

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
D. Craig Brown, Circuit Court Judge

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S.C. SUPREME COURT

LYNEL WITHERSPOON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000633

APPENDIX

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INDEX

INDEX	i
TRIAL TRANSCRIPT DATED JULY 24-25, 2013	1
APPLICATION FOR POST-CONVICTION RELIEF	178
RETURN	187
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED FEBRUARY 9, 2016	194
ORDER OF DISMISSAL	233
INDICTMENT AND SENTENCING SHEET	239
SCDC OFFENDER MANAGEMENT SYSTEM RELEASE DATE SCREEN	243
<u>STATE V. WITHERSPOON</u> 2014-UP-354 (FILED OCTOBER 8, 2014)	246

1 STATE OF SOUTH CAROLINA) TRANSCRIPT OF RECORD
2 COUNTY OF HORRY) CASE NO: 2013-GS-26-00857

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4
5 B E F O R E: The Honorable Larry B. Hyman
6 July 24 & 25, 2013
7 -----

8 STATE OF SOUTH CAROLINA
9
10 vs.
11
12 LYNEL WITHERSPOON
13

14 -----
14 APPEARANCES:

15
16 Scott Graustein, Assistant Solicitor
17 Attorney for the State
18

19
20 Kia Wilson, Assistant Public Defender
21 Attorney for the Defendant
22

23
24 Natalie Dahl, RPR
25 Court Reporter

I N D E X

1		
2		
3	Jury Voir Dire by the Court.....	10
4	Jury Selection.....	15
5	Opening statement by Mr. Graustein.....	37
6	Opening statement by Ms. Wilson.....	39
7		
8	WITNESS:	
9	Robert Pellerin	
10	Direct Examination by Mr. Graustein.....	41
11	Cross-Examination by Ms. Wilson.....	59
12	Redirect Examination by Mr. Graustein.....	65
13	Recross-Examination by Ms. Wilson.....	66
14		
15	Will Lynch	
16	Direct Examination by Mr. Graustein.....	68
17	Cross-Examination by Ms. Wilson.....	70
18		
19	Jeremy Brown	
20	Direct Examination by Mr. Graustein.....	73
21	Cross-Examination by Ms. Wilson.....	78
22		
23	Doris Yarbrough	
24	Direct Examination by Mr. Graustein.....	81
25	Cross-Examination by Ms. Wilson.....	84

I N D E X (CONTINUED)

WITNESS:

Maribeth Coleman

Direct Examination by Mr. Graustein.....	85
Voir Dire by Ms. Wilson.....	87
Direct Examination (cont.) by Mr. Graustein....	88
Cross-Examination by Ms. Wilson.....	93

Jessica Stone

Direct Examination by Mr. Graustein.....	97
Cross-Examination by Ms. Wilson.....	108
Redirect Examination by Mr. Graustein.....	116
Recross-Examination by Ms. Wilson.....	117

Closing Argument by Mr. Graustein.....	125
Closing Argument by Ms. Wilson.....	130
Jury Charge.....	137
Allen Charge.....	159
Verdict.....	168
Sentence of the Court.....	172
Certificate of Reporter.....	178

CASE CALLED FOR TRIAL - JULY 24, 2013

P R O C E E D I N G S

(July 24, 2013)

(State's Exhibits 1 through 4 marked.)

(Whereupon, a bench conference was had.)

THE COURT: All right. Call your case,
Mr. Solicitor.

MR. GRAUSTEIN: This is the matter of the
State versus Lynel Witherspoon on Indictment No.
2013-GS-26-0857. That is a true billed
indictment for distribution of cocaine, and it is
ready to go to trial.

THE COURT: It is a third offense?

MR. GRAUSTEIN: Third offense, Your
Honor. The State would be moving to amend the
indictment to distribution of cocaine base or
crack cocaine.

THE COURT: I'll hear you on that.

MS. WILSON: No objection, Your Honor.

THE COURT: Very well, so amended.

MR. GRAUSTEIN: That is under the Statute
44-53-375(B)(3), CDR-3039.

THE COURT: Any motions or pretrial
matters?

MR. GRAUSTEIN: None from the State.

MS. WILSON: Your Honor, we would just

MR. WITHERSPOON ADDRESSES THE COURT

1 have our normal motion to sequester all of the
2 witnesses.

3 THE COURT: We'll grant that as to both
4 sides. Lead investigator and the -- of course
5 the defendant, if he chooses to testify -- will
6 be available, okay.

7 MS. WILSON: Thank you, Your Honor.

8 THE COURT: Or in the courtroom. Mr.
9 Ropp, bring the jury panel in.

10 Are you going to have any witnesses other
11 than potentially the defendant?

12 MS. WILSON: No, sir, Your Honor. Before
13 the panel comes in, I think my client wants to
14 just put on the record his concerns about me as
15 his counsel. I want to be clear that my client
16 and I discussed that he was unhappy with me
17 before, and I think we appeared in front of this
18 court, and since then he has filed a complaint
19 about me. I want him to have an opportunity to
20 place that on the record before we begin today.

21 THE COURT: All right, sir.

22 MR. WITHERSPOON: I did file a complaint
23 of conflict of interest.

24 THE COURT: What is the conflict of
25 interest do you have?

MR. WITHERSPOON ADDRESSES THE COURT

1 MR. WITHERSPOON: Insufficient counsel.

2 THE COURT: That is not a conflict.

3 MR. WITHERSPOON: I had her, my counsel,
4 before in the past, and before she tried to get
5 me to cop a plea and that, but I wanted to take
6 it to trial, therefore, I see that that's a
7 conflict right there.

8 THE COURT: No, sir, that is not a
9 conflict. She was advising you as to what she
10 thought you should do with your case, and that is
11 not a conflict. Mr. Witherspoon, I'm not
12 continuing this case without counsel. If you
13 want to go forward -- I mean because you want to
14 change counsel. If you want to go forward
15 without a lawyer, that's fine. That decision has
16 been made freely and voluntarily by you, if that
17 is what you want to do. I suggest you not do
18 that because you are represented by a very
19 competent attorney, one that has appeared before
20 me many times and tried cases before me many
21 times. I'm telling you, you have a good lawyer.
22 Whether you like your situation or not, that's
23 not her fault. She will do the best job she can.
24 I'm not going to continue your case. I assume
25 that is what you want to do, continue your case

1 to get another lawyer, and we're not doing it
2 COURT ADDRESSES THE JURY PANEL
3 this late date after your case has already been
4 called for trial. Thank you, sir.

5 MR. WITHERSPOON: I just wanted to state
6 for the record, sir.

7 THE COURT: All right.

8 (A recess was taken to await the jury.)

9 THE COURT: Is that everyone, Mr. Ropp?

10 MR. ROPP: Yeah.

11 THE COURT: Ladies and gentlemen, it is
12 good to see you again. I have you up here this
13 morning because we are about to begin a trial of
14 the State of South Carolina versus Lynel
15 Witherspoon. Mr. Witherspoon is seated here with
16 his attorney, Ms. Wilson, at the defense table.
17 He is charged under an indictment with the
18 offense of distribution of cocaine base or crack
19 cocaine. Let me tell you at the outset that the
20 fact that a person may have been arrested and
21 indicted for the criminal offense raises no
22 presumptions or inferences at all, none,
23 whatsoever. An indictment is not evidence, it is
24 not to be considered by you as evidence. It is
25 nothing more than a document by which we begin
this process. We have to begin it with

1 something, and it is a document that is produced
2 COURT ADDRESSES THE JURY PANEL to, one, put the defendant on notice on what he
3 is charged with and, two, to start the legal
4 process. So let me make sure that you understand
5 that the fact that he has been indicted is not
6 evidence in this case.

7 Now, we're, as I said, about to begin the
8 process of selecting a jury for this case. As I
9 told you all on Monday, the jury selection
10 process is really two levels. The first was what
11 we did on Monday where we determined whether or
12 not you were qualified to serve as jurors. We're
13 now about to engage in the second level where we
14 determine whether or not you would have any
15 interest, prejudice or bias, whether there would
16 be any reason for you not to sit on this
17 particular jury, because there is nothing more
18 important in the jury trial process than
19 selection of a fair and impartial jury, and that
20 is sometimes a difficult process.

21 It is a process that we approach with
22 thoroughness. We want to make sure that none of
23 you would have any interest that might prevent
24 you from being fair and impartial in this case.

25 The way that we are going to do that is

VOIR DIRE BY THE COURT

1 in just a moment. I'll ask you some questions
2 about this case and any information that you
3 might have concerning the case. That is, I want
4 to know whether or not there is any possibility
5 that you would have any interest, prejudice or
6 bias about this particular case. It is so
7 important that you answer these questions
8 truthfully that we're going to place you under
9 oath again. You were placed under oath Monday
10 when you answered questions concerning your
11 general qualifications to serve as jurors, but
12 we'll place you under oath again to make sure you
13 answer truthfully concerning your qualifications
14 to sit on this particular trial. Madam Clerk.

15 (Whereupon, the jury panel was sworn.)

16 VOIR DIRE

17 THE COURT: Was there anyone that did not
18 take that oath?

19 And there is no response.

20 Let me begin if any of you have ever been
21 related by blood or marriage or do you have a
22 close, personal or social relationship with the
23 defendant in this case, Mr. Lynel Witherspoon?
24 Mr. Witherspoon, I'll ask that you stand and turn
25 around and face the jury so they can familiarize.

VOIR DIRE BY THE COURT

1 themselves. Thank you, Mr. Witherspoon. Has
2 anybody been related by blood or marriage or had
3 a close personal or social relationship with Mr.
4 Witherspoon?

5 And there is no response.

6 I have before me a list of potential
7 witnesses who may testify in this case. Some of
8 these witnesses may not testify. I ask the
9 attorneys to give me a list of those people who
10 might possibly testify, and the reason I do that
11 is I want to make sure that we don't have any
12 relatives or close personal friends of yours who
13 would be testifying in a case where you were
14 sitting on the jury. These witnesses are Robert
15 Pellerin, Will Lynch, Jeremy Brown, Jamey
16 Johnson, Doris Yarbrough, Maribeth Coleman, Dean
17 Bishop and Jessica Stone. Is anyone related by
18 blood or marriage to any person having those
19 names, or do you have a close personal or social
20 relationship with a person having those names?

21 And there is no response.

22 The attorneys in this case are Mr. Scott
23 Graustein. Mr. Graustein, please stand and face
24 the jury panel. Thank you Mr. Graustein. Mr.
25 Graustein is an assistant solicitor here in the

VOIR DIRE BY THE COURT

1 15th Judicial Circuit, although that circuit is
2 comprised of Horry and Georgetown, to my
3 knowledge, Mr. Graustein tries -- or represents
4 the State in matters only here in Horry County.
5 He's been with the solicitor's office for a
6 number of years, and I believe that's the only
7 practice you've had in Horry County; is that
8 right, Mr. Graustein?

9 MR. GRAUSTEIN: I had private practice
10 for a period.

11 THE COURT: All right. For some while.
12 Okay.

13 Now, seated at the defense is Ms. Kia
14 Wilson. Ms. Wilson is with the 15th Judicial
15 Circuit, public defender's office. She has been
16 representing people who have been charged with
17 criminal offenses here in this court for many
18 years, and as I said, she works presently with
19 the public defender's office. I believe that is
20 the only place you've worked; is that right?

21 MS. WILSON: I worked for the Center of
22 Equal Justice for about a year before I came
23 here.

24 THE COURT: With Horry County?

25 MS. WILSON: Yes, sir.

VOIR DIRE BY THE COURT

1 THE COURT: Okay. Very well.

2 Has anyone in the jury panel ever been
3 represented by either of these attorneys, or are
4 you related by blood or marriage to either of
5 these attorneys, or have you ever had a close
6 personal or social relationship with either of
7 these attorneys?

8 And there is no response.

9 Has any member of the jury panel formed
10 or expressed an opinion about any issue or matter
11 involved in this case? You don't know anything
12 about this case, so I'm going to tell you a
13 little bit about the case, just some basic
14 information that might help you identify this
15 incident that occurred, or allegedly occurred. I
16 want to know if you were present, if you were
17 driving by, if you know the parties who were
18 involved in it, if you heard anything about it,
19 if you read a newspaper article about it, if you
20 have any information, whatsoever, or if you have
21 discussed it with anyone. It is alleged that Mr.
22 Witherspoon did in Horry County -- in what part,
23 Mr. Graustein?

24 MR. GRAUSTEIN: Myrtle Beach section.

25 THE COURT: In the Myrtle Beach section

VOIR DIRE BY THE COURT

1 of Horry County on August 31, 2011, that he did
2 distribute, dispense or aid and abet or attempt
3 to conspire to distribute or dispense a quantity
4 of cocaine base or crack cocaine, as it is
5 commonly known. Does anyone know anything about
6 this case? Have you discussed it with anyone?
7 Do you recall reading about it? Do you have any
8 information, whatsoever, about this case?

9 And there is no response.

10 Is any member of the jury panel aware of
11 any bias or prejudice that they may have towards
12 either the State or the defendant in this case?

13 And there is no response.

14 Is there any member of the jury panel
15 that has recently been a member of the Grand
16 Jury? I think we tried to take care of that on
17 Monday, but would there be anybody who was a
18 member of the Grand Jury in February of 2013?

19 And there is no response.

20 Is there any member of the jury panel who
21 is a member or contributed to any group which has
22 as its primary concern the promotion of law
23 enforcement or victim's rights, and these groups
24 are things like MADD, SADD, Citizens Against
25 Violent Crimes, that type of group? Any one a

JURY SELECTION

1 member or contributor of such groups?

2 And there is no response.

3 Does any member of this jury panel know
4 of any reason, whatsoever, why he or she should
5 not serve as a juror in this case with particular
6 emphasis being placed on your ability to be fair
7 and impartial to both the State and the defense?

8 And there is no response.

9 Any further queries, Mr. Graustein?

10 MR. GRAUSTEIN: No, Your Honor.

11 THE COURT: Any from the defense?

12 MS. WILSON: No, Your Honor.

13 JURY SELECTION

14 THE COURT: Ladies and gentlemen, we're
15 about to begin the selection process. I find
16 that you are qualified to sit as jurors in this
17 particular case. The way we do that in the
18 criminal side of the court is a little different
19 than what we do on the civil side. If you have
20 had an opportunity to serve on a civil jury, you
21 might have noticed that you came in a room like
22 this and the attorneys immediately began calling
23 out numbers that were their strikes and that
24 those numbers didn't correlate at all with the
25 jury numbers that you actually have, and that's

JURY SELECTION

1 because we give the jurors new numbers that they
2 don't know anything about, and when the strikes
3 occur on the civil side, there is no way of
4 knowing whether you were struck or not. That
5 seems to be a polite way to do it compared to
6 when we look at the way we do it on the criminal
7 side, but our conditions here on the criminal
8 side of the court are different.

9 We require you, as your name is called,
10 to come forward and have you to stand right up
11 here by yourself in front of everybody, and at
12 that time the State will exercise its right to
13 seat you. The State will say something like --
14 Mr. Graustein will say, Present the juror, which
15 means that he accepts the juror on this
16 particular case, or he may say, Excuse the juror
17 on this particular case. If he says, Excuse the
18 juror, you get to return to your seat. If he
19 says, Present the juror, then Ms. Wilson has an
20 opportunity to either say, Swear the juror, in
21 such case you would come around and have a seat
22 in the jury box and be on the jury, or she may
23 say, Excuse the juror on this particular case,
24 and if that is what she does, you return to your
25 seat and you will not be on the jury.

JURY SELECTION

1 A lot of people find that that is
2 somewhat embarrassing to be brought up here and
3 have the attorneys say we accept you or reject
4 you. Please, don't be embarrassed by that. I
5 can tell you that that's a very difficult process
6 for attorneys and they have very, very little
7 information about you. Some of you may have
8 filled out your jury questionnaire form, and that
9 is probably the only information that they have,
10 whatsoever, about you, if they have that. The
11 reason you were struck is more than likely just
12 because they were looking down the list and saw
13 someone that they thought might be more
14 sympathetic to their position in the case and
15 they were simply trying to reach them.

16 I'm telling you all this so you don't
17 feel bad if you are struck, but you are probably
18 all hoping you'll be struck and not have to sit.
19 Let me tell you that if you are placed on this
20 jury, you'll find it to be an interesting and
21 rewarding experience. It is very seldom we're
22 called to serve as jurors to judge our fellow
23 citizens. It is a unique experience. Most
24 people go through life and never have done it.
25 Once you have done it, I think you will realize

JURY SELECTION

1 how important the jury process is to this
2 community, this state and this country, and I
3 believe you will be rewarded. You may not enjoy
4 it, but you will be rewarded by your service.

5 As I said, I found that all of you are
6 qualified to serve on this jury panel, so what
7 I'll do is I'll ask the clerk of court to begin
8 by calling your names one at a time and I'll have
9 you come forward. Come down here by this podium,
10 turn around and face the other folks in the
11 gallery and we'll get on with the selection
12 process. Five and five on the strikes.

13 MR. GRAUSTEIN: Yes, sir.

14 MS. WILSON: Yes, sir.

15 THE CLERK: Juror No. 229, Russell
16 Parker. What say the State?

17 MR. GRAUSTEIN: Present the juror.

18 THE CLERK: Defense?

19 MS. WILSON: Court's indulgence. Please
20 excuse the juror.

21 THE CLERK: You are excused for this
22 case.

23 308, George Sweet. What say the State?

24 MR. GRAUSTEIN: Present the juror.

25 THE CLERK: Defense?

JURY SELECTION

1 MS. WILSON: Please excuse the juror.
2 THE CLERK: You are excused from this
3 case.
4 107, Devin Floyd. What say the State?
5 MR. GRAUSTEIN: Present the juror.
6 THE CLERK: Defense?
7 MS. WILSON: Please swear the juror.
8 THE CLERK: Please be seated in the jury
9 box.
10 89, Stevie Doyle. What say the State?
11 MR. GRAUSTEIN: Present the juror.
12 THE CLERK: Defense?
13 MS. WILSON: Please seat the juror.
14 THE CLERK: Please be seated in the jury
15 box.
16 133 George Hammett. What say the State?
17 MR. GRAUSTEIN: Excuse the juror.
18 THE CLERK: You are excused from this
19 particular case.
20 327, Elizabeth Walker.
21 MS. WILSON: What was the number?
22 THE CLERK: 327.
23 MS. WILSON: Thank you.
24 THE CLERK: What say the State?
25 MR. GRAUSTEIN: Present the juror.

JURY SELECTION

1 THE CLERK: Defense?

2 MS. WILSON: Please seat the juror.

3 THE CLERK: Please be seated in the jury
4 box.

5 21, Kaitlin Boatwright. What say the
6 State?

7 MR. GRAUSTEIN: Present the juror.

8 THE CLERK: Defense?

9 MS. WILSON: Please seat this juror.

10 THE CLERK: 189, Sarah Majewski. What
11 say the State?

12 MR. GRAUSTEIN: Please excuse this juror.

13 THE CLERK: You are excused from this
14 particular case.

15 275, April Seymour. What say the State?

16 MR. GRAUSTEIN: Present the juror.

17 THE CLERK: Defense?

18 MS. WILSON: Please seat this juror.

19 THE CLERK: Please be seated in the jury
20 box.

21 13, Judy Barrs. What say the State?

22 MR. GRAUSTEIN: Present the juror.

23 THE CLERK: Defense?

24 MS. WILSON: Please excuse this juror.

25 THE CLERK: You are excused from this

JURY SELECTION

1 case.

2 79, Daniel Dekeyzer. What say the State?

3 MR. GRAUSTEIN: Present the juror.

4 THE CLERK: Defense?

5 MS. WILSON: Please seat this juror.

6 THE CLERK: 283, Tanya Skinner. What say
7 the State?

8 MR. GRAUSTEIN: Present the juror.

9 THE CLERK: Defense?

10 MS. WILSON: Please seat this juror.

11 THE CLERK: 65, Josh Copeland. What say
12 the State?

13 MR. GRAUSTEIN: Present the juror.

14 THE CLERK: Defense?

15 MS. WILSON: Please excuse this juror.

16 THE CLERK: You are excused from this
17 particular case.

18 318, Thomas Trout. What say the State?

19 MR. GRAUSTEIN: Present the juror.

20 THE CLERK: Defense?

21 MS. WILSON: Please swear the juror.

22 THE CLERK: Please be seated in the jury
23 box.

24 287, Johanna Smith. What say the State?

25 MR. GRAUSTEIN: Present the juror.

JURY SELECTION

1 THE CLERK: Defense?

2 MS. WILSON: Please swear this juror.

3 THE CLERK: Please be seated in the jury

4 box.

5 241, Ellen Popovich. What say the State?

6 MR. GRAUSTEIN: Present the juror.

7 THE CLERK: Defense?

8 MS. WILSON: Please excuse this juror.

9 THE CLERK: You're excused from this
10 particular case.

11 295, Kristy Stalvey. What say the State?

12 MR. GRAUSTEIN: Please excuse this juror.

13 THE CLERK: You're excused from this
14 particular case.

15 146 Matthew Holt. What say the State?

16 MR. GRAUSTEIN: Excuse this juror.

17 THE CLERK: You are excused from this
18 particular case.

19 159, Cynthia Johnson. What say the
20 State?

21 MR. GRAUSTEIN: Present the juror.

22 MS. WILSON: Please swear the juror.

23 THE CLERK: Please be seated in the jury
24 box.

25 274, Brandy Semones. What say the State?

JURY SELECTION

1 MR. GRAUSTEIN: Present the juror.

2 THE CLERK: Defense?

3 MS. WILSON: I'm sorry, one second.

4 Please seat this juror.

5 THE CLERK: Please be seated in the jury
6 box.

7 183, ginger Lewis. What say the State?

8 MR. GRAUSTEIN: Present this juror.

9 THE CLERK: Defense?

10 MS. WILSON: Please swear this juror.

11 THE CLERK: Please be seated in the jury
12 box.

13 THE COURT: Do you anticipate needing
14 more than one alternate?

15 MR. GRAUSTEIN: No, Your Honor.

16 MS. WILSON: No, Your Honor.

17 THE CLERK: 92, Robin Dunn. What say the
18 State?

19 MR. GRAUSTEIN: Present this juror.

20 THE CLERK: Defense?

21 MS. WILSON: Please excuse this juror.

22 THE CLERK: You are excused from this
23 particular case.

24 61, Marlene Coleman. What say the State?

25 MR. GRAUSTEIN: Present the juror.

JURY SELECTION

1 THE CLERK: Defense?

2 MS. WILSON: Please excuse this juror.

3 THE CLERK: You are excused from this
4 particular case.

5 130, Kesia Hamachek. What say the State?

6 MR. GRAUSTEIN: Present the juror.

7 THE CLERK: Defense?

8 MS. WILSON: Please swear this juror.

9 THE CLERK: Please be seated in the jury
10 box.

11 THE COURT: All right. That will be our
12 jury and alternate. Ms. Hamachek, will you
13 always occupy that seat when we return to the
14 courtroom? Ms. Johnson, if you will, always
15 occupy that seat. Mr. Ropp, will you take them
16 back to the jury room and show them where they'll
17 be while I excuse the balance of the jury.

18 (Whereupon, the jury exits at 10:32 a.m., and
19 the following is heard out of the presence of
20 the jury.)

21 THE COURT: All right. The balance of
22 this jury panel is excused for today. Thank you
23 for coming. Please call back at 6 o'clock this
24 afternoon. Thank you very much.

25 (Whereupon, the jury panel exits at 10:33

JURY SELECTION

1 a.m.)

2 THE COURT: Does the defense or State
3 challenge the jury panel?

4 MS. WILSON: No, sir, I do not.

5 MR. GRAUSTEIN: No, Your Honor.

6 THE COURT: Very well. Are we ready to
7 proceed with the trial?

8 MR. GRAUSTEIN: State is ready.

9 MS. WILSON: Ready, Your Honor.

10 THE COURT: We'll give the jury -- they
11 were stuck in the jury room for awhile, so let's
12 give them a chance to refresh themselves, and
13 we'll be back and ready to go in about ten
14 minutes, and that will give the attorneys an
15 opportunity for a break as well.

16 (A recess was taken from 10:34 to 10:36 a.m.)

17 THE COURT: Anything we need to take up
18 before the jury comes in?

19 MR. GRAUSTEIN: None from the State.

20 THE COURT: Anything from the defense?

21 MS. WILSON: Nothing, Your Honor, thank
22 you.

23 THE COURT: If you would, bring the jury
24 in.

25 (Whereupon, the jury enters at 10:36 a.m., and

COURT ADDRESSES THE JURY

1 the following was had in the presence of the
2 jury.)

3 THE COURT: We're about to begin this
4 case of the State of South Carolina versus Lynel
5 Witherspoon. I would like to make a few
6 preliminary remarks to you and let you know what
7 we'll be doing and how we'll do it. I ask
8 Ms. Johnson to sit in that chair because you will
9 be the forelady of the jury. If any issue arises
10 that requires my attention, please direct it
11 first to the attention of Mr. Ropp, the bailiff,
12 and he'll bring it to my attention and we'll
13 address it.

14 I'll tell you how I try cases. It is my
15 opinion that there is nothing more important than
16 the jury. Everything that we do in this
17 courtroom is for the jury. If you can't hear or
18 you can't see what is going on in the courtroom,
19 then justice cannot prevail, so I'll ask you if
20 at any time you can't hear a witness, you can't
21 see an exhibit, you are unable to determine what
22 is going on in the courtroom, I ask you to
23 immediately raise your hand and let me know that
24 so that we can adjust the podium or have the
25 witness speak up, or do whatever we need to do to

COURT ADDRESSES THE JURY

1 make sure that you can see and hear all of the
2 evidence that is presented in this case.

3 Also, if at any time during the trial of
4 this case you should become uncomfortable, you
5 need to refresh yourself, you need a break, don't
6 hesitate to raise your hand and let me know. I
7 do not want you to be distracted by that in any
8 way, form or fashion. We'll take a break any
9 time you, as the jury, determine that you need a
10 break. If you are on break or in the jury room
11 and I send for you and you are not ready to come
12 out, Ms. Johnson, tell Mr. Ropp that you're not
13 ready to come out and we'll do that.

14 Ms. Hamachek, you'll always occupy that seat
15 because you are our alternate. The rest of you
16 can sit anywhere you would like other than
17 Ms. Johnson and Ms. Hamachek's seat when we
18 return to the courtroom.

19 You may find that as this trial
20 progresses, it is different from the trials that
21 you may see on TV. I don't think you can turn on
22 the TV and there is not a trial or something
23 going on. We have TV stations dedicated just to
24 trials. There seems to be a lot of interest in
25 that sort of thing. Those trials may be, in your

COURT ADDRESSES THE JURY

1 experience, action-packed and always a lot of
2 suspension and things going on. In reality,
3 trials are not that way, because the search for
4 justice is often very slow, deliberate and
5 repetitive. The trial may move along, in your
6 opinion, at a snail's pace, but that is because
7 we must follow the rules of evidence. Evidence
8 and testimony must be presented in a way that is
9 orderly and in compliance with those rules of
10 evidence. So it may not be what you anticipate
11 or what you expect, but let me remind you that
12 just like the attorneys here, you are sworn to
13 uphold the integrity and the fairness of our
14 judicial system, and by doing so, you protect the
15 rights of this defendant and you also serve the
16 purposes of the State of South Carolina.

17 Now, what I tell you now is not to serve
18 as an instruction on the law. At the end of this
19 case, I will give you a thorough and complete
20 charge as to the law that you will apply in this
21 case, so do not think that this is the only
22 charge that I'm going to be giving you.

23 Now, the defendant in this case, Mr.
24 Witherspoon, as I said, has been indicted for the
25 offense of distribution of cocaine base or what

COURT ADDRESSES THE JURY

1 is commonly known as crack cocaine. I emphasize
2 again that an indictment is not evidence. The
3 fact that he has been charged is not evidence.
4 There is no inference or presumption that is
5 raised in any form or fashion concerning the fact
6 that he is charged and indicted, that has nothing
7 to do with your determination of whether or not
8 he is guilty or innocent of this charge.

9 He has pled not guilty to this charge,
10 and by doing so, he invokes his right on his
11 presumption of innocence. There is a presumption
12 of innocence that follows him throughout this
13 trial. He is presumed to be innocent and he is
14 innocent until such time as the State proves its
15 case beyond a reasonable doubt, that's the burden
16 of proof that the State has. The State must
17 convince each and every one of you of his guilt
18 of this particular offense beyond a reasonable
19 doubt.

20 As jurors, it is your duty to determine
21 the facts in this case. The facts from the
22 evidence, which you will receive during the
23 course of the trial, you are to consider nothing,
24 but the evidence that you hear from this witness
25 stand and any exhibits that may be introduced

COURT ADDRESSES THE JURY

1 into court. Naturally, you must sift through
2 that evidence, and you must determine the
3 credibility of the people who have testified
4 during the trial. In doing so, you can apply
5 anything that you in your lives have determined
6 to be a reasonable way to search for the truth.
7 You can believe one witness over many, or many
8 over one. You can believe part of a witness'
9 testimony and reject the remaining part. You can
10 believe everything a witness says, or you can
11 believe nothing a witness says. It is entirely
12 up to you. You can consider such things as how
13 well a witness is able to recall what happened,
14 what the witness' position was, whether he or she
15 was in a position to hear or see what transpired.
16 You can consider any interest, prejudice, bias or
17 motive that a witness may have. You may even
18 consider the way a witness appears, sometimes we
19 call that a witness' demeanor on the witness
20 stand.

21 After you have made a determination of
22 the facts in the case, you will apply the facts
23 as you find them to the law as I give it to you.
24 As I said, at the end of the trial I will give
25 you a detailed explanation of the law you are to

COURT ADDRESSES THE JURY

1 provide -- or to use. If you think about it, the
2 deliberations process is two parts. You, the
3 jury, determine what the facts are from the
4 evidence. I will provide you with the law. The
5 deliberation process is the bringing together of
6 those facts to the law to see how it fits in
7 determining whether or not the State has
8 convinced you beyond a reasonable doubt of the
9 defendant's guilt in this particular case.

10 Now, during the trial of this case, you
11 may at times hear the attorneys says something
12 like, We have a matter to take up outside the
13 presence of the jury, or, We have a motion to
14 make. Usually, that involves the way a
15 particular piece of evidence is presented or the
16 evidence itself, and that would require me to
17 perhaps comment on that evidence. It would be
18 highly improper for me -- for you to hear my
19 opinion about a particular piece of evidence. If
20 I say or do anything during this trial that would
21 suggest to you that I have an opinion about some
22 testimony or evidence in this trial, please
23 disregard it. That is absolutely unintentional.
24 I have no right to even have an opinion about the
25 evidence in the case; that is solely within your

COURT ADDRESSES THE JURY

1 prerogative to determine the weight and effect of
2 the evidence in this case.

3 So, naturally, when those types of
4 motions are made, we remove you from the
5 courtroom so that I will not influence you by any
6 comments that I make. It is not that we're
7 trying to keep anything from you, at all. The
8 attorneys are not trying to keep anything from
9 you, at all. It is merely a case of my, perhaps,
10 influencing your view of the evidence, and that's
11 why we would remove you from the courtroom.

12 Let me advise you that you should not
13 begin your deliberations on this case until you
14 have heard all of the evidence that is presented
15 and I have charged you on the law. There is
16 always two sides to every coin, and if you
17 discuss a witness' testimony, even among
18 yourselves, before you have heard all of the
19 testimony, that is pre-deliberations, so I ask
20 you not to do it. I don't anticipate this case
21 going past today. I think we can finish this
22 case today, based on what little information I
23 have from the lawyers. I may be wrong. We may
24 certainly go over into tomorrow, but I think we
25 will probably finish today. If we do go over,

COURT ADDRESSES THE JURY

1 let me ask you, again, not to discuss it with
2 your husbands, wives, significant others or
3 family members or anyone else, because, again,
4 that would be improper.

5 Do not try to determine anything about
6 this case by going on any Website or social
7 media. You know, we used to not worry about it,
8 but now everybody who has a Smart phone has at
9 his or her fingertips every old newspaper
10 articles, maps of every location in the world, I
11 think you can even bring it down and get pictures
12 of buildings and things of that. Don't do that.
13 You are going to have to base your determination
14 in this case solely on the evidence that you hear
15 from the witness stand. Please, I ask you not to
16 try to look up anything about this case. We've
17 had witnesses who even looked up the law and
18 tried to determine whether or not the judge
19 instructed them properly on the law. Please,
20 don't do anything like that.

21 I'll tell you this, and I emphasize it in
22 a way that I want you to understand, if I make a
23 mistake in this courtroom, ruling on the evidence
24 or charging of the law, anything of that nature,
25 it is on the record and the parties would have a

COURT ADDRESSES THE JURY

1 right to appeal what I do in the court of appeals
2 or supreme court, and they could correct my
3 errors. There is no one in the jury room with
4 you, no one knows what goes on in the jury room
5 but you, and if there is a mistake made in the
6 jury room, if there is a breach of my
7 instructions to you in the jury room, no one will
8 know about it, and those kinds of mistakes cannot
9 be corrected on appellant review. So I ask you
10 to please do not do anything of that nature.
11 Again, keep an open mind as you hear the evidence
12 and pay close attention to the evidence as it is
13 presented to you.

14 As we begin the case, Mr. Graustein, the
15 solicitor, will give what is called an opening
16 remark or opening statement. In that statement,
17 he may talk to you about the law, he may talk to
18 you about the evidence. He may suggest to you
19 what the facts in this case are, and that's
20 perfectly all right for him to do so, but I'm
21 telling you that what he says is not evidence.
22 It's not the law that you are to consider in this
23 case -- or may or may not be the law. You must
24 be guided by the law as I give it. The evidence
25 in this case will suggest -- or you will weigh

COURT ADDRESSES THE JURY

1 the evidence and determine what the facts are.
2 He has the right, and certainly should, to tell
3 you what he expects to show in his case. He
4 advises you as to why the defendant was charged
5 and why he believes the defendant is not guilty.
6 Remember, what he says is not evidence and
7 shouldn't be considered by you as evidence. You
8 consider only what you hear from the witness
9 stand.

10 After Mr. Graustein has completed his
11 opening remarks, Ms. Wilson will also give a
12 opening remark, and she will, likewise, discuss
13 this case with you in a light most favorable to
14 her client. She will tell you why she does not
15 believe that the State can meet its burden of
16 proof. These opening statements are to give you
17 an idea of what you can expect to see during the
18 trial of the case. Again, these opening remarks
19 are not evidence.

20 Following that, Mr. Graustein will begin
21 the case by putting up the witnesses that the
22 State has brought to prove this case. Again, the
23 burden of proof in this case is 100 percent on
24 the State. The State must prove its case. The
25 State must convince you of the defendant's guilt

COURT ADDRESSES THE JURY

1 beyond a reasonable doubt.

2 During his presentation, as the witnesses
3 come up, Ms. Wilson will have the opportunity to
4 cross-examine those witnesses after they have
5 testified for Mr. Graustein. At the end of the
6 State's case, Ms. Wilson will have the
7 opportunity to put up any witnesses that she
8 believes would be effective in showing or
9 discounting the State's case.

10 The defendant is not under any obligation
11 to put up a single witness. He has a presumption
12 of innocence. He has no obligation to testify or
13 to put up any witnesses, and if he does not, you
14 should not consider that against him in any form
15 or fashion.

16 At the end of the evidence, the State
17 will make a closing argument. Again, it is much
18 like an opening argument, it is not evidence, but
19 he will summarize the evidence that he believes
20 has been presented and what factual -- what facts
21 should be drawn or conclusions should be made
22 from that evidence. He, essentially, summarizes
23 his case. Ms. Wilson then has an opportunity to
24 do likewise.

25 Following that, I will instruct you fully

COURT ADDRESSES THE JURY

1 and completely on the law, and the case will be
2 given to you for your deliberations.

3 Anything further, Mr. Graustein?

4 MR. GRAUSTEIN: No, Your Honor.

5 THE COURT: Ms. Wilson?

6 MS. WILSON: Nothing, Your Honor.

7 THE COURT: Very well, let's begin the
8 case.

9 MR. GRAUSTEIN: Good morning, ladies and
10 gentlemen. I'm Scott Graustein, assistant --

11 THE COURT: One second. Let's swear the
12 jury. We haven't given the oath yet.

13 (Whereupon, the jury was sworn.)

14 THE COURT: Was there any member OF the
15 jury panel or the alternate that did not take the
16 oath?

17 And there is no response. Thank you very
18 much. I'm sorry, Mr. Graustein.

19 MR. GRAUSTEIN: Good morning. I'm Scott
20 Graustein, solicitor assistant with the
21 15th circuit, prosecutor in the case. The
22 judge went over various roles of the folks in the
23 courtroom and, of course, as he said, a lot of us
24 are familiar with how it works on TV, got the
25 clerk's office up here keeping everybody straight

OPENING STATEMENT BY MR. GRAUSTEIN

1 here, we got the court reporter that is taking
2 down everything that is said, of course you have
3 Ms. Wilson who is going to make sure that I do my
4 job, and the jury. Your job is to determine what
5 happened, that's what your job is.

6 The judge will tell you what the law is,
7 but you are the ones who will decide what
8 happened here. I'm going to tell you what
9 happened through my witnesses. As the Judge told
10 you, the defendant has been indicted on a
11 distribution of crack cocaine charge. Under the
12 law, and the Judge will instruct you on the law,
13 selling, distributing, any amount of crack
14 cocaine in South Carolina is illegal.

15 Our allegation is that the defendant sold
16 a quantity of crack cocaine. We're going to
17 present you with evidence that that's what
18 happened. Does it matter how much crack cocaine
19 he sold? No, it doesn't. So that's something we
20 have to prove to you. What we're going to do is
21 we've got a number of law enforcement officers
22 who worked on the case and will tell you what
23 they did with regard to this. The individual who
24 bought the crack cocaine will come in and tell
25 you what happened, and other evidence that was

OPENING STATEMENT BY MR. GRAUSTEIN

1 gathered by the police will be presented to you.
2 You will be able to determine that -- whether or
3 not this defendant sold crack cocaine to
4 somebody. That's the crux of the matter in this
5 case. Did this defendant sell crack cocaine? So
6 we'll present evidence on that.

7 Some of the evidence may seem, as the
8 Judge said, a little dry, maybe overly technical,
9 but that is things required by the law. We will
10 present the evidence that you should be able to
11 easily determine whether or not this defendant
12 sold crack cocaine on the date in question. Just
13 listen to the witnesses, look at the evidence and
14 you should be able to reach your verdict on this
15 case. Thank you.

16 THE COURT: Ms. Wilson.

17 MS. WILSON: Thank you, Your Honor. Good
18 morning, ladies and gentlemen. I'm Kia Wilson
19 from the public defender's office, and I
20 represent Lynel Witherspoon. I'm going to agree
21 with the State on one thing, and it is probably
22 the only thing we'll agree on the entire time
23 this case is tried, and that is you do have the
24 burden of deciding what happened in this case.

25 Now, the State wants you to believe that

OPENING STATEMENT BY MS. WILSON

1 it is a really simple easy process. He'll put up
2 the witnesses and you'll hear what they say, and
3 there is no way that you are going to be able to
4 find that Lynel is innocent, that's what he's
5 saying to you.

6 I'm going to say to you that your job is
7 much more serious than that. Yes, you are going
8 to hear what the State's witnesses say and they
9 are all coming up here and have very pointed
10 directed explanations for what occurred in this
11 case, every last one of them, because they have
12 an agenda, and their agenda is to convince you
13 that this man committed this crime. But out of
14 everything they will present to you, and there
15 will be lots of things they'll show, probably a
16 video, probably show you drugs, wave around a
17 little bag, this is the drugs from this case, but
18 there are also things they are not going to be
19 able to show you, things that they cannot show
20 you in this case which equals reasonable doubt,
21 okay. Everything that equals reasonable doubt is
22 a reason for you to not convict this man.

23 Now, as this case progresses, I will be
24 getting up and examining the witnesses here, but
25 I'm just asking you to listen with a very

OPENING STATEMENT BY MS. WILSON

1 critical ear and to look with very critical eyes
2 at every person and everything you see in this
3 courtroom today. I believe that if you do that,
4 you will find that Lynel is innocent of this
5 charge. Thank you very much.

6 THE COURT: Mr. Graustein, call your
7 witness.

8 MR. GRAUSTEIN: State calls Lieutenant
9 Robert Pellerin.

10 (ROBERT PELLERIN, having been duly sworn,
11 testified as follows:)

12 THE CLERK: State your name and spell
13 your last name.

14 MR. PELLERIN: My name is Lieutenant
15 Robert Pellerin, P-E-L-L-E-R-I-N.

DIRECT-EXAMINATION

16
17 BY MR. GRAUSTEIN:

18 Q Where are you currently employed?

19 A I'm currently employed at Coastal Carolina
20 University.

21 Q What capacity?

22 A I'm the lieutenant over operational support
23 and training.

24 Q Operational support and training for what?

25 A I train the whole department, make sure

ROBERT PELLERIN - DIRECT BY MR. GRAUSTEIN

1 everybody is up to date on their academy training,
2 making sure everybody stays certified through the
3 State.

4 Q That is what the police department out there
5 does?

6 A Yes, sorry.

7 Q How long have you been employed with them?

8 A Approximately eight years.

9 Q Okay. Prior to being employed by Coastal
10 Carolina Police Department, did you have any other
11 law enforcement experience?

12 A No, sir.

13 Q Now, at some point -- well, on August 31,
14 2011, were you working with the 15th Circuit Drug
15 Enforcement Unit?

16 A Yes, sir.

17 Q Okay. Was that a permanent position for
18 you?

19 A No. It was a three-month stint over --
20 during the summer, during the slow time at the
21 University.

22 Q Okay. And what were your duties when you
23 were with the drug enforcement unit?

24 A To investigate narcotic crimes.

25 Q Is that what the drug enforcement unit does?

ROBERT PELLERIN - DIRECT BY MR. GRAUSTEIN

1 A Yes.

2 Q And were you conducting an investigation on
3 August 31, 2011?

4 A Yes, sir.

5 Q What was your role in that investigation?

6 A I was the lead investigator to conduct the
7 controlled drug buy.

8 Q Okay. So on the incident in question here,
9 you were the lead investigator of this?

10 A Yes.

11 Q Okay. You said it was a -- you were doing a
12 controlled buy?

13 A Yes.

14 Q Is there a standard, to your knowledge, a
15 standard that drug enforcement units conducts a
16 controlled buy?

17 A There's a few ways. I wouldn't say there is
18 a standard. This typical type of controlled drug
19 buy that I was accustomed to was using a
20 confidential informant to purchase from a target,
21 purchase drugs from a target.

22 Q Okay. Is that what was happening in this
23 case?

24 A Yes.

25 Q Okay. So you used a confidential informant?

ROBERT PELLERIN - DIRECT BY MR. GRAUSTEIN

1 A Yes.

2 Q Was the confidential informant a police
3 officer?

4 A No.

5 Q Just a regular citizen?

6 A Regular citizen.

7 Q Working for the police?

8 A Yes.

9 Q Okay. As far as monitoring these controlled
10 buys, does an officer go in with the confidential
11 informant or how --

12 A They can. This particular operation an
13 officer was not with the person. They followed the
14 confidential informant to the location.

15 Q Okay. Do you rely on -- so are you going to
16 rely on what the confidential informant tells you
17 when they come back as to what happened?

18 A No. We typically wire them up with audio
19 and video surveillance.

20 Q Okay. Was this confidential informant wired
21 with video and audio?

22 A Yes.

23 Q Okay. Is that video and audio monitoring,
24 is it recording?

25 A Yes.

ROBERT PELLERIN - DIRECT BY MR. GRAUSTEIN

1 Q So that's all recorded?

2 A Yes.

3 Q All right. And the confidential informant
4 does the control buy?

5 A Yes.

6 Q Whose money do they use to buy?

7 A Official police funds issued to them from,
8 in this case, me as the investigator.

9 Q And in this particular case, you used a
10 confidential informant and you provided -- did you
11 provide him with police funds?

12 A Yes.

13 Q How much police funds did you provide?

14 A In this case it was \$40.

15 Q Okay. What was your confidential informant
16 supposed to do?

17 A Take the \$40 to the target location, meet up
18 with the target, exchange the \$40 for an amount of
19 crack cocaine and return back to a predetermined
20 meeting location.

21 Q Okay. Is that what happened?

22 A Yes.

23 Q And at this meeting location, you -- did you
24 know where it would be before the confidential
25 informant left?

ROBERT PELLERIN - DIRECT BY MR. GRAUSTEIN

1 A Yes.

2 Q And where was that transaction, what area?

3 A It was in the Myrtle Beach section of Horry
4 County. It was on -- I believe it was the
5 Boulevard Motel Apartments, 2508 South Ocean
6 Boulevard.

7 Q Okay. All right. So you meet up with your
8 -- you met up with your confidential informant?

9 A Yes.

10 Q And they are wired up, wired with video and
11 audio?

12 A Yes.

13 Q So there was a video camera?

14 A Yes.

15 Q On the confidential informant?

16 A Yes.

17 Q Where was that camera placed?

18 A It was placed in the -- where a button would
19 be, kind of like on a golf Polo shirt, one of the
20 buttons near the top, button cam.

21 Q What field of vision does that camera have?

22 A Forward facing, whatever the person wearing
23 the camera is facing, kind of whatever -- the front
24 of them.

25 Q Does it cover 180 degrees, or fairly narrow?

ROBERT PELLERIN - DIRECT BY MR. GRAUSTEIN

1 A It's somewhat narrow. It gets, I wouldn't
2 say 180 degrees, but -- I'm not sure of the exact
3 angle.

4 Q Would it be fair to say that the person
5 needs to be turned towards who they want to take a
6 picture of in order to get the picture?

7 A Yes.

8 Q So they have to have their body turned
9 towards them with this camera?

10 A Yes.

11 Q All right. Before your confidential
12 informant went out to do the buy, do you search
13 them before they go?

14 A Yes.

15 Q And did you search your CI in this case?

16 A I did search the CI.

17 Q What came back from your search of the CI?

18 A Nothing.

19 Q What were you searching for?

20 A Any type of contraband that they might be
21 able to use in the drug transition.

22 Q You are looking for drugs on them?

23 A Yes.

24 Q And you said you didn't find any drugs?

25 A No.

ROBERT PELLERIN - DIRECT BY MR. GRAUSTEIN

1 Q No contraband?

2 A No.

3 Q To your knowledge, was the vehicle searched?

4 A Yes.

5 Q Did you search the vehicle?

6 A No.

7 Q Was there anybody else -- how did the CI get
8 to the transaction location?

9 A The CI was driven by who, I believe, was her
10 boyfriend.

11 Q Okay. So there was somebody else with the
12 CI at the time of this transaction?

13 A Yes.

14 Q Was this person acting as a confidential
15 informant?

16 A No.

17 Q So they were giving them a ride?

18 A Yes.

19 Q Was that person supposed to do anything with
20 regard to conducting this controlled buy?

21 A No.

22 Q To your knowledge, did they do anything?

23 A To my knowledge, no.

24 Q Was that person searched?

25 A Yes.

ROBERT PELLERIN - DIRECT BY MR. GRAUSTEIN

1 Q And do you know if any drugs or contraband
2 were found on that person?

3 A None were found.

4 Q Would it be fair to say that when the
5 confidential informant left with the transaction,
6 there was no drugs on any person, anybody's person
7 or in the car?

8 A Yes.

9 Q Were they followed to the control buy
10 location?

11 A Yes, they were.

12 Q Did they stop along the way?

13 A No.

14 Q Meet with anybody along the way?

15 A No.

16 Q Get out of the car?

17 A No.

18 Q Pick anything up?

19 A No.

20 Q Just went straight to that location?

21 A Straight to the location.

22 Q During the control buy, was the confidential
23 informant under observation?

24 A Yes.

25 Q Did anybody approach their vehicle while

ROBERT PELLERIN - DIRECT BY MR. GRAUSTEIN

1 they were at that location?

2 A Yes.

3 Q Who? Were you able to identify anybody?

4 A They were parked there for approximately 11
5 minutes, and one of the agents working with me was
6 able to witness a black male get out of a green
7 Lincoln Towncar parked across the street from the
8 location where the CI was parked and walked up to
9 the vehicle, CI's vehicle?

10 Q Is that the only person that went up to the
11 informant's vehicle?

12 A Yes.

13 Q So nobody else went up to the vehicle?

14 A No.

15 Q Okay. Other than this one individual, black
16 male you said?

17 A Yes. Yes.

18 Q Now, the CI was there for 11 minutes, they
19 met with one person?

20 A Yes.

21 Q Did they leave that place where the buy went
22 -- was going down?

23 A No. They stayed in that location until the
24 buy was completed.

25 Q Okay. And then they left after -- well, did

ROBERT PELLERIN - DIRECT BY MR. GRAUSTEIN

1 this black male that went up to the vehicle, how
2 long did he stay at the vehicle, do you know?

3 A Several minutes. He got inside the vehicle,
4 inside the backseat of the vehicle and was in there
5 for several minutes or so.

6 Q All right. Did he get out?

7 A After the buy was conducted, he left the
8 vehicle and walked back across the street where his
9 vehicle was parked.

10 Q And what did the informant do?

11 A The informant then left the location, was
12 driven back to a predetermined meeting location to
13 meet with agents.

14 Q Okay. Was the informant followed back to
15 that location?

16 A Yes. Yes.

17 Q Did they stop along the way?

18 A No.

19 Q Pick anybody up along the way?

20 A No.

21 Q Get out of the car at all?

22 A No.

23 Q Pick up anything that you observed at all?

24 A No.

25 Q And when the informant got back, then what

ROBERT PELLERIN - DIRECT BY MR. GRAUSTEIN

1 did you do?

2 A When the informant got back, I retrieved the
3 drugs that she purchased from the control drug buy.
4 It was an off-white rock-like substance.

5 Q Hang on. I'll ask you to take a look at
6 what's marked as State's Exhibit 1. Tell me if you
7 can identify that.

8 A Yes. This is what the CI handed to me when
9 she returned from the buy.

10 Q So CI gave this item right here to you?

11 A Yes.

12 Q Okay. And you just described it as an
13 off-white rock-like substance?

14 A Yes.

15 Q So what did you believe it to be at that
16 point?

17 A I believe it to be crack cocaine.

18 Q Did she have any other money on her that you
19 gave her?

20 A No.

21 Q Let me ask you this. You said you searched
22 her before she left. Did you search her when she
23 got back?

24 A Yes.

25 Q Did you search the car when she got back?

ROBERT PELLERIN - DIRECT BY MR. GRAUSTEIN

1 A I personally did not, but it was searched.

2 Q And the guy who was driving, he was

3 searched?

4 A Yes.

5 Q Did you -- obviously, you said that she had
6 what you believed to be crack cocaine, and so she
7 didn't have the money, you said?

8 A No.

9 Q Have anything else, any other drugs or
10 contraband that you would be looking for?

11 A No. No.

12 Q And you've identified this as -- State's
13 Exhibit 1, how do you know this is what she brought
14 back to you?

15 A That's in the packaging that I sealed when I
16 returned back to the office to complete all of the
17 necessary paperwork.

18 Q Okay. When you say "the packaging," is
19 there a certain way you package up drug evidence
20 when it is collected?

21 A Yes. It is sealed in clear plastic and then
22 it was placed into an Horry County BEST kit.

23 Q What is a BEST kit?

24 A BEST kit is evidence packaging for narcotics
25 or drugs, and you use those to send off to the drug

ROBERT PELLERIN - DIRECT BY MR. GRAUSTEIN

1 labs to get tested for --

2 Q Is there anything unique about a BEST kit?

3 A They are sealed, and once they are sealed,
4 you know if they've been opened.

5 Q So it's got a seal on it that if it's
6 tampered with, you would know?

7 A Yes.

8 Q So if somebody opened it up and took the
9 drugs out, you would know someone opened it up?

10 A Yes.

11 Q And you testified that this is the drugs
12 that you took off of her?

13 A Yes.

14 Q That she came back from that buy with, and
15 that you put this in a BEST kit?

16 A Yes.

17 Q And then what happened with it?

18 A I personally brought it over to the Horry
19 County evidence bay and locked it into evidence.

20 Q Okay. And did you manipulate this at all?
21 Did you tamper with it?

22 A No, I did not.

23 Q So you didn't do anything with this before
24 putting it into the BEST kit?

25 A No.

ROBERT PELLERIN - DIRECT BY MR. GRAUSTEIN

1 MR. GRAUSTEIN: Move to have State's
2 Exhibit 1 entered into evidence as State's 1.

3 MS. WILSON: No objection.

4 THE COURT: Without objection.

5 (States Exhibit 1 admitted.)

6 Q (BY MR. GRAUSTEIN) And your testimony is that
7 this amount -- this is the amount of crack cocaine
8 that your informant purchased for \$40?

9 A Yes.

10 Q So that is a \$40 rock of crack cocaine.
11 Now, let's talk real quick about this video
12 equipment. Your confidential informant comes back
13 from the transaction, she's been followed the whole
14 time, been under observation the whole time, comes
15 back, you have the crack cocaine, or what you
16 believe to be crack cocaine, so did you do any test
17 on it or anything?

18 A I field tested it.

19 Q Okay. You field tested it. What was the
20 results of that test?

21 A Positive for crack cocaine.

22 Q Okay.

23 A Cocaine base.

24 Q So -- but that's not the end of it, as far
25 as you know, right? That's not the only test that

ROBERT PELLERIN - DIRECT BY MR. GRAUSTEIN

1 is done?

2 A No.

3 Q Okay. All right. So she comes back, she's
4 had video and audio monitoring the whole time she's
5 been gone. She gets back, meets with the agents
6 involved here, takes the -- you take the drugs. Do
7 you do anything with the monitoring equipment?

8 A Everything is recorded into the equipment.
9 I retrieve the equipment off of this confidential
10 informant, and I took possession of it and brought
11 it back to the office.

12 Q To your knowledge, was that video recording
13 equipment operating properly that day?

14 A Yes.

15 Q And was it operating properly at the time of
16 this control buy?

17 A Yes.

18 Q Was it operating properly throughout the
19 entire time?

20 A Yes.

21 Q You have no reason to believe that it ever
22 malfunctioned?

23 A No.

24 Q And you -- so you had a recording device,
25 and what do you do with that?

ROBERT PELLERIN - DIRECT BY MR. GRAUSTEIN

1 A You bring it back -- brought it back to the
2 office and you have to download it onto a computer.

3 Q Okay. And then it's on the computer and it
4 can be copied?

5 A Yes.

6 Q Okay. To your knowledge, was a copy made of
7 that reporting, of that video?

8 A Yes.

9 Q I'll show you what has been marked as
10 State's Exhibit 2 and ask if you recognize that?

11 A Yes.

12 Q And what is that?

13 A That's the video of the controlled drug buy
14 -- audio, I mean.

15 Q A copy of it?

16 A A copy of it.

17 Q And to your knowledge, do you know of any
18 modifications, additions, subtractions, any
19 alterations that were made to that recording?

20 A No.

21 Q Have you had an opportunity to look at this?

22 A Yes.

23 Q And is this a true and accurate copy of that
24 recording, of the recording made at the time of the
25 control buy?

ROBERT PELLERIN - DIRECT BY MR. GRAUSTEIN

1 A Yes.

2 Q Any additions?

3 A No.

4 Q Deletions?

5 A No.

6 Q Anything like that? Okay.

7 MR. GRAUSTEIN: The State moves to have
8 this entered into evidence, State's Exhibit 2,
9 the video.

10 MS. WILSON: Without objection.

11 THE COURT: Very well.

12 MR. GRAUSTEIN: It will be published
13 later, Your Honor.

14 (State's Exhibit 2 admitted.)

15 Q (BY MR. GRAUSTEIN) You took that -- so you
16 have a recording of the video. Let's see. I've
17 got a question about this transaction. You are --
18 who set up this control buy as far as when, where
19 and who was going to be involved? Who set it up?

20 A The confidential informant set it up.

21 Q So you didn't set it up?

22 A No.

23 Q And nobody from your agency that you know of
24 set it up?

25 A No.

ROBERT PELLERIN - DIRECT BY MR. GRAUSTEIN

1 Q Okay.

2 MR. GRAUSTEIN: Please answer any
3 questions Ms. Wilson may have.

4 CROSS-EXAMINATION

5 BY MS. WILSON:

6 Q Good morning, Agent Pellerin.

7 A Good morning.

8 Q Now, you said that the CI, the confidential
9 informant, is just a regular citizen, but she's
10 actually not that regular, is she?

11 A I mean, not necessarily.

12 Q Right. So, in fact, she's actually somebody
13 that has had some issues?

14 A Yes.

15 Q And they are usually drug-related issues,
16 correct?

17 A Yes.

18 Q And so she's not a regular citizen like
19 we're all sitting in here like regular citizens,
20 correct?

21 A Yes.

22 Q And the reason that she's wired with audio
23 and video is because you have to make sure that
24 what you think is supposed to be happening,
25 actually happens, right?

ROBERT PELLERIN - CROSS BY MS. WILSON

1 A Yes.

2 Q So you need backup to bolster what she says?

3 A Yes.

4 Q So, in effect, we have a person who you
5 pick, or that someone picks out, who then says, I
6 think we should go after this person, and you all
7 basically go after that person, correct?

8 A Yes.

9 Q And then you set that person up in a
10 position to go out and say, This is the person who
11 it is, and you have to back up the testimony with
12 video and audio, correct?

13 MR. GRAUSTEIN: I object. I think the
14 comment is a little bit on the credibility of a
15 witness who hasn't testified.

16 THE COURT: I'll let it go.

17 MS. WILSON: Thank you, Your Honor.

18 Q (BY MS. WILSON) And in -- sorry. In going out
19 with this confidential informant, you say that you
20 searched the confidential informant and the person
21 that was in the car with her, correct?

22 A Yes.

23 Q And when you searched, it took maybe 90
24 seconds, correct?

25 A I can't recall exactly how long, but

ROBERT PELLERIN - CROSS BY MS. WILSON

1 probably a good estimate of time.

2 Q So in 90 seconds, you basically determine
3 that this person is completely clear, they couldn't
4 have anything anywhere, is what you are saying,
5 correct?

6 A Yes.

7 Q So two people, 90 seconds apiece and you are
8 going out to show that there is one person guilty
9 of a crime, a crime that is by all accounts pretty
10 serious, otherwise, you wouldn't do the work that
11 you are doing, correct?

12 A Yes.

13 Q And you are doing a 90-second search of the
14 person to make sure they are clean?

15 A That is a thorough search.

16 Q Thorough search is 90 seconds? So,
17 certainly, in 90 seconds, in a minute-and-a-half,
18 there is no chance at all that you could have left
19 something on her, is what you are saying? There is
20 no chance at all?

21 A I don't believe I left anything.

22 Q But you are not certain? You can't be a
23 hundred percent?

24 A You can't be a hundred percent certain.

25 Q Okay. You weren't actually on scene when

ROBERT PELLERIN - CROSS BY MS. WILSON

1 this transaction took place, were you?

2 A I was across the street.

3 Q Across the street. So across the street,
4 we're talking about how far? Maybe a hundred
5 yards, 200?

6 A Maybe about a hundred yards.

7 Q And a hundred yards away, are you actually
8 watching a video at that time of the transaction?

9 A No.

10 Q So you can't really see anything, I assume
11 you are hidden at that time?

12 A Somewhat.

13 Q So you are not going to be in plain view
14 when you are having an undercover person going out
15 and try to trap somebody into a sale, you are not
16 going to be visible, correct?

17 A Correct. We're not visible.

18 Q And so you are hidden, and you're not on
19 scene where the transaction is taking place?

20 A Correct.

21 Q That's right?

22 A Correct.

23 Q And so you're situated some distance away,
24 and you did not actually, personally, firsthand
25 witness the transaction itself, did you?

ROBERT PELLERIN - CROSS BY MS. WILSON

1 A No.

2 Q So you can't tell this jury that you saw
3 anybody actually make the transaction that is the
4 subject of this case, can you?

5 A No.

6 Q And you say you gave the CI the \$40?

7 A Yes.

8 Q And you said the CI came back without it?

9 A Yes.

10 Q But you don't know who she gave the \$40 to?

11 A No.

12 Q Not firsthand, you don't know?

13 A Firsthand knowledge, no.

14 Q And you didn't recover any \$40, did you?

15 A No.

16 Q So there's no \$40 that you can say you
17 recovered anywhere, and there is no -- nothing that
18 you actually witnessed yourself that happened in
19 this case? You just know that you searched her in
20 about 90 seconds, a minute-and-a-half, and you know
21 you searched the driver in a minute. Do you know
22 the driver's name?

23 A No, I don't.

24 Q Okay. Now, when you give the CI the buy
25 money, the \$40, you retain those serial numbers,

ROBERT PELLERIN - CROSS BY MS. WILSON

1 correct?

2 A Yes.

3 Q So it's marked money, basically?

4 A Yes.

5 Q And you retain those serial numbers so you
6 will be able to identify the money when you make an
7 arrest, correct?

8 A Yes.

9 Q But you say you didn't find any money here
10 in this case?

11 A No. He was not arrested.

12 Q So you didn't get any money at the arrest?

13 A No.

14 Q And you didn't get any money because it
15 wasn't on the person that you arrested, correct?

16 A Correct.

17 Q Okay. Now --

18 MS. WILSON: Court's indulgence for one
19 second.

20 (A brief pause in the proceedings.)

21 Q (BY MS. WILSON) You said this was a
22 three-month stint that you actually did with the
23 drug enforcement unit?

24 A Yes.

25 Q And you were the lead investigator?

ROBERT PELLERIN - REDIRECT BY MR. GRAUSTEIN

1 A Yes.

2 Q So, basically, setting up this entire
3 scenario was your thing, correct? I mean, it was
4 sort of your baby, you oversaw the basic details of
5 handling this case?

6 A Yes.

7 Q And, again, you cannot identify the person
8 that was involved in this transaction through any
9 firsthand knowledge of your own?

10 A Not during the actual hand-to-hand buy.

11 Q So you didn't see the transaction go down,
12 is what I'm saying; is that correct?

13 A Correct.

14 MS. WILSON: No further questions, Your
15 Honor.

16 REDIRECT-EXAMINATION

17 BY MR. GRAUSTEIN:

18 Q Do you know when the defendant was arrested?

19 A I believe it was approximately a year after
20 the incident.

21 Q So would you be surprised if I told you he
22 was arrested in September of 2012?

23 A No.

24 Q And this incident, as we know, occurred
25 August 31, 2011?

ROBERT PELLERIN - REDIRECT BY MR. GRAUSTEIN

1 A Yes.

2 Q So would it surprise you that he didn't have
3 any of the buy money on him when he was arrested?

4 A No.

5 Q Now, you were asked about the video and why
6 you equip people with video recordings during these
7 control buys using confidential informants. Isn't
8 it also just as true that you record them not
9 because -- to counter defense arguments about what
10 happened?

11 A Yes.

12 Q So you video record these incidents so that
13 we have a true, accurate record of what happened?

14 A Yes.

15 Q Okay. We don't have to rely on what someone
16 tells us, necessarily?

17 A Yes.

18 MR. GRAUSTEIN: Thank you. That is all I
19 have.

20 MS. WILSON: If I could briefly.

21 RECROSS-EXAMINATION

22 BY MS. WILSON:

23 Q You did say that the CI was given the buy
24 money, and that the money is marked so you can
25 track the money, correct?

ROBERT PELLERIN - RECROSS BY MS. WILSON

1 A Yes.

2 Q So, arguably, you could have made an arrest
3 right there on the spot and you would have gotten
4 the buy money back, correct?

5 A Yes.

6 Q And that would have strengthened your case?

7 A Yeah.

8 Q It would have been much stronger right there
9 on the spot with that \$40, correct?

10 A Yes.

11 MS. WILSON: No further questions, Your
12 Honor.

13 THE COURT: You may step down.

14 MR. GRAUSTEIN: State would call Will
15 Lynch.

16 JUROR: Bathroom break.

17 THE COURT: You need one? Very well.
18 Mr. Ropp take the jury out.

19 (The jury exits at 11:42 a.m., and a recess
20 was taken.)

21 (The jury enters at 11:50 a.m., and the
22 following is heard in the presence of the
23 jury.)

24 THE COURT: All right, Mr. Graustein.

25 MR. GRAUSTEIN: The State calls Agent

WILL LYNCH - DIRECT BY MR. GRAUSTEIN

1 Will Lynch.

2 (WILL LYNCH, having been duly sworn, testified
3 as follows:)

4 THE CLERK: State your name and spell
5 your last name.

6 MS. LYNCH: Will Lynch, L-Y-N-C-H.

7 DIRECT-EXAMINATION

8 BY MR. GRAUSTEIN:

9 Q Agent Lynch, where are you currently
10 employed?

11 A Currently I'm employed by the City of North
12 Myrtle Beach, but I'm assigned to the
13 15th Circuit Drug Enforcement Unit.

14 Q How long have you been assigned to the drug
15 enforcement unit?

16 A I've been assigned to the drug enforcement
17 unit since its inception in 2006.

18 Q So you are a chartered member?

19 A Yes, sir.

20 Q And have been doing that for going on seven
21 years now?

22 A Yes, sir.

23 Q What sort of things do you do with the drug
24 enforcement unit?

25 A Investigate complaints regarding narcotic

WILL LYNCH - DIRECT BY MR. GRAUSTEIN

1 activity, also in charge of all of the surveillance
2 equipment, do a lot of phone forensics, things like
3 that, just work general drug cases.

4 Q Okay. Is that all drug enforcement units
5 do, drug cases?

6 A Yes, we're specifically put together to work
7 drug cases.

8 Q Okay. Do you participate in control buys
9 using confidential informants?

10 A Yes, sir.

11 Q And did you participate in the control buy
12 in question here on August 31, 2011?

13 A I did.

14 Q What was your role in that?

15 A My role that day was obviously to be there
16 for support. I actually -- when we all met with
17 the informant, my role at that time, when we first
18 met, was to search the informant's vehicle to make
19 sure there was no narcotics of any kind in the
20 vehicle prior to the control buy. Also, I was
21 assigned to do surveillance during the actual
22 transaction.

23 Q Okay. And did you search the informant's
24 vehicle?

25 A I did. I searched the informant's vehicle.

WILL LYNCH - DIRECT BY MR. GRAUSTEIN

1 Q Did you find any contraband or drugs in the
2 vehicle?

3 A I did not locate any contraband, whatsoever.

4 Q In your mind, was that a thorough search?

5 A It was.

6 Q Are you competent there was no drugs or
7 contraband in the vehicle?

8 A Yes, I am.

9 Q And you said that you also were involved in
10 surveillance?

11 A That's correct. You know, we had an idea
12 where the transition would go, so I positioned
13 myself in the area where I might have a vantage
14 point and, you know, we waited for the transaction
15 to take place.

16 Q From where you were set up for surveillance,
17 were you able to observe anything with regard to
18 the transaction?

19 A No, I was not.

20 MR. GRAUSTEIN: Please answer any
21 questions Ms. Wilson may have.

22 CROSS-EXAMINATION

23 BY MS. WILSON:

24 Q Good morning, Agent Lynch.

25 A Good morning. How are you?

WILL LYNCH - CROSS BY MS. WILSON

1 Q Good, thank you. You said you were the
2 searcher of the vehicle in this case?

3 A Yes, ma'am. Yes, ma'am.

4 Q So you didn't search the confidential
5 informant herself, did you?

6 A No, ma'am.

7 Q So you searched this vehicle, and the
8 vehicle took approximately two minutes, three
9 minutes?

10 A I would say so. I never really timed it,
11 but it's something like that.

12 Q And so what -- and this was -- do you
13 remember what kind of vehicle this was? This
14 wasn't an SUV, was it?

15 A No. It was a car, sedan type.

16 Q So maybe four doors, correct?

17 A Two or four.

18 Q Two or four doors. Well, of course two or
19 four doors (laughing).

20 So you searched that car, so there is a
21 back seat and front seat?

22 A Yes, ma'am.

23 Q And you are, I presume, looking under rugs?

24 A Floor mats, in the console, any cracks or
25 crevasses, typical places, I would say, we would

WILL LYNCH - CROSS BY MS. WILSON

1 locate drugs whenever we're searching a car.

2 Q And you just told the solicitor here that
3 you are pretty confident that the car was clean?

4 A Yes.

5 Q But you can't be a hundred percent certain
6 that the car was clean?

7 A I didn't come across any drugs during my
8 search, so unless there was something hidden, very,
9 very well, I didn't come across it.

10 Q Certainly something could have been hidden,
11 correct? It's possible?

12 A It's possible, sure.

13 Q And the reason you search is because you
14 want to make sure that you're trying to make sure
15 that this confidential informant isn't doing
16 something slick or something extra, correct?

17 A Yes, ma'am.

18 Q Okay.

19 MS. WILSON: No further questions, Your
20 Honor.

21 MR. GRAUSTEIN: No questions, Your Honor.

22 THE COURT: You may step down, Mr. Lynch.
23 Thank you.

24 MR. GRAUSTEIN: The State would call
25 Jeremy Brown.

JEREMY BROWN - DIRECT BY MR. GRAUSTEIN
(JEREMY BROWN, having been duly sworn,
testified as follows:)

THE CLERK: State your name and spell
your last name.

MR. BROWN: It is Jeremy Brown,
B-R-O-W-N.

DIRECT-EXAMINATION

BY MR. GRAUSTEIN:

Q Agent Brown, how are you doing this morning?

A Good.

Q Good. Where are you currently employed?

A Employed through Conway City, but assigned
to the 15th Circuit Drug Enforcement Unit.

Q How long have been assigned to the drug
enforcement unit?

A Approximately six years.

Q About six years. Have you been with the
drug enforcement unit for six years, and that is
what have you been doing?

A Yes.

Q What is your duties?

A K-9 handler.

Q K-9 handler?

A Yes, sir.

Q Are you involved with control buy operation,

JEREMY BROWN - DIRECT BY MR. GRAUSTEIN

1 things like that?

2 A Sometimes.

3 Q Were you involved in this control buy
4 situation in question here that occurred on
5 August 31, 2011?

6 A Yes, sir.

7 Q And in what capacity were you participating?

8 A I was assisting with his -- with the
9 undercover buy, searched the vehicle, I believe, at
10 one point, and the driver.

11 Q Okay. So you searched the driver who was
12 not the confidential informant?

13 A That's correct.

14 Q And you searched them before they went?

15 A Yes, sir.

16 Q All right. And what were the results of
17 that search?

18 A No contraband, no weapons found.

19 Q And you are searching for drug and drug
20 contraband, things like that?

21 A That's correct.

22 Q Are you confident that there was no
23 contraband or anything like that?

24 A Yes, sir.

25 Q On the driver?

JEREMY BROWN - DIRECT BY MR. GRAUSTEIN

1 A Yes, sir.

2 Q Okay. And you said you searched the
3 vehicle, too?

4 A Yes, sir.

5 Q When did you search the vehicle?

6 A I believe I searched it after the buy was
7 conducted.

8 Q After the buy?

9 A Yes, sir.

10 Q After they came back from the buy?

11 A Yes.

12 Q And did you find anything --

13 A No, sir.

14 Q -- that you expected to find?

15 A No, sir.

16 Q And I'll ask you to look at what's been
17 marked as State's Exhibit 1 and ask if you
18 recognize that?

19 A Yes, sir.

20 Q What is that?

21 A Evidence that I actually had taken to SLED
22 to get tested.

23 Q All right. So you took possession of this
24 evidence?

25 A That's correct.

JEREMY BROWN - DIRECT BY MR. GRAUSTEIN

1 Q And when did you get possession of it?

2 A I would have to look back.

3 Q Where did you get it from?

4 A From evidence.

5 Q Okay. So you got it from evidence?

6 A Yes, sir.

7 Q At the time you took it out of evidence, how
8 was it packaged?

9 A Inside of the BEST package and sealed.

10 Q So it was inside the BEST package, sealed.
11 Had the seal ever been broken from your
12 observations?

13 A No, sir.

14 Q Okay. So from what you could tell, it
15 appeared to be as it was packaged when it was
16 collected?

17 A Yes, sir.

18 Q And you took it from evidence, and what did
19 you do with it?

20 A I transported -- finished all of the
21 paperwork and transported it to SLED, dropped it
22 off at SLED to be tested.

23 Q Do you know who you gave it to at SLED?

24 A I can't remember her name.

25 Q Okay. It would have been an evidence person

JEREMY BROWN - DIRECT BY MR. GRAUSTEIN

1 at SLED?

2 A Yes, sir. It is usually three, four people
3 working the front desk up there.

4 Q All right. And when they are taken in, do
5 they sign it in?

6 A Yes, sir. I believe they sign it in and put
7 some of their numbers on it, stickers, their
8 numbers.

9 Q So you had to drive it up to Columbia?

10 A Yes, sir.

11 Q Did you drop it off at SLED the same day you
12 took it out of evidence from here?

13 A I believe so.

14 Q And did you tamper with it at all?

15 A No, sir.

16 Q Open the package at all?

17 A No, sir.

18 Q Didn't manipulate it, alter it in any way?

19 A No, sir.

20 Q How you got it is how you turned it into
21 SLED?

22 A Yes, sir.

23 MR. GRAUSTEIN: No further questions.

24 CROSS-EXAMINATION

25

JEREMY BROWN - CROSS BY MS. WILSON

1 BY MS. WILSON:

2 Q Good morning, Agent Brown.

3 A Good morning.

4 Q You said you searched the driver in the
5 case?

6 A That's correct.

7 Q The driver of the car, you don't remember
8 the driver's name, per chance?

9 A No.

10 Q And I presume that that search probably took
11 around a minute, maybe?

12 A Probably.

13 Q And in that minute, you don't recall finding
14 anything at all, no contraband, no weapons?

15 A No contraband. We emptied his pockets out,
16 went through everything, no containers to hold
17 anything, nothing in his pockets, nothing on his
18 person.

19 Q Out of curiosity, did you do like a cavity
20 search or anything?

21 A No, ma'am.

22 Q So your thorough search didn't include a
23 cavity search?

24 A We can't do that without a nurse being
25 present.

JEREMY BROWN - CROSS BY MS. WILSON

1 Q Really? Okay. And, now, you also say you
2 searched the vehicle after the buy?

3 A That's correct.

4 Q And after the buy, these drugs are what was
5 handed over, correct?

6 A (Deponent nods head.)

7 Q Is that correct?

8 A Uh-huh.

9 Q And you said that you had the job of
10 actually transporting it to -- for analysis?

11 A That's correct.

12 Q All right. And during the time of the
13 transaction, where the drugs were obtained by this
14 confidential informant --

15 A Okay.

16 Q -- you were not on scene, correct?

17 A No, I was on scene.

18 Q So you were standing with the confidential
19 informant?

20 A Standing with them, no. In the vicinity,
21 not on scene in the car.

22 Q So I was hearing that everybody was standing
23 across the street?

24 A Correct.

25 Q So were you with the across-the-street

JEREMY BROWN - CROSS BY MS. WILSON

1 group, or on scene?

2 A Across the street. When you say "on scene,"
3 I assume you mean with the buy.

4 Q When I say "on scene," I mean at the buy
5 transaction, you witnessed it firsthand?

6 A We were across the street, the location.

7 Q So you weren't there when it happened?

8 A That's correct.

9 Q And you didn't witness any transaction
10 firsthand, did you?

11 A No, ma'am.

12 MS. WILSON: Okay. No further questions.

13 MR. GRAUSTEIN: No more questions, Your
14 Honor.

15 THE COURT: You may step down. Thank
16 you.

17 MR. GRAUSTEIN: State calls Doris
18 Yarbrough.

19 (DORIS YARBROUGH, having been duly sworn,
20 testified as follows:)

21 THE CLERK: State your name and spell
22 your last name.

23 MS. YARBROUGH: Doris Yarbrough,
24 Y-A-R-B-R-O-U-G-H.

25 DIRECT-EXAMINATION

DORIS YARBROUGH - DIRECT BY MR. GRAUSTEIN

1 BY MR. GRAUSTEIN:

2 Q Ms. Yarbrough, where are you employed?

3 A With the South Carolina Law Enforcement
4 Division, commonly known as SLED.

5 Q What is your job?

6 A Forensic technician in the evidence control
7 department.

8 Q What are your duties?

9 A We accept evidence for forensic analysis
10 from law enforcement agencies through the state of
11 South Carolina.

12 Q Okay. So how long have you been employed
13 with them?

14 A For five years.

15 Q Been doing the same thing for five years, or
16 moving around?

17 A Yes, sir.

18 Q Same thing, all right. So part of your
19 duties are to accept into evidence, evidence that
20 was collected during drug investigations?

21 A Yes, sir.

22 Q So you take in drug evidence?

23 A Yes, sir.

24 Q And do you -- is it a drop box, or do you
25 accept it personally?

DORIS YARBROUGH - DIRECT BY MR. GRAUSTEIN

1 A I accept -- we do have a drop box, but we
2 also -- it is basically for our SLED agents, but
3 for our outside agents, we accept it in person.

4 Q Okay. What kind of procedures -- when
5 someone is bringing evidence into you all, what are
6 your procedures for taking that evidence?

7 A We take evidence on a SLED-to-contain basis.
8 We look at the packaging, verify that the packaging
9 is intact, look at the paperwork and make sure that
10 their information is correct.

11 Q Okay. And once you take it in, what do you
12 do with the evidence?

13 A All the evidence that is submitted is
14 monitored electronically. Once it is logged into
15 our system, we all have security pass codes and IDs
16 we have to use. Each computer we use is
17 identifiable to each person using it. Once it's
18 collected and placed into evidence, we have a
19 secured evidence room in our office that we place
20 all the evidence in the correct place.

21 Q Okay. I'll ask you to take a look at what's
22 been marked as State's Exhibit 1. Tell me if you
23 can identify that.

24 A I can identify it by the number, the yellow
25 sticker. It is a barcode sticker. Once the case

DORIS YARBROUGH - DIRECT BY MR. GRAUSTEIN

1 is logged in, that is how it is monitored
2 throughout our laboratory.

3 Q So that sticker gets put on that when you
4 take it in?

5 A Yes, sir.

6 Q All right. And you said that it is your
7 normal procedure when you take it in that you
8 inspect the packaging?

9 A I inspect the packaging to make sure it is
10 sealed properly, yes, sir.

11 Q So if this came in as what was testified to
12 as a BEST kit, you make sure that that BEST kit is
13 sealed?

14 A Yes, sir.

15 Q And to your knowledge, was this container
16 that came in, was it sealed?

17 A I check for the signature, the date and if
18 the package is properly sealed.

19 Q And so it was sealed. Did it appear to have
20 been tampered in any way?

21 A No, sir.

22 Q And did you do anything as far as opening
23 the package?

24 A Only to inspect the seal and the number --
25 there is like a serial number on each package, I

DORIS YARBROUGH - CROSS BY MS. WILSON

1 checked that against the paperwork.

2 Q Okay. But did you go into the BEST kit
3 itself?

4 A No.

5 Q So you didn't open that BEST kit, didn't
6 break the seal?

7 A Oh, no, sir.

8 Q And you didn't manipulate what was in it in
9 any way?

10 A No, sir, I did not.

11 MR. GRAUSTEIN: Answer any questions Ms.
12 Wilson may have.

13 CROSS-EXAMINATION

14 BY MS. WILSON:

15 Q Hi, Ms. Yarbrough.

16 A Hi.

17 Q You don't actually do any testing of the
18 actual drugs?

19 A No, ma'am, I do not.

20 Q And you did not witness the transaction nor
21 did you have any part of this control buy?

22 A No, ma'am.

23 Q In which these drugs were netted?

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

25 MS. WILSON: No further questions. Thank

MARIBETH COLEMAN - DIRECT BY MR. GRAUSTEIN

1 you.

2 THE COURT: You may step down.

3 MR. GRAUSTEIN: Maribeth Coleman.

4 (MARIBETH COLEMAN, having been duly sworn,
5 testified as follows:)

6 MR. GRAUSTEIN: May Ms. Yarbrough be
7 released from her subpoena?

8 THE COURT: Any objection?

9 MS. WILSON: No, Your Honor.

10 THE COURT: She may be released.

11 THE CLERK: Please state your full name
12 and spell your last name.

13 MS. COLEMAN: Maribeth Coleman,
14 C-O-L-E-M-A-N.

15 DIRECT-EXAMINATION

16 BY MR. GRAUSTEIN:

17 Q Ms. Coleman, where are you currently
18 employed?

19 A South Carolina Law Enforcement, commonly
20 known as SLED.

21 Q How long have you been employed there?

22 A For five years and four months.

23 Q All right. In what capacity are you
24 employed?

25 A Forensic chemist in the drug analysis

MARIBETH COLEMAN - DIRECT BY MR. GRAUSTEIN
1 department.

2 Q Forensic chemist. Do you need any sort of
3 special education to be a forensic chemist, a
4 degree or anything?

5 A Yes. I have a bachelor's of science degree
6 in chemistry and a master's in teaching chemistry
7 and physics, both from the University of South
8 Carolina. I have performed the training at SLED
9 and the drug analysis department, and also attended
10 the South Carolina Criminal Justice Academy, legal
11 training course.

12 Q All right. Any other specialized training
13 that you've received for forensic analysis?

14 A We do proficiency tests every year to keep
15 up with our certification, and we do attend
16 different seminars.

17 Q Do you routinely testify in court cases
18 regarding your findings?

19 A Yes.

20 Q Do you know about how many you've testified
21 in?

22 A Thirteen.

23 Q Okay.

24 MR. GRAUSTEIN: The State moves to
25 qualify this witness as an expert in narcotic.

MARIBETH COLEMAN - VOIR DIRE BY MS. WILSON
1 analysis.

2 THE COURT: Ms. Wilson.

3 MS. WILSON: Your Honor, at this time we
4 would object.

5 THE COURT: Would you like an opportunity
6 to cross-examine her?

7 MS. WILSON: I would, thank you.

8 VOIR DIRE EXAMINATION

9 BY MS. WILSON:

10 Q You said that you had five years and, I
11 think, four months?

12 A Yes, ma'am.

13 Q Of actual practice in this field, correct?

14 A Yes.

15 Q And during that time, approximately how many
16 drug analyses do you think you performed?

17 A Over 3,000.

18 Q Okay. So 3,000 analyses and you have
19 testified only about 13 times?

20 A Yes, ma'am.

21 Q And is there any follow up to your analysis?
22 Is there some kind of checks and balances to make
23 sure that your analysis is correct?

24 A Yes, we do have a review process.

25 Q And who else reviews it?

MARIBETH COLEMAN - VOIR DIRE BY MS. WILSON

1 A Another chemist in the department.

2 Q Okay. So you review it and someone double
3 checks your findings, basically?

4 A Yes.

5 Q Before the actual report comes out?

6 A Yes.

7 Q Okay. And how many tests, on average, do
8 you perform on each substance?

9 A On each substance?

10 Q That you are testing.

11 A May I refer to my notes for this particular
12 case?

13 Q Sure.

14 A I performed two tests.

15 Q On average?

16 A Yes.

17 MS. WILSON: No further questions, Your
18 Honor.

19 THE COURT: I'll find that she is
20 qualified in the field of drug analysis.

21 MR. GRAUSTEIN: Thank you, Your Honor.

22 MS. WILSON: Thank you, Your Honor.

23 DIRECT-EXAMINATION (CONTINUED)

24 BY MR. GRAUSTEIN:

25 Q Could you briefly, and hopefully without

MARIBETH COLEMAN - CONT. DIRECT BY MR. GRAUSTEIN

1 being too technical for the jury, describe what
2 your procedures are for testing narcotics that come
3 into your -- or suspected narcotics that come into
4 your office?

5 A Yes. The first thing I do is weigh the
6 substance, then I perform a chemical test, which is
7 a spot test. From there, I perform instrumental
8 analysis, which in this case was gas
9 chromatography-mass spectrometry.

10 Q Thank you. I'll show you what is marked as
11 State's Exhibit 1 and ask if you recognize this? I
12 believe your yellow sticker is on the other side.

13 A Yes.

14 Q Could you identify what that is?

15 A It is a heat sealed bag containing a BEST
16 kit, plastic bag and a rock substance.

17 Q Okay. Do you know or can you tell us how --
18 did that come into your possession at some point?

19 A Yes, sir.

20 Q Can you tell us how that came into your
21 possession, where you got it from?

22 A Yes. I received it from the evidence log-in
23 department from Doris Yarbrough.

24 Q Okay. So you got it from Ms. Yarbrough, who
25 just testified. And so once you got it, it was in

1 MARIBETH COLEMAN - CONT. DIRECT BY MR. GRAUSTEIN
your custody and control?

2 A Yes, sir.

3 Q Okay. And do you know for about how long
4 you had that in your custody and control?

5 A Yes. I received it January 7, 2013, and I
6 returned it to the evidence log-in on January 16,
7 2013.

8 Q And you returned it into your evidence
9 folks, and that's, then, to be returned back to the
10 agency?

11 A Yes.

12 Q And when you received it, did the packaging
13 that you received it in, did it appear to have ever
14 been tampered with, damaged in any way?

15 A No, sir.

16 Q And the seal was intact?

17 A Yes.

18 Q All right. Why did you take control of
19 this?

20 A I was assigned to the case.

21 Q To do what?

22 A To see if there was a presence of controlled
23 substances.

24 Q So I guess, to put it in layman's terms, you
25 were to do a drug test on that?

MARIBETH COLEMAN - CONT. DIRECT BY MR. GRAUSTEIN

1 A Yes, sir.

2 Q Okay. All right. So you probably have
3 already done this, but just because I'm not a
4 science guy, when you took it to do the drug
5 testing on it, what test did you do?

6 A I performed a chemical test, which is a spot
7 test, and also instrumental analysis, which was gas
8 chromatography-mass spectrometry.

9 Q And those tests are designed to determine --
10 or to test for the presence of what?

11 A For the presence of controlled substances.

12 Q Any substance in particular, or any
13 controlled substance?

14 A Any controlled substance.

15 Q All right. Do you do another test to
16 determine exactly what kind of substance it is?

17 A Well, in this case I performed a hexane
18 extraction, which is specific for cocaine base of
19 crack.

20 Q Oh, all right. So I guess kind of going
21 along with that, based on your testing, were you
22 able to form an opinion, in your expertise, on what
23 was contained in that -- in State's Exhibit 1, or
24 what that is?

25 A Yes, sir.

MARIBETH COLEMAN - CONT. DIRECT BY MR. GRAUSTEIN

1 Q What were you able to determine what that
2 was?

3 A Cocaine base crack found.

4 Q And that was based on what test that it was
5 cocaine base?

6 A The gas chromatography-mass spectrometry.

7 Q And did you publish -- make a written report
8 of your findings?

9 A Yes, sir.

10 Q I'll ask you to take a look at -- what is
11 marked for identification as State's Exhibit 3. Do
12 you recognize that?

13 A Yes.

14 Q And what is that?

15 A This is a drug report.

16 Q And is the drug report for any case in
17 particular?

18 A For L12-153-45.

19 Q What case is that? Is that your number?

20 A Yes. This is a case that I did.

21 Q And is it the drug -- is it the test results
22 for what is contained in Exhibit 1?

23 A Yes, sir.

24 Q Okay. So -- and so all of your findings was
25 it contained cocaine base or crack cocaine in that

MARIBETH COLEMAN - CONT. DIRECT BY MR. GRAUSTEIN
1 report.

2 A Yes, sir.

3 Q Did you also establish a weight?

4 A Yes.

5 Q And how much did the substance weigh?

6 A 0.1 grams.

7 Q So about a tenth of a gram?

8 A Yes.

9 Q Is that a true and accurate copy of the
10 report that you published in this case?

11 A Yes.

12 MR. GRAUSTEIN: State moves to enter
13 Exhibit 3 as State's Exhibit 3 into evidence.

14 MS. WILSON: No objection.

15 THE COURT: Without objection.

16 Q (BY MR. GRAUSTEIN) Does that report accurately
17 reflect your findings in this case?

18 A Yes, sir.

19 MR. GRAUSTEIN: Please answer any
20 questions Ms. Wilson may have.

21 THE COURT: Ms. Wilson.

22 CROSS-EXAMINATION

23 BY MS. WILSON:

24 Q Ms. Coleman, this is not like the field test
25 that is done before the drugs get to you, correct?

MARIBETH COLEMAN - CROSS BY MS. WILSON

1 A Correct.

2 Q This is actually a test that actually can be
3 presented in court, is the official test on the
4 drugs, correct?

5 A Yes, sir -- yes, ma'am, excuse me. Excuse
6 me.

7 Q It's okay. You didn't in any way rely on
8 any field test that occurs before the drug gets to
9 you, do you?

10 A No.

11 Q So when you test the drugs, you are the
12 expert, you are using the -- I heard her say
13 spectrometry or whatever -- sorry if I don't get
14 the terms correct -- but you are relying on those
15 tests to make your decision on whether or not it is
16 real, and that is what this drug report reflects,
17 correct?

18 A Yes, ma'am.

19 Q But you were not actually a part of anything
20 that happened before the drugs came to you, were
21 you?

22 A No.

23 Q So you weren't actually a part of the DEU
24 unit that went out and oversaw this transaction,
25 were you?

MARIBETH COLEMAN - CROSS BY MS. WILSON

1 A No.

2 Q And you did not actually see the transaction
3 take place, so you don't know who handed the drugs,
4 who handled them or where they came from?

5 A I don't.

6 Q You just know that you are charged with
7 testing the substance, and you do so and this is
8 the result of that test, correct?

9 A Correct.

10 MS. WILSON: No further questions, thank
11 you.

12 MR. GRAUSTEIN: No more questions, Your
13 Honor.

14 THE COURT: You may step down.

15 MR. GRAUSTEIN: Your Honor, the State
16 asks that Ms. Coleman is released from her
17 subpoena.

18 MS. WILSON: No objection.

19 THE COURT: Ms. Coleman, you are released
20 from your subpoena.

21 MR. GRAUSTEIN: May we approach, Your
22 Honor.

23 THE COURT: Yes.

24 (Whereupon, a bench conference was had in the
25 presence of the jury, but out of the hearing

MARIBETH COLEMAN - CROSS BY MS. WILSON
of the jury.)

THE COURT: Ladies and gentlemen, the attorneys tell me a witness is lining up and this is a good time for us to break for lunch. It is almost 12:30. I'll give you a good long lunch. Be back here in your jury room at 2 o'clock, a little over an hour-and-a-half. Thank you very much. Please do not discuss the case with anyone.

(The jury exits at 12:21 p.m., and the following is heard out of the presence of the jury.)

THE COURT: All right. We'll be at ease until 2 o'clock.

(Lunch recess from 12:21 p.m. to 2:00 p.m., and the following was heard out of the presence of the jury.)

THE COURT: Mr. Graustein, are you ready?

MR. GRAUSTEIN: Yes.

THE COURT: We have the clerk and court reporter. Ready, Ms. Wilson?

MS. WILSON: Yes, sir.

THE COURT: Okay. Bring them in.

(The jury enters, and the following is heard in the presence of the jury.)

JESSICA STONE - DIRECT BY MR. GRAUSTEIN

1 THE COURT: We have the jury back in the
2 courtroom and we're ready to proceed. Mr.
3 Graustein.

4 MR. GRAUSTEIN: The State would call
5 Jessica Stone.

6 (JESSICA STONE, having been duly sworn,
7 testified as follows:)

8 THE CLERK: State your full name and
9 spell your last name.

10 MR. STONEY: Jessica Louise Stone,
11 S-T-O-N-E.

12 DIRECT-EXAMINATION

13 BY MR. GRAUSTEIN:

14 Q Ms. Stone, how are you doing this afternoon?

15 A Good.

16 Q All right. Ms. Stone, where do you
17 currently live, just generally?

18 A In Clarendon County.

19 Q Are you employed, working there?

20 A Yes, sir, I am.

21 Q Let me talk about August 31st, 2011. Do
22 you remember that day?

23 A Yes, sir.

24 Q Okay. On that day, were you acting as a
25 confidential informant for the 15th Circuit Drug

JESSICA STONE - DIRECT BY MR. GRAUSTEIN

1 Enforcement Unit?

2 A Yes, I was.

3 Q And what were you supposed to do that day in
4 your capacity as a confidential informant?

5 A I set up a buy to buy \$40 worth of drugs.

6 Q Any specific type of drug?

7 A Crack cocaine.

8 Q Okay. You say you set up a buy?

9 A Yes, sir.

10 Q How did you do that?

11 A By phone conversation.

12 Q So you called the person you were supposed
13 to buy the drugs from?

14 A Yes, I did.

15 Q And you told the drug enforcement unit this?

16 A Yes.

17 Q And who -- what was the name of the person
18 that you called to set up that drug buy?

19 A Spoon.

20 Q Is that a nickname?

21 A Spoon.

22 Q So you knew the person as "Spoon"?

23 A Yes.

24 Q Is that person in the courtroom today?

25 A Yes, he is.

JESSICA STONE - DIRECT BY MR. GRAUSTEIN

1 Q Can you identify him by clothing he's
2 wearing?

3 A Tan striped shirts, orange socks, tan pants
4 and I do believe black shoes.

5 Q Is that the defendant in this case?

6 A Yes, it is.

7 Q You knew him as Spoon. So you knew him
8 before August 31st?

9 A Yes, I did.

10 Q And did you know his full name?

11 A Yes. I did afterwards.

12 Q Afterwards you did?

13 A Yes.

14 Q And you found out afterwards that his name
15 was?

16 A Lynel Witherspoon.

17 Q Okay. How long before this control buy did
18 you know him?

19 A I would say four to five months prior.

20 Q You were well familiar with him?

21 A Yes, I was.

22 Q He wasn't a stranger to you?

23 A No, sir.

24 Q And this was not the first time you ever met
25 him?

JESSICA STONE - DIRECT BY MR. GRAUSTEIN

1 A No, it was not.

2 Q So let's get back to August 31st, 2011.

3 You are working with the drug enforcement unit.

4 You set up this control buy with Spoon, who you've
5 identified as Lynel Witherspoon, by phone call?

6 A Yes.

7 Q And where was this control buy supposed to
8 take place?

9 A In Myrtle Beach.

10 Q In Myrtle Beach?

11 A Yes.

12 Q And did you set up the location where it
13 would happen?

14 A Yes, I did.

15 Q And what was your understanding of what you
16 were supposed to do to complete that control buy?
17 What did the agents of the drug enforcement unit
18 want you to do?

19 A Do what I said that I could do.

20 Q Which was what?

21 A Buy illegal drugs.

22 Q They gave you the money to buy the drugs?

23 A Yes, they did.

24 Q How much money did they give you?

25 A Forty dollars.

JESSICA STONE - DIRECT BY MR. GRAUSTEIN

1 Q Forty dollars. And how did you get to the
2 location where this control buy occurred?

3 A I was a passenger in a car.

4 Q Okay. So you were riding with somebody to
5 -- was it another confidential informant?

6 A No, he was not.

7 Q But someone giving you a ride?

8 A Yes.

9 Q Before you left to do the -- you had to get
10 there by car, correct?

11 A Yes.

12 Q So you got there by car. What was your
13 understanding of what, if anything, the drug
14 enforcement agents would be doing while this was
15 all going on?

16 A Following me, keeping an eye on me, making
17 sure nothing wrong happened.

18 Q Okay. Now, did they provide you with any
19 sort of recording equipment?

20 A Yes, they did.

21 Q They did, okay. What sort of recording
22 equipment -- and I'm not asking you to be real
23 technical --

24 A I had a small piece placed in my chest area,
25 and a small black box wrapped around my waist area.

JESSICA STONE - DIRECT BY MR. GRAUSTEIN

1 Q And your understanding was what would this
2 get recordings of?

3 A Video and audio.

4 Q So the camera was on your chest, you said?

5 A Yes. It was like a button.

6 Q Like a button. So it was on your chest.

7 Did the officers tell you what sort of field of
8 vision that camera would have?

9 A Yes.

10 Q So you knew you would have to look at him,
11 be turned towards someone to get a picture of him?

12 A Yes.

13 Q So they gave you the video recording
14 equipment and the audio equipment. Did they search
15 you before you left?

16 A Yes, they did.

17 Q They searched you, your person?

18 A Yes.

19 Q They searched the vehicle, that you know of?

20 A Yes, trunk and inside.

21 Q And after all of that was done, did they
22 test the equipment to make sure it was working,
23 right?

24 A Yes, they did.

25 Q And then you went off to do the control buy?

JESSICA STONE - DIRECT BY MR. GRAUSTEIN

1 A Yes.

2 Q About how long did it take to get from when
3 you left at to where the buy was supposed to take
4 place?

5 A Seven, eight minutes.

6 Q It wasn't a real long drive?

7 A No, sir.

8 Q Did you stop anywhere along the way?

9 A No, we did not.

10 Q Did you talk to anybody along the way?

11 A No.

12 Q Pick anything up along the way?

13 A No.

14 Q When you go to the location -- when you got
15 to where the control buy was supposed to happen,
16 tell the jury what happened then.

17 A Well, we met up at the place that we were
18 supposed to meet up over the phone. I waited for
19 him a little while, called him to make sure he was
20 still coming. He walked across, got in the
21 backseat of the car, we made the deal and he got
22 out and I left.

23 Q So he was in the backseat of the car?

24 A Yes.

25 Q Where were you sitting?

JESSICA STONE - DIRECT BY MR. GRAUSTEIN

1 A In front passenger's seat.

2 Q So you are in the front passenger's seat,
3 and he gets in the backseat. Do you remember if it
4 was left or right?

5 A Passenger's side.

6 Q So right behind you?

7 A Yes.

8 Q Okay. And, again, remind me where was your
9 camera?

10 A It was right in front.

11 Q So it's right here (indicates)?

12 A Yes.

13 Q In this general area (indicates)?

14 A Yes.

15 Q So you have to look at him -- your body has
16 to be turned towards them to get a picture?

17 A Yes.

18 Q So you are sitting in the car, he gets in
19 the car behind you?

20 A Right.

21 Q You gave him the \$40?

22 A Correct.

23 Q He gave you a quantity of drugs?

24 A Yes.

25 Q I'll ask you to look at what's been marked

JESSICA STONE - DIRECT BY MR. GRAUSTEIN

1 as State's Exhibit 1. I don't know if you can or
2 not, but can you identify that today?

3 A Yes.

4 Q What does that appear to be to you?

5 A Crack cocaine.

6 Q And is that what you got for your \$40?

7 A Yes, it was.

8 Q And then you left. Where did you go after
9 you left?

10 A Went back to the same spot as I got set up
11 at, met with the agents, went through everything
12 that happened, was unwired and then I went home.

13 Q So that was the end of your involvement in
14 this?

15 A Yes, it was.

16 Q And as far as you know, was your recording
17 equipment working?

18 A Yes.

19 Q Okay. Now, I'll show you what's been marked
20 as State's Exhibit 2. This has been previously
21 identified by Lieutenant Pellerin as a copy of the
22 recording that was made using your equipment on
23 August 31st. Have you seen this recording since
24 that -- since August 31st? Have you seen this
25 recording?

JESSICA STONE - DIRECT BY MR. GRAUSTEIN

1 A Yes, I have.

2 Q You have. And in viewing it, is that
3 recording an accurate recording of the events of
4 that control buy?

5 A Yes, it was.

6 Q In your viewing of the recording, were any
7 deletions made from the events that occurred?

8 A No, there was not.

9 Q Was anything added to the recording?

10 A No, there was not.

11 Q So this recording is a fair and accurate
12 recording of the events of that control buy you
13 made with the defendant?

14 A Yes, it was.

15 Q Okay.

16 MR. GRAUSTEIN: Your Honor, the State
17 would move to publish this recording for the
18 jury.

19 THE COURT: Ms. Wilson?

20 MS. WILSON: No objection.

21 THE COURT: Without objection.

22 MR. GRAUSTEIN: Your Honor, as we
23 discussed previously, the voids of this recording
24 system divide the one event into two files, just
25 so the Court and the jury is aware that we'll

JESSICA STONE - DIRECT BY MR. GRAUSTEIN
1 have to run the second file after.

2 (Whereupon, State's Exhibit 2 was
3 published to the jury.)

4 Q (BY MR. GRAUSTEIN) You just watched that video
5 with us, Ms. Stone?

6 A Yes, sir.

7 Q And was what we just watched a true,
8 accurate and complete recording of the control buy
9 you conducted on August 31, 2011?

10 A Yes, it was.

11 Q And who did you purchase the drugs from on
12 that date?

13 A Spoon.

14 Q Who is Lynel Witherspoon?

15 A Yes. Correct.

16 Q All right. When you -- after you left the
17 buy and heading back to meet with the agents, did
18 you do anything with the drugs? You said you put
19 them in cellophane. Did you do anything else?

20 A No, I did not.

21 Q Did you manipulate it in any way, alternate
22 it in any way with how you bought it from Spoon?

23 A No, I did not.

24 Q And it was obvious in the video and from
25 prior testimony that someone else was in the car

JESSICA STONE - DIRECT BY MR. GRAUSTEIN

1 with you?

2 A Yes, there was.

3 Q Did they give you the drugs that you ended
4 up turning into the police?

5 A No, he did not.

6 Q And, finally, have you been promised
7 anything for your testimony here today?

8 A No, I have not.

9 Q Have you been told to do anything other than
10 be truthful with us here today?

11 A No, I have not.

12 MR. GRAUSTEIN: Please answer any
13 questions that Ms. Wilson might have.

14 THE COURT: Ms. Wilson.

15 MS. WILSON: Thank you, Your Honor.

16 CROSS-EXAMINATION

17 BY MS. WILSON:

18 Q Hello, Ms. Stone.

19 A Hello.

20 Q I just want to cut right to the chase. You
21 have been convicted before of a crime of
22 dishonesty, correct?

23 A Yes, I have.

24 Q Not really just one time, not even twice,
25 but three times?

JESSICA STONE - CROSS BY MS. WILSON

1 A Yes, it is.

2 Q And that crime was a crime of forgery?

3 A Yes.

4 Q Value of over \$5,000?

5 A Yes, it is.

6 Q And, in effect, you stole over \$7,000?

7 A Yes, I did.

8 Q Is that right? And you have a conviction
9 for those things? You are a convicted felon?

10 A Yes, I am.

11 Q You are the person that set up this entire
12 process; isn't that correct?

13 A Yes, I was.

14 Q And you set it up. You're the only person
15 talking to anybody; isn't that correct?

16 A Yes, I am.

17 Q And you are the only person on the phone,
18 correct?

19 A Correct.

20 Q And you are the only person who can say they
21 saw someone; isn't that correct?

22 A Correct.

23 Q And you get a ride, go out, get wired by
24 this -- by the agents from the drug enforcement
25 unit, DEU, correct?

JESSICA STONE - CROSS BY MS. WILSON

1 A Correct.

2 Q And you then proceed to get in a car, camera
3 seems to be working pretty well while you are
4 getting wired. I see different faces on the video.
5 Did you see those faces, too, right?

6 A Yes, I did.

7 Q You get in the car and you could see the top
8 part of your face, and you can see the driver's
9 face even at some point; isn't that right?

10 A Yes.

11 Q And even when you get back, the video seems
12 to be working remarkably well, don't you think?
13 You can see the agent approaching, I believe Agent
14 Pellerin, after the alleged buy takes place; isn't
15 that correct?

16 A Yes.

17 Q So in all of this time you can see
18 everyone's face, but you can't see anyone's face at
19 the critical time which is what your purpose was to
20 get this transaction on video, correct?

21 A Correct.

22 Q And, yet, somehow that seemed to not happen;
23 isn't that correct?

24 A It seems that way.

25 Q And, in fact, not only is no one else

JESSICA STONE - CROSS BY MS. WILSON

1 visible on this video, but the only confirmation
2 that an act even occurred is you; isn't that
3 correct?

4 A Yes.

5 Q So it is just you?

6 A Yeah.

7 Q Just your word. Now, when you are sitting
8 in the vehicle and you are making the phone call,
9 there is no officer present to confirm that this
10 conversation actually took place with another
11 person, is there?

12 A No, there's not.

13 Q And there is no verifiable way to know that
14 you actually called out anywhere, is there, other
15 than what you say, correct?

16 A Correct.

17 Q So we got you, somebody who we already know
18 is convicted of crimes of dishonesty for being
19 untruthful or doing something fraudulent, correct?

20 A Correct.

21 Q Trying to prove that this happened the way
22 you said, but at the critical time, there is no
23 video evidence to show that what you are saying is
24 true, right?

25 A Right.

JESSICA STONE - CROSS BY MS. WILSON

1 Q Okay. So nobody else was a party to the
2 calls, right -- well, we've established that. No
3 one else was a party to the call except you, none
4 of the agents?

5 A No.

6 Q And you were there with only the driver in
7 the car?

8 A Correct.

9 Q Do you remember when you were patted down?

10 A Yes, I do.

11 Q How long do you think that took? Maybe 30
12 seconds?

13 A I would say a little longer.

14 Q Maybe a minute? Sound about right?

15 A Minute, minute-and-a-half.

16 Q Did they check under your clothes?

17 A Excuse me?

18 Q They didn't check under your clothes, did
19 they?

20 A They felt.

21 Q They did a pat-down?

22 A And I had to pull my shirt up.

23 Q Did you show your bra area or --

24 A No. No. No.

25 Q So they patted you down and you didn't pull

JESSICA STONE - CROSS BY MS. WILSON

1 your shirt up?

2 A No, I did not pull it up.

3 Q I thought you were saying you did. So you
4 are saying they patted you down, they didn't
5 actually check under your clothing?

6 A I had two shirts on, they checked up under
7 the first shirt.

8 Q You had two shirts on on this particular
9 day?

10 A Yes.

11 Q So they checked under the first shirt, but
12 they didn't actually check under your clothes?

13 A No.

14 Q Now, did anyone -- there wasn't anyone that
15 actually followed you out to the scene, or was
16 there someone?

17 A Yes.

18 Q So someone followed you out?

19 A Yes, they did.

20 Q But that person, whoever followed you, they
21 weren't there at the scene of the transaction where
22 you were, were they?

23 A No, they were not.

24 Q So, again, nobody else can verify anything
25 that you say happened, not even on the video?

JESSICA STONE - CROSS BY MS. WILSON

1 Nobody else can say what you say happened during
2 that transaction, correct?

3 A Correct.

4 Q Nobody but you?

5 A Correct.

6 MS. WILSON: Court's indulgence just one
7 second.

8 (A brief pause in the proceedings.)

9 Q (BY MS. WILSON) Now, these forgeries that you
10 had, you were convicted of those in 2001?

11 A Correct.

12 Q And you have been working with the drug
13 enforcement unit for a number of years, or just
14 something recent?

15 A Something recent.

16 Q And you would say probably that no one just
17 generally gets recruited, in a sense, to work for
18 the DEU, do they?

19 A No.

20 Q So usually there is some action or act that
21 causes the drug enforcement unit to want to use
22 you?

23 A Correct.

24 Q And that means that generally you're not
25 going to be what would be considered a regular

JESSICA STONE - CROSS BY MS. WILSON

1 citizen, would you, an average person who never had
2 any troubles?

3 A No, I'm not.

4 Q So just to recap, I want to make sure I'm
5 being very clear. No one, other than you, can
6 verify that a transaction even took place, can
7 they?

8 A No.

9 Q And with your crimes of dishonesty, because
10 basically that means you lied about something, you
11 did something that was fraudulent, that was false
12 and you were convicted for that?

13 A Yes, I was.

14 Q So you are the only person who can say what
15 happened, and you didn't even manage to get that on
16 video, is that what you are telling me?

17 A From the way it seems.

18 Q Did you get it on video?

19 A Everything but the face.

20 Q Wouldn't that be the point of the video
21 though, to get the face, don't you think?

22 A Yes.

23 Q I mean, you managed to get Pellerin's face
24 twice, correct?

25 A Correct.

JESSICA STONE - CROSS BY MS. WILSON

1 Q Nobody else can confirm anything in this
2 case but you?

3 A Correct.

4 Q Okay.

5 MS. WILSON: Court's indulgence one
6 second.

7 (A brief pause in the proceedings.)

8 MS. WILSON: Nothing further.

9 MR. GRAUSTEIN: Real briefly.

10 REDIRECT-EXAMINATION

11 BY MR. GRAUSTEIN:

12 Q When did those forgery convictions occur?

13 A I was convicted in 2001.

14 Q So about 12 years ago?

15 A Yes.

16 Q Okay. Now -- and we talked about this a
17 little bit before -- at the beginning of that
18 video, Agent Pellerin, he is putting the camera,
19 that button camera, right here on your clothes?

20 A It is actually a shirt pocket.

21 Q So he's putting it right here and he's
22 adjusting it and trying to make sure it's pointing
23 in the right way?

24 A Correct.

25 Q So are you shocked that he's on here?

JESSICA STONE - REDIRECT BY MR. GRAUSTEIN

1 A No.

2 Q He's trying to frame himself up pretty good?

3 A Correct.

4 Q And, again, we talked about you have to have
5 your body pointed at the person for them to show up
6 on the camera?

7 A Correct.

8 Q And, again, where were you at the time of
9 the transaction?

10 A In the front passenger's seat.

11 Q In the front passenger's seat. Where was
12 Spoon?

13 A In the backseat.

14 Q In the backseat right behind you?

15 A Correct.

16 Q In your mind, could you have in any way
17 turned around to get his face without looking real
18 suspicious?

19 A No, I could not have.

20 Q Okay. Thank you.

21 MS. WILSON: Really briefly, Your Honor.

22 RECROSS-EXAMINATION

23 BY MS. WILSON:

24 Q You didn't actually -- you do admit that
25 Pellerin's face is on the video before he actually

JESSICA STONE - RECROSS BY MS. WILSON

1 starts fooling with the camera, don't you?

2 A Yes.

3 Q So that's pretty clear from the video, isn't
4 it, that he's in the frame before he even starts
5 adjusting anything? It manages to catch his face,
6 correct?

7 A Correct.

8 Q And you said initially that it is your
9 job -- that you were sent out to do a job, which
10 was to get this transaction on video, correct?

11 A Correct.

12 Q So you didn't get anybody's face but
13 Pellerin's before the transaction, and you didn't
14 get anyone's face, but Pellerin's after the
15 transaction, and you got nobody's face during the
16 transaction; isn't that correct?

17 A That is due to the camera.

18 Q And the camera on you, you were sitting in
19 it instead of getting out of the car so you could
20 actually make the transaction, right?

21 A Correct.

22 Q So, again, there is nothing else here to
23 confirm the identity of anybody other than your
24 say-so, you calling out a name; isn't that right?

25 A Seems that way.

JESSICA STONE - RECROSS BY MS. WILSON

1 MS. WILSON: No further questions, Your
2 Honor.

3 THE COURT: You may step down. Mr.
4 Graustein.

5 MR. GRAUSTEIN: No further witnesses.

6 THE COURT: That's the State's case?
7 Okay. Take the jury to the jury room, Mr. Ropp.
8 (The jury exits at 2:55 p.m., and the
9 following is heard out of the presence of the
10 jury.)

11 THE COURT: All right, Ms. Wilson.

12 MS. WILSON: Your Honor, at this time I
13 move for a directed verdict. It is the defense's
14 position that the State has failed to prove the
15 elements they presented in the indictment. It is
16 very clear that not one person is able to
17 independently verify that my client is the person
18 who was supposedly --

19 THE COURT: The witness who just
20 testified did.

21 MS. WILSON: Well, Your Honor --

22 THE COURT: Doesn't that go to the weight
23 of the testimony, her credibility, but not the
24 existence of the evidence?

25 MS. WILSON: Okay. All right. Your

MOTION FOR DIRECTED VERDICT - MS. WILSON

1 Honor, in addition, I feel that there is -- even
2 if she confirms that he was the person that
3 committed the crime here, that he was the person
4 that came into the car, there is still not any
5 evidence of how she came to have the drugs, and I
6 don't recall her specifically saying that he was
7 the person who handed off the substance to her.
8 She claims that it wasn't --

9 THE COURT: She said she had him met him
10 to buy a 40.

11 MS. WILSON: That is what she says, but
12 there is nothing to suggest --

13 THE COURT: Isn't that testimony? Isn't
14 that evidence?

15 MS. WILSON: You are right, Your Honor.
16 Your Honor, we would ask that the Court consider
17 that the State has failed to meet their burden
18 and ask for a directed verdict.

19 THE COURT: I respectfully deny your
20 request for your directed verdict.

21 MS. WILSON: Thank you, Your Honor.

22 THE COURT: Ms. Wilson, have you
23 discussed with your client his right to testify?

24 MS. WILSON: I have, Your Honor.

25 THE COURT: Does he wish to testify?

MOTION FOR DIRECTED VERDICT - MS. WILSON

1 MS. WILSON: He does not, Your Honor.

2 THE COURT: Let me explain to him his
3 Constitutional rights.

4 Heather, would you swear him?

5 (LYNEL WITHERSPOON, having been duly sworn,
6 testified as follows:)

7 THE COURT: Mr. Witherspoon, at this time
8 I'm going to explain some of your rights, and if
9 you don't understand anything I say, please let
10 me know. If you want me to explain it in a more
11 detailed fashion, let me know that. Do you
12 understand what I'm saying? Speak up, Mr.
13 Witherspoon.

14 MR. WITHERSPOON: Yes, sir.

15 THE COURT: We have reached the stage of
16 the trial where you may present your defense.
17 You have the right to claim the protections given
18 you by the Fifth Amendment of the Constitution of
19 the United States, and that amendment, in part,
20 says no person shall be compelled in any criminal
21 case to be a witness against himself. This means
22 you cannot be required to testify in this case.
23 Of course, you have the right to testify on your
24 own behalf if you wish, however, no one can make
25 you testify. This is a personal right, and no

COURT ADDRESSES MR. WITHERSPOON

1 one can waive it except you.

2 If you decide to testify, you will be
3 subject to the same rules that govern other
4 witnesses, and you may be examined and
5 cross-examined on any relevant issue in the case.
6 In addition, if you have any convictions
7 involving dishonesty or false statements or
8 crimes punishable by imprisonment by more than
9 one year and this Court determines that the
10 probative value of admitting this evidence
11 outweighs its prejudicial effect to you, the
12 solicitor will be able to introduce your record
13 to attack your credibility.

14 If you decide to testify, this decision
15 on your part must be freely, voluntarily and
16 intelligently made with knowledge of your
17 protections given by the Fifth Amendment and the
18 consequences of your decision to testify. If you
19 decide not to testify, I will instruct the jurors
20 that they cannot give the fact that you did not
21 testify any consideration whatsoever, and that
22 there is to be absolutely no prejudice to you
23 because you did not testify. It is left entirely
24 up to you whether or not to testify.

25 I'm going to let you talk with your

COURT ADDRESSES MR. WITHERSPOON

1 attorney or any family or friends that you have
2 here, if you have any, or anyone else, but the
3 final decision will be left entirely up to you.
4 Do you understand what I've said?

5 MR. WITHERSPOON: Yes, sir.

6 THE COURT: Do you have any questions
7 about what I've explained?

8 MR. WITHERSPOON: No, sir.

9 THE COURT: Have you discussed with your
10 lawyer whether you should or should not testify?

11 MR. WITHERSPOON: Yes, sir.

12 THE COURT: Do you wish more time to talk
13 with her about whether or not you should testify?

14 MR. WITHERSPOON: No, sir.

15 THE COURT: Do you wish to testify?

16 MR. WITHERSPOON: No, sir.

17 THE COURT: All right. Thank you very
18 much. You may sit down.

19 Okay. Will the defense rest, then, Ms.
20 Wilson?

21 MS. WILSON: I'm sorry, Your Honor?

22 THE COURT: Is the defense going to rest,
23 then?

24 MS. WILSON: Yes, we are.

25 THE COURT: I'll have you do that on the

BY THE COURT

1 record once the jury is in, but at this time
2 we'll take a brief recess, come back in and do
3 arguments of the charge.

4 MS. WILSON: Thank you, Your Honor.

5 THE COURT: The charge I'm going to give
6 on the criminal defenses, I'll use the right to
7 remain silent, things of that nature. I think
8 you are familiar with my charges, but I'm going
9 to charge that the defendant is charged with the
10 distribution of cocaine base, crack cocaine.
11 State must prove beyond a reasonable doubt that
12 the defendant distributed, dispensed, delivered
13 or purchased or otherwise aided and abetted or
14 attempted to conspire to distribute, dispense,
15 deliver or purchase cocaine base.

16 "Distribute" means to deliver other than
17 by administering or dispensing a drug. A
18 transfer can involve an exchange of money, a
19 barter or a gift. There does not have to be
20 anything given in exchange for the drugs for a
21 transfer to constitute a distribution.

22 Any further request for the description
23 of the offense?

24 MR. GRAUSTEIN: No, Your Honor.

25 MS. WILSON: Nothing from the defense.

BY THE COURT

1 THE COURT: Thank you very much.

2 (A recess was taken from 3:03 p.m. to 3:14
3 p.m.)

4 (The jury enters at 3:14 p.m., and the
5 following is heard in the presence of the
6 jury.)

7 THE COURT: I believe we have our jury
8 panel. Ms. Wilson, the defense rests?

9 MS. WILSON: Yes, Your Honor, and we do
10 not wish to present a case.

11 THE COURT: So the defense rests. I'll
12 assume that your motion that was made has been
13 remade again? You make the same motions again?

14 MS. WILSON: Yes, sir, I would.

15 THE COURT: All right. I would so rule
16 the rulings I did earlier.

17 Okay. Mr. Graustein, are you prepared to
18 give a closing statement?

19 MR. GRAUSTEIN: Yes, Your Honor.

20 All I know, I wish members of my church
21 Bible study group knew how to buy a 40 of crack
22 cocaine, because that's the kind of witness they
23 want us to present to you. Unfortunately, we
24 know, and law enforcement officers know, to catch
25 a criminal, you need to use a criminal. I'm

CLOSING ARGUMENT - MR. GRAUSTEIN

1 probably not -- so often police agencies need to
2 use these confidential informants. They are not
3 members of your church group. They have broken
4 the law, just as defense counsel pointed out.
5 They are looking for help. They've broken the
6 law. So they are not doing it out of the
7 goodness of their heart, but that doesn't mean
8 they are liars, and it doesn't mean they are
9 making stuff up, and it doesn't mean that they
10 try to manufacture evidence.

11 Yes, the officers give them videotapes to
12 record what is going on, not because, oh, we're
13 dealing with this bad person, they obviously are
14 going to do something bad so we better watch them
15 the whole way. For just the reason we have these
16 trials, defense counsel says, You can't believe
17 that person. They are a bad person, don't listen
18 to them. That's why they use videotapes, so we
19 can say, See, what they told you is what shows up
20 on the videotape.

21 There isn't a thing that Ms. Stone
22 testified to that isn't on that videotape. Now,
23 it's true, unfortunately, she was unable to get
24 the high school year book picture of the
25 defendant. That was just the nature of the

CLOSING ARGUMENT - MR. GRAUSTEIN

1 circumstances in this case. The defendant
2 positioned himself behind her, and what is she
3 supposed to do? Hey, Spoon, it's time for your
4 close-up (indicates). Of course not. She's in
5 danger here. She's out doing a drug deal. The
6 last thing she wants him to know is that she's
7 working for the police, so she has to be careful
8 what she does. She can't do something that would
9 make him think why are you doing that weird
10 thing, why are you doing that big contortion and
11 turning like that.

12 Would we like to have the year book
13 picture of Mr. Witherspoon on that video?
14 Absolutely. We don't always get them. We don't
15 always get them. That doesn't mean her testimony
16 isn't true. Everything else that she testified
17 to, and the officers testified to, is borne out
18 by that video. In fact, in that video Lieutenant
19 Pellerin says, The target of this operation is
20 Lynel Witherspoon. Was it just dumb luck that
21 Lynel Witherspoon happened to show up? No.
22 Ms. Stone called him, set up a drug deal. Did
23 some random person just show up and she bought
24 \$40 worth of crack cocaine from them out there in
25 that parking lot? Of course not. Ms. Stone

CLOSING ARGUMENT - MR. GRAUSTEIN

1 called Lynel Witherspoon and set up a drug deal,
2 and he showed up and he sold her \$40 worth of
3 crack cocaine.

4 One of the reasons when I'm picking a
5 jury that I use is I try to look for folks that
6 might have some good commonsense, and that's what
7 I would like you all to use in this case, your
8 commonsense. The most obvious answer is what
9 happened. You can go through all sorts of
10 contortions, like the defense will want you to
11 do. Well, possibly this could have happened, and
12 possibly that could have happened. You have the
13 testimony of numerous law enforcement agents,
14 none of their testimony in any way contradicts
15 Ms. Stone's. Ms. Stone was the only person who
16 was actually present at the transaction, but that
17 is the nature of the confidential informants'
18 purchases. You're not going to have a big
19 audience. Drug dealers tend not to like to have
20 big audiences during their transactions.

21 So use your commonsense. What is the
22 obvious answer here? That it happened exactly as
23 the officers and Ms. Stone say it happened.
24 Ms. Stone may have had a forgery conviction from
25 12 years ago, and I don't think that -- well, you

CLOSING ARGUMENT - MR. GRAUSTEIN

1 decide whether that makes her a liar today,
2 whether she made up this video. The video plays
3 out. The video plays out. The defense wants to
4 say, You don't have his high school picture year
5 book picture, it isn't it. Can't be him. Don't
6 listen to Ms. Stone because she did forgery 12
7 years ago, even though the video backed up
8 everything that she testified to, and she
9 testified it's him. She called him Spoon as she
10 drove away. Call me, Spoon. Who do you think
11 she was talking about?

12 We have to prove our case beyond a
13 reasonable doubt. It doesn't mean beyond any
14 possible doubt, it is a reasonable doubt. Is it
15 that some random person showed up at the same
16 time during some made up telephone conversation
17 and someone happens to walk up with a 40 of crack
18 cocaine ready for sale? Is that a reasonable
19 doubt? The State does not have to prove its case
20 beyond any possible doubt, but a reasonable
21 doubt.

22 Look at the evidence. Use your
23 commonsense. What happened here? Did Ms. Stone
24 come up with some huge, elaborate plan to frame
25 Mr. Witherspoon while being videotaped? Is that

CLOSING ARGUMENT - MS. WILSON

1 a reasonable doubt? She secretly hid some drugs
2 and then ditched the money, all while videotaping
3 herself? In 28 minutes of that videotape she
4 masterminded all of this to bring in Mr.
5 Witherspoon, for whatever reason? Use your
6 commonsense, folks. When you look at the
7 evidence, think about the testimony, think about
8 the video you saw, and I'm sure you'll come back
9 and return a verdict of guilty. Thank you.

10 THE COURT: Ms. Wilson.

11 MS. WILSON: Thank you, Your Honor.
12 Ladies and gentlemen, we spent the better part of
13 a day here seeing the State put up witnesses,
14 witness after witness. The officers, arguably,
15 the most trustworthy of the people that took the
16 stand. They don't have any direct evidence to
17 show that Lynel is the person who committed this
18 crime.

19 Agent Pellerin got on the stand himself
20 and told you, we like to have the audio and video
21 because we basically want to backup what is being
22 said by the confidential informant. We basically
23 want to make sure that things happen the way they
24 claim they happen. But we saw a video that had
25 none of the stuff on it that they are trying to

CLOSING ARGUMENT - MS. WILSON

1 verify. And then the State basically wants you
2 to wrap this case up in a nice, pretty box with
3 pretty paper and a pretty bow and basically fill
4 in the gaps in their case for them. Use your
5 commonsense, they say. That is actually a good
6 idea. But their burden is more serious than
7 that, okay. They actually have to make you
8 believe beyond a reasonable doubt that this case
9 happened exactly the way they say. They actually
10 have to present evidence, believe evidence, that
11 it happened the way that they are saying it
12 happened, and I'm telling you, they haven't done
13 it. Let's start slow.

14 We don't have any officers who got up
15 here today and said that they saw this man commit
16 this crime, not one of them. You know that if
17 they were able to prove that he was the one that
18 did it, if any of them were able to get up on the
19 stand and say he did it, they would have said it
20 today. They would have said it, and they would
21 have said it over and over and over again, but
22 that didn't happen.

23 Then, they are going to wave around this
24 rock of crack here, this teenie, tiny rock of
25 crack. I'm not denying that they have crack.

CLOSING ARGUMENT - MS. WILSON

1 I'm not arguing that it's crack. I'm saying that
2 the crack didn't come from him. They haven't
3 shown you anything that says that he passed this
4 off. They haven't shown you a video showing he
5 handed this to somebody, they haven't shown
6 anything about how this crack came to be in this
7 lady's possession, confidential informant's
8 possession. Granted, they put her on the stand,
9 Ms. Stone on the stand. The State wants you to
10 think that I think she's trash, that's just not
11 true. She's a nice person just like everybody
12 else in here is a nice person, but what they also
13 want you to believe is that she's a regular
14 citizen just like us, and she is not. She has
15 other issues. The reason why her record comes in
16 is because she has a crime and convicted for
17 being dishonest on her record, that is why it
18 comes into the Court's hearing.

19 The State wants you to believe that you
20 should just completely disregard that, just throw
21 that out the window, you know, because it's not
22 your job to figure out if she's actually being
23 truthful. It is your job. That is your
24 function, to figure out if you can really believe
25 that she's truthful today.

CLOSING ARGUMENT - MS. WILSON

1 Now, there doesn't seem to be a whole lot
2 of evidence on this video. The State just got up
3 here and told you that -- that -- you know, we've
4 shown you everything, everything she said is on
5 the video. We already know that everything she
6 said is not on the video. This man is not on
7 that video. The full drug transaction itself,
8 not on the video.

9 Now, there's a whole issue about the \$40
10 in buy money. We don't see that in the video.
11 Now we're supposed to believe that it was given
12 to her. I don't have any problem believing it
13 was given to her, but it's not on the video, yet
14 she seems to come back with a rock of crack that
15 she says she got from somewhere, but none of that
16 is on the video either.

17 So we've got a confidential informant who
18 admittedly has lied in the past, who presumably
19 can't verify any of the things that she's saying
20 right now, with any independent source of
21 anything. There is no video. There is no other
22 party who can verify it. There is nothing else
23 there. There is just nothing else there. But
24 the State wants you to believe that it is not his
25 job or their job to actually tie this case up,

CLOSING ARGUMENT - MS. WILSON

1 and it is their job. They have to prove beyond a
2 reasonable doubt, and that is a very high burden,
3 not just that a crime happened -- I'm not even
4 saying something didn't happen, but we don't know
5 who did it. They haven't presented you any
6 evidence to show you who did it. That is what
7 I'm telling you is the issue in the case. There
8 is nothing in this case that they have shown you,
9 presented, that they tried to tell you about that
10 says he did it.

11 So I am in my car riding along and I yell
12 out my window, Hey, Bobby, call me, and -- and,
13 what does that mean? Absolutely nothing, because
14 maybe that is not Bobby. Maybe I'm saying it is
15 Bobby, maybe it's Susie, maybe it is Kenny, maybe
16 it's Derek, I don't know. My point to you is
17 that her calling out a name, her calling people
18 on the phone -- not one of the officers testified
19 that they knew anything about who she was talking
20 to on that telephone.

21 She said it was her job, her job to
22 capture this transaction, okay, to make this all
23 go down. What does she do? She gets in the car,
24 goes out wired with audio and video, and while
25 she's there, she doesn't think to get any of that

CLOSING ARGUMENT - MS. WILSON

1 stuff on camera? Camera worked before and after
2 the transaction, but nothing on the video during
3 the actual transaction? All of a sudden, she
4 comes back I got drugs and, oh, this is who it
5 is, by the way. I'm going to tell you, that is
6 not sufficient evidence to convict someone. That
7 is not sufficient evidence that should get you
8 over the hurdle of beyond a reasonable doubt.

9 Now, we covered the agents. We didn't
10 see anything -- they were only there at the very
11 beginning when they wired her and at the end
12 where she comes back, miraculously, with this
13 rock of crack. Not one of them were on scene
14 when the transaction occurred. They do cursory
15 pat-downs. They call them thorough, but
16 basically (indicates), you're good. Go out
17 there, see what you can do for us. Not
18 sufficient. Not good enough. You don't know
19 what they got on. You don't know what she's got
20 in the car with her. You don't know what's in
21 there.

22 As far as needing a nurse or some kind of
23 medical personnel to do a body cavity search,
24 since when would that be necessary? They do more
25 thorough searches than that at the airport. You

CLOSING ARGUMENT - MS. WILSON

1 are catching a flight, they are going to pat you
2 down. They will feel all over you, you probably
3 would need a date afterwards.

4 The video that the State tells you
5 corroborates everything that the confidential
6 informant tells you, doesn't corroborate anything.
7 I think it is very clear. You watched it, I
8 watched it, we all watched and there is nothing on
9 there. Nothing on there. I know more about what
10 she looked like at the time that this was supposed
11 to happen than I know about who it happened with.

12 She looks very nice today. The State is
13 trying to present an image to you. The piercings
14 are gone, wearing a nice dress. Does that make her
15 bad? It doesn't, but my point to you is that you
16 have to look past what they are trying to tell you
17 about what is most important in this case, and look
18 at what you know you see and then think critically
19 about what you know is not there.

20 Finally, I can't really stress the
21 importance of their burden in this case. The
22 State, it is their job, it is their only function
23 to prove that this crime could not have happened
24 any other way than the way they are saying, okay.
25 If you don't have a person that you can believe, if

JURY CHARGE - BY THE COURT

1 you don't have anybody else who witnessed anything,
2 you can't even get a face on a video, they haven't
3 met that burden. Under that basis, I'm going to
4 ask you that when you go back to the jury room and
5 you begin deliberations based on what the judge
6 instructs you the law is in this case, that you
7 find Lynel not guilty of this crime of
8 distribution. Thank you.

9 THE COURT: Ladies and gentlemen of the
10 jury, let's me remind you that during this trial
11 you and I have certain duties to perform. As the
12 trial judge, it is my duty and responsibility to
13 preside over the trial of the case, and I also
14 have the duty to rule on the admissibility of
15 evidence offered during a trial. You are to
16 consider only the competent evidence before you.
17 If there was any testimony ordered stricken from
18 the record in this case during this trial, you
19 must disregard that testimony. You are to
20 consider only the testimony which has been
21 presented to you from this witness stand, any
22 exhibits which have been made a part of the
23 record in this case and any stipulations or
24 agreements of counsel.

25 I have the additional duty to charge you

JURY CHARGE - BY THE COURT

1 the law applicable to this case as the presiding
2 judge. I'm the sole judge of the law of the
3 case, and it is your duty as jurors to accept and
4 apply the law as I now state it to you. If you
5 already have an idea as to what the law is or
6 what the law ought to be, and it does not agree
7 with what I now tell you what the law is, you
8 must abandon this idea because you are sworn to
9 accept the law and apply the law exactly as I
10 state it to you.

11 In every case tried in this court before
12 the jury, the jury becomes the sole and exclusive
13 judge of the facts of the case. A trial judge
14 cannot intimate, state, comment on or make any
15 statement to a trial jury about the facts in a
16 case. Since you, the jury, are the sole judges
17 of the facts in the case, you are not to infer
18 from what I've said during the progress of this
19 trial and ruling on the admissibility of the
20 evidence or otherwise or anything that I say now
21 during the course of this instruction to you,
22 that I have any opinion about the facts in the
23 case. The law does not allow me to have an
24 opinion about the facts in the case. This is a
25 matter solely for you, the jury, to determine.

JURY CHARGE - BY THE COURT

1 As jurors it is your duty to determine the
2 effect, value, weight and truth of the evidence
3 presented during this trial.

4 Now, the indictment in this case charges
5 the defendant with distribution of cocaine base,
6 sometimes that's referred to as crack cocaine. I
7 remind you that the fact that the defendant was
8 arrested, charged and indicted in this case is
9 not evidence in the case and cannot be considered
10 by you as evidence of guilt in the case, nor does
11 it create any presumption or inference of guilt.
12 That document is simply the formal written
13 instrument which contains the charge made against
14 the defendant. It is the formal document by
15 which the case is brought to court.

16 Now, the defendant has plead not guilty
17 to the indictment, and that plea puts the burden
18 on the State to prove the defendant guilty. A
19 person charged with committing a criminal offense
20 in South Carolina is never required to prove
21 himself innocent. I charge you that it is an
22 important rule of the law that the defendant in a
23 criminal case, no matter what the seriousness of
24 the charge is, will always be presumed to be
25 innocent of the crime for which the indictment

JURY CHARGE - BY THE COURT

1 was issued unless guilt has been proved by
2 evidence satisfying you of that guilt beyond a
3 reasonable doubt.

4 This presumption of innocence does not
5 end when you begin your deliberations, but it
6 accompanies the defendant throughout the trial
7 until you reach a verdict of guilty based on the
8 evidence satisfying you of that guilt beyond a
9 reasonable doubt. The presumption of innocence
10 is like a robe of righteousness placed about the
11 shoulders of the defendant which remains with the
12 defendant until it has been stripped from the
13 defendant by evidence satisfying you of the
14 defendant's guilt beyond a reasonable doubt.

15 The presumption of innocence is not mere
16 legal theory, it is not just a legal phrase, it
17 is a substantial right for which every defendant
18 is entitled unless you, the jury, are satisfied
19 from the evidence of the defendant's guilt beyond
20 a reasonable doubt. As I said, the State has the
21 burden of proving the defendant guilty beyond a
22 reasonable doubt. Some of you may have served as
23 jurors in civil cases where you were told that it
24 is only necessary to prove that a fact is more
25 likely true than not true, such as the greater

JURY CHARGE - BY THE COURT

1 weight or preponderance of the evidence. In
2 criminal cases, the State's proof must be more
3 powerful than that. It must be beyond a
4 reasonable doubt. Proof beyond a reasonable
5 doubt is proof that leaves you firmly convinced
6 of the defendant's guilt. There are very few
7 things in this world that we know with absolute
8 certainty, and in criminal cases the law does not
9 require proof that overcomes every possible
10 doubt. If based on your consideration of the
11 evidence you are firmly convinced that the
12 defendant is guilty of the crime charged, you
13 must find the defendant guilty. If, on the other
14 hand, you think there is a real possibility that
15 the defendant is not guilty, you must give the
16 defendant the benefit of the doubt and find him
17 not guilty.

18 There are two types of evidence which are
19 generally presented during a trial, direct
20 evidence and circumstantial evidence. Direct
21 evidence is testimony of a person who claims to
22 have actual knowledge of a fact, such as an
23 eyewitness. It is evidence which immediately
24 establishes the main fact to be proved.
25 Circumstantial evidence is proof of a chain of

JURY CHARGE - BY THE COURT

1 facts and circumstances indicating the existence
2 of a fact. It is evidence which immediately
3 establishes collateral facts from which the main
4 fact may be inferred. Circumstantial evidence is
5 based on inference, and not on personal knowledge
6 or observation.

7 The law makes absolutely no distinction
8 between the weight or value to be given to either
9 direct or circumstantial evidence, nor is a
10 greater degree of certainty required of
11 circumstantial evidence than of direct evidence.
12 You should weigh all of the evidence in the case.
13 After weighing all of the evidence, if you are
14 not convinced of the guilt of the defendant
15 beyond a reasonable doubt, you must find the
16 defendant not guilty.

17 Necessarily, you must determine the
18 credibility of witnesses who have testified in
19 this case. Credibility simply means
20 believability. It becomes your duty as jurors to
21 analyze and to evaluate the evidence and
22 determine which evidence convinces you of its
23 truth. In determining the believability of
24 witnesses who testified in this case, you may
25 believe one witness over several witnesses, or

JURY CHARGE - BY THE COURT

1 several witnesses over one witness. You may
2 believe a part of the testimony of a witness, and
3 reject the remaining part of the testimony of
4 that same witness. You may believe the testimony
5 of a witness in its entirety, or reject the
6 testimony of a witness in its entirety. You may
7 consider whether any witness has exhibited to you
8 any interest, bias, prejudice or other motive in
9 this case. You may also consider their
10 appearance and manner of a witness while on the
11 witness stand.

12 The rules of evidence ordinarily do not
13 permit witnesses to testify to opinions or
14 conclusions. An exception to that rule exists
15 for witnesses we call "expert witnesses." A
16 witness who by education and experience has
17 become an expert in some art, science, profession
18 or calling may state an opinion as to any
19 relevant and material matter in which the witness
20 claims to be an expert. It may also state the
21 reasons for that opinion. You should consider
22 any expert opinion received in evidence in this
23 case, and like any other evidence, give it the
24 weight you think it deserves. If you decide that
25 an opinion of an expert is not based on

JURY CHARGE - BY THE COURT

1 sufficient education and experience, or if you
2 conclude that the reasons given in support of the
3 opinion are not sound or that the opinion is
4 outweighed by other evidence, you may disregard
5 the opinion entirely. An expert witness'
6 testimony is to be given no greater weight than
7 that of other witnesses simply because the
8 witness is an expert. Further, you are not
9 required to accept an expert's opinion even
10 though it is not contradicted.

11 An issue in this case is the
12 identification of the defendant as a person who
13 committed the crime charged. The State has the
14 burden of proving identity beyond a reasonable
15 doubt. You must be satisfied beyond a reasonable
16 doubt of the accuracy of the identification of
17 the defendant before you may convict the
18 defendant. Identification testimony is an
19 expression or belief or impression by a witness.
20 You may determine the accuracy of the
21 identification of the defendant -- or you must
22 determine the accuracy of the identification of
23 the defendant. You must consider the
24 believability of each identification witness in
25 the same way as any other witness. You may

JURY CHARGE - BY THE COURT

1 consider whether the witness had ample
2 opportunity to observe the offender at the time
3 of the offense, and this will be affected by
4 things like how long or short a time was
5 available, or how far or close the witness was,
6 lighting conditions and whether the witness had a
7 chance to see or to know the person in the past.

8 Once again, the burden of proof is on the
9 State and extends to every element of the crime
10 charged, this specifically includes the burden of
11 proving beyond a reasonable doubt the identity of
12 the defendant as the person who committed the
13 crime. If after examining the testimony you have
14 a reasonable doubt as to the accuracy of the
15 identification, you must find the defendant not
16 guilty.

17 The defendant is charged with the
18 distribution of cocaine base or crack cocaine.
19 The State must prove beyond a reasonable doubt
20 that the defendant distributed, dispensed,
21 delivered, purchased or otherwise aided and
22 abetted, attempted or conspired to distribute,
23 dispense, deliver or purchase cocaine base, crack
24 cocaine. Distribution means to deliver other
25 than by administering or dispensing a drug, a

JURY CHARGE - BY THE COURT

1 transfer in exchange for money, a barter or a
2 gift. There does not have to be anything given
3 in exchange for the drugs or transfer to
4 constitute distribution.

5 I instruct you and emphasize that the
6 fact that the defendant in this case did not
7 testify is not a fact to be considered by you in
8 any way in your deliberations and in your
9 consideration of the question of the guilt or
10 innocence of the defendant. It must not be
11 considered by you in any manner, whatsoever. A
12 defendant has the Constitutional right to remain
13 silent and the assertion of this right must be
14 considered by you in -- must not be considered by
15 you in your deliberations. I repeat, under your
16 oath you are to draw no conclusions whatsoever
17 from the fact that the defendant in this case did
18 not testify. The fact that this defendant did
19 not testify should not even be discussed in the
20 jury room. The burden of proof is on the State.
21 The defendant is not required to prove his
22 innocence. The burden of proof remains on the
23 State to prove beyond a reasonable doubt.

24 There are two jury verdicts, or possible
25 verdicts you may find in this case, guilty and

JURY CHARGE - BY THE COURT

1 not guilty of distribution of crack cocaine.
2 There is no significance whatsoever in the order
3 in which I state these possible verdicts, it
4 simply means one must be stated first. Ladies
5 and gentlemen, your verdict must be an unanimous
6 one. Madam Forelady, when a jury agrees on the
7 verdict, write the verdict on the jury verdict
8 and sign it as foreperson, knock on the jury room
9 door and inform the bailiff that you've reached a
10 verdict. At that time we'll receive you back in
11 the courtroom.

12 I'll ask you now to return to your jury
13 room, but do not begin deliberations until you
14 are told to do so by the clerk or bailiff. There
15 are matters I may have to take up with the
16 attorneys. Let me say this, if I send in to you
17 the verdict form and the exhibits in this case,
18 that is my signal to you to begin your
19 deliberations. If I don't do that, I'll bring
20 you back out for further instructions. It has
21 been my practice -- and something I've done ever
22 since I've been on the bench -- to provide the
23 jury with a copy of my charge. You may have
24 noticed that I read my charge. The Supreme Court
25 allows me to give you a copy of my charge, but it

JURY CHARGE - BY THE COURT

1 must be verbatim, so I have to prepare it in
2 advance and read it to you, but I will send it in
3 for you to use as a Court's exhibit during your
4 deliberations process so you can refer back to
5 what I have told you. I know it is complexed and
6 rather lengthy and hard for laypersons to
7 remember all of that, and that is the reason that
8 I have my -- a transcript made of my charge, so
9 that you can use it.

10 As I said, I have a verdict form here.
11 The verdict form simply says, As to the charge of
12 distribution of cocaine base, we the jury
13 unanimously find the defendant -- and you have
14 guilty or not guilty, and you circle one and sign
15 it, Madam Forelady. Again, there is no
16 significance in the fact that guilty is written
17 before not guilty, it is just that we have to do
18 it some way.

19 Mr. Ropp, if you would, take the jury to
20 the jury room.

21 (The jury exits at 3:50 p.m., and the
22 following is heard out of the presence of the
23 jury.)

24 THE COURT: Anything further?

25 MR. GRAUSTEIN: Nothing further.

ALTERNATE JUROR EXCUSED

1 MS. WILSON: Nothing, Your Honor.

2 THE COURT: I'm going to have the charge
3 marked as Court's 1, and that will go in with the
4 jury, and I also will send in the verdict form.
5 Mr. Graustein, Ms. Wilson, if you would, let's
6 get together and make sure that the exhibits have
7 all been introduced and determine which exhibits
8 will be going back to the jury. Tony, could you
9 bring the alternate out?

10 (Court's Exhibit 1 marked.)

11 (Whereupon, the alternate juror, Kesia
12 Hamachek, enters.)

13 THE COURT: Ms. Hamachek, we're about to
14 send in the exhibits to the jury and, in fact,
15 you have just -- we're about to do that. So
16 they'll begin deliberations, which means you are
17 now released from service on this particular
18 case. Thank you for helping us today. Call back
19 after 6:00. Thank you.

20 MR. HAMPTON: Thank you.

21 THE COURT: All right. Take those to the
22 jury. We are at ease while the jury deliberates.

23 (Off the record at 3:53 p.m., and the
24 jury deliberation started.)

25 (Whereupon, at 4:15 the following took

JURY DELIBERATIONS - JURY QUESTION

1 place.)

2 THE COURT: All right. I have two
3 questions that have been submitted to the court
4 by the jurors. The first question is, Why was he
5 not arrested at the time of the drug deal?
6 Number 2, Why was he arrested in 2012?

7 Of course, those were not questions
8 asked, nor were they answered during the
9 testimony, and I intend to tell -- I'll hear you,
10 but what I believe is appropriate is to tell the
11 jury simply that, that they were neither asked
12 nor answered during the trial and it is not
13 appropriate for them to be answered at this time,
14 and they can consider only the evidence that they
15 have heard during the trial in their
16 deliberations.

17 Ms. Wilson, I'll hear from you.

18 MS. WILSON: Your Honor, I don't actually
19 differ with what the Court wants to tell the
20 jury. I think that is probably the best way to
21 handle it.

22 THE COURT: Mr. Graustein?

23 MR. GRAUSTEIN: I agree with defense
24 counsel, that seems to be an appropriate answer.

25 THE COURT: Okay. Tony, if you would,

JURY DELIBERATIONS - JURY QUESTION

1 bring them in.

2 (The jury enters at 4:16 p.m., and the
3 following is heard in the presence of the
4 jury.)

5 THE COURT: Ms. Johnson, I have your note
6 and you asked, Why was he not arrested at the
7 time of the drug deal and, number two, why was he
8 arrested in 2012. Those questions were neither
9 asked nor answered during the trial of this case,
10 and it would be highly improper to supplement the
11 testimony during your deliberations. So I can
12 only tell you that you must decide this case
13 based on the evidence that has been given and the
14 testimony that has been presented during the
15 trial of the case, all right. I hope that helps
16 you. Thank you very much. We'll mark this as
17 Court's Exhibit 2.

18 (Court's Exhibit 2 marked.)

19 (The jury exits at 4:19 p.m., and the
20 following is heard out of the presence of the
21 jury.)

22 THE COURT: All right. We're at ease.

23 (Off the record at 4:19 p.m.)

24 (The following was had out of the
25 presence of the jury, and the time is

JURY QUESTION

1 6:06 p.m.)

2 THE COURT: This is a question, Did the
3 cops state they saw the defendant get to the
4 backseat of the car?

5 We have two options. We can bring them
6 back in and let them hear all of the testimony
7 again and the tape, or, as I recall it, that was
8 never testified to. Can we agree on that?

9 MS. WILSON: It was never testified to.

10 MR. GRAUSTEIN: I don't remember.

11 THE COURT: Can we just write -- I don't
12 think anyone testified that they saw him get in
13 the back of the car.

14 MS. WILSON: No, they didn't.

15 THE COURT: So what if I write this was
16 never -- they never testified that they saw the
17 defendant get into the car? Will that satisfy
18 everyone?

19 MS. WILSON: Well, specifically, Your
20 Honor, the questions that I asked were, Did you
21 see --

22 THE COURT: What we're going to say is
23 they never testified that they saw the defendant
24 get in the backseat of the car, or there was no
25 testimony --

JURY QUESTION

1 MS. WILSON: They never testified to
2 that.

3 MR. GRAUSTEIN: There was no testimony
4 from the police that they --

5 MS. WILSON: I prefer they never
6 testified. There is no testimony suggests there
7 was actually a conversation where they never said
8 that that happened, it never came up. That they
9 testified that it was not, that they did not see
10 him is a different statement, to me.

11 MR. GRAUSTEIN: I say there is no
12 testimony, because I don't even know if it was
13 discussed.

14 MS. WILSON: It was. I specifically
15 asked each time each officer got up.

16 THE COURT: And I remember the officers
17 saying they didn't see, couldn't see. What do
18 you want to say, Ms. Wilson?

19 MS. WILSON: I forgot, actually.

20 THE COURT: The police never testified
21 that they saw the defendant get into the backseat
22 of the car?

23 MS. WILSON: Yes, sir. Thank you.

24 (A brief pause in the proceedings.)

25 THE COURT: The police never testified

JURY QUESTION

1 that they saw the defendant get into the backseat
2 of the car, okay?

3 MS. WILSON: Yes, sir.

4 THE COURT: Let's mark it, and I'll have
5 the deputy take it back.

6 MR. GRAUSTEIN: Just a moment. Just in
7 thinking back, I believe Deputy Pellerin said he
8 couldn't identify who was there, so he couldn't
9 identify -- he couldn't identify the defendant as
10 being the person who got in the backseat of the
11 car.

12 THE COURT: I didn't hear anybody
13 testifying about anybody getting in the backseat
14 of the car other than Ms. Stone.

15 MR. GRAUSTEIN: Right. I don't want the
16 jury to be given the impression that the officers
17 were saying, I never saw the defendant get in the
18 back of the car.

19 THE COURT: It was my impression the
20 officers were not in a place where they could
21 watch it.

22 MR. GRAUSTEIN: No, and not identify him.

23 MS. WILSON: I mean, they were never able
24 to see it, which is what my questions were to
25 each of them, that you were not on scene. They

JURY QUESTION

1 all said they were across the street and each of
2 them said they could not see.

3 THE COURT: My response is they never saw
4 the defendant get into the --

5 MR. PELLERINE: The only thing I said was
6 I never saw the transaction which took place.

7 MR. GRAUSTEIN: That is the crux of my
8 concern, is that you testified that you saw
9 someone get --

10 MS. WILSON: No, he didn't.

11 MR. GRAUSTEIN: -- but you couldn't
12 identify who it was.

13 MR. PELLERINE: I said a black male walk
14 across the street.

15 MR. GRAUSTEIN: That is my concern.

16 THE COURT: Did he testify that he saw
17 someone get in the car?

18 MR. GRAUSTEIN: No. No.

19 THE COURT: Then he didn't see anybody
20 get in the car. I think that is a proper answer.
21 Let's give it to the jury.

22 (Court's Exhibit 3 marked.)

23 THE COURT: We're at ease.

24 (Off the record at 6:12 p.m.)

25 (The following was had out of the

JURY QUESTION

1 presence of the jury at 6:30 p.m.)

2 THE COURT: We can let them listen to the
3 whole trial, or you can agree as to the response.
4 Did the officer identify the defendant at the
5 scene of the drug buy?

6 My recollection is that the officers were
7 not in a position to see the defendant.

8 MR. GRAUSTEIN: They were not in a
9 position, and they testified they were not in a
10 position to identify.

11 THE COURT: What do you -- how do you
12 want me to respond, Ms. Wilson?

13 MS. WILSON: Um...

14 THE COURT: How about, The officers were
15 not in a position to identify the defendant at
16 the scene of the drug buy?

17 MS. WILSON: Yes, sir.

18 MR. GRAUSTEIN: Yes, sir. The officers
19 were not in a position to identify the defendant
20 at the scene of the drug buy. Okay. Mark it
21 again, send it in.

22 (Court's Exhibit 4 marked.)

23 (Off the record at 6:32 p.m.)

24 (Whereupon, the following was had out of the
25 presence of the jury at 6:49 p.m.)

JURY QUESTION - BY THE COURT

1 THE COURT: We, the jury, cannot reach an
2 unanimous decision. The time is 6:50 p.m. What
3 I'm inclined to do is send this jury home and
4 bring them back in the morning and give them the
5 Allen charge.

6 MR. GRAUSTEIN: I agree.

7 THE COURT: We haven't ordered any food
8 and it is 8 o'clock before anything is here.
9 They've been at it all day long on this case.
10 I'm going to do it that way. Ms. Wilson?

11 MS. WILSON: Your Honor, certainly I
12 would not want them to go home, but I understand
13 the Court's position, and it makes sense.

14 THE COURT: All right. Bring them back
15 in.

16 (Court's Exhibit 5 marked.)

17 THE COURT: Bring them back in.

18 (The jury enters, and the following is heard
19 in the presence of the jury.)

20 THE COURT: Ms. Johnson, it is my
21 understanding that this jury has not reached a
22 verdict. In that case, I'm required to give you
23 an instruction as to your duties in the event you
24 can't reach a verdict, but it is 7 o'clock,
25 almost. It will take at least an hour for us to

JURY QUESTION - BY THE COURT

1 get any dinner in here for you, so what I'm
2 inclined to do is to let you go home, think about
3 this case, don't discuss it with anybody, be back
4 in the jury room at 9:30 in the mornings.

5 Mr. Ropp, take them back and make sure
6 that they are safely in their vehicles, and
7 please wear your badges in the morning.

8 (The jury exits at 6:52 p.m., and the
9 following is heard out of the presence of the
10 jury.)

11 THE COURT: Mr. Graustein, advise
12 Mr. Holford that I will be giving an Allen charge
13 in the morning. I will select the jury for him,
14 and I will hear motions, but I will not begin a
15 trial until we've had an opportunity -- we find
16 out what this jury will do.

17 MR. GRAUSTEIN: I will, Your Honor.

18 THE COURT: This jury has been very
19 active with questions.

20 MS. WILSON: Thank you.

21 (Whereupon, the proceedings for the day
22 of July 24, 2013 concluded at 6:53 p.m.)

23 (Whereupon, the following proceedings
24 were had on July 25, 2013 at 9:34 a.m.)

25 THE COURT: Let's bring in the jury.

JULY 24, 2013 ENDS - JULY 25, 2013 BEGINS - ALLEN

(The jury enters at 9:34 a.m., and the

following is heard in the presence of the jury.)

THE COURT: I see we have all of the jurors back. Madam Forelady, I'll give you an additional charge, and it has to do with trying to reach a verdict because, hopefully, you can make another effort to reach a verdict in this case and I some very brief comments I would like to make on the matter to reach that verdict.

As I've already told you, you are the sole judges of the facts and the evidence of this case. Now, as a judge, I'm not permitted to give you even a hint as to how I feel about any factual matter and, certainly, can give you no hint about what verdict you ought to bring in in this case. It is my duty to state the law of the case as I have done, and it is your duty to bring in the verdict now.

I can say this, that when a matter is in dispute, it is not always easy for two people to agree, and when 12 must agree, it becomes obviously correspondingly more difficult, but it is important that litigation -- and this is litigation -- be ended, if it may be ended

ALLEN CHARGE

1 without a single one of you doing violence to
2 your own conscious. No juror is expected to give
3 up an opinion based on reasoning satisfactory to
4 himself or herself merely because, or for the
5 purpose of, being in agreement with the other
6 jurors. I want you to understand that.

7 You're not called upon often to try
8 cases. It's very rare for our citizens to have
9 to sit on a jury, and that is a very difficult
10 duty or job, and we all acknowledge that. There
11 are about close to 50 judges here in this state
12 that, like me, try cases from day-to-day
13 throughout the year, and it is very unusual,
14 almost unheard of, for a jury to go out and
15 promptly return with a verdict, that's what would
16 happen if a jury normally was in agreement to
17 begin with. At the same time, we usually get a
18 verdict. What that means is that it is normal
19 for jurors to disagree at first, but the fact
20 that we normally get a verdict does not mean that
21 after reasonable persons lay aside all extraneous
22 matters and determine to decide a case on the
23 basis of the law and evidence, they do come to a
24 common understanding and write a verdict.

25 It has never been intended that a verdict

ALLEN CHARGE

1 of a jury should be a verdict of any one person.
2 On the other hand, the verified of a jury is the
3 collective reasoning of all persons on that jury
4 put together, and that is why we have a jury, so
5 that you may have the benefit of collective
6 thought, collective reasoning. It becomes your
7 duty to tell the other jurors how you feel about
8 the case and why you think as you do. I'm sure
9 you have been doing that. On the other hand, it
10 comes the others jurors' duty to exchange views
11 with you, and you should listen to each other and
12 give each other's thought such meaning as you
13 think it should have. So to some degree, it can
14 be said that jury service is a matter of give and
15 take.

16 If you don't agree on a verdict, it just
17 means that at some future term of court, before
18 me or some other judge, another jury will be
19 seated and the same witnesses that you have heard
20 will come, and the same lawyers will come and
21 they will ask basically the very same questions,
22 and presumably and probably they will get pretty
23 much the same answers that you have heard. We
24 will go through the whole process again. I have
25 no reason to believe that any other 12 citizens

ALLEN CHARGE

1 of Horry County will be more capable of solving
2 this controversy than you.

3 So what I'll do is -- and I'll do it just
4 this one time -- I'll ask you to return to your
5 jury room and to deliberate further and see if
6 you can write a verdict. I want to close this
7 part of my charge by adding and reminding you
8 that while it is important that litigation be
9 ended, it should be ended in the form of a
10 verdict by which none of you do violence to your
11 own conscious. No juror is expected to give up
12 an opinion based on reasoning satisfactory to
13 himself merely for the purpose of being in
14 agreement.

15 Now, with that instruction, I'm going to
16 ask you to return to your jury room and try one
17 more time. Of course, if you cannot reach a
18 verdict, Madam Forelady, you advise the Court of
19 that, and as I said, this matter will be -- there
20 will be a mistrial declared and it will be
21 retried. However, I hope your efforts are
22 successful and you can reach a verdict that
23 speaks the truth in this case. Mr. Ropp, will
24 you take the jury to the jury room.

25 (The jury exits at 9:40 a.m., and the

MS. WILSON'S OBJECTION TO ALLEN CHARGE
following is heard out of the presence of the
jury.)

THE COURT: Mr. Graustein, any objection
to my Allen charge.

MR. GRAUSTEIN: No, Your Honor.

THE COURT: Any objection to my --

MS. WILSON: Yes, sir, and my objection
is basically about the fact that there was an
Allen charge, and I know we talked briefly about
it in chambers. I understand the Court's
position, but I want to preserve for the record
that I did object to the Allen charge being done
immediately this morning.

THE COURT: We'll be at ease.

(Whereupon, the jury deliberates at 9:41
a.m., and the following was had at 10:06 a.m.)

THE COURT: This is the very reason I
don't like to start another trial, because this
jury would like to review the video. Can you
fast forward it and move it up and down, because
they may not want to see it all, just parts of
it? Are you ready, Mr. Graustein?

MR. GRAUSTEIN: No, Your Honor. For some
reason this thing is acting weird, of course.

(A brief pause in the proceedings.)

JURY DELIBERATION - JURY QUESTION

1 THE COURT: I think they probably are
2 looking to see what happened at the location
3 rather than these drives to and from, which
4 didn't seem to show much, but it will be up to
5 the jury. We'll show them anything they want.
6 You can stop and back up and replay, can't you?

7 MR. GRAUSTEIN: Yes, I can, Your Honor.

8 THE COURT: You may bring in the jury.

9 (Court's Exhibit 6 marked.)

10 (The jury enters at 10:09 a.m., and the
11 following is heard in the presence of the
12 jury.)

13 THE COURT: Ms. Madam Forelady, you've
14 asked to see the video again, and we have that
15 for you. The only way we can show it to you is
16 on this rather large screen here. We're not sure
17 or don't know what part you want to see. If you
18 want to see it all that is perfectly all right.

19 MS. JOHNSON: I don't think we want to
20 see the ride, they just wanted to see the actual
21 transaction.

22 THE COURT: Whatever took place at the
23 location?

24 MS. JOHNSON: Yes.

25 THE COURT: Is that right?

JURY DELIBERATION - JURY QUESTION

1 MS. JOHNSON: Yeah.

2 THE COURT: We will take it or fast
3 forward to that part of the video. We can stop
4 it, replay it, do any of those things for you,
5 and you can watch it as many times as you want.
6 Once you get past the part that you want to see,
7 just let us know and we'll be glad to help with
8 that.

9 MR. GRAUSTEIN: I believe this is the
10 portion they are talking about, and if it's not,
11 they could just let us know if this is too far
12 back or if this is...

13 THE COURT: All right.

14 (A section of State's Exhibit 2 published
15 to the jury.)

16 MS. JOHNSON: They would like it backed
17 up just a little bit.

18 THE COURT: That was a fairly short
19 segment. We'll bring the right up when things
20 aren't going. We'll watch the whole segment
21 again, and we'll go back to any part you want. I
22 think he can stop it, if you just let me know.

23 (A section of State's Exhibit 2 published
24 to the jury.)

25 MS. JOHNSON: We would like to see the

JURY DELIBERATION - JURY QUESTION

1 section -- the side-view mirror, the image.

2 THE COURT: Can you back up a little bit,
3 Mr. Graustein?

4 MR. GRAUSTEIN: Right there? Is that it?

5 (A section of State's Exhibit 2 published
6 to the jury.)

7 THE COURT: Was that it, Ms. Johnson?

8 MS. JOHNSON: The picture before that,
9 where his head was...

10 THE COURT: Okay. A little bit further.

11 (A section of states Exhibit 2 published
12 to the jury.)

13 THE COURT: Can you back that up one
14 step, I think that's what they are looking for.
15 Was that the portion, Madam Forelady?

16 MS. JOHNSON: Where they showed the head
17 in the mirror -- not in the mirror, in the
18 window.

19 THE COURT: Is it further back, or
20 forward?

21 MS. JOHNSON: It would be further back.

22 THE COURT: Okay. Let's back a few
23 steps, Mr. Graustein, if you can.

24 MR. GRAUSTEIN: Further back than --

25 MS. JOHNSON: No.

JURY DELIBERATION - JURY QUESTION

1 MR. GRAUSTEIN: So it would be forward.

2 Play it?

3 MS. JOHNSON: Yeah.

4 (A section of State's Exhibit 2 published
5 to the jury.)

6 MS. JOHNSON: Right there. Back up one
7 more.

8 THE COURT: Play it forward and we'll
9 keep --

10 MS. JOHNSON: Right there. Can you go
11 one frame back from there?

12 MR. GRAUSTEIN: One frame back? I'll
13 try.

14 THE COURT: Did you say one forward,
15 Madam Forelady?

16 MS. JOHNSON: Can it be brightened any?

17 MR. GRAUSTEIN: I would have to look.

18 THE COURT: Lights, Mr. Ropp.

19 (A brief pause in the proceedings.)

20 MR. GRAUSTEIN: We can turn the lights
21 down again.

22 (A section of State's Exhibit 2 published
23 to the jury.)

24 MS. JOHNSON: They would like the
25 defendant to stand up and face us.

JURY DELIBERATION - JURY QUESTION

1 THE COURT: Any objection?

2 MS. WILSON: I would, Your Honor, but...

3 THE COURT: I think that is appropriate.

4 Please stand. Please stand.

5 MS. JOHNSON: They wanted the image left
6 up. They want the lights off.

7 (A brief pause in the proceedings.)

8 THE COURT: Anything further that you
9 need?

10 MS. JOHNSON: No, sir.

11 THE COURT: That's all you need? Thank
12 you. You may return to your jury room.

13 (The jury exits at 10:24 a.m.)

14 (The jury enters at 10:34 a.m., and the
15 following is heard in the presence of the
16 jury.)

17 THE COURT: Madam Forelady, have you
18 reached a verdict?

19 MS. JOHNSON: We have.

20 THE COURT: Madam Clerk, please publish
21 the verdict for me.

22 THE CLERK: Indictment 2013-GS-26-857,
23 State of South Carolina, County of Horry, versus
24 Lynel Witherspoon. As to the charge of
25 distribution of cocaine base, we the jury

VERDICT

1 unanimously find the defendant guilty, dated
2 July 25, 2013, signed by foreperson Cynthia
3 Johnson.

4 Ladies and gentlemen of the jury, if this
5 is your verdict, so signify by raising your right
6 hand.

7 THE COURT: Let the record reflect that
8 each juror raised his or her right hand.

9 Any individual polling.

10 MS. WILSON: Yes, sir.

11 THE COURT: Poll the individuals.

12 THE CLERK: When I call your juror
13 number, please stand.

14 107, is this your verdict?

15 JUROR NO. 107: Yes, ma'am.

16 THE CLERK: Is this still your verdict?

17 JUROR NO. 107: Yes, ma'am.

18 THE CLERK: 89. Is this your verdict?

19 JUROR NO. 89: Yes, ma'am.

20 THE CLERK: Is this still your verdict?

21 JUROR NO. 89: Yes, ma'am.

22 THE CLERK: 327. Is this your verdict?

23 JUROR NO. 327: Yes, ma'am.

24 THE CLERK: Is this still your verdict?

25 JUROR NO. 327: Yes, ma'am.

JURY POLL

1 THE CLERK: 21. Is this your verdict?
2 JUROR NO. 21: Yes, ma'am.
3 THE CLERK: Is this still your verdict?
4 JUROR NO. 21: Yes, ma'am.
5 THE CLERK: 275. Is this your verdict?
6 JUROR NO. 275: Yes, ma'am.
7 THE CLERK: Is this still your verdict?
8 JUROR NO. 275: Yes, ma'am.
9 THE CLERK: 79. Is this your verdict?
10 JUROR NO. 79: Yes, ma'am.
11 THE CLERK: Is this still your verdict?
12 JUROR NO. 79: Yes, ma'am.
13 THE CLERK: 283, is this your verdict?
14 JUROR NO. 283: Yes, ma'am.
15 THE CLERK: Is this still your verdict?
16 JUROR NO. 283: Yes, ma'am.
17 THE CLERK: 318. Is this your verdict?
18 JUROR NO. 318: Yes.
19 THE CLERK: Is this still your verdict?
20 JUROR NO. 318: Yes.
21 THE CLERK: 287. Is this your verdict?
22 JUROR 287: Yes, ma'am.
23 THE CLERK: Is this still your verdict?
24 JUROR NO. 287: Yes, ma'am.
25 THE CLERK: 159. Is this your verdict?

JURY POLL

1 JUROR NO. 159: Yes, ma'am.

2 THE CLERK: Is this still your verdict?

3 JUROR NO. 159: Yes, ma'am.

4 THE CLERK: 274. Is this your verdict?

5 JUROR NO. 274: Yes, ma'am.

6 THE CLERK: Is this still your verdict?

7 JUROR NO. 274: Yes, ma'am.

8 THE CLERK: 183. Is this your verdict?

9 JUROR NO. 183: Yes.

10 THE CLERK: Is this still your verdict?

11 JUROR NO. 183: Yes.

12 THE CLERK: Thank you.

13 THE COURT: Any motions?

14 MS. WILSON: Yes, sir, there are. Your
15 Honor, at this time I would make a motion for a
16 new trial on the basis that I think the greater
17 weight of the evidence is against the decision of
18 this jury panel, and we would ask the Court to
19 respectfully give my client a new trial and new
20 opportunity to try this case in front of a
21 different panel.

22 THE COURT: I respectfully deny your
23 motion, Ms. Wilson. There is substantial
24 evidence in this trial to support the jury's
25 verdict, and I would decline to grant a new

MOTION FOR NEW TRIAL - MS. WILSON

1 trial.

2 MS. WILSON: Thank you, Your Honor.

3 THE COURT: Anything further?

4 MS. WILSON: If the Court is ready for
5 sentencing, I have mitigation.

6 THE COURT: Then I'll allow you to offer
7 that. Any reason why he should not be sentenced
8 at this time?

9 MS. WILSON: No, sir, Your Honor.

10 THE COURT: Mr. Graustein, I'll hear from
11 the State.

12 MR. GRAUSTEIN: Yes, Your Honor. With
13 regard to sentencing, the State would hand up
14 certified copies of prior convictions for
15 possession of cocaine base and distribution
16 of crack cocaine. These convictions are to be in
17 support of the defendant to be sentenced under
18 the charge of distribution of cocaine base, third
19 offense, and here is his sentencing sheet.

20 THE COURT: All right. It would appear
21 that he was sentenced on September 8, 2010 by
22 Judge Culbertson for the offense of possession of
23 less than a gram of cocaine base, and there was a
24 guilty plea before Judge Shuler on 11/4/1998 for
25 distribution of crack cocaine. Ms. Wilson, do

SENTENCING

1 you challenge the State's position that this is a
2 third offense?

3 MS. WILSON: No, sir, we do not, Your
4 Honor.

5 THE COURT: Very well.

6 MR. GRAUSTEIN: In regard to sentencing
7 also, Your Honor, as a prior record, the State
8 would also show an armed robbery conviction from
9 2000.

10 THE COURT: So there was an armed robbery
11 conviction as well?

12 MR. GRAUSTEIN: Yes, Your Honor.

13 THE COURT: Please make these two
14 certified copies of the convictions Court's 7 and
15 8.

16 (Court's Exhibits 7 & 8 marked.)

17 THE COURT: Let me hear from you, Ms.
18 Wilson. I believe the sentencing range for
19 distribution of crack cocaine, third offense, is
20 10 to 30 years.

21 MS. WILSON: Yes, sir, it is.

22 THE COURT: I'll hear from you in
23 mitigation.

24 MS. WILSON: Thank you, Your Honor. My
25 client is 34 years old. He is single, has no

SENTENCING

1 children, does have his GED, tells me that he
2 attended Horry Georgetown Technical College and
3 was receiving an education in culinary arts. I
4 think he also has some training in welding work
5 and was actually doing work as a carpentry
6 assistant.

7 Your Honor, certainly my client and I
8 have discussed this case over the past few months
9 and what would be the appropriate choice in this
10 case, trial or plea. My client has adamantly
11 maintained his innocence in this case from the
12 outset. That has not changed, and does not
13 change at this moment after the jury's decision
14 in this case. Certainly he has availed himself
15 of the judicial process where he had a jury
16 trial, which is his right, and he understands
17 that he is bound by this jury's decision.

18 I've explained to him that this 10 to 30
19 years he's facing is an 85 percent offense. I've
20 explained there is no probation nor suspended
21 sentence allowed, and at a minimum he has to
22 receive at least the ten, and I've explained to
23 him that it's non-parolable time. He understands
24 all of those things, I believe. Certainly I
25 think he never thought he would be in a position

SENTENCING

1 where the sentence would be imposed, but as I
2 said, he understands that this is a part of his
3 decision to avail himself of this jury process.

4 That being said, Your Honor, I'm
5 certainly asking the Court to consider a minimal
6 sentence. He has to do at least ten years, and
7 on the ten he'll do about eight-and-a-half years
8 of that ten-year sentence. We would certainly
9 ask the Court to keep the sentence under a
10 20-year mark. I think that 85 percent of any
11 amount of time is a long time to be in prison,
12 and we're asking the Court for any mercy you
13 might show to my client.

14 THE COURT: Would the defendant like to
15 address the Court?

16 MS. WILSON: I do not believe he wants
17 to. He does not wish to address the Court, Your
18 Honor.

19 THE COURT: I think that considering this
20 defendant's record, he has a prior for the same
21 offense, exact offense -- of course he has two
22 priors that qualifies as an enhancement, but he
23 also has an armed robbery, which gives me great
24 concern. I think an appropriate sentence in this
25 matter is 17 years in the State Department of

SENTENCING

1 Corrections. Thank you very much.

2 MS. WILSON: Thank you, Your Honor.

3 THE COURT: Ladies and gentlemen of the
4 jury, thank you again for your service. There is
5 nothing more important you could have done this
6 week than to serve on this jury. When we were
7 selecting you -- this is not an easy job. It is
8 difficult. However, I hope that all of you will
9 go away from here with a better understanding of
10 how this process works, a better understanding of
11 the importance of what jurors do and the
12 importance of the cases that come before us. You
13 are probably all sitting there saying, Why didn't
14 we know he had a prior record? Why didn't we
15 know that he had a prior armed robbery and
16 distribution? It would have made the job so much
17 easier, but our rules of court don't allow us to
18 put that into the record, because it might have
19 prejudiced or biased you against this defendant.
20 You had to decide this case only on the evidence
21 that you heard from the witness stand, and I hope
22 that stresses that point to you or impresses upon
23 you the fact that we have to sometimes keep
24 things away from a jury just so that you would
25 not use that unfairly, any past record against

1 the defendant, and ^{BY THE COURT} that he received a fair trial.

2 I think you all gave him a fair trial.

3 You worked very diligently in your deliberations.

4 You all seemed to be paying close attention in

5 this case, and I believe that you have issued a

6 verdict that speaks the truth, and I thank you

7 for your service. You will not be required again

8 this week. You are excused. You don't have to

9 call back in. Thank you very much.

10 (Whereupon, the jury exits at 10:45 a.m.,

11 and the trial concluded.)

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1
2
3 CERTIFICATE OF REPORTER

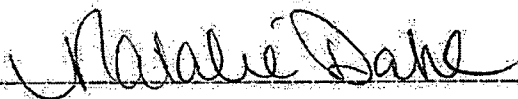
4 STATE OF SOUTH CAROLINA)

5 COUNTY OF HORRY)

6 I, Natalie Dahl, Official Court Reporter
7 for the Fifteenth Judicial Circuit of the State
8 of South Carolina, do hereby certify that the
9 foregoing is a true, accurate and complete
10 Transcript of Record of the proceedings had and
11 evidence introduced in the trial in the above
12 captioned case, relative to appeal, in the Court
13 of General Sessions for Horry County, South
14 Carolina on the 24th and 25th days of July 2013.

15
16 I do further certify that I am neither of
17 kin, counsel, nor have interest to any party
18 hereto.

19
20 August 30, 2013

21
22 

23 Natalie Dahl, RPR

24 Registered Professional Reporter
25

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Lynel Witherspoon #354076
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2014 CP26 8292

APPLICATION FOR
POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay 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 Manning Correctional Institution
2. Name and location of Court which imposed sentence Horry County, 1301 2nd Ave Conway, SC. 29528
Fifteenth Circuit
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) 2013 - GS - 26 - 00857
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) July 25th 2013, 17 yrs.
 - (b) _____

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Horry County
2014 DEC 12 PM 3:38
KELANIE HIGGINS-WARD
CLERK OF COURT

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes, appeal
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals, Case No. 2013-1650
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Appeals Dismissed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. Filed October 8th, 2014
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Rule 265(d)(2), S.C.A.C.R.
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Assistance of Counsel, during trial
- (b) Due Process
- (c) Ineffective Assistance of Counsel, performance on appeal

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

- (a) Counsel's failure to effectively utilize pretrial motions (see Attachment)
- (b) Denial of directed verdict motion was error of law (see Attachment)
- (c) Counsel's failure to perform and raise meritorious issues on appeal (Attachment)

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? Petition for Writ of Certiorari
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? Direct Appeal

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. Petition for Writ of Certiorari (pro se)
- ii. _____
- iii. _____
- iv. _____

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

- i. South Carolina Supreme Court / P.O. Box 11330 Columbia, S.C. 29211
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. Petition dismissed
- ii. _____
- iii. _____

11. (A.) Counsel's failure to effectively utilize pretrial motions, or establish an assertive defense, and raise significant objections in the criminal process fell below the standard of reasonableness and resulted in an unfair outcome of trial which prejudiced defendant. Tr. p. 6 ln 12 - p. 7, ln 1.

Strickland v Washington 466 U.S. 668 (1984) states "the purpose of the effective assistance guarantee of the Sixth Amendment is . . . to ensure that criminal defendants receive a fair trial."

Tr. 4, ln 12 - 17, Trial Counsel puts on record "that her client is unsatisfied with her performance before trial."

(b.) The trial judge erred in failing to enter a directed verdict because the state did not present substantial circumstantial evidence that Appellant was the person that committed the charged offense.

Tr. 109, ln 17 - Tr. 110, ln. 6; Tr. 114, ln. 14 - 22. The accused is entitled to a directed verdict when the state fails to present evidence to support every element of the charged offense.

In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970)

("Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.")

Our Supreme Court "has repeatedly affirmed the principle that when the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict." State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011).

(C.) Appellate Counsel's failure to perform and raise meritorious issues on appeal where contemporaneous objections preserved by trial counsel went ignored. Also filing of Anders by counsel, where issues were clearly meritorious, prejudiced appellant and appeal dismissed due to counsel's ineffectiveness. The Due Process Clause of the Fourteenth Amendment guarantees the right to effective assistance of counsel on a first appeal. Evitts v. Lucey 469

U.S. 387, 396-99 (1985).

- iv. _____
- (d) the date of each such disposition:
- i. October 31st, 2014
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. Dismissed
- 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?
Appeal was presented to Court of Appeals
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. Due process / error of law
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. trial
- ii. direct Appeal
- 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) Ineffective Assistance of Counsel (Appeal) / didn't raise on Appeal
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Public Defender, Kia Wilson - P.O. Box 1666 Conway, S.C. 29526
- ii. Appellant Counsel, Benjamin John Tripp - P.O. Box 11599 Columbia, S.C. 29211
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Kia Wilson, Trial Counsel
- ii. Benjamin John Tripp, Appeal Counsel
- iii. _____
19. State clearly the relief you seek in filing this application:
PCR proceedings and remand for new trial; vacated
20. Are you now under sentence from any other court that you have not challenged?
No

2014 CP26 8292

STATE OF SOUTH CAROLINA)

County of Horry)

VERIFICATION

I, Lynel Witherspoon, 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.

Lynel Witherspoon

SWORN to and subscribed before me this 8th
day of December, 2014.

Elizabeth Ward (L.S.)
Notary Public

My Commission Expires May 30, 2017

My Commission Expires: _____

FILED
Horry County
2014 DEC 12 PM 3:38
CLERK HUGGINS-WARD
CLERK OF COURT

2014 CP26 8292

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

I, Lynel Witherspoon, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Lynel Witherspoon
Applicant

SWORN or affirmed to and subscribed before me this

8th day of December, 2014

[Signature]
Notary Public

My Commission Expires: _____

My Commission Expires May 30, 2017

FILED
CLERK OF COURT
2014 DEC 12 PM 3:38
JELANE HUGGINS-WARD

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
	)	
Lynel Witherspoon, #254076,	)	Case No. 2014-CP-26-8292
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Respondent, making its Return to the Application for Post-Conviction Relief filed December 12, 2014, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In February 2013, the Horry County Grand Jury indicted Applicant for Distribution of Cocaine, third or subsequent offense (2013-GS-26-00857). Kia T. Wilson, Esquire, represented Applicant. On July 24, 2013, Applicant proceeded to trial before the Honorable Larry B. Hyman, Jr., and a jury. On July 25, 2013, the jury found Applicant guilty as indicted. Judge Hyman sentenced Applicant to seventeen (17) years imprisonment.

Applicant filed a timely notice of appeal. Benjamin J. Tripp, Esquire, of the Office of Appellate Defense perfected the appeal with the filing of an Anders¹ brief. The South Carolina Court of Appeals dismissed the appeal on October 8, 2014. State v. Witherspoon, Op. No. 2014-UP-

¹ Anders v. California, 386 U.S. 738 (1967).

354 (S.C. Ct. App. filed October 8, 2014). The remittitur was returned to the circuit court on October 27, 2014.

II.

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

1. "Ineffective assistance of counsel"
 - a. "Counsel's failure to effectively utilize pretrial motions, or establish an assertive defense, and raise significant objections in the criminal process"
2. "Due process"
 - a. "denial of directed verdict motion was error of law"
3. "Ineffective assistance of counsel, performance on appeal"
 - a. "Counsel's failure to perform and raise meritorious issues on Appeal"

Respondent denies Applicant is entitled to relief on any of these claims, and demands strict proof thereof. Any claims not specifically enumerated in the Application or amendments thereto will be opposed by Respondent at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRCP.

Attached to this Return and incorporated herein are the records of the Horry County Clerk of Court regarding the subject conviction(s), Applicant's records from the South Carolina Department of Corrections, the trial transcript, and Applicant's appellate records. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent submits Applicant's allegation of ineffective assistance of counsel is without merit. In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove trial counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial 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." Id. at 117-18, 386 S.E.2d at 625.

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

IV.

Respondent submits that Applicant's allegations regarding due process should be dismissed. Post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(b); see also Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal."). Applicant's allegations regarding the trial judge's denial of a directed verdict motion is an allegation of trial court error. Applicant could have raised this issue on appeal. His failure to do so has waived this allegation as grounds for relief. Therefore, Respondent requests these allegations be dismissed pursuant to Rule 12(b)(6), SCRPC.

IV.

Respondent further submits Applicant's allegation of ineffective appellate counsel is without merit. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. Where the

strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

The applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537, 397 S.E.2d at 526; Strickland, 466 U.S. at 687.

When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

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

V.

Respondent denies each and every allegation not hereinbefore expressly admitted, qualified, or explained.

VI.

WHEREFORE, having made its return, Respondent requests an evidentiary hearing be held.

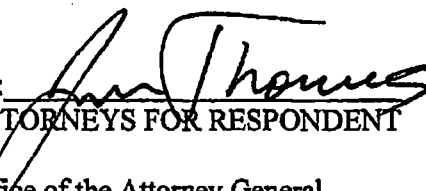
Respectfully submitted,

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By: 
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June 15, 2015

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

LYNEL WITHERSPOON, #254076)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2014-CP-26-8292

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 on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

James Kristian Falk, Esquire
3 Broad Street
Suite 450
Charleston, SC 29401

DATED this 15TH day of June, 2015.


 Norma Bigbee, Legal Assistant
 For Respondent

1
2 STATE OF SOUTH CAROLINA) TRANSCRIPT OF RECORD
3 COUNTY OF HORRY) CASE NO: 2014-CP-26-08292
4 PCR HEARING

5 B E F O R E: The Honorable D. Craig Brown
6 February 9, 2016

7
8 LYNEL WITHERSPOON,
9 Petitioner,
10 vs.

 ORIGINAL

11 STATE OF SOUTH CAROLINA,
12 Respondent.

13
14 APPEARANCES:

15 James Falk, Esq.
16 For the Petitioner.

17
18 Jessica Kinard, Esq.
19 For the Respondent.

20
21
22 Court Reporter:
23 Natalie Dahl, RPR
24
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I-N-D-E-X

WITNESS	PAGE
KIA WILSON	
Direct Examination by Mr. Falk.....	4
Cross-Examination by Ms. Kinard.....	21
Redirect Examination by Mr. Falk.....	28

E-X-H-I-B-I-T-S

PETITIONER'S EXHIBITS	MARKED & ADMITTED
NO EXHIBITS	

CALL OF THE CASE

P-R-O-C-E-E-D-I-N-G-S

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THE COURT: State ready?

MS. KINARD: Yes, Your Honor.

THE COURT: Call your case.

MS. KINARD: May it please the Court. This is the matter of Lynel Witherspoon versus State of South Carolina, Case No. 2014-CP-26-08292. Before the Court on application for post-conviction relief filed December 12, 2014. The applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from Horry County Clerk of Court. In February 2013, the Horry County Grand Jury indicted applicant for distribution of cocaine, third or subsequent offense. He was represented by Kia Wilson.

On July 24, 2013, applicant proceeded to trial before Honorable Larry B. Hyman Jr. and a jury. On July 25, 2013 the jury found applicant guilty as indicted. He was sentenced to 17 years in prison. Applicant filed a timely notice of appeal, which is perfected by the filing of an Anders brief by Benjamin J. Tripp with the Office of Appellant. The South Carolina Court of Appeals dismissed the appeal on October 8, 2014, and the remittitur was returned to the circuit court on October 27, 2014.

KIA WILSON - DIRECT EXAMINATION

1 State is present and ready to proceed. The
2 applicant is present and represented by Mr. James
3 Falk.

4 THE COURT: Are you ready to proceed?

5 MR. FALK: We are.

6 THE COURT: Call your first witness.

7 MR. FALK: May we call Ms. Wilson, and could I
8 have some latitude to treat her as a hostile witness?

9 THE COURT: Any objection?

10 MS. KINARD: No, Your Honor.

11 MR. FALK: Only because I had another attorney
12 general get yelled at for leading.

13 THE COURT: If that is what you are asking to do
14 in essence, I don't have a problem with you leading
15 and getting to the point.

16 (KIA WILSON, having been duly sworn, testified
17 as follows:)

18 DIRECT-EXAMINATION

19 BY MR. FALK:

20 Q Did you represent my client?

21 A I did.

22 Q And you were the only counsel on the case?

23 A Yes, I was.

24 Q Can you tell me a little bit about what the case
25 was?

KIA WILSON - DIRECT EXAMINATION

- 1 A It was a distribution case. It was a
2 distribution third. The video in this case was not
3 everything that the State probably should have had. It
4 was probably the one bright shiny spot we had in the
5 case, that and the witness for the State. But,
6 basically, my client's face wasn't clearly visible on
7 the video. That was very helpful to us. Honestly, it
8 was part of the reason that he wanted to go to trial.
- 9 Q This was a case with a confidential informant?
- 10 A It was.
- 11 Q Was there a significant lag when the alleged buy
12 took place and when the arrest was?
- 13 A I don't recall that with any specificity.
- 14 Q I think the record indicates it was a little bit
15 over a year; does that sound right?
- 16 A Yeah. Sure.
- 17 Q Do you recall looking at the video in the case?
- 18 A Oh, yes.
- 19 Q Is it safe to say that my client's -- would you
20 describe how well he was depicted in the video?
- 21 A That is my whole point, I don't think there was a
22 great depiction in the video. There was -- when the
23 video is set up, from what I recall and remember seeing
24 in my notes, apparently there was video at the setup by
25 the officer. The officer's face was clear as they were

KIA WILSON - DIRECT EXAMINATION

1 adjusting the video for the buy, and I think that at
2 the end that was clear as well. You don't see
3 Mr. Witherspoon's face on that video during the actual
4 buy.

5 Q Actually, when you read the trial transcript --
6 is it safe to say you don't actually see a hand-to-hand
7 transaction in the video?

8 A I believe that is correct, yes.

9 Q So the best evidence that the State had for
10 identification was from the confidential informant; is
11 that accurate?

12 A I think so. At least I thought so initially.

13 Q And there was a confidential informant that had
14 some prior convictions for dishonesty?

15 A Yes.

16 Q Now, this video, you acknowledge that he wasn't
17 -- you couldn't really see him, you couldn't see his
18 face, and you couldn't see the transaction?

19 A Right.

20 Q Did you consider moving to have the video
21 suppressed under Rule 403 in that it provided no
22 probative information to the case?

23 A No. I didn't think that was something that was
24 actually appropriate. The video was allegedly of this
25 buy. I believe it was from the buy. Actually, it was

KIA WILSON - DIRECT EXAMINATION

1 helpful that you couldn't see anything well. It didn't
2 hurt us, at least I thought it did not hurt us.

3 MR. FALK: One moment, Your Honor.

4 Q Do you recall at the beginning of the video Agent
5 Pelerin (phonetic) was speaking to the camera?

6 A I don't remember it with any specificity, and I
7 haven't watched this video again. I don't recall it.

8 Q Counsel and I with the State reviewed the video
9 again, and 1 minute and 10 seconds into the video,
10 Agent Pelerin says, We're here. This is a control buy
11 for crack cocaine from -- with a confidential informant
12 with the suspect being Lynel Witherspoon. Does that
13 sound like it may have been said?

14 A I certainly wouldn't doubt it.

15 Q Did you ever consider redacting -- asking that be
16 redacted before it was played?

17 A I did not. I don't recall even thinking overly
18 much about it, so I'm pretty sure that that did not
19 occur.

20 Q So the decision not to redact that was not
21 necessarily trial strategy?

22 A Actually, given what I said in my opening
23 statement, I actually think it played into what I was
24 saying, but I'm telling you that I did not have a plan
25 to redact that portion from the record, from that

KIA WILSON - DIRECT EXAMINATION

1 video, but I think in my opening statement when I say
2 that it goes towards I guess what my trial strategy
3 was, I think I said in my opening statement that the
4 State had an agenda, and certainly them stating on the
5 video that they were seeking Mr. Witherspoon kind of
6 played into that. But it wasn't intentional, that was
7 an accidental help.

8 Q Can I draw your attention to --

9 MR. FALK: May I approach?

10 THE COURT: Yes, sir.

11 Q Page 127. What line is that?

12 A It says, In fact -- looks like 18 going through
13 Line 20.

14 Q And that is from closing arguments from the
15 State; is that not correct?

16 A Yes.

17 Q Would you mind reading it?

18 A In fact, in that video Lieutenant Pelerin says
19 the target of this operation is Lynel Witherspoon.

20 Q Thank you. So the State certainly focused on
21 that testimony in their closing; is that accurate?

22 A On that line they did, yes.

23 Q So when the jury sees this video, they already
24 have it in their head that this -- that they are seeing
25 a video of a control buy of my client for a buy of

KIA WILSON - DIRECT EXAMINATION

1 crack cocaine?

2 A Yes, I would assume so.

3 Q Moving along. I'll show you part of the
4 transcript. Those highlighted sections are from Agent
5 Pelerin's testimony? Could you read that?

6 A All of it?

7 Q Just the highlighted sections. Tell me what
8 lines you're reading from.

9 A It starts on Line 5, part of a complete sentence
10 apparently -- or complete question. It says, And one
11 of the agents working with me was able to witness a
12 black male get out of a green Lincoln Town Car parked
13 across the street from the location where the CI was
14 parked and walked up to the vehicle, CI's vehicle.

15 Q So right there Agent Pelerin had no firsthand
16 knowledge of that testimony; is that right?

17 A I don't recall that specifically. I think I may
18 go back and ask him specifically about that, and that
19 he ultimately says that he was not on scene. I think
20 that is how I phrased my questioning. So, ultimately,
21 he admitted that did he not have firsthand knowledge.

22 Q But part of that testimony that a black male
23 comes out of the car and walks up to the other vehicle,
24 that was, in effect, evidence that the jury heard from
25 an incompetent witness, someone with no firsthand

KIA WILSON - DIRECT EXAMINATION

1 knowledge; is that correct?

2 A I don't know I understand what you are saying.

3 Q The jury heard that a black man got out car
4 walked up to the other car; is that correct?

5 A Yes.

6 Q And the person who uttered that statement did not
7 have any firsthand knowledge of that; is that correct?

8 A Well, apparently he told me no when I questioned
9 him about it on cross.

10 Q Did you ever make any type of effort to have that
11 part of his prior testimony stricken?

12 A I questioned him about it and got him to admit he
13 did not have firsthand knowledge on cross.

14 Q By, still, you didn't move to try to have it
15 stricken from the transcript, that testimony?

16 A You mean initially from the first video?

17 Q Or even once you found out, that testimony right
18 there, you didn't ask for it to be stricken?

19 A No. You would be correct in that. I actually
20 just questioned him about it. When he changed his
21 statement to say he did not have firsthand knowledge,
22 that he didn't see -- I felt that cured any issue
23 there.

24 Q But there was no curative instruction from the
25 Court?

KIA WILSON - DIRECT EXAMINATION

1 A No, there wasn't a curative instruction from the
2 Court. I did not request one, because he answered
3 otherwise.

4 Q Because the Court could have told the jury to
5 disregard that testimony from that witness with no
6 firsthand knowledge? The judge could have instructed
7 the jury --

8 A Yes. If I had asked the judge, I'm certain that
9 the judge could have, but it was also very simple to
10 say you didn't -- you weren't -- you don't have any
11 firsthand knowledge of what occurred here, which is
12 what ended up happening, and he admitted to that on the
13 record, if I remember correctly.

14 Q And those other highlighted sections?

15 A Starts at Line 1 on Page 51. It says -- part of
16 a question that says, This black male that went up to
17 the vehicle, how long did he stay at the vehicle? And
18 this is a direct by Mr. Graustein of Robert Pelerin.
19 It says, How long did he stay at the vehicle, do you
20 know? The answer is, Several minutes. He got inside
21 the vehicle, inside the backseat of the vehicle, and
22 was in there for several minutes or so.

23 It skips to Line 7 and the answer says, After the
24 buy was conducted, he left the vehicle and walked back
25 across the street where his vehicle was parked.

KIA WILSON - DIRECT EXAMINATION

1 Q And that is all testimony that he had no
2 firsthand knowledge of?

3 A Right.

4 THE COURT: What page are you referencing?

5 MR. FALK: Pages 50 and 51.

6 Q Did you consider having a Biggers hearing at the
7 beginning since there was an in-court identification?

8 A I don't recall thinking one would be necessary,
9 no.

10 Q Had there been a Biggers hearing, you would have
11 had an opportunity to have heard the testimony from the
12 confidential informant in advance, would you not?

13 A I already knew what she was going to say, and I
14 already knew that she had a record. So that was so
15 kind of what I was banking on. I mean, her testimony
16 was going to be that he was the person she bought from,
17 so I figured we could discredit her, and I think we
18 actually did a pretty good job of that. Ultimately, I
19 think the problem laid elsewhere.

20 Q So you were confident that the judge was going to
21 accept the in-court identification?

22 A Of whom?

23 Q Of my client -- confidential informant of my
24 client.

25 A I had no reason to think that there would be a

KIA WILSON - DIRECT EXAMINATION

1 problem with her pointing him out. I mean, it is her
2 testimony that this is what she saw, this is what
3 happened. I just felt there was enough problem with
4 her credibility that we could easily, you know,
5 discredit her, and I think ultimately that part was
6 successful. Ultimately, I think that is what actually
7 happened.

8 Q But had she not testified that the transaction
9 was between her -- had she not been able to testify in
10 court and identify my client, there would be no
11 identification testimony in the record?

12 A There wouldn't have been, but I don't know that
13 she would have been able to be kept out, and that is my
14 whole point. She was the only real witness to what
15 occurred, and she had credibility issues.

16 Q Thank you. The end of the trial sort of went a
17 bit haywire?

18 A That is where the problems really kicked in.

19 Q Is it safe to say that the jury, in your
20 impression, that they were having problems reaching a
21 verdict or deliberating?

22 A Yes, they were.

23 Q They came out with a couple of questions, did
24 they not?

25 A I believe they did.

KIA WILSON - DIRECT EXAMINATION

1 Q Just to refresh your recollection --

2 MR. FALK: Your Honor, I'll ask her to read 157
3 in the transcript.

4 Q Could you say what is happening in the trial?

5 A Apparently there is a jury question, and the jury
6 sends in a note saying they can't reach an unanimous
7 decision. It is 6:50 and the judge is saying he's
8 inclined to send the jury home and bring them back in
9 the morning, give them an Allen charge.

10 Q So he didn't want to give them an Allen charge
11 that night?

12 A Yes, he did not. That is correct.

13 Q Did you object to that?

14 A Apparently, I did not. I'm looking back --
15 hindsight is always 20/20 -- but for some reason I was
16 left thinking that I had said more, but apparently I
17 did not. According to this, I said I would not want
18 them to go home, but I understand the Court's position,
19 it makes sense.

20 Q So that would be -- if there was a concern about
21 whether or not there was proper -- not giving the Allen
22 charge -- dismissing them before the Allen charge, it
23 was not preserved for review?

24 A Okay.

25 Q But you --

KIA WILSON - DIRECT EXAMINATION

1 A I don't know if I would have to literally say the
2 words "I object" or if that is sufficient. If you are
3 telling me it was not, then I'll agree with you.

4 Q Now, the jury comes back first thing in the
5 morning; is that right?

6 A Yes. I believe they got back around 9:30
7 according to what the transcript said.

8 Q And did deliberations start?

9 A I don't recall. Yes, the judge gives them the
10 Allen charge.

11 Q Right off the bat?

12 A Yes.

13 Q And you didn't object to the Allen charge given
14 in the morning?

15 A So this is what happened, not on the record. We
16 are in judge's chambers. I had a conversation the
17 previous night with my father about what was going on
18 in my case, and it becomes apparent to me that
19 potentially it was problematic that we left without
20 doing the Allen charge first, okay.

21 In chambers that morning, I am seeking the
22 Court's guidance if we can fix this, or if it even
23 needs to be fixed. Maybe there is not a problem. I'm
24 not certain. I couldn't find anything handy about
25 what is actually required under these circumstances,

KIA WILSON - DIRECT EXAMINATION

1 and I never encountered that situation before. I
2 objected in chambers. When we come out, apparently
3 I'm trying to remember if I said something else --
4 apparently when we come in, I'm trying to say --
5 preserve whatever I had talked about in chambers. I
6 remember the jury coming out almost immediately, and I
7 remember not getting out much. So beyond that, that
8 is kind of what happened there.

9 So, no, I don't think there was an actual
10 objection on the record in the courtroom, because the
11 jury came in immediately, and I don't know that I had
12 an opportunity. I'm not saying that was an excuse,
13 but that is what happened. There was a conversation
14 about it. I remember it getting a little heated. I
15 certainly wasn't disrespectful, but it was -- I was
16 basically informed, in certain terms, that we were
17 going forward.

18 Q You made a reference to your father?

19 A Yes. He's an attorney, Ralph Wilson. I just
20 happen to contact him because I had a little concern
21 when I left about how things played out that evening,
22 you know, so I gave him a call.

23 Q I assumed he was a lawyer, I just --

24 A Yes, sir. I didn't clarify, I'm sorry.

25 Q Now, we come to sort of a surprise ending in this

KIA WILSON - DIRECT EXAMINATION

1 trial. So they deliberated, and then what happened?

2 A If I remember, the jury comes out with another
3 question, and at this point they are wanting to see
4 video again. I know the Solicitor set it up, they had
5 trouble getting it to play, and the jury specifically
6 had them go to the mirror view to see if they could
7 catch a freeze frame of Mr. Witherspoon, or the face,
8 whatever, in that side-view mirror, which somehow the
9 State was able to pull together.

10 So they literally freeze framed it, put it up on
11 the screen and blew it up. I was appalled by that.
12 It was more than I could have anticipated, but my real
13 problem came in with the judge ordering my guy to
14 stand up.

15 Q Let's just back up a second. So when you said
16 blew it up, there is a big screen --

17 A Yeah, a screen that comes down right up there. I
18 don't remember if we were in this courtroom, but it
19 comes down -- actually I think we were down in E or
20 D -- but anyway, screen comes down, Solicitor is
21 sitting there, camera is aimed and they freeze frame
22 that shot, and then they are manipulating it to try to
23 blow it up.

24 Q And you did not object?

25 A No, I did not object to that. It was evidence

KIA WILSON - DIRECT EXAMINATION

1 that -- it was already in evidence. That video was in
2 evidence. My concern -- and I believe this even now --
3 and apparently I was trying to object and I said I
4 object or some version of that, but I don't think I
5 objected strenuous enough or clear enough, because I
6 was very unhappy with the judge making my guy stand up
7 beside the video.

8 Q When you say "blew it up," was the picture on the
9 video -- when they were playing the video, was it the
10 same size --

11 A Oh, no, it was not.

12 Q So, in effect, the State was in effect actually
13 able to introduce a new trial exhibit?

14 A I'm not certain that I agree with that, which is
15 why I wouldn't have objected. It was in evidence. I
16 didn't have a problem with the fact that they were
17 freeze framing a specific part. My real problem,
18 honestly, was that it maybe slightly more pixilated in
19 appearance. It is not -- I don't think it is as clear
20 when you blow it up as it is maybe when it is viewed in
21 whatever normal capacity.

22 Q No question that the State already rested their
23 case?

24 A Yes.

25 Q And there is no question that the jury was

KIA WILSON - DIRECT EXAMINATION

1 looking at something that they did not see in the same
2 format as during the trial?

3 A I guess it was a different format.

4 Q So it is not like the jury is looking at evidence
5 and picking up the gun and looking at the gun, they saw
6 a different depiction of the evidence?

7 A I guess so, yes. I mean....

8 Q Now, we've gone a couple of times to the stand
9 up. Can you tell me what happened here?

10 A Can't be any clearer. The judge made my client
11 stand up beside the blown-up picture.

12 Q Did you object?

13 A Apparently my statement was cut off, and I have
14 to find where it was. I don't remember specifically
15 what I said.

16 MS. KINARD: Top of Page 168.

17 A Thank you. I said -- the Court says, Any
18 objection, and my statement says, I would, Your Honor,
19 but -- and then there is an ellipses -- and then the
20 Court says, I think that is appropriate, please stand.
21 Please stand.

22 Q So what happened next? My client --

23 A He -- I remember this part like I just watched it
24 on TV yesterday. He looks at me like he's looking
25 right now with that expression on his face, and I'm

KIA WILSON - DIRECT EXAMINATION

1 thinking to myself -- you know, I'm thinking an
2 explicative. I'm thinking, I cannot believe that the
3 judge is making my client stand up next to a video, you
4 know, next to a blow-up picture from a side-view mirror
5 picture from the video. But he looks at me and I said,
6 You have to stand up, the judge ordered you to stand
7 up, and he stands up, and that is that.

8 Q So even when the jury asks the question, you are
9 kind of in that when-did-you-stop-beating-your-wife
10 situation, because if he doesn't stand up, the jury is
11 going to draw negative inferences from that; wouldn't
12 you say that?

13 A I would, but I don't think -- apparently I didn't
14 get much out. I think that the decision was made when
15 the jury requested it, but I did attempt to object. It
16 just apparently got shut down pretty instantly.

17 Q Did you consider moving for a mistrial?

18 A I think -- I'm trying to remember what else I
19 might have said here, and I don't recall. I think
20 after that it was pretty instantaneous. I'm trying to
21 see if I made any more motions. I did. Apparently, I
22 asked for a new trial at the end, but I was apparently
23 told that my request was respectively denied.

24 Q Well, is it safe to say that is sort of the
25 general request for a new trial at the end? You didn't

KIA WILSON - CROSS-EXAMINATION BY MS. KINARD

1 raise any specific grounds, like if you were asking for
2 a mistrial for specific grounds you were seeking?

3 A I think it was general, but I did request one.

4 MR. FALK: One moment, Your Honor.

5 THE COURT: Yes, sir.

6 (A brief pause in the proceedings.)

7 MR. FALK: Nothing further.

8 THE COURT: Ms. Kinard.

9 MS. KINARD: Thank you, Your Honor.

10 CROSS-EXAMINATION

11 BY MS. KINARD:

12 Q How would you characterize the evidence against
13 your client?

14 A Most of it was -- I mean, you never know how
15 things will play out at trial. I always try to caution
16 my client, especially because he was looking at a third
17 or subsequent trial, not probably the best idea here.
18 There is always the chance that the CI does seem
19 credible to the jury despite the fact that there is
20 multiple crimes of dishonesty on the record that you
21 get to bring up, but you never really know. It was a
22 great risk because the amount of time he was looking
23 at. It was still pretty substantial evidence against
24 him, and I think -- I'm sure I informed him of that.

25 Q Was there any plea negotiations in this matter?

KIA WILSON - CROSS-EXAMINATION BY MS. KINARD

1 A He did have a plea offer, it was for distribution
2 second offense, and the minimum was -- it was for the
3 minimum of five years that he could get from that
4 charge.

5 Q What was your advice to him regarding the plea?

6 A To take the plea. I advised him to accept the
7 plea.

8 Q Did you put this in writing to him?

9 A Absolutely, because he was looking at 85 percent
10 of time that carried 10 to 30 years, and I told him
11 that expressly and I advised him to take it. I wrote
12 him, and my letter is dated July 15, 2013. I actually
13 -- he refused to sign it. I put the paragraphs where I
14 explain what the charge is, how much time each charge
15 carries, what you have been offered, how that is
16 different from your actual stated charge, and that I've
17 explained these things to you. I have a little line
18 behind each paragraph saying, you know, sign here that
19 you understand. He refused to sign each one, but he
20 did sign at the bottom, because he said I wish to have
21 a trial. So we went through it, and I told him to
22 sign, and he wouldn't sign. So he just signed that he
23 was having a trial despite my advice.

24 Q Go to what happened at the trial. The mention
25 was made of the video and how Mr. Witherspoon's name

KIA WILSON - CROSS-EXAMINATION BY MS. KINARD

1 was in the video. You stated that you didn't think
2 that was detrimental to the case?

3 A I didn't.

4 Q That is because the State was pushing an agenda?

5 A They were. I said it in my opening, I believe,
6 but it kind of played into everything that I was trying
7 to point out to the jury. They went in with an intent
8 to make him be the person they were looking for. He
9 was everything they were looking for to the point they
10 even had this woman come in -- and they knew she wasn't
11 the most credible witness. I mean they have CIs that
12 don't have records. Sometimes they get charges and
13 come in and do work for the DEU and never been in
14 trouble before other than having maybe a possession
15 charge or something of that effect that they are trying
16 to work off.

17 So I know that it could have -- certainly they
18 had other options, but they are using her. They bring
19 her in here for a buy where they can't get anyone on
20 the video. That is how I was framing it to the jury.
21 They came in with a plan. He was the end goal, and I
22 was urging the jury not to buy into that.

23 Q This may seem like a commonsensical question, but
24 who else would the jury expect to see on a video of
25 this?

KIA WILSON - CROSS-EXAMINATION BY MS. KINARD

1 A I don't understand.

2 Q Like, if he's the defendant --

3 A Absolutely. They should want to see him on the
4 video. That was the whole point, you know, there was
5 nothing of him on the video until that moment at the
6 end.

7 Q Mr. Falk questioned you about Mr. Pelerin's
8 testimony and whether he actually firsthand saw
9 anything, and you said that you believe you cured all
10 of that on cross?

11 A I did.

12 MS. KINARD: May I approach?

13 THE COURT: Yes.

14 Q (MS. KINARD) I want you to verify that, if we
15 could. Page 62 starting on Line 23. If you could
16 read that out loud.

17 A Sure. And so you are situated some distance away
18 and you did not actually personally firsthand witness
19 the transaction itself, did you?

20 His answer is, No.

21 So you can't tell this jury that you saw anybody
22 actually make the transaction that is the subject of
23 this case, can you?

24 His answer is, No.

25 Q Thank you. Glancing over the rest of the page

KIA WILSON - CROSS-EXAMINATION BY MS. KINARD

1 into Page 64, is that the line of questioning that you
2 continued for quite a bit?

3 A Yes, that he didn't have any firsthand knowledge.

4 Q So despite you not receiving a curative
5 instruction from the judge, you believe that the effort
6 you put into that line of questioning rehabilitated
7 your client?

8 A Oh, absolutely.

9 Q Let's go to the issue of the Allen charge. Look
10 at Page 163. You stated that you had objected in
11 chambers to the Allen charge, and I just wanted to call
12 your attention to Line 7 through 13 on Page 63. If you
13 could read that allowed, please.

14 A Line 7 starts, Yes, sir, and my objection is .
15 basically about the fact that there was an Allen
16 charge. I know we talked briefly about it in chambers.
17 I understand the Court's position, but I want to
18 preserve for the record that I did object to the Allen
19 charge being done immediately this morning.

20 Q So that is on the record, and that is preserved
21 even though it happened after the Allen charge was
22 given, you still made the effort to note your
23 objection?

24 A Yes, that's correct.

25 Q Did you have trouble getting your objections on

KIA WILSON - CROSS-EXAMINATION BY MS. KINARD

1 the record during this case?

2 A Apparently so. I tried to skim back over this
3 transcript. It seems like there were a lot of
4 interrupted statements, and I'm certainly not casting
5 dispersions on the judge. I just apparently -- and I
6 tend to be pretty forceful when I try to get something
7 out there, so I have to assume that the cutoffs were
8 equally as forceful.

9 Q Is there anything else you would like to share
10 with the Court about your presentation of this case?

11 A I tried to help Mr. Witherspoon to the best of my
12 ability. I do agree that the problems in this case
13 really -- I mean, really begin with the deliberations.
14 I really am, you know, apologetic about him having to
15 stand up beside that video. I honestly -- I spoke to
16 jurors after, and I don't know if this is appropriate
17 to bring up at this point, but I always kind of want to
18 figure out what happened, why not a better result for
19 me and for my client. Basically, the ID is what did it
20 for them, and they felt that prior to that --
21 apparently they were solidly in the corner that he
22 wasn't the person responsible, but the ID apparently
23 changed their minds about that. If I could go back and
24 change anything, that would definitely be it.

25 Q The ID, meaning the standup?

KIA WILSON - CROSS-EXAMINATION BY MS. KINARD

1 A Yes.

2 Q And to reiterate, you did object to that on Page
3 168 on the record?

4 A Yes. Apparently I did, but it is my major regret
5 here, because I remember that moment very clearly.

6 Q Is it fair to say that once a judge makes up his
7 mind, you have to roll with it?

8 A Yeah. I'm not going to argue with the judge. I
9 don't think that is appropriate unless -- you know,
10 there is a place and time for everything. I also
11 believe that I have to defend my client and his rights,
12 and I think that maybe I should have just taken the hit
13 and just, you know, put it all out there even though
14 I'm basically being cut off, because ultimately that is
15 my job.

16 So like I said, I really regret that part. I
17 don't know that it would change anything. I would
18 have gotten contempt, he would still stand up and I
19 think we -- it would have played out the same way. I
20 think it should have been in there, a more insistent
21 objection.

22 MS. KINARD: Nothing further.

23

24

25

REDIRECT-EXAMINATION

KIA WILSON - REDIRECT EXAMINATION BY MR. FALK

1 BY MR. FALK:

2 Q You said that the evidence was substantial?

3 A I mean, it always is. You have a confidential
4 informant who is coming in to say this is what
5 happened. You have, what I thought, not a good video,
6 and I think we were both of the same mind about that.
7 We both watched it and knew what wasn't there. You
8 have nobody else, but you have a confidential
9 informant, and he can't take the stand. So it is still
10 a risk.

11 Q I appreciate that it is a risk any time. There
12 is always a decision to be made about whether or not it
13 makes sense, and I'm not sure I would have suggested
14 the same thing, but, still, at the end of the day, the
15 only evidence you had was the testimony of the
16 confidential informant who had several felony
17 convictions for dishonesty; is that correct?

18 A Yes.

19 Q No video of the actual hand-to-hand transaction?

20 A Right.

21 Q No clear video other than the mirror of my
22 client?

23 A Uh-huh. Yes.

24 Q And the only real evidence that was introduced
25 was the bag, crack cocaine?

KIA WILSON - REDIRECT EXAMINATION BY MR. FALK

1 A Right. Well --

2 Q Is that correct? Excuse me, let me ask you this
3 question. The bag of crack cocaine was admitted into
4 evidence?

5 A I believe it was. I don't agree with you,
6 though, about the evidence, because prior to the actual
7 trial, these officers from DEU were claiming that they
8 were -- said they were across the street, but they were
9 claiming they were there to witness. All right. It
10 wasn't until cross that it became very clear that they
11 were not right there on scene. So I don't think that
12 that is insubstantial.

13 Q Let me back up. I was not -- my question is not
14 questioning your review of the evidence prior. I can
15 understand how police officers say one thing but the
16 testimony gets to the other. But at the end of the
17 trial, do you think the evidence was still substantial
18 against my client, and that is why I'm saying in light
19 of the fact that none of these investigating officers
20 now are able to say they saw anything, even though they
21 may have told you something different in the beginning,
22 and now that you have no control buy, no hand-to-hand
23 transaction, no video of my client, you have cocaine
24 but no forensics of the bag of cocaine, so we don't
25 know if there was fingerprint DNA or anything coming

ARGUMENT

1 off the bag, so in light of that, not what you thought
2 ahead of time, but once at the end of the day, do you
3 still think that the evidence was substantial?

4 A Hindsight is always 20/20. At the end of the
5 day, the jury believed that he was the face in that
6 rearview mirror blow-up, and so that was substantial
7 enough. I don't really know how to answer that.

8 Q I think the Attorney General wants to say there
9 was overwhelming evidence of guilt, so if there is any
10 problem here, it is cured by -- that is my point.

11 A Okay. Well, I mean, I certainly -- I don't
12 necessarily completely agree with you, however, I -- I
13 can't be any clearer than I already have been.

14 MR. FALK: Thank you. Nothing further.

15 MS. KINARD: Nothing further.

16 THE COURT: You may step down.

17 MR. FALK: Would you want proposed orders, or how
18 do you want to go forward?

19 THE COURT: Any other witnesses?

20 MR. FALK: Nothing.

21 MS. KINARD: No witnesses for the State, Your
22 Honor.

23 THE COURT: Let me hear by way of argument.

24 MR. FALK: Okay, Your Honor. I think it is
25 clear --

ARGUMENT

1 THE COURT: If you have any. I'm giving you an
2 opportunity to argue.

3 MR. FALK: Yes, Your Honor. I think this was a
4 clear, close identification case that I think there
5 was not -- that is why I was harping on the redirect.
6 There was not otherwise overwhelming evidence of
7 guilty. You had to rely on the testimony of a CI, and
8 she had her own issues with believability. I think
9 anything that tipped the scale in the State's favor is
10 going to have disproportionate prejudicial effect on
11 my client. The fact that the video starts off with a
12 police officer saying this is a -- telling them -- in
13 effect telling the jury what they are going to see --
14 the police officer tells the jury you are going to see
15 a control buy of crack cocaine from my client. The
16 jury didn't really get the chance to draw their own
17 conclusion. So, in effect, by letting it go
18 un-redact, I think it is a witness vouching for what
19 the video is going to say. So I think that was
20 prejudicial towards my client. I think all the
21 testimony that Agent Pelerin was testifying to on
22 Pages 50 and 51 was extremely prejudicial and it kind
23 of set up the details of the transaction and it came
24 in from a witness who had no firsthand knowledge of
25 the events.

ARGUMENT

1 I appreciate the fact that trial counsel went on
2 to say -- you know, certainly got him to admit, yeah,
3 you didn't see it, but there is a big difference
4 between impeachment and the Court instructing the jury
5 to disregard the evidence. I think we have to rely on
6 the fact that juries will follow a judge's instruction
7 and they -- the judge never instructed them to
8 disregard all of Pelerin's testimony regarding the
9 individual coming up, the transaction, my client
10 getting into the back of the car, all which was
11 extremely prejudicial, all of which went into
12 identification in a very close identification case.

13 Whether or not there was any real argument on the
14 Allen charge, maybe reasonable minds can differ, but I
15 think there was a real problem when the State is
16 allowed to come back, in effect introduce a new trial
17 exhibit. It was clear testimony from trial counsel
18 that the portrayal of the image at the very end, which
19 trial counsel said really thinks it made the
20 difference, is not what the jury saw originally. It
21 was a new piece of evidence, although it was from a
22 piece of evidence that was admitted. It certainly was
23 a new depiction of the evidence that they were able to
24 look at after they already had rested. And then the
25 fact that the judge asked my client to stand up, my

ARGUMENT

1 client has to stand up at that point, because if he
2 doesn't, the jury will draw a negative inference from
3 him not standing up or whatever. The fact that there
4 should be a motion for mistrial at that point, I think
5 by that time the jury would be too far contaminated.
6 Once they came out and asked for the person to stand
7 up, my client was never going to get a fair trial.
8 Again, this is not an overwhelming other evidence of
9 guilt case, this all really relies on the
10 identification.

11 THE COURT: Ms. Kinard.

12 MS. KINARD: Thank you, Your Honor. This was
13 clearly a case of a close identity call, shall we say,
14 but I don't think that any of the arguments that
15 Mr. Falk made are necessarily dispositive in this
16 matter. If you have a jury trial and you have a
17 defendant, who else would you expect to see on a tape?
18 The prejudice -- potential prejudice of hearing the
19 defendant's name on a tape of a control drug buy is so
20 minor that it could not have been dispositive here.
21 Furthermore, Ms. Wilson cured any potentially harmful
22 testimony from Officer Pelerin, and she did it
23 properly through cross-examination where she got
24 Officer Pelerin to admit that he was so far from the
25 buy that he could not possibly have seen it.

ARGUMENT

1 She testified that she objected to every possible
2 issue that there was. There is an objection on the
3 record to the Allen charge, an objection to the stand
4 up identification, and if the judge decided not to
5 listen to her, then he decided not to listen to her,
6 and that is his prerogative.

7 As for the contention that the freeze frame on
8 the side-view mirror as a new trial exhibit, I
9 disagree. It is from the same trial exhibit that
10 already had been entered into evidence. It is perhaps
11 one of the inherent issues with a video, but it is the
12 same exhibit, not new evidence.

13 Overall, Ms. Wilson cannot be found to have been
14 ineffective based on the standards that we have. She
15 was not deficient. She had a clearly articulated
16 trial strategy that the State was pushing an agenda.
17 She used that throughout the whole trial, and it was
18 very clear that that was her strategy, that was her
19 story and that is what she was going through. Because
20 she was not deficient, she could not have proven --
21 could not have been prejudicial to the applicant.
22 Therefore, the standards of Strickland simply are not
23 met, and she can't be considered to have been
24 ineffective in this situation.

25 She fought zealously for her client, and at the

ARGUMENT

1 end of the day the outcome was simply not in their
2 favor. She testified that the entire trial seemed
3 like it went very well until the issues with jury
4 deliberation, and those are the kinds of things that
5 are not firmly within her control and things that she
6 has to deal with as they come along.

7 I believe that she has testified, and it is
8 obvious from the transcript, that she did the best she
9 could, made her objections and just because there was
10 not a favorable outcome, that does not mean she was
11 ineffective by any means. Thank you.

12 THE COURT: Mr. Falk let me ask you this. Your
13 main qualms are pertaining to the video?

14 MR. FALK: Beg your pardon?

15 THE COURT: That pertaining to the video.

16 MR. FALK: Un-redacted, yes.

17 THE COURT: Failure to request a curative
18 instruction once --

19 MR. FALK: Pelerin testified.

20 THE COURT: He testified. Does that go to the
21 credibility issues? That is what we, as judges,
22 instruct jurors --

23 MR. FALK: Well --

24 THE COURT: Let me finish. They can say part of
25 what a witness says, all of what the witness says or

ARGUMENT

1 none of what a witness say. They get crossed up on
2 the stand all the time. I have never -- as a lawyer
3 nor as a judge -- have ever instructed a jury once
4 someone gets crossed up on the stand to disregard
5 other testimony that they've already given. Do you
6 have any case law that says that is a necessity or
7 requirement? I've never seen it.

8 MR. FALK: My point is this was incompetent
9 testimony. My point is this is like letting
10 uncontested hearsay evidence come in. You have a
11 witness who is a police officer, who is now testifying
12 to stuff he has no firsthand knowledge of. That's
13 different than, well, did you really see -- was the
14 light really green, red, that kind of thing. Of
15 course that is credibility of the witness. But this
16 is testimony, evidence that went in that was
17 incompetent because it was from someone with no
18 firsthand knowledge. That is where I think it is a
19 little different than credibility. I don't have case
20 law, but if you give my two weeks.

21 THE COURT: A few weeks?

22 MR. FALK: A week, I don't know.

23 THE COURT: I disagree with you on that, but if
24 you want some time to look at it a little further,
25 I'll give you a week.

ARGUMENT

1 MR. FALK: Thank you.

2 THE COURT: The issue pertaining to the Allen
3 charge, as well as the judge requiring the defendant
4 to stand up, it is clear from the record, from the
5 trial transcript, that Ms. Wilson objected to that.
6 What more could she do?

7 MR. FALK: Move for mistrial.

8 THE COURT: And -- okay. And that is it?

9 MR. FALK: Your Honor, there is two points there.
10 I don't want to run over my first point. The standup
11 I think was a problem, it should have been a mistrial,
12 and I'm pointing to the imaginary screen over here,
13 but it was the new trial exhibit that was published to
14 the jury after the State rested, because I think there
15 is a difference between showing -- they could have
16 shown it a hundred times, but when you take it, blow
17 it up, something like that, maybe the State should
18 have done it at the beginning, but they didn't. It is
19 a new trial exhibit. They were given a second bite
20 after they rested. I would think it would be like
21 coming back and doing chemical analysis on the drugs
22 after State rested.

23 THE COURT: All right. I'll give you a week to
24 get any case law that you want to get to me pertaining
25 to those issues.

ARGUMENT

1 MR. FALK: Thank you, Your Honor.

2 THE COURT: Anything else?

3 MS. KINARD: No, sir. Thank you.

4 (Whereupon, the proceedings concluded.)

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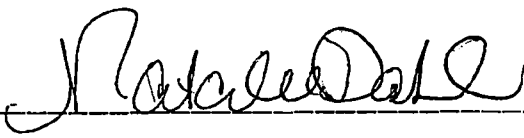
CERTIFICATE OF REPORTER

1
2 State of South Carolina)
3 County of Horry)
4

5 I, Natalie Dahl, Official Court Reporter for the
6 State of South Carolina, do hereby certify that the
7 foregoing is a true, accurate and complete Transcript
8 of Record of the proceedings had and evidence
9 introduced in the matter of the captioned case,
10 relative to appeal, in the Court of Common Pleas for
11 Horry County, South Carolina, on the 9th day of
12 February, 2016.

13 I do further certify that I am neither of kin,
14 counsel, nor interest to any party hereto.
15

16 April 20, 2016
17

18
19 
20 Natalie Dahl, RPR

21 Court Reporter
22
23
24
25

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Lynel Witherspoon, #254076,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2014-CP-26-8292

ORDER OF DISMISSAL
(Ends action)

HORRY COUNTY
CLERK OF COURT
2016 MAR 1 PM 1:20
MELANIE GIGGINS-WARD

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 12, 2014. Respondent made a timely Return on or about June 15, 2015. The Court convened an evidentiary hearing into the matter on February 9, 2016, at the Horry County Courthouse. Applicant was present at the hearing and represented by James K. Falk, Esquire. Jessica E. Kinard, Esquire of the South Carolina Attorney General's Office, represented Respondent.

Applicant and his trial counsel, Kia T. Wilson, Esquire testified at the hearing. The Court had before it a copy of the trial transcript, the records of the Horry County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the pleadings. At the close of the cases in chief, the Court left the record open for counsel to submit memoranda on the competence of certain testimony, its potential classification as hearsay, and the need for curative instruction. A memorandum was submitted by each party before the ruling was issued in this matter. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In February 2013, the Horry County Grand Jury indicted Applicant for Distribution of Cocaine, third or subsequent offense (2013-GS-26-

00857). Kia T. Wilson, Esquire, represented Applicant. On July 24, 2013, Applicant proceeded to trial before the Honorable Larry B. Hyman, Jr., and a jury. On July 25, 2013, the jury found Applicant guilty as indicted. Judge Hyman sentenced Applicant to seventeen (17) years imprisonment.

Applicant filed a timely notice of appeal. Benjamin J. Tripp, Esquire, of the Office of Appellate Defense perfected the appeal with the filing of an Anders¹ brief. The South Carolina Court of Appeals dismissed the appeal on October 8, 2014. State v. Witherspoon, Op. No. 2014-UP-354 (S.C. Ct. App. filed October 8, 2014). The remittitur was returned to the circuit court on October 27, 2014.

II. ALLEGATIONS

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

1. "Ineffective assistance of counsel"
 - a. "Counsels failure to effectively utilize pretrial motions, or establish an assertive defense, and raise significant objections in the criminal process"
2. "Due process"
 - a. "denial of directed verdict motion was error of law"
3. "Ineffective assistance of counsel, performance on appeal"
 - a. "Counsels failure to perform and raise meritorious issues on Appeal"

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each

¹ Anders v. California, 386 U.S. 738 (1967).

witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

A. Summary of Testimony

Trial counsel was called first by Applicant's counsel, and her testimony began with a review of the evidence in this case, which consisted primarily of an audio/video recording of a controlled drug buy. She testified that she did not believe a suppression hearing pursuant to Neil v. Biggers² was necessary because the video did not seem detrimental, as it did not show Applicant's face with any clarity, nor did it show a hand-to-hand transaction. In fact, trial counsel thought that the best evidence for the state was the testimony of the confidential informant, who had several crimes of dishonesty on her record, all of which trial counsel brought out at trial. Trial counsel believed that there were enough problems with the confidential informant's record and credibility that it was possible to discredit her testimony. Applicant questioned trial counsel extensively about whether Agent Pellerin, the law enforcement officer that was the key witness at trial and who set up the controlled buy, had direct knowledge of the drug sale. Trial counsel stated that she elicited on cross examination the fact that Agent Pellerin did not, in fact, witness the actual drug sale transaction, to which Applicant followed up by asking trial counsel why she did not object to hearsay or request a curative instruction from the judge about the allegedly improper nature of Agent Pellerin's testimony. Trial counsel testified that she did not think any of these measures were appropriate or necessary. Applicant also questioned trial counsel about the Allen³ charge that the jury received when they began deliberations on the second day of trial. To this, trial counsel testified that she

² Neil v. Biggers, 409 U.S. 188 (1972).

³ Allen v. United States, 164 U.S. 492, 17 S. Ct. 154 (1896).

objected strenuously in chambers to the court's suggestion of an Allen charge, and that she reiterated this objection on the record after the charge was issued. She further testified that she had a great amount of difficulty being heard on the record during this trial, and felt that many of her objections were cut off or not considered. The Applicant did not testify on his own behalf.

B. Ineffective Assistance of Counsel

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, Applicant must prove trial 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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove trial counsel's performance was deficient. Id. Under this prong, the Court measures trial counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced Applicant such that "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-18, 386 S.E.2d at 625.

The Court finds Applicant failed to meet his burden of proof to demonstrate trial counsel was ineffective in any manner. Specifically, the Court finds Applicant failed to demonstrate that trial counsel was deficient in any way. The Court finds very credible trial counsel's testimony regarding her trial strategy and how she was prepared to handle different elements of the evidence and witnesses at trial. The Court also finds persuasive and credible trial counsel's testimony that she attempted to object at all appropriate times, as the transcript reflects her recitation of the events. Trial counsel had a valid and clearly articulable trial strategy that was in line with the prevailing norms of professional conduct.

Because Applicant failed to prove that trial counsel was deficient, he does not reach the second prong of the Strickland test regarding prejudice. However, assuming *arguendo* that deficiency had been proven, Applicant failed to prove that he was in any way prejudiced by trial counsel's representation. Applicant presented no evidence of trial counsel representing him in a manner that was anything but professional and beneficial. Therefore, had this matter reached the second prong of the test, Applicant could not have proven that he was prejudiced by trial counsel's ineffective performance.

C. All other allegations

This Court notes that Applicant put forth other allegations including a due process violation, in that the denial of the directed verdict motion was error of law, and ineffective assistance of appellate counsel for failure to raise meritorious issues on Appeal. However, this Court finds Applicant either failed to meet his burden of proving Counsel was ineffective or failed to show how Counsel's actions prejudiced Applicant's case thereby. Accordingly, these allegations are denied.

IV. CONCLUSION

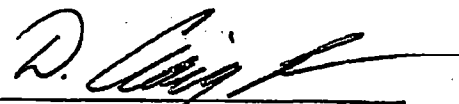
Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. There is nothing in this record to show that trial counsel was anything but prepared. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice;
and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 7 day of March, 2016.


The Honorable D. Craig Brown
Presiding Judge

Florence, South Carolina

DOCKET NO. 2013-GS-26-00857

WITNESSES

Robert Pellerin 15th Circuit Drug Enforcement Unit

The State of South Carolina

County of Horry

Scott A. Graustein

12H04311

COURT OF GENERAL SESSIONS

FEBRUARY, 2013 TERM

ARREST WARRANT NUMBER

M841911

CDR: 0185 44-53-0370(b)(1)

DOA: 9/14/2012

THE STATE

VS.

ACTION OF GRAND JURY

Lynel Witherspoon

B/M

FEB 28 2013

Foreperson of Grand Jury

Date:

ATTORNEY: Wilson, Kia T.

VERDICT

Indictment for

DISTRIBUTION OF COCAINE

Jimmy A. Richardson, II, Solicitor

Foreperson of Petit Jury

Date:

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

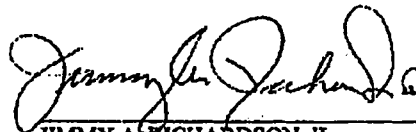
INDICTMENT

At a Court of General Sessions, convened on FEBRUARY 28, 2013, the Grand Jurors of Horry County present upon their oath:

DISTRIBUTION OF COCAINE**CDR: 0185 44-53-0370(b)(1)**

That **Lynel Witherspoon** did in Horry County, on or about August 31, 2011, distribute, dispense or aid, abet, attempt or conspire to distribute, dispense or deliver a quantity of Cocaine, a controlled substance under 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(b)(1), S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Harry

VS.

Lynel Witherspoon

AKA:

Race:

Sex: M

Age:

34

DOB:

Address:

City, State:

DL#:

SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: FWID/Dist/Mfg Cocaine Base or Meth, 3rd Offense (10 - 30 Years)

in violation of § 44-53-0375 (B) (3) of the S.C. Code of Laws, bearing CDR Code # 3039

☐ 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:

Graustein, Scott A.

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 17 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:☒ 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:

*Fees:

§ 14-1-206 (Assessment 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge)

§ 14-1-211(A)(2) (DUI Surcharge)

§ 36-5-2995 (DUI Assessment)

§ 56-1-286 (DUI Breath Test)

Provide 47.9 (Public Def/Prob)

§ 14-1-212 (Law Enforce. Funding)

§ 14-1-213 (Drug Court Surcharge)

§ 50-21-114(BUI Breath Test Fee)

§ 36-5-2942(J) (Vehicle Assessment)

Provide 90.5 (SOCJA Surcharge)

3% to County (if paid in installments)

TOTAL

\$

\$

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IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS2600857

A/W#: M841911

Date of Offense: 8/31/2011

S.C. Code § : 44-53-0375 (B) (3)

CDR Code #: 3039

SENTENCE SHEET

☐ CONVICTED OF or ☐ PLEADS

Clerk of Court/Deputy Clerk

Court Reporter

SCCA/217 (01/2011)

Presiding Judge

Judge Code:

Sentence Date:

2157

7-25-13

FTUP

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ 25.00 beginning 8/25/13

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Form Approved by
U.S. Attorney General
April 21, 2003
0CCA510

ORIGINAL

AFFIDAVIT

STATE OF SOUTH CAROLINA ☒ County/ ☐ Municipality of)
Horry)
Personally appeared before me the affiant Robert Pelletier)
being duly sworn deposes and says that defendant Lynel Witherspoon)
did within this county and state on or about 08/31/2011)
State of South Carolina (or ordinance of ☐ Municipality of Horry)
in the following particulars:)
Drugs / MDP, Narcotic drugs in Sch. I(b) & (c), LSD, and Sched. II (Cocaine)- 3rd or sub. offense)

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:
On or about August 31, 2011, Agents of the 15th Circuit Drug Enforcement Unit conducted a controlled drug buy of crack, in the Myrtle Beach section of Horry County from a Lynel D. Witherspoon, with the use of a CI. The CI bought an off white rock like substance which field tested positive for the presence of cocaine. Therefore there is probable cause to believe that the defendant did commit the offense of Distribution of crack 3rd, violation of SC Code of Laws 44-53-375 (B)

DEU 11-233

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Horry

Affiant's Telephone

Affiant's Address
607 Main Street
Conway, SC 29528-

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that defendant Lynel Witherspoon did violate the criminal laws of the State of South Carolina (or ordinance of ☐ Municipality of Horry ☒ County/) as set forth below:

DESCRIPTION OF OFFENSE: Drugs / MDP, Narcotic drugs in Sch. I(b) & (c), LSD, and Sched. II (Cocaine)- 3rd or sub. offense

Having found probable cause and the defendant being sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and Subscribed before me on 02/09/2012 4:23 PM

(L.S.)

FILE

Judge Code: 5081

Bradley Dwyer Mayers

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

Issuing Court ☒ Magistrate☐ Municipal☐ Circuit

Judge's Telephone (843)915-5290

Conway, SC 29526-5105

Judge's Address

1201 Third Avenue

ORIGINAL

ORIGINAL

Conway, SC 29528

1301 2nd Avenue

PO Box 677

General Sessions

RETURN WARRANT TO:

Signature of Constable/Law Enforcement Officer

Dpc R. Malden

RETURN

A copy of this arrest warrant was delivered to defendant Lynel Witherspoon on 9/14/12

Date:

Signature of Judge

(L.S.)

Is to be arrested and brought before me to be death with according to the law.
The accused ☐ County/ ☐ Municipality of

This warrant is CERTIFIED FOR SERVICE in the

Code/Ordinance Sec 44-53-0370(B)(1)

Offense Code: 0185

LSD, and Sched. II (Cocaine)- 3rd or sub. offense

Offense: Drugs / MDP, Narcotic drugs in Sch. I(b) & (c),

Prosecuting Officer: Robert Pelletier - 4144

Prosecuting Agency: Horry County - Deu

DOB: [REDACTED] 900

DL State: [REDACTED]

Sex: [REDACTED] 210

Phone: [REDACTED]

Address: [REDACTED]

Lynel Witherspoon

against

THE STATE

DEU 11-233

Horry

☒ County/ ☐ Municipality of

STATE OF SOUTH CAROLINA

M-841911

ARREST WARRANT

11:26:28 Monday, January 12, 2015

CMTI330D SCDC OFFENDER MANAGEMENT SYSTEM 01/12/15
OMCOMITA RELEASE DATE SCREEN C056368
SCDC# > 254076 LOC: MANNING
WITHERSPOON, LYNEL - SCDC CLASSIFICATION...: VIOLENT
OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL REGISTRY...: N
SEXUAL PREDATOR...: NOT APP
DNA STATUS...: COMPLETED
GPS REQUIREMENT...: N
PREA DECISION...:
CURRENT SENTENCE: 017-00-000 CONSECUTIVE SENTENCE ...: N
017-00-000 CURRENT SENT START DATE: 11/18/2012
PROJECTED COMPLETION DATES
MAXOUT DATE: 07/18/2021 CURRENT EWC ..: 2 F 5
YOA SIX YEAR DATE: / / CURRENT EEC ..: NOT CURRENTLY EARNING EEC
INITIAL PAROLE DATE: 03/28/2016 NEXT PAROLE HEARING DATE: 03/28/2016

TOTAL GT DAYS EARNED: 000460 LABOR CREW/WORK PROG DATE: 99/99/9999
TOTAL EARNED WORK CREDITS ...: 000165 LABOR CREW DISQ REASON:
TOTAL EDUCATION CREDITS: 000000 CATEGORY 4 OR 5 OFFENSE
TOTAL EXTRA EARNED CREDITS ..: 000 SUPERVISED REENTRY DATE...: 01/19/21
TOTAL SERVICE TIME EARNED ...: 000784 ISS.....:

PFKEYS: 5:HISTORY OF DATE CHANGES

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

RECORD SUMMARY REPORT DATED 01/12/15

C0239

WITHERSPOON,LYNEL - FBI # 922519FB9 SID# SC01144175 SCDC # 254076

OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE

INSTITUTION ... MANNING CORR INST

SECURITY/CUST.: 1B MINIMUM OUT RESTRICTED

CURR INCARC SENT....: 17 YRS 0 MOS 0 DYS

CENTRAL MONITORING.: YES

SOCIAL SECURITY #....: [REDACTED]

DORM.....: W7D0004B

RACE.....: B SEX....: M

PROJ MAXOUT DATE: 07/18/2021

PROJ PAROLE DATE: 03/28/2016

EWC JOB...: SANITATION WORKER

EDUC PGM.: NO CURR EDUC PROGRAM

EWC LEVEL: 2F5 EEC LEVEL:

ASSIGNMENT...: CAFETERIA

CURRENT PROGRAM...: NO CURRENT PROGRAM

AGE....: 35 DATE OF BIRTH...: [REDACTED]

PREVIOUS NUMBERS:

Y00254076

CURRENT OFFENSES

COCAINE DISTRIBUTION

SENTENCE

YRS MOS DYS COUNTY

17 0 0 HORRY

SENTENCE

START V/NV CATEGORY

11/18/2012 N 2

SENTENCE

YRS MOS DYS COUNTY

5 0 0 WILLIAMSBU

10 0 0 WILLIAMSBU

SENTENCE

START V/NV CATEGORY

1/13/20 0 N 3

1/13/20 0 V 4

PREVIOUS SCDC OFFENSES (COMPLETE)

FIREARMS PROVISION

ARMED ROBBERY

PRIOR COMMITMENTS OVER 90 DAYS:

MISSING PRIORS DATA

DETAINEES (HOLD, WANTED, NOTIFY):

NO DETAINEES

NO DETAINEES

ESCAPES:

NO ESCAPE HISTORY

CRIMINAL CHARGES:

NO CRIMINAL CHARGES WHILE IN CUSTODY

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

1/11/ 5 POSSESSION OF A WEAPON CONVICTED MAJOR

1/11/ 4 POSSESSION OF A WEAPON CONVICTED MAJOR

9/27/ 1 FIGHTING WITHOUT A WEAPON CONVICTED MAJOR

NON-ASSAULTIVE DISCIPLINARIES:

10/ 4/14 POSSESSION OF CONTRABAND OTHER

10/ 4/14 POSSESSION OF CONTRABAND PENDING OTHER

8/16/14 POSSESSION OF CONTRABAND CONVICTED ADMIN

6/20/14 POSSESSION OF CONTRABAND OTHER

6/ 9/14 INTERFERING WITH COUNT OTHER

11/ 4/13 VIOLATIONS WRITE/POST IN CONVICTED ADMIN

6/10/ 8 REFUSING OR FAILING OBEY CONVICTED ADMIN

2/11/ 8 INTERFERING WITH COUNT CONVICTED ADMIN

12/20/ 6 REFUSING TO WORK DROPPED CHARG

12/ 5/ 6 REFUSING TO WORK OTHER

2/ 5/ 6 REFUSING OR FAILING OBEY OTHER

1/11/ 5 POSSESSION OF CONTRABAND DROPPED MAJOR

3/24/ 4 GAMBLING AND LOAN SHARKI CONVICTED MAJOR

9/22/ 3 USE OBSCENE, VULGAR, PROFA CONVICTED MINOR

9/22/ 3 REFUSING OR FAILING OBEY CONVICTED MINOR

8/27/ 3 USE OBSCENE, VULGAR, PROFA CONVICTED MINOR

3/16/ 3 DISRESPECT CONVICTED MINOR

12/ 8/ 2 REFUSING OR FAILING OBEY OTHER

5/26/ 2 REFUSING OR FAILING OBEY CONVICTED MINOR

12/ 4/ 1 REFUSING OR FAILING OBEY CONVICTED MINOR

6/ 6/ 1 REFUSING OR FAILING OBEY CONVICTED MINOR

6/ 4/ 1 REFUSING OR FAILING OBEY CONVICTED MINOR

WITHERSPOON,LYNEL - FBI # 922519FB9 SID# SC01144175 SCDC # 254076 (CONTINUED)

11/28/ 0	USE, POSS NARC, MARIJ, UNAU	NOT GUILTY	MAJOR
11/18/ 0	REFUSING OR FAILING OBEY	CONVICTED	MINOR
10/23/ 0	POSSESSION OF CONTRABAND	CONVICTED	MINOR
10/15/ 0	FALSE STATEMENT TO HARM		OTHER
8/27/ 0	SEXUAL MISCONDUCT	CONVICTED	MAJOR
7/13/ 0	FAILURE TO WORK	DROPPED	MAJOR
6/19/ 0	REFUSING OR FAILING OBEY	CONVICTED	MINOR
6/17/ 0	REFUSING OR FAILING OBEY	CONVICTED	MINOR
6/17/ 0	OUT OF PLACE	CONVICTED	MINOR
6/15/ 0	OUT OF PLACE	CONVICTED	MINOR

HISTORY OF MOVEMENTS:

8/25/14	MANNING	INCARCERATED	ADMINISTRATIVE
10/ 2/13	MACDOUGALL CORR	INCARCERATED	ADMINISTRATIVE
7/31/13	KIRKLAND	INCARCERATED	NEW ADMISSION
7/ 1/10	UNK	RELEASE	EXPIRATION OF SENTENCE
7/ 1/ 8	WILLIAMSBURG CO	COMMUNITY SUPERVISIO	RELEASED TO PROBATION
5/ 7/ 8	WATKINS	PRE-RELEASE	PRE-RELEASE
4/24/ 0	TURBEVILLE	INCARCERATED	ADMINISTRATIVE
3/30/ 0	KIRKLAND	INCARCERATED	R&E PROCESSING
3/30/ 0	LIEBER	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
SANITATION WORKER	11/25/14	0/ 0/ 0		2F5
CUSTODIAL WORKER	08/26/14	11/24/14	LATERAL TRANSFER	2F5
CUSTODIAL WORKER	10/03/13	8/25/14	INSTIT TRANSFER	2F5
WARDKEEPER ASSISTANT	01/18/08	7/ 1/ 8	RELEASED/PAROLED	2F5
WARDKEEPER ASSISTANT	03/23/07	1/17/ 8	MI ELIGIBLE FOR LEVEL 2	3F5
WARDKEEPER ASSISTANT	03/22/07	3/22/ 7	ASLT/DRUG/MAJOR DISC	2F5
WARDKEEPER ASSISTANT	01/25/07	3/21/ 7	CUSTODY REVIEW	3F5
FOOD SERVICE AIDE	11/16/06	1/24/ 7	INMATE REQUEST	3F5
WARDKEEPER ASSISTANT	03/31/06	11/15/ 6	INMATE REQUEST	3F5
WARDKEEPER ASSISTANT	03/30/06	3/30/ 6	ASLT/DRUG/MAJOR DISC	2F5
WARDKEEPER ASSISTANT	08/23/05	3/29/ 6	CUSTODY REVIEW	3F5
CONSTRUCTION TRAINEE	12/16/04	8/22/ 5	INMATE REQUEST	3F5
CUSTODIAL WORKER	08/29/03	8/29/ 3	INMATE REQUEST	3F5
CUSTODIAL WORKER	11/27/02	8/28/ 3	ASLT/DRUG/MAJOR DISC	2F5
CUSTODIAL WORKER	08/08/02	11/26/ 2	MI ELIGIBLE FOR LEVEL 2	3F5
ELECTRICIAN HELPER	01/23/01	8/ 7/ 2	INMATE REQUEST	3F5
CUSTODIAN HELPER	07/11/00	1/22/ 1	LATERAL TRANSFER	3F5
FOOD SERVICE AIDE	04/25/00	7/ 6/ 0	UNSAT JOB PERFORM	2F5
WARDKEEPER ASSISTANT	04/13/99	9/30/99	RELEASED/PAROLED	2F5
FARM WORKER	12/04/98	3/15/99	INSTIT TRANSFER	2F5

HISTORY OF EARNED EDUCATION CREDITS:

EEC DESCRIPTION	START DATE	END DATE	TERMINATION REASON
LVL 3 - FULL TIME(NO EWC)	01/16/04	12/15/ 4	LATERAL TRANSFER
LVL 2 - FULL TIME(NO EWC)	10/17/03	1/15/ 4	ASLT/DRUG/MAJOR DISC
LVL 3 - FULL TIME(NO EWC)	09/26/03	10/16/ 3	MI ELIGIBLE FOR LEVEL 2
LVL 2 - FULL TIME(NO EWC)	09/12/03	9/25/ 3	ASLT/DRUG/MAJOR DISC
LVL 3 - FULL TIME(NO EWC)	09/01/03	9/11/ 3	MI ELIGIBLE FOR LEVEL 2
LVL 2 - FULL TIME(NO EWC)	03/16/99	4/12/99	COMPLETED EDUC PROGRAM

***** END OF REPORT *****

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Lynel Witherspoon, Appellant.

Appellate Case No. 2013-001650

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Unpublished Opinion No. 2014-UP-354
Submitted August 1, 2014 – Filed October 8, 2014

APPEAL DISMISSED

Appellate Defender Benjamin John Tripp, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General Salley W. Elliott,
both of Columbia, for Respondent.

PER CURIAM: Dismissed after consideration of Appellant's pro se brief and review pursuant to *Anders v. California*, 386 U.S. 738 (1967). Counsel's motion to be relieved is granted.¹

APPEAL DISMISSED.

WILLIAMS, GEATHERS, and McDONALD, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.