ii. _____
 - iii. _____
 - (c) the date of each such result:
 - i. MARCH 2014
 - ii. _____
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. SOUTH CAROLINA COURT OF APPEALS OPINION #2014-UP-103
 - ii. _____
 - iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
 - (b) _____
 - (c) _____

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

- (a) INEFFECTIVE ASSISTANCE OF COUNSEL
- (b) VIOLATION OF DEFENDANT'S 6TH AND 14TH AMENDMENT

CONSTITUTIONAL GUARANTEES

- (c) _____

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

(a) COUNSEL FAILED TO PROPERLY INVESTIGATE THE FACTS OF CASE AND ADEQUATELY PREPARE FOR TRIAL

(b) COUNSEL FAILED TO PROPERLY REPRESENT PETITIONER DURING TRIAL

(c) COUNSEL FAILED TO CONVEY ANY PLEA OFFERS FROM THE STATE TO PETITIONER AND FAILED TO ADVISE PETITIONER

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? YES
- (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 "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. DIRECT APPEAL

ii. _____

iii. _____

iv. _____

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

i. SOUTH CAROLINA COURT OF APPEALS

ii. _____

iii. _____

- iv. _____
 - (c) the disposition thereof:
 - i. APPEAL DENIED
 - ii. _____
 - iii. _____
 - iv. _____
 - (d) the date of each such disposition:
 - i. MARCH 2014
 - ii. _____
 - iii. _____
 - iv. _____
 - (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
NO. ISSUES NOT APPROPRIATE FOR DIRECT APPEAL
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
 - i. _____
 - ii. _____
 - iii. _____
 - (b) the proceedings in which each ground was raised:
 - i. _____
 - ii. _____
 - iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) _____
- (b) _____
- (c) _____

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

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

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

- (a) the name and address of each attorney who represented you:
 - i. SHAUN C. KENT, 19 SOUTH MILL STREET, MANNING, SC 29102
 - ii. MATTHEW SHERROD SWILLEY, 4TH CIRCUIT PUBLIC DEFENDER'S OFFICE, 418 WEST BLVD, CHESTERFIELD, SC 29709
 - iii. WANDA H. CARTER, S.C. COMMISSION ON INDIGENT DEFENSE, APPELLATE DEFENSE, PO BOX 11589, COLUMBIA, SC 29211
- (b) the proceedings at which each such attorney represented you:
 - i. KENT- ORIGINAL TRIAL COUNSEL
 - ii. SWILLEY- SUBSTITUTED TRIAL COUNSEL- TRIAL AND SENTENCING
 - iii. WANDA H. CARTER- APPELLATE DEFENSE COUNSEL

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

NEW TRIAL

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

NO

STATE OF SOUTH CAROLINA)

County of WILLIAMSBURG)

VERIFICATION

I, DAVID R. VICE, 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.

David R. Vice

SWORN to and subscribed before me this 2nd
day of September, 2014

Emily Hoke (L.S.)
Notary Public

My Commission Expires: 4-27-2016

FILED
2014 SEP 17 AM 11:14
SHARON W. STAGGERS
CLERK OF COURT
KINGSTREE, S.C.

STATE OF SOUTH CAROLINA)

COUNTY OF WILLIAMSBURG)

David R. Vice #00314663
Plaintiff,)

vs.)

State of South Carolina
Defendant.)

IN THE COURT OF COMMON PLEAS

PROOF OF ADR OR EXEMPTION

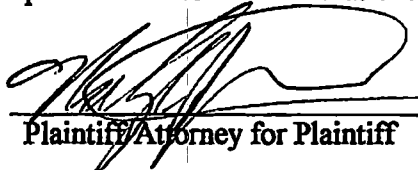
FILE NO.: 2014-CP-45-_____

14 CP45 485

(An original and copy of this form is to be completed and filed with the Office of the Clerk of Court and a copy forwarded to the attorneys for the parties within 10 days of the conclusion of ADR, or within 300 days of the filing date of the action, whichever is earlier.)

PURSUANT to the South Carolina Alternative Dispute Resolution Rules (SCADR):

- A. X I certify that this case is exempt from ADR for the following reason and the parties wish to exercise that exemption: Post-Conviction Relief


 Plaintiff/Attorney for Plaintiff

Ralph J. Wilson, Sr.

Print Name

843-381-0765

Phone/Fax

Date: 09/04/2014

Defendant/Attorney for Defendant

Print Name

Phone/Fax

2014 SEP 17 AM 11:13
 FILED
 SHERRON W. STAGGERS
 CLERK OF COURT
 KINGSTREE, S.C.

- B. _____ 1. Alternative Dispute Resolution (ADR) was conducted in the form of:

(Note: If binding arbitration has been chosen by the parties but not yet completed, an appropriate order of dismissal must be attached hereto.)

2. The neutral(s) was/were: (Name of arbitrator/mediator):

3. The ADR was conducted on _____, 20 _____

4. As a result of ADR, this case should be considered (please check one);

() Fully Settled.

() by Consent Judgment, to be filed by _____

or () Voluntary Dismissal to be filed by _____

() Partially Settled.

() At an Impasse.

() In need of further ADR I ☐ am ☐ am not willing to continue as a neutral. I recommend that ADR resume as of _____

5. Plaintiff ☐ was present ☐ was not present
 Defendant ☐ was present ☐ was not present

6. Other participants were:

_____ Lawyer for Defendant _____
 _____ Lawyer for Plaintiff _____
 _____ Representative for Insurance Carrier _____
 _____ Guardian *ad Litem* _____
 _____ Experts _____
 _____ Others _____

7. Choice of the neutral was by:

_____ Stipulation
 _____ Court Order

8. The total number of hours spent in ADR was: _____ hours.

9. Further comments of the neutral:

 Neutral's Signature

Date: _____

STATE OF SOUTH CAROLINA
COUNTY OF WILLIAMSBURG

David R. Vice, #314663

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

2014-CP-45-485

RETURN

The Respondent, making its Return to the application for post conviction relief (PCR) filed September 17, 2014¹, 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 Williamsburg County Clerk of Court. The Applicant was true bill indicted at the March 2012 term of the Williamsburg County Grand Jury for failure to stop for light, possession with intent to distribute marijuana, and trafficking in cocaine, 28 g. or more, but less than 100 g. (2012-GS-45-0050). Matt Swilley, Esquire represented Applicant. Applicant proceeded to a jury trial and was found guilty as indicted on November 6, 2012. The Honorable Clifton Newman sentenced Applicant to ten year term of imprisonment and a 50,000 fine for trafficking in cocaine (more than 28 g. but less than 100 g.), three year term of imprisonment for failure to stop for a blue light, and five year term of imprisonment for possession with intent to distribute marijuana with all sentences running concurrently.

¹ The application was received by the Respondent on January 27, 2015.

A timely notice of appeal was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. David R. Vice, 204-UP-103 (Ct. App. 2014). The Remittitur was issued on October 28, 2014.

Attached herewith and incorporated herein are the records of the Williamsburg County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, appellate records, and the trial transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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. Counsel failed to properly investigate the facts of the case and adequately prepare for trial
 - b. Counsel failed to properly represented Petitioner during trial.
 - c. Counsel failed to convey any plea offers from the State to Petitioner and failed to advise Petitioner.
2. Violation of Defendant's 6th and 14th Amendment Constitutional Guarantees.

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCPP.

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises

questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

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

V.

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

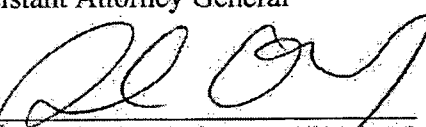
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

DANIEL GOURLEY
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

March 4, 2015.

STATE OF SOUTH CAROLINA

COUNTY OF WILLIAMSBURG

DAVID R. VICE, #314663,

Applicant,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2014-CP-45-485

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Ralph J. Wilson, Sr., Esquire
Wilson & Wilson Law Group
PO Box 1827
Conway, SC 29526

DATED this 4th day of March, 2015.


 Caroline Collins, Legal Assistant
 For Respondent

State of South Carolina	)	Court of Common Pleas
	)	Third Judicial Circuit
County of Williamsburg	)	Case No. 2014-CP-45-00485

David R. Vice,

Plaintiff,

-vs-

State of South Carolina,

Defendant.

Transcript of Record

July 15, 2015
Sumter, South Carolina

B E F O R E:

The Honorable Steven H. John, Judge

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

Ralph Wilson Sr., Esquire
Attorney for the Plaintiff

Daniel Gourley, Esquire
Attorney for the Defendant

Krystal J. Smith
Court Reporter

I N D E XWITNESS/DESCRIPTIONPAGE NUMBER

David Vice

Direct by Mr. Wilson..... 6

Cross by Mr. Gourley..... 23

Applicant Rests..... 30

Matthew Swilley

Direct by Mr. Gourley..... 30

Cross by Mr. Wilson..... 36

Redirect by Mr. Gourley..... 53

Direct by the Court..... 56

State Rests..... 58

Arguments of Counsel..... 58

Court Reporter Certification..... 63

E X H I B I T S

1				
2				
3	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
4	P-1	Motion		42
5	P-2	Affidavit		50
6				
7				
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				

1 JULY 15, 2015

2 (WHEREAS this matter was scheduled for a post-conviction
3 relief hearing, the applicant appeared along with his
4 counsel of record. The hearing began at 9:43 a.m.)

5 THE COURT: Yes, sir, Mr. Attorney General?

6 MR. GOURLEY: Yes, Your Honor. This is David Vice versus
7 the State of South Carolina, Docket Number 2014-CP-45-485.
8 He's presently confined in the South Carolina Department of
9 Corrections pursuant to orders of commitment of the
10 Williamsburg County Clerk of Court.

11 He was true-bill indicted at the March 2012 term of the
12 Williamsburg County Grand Jury for failure to stop for a blue
13 light, possession with intent to distribute marijuana, and
14 trafficking in cocaine, 28 grams or more but less than 100
15 grams. Mr. Swilley represented him.

16 He proceeded to a jury trial and was found guilty as
17 indicted on November 6th, 2012. The Honorable Clifton Newman
18 sentenced the applicant to a ten-year term of imprisonment and
19 a \$50,000 fine for trafficking in cocaine, a three-year term
20 of imprisonment for failure to stop for a blue light, and a
21 five-year term of imprisonment for possession with intent to
22 distribute marijuana, with all those sentences running
23 concurrently.

24 He filed a timely application on September 7th -- a timely
25 PCR application on September 17th, 2014, alleging ineffective

1 assistance of counsel for failure to properly investigate, for
2 failing to properly represent the petitioner during trial, and
3 a failure to convey any plea offers from the State, and a
4 violation of defendant's 6th and 14th Amendment constitutional
5 guarantees.

6 The State filed its return on March 4th, 2015. He's
7 represented in this matter by Mr. Wilson.

8 THE COURT: All right. Very good. All right. Mr.
9 Wilson, I'll be glad to hear from you, sir.

10 MR. WILSON: Your Honor, we're ready to proceed.

11 THE COURT: All right. Very good. If you want to call
12 your first witness?

13 MR. WILSON: If I could. Yes, sir. We'd call David
14 Vice.

15 THE COURT: All right. Please come around to be sworn,
16 sir. All right, sir. If you would, stop. Raise your right
17 hand, please, sir. Do you solemnly swear or affirm to tell
18 the truth, the whole truth, and nothing but the truth, so help
19 you God?

20 THE APPLICANT: Yes, sir.

21 THE COURT: Very good. Have a seat and state your full
22 name, please, sir.

23 THE APPLICANT: David Vice.

24 DAVID VICE, being first duly
25 sworn, testified a follows:

DAVID VICE - DIRECT BY MR. WILSON

DIRECT EXAMINATION

1
2 BY MR. WILSON:

3 Q: David, you are now incarcerated at Turbeville
4 Correctional Institution; is that correct?

5 A: Yes, sir.

6 Q: All right. Now, you filed a petition or an application
7 for post-conviction relief, did you not?

8 A: Yes, sir.

9 Q: All right. And why did you file that application?

10 A: Because I felt that my attorney was ineffective.

11 Q: Okay. Now, let's talk about that. In what ways was he
12 ineffective? Tell me what it is that he did or did not do
13 that make you believe that he was ineffective in representing
14 you.

15 A: Well, he didn't let the courts know that one week was not
16 long enough to prepare for trial. On the day of trial, he
17 didn't renew his motion for a continuance.

18 Q: Okay. Let's back up. Now, you got notice to go to trial
19 and did you have a lawyer when you got the notice to go to
20 trial? When the solicitor told you that your case was coming
21 up for trial, did you have an attorney at that time?

22 A: No, sir.

23 Q: All right. And so you hired Mr. Swilley?

24 A: Yes, sir.

25 Q: All right. How many days before you were to go to trial

DAVID VICE - DIRECT BY MR. WILSON

1 was it that you hired Mr. Swilley?

2 A: Like, 24 hours.

3 Q: Okay. And was that on a Friday or do you recall?

4 A: Yes, sir.

5 Q: All right. So you went -- where did you meet with Mr.
6 Swilley at on that particular day?

7 A: At -- it was Friday.

8 Q: All right. You met with him on Friday where?

9 A: In Conway at his office.

10 Q: Okay. And your trial was to begin in Kingstree on
11 Monday; is that correct?

12 A: Yes, sir.

13 Q: All right. Now, on Friday, did you tell Mr. Swilley that
14 your trial was to begin on Monday?

15 A: Yes, sir.

16 Q: All right. And did y'all have a conversation about
17 whether or not that was going to be okay and whether or not he
18 could represent you on these charges that quickly?

19 A: He said that he would ask for a continuance.

20 Q: Okay. And on Friday -- did y'all ask for a continuance
21 on Friday or at some time soon thereafter?

22 A: I think on Monday, the same day of trial.

23 Q: Okay. And -- and that was Judge Newman? You went before
24 Judge Newman on Monday morning to ask for a continuance; is
25 that correct?

DAVID VICE - DIRECT BY MR. WILSON

- 1 A: Yes, sir.
- 2 Q: All right. And do you recall what Mr. Swilley asked the
3 judge for in terms of a continuance? Did he ask for any
4 particular amount of time for a continuance or he just asked
5 for a continuance in general or do you remember?
- 6 A: No, sir. He just asked for a continuance. He didn't say
7 any amount of time.
- 8 Q: Okay. And the judge gave him a one-week continuance; is
9 that correct?
- 10 A: Yes, sir.
- 11 Q: All right. And did you then say to him, well, this is
12 not enough time or did y'all have any discussion about whether
13 or not one week for this trafficking charge was sufficient?
- 14 A: Yes. I said I felt that it wasn't long enough.
- 15 Q: Now, who did you say that to?
- 16 A: Mr. Swilley.
- 17 Q: Okay. And what was his response to that?
- 18 A: He didn't say anything, sir, not that I can remember.
- 19 Q: Okay. Now, on Friday when you met with him, did you have
20 discovery in your case at that point?
- 21 A: On Friday? No, sir.
- 22 Q: The Rule 5? Did you have copies of your Rule 5 or
23 discovery information at the time you met with Mr. Swilley on
24 Friday before the Monday of your trial?
- 25 A: No, sir.

DAVID VICE - DIRECT BY MR. WILSON

1 Q: Okay. Did Mr. Swilley -- when did Mr. Swilley get the
2 discovery on your case?

3 A: That was on Monday, the day after the trial.

4 Q: Okay. That was Monday, the day of the trial?

5 A: The day of the trial.

6 A: Or the day the trial was supposed to be?

7 A: Yes, sir.

8 Q: Is that correct? And he got that information from whom?
9 From what source? Where did he get the discovery information
10 from?

11 A: I'm not sure. Maybe investigators or the solicitor. I'm
12 not sure.

13 Q: Okay. Now, your first meeting with Mr. Swilley about
14 this case then would have been on that Friday before the
15 Monday; is that correct?

16 A: Yes, sir.

17 Q: Did you meet with Mr. Swilley again to discuss -- after
18 he got the discovery on Monday, did you meet with Mr. Swilley
19 again?

20 A: No, sir. Not until trial.

21 Q: Okay. Well, did you meet with him sometimes on Monday
22 after y'all left the courthouse?

23 A: Yes, sir.

24 Q: Okay. And where did that meeting take place between you
25 and Mr. Swilley?

DAVID VICE - DIRECT BY MR. WILSON

- 1 A: At my aunt's house.
- 2 Q: Okay. All right. And -- and what did y'all do? What
3 was the nature of the meeting that you had with Mr. Swilley at
4 your aunt's house on that Monday?
- 5 A: We watched the video and we stayed there for maybe twenty
6 minutes. Thirty minutes at the most.
- 7 Q: Okay. Now this was a video of what? What was this a
8 video of that you were watching?
- 9 A: A video of my charge, my crime, of me and the police.
- 10 Q: Okay. So it's a video of your arrest?
- 11 A: Yes, sir.
- 12 Q: Okay. And the -- and the -- and -- and the time leading
13 up to your arrest?
- 14 A: Yes, sir.
- 15 Q: Okay. Now, after you saw the video on Monday -- is that
16 the first time that you had seen this video?
- 17 A: Yes, sir.
- 18 Q: All right. Did you and Mr. Swilley then have any
19 conversation about whether or not you were going to have a
20 trial or whether or not you were going to enter some kind of a
21 plea or try to get a plea bargain? Did y'all have any
22 discussion about that after you saw the video on Monday for
23 the first time?
- 24 A: Yes. He said we were going to trial. He said he don't
25 -- he didn't think that they have anything on me. We're going

DAVID VICE - DIRECT BY MR. WILSON

1 to trial.

2 Q: Okay. So he tells you that -- that you're going to go to
3 trial. Well, did you ask him that or did he just volunteer
4 that you were going to have a trial?

5 A: No. I wanted to go to trial prior to that. I wanted to
6 go to trial, but he stated that that's still his decision too.

7 Q: Okay. Now, part of the reason -- well, let me ask you
8 this way. Your reason for -- why did you want to go to trial?

9 A: Because I wasn't guilty, sir.

10 Q: All right. And what was it about your arrest that you
11 had a problem with?

12 A: What was it about my arrest?

13 Q: Yes.

14 A: That I had a problem with?

15 Q: Yes, sir. Do you -- do you know why it was that the
16 police stopped you?

17 A: Yes, sir.

18 Q: All right. And why was -- why was that?

19 A: Because --

20 Q: What was the reason that they stopped you?

21 A: Well, they stopped me saying that I was known for driving
22 under suspension.

23 Q: Okay.

24 A: And say I crossed over the yellow line.

25 Q: Okay.

DAVID VICE - DIRECT BY MR. WILSON

1 A: Drove left of center.

2 Q: All right. And had you crossed over the yellow line?

3 A: No, sir.

4 Q: All right. And so you wanted your lawyer to make some

5 arguments for you about that?

6 A: Yes, sir.

7 Q: All right. And what was that argument that you wanted

8 him to make?

9 A: I wanted him to, you know, maybe limit the motion of the

10 testimony of the police officer that he said he knew me.

11 Q: Okay. So you wanted him to file some kind of a motion to

12 limit the testimony of the officer so that the officer

13 couldn't get on the witness stand and testify that you -- that

14 he knew you beforehand?

15 A: Yes, sir.

16 Q: All right. And -- and -- and did you have any other

17 discussion with him as to how y'all were going to do that?

18 Did y'all talk about that?

19 A: No, sir.

20 Q: All right. Was there any issue about the probable cause

21 for your arrest? Was there any discussion about that?

22 A: Yes. There was discussion. He -- I think he did a

23 motion for, like, fruit of the poisonous tree or something

24 like that, but --

25 Q: Okay.

DAVID VICE - DIRECT BY MR. WILSON

1 A: -- it was a motion to suppress.

2 Q: Okay.

3 A: But then the judge -- he denied it, but I didn't -- I
4 didn't know that once a judge denies it that that means that
5 they didn't find any probable cause.

6 Q: Okay.

7 A: But he -- I -- he didn't let me know that because I
8 didn't -- you know.

9 Q: All right. So there was -- he did make a motion for --
10 to -- saying that there was no probable cause for your arrest,
11 but what you're saying is that you didn't understand the
12 implications of that? Is that what you're saying?

13 A: Yes, sir.

14 Q: All right. And that when the judge ruled against you
15 that that evidence was going to come in against you, you
16 didn't understand what that meant?

17 A: No, sir.

18 Q: And Mr. Swilley never sat down with you and explained to
19 you that if we -- if you lost -- if the judge ruled against
20 you that all of this evidence was going to come in against
21 you?

22 A: No, sir.

23 Q: All right. Now, other than the time that you met with
24 him at your aunt's house, which is the first time that he had
25 the discovery, did you ever have another meeting with him

DAVID VICE - DIRECT BY MR. WILSON

1 where the two of you sat down and discussed the discovery
2 information or the trial strategy in your case?

3 A: No, sir. Not until the day of trial.

4 Q: Okay. All right. Now, on the morning of trial, which
5 would have been a week later which would have been the
6 following Monday, did y'all sit down before the trial started
7 and have any conversation? That is you and Mr. Swilley?

8 A: No, sir. I asked him a question. I said, well, how is
9 trial looking because I don't want to go through a trial if it
10 looks like I'm going to lose. And he said, well, she wants
11 ten out of you.

12 Q: All right.

13 A: And then nothing else was said, but I didn't know what
14 that meant.

15 Q: All right. Let me ask you about that. Prior to that,
16 had you had any plea offer from the State to your knowledge?

17 A: No, sir.

18 Q: All right. Did Mr. Swilley ever discuss with you a plea
19 offer from the State prior to y'all selecting a jury?

20 A: No, sir.

21 Q: All right. Well, did you ask him about a plea offer at
22 any point in time before he mentioned ten years to you?

23 A: No, sir.

24 Q: All right. And so what was your understanding then of
25 what was going on? That is that y'all were going to just go

DAVID VICE - DIRECT BY MR. WILSON

1 forward with the trial?

2 A: Yes, sir.

3 Q: All right. Now, if -- if you had known that the -- that
4 the judge had denied your -- your motion for -- for the
5 probable cause hearing, what would you have done differently?

6 A: I probably would have -- I probably would have took a
7 deal or plead guilty or something because I didn't -- I didn't
8 want a lot of time. I don't want a lot of time if I'm not
9 guilty.

10 Q: Okay. So to avoid getting a lot of time, you would have
11 tried to work out something?

12 A: Yes, sir.

13 Q: All right. But you didn't understand all that? Is that
14 what you're saying?

15 A: No, sir.

16 Q: Okay. Now, what else did your lawyer do that -- that
17 caused you some concern?

18 A: He failed to -- he didn't locate any witnesses.

19 Q: Okay.

20 A: Talk to any witnesses.

21 Q: All right. So you expected him to investigate your case?

22 A: Yes, sir.

23 Q: All right. And did he -- did -- to your knowledge, what
24 investigation, if any, did he do towards your case or in your
25 case?

DAVID VICE - DIRECT BY MR. WILSON

1 A: None to my knowledge. I mean I couldn't see none that he
2 could do in a week's time and none that he told me of that
3 what he'd done.

4 Q: Okay. Now, did -- did you give him the names of any
5 witnesses who might have been out there who might have seen
6 something or at least their street names or nicknames or
7 whatever about witnesses who might have been out there who
8 might have seen what had occurred?

9 A: Nicknames, street names, the name of the neighborhood.

10 Q: All right.

11 A: I didn't know any real names, but nicknames and the name
12 of the neighborhood.

13 Q: Okay. All right. And to your knowledge, did he ever
14 find any of these nicknamed people or make an attempt to find
15 any of these people?

16 A: He didn't make any attempt.

17 Q: Okay. All right. And let me ask you were there -- were
18 there people out there the day that this incident occurred?
19 Were there witnesses out there who did observe what went on?

20 A: Yes, sir. Maybe, like, ten people.

21 Q: All right. Now, let me also ask you -- so what else did
22 he not do that you wanted him to do for you, other than
23 investigating your case and not investigating your case?

24 A: He didn't have an identification hearing.

25 Q: An identification hearing for?

DAVID VICE - DIRECT BY MR. WILSON

1 A: For -- for my identity. Like, no one -- no one knew, you
2 know, me. So, like, no one knew that it was me or ever said
3 that it was me at no point in time in the courtroom.

4 Q: Okay. So nobody ever pointed you out as being David Vice
5 and being the person that had been arrested? Is that what
6 you're saying?

7 A: Yes, sir.

8 Q: All right. All right. And why would that be important?

9 A: Because the officer -- he said that he's known me from
10 the past, but I never -- we never had any dealings or anything
11 that would link him to me or he didn't have any source to, you
12 know, like, link us together as him saying that he knowed me.

13 Q: Okay. All right. So we've talked now about the fact
14 that he did not investigate or go out to the crime scene or
15 find witnesses that you had told him about. Is there anything
16 else that he did not do that you wanted him to do?

17 A: To maybe go by the crime scene, hire an investigator, an
18 expert witness. Let me see.

19 Q: And when you say an expert witness, what did you want an
20 expert witness to look at?

21 A: To maybe examine the videotape.

22 Q: Okay. So there was a videotape that was submitted of the
23 actual arrest in your case; is that correct?

24 A: Yes, sir.

25 Q: And you wanted an expert to examine it to see what?

DAVID VICE - DIRECT BY MR. WILSON

1 A: To see if anything happened differently in the video.

2 And then he didn't attempt to get any videos out of the other
3 cruiser's cars also.

4 Q: Okay. So there were a number of other police cruisers
5 involved in the -- in the -- in the arrest -- in your arrest
6 and you wanted the videos -- to see the videos from those
7 particular vehicles?

8 A: Yes, sir.

9 Q: Is that correct? And did you ever get those -- to see
10 those vehicles' video?

11 A: No, sir.

12 Q: All right. Have you ever seen them to this day?

13 A: No, sir.

14 Q: All right. Now, let me ask you what else is it that you
15 think that your lawyer could have done for you that he did not
16 do?

17 A: He didn't object to the curative instruction.

18 Q: Okay. Now, the judge gave a curative instruction to the
19 jury after some information came in about the officer knowing
20 who you were; is that correct?

21 A: Yes, sir.

22 Q: All right. And you're saying that the curative
23 instruction was insufficient and that your lawyer should have
24 objected to the curative instruction saying that it's
25 insufficient? Is that what you're trying to say?

DAVID VICE - DIRECT BY MR. WILSON

1 A: Yes, sir.

2 Q: All right. All right. But he did actually object to the
3 information coming in?

4 A: Yes, sir.

5 Q: All right. Now, do you -- and is it your belief that
6 that information hurt you? That is the fact that that
7 information was put in front of the jury that you were the
8 person -- that you were known to the police and that they knew
9 who you were and had had dealings with you in the past when
10 you did not testify in this case?

11 A: Yes, sir.

12 Q: All right.

13 A: The outcome definitely would have been different I feel.

14 Q: Okay. If they hadn't that that information?

15 A: Yes, sir.

16 Q: All right. Now, what else is there that you want to tell
17 us about your lawyer that he did not do?

18 A: When the Court had charged the jurors, he used the term
19 strong evidence and he didn't object to that.

20 Q: Okay.

21 A: And it could have been preserved for an appeal.

22 Q: All right.

23 A: And he didn't.

24 Q: All right. Now, what you're referring to is -- is that
25 during the course of the trial there was some testimony where

DAVID VICE - DIRECT BY MR. WILSON

1 the judge -- when he was charging the jury, he gave an
2 erroneous instruction is what you're saying?

3 A: Yes, sir.

4 Q: And using that strong evidence charge which had been
5 overruled by the Supreme Court at a previous case?

6 A: Yes, sir.

7 Q: All right. And your lawyer didn't object to him doing
8 that?

9 A: No, sir.

10 Q: Okay. And that was one of the grounds for your appeal;
11 is that correct?

12 A: Yes, sir.

13 Q: All right. And the Supreme Court refused to hear it
14 because it wasn't preserved?

15 A: Yes, sir.

16 Q: All right. Now, what else was there that you wanted to
17 talk about with your lawyer?

18 A: I just don't feel that I had a fair trial, and that his
19 ineffectiveness has prejudiced me. I felt if he would have
20 maybe conveyed or explained to me any plea offers or recommend
21 or negotiate, I don't think that I would have went to trial.
22 Even though I'm not guilty, but if I could know that I could
23 get lesser time for what I'm being accused for, then that's
24 what I would have went with.

25 Q: Okay. Let me ask you this. When -- on Monday the week

DAVID VICE - DIRECT BY MR. WILSON

1 later when y'all went back to the judge, when y'all went back
2 to actually try your case, at that point in time did Mr.
3 Swilley make a motion for a continuance and say to the judge
4 that he was not prepared to go forward at that time?

5 A: No, sir.

6 Q: Did you talk with him about that, why y'all were going
7 forward when you're not really ready? Did y'all have any
8 discussion about that?

9 A: I said it wasn't enough time, but it was -- you know.

10 Q: So you're saying that he should've asked for additional
11 time on Monday when y'all showed up for trial?

12 A: Yes, sir.

13 Q: All right. At that point in time, to your knowledge did
14 he even have all of the evidence?

15 A: I don't think he had any evidence, if you ask me, from my
16 knowledge.

17 Q: Okay. Well, he had the video because you saw the video?

18 A: He had the video. Yes, sir.

19 Q: All right.

20 A: Yes, sir.

21 Q: But you don't know what other evidence there was or what
22 other evidence that was out there that he did not have at that
23 point?

24 A: No, sir.

25 Q: All right. Do you know whether he had filed a motion

DAVID VICE - DIRECT BY MR. WILSON

1 asking for additional evidence that he had not received at
2 that point -- at the time y'all went to trial?

3 A: Not -- not from my knowledge.

4 Q: Okay. So he didn't talk to you about that?

5 A: No, sir.

6 Q: All right.

7 MR. WILSON: The Court bear with me for just one second,
8 Your Honor?

9 THE COURT: Yes, sir.

10 BY MR. WILSON:

11 Q: Let me ask you just this and then I'll be done. Are you
12 or were you guilty of the crime that you were charged with?

13 A: No, sir.

14 Q: All right. And do you believe that you had a fair trial
15 back in 2012?

16 A: No, sir.

17 Q: All right. And why is it that you believe that you did
18 not have a fair and impartial trial in 2012?

19 A: Because I was ineffective from my counselor, and I was
20 not guilty and I would have never been convicted if he would
21 have done those things, if he would have went to the crime
22 scene or examined the witnesses, go and, you know, just try to
23 do something to help me out, but I don't feel that he tried
24 anything. I don't feel like he tried enough --

25 Q: Okay.

DAVID VICE - CROSS BY MR. GOURLEY

1 A: -- for what I paid for.

2 Q: All right.

3 MR. WILSON: I don't have any other questions.

4 THE COURT: All right. Very good. Cross-examination?

5 MR. GOURLEY: Thank you, Your Honor.

6 CROSS-EXAMINATION

7 BY MR. GOURLEY:

8 Q: All right. Mr. Vice, you said your counsel was
9 ineffective for failing to look into some witnesses; right?

10 A: Yes, sir.

11 Q: Who were those witnesses?

12 A: There's some nicknames, like Vinny. I gave him the
13 nicknames at the time and where they reside.

14 Q: What were their nicknames?

15 A: Vinny.

16 Q: Okay.

17 A: Bobo.

18 Q: Okay.

19 A: Lou.

20 Q: Okay.

21 A: And Chuck.

22 Q: And Chuck?

23 A: I can't remember the rest of them. There was, like, ten
24 people altogether.

25 Q: Are any of those people here today?

DAVID VICE - CROSS BY MR. GOURLEY

- 1 A: No, sir.
- 2 Q: Okay. You also said that you wanted an expert witness to
3 investigate what?
- 4 A: The video.
- 5 Q: The video?
- 6 A: Yes, sir.
- 7 Q: Do you have an expert witness here today to talk about
8 the video?
- 9 A: Today? No, sir.
- 10 Q: Okay. Now, just a moment ago you said you're not guilty
11 of these charges; right?
- 12 A: Yes, sir.
- 13 Q: But you said you would have pled guilty?
- 14 A: If I -- if I would have find that I could have got lesser
15 time and not getting the time that I have, yes, sir.
- 16 Q: And did the State ever offer you a plea offer to have
17 lesser time?
- 18 A: No, sir.
- 19 Q: Okay. So -- okay. Now, you said -- just giving a brief
20 background to this case, an officer observed you -- allegedly
21 observed you crossing the -- crossing the yellow line, turned
22 around and kind of cut you off, and you sped around and sped
23 off and he chased you; right?
- 24 A: Yes, sir. But I never crossed over the yellow line, sir.
- 25 Q: Right. You disputed that you didn't across the yellow

DAVID VICE - CROSS BY MR. GOURLEY

1 line and that was for your motion to suppress saying that he
2 had no probable cause to pull you over in the first place
3 because you didn't cross the center of the yellow line; right?
4 A: Yes, sir.
5 Q: Okay. And during the chase, the officers allege that you
6 threw a bag of drugs out the window; right?
7 A: Yes, sir.
8 Q: Okay. And that was all captured on video; right?
9 A: Yes, sir.
10 Q: Okay. Now, you stated that you met with Mr. Swilley at
11 your aunt's house?
12 A: Yes.
13 Q: Were you out on bond at this time?
14 A: Out on bond? Yes, sir.
15 Q: When did you get out on bond? Do you remember?
16 A: Out on bond? Maybe February, March.
17 Q: Okay. And you were indicted -- do you remember when you
18 were indicted?
19 A: No, sir.
20 Q: Okay. Who was your first attorney?
21 A: Shaun Kent.
22 Q: Shaun Kent was your first attorney? And he was your
23 attorney up until you hired Matt Swilley?
24 A: Yes, sir. Really, we talked about him, but we never had
25 a contract.

DAVID VICE - CROSS BY MR. GOURLEY

- 1 Q: Okay.
- 2 A: So really Matthew Swilley was my first attorney.
- 3 Q: So you didn't have an attorney up until the time that
- 4 Matthew Swilley became your attorney?
- 5 A: No, sir.
- 6 Q: Shaun Kent never actively represented you at all?
- 7 A: For these charges, no, sir.
- 8 Q: Okay. And you said that Mr. Swilley -- your trial came
- 9 up on Monday and Mr. Swilley made a motion for a continuance
- 10 because you had just hired him the Friday before?
- 11 A: Yes, sir.
- 12 Q: What took so long to hire Mr. Swilley?
- 13 A: It took so long I didn't have the funds, sir.
- 14 Q: You didn't ask for a public defender?
- 15 A: Ask for a public defender? No.
- 16 Q: Okay.
- 17 A: No, sir.
- 18 Q: Why not?
- 19 A: I don't know. I didn't have knowledge of the law I
- 20 guess. I don't know.
- 21 Q: You didn't have knowledge of the law? Do you have any
- 22 other prior convictions?
- 23 A: Yes, sir.
- 24 Q: Okay. So this isn't your first time being in front of a
- 25 Court; correct?

DAVID VICE - CROSS BY MR. GOURLEY

1 A: No, sir.

2 Q: Okay. But Mr. Swilley did ask for a continuance;
3 correct?

4 A: Yes.

5 Q: And he got one, but he just got a week?

6 A: Yes.

7 Q: And during that -- after the continuance, you went to
8 your aunt's house and met him at your aunt's house and had a
9 brief meeting, twenty minutes or so?

10 A: Yes.

11 Q: And then you didn't see him ever again until the trial?

12 A: Yes.

13 Q: Did you ever try to contact him during that week?

14 A: Yes. I called him maybe once or twice.

15 Q: Okay.

16 A: Maybe we had a phone call no longer than five minutes.

17 Q: Okay. And did you know where his office was at?

18 A: Yes.

19 Q: Did you ever go to his office?

20 A: No, sir.

21 Q: Okay.

22 A: He never gave an appointment.

23 Q: Okay.

24 MR. GOURLEY: I beg the Court's indulgence, Your Honor.

25 THE COURT: Yes, sir.

DAVID VICE - CROSS BY MR. GOURLEY

1 BY MR. GOURLEY:

2 Q: You were there when the judge denied the probable --
3 motion to suppress; right?

4 A: Yes.

5 Q: So you knew it was denied and the police had probable
6 cause to go on; correct?

7 A: I seen where he denied it, but I didn't know the
8 significance.

9 Q: Okay.

10 A: Like I say, I didn't know the law. I don't --

11 Q: You didn't understand what that meant at the time?

12 A: Yeah. My attorney didn't explain.

13 Q: I gotcha. And you said your counsel was ineffective for
14 failing to have an ID hearing?

15 A: Yes.

16 Q: Okay. So what about that do you feel was ineffective? I
17 think you said the police officer -- you wanted to challenge
18 the police officer's identification of you?

19 A: Yes.

20 Q: Okay. But you were arrested in the car on video; right?

21 A: Yes.

22 Q: There's no disputing that you were driving the car that
23 was pulled over; correct?

24 A: Yes.

25 Q: Okay. So there's no disputing that an officer -- you

DAVID VICE - CROSS BY MR. GOURLEY

1 were in the car and that the officer was correct in his
2 identification; right?

3 A: Yes.

4 Q: Okay. And your counsel did object to the curative
5 instruction given by the judge; right?

6 A: No.

7 Q: He did not object?

8 A: No, sir.

9 Q: Do you have any recollection of that being appealed?

10 A: Being appealed?

11 Q: Yes, sir.

12 A: The curative instruction?

13 Q: Yes, sir.

14 A: He didn't object to it. It's not on appeal, but the
15 strong evidence term.

16 Q: Okay. The strong evidence term was appealed as well;
17 right?

18 A: Yes.

19 Q: Okay.

20 MR. GOURLEY: Your Honor, I don't have any other
21 questions.

22 THE COURT: All right.

23 MR. GOURLEY: Thank you, Mr. Vice.

24 THE COURT: Redirect?

25 MR. WILSON: Nothing further, Your Honor.

MATTHEW SWILLEY - DIRECT BY MR. GOURLEY

1 THE COURT: All right, sir. You may step down, sir.

2 MR. WILSON: Your Honor, that would be our showing.

3 THE COURT: All right. Very good. All right. Witnesses
4 on behalf of the State?

5 MR. GOURLEY: Yes, Your Honor. We'd call Mr. Swilley to
6 the stand, please.

7 THE COURT: All right, sir. If you'd raise your right
8 hand, please, sir? Do you solemnly swear or affirm to tell
9 the truth, the whole truth, and nothing but the truth, so help
10 you God?

11 THE WITNESS: I do.

12 THE COURT: Very good. Just have a seat and get situated
13 and, when you are, please state your name?

14 THE WITNESS: Matthew Swilley.

15 THE COURT: Go ahead.

16 MR. GOURLEY: Thank you, Your Honor.

17 MATTHEW SWILLEY, being first
18 duly sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. GOURLEY:

21 Q: Mr. Swilley, how did you come about representing Mr. Vice
22 in this case?

23 A: David called my office. At the time, I worked for Bobby
24 Frederick in Myrtle Beach. He called and set up an
25 appointment and came in and we met, and then I think sometime

MATTHEW SWILLEY - DIRECT BY MR. GOURLEY

1 later that Friday before his trial was to begin he came in and
2 retained me.

3 Q: Okay. Did he have prior counsel to your knowledge?

4 A: It was my understanding that Shaun Kent had represented
5 him. I didn't know the extent of the representation or what
6 -- when it had ceased, but it was -- I don't -- I can't recall
7 whether -- what time Shaun stopped representing him. That was
8 just the information I had.

9 Q: Okay. So you were retained the Friday before the trial
10 was supposed to start on that Monday?

11 A: That's correct.

12 Q: Did you have any kind of discussion with him about the
13 short amount of time that you had to prepare for trial?

14 A: Yeah. I told David that it was my understanding -- I
15 mean that I couldn't guarantee him anything, but I thought
16 that it would be continued at least to the next term of court.

17 Q: Okay. And obviously you filed a motion for continuance
18 the first Monday when it came up for trial; right?

19 A: I think I made an oral motion before Judge Newman.

20 Q: And that was granted and you were given a week?

21 A: Yeah. He -- he gave me seven days. I think that's
22 actually pursuant to the statute, but he did give me seven
23 days --

24 Q: Okay.

25 A: -- for a continuance.

MATTHEW SWILLEY - DIRECT BY MR. GOURLEY

1 Q: And during those seven days, what kind of investigation
2 did you do in this case?

3 A: That Monday, I drove out to where the alleged chase had
4 ensued and drove the route that was driven.

5 Q: Okay.

6 A: I do recall that. And looked at the scene, looked at
7 some of the houses around, drove all the way to the point
8 where the chase had ended.

9 Q: Okay. It's fair to say that this case basically hinged
10 on whether or not the police had probable cause to even pull
11 over Mr. Vice?

12 A: Well, at the point -- it was my belief that the point
13 where he ran that that kind of killed that argument.

14 Q: Right.

15 A: If he had not ran and just stayed right there, I think
16 we'd have a very good argument for suppression. I found
17 Deputy Hayes' testimony very dubious.

18 Q: Okay.

19 A: I didn't think that -- I didn't think that he had a
20 reason to stop David. He whipped his car. They were going
21 opposite ways and --

22 Q: Right.

23 A: -- and he whipped his car out in front of David --

24 Q: Okay.

25 A: -- and yelled stop. I think if David had just stayed, we

MATTHEW SWILLEY - DIRECT BY MR. GOURLEY

1 probably could have gotten the drugs suppressed.

2 Q: Okay. And you obviously argued that to Judge Newman?

3 A: I made that motion and argued that motion, but I mean
4 that was my belief.

5 Q: Okay. And that motion was denied; correct?

6 A: It was.

7 Q: All right. Did Mr. Vice ever give you a list of
8 witnesses or nicknames to look into on his behalf?

9 A: Not to my recollection.

10 Q: Okay.

11 MR. GOURLEY: I beg the Court's indulgence, Your Honor.

12 THE COURT: Yes, sir.

13 BY MR. GOURLEY:

14 Q: Were there any plea offers in this case?

15 A: Ms. Barr offered me ten years on the trafficking cocaine.

16 Q: Okay. When was that done?

17 A: I believe it was done on that Monday that the trial was
18 -- that Monday preceding or proceeding the Friday that I was
19 retained. She gave me the discovery that she had in the file
20 and then offered me ten years and then I -- David and I
21 discussed that and it was denied.

22 Q: Okay. So Mr. Vice turned that down?

23 A: That's correct.

24 Q: Okay. Do you feel there was any reason to file a *Neil v.*
25 *Biggers* motion in this case?

MATTHEW SWILLEY - DIRECT BY MR. GOURLEY

1 A: There were no photo lineups that were done in the case;
2 so no.

3 Q: Did you feel there was any reason to file an -- to
4 request an expert witness in this case to review the
5 videotape?

6 A: No. I reviewed the videotape with the investigator in my
7 office at the time, Bill Beam, along with Bobby Frederick, and
8 I discussed some of the things in the video with Mr. Beam,
9 being a former policeman, but that was pretty much the extent
10 of the -- I mean no, I never considered hiring an expert
11 witness for anything in the case.

12 Q: Okay. Did you object to the curative instruction given
13 by Judge Newman or did you object to the cause of the curative
14 instruction?

15 A: I objected when Loy Hayes said that he had a history of
16 running from the police.

17 Q: Uh-huh.

18 A: And then Judge Newman took the jury out, read the
19 curative instruction, and I didn't object to the curative
20 instruction. I probably should have. Actually, I should
21 have. I should have objected to the curative instruction.

22 Q: Okay.

23 A: To preserve --

24 Q: Are you aware of the applicant's appeal -- the issues
25 raised on appeal?

MATTHEW SWILLEY - DIRECT BY MR. GOURLEY

1 A: I think it was an unpublished opinion. I think I read
2 it.

3 Q: Okay. And if the issue regarding the curative
4 instruction wasn't addressed on appeal, you don't dispute
5 that, do you?

6 A: What do you mean?

7 Q: Whether or not the issue -- one of the issues on appeal
8 was the curative instruction?

9 A: Right.

10 Q: You don't dispute that? If it was found to be properly
11 preserved and addressed by the Court of Appeals, you don't
12 dispute that?

13 A: I'm not really sure what happened with the Court of
14 Appeals. I know I objected to the reference to prior bad
15 acts, and Judge Newman denied the motion for a mistrial and
16 gave the curative instruction.

17 Q: That's right. I'm misinterpreting the Court of Appeals'
18 opinion. I apologize. The issue was whether or not the judge
19 erred in denying a mistrial --

20 A: Okay.

21 Q: -- not whether the curative instruction cured that issue.
22 I apologize. Do you feel you were prepared for trial despite
23 the fact there was only a week to prepare? Given that short a
24 time?

25 A: I would have liked a lot more time, particularly a lot

MATTHEW SWILLEY - DIRECT BY MR. GOURLEY

1 more time to investigate into Deputy Hayes. I think if I'd
2 have gotten some records of personnel with the CJA, the
3 Criminal Justice Academy, I think I could have impeached him a
4 lot more, but I wasn't able to get that in time. It wasn't a
5 complex case, but to answer your question, yes, I would have
6 liked more time.

7 Q: Of course, I think everybody would have. But you did
8 cross-examine Deputy Hayes on whether he could properly
9 identify him and so on and so forth; right?

10 A: I did.

11 Q: Okay.

12 MR. GOURLEY: Your Honor, I don't have any other
13 questions. Thank you, Mr. Swilley.

14 THE COURT: All right. Cross-examination?

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

16 CROSS-EXAMINATION

17 BY MR. WILSON:

18 Q: Mr. Swilley, I just have a few questions. Let me ask you
19 when Mr. -- when Mr. Vice came to retain you, did you know at
20 that time that the trial was going to be actually the
21 following -- two days later actually?

22 A: He had let me know that the trial -- that they were
23 talking about calling his trial for that Monday. I told him I
24 didn't think that was going to happen. I didn't think any
25 judge was going to make a lawyer go forward, you know --

MATTHEW SWILLEY - CROSS BY MR. WILSON

1 Q: Okay.

2 A: -- one business day after he was hired. So I told him
3 that, you know, I -- we'd go to court and I'd make a motion
4 for a continuance.

5 Q: Okay. And so when he retained you, you were aware that
6 the trial was actually going to be -- and -- but you had no
7 way of knowing that the judge was actually going to grant you
8 a continuance on Monday --

9 A: Right.

10 Q: -- when you showed up; is that correct?

11 A: That's correct.

12 Q: All right. And so -- and did I understand you to say
13 that you got the discovery from the solicitor on Friday?

14 A: That was Monday, the Monday that the trial was originally
15 supposed to begin.

16 Q: Okay. So on Monday when you go to meet with the
17 solicitor -- I'm sorry. When you go to meet with the Court to
18 appear for the first time in this action, it's the actual day
19 of trial supposedly for Mr. Vice?

20 A: Yes.

21 Q: All right. And at that point, you have no discovery?

22 A: Until I -- yes.

23 Q: Monday. I'm talking about Monday morning when you
24 appeared in front of the Court to ask for the continuance.
25 Did you have any discovery at that point in time?

MATTHEW SWILLEY - CROSS BY MR. WILSON

1 A: I don't know. I think Kim -- or Ms. Barr rather gave me
2 discovery when I arrived, but I can't remember if it was
3 before we went in front of Judge Newman or after. I know that
4 when I arrived and made my motion the first time, David wasn't
5 there.

6 Q: Okay.

7 A: And Judge Newman basically said get him here before we
8 take this matter up, and he got there.

9 Q: Okay.

10 A: But to answer your question, I don't remember what -- at
11 what point in the day that I actually got discovery from Ms.
12 Barr.

13 Q: Okay.

14 A: But it was that Monday.

15 Q: All right. So you -- my question again was on Monday
16 when you appeared in front of Judge Newman, did you have
17 discovery in the case so that you knew what was facing you and
18 what the evidence was?

19 A: At the time I appeared before Judge Newman, I really
20 don't remember if I had it or didn't have it at that point in
21 the day.

22 Q: Well -- and even if you had it at that point, you
23 certainly wouldn't have had an opportunity to read through it
24 and know what was in it or even examine the video at that
25 time, would you have?

MATTHEW SWILLEY - CROSS BY MR. WILSON

1 A: Right. I thought it --

2 Q: All right.

3 A: I thought that the solicitor would have given me
4 discovery and just sent me back and said we're calling this
5 for whenever term. I didn't think the solicitor was going to
6 want to go forward with it the day I showed up.

7 Q: Okay.

8 A: I found that highly irregular.

9 Q: And -- and then on Monday, you went in front of Judge
10 Newman and you asked Judge Newman for a continuance. He
11 granted you a continuance of one week. Is that --

12 A: Right.

13 Q: -- your statement?

14 A: Yes, sir.

15 Q: All right. Did you say to him, Judge, I have not seen
16 the discovery, I don't know what's in it, I don't know if that
17 a week is going to be sufficient, I would ask the Court to
18 give me some additional time to get prepared and -- or let us
19 revisit this after we have seen the discovery to know the
20 extent of what we are facing?

21 A: I don't recall what I said. I know I moved for a
22 continuance and he gave me a week, but I don't remember
23 whether or not I asked for more time at that point or not. I
24 think I did, but I can't remember.

25 Q: Okay.

MATTHEW SWILLEY - CROSS BY MR. WILSON

1 A: I should -- I mean I would have. I wouldn't have -- I
2 wouldn't have just been satisfied with just one week.

3 Q: Well, you go back on -- he gives you one week and you go
4 back on Monday, the week later, and you actually began the
5 trial; is that correct?

6 A: Yes.

7 Q: At that time, did you make any effort to ask the judge to
8 give you an additional -- give you additional time so that you
9 could be prepared?

10 A: I don't remember.

11 Q: Did you -- you don't remember?

12 A: I don't.

13 Q: Did you --

14 A: I would have.

15 Q: I'm sorry.

16 A: I would have. I think that's something I would have
17 done, but I don't remember if I did or not to be honest.

18 Q: Well, have you looked at the transcript? Have you seen
19 the transcript of the trial?

20 A: No. I haven't read it.

21 Q: All right. So then you don't know if there is no mention
22 of any continuance in the transcript of the trial?

23 A: I haven't read the transcript.

24 Q: Okay. All right. So if I --

25 MR. WILSON: May I approach the witness, Your Honor?

MATTHEW SWILLEY - CROSS BY MR. WILSON

1 THE COURT: Yes, sir.

2 BY MR. WILSON:

3 Q: This is a transcript of the trial that you did and see if
4 there's anything in there where you asked Judge Newman for a
5 continuance or even raised the issue with him on the day of
6 trial?

7 (WHEREUPON, there was a pause in the proceedings.)

8 A: I don't see anything where I asked for a continuance in
9 this transcript.

10 Q: Okay. Let me ask you then -- on Monday morning -- on
11 Monday, the day of the trial, did you have all of the
12 discovery in this case?

13 A: I believe so.

14 Q: Well, let me ask you if you filed a motion requesting
15 additional discovery? And let me show you this motion that
16 you filed.

17 A: I didn't have these materials, no.

18 Q: Okay. And those were materials pertinent to his case?
19 That is Mr. Vice's case?

20 A: Right. I would have liked to have had them.

21 Q: All right. And you filed a motion requesting this
22 information; is that correct?

23 A: Yes.

24 MR. WILSON: And, Your Honor, I just ask that this be
25 marked for identification purposes and made part of the

MATTHEW SWILLEY - CROSS BY MR. WILSON

1 record.

2 THE COURT: Any objection to that?

3 MR. GOURLEY: No, Your Honor.

4 THE COURT: All right, sir. Go ahead and have it marked.
5 It's in evidence.

6 (WHEREUPON, Plaintiff's Exhibit Number a, a discovery
7 motion, was admitted into evidence.)

8 BY MR. WILSON:

9 Q: At the time you filed this motion on -- it says here
10 October 31st. And what was the first day of trial?

11 A: It would have been the Monday before the presidential
12 election.

13 Q: Okay. November 5th and 6th were the trial dates; is that
14 correct?

15 A: I believe so.

16 Q: All right. And you filed this motion and you asked them
17 for discovery and, at the time you went before Judge Newman on
18 Monday morning, the day of trial which would have been the 5th,
19 you did not have this information. And you asked specifically
20 in what's now marked as Plaintiff's Exhibit 1 for all calls
21 for service for Deputy Loy Hayes, dispatch logs, radio
22 transmissions, and all recordings for the date of December
23 19th, 2011, a copy of all dash-cam videos from the patrol cars
24 involved in the incident, a copy of Williamsburg County
25 Sheriff's Office policy and procedure handbook relating to

MATTHEW SWILLEY - CROSS BY MR. WILSON

1 traffic stops and traffic pursuits, any information on any
2 informants used in this case, the identity of any informants,
3 and what information was provided by any informants. And none
4 of this information was provided to you before the trial; is
5 that correct?

6 A: I don't believe so.

7 Q: Okay. And not having that information, you still went
8 forward with the trial without making a motion for a
9 continuance or advising the judge that that information had
10 not been provided to you by the prosecution?

11 A: I don't remember if I took that matter up on the record.

12 Q: Let me show you the transcript again and let you look at
13 it and see if there's any mention of that anywhere in the
14 transcript.

15 A: Not in this transcript.

16 Q: All right. Okay. Now, at some point in time during the
17 course of the -- of your trial -- the trial on -- so -- well,
18 let me back up. Not having this information that you
19 specifically requested -- let me ask you this. Would you have
20 requested it if you didn't think that it was necessary and
21 important to your preparation? Would you have requested it
22 just for no reason?

23 A: No.

24 Q: Okay.

25 A: I wanted it.

MATTHEW SWILLEY - CROSS BY MR. WILSON

1 Q: Right. And the reason that you wanted it is so that you
2 could represent the defendant in a very competent fashion?

3 A: Right.

4 Q: Okay. And in this particular case, there were multiple
5 vehicles involved in this arrest which would have had cameras;
6 is that correct?

7 A: I recall from watching the video other than Deputy Hayes'
8 patrol car, I think there were -- involved in the chase, I
9 think there was just one more.

10 Q: Okay.

11 A: But I think when David -- when David actually got
12 apprehended, I think, you know, a whole slew of them pulled
13 up.

14 Q: Do you know whether or not there were actually seven
15 additional vehicles involved in this arrest?

16 A: I have no -- I don't know how many vehicles were
17 involved.

18 Q: Okay. Well, wouldn't that be something that you would
19 want to know before you go to trial, you know, what is going
20 on in the case and who the witnesses are and who was there and
21 who saw what happened? Wouldn't that be important do you
22 think?

23 A: Right.

24 Q: All right. Now, let me also ask you at some point in
25 time you had -- you did read the information which did include

MATTHEW SWILLEY - CROSS BY MR. WILSON

1 a copy of an incident report that the police had provided or
2 that the State provided from the police?

3 A: Yes.

4 Q: Is that there? And in that report, there was an
5 indication that -- I think it was Officer Loy knew the
6 defendant and knew that he had been involved in criminal
7 activity and maybe had arrested him or was familiar with him
8 and that that was part of the reason that he stopped him?

9 A: Yeah. I think so. I mean it was -- it was definitely a
10 spurious stop.

11 Q: Okay.

12 A: I mean I didn't -- I didn't find the deputy very
13 credible.

14 Q: Okay. My point though is, is that was there any reason
15 knowing that the officer was going to try to say that, that he
16 knew this defendant and knew that he had been involved in
17 criminal activity in the past, that you would not make a
18 motion in limine to prevent that testimony from being admitted
19 in the course of his testimony?

20 A: You mean should I have made a motion to keep him from
21 mentioning any kind of prior bad acts of David?

22 Q: Yes, sir.

23 A: I mean looking back now I would have done that, but at
24 the time I figured, you know, he was somewhat familiar with
25 the rules of evidence, as was Ms. Barr, and that that wouldn't

MATTHEW SWILLEY - CROSS BY MR. WILSON

1 -- I mean that was kind of standard stuff. I mean I think
2 everybody knows that, but apparently he did not and he didn't
3 seem to really care. I mean I actually made reference to it
4 afterwards, but yeah, going back in time, I definitely would
5 have taken that up on the record outside of the hearing of the
6 jury.

7 Q: Okay. But you --

8 A: It's not the first time that's happened to me actually.

9 Q: But you didn't do that?

10 A: Right.

11 Q: All right. Well, is there any particular reason that you
12 did not do that?

13 A: I thought that the rules of evidence were going to be
14 complied with.

15 Q: Okay. And you would agree with me that even when a judge
16 gives a -- a curative instruction that once the jury hears
17 that information that it is really difficult to divest
18 themselves of that information even though the Court tells
19 them, look, you're supposed to ignore that, not pay it any
20 attention, and they're supposed to follow the Court's
21 instruction? It is difficult for jurors?

22 A: Absolutely.

23 Q: All right. And the defendant did not testify in this
24 case?

25 A: Correct.

MATTHEW SWILLEY - CROSS BY MR. WILSON

1 Q: Okay. And there's no question that that introduced his
2 character into evidence during the course of the trial?

3 A: It definitely prejudiced him, yes.

4 Q: All right. Now, let me ask you during -- during the
5 course of the trial, there was a probable cause hearing where
6 I assume you were trying to determine whether or not -- or a
7 suppression motion I guess might be a better word -- where you
8 were trying to -- to -- to keep out some evidence that was
9 obviously very prejudicial to the defendant, and you made the
10 motion and the motion was argued by you before the Court. Do
11 you recall that?

12 A: Yes.

13 Q: All right. Now, the Court ruled against you on that
14 motion?

15 A: Yes.

16 Q: Did you explain to the defendant what that meant? That
17 is that the Court had ruled against you that all of that
18 information -- those videos, whatever evidence there was, that
19 that information was then going to come in before the Court?

20 A: Yes.

21 Q: All right. And the jury would then hear that
22 information?

23 A: Yes.

24 Q: All right. So did you explain that to him?

25 A: Yes.

MATTHEW SWILLEY - CROSS BY MR. WILSON

1 Q: All right. Did you ask him if he understood that?

2 A: Yes.

3 Q: Okay. Let me ask you this. When the judge is doing his
4 -- his curative instruction -- because I think, if I'm not
5 mistaken, you did ask for a mistrial?

6 A: Yes.

7 Q: And he denied your mistrial -- motion for mistrial and he
8 gave a curative instruction, but then you didn't object to the
9 curative instruction?

10 A: I should have objected to the sufficiency of the curative
11 instruction and renewed my motion for a mistrial.

12 Q: Okay. All right. And why would you do that? Why?

13 A: I just made a mistake.

14 Q: Okay. Now, let me ask you -- are you familiar with *State*
15 *versus Cheeks* and the whole strong evidence argument or a
16 charge that judges have been giving? Were you -- well, let me
17 put it this way. Were you familiar with that in 2012?

18 A: I mean I know that case and I know that that's -- I think
19 the Court ruled it's an improper comment on the facts. I
20 think it's out of Laurens County. But I did not -- I did not
21 make an objection to that jury charge, which I should have
22 done at the time.

23 Q: All right. And the jury -- the Court charged the jury
24 that the fact that the defendant was found in possession of
25 drugs that that would be strong evidence basically of his

MATTHEW SWILLEY - CROSS BY MR. WILSON

1 guilt; is that fair?

2 A: I believe that's what he charged, yes.

3 Q: Okay. And that is not a correct state of the law in
4 2012? It was not?

5 A: Are you asking me? I don't know that.

6 Q: Yes, I'm asking you.

7 A: I don't know when *State v. Cheeks* came out, but if it had
8 came out before that, then that would have been an improper
9 statement of the law.

10 Q: Okay. But you didn't object to it?

11 A: Correct.

12 Q: All right. Is there any particular reason that you
13 didn't object to it?

14 A: I made a mistake.

15 Q: Okay. And are you familiar or are you aware that the
16 Supreme Court or the Court of Appeals found that that was not
17 preserved, that argument was not raised or that objection was
18 not made during the course of the trial and, therefore, it was
19 not preserved for appellate purposes and they refused to visit
20 it?

21 A: I don't remember reading that in the opinion, but it
22 should have been there.

23 Q: Okay.

24 MR. WILSON: Your Honor, may I have one second?

25 THE COURT: Yes, sir.

MATTHEW SWILLEY - CROSS BY MR. WILSON

1 (WHEREUPON, there was a pause in the proceedings as
2 counsel conferred.)

3 BY MR. WILSON:

4 Q: Let me show you this affidavit and ask you if you
5 recognize it and if that's your signature on the back?

6 A: Yes.

7 MR. WILSON: Your Honor, I'd offer this document.

8 THE COURT: Any objection?

9 MR. GOURLEY: No, Your Honor.

10 THE COURT: All right. Go ahead and mark this, please,
11 ma'am.

12 (WHEREUPON, Plaintiff's Exhibit Number 2, an affidavit,
13 was admitted into evidence.)

14 THE COURT: Do you need to use it?

15 MR. WILSON: Yes, sir.

16 THE COURT: All right. Well, go ahead and use it --

17 MR. WILSON: Thank you, sir.

18 THE COURT: -- and then you can give it back to me. Go
19 ahead.

20 BY MR. WILSON:

21 Q: Now -- well, I'll do this. Let me ask you to read what's
22 marked as Plaintiff's Exhibit Number 2 for the Court.

23 A: Now comes Matthew Swilley, who after being duly sworn
24 attests to the following:

25 That I am an attorney in good standing and admitted to

MATTHEW SWILLEY - CROSS BY MR. WILSON

1 practice in the state of South Carolina.

2 That I represented the defendant, David Vice, during his
3 trial on November 5th through 6th, 2012, on Indictment 2012-GS-
4 45-50, et. seq., for failure to stop for a blue light, PWID
5 marijuana, trafficking cocaine more than 28 but less than 10
6 [sic.] grams in Williamsburg County.

7 That the Honorable Clifton Newman was the trial judge of
8 the case and the case was tried before a jury. Counsel was
9 retained Friday before trial and counsel requested a
10 continuance from the assistant solicitor, Kimberly Barr, who
11 was prosecuting the case. The Court granted a one-week
12 continuance in the case, which allowed me one week to prepare
13 the case for trial.

14 That the time allotted for preparation was inadequate for
15 counsel to prepare for a case which has been pending since
16 2011. I made a diligent effort to represent Mr. Vice to the
17 best of my abilities, but did not interview or meet with any
18 witnesses prior to trial.

19 That I do not feel that I had adequate time to consult or
20 hire an expert witness to examine a crucial videotape in
21 possession of the State.

22 That the defendant was -- was in my opinion prejudiced by
23 my lack of ability to prepare, and I believe if I had adequate
24 time to prepare I could have obtained a more favorable result
25 for Mr. Vice.

MATTHEW SWILLEY - CROSS BY MR. WILSON

1 That as trial counsel I was ineffective in cross-
2 examining witnesses for the State as I had not had
3 insufficient time to investigate each potential witness or
4 review the testimony -- review their testimony with my client.
5 I do not believe Mr. Vice received a fair and impartial trial
6 and that Mr. Vice did not receive due process.

7 Q: Okay. And what is the date on that?

8 A: That is 24th January 2014.

9 Q: Okay. Let me ask you this. Do you believe or feel that
10 you were, in fact, prepared for this trial?

11 A: Not as prepared as I would've liked to have been.

12 Q: Well, I don't know that any of us are ever as prepared as
13 we'd like to be, but my question is really one of whether or
14 not you felt like you were able to provide effective
15 representation to the defendant during the course of the
16 trial. That's what I'm really asking.

17 A: Because of lack of time? Is that what you're asking me?

18 Q: For whatever reason.

19 A: No. I didn't feel like I could -- I didn't feel like I
20 could provide -- because I didn't have enough time -- as much
21 time to prepare as I would've liked, I did not feel that I
22 gave -- I was as effective as I should have been.

23 Q: Okay. All right. Just -- and I think just one more
24 question. At the end of the trial, did you have a

25 conversation with Mr. -- Mr. Vice -- well, let me back up. At

MATTHEW SWILLEY - CROSS BY MR. WILSON

1 the -- at the beginning of the trial after the jury was
2 selected, did you ever have a conversation with Mr. Vice about
3 the ten-year offer that the solicitor had made? And if you
4 did, tell us what that discussion was?

5 A: I discussed pleading guilty with Mr. Vice and I don't
6 recall if Ms. Barr left that open, but I told David I feel
7 like if you were to enter a plea, you would get -- you would
8 more than likely get less time than if you were convicted at
9 trial, and he told me that he didn't want to do any time. I
10 don't -- I didn't -- I didn't try to force him into a guilty
11 plea or coerce him into a guilty plea, but that was -- that
12 was the extent of the conversation we had.

13 Q: Is it your opinion then that Mr. Vice was prejudiced by
14 all of this action or inaction?

15 MR. GOURLEY: Your Honor, I'm going to object to that
16 question. That's for your decision, not Mr. Swilley's.

17 THE COURT: Sustained.

18 MR. WILSON: Thank you, Your Honor. I have no other
19 questions.

20 THE COURT: All right. Any redirect?

21 MR. GOURLEY: Yes, Your Honor. Very briefly.

22 REDIRECT EXAMINATION

23 BY MR. GOURLEY:

24 Q: Mr. Swilley, I don't think you hold yourself out to be a
25 bad attorney; right?

MATTHEW SWILLEY - REDIRECT BY MR. GOURLEY

1 A: No.

2 Q: Okay. And certainly you did everything that you could do
3 given the brevity of time that Judge Newman allowed you to do
4 to prepare for this trial; right?

5 A: Yes.

6 Q: Okay. So your affidavit saying that you did a poor job
7 in representing Mr. vice was due to the amount of time that
8 you had -- Judge Newman allowed you to have; correct? Not
9 because you're a bad attorney?

10 A: This affidavit I signed -- yeah, it says -- yeah, I feel
11 like it was -- David was prejudiced in my opinion by my lack
12 of ability to prepare and I believe that Mr. Vice had
13 inadequate time to prepare.

14 In all candor, I really was kind of disgusted with the
15 whole situation. I felt like I had been treated unfairly,
16 along with my client. I remember leaving the Williamsburg
17 County Courthouse very angry at the fact that I didn't -- I
18 didn't feel like I got treated fairly pretty much by everyone
19 involved. It was -- I was pretty angry. I'm getting angry
20 now thinking about it. I didn't -- I didn't think that David
21 got a fair shake. I didn't think that I got a fair shake and
22 it was one of the lesser enjoyable experiences of my six-year
23 career.

24 Q: Certainly. And that certainly parlays into this
25 proceeding today; correct?

MATTHEW SWILLEY - REDIRECT BY MR. GOURLEY

1 A: Parlays in this proceeding today?

2 Q: Yes.

3 A: What do you mean by that?

4 Q: Your anger and disgruntledness with this trial certainly
5 sways your opinion in this case today; is that correct?

6 A: Sure. Yes.

7 Q: So you filed a motion to retrieve additional documents
8 via Brady according to Mr. Wilson that he showed you?

9 A: Yes. Yes.

10 Q: Okay. And you did not receive those to your
11 recollection?

12 A: No.

13 Q: And you did not address that prior to the start of the
14 trial?

15 A: Not on the record, no. I don't recall if I spoke to Kim
16 -- Ms. Barr about that or not.

17 Q: Okay. And was there any informants in this case to your
18 knowledge?

19 A: Not to my knowledge.

20 Q: Okay. And you had a copy of the dash-cam video that you
21 reviewed?

22 A: Yes.

23 Q: Okay. So the other stuff that was left out that you
24 requested was I believe a policy and procedure handbook with
25 the cops and the records for Deputy Hayes' service records;

MATTHEW SWILLEY - REDIRECT BY MR. GOURLEY

1 right?

2 A: Yes.

3 Q: And in your opinion, is that Brady material?

4 A: Yes.

5 Q: Okay. And you did not have a copy of that?

6 A: Correct.

7 Q: And you don't recall whether or not you addressed that to
8 the judge prior to the proceedings?

9 A: No, I don't.

10 Q: And you feel that would have better enhanced your
11 opportunity to cross-examine Deputy Hayes?

12 A: Yes.

13 Q: Okay.

14 MR. GOURLEY: Your Honor, I don't have any other
15 questions. Thank you, Mr. Swilley.

16 THE COURT: All right. Anything on those questions, Mr.
17 Wilson?

18 MR. WILSON: No, sir, Your Honor.

19 DIRECT EXAMINATION BY THE COURT

20 THE COURT: All right. Mr. Swilley, just briefly -- I'm
21 sorry. Real quick. I just want to have this in the record.
22 Looking at the front page of the transcript of record, the
23 trial took place November 5 through 6, 2012; correct?

24 THE WITNESS: Yes, sir.

25 THE COURT: All right. And clearly in the charge, Judge

MATTHEW SWILLEY - DIRECT BY THE COURT

1 Newman used the words that the actual knowledge of the
2 presence of marijuana is strong evidence of the defendant's
3 intent to control its disposition or use. So the judge --
4 Judge Newman did say that; correct?

5 THE WITNESS: Yes, sir.

6 THE COURT: All right. Now -- and we were talking about
7 *State versus Cheeks*. Just so the record is clear, *State*
8 *versus Cheeks* is found in 401 S.C. 322, 737 S.E.2d 480. It
9 came out January 16th, 2013. So that's obviously after your
10 trial; correct?

11 THE WITNESS: Yes, sir.

12 THE COURT: So you didn't have the benefit of the Supreme
13 Court's opinion in *State versus Cheeks* at the time Judge
14 Newman gave the charge; correct?

15 THE WITNESS: Yes, sir.

16 THE COURT: All right. And with that, you didn't have
17 the benefit of any appellate court telling you that what
18 circuit judges had been doing for a long number of years was
19 incorrect? You didn't have the benefit of that?

20 THE WITNESS: I didn't -- I didn't think that charge at
21 the time was improper; so I didn't raise the issue. I don't
22 -- but, Judge, I don't know whether or not -- if there was any
23 other appellate opinion that --

24 THE COURT: All right. But --

25 THE WITNESS: -- did spell that out.

MATTHEW SWILLEY - DIRECT BY THE COURT

1 THE COURT: But you heard Mr. Wilson reference *State*
2 *versus Cheeks* and that's the one opinion that says that that's
3 -- the Supreme Court opinion that says it's not proper. And
4 obviously January 16th, 2013, is after November 5 and 6, 2012?

5 THE WITNESS: Yes, sir.

6 THE COURT: Very good. Thank you very much. Any further
7 questions?

8 MR. WILSON: Nothing further, Your Honor.

9 THE COURT: You may step down.

10 MR. GOURLEY: Your Honor?

11 THE COURT: Can the witness be excused, Mr. Wilson?

12 MR. WILSON: Yes, sir.

13 THE COURT: All right. You're excused to go back to your
14 regular duties, sir. Thank you.

15 MR. GOURLEY: Thank you, Judge.

16 THE COURT: Further witnesses on behalf of the State?

17 MR. GOURLEY: No, Your Honor.

18 THE COURT: Anything else, Mr. Wilson, as far as the
19 presentation of evidence?

20 MR. WILSON: No, sir, Your Honor.

21 THE COURT: All right. Would you like to make a brief
22 argument to the Court?

23 MR. WILSON: Yes, sir. Just briefly, Your Honor.

24 THE COURT: Please.

25 MR. WILSON: Your Honor, when you look at -- in this

1 particular case, when you look at the cumulative effect of the
2 things that occurred in this case -- and one of the most
3 egregious to me is the fact that counsel actually filed a
4 motion with the Court asking for additional information that
5 he had not been provided before trial and never received prior
6 to going forward with the trial and not only did he not do
7 that, he didn't ask for -- even attempt to ask the Court for a
8 continuance knowing that he didn't have that information. So
9 he couldn't have investigated the information because he
10 didn't even have it.

11 And I think -- and when you look at the fact that when
12 the defendant comes to him within a short period of time and
13 he said just now that he had six years' experience and, well,
14 I mean I don't know how many he had at that point or whether
15 that six years is now or six years back in 2012, but if he
16 didn't, then that would mean that he had three years'
17 experience and I don't know how many trials he's had.

18 But be that as it may, I don't think that's even the
19 issue. The issue here is a fundamental one, which is, is that
20 in order to go forward with a jury trial, you at least need to
21 have the discovery information that you know about if the
22 defendant is going to have any chance of having a fair trial.

23 The fact that this officer was able to get up and testify
24 and bring out the fact that he knew the defendant and that the
25 defendant was basically involved in criminal activity in the

1 past when the defendant did not testify certainly prejudiced
2 this defendant in the eyes of that jury. And I think
3 especially when cases are close that that becomes a real
4 problem when law enforcement gets up and they indicate to the
5 jury as they did and, yes, the Court did give a curative
6 instruction, but I submit to this Court that giving that
7 curative instruction does not divest the jury of that
8 information. It's there, it's in their minds, and they know
9 about it.

10 And the other thing is, is that whether or not *Cheeks* was
11 in existence -- and I apologize. Whether or not *Cheeks* was in
12 existence at the time I don't even know is the real issue
13 because it's still a comment on the facts and what you're --
14 what we as lawyers are supposed to do is listen to the charge,
15 make a determination as to whether or not it's objectionable,
16 and then bring that objection to the Court. If the Court
17 overrules us, well, then that's fine, but my point is that
18 that objection was never made and, had it been made, then this
19 defendant might not be sitting here today.

20 So I think collectively all those things together shows
21 that this defendant did not have a fair and impartial trial
22 and that he was certainly prejudiced by the collective errors
23 that counsel made in this particular case.

24 THE COURT: All right, sir. Mr. Attorney General?

25 MR. GOURLEY: Your Honor, just right out of the bag, Your

1 Honor, I submit to the Court that the applicant has shown no
2 prejudice. None of this material that's been presented to
3 this Court for its consideration here today, specifically the
4 documents referenced in Mr. Swilley's additional Brady motion,
5 none of that is before you today.

6 As Your Honor pointed out, the *State v. Cheeks* case was
7 decided in 2013. Obviously, Mr. Swilley could not have known
8 about it through ultimate clairvoyance on that issue.

9 Regarding the brevity of time spent with Mr. Vice prior
10 to trial, Your Honor, without more -- you know, he needs
11 additional evidence to show any kind of prejudice from that.
12 I would submit to the Court that Mr. Vice has shown no
13 additional evidence other than his mere allegations of he
14 should've done this, he should've done that.

15 There's no witnesses that testified. Mr. Vice presented
16 no evidence of the additional Brady material here before this
17 Court today. There was no expert witness that came in here
18 and testified and, as Your Honor knows, it's Mr. Vice's burden
19 of proof here today to establish there was any kind of
20 prejudice through the lack of investigation or discovery
21 material.

22 Regarding the curative instruction, Your Honor, that was
23 addressed. Mr. Swilley made a motion for a mistrial. The
24 judge gave a curative instruction and, Your Honor, I would
25 deem that was sufficient in this situation.

1 Furthermore, Your Honor, this is an overarching kind of
2 theme in this case. I would submit to the Court there was
3 clear overwhelming evidence in this case. Mr. Vice was
4 stopped, whether or not that's in dispute. Whether or not the
5 stop was legal or illegal, that was for the Court to decide.

6 But regardless, Mr. Vice was stopped, pursued in a chase,
7 pulled over while he was being pursued, and threw out various
8 narcotics. That was established to be marijuana and cocaine.

9 I think there's no issue in this case that Mr. Vice was
10 the one possessing that narcotic material here today and I
11 would submit to the Court that there's clear overwhelming
12 evidence of guilt which would negate any sort of prejudice, if
13 there was any in this situation. Thank you.

14 THE COURT: All right. Thank you very much. All right,
15 gentlemen. I'm going to take this matter under advisement and
16 I'll inform counsel of my decision. Thank you very much.

17 MR. WILSON: Thank you, Your Honor.

18 MR. GOURLEY: Thank you, Judge.

19 (WHEREUPON, the proceedings ended at 10:52 a.m.)
20

21 --- END REQUESTED TRANSCRIPT ---
22
23
24
25

1	State of South Carolina	)	
2		)	Certificate
3	County of Florence	)	

1 I, the undersigned, Krystal J. Smith, Notary Public and
2 Official Court Reporter for the Twelfth Judicial Circuit of
3 the State of South Carolina, do hereby certify that the
4 foregoing pages, numbered 1 through 62 constitute a true,
5 accurate, and complete Transcript of Record of all the
6 proceedings had and evidence introduced in the hearing of the
7 above captioned case, relative to appeal, in the Court of
8 Common Pleas for Williamsburg County, South Carolina, held in
9 Sumter, South Carolina, on the 15th day of July, 2015.

14 I do further certify that I am neither of kin, counsel,
15 nor interest to any party hereto.

17 s/Krystal J. Smith

18	Court Reporter

20	Florence, South Carolina

21	February 22, 2016

STATE OF SOUTH CAROLINA)

COUNTY OF WILLIAMSBURG)

STATE OF SOUTH CAROLINA)

v.)

DAVID R. VICE, III,)

DEFENDANT.)

IN THE COURT OF GENERAL SESSIONS
OF THE THIRD JUDICIAL CIRCUITFIRST SUPPLEMENTAL
MOTION FOR DISCOVERY AND
INSPECTION AS WELL AS BRADY
AND KYLES v. WHITLEY MATERIALSWARRANT NOS.: M-686755, M-686756,
M-686759CHARGES: FAIL TO STOP FOR BLUE
LIGHT, TRAFFICKING COCAINE,
PWID MARIJUANA

Pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure, and pursuant to Brady v. Maryland and Kyles v. Whitley, Defendant moves the prosecution to disclose the following, with the express provision that the duty of disclosure be a continuing one in the event that any such materials come into existence or become available after the initial disclosures, including but not limited to:

- 1) All calls for service for Deputy Loy Hayes, dispatch logs, radio transmissions, and all recordings for the date December 19, 2011;
- 2) A copy of all dash cam videos from the patrol cars involved in the incident;
- 3) A copy of Williamsburg County Sheriff's Office's policy and procedure handbook relating to traffic stops and traffic pursuits;
- 4) Any information on any informants used in this case, the identity of any informants, and what information was provided by any informants.

A CERTIFIED TRUE COPY

*Carolyn F. Williams*CAROLYN F. WILLIAMS
CLERK OF COURT
WILLIAMSBURG COUNTY

October 30, 2012

Respectfully submitted,

*Matthew S. Swilley*Matthew S. Swilley
Frederick Law Office
Attorney for the Defendant

P.O. Box 8219

Myrtle Beach, S.C. 29578

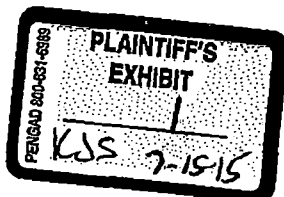
843-444-6122

mswilley@grandstrandlaw.com

CAROLYN F. WILLIAMS
CLERK OF COURT
WILLIAMSBURG COUNTY, S.C.

12 OCT 31 PM 1:55

FILED



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF WILLIAMSBURG) THIRD JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA,) AFFIDAVIT
vs.)
DAVID VICE,)
Defendant.)

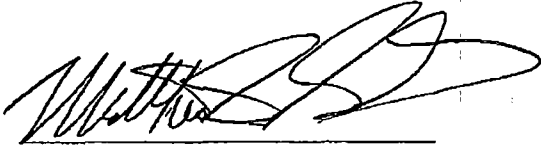
Now comes Matthew Swilley who after being duly sworn attests to the following:

1. That I am an attorney in good standing admitted to practice in the State of South Carolina.
2. That I represented the Defendant, David Vice, during his trial November 5-6, 2012 on Indictment # 2012-GS-45-0050 et.seq., for failure to stop for a blue light, PWID Marijuana, and Trafficking Cocaine, more than 28 but less than 100 grams in Williamsburg County.
3. That the Honorable Clifton Newman was the trial judge and the case was tried before a jury.
4. That counsel was retained Friday before trial and counsel requested a continuance from the Assistant Solicitor, Kimberly Barr, who was prosecuting the case. The court granted a one week continuance on the case which allowed me one week to prepare the case for trial.
5. That the time allotted for preparation was inadequate for counsel to prepare for a case which had been pending since December 2011.
6. That I made a diligent effort to represent Mr. Vice to the best of my abilities but did not interview or meet with any witnesses prior to trial.
7. That I do not feel that I had adequate time to consult or hire an expert witness to examine a crucial video tape in possession of the state.
8. That the Defendant was in my opinion prejudiced by my lack of ability to prepare and I believe if I had had adequate time to prepare I could have obtained a more favorable result for Mr. Vice.
9. That as trial counsel I was ineffective in cross examining witnesses for the State as I had not had sufficient time to investigate each potential witness or review their testimony with my client.



m ss

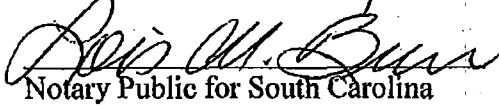
10. I do not believe Mr. Vice received a fair and impartial trial and that Mr. Vice did not receive due process.



Matthew Swilley

Date: 1/24/2014

SWORN and subscribed to me
this 24th day of January, 2014


Notary Public for South Carolina

My commission expires: 9/15/2018

STATE OF SOUTH CAROLINA
COUNTY OF WILLIAMSBURG

David R. Vice, #314663

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

2014-CP-45-485

ORDER OF DISMISSAL

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on September 17, 2014. Respondent made its return on March 3, 2015. An evidentiary hearing in to the matter was convened on July 15, 2015, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Ralph Wilson, Sr., Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. The Applicant was true bill indicted at the March 2012 term of the Williamsburg County Grand Jury for failure to stop for a blue light, possession with intent to distribute marijuana, and trafficking in cocaine, 28 g. or more, but less than 100 g. (2012-GS-45-0050). Matt Swilley, Esquire represented Applicant. Applicant proceeded to a jury trial and was found guilty as indicted on November 6, 2012. The Honorable Clifton Newman sentenced

Applicant to a ten year term of imprisonment and a \$50,000 fine for trafficking in cocaine (more than 28 g. but less than 100 g.), a three year term of imprisonment for failure to stop for a blue light, and a five year term of imprisonment for possession with intent to distribute marijuana with all sentences running concurrently.

A timely notice of appeal was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. David R. Vice, 204-UP-103 (Ct. App. 2014). The Remittitur was issued on October 28, 2014.

ALLEGATIONS

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

1. Ineffective Assistance of Counsel
 - a. Counsel failed to properly investigate the facts of the case and adequately prepare for trial;
 - b. Counsel failed to properly represented Petitioner during trial; and
 - c. Counsel failed to convey any plea offers from the State to Petitioner and failed to advise Petitioner.
2. Violation of Defendant's 6th and 14th Amendment Constitutional Guarantees.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. Applicant also presented testimony from Matt Swilley, Esquire. (hereinafter "Trial Counsel"). This Court also had before it a copy of the trial transcript, the Williamsburg County Clerk of Court records, Applicant's South Carolina Department of Correction records, appellate records, the PCR application, and return. During the evidentiary hearing, Applicant introduced various exhibits.

During the evidentiary hearing, Applicant stated that he is currently housed in Turbeville correctional institution. Applicant stated that he filed his PCR application because he felt his trial attorney was ineffective. Applicant stated that he was originally represented by Shaun Kent. Applicant stated that he hired trial counsel the Friday before the start of trial. Applicant stated Trial Counsel requested a continuance until the following term. However, Judge Newman only gave him a week long continuance. Applicant stated that the continuance was not long enough for Trial Counsel to adequately prepare the case. Applicant stated Trial Counsel received discovery the Monday after the continuance hearing. Applicant stated that they went to his Aunt's house to review the material. Applicant stated that they watched the police officer's dash cam video. Applicant stated the meeting lasted for approximately twenty or thirty minutes.

Applicant stated Trial Counsel told him that they needed to go to trial because the State had nothing on him. Applicant stated that he wanted to go to trial because he was not guilty of the charges. Applicant stated the police attempted to stop him because he was known for driving under a suspended license. Applicant stated the police officer claimed that he drove across the center yellow line. Applicant stated the police officer pulled his car in front of Applicant. Applicant stated that he sped off, a chase ensued, and he was stopped and arrested. Applicant stated that he wanted Trial Counsel to limit the testimony of the officer regarding this issue. Applicant noted that Trial Counsel filed a motion to suppress the evidence, but the motion was denied.

Applicant stated that he never discussed trial strategy with Trial Counsel. Applicant stated that there was no plea offer from the State. Applicant stated that Trial Counsel talked about a ten year plea offer. Applicant stated that he wanted to just go forward with the trial.

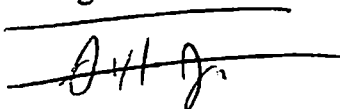
Applicant stated that he would have taken the ten year plea offer had he known that the motion to suppress hearing was denied. Applicant acknowledged that he was present for the hearing, but did not understand what the hearing meant. Applicant stated that he would have worked out something to avoid getting a lot of time.

Applicant stated Trial Counsel didn't locate witnesses or talk to anyone on his behalf because of the one week time period. Applicant stated he only knew the street names and nick names of people who were around the scene. Applicant stated there were about ten people present at the scene. Applicant stated Trial Counsel should have gone by the crime scene, hired an investigator, and examined the video tape.

Applicant stated Trial Counsel should have had an ID hearing because no one knew him. Applicant stated Trial Counsel was ineffective for failing to object to the curative instruction. Applicant acknowledged that Trial Counsel objected to the Officer Hayes stating that Applicant was known to run from law enforcement. However, Applicant claimed Trial Counsel should have objected to the curative instruction given by the trial judge. Applicant stated the Trial Counsel should have objected to the trial judge charging the jury regarding the "strong evidence" language.

Applicant opined that he would have pled guilty to get less time. Applicant stated that he did not feel Trial Counsel had any evidence to support his case. However, Applicant could not name what evidence Trial Counsel should have obtained. Applicant claimed that he is not guilty of the charges and was only found guilty because he received ineffective assistance of counsel.

Following Applicant's testimony, Trial Counsel was called to testify. Trial Counsel stated that Applicant retained him the weekend before his trial was scheduled to begin. Trial



Counsel stated Shaun Kent was representing Applicant previously. Trial Counsel stated that he advised Applicant that he could not guarantee a continuance in the case, but that he would make the motion. Trial Counsel thought that the court would continue the case until the next term of General Sessions. Trial Counsel was surprised when the trial judge only granted him a one week continuance. Trial Counsel stated that he was not satisfied with a one week continuance and felt the court should have granted him more time to prepare the case for trial.

Trial Counsel stated that he got discovery from the solicitor on the day of the motion's hearing. Trial Counsel stated that he filed a supplemental discovery motion requesting various documents including video tapes, service logs, recordings etc... Trial Counsel could not recall if he ever received the additional discovery. Trial Counsel could not recall whether he renewed his discovery request prior to trial on the record or off the record.

Trial Counsel stated that he drove out to the scene immediately following the continuance hearing. Trial Counsel explained that the police officer claimed Applicant crossed the yellow line. Trial Counsel stated the police officer cut Applicant off, Applicant drove around the officer, and a chase ensued. Trial Counsel stated that the officer claimed Applicant threw various narcotics out of the car window during the chase.

Trial Counsel stated that he explained all the probable cause information to Applicant prior to and after the hearing. Trial Counsel stated Applicant told him that he understood. Trial Counsel stated that he objected to Officer's Hayes testimony concerning Applicant's tendency to run from law enforcement. Trial Counsel stated that he moved for a mistrial and the judge denied his motion. Trial Counsel stated that he did not object to the curative instruction. Trial

Counsel stated that they discussed the ten year plea offer. Trial Counsel stated that he advised Applicant that the ten years was less time than he would get if convicted at trial.

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. Specifically, this Court finds Trial Counsel's testimony credible and Applicant's testimony not credible. 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).

INEFFECTIVE ASSISTANCE OF COUNSEL

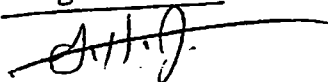
In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's 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, (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.

1. Ineffective assistance of counsel for failing to properly investigate the facts of the case and adequately prepare for trial.

This Court finds Trial counsel was not ineffective for failing to properly investigate the facts of the case and adequately prepare for trial. Initially, this Court notes "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984). In the instant case, Applicant retained Trial Counsel the weekend before his trial was scheduled for trial. Trial Counsel requested a continuance and was granted seven days to prepare the case. Trial Counsel was substantially hindered in his ability to fully prepare and investigate due to Applicant retaining his services at the ninth hour. Regardless, this Court finds Trial Counsel prepared and conducted a diligent investigation given his limited amount of time. Notably, Trial Counsel viewed and investigated the scene of the crime, obtained and reviewed discovery with Applicant, and prepared the case for trial. Based off of the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of

A handwritten signature, possibly reading "A.H.G.", is written over a horizontal line.

the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms.

Furthermore, Applicant has failed to provide this court with any credible evidence in support of his allegation. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). This Court notes Applicant complained that Trial Counsel failed to investigate into several witnesses and failed to call the various witnesses at trial. Since none of the witnesses testified at the PCR hearing, this Court cannot consider any testimony they might have given at trial to determine whether the failure to call them as witnesses constitute ineffective assistance of counsel. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (Holding the Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice).

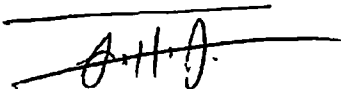
Applicant further complained the Trial Counsel should have retained an expert witness to review the video tape. Since no expert witness testified at the PCR hearing, this Court cannot consider any testimony he might have given at trial to determine whether the failure to call an expert as a witness constituted ineffective assistance of counsel. See Dempsev v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely speculative").

Additionally, Applicant claimed Trial Counsel was ineffective in failing to obtain additional discovery material and other various documents. Since Applicant failed to provide this Court with the documents in question, this Court cannot review them to ascertain whether Trial Counsel's failure to secure them amounts to ineffective assistance of counsel. See Palacio

v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense). Based off of the foregoing, this Court finds Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland – that he was prejudiced by Trial Counsel’s performance.

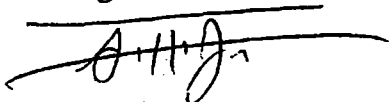
2. Ineffective assistance of counsel for failing to represent him properly at trial.

This Court finds Applicant’s allegation that he received ineffective assistance of counsel for Counsel’s failure to properly represent him at trial is meritless. First, Applicant claims Trial Counsel should have objected to the Trial Court’s curative instruction given after Trial Counsel’s request for a mistrial. At trial, Officer Hayes stated: “Considering knowing that - - if who the suspect was and knowing he was known to run from law enforcement - -”. Trial Counsel immediately objected to the testimony by the officer, and argued the admission was improper because it was evidence of prior bad acts. (T.80 lines 10-16). The Trial Court then sustained the objection and issued a curative instruction including striking the testimony from the record. (T.86 lines 7-11). Specifically, the Trial Court instructed the jury to “disregard the entire question and response.” (T.86). Applicant now contends that Trial Counsel should have objected to the curative instruction. However, this Court finds the Trial Court’s curative instruction was proper. As a result, this Court finds Applicant has failed to to present sufficient evidence to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present any credible evidence as to how he was prejudiced by Trial Counsel’s failure to

A handwritten signature, possibly reading "A.H.J.", is written over a horizontal line.

object to the curative instruction. Based off of the foregoing this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms.

Applicant further contends Trial Counsel was ineffective for failing to object to the Trial Court using language subsequently prohibited by *State v. Cheeks*, 401 S.C. 322, 737 S.E.2d 480 (2013). Specifically, Applicant referenced the Trial Court's charge to the jury: "Actual knowledge of the presence of the marijuana is strong evidence of the defendant's intent to control its disposition or use." However, the South Carolina Supreme Court has consistently held that Trial Counsel cannot be held ineffective for failing to anticipate changes in case law. See *Gilmore v. State*, 314 S.C. 453, 445 S.E.2d 454 (1994) (attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999). Applicant's trial was conducted in November 2012. *State v. Cheeks* was not decided until January 2013. As a result, Trial Counsel cannot be held ineffective for failing to anticipate changes in the law. This Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, this Court finds Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland – that he was prejudiced by Plea Counsel's performance. This Court finds Applicant's allegation should be denied and dismissed with prejudice.

A handwritten signature, likely of a judge or court official, is written over a horizontal line.

3. Ineffective assistance counsel for failing to convey any plea offers from the State to Petitioner and failed to advise Petitioner.

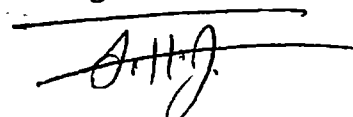
The Applicant seems to complain ineffective assistance on the ground that Trial Counsel failed to convey a plea offer. However, this Court notes Applicant acknowledged that he turned down a ten year plea offer prior to the start of trial. This Court finds credible Trial Counsel's testimony that he relayed the ten year plea offer and discussed the advantages and disadvantages of accepting the offer. This Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, this Court finds Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland – that he was prejudiced by Plea Counsel's performance. This Court finds Applicant's allegation should be denied and dismissed with prejudice.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his

A handwritten signature, possibly reading "J.H.J.", is written over a horizontal line.

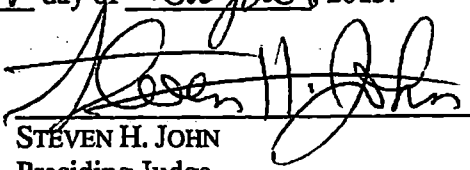
application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty 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 post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant 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 4th day of August, 2015.


STEVEN H. JOHN
Presiding Judge
Third Judicial Circuit


South Carolina