

I N D E X

	PAGE NO.
Exhibit List	3
Opening Remarks	5
Testimony of witnesses	
James M. Livingston	
Direct	6
Cross	40
Redirect	48
Applicant Rests	50
Joshua Kendrick	
Direct	50
Cross	58
Redirect	69
Court Reporter's Certification	72

E X H I B I T S

	Page No.
Applicant's Exhibit Number One, Death Certificate. .	13
Applicant's Exhibit Number Two, Letter	14
Applicant's Exhibit Number Three, Audiotape.	27
Applicant's Exhibit Number Four, Audio/Visual Tape	23
Applicant's Exhibit Number Five (ID), Proffer, 1/16/06 Letter	34

1 (The defendant, together
2 with counsel, was personally present in the
3 courtroom.)

4 COURT REPORTER: Your Honor, I've marked
5 Applicant's Exhibits for identification One through
6 Four.

7 THE COURT: Okay.

8 MS. WILLIAMS: May it please the Court,
9 this is Mr. James Livingston. He pled guilty on
10 April 13, 2009. He had I believe three charges of
11 distribution of a cocaine base. His sentence was 18
12 years from that charge.

13 He also, on May 22, 2009, had a probation
14 revocation hearing. He was on probation at the time
15 of his plea, and that was the basis for the
16 revocation. He was represented by Mr. Joshua
17 Kendrick for the guilty plea.

18 He was unrepresented at the probation
19 revocation. His counsel today is Bob Mills, so he
20 submitted an amended application. And he has set
21 forth several grounds for ineffective assistance of
22 counsel. But I believe we'll go into those in more
23 depth in this PCR hearing, and I'll turn that over
24 to Mr. Mills.

25 THE COURT: And, Mr. Mills --

1 MR. MILLS: Yes, sir, Your Honor.

2 THE COURT: -- the first page.

3 MS. WILLIAMS: I believe you have the
4 front page. He sent me the three pages.

5 MR. MILLS: We filed it back -- I don't
6 understand why it wouldn't have been in the file,
7 but we did file all three pages.

8 MS. WILLIAMS: Yes, sir. And you've given
9 it to me.

10 MR. MILLS: I do have an extra copy. I
11 believe it's an unfiled copy.

12 THE COURT: I'd just like to have all the
13 pages.

14 MR. MILLS: Yes, sir.

15 THE COURT: Thank you, sir.

16 MR. MILLS: Thank you, Your Honor.

17 THE COURT: I appreciate it. Okay, yes,
18 sir.

19 MR. MILLS: Your Honor, this is a post-
20 conviction relief action that Mr. James Livingston,
21 who is present, did plead guilty to three charges
22 based on three different incidents and was
23 represented by Josh Kendrick for those pleas back on
24 April 13, 2009.

25 And he had filed an appeal, which was

1 dismissed. This PCR was timely filed in 2009. And
2 we have an addendum that was actually filed back in
3 2011. There are several listed failure of trial
4 counsel that are listed and also a Beretta violation
5 for the allegation for the violation of probation
6 hearing. If Your Honor needs some more information,
7 we can give it to you. If not, we will call our
8 first witness.

9 THE COURT: You can call your first
10 witness.

11 MR. MILLS: Your Honor, the applicant
12 calls James Livingston to the stand.

13 (Whereupon, the applicant was sworn.)

14 JAMES M. LIVINGSTON, having first been
15 duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. MILLS:

18 Q Good morning, Mr. Livingston.

19 A Good morning.

20 Q Where are you incarcerated?

21 A Broad River Road Correctional Institution.

22 Q Okay. How long have you been incarcerated
23 in the South Carolina Department of Corrections?

24 A Almost four years.

25 Q Okay. And do you remember these charges

James M. Livingston - Direct

7

1 back from -- actually, on the plea that you did in
2 2009, you pled to three different charges, correct?

3 A Yes, sir.

4 Q Okay. Do you remember the charges that
5 you pled to?

6 A Trafficking cocaine and distribution of
7 crack cocaine.

8 Q Okay. You actually pled to distribution
9 three counts, correct, third offense?

10 A Yes, third offense.

11 Q Okay. One was originally a trafficking,
12 is that correct?

13 A Yes, sir.

14 Q Okay. And that was what we would call the
15 SLED case? That was a SLED investigation, South
16 Carolina Law Enforcement Division?

17 A Yes, sir.

18 Q Okay. And you also had two different
19 warrants from West Columbia, correct?

20 A Yes, sir.

21 Q That initiated in West Columbia?

22 A Yes, sir.

23 Q And they were all pending in the Lexington
24 County General Sessions Court?

25 A Yes, sir.

James M. Livingston - Direct

8

1 Q Okay. So the 2006-GS-32-00170 and the 172
2 were the West Columbia cases, correct?

3 A Yes, sir.

4 Q Okay. And then you also had a violation
5 of probation that occurred after the plea, is that
6 correct?

7 A Yes, sir.

8 Q And that was done before Judge McMahon, I
9 believe?

10 A That's correct.

11 Q On May 22, 2009?

12 A That's correct.

13 Q And did you have an attorney in that case
14 -- in the probation violation?

15 A No, sir.

16 Q Okay. Were you told the dangers of
17 proceeding without a lawyer?

18 A No, sir.

19 Q Okay. And Mr. Kendrick didn't represent
20 you at that time, correct?

21 A No, sir.

22 Q His representation had ended at that
23 point?

24 A Yes, sir.

25 Q And did the judge or anyone tell you that

James M. Livingston - Direct

9

1 you -- the dangers of proceeding without an
2 attorney?

3 A No, sir.

4 Q Okay. And did a probation officer tell
5 you anything about the dangers of proceeding without
6 a lawyer at that time?

7 A No, sir.

8 Q Okay. So no one told you -- you've seen
9 the transcript in this case, correct?

10 A Yes, sir.

11 Q And no one in the transcript, including
12 the judge, told you the dangers of proceeding
13 without a lawyer?

14 A Not to that effect.

15 Q Okay, all right. Well, let's go to the
16 2005 case with 2006 indictments out of West Columbia
17 and also the 2008 SLED case which was originally
18 trafficking, which was reduced down to distribution
19 of cocaine third offense. Who represented you on
20 those charges?

21 A Joshua Kendrick.

22 Q When did you -- was he retained or
23 appointed?

24 A He was retained.

25 Q When did you retain Mr. Kendrick?

James M. Livingston - Direct

10

1 A A little prior to after I caught the
2 charge.

3 Q Which one?

4 A The '05 charge.

5 Q Okay. So right after you caught the '05
6 charges, you retained Mr. Kendrick, okay. And those
7 charges were pending for a couple of years, correct,
8 before you came to court?

9 A Yes, they was held back almost three
10 years.

11 Q Okay. And in that case, there are two
12 different incidents, correct?

13 A Yes, sir.

14 Q And was there a confidential informant
15 that was actually involved in the alleged
16 transaction?

17 A Yes, sir.

18 Q Okay. And it was two different
19 transactions, correct, and two different dates?

20 A Yes, sir.

21 Q Okay. And was it the same confidential
22 informant on both cases?

23 A Yes, sir.

24 Q And you pled to those 2005 cases actually
25 at the same time with the 2008, which would have

James M. Livingston - Direct

11

1 been 2009, correct?

2 A Yes, sir.

3 Q And were you -- did you find out later
4 that the confidential informant who was part of the
5 transaction -- with no other witnesses to my
6 understanding, correct?

7 A Yes, sir.

8 Q Did you find out that he was deceased?

9 A Yes, sir.

10 Q Okay. Was that before -- was his date of
11 death before the date of the plea that you did in
12 2009?

13 A Yes, sir.

14 Q Okay. And did Mr. Kendrick do any
15 investigation to that effect that you know of to
16 determine that a witness -- a vital witness to the
17 case -- was deceased before your plea?

18 A No, sir.

19 Q Okay. And was the -- let me ask you this.
20 How do you know who the confidential informant was
21 in the two cases from West Columbia?

22 A How did I know --

23 Q Yes, sir.

24 A -- who he was?

25 Q Yes.

James M. Livingston - Direct

12

1 A Because I was present at the time.

2 Q Okay. You were present?

3 A Yes, sir.

4 Q Okay. And what was his name?

5 A Bernard Hutto.

6 Q Robert Bernard Hutto?

7 A Robert Bernard Hutto.

8 Q Does this look like -- this death
9 certificate that I have in my hand, which is marked
10 Plaintiff's Exhibit Number One, does it say Robert
11 Bernard Hutto --

12 A Robert Bernard Hutto.

13 Q -- and was born in 1954? Is that the
14 person that was involved when you were present?

15 A Yes, sir.

16 Q Okay. And just to -- what was the date of
17 death that Mr. Hutto died?

18 A May 29, 2007.

19 Q Okay. So your allegation is that Mr.
20 Kendrick failed to investigate this before your
21 plea?

22 A Yes, sir.

23 Q And therefore, since this was a witness,
24 the only witness for the State that actually would
25 have testified to any personal knowledge, you would

James M. Livingston - Direct

13

1 have been denied the right to cross-examine that
2 witness since they were dead, and therefore the case
3 could not have gone forward by the State?

4 A Yes, sir.

5 Q Okay. So you're claiming that he didn't
6 do a complete factual investigation at the time of
7 the plea to the charges from 2005?

8 A Yes, sir.

9 MR. MILLS: Your Honor, we would move that
10 death certificate into evidence.

11 MS. WILLIAMS: No objection from the
12 State.

13 THE COURT: Okay, with no objection.
14 Which one is that, applicant's number what?

15 COURT REPORTER: One.

16 THE COURT: Applicant's Number One is in
17 without objection, the death certificate.

18 (Whereupon, Applicant's Exhibit Number,
19 Death Certificate, was entered in evidence.)

20 Q And, Mr. Livingston, you had asked me to
21 see if we could get some information from West
22 Columbia, correct, to verify information?

23 A That's correct.

24 Q Okay. And I had subpoenaed records from
25 the West Columbia Police Department, to the best of

James M. Livingston - Direct

14

1 your knowledge?

2 A Yes, sir.

3 Q And are you aware -- and I've shown you
4 this letter as well as to the State, a letter
5 showing that they had basically "In reference to
6 James Livingston versus the State, several documents
7 listed in the subpoena are not available. The
8 charges Mr. Livingston pled guilty to were two
9 controlled buys of narcotics detectives organized
10 using a confidential informant, and all but one are
11 no longer employed by West Columbia."

12 It goes on to basically say that they
13 didn't have the information about the confidential
14 informant, that it is no longer available. And,
15 Your Honor, we would just move this letter into
16 evidence. I don't believe there's any objection.

17 THE COURT: Which one is it?

18 MR. MILLS: This is Plaintiff's Exhibit
19 Number Two.

20 THE COURT: Okay, all right.

21 Is there any objection, Ms. Williams?

22 MS. WILLIAMS: No, sir.

23 THE COURT: All right. Applicant's Number
24 Two is in without objection.

25 (Whereupon, Applicant's Exhibit Number

James M. Livingston - Direct

15

1 Two, Letter, was entered in evidence.)

2 THE COURT: What's the date of that
3 letter?

4 MR. MILLS: Your Honor, it does not have a
5 date on it, and we talked to the State about that.
6 It came to me awhile back. I just can't say what
7 date. I had actually subpoenaed West Columbia to
8 come here today, and they're not here, just if there
9 was any question about that. And I'm not sure why
10 they didn't follow the subpoena that we issued to
11 them last week, but they are not here.

12 THE COURT: Okay. And, Mr. Mills, it was
13 received by you sometime after 2011?

14 MR. MILLS: That's correct. That's
15 correct.

16 THE COURT: Okay, all right. Thank you,
17 sir.

18 MR. MILLS: Thank you, Your Honor.

19 Q Mr. Livingston, just another question
20 about the West Columbia incident. You are sure that
21 Mr. Hutto was the person that would have been a
22 witness if he had lived, correct?

23 A Yes, sir.

24 Q And he died before you actually pled
25 guilty in 2009?

James M. Livingston - Direct

16

1 A That's correct.

2 Q Okay. Is there anything else you would
3 like to add about that issue?

4 A Yes. From what I researched, see State
5 versus Ezell, it states that when a confidential
6 informant cannot be located to testify at trial, any
7 audio or visual tapes that have been recorded in
8 which the confidential informant identifies the
9 defendant may not be admitted into evidence because
10 the confidential informant is not available for
11 cross-examination.

12 Q And if you had known that the witness for
13 the State, the only witness that could place you at
14 the scene of this alleged distribution, was
15 deceased, would you have pled guilty?

16 A No, sir.

17 Q Okay. And you pled guilty along with some
18 other charges in this case, correct?

19 A Yes, sir.

20 Q Okay. So you pled to three charges at the
21 same time, correct?

22 A Yes, sir.

23 Q And two of those were the ones from these
24 West Columbia incidents?

25 A That's correct.

James M. Livingston - Direct

17

1 Q Okay. And the same confidential informant
2 who was deceased was involved?

3 A Yes, sir.

4 Q So there was a cumulative effect as far as
5 what you pled to. You pled to more than one, and
6 two of those were unprovable by the State?

7 A Yes, sir.

8 Q And you would not have pled if you had
9 known that?

10 A That's correct.

11 Q Okay. All right, let's move to the SLED
12 case. Now, when you hired Mr. Kendrick, you also
13 hired him not only for the West Columbia case but
14 later for the SLED case as well, is that correct?

15 A Well, he was already hired for the West
16 Columbia case.

17 Q Right, okay.

18 A Yes.

19 Q Okay. So he continued --

20 A He picked up the SLED case.

21 Q -- his representation at that point?

22 A That's correct.

23 Q Okay, all right. So tell me how many
24 times you met with Mr. Kendrick about the case and
25 about the West Columbia case. I didn't ask you

James M. Livingston - Direct

18

1 about that.

2 A Probably about a total of four times.

3 Q Okay. Where were you at the time? Were
4 you out on bond?

5 A Yes, I was out.

6 Q Okay.

7 A I was out on bond. I met him at his
8 office.

9 Q Okay. And you said about four times?

10 A Yes.

11 Q Okay. Did y'all go over the discovery in
12 the case?

13 A Not the West Columbia case.

14 Q Okay, I'm glad you answered that, because
15 I was going to ask you about that.

16 A Okay.

17 Q He did not go over the discovery in the
18 West Columbia case?

19 A No.

20 Q Did you ever see any of the discovery in
21 the West Columbia case?

22 A Nothing but the file.

23 Q What do you mean, the file?

24 A The paperwork.

25 Q Okay. Did you see any drug analysis from

James M. Livingston - Direct

19

1 the West Columbia cases? There are two cases.

2 A Yes, I seen a drug analysis.

3 Q Okay.

4 A Yes.

5 Q And did you see any audio or video in that
6 case?

7 A No, sir.

8 Q Okay. And that is the case where the
9 confidential informant was deceased by the time you
10 pled?

11 A That's correct.

12 Q Okay. Now, the SLED case -- so you had
13 talked to Mr. Kendrick prior to the SLED case
14 occurring, correct?

15 A Yes, sir.

16 Q The West Columbia case. How many times
17 did you meet with him about the West Columbia case?

18 A Probably about five times.

19 Q Okay. And how many times on the SLED
20 case?

21 A About twice.

22 Q Okay. And did you see the evidence in the
23 -- what evidence did you see from the SLED case,
24 which is the 2008-GS-32-2647 case?

25 A I called Mr. Kendrick. He asked me to

James M. Livingston - Direct

20

1 come down to his office. I arrived at his office,
2 and he said that he had the evidence from SLED, that
3 he received it from SLED. And he put the video in,
4 but he only played part of it. It did not have no
5 audio. And the only thing I could identify on the
6 video at that time was me standing in my kitchen
7 washing dishes.

8 Q Okay.

9 A And my daughters was in the kitchen trying
10 to warm up something to eat.

11 Q Okay.

12 A But they had left before any transaction
13 started.

14 Q Okay, let me ask you this. What did you
15 tell Mr. Kendrick was the basis of this transaction?

16 A That the confidential informant supplied
17 me with the drugs and came back and purchased some
18 of the same drugs and turned them over to SLED.

19 Q Okay. Did you mention to Mr. Kendrick an
20 entrapment defense? Did you mention that?

21 A No, sir.

22 Q Okay. Did he mention that to you?

23 A Mr. Kendrick brought out I wasn't entitled
24 to an entrapment defense because of my prior record.

25 Q Okay. And did he tell you why that was?

James M. Livingston - Direct

21

1 A Because of my prior record.

2 Q I mean, did he go into any further details
3 about an entrapment defense other than that?

4 A No, sir.

5 Q Okay. Did he also ask you whether or not
6 you had dominion and control over those alleged
7 drugs?

8 A No, sir.

9 Q Okay. Did you have dominion and control
10 over those alleged drugs?

11 A No, sir.

12 Q Okay. Did you have the right to do
13 anything with those drugs?

14 A No, sir.

15 Q Okay.

16 A But to give them back to the rightful
17 owner.

18 Q Okay.

19 A The confidential informant that was
20 working for SLED, Andrew Wilkins.

21 Q Okay. Were you able to -- so what was the
22 purpose of that, the confidential informant coming
23 by the house?

24 A The purpose of the confidential informant
25 coming by the house was to come back and pick the

James M. Livingston - Direct

22

1 drugs up that he had prior gave to me.

2 Q Okay. And you didn't have the right to
3 keep those, correct?

4 A No, sir.

5 Q Okay. Were you able to -- you said you
6 were able to see the video in the case?

7 A Parts.

8 Q Okay.

9 Beg the Court's indulgence.

10 Your Honor, this is Plaintiff's Exhibit
11 Number Four that we'd move into evidence. I don't
12 believe there's any objection from the State. This
13 is the audio/video from the alleged transaction from
14 2008 -- 2/27/2008.

15 MS. WILLIAMS: Your Honor, I've seen just
16 the part of the transaction, and I think this video
17 is pretty long. We looked at just the part that was
18 the transaction today, and it's my understanding it
19 came from Mr. Kendrick's file. So it is the video
20 in this issue.

21 THE COURT: Am I going to be watching the
22 whole thing.

23 MR. MILLS: I was going to show the part
24 that's relevant to the alleged transaction, because
25 otherwise it's an hour and a half or so. So we're

James M. Livingston - Direct

23

1 just going to do --

2 THE COURT: I'm not going to watch an hour
3 and a half.

4 MR. MILLS: Yes, sir. It's about five
5 minutes, Your Honor, a little less than that maybe.

6 THE COURT: And no objection, is that
7 correct, Ms. Williams?

8 MS. WILLIAMS: That's correct.

9 THE COURT: Okay. Applicant's Number Four
10 is in evidence without objection.

11 (Whereupon, Applicant's Exhibit Number
12 Four, Audio/Video Tape, was entered in evidence.)

13 MR. MILLS: Your Honor, could I have it so
14 that Mr. Livingston could see this, so he can
15 comment after he watches it?

16 (Whereupon, a portion of Applicant's
17 Exhibit Number Four was played before the Court.)

18 MR. MILLS: That's the end of the actual
19 inside the home --

20 THE COURT: Okay.

21 MR. MILLS: -- to identify it.

22 THE COURT: Thank you, sir.

23 Q So, Mr. Livingston, were you able to see
24 and hear that prior to your plea?

25 A Not all that.

James M. Livingston - Direct

24

1 Q Okay.

2 A Mr. Kendrick's equipment didn't have no
3 audio.

4 Q Okay.

5 A Mr. Kendrick said he would take it home to
6 his house and review it because he had better
7 equipment at his house.

8 Q Okay.

9 A So I didn't hear none of the audio.

10 Q Okay. And tell the Court what was the
11 actual transaction and what you told Mr. Kendrick
12 about what the actual transaction was.

13 A The actual transaction was he was coming
14 back to pick up the drugs that he had given to me
15 prior, after he had agreed it wasn't any good. He
16 gave me the option to sell some, but I refused.

17 Q Okay. And did you tell that to Mr.
18 Kendrick?

19 A Yes.

20 Q Did you tell him that you didn't have
21 dominion and control --

22 A Yes, sir.

23 Q -- over it, that it didn't belong to you
24 and you had no right to do anything with those
25 drugs?

James M. Livingston - Direct

25

1 A Yes, sir.

2 Q Okay.

3 Beg the Court's indulgence. Your Honor,
4 I'm going to move Applicant's Exhibit Number Three
5 into evidence. This is a telephone recording of the
6 conversation between the confidential informant and
7 Mr. Livingston.

8 THE COURT: Any objection?

9 MS. WILLIAMS: I've heard this
10 conversation. I don't have an objection to it.
11 There are several other conversations I have not
12 heard. And if there's anything on those
13 conversations I'd like to ask later, I would just
14 ask if I could do so.

15 THE COURT: I'll allow you to do that.

16 MR. MILLS: Well, could we listen to just
17 one this then this is all.

18 MS. WILLIAMS: He can listen to it.

19 THE COURT: That's what she --

20 MR. MILLS: There's another one -- another
21 that I have.

22 THE COURT: I think she'd probably like to
23 hear it ahead of time.

24 MR. MILLS: Because we listened to it
25 before Mr. Livingston was allowed. We couldn't take

James M. Livingston - Direct

26

1 this to the Department of Corrections, so I would
2 just ask him to listen to it in whole.

3 MS. WILLIAMS: Because I'd really like to
4 listen to it all.

5 THE COURT: You want to listen to them
6 before we go forward?

7 MS. WILLIAMS: We can talk about the one
8 that I've heard. I don't know what the other one
9 says.

10 THE COURT: You want to just go forward
11 with the one that you have that she's heard?

12 MR. MILLS: Well, we could do all of them
13 if you want to take two or three minutes and take a
14 break.

15 THE COURT: Okay, I'll take a break and
16 let you listen to them.

17 MS. WILLIAMS: Okay.

18 THE COURT: Okay. That way you won't have
19 to --

20 MR. MILLS: Yes, sir.

21 THE COURT: Okay, thank you.

22 MR. MILLS: Thank you, Your Honor.

23 THE COURT: Ms. Williams, you told me
24 you've heard this?

25 MS. WILLIAMS: Yes. And what we will do

James M. Livingston - Direct

27

1 is I will review all of them at a later date, not
2 that I think there's anything in any of the others,
3 but in case there is.

4 THE COURT: Okay.

5 MS. WILLIAMS: This is fine.

6 MR. MILLS: So we'd move Plaintiff's
7 Exhibit Number Three into evidence.

8 MS. WILLIAMS: Again, my understanding is
9 this is from Mr. Kendrick's file.

10 MR. MILLS: That's right.

11 THE COURT: Okay.

12 (Whereupon, Applicant's Exhibit Number
13 Three, Audiotape, was entered in evidence.)

14 (Whereupon, Applicant's Number Three was
15 played before the Court.)

16 Q Okay, Mr. Livingston, let me ask you a
17 couple of questions about that. Did you hear that
18 audio before you pled guilty?

19 A No, sir.

20 Q Okay. Did you know whether Mr. Kendrick
21 had that audio?

22 A He advised me he had it.

23 Q Okay. And tell me, first of all, is that
24 the full conversation to your knowledge, or is there
25 more to it?

James M. Livingston - Direct

28

1 A There was more to it.

2 Q Okay. What else was said? I guess at the
3 beginning of the conversation, what was said at that
4 point?

5 A At the beginning of the conversation, he
6 called and he asked me did I have anything. And I
7 responded, "Bro, I don't even know what I've got it.
8 I've got the same stuff you gave me to hold. Is you
9 ready to come back and pick it up, swap it out, or
10 whatever you want to do with it?"

11 Q Okay. And then the rest was that part
12 that we just heard?

13 A Yes.

14 Q Okay. So does that confirm that you did
15 not have dominion and control over the drugs, or
16 what could have been drugs at that time?

17 A Yes, sir.

18 Q Okay. And Mr. Kendrick didn't talk to you
19 about that, or did he?

20 A He just said he heard some money figures.

21 Q Okay.

22 A And that was it. And that they got me.

23 Q Okay. Would you have pled guilty if you
24 had known what all the evidence was in this case?

25 A No, sir.

James M. Livingston - Direct

29

1 Q Okay. Would you have raised a defense in
2 this case if you had known what the recording said?

3 A Yes, sir.

4 Q Okay. Both a potential entrapment
5 defense, correct?

6 A Yes, sir.

7 Q And potentially that you had no dominion
8 and control over the alleged drugs, correct?

9 A Yes, sir.

10 Q Okay. Let me just go back on the
11 probation violation. Would you have -- knowing the
12 dangers of getting several years in prison, would
13 you have proceeded without a lawyer in the probation
14 violation if you had known the dangers of it at that
15 time?

16 A No, sir.

17 Q Okay. Yes, sir?

18 A I'd like to speak on the conversation.

19 Q Okay.

20 A What I had, I had the surveillance
21 reports. The conversation says investigators and
22 agents had the CI to target Maurice Quinton
23 Livingston at phone number [REDACTED], to record the
24 conversation for investigative purposes. They said
25 that I said I answered the phone, and I advised that

James M. Livingston - Direct

30

1 I was selling eight and a quarter ounces of powder
2 cocaine for the price of \$1,625. That's noted on
3 the tape. They erased it.

4 Q Okay. What conversations did you have
5 with Mr. Kendrick about sentencing?

6 A It was a 20-year plea offer.

7 Q Okay. That was the initial plea offer?

8 A Yes, sir.

9 Q On what charges?

10 A On the SLED charge.

11 Q Okay.

12 A The trafficking charge.

13 Q All right. And then what happened?

14 A I told him that the drugs came from the
15 informant, and I don't see why I have to plead to
16 something when the drugs come from the government.

17 Q Okay. You pled to transacting the fact of
18 the government is what they were alleging, correct?

19 A Yes, sir.

20 Q Okay. And what other conversations did
21 y'all have about sentencing?

22 A That's when the other two charges came
23 about.

24 Q Okay. You already had the other two
25 charges pending --

James M. Livingston - Direct

31

1 A Yes.

2 Q -- for several years at that point?

3 A Yes.

4 Q Okay. And you mean as far as what the
5 sentence would be?

6 A When I first got to the courtroom, it was
7 just supposed to have been the trafficking charge.

8 Q Okay.

9 A And when I got there, he said, "What about
10 these other two charges?" which the other two
11 charges was paid for with the probation. That's how
12 I ended up with the probation for them two charges,
13 that one probation for the two charges that was
14 supposed to go away. I have a letter where him and
15 the Solicitor agreed, right here.

16 Q This letter was prior to the 2008 case?
17 This is a letter from 2006?

18 A 2006.

19 Q Right, okay.

20 A Yes. I had just received it when I got my
21 discovery from Mr. Kendrick. It states -- this is a
22 letter from --

23 MS. WILLIAMS: Your Honor, I think this
24 letter -- I have just a couple of objections to it.
25 I believe that Mr. Kendrick would have to properly

James M. Livingston - Direct

32

1 identify it and make it relevant. But this is also
2 related to the case that gives raise to his
3 probation violation. This is a plea he entered
4 prior to these cases. This is not the plea that's
5 on the report.

6 THE COURT: What's the relevance of this?

7 MR. LIVINGSTON: This was the --

8 THE COURT: Hold on one second, Mr.
9 Livingston. I need to ask Mr. Mills.

10 MR. MILLS: I believe this goes into the
11 plea negotiations prior to the trafficking case.

12 MS. WILLIAMS: That's my understanding.

13 MR. LIVINGSTON: To the '05 charges.

14 THE COURT: This is for --

15 MR. MILLS: This goes to --

16 MS. WILLIAMS: The 2005 charges. He was
17 on probation.

18 MR. MILLS: -- the 2005 charges which are
19 pending in this PCR application --

20 MS. WILLIAMS: No.

21 MR. MILLS: -- with the West Columbia
22 case.

23 THE COURT: We're dealing with just his
24 probation violation in 2005, is that true?

25 MR. LIVINGSTON: No.

James M. Livingston - Direct

33

1 MS. WILLIAMS: The 2005 cases were entered
2 as a guilty plea. He was on probation at the time
3 of these 2006 and 2008 offenses.

4 MR. MILLS: This is a letter concerning he
5 was on the probation, and then this is concerning
6 the 2005 cases which are on the application today.

7 MS. WILLIAMS: But that plea is not on the
8 table today. And if it is, we'll need to stand back
9 and get that plea transcript. And I believe that
10 would be barred under the statute of limitations.

11 THE COURT: The only thing I have to
12 discuss, I've got he was complaining about not
13 having an attorney for the probation violation.

14 MR. MILLS: That's correct, Your Honor.

15 THE COURT: Does that paper have anything
16 to do with this hearing in front of Judge McMahon on
17 May 29, 2009?

18 MR. MILLS: No, sir. This has to do with
19 -- this is relevant to the plea negotiations prior
20 to --

21 THE COURT: Okay.

22 MR. MILLS: -- the 2009 plea which
23 included the 2008 case, because this is a 2006
24 letter.

25 THE COURT: Right. I just don't

James M. Livingston - Direct

34

1 understand what the relevance is.

2 MR. MILLS: To show what the negotiations
3 were prior to the 2008 case.

4 THE COURT: Okay. I usually give people a
5 lot of leeway in these, but I just don't see any
6 relevance to it. If you want to make it --

7 MR. MILLS: I'll mark it as a Court's
8 exhibit.

9 THE COURT: -- as a proffer --

10 MR. MILLS: Yes, sir.

11 THE COURT: -- I'll accept it that way.

12 MR. MILLS: Yes, sir.

13 THE COURT: But as far as going into
14 evidence, I'm not going to let you do that, okay?

15 MR. MILLS: Yes, sir.

16 THE COURT: So this is going to be
17 Applicant's Number Five?

18 MR. MILLS: That's correct, Your Honor.

19 THE COURT: Okay. And that's going to be
20 your proffer?

21 MR. MILLS: That's a proffer, Your Honor.
22 I'll have him testify about what his --

23 THE COURT: Okay.

24 (Whereupon, Applicant's Exhibit Number
25 Five, Proffer, 1/16/06 Letter, was marked for

James M. Livingston - Direct

35

1 identification purposes.)

2 THE COURT: Give her time to review it.

3 Q Mr. Livingston, tell me about what
4 occurred in this letter to your knowledge as far as
5 Plaintiff's Exhibit Five.

6 A The letter states, "It is my
7 understanding" -- as well as the discussion between
8 the Solicitor and Mr. Kendrick, it states, "It is my
9 understanding you have no problem with pleading this
10 case to a sentence of probation concurrent to the
11 probation Mr. Livingston is currently serving. This
12 would be appropriate considering these warrants were
13 issued before Mr. Livingston's plea but not served
14 until after the plea."

15 Q So it's dealing with the pending cases,
16 the West Columbia cases that we've talked about?

17 A With the dead informant.

18 Q With the dead informant.

19 A Yes, sir.

20 Q And this letter was from January 16, 2006?

21 A Yes, sir, that's correct.

22 Q Were there any other conversations about
23 sentencing with Mr. Kendrick? Let me just ask you
24 this. Did he talk about the fact that you were not
25 pleading the trafficking, that you were pleading to

James M. Livingston - Direct

36

- 1 a lesser distribution charge instead of trafficking?
- 2 A Yes, lesser included offense, distribution
- 3 third.
- 4 Q Okay. And you had two prior drug
- 5 offenses, correct?
- 6 A Yes, sir.
- 7 Q Okay. Did he say anything about the
- 8 possibility of a life without parole sentence?
- 9 A Yes, sir.
- 10 Q Okay. What was the conversation about
- 11 that?
- 12 A He said if I didn't take the plea, then I
- 13 was looking at life without parole.
- 14 Q And what was the basis of that?
- 15 A I really didn't understand it.
- 16 Q Did he tell you why you would be looking
- 17 at life?
- 18 A Oh, third offense.
- 19 Q Third offense for what charge?
- 20 A Drug charge.
- 21 Q Okay. But that was your understanding,
- 22 that you were looking at life without parole for a
- 23 third offense drug offense?
- 24 A If I went to trial.
- 25 Q Okay. Did he tell you the law that was

James M. Livingston - Direct

37

1 based on?

2 A No, sir. He just -- I was out in the
3 hallway, and he walked in the courtroom. And he
4 came back with the box marked on the sentencing
5 sheet.

6 Q Well, did the State ever serve you with
7 notice to seek life without parole?

8 A No, sir, I did not get a notice of
9 requirement.

10 Q But your conversations with Mr.
11 Kendrick --

12 A Was I was facing life without parole.

13 Q And you don't know the basis of that?

14 A No, sir. Like I said, from my
15 understanding I thought it was the third offense.

16 Q Would you have pled guilty if you were not
17 looking at life without parole?

18 A No, sir.

19 Q Okay. Did the judge in the plea hearing
20 warn you of any life without parole type sentencing
21 structure?

22 A No, sir.

23 Q Okay. Did you ask -- so under the plea
24 that you did take --

25 A Uh-huh.

James M. Livingston - Direct

38

1 Q -- you were looking at a 15-year mandatory
2 sentence. Did you understand that?

3 A Yes, sir.

4 Q You were told that on the record?

5 A Yes, sir.

6 Q And the judge gave you an 18-year
7 sentence?

8 A Yes, sir.

9 Q Did you request that your lawyer file a
10 motion to reconsider?

11 A No, sir. But he promised me a motion to
12 reconsideration to take me back in front of the
13 Court, but it was off the record. And he also
14 promised that I could have this PCR hearing. He
15 stated that.

16 Q Okay. Is there anything else you want to
17 tell the Court about this case -- your cases?

18 A From my research dealing with my 2008
19 issue, if the Court would look at the transcript
20 page number 16, lines 14 through 20, Mr. Kendrick
21 stated, "Your Honor, I understand these are serious
22 charges. I will point out the person that purchased
23 the 200 and something grams from Mr. Livingston was
24 actually someone Mr. Livingston had had prior
25 transactions with.

James M. Livingston - Direct

39

1 "So he wasn't actually buying all of these
2 drugs, that he was giving some of them back, so that
3 they had purchased them together." But I'd like to
4 correct that. I wasn't -- we didn't purchase
5 nothing together. I was present when he purchased
6 it.

7 Q Is there anything else you want to say?

8 A In Truman versus U.S., Your Honor, 356
9 U.S. 369, Supreme Court, it states that "The Courts
10 refused to convict an entrapped defendant, not
11 because his conduct falls outside the proscription
12 of the statute but because even if his guilt be
13 admitted, the methods employed on a buyout -- for
14 the government to bring about conviction cannot be
15 counted."

16 THE COURT: Are there no other factual
17 issues?

18 MR. MILLS: I believe that's it, Your
19 Honor. I just wanted to cover one quick thing, Your
20 Honor.

21 THE COURT: Okay.

22 Q So would you have pled guilty to any of
23 these charges had you known, number one, that there
24 was a missing witness in the West Columbia cases;
25 and, number two, that you had defenses to the second

James M. Livingston - Direct

40

1 case, the SLED case?

2 A No, sir.

3 Q Okay. And would you have gone forward
4 without a lawyer in the probation case if you had
5 known the dangers of proceeding without a lawyer?

6 A No, sir.

7 Q All right, thank you. Please answer any
8 questions for the State.

9 THE COURT: Ms. Williams.

10 CROSS-EXAMINATION

11 BY MS. WILLIAMS:

12 Q Mr. Livingston, by the time you pled
13 guilty, you understood what you were pleading to
14 carried up to 90 years in prison, right?

15 A Yes, ma'am.

16 Q You understood these weren't your only
17 charges?

18 A Yes, ma'am.

19 Q You had three more charges of distribution
20 that also carried 30 years --

21 A Uh-huh.

22 Q -- two proximity charges, right?

23 A Yes, ma'am.

24 Q So you got rid of those by pleading guilty
25 here, right?

- 1 A Yes, ma'am.
- 2 Q That kind of helped out, right?
- 3 A Yes, ma'am.
- 4 Q Because those were all separate incidents
5 on different dates, is that correct?
- 6 A That's correct.
- 7 Q And this wasn't your first time in court
8 either, was it?
- 9 A No, ma'am.
- 10 Q You had a record including giving false
11 reports to police?
- 12 A Yes, ma'am.
- 13 Q You had had convictions for distributing
14 crack cocaine in proximity of a school?
- 15 A Yes, ma'am.
- 16 Q False report of a felony?
- 17 A Yes, ma'am.
- 18 Q Possession of marijuana?
- 19 A Yes, ma'am.
- 20 Q Failing to stop for blue lights?
- 21 A Yes, ma'am.
- 22 Q Possession with intent to distribute
23 cocaine?
- 24 A Yes, ma'am.
- 25 Q Possession of crack?

James M. Livingston - Cross

42

1 A Yes, ma'am.

2 Q Okay. And in this case involving SLED,
3 you heard the Solicitor give some facts on the
4 record during your plea, right?

5 A Yes, ma'am.

6 Q They included that your daughters were in
7 the kitchen when this happened, right?

8 A Yes, ma'am.

9 Q And that you had actually given a
10 confession at SLED headquarters admitting that you
11 were dealing cocaine?

12 A Yes, ma'am.

13 Q And you agreed that those facts were
14 correct?

15 A The facts that actually took place by
16 SLED, yes.

17 Q And you said you didn't agree with any of
18 the facts you gave?

19 A Repeat that?

20 Q On page 15 of the transcript, the Court
21 asked you, "Mr. Livingston, are those facts
22 correct?" You replied, "Yes, sir."

23 A Hold on, give me a second.

24 Q No problem.

25 THE COURT: You want to look at my copy of

- 1 the transcript?
- 2 A What page?
- 3 Q Page 15, beginning at line eight through
4 13.
- 5 A Fifteen, line eight?
- 6 Q Through 13.
- 7 A Okay, go ahead.
- 8 Q Now, with the CI in reference to West
9 Columbia, you weren't given his name prior to your
10 plea, is that correct?
- 11 A No, ma'am.
- 12 Q So the only way you can identify Mr. Hutto
13 is that you're telling the Court you sold drugs to
14 him that day?
- 15 A No, ma'am.
- 16 Q So how do you know who Mr. Hutto is?
- 17 A I've been knowing Mr. Hutto. Mr. Hutto
18 was an old friend.
- 19 Q So how do you know that that was the CI
20 that purchased those drugs that day?
- 21 A Because it was two other people in the
22 house that day.
- 23 Q So it was and two other people?
- 24 A Yes, ma'am.
- 25 Q Who bought drugs from whom?

1 A Bernard bought drugs from one of the other
2 individuals that was in the house.

3 Q And that's the only time you saw any drugs
4 being dealt that day?

5 A Yes, ma'am.

6 Q So that's why you feel it was Mr. Hutto?

7 A No, because I was present. I know it was
8 Mr. Hutto. I watched them.

9 Q So you were there that day. So that's a
10 speculation then? You never testified, you never
11 got any information from the State that said it was
12 Mr. Hutto, correct?

13 A No, ma'am.

14 Q Okay.

15 Beg the Court's indulgence, I apologize.

16 So you had been in court several times by
17 the time you went to your probation revocation
18 hearing, is that correct?

19 A Yes, ma'am.

20 Q You understood you could have an attorney
21 there?

22 A Roll call?

23 Q No, for your probation revocation.

24 A Oh, for the probation hearing?

25 Q I'm sorry, I'm skipping on you.

James M. Livingston - Cross

45

1 A Yes, ma'am.

2 Q And you understood that you could have an
3 attorney there if you wanted?

4 A Yes, ma'am.

5 Q You had retained Mr. Kendrick?

6 A No, not for the probation.

7 Q Okay. You made a decision not to have an
8 attorney?

9 A I already had 18 years. I didn't go back
10 to the probation revocation till after I was already
11 in prison.

12 Q Okay. And basically at the time of your
13 plea, you faced going to trial with a mandatory 25
14 years --

15 A Yes.

16 Q -- for pleading, right?

17 A Yes, ma'am.

18 Q Is that why you entered this plea? Is
19 that any basis for your decision to plead guilty?

20 A No, ma'am.

21 Q Why did you plead guilty?

22 A Because of what Mr. Kendrick told me.

23 Q About life without parole?

24 A Yes, ma'am.

25 Q Okay. Did he ever discuss with you the

James M. Livingston - Cross

46

1 probation revocation case?

2 A No, ma'am. It never was stipulated.

3 Q All right. I'm going to shift gears over
4 to the SLED buy where we have the videotape.

5 A Yes, ma'am.

6 Q Now, those drugs were in your house,
7 right?

8 A Yes, ma'am.

9 Q Okay. And that gentleman, he paid you for
10 them, right?

11 A Yes, ma'am.

12 Q He gave you \$1,625?

13 A Yes, ma'am.

14 Q And then you're selling me those drugs,
15 and they weren't your drugs?

16 A No, ma'am.

17 Q Was that a storage fee?

18 A No, ma'am. The drugs was his, and the
19 money was his.

20 Q And when you said that you were fronting
21 the drugs to him, what did you mean?

22 A I didn't tell him I was fronting.

23 Q You didn't?

24 A He stated fronting. I told him he could
25 take them all back because I couldn't do nothing

James M. Livingston - Cross

47

- 1 with them.
- 2 Q So they weren't good enough for you to
3 sell?
- 4 A Yes, ma'am.
- 5 Q Because you usually sell better drugs,
6 right?
- 7 A No, ma'am.
- 8 Q Why were those drugs there if they're not
9 good enough for you to sell? You planned to sell
10 them, right?
- 11 A No, ma'am.
- 12 Q You said they weren't good enough for you?
- 13 A Right. So he gave them to me to hold till
14 he come back and picked them up.
- 15 Q Why didn't you tell him to come pick it up
16 outside?
- 17 A Ma'am?
- 18 Q Why didn't you tell him to come pick it up
19 outside your house?
- 20 A Why didn't I tell him?
- 21 Q Uh-huh.
- 22 A To come pick it up outside of my house?
- 23 Q Uh-huh.
- 24 A What you mean, outside?
- 25 Q Did he have to pick it up in the kitchen

James M. Livingston - Cross

48

1 with your family inside your house?

2 A No, ma'am.

3 Q Could you take it to him?

4 A No, I didn't take it to him. He came in
5 and picked it up.

6 Q So people just leave drugs laying around
7 your house?

8 A He said he was dealing drugs.

9 Q And he just left the drugs in your house.
10 Did he drop them?

11 A No.

12 Q So you knew they were there?

13 A I was holding them till he called back and
14 picked them up.

15 Q Okay.

16 I think that's all, Your Honor. Thank
17 you.

18 THE COURT: Anything on redirect limited
19 to whatever --

20 MR. MILLS: Yes, sir.

21 THE COURT: -- she went over on cross?

22 REDIRECT EXAMINATION

23 BY MR. MILLS:

24 Q Mr. Livingston, you were asked by the
25 State whether or not you agreed with the facts, and

1 part of the question was that you made a statement
2 to the investigator. Did Mr. Kendrick tell you that
3 you could challenge the statements made to any kind
4 of law enforcement?

5 A No, sir. And the statement that I made
6 was voluntary. And when the discovery came, then it
7 was in affidavit form as an interrogation report.

8 Q Okay. That's all the questions I have.

9 A Because they said -- when they came to the
10 house, they said I was not under arrest and if I
11 would like to come down to the station to talk to
12 them.

13 MS. WILLIAMS: Your Honor, that's hearsay.

14 THE COURT: I note your objection, okay.
15 Anything else?

16 MR. MILLS: That's all, Your Honor.

17 THE COURT: All right.

18 Ms. Williams, I'm assuming nothing on
19 recross?

20 MS. WILLIAMS: No, sir,

21 THE COURT: Okay, you may step down.

22 Thank you, sir. I appreciate it.

23 All right, Mr. Mills, your next witness.

24 MR. MILLS: Your Honor, the applicant
25 rests.

1 THE COURT: Okay.

2 (Whereupon, the applicant rested.)

3 THE COURT: Ms. Williams, any witnesses
4 for the State?

5 MS. WILLIAMS: Yes, sir, Your Honor, Josh
6 Kendrick.

7 THE COURT: Mr. Kendrick.

8 (Whereupon, the witness was sworn.)

9 JOSHUA KENDRICK, having first been duly
10 sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MS. WILLIAMS:

13 Q Mr. Kendrick, can you tell me briefly
14 about how long you've been practicing law and
15 generally about your practice?

16 A Eleven years, and it's mostly criminal
17 defense.

18 Q And how did you come to represent Mr.
19 Livingston?

20 A He had hired me on an old -- well, the
21 original case that you talked about in this
22 courthouse and then came back to me when he got the
23 second charges --

24 Q Okay.

25 A -- the second set of charges.

Joshua Kendrick - Direct

51

1 Q And he received a sentence of probation
2 for the first set of charges?

3 A On the first case, yes.

4 Q Okay. And then you represented him on --
5 there were several charges that were not proessed.
6 Was that included in your representation, as well?

7 A At the point when we got to court,
8 whatever was pending against him I considered myself
9 representing him on.

10 Q Tell me about the posture of this case.
11 Was this ready to go to trial?

12 A Yes. The Solicitor was calling the case
13 on Monday. I think the day we pled was a Monday.
14 We were going to go to trial, but we were going to
15 go to trial on the trafficking case, not the other
16 case.

17 Q That was the case that SLED investigated?

18 A Correct.

19 Q Okay. So that was the only one that was
20 to be at trial on Monday?

21 A Correct.

22 Q The remaining cases would be still
23 pending?

24 A Correct.

25 Q Those involved different dates, different

Joshua Kendrick - Direct

52

1 witnesses?

2 A Correct.

3 Q Okay. Had you been given any information
4 identifying the confidential informant in those
5 other cases at that point?

6 A No.

7 Q Was that a common practice at the time?

8 A I mean, if we had been going to trial,
9 yes, I would have gotten the identification of the
10 confidential informant. But we weren't going to
11 trial on those cases, so I wasn't focusing on it at
12 that second.

13 Q Okay. Tell me about the plea negotiations
14 in this case.

15 A Well, if I remember correctly, he is
16 correct about the letter that he had from Mr. Burns,
17 and I may get some of the charges confused. But I
18 was under the impression that we were going to plead
19 some of those charges concurrently to probation.

20 And the reason for that was because Mr.
21 Livingston had done very well on probation, and my
22 argument was he had stayed out of trouble. These
23 charges should have been handled at the same time as
24 the plea, and they weren't. And that's certainly
25 not his fault.

Joshua Kendrick - Direct

53

1 Q Okay.

2 A The trafficking case came up later, and
3 that's what threw all that out the window, because
4 at that point, the Solicitor didn't really believe
5 me anymore that he had stayed away from drugs.

6 Q So the charges referenced in that letter
7 were some of the either nol prossed or the two that
8 he pled guilty to?

9 A Those were the old charges, and the date
10 of that letter is in 2006, where some of these
11 charges came up in 2008. So at that point, we are
12 talking about charges that basically the West
13 Columbia Police Department held because they knew it
14 was going to the charges he had. And then they
15 brought them back up, thinking that would mess
16 everything up, and it was going to.

17 Q Okay.

18 A It was the trafficking case that caused
19 all the trouble.

20 Q Okay. How did it come to be that these
21 other two cases were kind of rolled up with the
22 trafficking case for a plea?

23 A My guess is that -- we had never talked
24 about those cases. We had never talking about
25 pleading them. The final deal got done Friday night

Joshua Kendrick - Direct

54

1 at around 10:00 by cell phone, because we had missed
2 the 5:00 deadline to accept the deal.

3 I happened to know Mr. Burns' cell phone
4 number and was able to track him down. And he said
5 no, got off the phone for a little while, called me
6 back and said he had had a change of heart and would
7 let us plead to 15 to 30 on trafficking. I don't
8 remember clearly what happened the morning of the
9 plea, but I imagine at that point he told me that he
10 wanted those other pleas.

11 It was all going to be concurrent, and it
12 wouldn't have made any difference to my case,
13 because if we had not been able to reach a plea
14 agreement, we were going to start trial on the
15 trafficking case.

16 Q That trafficking case, that carried a
17 minimum of 25?

18 A Correct.

19 Q And you had explained that to Mr.
20 Livingston?

21 A Correct.

22 Q He's mentioned that you kind of threatened
23 him with a life without parole sentence. Do you
24 recall that conversation?

25 A Vaguely. I mean, "threat" might be a

Joshua Kendrick - Direct

55

1 little bit -- and I guess it depends on your
2 interpretation. I certainly was worried about that
3 because we're in Lexington County, and I had had
4 them do that to me before, where they had taken what
5 I had thought were relatively minor drug charges,
6 but because they were enhanced -- you know, second
7 or third offenses -- there had been an LWOP.

8 As a matter of fact, you know, it had
9 happened not long before all this came up. So it
10 was certainly a possibility. You know, whether they
11 would have done it or not, I'll never know. But it
12 was definitely an issue.

13 Q So given his prior offenses and he had the
14 SLED case, then you had other offenses that occurred
15 at separate incidents --

16 A Correct.

17 Q -- that could have been tried separately?

18 A Right. I mean, I think that in all
19 honesty they would have convicted him on the
20 trafficking case, and I don't think they would have
21 gone back and tried to try him again. But at that
22 point, he would have had 25 years instead of less.
23 So, I mean, it still was something that was a
24 benefit to him.

25 Q Had you had an opportunity to discuss with

Joshua Kendrick - Direct

56

1 him the evidence in the trafficking case,
2 specifically this videotape --

3 A Yes.

4 Q -- and audiotapes?

5 A Yes.

6 Q And had you talked about an entrapment
7 defense with him?

8 A Probably not much more than what he
9 relayed, which I don't remember that, but that is an
10 accurate statement of the law. So I would imagine
11 that's what I told him.

12 Q Did you think that an entrapment defense
13 was going to be viable at trial in this case?

14 A No. The problem with an entrapment
15 defense is that it has two elements. We didn't meet
16 either one of the elements. So the initial hurdle
17 to get the entrapment charge would have been
18 difficult.

19 And then the second issue is once you get
20 the entrapment charge, it's just a jury charge. It
21 doesn't lead to a directed verdict or a legal
22 resolution. So I didn't think we would get the jury
23 charge, and I didn't think we would, if we got the
24 jury charge, convince a jury to find him not guilty
25 on these charges.

1 MS. WILLIAMS: Beg the Court's indulgence.

2 Q And you were not retained on the probation
3 revocation matter?

4 A No, I never knew about the probation
5 revocation.

6 Q Okay. So you all never spoke about that
7 case at all, is that correct?

8 A No. I think he showed me the transcript,
9 and I imagine that that came up after the plea on
10 these charges. I mean, I probably would have shown
11 up with him if I had known about it, but I didn't
12 know about it.

13 Q Okay. You've represented many criminal
14 defendants in drug cases earlier. Would that be
15 safe to say?

16 A Yes, in pleas and trials.

17 Q Was this a fairly large amount of drugs
18 for someone who wasn't familiar with the drug trade?

19 A It's all relative. I mean, maybe it was a
20 little more than -- it wasn't personal use, I'll say
21 that.

22 Q Okay. And he was familiar with the
23 practice of fronting something; he seemed to know
24 what those kind of words meant?

25 A I don't have any idea what he was familiar

Joshua Kendrick - Direct

58

1 with. The problem I had was that unfortunately I
2 think it just happened in here too. He admitted the
3 conduct that met the definition of the statute, so I
4 couldn't put that up as my defense. And that's why
5 we were stuck on the trafficking case.

6 MS. WILLIAMS: I don't believe I have any
7 other questions.

8 THE COURT: All right.

9 Mr. Mills, anything on cross?

10 MR. MILLS: Yes, sir, Your Honor, may it
11 please the Court.

12 THE COURT: Yes, sir.

13 CROSS-EXAMINATION

14 BY MR. MILLS:

15 Q Mr. Kendrick, how are you this morning?

16 A Good, Mr. Mills.

17 Q Let's talk about the West Columbia case.
18 You had represented Mr. Livingston for a while on
19 the West Columbia cases, correct --

20 A Correct.

21 Q -- the two that hadn't pleaded to?

22 A Correct.

23 Q Okay. And did you do any investigation to
24 determine whether or not the person who was actively
25 involved as a witness in the case was still

Joshua Kendrick - Cross

59

1 available at the time he pled?

2 A I did not.

3 Q Okay. And did you attempt to do anything
4 with that?

5 A No.

6 Q Okay. And did you have a file on that
7 case, a full -- with the drug analysis, incident
8 reports, and all that?

9 A Correct.

10 Q The file from the Solicitor's Office did
11 not have the confidential informant's name, correct?

12 A I don't think I ever knew the confidential
13 informant's name.

14 Q Okay. But you did no research to find out
15 before the plea in 2009?

16 A No, like I said, those cases weren't at
17 issue when we were doing the plea negotiations. So
18 I assume they got added Monday morning. They
19 weren't up for trial.

20 Q I understand, they weren't up for trial.
21 But they were added to make it two extra charges
22 that he was pleading guilty to, correct?

23 A Right. And, you know, maybe that was a
24 mistake to plead them. The problem was if we hadn't
25 pled to those charges, we were picking a jury on the

Joshua Kendrick - Cross

60

1 trial.

2 Q I understand. But there is a cumulative
3 -- you agree there is a cumulative effect as far as
4 sentencing when you plead to more than one offense
5 at the same time, especially two extra offenses?

6 A Certainly, there can be.

7 Q Okay. So the judge -- in this case,
8 actually the judge did not give the minimum
9 sentence, correct?

10 A He gave him a little bit over the minimum.

11 Q Okay. So you had pled to -- or he pled to
12 -- the two West Columbia charges and the trafficking
13 and got 18 years instead of 15 years, correct?

14 A Correct.

15 Q So there could have been a cumulative
16 effect of having two charges added to the
17 trafficking which was brought down to a
18 distribution?

19 A Certainly.

20 Q Okay, all right. And as far as the SLED
21 case is concerned, did you tell Mr. Livingston that
22 he could challenge any statements made to the
23 police?

24 A We probably didn't talk about that. And I
25 think that, you know, I would have asked him the

Joshua Kendrick - Cross

61

1 circumstances of the statements. And, I mean, I
2 don't think they were challengeable. I mean,
3 certainly you can challenge anything.

4 Q Right,

5 A I mean, we can file any motion we want as
6 long as we've got a printer. Whether we were going
7 to win that or not in light of how much more time he
8 was facing would have been the issue. So I don't
9 know. I assume I may have told him how you
10 challenge a statement.

11 But I would have explained to him that if
12 they read him his rights and he agreed to talk to
13 them that, you know, I didn't think many judges in
14 South Carolina were going to toss that confession
15 out.

16 Q Do you have an independent recollection of
17 that?

18 A Not particularly.

19 Q Okay. So when he says you didn't do that,
20 you don't have anything to challenge that with?

21 A I don't have anything to challenge what he
22 said on the stand that day.

23 Q Okay. And as far as the aspects of
24 dominion and control of the drugs or entrapment,
25 either defense, did you talk about that with him?

Joshua Kendrick - Cross

62

1 A Yes. And what y'all discussed earlier is
2 completely correct on both theories. I mean, we
3 would have talked about dominion and control and
4 that what appears to be the confusion is that
5 ownership is irrelevant when you talk about it in
6 terms of who may have bought or sold. I mean,
7 unfortunately what he said up here was substantially
8 what I remember him telling me at the time, and that
9 meets the definition of trafficking.

10 Q So you told him that he did not have
11 dominion and control over the drugs?

12 A No, I told him that he did.

13 Q Okay.

14 A He had to be in possession.

15 Q Okay.

16 A The video reflected actual possession.

17 Q Okay.

18 A But then construction would have been
19 enough, which it also reflected. Dominion and
20 control is a way of explaining possession.

21 Q I understand. In other words, if I pick
22 up your pen, as you know, I may have it in my
23 possession, but I don't have dominion and control
24 over it because it's your pen. I do not have the
25 right to sell it, destroy it, or anything because

Joshua Kendrick - Cross

63

1 it's still your pen, correct?

2 A I mean, you're correctly explaining what
3 the words mean, but that's not how it works. In the
4 theory of drugs in a drug case, the person that is
5 in possession of the drugs, simply because they
6 don't have the right, which is unenforceable, but
7 the right to do something with them, that wouldn't
8 change the level of possession.

9 That was the problem we ran into, and it's
10 a problem I agree that Mr. Livingston was hung up
11 on. But it made no difference who owned those drugs
12 if he was in possession of them.

13 Q Okay. And did you explain that to him?

14 A That was what we -- if we had a
15 disagreement, which we really never did; I always
16 got along well with Mr. Livingston -- it was the
17 process of explaining that to him. I understood his
18 concern. It would tick me off to be in that
19 situation. But it didn't change whether I could
20 actually get him out of the charges.

21 Q Okay. So you explained to him that mere
22 presence with the drugs is not enough to be in
23 possession?

24 A I doubt we talked about mere presence,
25 because that wasn't what was going on in any of -- I

Joshua Kendrick - Cross

64

1 mean, in this case at all.

2 Q Okay. Did you explain that to him so he
3 potentially would have that defense?

4 A I don't remember. I would have probably
5 not have explained frivolous defenses to him,
6 because I would have been doing him a disservice to
7 make him think he should go to trial on a case that
8 he couldn't win.

9 Q Well, that's not necessarily frivolous, is
10 it, to explain the basis of the law about possessory
11 offenses such as drugs?

12 A Mere presence would be someone who was at
13 a crime scene but not -- I mean, I don't know. I
14 get your point, and I get Mr. Livingston's point.
15 You know, at that time, could I have beaten the
16 trafficking charge? And the answer is not on these
17 facts.

18 Q Okay.

19 A So, I don't know. Maybe I didn't explain
20 mere presence, but it didn't make any difference in
21 the case.

22 Q All right. And you did explain
23 entrapment; you did have a conversation with him
24 about entrapment?

25 A Yes, but I think it was probably just to

Joshua Kendrick - Cross

65

1 the extent of what he said. I don't think we went
2 into it in depth --

3 Q Okay.

4 A -- because I know that the critical part
5 of entrapment is predisposition, and you bring in
6 people's record. Even arrests can come up. He had
7 made some statement. Whatever statement he made to
8 SLED would have come up, even if it had been thrown
9 out, if we had tried to raise entrapment.

10 Q Well, did you fully explore the defense of
11 entrapment or just briefly --

12 A Not with him.

13 Q Okay, you didn't --

14 A I was aware of whether or not it would
15 work.

16 Q Okay.

17 A I may have done the research on it. But I
18 just know what the entrapment law is.

19 Q Okay.

20 A But I don't know how in depth I went into
21 it with him.

22 Q Now, let's talk about the sentencing. You
23 said you were worried about life without parole
24 potentiality?

25 A I was.

Joshua Kendrick - Cross

66

1 Q What was the basis of the life without
2 parole? He had not been served with any life
3 without parole, correct?

4 A No, absolutely not. And there was no
5 chance of him getting a life without parole sentence
6 that morning. My concern is if we balked at
7 pleading. We were only going to trial on one of his
8 charges. And I didn't know what they were going to
9 do with the rest of them.

10 Hopefully, no matter what happened to the
11 trafficking charge, they would have gotten rid of
12 the rest of them, because that was what we had
13 talked about prior. But I don't have any way of
14 predicting that.

15 Q What was the basis of the State seeking a
16 life without parole in this case?

17 A To be very clear, they were not seeking a
18 life without parole in this case.

19 Q Okay.

20 A The problem was he had other charges
21 pending which would have triggered life without
22 parole with the conviction he already had and if he
23 had been convicted of trafficking.

24 Q Okay. So what were the convictions? Let
25 me rephrase that. What were the convictions, then,

Joshua Kendrick - Cross

67

1 that would have potentially led to a life without
2 parole sentence that you advised him about in order
3 to preempt any seeking of life without parole by the
4 State?

5 A Distribution and trafficking plus one of
6 the other pending distributions.

7 Q Okay. So you think just a distribution --
8 you told him a distribution and a trafficking would
9 be enough as what -- as serious offenses?

10 A Yes. I have had people with three
11 distributions before get sentenced to life without
12 parole, and it got upheld on appeal. So I could be
13 wrong about that. And if I am, then I'll certainly
14 concede that point. But I am of the understanding
15 that a distribution counts as a strike. And a
16 proximity certainly counts.

17 Q Yes, proximity does. But are you sure
18 that distribution does?

19 A Then maybe it was the proximity, but I
20 believe the trafficking would have counted and the
21 proximity. And to understand something, it's not
22 fair to characterize that as being a major component
23 of what we were talking about that morning. Just
24 like if I talk to somebody about a drug enhancement,
25 I don't assume they're going to get charged again.

Joshua Kendrick - Cross

68

1 But it was a consideration I brought up.
2 It's not fair to say that I threatened him with it.
3 But, you know, if he had gotten it, I'd be sitting
4 up here explaining why I didn't explain.

5 MR. MILLS: Beg the Court's indulgence.

6 THE COURT: Okay.

7 Q So the sentencing sheet is marked with
8 172545, correct, as a serious offense?

9 A I haven't seen the sentencing sheet.

10 Q Okay. I think it's already into evidence
11 in the packet.

12 A I just haven't seen it. I'm not disputing
13 what it says.

14 Q It's marked as serious?

15 A It is.

16 MR. MILLS: Beg the Court's indulgence.

17 Q And now back to the entrapment issue. You
18 said you didn't think you could get a jury charge on
19 that?

20 A No.

21 Q Okay. But did you explain all the
22 elements to Mr. Livingston of entrapment?

23 A I don't remember.

24 Q Okay. As far as you remember right now,
25 you do remember saying about his prior record giving

Joshua Kendrick - Cross

69

1 him some sort of predisposition part?

2 A I just remember what he said. When he
3 said it up here, I have a memory of talking about
4 that because I feel like it was very close to the
5 last minute. And we were sort of grasping at straws
6 for a trial defense.

7 Q Okay. But you did not explain the full --
8 all the elements so that he could make a decision on
9 all the elements of entrapment, to your knowledge?

10 A I don't know if I did or not.

11 Q Okay.

12 That's all the questions I have, Your
13 Honor.

14 THE COURT: Anything on redirect limited
15 to his cross?

16 MS. WILLIAMS: Yes, sir, just briefly.

17 REDIRECT EXAMINATION

18 BY MS. WILLIAMS:

19 Q You said that the life without parole was
20 not a major factor of what y'all were discussing
21 that morning. What were the major factors that
22 morning?

23 A The 25 years on the trafficking charge.

24 Q On the trafficking charge. And he did
25 have two additional proximity charges he was facing

Joshua Kendrick - Redirect

70

1 that were not pressed as a result of this, right?

2 A Correct.

3 Q And he had a prior proximity charge, as
4 well?

5 A I believe so.

6 Q Okay. And this trafficking charge could
7 have been a strike for him?

8 A That's what I always thought.

9 Q Okay, all right, thank you.

10 THE COURT: All right, anything on
11 recross?

12 MR. MILLS: That's all we have.

13 THE COURT: Any other witnesses?

14 You may step down. Thank you, Mr.

15 Kendrick.

16 MR. KENDRICK: Do you need me to stay,
17 Your Honor?

18 THE COURT: You can be excused unless
19 somebody wants you --

20 MR. MILLS: No objection.

21 THE COURT: Okay, you are now free to go
22 to work.

23 MR. KENDRICK: Thank you, Judge.

24 THE COURT: Okay.

25 All right, Ms. Williams, any other

Joshua Kendrick - Redirect

71

1 witnesses for the State?

2 MS. WILLIAMS: Nothing further from the
3 State, Your Honor.

4 THE COURT: All right, I'll go back, and
5 I'll look over this. And I'll get back to you all
6 with my decision.

7 MR. MILLS: Thank you, Your Honor.

8 THE COURT: Thank you all very much.

9 --End of Transcript of Record--

Joshua Kendrick - Redirect

72


STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

COURT REPORTER'S CERTIFICATION

I, REMA K. GANTT THOMAS, OFFICIAL COURT REPORTER, AND NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE ABOVE-CAPTIONED CASE ON AUGUST 15, 2013, IN LEXINGTON, SOUTH CAROLINA.

I FURTHER CERTIFY THAT I AM NEITHER OF COUNSEL NOR KIN TO ANY OF THE PARTIES TO THIS CAUSE OF ACTION, NOR AM I INTERESTED IN ANY MANNER IN ITS OUTCOME.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL AT LEXINGTON, SOUTH CAROLINA, THIS THE SEVENTH DAY OF APRIL, 2015.


REMA K. GANTT THOMAS
OFFICIAL COURT REPORTER
STATE OF SOUTH CAROLINA