

VOLUME I OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

James R. Barber, III, Circuit Court Judge

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SC SUPREME COURT

DERRICK LAMAR CHEEKS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002310

APPENDIX

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PAGES 1 - 500

INDEX

INDEX	i
TRIAL TRANSCRIPT DATED OCTOBER 4-6, 2010	1
MOTION FOR NEW TRIAL TRANSCRIPT DATED OCTOBER 29, 2010	468
<u>STATE V. CHEEKS</u> , OPINION NO. 27211 (S.C. Supreme Court filed Jan 16, 2013)	477
APPLICATION FOR POST-CONVICTION RELIEF	484
RETURN	492
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED SEPTEMBER 3, 2015	496
APPLICANT'S EXHIBIT # 1 (CONSENT ORDER)	576
APPLICANT'S EXHIBIT # 2 (SEARCH WARRANT)	577
ORDER OF DISMISSAL	583
INDICTMENTS	595

1 STATE OF SOUTH CAROLINA)
 2 COUNTY OF SPARTANBURG) COURT OF GENERAL SESSIONS

3
 4 STATE OF SOUTH CAROLINA,) TRANSCRIPT
 5)
 6 PLAINTIFF,) OF
 7)
 8 vs.) RECORD
 9)
 10 DERRICK LAMAR CHEEKS AND) 09-GS-42-6452, 6453
 11 RICKY DWIGHT CHEEKS,) 09-GS-42-6455 - 6457
 12)
 13 DEFENDANTS.)

10
 11 October 4th - 6th, 2010
 12 Spartanburg, South Carolina

13 B E F O R E:

14 THE HONORABLE ROGER L. COUCH, Judge, and a jury.
 15

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1	<u>INDEX OF WITNESSES</u>	
2	<u>WITNESSES</u>	<u>PAGE</u>
3		
4	Motion	11
5	Jury Selection	17
6	Motion	39
7	Opening by The Court	53
8	Opening by Solicitor Hunter	62
9	Opening by Mr. Wilkes	66
10	Opening by Mr. Poole	72
11		
12	CRAIG HANNING	
13	Direct examination by Sol. Hunter	75
14	Cross-examination by Mr. Wilkes	91
15	Cross-examination by Mr. Poole	96
16	Redirect examination by Sol. Hunter	99
17	MATT HUTCHINS	
18	Direct examination by Sol. Hunter	102
19	Cross-examination by Mr. Wilkes	116
20	Direct examination by Sol. Hunter	121
21	Cross-examination by Mr. Wilkes	135
22	Cross-examination by Mr. Poole	139
23	Redirect examination by Sol. Hunter	147
24		
25	Motion	151

1	<u>WITNESSES</u>	<u>PAGE</u>
2		
3	NATE CANTRELL	
4	Direct examination by Sol. Hunter	176
5	Cross-examination by Mr. Wilkes	183
6	Cross-examination by Mr. Poole	184
7	Redirect examination by Sol. Hunter	188
8	TRAVIS MCJUNKIN	
9	Direct examination by Sol. Hunter	190
10	Cross-examination by Mr. Wilkes	195
11	Cross-examination by Mr. Poole	199
12	KELVIN WASHINGTON	
13	Direct examination by Sol. Hunter	205
14	Cross-examination by Mr. Wilkes	214
15	ANITA MULLINAX	
16	Direct examination by Sol. Hunter	218
17	Cross-examination by Mr. Wilkes	222
18	Redirect examination by Sol. Hunter	225
19	ROBERT ROSENBERG	
20	Direct examination by Sol. Hunter	227
21	Cross-examination by Mr. Wilkes	231
22	Redirect examination by Sol. Hunter	235
23	Recross examination by Mr. Wilkes	236
24		
25		

1	<u>WITNESSES</u>	<u>PAGE</u>
2		
3	ERIC ELDER	
4	Direct examination by Sol. Hunter	249
5	Cross-examination by Mr. Wilkes	266
6	Cross-examination by Mr. Poole	274
7	Redirect examination by Sol. Hunter	287
8	Recross examination by Mr. Wilkes	290
9	TRACY MARKLEY	
10	Direct examination by Sol. Hunter	293
11	Cross-examination by Mr. Wilkes	304
12	Redirect examination by Sol. Hunter	313
13	ASHLEY HARRIS	
14	Direct examination by Sol. Hunter	319
15	Cross-examination by Mr. Wilkes	333
16	Cross-examination by Mr. Poole	338
17	Redirect examination by Sol. Hunter	344
18	Recross examination by Mr. Wilkes	349
19		
20		
21		
22		
23		
24		
25		

1	<u>WITNESSES</u>	<u>PAGE</u>
2		
3	Motions	355
4	Closing by Solicitor Hunter	387
5	Closing by Mr. Wilkes	402
6	Closing by Mr. Poole	409
7	Charge by The Court	415
8	Question from the Jury	452
9	Verdict	457
10	Motion	459
11	Sentencing	465
12	Certificate	467
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1	<u>E X H I B I T S</u>			
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EY</u>
3		<u>State's Exhibits</u>		
4				
5	S-1	Photograph	81	82
6	S-2	Photograph	84	85
7	S-3	Drugs	86	331
8	S-4	Photograph	88	88
9	s-5	Photograph	90	91
10	S-6	Bag	124	
11	S-7	Baking Soda	125	126
12	S-8	Scale	125	126
13	S-9	Scale	125	126
14	S-10	Evidence Bag	127	
15	S-11	Scale	128	128
16	S-12	Inositol	128	129
17	S-13	Drugs	181	327
18				
19				
20				
21				
22				
23				
24				
25				

1	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
2		<u>Defendant's Exhibits</u>		
3				
4	D-1	Form C	231	
5				
6				
7				
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				

1	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV</u>
2		<u>Court's Exhibit</u>		
3				
4	C-1	Search Warrant	41	
5	C-2	Document	45	
6	C-3	Incident Report	45	
7	C-4	Note from Jury	456	
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				

P R O C E E D I N G S

(WHEREUPON, the following takes place outside the presence of the jury panel.)

THE COURT: All right. Mr. Hunter, you ready to call the cases?

SOLICITOR HUNTER: Yes, Your Honor.

Your Honor, at this time the State would call Derrick Lamar Cheeks in Indictment 09-6453 for trafficking in crack cocaine over 400 grams. He's also on Indictment 2009-6452 for possession with intent to distribute crack cocaine within one-half mile of a school.

The State would also call State v. Ricky Cheeks on Indictment 2009-6457 for trafficking in crack cocaine over a hundred grams, 2009-GS-42-6456, Ricky Dwight Cheeks in trafficking cocaine base over 400 grams, and 2009-6455, the State versus Ricky Dwight Cheeks in possession with intent to distribute crack cocaine within one-half mile of a school.

THE COURT: You want to pass them up?

Mr. Wilkes, you're representing Derrick Lamar Cheeks, is that correct?

MR. WILKES: That's correct, Your Honor.

THE COURT: Has your client been arraigned on the charges?

1 MR. WILKES: He is not on the -- I believe there's a --
2 there was an amended, but I---

3 SOLICITOR HUNTER: Your Honor, the, the possession with
4 intent to distribute crack cocaine with one-half mile was
5 charged. I believe he was arraigned on it. we amended the
6 indictment during the last Grand Jury, but it's the same
7 charge.

8 THE COURT: Does he waive arraignment?

9 MR. WILKES: I will say that he waives arraignment.

10 THE COURT: And does he wish to have trial by jury on
11 that charge?

12 MR. WILKES: Yes, sir, he does.

13 THE COURT: And does -- your client is Ricky, is that
14 right?

15 MR. POOLE: That's right, Your Honor.

16 THE COURT: And has he been arraigned on the charges?

17 MR. POOLE: Yes, sir, I'm, I'm confident that he has
18 been.

19 SOLICITOR HUNTER: It's the same issue with Mr.
20 Cheeks---

21 THE COURT: All right.

22 SOLICITOR HUNTER: ---with the, Ricky Cheeks as far as
23 the one charge.

24 THE COURT: And then does he waive arraignment on that
25 charge?

1 MR. POOLE: Yes, sir, trial by jury.

2 THE COURT: And continues to demand a jury trial?

3 MR. POOLE: Yes, sir.

4 THE COURT: All right. Now, any motions we need to
5 take up before we select the jury?

6 MR. POOLE: Yes, sir, I have a motion---

7 THE COURT: Yes, sir.

8 MR. POOLE: ---motion to sever.

9 THE COURT: I'll hear you.

10 MR. POOLE: ---the trials of these defendants.

11 Your Honor, my client, in Indictment 6457, Ricky
12 Cheeks, is charged with possession of more than 100 grams of
13 cocaine base, and on Indictment 6457 he's charged with
14 possession of more than 400 grams of cocaine base, and the
15 6456 indictment attaches to a residence at
16 in Spartanburg County. This house is the residence of a
17 codefendant who's a cooperating witness whose testimony is
18 anticipated in this trial of Tracy Markley. It's his
19 parent's home, and my client is charged with possession of
20 400 plus, greater than 400 grams at that home.

21 Now, the 100 grams -- and, so, is Mr., Mr. Ricky
22 Cheeks, excuse me, Derrick Cheeks is charged with that
23 charge. That's the main charge that this case is, are,
24 these cases are all about.

25 The 100 gram, greater 100 gram charge incurred by my

1 client as a result of a traffic stop that occurred around
2 the time of the execution of a search warrant on the
3 residence just mentioned, and it's our contention that the
4 bulk of this case concerns the execution of that warrant and
5 the drug seized. That is the greater amount of the greater
6 than 400 grams. That it would be prejudicial to my client,
7 who was not there at the time that the search warrant was
8 executed, and was stopped as a result of a traffic stop
9 violation at around the same time that the, the search
10 warrant was executed at the residence that there's prejudice
11 in that the jury hearing the evidence about the 400 grams at
12 the residence is overly prejudicial to the degree that these
13 cases should be severed and my client tried separately as a
14 result of the situation as it exists.

15 THE COURT: Thank you, sir.

16 Mr. Wilkes, you have a position?

17 MR. WILKES: Your Honor, obviously we, we would move
18 also to have the car charge, the distribution car charge or
19 possession, whichever it is, or the, the hundred gram case
20 severed as well because of the prejudicial effect on the
21 other. There -- they are remotely, but not necessarily so
22 that they need to be tried together. So, we're trying the
23 main body of the case, which is the trafficking. We
24 certainly join in his motion as well.

25 THE COURT: All right. I'll hear from the State on

1 that.

2 SOLICITOR HUNTER: Yes, Your Honor.

3 The reason we're attempting to try these together,
4 under State v. Tucker charges can, can be joined, tried
5 together when they arise out of a single chain of
6 circumstances or proved by the same evidence of the same
7 general nature, and as they were saying, no real right of
8 the defendant has been prejudiced.

9 In this case they were doing surveillance on Mr.
10 Cheeks, both Mr. Cheeks. I'll start saying Derrick and
11 Ricky from now on. They were doing surveillance on them.
12 They saw Ricky and---

13 THE COURT: Did they live, live in the same location?

14 SOLICITOR HUNTER: The location is actually a
15 codefendant, a codefendant's house.

16 THE COURT: Okay.

17 SOLICITOR HUNTER: They were doing surveillance on
18 these two gentlemen, see them arrive at the house together,
19 see Ricky and one of the cooperating witnesses, Eric Elder,
20 leave the location and drive to a Wal-Mart where they
21 purchased baking soda, come back to the location. Before
22 the search warrant is executed on the residence, Mr. Elder
23 and Mr. Ricky Cheeks leave the residence in the vehicle that
24 all three of them came to the residence and within, I
25 believe, two miles. The residence is at 152 Gordon Drive,

1 which is right behind woodland, woodland Heights Elementary
2 on John B. White Senior Boulevard. The place where the stop
3 occurred was on Briarwood at West Main Street, which is not
4 two miles from this location where a hundred grams of crack
5 cocaine was found on the ground which we alleged to be in
6 the possession of Mr. Ricky Cheeks.

7 (WHEREUPON, at this time Mr. Ricky Cheeks begins
8 talking loudly.)

9 SOLICITOR HUNTER: The---

10 THE COURT: Mr. Poole, is that your client?

11 MR. POOLE: Yes, sir.

12 THE COURT: You want to caution him.

13 Go ahead.

14 SOLICITOR HUNTER: It's the State's position that the
15 traffic stop is directly intertwined with the search
16 warrant, and, in fact, evidence will be presented that
17 Mr. Derrick Cheeks gave Ricky Cheeks the crack cocaine that
18 was found in the car stop and told him to deliver it to
19 someone, and, therefore, we believe that they should be
20 tried together.

21 THE COURT: Was the vehicle followed from---

22 SOLICITOR HUNTER: The vehicle was followed from the
23 house.

24 THE COURT: Okay. All right. Anything further, Mr.
25 Poole?

1 MR. POOLE: No, sir.

2 THE COURT: Motion denied.

3 Any other motions that we need to take up before the
4 jury comes in?

5 MR. WILKES: I'll have a suppression motion, Your
6 Honor, but I believe I---

7 THE COURT: You want to do that after jury selection?

8 MR. WILKES: After jury selection.

9 THE COURT: Before they're sworn?

10 SOLICITOR HUNTER: We would request before they're
11 sworn.

12 THE COURT: And before they're sworn, right?

13 MR. WILKES: Well, I would prefer after they're sworn
14 since it's an issue that can be raised at anytime.

15 THE COURT: Okay.

16 MR. WILKES: I would be entitled to raise it
17 afterwards.

18 SOLICITOR HUNTER: We would request that it be before
19 they're sworn so the double jeopardy does not attach cause
20 it, motion would be a motion that would affect the outcome
21 of the trial.

22 MR. WILKES: And I believe I, I have the right to raise
23 it at anytime, and in, instead of waiting halfway through
24 their first witness at the mention of the drugs and raise
25 it, it would make more sense to do it before we get that far

1 down the road.

2 THE COURT: We'll do it before we get that far, but
3 before the jury is sworn.

4 SOLICITOR HUNTER: Thank you.

5 THE COURT: All right. Any other matters that we need
6 to take up before the jury comes in?

7 MR. WILKES: I don't think so.

8 SOLICITOR HUNTER: Not at this point, Your Honor.

9 THE COURT: All right. Let's bring the jury panel in
10 for jury selection.

11 MR. WILKES: Judge, before the jury gets in, how are we
12 gonna handle the strikes?

13 AS I understand it, we believe we have five a piece if
14 I'm not mistaken.

15 THE COURT: State agree?

16 SOLICITOR HUNTER: Fine by me, Your Honor.

17 THE COURT: All right.

18 MR. WILKES: Or I could say ten a piece and see if the
19 State agrees.

20 SOLICITOR HUNTER: I don't agree to that.

21 THE COURT: I don't think he'll go that far.

22 MR. WILKES: But I think we'd be covered if we can
23 combine those.

24 THE COURT: It will be five a piece.

25 MR. WILKES: Five a piece.

1 THE COURT: Not on the alternate. I'm gonna make you
2 work together on that one.

3 MR. WILKES: We can do that.

4 SOLICITOR HUNTER: Your Honor, I think we'll agree to
5 one a piece on the alternate.

6 THE COURT: Okay. Is that right, one a piece?

7 MR. POOLE: Yes, sir.

8 THE COURT: And one for the State.

9 (WHEREUPON, the following takes place within the
10 presence of the jury venire.)

11 THE COURT: Ladies and gentlemen of the jury, we're
12 about to begin the trial in a couple of cases. I'm going to
13 go over those with you at this time. The cases that we're
14 about to begin is The State of South Carolina versus Ricky
15 Dwight Cheeks, and The State of South Carolina versus
16 Derrick Lamar Cheeks.

17 Now, in each case there are two indictments that have
18 been presented to the Court. I'm going to go over the
19 indictments that I have before me.

20 Now, let me explain to you an indictment is simply the
21 document that brings the cases before this Court. It
22 informs the Court of the charges to be tried and it informs
23 the defendants of the charges that have been brought against
24 the defendants. An indictment can not be used by a jury in
25 any fashion whatsoever in determining the guilt or the

1 innocence of a defendant. Again, it's simply the document
2 that brings the case before this Court and the charges that
3 have been lodged.

4 I'm going to go over the indictments with you because
5 later on I'm going to ask you some questions that would
6 apply specifically to these cases, and this will give you an
7 opportunity to know the allegations that have been made so
8 that you can more fully and completely answer the questions
9 I'm about to ask you concerning these matters.

10 The first cases, case that I will go over with you is
11 the indictment in Case Number 2009-GS-42-6455. This is in
12 the case of The State of South Carolina versus Ricky Dwight
13 Cheeks. The charge is possession with the intent to
14 distribute crack cocaine within one-half mile of a school.

15 The indictment states that Ricky Dwight Cheeks did, in
16 Spartanburg County, on or about June the 4th of 2009,
17 distribute, sell, purchase, manufacture, or unlawfully
18 possess with the intent to distribute a quantity of crack
19 cocaine, a Schedule II controlled substance; while in, on,
20 or within a one-half mile radius of the grounds of a public
21 or private elementary, middle, or secondary school, a public
22 vocational or trade school, or a technical education center,
23 or a public or private college or university. To wit,
24 Woodland Heights Elementary School under the provisions of
25 Section 44-53-445 of the Code of Laws of South Carolina,

1 1976 as amended, such possession not having been authorized
2 by law against the peace and dignity of the State and
3 contrary to the statute in such case made and provided.

4 The second indictment that I will go over with you is
5 Case Number 09-GS-42-6456. This is an indictment for
6 trafficking in crack cocaine.

7 This indictment states that Ricky Dwight Cheeks did, in
8 Spartanburg County, on or about June the 4th of 2009,
9 knowingly sell, manufacture, deliver, purchase, or bring
10 into the State or did provide financial assistance or did
11 otherwise aid, abet, attempt, or conspire to sell,
12 manufacture, deliver, or purchase, or bring into the state
13 or knowingly, actually or constructively possess, or did
14 knowingly attempt to actually or constructively possess more
15 than 400 grams of cocaine base and/or crack cocaine, a
16 Schedule II controlled substance, in violation of section
17 44-53-375 of the Code of Laws of South Carolina, 1976 as
18 amended, against the peace and dignity of the State and
19 contrary to the statute in such case made and provided.

20 The next indictment that I will go over with you is in
21 Case Number 09-GS-42-6452. The indictment is for possession
22 with the intent to distribute crack cocaine within one-half
23 mile of a school, and this is in the case of the State of
24 South Carolina versus Derrick Lamar Cheeks.

25 It states that Derrick Lamar Cheeks did, in Spartanburg

1 County, on or about June the 4th of 2009, distribute, sell,
2 purchase, manufacture, or did unlawfully possess with the
3 intent to distribute a quantity of crack cocaine, a Schedule
4 II controlled substance, while in, on, or within a one-half
5 mile radius of the grounds of a public or private
6 elementary, middle, or secondary school, a public vocational
7 or trade school, or a technical education center, or a
8 public private, public or private college or university. To
9 wit, Woodland Heights Elementary School under the provisions
10 of Section 44-53-445 of the Code of Laws of South Carolina,
11 1976 as amended. Such possession having not been authorized
12 by law against the peace and dignity of the state and
13 contrary to the statute in such case made and provided.

14 The next indictment is in Case Number 09-GS-42-6453.
15 This is for trafficking in crack cocaine. This is in the
16 case of the State of South Carolina against Derrick Lamar
17 Cheeks, and it states that the, that Derrick Lamar Cheeks
18 did, in Spartanburg County, on or about June the 4th of 2009
19 knowingly sell, manufacture, deliver, purchase, or bring
20 into the State, or did provide financial assistance, or did
21 otherwise aid, abet, attempt, or conspire to sell,
22 manufacture, deliver, purchase, or bring into the state or
23 did knowingly, actually, or constructively possess, or did
24 knowingly attempt to actually or constructively possess more
25 than 400 grams of cocaine base and/or crack cocaine, a

1 Schedule II controlled substance, in violation of Section
2 44-55-375 of the Code of Laws of South Carolina, 1976 as
3 amended, against the peace and dignity of the state and
4 contrary to the statute in such case made and provided.

5 Again, those are the charges that bring the case before
6 this Court, and, again, those documents can not be used by
7 you in any fashion in determining the guilt or the innocence
8 of the defendants in this matter.

9 Before I begin to ask you questions concerning this
10 matter I'm going to ask that the attorneys involved in this
11 case introduce themselves to you, and in the case of the
12 defense I'd ask that they introduce the defendants to you.

13 First of all, for the State.

14 SOLICITOR HUNTER: My name is Eddie Hunter. I work for
15 the Seventh Circuit Solicitor's Office under Tray Gowdy.

16 THE COURT: Thank you, sir.

17 Yes, sir, Mr. Wilkes.

18 MR. WILKES: I'm Jeff Wilkes and I represent
19 Mr. Derrick Cheeks right here.

20 THE COURT: Mr. Cheeks, if you would, stand please and
21 face the jury panel.

22 (Defendant complies.)

23 THE COURT: Thank you. You can be seated.

24 (Defendant complies.)

25 THE COURT: And Mr. Poole.

1 MR. POOLE: I am Roger Poole of the Public Defender's
2 Office for the Seventh Judicial Circuit and I represent
3 Mr. Ricky Cheeks.

4 THE COURT: Thank you. You can be seated.

5 (Defendant Ricky Cheeks stands.)

6 THE COURT: Now, ladies and gentlemen of the jury, at
7 this point in time I'm going to begin to ask some questions,
8 and, again, it's necessary that you be sworn concerning the
9 answers that you're about to provide to the court, that they
10 are truthful, honest, and complete.

11 Madam Plea, Clerk, please swear the prospective jury
12 panel.

13 (WHEREUPON, the jury venire was placed under oath at
14 this time.)

15 THE COURT: Now, if any member of the prospective jury
16 panel failed or refused to take the oath just administered
17 by the clerk please stand.

18 (No response.)

19 THE COURT: The record will reflect that all jurors
20 have been sworn for purposes of my questioning at this time.

21 Now, my -- we'll go through the same process. If you
22 have a response to my questions I'll ask that you stand.
23 I'll need to get your name and number on the record before I
24 receive any responses.

25 My first question is, is there any member of the jury

1 panel who has ever been related by marriage or are you
2 related by blood to either of the defendants, Derrick Lamar
3 Cheeks or Ricky Dwight Cheeks, if that's true, please stand.

4 (No response.)

5 THE COURT: Has any member of the jury panel ever had a
6 close personal or a social relationship with either of the
7 defendants in this case, Derrick Lamar Cheeks or Ricky
8 Dwight Cheeks, if that's true, please stand.

9 (Juror responds.)

10 THE COURT: Your name and number please, ma'am?

11 JUROR: Ebony Freeman, Number 61.

12 THE COURT: Yes, ma'am.

13 JUROR: We went to school together.

14 THE COURT: Well, ma'am, it looks like that may have
15 been several years ago. I'm not gonna ask you how long ago.
16 Remain standing please.

17 Have you maintained any relationship or knowledge of
18 them since that time?

19 JUROR: No.

20 THE COURT: Would the fact that you attended school
21 with, with which one?

22 JUROR: Derrick.

23 THE COURT: All right. Several years ago, would that
24 affect your ability to be fair and impartial in the trial of
25 this case?

1 JUROR: No.

2 THE COURT: Thank you, ma'am. You can be seated.

3 Anyone else?

4 (No response.)

5 THE COURT: Has any member of the jury panel ever been
6 represented by any of the attorneys that are involved in
7 this case or have they ever appeared on the other side of a
8 legal matter from you, if that is true, please stand.

9 (No response.)

10 THE COURT: Has any member of the jury panel ever been
11 related by marriage or have you had a close personal or are
12 you related by blood or have you had a close personal or
13 social relationship with any of the attorneys involved in
14 this case, if that's true, please stand.

15 (No response.)

16 THE COURT: I'm going to go over a list of potential
17 witnesses in the cases. If any of the witnesses are
18 present, when I call their names, I'll ask that they please
19 stand and face the jury panel so that you can place a face
20 with the names.

21 First of all, Mr. Paul Norris with the Spartanburg
22 County Sheriff's Department.

23 (Witness stands and no response.)

24 THE COURT: Thank you.

25 Mr. Ashley Harris with the Spartanburg County Sheriff's

1 Department.
2 (No response.)
3 THE COURT: Mrs. Anita Mullinax with the Spartanburg
4 County Sheriff's Office.
5 (No response.)
6 THE COURT: Mr. Matt Hutchins with the Spartanburg
7 County Sheriff's Office.
8 (Witness stands and no response.)
9 THE COURT: Mr. Steve Cooper with the Spartanburg
10 County Sheriff's Office.
11 (No response.)
12 THE COURT: Mr. Kelvin Washington with the Spartanburg
13 County Sheriff's Office.
14 (No response.)
15 THE COURT: Mr. Nate Cantrell or Cantrell with the
16 Spartanburg County Sheriff's Office.
17 (No response.)
18 THE COURT: Mr. Travis McJunkin with the Spartanburg
19 County Sheriff's Office.
20 (No response.)
21 THE COURT: Mr. Craig Hanning with SLED.
22 (Witness stands and no response.)
23 THE COURT: Tracy Markley from Spartanburg.
24 SOLICITOR HUNTER: Your Honor, he's being brought in.
25 THE COURT: Okay.

1 SOLICITOR HUNTER: Mr. Markley is.
2 THE COURT: All right. Right now?
3 SOLICITOR HUNTER: Yes, correct.
4 THE COURT: All right.
5 SOLICITOR HUNTER: He's out in the lobby. He's in a
6 wheelchair.
7 THE COURT: Okay.
8 SOLICITOR HUNTER: Your Honor, may we approach for a
9 second?
10 THE COURT: Yes, you may.
11 (WHEREUPON, a bench conference was held out of the
12 hearing of the jury at this time.)
13 THE COURT: All right, sir. Your name, sir, is Tracy
14 Markley, is that correct?
15 WITNESS: Yes, sir.
16 THE COURT: All right, sir. Ask you to have a seat
17 over there. Thank you.
18 Mr. Eric Elder from Boiling Springs.
19 (No response.)
20 THE COURT: Mr. Robert Rosenberg with the Spartanburg
21 County Sheriff's Office.
22 (No response.)
23 THE COURT: Mr. Corey Jamal Cheeks.
24 (No response.)
25 THE COURT: Shanonica -- did I say that right?

1 MR. WILKES: Shamonica.

2 THE COURT: Shamonica Cheeks.

3 (No response.)

4 THE COURT: Kenneth Lewis.

5 (No response.)

6 THE COURT: Now, as to the individuals that I have just
7 named, has any member of the jury panel ever been related by
8 marriage, are you related by blood, or have you had a close
9 personal or a social relationship with any of the
10 individuals that I have named as potential witnesses in this
11 case, if that is true, please stand.

12 (No response.)

13 THE COURT: Has any member of the jury panel or any of
14 your immediate family or close friends ever been prosecuted
15 by the Seventh Circuit solicitor's Office, if that is true,
16 please stand.

17 (No response.)

18 THE COURT: Has any member of the jury panel or a
19 member of your immediate family ever been arrested for,
20 charged with, or convicted of any crime involving or
21 relating to illegal drugs, if that is true, please stand.

22 (Juror responds.)

23 THE COURT: Yes, sir, your name and number?

24 JUROR: Mitch Gilcrist, 68.

25 THE COURT: Your situation, sir?

1 JUROR: I was charged with possession of controlled
2 substance.

3 THE COURT: All right, sir. You were charged with
4 that?

5 JUROR: Yeah.

6 THE COURT: Is that case now been ended?

7 JUROR: Yeah, it was years ago, years ago.

8 THE COURT: All right. Would that affect your ability
9 to be fair and impartial in this trial?

10 JUROR: No.

11 THE COURT: Thank you, sir. You can be seated.

12 Anyone else?

13 (No response.)

14 THE COURT: Has any member of the jury panel ever had
15 any experience with a police officer, a state trooper, a
16 federal agent, or a state or federal law enforcement agency
17 that might affect your ability to be fair and impartial in
18 the trial of this case, if that's true, please stand.

19 (No response.)

20 THE COURT: Does any member of the jury panel have an
21 opinion concerning the use of marijuana, cocaine,
22 methamphetamine, heroin, or other illegal, illegal drugs
23 such that it would affect your ability to be fair and
24 impartial in the trial of this case, if that's true, please
25 stand.

1 (No response.)

2 THE COURT: Has any member of the jury panel or a
3 member of your immediate family or a close personal friend
4 of yours ever served as a member or an officer in any law
5 enforcement agency, if that's true, please stand.

6 (Jurors respond.)

7 THE COURT: Yes, sir, your name and number?

8 JUROR: William Morgan, 114.

9 THE COURT: Your situation, sir?

10 JUROR: My father use to be an officer.

11 THE COURT: Well, is that here in Spartanburg County?

12 JUROR: No, sir.

13 THE COURT: Somewhere else?

14 JUROR: Yes, sir.

15 THE COURT: And would that affect your ability to be
16 fair and impartial in this case?

17 JUROR: No, sir.

18 THE COURT: Thank you, sir.

19 Ma'am, your name and number?

20 JUROR: Marie Dyer, Juror Number 50. My brother is a
21 police lieutenant in Fairview, New Jersey.

22 THE COURT: Thank you.

23 Would that affect your impartiality in this trial,
24 ma'am?

25 MR. POOLE: No, sir.

1 THE COURT: Thank you. You can be seated.

2 Anyone else?

3 (Juror responds.)

4 THE COURT: I'm sorry. Yes, ma'am, your name and
5 number?

6 JUROR: I have a brother-in-law that's a state trooper.

7 THE COURT: State trooper here in South Carolina?

8 JUROR: Yes.

9 THE COURT: Would that affect your impartiality in this
10 trial, ma'am?

11 JUROR: No.

12 THE COURT: Thank you. You can be seated.

13 Your name and number is?

14 JUROR: My name is Shamika Means, Number 44.

15 THE COURT: 44?

16 JUROR: (Nods affirmatively.)

17 THE COURT: Thank you.

18 Has any member of the jury panel ever worked for or
19 been associated with any employee of the following
20 locations, Fatz Cafe, either South Port Road or Boiling
21 Springs, Hopps on Blackstock Road, or Girls Cafe on
22 Blackstock Road, if that is true, please stand.

23 (No response.)

24 THE COURT: Has any member of the jury panel gathered
25 any information from any source outside of this courtroom

1 such that you may have formed or expressed an opinion about
2 any issue that might be involved in the trial of this case,
3 if that's true, please stand.

4 (No response.)

5 THE COURT: Is any member of the jury panel aware of
6 any bias or prejudice that you might have either for or
7 against either the State or the defense, if that's true,
8 please stand.

9 (No response.)

10 THE COURT: Is there any member of the jury panel who
11 has been a member of a Grand Jury which may have issued the
12 indictments in this case in 2009, if that's true, please
13 stand.

14 (No response.)

15 THE COURT: Is there any member of this jury panel who
16 is a member of or a contributor to any group which has as
17 its primary concern the promotion of law enforcement or
18 victims rights?

19 This would include but not be limited to such groups as
20 Mothers Against Drunk Driving, Students Against Drunk
21 Driving, Citizens Against Violent Crime, the South Carolina
22 Sheriff's Association, the South Carolina Troopers
23 Association, or similar organizations, if that's true,
24 please stand.

25 (No response.)

1 THE COURT: Does any member of this jury panel know of
2 any reason whatsoever why he or she should not serve as a
3 juror in this case with particular emphasis being placed on
4 your ability to be both fair and impartial to the State and
5 the defense, if that's true, please stand.

6 (No response.)

7 THE COURT: Are there additional questions from the
8 State?

9 SOLICITOR HUNTER: Nothing from the State, Your Honor.

10 THE COURT: Any from the defense, Mr. Wilkes?

11 MR. WILKES: No, sir.

12 THE COURT: Any from the defense, Mr. Poole?

13 MR. POOLE: No, sir.

14 THE COURT: All right. I'll declare then that the jury
15 panel, as now constituted, is qualified to serve as jurors
16 in this case. I'll instruct the clerk to begin to prepare a
17 list of potential jurors.

18 While she's doing that I'll just digress a little bit.
19 Back when I first started practicing law, when we picked
20 jurors, we had everybody's name in a capsule and we turned a
21 barrel over and we -- State Law required that a blind person
22 actually select the capsules from the barrel. So, now we
23 have computers that select names at random from those of you
24 that are still in the pool, and she's producing a list now
25 that the computer is generating. We assume that it's blind

1 and that it will be producing that list shortly.

2 So, once the list is produced we're gonna go through a
3 process where your names will be called, you'll be asked to
4 come forward, and when your name is called bring with you
5 any of your personal belongings such as a pocketbook or
6 whatever you have with you. Bring that with you down front
7 because if you're selected on the jury you'll go directly to
8 the jury box and be seated over here to my left. So, bring
9 whatever you have with you. We'll ask that you come down
10 front. They'll be a bailiff here. Turn and face the back
11 of the courtroom, and at that time the attorneys will be in
12 a position to exercise their strikes in the case. Now, if
13 you're not selected, if you're stricken, we'll ask you to
14 have a seat back in the back of the courtroom.

15 State ready to proceed?

16 SOLICITOR HUNTER: Yes, Your Honor.

17 THE COURT: Defense ready to proceed, Mr. Wilkes?

18 MR. WILKES: Yes, sir.

19 MR. POOLE: Yes, sir.

20 THE COURT: Madam Clerk, you can begin the jury
21 selection process.

22 (WHEREUPON, a jury panel of 12 were selected at this
23 time.)

24 CLERK: Your Honor, this will be for the alternate.

25 THE COURT: All right. We are selecting the alternate.

1 (WHEREUPON, an alternate juror was selected at this
2 time.)

3 THE COURT: Any objection to the jury selection process
4 from the State?

5 SOLICITOR HUNTER: None from the State.

6 THE COURT: From the defense, Mr. Wilkes?

7 MR. WILKES: None on behalf of Mr. Derrick Cheeks.

8 THE COURT: Mr. Poole.

9 MR. POOLE: No, sir.

10 THE COURT: All right.

11 (WHEREUPON, the remaining jurors were excused at this
12 time.)

13 THE COURT: I'll ask, while that's happening, for the
14 attorneys to please approach briefly.

15 (WHEREUPON, a bench conference was held out of the
16 hearing of the jury at this time.)

17 THE COURT: All right. Ladies and gentlemen, you have
18 been selected to serve as jurors on this case, and I also
19 note that it's past, a little past 12:30. So, we're going
20 to stop for lunch at this time as far as you're concerned.

21 Let me give you some instructions concerning your
22 position at this point in time. You have been selected as
23 jurors on this case. And when you leave the courthouse I
24 will -- you know very little about the case. But I'm going
25 to instruct you not to be discussing this case with anyone,

1 even among yourselves. You've been selected as fair and
2 impartial jurors with an open mind concerning any of the
3 issues that might be involved in this matter. And if you
4 begin to discuss even what the case is about or the people
5 that are involved, anything about it, you may talk to
6 someone who might influence that decision, might influence
7 your open mind, and that we don't want that to occur.

8 So, don't discuss it even among yourselves. I will,
9 throughout the trial, instruct you not to discuss this case
10 at anytime with anyone until such time as you've heard all
11 the evidence of counsel, you've heard all the evidence
12 presented, and I've charged you concerning the law, and then
13 and only then will I tell you to begin to discuss it among
14 yourselves in deliberations.

15 So, don't discuss the case with anyone. It's okay to
16 tell family, friends I've been selected to serve on a jury,
17 I'll tell you all about it when I'm done. But that's all
18 you need to tell them.

19 Now, also don't attempt to gather any information about
20 this case from any source outside of this courtroom. When
21 you return to the courtroom you'll be taking an oath to
22 decide this case based upon the law and the evidence. Now,
23 the only evidence that you're going to hear during this
24 trial is testimony of witnesses who've been sworn to tell
25 the truth who will testify from this witness stand here, and

1 whatever documents or other evidence that comes into the
2 record through that testimony. That's the only evidence
3 that you'll, you will hear.

4 So, it's, it's highly improper for you to gather any
5 information outside of this courtroom from any source. That
6 would be from media reports, newspaper articles, the
7 Internet, or any other source because, quite often, those
8 sources of information contain information either that's not
9 accurate or should not be considered by you under the rules
10 of evidence that the courts operate under.

11 So, again, don't attempt to gather any information
12 yourself. I don't expect this case to be reported in the
13 media. But if you should happen to hear a radio broadcast,
14 a television broadcast, or see an article, disregard it,
15 don't listen to it, turn it off. Because, again, you've
16 been -- you will be sworn to decide the case solely upon the
17 evidence, and that's what you're gonna hear in this
18 courtroom. Not from any other source. So, don't listen to,
19 watch, or read any media reports.

20 Don't allow anyone to discuss the case with you.
21 Should anyone approach you and attempt to discuss this case
22 with you, at anytime, I've already explained to you that
23 jury tampering is a felony in this state. I will expect you
24 and would ask you to report that fact to the Court. I can
25 assure you I'll take the appropriate action should that

1 occur. So, don't allow anyone to discuss the case with you.

2 Spartanburg is a small town as I've said. It's --
3 thank goodness. I like living here. But if you happen to
4 be in a restaurant where a participant in this trial is
5 located, don't sit where you can overhear their conversation
6 or anything like that. Again, I'm gonna ask you to be back
7 in the jury room. Now, there's some pretrial matters I have
8 to take up with the attorneys. I'm gonna give you an extra
9 long lunch break. I'll say be back at the jury room by
10 three o'clock. We should be in a position to begin the
11 trial at that point in time.

12 The bailiffs will show you the jury room that's in use
13 for this trial. You should return to that room at three
14 o'clock this afternoon.

15 Thank you very much. You're free to go to lunch.

16 (WHEREUPON, the following takes place outside the
17 presence of the jury.)

18 THE COURT: Any objection to my instructions from the
19 State?

20 SOLICITOR HUNTER: None from the State, Your Honor.

21 THE COURT: Any from the defense?

22 MR. WILKES: None, Your Honor.

23 THE COURT: Mr. Poole.

24 MR. POOLE: No, sir.

25 THE COURT: All right. We'll reassemble at two

1 o'clock. At that time I'll take up the, the pretrial
2 matters. I don't know who's on bond and who's in custody.

3 This gentleman in black?

4 MR. WILKES: He's in custody.

5 THE COURT: All right, sir. I will tell you, sir,
6 that -- you are Mr.---

7 MR. POOLE: Ricky Cheeks, Your Honor.

8 THE COURT: Ricky Cheeks.

9 DEFENDANT RICKY CHEEKS: Yes, sir.

10 THE COURT: Mr. Cheeks, your trial is going to begin
11 this afternoon at three o'clock.

12 DEFENDANT RICKY CHEEKS: Yes, sir.

13 THE COURT: I will tell you if you fail to reappear at
14 that time the trial will proceed in your absence.

15 Do you understand that, sir?

16 DEFENDANT RICKY CHEEKS: Yes, sir.

17 THE COURT: All right. Court's in recess until two
18 o'clock for pretrial motions.

19 MR. POOLE: For the record, Your Honor, I don't mean to
20 interrupt, but two o'clock, he needs to be back here at
21 2:00.

22 THE COURT: Yes, sir, I'm just saying the trial though
23 will begin---

24 MR. POOLE: Right.

25 THE COURT: The actual trial will begin at three

1 o'clock.

2 MR. POOLE: Yes, sir.

3 THE COURT: But two o'clock will be the motions
4 hearing.

5 SOLICITOR HUNTER: Your Honor, may we approach?

6 THE COURT: Yes, sir, you may.

7 (Whereupon, a bench conference was held at this time.)

8 THE COURT: All right. It's my understanding that the
9 defense has pretrial motions?

10 MR. WILKES: We do, Your Honor.

11 THE COURT: Mr. Wilkes.

12 MR. WILKES: We are moving to suppress the search
13 warrant based on the sufficiency of the search warrant, and
14 there was one other thing as well. Mr. Hunter gave me the
15 color photographs of some of the pictures he wants to
16 introduce. One of them has my client handcuffed and
17 recently tased and appearing so. We would ask that the
18 Court suppress this. That's gonna be prejudicial.

19 SOLICITOR HUNTER: Your Honor, the reason we have
20 submitted that -- and obviously Mr. Cheeks looks much
21 different today than he did at the time. I'm not sure what
22 the defense is gonna present as, as to their evidence, but
23 we ask that---

24 THE COURT: Pass up a copy so I can see what we're
25 talking about.

1 MR. WILKES: So the Court can see it, it looks like, it
2 looks like he is handcuff and it looks---

3 THE COURT: Well, I, I was -- I don't see any
4 handcuffs.

5 MR. WILKES: Oh, no. But he -- well, okay.

6 THE COURT: All right.

7 MR. WILKES: I will say that at the time he was
8 handcuffed, and it, it, to us, it would appear that he is.
9 In addition to his appearance after having been tased, it's
10 not one that I would want to go to the jury on.

11 THE COURT: How can you tell he's been tased?

12 His eyes are not open very wide.

13 Is that what you're referring to?

14 MR. WILKES: Yes, sir.

15 THE COURT: I don't even, I don't know how one looks
16 when they've been tased in particular.

17 MR. WILKES: Well, it---

18 THE COURT: I've seen people tased and I wasn't aware
19 that they all looked the same.

20 MR. WILKES: Well, I know that he was tased. What it
21 looks like is it looks like he's under the influence of
22 something. But I don't think he was and I don't think that
23 was the question. But I think that that photograph, as far
24 as the prejudicial, to serve any purpose, I don't think
25 we're raising any questions that because he looks different

1 today he is not the same person there arrested.

2 THE COURT: Is there an identity issue in the case?

3 SOLICITOR HUNTER: There, there's not an identity
4 issue. I'm, I'm just, as a caution, I'm not sure how
5 they're gonna testify as to the codefendants as to how they
6 acted, how they looked. I would be willing to stipulate
7 that if none of that type of testimony comes in I will not
8 present that picture.

9 THE COURT: I think we'll have to judge it at the time.

10 MR. WILKES: Right, I don't think we'll---

11 THE COURT: Okay.

12 SOLICITOR HUNTER: And I'll make sure that I ask before
13 we---

14 THE COURT: Okay. That will be fine. Thank you.
15 We'll, we'll deal with it in the context of the proof.

16 (WHEREUPON, the search warrant was marked as Court's
17 Exhibit No. 1 for identification purposes only at this
18 time.)

19 THE COURT: They're challenging the, the sufficiency of
20 the search warrant. In what respect, as to the affidavit or
21 the---

22 MR. WILKES: No, sir, as to the form of the search
23 warrant, the description of the premises is omitted. There
24 is no premises on the search warrant authorized to be
25 searched. Accordingly, it is deficient under both state law

1 and federal law, and it has been marked as, as a Court's
2 Exhibit I believe if the Court would like to see it.

3 THE COURT: I'd like to see a copy of it.

4 SOLICITOR HUNTER: I have the Court's Exhibit. There
5 is a description of premises on the, on this copy, Your
6 Honor.

7 THE COURT: There is?

8 SOLICITOR HUNTER: On the first page there isn't.
9 However, on the second page, and that's the certified copy
10 from the Magistrate Court, there is a description of the
11 premises.

12 MR. WILKES: All right. I don't see that in the search
13 warrant itself, Your Honor. I see it in the affidavit, but
14 I do not see it in the, in the search warrant.

15 THE COURT: Well, now, I'm looking at the description
16 of the premises.

17 THE COURT: All right. Mr. Hunter.

18 SOLICITOR HUNTER: Yes, Your Honor. I believe that the
19 search warrant, along with the affidavit, should be read
20 together. The affidavit clearly states the description of
21 the property sought, the description of the premises, the
22 reason for the, the affidavit, and that it should be read
23 together as one document as opposed to parsing it into two
24 separate pieces. It clearly gives notice to the magistrate
25 what premises are to be searched, the property to be sought.

1 I do note that it is not listed on the first page of
2 the, of the search warrant signed by Judge Pasley. However,
3 he did have the search warrant affidavit. He looked over
4 that. It was sworn before the magistrate. So, he had that
5 information and to, to separate the two would be uncalled
6 for, Your Honor.

7 MR. WILKES: Groh versus Ramirez, United States case,
8 Your Honor. The Supreme Court has addressed this issue.
9 In, in dealing with this, it -- there was a case where I
10 believe in this respect it was the particularized places or
11 things. When the particular things were left out, the
12 Supreme Court said, in this respect, the warrant was so
13 obviously deficiency that it must regard the search as
14 warrantless within the meaning of our law under Leon,
15 Maryland, and Steel.

16 There has been case law, of course, that says there are
17 times when it is appropriate to read an affidavit and search
18 warrant in conjunction with one another when the facts and
19 the details of the affidavit supplant the, the description
20 in general of the search warrant. There is no case stating
21 that a complete omission of the description to these, of the
22 premises can be supplemented or not even supplemented, but
23 can be replaced by a description in the affidavit because
24 the search warrant serves a completely different purpose
25 than the affidavit.

1 The search warrant is the judicial order, and then this
2 has been addressed in a number of cases. The Stanford
3 versus Texas when it says upon probable cause supported by
4 oath or affirmation particular describing the place to be
5 searched and the persons or the persons to be seized, things
6 to be seized, Stanford said that these words are precise and
7 clear. That has been pretty consistent throughout the
8 country and throughout the federal law as well.

9 The only exception to having a deficiency in the
10 description of the premises in a search warrant body to
11 allow an affidavit to, to add to that, not to replace it
12 completely, but just to add to it, the Ninth Circuit and I
13 believe the Tenth Circuits, federal circuits, have, have
14 said that that may be allowed, but only if two things are
15 met. One, it has to be clearly referenced and incorporated
16 in the search warrant, and it has to be clear that it uses
17 words of incorporation, which this one didn't. It was just
18 omitted.

19 So, under the Fourth Amendment, it, it fails and I
20 would also add this additional argument as well. But the,
21 the search warrant, under 160 being on a form prescribed by
22 the attorney general, I would provide the Court with I
23 believe form SCCA 513 as the standard search warrant form
24 that is approved by the Court and it is on-line. It had
25 clearly a place for description of a search warrant

1 particularly, and I think that the Court can take judicial
2 notice of that form, and that fact that it has four clear
3 lines for the placement of the, of the description of the
4 premises.

5 If I may mark one as an exhibit, Your Honor, I'm
6 referring to.

7 (WHEREUPON, the form was marked as Court's Exhibit No.
8 2 and an incident report was marked as Court's Exhibit No.
9 3. Both were for identification purposes only at this
10 time.)

11 MR. WILKES: I would also make reference, in the,
12 addition to the, to the form that is approved by the
13 attorney general for use, that the magistrate's, the summary
14 bench book for magistrates and, and city court judges for
15 the issuance of search warrants, in the provision under
16 search warrants in particular, it states that clearly for
17 the instructions for magistrates to fill out both the place
18 to be searched with particularity and the items to be
19 searched for, and I would ask the Court to take judicial
20 notice of the provisions of the summary court bench book
21 setting forth those provisions.

22 It, it is intended, it's suppose to be filled out
23 because it is the warrant that provides authority. It is
24 the blank warrant that allows unbridled discretion in where
25 they will search.

1 SOLICITOR HUNTER: Your Honor, if you look at the
2 attached document that he just gave you, at the top of the
3 search warrant form provided to the magistrates it says
4 appear, it appearing from the attached affidavit that there
5 are reasonable grounds to believe that certain property
6 subject to seizure under 17-13-40 as omitted is located on
7 the following premises. What I think is important here is
8 the attached affidavit to -- the attached affidavit in this
9 case does provide a description of the premises traveling
10 down John B. White Boulevard to I-26, turning right onto
11 Gordon, on to St. James Drive, and then turning right onto
12 Gordon Drive.

13 It, it is my belief and my understanding that as long
14 as the description of premises is, premise, excuse me,
15 premise it says, is on the affidavit that it, read together
16 with the search warrant, would be enough particularity to
17 rule in this case.

18 MR. WILKES: And, and, again, Your Honor, I, I will say
19 that the United States Supreme Court has addressed that and
20 I think that, that Groh would cover that, Groh versus
21 Ramirez at 540 U.S. 551, and it is not -- and, and in Groh,
22 the operative language I believe would be this warrant did
23 not simply omit a few items from a list of many to be seized
24 or missed to describe a few or several nor did it make what
25 fairly would be characterized as a mere technical mistake or

1 typographical area. Rather, in the space set aside for
2 descriptions of the items to be seized, the warrant stated
3 that the items consisted of a single dwelling residence,
4 blue in color. In other words, the warrant did not describe
5 items to be seized at all.

6 The particularity requirement of the Fourth Amendment
7 applies to the two things, the items to be seized and the
8 place to be searched, and they're treated equally. And in
9 Groh, the, the Court found that omitting them is tantamount
10 to a warrantless search, which is exactly, not exactly, but
11 it falls under the same Fourth Amendment protections and
12 that's what we have here.

13 This is not a case where the Fourth Amendment will
14 allow an affidavit to add details to the generalities of the
15 description in the search warrant. This search warrant has
16 no description. It's left out. Erroneous or not, it
17 doesn't matter. It's a general warrant and it, it is, it
18 is, it is not, it does not pass muster under the Fourth
19 Amendment.

20 THE COURT: Are you gonna hand up some of those cases?

21 MR. WILKES: I, I can, Your Honor.

22 MR. WILKES: Groh, I have cited to a number of, a
23 number, a number of federal cases. I can also---

24 MR. POOLE: May it please the Court, Your Honor?

25 THE COURT: Yes, sir.

1 MR. POOLE: Naturally I would put on the record that we
2 are joining in Mr. Wilkes motion and continue from beginning
3 to end for my defendant.

4 THE COURT: Well, now, your gentleman though was
5 stopped somewhere else, right?

6 MR. POOLE: But he's charged also with the house.

7 THE COURT: Oh, okay. Okay.

8 MR. WILKES: Your Honor, I don't have -- I apologize.
9 I should of made an index of all the cases. I can hand up
10 an argument that contains the cases for the Court's review
11 if that would be permissible.

12 THE COURT: Well, anything you've got that will let me
13 take a look at what I need to look at.

14 MR. WILKES: Thank you, Your Honor. I'm sorry. I
15 should of printed out the cases.

16 THE COURT: All right. Any other issues concerning the
17 search warrant other than the one you've argued?

18 MR. WILKES: No, sir, it's just our motion to suppress
19 the search warrant.

20 MR. POOLE: And we join in the same argument.

21 THE COURT: All right. Any other pretrial motions?

22 SOLICITOR HUNTER: Nothing from the State.

23 THE COURT: Is that the only pretrial motion you're
24 gonna have?

25 MR. WILKES: Yes, sir.

1 THE COURT: All right. I'll take a brief break while I
2 go back and take a look at it.

3 MR. WILKES: Thank you, Your Honor.

4 (WHEREUPON, a short recess was taken at this time.)

5 THE COURT: All right. I've had an opportunity to
6 review the search warrant in issue in this case along with
7 the cases that appear to apply to the case. Of particular
8 interest was the State versus Freddie Williams, and while
9 the facts are not exactly in line with this particular case,
10 it did -- the basic premise of that case is that, in South
11 Carolina, and it was a Supreme Court case decided in 1989,
12 was that you can read the warrant and the affidavit together
13 to supply information upon which a warrant is based.

14 Now, in this particular case the warrant itself does
15 not have a description of the place or property to be
16 searched in a, in the blank that is provided for that. I do
17 note, however, the warrant, in the very first paragraph,
18 refers back to the attached affidavit and states that
19 there's reasonable grounds to believe that certain property,
20 subject to seizure, is located on the following premises,
21 and that's where the, the description is omitted from the
22 warrant itself.

23 I have reviewed the Groh case. I did not find in the
24 Groh case any discussion concerning whether or not the
25 warrant in anyway referred back to the affidavit. In this

1 case the warrant does refer back to the affidavit,
2 affidavit, and I know arguably, by the defense side, it does
3 not do so with specific specificity. However, it goes on to
4 say now, therefore, you are hereby authorized to search the
5 premises for the property described below and to seize the
6 property if found. So, again, it's referring to the entire
7 document.

8 Now, according to this, the affidavit was attached to
9 the search warrant when it was served, is that correct?

10 SOLICITOR HUNTER: That's correct, Your Honor.

11 THE COURT: So, they were served in, at the same time,
12 and, of course, the affidavit specifically describes the
13 real estate even to the point of description and a house
14 number on, on how to get it there or how to get to that
15 location.

16 For that reason, and, of course, the williams case has
17 not been overturned at this point in time, and I do find
18 that there was no mention in the Groh case about any
19 reference back to the affidavit, which does exist in this
20 case, although, again, arguably by the defense not
21 sufficiently, I am going to find that under the williams
22 case it is sufficient, that I am not going to suppress the
23 warrant.

24 MR. WILKES: And, Your Honor, may I be heard---

25 THE COURT: Yes, sir.

1 MR. WILKES: ---just so I can be clear?

2 The -- I have submitted to the Court a few pages of our
3 argument that are detailed that I think the Court had the,
4 the ability to see our argument in detail.

5 THE COURT: Yes, sir.

6 MR. WILKES: May we mark that as an exhibit so that---

7 THE COURT: If you'd like. I mean I don't know---

8 MR. WILKES: I would like to.

9 THE COURT: You're gonna have to let the State take a
10 look at it and see if there's any information there that
11 they find objectionable.

12 MR. WILKES: Yeah, I think it's all argument, but we
13 would just like the record to be clear on what we argue
14 instead of having to---

15 THE COURT: Well, those cases exist.

16 MR. WILKES: And -- right.

17 THE COURT: They can, they can be referred to and I've
18 read your argument.

19 MR. WILKES: And just in---

20 THE COURT: So, I don't know that that's an exhibit.
21 That's just an argument.

22 MR. WILKES: Well, as long as the argument's preserved.
23 I, I think I was clear in, in our position on Williams is
24 Williams was a ruling on 17-13-140, not the Fourth
25 Amendment, and, therefore, we do not believe that it would

1 control the search warrant issue here under the Fourth
2 Amendment.

3 THE COURT: well, I understand, understand that's your
4 argument.

5 MR. WILKES: Okay. Very good.

6 THE COURT: All right. And I know you're making the
7 same argument, Mr. Poole.

8 MR. POOLE: That's right, Your Honor.

9 THE COURT: Okay.

10 MR. POOLE: On behalf of Ricky Cheeks.

11 THE COURT: All right. Anything further that we need
12 to cover before we bring the jury in?

13 MR. WILKES: Not that I'm aware of.

14 SOLICITOR HUNTER: Nothing from the State, Your Honor.

15 THE COURT: All right. You can bring the jury in.

16 (WHEREUPON, the following takes place within the
17 presence of the jury.)

18 THE COURT: All right. Good afternoon, ladies and
19 gentlemen. I'm gonna -- I told you that when you returned
20 to the courtroom you would be taking an oath concerning your
21 duties and responsibilities as jurors in this case, and at
22 this time I'm going to ask that the clerk please swear the
23 jury panel.

24 (WHEREUPON, the jury panel was placed under oath at
25 this time.)

1 THE COURT: All right. If any member of the jury panel
2 either failed or refused to take the oath just administered
3 by the clerk, I'd ask that you now please stand.

4 (No response.)

5 THE COURT: And the record will reflect that all jurors
6 have now been sworn for purposes of the trial.

7 Now, ladies and gentlemen, before we actually begin the
8 trial of the case there's some things that I want to go over
9 with you because, for some of you, this may be your first
10 experience in actually serving on a jury during the trial of
11 an actual case, and I'm going to speak to those individuals
12 who've not had this experience and go over some matters that
13 I think that you should be aware of concerning the procedure
14 that we'll follow, the way the case will proceed, and your
15 role and responsibility as jurors in this case.

16 Probably, for those of you who have never served on a
17 jury before, most of what you might know about how the jury
18 system operates in our country you would have learned from
19 such sources as television shows or books that you've read
20 or movies that you've seen or things of that nature. And
21 while those are always interesting, they're full of good
22 story lines, interesting plots, and excellent acting, and
23 that sort of thing, those are intended primarily for your
24 entertainment.

25 I think that's obvious when you see a television show

1 where a crime can be committed, the case tried and ended in
2 the space of an hour, and they even have time for
3 commercials during that period of time. So, obviously they
4 take some license with the way things actually are done in a
5 court of law. And, again, those are intended to entertain
6 you, to keep your interest concerning those matters.

7 What you're engaged in today is intended for anything
8 but your entertainment. What you're engaged in is a
9 fundamental part of our democracy, and I hope you appreciate
10 that because, in most countries around the world, you don't
11 see situations where citizens are allowed to come into
12 courtrooms and directly participate in the important
13 decisions that take place in the court, courts of those
14 countries. Our system is somewhat different in that regard
15 in that we have a jury system that dates back to the time of
16 the Magna Carta in 1214. Almost 800 years old is the
17 tradition that we follow.

18 What we're engaged in is a search for the truth, and
19 you can expect that a search for the truth is gonna be slow.
20 It's gonna be deliberate. Sometimes it's going to be
21 repetitive as you would expect a search for the truth to be.
22 What you're engaged in is an effort to see that justice is
23 done between the parties that come before the Court.

24 Now, this courtroom is a place of honor. It's
25 dedicated to the preservation of citizens' rights through

1 what many people believe to be one of the greatest justice
2 systems ever devised on the face of this earth. It's not a
3 perfect system. No system operated and devised by man will
4 ever be perfect. But, again, it's an effort to see that
5 justice is done between the parties that are before the
6 courts.

7 The attorneys that are going to be appearing in this
8 case are here to represent their client's interest, and I'm
9 sure they'll do an excellent job in doing that. But first
10 and foremost, these attorneys are also officers of this
11 Court. At some point in time they appeared before some
12 tribunal in this state and took an oath to assist you in
13 your search for the truth. You can expect from them that
14 they act in a reasonable, professional, and an ethical
15 manner in the presentation of their client's cases before
16 you during this trial.

17 I'll remind you too that you have now come before this
18 Court, you've taken an oath to decide the case based upon
19 the evidence and the law presented during the trial. You're
20 expected to act in a reasonable, ethical, and a professional
21 manner in the discharge of your duties as jurors. Again,
22 I've told you several times today and I'll continue to thank
23 you for your willingness to come forward and serve in the
24 jury system that we have in our court system in this state
25 today.

1 Now, again, I'm not intending to charge you concerning
2 the law that you will apply in this case. Later on I will
3 do that once all the evidence has been presented and the
4 arguments have been completed. What I'm attempting to do at
5 this time is to explain to you your role and responsibility
6 as jurors and the procedure that we'll follow in this
7 courtroom.

8 I've already gone over the, the indictments with you
9 during jury selection earlier. I'm not going to go over
10 those indictments with you again. But I will tell you that
11 those indictments represent the formal charges that have
12 been brought before the Court, and, again, can not be used
13 by you in any fashion in determining the guilt or the
14 innocence of a defendant in this case.

15 Now, to those indictments the defendants have pled not
16 guilty, and under the law and the Constitution of this state
17 that plea places the burden upon the State to prove the
18 defendant's guilt beyond a reasonable doubt. I will go over
19 with you the burden of proof that's upon the State and what
20 that means during my charge on the law. It's your duty
21 though, ladies and gentlemen, to decide, at the close of the
22 trial, whether or not the State has met that burden of
23 proving the defendants' guilty beyond a reasonable doubt.

24 Your purpose, as jurors, therefore, is to find and
25 determine the facts of this case and the law and the

1 Constitution of this state makes you the sole judges of the
2 facts in this case. I am the presiding officer in this
3 trial and it will my responsibility, from time to time, to
4 rule on the admissibility of evidence or the appropriateness
5 of questions that have been asked. I will tell you now that
6 you should not take from anything that I do in the discharge
7 of my duties as the presiding officer in this trial that I
8 have any opinion whatsoever as how you find and determine
9 the facts in this case. The law doesn't allow me an opinion
10 on that subject. I do not have opinion as to how you should
11 determine the facts in this case.

12 I will tell you that you are to determine the facts
13 from the testimony that you hear during this trial and the
14 other evidence that comes into the trial record through that
15 testimony. But it's up to you to determine the inferences
16 that you feel you can reasonably draw from the evidence
17 that's been presented to you. Therefore, it's especially
18 important that you do your duty of finding and determining
19 the facts in this case diligently and conscientiously
20 because ordinarily there's no means whatsoever by which we
21 can correct an erroneous determination of the facts by a
22 jury.

23 Now, the same law that makes you the sole judges of the
24 facts makes me the sole judges, judge of the law in this
25 case. The law, as I give it to you at the close of the

1 trial, is the only law that you can use in determining the,
2 the verdict in this matter.

3 Now, the law does not allow me to have an opinion
4 concerning the facts that you find and the law doesn't allow
5 you to disagree with me concerning the law to be applied.
6 So, if you came into the courtroom with a notion or an idea
7 as to what the law is or what the law ought to be, you'll
8 need to leave those notions or ideas outside of the jury
9 room before you begin your deliberations.

10 Now, as I told you earlier, until I advise you to begin
11 deliberations in the case, please do not discuss the case
12 with anyone, even among yourselves, because if you do that
13 before I tell you to begin your deliberations you'll be
14 discussing the case on partial information, partial
15 evidence. And, again, I don't want you to do anything to
16 begin to, to make decisions or reach conclusions until
17 you've heard all the evidence and I've charged you
18 concerning the law to be applied in this case. So, again,
19 please don't begin any discussions or try to gather any
20 information about this case from any other source during the
21 trial of this case.

22 Now, at the close of this trial, as I told you, it will
23 be your solemn responsibility to determine the guilt or the
24 innocence of the defendants that are before this case and
25 that verdict must be based solely upon the evidence

1 presented to you during the trial. The only evidence that
2 you will hear will be the statements of witnesses who've
3 been sworn to tell the truth who will testify from the
4 witness stand before you, and whatever evidence comes in
5 through that testimony. So, it's important that you not let
6 your thoughts wonder. Pay close attention to what goes on
7 in the courtroom so that at the close of the trial you'll be
8 in a position to discuss the case with your fellow jurors
9 during deliberations.

10 we'll open the trial with opening statements made by
11 the attorneys. We will then have the presentation of
12 evidence. Then we'll allow the attorneys to make a closing
13 or final argument before you. I will tell you that the
14 statements made by attorneys both at the beginning and
15 closing of the trial are not, those statements are not
16 evidence and can't be used by you in directly determining
17 the guilt or the innocence of a defendant.

18 At the beginning of the trial it will serve to tell you
19 what the case is about. At the close of the trial they'll
20 sum up the evidence from their client's prospective. But,
21 again, statements made by attorneys in the trial are not
22 evidence and can't be considered by you as evidence in this
23 case.

24 Now, from time to time during the trial there may be
25 issues that arise concerning the presentation of evidence

1 that require me to discuss those matters with the attorneys,
2 and if it's my belief that those discussions may involve
3 discussions of matters which might not be admissible into
4 evidence, I may ask you, on those occasions, to step into
5 the jury room while I discuss those matters with the
6 attorneys. Please don't take from the fact that I asked you
7 to leave the court during the trial, again, that I have an
8 opinion as to how you determine the facts. It's simply me
9 doing my job to see to it that you only consider the
10 evidence that's properly admitted under the rules that we
11 follow in this Court for the admission of evidence.

12 Once the argument is completed I'll bring you back into
13 the courtroom, I'll make a ruling, and we'll proceed with
14 the trial. But, again, don't take from the fact that I've
15 asked you to step out that I have an opinion as to how you
16 determine the facts in this case.

17 Now, in determining what facts are it's gonna be
18 necessary that you make judgments concerning the credibility
19 or believability of witnesses that testify before you and
20 that's what credibility means. It means believability. I
21 will tell you to use your own good common sense in making
22 that determination. On a daily basis, basis you use your
23 common sense to decide what you believe and what you do not
24 believe, and in -- this Court is no different. You should
25 use your own good common sense in determining credibility or

1 believability.

2 As the sole judges of the facts you have the right to
3 believe all of what a witness tells you, part of what a
4 witness tells you, or none of what a witness tells you. You
5 have the right to believe one witness against all of the
6 others or all of the others against one witness. You're the
7 sole judges of the facts. You're the sole judges of the
8 credibility of the witnesses, and you're the sole judges of
9 the weight that you assign to the testimony that they offer
10 during the trial.

11 Now, I will tell you that I appoint the foreperson of
12 the jury at the close of the trial. So, there will not be a
13 foreperson appointed until I give you my charge concerning
14 the law. At that time that person has no greater say in the
15 outcome of the case than any other of you. Each of you has
16 the same voice in the, in the verdict in this case since the
17 verdict must be unanimous. So, I'll appoint the foreperson
18 at the close of the trial. Their only function is to
19 preside over deliberations and to communicate with the Court
20 and to write a verdict once you have unanimously agreed upon
21 the verdict. But, again, that appointment will take place
22 at the close of the trial.

23 I want to be sure that I haven't violated anyone's
24 rights from my opening comments, does the State have any
25 objection to my opening statements?

1 SOLICITOR HUNTER: No objection from the State, Your
2 Honor.

3 THE COURT: Defense have any objection, Mr. Wilkes?

4 MR. WILKES: None from me, Your Honor.

5 THE COURT: Mr. Poole.

6 MR. POOLE: No, sir.

7 THE COURT: I told you that the defendants' plea of not
8 guilty places the burden upon the State, and the only, only
9 burden of proof is upon the State in this trial. For that
10 reason we allow the State to go first with the opening
11 arguments followed by the defense. Then the State will
12 proceed with the presentation of its evidence first. The
13 defense then has the right to present any evidence that they
14 choose to present. We then will do closing arguments and
15 then I'll charge you concerning the law. That's the
16 procedure or the process that we'll follow and the order
17 that we will go in during the trial.

18 So, at this time, Mr. Hunter, you may begin with the
19 State's opening statements.

20 SOLICITOR HUNTER: Thank you, Your Honor.

21 May it please the Court?

22 THE COURT: Yes, sir.

23 SOLICITOR HUNTER: What the State intends to prove
24 during this trial is that Derrick Cheeks was the cooker and
25 Ricky Cheeks was his runner. Now, starting on June 4th,

1 Craig Hanning with SLED -- would you please stand up?

2 (Witness complies.)

3 SOLICITOR HUNTER: Observed Derrick Cheeks and Ricky
4 Cheeks. I'll start calling them Derrick and Ricky cause the
5 Cheeks will start getting confusing. Observed Derrick
6 Cheeks and Ricky Cheeks, along with a man named Eric Elder
7 who you'll hear later this week, leaving the Super 8 Motel
8 on East or South Blackstock Road at Reidville Road, the one
9 that's right there by the Denny's and the fireworks store.
10 From that location Mr. Hanning followed them to 152 Gordon
11 Drive. 152 Gordon Drive is the home of Mr. Tracy Markley.
12 His father lives upstairs and Mr. Markley lives downstairs.

13 From there the story of Matt Hutchins takes over.
14 That's where the real crux of this case is. Matt Hutchins
15 is setting up surveillance on this house. At this point he
16 sees Eric Elder and Ricky Cheeks drive a black Crown Vic
17 that looks like a police car to the Wal-Mart at the Dorman
18 Center.

19 Investigator Hutchins, along with Investigator Raymond
20 of the Sheriff's Office, entered the Wal-Mart and followed
21 Eric Elder around the store. Eric Elder picks up a box of
22 baking soda from Arm and Hammer and purchases that baking
23 soda.

24 Why is that important?

25 Arm and Hammer baking soda is a precursor for cooking

1 cocaine into, to crack cocaine.

2 They're followed back to the house at 152 Gordon and
3 enter the house. At that point the search warrant is about
4 to be executed. But before it is, Ricky Cheeks and Eric
5 Elder leave the house in that same vehicle. They drive down
6 Briarwood towards West Main Street, cross over Warren
7 Abernathy Highway, get to Main Street where there's a stop
8 sign.

9 At that stop sign Eric Elder rolls through the stop
10 sign. They're pulled over by Investigator Hutchins along
11 with Nate Cantrell of the Sheriff's Office with DEA Task
12 Enforcement, and then, at the performance of the stop, over
13 100 grams of crack cocaine is found right where Ricky Cheeks
14 was standing. The search warrant then is executed at the
15 house of 152 Gordon Drive. Matt Hutchins, who just
16 participated in the car stop, is the first one into the
17 house.

18 Well, the house, it's large. At one, one side is a
19 car, and the other side it's a garage that has a length of
20 maybe two cars, three cars length wise. And that garage is
21 dirty. It's full of tools, full of crap. Mr. Markley will
22 testify to that.

23 while they're entering all officers are yelling search
24 warrant, Sheriff's Office, search warrant. But they can't
25 find the door. There's too much stuff. Finally

1 Investigator Hutchins realized that the door is being hidden
2 by a slab of wood, that piece of wood, and the team enters.

3 When they enter there's a door to their right, and a
4 staircase with red carpeted stairs leading up to the Elder,
5 to Mr. Markley's house. They're still yelling search
6 warrant, Sheriff's Office, search warrant. They're wearing
7 the protective gear with their badges. At this point they
8 enter the door to the right. They're looking at the room
9 directly in front of them, the kitchen. At that point
10 Investigator Hutchins sees Derrick Cheeks running from the
11 kitchen into the first bedroom on the left.

12 what did he find on the kitchen counter?

13 Finds 27 bags of crack cocaine right where Derrick
14 Cheeks was standing.

15 Now, he enters this room. It's dark. Investigator
16 Hutchins doesn't know where he is. So, he starts telling
17 him come out with your hands up, come out with your hands
18 up. Nothing. It's a dark room. Finally Mr. Cheeks
19 complies.

20 Mr. Hanning comes into the house. Obviously it's very
21 noticeable, 27 bags, approximately 27 bags of crack cocaine
22 sitting on the counter. Also in this house are two digital
23 scales, which are used to measure out the cocaine so that
24 you can put it in each separate bag so they weigh the same,
25 about an ounce a piece.

1 Derrick Cheeks was cooking crack cocaine in
2 Mr. Markley's house. Now, Mr. Markley was gonna get some of
3 that crack cocaine for letting him cook in his house, but
4 Derrick Cheeks is the cook, and Ricky Cheeks is his runner.

5 Now, I'm gonna ask you to use your common sense when
6 hearing the evidence in this case, listening to the
7 officers, looking at the pictures and the evidence that we
8 presented, and the crack cocaine. Just use your common
9 sense, and you'll see that Derrick is the cook, and Ricky's
10 the runner.

11 Thank you.

12 THE COURT: Mr. Wilkes.

13 MR. WILKES: Thank you, Your Honor.

14 Please the Court?

15 THE COURT: Yes, sir.

16 MR. WILKES: Ladies and gentlemen of the jury, the most
17 important thing the State failed to point out is the reason
18 that Mr. Markley and Mr. Elder are not on trial today, and
19 that would be conspicuously obvious to you as we go through
20 the trial. The question will become where did the crack
21 come from, who's responsible for it, and that would be the
22 question.

23 You'll hear testimony today from two people that will
24 tell you that it was the Cheeks' responsibility, that it
25 belonged to them. Those two people will be people that are

1 codefendants in this case, and they are not being tried
2 today because what you will see is there are rewards given
3 for testimony.

4 SOLICITOR HUNTER: Objection, Your Honor.

5 THE COURT: Just one second.

6 (Pause.)

7 THE COURT: Ladies and gentlemen of the jury, at this
8 point in time I'm gonna ask you to step back to the jury
9 room. Don't begin any discussion until I've advise you to
10 do so.

11 Thank you.

12 (WHEREUPON, the following takes place outside the
13 presence of the jury.)

14 THE COURT: State the objection.

15 SOLICITOR HUNTER: Your Honor, Mr. Wilkes is aware that
16 there's been no deal placed on the table for Mr. Markley or
17 Mr. Elder. They still face the charges of, of trafficking
18 just like Mr. Cheeks, both Mr. Cheeks and that is just
19 outside the bounds of, of opening statement, Your Honor.

20 MR. WILKES: I don't think so, Your Honor. I'm allowed
21 to comment on the motivations of the witnesses that are
22 gonna testify, and the key defense in this case is not that
23 they were not in the room, but that they were not
24 responsible for the drugs. And the motivation in this case
25 is, appears pretty obvious that when we stood before the

1 Court for the calling of the case all of the defense
2 attorneys stood up and said this is a trial. And yet,
3 Mr. Cheeks and Mr. Cheeks are sitting before the jury today.
4 Mr. Markley and Mr. Elder are not going to be before a jury,
5 and I think that it would be hard to deny that. The
6 statement---

7 THE COURT: well, is there something in the discovery
8 that indicates that there is a deal that's been struck
9 between them?

10 MR. WILKES: Your Honor, that -- the motivation that
11 they are not sitting in front of the jury as codefendants is
12 their motivation. The fact that the State may in---

13 THE COURT: well, now, but your comment that was
14 objected to was that there was some reward.

15 MR. WILKES: There will be a reward for them. The
16 reward is that they are not before this jury today, Your
17 Honor. They -- we called the cases this morning and they
18 were all trials, but we are here today and there's no reason
19 for me and Mr. Poole to be sitting here by ourselves other
20 than the fact that there's nothing that they can do with a
21 trafficking 400 gram case other than to dismiss it, to
22 reduce it to give them the benefit of their cooperating
23 witnesses.

24 THE COURT: I understand that. But I'm trying to find
25 out if there is some agreement in writing that---

1 SOLICITOR HUNTER: There's no agreement.

2 THE COURT: Let me finish.

3 SOLICITOR HUNTER: Yes, Your Honor.

4 THE COURT: Don't be cutting me off. I haven't gotten
5 in a full sentence since you started.

6 MR. WILKES: I---

7 THE COURT: You too.

8 MR. WILKES: I was going, but I hadn't quite got it out
9 yet.

10 THE COURT: But I have not seen thus far in this
11 argument any evidence that there is some type of written
12 agreement or some kind of, some kind of dismissal of charges
13 or something that would constitute a reward being offered at
14 this time. I'm being told by the solicitor the charges are
15 still pending and they could be tried.

16 MR. WILKES: Sure. And they're always gonna say that
17 because that is how we do it as attorneys to keep the
18 witnesses less---

19 THE COURT: Yes, sir, but I'm not gonna let you tell a
20 jury that there's a reward out there that has not yet been
21 consummated in some fashion.

22 MR. WILKES: Your Honor, that is an inference that I
23 believe that---

24 THE COURT: You have every right to comment on
25 inferences. That's not the way you placed it to the jury.

1 MR. WILKES: I'm sorry. How did I --?

2 THE COURT: You said that there was a reward that they
3 were receiving. We can play it back.

4 MR. WILKES: No, I'm not arguing with you at all. I --
5 if I -- I didn't intend it as though they have received it,
6 but it is a clear inference that they are---

7 THE COURT: That's how I took it.

8 MR. WILKES: Okay. Well, I understand that.

9 THE COURT: Okay.

10 MR. WILKES: But that---

11 THE COURT: And, so, my ruling would be that you can
12 comment well why aren't they on trial too.

13 MR. WILKES: Right.

14 THE COURT: You can raise those issues or questions to
15 the jury all day long---

16 MR. WILKES: That---

17 THE COURT: ---but not in the fashion -- let me finish.

18 MR. WILKES: I'm sorry, Your Honor. I'm agreeing with
19 you. I understand.

20 THE COURT: But you can't place it in the fashion that
21 there's some kind of a, almost a contractual relationship or
22 formal agreement unless there is one. If there is one, show
23 me.

24 MR. WILKES: I understand. I did not mean to carry it
25 that far. My intent was that they are not here and that

1 that creates the inference that the reward is there, and
2 that is their---

3 THE COURT: Well, there's a possibility of a reward.

4 MR. WILKES: Correct, and that -- if I overstepped,
5 that, that was not intended. I have been told that there is
6 nothing in writing, and I don't know how I can get past
7 that, but---

8 THE COURT: Now, I don't know that you can because I've
9 been in situations like this before.

10 MR. WILKES: I know.

11 THE COURT: Okay. As long as we understand ourselves,
12 you certainly have the right to comment on the fact that
13 they're not being tried with your clients.

14 MR. WILKES: Right.

15 THE COURT: Their cases are still out there and lots of
16 things could happen to those cases.

17 MR. WILKES: Right.

18 THE COURT: You have a right to talk about that.

19 MR. WILKES: Thank you. That's all I was trying to do.

20 THE COURT: Bring the jury in.

21 (WHEREUPON, the following takes place within the
22 presence of the jury.)

23 THE COURT: All right. The record will reflect that
24 the jury has returned to the courtroom.

25 I have sustained an objection. The defense will be

1 allowed to proceed with its opening statement pursuant to my
2 ruling.

3 You may proceed, Mr. Wilkes.

4 MR. WILKES: Thank you, Your Honor.

5 What we will ask you to do today is look at the
6 motivation of the witnesses. Look at why they may testify
7 to what they testify to. That is the most important thing
8 in any case is to examine why somebody testifies as they do
9 in a trial because, unfortunately, not all the testimony
10 that comes to court will be truthful. The purpose of the
11 jury is to determine, looking at motivation, looking at what
12 somebody has to gain, is to examine it, make a determination
13 of what is true, and that is the question that faces you.

14 All we ask is you be fair and you examine the evidence
15 hard. And when the judge gives you instructions on applying
16 the presumption of innocence that you apply it truthfully
17 and as seriously as the judge will tell you to do so.

18 Thank you.

19 THE COURT: Mr. Poole, you may proceed.

20 MR. POOLE: May it please the Court?

21 THE COURT: Yes, sir.

22 MR. POOLE: Good afternoon. I'm Roger Poole. I
23 represent Ricky Dwight Cheeks, and Mr. Ricky Dwight Cheeks
24 is seated over there in the white shirt. He's a little past
25 middle age. He is in not good health and these are obvious

1 things.

2 The most obvious thing right now is that he is an
3 innocent man. He remains innocent until 12 of you agree
4 that the State has proved their case and every element of
5 the offense or offenses for which he is charged beyond a
6 reasonable doubt. Mr. Ricky Dwight Cheeks stays innocent
7 until and unless you find him guilty of the charges. He
8 does not have to prove his innocence. The State has the
9 burden of proof all the way through this thing.

10 Judge Couch, a moment ago, mentioned a couple of things
11 that are going to be variations on a continuing theme and
12 themes in this case. He mentioned your ability and your
13 right and duty, in fact, to look at the believability and
14 the credibility of each and every witness that is sworn and
15 gives testimony. He also said that there will be a certain
16 amount of repetitiveness, and, unfortunately, when you have
17 two defendants or more and you have two lawyers at a defense
18 table, there is inherently a degree of repetitiveness.

19 Now, what I will try to do is not to infringe on your
20 time by being unnecessarily repetitive because we have two
21 defendants who are related by blood, and they have --
22 they're similarly situated, and the evidence is, at some
23 time, going to be overlapping and include both of them. So,
24 I will have to answer the same, ask the same questions of a
25 witness that Mr., my friend, Jeff Wilkes, will ask a witness

1 or vice versa.

2 So, please bear with us as we go through that. We're
3 doing our job. We are representing our clients and I thank
4 you for being here. I thank you for the attention you've
5 shown so far and the attention that I am assured that will
6 you follow as we go through this case, and I ask that you,
7 in the end, will return a verdict that speaks the truth, and
8 at the end of the day, whatever day that will be this week,
9 you can go home and everybody can say we did our job.

10 Thank you very much.

11 THE COURT: The State may call its first witness.

12 SOLICITOR HUNTER: Your Honor, may---

13 MR. WILKES: Your Honor -- excuse me.

14 Before we begin, we still -- we have one of -- we have
15 several witnesses in the courtroom, but Mr. Markley is still
16 here.

17 Can we sequester Mr. Markley?

18 THE COURT: Any objection?

19 SOLICITOR HUNTER: Your Honor, I, I have no objection
20 to that.

21 In fact, can we excuse Mr. Markley for today?

22 He'll show back up tomorrow.

23 THE COURT: Any objection?

24 MR. WILKES: None.

25 THE COURT: Mr. Markley, you're free to go at this

1 time. Thank you very much.

2 SOLICITOR HUNTER: May I take a moment to set up the---

3 THE COURT: Yes, sir, you may.

4 (Pause.)

5 SOLICITOR HUNTER: Thank you, Your Honor.

6 THE COURT: Yes, sir.

7 SOLICITOR HUNTER: The State will call Craig Hanning.

8 THE COURT: Come forward, sir, to my left to be sworn.

9 WITNESS: Yes, sir.

10 CRAIG HANNING, having been first duly
11 sworn, testified as follows:

12 THE COURT: Have a seat please. Once seated, state
13 your name.

14 WITNESS: Craig Hanning.

15 THE COURT: Mr. Hunter, your witness.

16 DIRECT EXAMINATION

17 BY SOLICITOR HUNTER:

18 Q Mr. Hanning, who's your current employer?

19 A I currently work for the State of South Carolina, Law
20 Enforcement Division, or SLED, and I'm currently assigned to
21 the narcotics unit in the Piedmont region.

22 Q How long have you been doing that?

23 A I've been employed with SLED since 2008.

24 Q Okay. What did you do before SLED?

25 A I worked for Greenville County Sheriff's Office for two

Craig Hanning - Direct examination
by Solicitor Hunter

1 years.

2 Q And before that?

3 A Prior to that I was a police officer in Palm Beach
4 County, Florida for 15 years.

5 Q Okay. So, your total law enforcement experience is?

6 A About 17 years total.

7 Q Okay. Now, explain the Piedmont area if you will.

8 A Basically I work anything in the Upstate. Spartanburg
9 County, Cherokee County, Greenville County, Anderson County.

10 Q Did you have an opportunity to be at the Super 8 Motel
11 on Blackstock Road on June 4th?

12 A I did.

13 Q And what were you doing at that point?

14 A On June 4th I received a phone call in reference to a
15 subject by the name of Eric Elder whose mother called me and
16 told me that---

17 MR. WILKES: Objection.

18 MR. POOLE: Objection.

19 MR. WILKES: Hearsay.

20 THE COURT: Sustained.

21 Q what, what were you doing at the Super 8 Motel?

22 A We were conducting surveillance.

23 Q Okay. And who were you surveilling at that point?

24 A Ricky Cheeks, Derrick Cheeks, and Eric Elder.

25 Q Okay. What did you view at the Super 8 Motel?

Craig Hanning - Direct examination
by Solicitor Hunter

- 1 A At that afternoon we received a phone call, responded,
2 we set up surveillance and I saw a black Ford Crown victoria
3 Police Interceptor Package parked back into a parking space
4 at the end of the building.
- 5 Q Could you please describe the vehicle to us?
- 6 A Sure. It's painted black. It had a, it had fake
7 antennas on the vehicle. It had police rims, dark tinted
8 windows, and it appeared to us to have been a retired police
9 car that would have been sold at auction.
- 10 Q Okay. Who was at the vehicle?
- 11 A Ricky Cheeks and then Eric Elder was dropped off there.
- 12 Q Okay. How long were they there together?
- 13 A About ten minutes.
- 14 Q Okay. Did anybody come visit them?
- 15 A They did. Derrick Cheeks came down from the hotel to
16 meet with them at which time they all got in the vehicle and
17 left.
- 18 Q Okay. And from there, where did they go?
- 19 A They went to
- 20 Q Can you please explain where that is in Spartanburg?
- 21 A Off John B. White Boulevard or John B. White Senior
22 Boulevard. There's a school, woodland, woodmont Elementary.
23 It's directly behind that little small neighborhood.
- 24 Q Would that school be woodland Heights?
- 25 A Woodland Heights, yes, sir.

Craig Hanning - Direct examination
by Solicitor Hunter

1 Q Did they stop anywhere between Super 8 Motel and the
2 residence?

3 A No, sir, they did not.

4 Q Are you sure?

5 A I'm positive.

6 Q Okay. At this point do you continue surveillance or
7 where do you go?

8 A We establish surveillance at different parts of the
9 neighborhood at which time I left surveillance, I left my
10 position to Investigator Raymond, and I met with
11 Investigator Hutchins at the Sheriff's Office.

12 Q Okay. Now, I want to go to the execution of the search
13 warrant---

14 A Yes, sir.

15 Q ---for a second.

16 where was your position on this execution team?

17 A I was the third person in the stack or in the, in the,
18 in line to enter the door.

19 Q Okay. where did y'all first enter?

20 A If you're facing 152 Gordon Drive there's a front door
21 to the house or the surveillance noted that they always used
22 the house, the, the door to the left next to the garage for
23 the side garage entrance.

24 Q Okay. So, where did you enter through?

25 A The side garage door.

Craig Hanning - Direct examination
by Solicitor Hunter

1 Q Could you please describe the state of the garage?

2 A Yes, sir, when we, we had arrived, we all stacked up on
3 the outside of the door. We had made several announcements,
4 police, search warrant, Sheriff's Office, search warrant.
5 Once we entered the door, once we breached the door, we came
6 into the garage. It was very cluttered with tools, wood.
7 It had one single pathway basically through the entire
8 garage.

9 Q How large was the garage?

10 A It was large. It was very long. It almost looked like
11 it was an unfinished basement, more than a garage that they
12 had turned into a workshop.

13 Q Okay. And were you able to find the door at first?

14 A The side door to the garage we were. The garage door
15 to the entry house, to the house we were not.

16 Q Why not?

17 A It was hidden behind a piece of wood---

18 Q Okay.

19 A ---or some clothes, some clothes were on it and stuff.

20 Q How long did it take you to finally enter the house?

21 A It probably took about 30 seconds for us to work our
22 way through the garage to that door.

23 Q So, you say there was one pathway?

24 A Yes.

25 Q And how many people were with you at this point

Craig Hanning - Direct examination
by Solicitor Hunter

1 approximately?

2 A Seven I believe.

3 Q Okay. And would it have been seven abreast or---

4 A It would of been almost in a straight-line.

5 Q Okay. Now, when you get to the door that you're
6 actually able to find, what happens next?

7 A We, again, continue yelling police with a search
8 warrant, Sheriff's Office with a search warrant, put your
9 hands up. We breached that door. When we enter that door
10 there's a stairway to the left and a closed door to the
11 right.

12 Q Okay.

13 A Based on our informant's description of the inside of
14 the house we knew that the suspect had lived downstairs.
15 So, we went to the house -- we went to the, to the right.

16 Q Okay. When you entered the room, where did you go?

17 A As soon as we entered the room it opens up to a, a
18 large family room, a large sitting room, which you could see
19 directly into the kitchen at which time I entered I was
20 behind Investigator Hutchins and Lieutenant Cooper, both
21 from the Sheriff's Office, and I encountered a white male
22 who was sitting in a chair and he put his hands up.

23 Q Was that white male previously here in a wheelchair?

24 A Yes, he was.

25 Q Did he make any type of movements?

Craig Hanning - Direct examination
by Solicitor Hunter

1 A Absolutely not.

2 Q Okay.

3 A He was taken into custody without incident.

4 Q When you went into the house, what did you first see in
5 the kitchen?

6 A I saw somebody run from the kitchen and go into a
7 bedroom at which point Investigator Hutchins and Lieutenant
8 Cooper had gone in towards that bedroom to secure that
9 bedroom, and I was securing Mr. Markley, and looking into
10 the kitchen I saw what appeared to be a large amount of
11 crack cocaine on the counter.

12 (WHEREUPON, a photograph was marked as State's Exhibit
13 No. 1 for identification purposes only at this time.)

14 SOLICITOR HUNTER: Your Honor, may I approach the
15 witness?

16 THE COURT: You may.

17 Q Mr. Hanning, I'm showing you what has been previously
18 marked as State's Exhibit No. 1.

19 Do you recognize that picture?

20 A I do.

21 Q What is it?

22 A It is the photograph of the kitchen area of
23 Mr. Markley's residence.

24 Q Does it fairly and accurately depict what you saw on
25 that day, June 4th, 2009?

Craig Hanning - Direct examination
by Solicitor Hunter

1 A Yes, sir, it does.

2 SOLICITOR HUNTER: Your Honor, at this time I'd move to
3 admit State's Exhibit 1 into evidence.

4 THE COURT: Any objection?

5 MR. WILKES: I don't have the numbering. I don't know
6 which one is which, but---

7 SOLICITOR HUNTER: It's the one I just showed you.

8 MR. WILKES: No objection.

9 THE COURT: Mr. Poole.

10 MR. POOLE: None here, Your Honor.

11 THE COURT: Without objection it will be admitted as
12 marked.

13 (WHEREUPON, State's Exhibit No. 1 was received into
14 evidence at this time.)

15 Q I'm gonna put it up on the large screen so that
16 everybody can see it.

17 Okay. Now, in relation to this picture, where did you
18 first enter?

19 A It would be straight back. It would be -- when you
20 enter the residence you look directly into the microwave
21 there. That wall would be the, as far back as you can go
22 inside the residence.

23 Q Okay. So, you're looking at the back wall where the
24 microwave is?

25 A Yes.

Craig Hanning - Direct examination
by Solicitor Hunter

1 Q Okay. Could you briefly describe the state of the
2 room, not the kitchen, but the room that this connects to?

3 A Disarray. There was a couch, a chair, a table, and
4 then tool boxes, big large rolling tool boxes, clothes.
5 Very disorganized---

6 Q Could you---

7 A ---and unkept.

8 Q Can you describe the state of the kitchen?

9 A The kitchen was very clean. There was no dishes on the
10 sink. The only thing that was present in the kitchen area
11 in plain view was the crack cocaine baggies. The stove had
12 boiling water indicating that there was a possible cocaine
13 cook being done at the time, scales, razors blades, and
14 plates which are all kindly used in the process of cooking
15 crack cocaine.

16 MR. WILKES: Your Honor, I would impose one small
17 objection, that the references as to what's viewed as being
18 the substance I think at this point would be an alleged
19 substance.

20 SOLICITOR HUNTER: Your Honor, we, we are gonna prove,
21 through the chain and as well as the testimony of the
22 chemist, that that substance is crack cocaine.

23 THE COURT: Well, I'm gonna sustain the objection at
24 this point in time---

25 SOLICITOR HUNTER: I will---

Craig Hanning - Direct examination
by Solicitor Hunter

1 THE COURT: ---and instruct the witness to -- he can
2 state what his state of mind is or what he believed it to be
3 or alleged it to be, but there's been no evidence to
4 establish exactly what it is.

5 SOLICITOR HUNTER: I'll refer to it as a substance from
6 now on.

7 MR. WILKES: Your Honor, also, can this be subject to
8 my pretrial, my suppression motion so I don't, and it be
9 continuing, so I don't have to object everytime there's a
10 mention of it?

11 THE COURT: Yes, sir.

12 MR. WILKES: Thank you, Your Honor.

13 THE COURT: And I assume, Mr. Poole, you want to say
14 the same thing?

15 MR. POOLE: Yes, sir.

16 THE COURT: All right. It will be -- it's noted that
17 the objection continues.

18 MR. WILKES: Thank you, Your Honor.

19 Q Now, in the background of this picture you described
20 the microwave.

21 Is that underneath the cabinet that has two glass
22 doors?

23 A It's the, it's the black object underneath that glass
24 cabinet all the way in the back right corner of the kitchen
25 area.

Craig Hanning - Direct examination
by Solicitor Hunter

1 (WHEREUPON, a photograph was marked as State's Exhibit
2 No. 2 for identification purposes only at this time.)

3 SOLICITOR HUNTER: May I approach the witness?

4 THE COURT: You may.

5 Q I'm gonna show you what's been premarked as State's
6 Exhibit 2.

7 Do you recognize that?

8 A I do.

9 Q How so?

10 A This is the photograph taken -- it's actually a
11 close-up of the microwave under the, the cabinet there, and
12 also it has an area of the stove with a pot of water on
13 it---

14 Q Does it fairly and accurately---

15 A ---and a scale.

16 Q ---depict the scene as you remember it on June 4th?

17 A It does.

18 SOLICITOR HUNTER: Your Honor, at this time the State
19 would move to admit State's Exhibit 2 into evidence.

20 THE COURT: Any objection---

21 MR. WILKES: None, Your Honor.

22 THE COURT: ---to No. 2?

23 MR. WILKES: None, Your Honor.

24 MR. POOLE: No, sir.

25 THE COURT: It'd be admitted as marked.

Craig Hanning - Direct examination
by Solicitor Hunter

1 (WHEREUPON, State's Exhibit No. 2 was received into
2 evidence at this time.)

3 Q So, with your testimony, you would say State's Exhibit
4 2 is this area of the kitchen?

5 A Yes.

6 Q Can you please describe what you see there?

7 A Yes, sir, there's a pot of water on the stove with a
8 spoon next to it and a digital scale, an unknown substance,
9 some of it in plastic bags, and then a microwave, and I
10 believe that's all. I can't see what's on top of the
11 microwave.

12 Q Okay. Does it appear to be a spoon or excuse me.
13 Okay. Another white substance?

14 A On the top of the microwave, yes, sir.

15 Q Okay.

16 (WHEREUPON, a package containing drugs was marked as
17 State's Exhibit No. 3 for identification purposes only at
18 this time.)

19 SOLICITOR HUNTER: Your Honor, may I approach the
20 witness?

21 THE COURT: Yes, you may.

22 Q I'm gonna hand you what's been premarked as State's
23 Exhibit 3.

24 Do you recognize that?

25 A I do.

Craig Hanning - Direct examination
by Solicitor Hunter

1 Q Briefly describe what it is.

2 A Inside this plastic bag is some more plastic bags,
3 which is considered a B.E.S.t. kit or an evidence collection
4 bag, which also contains multiple off-white rock like
5 substances and here's one as well as a glass Pyrex measuring
6 cup.

7 Q Okay. That's fine.

8 Now, are you familiar with the execution procedures of
9 a search warrant?

10 A I am. Yes, sir.

11 Q Did you collect State's Exhibit 3?

12 A I would have to check the inventory return, but I
13 believe I did, yes, sir.

14 Q Well, did you, did you recover State's Exhibit 3 there?

15 A Yes, sir, I did.

16 Q Who would you have called over to collect the evidence?

17 A Anytime we do a search warrant there's several parts
18 after the, the scene is secured. Once everybody is secured
19 in the residence, usually one person will take photographs,
20 and then one person will do what we call an inventory
21 return, which is every item that we are gonna collect as
22 evidence has to be documented, photographed, documented, and
23 then handwritten. Once I recovered what I suspected to be
24 an illegal substance on the counters, I contacted Kelvin
25 Washington, he's a deputy with the Sheriff's Office, advised

Craig Hanning - Direct examination
by Solicitor Hunter

1 him what I had, he came over and took possession of the
2 items and brought them back to the area where he was working
3 and he completed his inventory return.

4 Q Now, if I could go back for a second.

5 (WHEREUPON, a photograph was marked as State's Exhibit
6 No. 4 for identification purposes only at this time.)

7 SOLICITOR HUNTER: May I approach the witness, Your
8 Honor?

9 THE COURT: You may.

10 Q Showing you what's been previously marked as State's
11 Exhibit 4, do you recognize that item?

12 A I do. This is the, the garage.

13 Q Does it fairly and accurately depict the garage as you
14 remember it the day on June 4th, 2009?

15 A It does.

16 SOLICITOR HUNTER: And, Your Honor, at this time the
17 State would move to admit State's Exhibit 4 into evidence.

18 THE COURT: Any objection, Mr. Wilkes?

19 MR. WILKES: None, Your Honor.

20 MR. POOLE: No, sir.

21 THE COURT: Mr. Wilkes, when you address the Court---

22 MR. WILKES: I'm sorry, Your Honor.

23 THE COURT: ---I'm gonna ask that you stand. Thank
24 you.

25 It's admitted as marked.

Craig Hanning - Direct examination
by Solicitor Hunter

1 (WHEREUPON, State's Exhibit No. 4 was received into
2 evidence at this time.)

3 SOLICITOR HUNTER: May I approach, Your Honor?

4 THE COURT: You may.

5 SOLICITOR HUNTER: May I publish to the jury, Your
6 Honor?

7 THE COURT: You certainly may.

8 Q Please just note one more time the state, the state of
9 the garage.

10 A Oh, I'm sorry. I thought. The -- this would be from
11 the entry door going into the garage, and if you see where
12 the water heater there is the right-hand corner, the door to
13 the left of that is the actual entry door into the
14 residence.

15 Q Let me see if I can zoom in a little better.

16 A It's the biggest brown article in that picture. That's
17 the entry door of the residence.

18 SOLICITOR HUNTER: Your Honor, may I have the---

19 A ---to get into that.

20 THE COURT: May I have the witness step down and point
21 where his position was?

22 THE COURT: Yes, you may.

23 SOLICITOR HUNTER: Thank you.

24 Q would you please show the jury actually what you're
25 speaking of?

Craig Hanning - Direct examination
by Solicitor Hunter

1 A There's a door right here that goes into the residence.
2 I'm sorry. I thought that was a water heater. It's a
3 bookshelf.

4 Q Okay.

5 A Right in here.

6 Q Thank you.

7 A (Witness returns to the stand.)

8 (WHEREUPON, a photograph was marked as State's Exhibit
9 No. 5 for identification purposes only at this time.)

10 SOLICITOR HUNTER: Your Honor, may I approach the
11 witness?

12 THE COURT: Yes, you may.

13 SOLICITOR HUNTER: Thank you.

14 Q I hand you what's previously marked as State's Exhibit
15 5.

16 Do you recognize this picture?

17 A Yes, sir, this is a picture of myself holding a large
18 amount of U.S. currency that was rubber banded together.

19 Q Okay. And does it fairly and accurately depict the
20 scene as you remember it on June 4th, 2009?

21 A It does.

22 SOLICITOR HUNTER: Your Honor, at this time the State
23 would move to admit State's Exhibit 5 into evidence.

24 THE COURT: Any objection?

25 MR. WILKES: No objection.

Craig Hanning - Direct examination
by Solicitor Hunter

1 THE COURT: Sir?

2 MR. WILKES: No objection.

3 THE COURT: No objection?

4 MR. POOLE: No, sir.

5 THE COURT: All right. It will be admitted as marked.

6 (WHEREUPON, State's Exhibit No. 5 was received into
7 evidence at this time.)

8 SOLICITOR HUNTER: May I publish, Your Honor?

9 THE COURT: You certainly may.

10 Q Can you describe what is seen in this picture?

11 A There's a I believe seven or eight bundles of money
12 that are all rubber banded together, and they were at,
13 located in the suitcase inside one of the bedrooms inside
14 the residence.

15 Q Okay. Please answer any other questions that the
16 defense might have for you. Thank you.

17 A Yes, sir.

18 THE COURT: Mr. Wilkes, your witness.

19 MR. WILKES: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. WILKES:

22 MR. WILKES: May I approach?

23 THE COURT: Yes, you may, sir.

24 MR. WILKES: Thank you.

25 Q Agent Hanning, will you look at State's Exhibit No. 4,

Craig Hanning - Cross-examination
by Mr. Wilkes

1 and tell me, the door, does that door have a dartboard or
2 something on it?

3 A Looks like there's a picture on it.

4 Q Or a picture on it?

5 A Yes, sir.

6 Q Is that the door leading into the, the living area or
7 Mr. Markley's bedroom?

8 The -- do you know which door that would be?

9 A I'm assuming it's to the living area, but I wouldn't be
10 able to tell without a wider picture.

11 Q Is that the door you entered the living space through?
12 Did you go through that door?

13 A It appears to be that door. But, again, I don't know.
14 We would need a bigger picture of the garage. This only
15 depicts a small corner of the garage.

16 Q Okay. But that's y'all's evidence, right?

17 A Yes, sir.

18 Q You, you're familiar with those pictures?

19 A Yes, sir.

20 Q Did one of the doors lead into Mr. Markley's bedroom?

21 A Mr. Markley's had a -- his bedroom had an exterior
22 door --

23 Q All right.

24 A -- to the house. Not from the garage.

25 Q So -- but there was no interior door to his bedroom?

Craig Hanning - Cross-examination
by Mr. Wilkes

- 1 A No, there was, there was an interior door. If you're
2 inside Mr. Markley's residence you can walk from the family
3 room area into his bedroom---
- 4 Q Uh-huh. (Affirmative).
- 5 A ---and also there's an exterior door to the outside to
6 the open area.
- 7 Q Okay.
- 8 A Not the garage.
- 9 Q Okay.
- 10 A If I explained that correctly to you.
11 Do you understand?
- 12 Q I think I understand.
- 13 A Okay.
- 14 Q So, you entered into a door which led into the room
15 which you say Mr. Derrick Cheeks was?
- 16 A Yes.
- 17 Q When you entered the door, did you enter the room
18 straight into the room looking at the microwave?
19 Did I understand that correctly?
- 20 A A little bit to the left. The microwave, if you enter
21 the door straight in, the room opens up.
- 22 Q Okay.
- 23 A And straight ahead of you against the far wall would be
24 the kitchen area. So, you'd be able to see the microwave,
25 the sink, the stove, or the range.

Craig Hanning - Cross-examination
by Mr. Wilkes

- 1 Q Okay.
- 2 A And then to the left of that would be two bedroom
3 doors. So, it was one large room and two bedroom doors to
4 the left.
- 5 Q And one of those was Mr. Markley's?
- 6 A Yes.
- 7 Q And the other was?
- 8 A Could of been a spare -- it's a spare, it's a spare
9 bedroom. We don't know who stayed in there.
- 10 Q Okay. Is that where Mr. Derrick Cheeks was ultimately
11 found?
- 12 A No, he was found in Mr. Markley's bedroom.
- 13 Q Mr. Markley's room?
- 14 A Yes, sir.
- 15 Q Now, is that the room just straight across closest to
16 where you entered?
- 17 A It'd be the one closest to where we entered, yes, sir.
- 18 Q Okay.
- 19 A You have to walk in and then take three or four steps
20 and that would be the first door on your left.
- 21 Q Where was Mr. Markley at the time?
- 22 A He was sitting in a recliner in the large open air room
23 in the family room if you will.
- 24 Q Is the open air room part of the kitchen area?
- 25 A Yes, sir, I would say it's an open floor plan if you

Craig Hanning - Cross-examination
by Mr. Wilkes

1 will. There's no walls. There's only a small, a small area
2 that you, that you wouldn't be able to walk into the
3 kitchen. It's a -- there's an entryway into the kitchen,
4 but there's no walls. You'd be able to see right through
5 it.

6 Q Okay.

7 A It's just a small 4-foot wall where the sink is.

8 Q And you were third through the door?

9 A Yes, sir.

10 Q When you came through the door, did you personally see
11 Mr. Markley sitting -- he's to the right of you?

12 A Yes.

13 Q And Mr. Cheeks is going to the left?

14 A Mr. Cheeks went -- when, when I was the third person
15 through the door, generally the way search warrants are
16 executed, you go to the open area threat, the first threat
17 that you see, which would be any open door or any door.

18 Q Right.

19 A Being the third person in I would of been the first
20 person past the first door if you will.

21 Q Right.

22 A So, Lieutenant Cooper and Investigator Hutchins, when
23 they saw Mr. Cheeks running at them and went into that, to
24 that bedroom, they begin securing that bedroom at which time
25 I would of taken the next immediate threat which would of

Craig Hanning - Cross-examination
by Mr. Wilkes

1 been Mr. Markley in that large family room.

2 Q And my question specifically, did you see Mr. Cheeks
3 when you came through the door?

4 A I, I did not. I was -- I can't say I saw Mr. Cheeks.
5 I just know that they were going after a threat into that
6 room, and I was focused on my responsibility, which would be
7 the family room.

8 Q The next door?

9 A Yes, sir, or the -- actually the open room.

10 Q But you didn't see where Mr. Cheeks was when that door
11 got kicked open or whatever?

12 A No, sir.

13 Q Okay. Thank you. That's all I have.

14 THE COURT: Mr. Poole.

15 MR. POOLE: Thank you, Your Honor.

16 THE COURT: Just one second before we begin, Mr. Poole.
17 There's some discussion going on among people in the
18 gallery. I will clear the courtroom unless it stops.

19 You may proceed, Mr. Poole.

20 MR. POOLE: Thank you.

21 CROSS-EXAMINATION

22 BY MR. POOLE:

23 Q Agent Hanning, who owns the property at

24 ?

25 A I believe Mr. Markley, Senior does, which would be

Craig Hanning - Cross-examination
by Mr. Poole

- 1 Tracy Markley's father and his mother.
- 2 Q Tracy Markley's father and mother?
- 3 A Yes, sir.
- 4 Q Do they live there also?
- 5 A They do.
- 6 Q Okay. And, of course, Mr. Markley lives there?
- 7 A Yes, sir.
- 8 Q And when you say on June 4 -- was it June 4---
- 9 A Yes, sir.
- 10 Q ---2009?
- 11 when you saw Mr. Markley you said he was in a recliner?
- 12 A Yes, sir.
- 13 Q Is that right?
- 14 A I believe it was some sort of recliner.
- 15 Q And was he watching television or, or what he was
- 16 doing?
- 17 A I don't recall if the television was on. I don't
- 18 remember.
- 19 Q Okay.
- 20 A He was sitting there when we entered the residence and
- 21 he had a look of shock on his face, and he just -- he didn't
- 22 resist. He put his hands up and he just---
- 23 Q Okay.
- 24 A ---did everything I asked him to.
- 25 Q All right. Well, did you ask him to get up and---

Craig Hanning - Cross-examination
by Mr. Poole

1 A I did not.

2 Q Okay. Did he get up and move around?

3 A I didn't ask him to get up. Based on Mr. Markley's
4 size, the facts that his hand were in plain view, I wasn't
5 gonna have him go from a recliner from a sitting position
6 down to the floor when his hands were up, he was in a non --
7 he was in a passive state. He was handcuffed and taken into
8 custody.

9 Q Right.

10 Okay. So, he was handcuffed?

11 A Yes, sir.

12 Q And, and he walked?

13 A No, sir, we left him right where he was.

14 Q Okay.

15 A And he---

16 Q Was he taken into custody?

17 A Yes, sir.

18 Q Well, how was he taken out of the home?

19 A Eventually when we, when we secured him, I consider
20 that taking into custody. He was in my custody. He wasn't
21 free to leave.

22 Q Right.

23 A But he was to sit right where he was.

24 Q Okay.

25 A And then once he left, once we were finished with the

Craig Hanning - Cross-examination
by Mr. Poole

1 residence, with the search, he was escorted to a police car.

2 Q He was escorted?

3 A Well, walked out, yes, sir.

4 Q He walked out?

5 A Uh-huh. (Affirmative).

6 Q Okay. Thank you, Agent Hanning.

7 A Yes, sir.

8 THE COURT: Redirect?

9 SOLICITOR HUNTER: Yes, Your Honor, briefly.

10 THE COURT: Yes, sir.

11 REDIRECT EXAMINATION

12 BY SOLICITOR HUNTER:

13 Q Mr. Wilkes was talking about where you entered.

14 Could you briefly describe exactly how you entered into
15 the room?

16 A Into the room where Mr.---

17 Q Into the entire house. Just go through your pathway.

18 A We went to the garage door on the outside, the exterior
19 open air garage door. We knocked and announced. Nobody
20 came to the door. The door was locked. We re-breached it.
21 We entered through the cluttered garage to another interior
22 door.

23 Q And where did that interior door lead to?

24 A The residence of Mr. Markley or the basement of the
25 residence, the 152---

Craig Hanning - Redirect examination
by Solicitor Hunter

1 Q Was there a hallway before that door?

2 A We actually went -- yes, sir, we went into a hallway
3 and then to another door.

4 Q In that hallway, what was to your left?

5 A Stairs.

6 Q And to your right?

7 A A closed door.

8 Q Okay. Now, Mr. Wilkes had you say that you didn't see
9 Mr. Cheeks run.

10 You saw Mr. Markley, right?

11 A Correct.

12 Q And what was Mr. Markley doing?

13 A He was sitting in a recliner. Upon executing search
14 warrants, it's, it's our duty and our responsibility to yell
15 as loud as we can who -- we are wearing identifiable vests
16 that say either sheriff, mine says police because I work for
17 the state. All of us in the stack are announcing Sheriff's
18 Office, search warrant, get down on the ground, put your
19 hands up.

20 When I went in Mr. Markley had the look of surprise,
21 which is generally seen on subjects when the, the police
22 execute a search warrant at their house. It was -- he had a
23 look of amazement and just stood there with his or sat there
24 with his hands up in a non-aggressive demeanor.

25 Q Now, you say Mr. Markley today in the wheelchair,

Craig Hanning - Redirect examination
by Solicitor Hunter

1 correct?

2 A Yes, sir.

3 Q Could you please describe his appearance on that date,
4 June 4th, 2009?

5 A He was not as heavy. He was in, medically speaking,
6 I'm not a doctor, but he had some -- you could tell that
7 there were some medical issues, and he was pretty
8 disheveled. His appearance was that of somebody who is
9 unkept.

10 Q Okay. When you say not as heavy, I know you can't get
11 into he's 50 pounds less, but if you had to approximate?

12 A I would say probably 200 pounds heavier than he was 18
13 months ago.

14 Q You're saying he's heavier today?

15 A Yes, sir.

16 Q Okay. Thank you.

17 THE COURT: Recross.

18 MR. WILKES: None, Your Honor.

19 MR. POOLE: And none here, Your Honor.

20 THE COURT: You may step down.

21 WITNESS: Yes, sir.

22 THE COURT: The State may call its next witness.

23 SOLICITOR HUNTER: Your Honor, the State would call
24 Investigator Hutchins.

25 THE COURT: Come forward, sir, to my left to be sworn.

Matt Hutchins - Direct examination
by Solicitor Hunter

1 MATT HUTCHINS, having been first duly
2 sworn, testified as follows:

3 THE COURT: Please be seated. State your name please.

4 WITNESS: It's Investigator Matt Hutchins.

5 THE COURT: Mr. Hunter, your witness.

6 DIRECT EXAMINATION

7 BY SOLICITOR HUNTER:

8 Q Mr. Hutchins, who do you work for?

9 A Spartanburg County Sheriff's office.

10 Q And how long have you been employed there?

11 A Since 2002.

12 Q In what capacity?

13 A I'm currently -- I'm assigned to the vice and narcotics
14 unit of the Sheriff's Office.

15 Q Did you start out in that unit?

16 A No, I did not.

17 Q What did you do before that?

18 A When I first came to the Sheriff's Office I was
19 assigned to uniform patrol. After a little over a year
20 there then I was assigned to narcotics.

21 Q Okay. So, you've been at the Sheriff's office for
22 eight years?

23 A Yes, sir.

24 Q Okay. How much law enforcement experience did you have
25 before the Sheriff's Office?

Matt Hutchins - Direct examination
by Solicitor Hunter

1 A Prior to the Sheriff's Office, in 19, starting in 1998
2 I served as Magistrate's Court constable. After that, in
3 2000, I worked as a lake warden for two years, and then came
4 to the Sheriff's Office.

5 Q Okay. On this particular day, particular day,
6 June 4th, 2009, where did you first begin your
7 surveillance?

8 A I first -- first I got involved was I received a call
9 from Investigator Norris that he needed assistance on
10 surveillance, and I was told that a black Crown Vic---

11 MR. WILKES: Objection.

12 MR. POOLE: Objection.

13 MR. WILKES: Hearsay.

14 THE COURT: Sustained.

15 A I, I became involved conducting surveillance of a black
16 Crown Vic traveling up Reidville Road.

17 Q Okay. And that black, black Crown Vic, do you know who
18 the occupants of the vehicle were?

19 A Yes, I do.

20 Q Who were they?

21 A It was Mr. Ricky Cheeks was the passenger and, and Eric
22 Elder was the driver.

23 Q And where did this vehicle go?

24 A Went to the Wal-Mart at Dorman Center.

25 Q Did anyone get out of the vehicle?

Matt Hutchins - Direct examination
by Solicitor Hunter

- 1 A They did.
- 2 Q who?
- 3 A Mr. Eric Elder.
- 4 Q And where did he go?
- 5 A He walked inside of the Wal-Mart and I, myself, and
- 6 Investigator Raymond followed him into Wal-Mart.
- 7 Q When you went into Wal-Mart, how far back were you from
- 8 him?
- 9 A Initially a pretty good ways to let him get inside the
- 10 door. Then I exited my vehicle and I went inside. And when
- 11 I first observed him he was coming off of a grocery aisle on
- 12 the grocery side. I observed him carrying a box of baking
- 13 soda and the aisle he was coming off of was the baking soda
- 14 aisle.
- 15 Q Okay. Did you follow him to the register?
- 16 A I did. And to be exact, it was lane ten I believe.
- 17 Q All right. And what did he do at this register?
- 18 A When he walked to the register it appeared to me that
- 19 he was checking out, and I then went outside to my vehicle.
- 20 Q Did he come out with anything?
- 21 A Came out with a bag.
- 22 Q Okay. Now, from that point where did the vehicle go?
- 23 A The vehicle then went back to the address that
- 24 Investigator Norris had had under surveillance. I believe
- 25 it was Gordon, which to be exact is in

Matt Hutchins - Direct examination
by Solicitor Hunter

- 1 Spartanburg.
- 2 Q Okay. And what county is this?
- 3 A Spartanburg County.
- 4 Q Okay. Now, how long did you wait there?
- 5 A After he was followed back to that location, my job
- 6 then was to take up Investigator Norris' surveillance
- 7 position, and I took up that position, which was the, the
- 8 main eye per se of the residence.
- 9 Q When you came back to the residence from Wal-Mart, what
- 10 did Eric Elder and Ricky Cheeks do?
- 11 A When, when we followed them back or when I followed
- 12 them back, I did not have the initial eye of them getting
- 13 back to the residence. I -- when I took up my surveillance
- 14 point and relieved Investigator Norris, the, the subjects
- 15 had went inside and the vehicles were in the driveway.
- 16 Q When you say the subjects, who is that?
- 17 A That would be Mr. Elder and Mr. Ricky Cheeks.
- 18 Q Okay. At that point, following along the time line,
- 19 what did you do next?
- 20 A I then -- the next thing I observed at the residence
- 21 was Mr. Ricky Cheeks and Mr. Elder getting back in the Crown
- 22 Vic and leaving the residence.
- 23 Q Okay. And did you follow them at this point?
- 24 A I, I did. I noticed the vehicle leaving the driveway
- 25 at a high rate of speed, and I followed them from that

Matt Hutchins - Direct examination
by Solicitor Hunter

1 location.

2 Q And where did you follow them to?

3 A Followed them crossing over W.O. Ezell Boulevard on
4 Briarwood, and at Briarwood is a stop sign that intersects
5 with West Main. I observed the car to slow, not come to a
6 stop, and kind of like yield sign, instead of making a stop
7 sign, a yield sign, and taking a left and then an immediate
8 right.

9 Q So, did, did this vehicle -- who was driving this
10 vehicle by the way?

11 A Mr. Elder.

12 Q Okay. And did this -- was there a passenger in the
13 vehicle?

14 A There was.

15 Q who was that passenger?

16 A Mr. Cheek, Ricky Cheeks.

17 Q Okay. Can you point out Mr. Ricky Cheeks?

18 A Be the gentleman in the white shirt sitting at the
19 defense table.

20 Q Okay. And they were in this vehicle at this time?

21 A Yes, sir.

22 Q And it failed to complete a stop?

23 A Yes, sir, it failed to come to a complete stop at the
24 stop sign.

25 Q At what location?

Matt Hutchins - Direct examination
by Solicitor Hunter

- 1 A At Briarwood and West Main.
- 2 Q Okay. Did you pull them over?
- 3 A I activated my blue lights. They actually had taken a
- 4 right onto Vanderbilt, activated the blue lights, and the
- 5 vehicle pulled to the side of the road.
- 6 Q Okay. In what county did, was this on?
- 7 A Spartanburg County.
- 8 Q Okay. At this point what did you do next?
- 9 A I approached the vehicle.
- 10 Q Which, which side did you approach?
- 11 A The driver's side. Approached the driver's side of the
- 12 vehicle. I noticed that the driver passenger seemed to be
- 13 nervous.
- 14 Q Could you describe their nervous behavior?
- 15 A The driver was noticeably shaking. The passenger had
- 16 his hands clinched towards his pocket, and it was kind of
- 17 looking straight ahead instead of looking at me. I then
- 18 told both subjects to put their hands up on the dash in fear
- 19 of maybe weapons in the vehicle. Both subjects complied. I
- 20 then asked the driver, Mr. Elder, to step out of the
- 21 vehicle.
- 22 Q Okay. Now, when you asked them to step out of the
- 23 vehicle, what did he do?
- 24 A Mr. Elder then stepped out of the driver's side of the
- 25 vehicle.

Matt Hutchins - Direct examination
by Solicitor Hunter

1 Q Okay. Where did he go from there?

2 A Took him back to the front driver's side corner of my
3 patrol vehicle.

4 Q Did he, at anytime, go to the passenger side of the
5 vehicle, of his vehicle or yours?

6 A No, sir.

7 Q Where was your vehicle in the location, in reference to
8 his vehicle?

9 A My vehicle was directly behind his.

10 Q And this was that same black crown vic?

11 A Yes, this was the same black crown vic that they had
12 been observed in earlier.

13 Q Your vehicle is not equipped with a in camera system,
14 is it?

15 A No, mine's actually an undercover vehicle. It's an
16 SUV. It's equipped with blue lights and sirens.

17 Q Was there anybody else there with you, police presence?

18 A Investigator McJunkin, Investigator Cantrell, and
19 Investigator Beck that I, I recall.

20 Q Okay. Did Investigator -- did you observe what
21 Mr. Nate Cantrell did?

22 A I did.

23 Q What, what did -- what were your observations of his
24 conduct?

25 A Well, Mr. Cheeks had been asked to step from the

Matt Hutchins - Direct examination
by Solicitor Hunter

1 passenger side of the vehicle. while I was getting the
2 driver's license information from Mr. Elder, Investigator
3 Cantrell had a drug detection K-9 on the scene and ran the
4 vehicle, which means conducted a free air sniff of the
5 vehicle to which the K-9 alerted.

6 Q Now, from there I want you to go to the search warrant.
7 Did you leave the scene of the car stop?

8 A I did.

9 Q And, and where did you go?

10 A I went to a staging location where we were briefing for
11 the search warrant.

12 Q And what was that staging location?

13 A It was the, the -- if I recall, the back parking lot of
14 woodland Heights Elementary I believe.

15 Q Approximately how far is woodland Heights Elementary
16 from 152 Gordon Drive?

17 A Yards. I mean it's, it's very close.

18 Q Very close.

19 So, it's less than one-half mile?

20 A Oh, easy.

21 Q Investigator Hanning testified that he was the third
22 man in.

23 What was your position?

24 A My position was to be the lead man or guinea pig. I
25 was to be the first one through the door once the door is

Matt Hutchins - Direct examination
by Solicitor Hunter

1 breached.

2 Q Okay. where did you first enter the house?

3 A We entered on the -- if you're standing at the road
4 looking at the residence, we entered on the left side, which
5 is the left lower basement carport door. Entered it from
6 the left side, which would of been clearing the house from
7 the left to the right.

8 Q Okay. when you first entered the house, what did you
9 come to?

10 A Once, once we entered the carport door, it was clutter.
11 There was -- you could tell was a path where they had kept
12 clear to walk. When we got to the end of that path there
13 was no door that could be easily seen to enter into the
14 residence. what probably took 30 seconds seemed like
15 minutes trying to locate the door to get into the residence.

16 Q And were you saying anything at the time?

17 A We were announcing Sheriff's Office, search warrant,
18 show me your hands, Sheriff's Office, search warrant.

19 Q when you say announcing, could you please do maybe that
20 decibel level of what you were doing that day?

21 A In this microphone it's gonna be loud.

22 Q You can back away from the microphone, microphone.

23 A Sheriff's Office, search warrant.

24 Q Okay. So, pretty loud?

25 A It's pretty loud.

Matt Hutchins - Direct examination
by Solicitor Hunter

1 Q Okay. Now, you get to this door, what do you do next?

2 A Once we finally realize that there had to be a door
3 there, it was like wood. It was like a paneling on kind of
4 like a screen door. The door would pull back and forth.
5 Had clothes and whatnot hanging on it. Opened that door.
6 Entered the door and it entered into a hallway. On the left
7 was a set of red carpeted stairs, which had another door at
8 the top. To the right was a door, another door.

9 Q Which way did you go from there?

10 A I went right because the intel that we had received was
11 that the door to the right would of been the target
12 location.

13 Q Okay. When you enter the door, just tell me what you
14 saw first.

15 A Once the door was kicked open, tactical wise, once the
16 door is breached, you don't run straight in. You try to
17 assess real quick what's going on, any dangers you perceive.
18 When I opened the door I observed Mr. Derrick Cheeks, who
19 was running from the end of the counter which would of been
20 closest to me at the kitchen area to what would have been
21 the first bedroom on my left.

22 Q I'm gonna put up what's been admitted as State's
23 evidence 1.

24 Your Honor, may I have the witness step down from the
25 witness stand?

Matt Hutchins - Direct examination
by Solicitor Hunter

1 THE COURT: Yes, you may.

2 SOLICITOR HUNTER: Thank you.

3 A (Witness comes down from the stand.)

4 Q Where exactly did you see Derrick Cheeks when you first
5 entered the room?

6 A The first place that I observed him was coming from
7 that corner right there.

8 Q Okay. And as Mr. Hanning testified, that back wall
9 with the microwave is facing you?

10 A Yes, I, I actually, from my location, would of been
11 looking straight on towards this.

12 Q Were there any impediments to your view, any objects
13 blocking your view?

14 A No.

15 Q Okay.

16 A (Witness returns to the stand.)

17 SOLICITOR HUNTER: Your Honor, may we take something up
18 outside the presence of the jury?

19 THE COURT: Certainly.

20 Bring the lights up.

21 Ladies and gentlemen of the jury, I'll ask you to step
22 back to the jury room. As always, when we do this, I'll
23 instruct you not to begin any discussions until I advise you
24 to do so. You may retire.

25 (Whereupon, the following takes place outside the

Matt Hutchins - Direct examination
by Solicitor Hunter

1 presence of the jury.)

2 THE COURT: Yes, sir.

3 MR. WILKES: Your Honor, we would object to the details
4 of the tasing as being unnecessary, subjective on the parts
5 of the officers in deciding to do so. The fact that a
6 person may flee a scene is admissible perhaps and not
7 whether or not the police decided to shoot him or tase him
8 as he flees. So, I think that the fleeing is sufficient.
9 The tasing is just prejudicial.

10 SOLICITOR HUNTER: Your Honor, it's the State's
11 position that Mr. Cheeks obviously was standing at that
12 counter in sight of law enforcement. He fled to the first
13 bedroom, which was dark. In fact, I could proffer the
14 testimony from Mr. Hutchins as to this if you'd like to hear
15 that testimony first before we---

16 THE COURT: Why don't we do that?

17 SOLICITOR HUNTER: Okay.

18 Q Where did Derrick Cheeks run to?

19 A The first bedroom on the left as I was entering.

20 Q Okay. What was the state of the bedroom?

21 A Cluttered. Trash was piled up in the corners. Just
22 total clutter. There was a large treadmill probably twelve,
23 ten, twelve feet inside the doorway of the room.

24 Q Was -- what was the color of the room?

25 Were there lights?

Matt Hutchins - Direct examination
by Solicitor Hunter

- 1 A It was dark. It was dark.
- 2 Q Okay. Could you see into the room very well?
- 3 A Could not other than with a flashlight.
- 4 Q And who had a flashlight?
- 5 A I believe -- I know I did. I believe Lieutenant Cooper
- 6 may have also.
- 7 Q Okay. And at that point what are you yelling in the
- 8 room?
- 9 A We're ordering the subject to show his hands and come
- 10 out.
- 11 Q Did he do that?
- 12 A No.
- 13 Q Approximately how many times did you command the
- 14 subject or, in this case, Mr. Cheeks to do that?
- 15 A At least six, eight, ten times.
- 16 Q Okay. Were you able then to locate Mr. Cheeks?
- 17 A Eventually Mr. Cheeks did stand up from behind the
- 18 treadmill. He kept his hands towards his waistband. After
- 19 repeated orders to show us his hands, he then began to walk
- 20 towards us.
- 21 Q Okay. Could you please stand up and, and at least show
- 22 us what you mean by kept, keep his hands by his waistband?
- 23 A Would not show his hands.
- 24 Q Let the judge see this.
- 25 THE COURT: Go ahead.

Matt Hutchins - Direct examination
by Solicitor Hunter

1 WITNESS: Kept his hands right here and walked towards
2 us.

3 THE COURT: All right.

4 Q What were you telling him to do with his hands?

5 A To show us his hands, to put his hands up, and, and at
6 that point he continued to walk. I then conducted a leg, a
7 leg sweep and put him on the ground. At that point his
8 hands was still under him and he would not bring his hands
9 out after repeated commands for him to bring his hands out
10 from under him.

11 Q Now, at that point what happened?

12 A After repeated times of instructing him to get his
13 hands out from under him, Lieutenant Cooper then yelled
14 taser, taser, which I knew is command, is the initial
15 command prior to someone tasing somebody. At that point I
16 got out of the way of the taser prongs.

17 Q Is Mr. Cheeks, at that point, given another chance to
18 show his hands to you?

19 A Well, when, when I then moved he had ample opportunity
20 prior to Lieutenant Cooper firing the taser.

21 Q And did he move?

22 A No, he did not show his hands.

23 Q Did he show his hands to you?

24 A None -- not until after he was tased and got into
25 custody.

Matt Hutchins - Direct examination
by Solicitor Hunter

1 Q And then what happened after he didn't show his hands?

2 A He -- well, Lieutenant Cooper tased him.

3 Q Okay.

4 THE COURT: Are you through?

5 SOLICITOR HUNTER: Yes, Your Honor.

6 THE COURT: Mr. Wilkes.

7 MR. WILKES: May I ask him some questions?

8 THE COURT: Certainly.

9 CROSS-EXAMINATION

10 BY MR. WILKES:

11 Q From underneath him did you find drugs?

12 A Not from underneath him.

13 Q From underneath him did you find a weapon?

14 A No, sir.

15 Q Did you find any reason that his hands would be
16 underneath him?

17 A I, I don't know why he would not show us his hands.

18 Q Was he fighting?

19 A He was not complying.

20 Q Well, was he fighting?

21 A It's -- as far as fist fighting, no, cause his hands
22 was under him.

23 Q Did he have any kind of weapon or anything at all when
24 you picked him up?

25 A After the fact, no. At the time he was tased we did

Matt Hutchins - Cross-examination
by Mr. Wilkes

1 not know whether he had a weapon not.

2 Q Okay. Yes, sir.

3 THE COURT: Mr. Poole.

4 MR. POOLE: No questions, Your Honor.

5 THE COURT: All right. All right. I'll hear you
6 concerning---

7 MR. WILKES: Thank you, Your Honor.

8 THE COURT: ---your argument.

9 MR. WILKES: Again, the subjective decision to tase him
10 is, is no more than that. I'm not saying it's unjustified,
11 but I am saying that it is a bit prejudicial because it
12 creates a, just an inference that there was some sort of, of
13 fight or violence or drugs being hid and there's no evidence
14 of that. So, I don't know why it has to go any further than
15 to simply say that he did whatever he did and that he was
16 compelled to, to comply. But that the tasing, I don't know
17 that that is relevant and it appears to be much more
18 prejudicial than it would be probative on the issue we're
19 dealing with.

20 SOLICITOR HUNTER: Your Honor, it's the State's
21 position that this is very probative in this matter. Mr.
22 Cheeks was given the opportunity, as Mr. Hutchins has
23 testified multiple times as well as Mr. Hanning, to leave.
24 Search warrant was yelled out in the garage, in the hallway,
25 in the entrance to the room. Mr. Cheeks flees law

1 enforcement, hides himself in a dark room where law
2 enforcement doesn't know if he has a weapon, drugs, money,
3 anything that could harm a law enforcement officer. At this
4 time, Mr. Hutchins---

5 THE COURT: Start your argument again. We've got --
6 we're gonna have to have a discussion with the people in the
7 courtroom.

8 SOLICITOR HUNTER: Okay. It's the State's position
9 that this is probative to a matter at hand. Mr. Cheeks was
10 given ample opportunity, as the State has already presented
11 evidence, that police officers are yelling search warrant.
12 They're identifying themselves as police officers. They
13 enter the room. Mr. Cheeks flees law enforcement into a
14 dark room where they don't know if a weapon, drugs, or any
15 other item that might harm them is present.

16 He has his hands hidden underneath or near his
17 waistband. He won't comply with the officer's orders. We
18 think that's very probative in this case as, I believe, you
19 know, obviously he's saying the drugs aren't his.

20 MR. WILKES: And I didn't disagree with anything other,
21 other than the fact that then they tased him. That's the
22 only part that I'm objecting to. The facts that he's, he
23 states may be relevant under case law. The fact that they
24 then tased him I don't think is necessary to the point that,
25 that they're making, and it's just prejudicial.

1 THE COURT: Last word.

2 Anything else you want to tell me?

3 SOLICITOR HUNTER: Nothing, Your Honor.

4 THE COURT: All right. I'm not gonna allow you to go
5 into the fact that he was tased. I will allow you to go
6 into the fact that he was cooperative and that police had to
7 take additional measures to bring him under control. So,
8 I'll sustain the objection to that.

9 MR. WILKES: Thank you.

10 THE COURT: All right. We're gonna take a brief break.
11 I'm gonna caution those who are as spectators. In
12 the -- I don't have any problem you being present. I had to
13 stop the proceedings on one occasions. You were talking
14 back and forth. I have seen you shaking your head, making
15 demonstrations in reaction to testimony.

16 This particular gentleman in the red fleece, your name
17 is, sir?

18 MR. RICHARDS: Kevin.

19 THE COURT: Sir, stand up.

20 MR. RICHARDS: Kevin.

21 THE COURT: Kevin what?

22 MR. RICHARDS: Richards.

23 THE COURT: Mr. Bridges, you---

24 MR. RICHARDS: Richards.

25 THE COURT: Sir?

1 MR. RICHARDS: Richards.

2 MR. WILKES: Richards.

3 THE COURT: Richards. You've been very fidgety.
4 You've been bending over---

5 MR. RICHARDS: No, I was---

6 THE COURT: Don't argue with me. I'm telling you what I
7 observed. I'm gonna hold you in contempt of Court if you
8 continue to disrupt the proceedings in this Court.

9 You understand what that means?

10 MR. RICHARDS: Yes, sir.

11 THE COURT: I have the authority, if you, if you show
12 contempt of this Court in my presence, to put you in jail
13 for up to one year without a hearing, and there will be no
14 good time. You will serve that day for day.

15 Do you understand what I just said?

16 MR. RICHARDS: Yes, sir.

17 THE COURT: Can you behave while you're in the
18 courtroom?

19 MR. RICHARDS: Yes, sir.

20 THE COURT: I'm gonna urge you to do so if you wish to
21 stay.

22 I've noticed also, Mr. Wilkes, your client reacting to
23 testimony through head shakes, and nods, and facial
24 expressions. I will caution him at this time as well.

25 MR. WILKES: Yes, sir.

1 THE COURT: Court will be in recess for a period of
2 about five to ten minutes.

3 I'll caution the witness not to discuss your testimony
4 with anyone during the break.

5 WITNESS: Yes, sir.

6 THE COURT: Thank you.

7 (WHEREUPON, a short recess was taken at this time.)

8 THE COURT: State ready to proceed, Mr. Hunter?

9 SOLICITOR HUNTER: Yes, sir, Your Honor.

10 THE COURT: Mr. Wilkes, you ready to proceed?

11 MR. WILKES: I am, Your Honor.

12 THE COURT: And, Mr. Poole, are you ready?

13 MR. POOLE: Yes, sir.

14 THE COURT: Bring the jury in.

15 (WHEREUPON, the following takes place within the
16 presence of the jury.)

17 THE COURT: All right. The record will reflect the
18 jury has returned to the courtroom.

19 You may proceed, Mr. Hunter, in accordance with my
20 instructions.

21 SOLICITOR HUNTER: Yes, Your Honor.

22 CONTINUED DIRECT EXAMINATION

23 BY SOLICITOR HUNTER:

24 Q You earlier testified that you saw Mr. Cheeks run from
25 that kitchen counter in the front bedroom.

Matt Hutchins - Direct examination
by Solicitor Hunter

1 A Yes, sir.

2 Q What did you do next?

3 A I then posted up on the door of the bedroom.

4 Q What is posted up mean?

5 A When I go in we're, we're trained to identify threats.

6 Of course, a subject running into a room is an immediate

7 threat cause you know he's in there. Did a quick scan of

8 the living room, observed a large white male standing,

9 sitting in a chair with his hands up. To me, that's not as

10 big of a threat as a subject that's just running into a

11 room. Me being the lead man in, I go in, weapon drawn,

12 ordering the subject to come out and show me your hands.

13 Lieutenant Cooper, who was the second subject behind me

14 or would be the immediate subject behind me, pushed up on

15 the other side of the doorway. We tried to triangulate,

16 it's called, so I have a view of this side of the room.

17 He's got a view of that side of the room.

18 Q Are you able to look into the room at this time?

19 A I can see into the room, yes.

20 Q Please describe to the jury what the state of the room

21 was.

22 A It was clutter. Trash bags piled up, food. Just

23 massive clutter. Just inside the doorway, ten, twelve feet,

24 was a treadmill, large treadmill standing upright. Then

25 behind there was what appeared to be a sliding glass door

Matt Hutchins - Direct examination
by Solicitor Hunter

- 1 which would exit the room. The door was---
- 2 Q When you said exit the room, where would it exit to?
- 3 A To the outside of the residence. The door was closed,
- 4 which, and I observed to be clutter around it, which led me
- 5 to believe the subject was still inside the room.
- 6 Q Okay. Were the lights on in the room?
- 7 A No, it was, it was dark.
- 8 Q How were you able to observe what you just said?
- 9 A With flashlights.
- 10 Q Okay. Who had a flashlight?
- 11 A I did and I believe Lieutenant Cooper did. But I know
- 12 I did.
- 13 Q Were you telling Mr. Cheeks to do anything at this
- 14 point?
- 15 A Continued to order come out, show me your hands, put
- 16 your hands up. Did that six, eight, ten times. Finally I
- 17 observed Mr. Cheeks stand up from behind the treadmill.
- 18 Q Were you entering the room at this time?
- 19 A At that point I was still standing at the doorway.
- 20 What we're trained is, the doorway would provide some cover
- 21 if you did have a weapon. We stood up, continued to order
- 22 him to put his hands up, and he refused.
- 23 Q Where were his hands at that point?
- 24 A They were down in his, in his waistband area.
- 25 Q Did you continue to order him to put his hands up?

Matt Hutchins - Direct examination
by Solicitor Hunter

1 A Continued to order him to put his hands up. He
2 continued to refuse at that point. He stepped out from
3 behind the treadmill and started to walk in my direction
4 still refusing to show his hands.

5 Q After he refused did you then enter the room?

6 A As he started walking towards us I then entered the
7 room and took him into custody.

8 Q Okay. Now, once you take him into custody, did you
9 participate in the search of this residence?

10 A I did.

11 SOLICITOR HUNTER: Your Honor, at this point I submit
12 to the Court that this evidence bag, at this particular
13 point, is closed and we're opening it to get the items out.

14 THE COURT: All right. Has it been marked?

15 SOLICITOR HUNTER: She's marking it now.

16 (WHEREUPON, the evidence bag was marked as State's
17 Exhibit No. 6 for identification purposes only at this
18 time.)

19 SOLICITOR HUNTER: May I approach, Your Honor?

20 THE COURT: You may.

21 Q Investigator Hutchins, would you briefly describe what
22 that is. It's been premarked as State's Exhibit 6.

23 A This is an evidence bag. In the front of it it's got
24 the case number that matches this case. It says Item Number
25 1, digital scale, Item Number 2, digital scale, and Item,

Matt Hutchins - Direct examination
by Solicitor Hunter

1 Item Number 3, Arm and Hammer baking soda.

2 Q would you please open the bag?

3 A (Witness complies.)

4 (WHEREUPON, the baking soda was marked as State's
5 Exhibit No. 7. Two scales were marked as State's Exhibit
6 Nos. 8 and 9. All were for identification purposes only at
7 this time.)

8 SOLICITOR HUNTER: Your Honor, may I approach?

9 THE COURT: Yes, you may.

10 Q Let me show you what's been premarked as State's
11 Exhibit 8 and 9.

12 Can you please tell me what those are?

13 A That is digital scales.

14 Q Okay. You were at the execution of the search warrant
15 on June 4th?

16 A That's correct.

17 Q Were those -- are those in the same or substantially
18 the same condition as when you recovered them on that date?

19 A Kelvin Washington is who recovered all the evidence.
20 Basically what we do is locate it, and once we locate it we
21 let, one person's designed to collect all the evidence, know
22 where it is and they come and actually collect the evidence.

23 Q Are they in the same or substantially the same
24 condition as when you located them?

25 A Yes.

Matt Hutchins - Direct examination
by Solicitor Hunter

1 SOLICITOR HUNTER: Okay. Your Honor, at this time the
2 State would move to admit State's Exhibit 8, 9, and 10 into
3 evidence.

4 THE COURT: Any objection, Mr. Wilkes?

5 MR. WILKES: Subject to our objection on the search
6 warrant.

7 THE COURT: All right.

8 MR. POOLE: Same here, Your Honor.

9 THE COURT: All right. They'll be admitted as marked.
10 (Whereupon, State's Exhibit Nos. 7 through 9 were
11 received into evidence at this time.)

12 SOLICITOR HUNTER: Your Honor, may I approach?

13 THE COURT: Yes, you may.

14 Q I'll give you a second to read over that.

15 A Okay.

16 Q Okay. All right. State's Exhibit 8 and 9, can you
17 tell me where you located those in the residence?

18 A The one would be find, I don't know which item it is,
19 No. 8, small scale found on kitchen counter by Hutchins.

20 Q Uh-huh. (Affirmative).

21 So, that's the, the small scale that you found on the
22 kitchen counter?

23 A Yes.

24 Q Which kitchen counter is that?

25 A Be the kitchen counter that's in view in the picture.

Matt Hutchins - Direct examination
by Solicitor Hunter

1 Q So, that's not the one with the microwave. That's the
2 one with the Glad bag and the, and the baggies of the white
3 substance?

4 A Yes.

5 Q Okay. And the other digital scale, where did you find
6 that?

7 A The other small digital scale would be counter bedroom.

8 Q In the bedroom where?

9 A Be the second room to my left as I entered.

10 Q So, not the room that Mr. Cheeks went into?

11 A No.

12 SOLICITOR HUNTER: Okay. Your Honor, may I approach?

13 THE COURT: Yes, you may.

14 (WHEREUPON, an evidence bag was marked as State's
15 Exhibit No. 10 for identification purposes only at this
16 time.)

17 Q I'm handing you what's been marked previously marked as
18 State's Exhibit 10.

19 Do you recognize this?

20 A I do.

21 Q And what is that?

22 A It's an evidence bag again marked with this case number
23 labeled large digital scales, item number one, and number
24 two is two bottles of Inositol.

25 Q Okay. Could you please break the seal?

Matt Hutchins - Direct examination
by Solicitor Hunter

1 A (Witness complies.)

2 Q You can just hand me the bags.

3 (WHEREUPON, the scale was marked as State's Exhibit No.
4 11. The bottle of Inositol was marked as State's Exhibit
5 No. 12. Both were for identification purposes only at this
6 time.)

7 SOLICITOR HUNTER: Your Honor, may I approach?

8 THE COURT: You may.

9 Q I hand you what's been marked State's Exhibit 11.
10 Do you recognize this?

11 A That would be the large set of digital scales that is
12 item number seven on the search warrant return.

13 Q Did you locate this item?

14 A I did.

15 Q Is this in the same or substantially the same condition
16 as the day when you found it?

17 A It is.

18 SOLICITOR HUNTER: Your Honor, at this time the State
19 would move to admit State's Exhibit No. 11 into evidence.

20 THE COURT: Any objection?

21 MR. WILKES: Same objection.

22 THE COURT: Mr. Poole.

23 MR. POOLE: Same here, Your Honor.

24 THE COURT: All right. It will be admitted as marked.

25 (WHEREUPON, State's Exhibit No. 11 was received into

Matt Hutchins - Direct examination
by Solicitor Hunter

1 evidence at this time.)

2 Q Is that that same scale?

3 A That is.

4 Q Okay. So, that's located on the kitchen counter, the
5 back kitchen counter?

6 A On the back wall, yes, sir.

7 Q Okay. Go ahead and get some of this stuff out of your
8 way. I'll hand you what's been marked as State's Exhibit
9 12.

10 Do you recognize this?

11 A It's two bottles of, labeled GNC Inositol powder.

12 Q Did you locate those items with this search warrant?

13 A I did.

14 Q Are they in the same or substantially the same
15 condition as when you found them?

16 A They are.

17 SOLICITOR HUNTER: Your Honor, at this time the State
18 would move to admit State's Exhibit 12 into evidence.

19 THE COURT: Any objection?

20 MR. WILKES: Same objection.

21 THE COURT: All right.

22 MR. POOLE: Same.

23 THE COURT: And I'll rule the same and it's admitted.

24 (WHEREUPON, State's Exhibit No. 12 was received into
25 evidence at this time.)

Matt Hutchins - Direct examination
by Solicitor Hunter

- 1 Q Where did you locate the bottles of Inositol powder?
- 2 A The Inositol powder was located in the kitchen cabinet.
- 3 Q Okay. So, up there in the glass cabinets?
- 4 A In the glass cabinets, correct.
- 5 Q Now, please explain to the jury why Inositol powder is
- 6 important in this case.
- 7 A Inositol is commonly used as a cutting agent in powder
- 8 cocaine.
- 9 Q What is a cutting agent?
- 10 A It's used to make the volume more, add to it to
- 11 increase your profits to, to cut down the purity.
- 12 Q What are some other cutting agents to give the jury an
- 13 idea of what you're talking about?
- 14 A Inositol, Creatine, anything that resembles a, a powder
- 15 form close to the cocaine consistency.
- 16 Q When Mr. Elder purchased the Arm and Hammer baking
- 17 soda, would that be considered a cutting agent?
- 18 A Baking soda is commonly used when you cook the cocaine
- 19 into crack. Baking soda is used as an agent in crack
- 20 cocaine or cocaine base.
- 21 Q So, the Inositol is for the actual cocaine?
- 22 A Yes, and, and different agents can be used. But
- 23 Inositol usually---
- 24 Q It could be?
- 25 A Yes.

Matt Hutchins - Direct examination
by Solicitor Hunter

- 1 Q Make it less pure?
- 2 A Yes, so -- to increase profits.
- 3 Q How many years experience do you have as a narcotic's
4 agent?
- 5 A Since 2003. So about seven.
- 6 Q Have you been present during undercover, undercover
7 buys?
- 8 A I have.
- 9 Q Have you actually participated in undercover buys?
- 10 A I have.
- 11 Q Do you have information as to the price of crack
12 cocaine in June 2009?
- 13 A I do.
- 14 Q And now, with your office, do you deal with any
15 publications as to the price of crack cocaine during any
16 time period?
- 17 A Do DEA issues and publications about once a year that
18 relates to prices of cocaine, crack, meth, different drugs
19 in different areas of the country.
- 20 Q Okay. Does your office submit information to the DEA
21 for this publication?
- 22 A We do.
- 23 Q And have you done it in the years past previous to
24 this?
- 25 A I personally haven't, but our agency has.

Matt Hutchins - Direct examination
by Solicitor Hunter

1 Q But your office has?

2 A Yes.

3 Q Have you ever testified in Court in this jurisdiction
4 as an expert in the value of narcotics?

5 A I have.

6 Q Okay. And approximately how many times?

7 A Four to five.

8 Q When was your last time testifying to that fact?

9 A A few months ago in trial.

10 SOLICITOR HUNTER: Okay. Your Honor, at this time the
11 State would offer Matt Hutchins as an expert in the value of
12 narcotics.

13 THE COURT: Any objection?

14 MR. WILKES: None.

15 MR. POOLE: None here.

16 THE COURT: All right. He'll be qualified as an expert
17 within this field.

18 Ladies and gentlemen, what this means is that this
19 witness will be allowed to state his opinion within the area
20 of expertise for which he's been qualified. I'll give you
21 additional instructions during my charge to the jury at the
22 close of the trial as to how you can consider testimony by
23 an expert.

24 He's been qualified as such, and you may proceed, Mr.
25 Hunter.

Matt Hutchins - Direct examination
by Solicitor Hunter

- 1 SOLICITOR HUNTER: Thank you, Your Honor.
- 2 Q Mr. Hutchins, how is crack cocaine commonly sold on the
3 street?
- 4 A Common on the street is sold by the crack rock.
- 5 Q Okay. What's the approximate size of the crack rock?
- 6 A Approximate crack rock is .2 grams.
- 7 Q So, you said .2 grams?
- 8 A Yes, sir.
- 9 Q So, if you were to sell .2 grams times five, a gram,
10 how much would that cost?
- 11 A Usually a crack rock is \$20.
- 12 Q Okay. So, if you sold a gram, how much would that
13 cost?
- 14 A It'd be---
- 15 Q Well, if you multiple it out -- would a, would a
16 hundred dollars sound about right?
- 17 A Yeah, it would be a hundred dollars per gram .2 is 20.
- 18 Q Okay. Now, if you were to take approximately 650 grams
19 and sell it retail value, what would, what would the price
20 be?
- 21 A Price varies. Well, I can give you the lowest range we
22 saw---
- 23 Q Well, I'm saying retail. Not wholesale. So, with the
24 hundred dollars---
- 25 A You figure---

Matt Hutchins - Direct examination
by Solicitor Hunter

1 Q If you took 650 grams---

2 A You figure a hundred grams, there's 28 grams in an
3 ounce.

4 Q I'm going with just the retail value, the value we just
5 talked about. The one gram equals a hundred dollars.

6 If you had 650 grams, how much would that be worth
7 retail?

8 A Be 650 times a hundred. So, 65,000.

9 Q \$65,000?

10 A Roughly.

11 Q Now, as crack cocaine's also sold, you know, wholesale,
12 like at Costco, how is crack cocaine usually sold wholesale
13 value?

14 A Buying wholesale, when you -- it's, it's like, you
15 know, Costco/Sams, quantity, the larger quantity you buy the
16 less it cost. Wholesale is when you get into buying ounces.
17 Typically in 2009, which is when, the date of this case, we
18 were seeing prices anywhere a thousand dollars to \$1,200 an
19 ounce. As low as a thousand, as high as 1,200.

20 Q Okay. So, with 650 grams is approximately how many
21 ounces?

22 A It's---

23 Q I'll get the calculator.

24 A 650 divided by 28 grams in an ounce. It's---

25 Q It's about 23 ounces?

Matt Hutchins - Direct examination
by Solicitor Hunter

1 A That sounds right.

2 Q So, how much would, would an ounce go for?

3 A An ounce would go anywhere from a thousand dollars to
4 1,200.

5 Q So, if you go on the lower end, if you had 650 grams
6 and you sold about an ounce, it would be \$23,000?

7 A Yes, that's correct.

8 Q So, the value---

9 A On the low end.

10 Q Okay. So, between 23,000 and 65,000 depending on
11 wholesale or retail?

12 A That's correct.

13 Q Please answer any questions the defense may have.

14 THE COURT: Mr. Wilkes.

15 MR. WILKES: Thank you, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. WILKES:

18 Q You were at the initial traffic stop of Ricky Cheeks
19 and Mr. Elder?

20 A Yes, sir.

21 Q And you say that they were stopped for not completely
22 stopping at a stop sign?

23 A That's correct.

24 Q And how long was that after, after that did
25 Investigator Cantrell show up?

Matt Hutchins - Cross-examination
by Mr. Wilkes

1 A Investigator Cantrell was seconds behind me in the
2 stop.

3 Q With a drug dog, Igor, in the car?

4 A Igor, yes, sir.

5 Q Igor, Igor's in the car.

6 How, how is it that Igor was there for the traffic
7 stop?

8 Was he just nearby or was that part of the plan?

9 A Igor is assigned to our narcotic unit. Nate Cantrell
10 is the K-9 handler. Igor's always with Investigator
11 Cantrell.

12 Q Now, the driver of the car was whom?

13 A Mr. Elder.

14 Q And what was your contact with Mr. Elder?

15 A I approached him, identified why I stopped him, and
16 observed him to be nervous.

17 Q Had you ever met Mr. Elder before?

18 A I have not to my knowledge.

19 Q And you said Mr. Elder appeared nervous?

20 A Uh-huh. (Affirmative).

21 Q You didn't find any drugs on Mr. Elder, did you?

22 A I did not, no, sir.

23 Q Did anyone, as far as you know?

24 A Not to my knowledge.

25 Q How far were, was it from the house of 152 Gordon

Matt Hutchins - Cross-examination
by Mr. Wilkes

- 1 Drive, the place of the stop?
- 2 A Approximately a mile maybe. Maybe a mile and a half.
- 3 Q Mr. Elder followed all the way out of 152 Gordon Drive?
- 4 A Yes, sir, I followed him.
- 5 Q Did you follow him to 152 Gordon Drive?
- 6 A As far as when?
- 7 Q Were you at the Wal-Mart?
- 8 A Yes.
- 9 Q What did Mr. Elder do at the Wal-Mart?
- 10 A He purchased a box of baking soda.
- 11 Q Where was that box of baking soda found?
- 12 A There was a box of baking soda found during the
- 13 execution of the search warrant in the trash can.
- 14 Q All right. The trash can in the kitchen?
- 15 A In the kitchen, yes, sir.
- 16 Q Of whose, whose residence?
- 17 A Mr. Markley.
- 18 Q Had you had contact with Mr. Markley before this?
- 19 A No, sir, I had not.
- 20 Q The residence belonged to Mr. Markley?
- 21 A I was not lead investigator. I -- to be honest with
- 22 you, I don't -- I'm not sure.
- 23 Q Were you there -- you were the, the lead man---
- 24 A I was---
- 25 Q ---on the search warrant team?

Matt Hutchins - Cross-examination
by Mr. Wilkes

- 1 A On the entry team, yes, sir.
- 2 Q And you observed Mr. Markley in the residence at the
- 3 time of the search warrant?
- 4 A He was in the residence, yes, sir.
- 5 Q And at the time he did not weigh as, quite as much as
- 6 he does today?
- 7 A That, that -- he -- I don't know how much me weighed,
- 8 but he was not as heavy as he is today.
- 9 Q Okay. But he was escorted out. So, he was certainly
- 10 ambulatory, if I'm correct in my terminology?
- 11 He could walk?
- 12 A He walked out, yes, sir.
- 13 Q Okay. But he happened to be sitting down when you came
- 14 through the door?
- 15 A Yes, sir.
- 16 Q And how far away from the drugs that we saw was he?
- 17 Same room?
- 18 A The picture that's up there now shows the kitchen area.
- 19 Q Uh-huh. (Affirmative).
- 20 A On the -- could I step down to the picture?
- 21 Q Absolutely.
- 22 A (Witness comes down from the stand.)
- 23 This is the kitchen area here.
- 24 Q Uh-huh. (Affirmative).
- 25 A On the other side of this counter --

Matt Hutchins - Cross-examination
by Mr. Wilkes

1 Q Right.

2 A -- is, it starts the living room.

3 Q Okay.

4 A And he would be the, sitting over towards this area --

5 Q Okay.

6 A -- is a, starts a table and then chairs and TV, things
7 of that nature.

8 Q All right.

9 A So---

10 Q He, he would be close enough to know it's, either
11 participate or know what's going on in the kitchen?

12 A It would be in view.

13 Q Okay. Nothing further.

14 THE COURT: Mr. Poole.

15 MR. POOLE: Thank you, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. POOLE:

18 Q Investigator Hutchins, you were involved in a
19 surveillance and also of the following of the Crown Victoria
20 automobile, right?

21 A Yes, sir.

22 Q Surveillance of a residence and then following a car?

23 A Yes, sir.

24 Q And, and you were involved in the search of the home?

25 A Yes, sir.

Matt Hutchins - Cross-examination
by Mr. Poole

1 Q Now -- and when you followed the car to wal-Mart, you
2 were the one who got out of your car and walked in and
3 followed, and watched Elder's activities, right?

4 A Myself and Investigator Raymond, yes, sir.

5 Q Okay. And you and Raymond got back into the car and
6 then followed, went back to Gordon Drive, is that right?

7 A We were in separate vehicles.

8 Q Okay.

9 A When we conduct surveillance we want to stay behind the
10 vehicle the whole way. Other investigators take up parts,
11 in and outs, switching out so they don't see the same
12 vehicle behind them.

13 Q Okay. Now, this car was always driven by Elder, is
14 that correct?

15 A I don't know who, in the history of the car, always
16 drove it.

17 Q All right.

18 A The time I observed it driven to wal-Mart I observed
19 Elder, Elder driving it. The time I observed it leaving the
20 residence when the car stop took place Elder was driving
21 the -- if he was the only one that drove it I can't testify
22 to that.

23 Q All right. Do you know who, to whom the car belonged?

24 A I do not recall.

25 Q Okay. But -- and then when Elder -- when you got back

Matt Hutchins - Cross-examination
by Mr. Poole

- 1 to the residence on Gordon Drive, you followed the car and
2 Elder was driving it at that time?
- 3 A You talking about when it left the residence?
- 4 Q Right.
- 5 A Yes, sir.
- 6 Q Okay. You said it left in a high rate of speed?
- 7 A Yes, sir.
- 8 Q Okay. And then you testified that shortly thereafter
9 it ran a stop sign?
- 10 A Yes, sir.
- 11 Q Okay. So, that's what gave you probable cause to stop
12 the car, right?
- 13 A That's correct.
- 14 Q All right. And, so, did you write a ticket?
- 15 A I believe I issued a warning.
- 16 Q You issued a warning?
- 17 A Uh-huh. (Affirmative).
- 18 Q And to whom was that warning issued?
- 19 A I don't have a copy in front of me. I believe it was
20 the driver of the car.
- 21 Q The driver of the car?
- 22 A Driver of the car, Mr. Elder.
- 23 Q Mr. Elder?
- 24 A Uh-huh. (Affirmative).
- 25 Q And, so -- and Mr. Elder was the one who appeared to be

Matt Hutchins - Cross-examination
by Mr. Poole

1 nervous upon your first observations?

2 A Both of them appeared -- you know, when you say
3 nervous, people think it's just shaking. The passenger, I
4 observed him clinching like his pocket and had a straight
5 away stair, which, you know, usually if you're a passenger
6 of a vehicle you're looking to see what's going on. That,
7 my training and my experience, is also a nervous behavior
8 when you've got the thousand yard stair ahead of you. So,
9 in my opinion, both of them was acting nervous.

10 Q Okay. All right. Well, you're -- we're talking about
11 Mr. Cheeks now. Okay. Ricky Cheeks.

12 A Uh-huh. (Affirmative).

13 Q And you say he was acting nervous, and you said he's
14 clinching something in his and you gestured like this?

15 A Yeah, he had it clinched towards his pocket, yes, sir.

16 Q Okay. And towards the pocket?

17 A Uh-huh. (Affirmative).

18 Q So, he was on the passenger side?

19 A Yes, sir.

20 Q So, he would of been clinching with his left-hand, is
21 that right?

22 A Let me see. I got in my notes he was clinching his
23 pocket. That's what I observed. But it would be his
24 left-hand I would presume---

25 Q Now, you're trying to observe, investigator. I know

Matt Hutchins - Cross-examination
by Mr. Poole

1 you are. You're trying to observe.

2 My question to you, he was clinching, you indicated
3 with your left-hand, clinching on your suit like I'm doing
4 with my left-hand right here.

5 A Uh-huh. (Affirmative).

6 Q And, therefore -- and he was on the passenger side?

7 A Uh-huh. (Affirmative).

8 Q So, if you're looking in through the driver's side---

9 A Uh-huh. (Affirmative).

10 Q ---he would of been clinching with his left-hand,
11 right?

12 A Well, I mean -- yeah, I could still, would still be
13 able, even if it's with his right-hand, I don't recall which
14 hand, as my report states, he was clinching. I'll read
15 verbatim. Also observed Cheeks to be clinching his hand in
16 the pocket area of his pants while sitting in the vehicle.

17 Q Okay. Again, he was in the passenger side?

18 A He was in the passenger side.

19 Q And you just testified a moment ago, and you gestured,
20 using your left-hand?

21 A I was, I was gesturing clinching. Whether it's left,
22 right, I don't recall.

23 Q How -- now, the -- this car ran a stop sign?

24 A Uh-huh. (Affirmative).

25 Q And you got -- how many vehicles are involved at this

Matt Hutchins - Cross-examination
by Mr. Poole

- 1 point in time when the car was running the stop sign?
- 2 A I was the initial vehicle.
- 3 Q You were the initial vehicle?
- 4 A Uh-huh. (Affirmative).
- 5 Q How many other cars were involved in following the, the
- 6 Crown Victoria after the---
- 7 A Investigator---
- 8 Q ---after the stop, not stopping for the stop sign?
- 9 A Investigator Cantrell was the secondary vehicle.
- 10 Q Yes, sir.
- 11 A He arrived shortly after I got them stopped.
- 12 Q Okay. Okay. And now how long was this detention?
- 13 How long did you talk to Elder?
- 14 A I let him know why I was stopping him.
- 15 Q Which was?
- 16 A For failing to stop for the stop sign.
- 17 Q Uh-huh. (Affirmative).
- 18 A And then asked him to step from his vehicle.
- 19 Q Okay.
- 20 A Get his driver's license and identification, things of
- 21 that nature.
- 22 Q What else did you ask him?
- 23 A Well, once, once I noticed him nervous I asked him to
- 24 put his hands on the dash, and then that's when I asked him
- 25 to step from his vehicle.

Matt Hutchins - Cross-examination
by Mr. Poole

1 Q How long did this stop last for running a stop sign?

2 A The initial stop, I'm gonna -- five, six, seven
3 minutes. Long enough for -- I asked him to step from his
4 vehicle. Investigators asked the passenger to step from it.
5 While I was checking his information, Igor conducted the
6 free air sniff. So --.

7 Q Okay. So -- and then you, you stopped Elder?

8 A Uh-huh. (Affirmative).

9 Q He got out of the car or at some point in time the
10 first thing you asked him was do you know why I stopped you,
11 right?

12 A I---

13 Q You asked him---

14 A ---didn't ask him why. I told him why I stopped him.

15 Q Oh, you told him?

16 A Uh-huh. (Affirmative).

17 Q Did you write the ticket right then?

18 A Not when I gave him that. I asked for his ID, proof of
19 insurance, registration, and things of that nature.

20 Q All right. And after you, complied with you, did you
21 write the ticket right then?

22 A As he was, he was stepped back -- while he was getting
23 the information I was checking his driver's license through
24 our comp center. That's when it was doing the free air
25 sniff. And then once the dog alerted, Investigator Cantrell

Matt Hutchins - Cross-examination
by Mr. Poole

1 talked with the driver as to the alert, and he was -- and it
2 was at that point---

3 Q When was this warning written then?

4 A The warning was written after, once he was notified
5 that the dog had alerted on his vehicle, was asked as to,
6 you know, things of that nature on why the dog would alert.
7 Then a search was conducted of his vehicle.

8 Q The warning for stopping a, for failure to stop at a
9 stop sign---

10 A Uh-huh. (Affirmative).

11 Q ---was written after a complete search with a K-9 was
12 involved, is that right?

13 A Uh-huh. (Affirmative).

14 Q Is that your testimony?

15 A Yes, sir.

16 Q At the very end?

17 A Once, once he was -- yes, once all the paperwork, once
18 all the search, the warning was issued.

19 Q And it only took about six minutes or so for a K-9
20 search to occur, people to get out of the car, and you check
21 registration legitimacy, and driver's license legitimacy?

22 Is that all it took?

23 How long did it take?

24 A Talking about the whole time for when---

25 Q The whole time.

Matt Hutchins - Cross-examination
by Mr. Poole

1 A ---he was transported to jail and all?

2 Q Uh-huh. (Affirmative).

3 A That whole time probably was---

4 Q Not the, not the transporting. I'm talking about at the
5 scene right there where he, he failed to stop for the stop
6 sign.

7 A From the time he was blue lighted to the time of the
8 arrest---

9 Q That's right.

10 A ---and cleared up, fifteen, twenty minutes.

11 Q Fifteen, twenty minutes?

12 A Uh-huh. (Affirmative).

13 Q So, it was about fifteen or twenty minutes into this
14 that you wrote him a warning for failure to stop at a stop
15 sign?

16 A Uh-huh. (Affirmative).

17 Q Okay. Thank you.

18 THE COURT: Redirect?

19 SOLICITOR HUNTER: Yes, Your Honor. Briefly.

20 REDIRECT EXAMINATION

21 BY SOLICITOR HUNTER:

22 Q In your years as an officer, an officer, have you
23 conducted many traffic stops?

24 A Yes, sir.

25 Q Have you been in there when a dog or a K-9 does a open

Matt Hutchins - Redirect examination
by Solicitor Hunter

1 air sniff on a vehicle?

2 A I have.

3 Q In fact, how long does that usually take?

4 A Thirty, forty-five seconds, long enough for a dog to
5 run around the vehicle.

6 Q So, it's not a long time at all?

7 A No.

8 Q And when you're sitting there checking the license, how
9 long does that usually take?

10 A Two to three minutes.

11 Q Okay. So, the whole process of stopping the car
12 doesn't take that long?

13 A No, sir.

14 Q And you didn't issue the warning -- where was Mr. Ricky
15 cheeks by the time you issued the warning?

16 A Out of the vehicle standing on the passenger side.

17 Q Of your vehicle?

18 A Yes.

19 Q Okay. Thank you.

20 THE COURT: Mr. Wilkes?

21 MR. WILKES: Nothing further.

22 THE COURT: Anything further?

23 MR. POOLE: No, sir.

24 THE COURT: You may step down, sir.

25 All right. Ladies and gentlemen of the jury, we're

1 about 5:15. We're gonna stop at this point in time for the
2 afternoon. I'll ask you to be back in the jury room at nine
3 o'clock in the morning.

4 Same cautions I gave you earlier when you left the, the
5 courthouse. Don't attempt to gather any information from
6 any other source concerning this matter. Don't listen to,
7 watch, or read any media reports concerning the case. Don't
8 discuss the case with anyone, and don't allow anyone to
9 discuss the case with you. Should anyone attempt to contact
10 you concerning this case, please report that upon your
11 return.

12 Again, back in the jury room at nine o'clock in the
13 morning. We should be in a position to proceed. You may
14 retire for the evening. Thank you very much.

15 (Whereupon, the following takes place outside the
16 presence of the jury.)

17 THE COURT: All right. Any objection to the defendant
18 who's not in custody remaining out on bond?

19 SOLICITOR HUNTER: No objection from the State, Your
20 Honor.

21 THE COURT: All right. Then I will caution your
22 client, Mr. Poole, that we will begin the trial of his case
23 again in the morning at nine o'clock. Should he fail to
24 appear we will continue in his absence.

25 Do you understand that, sir?

1 DEFENDANT RICKY CHEEKS: I know that.

2 THE COURT: The other defendant remains in custody.

3 Thank you very much.

4 SOLICITOR HUNTER: Your Honor, may Investigator
5 Hutchins and Agent Hanning be excused?

6 MR. WILKES: I would object to Agent Hanning being
7 excused.

8 THE COURT: All right. We'll ask you to stay.

9 SOLICITOR HUNTER: And as far as Investigator Hutchins?

10 THE COURT: Any, any problem with Investigator Hutchins
11 being excused?

12 MR. WILKES: None at all, Your Honor.

13 THE COURT: Mr. Poole, any problem with that
14 arrangement?

15 MR. POOLE: No, sir.

16 THE COURT: All right, sir. You're free to go.
17 Court's in recess then until nine o'clock.

18

19 (Whereupon, Court was in recess for the evening.)

20

21

22

23

24

25

1 Tuesday, October 5th, 2010

2
3 THE COURT: All right. We had a brief meeting in
4 chambers and during that time -- just one second.

5 (Pause.)

6 THE COURT: All right. We had a brief conference and
7 at that time it was brought to the Court's attention that
8 Indictment 2009-GS-42-6457, that is for trafficking in crack
9 cocaine more than a hundred grams, was not announced to the
10 jury yesterday during voir dire. I don't believe the Court
11 announced to the jury at the beginning of the trial the
12 indictments. I think that at that time I indicated that I
13 had read them previously. That indictment, however, has not
14 been presented to the Grand Jury. It apparently was
15 attached to the back of other indictments and was not
16 brought to the Court's attention until this morning.

17 I've discussed the matter with counsel, and I'll be
18 glad to hear from you concerning the matter.

19 Mr. Poole.

20 MR. POOLE: May it please the Court?

21 THE COURT: And does that correctly state our pretrial
22 conference?

23 MR. POOLE: Yes, sir. Yes, sir. But one addition. I
24 think that case may have been presented to the Grand Jury.

25 THE COURT: I'm talking about to the jury pool during

1 voir dire.

2 MR. POOLE: That, that's right. That's right.

3 THE COURT: It was not presented during that period of
4 time.

5 MR. POOLE: That's right. That's right. But it, but
6 it was duly---

7 THE COURT: Now, does that correctly state our
8 conference?

9 SOLICITOR HUNTER: Yes. Yes, sir, it does.

10 THE COURT: And, Mr. Wilkes, does that correctly state
11 the conference?

12 MR. WILKES: Yes, sir, I believe it does.

13 THE COURT: All right. Now, Mr. Poole.

14 MR. POOLE: May it please the Court.

15 Your Honor, first of all, I bear a certain amount of
16 responsibility as an officer of the Court not to have
17 brought this to the Court's awareness, and I assure you that
18 it was unintentional. It was one of the, the situation
19 where I'm sitting at the table getting ready for the trial.

20 THE COURT: Well, apparently it was paper-clipped to
21 the back of other indictments---

22 MR. POOLE: Yes, sir.

23 THE COURT: ---and I was not aware that it was back
24 there.

25 MR. POOLE: Yes, sir, but nevertheless, I bear a

1 certain amount of responsibility in not bringing it to the
2 Court's attention and for that I do apologize.

3 THE COURT: All right, sir.

4 MR. POOLE: Now, what my motion is at this point in
5 time is a motion for mistrial, a mistrial on behalf of Ricky
6 Cheeks. These cases -- we'll talk about two of them. One
7 is greater than 400 and one is greater than 100. We have
8 two separate indictments relating to both of these cases.
9 And in preparation for this trial, and in looking at these
10 cases, I have viewed them as being individual and insular
11 and separate, and the preparation for the trial of the case
12 involved a lot of the departmentalization of looking at the
13 indictments in those terms.

14 Now, I know they're related. The State's position is
15 that they are related, and, and one can be contained within
16 the other. But I do not believe that is the case.

17 What we have, and by way of showing a prejudice at this
18 point in time, is that yesterday we've had two witnesses
19 that have testified. I'm -- the Special Agent Hutchins, and
20 no, excuse me, it was Special Agent Hanning was the first
21 SLED officer who testified, and there was testimony in my
22 notes that reflect that Ricky Cheeks was under surveillance
23 for certain activity on June 4th, and then the more
24 important and weighty testimony came in yesterday through
25 Investigator Hutchins who testified to the traffic stop.

1 Now, the traffic stop goes to the greater than
2 100 grams, and there was a lot of testimony on that, and
3 we -- I cross-examined Investigator Hutchins about different
4 aspects of that. But his, his testimony in chief was that
5 he testified that the driver of the Crown Victoria, that is
6 one Elder, ran a stop sign, talked about the drug dog, there
7 was a massive police presence there, Ricky Cheek was, Cheeks
8 was a passenger in the car. There was a clinching observed
9 on, on his part, furtive gesturing, nervousness, and then
10 there was testimony that cocaine was found at the scene as a
11 result of Igor's search, and that that cocaine was
12 attributed to belong to Ricky Cheeks.

13 Now, that, that is contained -- that, that goes to the
14 document and the indictment that's greater than 100 grams.
15 Testimony is already been presented on that issue, on that
16 case, and what we have is the prejudice in that regard, but,
17 furthermore, we have the statement that Mr. Hunter, my
18 friend and colleague, made to the jury that there was, Ricky
19 Cheeks was the deliverer and that Derrick was the baker.

20 Now, these opening statements, although the jury has
21 been cautioned all the time that they don't have much weight
22 because they're made by us lawyers and other reasons,
23 nevertheless, the jury's heard this. The jury has heard
24 that Derrick is the baker, Ricky is the deliver like it's a
25 pizza.

1 Now, what we're talking about here now and, again, is
2 prejudice. We got prejudice at the beginning of the case in
3 the remarks of the solicitor. We've got prejudice in the,
4 in the testimony of the two witnesses that have been
5 presented and heard by the jury and thoroughly
6 cross-examined as to the, whether or not Ricky Cheeks owned
7 the cocaine that was found at the scene of the stop. And,
8 so, in my opinion, there's prejudice to the degree that at
9 this point in time a mistrial should be granted.

10 Now, if the Court sees fit to not grant a mistrial, I
11 refer back to my earlier motion to sever because this was
12 the same type of problem that I was talking about in our
13 pretrial motions to sever the cases because what we had was
14 a, an incident involving the traffic stop and the incident
15 involving the residence. That, again, now has raised its
16 head in its glaring prejudicial manner.

17 And, so, I respectfully submit my arguments on those
18 two points to the Court and in, seriously, the motion for a
19 mistrial is made in, in earnest.

20 THE COURT: All right. And I assume you join in the
21 motion?

22 MR. WILKES: I would join if I could be heard.

23 THE COURT: Yes, sir.

24 MR. WILKES: Your Honor, we, we would join in moving
25 for a mistrial in this case. Obviously the intent was to

1 proceed on that indictment, and it was not called. And for
2 whatever reason, that leaves us with a lot of evidence in,
3 in the record from that offense that's not gonna be before
4 the jury. It's not something we can undo, and I, I would
5 submit that although there's always a great desire to press
6 through once something's started, that, that our clients'
7 overriding interest in a fair and clean trial should
8 overcome that.

9 We would move for a mistrial and be allowed to come
10 back on a day that we can do this cleanly without having
11 that clutter in the record, Your Honor.

12 THE COURT: I'll hear from you, Mr. Hunter.

13 SOLICITOR HUNTER: Yes, Your Honor.

14 Under State v. Tisdale and State v. Beckham the
15 granting of a mistrial is an extreme measure which should be
16 taken only when an incident is so grievous that the
17 prejudicial effect can not be removed any other way.

18 First, Your Honor, the State would argue that, one,
19 there is no prejudice. If a mistrial were to be granted,
20 the exact same evidence, the exact same opening, the exact
21 same witnesses would be testifying to the exact same thing.
22 And, second, even if you do find that there's precedence,
23 excuse me, prejudice that a reading of the indictment would
24 cure that prejudice. The incident must be so grievous to,
25 to have a mistrial granted, and we argue that, in this case,

1 all the jury's not heard is that there's one other
2 indictment. They've heard the evidence to the indictment.
3 They just haven't heard that that indictment is out there,
4 and I believe, before the start of the case, the State did
5 call this indictment. The jury was not here. This was when
6 he asked me to present the case. I believe the State did
7 call this indictment as part of this case.

8 MR. POOLE: Final rebuttal, Your Honor.

9 That's, that's our exact point, and the reason for
10 asking for a mistrial is that it is so grievous, and the
11 points I think I've already made into the record in that my
12 client, Mr. Ricky Cheeks, is prejudiced to the degree that
13 all this evidence has been heard already by the jury that
14 relates to an indictment that has not been read to the jury
15 and, and that's about all I think I can say except that it's
16 my real belief that this is a grievous mistake to go
17 forward.

18 THE COURT: Let me ask you this.

19 As far as the defense is concerned, you were aware of
20 the indictment all along and are prepared to go to trial on
21 the indictment?

22 This is not a surprise that the indictment exist?

23 MR. POOLE: It does not, does not -- it's not a
24 surprise that the document exists, correct.

25 THE COURT: And you were prepared and were defending

1 the case based on that indictment?

2 MR. POOLE: That's right. That's right.

3 THE COURT: Okay. All right.

4 MR. POOLE: But what we have is an indictment that is
5 not properly before the jury, and, and that relates to the
6 greater than 100 grams, which relates to the, the stop
7 and---

8 THE COURT: well, again, the jury is not made any
9 decisions on anything at this point in time. I realize --
10 and, of course, the indictment was read during voir dire.
11 It wasn't read at the beginning of the trial is my
12 understanding, my recollection of how, how this went down.

13 Do you disagree with that?

14 MR. POOLE: I think you're correct, yes, sir.

15 THE COURT: All right. Mr. Wilkes, you seem to want to
16 talk. Go ahead and say something.

17 MR. WILKES: May I?

18 (The Court nods affirmatively.)

19 MR. WILKES: Thank you.

20 It, it would appear more structural in, in nature. I
21 don't know that we can read the indictment and announce and
22 call a case to a jury in the middle of a trial.

23 THE COURT: well, again, we've got an issue here, Mr.
24 Wilkes, in that the case was called by the solicitor, and it
25 was called apparently properly at that time. The issue is

1 whether or not I think I read the indictment to the jury
2 pool --

3 MR. WILKES: Correct.

4 THE COURT: -- entire pool during voir dire, and at
5 that time the purpose of that reading was to allow them to
6 more fully answer the questions. That's exactly what I
7 instructed them.

8 MR. WILKES: I, I believe and---

9 THE COURT: Is that not what I told them. I'll be glad
10 to go back and read, read, have the court reporter read what
11 I said to them at the time.

12 MR. WILKES: I can.

13 THE COURT: That's what I always do. So, I'm sure I
14 did that.

15 MR. WILKES: I can't -- well, I don't, I don't doubt
16 it. If you say you did you did. I, I can't recall---

17 THE COURT: well, that's just been my practice.

18 MR. WILKES: Right.

19 THE COURT: Everytime I read it to them I tell them
20 that it can't be used as evidence.

21 MR. WILKES: Right.

22 THE COURT: They can't consider them in reaching a
23 guilty verdict or a not guilty verdict, and the only purpose
24 for my reading them is to allow them to more fully answer
25 the questions that I'm about to ask.

1 MR. WILKES: Okay.

2 THE COURT: I, I -- we can take it out of the record,
3 but I'm sure that's what I said.

4 MR. WILKES: I, I believe that announcing to the jury
5 the indictments, I just -- I believe that that was not
6 announced in.

7 THE COURT: Beg your pardon?

8 MR. WILKES: I do not believe that the Court announced
9 that one indictment.

10 THE COURT: During voir dire?

11 MR. WILKES: I, I believe -- I thought that---

12 THE COURT: well, let's go back and look at the record.
13 I'll take a---

14 MR. WILKES: Okay. I just---

15 THE COURT: I'll take a five minute break. Come over
16 here and look at it.

17 MR. WILKES: I appreciate it. I just can't recall.

18 THE COURT: Take a look at it. We'll take a break. Go
19 ahead.

20 MR. WILKES: Okay.

21 (Pause.)

22 THE COURT: Now, Mr. Wilkes, have you had a chance to
23 review the record?

24 MR. WILKES: I have, Your Honor. It appears, from what
25 I understand, the solicitor did call five.

1 THE COURT: Uh-huh. (Affirmative.)
2 MR. WILKES: The Court announced four.
3 THE COURT: Uh-huh. (Affirmative.)
4 MR. WILKES: And then referred back to the indictments
5 I think later when the jury was seated. So, we, we---
6 THE COURT: I just said that I was gonna read them
7 again.
8 MR. WILKES: Right, and we'll---
9 THE COURT: And at, at the beginning I think that the
10 purpose I said that I read them for was for them to more
11 fully---
12 MR. WILKES: Right.
13 THE COURT: ---answer the questions that I was about to
14 ask.
15 MR. WILKES: Right.
16 THE COURT: And I instructed them they can't be used by
17 them in any way in determining guilt or innocence.
18 MR. WILKES: Correct, and then I believe---
19 THE COURT: Is that a correct statement of what I said?
20 MR. WILKES: I believe that is, I believe that is
21 correct.
22 THE COURT: Okay.
23 MR. WILKES: And then I believe that when the jury was
24 seated, the Court was giving initial instructions, it
25 referenced---

1 THE COURT: I just said I was not gonna read them
2 again.

3 MR. WILKES: Right. Okay. And we would maintain that
4 the reference back to the four indictments would be the same
5 as having announced four to them at that time, and for the
6 record---

7 THE COURT: I understand that would be your position.

8 MR. WILKES: That is my position and for the record we,
9 we'd just -- we'll stick with that.

10 THE COURT: Well -- and does the record indicate though
11 that the State called all five cases?

12 MR. WILKES: It does. It does.

13 THE COURT: And there was no objection I believe when I
14 finished my initial argument to the initial statement to the
15 jury?

16 MR. WILKES: Right.

17 THE COURT: I asked if anybody had an objection to
18 anything that I said---

19 MR. WILKES: Right.

20 THE COURT: ---and I don't believe the defense raised
21 any objections.

22 MR. WILKES: That would put the defense in a tough
23 position to, to be asking for another charge to be brought.
24 So, I don't know if Mr. Poole would of been properly in that
25 position to raise it. I certainly wouldn't.

1 THE COURT: Well, I'm not, I'm not -- I'm just saying
2 there was no objection to my---

3 MR. WILKES: That's -- you are correct. I remember
4 that and that's, that's, that's correct.

5 THE COURT: And I always ask if there's any objection
6 to anything that I said in my opening statement.

7 MR. WILKES: That's, that's correct.

8 THE COURT: And I did not hear any at that time.

9 MR. WILKES: You would not hear an objection from the
10 defense for missing a charge I promise, but --.

11 THE COURT: Well, I didn't hear any from either side.

12 MR. WILKES: Well, that's true. But that, that, for
13 the record, would be our, our position, and we maintain that
14 that would prejudice us in increasing the charges for the
15 jury now.

16 THE COURT: Well, now, it doesn't increase it over the
17 cases that were called at the beginning of the trial.

18 MR. WILKES: That is true.

19 THE COURT: The way -- the prejudice that I see is that
20 perhaps there would be jurors who did not have the benefit
21 of my having read that indictment during voir dire and
22 perhaps did not properly answer questions.

23 MR. WILKES: Correct.

24 THE COURT: I'll be more than happy to inquire of the
25 jury at this time and read the indictment to them so that

1 they have a full understanding that that indictment does
2 exist, and would ask them if it would change any of the
3 responses that they had during voir dire.

4 MR. WILKES: Without waiving the initial objection and
5 motion for mistrial---

6 THE COURT: I'm not asking anybody to waive anything.

7 MR. WILKES: The, the---

8 THE COURT: I'm just saying that that is---

9 MR. WILKES: As, as---

10 THE COURT: ---a possibility to try to cure the
11 situation.

12 MR. WILKES: And, and for, for that portion, it, it
13 would cure their responses, and, and, therefore---

14 THE COURT: Well, I understand that. And I -- but,
15 again, we've got a situation where the case was called --

16 MR. WILKES: Correct.

17 THE COURT: -- by the solicitor to be tried. And as
18 I've indicated, apparently this indictment was paper-clipped
19 to the back of another one and was not read during voir
20 dire.

21 MR. WILKES: Right.

22 THE COURT: I did not read it again to them once the
23 case started, and I heard no objection to my having not done
24 it during voir dire.

25 MR. WILKES: Right.

1 THE COURT: In fact, there was no objection at all to
2 the jury selection process either.

3 MR. WILKES: That is, that is correct.

4 THE COURT: By either side cause I always ask for that
5 too.

6 Okay. Anything further, Mr. Poole?

7 MR. POOLE: Yes, sir, just for the sake, I assume that
8 the Court would, is planning on reading the indictment and
9 asking certain questions of the jury on the 100 grams.

10 THE COURT: Well, the concern I have there is that,
11 that, from your prospective, is that it may over emphasize
12 that particular charge to the jury if I do that. Mr. Wilkes
13 seems not want to discuss my having done that. I'll discuss
14 it with you as to whether or not you think that's a prudent
15 course if I decide not to mis-try the case, to bring that
16 indictment to the jury's attention, and also to cure any
17 possible problems that there might be with failure to
18 adequately answer the voir dire questions.

19 But, again, there is -- that will call that indictment
20 clearly to the jury's attention, and I -- the Court doesn't
21 want to overly emphasize any one charge. I can -- of
22 course, I intend and I always instruct the indictments at
23 the close of the trial during my charge on the law, and it
24 can just be included with the other charges at that time if
25 I decide to go forward.

1 MR. POOLE: Okay.

2 THE COURT: But I think it's a real decision on your
3 part as to whether or not you want me to try a curative
4 situation or simply state the State called it, I failed to
5 read it, you don't want me to inquire of the jury as to
6 whether that prejudices their answers to the voir dire, and
7 we'll go forward. If you want me to inquire to see if that
8 would change any answers that they gave during voir dire,
9 I'll be more than happy to do that.

10 MR. POOLE: Let me give you -- give me a moment so I
11 can confer---

12 THE COURT: All right.

13 MR. POOLE: ---and then I'll get back to you.

14 THE COURT: Because I understand this charge relates
15 primarily to your client---

16 MR. POOLE: Sure.

17 THE COURT: ---Mr. Poole, and not to Mr. Wilkes.

18 MR. POOLE: Sure.

19 THE COURT: So, he may be not so concerned about that.

20 MR. POOLE: Sure.

21 THE COURT: You might be. So, that is---

22 MR. WILKES: We are at odds now. That is a problem.

23 THE COURT: I'm just pointing that out.

24 (Pause.)

25 MR. WILKES: Here's, here's our dilemma, Your Honor.

1 I -- as you correctly noted, we obviously have different
2 concerns on it because my clients not necessarily part of
3 the charge and his is, and I would as soon have voir dire on
4 it and he would not. So, now we are in a---

5 THE COURT: Well, I can clearly instruct them that your
6 client is not involved in this charge at all. That can be
7 made abundantly clear to the jury.

8 MR. WILKES: And, and that would, that would suit me
9 well. But now Mr. Poole and I are at odds cause our
10 clients---

11 THE COURT: Well, now I'm going to ask Mr. Poole
12 whether he wishes for me to do anything curative as far as
13 voir dire is concerned. If I do that, then in the interest
14 of protecting Mr. Wilkes' client, I would clearly state that
15 this charge that I omitted during that discussion was, in no
16 way, involves my client cause he's not charged in it.

17 MR. POOLE: Your Honor, the less mention of it, the,
18 the less mention the Court makes of it is what I want at
19 this point --

20 THE COURT: Okay.

21 MR. POOLE: -- if the Court is determined to do that.
22 Less mention---

23 THE COURT: So, basically you'd rather I not go back
24 and inquire concerning the voir dire responses?

25 MR. POOLE: That's right.

1 THE COURT: Okay.

2 MR. POOLE: That's my position, and, and since that
3 does put us, puts us at odds, that leads to, again, to my
4 motion to---

5 THE COURT: well, I'm not sure that puts you at odds
6 because he doesn't want that mentioned at all I think.

7 MR. POOLE: Right.

8 THE COURT: Let's ask him what he wants.

9 Mr. Wilkes, what do you want?

10 MR. WILKES: I would like the voir dire, and I would
11 like -- I would like the voir dire.

12 THE COURT: Does it involve your client at all?

13 MR. WILKES: In a way it does because now the evidence
14 is been introduced, and I think that, that, to have the voir
15 dire is important, and I think to have the instruction that
16 my client is not involved in it is important as the Court
17 said.

18 Mr. Hunter.

19 SOLICITOR HUNTER: Your Honor, during the voir dire we
20 had a trafficking cocaine or crack over 400 grams, PWID half
21 miles for both defendants. I don't see how trafficking over
22 100 grams would, in anyway, influence their decisions in the
23 voir dire. If you just read the indictment and just as
24 Ricky Cheeks name in it, they would understand what the
25 indictment is and nothing further would need to be said.

1 THE COURT: Are we through talking about it?

2 MR. POOLE: Yes, sir, just---

3 THE COURT: Cause I've got a feeling that -- no, I
4 won't say that.

5 Go ahead.

6 MR. POOLE: For the sake of the, the record, Your
7 Honor, I make my objections now for the denial of my motions
8 for a mistrial and the denial---

9 THE COURT: Well, I haven't denied it yet. I'm still
10 considering it.

11 MR. POOLE: Well, in the totality of circumstances.

12 THE COURT: Well, I'm simply discussing with you if I
13 decide not to grant it.

14 MR. POOLE: Okay. When I hear, when I hear the Court's
15 decision---

16 THE COURT: Now we go from there.

17 MR. POOLE: Okay.

18 THE COURT: Because I do recognize that there is
19 perhaps a difference of opinion on the defense as to how
20 that should be handled. And, so -- but I'm not sure that
21 difference of opinion rises to the point that I should grant
22 a mistrial.

23 MR. POOLE: Yes, sir.

24 THE COURT: I will consider that.

25 MR. POOLE: Okay. Well, upon the Court's ruling, I --

1 just a brief remark I need to make.

2 THE COURT: Okay. All right. I'm gonna take it under
3 advisement a few minutes.

4 Court's in recess.

5 (WHEREUPON, a short recess was taken at this time.)

6 THE COURT: Mr. Poole, you want to take up something
7 with me before we start?

8 MR. POOLE: No, we're just awaiting your ruling, Your
9 Honor.

10 THE COURT: Okay. All right. All right. It appears,
11 from what I have gathered, that the issue is the fact that
12 the Court failed to announce to the jury one of the
13 indictments against Ricky Dwight Cheeks. That one being for
14 the, the, what I'll refer to as the traffic stop. That is
15 in Case Number 09-GS-42-6457. That particular indictment
16 was not read to the Grand Jury during voir dire. It was,
17 however, called by the State.

18 I also recall that, on those indictments, I asked both
19 defense counsel if they, if their clients should be
20 arraigned on those charges, and that both sides waived a
21 formal arraignment and asked for jury trial, both of the
22 defense attorneys waived arraignment and asked for a jury
23 trial on the charges. The purpose of my reading the
24 indictments to the jury panel as a whole was for the purpose
25 of allowing them to more fully respond to voir dire

1 questions that were about to be asked.

2 This indictment was not read to them at that time, and
3 to the extent that the jury panel may have used this
4 indictment in responding to my questions, I will inquire of
5 the jury concerning that particular issue. I do not find,
6 however, that there is any prejudice to the defense's cases
7 since both defendants were aware of the indictments being
8 called by the solicitor, that they were, that indictment was
9 before the Court, they have argued it in their opening
10 statement, and I did not hear any argument during our
11 discussion of this issue that somehow the defense has failed
12 to present some evidence or ask some question or, in some
13 way, defend Mr. Cheeks, Ricky Cheeks, from this indictment.
14 The issue appears to be whether or not the jury was
15 prejudiced somehow by my failure to read that indictment to
16 them during voir dire.

17 For that reason I will inquire of them to determine
18 whether or not any answers to my questions would have been
19 different had that indictment been read, but it is clear to
20 the Court that the case was called and was before the Court
21 at that time. I will note that, during the, all steps of
22 the process, all sides were asked whether or not there was
23 any objection to the Court's presentations to the jury panel
24 and the jury selection process. No objections were raised
25 until this morning.

1 So, when I talk about prejudice, I'm talking about
2 whether or not the defendant has had an opportunity to fully
3 defend and argue this particular indictment, and I find that
4 this defendant has had an opportunity to fully defend to
5 this point and argue that the, the issues that are in this
6 indictment. In fact, it's my belief that the defense was
7 not aware of the fact that it was not read until perhaps
8 this morning. It seems to be what I've gathered from my
9 discussions with counsel.

10 So, to that extent, I will inquire of the jury as to
11 whether or not it would change any of their responses, and
12 it's my finding that it was called before the Court by the
13 solicitor, and everyone was aware that the indictment was in
14 controversy in this particular matter.

15 Mistrial is a drastic solution and I will be sure that
16 the jury, from this point forward, forward is fully aware of
17 all indictments that are before the Court and the
18 allegations that have been made in those indictments.

19 Anything you wish to put on the record, the State?

20 SOLICITOR HUNTER: Nothing, Your Honor.

21 THE COURT: From the defense?

22 MR. POOLE: May it please the Court, Your Honor?

23 THE COURT: Yes, sir.

24 MR. POOLE: Just, just -- and this probably is
25 unnecessary, but I just want to make sure that the record

1 reflects that, that any, any introduction of evidence here
2 on, regarding the traffic stop indictment against Ricky
3 Cheeks we object to as a continuing objection based upon our
4 motion for a mistrial and our motion for severance.

5 THE COURT: Okay, sir.

6 MR. POOLE: As a motion made now for---

7 THE COURT: Any objection to him having a continuing
8 objection to any evidence you present on that particular
9 indictment?

10 SOLICITOR HUNTER: None, Your Honor.

11 THE COURT: All right. We'll note, note that your
12 objection continues throughout the trial.

13 MR. POOLE: Thank you very much.

14 THE COURT: Anything further, Mr. Wilkes?

15 MR. WILKES: No, sir.

16 THE COURT: All right. Let's bring the jury in.

17 (WHEREUPON, the following takes place within the
18 presence of the jury.)

19 THE COURT: All right. The record will reflect the
20 jury has returned to the courtroom.

21 First of all, let me apologize to you for your long
22 wait in the jury room this morning, and also make you aware
23 of the fact that it is fairly chilly in this courtroom. We
24 go through this quite often this time of the year when the
25 weather changes. In order to get this system turned over to

1 heat they have to climb up into the crawl space in the attic
2 and throw some switches and something. That's been asked
3 for. They're on their way suppose to be doing that.

4 So, I'm aware that it's cold. I apologize to you about
5 that. But we're doing everything we can. This is a fairly
6 old building and that -- it's, it's showing. So, my
7 apologize, apologies to you and we'll try to get that
8 rectified as quickly as we can.

9 Yesterday when I went over with you the indictments in
10 this case, and I did that when we were asking questions
11 about this case. Apparently there was one indictment that
12 was called by the solicitor for trial that was attached to
13 the back of another indictment that I did not read to you at
14 that time. So, I'm going to go over this indictment with
15 you again. I'll remind you that you remain under oath to
16 respond to my questions in a truthful, honest, and complete
17 manner.

18 The indictment that was not read to you at that time is
19 Case Number 09-GS-42-6457. That is an indictment against
20 Ricky Dwight Cheeks. It is for the offense of trafficking,
21 trafficking in crack cocaine. That indictment states that
22 Ricky Dwight Cheeks did, in Spartanburg County, on or about
23 June 4th of 2009, knowingly sell, manufacturer, deliver,
24 purchase, or bring into the state, or did provide financial
25 assistance, or did otherwise aid, abet, attempt, or conspire

1 to sell, manufacture, deliver, purchase, or bring into this
2 state, or did knowingly, actually or constructively,
3 possess, or did knowingly attempt to actually or
4 constructively possess more than a hundred, 100 grams of
5 cocaine base and or crack cocaine, a Schedule II controlled
6 substance, in violation of Section 44-53-375 of the Code of
7 Laws of South Carolina, 1976 as amended, against the peace
8 and dignity of the State and contrary to the statute in such
9 case made and provided.

10 Now, that's the indictment, as I've said, that was
11 attached to another one and was not read to you yesterday.

12 My question to you at this time is that having now
13 heard that indictment, would that have changed any of the
14 answers that you gave to any of my questions that I asked
15 during voir dire?

16 If it would change any of the answers that you gave me,
17 please stand.

18 (No response.)

19 THE COURT: If any of you feel that that would, in any
20 way, change the Court's finding that you are a fair and
21 impartial juror in this case, please stand.

22 (No response.)

23 THE COURT: Does the State wish any further inquiry of
24 the jury at this time?

25 SOLICITOR HUNTER: Nothing, Your Honor.

1 THE COURT: Does the defense wish any further inquiry
2 of the jury at the time, Mr. Wilkes?

3 MR. WILKES: No, sir.

4 THE COURT: Mr. Poole.

5 MR. POOLE: No, sir.

6 THE COURT: All right. All right. It will be my
7 finding that the jury's responses would have been the same
8 to the Court had that indictment been read. As I stated
9 earlier, the case was called by the State, and now I will
10 allow the State to proceed with the calling of its next
11 witness.

12 SOLICITOR HUNTER: Your Honor, the State calls Officer
13 Nate Cantrell.

14 THE COURT: Come forward to my left to be sworn.

15 NATE CANTRELL, being first duly
16 sworn, testified as follows:

17 THE COURT: Sir, once you're seated state your name for
18 the record.

19 WITNESS: It's Nate Cantrell.

20 THE COURT: Your witness, Mr. Hunter.

21 DIRECT EXAMINATION

22 BY SOLICITOR HUNTER:

23 Q Mr. Cantrell, did you have an opportunity to
24 investigate a car stop on June 4th, 2009?

25 A I did.

Nate Cantrell - Direct examination
by Solicitor Hunter

- 1 Q Okay. And where were you?
- 2 A We were at the intersection of Vanderbilt Road and
- 3 Textile Road located in Spartanburg County.
- 4 Q Is that near Vanderbilt and West Main Street?
- 5 A That's correct.
- 6 Q Okay. When you first got there, what did you do?
- 7 A When I first got there I noticed that Investigator Matt
- 8 Hutchins had conducted a traffic stop on a black in color
- 9 Ford I believe it's a Crown Victoria. I was there to help
- 10 back him up, support him on that traffic stop. Once I got
- 11 there, realized that we may need to use my narcotics
- 12 detection K-9.
- 13 Q Are you a K-9 officer?
- 14 A I am.
- 15 Q What type of training goes into that?
- 16 A In the latter part of 2003 I went to a 13 week course
- 17 with U.S. Customs Border Patrol in Fort Royal, Virginia.
- 18 That was to not only certify myself as a K-9 handler, but to
- 19 also certify my narcotics detection K-9 Igor.
- 20 Q Okay. And, so, you've been together how long?
- 21 A Since '03, latter part of '03.
- 22 Q Have you taken any other courses since that time?
- 23 A We not only train weekly, but we certify annually every
- 24 year.
- 25 Q So, you say weekly and annually?

Nate Cantrell - Direct examination
by Solicitor Hunter

1 A Yes, sir.

2 Q Okay. what type of training does he go through during
3 those weekly and annual certifications?

4 A Just general training as far as building searches,
5 vehicle searches. what we'll do is we set up problems.
6 We'll set out drugs that not only do I not know where it's
7 at, but obviously the K-9 doesn't either. Set out by a
8 third person, and we run real life scenarios.

9 Q What were to happen if he were to fail those tests?

10 A We would not be certified as a K-9 team.

11 Q All right. were you currently certified June 4th,
12 2009?

13 A Yes, we were.

14 Q Okay. How far behind Matt Hutchins were you when you
15 made, he made the car stop?

16 A As far as a resting spot was probably half to a whole
17 car length.

18 Q Well, as far as how far were you behind him time wise?
19 Were you pretty close to him?

20 A Yes, sir.

21 Q Okay. when you get out of the car with Igor, what do
22 you do next?

23 A I then begin to approach the suspect vehicle that we're
24 gonna conduct a free air sniff on.

25 Q Who's, who's at this vehicle?

Nate Cantrell - Direct examination
by Solicitor Hunter

1 A At the time it was Investigator Hutchins, I believe
2 Investigator McJunkin, and the two individuals that were in
3 the vehicle.

4 Q Okay.

5 A The suspect vehicle.

6 Q Did you ask them to do anything?

7 A I -- best I recall, I believe they were out of the
8 vehicle when I approached, and I asked them to remove the
9 two suspects from their vehicle, from around that vehicle
10 where I could conduct a free air sniff.

11 Q Now, why do you ask them to move from the vehicle?

12 A Mainly safety precautions and, and it doesn't hinder
13 our search area.

14 Q Okay. And when you approached the vehicle, where did
15 you approach it from?

16 A Again, that dictates as far as traffic and the, and the
17 environment on that particular day. I believe I approached
18 the vehicle from the rear passenger side.

19 Q Do you remember who was on the passenger side as far as
20 subjects?

21 A Yes, sir, that would of been a Mr. Ricky Cheeks who
22 is---

23 Q Okay.

24 A ---I believe in the passenger seat.

25 Q Who was the officer with him?

Nate Cantrell - Direct examination
by Solicitor Hunter

1 A Travis McJunkin, Investigator McJunkin.

2 Q When you approached the vehicle, did you notice
3 anything on the ground?

4 A No, sir, I did not.

5 Q Okay. What did you do once Igor started to sniff?

6 A Well, again, we had the investigators remove both
7 suspects from the vehicle. At that time I gave him a
8 command to conduct a free air sniff of the vehicle, and like
9 I said, approached him from the passenger rear side. I can
10 not recall if we made it all the way around the vehicle.
11 But the passenger door was partially opened. At that time,
12 K-9 Igor jumped into the passenger seat and alerted by
13 sitting at the passenger seat.

14 Q What, what type of alert dog is he?

15 A It's known as a passive alert, which means when he gets
16 into the presence of narcotics odor he'll sit at the, at the
17 closest point that he can get that odor and he sits and he
18 waits to be rewarded.

19 Q Will he move at all?

20 A No, sir.

21 Q What are the other types of alert dogs?

22 A It's also known as an aggressive alert, which basically
23 means that they will claw and scratch at the closest point
24 of the, the source of odor.

25 Q So, what did Igor do at the passenger seat?

Nate Cantrell - Direct examination
by Solicitor Hunter

1 A He sat.

2 Q Did he move?

3 A No, sir, not until I rewarded him.

4 Q Okay. And at that time, once you reward him, what
5 happened next?

6 A Once I rewarded Igor I removed him from the vehicle,
7 and I began to take him back to, to my vehicle to put him
8 up. From there I would go back and, and help do a hand
9 search of the vehicle.

10 Q Did you notice anything, anything on the ground when
11 you went back to the vehicle?

12 A No, sir, not that I recall.

13 Q Okay. When you came back to do the search of the
14 vehicle, what did you find?

15 A Found a clear plastic, plastic bag containing four
16 blocks of an off-white substance, and it was located on the
17 ground near the, the rear passenger area of the vehicle like
18 the rear fender weld.

19 (WHEREUPON, a bag containing drugs was marked as
20 State's Exhibit No. 13 for identification purposes only at
21 this time.)

22 SOLICITOR HUNTER: May I approach, Your Honor?

23 THE COURT: You may.

24 Q I'm gonna show you what's been premarked as State's
25 Exhibit 13.

Nate Cantrell - Direct examination
by Solicitor Hunter

1 Do you recognize this?

2 A Yes, sir, I do.

3 Q And how do you recognize that?

4 A This is the same substance I found on that day.

5 There's a clear plastic bag and there's four blocks of
6 off-white substance.

7 Q What is the plastic bag?

8 A I'm sorry?

9 Q What is the plastic bag called---

10 A It makes---

11 Q ---or the plastic bag that's in it?

12 A Okay.

13 Q Correct.

14 A You talking about---

15 A Correct.

16 A This is a, a, an evidence B.E.S.T. Bag that we use at
17 the Sheriff's Office to, to place cocaine, crack, heroin, or
18 meth.

19 Q Okay. And what do you do with this B.E.S.T. Bag?

20 A We'll take the, the drugs, place it in the evidence
21 bag. We'll then seal. It has a, a plastic strip that we'll
22 take off, seal it until you see the red line here. It has a
23 control number which identifies this bag. We take the, the
24 first portion of it, sign it, keep it with your case file,
25 and we record exactly what the control number is. That's

Nate Cantrell - Direct examination
by Solicitor Hunter

1 how we track.

2 Q Did you do that in this case?

3 A Yes, sir, I did.

4 Q And what do you do with the substance after that?

5 A We will deposit it into the evidence drop box or the
6 evidence locker of the Sheriff's Office and---

7 Q Where is that located?

8 A At the Spartanburg County Sheriff's Office on 8045
9 Howard Street.

10 Q And who has access to that drop box?

11 A The evidence custodian officers.

12 Q Does anybody else have access?

13 A No, sir.

14 Q Okay. Did you do that in this case?

15 A Yes, sir, I did.

16 Q Now, where did you collect the substance again?

17 A It was located on the ground directly at the rear
18 passenger area.

19 Q So, in the rear passenger side of the vehicle?

20 A Yes, sir.

21 Q Okay. Answer any questions the defense may have.

22 THE COURT: Mr. Wilkes.

23 MR. WILKES: Thank you, Your Honor.

24 CROSS-EXAMINATION

25 BY MR. WILKES:

Nate Cantrell - Cross-examination
by Mr. Wilkes

1 Q Officer Cantrell, have you had any contact or did you
2 have any contact in this case with Mr. Elder?

3 A No, sir, not that I recall.

4 Q Okay. Did you have any contact with Mr. Markley?

5 A Mr. Martin?

6 Q Markley, Tracy Markley.

7 A No, sir, not that I recall.

8 Q And that was -- I'm -- have you had any in the case at
9 all?

10 Have you had any communications with him since the date
11 of arrest?

12 A No, sir.

13 Q Very good. No further questions.

14 THE COURT: Mr. Poole.

15 MR. POOLE: Yes, sir.

16 CROSS-EXAMINATION

17 BY MR. POOLE:

18 Q Officer Cantrell, do you remember about what time you
19 arrived at the scene?

20 A I, I believe, and I don't have it in my report, but
21 looking from the other reports I believe it was around
22 four o'clock in the afternoon.

23 Q Around 4:00?

24 A I believe so.

25 Q And who -- this, this was in reference to a failure to

Nate Cantrell - Cross-examination
by Mr. Poole

1 stop at a stop sign, traffic stop?

2 A Best I recall, yes, sir.

3 Q Is that right?

4 A Investigator Hutchins was the one who conducted the
5 traffic stop, and I believe that was the offense.

6 Q Okay. And you were, of course, dispatched to this
7 location, and as far as you knew at that time it was a
8 routine traffic violation, is that right?

9 A We were conducting an operation that day, surveillance
10 with the narcotic's unit.

11 Q Okay.

12 A I did know that Investigator Hutchins observed a
13 traffic violation at that time and that's why he conducted
14 the traffic stop.

15 Q Okay. And, so, do you know how long the car had been
16 detained prior to you getting there?

17 A Not even minutes because I was pretty close to---

18 Q All right.

19 A ---Investigator Hutchins.

20 Q Okay. And I believe you stated that by the time you
21 got there the, both the, the, Elder and Ricky Cheeks were
22 still in the automobile?

23 A I believe, by the time I arrived, they were outside of
24 the vehicle.

25 Q Okay.

Nate Cantrell - Cross-examination
by Mr. Poole

1 A I, I may be correct on that, sir. I do know that by
2 the time I deployed my detection K-9 that they were outside
3 the vehicle. I can not remember, once I arrived on the
4 scene, if they were inside or out.

5 Q Once you arrived, were they, I'm talking about both of
6 them, were they outside of the vehicle---

7 A Once I---

8 Q ---or inside?

9 A Once I deployed my dog they were outside, yes, sir.

10 Q Okay. But you did -- you didn't deploy your dog as
11 soon as you got there?

12 A Shortly after, yes, sir. I can't recall if they were
13 inside the vehicle the second I got there.

14 Q Okay. So, both of them could of been outside, is that
15 right?

16 A Possible.

17 Q Okay. And when -- Igor, what breed of dog is he?
18 I'm just curious.

19 A He's a German Shepherd.

20 Q Okay. And how long have you been working with him, you
21 probably testified to that, how long?

22 A Since latter '03.

23 Q Okay. And when you deployed the dog, where, where was
24 the initial position of deployment?

25 A I retrieved him from the rear of my vehicle --

Nate Cantrell - Cross-examination
by Mr. Poole

1 Q Okay.

2 A -- which was located behind Investigator Hutchins'
3 vehicle.

4 Q Okay. And you take him around but, from behind your
5 car, around Investigator Hutchins' car, and to the Crown
6 Victoria?

7 A That's correct.

8 Q All right. What was the initial position of Igor on
9 the Crown Victoria?

10 Where -- what did you do?

11 A We approached the vehicle from the rear passenger area
12 is where we, we approached the suspect vehicle.

13 Q Rear passenger area and then---

14 A Yes, sir.

15 Q ---he went up to the passenger area and sat?

16 A Yes, sir, he actually went to the front passenger door
17 and jumped inside the vehicle and sat at the passenger seat.

18 Q Okay. So, you did not take Igor all the way around to
19 the driver's side?

20 A I do not recall taking him around the driver's side.
21 When I conduct a free air sniff with my dog, with Igor, he
22 will, he will work that area. If he catches the presence of
23 narcotics odor he'll continue to work that. If he does that
24 on the passenger side he may not make it to the driver's
25 side if that's where he's getting the, the strongest

Nate Cantrell - Cross-examination
by Mr. Poole

1 presence of the odor.

2 Q So, the answer to the question is then you do not
3 recall whether you took him around to the driver's side or
4 not, is that right?

5 A That's correct.

6 Q Okay.

7 A I don't recall.

8 Q All right. Thank you, Officer Cantrell.

9 A Uh-huh. (Affirmative).

10 THE COURT: Redirect?

11 SOLICITOR HUNTER: One quick question, Your Honor.

12 REDIRECT EXAMINATION

13 BY SOLICITOR HUNTER:

14 Q Mr. Poole was asking how long you worked with Igor.

15 How long have you been in law enforcement?

16 A Just a little over 12 years.

17 Q Doing -- what, what were your duties?

18 A When I first arrived, was hired, hired with the
19 Sheriff's Office I was on patrol. I've been in narcotics
20 for right at seven years.

21 Q And what are you currently doing?

22 A I'm assigned to the DEA task force. I'm still at the
23 narcotic's unit at the Sheriff's Office. But I'm a federal
24 task force officer with the DEA.

25 Q Okay. Thank you.

Nate Cantrell - Redirect examination
by Solicitor Hunter

1 THE COURT: Mr. Wilkes, any other questions?

2 MR. WILKES: No, sir. Thank you, Your Honor.

3 THE COURT: Mr. Poole.

4 MR. POOLE: No, sir.

5 THE COURT: You may step down.

6 State may call its next witness.

7 SOLICITOR HUNTER: State would call Investigator
8 McJunkin.

9 THE COURT: Come forward, sir, to my left to be sworn.

10 TRAVIS MCJUNKIN, having been first duly
11 sworn, testified as follows:

12 THE COURT: Have a seat please.

13 SOLICITOR HUNTER: Your Honor, may Mr. Cantrell be
14 excused?

15 THE COURT: You can be seated.

16 Any objection?

17 MR. WILKES: No objection, Your Honor.

18 THE COURT: Mr. Poole, any objection?

19 MR. POOLE: None here.

20 THE COURT: He's free to go.

21 SOLICITOR HUNTER: Thank you.

22 MR. WILKES: Your Honor, I'm not sure if that's

23 Mr. Elder in the back. If it is---

24 SOLICITOR HUNTER: It's not.

25 MR. WILKES: All right. I was gonna make a suppression

Travis McJunkin - Direct examination
by Solicitor Hunter

1 motion.

2 THE COURT: I understand.

3 All right. Have you stated your name?

4 WITNESS: Travis McJunkin.

5 THE COURT: Your witness, Mr. Hunter.

6 DIRECT EXAMINATION

7 BY SOLICITOR HUNTER:

8 Q Mr. McJunkin, who are you currently employed by?

9 A The Spartanburg County Sheriff's Office.

10 Q And how long have you been so employed?

11 A Since May of 2006.

12 Q Is that the basis of your law enforcement experience?

13 A No, sir, in 2003 I began working for the Spartanburg
14 Public Safety Department. Worked with them until 2005. I
15 went to the South Carolina Department of Probation, Parole,
16 and Pardon Services after which I began with the Sheriff's
17 Office in May of 2006.

18 Q Okay. And the Spartanburg Public Safety Department, is
19 that the city police?

20 A Yes, sir, it is.

21 Q Okay. How long have you been in narcotics?

22 A Since January of 2009.

23 Q Okay. Did you have an opportunity to assist in the
24 investigation on June 4th, 2009?

25 A Yes, sir, I did.

Travis McJunkin - Direct examination
by Solicitor Hunter

- 1 Q what were your duties at that time?
- 2 A Myself and Investigator Hutchins, Matt Hutchins, were
3 conducting surveillance during an operation that we had
4 during the process of which we began following a black Crown
5 Victor that committed a traffic violation at which time
6 Investigator Hutchins initiated a traffic stop on the same
7 vehicle and I assisted.
- 8 Q Where did Investigator Hutchins go?
- 9 A For the traffic stop?
- 10 Q Correct.
- 11 A The traffic stop occurred on Vanderbilt Road near the
12 intersection of Textile Road in Spartanburg County.
- 13 Q Now, when I said where did he go, I -- as far as once
14 the traffic stop was initiated, where was his movements, his
15 body movements to?
- 16 A Investigator Hutchins would be what we call the contact
17 officer. He would make contact with the operator of the
18 motor vehicle. So, he went to the driver's side of the
19 vehicle and spoke to a Mr. Eric Elder I believe was the
20 driver of the vehicle.
- 21 Q Okay. And where were you?
- 22 A There was a passenger in the front passenger seat, and
23 I responded to the passenger seat location.
- 24 Q Who was the passenger of that vehicle?
- 25 A A Mr. Ricky Cheeks.

Travis McJunkin - Direct examination
by Solicitor Hunter

1 Q Okay. Now, what did you do once you approached the
2 passenger?

3 A Initially, for safety reasons, I asked Mr. Cheeks to
4 keep his hands on the dashboard so I could see them.

5 Q Was he doing that?

6 A At that time, yes, sir.

7 Q Okay. At what point did you get him out of the car?

8 A I believe Investigator Hutchins asked Mr. Elder to step
9 to the rear of the vehicle at which time he also asked me to
10 do the same with Mr. Cheeks at which time I opened the door,
11 instructed him to unbuckle, and to step from the motor
12 vehicle.

13 Q Can you describe his actions at that time?

14 A He appeared nervous. His breathe---

15 Q By appear nervous, what do you mean?

16 A Breathing heavy, looking around, shaking. Just, in
17 general, just seemed nervous by our presence.

18 Q Okay. Did you hand him anything when he got out of the
19 car?

20 A He had a walking cane I believe in the front passenger
21 seat with him and I retrieved that for him.

22 Q Okay. When he stepped out of the car, did you observe
23 him doing anything?

24 A Yes, sir, he made a motion to reach for the right side
25 of the shorts that he had on, had on, kind of like the cargo

Travis McJunkin - Direct examination
by Solicitor Hunter

1 pocket area of the shorts he had on at which---

2 Q How long, how long were his pants?

3 A They were pretty long. If I'm not mistaken I think
4 they were below the knee.

5 Q How would you describe his movements?

6 A Well, he just kept reaching for the right side. We
7 describe them in law enforcement as furtive, suspicious.
8 There was something bulging in that area. I noticed that.
9 For safety I instructed him several times to keep his hands
10 away or keep from reaching for that right side of the pocket
11 area for my safety and Investigator Hutchins.

12 Q Did he comply with your orders?

13 A No, sir, he would initially, but I had to repeat myself
14 several times.

15 Q Okay. And at that time did he comply with your orders?

16 A No, actually I walked him to the rear of the vehicle.
17 Crown Victoria is a four door vehicle. When Investigator
18 Hutchins walked Mr. Elder to the rear of the vehicle I would
19 do the same with Mr. Cheeks. I escorted him to the rear of
20 the vehicle. It's kind of in-between the passenger door and
21 the trunk area, and, again, he reached and at one point I
22 had to physically move his hand from that area of his body.

23 Q Okay. At any point was Eric Elder on the passenger
24 side of that vehicle?

25 A No, sir, it was just myself and Mr. Cheeks.

Travis McJunkin - Direct examination
by Solicitor Hunter

1 Q So, there's only two people on that side of the
2 vehicle?

3 A Yes, sir.

4 Q Okay. Where did you take Mr. Cheeks, Mr. Ricky Cheeks,
5 from that point?

6 A Investigator Cantrell had arrived at this time.
7 Investigator Cantrell was gonna take his K-9 around the
8 vehicle at which time we can't have persons around the
9 vehicle. I escorted Mr. Cheeks to the front of Investigator
10 Hutchins' vehicle. I allowed Mr. Cheeks to walk in front of
11 me for safety purposes so I could see them. I wouldn't turn
12 my back to him and allow him to follow me, and I followed
13 him to the front of Investigator Hutchins' vehicle.

14 Q Now, when you first approached the car, did you view
15 anything on the ground?

16 A No, sir, I did not.

17 Q Okay. And after taking Mr. Cheeks back to Mr. Hutchins
18 car, did you observe anything on the ground?

19 A No, sir.

20 Q Once Igor did his sniff, did you observe anything on
21 the ground?

22 A No, sir, not at that time.

23 Q Okay.

24 THE COURT: Just one second.

25 Sir, the gentleman in the back, are you awake?

Travis McJunkin - Direct examination
by Solicitor Hunter

1 JUROR: Yes, sir.

2 THE COURT: I have to be sure that all jurors are
3 paying attention. Sit up so I can see your see, see your
4 eyes please, sir. Sit up straight for me. Thank you. You
5 need to pay attention to what's going on.

6 Thank you, Mr. Hunter. You may proceed.

7 SOLICITOR HUNTER: Thank you.

8 Q Once the search began on the car did you view anything
9 on the ground?

10 A Yes, sir, after Investigator Cantrell located a bag of
11 off-white rock like substance on the ground I seen it on the
12 ground in the exact area that myself and Mr. Cheeks were
13 when we were between the trunk area and the rear passenger
14 door on the Crown Victoria.

15 Q Other than officers, was anybody in that area other
16 than Mr. Cheeks?

17 A No, sir.

18 Q Okay. Please answer any questions the defense may
19 have.

20 THE COURT: Mr. Wilkes.

21 MR. WILKES: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. WILKES:

24 Q Were you involved in the search in anyway?

25 A The search of the vehicle?

Travis McJunkin - Cross-examination
by Mr. Wilkes

- 1 Q The residence.
- 2 A The residence?
- 3 Q Yes, sir.
- 4 A Yes, sir.
- 5 Q What was your participation in the search of the
- 6 residence?
- 7 A I searched the house, assisted in searching a side
- 8 room.
- 9 Q Which side room was that?
- 10 A I really can't recall. It was several rooms. My
- 11 lieutenant assigned me to one room in particular.
- 12 Q Can you describe which room it was as you went in the
- 13 building or in the bottom floor?
- 14 was it to the right or the left?
- 15 A I believe it was to the left. I can't -- it was
- 16 several rooms of the large basement area of the house.
- 17 Q All right. And the room that you searched, what did
- 18 you find?
- 19 A I can't recall if I found anything.
- 20 Q Okay. Did you have any conversation with Mr. Elder?
- 21 A I'm not sure. I do remember standing outside smoking,
- 22 talking with someone. But what it was I couldn't recall.
- 23 who it was I can't recall.
- 24 Q Can you recall if it was a white male or a black male?
- 25 A It was, it was a large white male.

Travis McJunkin - Cross-examination
by Mr. Wilkes

- 1 Q All right. Could that have been Mr. Markley?
2 A Yes, sir, it could of been.
3 Q And you were standing outside smoking with, with him?
4 A Yes, sir.
5 Q Is that during the search or after the search?
6 A I believe it was well after.
7 Q Did you have -- what, what was the nature of your
8 conversation?
9 A I think it was mostly about smoking being bad for you
10 maybe. I'm not -- nothing, nothing pertaining to the case.
11 Q All right. And how long was that?
12 A I guess how long it takes to smoke a cigarette. I'm --
13 I -- it wasn't a long time.
14 Q Was he in your custody at that time?
15 A My custody or---
16 Q Yes, sir.
17 A I remember him being in handcuffs, but I wouldn't say
18 he was under my custody. But, yeah, I was the one watching
19 him at that point in time.
20 Q Was there any other officer there with you?
21 A I can't recall. People were walking in, out, and
22 about.
23 Q Where did Mr. Markley go after y'all smoked a
24 cigarette?
25 A I can't recall.

Travis McJunkin - Cross-examination
by Mr. Wilkes

1 Q You would have -- he's in handcuffs -- you would have
2 transferred him to somebody else's custody or put him in---

3 A Well, they're several officers---

4 Q ---into someone else's---

5 A Well, they're several officers out there. I mean at --
6 I'm sure -- I mean he didn't, he didn't walk away. I can't
7 remember, at that point after we finished the cigarette,
8 where exactly he went, at that point, who took custody of
9 him then.

10 Q Got you.

11 Did you take him from the inside of the house to the
12 outside of the house?

13 A I believe he was already outside whenever I stepped
14 outside.

15 Q Okay. Do you remember distinctly where you found drugs
16 on the ground?

17 You remember those facts very clearly today?

18 A I remember that Investigator Cantrell found drugs on
19 the ground during the traffic stop.

20 Q Okay. And your participation in the traffic stop?

21 A I was what we would call a cover officer. My general
22 responsibilities would really be security base, make sure
23 that myself and Investigator Hutchins and those others
24 involved were safe.

25 Q And, and did you testify that you did not observe drugs

Travis McJunkin - Cross-examination
by Mr. Wilkes

1 on the ground at one point?

2 A Yes, sir, I believe so.

3 Q And you would, you would recall what you did not
4 observe on the ground accurately?

5 You, you believe you had a clear recollection of that?

6 A Yes, sir.

7 Q But not a clear recollection of what happened at the
8 house with Mr. Markley?

9 A I was smoking a cigarette with him at that point. I'm
10 not really investigating anything. Just kind of smoking a
11 cigarette at this point. I wasn't questioning him. Nothing
12 pertaining to the case. So, no, sir, I don't recall what my
13 exact conversation would have been with him at that time,
14 no, sir.

15 Q Have you had any contact with Mr. Markley or Mr. Elder
16 since that time?

17 A No, sir.

18 Q Had you had any before that time?

19 A No, sir.

20 Q Nothing further.

21 THE COURT: Mr. Poole.

22 MR. POOLE: Thank you, Your Honor.

23 CROSS-EXAMINATION

24 BY MR. POOLE:

25 Q And, Investigator McJunkin, I believe you testified

Travis McJunkin - Cross-examination
by Mr. Poole

1 that when you arrived both passengers, both the driver and
2 the passenger, were inside the car?

3 A Yes, sir, I was in the vehicle with Investigator
4 Hutchins when he initiated the traffic stop.

5 Q And, so, therefore, you, you arrived -- did you arrive
6 before Officer Cantrell?

7 A Yes, sir.

8 Q Okay. And then did you notice that Mr. Cheeks had a
9 walking cane?

10 A Yes, sir, I retrieved it from the vehicle for him.

11 Q Okay. And you asked them both to get out of the car,
12 didn't you?

13 A No, sir.

14 Q Okay. You asked---

15 A I asked Mr. Cheeks to step from the vehicle.

16 Q Okay. Did Mr. Elder get out of the car at the same
17 time?

18 A I believe Investigator Hutchins asked Mr. Elder to step
19 from the vehicle before Mr. Cheeks.

20 Q So, Elder was outside of the car before Mr. Cheeks?

21 A Yes, sir.

22 Q Okay. And you asked Mr. Cheeks to get out of the car
23 and you gave him his walking cane?

24 A Yes, sir.

25 Q And does that cane serve a useful purpose?

Travis McJunkin - Cross-examination
by Mr. Poole

1 In other words, did he use it?

2 A To assist with walking, yes, sir.

3 Q Okay. He's paralyzed on the left side of his body,
4 isn't he?

5 A I'm, I'm not aware.

6 SOLICITOR HUNTER: Objection, Your Honor. No knowledge
7 of Mr. Cheeks' impairment.

8 THE COURT: Overruled. He can state what he observed
9 or what, the extent of his knowledge. So --.

10 Q Okay. Well, let me ask you a few questions about that.

11 A Sure.

12 Q So, he has a walking cane?

13 A Yes, sir.

14 Q In what, what hand did he place it?

15 A That I can't recall. Initially he didn't place it
16 because we were just standing beside the car. He wasn't
17 walking anywhere.

18 Q Okay. But to walk, he used a walking cane, right?

19 A Yes, sir.

20 Q And do -- don't you recall that it was in his
21 right-hand?

22 A I can't recall which hand it was, which hand it was in
23 when I handed it to him.

24 Q Okay. Did you notice lack of mobility on his left side
25 of his body, actually his entire body, his leg and arm?

Travis McJunkin - Cross-examination
by Mr. Poole

1 A I did notice that he had some sort of physical
2 impairment on the left side of this vehicle, yes, sir.

3 Q Okay. And obviously that walking cane was used for the
4 compensation of his inability to move the left side of his
5 body?

6 A It would appear so, yes, sir.

7 Q Okay. So, therefore, he has a walking cane in his
8 right-hand?

9 A It would appear so, yes, sir.

10 Q All right. And at the same time you stated that you
11 saw him reaching for the right side of his right leg---

12 A Yes, sir.

13 Q ---and at this point he's got a walking cane in his
14 hand, does he not?

15 A I handed him the walking cane. I'm -- as far as him
16 walking with the cane, while reaching, no, sir, I don't
17 think I testified he was talking and reaching. We're
18 standing beside the vehicle.

19 Q Okay.

20 A There's no need for a cane at this point. So --.

21 Q Okay. Well, you gave him the cane?

22 A Yes, sir.

23 Q All right. And, and, so, whether he's using it or not
24 he's holding it in one hand, right?

25 A When I asked him to step from the vehicle, imagine, if

Travis McJunkin - Cross-examination
by Mr. Poole

- 1 you will---
- 2 Q Uh-huh. (Affirmative).
- 3 A ---going to the back side of the vehicle.
- 4 Q Uh-huh. (Affirmative).
- 5 A I want to have him turn his body facing the trunk. The
- 6 cane would of been resting against the motor vehicle. He
- 7 doesn't have to have the cane in his hand. Apparently he
- 8 didn't have the cane in his hand the entire time he was
- 9 reaching for his right pocket. I clearly had that
- 10 documented in my report. I clearly had, remember physically
- 11 moving his hands away from the right side of his pants. So,
- 12 either he was allowing his cane to rest against the
- 13 vehicle -- I wasn't looking at his cane when he was reaching
- 14 for the side of his pocket. I was looking for where his
- 15 hands were going for safety.
- 16 Q All right. You're looking for safety then, right?
- 17 A Yes, sir.
- 18 Q So, you've got a man who's paralyzed on the left side
- 19 of his body?
- 20 A Uh-huh. (Affirmative).
- 21 Q And you're concerned about your safety?
- 22 A Absolutely.
- 23 Q And, and he's older than you?
- 24 A Absolutely.
- 25 Q And, and he's using -- he's got this cane in his

Travis McJunkin - Cross-examination
by Mr. Poole

1 possession?

2 A Yes, sir.

3 Q And, so, he's got to be using it or holding it, doesn't
4 he?

5 A Not necessarily he doesn't have to be holding it or
6 using it. If we're standing still he's reaching for the
7 right side of his pocket and apparently he's not in use of
8 the case.

9 Q You didn't see him drop anything, did you?

10 A No, sir, I did not.

11 Q Okay. All right. And Elder was outside of the car
12 also?

13 A Yes, sir.

14 MR. POOLE: Okay. That's all the questions I have,
15 Your Honor.

16 THE COURT: Redirect?

17 SOLICITOR HUNTER: None, Your Honor.

18 THE COURT: You may step down, sir.

19 State may call its next witness.

20 SOLICITOR HUNTER: State would call Kelvin Washington.

21 THE COURT: Come forward, sir, to my left to be sworn.

22 KELVIN WASHINGTON, having been first duly
23 sworn, testified as follows:

24 THE COURT: Have a seat please. Once seated, state
25 your name for the record.

Kelvin Washington - Direct examination
by Solicitor Hunter

1 WITNESS: Kelvin Washington.

2 THE COURT: Mr. Hunter, your witness.

3 DIRECT EXAMINATION

4 BY SOLICITOR HUNTER:

5 Q Mr. Washington, how are you employed right now?

6 A Spartanburg County Sheriff's Office.

7 Q How long have you been employed by the Sheriff's
8 Office?

9 A Since March of 2006.

10 Q What are your current duties?

11 A I'm currently on uniform patrol.

12 Q And have you ever been on the narcotic's team?

13 A Yes, I have.

14 Q And how long were you on the narcotic's team?

15 A Since December of 2008.

16 Q Okay. Do you have any previous law enforcement
17 experience previous to the Sheriff's Office?

18 A Yes, sir.

19 Q And what is that?

20 A I worked at the Spartanburg County Detention Facility.

21 I worked at the Spartanburg Public Safety Department and
22 Orangeburg County Sheriff's Office.

23 Q Okay. For how long?

24 A Which, which department or all together?

25 Q All together.

Kelvin Washington - Direct examination
by Solicitor Hunter

- 1 A Going on approximately 17 years.
- 2 Q Seventeen years of experience?
- 3 A Yes, sir.
- 4 Q Okay. Have you ever had the opportunity to execute a
- 5 search warrant?
- 6 A Yes, sir, I have.
- 7 Q As part of the execution of the search warrant have you
- 8 had the opportunity to prepare a return?
- 9 A Yes, sir, I have.
- 10 Q Can you please explain what a return is?
- 11 A Return is an officer assigned to collect the evidence
- 12 that's been located by other investigators and inventory it
- 13 on, inventory it on a return part of the, return, return
- 14 section of the search warrant.
- 15 Q Okay. And in this case did you prepare a return?
- 16 A Yes, sir, I did.
- 17 Q So, are you the officer who recovered the items within
- 18 the house?
- 19 A Yes, sir.
- 20 Q And just for a moment were you involved in the car stop
- 21 in anyway?
- 22 A No, sir, I was not.
- 23 Q Okay. Now, when you're inside the house, what's the
- 24 proper procedure for collecting items and placing them into
- 25 evidence?

Kelvin Washington - Direct examination
by Solicitor Hunter

1 A Normally what happens I usually sit myself in a, in the
2 area and the officers, other investigators find the items in
3 the home, they call me and say look, I found items in this
4 area, I collect the area, and I log the officer name down,
5 what he found, and what area he found it in.

6 Q Do they move the items?

7 A No, sir, they don't.

8 Q Okay. Did that occur in this case?

9 A Yes, sir, it did.

10 Q When you collect the items of evidence, what do you do
11 with them?

12 A I log it on the return, I put down officer name who
13 recovered it, and I described the item on the return.

14 Q Okay. Did you do that in this case?

15 A Yes, sir, I did.

16 Q Okay. I'm gonna show you what's been premarked as
17 State's Exhibit 3.

18 Do you recognize that item?

19 A Yes, sir.

20 Q And how do you recognize that item?

21 A One of the items that was advised to me, showed to me
22 by one of the investigators and I recovered it and put it on
23 my return.

24 Q Okay. When you recover it what do you do with the
25 substance?

Kelvin Washington - Direct examination
by Solicitor Hunter

- 1 A I put it in a B.E.S.T. Bag. Well, first I actually log
2 it on the return portion, and then I put it in a B.E.S.T.
3 Bag for it to be put in evidence for an analysis.
- 4 Q Okay. Did you do that in this case?
- 5 A Yes, sir, I did.
- 6 Q And where do you take this?
- 7 A We take it to our evidence locker or drop box.
- 8 Q Okay.
- 9 A Drop it off.
- 10 Q And is your name on it?
- 11 A Yes, sir. Yes, sir, it is.
- 12 Q Okay. And did you write that information?
- 13 A Yes, sir, I did.
- 14 Q Okay. And what do you do with the evidence once you
15 get it from the evidence locker?
- 16 A I drop it off and then it's locked up and prepared for
17 the custodian to come pick it up the following day or that,
18 that same day.
- 19 Q Did you do this in this case?
- 20 A Yes, sir, I did.
- 21 Q With that evidence item?
- 22 A Yes, sir.
- 23 Q Okay. Can you explain the drop box to the jury?
- 24 A The drop box is at the Sheriff's Office. It's either
25 a, either a locked locker or a box itself almost like a mail

Kelvin Washington - Direct examination
by Solicitor Hunter

1 box you drop it in. I have no access to it afterwards. The
2 only person who has access afterwards is the evidence
3 custodian.

4 Q Okay. Did you seal this bag?

5 A Yes, sir, I did.

6 Q Looking at it today could you tell if there's any -- is
7 it a tamper evident bag?

8 A Yes, sir, it doesn't -- once we seal it it's not
9 tampered with until it goes to the chemist to be analyzed.
10 So, we don't -- well, you can tell it's been opened to be
11 analyzed.

12 Q Okay. When you dropped it off at the evidence locker,
13 had it been tampered with?

14 A No, sir, not by me.

15 Q Okay. I'm gonna show you what's been marked as State's
16 Exhibit 7.

17 A Yes, sir.

18 Q Do you recognize that?

19 A Yes, sir.

20 Q How do you recognize that?

21 A As one of the items showed to me by the officers. I
22 recovered it and put it on the return.

23 Q Is that in the same or substantially the same condition
24 as you found it?

25 A Yes, sir, it is.

Kelvin Washington - Direct examination
by Solicitor Hunter

1 SOLICITOR HUNTER: Your Honor, at this time the State
2 would move to admit State's Exhibit No. 7 into evidence.

3 THE COURT: Any objection?

4 MR. WILKES: We do, Your Honor, and we have previously
5 stated our objection to items retrieved by a search warrant.

6 THE COURT: Yes, sir.

7 MR. WILKES: Be glad to do it again.

8 THE COURT: No, I'm just -- is there an, an additional
9 objection?

10 MR. WILKES: Oh, no, sir.

11 THE COURT: Mr. Poole.

12 MR. POOLE: Subject to prior objections, Your Honor.

13 THE COURT: Prior objections.

14 All right. The ruling would be the same concerning the
15 prior issues. It will be admitted as marked.

16 Q Where did you find that box of baking soda?

17 A It was, it was shown to me by Investigator Raymond in a
18 trash can in the kitchen.

19 Q Okay. In your experience as a narcotic's officer, what
20 is the use of baking soda in the manufacturing of crack
21 cocaine.

22 A Use it -- it mixes with cocaine and use it to mix the,
23 the baking soda with it to put it in a microwave or they
24 cook it in a microwave or an oven, and then let it cool off
25 and it makes a cookie or, or a cake like or something and

Kelvin Washington - Direct examination
by Solicitor Hunter

1 then they cut it up after it dries off.

2 Q Okay. How far away from the white powder substance in
3 State's Exhibit 3 was that box?

4 A I think the kitchen trash can was right there by the
5 counter I think. It was right there in the kitchen I
6 believe.

7 Q So, not far at all?

8 A No, sir, probably a couple feet.

9 Q I'm gonna take you back to the residence for a second.
10 I show you what's been marked as State's Exhibit 2. It's
11 already into evidence.

12 Do you recognize that scene?

13 A Yes, sir.

14 Q Okay. How do you recognize that?

15 A When you first went in and officers recovered this. We
16 saw this. It was actually in plain view when we first went
17 in for the search warrant.

18 Q Okay.

19 A And it was in the kitchen.

20 Q In your experience as a narcotic's officer, what is
21 that scene on the oven or the stove?

22 A That's a pot, pot used to cook the crack with.

23 Q Could you give a general description of the, the, not
24 of the arrangement of the house, but the items in the house?

25 A Well, I can recall the house being very cluttered I

Kelvin Washington - Direct examination
by Solicitor Hunter

1 mean when we first went in. The kitchen had the -- when we
2 first went in the kitchen you could tell -- you had blocks
3 cut up on the kitchen counter, and you had that one other
4 counter there by the stove where you had the pot and the
5 other items already bagged up. But you had some drying on
6 another section of the kitchen counter there, on another
7 counter there in the kitchen.

8 Q How would you describe the state of the kitchen as
9 opposed to the rest of the house?

10 A The kitchen was in fairly good condition compared to
11 the rest of the house where I was at anyway. Where I was
12 sitting there trying to do the return was pretty cluttered
13 and messy and food all over the place. Now, the kitchen
14 was -- I'm not gonna say immaculate, but it was in a pretty
15 good condition compared to the rest of the house.

16 Q Okay. Now, when you recovered State's Exhibit 3, how
17 was it packaged at that time?

18 A It wasn't packaged. I think it was just in the trash
19 can.

20 Q Well, State's Exhibit 3. Excuse me.

21 A I'm sorry. You talking about---

22 Q This. It's right here.

23 A I'm sorry. Let me see that again.

24 Q If I can give you a hand. Hand you what's been shown
25 as State's Exhibit 2 and --.

Kelvin Washington - Direct examination
by Solicitor Hunter

- 1 A On this.
- 2 Q Two and---
- 3 A If they combined them together.
- 4 Q Two and one.
- 5 A Okay. Well, like I, like I said before, the one was --
- 6 you already had some that was already bagged up, and then
- 7 you had some that was on the counter drying already. So, I
- 8 mean you had some that was already bagged up in baggies,
- 9 what we call baggies, tie them up in plastic bags, and, you
- 10 know, and then the other ones were on the counter drying
- 11 that I can recall when we first got there.
- 12 Q Was there anything found on the microwave?
- 13 A I think there was some cookies in the microwave or
- 14 there was a cookie in the microwave that was drying.
- 15 Q When you say cookie, what does, what does that mean?
- 16 A Well---
- 17 Q If you can refer to it as a substance.
- 18 A All right. It's -- we call it a cookie, but it's
- 19 actually crack cocaine in the shape of a brown circular
- 20 cookie.
- 21 Q Hold on.
- 22 MR. WILKES: Your Honor, again, I object to the
- 23 conclusion of the substance that they found.
- 24 THE COURT: I'll sustain the objection.
- 25 A Oh, yes, sir. Well, it was what we call a cookie. Not

Kelvin Washington - Direct examination
by Solicitor Hunter

1 a cookie.

2 Q what does it, what does it look like?

3 A well, it looks like a cookie, but it's not a cookie.

4 You know, it's not a physical cookie per se like we would

5 eat in a cookie store or from a, from a, from a shop or

6 something. It's not a cookie. But it's a, you know---

7 Q Cookie shape?

8 A Right, it's the shape. It's in the same circle shape.

9 Q Please answer any questions the defense may have for
10 you. Thank you.

11 A Yes, sir.

12 THE COURT: Mr. Wilkes, your witness.

13 MR. WILKES: Thank you, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. WILKES:

16 Q Officer Washington?

17 A Yes, sir.

18 Q You took -- did you take pictures also?

19 A Yes, sir, I don't personally take the pictures, but we
20 have someone assigned to take the pictures usually prior to
21 me getting these items.

22 Q Okay. The -- did you take into custody the pot that
23 was on the stove?

24 A I don't think so, sir. I don't think that was part of
25 it. No, sir, I think a picture was taken of it just to show

Kelvin Washington - Cross-examination
by Mr. Wilkes

1 that, where the, supposedly where the crack was cooking at.

2 Q Do you -- did you have the picture showing the stove
3 with you up there?

4 A Yes, sir, I do. You, you---

5 Q Could you take a look at it and tell me is that -- you,
6 you observed that, the stove and the pot on the stove at the
7 time?

8 A Yes, sir, I think so.

9 Q Can you tell me the condition of that pot, the water in
10 that pot?

11 was it boiling?

12 A No, that -- no, sir, it wasn't boiling at the time.

13 Q Okay.

14 A But it -- I think it did have a little ring around the
15 top where you can see in the picture.

16 Q Okay. Did -- do you recall whether that pot was hot?

17 A No, sir, I can't recall. I couldn't tell you.

18 Q All right. Do you -- does it appear to you that, in
19 the picture, the eye is turned off?

20 A Yes, sir, it appears to be, yes.

21 Q I assume, in the process of the search, did you enter
22 the house?

23 were you in the initial entry team?

24 A Yes, sir, I was.

25 Q Where were you located in that initial entry team?

Kelvin Washington - Cross-examination
by Mr. Wilkes

1 A Probably five or six -- probably the fifth officer back
2 probably.

3 Q Okay. And how long was it before you began collecting
4 evidence?

5 A Once we secured the residence and we secured everyone
6 inside, make sure it's safe for everybody, I was like five
7 minutes maybe.

8 Q Okay. And within that few minutes, how soon was it
9 before you went to the kitchen area?

10 A Whenever someone called me and told me they found
11 something.

12 Q How long do you think that was?

13 A After we secured the residence, probably a couple
14 minutes.

15 Q Okay. When you noticed the pot sitting on the stove---

16 A Uh-huh. (Affirmative).

17 Q ---a couple minutes after entering the residence, you
18 saw no indication of that pot boiling?

19 A No, sir, I did not.

20 Q Okay. Did you have any conversation with Mr. Markley
21 at the residence?

22 A No, sir, I don't believe so.

23 Q Mr. Elder?

24 A No, sir.

25 Q Any conversations with them before or since the date of

Kelvin Washington - Cross-examination
by Mr. Wilkes

1 this search?

2 A No, sir.

3 Q Thank you.

4 No further questions, Your Honor.

5 THE COURT: Mr. Poole, your witness.

6 MR. POOLE: No questions, Your Honor.

7 THE COURT: Redirect.

8 SOLICITOR HUNTER: None, Your Honor.

9 THE COURT: You may step down, sir.

10 SOLICITOR HUNTER: May Investigator McJunkin and
11 Mr. Washington be excused?

12 THE COURT: Any objection to the excusing of those two
13 witnesses?

14 MR. WILKES: None, Your Honor.

15 MR. POOLE: No, sir.

16 THE COURT: They're free to go.

17 Mr. Hunter, you may call your next witness.

18 SOLICITOR HUNTER: Your Honor, the State would call
19 Anita Mullinax.

20 THE COURT: Come forward, ma'am, to my left to be
21 sworn.

22 ANITA MULLINAX, having been first duly
23 sworn, testified as follows:

24 THE COURT: Have a seat please. Once you're seated,
25 state your name.

Anita Mullinax - Direct examination
by Solicitor Hunter

1 WITNESS: Anita Mullinax.

2 THE COURT: Mr. Hunter, your witness.

3 DIRECT EXAMINATION

4 BY SOLICITOR HUNTER:

5 Q Mrs. Mullinax, how are you employed?

6 A Spartanburg County Sheriff's Office.

7 Q And what are your current duties at the Sheriff's
8 Office?

9 A I'm master deputy in evidence.

10 Q How long have you been doing that?

11 A Approximately three years in evidence.

12 Q Okay. Can you please give us a run down of your career
13 through law enforcement?

14 A I been there 27 years. I have been an administrative
15 lieutenant. I've been an investigator. I've been a crime
16 analyst. I've been a dispatcher. I've been a sergeant in
17 administration. I've -- the longest time was serving
18 warrants. I've served warrants for 16 years.

19 Q Okay. But you've currently been in evidence for three
20 years?

21 A Correct.

22 Q Could you please briefly describe the duties of an
23 evidence tech as it relates to a drug case?

24 A Basically what we do is we empty our, our drop box
25 that's sealed in the morning. We'll take everything out.

Anita Mullinax - Direct examination
by Solicitor Hunter

1 we'll -- especially like on a B.E.S.T. Bag, it will be in an
2 envelope. It will have an S number on it, which, like he
3 said, will already have the top taken off of it, and it will
4 be in an envelope with B and C forms. The B form is the
5 person who actually takes the drug in, and then the next
6 person that receives that drug will be the C form.

7 So, if we take it out of the drop box and we enter it
8 in our computer, we would be the C form. And then it has a,
9 a piece of paper in here. I don't know if it's in here
10 right now. But anyway, it lists who the person is that took
11 the drug in, it has the case number on it, and then it has
12 that S number. And what we'll do is we'll enter the case
13 number, the item number, the S number in our computer, and
14 then we'll put it in the back where it's sealed. It's a,
15 it's a room that we call our drug room. It's got a lock on
16 it. It can only be accessed by an evidence custodian. We
17 have a thumb lock where we have to put our thumb on it, and
18 then we wait for the lab person to come and pick it up from
19 us, and then they will find -- they will see a C form and
20 they will sign it before they test it.

21 Q All right. Starting in this case, when did you receive
22 control of that bag?

23 A Do you have my C form?

24 Says I received it on June 5th of 2009 from Kelvin
25 Washington.

Anita Mullinax - Direct examination
by Solicitor Hunter

1 Q If you had ever received a bag that had been tampered
2 with, what would you do with it?

3 A I would not, I would not keep it. I would call the
4 investigator and tell them that it was not sealed properly.

5 Q When you received this bag, was it tampered with?

6 A No, it was sealed.

7 Q Okay. So, at that point, what do you do with this bag?

8 A After I enter it in the computer, then it goes to our
9 drug room for, waiting for the lab personnel to be able to
10 pick it up.

11 Q Who has access to the drop box where this bag was
12 received?

13 A Just myself and Robert Rosenberg right now.

14 Q Okay. And in June 4th, 2009, who would of had
15 access?

16 A It would of been myself, Robert Rosenberg, and Jack
17 Westmoreland.

18 Q Okay. Are all the two, those other two individuals in
19 the courtroom today?

20 A Yes, they are.

21 Q You can stand up.

22 A Yes, they are.

23 Q Where is Mr. Rosenberg?

24 A He is seated beside the, behind the prosecutor table.

25 Q Is he the one in the Sheriff's Office uniform?

Anita Mullinax - Direct examination
by Solicitor Hunter

- 1 A Yes, he is.
- 2 Q And where is Mr. Westmoreland?
- 3 A He's at the back standing near the door with the short
4 sleeves on.
- 5 Q Also in a Sheriff's Office uniform?
- 6 A Correct.
- 7 Q Who has access to the drug room?
- 8 A Just the evidence custodians and then we allow the lab
9 personnel to come and pick up from that drug room.
- 10 Q Okay. So, it's just the three of y'all and the lab
11 personnel as well?
- 12 A Correct.
- 13 Q Now, when you received this evidence, you have a form,
14 is that correct?
- 15 A Our C form, yes.
- 16 Q What do you write on that form when you receive it?
- 17 A I write down the date that I receive it, the person
18 that I received it from, and then I also write on it that I
19 received a B.E.S.T. Bag and the control number, which I get
20 from the bag itself.
- 21 Q So, that's on State's Exhibit -- if you could just read
22 the red sticker.
- 23 A Three.
- 24 Q Okay. Is there anyway you could of written the report
25 before you received the bag?

Anita Mullinax - Direct examination
by Solicitor Hunter

1 A No, there's no way.

2 Q Why not?

3 A Cause I wouldn't of -- we enter it in the computer by a
4 case number, and then we attach this number on it, and I
5 can't enter it without a case number.

6 Q Okay. Are you ever out at the scene June 4th, 2009?

7 A I was not.

8 Q Okay. So, you just -- you're in the evidence room and
9 that's where you receive the evidence?

10 A Correct.

11 Q Is that true for all cases?

12 A Yes, it is.

13 Q Okay. Thank you. Please answer any questions the
14 defense may have.

15 THE COURT: Yes, sir, Mr. Wilkes, your witness.

16 MR. WILKES: Thank you, Your Honor.

17 CROSS-EXAMINATION

18 BY MR. WILKES:

19 Q Mrs. Mullinax, you say the purpose of the Form C is
20 what?

21 A It's a chain to show---

22 Q Chain?

23 A ---who covered, where it -- from hand-to-hand.

24 Q And you generally will fill these out for what purpose?

25 A Anytime the drug changes hands.

Anita Mullinax - Cross-examination
by Mr. Wilkes

1 Q And that is to ensure that the drugs are properly
2 handled/identified?

3 A Yes.

4 Q Okay. And filling out the forms is a critical function
5 of your job?

6 A Absolutely.

7 Q Let me ask you -- may I approach, Your Honor?

8 THE COURT: You may.

9 MR. WILKES: Thank you, Your Honor.

10 Q Can you take a look at two Form C's and tell me if you
11 recognize those?

12 A One of them is mine from where I took it in, and then
13 the other one is signed by Robert Rosenberg.

14 Q And can you tell me the difference between the two as
15 far as filling out the forms?

16 A They're two different B.E.S.T. bags.

17 Q Okay. And I notice that Mr. Rosenberg's is completed
18 as far as having a witness, is that correct?

19 A It is.

20 Q And at the bottom it says place, date, sworn to before
21 me, and the notary has signed the form where Mr. Rosenberg
22 has signed?

23 A Correct.

24 Q You did not do that?

25 A I have not been taught to have a notary sign any of my

Anita Mullinax - Cross-examination
by Mr. Wilkes

- 1 paperwork.
- 2 Q There's a space on there for it, isn't it?
- 3 A Correct. It's an old form.
- 4 Q You're saying there's a newer form?
- 5 A There has been one created. This was just a form that
- 6 we have had in the, in evidence for some time.
- 7 Q All right. But you would agree that there is a space
- 8 on the form that you're talking about for the drugs for a
- 9 witness to notarize your signature that you had sworn that
- 10 it is true and correct?
- 11 A Correct. If there's someone there to notarize it.
- 12 Q All right. And you did not have that done?
- 13 A There was no one present.
- 14 Q At any day?
- 15 A Not on this particular day.
- 16 Q So, you would be the only one in the evidence room all
- 17 day long?
- 18 A When I took this particular drug in I was.
- 19 Q Then you could not have had somebody notarize it, fill
- 20 it out, and complete the form afterwards?
- 21 A If I had already filled it out I would have to have
- 22 somebody in my presence when I signed it.
- 23 Q And you did not?
- 24 A There was no one available.
- 25 Q Nothing further.

Anita Mullinax - Redirect examination
by Solicitor Hunter

1 THE COURT: Mr. Poole.

2 MR. POOLE: No questions, Your Honor.

3 THE COURT: Redirect.

4 REDIRECT EXAMINATION

5 BY SOLICITOR HUNTER:

6 Q Are you required to have anybody sign the notary form
7 for your chain Form C?

8 A No, it is not required.

9 Q Is that part of Spartanburg County Sheriff's policy?

10 A No, it is not.

11 Q Okay. So, you have no reason to have somebody notarize
12 it?

13 A That's correct.

14 Q Okay. Now, in your duties as an evidence tech, are
15 there times when you're in and out of the office?

16 A Yes, there is.

17 Q Okay. So, on that day Mr. Rosenberg could of been
18 there?

19 A Right, that was just, when I took this particular drug
20 in, he was not.

21 Q So, that specific moment?

22 A Correct.

23 Q Okay. Now, if you were to sign the document, could you
24 have somebody come back and notarize that signature?

25 A Yes, but I would prefer to be present when I sign it

Anita Mullinax - Redirect examination
by Solicitor Hunter

1 for them to actually witness me signing it.

2 Q That's the purpose of the notary, isn't it?

3 A That's correct.

4 Q Thank you.

5 THE COURT: Recross, Mr. Wilkes?

6 MR. WILKES: None, Your Honor. I don't know if we
7 skipped over Mr. Poole.

8 THE COURT: Mr. Poole.

9 MR. POOLE: No, sir.

10 THE COURT: You may step down.

11 SOLICITOR HUNTER: Your Honor, I believe the evidence
12 room is locked up right now since we have everybody here.
13 May Mrs. Mullinax be excused?

14 THE COURT: Any objection?

15 MR. WILKES: None.

16 THE COURT: Mr. Poole?

17 MR. POOLE: None.

18 THE COURT: You're free to go. Thank you very much.
19 You may call your next witness.

20 SOLICITOR HUNTER: State will call Robert Rosenberg.

21 THE COURT: Mr. Rosenberg, come forward to my left to
22 be sworn.

23 ROBERT ROSENBERG, having been first duly
24 sworn, testified as follows:

25 THE COURT: Have a seat please, sir. Once you're

Robert Rosenberg - Direct examination
by Solicitor Hunter

1 seated state your name.

2 WITNESS: I'm Robert Rosenberg.

3 THE COURT: Mr. Hunter, your witness.

4 SOLICITOR HUNTER: Your Honor, if I may clear the
5 witness stand?

6 THE COURT: Yes, sir, you may do so.

7 DIRECT EXAMINATION

8 BY SOLICITOR HUNTER:

9 Q I'm, I'm gonna clear the witness stand and hand you
10 what's been shown as State's Exhibit 13.

11 I know this is gonna be repetitive, but where are you
12 employed?

13 A I'm currently employed with the Spartanburg County
14 Sheriff's Office.

15 Q And how are you so employed?

16 A Currently I'm an evidence custodian.

17 Q And how long have you been employed as such?

18 A Approximately ten to eleven years.

19 Q And how long have you been in law enforcement?

20 A Twenty-seven years.

21 Q Okay. Can you please give us just a brief little
22 explanation of drug cases and evidence?

23 I know we've heard this before, but --.

24 A Basically what officers do, they bring the drugs either
25 into the office or put them in a drop box, which is a

Robert Rosenberg - Direct examination
by Solicitor Hunter

1 secured drop box. They bring it to us. We pick it up, and
2 catalog it, and secure it for the court date.

3 Q Now, you have State's Exhibit 13 in front of you.

4 Can you please describe your interaction with that
5 item?

6 A This apparently was turned in -- I don't know if it's
7 turned into me or to the drop box. I don't have the
8 paperwork. It's turned into the drop box. I took it out of
9 the drop box, we brought it into the office. It's in a
10 brown envelope. I would of taken everything out. It's --
11 this envelope here is sealed and secured inside that brown
12 envelope, which contained the drugs. I would of filled it
13 out, a Form C, to represent the case and the chain, and put
14 it in our, locked it up in our drug room.

15 Q Okay. And was it tampered with at any point when you
16 picked it up from the drop box?

17 A No, sir.

18 Q Was it tampered with at any point when you left it in
19 the drug room?

20 A No, sir.

21 Q Okay. Did you have somebody sign your form to notarize
22 it?

23 A Yes, at that time what we were doing was that we'd take
24 one form, I'd sign it, someone would witness signing, notary
25 witnessing it, and we would leave off the dates and any

Robert Rosenberg - Direct examination
by Solicitor Hunter

1 pertinent information would be left off. Just be my name
2 and that she saw me sign it. No dates or anything would be
3 on it, and I would make a photocopy of it, and then I would
4 keep in, my forms in a secure area. And when, when it comes
5 in I take a form out and fill in the pertinent information
6 that still would represent the chain.

7 Q Who signed this form?

8 A I did.

9 Q Okay. Who notarized this form?

10 A Sandra Gray.

11 Q Now, when you said you filled in the information, you
12 wouldn't fill in the rest of her information, would you?

13 A No, not her information.

14 Q Who would come back and fill in that information?

15 A I would come back and fill in that information. This
16 is the practice we had then. It wouldn't have -- all it
17 would have on there is my name, that I worked at the
18 Sheriff's Office, my signature, and that she witnessed me
19 signing that signature. That would be it. And then when it
20 came in I'd fill in probably the proper information like the
21 date it came in, who brought it in, what it was, and the
22 date it's received.

23 Q Was there any way that you could of filled out the
24 information about that B.E.S.T. Bag previous to receiving
25 it?

Robert Rosenberg - Direct examination
by Solicitor Hunter

- 1 A No.
- 2 Q why not?
- 3 A I would not have that information.
- 4 Q Because?
- 5 A It wouldn't have been turned into me.
- 6 Q And you're not out in the field at this point?
- 7 A No, sir.
- 8 Q where are you located?
- 9 A I'm currently assigned to the evidence room.
- 10 Q On June 4th, 2009?
- 11 A At the Sheriff's Office.
- 12 Q where exactly within the Sheriff's Office?
- 13 A In the evidence room.
- 14 Q Okay. So, this evidence was not tampered with when you
- 15 received it?
- 16 A No, sir.
- 17 Q And you took it to the drug room?
- 18 A Yes, sir.
- 19 Q Okay. Please answer any questions the defense may
- 20 have.
- 21 THE COURT: Yes, sir.
- 22 MR. WILKES: Thank you, Your Honor.
- 23 THE COURT: Mr. Wilkes, your witness.
- 24 CROSS-EXAMINATION
- 25 BY MR. WILKES:

Robert Rosenberg - Cross-examination
by Mr. Wilkes

1 Q Mr. Rosenfield, may I see the document you're referring
2 to please?

3 May I approach, Your Honor?

4 THE COURT: You may.

5 MR. WILKES: Thank you.

6 (WHEREUPON, the Form C was marked as Defendant's
7 Exhibit No. 1 for identification purposes only at this
8 time.)

9 Q Mr. Rosenfield, is there an original form somewhere in
10 the evidence bag?

11 where's the original form?

12 A The original form?

13 Q Yes, sir.

14 A There are Form C's and a Form B inside the evidence
15 bag.

16 Q So, each of these bags will have the Form C and the
17 Form B in there?

18 A Yes, sir.

19 Q Okay. The -- so, what you're saying is you have a form
20 filled out ahead of time in part?

21 A In part, yes, sir.

22 Q Okay. Tell me the parts that are filled out ahead of
23 time.

24 A Mainly my name. Well, at the top -- I could show you
25 if I can see the form back again. Who I represent.

Robert Rosenberg - Cross-examination
by Mr. Wilkes

- 1 Q Is this---
- 2 A Spartanburg County.
- 3 Q Is this the form the same do you think as what's in the
- 4 bag?
- 5 Do you recognize that?
- 6 A The generic form is, yes.
- 7 Q Okay.
- 8 A Yes, it'd be completely empty inside the bag.
- 9 Q Okay. The -- it will be what?
- 10 A The forms they put in there are completely empty. I
- 11 mean they're completely blank that are inside the bag. I
- 12 mean it's got the regular standard form.
- 13 Q So, what evidence form's gonna be in the bags that we
- 14 have in court today?
- 15 Are they gonna be filled out?
- 16 A Yes.
- 17 Q Okay. When, when you fill out a form, is your
- 18 signature already on the form?
- 19 A Yes, sir.
- 20 Q When you fill out the form, is the notary's
- 21 signature---
- 22 A Yes, sir.
- 23 Q So, you don't really sign the form when you get this
- 24 evidence, do you?
- 25 A No, I've, I've already pre-signed the form.

Robert Rosenberg - Cross-examination
by Mr. Wilkes

1 Q You got a big old stack of them somewhere in your
2 office?

3 A I have them locked -- I have them in my desk, yes, sir.

4 Q Okay. And you pull out a pre-signed form, pre-signed
5 and pre-notarized?

6 A Yes, sir.

7 Q And then you just fill whatever information in on it
8 you want?

9 A Not what I want. It's what's needed for to show the
10 correct proper chain.

11 Q You could, you could draw a picture of Mickey Mouse on
12 that form if you wanted to and it would look like the notary
13 had notarized your signature, right?

14 A I could draw a picture of Mickey Mouse?

15 Q If you took one of your blank forms and drew a picture
16 of Mickey Mouse on that form and handed me that form today,
17 would it not appear as though you had a form with Mickey
18 Mouse on it that was signed and notarized?

19 A I suppose so.

20 Q Okay. But you would not have -- that notary would not
21 really have been there to witness a signature?

22 A The -- she was there when I signed the original.

23 Q Oh, when was that?

24 A At some point when I needed the original filled out, I
25 mean my original signature.

Robert Rosenberg - Cross-examination
by Mr. Wilkes

- 1 Q Was that that day?
- 2 A No.
- 3 Q Was that maybe six months---
- 4 A I could not tell you.
- 5 Q ---or maybe a year before?
- 6 A I could not tell you.
- 7 Q Could it have been as much as six months before?
- 8 A It could have. It'd been within that year.
- 9 Q Sometime within that year you signed that form in this
- 10 case?
- 11 A Yes, sir.
- 12 Q And sometime, as much as a year before, the notary's
- 13 signature was placed on the form?
- 14 A She would of been there when I signed it.
- 15 Q When you signed a blank form?
- 16 A Yes, sir.
- 17 MR. WILKES: May I have just one minute, Your Honor?
- 18 THE COURT: Yes, sir.
- 19 MR. WILKES: Thank you.
- 20 (Pause.)
- 21 Q You would agree with me that the purpose of that form
- 22 is to ensure the evidence comes to court is what it's
- 23 suppose to be?
- 24 A It represents the chain, which is the proper vehicle,
- 25 one of the proper vehicles to get it to the court.

Robert Rosenberg - Cross-examination
by Mr. Wilkes

1 Q And would you believe -- and do you think that filling
2 out a blank form and having it notarized as much as a year
3 before this case would be a proper procedure?

4 A The subject's information was not filled out in
5 advance.

6 Q No, that's not---

7 A The proper information---

8 Q That's not what I asked.

9 A ---was filled in though.

10 Q That's not what I asked.

11 Do you think that filling out that blank form a year in
12 advance, signature and notary, otherwise---

13 A Uh-huh. (Affirmative).

14 Q ---basically blank, is that proper procedure?

15 A Back then, yes, it was.

16 MR. WILKES: Okay. No further questions.

17 THE COURT: Mr. Poole.

18 MR. POOLE: No questions, Your Honor.

19 THE COURT: Redirect.

20 SOLICITOR HUNTER: Thank you, Your Honor.

21 REDIRECT EXAMINATION

22 BY SOLICITOR HUNTER:

23 Q Why would you draw a picture of Mickey Mouse on that
24 form?

25 A I do not know. It wouldn't -- it would be improper.

Robert Rosenberg - Redirect examination
by Solicitor Hunter

1 Q Would that get you fired, drawing Mickey Mouse on drug
2 forms?

3 A I, I don't know about getting me fired. I don't know
4 why I would do that.

5 Q Okay.

6 A It's not part of anything.

7 Q As you stated earlier, what information do you fill out
8 once that evidence comes to you?

9 A Yes, sir.

10 Q What information did you fill out once that evidence
11 comes to you?

12 A When that information comes to me it's the pertinent
13 information that's for the case. Be the date I received it,
14 up here it would be the number that matches the bag. That's
15 what I fill out. Also what officer brought it in, the date
16 I received it, and the date I would fill in at the top of
17 the notary that it---

18 Q Again, as we were talking earlier, do you have to have
19 someone notarize that piece of paper through policy of the
20 Spartanburg County Sheriff's Office?

21 A No, sir.

22 Q Okay. Thank you.

23 A Yes, sir.

24 THE COURT: Recross, Mr. Wilkes.

25 RE CROSS EXAMINATION

Robert Rosenberg - Recross examination
by Mr. Wilkes

1 BY MR. WILKES:

2 Q If you don't have to have somebody notarize it, why did
3 you, why did you take the time to make a whole stack of
4 forms to use for the year with a notary on it?

5 A This is how I was taught how to do it.

6 Q Okay. And, therefore, you proceeded to make a stack,
7 all identical, and then every time a case comes in fill in
8 what you need?

9 A I filled in the information from the case.

10 Q Would that be what you need for the form?

11 A Yes, sir.

12 Q Okay. And what was -- what benefit is putting the
13 notary on there if you didn't need it?

14 Doesn't that make it look more official?

15 A It makes it look more official I suppose.

16 MR. WILKES: All right. No further questions, Your
17 Honor.

18 THE COURT: Mr. Poole.

19 MR. POOLE: No questions, Your Honor.

20 THE COURT: You may step down, sir.

21 SOLICITOR HUNTER: Your Honor, may Officer Rosenberg be
22 excused?

23 THE COURT: Any objection?

24 MR. WILKES: None, Your Honor.

25 MR. POOLE: No, sir.

1 THE COURT: No objection. He's free to go.

2 WITNESS: Thank you.

3 THE COURT: All right. Ladies and gentlemen of the
4 jury, at this point in time we're going to take a short
5 break. I'm going to allow you to step back to the jury
6 room, jury room. As always, I'll instruct you not to begin
7 any discussions concerning this matter until I advise you to
8 do so. The bailiffs will see that you're comfortable. If
9 you need anything just let them know. You're free to step
10 back to the jury room.

11 (WHEREUPON, the following takes place outside the
12 presence of the jury.)

13 THE COURT: Court's in recess for about ten to fifteen
14 minutes.

15 (WHEREUPON, a short recess was taken at this time.)

16 THE COURT: Are you ready?

17 SOLICITOR HUNTER: I believe we have a motion to take
18 up outside the presence of the jury.

19 THE COURT: Oh, okay.

20 SOLICITOR HUNTER: Your Honor, at this point the State
21 was gonna call Mr. Eric Elder to the stand. I believe, in
22 speaking with Mr. Wilkes, I provided him with discovery of a
23 recent arrest of Mr. Elder. It is the State's position that
24 that recent arrest is irrelevant to the facts here and it
25 happened months after the, the search warrant and the car

1 stop, and that it will be substantially prejudicial and
2 outweigh any probative effects, under Rule 403, that he
3 would have going into this situation.

4 THE COURT: well, let me find out the details.

5 SOLICITOR HUNTER: Possession---

6 THE COURT: Arrested for?

7 SOLICITOR HUNTER: Possession of crack.

8 THE COURT: And?

9 SOLICITOR HUNTER: They saw him complete a deal.

10 THE COURT: It is a charge?

11 SOLICITOR HUNTER: It is a charge. Not a conviction.

12 THE COURT: Not a conviction.

13 All right.

14 MR. WILKES: And if I may, Your Honor, there's two
15 issues. One is Mr. Elder's propensity for arrest and
16 blaming other people for the drugs in---

17 THE COURT: I'm sorry. You're gonna have to speak up.

18 MR. WILKES: I'm sorry, judge. The -- there is the
19 propensity of Mr. Elder to blame the person closest to him
20 when he is arrested, which we believe is consistent with his
21 behavior in this case, and the other thing is there, from
22 the beginning, there has been and I believe, I believe that
23 the State's theory will be that my client is the, they've
24 said master mind before, and that Mr. Elder was working for
25 my client so to speak.

1 So, I think that, consistent with showing that not to
2 be the case, the subsequent arrest of Mr. Elder for having
3 in his possession and being in the middle of a drug
4 transaction would be relevant particularly since my client
5 was in jail at the time. So, he could not have been causing
6 Mr. Elder to sell or participate in drug deals.

7 So, I think, from that standpoint, that may be relevant
8 to our theory of defense and counter to what the State will
9 contend.

10 SOLICITOR HUNTER: Your Honor?

11 MR. WILKES: In other, in other words, everybody's
12 working at my client's behest. But my client was in jail,
13 then he was not cooking, then he was not distributing.
14 Mr. Elder was out there dealing on his own, which I believe
15 goes contrary to what they will claim that everybody was
16 working for my client.

17 THE COURT: Let, let me find out a little more detail
18 about what this is all about. There's been an arrest. He
19 was involved in some type of a, allegedly involved in some
20 type of a drug transaction.

21 SOLICITOR HUNTER: Where he was the purchaser.

22 THE COURT: He was the purchaser of drugs.

23 And is this through an undercover operation or is
24 this---

25 SOLICITOR HUNTER: He was purchasing from somebody on

1 the street and an undercover, Officer Porter and Spurgeon,
2 with the city observed this.

3 THE COURT: Observed the transaction?

4 SOLICITOR HUNTER: Correct.

5 THE COURT: Okay.

6 MR. WILKES: And there's, and there's a little more to
7 it. I believe---

8 THE COURT: Okay.

9 MR. WILKES: ---that one of the officers may have taken
10 a statement from him, which, in which, if I'm correct, he
11 stated he was working for the police. So, I think that that
12 is relevant as well to, to our case.

13 SOLICITOR HUNTER: And to give you even -- if you would
14 like, I can hand you an incident report and make a Court's
15 Exhibit?

16 THE COURT: That might be some assistance.

17 SOLICITOR HUNTER: To further complicate the matters,
18 Mr. Ricky Cheeks was present at this deal, and was found to
19 have marijuana on him.

20 THE COURT: Interesting.

21 MR. WILKES: It wouldn't be good if it just didn't get
22 complicated.

23 THE COURT: well, now, Mr. Poole, you have, must, just
24 have something to say about that. If this transaction comes
25 in it would be probably the whole thing.

1 MR. POOLE: This is another place where there's a
2 falling out between the defendants.

3 THE COURT: This is the first time I've heard about
4 this. This wasn't argued when you argued your motion
5 earlier. This is news to me.

6 MR. POOLE: Yes, sir, but if it's gonna come in and
7 implicate Ricky Cheeks, then we oppose this to come in
8 under, in any way, shape, or fashion.

9 THE COURT: I would suspect that you would.

10 MR. POOLE: And, and that's, that's simply the position
11 that Ricky Cheeks has.

12 MR. WILKES: However, he may rethink that when he
13 realizes that Mr. Elder is testifying against Mr. Ricky
14 Cheeks on the 400 grams as well. So, there's a dilemma, a
15 conundrum.

16 THE COURT: All right. Well, let me see the incident
17 report.

18 (Pause.)

19 THE COURT: Mr. Wilkes, I heard your argument. It
20 seemed like to me that he indicated a propensity for blaming
21 others.

22 MR. WILKES: Yes, sir.

23 THE COURT: I don't see that in this case.

24 MR. WILKES: I will say I'm looking at the additional
25 narrative. I know that.

1 THE COURT: We're talking about Mr. Elder now?

2 MR. WILKES: Yes, sir, that he -- additional narrative
3 indicates he denied having the drugs at the scene, but later
4 provided a statement.

5 THE COURT: But, again, I don't see him blaming anyone
6 else in this.

7 MR. WILKES: Well, let, let me---

8 THE COURT: He may -- he said it was a, where he was
9 getting change from somebody was what the transaction really
10 was.

11 MR. WILKES: Right. I know that he denied it. Let me
12 check these right quick and see cause I, I know there's
13 another incident as well that he blamed another individual
14 that I would try to get into as well. Oh, there it is. I'm
15 sorry, Your Honor. More important than that is his denial,
16 is his denial is the statement that he is, that he was in
17 Biggerstaff's parking lot trying to help with his pending
18 drug case so that he is trying to work off his drug case by
19 making cases against other people, and to that extent I
20 think that that is relevant to our case.

21 THE COURT: I'm, I'm trying to -- okay. Is there some
22 arrangement by which he is working off charges?

23 SOLICITOR HUNTER: No, Your Honor.

24 MR. WILKES: Doesn't matter. That's a subjective
25 matter if he's going around trying to buy or sell drugs or

1 set people up to, then, to, to work off his charges. If
2 that's his motivation I think that's relevant to his
3 credibility and his motivation.

4 SOLICITOR HUNTER: In fact, the Spartanburg Police
5 Department, when they, he said he was working for Agent
6 Hanning, called Agent Hanning, and Hanning advised the
7 police department that he, at that time, was not working for
8 Agent Hanning. It was most likely probably just an excuse
9 to see if he could get out of the charge.

10 MR. WILKES: Then it goes to his credibility when --
11 his credibility issue. But more importantly, it's his
12 subjective belief that he can get himself out of charges by
13 making drug deals or pointing drug deals at other people.

14 SOLICITOR HUNTER: Your Honor, my, my issue in this is,
15 under the same token, Mr. Derrick Cheeks has been arrested
16 since this charge. I, I wouldn't think that I'd be able to
17 go into his subsequent arrest from June 4th, 2009. Any
18 information gleamed from that point as to an act -- you
19 know, Rule 609 covers prior bad acts, which---

20 THE COURT: Oh, I agree. It's got to be a prior bad
21 act.

22 SOLICITOR HUNTER: I think we have an issue with the
23 situation where this is a subsequent act.

24 THE COURT: Oh, I agree. This is a subsequent bad act.

25 MR. WILKES: Your Honor, if he believes that giving

1 information and cooperating with the police is helping with
2 his charges pending that are pending, then it is relevant to
3 our case today because it is a matter of his motivation for
4 his testimony.

5 THE COURT: Well, I may, I may ask you, let you -- I'm
6 gonna let you ask him about any arrangement he has with the
7 police or---

8 MR. WILKES: All right.

9 THE COURT: ---if, if he's -- you're gonna be able to
10 ask about that. The question is whether you get to go into
11 the facts of this arrest. Now, that's a whole different
12 matter.

13 MR. WILKES: This will be the, this will be the
14 critical question then. If he's denying that he is
15 motivated to work off his charges, then his statement
16 should---

17 THE COURT: Then you can ask him if he has, in the
18 past, told someone that.

19 MR. WILKES: Thank you.

20 THE COURT: If he admits it, end of story.

21 MR. WILKES: Thank you.

22 THE COURT: If he denies it, then you can go into the
23 extrinsic facts to prove he made the statement.

24 MR. WILKES: Thank you.

25 THE COURT: That's the way that works.

1 MR. WILKES: I'm happy with that.

2 THE COURT: Okay.

3 MR. WILKES: Thank you.

4 THE COURT: But we're not gonna get into the charge
5 itself.

6 MR. WILKES: No.

7 THE COURT: We'll get into the statement that he may
8 have made.

9 MR. WILKES: No, no, that would not be necessary to, if
10 I can---

11 THE COURT: Okay.

12 MR. WILKES: ---ask him if, as to his motivation and---

13 THE COURT: And you can ask about his motivation in, in
14 doing anything that he's done if you think or if there's
15 some arrangement with the prosecution, you can ask about
16 that, in exchange for his testimony. And you can ask him if
17 he's made statements in the past that he, that he was
18 working off his charges.

19 MR. WILKES: Thank you, Your Honor.

20 THE COURT: And if he admits having done that, my
21 understanding, under the rule, that's the end of the, the
22 thing. If he denies having said that, then you can get into
23 extrinsic evidence to prove that he has made that statement.

24 MR. WILKES: Yes, sir, that's all I wanted to do.

25 THE COURT: Okay. That's the way I understand that

1 rule.

2 THE COURT: Anything else we need to cover?

3 MR. POOLE: Your Honor, I had an opportunity to speak
4 with my client about this present issue pending right now.

5 THE COURT: Uh-huh. (Affirmative).

6 MR. POOLE: And we join in with Mr. Wilkes' position.

7 THE COURT: Well, again, I'm, I'm not gonna allow him
8 to go into -- and Mr. Wilkes is the one who's trying to
9 raise it apparently.

10 MR. POOLE: Right.

11 THE COURT: I don't believe Mr., the prosecution wants
12 to raise it.

13 MR. POOLE: Uh-huh. (Affirmative.)

14 THE COURT: But I'm going to allow him to ask this,
15 this individual about any prior arrangements he has with the
16 police. I'll allow him to ask if he's made statements in
17 the past to anyone that he's working off his charges. And
18 if he says yes, I made that statement on one occasion, then
19 that would be the end of the inquiry as he's said something
20 that's consistent. Whether it's true or not I imagine the
21 State can ask him whether he really does have an
22 arrangement. If he says no, then that would go to his
23 credibility.

24 MR. POOLE: Yes, sir.

25 THE COURT: But I'm not gonna let him get into the

1 facts of the arrest --

2 MR. POOLE: Yes, sir.

3 THE COURT: -- or the circumstances that occurred at
4 Biggerstaff's. I do not intend to allow him, intend to
5 allow him to go into the facts that your client was, in any
6 way, involved --

7 MR. POOLE: Thank you, Your Honor.

8 THE COURT: -- since he didn't make the statement to
9 the police.

10 MR. POOLE: Yes, sir.

11 THE COURT: All right. Let's bring the jury.

12 (WHEREUPON, the following takes place within the
13 presence of the jury.)

14 THE COURT: All right. The record will reflect the
15 jury has returned to the courtroom.

16 I keep hoping for some warm air. We haven't gotten it
17 yet, but we're still working on that, ladies and gentlemen
18 of the jury.

19 When we broke earlier the State was in the process of
20 calling its witnesses, and you may call your next witness.

21 SOLICITOR HUNTER: Your Honor, the State would call Mr.
22 Eric Elder to the stand.

23 THE COURT: Come forward, sir, Mr. Elder. Come to my
24 left to be sworn in.

25 ERIC ELDER, having been first duly

Eric Elder - Direct examination
by Solicitor Hunter

1 sworn, testified as follows:

2 THE COURT: Have a seat please. Sir, once you're
3 seated, I'm gonna ask that you state your name. State your
4 name.

5 WITNESS: My name is Eric Wade Elder.

6 THE COURT: Thank you.

7 Mr. Hunter, your witness.

8 DIRECT EXAMINATION

9 BY SOLICITOR HUNTER:

10 Q Mr. Elder, if you could look over here.

11 How old are you?

12 A I'm 31.

13 Q And how long have you lived in Spartanburg County?

14 A My whole life.

15 Q Okay. And I want to take you to June 4th, 2009.

16 Do you remember that date?

17 A Yes, sir.

18 Q In the morning---

19 THE COURT: Sir, you're gonna have to speak up loud
20 enough for everybody to hear you.

21 WITNESS: Yes, sir.

22 THE COURT: Thank you.

23 Q You can just, you can just stay by the microphone and
24 it will, it will project to everybody in the room.

25 Okay. Where were you on the morning of June 4th,

Eric Elder - Direct examination
by Solicitor Hunter

- 1 2009?
- 2 A At Tracy Markley's house.
- 3 Q But before that, starting in the morning---
- 4 A I were -- I was at home.
- 5 Q Okay. And where is home?
- 6 A In Chesnee County.
- 7 Q Okay. Were you with anybody at that moment?
- 8 A Yes, sir.
- 9 Q And who was that?
- 10 A My mother.
- 11 Q Is she in the courtroom today?
- 12 A Yes, sir.
- 13 Q Where is she?
- 14 A She's right behind there.
- 15 Q This lady?
- 16 A Yes, sir.
- 17 Q Could you describe her?
- 18 A She's got black hair, pretty blouse or shirt.
- 19 Q Okay. Whose house were you at?
- 20 A Her house.
- 21 Q Okay. Where did you go after leaving her house?
- 22 A I went to a motel in, in downtown Spartanburg.
- 23 Q Why did you go to that motel?
- 24 A Cause Derrick Cheeks had called me that morning.
- 25 Q What were you going to do at that motel?

Eric Elder - Direct examination
by Solicitor Hunter

- 1 A Go pick him up.
- 2 Q Okay. To your knowledge, does Derrick Cheeks have a
- 3 driver's license?
- 4 A No, sir.
- 5 Q And how do you know this?
- 6 A Cause I've known him for a pretty good while.
- 7 Q How long have you known him?
- 8 A Five or six years.
- 9 Q During that time have you ever driven Mr. Cheeks?
- 10 A Yes, sir.
- 11 Q Approximately how many times?
- 12 A Couldn't count. A hundred or more.
- 13 Q Okay. Has anybody else driven Mr. Cheeks?
- 14 A Yes, sir.
- 15 Q Who else drives Mr. Cheeks?
- 16 A Christopher Johnson.
- 17 Q And anybody else?
- 18 A Tracy Markley.
- 19 Q Okay. Could you describe Tracy Markley to us?
- 20 A A real big heavy weight guy, maybe 500 pounds, long
- 21 goatee, real chubby guy.
- 22 Q Okay. Now, on that morning at the motel when you first
- 23 got there who was there?
- 24 A His uncle come walking down, walked outside.
- 25 Q Whose, whose uncle?

Eric Elder - Direct examination
by Solicitor Hunter

- 1 A Derrick's uncle.
- 2 Q Do you see Derrick's uncle in the courtroom today?
- 3 A Yes, sir.
- 4 Q And who is that?
- 5 A The man sitting right beside him in the white, white
- 6 blouse or the white long shirt.
- 7 Q Okay. How long were you at the hotel, a guess?
- 8 A Twenty minutes.
- 9 Q Okay. Was Derrick Cheeks at the car with you?
- 10 A No, he was up in the motel getting ready to come down.
- 11 Q Okay. So, who's at the car at this point?
- 12 A His uncle.
- 13 Q Okay.
- 14 A Ricky Cheeks.
- 15 Q Whose car is, are you at?
- 16 A I'm at Derrick's car.
- 17 Q Could you please describe that car?
- 18 A It was a 2000 something Police Interceptor with a cage
- 19 in it, black.
- 20 Q Okay. So, it's not your vehicle?
- 21 A No, sir.
- 22 Q In fact, did you own a vehicle?
- 23 A No, sir.
- 24 Q Did you own a vehicle at that point?
- 25 A No, sir.

Eric Elder - Direct examination
by Solicitor Hunter

- 1 Q Okay. Now, from the motel where do you go?
- 2 A We go probably two and a half miles down the street to
- 3 Tracy Markley's.
- 4 Q Okay. Do you know the address?
- 5 A Not right off the top of my head.
- 6 Q Okay. Does it sound about right?
- 7 A Yes. Yes, sir.
- 8 Q Okay. When you first show up at the house, what's
- 9 going on?
- 10 A Everybody's asleep.
- 11 Q When you say everybody, who is, who is that?
- 12 A There's, there's just Tracy's parents and we never seen
- 13 them much. So, they were upstairs. But downstairs
- 14 everybody was pretty much resting up.
- 15 Q When you say everybody, was anybody else at the house?
- 16 A I think just Tracy Markley was there.
- 17 Q Okay. Did you ever go upstairs?
- 18 A I have ate with his family once, twice.
- 19 Q Okay. But on June 4th, did you go upstairs?
- 20 A No, sir.
- 21 Q Do you remember if anybody else went upstairs?
- 22 A No, sir.
- 23 Q Okay. So, when you showed up, Mr. Markley was asleep?
- 24 A Yes, sir, to my knowledge.
- 25 Q What did you do next?

Eric Elder - Direct examination
by Solicitor Hunter

- 1 A I went in the house and sit down.
- 2 Q Okay. What were the actions of Mr. Ricky Cheeks and
- 3 Mr. Derrick Cheeks?
- 4 A Ricky went down and sat down too. Derrick Cheeks, his
- 5 actions were to get started cooking.
- 6 Q Did Derrick have anything on him when he came from the
- 7 hotel to Mr. Markley's house at ?
- 8 A Yes, sir.
- 9 Q What did he have on him?
- 10 A I think he had a bag of cocaine I didn't see at the
- 11 time when we left the motel, but when he got to the house he
- 12 had a large amount of cocaine.
- 13 Q Okay. And what did he do with that cocaine?
- 14 A Started cooking.
- 15 Q And when you say started cooking, can you describe what
- 16 he was doing?
- 17 A Getting pots and pans, oven on, getting everything
- 18 ready.
- 19 Q Did you leave the house at any point?
- 20 A I did.
- 21 Q Why did you leave the house?
- 22 A Cause he had told us, Ricky Cheeks to go get him a box
- 23 of baking soda from Wal-Mart.
- 24 Q Could Mr. Cheeks drive?
- 25 A No, sir.

Eric Elder - Direct examination
by Solicitor Hunter

- 1 Q Mr. Ricky Cheeks?
- 2 A No, sir.
- 3 Q Have you ever had to drive Mr. Ricky Cheeks?
- 4 A Yes, sir.
- 5 Q Approximately how many times?
- 6 A Forty to fifty times.
- 7 Q Now, where did you go from the house?
- 8 A I went to the Wal-Mart.
- 9 Q What did you do at Wal-Mart?
- 10 A Well, Ricky wasn't allowed to go into Wal-Mart. So, I
- 11 got the money from Ricky and I went into Wal-Mart and went
- 12 to the baking soda section in the Wal-Mart and got a box,
- 13 come back out, throw it in his lap, and went back.
- 14 Q Did you purchase this box?
- 15 A Yes, sir.
- 16 Q Who told you to purchase this box?
- 17 A Nobody told me. I knew what he was suppose to get.
- 18 Q Okay. I'm gonna show you what's marked as State's
- 19 evidence 7.
- 20 Do you recognize this item?
- 21 A Yes, sir.
- 22 Q What is this item?
- 23 A A box of refrigerant, freezer baking soda.
- 24 Q To the best of your knowledge, is that the box that you
- 25 bought?

Eric Elder - Direct examination
by Solicitor Hunter

- 1 A Yes, sir.
- 2 Q Are you familiar with how to cook crack cocaine?
- 3 A Yes, sir.
- 4 Q why?
- 5 A Cause I smoked it for a long time.
- 6 Q Okay. And how long have you been an addict?
- 7 A Seven, seven or eight years. I'm sorry.
- 8 Q You can take a second.
- 9 THE COURT: You got some tissue for him.
- 10 WITNESS: Yeah.
- 11 THE COURT: There you go. They're going to give it to
- 12 you.
- 13 Q Are you ready to proceed?
- 14 A Yeah.
- 15 Q Have you ever been present during the manufacturing or
- 16 cooking of crack cocaine?
- 17 A Yes, sir.
- 18 Q Have you yourself ever cooked the crack cocaine?
- 19 A I've bought a little bit before and cooked it in the
- 20 spoon for myself, yeah.
- 21 Q Okay. But when you say a little bit, how much is a
- 22 little bit?
- 23 A A gram or two.
- 24 Q Have you ever been present and cooked over 600 grams of
- 25 crack cocaine?

Eric Elder - Direct examination
by Solicitor Hunter

- 1 A No, sir.
- 2 Q Okay. Now, you're at the house.
- 3 what did you say Mr. Cheeks was doing at this point?
- 4 when, when you come back to the house with the baking
- 5 soda, what's occurring?
- 6 A You said Mr. Cheeks, Ricky or Derrick Cheeks?
- 7 Q Okay. I'll start -- Derrick Cheeks.
- 8 A Okay. He was in the kitchen going, doing, doing up the
- 9 crack, cooking crack.
- 10 Q Okay. why were you driving Mr. Derrick Cheeks and
- 11 Mr. Ricky Cheeks?
- 12 A Cause a lot of times I'd get free dope, free crack.
- 13 Q was that your understanding that day?
- 14 A Mostly everyday.
- 15 Q Everyday?
- 16 A Yeah.
- 17 Q Now, do you stay at the house the entire time?
- 18 A Not always.
- 19 Q No, on, on June 4th?
- 20 A Yeah, I stayed until usually and sat out of the way
- 21 until everything was done.
- 22 Q Okay. But you're there and present while he's cooking
- 23 it?
- 24 A Yes, sir.
- 25 Q who else is present while he's cooking it?

Eric Elder - Direct examination
by Solicitor Hunter

- 1 A Tracy was up, and, and his uncle, Ricky Cheeks, were,
2 were all in the same room.
- 3 Q Is there any way for anyone to know that was in that
4 room that crack was not being cooked?
- 5 A No, sir.
- 6 Q Did you leave the residence?
- 7 A Yes, sir.
- 8 Q who did you leave the residence with?
- 9 A With Ricky Cheeks.
- 10 Q And what were y'all going to do?
- 11 A Derrick had told him that he needed to go somewhere to,
12 to get rid of something.
- 13 Q Okay. And you were -- I couldn't hear you.
14 what did you say?
- 15 A Ricky -- Derrick told his Uncle Ricky that, that he
16 needed to get rid of something, somebody was calling. So,
17 he needed to get rid of something.
- 18 Q Okay. And where did you go from there?
- 19 A Went out the driveway, up the street probably about two
20 and a half miles, three miles from where, where we were at
21 in the opposite direction.
- 22 Q Okay. were you pulled over?
- 23 A Yes, sir.
- 24 Q Okay. why were you pulled over?
- 25 A The officer had said that I, I didn't stop fully at a

Eric Elder - Direct examination
by Solicitor Hunter

1 stop sign, and then I proceeded without fully stopping,
2 making a clean stop.

3 Q And did you do that?

4 A No, sir, it was raining and I, and I come halfway to a
5 stop and then kept on.

6 Q So, halfway?

7 You didn't stop fully?

8 A No, I didn't.

9 Q Okay.

10 A It was a stop sign I always came to. Just blew through
11 it.

12 Q When you left the house, did Mr. Ricky Cheeks have
13 anything in his possession?

14 A Yes, sir.

15 Q What did he have in his possession?

16 A A couple ounces of crack.

17 Q Okay. When you get to the car stop, do you know where
18 Mr. Cheeks has this substance?

19 THE COURT: At this time I'm gonna take a short break
20 and ask the jury to step back to the jury room. I'll ask
21 them not to begin any discussions concerning this case until
22 such time as I've asked you to do that.

23 You may retire to the jury room.

24 (WHEREUPON, the following takes place outside the
25 presence of the jury.)

Eric Elder - Direct examination
by Solicitor Hunter

1 THE COURT: The purpose of my taking the break is that
2 I've heard audible discussions or talk or comments
3 concerning the testimony that's being offered from the
4 witness stand coming from the defense table, and I believe
5 it's the gentleman over here to my far right who's making
6 the comments. I have already warned the defense about the
7 demonstrations that were taking place earlier in the trial
8 and this will not be tolerated.

9 MR. WILKES: We understand.

10 May I say something?

11 THE COURT: Yes, sir.

12 MR. WILKES: I believe Mr. Cheeks was trying to get our
13 attention. I don't think he was commenting negatively on
14 the testimony, but I apologize. We, we've got him stuck way
15 out at the end of the table.

16 THE COURT: Well, there are ways of getting peoples'
17 attention without disrupting the Court proceedings.

18 MR. WILKES: Yes, sir.

19 THE COURT: I'll give you a moment to caution him one
20 more time. The next time it will be a citation of contempt.

21 MR. WILKES: Yes, sir.

22 May -- can we speak to him for a minute?

23 THE COURT: I'll allow you to speak to him.

24 MR. WILKES: Thank you.

25 (Pause.)

Eric Elder - Direct examination
by Solicitor Hunter

1 THE COURT: All right. I believe the gentleman who
2 made the comment that I heard, and I did not hear what was
3 said, I just heard audible voices from the table, was
4 Mr. Ricky Cheeks, is that right?

5 MR. WILKES: That's correct, Your Honor. I believe he
6 called my name.

7 THE COURT: All right. Mr. Cheeks, I am going to
8 caution you this one more time. You may not disagree
9 with -- you may not agree with what a witness is saying.
10 You will have an opportunity later in this trial to present
11 your own evidence if you wish to do so. You will also have
12 an opportunity to testify should you choose to do so and
13 we'll discuss that later. But I will not allow disruption
14 of testimony that's going on in the courtroom.

15 Do you understand that, sir?

16 DEFENDANT RICKY CHEEKS: Yes, sir.

17 THE COURT: Any question about that?

18 DEFENDANT RICKY CHEEKS: No, sir.

19 THE COURT: If you wish to gain your attorney's
20 attention you can put a hand across the table. You can make
21 a motion without saying a word.

22 You understand that?

23 DEFENDANT RICKY CHEEKS: (Nods affirmatively.)

24 THE COURT: Do you understand that, sir?

25 DEFENDANT RICKY CHEEKS: Yes, sir.

Eric Elder - Direct examination
by Solicitor Hunter

1 THE COURT: I won't stop and caution you again. It
2 could result in your failure, your forfeit of your right to
3 be present during the trial as well.

4 You understand that, sir?

5 DEFENDANT RICKY CHEEKS: Yes, sir.

6 THE COURT: All right. Let's bring the jury back.

7 (WHEREUPON, the following takes place within the
8 presence of the jury.)

9 THE COURT: All right. Let the record reflect the jury
10 has returned to the courtroom.

11 You may proceed, Mr. Hunter.

12 SOLICITOR HUNTER: Thank you, Your Honor.

13 May it please the Court?

14 THE COURT: Yes, sir.

15 CONTINUED DIRECT EXAMINATION

16 BY SOLICITOR HUNTER:

17 Q When the jury left the room we were talking about the
18 car stop.

19 when your vehicle was stopped, what side were you on?

20 A I was on the driver's side.

21 Q Okay. Who came up to you?

22 If you don't know the name that's fine.

23 A One of the, one of the officers.

24 Q Okay. And what did he do with you?

25 A Just like any routine stop. He just came to the

Eric Elder - Direct examination
by Solicitor Hunter

- 1 window.
- 2 Q Okay. Was he -- where was he looking?
- 3 A At me through the windows right there. You couldn't
- 4 see in the car. He was looking where, with my window down,
- 5 he was looking at me.
- 6 Q All right. Could he see the passenger side as well?
- 7 A He could see through my lap.
- 8 Q Okay. So, he was at a higher advantage than you,
- 9 correct?
- 10 A Yeah.
- 11 Q Just obviously he's standing?
- 12 A Yeah, he's standing.
- 13 Q Did he -- what happened next after he gets your license
- 14 and registration?
- 15 A He asked me to, to step out. He wanted, wanted to know
- 16 if he could search the car.
- 17 Q Okay. What did you say at that point?
- 18 A I said, I said I had nothing on me, that there was no
- 19 use for me, you know, hide nothing.
- 20 Q Did he -- where did he take you once you stepped out of
- 21 the vehicle?
- 22 A The back of the car.
- 23 Q Okay. Did he take you any farther?
- 24 A To, to his car right there at the front of his car,
- 25 which was right behind the car.

Eric Elder - Direct examination
by Solicitor Hunter

1 Q At, at times were you on the passenger side of that
2 vehicle?

3 A No, sir.

4 Q Were you on the passenger side of his vehicle?

5 A No, sir.

6 Q Were you present when the dog was there?

7 A Yes, sir.

8 Q Okay. Were you present when a substance was found by
9 officers?

10 A Yes, sir.

11 Q Were you ever in possession of that substance?

12 A No, sir.

13 Q Okay. Now, I want to go back to the house for a little
14 bit.

15 How long have you known Tracy Markley?

16 A For about five years.

17 Q Okay. How many times have you been over to his house?

18 A Seventy-five or more times, a hundred.

19 Q Okay. Have you ever seen Derricks Cheeks at his house?

20 A Yes, sir.

21 Q Approximately how many times?

22 A More than 50.

23 Q Okay. Could you describe the state of matters within
24 Tracy Markley's house?

25 A The, the floor plan?

Eric Elder - Direct examination
by Solicitor Hunter

- 1 Q How does he, how does he keep his house?
2 A Dirty, nasty.
3 Q How nasty?
4 A Molding, old dinner trays, plates, cups everywhere with
5 mold on them.
6 SOLICITOR HUNTER: Your Honor, may I have a moment?
7 THE COURT: Yes, sir.
8 (Pause.)
9 Q Eric, I'm gonna put up on the -- Eric, do you recognize
10 this area?
11 A Yes, sir.
12 Q And where is this?
13 A It's the kitchen downstairs in Tracy's part of the
14 house.
15 Q Okay. When you left the house, do you remember this
16 area?
17 A Yes, sir.
18 Q Does that fairly and accurately depict what you
19 remember---
20 A Yes, sir.
21 Q ---seeing?
22 A Yes, sir.
23 Q Okay. Do you know what's on the stove?
24 A Yes, sir.
25 Q And what was that used for?

Eric Elder - Direct examination
by Solicitor Hunter

1 A Cooking crack.

2 Q And who was tending to that pot?

3 A Derrick Cheeks.

4 Q Thank you. Please answer any questions that the
5 defense might have for you, Mr. Elder.

6 THE COURT: Mr. Wilkes, your witness.

7 MR. WILKES: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MR. WILKES:

10 Q Mr. Elder, you said that 50 out of 75 times that you've
11 been over there Derrick Cheeks was there?

12 A Yes, sir.

13 Q And how did you get in when you went over there that
14 day you say with Mr. Ricky or Derrick Cheeks?

15 How, how did you get in the house?

16 A A lot of times that I'd call they knew I were on my
17 way, and if they didn't let me in I knocked until they let
18 me in.

19 Q Okay. Well, you went with Derrick that day?

20 A That day, yes, sir.

21 Q Mr. Markley was asleep?

22 A Yes, sir.

23 Q How did you get in the house?

24 A Derrick has a key.

25 Q Now, where else in that house had, have you been on

Eric Elder - Cross-examination
by Mr. Wilkes

1 that day?

2 A On that day I didn't go nowhere but in the bottom part
3 of the house---

4 Q Okay. And---

5 A ---where Tracy lives.

6 Q And did you go in any other room in the bottom part of
7 the house?

8 A No, sir.

9 Q How long were you there after you arrived with Derrick
10 Cheeks?

11 A Probably about an hour or two before I went to the
12 store.

13 Q Okay. What was going on immediately before you left
14 the store?

15 A Before I left to the store?

16 Q When you got ready to leave to go to the store, what
17 was going on?

18 A He was getting everything ready to cook crack.

19 Q Okay. Tell me exactly where, where was he.?

20 A Where was what?

21 Q Where was -- where do you say Mr. Cheeks was, Derrick
22 Cheeks?

23 A He was in the kitchen.

24 Q Okay. What did you observe him doing?

25 A Just getting pots and pans out and stuff ready for

Eric Elder - Cross-examination
by Mr. Wilkes

- 1 cooking.
- 2 Q Okay. was he boiling water?
- 3 A Uh-huh. (Affirmative).
- 4 Q That's it -- that's what was going on on the stove,
- 5 boiling the water in the pan?
- 6 A Yes, sir, something like that.
- 7 Q Okay. How, how long have you known Tracy Markley?
- 8 A Five years.
- 9 Q what's your relationship with Tracy Markley?
- 10 A Just smoke crack together.
- 11 Q How did you meet Tracy Markley?
- 12 A Through Derrick Cheeks.
- 13 Q Did you do anything other than smoke crack at Tracy
- 14 Markley's house?
- 15 A No, just sit around.
- 16 Q Sit around with whom?
- 17 A With Tracy and whoever's there.
- 18 Q Name some other people that have been there.
- 19 A It's a lot of people. Christopher was there, Johnson.
- 20 He stayed there a lot cause he usually was there everyday.
- 21 Q What did Christopher Johnson do?
- 22 A He smoked crack and drove with cars.
- 23 Q Christopher Johnson cook any crack?
- 24 A No.
- 25 Q Did you ever see Kenneth Lewis over at the house?

Eric Elder - Cross-examination
by Mr. Wilkes

- 1 A I don't know no Kenneth Lewis.
- 2 Q Xavier Carson?
- 3 A I do know a guy named Xavier.
- 4 Q How, how would Xavier come over to the house?
- 5 A He wasn't allowed there.
- 6 Q How do you know Xavier then?
- 7 A I know him through, through Derrick Cheeks.
- 8 Q But you'd never seen him at the Markley residence?
- 9 A If he was allowed one day to come with them he was
- 10 there, but he wasn't allowed to come on his own there.
- 11 Q Okay. well, who could invite him over?
- 12 A Derrick.
- 13 Q All right. You're not saying that Derrick ever slept
- 14 there or spent the night at the Markley residence, are you?
- 15 A Yeah, he, he has.
- 16 Q Okay. Did you ever get food -- did you ever stay long
- 17 enough to eat while you were at the Markley house?
- 18 A Tracy didn't keep nothing good to eat there. If there
- 19 was anything in there to eat it was in there for a long
- 20 period of time.
- 21 Q How long typically would you stay over at Tracy's house
- 22 when you visited him?
- 23 A Just depends on if I had a good bit of crack to smoke.
- 24 Q Now, you were charged with trafficking along with
- 25 Mr. Cheeks, weren't you?

Eric Elder - Cross-examination
by Mr. Wilkes

1 A Yes, sir.

2 Q Okay. Now, have you been promised anything to testify
3 today against Mr. Cheeks?

4 A No, sir.

5 Q You expecting to have your charges not brought before
6 this Court?

7 A No, sir, I face the same charges he does just right
8 along with him.

9 Q You expecting to have them reduced?

10 A No, sir.

11 Q What's your understanding of why you're not on trial
12 today with him?

13 A Because I don't agree with the selling drugs and I'm
14 not a drug dealer. But I am a crack head and I was for a
15 long period of time and that was my way of getting the
16 drugs. But I don't agree with what he does.

17 Q Do you believe that what you do today testifying may
18 help you?

19 A No, sir.

20 Q You don't believe that it will help you?

21 A No, sir, it won't help. I could go to prison just like
22 he can.

23 Q But not today?

24 Have you ever told the police that you were trying to
25 help yourself by working off your charges?

Eric Elder - Cross-examination
by Mr. Wilkes

1 A I have.

2 Q what did that mean?

3 A Nothing really.

4 Q well, what, what did it mean to you?

5 A I was scared and it was a way to, to try to, to try to
6 help myself, but it wasn't.

7 Q Okay. So, if you cooperate with the police, you are
8 helping yourself?

9 A No, sir.

10 Q well, you just said you, you made that statement and
11 you believed it?

12 A No, I didn't believe it.

13 Q But you don't believe it now?

14 A I didn't believe, I didn't believe I was gonna be
15 helped. I just said that statement.

16 Q So, you, you told the police officer you were trying to
17 help yourself?

18 SOLICITOR HUNTER: Objection, Your Honor.

19 THE COURT: I'm gonna ask the jury at this point in
20 time to step back to the jury room. Don't begin any
21 discussions concerning this case until such time as I've
22 asked you to do so.

23 (WHEREUPON, the following takes place outside the
24 presence of the jury.)

25 THE COURT: The objection is?

Eric Elder - Cross-examination
by Mr. Wilkes

1 SOLICITOR HUNTER: Your Honor, your previous ruling was
2 that once he answered yes that he did make that statement
3 that that inquiry would stop. I was allowing Mr. Wilkes to
4 tip-toe the line. However, when he starts talking again,
5 that he's already asked the question, he's already answered
6 it, and he starts talking to him again as to what he told
7 police, and we believe he's already asked and answered that
8 question, and subject to your ruling, can't go into that
9 inquiry any further.

10 THE COURT: Mr. Wilkes.

11 MR. WILKES: My understanding is that you were very
12 clear on me not getting into the details of the arrest. But
13 I have asked him, and he said he did, in fact, make the
14 statement, which I am trying to understand, through my
15 questioning, how you can make that statement to the police
16 but not know what it meant at the time or not believe it
17 means anything now. And I think that that is critical to my
18 defense of having the right to cross-examine him on what he
19 believed that statement meant.

20 THE COURT: Well, my biggest concern is that if we keep
21 walking that tightrope we may fall off, which means we may
22 get into what happened and how it happened and under what
23 circumstances it happened, which is extrinsic evidence that
24 might prove that the statement was made.

25 MR. WILKES: Right.

Eric Elder - Cross-examination
by Mr. Wilkes

1 THE COURT: So, I'm gonna caution you---

2 MR. WILKES: All right.

3 THE COURT: ---that you're walking a tightrope.

4 MR. WILKES: I am.

5 THE COURT: And it could result in your falling off.

6 MR. WILKES: I understand.

7 THE COURT: So, I don't have any problem with you
8 asking him what, what that meant to him. You could ask if
9 it was a true statement or not, and I think he's indicated
10 somewhat that it was not a true statement. But if we start
11 getting into the facts and circumstances of the arrest or
12 how it came about or under what circumstances that statement
13 was made, that's extrinsic evidence, which is no longer
14 available to you since he's admitted making the statement.

15 MR. WILKES: I am not trying to get in the facts of the
16 case.

17 THE COURT: I know you're not trying to, but if we keep
18 pushing it to the edge it eventually goes over.

19 MR. WILKES: Very well.

20 THE COURT: And, so, I'm gonna, I'm gonna keep him on a
21 tight leash as far as asked and answered. We're not gonna
22 beat this dog to death.

23 You understand?

24 MR. WILKES: I do.

25 THE COURT: All right. Bring the jury back.

Eric Elder - Cross-examination
by Mr. Wilkes

1 (Whereupon, the following takes place within the
2 presence of the jury.)

3 THE COURT: The record will reflect the jury has
4 returned to the courtroom.

5 You may proceed pursuant to my instructions, Mr.
6 Wilkes.

7 MR. WILKES: Thank you, Your Honor.

8 CONTINUED CROSS-EXAMINATION

9 BY MR. WILKES:

10 Q Mr. Elder, when you made the statement that you were
11 trying to help with your pending drug case, that was not
12 true?

13 Is that what you're saying?

14 A Yes, sir.

15 MR. WILKES: If I can have just one second?

16 THE COURT: Yes, sir.

17 MR. WILKES: Thank you.

18 (Pause.)

19 MR. WILKES: Thank you, Your Honor. That's all I have.

20 THE COURT: Mr. Poole.

21 MR. POOLE: May it please the Court?

22 THE COURT: Yes, sir.

23 CROSS-EXAMINATION

24 BY MR. POOLE:

25 Q Mr. Elder, I'm gonna have to ask you some similar

Eric Elder - Cross-examination
by Mr. Poole

- 1 questions that you've already been asked.
- 2 A Yes, sir.
- 3 Q Now, you are charged with the same charges as Derrick
- 4 Cheeks --
- 5 A Yes, sir.
- 6 Q -- which is trafficking in crack cocaine 400 grams or
- 7 more?
- 8 A Yes, sir.
- 9 Q And which is the manufacturing of crack cocaine near a
- 10 school?
- 11 A Yes, sir.
- 12 Q And those charges are still pending?
- 13 A Yes, sir.
- 14 Q And you have an attorney?
- 15 A Yes, sir.
- 16 Q Is he here in the courtroom today?
- 17 A Yes, sir.
- 18 Q Okay. Good. You have a very capable attorney, don't
- 19 you?
- 20 A As anyone ever would have.
- 21 Q Okay. He's retained or is he?
- 22 A Yes, sir.
- 23 Q Is that right?
- 24 A Yes, sir.
- 25 Q Okay. And, and you've had often -- you've had a lot of

Eric Elder - Cross-examination
by Mr. Poole

1 contact with law enforcement and personnel from the
2 Solicitor's Office prior to your testimony today, haven't
3 you?

4 A No, sir.

5 Q You have had, you have had none?

6 A I have. But I haven't had a lot.

7 Q Okay. You've had meetings before your testimony today,
8 haven't you?

9 A With my lawyer.

10 Q Okay. And you deny having, having any meetings with
11 any of the solicitors or law enforcement?

12 A I have before.

13 Q Okay. Well, that's what my question was that you've
14 had some meetings then?

15 A Not pertaining to this case.

16 Q Okay. And it's your testimony, I believe you were
17 asked while you were testifying, is that Mr. Wilkes asked
18 you why are you testifying, and you said you don't agree
19 with selling drugs?

20 A No, sir, I don't.

21 Q Uh-huh. (Affirmative).

22 Okay. So, yet you have been, for seven or eight years,
23 involved in the drug culture?

24 A Smoking drugs, yes, sir.

25 Q Yes, sir.

Eric Elder - Cross-examination
by Mr. Poole

1 You have been involved, for seven or eight years, in
2 the drug culture, haven't you?

3 A Yes, sir, and it ruined my life and I hate, I hate
4 that, that it ruined my life.

5 Q Yes, sir. I understand and believe me I can understand
6 that.

7 A Yeah.

8 Q Will you understand that please?

9 A Uh-huh. (Affirmative).

10 Q But, yet, you're testifying today against your
11 codefendants?

12 A On my---

13 Q Aren't you?

14 A Yeah. Yes, sir.

15 Q And you, and you're telling this jury that your sole
16 reason for testifying is because you don't believe in the
17 selling of drugs?

18 A No, sir, it's wrong.

19 Q Okay. Well, did you have -- when did you come to that
20 realization?

21 Was it on June 4th, 209?

22 A No, sir.

23 Q Because you were involved with it at that time, weren't
24 you?

25 A I, I have to get my way of buying it, yes, sir, and I

Eric Elder - Cross-examination
by Mr. Poole

1 had to buy drugs and that's where I had to go, to a drug
2 dealer.

3 Q And, and you've been around drug dealers for a long
4 time?

5 A I grew up in that area. So --.

6 Q Okay. And you, you have -- you do hope to benefit from
7 the giving of your testimony today, don't you, sir?

8 A No, sir.

9 Q You don't?

10 A No, sir.

11 Q The only reason you're testifying is because you have a
12 personal conviction against the buying and selling of drugs?

13 A Yes, sir.

14 Q Marijuana?

15 A Yes, sir.

16 Q All drugs?

17 A Yes, sir.

18 Q Crack cocaine?

19 A Yes, sir.

20 Q All drugs?

21 A All drugs.

22 Q Did you use all drugs?

23 A I've used a pretty good, pretty bit all of them, yes,
24 sir.

25 Q So, you have renounced the use of all illegal drugs?

Eric Elder - Cross-examination
by Mr. Poole

1 SOLICITOR HUNTER: Objection, Your Honor. Asked and
2 answered.

3 THE COURT: Overruled.

4 Q So, you have renounced and repented, is that right?

5 A I just don't agree with it, sir.

6 Q Well, okay. Well, what's the reason for your current
7 disagreement?

8 A It ruined my life.

9 Q Okay. So, you have renounced and repented and you've
10 seen the light?

11 A To put it in a Godly way you can, yes, sir.

12 Q And you're testifying today against your codefendants?

13 A Yes, sir.

14 Q Is that your suit?

15 A Yes, sir.

16 Q Okay. When did you buy it?

17 A I bought it from Faith Ministries---

18 Q Yes, sir.

19 A ---for about \$2.

20 Q Yes, sir.

21 A Yes, sir.

22 Q For Court, didn't you?

23 A No, for church.

24 Q Okay. Good. The night of the traffic stop---

25 A Yes, sir.

Eric Elder - Cross-examination
by Mr. Poole

- 1 Q ---you said it was raining?
2 A Yes, sir, it wasn't, it wasn't at night.
3 Q well, the day of the traffic stop.
4 A Yes, sir.
5 Q It was raining?
6 A Yeah, at that point in time.
7 Q I mean it's a summer shower?
8 A It came. It came.
9 Q Raining pretty hard, wasn't it?
10 A I mean it wasn't raining that morning, but it, it came
11 right then at that time around noon.
12 Q And a summer shower, middle of the day?
13 A Yeah.
14 Q Hot?
15 A I don't remember---
16 Q June 4th.
17 A ---much about the hotness.
18 Q Okay.
19 A I was standing looking at police. It was a lot of
20 things feeling hot.
21 Q Pardon me?
22 what did -- the heat was on?
23 A Yes, sir.
24 Q Okay. And so, look, in a more serious note---
25 A Yes, sir.

Eric Elder - Cross-examination
by Mr. Poole

- 1 Q ---it was raining?
- 2 A Yes, sir.
- 3 Q All right. And you're having to get out of the car and
- 4 stand in the rain, aren't you?
- 5 A Yes, sir.
- 6 Q And you, you were in the presence of Ricky Cheeks,
- 7 right, Ricky Cheeks?
- 8 A Yeah, he had to walk on the, on the passenger side. He
- 9 had to walk back---
- 10 Q Okay.
- 11 A ---also.
- 12 Q And now what was your testimony as to how much crack
- 13 cocaine he had on him?
- 14 A It's just a couple ounces.
- 15 Q A couple ounces?
- 16 A Uh-huh. (Affirmative).
- 17 Q Well, let's say -- a couple means two, doesn't it?
- 18 A No, it could mean more than two.
- 19 Q A couple means more than two?
- 20 A To me it does.
- 21 Q All right. Or so you're saying that -- well, how
- 22 much -- I mean you were there. I mean you've been there 75
- 23 of a hundred times at this place. You've see these guys and
- 24 apparently y'all are friends and you know exactly what's
- 25 going on with one another in your, one another's lives.

Eric Elder - Cross-examination
by Mr. Poole

- 1 You're in this drug culture.
- 2 A But I didn't want---
- 3 Q How -- did he have two ounces or not?
- 4 A It, it looked to be more than two ounces.
- 5 Q Oh, more than two ounces.
- 6 A So, it's a couple ounces.
- 7 Q Didn't you just testify a while ago it's two ounces?
- 8 A No, sir, I didn't.
- 9 Q Okay. well, how much was it?
- 10 You knew. You know you knew.
- 11 A I didn't weigh it, sir.
- 12 Q I'm not asking you to weigh it.
- 13 A Okay.
- 14 Q You're familiar with costs, street value, weren't you?
- 15 A I didn't know how much he was gonna be paid for it
- 16 either.
- 17 Q well, how much was it?
- 18 A It looked to be a couple of ounces.
- 19 Q Two ounces?
- 20 A Could of been more.
- 21 Q Three?
- 22 A Could of been four. I'm not sure to be honest.
- 23 Q Bear with me, Mr. Elder. Let me try to see if I can
- 24 understand something.
- 25 You say that you went to wal-Mart and bought soda at

Eric Elder - Cross-examination
by Mr. Poole

1 the behest of somebody, at the request of someone, is that
2 right?

3 A I went to Wal-Mart and bought some baking soda, yes,
4 sir, I did.

5 Q Okay. And that's it right there?

6 A Yes, sir.

7 Q All right. And then you got it and you threw it in
8 Ricky Cheeks' lap, is that right?

9 A I got in the car and tossed it in his lap as I was
10 driving.

11 Q Uh-huh. (Affirmative). And that -- yeah, yeah, or
12 your direct testimony was I threw it.

13 A Yeah.

14 Q Now, what you're, what you're doing right now, aren't
15 you throwing the entire blame on this in the laps of Ricky
16 and Derrick Cheeks?

17 A No.

18 Q That's what you're doing today, sir?

19 A No, sir, I admit I paid for it. I went into the
20 Wal-Mart and paid for it.

21 Q I'm talking about the entire cocaine/crack cocaine
22 scenario.

23 You're throwing it in their laps, aren't you?

24 A I didn't sell drugs.

25 Q Pardon me?

Eric Elder - Cross-examination
by Mr. Poole

- 1 A I didn't sell drugs.
- 2 Q were you guilty of anything?
- 3 A Yes, sir, I was guilty of smoking crack and I was
- 4 guilty of driving the car.
- 5 Q How about manufacturing?
- 6 A I didn't cook crack, no, sir.
- 7 Q Oh, so, you're not gonna go that far up, are you?
- 8 A I didn't cook it. I'm not gonna lie to you.
- 9 Q Well, you ever heard of the hand of one is the hand of
- 10 all?
- 11 A A lot of people live by that, yes, sir.
- 12 Q In law, in law, the hand of one is the hand of all. If
- 13 you're involved, even on the periphery of criminal activity,
- 14 if you know what's going on and you're around, the hand of
- 15 one is the hand of all.
- 16 You've heard of that?
- 17 A That's true.
- 18 Q You've heard it from your lawyer, haven't you?
- 19 A No.
- 20 Q But you've heard it before?
- 21 A Yeah.
- 22 Q And you understand it?
- 23 A I do.
- 24 Q And, so, you know that you're facing serious
- 25 imprisonment if you're found guilty---

Eric Elder - Cross-examination
by Mr. Poole

- 1 A For knowing---
- 2 Q ---for these charges?
- 3 A For knowing Derrick Cheeks and these people, yes, sir,
- 4 I know that.
- 5 Q Okay. But you sit here today and you say that the only
- 6 thing you're guilty of is just knowing about it?
- 7 A No, I'm guilty of buying crack.
- 8 Q How about manufacturing?
- 9 I'll ask you one more time, are you guilty of it?
- 10 A I'm not guilty of cooking crack, no, sir.
- 11 Q Were you around when it was being cooked?
- 12 A Yes, sir.
- 13 Q well, how then can you not be guilty?
- 14 A Cause I didn't pay for it, I didn't buy it, I didn't
- 15 purchase it, and I didn't cook it.
- 16 Q well, what about you buying the ingredients that's used
- 17 in the manufacture of it?
- 18 A I could go buy you some shoes, does that mean that
- 19 they're mine or yours?
- 20 I bought them for you.
- 21 Q well, I appreciate that offer. Thank you.
- 22 A All right.
- 23 Q But we're talking about you buying this soda right
- 24 here.
- 25 That's participation, isn't it?

Eric Elder - Cross-examination
by Mr. Poole

1 We could go on and on about your participation in this
2 scenario, couldn't we?

3 A You could make it look like a hundred different things.
4 That's your opinion of what you're---

5 Q But you're sitting there today saying the only thing
6 you are guilty of is just knowing a little bit about what
7 was going on?

8 A No, I didn't say I knew a little bit.

9 Q You knew everything?

10 A Pretty much a lot, but that didn't mean I participated
11 in it every day.

12 Q And, of course, you would tell the truth if I asked you
13 if you disposed or dropped any crack cocaine out there on
14 that road that day, wouldn't you?

15 You'd tell the truth about that, wouldn't you?

16 A I would tell you the truth.

17 Q Do you consider that you didn't have possession of it?

18 A I know I didn't have possession of it.

19 Q You were aware of it?

20 A I was aware.

21 Q What about the hand of one is the hand of all, we're
22 back to that, you're not guilty of it?

23 A That would be left in a court of law.

24 MR. POOLE: That's all I have, Your Honor.

25 THE COURT: Redirect?

Eric Elder - Redirect examination
by Solicitor Hunter

1 SOLICITOR HUNTER: Yes, Your Honor.

2 THE COURT: Yes, sir.

3 REDIRECT EXAMINATION

4 BY SOLICITOR HUNTER:

5 Q Let's go over what you heard last from Mr. Poole. He
6 asked you if you had any meetings on this case.

7 In fact, you have met with me at least once on this
8 case, correct?

9 A I've met you.

10 Q Okay. And we talked about this case?

11 A Yeah, I've talked about it, things.

12 Q Okay. Now, you agree you were a participant at the
13 house?

14 A Yes, sir.

15 Q Okay. You bought the baking soda?

16 A That day I did.

17 Q Okay. And, and who was cooking crack?

18 A Derrick Cheeks.

19 Q Okay. And who was running that crack?

20 A His uncle, Ricky Cheeks.

21 MR. POOLE: Objection, Your Honor. Improper redirect.

22 THE COURT: I'm listening.

23 MR. POOLE: Your Honor, this is not, a question that
24 could of been asked during direct. I don't think it's in
25 response to anything that was brought out in

Eric Elder - Redirect examination
by Solicitor Hunter

1 cross-examination.

2 THE COURT: Aren't we to go to something new that was
3 bought out in cross?

4 SOLICITOR HUNTER: After that question, Your Honor, he
5 just asked about the, the car stop, and if he had possession
6 of the crack, and could he tell the truth, and who had
7 possession of the crack. I'm just going back to what he
8 said on cross, Your Honor.

9 THE COURT: Well, I'm gonna ask that you get there.
10 I'll sustain the objection as to the last question. You can
11 get to any new matters that was brought up in cross.

12 SOLICITOR HUNTER: I'm actually gonna skip over to Mr.
13 Wilkes at this time, Your Honor.

14 THE COURT: Beg your pardon?

15 SOLICITOR HUNTER: I'm gonna skip over to Mr. Wilkes at
16 this time.

17 THE COURT: All right. Mr. Wilkes.

18 SOLICITOR HUNTER: No, no, no.

19 THE COURT: Oh, you -- oh, you want to go on?

20 SOLICITOR HUNTER: Yes.

21 THE COURT: Okay. Excuse me.

22 MR. WILKES: He was going to skip over to me.

23 THE COURT: I misunderstood. Go ahead.

24 Q Now, Mr. Wilkes asked you about Xavier Carson, is that
25 correct?

Eric Elder - Redirect examination
by Solicitor Hunter

- 1 A Yes, sir.
- 2 Q Was he present at 152 Gordon Drive that day?
- 3 A No, sir.
- 4 Q Was he present during the car stop?
- 5 A No, sir.
- 6 Q Was he present at the Wal-Mart?
- 7 A No, sir.
- 8 Q In fact, how do you know Xavier Carson?
- 9 A Through Derrick Cheeks.
- 10 Q Okay. He also asked about Chris Johnson.
- 11 Was Chris Johnson also at ?
- 12 A No, sir.
- 13 Q Was Christopher Johnson at the Wal-Mart?
- 14 A No, sir.
- 15 Q Was Christopher Johnson at the car stop?
- 16 A No, sir.
- 17 Q In fact, how do you know Christopher Johnson?
- 18 A Cause he was at the motel.
- 19 Q Okay.
- 20 A That -- he was asleep and that's the whole reason why I
- 21 needed to drive that day for Derrick.
- 22 Q Okay. How did you meet Christopher Johnson?
- 23 A Through Derrick Cheeks.
- 24 Q Okay. No further questions.
- 25 THE COURT: Mr. Wilkes.

Eric Elder - Recross examination
by Mr. Wilkes

1 MR. WILKES: Thank you, Your Honor.

2 THE COURT: Recross.

3 RECROSS EXAMINATION

4 BY MR. WILKES:

5 Q When was it you last spoke with the solicitor about
6 your case, your testimony?

7 A I don't remember the date.

8 Q Was it a week ago, a month ago, a year ago?

9 A Probably about a month ago.

10 Q Okay. When was the last time you spoke with Agent
11 Hanning about the case?

12 A A year or more ago.

13 Q Any other agents in the case that you have spoken with
14 them?

15 A Not to my knowledge.

16 Q To your knowledge, would -- you should remember if you
17 spoke to them within the last six months or so, wouldn't
18 you?

19 A Hu huh. (Negative).

20 Q You wouldn't?

21 A Not about the case. Not about my case. Not this case.

22 Q Would you talk to them about other cases?

23 SOLICITOR HUNTER: Objection, Your Honor.

24 THE COURT: Sustained.

25 MR. WILKES: If I can have one second?

1 THE COURT: Yes, sir.

2 (Pause.)

3 MR. WILKES: Nothing further. Thank you, judge.

4 THE COURT: Mr. Poole.

5 MR. POOLE: Nothing further, Your Honor.

6 THE COURT: All right, sir. You may step down.

7 WITNESS: Thank you, Your Honor.

8 SOLICITOR HUNTER: Your Honor, may Mr. Elder be
9 excused?

10 THE COURT: Any objection to this witness being
11 excused?

12 MR. WILKES: I do, Your Honor.

13 THE COURT: All right, sir. I'm gonna ask him to stay
14 around.

15 THE COURT: All right. Ladies and gentlemen of the
16 jury, at this point in time we're going to break for lunch.
17 The same instructions I'll give you everytime you leave the
18 courthouse not to attempt to gather any information about
19 the case, don't discuss the case with anyone, and don't
20 allow anyone to discuss the case with you. Don't listen to,
21 watch, or read any media reports and should anyone try to
22 contact you about your participation in the case please
23 report that to the court.

24 We're going to return to the jury room at two o'clock.
25 At that point in time we should be in a position to resume

1 the trial of the case. As this time you're free to go.

2 Thank you very much.

3 THE COURT: Remain seated while the jury retires.

4 Thank you.

5 (Whereupon, the following takes place outside the
6 presence of the jury.)

7 THE COURT: All right. Court's in recess until two
8 o'clock. Thank you very much.

9 (Whereupon, Court was in recess for the lunch hour.)

10 THE COURT: All right. Is the State ready to proceed?

11 SOLICITOR HUNTER: Yes, Your Honor.

12 THE COURT: Defense ready?

13 MR. WILKES: Yes, sir.

14 MR. POOLE: Yes, sir.

15 THE COURT: All right. Bring the jury in.

16 (Whereupon, the following takes place within the
17 presence of the jury.)

18 THE COURT: The record will reflect that the jury has
19 returned to the courtroom. I trust everyone's had a good
20 lunch.

21 At this time the State may call its next witness.

22 SOLICITOR HUNTER: Your Honor, the State would call
23 Tracy Markley.

24 THE COURT: All right, sir. If you'll come forward,
25 and we'll try to get you as close to the witness stand as we

Tracy Markley - Direct examination
by Solicitor Hunter

1 can please, sir.

2 TRACY MARKLEY, having been first duly
3 sworn, testified as follows:

4 THE COURT: Can you turn, sir, and face out towards the
5 back of the courtroom.

6 (witness complies.)

7 THE COURT: We got to get you as close as we can to
8 that microphone.

9 WITNESS: That's all right.

10 THE COURT: All right. State your name please, sir.

11 WITNESS: Tracy Markley.

12 THE COURT: Thank you.

13 Your witness, Mr. Hunter.

14 DIRECT EXAMINATION

15 BY SOLICITOR HUNTER:

16 Q Mr. Markley, how long have you lived in Spartanburg
17 County?

18 A About 20 years.

19 Q Okay. And previous to that where did you live?

20 A Miami, Florida.

21 Q where do you currently live?

22 A

23 Q okay. And whose residence is that?

24 A It's my parents.

25 Q Your parents, who would they be?

Tracy Markley - Direct examination
by Solicitor Hunter

- 1 A J.N. and Pat Markley.
2 Q Okay. And is Mr. Markley in the courtroom today?
3 A Yes, he is.
4 Q Where is he?
5 A The gentleman with the gray sweater.
6 Q Okay. And who's sitting next to him?
7 A It's my lawyer.
8 Q Okay. In this case you've been charged with
9 trafficking crack over 400 grams?
10 A Yes.
11 Q You've also been charged with possession with intent to
12 distribute that crack---
13 A Yes.
14 Q ---near Woodland Heights Elementary?
15 A Yes.
16 Q Okay. Same charges as Mr. Cheeks and Ricky Cheeks
17 minus the car stop?
18 A Yes.
19 Q Were you present at the car stop?
20 A No.
21 Q Okay. Can you briefly describe June 4th, 2009, how
22 you remember that, that date?
23 A I was sitting at the table smoking some crack and heard
24 some, you know, beating on the door, the door come flying
25 in, SLED came in, and, you know, told me, they said they had

Tracy Markley - Direct examination
by Solicitor Hunter

1 a warrant, then for everybody to get on the ground, and
2 pretty much at that point I was on the ground.

3 Q Previous to this point, but before that, how did your
4 day unfold?

5 A Waking up, Derrick coming in and proceeding to do some
6 cooking on the, on the stove.

7 Q So, when you said waking up, when Derrick arrived at
8 your house, were you asleep?

9 A Probably, yes.

10 Q Okay. Does Mr. Cheeks, Derrick Cheeks, have a key to
11 your house?

12 A At one point he did, but that particular day I don't
13 know if he did or not.

14 Q Okay. Why did Mr. Cheeks have a key to your house?

15 A It was -- I guess you could say I was a heavy sleeper
16 and cause I did so many drugs. When I did finally go to
17 sleep I was real hard to wake up. So, it was, I guess, so
18 he could come in and wake me up cause I was pretty much like
19 a chauffeur to him. I drove him everywhere.

20 Q Was there any other drivers for Mr. Cheeks?

21 A Yeah, Chris Johnson and Eric Elder.

22 Q Okay. On that particular day, who, who showed up at
23 your house?

24 A Derrick came, had Ricky with him, and, and Eric.

25 Q Okay. Was Christopher Johnson ever at your house that

Tracy Markley - Direct examination
by Solicitor Hunter

1 day?

2 A I can't remember. I think he -- I don't think he was
3 there that day at all.

4 Q Okay. Was he there when you woke up?

5 A who's that?

6 Q Christopher Johnson.

7 A No.

8 Q Was he there when the police entered the house?

9 A No.

10 Q Okay. Now, Mr. Markley, could you briefly describe to
11 the jury the state of your house?

12 A As far as --?

13 Q Well, as far as how you keep your house.

14 A I'm a slob. I'm, you know, pretty messy. Derrick was
15 real good about, you know, trying to keep the place clean,
16 all cleaned up.

17 Q Now, why would Derrick keep it cleaned?

18 A He's just a clean freak.

19 Q Were there any other reasons why Derrick wanted to keep
20 it clean?

21 A No, he's just a -- he just likes keeping things clean
22 all the time.

23 Q Okay.

24 A He's a fanatic, fanatic about it.

25 Q When he showed up at your house and you wake up, what

Tracy Markley - Direct examination
by Solicitor Hunter

1 happens next?

2 A It depends on the particular day. It may be -- he
3 might be, he might be waking me up to, you know, for me to
4 take him to the store or go grocery shopping or drop some
5 items off at, you know, one of his various lady friends that
6 he's got kids by.

7 Q Okay. On, on June 4th, 2009, did you own a vehicle?

8 A I had a motorcycle, but it wasn't running.

9 Q Okay. Whose vehicle would you drive if you were to
10 drive a vehicle at that time?

11 A One of Derrick's cars.

12 Q Okay. Do you know how many he had?

13 A There was like three of them, but his brother would use
14 one and we were using the other one, and then the other car
15 was actually in my name. But it was being loaned at one of
16 his, one of the girls that he has twin girls by.

17 Q So, there was a car in your name?

18 A Yeah.

19 Q Did you purchase that vehicle?

20 A No, I didn't pay for it, but it was in my name.

21 Q Okay. Who purchased that vehicle?

22 A Derrick did.

23 Q Okay. Now, when you wake up, who's, who's in the
24 kitchen?

25 A Derrick was in there cooking.

Tracy Markley - Direct examination
by Solicitor Hunter

- 1 Q Okay. Who else was in the house?
- 2 A Rick was there. He was sitting in the living room
- 3 watching TV.
- 4 Q Okay. How close is this area to the kitchen?
- 5 A Well, it's like a big, big rec room with a small
- 6 kitchen.
- 7 Q Okay. So, approximately how many feet?
- 8 A Twenty, twenty-five feet long.
- 9 Q Okay. Now, while Derrick's in the kitchen, where's
- 10 Eric?
- 11 A Well, when he's there, he's usually hovering over
- 12 Derrick.
- 13 Q Okay. Specifically on June 4th?
- 14 A He was, he was either in the kitchen or he was in the
- 15 living room watching TV.
- 16 Q Okay. Did Eric participate in the cooking of the
- 17 crack?
- 18 A No, Derrick didn't permit it, but, you know, Eric was
- 19 real, I call it sneaky. So, he was trying to be on top of
- 20 everything.
- 21 Q Okay. Did Eric ever leave the residence?
- 22 A Yes.
- 23 Q Who went with him?
- 24 A That one particular time Rick did.
- 25 Q Okay. Do you know where they went?

Tracy Markley - Direct examination
by Solicitor Hunter

1 A No, I have not -- I have no idea.

2 Q Okay. Now, when the police entered your residence,
3 what were they saying?

4 A When they entered or---

5 Q When they entered into your room, were they yelling
6 anything?

7 A Yeah, they were, you know, identifying themselves and
8 saying they had a warrant that, for, you know, everybody to
9 get on the ground.

10 Q Okay. When they entered the room, where is Derrick
11 Cheeks standing?

12 A He was in the kitchen and then he ran into my bedroom,
13 which is near the front door.

14 Q Okay. And what is the state of your bedroom?

15 A It was dark.

16 Q Okay.

17 A I like it real dark. I, I like -- I don't like the
18 light when I sleep.

19 Q Okay.

20 A Cause I sleep in the daytime most of the time.

21 Q How about the, the items in your bedroom, how was it
22 kept?

23 A I guess you could say I'm a horder or a collector. I
24 find things and it gets kind of cluttered.

25 Q Okay. Tracy, I'm going to show you what's been marked

Tracy Markley - Direct examination
by Solicitor Hunter

1 as State's evidence 5.

2 Were you aware that money was seized in that search
3 warrant?

4 A Yes.

5 Q Were you aware that it was seized in your house?

6 A Yes.

7 Q Is that your money?

8 A No.

9 Q Whose money is that?

10 A I'm sure it was Derrick's.

11 Q Why are you sure?

12 A Well, I never had no money. Every minute, penny I got
13 I, I wasted away on buying crack.

14 Q Okay. How long have you been an addict?

15 A Well, before I moved up here from Miami I was an addict
16 for, for about a year and then I put myself in detox, and
17 then went into the homeless shelter. Then I convinced my
18 parents I quit and they let me come up, move up here. So,
19 then in, let's see '04, in '04, about June or July, I
20 started working at Fatz and from that time on, with the
21 person that was working there too, me and him became
22 buddies. He sort of got me smoking crack.

23 Q And how did you meet Derrick Cheeks?

24 A It was a long process. We knew each other at work. We
25 weren't friends. We didn't hang out. It was a, probably a

Tracy Markley - Direct examination
by Solicitor Hunter

1 six month period before me and him actually started hanging
2 out, and that was because of my friend, James Cranfield. He
3 was, he was going to Derrick to buy crack, and, like I said,
4 he got me started smoking, and we would go to his, you know,
5 where he lived at the time to buy some. But that, you know,
6 I didn't, I didn't even go inside and buy it or anything
7 cause at that time I still didn't know---

8 Q When did you first meet Ricky Cheeks?

9 A I guess it was probably six months or a year later or
10 something like that when he had moved to another location.
11 I had, I had met him, but he was like, he was like me. He
12 was a, an addict also.

13 Q Okay. Did you have an arrangement with Mr. Cheeks
14 regarding your house?

15 A No, not really. It was -- it just happened because the
16 one, the one car that we had loaned to his, one of his lady
17 friends had, had some damage done to it and I'm a mechanic
18 by trade. So, I started working on it. But in the process
19 I wasn't thinking, I was rushing, and I basically made it so
20 instead of the car, it costing say a thousand dollars to
21 fix, it ended up costing him 5,000 because I was rushing it
22 and didn't do a proper job. So, because of that I owed him
23 quite a bit of money.

24 Q And how did you repay that?

25 A By letting him cook at my house.

Tracy Markley - Direct examination
by Solicitor Hunter

1 Q Okay. And specifically on June 4th, 2009, who was
2 cooking at your house?

3 A What day?

4 Q June 4th, 2009.

5 A Derrick.

6 Q Okay. And did you expect to receive anything from him
7 at that point?

8 A Yeah, he would give me a little bit for, for the, for
9 the privilege of, you know, him cooking at the house, and
10 then, you know, anytime I would drive he always paid me in
11 crack.

12 Q Have you met with investigators since your arrest?

13 A No, I haven't.

14 Q Have you met with Investigator Paul Norris?

15 This is Mr. Norris.

16 A I don't, I don't---

17 Q Have you met with Mr. Norris, Mr. Norris and I at your
18 attorney's office?

19 A Oh, okay. Yes, I---

20 Q Okay.

21 A ---wasn't sure what you were talking about.

22 Q At that time or anytime before has the State promised
23 you any deals regarding your charges?

24 A No, they haven't.

25 Q Have you been promised orally or in writing as to your

Tracy Markley - Direct examination
by Solicitor Hunter

1 charges?

2 A No.

3 Q So, you're still facing those charges today?

4 A Yes.

5 SOLICITOR HUNTER: Beg the Court's indulgence for a
6 moment.

7 THE COURT: Yes, sir.

8 (Pause.)

9 Q All right. Mr. Markley, you talked about how messy
10 your house was. I'm gonna show you what's been marked as
11 State's Exhibit 4.

12 Do you recognize that?

13 A That's the garage.

14 Q Okay. And what's the state of your garage?

15 A Oh, that side there is pretty much storage like there's
16 a washer and dryer, and then my dad's lawn mower, and then
17 storage pretty much right there.

18 Q How would you describe that area?

19 A It's -- I guess you say it's messy, but, you know, it
20 just needs to be cleaned up a bit, but---

21 Q Okay. Now, does the inside of your house match kind of
22 the garage as far as disarray?

23 A Yeah, I would say it. You know, my -- probably my
24 little bedroom there by the front door would probably be,
25 been a little messy.

Tracy Markley - Direct examination
by Solicitor Hunter

1 Q And that's the bedroom that Mr. Cheeks ran into when
2 the police showed up?

3 A Yes.

4 Q Okay. Do you keep much food in your house?

5 A Yeah, my parents would buy me food at the time.

6 Q Is that food cooked or is it already pre-made?

7 A I had, I had prepared, cooked it myself.

8 Q Okay. So, you already consider yourself a slob.

9 If you cooked the food, how would your kitchen look?

10 A It would get messy after a while. But when Derrick was
11 around the place was spotless.

12 Q Okay. Now, Mr. Cheeks and Mr. Elder left your house
13 before the police entered, correct?

14 A Yes.

15 Q Did you see anything happen between Mr., Mr. Derrick
16 Cheeks and Mr. Ricky Cheeks at that time?

17 A No.

18 Q Okay. Please answer any questions that the defense may
19 have for you.

20 THE COURT: Mr. Wilkes, your witness.

21 MR. WILKES: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. WILKES:

24 Q Mr. Markley, how long have you known Derrick Cheeks?

25 A Pretty much since '04.

Tracy Markley - Cross-examination
by Mr. Wilkes

- 1 Q Six years or so?
- 2 A Yes.
- 3 Q You say you met at Fatz Cafe?
- 4 A Yeah, but like I said, yeah, through a friend, yeah.
- 5 Q You worked there at the time?
- 6 A Yes, I did. I did prep.
- 7 Q And did he work there also?
- 8 A He works on the line. He was like the main, the main
- 9 cook there.
- 10 Q Now, initially what kind of relationship did y'all
- 11 have?
- 12 were y'all friends?
- 13 A No, it wasn't, really wasn't until I quit or we both
- 14 quit from Fatz before we actually became friends.
- 15 Q All right. And about how long ago was that or how long
- 16 after you had met did that happen?
- 17 A Probably, probably October, November of '04.
- 18 Q Okay. So, y'all had been friends for a considerable
- 19 period of time?
- 20 A Yes.
- 21 Q You'd been over to his house?
- 22 A Yes.
- 23 Q Had a key to his house?
- 24 A No.
- 25 Q Ever visit his house?

Tracy Markley - Cross-examination
by Mr. Wilkes

- 1 A Yes.
- 2 Q Why would you visit his house?
- 3 A Most times cause I was going over there to pick him up,
4 take him to the grocery store, mall.
- 5 Q Okay. Go grab dinner then?
- 6 A Take and put toys together for his, you know, for his
7 kids.
- 8 Q Ever have dinner there with him or his family?
- 9 A Yes.
- 10 Q Back some six years ago or so, four, six years ago, how
11 often did you see him?
- 12 A About every day.
- 13 Q Now, on occasion did y'all, y'all would go out to eat?
- 14 A Yes.
- 15 Q And when he would come over to the house, y'all do
16 things like just normal things, play darts?
- 17 A Hang out, yeah.
- 18 Q X-Box, hang out, that sort of thing?
- 19 A (Witness nods affirmatively.)
- 20 Q Y'all do X-Box, watch TV?
- 21 A Yeah.
- 22 Q Normal?
- 23 A Then he pretty much watched, watched sports and stuff.
24 But I had multi TV's in the house. So, there was a lot of
25 different things going on.

Tracy Markley - Cross-examination
by Mr. Wilkes

1 Q Now, you, you had said you weren't, you weren't sure if
2 he had a key on that day.

3 You were asleep when he came in?

4 A Yeah, but, you know, he usually knocks pretty loud and,
5 you know, continuously. It usually wakes me up and, and my
6 dog is what usually wakes me up.

7 Q All right. It didn't the day of the search though?

8 You were asleep when he came in?

9 A When the day on the -- when we -- when they came in I
10 was awake.

11 Q So, you weren't asleep when Mr. Cheeks and---

12 A Oh.

13 Q ---Mr. Elder came?

14 A When he came over I probably was asleep.

15 Q Okay.

16 A I thought you meant when SLED came.

17 Q No, I'm sorry. So, if you were asleep when he came
18 over he had to let himself in?

19 A He might of. I don't remember.

20 Q Okay. Well, if you were asleep he had to, didn't he?
21 was anyone else there?

22 A No, not that I know of.

23 Q Okay. So, he would of had to of let himself in then?
24 Mr. Elder didn't have a key, did he?

25 A No.

Tracy Markley - Cross-examination
by Mr. Wilkes

1 Q Okay.

2 A No, he was a thief. I, I wouldn't let him keep, take
3 my eyes off that boy.

4 Q I understand.

5 Mr. Cheeks ever bring any friends over to, to your
6 house?

7 A Probably some close friends or something, but pretty
8 much it was just when, you know, they'd come over and watch
9 sports.

10 Q Okay. That was okay with you if he brought a friend
11 over?

12 A Yeah.

13 Q All right. And would there be times when he would come
14 over and you would not be there at the time that he came
15 over, but you would get there and, and he would be there?

16 A It wasn't regularly. It was very rare if that ever
17 happened.

18 Q But it wouldn't, but it wouldn't---

19 A He didn't like being there if I wasn't there.

20 Q But it would of happened?

21 A It could of happened.

22 Q Okay. Now, your friendship with him over time, in
23 addition to doing just the normal hanging out things, what,
24 what else might he do?

25 would he, would he wash clothes at your house?

Tracy Markley - Cross-examination
by Mr. Wilkes

1 A He might of. It would of been very rare. But if he
2 was washing clothes it was probably mine.

3 Q Well, you're not -- you wouldn't be wearing the same
4 size Fatz t-shirt as him?

5 A Oh, no, I'm quite, I'm quite a big bigger.

6 Q Is it possible that there was some of his Fatz t-shirts
7 clothes in your house the day of the search?

8 A I'm sure, I'm sure there was.

9 Q Okay. The -- we've talked about food in the house.
10 Did he ever bring over any Fatz food---

11 A Yes.

12 Q ---and put it in the frige?

13 And at the time of the search it's possible that some
14 of, Fatz food was in the refrigerator?

15 A Oh, there was always. He was always bringing something
16 out after hours, you know, when he got off work.

17 Q So, it wouldn't be usual for him to just come over and
18 hang out?

19 A Normally after I, you know, when I, I went and picked
20 him up from work---

21 Q Right.

22 A ---and then bring him, you know, he'd come and hang out
23 or something.

24 Q Did he ever take showers or baths there and clean-up?

25 A I don't know. I suppose, I suppose it could of

Tracy Markley - Cross-examination
by Mr. Wilkes

1 happened. I don't remember.

2 Q But he could have?

3 A He could have.

4 Q Okay. Now, you said Derrick was in the kitchen at the
5 time that there was the banging and the yelling of the
6 search warrant?

7 Is that---

8 A Yes.

9 Q ---what you had said?

10 A Yes.

11 Q What, what was he doing at that time?

12 A He was cooking. But when SLED came in and stuff he had
13 the impression that we were being robbed because it's --
14 I've had occasions when people would come over in the middle
15 of the night and try to break in the house. And, so, he ran
16 to the room figuring we were being robbed.

17 Q And when you say cooking, that means boiling water on
18 the stove, things going?

19 A Yes.

20 Q All right. Now, you had said that you were sure the
21 money in the picture was Derrick's?

22 A Well, it wasn't mine.

23 Q Okay. That's what I want to get out.

24 The -- you don't know for sure, do you?

25 A Well, I mean I don't know for absolutely. But just,

Tracy Markley - Cross-examination
by Mr. Wilkes

1 you know, I just took it for granted it was just cause the
2 way they're rolled up and stuff, you know, he was real
3 particular about having everything rolled up in a rubber
4 band, you know, so he could keep track of how much he had.

5 Q But you don't know that it was his money?

6 A Well, I don't -- I'm, I'm -- it wasn't mine. I'll put
7 it that way. I know it's not mine.

8 Q Okay.

9 A I never had money.

10 Q Do you know where it was found?

11 A It was in my spare bedroom. I kept in the -- it was a
12 storage room.

13 Q Okay. And do you know whether it was found in a
14 suitcase?

15 A It was in Chris Johnson's suitcase.

16 Q All right. So, even though the money is found in Chris
17 Johnson's suitcase, and you're still sure it's Derrick
18 Cheeks?

19 A Well, it could of Chris'.

20 Q Okay.

21 A But I'm just saying it wasn't mine.

22 Q But your conclusion the first time is, is---

23 A I've been saying more or, you know, most likely it
24 might of been his.

25 Q Okay. Now, have you talked to Agent Hanning about this

Tracy Markley - Cross-examination
by Mr. Wilkes

1 case?

2 A Not until that one day that, there at my lawyer's
3 office.

4 Q All right. Have any other law enforcement officers
5 talked to you, by telephone or personally, about this case
6 over the last few months?

7 A No.

8 Q Now, what is your belief as far as your testifying
9 today?

10 Do you believe that that's gonna help you with your
11 charges?

12 A I don't know if it's gonna help or not.

13 Q Let me ask this. Are you hoping that it does?

14 A I'm sure I'm hoping it, it does. But I just figured
15 I'd do the right thing.

16 Q Right now you believe there's a possibility that it
17 might, don't you?

18 A Like I said, I wasn't promised anything.

19 Q Do you---

20 A I even asked---

21 Q Do you believe---

22 A ---if I could get something in writing and they said
23 no.

24 Q They can't give you anything in writing, right?

25 A Yes.

Tracy Markley - Cross-examination
by Mr. Wilkes

1 Q But you believed that it's gonna help, don't you?

2 A well, what I believe and what they decide to do is, is
3 two different things.

4 Q But you believe that it's gonna help, don't you?

5 A well, I'd be an idiot if I didn't.

6 Q Thank you.

7 No further questions.

8 THE COURT: Mr. Poole.

9 MR. POOLE: Ask the Court's indulgence for just a
10 moment.

11 (Pause.)

12 MR. POOLE: No questions of this witness.

13 THE COURT: Redirect.

14 SOLICITOR HUNTER: Yes, Your Honor.

15 REDIRECT EXAMINATION

16 BY SOLICITOR HUNTER:

17 Q Mr. Wilkes was asking you about the money that was
18 found in your bedroom.

19 What makes you believe that it's Mr. Cheeks, Derrick
20 Cheeks?

21 A Because after Chris Johnson or Eric Elder would come
22 back from dropping off some, you know, from some, you know,
23 cocaine or the crack, they would bring them back money.
24 He'd count it out. When he'd get done counting it out he'd
25 get to a certain amount like say a thousand dollars, which

Tracy Markley - Redirect examination
by Solicitor Hunter

1 is a round sum, put a rubber band around it, and put it in a
2 bag. And most of the time he'd take it with him and take it
3 to the house.

4 Q Do you know Mr. Derrick Cheeks to stash stuff at your
5 house?

6 A I'm sure he might of, but I didn't know if he did or
7 not. Only times I ever knew he did is I would see him do
8 it.

9 Q What about items other than money?

10 A He would -- occasionally I guess he had done it cause I
11 have found it and smoked it.

12 MR. WILKES: Objection. That I believe is speculation,
13 Your Honor. I believe the question was does he know it, and
14 he is clearly testified that he does not. That is a guess.

15 THE COURT: Well, I'm gonna allow him to explain his
16 answer. I -- if -- he did say that he didn't know it, but
17 I'll allow him to explain his answer.

18 Q Have you seen Derrick Cheeks stash anything other than
19 money at your house?

20 A He had at, at a time or two like I said.

21 Q And what was that?

22 A Cocaine. Crack.

23 Q And how do you know that?

24 A Cause I had seen him over, you know -- he didn't
25 purposely let me see, but I just happened to be nosy,

Tracy Markley - Redirect examination
by Solicitor Hunter

1 wondering what he was doing, and had seen it. Once he left,
2 I, I got into the stash and smoked it.

3 Q Okay.

4 A So, he didn't do it anymore after that.

5 Q Now, Mr. Wilkes was asking you about TV and watching
6 him come and hang, over.

7 How often would he come over just, just to hang out?

8 A A couple times a week. It all depends on what's going
9 on. Most of the times it was after or before I was gonna
10 take him driving, you know, to, cause, like I say, we go to
11 the mall a couple hours, then go to Woodruff to see his
12 twins, you know, and I'd be putting toys together, beds
13 together, stuff like that, and we'd stay there half the
14 night, then he would come back, and then hang out the house
15 for a few hours, and then when he would get tired I would
16 take him home.

17 Q Okay. So, were there -- there were times when he would
18 come just to hang out?

19 A If there was a game on or something he wanted to see
20 and, you know, and after we done our drive, I would say I
21 did my chores driving him around, yes.

22 Q So, you characterize what you had to do for him as
23 chores?

24 A Well, like I say, pretty much driving him around.

25 Q Did you know Derrick Cheeks to have a driver's license?

Tracy Markley - Redirect examination
by Solicitor Hunter

1 A No, he doesn't.

2 Q Okay. Do you know why?

3 A I don't know. I guess he just never learned to drive
4 or I guess he just liked people driving him around.

5 Q Okay. Thank you.

6 THE COURT: Recross?

7 MR. WILKES: Speaking on behalf of both of us, we have
8 no further questions.

9 THE COURT: All right. Is that correct, Mr. Poole?

10 MR. POOLE: That is true.

11 THE COURT: All right, sir. You may step down.

12 WITNESS: Thank you.

13 SOLICITOR HUNTER: Your Honor, may Mr. Markley be
14 excused?

15 THE COURT: Any objection?

16 MR. WILKES: None, Your Honor.

17 MR. POOLE: No, sir.

18 THE COURT: You're free to go if you'd like, sir.

19 WITNESS: Okay. Thank you.

20 SOLICITOR HUNTER: Your Honor, may we approach?

21 THE COURT: You may.

22 (WHEREUPON, a bench conference was held out of the
23 hearing of the jury at this time.)

24 THE COURT: Ladies and gentlemen of the jury, I'm
25 informed the next witness is on his way to the courtroom but

1 has not yet arrived. So, we're gonna take a little break at
2 this time, allow you to step back, stretch your legs.

3 As I always instruct you -- just one second. Don't
4 begin any discussions concerning this case until I've
5 advised you to do so during deliberations. You may retire
6 now. Thank you very much.

7 (WHEREUPON, the following takes place outside the
8 presence of the jury.)

9 THE COURT: All right. Court will be in recess until
10 such time as the witness has arrived.

11 (WHEREUPON, a short recess was taken at this time.)

12 THE COURT: All right. I understand the State's
13 witness has appeared, is that correct, Mr. Hunter?

14 SOLICITOR HUNTER: That's correct, Your Honor.

15 THE COURT: For planning purposes, expected length of
16 your trial, your case?

17 MR. WILKES: If we put up witnesses, no less than an
18 hour. We'll be finished today I think.

19 THE COURT: All right. The question I have though is I
20 can charge and send the jury out today.

21 would you prefer doing that if we get there?

22 MR. WILKES: Absolutely no reason not to.

23 THE COURT: Mr. Poole.

24 MR. POOLE: No problem.

25 THE COURT: Okay. All right. We'll move in that

1 direction.

2 Any specific request for charge from the State that you
3 want to ask us for?

4 SOLICITOR HUNTER: As Mr. Poole brought up, the hand of
5 one is the hand of all.

6 THE COURT: And any specific request from the defense?

7 MR. WILKES: The mere presence charge, Your Honor.

8 THE COURT: All right. Anything else---

9 MR. POOLE: No, sir.

10 THE COURT: ---specifically?

11 All right. All right. It appears everyone is now
12 present.

13 Bring the jury in.

14 (WHEREUPON, the following takes place within the
15 presence of the jury.)

16 THE COURT: All right. The record will reflect that
17 all jurors have returned to the courtroom, and when we broke
18 earlier the State was in the process of presenting its
19 evidence.

20 You may call your next witness.

21 SOLICITOR HUNTER: Yes, sir, Your Honor.

22 The State would call Lieutenant Ashley Harris of the
23 Spartanburg County Sheriff's Office.

24 THE COURT: Come forward, sir, over here to my left to
25 be sworn.

Ashley Harris - Direct examination
by Solicitor Hunter

1 ASHLEY HARRIS, having been first duly
2 sworn, testified as follows:

3 THE COURT: Sir, have a seat in the witness stand.
4 Once seated, please state your name for the record.

5 WITNESS: My name's Ashley Harris.

6 THE COURT: And your witness.

7 DIRECT EXAMINATION

8 BY SOLICITOR HUNTER:

9 Q Mr. Harris, where are you currently employed?

10 A I work for the Spartanburg County Sheriff's Office.

11 Q How long have you been employed, been employed there?

12 A I've been with the Sheriff's Office for a little over,
13 right at 12 years now.

14 Q And what have your duties been during that time?

15 A I am responsible for forensic drug analysis. I analyze
16 items that are submitted to the, to the lab, to the
17 Sheriff's Office lab for analysis so we can determine what
18 the item might be and how much it weighs for court purposes.

19 Q Okay. And did you go to college?

20 A Yes, sir, I did.

21 Q Where did you go?

22 A I have a Bachelor's Degree from Wofford here in
23 Spartanburg in chemistry.

24 Q Okay. Do you have any other training that would
25 benefit you in your field today?

Ashley Harris - Direct examination
by Solicitor Hunter

1 A Yes, sir, I also have a Master's Degree in Analytical
2 Chemistry from Furman University in Greenville, and in 1997
3 I was hired by the South Carolina State Law Enforcement
4 Division in Columbia as a forensic drug chemist, and I was
5 there for a little over two years completing their forensic
6 training program in forensic drug analysis. Also have
7 continuing education, education classes and instrumental
8 update classes every year to maintain certification.

9 Q Have you had any training as a police officer?

10 A Yes, sir, I went to the South Carolina State Police
11 Academy in 1997.

12 Q Have you ever had the opportunity to testify as an
13 expert in Spartanburg County?

14 A Yes, sir, I'm not sure of the total number. But I've
15 been qualified in excess of 70 times as a, excuse me, in
16 excess of 90 times, but I'm not sure how many of those are
17 from Spartanburg.

18 Q Okay.

19 A But the largest percentage were in Spartanburg.

20 Q Okay. And of those, how many are dealing with narcotic
21 drugs?

22 A The bulk of them.

23 SOLICITOR HUNTER: Okay. Your Honor, at this time we
24 would offer Lieutenant Ashley Harris as an expert in the
25 chemical analysis of drugs.

Ashley Harris - Direct examination
by Solicitor Hunter

1 THE COURT: Any objection?

2 MR. WILKES: None, Your Honor.

3 THE COURT: Mr. Poole?

4 MR. POOLE: None here.

5 THE COURT: All right. Without objection he'll be
6 qualified as an expert within the field that he has been
7 offered.

8 Ladies and gentlemen, that will allow this witness to
9 state opinions within that field of expertise. Normally
10 witnesses are not allowed to state their opinions. I'll
11 give you further instruction on how to take the testimony of
12 an expert or how you can treat it during my charge.

13 You may proceed.

14 SOLICITOR HUNTER: Thank you, Your Honor.

15 Q Mr. Harris, does Spartanburg County Sheriff's Office
16 have a policy in regards to dealing with evidence of drugs?

17 A Yes, sir, we have a, a policy in, concerning the
18 evidence transfer dealing with drugs. We use a system that
19 was adopted from SLED called the B.E.S.T. Bag system where
20 basically we have a tamper evident bag and that is sealed if
21 it fits within that bag for analysis including all the
22 paperwork that goes with that material. The chain of
23 custody is required to, to accompany all cases that are
24 submitted to the lab and have to be properly sealed before
25 we'll take custody of them.

Ashley Harris - Direct examination
by Solicitor Hunter

1 Q If they're not properly sealed, will you take custody
2 of them?

3 A No, sir, we will not.

4 Q What will you do at that point?

5 A At that point it's returned to the submitting agency.
6 we actually deal with 26 different agencies that try to
7 utilize our lab.

8 We will not accept a case that has not been properly
9 sealed, and the way we go about that is when the case is
10 brought in to be analyzed, it will be looked over to make
11 sure that it's properly sealed, make sure that it has a
12 proper chain of custody. If it does not, we'll send it back
13 with that agency and refuse to take it.

14 In the event we miss it upon that cursory inspection,
15 we'll assign it a lab number, it will go into our system,
16 and then before we start to work that case we do another
17 inspection to make sure that we didn't miss anything the
18 first time. So, all things have to be sealed before they're
19 analyzed.

20 Q Okay. Let me start with Lab Number 090472. Let me
21 show you what's been premarked as State's Exhibit 13.

22 A Okay.

23 Q Now, the procedure that you just named, did you follow
24 that in this case?

25 A Yes, sir, I did. As you can see, the blue stripped bag

Ashley Harris - Direct examination
by Solicitor Hunter

1 that's on the inside of this heat sealed bag is what we
2 refer to as a B.E.S.T. Bag. B.E.S.T. stands for Best
3 Evidence Sample Testing that's simply a tamper evident bag
4 so we have consistency within submissions to try, so
5 everybody's not using their own system, we have consistency
6 to speed up the process a little bit.

7 Q Now, in this case, where did you receive that bag?

8 A This case is a Spartanburg County Sheriff's Office
9 case. So, the way we receive items from the Spartanburg
10 County Sheriff's Office, we actually make a daily trip down
11 to the evidence room and pick up evidence directly from the
12 drug vault of the evidence room.

13 Q who has access to this drug vault?

14 A There's up to three evidence officers at this point.
15 They have two, one person was just transferred, and their
16 supervisor as far as I know, sir.

17 Q Okay. And anybody from your lab have access?

18 A I do not. Our other chemist actually does inventory,
19 but she can't go in with, by herself because of the security
20 system. She only has a key to get in it. Someone is there.
21 But there has to be someone there for her to gain access.

22 Q And on what day did you pick up that bag?

23 A I received it on June the 8th of 2009.

24 Q Okay. And what did you do with it?

25 A I did a cursory inspection to look and make sure that

Ashley Harris - Direct examination
by Solicitor Hunter

1 it was sealed. I found it to be sealed. I assigned it a
2 lab number in this case. L09, L for lab number, 09 for the
3 year, and then 0472 cause it was the 472nd drug case
4 submitted in 2009. And then I took it back to the lab and
5 placed it in order for analysis.

6 SOLICITOR HUNTER: Okay. Your Honor, at this time the
7 State would move to admit State's Exhibit 13 into evidence.

8 THE COURT: Objections?

9 MR. WILKES: Your Honor, we -- is that the small bag?

10 SOLICITOR HUNTER: That's the small bag.

11 MR. WILKES: Yes, sir, we would, we would have a chain
12 objection.

13 THE COURT: All right. Ladies and gentlemen of the
14 jury, at this time I'll ask you to step back to the jury
15 room. As usual, don't begin any discussions until I've
16 advised you to begin those. You may step down.

17 (WHEREUPON, the following takes place outside the
18 presence of the jury.)

19 THE COURT: Yes, sir, you may state your objection.

20 MR. WILKES: Your Honor, I want to make sure that the
21 chain -- is this Mr. Rosenberg's?

22 SOLICITOR HUNTER: Correct.

23 MR. WILKES: This is Rosenberg's. We would object on
24 the basis that Mr. Rosenberg's documentation, his handling
25 of the chain documents does not allow him to identify it

Ashley Harris - Direct examination
by Solicitor Hunter

1 properly nor was it properly done as he had testified to in
2 Court, but I'll go through this before. But he had
3 testified that he filled out documents as much as a year in
4 advance, and he has then filled in the remainder of the form
5 and used it for each case that goes by him, and done that in
6 this case. So, we believe that the problems with the chain,
7 that, that the documentation would not be sufficient to
8 allow him to either identify it or to substantiate the
9 admission of that evidence in.

10 THE COURT: Mr. Poole.

11 MR. POOLE: And my client enters into that same
12 objection---

13 THE COURT: Okay.

14 MR. POOLE: ---that Mr. Wilkes made.

15 THE COURT: Be happy to hear from you.

16 SOLICITOR HUNTER: Yes, Your Honor. The chain of
17 custody, in, in the way that Mr. Wilkes is arguing, he is
18 arguing this there is a compromise in the chain of custody
19 as opposed to a break. A compromise in the chain of
20 custody, which we argue there isn't in the first place,
21 would only go to the weight of the evidence as opposed to
22 the admissibility of the evidence. We're asking
23 specifically to move this into evidence, to admit it into
24 evidence.

25 Now, if he wants to argue the credibility of the

Ashley Harris - Direct examination
by Solicitor Hunter

1 witness, the fact that the forms might not have been signed
2 as he wished they properly were, that would absolutely go to
3 weight. However, I don't believe it goes to admissibility
4 under State v. Carter.

5 THE COURT: Anything further, Mr. Wilkes?

6 MR. WILKES: Nothing, Your Honor.

7 THE COURT: Okay. I'll overrule the objection.
8 Anything else?

9 MR. WILKES: Let me just take a look at the other bag
10 right quick if I can.

11 THE COURT: My understanding, let me be sure, my
12 understanding of your objection is the fact that he claimed
13 that he had signed the forms and then filled in the
14 pertinent information---

15 MR. WILKES: Yes, sir.

16 THE COURT: ---when the items came in and that perhaps
17 that was not notarized properly?

18 MR. WILKES: That is correct.

19 THE COURT: And my understanding of the notary process,
20 that is used to allow a custodian not to appear in court,
21 but for the document to be introduced, and in this
22 particular case the custodian did appear. He did testify
23 that he filled in the document, pertinent information
24 contemporaneous with its receipt. For that reason, again, I
25 will overrule the objection.

Ashley Harris - Direct examination
by Solicitor Hunter

1 (WHEREUPON, State's Exhibit No. 13 was received into
2 evidence at this time.)

3 MR. WILKES: If I can look at that and check the --.

4 THE COURT: Yes, sir.

5 SOLICITOR HUNTER: So that way we don't have to send
6 the jury back out again.

7 THE COURT: That will be fine.

8 (Pause.)

9 MR. WILKES: Judge, thank you.

10 THE COURT: All right. Any other objections that I
11 need to deal with?

12 MR. WILKES: No, sir, I don't see any.

13 THE COURT: All right. Let's bring the jury in.

14 (WHEREUPON, the following takes place within the
15 presence of the jury.)

16 THE COURT: All right. I've overruled the objection.
17 You may proceed.

18 CONTINUED DIRECT EXAMINATION

19 BY SOLICITOR HUNTER:

20 Q Lieutenant Harris, what did you do with that piece of
21 evidence when it came into your office?

22 A It was placed into the safe we have in the office, and
23 it, awaiting its time for analysis and it was actually
24 analyzed on 6/10 of 2009.

25 Q When you say analyze, what test would you perform?

Ashley Harris - Direct examination
by Solicitor Hunter

1 A Again, the first thing to do before I actually open the
2 evidence is to make sure that it is properly sealed, check
3 for that. After taking it out I would do a series of tests.
4 The first one would be a presumptive test. It gives me an
5 idea of what I might be dealing with. Most cases that is a
6 simple color test. You drop some chemicals on a small
7 amount of the item and look for a color change. That color
8 change will then tell you which, how to go further. And
9 then I took samples of it and placed it on a GC masspec,
10 which is our piece of instrumentation that gives a direct
11 definitive answer as to its identity. After all samples
12 were taken out of the solution, out of the substance, a
13 weight was obtained for the report purposes.

14 Q Were you able to obtain an opinion as to what this
15 substance is?

16 A Yes, sir, I did. I was. If I may refer---

17 Q Could you please state your opinion?

18 A Yeah, if I may refer to the report. Item number one in
19 this case was described as an off-white rock substance. It
20 was found to be cocaine base, more commonly known as crack,
21 with a total weight of 111.31 grams.

22 Q So, you say over one hundred grams?

23 A Yes, sir, that is correct.

24 Q And how do you weigh this substance?

25 A As I stated, all samples are taken prior to obtaining a

Ashley Harris - Direct examination
by Solicitor Hunter

1 weight, and the weight is obtained. On my bench it's a
2 Mettler Toledo analytical balance that is calibrated monthly
3 in-house. Then we also bring in an outside agency, an
4 independent company, to check its viability, its
5 reproducibility once a year.

6 Q If the crack cocaine was in a bag, would you weigh the
7 bag?

8 A No, sir, all packaging is removed from the item, and
9 also if the substance appears extremely wet we'll actually
10 air dry that substance to make sure that there's no water
11 associated with it also.

12 Q Okay. So, that 111 grams is just the crack cocaine?

13 A That's correct, sir.

14 Q Well, I've just been, handed you what's been, marked as
15 State's Exhibit 3.

16 A Yes, sir.

17 Q Is that the same or substantially the same condition
18 when you first received it?

19 A Again, it was placed within the B.E.S.T. Bag that's
20 within the heat sealed bag. After I complete the analysis I
21 place everything down into a heat sealed bag, and then the
22 seal, place my initials, the date, and the lab number so
23 that it, when it makes it to Court it will be obvious that
24 it is not been tampered with in any way.

25 Q When you received the original inside bag, was it

Ashley Harris - Direct examination
by Solicitor Hunter

1 tampered with?

2 A No, sir, it was not.

3 Q And when did you receive that?

4 A I, I received this item on June the 8th also, the same
5 day as the previous.

6 Q Did that exhibit stay under your control?

7 A Yes, sir, it was, went through the same process as the
8 other one. I analyzed it to make sure that it didn't have
9 any, any holes, that it was properly sealed. I assigned it
10 a lab number, took it back to the lab, and it also was
11 analyzed on June the 10th, being in the lab for two days,
12 analyzed it again or looked over the outside of it again to
13 make sure that it hadn't been tampered with, that it was
14 properly sealed, and then the way I signify that I do that
15 is I write the ok, my initials, and then the date which I'm
16 opening it on the outside of the bag. It can be seen here
17 through the window.

18 SOLICITOR HUNTER: Your Honor, at this time the State
19 would move to admit State's Exhibit 3 into evidence.

20 THE COURT: Any objection?

21 MR. WILKES: We had a previous objection we would
22 maintain.

23 THE COURT: Subject to your prior objections, Mr.
24 Poole, as well?

25 MR. POOLE: Subject to the prior, Your Honor, yes, sir.

Ashley Harris - Direct examination
by Solicitor Hunter

1 THE COURT: Subject to all prior objections it will be
2 admitted.

3 (WHEREUPON, State's Exhibit No. 3 was received into
4 evidence at this time.)

5 Q What did you do with this exhibit once you received it?

6 A I went through the same process I went through with the
7 other one. All items were removed from their packaging,
8 samples were taken, performed the color test on those
9 samples. Once the color test gave me an indication as to
10 what the item was, I then performed a confirmatory test on
11 our GC masspec to determine that it was, what the item was.
12 And then after all samples were taken, obtained a weight.

13 Q From those tests were you able to form an opinion as to
14 what the substance was?

15 A Yes, sir, if I may look back at the report again.

16 Q Uh-huh. (Affirmative).

17 Please state your opinion.

18 A There were multiple items within this case file all
19 total. Item number one, which is described as approximately
20 12 large off-white rock substances in a Ziploc, was found to
21 be cocaine base. More commonly known as crack. The total
22 weight of 321.53 grams.

23 Item number two was listed as 11 bags of off-white rock
24 substance. Those items were determined to be cocaine base,
25 more commonly known as crack. The total weight of

Ashley Harris - Direct examination
by Solicitor Hunter

1 301.40 grams.

2 Item number three was a measuring cup, razor, and bags,
3 and those items were not analyzed based on the, their
4 appearance.

5 Item number four was a cookie of a off-white rock
6 substance, a round disk of a off-white rock substance. Was
7 found to be cocaine base, more commonly known as crack.
8 Total weight of, of 39.49 grams.

9 And the last item was some off-white rock substance
10 crumbs, and those items were not analyzed.

11 Q Okay. How did you weigh these item?

12 Did you weigh these items in the same way you weighed
13 the items in State's Exhibit 13?

14 A Yes, sir, all items, all samples were taken prior and
15 they were weighed without the weight of the packaging
16 included.

17 Q Okay. And do you know the total weight of all the
18 items tested from this?

19 A I---

20 Q If I were to give you a weight of 662.4 grams, does
21 that sound about right?

22 A Yes, sir, that sounds correct.

23 Q Okay. So, the total weight of the items in State's
24 Exhibit 3 is 662.42 grams?

25 A Yes, sir.

Ashley Harris - Direct examination
by Solicitor Hunter

1 Q And just, just for clarification, crack cocaine is in
2 what schedule?

3 A It is a Schedule II drug, which means cocaine, by
4 definition, has an accepted medical use and it has a high
5 propensity for abuse and addiction. Crack is under the same
6 schedule.

7 Q Okay. Please answer any questions that the defense may
8 have for you.

9 A Yes, sir.

10 THE COURT: Yes, sir, Mr. Wilkes.

11 MR. WILKES: Thank you, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. WILKES:

14 Q Lieutenant, did you -- you say you took multiple
15 samples.

16 Are you saying that you took a single sample of every
17 individual bag?

18 A Yes, sir, if I might refer to my notes.

19 Q Please.

20 A In this -- in here -- are you in reference to 474?

21 Q Yes.

22 A The large bag?

23 Q Yes, sir, the one with alot.

24 A There were 12 large off-white rock substances and I did
25 multiple samples. I did samples off of five of those rocks

Ashley Harris - Cross-examination
by Mr. Wilkes

1 and ended up same one, one universal sample for the GC
2 masspec.

3 Q There's 12 bags.

4 A No, sir, it was just 12 individual rocks in one bag.

5 Q Twelve in one bag?

6 A Yes, sir.

7 Q And you tested a portion of them?

8 A I obtained a sample from five of them, yes, sir. DEA
9 has a testing strategy that has been used for years where
10 they take the square root plus one.

11 Q I'm not asking that. My question was just simply you
12 didn't test every item in that bag.

13 A No, sir, I didn't. It is our policy to follow the
14 item, the line that's set up that DEA has been using for
15 years where we do the square root plus one. I actually did
16 in excess of that. The next square root number that has an
17 even square foot would be 16. So, that would be four plus
18 one more for additional tests. So, there were five rocks
19 tested.

20 Q Square root or not, if they weren't all crack you
21 wouldn't know that?

22 A No, sir, they have to be consistent in color, shape,
23 texture for us to combine them all, but they were all
24 packaged in one larger bag. But, yes, sir, I took five spot
25 tests and one GC masspec.

Ashley Harris - Cross-examination
by Mr. Wilkes

1 Q Okay. And, and we're talking about the, the, the five
2 were in one bag?

3 A All 12 of them were in one large Ziploc.

4 Q All 12.

5 Were there other items which you tested inside of that
6 bag?

7 A Each, everything was individually packaged. Item
8 number one was 12 off-white rock substance, large off-white
9 rock substance in one Ziploc. The other items were packaged
10 separately within the B.E.S.T. Bag.

11 Q Okay. So, there were other items that you have
12 testified you concluded were crack cocaine.

13 Did you test each individual item of the other, other
14 things --

15 A I can answer on each individual---

16 Q -- or did you do the square root thing?

17 A I can answer on individually one cause they're -- item
18 number two was 11 bags of off-white rock substance. They
19 were all spotted separately. It was a notation made that
20 they were similar in color, texture, appearance, packaging,
21 and they were combined for weight and one GS masspec sample.
22 But all 11 were spotted and found to be consistent.

23 Q So, you're saying they were consistent in the way they
24 looked?

25 A Yes, sir.

Ashley Harris - Cross-examination
by Mr. Wilkes

- 1 Q But not tested?
- 2 A They were all individually spot tested, yes, sir.
- 3 Q All of the bags, but not all the contents of each bag?
- 4 A Each -- the contents of each bag was sampled for---
- 5 Q Was sampled?
- 6 A Yes, sir.
- 7 Q Okay. But that means -- but -- I'm -- but each -- the
- 8 contents of each bag, if it, if it's got what you believe
- 9 are crack rocks in there, you don't, you don't test all of
- 10 them?
- 11 A No, sir.
- 12 Q How many were in one of the bags?
- 13 A I didn't make a notation based other than the fact that
- 14 they were all similar in color, texture, and appearance, and
- 15 there would be no way for anyone to differentiate one bag
- 16 from another. So, I assumed they were all the same and
- 17 after they all spotted the same they were combined for one
- 18 GC masspec and one weight.
- 19 Q And you would agree with me that -- I understand the
- 20 statistical sampling you're doing, but you would agree with
- 21 me that it is possible that a large portion of that bag,
- 22 which you believe is crack cocaine, has not been tested
- 23 other than the statistical sample that is not actually been
- 24 tested?
- 25 A Are you asking me if I did not -- I'm confused.

Ashley Harris - Cross-examination
by Mr. Wilkes

1 Are you asking me if I tested everything?

2 Q The actual testing -- in other words, your term when
3 you---

4 A Well, we---

5 Q ---say we've tested all of this means you have done a
6 statistical sampling, some sort of sampling of what's in
7 there, but you've got -- I could lay out on the table the,
8 the different pieces in there, and you would not be able to
9 say, with certainty, that all of those pieces were crack
10 cocaine?

11 A That is---

12 Q With certainty.

13 A That is correct.

14 Q All right.

15 A If they were 5,000 crack rocks, I would have to test
16 each individual crack rock and consume the entire crack rock
17 or whatever this off-white rock substance was to be a
18 hundred percent sure that all the items in there had been
19 tested, yes, sir.

20 Q well, but that's not necessarily true, is it, because
21 it's, it's -- if the rock has the substance in it, then
22 it's, then it's considered crack, right?

23 A So---

24 Q Cause you don't have to use up the whole rock to test
25 it?

Ashley Harris - Cross-examination
by Mr. Wilkes

1 A That's correct.

2 Q Okay. And there's not 5,000 rocks in there, is there?

3 A No, sir.

4 Q Okay. How many do you think there are?

5 There's---

6 A I didn't make any notation other than the fact that the
7 bags were, all contained off-white rock substance similar in
8 color and texture. That's the only notation I made.

9 Q No further questions. Thank you.

10 THE COURT: Mr. Poole.

11 MR. POOLE: May it please the Court.

12 CROSS-EXAMINATION

13 BY MR. POOLE:

14 Q Lieutenant Harris, where is L09472?

15 A Right there beside you, sir.

16 Q This is it?

17 A Yes, sir, that is it.

18 Q And how did you appear to be -- how many?

19 A Let me refer back to my notes.

20 Q Okay.

21 A Now, in this case there were four individual bags tied
22 closed containing large off-white rock substance similar in
23 color, texture, and packaging, and four, four spots were
24 done and one GC masspec.

25 Q Okay. Are these like four of these?

Ashley Harris - Cross-examination
by Mr. Poole

- 1 A Yes, sir.
- 2 Q Did you test one of these?
- 3 A Took a spot test on each individual one. After they
- 4 spotted the same, they were similar in color, texture,
- 5 packaging, and there was no way to differentiate between
- 6 them, and I took one GC masspec preliminarily and obtained
- 7 one weight.
- 8 Q Okay. which one of these did you take the G -- what do
- 9 you call it?
- 10 A GCSMS, GC masspec, same thing.
- 11 Q And which one of these did you take for?
- 12 A There was a conglomerate sample.
- 13 Q A sample from each?
- 14 A Yes, sir.
- 15 Q There's a piece right there broken off, isn't there?
- 16 A Yes, sir.
- 17 Q Thank you.
- 18 A Uh-huh. (Affirmative).
- 19 MR. POOLE: Just a moment, Your Honor.
- 20 (Pause.)
- 21 Q And this exhibit right here --
- 22 A Yes, sir.
- 23 Q -- you testified as to its weight?
- 24 A Yes, sir.
- 25 Q which is 113 grams, 111 grams plus?

Ashley Harris - Cross-examination
by Mr. Poole

1 A Yes, sir, 111.31, yes, sir.

2 Q You don't know what percentage of these materials is
3 actual crack, do you?

4 A No, sir, we're not -- we don't quantitate in our lab.
5 We're not required to by State Law.

6 Q So, there could be less than a hundred grams of actual
7 crack in---

8 SOLICITOR HUNTER: Objection, Your Honor.

9 May we approach?

10 Q ---in this bag?

11 THE COURT: Yes, you may.

12 (WHEREUPON, a bench conference was held out of the
13 hearing of the jury at this time.)

14 THE COURT: Ladies and gentlemen of the jury, I'll ask
15 you to step back to the jury room. Don't begin any
16 discussions about the case until I've advised you to do so.
17 Thank you very much.

18 (WHEREUPON, the following takes place outside the
19 presence of the jury.)

20 WITNESS: Judge, can I get down and get some water?

21 THE COURT: Yes, sir.

22 I'm gonna allow the witness to step down and get some
23 water.

24 MR. WILKES: Yes, sir.

25 THE COURT: All right. The objection is?

Ashley Harris - Cross-examination
by Mr. Poole

1 SOLICITOR HUNTER: Your Honor, the objection is under
2 state, South Carolina State Law, unlike the federal system,
3 purity of the substance does not matter. whether -- with
4 those four rocks or with any of the rocks, if any percentage
5 of it is crack cocaine, under State Law, it's considered
6 crack cocaine. I just wanted to make sure that Mr. Poole is
7 not gonna go into the purity of the substance or how much
8 out of the actual substance was crack cocaine because
9 obviously, under State Law, purity does not matter during
10 state cases.

11 MR. WILKES: If we may, Your Honor. That is correct,
12 but the question is, is about to be asked that he's driving
13 at is he's sampled individual rocks out of a bag of rocks.
14 That's not a purity question. If the question is do you
15 how, you know then five rocks out of a bag of rocks is crack
16 cocaine. You know that for a fact cause you tested it.
17 You're guessing at the rest, assuming you know for a fact
18 that is, how much does that weigh. How much do those five
19 rocks weigh. That's the question that's coming.

20 SOLICITOR HUNTER: I understand---

21 MR. WILKES: That's not a purity question.

22 SOLICITOR HUNTER: But the question posed was how much
23 of that crack rock, crack rock did you know to be crack
24 cocaine, and under, under that scenario I do not believe
25 that testimony should be---

Ashley Harris - Cross-examination
by Mr. Poole

1 MR. WILKES: He's, he's correct. But I don't think
2 that was the question that was intended. That was---

3 THE COURT: That was the question that was asked
4 though.

5 MR. WILKES: Right. That, that -- the next one that's
6 coming is how much did he weigh that he actually knows for
7 sure. So, that's---

8 THE COURT: All right. Is there any objection to that
9 line of questioning?

10 SOLICITOR HUNTER: That question, no. However, we
11 would advise, or not advise, but ask the Court to provide
12 instruction as to the state law regarding purity.

13 THE COURT: Well, what I'm gonna do is strike the last
14 question---

15 SOLICITOR HUNTER: Okay.

16 THE COURT: ---and ask them to disregard it.

17 SOLICITOR HUNTER: Thank you.

18 THE COURT: And I'm not gonna go into a charge on the
19 law at this point in time.

20 SOLICITOR HUNTER: Well, I'm saying at the end.

21 THE COURT: Well, you better get something to propose
22 to me.

23 SOLICITOR HUNTER: Okay. Yes.

24 THE COURT: And show me where it came from. I don't
25 think we'll get it done today.

Ashley Harris - Cross-examination
by Mr. Poole

1 SOLICITOR HUNTER: I don't think we will.

2 THE COURT: All right. Bring the jury back.

3 (WHEREUPON, the following takes place within the
4 presence of the jury.)

5 THE COURT: All right. The record will reflect that
6 the jury has returned to the courtroom.

7 I have granted or sustained the objection made by the
8 State in this matter, and I am striking the last question
9 from the record of the case. What that means is that case,
10 that question has been removed from the record of the case.
11 Therefore, you can not consider that question in any fashion
12 later on in reaching a verdict, and I'll give you a little
13 more instruction concerning matters that are stricken from
14 the record during the trial when I charge you concerning the
15 law.

16 I believe, Mr. Poole, you were in your
17 cross-examination. You may continue.

18 MR. POOLE: Yes, sir.

19 CONTINUED CROSS-EXAMINATION

20 BY MR. POOLE:

21 Q Lieutenant, you mentioned that you took a sample and
22 you subjected it to, to a test.

23 A Yes, sir.

24 Q Is that right?

25 A Yes, sir.

Ashley Harris - Cross-examination
by Mr. Poole

1 Q And how much was the weight of that sample?

2 A Of the sample?

3 Q Yes, sir.

4 A In the order of a hundredth of a gram.

5 Q Okay.

6 A The GC masspec is a very sensitive instrument. So, we
7 take very small samples.

8 MR. POOLE: Okay. Please bear with me just a moment,
9 Your Honor.

10 THE COURT: Yes, sir.

11 (Pause.)

12 Q Did you test each rock that was in that exhibit?

13 A I sampled each rock with, for the color test, yes, sir.

14 MR. POOLE: Okay. No further questions, Your Honor.

15 THE COURT: Redirect.

16 SOLICITOR HUNTER: Yes, Your Honor.

17 REDIRECT EXAMINATION

18 BY SOLICITOR HUNTER:

19 Q During cross-examination, you mentioned a DEA policy.

20 Could you please describe to the jury what that policy
21 is?

22 A Yes, sir, the DEA has established a sampling policy to
23 determine how many samples need to be taken from a given
24 item that was submitted for analysis. In the event there
25 are 100 crack rocks, you would take the square root of that

Ashley Harris - Redirect examination
by Solicitor Hunter

1 number plus one. The square root of a hundred is ten. You
2 would take one additional one. That would be 11. With the
3 one with the item that that came up, I believe there were 11
4 or 12.

5 Q There were 12.

6 A There were 12 items in that case. So, I took the next
7 even number with a root, which was 16, which would have four
8 spots, and then added one to it making five.

9 Q Okay. Can you briefly explain what the spot test is
10 again?

11 A Spot test is simply a color test. You take a small
12 sample of the, in this case, five rocks. You add some
13 chemicals to it and look for a color change. In the event
14 they color, they change color in a particular way, that
15 tells you where to take your next analysis, what piece, what
16 type of solvent to use to make sure that it's injectable in
17 the masspec.

18 Q Now, as far as item one, did the crack rocks change
19 color?

20 A Yes, they did.

21 Q And in what way did they change color?

22 A The spot test for cocaine and crack cocaine is a, is a
23 two part test, cobalt thiocyanate and tin chloride. You
24 place cobalt thiocyanate on it first. If it turns blue,
25 it's the hydrochloride salt form of cocaine. If there's no

Ashley Harris - Redirect examination
by Solicitor Hunter

1 change or it's a very light blue, you add the second part to
2 it, and if it turns blue, then that's an indication that
3 it's the free base form of cocaine known as crack.

4 Q Okay. And in this case, how did it change?

5 A It, it was a faint blue and it went to a very dark
6 blue, and then we actually use a secondary test in GC
7 masspec to look for solubility that confirms the fact that
8 it's crack cocaine and you take it one step further on the
9 analysis.

10 Q So, let me get this straight.

11 On item one, you take out five of the rocks that are --
12 these rocks are all in one bag?

13 A They're in one ziploc bag, yes.

14 Q You take out five of these rocks?

15 A Yes, sir.

16 Q Do they match in size?

17 A They're all similar in color, size, texture. They'd be
18 no way to tell this one from this one.

19 Q Okay. So, if I were to hand one to you today, you'd
20 never, wouldn't be able to tell which one of them apart?

21 A That's correct. We -- if, if they had been, if they
22 had varied in size, varied in color, varied in texture,
23 appeared different, spotted different, any kind of, anything
24 to be an indication that they weren't the same, they would
25 of been treated differently, and each one of them would of

Ashley Harris - Redirect examination
by Solicitor Hunter

1 been tested individually.

2 Q So, if you had tested those five and something funny
3 happened, if they each hadn't of come out with the same
4 result, what would you have done?

5 A I would of separated them, as good as I could
6 individually making 12 individual piles and tested each, and
7 went back and tested each one individually.

8 Q Did you have to do that in this case?

9 A No, sir, they were all similar in color, texture,
10 appearance, they spotted the same, and, and they came out of
11 one bag. So, they were complied for one GC masspec and one
12 weight.

13 Q As far as item number two on this one, how were those
14 packaged when you received them?

15 A There were 11 individual bags of off-white rock
16 substance.

17 Q Okay. Now, when you have the off-white rock like
18 substance, what you testified as it was cocaine, crack
19 cocaine --

20 A Yes, sir.

21 Q -- and they're in separate bags, is that treated
22 differently when they're all, as opposed to when they're all
23 together?

24 A Yes, sir, we have to take a little more care because,
25 at this point, someone is taken the time to package them

Ashley Harris - Redirect examination
by Solicitor Hunter

1 separately. So, we make sure we spot each individual bag.
2 Again, they were all similar in color, texture, packaging
3 appearance. They were all spotted separately. They all
4 spotted exactly the same. Since they were all, those 11
5 bags were in the larger Ziploc, they were packaged
6 ultimately in it, and one GC masspec, and one weight was
7 obtained after the visual inspection, and then the, and the
8 inspection, and the spot test.

9 Q And then item number four?

10 A In -- item number four was an individual, one
11 individual cookie.

12 Q Okay. So, what, what test did you perform on that
13 item?

14 A Same test performed on the other ones is that it, a
15 color test, cobalt thiocyanate, tin chloride, saw how it
16 spotted, obtained the sample with the GC masspec and ran it.

17 Q Okay. Now, as far as the item that Mr. Poole was
18 looking at --

19 A Yes, sir.

20 Q -- how was that packaged when you received it?

21 A There were four individual bags that were tied closed
22 containing large off-white rock substances and they were
23 similar in color, texture, and packaging, spotted
24 separately, combined for one weight, and one GC masspec.

25 Q So much like the item --?

Ashley Harris - Redirect examination
by Solicitor Hunter

1 A Item two?

2 Q Item two from the previous test.

3 A Yes, sir, that's correct.

4 Q Okay. Thank you. No further questions.

5 THE COURT: Recross.

6 MR. WILKES: Yes, sir.

7 RE CROSS EXAMINATION

8 BY MR. WILKES:

9 Q Lieutenant, when you say spot test, that's not a
10 conclusive test, is it?

11 A No, sir, it's a presumptive test to identify if they
12 are consistent in character, chemical character.

13 Q Okay. But it is not a conclusive test?

14 A No, sir, the GC masspec is the only conclusive test.

15 Q So, the only way you can tell a jury that you know that
16 a rock is crack is if you have tested it with the
17 masspectrometer?

18 A That's correct.

19 Q Okay. Now, when you say you sampled, you come to use a
20 formula and you pull out a number, a specific number out of
21 all of this, and you test a few with the masspectrometer,
22 correct?

23 A I---

24 Q You, you, you -- out of the whole -- if we emptied that
25 out, there would be a number of items?

Ashley Harris - Recross examination
by Mr. Wilkes

- 1 A Uh-huh. (Affirmative).
- 2 Q You have taken a sample, which would mean just a few of
- 3 the number?
- 4 A Yes, sir.
- 5 Q And you've tested those with the massspectrometer?
- 6 A Yes, sir.
- 7 Q So, you can tell the jury for sure that those items
- 8 that you tested with the massspectrometer are crack cocaine?
- 9 A Yes, sir.
- 10 Q Okay. The others we can not say for sure is crack
- 11 cocaine?
- 12 A Yeah, the only way to be able to do that would be to
- 13 test absolutely every rock, yes, sir.
- 14 Q Okay.
- 15 A That's correct.
- 16 Q And can you tell me the weight of the ones that you
- 17 actually tested with the massspectrometer?
- 18 A Of the sample?
- 19 Q Not the little sample that you used.
- 20 A Okay.
- 21 Q But the number of rocks, all of those samples that you
- 22 picked out to take some to test, what was the weight of
- 23 those combined?
- 24 A In 472, 111.31.
- 25 Q Now, let me ask you, when you say that---

Ashley Harris - Recross examination
by Mr. Wilkes

- 1 A Yes, sir.
- 2 Q ---does that mean that you tested every piece or are
3 you, how -- is that the total amount, the total weight
4 you're giving me?
- 5 A Yes, sir.
- 6 Q And I'm either not asking a good question or I'm
7 misunderstanding and I'm, I'm trying. Let me---
- 8 A It's possible I'm misunderstanding. I was gotten out
9 of a bed just a few minutes ago. I'm out with the flu this
10 week.
- 11 Q And I know that and I appreciate it. I'll try to go
12 slow.
- 13 The -- if you had taken out -- right now if you were to
14 pull out the rocks---
- 15 A Yes, sir.
- 16 Q ---or the pieces that you sampled---
- 17 A Yes, sir.
- 18 Q ---and we put them over here---
- 19 A Yes, sir.
- 20 Q ---because we know those are crack cocaine.
- 21 A Okay.
- 22 Q Gas spectrometer says so.
- 23 A Okay.
- 24 Q The other ones we don't know for sure, can't say for
25 sure.

Ashley Harris - Recross examination
by Mr. Wilkes

1 A Well, a representative sample is taken. In that -- in
2 the case of 472, each one was individually spot tested and
3 then one representative sample was taken for the GC masspec.
4 Q I understand when you say that, but I am asking for
5 sure. I'm talking conclusively. You know for sure it's
6 crack cocaine.

7 A In my opinion, yes, sir, it is. I, I don't---

8 Q I know in your opinion, but is it possible is -- would
9 it be possible that it not be?

10 A Well, no, sir, it tested positive for cocaine, crack
11 cocaine via the GC masspec. I---

12 Q You're, you're telling me that it is impossible that I
13 could take a piece, a rock out of that bag and it not be
14 crack cocaine?

15 A Oh, you -- I thought you were asking about what I
16 analyzed.

17 Q No, no, no, no, not what you analyze.

18 A Okay. I'm sorry.

19 Q Not what you analyzed.

20 A Okay.

21 Q I'm talking about what you did not analyze. When we
22 separated out, we say here are the rocks, the cookies,
23 whatever, we know conclusively per gas spectrometer, crack
24 cocaine, and then we're gonna have a pile over here that was
25 not tested with the gas spectrometer.

Ashley Harris - Recross examination
by Mr. Wilkes

1 A Well, a representative sample was taken each time. So,
2 I -- once, once they all spot test the same, they're added
3 in together and one representative sample is taken.

4 Q I'm, I'm---

5 A Well---

6 Q Representative sample, I understand. But I'm trying to
7 make sure that the jury understands that this is a sampling
8 method of testing.

9 A Yes, sir.

10 Q This pile over here has not been subjected to the gas
11 spectrometer, correct?

12 A A representative---

13 Q Just yes or no.

14 A Well, I'm---

15 Q Just yes or no.

16 A Yes, it has been because a representative sample was
17 taken out and analyzed through the GC masspec.

18 Q How did you take a representative sample?

19 Did you take a representative sample out of each rock?

20 A When I'm doing an analysis I pile it all together and
21 take representative samples, and combine those for one GC
22 masspec. I'm not sure what you're asking me.

23 Q And I'm not sure if I'm misunderstanding, and I'm, I'm
24 not trying to confuse you on things.

25 A Once they, once they spot the same and they're

Ashley Harris - Recross examination
by Mr. Wilkes

1 consistent in color---

2 Q Uh-huh. (Affirmative).

3 A ---texture, packaging, there's no way to differentiate
4 this one from this one. They're combined and one
5 representative sample is taken.

6 Q When you combine them at that point, do you know that
7 it's all chemically the same?

8 A No, sir, I don't know that definitively, no, sir.

9 Q Okay. So, when you take one representative sample out
10 to test it, you're assuming that it is?

11 A The representative sample is -- I take a little off of
12 multiple rocks. I don't take one sample. I---

13 Q I understand what you're saying, but you do not take a
14 sample off of all of it?

15 A No, sir.

16 Q And you can't tell me the weight attributable to what
17 you have tested with the massspectrometer?

18 A No, sir, I can not.

19 Q Thank you. That's all I wanted.

20 THE COURT: Mr. Poole.

21 MR. POOLE: No questions.

22 THE COURT: You may step down.

23 WITNESS: Thank you, sir.

24 THE COURT: You wish to excuse the witness?

25 SOLICITOR HUNTER: Yes, due to his sickness I would

1 prefer him out of the courtroom.

2 THE COURT: Any objections?

3 MR. WILKES: None, Your Honor.

4 MR. POOLE: No objection.

5 THE COURT: All right. He's free to go. Thank you
6 very much.

7 The State may call its next witness.

8 SOLICITOR HUNTER: Your Honor, the State rests.

9 THE COURT: Ladies and gentlemen, that concludes the
10 presentation of evidence by the State. There's some matters
11 that I must take up with counsel before we go to the next
12 phase of the trial. I'm going to ask you to step back to
13 the jury room. And as always, don't begin any discussions
14 until I've advised you to do so. You may retire.

15 (WHEREUPON, the following takes place outside the
16 presence of the jury.)

17 THE COURT: All right. Motions.

18 MR. WILKES: Your Honor, I would make a motion or renew
19 my motion on the search warrant issue that we had raised in
20 limine and tried to maintain throughout. And based on that,
21 we believe that the evidence, which was introduced from the
22 search warrant, should not have been, and as a result, we
23 would be entitled to a directed verdict.

24 Also, we believe that we would be entitled to a
25 directed verdict based on the failure of the State to be

1 able to establish the weight of 400 grams or more of actual
2 crack cocaine which was located in the house to the extent
3 that the officer testified, he has testified to a
4 statistical sampling, but he can not testify to the actual
5 weight of the matter or, or the amount that he is actually
6 tested with the massspectrometer to conclusively say it is
7 crack cocaine, and that the other amount would be simply
8 speculative or subject to his presumptive test, which is not
9 a conclusive test, Your Honor, and we believe we would be
10 entitled to a directed verdict on that matter as well.

11 THE COURT: Mr. Poole.

12 MR. POOLE: Your Honor, I join in Mr. Wilkes' motion
13 for directed verdict based on the grounds that were
14 mentioned as far as the suppression of the evidence was
15 concerned and has continued throughout this case. I would
16 also argue similarly that in the case against Ricky Cheeks
17 where the 111.31 grams of crack cocaine was introduced, the
18 weight argument, I join in that motion as a basis for a
19 directed verdict on behalf of Mr. Cheeks.

20 THE COURT: All right. Any, any citations of authority
21 in which the motion concerning the weight?

22 MR. WILKES: No, sir, I really didn't see this coming.
23 It just struck me when, when I realized that---

24 THE COURT: I'm, I'm just -- it's a novel argument to
25 me.

1 MR. WILKES: Is, it is to me. I was just quite shocked
2 that, that the statistical sampling came out the way it did,
3 and it struck me as though they can not testify conclusively
4 that the amount is crack cocaine.

5 THE COURT: So, so, is it your argument that everytime
6 they do samplings of drugs that they have to take each
7 item -- in other words, if we're talking about marijuana,
8 they have to take each leaf and sample each leaf?

9 MR. WILKES: I'm not -- I believe this is not marijuana
10 involved.

11 THE COURT: Well, I know that. But I'm just trying --
12 I'm, I'm---

13 MR. WILKES: I have not---

14 THE COURT: I'm trying to take this out to its, to what
15 we're talking about here, and you tell me, is that what
16 you're saying?

17 MR. WILKES: I am, I am not saying---

18 THE COURT: Just answer my question.

19 MR. WILKES: I can not extrapolate that to marijuana.
20 I am---

21 THE COURT: So, you refuse to answer my question?

22 MR. WILKES: If it's one pile of marijuana that might
23 be different. But we are talking about a substance that we
24 have already had evidence introduced as to cut without
25 getting, you know, too far---

1 THE COURT: Well, the testimony was that the DEA has
2 established this method by which they do statistical
3 sampling.

4 MR. WILKES: Sure.

5 THE COURT: So, I assume they use this in Federal Court
6 and other places from what I've heard.

7 MR. WILKES: Right.

8 THE COURT: I guess we could break down and find out.

9 MR. WILKES: Well, perhaps.

10 THE COURT: But you---

11 MR. WILKES: But I was presented with it, and, and it
12 struck me as though, in this case, because we're dealing
13 with, with a number of identifiable rocks or cookies or
14 different groups of things, they're not all exactly
15 identical, but we're, we're dealing with some items that
16 certainly could have each been tested and they have
17 determined that they will test just a portion of them, and
18 I, I believe that they can not testify that all of the
19 material they---

20 THE COURT: Well, now, in his testimony he did say that
21 he was of the opinion---

22 MR. WILKES: He was.

23 THE COURT: ---his expert opinion that it was all crack
24 cocaine.

25 MR. WILKES: He did.

1 THE COURT: Okay.

2 MR. WILKES: He did.

3 THE COURT: I'll hear from you since he won't answer my
4 question.

5 SOLICITOR HUNTER: Your Honor, your question is the
6 exact---

7 THE COURT: I think I know the answer to the question,
8 but go ahead.

9 SOLICITOR HUNTER: Your question is my exact argument
10 is that when we find a marijuana plant do we have to test
11 every single leaf to make sure it's marijuana or if we had
12 found 10,000 rocks. He testified they are all of the same
13 weight or, from his looks, same weight, color, texture
14 packaging. At that point he takes the spot test of or if
15 they're packaged individually, he spot tests every one. If
16 they're packaged, not packaged at all as, like item one,
17 they're 12 or, yeah, 12 rocks in one plastic bag that Kelvin
18 Washington recovered, he'll spot test the 16, the square
19 root plus one. Then he combines all of those rocks and
20 takes a subject sample not of every rock, but of some rocks.
21 At that point he's not sure if he's testing the one that he
22 sampled during the spot test and that spectrometer test came
23 back as crack cocaine of the group.

24 If we're to grant a directed verdict motion on this,
25 every single case that the Spartanburg County Sheriff's

1 office has done in the drug case would be in question as
2 well as probably every case that the DEA or the federal
3 government has done because that's the testing guideline
4 that they're following. Further, we submit that sufficient
5 evidence has gone to the jury, been presented to the jury to
6 continue on past this directed verdict motion.

7 MR. WILKES: I would---

8 THE COURT: Yes, sir.

9 MR. WILKES: I would -- thank you, Your Honor. I would
10 say that there was no testimony that it was an overwhelming
11 amount that he could not test. There, there was no
12 testimony to support---

13 THE COURT: No, no, the testimony was that he followed
14 the DEA guidelines.

15 MR. WILKES: That's true.

16 THE COURT: And---

17 MR. WILKES: But only as to the, the, the method of
18 sampling. But there's no testimony that it was necessary to
19 do so as a convenience to him or for whatever reason.

20 THE COURT: Well, well, is there, is there -- do you
21 know of a case that draws a line as to when the test changed
22 to something else?

23 MR. WILKES: I do not.

24 THE COURT: You're the one that needs to give me some
25 authority.

1 MR. WILKES: I wish I could. You know, this, this came
2 up unexpectedly, and I, I felt compelled to raise it, and I
3 would love to. But I have neither my computer nor any
4 research on it. I'm not, I'm not saying that there's not or
5 that there is. But I, I'm raising it as clearly---

6 THE COURT: I, I know you're raising it clearly.

7 MR. WILKES: ---as well -- but as---

8 THE COURT: Again, I'm asking you for some authority
9 to, for your position, and I'm entitled to that.

10 MR. WILKES: You are.

11 THE COURT: A lawyer's suppose to give me that
12 information.

13 MR. WILKES: I'm suppose to be smart enough to do that,
14 but I did not, did not anticipate his testimony that this
15 small amount of drugs was gonna be sample and spot tested.

16 THE COURT: And I don't know that I've ever heard
17 testimony otherwise, but that doesn't make it right or
18 wrong. I'm just saying that I don't know that I've heard
19 that every single rock---

20 MR. WILKES: Right.

21 THE COURT: ---or every single leaf was tested.

22 MR. WILKES: And I---

23 THE COURT: And I know we're not dealing with marijuana
24 here, but if we're dealing with individual items within the
25 same bag---

1 MR. WILKES: Right.

2 THE COURT: ---separable, they're movable. You can lay
3 them down and spread them out and have different items, but
4 your position would be that every item has to be tested?

5 MR. WILKES: Yes.

6 THE COURT: Okay.

7 MR. WILKES: But, but in this case, but specific to
8 this case is that there, there's no testimony -- but if I
9 were to cut open that bag being we pulled out five things or
10 ten things, it would seem quite obvious that there would be
11 very little reason for him to sample it. Now, there could
12 be 10,000 things, but he hasn't testified that there's any
13 reason to do any kind of sampling on it, that there would be
14 unreasonable for him to simply test it, and he can not
15 say -- not only can he not say that it's all conclusively
16 crack cocaine, but he can't attribute even the amount of
17 weight to what he did test as conclusively crack cocaine.

18 So, I believe it's a -- the argument interests me
19 tremendously. I apologize that I have not come across it
20 before to, to be able to cite a case.

21 THE COURT: Well, without any authority for me to break
22 new ground---

23 MR. WILKES: I would, I would be glad to research it if
24 I had the capacity to, but at this moment I, I---

25 THE COURT: It's looking more and more like you'll have

1 overnight. I don't send juries out after four o'clock. I
2 never do.

3 MR. WILKES: So, we've got three minutes to get it in.

4 THE COURT: We're not gonna make it.

5 Any there other motions cause he's gonna make some
6 motions?

7 (Pause.)

8 MR. POOLE: Your Honor?

9 THE COURT: Any other motions?

10 I've, I've heard your motions. I want to hear Mr.
11 Poole's unless there's something else, Mr. Wilkes.

12 MR. WILKES: No, sir.

13 THE COURT: Okay. Mr. Poole.

14 MR. POOLE: Your Honor, very simply, I made a motion or
15 I thought I made a motion for a directed verdict based on
16 the, number one, the pretrial motion for suppression of
17 evidence, and, number two, I join in Mr. Wilkes' motion
18 regarding this situation about the weight.

19 THE COURT: Do you have any authority?

20 MR. POOLE: No, sir, I don't have any authority
21 whatsoever on that point.

22 THE COURT: All right.

23 MR. POOLE: But---

24 THE COURT: All right. Well---

25 MR. POOLE: I join in the same, the motions are the

1 same.

2 THE COURT: Well, I'll take it under advisement because
3 probably I'll give you overnight to bring me some authority.

4 MR. WILKES: Well---

5 THE COURT: Now, the, concerning the presentation of
6 your clients as witnesses, I need to inquire of them at this
7 point in time.

8 So, let's see, Mr. Derrick Cheeks, if you'll stand
9 please, raise your right-hand.

10 (Defendant complies.)

11 THE COURT: Please swear him for me, Madam Clerk.

12 (WHEREUPON, Defendant Derrick Cheeks was placed under
13 oath at this time.)

14 THE COURT: You can -- you may be seated.

15 Now, Mr. Cheeks, I'm going to go over with you, at this
16 time, certain of your Constitutional rights. I want to be
17 sure that you understand these. So, after I finish
18 explaining this to you I'll give you an opportunity to ask
19 any questions you'd like to ask about this.

20 We've reached the stage of this trial where you have
21 the right to present your defense. You have the right, at
22 this time, to claim the protections which are given to you
23 under the Fifth Amendment to the United States Constitution.
24 That amendment, amendment reads, in part, that no person
25 shall be compelled, in any criminal case, to be a witness

1 against himself.

2 What that means is that you can not be required to
3 testify in this case. You certainly have the right to
4 testify if you choose to. However, no one can make you
5 testify. The right to remain silent is a personal right.
6 That means it belongs to you, and no one can waive the right
7 to remain silent except yourself.

8 Now, I will advise you that if you decide to testify in
9 this case that you will be subject to the same rules that
10 govern the testimony of any other witness. What that means
11 is that you would be examined by your attorney. Then you
12 would be cross-examined by the State's attorney. And in
13 this particular case you could be examined also by your
14 codefendant's attorney.

15 Now, I will tell you that if you have on your record
16 convictions that involve dishonesty or false statements or
17 for crimes which were punishable by the imprisonment of, for
18 more than one year, and this Court makes a determination of
19 the probative value of admitting that evidence outweighs its
20 prejudicial effect to you, then the solicitor would be able
21 to introduce your record to attack your credibility.

22 Now, if you decide to testify, the decision on your
23 part must be made freely and voluntarily and intelligently.
24 That means it's done with the knowledge of the protections
25 given to you by the Fifth Amendment and the consequences

1 should you decide to testify. I will inform you that in
2 making the decision that if you decide not to testify that I
3 am obligated, I'm required to instruct the jury that your
4 silence could not be used against you in any fashion or
5 manner whatsoever.

6 Now, you have the right to discuss this discussion with
7 anybody you'd like to discuss it with. You, you can discuss
8 it with your lawyer, your family, your friends, or anyone
9 else, but the ultimate decision is yours and yours alone.
10 That means that you will have to make the decision and it
11 will be left entirely up to you.

12 Now, do you understand the right that I've just
13 explained?

14 DEFENDANT DERRICK CHEEKS: Yes, sir.

15 THE COURT: You have to answer me verbally.

16 DEFENDANT DERRICK CHEEKS: Yes, sir.

17 THE COURT: Do you have any questions about that right?

18 DEFENDANT DERRICK CHEEKS: No, sir.

19 THE COURT: Have you had an opportunity to discuss this
20 decision with your attorney?

21 DEFENDANT DERRICK CHEEKS: Not really.

22 THE COURT: Would you like that opportunity at this
23 time?

24 DEFENDANT DERRICK CHEEKS: Yes, sir.

25 THE COURT: All right, sir. I'll allow you to step out

1 and discuss this with you.

2 MR. WILKES: Thank you, Your Honor.

3 THE COURT: Now, I'll need to have the other defendant
4 please, Mr. Ricky Cheeks, sworn.

5 Sir, if you'll stand.

6 (WHEREUPON, Defendant Ricky Cheeks was placed under
7 oath at this time.)

8 THE COURT: Now, Mr. Cheeks, I'm gonna go over the same
9 information I just went over with your codefendant, but I'm
10 gonna go over it with you in particularity so that I'm sure
11 you understand this right as well.

12 Again, we have reached the point in this trial where
13 you have the right to present your defense, and I want you
14 to be sure that you understand certain rights that are
15 afforded to you under the United States Constitution.
16 Specifically what I'm talking about is the right to claim
17 the protections given to you under the Fifth Amendment to
18 the United States Constitution, and that states that no
19 person shall be compelled, in any criminal case, to be a
20 witness against himself. That means that you can not be
21 required to testify during this trial. You certainly have a
22 right to testify if you wish to do so. But no one can make
23 you testify. The decision as to whether or not to testify
24 is a personal decision that's left up to you.

25 I will advise you also that if you decide to testify

1 you'll be governed by the same rules as any other witness.
2 You'll be examined by your lawyer, cross-examined by the
3 other attorneys in this case, and, again, if you have
4 convictions on your record involving dishonesty, false
5 statements, or for crimes that are punishable by
6 imprisonment for more than one year and this Court makes a
7 determination that the probative value of admitting that
8 evidence outweighs its prejudicial effect to you, that
9 information could be used by the prosecutor to attack your
10 credibility.

11 Now, if you decide to testify, the decision, on your
12 part, must be made freely, voluntarily, and intelligently by
13 you with knowledge of the protections given to you by the
14 Fifth Amendment, and the possible consequences of your
15 decision as to whether or not to testify. I will tell you
16 that if you decide not to testify, again, I will instruct
17 the jurors that your silence can not be used against you in
18 any fashion whatsoever in, in this case, and the decision as
19 to whether or not, excuse me, that fact that you did not
20 testify can not even be discussed by them in their
21 deliberations.

22 Now, the decision as to whether or not to testify is
23 entirely yours. Again, you can discuss it with anybody
24 you'd like to discuss it with, your lawyer, family, friends,
25 but in the final analysis it's your decision and your

1 decision alone.

2 Now, do you understand the rights that I have
3 explained?

4 DEFENDANT RICKY CHEEKS: Yes, sir.

5 THE COURT: Do you have any questions about them?

6 DEFENDANT RICKY CHEEKS: No, sir.

7 THE COURT: Have you had an opportunity to discuss this
8 decision with your lawyer?

9 DEFENDANT RICKY CHEEKS: We discussed it, discussed it
10 briefly, yes.

11 THE COURT: All right. Do you wish to discuss it with
12 him further?

13 DEFENDANT RICKY CHEEKS: Yeah, I would like to discuss
14 it.

15 THE COURT: All right. I'll take a brief recess, and
16 I'll give you an opportunity.

17 Court will be in recess for about ten to fifteen
18 minutes. Thank you very much.

19 (WHEREUPON, a short recess was taken at this time.)

20 THE COURT: All right. As to the motions, the original
21 motions based on the search warrant are denied. Motions
22 concerning the weight, kind of interesting, I think that
23 goes to the weight of the testimony and not necessarily to
24 whether or not there is sufficient testimony to avoid a
25 directed verdict.

1 So, I'm gonna deny the motion for directed verdict. I
2 think you can argue it to the jury, whether or not that is
3 sufficient testimony. But his testimony was that, in his
4 opinion, it was all crack cocaine. He was an expert,
5 qualified in the subject, and, so, that's gonna be
6 sufficient to take it to a jury.

7 Now, let's begin with Mr. Derrick Cheeks.

8 Mr. Cheeks, you're still under oath at this time. You
9 can stand for me.

10 (Defendant Derrick Cheeks complies.)

11 THE COURT: Have you had an opportunity now to discuss
12 this decision about your testimony with your lawyer?

13 DEFENDANT DERRICK CHEEKS: Yes, sir.

14 THE COURT: And is there anything else that you feel
15 you need to discuss with him at this time?

16 DEFENDANT DERRICK CHEEKS: No, sir.

17 THE COURT: Do you wish to testify in this trial?

18 DEFENDANT DERRICK CHEEKS: No, sir.

19 THE COURT: All right, sir. You can be seated. Thank
20 you very much.

21 And, sir, I'm gonna allow you to remain seated. I know
22 that you have some trouble standing up.

23 Mr. Ricky Cheeks, have you had an opportunity to
24 discuss this with your lawyer about whether or not to
25 testify?

1 DEFENDANT RICKY CHEEKS: Yes, sir.

2 THE COURT: And is there anything else you need to
3 discuss with him or anyone else concerning this issue?

4 DEFENDANT RICKY CHEEKS: No, sir.

5 THE COURT: Do you intend to testify in the case?

6 DEFENDANT RICKY CHEEKS: No, sir.

7 THE COURT: All right. Now, does the defense have
8 other witnesses you wish to call?

9 MR. WILKES: If I can have one second to confer?

10 THE COURT: Yes, sir.

11 (Pause.)

12 THE COURT: Yes, Mr. Wilkes.

13 MR. WILKES: On behalf of Derrick Cheeks we will not be
14 calling any further witnesses.

15 THE COURT: All right. Mr. Poole.

16 MR. POOLE: On behalf of Ricky Cheeks we will not be
17 calling any witnesses.

18 THE COURT: All right. At this time we're at almost
19 4:30 in the afternoon. I'm going to bring the jury in and
20 call on you and allow you to rest on the record, and will
21 instruct the jury that we will begin tomorrow.

22 I understand your argument in the Supreme Court is at
23 nine o'clock?

24 MR. WILKES: It's at nine o'clock, and it's a, I guess,
25 a couple hour drive back. I'll be able to head out after --

1 by ten o'clock I'll be on the road. So, I'll be back by
2 12:00.

3 THE COURT: Well, I'm gonna ask the jury to assemble
4 around, let's say, one o'clock. That will give everybody
5 time to have lunch completed and we'll, at that time, allow
6 you to argue the case and I will charge the jury.

7 MR. WILKES: Thank you, Your Honor.

8 SOLICITOR HUNTER: Your Honor, since they're not
9 presenting evidence, may Mr. Elder be excused as well as
10 Mr. Hanning?

11 THE COURT: Any objection to those witnesses being
12 excused?

13 MR. WILKES: None at all, Your Honor.

14 THE COURT: All right. So, they're gonna be free to
15 go. Thank you very much.

16 All right. I'll allow them to vacate the -- all right.
17 Let's bring the jury in.

18 (Whereupon, the following takes place within the
19 presence of the jury.)

20 THE COURT: All right. The record will reflect that
21 the jury has returned to the courtroom.

22 When we broke earlier the State had completed the
23 presentation of the evidence in its case. At this, this
24 time the defense has the right to call any witnesses the
25 defense wishes to call.

1 First of all, Mr. Wilkes.

2 MR. WILKES: Your Honor, on behalf of Derrick Cheeks we
3 rest, Your Honor.

4 THE COURT: And Mr. Poole.

5 MR. POOLE: On behalf of Ricky Cheeks we rest.

6 THE COURT: All right. Ladies and gentlemen, that
7 concludes, concludes the presentation of evidence in this
8 matter. I do note we're at 4:30 in the afternoon and we
9 still have closing arguments to be made by counsel as well
10 as my charge concerning the law. I would expect that those
11 things would probably take about an hour to complete. That
12 would put us at 5:30 before you would get the case to begin
13 deliberations.

14 So, I'm gonna carry the case over until tomorrow. One
15 of the attorneys involved in this case has an argument in
16 the Supreme Court in a totally unrelated matter at nine
17 o'clock in the morning. So, I'm going to ask you to
18 reassemble in the jury room at one o'clock in the afternoon
19 tomorrow afternoon. That should give him an opportunity to
20 be back. At that time we'll begin with closing arguments
21 made by counsel, and I will charge you concerning the law.
22 Thereafter you will receive the case for your deliberations.

23 I will advise you again, upon leaving the courthouse,
24 the same advice or instructions that I have given you
25 already, not to attempt to gather any information about the

1 case, don't discuss the case with anyone, and do not allow
2 anyone to discuss the case with you. If anyone attempts to
3 do that, please report that upon your return to the
4 courthouse. Don't listen to, watch, or read any media
5 reports about the case.

6 So, at this point in time you're free to go. I want
7 you to be back in the jury room, back in the jury room at
8 one o'clock tomorrow afternoon. We should be in a position
9 to complete the case at that time.

10 Thank you very much. You're free to go for the
11 evening.

12 (WHEREUPON, the following takes place outside the
13 presence of the jury.)

14 THE COURT: All right. Mr. Ricky Cheeks I believe is
15 out on bond. I'm going to allow him to remain out. He can
16 return at one o'clock.

17 I'll advise you we will begin the trial again at that
18 time. If you fail to appear you will be tried in your
19 absence.

20 Do you understand that, sir?

21 DEFENDANT RICKY CHEEKS: Yes, sir.

22 THE COURT: All right. Mr. Derrick Cheeks will remain
23 in custody. Thank you very much.

24 Court's in recess until one o'clock.

25

(Whereupon, Court was in recess for the evening.)

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1 Wednesday, October 6th, 2010

2

3 THE COURT: All right. Mr. Hunter, I've received some
4 request for charge from the State. Let's talk about those.

5 SOLICITOR HUNTER: Yes, Your Honor. The State is
6 requested -- I believe the first three are, are pretty
7 simple, the trafficking substantial charges along with the
8 PWID half mile charges.

9 THE COURT: Yes, sir.

10 SOLICITOR HUNTER: We've also requested the hand of one
11 is the hand of all, which I believe we requested yesterday
12 orally, but as far as the weight of the controlled
13 substance, both three, four, and five, the weight of the
14 controlled substance, the permissive, permissive
15 inferences -- oh, excuse me.

16 OFFICER: I'm sorry.

17 (Whereupon, Defendant Derrick Cheeks comes into the
18 courtroom at this time.)

19 THE COURT: All right. We were talking about the
20 request for charge I just received, and you were down on
21 number four or five.

22 SOLICITOR HUNTER: well, Your Honor, I was gonna
23 explain, three, four, and five are all statutory charges.
24 Number three, the weight of the controlled substance, under
25 44-53-392, the weight of the controlled substance in the

1 state cases is a, the weight in a pure form or a compound or
2 a mixture. I believe there's been testimony as to the fact
3 that there were several rocks and some were tested or some
4 were not. We would request an instruction on that as well
5 as four and five deal with permissive inference as to
6 possession with intent---

7 THE COURT: Now, tell me what number four is.
8 What, what are you talking about there?

9 SOLICITOR HUNTER: With trafficking, we must only prove
10 that he possessed the crack cocaine.

11 THE COURT: Yes.

12 SOLICITOR HUNTER: But the possession with intent to
13 distribute half mile, we must prove that, not only did he
14 possess it, but that he possessed it with the intent to
15 distribute. Under State Law, there's a permissive inference
16 that if he possess more than one gram of crack cocaine---

17 THE COURT: Well, are you referring to the attachment
18 that's on the back of this?

19 SOLICITOR HUNTER: That's correct. That, that
20 attachment comes from---

21 THE COURT: And what portions of that attachment are
22 you requesting to have charged?

23 SOLICITOR HUNTER: Under the one that is handed to you,
24 I believe that it's highlighted.

25 THE COURT: Oh, I didn't have the---

1 SOLICITOR HUNTER: Oh, okay.

2 THE COURT: My law clerk had the highlighted copy.

3 okay. Now that brings it more into focus for me.

4 SOLICITOR HUNTER: Yes, it's the last two paragraphs.

5 The final paragraph is just referring back to the beginning
6 of the charge. This charge is taken from the possession
7 with intent to distribute crack cocaine, and it just -- the
8 last two paragraphs, starting with there is a further
9 provision in the law in regard to possession with intent to
10 distribute, that after one gram of crack cocaine is proven,
11 the jury may infer past one gram of crack cocaine, that the
12 defendant did intend to distribute that crack cocaine.

13 THE COURT: I understand.

14 SOLICITOR HUNTER: And then as far as the number five,
15 it's the same with manufacturing. Under 44-53-375(d),
16 there's been testimony that there were pots, baking soda,
17 bottles of Inositol, Inositol powder, which all are
18 paraphernalia items in the manufacturing of crack cocaine,
19 and then 44-53-375(d), possession of equipment or
20 paraphernalia used in manufacturing of cocaine, cocaine
21 base, or methamphetamine, they use the prima facia evidence.
22 Obviously state law says you can not use the prima facia
23 evidence. However, permissive inference is allowed of the
24 intent to manufacture, and we would request a charge
25 basically the same as the possession with intent to

1 distribute the half mile charge, but just the language as
2 far as to manufacturing.

3 THE COURT: So, what you're stating is, what you -- the
4 request you have on number five is that you want to say
5 possession of equipment or paraphernalia used in the
6 manufacturing of and I suppose it's cocaine base is what
7 we're referring to?

8 SOLICITOR HUNTER: Correct.

9 THE COURT: Is---

10 SOLICITOR HUNTER: A---

11 THE COURT: A permissive inference?

12 SOLICITOR HUNTER: That manufacturing of crack
13 cocaine---

14 THE COURT: I'm trying, I'm trying to get -- does
15 that -- are you saying that creates an inference---

16 SOLICITOR HUNTER: It's creates an inference that the
17 jury---

18 THE COURT: That the jury may take if they choose,
19 along with other evidentiary facts---

20 SOLICITOR HUNTER: Correct.

21 THE COURT: ---to make a determination.

22 Okay. That's what the -- is that what you're
23 requesting?

24 SOLICITOR HUNTER: Correct.

25 THE COURT: well, you have a puzzled look. I'm gonna

1 give you an opportunity to talk to me about it in just a
2 minute.

3 MR. WILKES: That could be the residual of Judge Toal
4 on the---

5 THE COURT: Well, I don't, I don't know. I trust you
6 had a good trip.

7 MR. WILKES: The trip was good. I'm afraid that
8 in-between the trip was, was rather disturbing, but---

9 THE COURT: Well, that's okay.

10 MR. WILKES: So, it's---

11 THE COURT: I, I made a few disturbing trips to
12 Columbia in my time. So, I understand.

13 MR. WILKES: The -- I'm not sure it, it talks about the
14 prima facia evidence of intent to manufacture.

15 THE COURT: Well, he says that, that, and he's correct,
16 I don't think I can charge prima facia evidence. What he is
17 saying is that he's asking me to say that that creates, that
18 permits the jury to draw an inference from those facts.

19 MR. WILKES: I, I, I think we, and it's hard to
20 articulate off-the-cuff, but I, I have a feeling that that
21 is drawing focus on facts of the case. I mean that, when
22 they are charged with the statute, they're facts and
23 evidence from which they can find that there was
24 manufacturing. For us to duplicate that and then say, by
25 the way, if you find these facts, the fact that they're

1 scales and such, you may use that as an inference. well,
2 they already know that.

3 I think we're duplicating and emphasizing unnecessarily
4 on, not necessarily a comment on the facts, but it, it's
5 very focused on particular facts of the case. I think that
6 the statute itself, the indictment, the statute, would,
7 would probably satisfy the charge that they need and then
8 they will find the facts of whether there's manufacturing or
9 evidence of manufacturing. But I think if we just, you
10 know -- they can, they can find an inference of anything
11 from anything, and if we start focusing on particular facts
12 that may exist, we're emphasizing that to a jury, and I
13 just, I think that might not be necessary for them to
14 understand what they're doing.

15 THE COURT: All right. How about the section of
16 Justice, Judge Anderson's charge book concerning the
17 permissive inference, inference a jury might draw from the
18 possession of one gram or more of crack cocaine as far as---

19 MR. WILKES: Yes, sir, that -- now, that, that is, as I
20 understand it, the, the well established law that, that more
21 than one gram creates that inference.

22 THE COURT: Yes, sir.

23 MR. WILKES: But I'm not familiar with focusing on---

24 THE COURT: On number five, I'll let you argue that to
25 the jury. I'll not charge it as part of the law.

1 SOLICITOR HUNTER: Thank you, Your Honor.

2 THE COURT: Now, anything else, from the State's
3 prospective, before I have the jury---

4 SOLICITOR HUNTER: Your Honor, if, if I may put one
5 last thing on the record regarding that. The reason we
6 requested that charge as far as to the manufacturing, the
7 manufacturing language is the same, that the drug
8 paraphernalia, if they find that there's drug paraphernalia
9 evidence, that they, that is prima facia evidence of
10 manufacturing. The language is the same in distribution.
11 If they find evidence that the gram, the crack cocaine
12 weighs more than one gram, it says prima facia evidence.
13 So, that's why, the reason we were requesting the charge.

14 THE COURT: I understand that's why you were requesting
15 it.

16 SOLICITOR HUNTER: I just wanted to put that on the
17 record.

18 THE COURT: I'm not familiar with having done that
19 before and I'm not gonna go there.

20 SOLICITOR HUNTER: well, they didn't have manufacturing
21 in the book either. So, that's---

22 THE COURT: Okay. So, that, that would be uncharted
23 territory, and maybe when they tell me I should do that I
24 will.

25 MR. WILKES: Your Honor, may I say one---

1 THE COURT: Yes.

2 MR. WILKES: On the, on the hand of one is the hand of
3 all, I know that is often charged in different cases. It
4 may be troubling in this case, the hand of one is the hand
5 of all, because there's been testimony from Mr. Elder, who
6 they referred to being a codefendant, although he's not here
7 on trial, that some of his activity probably would not be
8 within the scope of what my client's charged with or
9 Mr. Ricky Cheeks to the extent that if we say the hand of
10 one is the hand of all, it might be overly broad to allow
11 them to interpret anything that's done even though it's not
12 related.

13 THE COURT: Talk, talk specifically. What are you
14 talking about?

15 MR. WILKES: Well, I -- Mr., Mr. Elder, in specific,
16 specifically, Mr. Elder and Mr. Markley were both talking
17 about having been addicts, having used for a long time. Mr.
18 Elder was talking about at one point yes, he had cooked
19 crack cocaine, but it was just a small amount for his own
20 use, and I, I'm afraid that a hand of one -- and they're not
21 necessarily related.

22 THE COURT: Mr., Mr. Poole brought that up in his
23 cross-examination of Mr. Elder fairly eloquently I
24 thought---

25 MR. WILKES: He did.

1 THE COURT: ---to, to the jury that perhaps when one
2 participates in such as buying baking soda and that sort of
3 thing that you become part of the transaction. In fact, he
4 specifically asked him about the hand of one the hand of
5 all.

6 MR. WILKES: That is, that is correct. But as far as
7 the jury charge, there was testimony from Elder and Markley
8 that was, probably exceeded the time period of, of what
9 we're talking about with the Cheeks.

10 THE COURT: Well, I understand that. But my, my, my
11 job is to charge anything the jury might consider.

12 MR. WILKES: Right.

13 THE COURT: I don't charge it based on the weight of
14 the evidence involved or how much evidence there might have
15 been. It's a question of the existence of evidence.

16 MR. WILKES: And, and to some extent we're attempting
17 to limit their consideration as far as---

18 THE COURT: Through, through your arguments you can,
19 you certainly have the right to argue those things.

20 MR. WILKES: But we're not saying is, as far as the
21 charge, to say the hand of one is the hand of all period,
22 it -- there should be some limitation -- the jury should
23 understand there's a limitation that---

24 THE COURT: Well, the limitation is as to these
25 charges.

1 MR. WILKES: As to these charges.

2 THE COURT: Yeah.

3 MR. WILKES: And that anything that they testified that
4 they've done outside of those charges doesn't go back to---

5 THE COURT: Well, that, that's true.

6 MR. WILKES: ---these charges.

7 THE COURT: And I'm gonna tell them that the only
8 thing, the charges they're considering are these charge.
9 I'm not gonna get into other things. I'm not gonna go into
10 possession or use or---

11 MR. WILKES: Okay.

12 THE COURT: No, that won't be charged.

13 MR. WILKES: I just -- and, and I just don't want them,
14 under the hand of one hand of all, to, to attribute anything
15 Mr. Elder and Mr. Markley have said about their past drug
16 usage if it didn't relate specifically to the cheeks.

17 THE COURT: Well, I think the charge that I give states
18 that they actually have to come together and have a joint --
19 so, that -- I think the charge itself is gonna take care of
20 that.

21 MR. WILKES: It may. I'm not familiar with your
22 charge. I'm sorry.

23 THE COURT: So, I think it's gonna take care of that.
24 It's gonna require a joint effort to further the criminal
25 activity, whatever that might be.

1 MR. WILKES: That's it.

2 THE COURT: Mr. Poole, any issues on the charges?

3 MR. POOLE: No, sir, we, we just join in with anything
4 that Mr. Wilkes has already said.

5 THE COURT: Okay. All right. Now, let's see. Refresh
6 my memory, did the defense enter any evidence in the record?

7 SOLICITOR HUNTER: I will be going first, Your Honor.

8 THE COURT: That's what I thought.

9 MR. WILKES: I got real close.

10 SOLICITOR HUNTER: He got close.

11 THE COURT: Well, I was looking at you when I said
12 that.

13 MR. WILKES: So, I scared myself when I almost did.

14 THE COURT: Okay. And as far as you gentlemen, are you
15 gonna go first, Mr. Wilkes, followed by Mr. Poole?

16 MR. WILKES: I'll be glad to go, be the guinea pig and
17 go first.

18 THE COURT: Okay. I don't know if y'all talked about
19 it or had some strategy and tell me if you do so---

20 MR. WILKES: I'll be glad to go first.

21 THE COURT: Okay. That's fine.

22 All right. Bring the jury in.

23 (WHEREUPON, the following takes place within the
24 presence of the jury.)

25 THE COURT: All right. Good afternoon.

1 The record will reflect the jury has returned to the
2 courtroom, and I trust everyone had a good morning. I told
3 you that when we returned to the courtroom that -- and oh,
4 by the way, I'm told that there is no heat in the building
5 right now. They're doing some work on the roof with the
6 boilers, and, apparently whatever they've done has shut down
7 the old boiler, and, so, it is what it is. Here's where we
8 are.

9 So, if you smell a little tar smell in the, in the
10 courtroom that's because they're sealing the new equipment
11 they're putting in so it doesn't leak. So, just bear with
12 us. We're in construction and that's just the problem we
13 have, and I apologize to you. But it's beyond our control
14 at this point in time.

15 But anyway, I told you we would be returning for the
16 closing arguments to be offered by the attorneys. And at
17 this time the State will be going first.

18 Mr. Hunter.

19 SOLICITOR HUNTER: Your Honor, may it please the Court?

20 THE COURT: Yes, sir.

21 SOLICITOR HUNTER: Derrick Cheeks and Ricky Cheeks are
22 guilty. Guilty of trafficking in crack over 400 grams,
23 guilty of possessing with intent to distribute that crack
24 within one-half mile of a school, Woodland Heights
25 Elementary, and Mr. Ricky Cheeks is also guilty of

1 trafficking in crack over 100 grams for when he took the
2 crack from the house and was going to deliver it.

3 Now, at the beginning of the trial I stood up and said
4 Derrick Cheeks was the cooker and Ricky was the runner.

5 From the facts that you heard the past two days, did
6 anything show different?

7 Did anything show different that Derrick didn't cook
8 the crack, that Ricky didn't run the crack?

9 I submit to you that it didn't.

10 Now, this is a situation where you have two relatives.
11 Mr. Cheeks, Mr. Derrick Cheeks is the head of the snake.
12 He's the main man.

13 MR. WILKES: Objection, Your Honor.

14 THE COURT: The objection is?

15 MR. WILKES: The objection is characterizing my client
16 as a snake.

17 THE COURT: I'll sustain that and strike that, that
18 reference.

19 Ladies and gentlemen, I'll instruct you further on
20 matters that have been stricken.

21 You may proceed.

22 SOLICITOR HUNTER: Derrick Cheeks is the main man of
23 this organization. Underneath him are Ricky Cheeks and the
24 two gentlemen that testified here yesterday, Eric Elder and
25 Tracy Markley. Derrick cooks it. They run it for him.

1 Now, I'm gonna go over the story again that I told you
2 at the beginning of the trial. Craig Hanning from SLED was
3 doing surveillance at the Super 8 Motel on South Blackstock
4 Road near the Denny's at Reidville Road. He's watching
5 Ricky Cheeks and a black Crown Vic Police Interceptor, had
6 fake antennas, looked like a police car. He watches as Eric
7 Elder gets dropped off there. He sits there for a minute.
8 Eric and Ricky are conversing.

9 Derrick comes out of the hotel. They leave the hotel
10 and go to () e, which is the home of Tracy
11 Markley. That home, as Matt Hutchins testified, is yards
12 from Woodland Heights Elementary. Definitely less than
13 one-half mile as he said.

14 When they get there, as Eric testified, Derrick begins
15 to prepare to manufacture crack cocaine. He's getting the
16 pots and the pans ready. He sends Eric off to Wal-Mart.
17 Eric goes in the car, but Ricky has to go with him.

18 What do they buy?

19 Baking soda.

20 How much baking soda is in here?

21 None. When the police found it that day there was
22 nothing left in here. It was purchased only hours before.
23 They get back to the house. Derrick begins cooking the
24 crack cocaine. Inositol powder, a cut for cocaine. You add
25 this to the cocaine so that you have more cocaine so when

1 you cook it you can sell more. You then add the baking soda
2 too. From the chemical reaction the crack cocaine forms.
3 All you need is a stove and a pot or even a microwave. It's
4 pretty simple.

5 At that point Derrick hands Ricky this, 111.31 grams of
6 crack cocaine. That could fit into your pocket. That could
7 fit into your pants.

8 Now, we also heard Investigator Hutchins talk about the
9 value of the cocaine, of crack cocaine, and how it's
10 normally sold on the street. It's normally sold in, either
11 in a rock or in the ounce. An ounce equals 28 grams.

12 Four rocks here, 111 grams, divided by four, guess how
13 much that is?

14 27.82 grams. Almost exactly 28 grams. An ounce in
15 each rock.

16 You know what's even funnier?

17 When they go to the house they find 12 rocks drying.
18 They put them in a plastic bag. The total weight of that is
19 321.53 grams. You divide those 12 rocks into that grams,
20 you get 26.79 grams. Almost an ounce each. Exactly how
21 crack cocaine is sold.

22 There's also 11 bags found on the counter each with a
23 rock inside of it. When you divide those into the
24 301.4 grams that it weighed, 27.4 grams. Almost exactly an
25 ounce.

1 How do they know this?

2 How does Derrick get it like that?

3 Scales.

4 Three of them are found in the house. You can even see
5 the residue on the large scale. Take a look at what's right
6 next to that large scale. Multiple bags of crack cocaine.

7 Now, I've gotten to the point where they've left. The
8 police perform a car stop on Eric Elder for running a stop
9 sign, the stop sign at Briarwood and West Main Street. To
10 get from the house to that area you take a right out of the
11 driveway. You take a right on Fox Cross Road, a left on
12 Briarwood. You cross over Warren Abernathy Highway or 29,
13 and you come to a stop sign at West Main Street where it's
14 cut off of Warren Abernathy heading, heading towards
15 Vanderbilt Lane. That's the stop sign he rolls through. He
16 then pulls over at Vanderbilt and Textile.

17 The police get him out of the car. He's on the driver
18 side of the vehicle. Never goes to the passenger side of
19 the vehicle. He was brought back to the other end of Matt
20 Hutchins car. Travis McJunkin goes to the right side, the
21 passenger side of the vehicle, gets Ricky Cheeks out of the
22 car, sees him messing with his pocket. Tells him multiple
23 times to stop. He doesn't comply. In fact, Travis said one
24 time he had to make him stop.

25 He brings him back to the passenger side of Matt

1 Hutchins' vehicle at which point the dog does a sniff around
2 the car or at least to the passenger side. Jumps into the
3 passenger seat and sits there, the signal to alert that
4 narcotics are present in that vehicle.

5 Who was just sitting in that passenger seat?

6 Ricky Cheeks.

7 He gets the dog outside.

8 What's on the ground by the back passenger wheel?

9 Four ounces or 111 grams of crack cocaine.

10 I asked you to use your common sense when I first came
11 up here.

12 What does your common sense tell you when the only
13 person, other than police personnel, at the back passenger
14 wheel and there's cocaine found there or crack cocaine?

15 What does your common sense tell you?

16 After the traffic stop they hurry up, hurry up and get
17 ready for the search warrant. Matt Hutchins is the lead
18 into the search warrant. That means he's the first one.
19 They go in through the garage after knocking and announcing.
20 No one answers the door. They enter the garage.

21 Take a look at how messy this is. He testified that
22 there's one little pathway. But originally they couldn't
23 find the door, and the whole time he had to back up from the
24 microwave because it was loud. They're yelling Sheriff's
25 Office, search warrant, Sheriff's Office, search warrant the

1 whole time.

2 They finally get to the door. When they open it, to
3 the left, red stairs with carpet. To the right, another
4 door. Exactly what I told you in opening statement.

5 They turned to the right, opened that door, and they're
6 greeted with this view. If you go a few steps in to the
7 right, Tracy Markley. Now, he's a big man now. He's a
8 really big man now. He's a big man then too. Hands up. He
9 knows it's the police. He sees their badges. He sees their
10 vests. Hands up.

11 But who's at the corner of this kitchen counter right
12 next to all of this crack cocaine?

13 Derrick Cheeks.

14 At this point they collect the evidence. Whoever finds
15 the evidence then gets Kelvin Washington to come over. He
16 actually takes the evidence, places it in the bags to be
17 placed in evidence.

18 Let you take a look at how much cocaine, crack cocaine
19 was in that house, and you're gonna be able to take all of
20 these exhibits back in the jury room with you when you
21 deliberate.

22 Why don't you take a look at it?

23 Do you see any difference in the size, shape, color or
24 do they all look indistinguishable to you?

25 If I were to give somebody one of these rocks and I

1 knew it to be crack cocaine, give somebody else another rock
2 which I knew not to be crack cocaine, could they tell a
3 difference?

4 Take a look at it when you get back there.

5 Now, we heard evidence from Tracy and Eric that Derrick
6 was cooking that day, and, in fact, Tracy admitted that his
7 hope, as always, was to get a crack rock so that he could
8 smoke it cause he was an addict. Eric admitted that he was
9 an addict as well. He cried with his mother in the gallery.
10 Derrick Cheeks cooked the crack. Ricky runs it.

11 Now, I think Ricky's also charged with trafficking
12 crack over 400 grams. He's charged with this crack, crack
13 found at the car stop, crack found near the rear passenger
14 wheel where Ricky was standing messing with his shorts. But
15 he's also charged with this crack. Crack still sitting at
16 the house.

17 And how is that?

18 He's gone from the house. But there's a thing called
19 actual and constructive possession. Actual possession means
20 that I'm actually holding it. It's in my possession. My
21 Clemson ring, it's in my possession.

22 I'm not possessing that computer right now, but whose
23 dominion and control is it under?

24 Mine.

25 So, I'm still possessing that computer.

1 Ricky Cheeks went to the store for Derrick Cheeks. He
2 ran the crack, the hundred grams for Derrick Cheeks. Not
3 only did he know what was going on, he participated in it.
4 If you take a bottle of blue water and take a bottle of
5 green water, even if that blue water is the main water
6 you're gonna use, if you put the green water in it, it turns
7 yellow.

8 Can you separate the two back?

9 Ricky's actions in helping Derrick cook that 400 grams
10 makes him guilty of trafficking over 400 grams.

11 Now, trafficking's an interesting statute. I don't
12 have to prove that he intended to distribute all of this
13 cocaine under the trafficking statute. I don't have to
14 prove that he cooked it. Although I submit to you that I
15 have.

16 This pot, empty bottle of baking soda, Inositol powder,
17 the cut, and the final product. But I still don't have to
18 prove to you that he even cooked it. I could. And that
19 would be enough for the trafficking. I only have to prove
20 that he possessed this crack cocaine, and I submit to you
21 that he did.

22 Now, Mr. Rosenburg is an evidence tech. Been in the
23 Sheriff's Office or law enforcement for a long time, and the
24 defense attacked him. He had the notary sign the sheet
25 before he ever got the drugs.

1 okay. But you heard him testify. You heard kelvin
2 Washington testify.

3 was this bag sealed when you gave it to evidence?
4 was it tampered with?

5 No.

6 You heard Rosenberg testify.

7 was this bag sealed when you received it?

8 Yes.

9 was it tampered with?

10 No.

11 what did you do with it?

12 Put it in the drug locker.

13 You heard Ashley Harris.

14 what did you do with it?

15 I picked it up from the drug locker.

16 was it sealed?

17 Yes.

18 was it tampered with?

19 No.

20 So, I admit that he should not have had Sandra Gray
21 sign his form. This evidence was not tampered with. There
22 it is. All you have to do is look at the pictures. This
23 evidence didn't come from some random place. It came from
24 right here and right here.

25 Now, they're also both charged with possession with

1 intent to distribute within one-half mile of a school. Matt
2 Hutchins already testified it's yards from Woodland Heights
3 Elementary. Less than one-half mile. But with possession
4 with intent to distribute I only -- I have to prove not only
5 that he possessed it, not only that both Ricky and Derrick
6 possessed these drugs, but they possessed them with the
7 intent to distribute them.

8 State Law allows a jury to come to a permissive
9 inference when the amount of drugs in question reaches a
10 certain level along with the other facts that have been
11 presented here today in the past two days. If those drugs
12 weigh over one gram, one gram, which as Matt Hutchins
13 testified .2 grams is the usual selling on the street, so
14 one gram, you're allowed to infer that they had the intent
15 to distribute. Six hundred grams, six hundred times that
16 inference. 111 grams. That's 111 times the inference that
17 you're allowed to infer.

18 Now, Ashley testified, Lieutenant Ashley Harris, as to
19 his testing of the drugs. On June 4th, 2009, he had over
20 12 years of experience as a chemical analyst. He had a
21 Bachelor's Degree from Wofford. He had training at the
22 South Carolina Criminal Justice Academy. He had a Master's
23 Degree in Chemistry from Furman. He attended multiple
24 training annually each year as to his testing, and he
25 followed the DEA, which is the Drug Enforcement Agency,

1 testing procedure on all of these drugs.

2 On the crack that was found drying, the ones that were
3 not already bagged, DEA policy let's you go up to the next
4 biggest number that has a number that is square. So, 16.
5 If you have 12 rocks, square root of 12 is the number that's
6 three-point something something something something. So,
7 you go to the next number that would get you a normal
8 number, which would be 16. The square root of which is
9 four. Then you add one. So five. He takes five of those
10 rocks and does his spot test.

11 Now, what the spot test is, as he testified, he takes a
12 chemical, takes a little substance of the rock, on five of
13 those rocks and tests it. He puts a chemical on each little
14 substance. Only after they've all turned blue does he
15 perform another test. If it turns dark blue, it's the
16 presence of the hydrochloride salt, which is cocaine. If it
17 turns light blue, they add another chemical. If that
18 chemical then turns that substance dark blue, it shows that
19 the free base form of cocaine, crack cocaine, is present.

20 At that point he takes all the rocks together. He
21 takes a sampling of some of the rocks, puts it into his
22 massspectrometer. We've -- I'm sure some of y'all have seen
23 it on TV. It's a huge machine that spins round and round.
24 It will give you substance, the chemical analysis of the
25 substance. When he did that for those 12 rocks, it was

1 crack cocaine.

2 Now, for each of the ones that are packaged
3 individually, the 11, he spot tests every single one of
4 them. They all come back as cocaine, cocaine base. He then
5 takes a sample of some of them, puts it into his
6 massspectrometer, same results.

7 Further, there's one last item, a cookie that's found
8 on top of the microwave. He tests that separately. That is
9 one big cookie. He does the spot test on that one according
10 to DEA policy, the testing that he's always done the past 12
11 years, spot test comes back positive for cocaine base, takes
12 a substance of that, puts it in his massspectrometer, comes
13 back as cocaine base. This is crack cocaine.

14 Now, I'm sure the defense is gonna argue that Ashley
15 can't tell sure 100 percent conclusively, if he pulled out a
16 rock, if he tested that rock, if it's crack cocaine. But
17 I'd submit to the jury that I have to prove beyond a
18 reasonable doubt. Not 100 percent. Just beyond a
19 reasonable doubt.

20 Now, you can look at all of this information, all of
21 these exhibits, and they want you to believe this is not
22 crack cocaine?

23 You have the cut. You have the baking soda. You got
24 the pot. You got the scales. But they want you to believe
25 it's not crack cocaine.

1 And when I first came up here I pointed at these two
2 gentleman, Derrick Cheeks and Ricky Cheeks. Both guilty of
3 trafficking over 400 grams. Ricky's also guilty of
4 trafficking crack over 100 grams, because as Roger Poole so
5 eloquently put during his questioning of Eric Elder, the
6 hand of one is the hand of all. If Ricky Cheeks
7 participates in the cooking/selling, if he gets together
8 with Derrick Cheeks and their plan is to cook all of this
9 crack, even if he just runs this little bit of crack, he's
10 guilty of this too. The hand of one is the hand of all.

11 Now, does that make Eric Elder and Tracy Markley any
12 less part of this scheme?

13 No, it doesn't.

14 In fact, Tracy said so. In fact, Tracy said Eric was a
15 thief.

16 How much evidence did you hear that Eric ever drove by
17 himself?

18 He didn't.

19 Or that Tracy drove by himself?

20 He didn't.

21 In fact, Tracy admitted he found crack cocaine that
22 Derrick had stored at his house.

23 What did he do with it?

24 He smoked it.

25 Called Eric a thief.

1 why do you think Ricky Cheeks is in this car?

2 what does your common sense tell you?

3 His family member's in the car. Blood is thicker than
4 water. Ricky Cheeks isn't gonna steal from him. Eric and
5 Tracy might, admitted crack heads on the stand.

6 One final issue. Tracy Markley lives at 152 Gordon
7 Drive. Neither Derrick Cheeks or Ricky Cheeks lives there.

8 what does common sense tell you?

9 Three people come over to a house. while the person
10 who lives there is asleep they enter that house. Two of
11 them leave with a hundred grams of crack. The same reason
12 Ricky rides with, with Eric.

13 You think Eric's gonna leave over 600 grams of crack
14 with an admitted crack head?

15 Matt Hutchins testified that, if sold individually,
16 little rock, by rock, you're looking at \$65,000 in this bag
17 alone.

18 what normal person in society leaves \$65,000 worth of
19 stuff with someone that they can't trust?

20 That's why Derrick stayed in the house. He's
21 protecting his investment.

22 Thank you.

23 THE COURT: Mr. Wilkes, for the defense.

24 MR. WILKES: Thank you, Your Honor.

25 THE COURT: Yes, sir.

1 MR. WILKES: The solicitor kept pointing over to my
2 client. Who the solicitor can not point to is Mr. Markley,
3 Mr. Elder. Can't point to them cause they're not here.

4 Now, the testimony was what you heard it to be. And,
5 so, when the solicitor tells you something, if that is not
6 what you recall the facts to be, the facts are what you
7 recall them to be. Not what I say. Not what the solicitor
8 says. But it's what you remember the facts to be.
9 Sometimes we misstate something. It's not intentional. The
10 facts are what you believe them to be.

11 Now, Mr. Markley testified that he had been friends
12 with Mr. Cheeks for a number of years. Mr. Cheeks had
13 stayed at his house overnight. He had a key to his house.
14 He hung out there. He played darts. He watched TV. He did
15 a lot of things there. There's food in the refrigerator
16 that Mr. Cheeks brought over. He washed his clothes there
17 from time to time. And I believe Mr. Markley may of said
18 that, at the time of the search, there was probably some of
19 Mr. Cheeks clothes there at the time. So, Mr. Cheeks was a
20 friend of Mr. Markley's. He was at the house regularly.

21 Now, it's convenient for Mr. Markley and Mr. Elder if
22 they can blame Mr. Cheeks. But the simple fact that
23 Mr. Cheeks is at Markley's house is not a significant factor
24 because he's there a lot.

25 Now, I will say that there's all this testimony about

1 Mr. Cheeks is cooking crack at the time and the police break
2 in and he's right there cooking crack, and the solicitor's
3 pointed to this evidence of Mr. Cheeks is cooking crack.
4 Mr. Markley I believe, and maybe Mr. Elder too, that
5 Mr. Cheeks is there, the pots a boiling, it's a going, and
6 it's a cooking and the police---

7 SOLICITOR HUNTER: Objection, Your Honor. Misstating
8 facts and, and evidence.

9 MR. WILKES: I don't---

10 SOLICITOR HUNTER: There was no testimony that the
11 water was boiling at wall.

12 MR. WILKES: I believe there was, Your Honor. I
13 remember quite distinctly there was.

14 SOLICITOR HUNTER: In fact, I remember Mr. Wilkes
15 asking if the water, if the eye was on, and everybody was
16 saying that no, it wasn't, that water wasn't boiling.

17 THE COURT: Well, I'm gonna allow him to make that
18 argument, and the jury can use their recollection of the
19 facts to determine whether it's a valid one or not.

20 SOLICITOR HUNTER: Thank you.

21 MR. WILKES: Thank you, Your Honor.

22 I believe, if you recall, Mr. Elder and Mr. Markley
23 both indicated that Mr. Cheeks was cooking crack. The water
24 was boiling. He was there in the middle of it.

25 And the question to Officer Kelvin Washington was,

1 Officer Washington was the water boiling when you bust
2 through that door?

3 Was the eye on even?

4 It was not, which was completely inconsistent with what
5 Mr. Markley and Mr. Elder wanted everyone to believe. They
6 even asked Officer Washington to look at the picture.

7 There's no boiling water, and the eye is on, and the police
8 busted through the door, and that is inconsistent with what
9 Mr. Markley and Mr. Elder say.

10 Mr. Markley and Mr. Elder want you to believe that
11 there's a water boiling and, and cooking going on, but
12 that's not what Officer Washington observed, and that's what
13 that picture shows, and they busted through that door and
14 started seizing stuff and taking pictures right away.

15 So, the explanation is what?

16 Now, they want to say that Mr. Cheeks is standing at
17 the counter and he's in this area here when the police come
18 in. But Mr. Markley said, when the police came in,
19 Mr. Cheeks thought they were being robbed, and if you're on
20 the couch or anywhere else in this room, you're going by the
21 counter to get to the bedroom, which is the, about the only
22 place, as I understand, that there was to run if you're
23 being robbed.

24 Now, there is evidence before you. There's drugs
25 before you. There's scales before you. The question is not

1 drugs in the house. The question is who's cooking this
2 crack cocaine.

3 Mr. Markley and Mr. Elder want you to believe that it's
4 Mr. Cheeks. However, an important thing, when you walk
5 through the door and you become a jury member, you become
6 subject to the very important rule, reasonable doubt, and
7 reasonable doubt means that we give the benefit of all
8 reasonable doubt to a man charged with a crime.

9 Now, when you consider the evidence in this case, you
10 not only consider the evidence that's presented, but you can
11 consider the absence of evidence. Evidence that most likely
12 would be there if what the other side says is true.

13 Now, the interesting thing about this is that the State
14 has offered up Exhibit No. 8, which is a scale, Exhibit No.
15 9, which is a scale, and 11, which is a big scale, and with
16 dust on it of some sort which they say is cocaine and all
17 kinds of things on it. And you have all of these bags in
18 which they say is, crack cocaine is sitting in. If you look
19 at State's Exhibit 2 and State's Exhibit 1 you'll see
20 photographs and you'll see photographs of what appeared to
21 be in the bags, and at the time they're not undone like they
22 are here. They appear to be in plastic sitting next to what
23 is No. 11 here, and I don't see the pot in evidence, but
24 there's a number of other things that if you'll look at, and
25 especially the things that they have given you, there's been

1 no testimony as to the fingerprints on any of this stuff.

2 You would think that if Mr. Cheeks is sitting there
3 cooking all of this stuff and using all of these things and
4 these things that his fingerprints are all upon them. And
5 we know, fortunately, that when the police picked up all of
6 these things, they have their gloves on so they don't mess
7 those fingerprints up, they can test for them, that they
8 have not brought you the evidence that would show as it's
9 Mr. Cheeks and not Mr. Markley and Mr. Elder trying to put
10 the blame on somebody else.

11 So, I submit to you that if the lack of something so
12 simple as a fingerprint on these items would show who has
13 had these items in their hands, that is a doubt that you
14 have to give to Mr. Cheeks. The police have not testified
15 why they didn't or if they did and it just didn't turn up
16 the way they wanted it. There's no evidence. It's pretty
17 simple evidence. The absence of that evidence can create
18 doubt, and reasonable doubt must be resolved in the favor of
19 the defendant.

20 Now, as the solicitor indicated, the chain of custody
21 is the documents that ensures that the items are properly
22 handled. One evidence technician testified it was not
23 notarized because it would be improper or she couldn't do it
24 because nobody was there and could see her do it. That
25 wouldn't be right or something to that effect. But the

1 other evidence tech testified that he had a blank form
2 already notarized, signed, and he just filled in what he
3 needed that day.

4 Ladies and gentlemen, I don't know how that is
5 appropriate, proper, or how that gives you confidence as to
6 the handling of the evidence in question. But I will say
7 this. When you heard the testimony of Lieutenant Ashley
8 Harris, he had given this expert opinion that they're six
9 and some odd, however many grams of crack cocaine.

10 Now, an expert's testimony is certainly very important
11 and we, we give it weight, but it doesn't mean you have to
12 believe it. If you listened to the facts of the case and
13 you believe differently from what an expert has given his
14 opinion on, then you're entitled to find differently.

15 Now, when I specifically asked to explain, have him
16 explain how it is he comes to say six hundred and some odd
17 grams of this substance is crack cocaine and how does he
18 know that, and he went on to tell me how DEA says do it this
19 way. I asked specifically, specifically tell me, can you
20 say that all these pieces are conclusively crack cocaine.
21 The whole purpose of the testing is to be able to say
22 conclusively it's crack cocaine, and a gas spectrometer does
23 that. So, you test it and you can say it is.

24 But that's not exactly what happened. What happens is
25 they take some of the material, not all of it, some of it,

1 and now keep in mind that in all of this stuff that they
2 have gathered together and have now dumped in these bags
3 they say that oh, here's stuff for making crack, here's
4 stuff for making crack, and all of this is somewhere because
5 it's sure not in here. But it's somewhere. Whether it's
6 here I don't know. But the question is what is in here and
7 can you conclusively say it's crack cocaine. He said no, he
8 can not.

9 Now, I may of asked if he was assuming that the rest
10 was, was. I think he is. Because if it has not been
11 tested, just because this one is doesn't mean that that one
12 is. And when you decide the case, the case is is there
13 crack cocaine over 400 grams I believe is the way the judge
14 will read the charge. If that's true, then you've got to
15 know, beyond a reasonable doubt, that there's more than
16 400 grams.

17 Now, if there's 600 or so grams, how do we know that
18 400 of it is conclusively crack cocaine?

19 How can we say for sure it is other than making an
20 assumption and we can not?

21 So, given the benefit of the doubt, I said okay, well,
22 tell me how much can you say is conclusively crack cocaine.
23 Just tell me how much you know for sure conclusively is
24 crack cocaine and he couldn't. He couldn't tell me.

25 So, he could not say weight, any amount of weight that

1 was conclusively crack cocaine.

2 So, as far as reasonable doubt goes, is there a way to
3 say that there is more than 400 grams of that substance?

4 Not that substance. Not that substance.

5 But 400 grams or more that is definitely crack cocaine
6 and there is not.

7 Now, I'm gonna sit down and let Mr. Poole take over and
8 have his say, but when I say -- and the judge is going to
9 explain the law, and he will explain that the defendant is
10 entitled to reasonable doubt.

11 Now, that is a very serious charge because in everyday
12 life we get by by sometimes making assumptions and guesses,
13 but that door right there ends that. It becomes necessary
14 and important that we don't make assumptions and guesses and
15 that we listen to what the judge charges and follow it very
16 carefully. If it means finding a man guilty, then you find
17 him guilty. But if it means finding a man not guilty, then
18 that's what you have to do.

19 Thank you.

20 THE COURT: Mr. Poole.

21 MR. POOLE: May it please the Court?

22 THE COURT: Yes, sir.

23 MR. POOLE: Good afternoon again, ladies and gentlemen.
24 Let me, let me start sort of, of where Mr. Wilkes ended. Go
25 back to the chain of custody forms and then get back to the

1 residence and what we've been referring to as the traffic
2 stop, and necessarily it's gonna have to be somewhat
3 repetitive, but -- and I'll try not to be unduly repetitive
4 of what's already been said.

5 What -- you're gonna hear a lot about reasonable doubt,
6 and what the State has to prove for you to find Ricky Cheeks
7 guilty of these three charges beyond a reasonable doubt. He
8 will tell you exactly what the definition is and what the
9 burden is upon the State to establish that proof. So,
10 that's his domain and your domain is whether or not the
11 facts fit.

12 And referring to the testimony of Lieutenant Ashley
13 Harris who says that all of this combined crack cocaine,
14 allege crack cocaine, 600 plus grams, when he was being
15 cross-examined, he, of course, stated that there was a
16 standard way of doing things, and the DEA, the Drug
17 Enforcement Administration, has set, set a, guidelines and
18 procedural rules that must be followed. He testified to
19 that.

20 But when he got right down to it to the end, my, my
21 notes indicate that he said that it is possible that, on the
22 untested material, is not crack cocaine. That was toward
23 the end of his testimony. That's what I recall. That's
24 what I wrote down. If you have any different recollection,
25 and you collectively think that the record indicates

1 something different, then certainly go by your own
2 recollection because you are the finders of fact in this
3 case. That's what I wrote down. It is possible that the
4 untested is not crack cocaine.

5 So, we don't know about the weight issue, and,
6 therefore, we have the same type of reasonable doubt that
7 attaches to my client, Mr. Ricky Cheeks, and getting to the
8 chain of custody forms, the chain of custody forms, I find
9 that to be disturbing when you have pre-notarized and
10 pre-signed forms that are routinely filled in, fill in the
11 blank, and then you come into Court and say this establishes
12 the chain of custody, then that is bothersome because that
13 is not the right way to, to do it.

14 A notary has to witness a signature, a notary, and, and
15 the person signing it has to sign it in the presence of a
16 notary and make contemporaneous notations of what is been
17 given to him or her in the chain of evidence in that
18 evidence room. That did not occur here.

19 we've got some problems in this case, ladies and
20 gentlemen, that are very fundamental that go to the root of
21 how cases like this are handled and how testimony is
22 presented and not presented and who says what. And when you
23 get right down to it, what you've got is basically the
24 testimony of, of Mr. Elder and you got the testimony of, of
25 Mr. Markley.

1 Now, Mr. Elder is a reformed, a repentant, and he is
2 renounced the use of drugs. Well, that's a good thing. I
3 don't, personally don't have any desire to be associated
4 with any type of drugs or anybody associated with them. But
5 it really is easy to get that jailhouse religion when you're
6 getting ready to have to answer to the same charges as these
7 defendants are going to have, are answering to right now.

8 Mr. Elder had -- and this is what he said. He said
9 that he had known Tracy Markley for about five years, and
10 that for seventy-five to a hundred times he, they had smoked
11 crack cocaine together. Five years, seventy-five to a
12 hundred times.

13 Okay. Now, that is ongoing criminal activity. That is
14 a pattern. That's a long time. That's a lot of crack
15 cocaine, and now we're talking about bringing in two other
16 people, tying them up with these two guys, and saying
17 they're guilty of the same type of pattern of behavior.

18 Now, also, when we get to the residence, when we get to
19 the possession that Mr. Hunter talks about Ricky Cheeks
20 having either actual or constructive possession of the
21 greater than 400, allegedly greater than 400, I guess the
22 big bag, the big bag here, grams, the -- I don't, I don't
23 understand that. I don't understand actual or constructive
24 possession as regards to Ricky Cheeks.

25 We got -- it's in Tracy Markley's house. Ricky Cheeks

1 happens to be there that day, and also there is the fact
2 that no testimony that I recollect says he received any of
3 this into his possession.

4 SOLICITOR HUNTER: Objection, Your Honor. Misstating
5 facts in evidence. Mr. Eric Elder testified that Mr. Cheeks
6 gave Ricky Cheeks the crack cocaine.

7 THE COURT: I'll sustain the objection.

8 MR. POOLE: And, of course, Mr. Elder said that at no
9 time in, while he was in the car did he have possession of
10 any crack cocaine. Okay. That, that's in the evidence.
11 Eric Elder said he, at no time, did he have in his
12 possession crack cocaine.

13 Now, mere presence, being merely present where
14 something is going down, and the judge will instruct you on
15 what that means, does not mean that you're guilty of a crime
16 if you just happen to be there.

17 Now, moving on to the traffic stop, Mr. Elder testified
18 that he had no possession of, of the crack cocaine, and that
19 Mr. Ricky Cheeks had two ounces on his person. There's
20 testimony that there was some clutching on the left side
21 that was observed by one of the officers. There was
22 testimony that when he got out of the car he was making some
23 furtive gestures trying to remove something from his, his
24 right pocket.

25 Now, you've seen Ricky Cheeks. He -- you know what

1 kind of condition he's in. He carries a cane on his right
2 side. He's paralyzed, practically immobile on his left.

3 Now, how can you see what's going on on the right side
4 if you're, of a passenger on the passenger seat when you're
5 standing there next to the driver?

6 How can you drop something when you have a cane that
7 you have to carry to support the right side of your body and
8 you can't use your left-hand at all, and the, the final
9 investigator that testified said he did not see Ricky Cheeks
10 drop anything at all.

11 Okay. Eric Elder's testimony is not believable. I
12 mention all of these things in the entire context that,
13 again, each defendant that comes into this courtroom is
14 entitled to the benefit of the doubt, and all things,
15 circumstances, and all of this evidence, I, I ask you to
16 consider it in your heart of hearts because there's plenty
17 of reasonable doubt as it relates to my client, Mr. Ricky
18 Cheeks, and it is my position and it's his position that the
19 proper verdict in this case, since the State has not carried
20 its burden of proof to the requisite degree that it should,
21 is you find Ricky Cheeks not guilty of all of these charges.

22 Thank you for your time. Thank you for your caring
23 about this case.

24 THE COURT: All right. Ladies and gentlemen of the
25 jury, we've been going for about an hour. We're gonna just

1 take a very short break before I begin my charge concerning
2 the law. As always, I will instruct you not to begin any
3 instructions, any discussions concerning this matter until
4 I've instructed you to do so.

5 You may retire to the jury room. Thank you very much.

6 (WHEREUPON, the following takes place outside the
7 presence of the jury.)

8 THE COURT: I'd ask the attorneys to approach. I've
9 got verdict forms I'd like you to take a look at.

10 (Pause.)

11 THE COURT: Any objections to those, gentlemen?

12 MR. WILKES: For the record, none from Mr. Ricky
13 Cheeks.

14 THE COURT: No objection from Mr. Wilkes as to his
15 client.

16 MR. POOLE: None from Mr. Ricky Cheeks.

17 THE COURT: Okay.

18 SOLICITOR HUNTER: None from the State either.

19 THE COURT: All right. As soon as they're ready we'll
20 bring them back in.

21 I'll just tell you it's my practice that I'll finish
22 the charge. I'll send the jury back out one more time.
23 I'll get you to go over the exhibits and be sure we've got
24 an agreement as to what's going back and you can make any
25 objections to my charge at that time you'd like to make.

1 MR. WILKES: Yes, sir.

2 (WHEREUPON, the following takes place within the
3 presence of the jury panel.)

4 THE COURT: All right. The record will reflect that
5 the jury has returned to the courtroom.

6 It is now my obligation to charge you concerning the
7 law to be applied in this case, and I'm going to go over
8 with you, first of all, at this time the indictments that
9 brought the case before this Court. These are, again, the
10 documents that inform the defendant of the charges that have
11 been lodged against each defendant. It informs the Court of
12 the charges to be tried.

13 The indictment -- first of all, the two indictments
14 that I'll go over with you, first of all, are the
15 indictments against the defendant, Derrick Lamar Cheeks,
16 Cheeks. The first indictment is Case Number 09-GS-42-6453.
17 This indictment is for the offense of trafficking in crack
18 cocaine.

19 The indictment states that Derrick Lamar Cheeks did, in
20 Spartanburg County, on or about June the 4th of 2009
21 knowingly sell, manufacture, deliver, purchase, or bring
22 into the State, or did provide financial assistance or did
23 otherwise aid, abet, attempt, or conspire to sell,
24 manufacture, deliver, purchase, or bring into the State, or
25 did knowingly, actually, or constructively possess, or did

1 knowingly attempt to actively or constructively possess more
2 than 400 grams of cocaine base and/or crack cocaine, a
3 schedule II controlled substance, in violation of Section
4 44-53-375 of the Code of Laws of South Carolina, 1976 as
5 amended, against the peace and dignity of the state, and
6 contrary to the statute in such case made and provided.

7 The next indictment that I will go over with you is
8 also an indictment against Derrick Lamar Cheeks, and this is
9 in Case Number 09-GS-42-6452. The indictment is for
10 possession with the intent to distribute crack cocaine
11 within one-half mile and that's referring to a school.

12 In this case the indictment states that Derrick Lamar
13 Cheeks did, in Spartanburg County, on or about June the
14 4th, 2009, distribute, sell, purchase, manufacture, or
15 unlawfully possess with the intent to distribute a quantity
16 of crack cocaine, a Schedule II controlled substance, while
17 in, on, or within a one-half mile radius of the grounds of a
18 public or private elementary, middle, or secondary school, a
19 public vocation or trade school, or a technical center, or a
20 public or private college or university, to wit, Woodland
21 Heights Elementary school, under the provisions of Code
22 section 44-53-445 of the Code of Laws of South Carolina,
23 1976 as amended, such possession having not been authorized
24 by law, against the peace and dignity of the State, and
25 contrary to the statute in such case made and provided.

1 Those are the two indictments that pertain to Derrick
2 Lamar Cheeks in this case.

3 The other indictments that I will go over with you are
4 the indictments that involve Ricky Dwight Cheeks. The first
5 indictment that I will go over with you is in Case Number
6 09-GS-42-6457. This indictment is for trafficking,
7 trafficking in crack cocaine.

8 This indictment states that Ricky Dwight Cheeks did, in
9 Spartanburg County, on or about June 4th, 2009, knowingly
10 sell, manufacture, deliver, purchase, or bring into the
11 State, or did provide financial assistance, or did otherwise
12 aid, abet, attempt, or conspire to sell, manufacture,
13 deliver, purchase, or bring into the State, or did
14 knowingly, actually, or constructively possess, or did
15 knowingly attempt to actually or constructively possess more
16 than 100 grams of cocaine base and/or crack cocaine, a
17 scheduled II controlled substance, in violation of Section
18 44-53-375 of the Code of Laws of South Carolina, 1976 as
19 amended, against the peace and dignity of the State and
20 contrary to such statutes made and provided.

21 The next indictment is also against Ricky Dwight
22 Cheeks, and it's in Case Number 2009-GS-42-6456. It is also
23 for trafficking, trafficking in crack cocaine.

24 Now, this indictment states that Ricky Dwight Cheeks
25 did in Spartanburg County, on or about June the 4th of 2009,

1 knowingly sell, manufacture, deliver, purchase, or bring
2 into the state, or did provide financial assistance, or did
3 otherwise aid, abet, attempt, or conspire to sell,
4 manufacture, deliver, or purchase, or bring into this state,
5 or did knowingly, actually, or constructively possess, or
6 did knowingly attempt to actually or constructively possess
7 more than 400 grams of cocaine base and/or crack cocaine, a
8 Schedule II controlled substance, in violation of Section
9 44-53-375 of the Code of Laws of South Carolina, 1976 as
10 amended, against the peace and dignity of the state and
11 contrary to such statute made and provided.

12 The final indictment against Ricky Dwight Cheeks is for
13 possession with intent to distribute crack cocaine within
14 one-half mile. That is in Case Number 09-GS-42-6455.

15 That indictment states that Ricky Dwight Cheeks did, in
16 Spartanburg County, on or about June 4 of 2009, distribute,
17 sell, purchase, manufacture, or unlawfully possess with the
18 intent to distribute a quantity of crack cocaine, a
19 Scheduled II controlled substance, while in, on, or within
20 one-half mile radius of the grounds of a public or private
21 elementary, middle, or secondary school, a public vocational
22 or trade school, or a technical education center, or a
23 public or private college or university, to wit, Woodland
24 Heights Elementary School, under the provisions of Section
25 44-53-445 of the Code of Laws of South Carolina, 1976 as

1 amended, against the peace and, excuse me, and as amended,
2 such possession having not been authorized by law against
3 the peace and dignity of the state and contrary to the
4 statute in such case made and provided.

5 Those are the indictments that are before the Court at
6 this time, and I remind you the fact that a defendant has
7 been arrested, charged, and indicted in a case is not
8 evidence in the case and can not be considered by you as
9 evidence of guilt in the case nor does it create any
10 presumption or inference of guilt. These documents are
11 simply the formal written documents that contain the charges
12 made against the defendants. It is the documents by which
13 those cases have been brought into this Court.

14 Now, each indictment carries a separate and distinct
15 offense, and you, the jury, must decide each indictment
16 separately on the evidence and the law applicable to it
17 uninfluenced by your decision as to any other indictment
18 before the Court. A defendant may convict, be convicted or
19 acquitted on any or all of the charges that have been made
20 against that defendant. You will be asked to write a
21 separate verdict of guilty or not guilty as to each
22 indictment on each defendant.

23 Now, in this case there are two defendants in the case
24 each of whom is charged with the crimes that I have gone
25 over with you already. In the case of each defendant, and

1 the evidence and the law concerning that defendant should be
2 considered separately and individually. Your verdict does
3 not have to be the same for both defendants in this case.
4 The fact that you may find one defendant guilty or not
5 guilty should not control your verdict as to the other
6 defendant, and where more than one person is charged with a
7 crime, if the evidence so warrants it, you may convict one
8 and acquit the other, you may acquit both, or you may
9 convict both. It will depend upon your view of the evidence
10 and the testimony that you've heard.

11 You must take each defendant and consider the evidence
12 as to that defendant and my instructions to you on the law
13 as to each defendant and each charge against those
14 defendants. You will then write a separate verdict of
15 guilty or not guilty for each individual defendant on each
16 individual indictment in the case.

17 Now, the defendants in this case have pled not guilty
18 to the indictments that I have gone over. That plea places
19 the burden upon the State to prove the defendant guilty. A
20 person charged with the commission of a criminal offense in
21 this state is never required to prove himself innocent. I
22 charge you it's an important rule of law that a defendant in
23 a criminal case, no matter what the seriousness of the
24 charge might be, is always presumed to be innocent of a
25 crime for which an indictment has been issued unless guilt

1 has been proven to you, the jury, by evidence that satisfies
2 you of that guilt beyond a reasonable doubt. The
3 presumption of innocence does not end when you begin your
4 deliberations. It continues throughout these proceedings
5 and into your deliberations until you reach a verdict of
6 guilt based on evidence that satisfies you of that guilt
7 beyond a reasonable doubt.

8 The presumption of innocence has been described
9 sometimes like the robe that I wear into this courtroom. It
10 remains about the shoulders of a defendant throughout the
11 trial and into your deliberations until and unless it has
12 been stripped from the defendant by evidence that satisfies
13 you of that defendant's guilt beyond a reasonable doubt.

14 Now, the presumption of innocence is not a mere legal
15 theory and it's not just a legal phrase. It's a substantial
16 right that every defendant is entitled to unless you, the
17 jury, are satisfied from the evidence of that defendant's
18 guilt beyond a reasonable doubt.

19 Now, you've already heard me refute, refer to proof
20 beyond a reasonable doubt or proof satisfying you of guilt
21 beyond a reasonable doubt, and you may be asking yourself
22 well, just what is meant legally by a reasonable doubt.

23 What is a reasonable doubt legally?

24 A reasonable doubt is that kind of doubt that would
25 cause a reasonable person to hesitate to act, and the State

1 has the burden of proving the defendant guilty beyond a
2 reasonable doubt.

3 Now, some of you may have been involved at some point
4 in time in a civil case. A civil case in our courts is one
5 where someone is seeking monetary damages from another
6 person perhaps for breach of contract or for an injury that
7 occurred as a result of an accident or something of that
8 nature, and in those cases, where civil or money damages are
9 being sought from someone, the standard of proof is by the
10 greater weight or the preponderance of the evidence. That
11 means the scales of justice tilting ever so slightly one way
12 or the other.

13 That's not the standard of proof in this case. The
14 proof in a criminal case is more powerful than that. It is
15 proof beyond a reasonable doubt. Proof beyond a reasonable
16 doubt is that kind of proof that would leave you firmly
17 convinced of the defendant's guilt.

18 Now, that's very few things that go on in this world
19 and in our lives that we can prove beyond any doubt
20 whatsoever, and that's not the standard of proof that the
21 State is placed to in this case. I will tell you that if,
22 based on your consideration of the evidence, if you are
23 firmly convinced that the defendant is guilty of the crime
24 charged, then you must find the defendant guilty. If, on
25 the other hand, there's a real possibility that the

1 defendant is not guilty, you must give the defendant the
2 benefit of that doubt and find him not guilty.

3 Now, I'll remind you that, during the trial, you and I
4 have had different duties to perform. As the trial judge
5 it's been my responsibility to preside over the case. I've
6 had the duty of ruling on the admissibility of evidence or
7 the appropriateness of questions that may have been asked,
8 and I will tell you you are only to consider the competent
9 evidence before you.

10 If there was any matter that I ordered stricken from
11 the record during the trial of this case you must disregard
12 that information or that evidence in its entirety. It can
13 not be used by you in any fashion in determining your
14 verdict in this case. You're to only consider the testimony
15 and evidence which has been presented from this witness
16 stand and the exhibits that have been entered into the
17 record of the case and any stipulations, that would be
18 agreements as to exhibits entered into by counsel.

19 I now have the additional duty of charging you
20 concerning the law that's applicable in this case, and I
21 told you at the beginning of the trial I am the sole judge
22 of the law to be applied in this case. Under your oath as
23 jurors it's your responsibility to take the law as I give it
24 to you, apply it to the facts as you find them to be, and
25 that should put you in a position to reach a just and a true

1 verdict in this case. If you came into this courtroom with
2 any idea as to what the law is or what it ought to be, you
3 should leave those notions outside of the jury room. You
4 are sworn to accept the law as I give it to you again and
5 apply it to the facts as you find them to be.

6 Now, in every case tried before this Court a, the jury
7 becomes the sole and exclusive judges of the facts in this
8 case. I can not indicate, state, or comment on any facts in
9 this matter nor you, should you take from anything that I
10 have done in the discharge of my duties as the presiding
11 officer that I have an opinion in any, in any fashion
12 whatsoever as to how you might determine the facts in this
13 case. The law doesn't allow me an opinion on that subject,
14 and I don't have an opinion as to how you should determine
15 the facts in this case. It is for you, the jury, to decide
16 the facts in this case. It's your duty to determine the
17 effect, the value, the weight, and the truth of the evidence
18 that's been presented during this trial.

19 Now, in doing that I will tell you that there are two
20 types of evidence that you have the right to consider in
21 reaching your verdict, and I'll describe these two types of
22 evidence, explain to you what I mean by that.

23 The first type of evidence I'll discuss with you is
24 what is called direct evidence. That's evidence or
25 testimony from someone who claims to have direct knowledge

1 of the facts about which they testify, that they saw
2 something, they experienced something, they felt, tasted
3 smelled. In other words, someone who actually participated
4 in the events about which that person testifies. That's
5 what's meant by direct evidence.

6 The other type of evidence that you can consider is
7 what is called circumstantial evidence. Now, circumstantial
8 evidence is proof of a chain or, or facts or circumstances
9 that indicate the existence of some other fact. It's
10 sometime described as proof of collateral facts from which a
11 main fact could be reasonably inferred. Therefore,
12 circumstantial evidence is based on inference and not upon
13 personal knowledge or observation.

14 I like to use a very simple example as to what I mean
15 by proof of facts by circumstantial evidence. Let's say
16 last night before you went to bed you looked outside the
17 window of your home, the stars were shining, everything was
18 pretty outside. That's the way it was last night. You
19 slept well all night, didn't hear or see a thing, woke up
20 the next morning, looked out that very same window, and,
21 even though the sun was shining, there was water dripping
22 from all the trees, there were puddles in the driveway, the
23 road in front of where you lived was wet. Now, you didn't
24 see it rain and you didn't hear it rain, but from those
25 collateral facts that you know to be true, you could

1 reasonably infer that it might have rained during the night
2 or did rain during the night. That's what's meant by proof
3 of collateral facts from which a main fact could be
4 reasonably inferred.

5 Now, the law makes no distinction between the weight or
6 the value that you can give to either direct or
7 circumstantial evidence nor is there a greater degree of
8 certainty required of circumstantial evidence than that of
9 direct. You, the jury, have the right to weigh all of the
10 evidence in this case. And if, after weighing all of the
11 evidence, you are convinced, you're not convinced of the
12 defendant's guilt beyond a reasonable doubt, then you must
13 find the defendant not guilty. However, if you are firmly
14 convinced, beyond a reasonable doubt, of the defendant's
15 guilt, you must find the defendant guilty.

16 Now, in doing your job as jurors, determining facts,
17 it's gonna be necessary that you determine the credibility
18 or believability of the witnesses that you've heard in this
19 trial. That's what credibility means. It means
20 believability. It's your duty, as jurors, to analyze and
21 evaluate the evidence and determine what evidence convinces
22 you of its truth.

23 In determining believability of a witness who may have
24 testified in this case you can believe one against all the
25 others or all the others against one. You can believe all,

1 part of, or none of what a witness has told you. You're the
2 sole judges of the facts in this case. So, therefore,
3 you're the sole judges of the believability of the witnesses
4 that you've heard.

5 Now, you can believe -- you have the right to consider
6 such factors as whether or not a witness might have a stake
7 in the outcome of a case, whether a witness actually had the
8 ability to know or experience the things about which the
9 witness testified, whether or not the witness might be
10 biased or prejudiced one way or the other in the case, and
11 you've observed the witnesses as they testify, as they
12 spoke. Take all of the factors I just mentioned as you
13 choose to, and use your own good common sense and reach a
14 determination as to the credibility or believability of the
15 witnesses that you've heard during this trial.

16 Now, during this trial we had testimony from witnesses
17 who were qualified as experts, and ordinarily, under the
18 law, witnesses are not allowed to state their opinions on
19 subjects when they testify. They must testify about the
20 facts. An exception to that general rule is made for
21 witnesses who are qualified as an expert. That's someone,
22 because of their experience or knowledge or education in
23 some art, science, or profession, has been determined to be
24 an expert in that field and then was admitted, that
25 testimony was admitted on that basis. Those witnesses are

1 allowed to state their opinions within the area of their
2 expertise, and also state the reasons for their opinions.

3 I will tell you to consider the testimony of an expert
4 received in this case like any other evidence that you've
5 heard. You give it the weight you think it deserves. If
6 you decide that the opinion of an expert witness is not
7 based on sufficient education or experience or you conclude
8 that the reasons given by the expert in support of that
9 opinion are not sound or the opinion is outweighed by other
10 evidence, you have the right, as the jury, to disregard an
11 expert's opinion in its entirety.

12 An expert's opinion or testimony is to be given no
13 greater weight simply because the person was designated as
14 an expert. You're not required to accept an expert's
15 opinion even though it may not be contradicted by other
16 evidence. Again, you're the sole judges of the facts and
17 you're the sole judges of the weight that you choose to give
18 to each witness' testimony including expert witness'
19 testimony as well.

20 Now, in order to establish criminal liability it's
21 necessary for the State to prove intent. That's the mental
22 state required to be proven in any statute or crime to
23 establish criminal liability. Criminal intent is always a
24 matter for the jury to determine from the facts and
25 circumstances of each case because there's no way that we

1 can look in someone's brain and tell exactly what they
2 intended to do at any given moment in time. So, there's no
3 scientific way to prove what someone intended to do.

4 Therefore, criminal intent is based upon inference and
5 what can be inferred from the facts and circumstances shown
6 to have existed at the time of the alleged incident. That's
7 how you make a determination as to whether or not any
8 necessary elements of intent in a criminal statute is
9 present. It's not necessary, again, to establish intent by
10 direct or positive evidence. It can be established the same
11 way as any other fact taking into consideration the acts of
12 the parties, the facts and circumstances of the case.
13 Criminal intent, however, is a mental state. It's a
14 conscious wrongdoing, and it's up to you to determine what a
15 defendant intended to do based upon the circumstances that
16 were shown to have existed at the time of the alleged
17 incident.

18 Now, if a crime is committed by two or more people who
19 are acting together in committing a crime, the act of one is
20 the all. A person who joins with another to commit an
21 unlawful act is criminally responsible for everything done
22 by the other person which happens as a probable and natural
23 consequence of the acts done in carrying out the common plan
24 or purpose.

25 For example, if a crime -- and this doesn't apply to

1 this case. I'll just give this as an example. If two
2 people are involved in a crime and only one of them carried
3 a gun during the commission of that crime, and during the
4 commission of that crime a person was killed, even though
5 the gun was in the hand of only one, and even though only
6 one of them could of pulled the trigger, the hand of one in
7 that case would be hand of all. So, therefore, both of them
8 could be charged with the killing and could be held
9 responsible for that. Assisting another in the commission
10 of an act of one is the act of all. Sometimes it's said the
11 hand of one is the hand of all.

12 Prior knowledge that a crime is going to be committed
13 without more is not sufficient to make a person guilty of
14 that crime, and mere knowledge that another person is going
15 to commit a crime, even if the defendant is present when the
16 crime is committed, is not sufficient to convict the
17 defendant as a principal. Guilt as a principal is shown by
18 actual or constructive presence at the scene as a result of
19 a prior arrangement. Therefore, a finding of a prior
20 arrangement or plan or a common scheme is necessary to find,
21 for a finding of guilt as a principal.

22 The State must prove, beyond a reasonable doubt by
23 competent evidence, the theory of the hand of one being the
24 hand of all. A principal in a crime is one who either
25 actually commits the crime or was, or who was present

1 aiding, abetting, or assisting in the commission of the
2 crime. When a person does an act in the presence of and
3 with the assistance of another, the act is done by both.
4 where two or more are acting with a common plan or scheme,
5 and they are present at the commission of the crime, it does
6 not matter who actually commits the crime. All are guilty.
7 The hand of one is the hand of all.

8 Present -- being present at the commission of the crime
9 means to be sufficiently near so as to aid, abet, assist in
10 the commission of the crime. However, mere presence at the
11 scene of a crime is not sufficient to convict one as a
12 principal on the theory of aiding/abetting.

13 Intent is also a necessary element for there to have
14 been a common design or intent to commit a crime, and the
15 crime must have been committed pursuant thereto with the
16 person aiding and abetting by some overt act. Intent means
17 intending the result which actually occurs. Not
18 accidentally or involuntarily. Intent may be shown by acts
19 or conduct of a defendant and other circumstances from which
20 you might naturally and reasonably infer intent. The State
21 must prove these elements beyond a reasonable doubt.

22 As I have told you, mere presence at the scene of a
23 crime is not sufficient to prove someone guilty of a crime.
24 A defendant's presence where a crime is being committed or
25 mere association with a person who commits a crime does not

1 make the defendant a, an accomplice, an aider and abettor of
2 that person committing the crime. The burden is upon the
3 state to prove every element of the crime charged. If you
4 find, after reviewing all of the evidence, that the State
5 has proven that the defendant was only present at the scene
6 of a crime, and that they have not proved, beyond a
7 reasonable doubt, any other participation in the crime, then
8 you must find the defendant not guilty. The law is that
9 proof of someone being at the, at a scene of a crime is not,
10 in and of itself, sufficient to find someone guilty.

11 I will instruct to you and emphasize to you that the
12 fact that the defendants did not testify is not a factor to
13 be considered by you in the case in your deliberations and
14 in your consideration of the question of guilt or innocence
15 of the defendants. It must not be considered by you in any
16 manner whatsoever. I will tell you a defendant has a
17 constitutional right to remain silent, and the assertion or
18 exercise of that right by a defendant must not be considered
19 by you in your deliberations.

20 I repeat to you that, under your oath, you are to draw
21 no conclusion whatsoever from the fact that a defendant in
22 this case did not testify. The fact that a defendant, the
23 defendant did not testify should not even be considered by
24 you or discussed by you in the jury room. The burden of
25 proof, as I have stated, is upon the State. A defendant is

1 not required to prove his innocence. The burden of proof
2 remains upon the State to prove the defendant guilty beyond
3 a reasonable doubt throughout the, the trial.

4 Now, I'm going to go over the specific crimes that have
5 been charged at this point in time. We have two
6 different -- we actually have two different defendants.
7 Each of whom has been charged with trafficking in crack
8 cocaine. Both of whom have been charged with trafficking in
9 crack cocaine in excess of 400 grams, and in the case of
10 Ricky Dwight Cheeks, he has been charged also with
11 trafficking in, in crack cocaine more than 100 grams.

12 Now -- excuse me. Therefore, the defendants have been
13 charged with trafficking in crack cocaine. The State must
14 prove, beyond a reasonable doubt, that the defendant
15 knowingly sold, manufactured, cultivated, delivered,
16 purchased, brought into the State, provided financial
17 assistance, or otherwise aided, abetted, attempted, or
18 conspired to sell, manufacture, cultivate, deliver,
19 purchase, or bring into the State, was knowingly in actual
20 or constructive possession or knowingly attempted to become
21 in actual or constructive possession of crack cocaine.

22 The State must also prove, beyond a reasonable doubt,
23 that the amount of crack cocaine in the one charge that's
24 against both of them was 400 grams or more. There's also a
25 charge, as I indicated in the case of Ricky Cheeks, of, of a

1 charge of 100 grams or more.

2 Now, possession, to prove possession the State must
3 prove, beyond a reasonable doubt, that the defendant in the,
4 in the case both had the power and the intent to control the
5 disposition or use of the crack cocaine. Therefore,
6 possession, under the law, can either be actual or
7 constructive.

8 Now, actual possession means that the crack cocaine was
9 in the actual physical custody of the defendant.
10 Constructive possession means that the defendant had
11 dominion or control or the right to exercise dominion or
12 control over either the crack cocaine or the property on
13 which the crack cocaine was found.

14 Now, mere presence at a scene where drugs are found is
15 not enough to prove possession. Actual knowledge of the
16 presence of the crack cocaine is strong evidence of a
17 defendant's intent to control its disposition or use. The
18 defendant's knowledge and possession can be inferred when a
19 substance is found on property under the defendant's
20 control. However, this inference is simply an evidentiary
21 fact to be taken into consideration by you along with other
22 evidence in this case and to be given the amount of weight
23 you think it should have. Two or more persons may have
24 joint possession of a drug.

25 Now, under the statute the word deliver means to

1 actually or constructively attempt to transfer the drug.
2 Distribute means to deliver other than by administering or
3 dispensing a drug. Manufacture means to produce, prepare,
4 convert, process, plant, cultivate, grow, or harvest a drug
5 either naturally or chemically. Manufacturing includes any
6 package or re-packaging of a drug or labeling or re-labeling
7 of a drug's container.

8 There's also a charge against both defendants for
9 distribution of a controlled substance within the proximity
10 of a school. The defendants have been charged with the
11 distribution of crack cocaine within proximity of a school
12 or a park. The State in this case must prove, beyond a
13 reasonable doubt, that the defendant distributed, sold,
14 purchased, manufactured, or unlawfully possessed with the
15 intent to distribute crack cocaine while in, on, or within
16 one-half mile of the grounds of a public or private
17 elementary, middle, or secondary school, a public playground
18 or park, a public vocational or trade school or technical
19 education center, or public or private university.

20 Now, I'm also going to charge you concerning the weight
21 of a controlled substance. The weight of any controlled
22 substance referenced in the law that I've just gone over
23 with you is the weight of that substance in pure form or any
24 compound or mixture thereof.

25 Also, concerning the, the proximity charge, there is a

1 further provision in the law regarding, in regard to
2 possession with intent to distribute crack cocaine. Code
3 Section 44-53-375(b) of the South Carolina Code of Laws
4 creates a permissive inference that possession of one or
5 more grams of crack cocaine constitutes the possession with
6 the intent to distribute. Thus, Section 44-53-375(b)
7 provides that possession of one or more grams of crack
8 cocaine gives rise to a permissive inference of a violation
9 of the statute. The inference of a violation of the law by
10 possession of one or more grams of crack cocaine may be
11 drawn from proof of the quantity of the drug.

12 The resulting implication, implication only permits,
13 rather than requires, the jury to infer a violation of law.
14 This is another piece of evidence for you to consider and
15 evaluate. This permissive inference does not relieve the
16 State from actually proving, beyond a reasonable doubt, the
17 element of intent to distribute. This permissive inference
18 is of an evidentiary nature, and the permissive inference
19 does not require the jury to infer a violation of the law.
20 In other words, the permissive inference of a violation of
21 the law from the possession of a certain quantity of crack
22 cocaine is simply an evidentiary fact to be taken into
23 consideration by you, the jury, along with other evidence in
24 the case, and it's to be given such weight as you, the jury,
25 determines it should receive. You are free to accept or

1 reject the permissive inference depending upon your view of
2 the evidence.

3 Stacie Lanford, please raise your hand.

4 (Juror complies.)

5 THE COURT: You're going to be the foreperson of the
6 jury. That means that you will be the person who will be
7 responsible to preside over the discussions that go on. If
8 during the discussion of the jury the jury formulates a
9 question that you'd like to submit to the Court, I'd ask you
10 get the jury to agree upon the form of the question, put it
11 in writing on a piece of paper, knock on the door, and hand
12 it to the bailiff. He'll be seated right outside the door.
13 They'll deliver the question to me and I'll consider what
14 answer I can give.

15 I will tell you, however, I can't answer each and every
16 question that you may have in deliberations because I've
17 told you we have separate functions. I can't become
18 involved in your decisions concerning the facts in this
19 case. But I'm not asking you to edit any question. You
20 simply write the question down the jury has, submit it to
21 me, and I will formulate the appropriate answer that I think
22 I should give to you.

23 Also, I will be giving you a verdict form, actually two
24 verdict forms. One for each defendant that will least, list
25 each of the indictments that they're charged with, and will

1 give you options concerning those particular charges. You
2 will mark the appropriate option when you receive that form
3 and I'll go over that with you in more detail in a few
4 minutes once the jury has reached a unanimous verdict on
5 that question.

6 And, again, the jury verdict must be unanimous. Each
7 and every one of you must agree upon the verdict before it
8 is the verdict of the jury. That means no juror, even the
9 foreperson, has any greater say in the outcome of the case
10 than any other juror. Again, all, all of your verdicts must
11 be unanimous as to each and every question that's been
12 submitted.

13 Now, I've gone over a lot with you and I want to be
14 sure that the lawyers have not detected that I've left
15 something out or made an incorrect statement in what I've
16 said. So, I'm going to go over some things with them at
17 this time. I'm going to ask you to step back into the jury
18 room one more time. Don't begin any discussions until I
19 bring you out for final instructions, submit the evidence
20 and the verdict forms to you, and ask you to begin your
21 deliberations.

22 You can retire to the jury room.

23 (WHEREUPON, the following takes place outside the
24 presence of the jury.)

25 THE COURT: Any objections to the charge from the

1 State?

2 SOLICITOR HUNTER: None, Your Honor.

3 THE COURT: Any from the defense?

4 MR. WILKES: Your Honor, one objection, one comment,
5 one request.

6 THE COURT: Yes, sir.

7 MR. WILKES: The objection we would have would be the
8 Court's charge on knowledge is strong evidence we believe
9 may be a comment on the facts under the circumstances of
10 this case because---

11 THE COURT: Tell me, tell me in what location I made
12 that statement.

13 MR. WILKES: Toward the end and that was made as to---

14 THE COURT: The permissive inference?

15 MR. WILKES: I believe so.

16 THE COURT: We have that in writing. If you'll point
17 that out to me.

18 MR. WILKES: I, I don't.

19 THE COURT: It's from Judge Anderson's charge book.

20 SOLICITOR HUNTER: I don't believe that's in that
21 particular charge.

22 MR. WILKES: I don't, I don't see it, Your Honor, but
23 if I can articulate -- I'll articulate the best---

24 THE COURT: If you'll tell me where it is I'd like
25 to---

1 MR. WILKES: I don't, I don't see it.

2 THE COURT: I can correct it if you'll tell me where
3 that is.

4 MR. WILKES: I don't, I don't see it, Your Honor. It
5 may of been near mere presence. It was, it was toward the
6 end of the charge, and, and I'm sorry. I don't see it in
7 Judge Anderson's charge. It may of been outside of that.
8 The Court has, was explaining---

9 THE COURT: Tell me what you, what you recall that I
10 said.

11 MR. WILKES: I believe Your Honor said, as far as
12 presuming, I think it was the presumption of, a presumption
13 arising from knowing the drugs were there and it was
14 somewhere around mere presence, and the, and I copied
15 down -- the quote was that a defendant's knowledge is strong
16 evidence of -- I think it's of his possession. The fact
17 that he knows it's there is, is strong evidence that he is
18 in possession of it, and, and the problem that I had with
19 that---

20 THE COURT: Then that would be under possession.

21 MR. WILKES: Yes, sir, it may be under possession. I'm
22 sorry. I just -- I got to writing. You said it. So I
23 could quote that part.

24 THE COURT: Actual knowledge of the presence of crack
25 cocaine is strong evidence of the defendant's intent to

1 control its disposition or use. The defendant's knowledge
2 and possession may be inferred when a substance -- okay.
3 That, that refers to State versus Kimbrell. Pull that up
4 and let's see what it says.

5 MR. WILKES: Yes, sir, that's, that's the language I
6 would object to that, under the facts of this case, we
7 believe that it, it would require some sort of language to
8 mitigate that because there was never -- it's not a question
9 that the people in the room knew.

10 THE COURT: Do you need a cite?

11 294 SC 51.

12 MR. WILKES: It's not a question that that they knew it
13 was there, but then it -- that does not -- that takes away
14 and nullifies the mere presence argument in this case. In
15 other words, when we say that it's strong evidence, it, it
16 not only seems to comment on the facts and the weight of the
17 facts---

18 THE COURT: Actual knowledge of the presence of the
19 crack cocaine is strong evidence -- but it doesn't say that
20 it's -- I'll see what that case says.

21 MR. WILKES: I would like to too, and I, if I would of
22 seen it coming I would of been better prepared for that.
23 But it just -- it struck me as it was in there with
24 presumption shortly after mere presence.

25 THE COURT: Well, let me see what -- I'll look at the

1 case. But go on to the next one.

2 MR. WILKES: The mere presence pleased me to no end,
3 but then that seemed to, to rob me of it. So --.

4 THE COURT: Well, I don't know whether it did or not.
5 But, of course, there was some evidence of one of the
6 defendant's running from the scene.

7 MR. WILKES: Yes.

8 THE COURT: Okay. Go ahead.

9 MR. WILKES: The other was -- there, there was a
10 requested charge as to the lack of evidence can be
11 considered as well. The Court had told the jury I believe
12 that there's two kinds of facts or two kinds of evidence
13 that can be considered, direct and indirect. But I believe
14 they can also consider the absence of evidence in their
15 deliberations and we, we would ask the Court---

16 THE COURT: I understand you're asking for that.
17 Anything else?

18 MR. WILKES: The, the only other thing was more of a
19 comment which Mr. Poole may have an issue with, but I think
20 the Court had said it was, it was talking about the, the
21 indictments and the Court had said the one charge against
22 both of them, and I don't know if that may of been perceived
23 by the jury---

24 THE COURT: I just said there was, there was charges of
25 trafficking against both of them.

1 MR. WILKES: Against both of them.

2 THE COURT: Yeah.

3 MR. WILKES: And I understand what the Court meant. I
4 don't know if the jury did. But it was that comment of the
5 one charge against them. It may link them together. The
6 Court allowed---

7 THE COURT: I'll make it clear that -- I thought I make
8 it clear that each has to be judged on their own.

9 MR. WILKES: You did earlier.

10 THE COURT: That was, that was very clearly -- I know I
11 made a lot of effort to be sure that they knew---

12 MR. WILKES: You did.

13 THE COURT: ---that they each stand on their own and
14 they each have a separate verdict.

15 MR. WILKES: You, you did and---

16 THE COURT: Okay. And I'll clear that up to them, that
17 each person has to be judged on their own on each charge.

18 MR. WILKES: Thank you, Your Honor.

19 THE COURT: We've separated them on the verdict forms.
20 So, they'll be---

21 MR. WILKES: That---

22 THE COURT: It clearly has the number of the
23 indictments, and it has the charge that they're facing.

24 MR. WILKES: Yes, sir.

25 THE COURT: Yes, sir.

1 MR. POOLE: Your Honor, I just join in Mr. Wilkes
2 objections and modifications---

3 THE COURT: Okay. All right.

4 MR. POOLE: ---modifications that he's suggested.

5 THE COURT: All right. Look up Solomon versus State,
6 313 SC 526.

7 Is that where you are?

8 SOLICITOR HUNTER: No, Your Honor. I'm on State v.
9 Kimbrell. If I could speak to that?

10 THE COURT: Yes, sir, please do.

11 SOLICITOR HUNTER: I believe it says because -- it's
12 specifically straight from this case. An accused person has
13 possession of controlled, contraband when he has both the
14 power and intent to control its disposition or use because
15 actual knowledge of the presence of the drug is strong
16 evidence of intent to control its disposition or use.
17 Knowledge may be equated with or substituted for the intent
18 element, which is almost exactly what you said.

19 MR. WILKES: But I don't, I don't think that's a jury
20 charge out of Kimbrell.

21 THE COURT: Well, I'm taking this out of the Supreme
22 Court's recommended charge.

23 MR. WILKES: I hate -- I did not know that.

24 THE COURT: That's the reason I have the footnotes.

25 MR. WILKES: It would not be my first time today I have

1 taken issue with something.

2 THE COURT: I'm not saying you haven't -- you
3 certainly -- and they have -- let's see, on the assault,
4 what was it, assault and battery with intent to kill, they
5 reversed their standard charge. So, I'm not telling you
6 they don't do that. I'm just saying that's where it came
7 from.

8 Check, check out Solomon versus The State, 313 SC 526.
9 It's a more recent case, 1994.

10 SOLICITOR HUNTER: It's that same language. I think
11 it's actually probably quoting---

12 THE COURT: Kimbrell.

13 SOLICITOR HUNTER: ---Kimbrell.

14 THE COURT: Okay.

15 SOLICITOR HUNTER: Because of the actual knowledge of
16 the presence---

17 THE COURT: So, it was an '87 case and they reaffirmed
18 it in '94.

19 SOLICITOR HUNTER: Let me make sure that that's at
20 least in the headnotes.

21 THE COURT: Actually Solomon was a PCR where they said
22 that the judge's use of the word strong commented on the
23 facts and they said it didn't.

24 Okay. So, I'm gonna leave it like it is. Now, I will
25 clear up the question as to, as to whether or not they were

1 charged jointly, that there are separate indictments on each
2 of them and charged separately albeit for the same crime.

3 MR. WILKES: Right.

4 SOLICITOR HUNTER: And we have no objection to that.

5 THE COURT: And the reason I was saying that is so that
6 they realize that these charges apply to the crimes on both
7 of them, but I'll straighten that out.

8 MR. WILKES: And, Your Honor, I had requested the
9 instruction that they may also consider the lack of evidence
10 in there.

11 THE COURT: And I understand that, but I think that I
12 have sufficiently charged them concerning their ability, the
13 way the evidence is on that.

14 All right. Go over the evidence to be sure that the
15 proper evidence is being sent back please and let me know if
16 we have an agreement.

17 MR. WILKES: Now, I'm not sure when you were talking to
18 the jury you may of said something like go back there and
19 open this up or---

20 SOLICITOR HUNTER: I said look at it.

21 MR. WILKES: Look at it. We may want to---

22 THE COURT: I'll caution them not to be taking drugs
23 out and handing them around.

24 MR. WILKES: Not to open that bag up. It might be a bad
25 thing.

1 THE COURT: They're clear. They can look through them.
2 Okay. Do we have an agreement as to where the exhibits
3 are and that they're okay?

4 SOLICITOR HUNTER: From the State, yes.

5 THE COURT: And from the defense?

6 MR. WILKES: From Mr. Derrick Cheeks, yes.

7 THE COURT: And?

8 MR. POOLE: Ricky Cheeks, yes.

9 THE COURT: Okay. Thank you very much.

10 MR. WILKES: Thank you, Your Honor.

11 THE COURT: All right. Let's bring the jury in.

12 (WHEREUPON, the following takes place within the
13 presence of the jury.)

14 THE COURT: All right. Madam Forelady, I'm going to
15 pass over to you the verdict forms. I'm gonna do that one
16 at a time.

17 The first one is the verdict form for Derrick Cheeks,
18 and I'll -- let me go over that with you so I'm sure you
19 understand the document. At the top you'll see that it
20 indicates the state and county in which we're located and
21 the Court in which we're in. The caption below that
22 indicates the caption, the State of South Carolina versus
23 the defendant. Over to the right it has a verdict form and
24 it lists the indictments for which the verdict is being
25 reached. Under that it has in heavy black print verdict,

1 and they're two different questions that have been asked of
2 you.

3 The first one is as to the proximity charge, and the
4 choices under that are not guilty and guilty. When the jury
5 is reached a unanimous verdict you will check the
6 appropriate line beside that and I'll instruct the jury
7 please don't take from the fact that I have put these
8 choices in any order on the form that I have an opinion as
9 to what, how you should decide the case. There's two
10 choices to each indictment. That's just the order they're
11 always in in every case I handle. That comes off of my
12 computer and that's just the way it's printed. So, it's no
13 preference by me one way or the other as to the order in
14 which they're placed on the document.

15 The second charge is as to the trafficking charge, and,
16 again, it has the same choices. Again, not guilty and
17 guilty and you'll check the appropriate blank beside the
18 appropriate verdict once a unanimous verdict has been
19 reached. Below that is a place for you to sign that. So,
20 once you've completed that form you will sign it and that
21 will be all that you will do in that case.

22 The other form that I'm going to hand you is the
23 verdict form for Ricky Dwight Cheeks, and, again, has the
24 same information at the top concerning the county, the
25 state, the caption of the, of the case indicates the State

1 against the defendant. It lists the numbers of the cases.

2 And, again, there are, in his case, there are three
3 different indictments. One for proximity and then one for
4 two levels of trafficking, 100 grams or more and one more
5 than 400. But that's stated specifically on there the
6 different indictments and what they're for. Again, the
7 choices are guilty or not guilty.

8 Now, I want to be sure that you understand that you
9 have the right, and you should consider each and every
10 indictment separately from the others, each charge
11 separately from the others, each defendant separately from
12 the others. None of them are charged jointly with any, any
13 particular crime. The charges are on the document as to
14 each defendant, defendant as to what they're charged with.
15 So, you should be unaffected by any verdict you reach in any
16 other matter placed before you. You should decide each
17 indictment on its own merits based on the facts and the
18 evidence that you find them to be and the law that I charge
19 you as to that particular charge.

20 So, again, there are no joint charges. There are
21 simply separate charges for each defendant, and those will
22 be decided separately by you, and, again, that, that verdict
23 must be unanimous.

24 Now, we have the evidence here and the bailiffs are
25 going to bring that evidence back into the jury room so that

1 you can view that. I will caution you, the sealed bags
2 should not be opened while you have those in your
3 possession. You can look through them. They're clear
4 plastic and you can observe the evidence on the inside. Do
5 not open those bags in, in your deliberations or in your
6 consideration of the evidence.

7 Now, at this time I'm going to ask that the 12 jurors
8 on the jury retire to begin your deliberations.

9 Sir, you're the alternate. You remain seated.

10 Madam Forelady, you may retire and begin your
11 deliberations.

12 (WHEREUPON, the following takes place outside the
13 presence of the jury with the alternate juror being
14 dismissed at this time.)

15 THE COURT: All right. Any objection to my final
16 instructions from the state?

17 SOLICITOR HUNTER: None from the State, Your Honor.

18 THE COURT: Any from the defense?

19 MR. WILKES: None preserving our objections other than
20 the one cured.

21 THE COURT: Oh, I understand.

22 Okay. Any objections?

23 MR. POOLE: Same here, Your Honor.

24 THE COURT: All right. Court will be in recess until
25 such time as a verdict is reached.

1 (WHEREUPON, the jury began deliberations at 3:00 and
2 sent out a question at 4:07.)

3 THE COURT: All right. I have received two inquiries
4 from the jury on the same document. The first one asked the
5 question exactly where was the more than 100 grams found by
6 the car, State Exhibit No. 13. I've had the court reporter
7 search the record as to where that testimony does exist in
8 the record. It exists in Investigator Cantrell's testimony.
9 Be glad to show it to you. It may require a comment by the
10 Court on the facts if I do that. I can, if they request,
11 play that testimony. So, I'm going to ask the attorneys to
12 confer as to how you'd like for me to respond to that.

13 The other question is does Exhibit 13 include -- now
14 Exhibit 13 would be the hundred gram bag that was found at
15 the car stop, does it include the Ziploc bag or is the
16 Ziploc bag part of the evidence collection?

17 I don't know what Ziploc bag they're referring to. I
18 thought maybe you could help you.

19 SOLICITOR HUNTER: I believe they're referring, if
20 that's the 100 grams, they were, the crack rocks were
21 actually within four loose bags and those bags are in the
22 exhibit. However, Ashley Harris testified that he takes
23 those out of the bag when he weighs them. So, I don't know
24 if that's what they're getting at, if that's part of the
25 hundred grams or not.

1 THE COURT: I, I'd be speculating. I'm not sure what
2 that means. I will ask for the---

3 SOLICITOR HUNTER: That would be my inference.

4 THE COURT: I will ask the forelady, when I bring her
5 in, if she could clarify what the question is as far as -- I
6 don't know exactly -- what did Exhibit 13 consist of?

7 SOLICITOR HUNTER: It was four -- it was the B.E.S.T.
8 Bag, and when they take it in, and it was in four loose,
9 each rock was in a loose bag. It wasn't tied. When they do
10 the testing they leave the rocks and the bags that were, the
11 rocks were in within this bag.

12 THE COURT: So, they may be talking about loose bags
13 that are inside---

14 SOLICITOR HUNTER: Correct.

15 THE COURT: ---the current bag?

16 SOLICITOR HUNTER: Correct, and those bags, for the
17 Exhibit 3, are also in this.

18 THE COURT: Okay. We'll ask them for more definite and
19 certain information. Discuss among yourselves how you want
20 me to do this. I can play that entire testimony. I can
21 play a portion of it. They're entitled to review evidence
22 that they request. So --.

23 MR. POOLE: Could we, could we see where it is here?

24 THE COURT: Sure. Step up.

25 (Pause.)

1 THE COURT: What's, what's the issue?

2 MR. POOLE: Lines 6 through 10 are fine.

3 SOLICITOR HUNTER: That would, that would be my
4 question and his answer to the question of where it was
5 found.

6 THE COURT: All right. I can have the court reporter
7 read her transcript rather than the Court do that.

8 MR. WILKES: Is there, is there any other instance
9 where that was referenced would be the only question.

10 THE COURT: Is there another -- do you -- are you aware
11 of anytime that you asked about that?

12 SOLICITOR HUNTER: I believe Mr. McJunkin may of also
13 said something about it in his testimony.

14 THE COURT: All right. Pull it up and see if you can
15 find anything.

16 (Pause.)

17 MR. POOLE: But they're asking -- Your Honor, they're
18 asking only where was the, it was located, right?

19 THE COURT: The exact question is exactly where was the
20 more than 100 grams found by the car (State Exhibit 13).

21 (Pause.)

22 MR. WILKES: It looks like one said, one said rear
23 passenger area and one said between trunk---

24 MR. POOLE: Trunk and door.

25 MR. WILKES: ---and door.

1 THE COURT: well, I, I don't have any -- if you can
2 agree on what lines that we're dealing with, and my only
3 other concern is that there are cases that indicate that the
4 Court needs to make a determination that doing this would
5 not overly emphasize some portion of the testimony as
6 opposed to others.

7 MR. WILKES: All right.

8 THE COURT: Now, if you will tell me you don't object
9 to me reading back certain sections of the, a transcript,
10 taking that into consideration, then I can go that way.
11 Otherwise I think I would be constrained to play the entire
12 testimony of the people involved from start to finish. So,
13 if I start picking out snippets, what I'm saying is it has
14 to be done by stipulation---

15 MR. WILKES: Right.

16 THE COURT: ---of counsel and understanding the risks
17 involved.

18 MR. WILKES: Sure.

19 MR. POOLE: Okay.

20 MR. WILKES: If I can confer one second I think I can
21 resolve it?

22 THE COURT: And you may want to talk to your client.
23 whatever you want to do.

24 MR. WILKES: Sure.

25 (Pause.)

1 MR. POOLE: Your Honor?

2 THE COURT: Yes, sir.

3 (WHEREUPON, the jury informed the bailiff at 4:15 they
4 had a verdict.)

5 THE COURT: Well, that solves that problem.

6 Gentlemen, I've just been informed by the bailiffs that
7 they have reached a verdict.

8 MR. WILKES: That was easy.

9 THE COURT: So, I think we can forego the answers to
10 the questions.

11 MR. WILKES: I guess so.

12 THE COURT: All right. Just one second.

13 I'm going to have this marked as Court's Exhibit No. 1.

14 (WHEREUPON, the note from the jury was marked as
15 Court's Exhibit No. 4 for identification purposes only at
16 this time.)

17 THE COURT: All right. Bring the jury in.

18 (WHEREUPON, the following takes place within the
19 presence of the jury.)

20 THE COURT: All right. The record will reflect that
21 the jury has returned to the courtroom.

22 Madam Forelady, I've been informed by the bailiff that
23 a verdict has been reached, is that true?

24 FORELADY: Yes, Your Honor.

25 THE COURT: If you'll pass the forms to the bailiff.

1 Thank you.

2 (Forelady complies.)

3 THE COURT: All right. Madam Clerk, I'm going to ask
4 that you publish the verdicts for me. First of all, as to
5 Derrick Lamar Cheeks.

6 CLERK: The State of South Carolina, the County of
7 Spartanburg, in the Court of General Sessions, verdict form
8 for Mr. Derrick Lamar Cheeks, as to the Indictment Number
9 2009-GS-42-6452 for possession with intent to distribute
10 cocaine within one-half mile, we, the jury, unanimously find
11 the defendant, Lamar Cheeks, guilty.

12 As to Indictment Number 2009-GS-42-6453, for
13 trafficking in crack cocaine of more than 400 grams, we, the
14 jury, unanimously find the defendant, Derrick Lamar Cheeks,
15 guilty. Signed by the foreperson this 6th day of October,
16 2010.

17 THE COURT: Inquire of the jury concerning that one.

18 CLERK: Ladies and gentlemen of the jury, is this your
19 verdict and still your verdict, if so, please raise your
20 right-hand.

21 (WHEREUPON, all jurors raise their hands at this time.)

22 THE COURT: Now I'll ask that you publish the verdict
23 as to Ricky Cheeks.

24 CLERK: In the State of South Carolina, the County of
25 Spartanburg, the Court, in the Court of General Sessions, as

1 to Indictment Number 2009-GS-42-6455, possession with intent
2 to distribute crack cocaine within one-half mile, we, the
3 jury, unanimously find the defendant, Ricky Dwight Cheeks,
4 guilty.

5 As to Indictment Number 2009-GS-42-6456 for trafficking
6 in crack cocaine of more than 400 grams, we, the jury,
7 unanimously find the defendant, Ricky Dwight Cheeks, guilty.

8 As to Indictment Number 2009-GS-42-6457 for trafficking
9 in cocaine, crack cocaine of more than 100 grams, we, the
10 jury, unanimously find the defendant, Ricky Dwight Cheeks,
11 guilty. Signed by the foreperson this 6th day of October,
12 2010.

13 Ladies and gentlemen of the jury, if this is your
14 verdict and still your verdict, if so, please raise your
15 right-hand.

16 (WHEREUPON, all jurors raise their hands at this time.)

17 THE COURT: Thank you.

18 Anything further from the State before I release the
19 jury?

20 SOLICITOR HUNTER: Nothing from the State, Your Honor.

21 THE COURT: Anything from the defense?

22 MR. WILKES: Nothing, Your Honor.

23 THE COURT: Mr. Poole.

24 MR. POOLE: Your Honor, I request, request polling of
25 the jury.

1 THE COURT: All right. As to Ricky---

2 MR. POOLE: Mr. Ricky Cheeks.

3 THE COURT: verdicts -- all right. If you'll poll the
4 jury as to verdicts concerning Ricky Dwight Cheeks.

5 (WHEREUPON, all jurors were polled at this time and all
6 jurors answered in the affirmative that this was and is
7 still their verdict as to Defendant Ricky Cheeks.)

8 THE COURT: Do you have anything further, Mr. Poole,
9 before I release the jury?

10 MR. POOLE: No, sir.

11 THE COURT: All right.

12 (WHEREUPON, the jury panel was released at this time.)

13 THE COURT: Anything further from the State?

14 SOLICITOR HUNTER: Nothing, Your Honor.

15 THE COURT: Anything further from the defense?

16 MR. WILKES: Nothing, Your Honor.

17 THE COURT: Mr. Poole.

18 MR. POOLE: Your Honor, at this point in time I would
19 move for a new trial on behalf of Ricky Cheeks, and this
20 motion is based upon the pretrial motions that Your Honor
21 denied on the admissibility of the evidence. It was based
22 upon the grounds that were made at the directed verdict
23 stage, and at this time, on his behalf, I move for a new
24 trial.

25 THE COURT: The Court would make the same ruling.

1 Motion will be denied.

2 MR. POOLE: Yes, sir.

3 THE COURT: All right. As soon as we -- do you have
4 sentencing sheets ready?

5 SOLICITOR HUNTER: I do.

6 THE COURT: You need to get them to fill out part of
7 that?

8 (Solicitor Hunter nods affirmatively.)

9 THE COURT: All right. If you'll take care of that for
10 me.

11 (Pause.)

12 THE COURT: All right. You can approach the bar
13 please.

14 (WHEREUPON, all parties comply.)

15 THE COURT: All right. You ready, Mr. Hunter?

16 SOLICITOR HUNTER: We are calculating the time spent in
17 jail, Your Honor.

18 THE COURT: Okay. I'll give you a minute.

19 (Pause.)

20 THE COURT: All right. Mr. Hunter, you ready?

21 SOLICITOR HUNTER: Yes, Your Honor.

22 THE COURT: Defense ready?

23 MR. WILKES: I am, Your Honor.

24 THE COURT: All right. All right. Mr. Derrick Lamar
25 cheeks, you, having been found guilty by a jury of your

1 peers and been convicted of trafficking in crack cocaine
2 400 grams or more and possession with intent to distribute
3 within proximity of a school, I'll be happy to hear from
4 your attorney in mitigation.

5 MR. WILKES: Thank you, Your Honor.

6 THE COURT: Yes, sir.

7 MR. WILKES: I would ask Your Honor to take into
8 consideration the fact that he has no prior criminal record.
9 He is 30 years old and has four young children. Most
10 importantly, I would ask the Court to make a distinction
11 between the case and other cases where people come to Court
12 and they give testimony that is both outrageous and
13 inconsistent with the facts. Mr. Cheeks did no more than
14 exercise his right to a trial, and I would ask Your Honor to
15 take that into consideration in sentencing him in this case.

16 THE COURT: All right. Mr. Cheeks, you wish to be
17 heard?

18 DEFENDANT DERRICK CHEEKS: No, sir, I'm fine.

19 THE COURT: All right. He indicates there's no prior
20 record for this defendant, is that correct?

21 SOLICITOR HUNTER: I believe there's a shoplifting, but
22 I don't believe it happened before this.

23 THE COURT: Okay. After this?

24 SOLICITOR HUNTER: It may of happened after this,
25 correct.

1 THE COURT: Okay. Well, I'm gonna disregard it. If it
2 didn't happen before this I won't pay any attention to it.

3 Okay. So, I will---

4 MR. WILKES: Thank you, Your Honor.

5 THE COURT: As far as that's concerned, that doesn't
6 exist.

7 MR. WILKES: Thank you.

8 THE COURT: All right. Now, Mr. Ricky Dwight Cheeks,
9 you have been found guilty by a jury of your peers of
10 possession with intent to distribute in proximity of a
11 school, trafficking in crack cocaine 400 grams or more, and
12 trafficking in crack cocaine 100 grams or more, but less
13 than 200 grams. I'll be happy to hear from you, Mr. Poole,
14 in mitigation and concerning his sentencing.

15 MR. POOLE: Yes, sir, may it please the Court?

16 THE COURT: Yes, sir.

17 MR. POOLE: Mr. Ricky Cheeks is 50 years of age. In
18 1978 he was in an, in an automobile accident that left him
19 as he is right now, which is paralyzed on the left side of
20 his body. He is a diabetic. He has serious health
21 problems. He has one son who is grown. He has an 11th
22 grade education, and he's the uncle of his codefendant. And
23 I would similarly ask that he not be penalized for
24 exercising his right to a trial.

25 As far as his prior record is concerned I think there

1 some, may be some minor drug charges. I'm sure the
2 solicitor will speak to that.

3 THE COURT: Anything you'd like to say, Mr. Cheeks?

4 DEFENDANT RICKY CHEEKS: No, sir, I'm all right.

5 THE COURT: Prior record.

6 SOLICITOR HUNTER: Your Honor, in 1977 he had a
7 disturbing the peace along with a simple possession of
8 marijuana, and in 2007 he had possession of crack cocaine.

9 THE COURT: All right. Let me be sure that I am square
10 on the sentence range in these cases.

11 Four hundred grams or more, the sentence range is 25 to
12 30 years and a fine of 200,000?

13 SOLICITOR HUNTER: Non-suspendible.

14 THE COURT: No part can be suspended.

15 SOLICITOR HUNTER: Correct.

16 THE COURT: Is that correct?

17 And on the proximity, it's ten to fifteen years and a
18 fine of not less than \$10,000.

19 SOLICITOR HUNTER: I did want to at least mention to
20 the Court, under the new changes of law, that is now zero to
21 ten. This event did occur before 2009. The new law does
22 have a savings clause, but I'll leave that up to the
23 discretion of this Court if they would like to give the
24 benefit to the defendant.

25 THE COURT: I understand.

1 And on the charge of more 100, but less than 200, it's
2 25 years and a fine of 50,000?

3 SOLICITOR HUNTER: I believe so, yes, Your Honor.

4 THE COURT: I'll check it.

5 SOLICITOR HUNTER: I know the 25 years is correct.

6 THE COURT: Is it a, according to my records, it is and
7 a fine of a hundred thousand.

8 SOLICITOR HUNTER: Hundred thousand.

9 THE COURT: And no suspended sentences or probation.

10 SOLICITOR HUNTER: Correct.

11 THE COURT: Did you get the time credits for the
12 individuals?

13 SOLICITOR HUNTER: Yes, Your Honor. For Derrick Cheeks
14 it's 298 days, and for Ricky Cheeks it's 65 days.

15 THE COURT: Do you agree with that, his calculation?

16 MR. WILKES: It appears to be correct, Your Honor.

17 THE COURT: Mr. wilkes?

18 MR. WILKES: Yes.

19 THE COURT: And Mr. Poole?

20 MR. POOLE: Yes, sir.

21 THE COURT: Ricky Cheeks was 60?

22 SOLICITOR HUNTER: Five. The difference between the
23 two is Mr. Derrick Cheeks had his bond revoked.

24 THE COURT: I understand.

25 SOLICITOR HUNTER: He's been sent back to jail.

1 THE COURT: All right. Mr. Derrick Lamar Cheeks, the
2 Sentence in this case, in Case Number 2009-6453, trafficking
3 in crack cocaine forty, 400 grams or more, the Sentence is
4 that you be confined in the State Department of Corrections
5 for a period of 25 years and pay a fine of \$200,000. I've
6 given credit for 298 days of service. I've run that
7 concurrent with other sentences given on today's date.

8 As to the possession with intent to distribute near a
9 school, Case Number 2009-6452, the Sentence is ten years and
10 a fine of \$100,000. Run concurrently with credit for 298
11 days.

12 As to Mr. Ricky Dwight Cheeks, it's the Sentence of
13 this Court in Case Number 2009-6456, this is trafficking in
14 crack cocaine 400 grams or more, the Sentence is 25 years
15 and a fine of \$200,000. I've run that concurrently and have
16 provided for 65 days of service.

17 In Case Number 2009-6455, the Sentence is ten years and
18 a fine of 100,000 run concurrently and 65 days of credit.

19 In the 100 gram or more, but less than 200 grams, the
20 Sentence is 25 years run concurrently with 65 days of
21 credit, and there is a fine there of \$50,000.

22 Good luck to you, gentlemen.

23 MR. POOLE: Thank you, Your Honor.

24 SOLICITOR HUNTER: Your Honor, may we look at something
25 for a second?

1 THE COURT: Certainly.

2 MR. WILKES: Thank you for your consideration.

3 THE COURT: You gentlemen want to approach?

4 MR. WILKES: Yes, sir.

5 (WHEREUPON, a bench conference was held at this time.)

6 THE COURT: All right. Court's in recess until nine
7 o'clock in the morning.

8

9 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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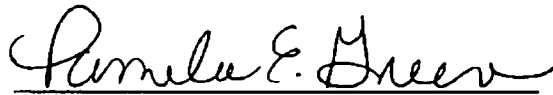
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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 4th through the 6th day of October, 2010.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

November 16th, 2010

A handwritten signature in cursive script that reads "Pamela E. Green". The signature is written in dark ink and is positioned above the printed name.

PAMELA E. GREEN, Court Reporter

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) COURT OF GENERAL SESSIONS

3
4 STATE OF SOUTH CAROLINA,) TRANSCRIPT
5 PLAINTIFF,) OF
6 VS.) RECORD
7 DERRICK LAMAR CHEEKS,) 09-GS-42-6452, 6453
8 DEFENDANTS.)
9

10 October 29th, 2010
11 Spartanburg, South Carolina
12

13 B E F O R E:

14 THE HONORABLE ROGER L. COUCH, Judge, and a jury.

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

16 EDDIE HUNTER
17 ASSISTANT SOLICITOR
18 Attorney for the State

19 JEFF WILKES
20 ESQ.
21 Attorney for the Defendant

22
23 PAMELA E. GREEN
24 Circuit Court Reporter
25 Seventh Judicial Circuit

I N D E X O F W I T N E S S E S

(There were no exhibits marked or testimony taken
during this hearing.)

P R O C E E D I N G S

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THE COURT: Mr. Wilkes, I believe you have a motion, is that right?

MR. WILKES: It is, Your Honor.

THE COURT: I'm happy to hear you.

MR. WILKES: This is the case of the State versus Derricks Lamar Cheeks.

THE COURT: Okay. I'm happy to hear you, sir.

MR. WILKES: Thank you, Your Honor.

SOLICITOR HUNTER: Your Honor, may I approach?

THE COURT: Please do.

SOLICITOR HUNTER: I always hand our copy up to you.

THE COURT: Thank you. I've got it here.
Okay.

MR. WILKES: Thank you, Your Honor.

THE COURT: Now, Mr. Wilkes, you may proceed.

MR. WILKES: Thank you, Your Honor.

We are renewing our previous motions and trying to clarify some of the case law that we had gone over on the original motion to suppress. We believe that the Williams case was decided on statutory grounds. I know the Court had relied on it heavily in its decision, and the Williams case, we believe, is heavily rooted in the statutory requirements of the warrant provision of 17-13-140. Not on Fourth

1 Amendment grounds.

2 And as I understand, and I can always be wrong, but I
3 don't believe there's any Fourth Circuit case law on the
4 subject.

5 THE COURT: Well, I may tend to differ with you.

6 MR. WILKES: Well, I'd like to discuss it if it is
7 cause I'm not sure that I have seen it.

8 THE COURT: I've come across a case, U.S. versus
9 Horowitz, it is a Fourth Circuit case, 2006, that talks
10 about the particularity requirement of the Fourth Amendment
11 being satisfied by a cross-reference in a warrant to
12 separate documents that identify the property in sufficient
13 detail, which is pretty much right what we're talking about
14 here where you've got an affidavit that describes the
15 property in sufficient detail, and an absence of a
16 description in the warrant itself.

17 MR WILKES: Right, and I can't speak to Horowitz in
18 particular. I can't recall those facts. I don't think I've
19 seen that. I'm, I'm familiar with the Tenth Circuit and I
20 believe maybe the Eleventh Circuit case---

21 THE COURT: well, they actually address that in this
22 decision, and it says that we recognize that a majority of
23 our sister circuits appear to require the satisfaction of
24 both conditions before allowing a separate document to be
25 read as part of the search warrant.

1 MR. WILKES: Right.

2 THE COURT: They were talking about the reference back
3 and forth---

4 MR WILKES: Correct.

5 THE COURT: ---between the two.

6 MR WILKES: Correct, the specific reference.

7 THE COURT: And then they specifically say, in this
8 circuit, however, it is sufficient that -- it is sufficient
9 either for the warrant to incorporate the supporting
10 document by reference or the supporting document to be
11 attached to the warrant itself.

12 And, in this case, I recall that the affidavit was
13 attached to the search warrant with the information that I
14 had, and, in fact, the, the warrant refers to the attached
15 affidavit in its body, and, and this case -- and in the
16 Fourth Circuit, that case says while they recognize they're
17 in the minority, they're gonna be in the minority on that.

18 MR WILKES: And, and I -- and from a factual
19 standpoint, I've -- I would point out that, I think, when
20 the Fourth Circuit Court or when the Court says that -- the,
21 the reference that has been used by the majority of circuits
22 is an express and intentional reference back to other
23 documents---

24 THE COURT: Well, I read that. But this---

25 MR WILKES: ---which we don't have.

1 THE COURT: Yeah, but the Fourth Circuit says either a
2 reference or attaching it is sufficient.

3 MR WILKES: Right.

4 THE COURT: They don't even say that the reference has
5 to be clear.

6 MR WILKES: Right.

7 THE COURT: And I realize it's a, it's a departure of
8 what the majority -- but I am in the Fourth Circuit.

9 MR WILKES: We are in the Fourth Circuit I understand,
10 and then that would put me arguing against Fourth Circuit
11 precedence, but we, we were in that -- we will stay in that
12 position because we, we'll maintain that the majority is
13 correct, but just for the record --

14 THE COURT: Yes, sir.

15 MR WILKES: -- it is not a, a case where we can say
16 that, that the magistrate, issuing magistrate intentionally
17 incorporated it by explicit words of reference.

18 THE COURT: Well, I, I agree he does not -- that's not
19 in this one.

20 MR WILKES: Right.

21 THE COURT: But, again, if you, if you read that case,
22 they say that it is sufficient either for the warrant to
23 incorporate the supporting document by reference or the
24 supporting document be attached to the warrant itself.

25 MR WILKES: Correct. Then that will, for the first

1 time, put me arguing the majority. So, I'm -- I will hold
2 to the majority position in this Court for us to, to take
3 up.

4 THE COURT: Oh, I -- and I can appreciate your
5 argument, and I understand there is a split of authority.
6 And, and I guess, unfortunately, from your point of view, we
7 are in a circuit that is contrary to your position, it
8 appears from this case.

9 MR. WILKES: I understand.

10 THE COURT: And we -- and, and my law clerk has
11 shepardized it. We don't find any change in the Fourth
12 Circuit, and, of course, the Supreme Court, I don't think,
13 has yet addressed that issue. So --.

14 MR. WILKES: Not yet.

15 THE COURT: Now, I'll hear from you, Mr. Hunter, but
16 I'm making your argument I think.

17 SOLICITOR HUNTER: I was gonna say I think you're
18 making my argument for you, for me. So, the State just
19 believes that the motion for a new trial should be denied.

20 THE COURT: Well, based, based on the research we have,
21 and what I'll do is I'm not gonna sign an order just yet
22 since this case you weren't aware of. You can step up and
23 my law clerk can give you the citation.

24 MR. WILKES: Thank you, Judge.

25 THE COURT: I'll let you take a look at it, and if you

1 have anything you'd like to submit, I'll be happy to hear
2 from you.

3 MR WILKES: Thank you.

4 THE COURT: Okay. Thank you very much.

5

6 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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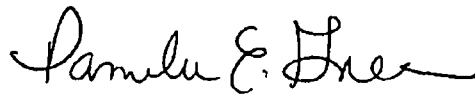
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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 29th day of October, 2010.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

May 19th, 2011



PAMELA E. GREEN, Court Reporter

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

Derrick Lamar Cheeks, Appellant.

Appellate Case No. 2011-183009

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 27211

Heard November 15, 2012 – Filed January 16, 2013

AFFIRMED

J. Falkner Wilkes, of Greenville, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Salley W. Elliott, and Assistant
Attorney General Julie Kate Keeney, all of Columbia,
and Solicitor Barry Joe Barnette, of Spartanburg, for
Respondent.

JUSTICE PLEICONES: Appellant was convicted of trafficking in crack cocaine in excess of 400 grams and possession of crack with intent to distribute within proximity to a school and received concurrent sentences of twenty-five years (trafficking) and ten years (proximity). On appeal, he contends the trial court erred in failing to find a search warrant fatally defective, and in giving an improper jury

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instruction.¹ We find no merit in the warrant issue, but agree the instruction was improper. Because we find appellant was not prejudiced by the erroneous charge, however, we affirm his convictions and sentences.

ISSUES

- 1) Was the search warrant fatally defective because it did not contain a description of the place to be searched?
- 2) Did the trial judge err in charging the jury that "[a]ctual knowledge of the presence of crack cocaine is strong evidence of a defendant's intent to control its disposition or use?"

DISCUSSION

1. Search warrant.

Appellant contends the search warrant which led to his arrest was invalid because it did not describe the place to be searched. We disagree.

The search warrant is blank following the section titled "**Description of Premises (Person, Place, or Thing) to be Searched.**" The warrant refers to the attached affidavit, however, which contains both a description of the dwelling to be searched, including its address, and detailed directions to it. Moreover, the solicitor represented that the warrant and affidavit were served together. The trial judge held the warrant and affidavit could be read together to establish the premises description and found the description of the place to be searched met all constitutional and statutory requirements. *State v. Ellis*, 263 S.C. 12, 207 S.E.2d 408 (1974) (warrant and affidavit read together withstand constitutional and statutory attacks on particularity of premises) *disapproved on other grounds by*

¹ Appellant's codefendant (and uncle) raised virtually the same arguments in an appeal decided by the Court of Appeals. *State v. Cheeks*, 400 S.C. 329, 733 S.E.2d 611 (Ct. App. 2012).

State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987); *State v. Williams*, 297 S.C. 404, 377 S.E.2d 308 (1989).²

Appellant contends the warrant is "plainly invalid" because it did not comply with the Fourth Amendment's requirement that the warrant "particularly describ[e] the place to be searched" citing *Groh v. Ramirez*, 540 U.S. 551, 557 (2004). *Groh* was a *Bivens*³ suit where the warrant application that contained the particularized information was not incorporated into the warrant itself. The *Groh* Court therefore did not reach the issue whether a facially defective warrant can be salvaged by considering other related documents. The Court did acknowledge that most appellate courts have held that they "may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." *Id.* at 557-558; see also *U.S. v. Hurwitz*, 459 F.3d 463, 470-471 (4th Cir. 2006) (in Fourth Circuit, warrant construed with supporting documents if incorporated by warrant language or if those documents accompany warrant).

Here, the warrant refers to the attached affidavit, and the solicitor represented without contradiction that the affidavit accompanied the warrant. As we read the opinion, nothing in *Groh* prohibits a court from considering an accompanying or "incorporated" affidavit along with the search warrant for purposes of satisfying the Fourth Amendment's particularity requirements.

We affirm the trial judge's ruling upholding the validity of the search warrant.

2. Jury instruction.

When the police executed the warrant at witness Markley's house, they interrupted appellant in the process of 'cooking' crack cocaine. He was observed fleeing from the kitchen, where water was boiling, materials⁴ used in the manufacture of crack were on the kitchen counters, and a digital scale was found. In addition, 650 grams of crack,⁵ most of which was broken up into baggies, was seized from the kitchen

² Appellant's argument rests largely on U.S. Const. amend. IV, but he also invokes S.C. Const. art. I, § 10 and S.C. Code Ann. §§ 17-13-140 and -160 (2003). Our decision disposes of all grounds.

³ *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

⁴ Inositol and baking powder.

⁵ The crack was valued at between \$23,000 (wholesale) and \$65,000 (retail).

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where appellant had been found cooking. Moreover, on the day of his arrest, appellant sent his uncle on "an errand" from the house where appellant was found cooking, after having sent the uncle to a store to buy baking soda. When the car in which the uncle was travelling was stopped and searched, two ounces of crack were found, the inference being that the uncle was delivering the crack for appellant. In short, there was overwhelming evidence that appellant both trafficked in more than 400 grams of crack and possessed it with intent to distribute.

During the jury charge, the jury was repeatedly instructed that mere presence at the scene of a crime is insufficient evidence, in and of itself, to support a guilty verdict. When charging the jury on trafficking by possession, the trial judge stated:

Now, possession, to prove possession the State must prove, beyond a reasonable doubt, that the defendant in the, in the case both had the power and the intent to control the disposition or use of the crack cocaine. Therefore, possession, under the law, can either be actual or constructive.

Now, actual possession means that the crack cocaine was in the actual physical custody of the defendant. Constructive possession means that the defendant had dominion or control or the right to exercise dominion or control over either the crack cocaine or the property on which the crack cocaine was found.

Now, mere presence at a scene where drugs are found is not enough to prove possession. **Actual knowledge of the presence of the crack cocaine is strong evidence of a defendant's intent to control its disposition or use.** The defendant's knowledge and possession can be inferred when a substance is found on property under the defendant's control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with other evidence in this case and to be given the amount of weight you think it should have. Two or more persons may have joint possession of a drug.

(emphasis supplied).

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Appellant objected to this "actual knowledge/strong evidence" charge, arguing that it was a comment on the facts and the weight of those facts, and that it nullifies or at least conflicts with the mere presence charge. He followed up by noting that *State v. Kimbrell*, 294 S.C. 51, 362 S.E.2d 630 (1987), upon which the judge and solicitor relied, did not involve a jury charge. The judge clarified he was also relying on *Solomon v. State*, 313 S.C. 526, 443 S.E.2d 540 (1994). We now clarify *Kimbrell* and overrule *Solomon* to the extent it approves of the "actual knowledge/strong evidence" charge.

In *Kimbrell*, appellant contended she was entitled to a directed verdict because the State failed to present evidence that she knowingly possessed the cocaine. The evidence at trial showed that appellant's ex-husband dealt drugs from his trailer. Appellant was present at the trailer when a confidential informant (CI) arrived for an arranged buy. As the ex-husband and CI left the trailer to look at the marijuana stored outside, the ex-husband had appellant leave a bedroom and go to the kitchen where cocaine was on the counter, telling her "the toot [cocaine] is laying on the table, we're going outside, watch it." In deciding the directed verdict issue on appeal, the Court noted that a "person has possession of contraband when he has the power and intent to control its disposition or use" and then held

[t]he State produced evidence that [appellant] had actual knowledge of the presence of the cocaine. Because actual knowledge of the presence of the drug is strong evidence intent to control its disposition or use, knowledge may be equated with or substituted for the intent element.

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Kimbrell, 294 S.C. at 54, 362 S.E.2d at 631.

From this language has evolved a jury charge to the effect that "actual knowledge [of the possession of drugs] is strong evidence of intent to control its disposition or use." We agree with appellant that this charge both improperly weighs the evidence, and that it largely negates the mere presence charge.

Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that future juries should be charged that these facts are probative of guilt. It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts. For example, it is well-settled that while evidence that a criminal defendant evaded arrest or absconded from the jurisdiction may be admissible as evidence of guilt,

2013 FEB 4

and may be argued to the jury as such, it is improper to charge the jury on this evidentiary inference because such a charge places "undue emphasis" on that piece of circumstantial evidence. *E.g.*, *State v. Grant*, 275 S.C. 404, 272 S.E.2d 169 (1980). Similarly, charging a jury that "actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use" unduly emphasizes that evidence, and deprives the jury of its prerogative both to draw inferences and to weigh evidence. This charge converts all persons merely present who have actual knowledge of the drugs on the premises into possessors of that drug. We agree with appellant that this charge largely negates the mere presence charge, and erroneously conveys that a mere permissible evidentiary inference is, instead, a proposition of law.

Even if we did not agree with appellant that the "strong evidence" charge undermines the mere presence charge, we hold that the "strong evidence" charge is improper as an expression of the judge's view of the weight of certain evidence, and overrule *Solomon* on this point.

In his post-conviction relief (PCR) action, Solomon contended the use of the adjective "strong" was either a comment on the facts or an improper expression of the trial judge's view of the weight of the evidence and alleged his trial counsel was ineffective for failing to object to it. On certiorari to review the denial of Solomon's PCR, the Court summarily dealt with this issue, stating only that the "instruction was in accord with *Kimbrell*." *Solomon*, 313 S.C. at 529, 443 S.E.2d at 542. *Solomon* is wrongly decided because, as appellant argues, "strong" is necessarily a comment on the weight of the evidence, and *Kimbrell* does not approve any such charge.

We now overrule *Solomon* and instruct the bench to no longer use the "strong evidence" charge, which is derived from a statement on the sufficiency of the evidence in *Kimbrell*. Appellant cannot show prejudice from the charge in this case, however, as there was no evidence that he was "merely present" at Markley's house when the search warrant was executed. Rather the evidence was that he was actively cooking crack cocaine when the warrant was served, and that he possessed the 650 grams of crack found on the kitchen counter. Further, in light of the overwhelming evidence of appellant's guilt, he cannot demonstrate prejudice warranting reversal from the adjective "strong" used in the charge.

CONCLUSION

Appellant's convictions and sentences are

AFFIRMED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

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FORM 5

STATE OF SOUTH CAROLINA)

County of Spartanburg)Derrick Lamar Checks 343108)

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

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2013-CP-42-2654

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 Lee Correctional Institution / 1990
Wisaday Highway / Bishopville S.C 29010
2. Name and location of Court which imposed sentence Spartanburg County
General Sessions Court / 180 Magnolia Street Spbg S.C 29010
3. Name(s) of co-defendant(s) (if any) Eric Elder, Tracy Markley,
and Ricky Checks
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2009-65-42-6452 Possession w/it intent to
 - (b) distribute within one-half mile of school zone

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AND ENTERED BY	
<i>[Signature]</i>	
DATE	
DOC TYPE	6-25-13

To-Quick checks

- (c) 2009-65-42-6453 Trafficking in crack more than 400 grams
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) October 6, 2010
- (b) 10 years and \$100,000 fine possession with intent to distribute
- (c) 25 years and \$200,000 fine trafficking crack more than 400 grams
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty N/A
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere N/A
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. Court of Appeals
- ii. Supreme Court of South Carolina
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Pursuant to Rule 204(b) South Carolina Appellate
- ii. Court Rules case was reviewed by South Carolina
- iii. Supreme Court And Conviction was affirmed
- (c) the date of each such result:
- i. July 25, 2012 rule 204(b)
- ii. November 15, 2012 Oral Argument
- iii. January 16, 2013 Conviction Was Affirmed
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Rule 204(b) Of South Carolina Appellate Court
- ii. Rules Ordered Case To Be Reviewed By The
- iii. South Carolina Supreme Court
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) N/A

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(c)

N/A

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

- (a) Counsel failed to argue the probable cause to issuance of warrant
 (b) Counsel failed to challenge the veracity of warrant affidavit
 (c) Counsel failed to move for a bill of particulars requesting disclosure of confidential informant

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

- (a) Affidavit fail to establish probable cause
 (b) Affidavit contain false information fail to show reliability of statement
 (c) The affidavit show the CI was used for more than a mere tipster

12. Prior to this application have you filed with respect to this conviction:

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

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. N/A
 ii. _____
 iii. _____
 iv. _____

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

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

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(c) the disposition thereof:

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

(d) the date of each such disposition:

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

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

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

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

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

(a) which grounds have been presented:

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

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

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

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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) U.S Const Amend IV, S.C. Const Art 2 §10 failed to raise issue
 (b) U.S Const Amend IV, Franks Hearing failed to investigate and raise issue
 (c) U.S Const Amend IV, Rules Crim Proc Rule 5(a)(1)(K) Batson and Roviato Standards

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

- (a) your arraignment and plea? N/A
 (b) your trial, if any? yes
 (c) your sentencing? yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

Rule 29, Brady Request, Motion To Compel Disclosure of CI

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. J Falkner Wilkes
Attorney At Law
 ii. 114 Whitsett Street
Greenville S.C 29601
 iii. _____

- (b) the proceedings at which each such attorney represented you:

- i. Trial
 ii. Sentencing
 iii. Appeal

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

I request a new trial pursuant to my 4th Amendment grounds
I request relief from charges in New Drug Laws
I request a new trial pursuant to Newly Discovered Evidence

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

No

STATE OF SOUTH CAROLINA)

County of Bishopville)

VERIFICATION

I, Derrick Lamar Cheeks, 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.

Derrick Lamar Cheeks

SWORN to and subscribed before me this 19
 day of June 2013.
Debra Jones (L.S.)
 Notary Public

My Commission Expires: 11-4-2015

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

I, Derrick Lamar Cheekes, 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.

Derrick Lamar Cheekes
Applicant

SWORN or affirmed to and subscribed before me this

19 day of June, 2013

Debra Jones
Notary Public

My Commission Expires: 11-4-2015

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	2013-CP-42-2654
Derrick Lamar Cheeks, #343108,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent, making its Return to the application for post-conviction relief (PCR) filed June 21, 2013, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the November 2009 term and the indictment was amended at the October 2010 term of the Spartanburg County Grand Jury for trafficking in crack, over 400 grams (2009-GS-42-6453) and possession with intent to distribute within ½ mile of a school zone (2009-GS-42-6452). The Applicant was represented by J. Falkner Wilkes, Esquire. On October 6, 2010, the Applicant proceeded to trial and was found guilty by a jury of the charges as indicted. The Honorable Roger L. Couch sentenced Applicant to concurrent sentences of twenty-five years with a \$200,000 fine for trafficking in crack and ten years with a \$100,000 fine for possession with intent to distribute within ½ of a school zone.

A timely Notice of Appeal was filed on Applicant's behalf by J. Falkner Wilkes, Esquire. The South Carolina Supreme Court affirmed the Applicant's conviction. State v. Cheeks, Op. No. 27211 (Sup. Ct. filed January 16, 2013). The Remittitur was issued on February 1, 2014.

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Attached herewith and incorporated herein are the records of the Spartanburg County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and Applicant's appellate records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

- a. Ineffective assistance of counsel, in that;
 - i. Counsel failed to argue probable cause for issuance of the warrant,
 - ii. Counsel failed to challenge the veracity of the warrant affidavit,
 - iii. Counsel failed to move for a bill of particulars requesting disclosure of the confidential informant.

III.

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, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 334 S.E.2d 813. Respondent notes that it appears the Applicant appeared and pled guilty voluntarily without the assistance of counsel.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

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

IV.

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

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held solely on the claim of ineffective assistance of counsel.

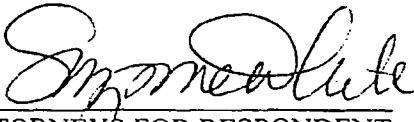
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

July 10, 2014.

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1 STATE OF SOUTH CAROLINA }
2 COUNTY OF SPARTANBURG } COURT OF COMMON PLEAS NONJURY

3
4 DERRICK LAMAR CHEEKS,)
5 APPLICANT,)
6 VS.)
7 STATE OF SOUTH CAROLINA,)
8 RESPONDENT.)

TRANSCRIPT
OF
RECORD
2013-CP-42-2654

9
10 September 3rd, 2015
11 Spartanburg, South Carolina

12
13 B E F O R E:

14 THE HONORABLE JAMES R. BARBER, III, Judge.

15
16 A P P E A R A N C E S:

17 CHRISTOPHER D. BROUGH
18 ESQ.
Attorney for the Applicant

19 JUSTIN J. HUNTER
20 ASSISTANT ATTORNEY GENERAL
Attorney for the Respondent

21
22
23 PAMELA E. GREEN
24 Circuit Court Reporter
25 Seventh Judicial Circuit

I N D E X O F W I T N E S S E S

<u>WITNESSES</u>	<u>PAGE</u>
DERRICK CHEEKS	
Direct examination by Mr. Brough	5
Cross-examination by Mr. Hunter	36
Redirect examination by Mr. Brough	47
J. FALKNER WILKES	
Direct examination by Mr. Hunter	55
Cross-examination by Mr. Brough	64
Redirect examination by Mr. Hunter	74
Closing by Mr. Brough	76
Closing by Mr. Hunter	77
Certificate	79

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
	<u>Applicant's Exhibits</u>		
A-1	Consent Order	7	9
A-2	Search Warrant	12	13

P R O C E E D I N G S

1
2
3 THE COURT: All right. Are we ready to go on to the
4 next one?

5 MR. HUNTER: May it please the Court, Your Honor?

6 THE COURT: Yes, sir.

7 MR. HUNTER: My name is Justin Hunter from the South
8 Carolina Attorney General's Office. The current case is
9 Derrick Lamar Cheeks versus the State of South Carolina.
10 That's 2014-CP-42-2654.

11 Your Honor, he was indicted by the Spartanburg County
12 Clerk of Court for trafficking in cocaine.

13 THE COURT: '13, isn't it?

14 I looked at the file. It indicates 2013. Here's the
15 application though.

16 MR. HUNTER: 2013-CP, yeah, you're correct, Your Honor.
17 My apologies. 2013-CP-42-2654.

18 Your Honor, he was indicted by the Spartanburg County
19 Clerk of Court for trafficking in crack cocaine over
20 400 grams. That was Indictment 2009-GS-42-6453 and also
21 indicted for possession with intent to distribute crack
22 cocaine within a half mile of a school. That's Indictment
23 2009-GS-42-6452. He was represented by Mr. Jeff Wilkes.

24 Your Honor, on October 6th, 2010, he proceeded to a
25 jury trial and was found guilty as indicted. The Honorable

Derrick Cheeks - Direct examination
by Mr. Brough

1 Roger Couch sentenced him to concurrent sentences of 25
2 years imprisonment for trafficking in crack cocaine 400 plus
3 grams and ten years imprisonment for possession with intent
4 to distribute in a half mile of a school.

5 Mr. Wilkes filed a notice of appeal and an appeal was
6 perfected. By published opinion filed January the 16th,
7 2013, the South Carolina Supreme Court affirmed Applicant's
8 convictions and remittitur was issued February 1st, 2014.
9 I apologize. I believe that would be 2013.

10 On June 21st -- beg the Court's indulgence one
11 second, Your Honor. I apologize.

12 (Pause.)

13 MR. HUNTER: The South Carolina Supreme Court opinion
14 was filed January 16th, 2013. Remittitur was sent
15 February 1st, 2013. On June 21st, 2103, filed his current
16 PCR application alleging several grounds for relief. He's
17 represented by Mr. Chris Brough who also filed an amendment.
18 He's present in the courtroom. I'll turn it over to
19 Mr. Brough.

20 THE COURT: Yes, sir.

21 MR. BROUGH: Thank you, Your Honor.

22 May it please the Court.

23 Your Honor, Applicant would call Derrick Cheeks to the
24 stand.

25 THE COURT: Mr. Cheeks, please raise your right-hand if